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VOLUME 22 FALL 2024 ISSUE 1

CONTENTS

Renewing Our Vows: The Lawyer's Oath and Our Pledge to Democracy……..1
Colin M. Black

Checks, Balances, and Challenges to the Supremacy of the Supreme Court……..67
Zachary Carr

The Open and Obvious Doctrine: Tort Law As the New Frontier for Revitalizing the Jury……..113
Priya Vaishampayan

Taming the Wild West: Can Order Be Restored to the Collegiate Playing Fields?……..156
Edward D. Cavanagh

The Fight to Provide Affordable Housing for the Poor—The New Jersey *Mount Laurel* Decisions……..199
Carl S. Bisgaier

RENEWING OUR VOWS: THE LAWYER'S OATH AND OUR PLEDGE TO DEMOCRACY

Colin M. Black[*]

[*]Colin M. Black is Associate Professor of Legal Writing at the Suffolk University School of Law. The author especially thanks Dyane O'Leary, Andrew Perlman, and David Yamada for comments on earlier drafts of this article. Thanks also to Gregory Ewing and Tiffany Souza of Suffolk University's Moakley Law Library for additional research assistance and support.

TABLE OF CONTENTS

INTRODUCTION……4
I. A BRIEF HISTORY OF THE OATH AND ITS EVOLUTION IN U.S. LAW……6
A. The Early Oaths……7
B. The "Do no Falsehood" Oath……9
C. American Colonies Adopt the Oath……10
D. The "Zealous Advocacy" Adjustment……13
E. Formalization and Codification of Legal Ethics……14
III. LAWYER'S SPECIAL ROLE IN DEMOCRACY……17
A. Government Lawyers……18
B. Non-Government Lawyers ……25
IV. CHALLENGES TO DEMOCRACY: A CASE STUDY OF THE 2020 U.S. ELECTION……27
A. Propagation of False Claims……28
B. Fake Electors Scheme……31
C. Litigation Efforts……35
D. Pressure Campaign……37
E. The January 6, 2021 Insurrection……41
F. Voting "Nay" to Certify the Election……43
V. MODERNIZATION OF THE OATH AND OTHER PROPOSALS……46
A. Modernizing the Lawyer's Oath……46
B. Additional Proposals……54
1. Law School Curriculum……54
2. Continuing Legal Education……59
3. Rule and Discipline Reforms……60
a. Expanding Rule 8.3: Mandatory Reporting of Misconduct……62
b. Revising Rule 8.4: Conduct Prejudicial to the Administration of Justice……62
a. Improving the Disciplinary Process….63
CONCLUSION……65

ABSTRACT

For centuries, lawyers have sworn to an oath as a prerequisite to admission. The oath, barely evolved from their historical roots, represents the guiding commitment lawyers make to democratic principles of honesty, integrity, fairness, and the rule of law. This commitment is in exchange for the power and privilege of belonging to the legal profession. However, the ethical landscape for legal practitioners has evolved, particularly in response to the alarming events of the 2020 U.S. presidential election. These events revealed significant lapses in the judgment and conduct among some lawyers, exposing the need for a recommitment to the democratic principles embedded in the oath. This article critically examines the historical development of the lawyer's oath and argues for its modernization to better reflect the ethical challenges of contemporary legal practice. It highlights the need for the oath to include explicit commitments to democratic principles, the rejection of bias, and the reinforcement of ethical responsibility. The article further explores how these modernized principles can be integrated into legal education and professional conduct to help avoid future lapses. In advocating for these reforms, the article asserts that a renewed and modernized oath is essential for the legal profession to reclaim its role as a defender of justice and public trust.

INTRODUCTION

Every lawyer takes an oath upon admission to the legal profession. This oath, of ancient origin, requires that today's lawyers swear or affirm to conduct themselves in an ethical manner. The oldest lawyer oath in the country provides that:

> Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:
>
> I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.[1]

The lawyer's oath embodies the democratic principles of the rule of law and stands as a pledge for justice, equality, and due process in a democratic legal system. Indeed, lawyers are not merely participants in the legal process; they are architects of policy, interpreters of laws, and guardians of democratic institutions. Their power must be balanced by their obligations. It is within this framework, that the lawyer's oath finds profound significance and its modernization a critical step

[1] MASS. GEN. LAWS ch. 221, § 38 (2022).

toward a professional recommitment to the principles embedded in the oath.

Reciting the lawyer's oath is more than a ceremony. It is a pledge that binds the legal profession to the highest standards of integrity, fairness, and a commitment to the rule of law. But recent history, specifically the lawyer led efforts to undermine the 2020 U.S. presidential election, has exposed serious concerns in the ethical foundations of the profession. Lawyers, who should be the bulwark against the anti- democratic movements, were instead seen at the forefront of efforts to distort the truth, manipulate the electoral process, and undermine public confidence in our democratic institutions. The consequences of these actions are not merely professional lapses— they are existential threats to the integrity of democracy.

This article considers the origin and evolution of the lawyer's oath to establish its significance in regulating lawyers as their role in the development of democratic institutions demonstrates the import of ethical conduct that obligates the lawyer to democratic ideals. It begins by exploring the historical roots of the oath in Section II, tracing its journey from ancient civilizations to its modern-day embodiment in legal practice. In this section, I rely heavily on the extensive historical exploration of the oath by Carol Rice Andrews, as well as the scholars that she cites.[2] The discussion reveals how the oath has long served as a moral compass, guiding lawyers in their dual roles as advocates and public servants.

In Section III, the article turns its focus to the contemporary landscape, examining the unique role that

[2] Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1386 (2004) [hereinafter Andrews, *Standards of Conduct*]; Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009) [hereinafter Andrews, *Lawyer's Oath*]; Geoffrey C. Jr. Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1981) [hereinafter *Hazard, Legal Ethics*]; Geoffrey C. Jr. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1990) [hereinafter *Hazard, Future of Legal Ethics*]; JOSIAH HENRY BENTON, THE LAWYER'S OATH AND OFFICE (1909).

lawyers play in democracy today. Whether in the courtroom, the legislature, or the advisory boardroom, lawyers' decisions shape the legal and ethical standards that govern society. This section discusses the inherent challenges and ethical dilemmas that arise when a lawyer's duties conflict.

The ethical breaches during the 2020 election are the focus of Section IV.

Here, the article scrutinizes the actions of lawyers who crossed the line from advocacy to manipulation, highlighting cases where misinformation, fraudulent schemes, and incitement to violence were used as tools to subvert the democratic process.

In response, Section V offers a path forward, proposing a recommitment to the principles within the lawyer's oath. This section calls for modernizing the language of the lawyer's oath to reflect the values of today's diverse legal ethical concerns, and humbly offers a sample modification of the Massachusetts lawyers' oath. Section V further suggests various enhancements to formal legal education and continuing legal education, revisions to the ABA Model Rules of Professional Conduct, and improvements to disciplinary procedures.

By reexamining the intersection of legal ethics and democracy, this article argues for a renewed dedication to the principles of lawyer's oath as a vital safeguard for the integrity of the legal profession and, by extension, democracy itself. A recommitment to the principles inherent in the oath can enhance the public trusts in the legal system as a guardian of democracy. Modernizing the oath is an essential step to this professional recommitment.

I. A BRIEF HISTORY OF THE OATH & ITS EVOLUTION IN U.S. LAW

The lawyer's oath embodies deeply rooted principles of ethical conduct. Its evolution in democratic legal system underscores the oath's significance in our modern legal landscape. As Professor Andrews' important historical

exploration of the oath reveals, its historical context demonstrates the importance of advocating for a recommitment to its underlying principles of ethical conduct.[3]

A. The Early Oaths

Oath taking dates back to ancient civilizations.[4] Oaths were essential in confirming truthfulness and loyalty.[5] Indeed, ancient Greek and Roman societies integrated oaths in their legal systems, representing their significance in ensuring justice.[6] For example, in Greece, advocates swore oaths to their gods, sacred altars and relics.[7] And, Romans required oaths from witnesses, judges, and litigants, underscoring the integrity of the judicial process.[8] These oaths served a moral function—committing advocates to ethical conduct under the threat of divine reckoning.[9] The earliest recorded oaths can be found in

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[3] Andrews, Standards of Conduct, *supra* note 2; Andrews, Lawyer's Oath, *supra* note 2.

[4] Andrews Lawyer's Oath, *supra* note 2, at 7; *See also* JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE, AND HISTORY (London, John W. Parker 1834); HELEN SILVING, ESSAYS ON CRIMINAL PROCEDURE 4 (1964); JOSEPH PLESCIA, THE OATH AND PERJURY IN ANCIENT GREECE (1970); Matthew A. Pauley, I Do Solemnly Swear: The President's Constitutional Oath – What It Means, Why It Matters (1999) (Ph.D. dissertation, Harvard University) (on file with University Microfilms International).

[5] *See* Andrews, *Standards of Conduct*, *supra* note 2, at 20; Jonathan Belcher, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287; Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009).

[6] Frederick B. Jonassen, *"So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 303, 312 (2013); Belcher, *supra* note 5, at 291; Andrews, *Lawyer's Oath*, *supra* note 2, at 8-9.

[7] Milhizer, *supra* note 5 at 8; Belcher, *supra* note 5, at 291.

[8] *See* BENTON, *supra* note 2, at 19; *see also* Milhizer, *supra* note 5, at 11-12.

[9] *E.g.*, Milhizer, *supra* note 5, at 4. *See also* Jonassen, *supra* note 6, at 312; Andrews, *Lawyer's Oath, supra* note 2, at 7; William R. Nifong, *Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law Notes*, 49 DUKE L.J. 1077, 1103-04 (2000).

the Old Testament, reflecting this profound connection between faith in a god and ethical conduct.[10] Professor Andrews rightfully suggests that by invoking supernatural oversight, early oath taking emphasized the importance of ethical conduct in a civilized society under the threat of lay punishment and heavenly retributions.[11]

These early oaths served as the first formal set of standards for legal advocates.[12] Interestingly, some of these early advocate oaths read strikingly similar to modern oaths. For example, in the Justinian era, advocates were required to swear to be "true and just" and "not prosecute a lawsuit…[that] is dishonest, utterly hopeless or composed of false allegations."[13] This oath emphasizes the balance of a lawyer's duties between client and justice.

The oath became more formalized within various legal systems in medieval Europe as litigation and courts modernized. For example, in 1221, Roman Emperor Frederic II, required advocates to renew annually that they will pursue their cause "with all good faith and truth, without any tergiversation, succor; nor will they allege anything against their sound conscience; nor will they undertake desperate causes . . . by misrepresentation . . ."[14] Like the Justinian oath, this oath imposed a duty to the judicial system as well as the client.

The evolution of European oaths continued to regulate advocate conduct to protect both the client and the law. In London, a 1234 ecclesiastical decree required advocates to swear an oath to "plead faithfully, not to delay justice . . . but to

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[10] *See Genesis* 21:23-24 (New International) ("Now swear to me here before God that you will not deal falsely with me or my children or my descendants . . . Abraham said, 'I swear it.'"); Andrews, *Standards of Conduct*, *supra* note 2; Jonassen, *supra* note 7, at 309.

[11] Andrews, *Standards of Conduct, supra* note 2, at 1392-93; BENTON, *supra* note 2.

[12] BENTON, *supra* note 2, at 9-10; Andrews, *Lawyer's Oath, supra* note 2, at 6-7.

[13] Andrews, *Lawyer's Oath, supra* note 2, at 9.

[14] *Id.* at 10. *See generally* JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE AND HISTORY (1834).

defend his client both according to law and reason."[15] In France, advocates took oaths to maintain truthfulness, avoid delays, and serve the poor.[16] These oaths reflected the growing recognition of the lawyer's role as a public servant with obligations beyond just client services but to the greater public expectations of the legal profession.

B. The "Do no Falsehood" Oath

Oaths continued as the primary regulatory tool of advocates in Europe.[17] The English "do no falsehood" oath, dating back to 1402, required attorneys to swear they would not engage in falsehoods or deceit in their practice.[18] The oath mandated that lawyers affirmatively report falsehoods to the court.[19] It also barred delays, limited the fees, and required a pledge of competence.[20] This oath laid the groundwork for modern legal oaths, establishing a foundational commitment to honesty and integrity.[21] Similarly, a lawyer's oath in Denmark and Norway from 1683 emphasized fairness in litigation,

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[15] Andrews, *Lawyer's Oath*, *supra* note 2, at 11; Nifong, *supra* note 9, at 1091.
[16] *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 7; *see also* BENTON, *supra* note 2, at 12, 112-21.
[17] Andrews, *Lawyer's Oath*, *supra* note 2, at 25; Milhizer, *supra* note 5, at 19-27 (Oath-taking was not limited to medieval Europe. In ancient Africa, truth-telling was often pledged with animal sacrifice, blood-spilling, incantations, and swearing on nature or objects. Traditional Chinese oaths had similar themes like decapitating a chicken and writing sacred characters on paper and burning it to emphasize the truthfulness of their cause. In Aztec culture, witnesses invoked the Sun and Earth gods while touching a finger to the ground and then to their tongue to pledge their commitment to honesty).
[18] BENTON, *supra* note 2, at 59; Jonassen, *supra* note 6, at 313; Andrews, *Lawyer's Oath*, *supra* note 2, at 13; Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404, 406-07 (1967).
[19] BENTON, *supra* note 2, at 43; *see also* Jonassen, *supra* note 6 at 347; Goodman, *supra* note 18 at 407.
[20] Jonassen, *supra* note 6; *see also* Goodman, *supra* note 18 at 406; Andrews, *Lawyer's Oath*, *supra* note 2 at 13.
[21] *See* BENTON, *supra* note 2, at 44-47; *see generally* Jonassen, *supra* note 6.

honesty, and the avoidance of frivolous delays.[22] Oaths ensured that advocates conducted themselves with a sense of duty and ethical responsibility.[23] These oaths were not merely ceremonial but integral practices emphasizing truthfulness and fair play in a judicial system.

C. American Colonies Adopt the Oath

Unsurprisingly, the English and European legal systems significantly influence the development of American legal ethics.[24] Early American colonies adopted oaths influenced by English, French, and other European models.[25] The adoption of these models was driven by the need to establish an ethical legal system in the new colonies.[26] Similar to Europe at this time, early American colonial oaths served as the primary regulation of the legal profession.[27]

Like their European counterparts, oaths in the American colonies emphasized a lawyer's duties of honesty, competency, and the support of just causes. The most common adopted model was the English "do no falsehood" oath.[28] For example, the Massachusetts Bay Colony oath required lawyers to commit to integrity and faithfulness to justice.[29] In 1701, Massachusetts formally adopted a modified version of the "do no falsehood"

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[22] BENTON, *supra* note 2, at 24-25; Andrews, *Lawyer's Oath*, *supra* note 2, at 17.
[23] *See* Jonassen, *supra* note 6; BENTON, *supra* note 2, at 28; Goodman, *supra* note 18, at 409.
[24] *See* BENTON, *supra* note 2, at 9; Andrews, *Lawyer's Oath*, supra note 2, at 4; *and* Jonassen, *supra* note 6, at 323*; and* Goodman, *supra* note 18, at 406-07.
[25] BENTON, *supra* note 2; Andrews, *Lawyer's Oath*, *supra* note 2. *See also* Goodman, *supra* note 18, at 404-11.
[26] *See generally* Jonassen, *supra* note 6; *and* Andrews, *Lawyer's Oath*, *supra* note 2.
[27] Andrews, *Lawyer's Oath*, *supra* note 2, at 19; *see* Goodman, *supra* note 18, at 406-07.
[28] *See generally* BENTON, *supra* note 2. *See also* Andrews, *Lawyer's Oath*, *supra* note 2, at 4; *see also* Goodman, *supra* note 18.
[29] Milhizer, *supra* note 5, at 27-28.

oath.[30] The adoption of the English oath tradition highlighted the social need for regulatory guidance in civic matters, like jury duty, witness testimony, holding public office, and, of course, serving as an advocate.[31]

Following the American Revolution, states began adopting their own versions of the lawyer's oath, with some incorporating a pledge to state and federal constitutions.[32] For example, in 1787, New York's oath required lawyers to "truly and honestly demean" themselves in their practice according to their knowledge and ability.[33] In 1799, New Jersey required lawyers to take an oath of allegiance to the state as well as an oath of honesty and faithfulness in practice.[34] Delaware and Pennsylvania also adopted modified "do no falsehood" oaths that include pledges of allegiance to constitutions.[35]

The Nineteenth century marked a significant period in the formalization of legal ethics and the lawyer's oath in the United States. Legal scholars and practitioners such as David Hoffman, Simon Greenleaf, and George Sharswood played pivotal roles in shaping the ethical framework for lawyers.[36] However, the evolution of the oath reflected a shift from a moralistic approach to one more closely aligned with the concept of zealous advocacy for clients.[37]

Published in 1817, David Hoffman's "A Course of Legal Study" first introduced a comprehensive set of ethical guidelines for American lawyers, emphasizing the importance

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[30] Andrews, *Lawyer's Oath, supra* note 2, at 20. *See also* Milhizer, *supra* note 5, at 28; Goodman, *supra* note 18, at 407.
[31] *See Andrews*, *Lawyer's Oath, supra* note 2, at 8-9, 11, 24-25, ; Herbert Pope, *The English Common Law In The United States*, 24 HARV. L. REV. 6 (1910).
[32] Andrews, *Lawyer's Oath*, *supra* note 2, at 22; Goodman, *supra* note 18, at 408; *see generally* Herbert, *supra* note 31.
[33] Andrews, *Standards of Conduct*, *supra* note 2 at 1416 n.179.
[34] *Id.* at 1417 n.186.
[35] *Id*. at 1416 nn.206, 209.
[36] Michael H. Hoeflich, *Legal Ethics in the Nineteenth Century: The Other Tradition Special Issue on Professional Responsibility: Essay*, 47 U. KAN. L. REV. 793, 794 (1998).
[37] *Id.* at 816.

of personal morality in legal practice.[38] Hoffman's "Resolutions in Regard to Professional Deportment" explicitly rejected frivolous defenses, promoted honesty in legal proceedings, and underscored the lawyer's duty to both the client and the broader justice system.[39] This early view was tied closely to the lawyer's oath, which Hoffman and his contemporaries saw as a binding commitment to justice and the public good.[40]

In his inaugural address at Harvard Law School in 1834, Simon Greenleaf emphasized this dual loyalty to a client and the public.[41] Greenleaf viewed the lawyers role in society as paramount because of the lawyer's unique access to the justice system and ability to assist in the prevention or reparation of wrongs.[42] Greenleaf argued that the lawyer's oath required lawyers to prioritize justice and the broader social good over blind alliance to their clients objectives.[43] Greenleaf's focus on the oath highlighted the notion that a lawyer's obligations were not simply to the client cause, but to the public good, with a duty to the legal system and democratic institutions.[44]

As the century progressed, George Sharswood introduced a more nuanced perspective, acknowledging the tension between a lawyer's moral beliefs and professional duties.[45] In his 1854 seminal work "An Essay on Professional Ethics," Sharswood further developed the concept of the lawyer's oath by articulating the potentially conflicting

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[38] *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (London, John Miller, 2d ed. 1836); Hoeflich, *supra* note 36, at 797.
[39] *See* HOFFMAN, *supra* note 38, at 754; Hoeflich, *supra* note 36, at 795-96.
[40] *See* HOFFMAN, *supra* note 36, at 798-99.
[41] *See* Simon Greenleaf, *A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University*, in THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 134 (Michael H. Hoeflich ed., 1988).
[42] *See id*. at 140.
[43] *Id.* at 151.
[44] *See id.* at 153.
[45] *See* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 102-03 (Philadelphia, T. & J.W. Johnson, 5th ed. 1884); Hoeflich, *supra* note 36, at 803-04.

responsibilities of lawyer between the obligations as advocates for their clients and as officers of the court.[46] While Sharswood maintained that lawyers owed fidelity to their clients, he also recognized that this obligation was tempered by their role as officers of the court, bound by their official oath.[47] Sharwood's approach represented a middle ground, allowing lawyers to represent clients zealously while still adhering to a moral framework that considered the public interest. Sharswood's ideas emphasized that lawyers should balance their duty to clients with their obligation to uphold justice and the integrity of the legal system.[48]

D. The "Zealous Advocacy" Adjustment

However, by the late Nineteenth century, the principles of zealous advocacy gained momentum while the notions of a societal obligation to fairness, ethical conduct and public service waned.[49] The emerging industrial economies demanded lawyers represent clients with all legal means, despite its ethical consequences.[50] This mis-aligned focus on client demands marked a significant departure from earlier ethical approaches. A lawyer's duty to the public gave way to client advocacy. This diversion reflected a broader transformation in legal ethics in the United States.

The lawyer's oath, once a lawyer's mandate of morality and public service, increasingly became a mere formality, second to client demands.[51] Principles of truthfulness and justice gave way to the rise of zealous advocacy and laid the groundwork for our modern legal ethics.[52] The shift from an

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[46] Hoeflich, *supra* note 36, at 803.
[47] *Id.* at 806.
[48] *See id.* at 805-06.
[49] *See* Hoeflich, *supra* note 36, at 816; Andrews, *Lawyer's Oath*, *supra* note 2, at 29.
[50] *See* Hoeflich, *supra* note 36, at 817.
[51] *See* Andrews, *Lawyer's Oath, supra* note 2, at 33, 39-41; Hoeflich, *supra* note 36, at 817.
[52] *See* Hoeflich, *supra* note 36, at 815.

oath to a set of guidelines reflected the growing complexity of legal practice and the need for more detailed ethical standards.[53] This transition was driven by the recognition that while the oath provided a broad moral framework, there was a need for specific rules to address the diverse ethical dilemmas faced by lawyers in their practice.[54]

E. Formalization and Codification of Legal Ethics

In the late Nineteenth and early Twentieth century, the legal profession in the United States continued to evolve with increasing formalization of ethical standards and oaths.[55] The American Bar Association (ABA), founded in 1878, played a crucial role in standardizing legal ethics across the country.[56] The ABA's Canons of Professional Ethics, adopted in 1908, were among the first comprehensive set of ethical guidelines for lawyers, setting the stage for modern codes of conduct.[57]

As part of the Canons of Professional Ethics, the ABA also adopted a model oath in 1908.[58] In its final report the ABA committee explained that the oath served as a set of "clear and concise" set of binding duties, while the canons discussed the obligations of lawyers as they perform their specific professional role.[59] The ABA's 1908 Model Oath stated:

> DO SOLEMNLY SWEAR:
> I will support the Constitution of the United States and the Constitution of the State of . . .;

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[53] *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 31, 54-55.
[54] *See id.* at 28.
[55] *See* Hoeflich, *supra* note 36, at 813; Andrews, *Lawyer's Oath*, *supra* note 2, at 18-19.
[56] *See* Andrews, Standards of Conduct, *supra* note 2, at 1435.
[57] *Id.*
[58] Hoeflich, *supra* note 36; Andrews, Standards of Conduct, *supra* note 2, at 1835; *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 584 (1908).
[59] *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 570. 573, 584-85 (1908); *see also* Andrews, Standards of Conduct, *supra* note 2, at 1451-52.

> I will maintain the respect due the Courts of Justice and judicial officers;
> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;
> I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;
> I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;
> I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.
> SO HELP ME GOD.[60]

[60] *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 585 (1908). *See also* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & SOC. INQUIRY 1 (1999).

This oath combined elements from historical oaths and emphasized supporting the Constitution.[61] The oath's pledge included respect for the courts and upholding honesty in litigation.[62] The oath also included a "just cause" provision, allowing lawyers to refuse cases deemed unjust, requiring a lawyer balance the duty to client advocacy with broader ethical considerations.[63] The codification of the oath suggested a potential significant milestone in providing a framework for ethical conduct and reinforcing a lawyer's role as guardians of the justice system.

The ABA Model Rules of Professional Conduct, first adopted in 1983 and subsequently revised, incorporate many principles inherent in the lawyer's oath.[64] These rules emphasize core values such as competence, confidentiality, and loyalty, reflecting the enduring importance of the lawyer's oath in guiding ethical behavior.[65] The formulation of these rules was driven by the recognition that the oath alone was insufficient to address the complex ethical issues faced by modern lawyers, necessitating a more detailed and standardized set of guidelines.[66] The ABA's efforts to codify ethical standards were motivated by the need to address inconsistencies in the ethical practices of lawyers across different states.[67] The Model Rules provided a comprehensive framework that could be adopted by state bar associations, ensuring that all lawyers adhered to the same high

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[61] *See generally* Hoeflich, *supra* note 36; *see* Andrews, *Standards of Conduct*, *supra* note 2, at 1425-26 n.278. 1438-39, 1442; *see also* Goodman, *supra* note 18.

[62] Hoeflich, *supra* note 36, at 812-13.

[63] *Id.* at 801, 805-06.

[64] Andrews, *Standards of Conduct, supra* note 2, at 1434-35; Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 178-179 (2010); Eric C. Chaffee, *Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law*, 28 GEO. J. LEGAL ETHICS 323, 332-33 (2015).

[65] Andrews, *Lawyer's Oath, supra* note 2, at 60; *see* Hoeflich, *supra* note 36; Davis, *supra* note 64, at 176; Chaffee, *supra* note 64, at 365.

[66] Andrews, *Lawyer's Oath, supra* note 2, at 34; Chaffee, *supra* note 64, at 331-32.

[67] *See* Chaffee, *supra* note 64, at 333; Andrews, *Lawyer's Oath, supra* note 2, at 34; Jonassen, *supra* note 6.

standards of professional conduct.[68] Consequently, the adoption of the ABA rules across jurisdictions overshadowed the oath as a beacon for ethical conduct.

II. LAWYER'S SPECIAL ROLE IN DEMOCRACY

In democratic societies, the rule of law serves as the bedrock upon which justice, equality, and the protection of individual rights are built.[69] Lawyers, as key players within a democratic legal system, occupy positions of significant power, privilege, and influence.[70] Their reach extends far beyond the courtroom. Lawyers serve in both government and non-government roles. In government roles, lawyers serve as legislators, judges, government attorneys, and advisors who shape public policy, interpret the law, and ultimately influence the trajectory of democratic governance.[71] Lawyers serving in non-government roles also hold significant power, privilege and influence in their client advocacy.[72] Lawyers, in any capacity, who lend their professional credibility to false claims about critical components of

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[68] *See* Chaffee, *supra* note 64, at 334; Andrews, *Lawyer's Oath, supra* note 2, at 43; Davis, *supra* note 64, at 165.

[69] Bruce A. Green, *The Lawyer's Role in a Contemporary Democracy, Foreword*, 77 FORDHAM L. REV. 1229, 1229-32 (2009); Rakesh K. Anand, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role*, the Role of the Lawyer in American Democracy, 77 FORDHAM L. REV. 1611 (2009).

[70] Anand, *supra* note 69, at 1619-20; Green, *supra* note 69, at 1239-40; Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 744 (2022). *See also* DELIBERATIVE DEMOCRACY—ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1999); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18–20 (1993).

[71] *See* Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 251, 153, 266-67 (2011).

[72] *See* Colin Marks & Nancy B. Rapoport, *The Lawyer's Role in a Contemporary Democracy, Promoting the Rule of Law, the Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269 (2009); Green, *supra* note 69, at 1240.

our democratic institutions pose a significant risk to democracy, itself.[73]

Lawyers possess unparalleled access to the mechanisms of power within democratic societies.[74] As legislators, judges, and executive branch lawyers, they play a central role in shaping laws, policies, and societal norms.[75] As non-government lawyers, they influence democratic norms through their representative capacities. This access is a double-edged sword. While it enables lawyers to effectuate justice and uphold the rule of law, it also places them in positions where ethical lapses can have dire consequences for democracy.[76]

A. Government Lawyers

Lawyers serving in legislative capacities are entrusted with the significant responsibility of safeguarding and promoting democracy through their lawmaking and policymaking roles. Their legal expertise, coupled with a deep understanding of constitutional principles, positions them uniquely to influence the creation of laws that uphold democratic ideals. These role place lawyers at the heart of governance, where they must ensure that the laws they create align with constitutional principles and democratic values.[77]

Lawyer-legislators play a critical role in ensuring that the laws they draft reinforce and protect the core values of

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[73] Andrew M. Perlman, *The Legal Ethics of Lying About American Democracy*, 22-2 SUFFOLK UNIV. L. SCH. LEGAL STUD. RSCH. PAPER SERIES 1 (2023).
[74] Green, *supra* note 69, at 1239; Goldstein, *supra* note 70, at 745-46, 748, 754, 756, 763
[75] *See generally* Deborah M. Hussey Freeland, *What Is a Lawyer - A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS Univ. PUB. L. REV. 425 (2012); *see also* Green, *supra* note 69, at 1238-41; Kruse, *supra* note 71, at 264-65.
[76] Goldstein, *supra* note 70, at 747-48, 753-54, 758.
[77] *See id.* at 739-41, 744; Green, *supra* note 69, at 1230, 1232-33; Mary L. Smith, *Lawyers Must Act Now to Save Our Democracy*, US NEWS & WORLD REP. (July 28, 2024), https://www.usnews.com/opinion/articles/2024-07-28/lawyers-must-act-now-to-save-our-democracy.

democracy.[78] This responsibility is heightened by their legal training, which equips them to foresee potential constitutional challenges and to design legislation that not only complies with the Constitution but also promotes broader democratic principles such as equality, transparency, and participation.[79] Their duty extends beyond merely ensuring legal compliance; they must also work to enhance democratic governance by crafting laws that empower citizens and protect individual rights.[80]

As policymakers, lawyers must navigate the complexities of modern governance, where laws must balance the needs of diverse constituencies while upholding the rule of law. This is particularly important in areas such as civil rights and electoral laws, where the potential for laws to either bolster or undermine democratic processes is significant.[81] The democratic duty of lawyer-legislators is to ensure that such laws enhance citizen participation and safeguard against disenfranchisement or discrimination.[82]

Lawyers in legislative roles must also balance their legal ethical obligations with their obligations to the electorate.[83] This requires a careful consideration of both legal principles and the democratic will of the people. Lawyer-legislators are not only public servants but also stewards of the public trust, responsible for ensuring that their legislative actions reflect the

[78] Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Anand, *supra* note 69, at 1614.
[79] Lawson, *supra* note 78.
[80] *Id. See also* Anand, *supra* note 69, at 1620.
[81] Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1860-61 (2023).
[82] *Id.* at 1877-78.
[83] Christopher F. Zurn, *Deliberative Democracy and Constitutional Review*, (2002), https://papers.ssrn.com/abstract=2271598 (last visited Aug 10, 2024); Dale Bumpers, *The Congressional Oath of Office*, 24 U. ARK. LITTLE ROCK. L. REV. 803 (2001); Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What - The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK. L. REV. 897 (2000).

will of the people while adhering to constitutional norms.[84] This balance is essential to maintaining both the legitimacy of the legislative process and the public's faith in democratic institutions. The principle of democratic accountability requires that lawyer-legislators engage in meaningful deliberation and debate, ensuring that the laws they propose are thoroughly vetted and debated in public forums. This process is crucial for fostering transparency and ensuring that the legislative process remains open and responsive to the needs of all citizens.[85]

Beyond drafting laws, lawyers who influence policy must ensure that the policies they develop are aligned with democratic values. Whether working within government agencies, think tanks, or advocacy groups, lawyers have a duty to advocate for policies that enhance transparency, protect civil liberties, and promote equal access to justice.[86] Their legal expertise enables them to identify potential legal and constitutional challenges early in the policy-making process, ensuring that policies are both legally sound and democratically robust.[87] In this capacity, lawyer- policymakers must remain vigilant against the erosion of democratic norms. This includes resisting efforts to undermine the rule of law or to concentrate power in ways that threaten democratic governance. By upholding their duty to democracy, lawyers in these roles contribute to a legal and political framework that supports the flourishing of democratic principles and practices.

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[84] J. Michael Luttig, *American Democracy in Peril 121st Sibley Lecture*, 58 GA. L. REV. 1 (2023). *See also* Kruse, *supra* note 71, at 263; Anand, *supra* note 69, at 1629.

[85] Ross L. Malone, *The American Lawyer's Role in Promoting the Rule of Law*, 43 MARQ. L. REV. 3 (1959); Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 605 (2024); Goldstein, *supra* note 70, at 745.

[86] Barry Daniel Malone, *The Burden of Our Privilege*, ABA, https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-management/the-burden-of-our- privilege/ (last visited Aug 10, 2024). *See generally* Bulman-Pozen, *supra* note 81; Cummings, *supra* note 85

[87] Cummings, *supra* note 85. *See also* Malone, *supra* note 85; Goldstein, *supra* note 70, at 645.

Lawyer-judges also play a significant role in ensuring democratic integrity. Judicial power in a democracy is a cornerstone of maintaining the balance of power among the branches of government and ensuring the protection of constitutional rights. Judges wield significant authority, as their rulings not only resolve individual disputes but also set precedents that can shape the law for generations.[88] This power underscores the need for judges to exercise their authority with the utmost integrity, impartiality, and adherence to the rule of law.[89] It is important to note that this article does not address the current state of judicial ethics. Separate and apart from specific judicial ethical obligations (or the lack thereof) is an independent analysis that is deserving of its own analysis. Here, the focus remains on lawyer-judge obligations stemming not from independent judicial oaths but from the same lawyer oath taken by most judges.

The doctrine of judicial review grants judges the power to determine the constitutionality of legislative and executive actions, effectively serving as a check on the other branches of government.[90] As guardians of the Constitution, judges are tasked with ensuring that all laws and government actions align with the foundational principles of democracy.[91] However, the

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[88] *See* Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSPECTIVES ON POL. 805 (2009); Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 669-70 (2001).

[89] *See generally* Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy Symposium: The Lawyer's Role in a Contemporary Democracy: Promoting Social Change and Political Values*, 77 FORDHAM L. REV. 1591 (2008); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 190 (2006); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 162 (2003).

[90] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803); Shapiro, *supra* note 90, at 669.

[91] Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined Conference: Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 929, 938 (2006). *See also* AKHIL REED AMAR, AMERICA'S

exercise of judicial review requires a delicate balance; judges must avoid the perception of overreach, where the judiciary might be seen as encroaching on the roles of the legislative and executive branches.[92]

The power of judicial interpretation also extends to the creation of common law, where judges set legal standards that will guide future cases.[93] This lawmaking function is critical in areas where statutory law is silent or ambiguous, allowing judges to fill gaps in the law through reasoned analysis and precedent.[94] However, this creative aspect of judicial power must be exercised with restraint, as judges are unelected officials, and excessive judicial activism can lead to accusations of undemocratic governance.[95]

Moreover, judicial decisions often reflect broader societal values, making the judiciary a powerful agent of social change.[96] Landmark rulings, such as those in Brown v. Board of Education, Roe v. Wade, Citizens United v. FEC, Dobbs v. Jackson Women's Health Organization, illustrate how judicial interpretations can have profound implications for civil rights and liberties.[97] These judicial opinions demonstrate the judiciary's role in shaping the moral and legal fabric of the

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UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 29 (2012).

[92] *See* Dinh, *supra* note 91, at 11; Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations Conference: Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 909, 912-13 (2006).

[93] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 20 (1921); Shapiro, *supra* note 90, at 669; Zurn, *supra* note 83, at 528.

[94] RICHARD A. POSNER, HOW JUDGES THINK, 85-86 (2008). *See also* Burbank, *supra* note 92 at 914

[95] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16 (1962); *see generally* Geyh, *supra* note 89.

[96] Owen M. Fiss, *The Forms of Justice Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 2 (1979).

[97] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Roe v. Wade, 410 U.S. 113, 153 (1973); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022). *See also*, Geyh, *supra* note 89.

nation, further highlighting the ethical responsibilities that accompany judicial power.

Accordingly, judicial impartiality is not only a professional duty but also a constitutional mandate. The Due Process Clause of the Fifth and Fourteenth Amendments guarantees every litigant the right to a fair trial before an impartial judge.[98] The appearance of bias or the perception that a judge has a personal stake in the outcome of a case can undermine the integrity of the entire judicial system.[99] Consequently, judges must meticulously avoid conflicts of interest and any behavior that could compromise their neutrality. The ethical imperatives that guide judicial behavior are not only foundational to the individual judge's role but also crucial to maintaining the public's confidence in the legal system. The judiciary's power, while immense, must always be exercised with a profound sense of responsibility, grounded in ethical principles that safeguard the integrity of the democratic process.

Government lawyers also occupy a unique and powerful position within the legal system, as they are responsible not only for representing the government in legal matters but also for ensuring that the actions of government officials comply with the law. This dual role places them at the intersection of legal advocacy and public accountability, where their decisions can profoundly impact the interpretation and enforcement of laws.[100]

Government lawyers, including attorneys general and agency, are key players in the implementation of government policy.[101] They provide legal counsel to government officials,

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[98] Tumey v. Ohio, 273 U.S. 510, 523 (1927).
[99] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883-84 (2009). *See also* Dinh, *supra* note 91.
[100] *See* W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law Symposium: The Lawyer's Role in a Contemporary Democracy: Promoting the Rule of Law*, 77 FORDHAM L. REV. 1333, 1337 (2008).
[101] *Id.*

draft legislation, and represent the government in court.[102] Their work often involves complex legal issues that require a deep understanding of both the law and the broader policy objectives of the government.[103] For instance, when advising on matters related to national security, environmental regulation, or civil rights, government lawyers must navigate the fine line between advancing the policy goals of the administration and ensuring that these policies do not violate constitutional principles.[104]

The influence of government lawyers extends beyond the courtroom. Their legal opinions and interpretations of the law can shape the direction of government policy and influence public perception of the legality and legitimacy of government actions.[105] This is particularly true in high-stakes situations where the legality of executive actions is in question. For example, during the Trump administration, government lawyers played a pivotal role in defending executive orders related to immigration, environmental deregulation, and national security, each of which sparked significant legal and public debate.[106]

The ethical responsibilities of government lawyers are paramount, given their role in upholding the rule of law while serving the interests of their government clients.[107] These lawyers must adhere to professional ethical standards that require them to act with integrity, honesty, and impartiality.[108] This can be particularly challenging in politically charged

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[102] *See generally* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). *See also* Wendel, *supra* note 100.

[103] *See generally* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2018).

[104] *See id.* at 2183-88.

[105] *See* Reinstein, *supra* note 102.

[106] Susan S. Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education After the Trump Administration: Lessons and Legacies for the Legal Profession*, 69 WASH. U. J. L. & POL'Y 17 (2022).

[107] *Id.*; Wendel, *supra* note 100 at 1335; *see also* Kent et al., *supra* note 103 at 2118.

[108] *See* Wendel, *supra* note 100 at 1335. *See generally* Reinstein, *supra* note 102.

environments where there may be pressure to prioritize political loyalty over legal objectives.

One of the most significant ethical challenges for government lawyers is the duty to uphold the Constitution and the law, even when it conflicts with the directives of their clients. This duty is codified in the Model Rules of Professional Conduct, which state that a lawyer representing a government agency must prioritize the public interest and the integrity of the legal system over the interests of individual government officials.[109] This means that government lawyers must be prepared to refuse to defend actions or policies that they believe are unconstitutional or unlawful, even at the risk of political or professional repercussions. The power wielded by government lawyers carries with it a significant ethical responsibility. As guardians of the rule of law within the government, they must navigate the complexities of legal advocacy while maintaining their commitment to constitutional principles and public trust.

B. Non-Government Lawyers

Non-government lawyers also play a crucial role in upholding democratic institutions.[110] Non-government lawyers include (1) lawyers in private practice; (2) in- house lawyers representing institutions; and (3) lawyers in the non-profit sector, ranging from legal aid/legal services to public interest law reform advocacy.[111] These lawyers, whether in private practice or corporate settings, carry a broad responsibility to society that extends beyond their duties to individual clients.[112] Their actions and decisions can have far-reaching implications

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[109] *See* MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9 & 1.11 (AM. BAR ASS'N 2024); Wendel, *supra* note 100.

[110] *See* Green, *supra* note 69.

[111] Rosen, *supra* note 89 at 168; Zacharias, *supra* note 89 at 1599. *See also* Irma S. Russell, *The Lawyer as Public Citizen: Meeting the Pro Bono Challenge Symposium on Innovations in Pro Bono Practice*, 72 UMKC L. REV. 439, 445 (2003); Wendel, *supra* note 100 at 11.

[112] Green, *supra* note 69 at 1236; Russell, *supra* note 111 at 444; Zacharias, *supra* note 89 at 1600.

for the rule of law, public trust, and the integrity of democratic institutions.[113] Non-governmental lawyers do face unique ethical challenges, however, particularly when balancing their duty to zealously represent clients with their broader responsibilities to the legal system and society.[114] While the duty to advocate for clients is fundamental, it must be balanced against a lawyer's ethical obligations to the court, the public, and the democratic system.[115]

This tension is especially pronounced in corporate law, where lawyers must navigate complex issues involving legal compliance, ethical business practices, and the societal impact of corporate actions. For instance, corporate lawyers advising businesses must ensure that their legal guidance not only advances the interests of their clients but also aligns with democratic values such as transparency, accountability, and social responsibility.[116] This ethical balancing act is critical in maintaining the integrity of both the legal profession and the democratic system.

Further, non-governmental lawyers are often at the forefront of defending democratic principles through litigation and advocacy. Public interest litigation, for example, has historically been a powerful tool for advancing democratic ideals and protecting individual rights.[117] Lawyers engaged in this type of work challenge unjust laws, defend civil liberties, and hold powerful entities accountable, thereby playing a pivotal role in societal progress.[118] For example, lawyers outside of government roles were instrumental in ensuring the integrity of the electoral process and protecting the democratic right to

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[113] *See* Green, *supra* note 69; Malone, *supra* note 86.
[114] *See* Green, *supra* note 69; Freeland, *supra* note 76; Bruce A. Green & Russell G. Pearce, *Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2008).
[115] *See generally* Rosen, *supra* note 89. *See also* Kruse, *supra* note 71 at 251.
[116] Green, *supra* note 69 at 1231. *See generally* Marks & Rapoport, *supra* note 72.
[117] Rosen, *supra* note 89 at 166-67; Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFF. L. REV. 659, 663 (2014).
[118] Rosen, *supra* note 89; Galperin, *supra* note 117.

vote during the election challenges related to the 2020 U.S. election.[119] These efforts underscore the essential role that non-governmental lawyers play in upholding democracy.

Public trust in the legal system is foundational to a functioning democracy.[120] Lawyers, through their actions and behavior, significantly influence this trust.[121] Ethical lapses or misconduct by lawyers can erode public confidence in the justice system, undermining the very foundation of democratic governance.[122] Conversely, acts of integrity and justice by lawyers can reinforce public trust and the legitimacy of legal institutions.[123]

The behavior of lawyers, particularly in high-profile cases or those with public policy implications, can shape public attitudes toward the legal profession and the justice system. When lawyers act with integrity, transparency, and a commitment to justice, they help build confidence in the legal system, ensuring it is perceived as fair and impartial. Consequently, government and non-governmental lawyers occupy a pivotal role in democratic societies, wielding significant influence in shaping the legal system and public policy. This position comes with a corresponding responsibility to defend democratic ideals, uphold the rule of law, and maintain public trust. Upholding the highest standards of ethical conduct is essential for maintaining public trust and ensuring that the legal system functions effectively in a democratic society.

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[119] Goldstein, *supra* note 70.

[120] *See generally* Rosen, *supra* note 89; Freeland, *supra* note 75. *See also* Cummings, *supra* note 86 at 537; Martin Bohmer, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, Equalizers and Translators: Lawyer's Ethics in a Constitutional Democracy*, 77 FORDHAM L. REV. 1363 (2009).

[121] Rosen, *supra* note 89 at 189.

[122] *See* Green, *supra* note 69.

[123] Ascanio Piomelli, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1400 (2009). *See generally* Bohmer, *supra* note 120.

III. CHALLENGES TO DEMOCRACY: A CASE STUDY OF THE 2020 U.S. ELECTION

The 2020 U.S. presidential election was marked by unprecedented efforts to subvert democracy. And, lawyers spearheaded a significant number of these efforts. These actions include (a) the propagation of false claims of voter fraud, (b) the orchestration of the fake electors plot, (c) the filing of baseless lawsuits, (d) the pressure campaign to "find votes," (e) the involvement in the January 6th insurrection, and (f) voting not to certify the election. Each of these actions represented a deliberate attempt to overturn the will of the American electorate and posed a grave threat to the integrity of democratic institutions. While it is true that many of these lawyers are facing consequences, both criminally and professionally,[124] the conduct alone underscoring the critical need for a professional recommitment to the ethical obligations expected by the oath.

A. Propagation of False Claims

Concerted efforts, by lawyers, to undermine and delegitimize the results of a free and fair election underscores the critical need for a recommitment to the oath's ethical guidance. These lawyers played pivotal roles in spreading misinformation and perpetuating the false narrative that the election was "rigged" or "stolen."[125] This disinformation campaign was not confined to courtrooms. Instead, it extended into the public sphere, where these legal professionals used

[124] Alison Durkee, *All Of Trump's Lawyers Who Have Faced Consequences—As Jenna Ellis Takes Deal*, FORBES (Sep. 26, 2024) https://www.forbes.com/sites/alisondurkee/2024/08/06/kenneth-chesebro-charged-in-wisconsin-here-are-all-the- former-trump-lawyers-now-facing-legal-consequences/.

[125] Cummings, *supra* note 85; *see also* William L. Wheeler, *When the Dust Has Settled: Fallout from the 2020 Presidential Election and S.B. 202 Placed Georgia's Election Code in the Nation's Crosshairs Comments*, 74 MERCER L. REV. 409, 411 (2022).

media appearances, public statements, and social media to sow doubt about the integrity of the electoral process.[126]

One of the central lawyers in this misinformation campaign was Rudy Giuliani, who served as Trump's personal attorney.[127] Giuliani repeatedly made unfounded claims of widespread voter fraud, asserting that the election had been stolen through illegal votes, manipulation of voting machines, and other fraudulent activities.[128] Despite the lack of evidence to support these claims, Giuliani continued to push this narrative in various media appearances and press conferences, thereby amplifying the misinformation to a broad audience.[129]

Sidney Powell, another attorney closely associated with the Trump campaign, was also instrumental in propagating the "rigged" election narrative.[130] Powell advanced a particularly outlandish theory that involved an international conspiracy to manipulate voting machines.[131] She claimed that this conspiracy involved foreign actors, including Venezuela and China, and that it was orchestrated to ensure Trump's defeat.[132] Powell's assertions were widely discredited, yet she persisted in making these claims in public forums, further spreading misinformation and undermining public confidence in the electoral process.[133]

The misinformation campaign was not limited to these two lawyers. Several other attorneys associated with Trump and his allies engaged in similar efforts to delegitimize the election results.[134] These lawyers often appeared on conservative media outlets, where they repeated the baseless allegations of voter fraud and a stolen election.[135] By doing so, they played a significant role in shaping the perceptions of

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[126] Luttig, *supra* note 84 at 3-4.

[127] Cummings, *supra* note 85; Wheeler, *supra* note 125, at 410-11.

[128] *Id.*

[129] *See* Cummings, *supra* note 85 at 563.

[130] Cummings, *supra* note 85 at 576.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 562.

[135] *Id.*

millions of Americans, many of whom came to believe that the election had indeed been stolen despite all evidence to the contrary.[136]

One of the most concerning aspects of this misinformation campaign was its impact on public trust in the electoral process. Polls conducted in the months following the election revealed that a significant portion of the American public, particularly among Republican voters, believed that the election had been stolen from Trump.[137] This belief was directly attributable to the relentless efforts of lawyers and other Trump allies who continued to propagate these false claims, even in the face of overwhelming evidence that the election was free and fair.[138]

The spread of misinformation by these lawyers also had tangible consequences beyond merely shaping public opinion. It contributed to an atmosphere of mistrust and hostility that ultimately culminated in the January 6th insurrection at the U.S. Capitol.[139] Many of those who participated in the attack were motivated by the belief that the election had been stolen, a belief that was fueled by the disinformation campaign led by Trump's legal team and their allies.[140]

The actions of these lawyers in spreading false claims about the 2020 election represent a significant breach of their ethical obligations.[141] As officers of the court, lawyers have a duty to uphold the integrity of the legal system and the rule of law.[142] By engaging in a campaign of misinformation aimed at undermining the electoral process, these lawyers not only violated their ethical duties but also contributed to a broader erosion of trust in American democracy.[143]

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[136] Cummings, *supra* note 85 at 597.
[137] *Id.*
[138] *Id.* at 597-98.
[139] *Id.* at 595; Luttig, *supra* note 84 at 9.
[140] Smith, *supra* note 78.
[141] *See* Rosen, *supra* note 89 at 185.
[142] *Id.*; Cummings, *supra* note 85 at 528-529.
[143] Galperin, *supra* note 117; Rosen, *supra* note 89.

Furthermore, the continued propagation of these false claims has had a lasting impact on the political landscape in the United States. The narrative of a "rigged" election has become a central tenet of the political discourse among Trump supporters, leading to ongoing efforts to challenge and undermine future elections.[144] This persistent undermining of the electoral process poses a serious threat to the stability of American democracy and highlights the dangerous consequences of the misinformation spread by lawyers in the aftermath of the 2020 election. Such conduct demands that the profession reflect and recommit its founding principles embedded in the oath.

B. Fake Electors Scheme

One of the most audacious and troubling aspects of the efforts to overturn the 2020 presidential election was the fake electors scheme. This plan involved creating and submitting false slates of electors in several key battleground states that had been won by Joe Biden.[145] The intent was to replace the legitimate electors who were bound to vote for Biden with Trump supporters, thereby creating a pretext for rejecting the official electoral votes and potentially throwing the election to Donald Trump.[146] Lawyers played a central role in orchestrating and legitimizing this scheme, which represented a direct attack on democratic processes.[147]

The fake electors scheme was conceived as part of a broader strategy to overturn the 2020 election results through both legal and extralegal means. The plan centered around the idea that if multiple states submitted competing slates of electors, Vice President Pence, who was presiding over the certification of the electoral votes on January 6, 2021, could

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[144] Cummings, *supra* note 85 at 593.
[145] SELECT COMM. TO INVESTIGATE THE JAN. 6 ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 341 (2022); Cummings, *supra* note 85, at 582.
[146] Cummings, *supra* note 85 at 582-584. *See also* Luttig, *supra* note 84 at 3-4.
[147] Cummings, *supra* note 85 at 514-515.

declare the election results invalid in those states.[148] If successful, the plan would have resulted either in Trump being declared the winner or, more likely, throw the decision to the House of Representatives, where Republicans controlled a majority of state delegations.[149]

The scheme required the cooperation of Republican officials in several battleground states, including Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.[150] In each of these states, Trump's legal team and their allies pressured local Republican leaders to submit alternate slates of electors who would cast their votes for Trump, despite the fact that Biden had won the popular vote in those states.[151] These fake electors would then send their votes to Congress, where they would be presented as legitimate alongside the official slates.[152]

Lawyers were deeply involved in the planning and execution of the fake electors scheme. One of the key figures in this effort was John Eastman, a conservative legal scholar and attorney who advised Trump and his allies on how to use the fake electors to overturn the election.[153] Eastman drafted memos outlining the legal rationale for the scheme, arguing that the Vice President had the authority to reject the official electoral votes and recognize the fake electors instead.[154] These memos were widely circulated among Trump's legal team and served as the blueprint for the scheme.[155]

Eastman's legal theory was based on a distorted interpretation of the Constitution and the Electoral Count Act of 1887.[156] Eastman argued that because there was precedent for Congress to resolve disputes over electoral votes, the Vice

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[148] *Id.* at 582.

[149] *Id.*

[150] Cummings, *supra* note 85 at 582.

[151] *Id.*

[152] *Id.*

[153] Cummings, *supra* note 85 at 543.

[154] *Id.* at 591.

[155] *See id.*

[156] *Id.* at 584, 589.

President could unilaterally decide which slate of electors to recognize.[157] This interpretation was widely rejected by legal scholars and was ultimately dismissed by Pence, who refused to go along with the plan.[158] Nonetheless, Eastman and other lawyers continued to push this theory, using it to justify the submission of fake electors.[159]

Giuliani also played a crucial role in coordinating the efforts to submit the fake slates, working closely with Republican officials in the targeted states.[160] He pressured these officials to convene meetings of the state legislatures to formally approve the alternate electors, even though there was no legal basis for doing so.[161] Giuliani's efforts were part of a broader campaign to create chaos and confusion around the certification of the electoral votes, thereby providing a pretext for rejecting Biden's victory.[162]

The fake elector's scheme was executed with varying degrees of success across the targeted states. In some states, Republican officials were persuaded to sign certificates falsely claiming that they were the duly appointed electors of their state.[163] These certificates were then sent to Congress and the National Archives, where they were intended to be presented alongside the legitimate electoral votes on January 6, 2021.[164] In Michigan, for example, a group of Republican officials met in the state capitol on December 14, 2020, the same day that the legitimate electors were meeting to cast their votes for Biden.[165]

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[157] *Id.* at 543, 584, 589, 591.

[158] *Id.* at 584, 587.

[159] *Id.*

[160] Cummings, *supra* note 85, at 591.

[161] *Id.* at 560-65.

[162] Cummings, *supra* note 85, at 562-64.

[163] *See id.*; Alan Feuer & Katie Benner, The *Fake Electors Scheme, Explained*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html.

[164] *See* Cummings, *supra* note 85, at 584

[165] Laurence H. Tribe, *Anatomy of a Fraud: Kenneth Chesebro's Misrepresentation of My Scholarship in His Efforts to Overturn the 2020 Presidential Election*, JUST SECURITY (Aug. 8, 2023),

The group signed a certificate declaring themselves the "duly elected and qualified electors" of Michigan, even though Biden had won the state by over 150,000 votes.[166] Similar actions took place in other states, including Georgia and Pennsylvania, where alternate slates of electors were also assembled and their votes submitted to Congress.[167]

These actions were not just symbolic. The efforts were intended to create a genuine dispute over the election results that could be used to justify further legal challenges or even direct intervention by the Vice President or Congress.[168] The lawyers involved in this scheme were fully aware of its potential to disrupt the constitutional process and to undermine the peaceful transfer of power.[169] Their actions represented a profound breach of their ethical obligations as officers of the court and as defenders of the rule of law.

The fake electors scheme ultimately failed, largely due to the refusal of Vice President Pence and other key officials to go along with it.[170]

On January 6, 2021, as Congress met to certify the electoral votes, Pence rejected the efforts to recognize the fake electors and proceeded with the certification of the legitimate votes.[171] However, the scheme contributed to the broader effort to delegitimize the election and played a role in inciting the violent attack on the U.S. Capitol that followed.[172]

The involvement of lawyers in the fake electors scheme has led to significant legal and ethical repercussions. Some of the lawyers involved, including John Eastman, have faced investigations and disciplinary actions for their roles in

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https://www.justsecurity.org/87498/kenneth-chesebros-misrepresentation-of-laurence-tribe-scholarship-in-his- efforts-to-overturn-the-2020-presidential-election/.

[166] *Id.*; Cummings, *supra* note 86; Proposals for Reform, *supra* note 138.

[167] Cummings, *supra* note 85.

[168] *Id.* at 584.

[169] *Id.*

[170] *Id.* at 592-94, 606.

[171] *Id.*

[172] *Id.*

attempting to subvert the election.[173] The conduct of the lawyers involved in this scheme fall well below the ethical expectations of the profession. Through false and misleading information, these lawyers used their position of power and influence to manipulate the electoral process for the purpose of interrupting the peaceful transfer of power after a democratic election. Such conduct is violative of a lawyer's obligations to the democratic principles of honesty, fairness, and rule of law, demonstrating a need to recommit to the ethical guidance provided in the oath.

C. Litigation Efforts

In the wake of the 2020 United States presidential election, a wave of lawsuits was launched across the country, all aiming to overturn the results of the election that had declared Joe Biden as the winner. Once again, lawyers spearheaded these baseless legal efforts.[174] Despite the lack of credible evidence, these lawsuits were aggressively pursued in numerous courts, reflecting a broader strategy to delegitimize the election and maintain Trump's hold on the presidency.[175]

One of the most prominent legal efforts was led by Sidney Powell, who infamously referred to her lawsuits as releasing the "Kraken."[176] Powell filed multiple lawsuits in key battleground states, including Georgia, Michigan, Wisconsin, and Arizona, alleging widespread voter fraud and conspiracy theories involving the voting machines.[177] Powell's lawsuits claimed that votes were switched from Trump to Biden through the manipulation of voting machines, and she further alleged that this was part of an international plot to rig the election.[178]

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[173] *Id.* at 516 n.11.
[174] *See generally* Cummings, *supra* note 85.
[175] *Id.*
[176] *Id.* at 576.
[177] *Id.* at 576-77.
[178] *Id.* at 576 n.331.

However, these lawsuits were based on unfounded claims and lacked credible evidence. Courts across the country dismissed Powell's cases, often in scathing terms, citing the absence of any substantive proof to support her allegations.[179] Judges criticized the lawsuits for being filled with speculative and implausible assertions, noting that they failed to meet even the basic standards of legal pleading.[180]

Despite these dismissals, Powell and her legal team continued to push these lawsuits, using them as a platform to propagate the false narrative that the election had been stolen.[181] This strategy was not just about winning in court; it was about sowing doubt and confusion among the public, with the ultimate goal of undermining confidence in the electoral process.[182]

These lawsuits were emblematic of the broader legal strategy to use the courts not necessarily to win, but to create a narrative of a flawed and illegitimate election.[183] By filing these lawsuits, the Trump lawyers sought to cast doubt on the validity of the election results and to keep the possibility of overturning the outcome alive, even as the courts consistently rejected their claims.[184]

One of the more brazen legal efforts came from the State of Texas, whose attorney general filed a lawsuit directly with the U.S. Supreme Court seeking to invalidate the election results in four battleground states: Georgia, Michigan, Pennsylvania, and Wisconsin.[185] The Texas lawsuit, backed by Trump's legal team

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[179] *See* Cummings, *supra* note 85, at 577; Alexandra Just, *Trumping Unmeritorious Election Contests: The Need for Uniform Election Contest Laws in the Wake of 2020 Election Litigation Notes*, 62 U. LOUISVILLE L. REV. 167, 184 (2023).

[180] Just, *supra* note 179, at 184.

[181] Cummings, *supra* note 85 at 588.

[182] *See* Luttig, *supra* note 84, at 4.

[183] Cummings, *supra* note 85.

[184] *Id.*

[185] Texas v. Pennsylvania, 2020 U.S. LEXIS 5994 (2020); Adam Liptak, Texas Files An Audacious Suit with the Supreme Court Challenging the Election Results, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/08/us/politics/texas-files-an-

and supported by several Republican attorneys general and members of Congress, argued that these states had violated the Constitution by changing their election procedures in response to the COVID-19 pandemic.[186] The lawsuit claimed that these changes had led to widespread voter fraud and that the results in these states should be invalidated, thereby handing the election to Trump.[187] However, the U.S. Supreme Court swiftly rejected the lawsuit, stating that Texas lacked standing to challenge the election results in other states.[188] The Court's decision effectively ended one of the most significant and far-reaching legal efforts to overturn the 2020 election.[189] The Texas lawsuit highlighted the extreme lengths to which Trump's legal team and their allies were willing to go in their efforts to overturn the election. Despite the lack of any credible evidence to support their claims, they were prepared to engage in unprecedented legal action that, if successful, would have subverted the will of millions of voters across multiple states.[190]

The multiple lawsuits filed after the 2020 election raised significant ethical concerns within the legal profession. Lawyers are bound by ethical obligations to uphold the rule of law, to refrain from filing frivolous lawsuits, and to avoid engaging in conduct that undermines public confidence in the legal system. However, the post- election lawsuits filed by Trump's legal team and their allies violated these fundamental ethical principles. These lawsuits were widely seen as an abuse of the legal system, using the courts as a tool to pursue a political agenda rather than to seek justice.[191] By filing baseless lawsuits and making unsupported allegations of voter fraud, these lawyers violated the ethical obligations explicit in the Rules of Professional Conduct, as well as the guiding principles of the

audacious-suit-with-the-supreme-court-challenging-the-election-results.html.

[186] *Id.*

[187] *See* Just, *supra* note 179 at 194 n.171.

[188] *See Texas*, 2020 U.S. LEXIS 5994 (2020).

[189] *See* Cummings, *supra* note 85.

[190] *Id.*

[191] *Id.* at 559-60.

oath, suggesting the need for a recommitment to these ethical guidelines.

D. Pressure Campaign

In addition to the multiple lawsuits, a fake electors scheme, and widespread misinformation campaign, another critical component of the efforts to subvert the 2020 election results was a targeted pressure campaign directed at state officials. Lawyers closely aligned with former President Donald Trump played a pivotal role in this campaign, attempting to coerce and intimidate state officials into overturning the certified election results in key battleground states.[192]

The pressure campaign on state officials was another concerted effort to reverse the outcome of the 2020 presidential election by influencing state legislatures, governors, secretaries of state, and election officials.[193] The central goal was to convince these officials to decertify the election results, declare the election invalid, or appoint alternate slates of electors who would cast their votes for Trump instead of Biden.[194] This campaign targeted states where Biden had won by narrow

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[192] *See* Barbara McQuade, *United States v. Donald Trump: A 'Model Prosecution Memo' on the Conspiracy to Pressure Vice President Pence,* JUST SECURITY (Feb. 22, 2022), https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/; Amy Gardner, 'I just want to find 11,780 votes': In extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in his Favor, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html. ; Leigh Ann Caldwell, Josh Dawsey & Yvonne Wingett Sanchez, *Trump Pressured Arizona Gov. Doug Ducey to Overturn 2020 Election*, WASH. POST (July 1, 2023), https://www.washingtonpost.com/nation/2023/07/01/trump-2020-election-arizona-governor-doug-ducey/; *Here's Every Word From the Fourth Jan. 6 Committee Hearing on its Investigation*, NPR (June 21, 2022), https://www.npr.org/2022/06/21/1105848096/jan-6-committee-hearing-transcript.

[193] *Id.*

[194] Cummings, *supra* note 85.

margins, including Georgia, Michigan, Pennsylvania, and Arizona.[195]

Lawyers played a crucial role in this campaign by providing legal arguments, drafting memos, and directly engaging with state officials.[196] They sought to exploit ambiguities in state election laws, as well as the heightened political tensions following the election, to achieve their objectives. The pressure campaign was not limited to private conversations. It also included public statements, media appearances, and coordinated efforts to mobilize Trump's supporters to apply additional pressure on state officials.[197]

One of the most prominent lawyers involved in the pressure campaign was again, Rudy Giuliani. Giuliani was at the forefront of efforts to persuade state legislators and election officials to overturn the election results.[198] In multiple public hearings organized by Republican lawmakers in states like Michigan, Pennsylvania, and Arizona, Giuliani presented baseless claims of voter fraud and urged lawmakers to take action to nullify the election's results.[199] These hearings, though unofficial and lacking any legal authority, were used as platforms to propagate the false narrative of a stolen election and to pressure state officials into compliance.[200]

Giuliani's strategy involved a mix of legal arguments and inflammatory rhetoric. He argued that state legislatures had the constitutional authority to override the popular vote and appoint electors directly, a claim that was widely discredited by constitutional scholars.[201] Despite the lack of legal merit, Giuliani persisted, using his position and influence to push state officials towards taking unprecedented and illegal actions.[202] Attorney John Eastman also played a key role in the pressure

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[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] Cummings, *supra* note 85, at 852-53.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

campaign. Eastman authored legal memos that were circulated among state officials, outlining the supposed constitutional and statutory grounds for decertifying the election results.[203] These memos argued that states could declare the election results invalid due to alleged irregularities and appoint new electors.[204] Like Giuliani, Eastman's arguments were based on a distorted interpretation of the law, but they were instrumental in providing a legal veneer to the pressure campaign.[205]

One of the most infamous examples of the pressure campaign involved a phone call between Trump, his lawyers, and Georgia Secretary of State Brad Raffensperger.[206] During this call, Trump, with Giuliani's involvement, pressured Raffensperger to "find" enough votes to overturn Biden's victory in Georgia.[207] Giuliani played a crucial role in framing the conversation, repeatedly asserting that widespread voter fraud had occurred in Georgia and that Raffensperger had the authority to correct the alleged wrongdoing.[208] This call, which was later made public, exemplified the direct and coercive tactics employed by Trump's legal team to subvert the election results.[209]

This pressure campaign continued in other key states. In Michigan and Arizona, Giuliani and other lawyers pressured Republican members of the state legislature to decertify the

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[203] Cummings, *supra* note 85, at 588-91; BOB WOODWARD & ROBERT COSTA, PERIL 131, 209-12 (2021); *Read: Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html [hereinafter "*Two Page Memo*"]; *Read: Trump Lawyer's Full Memo on Plan For Pence to Overturn the Election*, CNN (Sept. 21, 2021), https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-penceoverturn-election/index.html [hereinafter "*Full Memo*"].

[204] *Two Page Memo*, *supra* note 204; *Full Memo*, *supra* note 204.

[205] WOODWARD & COSTA, *supra* note 204, at 209-12.

[206] Cummings, *supra* note 85, at 587-88; Jerry H. Goldfeder, E*xcessive Judicilization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 368 (2021).

[207] Just, *supra* note 179, at 184 n. 124.

