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CONTENTS

NAVIGATING INTERNATIONAL ETHICAL COMPLEXITIES: THE FOREIGN CORRUPT PRACTICES ACT'S SHORTCOMINGS IN HIGH-RISK INTERNATIONAL OPERATIONS

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This article has been two decades in the making. I originally presented an earlier version of this paper at the Black, Indigenous, and people of color Conference held at Albany Law School in 2018. Thanks to the contributions, guidance and assistance of my research assistants over the past two years I have been able to bring this article to fruition. In particular, I would like to thank Marie-Therese Witte, J.D. 2024 at Albany Law School and Editor-in-Chief of the *Albany Law Review*, Vol. 87, Caroline Drenkard, J.D. 2025 at Albany Law School and Editor-in-Chief of the *Government Law Review*, Vol. 18, Patrick Schroeder, and Sam Poyer.

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ABSTRACT

United States and international laws designed to prevent fraud, bribery, and corruption in business dealings seek to promote stability and economic growth. But, who do these laws protect in times of conflict? Are the exceptions and defenses to any prosecution under these laws too restrictive, impeding the eventual security of human life in an attempt to create and sustain the utopian goals of free economic markets? This article analyses the author's encounters with armed military personnel as managing director of a cellular phone company in Abidjan, Côte d'Ivoire, in May 2001 and the aftermath which eventually led to the company's closure in 2003. Part I of the article provides background information on the chain of events that led to the encounter and the economic and political state of Côte d'Ivoire at the time. Part II of this article briefly discusses the rule of law and its application in Africa. Part III explores the implications of the Foreign Corrupt Practices Act ("FCPA") and how the provisions of the Act applied to the author's situation with regard to the duress exception to the FCPA and facilitation payments. In Part IV, the author argues for an expansion to the duress exception which would take into account political and social circumstances indicating an environment of duress. The author proposes a test to be used by persons and courts faced with similar circumstances.

I. BEHIND THE CURTAIN: A GLIMPSE INTO HIGH-STAKES INTERNATIONAL OPERATIONS

A. In the Eye of the Storm: A Personal Account of Corporate Conflict in Côte d'Ivoire

"*Nous sommes un pays de droit*," asserted Michel Etté, our young lawyer, to some ten soldiers surrounding me in my office in Abidjan. There were another twenty to thirty in the hallway and reception. The first time I heard that phrase, "This is a country of laws" and fully understood the concept of "rule of law" in my gut was on May 25, 2001, in Abidjan, Côte d'Ivoire at about 7 pm GMT. Alexandre Galley, an Ivorian businessman, alleged mercenary and arms dealer, had paid for a military division of the Ivorian armed forces to invade our company, in order to force the handover of the cellular phone company of which I was the managing director. He had brought with him a *notaire*, which is a specialized lawyer in deeds and corporate documents in Côte d'Ivoire's civil law system.[1] The *notaire* would document and certify the legal handover of the company. I would do it, it was thought, because I would be scared of the armed men with AK-47s.

How did a lawyer from America end up in the middle of this standoff? As a brief background, I graduated from Harvard Law School in June 1987, studied for the New York Bar exam, spent August and September in Bermuda and weathered Hurricane Emily with my parents and friends. I began working in the litigation department of Shearman & Sterling in October

[1] *See* Armiel Olivier Yapi & Yao Mamoudou Ouattara, *Update: The Legal System in Côte d'Ivoire,* NYU LAW GLOBALEX, https://www.nyulawglobal.org/globalex/Cote_dIvoire1.html (describing the legal system of Côte d'Ivoire which is modeled on the French legal system); *Quel est le Rôle d'un Notaire ?* [*What is the Role of a Notaire?*], VIE PUBLIQUE, https://www.vie-publique.fr/fiches/38275-quel-est-le-role-dun-notaire (last updated Oct. 9, 2023) (describing how, in France, Notaires help with the preparation and execution of legal documents in transactional matters).

1987, where I acquired skills that served me well for my future endeavors.

In March 1990, I married a young Mauritanian lawyer whom I had met at Harvard Law School. He had received his LLM from Harvard in June of 1987 and spent the following year as a foreign associate at Coudert Brothers in New York City. He accepted a job with the African Development Bank in 1989 and moved to Abidjan, Côte d'Ivoire in Fall 1989.

I left New York and Shearman & Sterling in April 1990 to join my husband in Abidjan. I initially worked for a small American law firm in Abidjan. I then convinced the largest firm in the country, N'Goan, Asman & Associés, that I could build an international practice for them of English-speaking clients and other non-francophone clientele. I would spend the next several years working on a variety of matters involving an array of clients from across the globe. I also represented the American Embassy, British Embassy, and South African Embassy, together with some of the Development Financial Institutions. N'Goan, Asman & Associés was an influential firm in the country by virtue of the fact that its largest client was the office of the Prime Minister and other government offices.

In 1998, while still at N'Goan, Asman & Associés, I was engaged by a New York law firm with regard to the acquisition of Comstar Cellular, SA in Côte d'Ivoire ("Comstar"). Modern Africa Growth & Investment Company, L.L.C. ("MAGIC") had approached Western Wireless International Corporation ("WWI") regarding the purchase of Comstar, which was a small, failing GSM cellular telephone company in the country. I was initially approached to do the local due diligence on the company on behalf of WWI. When the deal between MAGIC, WWI and the shareholders of Comstar was concluded, WWI—the operating company—offered me the position of Managing Director of Comstar, which I accepted eventually, effective August 1, 2000. Subsequently, Comstar changed its name to Cora de Comstar, SA and then Cora, SA ("Cora").[2]

[2] The Board of Directors included, among others, Ellen Johnson Sirleaf, the former President of Liberia, Ibrahim Keita (Chairman), and myself.

Fast forward to May 2001 and I am facing Galley's military. Instead of handing over Cora, I called company headquarters in Seattle, the U.S. Embassy, the U.S. Commercial Consular Agent, the office of the prime minister of Côte d'Ivoire, and other sundry characters in Africa, Europe and America. I resisted because this was not supposed to be happening, and I just knew that someone would show up immediately to put matters right. After all, I had already spent eleven years in Côte d'Ivoire, practicing law and facilitating business deals of all sorts. There was corruption in this developing African country, but there was also a sense of the rule of law. People followed the law; we executed contracts; we followed labor laws; there were regulators and administrative agencies. There was, above all, a highly developed judiciary with civil courts, criminal courts, and commercial courts.[3] The courts issued written decisions and the parliament enacted legislation.[4] The country worked and functioned on the basic premise of a legal system of government.[5] Because Côte d'Ivoire had been under direct French control from 1889 to 1960, French civil law was the model for the Ivorian Constitution, resulting in a highly organized bureaucracy with the guiding philosophy that every citizen had a say in state action and, equally, was accountable to the state.[6] At the same time, more than sixty ethnic groups lived within the borders of Côte d'Ivoire which the French colonial power had constructed for its convenience; tensions were rising between the Muslim-majority north and the Christian-majority south.[7] Reliance on shared rule of law was holding together a country with substantial internal tensions.

That night in May 2001, I grew a backbone and said no: I would not sign over the company to Mr. Galley. The soldiers were uneasy. The *notaire* and these armed men who seemed also to be on drugs did not quite know what to do with a woman

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[3] Yapi & Ouattara, *supra* note 1.
[4] *Id.*
[5] *See generally id.*
[6] *Id.*
[7] *Id.*; Francis Akindès, *Côte d'Ivoire: Socio-political Crises, 'Ivoirité' and the Course of History*, 7 AFR. SOCIO. REV. 11, 15 (2003).

in this physically hostile situation. They actually said that they could not mistreat me because I was a woman. It was all quite dramatic. Michel Etté kept yelling for me to sit in my chair as the head of the company while Galley was yelling at the soldiers to remove me from the company, which he said was his. Eugene Peabody, the Chief Administrative Officer, who was Liberian, was very nervous. He had lived through civil war in his own country of Liberia. He wanted me to sign the papers and leave immediately.[8] He felt the soldiers could start shooting at any mistaken move and suspected that they were drugged. We were at a standoff in my office for some ninety minutes in these conditions.

Nevertheless, the soldiers removed all of us, including my general counsel, my financial advisor from Seattle, and my chief administrative officer, together with the very furious Michel Etté, to the parking lot where they provided me with a chair. Two soldiers physically picked me up by the arms and removed me as I kicked and hurled legal threats and various insults in French. The U.S. Embassy security officers eventually managed to enter the premises and negotiated our safe departure. As I exited the main office at Immeuble Kharrat, I saw that Cora employees and their families had gathered on the street below. I later learned that word had spread of the disturbance at the office, and about half the company staff were now standing outside the building, talking quietly amongst themselves and waiting to see what would happen.

It took three days to regain physical control of the company, a period of time that included a ten-hour meeting with the Prime Minister and Alexandre Galley and his associates. Prior to this meeting, U.S. Ambassador Mu and one of the Consular officers had met privately with the Prime Minister and came to me with the feeble response that the Ivorian government could not intervene, but would have a word with Mr. Galley. Thus, the day started with me ordering U.S.

[8] Indeed, I had called the President of WWI, who had told me to sign the papers. He told me that we would "get the company back." I told him we would not if I signed the papers.

Ambassador Mu back into the room with the Ministers to assert the might of the U.S. government. My backbone was growing with every hour of this crisis.

During our all-day meeting, I noticed that Galley was missing the tips of his two pinkie fingers. He was seated across the large conference room table at the *Primature* (the Prime Minister's office) from me and spent the entire day staring me down and twirling his tipless pinkies in front of me. It was a grueling day. We ate nothing and drank nothing. I remember exactly where everyone was sitting at the long conference table; images from that day are sealed into my memory. Finally, at about 5 p.m., the Prime Minister met with our group separately to tell us that he would be "reinstalling" us back in our offices. I asked him how he could do this as Galley had military guards on the premises. I actually broke down and cried right there in the large receiving room in front of the Prime Minister and the Chairman of my Board. So much for my sense of being a hard-nosed telecom warrior fighting it out. The Prime Minister arranged for another branch of the military to accompany us back to the company.[9]

We were back in business; we discovered that Galley had stolen both physical and digital files during his occupation of Cora's offices.[10] Galley continued to return to the company with different military and government officials over the following two years.[11] He used the media and the press to intimidate us.[12] He also used the courts and judicial system, both criminal and civil, by instituting actions and bribing judges, including

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[9] Prime Minister Pascal Affi N'Guessan actually looked at me and smiled and said: "I have my own branch of the military."

[10] *See* Complaint from Cheryl Packwood, General Director, Cora de Comstar, against Mr. Galley, Alexandre, filed at the 1st Neighborhood Police Precinct, Abidjan (Oct. 19, 2001).

[11] *See id.*

[12] *See, e.g.,* Yves De Sery, *Galley: 'Le 1er Ministre Nous a Déçus'* ['*The Prime Minister Has Disappointed Us'*], LE NATIONAL (Abidjan), Jan. 10, 2002, at 8; Frank Konaté, *Affaire Cora de Comstar-G.A. Holding – Alexandre Galley: 'Le Minister Liabi Douayoua m'a trompé'* [*Cora de Comstar-G.A. Holding Case – Alexandre Galley: 'Minister Liabi Douayoua Deceived Me'*], L'AURORE (Abidjan), Apr. 15, 2002, at 8.

bringing an action specifically to unseat me from my post.[13] He threatened the staff and me with physical harm until I was allocated bodyguards and my driver was given defensive driving instruction.

Galley was quite a colorful character, and rumors were swirling that he was involved in nefarious dealings amongst my colleagues in Côte d'Ivoire. He was allegedly the intermediary in the highly publicized sale of two helicopters to President Charles Taylor in Liberia. It was also rumored that he was wanted by one of the leaders of a central African country for reneging on various deals. When the United Nations Security Council had placed him on the list of sanctioned persons and organizations in a resolution which went into effect on May 7, 2001, just weeks before our siege erupted, the widespread rumors were validated.[14] At one point during the following two years, Galley told Michel Etté, our lawyer, that it would have been nothing for him to kill my colleagues and me. He was an unsavory character to say the least.

B. The Hostile Takeover: Unraveling the Motives Behind a Corporate Siege

Cora was formally a struggling cellular phone company which had been incorporated in 1993 in Abidjan under the name Comstar Cellular S.A. by a group of American businessmen, Wireless Communications Technologies, Inc. ("WCT"), together with Ivorian business partners.[15] It had

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[13] *See, e.g.*, Société G.A. Holding v. Société Cora de Comstar Cellular-SA (Tribunal de Première Instance d'Abidjan, Apr. 17, 2001) (This decision also states that a similar suit was in proceedings in Brussels in the same time frame. While the case does not directly evidence that the decision was harassing, it shows that multiple suits were happening at the same time.).
[14] *See* U.N. S.C. Res. 1343 (2001) ON LIBERIA; *See also* Press Release, Security Council, Security Council Committee Issues List of Persons Affected by Resolution 1343 (2001) On Liberia, U.N. PRESS RELEASE SC/7068 (Apr. 6, 2001), https://press.un.org/en/2001/sc7068test.doc.htm.
[15] *See* Bylaws of Comstar Cellular S.A., Côte d'Ivoire, CCCI S.A. (Dec. 28, 1993).

limited infrastructure with only four cell sites in Abidjan and no short message service capability or voice message platform.[16] Coverage was limited to a small part of the city and there was no service in the interior of the country, not even along the beach front just outside of Abidjan along the road to Grand Bassam where the well-heeled spent their weekends.[17] There were no funds to build out a competitive network.[18] It had virtually no users and had cash flow available only to keep a limited staff and meet expenses.[19] As a result, the shareholders had looked for additional investors.[20]

WCT first sold a controlling interest of their shares to Alexandre Galley for a total of more than 70 million USD, pursuant to a share purchase agreement dated November 13, 1998, by which fifty-one percent of Comstar's shares belonging to WCT would be transferred to Galley's company, G.A. Holding S.A.[21] The whole process for the sale was rudimentary and questionable under Ivorian law.[22] When I joined Comstar and reviewed its business records I was shocked to find that no due

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[16] *See generally* Cora S.A., Project Brief: Cora Management Buy-Out, US $30 Million 3 (July 10, 2002).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Share Purchase Agreement between Wireless Communications Technology, Inc. and G.A. Holding S.A., signed and executed Nov. 13, 1998 and registered with the Clerk of the Court in Abidjan (Dec. 9, 1999) (incorporating Memorandum of Understanding of July 30, 1998 as attached exhibit).

[22] *See* Comstar Cellular S.A., Statuts, Arts. 13C, 18 (June 6, 1994) (on file with author) (transfer of shares must be approved by Board of Directors; meetings of Board of Directors proceed by voice vote with the majority of members present or represented); 'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, *Acte Uniforme Relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Économique*' ['Organization for the Harmonization of Business Law in Africa, Uniform Act Relating to the Law of Commercial Companies and Economic Interest Groups'], Article 454 (1997) (repealed 2014) (applicable to Comstar's bylaws during period of validity). Meetings of the Board of Directors must be in person and majority of the Board must be present or represented; without such a meeting, share transfer would be negated.

diligence was performed on Galley, his company, or his means to pay any money.[23]

During negotiations, G.A. Holding agreed to pay $500,000 to WCT within ten business days of the execution of the share purchase agreement, and $200,000 to Comstar at the time of the agreement's execution. Instead, G.A. repeatedly told WCT that funds had been wired and claimed to fax WCT proof of these transfers, which WCT never received despite repeated follow-up.[24] In the end, WCT only received $150,000, and G.A. Holding did not meet its other obligations to pay Comstar's outstanding bills, open a letter of credit, or pay the equipment vendor for the planned infrastructure expansion.[25]

As a result, WCT went in search of new investors. They found MAGIC, together with WWI.[26] MAGIC was a direct equity investment fund established in 1997 to invest in sub-Saharan Africa.[27] Its "guiding investment principles include[d] investing in projects that . . . [were] private and independent of political alliances, significant to the host country, usually involving the build-out of existing infrastructure, and linked to international markets in order to generate reliable hard currency

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[23] Letter from Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Sept. 10, 1998) (on file with author).

[24] Share Purchase Agreement between Wireless Communications Technology, Inc. and G.A. Holding S.A., (Dec. 9, 1999) (signed and executed November 13, 1998 and registered with the Clerk of the Court in Abidjan) (on file with author); Letter of Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Dec. 4, 1998) (on file with author); Letter of Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Dec. 11, 1998).

[25] Letter from Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Jan. 7, 1999) (on file with author).

[26] Letter from Brad Horwitz, President of WWI, & Niles E. Hemboldt, Exec. Comm. Chairman of Mod. Afr. Fund Managers, L.L.C., to Laurent Gbagbo, President of the Republic of Côte d'Ivoire (Dec. 12, 2003) (on file with author).

[27] DAVID S. FICK, ENTREPRENEURSHIP IN AFRICA: A STUDY OF SUCCESSES 29 (2002).

revenues."[28] WWI was an American cellular phone company, which invested in and operated cellular and other telephone companies around the world, including in countries such as Haiti, Ghana and Iceland.[29] It was a subsidiary of Western Wireless Corporation.[30] This new deal involved a direct investment into Comstar by MAGIC and WWI through a capital increase in the shareholdings.[31]

The transaction was completed for effective date November 30, 1999.[32] Once the deal was completed and the new shareholders commenced a full-scale build-out of Comstar in 2000, Galley went to court to assert his right to own the company.[33] On December 12, 2000, he received a favorable decision in the Court of Appeals of Abidjan against Comstar requiring that his ownership of fifty-one percent of the shares be registered in the company's registry.[34] Comstar appealed this decision to the Supreme Court of Côte d'Ivoire.[35] Just prior to the issuance of the decision in May 2001, I was approached by an intermediary from Tia Kone, a Justice of the Supreme Court of Côte d'Ivoire, for money to assure that the decision would come

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[28] *Id.*

[29] *See* Western Wireless Corp., Annual Report (Form 10-K), 27 (Mar. 26, 2003) ("[Western Wireless International Holding Corporation], through its consolidated subsidiaries and equity investments, is a provider of wireless communications services in nine countries. [Western Wireless International Holding Corporation] owns controlling interests in six of these countries: Slovenia, Austria, Ireland, Bolivia, Haiti and Ghana."). *See also* K. RIVA LEVINSON, CHOOSING THE HERO: MY IMPROBABLE JOURNEY AND THE RISE OF AFRICA'S FIRST WOMAN PRESIDENT 91 (2016).

[30] Western Wireless Corp., *supra* note 29, at 3.

[31] Convertible Debt Purchase Agreement between Comstar Cellular S.A., Wireless Communications Technology, Inc., Modern Africa Two, LLC, and Western Wireless International Ivory Coast Corporation (Nov. 12, 1999) (on file with author).

[32] *Id.*

[33] G.A. Holding S.A. v. Societe Comstar Cellular, Chambre Civile et Commerciale of Cour d'Appel d'Abidjan (2000).

[34] *Id.*

[35] Côte d'Ivoire Supreme Court Decision #285/01, argument held May 10, 2001, decision issued June 1, 2001, Annals de Justice [official court record] Vol. 37 Folio 10 #1353 Slip 321/1.

down in the favor of MAGIC and WWI. I refused with a decisive "No."[36] The decision came down, stating that Galley was entitled to the share transfer as per his original agreement and denying Comstar's appeal.[37]

Instead of trying to negotiate a settlement with regard to his claims on the company, he stormed the company on May 25, 2001, with two truckloads of soldiers toting AK-47s and other weapons.

Together with my shareholders, I spent the better part of the following two years negotiating and lobbying with the Ivorian and U.S. governments in this matter.[38] The affair generated numerous lawsuits both in Côte d'Ivoire and Belgium.[39] Throughout this period, Galley would bribe different branches of the police and military to attempt at gunpoint additional take-overs of the company.[40] In the summer of 2002,

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[36] The Foreign Corrupt Practice Act loomed large in my mind when I was approached aside from any anti-corruption statutes under local laws. As an American and employee of a US company, the sanctions for bribery of an Ivorian judge would have been significant for both WWI and me. When I reported the event back to the President, his immediate response was: "You did just walk out of the room." On the other hand, I was rebuked and chastised by our local partners and associates, some of whom were also American, for not "fixing" the problem through bribery because I was put in charge of the company to manage local issues.

[37] Côte d'Ivoire Supreme Court Decision #285/01, Vol. 37 Folio 10 #1353 Slip 321/1.

[38] *E.g.*, Letter of Francis Nyirjesy, Modern Africa Fund Managers, LLC to Pascal D. Kokora, Ambassador of Côte d'Ivoire to the United States (April 12, 2002) (on file with author); Letter of Cheryl Packwood to Mr. Affi N'Guessan, Prime Minister, Côte d'Ivoire, June 8, 2001; Letter of Stephen D. Cashin, Managing Director, Modern Africa Fund Managers, LLC to M. Bouhoun Bouabre, Finance Minister, Côte d'Ivoire (April 30, 2002) (on file with author).

[39] Société G.A. Holding et. Al. v. Société Cora de Comstar Cellular-SA et. Al., Tribunal de Première Instance [TPI] [Court of first instance], d'Abidjan, (April 17, 2001) (This decision also states that a similar suit was in proceedings in Brussels in the same time frame. Belgium had venue because G.A. Holding was based in Belgium).

[40] *See, e.g.,* Complaint against Mr. Galley, Alexandre, filed October 19, 2001, at the 1st Neighborhood Police Precinct, Abidjan, by Cheryl Packwood, General Director, Cora de Comstar (on file with author).

the Chairman of the Board of Cora, Ibrahim Keita, was detained in the offices of Directorate of Territorial Surveillance without any right to counsel, or, indeed, right to see anyone, including his wife and family.[41] A doctor was permitted to see him to check his blood pressure from time to time. He had no bed nor any comforts associated with a regular jail cell. He was in an actual office for what would end up being months before he was transferred to a hospital because his health completely failed.[42]

By mid-2002, I had permanent bodyguards, with my ten-year old son learning karate from one of them, working on different levels of belts. Within days of the civil war breaking out in September of that year,[43] I left with my three boys to go to Bermuda after five red berets (Ivorian army paratroopers)[44] climbed over the wall surrounding the Network Operating Center and fired on it. I traveled back and forth over the following year and ran the company remotely from Bermuda. Indeed, Galley gave new meaning to the term "hostile takeover."

In the fall of 2002, I finally decided to engage a private military security firm to prepare a background study of Cora, S.A. I wanted to know what was going on behind the scenes with

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[41] *See* COTE D'IVOIRE, U.S. Dep't of State, Bureau of Democracy, Hum. Rts., and Lab., County Reports on Human Rights Practices 2002 (Mar. 31, 2003), https://2009-2017.state.gov/j/drl/rls/hrrpt/2002/18179.htm ("On August 10, [2002] the military Rapid Intervention Unit (BIR) arrested at home Ibrahim Keita, the President of Cora de Comstar, a cellular telephone company, and took him to the DST. Keita had access to his physician and after 3 days, his lawyer. The Government accused Keita of financing destabilization efforts.").

[42] Galley and G.A. Holding had attempted to revoke Mr. Keita's position on the board of Cora on May 16, 2001. *See* Memorandum of Board of Directors, G.A. Holding S.A. (May 16, 2001) (on file with author).

[43] *Ivory Coast Profile – Timeline,* BBC NEWS (Jan. 15, 2019), https://www.bbc.com/news/world-africa-13287585.

[44] *See Côte d'Ivoire/ Les Commandos Parachutistes Exhortés à Travailler "Dur" Pour Redorer L'image du Béret Rouge* [*Ivory Coast/ Parachute Commandos Urged to Work "Hard" to Restore the Image of Red Berets*, ABIDJAN.NET (Oct. 5, 2017), https://news.abidjan.net/articles/623609/cote-divoire-les-commandos-parachutistes-exhortes-a-travailler-dur-pour-redorer-limage-du-beret-rouge (defining 'red berets' as Ivorian army paratroopers).

the Ivorian government and the company. Since I had been working on this matter, first as a lawyer beginning in 1998, and then, as the managing director from 2000, the country had experienced its first coup d'état in December 1999.[45] The political and military situation was becoming less stable.[46]

The Ugandan based company I engaged to do the clandestine study sent a former French intelligence agent to the country to investigate. He prepared a report which included the following details.[47] First, President Gbagbo wanted ownership of Cora, S.A. in order to establish a private means of communications with his military in the fight to maintain power.[48] He was using Galley to obtain control of the company.[49] Second, my life and the lives of my closest directors were in danger. Indeed, we had been placed on the death squad list of Madame Simone Gbagbo, the wife of President Gbagbo. Madame Gbagbo had a widely reported list of people to be killed who were considered sympathizers of the opposition leader Allasayne Ouattara, together with those who presented a threat to the current government.[50] She was alleged to have paid and financed the

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[45] Agence France-Presse, *Troops Overthrow Ivory Coast's Government,* N.Y. TIMES (Dec. 25, 1999), https://archive.nytimes.com/www.nytimes.com/library/world/africa/122599ivory-coast-afp.html.

[46] *See infra* Part I-C.

[47] I eventually destroyed the hardcopy of the original report because I was terrified that it would be found amongst my belongings when I returned to Côte d'Ivoire. I shredded it in my hotel room in Paris the night before I boarded an Air France flight in the late winter of 2002.

[48] *See also* LEVINSON, *supra* note 29, at 90 ("Cora de Comstar is a strategic asset that proves to be just too attractive for the insecure Ivorian president, who lives in constant fear of a counterinsurgency. In early 2000, through a corrupt court order enforced by his presidential police, Gbagbo seizes the US-owned company.").

[49] *See id.*

[50] *See* Colum Lynch, *Ivory Coast First Lady Leads Death Squad, Report Alleges*, WASH. POST (Jan. 28, 2005, 7:00 PM), https://www.washingtonpost.com/archive/politics/2005/01/29/ivory-coast-first-lady-leads-death-squad-report-alleges/924d309d-31a5-4aef-bc33-fe9f79b4225a/ (discussing how "[a] confidential U.N. report sa[id] that . . . Simone Gbagbo, ha[d] directed a death squad responsible for killing rivals of her husband's government"); s*ee* William Burke-White, *A Wife*

militia which carried out her orders to kill those on this list.[51] Third, the former French intelligence agent feared for his own safety as he investigated the matter, and left the country early, fearing that he would be associated with Cora, S.A. Finally, the French expatriate "community" indicated to him that they could not believe that I was still alive.

After I read the report, I met the American owner of this Ugandan based company in a restaurant off the Champs Elysees in Paris to discuss our next steps. The recommendation was to pick Galley up and take him to the central African country where we knew a particular president would "take care of him."[52] In other words, the recommendation was to kill Galley. All parties at the table looked to me, as managing director, to give the order. Interestingly, the Regional Vice President asked if the situation really was as "hysterical" as the report indicated. His attempt to minimize reality were quickly stamped out by the contractor and my disgusted growl.

How do you describe all the emotions that come to you at a moment like this? How do I explain how I had hoped and prayed that this man, who lived through fraud, corruption, lies and violence would just disappear? He had threatened not just my life, but also the lives of my children, my friends, and my colleagues. This man threatened to take away the livelihood of

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Accused of War Crimes: The Unprecedented Case of Simone Gbagbo, ATL. (Dec. 3, 2012), https://www.theatlantic.com/international/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/.

[51] Agence France-Presse, *Ivorian Ex-Militia Chief Says Simone Gbagbo Bankrolled Group*, DAILY MAIL, (June 28, 2016, 4:52 PM), https://www.dailymail.co.uk/wires/afp/article-3664853/Ivorian-ex-militia-chief-says-Simone-Gbagbo-bankrolled-group.html (Simone Gbagbo was tried twice. After her first trial, she was sentenced to twenty years in prison for "harming state security." During her second trial, for "crimes against humanity," former militia chief, Moise Metchro Harolde Metch, testified to the existence and financing of the death squads and militias by Simone Gbagbo.).

[52] *See* LEVINSON, *supra* note 29 at 90 (This author was referring to the same central African country in which Galley was rumored to be wanted for reneging on various deals.).

some two hundred employees, each of whose salaries fed and clothed perhaps thirty other persons. How do I describe how much I wanted for Galley to die? There, I wrote it. Against these feelings, with utter fear and trepidation and, indeed, tears, I looked around at the three men sitting at the table in that Parisian restaurant, one of whom was the Regional VP and my boss, and I squeaked out "No!"

I would not order Galley's death.

The owner of the Ugandan company, who was a kind grandfatherly man, looked at me and said: "You do know that he [Galley] would not hesitate to kill you." I told him that I knew that, but I would not be able to live with myself if I gave such an order.

That meeting is emblazoned in my memory for the rest of my life. While I ultimately believe that I made the right decision from a moral and ethical point of view, I cannot help but express doubt and ask: Did I make the right choice? Did I, when it came to the inimitable question of bribery of the courts and local officials, or when it came to fighting violence with violence? Our lives were in immediate danger and sometimes "not so immediate" danger. We were not gun-toting executives. The employees were in danger. Their jobs were at risk and, eventually in October 2003, the shareholders did, indeed, close the company and left the country. They did not dissolve it or file for bankruptcy or anything. They just locked the doors with a key and removed the essential employees from the country along with the software information which would operate the network.

Looking back and contemplating the decision I had made years prior not to pay Tia Kone,[53] I firmly believe that had I made that simple bribe, the court's decision would have gone the other way, thus denying Galley's entitlement to Cora and removing any incentive for him to take the company by storm. Instead, it is evident that abiding by the FCPA and not bribing the justice led, ironically, to the endangerment of the employees and the eventual downfall of the business.

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[53] *See supra* text accompanying note 36.

C. Navigating the Economic and Political Realities of Côte d'Ivoire in the 1990s and Early 2000s

At what point do anti-bribery statutes, including the Foreign Corrupt Practices Act ("FCPA"),[54] American business ethics and morals become useless in dangerous situations abroad? To answer this questions fully, an understanding of the economic and political environment is necessary to comprehend the severe pressure under which we were operating.

Abidjan, Côte d'Ivoire's largest city, was once labeled as the Paris of Africa.[55] When I arrived in 1990, the people spoke of the glory days of the 1960s to 1980s when the economy boomed, and champagne flowed in the streets.[56] By 1990, however, the country was in turmoil due to student demonstrations which led to crack downs and the death of a student.[57] The students were protesting conditions in the dormitories and other education issues.[58] These demonstrations were indicative of larger economic problems in the country.[59] The economy was no longer booming.[60] Jobs were not as plentiful and pressure from large waves of immigrants from neighboring countries, together with large numbers of war

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[54] *See infra* Part III.
[55] Jean L. Comhaire, *The Arts of Côte d'Ivoire*, BRITANNICA (last visited Aug. 12, 2024), https://www.britannica.com/place/Cote-dIvoire/The-arts.
[56] *See* ROBERT EARL HANDLOFF & THOMAS DUVAL ROBERTS, CÔTE D'IVOIRE : A COUNTRY STUDY, (Library of Congress Federal Research Division 1991), available at https://www.loc.gov/item/90005878/.
[57] Kenneth B. Noble, *Unrest in Ivory Coast's Capital Turns to Violence,* N.Y. TIMES (Feb. 25, 1990), https://www.nytimes.com/1990/02/25/world/unrest-in-ivory-coast-s-capital-turns-to-violence.html.
[58] *Id.*
[59] *See generally* Cyril Kofie Daddieh, *Universities and Political Protest in Africa: The Case of Côte d'Ivoire,* 24 ISSUES AFR. HIGHER EDUC. (1996), https://www.jstor.org/stable/1166616.
[60] *See* IMF, *Côte d'Ivoire*, Country Report (May 11, 2016), https://www.imf.org/external/pubs/ft/scr/2016/cr16148.pdf.

refugees from the Liberian civil war contributed to a general feeling of unrest and fear.[61]

At that time, the first and only president and father of the country, Félix Houphouët-Boigny, had been in power for thirty years and was in failing health.[62] Under much political pressure, he named Allassane Dramane Ouattara as Prime Minister in 1990.[63] Ouattara remained in this post until the death of President Houphouët-Boigny in December 1993.[64] Following his death, my family and I passed two tense days locked in the house. There were riots in the populous areas of Abidjan. More importantly, there was uncertainty about who would succeed President Houphouët-Boigny. The Ivorian Constitution provided for succession by the President of the National Assembly, who was Henri Konan Bedie.[65] However, there was some thought that Prime Minister Ouattara would attempt to succeed Houphouët-Boigny. As there was no immediate announcement and forty-eight hours of evident indecision, the population was on edge.

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[61] *See id*.; Akindès, *supra* note 7.

[62] *See* Kenneth B. Noble, *Felix Houphouet-Boigny, Ivory Coast's Leader Since Freedom in 1960, Is Dead*, N.Y. TIMES (Dec. 8, 1993), https://www.nytimes.com/1993/12/08/obituaries/felix-houphouet-boigny-ivory-coast-s-leader-since-freedom-in-1960-is-dead.html.

[63] *See Alassane Ouattara (1990-1993) : 1er Premier Ministre* [*Alassane Ouattara (1990-1993) : 1st Prime Minister]*, CABINET DU PREMIER MINISTRE DE CÔTE D'IVOIRE [CABINET OF THE PRIME MINISTER OF CÔTE D'IVOIRE], https://primature.ci/premierministre/?pm=13.

[64] *See* Noble, *supra* note 62.

[65] *Cote d'Ivoire 1999 Report on Human Rights Practices,* U.S. DEP'T OF STATE (Feb. 23, 2000), https://2009-2017.state.gov/j/drl/rls/hrrpt/1999/242.htm ("Upon the death in 1993 of Houphouet-Boigny, who had been President since independence, National Assembly President Bedie became President by constitutional succession and served out the remainder of Houphouet's term. Due to concerns about 1994 changes to the candidacy requirements of the electoral code that excluded a leading opposition rival to Bedie, and about irregularities in voter registration, the major opposition parties staged an 'active boycott' of the 1995 presidential election, both declining to participate and trying to interfere with the voting process; however, in 1995 President Bedie won 96 percent of the vote").

Two days after Houphouët-Boigny died, Bedie went to the television station with armed guards and the support of the French government and declared that he was President of the Republic of Côte d'Ivoire.[66] CNN reported on television at the time that this was a coup d'etat.[67] I watched in horror as the events unfolded, knowing that while Bedie was supposed to succeed to power, none of the judicial processes had taken place to ensure stability.[68] We, therefore, lurched into the next phase of political uncertainty. Bedie would spend the next six years of his presidency disputing who could run for president in the next elections based on the definition of who was Ivorian.[69]

On December 23, 1999, we awoke to a coup d'état and the eventual removal of Bedie and his family by the French

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[66] *See, e.g.,* Joseph Hellweg, *A History of Crisis in Côte d'Ivoire,* SOC'Y FOR CULTURAL ANTHROPOLOGY (Jun. 25, 2012), https://culanth.org/fieldsights/a-history-of-crisis-in-c%C3%B4te-divoire. (There are conflicting reports about the timeline, with some sources suggesting that Bédié declared himself president just hours after the death of Houphouët-Boigny). *See also Henri Konan Bédié*, WIKIPEDIA, https://en.wikipedia.org/wiki/Henri_Konan_B%C3%A9di%C3%A9; Cyril K. Daddieh, *Elections and Ethnic Violence in Côte d'Ivoire: The Unfinished Business of Succession and Democratic Transition*, 29 AFR. ISSUES 14, 17 (2001). However, with a vivid memory of the suspense during those two days, this author remembers Bédié's declaration following the timeline described herein.

[67] *See* Daddieh, *supra* note 66*.*

[68] *Id.*

[69] I was approached in the late 1990s by a close associate of President Bedie to provide a secret opinion on the eligibility requirements for presidency under the US Constitution. President Bedie, trying to use U.S. law as a prime example of nationality requirements, wanted to be able to argue that the US law required that both parents of a presidential candidate must be born in America to be able to run. He was arguing that his prime challenger, Allasane Dramane Ouattara was not eligible because one of his parents was born in Burkina Faso, or at the time of birth, the Upper Volta. Ouattara disputed this allegation claiming that both parents were indeed of Ivorian birth. Bedie wanted to be able to say that because US federal law required both parents to be born American, then the Ivorian requirement was not unreasonable. I prepared an extensive and detailed opinion on U.S. law and history on the matter but was not able to arrive at the desired conclusion of my client. On a side note, I was never paid for this work and knew somehow that I was not supposed to expect any payment.

military on a helicopter from the French military base.[70] An army general, Robert Guéï, installed himself as President on December 24, 1999.[71]

National elections were held in October 2000, but they were far from free. General Guéï tried to hold on to power by limiting the field to four additional candidates based on a notion of who was a real Ivorian national.[72] As a result, Allassane Dramane Ouatarra – the candidate who would have represented at least half of the country – was deemed ineligible to run for president; his candidacy was rejected on the basis that both of his parents were not Ivorian.[73] The debate of his parentage and eligibility for the office of the president had raged in the media,

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[70]Karl Vick, *Bedie Flees Ivory Coast for Togo,* WASH. POST (Dec. 26, 1999), https://www.washingtonpost.com/archive/politics/1999/12/27/bedie-flees-ivory-coast-for-togo/dbcc962d-f167-4480-93f6-f85e85155894/.

[71] U.S. DEP'T OF STATE, *supra* note 65 ("Retired General Robert Guei took over the Government after a mutiny that began on December 23, evolved into a major military revolt on December 24, and culminated in the dismissal and forced departure of President Henri Konan Bedie").

[72] *See Cote d'Ivoire Presidential Ballot 2000*, INT'L FOUNDATION FOR ELECTORAL SYS. (Oct. 21, 2000), https://www.ifes.org/tools-resources/election-materials/cote-divoire-presidential-ballot-2000 (lists candidates in the running for the presidential election as Robert Guéï, Laurent Gbagbo, and three others); *The New Racism: The Political Manipulation of Ethnicity in Côte d'Ivoire*, HUMAN RTS. WATCH (Aug. 2001), https://www.hrw.org/report/2001/08/28/new-racism/political-manipulation-ethnicity-cote-divoire; *Cote d'Ivoire 2001 Report on Human Rights Practices,* U.S. DEP'T OF STATE (Mar. 4, 2002), https://2009-2017.state.gov/j/drl/rls/hrrpt/2001/af/8355.htm ("The presidential elections followed several postponements and a controversial Supreme Court decision on October 6, 2000, disqualifying 14 of the 19 candidates, including all of the PDCI and RDR candidates.") ("Ouattara was excluded from running in the presidential and legislative elections following the Supreme Court's October 6, 2000, and November 30, 2000, rulings that he had not demonstrated conclusively that he was of Ivoirian parentage."); Douglas Farah, *Candidates Disqualified in Ivory Coast,* WASH. POST (Oct. 7, 2000), https://www.washingtonpost.com/archive/politics/2000/10/07/candidates-disqualified-in-ivory-coast/2cb35bf1-6647-473c-af3d-1441d6ab9172/.

[73] *See* INT'L FOUNDATION FOR ELECTORAL SYS., *supra* note 72.

public debate and the National Assembly for almost a decade at this point.[74]

During the electoral count, Guéï stopped the count and declared himself the winner.[75] The people rose up and went into the streets; more than 500 people were killed.[76] The military sided with the people and, thus, Laurant Gbagbo, who did win the majority of votes in this limited election, came to power.[77] But, the legitimacy of his election would be contested over the next eleven years and would lead to the outbreak of civil war starting in September 2002, dividing the country between north and south.[78]

Against this backdrop and over the coming years, there were constant riots, demonstrations, curfews, business closures for several days while fighting would break out between government forces and rebels (or regular disgruntled people).[79] Simone Gbagbo, the wife of President Gbagbo, would constitute and run a militia to kill off opposition to her husband.[80]

Côte d'Ivoire presented always as an economy with significant opportunity and potential for foreign investors, even during the economic downturn of the 1990s and after the coup

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[74] *See supra* text accompanying note 69.

[75] *Election Violence in Abidjan: October 24-26, 2000*, HUMAN RTS. WATCH (Dec. 20, 2000), https://www.hrw.org/legacy/backgrounder/africa/IvoryCoastbrf.htm.

[76] *Id*. *See also* INT'L FOUNDATION FOR ELECTORAL SYS., *supra* note 72 (discussing "a flawed October 22 presidential election, which was marred by significant violence and irregularities . . . According to the Ivoirian Movement for Human Rights (MIDH), during and following the October 2000 presidential elections, security forces killed more than 500 persons during clashes with protesters.")

[77] *Election Violence in Abidjan: October 24-26, 2000*, HUMAN RTS. WATCH (Dec. 20, 2000), https://www.hrw.org/legacy/backgrounder/africa/IvoryCoastbrf.htm; U.S. DEP'T OF STATE, *supra* note 72.

[78] BBC NEWS, *supra* note 43.

[79] *See* U.S. DEP'T OF STATE, *supra* note 72.