[208] *See* Cummings, *supra* note 85, at 584.

[209] *See id.*

election results and appoint an alternate slate of electors.[210] They held a series of meetings with state legislators, presenting them with dubious affidavits and testimonies alleging voter fraud.[211] Despite these efforts, Michigan and Arizona lawmakers refused to comply, citing the lack of credible evidence and their duty to uphold the certified election results.[212]

The involvement of lawyers in the pressure campaign raised serious legal and ethical concerns. The actions of Giuliani, Eastman, and other lawyers involved in the pressure campaign clearly violated democratic principles of rule of law, truthfulness, and integrity in the system. By attempting to coerce state officials into overturning the certified election results, these lawyers not only engaged in unethical conduct but also potentially violated state and federal laws.[213]

The pressure campaign also contributed to the broader erosion of trust in the democratic process.[214] This campaign undermined public faith in the integrity of the electoral process and set a dangerous precedent for future elections. These lawyers continued to misrepresent the facts, push false legal claims, and pressure state actors to violate election procedures for the purpose of changing the results of the election.

These actions are violative of the ethical obligations of lawyers and underscores the need for a recommitment to the high ethical standards the oath expects.

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[210] *See id.* at 586-88; Just, *supra* note 179, at 183.

[211] Cummings, *supra* note 85, at 582.

[212] Just, *supra* note 179 at 187. *See also* Cummings, *supra* note 85, at 587; Margaret Tarkington, *After the Trump Administration: Lessons and Legacies for the Legal Profession: The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287 (2022).

[213] *See* Just, *supra* note 179, at 186-87; Cummings, *supra* note 85, at 587-88.

[214] Just, *supra* note 179, at 186. *See generally* Cummings, *supra* note 85; Luttig, *supra* note 84.

E. The January 6, 2021 Insurrection

The January 6th, 2021 insurrection at the Capitol was a watershed moment in American history, as a violent mob sought to overturn the results of the 2020 presidential election by disrupting the certification of the Electoral College votes.[215] Among those who participated in or supported the insurrection were several individuals who were members of the legal profession.[216] These lawyers played various roles, from providing legal advice and justification for the actions of the rioters to directly participating in the events of that day.[217]

Before and during the events of January 6th, several lawyers were instrumental in providing the legal arguments that underpinned the attempts to overturn the 2020 election results.[218] These lawyers advanced theories that the Vice President could unilaterally reject the certified electoral votes from certain states or that state legislatures could appoint alternate slates of electors.[219] These arguments were central to the narrative that the election had been "stolen" and that extraordinary measures were justified to prevent Joe Biden from taking office.[220]

Once again, Attorney Eastman was one of the most influential figures in this regard. Eastman authored memos and gave public speeches in the days leading up to January 6th, arguing that Vice President Pence had the authority to reject the electoral votes from contested states.[221] Though Eastman's legal

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[215] Michael Sozan & William Roberts, Tr*ump and His Allies Must be Held Accountable for the January 6 Insurrection* (Apr. 2023), https://www.americanprogress.org/wp-content/uploads/sites/2/2023/04/Jan6insurrection-report.pdf. *See generally* Cummings, supra note 85.

[216] *See* FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663, at 65-83.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

theories were legally flawed, they also served as a key justification for the actions of the mob that stormed the Capitol.[222] His arguments were cited by those who believed that the insurrection was necessary to "save" the country from a fraudulent election.[223]

Attorney Giuliani was also involved. On the day of the insurrection, Giuliani spoke at the rally that preceded the attack on the Capitol, where he called for "trial by combat" to resolve the election dispute.[224] This rhetoric, combined with his previous efforts to delegitimize the election results, helped incite the mob and contributed to the violence that ensued.[225]

In addition to those who provided legal justification for the insurrection, there were also lawyers who directly participated in the attack on the Capitol. One notable example is Paul Davis, a Texas attorney who was filmed outside the Capitol on January 6th, expressing his support for the rioters and making statements that aligned with the false narrative of a stolen election.[226] Davis, who was employed as an in- house counsel for a company at the time, was later fired from his position due to his involvement in the insurrection.[227] He has since faced legal and professional repercussions, including investigations by the State Bar of Texas.[228] William Calhoun, a Georgia attorney who openly boasted on social media about breaching the Capitol and participating in the violence.[229]

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[222] *Id.*

[223] *Id.*; Cummings, *supra* note 85, at 593-94.

[224] Rudy Giuliani, Speech at Donald Trump's "Save America" Rally (Jan. 6, 2021), https://www.rev.com/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat. *See also* Cummings, *supra* note 85, at 593 n. 446.

[225] Cummings, *supra* note 85 at 593-94.

[226] Debra C. Weiss, *Lawyer Lost His Job, His Fiancée and His Friends After Presence Outside Capitol Riot*, ABA JOURNAL., (Feb. 17, 2022, 11:07 AM), https://www.abajournal.com/news/article/lawyer-lost-his-job-his- fiancee-and-his-friends-after-presence-outside-capitol-riot.

[227] *Id.*

[228] *Id.*

[229] Debra C. Weiss, *Georgia Lawyer Who Bragged of Shutting Down "Stolen Election Shenanigans" is Found Guilty in Jan. 6 Case*, ABA JOURNAL, (Mar. 21,

Calhoun's actions, including his statements that he was part of an "armed revolution" to overturn the election, were emblematic of the extremism that motivated many of the rioters. He was later arrested, charged and convicted with several federal crimes.[230]

The involvement of lawyers in the January 6th insurrection raises serious legal and ethical concerns. The actions of the lawyers involved in the insurrection, whether through providing legal justification or directly participating in the violence, represent a stark violation of these ethical obligations.[231] The participation of lawyers in an insurrection that sought to overturn a democratic election highlights the dangers of politicizing the legal profession and using legal arguments to justify unlawful actions.[232] It also underscores the need for the legal community to reaffirm its commitment to the democratic principles embedded in the lawyers' oath.

F. Voting "Nay" to Certify the Election

Despite the attack on the Capitol, several lawyers spearheaded another effort to alter the outcome of the 2020 election. After a violent mob stormed the U.S. Capitol in an attempt to prevent the certification of the Electoral College results, Congress reconvened to complete the certification process.[233] Despite the unprecedented attack on the Capitol and the clear results of the election, a significant number of lawmakers, including several who were also attorneys, voted to

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2023, 9:21 AM), https://www.abajournal.com/news/article/georgia-lawyer-who-bragged-of-shutting-down-stolen-election-shenanigans-is-found-guilty-in-jan-6-case.

[230] *Id.*

[231] *See* Cummings, *supra* note 85, at 599, 600.

[232] Luttig, *supra* note 84.

[233] *Id.*; Susan S. Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education After the Trump Administration: Lessons and Legacies for the Legal Profession*, 69 WASH. U. J. L. & POL'Y 17 (2022).

reject the electoral votes from certain states that had been won by Joe Biden.[234]

These lawyer-legislators, who had been trained in the law and had taken oaths to uphold the Constitution, argued that the election results in certain states were tainted by fraud.[235] However, these claims were based on the same baseless allegations that had been repeatedly rejected by courts across the country.[236] Despite the lack of credible evidence, these legislators used their legal knowledge and positions of authority to lend legitimacy to the false narrative that the election had been stolen.[237] One prominent example of a lawyer-legislator who voted not to certify the election results was Senator Josh Hawley of Missouri.[238] A graduate of Yale Law School and a former clerk for Chief Justice John Roberts, Hawley had established himself as a legal scholar and a rising star within the Republican Party.[239] Despite his legal background, Hawley was the first senator to announce that he would object to the certification of the electoral votes, citing unfounded claims of voter fraud in Pennsylvania.[240] His decision to lead this objection, despite the lack of evidence, was widely criticized as a political maneuver that undermined the rule of law.[241]

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[234] Cummings, *supra* note 85; Just, *supra* note 179; Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html.

[235] Cummings, *supra* note 85, at 582.

[236] *See id.* at 591.

[237] Press Release, Sen. Josh Hawley, Sen. Hawley Will Object During Electoral College Certification Process On Jan 6, (Dec. 30, 2020), https://www.hawley.senate.gov/sen-hawley-will-object-during-electoral-college-certification-process-jan-6/.

[238] *Id.*

[239] *Id.*

[240] Press Release, Sen. Josh Hawley, Sen. Hawley Will Object During Electoral College Certification Process On Jan 6, (Dec. 30, 2020), https://www.hawley.senate.gov/sen-hawley-will-object-during-electoral-college-certification-process-jan-6/.

[241] Just, *supra* note 179.

Following his lead, another lawyer-legislator who played a key role in the objections was Senator Ted Cruz of Texas.[242] Cruz, a graduate of Harvard Law School and a former Solicitor General of Texas, also objected to the certification of the electoral votes from Arizona.[243] Cruz argued that the objections were necessary to address concerns about the integrity of the election, despite the fact that these concerns were based on debunked conspiracy theories.[244] Cruz's legal background and his role as a constitutional lawyer lent credibility to the objections, even as they were widely dismissed by legal experts and courts as meritless.

The decision by lawyer-legislators to vote against certifying the election results raised obvious and serious legal and ethical questions. As attorneys, these legislators were bound by professional and ethical obligations to uphold the law and to avoid conduct that undermines the legal system.[245] By voting to reject the certified election results based on unfounded claims, these lawyer-legislators violated these ethical obligations and contributed to the erosion of public trust in the electoral process. Their conduct contributed to the broader effort of undermining elections and the peaceful transfer of power by using their legal expertise and positions of authority to advance baseless objections.[246] By advancing baseless objections and lending credibility to unfounded claims of election fraud, these legislators undermined the rule of law and contributed to the erosion of public trust in the democratic process.

All of the lawyer-led schemes to overturn the 2020 U.S. Presidential election were designed to undermine the electoral

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[242] Yourish et al., *supra* note 237; Luttig, *supra* note 84.
[243] *Id.*
[244] Press Release, Sen. Ted Cruz, Sen. Cruz: We Have an Obligation To the Constitution To Ensure That This Election Was Lawful (Jan. 03, 2021), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-we-have-an-obligation-to-the-constitution-to-ensure-that-this-election-was-lawful.
[245] *See generally* Rosen, *supra* note 89.
[246] Luttig, *supra* note 84.

process, create public mistrust, and install, as president, the loser of the election - the antithesis of democracy. These actions have had far-reaching implications for public trust in the legal profession and the integrity of democratic institutions. The audacity to knowingly, or recklessly, advance false claims of fraud in multi-faceted schemes to overturn the will of the people, underscores the importance for the legal profession to recommit to ethical conduct that our oath expects.

V. MODERNIZATION OF THE OATH AND OTHER PROPOSALS

The lapses identified in section IV underscoring the need for a renewed professional commitment to the oath's principles of honesty, integrity, fairness, and the rule of law. Indeed, the ABA Task Force for American Democracy recently published a report highlighting the alarming rise of misinformation, political violence, and polarization.[247] The report urged a renewed focus on ethical training and a reaffirmation of the lawyer's oath.[248] Below are recommendations for modernizing the lawyer's oath. In addition, I offer some additional proposals to reinforce the ethical foundations of the legal profession through reforms for law school education, continuing legal education (CLE), state disciplinary procedures. To be sure, none of these recommendations alone, or in cooperation with each other, will not deter or prevent a lawyer intent on violating their ethical obligations. However, these recommendations will serve to reemphasize the importance of ethical conduct given the critical role lawyers play in a democratic society.

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[247] ABA TASK FORCE FOR AMERICAN DEMOCRACY, ANALYSIS: OVERCOMING SERIOUS THREATS TO OUR DEMOCRACY (2024), https://www.americanbar.org/content/dam/aba/administrative/news/2024/aba-democracy-task-force.pdf.

[248] *Id.*

A. Modernizing the Lawyer's Oath

While several states have recently updated the language of their oaths, many still contain problematic language.[249] Modernizing the lawyer's oath serves to reinvigorate the solemn obligations it represents - justice, fairness, and the rule of law. These commitments flow from a lawyer's unique position of privilege within a democratic society.[250] Serving as both advocates for individuals and gatekeepers of the legal system, lawyers are entrusted with the duty to uphold justice, protect the rights of their clients, and contribute to the public good.[251] Accordingly, the lawyer's oath must be more than just a ceremonial recitation; it should be a powerful reminder of the responsibilities that come with the privilege of practicing law. Modernizing the lawyer's oath by addressing outdated language, emphasizing democratic principles, and eliminating bias should reinforce the ethical principles inherent in the oath.

Moreover, by modernizing the oath to explicitly include commitments to democratic values and human rights, the legal profession can reinforce its aspirational guidance for fulfilling the lawyer's role in protecting democracy.

Unfortunately, many current lawyer's oaths contain language that is archaic, biased, and complex, which can obscure the significance of these commitments and alienate many lawyers.[252] Oddly, Kentucky requires applicants to the bar to promise that they have not and will not participate in a duel.[253] Traditional oaths, like the Massachusetts or Missouri oath, frequently include terms that are unfamiliar to modern practitioners, such as "lucre" and "artifice," which diminish the oath's impact and make it feel more like an antiquated formality

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[249] Lauren E. Bartlett, *Human Rights and Lawyer's Oaths*, 36 GEO. J. LEGAL ETHICS 411, 429, 432 (2023).
[250] Anand, supra note 69; Green, supra note 69; Luttig, supra note 84, at 16.
[251] Luttig, *supra* note 84, at 16; Green, *supra* note 69, at 1232; Rosen, *supra* note 89, at 55.
[252] *See generally* Bartlett, *supra* note 250.
[253] KY. CONST. § 228.

than a meaningful pledge.[254] Advocates for plain language argue that the oath should be revised to be more accessible, ensuring that every lawyer fully understands the ethical standards they are committing to.[255]

For example, instead of swearing to avoid pursuing claims for "lucre or malice," a modern oath would eliminate these archaic terms and add more relevant and operative words like "fairness" and "honesty."[256] Simplifying the language makes the oath a more powerful and clear declaration of ethical responsibility.[257]

Many oaths fail to explicitly reference a lawyer's commitment to democratic principles.[258] For example, the Connecticut, Massachusetts, and New Hampshire oaths do not include a pledge to uphold the U.S. Constitution.[259] While the Massachusetts' lawyer's oath statute mentions the constitutions, absent in the actual oath is any such language.[260]

To reinvigorate democratic principles, it is essential that the oath reflect a lawyer's responsibility to protect these principles.[261] The omission of such language undermines these critical obligations.[262] To address this gap, modern oaths should include language that explicitly commits lawyers to defending

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[254] Bartlett, *supra* note 250, at 422-24, 441. *See also* Stephen C. O'Neill, *The History of the Lawyer's Oath*, 5 MASS. LEGAL HIST. 91 (1999).
[255] *See* Bartlett, *supra* note 250, at 426.
[256] *See id.*; Frances M. Moran, *An Oath for the Legal Profession*, 35 WOMEN LAW. J. 15 (1949).
[257] *See* Joseph Kimble, *Plain Language: Time for a Clearer, Plainer Alternative to our Lawyer's Oath?*, 98 MICH BAR J. 36 (May 2019); Bartlett, *supra* note 250, at 439.
[258] *See* Bartlett, *supra* note 250, at 439.
[259] Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide*, 30 CARDOZO L. REV. 1843, 1844 (2008); Bartlett, *supra* note 250, at 413; CONN. GEN. STAT. § 1-25 (2017); MASS. GEN. LAWS. ch. 221, § 38 (2022); N.H. REV. STAT. ANN. § 311:6 (2023).
[260] MASS. GEN. LAWS. ch. 221, § 38 (2022).
[261] *See* Green, *supra* note 69, at 43-44; Luttig, *supra* note 84, at 16. *See generally*, Bartlett, *supra* note 250 (describing concerns about pledge to constitution).
[262] Travis Pickens, *The Meaning in a Lawyer's Life*, 93 OKLA. BAR J., April 2022, at 6.

the rule of law, promoting justice, and safeguarding the rights of all individuals. For instance, a revised oath might include specific language related to the protection of federal and state constitutions.[263] This addition would reinforce the lawyer's role as a guardian of these essential values, ensuring that their practice aligns with the broader goals of justice and equality.[264]

Existing oaths also fail to confront language of bias, discrimination, and inequality within the legal profession.[265] Despite the legal profession's emphasis on fairness and justice, current oaths do not explicitly require lawyers to combat systemic biases or advocate for equality.[266] Indeed, many oath's contain problematic language. For example, the Maine, Massachusetts, and Rhode Island oaths all have exclusionary male-gender specific language, suggesting a male dominated profession.[267] Similarly, many states' oaths, including Florida, New York, Massachusetts and Texas, have religious language stemming from its Christian influences, potentially alienating non- Christians, non-religious, and others.[268] These issues can perpetuate inequalities and allow discriminatory practices to persist unchallenged. A modernized oath should eliminate the problematic language and include clear statements obligating lawyers to recognize and oppose bias in all its forms.[269] For example, the oath could require lawyers to oppose all forms of discrimination and commit toward a more just and equitable legal system.[270] By incorporating these commitments, the oath would reaffirm the lawyer's dedication to ethical practice and contribute to creating a more inclusive and fair legal profession.

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[263] Bartlett, *supra* note 250, at 424.
[264] Andrews, *Lawyer's* Oath, supra note 2, at 30, 59-62.
[265] Bartlett, *supra* note 250, at 430.
[266] Bartlett, *supra* note 250, at 419-420.
[267] ME. REV. STAT. ANN. tit. 4, § 806 (2023); MASS. GEN. LAWS ch. 221, § 38 (2022); R.I. SUP. CT. R. art. II, R. 8 (2023).
[268] In re Oath of Admission to the Fla. Bar, 73 So. 3d 149, 150 (Fla. 2011). N.Y. CONST. art. XIII, § 1; MASS. GEN. LAWS. ch. 221, § 38 (2022); TEX. CONST. art. XVI, § 1.
[269] *See* Bartlett, *supra* note 250, at 419-420; Andrews, *supra* note 2, at 52-53, 60-61.
[270] *See* Bartlett, *supra* note 250, at 442-43.

The Massachusetts' lawyer's oath is the oldest American oath—a prime example of an archaic, biased, and confusing oath—ripe for modernization.[271] Below, the Massachusetts' lawyer's oath is used as a template for potential modernization.

Currently, the full text of the Massachusetts statute enacting the lawyer's oath provides:

> Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:
>
> I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.[272]

A review of the oath's language exposes several critical concerns of archaic language, bias and poor writing. As the oldest oath in the country, it is not surprising that it contains outdated language like "lucre" instead of "profit" and "wittingly or willingly" rather than "knowingly or intentionally."[273] The oath also contains biased language that undermine the professions efforts at inclusivity. The use of gender specific

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[271] *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 19-21.
[272] MASS. GEN. LAWS ch. 221, § 38 (2024).
[273] *Id.*

terms like "him" and "man" in the oath is exclusionary and more inclusive language must be substituted. The oath also assumes a belief in a monotheistic deity. By swearing "So help me, God," the oath excludes followers of other religions, the non-religious, and those that belong to a belief system that prohibits such conduct. A modern oath would eliminate gendered language and all religious references, thereby eliminating exclusionary language and replacing with more inclusive terminology.

Furthermore, the oath is poorly written for the modern context. First, the entire oath is written as a single run-on sentence, which makes it difficult to read and understand. The oath also repeats the prohibition of false claims. Oath-takers first "swears" to "do no falsehood" in the first segment of the sentence, and then, to not "promote or sue any false…suit" in the second section. Breaking the oath into shorter, more concise sentences would improve clarity and understanding.

Finally, the Massachusetts lawyer's oath, as written, references three separate oaths. The first line of the oath statute seems to require that attorneys take the supporting oaths for both the United States and Commonwealth Constitutions. However, following that language, the statute provides the specific oath of attorney office. The separate treatment of these oaths suggests a disconnect between what is required and what is actually sworn to by newly minted lawyers. At best, the mere reference to the constitutions but failure to include in the actual oath demonstrates ambiguity and a lack of consistency in writing. At worst, the omission of constitutional commitments in the oath undermines the intent of the oath and the attorney's duty to uphold the democratic principles contained in these constitutions.

To modernize the Massachusetts oath, it is critical to draft language that addresses the ethical demands of today's legal practice.[274] This includes simplifying the language,

[274] Luttig, *supra* note 84; James Podgers, *A New Look: ABA Plans First Comprehensive Review of Disciplinary Enforcement Rules in 20 Years*, ABA JOURNAL (Nov. 1, 2012, 8:00 AM), https://www. https://www. https://www.abajournal.com/magazine/article/a_new_look_aba_plans_first_comprehensive_review_of_disciplinary_enforcement.

eliminating bias language, as well as adding specific commitments to democratic principles. An effective modern oath will provide a simple statement connecting a lawyer's privilege to their obligations to client, the public, and the justice system in a democratic society.

Drawing from existing oath languages, including from several revised state oaths, and various human rights oath variations, can provide some guidance toward a more modern and impactful oath. For example, all but four state constitutions include a pledge to uphold the U.S. Constitution.[275] A few states have eliminated gender-specific language.[276] And still others include language related to the dignity, honesty and fairness.[277]

However, none of the current lawyer oaths explicitly mention human rights.[278] Fortunately, we can look to human rights organizations for guidance on language that supports and defends human rights. For example, the Universal Declaration of Human Rights (UDHR) provides guidance for explicit language for recognition of the inherent rights and freedoms, like equality under the law, dignity, non-discrimination, speech, religious and political participation and affiliation, personhood, access to justice, and so on.[279]

Applying these modifications, a more modern version of the Commonwealth of Massachusetts' oath could read:

> I promise to support the Constitutions of the United States and the Commonwealth.

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[275] *See* Bartlett, *supra* note 250, at 413 n.7.

[276] *E.g. Rule 6: Admission of Attorneys*, TENN. ADMIN. OFF. OF THE CTS., https://www.tncourts.gov/rules/supreme-court/6 (last visited Aug 22, 2024).

[277] *Id. See generally* Bartlett, *supra* note 250.

[278] BARTLETT, *supra* note 250, at 437.

[279] G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at 71 (Dec. 10, 1948). *See generally* Risa E. Kaufman, *By Some Other Means: Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2011); Davis, *supra* note 64.

> I will employ and defend the principles of fairness and the impartial administration of justice.
>
> I commit to practice with honesty, integrity, and respect, and oppose all forms of discrimination and injustice. Recognizing the profound responsibility that comes with the license's privileges, I will use my legal knowledge only to protect my clients and the justice system with the highest ethical standards.

This revised oath maintains the core commitments of the original while incorporating modern ethical considerations that are essential for today's legal practice. By explicitly addressing issues such as bias, human rights, and democratic values, the modernized oath provides a simple yet comprehensive ethical framework that aligns with the responsibilities of contemporary lawyers.

The proposed changes, including the use of plain language and the incorporation of commitments to democracy, human rights, and the elimination of bias, reflect the evolving responsibilities of lawyers in society source might be good here. The revised Massachusetts Lawyer's Oath serves as a template for these changes, demonstrating how traditional ethical commitments can be updated to meet contemporary challenges. By modernizing the oath, the legal profession can reinforce its commitment to justice, equality, and the rule of law, ensuring that lawyers continue to serve as guardians of these vital democratic principles.

A. Additional Proposals

1. Law School Curriculum

Law schools play a critical role in the development of professional lawyers.

Accordingly, law schools are an appropriate place for considered reforms to integrate the principles inherent in the lawyer's oath source might be good here. Integrating these principles — honesty, integrity, fairness, and the rule of law — into Professional Responsibility (PR) courses would find faculty support if the MPRE assessed these ethical principles. Legal ethics involve not just adherence to the law but also embodying professional aspirations that guide lawyers in navigating moral complexities within the legal system.[280] The challenges exposed by recent events, particularly the attempts to undermine democratic processes during the 2020 presidential election, underscore the critical need to reinforce these principles from the outset of legal education.[281]

The MPRE should be revised to assess these broader foundational ethical principles. This would force PR courses to not merely focus on the Model Rules of Professional Conduct; these courses would then delve deeper into the historical and philosophical foundations of the legal profession's commitment to democracy and the rule of law. This approach would help students understand that their responsibilities as lawyers extend beyond client representation to include upholding the very structures that sustain democratic governance. Incorporating case studies and simulations that present students with real-world ethical dilemmas is essential for bridging the gap between theory and practice.[282] For instance, scenarios based on the legal challenges surrounding the 2020

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[280] *See* Hazard, *supra* note 2, at 574.
[281] *See* Luttig, *supra* note 84, at 2-7.
[282] Robert P. Burns, *Teaching the Basic Ethics Class Through Simulations: The Northwestern Program in Advocacy and Professionalism*, 58 L. & CONTEMP. PROBS. 37, 38 n.4 (1995).

election can be utilized to illustrate the importance of ethical decision-making in preserving democratic integrity.[283] These exercises not only enhance students' critical thinking skills but also instill a deep appreciation for the lawyer's role in safeguarding the rule of law.

Moreover, PR courses could include specialized modules on constitutional ethics, emphasizing the lawyer's duty to uphold constitutional principles even when faced with conflicting pressures.[284] The intersection of legal rules and professional aspirations requires lawyers to navigate complex moral landscapes, where the preservation of democratic institutions often hangs in the balance.[285] Further, guest lectures and workshops featuring practitioners who have confronted significant ethical challenges in their careers can further enrich the learning experience.[286] These interactions provide students with firsthand insights into the real-world implications of ethical practice and the vital role that lawyers play in defending democratic values.

Embedding the principles of the lawyer's oath into PR courses is not just about teaching future lawyers to follow the rules but about cultivating an enduring commitment to the ethical foundations of the legal profession. By doing so, law schools can prepare students to meet the demands of a profession that is integral to the preservation of democracy and the rule of law.[287]

Law schools should also consider incorporating similar learning objectives in courses involving Professional Identity Formation (PIF). The concept of PIF in legal education has gained significant traction in recent years, particularly with the

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[283] *See generally* Luttig, *supra* note 84.
[284] *See Rule of Law in an American Life: A long and Intentional Tradition*, AM. BAR ASS'N., https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-in-american-life--a-long-and-intentional-tradition/ (last visited Aug 12, 2024).
[285] Hazard, *supra* note 2.
[286] Luttig, *supra* note 84.
[287] Hazard, *supra* note 2; *See* Luttig, *supra* note 84, at 16.

American Bar Association's (ABA) adoption of Standard 303(b)(3), which mandates that law schools provide substantial opportunities for students to develop their professional identities.[288] This shift in legal education recognizes that the process of becoming a lawyer involves more than just acquiring knowledge of the law; it also requires the internalization of the values and responsibilities that define the legal profession.[289]

At its core, PIF "focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society."[290] This involves an intentional exploration of the values, guiding principles, and well-being practices that are foundational to successful legal practice.[291] Law schools play a crucial role in shaping these identities by helping students integrate these professional values with their personal values, ultimately fostering a healthy, integrated professional identity.[292]

One of the key challenges in PIF, however, is the concern that the values and obligations of the legal profession are not just taught, but be internalized by students.[293] As noted in the Carnegie Report, legal education constitutes a powerful moral apprenticeship that profoundly shapes students' values, perceptions, and interpretations of the legal world.[294] This underscores the importance of a deliberate and thoughtful approach to PIF, one that acknowledges the transformative impact of legal education on students' professional identities.[295] Through this deliberative process, law students get a better

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[288] Timothy W. Floyd, *Lawyers and Civil Discourse: Respect and Civility as a Matter of Professional Identity*, 76 BAYLOR L. REV. 90, 91-92 (2024).
[289] Kellye Y. Testy & Zachariah J. DeMeola, *Leading the Way: The Power of Professional Identity Formation for Lawyers*, 76 BAYLOR L. REV. 115, 147 (2024).
[290] Floyd, *supra* note 289.
[291] *Id.* at 92.
[292] *See* Testy & DeMeola, *supra* note 290, at 143-49.
[293] SHAILINI GEORGE, THE LAW STUDENT'S GUIDE TO DOING WELL AND BEING WELL (2021).
[294] Floyd, *supra* note 289, at 92.
[295] Testy & DeMeola, *supra* note 290, at 143-49.

understanding of their personal role within the bounds of professional expectations.

A successful PIF program requires law schools to be intentional in their educational practices, ensuring that students are not only aware of the ethical obligations of lawyers but also committed to understanding how these obligations impact their professional lives.[296] This involves creating opportunities for students to engage with the core values of the legal profession—such as honesty, integrity, fairness, and the rule of law—in a way that resonates with their personal experiences and aspirations.[297]

In practical terms, this means incorporating PIF into the curriculum in a way that goes beyond traditional classroom instruction. Experiential learning opportunities, such as clinics and externships, are particularly effective in helping students internalize professional values by providing real-world contexts in which to apply them.[298] These experiences allow students to develop an understanding of the profession's expectation that lawyers balance the interests of client and their obligations to democratic principles.[299]

Professional Identity Formation is a critical component of legal education, one that requires deliberate effort and thoughtful integration into the curriculum. By focusing on the development of a professional identity that is grounded in the core values of the legal profession, law schools can prepare students to not only excel in their legal careers but also to fulfill their roles as ethical leaders in a democratic society.

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[296] *See* Floyd, *supra* note 290, at 92.

[297] *Id.* at 134-35*. See also* Patrick Emery Longan, Daisy Hurst Floyd & Timothy W. Floyd, *A Virtue Ethics Approach to Professional Identity: Lessons for the First Year and beyond Symposium: Professional Identity Formation and Its Pedagogy*, 89 UMKC L. REV. 645, 660 (2020); Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 U. ST. THOMAS L.J. 366, 390-91 (2008).

[298] Testy & DeMeola, *supra* note 291 at 134-35.

[299] Floyd, *supra* note 290.

The development of a lawyer's professional identity should not be confined to the traditional curriculum of doctrinal courses and clinical experiences. To cultivate a well-rounded understanding of the legal profession's role in a democratic society, law schools should offer additional learning opportunities that emphasize the civic obligations of lawyers. These can take the form of specialized courses, seminars, workshops, and speaker series that focus on the intersection of law, democracy, and civic engagement.

Civic-related law courses can also help prepare students to fulfill their roles as public citizens, a concept enshrined in the Preamble to the ABA Model Rules of Professional Conduct.[300] Civic-related courses can equip students with the knowledge and skills they need to navigate these challenges and to advocate for justice and the rule of law in their professional lives.[301] These courses can cover a wide range of topics, including the lawyer's role in democratic institutions, the importance of the rule of law, and the ethical obligations lawyers have to society at large.[302] By exposing students to these broader themes, law schools can help them develop a deeper understanding of how their work as lawyers can contribute to the preservation and enhancement of democratic institutions.

In addition to formal courses, law schools should create opportunities for students to engage with these topics through seminars, workshops, and speaker series. These formats allow for more interactive and in-depth exploration of civic-related issues, fostering a space where students can discuss and reflect on the challenges facing the legal profession and society. For example, workshops on constitutional law and democracy, or speaker series featuring prominent legal scholars and practitioners, can provide students with valuable insights into the complexities of legal practice in a democratic society.[303]

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[300] *Id.* at 94-95.
[301] Luttig, *supra* note 84.
[302] *See* Testy & DeMeola, *supra* note 290.
[303] *See* Floyd, *supra* note 289, at 104.

These opportunities can be particularly effective in helping students understand the importance of civic obligations and public service as integral components of their professional identity. The values of respect, empathy, and commitment to the truth are core to the legal profession and are essential for maintaining a healthy democracy.[304] By integrating these values into civic-related courses and extracurricular opportunities, law schools can encourage students to see their legal careers not just as a means of personal advancement but as a way to contribute to the greater good.[305]

2. Continuing Legal Education

The legal profession's commitment to maintaining high ethical standards and upholding the rule of law requires ongoing education beyond the initial stages of a lawyer's career. Continuing Legal Education (CLE) programs serve a critical role in ensuring that lawyers remain knowledgeable about evolving legal standards, ethical obligations, and professional responsibilities.[306] Democracy themed CLE programs would continually reinforce the profession's obligation to these principles.

CLE programs are particularly crucial in the realm of legal ethical training. Lawyers must continually maintain their competence with regards to professional responsibility.[307] Without continuous education, the evolving nature of ethical considerations could lead to lapses in ethical judgment, resulting in malpractice or disciplinary action.[308] Indeed, CLE is

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[304] *Id.* at 90.
[305] *See* Testy & DeMeola, *supra* note 290.
[306] Randall T. Shepard, *Celebrating Twenty Years of Continuing Legal Education: The Art and Science of Educating Attorneys: The Scope of the Issue: Defining Continuing Legal Education: The "L" in "CLE" Stands for "Legal"*, 40 VAL. U. L. REV. 311, 323-24 (2006).
[307] Marcia L. Proctor, *Legal Education: Continuing Education in Professional Responsibility*, 77 MICH. B. J. 678, 678 (1998).
[308] *Id.*

integral to ensuring that lawyers are not only competent in their legal knowledge but also in their ethical obligations.[309]

To be sure, CLE programs devoted to professional ethics do exist. For example, the ABA provides members hundreds of CLE courses focused solely on ethics.[310] Many states, including Massachusetts, also provide CLE on ethical issues.[311] Notwithstanding these continuing educational opportunities, CLE programs designed specifically to address the issues defined by the recent lapses related to the 2020 U.S. election would emphasize a practicing attorney's continued obligations to these ethical considerations and expectations.

CLE programs can provide a critical link between the structured environment of law school and the ad hoc, often uneven, environment of practice. While law school offers a broad overview of professional responsibility, CLE allows for more focused and contextual teaching, concentrating on the ethical issues that arise within specific areas of legal practice.[312] This contextual approach ensures that lawyers can apply their ethical knowledge directly to their practice, making CLE an indispensable tool for ethical competence. This ongoing education helps lawyers avoid the pitfalls of outdated knowledge and reinforces their commitment to ethical practice.[313] By ensuring that lawyers continue to engage with their ethical obligations, the profession can help practicing lawyers recommit to the ethical obligations they promised at the beginning of their careers.

3. Rule and Discipline Reforms

[309] *See* Shepard, *supra* note 307, at 324.
[310] *Free CLE Member Benefit Library*, ABA, https://www.americanbar.org/cle-marketplace/cle-library/search/ (last visited Aug 22, 2024).
[311] *About MBA CLE*, MASSBAR ASS'N, https://massbar.org/education (last visited Aug 22, 2024).
[312] Proctor, *supra* note 308.
[313] Shepard, *supra* note 307, at 317-18.

To address the ethical lapses, it is also important to consider revisions and enhancements to the ABA Model Rules of Professional Conduct (ABA Rules) and the corresponding disciplinary procedures. Disciplining a lawyer for ethical conduct often hinges upon whether the lawyer was acting within their representative role.[314] There is no real debate that lawyers in representative roles should be disciplined for unlawful and unethical conduct.[315]

However, disciplining lawyers for conduct in a nonrepresentative role raises serious constitutional and political concerns.[316] In his chapter on disciplining lawyers related to the 2020 presidential election subversion efforts, Dean Perlman explains that the disciplining lawyers for conduct outside of their representative capacity is more limited.[317] This is true mostly because the rules do not address a lawyer's conduct outside of their professional roles.[318] Dean Perlman notes two important exceptions: (1) conduct so egregious to question fitness or character to practice and (2) conduct involving dishonesty, fraud, deceit or misrepresentation.[319]

It is the significance of these two exceptions that speaks to the principles embedded in the oath. These two exceptions are precisely where the oath can provide support for the enforcement of these principles outside a lawyer's representative role. Conduct by a lawyer that undermines democratic institutions is unethical, regardless of whether the conduct was within a representative capacity, or not. The following proposed changes aim to reinforce the legal profession's commitment to the democratic principles inherent in the lawyer's oath, emphasizing deterrence over punishment. A careful application of these exceptions can help reinforce the importance of ethical conduct whether acting in representative

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[314] Perlman, *supra* note 73, at 2.
[315] *Id.* at 3; Luttig, *supra* note 84.
[316] *See* Perlman, *supra* note 73, at 1, 8.
[317] *Id.* at 10.
[318] *Id.*
[319] *Id.*

capacity or not. Furthermore, simple revisions to the Rules can also capture some conduct of lawyers in non-representative roles.

a. Expanding Rule 8.3: Mandatory Reporting of Misconduct

One area for potential enhancement is Rule 8.3, which currently requires lawyers to report serious professional misconduct by their peers.[320] Broadening this rule to mandate reporting of misconduct that threatens democratic processes, such as attempts to undermine election integrity could prove effective.[321] The adoption of a similar rule by the California Supreme Court, which compels attorneys to report any criminal acts or conduct involving fraud or dishonesty, serves as a precedent for this type of expansion.[322] Enhancing Rule 8.3 to reflect the profession's duty to protect democratic principles could serve promote the principles inherent in the lawyer's oath.[323] Such a revision would underscore the legal profession's role as a guardian of democracy, ensuring that unethical actions related to democratic institutions are reported and addressed.

b. Revising Rule 8.4: Conduct Prejudicial to the Administration of Justice

Another key consideration is revising Rule 8.4, which addresses conduct prejudicial to the administration of justice. Specifically, the rule could be amended to explicitly include actions that undermine democratic institutions, thereby providing clearer grounds for disciplinary action against

[320] MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N. 2024).
[321] *See* Rosen, *supra* note 89.
[322] Balassone, *supra* note 322.
[323] *See* Luttig, *supra* note 84, at 15; Rosen, *supra* note 89, at 158.

lawyers involved in activities like election subversion.[324] The complex ethical challenges faced by government lawyers suggests that existing rules may be inadequate for addressing these challenges, further supporting the need for such a revision.[325] By expanding Rule 8.4 to cover conduct that threatens democracy, the legal profession would reaffirm its commitment to safeguarding the institutions that are vital to democracy.

c. Improving the Disciplinary Process

In addition to rule enhancements, improvements to the disciplinary process itself are essential to ensure that unethical conduct is addressed promptly and effectively. These improvements should focus on increasing the efficiency, transparency, and deterrent effect of disciplinary proceedings.[326]

The current disciplinary processes are too slow and lenient, which can erode public trust in the justice system.[327] To address this, the ABA should consider implementing reforms that streamline the process, particularly in cases involving significant ethical violations like those related to the 2020 election. A more efficient process would not only ensure timely accountability but also serve as a stronger deterrent against future misconduct. Indeed, a more effective disciplinary process could play a crucial role in preserving the rule of law.[328]

Transparency in disciplinary proceedings also is crucial for maintaining public confidence in the legal profession. Consideration should be given to mandating that disciplinary

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[324] *See* Podgers, *supra* note 275. *See generally* Luttig, *supra* note 84.
[325] Susan Saab Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education*, 69 WASH. U. J.L. & Pol'y 17 (2022).
[326] Podgers, *supra* note 275.
[327] *Id.*
[328] *Id. See generally* Luttig, *supra* note 84.

actions, especially those involving significant ethical violations, be made public whenever possible.[329] Publicizing sanctions could reinforce the profession's commitment to ethical behavior and serve as a powerful deterrent to future misconduct.[330] Moreover, increased transparency in the disciplinary process would help restore public trust in the legal system, particularly in cases where lawyers' actions have had a direct impact on democratic processes.[331]

To ensure that cases involving election-related misconduct are handled with the necessary expertise and seriousness, the establishment of specialized oversight bodies should be considered. These bodies would focus exclusively on cases that involve attempts to undermine democratic processes, ensuring that such cases receive the attention and resources they warrant.[332] Specialized oversight could improve the consistency and rigor of disciplinary actions in these cases, reinforcing the legal profession's role in protecting the integrity of democratic institutions.

The proposed revisions and enhancements to the ABA Model Rules of Professional Conduct and state disciplinary procedures are some steps toward reinforcing the legal profession's commitment to the democratic ideals enshrined in the lawyer's oath. By expanding reporting obligations, revising existing rules to address democratic integrity, and improving the disciplinary process through increased efficiency, transparency, and specialized oversight, the legal profession can better deter unethical behavior and uphold the values that are fundamental to a functioning democracy.

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[329] Goldstein, *supra* note 70, at 769.
[330] Jon J. Lee, *Private Sanction, Public Harm?*, 48 BYU L. REV. 1255, 1324-25, 1337-39 (2023).
[331] *See* Luttig, *supra* note 84.
[332] Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275 (2007); Luttig, *supra* note 84; Fortney, *supra* note 235.

CONCLUSION

The lawyer's oath is not just a relic of tradition. It is a pledge that embodies the core values of a legal profession in a democratic society — honesty, integrity, and a steadfast commitment to the rule of law. As we have seen, this oath has evolved over centuries, reflecting the moral and ethical standards that society expects from its legal practitioners. Yet, the events of recent years, particularly those surrounding the 2020 presidential election, exposed critical weaknesses in how these standards are upheld. Lawyers, who should be the guardians of democratic integrity, have instead, in some cases, become the very instruments of its erosion.

The proposals outlined herein are not a cure-all, but offer a roadmap for a recommitment to the principles inherent in the lawyer's oath. By modernizing the language of the oath, integrating the principles of the lawyer's oath more deeply into legal education, revising the ABA Model Rules of Professional Conduct, and enhancing disciplinary procedures, the legal profession can renew its dedication to democracy. These measures expressly recommend a recommitment to democratic principles as a vital professional obligation.

In conclusion, the lawyer's oath is more than just the words — it is a covenant with a democratic society, a promise that lawyers will uphold the highest ethical standards in the service of justice. In a time when the very fabric of democracy is under strain, the legal profession must look inward, recommit to these values, and ensure that the oath remains a powerful and relevant guide for all who enter the profession. By doing so, the profession reinforces its role as a bulwark of democracy.

CHECKS, BALANCES, AND CHALLENGES TO THE SUPREMACY OF THE SUPREME COURT

Zachary Carr

INTRODUCTION

The Supreme Court is one of the most powerful institutions in the Federal Government, but it's quickly losing its primary source of influence. While Congress derives power from its financial control over government, and the Executive Branch derives power from its military and regulatory control over government, the Court's power to make binding legal decisions derives from its perceived legitimacy.[1] In most cases, the American public does not honor the Court's decisions because of any pressure that the Court could exert. They honor the Court's decisions because they recognize that the Constitution has delegated an essential power to the Court, and they trust that the justices are exercising that power responsibly. Unfortunately for the justices, that legitimacy has decreased markedly, with only 27% of respondents in a 2023 poll placing 'a great deal' or 'quite a lot' of confidence in the Court.[2]

A legitimacy crisis seems to be brewing in the Court, and in order to maintain their authority, the Court will need to resist acting in ways that continue to erode public confidence.[3] Even

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[1] *See* Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013). *See also* Stephen Breyer, *The Supreme Court of the United States: Power and Counter-Power*, RÉVUE EUROPÉNNE DU DROIT: GOVERNING GLOBALIZATION, Aug. 2021, at 80-87, https://geopolitique.eu/en/articles/the-supreme-court-of-the-united-states-power-and-counter-power/.

[2] *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx (last visited Oct. 27, 2024).

[3] Shortly before the writing of this article, the Court faced a wave of headlines unfavorably characterizing some of the justices' personal relationships with wealthy political donors, and chastising the justices for failing to recuse from cases that present apparent conflicts of interest. So far, at least a third of the Court has been the target of such allegations. Chief Justice Roberts was criticized for failing to recuse from a case where his wife had a close professional relationship with advocates arguing before the Court. *See* Steve Eder, *At the Supreme Court, Ethics Questions Over a Spouse's Business Ties*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html (discussing a colleague of Chief Justice Roberts' wife Jane (a legal recruiter who earned six figure commissions for placing attorneys in

if the justices can cure their ethical lapses, further threats to institutional legitimacy come from the other branches of government. There are numerous examples of the political branches disregarding, repudiating, or trying to avoid orders issued by the Court, dating back to the early Nineteenth Century. While these incidents were largely isolated throughout history, some anticipate a disobedient trend emerging.[4]

In fact, as of this writing, two separate governors are currently acting in direct and open opposition to very clear directives from the Court. In Florida, Governor Ron DeSantis has signed legislation that would "subject child rapists to the death penalty."[5] While a state government has considerable power to determine the penalties for state law crimes, the Court ruled in 2008 that subjecting a sex offender under similar circumstances

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law firms that argue before the Supreme Court) whom expressed concern to the Justice Department and Congress about potential conflicts of interest). Justice Thomas and Justice Alito have both been criticized for failing to recuse from cases where close personal friends, who had funded lavish vacations with those justices, had some stake in the resolution of cases before the Court. *See generally* Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; *See also* Press Release, Senator Sheldon Whitehouse, Whitehouse Lodges Ethics Complaint Against Supreme Court Justice Samuel Alito (Sep. 5, 2023) (on file with author).

[4] While it may not be exhaustive, the historical research informing this Note identified two instances of disobedience between 1800 and 1900 and one instance between 1900 and 2000. An acceleration is observed when this is compared with three instances of disobedience in the 24 years since 2000. Including the following discussion of current events in Florida and Texas, there are five instances of disobedience identified since 2000. *See* Ryan Doerfler & Samuel Moyn, *We Are Already Defying the Supreme Court*, DISSENT MAGAZINE, Winter 2024, https://www.dissentmagazine.org/article/we-are-already-defying-the-supreme-court/. Accompanying this increased frequency, Republican officials have begun signaling their resistance to the Court. *See* Aaron Blake, *Republicans now say it might be okay to ignore the Supreme Court*, WASH. POST (Jan. 29, 2024), https://www.washingtonpost.com/politics/2024/01/29/republicans-now-say-it-might-be-okay-ignore-supreme-court/.

[5] Press Release, Office of the Governor of Florida, Governor Ron DeSantis Signs Third Consecutive Anti-Crime, Pro-Public Safety Legislative Package, (May 1, 2023) (on file with author).

to the death penalty violates the Eighth Amendment's protection against cruel and unusual punishment.[6] In that case, the Court ruled that the death penalty represented an excessive punishment for sex crimes unless the crime causes the victim's death.[7] The Florida government knew that their actions would disobey the Court's interpretation of the Eighth Amendment's limitations; in a press release announcing the new law, Governor DeSantis's office vowed "to overrule judicial precedents which have unjustly shielded child rapists from the death penalty."[8] Florida's enactment of this legislation was not merely an empty threat to dissuade child predation; prosecutors have already begun asking Florida courts for the death penalty in cases where the defendant is accused of non-fatal sexual battery against a child.[9]

In Texas, Governor Greg Abbott has openly violated a recent decision relating to the authority of state and federal agents over the border between the United States and Mexico.[10] In that case, Texas officials installed barbed wire on the northern bank of the Rio Grande in an area commonly used by undocumented immigrants to enter the United States, but federal agents with Customs and Border Patrol routinely cut through this fence to render medical attention to immigrants who get stuck in the river and need help.[11] While this case was working its way up the appellate system, a group of migrants drowned in the area.[12] Federal officials maintain that Texas law

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[6] Kennedy v. Louisiana, 554 U.S. 407 (2008).
[7] *Id.* at 421.
[8] Office of the Governor of Florida, *supra* note 5.
[9] Dan Sullivan & Romy Ellenbogen, *Florida Seeks Death Penalty in Lake County Sex Abuse Case Under New Law*, TAMPA BAY TIMES (Dec. 14, 2023), https://www.tampabay.com/news/crime/2023/12/14/florida-death-penalty-child-rape-law-desantis-lake-county/.
[10] Dep't of Homeland Sec. v. Texas, 144 S. Ct. 715 (2024).
[11] *See* Mark Sherman & Paul J. Weber, *Supreme Court Allows Federal Agents to Cut Razor Wire Texas Installed on US-Mexico Border*, ASSOCIATED PRESS (Jan. 22, 2024), https://apnews.com/article/supreme-court-immigration-texas-razor-wire-9daef6bd316211b6633ece718e505187.
[12] Colbi Edmonds, *3 Migrants, Including 2 Children, Drown Near Texas Border*, N.Y. TIMES (Jan. 14, 2024),

enforcement physically prevented them from removing the wire and rendering lifesaving assistance, although this is disputed by the Texas Government, who claims that the migrants were already deceased when Federal agents arrived.[13]

Regardless of that factual dispute, the Court summarily ruled that Federal officials can remove the barbed wire while the merits of the case are litigated.[14] Like his counterpart in Florida, Governor Abbott is contesting the constitutional interpretation favored by the Court. In a statement, Governor Abbott minimized the effect of the Supremacy Clause, which federal officials argue governs the case, and instead argued that a constitutional provision "acknowledge[ing] 'the States' sovereign interest in protecting their borders" is the "supreme law of the land."[15] In both the Florida and Texas cases, officials from various executive branches seem to declare that they, rather than the U.S. Supreme Court, are correctly interpreting what the law says.

There are obvious benefits to imposing the strongest possible deterrent to child predation, and States can have legitimate sovereignty concerns about Federal immigration policy. Notwithstanding the merits of these policies, there could be significant constitutional ramifications to this sort of recalcitrance. It has long been held that it is "emphatically the province and duty of the judicial department to say what the law is."[16] However, by disobeying the Court's commands, the other

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https://www.nytimes.com/2024/01/14/us/migrants-drown-texas-dispute.html.

[13] *Id.*

[14] Adam Liptak, *Supreme Court Backs Biden in Dispute With Texas Over Border Barrier*, N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/01/22/us/politics/supreme-court-texas-border-barbed-wire.html.

[15] Press Release, Office of the Governor of Texas, Statement on Texas' Constitutional Right to Self-Defense (Jan. 24, 2024) (on file with author).

[16] Marbury v. Madison, 5 U.S. 137, 177 (1803); Cooper v. Aaron, 358 U.S. 1, 18 (1958); *See also* Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973); Lowe v. SEC, 472 U.S. 181, 230 (1985); Clinton v. Jones, 520 U.S. 681, 703 (1997); Georgia v. Pub. Res. Org. Inc., 590 U.S. 255, 293 (2020) (Ginsburg, R., dissenting).

branches assert, at least implicitly, that the Court is incorrect in their decision. How can the Court's legitimacy survive if its primary constitutional function is being disregarded by the rest of government? The system of checks and balances created by the Constitution strikes a delicate balance of federal power,[17] and removing the Court's influence from that system leads to the risk that one of the remaining branches will accumulate power excessively. By second-guessing the Court's constitutional interpretation, these governors purport to assume some judicial power in addition to and in excess of their executive power. By analyzing similar cases throughout history, this Note attempts to suggest how this power struggle will be resolved.

Part I of this Note will analyze six cases throughout American history in which clear, unambiguous commands by the Supreme Court were disobeyed, repudiated, or ignored by the entities they sought to regulate. This analysis will include the aftermath of each of these incidents, considering the effect that these incidents had on the Court and the commanded entities. In each of these cases, the political branch's disobedience was widely publicized, either in newspaper headlines, or through provocation by the disobedient officials themselves. This carries potential constitutional implications; seeing the Court as a disrespected, disobeyed institution diminishes the public's perception of the Court's legitimate authority, which in turn diminishes the Court's institutional strength.

Part II will draw a distinction between the Court's constitutional interpretation and their statutory interpretation. This Note will reach the conclusion that the Court's statutory interpretation, while worthy of deference, does not need to be the final word. Numerous examples of Congress modifying statutes to circumvent unfavorable Court opinions suggest that the Constitutional order survives even if the political branches were more direct in their statutory circumvention.

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[17] Aziz Huq, *Twelve Steps to Restore Checks and Balances*, BRENNAN CENTER FOR JUSTICE (Jan. 1, 2008), https://www.brennancenter.org/our-work/research-reports/twelve-steps-restore-checks-and-balances.

On the other hand, this Note will conclude that the Court's constitutional interpretation should be given absolute deference. Unless there is political appetite to abolish the Court through constitutional amendment, it must serve its constitutional role within the government.[18] Disregarding both the Court's constitutional and statutory interpretations could create a vacuum around the judicial power and could risk either Congress or the Executive assuming that power and accumulating a problematic volume of influence over the government. The power to resolve ambiguities in constitutional interpretation, which cannot be so easily modified by the political branches, deserves the respect of the political branches and (depending on the justices' behavior) deserves legitimacy amongst the public as well.

Part III will apply this analysis to a case that was recently decided by the Court. Taking into consideration the political, legal, and institutional impacts of prior disobedience, this section will discuss the hypothetical implications that would arise if the president were to disobey a loss at the Court. Specifically, this section will consider *Biden v. Nebraska*[19], in which the Supreme Court ruled that the Secretary of Education lacked statutory authority to enact a broad program of student loan forgiveness. Like most of the disobedient officials discussed in Part I, President Biden has staked considerable political capital on a program that was foreclosed by the Court in *Nebraska*, and this section will use past examples to analyze the impacts that such disobedience could have on the institutional legitimacy of the Court, as well as the political and legal legitimacy of any student loan forgiveness taken in disobedience of the Court's decision.

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[18] *See Marbury*, 5 U.S. at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."). Following Chief Justice Marshall's logic, Article III (which establishes the Court and grants it jurisdiction) cannot be without effect. There must therefore be a Supreme Court that exercises the judicial powers enumerated by the Constitution.

[19] 600 U.S. 477 (2023).

I

A. Worcester v. Georgia

Early in U.S. history, a considerable amount of federal litigation involved tribal law, and the proper constitutional role for Native American tribes to occupy. The Constitution implies that Native tribes aren't categorized as States, nor are they categorized as foreign nations,[20] but it never clearly addresses what role tribes *should* play within the Constitutional system. In the early nineteenth century, Congress established the bounds of Native land and prescribed conditions governing interactions between the government and the tribes through treaties Congress then ratified.[21] That Congress defined this relationship through treaty implies that the tribes were not bound by American law; if they were, the government could compel desired conduct through statute, rather than exchanging concessions for desired conduct in consideration of a treaty.

A prominent native tribe that entered into treaties with the federal government was the Cherokee Nation, whose territory spans much of the southeastern United States, including much of Georgia. Georgia passed a law that would require non-Natives to obtain a license before living on a reservation and convicted a Vermont citizen residing in Cherokee territory for violating this law.[22]

The defendant argued that he was outside the jurisdiction of the Georgia legal system; he was a resident of the Cherokee Nation, there with the permission of the tribe and the federal government, and the Cherokee Nation enjoyed

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[20] U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power . . .] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[21] *American Indian Treaties*, NATIONAL ARCHIVES (June 22, 2022), https://www.archives.gov/research/native-americans/treaties (last visited Oct. 31, 2024).

[22] Worcester v. Georgia, 31 U.S. 515, 537 (1832).

sovereignty over the territory in question.[23] The Supreme Court agreed, holding that Georgia's law violated the Cherokee Nation's sovereignty as contemplated by the Constitution and codified by treaty.[24]

This decision enraged President Andrew Jackson, who had previously informed Congress of his desire to "[open] the whole territory between Tennessee to the north and Louisiana to the south to the settlement of the whites," a swath of land that includes much of the Cherokee territory in Western Georgia.[25] Jackson, along with allies in Georgia, initially refused to enforce the ruling.[26]

Jackson's reading of the Constitution treats native tribes differently than the reading favored by the Court. The Court interprets Article I, Section 8 to confer sovereignty upon native tribes, which would necessarily mean the State of Georgia would be unable to bind the territory through its laws. Instead, the states would need to offer something to the tribes in exchange for leaving the land Jackson desired.

Jackson publicly railed against this interpretation, and some of his political allies did as well.[27] After a few years where his anger failed to move the needle on native sovereignty, the President acknowledged the Court's supreme interpretive authority and began working on Plan B.[28] Jackson's Plan B would ultimately be the Trail of Tears, under which members of the Cherokee, Muscogee, Seminole, Chickasaw, and Choctaw nations were forced to leave their land in and around Georgia. While this seems like a victory for Jackson, the program was probably costlier than Jackson would have liked. The program

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[23] *Id.* at 538; *Worcester v. Georgia*, BRITANNICA (Mar. 4, 2024), https://www.britannica.com/topic/Worcester-v-Georgia.
[24] *Worcester,* 31 U.S. at 561.
[25] President Andrew Jackson, Speech to Congress on Indian Removal (Dec. 6, 1830) (transcript available in the Nat. Park Serv. Teaching with Museums Collection).
[26] *Worcester v. Georgia*, BRITANNICA (Mar. 4, 2024), https://www.britannica.com/topic/Worcester-v-Georgia.
[27] *See* Jeffrey Rosen, *Court History*, PBS (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/antebellum/history2.html.
[28] *See* Jackson, *supra* note 25.

required the Government to offer substantial plots of land west of the Mississippi to the displaced Native tribes.[29] At the time, this territory had not acceded to the United States, but it would nevertheless provide an obstacle to the westward expansion envisioned by the proponents of Manifest Destiny, such as Jackson.

Regardless of the eventual displacement of Native Americans, the true point of disagreement in *Worcester* was whether they should be given sovereign rights. On that point, Jackson's fierce opposition to *Worcester* would ultimately prove unsuccessful. Despite his outrage at the Court's decision, Jackson stopped trying to impose U.S. law on Native tribes and listened when he was forbade from expelling Natives with no consideration for their future placement.[30]

B. Brown v. Board of Education

One of the most widely publicized Supreme Court decisions in the institution's history came at the onset of the Civil Rights Movement. Before public transit and lunch counters were desegregated, Black students sought admission to exclusively white schools.[31] Under the long-standing doctrine of 'separate but equal,' state and local governments had maintained separate schools on a racially-segregated basis that the states argued were functionally equal in quality.[32] The petitioners alleged that the schools were inherently unequal[33]

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[29] *Preludes to the Trail of Tears*, NATIONAL PARK SERVICE (Sep. 5, 2021), https://www.nps.gov/articles/000/preludes-trail-of-tears.htm.

[30] Rosen, *supra* note 27.

[31] Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).

[32] *Id*. at 483 n.1.

[33] Apart from the disparate educational outcomes between a higher quality White school and a lower quality Black school, this anti-segregation argument proceeds by outlining the psychological impacts of othering Black students at such a young, impressionable age. Citing dictum in one of the lower court decisions, Chief Justice Warren highlighted this principle most clearly in the majority opinion, writing:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater

and could not possibly be made equal, thereby denying students at segregated schools equal protection under the law.[34] The Supreme Court ultimately agreed, holding that segregation has no place in the field of public education[35] and that the doctrine of 'separate but equal' should be rejected.[36]

Brown was a consolidation of cases from Kansas, South Carolina, Virginia, and Delaware, but 17 states required racial segregation in public schools when the *Brown* decision was issued.[37] One of these states was Alabama, where multiple state officials sought to continue segregation, notwithstanding the Supreme Court's clear repudiation of the practice. The Alabama Board of Education noted that no Alabama schools were sued in *Brown*, so while the decision rendered segregation unconstitutional, it did not directly command Alabama to integrate their schools. Relying on this argument, Governor Seth Gordon Persons introduced a resolution to the state Board which would continue segregation until the Alabama school system itself was directly implicated in a lawsuit.[38]

After Governor Parsons' tenure had ended, subsequent governors continued his fight. Governor George Wallace[39]

> when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."
> *Id.* at 494.

[34] *Id.* at 488.
[35] *Id.* at 495.
[36] *Brown*, 347 U.S. at 495.
[37] P. SCOTT CORBETT ET. AL, U.S. HISTORY, at 775 fig. 28.18 (2014) (ebook).
[38] *After Brown Ruling, Alabama Education Board Votes Unanimously to Continue Enforcing Public School Segregation*, EQUAL JUSTICE INITIATIVE, https://calendar.eji.org/racial-injustice/jul/09 (last visited Oct. 31, 2024).
[39] Governor George C. Wallace, Inaugural Address (Jan. 14, 1963). Governor Wallace fiercely disagreed with Chief Justice Warren's repudiation of segregation. In his inaugural address, delivered nine years after the *Brown* decision, the Governor famously declared "segregation now, segregation tomorrow, segregation forever."

staged the famous "Stand in the Schoolhouse Door," in which he personally blocked the entrance to an auditorium at the University of Alabama to prevent the matriculation of two Black students.[40]

The Alabama Legislature took another approach. State Representative Henry Beatty devised a scheme wherein Alabama's public schools would be integrated, but separate, tuition-charging private schools (referred to as segregation academies) would be established as well.[41] Under this proposal, public schools would be reserved for students who are unable to pay for private education. However, any white student who demonstrated financial inability to pay for a segregation academy could have their tuition waived.[42]

Perhaps the most widely publicized repudiation of *Brown* came from Arkansas, where nine Black students had enrolled at the all-white Central High School in Little Rock. Governor Orval Eugene Faubus publicly declared his intent to defy *Brown* and dispatched the Arkansas National Guard to block the students' entrance into the school.[43]

In the end, neither Alabama nor Arkansas' attempts to defy *Brown* were successful. Governor Wallace's Stand in the Schoolhouse Door was ultimately broken by the Army 2nd

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[40] Warren K. Leffler, *Governor George Wallace Attempting to Block Integration at the University of Alabama,* (photograph), *in* U.S. NEWS & WORLD REPORT (June 11, 1963) (on file with Libr. Of Cong.)

[41] The *Brown* decision used language that limited its holding to the public education context, so private schools were not subject to its mandate. *Brown*, 347 U.S. at 495. This was a loophole that would take a little longer to close. Runyon v. McCrary, 427 U.S. 160, 170-73 (1976) (analyzing the applicability of 42 U.S.C. § 1981 to private contracts, finding § 1981 violations when private contracts involve racial discrimination, and identifying such a violation in the discriminatory private school scheme at-issue).

[42] Marilyn Grady & Sharon C. Hoffman*, Segregation Academies Then and School Choice Configurations Today in Deep South States,* CONTEMP. ISSUES IN EDUC. LEADERSHIP 2:2 (2018), at 9.

[43] *Little Rock School Desegregation*, STANFORD UNIVERSITY: MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, https://kinginstitute.stanford.edu/little-rock-school-desegregation (last visited Oct. 31, 2024).

Division, which President Kennedy had sent to enforce the University's desegregation.[44] In addition, segregation in private schools was found unconstitutional in 1976, severely limiting the segregation academies' abilities to circumvent *Brown*.

In Arkansas, President Eisenhower sent the 101st Airborne Division to Little Rock to escort the Little Rock Nine into their school.[45] Enraged by this, Governor Faubus would end up closing all public schools for a short time; they were reopened (on an integrated basis) in 1960.[46]

At first, the opposition to *Brown* seems insurmountable; a locally unpopular decision was published and high-ranking state officials resisted its enforcement with every ounce of their power. The governors' intransigence was incredibly popular with local voters, providing political motivation to back up the governors' resistance. However, those governors were not the only ones responsible for enforcing the law in their states. Presidents Eisenhower and Kennedy were too devoted to the Constitution, as interpreted by the Court to guarantee the right to integrated education. They had the ability to overcome the governors' influence, and if the governors were not going to enforce *Brown* in their states, the presidents were going to do it for them.

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[44] Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 11, 1963).

[45] Lonnie Bunch, *The Little Rock Nine*, THE SMITHSONIAN INSTITUTE: NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE, https://nmaahc.si.edu/explore/stories/little-rock-nine (last visited Oct. 28, 2024).

[46] Sondra Gordy, *Empty Classrooms, Empty Hearts: Little Rock Secondary Teachers, 1958-1959*, 56 THE ARKANSAS HISTORICAL QUARTERLY, 427, 442, n.4 (1997) (expressing unhappiness with the academic disruption that accompanies a year of school closures, voters ousted segregationists from the Board of Education. The new board members voted to reopen schools, in compliance with *Brown*.)

C. Massachusetts v. EPA

Unlike the Presidents' actions following *Brown*, the Executive Branch is unlikely to force compliance through military action when that Branch is itself the target of the Court's orders. The Environmental Protection Agency (EPA) is within the Executive Branch, and during the Administration of President George W. Bush, the EPA issued a determination in which it concluded that certain motor vehicle emissions were not regulatable, arguing that they were outside the scope of the Clean Air Act.[47] State governments challenged this determination[48], and the case made its way up to the Supreme Court, who strongly disagreed with the EPA's characterization of these greenhouse gas emissions.[49] Justice Stevens' opinion held that the carbon emissions in-question were clearly within the Clean Air Act's broad definition of a pollutant. Further, even though the Congress that passed the Clean Air Act could not have foreseen the environmental impacts of greenhouse gases, there was no apparent Congressional intent to prevent the EPA from addressing global threats not contemplated by the Act's framers. Rather, Congress intentionally crafted the Act with flexibility to address unforeseen threats.[50]

The Bush Administration tried to limit the scope of the Court's holding, reframing it to argue that the decision allowed the EPA to decide whether to regulate carbon dioxide. Ultimately, the Agency would not take further action to regulate carbon dioxide.[51] In press conferences and memoranda, the Agency continued to invoke the Administrator's 'discretion' in

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[47] Memorandum from EPA General Counsel Robert E. Fabricant to Acting EPA Administrator Marianne L. Horinko (Aug. 28, 2003) (on file with author).
[48] Massachusetts v. EPA, 549 U.S. 497, 514 (2007).
[49] *Id.* at 528.
[50] *Id.* at 532.
[51] *See* Ben Lieberman, *The EPA's Prudent Response to Massachusetts v. EPA*, THE HERITAGE FOUNDATION (Mar. 28, 2008), https://www.heritage.org/environment/report/the-epas-prudent-response-massachusetts-v-epa.

enforcing the Clean Air Act, and continuously failed to consider carbon dioxide as a pollutant under the Act. Luckily for Bush Administration EPA officials, the *Massachusetts* decision came down in April 2007, and their terms were set to expire in January 2009.[52] They would most likely be gone by the time another challenge made its way to the Supreme Court. These officials ran out the clock for their remaining months until the Obama Administration took over.