[80] *See* sources cited *supra* note 50. https://www.theatlantic.com/international/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/.

d'état of December 23 and 24, 1999.[81] By 1999, Côte d'Ivoire had the third largest economy in sub-Saharan Africa after South Africa and Nigeria.[82] The economy was based primarily on coffee, cocoa, palm oil, and rubber.[83] Oil deposits and gold and other mineral deposits were in an early exploration and production phase.[84] For investors looking to invest in Africa, Côte d'Ivoire was considered one of the safest countries.[85] Indeed, there was a general perception that corruption was lower in Côte d'Ivoire than in other countries in the region[86] and that the banking system was more secure because of the CFA Franc, which was pegged initially to the French Franc and then to the Euro.[87]

II. EXPLORING THE APPLICABILITY OF THE RULE OF LAW

The notion of the rule of law is ancient and is discussed in all forms of literature and formats.[88] The institutions tasked

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[81] *See* IMF, *supra* note 60.

[82] U.S. DEP'T OF STATE, FY 2000 COUNTRY COMMERCIAL GUIDE: COTE D'IVOIRE 1 (1999).

[83] *Id.*

[84] *Id.* at 4-5.

[85] *See id.* at 1 (discussing how Côte d'Ivoire "ha[d] demonstrated strong, sustained economic growth" since 1994 and, despite anticipated slowing of economic growth, it was thought to have "a good chance of returning to the 6 or 7 percent growth rate in 2000 or 2001").

[86] *See Corruption Perceptions Index: 1998*, TRANSPARENCY INT'L, https://www.transparency.org/en/cpi/1998 (last visited July 9, 2024) (with a Corruption Perceptions Index ("CPI") of 3.1 in 1998, Côte d'Ivoire outscored several sub-Saharan African countries—namely Uganda, Kenya, Tanzania, Nigeria, and Cameroon—and followed closely behind Ghana and Senegal.).

[87] *History of the CFA Franc,* BCEAO, https://www.bceao.int/en/content/history-cfa-franc (last visited July 9, 2024).

[88] The concept of the rule of law can be traced back to ancient civilizations, including Greek and Roman thought, where philosophers such as Aristotle articulated the idea that law should govern rather than individual rulers. *See* Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHIL. (June 22, 2016), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=rule-of-law. The rule of law is the idea

with working towards developing the African Continent have stressed prominently the establishment of good governance and the rule of law as a necessity for the advancement and full emergence of African countries into the global economy.[89] At its

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that underlying law is a fundamental principle that all individuals and institutions, including the government itself, are subject to and accountable under the law. *See id.* It is a key concept in legal and political theory, representing the idea that law, rather than arbitrary power, should govern a nation. *See id.*

While medieval theorists "sought to distinguish lawful from despotic forms of kingship," more modern discussions about the rule of law revolve around the authority of law and how it is derived. *See id*. *See e.g.*, LON FULLER, THE MORALITY OF LAW (1969) (discussing the necessary requirements that a legal system must have in order for it to be followed); T.R.S. Allan, *Dworkin and Dicey: the Rule of Law as Integrity*, 8 OXFORD J. OF L. STUDIES 266, 266-68 (1988) (arguing that Ronald Dworkin's theory of Law as Integrity reinforces the rule of law as it ensures consistency in its application); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 212 (Clarendon Press, 1979) (examining the necessary principles to ensure the rule of law); SCOTT HERSHOVITZ, LAW IS A MORAL PRACTICE 147-148 (Harvard Univ. Press 2023) ("the rule of law requires a shared moral outlook. Officials and (to a lesser extent) laypeople must see legal practices as sources of morality"); H.L.A. HART, THE CONCEPT OF LAW (Clarendon Press, 2d ed. 1994).

For a discussion about the rule of law in Africa in particular, Makau Mutua has written about this in depth. *See* Makau Mutua, *Africa and the Rule of Law*, 13 INT'L J. ON HUM. RTS. 159, (2016).

[89] *See, e.g.*, AFR. DEV. BANK GRP., AT THE CENTER OF AFRICA'S TRANSFORMATION: STRATEGY FOR 2013–2022, at 8 (discussing how African countries can promote private sector-led growth by "strengthen[ing] regulatory, institutional and financial frameworks, leading to more effective rule of law and reduced corruption"); ECOWAS BANK FOR INV. & DEV., STRATEGIC PLAN 2010-2014, at 17 (discussing how part of Economic Community of West African States (ECOWAS) Vision 2020 was to "[c]reate a . . . prosperous and cohesive region, built on good governance and where people have the capacity to access and harness its enormous resources through the creation of opportunities for sustainable development and environmental preservation"); *About the African Union*, AFR. UNION, https://au.int/en/overview (last visited Aug. 15, 2024) (discussing how the African Union (AU) vision is "An Integrated, Prosperous and Peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena," with an aim, among others, of promoting "democratic principles and institutions, popular participation and good governance").

best, the African Development Bank takes to heart and quotes the Abuja Declaration: "The rule of law, justice, respect for fundamental rights, and development are inextricably linked."[90]

Makau Mutua has discussed in depth the applicability and the need to reconsider the interpretation of the meaning of the rule of law in Africa "to achieve sustainable development."[91] He argues that it does not translate as understood in the Western context to the African continent and the very different historical context of a continent ravaged by the Atlantic slave trade and colonization.[92]

We were, indeed, naïve that the basic premise of the rule of law could be blithely stamped on Côte d'Ivoire during the time of our decision-making process. Indeed, at its basic function, the court applies the laws of the land. In our case, it was the Supreme Court Justice, himself, who broke the notion of rule of law in Côte d'Ivoire when he requested a "little gift" that very difficult day in May 2001. Or, is the notion of the rule of law outside of the United States, indeed, different, as Makau Mutua asserts, and we, together with the United States Government, were ignorant of this actuality when we attempted to bridge the world with our American notions of how to do business and apply the law? American exceptionalism ignores the cultural realities on the ground in developing nations and, at times, risks the lives of the very people it seeks to protect. At least, in the case of Cora, this statement represented our situation.

In the end, the rule of law is a fragile notion at best. Indeed, Côte d'Ivoire on its face met the requirements of a country of laws as our lawyer Michel Ette so aptly described it. Charles Manga Fombad sets forth six "core elements of the rule of law", which include:

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[90] Seward M. Cooper, *Introduction*, 1 L. FOR DEV. REV., at iv (2006) (quoting THE ABUJA DECLARATION ON LAW, JUSTICE, AND DEVELOPMENT ¶ 1 (2003) (The Abuja Declaration, authored by African jurists and lawyers at the All Africa Conference on Law, Justice and Development, speaks to the importance of the rule of law and independent, ethical judicial personnel in Africa, as well as the efforts required to attain a more equitable judicial system.)).

[91] Mutua, *supra* note 88, at 159.

[92] *See id.* at 161-62.

> (i) the principle of legality, which includes the requirement of a transparent, accountable and democratic process for enacting laws;
> (ii) the principle of non-discrimination and equality before the law, which means that government and its officials and agents as well as individuals and private entities are accountable under the law;
> (iii) legal certainty and prohibition of arbitrariness, which requires that laws are clear, publicised, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property;
> (iv) the process whereby the laws are enacted, administered and enforced is accessible, fair and efficient;
> (v) justice delivered in a timely manner by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve; and
> (vi) respect for human rights.[93]

One act of a Supreme Court Justice, who was supposed to be independent and neutral, demonstrated the fragility of the legal system. While every day we work towards a more perfect system—one of transparency, equality, certainty,—what would be small acts can implode the façade that the rule of law exists. And without it, democracy fails, chaos ensues, and the very people that the law is designed to protect can die. The case of Cora was in the end a microscopic example of what the country was suffering with limited elections, coup d'etats, demonstrations, riots, ethnic cleansing and much more.

[93] Charles Manga Fombad, *An Overview of the Crisis of the Rule of Law in Africa*, 18 AFR. HUM. RTS. L. J. 213, 217-18 (2018).

III. THE FCPA'S REACH IN INTERNATIONAL BUSINESS CONFLICTS

The United States Foreign Corrupt Practices Act, 15 U.S.C §§ 78 dd-1, et seq. (the "FCPA"), was first enacted in 1977 by the U.S. Congress in an effort to combat bribery worldwide.[94] The idea was to prevent U.S. companies and their representatives operating in foreign countries from bribing foreign officials. The U.S. government wanted to "create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace."[95] The United States government and its officials posited that bribery and corruption inhibit economic growth and development, and therefore a world without bribery would allow market forces to operate:

> Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law. And it threatens stability and security by facilitating criminal activity within and across borders, such as the illegal trafficking of people, weapons, and drugs.[96]

The roots of the FCPA lie in the aftermath of the Watergate Investigations.[97] Corporations and executives faced accusations of "using corporate funds for illegal domestic political contributions," which prompted the Securities and Exchange Commission (SEC) to launch its own investigation into

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[94] *Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act (Jan. 9, 2025).

[95] CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1 (2d ed. 2020) (footnote omitted).

[96] *Id.* at 1-2 (footnotes omitted).

[97] *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. REV. 930, 933 (2012); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L. L. REV. 689, 694 (2000).

the practices of corporations to protect investor interests.[98] On May 12, 1976, the SEC submitted its *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices* to the Senate Banking, Housing and Urban Affairs Committee.[99] The report revealed the existence of "slush funds" used for, *inter alia*, "questionable or illegal foreign payments . . . cast[ing] doubt on the integrity and reliability of the corporate books and records" on which the SEC relies to protect investors.[100]

The House Subcommittee on Consumer Protection and Finance then held a series of hearings in September 1976 and April 1977 on bills to proscribe the payments described in the SEC Report.[101] In its September 28, 1977 report, the House Committee on Interstate and Foreign Commerce recommended H.R. 3815, the bill which would eventually amend the Securities Exchange Act of 1934 in order to include prohibitions against bribery of foreign officials by U.S. corporations.[102] This report cited several purposes for the bill. First, that the practice is inherently unethical and "counter to the moral expectations and values of the American public."[103] Second, such payments are bad business because it "erodes public confidence in the integrity of the free market system," giving an unfair advantage "to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship," thus "reward[ing] corruption instead of efficiency."[104] The practice also worsens the reputation of American corporations in general overseas, leading to lawsuits and overall loss of

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[98] *See* U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976), reprinted in Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353, at 2 (May 19, 1976) [hereinafter SEC REPORT]. *See also* Koehler, *supra* note 97, at 932; Shaw, *supra* note 97, at 694-95.

[99] *See* H.R. Rep. No. 95-640, at 6 (1977). *See generally* SEC REPORT, *supra* note 98.

[100] *See* SEC REPORT, *supra* note 98, at 2, 8.

[101] H.R. Rep. No. 95-640, at 6 (1977); Koehler, *supra* note 97, at 997.

[102] *See* H.R. Rep. No. 95-640, at 3.

[103] *Id.* at 4.

[104] *Id.* at 4-5.

business and assets;[105] it is unnecessary, as several business leaders testified before the Committee;[106] and bribery of foreign officials fosters domestic "adverse competition effects."[107] The Committee also cited the practice's impact on U.S. foreign policy including "embarrass[ing] friendly governments, lower[ing] the esteem for the United States . . . and lend[ing] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations."[108] Finally, the Committee emphasized that a law prohibiting bribery could help U.S. companies "resist pressures and refuse those requests" when in compromising situations.[109]

The Senate Committee on Banking, Housing, and Urban Affairs released their own report on May 2, 1977, recommending Senate Bill 305, which would amend the SEC Act of 1934 "to require companies subject to the jurisdiction of the Securities and Exchange Commission to maintain accurate records, to prohibit certain bribes, to expand and improve disclosure of ownership of the securities of U.S. companies."[110] Starting in 1976, during the 94th Congress, the Senate held several hearings to understand the issue of "improper payments to foreign government officials by American corporations."[111] "[D]esigned to prevent the use of corporate funds for corrupt purposes," the Senate's version of the law aims to combat the same activity for the same reasons.[112] Citing the same SEC *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practice* as the instigating force behind the law,[113] the Committee report claims that the bribing of foreign officials has besmirched the

[105] *Id.* at 5.
[106] *Id.*
[107] *Id.*
[108] H.R. Rep. No. 95-640, at 5.
[109] *Id.*
[110] S. Rep. No. 95-114, at 1 (1977).
[111] *Id.*
[112] Koehler, *supra* note 97, at 997. *Compare* S. Rep. No. 95-114, at 3-4, *with* H.R. Rep. No. 95-640, at 4-5 (1977).
[113] S. Rep. No. 95-114, at 3 (1977).

reputations of both the U.S. government and U.S. businesses abroad; it is unnecessary; it undermines a free market economy, which should be based on the "price, quality, and service" of a product, not a bribe; and, finally, it affects the "domestic competitive climate."[114] By requiring honest corporate recordkeeping, the bill aims to restore public confidence in U.S. businesses, the free market economy, and the U.S. government.[115]

The FCPA was the first point of reference for every American business and person doing business abroad. Côte d'Ivoire had its own series of anti-bribery or corruption laws which would have applied as well.[116]

The anti-bribery provisions of the FCPA make it unlawful for an agent of a U.S. business to "corruptly" pay, promise to pay, offer, gift, or authorize "the giving of anything of value to . . . [a] foreign official" in order to influence the foreign official.[117]

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[114] *Id.* at 4.

[115] *See id.* at 7.

[116] *See Anti-Corruption Laws in Côte d'Ivoire*, LEXAFRICA, https://lexafrica.com/2014/04/anti-corruption-laws-in-cote-divoire/ (last visited Aug. 15, 2024) (before new laws adopted in the early 2010s, "the only legal framework after the Independence was the Ivoirian Code Pénal, or Penal Code, which criminalises passive and active bribery of public officials. This Code forbids the act of offering, giving and promising a bribe (active bribery), and the act of soliciting, asking for, agreeing to and accepting a bribe (passive bribery). It was, however, unclear if foreign bribery was criminalised in Côte d'Ivoire, since there was not direct reference to foreign public officials.").

[117] 15 U.S.C § 78dd–1(a). On February 10, 2025, President Donald J. Trump issued an executive order directing the Department of Justice to pause enforcement of the FCPA for 180 days. Exec. Order No. 14209, 90 Fed. Reg. 9,587 (Feb. 14, 2025). However, the statute of limitations is five years for violations of the FCPA's anti-bribery provisions; the recent executive order does not toll or change the statute of limitations for bribery violations. *Id.*; 18 U.S.C. § 3282.

As a federal law, the FCPA can be amended or repealed only by an act of Congress or declared unconstitutional by a decision by the United States Supreme Court. It cannot be amended, repealed, or declared unconstitutional by an executive order. Terran ex rel. Terran v. Sec'y of Health & Hum. Servs., 195 F.3d 1302, 1312 (Fed. Cir. 1999) (power to

Specifically, the bribe—or "anything of value"—would have to be given with the purpose of either "(i) influencing any act or decision of such foreign official in [their] official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage"; or "obtaining or retaining business" through the influence of the foreign official.[118] The term "corruptly" in the statute requires that the person paying the bribe intends to wrongfully influence the recipient.[119] The term "is intended to connote that the offer, payment, and promise was

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amend or repeal statutes is vested by the Constitution in Congress exclusively, not in the executive branch); s*ee* Marbury v. Madison, 5 U.S. 137 (1803) (Supreme Court power to declare an act of Congress unconstitutional); s*ee also* U.S. CONST. art. I, § 8 (Exclusive congressional powers to "regulate commerce with foreign nations" and to "make all laws which shall be necessary and proper" to executing this power); *and see* U.S. CONST. art. II, § 3 (The President shall "take care that the laws be faithfully executed.").

A presidential directive to an executive-branch agency suspending the enforcement of a law passed by Congress implicates concerns of separation of powers between the three branches of government, particularly for an agency such as the Department of Justice with a tradition of independence and impartiality. U.S. CONST. art. I, § 1 (Congress holds the power to enact legislation); U.S. CONST. art. II, § 3; *see also About DOJ: Our Values*, U.S. DEP'T OF JUST., https://www.justice.gov/about (last visited April 5, 2025). Examining this issue in full would require another article. Nevertheless, the current suspended enforcement of the FCPA does not obviate U.S. businesses' obligation to follow the FCPA and does not relieve them of potential consequences in the event of its violation because the statute of limitations continues to run on any violation. *Compare* Exec. Order No. 14209, 90 Fed. Reg. 9,587 (Feb. 14, 2025) *with* 18 U.S.C. § 3282 *and* Terran v. HHS, 195 F.3d at 1312. In addition, business ethics requirements such as those embodied in the FCPA are good for global markets and U.S. businesses as determined by the U.S. Congress. *See* H.R. Rep. No. 95-640, at 4-5; *cf.* S. Rep. No. 95-114, at 4, 7. This article evaluates existing business ethics requirements in the FCPA and their inadequacies with regard to certain dangerous realities on the ground in foreign jurisdictions that are not dealt with by the law in its current form.

[118] 15 U.S.C § 78dd–1(a).

[119] U.S. Dep't of Just., Foreign Corrupt Practices Act Review Opinion Procedure Release No. 22-1 (Jan. 21, 2022), at 2-3.

intended to influence an official to misuse [their] official position."[120] This involves more than just a general intent to commit a crime; it requires proof that the defendant acted with a purpose of achieving an unlawful result or a lawful result by unlawful means.[121]

The Second Circuit in *United States v. Ng Lap Seng* further elucidates this concept of intent, emphasizing that acting "corruptly" involves voluntary and intentional actions with an improper motive, aimed at influencing an official to misuse his position.[122] In this case, where an individual was being charged with bribing UN officials,[123] the court did not require proof of a breach of duty; instead, it focused on the improper influence and misuse of position.[124]

In the context of bribery of judges, the application of "corruptly" involves the intentional offering, giving, or promising of something of value with the intent to influence a judge's decision or action.[125] This is akin to how the Second Circuit interpreted "corruptly" in *United States v. Alfisi*, where the court held that bribery does not necessarily require an intent to procure a breach of duty, but rather the intent to influence an official act.[126] Thus, in any case involving payments to a judge, the payments would constitute bribery if made with the intent to influence the judge's official actions, regardless of whether those actions are legally proper.[127]

The FCPA allows a "narrow exception" for facilitating payments and provides for two affirmative defenses: (1) the "local law" defense and (2) the "reasonable and bona fide business expenditure" defense. Additionally, "[s]ituations

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[120] *Id.* at 3 (quoting United States v. Kozeny, 667 F.3d 122, 135 (2d Cir. 2011)).
[121] *See* United States v. Ng Lap Seng, 934 F.3d 110, 142 (2d Cir. 2019) (quoting *Kozeny*, 667 F.3d at 135).
[122] *See Seng*, 934 F.3d at 142 (quoting *Kozeny*, 667 F.3d at 135).
[123] *Seng*, 934 F.3d at 116.
[124] *See id.* at 142.
[125] United States v. Alfisi, 308 F.3d 144, 151 (2d Cir. 2002).
[126] *Id.* at 150.
[127] *See id.*

involving extortion or duress will not give rise to FCPA liability."[128]

In retrospect, for the past twenty odd years, I have questioned whether we could have made that payment under the various exceptions to the FCPA. Much that has been written on the FCPA involves the exception for "'facilitating or expediting payments' made in furtherance of routine governmental action."[129] The act provides for making payments for the movement of goods, processing papers, providing telephone services and the like.[130] It would be of interest to posit an argument that the payment to the Supreme Court Justice would have amounted to a facilitation payment since the legally viable and supportable resolution would not be to uphold the registration of shares in G.A. Holding's name.[131] However, the interpretation of this exception has not gone beyond routine payments.

Due to the normalized business practice of bribing in Côte d'Ivoire at the time, few people in the government and community took pity on my plight or the company's plight when the Supreme Court Justice solicited the bribe. Judges and public officials were bribed or requested bribes themselves on a regular and customary basis in Côte d'Ivoire.[132] It was regular, normal, and a matter of business. The saying "One man's corruption is another man's business" is an apt description of the environment in which we operated. In various transactions,

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[128] CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, *supra* note 95, at 23-28.
[129] *Id.* at 25.
[130] *Id.*
[131] *See* Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMPARATIVE L. REV. 111, 116 (2013) (if facilitation payments can be made "when there is proof that any payment made is lawful under the written laws and regulations of the local country," could a facilitation payment to ensure that the lawful outcome of a court case occurs also be allowable?).
[132] *See Cote d'Ivoire 2001 Report on Human Rights Practices*, *supra* note 71 ("Judges serve[d] at the discretion of the executive, and there were credible reports that they submit[ted] to political pressure [and financial influence.]").

it would be commonplace to find a family member of the President or other minister as a shareholder in the local company which would then go on to win a bid on a government contract. For example, a senior counselor to the President recounted to me once how he does not take bribes but, instead, he is willing to be a shareholder in a company and this is why he is not corrupt.[133] Hence, when I was approached by the Supreme Court Justice's intermediary for payment to rule on our behalf, it was viewed by others as a customary practice. Unfortunately, the differences in businesses practices between different countries was not, and is not currently, an exception to the FCPA.[134] Indeed, we were just naïve Americans trying to abide by the rules of the FCPA.

The more interesting exception to the FCPA, and the one potentially applicable in this case, is for payments made in cases of extortion or duress, or what I would refer to as the threat of bodily harm. In *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* the Department of Justice and the SEC state that "a payment made in response to true extortionate demands under imminent threat of physical harm cannot be said to have been made with corrupt intent or for the purpose of obtaining or

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[133] This conversation took place while I was seeking his intervention with President Gbagbo in the Cora matter. The senior counselor did not seem to consider receipt of shares in a company as comparable to traditional monetary bribes, and he did not seem concerned that, as a government employee, his acceptance of shares from a bidding company could introduce a conflict of interest.

[134] Indeed, much of the commentary critiquing the FCPA surround this idea that "much of the difficulty that corruption presents from a regulatory standpoint is that activities that are considered improper in certain parts of the world would not be thought of as such in other regions." Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 CORNELL INT'L L. J. 470, 471. Such critics argue that "we should not analyze corruption in absolute moral terms; instead, we must address problems with the improper use of power in light of surrounding social, economic, and political contexts." *Id. See also* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 238 (1997) ("[o]ne theory [in light of these cultural differences] suggests that the FCPA places unreasonable burdens on U.S. businesses and is therefore destined to fail.")

retaining business."[135] Mere economic coercion is not enough to trigger the protections of this exception.[136] The bribe must come under such intense circumstances that the U.S. company is stripped of the ability to make a "conscious decision" whether or not to pay the bribe.[137] The Department of Justice and the courts have recognized that companies in "high-risk countries" are subject to genuine threats to freedom, life, and bodily harm.[138] Due to this focus on violence and imminence, it is no surprise that, in situations in which it was determined that the sanctions of the FCPA did not apply, actual physical threats were the precondition to the bribe.[139] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* further states,

> In order to establish duress or coercion, a defendant must demonstrate that the defendant was under unlawful, present, immediate, and impending threat of death or serious bodily injury; that the defendant did not negligently or recklessly create a situation where he would be forced to engage in criminal conduct . . . ; that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.[140]

In fact, Congress gave a particularly illustrative example of this exception when it said that "a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose."[141]

This distinction was further recognized by the court in *United States v. Kozeny*.[142] In that case, the court concluded that

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[135] CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, *supra* note 95, at 27 (footnote omitted).
[136] *Id.*
[137] *Id.* at 28.
[138] *Id.*
[139] *See* United States v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008).
[140] CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, *supra* note 95, at 111 n.174.
[141] S. Rep. No. 95-114, at 11.
[142] 582 F. Supp. 2d 535.

a business that pays a bribe under the threat of imminent physical harm will not be held to have violated the FCPA because they lacked the "intent to bribe the official."[143] However, if a bribe is paid because a government official demanded the payment as a prerequisite to market entry or a contract signing, the bribe payor cannot make the same argument that they lacked the necessary intent "because [they] made the 'conscious decision' to pay the official."[144] At the time of the proposed bribe, there was little question that paying a Supreme Court Justice of Côte d'Ivoire constituted a bribe under both the laws of Côte d'Ivoire and the U.S. FCPA, regardless of the duress exception.

First, the payment would go to a foreign government official to produce a favorable decision to a local company, which was a subsidiary of two American companies. Due to the moral implications of the bribe, I did not need a legal opinion from any lawyer to inform me of what I should do, but I also knew that the payment would be a bribe under the FCPA for these reasons. However, there was the possibility that the duress exception applied. At first glance, it is unlikely that the exception applied even though there was significant unrest in the country at the time, and therefore potential danger. In Abidjan during the spring of 2001, we were living in a heightened state of political and social unrest.[145] We could certainly have made the argument that we were living and working in difficult and violent circumstances. Côte d'Ivoire had undergone a military coup in December 1999 which was followed by a military dictatorship and then elections which were mired in corruption and injustice.[146] While it was still one of the top three economies in Sub-Saharan Africa,[147] the political and social instability made it economically unstable.[148] In addition, the shareholder of G.A. Holding, Alexandre Galley, was

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[143] *Id.* at 541.
[144] *Id.*
[145] *See supra* Part I-B.
[146] *See supra* Part I-C.
[147] U.S. DEP'T OF STATE, *supra* note 82, at 1.
[148] *See* IMF, *supra* note 60.

a renowned bad character who would eventually find himself on the United Nations Security Council Resolution 1343 (2001) on Liberia.[149]

Could all of these factors rise to the level of duress for the purpose of exempting the application of the FCPA to my proposed bribe? Probably not. In light of the extreme examples given by Congress and the courts of the duress exception, it is unlikely that these circumstances would have been enough for a court to rule that a bribe payment was completely void of 'conscious decision-making.' Additionally, while I was aware of the general instability throughout the country, I was unaware (at the time) of the danger that I faced. As discussed above, courts have not accepted that the term "corruptly" as used in U.S. anti-bribery statutes "requires evidence of an intent to procure a violation of the public official's duty."[150] In other words, even if the payment to the Supreme Court Justice would have encouraged him to conform to his duty as a public official and make a decision that was right all along, I would still have acted "corruptly" according to the FCPA.

The timing here is important to note. While the exception did not apply at the time the bribe was solicited, any potential bribe paid after Galley stormed the company would likely have met the required circumstances for duress. At the time of the storming, there was literally a gun to my head, so any potential payment would have been made to quell the potential violence, and not with the corrupt intent.[151] Additionally, the company faced a constant state of potential danger over the next two years. At any point, in Galley's own words, it would have been nothing for him to kill me and my colleagues. Additionally, as I

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[149] *See supra* notes 10-14 and accompanying text.

[150] United States v. Alfisi, 308 F.3d 144, 150 (2d Cir. 2002) (in relation to an anti-bribery violation under 18 U.S.C. § 201(b)(1)(A), the court was unpersuaded by the defendant's argument "that he should not be found guilty of bribery if he paid money to [a USDA inspector] solely to induce him to perform his job faithfully"; such a purpose does not vitiate the corrupt intent element.). *See also* United States v. Ng Lap Seng, 934 F.3d 110, 142-43 (2d Cir. 2019).

[151] *See supra* notes 134-143 and accompanying text.

hired bodyguards and learned that I was on the hit-list for a person in power, I knew that there was a threat of imminent harm. Thus, any potential bribe made to ease the tensions would likely have fit the duress exception.

But, at the point that the duress exception would have applied, it was too late; the Supreme Court Justice had already issued his opinion; we had already faced potential violence; the danger was extant; and it was unlikely that a subsequent payment would have dissipated the dangerous atmosphere. Accordingly, the FCPA and its interpretation failed the company, the employees, the shareholders and me. The laws and customs did not protect us in time of conflict. Indeed, my non-payment to the Supreme Court Justice in no way enhanced economic development or fairness pursuant to the grand principle iterated by the US Senate and other government officials. In fact, the failure to pay the Supreme Court Justice accomplished the opposite. The nonpayment led to the loss in court, which created an atmosphere of danger and violence while threatening (and ultimately obliterating) the health of the company.

Truly, it is arguable that a favorable decision would have not only provided business and economic benefit to WWI and MAGIC, but job security to the employees of the company. What the laws and articles on these issues did not and do not address is that a favorable decision would have avoided the violence and threat to the personal safety of the employees. A favorable decision would have avoided the eventual closure of the company in October 2003, which happened solely because of the ongoing threat of bodily harm to individuals. In sum, a favorable decision would have allowed some 200 employees to keep their jobs, feed their families, together with the extended members of those families living outside of Abidjan. Ultimately, this is a real-life example of the FCPA having an *adverse* effect on the economic stability of the country and the safety of Americans abroad.[152]

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[152] *Contra* CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, *supra* note 95, at 2 (stating how corruption "threatens stability and security by facilitating criminal activity within and across borders").

IV. REDEFINING BOUNDARIES: EXPANDING THE FCPA DURESS EXCEPTION IN UNCHARTED TERRITORIES

In retrospect and in light of the violent events that occurred, I would argue that the FCPA needs to be more broadly interpreted to expand the definition of *duress*. A payment to the Ivorian Supreme Court Justice, as requested through the intermediary under the circumstances described in Part I of this article above, should have been exempted from being qualified as a bribe under the duress exception to the FCPA. This example gives teeth to the critiques of the FCPA which say that there needs to be more respect in the law for other cultures and their practices.[153] In the end, there needs to be a more coherent and valid structure to determine when the rules and laws of society can be suspended in conflict.

The duress exception negates the requirement of corrupt intent.[154] The factual circumstances in a situation where there was no proverbial gun to the head would have to be analyzed in light of the political and social climate together with other factual circumstances to determine whether there was no corrupt intent at the time of making the bribe. In other words, the finding of no corrupt intent would also be generated out of the violent climate under which the company and its employees are operating. Judgment should be made based on the following:

a. Is the bribe solicited? The offer of a bribe would not, by itself, indicate initial duress. On the other hand, if the party receiving the bribe is the one to initially request payment, particularly if this request is accompanied by an implicit or explicit threat, this could be an indicator of duress. In the situation of Cora described above, the Supreme Court Justice solicited the bribe. Neither the company executives nor I sought out the Justice in an attempt to influence his decision. Any payment would

[153] *See* sources cited *supra* note 134 and accompanying text.
[154] *See supra* Part III.

have been made in response to a request which would then trigger an analysis of the following four questions.

b. Is there civil and military unrest in the country? Are people demonstrating? Was there any attempt in the past two years to overthrow the government? If the political environment is unstable, especially if this rises to the level of habitual violence, ordinary channels of business may be blocked, and there may be an imminent need to secure the physical safety of a company's employees, even if no one is holding a gun to anyone's head at that instant. Additionally, solicitation of a bribe in this context may indicate an implicit threat of violence.
c. What is the economic condition of the country? Is the country an emerging market? Is it a frontier market? Less stable and less established markets may have more informal commercial norms, tying into the facilitation payments exception to the FCPA. Payment of bribes may also be an unwritten local norm where commercial law has not been formalized or where conditions on the ground do not match the laws on the books.
d. What is the country's ranking on the Corruption Perceptions Index? A country with a low ranking, where the norms of doing business involve payment of bribes to public officials, is an environment where violence and harm is likely to result when local norms are not followed. The Corruption Perceptions Index is a particularly useful metric because it is based on the confidential ratings of international business executives and focuses on public sector corruption.
e. Other factors could include, among other things, the reputation of the parties involved, any applicable sanctions, criminal behavior or prosecutions. Parties with a particularly violent reputation may solicit a bribe under duress without needing to hold a gun to anyone's head. Environments where there will be no legal consequences for bribe solicitation, and particularly environments where people who refuse to pay bribes

could be subject to negative legal consequences, may contribute to an atmosphere of duress.

V. FINAL REFLECTIONS: LESSONS LEARNED FROM THE FRONTLINES OF INTERNATIONAL BUSINESS

I spent two years fighting against Alexandre Galley in Côte d'Ivoire. We used the courts.[155] We lobbied the U.S. government with the now infamous firm BKSH & Associates, formerly BMSK which belonged to Paul Manafort, through his far more ethical associate, Riva Levinson.[156] We eventually were successful in having the United States government revoke Côte d'Ivoire's much-wanted African Growth and Opportunity Act Designee status, the first time any country had lost that trade preference.[157] I spent an enormous amount of time with the U.S. Embassy and Department of State officials, and Ivorian officials of every rank and status, trying to fix not just the judicial decision but regulatory issues and tax issues. I myself had been locked in police stations and government ministry offices in attempts to intimidate me, to make me go home. In the end, the problems of Cora were larger than could be managed. The country would break out in full-scale civil war in September

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[155] *See, e.g.,* G.A. Holding S.A. v. Societe Comstar Cellular et. al., Chambre Civile et Commerciale of Cour d'Appel d'Abidjan (Côte d'Ivoire 2000); Supreme Court Decision #285/01, argument held May 10, 2001, decision issued June 1, 2001, Annals de Justice [official court record] Vol. 37 Folio 10 #1353 Slip 321/1.

[156] LEVINSON, *supra* note 29, at 90-91.

[157] *AGOA Country Eligibility: Background*, AGOA.INFO, https://agoa.info/about-agoa/country-eligibility.html (last visited June 18, 2024) ("[O]n May 16, 2002 the Ivory Coast (Côte d'Ivoire) was designated as the 36th AGOA eligible country (the Ivory Coast subsequently lost, and later regained beneficiary status)."); *Ivory Coast Seeks to Requalify for AGOA*, AGOA.INFO (Nov. 23, 2007), https://agoa.info/news/article/4000-ivory-coast-seeks-to-requalify-for-agoa.html; K. RIVA LEVINSON, *supra* note 29, at 90-91. *See also* Bilateral Meeting, Côte d'Ivoire-United States, Final Communique (Jan. 25, 2002) [this is a joint diplomatic press release] (on file with author).

2002 and many lives would be lost. Stability came finally with the election of Allassane Dramane Ouattara almost 10 years later, but only after much pain and suffering for the country. Cora was perhaps a microcosm of the greater and larger issues affecting a country at war with itself.

LOPER BRIGHT AND THE ASSAULT ON EXPERTISE

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INTRODUCTION

For decades, *Chevron* deference provided a strong, reliable, and predictable foundation upon which federal administrative agencies could deploy their expertise to address public policy problems.[2] During this period of tremendous technological change,[3] federal administrative agencies tackled a wide range of regulatory issues under the *Chevron* framework.[4] Federal agencies could move forward boldly in this era, confident in their roles as "conveners" within the public policy system.[5] Indeed, when federal agencies were at the height of their power,[6] the legislative branch appeared to have become more polarized and less effective.[7] Federal administrative agencies simply could not wait for ineffective elected

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[2] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984).

[3] *See* SARA BAASE & TIMOTHY M. HENRY, A GIFT OF FIRE: SOCIAL, LEGAL, AND ETHICAL ISSUES FOR COMPUTING TECHNOLOGY 1-26 (5th ed. 2018) (describing the "pace of change" in technology over the past few decades and its impact on society).

[4] "That rule has formed the backdrop against which Congress, courts, and agencies- as well as the regulated public- all have operated for decades. . . . It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds. . . ." Loper Bright Enters. v. Raimondo, 603 U.S. 369, 449 (2024) (Kagan, J. dissenting).

[5] A "convener" is someone who helps build relationships across boundaries. *See* Iteke van Hille et al., *Navigating Tensions in a Cross-sector Social Partnership: How a Convener Drives Change for Sustainability,* 26 CORP. SOC. RESP. & ENV'T MGMT. 317, 317 (2023) (describing individual "convener" characteristics in "Cross-sector social partnerships"). The author uses the term "convener" at the organizational level of analysis. Under *Chevron* deference, administrative agencies held relative power within the policy ecosystem and operated as "conveners," connecting stakeholders through advisory committee management and rulemaking processes.

[6] *See generally* Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L. J. 141 (2012) (explaining how *Chevron* increased the power of administrative agencies to make law).

[7] Stephen Ansolabehere et al., *What Has Congress Done?*, *in* GOVERNING IN A POLARIZED AGE: ELECTIONS, PARTIES, AND POLITICAL REPRESENTATION IN AMERICA 243-246 (Alan S. Gerber & Eric Schickler, eds., 2017).

representatives to update statutory authorities to keep up with technological changes and societal needs.

Against this background, *Loper Bright* upended *Chevron* deference by declaring it incompatible with the statutory text of the Administrative Procedure Act.[8] At first glance, *Loper Bright* seems a reasonable return to the plain language of the APA. It may be tempting to treat the overturning of *Chevron* deference as merely a minor change in administrative law practice. After all, *Skidmore* deference likely remains in place.[9] When viewed solely through a legal lens, *Loper Bright* is like that Jenga piece you thought was so important.[10] You avoided removing the piece until forced, and when you did you were pleasantly surprised to see the game structure still standing.[11]

The main thesis of this article, however, is that attorneys view *Loper Bright* solely through a legal lens at their own risk. From a wider perspective of public administration and public policy,[12] the *Loper Bright* decision is just one salvo in a broad

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[8] *Loper Bright*, 603 U.S. at 371.

[9] *Skidmore* deference allows, but does not require, federal judges to defer to agency interpretations of statutes based on past agency practice and other factors. "The weight of [agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[10] *Jenga,* WIKIPEDIA, https://en.wikipedia.org/wiki/Jenga (last visited Feb. 23, 2025).

[11] Although the U.S. Supreme Court overruled *Chevron* deference in *Loper Bright*, the overall structure of administrative law remains, including *Skidmore* deference and other laws and policies. *See generally Skidmore*, 323 U.S. 134 (1944); Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2024); Federal Advisory Committee Act (FACA), 5 U.SC. §1001-1014 (2024); Freedom of Information Act, 5 U.S.C. § 552 (2024).

[12] Public administration is the study and practice of administering laws and authority, through bureaucratic organization and "task differentiation, specialization, *expertise*, and/or professionalism." H. GEORGE FREDERICKSON ET AL., THE PUBLIC ADMINISTRATION THEORY PRIMER 2 (Westview Press, 2nd ed. 2012) (emphasis added). Frederickson et al.'s characterization of public administration is noteworthy for how it describes expertise as necessary to administer authority for the benefit of society. "Public policy" is "whatever

assault on expertise as a value. When viewed from this perspective, the issue is not what remains of judicial deference post-*Loper Bright*. Rather, the issue is how multi-sector policy actors, including attorneys, can adjust their advocacy for a world in which expertise is no longer the coin of the public policy realm.

This article proceeds as follows. Part I provides a concise overview of *Chevron* deference and how *Loper Bright* overrules the same. Part I orients the reader to the main cases which spark the broader ideas of the article. Part II draws upon the legal, public policy, and public administration literature to explain the concept of expertise and its role within the policy process. Part III argues that *Loper Bright* is one part of the assault on expertise. *Loper Bright* must be understood in the context of *West Virginia v. E.P.A.*,[13] and other attacks on expertise within the media and the court of public opinion.

Part IV analyzes the impact of the assault on expertise on various policy actors. Based on their research, training, and experience, the author suggests how the relative power of certain institutional actors has shifted post-*Loper Bright*, and how these actors may attempt to counterbalance these changes in power. Part V offers broader implications for theory and practice at the intersection of law and public administration.

The author holds two main assumptions based on their teaching, research, and practice, and these assumptions inform this article. First, the author views law and public policy as separate but overlapping fields. Public policy is not a subset of law, but neither is law a subset of public policy.[14] This worldview places attorneys and the practice of law within a

governments choose to do or not to do." THOMAS R. DYE, UNDERSTANDING PUBLIC POLICY, 1 (10th ed. 2002).

[13] West Virginia v. E.P.A., 597 U.S. 697 (2022).

[14] For a more thorough explanation of the author's position on the relationship of law and public policy, *see* Brian K. McNamara, *Advancing Policy Advocacy: A Policy Process Approach,* 47 NOVA L. REV. 343, 351-53 (2023).

broader public policy ecosystem.[15] This perspective also means that attorneys do not hold a privileged place within public policy systems. To be sure, attorneys have unique skills which make them well-suited for public policy work, but attorneys must build coalitions and leverage networks just as non-attorney policy advocates.

Second, the author views expertise as an important check on other powers within the United States federal government. Just as the judiciary checks the executive and legislative branches with judicial review,[16] the legislative checks the judiciary and executive with impeachment authority,[17] expertise checks the undisciplined decision-maker. In other words, expertise increases the likelihood that policy proposals receive their due consideration and minimizes poor societal outcomes from rushed and misinformed policy solutions.[18]

For this article, the author defines expertise as any knowledge relevant to policy discussions within a policy ecosystem. The author defines expertise broadly for two reasons. First, expertise in public administration and policy can

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[15] The author uses "policy ecosystem" in this article because this term accurately captures public policy actors as a complex network of shifting power and relationships. The term "policy ecosystem" is not the author's—one may see this term in other informal sources. *See Public Policy Ecosystem Maps*, MIT POL'Y LAB, https://policylab.mit.edu/publicpolicymaps/ (last visited Feb. 23, 2025). For this article, "policy ecosystem" is roughly analogous to the term "policy arena." *See* McNamara, *supra* note 14, at 344. "Policy ecosystem," however, more accurately captures the dynamic relationships between various policy actors than "policy arena."

[16] *See* Marbury v. Madison, 5 U.S. 137 (1803); Loper Bright Enters.v. Raimondo, 603 U.S. 369 (2024).

[17] *See* U.S. CONST. art. I, § 2.