Early on in his term, President Obama reversed EPA's prior determination regarding the pollutive nature (and regulatability) of carbon dioxide. Under his Administration, it was determined that carbon dioxide was a pollutant, and resources would be directed so that EPA could regulate it pursuant to the provisions of the Clean Air Act, and the commands of Justice Stevens' opinion in *Massachusetts*.[53]

Here there were no direct consequences for twisting the Court's words; both President Bush and his EPA Administrator were able to serve the remainder of their terms before leaving government on good terms. However, the effect of their actions did not last. Sometimes officials from other areas of government force compliance, as in the aftermath to *Worcester* and *Brown*.[54] In this case, the recalcitrant officials left office and their replacements corrected EPA's interpretation of the Act.[55] Once again, the law as interpreted by the Court prevails, thanks to commitment within the Obama Administration for the principles of checks and balances.

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[52] Kate Sheppard, *Bush Administration Decides to Run Out the Clock on Regulating Greenhouse-Gas Emissions*, GRIST MAG. (July 12, 2008), https://grist.org/article/countdown-to-crawford/.

[53] Lawrence Hurley & Elana Schor, *Congress Emits Half-Truths in Spin War Over* Mass. v. EPA, N.Y. TIMES (Mar. 17, 2011), https://archive.nytimes.com/www.nytimes.com/gwire/2011/03/17/17greenwire-congress-emits-half-truths-in-spin-war-over-im-12380.html?ref=earth.

[54] *Worcester,* 31 U.S. at 561; Leffler, *supra* note 40; Bunch, *supra* note 45.

[55] Hurley & Schor, *supra* note 53.

D. Allen v. Milligan

This phenomenon has recently occurred in the election context. After the 2020 census, Alabama released a newly-redistricted map, in which voters of color comprised a majority in only one of the state's seven Congressional districts.[56] Voters sued, arguing that the state's demographics could support two majority-minority districts, and any map that did not include that many majority-minority districts would violate the race-proportionality requirements in § 2 of the Voting Rights Act of 1965.[57]

In defense of its electoral maps, the State of Alabama argued that it would not consider the racial composition of its districts, since "a legislature cannot make race a 'more important thing' than race-neutral considerations "to create a majority-minority district.'"[58] Alabama read the Voting Rights Act to require states to draw congressional lines based on "principles such as maintaining communities of interest and traditional boundaries"[59] before considering race.

The Court disagreed. Writing for the majority, Chief Justice Roberts noted that communities of interest could come

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[56] Kyle Gassiott, *Court Ruling on Black Political Power in Alabama Could Affect Maps in Other States*, NPR (June 9, 2023, 5:00 AM), https://www.npr.org/2023/06/09/1181211850/alabama-redistricting-supreme-court-ruling-reaction.

[57] *See Id.* (§ 2 provides: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

[58] Emergency Application for Administrative Stay at 30-31, Merrill v. Milligan, 142 S. Ct. 879 (2022) (No. 21-1086), (citing Cooper v. Harris, 581 U.S. 285, 300 (2017)).

[59] *See* Allen v. Milligan 599 U.S. 1, 19 (2022) (citing Singleton v. Merrill, 582 F.Supp.3d 924, 1012 (N.D. Ala. 2022) (While the stay petition did not define either of these terms, the Court helpfully does so. A 'community of interest' is defined under Alabama law as an "area with recognized similarities of interest, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities."). *Id.* at 33 (as for 'traditional boundaries' guideline, the Court reads Alabama's evidence to suggest this refers to the preservation of municipal boundaries).

from similarities in racial identity,[60] and held that "the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[61] Under the State's proposed map, voting districts were not 'equally open' because "…minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter."[62]

Alabama's position at the Court was strengthened by a unique theory of constitutional interpretation gaining prevalence at the time. The Constitution permits state legislatures to prescribe the times, places, and manner of administering federal elections, while leaving Congress the option to make or alter such regulations.[63] Conservative legal activists advanced the Independent State Legislature Theory, under which the legislative power enumerated by the 'Times, Places and Manners' clause is plenary and insulated from judicial review.[64] Accepting this argument, it appears as though the power of the Alabama legislature is unchecked by the courts. Unfortunately for the plaintiffs, many had accepted this argument; concurrent litigation had reached the Court over the North Carolina judiciary's ability, or lack thereof, to challenge the legislature's electoral decisions.[65]

This may have emboldened Alabama. The new maps that the State produced failed to cure the racial proportionality concerns that ultimately led the original maps to be struck down.[66] A three-judge panel of the U.S. District Court for the

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[60] *See id.* at 19.
[61] *Id.* at 24-25 (citing 52 U.S.C. § 10301).
[62] *Id.*
[63] U.S. CONST. art. I, § 4, cl. 1.
[64] Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 511, 545 (2021).
[65] Moore v. Harper, 600 U.S. 1, 22 (2023).
[66] *See Alabama Lawmakers Refuse to Create a 2nd Majority-Black Congressional District*, NPR (July 21, 2023), https://www.npr.org/2023/07/21/1189494854/alabama-redistricting-

Northern District of Alabama refused to allow the new map to advance; this time, the court invited a special master to propose new, compliant maps.[67] The district court then selected one of these maps and ordered that the Election of 2024 be administered under the map of their choice.[68]

Related, consolidated proceedings have appealed to the Supreme Court, which refused to grant relief against the order.[69] Despite Alabama's attempts to disregard the Court's clear race-proportionality prescription, and its apparently unchecked power to do so in the electoral context, the District Court panel, and later the Supreme Court itself, forced the state back into compliance with the Voting Rights Act.

E. Dred Scott v. Sandford

While the cases explored thus far featured recalcitrant officials being reluctantly brought to compliance, that is not always how these disputes resolve. Another (albeit far less common) possibility is illuminated by *Dred Scott v. Sandford* and *Whole Women's Health v. Jackson.*

In the mid-Nineteenth Century, the most prominent legal battles were fought over the abolition or preservation of slavery. One of the most significant cases illuminating this societal discord arose when a freed slave sued a slaveholder for independence.[70] Writing for the Court, Chief Justice Taney dismissed the case for lack of jurisdiction.[71] Under Taney's reading of the Constitution, Scott was not a citizen and no state

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map-black-districts (after the Court ordered Alabama to enact a new map comprising two majority-minority districts, the new map released by the State continued to include only one such district).

[67] Singleton v. Allen, 690 F. Supp. 3d 1226, 1239 (N.D. Ala. 2023).

[68] *Id.*

[69] Singleton v. Merrill, 2021 U.S. Dist. LEXIS 243058 (N.D. Ala. 2021), *stay denied*, 144 S. Ct. 476 (2021). *See also Moore*, 600 U.S. at 22 (2023) (rejecting the expansive reading of the Independent State Legislature Theory upon which Alabama relied).

[70] *Scott v. Sandford*, 60 U.S. 393 (1857)

[71] *Id.* at 454 (1857).

law could grant him federal citizenship.[72] As such, he was not entitled to bring his claims into federal court.[73]

While he was less outwardly provocative than Jackson, President Lincoln publicly disagreed with the Court's holding in *Dred Scott*. The opinion, in Lincoln's reading, failed to recognize that the promises made by the Declaration of Independence are colorblind, and they should apply to slaves and freedmen just as they apply to White citizens.[74] Lincoln noted two separate functions that the Court serves: to settle the disputes before them, and to indicate how subsequent cases will be decided.[75] *Dred Scott*, according to Lincoln, fit firmly within the first category; the Court decided only the case immediately at bar based on the state of the law at that time, but it did not create any precedent that would bind future decisions. Lincoln argued that public officials were free "to resist wrong and harmful decisions of the Supreme Court and to seek to have them reversed and overturned. That was simply part of the Constitution's system of checks and balances."[76] In his Presidential campaign for the Election of 1860, Lincoln's rhetoric sharply disagreed with the Court's analysis, and when he became President, he began 'resisting' it in his governance.[77]

The *Dred Scott* decision aggravated the rift preceding the Civil War, by "[spurring] the Republican Party to take up the anti-slavery cause with more zeal and determination than

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[72] *Id.* at 406.
[73] *Id.*
[74] President Abraham Lincoln, Speech on the Dred Scott Decision at Springfield (June 26, 1857).
[75] *Id*.
[76] Michael S. Paulsen, *Lincoln Versus Judicial Supremacy*, WASH. POST (May 20, 2015, 8:31 A.M.), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/lincoln-versus-judicial-supremacy/.
[77] *See Timeline: Abraham Lincoln and Emancipation*, LIBR. OF CONG., https://www.loc.gov/collections/abraham-lincoln-papers/articles-and-essays/abraham-lincoln-and-emancipation/timeline/ (last visited Oct. 31, 2024) (initially, Lincoln patiently waited for emancipation, lobbying Senators and negotiating the terms of the Emancipation Proclamation.)

ever."[78] Before the decision, neither the Court nor Congress had conclusively declared whether freed slaves would be eventually granted citizenship, and the civil rights that follow. This ambiguity had appeased some abolitionists, who grew radicalized once Chief Justice Taney foreclosed that possibility altogether. The Chief Justice "made the question unavoidable and it is that event that forced the members of Congress, President Lincoln and then President Johnson and eventually the Supreme Court to acknowledge the political presence of millions of people and their [sic] full rights to citizenship of the United States."[79]

President Lincoln had made slavery, and his opposition to the *Dred Scott* decision, a major campaign issue in the Election of 1860. His Republican Party entered the election cycle with a pledge "to bind the nation together as a free-labor society modeled on Northern capitalism, free wage-labor, and the ultimate extinction of slavery."[80] Southern states would not accept this platform, and upon Lincoln's victory, Confederates launched attacks that would grow into the Civil War.[81] The South would attempt secession and the formation of a new nation where they could continue practicing slavery in perpetuity.[82]

After a horrifically bloody war, national debates around slavery and the South's position relative to the rest of the country had been resolved. To prevent the rift at the Mason-Dixon Line from reopening, Congress took swift, permanent action to extend Constitutional rights to former slaves. It took

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[78] Alix Oswald, *The Reaction to the Dred Scott Decision*, 4 VOCES NOVAE 169, 186 (2018).

[79] J. Robert Osborne, *The Thirteenth, Fourteenth and Fifteenth Amendments and the Dred Scott Decision: An Unlikely Stop on the Way to Citizenship*, 3 YALE-NEW HAVEN TCHRS.' INST. 1, 1 (Aug. 2014),.

[80] Michael Burlingame, *Abraham Lincoln: Campaigns and Elections*, THE MILLER CTR. AT THE UNIV OF VA., https://millercenter.org/president/lincoln/campaigns-and-elections (last visited Oct. 31, 2024).

[81] *Civil War Begins*, U.S. SENATE: HIST. HIGHLIGHTS, (Apr. 12, 1861), https://www.senate.gov/artandhistory/history/minute/Civil_War_Begins.htm.

[82] CONST. OF THE CONFEDERATE STATES of 1861, art. IV, § 3(3).

eleven years, but Lincoln's ideas of Civil Rights for all had been realized. This case is different from *Worcester*, *Brown*, *Massachusetts*, and *Allen*; in those cases, the law remained steady, and any opposition to the Court's interpretation of the law failed to result in any widespread departure from the Court's declarations.

In this case, alternatively, the law changed to meet Lincoln's position. While the Court is the ultimate interpreter of the Constitution, it could no longer be said that Lincoln's advocacy against *Dred Scott* was incorrect; the official interpretation of the Constitution had been changed to make his position the correct one. The *Dred Scott* decision had been written into obsolescence.

F. Roe v. Wade; Planned Parenthood v. Casey

In the last half of the 20th Century, the Court found that the constitutional right to privacy encompasses the right of a woman to terminate her pregnancy,[83] and heard considerable litigation on abortion. The petitioner in *Roe* had challenged a total ban on abortions in Texas[84], and the petitioner in *Casey* had challenged five abortion restrictions under Pennsylvania law.[85] The holdings in these cases were similar; *Roe* struck down prohibitions on abortion in the first trimester as presumptively

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[83] Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992).

[84] *Roe*, 410 U.S. at 117-20 (explaining the Petitioner's challenge to TEX. CODE CRIM. PROC. ANN. arts. 1191-1194, 1196 (1925)).

[85] Those five abortion restrictions were as follows: 18 PA.C.S. § 3205 required the patient to receive informed consent before an abortion, including certain information which must be given within 24 hours of the procedure; § 3206 required the informed consent of at least one parent when a minor sought an abortion; § 3209 required married patients to sign a statement indicating that they had notified their husband of their plan to abort a pregnancy; §§ 3207(b), 3214(a), and 3214(f) collectively imposed certain reporting requirements on abortion facilities; and § 3203 defined a 'medical emergency' that could excuse compliance with §§ 3205, 3206, and 3209.

invalid[86], and *Casey* struck down regulations that would pose an 'undue burden' on the woman's abortion right before fetal viability.[87]

These were long-standing precedents; *Roe* was valid for 49 years, and *Casey* was valid for 30 years. As the Court grew more conservative, commentators worried that the future of abortion rights was uncertain, and that anxiety ballooned when the Court granted certiorari in *Dobbs v. Jackson Women's Health Organization*.[88] When the question presented in that case was limited to directly challenge *Roe* and *Casey*, it was widely speculated that *Roe* and *Casey* were doomed, and that the decision in *Dobbs* would be the final nail in their coffin.[89]

However, before *Dobbs* was decided, Texas enacted the Texas Heartbeat Act[90] (S.B. 8), which criminalized any abortion performed after the detection of a fetal heartbeat, which the State determined would occur around 6 weeks.[91] The law had an

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[86] *Roe*, 410 U.S. at 164; *Casey*, 505 U.S. at 846, 877.

[87] In *Casey*, Justice O'Connor deferred to scientific experts as to the definition of fetal viability. At the time *Casey* was decided, 23 weeks was generally considered to be the point where fetal viability began. *Casey*, 505 U.S. at 860.

[88] 597 U.S. at 234 (2022).

[89] Robin Marty, *The Supreme Court is Eyeing Roe v. Wade's End with This Mississippi Abortion Ban Case*, NBC NEWS (May 18, 2021, 4:32 AM), https://www.nbcnews.com/think/opinion/supreme-court-eyeing-roe-v-wade-s-end-mississippi-abortion-ncna1267706. The questions presented in the Petition for Writ of Certiorari asked whether pre-viability abortion restrictions were unconstitutional, asked whether doctors have third-party standing to challenge abortion restrictions, and debated the proper standard for analyzing abortion restrictions. The order granting the petition discarded these and limited its grant to the first question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." This question directly implicates the central holding of *Roe* (under which prohibitions on elective abortions were unconstitutional in the first trimester [which ends before viability begins]) and *Casey* (under which all prohibitions on elective abortions before viability are presumptively unconstitutional).

[90] TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021).

[91] Bethany Irvine, *Why "Heartbeat Bill" is a Misleading Name for Texas' Near-Total Abortion Ban*, TEX. TRIB. (Sept. 2, 2021, 4:00 PM), https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/.

unusual structure; state officials were explicitly prohibited from enforcing the law, but private citizens were authorized to bring an enforcement action against anyone who obtained, performed, or assisted in the administration of an abortion.[92] The law was challenged for clearly violating both *Roe* and *Casey*, which were still valid at the time.

In an opinion by Justice Gorsuch, the Court dismissed the majority of the challenge on the basis that the plaintiffs did not have standing to sue the defendants named.[93] Despite the egregious violation of Supreme Court precedent that S.B. 8 presented, the Court refused to address the merits of the challenge, since standing is a threshold issue which determines "whether the litigant is entitled to have the court decide the merits of the dispute."[94] While *Roe* and *Casey* would only remain operative for another six months, Texas was able to successfully abrogate the rights that those cases protected, in disregard of the authority that the Court possessed in deciding *Roe* and *Casey*.[95]

Jackson did not create any major Constitutional crises, probably because many assumed the Supreme Court was imminently planning to settle the issue of abortion rights for good.[96] However, polling between the issuance of *Jackson* and

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[92] TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208(a)(2)–(3) (West 2021).

[93] Whole Woman's Health v. Jackson, 595 U.S. 30, 51 (2021).

[94] Allen v. Wright, 468 U.S. 737, 750-51 (1984).

[95] The peculiar structure of S.B. 8 led to the finding of a lack of standing. Recall that S.B. 8 deputized private citizens to bring enforcement actions. Another provision of the statute explicitly prohibited state officials from enforcing the law. Given that the Constitution applies only against the government and state actors, challenges to laws that violate constitutional rights may only be brought against a government official charged with enforcing the law. Since S.B. 8 delegated no enforcement authority to most state officials, the threshold question of standing precluded the Court from reaching the merits of the Constitutional challenge in *Jackson*. Litigation was allowed to proceed against some lower-level state officials, but *Dobbs* rendered the case moot before final judgment was issued against any officials.

[96] David G. Savage, *Supreme Court's Conservatives on the Verge of Ending Right to Abortion*, L.A. TIMES (Dec. 15, 2021),

the issuance of *Dobbs* is consistent with approval ratings that had been falling for years.[97]

This case is most analytically similar to *Dred Scott*, 60 U.S. 393 (1857). In both cases, the officials violating precedent were not brought into compliance. Instead, the law being challenged by those officials was changed in their favor. It is not unusual for someone who opposes a decision to bring a lawsuit seeking to overturn it. In those cases, the Court should explain how the law, or at least the Court's interpretation of the law, had changed such that the case should be resolved differently. Here, however, the Court gave little explanation for the inconsistent application of the law that arose from S.B.8. Instead, they dismissed the case on standing and allowed this inconsistency to further diminish their perception of impartiality. While the law was eventually harmonized by *Dobbs* (which created further issues of impartiality, even if it cured the checks and balances and federalism problems *Jackson* created), the period before its harmonization saw numerous headlines and polls that do not bode well for the Court's authoritative legitimacy.[98]

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https://www.latimes.com/politics/story/2021-12-15/supreme-courts-conservatives-on-the-verge-of-ending-right-to-abortion; Ian Millhiser, *It Sure Sounds Like Roe v. Wade is Doomed*, VOX (Dec. 1, 2021), https://www.vox.com/2021/12/1/22811837/supreme-court-roe-wade-abortion-doomed-jackson-womens-health-dobbs-barrett-kavanaugh-roberts.

[97] *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/.

[98] Mark Joseph Stern, *The Supreme Court Overturned Roe v. Wade in the Most Cowardly Manner Imaginable*, SLATE (Sept. 2, 2021), https://slate.com/news-and-politics/2021/09/supreme-court-overturn-roe-wade-texas.html; Barbara A. Perry, Opinion: The Supreme Court is Grievously Wounded, CNN (May 13, 2022), https://www.cnn.com/2022/05/12/opinions/supreme-court-opinion-leak-perry/index.html (noting record-low Supreme Court approval and "suggesting that unpopular decisions [including] on Texas's abortion limitations…were taking a toll."); *Majority Say Let Roe Stand; Scotus Approval Rating Drops*, MONMOUTH UNIV. (May 11, 2022), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_051122/ (analyzing independent

II

When these cases are analyzed together, a pattern emerges. While the political branches may have initially challenged or disobeyed the spirit or the letter of the decisions they disliked, they would eventually be dragged into compliance. While the judiciary lacks effective measures to enforce its decisions, other, more forceful governmental actors usually compelled this result.

President Jackson's very loud opposition to *Worcester* would not have a permanent effect; while much of the South would end up colonized by Whites (as he desired), Congress and the Court continue to recognize Native tribes as distinct governing bodies, outside the jurisdiction of any of the United States. Laws enacted by Congress or any of the United States, like the Georgia law Jackson supported in *Worcester*, were invalid.

Similar to President Jackson's opposition, President Lincoln's opposition to the Court was largely rhetorical. Lincoln took no action during his presidency to overtly disobey *Dred Scott*, though he was public in his disagreement with the decision. Nevertheless, President Lincoln's dispute with *Dred Scott* was soon resolved by the ratification of the Fourteenth Amendment. Under that Amendment, the promises of liberty outlined in the Declaration of Independence would be made colorblind, just as Lincoln argued they should be.[99]

Brown established a very clear rule: that racial discrimination in public schools is unconstitutional.[100] Active efforts to resist this in Alabama and Arkansas were overcome by the National Guard. Notwithstanding the clarity of this notion, students in Virginia and South Carolina remained segregated until the Court outlined a clear remedy for discrimination, and a delegation of responsibilities that would facilitate the integration of schools whose segregation was deeply rooted.[101]

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polling to find that support for the Supreme Court had markedly decreased among democrats and independents).

[99] President Abraham Lincoln, *supra* note 74.

[100] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[101] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

Once this supplemental decision was issued, the states remaining in disobedience quickly worked toward integration.

President Bush was more active in his non-compliance. Under his Administration, the Solicitor General of the United States argued before the Court that the question of whether a certain chemical posed an environmental threat was a policy consideration, and it was the policy of the Bush Administration that the connection between emissions and climate change was uncertain.[102] The Court's construction of the Clean Air Act, 42 U.S.C. § 4701 *et. seq.*, reached a different conclusion, instead finding that policy considerations cannot play a role in that decision, especially when the evidence of environmental harm is as conclusive as it was in this case.[103] After the decision was issued, the Administrator of the EPA creatively reframed the Court's decision, arguing instead that the decision gave him the authority to determine, irrespective of policy considerations, whether the EPA would regulate greenhouse gases.[104] Bush officials maintained this interpretation of *Massachusetts* until the end of their terms; it was a change in administration that eventually brought EPA into compliance. When President Obama assumed control of the agency, greenhouse gases were quickly determined to be pollutants and were soon enforced under CAA.[105]

The conclusion that the *Allen* court reached was also very clear: the Voting Rights Act requires states to provide an opportunity for voters to elect a congressional delegation that is roughly proportionate to the racial composition of the State.[106] It was not acceptable that Alabama's initial maps included one predominantly Black district, because the state's Black

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[102] *See* Transcript of Oral Argument at 30-31, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).
[103] *Massachusetts*, 549 U.S. at 533-34.
[104] *See* Lieberman, *supra* note 51.
[105] Press Release, U.S. EPA, Greenhouse Gases Threaten Public Health and the Environment (Dec. 07, 2009), (https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/08d11a451131bca585257685005bf252.html).
[106] Allen v. Milligan, 599 U.S. 1, 24-25 (2023).

population was large enough to warrant representation in two of the seven seats. The District Court panel refused to let Alabama proceed with elections under its unconstitutional maps.

The S.B. 8 abortion restrictions were in open violation of a considerable line of Supreme Court precedent when they were enacted, but they would only remain noncompliant for about six months.[107] In June of 2022, the Supreme Court issued a decision that explicitly overruled both *Roe* and *Casey*.[108] The Court held that the Fourteenth Amendment does not recognize the right to abortion as a privacy interest protected by substantive due process, which freed the States to individually craft abortion legislation, and allowed restrictions to be immediately passed, up to and including complete bans on all abortion.[109] With this change, there was no longer a constitutional problem with Texas' scheme, which only allowed abortions before six weeks. This case is interesting; while each of these political actors would eventually end up in compliance with the Court, that compliance usually involved the political branch reluctantly acquiescing to the Court's orders. Texas, however, stubbornly enforced the six-week limit imposed by S.B. 8. In this case, it was the Court who changed the state of the law, and they did so in a way that would allow S.B. 8 to survive without any constitutional violations.

There is a distinction that separates these cases. Recall that the oppositions to *Worcester*, *Brown*, *Roe* and *Casey*, *Massachusetts*, and *Allen* were all resolved by the political actor's

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[107] Specifically, the right to an elective abortion has been protected as a substantive due process right under the Fourteenth Amendment, as well as the Ninth Amendment's reservation of rights to the people. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 60 (1976); Colautti v. Franklin, 439 U.S. 379, 386 (1979); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 775 (1986); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[108] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

[109] Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans – Here's What Happens When Roe is Overturned*, THE GUTTMACHER INST. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

acquiescence to the Court, or by a change in the Court's composition that would subsequently vote to change the law. This pattern suggests that opposition to a Court order will eventually be reversed by a different, or subsequent, government actor.

Conversely, the controversy around *Dred Scott* and *Jackson* were resolved by intervening changes in the law itself. The *Dred Scott* Court diverted from the merits of the complaint, and instead ruled that freed slaves were not citizens and had no right to come into court at all. It is this holding that offended Lincoln, as it racially qualified the liberty promised to all by the Constitution. 11 years after *Dred Scott* was decided, the Constitution would be amended to grant citizenship to all persons born or naturalized in the United States, and to compel the equal protection of the law, regardless of race.[110] Had he lived to see the ratification of the Fourteenth Amendment, President Lincoln would not need to acquiesce to the contrary determination of the Court. Unlike Alabama's commitment to segregated schools, or Bush's commitment to selective non-enforcement of CAA, Lincoln's desire that the Constitution apply regardless of race would eventually be realized, but only because Congress amended the Constitution in a manner that vindicated that desire.

Similarly, the Texas Legislature was not ordered to change their application of S.B.8. While they stood firm in their position, the Court changed the state of abortion law to cure the Fourteenth Amendment concerns inherent in S.B.8's promulgation.

This demonstrates an important exception to the supremacy of the Court's legal interpretation. In some circumstances, if a political actor suffers a loss at the Court, they can work to change the law to circumvent the Court's concerns. It cannot be said that Lincoln's opposition is incorrect and that he will be pulled into compliance with *Dred Scott*; the Constitution was changed so that Lincoln's interpretation *is now the correct one*. The Court's mandate over the political branches

[110] U.S. CONST. amend. XIV, § 1.

is merely to resolve disputes by declaring "what the law is," through constitutional or statutory interpretation.[111] If such a declaration is inconvenient to the political branches, they can make it so that the law interpreted by the Court is no longer in effect. If the Constitution is amended to provide citizenship rights to freedmen, the Court cannot then say that freedmen are constitutionally precluded from citizenship or its inherent rights, and any prior declaration to that effect would be nullified by the Amendment.

If a political actor's conduct is invalidated as illegal by the courts, the politician can garner political support to change the underlying law, authorizing his desired conduct. However, this presents practical challenges. From a political standpoint, it is incredibly difficult to amend the U.S. Constitution.[112] While the Fourteenth Amendment was ratified relatively quickly after *Dred Scott*, proponents for a new constitutional amendment do not have the leverage that they did after the Civil War.[113] Given the increasing political polarization in Congress and state legislatures, the likelihood of an amendment being successfully ratified is extremely low. As a result, a politician who loses at the Court will have a difficult time trying to change the Constitution to support their ideas. The Court's constitutional interpretation is nearly bulletproof.

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[111] Marbury v. Madison, 5 U.S. 137, 177.

[112] There are two methods by which the Constitution may be ratified, but either avenue presents an almost impossibly high bar. Amendments can either be proposed by a two-thirds vote of both chambers of Congress, or by a Constitutional convention empaneled by two-thirds of the States. Once an amendment is proposed, it must be ratified by the legislatures of three-fourths of the States. U.S. CONST. art. V.

[113] It was abnormally easy to ratify the Fourteenth Amendment; after the Confederate States had lost the Civil War, they needed to be readmitted to the Federal government. Congress welcomed their Confederate compatriots through a series of statutes called the Reconstruction Acts. As a condition of readmission, the Reconstruction Acts required Confederate states (who would be the most resistant to the Fourteenth Amendment) to enact the Amendment. An Act to Provide for the more efficient Government of the Rebel States, 14 Stat. 428-30, § 5 (1867).

The Court's statutory interpretation, on the other hand, is much more vulnerable, because the process for ratifying a federal statute is far less exacting.[114] Notwithstanding its polarity, Congress is able to ratify dozens of bills every year.[115] If the Court interprets a statute in a manner that draws opposition among the political branches, Congress can clarify its intent, again nullifying the unpopular opinion. If the Court interprets a statute to proscribe desired conduct or prescribe undesired conduct, Congress can pass a new statute clarifying the effect of the law. Only a simple majority would be required to challenge the Court in these ways.[116]

Moreover, the lower threshold for passing statutes affords a greater opportunity for the political branches to dispute the Court's statutory interpretation. As *Marbury* held, the Court is the final arbiter of what the law means. Therefore, the easiest way for the political branches to challenge a decision they dislike is to change the law upon which the decision relies, forcing the Court's unpopular, prior interpretation of the law's meaning into obsolescence. Given the difficulty inherent in the constitutional amendment process, the Court's constitutional interpretation would be significantly harder to challenge.

Lincoln was not alone in his opposition to *Dred Scott*; it is widely argued that slavery, whose often disputed legality was upheld by decisions such as *Dred Scott*, was the primary

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[114] To be ratified under Federal law, a statute must be approved by a majority of the Congressional committee in which it originates. Then, it must be approved by a majority of the Congressional chamber in which it originates. Then, an identical bill must be approved by a majority of the other Congressional chamber. Finally, the President must approve the bill, or two-thirds of both chambers decide to override the President's objections. *See infra* note 111.

[115] Eric McDaniel, *Congress Passed So Few Laws this Year that We Explained Them All in 1,000 Words*, NPR (Dec. 22, 2023, 5:00 A.M.), https://www.npr.org/2023/12/22/1220111009/congress-passed-so-few-laws-this-year-that-we-explained-them-all-in-1-000-words.

[116] *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained/the-legislative-process (last visited Oct. 31, 2024).

contributor to the Civil War.[117] Despite the passionate dissent against the decision, it would take eleven years before freedmen were guaranteed some of the rights and privileges of citizenship. Even after the United States had won the Civil War, and the Emancipation Proclamation took effect, officials throughout the South continued to deny the rights of citizenship to the freedmen.[118] The prevailing argument at the time held that, while the Proclamation prevents the continuation of slavery, it did not require government to honor civil rights, such as the right to litigate that Dred Scott sought.

Since *Dred Scott* held, from a Constitutional perspective, that the promises made by the Framers were categorically withheld from slaves, governments would continue to resist extending civil rights on the basis that it was not required under the Constitution. Indeed, since *Dred Scott* was a case of Constitutional interpretation, it took an amendment to the Constitution to correct it. That correction came in 1868, when Congress guaranteed birthright citizenship to all, and prohibited the States from denying the equal protection of the law to citizens.[119] Despite the strong political opposition to slavery, and its direct contribution to the recent war, no quick statutory remedy could supersede the constitutional basis for the *Dred Scott* decision.[120]

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[117] *Slavery as a Cause of the Civil War*, NAT'L PARK SERV. (Mar. 7, 2023), https://www.nps.gov/liho/learn/historyculture/slavery-cause-civil-war.htm ("Today, most professional historians agree…that slavery and the status of African Americans were at the heart of the crisis that plunged the U.S. into a civil war from 1861 to 1865").

[118] The Emancipation Proclamation was written by President Lincoln, and it abolished the legality of slavery on a national level. However, it would not go into effect until the War was won. Since the rebellious Southern States asserted that they were a separate, sovereign nation, they would not consider themselves bound by the Proclamation and would take no steps toward its enforcement. When the war had concluded, and the seceding States returned to American control, they also returned under the influence of American laws, including the Proclamation.

[119] U.S. CONST. amend. XIV.

[120] *See* Marbury v. Madison, 5 U.S. 137, 180 (1803) ("[T]he constitution of the United States confirms … that a [statutory] law repugnant to the

A case of an easily overridden statutory interpretation illuminates this principle. Consider the employment discrimination case brought by a retiree named Lilly Ledbetter in 1998.[121] Ledbetter worked at a tire plant for nearly twenty years, and upon her retirement, she accused her employer of denying her raises because of sexually discriminatory evaluations throughout her tenure.[122] She was unaware of the pay disparity until her retirement, but she filed her complaint quickly after discovering it. The Court held nevertheless that her claims were time-barred and upheld a denial of her discrimination claims.[123] The law required claims to be brought within six months of the discriminatory act, and since she was unaware of the discrimination until her retirement, she was unable to litigate the discrimination she experienced throughout her entire tenure at the tire plant. In denying her claims, Justice Alito opined that any discrimination that was not reported within the statute of limitations was "merely an unfortunate event in history which has no present legal consequences."[124]

The Court decided *Ledbetter* as primary campaigns for the Presidential Election of 2008 were organizing. Opposition to the decision was quick in the Democratic Party, which had included a pledge to overturn the decision in their 2008 platform.[125] Then-Senator Obama made *Ledbetter* an issue in his campaign, featuring the plaintiff in a campaign advertisement criticizing his political rival, Senator John McCain, on his opposition to equal pay legislation.[126] Just over a week

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constitution is void; and that the courts, as well as other departments, are bound by that instrument.").

[121] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

[122] *Id.* at 621-22.

[123] *Id.* at 642-43.

[124] *Id.* at 625-26 (citing United Air Lines v. Evans, 431 U.S. 553, 558 (1977)).

[125] *2008 Democratic Party Platform*, U.C. SANTA BARBARA: THE AM. PRESIDENCY PROJECT, (Aug. 25, 2008), https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform.

[126] Brian Montopoli, *Obama Camp Hits McCain On Equal Pay; McCain Camp Links Obama To Chavez*, CBS NEWS (Sept. 19, 2008, 5:17 PM),

into his administration, Obama signed his first piece of legislation, which eliminated the statute of limitations on discrimination claims, and overruled *Ledbetter*. Since the Court's unpopular opinion was the result of interpreting the Civil Rights Act of 1964, a federal *statute*, it could be reversed by enacting a new statute to the opposite effect.

This presents an important distinction in the power of the Court's legal interpretation. Article V of the Constitution sets a very high bar for changing the Constitution, and *Marbury* commands that the judiciary's interpretations of the Constitution cannot be rebut by statute. No legislative or executive entity has ever challenged this delegation of interpretive authority, and the Court has maintained that authority since the beginning of the Republic.[127]

Even if the Court's interpretation of a statute is accurate, Congress can reshape statutes to their liking by a simple majority. This happens regularly and has never presented a problem of legitimacy.[128] Attempting to overturn the Court's constitutional interpretation, on the other hand, would likely pose significant legitimacy concerns. The history surveyed in Part I suggests that any such attempts would not be successful in the long term (unless the law changes or the Court themselves changes their interpretation of the law). Looking to the experiences of Governors Persons and Faubus, any such attempts would likely result in temporary embarrassment and eventual, reluctant acquiescence by the disobeying official. Whatever action was taken in contradiction to the Court's orders would likely be viewed unfavorably by the Federal government, who may exert influence to bring the officials into compliance.

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https://www.cbsnews.com/news/obama-camp-hits-mccain-on-equal-pay-mccain-camp-links-obama-to-chavez/.

[127] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803); Cooper v. Aaron, 358 U.S. 1, 18 (1958); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 347 (Roberts, C.J., concurring in part and dissenting in part).

[128] *Cf.* Plaut v. Spendthrift Farms, 514 U.S. 211, 216 (1995) (judicial construction of a statute determines what the law is both before and after its interpretation by the Court; notwithstanding this principle, new law can be enacted which sidesteps some disfavored aspect of the decision).

Alternatively, if no action is taken to compel compliance with the Court, it could have serious ramifications for the public's perception of the Court. Most scholars perceive the Court to play an essential role in the Constitutional order, but if a political actor were able to successfully resist the Court's declaration of "what the law is," and no force was exerted by the legislative or executive branches to ensure compliance, then the Court might develop a reputation for inability to enforce its edicts. In that scenario, its decisions may be viewed as optional; if an official has substantial political capital invested in an invalidated policy, and the Court has no recourse for disobedience, the official will be more highly incentivized to simply proceed with their policy intentions. Every decision by the Court would essentially have the same legal force as an advisory opinion.[129]

III

During his presidential campaign preceding the Election of 2020, President Biden campaigned heavily on a policy of broad student loan forgiveness. Over 70% of college graduates were leaving school in debt, and as of 2016, the average debt balance for a new college graduate was $37,000.[130] Recognizing the need for most Americans to borrow in order to fund their higher education, and recognizing the abysmal state of the job market at the time, the President maintained his commitment to reducing the debt burden held by student loan borrowers, and

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[129] An advisory opinion has no legal force; it merely informs the parties as to how laws apply to certain situations. Federal courts are not allowed to issue advisory opinions; the judicial power that federal courts exercise does not exist unless there is a legitimate adversarial dispute that requires the judicial power for its resolution. As such, courts will not render any judgment unless it will be binding and conclusive on the parties. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948).

[130] Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt,"* FORBES (Oct. 7, 2020, 12.59 PM), https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/?sh=79ad69b558a7.

took certain actions in support of that goal when he entered office.[131]

On August 24, 2022, the President announced his most comprehensive proposal for student debt relief; he was directing Miguel Cardona, the Secretary of Education, to enact a three-part program to reduce the debt burdens of graduates making less than $125,000 per year. The plan proposed:

> 1. To forgive $20,000 in federal student loan debt held by Pell Grant recipients, as well as $10,000 in federal student loan debt held by non-Pell Grant recipients;
> 2. To introduce an income-driven repayment plan that would reduce the monthly payments required of borrowers, as well as loosening the eligibility requirements that borrowers had to satisfy to qualify for the Public Service Loan forgiveness program; and
> 3. To enable Americans to attend community colleges for free, while holding schools accountable for hikes in their tuition rates.[132]

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[131] At the time of President Biden's inauguration, Congress was not amenable to his proposal for broad student loan forgiveness. Democrats' thin majority in the Senate and the House of Representatives was insufficient to withstand divisions over the policy within their own caucus, notwithstanding opposition from the Republicans, Sylvan Lane, *Pelosi Disputes Biden's Power to Forgive Student Loans*, THE HILL (July 28, 2021, 2:34 PM), https://thehill.com/policy/finance/565297-pelosi-disputes-bidens-power-to-forgive-student-loans/. There were some, minor steps that the President was able to take without Congressional support. This includes directing the Secretary of Education to extend a pause on Federal student loan repayment and ensuring that these federal loans accrue 0% interest during this time, Press Release, U.S. Dept. of Educ., At the Request of President Biden, Acting Secretary of Education Will Extend Pause on Federal Student Loan Payments, (Jan. 21, 2021) (on file with author).

[132] *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need it Most*, THE WHITE HOUSE: BRIEFING ROOM (Aug. 24, 2022),

Just over a month after the White House announced their plan, a group of six states sued the President, arguing that the Secretary of Education lacked statutory authority to enact the plan as he was directed to do.[133] The President cited the Higher Education Relief Opportunities for Students Act of 2003[134] (the HEROES Act) as the legal authority for his plan.[135] That statute was enacted in response to the September 11, 2001 terrorist attacks, and gave "the secretary of education the power to 'waive or modify any statutory or regulatory provision' to protect borrowers affected by terrorist attacks."[136] In a brief filed in the Supreme Court, Solicitor General Elizabeth Prelogar argued that the Act was not limited to terrorist attacks, but instead allowed the Secretary to "respond to a 'national emergency' by waiving or modifying 'any statutory or regulatory provision' governing federal student loans," which would include the proposal in question.[137] The COVID-19 pandemic had been declared a national emergency, triggering Secretary Cardona's authority under the HEROES Act.

The Court disagreed. On June 30, 2023, the Court issued an opinion in which the forgiveness plan was framed as a fundamental change to the federal student loan scheme. While the Court conceded that the HEROES Act authorizes Secretary Cardona to waive or modify existing statutory provisions, the Secretary's actions apparently exceeded his authority under both of those provisions. In his Opinion of the Court, the Chief Justice found the forgiveness scheme would amount to a "'basic

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https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

[133] Brief for Petitioner at 11, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

[134] 20 U.S.C. §§ 1098aa-1098ee, (2003).

[135] Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 OLC Lexis 3 (2022).

[136] Adam Liptak, *What is the HEROES Act?*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/us/politics/heroes-act.html.

[137] Brief for Petitioner at 18, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

and fundamental chang[e] in the scheme' designed by Congress," rather than a mere modification.[138]

Secretary Cardona had argued that his power to 'waive' under the Act was broader than his right to 'modify,' but the Chief Justice did not think that this power allowed him to waive $10,000 to $20,000 of student debt obligations. Rather, Chief Justice Roberts interpreted this to allow the Secretary to nullify certain legal agreements, seemingly excluding student loan agreements from that arrangement.[139] President Biden had lost at the Supreme Court, and the broad student loan forgiveness program upon which he had campaigned for the Presidency was foreclosed by the Court.

After the decision was issued, President Biden signaled his disagreement, but committed nonetheless to honor the Court's authority, promising to find "other ways to deliver relief to hard-working middle-class families."[140] While the Court found his universal debt forgiveness plan to be too broad, President Biden subsequently engaged in more targeted debt forgiveness, specifically targeting borrowers in the Public Service Loan Forgiveness program, as well as borrowers whose loans were serviced through an income-driven repayment program.[141]

What if the President had followed the paths of Governors Persons and Faubus, and of the Alabama and Texas legislatures, by acting in direct opposition to the Court's unfavorable decision? Would student loan balances be reduced by the amount he pledged in the August 2022 plan? Would those balances eventually be forced back up by subsequent administrations? Based on the historical analysis in Part I, it is

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[138] *Nebraska*, 600 U.S. at 494.
[139] *Id.* at 498.
[140] Press Release, The White House, Statement from President Joe Biden on Supreme Court Decision on Student Loan Debt Relief (June 30, 2023), (on file with author).
[141] Lexi Lonas, *Biden Has Forgiven Billions in Student Loans. Who Has Gotten the Relief?,* THE HILL (Jan. 23, 2024, 6:00 AM), https://thehill.com/homenews/education/4422088-biden-forgiven-student-loans-debt-relief/.

not likely that unilateral action by the President or the Secretary of Education would suffice to reduce the debt burden of student loan borrowers. When Governors Persons and Faubus acted in contradiction to the Court, they were soon brought into compliance, largely through intervention by the executive branch of the federal government on the Court's behalf. It's unlikely that the same would happen right away in this case, since the officials working on the student loan forgiveness program are all in the upper echelons of the executive branch of the federal government. Although, just as the Obama Administration quickly reversed EPA's resistance to *Massachusetts*, the next Presidential administration would be within their rights to reverse Secretary Cardona's actions, adding the forgiven $10,000 to $20,000 back to borrower's student loan accounts. Many borrowers, whose loans would have been forgiven entirely under Biden's plan, could fall back into debt to the Department of Education and its loan servicers.

However, President Biden theoretically has better prospects to see his goal realized that did Governors Persons or Faubus. Chief Justice Roberts's vacatur of President Biden's plan was based on the theory that it required Secretary Cardona to exceed his authority under the HEROES Act. The case involved statutory interpretation by the Court, not Constitutional interpretation. Recall that an unfavorable statutory interpretation can be avoided by merely amending the interpreted statute by simple majority. Chief Justice Roberts found that the Act's grant of authority to waive or modify existing statutory or regulatory provisions could not comprise Biden's broad loan forgiveness plan, since the plan went farther than that authority would permit. However, if the political appetite existed in Congress, a Senator or Representative sympathetic to Biden's cause could introduce a bill amending the HEROES Act and adding or amending a provision to authorize broader action on student loans. Alternatively, that sympathetic congressman could also introduce a more straightforward bill designed at reducing the debt burden held by American graduates, specifically delegating that authority in an executive branch official. That would cure the legal issues

that halted forgiveness in *Nebraska*. The Court would no longer be able to say that the Secretary is exceeding his authority, since Congress would be explicitly granting him that authority.

If Congress were more productive, and less hostile to the President's student loan intentions,[142] this would be enough to cure the statutory issues that the Court presented the first time around. However, another threat comes from the Constitution. Before student loans may be accepted, student borrowers must sign contracts promising to repay the debts they are incurring.[143] This leaves debt relief vulnerable to the Contract Clause, under which the government may not interfere with the performance of contractual obligations unless it is justified by an appropriate exercise of the State's police power.[144] This proscription would require proponents of debt relief to show that, without debt relief, "vital public interests would…suffer."[145] Their relief would also be limited to a "temporary and conditional restraint" of the challenged contract provisions.[146] The requirement that relief be "temporary" would probably defeat the purpose of the debt relief program. Even if not, it's unlikely that the proponents of student debt forgiveness could carry the burden required by relevant caselaw.[147]

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[142] Bills introduced to grant broad student loan forgiveness have failed to make it out of their respective committees. *See* Student Loan Relief Act, H.R. 4797, 117th Cong. (2021).

[143] Meghan Lustig, *Student Loan Promissory Note: What to Know*, U.S. NEWS & WORLD REP. (June 17, 2022, 9:57 A.M.), https://www.usnews.com/education/blogs/student-loan-ranger/articles/student-loan-promissory-note-5-things-to-know-before-you-sign.

[144] *Manigault v. Springs*, 199 U.S. 473 (1905) ("…the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as…are necessary for the general good of the public, though contracts…may thereby be affected.").

[145] *See Blaisdell*, 290 U.S. at 440.

[146] *Id*.

[147] *Blaisdell*, 290 U.S. at 437 ("The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."). The Court's decision against the student loan relief proposed by President Biden did not discuss any economic interests that would be harmed absent debt relief. Rather, Chief

While passing a law clearly authorizing student debt relief would easily side-step the Court's prohibitive statutory interpretation, a proscription based in the Contracts Clause would present a more insurmountable obstacle to the President's intentions. History demonstrates that officials who act in defiance of the Court's mandates generally come into compliance before fully realizing their contrary goals, and the current membership of the Court does not appear poised to recreate the two exceptions to this rule.[148]

In fact, the climate that preceded the Court's unusual approval of the defiant S.B. 8 is distinguishable from the student loan context on two grounds. First, the *Jackson* Court had already heard oral argument in a case in which a majority of the Justices agreed that "*Roe* was egregiously wrong from the start."[149] Despite the law that was officially on the books at the time, these justices did not believe that the Constitution should confer a substantive due process right to abortion. Without that right, Texas' actions were arguably not in violation of the Fourteenth Amendment.

Second, even if the Justices couldn't overtly admit that they were disregarding a precedent that they felt was incorrect, they may have known that its days were numbered. If abortion

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Justice Roberts had significant concerns for the State's economic interests *if relief occurred*. *Nebraska*, 600 U.S. 477, 496 (describing the debt relief program as one that would "[create]…$430 billion in federal debt.").

[148] The Court's orders prevailed over the interests of the contrary officials in *Worcester*, *Brown*, *Massachusetts*, and *Allen*. Lincoln's interests were brought into line with Constitutional interpretation following the ratification of the Fourteenth Amendment, and while constitutional amendment would theoretically authorize Biden's intended actions, the political landscape in Congress and state legislatures throughout the country do not indicate any hope for a proposed constitutional amendment authorizing the cancellation of student debt. The exceptions to the rule set by *Worcester*, *Brown*, *Massachusetts*, and *Allen* are the Reconstruction Amendments changing the law to render *Dred Scott* obsolete, and the Texas legislature's disobedience of *Roe* and *Casey*, which was ultimately authorized by the Court's changed Constitutional interpretation in *Dobbs*.

[149] Dobbs v Jackson Women's Health Org., 597 U.S. 215, 231. The Court heard oral argument in *Dobbs* on December 1, 2021, and the opinion in *Whole Women's Health v. Jackson* was released on December 10, 2021.

restrictions would be constitutionally permitted in a few months anyway (upon the *Dobbs* ruling), that incentivizes the Court to just allow Texas a head-start; the law surrounding abortion will be inconsistent for a few months, but that inconsistency would end as soon as the Court released its *Dobbs* decision, and it allows them to avoid disentangling the bizarre enforcement scheme that S.B. 8 created.[150]

President Biden benefits from neither of these considerations. First, the Court has already heard oral argument in a student debt relief case *and ruled 6-3 against the debt relief program*. This suggests, if anything, that any attempts by the President to resist the Court's ruling would be challenged by the Court, not tolerated.

Second, there is no case pending before the Court in which the Justices could reverse their decision in *Nebraska*. If the President were to resist enforcing the Court's decision, he could not simply wait out the clock until the Court rules for him, as the Texas Legislature did. Even if there was a case pending before the Court whose lower court record could support a reversal of *Nebraska*, there is no evidence to suggest that any of the six votes against debt relief would change their mind.

The Court has determined that the law does not currently authorize Biden's student debt relief plans. His only hope of continuing the relief program is if Congress changes the law to authorize relief. Given the unlikelihood that Congress amends this law, Biden's student loan relief program is effectively dead in the water. It appears as though the President knew, almost

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[150] Courts are supposed to resolve the legal question and do no more. There is a concern that, if the Court were allowed to rule on every aspect of a case, notwithstanding its relevance to the ultimate disposition, then judges could essentially legislate from the bench. The Judicial Power granted to courts in Article III of the Constitution enables them to resolve legal disputes, but it authorizes them no further. As Chief Justice Roberts said, "[if] it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs*, 597 U.S. at 348. If the Court dove into the merits of S.B.8, it could unintentionally raise more questions and increase uncertainty. Given these concerns, the Court found it preferable to simply toss the case on standing.

immediately, that this would be the case. The White House quickly pivoted to new, targeted forms of debt relief.[151]

The Supreme Court is deceptively powerful. At first glance, it appears to be the least powerful, most dependent branch of government. From a financial standpoint, it is entirely dependent on Congress.[152] From a security standpoint, it is dependent on the Supreme Court Police, comprised of officers of the Executive Branch working pursuant to a Congressional statute.[153] When it has faced serious resistance, it has been reliant on executive actions, such as activation of the National Guard, to give force to its decisions.

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[151] A few hours after the *Nebraska* decision was released, Secretary Cardona announced three steps that the Biden Administration was prepared to make, in apparent anticipation that they would lose the *Nebraska* case. First, the Department began the rulemaking process to promulgate greater authority to settle with loan servicers and reduce the balances on certain loans. Next, the Department rolled out the Saving on a Valuable Education (SAVE) Program, which reduces required monthly payments based on the income of the borrower, preventing borrowers from falling behind due to an inability to make the required payments. Lastly, the Department announced that, while borrowers would need to begin repaying their loans, they would be given a one-year 'on ramp' period, during which they could wean themselves back into a life where student loan payments form part of their monthly expenses. In the year after *Nebraska* was issued, the Administration had forgiven almost $138,000,000,000 in student debt from almost 3,900,000 borrowers over the course of over two dozen targeted, executive actions. *See Fact Sheet: President Biden Cancels Student Debt for More than 150,000 Student Loan Borrowers Ahead of Schedule*, THE WHITE HOUSE (Feb. 21, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-president-biden-cancels-student-debt-for-more-than-150000-student-loan-borrowers-ahead-of-schedule/. *Press Briefing by Press Secretary Karine Jean-Pierre, Secretary of Education Miguel Cardona, and Deputy Director of the National Economic Council Bharat Ramamurti*, THE WHITE HOUSE, (June 30, 2023, 4:30 PM), https://www.whitehouse.gov/briefing-room/press-briefings/2023/06/30/press-briefing-by-press-secretary-karine-jean-pierre-secretary-of-education-miguel-cardona-and-deputy-director-of-the-national-economic-council-bharat-ramamurti/; THE WHITE HOUSE, *supra* note 133.

[152] U.S. CONST. art. I, § 9, cl.7.

[153] 40 U.S.C. § 6121(a).

After his loss in *Worcester v. Georgia*, President Jackson apocryphally noted, "John Marshall has made his decision, now let him enforce it."[154] However, that taunt relies heavily on a flawed, underestimated view of the Court's influence throughout the government. Sure, John Marshall may not have any troops at his command. And, as long as the Appropriations Clause remains valid, the Court will rely on Congress for its funding. But Jackson's comments imply that the Court acts alone, and that no other state actors would go to bat for the Court. It fails to adequately consider that government officials trust and value the Constitution. In fact, most government officials must take an oath pledging to support and defend the Constitution. Supporting and defending the Constitution involve supporting all of it, whether or not one personally agrees with every word of what it says. If the Court says that Georgia cannot govern Native territory, the President could disagree with that decision. But for his disagreement to have any effect, then every single judge and prosecutor handling criminal cases in Georgia will have to agree to ignore the Court and proceed with their prosecutions. Currently, the Constitution is too popular in the United States for every responsible official to ignore the Court. Somewhere along the way, there will be a prosecutor who decides not to bring charges, or a judge who reverses convictions due to the lack of jurisdiction over Native land. Since most government officials aren't interested in violating their Constitutional oath, there will always be someone who brings the Court's wishes to fruition. There will be someone like President Eisenhower or Kennedy, activating the National Guard to integrate schools. There will always be lower court judges who refuse to approve voting maps that they find to violate the Voting Rights Act.

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[154] Justice Breyer, University of Pennsylvania Law School Commencement Remarks, (May 19, 2003).

CONCLUSION

Anxiety about the state of the U.S. government and its future is widespread and enduring. Some voters are concerned that certain politicians will assume power and disregard the democratic process.[155] Other voters are concerned that the electoral system will be manipulated to achieve certain results[156].

These concerns are not unfounded; political rhetoric has been growing more polarized, and as ideas veer toward the extreme, reverence to the institutions that would provide guardrails against those extremes is diminishing. There is a tangible sentiment that certain leaders, whose intentions would be hindered by these institutions, will be able to steamroll past any obstacles and realize their goals despite the Constitution.[157]

It can be difficult to have faith in these institutions which seem vulnerable to despotic influences. The situation feels exceptionally hopeless when those in the highest echelons of American government are echoing these institutional threats.[158] However, there was a time when President Jackson was the most powerful force occupying American government. Jackson was

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[155] Thomas Carothers & Frances Z. Brown, *Can U.S. Democracy Policy Survive Trump?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 1, 2018), https://carnegieendowment.org/2018/10/01/can-u.s.-democracy-policy-survive-trump-pub-77381; *New Poll: 81% of Voters Believe Democracy is Threatened*, GEO. U. INST. OF POLS. AND PUB. SERV. (Mar. 21, 2024), https://politics.georgetown.edu/2024/03/21/new-poll-81-of-voters-believe-democracy-is-threatened/.

[156] Vanessa Williamson, *Democratic Decline in the United States: Strategic Manipulation of Elections*, THE BROOKINGS INST. (Oct. 23, 2023), https://www.brookings.edu/articles/democratic-decline-in-the-united-states-strategic-manipulation-of-elections/.

[157] Lawrence B. Glickman, *Trump's Call to Suspend the Constitution Betrays the Lawlessness of Law and Order*, WASH. POST (Dec. 15, 2022, 6:00 AM), https://www.washingtonpost.com/made-by-history/2022/12/15/donald-trump-law-and-order/.

[158] Alex Woodward, *'Election Deniers' Are Still Running Congress Three Years After January 6*, THE INDEP. (Jan. 5, 2024, 5:34 PM), https://www.the-independent.com/news/world/americas/us-politics/election-denier-congress-jan-6-trump-b2473943.html.

fervent in his intentions for the Native territory in Georgia, and he was forceful in his opposition to the Court. Despite his power and influence, he was unable to single-handedly overcome institutional guardrails. His influence was insufficient in the face of patriotic officials, too devoted to the Constitution to capitulate to Jackson's will.

Likewise, Governors Faubus and Persons' actions were indisputably popular among their constituencies.[159] This popularity, combined with Southern notions of states' rights against federal overreach,[160] made the governors a seemingly unstoppable force. However, Presidents Eisenhower and Kennedy were too committed to the Constitution and its separation of powers to let the governors prevail over the founding document.

Likewise, under the Independent State Legislature Theory, the Alabama state legislature seemed uniquely powerful to decide the question of voting maps at the time. Once Alabama had been disabused of the notion that its electoral authority was absolute, and the Court ruled against the State in *Allen*, it became apparent that the Constitutional order would require new maps to be redrawn. Despite the strength of the Alabama State Legislature, officials were committed to that Constitutional order, and that commitment led them to begin working on new redistricting maps. The State Legislature's 'absolute' power was inadequate to persuade its own employees to continue with the old maps in defiance of the Court's orders.

While *Dred Scott* and *Roe/Casey* involved the law changing to vindicate the wishes of the challenging political official, there is nothing to indicate that Lincoln, or the Texas

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[159] Julie Ray, *Reflections on the 'Trouble in Little Rock'*, GALLUP (Feb. 25, 2003), https://news.gallup.com/poll/7867/reflections-trouble-little-rock.aspx. (Americans were polled after President Eisenhower activated the National Guard in a rebuke of Governor Faubus. Outside the South, 74% of Americans thought Eisenhower "did the right thing." Within the South, only 36% of respondents approved of Eisenhower's actions).

[160] Alan Singer, *Brown v. Board of Education of Topeka, Kansas: A Document Package with Lesson Ideas*, 4 SOC. SCI. DOCKET, no. 2, 2004 at 10, 23 ("*Brown* "climaxes a trend in the Federal Judiciary undertaking to…encroach upon the reserved rights of the States and the people.")

Legislature, would be allowed to continue their recalcitrance. At some point, an official responsible for enforcing the challenged laws would be confronted with this same choice: their loyalty to the Constitution versus their loyalty to the relevant recalcitrant official.

Every time this question has been presented, someone with sufficient authority chose the Constitution. Unless the Constitution's popularity declines significantly, it seems exceedingly unlikely that *every* responsible official would discard the Constitution. So long as that remains the case, defiance of clear Supreme Court orders will ultimately be unsuccessful.

THE OPEN AND OBVIOUS DOCTRINE: TORT LAW AS THE NEW FRONTIER FOR REVITALIZING THE JURY

Priya Vaishampayan

INTRODUCTION

The United States is experiencing a breakdown in democracy. Donald Trump, the Republican Presidential Candidate, has been convicted of and is still facing an onslaught of criminal charges.[1] Although Presidential candidate Kamala Harris has invigorated many progressive voters, the uncommitted movement has criticized Harris's position on a ceasefire[2] and for an incident involving a Palestinian speaker at the Democratic National Convention.[3] College campuses have also been the center of discord. Police have arrested over 2,400 students engaged in protests on more than 50 college campuses across the country.[4] Meanwhile, public faith in the government is low.[5] According to a recent Pew poll, only "22% of Americans say they trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (21%)."[6] Additionally, only about 47% of Americans have a positive view of the current Supreme Court, which is close to a

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[1] *See Tracking the Trump Criminal Cases*, POLITICO (Aug. 2, 2024, 4:00 AM), https://www.politico.com/interactives/2023/trump-criminal-investigations-cases-tracker-list. *See also* Eric Tucker & Alanna D. Richer, *Feds File New Indictment in Trump Jan. 6 Case, Keeping Charges Intact but Narrowing Allegations*, AP NEWS (Aug. 27, 2024, 8:42 PM), https://apnews.com/article/trump-jack-smith-jan-6-186c874404912578e44d5781c8267e2d (noting a new indictment that narrowed certain allegations against Trump for the January 6 riots in light of the Supreme Court decision on presidential immunity).

[2] *See* Hala Alyan, *This is Who Kamala Harris Fails*, N.Y. TIMES (Aug. 28, 2024), https://www.nytimes.com/2024/08/28/opinion/kamala-harris-gaza-israel-war.html.

[3] *See* Aymann Ismael, *This Isn't Going Away for Kamala Harris*, SLATE (Aug. 29, 2024, 4:05 PM), https://slate.com/news-and-politics/2024/08/kamala-harris-dnc-speech-israel-gaza-trump.html.

[4] Janie Boschma & Lou Robinson, *How Pro-Palestinian Protest Arrests Have Unfolded Across College Campuses*, CNN (May 8, 2024), https://www.cnn.com/2024/05/08/us/pro-palestinian-protests-arrests-colleges-dg/index.html.

[5] *See Public Trust in Government: 1958-2024*, PEW RSCH. CTR., (June 24, 2024) https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/.

[6] *Id.*

"historic low" in approval ratings.[7] Our civil jury system has also been in sharp decline. Prior to the pandemic, only 0.5% of civil cases proceeded to trial in federal court and less than 1% went to trial in state courts.[8] This stands in stark contrast to the 5.5% standard in the mid-1900s.[9] Thanks to a combination of settlement and pretrial procedures, our legal system has incentivized parties to avoid trial.[10] Although less trials make for a more efficient legal system, it also means that the public plays little to no role in case outcomes.

In this note, I will focus on the decline of our civil jury system as a critical issue. Fewer trials inevitably take away the role of people in shaping the law. And this may produce laws that are less democratic or detached from specific community interests. Ultimately, I will explore how our breakdown in democracy can be traced to the decline of our civil jury system. On the other end, I will examine how our country can revitalize the jury as a democratic institution. I will look to various sources—tort law, sociology, and political philosophy—to reimagine a legal system that can better center community and people.

In the first section of this note, I will examine the origins and development of the jury system. I will trace its development through key historical periods and assess how our legal system and prominent leaders failed to establish the jury as a robust institution. Moving on, I will turn to Hannah Arendt's theory on revolutions to shed light on the essential principles that comprise robust democratic institutions. Through her theory on the successes and failures of

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[7] Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR., (Aug. 8, 2024) https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/.

[8] John Quinn, *The Decline of the Civil Jury Trial: Implications for Trial Practice*, NEWSWEEK (May 18, 2022, 10:34 AM), https://www.newsweek.com/decline-civil-jury-trial-implications-trial-practice-1707481.

[9] *Id.*

[10] *See id.*

revolutions, I hope to use this as a theoretical starting point for how legal our system can reconfigure our conception of the jury. Then, this note will shift to tort law. I will examine how tort law is much more than just personal injury law—but an area of law that is grounded in sociology and community values. By tracing the evolution of the Restatements, I will note how community has become the focal point of tort law. Diving deeper into tort law, I will examine the open and obvious doctrine. Under this doctrine, property owners are not liable for any harm caused by a dangerous condition on their property if that harm was open and obvious to a reasonable person.[11] It operates as a no duty rule, in that it allows judges to dismiss plaintiff's negligence claims if they find that the plaintiff encountered an open and obvious danger.[12] The open and obvious doctrine is relevant for two reasons. First, it allows judges to dismiss cases without jury involvement and therefore stands in contrast to tort law's overall shift to community values.[13] Second, this doctrine is an interesting example of how our legal system diminishes the role of the jury. In particular, I will focus on New York's varying approach to the doctrine and examine how New York can change its approach to be more community minded. Finally, I will turn to sociological theories to conceptualize how tort law could be an ideal starting point to re-imagine and re-establish our juries as democratic institutions. By re-interpreting traditional doctrines, like the open and obvious doctrine, and re-imagining a new role for the jury, we can begin to re-build our democracy.

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[11] *See* RESTATEMENT (SECOND) OF TORTS § 343 cmt. a (A.L.I. 1965).
[12] *See id.*
[13] *See* RESTATEMENT (FIRST) OF TORTS § 347(A.L.I. 1934) (landowners are not liable for open and obvious dangers); Michalski v. Home Depot, Inc., 225 F.3d 113, 118 (2d Cir. 2000) (noting the no-duty rule and the shift in Restatements to a foreseeability standard).

I. THE CIVIL JURY SYSTEM

Civil juries have preceded the founding of our nation. Leading up to the revolution, colonists relied on the jury to guard against the Crown's tyranny.[14] An early example of this is John Peter Zenger's trial.[15] In this case, Zenger faced libel and corruption charges for publishing articles that criticized British rule.[16] During the trial, Alexander Hamilton represented Zenger and argued that the jury should assess matters of law and fact in this case.[17] Notably, the jury acquitted Zenger despite the judge threatening perjury for failure to issue a guilty verdict.[18] At the time, colonists celebrated the Zenger trial as a symbol of resistance against the Crown.[19]Blackstone also praised the jury for this very reason.[20] In his scholarship, he described juries as the "principal bulwark of [every Englishman's] liberties" and a "strong and two-fold barrier . . . between the liberties of the people[] and the prerogative of the crown."[21] Thus, leading up to the American Revolution, juries were celebrated for their resistance to British occupation.

Much has changed since the American Revolution, however. Although colonists viewed the jury as a guard against British power, current scholars have highlighted other aspects of the civil jury. Charlotte Tilley takes a sociological view and characterizes the jury as a source of community values.[22] Juries are composed of community members and reinforce or

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[14] Richard L. Jolly et al., *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 93 (2022).
[15] *Id.*
[16] *Id. See also* Jon P. McClanahan*, The 'True' Right to Trial by Jury: The Founders' Formulation and its Demise*, 111 W. VA. L. REV. 791, 792-93 (2009).
[17] Jolly, *supra* note 14, at 93.
[18] *Id.* at 94.
[19] *Id.*
[20] *Id.* at 93.
[21] *Id.*
[22] *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320 (2017).

create new social norms in issuing a verdict.[23] Like communities, juries discuss and evaluate the boundaries of social norms.[24] Thus, juries are much more than just factfinders—they infuse the legal system with insight on shifting social norms and articulate how the law should operate in communities.[25] Others have praised juries as an essential component of democracy.[26] Juries help uphold our system of checks and balances and ensure that citizens can check government power.[27] Juries also serve as a powerful form of political participation.[28] They empower people to take an active role in our legal system and in turn, reinforce public trust in government.[29] While the jury system is not free of fault, it inspires citizens to serve the public, expands their understanding of the legal system, and reaffirms confidence in the legal system.[30]

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[23] *Id.* at 1353-54.

[24] *See id.* at 1354 (noting that jurors are "drawn from the community…to either approve or disapprove of the defendant's behavior.").