[18] *See* COLLINS ET AL., THE OXFORD HANDBOOK OF EXPERTISE AND DEMOCRATIC POLITICS, 60 (Gil Eyal & Thomas Medvetz, eds. 2023). The authors advance a similar argument about scientific expertise as a check not within the U.S. federal system, but as a broader check against populism in democratic societies. "The role of scientific expertise in democracy. . . is to contribute to the network of checks and balances needed to resist slipping, under the pressure of events, into more authoritarian styles of rule." Their argument aligns with this article's claim that devaluing expertise opens the door for ideology instead of expertise to dominate public policymaking.

be procedural or substantive expertise. Indeed, policy ecosystems require their actors collectively to hold procedural and substantive expertise. Procedural expertise refers to knowledge about how to connect the policy actors and how to coordinate discussions between stakeholders. Substantive expertise relates to the subject matter of the policy. For example, within the water pollution policy ecosystem, substantive expertise would include relevant technical and scientific knowledge about biology and chemistry.

Second, expertise rests primarily, but not exclusively, within administrative agencies. Administrative agencies must also marshal expertise from outside their agencies as part of the policy process. This can include obtaining a proper saturation of comments during notice-and-comment rulemaking.[19] It can also include leveraging federal advisory committees to provide input on policy issues.[20] Although *Loper Bright* addresses agency interpretation of their own statutes, this article will also address how the case may impact how federal agencies leverage external expertise to inform public policy.

As this article concludes, the greatest danger of *Loper Bright* is not the overruling of *Chevron* deference in federal litigation. Rather, the danger is that, as part of a broader assault on expertise, *Loper Bright* and other attacks have opened the door for ideology to trump technical proficiency in the policy process. Without expertise as a check on hasty decision-makers, public policy is more open to the ideological whims of the most powerful policy actors for any given policy issue.

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[19] Under the Administrative Procedure Act, 5 U.S.C. § 553 (2024), agencies engage in notice and comment rulemaking. Under this process, agencies propose a rule, collect public comments on the proposal, and then consider the comments when developing the final rule.

[20] *See* Federal Advisory Committee Act (FACA), 5 U.S.C. §1001 (2024). Under the FACA, agencies appoint private sector stakeholders to advise the agency on public policy issues within the stakeholders' expertise.

I. CHEVRON AND LOPER BRIGHT

Loper Bright explicitly overruled the Supreme Court's command in *Chevron v. Natural Resources Defense Council* for federal judges to defer to permissible agency interpretations of an agency's own statute.[21] What became known as *Chevron* deference was a two-step inquiry. First, was the statutory language "ambiguous?" If yes, courts then inquired whether the agency interpretation was based on a "permissible" reading of the statute. If the answer to the second question was yes, then the courts deferred to the agency interpretation of the statute.[22]

Chevron deference served as the foundation for decades of administrative practice.[23] There were three major benefits to *Chevron* deference. First, expert bureaucrats had the top cover to address existing policy problems. To be sure, the law required agencies to seek stakeholder input on proposed regulations. But agencies did not need to seek legislative permission to proceed with regulatory projects that were both required for society and arguably within the agency's authority. Second, agencies could proceed boldly in addressing emergent technological issues. Finally, this deference framework arguably relieved the judiciary and the legislature of the burden to become policy experts for any given issue.[24] Judges could focus on judging. Legislators could focus on legislation, while retaining oversight of agencies and the ability to override problematic regulations by statute.

Critics, however, believed that *Chevron* deference tipped the scales inappropriately toward unelected bureaucrats.[25] A

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[21] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).
[22] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-45 (1984).
[23] *See* Commemoration, *Thirty Years of Chevron v. NRDC and the Administrative Law Review: A Letter from the Executive Board*, 66 ADMIN. L. REV. 235 (2014).
[24] "Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy." *Loper Bright*, 603 U.S. at 449 (2024) (Kagan, J., dissenting).
[25] *See* Jeffrey M. Supprenant, *Pulling the Reins on Chevron*, 65 LOY. L. REV. 399 (2019) (Comment) (critiquing *Chevron* as propping up the administrative state).

groundswell of support for reviewing *Chevron* gained traction.[26] Ultimately, the U.S. Supreme Court granted certiorari and consolidated two cases directly challenging *Chevron* deference.[27]

Loper Bright was a challenge to a National Marine Fisheries Service ("NMFS") interpretation of an agency statute. Federal fisheries law imposes catch quotas for many fisheries, including the Atlantic Herring fishery. Federal law also requires observers on board certain vessels to help monitor quotas.[28] The NMFS administrator interpreted the controlling statute to allow NMFS to place the cost of the observer upon the industry itself.[29] A fishing industry member objected to this determination and directly challenged the *Chevron* framework itself.[30]

The Court held for the fishing industry interests and directly overturned *Chevron*. Primarily, the Court held that the Administration Procedure Act preserves the judiciary's sole function to determine the meaning of law, and *Chevron* deference, which allows for agency interpretation of law, does not align with the text of the Administrative Procedure Act.[31] Although the Court acknowledged the decades of practice under *Chevron*, the Court would not perpetuate what it believed to be a legal error under the principle of *stare decisis.*[32] The majority implicitly framed the relevant expertise as knowledge in statutory construction.[33]

Justice Kagan's dissent framed the Court's opinion as dismissive toward agency expertise. In her view, *Chevron*

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[26] *See* Kristine E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931 (2021); *see generally* Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018).
[27] *See* Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023), *cert. granted in part*; Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) *cert. granted in part*.
[28] *Loper Bright*, 603 U.S. at 380-81 (2024).
[29] *Id.* at 382.
[30] *Id.* at 382-84.
[31] *See id.* at 396.
[32] *Id.* at 407-09.
[33] *See Id.* at 396.

deference reflected the reality of public policymaking. Congress intended for agencies to interpret ambiguous statutes.[34] In fact, agencies did not usurp the judiciary by making legal determinations because the agency determinations were actually policy determinations based on agency expertise.[35]

By directly overturning *Chevron* deference, the Court dismissed and minimized the agency technical expertise necessarily to fill in statutory ambiguities. The Federal judiciary no longer must defer to permissible agency interpretation of ambiguous statutes. To be sure, *Loper Bright* does not prohibit deference and endorses *Skidmore* as a framework for optional deference.[36] However, *Loper Bright* opens the door for federal judges, even those without substantive and relevant policy expertise, to substitute their own policy judgments over the experienced and expert determinations of administrative agencies.

II. LITERATURE REVIEW

Although it is important to understand *Loper Bright's* legal implications, such a perspective is insufficient in considering the case's public policy impacts for three major reasons. First, law does not operate in a vacuum. The decision to bring a lawsuit in the first instance depends upon law's relationship to society at large. At some point, a policy actor from outside the legal system decides to commence a legal process to obtain a desired policy output through the courts.[37] Second, the policy ecosystem consists of both attorneys and non-attorneys, and law does not explain the behavior of all participants. Finally, a legal perspective neither explains nor predicts the behavior of non-legal policy actors throughout all stages of the temporal policy process. By virtue of their training,

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[34] *Loper Bright*, 603 U.S. at 449-50 (Kagan, J. dissenting).
[35] *Id.*
[36] *See id.* at 371 (majority opinion).
[37] *See* Emery G. Lee III, *Policy Windows on the U.S. Courts of Appeal*, 24 JUST. SYS. J. 301-323 (2003) (applying John W. Kingdon's policy streams to appellate courts).

attorneys tend to focus primarily on the decision-making stages of the policy process.[38]

Attorneys are just one category of actors within the broader public policy ecosystem. The exact number of policy actors and their occupations may vary depending on the policy issue, but they include both institutional and individual actors with varying levels of substantive expertise. For example, the maritime policy ecosystem includes interrelated actors at the international, nation-state, and regional levels. At the international level, the International Maritime Organization,[39] flag state administrations,[40] and industry and public interest advocacy groups wield significant influence.[41] At the national level within the United States, the major players include unions,[42] congressional oversight committees,[43] administrative

[38] For a more thorough explanation of the author's position on this issue, *see* McNamara, *supra* note 14, at 345.
[39] INT'L MAR. ORG., https://www.imo.org/ (last visited Feb. 23, 2025).
[40] Flag state administrators ensure that vessels flying their nation's flag comply with international standards. Z. Oya Ozcayir, *The Use of Port State Control in Maritime Industry and Application of the Paris MOU*, 14 OCEAN & COASTAL L.J. 201 (2009). In the United States, the U.S. Coast Guard is the flag state administration. *Flag State Control Division (CG-CVC-4)*, U.S. COAST GUARD, https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Flag-State-Control-Division/ (last visited Feb. 23, 2025).
[41] For example, the Clean Shipping Coalition advances environmental perspectives at the International Maritime Organization. CLEAN SHIPPING COAL., https://cleanshipping.org/ (last visited Feb. 23, 2025).
[42] SEAFARERS INT'L UNION, https://www.seafarers.org/ (last visited Feb. 23, 2025).
[43] *E.g.*, U.S. SENATE COMM. ON COM., SCI., & TRANSP., https://www.commerce.senate.gov/ (last visited Feb. 23, 2025).

agencies,[44] advisory committees,[45] industry organizations,[46] and their respective attorneys. At the local or port level, state pilotage regulators,[47] port administrators,[48] and state or local law enforcement actors help shape public policy.[49] The policy actors interact dynamically and constantly up, down, and across governmental levels and industry sectors to set issues on the policy agenda and work through potential solutions.

Two predominant public policy models, which the author did not study in law school, are the policy process model,[50] and Kingdon's policy streams model.[51] Intellectual models aspire to "describe," "explain," or "predict" behavior.[52] These two policy models are not perfect, but, in the author's experience, they help individual actors, including attorneys, understand how to orient themselves within a policy ecosystem.

The policy process model envisions public policy creation as somewhat linear. Under this model, public policy proceeds in an orderly fashion from problem identification to policy formulation, decision-making, implementation, and evaluation.[53] Many actors can be involved in the early and late

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[44] *E.g.*, FED. MAR. COMM'N, https://www.fmc.gov/ (last visited Feb. 23, 2025).
[45] *E.g.*, *National Offshore Safety Advisory Committee*, U.S. COAST GUARD, https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Commercial-Regulations-standards-CG-5PS/Office-of-Operating-and-Environmental-Standards/vfos/NOSAC/ (last visited Feb. 23, 2025).
[46] *E.g.*, THE AM. WATERWAYS OPERATORS, https://www.americanwaterways.com/about (last visited Feb. 23, 2025).
[47] *E.g.*, NEW ORLEANS BATON ROUGE S.S. PILOTS ASS'N, https://neworleansbatonrougepilots.com/ (last accessed Feb 23, 2025).
[48] Such as U.S. Coast Guard Captains of the Port. *See* 33 C.F.R. §6.01-3 (2025).
[49] *E.g.*, LA. DEP'T OF WILDLIFE & FISHERIES, https://www.wlf.louisiana.gov/ (last visited Feb. 23, 2025).
[50] MICHAEL HOWLETT ET AL., STUDYING PUBLIC POLICY: POLICY CYCLES & POLICY SUBSYSTEMS (3d ed. 2009).
[51] JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2014).
[52] FREDERICKSON ET AL., *supra* note 13, at 5.
[53] *See* HOWLETT ET AL., *supra* note 50 (explaining the various stages and labeling them as the "policy cycle").

stages of the process, but usually the public sector holds a monopoly over the decision-making stage.[54]

Kingdon's policy streams theory originally developed to address the agenda setting stage of the policy process, but the model is useful to conceptualize the roles of individual actors at any stage of policy. Under Kingdon's model, policy ideas exist in three independent streams, the "problems," "policy," and "politics" streams.[55] Policy windows open when the three streams converge. Windows can open during regular intervals and unplanned events,[56] or they can open when "policy entrepreneurs" work to cross the streams.[57]

Many, but not all, policy actors in any given ecosystem work in the public sector. Public administration is an applied field for leadership and management in the public sector and in other organizations with a public purpose.[58] Public administration differentiates itself from business administration with its focus on normative values rather than shareholder value.[59] Practitioners typically study public

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[54] *Id.* at 140.

[55] Brian K. McNamara & John C. Morris, *Crossing the Bar to Cross the Streams: Kingdon's "Policy Streams" Applied to Vessel Status in Admiralty,* 19 LOY. MAR. L.J. 1, 9-10 (2020).

> The problem stream involves the policymaking agenda, or in other words, the perception that certain problems require governmental action. The policy stream involves the range of policy proposals, backed by policy specialists or policy entrepreneurs, available in the political system at any one time. The politics stream involves the composition and incentives of the relevant policymakers as well as the broader political context.

Id. at 10 (citing Emery, *supra* note 37, at 305.).

[56] KINGDON, *supra* note 57, at 203.

[57] *See id.* at 179-81 (explaining that "policy entrepreneurs" hold special skill or passion for an issue and develop the capacity to connect stakeholders for their policy issue).

[58] *See* Donald F. Kettl, *Public Administration: The State of the Field, in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II 407-428 (Ada W. Finifter ed., 1993) (describing the various labels for what is known as public administration and conceding that the field is "fragmented").

[59] *See* DAVID H. ROSENBLOOM & ROBERT S. KRAVCHUK, PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR 5-13 (6th

administration in a graduate school,[60] and they train to operate in individual organizations,[61] and collaboratively across sectors.[62] The four "pillars" of public administration are "efficiency, effectiveness, economy," and "social equity."[63] Public administration considers law to be one of its foundational fields,[64] and indeed at least one author describes public administration as "running the Constitution."[65]

The politics-administration dichotomy informs the field of public administration.[66] Under this concept, scholars recognize that elected officials oversee an apolitical public administration staff. This framework provides an intellectual foundation for reconciling the growth of the administrative bureaucracy with the U.S. Constitution.[67] In other words,

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ed. 2005) (differentiating public administration from business administration).

[60] Typically obtaining a Masters of Public Administration or Masters of Public Policy degree. *MPA/MPP Degrees*, NASPAA, https://www.naspaa.org/resources/why-public-service-degree/mpampp-degrees (last visited Feb 23, 2025).

[61] *See* FREDERICKSON ET AL., *supra* note 12, at 101-102 (describing Luther Gulick's list of public administrator responsibilities within hierarchical organizations).

[62] *See* Madeleine McNamara, *Starting to Untangle the Web of Cooperation, Coordination, and Collaboration: A Framework for Public Managers*, 35 INT'L J. PUB. ADMIN. 389 (2012) (distinguishing management practices in various horizontal cross-sector organizational relationships).

[63] Erick Stokan et al., *Fifty Years as the Fourth Pillar of Public Administration: A Polycentric Extension of the Social Equity Framework*, 101 PUB. ADMIN. 1427, 1428 (2023).

[64] *See* Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1530-31 (2015); Bradley E. Wright, *Public Administration as an Interdisciplinary Field: Assessing its Relationship with the Fields of Law, Management, and Political Science*, 71 PUB. ADMIN. REV. 96, 96 (2011).

[65] Robert K. Christensen, *Running the Constitution: Framing Public Administration*, 32 PUB. PERFORMANCE & MGMT. REV. 604, 604 (2009).

[66] FREDERICKSON ET AL., *supra* note 12, at 15-20.

[67] For a legal perspective on the administrative state's legitimacy, *see* Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179 (1997) (discussing and critiquing the predominant theories that the administrative state's legitimacy flows from the Chief Executive).

unelected bureaucrats are not directly accountable to the public. However, these bureaucrats develop deep expertise in their policy fields, and are accountable for performance to the elected and appointed officials above them in the public sector organizational chart. In this way, human resources controls ensure bureaucrats implement policy aligned with their elected and appointed supervisors. Because the bureaucracy implements policy in accordance with political will, the public can hold the elected officials accountable for public policy with which they disagree.

One main point of this paper is that bureaucratic expertise serves as a de facto additional check within our traditional federal checks and balances.[68] Bureaucratic expertise carries out this check in at least three ways. First, procedural expertise ensures the federal government captures necessary stakeholder and community input during the policy formulation phase.[69] Second, bureaucratic experts develop relationships and social capital with policy actors in other sectors and with legislative oversight staff.[70] This relational expertise ensures lines of communication remain open through changes in federal administrations or when unanticipated events open policy windows, and in turn these relationships ensure that policy actors are aware of potential policy proposals. Third, substantive bureaucratic expertise provides a check on ideological influence within the policy process. Expert

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[68] *See* Harry Collins et al., *The Third Wave and Populism: Scientific Expertise as a Check and Balance*, *in* THE OXFORD HANDBOOK OF EXPERTISE AND DEMOCRATIC POLITICS 52, 60 (Gil Eyal & Thomas Medvetz eds., 2023) (discussing expertise as a check on "populism").

[69] Federal expert bureaucrats coordinate public comment review during notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553(b) (2024), and manage relationships with their advisory committees under the Federal Advisory Committee Act (FACA), 5 U.S.C. § 1001(2) (2024).

[70] "Social capital" can be defined loosely as "trust" that develops during collaborative engagements as well as an important "initial input" for successful collaboration. Cheryl L. Wagner & Maria E. Fernandez-Gimenez, *Effects of Community-Based Collaborative Group Characteristics on Social Capital*, 44 ENV'T MGMT. 632, 632-33 (2009).

bureaucrats filter policy proposals based on their own extensive experience. Expert review helps ensure well-considered and viable policy proposals reach decision-makers.

Expertise is central to the study and practice of public administration, but how does expertise operate at the boundary of law and public administration? Public administration and law are related fields.[71] Szypszak notes that many early public administration scholars considered law to be "foundational" to the field of public administration.[72] Public administration and law continue this close relationship today in two ways: the fields overlap in their subject matter and share a concern for the relationship between theory and practice.[73] In addition to the overlap in subject matter, public administration scholarship draws upon legal scholarship and vice versa across the overlapping boundary between the fields.

Expertise features in the study of public administration and law and is an "exemplary case"[74] of a cross-disciplinary topic because of its frequent mention in the scholarly literature. The legal literature, however, is beginning to recognize limitations inherent in the "rational-instrumental" approach to expertise which supported *Chevron* deference. Specifically, the "rational-instrumental" approach does not account for the internal workings of bureaucratic agencies.[75] Another limitation of the legal literature's examination of expertise lies in

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[71] Metzger, *supra* note 64, at 1517-18; *see also* Bradley E. Wright, *Public Administration as an Interdisciplinary Field: Assessing its Relationship with the Fields of Law, Management, and Political Science*. 71 PUB. ADMIN. REV. 96 (2011).

[72] Charles A. Szypszak, *Teaching Law in Public Affairs Education: Synthesizing Political Theory, Decision Making, and Responsibility*, 17 J. PUB. AFF. EDUC. 483, 483-85 (2011).

[73] *See* Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J. L. & FEMINISM 13 (1991).

[74] *See* Franziska Wallmeier et al., *Knowledge Construction in Public Administration: A Discourse Analysis of Public Value*, 79 PUB. ADMIN. REV. 488, 488-90 (2018).

[75] Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464-65, 467 (2012).

inconsistent use of terms and definitions that have settled usage within the public administration literature.[76]

The issue of expertise is relevant to law and public policy because of recent calls within public administration scholarship for a renewed focus on law,[77] and within legal scholarship for an "enlightened" understanding of public administration.[78]

There is a rich literature on the topic of expertise in modern public administration. Scholars in the field approach expertise from a variety of perspectives. From the perspective of the politics/administration dichotomy, this author argues that expertise is related both to knowledge and efficiency. The implication is that the political leaders themselves cannot carry their own directives into practice due to a lack of resources, time, and substantive knowledge.[79] In this sense, expertise is both expertise as to process and expertise as to technical knowledge.[80]

"Classical organizational theorists"[81] focus on structure in large part to capture expertise in the most efficient manner possible. In "bureaucracies," "decisions are to be based on technical expertise".[82] The early strand of literature, led by Frederick W. Taylor's *Scientific Management*,[83] focuses on expertise and efficiency and identifying the "one best way" to

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[76] *Id.*

[77] Stephanie Newbold, *Toward a Constitutional School for American Public Administration*, 70 PUB. ADMIN. REV. 538, 539-40 (2010); Christensen, *supra* note 65, at 605 (2009); Laurence E. Lynn, Jr., *Restoring the Rule of Law to Public Administration: What Frank Goodnow Got Right and Leonard White Didn't*. 69 PUB. ADMIN. REV. 803, 803-04 (2009).

[78] *See generally* Metzger, *supra* note 64; *see also* Shapiro et al., *supra* note 75, at 465.

[79] James H. Svara, *Beyond Dichotomy: Dwight Waldo and the Intertwined Politics-Administration Relationship*, 68 PUB. ADMIN. REV. 46 (2008).

[80] *See* Lawrence B. Mohr, *Authority in Organizations: On the Reconciliation of Democracy and Expertise*, 4 J. PUB. ADMIN. RSCH. THEORY 49 (1994).

[81] *Id.* at 50-51.

[82] Thomas H. Hammond & Gary J. Miller, *A Social Choice Perspective on Expertise and Authority in Organizations*, 29 AM. J. POL. SCI. 1, 1 (1985) (discussing FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (Norton 1967) (1911)).

[83] Mohr, *supra* note 80, at 51 (1994).

accomplish tasks, although this approach was "softened" by Barnard and others.[84]

The early discussions on expertise focused on the concept from a management perspective, but public administration draws on multiple foundational disciplines, including law.[85] Christensen argues that the "early pull" of the field "from law to management" resulted in the exclusion of law from such modern scholarly movements including "New Public Management/privatization and performance-centered models of administration."[86] Law appears to serve as a surrogate for that bundle of values that separates public administration from business administration and that gives public administration its essential character.[87] For public administration scholarship, there does not appear to be a single inflection point, related to the concept of expertise, driving renewed focus on public law. However, there appears to be greater scholarly interest in law beginning in the 1990s, which may align with the New Public Management and Reinventing Government movements and those movements' exclusion of law.

Legal scholarship discusses expertise in terms of judicial deference to agency determinations or interpretations of statutes, regulations, and agency policy. Federal courts will give different levels of deference to agency interpretations in different contexts,[88] but the most famous type of deference, was the *Chevron* deference overruled by *Loper Bright*.

The underlying policy rationale for *Chevron* deference was that the agency possesses greater expertise than the courts to interpret statutes within their mission areas. One may think that the judiciary deferred to agencies because the judiciary

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[84] *Id.*

[85] Christensen, *supra* note 71, at 605.

[86] *Id.*

[87] Charles R. Wise, *Public Administration is Constitutional and Legitimate*, 53 PUB. ADMIN. REV. 257, 260 (1993); Hal G. Rainey et al., *Comparing Public and Private Organizations*, 36 PUB. ADMIN. REV. 233 (1976).

[88] Richard J. Pierce Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515-520 (2011).

views agency expertise as a source of authority. However, the prevailing view in legal scholarship is judicial deference to agency determinations is based on democratic accountability. From a structural perspective, courts defer to agencies so that the politically accountable administration can be responsible for the determination, not that the agency expertise serves as a source of authority and legitimacy for the interpretation itself.[89]

Shapiro is the strongest voice of a group of legal scholars who critique the dominant view that Shapiro calls the "rational-instrumental" approach, or the "outside-in" accountability.[90] Shapiro and others believe that this legal focus on structure misses the mark by ignoring the realities of how agencies make policy internal to the organization. Shapiro and others do not view *Chevron* deference as a sign that the law respects public administration. Rather, Shapiro and others believe the dominant view to be that the law "distrusts" administration.[91] For legal scholars, *Chevron* and its focus on institutionalism appears to be an inflection point that drives calls for greater alignment with public administration.

This emerging strand of legal scholarship calls for an "enlightened" understanding of public administration. The scholarship champions an approach that acknowledges the realities of internal workings of agencies from the "inside-out" perspective.[92] This new approach appears to recognize expertise as a source of legitimacy on its own terms. The implication is that the legal academy needs to recognize public administration as more than the rote interpretation and execution of statutes.[93]

This author submits that one challenge to greater understanding of public administration in the legal academy is the misunderstanding of social science terminology. Terms such

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[89] Shapiro et al., *supra* note 75, at 463-70.
[90] *Id.* at 483.
[91] Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of "Expert" Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 496 (2013).
[92] Shapiro et al*., supra* note 75, at 479-81, 483-87..
[93] Sidney A. Shapiro, *Law, Expertise, and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENV'T. LAW 661 (2019).

as "paradigm," "qualitative," and "scientific" have generally accepted definitions within social sciences.[94] Legal scholars do not always use these terms in the same way as public administration scholars.[95] Words have meaning, and imprecise use of social science terms in legal scholarship limits the transferability of concepts between public administration and law.

Chevron's demise and the assault on expertise offer opportunities for scholars and practitioners to build a stronger bridge between the fields of public administration and law. First, as discussed above, public administration scholars and legal scholars should use terminology consistently in their research. Second, public administration programs should re-focus their attention on law as a foundational field for the study of public administration.[96]

Finally, to promote mutual understanding between the two fields, scholars should research knowledge construction and knowledge exchange between the two fields. In other words, what are the processes for the diffusion of legal concepts into the theory and practice of public administration, and vice versa? If public administration and legal scholars embark on this venture together, this proposed line of scholarship will have the secondary benefit of promoting a common research methodology between the fields. Discourse analysis and content analysis would be appropriate approaches for the study of texts in this endeavor, and the work of Wallmeier et al. in knowledge construction in public administration would serve as a model for this line of research.[97]

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[94] *See generally* JONATHAN W. MOSES & TORBJORN. L. KNUTSEN, WAYS OF KNOWING: COMPETING METHODOLOGIES IN SOCIAL AND POLITICAL RESEARCH (2007); THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3D ED. 1996); KINGDON, *supra* note 51.

[95] *See* Shapiro et al., *supra* note 75.

[96] Szypszak, *supra* note 72, at 483.

[97] Wallmeier et al., *supra* note 74.

III. THE ASSAULT ON EXPERTISE

This Part argues that policy practitioners should not view *Loper Bright* in isolation. Rather, the case is part of a broader assault on expertise with significant consequences for policy practice. This Part begins by analyzing *Loper Bright* and *West Virginia*,[98] which, taken together, weaken the power of federal administrative agencies to solve policy problems through their expertise. It continues by examining other assaults on expertise, including the recent and ongoing purge of the federal civil service workforce.

A. Loper Bright and West Virginia v. E.P.A.

Loper Bright is not the only appellate case to devalue agency expertise. Two years prior, the U.S. Supreme Court invoked the major questions doctrine ("MQD") to invalidate an Obama-era Clean Power Rule in *West Virginia v. E.P.A.*[99] The MQD means "administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance."[100]

With *Loper Bright* and *West Virginia*, the Court sends three clear signals to administrative agencies regarding their expertise. First, legitimacy no longer flows from agency expertise. Agency expertise may remain persuasive but is not authoritative. Second, although Congress may be ineffective,[101] agencies use their expertise to get ahead of Congress on policy issues at their own peril. To the extent that agencies interpret existing statutes in new ways to address emergent technology or to address social justice issues, the new interpretations may cut against *Skidmore* deference. Additionally, agencies might run afoul of the MQD by interpreting regulations consistently

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[98] West Virginia v. E.P.A., 597 U.S. 697 (2022).
[99] *Id.*
[100] *Id.* at 735 (Gorsuch, J., concurring) (internal quotations and citations omitted).
[101] Ansolabehere et al., *supra* note 7, at 243-46.

but applying that interpretation to a rulemaking project on a much larger scope or scale than the interpretation has been used in the past. Either way, agency expertise alone is no longer a license to respond independently to policy problems.

B. Broader Societal Attacks on Expertise

The appellate cases described above are just some examples of a much broader assault on administrative expertise. First, certain actors have recently disparaged the federal administrative bureaucracy as the "Deep State."[102] The implication, of course, is that unelected expert bureaucrats drive public policy based on their own personal agendas, rather than working diligently and professionally to implement the directives of elected and appointed officials working above them. The secondary implication is that expert bureaucrats operate based on a partisan political ideology.[103] These attacks encourage the public to question expertise as a public service value.

Second, the federal government recently purged many probationary civil service employees.[104] These actions, ostensibly to improve efficiency, likely will have the practical effect of breaking the knowledge and expertise diffusion chain from one generation of public servants to the next. To be sure, promoting government efficiency is a legitimate executive branch action, which can include reducing the workforce to cut costs. Much remains to be seen, however, whether these cuts will drive actual improvements in efficiency and effectiveness in public service delivery.

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[102] Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653 (2018).
[103] *See id.*
[104] Courtney Rozen, *Trump's Mass Firings of Federal Workers Spread Chaos Nationwide*, BLOOMBERG L. (Feb. 24, 2025, 10:10 AM), https://news.bloomberglaw.com/daily-labor-report/trumps-mass-firings-of-federal-workers-spread-chaos-nationwide.

Third, the federal government canceled the Presidential Management Fellowship Program.[105] This program provides a pathway for aspiring public servants to enter the federal government directly from school. When combined with the purge of probationary employees, the effect is not just to remove existing expertise from the pipeline, but to break the chain of mentoring and knowledge diffusion within the federal government.

Fourth, the Chief Executive has attempted to reorganize independent agencies under direct Presidential control.[106] These agencies customarily provide specialized expert service or enforcement for the public benefit. Their leaders typically serve staggered terms designed to insulate their expertise from changes in presidential administrations and ensure continuity of service no matter the political affiliation of the political party controlling the White House.[107]

Finally, the federal government recently purged several federal advisory committees of all their members.[108] Many of these committees advised the government on particularly sensitive technology policy issues.[109] Notably, these committees exist to provide agencies with the benefit of independent external expertise.

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[105] Exec. Order No. 14217, 90 Fed. Reg. 10577 (2025)
[106] Exec. Order No. 14215, 90 Fed. Reg. 10447 (2025).
[107] *See* Ashley Lopez, *Trump Wants More Power over Agencies. Experts Worry About Campaign Finance Regulators*, NPR (Feb. 20, 2025, 2:54 PM), https://www.npr.org/2025/02/20/nx-s1-5302704/trump-power-independent-federal-election-commission.
[108] A.J. Vicens & Raphael Satter, *US DHS Fires Outside Advisers, Sources Say China Probe Disrupted*, REUTERS (Jan. 21, 2025, 8:17 PM), https://www.reuters.com/world/us/us-department-homeland-security-firing-all-advisory-committee-members-letter-2025-01-21/.
[109] Such as the National Offshore Safety Advisory Committee, which advises the U.S. Coast Guard, in part, on offshore cybersecurity issues. *National Offshore Safety Advisory Committee*, *supra* note 45.

IV. PRACTICAL IMPLICATIONS

A. A Paradigm Shift- Power Away from Administrative Agencies

A paradigm is a generally accepted set of beliefs within a field. Previously, public policy rested on a foundation of expertise. To be sure, political leadership directed the focus and emphasis of policy. But apolitical administrative agencies operated at the center of policy ecosystems, leveraging their procedural and substantive expertise to facilitate public policy. However, *Loper Bright, West Virginia*, and the broader assault on expertise have created a paradigm shift.[110] This post-expertise era dismisses and devalues expertise within the public policy ecosystems. Expertise no longer holds inherent authority and legitimacy, due to changes in legal structures or the emergent public perception that expert bureaucrats lack democratic legitimacy to facilitate solutions to public problems.

B. Impact on Policy Actors

Part III, above, explains how many different actors occupy the policy ecosystem to effect public policy. How, then, should the various actors adjust their policy advocacy to account for the post-expertise paradigm shift? This sub-part analyzes how various institutional actors can adjust their public policy work to maintain their institutional power or to take advantage of the shift in power dynamics post-*Loper Bright*. This subpart addresses institutional actors and then briefly offers suggestions for attorneys working in the public and private sectors.

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[110] *See* KUHN, *supra* note 94, at 23 (defining paradigm generally as a set core of beliefs in academic fields that shift dramatically at an inflection point representing a new understanding of beliefs).

1. Administrative Agencies

Administrative agencies have lost relative policy power and influence post-*Loper Bright*. Agencies may respond to this loss of power by bolstering their chances of judicial deference, avoiding the rulemaking process entirely, or working closely with Congress to amend their statutory authority. A combination of these efforts may help an agency retain its influence in the policy process.

There are three major ways agencies may bolster their chances of judicial deference to controversial regulations. First, agencies must prioritize precise and detailed administrative records justifying their agency actions.[111] Although administrative records have always been important to support agency positions, after *Loper Bright* the judiciary might draw a significant negative inference from any gaps or weaknesses in an administrative record.

Second, agencies must pay closer attention to public comments during the notice-and-comment rulemaking process.[112] Close evaluation of public comments from a variety of stakeholders, and a detailed response to those comments in the final rule, may inoculate an agency from a charge that the final rule is merely a pre-determined course of action. For particularly complex rules, agencies may wish to use the supplemental notice of proposed rulemaking process.[113]

Third, agencies should increase their reliance on their advisory committees to provide non-binding recommendations prior to entering the rulemaking process. Duly constituted

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[111] *See* Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 377, 382 (2009) (describing several issues related to administrative records in challenges to agency action).

[112] 5 U.S.C. § 553 (2024).

[113] For example, the U. S. Coast Guard may issue a supplemental notice of proposed rulemaking ("SNPRM") if "a proposed rule has been substantially changed from the original notice of proposed rulemaking." The SNPRM "provides an opportunity for additional comment." Supplemental Notice of Proposed Rulemaking, 33 C.F.R. § 1.05-40 (2025).

advisory committees provide important stakeholder perspective on the relative importance of different regulatory projects. Authentic and thorough engagement with an advisory committee creates a strong record that a rule is not only necessary but has prior buy-in from regulated entities.

Agencies may also mitigate *Loper Bright's* impacts by avoiding the rulemaking process entirely. Policy letters and interpretive statements require neither public input nor transparency but effectively compel compliance from regulated entities. When used appropriately, these tools serve as de facto regulations, although they bypass the procedural guardrails intended to facilitate stakeholder input and may be challenged.[114]

Finally, administrative agencies may simply ask Congress for statutory clarity in their authorities. *Loper Bright* and *West Virginia* do not prohibit agencies from acting within their expertise, but functionally prevent agencies from getting too far in front of Congress when doing so. One major critique of *Loper Bright* is it treats the rulemaking process as completely siloed from the legislative process. But Congress and agencies do not make music like Bernie Taupin and Elton John, with Congress writing the lyrics alone and passing them off to agencies to create the score.[115] In practice, Congress and agencies work closely together. In the author's experience,

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[114] Perhaps the most well-known recent example of a policy letter is from the Department of Education. Dep't of Educ., Civ. Rts. Off., Policy Letter on Title VII Discrimination After SFFA v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf. With this letter, the Trump Administration attempted to coerce compliance from various schools and universities to pull back on Diversity, Equity, and Inclusion efforts based on an expansive interpretation of existing law. Much remains to be seen how this effort will play out in practice or in the courts.

[115] Bernie Taupin is the lyricist for many of Elton John's songs. Bernie Taupin usually writes lyrics and then passes them to Elton John to compose music for those lyrics with minimal additional interaction. Jim Farber, *Bernie Taupin is Still Standing*, VULTURE (Sept. 17, 2023), https://www.vulture.com/article/bernie-taupin-in-conversation.html.

Congress seeks agency input and comment before adjusting statutory authority.[116]

2. The Chief Executive

At first glance, *Loper Bright* and the assault on expertise may appear to weaken the Chief Executive along with their administrative agencies. However, the President may still issue Executive Orders to carry out their agenda. Executive Orders carry the force of law and do not require public comment. Federal courts may also give more deference to Executive Orders under the theory that the President holds elected office, and therefore is more directly accountable to the public for unpopular Executive Orders. After *Loper Bright*, Executive Orders remain a valuable tool to consolidate executive branch power in the policy process.

3. Congress

The author offers that Congress has neither lost nor gained relative power through the assault on expertise. However, the new paradigm places greater responsibility upon Congress to exercise the power it holds. Congress may no longer passively wait for administrative agencies to leverage their own expertise to solve policy problems. In this new era, Congress likely needs to exercise more active oversight authority. In the alternative, Congress may delegate authority more explicitly for agencies either to interpret their own statutes or to tackle novel policy issues. Neither *Loper Bright* nor the Major Questions Doctrine prohibit Congress from allowing agencies to lean forward to solve policy problems, but Congress must be clear in its delegations.

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[116] Jarrod Shobe, *Agencies as Legislator: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 455 (2017).

4. Industry

Loper Bright and the assault on expertise have increased the relative power of industry in the policy process. The author argues that the overruling of *Chevron* deference and the Supreme Court's approval of the MQD have handed industry de facto veto power over novel agency regulations. In addition to challenging regulations on major questions doctrine grounds, industry can take two major actions to consolidate its new strength in the policy process.

First, industry should continue to seek seats on federal advisory committees. Agencies might be more tentative now in advancing novel regulations, particularly those dealing with emergent technology. For these policy issues, industry may hold greater expertise than the agencies themselves. Through advisory committee participation, industry can drive agency action and regulatory projects by exploiting the expertise differential between the private sector and agencies.

Second, industry should provide thorough and detailed comments to any agency rulemaking that drives significant changes in a regulatory space. Although such comments will require resources to create, these comments may provide a strong warning to agencies that they are treading into MQD territory or otherwise risk adverse judicial rulings on their proposed actions. Conversely, strong industry support of favorable, but novel, regulation, may help the agency develop the record it needs to withstand judicial scrutiny.

5. Nonprofit Sector

Nonprofit advocacy groups have lost some relative public policy power after *Loper Bright*. These groups should adjust their advocacy in two major ways to retain their influence. First, these advocates should provide more frequent and detailed comments on proposed federal rules. As with industry stakeholders, advocacy groups have an interest in creating a strong administrative record for or against proposed rules.

Second, nonprofit advocacy groups should focus their agenda setting efforts away from the federal administrative agencies and more toward federal legislative, international, and state-level efforts. At the federal level, legislative advocacy may yield more certain results because of agencies' reduced power to craft novel and innovative rules that align with advocates' preferred positions. International advocacy may also provide more return on investment in today's environment, especially when international treaties are well-entrenched in the policy landscape for the nonprofit advocates' policy issues. Within the United States, state-level administrative advocacy may also yield positive results.

6. Attorneys

Although *Loper Bright* is part of a broader paradigm shift in public policy, this shift opens opportunities for attorneys to add value in new ways for their clients. Attorneys traditionally focus on building and arguing cases at the decision-making stage of the policy process. Attorneys should broaden their perspective and view themselves as "policy entrepreneurs" across all stages of the policy process.[117] With expertise now devalued in the policy process, coalition building across sectors and industries may become just as important as technical knowledge about a given policy issue. The best attorneys will develop strong networks not just within the legal profession, but throughout their clients' industries.

For private sector attorneys, this means forgoing some billable hours to build true relationships with clients and a deep understanding of their needs. Keep up with the public policy affecting your industry. Regularly advise your clients of upcoming legislative oversight hearings and agency rulemakings. Zealously advocate for public policy positions just as you would for their interests in the courtroom or at the negotiation table.

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[117] *See generally* KINGDON, *supra* note 51, at 179.

For public sector attorneys, this means reaching across sectors to build relationships with the private bar. To be sure, the federal standards of conduct may place some limits on how you interact with private sector attorneys,[118] but they do not prohibit professional relationships. Also, get to know your regulators and how they perceive the current regulatory structure. Agency bureaucrats will provide you with important information on regulatory gaps and industry perspective you may not get from private counsel.

V. BROADER IMPLICATIONS

As Part IV stated, the post-expertise era represents a "paradigm shift" for law and public policy. This paradigm shift will have implications not just for policy actors within the ecosystem, but also for theory building at the intersection of law, public administration, and public policy. This Part analyzes a non-exhaustive list of topics and issues in the post-expertise era.

First, to what extent will ideology run rampant in the policy process? Expertise ultimately serves as a pragmatic check on undisciplined decision-makers. In a policy system which values expertise, public policy proceeds incrementally. To be sure, a change in federal executive administrations always brings policy changes. However, these changes typically are predictable, with advance notice for the regulated community to provide comments to rulemakings or to engage in legislative advocacy as a new administration shapes its agenda. When expertise is valued, public policy is like a large, but stable, commercial maritime vessel in the open ocean. When the vessel rolls to port (or left), for example, it only heels over a few degrees. The physical forces on the vessel then cause the vessel to return upright and heel over just a few degrees to starboard

[118] For example, most federal public sector attorneys must follow Standards of Ethical Conduct for Employees of the Executive Branch. *See* 5 C.F.R. § 2635 (2025).

(right). The vessel's movements are smooth and predictable, not too far left or not too far right.

In the absence of expertise, however, there is no check on hasty public policy decisions. As institutional policy actors seek end-around approaches that require no public notice or input, ideology may trump expertise as the dominant force in the policy process. Coalition-building, professional networks, and mass communications strategies become more important than technical expertise when decision-makers eschew linear policy formulation for quick and easy policy solutions. Public policy in the post-expertise era is no longer an inherently stable vessel. Without effort from policy actors to offset the degradation of expertise, the vessel heels over dangerously and cannot maintain a steady course and speed. Indeed, if ideology flows unimpeded into public policy spaces the vessel of public policy may heel over one direction and never recover to its fully upright position.

The assault on expertise also has implications for the "Rule of Law." When the Rule of Law exists in society, this means laws and rules exist, and that society is willing to follow those laws and rules.[119] In other words, society is bound together by a culture of legal compliance. The public accedes to the rule of law because the public perceives the system to be legitimate. Expertise is one driver of legitimacy in law and public policy. When society perceives laws to be technically proficient, either in their substance, their process, or both, then the public is more likely to follow those laws. When society views the system as legitimate, then public policy is seen as a regular push and pull of competing interests, with the opportunity to engage the system to advocate for change when necessary.

Without expertise as a source of legitimacy, however, society might be less likely to view public policy as legitimate. Those who object to a given policy may view it as illegitimate or

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[119] *See* Monika Zalnieriute et al., *The Rule of Law "By Design?,"* 95 TUL. L. REV. 1063, 1067-68 (2021) (noting that the legal academy describes "the rule of law" as "one of the most iconic and prominent social values." When the rule of law exists, then citizens feel bound by the law and the "legal system" itself "is free from certain threats").

substantive grounds, procedural grounds, or both. Substantively, those who oppose policy may perceive it lacks the proper technical foundation. Procedurally, those who oppose policy may perceive it as illegitimate because there appears to be no way to participate meaningfully in any process to overturn the existing policy.

The assault on expertise may also have significant implications for the role of law as a source of values in society.[120] The U.S. Constitution,[121] court decisions,[122] and many administrative law statutes inject values of fairness, equality, and transparency into our public policy process.[123] Taken together, these laws and values presume the existence of a functioning bureaucracy with the procedural expertise to facilitate stakeholder input and the substantive expertise to conduct meaningful review of the stakeholder input as a basis for policy recommendations to a decision maker.

The assault on expertise may impact the role of law as a source of values in two main ways. First, without institutional bureaucratic expertise to facilitate policy formulation, competing policy proposals are more likely to reach decision-makers without being tested through community or stakeholder engagement. The result may be more top-down policy directives that fail to address community needs. Second, a greater use of non-deliberative policy tools such as interpretive guidance and policy letters, rather than

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[120] These values include equal protection and due process, social equity, and transparency. U.S. CONST. amend. V, XIV; H. George Frederickson, *Public Administration and Social Equity*, 50 PUB. ADMIN. REV. 228 (1990); Lisa B. Amsler, *Collaborative Governance: Integrating Management, Politics, and Law*, 76 PUB. ADMIN. REV. 700, 704 (2016) ("administrative law reflects six key public values: those commonly addressed in the literature—accountability, efficiency, effectiveness, transparency, participation—but also collaboration.").

[121] U.S. CONST. amends. V, XIV.

[122] *See, e.g.,* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (declaring "separate but equal" segregation by race unconstitutional in public schools).

[123] *See, e.g.,* Administrative Procedure Act, 5 U.S.C. § 551; Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2024); Federal Advisory Committee Act, 5 U.S.C. § 1001.

rulemaking, will force those who oppose policy to constantly play defense. Opponents may not be willing or able to commit the resources necessary to challenge these policy tools through federal lawsuits. Therefore, the courts might be less likely to judge the validity of policy outputs in the post-expertise era.

The assault on expertise also holds implications for the policy process model and Kingdon's policy streams model. Devaluation of expertise in the policy process may impact how policy actors work within each stage and how the stages relate to each other. The author offers that the post-expertise era may impact the models in three main ways. First, policy may move more quickly from the agenda setting stage to the policy output stage within the policy process model. To the extent that decision-makers devalue expertise, they may be more likely to bypass stakeholder input. Second, and by reference to Kingdon's policy streams model, policy actors must be more attuned to policy windows opening in irregular ways. For example, in this new era, social media posts may open policy windows just as powerfully as regular election cycles or scheduled oversight committee hearings. Finally, policy entrepreneurs may hold more relative power in the post-expertise era. To the extent that policy moves much more quickly from idea to implementation, policy entrepreneur skills may become more important than substantive policy expertise, because entrepreneurs can leverage networks to coordinate rapid policy efforts.

VI. LIMITATIONS AND CONCLUSION

The author acknowledges three major limitations to this article. First, this article admittedly focuses on and critiques recent conservative action. This article, however, is not intended to be a political statement. The purpose of this article is to highlight impacts on public policy arising out of the general assault on expertise. To the extent that the assault on expertise erodes normative guardrails in our public policy system, the loss of those guardrails exposes the system to ideological influence from any political perspective.

Second, this article focuses on U.S. federal law to the relative exclusion of state law and policy. The legal and public administration academies tend to focus on federal law and practice, and it is a valid question whether this general approach best serves students and the fields. With that said, the author perceives the assault on expertise as primarily a federal issue. States may have different legal structures in place that preserve expertise, and state public policy ecosystems may therefore be shielded to a large degree from the federal assault on expertise.

Finally, this article represents the author's informed hypotheses about how the assault on expertise will impact law and public policy. This article, however, like most legal scholarship, is normative rather than empirical. The author encourages law and public administration scholars to test the claims in this article through empirical testing and research.

In conclusion, when viewed solely through a legal lens *Loper Bright* might seem no more than a slight shift in the law of judicial deference. After all, the Supreme Court does not forbid judicial deference to agency interpretations of their own statutes, and *Skidmore*[124] deference likely remains in place for now. But such a perspective misses the bigger picture. *Loper Bright*, *West Virginia*, and other appellate cases suggest the current conservative U.S. Supreme Court devalues expertise. Law, of course, reflects society, and these rulings align with a broader public attack on expertise. From the demonization of the apolitical civil service, to the recent purge of federal civil service employees, to broad firings of Department of Homeland Security advisory committee members, we may view *Loper Bright* as just one part of a broader assault on expertise with significance beyond the courtroom and into the policy process.

This assault on expertise has significant implications for the practice and theory of law, public administration, and public policy. At a broad level, the culling of expertise opens the door for unchecked ideology to drive public policy. This paradigm shift in the policy ecosystem has recalibrated the relative power and influence of both institutional and individual policy actors.

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[124] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

In the post-expertise era, institutional and individual policy actors must adjust their strategies either to solidify their new relative strength or to offset their loss of relative power.

For attorneys, the post-expertise era places a premium on coalition-building and proactive lawyering throughout the policy process. Although lawyers will always possess unique skill and license to guide clients through the decision-making phase of public policy, the speed of policy development and implementation may increase. Attorneys must broaden their vision and skills to help their clients shape policy from agenda setting through the program evaluation stages. In short, attorneys must become "policy entrepreneurs."[125]

For legal scholars, the post-expertise era offers the opportunity to study the role of law, and indeed the Rule of Law, in a hollowed-out administrative state. For example, how do Constitutional principles inject value into the policy process when decision-makers avoid using deliberative and transparent policy tools? How does the loss of collective career knowledge at institutions such as the Department of Justice impact civil rights litigation and enforcement? These are just two of the many important research questions the legal, public administration, and public policy academies should address together in the coming years.

In summary, *Loper Bright* is but one example of a broader assault on expertise with implications for the practice of law and public policy. As scholars and practitioners, we must acknowledge the post-expertise era is upon us. Pragmatic research and practice will help us identify how policy ecosystems work differently in this new era and how we can preserve normative values in the practice of law and public policy.

[125] KINGDON, *supra* note 51.

THE ELECTIONS TRANSPARENCY ACT: A STEP BACKWARD FOR FAIR AND DEMOCRATIC ELECTIONS IN THE SOPRANO STATE

Sally Abdulraouf

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INTRODUCTION

Despite being described as the "antithesis of good government" and decried as a "transparent abuse of power" by former State Judge Stephen M. Holden,[1] on April 3, 2023, New Jersey's Governor Phil Murphy reshaped the state's campaign finance laws and the independent Election Law Enforcement Commission by signing the Elections Transparency Act into law.[2] Even though "all four members of the New Jersey Election Law Enforcement Commission (ELEC)" resigned in protest,[3] the governor responded by utilizing his newly gained powers to appoint new commissioners who agreed "unanimously to toss 107 cases, including complaints against four of the 'big six' political party committees . . . [that] allegedly failed to comply with campaign finance quarterly reporting requirements in 2017."[4] Meanwhile, cities like Jersey City, which had strict pay-to-play ordinances in place, were forced to repeal their own local laws because the new Act preempted them.[5]

What was publicized as a bill that was intended to reform campaign finance and tackle the issue of dark money in politics, in a short time, proved to be rather a setback for reform efforts as well as the fairness of the electoral process in New Jersey. At

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[1] *See* Tracey Tully, *Gov. Murphy Signs Law Decried as 'Frontal Assault' on Good Government,* N.Y. TIMES (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/nyregion/new-jersey-phil-murphy-campaign-finance.html.

[2] S. 2866, 220th Leg., 2022-2023 Sess. (N.J. 2023).

[3] Lawrence Norton & Lyndsay O'Reilly, *New Jersey Overhauls Pay-to-Play and Other Campaign Finance Laws,* JD SUPRA (Apr. 11, 2023), https://www.jdsupra.com/legalnews/new-jersey-overhauls-pay-to-play-and-9093574/.

[4] Dana Difilippo, *New Jersey's Election Watchdog Dumps 107 Cases After Controversial Law Cuts Investigation Time*, N.J. MONITOR (July 25, 2023), https://newjerseymonitor.com/2023/07/25/new-jerseys-election-watchdog-dumps-107-cases-after-controversial-law-cuts-investigative-time/.

[5] Daniel Israel, *Jersey City Takes First Steps To Repeal Pay-To-Play Reform Ordinance*, TAP INTO JERSEY CITY, https://www.tapinto.net/towns/jersey-city/sections/government/articles/jersey-city-takes-first-steps-to-repeal-pay-to-play-reform-ordinance (Dec. 5, 2023, 4:48 AM).

a time when "[l]arge shares of the public see political campaigns as too costly, elected officials as too responsive to donors and special interests. . . ."[6] Governor Murphy decided to sign into law an Act that doubled the donation limits, extensively reduced "the time for investigating allegations of impropriety to two years, down from 10," and granted himself the authority "to appoint an entirely new four-person election board, [while] circumventing the traditional approval needed from the State Senate."[7] The ramifications of this Act on the electoral process and campaign finance were apparent during the 2023 November General Election. However, the lasting impact of the act is anticipated to extend far into the future, particularly regarding the surge in campaign spending at all levels, decline in voter turnout, narrowing of the candidate pool, and erosion of trust in the fairness and integrity of democratic elections and government institutions.

I. THE HISTORY OF CAMPAIGN FINANCING

The influence of money in U.S. elections has been apparent and well recognized since the mid-1700s. Historian Stern Randall proclaimed that George Washington lost his first campaign for the Virginia House of Burgesses in 1757 because he failed to spend money on food and alcohol for his voters.[8] Since then, the costs of elections have ballooned exponentially due to factors such as technological advancements, which revolutionized campaigning and the altered the dynamics of electoral politics, the proliferation and utilization of campaign strategists, as well as the expansive role of government over the years that in turn created an environment where special

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[6] Andy Cerda & Andrew Daniller, *7 Facts About Americans' Views of Money in Politics*, PEW RSCH. CTR. (Oct. 23, 2023), https://www.pewresearch.org/short-reads/2023/10/23/7-facts-about-americans-views-of-money-in-politics/

[7] Tully, *supra* note 1.

[8] Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 755 (2012).

interests are incentivized to invest heavily and compete in elections to gain access and influence over public policies.

A. From "Party-Centered" to "Candidate-Centered" Elections

Up until the 1960s, electoral politics can be described as "party centered, locally governed, and profoundly hierarchical, ruled by party bosses who decided party affairs . . . ."[9] Candidates benefitted from "party-sponsored newspapers, the distribution of party ballots to voters, and 'treating' voters to popular forms of entertainment."[10] However, with the rise of new technology, the role of money in electoral campaigns became even more vital. The growing utilization of television and radio by political candidates since the late 1950s and 1960s allowed for the arrival of the candidate-centered era, as it enabled candidates to connect directly with their electoral bases and to rely less on party endorsements and more on their image.[11] In 1959, then-Senator John F. Kennedy declared that with the arrival of the televised elections era, "Party leaders are less willing to run roughshod over the voters' wishes and hand-pick an unknown, unappealing or unpopular in the traditional 'smoke-filled room' when millions of voters are watching, comparing and remembering."[12]

However, either chosen party did not totally lose its influence, rather, it gained a new role centered around constructing strong campaign finance infrastructure, employing professional fundraisers, and cultivating loyalty among donors,

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[9] Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 550 (2016).
[10] Raymond J. La Raja, *Why Soft Money Has Strengthened Parties*, *in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 69, 70 (Anthony Corrado, Thomas E. Mann & Trevor Potter eds., 2003).
[11] Kang, *supra* note 9, at 552.
[12] Alex Pasternack, *"A Force That Has Changed the Political Scene": JFK's Essay on His Favorite (and Most Feared) Technology,* VICE (Nov. 14, 2010, 7:10 PM), https://www.vice.com/en/article/nzz7ax/a-force-that-has-changed-the-political-scene-when-jfk-schooled-america-on-tv-in-politics.

vital for establishing electoral war chests that allowed them to compete and to utilize modern technology in their favor.[13] Political parties employed "strategies developed by commercial enterprises to identify and inform citizens: direct mail, surveys, and telephone calls."[14] However, the great costs associated with this new medium and campaign tools allowed the big financial contributors, public relations experts, and demagogues, to "tell the candidate not only how to use TV but what to say, what to stand for and what 'kind of person' to be."[15]

B. The Rise of Special Interests

In electoral politics, money is a powerful instrument that not only enables parties and candidates to connect with voters and broadcast their platforms but also gives those who wield it crucial leverage when it comes to influencing electoral outcomes and policymaking. Nowadays, even "[m]inors under the age of eighteen, incarcerated prisoners, corporations, unions, political parties, and political action committees [who] cannot vote…have the ability to influence … federal, state, and local elections with their checkbooks." [16]

Over time, various entities that contribute funds to electoral campaigns have gradually gained sway over the political process. Since the 1970s, the business sector, alongside other interest groups, has emerged as one of the most influential entities in electoral politics. The proliferation of lobbying groups acting on behalf of business interests allowed them to utilize electoral expenditure and donations to sway legislation in their favor, to avoid strict regulations, and ultimately pursue narrow economic interests.[17] Nowadays, "the biggest companies have upwards of 100 lobbyists representing them,

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[13] *See* Kang, *supra* note 9, at 553.
[14] La Raja, *supra* note 10, at 78.
[15] *See* Pasternack, *supra* note 12.
[16] Eugene D. Mazo, *Our Campaign Finance Nationalism,* 46 PEPP. L. REV. 759, 762 (2019).
[17] *See* RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 60, 65, 72 (2015).

allowing them to be everywhere, all the time…[and] [o]f the 100 organizations that spend the most on lobbying, 95 consistently represent business."[18]

1. Soft Corruption

Money is an inevitable reality of politics and electoral campaigns, and while its presence is not inherently problematic, it is the way that it is usually employed that requires critical examination and scrutiny. Corruption, existing in its various forms, is not always conspicuous or easily identifiable, especially in the realm of campaign finance. Corruption can take the form of *soft* corruption, a subtle and hard-to-trace form of misconduct or "quid pro quo" wrongdoing, that thrives on exploiting loopholes and ambiguities within the legal system. Soft corruption "is found in the exploitation of such political and governmental activities as campaign finance, lobbying, patronage, and the electoral process, as well as potential conflicts of interest where a public official acts on government matters that provide personal rewards."[19] For example, when individuals manipulate government functions for personal gains or political advantages, or when legislative leaders seek sizable campaign contributions from special interests in exchange for legislative outcomes, that is soft corruption. Similarly, soft corruption occurs when lobbyists, acting on behalf of special interests or corporations, organize fundraising events for legislative candidates, and when "lawmakers do the bidding of lobbyists against the best interests of their constituents and the general public, they are engaging in soft corruption."[20] Quid pro quo rewards could be businesses receiving favorable narrowly tailored tax breaks, law firms being appointed as legal counsel

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[18] Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATL. (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/.

[19] WILLIAM E. SCHLUTER, SOFT CORRUPTION: HOW UNETHICAL CONDUCT UNDERMINES GOOD GOVERNMENT AND WHAT TO DO ABOUT IT 4 (2017).

[20] *Id.* at 8.

to the government, or labor unions, contractors, and developers obtaining special permits, favorable treatment from regulatory agencies, or being awarded government contracts, even if they did not offer the lowest or most beneficial bid; that is soft corruption.[21]

2. Addressing Soft Corruption: Campaign Finance Regulations at the Federal Level

Amongst the various forms of soft corruption, campaign finance is the most dominant form. " It pertains to the funding of a particular campaign…the formation of a political action committee, the spending by a political party, the transfer of dollars from one war chest to another, the funds spent to influence voters to vote yes or no on a public question, and much more."[22] Often seen as an inevitable aspect of the electoral system, when campaign finance is plagued by dark money and quid pro quo exchanges, it "subvert[s] the quality of public policy, thus adversely affecting traditional government responsibilities such as education, health care, transportation, and social services."[23] For decades, laws and reforms have been introduced to mitigate the influence of corruption in campaign finance and electoral politics by individual states as well as Congress. Reforms introduced throughout history developed through three major eras: the Progressive Era, the Post-Watergate Era, and the *Citizens United* Era.[24]

a. The Progressive Era

During the late nineteenth and early twentieth centuries, railroads, utilities, and corporate giants emerged as dominant special interests, exerting significant influence on legislation

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[21] *Id.* at 7.
[22] *Id.* at 8.
[23] *See id.* at 4.
[24] *See* Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL'Y REV. 217, 217 (2013).

through their contributions to local and state elections.[25] In response, state legislatures began implementing campaign finance laws that restricted campaign spending and required disclosure of funding sources, but did not impose limits on contributions.[26] In line with the initiatives undertaken by states, Congress passed the Tillman Act in 1907 to ban direct contributions from businesses, however, corporate interests managed to find and utilize the loopholes in the system through soft money contributions, lobbying, and expenditure on political ads.[27] In another attempt to curb corporate interests, Congress tried to impose more regulations on campaign finance in 1947 by requiring "groups to identify themselves and file financial information – expenditures and receipts – for any direct lobbying of legislators."[28] Since then, and against the backdrop of a political scandal that shook the political scene, Congress's reform initiatives and attempts to regulate campaign finance grew increasingly proactive.

b. The Post-Watergate Era

During what is referred to as the "post-Watergate era," there was a notable development in federal finance regulations, designed to further restrict and oversee campaign expenditure and contributions. Congress passed the Federal Election Campaign Act (hereinafter "FECA") in 1971, thus establishing contribution limits, disclosure requirements for contributions and expenditures by campaigns, and requiring campaigns to maintain records of the names and addresses of donors.[29] Not too long after its passage, FECA was challenged on constitutional grounds, and its provisions were amended. In

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[25] SCHLUTER, *supra* note 19, at 5. *See also* Johnstone, *supra* note 24 at 220;
[26] Johnstone, *supra* note 24, at 5.
[27] Kevin Weber, *Unsuccessful Campaign Finance Reform: The Failure of New Jersey's 2004-2005 Pay-to-Play Reforms to Curb Corruption and the Appearance of Corruption*, 38 SETON HALL L. REV. 1443, 1453 (2008).
[28] Robert F. Sittig, *Campaign Reform: Interest Groups, Parties, and Candidates,* ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1995, at 85, 86 (1995).
[29] *See* Johnstone, *supra* note 24, at 223.

Buckley v. Valeo (1976), the Supreme Court ruled that "the First Amendment requires the invalidation of the Act's independent expenditure ceiling, § 608 (e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608 (a), and its ceilings on overall campaign expenditures, § 608 (c)."[30] However, the Court found "no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act."[31] The Court reasoned that when it comes to expenditure limits, "eliminating corruption or the appearance of corruption was not a sufficient regulatory rationale, because campaign expenditure did not directly create the quid pro quo relationship between candidate and donor that would lead to corruption."[32] However, a "limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication . . . for it . . . does not in any way infringe upon the contributor's freedom to discuss candidates and issues."[33]

FECA was further amended in 1979, whereby most of its reporting requirements were removed, and the threshold for the disclosure of contributions was raised to $200, and to $250 for expenditure-related disclosures.[34] Such reforms perpetuated the problem of high entry costs for challengers and potential candidates who do not have access to full war chests and relied on direct contributions. Meanwhile, incumbents who relied extensively on financial support from wealthy donors and business interests remained in power and continued to owe them political favors. The persistence of this dynamic not only allowed for the rise of the PACs and diversion of resources to outside interest groups, but it also intensified partisan rhetoric and exacerbated voter alienation.[35] Hence, it is clear that given the potential for unintended consequences and unpredictable

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[30] *Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976).
[31] *Id.* at 84.
[32] William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 348 (2000).
[33] *Id.* at 348-49.
[34] *See* Johnstone, *supra* note 24, at 223.
[35] *See* Marshall, *supra* note 32 at 354-373.

outcomes arising from campaign finance regulations, it is essential that such laws undergo periodic review to safeguard the integrity of the electoral process while also safeguarding liberties and freedoms.

c. The *Citizens United* Era

In the post-*Buckley* era, contribution limits and mandatory disclosure became "the primary permissible means of regulation, and anti-corruption and publicity are the primary permissible ends of regulation."[36] In 2010 the Supreme Court delivered another blow to campaign finance regulations with its *Citizens United v. FEC* decision.[37] Relying on the First Amendment, the Supreme Court invalidated all state contribution limits on independent committees, PACs, advocacy groups, corporations, and unions, citing that such measures violate the right to free speech.[38] The Court treated corporations and unions the same as individuals, and ruled that they "can give unlimited sums on behalf of or in opposition to an identified candidate or issue, providing these expenditures are not coordinated with a specific campaign."[39] Furthermore, in *Speechnow.org v. FEC,* the Court found it "unconstitutional to apply contribution limits to PACs that made only independent expenditures…[and] Super PACs are able to raise unlimited sums, regardless of whether it is given to them by individuals or corporations, and to spend unlimited sums."[40] As for 501(c)(4) organizations, they are not required to disclose the names and information of their donors to the FEC.[41] Consequently, a "plethora of super PACs and social welfare-focused 501(c)(4) organizations entered the political scene."[42]

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[36] Johnstone, *supra* note 24, at 226.
[37] Citizens United v. FEC, 558 U.S. 310 (2010).
[38] Gaughan, *supra* note 8, at 759-60.
[39] SCHLUTER, *supra* note 19, at 6.
[40] Mazo, *supra* note 16, at 810-11.
[41] *Id.*
[42] Sheila Krumholz, *Campaign Cash and Corruption: Money in Politics, Post-Citizens United,* 80 SOC. RSCH.: INT'L Q., 1119, 1125 (2013).

After the *Citizens United* decision, the floodgates opened for anonymous contributions to political campaigns at all levels, allowing corporations and issue-specific PACs to inject information and influence the policy debates and electoral outcomes with little to no accountability.[43] For example, in 2010, "[e]ighty-three newly minted Super PACs quickly raised more than $60 million for the 2010 elections…[and] election spending by all outside groups…increased dramatically…to more than $300 million."[44] And merely 2 years later, outside groups were able to raise and "spend more than $1 billion for the 2012 elections, with roughly 1310 Super PACs raising more than $800 million and accounting for more than $600 million of the total spending."[45] It is not surprising that recent elections are characterized by the ever-increasing amounts of money and expenditure at the local, state, and federal levels.

3. Unintended Consequences and Loopholes

Campaign finance reforms, even though promoted as well-intentioned efforts to increase transparency and fairness in elections and campaigning, and more importantly, to curb the influence of dark money in politics, instead benefited incumbents, business interests, and further eroded the public's trust in the government and its institutions.

a. The Rise of Business Interests

The increasing influx of money into electoral politics, perpetuated by the removal of expenditure limits and the empowerment of PACs and other outside spending sources, produced "significant temptation to engage in soft

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[43] Michael Latner & Gretchen Goldman, *Fighting Corruption, Promoting Evidence: Reforms to Strengthen Democracy for the Public Good,* CTR. FOR SCI. & DEMOCRACY: UNION CONCERNED SCIENTISTS (Apr. 4, 2019), https://www.ucs.org/resources/fighting-corruption-promoting-evidence.
[44] Kang, *supra* note 9, at 594-95.
[45] *Id.* at 595.

corruption."[46] Examples of soft corruption that end up passing legal muster include when "legislative leaders seek large campaign contributions from special interests that have a stake in pending legislative proposals with an unspoken quid pro quo … [or] [w]hen lobbyists conduct fund-raising events for legislative candidates."[47] Even when looking at individual donors, a trend emerges that highlights the dominance of business interests over electoral finances, either through the influence of business executives and professionals or lobbyists.[48]

While business interests have long exerted influence over American politics, the reforms of the past decades ushered a new era of electoral politics characterized by unprecedented levels of spending. Outside spending on federal elections, which historically ranged around $20 millions throughout the 1990s, rose to around $330 millions in 2008, and following the *Citizens United* decision it reached $1 billion mark in 2012, and then the $1.4 billion mark in 2016.[49] It is reported that corporations "spend about $2.6 billion a year on reported lobbying expenditures…[and] [t]oday, the biggest companies have upwards of 100 lobbyists representing them…[and][o]f the 100 organizations that spend the most on lobbying, 95 consistently represent business."[50]

Although it is hard to find overt evidence linking PACs contributions to politicians' votes, studies have consistently demonstrated that "politician's positions reflected the preferences of their donors to an uncanny extent."[51] For example, in a study that examined letters sent by lobby groups

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[46] SCHLUTER, *supra* note 19, at 6.
[47] *Id*. at 4.
[48] *See* Krumholz, *supra* note 42, at 1123.
[49] Eugene D. Mazo & Timothy K. Kuhner, *Democracy by the Wealthy: Campaign Finance Reform as the Issue of Our Time, in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 1, 5 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).
[50] Drutman, *supra* note 18.
[51] Nicholas Stephanopoulos, *Aligning Campaign Finance Law, in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 74, 74-75 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

to Senate committees, the author found that lobby groups that fundraised for a committee member had a better chance of having their requests answered, reflected by the amendments introduced by the committee members and votes, than if they did not fundraise for that member.[52] Further, "members of Congress may be more inclined to do favors for groups that fundraise for them than for groups with whom they share a political ideology."[53] Such findings highlight the dynamics of political influence, as well as the significant role campaign fundraising plays in shaping legislative work. Ultimately, this dynamic is advancing a form of democracy that is "premised on responsiveness to the large donors and spenders,"[54] rather than reflecting the will of the people.

b. Endurance of Incumbents in Maintaining Political Power

The growing influence of the business sector on policymaking and the resulting proliferation and normalization of quid pro quo exchanges involving policymakers favors incumbents. In exchange for favorable policies and regulations, incumbents are rewarded with expenditure and donations from corporations through PACs and lobbying firms.[55] The business sector invests in incumbents to gain access and influence over the policymaking process and to ensure that regulations do not harm their interests. In return, incumbents, while in office and while campaigning, prioritize the interests of their biggest donors, rather than their constituents, to maintain the flow of campaign funds and expenditure by businesses and PACs.

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[52] Amy M. McKay, *Fundraising for Favors? Linking Lobbyist-Hosted Fundraisers to Legislative Benefits*, 71 POL. RES. Q. 869, 876 (2018).
[53] *Id*.
[54] Timothy K. Kuhner, *The Third Coming of American Plutocracy: What Campaign Finance Reformers Are Up Against, in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 19, 51 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).
[55] *See* LA RAJA & SCHAFFNER, *supra* note 17, at 72-79.

Conversely, challengers who typically campaign on platforms advocating for change, are usually backed by unions, single-issue groups, and advocacy organizations.[56] Unlike incumbents who have established "names" and "images," challengers compete on unequal grounds due to the lack of established reputation and lack of sufficient funding needed to publicize their agenda through the media. Over time, this has skewed electoral outcomes in favor of incumbents and affected the diversity of and limited the perspectives of the candidacy pool at the local, state, and federal levels. This dichotomy highlights the significant influence of the various interests over politics and policymaking. Additionally, it leads to the erosion of public trust in elected officials, the democratic electoral process, and democratic values, and increases the barriers to entry for challengers, who are more likely to rely on individual donors and grassroots groups in funding their campaigns.

c. The Electorate's "Crisis of Confidence"

Consequently, this environment led to a "crisis of confidence," as President Jimmy Carter called it, that made citizens lose faith "not only in government itself but in the ability as citizens to serve as the ultimate rulers and shapers of our democracy."[57] Despite the anticipation that the increase in educational attainment, and the enfranchisement of 18-year-olds and African Americans voters in the South during the 1960s and 1970s, would result in a rise in voter participation over time, against the backdrop of political scandals, diminishing confidence in officials and government responsiveness, it instead led to decline in voter turnout.[58]

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[56] *Id.* at 66.

[57] President Jimmy Carter, Televised Address: Crisis of Confidence (Jul. 15, 1979).

[58] Stephen D. Shaffer, *A Multivariate Explanation of Decreasing Turnout in Presidential Elections, 1960-1976*, 25 AM. J. OF POL. SCI. 68, 92 (1981); *see also* Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502, 502 (1982) (the author notes that although the data suggest these attitudinal changes contributed to the

First, wealthy donors, PACs, lobbyists, and corporations are not representative of the general population, neither ideologically nor demographically. For example, wealthy donors who tend to be white, middle-aged males tend to be more conservative than the general population, especially on issues pertaining to public funding for education and healthcare, tax cuts for businesses, increased privatization, and reduction of the power of unions.[59] Feeling disenfranchised and overpowered by these narrow interests, voters are left discouraged from participating in elections.

Additionally, with every election, the prominence of foreign influence on electoral finance is on the rise, further fueling the discrepancy in representation. In *Bluman v. FEC,* the Supreme Court barred non-US citizens from contributing to political elections as well as "express advocacy expenditures"; however, it allowed foreigners to contribute to issue advocacy, and excluded citizens of other states, minors, and corporations from its holding.[60] Consequently, "[i]n 2018, a record 238 PACs belonging to the U.S. subsidiaries of foreign corporations supported political candidates across the United States, contributing more than $23.5 million to American electoral campaigns in total."[61] Meanwhile, candidates for the U.S. House of Representatives "received an average of 73.8% of their contributions from outside of their districts,"[62] and "[i]ncumbent Senators running for re-election in 2018, 41.9% of their contributions on average came from within state and 58.1% came from out of state."[63] This, in turn, makes it more likely for lawmakers to support policies that align with the positions of their donors rather than their own constituents, and this becomes more salient if there are obvious demographic and

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decline in voter participation, a causal relationship cannot be conclusively established).

[59] Mazo & Kuhner, *supra* note 49, at 6-7.

[60] Blumen v. FEC, 565 U.S. 1104 (2012).

[61] Eugene D. Mazo, *Our Campaign Finance Nationalism,* 46 PEPP. L. REV. 759, 810 (2019).

[62] *Id.* at 798.

[63] *Id.* at 802.

socio-economic disparities between the two groups. Foreigners and out-of-state donors can also influence elections at the state and local levels by contributing to 501(c)(4), and since they are not regulated by the FEC and are not required to disclose the names of their donors, voters have no access to data that would reveal information about the identity of the contributors, including foreign entities.[64]

C. Striking the Balance Between Contribution and Expenditure Limits in Campaign Finance

Proponents of the deregulation measures often claim that since there is no evidence that there was a "significant decline in political corruption in the United States since the adoption of campaign finance legislation in the 1970s,"[65] then imposing contributions and expenditure limits is pointless. Some even go further and argue that contribution limits produce negative effects. For example, Anthony J. Gaughan argues that contribution limits force candidates to spend most of their time chasing small contributions to raise money for their campaigns, which turns them into "perpetual fundraisers" instead of productive officials.[66] Moreover, when it comes to incumbents who possesses power, prominent platform, established reputation, and a strong base of supporters, imposing contribution limits may disproportionately impede challengers from being able to launch effective campaigns, convey their message to the electorate, and compete on an equal footing with the incumbent's established level of influence and popularity.[67]

Since the FEC's contribution and expenditure limits do not extend to PACs and other independent advocacy groups, more likely than not, candidates will feel compelled to rely on them for campaign financing, and this setup will enable

[64] *See id.* at 811.
[65] Gaughan, *supra* note 8, 792.
[66] *See id.* at 795-96.
[67] *See id.* at 798.

candidates to bypass contribution limits laws and even disclosure measures in certain cases.[68] Hence, the likes of Gaughan prefer that "Congress and the state legislatures reassert the primacy of candidate campaigns by abandoning contribution limits entirely, while preserving FECA's mandatory disclosure requirements."[69] This line of thought prioritizes transparency for voters to curb corruption and the influx of dark money into elections.

However, a more middle-ground approach regarding contribution and expenditure limits looks at the "optimal range" of each regulatory tool before evaluating its efficiency. Anthony Johnstone argues that in the quest to curb corruption, it is not necessary to lower the contribution limits or expenditure limits as low as possible; rather, effective regulation measures depend on the relative size and particular practices of the jurisdiction that have varying optimal ranges.[70] Setting high contribution limits leads to the concentration of campaign finances in the hands of the wealthy donors and established elites, meanwhile super low contribution limits push candidates to focus on raising funds, puts incumbents at an advantage, and diverts the influence to interest groups and PACs, that operate with narrow agendas and are less transparent about the source of their funds.[71] As for expenditure, low expenditure limits deprive candidates, especially non-incumbents, of the ability to relay their message to the public and compete on equal footing with established politicians, and high expenditure limits favor the interests of wealthy donors, further leading to the fostering of soft corruption and *quid pro quo* exchanges.[72]

And even with disclosure requirements, when the threshold for disclosure is too low, average voters and individual donors will be less reluctant to contribute and more willing to redirect their contributions toward PACs and interest groups, leaving "die-hard" or "radical" voters to dominate the

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[68] *See id.* at 792.
[69] *Id.* at 763.
[70] *See* Johnstone, *supra* note 24, at 218-20.
[71] *See id.*
[72] *See id.* at 217.

pool of direct contributors.[73] And when the disclosure limits are too high, it allows campaigns to conceal relevant information, cater to the interests of the wealthiest donors, and ultimately deprive ordinary voters of knowing which wealthy donors have funded which campaign.[74]

Therefore, implementing or altering contribution or disclosure limits will produce diverse outcomes for both the electorate and the campaign finance system. Thus, in their pursuit to provide the electorate with information about donors and the sources of campaign finance, to deter actual corruption or the appearance of it, and to gather data to enforce more substantive measures, lawmakers should focus on arriving at the "optimal range" for setting contribution and disclosure limits.

II. CAMPAIGN FINANCE IN NEW JERSEY: CORRUPTION AND REFORMS

New Jersey, "notorious in the United States for political corruption . . . [is] particularly vulnerable to procurement corruption because of . . . the state's concentration of power in its governor, its weak lobbying-disclosure laws, and its highly flexible procurement rules."[75] Additionally, "the county political parties hold substantial political power, much of it exercised in the selection of candidates who, when elected, will be loyal disciples of their political benefactor."[76] Overall, and especially at the state level, government officials and even those serving at the federal level "look to the local political infrastructure for election, reelection, appointments, and even policy formulation

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[73] *Id.* at 218.
[74] *Id.* at 219.
[75] Rachel Jackson, *Blowing the Whistle on the Pay-to-Play Game: Campaign Financing Reform in New Jersey, 1998-2012*, PRINCETON UNIV.: INNOVATIONS FOR SUCCESSFUL SOCIETIES (Dec. 2012), https://successfulsocieties.princeton.edu/publications/blowing-whistle-pay-play-game-campaign-financing-reform-new-jersey-1998-2012.
[76] SCHLUTER, *supra* note 19, at 27-28.

. . . for their own political survival."[77] Additionally, because local officials tend to be less visible compared to ones that serve at the national level, "it stands to reason that they are more susceptible to ethical transgressions and political manipulation—which are also under the radar."[78]

Throughout the nineteenth century, business interests, notably the interests of the railroads and utilities corporate giants, as well as the alcoholic beverages industry, influenced how legislators voted in the state.[79] For years, New Jersey's laws did not require disclosure of political contributions or contributions to lobbying firms by businesses seeking to establish contracts with the state government.[80] It was estimated that "more than $1 billion was wasted annually through no-bid contracts and other favors."[81] The state's history is marred by the presence of soft corruption, where political connections and *quid pro* quo exchanges dictate the awarding of government contracts, the abuse of hiring and appointments of unqualified officials, and pension padding.[82] Therefore, political connections and loyalty take precedence over qualifications, and voters' interests and concerns are secondary to the interests of the elites. When it comes to the "consequences of soft corruption, three are particularly troubling for . . . New Jersey: higher-cost government, bad governmental decisions, and an apathetic public."[83]

A. The Road to "Pay-to-Play" Reforms

An owner of a New Jersey-based company who worked as an informant for the FBI once declared that "for companies that seek contracts from municipalities in New Jersey, the only difference between a bribe and a campaign contribution is that

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[77] *Id.* at 15.
[78] *Id.* at 16.
[79] *Id.* at 5, 78-79.
[80] Jackson, *supra* note 75, at 2.
[81] *Id.*
[82] *See* SCHLUTER, *supra* note 19, at 10-11.
[83] *Id.* at 10.

the latter is legal."[84] Starting in the 1990s, calls for reforms to New Jersey's campaign election contributions and "pay-to-play" practices began to emerge. The phrase "pay-to-play," utilized by the media, activists, politicians, and voters, describes the practice by which "businesses . . . [donated] money to New Jersey political parties and candidates in exchange for favorable consideration in the awarding of government contracts."[85] For decades, this practice was highly utilized by NJ's politicians, especially those seeking reelection, who worked to block any reform attempts targeting such practices.[86] Exacerbating the situation further was the fact that under New Jersey law, contracts did not have to go to the lowest bidder. Thus, for decades, "state officials have tremendous latitude when doling out contracts, with little to stop an official from steering a contract to whomever he or she chooses, including a campaign supporter."[87] However, civil society reformers, grassroots campaigns, and a series of Democratic and Republican governors successively worked to introduce pay-to-play reforms.

At its earliest stage, the reform movement in New Jersey was initiated by Democratic governors and lawmakers who aimed to curb the influence of the Republican Party, because "although both sides relied on corporate donations, Democratic candidates tended to win far greater financial support from unions and labor interests."[88] Hence, the first reform initiatives targeted lobbyists advocating on behalf of the business interests. In 1971, the first law to regulate lobbying activities in the state was introduced, requiring lobbyists to wear identifiable badges and prohibiting them from serving as members of the legislative staff.[89]

In 1990, a bipartisan commission called the Ad Hoc Commission on Legislative Ethics and Campaign Finance, also

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[84] *Id.* at 74.
[85] Jackson, *supra* note 75, at 1.
[86] *Id.* at 2.
[87] Weber, *supra* note 27, at 1448.
[88] Jackson, *supra* note 75, at 7.
[89] SCHLUTER, *supra* note 19, at 79.

known as the Rosenthal Commission after its chair Alan Rosenthal, issued a report calling for reforms of campaign financing laws and legislative ethics in New Jersey, a state with no contribution limits.[90] The report recommended setting the disclosure threshold at $200 or more, the disclosure of donors' occupations and employers, and limiting yearly contributions to municipal political committees to $5,000, $10,000 to county political committees, and $25,000 to state political parties.[91] However, the bill that gained bipartisan support and was ultimately signed into law in 1993 set the contribution limits to county political committees at $25,000 per year, and allowed legislators instead of the party caucuses to establish, authorize, and designate political committees to help elect officials. [92] Thus, it increased the power of the legislators over elections rather than political parties, enabling them to establish political committees to raise funds and choose who to support in elections. As a result, "[l]egislative leaders . . . and the leadership committees became the fund-raising Goliaths of New Jersey politics."[93]

In 1993, once all campaigns reported their donations to the Election Law Enforcement Commission, it was evident that there was a 60% increase in new spending on local and state elections compared to the previous election cycle, and that special interests became ever more influential in Trenton.[94] Additionally, "[a]fter their creation in 1993, leadership PACs showed an increase of 325 percent in their donations to legislative candidates," [95] and it became apparent that the real function of such PACs was to "circumvent the limits . . . on individual contributions to personal campaign accounts . . . [to] facilitate the wheeling of funds to campaigns . . . [to] hide the identities of donors . . . [and] aid the political fortunes of the

[90] *Id.* at 57.
[91] *Id.* at 57-58.
[92] *Id.* at 60.
[93] *Id.* at 60.
[94] SCHLUTER, *supra* note 19, at 62.
[95] *Id.* at 68.

legislative leaders who make the donations,"[96] to allow candidates to conceal the "undesirable" sources and interests of their major donors. Additionally, the reform measures empowered legislators, such as the Senate President and Assembly Speaker, who were privileged to form their own committees, to bolster their electoral prospects by providing funds to fellow legislators through their own committees.[97]

The reforms proved ineffective in curbing soft corruption and *quid pro quo* exchanges, as instances of patronage and abuse of power within the political system continued to occur, especially in relation to business interests. Finally, in response to a 1998 scandal linked to the awarding of a $392 million contract for a privatized motor vehicle inspection system by Parsons Infrastructure & Technology Group, Inc. that failed within a few months of its operation, civil society and grassroots movements began to call for electoral contribution reforms.[98] The push for reforms was further perpetuated by the fact that under the administration of Republican Governor Christine Whitman, Parsons made campaign contributions totaling $62,000 to Republican committees. While there were no direct allegations, the situation raised concerns about the appearance of impropriety.[99]

Against a backdrop of scandals, legal challenges, and setbacks, and with the help of groups such as Citizens Campaign, several attorneys and lawmakers, as well as successive Governors, James E. McGreevey, Richard J. Codey, Jon Corzine, and Chris Christie, a new framework was established over the period of almost a decade.