[25] *See id.* at 1353 ("Tort law replicates the processes that sociological communities use to cultivate, reshape, and signal social norms in areas where the political community at large has expressed no specific outcome preference.").

[26] *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241 (2014).

[27] *See id.* at 1271 ("The civil jury further distributes the divided authority of the state and vests citizens with direct and substantial authority with respect to one of the state's functions: adjudicating disputes both among citizens and between citizens and government officials."); Jolly, *supra* note 14, at 84 (noting that juries serve as a "bulwark against powerful social and economic actors" and ensure that government cannot impact "core private rights…without passing through a body of laypeople.").

[28] *See* Jolly, *supra* note 14, at 85.

[29] *See id.* at 85 (noting that juries foster a "commitment to democratic governance").

[30] *See* Judge Pierre H. Bergeron, *The Promise of State Constitutions in Restoring Jury Trials*, STATE CT. REP. (Apr. 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/promise-state-constitutions-restoring-jury-trials. This is not to say that juries are free of fault. First, juries can substantially increase the costs of cases. For instance, an article noted that jury trials increased the average cost of torts cases from "$1,740 to $15,028." Another concern is that jury trials incentivize

Recently however, jury trials have become a rare occurrence. The Brennan Center noted that only one percent of cases make it to a jury trial.[31] This percentage is similar for general jurisdiction courts in New York State, wherein only 1.15% of civil cases were tried by a jury.[32] There are various hypotheses for this decline. The COVID-19 pandemic created unprecedented challenges for our legal system.[33] The pandemic forced courts to temporarily halt trials and other legal proceedings.[34] For instance, In 2020, the Court Statistics Project noted that "juries disposed of a median of only 0.06% of filed civil disputes—with Alaska reporting zero civil jury trials for the second year in a row."[35] Bench trials also declined.[36] While in 1962, 6% of cases were resolved by bench trials, this percentage fell to 0.21% in 2021.[37] Even once pandemic conditions improved, courts had to reckon with a

attorneys to prioritize style over substance. Critics argue that this could embolden trial lawyers to be "overly flamboyant" to persuade juries to find for a party. This in turn creates the need for more evidence rules to protect juries from "manipulative lawyering." Finally, critics argue that juries are not competent to analyze complicated legal issues. This stems from jury member's lack of technical knowledge on certain legal matters, susceptibility to lawyer's "theatrics", and pro-plaintiff bias. Proponents of the jury system could argue that juries' truth-seeking and democratic function justify increased costs to the legal system. *See* Case Comment, *Developments in the Law: The Civil Jury*, 7 HARV. L. REV. 1408, 1424-26, 1429-30, 1433, 1437 (1997).

[31] *See* Bergeron, *supra* note 30.

[32] Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 27, 32 (2017) (citing data from 2012, "the most recent year for which comprehensive civil case statistics are available").

[33] *See* Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19.

[34] *See id.*

[35] Jolly, *supra* note 14, at 114.

[36] *Id.*

[37] *Id.*

backlog of cases and how to effectively implement remote proceedings.[38]

Some have argued that the Federal Rules of Civil Procedure marked the decline in jury power. As a law journal article noted: "[t]he original drafters of the rules were radically anti-jury" and "[v]irtually everyone connected with urging uniform procedural rules denigrated juries."[39] In line with this idea, the drafters created jury waiver default rules that required a litigant to affirmatively request a jury trial.[40] Failure to do this would result in a bench trial.[41] John Langbein contends that the development of pre-trial procedure has made it unnecessary for parties to proceed to trial.[42] For instance, the development of discovery and settlement procedures has incentivized parties to avoid the cost of trial.[43] For parties like corporations, discovery involves documentary evidence that is efficient and reliable.[44] Instead of relying on witnesses who may not be able to recall information, documentary evidence "speaks for itself" and is a better alternative to trial.[45] Summary judgment and motion to dismiss standards are also responsible.[46] Thus, the development of pre-trial procedures may explain the decrease in jury trials.

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[38] *See* Adelstein, *supra* note 33; Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic, New Report Finds*, ABA JOURNAL (Aug. 31, 2021, 12:57 PM CDT), https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds.

[39] Jolly, *supra* note 14, at 116-17.

[40] *Id.* at 117.

[41] *Id.*

[42] *See* Jonathan Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 542 (2012).

[43] *See id.* at 548 (noting that discovery facilitates settlement and "serves to displace rather than to prepare for trial").

[44] *Id.* at 548-49.

[45] *Id.*

[46] *Id.* at 526, 543 (noting that pleadings such as 12(b) motions to dismiss provide an "early-stage opportunity" for defendants to dismiss a case and that summary judgment and pre-trial procedures cause many cases to be resolved at the pre-trial level).

Public confidence in courts has also dropped. A recent article noted that "US Supreme Court's fall in public confidence was most precipitous, declining from 63% approval to 53% from last year's standing" and that this was "20 points lower than the public's confidence in the Supreme Court a decade ago."[47] Similarly, public confidence in the government has reached a low with only 22% of Americans saying that they trust the government "to do what is right."[48] And the decline in jury trials may exacerbate this problem. First, the decline in trials will result in less case law, which could create "greater uncertainty about trial outcomes and substantive law."[49] Additionally, less trials could lead to less equitable outcomes.[50] One concern is that disproportionate reliance on pre-trial procedures can lead to decisions that are devoid of the "full factual content that has in the past given our law life and the capacity to grow."[51] Ultimately, juries bring transparency to the judicial process.[52] They allow citizens to weigh facts and provide new perspectives on how the law should be applied.[53] And without this equalizing force, our democracy could be in danger.

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[47] Valerie Hans, Richard Jolly & Robert Peck, *Fixing the Public's Confidence in the Courts Starts with Juries*, BLOOMBERG L. (Dec. 21, 2022), https://news.bloomberglaw.com/us-law-week/fixing-the-publics-confidence-in-the-courts-starts-with-juries?context=search&index=9.
[48] Pew Rsch. Ctr., *supra* note 5.
[49] Smith & MacQueen, *supra* note 32, at 35.
[50] Robert P. Burns, *What Will We Lose if the Trial Vanishes*, 37 OHIO N.U. L. REV. 575, 576 (2011) (noting that the loss of jury trials would "wound our legal order" and democracy).
[51] *See id.*
[52] *See* Bergeron, *supra* note 30 (noting how juries uphold both justice and transparency in the legal system).
[53] Jolly, *supra* note 14, at 86-87 (noting how jurors bring "diverse viewpoints" to factfinding and incorporate community norms into their decision-making).

II. TRACING THE JURY THROUGH KEY HISTORICAL PERIODS

Although scholars have conceptualized the jury as a symbol of democracy, the modern-day jury has yet to match up to that ideal. To understand why the jury has failed to meet its lofty goals, I will examine how individual and institutional actors in the Founding Era and Reconstruction period failed to properly imbue the jury with certain ideals. The Founding Era marked the beginning of America's democracy.[54] Similarly, the Reconstruction was a watershed moment in which the United States grappled with how to establish a legal system, uphold democracy, and civil rights.[55] Even with this potential, both historical periods quickly lost steam and failed to properly situate the jury as a key to democracy.[56] In these next two sections, I will explore why these two periods failed to establish the jury as a key component of our legal system.

A. The Founding Era

The Founding Era was a pivotal moment for the beginning of our nation. In the wake of the American Revolution, the Founders envisioned a political system free of tyranny and authoritarianism.[57] The jury was one such

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[54] *See* Yaniv Roznai, *Revolutionary Lawyering? On Lawyers' Social Responsibilities and Roles During a Democratic Revolution*, 22 S. CAL. INTERDIS. L.J. 353, 358 (2013); Jack P. Greene, *The American Revolution*, 105 AM. HIST. REV. 93, 93 (2000) (noting that the American Revolution was the first stage in "dismantling imperial structures").

[55] *See* Eric Foner, *The Civil War, Reconstruction and the Origins of Birthright Citizenship*, MARQ. LAW. MAG. 34, 34 (noting how "Reconstruction was a unique moment" in history for "political democracy" and African American rights).

[56] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States.*, 61 U. CHI. L. REV. 867, 894-95 (1994) (noting the continuing racial disparities in jury service after Reconstruction). *See generally* Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville About Juries: Juries Empower Judges*, 81 LA. L. REV. 1 (2020) (noting Tocqueville and Montesquieu's top-down view of juries).

[57] *See* Jolly, *supra* note 14, at 92.

safeguard.[58] In *Democracy in America*, Alexis de Tocqueville characterized the jury as a political institution.[59] He likened jury service to universal suffrage and described it as putting the "real direction of society in the hands of the governed."[60] Tocqueville also emphasized the importance of a civil jury.[61] He described how the civil jury "vests each citizen" with a public duty and involves the practice of equitable principles. .[62] Finally, one of Tocqueville's pivotal points was that the jury is a "public school" that helps people learn about their rights, the legal system, and exchange information.[63]

Even with this lofty language about the jury, scholars have begun to rethink Tocqueville's characterization of the jury. One such scholar, Renee Lettow Lerner, has characterized Tocqueville and Montesquieu in a drastically different light.[64] In her article, she described how Tocqueville praised juries because of their ability to hide judicial power.[65] While Tocqueville sought to prevent government tyranny, he also believed that too much popular control could lead to chaos.[66] To Tocqueville, the judge was the safeguard of democracy, not the jury.[67] Tocqueville's paternalistic views can be gleaned from *Democracy in America*. For instance, Tocqueville was explicitly elitist in his characterization of the jury as a school: he described how jury service exposes people to "enlightened members of the upper class" and thus expands their

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[58] *See id.*
[59] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, at 442 (James T. Schleifer ed. & trans., Liberty Fund 2012) (1835) (ebook).
[60] *Id.* at 445.
[61] *Id.* at 447-48.
[62] *Id.* at 448.
[63] *Id.* at 448 ("I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation: and I look upon it as one of the most efficacious means for the education of the people, which society can employ.").
[64] *See generally* Lerner, *supra* note 56.
[65] *Id.* at 2, 6.
[66] *See id.* at 6.
[67] *See id.*

knowledge.[68] Instead of characterizing jurors as possessing crucial knowledge, he saw jury service as increasing the "natural intelligence of a people."[69] Tocqueville also placed considerable importance in the judge. To Tocqueville, the judge possessed the most knowledge about the law, guided the jury, and "put the question of law into their [juror's] mouths."[70] In fact, his view of the jury can be summed up in this sentence: "the jury sanctions the decision of the judge."[71] Thus, contrary to what people may think, Tocqueville viewed the jury as subordinate to the judge and in many ways, his characterization of the jury was antidemocratic.

Montesquieu also shared similar views about the jury. Montesquieu described how juries helped "deflect[s] attention from judges."[72] To Montesquieu, jurors engaged in the "dirty work" of factfinding and assumed the blame for bad decisions.[73] He was also concerned about the jury's ability to understand legal issues and bias.[74] For the first concern, he believed that jurors should only decide questions of fact.[75] He also advocated simplifying cases so that jurors could accurately issue verdicts.[76] In terms of juror bias, Montesquieu believed that new trials and taking away certain criminal cases from the jury could help reduce bias.[77] Thus, thinkers like Montesquieu and Tocqueville characterized the jury as a minor aspect of the legal system.

This elitist and paternalistic characterization of the jury prevented it from becoming a true function of democracy. And though Tocqueville and Montesquieu were not the only scholars, they represented prominent political leaders'

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[68] *See* TOCQUEVILLE, *supra* note 59, at 266, 422.
[69] *Id.*
[70] *Id.* at 267.
[71] *Id.*
[72] Lerner, *supra* note 56, at 16.
[73] *Id.*
[74] *Id.* at 17.
[75] *Id.* at 13.
[76] *Id.*
[77] *Id.*

attitudes about juries.[78] Because the conception of juries was so limited, the Founders were unable to institutionalize the jury as valuable thinkers and embodiment of community values.[79] And by characterizing jurors as mere agents of judges, the Founders missed the mark in establishing a robust democratic system.

B. Reconstruction

Reconstruction was another pivotal period in which the jury could have emerged as a major institution. In the wake of the civil war, the United States abolished slavery and reckoned with how to re-imagine American citizenship.[80] Reconstruction was a period in which the United States could have enacted significant civil rights change.[81] However, President Lincoln's death and President Johnson's assumption of the presidency led to the opposite result.[82] President Johnson was "deeply racist" and sought to scale back the abolition of slavery through the Black Codes.[83] Through the Black Codes, many Southern states passed laws that required Black men to sign labor contracts and work for white employers.[84] Failure to do so would result in an arrest, fine, and indentured servitude.[85] In response, Congress enacted the Civil Rights Act of 1866 and later enshrined crucial civil rights

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[78] Lerner, *supra* note 56, at 2-3 (noting that Tocqueville and Montesquieu were "influential thinkers" and developed foundational scholarship on topics such as the separation of powers doctrine).
[79] *See id.* at 52-53 (noting that Tocqueville and Montesquieu's notion of the jury as a "mask" for judicial power may have "backfired" and masks judicial incompetence or corruption).
[80] Foner, *supra* note 55, at 34, 37.
[81] *See id.* at 34 (noting that Reconstruction was a "unique moment" for "political democracy" and African American rights).
[82] *See id.* at 39-40.
[83] *Id.* at 39.
[84] *Id.*
[85] *Id.*

in the Fourteenth and Fifteenth Amendments.[86] Even with this, however, Reconstruction proved to be a failure for progress in civil rights and racial justice.[87]

Louisiana is a key example of the failure of the civil rights enforcement. In the wake of the Civil War, Louisiana appeared to be a potential incubator for civil rights progress.[88] Louisiana was home to a significant proportion of Black people, Black political leaders, and was host to a major city.[89] However, growing Black political power soon led to a backlash of White Supremacist violence.[90] Ranging from murders to voter intimidation, Louisiana soon faced a crisis that only the Supreme Court could resolve.[91] However, through a series of decisions, the Supreme Court repeatedly refused to intervene and uphold Black people's civil rights.[92]

United States v. Cruikshank is a prime example. In, *Cruikshank*, the Court refused to apply the Fourteenth or Fifteenth Amendment to the states.[93] *Cruikshank* arose out of the brutal Colfax massacre, when a mob of white men murdered around 105 Black men in Louisiana.[94] Although the State prosecuted 97 men in connection with the massacre, a jury only convicted three of conspiracy.[95] Ultimately, the Supreme Court upheld the dismissal of charges against the defendants and held that neither the Fourteenth nor the Fifteenth Amendment allowed the federal government to

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[86] *See* Foner, *supra* note 55, at 39-41.
[87] *Id.* at 42 (noting the failure of the Reconstruction and the rise of patriotism and xenophobia).
[88] Donna A. Barnes & Catherine Connolly, *Repression, the Judicial System, and Political Opportunities for CR Advocacy during Reconstruction*, SOCIO. Q., Spring 1999, at 327, 329.
[89] *Id.* at 329-30.
[90] *Id.* at 331.
[91] *Id.* at 333.
[92] *Id.* at 335 (noting how the Supreme Court refused to enforce the Fourteenth Amendment to states and ultimately hampered civil rights progress).
[93] *See* United States v. Cruikshank, 92 U.S. 542 (1875).
[94] Barnes & Connolly, *supra* note 88, at 332.
[95] *Id.* at 335.

exercise jurisdiction over state civil rights cases.[96] In one fell swoop, the Supreme Court indicated that the federal government would not intervene in egregious racial violence.[97] Furthermore, the Court's decision meant that states had ultimate control over civil rights violations.[98] For states like Louisiana, this meant that the South would have free rein in dismantling any civil rights progress.

The *Civil Rights Cases* of 1883 are also notable. In these five consolidated cases, the Court invalidated portions of the Civil Rights Act of 1875 and held again that the Fourteenth and Fifteenth Amendments did not grant federal jurisdiction over the states.[99] As a result, federal courts could not intervene and stop egregious racial violence at the state level.[100] The Supreme Court's jurisprudence reflected the Court's broader concern about the centralization of power and the Court's belief that it needed to prevent the federal government from encroaching on individual rights.[101] However, this reasoning also created a "structural context" that ultimately doomed the civil rights movement in the Reconstruction period.[102]

The Reconstruction Era's setback in civil rights also limited the jury's development. Initially, Reconstruction brought momentum in dismantling racial barriers to jury service and conceptualizing the jury as an essential right.[103] For instance, the Civil Rights Act of 1875 prohibited jury discrimination.[104] Moreover, the Civil Rights Act built on language from the Fifteenth Amendment which prohibited the federal or state government from denying rights to citizens

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[96] *Id.* at 336.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Barnes & Connolly, *supra* note 88, at 338-39.
[101] *Id.* at 340.
[102] *Id.*
[103] *See* Andrew G. Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1124 (2014) (noting that during the Virginia Constitutional Convention of 1868, Charles Porter introduced a resolution that framed jury service as a right available to people of all races).
[104] AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 273 (2000).

based on race.[105] The Supreme Court also appeared to affirm this idea. In *Strauder v. West Virginia*, the Supreme Court held that The Supreme Court of West Virginia violated the Fourteenth Amendment in preventing black people from serving on a jury in a criminal case.[106] Finally, the Fifteenth Amendment recognized African American's rights to not only serve on the jury, but to vote and hold office.[107] However, this progress was short-lived. Though the federal government and the Supreme Court prohibited racial barriers to jury service, many Southern states did not enforce this right.[108] Ultimately, like the Founding Era, the government and the Supreme Court in the Reconstruction period fell short in establishing the jury as a democratic institution.

1. Hannah Arendt's Theory and the Jury System

The Founding Era and Reconstruction period are critical in showing how our jury system has failed to reach its true potential. To examine how we can reimagine the jury as a democratic institution, I will turn to Hannah Arendt's theories on revolutions and political institutions.

In *On Revolution*, Hannah Arendt theorized about the success of specific revolutions and the key to creating robust political institutions. In her book, she praised the American Revolution for its focus on freedom.[109] Arendt conceptualized freedom as a positive right.[110] Unlike liberation which meant freedom from government intrusion, freedom required the

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[105] *Id.*
[106] *Id.*; Strauder v. West Virginia, 100 U.S. 303, 304 (1879).
[107] AMAR, *supra* note 104, at 273.
[108] *See* Alschuler & Deiss, *supra* note 56, at 894-95 (noting that "the right remained unenforced for most of the century" and that in 1910, "African Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia").
[109] HANNAH ARENDT, ON REVOLUTION 62-63 (1963).
[110] *See id.* at 25 (characterizing liberation as a negative right "to be free from oppression" and freedom as the "formation of something new").

creation of something completely new.[111] To Arendt, this distinction was important. Revolutions based on liberation only allowed people to choose who could *not* rule, rather than who *could* rule.[112] Thus, revolutions based on liberation resulted in monarchies, whereas freedom resulted in a completely new system.[113] In more concrete terms, freedom meant political participation and "admission to the public realm."[114] Thus, Arendt concluded that the American Revolution's focus on freedom as a positive and collective right led to its success.

In addition, Arendt attributed the downfall of the French Revolution to its focus on necessity and social inequality.[115] Arendt noted how irresistibility and violence were at the heart of the French Revolution.[116] Rather than creating robust political institutions, the French revolutionaries saw their purpose as "historical necessity" which meant that "instead of freedom, necessity became the chief category of political and revolutionary thought."[117] To Arendt, this was the French Revolution's fatal flaw. Without a clear vision for creating a new government, no one could control the course of the revolution and it devolved into the Reign of Terror.[118] Arendt also criticized the French Revolution's focus on social inequality.[119] This overreliance on social inequality prevented the French Revolution from creating a robust government.[120] Although this point is certainly controversial, theorists have argued that Arendt was not opposed to eradicating social inequality, but believed that revolutions must first focus on

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[111] *Id.*
[112] *Id.*
[113] *See id.*
[114] *Id.*
[115] ARENDT, *supra* note 109, at 54-55.
[116] *See id.* at 40-42 (defining irresistibility and noting that it "echoe[d] from beginning to end through the pages of the French Revolution").
[117] *Id.* at 46.
[118] *Id.* at 44, 92, 94-95.
[119] *See id.* at 54-55.
[120] *See id.* (noting that the revolution's focus on necessity and poverty prevented the French from establishing freedom).

creating democratic institutions.[121] Put another way, Arendt believed that successful revolutions must be both "radical and conservative."[122] Revolutions must be radical in destroying old institutions and must also "moderate change" in order to create "free and durable institutions."[123] Although the validity of Arendt's theories about social issues is beyond the scope of this note, her emphasis on creating robust political institutions is worth noting.

Central to Arendt's analysis of freedom was the importance of collective action. For instance, Arendt criticized Rousseau for his emphasis on the individual.[124] Rousseau theorized that citizens would not communicate or exchange ideas in an "ideal republic" and that promoting individuality would help avoid political factions.[125] In contrast, Arendt argued that individual identity could only be formed collectively.[126] She believed in a "collective effort" to create a government based on "shared public principles."[127] By exchanging information and establishing principles, people would make promises to each other, which would in turn create a strong foundation for freedom.[128] And to Arendt, juries and town halls captured this idea of collective action.[129] Arendt praised town-hall meetings and juries because of their ability

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[121] *See* Daniel Gordon, *"The Perplexities of Beginning": Hannah Arendt's Theory of Revolution*, *in* THE ANTHEM COMPANION TO HANNAH ARENDT 116-18 (Peter Baehr & Philip Walsh eds., 2017); Herbert A. Deane, *On Revolution. by Hannah Arendt*, 78 POL. SCI. Q. 620, 620-21 (1963) (reviewing Hannah Arendt, On Revolution (1963)) (arguing that Arendt's scholarship was "insensitive to the problem of poverty" and characterized her as a conservative).

[122] Gordon, *supra* note 121, at 117.

[123] *Id.*

[124] *See* James Miller, *The Pathos of Novelty: Hannah Arendt's Image of Freedom in the Modern World*, *in* HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 177, 187 (Melvyn Hill ed. 1979).

[125] *Id.*

[126] *See id.* at 191.

[127] *Id.*

[128] *Id.*

[129] *See* Hannah Arendt, *On Hannah Arendt in* RECOVERY OF THE PUBLIC WORLD 317 (Melvyn A. Hill ed., 1979).

to debate issues of "common public interest" and engage in "active citizen participation."[130] Thus, collective action was a key aspect of Arendt's concept of freedom and democracy.

Arendt's theory offers an interesting perspective on re-conceptualizing the jury. On the one hand, she emphasized the importance of creating robust political institutions and basing government in collective action.[131] At the same time, however, she believed that political institutions should be distinct from entities that promulgate social policy.[132] Although this garnered criticism, Arendt made an important point in examining the building blocks of dynamic political institutions. In a later section, I will further explore how Arendt's thinking and sociological theory can help reformulate our idea of the jury.

III. TORT LAW

Tort law also offers unique insight into reconceptualizing our civil jury system. Negligence, in particular, grapples with how communities should deal with harm. Consider the following example. A child wanders onto a construction site. No workers are present at the time. As the child wanders around the site, he accidentally falls into a manhole and sustains severe injuries. If this was public property, is the government liable for the child's injury? Or does the child assume risk by wandering onto the site? Put another way, how should the law rectify this harm? In this section, I will focus on how the open and obvious doctrine grapples with these very

[130] However, Arendt also limited collective action to political issues. Thus, juries and town halls could decide political issues, but not social issues. This point has garnered significant controversy in the academic community. Although Arendt's distinction between the social and political spheres is beyond the scope of this note, it is important to capture the nuances of Arendt's definition of collective action. *See id.* at 315-317.

[131] *See* Miller, *supra* note 124, at 191.

[132] *See* ARENDT, *supra* note 109, at 315-16 (noting that the French and Russian Revolutions failed due to its focus on social issues whereas the American Revolution succeeded due to its focus on creating political institutions).

questions. First, I will turn to sociology as a helpful starting point for understanding tort law. Then, I will analyze the Restatement's shifting approach to the open and obvious doctrine and the emergence of the reasonable person standard. Finally, I will examine New York's divided approach to the open and obvious doctrine.

A. The Sociological Underpinnings of Tort Law

Sociology is a helpful theoretical framework for tort law. In *Tort Law Inside and Out*, Christina Tilley theorized that tort law is a "vehicle" for communities to continuously examine and change values.[133] First, Tilley examined differing interpretations of community.[134] For instance, Locke defined community as individuals agreeing to give up certain rights to allow the state to properly enforce public welfare.[135] Thus, Locke viewed the State as the ultimate source of community values.[136] Conversely, sociologists conceptualize community as existing outside the State.[137] Tilley hypothesized that communities form "because the state is incapable of 'meet[ing] the psychic demand of individuals'" due to massive bureaucracy, complicated organization, and disconnect from individual concerns.[138] Thus, individuals step in to fill this gap and create community values through discussion of ideas about adequate social rules.[139]

Tilley also examined how solidarity and significance are essential to communities. Solidarity is akin to "social unity" and significance means that a person feels empowered to "fulfill in the reciprocal exchanges of the social scene."[140] Through both

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[133] Tilley, *supra* note 22, at 1320.
[134] *See id.* at 1346-48.
[135] *See id.* at 1348.
[136] *See id.*
[137] *See id.* at 1349.
[138] *Id.*
[139] Tilley, *supra* note 22, at 1351.
[140] *Id.* (quoting R.M. MACIVER & C.H. PAGE, SOCIETY 293 (1961)).

solidarity and significance, individuals create community norms.[141] And if a member disobeys a norm, this in turn motivates communities to evaluate the boundaries of these social norms.[142] Tilley argued that tort law operates in the same way as communities do.[143] The jury is a key actor. Throughout a tort case, a jury will assess whether a defendant is liable for harm.[144] In reaching this decision, jurors will contemplate whether a defendant's behavior violated a community norm.[145] And just like an individual's violation of a norm can motivate a community to reconsider that norm, a defendant's behavior can prompt juries to reexamine current liability rules.[146] Finally, both solidarity and significance are critical to juries. Jurors must feel empowered to construct norms and be able to work collectively to reach a verdict.[147] As I will explore in a later section, Tilley's concept of community is critical to rethinking the open and obvious doctrine and the jury as an institution.

Tilley also traced the evolution of theories regarding tort law. Tort law has been defined by two competing theories: corrective justice and economic theory.[148] Initially, tort theorists conceptualized tort law as furthering corrective justice by penalizing wrongdoers for harming victims.[149] As legal realism emerged, scholars opted for a new approach that focused on fairly allocating costs "without discouraging socially useful activities."[150] Oliver Wendell Holmes advocated for the view that "injurers should *not* be held liable in tort on the theory that any infliction of harm was immoral, but instead

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[141] *Id.* at 1352.
[142] *Id.* at 1352-53.
[143] *Id.* at 1353.
[144] Tilley, *supra* note 22, at 1354.
[145] *Id.* at 1354-55.
[146] *Id.* at 1355.
[147] *See id.* at 1352 (noting that just as solidarity and significance enable community members to create norms, this will enable juries to construct cogent norms).
[148] *Id.* at 1326-27.
[149] Tilley, *supra* note 22, at 1326.
[150] *Id.* at 1327.

that liability should attach only if the injurer's actions were [unreasonable]. . .."[151] This reasonable person standard would become the foundation of tort law.

In the 1970s, judges and theorists continued to expand this economic theory. Some theorists reasoned that tort law should base liability on the party who could have incurred the least cost in avoiding the accident.[152] Posner added to that idea by postulating that tort law should be based in efficient allocation of resources.[153] Nevertheless, Tilly hypothesized that the economic theory did not completely eliminate the corrective justice view of tort law.[154] Rather, these competing theories draws on a broader theme: the importance of community values.[155]

B. Restatements of the Law and the Open and Obvious Doctrine

Restatements of the law play a critical role in tort law. The American Law Institute publishes the Restatement of the Law to guide courts about key principles in a certain area of law.[156] Through existing case law, statutes, and normative principles, the Restatement assists courts in applying the law.[157] However, unlike statutes or precedent, Restatements only serve as persuasive authority.[158] The American Law Institute has promulgated three restatements regarding tort law—all of which have changed dramatically regarding the open and obvious doctrine. For instance, while the Restatement First did not hold landowners liable for individuals harmed by

[151] *Id.*
[152] *Id.* at 1329.
[153] *Id.*
[154] *Id.*
[155] Tilley, *supra* note 22, at 1342.
[156] *Restatement of the Law*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/restatement_of_the_law (last visited Oct. 22, 2024).
[157] *See id.*
[158] *Id.*

an open and obvious danger, the Restatement Second shifted away from this strict rule and noted that a landowner could be liable for harm if that harm was foreseeable.[159] As I will discuss below, this shift in the Restatements is crucial—by discarding traditional rules, the Restatement imposed a duty of reasonable care on landowners and involved the jury as a key actor in the process.[160]

C. Restatement First

The American Law Institute promulgated the Restatement First of Torts in 1934.[161] The First Restatement merely summarized common law and did not propose any normative approaches to tort law.[162] This approach affected the Restatement's interpretation of the open and obvious doctrine. Specifically, §340 stated: "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."[163] Thus, the open and obvious doctrine operates as a no-duty rule under the Restatement First.[164] If a licensee knew

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[159] *Compare* RESTATEMENT (FIRST) OF TORTS § 347(A.L.I. 1934) (absolving landowners of liability for open and obvious dangers), *with* RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965) (shifting to a foreseeability standard and noting that landowners could be liable in certain situations).
[160] *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 (A.L.I. 2012).
[161] RESTATEMENT (FIRST) OF TORTS (A.L.I. 1934).
[162] *See* Richard L. Revesz, *The Debate Over the Role of the Restatements*, A.L.I. (Aug. 8, 2019), https://www.ali.org/news/articles/debate-over-role-restatements/ (quoting Herbert Goodrich) (noting that the First Restatement sought to "state the law as it was, not as some of us would like it to be.").
[163] RESTATEMENT (FIRST) OF TORTS § 347(A.L.I. 1934). The Restatement also applied the open and obvious doctrine to public utilities and stated that a public utility would not be liable for an open and obvious condition unless a person had no choice but to encounter the danger to use the utility. *See id.* §347.
[164] *See* Michalski v. Home Depot, Inc., 225 F.3d 113, 118 (2d Cir. 2000).

of and appreciated the risk of the open and obvious danger, the landowner did not owe any duty of reasonable care to that person.[165] Applying this to the courts, this no duty rule allowed judges to dismiss plaintiff's negligence claims if the judge found that the plaintiff encountered an open and obvious danger.[166] Ultimately, the traditional interpretation of the open and obvious doctrine shielded landowners from liability and centralized power in judges, rather than juries.

The Restatement First also created strict classifications for land entrants. For instance, an invitee is a business visitor who is invited or permitted to be on the land for a direct or indirect business purpose.[167] On the other hand, a licensee is a person who the landowner permitted or invited to be on his or her land.[168] Finally, a trespasser is a person who intentionally entered a landowner's land without his or her consent (or an existing privilege).[169] By creating these classifications, the Restatement (and common law) sought to protect landowners from liability against certain entrants.[170] For instance, a landowner owes a duty of reasonable care to an invitee, but only a duty to refrain from wanton or willful injury to a trespasser or licensee.[171] These classifications also had feudal origins and reflected a time when our "culture [was] deeply rooted to the land" and placed a high value on land

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[165] *See id.* ("Traditionally, a landowner was not subject to liability to business visitors for dangerous conditions on the premises if the visitor knew of the condition and recognized the risk.").
[166] *See* Sandler v. Patel, 733 N.Y.S.2d 131 (App. Div. 2001) (dismissing a plaintiff's negligence claim because it was open and obvious and noting that liability "will not attach when the dangerous condition complained of was open and obvious") (quoting Panetta v. Paramount Communications, 681 N.Y.S.2d 85 (App. Div. 1998)).
[167] RESTATEMENT (FIRST) OF TORTS § 332 (A.L.I. 1934).
[168] *Id.* § 330.
[169] *Id.* § 158.
[170] *See* Rowland v. Christian, 443 P.2d 561, 565 (Cal. 1968) (noting that the justification for limiting a landowner's liability for licensees was that "a guest should not expect special precautions to be made on his account").
[171] *Id.*

ownership.[172] However, the Restatement Second changed the application of this rule.

D. Restatement Second

The Restatement Second changed the strict interpretation and based the doctrine off foreseeability.[173] The context of the Restatement's drafting is also important. At the time, many viewed the First Restatement and other authoritative sources as "ponderous" and "inaccessible."[174] The First Restatement provided information about black letter law and hypotheticals and was too abstract for both practitioners and law students to understand.[175] However, Prosser soon changed this. In the Second Restatement, Prosser condensed complicated legal precedent into clear and understandable principles.[176] Prosser's work was also unique in that it centered the community (and policy) as a function of tort law.[177] A survey found that the Restatement Second alluded to community forty-seven times.[178] This survey also found that these references appeared in every section of the Restatement (including negligence).[179] Thus, although not explicit, the Second Restatement certainly appeared to center community as a key consideration of tort law.[180]

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[172] Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959). *See also Rowland*, 443 P.2d at 565 (noting that strict classifications stemmed from the high value of land ownership in Anglo-American society and landowner power).
[173] *See* Michalski v. Home Depot, Inc., 225 F.3d 113, 119 (2d Cir. 2000).
[174] Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 42 (2013).
[175] *See id.* at 41-42.
[176] *Id.* at 45.
[177] *See* Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1164 (1992) (noting that Prosser was interested in policy and the "social functions of tort law"); Tilley, *supra* note 22, at 1342.
[178] Tilley, *supra* note 22, at 1342.
[179] *Id.*
[180] *Id.*

The Restatement's treatment of the open and obvious doctrine also reflected this broader normative change. Contrary to the Restatement First, the Restatement Second stated that a landowner could be liable for open and obvious dangers in certain situations.[181] For instance, if a landowner could anticipate that an open and obvious danger would harm an invitee, then the landowner could be liable for harm.[182] Additionally, the Restatement noted that if a landowner had reason to expect that "invitee's attention may be distracted, so that he will not discover what is obvious….or fail to protect himself against it," then the open and obvious doctrine will not apply, and the landowner will owe a duty of reasonable care to the invitee.[183] By doing this, the Restatement Second moved away from strict no duty rules and signaled that landowners owe a duty of reasonable care to land entrants in specific situations.

E. Restatement Third

The Restatement Third went even further than the Second Restatement. It stated that an open and obvious danger does not relieve a landowner of liability and applies to all entrants (except for flagrant trespassers).[184] The drafters reasoned that even if an entrant could discover an open and obvious danger, landowners are still responsible for "residual risks."[185] Therefore, the jury should assess open and obvious dangers at the comparative fault stage.[186] The Restatement

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[181] *See* RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965).
[182] *Id.* ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.").
[183] *See id.*
[184] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 (A.L.I. 2012).
[185] *See id.*
[186] *See id.* (noting the comparative fault scheme and the old rule that landowners owed no duty of reasonable care regarding open and obvious dangers).

detailed that "[w]hen land is held open to the public and a high volume of entrants can be anticipated, a reasonable possessor should anticipate greater risk, requiring greater precaution than if the land is private or few entrants are likely."[187] In assessing reasonable care, "the fact-finder must also take into account the surrounding circumstances, such as whether nearby displays were distracting and whether the landowner had reason to suspect that the entrant would proceed despite a known or obvious danger."[188].

The Restatement Third is notable not only for its radical treatment of the open and obvious doctrine, but its reconceptualization of tort law. In *The Reasonable Person*, Miller and Perry noted that the Restatement Third proposed a "normative commitment" that was atypical of tort law or the American Law Institute.[189] Specifically, the authors found that past restatements were "predominantly positive and only incrementally normative."[190] Other scholars have criticized this change and argued that it undoes the stare decisis doctrine.[191] Some believe that the Restatements should merely "restate the law" in a "non-prejudicial manner so as not to unleash normative forces" that the courts have not legitimized through stare decisis.[192] In short, some theorists believe that the courts, not restatements, should dictate the normative

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[187] *Id.*
[188] Kelli Michelle Devaney, *Summary of Foster v. Costco Wholesale Corp., 128 Nev. Adv. Op. 71*, 129 *NEV. L. J. SUP. CT. SUMMARIES* (Jan. 1, 2013).
[189] Allen D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 334 (2012). *See also* Tilley, *supra* note 22, at n.102 (noting that although the Restatement Third didn't center community as much as the Second Restatement, it still placed community on the same level as efficiency and theoretical justifications).
[190] Miller & Perry, *supra* note 186, at 333 (quoting Stephen Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 814 (2001)).
[191] *See* Steven Hetcher, *Symposium: Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 866 (2001).
[192] *Id.*

direction of tort law.[193] Regardless of the debate, however, the Restatement Third was a unique effort to instruct the legal system on how tort law should operate.

A few other things are worth nothing. The Restatement Third was unique in that it was completed in "discrete projects" rather than a comprehensive work with one author.[194] Unlike William Prosser, who drafted the Second Restatement, multiple actors drafted the Third Restatement and published sections at different times.[195] Additionally, the Third Restatement was drafted at time when tort law had become a lot more politicized and policy-oriented.[196] Whereas tort law was mainly associated with automobile accidents in personal injury law in the 1960s, it has now become associated with medical malpractice, environmental issues, and much more.[197] Since then, a diverse range of actors have emerged with distinct interests in shaping the direction of tort law.[198] Thus, the Restatement Third included both a radical shift in tort law regarding duty and the open and obvious doctrine and more contention in other areas, such as products liability.[199]

IV. TORT LAW'S SHIFT TO REASONABLE CARE

Modern courts have mirrored the Restatement's shift to the reasonable care standard. Notably, the Supreme Court has stated, "[t]he distinctions which the common law draws

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[193] *See id.* (implicitly noting that restatements should be written in an objective way so as not to affect legitimate processes like stare decisis).
[194] Michael D. Green, *Symposium, Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1011, 1012 (2011).
[195] *Id.*
[196] *See* Sugarman, *supra* note 177, at 1164; Tilley, *supra* note 22, at 1338-39 (noting that the Restatement Third of Products Liability was drafted by various "interest group appeals" and that the group's reporters were "brokers of ideas advanced by contending political forces.").
[197] Sugarman, *supra* note 177, at 1164.
[198] *See id.*
[199] *See id.*; Miller & Perry, *supra* note 189 (noting the Restatement Third marked a dramatic shift in drawing normative conclusions about the law).

between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism."[200] The Supreme Court went on to note that due to industrialization and urbanization, modern courts have applied more nuanced rules.[201] Other courts have followed this reasoning. In *Rowland v. Christian*, the California Supreme Court noted, "[w]hatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules."[202] In one fell swoop, the Court rejected categorical classifications (such as invitee or trespasser) and held that property owners owe a duty of reasonable care to everyone.[203]

New York has also shifted to the reasonable care standard. *Basso v. Miller* is a helpful example of how New York courts abandoned strict entrant classifications in favor of the reasonable care standard.[204] In *Basso*, the Court of Appeals noted the historical roots of these classifications.[205] Licensee and trespasser classifications arose out of the feudalism era, when the economy was mostly agrarian, and landowners depended on land for subsistence.[206] As the concurrence elaborated, it was "socially desirable policy" for a "landowner to use and exploit his land as he saw fit" without having to worry about liability.[207] As a result, the common law created strict classifications, such as trespasser and invitee, to "immuniz[e]" the landowner from liability.[208] However, with industrialization, there was no longer a need for such strict

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[200] Kermarec v. Compagnie, 358 U.S. 625, 630 (1959).
[201] *See id.*
[202] Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968).
[203] *See id.* at 568.
[204] *See* Basso v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976).
[205] *See id.* at 871-72.
[206] *See id.* at 871-72, 875 (Breitel, C.J., concurring).
[207] *Id.* at 875 (Breitel, C.J., concurring).
[208] *Id.* (Breitel, C.J.., concurring).

classifications.[209] As a result, modern courts attempted to be more flexible and create further sub-classifications, but this only created further confusion.[210] Finally, the majority noted various sister courts that abandoned these classifications and adopted the duty of reasonable care.[211] Thus, the Court of Appeals adopted the reasonable care standard and held that a landowner should maintain his property in a "reasonably safe condition" and factor in the likelihood of injury to other people and the "burden of avoiding the risk."[212]

Rowland v. Christian is also helpful in illustrating a broader shift in tort law. In *Rowland*, the plaintiff sued Ms. Christian in response to injuring his hand while using her bathroom faucet.[213] The plaintiff argued that Ms. Christian knew that the faucet was broken, and was therefore negligent in failing to fix the open and obvious danger.[214] In response, Ms. Christian filed a motion for summary judgment and argued that the plaintiff was contributorily negligent and assumed the risk of harm.[215] The Court found for the plaintiff and reasoned that the evidence did not show the faucet was obviously cracked to a third party.[216] Rather, the Court found it likely that Miss Christian knew of the danger, could have expected that the plaintiff would not discover the danger, and that she failed to exercise a duty of reasonable care to either fix the danger or warn the plaintiff.[217]

In reaching this conclusion, the Court articulated a radical shift in assessing landowner liability. Rather than following the traditional classifications (such as invitee or trespasser), the court noted that society now exercised "an increasing regard for human safety" that justified abandoning these strict

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[209] *See id.* (Breitel, C.J., concurring).
[210] *See Basso*, 352 N.E.2d at 872.
[211] *See id.* (citing Rowland v. Christian, 443 P.2d 561 (Cal. 1968)).
[212] *Id.* (quoting Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 100 (D.C. Cir. 1972)).
[213] 443 P.2d. at 562.
[214] *See id.*
[215] *Id.* at 562-63.
[216] *Id.* at 563.
[217] *Id*.

rules.[218] The Court also cited precedent that reflected this shift in viewing harm. For instance, in *Hansen v. Richey*, the court found that the defendant's liability for a wrongful death action regarding a youth who drowned in a pool should be based on the landowner's knowledge of the dangerousness of the pool.[219] In *Howard v. Howard*, the Court held that the defendant was liable for plaintiff's injury from a slip and fall because he instructed the plaintiff to walk through an area that he knew was dangerous and failed to warn the plaintiff of this condition.[220]

In sum, modern courts are trending towards more nuanced and holistic understandings of examining harm. Central to this shift is the overall improvement in societal conditions.[221] As the court noted in *Basso*, the shift from feudalism to a more egalitarian society has prompted courts to re-examine liability.[222] Additionally, the shift in societal norms have made courts more attuned to personal safety.[223] In the next section, I will examine how New York's trend towards the reasonableness standard does not comport with its interpretation of the open and obvious doctrine.

V. NEW YORK'S APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE

Although New York Courts have shifted to a reasonable care standard, the courts are unclear regarding the open and obvious doctrine. Generally, New York Courts have held that the open and obvious doctrine does not negate a landowner's

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[218] *Id.* at 565.
[219] *Rowland*, 443 P.2d at 565 (citing *Hansen*, 46 Cal. Rptr. 909, 913 (Cal. Ct. App. 1968).
[220] *Rowland*, 443 P.2d at 565 (citing *Howard v. Howard*, 9 Cal.Rptr. 311, 312-13 (Dist. Ct. App. 1960)).
[221] *See* Basso v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976) (noting that industrialization diminished the need for strict entrant classifications).
[222] *See id.*
[223] *See Rowland*, 443 P.2d. at 565 (noting that society now places a higher value on human safety).

duty of reasonable care.[224] The courts have held that while the open and obvious doctrine can negate a duty to warn, it does not affect the duty of reasonable care.[225] However, New York courts do not apply this in a uniform manner. For instance, courts still apply the open and obvious doctrine as a no duty rule to "natural geographic phenomena."[226] In *Melendez v. City of New York*, the First Department held that the open and obvious doctrine negated the City's liability for a plaintiff's injuries from slipping off a waterfall ledge.[227] The Court reasoned that since the waterfall and the slippery ledge were open and obvious, the plaintiff should have reasonably anticipated the danger.[228] The Court also tried to reconcile its holding with New York's shift to the reasonable care standard.[229] Although open and obvious dangers do not negate a duty of reasonable care, it can negate a duty regarding "natural geographic phenomena."[230] Finally, the Court noted precedent supporting this exception.[231]

Other cases have invoked this natural geographic exception. In *Cohen v. State of N.Y.*, four young men drowned

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[224] *See Basso*, 352 N.E.2d at 872 (holding that landowners owe a duty of reasonable care and rejecting traditional entrant classifications); *Cupo v. Karfunkel,* 767 N.Y.S.2d 40, 42-43 (App. Div. 2003) (noting that a landowner must maintain property in a reasonably safe condition).

[225] *See Cupo,* 767 N.Y.S.2d at 42-43 (noting that a landowner owes a duty of reasonable care but does not have a duty to warn of open and obvious dangers).

[226] Cohen v. State of N.Y., 854 N.Y.S.2d 253, 255 (App. Div. 2008); Melendez v. City of N.Y., 906 N.Y.S.2d 263, 264 (App. Div. 2010).

[227] *Melendez*, 906 N.Y.S.2d at 264.

[228] *Id.*

[229] *See id.* (noting various Departments' rejection of the open and obvious doctrine).

[230] *Id.*

[231] *See Cohen*, 854 N.Y.S.2d at 255 (noting that the duty of reasonable care does not extend to natural geographic phenomena which "can readily be observed by those employing the reasonable use of their senses") (quoting Tarricone v. State, 571 N.Y.S.2d 845, 847 (App. Div. 1991)); Cramer v. Cty. of Erie, 804 N.Y.S.2d 201, 201-02 (App. Div. 2005) (noting that the defendant county had no duty to warn or protect a plaintiff from a ravine because it was a "natural geographic phenomenon").

after entering a swimming hole in the Adirondack State Park.[232] The Third Department noted that although a landowner has a duty "to take reasonable precautions", this did not apply to natural geographic fixtures that a reasonable person could easily observe on their own.[233] Unfortunately, the court did not expand beyond that brief explanation. At first glance, this interpretation comports with the Restatement Second on open and obvious dangers.[234] Comment b states: "the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know."[235] However, the Restatement Second also notes that § 343A requires the landowner to protect an invitee against known dangers, if the landowner can anticipate potential harm "notwithstanding such knowledge."[236] *Cohen*'s reasoning also appears to violate the Restatement Third. Comment f noted that a landowner owes a duty of reasonable care regarding risks associated with natural conditions, including bodies of water, plants, and much more.[237] Although comment f does not speak to the open and obvious doctrine, it details how the reasonable care standard applies to natural conditions.[238] Finally, comment k notes that a landowner should anticipate a greater risk of harm for public land with a high volume of entrants.[239] Thus, New York courts' application of this exception appears to go against the shift in Restatements towards a reasonable care standard.

Applying the Restatement Second's logic, the court in *Cohen* could have reached an entirely different outcome. The court could have found that the county owed a duty of reasonable care because it was public land and people often visited the swimming hole. The county could have also easily posted signs

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[232] *Cohen*, 854 N.Y.S.2d at 255.
[233] *Id.*
[234] *See* RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965).
[235] *Id.* at § 343 (A) cmt. b.
[236] *Id.*
[237] *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. f (A.L.I. 2012).
[238] *See id.*
[239] *Id.* at § 51 cmt. k.

informing the public of specific dangers, such as risks associated with high rainfall or turbulent water. Moreover, the county could have easily employed lifeguards to watch the pool if someone drowned. Thus, New York's natural geographic exception contradicts the reasonable care standard and ignores how the law can hold actors liable for harm, without imposing a high cost.

New York Courts are also unclear regarding the duty to warn. Although all four departments hold that an open and obvious danger precludes a duty to warn, the Third Department has carved out exceptions. For instance, in *Comeau v. Wray*, the Third Department found that a landowner has a duty to warn when he or she has "reason to expect that persons will find it necessary to encounter the obvious danger" and cited the Restatement Second.[240] The Restatement Second elaborates on the duty to warn. In § 343(A), comment f notes that a landowner's duty of reasonable care can include a duty to warn.[241] If a landowner can anticipate that an open and obvious danger could harm invitees, then he or she may have a duty to warn or take other reasonable steps to protect the entrant.[242] Comment f elaborated on this further:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him,

[240] Comeau v. Wray, 659 N.Y.S.2d 347, 349 (App. Div. 1997).
[241] RESTATEMENT (SECOND) OF TORTS § 343(A) (A.L.I. 1965).
[242] *See id.*

> against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.[243]

In contrast, the Second Department hasn't articulated an exception for the duty to warn or incorporated the Second Restatement. For instance, in *Cupo v. Karfunkel*, the court held that a landowner does not have a duty to warn of an open and obvious danger.[244] The court reasoned that the existence of an open and obvious danger notifies an entrant of potential risks, and therefore negates the need for a warning.[245] The court did not articulate any exceptions to this duty to warn.[246] The Court of Appeals echoed this standard. In *Tagle v. Jakobs*, the court held that a landlord did not have a duty to warn a tenant of electrical wires running through a tree.[247] The court reasoned that a reasonable person could have observed the wires and appreciated the risks associated with climbing that tree with wires.[248] Although not explicit, the court appeared to assume that the tenant assumed all risks associated with the wire,

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[243] *Id.*
[244] Cupo v. Karfunkel, 767 N.Y.S.2d 40, 42 (App. Div. 2003).
[245] *Id.* at 42-43.
[246] *See id.*
[247] 97 N.Y.2d 165, 170 (2001).
[248] *Id.* at 334.

since it was open and obvious.[249] Overall, New York courts fail to fully incorporate the Restatement Second's approach to a landowner's duty to warn.

Although New York has moved towards a reasonable care standard, the courts still fail to fully apply the modern approach to the open and obvious doctrine. For instance, the court's natural geographic exception relieves landowners of any duty of reasonable care regarding natural open and obvious dangers.[250] Similarly, the court's inconsistent application of the duty to warn also fails to recognize the Restatement Second's approach to recognizing a duty to warn in specific situations.[251] Ultimately, if New York seeks to fully apply the spirit of the Restatements, the courts should discard the natural geographic exception and formulate a duty to warn rule that comports with the Second and Third Restatement.

A. Rethinking the Open and Obvious Doctrine and the Jury

How can tort law serve as the starting point for revitalizing juries? In *Tort Law Inside and Out*, Christina Tilley argues that sociology can help re-conceptualize torts as a vehicle for community values.[252] Additionally, Hannah Arendt has penned important discourse in examining the formation of robust political institutions.[253] In this section, I will build on Tilley and Hannah Arendt's theory to re-conceptualize the jury as both a sociological and political institution. I will argue that Tilley's sociological theories should encourage New York Courts to dispense with the open and obvious doctrine and center

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[249] *See id.* (noting that a person would have reasonably seen the wires in the tree and understand the associated risks).
[250] *See* Cohen v. State of N.Y., 854 N.Y.S.2d 253 (App. Div. 2008); Cramer v. Cty. of Erie, 84 N.Y.S.2d 201 (App. Div. 2010).
[251] *See* Comeau v. Wray, 659 N.Y.S.2d 347, 347 (App. Div. 1997); Cupo v. Karfunkel, 767 N.Y.S.2d 40, 40 (App. Div. 2003).
[252] *See* Tilley, *supra* note 22, at 1324-26.
[253] *See* ARENDT, *supra* note 109 at 72.

community values in tort cases.[254] I will also reflect on how conceptualizing juries as incubators for community norms can finally achieve the "freedom" that Hannah Arendt envisioned for political institutions.[255] Finally, I will use legal empowerment theory to frame jury service as civic duty that can promote important change in our legal system.

In *Tort Law Inside and Out*, Christina Tilley examined community values in tort law. To Tilley, "torts operate as a vehicle" in which "communities perpetually reexamine and communicate their values."[256] And juries play a critical role in establishing community norms.[257] To illustrate this point, Tilley examined how juries could create community norms in the negligence context.[258] For instance, in 2015, a California law required parents to immunize their children prior to school enrollment but excepted parents who personally objected to vaccinations.[259] At this time, California also experienced a measles outbreak.[260] Tilley theorized that a parent whose child had gotten measles from an unvaccinated student could sue for negligence.[261] However, the reasonableness of this action would depend on the specific community norms: while one community in California may value vaccinations, another may

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[254] *See* Tilley, *supra* note 22, at 1354 (noting how jurors often contemplate community norms).
[255] *See* ARENDT, *supra* note 109, at 62-63.
[256] Tilley, *supra* note 22, at 1320.
[257] *See id.* at 1354 (noting that jurors "are drawn from the community" and decide whether a defendant's behavior deviates from or complies with norms); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 436 n.128 (1999) (quoting Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483 (1956) ("It offers an assurance of judgment by neighbors who understand the community climate of values, a bulwark against the petty tyrannies of headstrong judges, and a means of softening the cold letter of the law in cases of hardship.")).
[258] *See* Tilley, *supra* note 22, at 1389-90 (noting the 2015 measles outbreak as an example).
[259] *Id.*
[260] *Id.*
[261] *Id.*

not see it as a necessary public health requirement.[262] Thus, the jury could help impose the relevant community standard regarding vaccinations.

Tilley's theories about community values are especially salient for New York's approach to the open and obvious doctrine. To fully establish the jury as a hub for community values, New York courts should discard the natural geographic exception and follow the Restatement Third in assessing open and obvious dangers. Consider the following case. In *Cohen v. State of N.Y.*, four young men drowned after entering a swimming hole in the Adirondack Park.[263] The Third Department found that the county defendant did not owe a duty of reasonable care, because the swimming hole was a natural geographic fixture that a reasonable person could have easily observed on his or her own.[264] However, if a jury had considered this case, the outcome may have been drastically different. A jury composed of parents or younger people may have viewed this incident as egregious and found that the defendant should have taken greater precautions to warn the public of drowning risks. A more landowner-based jury may have taken the opposite interpretation and reasoned that the young men should have been more vigilant. Either way, sending this case to the jury would have allowed the community to articulate a cognizable norm regarding landowner's liability for natural dangers.[265] Thus, by shifting the open and obvious danger analysis to the jury, New York Courts can restore the jury as a creator of community norms.

Empowering juries to consider community values also has other benefits. In *Living As One: Tort Law and a Duty to Imagine*, Tilley noted that jury verdicts on personal injury

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[262] *Id.* at 1390.
[263] 854 N.Y.S.2d at 255 (App. Div. 2008).
[264] *Id.* at 255-56.
[265] *See* Tilley, *supra* note 22, at 1390-91 (describing how the reasonableness of vaccination in the measles case would depend on the specific community norms in which the legal dispute arose from).

claims can facilitate social cohesion.[266] Juries are a unique place where "where citizens are expected to listen to the personal narratives" of people with varied racial and economic backgrounds.[267] Through this process, juries engage in an imaginative process where they may reckon with marginalized groups' experiences and issue a verdict that seeks to redress structural inequalities.[268] As Tilley noted, although this assumes that jurors are free of biases, jurors are generally "more willing to identify with plaintiffs who lack social capital than their judicial counterparts."[269] Finally, the collaborative nature of juries encourages people to meaningfully engage with each other and consider different perspectives—all of which can foster "organic social cohesion."[270] Ultimately, situating juries as meaningful actors in the judicial system can encourage juries to address social inequity, lead to more democratic outcomes, and create a sense of unity amongst jurors.

However, to fully establish the jury as a community institution, New York courts will need to engage in broader change. For instance, courts could craft jury instructions that encourage juries to consider community values in their decision.[271] On the other end, lawyers could choose to incorporate community norms in briefs and legal memoranda regarding open and obvious dangers. And finally, juries can assess how to establish norms regarding open and obvious dangers. Should landowners be held liable for all harm that has occurred on their property? Or should liability be limited to egregious instances involving children or death? Put another way, all actors in the legal system should make a concerted

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[266] Cristina Tilley & Rebecca Ferguson, *Living as One: Tort Law and a Duty to Imagine*, CTLA FORUM, Fall 2023, at 1, 11.
[267] *Id.*
[268] *See id.* at 11-12.
[269] *Id.* at 11.
[270] *Id.*
[271] *See* Tilley, *supra* note 22, at 1390-91 (noting that juries would need to be "explicitly instructed" that community is relevant to specific tort claims).

effort to incorporate this idea of community into the analysis of open and obvious dangers.

Arendt's theories about freedom are also applicable to the jury. In an earlier section, I examined how Arendt focused on the successes and failures of different revolutions. To Arendt, the success of the American Revolution lied in its commitment to safeguarding freedom.[272] Arendt conceptualized freedom in a few ways. First, it requires the creation of something that was completely new.[273] It involves eradicating an obsolete institution and creating a new, robust political institution.[274] Arendt also saw political participation and collective action as a foundation for freedom.[275] Through collective action, people would make "promises" to each other which would form the basis for how our government interacts with people.[276] In short, freedom is only formed through collective action, mutual promises, and a radically new yet stable institution.

By encouraging juries to promulgate community norms, jurors engage in the very exercise that Arendt described. In crafting a cogent norm, jurors must make promises to each other (and maybe even compromise).[277] And in making these promises, jurors build trust with each other, feel empowered as decisionmakers, and ideally promulgate verdicts that reflect a community norm. Thus, this collaborative process results in the creation of shared principles that could not only reinspire public faith in the legal system, but also encourage the government to better address community concerns.[278] For instance, jury verdicts can inform the public and legislators about a salient public policy issue.[279] It may prompt legislators

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[272] ARENDT, *supra* note 109, at 62-63.
[273] *Id.* at 34.
[274] *See* Gordon, *supra* note 121, at 117.
[275] *See* Miller, *supra* note 124, at 191.
[276] *See id.*
[277] *See id.* (describing how collective action requires making mutual promises).
[278] *See id.* (describing how mutual promises form the basis of government); see Miller, *supra* note 124 at 187.
[279] *See* Tilley, *supra* note 22, at 1392.

to draft legislation to address a broader public safety issue raised by a tort claim.[280] Conversely, problematic jury verdicts can prompt legislators to promulgate legislation that combats this.[281] Thus, reconceptualizing the jury in this manner can facilitate legislators, organizers, and other actors to better solve pressing social issues.

Further still, critical legal empowerment theory can provide a way forward for our civil legal system. Critical legal empowerment theory focuses on redistributing legal power and placing it in the hands of marginalized communities.[282] Instead of viewing "impacted people as 'recipients of services provided by lawyers'", it conceptualizes them as "'change agents who force greater transparency, accountability, and fairness' from legal systems."[283] This is directly applicable to our jury system. Jurors are critical legal actors with the potential to push the law in an equitable direction. Jurors can help imbue the law with a unique perspective and ensure that the law properly supports marginalized communities.

To properly actualize legal empowerment theory, our legal system will need to dramatically change the way it distributes power. During a jury trial, judges can make a concerted effort to ensure that jurors understand a case's posture and encourage jurors to consider community norms in issuing a verdict. Lawyers can also invest in legal empowerment by treating jurors as dynamic legal actors. For instance, instead of relying on theatrics or emotional appeals to unfairly sway juries, lawyers can incorporate relevant policy and community norm-based arguments during trial. By doing this, lawyers can re-conceptualize jurors as significant decisionmakers, rather than a disinterested group of people with limited legal knowledge.

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[280] *See id.*
[281] *See id.*
[282] *See* Sukti Dhital et al., *Foreword: Critical Legal Empowerment*, 97 N.Y.U. L. REV. 1547, 1551 (2022) (noting that critical legal empowerment theory "embraces community-based efforts to redistribute legal power").
[283] *Id.*

Finally, jurors can reimagine their role as a civic duty. Rather than view jury service as a burden, people can see it as akin to voting or participating in a town hall meeting.[284] Similarly, instead of perceiving jury service as something that is exclusively legal, people can view it as a way to enact necessary community and policy-based change. And finally, community organizers, activists, and non-profit organizations can do their part to frame jury service as a civic duty. Ultimately, reconceptualizing the jury will require investment from all legal actors– judges, attorneys, jurors, and activists.

CONCLUSION

Revitalizing the civil jury will not be an easy task. However, tort law and community norms could be the perfect way to start this process. In this note, I traced the development of juries throughout American history and how our government, prominent leaders, and the legal system failed to properly situate the jury as a dynamic institution. I then turned to tort law and the open and obvious doctrine as a mechanism to understand the jury as an institution. Both the Restatements and case law illuminated how community norms have become a prevalent consideration of tort law. Moreover, New York's conflicting approach to the open and obvious doctrine further emphasizes how incorporation of community norms and a shift to the Third Restatement approach could better serve community interests.

Finally, I examined various theories to reimagine what a dynamic jury could look like and how New York courts could properly implement this. If we can properly reimagine the jury as a community centric and political institution, we can begin to re-build the civil jury into a dynamic and vibrant institution. And tort law is at the core of this solution. Tort law—and more specifically, community norms—can help refashion the jury into an institution that both considers and crafts community

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[284] *See* ARENDT, *supra* note 129, at 317 (praising town halls for resolving open questions).

norms when issuing verdicts. However, this process will require investment from diverse actors ranging from judges to attorneys to community organizers. Only if we invest in this new vision of the jury, can we create legitimacy to the legal system and in turn, rebuild our democracy.

TAMING THE WILD WEST: CAN ORDER BE RESTORED TO THE COLLEGIATE PLAYING FIELDS?

Edward D. Cavanagh

"Money changes everything."[1]

INTRODUCTION

On May 23, 2024, the NCAA and member conferences entered into a historic settlement to resolve the *House* case, a class action lawsuit brought on behalf of some 14,000 college athletes seeking damages for lost opportunities to gain financial benefits from their schools' use of their name, image, and likeness ("NIL") due to the NCAA's past denials of NIL compensation from media broadcasts, video games, and third parties.[2] The trial court had certified damage classes consisting of (1) men's football and basketball players; (2) women's basketball players; and (3) other sports.[3] As part of the settlement, defendants agreed to pay class members save $2.77 billion over the next ten years for some 14,000 claims dating back to 2016.[4] More importantly, the settlement also includes a provision for revenue sharing that would allow schools to commit up to $22 million per year from media revenue to be paid directly to college athletes as soon as the 2025 season,[5] marking the first time that college athletes will be permitted to receive direct payments from their institutions.

The significance of this landmark settlement cannot be overstated. As the Supreme Court has noted, "[f]rom the start,

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[1] Adam Davidson, *Money Changes Everything,* N.Y. Times (Feb 5, 2013), https://www .nytimes.com/2013/02/10/magazine/money-changes-everything.html.

[2] *See Joint Statement on the Agreement of Settlement Terms*, NCAA (May 23, 2024), https://www.ncaa.org/news/2024/5/23/media-center-joint-statement-on-the-agreement-of-settlement-terms.aspx.

[3] *See* Order Granting Motion for Certification of Damages Classes, 2023 WL 8372787, (N.D Cal. Nov. 3, 2023)
[hereinafter *House*].

[4] Ross Dellenger, *NCAA, Power 5 Conferences Vote to Approve $2.8 B Settlement in House, Hubbard and Carter Cases,* Yahoo Sports (May 23, 2024),https://sports.yahoo.com/ncaa-power-five-conferences-vote-to-approve-28b-settlernent-in-house-hubbard-and-cmter-cases-001736810.html.

[5] *Id.*

American colleges and universities have had a complicated relationship with sports and money."[6] Colleges and universities have "sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni."[7] For decades, colleges and universities have portrayed their intercollegiate athletic programs as amateur endeavors[8]—student athletes participating in extracurricular activities—while at the same time reaping tens of millions of dollars in revenue from these programs, principally from television contracts and licensing agreements.[9] Tho NCAA's current contract to broadcast its March Madness basketball tournament alone is worth $1.1 billion annually.[10] Ironically, the student athletes whose efforts created value for their institutions have not been given a piece of the pie. That irony has not been lost on college athletes who, in the past two decades, have pushed back with a flurry of lawsuits seeking, among other things, the right to be fully compensated for use of the name, image and likeness[11] and casing of strict transfer rules that required athletes transferring between schools to sit out a year before they are eligible to compete at their new schools.[12] Other athletes have claimed that they are employees of their universities and have demanded the right to compensation and the right to unionize.

The *House* settlement did not come about overnight. Rather, it was the culmination of a series of lawsuits challenging the NCAA's iron-fisted control over college athletics. Even prior to *House,* the NCAA had eased its restrictions on interschool

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[6] NCAA v. Alston, 594 U.S. 69, 74 (2021).
[7] *Id.* at 76.
[8] *Id.*
[9] *See Id.* at 79.
[10] *Id.* at 79-80.
[11] O'Bannon v. NCAA, 802 F. 3d 1049, 1052 (9th9 th Cir. 2015).
[12] *See, e.g.*, Vassar v. NCAA & Nw. Univ., No. 16-cv-10590, 2017 U.S. Dist. LEXIS 239339, 2 (N.D. Ill. Nov. 14, 2016); *see also* Press Release, U.S. Department of Justice, Justice Department and State Coalition Restore Competition for College Athletes at Division I Institutions (May 30, 2024) (insert hyperlink) (announcing proposed consent decree barring the NCAA from enforcing restrictive transfer eligibility rules).

transfers,[13] thereby making the transfer portal more accessible to athletes, and dropped its blanket opposition to NIL payments.[14] Those two developments alone have transformed intercollegiate athletics to the point that the college sports scene bears little resemblance to that which existed even two years ago. Whereas athletes once looked to colleges not only to hone their athletic skills but also to provide an education and preparation for life after sports, money is now top of mind for young recruits; and institutional loyalty is now negotiable. In many ways, the emerging model for college athletics is indistinguishable from the professional model. As LSU football coach, Brian Kelly, observed, there is "a lot of money" in college sports.[15] Kelly then drew parallels between the recruitment of college athletes and the signing of professional athletes. Like the professional rookie, the college recruit seeks a "signing" bonus.[16] Just as a free agent in professional sports asks for a bump in pay when seeking to change teams, the college athlete seeks a "free agent" bonus.[17] Like a professional player who chooses to stay put on a team, college athletes who do not transfer seek a "retention" bonus.[18] This new normal in college athletics was a factor in the decision of legendary University of Alabama football coach, Nick Saban, to retire following the 2023 season.[19] Saban recalled ruefully that today's recruits arc more

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[13] *See NCAA Approves New Rule Allowing Transfers Immediate Eligibility,* Fox Sports, https://fox.sports.com/stories/college-football/ncaa-approves-new-rule-allowing-transfers-imrnediate-eligibility (Apr. 17, 2024).