Starting in 2004, Governor McGreevey issued an executive order banning "state government agencies from entering into any transaction valued at more than $17,500 with any business entity that had contributed to a gubernatorial campaign or to a state or county political party committee."[100]

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[96] *Id.* at 62.
[97] *Id.* at 64.
[98] Jackson, *supra* note 75, at 3.
[99] Weber, *supra* note 27, at 1448.
[100] Jackson, *supra* note 75, at 2.

Following his resignation, Governor Richard J. Codey began pushing for lobbying disclosures, created an ethics commission, and eventually signed pay-to-play legislation into law in 2005.[101]

Although the legislation was passed and codified into law, it faced resistance and opposition from lawmakers and was even challenged in courts. Upon the issuance of Executive Order No. 134 in 2004, the Office of the Legislative Services opined that the Executive Order "infringes upon the lawmaking power of the legislature and [violates the] separation of powers." [102] Additionally, the Federal Highway Administration found the law to be in violation of federal competitive bidding laws and threatened to pull funds from the state if the legislation encompassed projects that received federal highway dollars.[103] In the 2008 case of *In re Earle Asphalt Company*,[104] the pay-to-play law's constitutionality was questioned, specifically on First Amendment grounds. However, the court ruled that the State had shown a sufficiently important interest in justifying the law and had used specific measures to prevent unnecessary restrictions on constitutional freedoms.[105]

B. Loopholes, Ambiguities, and Pushback

As a result of the challenges and pushbacks, the pay-to-play bill was passed with amendments that allowed for numerous loopholes to emerge, thus diminishing its overall effectiveness. When Governor Codey signed the bill into law, it had been amended to incorporate a provision exempting projects funded by federal highway funds, thereby establishing a loophole for pay-to-play politics.[106] Therefore, a firm could make donations that exceed the limited amount without risking their eligibility for state contracts if they directly made

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[101] *Id.* at 6-8.
[102] Weber, *supra* note 27, at 1450.
[103] *Id.* at 1451.
[104] *In re Earle Asphalt Co.*, 401 N.J. Super. 310, 318 (N.J. Super. Ct. App. Div. 2008).
[105] *See* Weber, *supra* note 27, at 1458-59.
[106] *Id.* at 1451.

donations up to $10,000 to a federal campaign fund or up to $25,000 a year to legislative leadership committees and political action committees.[107] Such committees and funds would, in turn, "wheel" the money to the specific campaigns. For example, in 2003, real estate developer Jack Morris and former state Senator John Lynch, who maxed out their contribution limits to the Ocean County Democratic Party, each contributed $27,000 to the Hunterdon County Democratic Committee, which then "wheeled" two checks of $25,000 each to the Ocean County Democratic Party that helped elect the mayor there.[108] In a similar manner, Jon S. Corzine, Wall Street CEO and former U.S. Senator, "made the maximum personal contribution of $37,000 to the Bergen County party and then sent identical amounts to four other Democratic county units, as well as a total of $27,500 to the two leadership PACs of his party . . . [ultimately] $212,500 found its way to"[109] the Bergen County Democrats.

Another loophole allowed employees of businesses, especially partners who own less than 10% of the profits or assets, to make personal donations to campaigns.[110] This holds particular importance for law firms. Alongside law firms, engineering firms, and consultants who worked on behalf of developers circumvented the pay-to-play bans when dealing with redevelopment zones and acquiring development rights to abandoned or dilapidated properties.[111] Notably, redevelopment agreements are not covered by pay-to-play provisions. Thus, it allowed such firms to make donations without restrictions.[112] Additionally, the legislation's allowance for local governments to formulate their own pay-to-play laws using the state law as a minimum standard led to the creation of a "patchwork" of regulations that resulted in inconsistencies across the state.[113]

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[107] Jackson, *supra* note 75, at 8-9.
[108] SCHLUTER, *supra* note 19, at 24.
[109] *Id.* at 26-27.
[110] Weber, *supra* note 27, at 1462.
[111] *Id.* at 1468.
[112] *Id.*
[113] Norton & O'Reilly, *supra* note 3.

Furthermore, patronage and *quid pro quo* exchanges remained an ongoing issue for the state and its officials. For example, Charles Kushner, a multimillionaire real-estate developer who contributed more than $1.5 million to Governor McGreevey's campaign, was named by McGreevey "to the Port Authority of New York and New Jersey, a plum spot for a real-estate developer since it controls hundreds of millions of dollars in development contracts."[114] Meanwhile, Rajesh Chugh, a business owner who raised over a million dollars for McGreevey's campaign, was awarded a "$85,000-a-year post in the secretary of state's office that Chugh boasted made him assistant secretary of state and the third most powerful guy in New Jersey government."[115]

Further efforts were implemented in 2006 by the newly elected Governor Jon Corzine, who issued two executive orders that extended the law to include "contributions to legislative leadership committees and municipal political party committees" and banned "contractors from making massive donations to a legislative leadership committee based on the implicit understanding that the money would be transferred to the state party."[116] However, contractors and other special interest donors continued to utilize the loopholes in the system and became increasingly reliant on PACs and other independent entities. Since special interest PACs are not subject to pay-for-play laws, contractors and other wealthy donors increased their direct contributions to PACs, especially for county and municipal campaigns.[117] Meanwhile, wealthy candidates like Corzine utilized the status of non-profits and established charities that "loaned" money to specific political blocs and entities, such as churches in Northern New Jersey and Camden, which in return endorsed him for the governorship.[118]

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[114] BOB INGLE & SANDY MCCLURE, THE SOPRANO STATE: NEW JERSEY'S CULTURE OF CORRUPTION 52 (2008).
[115] *Id.* at 53.
[116] Jackson, *supra* note 75, at 10.
[117] SCHLUTER, *supra* note 19, at 32.
[118] *Id.* at 45-46.

In 2009, Governor Chris Christie, through an executive order, attempted but failed to expand the pay-for-play regulations. Christie added legislative leadership committees to the list and "extended the definition of *business entity* to include the state's powerful labor unions and labor organizations," hence making them ineligible "to enter into collective bargaining agreements with the state if they had given campaign contributions of more than $300," however, the court ruled that these measures infringe upon legislative powers.[119] Additionally, around the same time, the *Citizens United* decision further exacerbated the problem in New Jersey by allowing more money to be funneled to elections under the guise of "free speech," and it "opened the door to unlimited dark money spending by businesses and nonprofits, and helped establish the idea that 'corporations are people.'"[120]

Although the impact of pay-for-play reforms at the local level is hard to discern due to the patchwork nature of its adoption and implementation, the Election Law Enforcement Commission's statistics show that between 2006 and 2011, "political donations by government contractors dropped for the fifth year in a row to $9.6 million across . . . [New Jersey] from $15.1 million."[121] Therefore, it is evident that, regardless of the setbacks and legal challenges, reform efforts yielded tangible outcomes, albeit incremental, especially regarding the awarding of state contracts.

C. The Elections Transparency Act of 2023

The Elections Transparency Act (hereinafter "ETA"), signed into law by Governor Murphy on April 3, 2023, introduced significant amendments to pay-to-play regulations, contribution limits, and the timetable for investigating complaints. One of the most important reforms addresses the

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[119] Jackson, *supra* note 75, at 11.
[120] Rachel Moseson, *Bringing Dark Money to Light: Political Nonprofit Disclosure Statues in Delaware and New Jersey,* RUTGERS U. L. REV. 1, 7 (2017).
[121] Jackson, *supra* note 75, at 12.

"patchwork" problem. The ETA "preempts all pay-to-play ordinances adopted by local governments … and pay-to-play rules adopted by local independent authorities and boards of education."[122] Hence, the new law eliminates major inconsistencies across the state.

When it comes to disclosure requirements, the ETA lowered the disclosure threshold from $300 to $200 and requires the submission of a cumulative quarterly report to the Election Law Enforcement Commission (hereinafter "ELEC") "of all contributions in excess of $200 in the form of money, loans, paid personal services or other things of value . . . the name and mailing address of each person or group . . . [and] occupation of the individual." [123] Although lowering the reporting threshold and requiring quarterly reporting to the ELEC is a step forward in the quest to curb the presence of "dark money" and pay-to-play practices, the significant increase in contribution limits is poised to amplify the influence of businesses, wealthy donors, and special interests on local elections.

Table 1: Changes Under the Elections Transparency Act [124]

[122] Norton & O'Reilly, *supra* note 3.
[123] N.J. STAT. ANN. § 19:44A-16(a) (West 2023).
[124] Guillermo C. Artiles, William J. Palatucci & Omar A. Bareentto, *The Elections Transparency Act: What You Need to Know About NJ's New Campaign Finance and Pay-to-Play Law*, MCCARTER & ENGLISH (Apr. 12, 2023), https://www.mccarter.com/insights/the-elections-transparency-act-what-you-need-to-know-about-njs-new-campaign-finance-and-pay-to-play-law/; Rudy S. Randazzo & Mary Kathryn Roberts, *What You Need to Know About the Election Transparency Act*, RIKER DANZIG (Apr. 6, 2023), https://riker.com/publications/what-you-need-to-know-about-the-election-transparency-act/.

Recipient	Pre-ETA Limits	ETA Limits
Reporting Requirements:	Candidates and Committees: $300	Candidates and Committees: $200
	Independent Expenditure Committees (PACs and non-profits): None	Independent Expenditure Committees (PACs and non-profits): $7,500 or more as well as expenditures made on elections
Campaign Contributions:	Gubernatorial Candidates: $4,900 per election (primary and general elections count together)	Same
	Candidates (other than Candidates for Governor or Lt. Governor): $2,600 per election	Candidates other than Candidates for Governor or Lt. Governor): $5,200 per election
	Legislative Leadership Committees: $25,000 per year	Legislative Leadership Committees: $75,000 per year
	State Political Party Committees: $25,000 per year	State Political Party Committees: $75,000 per year (Plus $37,500 per year to housekeeping account)
	County Political Party Committees: $37,000 per year	County Political Party Committees: $75,000 per year (Plus $37,500 per year to a housekeeping account)
	Municipal Political Party Committees: $7,200 per year	Municipal Political Party Committees: $14,400 per year
	Political Committees: $7,200 per election (primary and general	Political Committees: $14,400 per election (primary and general

	elections count separately)	elections count separately)
	Continuing Political Committees: $7,200 per year	Continuing Political Committees: $14,400 per year
Pay-to-Play Laws:	Prohibits contractors from being awarded public contracts if they donate to state, county, municipal political parties, and legislative leadership committees.	No prohibition on contractors who donate as long as the awarding of the public contract was made in compliance with the fair and open process.
Statute of Limitations:	10 years	2 years (applies retroactively)

Although contribution limits to gubernatorial candidates were left unchanged, the new law increased the limits for contributions to other candidates, legislative leadership committees, political committees, as well as state, county, and municipal political party committees.[125] Under the ETA, the contribution limits have nearly doubled, with the most notable increase seen in contributions to legislative leadership committees, rising from $25,000 to $75,000 per year.[126] Meanwhile, contributions to other recipients doubled or tripled as well, with some having the ability to receive more money in housekeeping accounts. For example, candidates, besides those running for Governor or Lieutenant Governor, can receive up to $5,200 per election, instead of $2,600.[127] Likewise, the limits doubled for contributions to municipal political party committees and political committees from $7,200 per year to

[125] N.J. STAT. ANN. § 19:44A-29 (West 2023); NJ ELEC, *Gubernatorial Public Financing,* slide 8 (Nov. 2020), https://www.cabq.gov/clerk/documents/new-jersey-candidate-power-point.pdf. *See also* Tully, *supra* note 1.
[126] N.J. STAT. ANN. § 19:44A-11.4(a)(1) (West 2023); Norton & O'Reilly, *supra* note 3.
[127] Norton & O'Reilly, *supra* note 3.

$14,400 per year, whereby primary and general election contributions to political committees are counted separately. [128]

Additionally, a significant increase is noticeable in the new contribution limits for both State and County political party committees. The contribution limits to State Political Party Committees tripled under the ETA. Meanwhile, it doubled for the County Political Party Committees, with both having the ability to maintain $37,500 per year in housekeeping accounts.[129] Such accounts may then be used for "'non-political' expenses, such as rent, utilities, taxes, legal and accounting expenses . . . [and] gubernatorial campaigns may use party housekeeping accounts for non-political expenditures following their election, and the expenses will not be considered in-kind contributions from the party to the campaign."[130]

1. Immediate Consequences and Long-Term Impact: The 2023 Legislative General Election and Beyond

The unprecedented influx of money into state, local, and municipal elections in the 2023 election, which is expected to rise over the coming years, will only further the influence of the wealthy, business interests, and perhaps even out-of-state donors over electoral outcomes and public policies across New Jersey. Small-town candidates and third-party candidates will be impacted the most, considering that most of them rely on individual donors who might be dissuaded from contributing due to the lowering of the reporting threshold, meanwhile establishment candidates who are backed by their parties, PACs, and political committees will have access to an even larger pool of resources for media ads, research and development, polling, and traveling.

Moreover, the challenge of addressing the presence of "dark money," "pay-to-play" practices, and patronage issues has

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[128] *Id.*
[129] *Id.*
[130] *Id.*

become increasingly daunting due to the significant shortening of the statute of limitations for actions pursued by the ELEC. Instead of ten years, the ETA, under N.J. Stat. Ann. § 19:44A-6a, establishes that any enforcement action brought by ELEC "for any violation . . . shall be subject to a statute of limitations of two years following the occurrence of the alleged violation . . . provided . . . [that it] shall apply retroactively to any alleged violations occurring prior to the effective date of this act."[131]

a. Increased Spending

The first election cycle following the implementation of the ETA saw a notably high level of spending, as well as a mere 27% voter turnout.[132] The expenditure and contributions for the 2023 election exceeded all previous records, aside from the 2017 election, marking a significant increase in spending.[133] Leading to November 7, 2023, "[c]andidates and interest groups shelled out a whopping $70.3 million combined as all 120 seats in the Legislature…topped the ballot…according to…the New Jersey Election Law Enforcement Commission."[134] In the 11th District alone, around ten million dollars were spent to secure Democrat Vin Gopal's seat in the State Senate and to win two assembly seats for the Democratic Party.[135] Meanwhile, Independent Committees funneled a total of $22,969,841 to Democratic and Republican candidates across the state.[136] This evident short-term surge in spending is a cause for concern for

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[131] N.J. STAT. ANN. § 19:44A-6(a) (West 2023).
[132] Brent Johnson, *A Whopping $73M Was Spent on N.J.'S Legislative Elections. Here's Where It Went*, NJ.COM (Dec. 2, 2024), https://www.nj.com/politics/2023/12/a-whopping-73m-was-spent-on-njs-legislative-elections-heres-where-it-went.html.
[133] Press Release, N.J. Election Law Enf't Comm'n, Candidate and Independent Spending High During 2023 General Election (Dec. 1, 2023), https://www.elec.nj.gov/pdffiles/press_releases/pr_2023/pr_12012023.pdf. Figure 1 and Table 2 on page 43 illustrate the significant disparity in spending and contributions, with a particularly notable increase in 2023.
[134] Johnson, *supra* note 132.
[135] *Id.*
[136] Press Release, N.J. Election Law Enf't Comm'n, *supra* note 132, at 3 tbl.5.

it foreshadows even more significant increases in election expenditures over the years to come.

Figure 1: New Jersey Legislative General Election Campaign Finance[137]

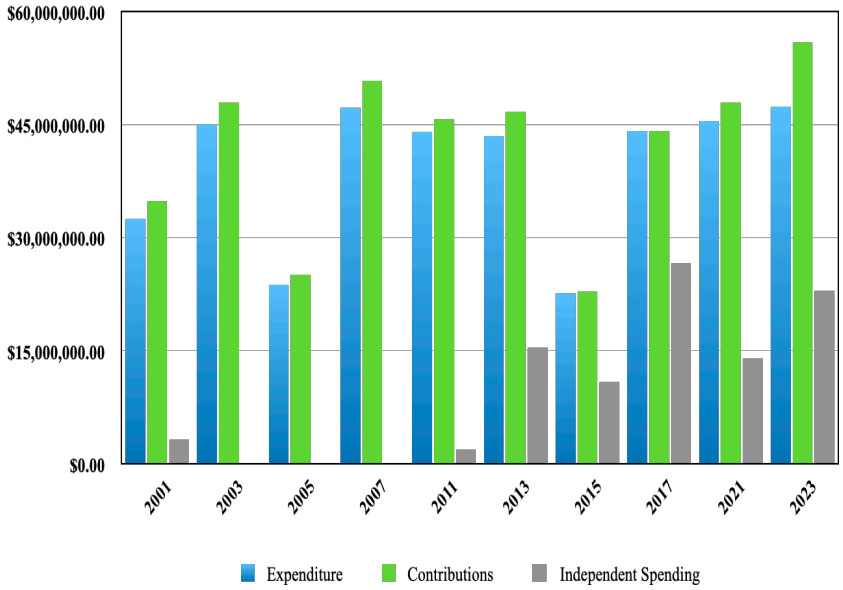

Table 2: Data from the New Jersey Law Enforcement Commission[138]

Year	Expenditure	Contributions	Independent Spending
2001	32,550,394	34,825,851	3,166,463
2003	44,990,255	47,911,008	4,857
2005	23,713,193	25,081,696	3,476
2007	47,231,847	50,797,317	165,000
2011	44,024,272	45,656,674	1,835,500
2013	43,446,977	46,691,108	15,375,071

[137] *Id.* at 1 tbl.1.
[138] *Id.*

2015	22,632,814	22,883,719	10,908,983
2017	44,164,473	44,117,517	26,562,428
2021	45,474,841	47,896,089	14,000,959
2023	47,351,472	55,852,814	22,969,841

Table 3: Spending By Independent Committees during the 2023 Legislative General Election[139]

Group	Amount Spent	Backing	Group	Amount Spent	Backing
Brighter Future Forward	$3,663,219.00	Democratic Candidates	***Stronger Foundations Inc (Operating Engineers)***	$1,997,565.00	Republican Candidates
Middle Ground	$2,649,658.00	Democratic Candidates	***Strengthen Our State***	$675,254.00	Republican Candidates
American Representative Majority	$2,396,563.00	Democratic Candidates	***Women for a Stronger New Jersey***	$597,127.00	Republican Candidates
Garden State Forward (NJEA)	$2,329,155.00	Democratic Candidates	***Republican State Leadership Committee***	$765,295.00	Republican Candidates
Prosperity Rising NJ Inc	$2,255,881.00	Democratic Candidates	***South Jersey Strong***	$217,709.00	Republican Candidates
Working for Working Americans (Carpenters)	$1,500,000.00	Democratic Candidates	***Garden State Success***	$209,742.00	Republican Candidates
Growing Economic Opportuniti	$1,159,374.00	Democratic Candidates	***Patriots for Progress***	$49,760.00	Republican Candidates

[139] *Id.* at 3 tbl.5.

es (Laborers)					
Carpenters Action Fund	$1,000,000.00	Democratic Candidates	***NRA Political Victory Fund***	$7,497.00	Republican Candidates
Planned Parenthood	$361,731.00	Democratic Candidates	***NJ Right to Life PAC***	$7,320.00	Republican Candidates
Progress for NJ PAC	$250,000.00	Democratic Candidates	***NJ Family Policy Center***	$6,089.00	Republican Candidates
Jersey Freedom	$214,696.00	Democratic Candidates	***New Jersey Coalition of Real Estate***	$351,492.00	Both Parties
NJ League of Conservation Voters Victory Fund	$166,414.00	Democratic Candidates	***America's Future Fund***	$38,300.00	Uncertain
AFT Solidarity	$100,000.00	Democratic Candidates	**Total:**	**$22,969,841.00**	

b. Evasion of Election Finance Investigations

Although the likes of Nicholas Scutari, one of the sponsors of the ETA and president of the State Senate, have likened the 10 years statute of limitation period to a "police officer writing a ticket long after a traffic infraction," the reality is that the substantial reduction to two years will result in "wiping" the violations that were committed prior to April 2021 off the books. [140] Since its enactment, almost half of the active investigations have been tossed out.[141] Remarkably, amongst the 107 complaints that fell outside the statute of limitations, two claims from the 2017 election cycle involve the Republican State Committee and Democratic State Committee; the Republican State Committee for allegedly failing to report

[140] Tully, *supra* note 1.
[141] Difilippo, *supra* note 4.

nearly $15,000 in donations, and the Democratic State Committee for failing to report almost $900,000 in donations, and $1 million dollars in spending.[142] Likewise, 105 other instances involving numerous violations will remain uninvestigated, permitting individuals who accepted "dark money" or neglected to report their donations and expenditures to evade accountability.

Considering that most violations do not come into light until after elections are over, or after a period of investigation by grassroots groups and civic entities, limiting the statute of limitations to two years will allow many violations to go uninvestigated and unnoticed. Not only that, but it will also encourage those willing to participate in acts that violate the state's contracting and campaign financing laws to commit violations, as they are not deterred by a long period during which their illegal acts might be uncovered. Hence, although this move will reduce the burden of investigation on the relevant agencies in the state, in the long run, its negative effects will allow for the proliferation of violations that go uninvestigated and will allow campaigns and donors to abuse the existing laws.

c. Declining Civic Engagement and Escalating Marginalization

A well-functioning Democracy "requires an involved citizenry . . . [and] [w]hen a majority of citizens do not participate in the democratic process, the resulting political decisions represent the choice of a few . . . [hence] negating the democratic premise."[143] When citizens lose faith in their ability to bring about political change, especially through the electoral process, they become distrustful of the political processes and government institutions. Such a disenchanted electorate can become either more susceptible to manipulation by radical or

[142] *Id.*

[143] Marshall, *supra* note 32, at 374.

populist politicians or disengaged from the political process altogether.[144]

Political theorists on modern political democracy, like Schmitter and Karl, have constantly emphasized the importance of the democratic electoral process and participation in elections as a founding pillar for a healthy democracy. [145] Fair democratic elections ensure that the government and its policies reflect the will of the citizens, as well as serve as a tool to curb corruption, institutional checks and balances, and as a mechanism to sanction those who try to undermine the well-being of the state and its citizens. [146] For example, a democratic electoral system creates a desire for candidates and incumbents to get re-elected. Such desire motivates individuals to prioritize their reputation, especially if they know that there are alternative candidates present who can replace them.[147] Therefore, it is imperative for a democratic society to nurture and empower an effective civil society, watchdog organizations, and other grassroots movements to ensure that corruption is investigated and reported so that the electorate is well-informed prior to elections and that their desired policies are produced by the elected officials. After all, "corruption can provoke changes in voting behavior, such as increasing voter abstention, increasing volatility of persistent discrimination against minorities, social classes and women."[148]

Therefore, if corruption is left unchecked, not only will trust in the traditional parties erode, but it might also lead to the emergence of radical populist parties, like in Europe, that capitalize on the erosion of the "social contract," voter apathy, and weaknesses in the democratic system and state institutions. Additionally, corruption, or the appearance of it even,

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[144] *See id.* at 372.

[145] *See* ELISKA DRAPALOVA ET AL, CORRUPTION AND THE CRISIS OF DEMOCRACY: THE LINK BETWEEN CORRUPTION AND THE WEAKENING OF DEMOCRATIC INSTITUTIONS 2-3 (Transparency International 2019), http://www.jstor.com/stable/resrep20482.

[146] *Id.* at 3.

[147] *Id.* at 4.

[148] *Id.* at 7.

undermines economic growth at all state levels, state capacity, as well as the allocation of talent.[149] Therefore, if politicians and other elected officials sense that they are not being monitored or that they can effectively use the loopholes in the system for their own benefit, then more likely than not they will take advantage of the situation at the expense of the general public. [150] And once the political system and government become unresponsive to the wishes of its citizens and unaligned with their interests, the electorate will become more apathetic and disengaged, which in return will allow for more corruption.[151] Therefore, this vicious cycle of corruption, erosion of political democratic values, and electoral participation will continue to expand from the local to the state and to the national level.

D. Alternative Reform Options for Lawmakers

Polls across the nation and trends in public opinion that cross partisan and demographic lines showcase that "[l]arge shares of the public see political campaigns as too costly, elected officials as too responsive to donors and special interests, and members of Congress as unable or unwilling to separate their financial interests from their work as public servants."[152] About "(84%) says that 'special interest groups and lobbyists have too much say in what happens in politics' is a good description of the political system."[153] And to alleviate the negative consequences of the current political landscape, "[r]oughly seven-in-ten U.S. adults (72%) say that there should be limits on the amount of money individuals and organizations can spend on political campaigns."[154] However, in the post-*Citizens United* world, lawmakers do not have much room to target spending by individuals, PACs, or even corporations. However, they have other options that could potentially yield superior results to

[149] *Id.*
[150] Krumholz, *supra* note 42, at 1120.
[151] *See* Latner & Goldman, *supra* note 43.
[152] Cerda & Daniller, *supra* note 6.
[153] *Id.*
[154] *Id.*

those achieved by the ETA so far. Officials in New Jersey should consider the public financing of campaigns, vouchers to voters, matching donations, or even micro-grants to candidates, as well as setting term limits.

For decades, "public financing programs at the federal, state, and municipal levels have served, in the words of the US Supreme Court, 'as means of eliminating the improper influence of large private contributions'."[155] Empirical studies have shown that public financing of elections also encourages candidates to spend less time fundraising, and "reduce the opportunity for corruption and strengthen our perception of government . . . promote contested and competitive elections, foster diversity in the electoral process, and encourage voter-centered campaigns."[156] Implementing public financing of elections may cost the voter about $10 per year.[157] However, this investment could foster a crucial shift, making candidates accountable to the electorate rather than special interest groups, prioritizing the electorate's needs, and enhancing the integrity of the electoral process.[158]

Another proposed solution involves offering voters vouchers or matching donations and grants to candidates. Adam Lioz argues that states or localities can offer vouchers to voters who are 18 years old or older so that they can contribute to candidates, parties, or PACs, or match the contributions given by public funds once the candidate raises a specific amount of money.[159] Additionally, micro-grants can be offered to help candidates with the startup costs. Such proposals address the issue of high entry costs, particularly pertaining to challengers and third-party candidates who struggle to compete against

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[155] Mimi Murray et al., *Public Financing Fosters Electoral Diversity, in* CAMPAIGN FINANCE, OPPOSING VIEWPOINTS SERIES 29, 30 (Kathryn Roberts ed., 2019).
[156] *Id.* at 32.
[157] Joan Mandle, *Public Financing Is in The Interest of All People, in* CAMPAIGN FINANCE, OPPOSING VIEWPOINTS SERIES 57, 58 (Kathryn Roberts ed., 2019).
[158] *Id.* at 60.
[159] Adam Lioz, *Raising All of Our Voices for Democracy: A Hybrid Public Funding Proposal, in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 126, 143 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

incumbents who enjoy the support of big donors, political parties, and PACs, and benefit from name recognition and publicity. Hence, reforms could address this issue further by introducing term limits to ensure that incumbents do not remain in power for too long while relying on the support of special interests in exchange for favorable policies and other quid pro quo exchanges.[160]

III. CONCLUSION

Free and democratic elections have been the cornerstone of American representative democracy for centuries, an idea that inspired countries and various constitutions worldwide. However, the mere occurrence of elections does not guarantee the preservation of democratic values, nor that the people's will is reflected in who gets elected and what policies they choose to follow. Unfortunately, "[d]emocracy is now premised on responsiveness to the large donors and spenders."[161] The sequence of Supreme Court decisions over the past decades made it clear that "money is considered speech, democracy is construed as an open market, corruption is limited to specific instances of bribery, and ingratiation, access, and influence on the basis of wealth have obtained constitutional protection and ideological justification from the highest court in the land."[162]

However, one must start at the local level to fix the system. Local elections are "the venue where the influence of wealthy elites and established interest groups might be diminished and where non-elites are able to participate fully as volunteers and candidates."[163] Local elections are also the place

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[160] *See* ALAN ROSENTHAL, *Building Relationships*, *in* THE THIRD HOUSE: LOBBYISTS AND LOBBYING IN THE STATES 108, 110, 124, (2001) (Rosenthal argues that term limits can weaken the established relationships between lobbyists and legislators, potentially reducing lobbyists' influence over the legislative process).

[161] Kuhner, *supra* note 54, at 51.

[162] *Id.* at 53.

[163] BRIAN E. ADAMS, CAMPAIGN FINANCE IN LOCAL ELECTIONS: BUYING THE GRASSROOTS 4 (2010).

where "different types of candidates can succeed, enhancing the pluralistic nature of the American political system and limiting the problems caused by biases and inequalities in national politics."[164] Initiatives directed at increasing participation and civic engagement should focus more on local elections, especially since citizens can have more access to them through public meetings and forums.

In retrospect, despite its projected intentions, the Elections Transparency Act represents a regression rather than progress in combating corruption, the appearance of corruption, and addressing the ballooning influence of corporate interests in elections. By failing to address the loopholes from earlier reform attempts and allowing for increased contribution limits, the Act undermined decades' worth of efforts and initiatives that aimed to uphold and improve the integrity of the democratic process in New Jersey and to foster citizen engagement in the political sphere.

[164] *Id.*

THE BURDEN-SHIFTING IDEA: SHIFTING THE BURDEN OF PROOF FROM PARENTS TO SCHOOL DISTRICTS IN SPECIAL EDUCATION DUE PROCESS PROCEEDINGS

Mary Casper

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I. INTRODUCTION

At the age of four, Frankie was diagnosed with Pervasive Developmental Disorder not otherwise specified, a subtype of Autism. When he was entered kindergarten, he was placed in an Autism support classroom with seven other students, as well as one teacher and two paraprofessionals. Frankie exceeded in this environment and showed great progress throughout his time in kindergarten and first grade. However, when Frankie entered second grade, the school district changed his IEP and he was moved into a general education classroom, consisting of 24 students, one teacher, and no support professionals. The progress Frankie had made the last two years vanished before his parents' eyes and he began to regress. He could no longer hold a pencil, recite the alphabet, or write his name.

His parents pleaded with the school district to move him back into the Autism support classroom or give him a one-on-one aid in the general education classroom. When the school district refused, his parents were forced to enroll Frankie in a private school for individuals with intellectual disabilities. Since the school district failed to provide Frankie with an appropriate IEP, his parents requested the school district cover the tuition of the private school. The school district denied their request and his parents filed for due process, the beginning of their ten year legal battle with the school district for the placement of their son.[1]

Parents typically request due process hearings in an effort to get their child with disabilities mandated services or the necessary support their child needs to succeed in the classroom.[2] Due process proceedings initially were designed to

[1] *See generally* Norristown Area Sch. Dist. v. Frank C., 2014 U.S. Dist. LEXIS 201121 (E.D. Pa. 2014) (Discussing the compensatory education of a ten-year-old child eligible for special education services after his IEP was found to be inappropriate).

[2] Yoav Gonen, *Parents sacrifice savings and careers in fight for special education services*, CHALKBEAT (July 8, 2019, 10:24 AM)

resolve parent disagreements with schools but have now become new obstacles standing between children with disabilities and their access to the appropriate education. Due process proceedings have become time-consuming, costly, and further strain the relationship between parents and the school district.

One parent stated that many parents give up during due process because the "city wants to make them run around in circles." [3] In a survey conducted on special education attorneys regarding due process proceedings, attorneys representing parents generally rated their experience of due process proceedings as more complex and much more akin to a civil trial while the school district attorneys generally found the due process hearings to be fairly simple.[4]

A contributing factor to the issues of due process proceedings is the burden of proof standard under the Individuals with Disabilities Act (IDEA). The IDEA does not assign burden of proof to parents or the school districts, but many states have required that the challenging party, the parents, bear the burden of proving the IEP is inadequate or improper. In the survey referenced above, parent attorneys found that the cases were more complex for them because of the pressure of having to pull together enough evidence to meet a preponderance standard while being limited in their access to evidence.[5]

However, the burden placed on parents in due process proceedings makes it incredibly difficult for parents to succeed since these proceedings are timely and can become expensive rather quickly.[6] However, by shifting this burden back to the

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https://ny.chalkbeat.org/2019/7/8/21108444/parents-sacrifice-savings-and-careers-in-fight-for-special-education-services

[3] *Id.*

[4] Jane R. Wettach & Bailey K. Sanders, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys*, 20 CONNECTICUT PUBLIC INTEREST LAW JOURNAL 239-288 (2021).

[5] *Id.*

[6] Jennifer Smith & Kristen Kinast, *Trends in Due Process Litigation*, FRANCZEK (Jan. 18, 2023), https://www.specialedlawinsights.com/2023/01/trends-in-due-process-litigation/

school districts it could reduce costs and enhance district accountability, making due process proceedings more efficient.[7]

This article will explore the burden of proof standard in special education due process proceedings and explain why school districts are better equipped to handle this burden. As part of this exploration, the article will include results of surveys and policy papers that illustrate the effects this burden has on parents, as well as other statistics states have relied on when introducing legislation that shifts this burden back to the school district.

Part I of the note will delve into the background of special education. It will discuss the origins and development of the IDEA, explain due process proceedings in special education cases, and introduce the burden of proof standard used in due process proceedings. Part II will analyze the burden of proof standard. It will begin by assessing the burden placed on parents and students with disabilities and how this burden has created a power imbalance between parents and school districts. It will then discuss why schools are better equipped to handle this burden. Part III will discuss the reasons for and against shifting the burden from parents to school districts, as well as look at some of the states that have already adopted this burden-shifting standard and the effects it has had on due process proceedings.

II. HISTORY OF SPECIAL EDUCATION AND BACKGROUND OF IDEA

Prior to 1975, children with disabilities were denied access to education and opportunities to learn.[8] Many individuals with disabilities lived in state institutions and the families of these individuals had little say in the planning and

[7] *Bill Placing Burden of Proof on Districts Now Law*, EDUCATION LAW CENTER, (Feb. 5, 2008), https://edlawcenter.org/news/archives/special-education/bill-placing-burden-of-proof-on-districts-now-law.html

[8] *A History of the Individuals With Disabilities Education Act*, IDEA, (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History

placement decisions of their child.[9] In the 1950s and 1960s, many families of individuals with disabilities and supporting associations began to develop practices for children with disabilities.[10] Congress attempted to remedy the lack of educational opportunity for children with disabilities by enacting the Elementary and Secondary Education Act of 1965 ("ESEA").[11] This act implemented funding requirements for public school districts so that they would meet the education needs of children with disabilities, especially in lower socio-economic districts.[12] Eventually this act was replaced with the Education of the Handicapped Act ("EHA"), which combined all educational programs for disabled children.[13] Despite the enactment of these acts, failure to implement harsher guidelines for school districts resulted in the continuation of a majority of school districts failing to education children with disabilities appropriately.[14]

However, true legislative change did not come until after the decision of two landmark cases. [15] The courts in *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* and *Mills v. Board of Education of the District of Columbia* were the first to hold that the state could not deny an individual's right to equal access to education based on an intellectual disability, regardless of the additional costs of accommodations for the school.[16]

In *PARC*, the parents of thirteen individual children with disabilities brought a class action against the Commonwealth of Pennsylvania for acting through its local school districts to

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[9] *Id.*
[10] *Id.*
[11] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Ac*t (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *A History of the Individuals With Disabilities Education Act*, IDEA, (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History
[16] Pa. Ass'n for Retarded Citizens v. Pennsylvania, 343 F. Supp. 279, (E.D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

exclude their children from education.[17] The attorney general ultimately reinterpreted the meaning of the challenged statutes to support the notion that every child with a disability had the right to free appropriate public education.[18]

In *Mills*, the court held that the school district violated the Due Process Clause of the Fourteenth Amendment by providing education to non-learning disabled children but denying publicly supported education to children with learning disabilities.[19] Following these landmark cases, Congress codified the Education for All Handicapped Children Act of 1975.[20] There were four notable purposes of this act. First, to assure that all children with disabilities have available to them a free and appropriate public education designed to meet their unique needs.[21] Second, to assure that the rights of children with disabilities and their parents are protected.[22] Third, to assist States and localities to provide for the education of all children with disabilities.[23] Lastly, to assess and assure the effectiveness of efforts to educate all children with disabilities.[24] The Act was reauthorized in 1990, formally changing the name to the Individuals with Disabilities Education Act (IDEA). [25]

The IDEA assures that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their educational needs, assures that the rights of children with disabilities and their parents are protected, assists states in providing for the education of all children with

[17] Pa. Ass'n for Retarded Citizens, 343 F. Supp. 279, at 282.
[18] *Id.* at 285.
[19] Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).
[20] 20 U.S.C.S §1400
[21] *A History of the Individuals With Disabilities Education Act*, IDEA, (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

disabilities, and assesses the effectiveness of efforts to education children with disabilities.[26]

There are three parties involved in due process proceedings: parents, school districts, and the child with disabilities. Each of these parties has a unique relationship with one another. First, there is a relationship between the school district and the child with a disability. The primary goal of the IDEA is to ensure all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. The right of child to have access to free appropriate public education corresponds to a substantial affirmative obligation on the part of local school districts.[27] Part of this right forces school districts to ensure that students with disabilities are involved in, and make progress I, the general education curriculum. [28] This duty creates the relationship between school districts and the student with a disability. This relationship revolves around the implementation and design of the IEP, which measures the students involvement and progress in the general education curriculum

There are two distinct relationships that surround the IDEA. First, the IDEA has created a new relationship between the school district and the child with a learning disability. This relationship centers on the design and implementation of an individualized education program (IEP).[29] The IEP sets the backdrop for the challenge against the school district. To prevail on a claim under the IDEA challenging the implementation of an

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[26] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act* (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1 (citing 20 U.S.C.A. § 1400(c)).
[27] Joanne Karger, *A New Perspective on Schaffer v. Weast: Using a Social Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings*, 12 UC DAVIS J. JUV. L. & POL'Y 133 at 146.
[28] *Id.*
[29] *Id.*

individualized education program (IEP), the aggrieved party must show more than a de minimis failure to implement all elements of that IEP , and must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.[30]

The purpose of an IEP is to address the child's unique learning needs.[31] An IEP typically has to include certain components: (1) a statement of the student's present levels of educational performance; (2) a statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in an evaluation report; and (3) a statement of the specific special education services and programs and related services to be provided.[32] Other information used for an IEP includes the child's current levels of academic achievement and functional performance including how the child's disability impacts his or her involvement and progress in the general education curriculum.[33] Under the IDEA, an IEP is not required to maximize the disabled child's educational potential.[34] Rather, it's purpose is to guarantee a basic floor of opportunity for all children with disabilities.[35]

Second, a separate relationship exists between the school district and the parent of the child with learning disabilities. The IDEA compels the participation of parents as members of their child's IEP team.[36] Parents have the right to inspect their child's education records, participate in meetings regarding their child's education, and obtain independent

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[30] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act (*IDEA*)* (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1; *See also J.L v. Francis Howell R-3 School Dist.*, 693 F.Supp. 2d 1009 (E.D. Mo. 2010) (Discussing a due process hearing where parents sought reimbursement for the costs of a private school for their child with disabilities).

[31] *Id.*

[32] 43 P.L.E. Schools § 183.

[33] Karger, *supra* note 27.

[34] 43 P.L.E. Schools § 183.

[35] *Id.*

[36] Karger, *supra* note 27.

educational evaluations.[37] While the original intent of the IDEA was for parents and school districts to be partners in the creating of an appropriate education plan for the child with learning disabilities, many parents feel they are secondary in the process and lack the power to have a say regarding their child's education.

The IDEA is inherently vague in the terms "free appropriate public education" causing parents and school districts to disagree on what special education services and placement a child should receive under the law.[38] A free and appropriate public education encompasses special education and similar services that (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the state educational agency; (3) include an appropriate preschool, elementary or secondary school education in the state involved; and (4) are provided in conformity with the individualized education program required under 20 U.S.C.A. § 1414(a)(5).[39] Courts have identified numerous services that are required by IDEA to be provided to children with disabilities on the basis that the services fell within the meaning of FAPE, "special education," "related services," or a combination of these terms.[40] While the appropriate placement depends on the unique needs of the child with disabilities, examples of types of appropriate educational placements include: public classroom, special education setting in a public school, alternative public school, private school, residential program, alternative residential program, or home tutoring service or habilitation program.[41]

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[37] *Id.*

[38] Wettach and Sanders, *supra* note 4.

[39] 20 U.S.C.A. § 1401(a)(18).

[40] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act* (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1.

[41] *Id.*; *See also Krinchinsky By and Through Krinchinsky v. Knox County Schools*, 963 F.2d 847 (6th Cir. 1992) (Holding that an administrative agency's findings concerning the appropriateness of an individualized education plan that the public school system proposes for a child with disabilities may be appealed).

The IDEA combats the vagueness in regard to the meaning of FAPE by providing several dispute resolution tools to help resolve differences of opinion. Parents who disagree with the proposed program or placement of their child have the right to request a special education due process hearing.[42] The process begins when a parent files a written complaint against the school and then attends a resolution session.[43] If the parents and school district cannot come to an agreement during the resolution session or mediation, then a due process hearing is held. During this hearing, evidence is presented, and witnesses may be asked to speak and then a decision is made by a hearing officer.[44]

However, there are limitations to these due process proceedings. The IDEA only allows parents to file due process complaints for disputes related to "identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education [FAPE]."[45] Disputes can be either substantive or procedural. Substantive issues are issues surrounding a child's right to an appropriate education, such as inadequate IEPs, while procedural issues involve the technical aspects of the evaluation or IEP process, such as failure by the school to give prior written notice.[46] But, due process decisions regarding FAPE must be based on substantive issues.[47] Due process hearings function similarly to courtroom trials. During these proceedings, parents have the right to hire a lawyer, present evidence, have witnesses testify or cross-examine school's witnesses.[48] Due process decisions

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[42] *The Process of Due Process for Special Education Students*, MCANDREWS, MEHALICK, CONNOLLY, HULSE, AND RYAN P.C, (last visited Feb. 8, 2024), https://mcandrewslaw.com/publications-and-presentations/articles/the-process-of-due-process-for-special-education-students/

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Andrew M.I. Lee, *Due process rights: What you need to know*, UNDERSTOOD, (last visited Feb. 9, 2024) (https://www.understood.org/en/articles/due-process-rights-what-you-need-to-know

are not final, so parents have the right to challenge the decision.[49]

A. Overview Special Education Mediation and Due Process Proceedings

The number of due process complaints filed reached an 11-year peak for the fifth consecutive year in 2020-21 at 23,567 filings nationally.[50] Of these 23,567 complaints, only 1,296 resulted in a fully adjudicated hearing in 2020-21.[51]

Generally, when an issue arises between parents and a school over the education of their child, mediation will occur. While each state differs regarding their timeframes, they typically all follow the same process. In New Jersey, a parent or local education agency ("LEA") has two years to file for due process from the date of the alleged complaint. Once the complaint is filed, the LEA is granted 15 days to schedule a resolution session, or mediation, if the parties prefer.[52] Mediation is typically encouraged as it is cost-effective, timely, and less adversarial than due process.[53] During mediation, an impartial, third-party facilitator assists the LEA and parent in identifying areas of disagreement and discussing methods to resolve these disagreements.[54] The parties are not required to

[49] *Id.*
[50] *Trends in Dispute Resolution (DR) under the IDEA for SY 2021-2022*, CADRE, (Dec. 2023) https://www.cadreworks.org/files/trendsindisputeresolution-ffy2020-21accessiblepdf
[51] *Id.*
[52] Renee A. Davis, *SPECIAL EDUCATION DUE PROCESS: AN ANALYSIS OF DECISIONS IN NEW JERSEY FROM JULY 2005 - JUNE 2012*, ROWAN UNIVERSITY: THESES AND DISSERTATIONS (2022).

[53] *Id.*
[54] *Id.*

mediate, but it is the best option to resolve the dispute because of the time saving and costly nature of the process.[55]

If parents decide to forgo mediation, or a decision cannot be reached, a due process hearing can be requested. However, the IDEA requires parents to formally file for IEP due process within two years of the dispute.[56] Failing to file within this time frame results in parents losing their rights to challenge the IEP.[57] In New Jersey, once a due process hearing is requested, the student will remain in the last agreed-upon placement until the outstanding matters are resolved.[58] The waiting-period associated with this process is critical because the longer the process takes to get resolved, the longer the child goes without receiving the necessary educational services, which will be discussed more in a later section of this note. Prior to the start of the hearing, the parties must formally disclose all evidence they intend to use during the due process proceedings. However, this is a difficult task for parents who do not have access to the vast array of records necessary to prove their case, while school districts can easily access records and individuals who have the information they need to prevail in due process proceedings. Due process cases in New Jersey are heard before an Administrative Law Judge ("ALJ"), which is a neutral party with knowledge of the IDEA.[59]

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[55] *Understanding IEP Due Process*, UNDERSTANDING SPECIAL EDUCATION, (last visited Feb. 18, 2024), *https://www.understandingspecialeducation.com/IEP-due-process.html*

[56] *Id.*

[57] *Id.*

[58] N.J.A.C 6A:14-2.7

[59] Davis, *supra* note 52.

III. BURDEN OF PROOF STANDARD IN DUE PROCESS PROCEEDINGS UNDER THE IDEA

A. Burden of Proof as a Legal Concept

The Burden of Proof consists of two components: the burden of production and the burden of persuasion. The burden of production refers to a party's obligation to provide evidence that proves each element of a claim or cause of action.[60] Generally, this burden is placed on the moving party to introduce evidence that proves each element of its claim.[61] If the party fails to provide sufficient evidence that is strong enough to support their case, they lose. However, if sufficient evidence is presented, the issue is submitted to a finder of fact. In some case, if sufficient evidence is presented, the burden could shift to the opposing party, who is then forced to provide evidence to rebut the initiating party's evidence or present evidence that would establish an affirmative defense.[62] The burden of production has the ability to shift from party to party throughout the case.

On the other hand, the burden of persuasion stays with the same party throughout the fact-finding process. The burden of persuasion involves persuading the finder of fact of the correctness of a party's position.[63] In cases where the evidence is equally divided between the parties, the burden of persuasion is typically outcome-determinative. In these "tie" cases, the tie goes to the litigant who does not have the burden of persuasion.[64]

The standard of review is also tied to the concept of burden of proof. The standard of review refers to the scrutiny with which a higher tribunal reviews the factual findings of a

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[60] Thomas A. Mayes, Perry A. Zirkel & Dixie S. Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. (2005).
[61] *Id*.
[62] *Id.* at 33.
[63] *Id.* at 34.
[64] *Id.*

lower tribunal.[65] The levels of scrutiny exist on a spectrum, with one end being "de novo" review, meaning the reviewing body gives little or no weight to a lower body's decision. At the other end, a lower body's findings may be reviewed for substantial evidence or abuse of discretion.[66]

B. Burden of Proof and the IDEA

In the context of reviewing an administrative decision made under the IDEA, courts have employed a "modified de novo" standard of review. Under the IDEA, the standard is "preponderance of evidence," meaning the burden of proof must be of greater weight than the evidence favoring the defining party.[67] To put this another way, the party with the burden of proof in a case with "preponderance of the evidence" standard must present evidence that it is more likely than not that the party's position is correct.[68]

This standard of review was first used by the court in *Rowley*, where it was stated that this modified de novo review standard requires the reviewing court to make "independent decisions" as to the issues raised based on the preponderance of the evidence while giving "due weight" to the determinations made during the state administrative proceedings.[69] Furthermore, the court's inquiry under the IDEA requires a procedural and substantive analysis.[70] First, the court must determine whether the school system has complied with the procedures set forth in the IDEA.[71] Second, the court must assess whether the individualized education plan (IEP)

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[65] *Id.*
[66] Thomas A. Mayes, Perry A. Zirkel & Dixie S. Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. (2005).
[67] *Id.*
[68] *Id.*
[69] Winkelman v. Parma City Sch. Dist. Bd. of Educ., 2009 U.S. Dist. LEXIS 112137 (citing *Rowley*, 458 U.S. at 206)
[70] Nack ex rel. Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006).
[71] *Id.*

developed through those procedures was reasonably calculated to enable the child to receive educational benefits.[72] Under this analysis, the burden rests on the parents to prove, by a preponderance of the evidence, that the IEP was inadequate.

The IDEA does not allocate the burden of proof in due process proceedings to either party. However, in 2005, the Supreme Court ruled that the party requesting a due process hearing bears the burden of proof under the IDEA unless a state enacts legislation to the contrary.[73] Brian Schaffer was a child who struggled academically as a result of learning disabilities and speech-language impairments.[74] Brian's parents brought suit against the school district and the court placed the burden of proof on them to prove that Brian's IEP was inadequate.[75] However, the parents asked the court to assume that every IEP was invalid and the burden be placed on school districts to demonstrate that it was not.[76] The court rejected this argument and instead held that the party challenging an IEP, the parents, bear the burden of persuasion in a due process hearing.[77] Since this decision, several states and the District of Columbia have effectively overridden Schaffer by creating statutes or other regulatory regimes that generally place the burden of proof is on the public agency.[78] Many of these regulatory regimes state that while the party seeking relief has the burden of proof, the public agency is responsible for proving the appropriateness of the child's program or placement.[79] For example, the District of Columbia states that the party seeking relief has the burden of production and burden of persuasion, except in cases where there is a dispute about the appropriateness of the child's program or placement or when a parent seeks tuition

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[72] *Id.*
[73] Schaffer v. Weast, 546 U.S. 49 (2005).
[74] *Id.* at 54.
[75] *Id*. at 56.
[76] *Id.* at 59.
[77] *Id.* at 62.
[78] Tiffany Clark & Lynne B. Rosen, *The Burden of Proof in Special Education Due Process Hearings*, DEPARTMENT OF LEGISLATIVE SERVICES (2017).
[79] *Id.*

reimbursement for a unilateral parental placement.[80] Other states, such as New Jersey, place the burden of proof and production on the public agency in all cases.[81]

IV. SHIFTING THE BURDEN: EFFECTS OF PLACING THE BURDEN ON PARENTS

While some states have shifted the burden to school districts, many states still hold that the party challenging the IEP, bears the burden of proof in due process proceedings under the IDEA. However, the burden of proof is not the only burden placed on parents during these hearings. Due process proceedings place emotional and financial burdens on parents and make it more difficult for them or the child with disabilities to succeed. In placing the burden of proof on parents, parents are automatically placed in a powerless position and forced to overcome adverse challenges before they even begin the due process proceeding.

The fees for attorneys and experts alone are extremely costly and while the IDEA allows for attorneys' fees, many parents never get this chance because they fail to meet the burden of proof because of the accessibility issue. Also, many parents of children with disabilities are from low-income communities and therefore cannot handle the costs of due process proceedings forcing them to give into the school district. However, school districts are larger and can offset the expenses of due process proceedings much more efficiently than a parent of a child with an intellectual disability.

A. Burden Placed on Parents in Special Education Due Process Proceedings

This section will discuss the burdens placed on parents of children with disabilities and the short- and long-term effects caused by parents having to bear this burden. It will then discuss

[80] *Id.*
[81] *Id.*

several reasons why school districts are better equipped to handle the burden of proof. By placing the burden of proof on families, the inherent issues of the due process system are placed entirely on the parents, rather than the school district. These issues include the unequal balance of accessibility for documents and testimony for the discovery process, as well as the heavy financial strain placed on families throughout this process.

1. Accessibility and Unequal Opportunity for Discovery

School districts have an automatic advantage in due process proceedings because of the unlimited access they have to documents, experts, such as teachers, and other relevant school information.[82] On the other hand, parents entirely lack access to all this information.

In order for due process hearings to be fair, the parents need timely notice and prior access to the evidence.[83] Many parents believe that timely notice prior to their due process hearing is not an issue, but many argue that prehearing activities, such as access to school records pertaining to their child and relevant to the IEP were not made available in an appropriate or timely manner. In a study, only 24% of parents reported that all or nearly all pertinent school records had been made available and another 24% reported that no or nearly no such records had been forthcoming.[84] To make matters worse, 51% of parents claims that schools provided no or almost no explanations of the meaning of the provided records. Keeping in mind that parents are already at a disadvantage during due process hearings and lack the same level of knowledge that the experienced school districts do makes this statistic especially

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[82] *Make Burden of Proof Fair and Equitable*, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES (last visited Mar. 8, 2024), https://www.copaa.org/page/BOP.

[83] Steven S. Goldberg & Peter J. Juriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILDREN 6, 546-555 (May 1991).

[84] *Id.* at 550.

concerning. If parents are given records with no explanation of the contents of the record or how it relates to the IEP, they cannot effectively build their case against the school district and will likely fail to carry the burden of proof, ultimately resulting in the loss of their case. Furthermore, during IEP meetings, which ultimately becomes the basis of the parent's argument against the school district, some parents found that accessing the necessary information was nearly impossible, with one parent stating:

> Not enough information is presented to parents in regard to what services their child is eligible for. We have to find things out the hard way, by investigating ourselves and it is an exhausting experience. Schools should be much more forthcoming with that info. They should be more focused on what the child truly needs to succeed rather than how they can conserve their resources.[85]

Alternatively, although the IDEA mandates parental access to all of the child's educational records and evaluations prior to the due process hearing, these provisions are not comparable to the rigorous discovery requirements in civil litigation.[86] The school district's control a majority of the necessary records that parents need in order to establish their case. This also includes control over important experts to the case, the child's teachers, who are employees of the school district. School districts also possess a level of expertise on academic affairs that parents often do not because they are familiar with due process proceedings and understand what courts typically require of each side.[87]

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[85] Kelli A. Sanderson, "*Be Prepared to Fight Like Hell": Parent Advice for IEP Meetings*, EXCEPTIONALITY 31(3): 1-18, (Feb. 2023).
[86] Jennifer M. Saba, *Undue Deference: Toward a Dual System of Burdens under the Individuals with Disabilities Education Act,* 57 DEPAUL L. REV. 133 (2007).
[87] *Id.*

2. Financial Strain

Another issue with placing the burden of proof on parents during special education due process proceedings is that many parents are unable to afford attorneys or experts, while school districts already have this representation on hand. For reference, if parents decide to receive representation from an attorney, legal fees typically cost an average of $19,000.[88] However, in certain districts and cases, parent attorney fees can be upwards of $75,000.[89] Furthermore, in a survey of special education attorneys, 80% of those interviewed indicated that good results for the student with disabilities require expensive experts and 82% of parent attorneys agreed that in order for parents to prevail in due process hearings, representation by attorneys is a necessity.[90] In a study on the Massachusetts special education due process proceedings, the researcher found that approximately 50% of parents undergoing due process proceedings forgo hiring an attorney in order to minimize expenses.[91] However, Table 5 of the article illustrates that in the 258 cases where parents appeared pro se, 71% of those pro se cases resulted in a loss for the parents and child with disabilities.[92]

These cost of just the essentials, experts and attorneys, illustrates just two barriers for parents without the resources

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[88] *IEP Process vs Due Process and IDEA Compliance*, NATIONAL SPECIAL EDUCATION ADVOCACY INSTITUTE, (last visited Feb. 3, 2024), https://www.nseai.org/iep-vs-due-process

[89] *Id.*

[90] Grace Tatter, *Low-Income Students and a Special Education Mismatch*, HARVARD GRADUATE SCHOOL OF EDUCATION, (Feb. 21, 2019), https://www.gse.harvard.edu/ideas/usable-knowledge/19/02/low-income-students-and-special-education-mismatch#:~:text=In%20their%20analysis%20of%20data,objective%20categories%2C%20like%20hearing%20impairment.https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6780&context=faculty_scholarship

[91] William & Vivian Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*, SAGE (2015).

[92] *Id.*

and funding necessary to enforce the right of their child to a free and appropriate public education, but they are not the end of a parent's financial hurdles. In some cases, parents may elect for an out-of-district placement of their child, which substantially increases the costs parents have to pay. An out-of-district placement is a specialized school or program that parents opt to send their child to when their school district cannot meet their child's educational needs.[93] These placements are able to provide the appropriate education for a child with disabilities, but they are extremely costly, and school districts will often be reluctant or outright refuse to pay for the costs of the placement.[94] On average, private, out-of-district placements cost around $50,000 a year, and can even reach up to $100,000 in total expenses once transportation and other services are factored in.[95]

Returning to Frankie's case,[96] his parents were forced to decide between keeping their son in a public school with an inappropriate IEP and risk further educational regression, or move him to a private school and cover the expenses themselves. They ultimately decided to place their son in a private special education school.[97] To come up with the money to support their son, they withdrew from their 401(k) account early and put the remaining expenses on a credit card. Frankie's parents were fortunate enough to have the ability to access those assets to immediately place their son in a program that allowed him to flourish educationally and socially, but they faced deep financial strain.

Income disparity adds another dimension to this issue, as low-income parents without resources like a savings account,

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[93] Amanda Morin, Out-of-District Placement: How it Works, UNDERSTOOD, https://www.understood.org/en/articles/out-of-district-placement-how-it-works (last visited xxx).

[94] *See* Lisa Lightner, *How to Get an Out-of-District Placement (IEP and Special Education),* A DAY IN OUR SHOES, https://adayinourshoes.com/iep-private-placement/ (last visited Feb. 8, 2024).

[95] *Id.*

[96] Norristown Area Sch. Dist. v. Frank C., 2014 U.S. Dist. LEXIS 201121 (E.D. Pa. 2014).

[97] *Id.* at *7.

a 401(k), or even room on their credit card are unable to meet the cost of tuition. Research has shown that there is a positive correlation between poverty and special education assignment since children in poverty have experiences that are more heavily associated with disability.[98] Families of children with disabilities have dramatically higher rates of poverty and are less educated than the population as a whole, thus are far less likely to prevail against the school district since they lack the necessary resources.[99]

Of the seven million children receiving special education services under the IDEA, one-quarter live below the poverty line and two-thirds live in households with incomes of $50,000 or less.[100] A study by the American Bar Association found that 60% to 70% of Americans cannot afford lawyers to meet their non-routine legal needs.[101] The costs associated with IDEA highlight the discrepancies between wealthy families and families living below the poverty line. The private school tuition remedy available under the IDEA illustrates just one-way families without means may be overlooked. When public schools fail to provide FAPE, a parent may seek tuition reimbursement if they decide to switch their child into private school.[102] This right is limited for families without financial resources, since many private schools require up-front payments, contracts, deposits, or have other admissions policies in place that have the effect of excluding these families.[103] In cases where families are able to find a private school that would conditionally accept their child, the parents may still have to incur substantial debt to the school

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[98] Laura A. Schifter et al., *Students from Low-Income Families and Special Education*, CENTURY FOUND. (Jan. 17, 2019), https://tcf.org/content/report/students-low-income-families-special-education.

[99] *See* Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections From the Frontlines of Special Education*, 20 AM. U. J. OF GENDER SOC. POL'Y AND L. 107, 112-113 (2011).

[100] *Id.* at 113. ("For the poorest parents, legal services are simply not affordable, and limited resources restrict free legal aid to a fortunate few.")

[101] *Id.*

[102] *Id.* at 121.

[103] *Id.*

in order to secure their child's spot. This is not a realistic option for many families, as the remedial processes under IDEA are very lengthy and their debt to the school would only accrue over that time.

Under the IDEA, school districts are responsible for conducting evaluations of children suspected of having disabilities.[104] However, if a school district fails to evaluate or conduct a particular assessment as part of the overall evaluation, the IDEA does not expressly allow a parent to obtain an Independent Educational Evaluation ("IEE").[105] These IEEs are another area where low-income families are burdened. An IEE is an evaluation or assessment conducted by educational professionals who do not work for or are otherwise affiliated with the district .[106] This independent assessment is critical for due process proceedings because it enables parents to obtain evaluative information as well as suggestions on instructional strategies from professionals who are not beholden to district, or under pressure to minimize district spending.[107] Even though this evaluation is a crucial piece of evidence for parents due process proceedings, it is difficult for a parent without financial resources to exercise this right because they typically cannot afford an expert.[108] Under the IDEA, parents have the right to request an IEE, to which the school district must either ensure the IEE is provided, or file an administrative due process hearing of their own to show that its own evaluation is appropriate. Without an independent evaluation contradicting the claims of the district, parents cannot refute these claims.[109]

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[104] *Id.*
[105] Hyman et al., *supra* note 99 at 128.
[106] *Id.* at 126.
[107] *Id.*
[108] *Id.* at 126-27.
[109] *Id.*

3. IDEA's Disproportionate Impact on Impoverished Families

The IDEA offers students with disabilities a substantive right to free appropriate public education, but does not guarantee equal educational outcomes. A students IEP team, comprised of their parents, their teachers, and representatives of the district, make ddecisions regarding placements where a child is to receive specialized instruction, and other related services. However, it's the school districts and not the parents that are in control of designing and structuring these placements, which means that the district's budget, staffing, and state laws all impact what is offered to the child with disabilities.[110] Well-funded school districts typically can handle this structuring with ease, but low-income school districts are less likely to have the same opportunities for integration which leads to higher rates of segregation and poorer academic outcomes .[111] This mismatch between school resources and student needs becomes apparent in overcrowded classrooms, dilapidated facilities, and lower quality services.[112] One study indicated that 90% of low-income school districts lack vital resources, including the ability to hire qualified special education teachers.[113] The lack of adequate resources leads to larger disparities in academic achievement between students with disabilities and those without. For these reasons, students with disabilities in low-income school districts face challenges not only related to their individual disability, but also to the structural shortcomings of the school district. While the IDEA was intended to address issues related to disability, it fails to provide a means of support for these structural shortcomings pervasive in low-income districts.

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[110] Claire S. Raj, *Rights to Nowhere: The IDEA's Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 426-27 (2022).
[111] *Id.* at 427.
[112] *Id.* at 428.
[113] *Id.*

Childhood is a crucial period to an individual's brain development and growth. In certain situations, delaying children from receiving the appropriate education and services may impact their development growth and educational achievements. Children who grow up in poverty are even more highly affected by their circumstances and their developmental growth is impacted. Research has shown that children who grow up in poverty have significantly less white and cortical grey matter, the actual tissue of the brain, massively impeding their learning capacities at early ages.[114] Furthermore, due to the circumstances that children with poverty deal with, their brains show a substantial deterioration of cognitive capabilities associated with memory, language, and reading.[115] Children with impairments who are not in the appropriate educational setting are likely to be disadvantaged for the rest of their lives.[116]

It is also important to note that the classification of special education students is more likely to identify low-income students, rather than their more affluent peers, specifically in subjective categories like emotional disability.[117] This creates a separate issue, where special education classes are no longer based on need, but rather a failure of the school district to appropriately place the student. Some researchers hypothesize that school districts with more limited resources are misidentifying low-income students as students with disabilities in order to place them in separate classrooms because the general education program of the school district fails to meet the needs of these students.[118] Another theory for why poverty and special education placement so often correlate

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[114] Morgan Marie Auge, *The Effects Poverty Has on Students in Special Education*, (Jul. 2021) (Master's Thesis, Bethel University) (Spark Repository).

[115] *Id.* at 27 (tying the impediment of early childhood brain development to neglect, family stress, and malnutrition).

[116] *Id.*

[117] Tatter, *supra* note 90.

[118] Bruno Youn, *Poverty and Special Education Placement,* INLAND EMPIRE OUTLOOK, Spring 2018, at 15.

is that school districts are intentionally denying services to students with disabilities to avoid paying the cost of providing the services they need.[119] School districts with more low-income students face more financial pressure and thus, have more incentive to deny services. Since the families in these school districts are low-income, the parents of these students presumably are less likely to have access to the legal and financial resources necessary to advocate for the child with disabilities in situations where they feel they are being deprived of the necessary services.[120] For example, school districts may find it more cost-effective to place students in general education classrooms rather than special education classrooms, even though the child's academic achievements and developmental progress would be thwarted in the general classroom. While this violates the IDEA, school districts, specifically those in low-income areas, have found ways around the requirements of the IDEA. Local educational agencies may refuse to identify children who clearly have disabilities, allowing them to avoid any obligation of having to provide the child with the necessary services and aides.[121]

By placing the burden of proof on parents rather than school districts in special education due process proceedings, the IDEA puts further financial strain on low-income parents of children with disabilities. Unable to afford an attorney, parents are forced represent themselves against the districts and their attorneys, walking into an adversarial situation without the resources and knowledge necessary to show that the district failed to comply with the procedures and the substantive provisions of the IDEA.[122]

Aside from the financial burden placed on parents in special education due process proceedings, parents of children with disabilities also face additional financial burdens, such as various therapy services, specialized day cares, and daily living adaptations that make it easier for the child to be successful in

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[119] *Id.* at 19.
[120] *Id.*
[121] *Id.*
[122] *See* Hyman, *supra* note 119 at 144.

day-to-day life.[123] Additionally, families of children with disabilities could have out-of-pocket health-care expenditures that are significantly larger than that of families of children without disabilities.[124]After that, the transaction costs associated with bringing a due process claim are very high and spread unevenly throughout the affected population, deterring many families from ever arguing against an IEP, no matter how inappropriate it may be for their child.

One type of transaction cost is the cost of involvement in educational decisions. Since parents have fewer financial resource, this cost is generally more expensive for them because of the higher cost involved in obtaining sufficient knowledge to participate in these decisions, as well as the additional cost related to loss of time at work to participate in these decisions.[125]

The second type of transaction cost involves the risk associated with raising a claim, which varies with the ease of exiting the school system.[126] Wealthier families are more able to raise individual claims because they can afford to move to a different district, or even into a private school, if their relationship with the school is harmed in the process of complaining.[127] However, lower income families do not have these same options, making it riskier for them to raise complaints against the school district.

Another type of transaction cost involved in due process proceeding and special education litigation, perhaps the most significant cost, is hiring an attorney. To limit the size of this

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[123] Christine Michel Carter, *Effective Tools for Working Parents Raising Special Needs Children,* FORBES (Sep. 8, 2024, 11:50 AM), https://www.forbes.com/sites/christinecarter/2024/09/08/effective-tools-for-working-parents-raising-special-needs-children/

[124] Kimberly Goodwin, PhD, *Financial Challenges of Raising a Child with Disabilities*, NOBLE (Sep. 30, 2018), https://www.mynoblelife.org/2018/09/financial-challenges-of-raising-a-child-with-disabilities/

[125] Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1444 (2011).

[126] *Id.*

[127] *Id.*

transaction cost and incentivize attorneys to take these cases, the IDEA includes a provision permitting prevailing parents to obtain attorneys' fees from the other party.[128] However, Supreme Court decisions have limited this effect which explains why the provision has not ameliorated the difficulties low-income families face in finding an attorney.[129]

One such decision from the court came from *Marek v. Chesny*.[130] There the Court ruled that in cases where parents prevail at the conclusion of a proceeding, but the monetary judgment they obtain is less than the settlement offer they previously rejected, they cannot recover attorneys' fees unless they were substantially justified in refusing that offer.[131] Additionally, no attorneys' fees can be awarded for participation in IEP meetings and even more, attorneys' fees can be reduced if the parent or parent's attorney "unreasonably protracted" the proceedings; if the fees or hours are determined to be excessive.[132] These practices restricting the grant of attorneys' fees constrict the supply of practitioners and reduce low-income families' access to lawyers.

An additional level of concern regarding the financial risks to parents revolve around a 2004 Congressional provision that makes parents and their attorneys responsible for the attorneys' fees of the defendant school districts in a variety of circumstances: if the complaint is determined to be frivolous, unreasonable, or without foundation, or if the complaint was presented for "any improper purpose."[133] While these provisions disincentivize parents from making frivolous complaints, many parents could still file a complaint they believe is proper, but crosses the line into unreasonable

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[128] *Id.* at 1445.
[129] *Id.* at 1446.
[130] Marek v. Chesny, 473 U.S. 1 (1985).
[131] *Id.* at 11-12 (1985). *See also* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1096-97 (2007) (discussing *Marek v. Chesny* as part of a broader effort to curb civil rights claims).
[132] Pasachoff, *supra* note 122 at 1447.
[133] *Id.*

advocacy. This mistake would force parents into the burden of covering the school district's legal fees.[134] Therefore, parents, who face more risks by entering into litigation proceedings, are more likely to decide against raising claims against the school district out of fear that these heavy costs will fall on them in the end.

The financial burden may push parents into alternative dispute resolution forums, like mediation, without an attorney, putting them at an automatic disadvantage against the more knowledgeable and powerful school district.

4. Emotional Pressures

The final burden placed on parents during special education due process proceedings are the emotional pressures that parents must deal with throughout the process. Parents of children with disabilities are prone to psychological distress, such as anxiety and sleep disturbances.[135] In a study analyzing the parental stress in families of children with disabilities, the researchers isolated the risk factors associated with increased emotional burdens and stress. Some of these risk factors included parents' thoughts and emotions associated with worries about current and future situations, educational barriers, perceived judgement from others, and contrasting perspectives regarding the child's needs and proposed solutions.[136] While these are just some of the contributing factors to parent's emotional burdens, adding a complex, expensive legal proceeding to the mix only adds to the emotional toll on parents of children with disabilities.

The initial emotional pressure parents must deal with comes from the stress of challenging the school district and its educators, the people in charge of their child's educational opportunities. Many parents face valid concerns that by

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[134] *Id.*

[135] Andrew W.Y. Cheng & Cynthia Y.Y. Lai, *Parent Stress in Families of Children with Special Educational Needs: A Systematic Review*, FRONTIERS PSYCHIATR, Aug. 2023, at 1.

[136] *Id.* at 5 tbl.1, row 3 (citing Shaffer et al.).

bringing a claim against the school district, they could jeopardize their relationship with the school and prejudice their child's future educational opportunities.[137] The IEP meeting itself is an emotionally draining event that parents have to take part in. While IEP meetings are meant to be collaborative between parents and school boards, many issues may arise over conflicting views on what is best for the child.[138] In a survey of parent experiences during IEP meetings, parents described and rated their past IEP meeting experiences.[139] The study found that the overall IEP experience is overwhelmingly negative for parents.[140] The meetings are student-centered and focused on student progress, and these meetings afford opportunities for parent and student participation, but the positive experience for parents ends there.[141] Over half of the responses in the survey described the IEP experience as negative, citing discontent of IEP team members and school practices.[142] The main areas of dissatisfaction from parents were lack of collaboration, deficit-based meetings, unprofessional behavior, and a broken special education system.[143] Parents also face an additional emotional burden during IEP meetings and due process proceedings as parents build their case with the facts that will illustrate the educational and mental deficits their child deals with.[144] Although the parents are obviously aware of the disabilities their child has, for many parents, hearing negative things about their child is "stressful" and "defeating."[145]

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[137] *See* Pasachoff, *supra* note 122, at 1447.
[138] Kelli A. Sanderson, "*Be Prepared to Fight Like Hell": Parent Advice for IEP Meetings*, EXCEPTIONALITY 31(3): 1, 1 (Feb. 2023).
[139] *Id.*
[140] *Id.* at 14.
[141] *Id.* at 5 tbl.2.
[142] *Id.* at 6.
[143] *Id.*
[144] *See generally* Sanderson, *supra* note 140 at 7 ("Be prepared to fight like hell.").
[145] *Id.*

B. Shifting Burden of Proof: Effects on School

This section will look at the current federal funding system relied on by school districts and argue that even though the current system is flawed, school districts are in a stronger position to cover the expenses associated with special education due process proceedings instead of parents of students with disabilities.

After analyzing the effects of placing the burden of proof on parents, it is appropriate to also address the impacts of placing the burden of proof on school districts. In addressing these effects, it is imperative to look at the issue of the lack of funding towards special education programs across the country.

Special education programs across the United States are consistently underfunded, even as the number of students qualifying for special education services increases to over 7 million students.[146] In 2020-21, over 307,000, or 18.1% of public-school students, received special education programs and services, an increase of 13.9% over the last 12 years.[147] However, the funding for these programs does not align with the growing need for them.

The IDEA is one of the primary "funding statutes" used for public education.[148] The Act provides states with federal funding by granting money to offset a portion of the excess cost of delivering special education and related services to children with disabilities.[149] The IDEA authorized federal funding for 40% of average per-pupil expenditure ("APPE") to pay a

[146] Mark Lieberman, *How Special Education Funding Actually Works*, EDUCATIONWEEK (Apr. 27, 2023), https://www.edweek.org/teaching-learning/how-special-education-funding-actually-works/2023/04.
[147] PA. SCHOOL BOARDS ASS'N, 2022 STATE OF EDUCATION 13 (2022).
[148] Tammy Kolbe, et al., *More Money is Not Enough: (Re)Considering Policy Proposals to Increase Federal Funding for Special Education*, 129 AM. J. OF EDUC. 79, 80 (Nov. 2022).
[149] *Id.* at 81; 20 U.S.C. § 1411.

portion of expenses for special education services.[150] However, since the IDEA was enacted, federal funding has fallen well below the 40% threshold.[151]

Furthermore, evidence also suggests that there are disparities in the allocation of federal IDEA funding such that states where the number of children aged 3-21 increased over the past two decades received fewer federal dollars per student, and large states received about 12% less funding than small states.[152] These disparities ultimately cause issues that affect the school districts. On average, larger districts with more students received less IDEA funding than small districts, districts in the smallest states had higher per-child federal IDEA funding, and districts with the largest declines in enrollment over the past fifteen years had higher per-child allocations.[153]

This funding gap is a common trend throughout the United States, and in order to make up for this gap in special education funding, most school districts have been forced to pay a larger share of special education expenses entirely from increases in local funding sources, such as property taxes.[154] Figure 1, below, illustrates the growing funding gap that school districts are facing due to the lack of federal and state funding. While this table focuses on Pennsylvania's special education funding gap, this trend is common among many states.[155]

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[150] Katie Graves, *Funding Falls Short for Students with Disabilities*, NAT'L ASS'N OF ELEMENTARY SCH. PRINCIPALS (Nov. 20, 2023), https://www.naesp.org/blog/funding-falls-short-for-students-with-disabilities/.

[151] Lieberman, *supra* note 141.

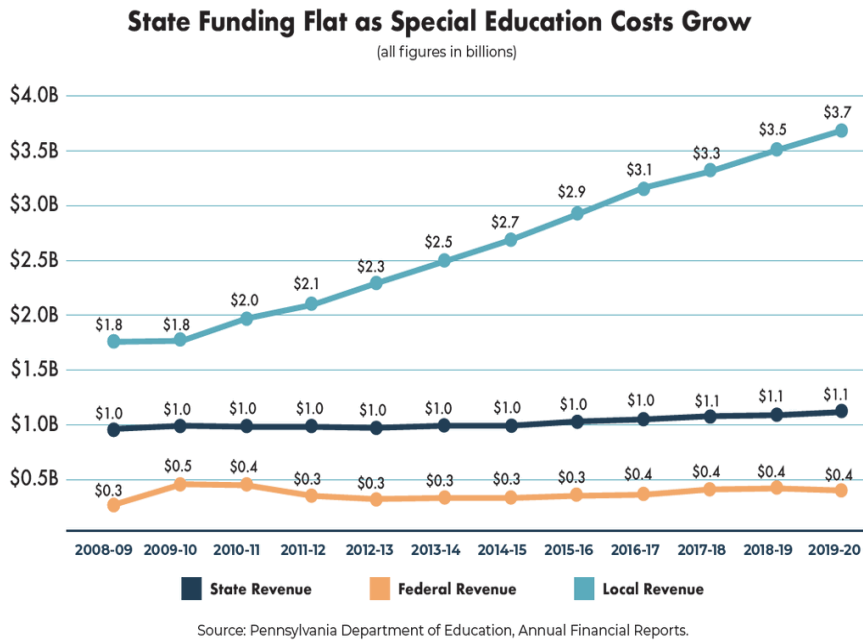
[152] Kolbe, *supra* note 143, at 83.

[153] *Id.*

[154] *See 2022 State of Education*, *supra* note 149, at 29.

[155] Carol Kocivar, *Special Education Costs Flood School Budgets*, ED100 (Feb. 3, 2020), https://ed100.org/blog/special-education-costs-flood-school-budgets (displaying the dismal funding level of special education programs in California, compared to the aspirational funding goals); Lisa Lightner, *How to Get an Out-of-District Placement (IEP and Special Education),* A DAY IN OUR SHOES, https://adayinourshoes.com/iep-private-placement/ (last visited Feb. 8, 2024), (showing the gap in federal funding from 2014-2018 in Washington). *See also* Kristine Goodrich, *Special Education Funding Gaps Growing, Inequitable*, FREE PRESS, (Mar. 3, 2019),

Figure 1: Special Education Funding Gap in Pennsylvania[156]



Despite the fact that these school districts lack adequate funding, they still have other means of offsetting the costs of special education programs, as well as costs that pile up during due process proceedings. In the event that a school district exceeds the amount of federal, state, and local funding to support a child with disabilities, they have access to alternative funding options. Based on a study done by the National Center for Education Statistics, total expenditures for public schools in the United States were $870 billion, averaging to $17,013 per

https://www.mankatofreepress.com/news/local_news/special-education-funding-gaps-growing-inequitable/article_233cb558-3c3e-11e9-b2e7-6ff371a12436.html (illustrating Minnesota's Special education spending gap).

[156] EDUCATION LAW CENTER, FIXING THE SPECIAL EDUCATION FUNDING GAP 2 tbl.1 (2022).

pupil.[157] However, 80% of the current expenditure costs were spent on salaries and employee benefits.

School districts have also argued that the more money the school district must utilize for the defense of legal cases, the less there is to be spent on students to further their academic achievements.[158] To support this argument, the New Jersey School Boards Association ("NJSBA") relied on a study which illustrated the cost of providing special education services in New Jersey. This study found that local, state, and federal special education expenditures in New Jersey totaled $3.3 billion.[159] The primary reasons for the exorbitant costs were out-of-district placements, programs for students with autism, and other related services and resource programs.[160] In 2013, the NJSBA conducted a nationwide survey to determine what regulations and legislation special education directors believed would benefit the school district.[161] Over one-third of school officials surveyed believed that the adjudication process for special education program, especially with regards to the burden of proof and production, was an area in need of change.[162]

Parents are burdened throughout the IDEA's special education due process proceeding. Before the proceeding even commences they must attempt to access records that are completely controlled by the school district. Continuing through the hearing, these parents face various costs that create deep financial strain, all while dealing with the emotional pressures that come with taking this fight on for the sake of their child's education. Conversely, school districts do not face these same problems, and are in a much better position to handle the handle these costs than parents are. First, school districts have much more robust financial means, than parents do and are able to

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[157] N.J. SCHOOL BOARDS ASS'N, SPECIAL EDUCATION: A SERVICE, NOT A PLACE 17-18 (2014).
[158] *Id.* at 17.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 23.
[162] *Id.*

better offset the litigation expenses. They also generally do not have the personal stake in the special education due process proceedings that a parent does, and can build their case without the emotional burden that parents struggle with through the process. Finally, school districts have almost complete control and access to all of the records needed to establish their case in support of their own IEP. It would be far more efficient if the burden of proof was on the school district to defend their own IEP as adequate to the needs of the child, rather than asking parents to try and get these same records from the schools to show that it is inadequate.

C. Rationales and Effects of Current Legislation Shifting the Burden to School Districts

Realizing the strain that the burden of proof places on parents, many advocacy groups have made efforts to shift the burden of proof to the school districts through legislation. This legislation has been introduced in several states, including Alaska, Hawaii, and Virginia.[163] Maryland, in particular, is one state that is currently challenging the current burden of proof in special education due process hearings.[164] As it stands in Maryland, the burden of proof is on the moving party, but proponents of House Bill 294 argue that the burden should be on the school districts.[165] Delegate Vanessa Atterbeary, co-sponsor of the bill, logically explained why the burden of proof should be shifted to school districts, stating:

> The burden should be on the school system, to show by a preponderance of evidence, that they

[163] Christina A. Samuels, *Some States Shift IEP Burden of Proof to School Districts*, EDUCATIONWEEK (Jan. 28, 2008), https://www.edweek.org/teaching-learning/some-states-shift-iep-burden-of-proof-to-school-districts/2008/01.
[164] Hannah Cechini, *Md. Lawmakers Seek to Flip Burden of Proof in Special Education Disputes*, WMDT (Feb. 8, 2023), https://www.wmdt.com/2023/02/md-lawmakers-seek-to-flip-burden-of-proof-in-special-education-disputes/.
[165] *Id.*

> are essentially providing what is required and that they're doing what they should be and doing right by that child. Parents need a fair shot to advocate for their child. You cannot do that if you're going up against an entire in-house legal system.[166]

However, this introduction to the burden shifting process has been extremely slow. One reason for this is that all the efforts are being made at the state level rather than through federal law.[167] Many states rely on the holding from *Schaffer v. Weast*, in arguing that the burden should be placed on parents during IEP due process hearings, since it would place IEP disputes on the same level as other disputes.[168] However, this logic is flawed. IEP disputes are not like other disputes because the controlling evidence for these proceedings is almost entirely in the hands of the opposing party.