[14] *See Division I Council Approves NIL Disclosure and Transparency Rules,* NCAA (Jan. 10, 2024) https://www.ncaa.org/news/2024/1/10/media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx.

[15] Travis May, *Head Coach of LSU Football Brian Kelly says what we're all thinking when it comes to the future of college football* AtoZ Sports, (Apr. 12, 2024), https://www.atozsports.com/college -football head coach-of-isu-football-brian-Kelly-says-what-were-all-thinking-when-it-comes-to-the-future-of-college- football/.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* Chris Law, *Nick Saban wants to be a voice for change in college football,* ESPN (Feb. 21, 2024), https://www.espn.com/college-

concerned with guarantees of playing time and the amount of money they could be paid than they are about development as athletes and preparation for life after sports.[20]

Now that the *House* settlement authorizes direct payments to athletes, money has become more important than ever in shaping the intercollegiate sports scene. Far from the staid, buttoned down atmosphere that prevailed for years under the watchful eye of the National Collegiate Athletic Association ("NCAA"), the atmosphere in college sports today has been described as the "Wild West."[21] Alumni-funded booster collectives, flush with cash, are offering recruits money.[22] Are these NIL payments (OK) or pay to play inducements (not OK)? How do you tell the difference? Athletes are transferring in droves. Is there nothing a college can do to stop the talent drain? How should direct compensation payments to athletes be apportioned?

This article will (1) review the evolution to college athletics and the demise of the NCAA amateur model, principally through an antitrust lens, (2) analyze the impact of other statutory schemes, viz. (a) Labor laws, (b) Title IX, and state NIL laws; (3) offer proposals for a compensation model that brings some sanity and common sense to the intercollegiate athletics scene.

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footbalI/story/id/ 39572219/nick-saban-wants-voice-change-college-football.

[20] *See id.*

[21] Kristopher J. Brooks, *It's the "Wild, Wild West" for companies hoping to monetize college athletes,* MONEY WATCH (July 30, 2021), https://www.cbsnews.com/news-nil-college-athletes-collegiate-sports--ncaa/.

[22] *See* David Ubber & Tess Demeyer, *What is NIL How has it Changed College Sports and Why are Schools Under Investigation?* THE ATHLETIC (Feb. 2, 2024), https://www.nytimes.com/athletic5245564/202/02/21/nil-explained-ncaa-name-image-likeness-investigation.

I. THE RISE AND FALL OF THE NCAA

A. Costs of Housing and Development

The NCAA is the regulatory body governing college athletes. It consists of some 1,100 member colleges and universities and makes rules for all aspects of intercollegiate sports, including recruitment, academic eligibility, compliance, and sanctions for violating its standards.[23] The NCAA also sponsors championship tournaments, such as March Madness in basketball.[24] Founded in 1906, the NCAA' s original mission was to provide a regulatory structure for college sports that would protect student athletes, most notably football players, from injury.[25] The NCAA also sought to rid college sports of itinerant athletes who went from school to school, playing sports for pay without even enrolling.[26] Indeed, the NCAA constitution made clear that college sports were to be an amateur endeavor, providing that "[n]o student shall represent a college or university in any intercollegiate game or contest who has at any time received directly or indirectly, money or other consideration, to play on a team…."[27] In addition to direct pay, NCAA rules barred NIL payments, excessive educational payments, performance- based payments, and preferential

[23] David A. Martin, *Breaking (from) Board: Putting "Student" in "Student-Athlete" NCAA Basketball Transfer Regulations* 2019 Ill. L. Rev. 1117, 1122 (2019), *see* NCAA v. Alston, 594 U.S. 69, 74-80 (2021).
[24] *Alston*, 594 U.S. at 769.
[25] Jennifer A. Schults, *If at First You Don't Succeed Try, Try, Again: Why College Athletes Should Keep Fighting for "Employee" Status,* 56 COL. J. LAW & SOC. PROB. 452, 458-61 (2023).
[26] *Alston,* 549 U.S. at 75 ("The absence of academic residency requirements gave rise to 'tramp athletes' who 'roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better.'") *See also* SCHULTS, *supra* note 25, at 459. (stating that many college stars were suspected of parading "false college colors" that is, taking money under the table while masquerading as an amateur).
[27] *See Alston,* 594 U.S. at 76 (citing Intercollegiate Athletic Ass'n of the U.S. Const. By-Laws, art VII §3 (1906)).

treatment for athletes.[28] The NCAA did, however, allow tuition scholarships for student-athletes, and today college may, consistent with NCAA rules, pay the full cost of attendance for scholarship athletes.[29]

B. NCAA and the Sherman Act

For decades, the NCAA, its member schools, and athletes lived in relative harmony under NCAA governance. In the latter part of the twentieth century, the NCAA began to face lawsuits contending that it rules constituted unreasonable restraints of trade in violation of section one of the Sherman Act.[30] The NCAA has consistently argued that its rules are immune from antitrust scrutiny.[31]

1. NCAA v. Board of Regents of the University of Oklahoma

Harmony gave way to dissonance in 1981. Ironically, it was the schools themselves, and not the (perhaps) more aggrieved athletes, who initiated the first major antitrust action against the NCAA. Member schools with major football programs grew unhappy with NCAA policies on televising football games, particularly its exercise of complete control over the number of college games that could be televised under contracts with ABC and CBS that the NCAA had negotiated.[32] These schools formed the College Football Association ("CFA") a sub-group within NCAA Division I football, to lobby for the interests of schools with big time football programs.[33] In 1981,

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[28] *Bylaws*, art. 12 § 12.1.2.1.5, at pg. 36, NAT'L COLLEGIATE ATHLETIC ASS'N 2024-2025 DIVISION I MANUAL (2024).
[29] *Alston,* 594 U.S. at 77-78.
[30] 15 U.S.C. §l.
[31] *See Alston,* 594 U.S. at 74.
[32] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 88-95, 106 n. 30 (1984).
[33] *Id.* at 89, 94-95.

the NCAA negotiated deals with ARC and CHS to televise college football games for the 1982-85 seasons.[34]

The CFA faction was particularly unhappy with two aspects of these contracts: (1) the appearance requirements, which obligated the networks to schedule appearances for 82 member schools; and (2) appearance limitations, which provided that a school could appear on television no more than six times during the period of the contracts.[35] The appearance requirement meant that the networks would have to televise games of schools with smaller and less competitive programs. The appearance limitation provision meant that major programs would have less television exposure. The CFA then negotiated its own television deal with NBC, but backed out of that deal when the NCAA threatened sanctions if the contract were to go forward.[36]

The CFA members responded with an antitrust action under section one of the Sherman Act, alleging that the NCAA had acted as a cartel that limited the output of televised college football games and artificially raised their prices.[37] The Supreme Comi ultimately agreed that the NCAA television plan artificially limited output and raised the price of televising college football game and hence violated the Sherman Act.[38] Although the Supreme Court recognized that the NCAA's conduct mirrored the action of cartels, it declined to condemn out of hand the NCAA restrictions.[39] Analogizing the NCAA to a professional sport league, the court stated that some restrictions among member schools competitors arc necessary if the product of college football is to exist at all and that NCAA restrictions should be condemned only if they are shown to be anticompetitive as a matter of fact.[40] Accordingly, the NCAA must be given some leeway in restricting member activities.

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[34] *Id.* at 91-92.
[35] *Id.* at 94.
[36] *Id.* at 94-95.
[37] *Id.* at 95-96.
[38] *Bd. of Regents*, 468 U.S. at 98-99.
[39] *Id.* at 100-101.
[40] *Id.* at 101.

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[41]

At the same time, the Court made clear that allowing the NCAA latitude is not tantamount to granting it antitrust immunity and that NCAA acts that run afoul of the Sherman Act would be condemned.[42] Here, the Court recognized that although "maintaining a competitive balance among amateur athletic teams" was a valid interest, the NCAA had failed to prove that the restrictive television plan could achieve competitive balance.[43]

> [c]onsistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record suppo1ts the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than

[41] *Id.* at 119.
[42] *See Id.* at 120.
[43] *Id.* at 117.

> enhanced the place of intercollegiate athletics in the Nation's life.[44]

At the same time, the Court made clear that allowing the NCAA latitude is not tantamount to granting it antitrust immunity and that NCAA acts that run afoul of the Sherman Act would be condemned.[45] Here, the Court recognized that although "maintaining a competitive balance among amateur athletic teams" was a valid interest, the NCAA had failed to prove that the restrictive television plan could achieve competitive balance.[43]

Although the NCAA lost on the merits and in the process perhaps also lost any air of invincibility that it might have otherwise believed that it had, the decision in *Board of Regents* was not without its bright spots for the regulatory body. Restraints by the NCAA would be adjudged under the Rule of Reason and not under a per se jurisprudence that would condemn NCAA restraints out of hand and not allow the NCAA to offer justifications for its restrictions.[46] The Court noted further that college football is associated with an academic tradition that differentiates it from professional sports.[46] The Court also underscored the importance of amateurism in college athletics, stating that "athletes must not be paid, must be required to attend class and the like." in order to "preserve the character and quality of [college football]."[47] The lower courts followed suit in granting the NCAA leeway in its governance of intercollegiate athletics and in making amateurism synonymous with college sports.[48]

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[44] *Bd. of Regents*, 468 U.S. at 120.
[45] *Id.* at 103.
[46] *Id.* at 101-102.
[47] *Id.*
[48] *See, e.g.,* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090 (7th Cir. 1992) ("We consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations."); O'Bannon, v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015). *See also* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 172 (3d Cir. 2024); Gaines v. Nat'l Collegiate

2. *O' Bannon*

The Supreme Court in *Board of Regents* did not address the question of whether NCAA restrictions on compensation of college athletes violated the Sherman Act. Ed O'Bannon, a star basketball player for UCLA in the mid-90s, brought an antitrust class action against the NCAA alleging that its compensation restrictions violated the Sherman Act because they (1) prevented athletes from earning NIL payments; (2) limited scholarship benefits; (3) barred compensation from outside sources based on their athletic skills or ability; and (4) prohibited endorsement of commercial products or services by athletes while in school.[49] The trial court held that the foregoing restrictions constituted unlawful restraints of trade in violation of the Sherman Act.[50] As the Ninth Circuit later noted, "[a]s far as we are aware, the district court's decision is the first by any federal court to hold that any aspect of1hc NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."[51]

The Ninth Circuit affirmed, in part, the ruling below, holding that schools must be allowed to raise athletic scholarship benefits to the full cost of attendance.[52] The court concluded that while preservation of amateurism is a cognizable procompetitive benefit, limits on athlete scholarships do not promote competition in the "college education" market "whereas colleges compete for the services of athletic recruits."[53] On the other hand, the Ninth Circuit upheld NCAA rules that barred athletes from receiving "NIL cash payments

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Athletic Ass'n, 746 F.Supp. 738, 744 (M.D. Tenn. 1990) ("Even in the increasingly commercial modern world, there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.").

[49] O*'Bannon,* 802 F.3d 1049, 1053.

[50] *O.Bannon,* 7 F. Supp. 3d at 988 ("This price-fixing agreement constitutes a restraint of trade.").

[51] O*'Bannon,* 802 F.3d at 1053.

[52] *Id.* at 1075-76.

[53] *Id.* at 1070.

untethered to their education expenses."[54] In the view of the Ninth Circuit, NIL payments represented a "quantum leap" from payments related to education; and "[o]nce that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."[55]

Both sides could claim victory in *O'Bannon.* The plaintiffs won the right to be paid the full cost of college attendance. The NCAA convinced the court that NIL payments would undermine amateurism and hence the whole foundation of inter-collegiate athletics. However, the real significance of *O'Bannon* is that the decision focused attention on how college athletes were being systematically exploited by their institutions and the NCAA through the denial of NIL payments. *O'Bannon* spurred additional lawsuits challenging a myriad of NCAA restrictions on athletes.[56] Finally, the *O'Bannon* holding galvanized state legislatures into action by passing laws to protect NIL rights for college athletes within their respective states.[57]

3. Alston

Alston v. NCAA, the third case in the NCAA trilogy, was a class action by college football and basketball players that challenged "a narrow subset of the NCAA compensation rules - namely, restricting the education related benefits that students athletes might receive"[58] including (a) aid post-eligibility internships; (b) cash awards for academic success or graduation; and (c) in-kind education benefits. The Supreme Court affirmed the trial court's holding that the NCAA's restrictions on the education-related benefits at issue were "patently and inexplicably stricter than is necessary" in order to achieve the procompetitive benefits that the NCAA had

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[54] *Id.* at 1076.
[55] *Id.* at 1078.
[56] *See, e.g., Alston,* 594 U.S. 69 (2021) (compensation for education related expenses); Vassar v. NCAA, No. 1:16- cv-10590, 2016 WL 6693054 (N.D. Ill. Nov. 14, 2016) (transfer eligibility).
[57] *See, e.g.,* CAL. EDUC. CODE § 67456 (Deering 2021).
[58] *Alston,* 594 U.S. at 108 (Kavanaugh, J., concurring).

asserted.[59] The Court, however, declined to address compensation issues beyond education- related benefits:

> The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.[60]

The decision did not pass on the legality of NCAA restrictions on NIL payments. Moreover, the ruling did not bar the NCAA from banning cash or in-kind compensation unrelated to education, from defining the type of benefits that are education-related, or from limiting cash awards for athletic or academics achievement. Nor did the opinion address restrictions on benefits to athletes imposed by conferences or individual schools.

At the same time, the Court made clear that the NCAA was a commercial enterprise and subject to antitrust scrutiny. It rejected out-of-hand any contention that the NCAA was entitled to Sherman Act immunity because its restraints "happen to fall at the intersection of higher education, sports, and money,"[61] noting that it "has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond

[59] *Id.* at 101.
[60] *Id.* at 108 (Kavanaugh, J., concurring).
[61] *Id.* at 94.

enhancing competition."[62] Nor did the Court agree that the NCAA restraints were entitled to "abbreviated deferential review" under the Sherman Act. Here, the "NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition"[63] and that ''student athletes have nowhere else to sell their labor."[64] Although the Court acknowledged that "some degree of coordination between competitors within sports leagues can be procompetitive"[65] in that they make the athletic enterprise possible, nevertheless, it further stated "[t]hat *some* restraints are necessary to create or maintain a league sport does not mean *all* aspects of elaborate interleague cooperation are."[66]

The Court was especially reluctant to defer to the NCAA concept of amateurism. It noted that the "district court found that the NCAA had not adopted any consistent definition" of amateurism.[67] Further, the trial court "observed that the NCAA conception of amateurism has changed steadily over the years."[68] Moreover, the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon.''[69] In any event, the district court found little evidence "to support the NCAA's contention that its compensation restrictions play a role in consumer demand."[70] Indeed, the NCAA adopted its compensation restrictions without any reference to consumer demand.

In addition, the Court rejected the NCAA argument that the decision in *Board of Regents* foreclosed inquiry into

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[62] *Id.* at 94-95.
[63] *Id.* at 90.
[64] *Alston,* 594 U.S. at 90.
[65] *Id.*
[66] *Id.* (citing American Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010)).
[67] *Id.* at 101.
[68] *Id.* at 83.
[69] *Id.* (citing In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F. Supp. 2d 1058, 1070 (N.D. Cal. 2019)).
[70] *Alston,* 594 U.S. at 83. (Citing In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F.Supp.2d at 1070-71.

compensation limits imposed by the NCAA.[71] First, NCAA compensation rules were not at issue in *Board of Regents.* Second, although *"Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation," that does not mean that "courts must reflexively reject *all* challenges to NCAA compensation restrictions."[72] However, the specific language from Justice Stevens' opinion in *Board of Regents*-that the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the line"[73]-were "stray comments"[74] or "an aside''[75] and accordingly, nothing more than dicta.

Finally, the Court agreed with the trial court that the NCAA must have "ample latitude" to run intercollegiate sports and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints."[76] It recognized that courts must engage in a careful analysis of market realities to determine whether violation exists; and "[i]f those market realities change, so may the legal analysis."[77] Notably, what has changed in the college sports in forty years since *Board of Regents* is the explosive growth of television and other media revenues that has inured to the financial benefit of the NCAA and its member institutions. For example, in 2020 the Southeastern Conference reached a ten-year deal worth $3 billion with Disney to televise its football games on ABC and ESPN.[78] In 2022, the Big Ten concluded a media deal with NBC, CBS, and Fox worth $8 billion over seven years to televise its

[71] *Id.* at 91-92.
[72] *Id.* at 92.
[73] *Id.*
[74] *Id.* at 93.
[75] *Alston,* 594 U.S. at 93.
[76] *Id.* at 84.
[77] *Id.* at 93.
[78] *See* Kevin Draper and Alan Blinder, *SEC Reaches $3 Billion Deal with Disney, Drawing CBS Ties Toward an End,* N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/sports/ncaafootball/sec-disney-deal.html

football games."[79] What has not changed-until now-is the fact that college athletes do not share in those revenues. This fact, coupled with the fact that the NCAA amateurism justification is on shaky ground, if not life support, suggests that the Court may well find in the near future that the NCAA rules on compensating college athletes violate of the Sherman Act.

a. Justice Kavanaugh's Concurrence in *Alston*

In a scathing concurring opinion, Justice Kavanaugh excoriated the NCAA for exploiting college athletes for financial gain stating that "[t]he bottom line is that the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges each year."[80] He forcefully rejected the NCAA defense "that colleges may decline to pay student athletes because the defining feature of college sports ... is that the students are not paid" as "circular and unpersuasive."[81] He further stated that the "NCAA's business model would be flatly illegal in almost any other industry in America;" and, accordingly,[82] "it is not clear how the NCAA can legally defend its remaining compensation rules."[83] Justice Kavanaugh recognized that ''[i]f it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions

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[79] *See* Chloe Peterson, *The power of broadcast TV cannot be under-estimated: Big Ten readies for new media deal with NBC, CBS, FOX,* INDYSTAR, (July, 27, 2023, 2:02 PM), https://www.indystar.com/story/sports/college/2023/07/26/big-ten-football-readies-for-tv-deal-with-nbc-cbs-fox/70471706007/

[80] *Alston,* 594 U.S. at 110 (Kavanaugh, J., concurring).

[81] *Id.* at 109; *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 181 (3d Cir. 2024) (argument that college athletes need not be paid because the defining feature of college sports is that athletes are not paid "is circular, unpersuasive, and increasingly untrue.") (quoting and supporting Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 109 (2021) (Kavanaugh, J. concurring)).

[82] *Alston,* 594 U.S. at 109.

[83] *Id.* at 111.

would undoubtedly ensue," including (1) the effect of paying student athlete in revenue-producing sports on non-revenue-generating sports; (2) whether some athletes could be paid and others not paid; (3) assuring that any payment scheme complies with Title IX; (4) whether limitation akin to a "salary cap" on payments to athletes would be desirable and, if so, how could that cap be administered; and (5) whether students athletes could be compensated in a manner that is financially sustainable.[84]

Justice Kavanaugh did not dispute that the NCAA may lawfully promulgate certain kinds of rules governing college sports, such as requiring students to be enrolled in an institution and to be in good standing in order to be eligible to participate in a given sport.[85] He also recognized that "the NCAA and its member colleges maintain important traditions that have become part of the fabric of America."[86] Nevertheless, he concluded that "those traditions "alone" cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated."[87]

As discussed above,[88] *Alston* made clear that its ruling was narrow and involved only NCAA restrictions on education-related payments; restrictions on payments not related to education could remain in place. Still, *Alston* left the NCAA with little to celebrate. The Court war openly skeptical of the NCAA's amateurism justification for its compensation restrictions. Justice Kavanaugh's blistering concurrence painted a grim picture of the NCAA's future in the courts. State legislatures were enacting laws to protect athletes' NIL rights. The handwriting was on the wall, and the NCAA finally got it. In May 2024, the NCAA agreed to a landmark settlement of the *House* case. ln so doing, the NCAA abandoned its bedrock position that college athletes are amateurs and must not be paid.

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[84] *Id.*
[85] *Id.* at 110-11.
[86] *Id.* at 111.
[87] *Id.* at 112.
[88] *See Alston*, 594 U.S. 69 (2021).

4. House v. NCAA

As discussed above,[89] *House* was a class action litigation brought against the NCAA and major conferences on behalf of some 14,000 former college athletes seeking damages for lost NIL opportunities caused by the NCAA's rules denying NIL compensation from television broadcasts, video games, and third parties to college athletes. Under the settlement agreement, defendants would pay class member some $2.8 billion over the next ten years.[90] The settlement would also rescind limitations on athletic scholarships and in place of those limitations would institute roster caps for various sports.[91]

More importantly, the settlement also includes a revenue sharing provision that would allow schools to commit up to $22 million per year from media revenues to be paid directly to college athletes as soon as the 2025 season.[92] Thus, for the first time, school will be permitted to pay their athletes directly. The milestone settlement in *House* appears to be an economic bonanza for college athletes. Not surprisingly, college coaches and administrators have greeted the news of the settlement with trepidation, confusion, and more than a little anxiety.[93] Trepidation stems from concerns about the impact of the settlement negotiated by wealthy institutions with big-time football programs on smaller, less wealthy schools and on non-revenue generating sports.[94] Confusion is likely to be experienced by families of prospective college athletes.[95] Once the question was simple: will there be a scholarship or not? Now, college recruits face a bewildering array of options to

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[89] *See, supra* nn3, and accompanying text
[90] *See* Dellenger, *supra* note 4.
[91] *Id.*
[92] *Id.*
[93] David Chen, Jacey Fortin, and Anna Betts, *NCAA Athlete's Pay Deal Raises Questions About Future of College Sports,* N.Y. Times (May 24, 2024), https://www.nytimes.com/2024/05/24/us/ncaa-payments-athletes-reaction.html.
[94] *Id.*
[95] *Id.*

finance their education and earn income-scholarships, NIL payments, and revenue sharing.[96] Smaller conferences are have objected to shouldering the financial bunders flowing from the settlement shaped by big schools.[97] Yet another concern is how the settlement will impact women's sports at the college, level and whether Title IX issues will be implicated.[98]

II. LEGAL ISSUES IN THE WAKE OF *HOUSE*

The settlement in *House,* while surely a milestone, does not end the ongoing debate about whether, and how, to compensate college athletes. As the Supreme Court in *Alston* noted, the "market realities [for college sports] have changed significantly since 1984," the year that *Board of Regents* came down.[99] Just as *Alston* paved the way for NIL payments, the *House* settlement marks one more step in the evolution of that ever-changing intercollegiate sports landscape. Moreover, the settlement faces major hurdles. First, it must be approved by the trial judge, and that approval is likely. Second, it must pass antitrust scrutiny. Third, the settlement is likely to have spillover effects involving labor issues and Title IX issues that must be addressed.

A. Revenue Sharing and the Antitrust Laws

As matters now stand, the revenue sharing provisions of the *House* settlement are vulnerable to challenge as a price-fixing agreement in violation of section one of the Sherman Act.[100] Arguably, the $22 million cap on funds available for revenue sharing for each school that has been agreed upon by the NCAA and its member institutions as part of the *House* settlement is a contract in restraint of trade in that it artificially limits what athletes can be paid. The fact that the agreement was

[96] *See Id.*
[97] *See Id.*
[98] *See Id.*
[99] *Alston*, 594 U.S. at 93.
[100] 15 U.S.C. § 1 (1937).

reached as part of a settlement of an antitrust suit does not confer antitrust immunity.[101] Similar limits on compensation, so-called salary caps, implemented by certain professional sports leagues, are free from antitrust scrutiny because they are the products of collective bargaining agreements.[102] Under the non-statutory labor exemption, restrictions on wage, hours, working conditions, and other issues that are the subject of collective bargaining between labor and management are exempt from antitrust review.[103] That antitrust exclusion, however, is not available for the kind of revenue sharing contemplated by the *House* settlement because it is not a product of the collective bargaining process.

B. Labor Issues

At first glance, recognizing athletes or employees who can unionize can bargain collectively might appear to be the most expeditious way to address the problem of potential antitrust liability. This solution, however, is not as simple as it appears and, indeed, may create more problems than it resolves because recognition of college athletes as employees will have ramifications beyond antitrust law. Colleges and athletes have very different views on whether athletes should be recognized as employees with the rights to unionize and engage in collective bargaining. Colleges have successfully resisted[104]—

[101] *See* FTC v. Actavis, Inc., 570 U.S. 136, 141 (2013) ("reverse settlement payments such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws.").
[102] *See* Brown v. Pro Football Inc., 518 U.S. 231 (1996) (upholding a salary cap of $1,000.00 per week for substitute players on a development squad).
[103] *See* Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 688-89 (1965).
[104] Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) ("Because NCAA-regulated sports are 'extracurricular,' 'interscholastic athletic' activities, we do not believe that the Department of Labor intended the FLSA to apply to student-athletes."); Dawson v. NCAA, 250 F. Supp. 3d 401, 408 (N.D. Cal: 2017) ("there is . . . no legal basis for finding [Division I athletes] to be 'employees' under the FLSA."); *see generally* Adam Epstein & Paul Anderson, *The Relationship Between a Collegiate Student-*

and continue to resist[105]—efforts by athletes to unionize. Colleges view athletes, not as employees, but as students engaged in extracurricular activities, that is, athletes are amateurs not professionals.[106] Athletes are not paid on the basis of services they render to their schools. Indeed, athletes are not paid wages at all; nor do they render the kind of work product traditionally as associated with employment.[107] Moreover, treating athletes as students engaging in extracurricular activities rather than employees who are paid aligns with the school's narrative that intercollegiate athletics is an amateur enterprise.[108] Undoubtedly, colleges have a very practical concerns about increased costs that would be incurred through wages, benefits, worker's compensation, as well as potential catastrophic liability for injuries suffered by athletes in practices or in games. They may also view the issue as a slippery slope which threatens colleges with significant loss of control over their students. Yet, the NCAA in lobbying Congress still

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Athlete and the University: An Historical and Legal Perspective, 26 MARQ. SPORTS L. REV. 287, 297 (20l6) ("[T]he courts have been consistent finding that student-athletes are not recognized as employees under any legal standard, whether bringing claims under workers' compensation laws, the NLRA or FLSA.").

[105] *See* William Gilchrist, *Are College Athletes Employees? Unpacking the NLRB's Decision in Trustees of Dartmouth College*, WAKE FOREST L. REV. (2024), https://www.wakeforestlawreview.com/2024/03/are-college-athletes-employees-unpacking-the-nlrbs-decision-in-trustees-of-dartmouth-college/.

[106] *See* Santul Nerkar, *The NCAA Agreed to Pay Players but Won't Call Them Employees,* N.Y. TIMES, May 27, 2024, at D6. (statement from Rev. John I Jenkins, President of the University of Notre Dame) ("Congress must 'establish that our athletes are not employees, but students seeking college degrees.'").

[107] [107] *See* Jonathan Israel, *Repeat After Me: College Athletes Are Not School Employees Under the FLSA,* FOLEY BLOG (November 8, 2017), https://www.jdsupra.com/legalnews/repeat-after-me-college-athletes-are-60007/ ("[S]tudent athlete play is not work and extracurricular endeavor of student athletes do not render them employees under the FLSA.").

[108] *See* NERKAR, *supra* note 106.

relies heavily on the amateurism argument in resisting the claim that athletes are employees.[109]

Athletes paint a very different picture; they are much more than students engaged in an extracurricular, amateur enterprise.[110] As employees, athletes would gain two important benefits:(1) the right to unionize and engage in collective bargaining; and (2) the right to a minimum wage under the Fair Labor Standards Act.[111] Athletes may argue that they are more like employees than students because of the significant control that schools exercise over their activities, control that is far greater than that exercised over ordinary students.[112] Colleges dictate athletes' schedules by determining practice times, travel schedules, and game participation. This entails 30-40 hours per

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[109] *See* Amanda Christovich, *The NCAA's Existential Question: Can You Pay Players and Still Call Them Amateurs*, FRONT OFFICE SPORTS (April 16, 2024), https://frontofficesports.com/the-ncaas-existential-question-can-you-pay-players-and-still-call-them-amateurs/#:~:text=While%20it%20tries%20to%20placate,amateurs%20once%20and%20for%20all ("[NCAA President Charlie Baker] has said on multiple occasions that in order for [his reform] proposal to work, congress must pass legislation declaring collegiate athletes to be amateur once and for all.").

[110] *See* Schults, *supra* note 25, at 453:

> College athletes perform real labor, make real sacrifices. bear real risks, and create real value. They devote significant time and energy to their sport, adhere to lengthy lists of rules, put their health and safety on the line, and collectively generate billions of dollars in revenue-all for the colleges they compete for. Nevertheless, these athletes are not recognized as "employees" under the law.

[111] *Id.* at 489-92.

[112] *See* Jason Belzer, *Leveling the Playing Field: Student Athlete on Employee Athletes,* FORBES (Sept. 11, 2013), https://www.forbes.com/sites/jasonbelzer/2013/09/09/leveling-the-playing-field-student-athletes-or-employee-athletes/ (highlighting the schedule of a typical college athlete).

week devoted to athletics and even more time for some sports, such as football and basketball, both in season and out of season. Athletes have to schedule classes around practices and game times and, as a result, may be denied the opportunity to take certain courses because of the commitment to a sport. Certain sports necessitate significant travel, which results in time away from the classroom. Game schedules may mean that athletes must sacrifice vacation time and time with family. In short, playing a college sport comes with a stiff price tag.[113] Accordingly, athletes view themselves as akin to work-study students, who are paid for the time in service to their institutions; but, athletes, as the faces of their schools, contribute far more to the bottom line than work-study students.[114]

Outside the courts, the NCAA has lobbied Congress for legislation that would fully protect revenue sharing from legal challenges.[115] Congress typically does not intervene to provide antitrust immunity for special interests but has done so in the past as when, for example, it granted antitrust immunity to the merger between the National Football League and the America Football League.[116] Senator Chris Murphy (D-Conn.) has introduced legislation that would make college athletes employees and have the right to unionize and bargain collectively.[117] No doubt, the NCAA would prefer less sweeping

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[113] *See Sacrifices,* STUDENT ATHLETES, ukstudentathletes.wordpress.com/about/ (last visited Feb. 2, 2025).

[114] *See,* Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future,* 95 CHI. KENT L. REV. 187, 203-09 (2020).

[115] Jesse Dougherty, *Why Capitol Hill Remains a Key Battleground in College Sports,* WASH. POST (Jun. 7, 2024), https://www.washingtonpost.com/sports/2024/06/07/ncaa-congress-antitrust-exemption/ ("The NCAA and its conferences are continuing to lobby-and lobby hard for a federal bill that would offer antitrust protections, a preemption of state laws that contradict NCAA rules and a 'special status' for college athletes that says they cannot become employees.").

[116] 15 U.S.C.S. § 1291 (LEXIS through Pub. L. No. 118-107).

[117] *See* College Right to Organize Act, S. 1929, 117th Cong. (2021).

legislation and would offer the *House* settlement as an example of how an acceptable outcome can be reached without recognizing athletes as employees with the right to unionize.[118] A major concern is that some schools, including Division I schools, will simply eliminate their sports programs if athletes are treated as employees.[119] A legislative solution is likely to chart a clear and predictable course for revenue sharing in the future, but whether Congress will act is another question.

C. Title IX Issues

The *House* settlement does not address potential Title IX[120] issues that may result, now that athletes can be paid directly. Title IX, enacted in 1972, bars gender-based discrimination in federally funded educational programs; including college sports.[121] Title IX regulations mandate that colleges provide equal opportunity to male and female athletes in their sports programs.[122] Title IX also requires that in addition to equal

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[118] *See* Michael McCann, *Congress to Consider Bill Declaring College Athletes Are Not Employees,* SPORTICO (Jun. 12, 2024, 2:38 PM), https://www.sportico.com/law/analysis/2024/ncaa-antitrust-settlement-congress-athletes-employee-debate-1234783946/ (stating that NCAA hopes that *House* settlement "will earn the NCAA good will in Congress" and reject the concept of athletes as employees).

[119] *See* Jim Trotter, *If NCAA House settlement is approved, smaller schools could take the brunt of the impact,* N.Y. TIMES (Jun. 17, 2024), https://www.nytimes.com/athletic/5546613/2024/06/07/ncaa-college-sports-antitrust-house-settlement/ ("Seemingly little attention has been paid to the mid-major or lower-level Division I Schools, which some administrator and executors believe could be left with three choices when addressing the loss of revenue stemming from the $2.8 billion settlement: find a way to replace the money, make cuts to programs to offset lost money or drop down a division.").

[120] 20 U.S.C. § 1681(a) (2024).

[121] *Id.* ("No person in the United States shall, on the basis of sex, be excluded from participation be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

[122] *See* Shults, *supra* note 25 at 498 (Title IX "revolutionized college sports by banning sex discrimination against any

opportunities in college sports, women are also entitled to "equal treatment and benefits."[123] Title IX regulations, drafted in an era when compensating college athletes was not allowed or ever contemplated, do not specifically address the treatment of non-education related benefits paid to athletes.

Nevertheless, schools must be conscious of any disparate impact that athlete compensation policies have on the opportunities and benefits provided to female athletes. Many women's sports programs, like many men's programs, are not revenue generating. As long as women and men participating in non-revenue programs receive like compensation, schools will not run afoul of Title IX. If direct payments to athletes make them employees of the institution, then it is unclear whether Title IX requires equal payment for male and female athletes' services. The scope of Title IX in this context is disputed but some scholars maintain that Title IX applies regardless of whether athletes are deemed to be employees.[124] The Title IX requirement of equity should clearly kick in and schools "would be bound to provide athletes on women's teams with comparable treatment and benefits."[125] In that case, college athletic departments may face a serious cash crunch.[126] With the proposed revenue sharing in the *House* settlement, schools will be able to pay up $22 million annually directly to their athletes from funds earned through media contracts and ticket sales.[127] At the same time, with the abnegation of scholarship limits schools are likely to spend an additional $5 million to $10 million on scholarships.[128] That amounts to about $30 million

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person in an "educational program or activity receiving federal assistance.").

[123] *Id.* at 499.

[124] *Id.* at 499 & n.298.

[125] *Id.* at 499.

[126] *Id.*

[127] *See* Brandon Marcello, *Gut Wrenching Choices, Title IX Complications Face College Athletics in Wake of House v. NCAA Settlement,* CBS SPORTS (May 30, 2024), https://www.cbssports.com/college-football/news/gut-wrenching-choices-title-ix-complications-face-college-athletics-in-wake-of-house-v-ncaa-settlement/.

[128] *Id.*

added expenditures. Yet, in 2023, only two major programs—Georgia and Indiana—netted $30 million or more from their athletic programs.[129] That leaves many programs strapped for cash and looking for ways to cut costs; no program—men's or women's—is safe from extraction.[130]

A second question is how the $22 million from the same revenue sharing provision in the *House* settlement will be distributed. Athletes in revenue-generating sports-football and basketball-may argue for a bigger share of pie. Title IX, on the other hand, would suggest equity among players. That, in turn, could generate yet another round of antitrust suits in which athletes in major sports would urge that they should be paid on the basis of their market value. Litigation could conceivably be avoided, however, if the Department of Education would update Title IX regulation to address specifically how revenue sharing funds should be distributed across sports. One solution might be for colleges to treat direct payments to athletes as athletic scholarships and thereby implement proportionally equal payments between male and female athletes.

III. IMPLEMENTATION OF THE COMPENSATION MODEL FOR COLLEGE ATHLETES: A BLUEPRINT FOR THE FUTURE

The *House* settlement provides the broad outline for a compensation model for college athletes but no guidance on how that model is to be implemented. Part II, *supra,* examined the legal and practical issues that remain in the wake of *House.* Set forth below is a proposed framework for implementing *House* that successfully navigates potential legal and practical pitfalls and restores order to the chaotic intercollegiate playing fields.

[129] *Id.*
[130] *Id.*

A. Revenue Splits

A key element of the *House* settlement agreement is the provision that allows athletes to share up to a $22 million from media revenue earned by the colleges. That figure was waived as part of a negotiated agreement between the parties in *House.* Presumably, the $22 million share is not set in stone and will be subject to future negotiations. As the law now stands, the agreement to set the athletes' share of revenue at a specified rate reached outside the collective bargaining process is vulnerable to attack under the Sherman Act as a contract in restraint of trade.[131] However, that is precisely what the NCAA is trying to avoid.

A principal goal of the *House* settlement was to provide schools with some certainty in implementing revenue sharing plans with their athlete.[132] That certainty had proven elusive as the NCAA has defended a battery of antitrust cases in recent years. The settlement can also serve as a blueprint for future Congressional legislation that would guarantee antitrust immunity for revenue sharing in intercollegiate sports.[133] Without the congressional action, the NCAA and its members are likely to continue to be target of antitrust suits.[134] These suits, in turn, would serve to prolong, and perhaps add to, the uncertainty surrounding the compensation of college athletes that currently exists. Accordingly, legislation authorizing antitrust immunity for the NCAA and member schools appears essential to implementation of any direct payment plan.

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[131] 15 U.S.C. § 1 (1937); *See* Corrada, *supra* note 114, at 210-17 ("[W]ithout unionization of and collective bargaining with these athletes, the NCAA will not be able to sustainability weather what will be crippling antitrust liability.").

[132] Trotter, *supra* note 119.

[133] *Id.*

[134] *See* Corrado, *supra* note 114 at 210-11.

B. Allocating Shared Revenues Within a School

The next question is how a school should allocate the $22 million in shared revenue among the various teams within its athletic program. Two approaches (1) a market-based allocation; or (2) an equitable distribution might be considered. Under a market-based allocation, a program would share in the revenues to the extent it generated those revenues. For a major college football program, which generates roughly 85% of athlete department revenue through football television contracts, this means that some $17 million would return to football players.[135] Other programs would he left with the crumbs. Presumably, non-revenue sports, including many women's sports programs, would receive nominal payments or no funds at all.

The market-based allocation creates several potential problems. First, it may run afoul of the proportionality requirements of Title IX and relegate most women's sports to permanent second class citizenship.[136] Second, certain non-revenue sports may be defunded or climinated.[137] Historically, revenue generating sports have subsidized non-revenue producing sports. Now, with $22 million that once went to athletic departments now going to compensate athletes instead, certain sports may no longer receive funding generated by the football program and will either have to become self-funding or face elimination by the school.[138] In short, the new system creates a form of "financial Darwinism" in which there are haves and have-nots.[139]

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[135] Alex Weber, *Pete Thamel addresses how schools will handle dividing money from House settlement,* ON3 (May 25, 2024), https://www.on3.com/news/pete-thamel-addresses-how-schools-will-handle-dividing-money-from-house-settlement/ (statement of Pete Thamel of ESPN) ("[F]ootball-and I think it's a safe estimate-is about 85% of the revenue at most schools, proportional to TV contracts.").
[136] *See* Marcello, *supra* note 127.
[137] *Id.*
[138] *See* Trotter, *supra* note 119.
[139] *Id.*

Alternatively, a school could adopt an equity-based distribution model in the spirit of Title IX that, for example, would split the $22 million equally between men's and women's sports. An even split would be a positive step toward remedying the inequality that has persisted between men's and women's intercollegiate sports. On the other hand, an even split may prove both impractical and unworkable. Now that athletes will receive direct payments out of revenue that would otherwise flow to their schools, athletic departments will face budget shortfalls and be forced to fundraise to make up these shortfalls. The larger programs may well be able to procure additional funds by tapping their fanbase or alumni-backed collectives.[140] But, even the most robust athletic programs have difficulty balancing their budgets now and face possible donor fatigue if they go back and ask for money to make up the amounts paid directly to athletes. Still "it is much easier for the Ohio States and the Alabamas of the world to make up for lost revenue, even if it is a projected $2 million a year, then it is for [smaller programs] and others, where the pathway to solvency is longer and harder."[141] Charles Baker, the NCAA president, has acknowledged that smaller schools could be hit harder by *House* even though they were not the focal point of the *House* litigation, adding: "I understand this change will not be easy to manage, but given the challenges facing college sports over the last few decades, change is inevitable."[142]

Simply put, small-time programs may be the victims of the financial Darwinism that is part and parcel of the new world of intercollegiate athletics.[143] Accordingly, it is likely that economic factors will trump equality when it comes to distribution of shared revenues.

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

C. Allocating Revenues Within a Given Sport

As a threshold matter, how direct payments are allocated among squad members ought to be prerogative of each school individually. To leave that determination to the NCAA or individual conferences would only serve to invite antitrust suits. The basic choice is between a lockstep model in which each team member receives equal compensation and a performance-based model, under which a player is compensated based on productivity. To some, it may seem apparent that the starting quarterback should be paid more than the third-string quarterback who secs no game action. That approach, however, may be too simplistic. The third-string quarterback may well see no playing time in games, but he still makes valuable contribution to the team by, among other things, (1) practicing twelve months per year; (2) attending all quarterback meetings·, (3) travelling to all games with the team·, (4) running the plays of the upcoming opponent in practice each week so that the defense, will be optimally prepared; (5) signaling the offensive plays to the quarterback each game; and (6) engaging in strategy conferences during each game. A lockstep model recognizes that each member of a team contributes to the team even if he sees no playing time and that each team member contributes the same amount of time to the team. A lockstep model is not only fair but easy to administer.

A performance-based model, on the other hand, is much more complicated to administer and raises many difficult questions. Should performance be judged by playing time alone on the quality of one's performance during playing time? Should performance for compensation purposes be adjudged on a week-to-week basis? What happens to compensation when a starting player is injured or performs poorly and is demoted to reserve status? Should injured players still be compensated? Not only is a performance model complicated to administer, it may create resentment between the haves and the have nots on a team. Those resentments can, in turn contribute to a toxic locker room atmosphere, which is unhealthy and may be self-defeating. A lockstep motel would avoid any conflict between

haves and have nots; it would also obviate any claims of favoritism by the coaching staff "star" players and other who feel short-changed by an equal-pay approach can gain additional payments through NIL agreements. At the end of the day, a lockstep approach to player compensation has more benefits and fewer drawbacks than a performance-based model.

D. How Win Schools React to the New World of Compensated Student Athletes

The *House* settlement breaks new ground by allowing athletes to be paid directly by their schools. In settling that case, the NCAA traded for the certainty of a $2.77 billion price tag rather than risk a much larger and potentially catastrophic treble damages judgment. The NCAA, however, was not just concerned with the claims in *House;* but rather, had its eye on the bigger picture.[144] The winds of change have been blowing in intercollegiate athletics, and momentum has been building in favor of the athletes. Public sentiment now favors compensation of athletes, suggesting that "amateurism" is no longer important to fans of college sports.[145]

Together with public opinion, the Supreme Court's decision in *Alston* dealt a severe blow to the NCAA. Although the NCAA could claim victory in *Alston* in that the Court let stand the NCAA restrictions on payments to athletes unrelated to education,[146]

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[144] *See* Nerkar, *supra* note l 06 ("Over the past decade Public opinion and a server of court rulings-not to mention the reality that college athletic have generated billions of dollars in annual revenue and that athletic received none of it- have forced the N.C.A.A. to unravel restriction on player compensation.").

[145] Michael Ricciardelli and Marty Appel, *More than Half of Americans Say 'Yes' to Student-Athlete Payments for Revenue- Generating Sports; Number Rises to 62 Percent for Sports Fans,* SETON HALL UNIVERSITY BUSINESS NEWS (Mar. 22, 2023), https://www.shu.edu/business/news/sports-poll-public-favors-student-athlete-pay.html.

[146] *Alston,* 594 U.S. at 108 (Kavanaugh, J. concurring) (stating that compensation rules outside of education-related benefits "remain on the books").

a best that was a Pyrrhic victory. Other parts of the opinion slammed the NCAA 's position. First, the Court reiterated the NCAA's claims that its rules were beyond antitrust scrutiny.[147] Second, the court was openly skeptical of the NCAA's amateurism defense.[148] Third, the Court stressed that any restrictions imposed by NCAA rules had to be adjudged against "market realities," and that market realities had changed significantly since 1984.[149] Having dropped its ban on NIL payments in the wake of *Alston,* the NCAA effectively acknowledged that market realities had indeed changed and that its restriction on athletic compensation could no longer be justified.

Justice Kavanaugh's devastating concurring opinion, lambasting the NCAA and member schools for reaping billions of dollars in revenues on the backs of unpaid college athletes, made the NCAA and member schools appear greedy and exploitative.[150]

In settling *House,* the NCAA was looking to bring stability back to intercollegiate sports,[151] which had grown chaotic since the influx of NIL money from alumni backed booster collectives and the wide open transfer portal. The settlement might also be viewed as a plea to Congress to intervene in intercollegiate sports to restore stability.[152] Nevertheless, whether or not

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[147] *Alston,* 594 U.S. at 91 ("On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation-and this approval foreclosed any meaningful review of those limits today. We see things differently.")

[148] *Id.* at 83 (citing the trial court's discussion of amateurism).

[149] *Id.* at 93.

[150] *Id.* at 107-112 (Kavanaugh, J. concurring).

[151] David Hale, *Charlie Baker hopes NCAA settlement creates stability for schools,* ESPN (May 13, 2024) https://www.espn.com/college-sports/story/-/id/40140633/charlie-baker-hopes-ncaa-settlement-creates-stability-schools (explaining that the settlement will "create predictability and stability for schools").

[152] Charles Baker, et. al, *Joint Statement on Agreement of Settlement Terms*, NCAA (May 23, 2024) https://www.ncaa.org/news/2024/5/23/media-center- joint-statement-on -the-agreement-of-settlement-terms.aspx ("This settlement is also a road map for college sports leaders and Congress to ensure this

Congress intervenes, schools must now adapt to the new normal of compensated college athletes.

1. Tighter Athletic Budgets

One feature of the new normal is likely to be tighter athletic department budgets, now that a portion of the media revenues that once flowed to institutions will be shared directly with athletes. Colleges and universities will have some tough calls to make regarding (1) whether and how to make up for revenues that now go directly to athletes rather than to athletic department; (2) whether to drop certain athletic programs; and (3) whether to make some programs self-funded.[153] Further, now that the *House* settlement eliminates scholarship limits, schools will have to determine whether to increase scholarships in certain sports and how to reallocate scholarships among the sports being offered.[154] In addition tighter budgets are likely to impact coaches significantly. Salaries may decrease, and the job descriptions of head coaches may well expand to include fundraising. As Jeff Hafley, former Boston College head football coach and now defensive coordinator for the Green Bay Packers, observed upon leaving the college coaching ranks" "College coaching has become fundraising, NIL and recruiting your own

uniquely American institution can continue to provide unmatched opportunity for million of students.").

[153] *See* Chen, supra n. 93.

[154] Pete Iacobelli, *Big changes for the NCAA likely to upend scholarship limits and roster sizes across college sports,* AP NEWS (May 28, 2024), https://apnews.com/article/ncaa-settlement-scholarships-8a35Sal 274f2cef644449833b4099d21 ("Scholarship limits for individual teams are expected to be lifted. That could mean even more scholarships available from certain schools for money-makers like football or basketball. It could mean that programs like baseball and softball - which have to slice and dice scholarships each season - could be fully funded. Bet even the wealthiest schools may have to make tough choices when it comes to investing in which sports.").

team and transfers. There's no time to coach football anymore."[155]

2. Policing NIL Payments

The *House* settlement does not affect NIL payments going forward, and an athlete may still earn NIL money in addition to receiving direct payments from revenue sharing. NIL was intended to compensate athletes for use of their so name, image and likeness *after* they enroll at a school. It was not intended to be an *inducement* to enroll is a particular school. Nevertheless, as one commentator has observed, "NIL has largely become pay to-play at the highest levels of college football and basketball,"[156] and the *House* settlement "aims to rectify that."[157] How this will be accomplished is not clear. Since the introduction of NIL payments, the NCAA has done little to police payments by booster collectives. After *House,* the "[r]ole of collectives remains up in the air."[158] A case in point involves Texas Tech's recruitment of superstar softball pitcher Nijaree Canady who had previously pitched for Stanford.[159] Canady

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[155] Pete Thamel, *Packers Hire Boston College's Jeff Hafley as Defensive Coordinator,* ESPN (Jan. 31, 2024), https://www.espn.com/nfl/story/-/id/39429573/sources-packers-hire-boston-college-jeff-hafley-dc.

[156] Ben Portnoy, *House Settlement Leaves Numerous Questions for NCAA, College Sports Moving Forward,* SMALL BUSINESS JOURNAL (May 24, 2024), https://sportsbusinessjournal.com/Articles/2024/05/24/ncaa-settlement-follow-up-questions.

[157] *Id.*

[158] Shehan Jeyarajah, *How Historic House v. NCAA settlement will impact college athletics on and off the field for years to come,* CBS SPORTS (May 24, 2024), https://www.cbssports.com/college-football/news/how-historic-house-v-ncaa-settlement-will-impact-college-athletics-on-and-off-the-field-for-years-to-come/ ("With revenue-sharing entering the picture, the pressure on collectives to provide a primary income for revenue sport athletes on campus will decrease, a huge win for fans.").

[159] Justin Williams & Stewart Mandel, *The unprecedented million-dollar recruitment of the nation's best softball player*, NY TIMES (July 29, 2024), https://www.nytimes.com/athletic/5664181/2024/07/29/nijaree-canady-texas-tech-nil-million-dollar-contract/.

received a NIL offer reportedly in excess of $1 million from the Texas Tech affiliated NIL collective.[160] She enrolled in Texas Tech. Was that payment a pay-for-play inducement or a true NIL deal reached after her enrollment at Texas Tech? Unquestionably NCAA enforcement could be beefed up, NCAA guardrails on NIL "have been gutted after court losses."[161] Schools themselves could also play a role in policing collectives. To that end, some have suggested that NIL programs be administered in-house by the schools themselves rather than by third parties. Others have opposed bringing NIL programs in-house, questioning whether schools have the resources and expertise to manage endorsements of their athletes. However accomplished, policing of collectives is essential to assuring fairness play and a level playing field.

3. Managing the Transfer Portal

Historically, the NCAA rules restricted the ability of athletes to transfer to another program by forcing transfers to sit out a year before they would be eligible to pa11icipate in the athletic program at their new school. Athletes have successfully challenged these restrictions in court[162] and the NCAA backed off its restrictions on one-time transfers.[163] The amended complaint in *Ohio v. NCAA* characterizes the NCAA's Transfer Eligibility Rule as "a no poach agreement between horizontal competitor schools that serves to allocate the market for labor of NCAA Division I athletes."[164] With the relaxation of the rules on transferring college athletes now enjoy unprecedented

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[160] *Id.*

[161] *Id.*

[162] *See, e.g.,* Williams v. Nat'l Collegiate Athletic Ass'n, No. 24-614, 2024 WL 397760 at 1 (D.N.J. Feb. 2, 2024).

[163] *See* Stewart Mandel, *NCAA Agrees to End Transfer Rules Permanently; Athletes Who Lost Eligibility Will Have Year Restored*, N.Y. TIMES: THE ATHLETIC (May 30, 2024), https://www.nytimes.com/athletic/5530608/2024/05/30/ncaa-transfer-rules-banned-permanently/.

[164] Amended Complaint at 3, Ohio v. Nat'l Collegiate Athletic Ass'n, No. 1:23-cv-100 (N.D.W.Va. 2024).

mobility. College coaches have quickly adapted, and the wide open transfer portal (together with NIL) has fundamentally reshaped basketball recruiting.[165] The stock of transfers has risen, while the value of high school recruits has declined.[166] Some coaches now view high school players as risky "rentals" and are prioritizing experienced transfers over the development of freshman recruits.[167] Indeed, coaches who still try to build their programs off of high school recruits, arc "pushing against a current that has taken over the sport."[168]

At the same time, the wide open transfer portal, has in some ways negatively impacted college programs. It has led to constant turnover of rosters, making it difficult to develop continuity in programs and to kindle a loyal fan base. Individual schools, nevertheless, are not powerless to deal with the transfer issue. Schools may, for example, limit athletes via contract. If athletes want to transfer, they would have to buy out that contract. On the other hand, athletes might avoid schools that make that kind of contractual demand. The alternative for schools is to accept the wide-open transfer portal, do their best to retain their athletes, and take steps to attract transfers who can help their programs.

A more effective approach might be to have Congress intervene and enact legislation authorizing athletes to engage in collective bargaining with their institutions. Although there is no guarantee that Congress would act on this issue, the NCAA has lobbied aggressively for protection from potential antitrust liability as it attempts to govern college athletics.[169] Legislation

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[165] *See* Matt Norlander, *How Transfer Portal, NIL Reshaping College Basketball Recruiting Has Dropped Value of High School Prospects*, CBS SPORTS (July 8, 2023), https://www.cbssports.com/college-basketball/news/how-transfer-portal-nil-reshaping-college-basketball-recruiting-has-dropped-value-of-high-school-prospects/.

[166] *See id.*

[167] *See id.*

[168] *Id.*

[169] Jesse Dougherty, *Why Capitol Hill Remains a Key Battleground in College Sports,* WASH. POST (June 27, 2024), https://www.washingtonpost.com/sports/2024/06/07/ncaa-congress-antitrust-exemption/ ("The NCAA and its conferences are continuing to

that would protect the NCAA and its members, conferences, and athletes from legal exposure as they attempt to navigate the new landscape in college sports has been introduced, but "no bill has made it past the introductory phase."[170] Congressional intervention would bring some measure of certainty and predictability to the college sports scene, which now borders on the chaotic. Without Congressional action, the *House* settlement will almost certainly face antitrust challenges; and the NCAA will be forced to defend more costly lawsuits, which, in turn, will make it difficult for the NCAA to do any form of governance, thereby leaving intercollegiate athletics in a state of flux. Senator Ted Cruz has made an even more dire prediction:

> There is a misconception that the [House v. NCAA] settlement reduces the urgency for Congress to act to protect college sports. Nothing could be further from the truth. Without congressional action, there is a very high risk that college sports as we know them will be destroyed and the student-athletes will experience irreparable harm, including loss of benefits and scholarship guarantees.[171]

lobby - and lobby hard – for a federal bill that would offer antitrust protections, a preemption of state laws that contradict NCAA rules and a "special status" for college athletes that says they cannot become employees.").

[170] *See id.*

[171] *Id.*

E. Labor Issues

Historically, student athletes have not been recognized as employees of their institutions.[172] Recently, however, student athletes have made a renewed push to be treated as employees and not simply students attending a college. Employee status would confer two important benefits on athletes: (1) the right to unionize and engage in collective bargaining; and (2) the right to be paid at least a minimum wage.[173] As discussed above, the right to unionize and engage in collective bargaining would shield players and colleges alike from any antitrust liability related to revenue sharing, pursuant to the non-statutory labor exemption. [174]

In addition, as employees, athletes would be entitled to a minimum wage under the Fair Labor Standards Act.[175] Athletes argue that they are more like employees than students because of the significant control that institutions exert over athletes. Colleges dictate athletes' schedules by determining practice times, travel schedules, and game participation. Accordingly, athletes view themselves as akin to work-study students, who are paid for their time in service to their institutions, But at the same time, athletes contribute far more to a college's bottom line than work-study students.

Colleges, on the other hand, have resisted classifying student athletes as employees, citing the same playbook used in arguing against compensation for athletes—college athletes are amateur.[176] Unfortunately for the NCAA and its members, *Alston* dealt *a* stiff blow to the NCAA 's amateurism argument. In analyzing the NCAA's compensation restrictions, *Alston* recognized that although the NCAA may well "play a critical role in the maintenance of ... amateurism" in intercollegiate athletics, antitrust strictures nevertheless apply to college sports.[177]

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[172] *See* Israel, *supra* note 107.
[173] *See* Schults *supra* note 25, at 489-492.
[174] *See id.* at 496-497.
[175] *See id.* at 489-492.
[176] *See* Nerkar, *supra* note 106.
[177] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S.69, 92 (2021).

Using this same reasoning in the labor context, one could conclude that the NCAA cannot withhold employee status from college athletes because they are amateurs. Whether made in the compensation context or the labor context, the amateurism argument is "circular and unpersuasive."[178] *Alston* also "disrupted the status quo by holding that *Board of Regents* did not create a binding precedent 'reflexivity' supporting the organizations compensation rules."[179]; rather judges should apply legal standards that have developed in the courts.[180]

Finally, *Alston* has, at least indirectly, undermined the NCAA position that athletes are not employees because they are amateurs in two ways. First, *Alston* triggered the NCAA's decision to revoke its blanket ban on NIL payments.[181] Second, the Com1 stressed the need for judges to look to economic realities in assessing the legality of NCAA regulations.[182] *Alston* has also signaled a changed in the lower courts. The Third Circuit in *Johnson v. NCAA* held in July 2024 that "college athletes cannot he barred as a matter of law from asserting FLSA claims simply by virtue of a 'revered tradition of amateurism'."[183] Rejecting the NCAA's argument that the history and tradition of amateurism is sufficient to deny athletes employee status under the FLSA, the court specifically declined to "use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of athletes' relationships to their schools."[184] Rather, the court held that college athletes maybe employees under the FLSA when they:

> (a) perform services for another part, (b) "necessarily and primarily for the [other party's] benefit," *Tenn. Coal,* 321 U.S. at 598, 64 S. Ct. 698, (c) under that party's

[178] *See id.* at 109 (Kavanaugh, J. concurring).
[179] Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 173 (3d Cir. 2024).
[180] *Alston,* 594 U.S. at 109 (Kavanaugh, J. concurring).
[181] *Johnson*, 108 F.4th at 173 (footnote omitted).
[182] *See Alston,* 594 U.S. at 93, 106.
[183] *Johnson,* 108 F.4th at 182 (citation omitted).
[184] *See id.* (citation omitted).

> control or right of control, *id.,* and (d) in return for "express" or "implied" compensation or "in-kind benefits." If so, the athlete in question may plainly fall within the meaning of "employee" as defined in 29 U.S.C. § 203(e)(1). Ultimately, the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal and economic reality that is that of an employee-employer.[185]

The Court also threw salt into the NCAA's wound by eschewing the term "student-athlete," describing it as "an NCAA marketing invention designed to 'conjure the nobility of amateurism,' assert "the precedence of scholarship over athletic[s]', and 'obfuscate the nature of the legal relationship at the heart of a growing commercial enterprise."[186]

Finally, the National Labor Relations Board, likely in response to *Alston,*[187] has for the first time taken the position that athletes are employees for purposes of the National Labor Relations Act.[188] NIL payments have become widespread in the past two years, the line demarcating professional from college sports has grown fuzzy, and the economic reality is that college athletes, flush with NIL money, look a lot more like professionals than amateurs.

If athletes do gain recognition as employees, they may find that their new status has downsides. With added income, athletes may face new costs. Scholarships and related educational benefits, tax-free under current law, may now be

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[185] *Id.* at 180.
[186] *Id.* at 170 (footnote omitted).
[187] *Id.* at 176 (footnote omitted).
[188] *Id.*

taxable.[189] That may not be a big deal for a football or basketball player earning direct compensation and NIL money in addition to a scholarship; but for a swimmer or a gymnast, with minimal or no direct payments, it may be a hardship to come up with funds to pay taxed on the scholarship.[190] Schools, as employers, may seek contribution from athlete employees for the costs of health care, dental care, and retirement benefits. Schools may impose limits on use of social media and enforce policies that limit entities that athletes can partner with to earn endorsement money.[191]

Second, employee status for athletes may lead to a contraction of sports programs and have an especially devastating effect on non-revenue sports programs.[192] The increased costs of salaries and benefits for athlete-employee salaries and benefits may leave schools strapped for cash to support all athletic programs.[193] Administrators will likely not cut revenue-generating programs, but may well eliminate non-revenue sports,[194] such as swimming, track, fencing, and gymnastics. Simply put, athletes may want to think twice about gaining employee status.[195]

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[189] Travis Knobbe, *NCAA Athletes Shouldn't Want to be Employees,* LWOS (Feb. 6, 2024), https://www.lastwordonsports.com/collegefootball/2024/02/06/ncca-athletes-shouldn't-want-to-be- employees-2/.

[190] *Id.*

[191] David Cobb, *House v. NCAA Settlement Winners and Losers: Athletes Take Monumental Step, Non-Revenue Sports at Risk,* CBS SPORTS (May 24, 2024), https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-winners-and-losers-athletes-take-monumental-step-non-revenue-sports-at-risk/ ("In addition to potential measure, such as staff cuts and delayed facilities upgrades, non-revenue sports could be on dropping block.").

[192] *See id.*

[193] *Id.*

[194] Knobbe, *supra* note 190.

[195] Ben Nuckols, *NCAA Head Warns That 95% of Student Athletes Face Extinction if Colleges Actually Have to Pay Them as Employees,* FORTUNE (Feb. 24, 2024), https://fortune.com/2024/02/24/ncaa-college-sports-employees-student-athletes-charlie-baker-interview/.

Third, as employees, athletes may face loss of individual freedoms. Once athletes are designated as employees, schools may seek to impose contractual limits on an athlete's activities. Athletes may be subjected to strict work place rules, such as fines for lateness or missing meetings. Athletes may have to negotiate a buyout before their schools release them from their contracts so that they can transfer elsewhere. Simply put, employee status may kill non-revenue sports.[196]

F. Title IX Issues

As noted above,[197] the *House* settlement does not address potential Title IX issues that may result. The question is whether women participating in non-revenue sports should be paid the same amount as male football players being paid out of fonds generated by revenue sharing authorized by the *House* settlement. If direct payments to athletes make them employees of the institutional, then Title IX arguably does not require equal payments for employment related services. For example, Title IX does not require that the female women's basketball coach be paid the same as the male men's basketball coach. However, if athletes are not deemed employees, Title IX requirement of equality should clearly kick in. In that case, college athletic departments may face a serious cash crunch. With the proposed revenue sharing in the *House* settlement, schools will be able to pay up $22 million annually directly to their athletes from funds earned through media contracts and ticket sales. At the same time, with the abnegation of scholarship limits schools are likely to spend an additional $5 million to $10 million on scholarships. That amounts to about $30 million added expenditures. Yet, in 2023, only two major programs—Georgia and Indiana—netted $30 millions or more from their athletic programs.[198] That leaves many programs strapped for cash and looking for ways to cut costs. Women sports will be a prime target for elimination.

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[196] *See* Shults, supra note 25 and accompanying text.
[197] *See* Marcello, *supra* note 127.

A second question is how the $22 million from the same revenue sharing provision in the *House* settlement will be distributed. Athletes in revenue-generating sports—football and basketball—may argue for a bigger share of pie. Title IX, on the other hand, would suggest equality among players. That, in turn, could generate yet another round of antitrust suits in which athletes in major sports would urge that they should be paid on the basis of their market value. Litigation, could be avoided, however, if the Department of Education updates Title IX regulation to address specifically how revenue sharing funds should be distributed across sports. One solution might be for colleges to treat direct payments to athletes as athletic scholarships and thereby implement proportionally equal payments between male and female athletes.

CONCLUSION

The *House* settlement has forever altered the landscape of intercollegiate athletics. The line separating amateur from professional sports has been crossed, and there is no turning back. Many athletes, at least those participating in revenue-generating sports, will be compensated directly, thus ending decades of exploitation by colleges and universities. Yet, many uncertainties remain. The spill-over effects of the settlement, including (1) whether students should be considered employees; (2) potential Title IX discrepancies; and (3) fair distribution of shared revenue among athletic programs and athletes at individual schools are likely to be the subjects of litigation for years to come. What is certain, however, is that intercollegiate sports will never be the same. Money does, in fact, change everything.

THE FIGHT TO PROVIDE AFFORDABLE HOUSING FOR THE POOR

THE NEW JERSEY MOUNT LAUREL DECISIONS

The First Fifteen Years (1970–1985)

Mount Laurel I and Mount Laurel II

Carl S. Bisgaier

PREFACE

> In the annals of land use, the annals of poor people's justice too, the trilogy of "*Mount Laurel*" cases is renowned. Because these were state-court rulings, they never unleashed the national passions of cases like "*Brown v. Board of Education*", which outlawed racial segregation, "*Roe v. Wade*", which made abortion a constitutional right. Yet, these are the most critical decisions on zoning in the country since the U.S. Supreme Court first announced, nearly three-quarters of a century ago, that municipalities could tell landowners how their land could, and could not, be used.[1]

Fifty years ago, on behalf of lower-income persons of color and their representatives, I filed a complaint against the Township of Mount Laurel, New Jersey, in the State Superior Court, Law Division, Burlington County. The complaint alleged a pattern and practice of pervasive municipal discrimination against the poor. The means to that end were: (1) not providing any opportunity for the construction of affordable housing; and (2) failing to utilize a code enforcement program to upgrade dilapidated and dilapidating housing currently occupied by its resident poor; essentially, forcing them ultimately to move out of the Township.

At that time, I was in my second year as a practicing attorney. I had little experience with litigation, and, particularly, I had no way of judging how long a case like this might take. As was true of young people then, most of my understanding of

[1] DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

how litigation worked was from watching a television series like *Perry Mason*. Mr. Mason's cases usually took about an hour from start to finish. As things turned out, the *Mount Laurel* case lasted a bit longer than that. In fact, now, half a century later, related litigation is pending and more is anticipated. Municipalities are still being sued, trial court decisions rendered, and, often, settlements reached. On July 1, 2025, a new "round 4" of municipal "fair share" housing obligations are likely to be determined and released.[2] Municipalities will be required to implement them and that, inevitably, will engender additional litigation.

This article is a personal accounting of the first fifteen years of the original litigation, from 1970 to 1985. As the events occurred many years ago, I have endeavored to be as accurate as possible and have shared drafts with others who were involved, received, reviewed and incorporated their comments. I apologize if there are any inaccuracies. I have tried to eliminate them or, at worst, minimize them.

This period covers the time from when the *Mount Laurel* case was conceived in 1970 until its final settlement in 1985. Even then, it would take another twelve years, not until 1997, before an affordable housing project would be approved by the Mount Laurel Township Planning Board and then another three years before construction would commence. The result, however, was and is extraordinary. That would be the acclaimed "Ethel R. Lawrence Homes." [3] This development honors, in name, the lead, non-institutional, plaintiff in the *Mount Laurel* case; its heart and soul. After the 60-acre site was acquired, Mrs. Lawrence did come for a visit and reviewed the concept plan for the development. Although she lived to see the ultimate settlement of the litigation, she died of cancer in 1994 and did not see the construction of the affordable housing that her

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[2] N.J. DEPT. OF CMTY. AFFS., AFFORDABLE HOUSING OBLIGATIONS FOR 2025-2035 (FOURTH ROUND) METHODOLOGY AND BACKGROUND (2024).

[3] *Ethel R. Lawrence Homes & Robinson Estates*, FAIR SHARE HOUSING DEVELOPMENT, https://fairsharedevelopment.org/housing/development/ethel-lawrence (last visited Dec. 13, 2024).

efforts had enabled. Had she been allowed that privilege, and had she walked among the buildings and shared time with the resident families and children, she would have been justifiably thrilled. But that was not to be.

When the development application was finally approved by the Township Planning Board, the process of review and decision was deemed sufficiently noteworthy to be reported in the New York Times on three different occasions.[4] Some news "fit to print."

A. Spoiler Alert

Ultimately, the plaintiffs won this case. The litigation, at least as it applied to Mount Laurel Township, did finally end, and they achieved a spectacular victory. It is often assumed, suggested or intimated that the experience must have been thrilling for me and the other attorneys who represented them and undertook the litigation on their behalf. Speaking for myself, it assuredly was not the least bit thrilling. For the better part of those fifteen years, I experienced defeat and certainly felt defeated, literally and repeatedly. Despite all of that, Mrs. Lawrence, was undaunted, and never seemed to waiver in her resolve. She was a very religious person and saw our effort in spiritual terms. To her, we were on a mission, one to be pursued for however long it would take. She was an inspiration, a rock. I could not comprehend how she managed it, but she never bent in her resolve – and, so, neither did we.

Personally, as the seemingly endless time went on in its "petty pace from day to everlasting day,"[5] I endured by adhering to an agenda that morphed from wanting to win to wanting, at least, to make life as miserable as possible for the defendants and their supporters and to make it impossible for the courts to

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[4] *See* Ronald Smothers, *Decades Later, Town Considers Housing Plan For the Poor*, N.Y. TIMES, Mar. 3, 1997 at B14. Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, N.Y. TIMES, Apr. 12 1997 at 21; Jill P. Capuzzo, *The Affordable Housing Complex That Works*, N.Y. TIMES, Nov. 25, 2001 at NJ14;

[5] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5, l. 20

duck the rendering of a decisive opinion. We had to make it clear that we were not going to abandon the effort until the final decision was issued. As my knowledge, frustration and anger grew over the years, I got to the point of seeing everyone "on the other side;" including, all of the opposing lawyers, planners, government officials, judges and court "masters," as adversaries – some as obstacles, others, literally, as the enemy. Everyone who stood between us and victory had to be played, manipulated and, if I was able to do it, turned around or, if necessary, taken down.

When, after I retired, I related this to one of the court's masters, Betsy McKenzie, she was truly surprised and, I think upset. Given how we obviously felt about each other, Betsy could not believe that I thought of her that way and treated her as someone to be manipulated. She and I, on a personal and professional level, were truly deep mutual admirers. I could not think more highly of any one who was involved in this work than Betsy. Look, there were many that filled shoes like that besides her: David Kinsey, Phil Caton, Alan Mallach, the three trial judges who ultimately heard all of the cases and others. But, they all, including Betsy, had to be worked and played, as best I could, to get them to enable my clients to "win." Sorry, but that's the unvarnished truth. "Worked" and "played," whatever it took. For me it was a kind of theater – acting a part to get a result. Acting pretty much all the time.

Basically, what Ethel Lawrence experienced as a religious mission, I experienced as something akin to a holy war. The goal was to win, to take them down, and I tried my best to do just that. The issues presented in the case were not matters that I thought would yield to a "let's agree to disagree" or a "it's just a difference of opinion" handshake. I saw the issues, appropriately, in black and white: a stark difference between right and wrong, good and bad, righteousness and evil. There was really nothing to discuss about the constitutionality, legality and morality of what the government was doing. All of the "fair share" numbers that were paraded before the courts represented real, oppressed and suffering people. They deserved to be seen, to be heard and to obtain a definitive

judgement by the New Jersey Supreme Court. Under our law, these mean-spirited government officials were fiduciaries. They were sworn to help all of our people. Yet, to the contrary, they were using their power to persecute the poor – our own citizens, the ones who were least able to defend themselves. It was disgusting and it was unrelenting.

Despite the losses, the empty victories and the endless delays along the way, I developed a deep resolve to see the matter to its conclusion. I was committed to doing whatever I could to force the New Jersey Supreme Court to reveal publicly, in a written opinion, a clear and unambiguous ruling on what I and my colleagues perceived to be a patent government policy of racial and economic discrimination. Incredibly, the discrimination was open and notorious. Those devising it and implementing it, totally unapologetic. They, intentionally, were using the powers of government to foster the segregation of African-American and Hispanic citizens and the poor in urban ghettos and rural pockets of poverty. If the Supreme Court was going to sanction such discrimination by pubic officials, then it would have to say so openly. It would have to validate this outrage. The Justices would have to live with that, one way or the other. At least it wouldn't be swept under some tattered rug as if it were not a discernable reality.

B. The Game Plan

Strategically, the game plan was simple enough. I didn't have to make it up. It was outlined for me in a 1968 monumental report that set forth the findings of a Presidential Commission, the National Advisory Commission on Civil Disorders; known as the "Kerner Commission" after its chairperson, Illinois Governor, Otto Kerner.[6] This prestigious, bi-partisan body had been created by President Lyndon Johnson in 1967 by an

[6] *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967) [hereinafter KERNER REPORT], https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report.

Executive Order.[7] It was tasked with the obligation to investigate, analyze, make findings and recommendations to address the intense urban civil war that recently had erupted in virtually every American city.[8] I believed that we could prove, in a legal proceeding, the factual existence in New Jersey of the injustices that the Commission had outlined and condemned. Further, I believed that we could prove these injustices were not circumstantial, and that, in fact, they were occurring, as the Commission had found, as an inevitable result of an intentional public policy of racism and economic discrimination. I reasoned that, if I could do that, we should have a shot at success. Although I had the support of an incredible group of plaintiffs and of other committed lawyers and planners, for me, personally, it was an extraordinarily difficult road to go down. You can't keep losing when you are litigating issues that are so fundamentally important to your clients and to so many disenfranchised people, and for such an incredibly long time, without it taking an enormous emotional toll. At least, I could not.

The defeats were hard to bear. The timing was worse. We started working on the case in 1970. The complaint was filed in 1971. In 1972 the initial trial court decision, while giving us a surprising partial victory, ruled against us on our most important legal theory – that suburban municipalities must respond to regional housing needs.[9] We then waited *three* years until an apparent Supreme Court victory in 1975.[10] However, as groundbreaking as it was, and as thrilled as we were to read it, the decision proved to do almost nothing to change the racist, segregationist, exclusionary landscape. The problem was that it had no teeth, nothing to stop the discrimination from happening and continuing. It also was inscrutable, as the Court left to

[7] Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).
[8] President Lyndon B. Johnson, Remarks Upon Signing Order Establishing the National Advisory Commission on Civil Disorders (July 29, 1967).
[9] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972).
[10] S. Burlington Cnty. NAACP v. Mount Laurel Twp. (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975).

others the task of defining basic relevant concepts and articulating what compliance would actually look like. An almost fatal blow occurred *three* years later, in 1978, as a second trial court decision ruled in favor of Mount Laurel Township.[11] The trial court validated an incredibly brazen "non-compliance" plan, clearly designed to thwart the Supreme Court decision.

After that debacle, we had to wait *eight* more years for the second Supreme Court decision.[12] Then, and not until then, did our clients and the poor achieve a conclusive and emphatic vindication of their constitutional rights. The Court gave them a complete victory, with remedial measures that went far beyond what we had sought, better than we had hoped. The Justices, unanimously, created the framework for the implementation of a *judicial* program that would result in the actual construction of affordable housing, and as a result, literally tens of thousands of low and moderate income households in New Jersey now reside in safe, decent, sanitary and affordable housing.

C. Beginnings

When the litigation was commenced, I was a staff attorney employed by Camden Regional Legal Services (CRLS). CRLS was a federally-funded poverty law program that delivered free legal services to indigent residents in a five-county region in South Jersey, located across the Delaware River from Philadelphia. I worked in the Law Reform Unit, headed by an extraordinary lawyer and tireless advocate for the poor, Peter O'Connor. It was staffed by Peter, me, Tom Oravetz, also a recent law school graduate, Ken Meiser, absent from his third-year at Harvard Law School, and a young planner, Carolyn Griesmann. We collectively had about six years of legal experience, none of which included much actual litigation and certainly nothing akin to "major" litigation. We had very little

[11] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978).
[12] S. Burlington Cnty. NAACP v. Mount Laurel Twp. (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983)

experience preparing witnesses, hiring and presenting expert witnesses, doing much "discovery," preparing or undertaking cross-examination, taking appeals, preparing trial and appellate briefs, arguing before appellate panels. Substantively, we had little or no understanding of real estate development, affordable housing programs, land use, zoning or the like – except as we might have learned in law school. It would be appropriate to describe the lot of us as totally unprepared for what we were about to undertake – a fact that we openly shared with our clients.

I certainly did not imagine or anticipate that the case would occupy me for the remainder of my legal career and become, historically, one of the most seminal land use and civil rights matters ever decided. Ultimately, it fostered several New Jersey Supreme Court and a myriad of lower court decisions. The *Mount Laurel* Doctrine resulted in the development of affordable units throughout the State and continues to generate more. Noteworthy is the fact that many of these lower income units have been constructed in suburban municipalities that had blocked any such development - places where mostly White, middle- and upper-income people resided.

The Plaintiffs were nine individuals and three non-profit entities. The Defendants were the Township of Mount Laurel, its Governing Body and several builders who were developing properties in the Township. The litigation was tried twice in the State Superior Court, Law Division and heard twice on appeal by the New Jersey Supreme Court. Both Supreme Court decisions were fundamental land use law game changers - the first in 1975 and then, with a lot more conviction, the second in 1983. They exhibit what the judiciary can do, if it really desires to do so, in the face of economic and racial injustice and in the face of a lack of help or caring by the Legislative and Executive branches of government. It would be wrong to lose sight of the fact that it was the Judicial branch of our New Jersey government, not its Executive or Legislative branches, that acted to protect the rights of African-Americans and Hispanics and the poor. It did so by providing and assuring the implementation of a clear and decisive mandate through a court-created program that

guaranteed the actual construction of affordable housing. Housing which, ultimately, was built, with more still being built.

Much has been written about the role of the courts in this case and in other such matters. In the context of the *Mount Laurel* decisions, this concern has been openly discussed by members of the Supreme Court, itself. See, for example, the concurring opinion of the late Justice Robert C. Clifford, in *Oakwood-at-Madison, Inc. v. Township of Madison*,[13] ("*Madison Township*") which opens with this not-so-subtle reflection: "Sometimes judges decide cases with their fingers crossed."[14]

Academics, talking heads and spin merchants love to express their intellectual acumen by debating topics such as "the proper role of the courts". Over the years, I have tried to avoid getting caught up in that dialogue. Frankly, I have found it incredibly annoying and pondered upon by primarily White male academics who seem to have no understanding of what it is like to be disenfranchised and poor in America. There is nothing to learn from this debate for an advocate representing poverty-stricken clients. We represented people who had nowhere else to go to vindicate their Constitutional rights. Their plight was actually created and supported by our Legislative and Executive Branches of State Government and by a myriad of local officials. Our clients and we, their lawyers, did not "decide" to litigate. We and they had no choice. Further, the New Jersey courts were given little choice in the matter as well. They either were going to deliver justice or join the Executive and Legislative branches of our State Government in sanctioning its denial. Fortunately, for the poor, the courts determined to act.

The case was captioned, *Southern Burlington County NAACP v. the Township of Mount Laurel*. The first appeal led the New Jersey Supreme Court, in 1975, to articulate the "*Mount Laurel* doctrine". The basic principle, and I am paraphrasing, is that every municipality in the State has an *affirmative* obligation to address the housing needs of its indigenous poor, and all "developing" municipalities have an *affirmative* obligation to

[13] 371 A.2d 1192 (N.J. 1977)
[14] *Id.* at 631.

address the housing needs of its regional, indigent, present and projected population. Municipalities were to provide measures to assess the need and to create realistic housing opportunities for their "fair share" of their regional need.[15]

Unfortunately, as previously stated, the Court, in *Mount Laurel I*, while articulating an extraordinary doctrine, failed to provide the clarity necessary for its implementation. Worse, the decision did not set forth any remedy for municipal intransigence. The Supreme Court did what courts usually do. Having set forth a mandate, it simply noted that it expected that municipalities would comply in "good faith". The following years proved, what both sides knew and believed from the start, that the Court's expectation was a naive fantasy. As time went by, municipal intransigence was the rule and little or nothing positive occurred. Even Mount Laurel Township, which remained, on remand, under judicial supervision, approved a contemptuous response, which, incredibly, was upheld by a horrifically misguided and unsympathetic trial court judge three years later in 1978.[16]

New Jersey municipal officials and their attorneys quickly learned that they could manipulate *Mount Laurel I* into a totally ineffective doctrine. The impact on us as advocates was devastating. We went from a sense of victory to pervasive professional depression. It was difficult to imagine how to go on with this. Yet there were those who seemed totally undaunted, like Mrs. Lawrence and Paul Davidoff, an academic and affordable housing advocate. Mr. Davidoff went to far as to convene annual meetings of housing advocates, some at the Mohonk Mountain House in New Paltz, New York. He and Mrs. Lawrence had experienced what it means to seek social change and that you just had to keep going, keep pushing and maybe you might achieve something positive. "You can't always get what you want, but if you try sometimes, you get what you need".[17] For me, personally, the emotions were all over the

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[15] *Mount Laurel I*, 336 A.2d at 734.
[16] *Mount Laurel II*, 391 A.2d 935.
[17] THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT (UMG 1969)

place – the anger was intense, the frustration palpable and the sense of hopelessness penetrating.

Ironically, there was an upside to what the municipalities were doing. As it turned out, the abject failure of *Mount Laurel I* was so blatant and luminous that no reasonable observer could deny it. And, as it ultimately turned out, there were seven personally affected reasonable observers out there taking it all in – the seven Justices of the New Jersey Supreme Court.

Municipal officials would pay a price for their arrogance and for so openly flaunting a Supreme Court ruling. As the landscape of non-compliance revealed itself and in light of the chaos created by a crush of pending cases, the Court became determined to avoid further embarrassment and to regain some semblance of credibility. In a way, the Justices had little choice – either back down or devise a truly positive outcome. After all was said and done, when I look back on what must have happened in 1983 and tried to envision what was going on as the Justices secretly deliberated on a ruling in the second *Mount Laurel* appeal, I was reminded of how American cinema immortalized what may well have been an apocryphal observation by the Japanese Admiral responsible for the "successful" attack on Pearl Harbor as he contemplated the inevitable American counterattack. While his cohorts were rejoicing in the "victory", he was portrayed musing: "I fear all we have done is to awaken a sleeping giant and fill him with a terrible resolve." [18] Well, in this context, it was our seven Supreme Court Justices who were awakened, and it was the Court that counterattacked with a terrible resolve. The result was its momentous decision, *Southern Burlington NAACP v. Township of Mount Laurel* (*Mount Laurel II*).

It can reasonably, if injudiciously, be said that the Court responded with a vengeance. Whatever was left to the imagination in *Mount Laurel I,* was detailed with unquestionable clarity in *Mount Laurel II*. The Court gave the most explicit and specific direction and expressed a total intolerance for further

[18] TORA! TORA! TORA! (20th Century Fox 1970)

delay.[19] In a clear message, it provided a remedy that placed a high price and penalty on any municipality that had failed to fulfill the obligations as set forth in its *first* decision (as if it were clear and obvious what form compliance should have taken).[20] Nothing more could have underscored the Court's intolerance for the past years of municipal contempt than its refusal to give municipalities a grace period to comply before being vulnerable to a court challenge under the new and specific mandate set forth in *Mount Laurel II*. The municipalities simply could not protect themselves from the onslaught of litigation that the Court intentionally had unleashed, expressly anticipated and which soon cascaded down in a seemingly endless avalanche of litigation.

Shortly after *Mount Laurel II* was released, my late friend, colleague and notable New Jersey land use lawyer, Henry Hill, was asked by the press to assess how vulnerable New Jersey municipalities actually were. Henry was not one to pull any punches - in or out of a courtroom. In an infamous response, he likened their vulnerability to that of baby seals on the frozen Alaskan tundra helplessly awaiting being clobbered on their heads by a slew of salivating hunters – with no rock to hide under. Now, if true, that would be very "vulnerable", and it was, quite definitely, true.

I. CHAPTER 1: ORIGINS

A. Personal

There were both personal and professional origins for me setting a stage for my work in the Legal Services program and with a specialty in affordable housing that predated the filing of the *Mount Laurel* litigation. My father, Murray M. Bisgaier, was the son of immigrants, raised in a Manhattan tenement. He was friends with Meyer Lansky and his family. He was a LaGuardia Democrat who maintained strong ties to

[19] *Id.* at 307.
[20] *Id.* at 330.

Tammany Hall. As fate would have it, he became one of New Jersey's first municipal planners. He was a workaholic. Trained as a lawyer, he left his fledgling family in Brooklyn and went to Washington to work for the Federal Government during World War II. When the politicians realized that there would be a huge demand for housing generated by millions of young returning veterans, administrators were tasked with coming up with programs to address that need. Having no clear source of people with any expertise, they turned to their lawyers to do that job. So, my father became a housing and planning expert overnight. He and his colleagues created the massive housing programs that funded hundreds of thousands of new units throughout the United States. Part of the Federal program was the provision of federal grant-funding to help finance local municipal planning. New Jersey matched that federal program with one of its own.

When my father left his work in Washington, he created one of the first municipal planning firms in New Jersey, Community Housing and Planning Associates. He approached local officials offering to prepare "Master Plans". These plans would have several "elements" which, taken together, would provide a present-day snapshot of the municipality, an assessment of future needs (retail, residential, educational, recreational, public works, road construction and improvements, etc.) and a blueprint for how to address those needs. The attraction was that the towns needed the planning, and he could get it done for them "free of charge" by obtaining State and Federal grants. He was very successful, and at one point or another represented a host of New Jersey municipalities throughout the State – literally from the City of Cape May to the City of Patterson; including, Atlantic City and Hoboken and many other urban and suburban municipalities. When New Jersey began licensing planners, he and a few others, like the renowned planner, Harvey Moskowitz, were "grandfathered", being given the first planning licenses without having to take any examinations or showing any educational credentials, none of which they had.

My initiation into the world of planning and housing occurred while in high school and college, during the summers,

when I worked in his office in New York. I gathered data and even prepared some of the elements of Master Plans. In Hoboken, as part of the approval of an Urban Renewal Area, I did on-site resident relocation and building condition studies. I would go door to door, showing my credentials, interviewing and getting relocation data from the soon-to-be displaced residents. They turned out to be mostly single-parent women, transient, itinerant seamen and young prostitutes. They were oddly accommodating to me, apparently not looking for trouble from any public authority, even one who was all of 19. They dutifully answered my questions about their relocation needs – household size, children, income. I became an accepted oddball in the neighborhood as we all joined in on what was, effectively, a silly, but necessary charade.

I also had a checklist of housing conditions, which I had to assess for every building. This included an inspection of rooftops. My first visit to the top of one of these shoreline buildings blew me away, almost literally. I turned and actually fell back as there suddenly came into view the entire expanse of the New York City skyline across the Hudson River. My father and Hoboken had the accurate vision that this location and the existence of the Hudson Tubes that connected Hoboken to Manhattan by rail would transform it into an upscale city.

The most memorable part of that work came when I attended random hearings with my father on applications for housing developments. I was most deeply affected by the public meetings at which he would be tarred and feathered trying to get certain municipalities to accept affordable housing developments. While it was relatively easy when the housing was in urban areas and was dedicated to senior citizens, applications for family housing was another thing. The emergence of the NIMBYS ("not in my backyard") made it virtually impossible to achieve such developments anywhere except in some willing urban municipalities where the poor already were disproportionately located.

One of my memories of that time was of a map, pinned on a wall in my father's conference room, that depicted the actual right-of-way of the proposed Atlantic City Expressway,

connecting Philadelphia and points west with the New Jersey shore. Above the map was a drape ready to be pulled down as a cover if any visitor came in. I admit to having the thought that we could so easily have taken economic advantage of knowing the proposed right-of-way and where all the intersections would be, but I can't imagine that thought ever crossed my father's mind. He later became somewhat infamous for his opposition to gambling in Atlantic City which led him to get fired as that City's long-term municipal planner.

After he died, he was memorialized by the Catholic Diocese of Patterson for his work with their housing non-profits, the Riese Corporations. I then approached Bishop Frank Rodimer about naming a common room in the Patterson development after him. He declined. Instead, he offered to name the high-rise residential building, then the tallest in the city, after him and to display his portrait in the entrance hall. On the occasion of my parents' 50th Wedding Anniversary, the Diocese obtained a colorful plaque from the Vatican with a formal Papal Blessing for them; which, given their religious affiliation, was kind of a remarkable honor to have received and to hang in their home.

B. Professional

I never entertained a thought about working as a planner with my father. I graduated from college in 1965. Like many other college students at the time, I had been "radicalized" by the riots of the 1960s and the assassination of President Kennedy in 1963. Then, you could throw into the mix the Civil Rights Movement, the Anti-Vietnam War Movement and the televised depictions of protestors being attacked by sheriffs and the police. I was inspired by the work that Attorney General Robert Kennedy and other lawyers were doing to enforce the rights of the poor, largely African-American citizens, and the positive role the courts seemed to be playing in that effort. So, "lawyering" looked like a great portal to act out my own issues with the government institutions and the people who perpetuated this oppression.

The work of the US Attorneys personally protecting African-American students integrating public schools, colleges and universities, was not hidden from view. I was just 16 when I saw television videos of a little African-American girl being escorted by Federal Marshals into a public school in New Orleans, traversing a sea of horrific-looking, spitting and screaming White adults. I could not imagine how they could be doing that to a child or how she could have the courage to walk that gauntlet into grade school.

These events were all conveyed on an expanded media that brought them, sometimes live and in real time, into our homes and college dorms: that would be television. It was a new, more intimate and demanding form of television. We saw the daily reporting on the Vietnam War, literally from the battlefields, the Cuban Missile Crisis, Lee Harvey Oswald murdered on live TV, an elderly, unarmed African-American female protestor writhing in agony on the street after a sheriff planted a cattle prod on her chest and set off the electric charge.

I came to think of the law as a vehicle for social change and had that vision for my career. I went to the University of Pennsylvania Law School because of its "liberal" reputation. Penn had a policy of getting practitioners to teach and to encourage academics to actually practice law. It was one of the two law schools that were administering the Reginald Heber Smith Fellowship Program, a federally funded grant program to incentivize law school graduates to forego Wall Street and to work in a local Legal Services Program funded by the federal Office of Economic Opportunity ("OEO").

Having been awarded a "Reggie" Fellowship upon being graduated from Penn, I could have gone almost anywhere to work, as the Fellowship would pay for my salary and benefits for two years. However, my mentor at Penn, Howard Lesnick, suggested, kind of insisted, that I cross the Delaware River to Camden and meet with "this O'Connor guy", who he heard had a reputation for tilting at windmills and who might need some help. So, my friend and fellow "Reggie", Tom Oravetz and I did just that. We met with Peter. Peter was a "snake charmer" and he pulled us in like fish on a reel. He salivated at the opportunity

to get "free" staff attorneys from Penn, and set out a plan to do "law reform" in a separate unit of the program. Tom and I were sold by the prospect of having a great opportunity to do aggressive lawyering in Camden and told Howard we wanted him to assign us there – which I think he already had done.

It was 1969 when I started work as a staff attorney at CRLS. I became its Executive Director in 1972. In 1974, I left to join the newly formed State Department of the Public Advocate ("DPA") as Deputy Director, and later as Director of the Division of Public Interest Advocacy. The CRLS Law Reform Division transformed CRLS into one of the most notorious legal services programs in the country, maybe sharing that honor with Cal Rural.

In 1972, upon being reelected, President Nixon is said to have expressed his fury over the fact that the Federal Government was financing the Legal Services Program and being used to sue federal, state and local governments.[21] Looking for a poster child of what he deemed symbolized that abuse, his administration targeted our program, CRLS, citing our litigation against the City of Camden and Mount Laurel Township. Vice President Spiro Agnew was unleashed to openly attack us as representing everything he deemed wrong with the National Legal Services Program. We recall him saying that we were, essentially a left-wing "Fifth Column", supporting a rogue, OEO-funded, African-American and Hispanic "shadow government." We were, he charged, operating without oversight control or discipline, working outside of the elected government, challenging and undermining programs initiated by elected officials. In truth, he was absolutely right. Sometime after he resigned in disgrace, efforts like ours and charges like his, ultimately led to regulatory and statutory changes prohibiting the legal services programs from doing "law reform", class actions, and litigating on certain specified issues;

[21] Oval Office 498–5, May 13, 1971, White House Tapes, Richard Nixon Presidential Library and Museum (RNPL)

such as, abortion, redistricting, welfare.[22] But by then, our "damage" in South Jersey had already been done.

II. CHAPTER 2: URBAN RENEWAL — NEGRO REMOVAL

In the '60s and early '70s, Camden and other New Jersey cities, and cities across the country, were the venues of civil rights protests and many destructive riots.[23] My first day at work in September, 1969 actually was spent in the Camden Municipal Jail interviewing African-American prisoners who had been arrested during the prior night's rioting. CRLS was a civil, not a criminal, law program. Our focus was limited to what could be done through civil, not criminal, litigation to address the needs of our African-American, Hispanic and poverty-stricken clients. That first day was devoted to interviewing prisoners who had witnessed the police destroy an African-American owned and operated dashiki business. The officers of the law had, literally, gone around the sewing room floor of the building using their billy-clubs to smash the pins of all the sewing machines. That ended the dashiki business.

My "Bible" then was the Kerner Commission Report. The document was mesmerizing to me as a young attorney. The allegations and conclusions were incredible enough, but the fact that they were set forth in an official report published by a *Presidential* Commission was astonishing.

Our Country, it said, was "moving toward two societies, one Black, one White – separate and unequal." The blame was placed squarely on White America: "What White Americans have never fully understood — but what the Negro can never forget — is that White society is deeply implicated in the ghetto.

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[22] H.R.3610 - Omnibus Consolidated Appropriations Act, 1997

[23] *See* Nicholas Iaroslavtsev, *Camden, New Jersey Riots (1969 and 1971)*, BLACKPAST (July 1, 2018), https://www.blackpast.org/african-american-history/camden-new-jersey-riots-1969-and-1971/; *see also* Weekend Edition Saturday, *40 Years On, Newark Re-Examines Painful Riot Past*, NPR (July 14, 2007), https://www.npr.org/2007/07/14/11966375/40-years-on-newark-re-examines-painful-riot-past.

White institutions created it, White institutions maintain it, and White society condones it."[24]

The focus for us in Camden was a particular federal program that had been specifically targeted by the Kerner Commission: Urban Renewal. Urban Renewal can result in the demolition of whole neighborhoods and the required relocation of residents. The program mandates the completion of a several stage process regulated by both the Federal and State governments. It leads to the redevelopment of a designated "Urban Renewal Area". The designation of the targeted land area is preceded by studies demonstrating that the area is blighted or otherwise in need of redevelopment. Studies are done of the existing structures and the existing residents. All residents are interviewed and a determination is made of their needs if they were to be relocated. This results in a written "Relocation Plan". The overall Urban Renewal Plan would then be prepared, and all of this would have to be subject to approval by the local Governing Body after it conducted public hearings. The power is enormous, and the relevant law and how it was implemented by our courts is very deferential to the decisions made by the local government.

Once the planning was completed, the Governing Body would go through the next phase: choosing a Redeveloper. The work of a Redeveloper could be profitable enough to attract competitive applications. However, the choice of the Redeveloper was strictly in the discretion of the local Governing Body.

Urban Renewal was something that I had personal experience with when working with my father. I was shaken by the allegations in the report that branded Urban Renewal as simply a veiled program of "Negro Removal." I called and asked my father about that. He said it clearly was possible, if not probable, and was certainly happening; particularly, if a legitimate Relocation Plan was not implemented and affordable housing was not part of the Redevelopment Plan. The areas targeted by local politicians for "renewal" would be those

[24] KERNER REPORT, *supra* note 6, at 1.

occupied by the poor since it was most likely those areas that would be the location of structures and neighborhoods that were "blighted". He said that municipalities strategically might allow these areas to deteriorate without making any remediation efforts so that residents would leave "voluntarily". Thus, they avoided the need for government financed relocation. Ultimately, the goal would be to relocate the remaining population, tear down the existing structures and create vacant land which could be redeveloped by a chosen private developer consistent with an approved Urban Renewal Plan. Since lower income areas would be targeted and since they would most likely be populated by African-Americans and Hispanics, that would be tantamount to "Negro (and Hispanic) Removal" – whether intentional or not.

III. CHAPTER 3: LITIGATING AN URBAN STRATEGY (1969)

Camden then was blessed with several very strong and vocal African-American and Hispanic organizations. They had been awarded grants from the OEO. This community leadership had created a local Camden County OEO Corporation which received federal grants and then funneled money and support to the local community – both African-American and Hispanic. The money and the funneling gave the CCOEO a huge power base in Camden, countervailing the elected government which had no say in who would get the money or how the money would be spent.

Camden was engaged in massive urban renewal projects. I believe there were five. They were designed to dislocate whole African-American and Hispanic neighborhoods and a daunting number of individuals and families. Also, the alignment of a proposed Interstate highway, I-676, connecting the Ben Franklin Bridge and the Walt Whitman Bridge, was designed to cut through community neighborhoods, effectively destroying them and causing massive residential dislocation.

The local government had a grand plan.[25] Camden is located on the Delaware River directly across from Philadelphia. It is the home of Rutgers University – Camden. It then was the location of the RCA Corporation ("Camden Records", "His Master's Voice") and the Campbell Soup Corporation which processed its tomato soup at a plant along the river. It is directly connected to Philadelphia by two bridges and a modern rail transit system to Center City. With that base, there was hope of a strategic Camden renewal that would bring new construction, upgraded residential developments and a higher income population. Not surprisingly, Urban Renewal was to be a major player.

The local OEO, controlled by African-Americans and Hispanics, wanted this to stop or, at least, wanted input into the planning process to protect their people. So, with little encouragement from us, they authorized us to sue. And we did. A massive lawsuit was filed challenging the planning of the projects.[26] Other action was taken challenging the proposed right-of-way of the Interstate Highway and many lesser suits attacked other actions by the City Government.

The "Camden Coalition" litigation brought everything to a halt. Ultimately, it would be settled by the intervention of the City's political boss and Director of its Department of Public Works, Angelo ("Eric") Errichetti. He later would become the City's Mayor and a State Senator. Peter would actually join his Senate staff. Unfortunately, Eric, who was a genuinely good and, I totally believe, honest person, would gain national notoriety as a victim of the Abscam scandal.[27] He would be manipulated by federal agents and taken down with a U.S. Senator, a Congressman or two and other politicians and serve time in a Federal Penitentiary. He never recovered. In 2013 he would be

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[25] Donald Janson, *Camden Mayor Strives for Rebirth of Blighted City*, N.Y. TIMES, Nov. 6, 1975, at 88.

[26] *About Peter J. O'Connor*, FAIR SHARE HOUSING DEVELOPMENT, https://fairsharedevelopment.org/about/staff/peter/ (last visited Dec. 13, 2024).

[27] FBI, *ABSCAM*, FBI: HISTORY, https://www.fbi.gov/history/famous-cases/abscam (last visited Dec. 13, 2024).

fictionalized as "Carmine Polito", and the scandal would be immortalized in a "major motion picture" - "American Hustle".[28]

IV. CHAPTER 4: THE SUBURBS — WAKE UP AND SMELL THE LATTE

A. Haddonfield Calling

All that being said, this isn't about our CRLS "Urban Strategy". It is actually about the flip side. A side that we had completely ignored until I got one of those random phone calls that triggered a lot of our work. It turned out that just as urban municipal governments were doing their best to divest themselves of blight, poverty and their indigent populations, suburban governments were doing their best to undermine that effort and maintain the status quo. They were committed to keeping "those people" out of their towns and making sure that the urban ghettos remained as their perpetual homes. The path to the success of that goal was obvious: preclude the construction of affordable housing.

I probably never would have focused on what these towns were doing had I not gotten a totally unexpected phone call from a minister who served his flock in a nearby suburb, Haddonfield, New Jersey. I do not remember, for sure, which of these two prominent church leaders called, but it would have been either Reverend Dr. Charles A. Sayre of the United Methodist Church or Reverend Dr. Thomas P. Lindsay of the First Presbyterian Church. I'm thinking it was Dr. Lindsay, but it doesn't really matter. Both were major figures in Haddonfield and their churches were renowned institutions in the region with a large flock composed of some of the more prominent regional dignitaries. I recall that, innocently, both ministers and some other good local souls were engaged in a failing mission to aid what was left of Haddonfield's poor, African-American community.

Until then, the truth is that Peter, Tom, Ken, Carolyn and I were not looking East at all. We didn't care much about what

[28] AMERICAN HUSTLE (Columbia Pictures 2013).

was going on in the suburbs. Our only suburban connection was with a do-gooder, White organization, the "Friends of the Black Peoples Unity Movement", which supported the economic efforts of the Camden African-American community. Our clients were urban and had local organizational support. No one ever asked us anything about the suburbs, and we never gave a thought to what they were doing or how that might be impacting our Camden clients. We were focused solely on urban poverty. It is embarrassing to acknowledge that I had ignored, essentially, half of the findings in the Kerner Commission Report.

Haddonfield was and still is the crown jewel of South Jersey suburbia. It has a thriving main street - "Kings Highway", literally dating back to a 60-foot wide "King's" right-of-way granted in something like 1680.[29] The "highway" and immediate vicinity are lined with many buildings that also predate the Revolutionary War. It has a history of being settled and developed in the 1600s and celebrates its history of Colonial, British and Hessian troop movements and the like. The main retail area is surrounded by intact and massive neighborhoods of mostly very large Victorian homes. This is all perpetuated by the Borough's adoption of one of the first Historic Preservation District ordinances in New Jersey.[30] If you want to do anything to a structure located in that District, you need approval from the local Historic Preservation Commission – like even the color of the paint you might want to use.

Haddonfield is serviced by a station on a High-Speed (commuter) Line traversed by modern, air-conditioned trains. They run just about every quarter hour during peak times and

[29] U.S. Dep't of Interior, Nat'l Register of Historic Places, King's Highway Historic District, (2000) https://npgallery.nps.gov/NRHP/ (Reference Number 00001493).

[30] Adam L Cataldo & S. Joseph Hagenmayer, *A Leader for Preservation in Haddonfield Dies at 82 Now Described as a Visionary, Joan L. Aiken Organized a Pioneering Effort to Save the Borough's Historic Architecture*, PHILA. INQUIRER (July 11, 2000), https://archive.ph/20130615231413/http://articles.philly.com/2000-07-11/news/25608998_1_historic-district-historic-buildings-preservation-council.

provide service to Philadelphia in about twelve minutes. Haddonfield accepted the commuter rail, but conditionally. It is the only suburban town where the otherwise elevated train stations and tracks were, the story goes, required to be set far below street level. The Borough is a stone's throw from access to Interstate 295 which connects it to the rest of the world. As you might imagine, Haddonfield has one of the wealthiest populations south of Princeton,[31] New Jersey and one of the best public-school systems in the State, if not in the country.[32] It is so small geographically, that its kids all walk to school – bussing is not provided except for developmentally or physically impaired students. I know this as a long-term resident who raised my own children there – as do a lot of our local professional athletes.

Now, doesn't that sound like a great place to locate some affordable housing? Not according to Haddonfield. At the time, it had virtually no housing affordable to lower income households. But it still had some. It turned out that the remnants of a poor, African-American community actually still existed in Haddonfield. It was located at the intersection of Ellis Street and Lincoln Avenue. Incredibly, two Churches that serve mostly African-American congregations were and *still are* located there, in this incredibly wealthy, predominantly White haven: the Mt. Olivet Baptist Church (circa 1890) and the Greater Mt. Pisgah Church (circa 1860). These, originally, provided spiritual relief to the African-American servants of Haddonfield's wealthy, White community. While the two churches are still active, the former neighboring African-American residents and their residences are not.

The minister who called me that day was the leader of a prominent, mostly White, church. He and another minister of a different prominent, mostly White, church were supporting a

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[31] *List of New Jersey Locations by Per Capita Income*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_New_Jersey_locations_by_per_capita_income (last visited Dec. 15, 2024) (citing census data, Haddonfield is ranked 52nd out of 559 total municipalities).

[32] *Best New Jersey High Schools*, U.S. NEWS, https://www.usnews.com/education/best-high-schools/new-jersey/rankings (last visited Dec. 15, 2024).

coalition of local good guys who had joined together to develop some vacant land at that intersection and to redevelop some rundown multifamily structures along Ellis Street - all for lower income households. They had obtained an option on the land and were working with the State to achieve the necessary funding. The problem was that any project like that would require significant municipal cooperation through rezoning and support for a grant application. Apparently, Haddonfield was not cooperating.

The minister's call came at a time when their option on the land was expiring or had expired. He asked if I could come out and discuss what they could do, how I might help them. So, with my limited knowledge of this area of the law, the law of land use regulations, I agreed. We met that night at one of the African-American churches. They detailed their tale of woe. Apparently, the land owner, a local attorney, was not inclined to extend their option. They said that he now would achieve something of a windfall by selling the land to a developer for the construction of relatively (by Haddonfield standards) small-lot single-family homes. Not surprisingly, according to them, Haddonfield, which normally would have opposed such a development, intended to cooperate and support it. If you saw it today, you might contemplate this oddity in a town of larger homes on larger lots. You would need to know the history to understand how a small lot development of modest-sized homes ever got there.

My feedback was relatively simple. First, the landowner is a non-governmental person who can be sued only for breach of contract, which isn't applicable here. Absent a contractual commitment to the contrary, he can choose whether to extend an option on his land. If the land is not under contract, he can choose to sell it to the new buyer, a regional developer. Second, the only leverage that they could have over the municipality, landowner and developer would be to sue the Borough for discrimination against the poor and/or challenge any rezoning that would benefit the builder as part of a municipal conspiracy to undermine a legitimate housing opportunity for the poor.

This meeting was held before my own conceptualization of the *Mount Laurel* litigation and the legal theories I and my colleagues developed for that case. So, in a way, Haddonfield lucked out. If this had happened in a few more months, given the opportunity to enhance my own land use education and an emerging understanding of the effects of "exclusionary zoning", the *Mount Laurel* Doctrine might well have been the *Haddonfield* Doctrine. However, in retrospect, even armed with that greater knowledge, I do not believe that I ever could convince these ministers to support any legal action against their own town. I mean, it probably wouldn't have gone down all that well in their church pews on Sunday.

B. We Build What They Want

I learned five things from this encounter. First, it is very hard to get local residents and professionals, like the two ministers involved here, to sue their own town. That idea was flat out rejected - which meant that their project was dead and that the Borough had successfully thwarted their effort to provide affordable housing in the town. Second, the law is all on the municipal side. The courts pay enormous deference to local decisions on local zoning matters, and it would be difficult to go up against the presumption of rationality and validity that insulates government decision making. Third, time is on the municipal side. Legal actions take a lot of time, and if the municipality intends to fight any action for as long as it can, landowners, option holders and developers would be looking at years before they could get any result. Fourth, even if they prevailed, the remedy the courts would provide would be to order the municipality to rezone. However, there would be no requirement that the municipality grant any preference or benefit to the litigating plaintiff or to provide the zoning that they needed to build what they wanted.

The fifth and, perhaps, my greatest lesson occurred when I was schooled by the Haddonfield developer who took over the do-gooders option and by other developers in the region. After walking away from my meeting in Haddonfield and feeling

pretty ineffective, I decided to see if the current developer would be willing to chat about what had happened. I called him, and he said we could talk but only at a meeting of the regional professional group of developers, the South Jersey Builders Association ("SJBA"). That was fine with me, and he agreed to set up the meeting.

When I attended a meeting of the SJBA, I had really just one question to ask: since there are abundant federal and state funds available to finance the construction of affordable housing, making the construction virtually risk free (an incredible incentive to builders), and since there would be a virtually unlimited class of prospective tenants whose rents would be underwritten by the Federal Government, *why don't you do it*? Why don't you approach the municipalities and seek approval for an affordable housing project. Sounded good to me, but I actually, unintentionally, provoked laughter. They said that I was completely out of touch with the reality of the development business. Actually, the truth was that I knew absolutely nothing about it at all.

Apparently, for similar reasons as set forth above, the idea of suing a municipality to get an approval was beyond ridiculous. First, it might take years. Second, even if you won, you would not get what they called a "builder's remedy", a remedy for the prevailing plaintiff to get what they had proposed. Third, it is virtually impossible, financially, to work in a town where you are seen as an "enemy". Why? They gave me a simple example: before they can pour concrete, a local official might have to come out to verify that the psi (pounds per square inch) of the concrete is acceptable. If the guy doesn't show up, you could lose a lot of concrete and time. The fact was that almost every aspect of the actual path to and through the construction of a development was fraught with approvals, permits and inspections. If the local code enforcement official was looking to kill your project, he or she easily could.

They were very convincing. In any event, they clearly were not going to be any help absent a dramatic change in the law. Their final words, left ringing in my ears, were: "We build

what they want and where they want it, and we are doing just fine. The last thing we need is to get on their shit list."

C. The Two Americas

When I returned to the office, I picked up the Kerner Commission Report again and reread the language on the "two Americas" – one urban and predominantly Black, the other suburban and predominantly White. The Report, in fact, said that this was a function of local governmental power, design and intent. This assessment made me reflect on our work - were we at CRLS innocently fostering this segregation by focusing all of our efforts on urban development? Shouldn't we also, at least in tandem, be seeking to open up the suburbs to the poor, African-American and Hispanic populations? The fact that I was even asking the question was kind of pathetic. Had I been a more careful reader of the Kerner Commission Report, I would have gotten the answer some time ago.

> Unless there are sharp changes in the factors influencing Negro settlement patterns within metropolitan areas, there is little doubt that the trend toward Negro majorities will continue."[33] "Providing employment for the swelling Negro ghetto population will require ... opening suburban residential areas to Negroes and encouraging them to move closer to industrial centers . . ."[34] "[C]ities will have Negro majorities by 1985, and the suburbs ringing them will remain largely all white unless there are major changes in Negro fertility rates, in migration

[33] KERNER REPORT, *supra* note 6, at 216.
[34] *Id.* at 217.

> settlement patterns or public policy."[35]

According to the Report, something called "zoning" was being used by municipalities to orchestrate and control suburban development to assure that only middle- and upper-income housing could be constructed. I had never heard of zoning. Maybe I did when I was working for my father, but I had no memory of it. I did a little research and learned enough to truly open my eyes as to how effectively and completely municipalities could use this power to control development. This incredible intrusion of government power into private sector decision-making (ironically with the full support of conservative politicians and voters) was first approved by the U.S. Supreme Court in 1926, ostensibly to provide municipalities with a tool to avoid massive conflicts in land use; such as, the location of a cement factory or gravel excavation pit next to an existing or planned residential development.

Initially, zoning seemed like a relatively harmless device to provide legally separate areas so as to keep apart and buffer incompatible residential, commercial and industrial developments. It was upheld as constitutional in a case captioned, *The Village of Euclid v. The Ambler Realty Company*,[36] This aspect of land use control is often referred to as "Euclidian Zoning". The Court was very deferential to the municipality and, basically, ruled that every exercise of the zoning power would be upheld if it had *any relationship to public health, safety, morals or, something called, "the general welfare"*.[37] To be successful, a challenger would have the burden of demonstrating that the particular ordinance was arbitrary, capricious or unreasonable in the face of a *presumption of validity* granted to the public entity. Lots of luck with that.

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[35] *Id.* at 216.
[36] 272 U.S. 365 (1926).
[37] *Id.* at 395.

D. It's So Easy

The thing of it was that, while reading the cases was enlightening, I was at sea as to how the zoning power could promote such effective exclusion and discrimination. So, I turned to our resident planner, Carolyn. Her immediate reaction was: "It's so easy. They can pretend that all that they are doing is establishing standards to promote tax ratables with upscale, attractive residential development, but by indirection or intent, they are undermining the possibility of providing housing for a substantial percentage of our population. Further, they have no scientific basis in public health and safety to justify the excessive controls that they impose. It's all done under the umbrella of a concept that did not yield to a precise definition: '*the general welfare*'." She then gave me a short but very effective primer on land use controls.

Apparently, over the years since the 1926 *Euclid* decision, municipal use of the zoning power dramatically evolved. Land use controls became far more sophisticated – to the point now where the local government literally controls almost every aspect of land development. Initially, it was just about maintaining distinct areas for different, incompatible "uses" - keeping them apart. It now was used to control the nuts and bolts of land development in almost all respects, and not surprisingly, every one of those nuts and bolts affect cost.

You start out with not just controlling the location of residential uses, but also mandating the location of different *types* of housing - even the total exclusion of small lot single-family housing and multifamily dwellings. Then, you control the "density" of those units; i.e., how many of them are allowed to be built on a lot or a parcel. Land is a finite natural resource. We pretty much aren't growing any more of it than what we've got. By limiting density, you can control how many residential units can be built. Let's take single-family homes. If I have 100 acres that are zoned for residential units and are limited to only one type – detached, single-family units and then I am limited to, say, just building 1 unit per acre, the municipality has already done a lot to drive up cost. The detached single-family unit is probably

the most expensive form of residential structure and the most environmentally bankrupt. Limiting development to that distinct residential use goes a long way to controlling who can afford to live on that land. Limiting how many units can be constructed on an acre further drives up cost. And that's just the opening salvo.

Compare that constraint to a more "inclusive" form of residential use. Just take smaller lot detached single-family housing, say at a density of 5 units per acre. Obviously, I now can put 5 times as many units on the same tract of land. Instead of lots being about an acre per unit, now I can build on lots as small as about 7,000 square feet per unit instead of 43,560 square feet. But there's a lot more, just consider townhouses at 6 to 15 units per acre or apartments at 10 to 20. Clearly, these are far less expensive to build per unit and provide a great savings in land absorption. And we are not even talking about mid-rise and high-rise structures.

Then there are the secondary impacts; like controls that mandate aspects of the unit itself and the location of the unit on the property. Municipalities were regulating the number of bedrooms in a multifamily project, and the minimum square footage of the units, probably one of the most cost-generative impacts. Then they could regulate the height of the building, affecting the number of floors. The building's mass – limitations on lot coverage by impervious surfaces; then, add to the pile property line setbacks for side yards (e.g., eliminating zero lot line units), front yard setbacks from streets, the location of detached garages. Now, throw in street widths, required curbs (Belgian Block or concrete?), concrete sidewalks, on both sides of the street, and their width (3 feet?, how about 4 feet?).

Obviously, all of this affects cost. Here's just one example: there's a lot more street required to service one acre lots than quarter acre lots. More asphalt, more concrete, more sidewalks and curbing, longer sewer and water lines running beneath the ground and laterals running from the house to the large mains in the street. Cost, cost and more cost – ultimately shaping the price of the end-product and the wealth of a potential buyer, the incoming resident. Some ordinances actually went so far as to

preclude who the "user" could be – mandating ownership of the unit by the resident and precluding rentals, even requiring "families" to be groups of biologically-related individuals. Seriously.

Municipal officials, if asked, would justify all of this as *necessary* to support the municipal tax base, which, in New Jersey is largely derived from property taxes, and to protect property values of existing and future residents. In effect, their eyes were not only on ratables but also on the flip side, keeping school age children to a minimum. In one case, I argued that a pregnant woman was about as lethal to municipal officials as a toxic waste dump. The less units, the less bedrooms, the less children. Where multifamily housing was permitted, they might limit them to one-bedroom units and single-family homes might not be permitted to use basements as bedrooms.

So, the more expensive the unit and wealthier the resident, the easier it is to fill government coffers and minimize government cost. Then, you can add as a more transparent justification, the need to keep out the costly "riffraff" and the "types" of families with lots of kids and unrelated families and individuals living together. The concept of the "general welfare" was easy enough to use in this context.

E. Pay No Attention to That Man Behind the Screen

So here is where it all ended up: effectively, there was a man behind a kind of screen dictating everything: *the local government actually was the developer* – determining precisely what could be built and where it would be located - *landowners and builders became, essentially, governmental tools, implementing the governmental program and the policies reflected in the local ordinances*. "We build what they want and where they want it."

If you drive down any street in any of these suburban municipalities, you are not looking primarily at what developers designed and chose to build. You are looking at what they were allowed to build. You are looking at what municipalities told them to build. The builders were not deciding anything. They

were simply implementing municipal policy and decisions. They might as well be public employees working for the local planning department.

All of this was validated in New Jersey in 1952 in cases that permitted very specific land use controls; such as, the imposition of minimum floor areas for a residential unit. *Lionshead Lake v. Wayne Township*,[38] and *Schmidt v. Board of Adjustment of the City of Newark*:[39]

> [S]o long as the zoning ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic and political unit, it is in the general welfare and therefore a proper exercise of the zoning power. The underlying question before us is whether in the light of these constitutional and legislative provisions the zoning ordinance of the defendant township is arbitrary and unreasonable.[40]

In 1977, after New Jersey courts had become more enlightened to the abuse of the zoning power, Linda Pancotto, Ken and I litigated a case for the Public Advocate which resulted in the reversal of this decision in 1979 and invalidated minimum square footage requirements that exceeded minimum standards required for health and safety (the "general welfare" be damned).[41] Legitimate minimums were easy enough to establish through published public health standards. We had the benefit of the Federal Minimum Property Standards that provided minimal requirements for many thousands of

[38] 89 A.2d 693 (N.J. 1952).
[39] 88 A.2d 607 (N.J. 1952).
[40] *Lionshead Lake*, 89 A.2d at 697.
[41] Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 405 A.2d 381 (N.J. 1979).

federally-funded housing units that had been constructed throughout the country and in New Jersey.

However, that happened in 1979, and this was 1970 - a light year earlier in land use time given what was to happen in New Jersey in that decade. In 1970, our research demonstrated that the zoning power was virtually sacrosanct. Further, as set forth in the Kerner Commission Report, it had become a powerful weapon which could be, and was being, used to discriminate against the poor and African-American and Hispanic households. The obvious intent was to preclude the construction of affordable housing anywhere in the municipality. With its vast array of judicially sanctioned development controls, any municipality could assure that only middle- and upper-income housing could be constructed. Thus, without saying that they were doing it, in the guise of land use controls supported by some iteration of the "general welfare", municipalities easily could discriminate against the poor and African-American and Hispanic households – and frustrate any effort to provide housing opportunities for them outside of urban areas.

Here's an incredible irony to give a perspective on just how ridiculous all this was. Remember Haddonfield? Well, this crown jewel, home of stately Victorian mansions and one of the best school systems in the State, with its ancient American history and probably the wealthiest regional population, highest property values and greatest tax base – that Haddonfield actually could not be replicated under any of the municipal zoning ordinances that controlled development in New Jersey's suburbs. Haddonfield's lot sizes were too small, setbacks too short, streets too narrow and the like. It even had a mix of duplexes and triplexes scattered among and between single-family homes, in broken-up Victorian structures that had become multifamily uses. The horror of it all.

Well, if things weren't already lined up enough to enable municipalities to dictate land development, those things got decidedly worse. Fortunately, however, they got so much worse as to be, to their ultimate detriment, incredibly transparent. This

would be the rise of a novel and monstrous municipal land use tool; what planners affectionately called "New Towns".

V. CHAPTER 5: NEW TOWNS — THE FINAL FRONTIER

Fortuitously, something totally unexpected occurred for me personally. I went on "vacation" to Los Angeles, California. It turned into what might be called "a busman's holiday". After randomly chatting with some acquaintances about what we were doing in New Jersey, I was told that it might be interesting for me to visit a massive new development that was being built outside of Los Angeles. So, I did. I went on a side trip to see Westlake Village. This project was so momentous that I could not take it all in. It was an actual, cast-in-municipal-stone, "New Town". The developers were, literally, building a massive new municipality from scratch. Of course, all of this had been fostered, reviewed and approved in detail by the relevant municipalities in which the lands were located. Municipal officials must have had their hands, fingers and fingernails deeply dug into the planning and design of this place.

What more did we need? Basically, governmental officials would review an application for a large development with no particular restraint or standards. *The municipal governments were engaging in an actual land and development deal!* "You go get the land, come up with a development concept and run it by us. If we like it, you get approvals. If not, you go back to the drawing board, with some additional direction from us, and bring us back something we do like. Then, we will approve it, and you can go and build it."

I went to the Westlake Village sales office and talked with a young person who was marketing the development that day. I showed interest, and she gave me the grand tour. At one point, I asked about affordable housing, housing for the poor and the like. She laughed and assured me that: "You certainly don't have to worry about that here."

That was the truth. Westlake Village's construction began in the late '60s. It was designed to be a "refuge" for the wealthy (like the wealthy needed a refuge and from whom and

what?). It succeeded. Today Westlake Village is one of the wealthiest communities in California.[42] It is home to many notable athletes and theater personages. It's 8,000 residents enjoy an average income of almost $200,000.[43] It has virtually no lower income housing and less than 2% of its population is African-American.[44] Sounds like a successful public governmental outcome.

There it was. Just what the Kerner Commission said it would be – a government-sponsored and designed haven for the rich and the White. The key words here are "government" and "sponsored and designed". This scenario was not exactly my image of government working for the "general welfare". To the contrary, the government clearly was working for the welfare of those who needed its support the least – middle- and upper-income households. Public officials certainly were not encouraging or requiring housing for the poor. In fact, they were doing pretty much everything they could to preclude it. Now there's some "general" welfare for you.

Westlake Village was not an anomaly. In effect, it was simply one example of what happens when municipalities really take over – raising their land use powers to an unprecedented and more precise level. At the time, the land use world had become enamored with this new scale of development – "new towns". Reston, Virginia and Columbia, Maryland were the oft-cited examples of what government and the private sector could accomplish when "*working together*".[45] Basically, the normal

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[42] *List of California Locations by Income*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_California_locations_by_income (last visited Dec. 15, 2024) (Westlake Village has a median household income of $115,550).

[43] *Westlake Village, CA*, DATA USA, https://datausa.io/profile/geo/westlake-village-ca/ (last visited Feb. 21, 2025)

[44] *QuickFacts West Lake Village City, California*, U.S. CENSUS BUREAU (July 1, 2024), https://www.census.gov/quickfacts/fact/table/westlakevillagecitycalifornia/PST045224.

[45] *BLVD at Reston Station Demonstrates the Economic Success of Public-Private Partnership for Fairfax County*, FAIRFAX COUNTY: PUBLIC AFFAIRS (Mar.

land use controls were suspended to accommodate these massive development proposals that were intended to create, literally, new towns. Effectively, this gave local government the ultimate power – to review, direct and constrain huge developments and ensure exactly what would be built and what populations would be benefitted. There would be no mystery about the outcome – little or no lower income households, few if any African-American and Hispanic households. It was virtually foolproof, and it did work.

Driving back to Los Angeles, I had a single thought: *This just cannot be legal*.

VI. CHAPTER 6: OR CAN IT?

So, the veil had been removed and the bandage ripped from the skin. Zoning and land use controls were government programs. Any government program is founded on the overarching principle that government must act for the *general* welfare. How could it be legal for government *proactively* to design communities, neighborhoods, and residential units which create housing opportunities just for the wealthy while, at the same time, designing land use controls that effectively excluded the possibility of constructing lower income housing? To the contrary, shouldn't they be proactively implementing controls to generate realistic housing opportunities for the poor? This municipal action was an open, brazen and transparent policy of government discrimination and exclusion. Putting housing aside for the moment, could they do that with access to food?, access to medical care?, access to public education?

New Jersey was already deep into allowing municipalities to use their land use authority to discriminate and exclude. Then, in the late '60s, the Legislature adopted a permissive zoning law that enabled municipalities to approve

6, 2016), https://www.fairfaxcounty.gov/publicaffairs/blvd-reston-station-demonstrates-economic-success-public-private-partnership-fairfax-county.

"planned unit developments",[46] the State's own moniker for a "new town". Planned unit developments would get away from the precise constraints of zoning and allow the developer great leverage in proposing a new development and the municipality great leverage in enabling projects of a certain size to be designed, relatively freely, by the developers – but to ultimate municipal review and approval. The municipality would then have the unfettered and unregulated opportunity to review and negotiate the deal – partners in crime.

At the time, I was unaware that one municipality within our service area had bought into this planned development, new town, land development option in a big way. This historic farm community was looking to change. It had approved five such developments consisting of about 11,000 units. The housing could accommodate about 50,000 new residents and was staged to occur over twenty years. This awakening, slumbering giant, a budding suburb of Philadelphia in its expanding metropolitan area, was located at Exit 4 of the New Jersey Turnpike, a stone's throw from Philadelphia and with access to Interstate 295, which had turned into a colossal commuter corridor servicing all of South Jersey. The town's fathers (no mothers yet) unabashedly, had exposed its future for all to see: a future that the Kerner Commission explicitly had predicted and warned against. Welcome to Mount Laurel Township.

VII. CHAPTER 7: A SUBURBAN STRATEGY (1970)

Upon returning to New Jersey and my office, I called for a staff meeting and sat down with Peter, Tom, Ken and Carolyn. We had been working tirelessly to support lower income households in Camden and to keep them from being uprooted by Urban Renewal and Highway projects - prong one of the Kerner Commission Report. However, we were not doing anything to provide affordable housing opportunities in the suburbs. Meanwhile, literally, tens, if not hundreds of thousands of units were being proposed, designed and constructed for

[46] N.J. STAT. ANN. § 40:27-6.6 (West 1968)

upper-income households in the suburbs. It wasn't as obvious what was going on when this was being done with piece meal developments pursuant to traditional zoning codes. But now, with this new land use device, it was bald, brazen and completely visible for anyone to see and understand. Further, this was continuing to foster the flight of middle- and upper-class households from the cities. Effectively, we were doing nothing to undermine the continuing development of the "two Americas" in our own backyard – the second prong of the Kerner Commission Report. We all agreed that we should formulate an attack on suburban exclusion fostered by local governments through laws, ordinances and regulations - what we would later learn that others already had described in the catch-all phrase: "exclusionary zoning".

I wanted to go after them, force a confrontation on the fundamental concept that the "general welfare" required government to affirmatively address the housing needs of the poor. Ken, our renegade Harvard law student, was assigned the task of doing the initial research and educating us. It didn't take him all that long. It turned out that New Jersey was something called a "home rule" State, meaning that decisions affecting local development were delegated to municipalities. Further, those decisions were granted extraordinary deference by the courts and were validated if they could be justified for *any* reason. Those seeking to challenge these controls had the heavy burden of proving them to be, basically, irrational.

So, that did not sound all that good, and again I heard that ringing in my ears of the laughter I got from the assortment of builders I had interviewed. I did have a positive take on this. It seemed to me that the visible manifestations of the insidious discrimination could be enough to provide a basis for an attack. In New Jersey, these local powers were derived from the State Constitution, itself, and were delegated to the municipalities by the State Legislature though its Municipal Land Use Law. This was the same Constitution that required "equal protection" and "due process" in the implementation of public policy.[47]

[47] U.S. CONST. amends. XIV, V.

Ken then shared with us a State Supreme Court decision which seemed to set forth in detail our position almost exactly – as if we had written it ourselves. Ken said that it turned out that a Justice of our Supreme Court was one of the foremost national jurists on the issue of land use, Justice Frederick Hall. He provided us with copies of an opinion written by Justice Hall: this was *Vickers v. Township Committee of Gloucester Township*.[48] Justice Hall assailed the use of these municipal controls and called for them to be reigned in and properly conditioned by the courts. It was an amazing read. This was a broad legal and intellectual attack. It was exactly what we hoped to find. Check it out:

> I suggest only that regulation rather than prohibition is the appropriate technique for attaining a balanced and attractive community. The opportunity to live in the open spaces in decent housing one can afford and in the manner one desires is a vital one in a democracy. It seems contradictory to sustain so readily legislative policy at the state level forbidding various kinds of discrimination in housing … and permitting the use of eminent domain and public funds to remove slums and provide decent living accommodations, … and at the same time bless selfish zoning regulations which tend to have the effect of precluding people who now live in congested and undesirable city areas from obtaining housing … within their

[48] 181 A.2d 129 (N.J. 1962).

> means in open, attractive and healthy communities."[49]

Could it get much better than that? Not really, but there turned out to be one significant problem. After getting over my initial euphoria, I noticed that Ken had provided us with a *minority* decision. Only one other jurist, the Hon. C. Thomas Schettino, had joined Justice Hall's *dissent*. In fact, the Chief Justice, the liberal and highly respected Hon. Joseph Weintraub, had joined in a majority decision ruling the other way. The majority had disagreed with Justice Hall and, in a 5-2 decision upheld the total exclusion of mobile home parks in the defendant Township.[50]

I just said, "Ken, look, what you have here, this decision, it's a *minority* opinion." Everyone in the room let out a collective moan. It had the most negative ramifications. Basically, the Court, in its *majority* opinion, had considered and rejected all of our legal theories – pretty much all of which had been, essentially, set forth in Justice Hall's dissent.

Then we read an earlier decision which set the stage for *Vickers, Napierkowski v. Gloucester Twp*.[51] This case, dealing with discrimination against a single mobile home not located in a mobile home park. The Court, without much expert testimony or consideration of how its concerns might be mitigated, unanimously reversed a lower court ruling, stating broadly:

> The decisions elsewhere highlight the fact that the use of trailers as permanent residences present problems which are ofttimes inimical to the general welfare. In addition to the obvious health and safety hazards there are other considerations which a municipality must take into account in regulating the use of

[49] *Id.* at 147 (Hall, J., dissenting).
[50] *Id.* at 140.
[51] 150 A.2d 481 (N.J. 1959).

trailers. Two of the basic concepts of sound zoning, encouragement of the most appropriate use of land and conservation of property values, may be undermined by the indiscriminate location of trailers within a municipality. There can be little doubt that the maintenance and use of a trailer in a particular locale would tend to stifle development of the area for residential purposes. And from the point of view of aesthetic considerations (which are inextricably intertwined with conservation of the value of property) trailers may mar the local landscape.

In our view, the refusal of the municipality to permit the isolated and interspersed maintenance and utilization of trailers on individual lots in residence districts is not an arbitrary and unreasonable exercise of the zoning power, even where, as here, the proposed location in its present state and, assuming arguendo that the trial court's prediction is accurate, the reasonably foreseeable future is rural and undeveloped.

Zoning must subserve the long-range needs of the future as well as the immediate needs of the present and the reasonably foreseeable future. It is, in short, an

> implementing tool of sound planning."[52]

Wow. This was so awful as to be almost beautiful. The Court's language contained enough devastating buzz words that the sting might require hospitalization. Check out these judicial chestnuts: "most appropriate use of land", "preservation of property values", "obvious health and safety hazards", "aesthetic considerations", "stifle development of an area for residential purposes". Oops. While the language refers to the impact of trailer homes, it did not seem like a big lift to apply it to municipal programs to cleanse an area of "dilapidated" or unkept housing and undermining the inclusion of lower income housing. Was there really much of a distinction between a trailer home and a unit for a low- or moderate-income household?