In 2008, Pennsylvania attempted to pass House Bill 2438.[169] This bill proposed shifting the burden of proof from parents back to Local Education Agencies. Supporters of this bill relied on the original legislative intent of the IDEA and Chapter 14, which were to develop safeguards and protections to provide students with disabilities FAPE.[170] They also reasoned that by shifting the burden of proof back onto the school districts, it will incentivize them to actually offer programs that provide free appropriate public education with all necessary supports and services, ensuring more accountability for the LEAs and less responsibility on families.[171]

Nevada also proposed legislation to shift the burden of proof back to school districts.[172] Nevada offered similar

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[166] *Id.*
[167] Samuels, *supra* note 157.
[168] *Id.*
[169] H.B. 2438, 2007-2008 Gen. Assemb., Reg. Sess. (Pa. 2008).
[170] *Hearing on H.B. 2438 Before the H. Subcomm. on Special Educ.*, 2008 Leg., Reg. Sess. (Pa. 2008) (testimony of Ken Oakes on behalf of The ARC of Pennslyvania).
[171] *Id.*
[172] A.B. 318, 76th Leg., Reg. Sess. (Nev. 2011).

rationale as Pennsylvania's policymakers, citing reasons such as the greater accessibility to resources for school districts and the importance of leveling the playing field between parents and the school district.[173] Nevada also provided statistics to support their push for a shift in the burden of proof. In the data reviewed by policymakers and supporters of the bill, from 2000 to 2005, there were 22 hearings in Nevada; parents won seven of these cases, while school districts won the remainder.[174] From 2006 to 2011, there were 13 hearings, all of which were won by the school districts.[175]

Washington has also recently proposed a bill to establish burden of proof requirements for special education due process hearings.[176] Essentially, the bill proposes that with minor exceptions, the school district has the burden of proof, including the burden of persuasion and production, whenever it is a party to a due process hearing that concerns the identification, evaluation, reevaluation, classification, educational placement, disciplinary action or provision of a free appropriate public education for a student with a disability.[177] The public testimony in support of the bill explains that placing the burden of proof on school districts is essential because due process hearings are complicated and create unnecessary barriers for families.[178] Moreover, supporters clearly cite the disadvantage parents have in accessing information to build their cases by explaining that school districts have access to all of the documents since they create the IEPs.[179] Therefore, it is inherently easier for them to prove their case by a preponderance of the evidence, especially if they are confident in the IEPs they craft and in the services they provide.[180] Finally, supporters of the Washington

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[173] SUMMARY OF ASSEMBLY BILL NO. 318, LEGAL AID CTR. S. NEV. (2011) (on file with author).
[174] *Id.*
[175] *Id.*
[176] S.B. 5883, 68th Leg., Reg. Sess. (Wash. 2024).
[177] *Id.*
[178] H. 68-24, Reg. Sess., at 2 (Wash. 2024).
[179] *Id.*
[180] *Id.*

bill found that the shift in the burden of proof incentivizes resolution, allowing more cases to resolve more quickly.[181]

While some states, like Maryland and Washington, are currently proposing bills to shift the burden of proof to school districts, there are many states that have legislation in place that effectively places the burden of proof on the school district, regardless of who disputes the IEP.[182]

For example, Connecticut's statute places the burden of going forward with the evidence on the party seeking relief, while the public agency (the school district) has the burden of showing the appropriateness of the child's program or placement.[183] Likewise, the District of Columbia carves out exceptions to the general rule that the party disputing the IEP, typically the parent, bears the burden of proof. The statute in the District of Columbia places the burden of production and the burden of persuasion on the party seeking relief, except where there is a dispute about the appropriateness of the child's program or placement, or where a parent seeks tuition reimbursement for a unilateral parental placement.[184] However, New York has instituted a statute contrary to the District of Colombia's, placing the burden of proof on the public agency, including the burden of persuasion and the burden of production, except in a case where a parent seeks tuition reimbursement for a unilateral parental placement.[185]

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[181] *Id.*

[182] *See Burden of Proof Legislation—Burden of Proof, Ho. Co. 2-22*, HOWARD CNTY. PUB. SCH. SPECIAL EDUC. CITIZENS' ADVISORY COMM., https://www.ptachc.org/wp-content/uploads/2021/11/Burden-of-Proof-Legislation-Explanation.pdf (last visited Nov. 27, 2024) (organizing all fifty states' current burden of proof laws into three categories: (1) No change: Burden continues to be on school district; (2) No Change: Burden continues to be on the moving party; and (3) Change: Burden is on the moving party).

[183] Tiffany Clark & Lynne B. Rosen, *The Burden of Proof in Special Education Due Process Hearings*, DEP'T OF LEGIS. SERVS, *Issue Papers: 2017 Legislative Session* 91, 92 (2016), https://www.mabe.org/wp-content/uploads/2017/01/2017rs-Issue-Papers-SpecEdBofP.pdf (last visited Nov. 27, 2024).

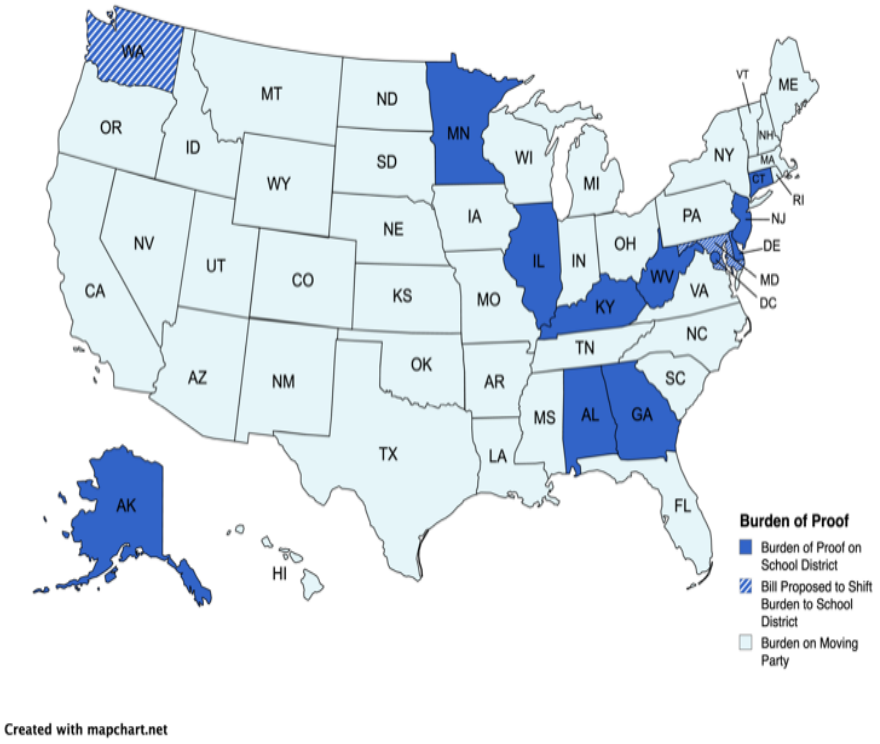
[184] *Id.*

[185] *Id.*

New Jersey has been a major proponent in creating legislation to ease the burden on parents with respect to special education due process proceedings. Most recently, a settlement agreement may alter how school districts' individualized education program team decisions are reviewed.[186] According to the settlement agreement, the Office of Special Education ("OSE") will investigate school district determinations with respect to evaluation, placement, and provision of a FAPE to student with disabilities.[187] This essentially will provide an opportunity for a low or no cost review of IEP team determination that can be used in lieu of, or in addition to, special education due process proceedings.[188] This is significant because it provides an option for parents, especially those who may not be able to afford to go through with the due process proceeding. A settlement like this could have enormous implications for future special education litigation. First, since the agreement proposes a requirement to investigate placement and what constitutes FAPE, the number of requests for complaint investigations will increase.[189] Second, this process would afford parents of children with disabilities a means for low-cost review, and if appropriate, alteration of IEP team decisions as a first step in an appeal process and, if successful, eliminates the need for costly litigation.[190]

[186] John Worthington, *NJDOE Agrees to Major Revisions to State Complaint Process in Special Education*, N.J. PRINCIPALS & SUPERVISOR ASS'N (Sept. 7, 2023), https://njpsa.org/njdoe-agrees-to-major-revisions-to-state-complaint-process-in-special-education/.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*

Figure 2: Who Has the Burden of Proof in Each State [191]



V. CONCLUSION

Although school districts raise valid arguments against shifting the burden of proof and production onto them, this issue creates a balancing problem that legislators must assess when making these decisions. School districts fairly argue that this burden shifting negatively impacts their allocation of resources and eats up a large amount of their funding. However, the alternative option in this case is to keep the burden of proof and production on parents. Looking solely at the resources

[191] Adapted from *Make Burden of Proof Fair and Equitable,* COPAA, https://www.copaa.org/page/BOP

accessible to both parties, it is obvious that school districts are more equipped to handle the financial and emotional burdens associated with due process burden of proof. While the burden may strain the school district's resources, the alternative would prevent many parents of children with disabilities from getting a chance to go through due process proceedings, resulting in the child with disabilities remaining in a placement that is not appropriate for them and impacting their growth and development for the future. Furthermore, one could argue that shifting the burden of proof to school districts could ultimately save them money since costs of litigation are reduced when schools have the burden of proof. Therefore, if school districts are in the wrong, quicker resolutions and lower attorneys' fees for parents would save the district money long-term.

States that have implemented legislation which shifts the burden of proof to school districts have proven that the burden shifting leads to quicker resolution of disputes.[192]Shifting the burden of proof to school districts would not only lead to better resolution of disputes, but also would hold districts accountable for implementing appropriate individualized education programs for students with disabilities in their district. Placing the burden of proof on school district also favors equity since students and families of children with disabilities are at an inherent disadvantage in due process proceedings since they do not have immediate access to data, legal representation, or expertise regarding the IEP. For all these reasons, implementing this procedural change would level the playing field between school districts and parents.

[192] Ramona Hattendorf, *Make Due Process in Special Education Fair*, PUBLIC POLICY: IDEAS TO SUPPORT PEOPLE WITH IDD (2024).

IT IS TIME TO ADMIT DEFEAT IN THE WAR ON DRUGS AND ALLOW ITS VICTIMS TO HEAL

Randall Petronko

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PART 1: BACKGROUND

How It's Going

The War on Drugs officially started on June 17, 1971,[1] and it has been a massive failure scientifically, fiscally, and societally. President Richard Nixon declared, "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."[2] In his address, he requested Congress give him $350 million to fund the War on Drugs, an over 400% increase in the federal drug budget from two years earlier.[3] When President Nixon created the Drug Enforcement Administration ("DEA") in 1973 it had a budget of less than $75 million and around 1,500 agents. Today those numbers have increased to a budget of over $2 billion and over 5,000 agents.[4] The War on Drugs has been going on for fifty-three years and has cost $1 trillion, $39 billion of that in 2022.[5] Despite the massive number of resources devoted, drugs are the clear winner. In 2021, the Government Accountability Office ("GAO") added the war, which they designated "National Efforts to Prevent, Respond to, and

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[1] Benjamin T. Smith, *New Documents Reveal the Bloody Origins of America's Long War on Drugs*, TIME (Aug. 24, 2021 at 12:49 PM), https://time.com/6090016/us-war-on-drugs-origins/.

[2] President Richard Nixon, White House Briefing: Remarks About an Intensified Program for Drug Abuse Prevention and Control (Jun. 17, 1971), *in* THE AM. PRES. PROJECT https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control.

[3] David Farber, *The War on Drugs Turns 50 Today. It's Time to Make Peace.*, WASH. POST (June 17, 2021), https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/.

[4] *War on Drugs*, HIST., https://www.history.com/topics/crime/the-war-on-drugs (last updated Dec. 17, 2019).

[5] Dante Chinni, *Costs in the War on Drugs Continue to Soar*, NBC NEWS (July 2, 2023), https://www.nbcnews.com/meet-the-press/data-download/costs-war-drugs-continue-soar-rcna92032.

Recover from Drug Misuse" to their High-Risk list.[6] The GAO has maintained the list since the 1990s to focus "attention on government operations with greater vulnerabilities to fraud, waste, abuse, and mismanagement, or that are in need of transformation to address economy, efficiency, or effectiveness challenges."[7] In short, the GAO's High-Risk list highlights government programs that are systematically failing. Many factors are used and investigated prior to being added to this list, "We consider qualitative factors . . . public health . . . national security, national defense . . . citizens' rights . . . injury or loss of life; or significantly reduced economy, efficiency, or effectiveness."[8] Additionally, that analysis only occurs if there is $1 billion at risk from the program. The 2021 report notes, "National rates of drug misuse have been increasing, and drug misuse has resulted in significant loss of life and harmful effects to society and the economy."[9] If the war had a positive impact, at least one of those metrics would be decreasing. In fact, the argument can be made that the war has done more harm to the United States than good. Despite increasing efforts fighting the War, there was a 163% increase in drug overdose deaths between 2002-2019.[10] The 2023 GAO report notes that none of the five criteria for removal from the High-Risk list were met; three were partially met and two were not met at all.[11]

"Every 25 seconds, someone in America is arrested for drug possession. The number of Americans arrested for possession has tripled since 1980, reaching 1.3 million arrests per year in 2015."[12] Between 1995-2016, 77% of drug arrests

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[6] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-119SP, HIGH-RISK SERIES: DEDICATED LEADERSHIP NEEDED TO ADDRESS LIMITED PROGRESS IN MOST HIGH-RISK AREAS, (2021).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106203, HIGH-RISK SERIES: EFFORTS MADE TO ACHIEVE PROGRESS NEED TO BE MAINTAINED AND EXPANDED TO FULLY ADDRESS ALL AREAS (2023).
[12] Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27,

were for possession.[13] On any given day there are 361,000 incarcerated persons serving sentences for drug offenses, making up 20% of the entire incarcerated population. Of that 20%, there are six times more people serving sentences for possession than for sales.[14] Almost 1 million people are on probation or parole for drug related offenses.[15] "The majority of people (61%) arrested 3 or more times reported having a substance use disorder. Over a quarter (27%) had a serious or moderate mental illness."[16] Despite this, only a fraction of jails provide treatment for substance abuse or mental health problems. Even worse is that incarceration frequently causes a person to be cut off from treatment and medications, putting them into withdrawal in a setting that is ill equipped to handle their medical needs.[17] "Between 2000 and 2018, the number of people who died of intoxication while in jail increased by almost 400%; typically these individuals died within just one day of admission."[18]

It isn't just drug treatment that is stopped, it can take days, if at all, for all medications and treatments to be restarted. Additionally, incarceration actually leads to increased deaths from overdose. Studies have shown that in "the first two weeks after their release from prison, individuals are almost 13 times

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2018), https://www.americanprogress.org/article/ending-war-drugs-numbers/.

[13] FBI, Crime Data Explorer, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest (last visited Feb. 26, 2024).

[14] Press Release, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE, (Mar. 14, 2024) (on file with author).

[15] *Probation and Parole in the United States, 2022*, U.S. DEP'T. OF JUST., at 6, https://bjs.ojp.gov/document/ppus22.pdf (last visited Jun. 8, 2025).

[16] Press Release, Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html.

[17] Sawyer & Wagner, *supra* note 13, at 18.

[18] *Id.*

more likely to die"[19] from overdose. Sadly, research has shown that the underlying issues, not violence, are what led to the police contact, and that "jails have become 'the de facto mental health care system in many communities,' and that police are often used to respond to medical and mental health problems, not to matters of public safety."[20]

It costs on average over $42,672 per year, per person, to keep someone incarcerated. In New York that number jumps to over $150,000.[21] The costs aren't always directly associated with agency budgets. Incarceration impacts entire communities by affecting a person's ability to reintegrate back into society and contribute to their community.[22] "The cumulative emotional stress resulting from high incarceration rates in a community may generate feedback loops of its own—perhaps by inducing substance abuse and other behaviors associated with depression and anxiety, and in turn predicting further incarceration."[23] The children of incarcerated parents are six times more likely to be incarcerated in their own lifetimes than other children.[24] Additionally, families are usually the ones

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[19] Pearl, *supra* note 12, at 2.
[20] Jones & Sawyer, *supra* note 16, at 5.
[21] Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 65405 (Sept. 22, 2023); Steve Rempe, *The Cost(s) of Incarceration*, PRISON FELLOWSHIP, https://www.prisonfellowship.org/2013/10/the-costs-of-incarceration/ (last visited Apr. 3, 2024) ("[T]he annual cost per inmate in state-run facilities for the year 2012 was an amazing $167,731.").
[22] Laura Bane, *Our Mission*, REMEDY PROJECT ACTION, https://action.theremedyproj.org/our_mission (last visited Apr. 3, 2024) ("The long-lasting psychological and physical damage that incarceration wreaks actually reduces the chance of success or healing and increases the chance of recidivism . . . causing them to struggle to maintain or develop relationships, find housing and employment . . . their family and friends suffer from feelings of loss and abandonment . . . incarcerated people's children experience higher likelihoods of being incarcerated themselves.").
[23] Emily von Hoffmann, *How Incarceration Infects a Community*, ATL. (Mar. 6, 2015), https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/.
[24] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. OF

paying fines or other penalties, and it's estimated that these families spend, "$2.9 billion a year on commissary accounts and phone calls."[25] This is money that could be used to support the rest of their family, or put back into the community. Conversely, the average cost of a drug rehabilitation program is about $5,000,[26] and gives patients the opportunity to address the root issues behind their drug use. Drug courts that utilize substance use treatment and other supportive services have also had great success reducing recidivism. "A national evaluation of drug courts found that participants were 26% less likely to report substance use after completing the program than individuals processed through traditional judicial systems. Drug court participants were also less likely than nonparticipants to report unmet educational, employment, and financial service needs."[27]

History of Prohibition and Criminalization

Although many people likely believe that drug laws were created for health or safety reasons, their true origins are based in economics and racism. The late 1800s and early 1900s saw multiple instances of xenophobia and drug policies intertwined. Marijuana and opiate prevalence was blamed on Chinese immigrants, while cocaine usage was blamed on African Americans.[28] "The Harrison Narcotics Tax Act of 1914 is widely viewed in the scholarly literature as the beginning of the U.S.

JUST., https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children (Apr. 24, 2024).

[25] Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), https://themarshallproject.org/…/the-hidden-cost-of-incarceration?psafe_param=1&gad_source=1….

[26] *Cost Of Rehabilitation Vs Incarceration - Which Is Cheaper*, SANA LAKE RECOVERY CTR., https://sanalake.com/addiction-resources/drug-treatment-vs-incarceration/ (May, 2024).

[27] Pearl, *supra* note 12, at 5.

[28] Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 507 (1990); Cynthia A. Brown, *Beyond the Money: Expected (and Unexpected) Consequences of America's War on Drugs,* 4 LMU L. REV. 118, 122-28 (2017).

government's war on drugs,"[29] however, it was actually an amendment of the 1909 Opium Exclusion Act. Specifically, it was an amendment that prohibited "the importation and use of opium for other than medicinal purposes."[30] The Act had nothing to do with fighting addiction, it was passed as a part of the United States' obligations under the Hague Convention.[31] It didn't even outlaw opium and its derivatives or cocaine, it merely "required drug manufacturers and sellers to register their activity with the federal government, to keep records of their sales, and to pay taxes on each transaction."[32] The next major regulation of substances, though not narcotics, came in 1919 through the 18th Amendment, prohibiting the manufacture, sale, and transportation of alcohol. Later repealed by the 21st Amendment in 1933, to date, it is the only Amendment ever to be repealed.[33]

In subsequent decades, cannabis would become the next target of federal regulation. Mexican immigration in southwest America is primarily responsible for introducing the United States to recreational use of cannabis.[34] After the Mexican Revolution of 1910, an influx of Mexican migrants entered the U.S., and along with them came horror stories about marijuana use, stoking fears and prejudices about Mexicans.[35] Exacerbated by mass unemployment during the Great Depression, public resentment of Mexicans grew, escalating governmental concern over marijuana. By 1931, twenty-nine states had outlawed the

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[29] Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 INDEP. REV. 509, 509 (2016).
[30] U.S. DEP'T OF JUST., OPIUM AND NARCOTIC LAWS, (1981).
[31] Schmoke, *supra* note 28, at 508.
[32] Brown, *supra* note 28, at 130.
[33] *The Constitution: Amendments 11-27*, NAT'L ARCHIVES AND REC. ADMIN., https://www.archives.gov/founding-docs/amendments-11-27 (last visited Apr. 1, 2024).
[34] *Marijuana Timeline*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited Dec. 5, 2023).
[35] *Id.*

drug.[36] Propaganda and scare tactics continued with the 1936 release of the film, *Reefer Madness*. "*Reefer Madness* was an exploitation movie, one of the many films that mined sex, gore, or other tawdry subjects for maximum effect."[37] Federal prohibition came shortly after with the Marihuana Tax Act of 1937. Experts attribute the passing of the act to four men, Harry J. Anslinger of the Federal Bureau of Narcotics, Pierre Samuel du Pont of the DuPont Company, William Randolph Hearst, who owned most of the newspapers of the time, and the John D. Rockefeller of Standard Oil.[38] Hemp was seen as competition to their industries—DuPont's cellophane, rayon, and synthetic nylon, Hearst's paper mills, and Rockefeller's oil—all were threatened by the versatility and cost-effectiveness of hemp-based products.[39] Anslinger used the power of propaganda to stoke people's fears, "arguing that the use of marijuana caused insanity and led to violent crime."[40] To avoid a Constitutional battle, Anslinger used Congress' tax powers to outlaw marijuana. Part of the reason that he was so successful in his campaign was his use of the word, "marijuana," from the Mexican-Spanish word for the plant, playing into the existing resentment of Mexicans.[41] At the time, most people, including members of Congress did not know that cannabis and marijuana were the same thing.[42]

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[36] *Id.*

[37] Kristin Hunt, *Marijuana Panic Won't Die, but Reefer Madness Will Live Forever*, JSTOR DAILY, (Apr. 23, 2020) https://daily.jstor.org/marijuana-panic-wont-die-but-reefer-madness-will-live-forever/.

[38] Dr. David Bearman, *Oil vs. Cannabis: Why Marijuana Became Illegal and Still is Today*, HUFFPOST, https://www.huffpost.com/entry/oil-vs-cannabis-why-marijuana-became-illegal-and_b_592d8b54e4b0a7b7b469cd4d (May 30, 2017 11:50 AM).

[39] *Id.*

[40] Brown, *supra* note 28, at 133.

[41] Matt Thompson, *The Mysterious History of 'Marijuana'*, NPR: CODE SWITCH (July 22, 2013), https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana

[42] William C. Shelton, *Medical Cannabis and Beyond*, SOMERVILLE TIMES, (Jan. 4, 2013), https://www.thesomervilletimes.com/archives/33964.

There were skeptics over the claims, notably the American Medical Association ("AMA"),[43] and New York City Mayor Fiorello LaGuardia.[44] LaGuardia tasked the New York Academy of Medicine to study marijuana. They concluded and published their study in 1944. Much to Anslinger's displeasure, every claim that he made was contradicted. "Among its findings were that: smoking marijuana does not lead to addiction or to morphine, heroin, or cocaine use; aggression, violence and belligerence are not common consequences of smoking marijuana; and publicity concerning catastrophic effects of smoking marijuana is unfounded."[45] Despite these findings, the damage was already done.

The country's first mandatory minimum sentences for drug-related offenses were established when the Boggs Act of 1951 modified the Harrison Act and increased penalties fourfold.[46] Over the years both the AMA and the American Bar Association ("ABA") attempted to convince Congress to reassess, "the degree to which narcotic drugs were an issue, and the efficacy of the drug laws in place."[47] They were able to convince Senator Price Daniel to conduct hearings across the country to assess the issue.[48] In 1956 the committee finished their assessment and reported, "a severe drug problem requiring drastic punitive measures."[49] The report chastised the Supreme Court, the Narcotics Bureau and its agents, and drug treatment clinics, blaming them all for not doing enough to stop the increasing intensity of drug issues. Unfortunately, the actions of the AMA and ABA had the opposite effect of what they hoped and the results of the study led to "even more repressive legislation – the Narcotic Control Act of 1956."[50] It should be noted that in the 1950s and 1960s, the Central Intelligence

[43] Brown, *supra* note 28, at 133.
[44] Shelton, *supra* note 42.
[45] *Id.*
[46] Brown, *supra* note 28, at 135.
[47] *Id.* at 135.
[48] *Id.* at 134.
[49] *Id.*
[50] *Id.*

Agency ("CIA") was using various narcotics and hallucinogens, including LSD, in multiple interrogation and mind control experiment programs including the infamous MKULTRA.[51] In fact, Sidney Gotlieb, the director of the program, "was the unwitting godfather of the entire LSD counterculture. In the early 1950s, he arranged for the CIA to pay $240,000 to buy the world's entire supply of LSD."[52]

Marijuana and psychedelic drug use grew with the cultural trends of the 1960s. At the same time, the federal government continued its zero-tolerance policy. The Drug Abuse Control Act of 1965 ("DACA") mandated the "registration, inspection, and record-keeping by all persons concerned with any controlled substance covered under the Act and with the trafficking of those substances."[53] The Act was an amendment of the Federal Food, Drug, and Cosmetic Act and added any drug that had a "hallucinogenic effect"[54] and put them under the authority of the Food and Drug Administration ("FDA"). Although this did not make psychedelics like LSD and psilocybin mushrooms illegal, it did affectively halt the majority of research being done with them and lay the groundwork for Nixon's upcoming War on Drugs. At Senate hearings in 1966, doctors and scientists testified against the criminalization of psychedelics.[55] Despite their testimony, FDA Commissioner James Goddard called LSD "one of the most dangerous drugs with which I am acquainted."[56] In 1968 the House of

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[51] *See Project MKULTRA, The CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Subcomm. on Intel. and the Subcomm. on Health and Sci. Rsch.*, 95th Cong. (1977).
[52] Terry Gross, *The CIA's Secret Quest For Mind Control: Torture, LSD And A 'Poisoner In Chief'*, NPR: FRESH AIR (Sept. 9, 2019), https://www.npr.org/2019/09/09/758989641/the-cias-secret-quest-for-mind-control-torture-lsd-and-a-poisoner-in-chief.
[53] Brown, *supra* note 28, at 136.
[54] Drug Abuse Control Amendments of 1965., Pub. L No. 89-74, 79 Stat. 226, 227 (1965).
[55] Conrad Sproul, *"Don't Kill My Buzz, Man!" - Explaining the Criminalization of Psychedelic Drugs*, 19 OR. UNDERGRADUATE RSCH. J. 1, 35 (2021).
[56] *Penalties for Possession of LSD Reluctantly Backed by Goddard*, N.Y. TIMES, Feb. 27, 1968, at A1.

Representatives voted 320-2 to amend DACA and criminalize personal possession of psychedelics.[57] That same year President Johnson combined the Bureau of Narcotics and the Bureau of Drug Abuse Control into the Bureau of Narcotics and Dangerous Drugs ("BNDD"), the predecessor to the Drug Enforcement Administration ("DEA"), and placed it under the control of the Department of Justice ("DOJ").[58]

Despite the push for stricter regulations, the Marihuana Tax Act was ruled unconstitutional in 1969,[59] though this victory was short lived. Using similar tactics as Anslinger, Richard Nixon sensationalized drug use and used the turmoil surrounding anti-civil-rights backlash as cornerstones in his election campaign. Upon his election, he kept his promise, and his administration passed The Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CSA"). In a 1994 interview, John Ehrlichman, President Nixon's domestic policy chief, admitted that the War on Drugs had darker motives.

> We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did.[60]

With this, the War on Drugs had officially begun. One of the most significant parts of the CSA is the classification of all drugs into five categories, or "schedules,"[61] as well as giving

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[57] Sproul, *supra* note 55, at 37.
[58] *The DEA Years 1970-1975*, DEA, at 30, https://www.dea.gov/sites/default/files/2021-04/1970-1975_p_30-39_0.pdf (last visited Mar. 22, 2025).
[59] Shelton, *supra* note 41.
[60] HIST., *supra* note 4.
[61] 21 U.S.C. § 812.

marijuana an official definition.[62] The act also created a commission to study marijuana,[63] repealed previous drug legislation, like The Narcotic Drugs Import and Export Act and The Opium and Poppy Control Act of 1942, and repealed sections of the Internal Revenue Code of 1954 that included marijuana.[64] The schedules were "arranged in descending order based on a substance's potential for abuse and ascending order determined by a substance's approved medicinal use."[65] Marijuana, psilocybin, LSD, and were placed in Schedule I,[66] the most restrictive, and deemed to have a high potential for abuse, no medical use, and restricted from all use, including scientific research.[67] The categorization was excessive and did not match available research. It is likely that propaganda and misinformation led to its placement.[68]

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[62] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 102, 84 Stat. at 1244 ("The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.").

[63] § 601, 84 Stat. at 1292 ("The Commission shall conduct a study of marihuana including, but not limited to, the following areas: (A) the extent of use of marihuana in the United States to include its various sources, the number of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use; (B) an evaluation of the efficacy of existing marihuana laws; (C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological; (D) the relationship of marihuana use to aggressive behavior and crime; (E) the relationship between marihuana and the use of other drugs; and (F) the international control of marihuana.").

[64] *See* § 1101, 84 Stat. at 1292.

[65] Brown, *supra* note 28, at 138.

[66] 21 U.S.C. § 812.

[67] Farber, *supra* note 3.

[68] *See Drug War History*, DRUG POL'Y ALL., https://drugpolicy.org/drug-war-history/ (last visited Apr. 7, 2024).

Worth mentioning about the original CSA is the lack of differentiation between marijuana and hemp, or mention of hemp at all. Although it was known by some that there was a difference between psychoactive marijuana and non-psychoactive hemp, the issue of the lack of distinction in the CSA was not addressed until the case of *Hemp Industries Association v. DEA* in 2003. The appellants in this case used hemp in their products, and argued that based on the wording in the definition for marijuana, that Congress never meant to include hemp and challenged "[DEA] regulations that, taken together, would ban the sale or possession of such items even if they contain only non-psychoactive trace amounts of tetrahydrocannabinols ("THC")."[69] The 9th Circuit held that the DEA "cannot regulate *naturally-occurring* THC *not* contained within or derived from marijuana—i.e., non-psychoactive hemp products—because non-psychoactive hemp is not included in Schedule I."[70] Despite this win and differentiation by the Court, it would not be until the 2018 Farm Bill that a hemp exception was added to the definition of marijuana in the CSA, and "explicitly preserved FDA's authorities over hemp products."[71] Hemp's official definition became "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."[72] The important distinction in this definition is the concentration level of delta-9 THC, the psychoactive chemical in cannabis.

In 1973, President Nixon merged the BNDD and the Office of Drug Abuse Law Enforcement ("ODALE") into the DEA to end "interagency rivalries" and centralize enforcement of the

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[69] Hemp Indus. Ass'n v. DEA, 357 F.3d 1012, 1013 (9th Cir. 2004).
[70] *Id.* at 1018.
[71] *Hemp Production and the 2018 Farm Bill*: *Hearing on 2018 Farm Bill, PL 115-334 Before S. Comm. on Agric., Nutrition, & Forestry*, 116th Cong. (2019) (testimony of Amy Abernethy, Principal Deputy Comm'r, Office of the Comm'r, FDA, HHS).
[72] 7 U.S.C. § 1639o (1).

CSA, and "declared an all-out global war on the drug menace."[73] The 1970s saw a rise of anti-drug parents due to a spike of teen drug use. "Daily pot smoking among high school seniors alone climbed 80 percent between 1975 and 1978 . . . and marijuana last year accounted for the second largest number of admissions to federally funded drug treatment facilities."[74] Parents across the country were shocked to discover that their children were experimenting with drugs. Some parents sent their children to rehabilitation facilities, or to camps to separate them from the friends that they assumed were a bad influence on their children. Others formed local parenting groups and started lobbying the government for harsher punishments and crackdown on the sale of paraphernalia.[75]

When President Reagan took office in 1981, he continued and expanded Nixon's war on drugs. The President was joined by First Lady Nancy Reagan, who launched her famous "Just Say No" advertising campaign in 1982, which included speeches across the country and publicized visits to rehabilitation centers, as well as an international conference on youth drug abuse with the first ladies of seventeen countries in 1985.[76] The First Lady would go on to lambast and demonize even casual marijuana smokers for the actions of drug cartels. "The casual user may think as he takes a line of cocaine or smokes a joint in the privacy of his nice condominium . . . that he's somehow not bothering anyone . . . . If you're a casual drug user, you're an accomplice to murder."[77]

Due to the growth of indoor cannabis cultivation, the DEA developed Operation Green Merchant in 1988 which "targets

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[73] *DEA Celebrates 50 Years*, DEA, https://www.dea.gov/dea-celebrates-50-years (last visited May 15, 2025).
[74] Peggy Mann, *The Parent War Against Pot*, WASH. POST (Jan. 6, 1980), https://www.washingtonpost.com/archive/opinions/1980/01/06/the-parent-war-against-pot/920b8380-fdbb-4f3b-b205-b2d25831fa21/.
[75] *Id.*
[76] *Nancy Reagan*, HIST. (2009), https://www.history.com/topics/first-ladies/nancy-reagan.
[77] *Casual Users 'Accomplices' to Murder: 1st Lady*, L.A. TIMES (Feb. 29, 1988), https://www.latimes.com/archives/la-xpm-1988-02-29-mn-281-story.html.

the indoor growing industry including suppliers of seeds, equipment and cannabis cultivators."[78] Purportedly, *High Times*, a cannabis and counterculture magazine started in 1974, was the center of this operation due to their frequent advertising of indoor growing equipment.[79] The program was successful, and continued into President George H.W. Bush's term, with the DEA reporting $29.5 million worth of assets seized in 1989 alone.[80]

One of the more significant, yet lesser known, marijuana laws was the Solomon-Lautenberg Amendment in 1990.[81] As part of an amendment to the Department of Transportation and Related Agencies Appropriations Act, it required states to impose a 6-month suspension or revocation of a person's driver's license for "any violation of the Controlled Substances Act . . . or any drug offense"[82] or the state would lose federal highway funding. Although states were able to opt out and still receive funding, by 1995 "30 states, Puerto Rico, and the District of Columbia have implemented some form of these laws."[83] It should be noted that the text of the amendment reads "*any* violation" or "*any* drug offense," not just instances where the person was operating a vehicle. Although most states have since opted out of the amendment, as of 2021 three states, Alabama, Arkansas, and Florida, continue to suspend licenses under the Act.[84]

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[78] U.S. DEP'T OF JUST., 126492, 1989 DOMESTIC CANNABIS ERADICATION/SUPPRESSION PROGRAM, (1989).
[79] *See* United States v. Pollard, 965 F.2d 283, 284 (7th Cir. 1992).
[80] U.S. DEP'T OF JUST., *supra* note 82, at 24.
[81] 23 U.S.C. § 159.
[82] Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 101-516, §333, 104 Stat. 2155, 2185 (1990).
[83] *"Possess a Joint, Lose Your License": July 1995 Status Report*, MARIJUANA POL'Y PROJECT (July. 1995), https://web.archive.org/web/20071008235035/http://www.mpp.org/site/c.glKZLeMQIsG/b.1087547/k.33C1/Possess_a_Joint_Lose_Your_License.htm.
[84] *Solomon-Lautenberg Amendment*, WIKIPEDIA, https://en.wikipedia.org/wiki/Solomon-Lautenberg_amendment (last visited Dec. 5, 2023).

The Clinton Administration continued the War on Drugs through the 1990s. The Violent Crime Control and Law Enforcement Act of 1994, also known as the 1994 Crime Bill, did not directly target drugs, however it did increase penalties for possession and sales.[85] The crack epidemic and gang violence were used as justification for its passing. Its implementation contributed to the explosion of the prison industrial complex in the U.S., "The number of state and federal adult correctional facilities rose 43 percent from 1990 to 2005. For a period in the 1990s, a new prison opened every 15 days on average."[86]

The last federal legislation of note is the Illicit Drug Anti-Proliferation Act of 2003, also known as the Reducing Americans' Vulnerability to Ecstasy Act or RAVE Act.[87] The Act was a modification of the crack house law and prohibited "knowingly leasing, renting, or using, or intentionally profiting from, any place (as well as opening, maintaining, leasing, or renting any place, as provided under current law), whether permanently or temporarily, for the purpose of manufacturing, storing, distributing, or using a controlled substance."[88] There was immediate pushback as club owners and other event rental spaces feared that the broad language would be used to target and shut down their businesses if drug usage was discovered on their property.[89] Instead of letting the bill fail, then Senator Joe Biden slipped the bill into the PROTECT Act, also known as the

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[85] *See* Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1993).
[86] Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice.
[87] Illicit Drug Anti-Proliferation Act of 2003, S. 226, 108th Cong. (2003).
[88] SUMMARY: S.226 — 108th Cong. (2003-2004), CONG., https://www.congress.gov/bill/108th-congress/senate-bill/226.
[89] *DEA Must Not Be Allowed to Chill Speech or Shut Down Electronic Music Events*, ACLU (Sept. 11, 2003), https://www.aclu.org/documents/dea-must-not-be-allowed-chill-speech-or-shut-down-electronic-music-events.

Amber Alert Bill.[90] "Even those that opposed the RAVE Act had to vote for the final 'Amber' bill if they wanted to enact the provisions combating child abductions."[91] This questionable move worked, causing people to instantly associate child abduction with raves and ecstasy and furthering misinformation.

Despite all of these efforts from the federal government to curb the sale of drugs, the CIA was found to be linked to the sale of drugs at one point. In 1996, the *San Jose Mercury News* published a three-part series that alleged that the CIA had connections, through their support of Nicaraguan Contras, to the sale of crack in Los Angeles in the 1980s.[92] Although they denied direct involvement, a report from the CIA's own inspector general revealed that the agency was at least aware of the connection between funding the Contras and cocaine/crack sales, and in some cases pressured the DEA away from investigating.[93] The crack epidemic is one of the national issues that led to President Reagan signing the Comprehensive Crime Control Act of 1984 which "raised federal penalties for marijuana possession and dealing," and the Anti-Drug Abuse Act which instituted "mandatory sentences for drug-related crimes."[94] The infamous 'three strikes law' that mandated life sentences for repeat offenders was an amendment to the Anti-Drug Abuse Act added in the early 1990s. The increased

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[90] Erin Treacy, *The Rave Act: A Specious Solution to the Serious Problem of Increased Ecstasy Distribution: Is It Unconstitutionally Overbroad*, 28 HASTINGS COMM. & ENT. L.J. 229, 255 (2006).
[91] *Id.*
[92] *The CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions*, U.S. DEP'T OF JUST., https://oig.justice.gov/sites/default/files/archive/special/9712/ch01p1.htm (last visited Apr. 8, 2024).
[93] *See* Walter Pincus, *CIA Ignored Tips Alleging Contra Drug Links, Report Says*, WASH. POST (Nov. 3, 1998), https://www.washingtonpost.com/archive/politics/1998/11/03/cia-ignored-tips-alleging-contra-drug-links-report-says/d7ade266-803e-4987-9d01-ce7d98d9ea13/; M. LEVINE & L. KAVANAU-LEVINE, BIG WHITE LIE: THE CIA AND THE COCAINE/CRACK EPIDEMIC, 3 (Thunder Mouth's Press, 1st ed. 1993).
[94] PBS, *supra* note 34.

penalties have been heavily criticized as being racially biased: "[I]t allocated longer prison sentences for offenses involving the same amount of crack cocaine (used more often by black Americans) as powder cocaine (used more often by white Americans). Five grams of crack triggered an automatic five-year sentence, while it took 500 grams of power cocaine to merit the same sentence."[95]

PART 2: CONTROLLED SUBSTANCES

LSD

Lysergic acid diethylamide ("LSD") was discovered by a Swiss chemist named Albert Hofmann while working for Sandoz laboratories in 1938.[96] Hofmann was attempting to "synthesize a chemical compound that would stimulate the respiratory and circulatory systems."[97] According to the DEA, it is a "potent hallucinogen" that can caused impaired depth and time perception, as well as "distorted perception of the shape and size of objects, movements, colors, sound, touch, and the user's own body image."[98] LSD and some other psychedelics cause a neurological phenomenon called synesthesia where the "brains process the same information through two or more brain areas at once."[99] In lay terms, senses can become

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[95] HIST., *supra* note 4.
[96] Paul Massari, *A Long, Strange Trip: LSD's Path from Miracle Drug to Social Menace*, HARV. GRIFFIN GSAS NEWSL. (July 28, 2021), https://gsas.harvard.edu/news/long-strange-trip.
[97] Tom Shroder, *'Apparently Useless': The Accidental Discovery of LSD*, ATL. (Sept. 9, 2014), https://www.theatlantic.com/health/archive/2014/09/the-accidental-discovery-of-lsd/379564/.
[98] *Drug Fact Sheet: LSD*, U.S. DEP'T OF JUST., DRUG ENF'T ADMIN. (Dec. 2024), https://www.dea.gov/sites/default/files/2023-04/LSD%202022%20Drug%20Fact%20Sheet.pdf.
[99] *Synesthesia*, CLEVELAND CLINIC, https://my.cleveland clinic.org/health/symptoms/24995-synesthesia (May 3, 2023) (asserting synesthesia is also found in neurodivergent people and can also be caused by some types of brain injuries)*; see also Trippy Research: Chemically-Induced Synesthesia*,

connected, causing experiences like tasting colors, or seeing and feeling sound.