OK. So, time to step back. Given our youth, inexperience and innocence, that did not take long. Upon carefully reviewing the context and the facts which provided the basis for the Court's decisions, we decided that it did not appear that the legal theories we intended to rely upon actually had been fully developed. These cases were really about mobile homes and mobile home parks. At the time, people had a real, if not realistic, phobia about prefabricated housing; particularly, if it came with wheels. Justice Hall notwithstanding, these cases were not about the overall impact of local zoning on the poor or discrimination against the poor. We decided to move ahead, damn the torpedoes – obviously, we had nothing left to lose as it all already had been lost. Ken, Caroline and I teamed up to put the case together and, ultimately, to file a complaint. We just needed some good facts, a terrible defendant and an endearing plaintiff. Just a bit of a lift. But, all that was soon to come as the stars would line up just about perfectly.

Vickers was decided in 1962. Then as we were putting our case together something unexpected happened. The New Jersey Supreme Court rendered a decision in a case captioned, *DeSimone v. the Greater Englewood Housing Corp. No. 1*.[53]

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[52] *Id.* at 488.

[53] 267 A.2d 31 (N.J. 1970).

"*DeSimone*" actually involved the construction of a lower income housing project in Englewood *that the municipality had approved*! It was the NIMBYs who appealed that approval. The world turned upside down. Time being important in the context of funding applications, the Supreme Court accelerated the hearing on the appeal.

Two significant aspects of the decision were noteworthy. First, Justice Hall wrote the *majority* opinion, and it was unanimous. It was exactly the same array of Justices that seemingly had gone the other way in *Vickers*. They now, post-riots and post-Kerner Commission, allowed Justice Hall to take the lead on land use and affordable housing issues. Second, Justice Hall wrote something in the decision that was completely excessive and unnecessary. That might not seem all that important, but I felt like he was sending out a message to potential litigants.

Considering that Englewood had approved the project, all Justice Hall had to say was that it had a rational basis to do so and that the objectors had not overcome the strong presumption in favor of the decisions made by the local officials. I guess, in this instance, what was good for the goose, now is good for the gander. Justice Hall did rely on the presumption in favor of municipal action, but he went further. The case involved, in part, the need for a *use* variance from the existing zoning – permission to construct a use (like a multifamily housing project) on land that had *not* been zoned for that use by the Governing Body. "Use variances" are not easy to get in New Jersey, since the zoning ordinance, as it is, expresses the intent of the Governing Body as to what uses should be located where. Zoning Boards of Adjustment are supposed to be very circumspect not to grant use variances that usurp the decisions of the Governing Body. Their traditional, historic role, was just to provide relief where the zoning ordinance might have, inadvertently, effected a "taking" of land which would have triggered a damage action.

The Englewood Zoning Board had granted the variance to allow this multifamily, affordable housing project. That left open an interesting hypothetical question - something courts

are not supposed to ask or answer until the issue is squarely before them. This hypothetical was intriguing. *What would the Court have done if the Board had denied the application? What if it had denied the variance as the objectors argued it should have done?* Justice Hall could not resist answering that hypothetical, and a unanimous Court let him get away with doing so. He opined that, given the State Legislative findings of housing need, *the provision of affordable housing was, itself, a special reason that could justify the grant of a variance*.[54]

He then went even a step further. He offered more of what lawyers call "dicta" - observations that are *unnecessary* to the resolution of the issue before the Court. Generally speaking, judges do not do that. They limit their findings of fact and law only to what is *necessary* to decide the case. Be that as it may, Justice Hall went off the rails and opined that: "In sum, the use variance was properly granted. *In fact, a denial of it under the circumstances and proofs could not well be sustained*."[55] (Emphasis added).

Gotta love language like that: "Could not well be sustained"! Bingo, he appeared to be sending a clear invitation for anyone out there to bring him such a case. We figured that could be us. We pushed on with a lot more hope.

VIII. CHAPTER 8: THE HEAVENLY STARS LINE

A. Finding a Defendant

I know that the law, litigation, is not supposed to work this way, but there was no choice. The archetype is that lawyers wait to be approached by aggrieved parties. Ambulance chasers and product liability actions aside, we are not supposed to crave to litigate an issue, go out and look for a "good" defendant to sue and then, having found one, look for clients that we can represent in a lawsuit. Well, sometimes things have to get flipped in order to move forward. Certainly, no one was

[54] *Id.* at 38.
[55] *Id.* at 39.

knocking on our door to bring a Constitutional challenge to upend decades of New Jersey Supreme Court and inferior court cases that uniformly validated the local zoning power and the decisions made by local officials; particularly, in our wealthy suburbs.

If there was going to be a case, it seemed pretty clear that we had to manufacture it. So, the next step was to find a good target. My predilection for Haddonfield was rejected by Peter, Ken and Caroline, and, ultimately, I agreed. Notwithstanding its history and stature, it really did not present the world with a picture of a new future since it was almost entirely developed and actually looking not to change at all. So, we looked for municipalities in our service area that were developing and that were approving planned unit developments. Ken and I researched local municipalities that had approved such developments. We found several in our service area that were promising. We knew absolutely nothing about any of them.

We needed some local input and, fortunately, we had CRLS attorneys and staff in local offices throughout our region that could help. We needed a good defendant and an appropriate plaintiff or two. I sent out a notice to all of our branch offices to see if anyone had contacts in any of the municipalities we had identified and, particularly, potential clients who were having housing issues.

Almost immediately, the heavens opened up. I got a call from our Burlington City office. "You should meet with this Moorestown minister, Stuart Wood. He's dealing with this issue right now." I had never heard of him and had no idea what issue he was dealing with; although, it sounded kind of familiar. A meeting was set up, and the stars began to line up in an incredible way.

Déjà vu all over again. Haddonfield all over again. Reverend Wood informed us that he had been working with a local, African-American group in one of our target municipalities, Mount Laurel Township. The group, the Springfield Action Association, had obtained "seed money" from the State Department of Community Affairs to develop a plan to construct just 36(!) lower income units in the Springville area of

Mount Laurel Township. They had an option on land, but the Township refused to cooperate, and had been mortifying and humiliating to him personally and to the local African-American residents in public meetings and private conversations. At this point, the group had lost its option and had given up. He considered the matter done, with no hope of resurrection.

More "good" news was that, at the same time it thwarted this modest effort, the Township was going about approving a massive planned development, the Larchmont PUD – one of five in the Township. That development easily could have provided sewer and water service to their location on Hartford Road. Also, the Springville area was home to many indigent, African-American residents, some literally living in converted chicken coops. They likely would be forced from their "homes" and would have to relocate out of the Township. This dislocation already had been going on for some time.

Incredibly, it got "better". It turned out that Mount Laurel was home to a strong African-American population, *dating back to before the Civil War*. This place had been a waystation on the "underground railroad", harboring fleeing slaves.[56] They had an historic church, Jacob's Chapel, A.M.E. Church, that dated back to the mid-1860s. Adjacent to the Church was a graveyard, circa 1811(!) which was one of the first African-American graveyards, the "Colemantown Negro Cemetery". Here were buried the deceased members of African-American Civil War regiments. A local Quaker, Albert Jacobs, gifted the land for the church building. It has been an active church at this location for over 100 years. Can it get any better? Yes, it can.

The African-American residents had been highly respected and politically powerful in the Township when it was a simple farm community. Then came the very recent influx of new housing. That housing, affordable to middle- and upper-income migrants from the city, was almost exclusively occupied by Whites. The governing body was now controlled by the new

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[56] *Jacob's Chapel*, NEW JERSEY HISTORIC TRUST: FUNDED SITES, https://www.nj.gov/dca/njht/funded/sitedetails/jacobs_chapel.shtml (last visited Dec. 15, 2024).

residents who "knew not Joseph".[57] They were not supportive of providing affordable housing for their indigenous poor, let alone the regional poor. The African-American, long-term residents were literally told by the Mayor: "If you cannot afford to live here, move to where you can afford to live."[58] No need to wonder where that was.

Talk about laying out your future – over 11,000 new units, probably up to 50,000 new residents, and nothing for the poor, not even for their own indigent residents. Not even 36 units. Okay. Part I done. We had found a perfect Township to sue. Now, all we needed was one perfect plaintiff willing to do it – we found twelve.

B. Finding a Plaintiff—Or Twelve

The matriarch of the Mount Laurel African-American community was Mary Robinson. Reverend Wood suggested we meet with her. I enthusiastically agreed, and he set up a meeting the next night at the home of Mrs. Robinson's daughter, Ethel Lawrence. Peter and I went there, and met our future.

There were several people at Mrs. Lawrence's home, all had been involved in the failed attempt by the Springville Action Association to build affordable housing. I had gained a lot of knowledge since my Haddonfield experience, and I now knew the drill. I told them that what they experienced was common throughout New Jersey and the country and recently had been exposed by a Presidential Commission. I said that the current state of the law would provide them no relief. There was no quick fix. If they wanted to deal with this, they would have to commit to a long fight that probably would require a New Jersey Supreme Court decision. They could expect no support locally or help from the State Legislature.

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[57] *Exodus* 1:8 (King James).

[58] Martina Manicastri, *A History of the Mount Laurel Doctrine*, FAIR SHARE HOUS. CTR. (Oct. 28, 2022), https://www.fairsharehousing.org/a-history-of-the-mount-laurel-doctrine/.

I could tell that things were getting pretty uncomfortable in the room. They seemed to understand what was coming next. So, I let it drop:

"If you want to do something about this, you are going to have to sue the Township, spell out who you are and what has happened to you and ask for judicial relief. Litigation is your only realistic option – if you can call it that. Frankly, legally things are so bad right now, I have no idea whether it is possible to prevail and if you did, what relief you would get. Also, I imagine you may be the target of some local animosity, but I think I can take care of that."

Someone said, "How are you going to do that?"

"We probably can line up some institutional groups, like the NAACP, to participate. They would be untouchable by any local attack, and would make any threats against an individual plaintiff irrelevant to the case proceeding."

Frankly, I was making some of this up as I was going along, but it did seem right. We had strong connections with these groups, and they were fearless and aggressive.

"Of course, our representation would be entirely free."

This proposal, obviously, was a heavy lift for them. Let's see. You got, Peter and me, two young, inexperienced White attorneys from a poverty program in Camden, who they had never met, telling them that they should sue their home Township with little hope of success, and, by the way, the litigation might take years. Stepping back, other than the intrigue of the undertaking, it didn't seem all that promising.

At first, Mrs. Robinson was opposed, and she also was very upset. She said that this was her town. She had grown up here. Her children and grandchildren lived here, most of the family and all of her friends. She could not imagine suing her own town. More Haddonfield déjà vu. Things were looking bad until, without a millisecond going by, they changed abruptly.

A young woman got up and said, "Grandma, right, I'm living here, but I'm living in a converted chicken coop on well water and an outhouse! Our people have been leaving. I'm going to have to leave. They kept us from getting decent housing. That's who they are. Why do you care what they think?"

That turned out to be Mrs. Robinson's grandchild, Thomasine Lawrence. Then another, very powerful-looking woman stood up. She was riveting – exuding total confidence and simply statuesque in appearance. As she rose, everyone quieted down and took notice. She clearly was a leading figure. Actually, we were in her house. This was Thomasine's mother and Mrs. Robinson's daughter, Ethel.

"Momma, I am not going to disagree with you in front of these young men, but we have to talk about this after they leave. I just do not see that we really have a choice. We do this, or we give up. And I just cannot see us giving up. If someone, like this boy, has a hammer, we might as well let him swing it. This is our town, where we live, where our ancestors lived and are buried, and we should fight to keep it a place where we can stay. We won't be suing our town. We will be suing theirs. We need to get our town back."

That would be the incredible Ethel Lawrence. Mrs. Lawrence was the fifth generation of her family that called Mount Laurel home. She would be the rock that kept this case on solid footing and my mental state from totally deteriorating for the next fifteen years.

It was clearly time for us to go. There was not much more for me to say anyway, and they really wanted us to leave so that they could talk about what to do. Mrs. Robinson thanked us for coming and said only that she would get back to me. So, Peter and I left and met with our staff to consider how to proceed.

The facts here were incredible. We could not have written a better scenario. Just starting with the bald fact that these officials were permitting, helping design and approving 11,000 units for newcomers while, at the same time, refusing to help their own citizens build just 36 units of affordable housing. Almost an unbelievable script. As it turned out, Mount Laurel had made a big mistake and would regret not supporting that modest proposal. We would get them for doing this, but that would take a really long, long time.

I got a call from Reverend Wood the next day. Mrs. Lawrence wanted to meet with us. Peter and I met with them immediately. Mrs. Lawrence said that she asked around and

gotten very positive feedback about us. However, she still needed additional assurance. She asked one question:

"How committed are you to this? I am not going to bring my family and friends into something like this without knowing for sure that you are going to stay with it until it's done. I know this is exciting for you to do, but the long haul is something different. My whole life and the lives of my people has been a long haul. I know how that can get as time grinds on. I need an absolute commitment that, no matter what, once we start, you will see this through to the end. If you will commit, then we will commit."

Seemed reasonable enough. Had I known I was committing to over fifteen years of litigation, just to get the door open, let alone actually to get the housing built, I might had been more daunted, but I did not have that clairvoyance.

"I and the staff at CRLS are totally committed and will stay with the case until it is done. Wherever I might go, if at all possible, I personally will continue to work on this case, and there are others who feel the same and will do the same. The legal representation will be there to the end."

She didn't skip a beat.

"OK, then we will do it. I will be a plaintiff, my daughter, Thomasine, will be one and so will my Aunt Catherine. What else do you need?"

Here are some interesting facts that we did not know at the time. Ethel Lawrence's "Aunt Catherine" was Catherine Still. Mrs. Still, was a direct descendant of Dr. James Still, a huge historic notable in the area – "the Black Doctor of the Pines."[59] He was almost totally self-educated and became a respected botanist and doctor. Also, get this: the Robinson/Lawrence clan was well-represented in the National Football League! Mary Robinson's son, Ethel Lawrence's brother, is Dave Robinson. He was a linebacker for the Green Bay Packers for about a decade and, ultimately was inducted into the National Football League

[59] Janet Jackson- Gould & Janet Carlson-Giardina, *Dr. James Still Office Historic Site Overview*, NEW JERSEY STATE PARK SERVICE: HISTORIC SITES, https://www.nj.gov/dep/parksandforests/historic/drjamesstill.html (last visited Dec. 15, 2024).

Hall of Fame.[60] I met him once at the Day Care Center where Mrs. Lawrence worked. Kids were climbing all over him, and I believe he actually picked up and carried about ten of them at one time.

Our thoughts on this case had advanced a lot. I told Mrs. Lawrence that we envisioned three different individual plaintiff classes. First, local residents like herself. Second, prior residents who had been effectively forced to leave because of substandard housing conditions or dislocation by private developers. Third, we would have Camden, "regional", residents sue to obtain access to suburban housing opportunities. To insulate all of the individual plaintiffs, we would seek institutional help, with the first named plaintiff being such an institution.

"OK. That all sounds right."

"You three are perfect as our local resident plaintiffs, but I need you to find some former residents willing to sue. Meanwhile, we will deal with getting our "regional" plaintiffs and the institutional plaintiffs. I will prepare a draft complaint for you to review, and we will file here, in the State Superior Court in Mount Holly."

"That will be Judge Martino. He's no fool. He knows all about us. Finding people will not be a problem. I will get you some names, and you will let me know when you are ready."

That did not take long. Within days, we had met with and signed up three refugees from Mount Laurel, all indigent, all having been "forced out", all living in nearby communities and all wanting to return. We knew who we wanted as our "regional" individual plaintiffs. They were local Camden activists and happy to oblige. Peter had them signed on immediately. That left the institutional plaintiffs.

I wanted more than one. I did not want to take the chance of any one of a class of plaintiffs creating a problem down the road. We knew these groups, and they knew us. We had worked together on several projects; particularly, the Camden Urban Renewal and Highway work. We decided to go after three and

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[60] *Dave Robinson*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/dave-robinson/ (last visited Dec. 15, 2024).

Peter got them all to sign on, which they did eagerly: the Southern Burlington County NAACP (which included Mount Laurel in its service area), the Camden County NAACP and the Camden County CORE ("Congress on Racial Equality").

We were set. Plaintiffs representing local need. Plaintiffs representing the displaced poor. Urban plaintiffs representing regional need. Institutional plaintiffs that clearly would have a legitimate interest in the subject matter. They all would pass New Jersey's relatively modest standard for "standing" – the requirement that, in order to be a litigating party, you must have a requisite interest in the subject matter of a case before being allowed to sue.

As an aside, we also committed to help the individual plaintiffs on any legal issue that we could. For example, Ken had been working with a coalition of tenant organizations that included representative activists who supported lower income tenants and had joined with the New Jersey Tenants' Organization, an advocacy group of relatively wealthy tenants that arose out of the plethora of Fort Lee multifamily, luxury rental housing. They proved to be a formidable coalition. Among the legislation that Ken helped write and that they sponsored and got adopted was the New Jersey Rent Receivership Act.[61] This law, adopted on June 21, 1971 (shortly after the filing of the *Mount Laurel* complaint), allowed for tenants in substandard housing to put their rent into receivership to force the upgrade of their housing conditions. I filed the first receivership case putting Thomasine's converted chicken coop into receivership. This led to her getting indoor plumbing and clean well water. Also, many years later, after leaving government and pursuing the actual development of affordable housing, my partners and I had the financial opportunity to finance an upgrade for Mrs. Lawrence's home; including substantial interior improvements and a connection to public water and sewer.

[61] N.J. STAT. ANN. § 2A:42-85

C. The Defendants

We sued the Township, its Governing Body, its Zoning Board of Adjustment and its Planning Board. They were no brainers. Then we considered suing the developers of the planned developments in the Township. That would be a longshot since the developments had been tentatively approved, and they, arguably, had done nothing wrong and had "vested" rights.

Peter and I knew one of the major developers, Richard Goodwin. He was working on the Ramblewood PUD and the massive Larchmont PUD. I knew him from a prior matter that was totally amicable. We met with him and asked if he would modify has plans to include some affordable housing. That was a total non-starter. We offered that we could get rid of some of the exactions that the Board had gotten from him as a condition of his approvals – like giving them a fire truck and thousands of dollars for the schools. He just could not see doing anything that might jeopardize his projects. We told him we might sue him. That ended the conversation, as he then referred us to his lawyers.

Peter and I, and my Penn Law Property Professor, Jan Krasnowiecki, a nationally recognized land use expert, met with his legal team - attorneys at a major Philadelphia firm. We went to their offices and like six or seven lawyers came in. After listening to me, they just thought the idea that Goodwin had any exposure was laughable. So, that did not go anywhere.

We did sue all the developers, but the court dismissed them without much reflection. We let it drop and did not raise the issue on appeal. Our thought was that, given the length of time these projects would be developed, they would surely have to come back in for modified approvals. If so, we could attack when they did. Furthermore, until we obtained a viable change in the law, the developers were effectively out of reach. Once we did, they came out of the woodwork looking to benefit from our success and participated in the settlement to construct affordable housing in the Township. After all, it now was "wanted" and they had just the land on which it could go.

IX. CHAPTER 9: THE FILING (1971)

Frankly, when we were considering where to file suit, we had not been specifically concerned about the location of the municipality that we ended up attacking; that is, the County in which it was situated. We certainly were not ethically above "forum shopping"; that is, picking a defendant located in a vicinage that had a "good" judge. For this case it didn't seem all that important since we figured there was little or no chance of winning at the trial level. Our goal would be to create the best evidential "record" (testimony and documents) that we could and hope to win on appeal. On the other hand, the trial judge, as later events would clearly demonstrate, could be a big factor in our ability even to create a good record.

We had a five-County program. Each County had its own slate of trial court judges. There was a big difference in one respect and that would be the Assignment Judge. Every County in New Jersey has a designated Assignment Judge. This jurist is the top judicial dog of a particular County. As the name implies, this judge has the authority to "assign" cases among the various judges who populate the bench in his or her County. Of course, the Assignment Judges can choose to keep most any case they want for themselves. A case like this, a constitutional attack on the municipal zoning power, was almost certainly going to be kept by the Assignment Judge for adjudication.

The Assignment Judge in Camden County, W. Orvyl Shalick, ruled over several of the Counties in our service area. He seemed openly to despise Peter and me and to disdain the legal services program. He never openly expressed much empathy for our indigent White, African-American or Hispanic clients. We felt, for sure, that he would have been a disaster and might make it difficult for us to get the evidence that we needed to put on the record for appellate review.

As if things had not been going well enough, Mount Laurel was not located in one of our three Counties under Shalick's domain. It was located in Burlington County, a totally different vicinage, and under the auspices of a different

Assignment Judge, the Hon. Edward V. Martino. As Mrs. Lawrence had intimated, Judge Martino was of an entirely different stripe. He certainly was known as conservative politically, but he had qualities that were extremely appealing to us: he was smart, he was a committed jurist, he would not allow politics to affect his decision, and he most certainly knew all about Mount Laurel Township - its past and recent history. He would know its African-American population and their extraordinary rich back story and current housing conditions. Also, it was most likely that he would know about Mary Robinson and the Lawrences.

Ken and I did consider suing in Federal Court. However, with the retirement of Earl Warren and the placement of Warren Burger on the Supreme Court, federal doctrine did not seem like something that would be expanded to support our legal theories. Also, the existing cases set a difficult standard for proof of discrimination. The prevalent doctrine held that, for discrimination to be unconstitutional, it had to be intentional.[62] Simply proving that, regardless of intent, discrimination was an ultimate effect, would not be enough.

The strategic question of whether to file in Federal or State Court was easily resolved by mutual agreement among the staff. We believed that we had a much better chance by keeping the courts focused on interpreting the New Jersey Constitution and laws. Although a Federal Judge would have the power to rule on New Jersey law, that would be done very conservatively, if at all. We simply did not want to struggle with a Federal Judge who might be reluctant to break new ground interpreting State law. On the other hand, we determined to include Federal Constitutional and legal challenges alongside claims arising under the State Constitution and laws. This was, to some extent, deference to the fact that, across the nation, others were pursuing this line of attack and, during the course of our case, might actually prevail. Also, New Jersey judges would be free to apply Federal Constitutional and legal principles if appropriate.

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[62] *See* Wright v. Rockefeller, 376 U.S. 52 (1964); Akins v. Texas, 325 U.S. 398 (1945).

Ultimately, as the case developed, the New Jersey Judges relied almost exclusively on State law. This had the additional benefit of foiling an attempt by the defendants to obtain a United States Supreme Court appeal, which they did seek, since there were no Federal Constitutional or legal decisions for our Federal Supreme Court to review.

Writing the first draft of the complaint was a lawyer's dream. My mentor, and a CRLS Board Member, was Joe Rodriguez. Mr. Rodriguez was one of the most prestigious litigators in our region, if not the State. He later would become the State Public Advocate and then a Federal District Court Judge. You could hardly meet a nicer, more genuinely caring individual. And one who was so incredibly smart. Peter and I met with him, and he provided a lot of guidance and specific advice, both before our filing the complaint and then before and during the trial.

Mr. Rodriguez was all about complaints. He advised all the attorneys that this was the one document every trial judge would read. This was an opportunity to set the table for the plaintiff's case – the facts supporting the grievance, the law that was allegedly violated and the remedy being sought. I had waited a long time to do this, and it was a thrill.

I detailed all of the history, alleging that the Township had been delegated its power to zone with the absolute constitutional constraint that it be exercised to benefit the general welfare of *all* citizens and provide for equal protection and fundamental due process.[63] It was not hard to demonstrate that Mount Laurel had directed its efforts to the general welfare of just middle- and upper-income households, while doing nothing for the poor. Since the Township was being proactive, we alleged that it had to be proactive for the poor as well.

Our most novel claim was that the Township had an obligation that went beyond the needs of its existing (and former) residents.[64] We argued that there was a regional need

[63] Complaint at 10, 13-14, S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972).
[64] *Id.* at 30.

for housing, which could be assessed, and then distributed among the region's municipalities on a "fair share" basis and that Mount Laurel was required to do that assessment and provide those opportunities.

Ken, Caroline and I went over the drafts and finally settled on a proposed document to file. Even though they were not lawyers, I indicated on the Complaint that they helped draft it. The final document was detailed and covered 32 pages. I ran that by Peter, Tom and Mr. Rodriguez. All approved. Lastly, I took it to Mrs. Lawrence, who reviewed it thoroughly and immediately approved. We then filed. Just for a bit of irony, as the timing was right, I wanted to file it on Law Day, May 1, 1971, but that turned out to fall on a Saturday, so I had to settle for May 3. We then waited to see how the lawyers on our Board would react. However, with Mr. Rodriguez in our corner, we did not expect a problem, and none occurred.

X. CHAPTER 10: THE FIRST TRIAL (1972)

Mount Laurel in 1972 was represented by an exceptional lawyer of undeniable integrity, John F. Gerry. Mr. Gerry ultimately would be elevated to be a judge in the Federal District Court in Camden. His defense of the Township's was direct and to the point. He argued that it had the legal right to do what it was doing which, basically, was to focus on the fiscal health of the Township and the protection of property values of existing and future residents. Since, in New Jersey, municipal financing was largely a product of revenue collected from the real estate tax, Mount Laurel was committed to assuring that development in the Township would generate the maximum tax ratables possible. It was focused on creating residential, commercial and industrial developments which would do just that and to generate and preserve property values. Since lower income housing clearly would not do either, Township officials would be foolish to zone for it and were not doing anything unlawful or unconstitutional by not zoning for it. There is nothing in the law that mandates that a municipality must zone for every conceivable use. Basically, he argued forcefully that the

Township's intent was rational even if the effect could be construed as discriminatory. The developers simply argued that they had done nothing wrong and had land use approvals that were lawfully obtained.

The litigation quickly entered the "discovery" phase in which both sides could seek whatever factual information was available from the other and depose (take sworn testimony) from potential fact and expert witnesses. I filed a demand for the production of copies of all of their relevant records, minutes of meetings of the Governing Body, the Planning Board, the Zoning Board of Adjustment and any department responsible for code enforcement and social welfare. I wanted copies of all proceedings, applications and decisions, permits and approvals. It would have taken them a decade to deliver all of that to us.

Mr. Gerry called and said just that. While he acknowledged that we surely were entitled to get the documents, they simply could not take the time and the expense to provide them. In order to avoid seeking judicial review of our discovery demand and the Township's refusal to comply, he proposed something unique. He offered me a desk in the municipal building and free access to all of their files – no questions asked. No one would be looking over my shoulder or monitoring what I reviewed or copied. I accepted.

For several weeks, I worked at my own desk in the Mount Laurel municipal building. The staff was cordial and provided me with whatever I requested. I went through years of hearings, minutes and applications. It was a treasure trove of supporting facts. Many statements were being made as to the intent of the municipality and how its plans would be implemented. Hearings on applications and plan reviews were replete with proof of active bargaining between the developers and the Township. The Boards extracted enormous concessions in return for the approvals - most everything except a commitment to provide affordable housing.

I suppose the most damning evidence were the words of Township officials addressing the existing neighborhoods that suffered from blighted and unsound housing conditions. They actually felt no qualms in stating that their goal was to demolish

all of these units. In order to avoid having to deal with the process and cost of relocating any tenants, they determined to do nothing while units were occupied – no inspections, no orders to vacate and the like. They openly strategized that they would just wait until a property was vacated before acting to shut it down and demolish it. Also, they would do nothing to achieve an upgrade to the housing conditions through building code enforcement. The strategy was very successful as tenants did vacate and leave, and since they left "voluntarily", no relocation assistance had to be provided. Once the tenant left, the Township officials acted quickly to have the buildings taken down.

I detailed all of my findings in a document called a Demand for Admissions. A "Demand" is a simple request that requires the other side to provide yes or no answers as to whether each fact set forth in the Demand is true or false. There was no getting around their providing answers, and there was a stiff penalty for not responding truthfully. Mr. Gerry would not play games with this and had no choice but to provide an accurate response. After his staff took a quick review of the initial demands, they "admitted" to the truth of everything in the document. I guess he figured I had copied and referenced everything accurately.

With the Answer to the Demand for Admissions, my trial work was going to be minimized. We would not need to call any fact witnesses. The Township did not dispute who the plaintiffs were and their housing conditions as set forth in the Complaint. They basically knew who they were, their history and current living conditions. The Township really preferred that they not testify. From my perspective, their Answer to the Demand for Admissions provided all the salient facts we needed to demonstrate intentional discrimination against the poor.

We would need an expert to testify that the standards in the zoning and subdivision ordinances were excessive and unduly cost-generative. We had to establish that affordable, low- and moderate-income housing could not be built under this array of land use controls. We had a witness, Leon Weiner, a highly respected, national developer of affordable housing who

was working on projects in Camden. He agreed to testify for us. Peter, however, decided to orchestrate a public lynching of the man at a meeting in Camden that Mr. Weiner had put together to talk about his work with representatives of the local community. It did not go well. The hostility was palpable and, after vocally attacking the man, the public walked out in an obvious orchestrated action. Peter got up and left with them. He was so happy with the result. I could hardly believe it. I figured correctly that this was not going down well with Mr. Weiner. Expectedly, the fallout from that debacle came the next day. Mr. Weiner called me and pointedly accused us, including me, of being despicable people for blindsiding him like that. Further, he would not provide any testimony in the *Mount Laurel* case. He hung up before I could say anything. Not like I had anything worth saying. I could hardly blame him.

Somewhat of a panic set in as this was shortly before the trial was to start, and we desperately needed to replace him immediately. We were able to do that with a planner who would evolve into a personal friend and business associate of mine. In October, 1971, an unexpected event occurred. A decision came down from North Jersey which addressed some, but not all, of the issues we were raising. It was the first trial court decision in the *Madison Township* case.[65] Unbeknownst to us, a private attorney, Fred Mezey, representing a developer along with a group called the Suburban Action Institute ("SAI") which joined the suit on behalf of six lower income plaintiffs, represented by Lois Thompson, had filed an exclusionary zoning case against Madison (now "Old Bridge") Township. They won.

When Mr. Weiner dropped out as a witness, I figured these guys might provide us with a replacement. I called them and spoke with Paul Davidoff, the head of SAI. As it turned out, I was not inventing the wheel, just ignorant that others were already out there doing the same thing. Mr. Davidoff was an extraordinary academic, a nationally respected planner and a formidable advocate for integration and opening the suburbs to

[65] Oakwood at Madison, Inc. v. Madison Twp., 283 A.3d 353 (N.J. Super Ct. Law Div. 1971).

affordable housing. We developed a great rapport and worked together on affordable housing issues in New Jersey for many years until his untimely death. Mr. Davidoff recommended that we use a planner, Peter Abeles, who had given testimony in the *Madison* case. He had been extremely impressed with Mr. Abeles' testimony and, coming from Mr. Davidoff, I figured correctly that was high praise. What he didn't tell us, and I never dreamed to ask, was that Mr. Abeles had testified as the *municipal planner*, not theirs - a time bomb waiting to go off that I had no idea was even there.

So, I called Mr. Abeles and told him of our need for an expert. He was extremely affable and happy to oblige. Unfortunately, he lived in New York City and suggested we come up and talk at his home. We had no choice. Peter O'Connor and I drove up to New York in a snow storm, interviewed him and hired him. Mr. Abeles, as they say, had the personability of one who could sell coal in Newcastle. Judges loved him. He provided great, convincing and decisive testimony essentially tearing apart the municipal land use code and the actions of public officials in the treatment of the resident poor. Incredibly, it never came out that he had testified for Madison Township on the municipal side.

The trial lasted just four days. Ken worked with me on the preparation and sat beside me at the counsel table. Peter, who had developed a very close relationship with Mrs. Lawrence and her family, maintained client contact and orchestrated getting Mrs. Lawrence and some of her supporters to the courthouse. She attended every day. Her just sitting there with her almost Romanesque stature was enough to level the playing field.

As I had never actually done a trial remotely as complicated as this, I needed a lot of procedural help from Mr. Rodriquez. I didn't even know how to get a document, like the Answer to our Demand for Admissions, into evidence. He literally had to set forth in writing precisely what I had to say.

Our direct case went in easily and very smoothly except for my lack of courtroom etiquette. At one point during my examination of a witness, I was standing next to the court's

bench and had my elbow on the desk. Mr. Gerry whispered for me to come over and advised that Judge Martino really did not like anyone touching and certainly did not like anyone leaning on his bench. Mr. Gerry knew that, pretty much, I had no idea what I was doing and acted almost in a fatherly way during the trial. He was, basically, a real gentleman.

Peter Abeles covered the field of what was wrong with the zoning ordinance, subdivision ordinance, PUD approvals and the like. He opined the obvious: there was no possibility of constructing affordable housing under this regulatory regime unless the Township demanded that it be done as part of the approvals. During the course of the two trials, other experts supported our work as well, Alan Mallach, Mary Brooks, David Kinsey, Yale Rabin. Truthfully, we had no trouble finding people wanting to support this effort.

XI. CHAPTER 11: THE FIRST TRIAL COURT DECISION (1972)

Judge Martino didn't waste much time. His decision came down shortly after the trial ended. He also had a sense of history and released the opinion on Law Day, May 1, 1972, almost exactly one year after the complaint had been filed. The ruling actually gave us a partial victory - far more than we had expected given the status of the law at that time. We had done a pretty thorough job on the issue of the plight of the indigent poor. Going back to my experience of doing building surveys in Hoboken, at one point I had most of our staff out in Mount Laurel going over the entire Township, looking for and documenting deteriorating or dilapidated, occupied housing. We had forewarned and gotten approval from the local police, and they did not interfere.

Our proofs and Judge Martino's obvious personal knowledge led him to rule against the Township on our allegation that it had an affirmative obligation to support housing opportunities for the local poor and to work to upgrade their housing conditions. He also mandated that they provide opportunities for former indigent residents who had been "forced" to leave and who wished to return.

His factual findings came right out of the Answers to our Demand for Admissions. Later, he said privately, that the Township could not possibly prevail once he had read their answers:

> Minutes of various Township Committee meetings expressing the attitudes of the members of the Governing Body were introduced into evidence. Early in 1968 the Mayor, when a discussion arose as to low-income housing, stated it was the intention of the Township Committee to take care of the people of Mount Laurel Township but not make any area of Mount Laurel a home for the county. A Committeeman added that it was the intent of the Township to clear out substandard housing in the area and thereby get better citizens. At a later meeting of the Township Committee in 1969, a variance to permit multi-family dwelling units was rejected because the Committee did not see a need for such construction. At a meeting in 1970 a Committeeman, during a discussion of homes being run down and worthless, indicated that the policy was to wait until these homes were vacant before the Township took action, "because if these people are put out on the street they do not have another place to go." At another meeting in September 1970 a Township Committeeman, when referring to pressure from the Federal and

> State Governments to encourage low-cost housing, retorted that their most useful function was to evaluate and screen away all but the most beneficial plans. He added, "We must be selective as possible approving only those applications which are sound in all respects. We can approve only those development plans which will provide direct and substantial benefits to our taxpayers." All through the various admissions permitted to be introduced into evidence, the evidence clearly indicates the attitude of developers who proposed various developments which were not concerned with people of low incomes. Every proposal made leaned in the direction of homes for only those of high income.[66]

However, having made these findings, he would not support our fair share regional need argument. The remedy he provided was for the Township to assess only the housing needs of its existing residents living in substandard conditions, former residents wishing to return and projected employees of retail and industrial developments that exist or would be constructed in the municipality.[67] There was no requirement otherwise to assess regional need and provide housing opportunities for a fair share of that need.

This was a big, but fully anticipated setback, as it thwarted our effort to address the economic and racial disparities detailed by the Kerner Commission and prevalent in

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[66] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super Ct. Law Div. 1972).
[67] *Id.* at 473-474.

our region. The decision ran directly contrary to the Commission's finding that, by using existing land use law, suburban municipalities were deliberately creating, fostering and enforcing regional locational patterns of racial and economic discrimination. On the positive side, given the disparity between his ruling and the ruling in Madison, it was likely that the cases would be heard, probably together, by the Supreme Court to resolve any inconsistencies.
The Township appealed and so did we.

XII. CHAPTER 12: *MOUNT LAUREL I (1975)*

Three years passed before an appellate decision would be rendered. The appeal presented a major strategy question. By the time we had completed our trial work, the SAI's *Madison Township* case had been expedited for a hearing by the Supreme Court. I felt that we had a far better factual record and, of course, very much wanted to participate in that hearing. Also, as groundbreaking as that trial court decision was, it did not provide any specificity regarding key elements of the remedy. Although it did rule on the need for a regional approach to zoning, without much more, the court simply ordered the Township to rezone.

So, we filed an emergent motion seeking an order that would allow us to bypass the Appellate Division and appeal directly to the Supreme Court. We sought to have our appeal joined with the pending *Madison Township* appeal.

The motion for direct relief and joinder of the hearings was granted. Ken and I prepared and filed our appellate brief. We focused heavily on the facts. Part of our trial court presentation was a series of graphics showing how, over time, the economic and racial patters in our region had changed. Each municipality was depicted on a regional map, with maps going back several decades. The historic fact was that not long ago there was general inclusivity – economic and racial profiles were largely identical among the region's municipalities. The time changes showed how the demographics of the location of the poor and African-American and Hispanic households in the

region had gradually morphed to the pattern of racial and economic segregation that existed in the 1970's. Clearly, the driving force behind that change was the municipal use of the Municipal Land Use Law and selective code enforcement strategies to funnel the wealthy in and the poor out.

As a result of the great migration of African-Americans from the south in the early and mid-20th Century, and Puerto Rican emigres relocating from the Island, the fodder for segregation was overwhelming. They had no place to go other than to our urban areas. "Integration" was accurately described by the radical organizer and theorist, Saul D. Alinsky, this way: a 'racially integrated community' is a chronological term timed from the entrance of the first Black family to the exit of the last White family.[68] And the same was true in reverse, as the municipalities that were welcoming the White flight implemented programs which, effectively, amounted to "racial, economic and ethnic" cleansing.

A. The First Supreme Court Hearing (March, 1973)

Since the *Madison* case had been first in line, it would be the first heard in the consolidated appeals. I met with the attorneys for the Suburban Action Institute, Lois Thompson and Dick Bellman. Mr. Bellman would be doing the argument. He was a superb lawyer whose private practice focused on employment discrimination. I, on the other hand, was barely out of law school and had only once argued a case before an appellate court, let alone the Supreme Court.

We went over how best to present the case, and as Mr. Bellman would be going first, I didn't figure I would have much to add. Things didn't go all that well. Mr. Bellman was given a pretty rough time. As soon as I got up, I was confronted by one

[68] *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, HEARINGS (1959) ("The principal reason for flight is the belief that the neighborhood will soon be all Negro, and that the family which remains, will be a white minority of one. The coming of the first Negro family symbolizes the beginning of the end. This has been the white experience, and the white population, like any population, acts on the basis of what experience has taught it.")

of the Justices focusing on regional need and fair share methodologies. I was grilled on issues of taxation and the existing legal standard that anything that could justify local municipal action would be acceptable, regardless of secondary and tertiary consequences. I didn't do all that well either. After the hearing, we felt pretty awful. Ken, having witnessed the ordeal, confirmed how miserably the argument had gone.

Sometimes you get a second chance. Miraculously, that happened here. After a while, we got a notice that the Court wanted the matter reargued. Apparently, there were open questions and, before ruling, the Justices wanted to hear from us again. My preparation for that included a daunting experience. All Supreme Court arguments are recorded. Ken insisted that we see if they would allow us to listen to the tapes of the first argument. No harm in asking. We called the Supreme Court Clerk's office, and he agreed. We were given a time to come and listen to them in the courtroom.

One thing you never want to listen to is a recording of yourself having a really bad day. On the other hand, this was a great opportunity, and it proved extremely helpful. Ken and I sat alone in that vast, historic courtroom under the gaze of portraits of prior members of the Court and listened and learned. We came up with effective strategies to address the Court's questions. It proved extremely important and hugely helpful. Although we did not know it at the time; as it turned out, the *Madison Township* case would implode, and Mr. Bellman would be gone. Suddenly I learned at the hearing that I would be lead counsel and would open the argument, supported by two *amici* presentations. Had Ken and I not listened to those tapes, I would have been incredibly unprepared. But we did listen, and we did cover the field of potential responses, and this time I felt truly ready to deal with whatever concerns the Justices raised.

B. The Second Hearing (January 8, 1974)

In the time between the hearings, about *nine months*, the *Madison Township* case dissolved. Between the two dates for oral arguments, Madison Township totally rezoned, as directed

by our own Peter Abeles. They argued that this was in response to the trial court decision. Although, no one advised the Court of this fact until the second hearing, it effectively meant that the *Madison Township* appeal was "moot". Since the original trial court decision and the ensuing appeal were based on an ordinance that no longer existed, the appeal was effectively withdrawn. The Chief Justice was clearly furious because, as you can imagine, the Court and its staff had spent good deal of time preparing to address the facts of that case and the decision below. Regardless, there was nothing the Court or Mr. Bellman could do. So, the first thing that happened at the hearing was that the *Madison Township* case was remanded back to the trial court to review the new ordinance, and the Chief admonished the Township that once a new trial court decision was rendered, if an appeal was taken, it was not to rezone until that appeal had been heard and decided.

So, that left just us. Professor Norman Williams, who participated as one of the *amici*, later wrote the following:

> *Mount Laurel* became the leading case in an odd way. It was long thought that the leading case for the great reversal would be one brought against Madison Township in Middlesex County, usually referred to as *Oakwood at Madison.* This case was argued first before the whole New Jersey Supreme Court in March, 1973, along with another case from South Jersey which had not received much public attention (Mount Laurel). At the end of that term the two cases were set down for reargument the following year, presumably because the personnel on the court were changing, and it was deemed wise to let the new judges decide how they wanted to deal with this

> complex problem. At the second oral argument in January, 1974, however, *Oakwood at Madison* fell apart in extraordinary fashion. Suddenly everyone in the courtroom realized that the vehicle for the great reversal would be the relatively unknown case from South Jersey. *Mount Laurel* had been brought by lawyers working for Camden Legal Services, and was directed against a township just entering a period of large-scale development, with some scattered rural slums remaining from an earlier period, characterized by a lot of migratory agricultural labor. To these lawyers (led by Karl [sic] Bisgaier) belongs all the credit that the great reversal came at all, or at least that it came without several years of further delay. [69]

Thus, it happened that the *Mount Laurel* case became the only matter before the Court, and I would be getting up first to respond to the Court's concerns. One strategic decision that worked in our favor was the presence of Professor Williams. He was a national expert on land use law and a professor at Rutgers University. When I was preparing for the trial and learned of his existence, Ken and I went up and met with him. He was very helpful. As a throwback to a former non-computer era, his office was littered with copies of land use decisions from all over the country, with multiple, colored tags containing numeric categories. He also had overflowing containers of 3x5 cards filled with his scribblings. Professor Williams was writing his

[69] Norman Williams Jr., *The Background and Significance of* Mount Laurel II, 26 J. URB. & CONTEMP. L. 3, 7-8 (1984).

great treatise on land use, and this was how he had to organize his notes.

Professor Williams, on behalf of an organization called the Public Interest Research Group, had been admitted as an *amicus* to present oral argument in the *Madison Township* case.[70] Also, a fellow Legal Services lawyer and personal friend, Melville De Miller, on behalf of the State Legal Services Housing Task Force, had also been granted *amicus* status in that case. Basically, an *amici* presentation simply means that the Court accepted the non-party as representing a group with a legitimate interest in the outcome and worthy of being heard as a "friend of the court". Well, with the demise of the *Madison Township* case, that effectively, eliminated the *amici* as well since neither had moved to be *amici* in our case. So, I approached Professor Williams and Mr. Miller in the hallway and told them that I intended to make an oral motion to have them accepted by the Court as *amici* in our case. Of course, they were thrilled. I informed the Court Clerk of this decision and made the motion as soon as the Court reconvened. Mount Laurel had no legitimate basis to object. The motion was summarily granted. I was no longer going to be hanging out there alone.

This time the argument went extremely well. Having listened to the tapes of the first argument and Ken and I going over all of the questions, I had ready and reasonable answers at the second hearing. After it was over, we felt pretty confident that something good was going to happen.

However, initially, the only thing that happened was that over a year passed without the Court releasing a decision. Not a great sign.

C. The First Decision, Mount Laurel I (March 24, 1975)[71]

Finally, in March, 1975, *two years* after the first argument and three years after our trial, we were apprized that a decision had been sent out and would be available the following day.

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[70] *Id.* at 3.

[71] *Mount Laurel I*, 336 A.2d 713 (N.J. 1975).

Peter O'Connor and I went to the Camden Post Office first thing in the morning and got a copy. Sitting on the Post Office garage platform wall, I read it and was amazed. I turned to Peter, handed him the decision and just said, "We won". It was what you might reasonably describe as a "blockbuster". It set New Jersey land use law on its ear. Justice Hall now was writing for the majority, and the majority was a *unanimous* Court. The basic ruling was that all New Jersey municipalities had an affirmative obligation to address the needs of their indigenous poor.[72] This was, essentially, an affirmance of that part of Judge Martino's trial court decision. But Justice Hall was hardly through with Mount Laurel Township.

The nuclear bomb came second. The Court ruled that Mount Laurel and all "developing" municipalities in New Jersey had an affirmative obligation to provide realistic housing opportunities for a fair share of their region's poor.[73] They were required to assess that need, calculate their fair share and address it.[74]

We were ecstatic. Ethel Lawrence was jubilant. Then, in short order, reality sank in as things all around fell apart.

The Court, as most courts do, having articulated a new mandate, left it up to municipalities to act in good faith to implement it.[75] There was nothing definitive in the decision on

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[72] *Id.* at 724 ("We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.").

[73] *Id.* at 731-732 ("As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.")

[74] *Id.* at 732-734.

[75] *Id.* at 734 ("Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mount Laurel must do in that regard. It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further

numerous critical issues: how do you define a "developing" municipality; what are the geographic "regions"; how do you assess housing "need"; over what period of time is that need to be assessed; how do you calculate "fair share"; does it have to be a precise number; what does it mean to "affirmatively" provide "realistic" housing opportunities to respond to the municipal "fair share"? Do you have to grant tax abatements to satisfy federal and state affordable housing funding preconditions? What represents "good faith" and how do you know it when you see it?

All of that was left to trial court judges to figure out, and they were totally unprepared, uneducated on the subject matter and sorely put to the test.

XIII. CHAPTER 13: "GOOD" FAITH COMPLIANCE

Between the Court's decision in 1975 and the second Supreme Court hearing on the second round of appeals in 1980, for five years, every aspect of the 1975 decision was the subject of intense litigation. It was not going well. I doubted that a single affordable home was constructed as a result of the first decision or that a single New Jersey municipality acted in good faith to comply. Perhaps the worst of them was Mount Laurel, itself. Mount Laurel's "compliance" plan was plainly disgusting and an obvious contemptuous affront to the Supreme Court - at least obvious to everyone except our new trial judge.

Several cases actually found there way up to the Supreme Court again.[76] Decisions came down on issues like whether this

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extent of judicial power in the field or to exercise any such power…. The municipality should first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable.").

[76] *See* Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 364 A.2d 1016 (N.J. 1976) (challenging a zoning ordinance permitting the development of mobile home parks for the exclusive use of the elderly); Fobe Associates v. Mayor and Council and Bd. of Adjustment of Borough of Demarest, 379 A.2d 31 (N.J. 1977) (challenging a zoning ordinance

or that municipality was "developing". In one case I had, a municipality argue that it was "developed", not "developing".[77] I asked their planner if he could honestly take the position that municipal development was immutable and not subject to change, even radical change, over the years. He thought so. He then could not quite answer this question: "When in the history of a municipality like, say, New York City, would he state that it was fully developed?" The point was that you could not simply look at available vacant land. The concept of a municipality being "fully developed" and, therefore, not likely to experience additional development activity was absurd. The issue was not just the availability of vacant land, but also the probability that developed land would be the subject of redevelopment.

Ironically, the most upsetting decision post-*Mount Laurel I* was the ultimate ruling in the *Madison Township* case, itself.[78] The Township's "new" compliance plan was challenged and ultimately set aside by the trial court.[79] As previously admonished, the township did not rezone prior to the Supreme Court hearing. The Supreme Court heard argument in that case on the issue of what constitutes a valid compliance plan. We, the Public Advocate, participated as *amicus*.

Incredibly, the decision was written by an Appellate Division judge, Milton B. Conford, temporarily assigned to the Court to cover a vacancy. The majority came up with a doctrine that municipalities simply had to remove all unnecessary barriers to the construction of less expensive housing, referring to it as the removal of "undue cost-generating restrictions" and enabling the construction of "least cost housing".[80] The idea being that if minimal standards were set, developers could build less expensive homes. This fantasy was inadvertently revealed

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prohibiting multi-family residential buildings); Pascack Ass'n, Ltd. v. Mayor & Council of Washington Twp., Bergen Cnty., 379 A.2d 6 (N.J. 1977).

[77] Pascack Ass'n, Ltd. v. Mayor & Council of Washington Twp., Bergen Cnty., 379 A.2d 6 (N.J. 1977).

[78] Oakwood at Madison, Inc. v. Madison Twp., 371 A.2d 1192 (N.J. 1977).

[79] Oakwood at Madison, Inc. v. Madison Twp., 320 A.2d 223 (N.J. Super. Ct. Law Div. 1974).

[80] *Madison Twp.*, 371 A.2d at 1227-28.

to be illusory by the Court itself as it opined that not all developers would take advantage of this "opportunity", so the Township should "overzone."[81]

The fundamental error here was that, while it might be true that by removing controls that resulted in unnecessary costs, developers could build less costly housing, that did not mean that the housing would be less expensive to the consumer. The sale cost and the rental price would still be keyed to what the top of the market would bear. That was just fundamental pricing economics. This remedy would not, and did not, lead to the construction of housing for the poor or "least cost" to the buyer or tenant. Further, the Court did not require the assessment of a precise fair share allocation.[82] All of this just managed to achieve a bare majority of the Justices in favor:

> However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income housing needs of a specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case. Firstly, numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance by any technique revealed to us by our study of the

[81] *Id.* at 1256-57 (Pashman, J. concurring in part).

[82] *Id.* at 1222 ("The number and variety of considerations which have been deemed relevant in the formulation of fair share plans is such as to underscore our earlier observation that the entire problem involved is essentially and functionally a legislative and administrative, not a judicial one.").

data before us. There are too many imponderables between a zone change and the actual production of housing on sites as zoned, not to mention the production of a specific number of lower cost units in a given period of time. Municipalities do not themselves have the duty to build or subsidize housing. Secondly, the breadth of approach by the experts to the factor of the appropriate region and to the criteria for allocation of regional housing goals to municipal "subregions" is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authoritative. For the same reasons, we would not mandate the formula approach as obligatory on any municipality seeking to correct a fair share deficiency.

We are convinced from the record and data before us that attention by those concerned, whether courts or local governing bodies, to the substance of a zoning ordinance under challenge and to bona fide efforts toward the elimination or minimization of undue cost-generating requirements in respect of reasonable areas of a developing municipality represents the best promise for adequate productiveness without resort to

> formulaic estimates of specific unit "fair shares" of lower cost housing by any of the complex and controversial allocation "models" now coming into vogue.[83]

This was a major retreat. Further, the Justices were all over the map, with several concurring and dissenting opinions. Hardly the unanimous majority that supported the *Mount Laurel* decision just two years earlier.

One Justice, Moris Pashman, issued a blistering dissent.[84] Justice Pashman was the most reliable advocate for the poor and African-American and Hispanic households on the Court. His dissent proved to be a worthwhile exercise. It reminded me of the role that U.S. Supreme Court Justice Harlan played in his dissenting opinion in *Plessy v. Ferguson*.[85] He provided the framework for the Court's later reversal in *Brown v. Board of Ed.*[86] Justice Pashman provided the vision of what the Court could and should be doing. It would just take another six long years of failure before we got there.

XIV. CHAPTER 14: THE PUBLIC ADVOCATE WEIGHS IN

In 1974, New Jersey Governor Brendan Byrne, riding on a platform of "Government Under Glass" in the wake of the

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[83] *Id.* at 1200.

[84] *Id.* at 1229 ("I differ with the majority, however, as to the nature and scope of judicial remedies made available for the trial court during the remedial stages of the litigation. In cases of this nature, I conceive that powerful judicial antidotes may become necessary to eradicate the evils of exclusionary zoning. For this reason, I would proceed less gingerly than the majority; I would go farther and faster in outlining for the trial judge the full arsenal of judicial weaponry available for this purpose. I will first analyze the need for stronger, more effective judicial relief in exclusionary zoning cases and then enumerate the various remedial weapons which are or should be available to the trial judge upon remand.") (Pashman, J., dissenting in part).

[85] 163 U.S. 537, 552 (Harlan, J., dissenting).

[86] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Nixon debacle, created the Department of the Public Advocate.[87] The Department's mandate was to serve the "public interest" *as perceived by the Public Advocate*.[88] The Governor appointed Stanley C. Van Ness to the new Cabinet level position. Mr. Van Ness was then the State Public Defender and about as highly a respected lawyer and human being as one could hope to meet in New Jersey.

At about the same time I was ready to move on, having been the CRLS Director for too long. My litigation work was being shelved by administrative demands and grant applications and funding. In just two years, we had expanded dramatically with several, new specialty divisions – like Senior Citizen Rights, Welfare Rights, Tenant Rights, Family Rights and Child Care. The money was there, and we went for it and got it. The demands of running what had become one of the largest law firms south of Trenton were totally undermining my ability to practice law. And I wanted to be practicing law.

I gave the Board written notice of my intent to resign, agreeing to stay on until they hired a replacement. That same day, I got a call from Judy Yaskin, a member of our Board and New Jersey's First Assistant State Public Defender. Judy was a neighbor and a friend and supported the work we were doing, no matter how controversial. She and Mr. Rodriguez stood up to the withering attack the program faced from Vice President, Spiro Agnew – without blinking.

Ms. Yaskin asked if I had any plans, and I said that I did not. I literally was just thinking of returning to a staff attorney position at CRLS. She then told me about this new Department. She was going to be the Assistant Commissioner to Stanley Van Ness, and she thought I might want to join. The Department had a litigating Division, Public Interest Advocacy ("PIA"), and there was an open position for a Deputy Director. Her close friend, another Public Defender, Art Penn, would be the Division Director, and she recommended we meet. I said that having just

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[87] Frederick D. Murphy, *Government Under Glass*, BLACK ENTERPRISE, July 1977, at 45.

[88] Department of the Public Advocate Act of 1974, ch. 27, N.J. Laws 67.

resigned from an administrative position, the last thing I wanted was a position like "Deputy Director" which would require me to do administrative work. She assured me that would not be the case. Mr. Penn would handle all of the administrative end. I could supervise the litigation.

So, I took a look. The statutory scope of this Division's power was incredible. Litigation could be undertaken on behalf of aggrieved plaintiffs, but also, just in the name of the Public Advocate. The only statutory constraint was that the litigation be in the "Public Interest", as perceived by the Public Advocate.[89] Further, this was a ticket into any on-going litigation in which the Public Advocate wished to participate as an *amicus*. It was unlikely that any court would choose not to hear from the State's public interest "watchdog". Also, we would have the resources of the entire State Government - just consider for a moment what the meant: access to support from staffs of the Department of Environmental Protection, Health and Human Services, Transportation, Economic Development – the whole nine yards of the State Administration.

I met with Mr. Penn and that was the start of a lifelong friendship. Art proved to be everything that Ms. Yaskin had promised. Still, I really never thought that someone like me, with my politics, would ever end up working for a government agency. I was very concerned that there would be too many political constraints. Art assured me that would not happen. He turned out to be correct. Mr. Van Ness was beyond reproach. Nothing and no one could divert him from doing what he believed was the right thing to do.

I gave Art our CRLS annual publication of the work that we had done and our on-going cases. I asked him to share that with Mr. Van Ness and see if there was anything there, any litigation that we had brought, which he would be uncomfortable supporting. I was most concerned about the *Mount Laurel* case which was then on appeal. He quickly assured me to the contrary. So, I met with Mr. Van Ness and was

[89] Department of the Public Advocate Act of 1974, ch. 27, § 30, N.J. Laws 67, 77.

incredibly impressed. He had only one rule, which I violated by accident only once, "You do your talking only in court. I do all of the talking outside of court."

One concern was that Mr. Van Ness insisted that at least half of our attorney positions be offered to lawyers in the Public Defender system. The problem was that these attorneys knew little or nothing about Civil Litigation, being trained as "defenders". There is a radical difference between the two, certainly in the context of aggressive advocacy. Completely different mindsets. But, that was not going to dissuade Mr. Van Ness.

I was able to mitigate my concerns by filling the non-PD slots with known entities. I insisted that Ken Meiser be offered a position in PIA, and others from Legal Services Programs, like Steve Blader from Mercer County's Legal Services program. Mr. Van Ness did not care. He said that was for Art to decide. Art agreed, and Ken and I both left CRLS and headed up to Trenton.

At about the same time, Peter O'Connor left CRLS as well. He started his own practice, focusing on the provision of affordable housing developments. He then achieved his greatest contribution - creating a non-profit, the Fair Share Housing Center to maintain pressure on "*Mount Laurel*" compliance.[90] He and I had considered the need for such an entity years before. We prepared a proposal and applied for funds to the Ford Foundation. We were invited up to New York to meet with their personnel. I thought that things went very well, but shortly after the meeting we were informed that our application had been rejected. Things turned out a lot better when Peter continued to pursue this after we had some successes with the *Mount Laurel* litigation and the fact that this housing effort was going to have a State-wide impact. He and Linda Pancotto, who was then working for him on a Vista grant, again journeyed up to New York, but the grant application was again rejected by Ford. However, as *Mount Laurel* and affordable housing had become a major State issue and a kind of cause célèbre, he was able to

[90] *Our Story*, FAIR SHARE HOUSING CENTER: ABOUT US, https://www.fairsharehousing.org/about/ (last visited Feb. 4, 2025).

achieve funding from New Jersey foundations and launched what has become an incredibly successful housing advocacy program, the Fair Share Housing Center.

The Center was recognized by the Supreme Court for its work[91] and was later active in a myriad of lawsuits and settlements of *Mount Laurel* litigation.[92] Peter also decided to work on the development side and created an entity to get affordable housing approved and constructed, Fair Share Housing Development ("FSHD") which now manages several projects in Mount Laurel, Camden and Cherry Hill. We are getting somewhat ahead of the chronology.

All of this attorney dislocation and relocation left a major hole at CRLS for land use litigation. There was no one left. So, the first case taken by the Division of Public Interest Advocacy was the representation of the plaintiffs in the *Mount Laurel* case. Everyone consented to the substitution of counsel. Peter would be treated as "Of Counsel". Now, compliance issues would be handled by the State Public Interest Watchdog, further infuriating the Township.

XV. CHAPTER 15: MOUNT LAUREL TOWNSHIP REVISITED *MOUNT LAUREL II,* THE SECOND TRIAL (1978)

The *Mount Laurel* case, itself, was remanded back to the trial court in Mount Holly.[93] The Township would be given the opportunity to rezone, and having been given that opportunity, it would do so with a vengeance. The rezoning was so outrageous that I thought it bordered on open contempt. Three

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[91] *See* In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing
Add to Keep List, 110 A.3d 31, 42 (N.J. 2015) (recognizing Fair Share Housing Center's standing to represent the public's interest in municipal compliance with affordable housing obligations).

[92] *Mount Laurel IV*, FAIR SHARE HOUSING CENTER: ABOUT US, https://www.fairsharehousing.org/about/ (last visited Feb. 4, 2025).

[93] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978).

small sites, largely undevelopable, were zoned for affordable housing.[94] They had, literally, rezoned only 20 acres of the municipality's 14,300 acres.[95] The actual sites were unsupportable. Here's one example: the "R-5 "district". This "district" actually was one tiny parcel that literally was located in the midst of an approved industrial park that bordered Mount Laurel and Moorestown.[96] Its only access was through that commercial development.[97] It was in an area of the Township with no adjoining residential zoning or development and separated from most of the Township by the New Jersey Turnpike and Interstate 295. It was largely consumed by wetlands.[98] The icing on the cake was that it was in the right-of-way of a proposed extension of the Hi-Speed Line commuter rail system connecting to Philadelphia. With that prospect on record, no financial institution would offer to support a residential development at that location.

I met with the attorney for the owner of the parcel, Frank Wisniewski. He assured me that the last thing that was going to happen on that site was a residential development. Even if it otherwise made sense, no commercial developer would want to create a residential development with potential objectors and complainers to whatever would be going on in the industrial park. He said that he had spoken to Mount Laurel's attorney, Jack Trimble, about this. He told Mr. Trimble that there was no way it ever would be developed. He said that Mr. Trimble told him that the Township could care less, it was simply looking for the worst possible parcels to rezone and preferred that no development occurred. I asked him if he would testify to that conversation, and he agreed - if he were subpoenaed. I was truly surprised to encounter such a stand-up commercial lawyer. His testimony would not endear him or his client to the Township. I handed him a subpoena the next day and added him to our witness list.

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[94] *Id.* at 944.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

Another nuance occurred with the appearance of a regional developer, Roger Davis. He was represented by a highly respected local land use lawyer, David Brandt. Mr. Davis had proposed a mobile home park in Mount Laurel that would provide "least cost" units. His project had been rejected, and he wanted a remedy that would enable him to build. We decided to support his intervention in the case if he committed to provide affordable, not just "least cost", housing. I felt that having a developer who would actually deliver something at the end of the day was extremely appealing and would resolve issues like: "Will this work?".

As obvious as the Township's lack of compliance was, we were faced with a serious problem. Judge Martino had retired and a far more conservative and politically connected judge, Alexander A. Wood, now was assigned to handle the remand. He would be "monitoring" Mount Laurel's "compliance" and any litigation that might ensue. He was a known disaster for us, completely unreliable and deferential as possible to municipalities.

Jack Gerry was gone as well. He now was a Federal District Court judge. So much for a continuation of our gentleman's decorum. Unlike the first trial, Mount Laurel now chose not to rely only on its local counsel and brought in a reputed "attack dog", North Jersey litigator, John Patton. As it turned out, he did have a lot of bark, but not much bite – at least in this litigation. His cross-examination of our witnesses seemed totally unimpactful.

There was nothing that we could do but prepare a strong case, get it on the record, lose as quickly as possible and appeal. The first trial lasted just four days. This one would be far longer and far more complicated, as we had to come up with a plan to address the calculation of regional need and a fair share allocation model, and definitive models for what constituted creating a realistic housing opportunity. Again, none of this had been clarified by the Supreme Court. Also, we had to attack the sites selected by the municipality and offer an alternative plan. That would mean a lot of diverse expert testimony.

Peter O'Connor offered the use of his Cherry Hill office to me, as I was now located in Trenton and needed someplace local to do my work. Then, he offered something, actually someone, who proved much more valuable. While Ken was available within PIA to help with any legal research; the actual trial work was another thing entirely. Fortunately, Peter suggested that a VISTA attorney assigned to his office, Linda Pancotto, might like the opportunity to work on the trial. Ironically, Linda had been an intern law clerk for none other than Judge Jack Gerry. Peter and she both agreed that she would devote all of her time to the *Mount Laurel* case through the completion of the trial. She and I then prepared for the trial, undertook the depositions of the Township's witnesses, prepared the direct examination of our witnesses and the cross-examination of the Township's witnesses. Linda, Ken and I worked on pre-trial briefs and motions.

We had four expert witnesses: Peter Abeles, Alan Mallach, Yale Rabin, and Mary Brooks. This time, Ethel Lawrence also testified. Our experts were excellent, their direct testimony covered the field as well as we could have expected. Testimony was provided on how the local officials had ignored the needs of the poor. Proofs of a way to calculate "fair share" were presented.

Peter Abeles was awesome, as usual. He tore apart the zoning standards and the sites chosen by the Township for the location of affordable housing. He, of course, felt the need to lighten things up. Here's a taste of Peter Abeles' humor: on direct examination, he testified that the noise from the highway and potential speed line traffic on the R-5, industrial park site could get up to 90 decibels. The Judge asked him: "Just how loud is that?" Circumstantially, the noon fire department horn went off, temporarily deafening everyone in the courtroom. Peter testified: "Just about that loud, Judge." I said, "Mr. Abeles, the court reporter cannot and does not record sound." He amplified, so to speak.

Mr. Abeles, as charming as he could be, could also be incredibly mischievous. He took a big risk that astonished me, but there was nothing I could do except watch it unfold and

await the disaster that surely would follow. Mr. Patton had numeric tags with paper clips all over a printed deposition that he handed to Abeles. He asked him to read a portion of it out loud into the record. There was an objection, and Judge Wood deliberated on how to respond. While he did, Mr. Abeles sat on the witness stand with the deposition and went about removing and pocketing at least half of the paper clips and tags. I kept shaking my head. He just kept smiling at me. I couldn't believe what I was seeing. Why Patton didn't call him out on that, I cannot imagine. I guess he just didn't realize it had happened The Judge surely would have gone out of his mind and might have dismissed Mr. Abeles as a witness and struck his testimony. Well, fortunately, it all just passed unnoticed. As we left for the day, Mr. Abeles reached into his pocket and handed me what looked like about a 1,000 paper clips which I hurriedly took and pocketed so no one would see what he was doing.

Speaking of striking testimony, the most disturbing event occurred upon the testimony of Mr. Wisniewski about his conversation with Mr. Trimble. On direct examination, he went over it all. He referred to Mr. Trimble as "a responsible municipal official" without naming him directly. Mr. Patton was to do the cross-examination, but Mr. Trimble freaked out and insisted on doing the cross himself. He specifically asked Mr. Wisniewski to identify the person on the record. His response was, "That person was you, Mr. Trimble". Then the Judge freaked out, walked off the bench and called us all into chambers.

Judge Wood, exhibiting a complete lack of judicial decorum, temperament and wisdom and a great deal of bias, said that the testimony about Mr. Wisniewski's conversation with Mr. Trimble was inappropriate since Mr. Trimble was an attorney in the case. I noted that being an attorney, even an attorney in the case, did not insulate his statements from being entered into evidence and considered by the court. We had named Mr. Wisniewski as a witness, and the Township had not sought to question him in pre-trial depositions. The Judge said it was too prejudicial. I responded that this was not a jury trial with lay people considering evidence. As he, the Judge, would be

considering the evidence, he certainly could rise above being affected by prejudice in weighing the value of the evidence. Further, I said that I would not object to a short delay to give the Township the opportunity to take Mr. Wisniewski's deposition prior to continuing his cross-examination. Lastly, I pointed out that it was Mr. Trimble that got his name on the record, not me or Mr. Wisniewski. Frankly, this was boiler plate rules of evidence and there was no possible basis to strike this part of Mr. Wisniewski's testimony.

The Judge would not relent. He clearly cared only about Jack Trimble's stature with his municipal clients. He said that if we did not agree to strike this testimony, he would declare a mistrial, and we would have to start from scratch. He would not strike the testimony without my consent. Further, he could not guarantee when such a major case would fit into his schedule - so we could anticipate a long delay. We were apoplectic. This already had been a long trial, all of our direct testimony was in, but the Township had not presented its defense. The idea of going through it all again just for Mr. Wisniewski's testimony about the conversation was truly daunting. Then the Judge leaned over and, in front of everyone, said, "Look, you have nothing to lose. I have heard the testimony. I'm not going to forget it, like it or not." Incredible, was he saying that he would consider what he had heard even though it would no longer be on the record and had not been subject to completed cross-examination or counter-testimony, if any, from Mr. Trimble? I did not believe him for a second. Nevertheless, there was no appeasing him.

We huddled and considered that we had no reasonable option. We needed to get this trial over with, take our anticipated loss and move for an expedited appeal. Other cases were going up to the Supreme Court, and we needed this trial to end to be able to consolidate with them. This particular revelation in Mr. Wisniewski's testimony was not crucial. I spoke with him, and he said that he understood and that I should just do what I think was best for the plaintiffs. The man just oozed integrity. So, we agreed to strike the testimony. Whether I really had much choice, even if we made the correct decision

under the circumstances, it was one that I have always regretted. Some years later, when I was in private practice with Flaster, Greenberg, P.C., I asked Mr. Wisniewski to join me in establishing a land use practice for that firm. He did, and we worked together as law partners for several years.

The testimony of the municipal experts was disgustingly biased and unrelated to relevant facts and scientific justification. I suppose in order to impress us, a named principal of the land use planning firm that advised the Township testified. He opined on several of the controls, contradicting basic accepted, published national minimal standards that are designed by scientists and planning experts to protect health and safety. He even seemed a bit at sea in talking about the various areas of the Township. On cross-examination, I took a little risk, deciding to ask some questions that I did not know for sure how he would respond (thus violating a basic principle of cross-examination - never to ask a question if you don't know how the witness *must* answer). With a map of the Township up on a board, I asked him if he could identify the different named communities that composed the Township of Mount Laurel, like Rancocas Woods, Masonville and Springville. You would think that a municipal planner should be able to do that before he opines what's best for the community. Well, he could not. So much for his knowledge of the Township. These areas were developed with almost none of the standards that he was saying were essential. Rancocas was a treasure to the Township and the location of the homes of municipal officials – but it had narrow streets, no sidewalks, no curbs, small lots. On his direct examination, he opined that the municipality could not approve mid-rise or high-rise structures since it did not have the firefighting capability. As Exit 4 of the New Jersey Turnpike was located within Mount Laurel, I asked him if he was familiar with and could identify the hotels located at that exit. He could not. He had to acknowledge that they were mid- to high-rise structures. He admitted that, clearly, if the Township could address fire issues at those commercial ratables, it should be able to do the same thing for a residential building of the same height. He was a terrible witness.

The Township had their actual planner, Lou Glass, as a witness to justify the standards in their ordinance. Expert witnesses are really not supposed to "side" with their client. Of course, except for a few, planners like David Kinsey, Betsy McKenzie and Alan Mallach, they almost always do side with the clients who are paying their way. Kinsey was impossible to "feed". He expressed his expert opinion, like it or not. I trusted him and figured we would use him, like it or not. He became the go-to planner for the Fair Share Housing Center and for my affordable housing efforts after I left the Public Advocate. Dr. Kinsey was open to discussion, but ultimately told you what he would say and that was that. He was very difficult to cross-examine - basically, it would be hard to find inconsistencies in his testimony with his prior writings, testimony and the like. The ancient Roman educator, Marcus Fabius Quintilianus is quoted as saying something like "liars have to have good memories".[99] People who tell the truth, do not. That's because, while it's hard to remember your lies, one can easily repeat the truth.

I won't say that Lou Glass would lie, but he certainly did not have a great memory. He seemed to take things to an extreme in the other direction, appearing to me as being openly biased in favor of whatever his client chose to do, whether he may have agreed with it or not, and whether it had any scientific basis or not. He testified on the full scope of the Township's land use controls - things like lot size, setbacks, sidewalks – the soup-to-nuts of development standards. All of this, he opined, was essential to the protection of public health and safety.

I was so angry that, in preparation for his cross-examination, I found out where he and his family lived in a Pennsylvania suburb of Philadelphia and drove out to his house. If I actually had the right place, it turned out to be located on a lot that was much smaller than anything permitted in Mount Laurel and on a street that was much narrower and which had no sidewalks. It was completely bereft of anything like the

[99] QUINTILIAN, INSTITUTIO ORATORIA IV (H.H. Butler ed., Loeb Classical Library 1920) (n.d.)

standards he was saying were necessary health and safety minimums.

As his cross-examination ensued, he ultimately figured out what I had done and basically lost it on the stand. There was not much he could say to defend his position given that he was raising his own family in a house which existed under extremely less onerous land use restraints. There was no way he could justify living with his wife and children under conditions that were below those he was opining were necessary to protect their health and safety. He melted away. At least I thought so, until I read Judge Wood's horrendous decision.

XVI. CHAPTER 16: *MOUNT LAUREL II* — SECOND TRIAL COURT DECISION (1978)

I hope, in light of the pathetic state of our United States Supreme Court, that there is no one out there who still believes in "blind justice" or that it doesn't really matter who the judge is. There is, of course, that Greek goddess of human justice, Justitia. She is everywhere holding the scales of justice and carrying a sword at her side. The sword is to let you know what happens if you fail to be just. She is now usually shown blindfolded. People incorrectly assume that is to keep her honest, not actually knowing who the litigants are – "blind justice". But the truth is that the adornment of the blindfold came centuries after she was deified and represented in Greco-Roman art and sculpture. In fact, this change in apparel was fostered as a way she could be protected from actually seeing all of the injustice that was being done in the world.

Here, you just need to read and compare the trial court opinions by Judge Martino and Judge Wood in the *Mount Laurel* case.[100] The former was a man of great integrity, the latter wrote a decision that, although he got some grace from the Supreme Court, in my opinion, was a disgrace. As little hope as we had

[100] *Compare* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972), *with* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978)

that we could prevail before this Judge, his actual decision was shocking. He basically validated everything that the Township had done and was dismissive of all of our expert witnesses. It was truly disgusting. Ironically, out of nowhere, he decided to support the Davis mobile home park, and essentially, ordered the Township to approve it in ninety days. Justice for the corporate sector, injustice for the disenfranchised poor and African-American and Hispanic households. America, greatest country on Earth.

When the Judge's clerk called to say that we could pick up the decision at the courthouse, Linda and I drove out and prepared for the worse. We got it, read it, and our self-preparation notwithstanding, we stood there just stunned. It was a total fiasco. We lost everything. All that work, all those years, and after the presentation of a truly foolproof case, we, basically, had gotten nothing. The reality of it was extremely difficult to comprehend.

Certainly, one of the worst experiences for me in my career up to then and to this day, was having to drive out to Ethel Lawrence's home and apprise her of the result. Linda and I did that, heading right to her home from the courthouse. Mrs. Lawrence was incredible. Her religious vision came to bear. She was absolutely convinced that we would win this case. She said to "trust in the Lord, and the Lord will deliver". I'm thinking, maybe you could have the Lord to be so good as to send an angel or two to hammer this awful Judge before he rendered this even more awful decision. The fact is that we were devastated. Mrs. Lawrence spent more time consoling us than we had to do to console her. Recognizing the condition we were in, she sat us down, made some coffee and let us chill for a while, all the time thanking us, praising us and trying to convince us that we would be okay and that, in the end, we would win. If there is anyone who might be thinking that doing this case was thrilling, I suggest you imagine what it was like to experience that loss and, as it turned out, to endure a five year wait to see it overturned. Five years. What were you doing five years ago?

We appealed. The Township did as well with regard to the Davis mobile home park.

XVII. CHAPTER 17: SO, WHAT'S IN THE PUBLIC INTEREST?

With the temerity of a previously spanked adolescent who now had gotten away with emptying the cookie jar, Mount Laurel decided to double down. Its leaders just could not miss an opportunity to embarrass themselves publicly. The Governing Body was apoplectic that the plaintiffs were now being represented by the State Public Advocate. So, they decided to sue the Department, challenging Mr. Van Ness' decision to represent the plaintiffs. They sought to undermine the Department, arguing that the relevant legislation had failed to establish clarity and standards in granting the Public Advocate the right to sue "in the public interest", as he perceived it. This, of course, in contradistinction to the well-defined concept of "in the general welfare" on which they were relying. The Township complained that we had refused to finance their defense. We had rejected its request that we appoint and pay for a special counsel to represent their "competing public interest".

That case was brought right up to the Supreme Court on an expedited basis. Art Penn argued the matter for the Department. The Supreme Court unanimously held that the legislation was specific enough and that Mr. Van Ness' decision to represent the *Mount Laurel* plaintiffs was not arbitrary or capricious and certainly served a public interest.[101] These were the Court's last words on the subject:

> The vital need to hold the government accountable to those it serves and the *need to provide legal voices for those muted by poverty and political impotence cannot be overemphasized*. The Public Advocate goes far toward satisfying these needs, thereby nourishing and revitalizing our political system. The legislative definition of

[101] Mount Laurel Twp. v. Dep't of Pub. Advoc., 416 A.2d 886 (N.J. 1980).

> "public interest" constitutes a realistic attempt to create an effective advocate for the general public. The legislature could have delineated particular substantive areas and thus limited the Public Advocate, but it chose not to do so, a decision which was clearly within its prerogative. Plaintiffs' real complaint here is that the Public Advocate is free to litigate cases which do not fit into the plaintiffs' ideological mold. The Constitution, however, is not bound to any one group's vision of the political order. Although public interest may elude a universally satisfactory definition, see, e.g., Cahn & Cahn, "Power to the People or the Profession? The Public Interest in Public Interest Law", 79 Yale L.J. 1005 (1970), we cannot say that the creation of the Department of the Public Advocate is unconstitutional. Indeed, the Public Advocate admirably furthers the principles embodied in our Constitution.[102] (Emphasis added).

The winds of change rattling through the Halls of Justice.

XVIII. CHAPTER 18: MORRIS COUNTY TO THE RESCUE

After the trial court decision and given what was going on throughout the State, I was pretty depressed about the anemic condition of the once vaunted "*Mount Laurel* Doctrine".

[102] *Id.* at 893.

So were Ken and Linda, as was anyone with knowledge and who cared about the poor and this effort to provide them decent housing. Things seemed to be falling apart. We had the uncomfortable feeling that the issue of affordable housing was dramatically losing steam. Certainly, if we ever had any momentum or hope of getting realistic compliance, that was gone. At the time, four cases challenging compliance plans were coming up through the appellate process. And now, so was ours. We needed a splash – something that would shake things up and convince the Supreme Court, the Legislature and municipalities that the issue was not going away and that they had to do a lot more if there ever was going to be compliance. They had to provide clarity in the doctrine to facilitate consistent and non-conflicting trial court review and significant exposure for recalcitrant municipalities.

My thought was to sue someone, someone big. Further, the lawsuit had to showcase the need for state-wide controls, fair share planning and compliance methodologies. Ken and Linda agreed. We first considered, and rejected as too political and unwieldly, suing the Legislature. But then we quickly came up with a good idea of who that someone might be. So, we met with Mr. Van Ness and Art Penn, and they approved our plan.

Morris County New Jersey is perhaps the wealthiest county in the State and a largely conservative, Republican bastion. An attack there by the Public Advocate would send shock waves throughout the State. We were certain that none of the municipalities had made anything like a good faith effort to comply with the 1975 "*Mount Laurel*" decision. So, we decided to sue, in one case, every municipality in the County. Now, that would create a splash.

Linda said we could simply focus on the newly approved "State Development Guide" published by the Department of Community Affairs.[103] This document provided a map of the whole State by municipality, delineating, in part, what those planners determined were State Growth Areas. So, we singled out those municipalities in Growth Areas. We then visited the

[103] N.J. DEP'T OF CMTY. AFFS, NEW JERSEY STATE DEVELOPMENT GUIDE PLAN (1977).

"developed" municipalities for signs of potentially developable areas; like, for example, golf courses, large retail or commercial buildings that were vacant, for sale or underutilized. Our planning experts reviewed what there was of compliance plans in each of the targeted municipalities. They determined that 27, yes, 27, were clearly vulnerable to suit. So, we did just that. The State Public Advocate, in a single complaint, filed suit against 27 Morris County municipalities.

To put it mildly, the governing bodies of the municipalities that were sued went ballistic. They uniformly did not like being individually, let alone collectively, targeted. So, they sued us, the Public Advocate Department, taking the position that we were not acting in the public interest. As this was an appeal from an administrative decision, the case went directly to the New Jersey Appellate Division. Art represented the Department and obtained a resounding victory. Reading the decision, I had to consider how far we actually had come from the pre-*Mount Laurel I* view of the "public interest". Just check out this first quoted paragraph:

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation.
>
> It is quite apparent that in arriving at his decision to institute the litigation, the Public Advocate properly adhered to the statutory guidelines for the exercise of his discretion in the matter. In the circumstances these guidelines sufficiently circumscribe the exercise of that discretion while properly allowing for the meaningful effectuation of the policy of the legislation. We discern

> no constitutional infirmity in N.J.S.A. 52:27E-31.
> The decision of the Public Advocate under review is affirmed. [104]

The "*Morris 27*" litigation, filed by the State's Public Advocate, was somewhat of a game changer. It was front page news everywhere. If the municipalities in Morris County were going to have their feet put to the fire, the rest of the State was not going to be spared. Also, by bringing them all in, the pressure was created for the approval of a uniform fair share plan and compliance program. The county judge handling the matter was the Hon. Robert J. Muir. He was an excellent judge, and although with a deep Republican political background, he was totally fair and of the highest integrity.

I was really thrilled to meet Judge Muir. First, of course, we would have as our trial venue the incredible Morris County courthouse and his heritage courtroom. This was the location of the 1935 Charles Hauptmann, Lindbergh kidnapping trial. Hauptmann was found guilty and executed. Hopefully, that would happen to the defendants in our case. Also, for more recent notoriety, Judge Muir, himself, had presided over the tragic case of *Karen Ann Quinlan*. He opined that it would be inappropriate to remove life support from a live human, even one who, according to the medical experts was, effectively, brain dead, incompetent and in a persistent vegetative state with no hope of recovery.[105] The New Jersey Supreme Court reversed; yet, explicitly complimented Judge Muir on his decision.[106] Ms. Quinlan, despite all of this, lived comatose for almost ten additional years! In a meeting with me and one of the municipal attorneys, a close friend of his, the Judge said that he thought about the case just about every day, and he was heartbroken just having to listen to the testimony, let alone having to rule, especially against the wishes of her family. "Those poor people."

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[104] Borough of Morris Plains v. Dep't of Pub. Advoc., 404 A.2d 1244, 1249-50 (N.J. Super. Ct. App. Div. 1979) (citing S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 727).
[105] Matter of Quinlan, 348 A.2d 801 (N.J. Super. Ct. Ch. Div. 1975).
[106] Matter of Quinlan, 355 A.2d 647 (N.J. 1976).

The *Morris County 27* organizational hearings before Judge Muir were kind of a carnival but a lot less fun; except for us. We were pretty much enjoying the chaos. All 27 municipalities were well-represented. The Judge did his best to take control and attempted to put some commonality to the anticipated discovery and trial(s). However, it was clear that, without guidance from the Supreme Court, he might totally lose his mind. The law, as it stood, was simply too inscrutable and unwieldly. He could not possibly hear separate testimony from each defendant on issues like "fair share", "developing municipality", compliance mechanisms, good faith, etc., etc. He needed a more definitive decision from above. That would soon happen, as the Supreme Court really had no choice and brought up the four pending appeals.

XIX. CHAPTER 19: *MOUNT LAUREL II (1983)*

A. The Second Supreme Court Appeal and Argument; Are We Even Going To Be Invited?

I filed a motion with the Supreme Court to expedite our case, to bypass the Appellate Division, and to consolidate our appeal with the other four cases. Seemed like a no-brainer. Not quite. Much to my shock, the motion was *denied* without comment. Once I got off the floor and back in my chair, got over the shock and smoldering anger, I prepared and filed a motion for reconsideration - probably the first time in history that had ever happened on such a discretionary court decision. I simply pointed out that we were representing the *original Mount Laurel* plaintiffs. *They had litigated this issue now for the better part of a decade.* It was unseemly for them to be put aside while other cases would proceed ahead of them. Also, there was the fact that we, their counsel, were the State Public Advocate and surely would be allowed participation as the matter was clearly in the public interest. Certainly, it had to be a given that we would be allowed in as an *amicus*, so it was kind of absurd not to let us in as client advocates for the original plaintiffs.

To his credit, the Chief Justice quickly reversed the decision. He brought up our case, consolidated it with the others and placed us at center stage to be the lead case and for us to be the attorneys who would initiate the argument - to be the first to be heard. Frankly, when the ultimate decision came down, captioned with our clients as the named plaintiffs, I felt vindicated that the right plaintiffs were being respected. This was their case, win or lose, and Ethel Lawrence and the others deserved that recognition.

B. The Supreme Court Brief

The filing of a Supreme Court brief is always a daunting task. This was particularly true in our case as we had an enormous record and there were so many relevant issues to be resolved. The brief must set forth the facts as presented in the record of the trial below and the legal arguments relied upon to prevail. For us, I felt that the Statement of Facts was critical. We had to juxtapose the lack of clarity in *Mount Laurel I* with what Mount Laurel, itself, had done and how the previous decision had led to this inevitable failure to achieve compliance. I argued that whatever the Supreme Court thought it might have achieved in *Mount Laurel I,* it could not possibly have intended this result; yet, the decision's lack of clarity and the Court's misguided trust in municipal good faith were the reasons it failed. We had to prove that.

Foremost, our brief had to be readable and every line annotated with a reference to the record below. We had a great, but huge record. There were voluminous transcripts of testimony, about 30, covering all of the trial dates. Further, there was a massive number of exhibits, presented in a "Joint Appendix" – the document agreed to by both parties which presented the non-testimonial evidence. It was over 700 pages long. The record seemed impenetrable. Someone had to make it totally accessible and supportive of an irrefutable narrative of what had happened and of our position.

Linda Pancotto just said, "I can do that. I'll do it." No argument there. She had spent a year working under Judge

Gerry in the Federal District Court. That meant reviewing innumerable trial briefs, detailing the trial record and setting the table for the Judge. She had the incredible patience that it would take to go through everything and sort it out, organize it and present it coherently. It wasn't going to be easy. I wanted a complete Statement of Facts, and I wanted every sentence and reference explicitly cited to a Transcript page and line and/or a specific page of the Joint Appendix. I didn't want the Justices or their Law Clerks to have any difficulty finding support for every statement in our factual presentation. Linda would have to organize the record and spell out our case as clearly as possible.

The ironies abound. Jack Gerry, Mount Laurel's former counsel and now a Federal Court Judge and who had hired Linda, had inadvertently helped prepare her for the daunting task of writing the most important part of our Supreme Court brief. She undertook the task of making our massive trial record readable, accessible, well-documented and compelling. Linda literally disappeared into her office behind a closed door for the better part of two months. All I had to do was work with her on some of the structure and a little of the content. When she was done, she emerged with an extraordinary document. The final Statement of Facts was over 100 pages of a 130-page brief. The Chief Justice later complimented us, saying that this was one of the best submissions he had ever read.

One problem with such an extensive record is that the most obvious and significant facts can be lost in the complexity of the entirety. We needed a way to get the picture vividly across of what was going on in a simple, clear and definitive manner. So, we did something unusual. Instead of just referring to the record below and identifying the referenced documents, we decided to bring it home. A picture can truly be "worth a thousand words", and in this case, it surely was. Instead of just referring to them and citing them, we included in the brief photo copies of three maps that had been admitted into evidence. The first was an aerial of the vast land area of the Township and, as dots on the map, the tiny isolated "affordable housing Districts". The second map was a detail of one of the sites, the R-5 Zone, showing all of the constraints to development. The Third was a

map of the Township showing the massive approved planned unit developments and depicting, and thus juxtaposing, the tiny affordable housing sites. The maps alone probably would have won the case for us.

Ken and I worked on the Legal Argument and the needed remedy. We all reviewed the final draft of the legal argument. It was a commendable job, but frankly, for anyone who read the Statement of Facts that preceded it, the legal argument was mere surplusage.

C. The First Hearings — October 20, 21, and 22, 1980

The Supreme Court courtroom at the first hearing was mobbed with attorneys, reporters and a "sold-out" general public audience. The argument went extremely well. As I was the attorney representing the *Mount Laurel* plaintiffs and the attorney from the Public Advocate and since our case was the first listed, everyone agreed that I would initiate the argument. We had several goals. First, we needed to get the Court to clarify the doctrine. We needed a means to get uniformity throughout the State on issues like fair share enumeration and compliance mechanisms. Second, we needed a ruling that compliance was an affirmative obligation and that municipalities had to be proactive to create the realistic opportunity for actual affordable housing, not "least cost" housing. They should be required to provide for and approve whatever was reasonable to enable the projects to be built. This went beyond zoning. They had to comply with State and Federal preconditions to the approval and financing of an affordable housing project. This meant granting tax abatements and the adoption of appropriate resolutions, like a resolution of need.

Third, of critical importance, we needed the creation of a class of plaintiffs incentivized and financially capable of suing. The Chief asked why we could not do it - the Public Advocate and the legal services attorneys. I pointed out that most of the attorneys were just out of law school and very few of the attorneys had land use experience. Further, the programs could not possibly afford to retain counsel or finance the litigation. I

said that the same was true of the Public Advocate. The Division of Public Interest Advocacy had just nine attorneys with a very broad mandate. Even if all of them were forced to work on *Mount Laurel* compliance hearings, the number would be far short of what was necessary and contrary to the broad mandate in the Legislation.

"So?", the Chief asked. Fortunately, this issue succumbed to an easy and unavoidable solution. We needed only to point to the Davis intervention in our case, and the fact that Judge Wood actually provided Davis with a site-specific remedy. The answer was obvious: there was no better class of plaintiffs to carry the ball than those who would have a financial stake in the outcome: the builders. However, they had to be incentivized to sue recalcitrant municipalities. It would take a lot to convince them to litigate. They would need the requisite interest in land, the ability to carry the property for what might take years and the financial backing to undertake expensive litigation. They needed a big enough carrot to convince them to be the Court's "boots on the ground". The fact was that the necessary remedy was right before the Court – the imposition of a "builder's remedy" – and Roger Davis should get the first one for his mobile home park - if he agrees to provide affordable housing as part of the larger project.

Our position was that the Court must establish an easily obtainable, profitable outcome to attract developers to sue so that there would be clear and unavoidable exposure to recalcitrant municipalities. Hopefully, that exposure alone would encourage voluntary compliance without the need for a compelling lawsuit. The solution was simple and easy to implement: if a developer would commit to providing a percentage of affordable units (20% sounded good) and if the developer established municipal non-compliance, and if the developer litigated to achieve compliance, then the developer's own development proposal would have to be approved. The only municipal defense would be that there were public *health and safety* issues. Merely arguing that the development was contrary to the "*general welfare*" would not be accepted. If the

Court bought into this proposal New Jersey land use law would flip a full 180 degrees.

I also took direct aim at the *Madison* case standard of "least cost housing".[107] There was nothing wrong with mandating minimal standards, but that alone would not result in affordable housing. At best, it would just make construction less expensive for developers to build middle- and upper-income housing. I pointed to the mass of municipal attorneys on the other side of the room and stated that there could be only one reason that they uniformly were here supporting the "least cost" doctrine and that reason was that it did not produce affordable housing. Nothing else could possibly get them to reach a unanimous agreement.

Lastly, it was important to frame the case as being about real people, real households, children and the elderly poor. The issue was not whether they were going to live, but how and where they were going to live. These were the people who were most affected by a concept like "the general welfare". While numbers mattered, these numbers were human beings in need of help to get something as basic as decent shelter for them and their children.

Supporting argument followed from Dick Bellman, Marilyn Morehouser and many other amici presentations. There was a veritable slew of attorneys arguing on the other side, representing municipalities, "leagues" and even a bunch of Republican Assemblymen who joined together to be heard denigrating the need to address the housing crisis. It was an incredible show.

D. The Second Hearing — December 15, 1980

There was no question that the Justices were upset and frustrated that the 1975 mandate had been largely ignored and certainly not implemented. They appeared ready to correct that problem. They did call us back for additional argument providing issues that the Court wanted addressed. Singular

[107] Oakwood at Madison, Inc. v. Madison Twp., 371 A.2d 1192 (N.J. 1977).

among these were compliance mechanisms, such as, whether municipalities had to agree to Federal requirements for the provision of Federal funding. As "out there" as that may seem, it was relatively easy to address. Failure to comply with these requirements, such as tax abatements would mean no Federal support for affordable housing developments. Importantly, since these were *government* standards and were used to provide thousands of housing units throughout the country, it was hard to envision how a municipality in New Jersey could argue they were contrary to health, safety and the ever-elusive, "general welfare".

The second argument occurred on December, 15, 1980. It was all positive and looked extremely promising. We left the argument, as we had after the second *Mount Laurel I* hearing, feeling like something good was going to happen, finally. But, déjà vu. Nothing happened – months went by with no word from the Court. You cannot imagine what that can do to a person. Mrs. Lawrence insisted that it was okay. She said that we had to realize how long her people had suffered, and they still suffered. If the Justices need this time to do the right thing, then it would be worth the wait. She could wait – as the rest of us were going out of our minds.

XX. CHAPTER 20: THE SECOND SUPREME COURT *MOUNT LAUREL* DECISION, JANUARY 20, 1983 (THAT DATE IS NOT A TYPO)

Measuring the delay in getting a decision from the Supreme Court in months turned out to be overly optimistic. We would be waiting for *over two years*. In anticipation of a decision, various groups would schedule conferences to address the Court's rulings. These either were cancelled or transformed into informational, educational presentations and prognostications. As time went on, there was a great deal of speculation, but no one truly knows what is happening in the Court's Conference Room as the Justices deliberate. Recall, that the *Madison Township* Justices were split over how to address the issue and

had failed to reach anything like a decisive, unanimous decision. So, it appeared that might be happening again.

Then, on January 20, 1983, the decision finally came down.[108] It was, once again, *unanimous*. *Twelve* years had passed since the filing of our Complaint, but, finally, we appeared to have what was needed to set the stage for compliance and the provision of the actual construction of affordable housing.

The victory was epic. We got everything we asked for – everything. And, then we got much more. The bottom line was that the Justices were extremely angered by the fact that their prior decision had been so openly flaunted.[109] There was no question that they were not going to allow that to happen again and that it was "pay back" time. Talk about awakening a sleeping giant and dealing with its terrible resolve. As for the lack of clarity in the *Mount Laurel I* decision, Chief Justice Wilentz and his Associate Justices now covered the landscape completely, leaving nothing to the imagination. Truthfully, nothing. There would be no need to litigate over what the Court meant.

Some of the best of it all, and something we were particularly gratified to read, was what the Court had to say about Mount Laurel, itself. The Justices provided the following as to its "compliance" plan that had been validated by Judge Wood:

> We find that the amended ordinance falls far short of what was required, that it neither corrects the particular deficiencies of the prior ordinance nor otherwise affirmatively provides a realistic opportunity for Mount

[108] *Mount Laurel II*, 456 A.2d 390 (N.J. 1983).

[109] *Id.* at 410 ("After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.").

> Laurel's fair share of lower income housing. *It is little more than a smoke screen that attempts to hide the Township's persistent intention to exclude housing for the poor.* (Emphasis added).
>
> In our original decision we gave Mount Laurel the opportunity to amend its ordinance. Stating that "[w]e trust it will do so in the spirit we have suggested ...," Mount Laurel I, 67 N.J. at 192, we declined to impose any judicial supervision over the municipality's efforts to comply. Our trust was ill placed. Therefore, to assure compliance with our mandate, all further proceedings to conform to today's decision shall be strictly supervised by the trial court, including not only any further litigation that may be required by this opinion, but all municipal action needed to conform to this and the trial court's judgment.[110]

It was so incredibly justifying of the effort Linda put into the Statement of Facts. The Court just outright copied sections of our brief and decimated the "sites" for affordable housing that were part of the municipal plan:

> The zone designated R-5, consisting of 13 acres, allows the construction of townhouses and garden apartments with a maximum of 10 units per acre. It is owned by an industrial developer, is totally surrounded by

[110] *Id.* at 460.

> industrially zoned land, virtually isolated from residential uses, has no present access to other parts of the community, no water or sewer connections nearby, is in the path of a proposed high speed railroad line, and is subject to possible flooding. It would be hard to find (other than R-6) a less suitable parcel for lower income or indeed any kind of housing. Furthermore, as one of plaintiffs' experts pointed out, no experienced industrial developer would allow this parcel to become a pocket of protesting residents objecting to the planned industrial uses surrounding them. Mount Laurel II, at pp: 297-298[111]

While the Court's specific assault on Mount Laurel's contemptuous plan was particularly satisfying, its generic holdings were incredible. It held that:

> 1. *Every* municipality has an affirmative obligation to assess the housing needs of its indigenous poor and devise a program to address those needs.[112]
> 2. *Every* municipality has an affirmative obligation to address its fair share of the regional need for affordable housing and devise a *proactive* program to address their fair share.[113]
> 3. *As a precondition of the right to zone*, municipalities were required

[111] *Id.* at 462.
[112] *Id.* at 418.
[113] *Id.*

> to adopt a Land Use Plan Element and a Housing Plan Element to their Master Plans, detailing the foregoing.[114]
>
> 4. *Approximations and good faith were deemed irrelevant. The obligation was to be calculated as a specific number, and it was either lawfully addressed in its entirety or the municipality would be deemed non-compliant, regardless of their intentions.[115]*
>
> 5*. There would be no municipal "grace period" to achieve compliance*. Municipalities had ample time to comply and would be held accountable if they were sued prior to attaining compliance.[116]
>
> 6. Lawsuits alleging non-compliance could be filed by public interest groups, but also by landowners and developers who could propose specific developments on their property, designed in a manner that was totally unrelated to, or controlled by, existing zoning.[117]

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[114] *Mount Laurel II* at 418.

[115] *Id.* at 422.

[116] *Id.* at 456 ("It is now five years beyond Madison. The direct orders we issued to the municipality then, 72 N.J. at 553, 371 A.2d 1192, may appropriately now be issued by trial courts initially and with complete specificity. And that which we intimated in Madison might be the ultimate outcome after so many years of litigation—adoption by the trial court of a master's recommendations to achieve "compliance," id. at 553–54, 371 A.2d 1192—may now be the appropriate initial judicial remedy at the trial level.").

[117] *Id.* at 452.

> 7. *Builder's remedies were to be readily granted*. If the landowner/developer was successful in proving non-compliance and if they completed the case until the court deemed the municipality compliant, their development proposal would be deemed approved unless the municipality could demonstrate that it clearly would be contrary to public health and safety and/or would create demonstrable environmental degradation that could not be remedied. *There would be no defense by the municipality that the plan was contrary to the general welfare*.[118]
>
> 8*. Upon proving non-compliance, the presumption of validity that always had attached to municipal decisions would be reversed, and the presumption would favor the plaintiff/developer and their proposed development.*[119]

All of this was what we had hoped to achieve (like on Christmas Day), but the Court was not finished. It went off on its own. None of the litigants' attorneys, including me, had proposed what the Court now imposed:

> 9. *Three "Mount Laurel" trial judges would be appointed to handle all* <u>*Mount Laurel*</u> *cases*, and the cases would have a special and separate docket number.[120]

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[118] *Id.*

[119] *Id.* at 465-466.

[120] *Mount Laurel II* at 459.

> 10. Each *Mount Laurel* judge would have jurisdiction over a separate regional area as designated by the Court and handle all cases filed within their vicinage.[121]
> 11. <u>*Mount Laurel*</u> *Judges could freely appoint experts, "Masters", to work with the courts* and with the parties to foster compliance and, hopefully, settlements. The Masters would be paid by the defendant municipality and would be independent experts that could provide testimony.[122]
> 12. *The Chief then appointed three of the State's most prestigious and widely respected trial court judges to the task: the Hons. Anthony Gibson, Eugene Serpentelli and Stephen Skillman.* Generally speaking, their work and their demeanor achieved broad approval by attorneys for both the municipalities and the plaintiff litigants. *They clearly were the Supreme Court's surrogates, saddled with the task of validating and implementing what the Court had directed. There was no question that they would do just that. Failure was not an option.*

We were, to say the least, euphoric. Ironically, the first cold water thrown on the decision was by Stuart Hutt, counsel to the New Jersey Builder's Association. Circumstantially, soon after the decision was rendered, he spoke at a preplanned Builder's Association meeting and offered the view that no

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[121] *Id.*
[122] *Id.*

builder would be willing to take the risk. "It is not going to work."

Mr. Hutt would soon be proven wrong. Within a year of the decision, over ninety *Mount Laurel* lawsuits had been filed. Developers from all over the State, Nation and Canada decided things were looking good in New Jersey and got their hands on New Jersey properties, often in our most "exclusive" municipalities, and sued. Soon, a state-wide fair share plan was agreed upon. Then, through court decisions and settlements, massive compliance was achieved as builder's remedies had become commonplace and included a commitment to provide affordable housing as a condition of their development approvals.

POSTSCRIPT

A. Compliance

As Mr. Hill predicted, the State's municipalities succumbed to the inevitable bludgeoning. The three *Mount Laurel* judges did their job, implemented compliance as the Chief Justice had ordained and granted municipalities no quarter. After a century of dominating the courtroom with blanket presumptions supporting whatever they did, it was fantastic to see the tables turned so dramatically. Certainly, there were extraneous issues to resolve, like could there be multiple builder's remedies in one case? Several municipalities had been sued by multiple developers. I think tops was six. The answer, was "yes", they could.

Resolving the issue of a formulaic fare share plan and providing specific numbers for municipal compliance was a major task. Judge Serpentelli literally convened a hornets' nest of municipal, public interest and builder planners and lawyers in his courtroom and threatened to keep them there until they reached agreement on a formula. Under the auspices of his Master, Carla Lehrman, they did. The ensuing "consensus

methodology" or "Lehrman model" became the standard.[123] It was tweaked by ensuing cases, but generally held its own and pumped out numbers for every municipality in the State. A notable humorous result was the effect of the formula's use of employment data as one of its allocation factors. Princeton Borough found itself to have a very large fair share number which turned out to be due to very high employment - which clearly could not possibly have been located within its borders. It turned out that just about every major corporate enterprise that lined the Route 1 corridor in West Windsor had used a Princeton Post Office Box as its corporate headquarters to be able to identify themselves as being "located in Princeton". Nice for West Windsor's fair share numbers, but very bad for Princeton's. So, adjustments had to be made.

Deservedly, municipalities were targeted in inverse relationship to their wealth. As one should have expected, the more prosperous towns were the most attractive to "rapacious" developers. Builders could option land zoned for 2-acre, even 10-acre, single-family lots, propose a development at six or more units per acre and ultimately prevail in *Mount Laurel* litigation, or as often was the case, settle. Municipalities had lost control over land use policy.

[123] Judge Gibson, Judge Serpentelli, and Judge Skillman came to rely on three data points to determine need: (1) overcrowded units, (2) units lacking "complete plumbing facilities for the exclusive use of the occupants," and (3) "units lacking adequate heating." AMG Realty Co. v. Warren Twp., 504 A.2d 692, 699 (N.J. Super. Ct. Law Div. 1984). In that case Judge Serpentelli noted, "Reliable data refers to the best source available for the information needed and the rejection of data which is suspect. The need to make as few assumptions as possible refers to the desirability of avoiding subjectivity and avoiding any data which requires excessive mathematical extrapolation. An internal system of checks and balances refers to the effort to include all important concepts while not allowing any concept to have a disproportionate impact." *Id.* at 726.

B. The Council on Affordable Housing—Mount Laurel III *and* Mount Laurel IV

1. *Mount Laurel III* (1986)

Things were not going all that well for the municipal side, so they meekly, but aggressively, turned to the Legislature for help. The fact is that for many years, the Legislature had been kicking around legislation that would provide for State-wide housing planning and support for affordable housing development. Not surprisingly, due to municipal objections, those efforts never got anywhere. Well, the landscape now was very different as municipalities were begging for relief generally and, particularly, from builder's remedies. They got it with the adoption of the Fair Housing Act which created the Council on Affordable Housing ("COAH").[124] COAH was granted the power and mission to assess fair share obligations and compliance methods and to review voluntarily submitted compliance plans. Its staff would work with municipalities to "fix" the plans. Ultimately, the plans would be submitted to the COAH Board for review and approval. Once its plan was approved by COAH, the relevant municipality would obtain a "repose" from further litigation, similar to the Judgement of Repose granted by the courts.

One incredible nuance was the adoption by the Legislature of a provision providing for "Regional Contribution Agreements".[125] These enabled wealthy suburban municipalities, essentially, to barter away up to 50% of their obligation to provide affordable housing by paying financial contributions to other municipalities to build them. Of course, this would be tempting only to poor urban municipalities. The concept was clearly contrary to the effort to regionalize the location of housing opportunities for the poor. Regardless, it would be upheld by the Court. To their credit, many urban municipalities refused to cooperate with suburban efforts to

[124] New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 (West 1985).
[125] *Id.* at § 52:27D-312.

"sell" the housing obligation. However, others, in need of financial support in their own communities, could not resist taking the funds.

Developers and affordable housing advocates challenged aspects of the COAH legislation and the matter quickly came before the Supreme Court for review. In *Hills Development Co. v. Bernards Township,* (commonly referred to as *Mount Laurel III*),[126] the Court heard argument on the issue of the viability of COAH as a compliance mechanism. Many land use attorneys participated; including, but not limited to: myself, Ken Meiser, Art Penn, Henry Hill, John Payne, Guillet Hirsch, Stephen Eisdorfer and many more on both the affordable housing advocate side and the municipal side.

The Court quickly validated the law. It essentially, if only temporarily, washed its hands of the need for judicial monitoring and assuring the implementation of municipal compliance. The Court justified a *moratorium* on builders' remedies, giving time for COAH to get its act together.[127] Somewhat shockingly, it ruled *retrospectively*, validating the anticipated mass transfer of pending litigation to the new Council. Full disclosure: this included a matter that was being actively litigated and pursued by my own development company. The only basis to avoid a transfer would be proof that the transfer would result in a "manifest injustice".[128] The Court determined that the mere loss of a potential builder's remedy in pending litigation was not tantamount to such an injustice.[129]

Thus, developers, who had engaged in the compliance process, financed land acquisition, undertook expensive and time-consuming litigation and compliance proceedings, who were actually fulfilling the intent of *Mount Laurel II,* were out in the cold. Since COAH did not provide for builder's remedies, this left (very unfairly) developers, like my own company, with nothing to show for undertaking the litigation. The developers effectively lost everything that they had put into the process.

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[126] 510 A.2d 621 (N.J. 1986).
[127] *Id.* at 652.
[128] *Id.* at 631.
[129] *Id.* at 647-48.

Some of the language in the opinion, which was so dismissive of the builder's concerns, was the height of judicial arrogance and indifference and lacked basic judicial integrity. Check this out:

> The impact of transfer on a builder, of course, is somewhat different. The builder's loss of expected profits is discordant, under these circumstances, with the connotations of "manifest injustice." *That loss is a risk to which builders are regularly exposed in a variety of circumstances.* (Emphasis added).
>
> It has been suggested that there is a different kind of injustice here, for, as some have put it, this Court in Mount Laurel II "invited" the builders to bring these suits, solicited the "help" of the builders in our effort to vindicate the constitutional obligation. In effect, we are said to have asked them to join in a struggle to vindicate a constitutional interest. Those assertions remind us of the opposite claim, which is that we invented the remedial doctrine not for the benefit of the poor, but for the benefit of the builders. The truth is that we devised a remedy that we believed would be effective. We concluded that if it were possible for builders to profit from lower income housing, they would pursue it, and further concluded that such pursuit was likely to increase compliance with Mount Laurel. We did not "hope" the

> builders would join in this effort, we expected that they would.
> Nevertheless, there is an obvious basis to a builder's claim that pursuit of this litigation was justifiable, but if that suggestion is intended to create the image of an estoppel, there is no substance to it. *If there is any class of litigant that knows of the uncertainties of litigation, it is the builders. They, more than any other group, have walked the rough, uneven, unpredictable path through planning boards, boards of adjustments, permits, approvals, conditions, lawsuits, appeals, affirmances, reversals, and in between all of these, changes in both statutory and decisional law that can turn a case upside down. No builder with the slightest amount of experience could have relied on the remedies provided in Mount Laurel II in the sense of justifiably believing that they would not be changed, or that any change would not apply to the builders.* (Emphasis added) If ever any doctrine and any remedy appeared susceptible to change, it was that decision and its remedy. The opinion itself constituted the strongest possible entreaty for legislative change.[130]

Well, it turns out that we can add the lack of judicial integrity to the pitfalls of that "rough, uneven, unpredictable

[130] *Id.* at 649-50.

path" that builders have to traverse. As someone who was burned by this judicial lack of judiciousness, I for one would take umbrage at the thought that the Court, having lured builders into the process with the promise of a builder's remedy and not having suggested that it could be divested at the whim of the Legislature, would so cavalierly wash their hands of any obligation to those who carried *their* ball for *them* when no one else would or could. Without the builders litigating, there had not been and would never have been municipal compliance. Further, there never would have been a "COAH."

Once COAH had been established and numbers assessed, municipalities that did not submit to its jurisdiction were still vulnerable to litigation. A multitude of municipalities submitted to the jurisdiction of the Council and got out from under the sword of Damocles that the *Mount Laurel* builder's remedy created.

2. *Mount Laurel IV* (2015):

The truth is that initially COAH did a pretty good job; however, with the addition of the Regional Contribution loophole the opportunity to provide family affordable housing in the wealthier suburbs in the first two rounds of fair share compliance was severely marginalized. Ultimately, COAH's effectiveness was undermined and eviscerated by, ironically, a Democratic Administration. In the effort to achieve positive social change, it is particularly depressing when people in power, in this case elected and appointed Democrats, who you expect will support the effort, actually act aggressively to undermine it. When Susan Bass Levin was the Democrat appointee to head the New Jersey Department of Community Affairs and became the *de facto* head of COAH, the handwriting, so to speak, was on the wall.

Ms. Levin was no stranger to the *Mount Laurel* case. She was the former Mayor of Cherry Hill which had been the target of affordable housing litigation by several developers: including, Peter O'Connor. When asked to comment by the press, Peter trashed her appointment, after which he was tormented by the

administration in his attempts to get State financing for his own development projects; particularly, the Short Hills project in, of all places, Cherry Hill. Ms. Levin absolutely despised Peter, and it was a long time before the Short Hills project actually got built. However, Peter being the tenacious soul that he is, the project now stands.

The Democrat Administration did successfully torture the system to the point of oblivion. For one thing, COAH failed to provide timely updates. It's failure to do so was the subject of litigation.[131] Arguing before the Appellate Panel, I was asked what the problem is. I answered by pointing to the DAG representing COAH and said that her job is delay and she has no downside – you are unlikely to fine, disbar or otherwise penalize her or her boss. So, the real problem is you and your failure to come up with an effective consequence. After that assessment settled in among the judges and lawyers, I was asked what that consequence might be. I suggested giving them 30 days to adopt the rules or the task will be handed over to Judge Serpentelli. After all, he did this before in single day. The decision came down giving COAH 90 days.

The delay wasn't the only issue as COAH came up with bizarre methodologies and, basically, fell apart. The coup de grace did come under a Republican Governor, Chris Christie. COAH became so ineffective that, ultimately, the Supreme Court gave up on it. Kevin Walsh of the Fair Share Housing Center argued that case and successfully led the way for the Court to bury the agency.[132]

In what is commonly referred to as *Mount Laurel IV,* the Court had no choice but to recognize that COAH had become an ineffective entity, and it reinstituted judicial review of municipal compliance.

> Fair Share Housing Center (FSHC) filed the present motion in aid of litigants' rights because COAH

[131] In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 855 A.2d 582 (N.J. Super. Ct. App. Div. 2004)

[132] In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel N.J. Council on Affordable Hous, 110 A.3d 31

> failed to promulgate the Third Round Rules. *We thus are in the exceptional situation in which the administrative process has become nonfunctioning, rendering futile the FHA's administrative remedy.* (Emphasis added) The FHA's exhaustion-of-administrative-remedies requirement, which staves off civil actions, is premised on the existence of a functioning agency, not a moribund one.
>
> Due to COAH's inaction, we agree that there no longer exists a legitimate basis to block access to the courts.[133]

In any event, regardless of this tortured history, the *Mount Laurel* Doctrine survived and still abides, and municipal compliance is still under the gun of potential litigation and the fear of litigation. Affordable units are still being planned, approved and constructed. Even Haddonfield complied, at least to the extent of allowing an elderly project. It has had to negotiate with the FSHC to resolve the remainder of its *Mount Laurel* obligations.

C. The Attorneys

1. Me

Before *Mount Laurel II* came down in 1983, I had resigned from the Department of the Public Advocate. With the political change in the Administration in 1982, from Democrat to Republican, Stanley Van Ness would be gone, and I was definitely targeted for removal. Ironically, the new Governor appointed my friend and mentor from Camden, Joe Rodriguez, as the new Public Advocate. He asked me to stay. I was two feet

[133] *Id.* at 34.

out the door by then and not interested in looking back, but agreed to stay for up to six months or any earlier time that he felt comfortable with my leaving. I ultimately left and opened my own private practice while considering my options.

At the time, there was a growing negative consensus among developer lawyers that the *Mount Laurel II* decision had not provided a sufficient incentive for their clients to take the bait. This was truly infuriating, given our efforts and the Court's commitment. I was totally blindsided by the fact that the very community chosen to benefit the most economically from the work, who we had argued that the Court should task with compliance, was now undermining the decision.

Then, unexpectedly, the door opened for me to pursue the *Mount Laurel* remedy with my own development company. Peter Abeles called and wanted to aggressively promote compliance himself. He had access to a Chicago equity firm willing to finance inclusionary developments in New Jersey. He asked me to join as lawyer and principal. Sounded great but he was a planner and I was a land use lawyer and neither of us had any business acumen – certainly something we would need to deal with venture capitalists.

Ken Schuman, my close, personal friend since 6th Grade, was a graduate of the Columbia Business School and had been the Economic Development Commissioner under Mayor Koch in New York. Ken had a strong business background, working at the investment banking firm, Lehman Brothers, but also a person with a fundamental caring for the poor. My father had earlier helped him get a job at the Hudson Guild Neighborhood House, and he also taught disadvantaged poor and African-American and Hispanic households in a New York public grade school. The timing was perfect and, when I explained to him what we were proposing to do, Ken joined as well. He provided the critical corporate/business background knowledge that we desperately needed.

The three of us created Affordable Living Limited Partnership and, later, American Newlands Limited Partnership. We raised several million dollars over the years and optioned land in many municipalities. We then sued under

Mount Laurel, obtained approvals and contracted with builders to take over the project and build the inclusionary developments. Several thousand units were built through our work, virtually all of which had large affordable housing components.

A disgruntled Morris County State Legislator, still chaffing from my work with the State, actually filed an ethics complaint against me as a former State employee, "using the *Mount Laurel* case to my advantage". The charge made the front page of the Newark Star-Ledger.[134] Art represented me and experienced the ignominy of also being charged after he revealed his participation in some of our work. The filing of the ethics complaint was political and had no merit. As former State employees, we were not privy to any undisclosed information or data, had no advantage from our work with the State and were not doing anything that about 100 other attorneys were also doing in New Jersey. Further, we were simply following and fulfilling a clear directive from a State Supreme Court decision which we had not written or controlled and which was public knowledge and open to anyone to read and seek to implement. The charges against us were summarily dismissed without a hearing. The dismissals didn't quite get the publicity as had the charges. They were reported in a tiny article in the back pages of the Newark Star-Ledger. The bad news gets prominently displayed on the front page, while the good news is buried somewhere as filler in the back.

2. Peter O'Connor

After *Mount Laurel I* was decided. Peter had left CRLS and opened his own law firm to work on affordable housing development and related issues. Earlier when we were still at CRLS, we had envisioned the need for an advocacy group, a Center, to monitor the state-wide implementation of *Mount*

[134] Robert Schwaneberg, *State to Review Case Against 2 Advocate Aides*, STAR-LEDGER, Aug. 1, 1985, at 1.

Laurel I litigation. Ultimately, Peter was able to achieve such funding.

The Fair Share Housing Center was created in 1975, and, initially led by Peter, became a major watchdog and implementer of the *Mount Laurel* Doctrine. The Supreme Court, in *Mount Laurel IV*, recognizing the work of the Center, required all filings of *Mount Laurel* cases to be copied to the Center and granted the Center broad standing to participate, as an *interested party*, in any case it chose to do so.[135] The Court, however, did not provide for the Center to be paid for its work. As things evolved, a ready source of funds for the Center emerged as many settlements were conditioned on payments to the Center for the work it had done.

Peter left working at the Center in 2015 as it became ensconced in litigation. He turned his attention to the full-time work of being a non-profit, affordable housing developer. In June of 1986 he created FSHD and has functioned as its Executive Director ever since, constructing and managing several developments which provide 100% affordable housing units.

After Peter left, the Center then would be led by two extraordinary attorneys: first by Kevin Walsh and then by its present Director, Adam Gordon. They carried on the work with incredible energy. The Center grew tremendously in size and influence and helped getting the Legislature to approve additional implementing legislation.

3. Linda Pancotto

After being second chair to me on the second *Mount Laurel* trial court hearing, Linda did not continue her work with Peter after her Vista term ended. Art and I offered her a position with the Public Advocate, which she accepted and that led to her appellate work on the *Mount Laurel II* case. She left the Public

[135] In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing
Add to Keep List, 110 A.3d 31, 42 (N.J. 2015).

Advocate in 1980. Once I left, she came back to work as a project manager on *Mount Laurel* applications and developments generated by the corporate entities I had established with Ken Schuman and Peter Abeles. She monitored the professional work and kept the projects moving.

4. Ken Meiser

Ken left the Public Advocate's Office around the time that I did. He made what turned out to be a professional mistake working as counsel to then Mayor Susan Bass Levin in Cherry Hill. They were about as close to oil and water as two people possibly could get. We often met, and I strongly encouraged him to leave. Fortunately, he was able to do so and joined our friends, Dave Frizell and Harry Pozycki, in their Metuchen Law Firm. This change enabled him to do real estate and land use work, often representing *Mount Laurel* developers. He ultimately joined Hill Wallack, Henry Hill's law firm, and was provided with an ample workload of affordable housing developers to represent. Ken recently passed away. He was one of the most intelligent people I have ever met and covered that with a genuine caring heart. I don't think he ever got the recognition he deserved; particularly, for his work on the *Mount Laurel* and related cases and tenant's rights advocacy.

D. The Mount Laurel *Case*

In the *Mount Laurel II* decision, the Supreme Court again remanded the actual Mount Laurel case, itself, to the trial court with instructions to resolve the dispute pursuant to the standards set in the Supreme Court decision. Fortunately, by virtue of the appointment of the three standing *Mount Laurel* Judges, we would not have to deal with Alexander Wood as our trial judge. The Public Advocate's representation became secondary on reaching a settlement; although, Ken continued to participate, and I worked on settlement implementation. Peter O'Connor effectively took over the direct representation on the remand with the intent of settling the case and, in part, having

FSHD participate in the construction of affordable housing in the Township to assure that the units would be affordable to very low income families.

Although a good friend of Peter's, Joe Rodriguez was adamant that the Public Advocate could not be involved in a settlement process that would result in an order granting one of the attorneys in the case the right to do development approvals. This was addressed by the ultimate settlement language that provided for the *Mount Laurel* plaintiffs to have the right to designate a developer for part of the implementation plan and removing Peter as a direct beneficiary.

In 1985, the case was finally and formally settled. Mount Laurel agreed to provide a realistic housing opportunity to develop 995 units of affordable housing (somewhat in excess of the 36-unit debacle that set off the litigation). FSHD would play a major development role, designated by the plaintiffs as the non-profit housing provider. Over fifteen years had passed since the Township had foolishly undermined the goals of its own residents to build those 36 affordable units. Had it given Mrs. Lawrence and the Springville Action Association the support that they deserved and should have gotten from responsible government officials, Mount Laurel would not have become the poster child of economic and racial discrimination in New Jersey.

E. The Ethel R. Lawrence Homes

One remarkable result of the litigation and the settlement was the construction, by Fair Share Housing Development, of the Ethel R. Lawrence Homes in Mount Laurel. It is such a shame that Mrs. Lawrence did not live to see this housing that was named in her honor.

I represented FSHD in obtaining the local approval for the development. The outpouring of hundreds of angry residents led the fire marshal to insist that the hearings be conducted in the Middle School. It was packed. At one point, while doing the presentation, I was literally being poked in my back by someone seated behind me. I turned and found myself

staring into the eyes of a grey-haired, very frail, elderly woman, surely from the nearby age-restricted housing. She looked up at me, a little shaken, but with the nerve to opine: "You are scum". I politely asked her not to poke me again, and she didn't.

The hearing drew a huge audience. It was incredible how motivated people seemed to be to stop this development. At one point, in the hallway, a very old man, breathing through a portable oxygen device tottered in, ironically being supported by an African-American nurse. I couldn't believe it. I went over to them and told him that he was not needed here and should go home. Without a response, the nurse did a 180 and took him away. One objector actually questioned why we would call the project, "Homes", since that conjured up, in her mind, ghetto housing. Some men threatened Peter, that they would be waiting for him outside. They did not, but all of this set a very disturbing tone. Truthfully, it was a little frightening, but there was a contingent of the local police ready to deal with any problem that might arise. None did.

Phil Caton, the court's Master, testified. He made it clear that the Board absolutely had to approve this project. It was part of the settlement and presented no planning, health or safety issues of any concern. One of the Board members was a hold out. She apparently anticipated running for Mayor. The Board caucused and made it clear to her that the decision was going to be unanimous one way or the other, and if it were denied, the Township would be exposed to endless, expensive litigation, leading to the inevitable approval of the project. She relented.

After all was said and done, the project was unanimously approved. It was April 12, 1997, *twenty-six years* after the complaint was filed. The approval was of sufficient national interest that it, and some of the back story, was reported in the New York Times.[136] The reporter quoted an angry resident shouting at the Board members after the approval vote: "You are history!". Well, in fact they were, but not the "history" he was talking about.

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[136] Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, N.Y. TIMES, Apr. 12 1997 at 21.

After the creation of the Fair Share Housing Center, the Ethel R. Lawrence Homes is truly Peter's crowning achievement. It has become a showcase of what a 100% affordable housing project could look like and how incredibly successful it could be. 140 affordable units, on the sixty-acre site, provide just a magnificent environment for the lower-income residents. Appropriately, it was constructed under the watchful eyes of another Lawrence. Mrs. Lawrence's daughter, Ethel, was retained by FSHD as the Project Director.

The development contains an educational center for all the children, appropriately named after Peter's mother, Margaret Donnelly O'Connor, where the kids can go after school and are supported and their school work monitored. There are outdoor and indoor recreational facilities. Peter's administrative offices also are on site, and the development is under the watchful eye of Debbie DelGrande, his right and left hands. They keep a close rein on the project, the residents and the children. In retrospect, the public opposition was totally misguided, as many now acknowledge. The project has been hailed by local officials as a huge success for its attractiveness, maintenance, lack of crime, and proactive connection with the public schools and the local administration. There is no shortage of notables who visit - politicians, dignitaries, academics and intellectuals, all of whom openly express their disbelief that they are looking at a 100%, family, affordable housing project. But that's Peter, always eschewing the cheaper sedan for the Cadillac. It would be well worth anyone's time to visit it.

The Ethel R. Lawrence Homes is the focus of a book addressing it as a breakthrough in suburban integration. *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*,[137] Saul Alinsky's admonition about integration to the contrary, no one is moving out of Mount Laurel as a result of the introduction of affordable housing into the Township.

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[137] DOUGLAS S. MASSEY, ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB (2013).

F. Affordable Housing

The *Mount Laurel* decision has spawned the construction of tens of thousands of low- and moderate-income housing units, often in locations that never would have permitted the housing absent the mandate and the builder's remedy. A huge secondary impact has been the development of tens of thousands more multifamily and small-lot, single-family units. This occurred since the "builder's remedy" required developers, generally, to provide up to twenty percent of the total units as affordable. This left 80% free-market units. Since many municipalities preferred "inclusionary developments" to 100%, stand-alone affordable housing projects, the former proliferated throughout the State, again in locations that otherwise never would have permitted such "intense" development. These projects often provided housing opportunities that otherwise would never have been provided for middle-income households.

G. Related Cases

The Supreme Court now had a new sensitivity to the implications on the poor of governmental action in the area of land use. This led to a number of other cases after *Mount Laurel I* which were not directly related to *Mount Laurel* implementation, *per se*. However, the cases addressed specific land use controls that affected housing for the poor and the ability of the poor to access affordable housing. The following are a few examples of matters that I worked on:

1. Homebuilders League

In *Home Builders League of South Jersey, Inc. v. Township of Berlin*,[138] four years after *Mount Laurel* I, the Court finally put to bed the power of municipalities to control minimum habitable house/unit sizes. Such regulations clearly impacted directly on cost. The Public Advocate intervened. I argued for the Department. Linda and Ken assisted in writing the brief. The Court stated that:

> We have experienced that change in conditions which has been reflected in pertinent legislative and judicial attitudes. Zoning which excludes low and moderate income families for fiscal purposes has been condemned as contrary to the general welfare. [. . .]
> Rather, the ordinance appears to be directed solely toward economic segregation. Under these circumstances and in the absence of proofs showing a connection between the minima and the legitimate purposes of zoning (public health, safety and welfare), such as would be established by an occupancy relationship, the provisions must fall.[139]

2. *State v. Baker*

In *State v. Baker*,[140] the Court addressed municipal attempts to control the actual occupants of housing. The Public Advocate was granted leave to

[138] 405 A.2d 381 (N.J. 1979).
[139] *Id.* at 392-393
[140] 405 A.2d 368 (N.J. 1979).

appear as *amicus curiae*. I argued for the Department, and Linda and I did the brief. This was an attempt by municipalities to directly control the "users" as opposed to the "uses". Towns did this by limiting permitted occupancy to the residents' *legal or biological relationship*. This form of discrimination precluded biological or legally unrelated lower income persons and families from living together to financially afford shelter. It affected unrelated couples and single parents living with their children and an unrelated support person or "significant other". It also directly affected LGTBQ+ households. The Court opined that issues of overcrowding and the like could be directly controlled by specific ordinances that reflected scientific standards generated by public health organizations. The Court stated that:

> The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated "widows, widowers, older spinsters or bachelors or even of judges" from residing in a single unit within the municipality. [. . .] Regulations based upon biological traits or legal relationships necessarily reflect generalized assumptions about the stability and

> social desirability of households comprised of unrelated individuals, assumptions which in many cases do not reflect the real world.[141]

3. Homes of Hope

After *Mount Laurel II,* an issue remained as to whether municipalities that achieved compliance would have any further obligation to support applications for affordable housing that were not part of the approved plan. Basically, under *DeSimone*, variances were to be freely granted for government funded, 100% affordable housing projects. Was that still true for a *Mount Laurel* compliant municipality? In *Homes of Hope, Inc. v. Eastampton Twp.*,[142] the Appellate Division ruled that, even if a municipality has been certified as having satisfied its *Mount Laurel* obligation, an application for a use variance for affordable housing was still a special reason, as set forth in the *DeSimone* case,[143] and the municipal *Mount Laurel* compliance certification did not impact on whether the application should be approved.[144]

I represented, briefed the matter and argued as counsel for the Fair Share Housing Center which had been granted *amicus curiae* status. We provided the Court with ample proof that the statewide fair share housing numbers were based on a need assessment representing just a fraction of the actual need. This was a result, in part, of the compromises reached in the creation of the Lehrman fair share methodology. For example, "cost-burdened" households were not included in the need assessment. These are households paying a substantially greater portion of their income for shelter than was consistent with national standards. There were hundreds of thousands of such households in New Jersey. Including them in the Lehrman

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[141] *Id.* at 371-372.
[142] 976 A.2d 1128
[143] DeSimone v. the Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970).
[144] *Homes for Hope*, 976 A.2d at 1130.c

methodology would have generated a more accurate, but an incredibly high calculation of need. However, although they were not included in the need assessment, we had to recognize that these were households actually in need of shelter that they could afford and would be motivated to seek such units when they became available – thus competing with households that actually were included in the need assessment. Ironically, since many already were living in municipalities or close to those that would be providing new affordable housing, they might well be the first in line to capture access to those new units even though they were not part of the need assessment.

The Court ruled in our favor, stating that:

> The issue presented is whether affordable housing continues to constitute an inherently beneficial use for purposes of obtaining a use variance, N.J.S.A. 40:55D-70d(2), after the municipality in which the property is located has met its fair share obligation under the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329.19, and its concomitant regulations. We conclude that a municipality's compliance with the FHA by meeting its fair share obligation does not impact affordable housing's inherently beneficial use status for purposes of obtaining a use variance. Affordable housing continues to foster the general welfare and constitutes a special reason to support a use variance. [. . .]
>
> A COAH certification does not mean that a municipality has reached a limit for affordable housing. Neither the FHA, nor Mount Laurel I or II, explicitly or implicitly

> supports the Board's argument that once a municipality's Mount Laurel obligation has been fulfilled, a need for low- or moderate-income housing no longer exists. It is beyond question that even if a municipality meets its Mount Laurel obligation, substandard housing will continue to exist. Providing affordable housing to meet that need, on a case-by-case basis, continues to foster the general welfare, regardless of a COAH certification, so as to constitute a special reason to satisfy the positive criteria. The "[g]eneral welfare, as that concept is used in the determination of whether special reasons exist under [N.J.S.A. 40:55D-70d] for granting a use variance, comprehends the benefits not merely within municipal boundaries but also those to the regions of the State relevant to the public interest to be served."[145]

[145] *Id.* at 1130, 1134 (quoting Kunzler v. Hoffman, 225 A.2d 321 (1966).

ETHEL LAWRENCE, IN MEMORIAM

It has been about fifty years now since the idea of the *Mount Laurel* litigation first germinated in my head and was formulated into a lawsuit with the support of Peter, Ken, Carolyn and Tom. None of us possibly could have imagined that we would be doing this for decades when we first met with Mary Robinson and her daughter, Ethel Lawrence. They not only agreed to pursue the case, but Mrs. Lawrence agreed to be a plaintiff and brought in her own daughter and Aunt as additional plaintiffs. Mrs. Lawrence became a vital support-person for all of us and an active spokesperson for the effort; which included her often doing public presentations, at least once at Harvard. She died in 1994. She did live to see her efforts succeed on paper, but she did not live long enough to walk about, through and around the Ethel R. Lawrence Homes. That would have been an awesome day for her and for all of us. It was decidedly unfair that she was not able to see this gem of a project, which carries her name, constructed and occupied and so hugely successful in the Township she loved most of all. Even after all that she had endured and how miserably the local officials had treated her, her family and her community, she was undaunted in her love for Mount Laurel Township. It was, after all, her ancestral home. In the end, it was Ethel Lawrence who would provide Mount Laurel with its most important and incredible gift – social inclusivity and harmony.