Hofmann had been working with "ergot, a fungus found in tainted rye that had been used as a folk medicine for generations."[100] It had been used to "hasten childbirth and staunch bleeding after delivery" due to its blood vessel and muscle-constricting properties.[101] Hoffman recreated ergot's active ingredients with its component chemicals, combining these with other organic molecules.[102] Hoffman named and numbered these compounds as LSD 1-25, but they did not end up having the desired effect on the respiratory and circulatory systems that Sandoz was looking for, so they were shelved for a number of years.[103] Years later, Hofmann told his associates, "I did not choose LSD; LSD found and called me."[104] He stated that he had a "feeling that this substance could possess properties other than those established in the first investigations."[105] On April 16, 1943, while resynthesizing it, he "he accidentally ingested a small amount and perceived 'extraordinary shapes with intense, kaleidoscopic play of colors.'"[106] Three days later, on April 19 at 4:20PM, he took 250 millionths of a gram.[107] Thinking it was a small dose, he was not expecting much to happen. About forty minutes later he began to feel the effects, noting in his lab journal, "Beginning dizziness, feeling of anxiety, visual distortions, symptoms of paralysis, desire to laugh."[108] He then asked his lab assistant to help him home on their bicycles. His journey home would become one of the most

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TECH. NETWORKS (July 7, 2015), https://www.technologynetworks.com/neuroscience/articles/trippy-research-chemically-induced-synesthesia-284935;

[100] Shroder, *supra* note 101.

[101] *Id.*

[102] *Id.*

[103] *See id.*

[104] *Id.*

[105] *Id.*

[106] *LSD*, HIST. (Aug. 21, 2018), https://www.history.com/topics/crime/history-of-lsd.

[107] Shroder, *supra* note 87.

[108] *Id.*

famous bicycle rides to this day.[109] Hofmann says that he felt a dramatic shift in consciousness, and he believed that LSD could be valuable in psychiatry.[110] Sandoz then started providing psychiatrists with LSD for research purposes in the 1950s under the brand name Delysid.[111]

Over the next two decades, LSD was studied and used to treat a myriad of issues.[112] Canadian studies in the 1950s that focused on its effects on chronic, treatment-resistant alcoholics "reported an unprecedented 50% improvement rate."[113] Dr. Oscar Janiger, a psychiatrist who pioneered the use of psychedelic substances to expand one's mind, is credited with introducing LSD to Cary Grant, Aldous Huxley, and other celebrities of the time.[114] According to his own records, from 1954 to 1962, Dr. Janiger "administered almost 3,000 doses of LSD to 1,000 volunteers."[115] Despite this, Dr. Janiger has not received the same credit and fame as the infamous counter-culture hero, Timothy Leary. In 1960, Timothy Leary and Richard Alpert, psychologists at Harvard, created the Harvard Psilocybin Project to "explore the effects of psychotropic

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[109] *See* Andrew DeAngelo, *Bicycle Day May Soon Overtake Cannabis Holiday 4/20*, FORBES (Apr. 11, 2023), https://www.forbes.com/sites/andrewdeangelo/2023/04/11/bicycle-day-may-soon-overtake-cannabis-holiday-420/.

[110] *LSD*, NEW SCIENTIST, https://www.newscientist.com/definition/lsd/ (last visited Mar. 26, 2024).

[111] *Id.*

[112] *LSD*, BRITANNICA, https://www.britannica.com/science/LSD (last visited Apr. 1, 2024) ("In the 1960s LSD was proposed for use in the treatment of neuroses, especially for patients who were recalcitrant to more conventional psychotherapeutic procedures. LSD also was tried as a treatment for alcoholism and to reduce the suffering of terminally ill cancer patients. It was studied as an adjunct in the treatment of narcotic addiction, of children with autism, and of the so-called psychopathic personality.").

[113] Matthew Oram, *Prohibited or Regulated? LSD Psychotherapy and the United States Food and Drug Administration*, 27 HIST. PSYCHIATRY 290, 291 (2016).

[114] Associated Press, *Oscar Janiger, 83, Psychiatrist and Early Advocate of LSD Use*, N. Y. TIMES (Aug. 19, 2001), https://www.nytimes.com/2001/08/19/us/oscar-janiger-83-psychiatrist-and-early-advocate-of-lsd-use.html.

[115] *Id.*

substances on the human mind."[116] At first, Leary and Alpert conducted studies only with graduate students and with a physician attending all experiments, but would eventually dismiss the physician from their sessions and begin to use undergraduate students for the experiments.[117] These changes, as well as the fact that they conducted experiments off of Harvard campus and outside of laboratories led the university to dismiss the pair from their academic positions in 1963.[118] However, Leary would go on to become massive proponent of psychedelic use in the counter-culture revolution with his famous words, "turn on, tune in, drop out."[119] Hofmann and other researchers blamed Leary for giving LSD its bad reputation.[120] Their concerns would ring true, as it would Leary's research and reputation that led to LSD being regulated and criminalized. The 1962 Drug Efficacy Amendment to the Food, Drug, and Cosmetic Act of 1938 was said to be partially instigated by complaints from administrators and faculty members at Harvard who were "concerned about the safety of Leary and Alpert's research subjects, and critiqued the rigor of their unorthodox methodology."[121] Similar to Leary, Ken Kesey, a

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[116] *Timothy Leary*, HARV. DEP'T OF PYSCH., https://psychology.fas.harvard.edu/people/timothy-leary (last visited Apr. 1, 2024).

[117] OAKLEY STERN RAY, DRUGS, SOCIETY, & HUMAN BEHAVIOR 381 (3rd ed. 1983).

[118] *Id.*

[119] *See id.* at 282; *Albert Hofmann and Bicycle Day*, HIST. (Aug. 21, 2018), https://www.history.com/topics/crime/history-of-lsd ("Leary founded a psychedelic religion based on LSD called the League for Spiritual Discovery.").

[120] John Horgan, *Tripping in LSD's Birthplace: A Story for "Bicycle Day"*, SCI. AM. (April 19, 2024), https://www.scientificamerican.com/blog/cross-check/tripping-in-lsds-birthplace-a-story-for-e2809cbicycle-daye2809d/. *See also* Nikita Kansra & Cynthia W. Shih, *Harvard LSD Research Draws National Attention*, HARV. CRIMSON (May 21, 2012), https://www.thecrimson.com/article/2012/5/21/harvard-lsd-project-leary/.

[121] HARV. DEP'T OF PSYCH., *supra* note 120. *See also* Sproul, *supra* note 55, at 9; Massari, *supra* note 86 ("The 1962 law essentially created the modern clinical trial"); Kansra & Shih, *supra* note 104 (President Nixon called him "the most dangerous man in America.").

volunteer of the MKULTRA program and author of *One Flew Over the Cuckoo's Nest*, also became a huge proponent of LSD. He created a group called the Merry Pranksters that "hosted a series of LSD-fueled parties in the San Francisco Bay Area" called "Acid Tests."[122] Although the main talking points against LSD were based on health and safety, none of the legislation affected the Army and CIA programs that were dosing unwitting participants.[123] Prior to its full criminalization, in the Senate Subcommittee on the Executive Reorganization of the Senate Committee on Government Operations, Senator Robert F. Kennedy declared, "Perhaps to some extent we have lost sight of the fact that (LSD) can be very, very helpful in our society if used properly."[124] Senator Kennedy's wife was treated with LSD, and through her treatment he witnessed firsthand benefits of the drug.[125] That same year, Sandoz Pharmaceuticals voluntarily withdrew its sponsorship of LSD research, effectively halting legal access.[126] "Kennedy criticized the administration for doing too little to ensure their continuation: 'if they were worth while I would think you would let them continue … If it was helpful [research] 6 months ago, why is it not helpful now?'"[127]

MDMA

3,4-Methylenedioxymethamphetamine ("MDMA"), better known by its street name, "ecstasy," is an empathogen and a stimulant.[128] "Empathogens increase a person's feeling of

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[122] HIST., *supra* note 94.
[123] *See* Sproul, *supra* note 55, at 6; Horgan, *supra* note 104. *See generally Project MKULTRA, The CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Subcomm. on Intel. and the Subcomm. on Health and Sci. Rsch.*, 95th Cong. (1977).
[124] *When Bobby Kennedy Defended LSD*, MAPS (July 12, 2012), https://maps.org/news/media/when-bobby-kennedy-defended-lsd/.
[125] *Id.*
[126] Oram, *supra* note 117, at 290.
[127] *Id.*
[128] *MDMA (ecstasy)*, BETTER HEALTH CHANNEL, https://www.betterhealth.vic.gov.au/health/healthyliving/mdma-ecstasy (May 19, 2023).

empathy and benevolence towards others, as well as feelings of being socially accepted and connected."[129] Empathogens work by causing the body to release serotonin and dopamine into the brain.[130] According to the DEA, "MDMA acts as both a stimulant and hallucinogen, producing an energizing effect, distortions in time and perception, and enhanced enjoyment of tactile experiences" and also goes by multiple other names, such as "Adam," "Beans," "Hug Drug," "Lover's Speed," and most notably "Molly."[131] MDMA's effects include euphoria, alertness, reduced inhibition, and empathy as well as increased blood pressure and heart rate, muscle tension, and teeth clenching.[132]

MDMA is actually much older than its tenure as a 'club drug,' and its creation had a far more noble purpose. It was first synthesized and patented in 1912 by Merck Pharmaceuticals in their search for a new blood clotting drug,[133] and was originally called "Methylsafrylaminc."[134] Internal reports indicate that

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[129] *Empathogens*, ALCOHOL & DRUG FOUND. (2023), https://adf.org.au/drug-facts/empathogens/ (last visited Mar. 30, 2024).

[130] *Id.* This brain chemical is involved with neural processes that influence things like sensory perception, mood, sleep, and certain types of movement. It may also be involved in triggering hormones that impact sexual arousal. The MDMA-related increase in serotonin activity is what may result in the elevated mood, emotional closeness, and heightened empathy experienced by those using ecstasy. Dopamine. This brain chemical is associated with increased energy and activating the reward system, which can lead to the pleasurable reinforcement of continued use of the drug. Norepinephrine. This brain chemical increases heart rate and blood pressure, and may play a hand in some of the heightened physiological responses to ecstasy use."); *see also* Tamera Martens, MA*, Ecstasy Overdose: Signs, Symptoms & Treatment for MDMA Overdose*, AM. ADDICTION CTR., https://americanaddictioncenters.org/ecstasy-abuse/overdose (Oct. 28, 2024).

[131] *Ecstasy Or MDMA (also Known As Molly)*, DEA, https://www.dea.gov/factsheets/ecstasy-or-mdma-also-known-molly (last visited Mar. 19, 2024).

[132] *Id.*

[133] Lucca Jaeckel, *The MIND Blog: A History of Ecstasy Science*, MIND FOUND. (Nov. 28, 2022), https://mind-foundation.org/history-of-ecstasy/.

[134] NAT'L INST. ON DRUG ABUSE, MDMA (ECSTASY) ABUSE 7, https://nida.nih.gov/sites/default/files/1763-mdma-ecstasy-abuse.pdf (Sept. 2017).

they were trying to find a way around a competitor's "existing patent for the synthesis of a clotting agent called Hydrastinin."[135] Due to lack of interest, MDMA was shelved for fifteen years until 1927 when Merck was "was interested in adrenaline- or ephetonine-like substances on the basis of safrole."[136] MDMA was converted into a hydrochloride salt, underwent chemical studies, and was renamed "Safryl-methyl-amin" according to a 1927 report.[137] MDMA again disappeared until the 1952 when basic toxicological tests were conducted. MDMA was tested along with mescaline and six other mescaline analogs on five species of animals through a research contract from the Army Chemical Center.[138] It wouldn't be until the 1970s that the effects of MDMA on humans would be seen and studied. Sometime in the late 1960s, MDMA became to be used as a street drug, and was first reported in Chicago in 1970.[139] Based on chemical testing, authorities believed that "MDMA was first synthesized by underground chemists in search of "legal alternatives" for the closely related and highly sought-after drug MDA, which was scheduled under the Controlled Substances Act (CSA) in 1970."[140] The emergence of MDMA as a street drug, and the stories of its effects on people reignited the interest in the scientific community. In the mid-1970s, a

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[135] Roland W. Freudenmann et al., *The Origin of MDMA (Ecstasy) Revisited: The True Story Reconstructed from the Original Documents**, 101 ADDICTION 1241, 1242 (Aug. 8, 2006), http://dx.doi.org/10.1111/j.1360-0443.2006.01511.x (addressing that over the years there have been claims that Merck was originally searching for an appetite suppressant, but those claims have not been substantiated, researchers believe this was caused by confusion with studies done on MDA, an analogue of MDMA).

[136] *Id.* at 118.

[137] *Id.*

[138] Hardman, H.F., et al., *Relationship of the Structure of Mescaline and Seven Analogs to Toxicity and Behavior in Five Species of Laboratory Animal*, 25 TOXICOLOGY & APPLIED PHARMACOLOGY 300 (1973). Although the testing was done in 1953-54, the reports were not declassified until 1969.

[139] Torsten Passie & Udo Benzenhöfer, *The History of MDMA As an Underground Drug in the United States, 1960–1979*, 48 J. PSYCHOACTIVE DRUGS 72 (2016).

[140] *Id.* at 67.

psychopharmacologist named Alexander Shulgin introduced the drug to psychotherapists who gave it to their patients to assist in therapy.[141] They chose to use the name "Adam," a reference to the biblical Adam, when administering it to patients because it "returned their patients to a more innocent state" and made them more willing to open up and participate in therapy sessions.[142] Alexander Shulgin and David Nichols later described the psychological effects of substances chemically related to known psychoactive substances in their 1978 book chapter "Characterization of Three New Psychotomimetics."[143] MDMA was described as "a drug that appears to evoke an easily controlled altered state of consciousness with emotional and sensual overtones."[144] Interestingly enough, it was this unsanctioned use by therapists that led to its increasing recreational use. "Most people were trying 'Adam' for the first time, and their suppliers were usually close friends who wanted to share the therapeutic experience."[145] Although MDMA was gaining popularity among psychiatrists in the 1970s and 1980s,

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[141] At the age of 16, Alexander Shulgin studied organic chemistry Harvard University. He also has a Ph.D. in biochemistry from U.C. Berkeley, and did post-doctorate work in psychiatry and pharmacology at U.C. San Francisco. He is an author, psychopharmacologist, pharmacologist, medicinal chemist, organic chemist, and biochemist. *Alexander Shulgin*, WIKIPEDIA, https://en.wikipedia.org/wiki/Alexander_Shulgin, (last visited Apr. 1, 2024); *Alexander Shulgin*, EROWID, https://www.erowid.org/culture/characters/shulgin_alexander/, (last visited Apr. 1, 2024). *See also* Jaeckel, *supra* note 116.

[142] *MDMA*, HIST. (2018), https://www.history.com/topics/crime/history-of-mdma (last visited Mar. 19, 2024).

[143] Jaeckel, *supra* note 116.

[144] Jaeckel, *supra* note 116; Alexander T. Shulgin and David E. Nichols, *Characterization of Three New Psychotomimetics* in THE PSYCHOPHARMACOLOGY OF HALLUCINOGENS (1978), https://chemistry.mdma.ch/hiveboard/rhodium/shulgin-nichols.three.new.html (last visited Mar. 19, 2024). The effects were compared to psilocybin, cannabis, and MDA. However, notable differences led Nichols to identify it under a new subgroup of psychedelics called entactogens.

[145] Alana R. Pentney, *An Exploration of the History and Controversies Surrounding MDMA and MDA*, 33 J. PSYCHOACTIVE DRUGS 213 (2001), http://dx.doi.org/10.1080/02791072.2001.10400568.

concerns over its recreational use in Texas nightclubs brought it to the attention of the DEA.[146] Using the Comprehensive Crime Control Act of 1984, which allowed "the attorney general to place any substance posing 'an imminent hazard to public safety' onto Schedule I for a period of one year while the final scheduling process is under way," the DEA imposed an emergency prohibition on MDMA in 1985, ten days prior to official hearings on its classification were to begin.[147] A group of researchers and mental health professionals promptly opposed the scheduling, asking to hear from specialists in the field to determine the substance's future legal position. In May 1986, the judge proposed that MDMA be added to Schedule 3, citing his belief that the drug had a recognized medicinal value. This would have permitted study on the drug and its application in therapy.[148] John C. Lawn, the DEA's administrator, overruled the decision arguing that because the FDA was not regulating MDMA, it had no accepted medical use.[149] The move was appealed in December 1987, but was permanently placed in Scheduled I in March 1988.[150]

Despite its scheduling, MDMA would continue to be sold and used in the club and underground music scenes. According to the New York Times, "surveys in the U.S. estimate that 7.5 percent of Americans over the age of 12 have tried Ecstasy at least once" and at least 20 million people have used it recreationally around the world.[151]

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[146] Jaeckel, *supra* note 116.
[147] *What is the History of MDMA?*, NAT'L INST. ON DRUG ABUSE (2021), https://nida.nih.gov/sites/default/files/1763-mdma-ecstasy-abuse.pdf (last visited Mar. 19, 2024); Pentney, *supra* note 129.
[148] Jaeckel, *supra* note 116.
[149] Jaeckel, *supra* note 116.
[150] Pentney, *supra* note 129.
[151] Rachel Nuwer, *MDMA Is One of the Safer Illegal Drugs. But There Are Risks*, N.Y. TIMES (Aug. 18, 2023), https://www.nytimes.com/2023/08/18/well/mind/mdma-ecstasy-risk.html (last visited Apr. 1, 2024).

Psilocybin

"Psilocybin (4-phosphoryloxy-N,N-dimethyltryptamine) is an indole-based secondary metabolite produced by numerous species of mushrooms."[152] It's what puts the "magic" in "magic mushrooms." The primary psychoactive ingredient in hallucinogenic mushrooms, psilocybin is a serotonergic hallucinogen that affects mood and perception and causes hallucinations in those who consume it.[153] According to the DEA the effects are similar to peyote and mescaline, and "the psychological consequences of psilocybin use include hallucinations and an inability to discern fantasy from reality."[154] They are currently a Schedule I substance under the CSA.[155]

"Mushrooms containing psilocybin are found across most ecological zones on all continents aside from Antarctica."[156] Some research suggests that they are older than modern humans dating back 75 million years.[157] Although samples were not seen in the U.S. until the 1930s, their use among the South American Aztec Indians go back centuries.[158] In 1529, Spanish Franciscan friar Bernardino de Sahagún went to Mexico and spent 50 years studying the Aztec. He wrote the *Historia general de las cosas de la Nueva España*, where he described "Teonanacatl, 'God's Flesh,' the sacred mushrooms of

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[152] David E. Nichols, *Psilocybin: From Ancient Magic to Modern Medicine*, 73 J ANTIBIOTICS 679 (2020).
[153] Dominique Strauss et al., *An Overview on the Taxonomy, Phylogenetics and Ecology of the Psychedelic Genera Psilocybe, Panaeolus, Pluteus and Gymnopilus*, 5 FRONTIERS FORESTS & GLOB. CHANGE (2022).
[154] *Psilocybin*, DRUG. ENF'T ADMIN., https://www.dea.gov/sites/default/files/2020-06/Psilocybin-2020.pdf (last visited Apr. 2, 2024)
[155] *Id.*
[156] Mattha Busby, *'Flesh of the Gods': The Trippy History of Magic Mushrooms*, VICE (Sept. 2, 2022), https://www.vice.com/en/article/epzx4p/magic-mushrooms-history.
[157] *Id.*
[158] Nichols, *supra* note 136, at 679.

Mesoamerica."[159] One hundred years later, the physician to the King of Spain, Francisco Hernández de Toledo, wrote a manual for missionaries traveling to the New World in 1656. In it, he discussed the different mushrooms that the natives consumed, mentioning some that led to "a kind of 'madness' by bringing 'before the eyes all kinds of things, such as wars and the likeness of demons.'"[160] There are even historical records that claim guests at the coronation of Montezuma II were given psychedelic mushrooms. "Kingsborough reports that 'wild mushrooms' were given to visitors at Montezuma's coronation, and that the mushrooms intoxicated the visitors and caused them to dance . . . the visions which accompanied the intoxication were believed to constitute divine advice concerning the future."[161] Although stories circulated for years, botanists and other scientists took them as folk tales until 1936 when Robert Weitlaner visited Oaxaca and was told stories of their uses and was able to obtain a few samples.[162] He sent these samples to Harvard University, but unfortunately the samples were too degraded and could not be identified and further studied. Two years later, Richard Evans Shultes, a Harvard botanist, "obtained specimens of three species of sacred mushrooms that were ultimately identified as *Psilocybe caerulescens*, *Panacolus campanulatus*, and *Stropharia cubensis*.[163] R. Gordon Wasson, an amateur mycologist, became aware of the mushrooms through Shultes' work and traveled to Oaxaca in 1955 where they were permitted to take part in a ritual. A 1957 Life Magazine photo-essay called *Seeking the Magic Mushroom* chronicled the trip.[164] Wasson would go on to return to Oaxaca with French mycologist Roger Heim later that

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[159] *Id.* at 679.
[160] *Teonanacatl Mushrooms: Flesh of the Gods*, U.S. FOREST SERV., https://www.fs.usda.gov/wildflowers/ethnobotany/Mind_and_Spirit/teonanacatl.shtml (last visited Mar. 21, 2024).
[161] Richard Evans Schultes, *Teonanacatl: The Narcotic Mushroom of the Aztecs*, 42 AM. ANTHROPOLOGIST 429, 433 (1940).
[162] *Id.* at 434.
[163] Nichols, *supra* note 136, at 680.
[164] *Id.*

year and the latter cultivated 100 grams of dried *Psilocybe mexicana*. The sample was sent to Albert Hofmann, the aforementioned chemist who discovered LSD, for analysis.[165] Believing that there would be "no dramatic effect on the behavior of mice or dogs," Hofmann ingested 2.4 grams to test their effects.[166] He later went on to identify the main component and complete total synthesis of the psilocybin molecule.[167]

In 1960, after psilocybin was identified and synthesized, Hoffman's employer, Sandoz Pharmaceuticals, started selling pills with 2 mg of the drug under the brand name Indocybin.[168] According to Sandoz, it could be helpful as a medication adjuvant for psychotherapy.[169] Over 100 reports would be published between 1960 and 1980 "that included anecdotal reports of human use, as well as analytical and biochemical studies."[170] Over 200 studies focusing on its biochemistry, pharmacology, chemistry, and effects on humans have been published since 1980.

PART 3: MODERN RESEARCH AND USES

Neurogenesis and Neuroplasticity

For the following sections, it is necessary to explain two topics that are central to the medical science behind psychedelics: *neurogenesis* and *neuroplasticity*. Neurogenesis is the process by which the brain produces new neurons.[171] For decades, the prevailing school of thought was that when brain cells died, that was it, they were gone forever.[172] They did not

[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 681.
[169] Nichols, *supra* note 136, at 681.
[170] *Id.*
[171] Matthew Solan, *The Book of Neurogenesis*, HARV. HEALTH (Aug. 1, 2021), https://www.health.harvard.edu/mind-and-mood/the-book-of-neurogenesis.
[172] *Id.*

repair themselves, regenerate, nor were they replaced by new ones. Science has since advanced, and research shows that damaged brain cells can regenerate through a process called neurogenesis.[173] Studies show that neurogenesis continues throughout a person's life, however, it does decline the older a person gets.[174] Scientists are attempting to further understand the process of neurogenesis, and are searching for ways to boost its processes hoping that it "may solve the puzzle for improving age-related memory loss and perhaps prevent dementia, including Alzheimer's disease."[175]

Neuroplasticity is the brain's capacity for adaptation. "It refers to the physiological changes in the brain that happen as the result of our interactions with our environment."[176] From the time the brain begins to develop in utero until the day we die, the connections among the cells in our brains reorganize in response to our changing needs. This dynamic process allows us to learn from and adapt to different experiences."[177] The term dates back to 1948 when Jerzy Konorski, a Polish neuroscientist, used it to describe observed changes in neuronal structure.[178] Scientists in the 1960s discovered that after traumatic events neurons would restructure themselves to adapt, and "further

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[173] Callum Campbell, *Can Brain Cells Regenerate?*, CTR. OF THE CELL, https://www.centreofthecell.org/blog/science-questions/can-brain-cells-regenerate/ (last visited Feb. 6, 2024).
[174] Solan, *supra* note 154.
[175] *Id.*
[176] *See generally* Eberhard Fuchs & Gabriele Flügge, *Adult Neuroplasticity: More Than 40 Years of Research*, 2014 NEURAL PLASTICITY 1–10 (2014), ("A number of factors such as stress, adrenal and gonadal hormones, neurotransmitters, growth factors, certain drugs, environmental stimulation, learning, and aging change neuronal structures and functions. The processes that these factors may induce are morphological alterations in brain areas, changes in neuron morphology, network alterations including changes in neuronal connectivity, the generation of new neurons (neurogenesis), and neurobiochemical changes.").
[177] Courtney E. Ackerman, *What Is Neuroplasticity? A Psychologist Explains [+14 Tools]*, POSITIVEPSYCHOLOGY.COM (2023), https://positivepsychology.com/neuroplasticity/ (last visited Feb. 6, 2024).
[178] *Id.*

research found that stress can change not only the functions but also the structure of the brain itself," and that "stress can actually kill brain cells."[179] The results of the research weren't all negative. Although they learned that there were multiple ways to kill brain cells, they also discovered there are "other ways for them to adapt and reconnect, and perhaps even ways for them to regrow or replenish."[180] Neuroplasticity was then split into two categories: "Structural neuroplasticity, in which the strength of the connections between neurons (or synapses) changes," and "functional neuroplasticity, which describes the permanent changes in synapses due to learning and development."[181]

Neuroplasticity is linked to how we learn and grow, adapt to our environment, and how we deal with stress and its long-term effects on us. The process of learning causes new neural connections within the brain and changes the way our brain processes information, as well as how we respond to similar situations in the future. However, scientists note that "not all learning is created equal—learning new facts does not necessarily take advantage of the amazing neuroplasticity of the brain, but learning a new language or a musical instrument certainly does."[182] Similarly, our brains are creating connections when we are exposed to prolonged stress and traumatic experiences. "The interactions between chronic stress or a dysregulated stress response and the molecular, cellular, and behavioral changes that attend the development of a depression-like state have become increasingly clear. The relationship between psychosocial stressors and the development of depression in susceptible individuals has long been apparent."[183] Additionally, it was observed that the

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[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] Christopher Pittenger & Ronald S. Duman, *Stress, Depression, and Neuroplasticity: A Convergence of Mechanisms*, 33 NEUROPSYCHOPHARMACOLOGY 88, 88 (2007).

hippocampus of animals would atrophy as a result of stress.[184] Scientists have observed hippocampal atrophy in patients with major depression and suggest that "disruption of hippocampal function, including the capacity for neuroplasticity, could contribute to several aspects of major depression."[185] Similarly, the amygdala is also severely impacted by chronic stress and trauma.[186] However, instead of atrophy, the opposite effect, hyperactivity occurs. The amygdala's control over fear is vital to survival, it interprets what you see and hear and analyzes it to assess danger. Future situations with similar stimuli then trigger fear and anxiety as a defense mechanism to keep you more alert to your surroundings.[187] Under normal conditions, the amygdala's fear-based learning is a benefit, triggering the body's fight or flight responses before our conscious brain has interpreted the situation. However, prolonged exposure to stress or severe trauma damages the amygdala and "disrupts your ability to feel fear or learn from it."[188] Issues with the amygdala have been linked to mood, panic, and personality disorders, phobias, PTSD, Alzheimer's, autism, and even strokes and brain cancer.[189]

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[184] Pittenger & Duman, *supra* note 165*; see also* Anand, K. S., & Dhikav, V., *Hippocampus in Health and Disease: An Overview*, ANNALS INDIAN ACAD. NEUROLOGY, 15(4), 239-246 (2012) ("Hippocampus is a complex brain structure embedded deep into temporal lobe. It has a major role in learning and memory. It is a plastic and vulnerable structure that gets damaged by a variety of stimuli. Studies have shown that it also gets affected in a variety of neurological and psychiatric disorders.").

[185] Pittenger & Duman, *supra* note 184.

[186] *See* Cleveland Clinic Medical Professional*, The Amygdala: A Small Part of Your Brain's Biggest Abilities*, CLEV. CLINIC, https://my.clevelandclinic.org/health/body/24894-amygdala (last visited Feb. 8, 2024) ("Your amygdala is a small, almond-shaped structure inside of your brain. It's part of a larger network in your brain called the limbic system. When it comes to your survival, your amygdala and limbic system are extremely important. These are parts of your brain that automatically detect danger. They also play a role in behavior, emotional control and learning.").

[187] *Id.*

[188] *See id.*

[189] *Id.*

Current Studies

To date, there are over 600 studies involving psychedelics and other similar drugs listed on ClinicalTrials.gov,[190] an online database maintained by the National Institute of Health, including 7 for Peyote,[191] 158 for MDMA,[192] 130 for LSD,[193] 230 for Psilocybin,[194] 208 for DMT,[195] and 9 for Ayahuasca.[196] Every single one of them is a Schedule I narcotic that the DEA claims has "no currently accepted medical use."[197] Despite many states having medical marijuana programs, it too remains in Schedule I. Additionally, the website Psychedelic Alpha is currently tracking over 60 psychedelic drugs undergoing clinical trials.[198] Since 2017, LSD, MDMA, and psilocybin have all been declared "breakthrough therapies" by the FDA for posttraumatic stress disorder ("PTSD"), treatment-resistant depression, and generalized anxiety disorder ("GAD").[199]

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[190] *See* Search: "Psychadelic", NAT'L INST. OF HEALTH, https://clinicaltrials.gov/search?term=psychedelic (last visited Apr. 1, 2024).
[191] Search: "Peyote", NAT'L INST. OF HEALTH https://clinicaltrials.gov/search?term=peyote (last visited Apr. 1, 2024).
[192] Search: "MDMA", NAT'L INST. OF HEALTH, https://clinicaltrials.gov/search?term=mdma (last visited Apr. 1, 2024).
[193] Search: "LSD", NAT'L INST. OF HEALTH, https://clinicaltrials.gov/search?term=lsd (last visited Apr. 1, 2024).
[194] Search: "Psilocybin", NAT'L INST. OF HEALTH, https://clinicaltrials.gov/search?term=Psilocybin (last visited Apr. 1, 2024).
[195] Search: "DMT", NAT'L INST. OF HEALTH, https://clinicaltrials.gov/search?term=dmt (last visited Apr. 1, 2024).
[196] Search: "Ayahuasca", NAT'L INST. OF HEALTH, https://clinicaltrials.gov/search?term=Ayahuasca (last visited Feb. 24, 2025).
[197] *Drug Scheduling*, DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/drug-scheduling (last visited Feb. 24, 2025).
[198] Michael Haichin, *Psychedelics Drug Development Tracker*, PSYCHEDELIC ALPHA, https://psychedelicalpha.com/data/psychedelic-drug-development-tracker (last visited Feb. 24, 2025).
[199] *Breakthrough Therapy*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/patients/fast-track-breakthrough-therapy-

"Psychedelics are 5-HT2A receptor agonists that can lead to profound changes in perception, cognition, and mood."[200] In contrast to other treatments, psychedelic-assisted psychotherapy has shown in Phase 2 clinical trials to produce long-lasting symptom reductions after one or a few sessions. These factors suggest that psychedelics could revolutionize psychiatry and neuroscience.[201] Most patients using currently available medication therapies respond only mildly to moderately, with over one-third of patients not responding at all

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accelerated-approval-priority-review/breakthrough-therapy (last visited Feb. 24, 2025); Ashley Gallagher, *FDA Accepts New Drug Application for MDMA-Assisted Therapy for PTSD*, PHARMACY TIMES (Feb. 13, 2024), https://www.pharmacytimes.com/view/fda-accepts-new-drug-application-for-mdma-assisted-therapy-for-ptsd*; see also* Sandee LaMotte, *Single Dose of LSD Provides Immediate, Lasting Anxiety Relief, Study Says*, CNN (Mar. 7, 2024, 8:16 AM), https://edition.cnn.com/2024/03/07/health/lsd-anxiety-fda-breakthrough-therapy-wellness/index.html; Yasemin Saplakoglu, *FDA Calls Psychedelic Psilocybin a 'Breakthrough Therapy' for Severe Depression,* LIVE SCI. (Nov. 25, 2019), https://www.livescience.com/psilocybin-depression-breakthrough-therapy.html; Collin M. Reiff et al., *Psychedelics and Psychedelic-Assisted Psychotherapy*, 177 AM. J. PSYCHIATRY 391 (2020).

[200] Alex C. Kwan et al., *The Neural Basis of Psychedelic Action*, 25 NATURE NEUROSCIENCE 1407 (2022); *see also* Ishier Raote et al., *Serotonin 2A (5-HT$_{2A}$) Receptor Function: Lingand-Dependent Mechanisms and Pathways, in* SEROTONIN RECEPTORS IN NEUROBIOLOGY (Amitabha Chattopadhyay ed., 2024). ("The serotonin 2A receptor (5-HT2A) has been implicated in mental disorders . . . in processes such as learning and memory, and also in neurogenesis . . . Though the receptor has been studied largely in relation to its multiple functions in the CNS, high levels of receptor expression in other areas . . . suggest that it could play crucial roles in other aspects of physiology . . . drugs, psychotropic or therapeutic, modify many aspects of receptor functionality.").

[201] *See* Kwan et al., *supra* note 200. ("Psychedelics . . . can profoundly bend sensory processing, alter cognition and produce intense subjective experiences. The abilities of psychedelic drugs to modulate perceptual states provide powerful tools for probing the human mind. Psychedelics [also] afford potential benefits to individuals diagnosed with a wide range of neuropsychiatric disorders, including depression, anxiety and substance-use disorders. Unlike current treatment options, only one or a few sessions of psychedelic-assisted psychotherapy have been reported to yield durable reductions of symptoms in phase II clinical trials. For these reasons, psychedelics hold promise to transform neuroscience and psychiatry.").

(i.e., resistant to treatment). In addition, the majority of currently prescribed pharmaceuticals take several weeks to start working therapeutically, and prolonged use of these medications is frequently linked to unwanted effects leading to a decline in treatment compliance.[202] "Controlled trials using LSD or psilocybin reported fast (days) and enduring (weeks to months) improvements of depression and anxiety symptoms in patients with life-threatening diseases/cancer."[203] Ketamine and serotoninergic psychedelics have been labeled "psychoplastogens" because they enhance neuroplasticity which is believed to be the reason for their antidepressant effects.[204] One theory regarding psilocybin is that it induces "rapid and stable dendritic plasticity."[205] "Other mechanisms of psychedelics could be related to the role of 5-TH2A cortical receptors in improving memory and learning (thus cognitive flexibility) in depression."[206] Psychedelics help deactivate default mode network breaking rumination, the "rigid pattern of negative thinking about oneself and the world," creating an opportunity to relearn new thought patterns.[207] Additionally, psychedelics are showing evidence that they improve the quality of life of people with chronic pain by allowing patients to

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[202] *See* Rafael Guimarães dos Santos et al., *Hallucinogenic/Psychedelic 5HT2A Receptor Agonists as Rapid Antidepressant Therapeutics: Evidence and Mechanisms of Action*, 35 J. PSYCHOPHARMACOLOGY 453 (2021).
[203] *Id*. at 454.
[204] *Id*. at 456.
[205] Sophie A. Rogers et al., *Psilocybin-Enhanced Fear Extinction Linked to Bidirectional Modulation of Cortical Ensembles*, BIORXIV (Feb. 4, 2024), https://www.biorxiv.org/content/10.1101/2024.02.04.578811v1.
[206] Santos, *supra* note 187, at 456; Alejandro Torrado Pacheco et al., *Acute Psilocybin Enhances Cognitive Flexibility in Rats*, 48 NEUROPSYCHOPHARMACOLOGY 1011 (2023) ("Cognitive flexibility is the ability to switch between mental processes in order to appropriately adapt behavior to changes in the environment. Impairments in cognitive flexibility are a prominent feature of many psychiatric disorders, including major depression (MDD) and substance use disorders.").
[207] Santos, *supra* note 187, at 456.

"reset" their thinking about their circumstances.[208] Studies have even shown amazing results treating addiction.

> Participants reported substantial changes, with 43.8% decreasing or ceasing alcohol use, 42.5% ceasing or decreasing antidepressant use, and 42.4% decreasing or ceasing cocaine use. The highest rates of increased use were for cannabis (10.9%) and tobacco products (9.3%). The most common reasons for substance use reductions were feeling more connected with self (73%), nature (55%), and others (54.6%), as well as feeling less anxious or depressed (59.4%).[209]

In a 2018 interview, David Nichols, who has been studying many of these substances since the 1970s, stated "it looks like psychedelics may be, I'm going to hesitate to say, a magic bullet, but they're able to do things at this point that we've seen in these studies that other treatments and medications are unable to do."[210]

One of the most promising events for the future of psychedelics in mental healthcare took place just last year. The FDA "accepted a New Drug Application (NDA) for midomafetamine capsules (MDMA) intended for use in combination with psychological intervention for individuals with posttraumatic stress disorder (PTSD)."[211] Additionally,

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[208] *See* Farah Z. Zia et al., *Are Psychedelic Medicines the Reset for Chronic Pain? Preliminary Findings and Research Needs*, 233 NEUROPHARMACOLOGY 1 (2023).

[209] Kevin F. Boehnke et al., *Changed Substance Use After Psychedelic Experiences Among Individuals in Canada*, 22 INT'L J. MENTAL HEALTH & ADDICTION 842 (2023) (the study had 1639 participants and included MDMA, LSD, psilocybin, and many other psychedelics, dissociatives, and hallucinogens).

[210] Cullen Browder, *'Microdosing' Growing in Popularity Among Tech Workers, but is it Safe?*, ASSOCIATED PRESS (Aug. 10, 2018, 12:33 PM), https://apnews.com/article/steve-jobs-19667206b7418099ef6a9a09f8cc575f.

[211] Erin O'Brien, *FDA Accepts, Grants Priority Review of NDA for MDMA-Assisted Therapy for PTSD*, PSYCHIATRIC TIMES (Feb. 13, 2024), https://www.psychiatrictimes.com/view/fda-accepts-grants-priority-review-of-nda-for-mdma-assisted-therapy-for-ptsd.

they placed it in priority review status "setting a Prescription Drug User Fee Act (PDUFA) target action date of August 11, 2024."[212] If authorized, this would be the first time the agency has recognized psychedelic and MDMA-assisted treatment. It also calls for the removal of MDMA from Schedule I in order to recognize the drug's medical and therapeutic benefits.[213] Lykos Therapeutics included "two randomized, double-blind, placebo-controlled Phase 3 studies" in their NDA submission.[214] Their MAPP2 study had almost unbelievable results. "The study showed in the MDMA-assisted therapy group, 86.5% of participants experienced a clinically meaningful improvement at 18 weeks post-baseline . . . results showed that 71.2% of participants . . . no longer met DSM-5 diagnostic criteria for PTSD at the end of the study."[215]

One notable psilocybin treatment in recent years, Compass Pathways is currently demonstrating having success with COMP360 in Phase 2 trials. In December 2023, they announced that COMP360 "was well-tolerated and the safety profile was as expected, with no treatment emergent serious adverse events recorded."[216] They expected to release "safety

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[212] *Id.*

[213] Gallagher, *supra* note 183.

[214] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, LYKOS THERAPEUTICS (Feb. 9, 2024), https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD.

[215] *MAPS PBC Announces Publication of Results from Confirmatory Phase 3 "MAPP2" Trial of MDMA-Assisted Therapy for PTSD in Nature Medicine*, DRUGS.COM (Sept. 14, 2023), https://www.drugs.com/clinical_trials/maps-pbc-announces-publication-results-confirmatory-phase-3-mapp2-trial-mdma-assisted-therapy-ptsd-21329.html.

[216] *Compass Pathways Announces Investigational COMP360 Psilocybin Treatment was Well-Tolerated in Phase 2 Study of Post-Traumatic Stress Disorder,* COMPASS PATHWAYS (Dec. 19, 2023), https://www.globenewswire.com/news-release/2023/12/19/2798886/0/en/Compass-Pathways-announces-investigational-COMP360-psilocybin-treatment-was-well-tolerated-in-phase-2-study-of-post-traumatic-stress-disorder.html.

and efficacy data" sometime in the spring of 2024.[217] They have also recently entered into a research collaboration agreement with Hackensack Meridian Health to "inform the delivery model design of investigational COMP360 psilocybin treatment, if FDA-approved."[218] MindMed also had great success in their Phase 2 trials with their LSD medication MM120. Their study of 198 male and female participants concluded in December 2023.[219] The results were amazing. Twelve weeks post administration, they reported a "48% rate of remission from generalized anxiety disorder" and 65% had "improved clinical signs of generalized anxiety disorder" from a single dose.[220] Chief medical officer for MindMed, Dr. Daniel Karlin, also noted impacts on signs of depression, "we saw rapid and robust improvement on depression symptoms in people — depression and anxiety have overlapping disease definitions."[221] They are expected to move into Phase 3 trials sometime in the near future.

PART 4: POLICY SUGGESTIONS

The first thing that must happen is a reassessment and reformation of the drug schedule list, possibly a complete abolishment and reboot. Given what we know now, the years of misinformation and the racist and totalitarian origins of the CSA, we need the opportunity to start fresh. Drug enforcement under the CSA has been a modern dark age that shut down legitimate research and prevented future research because the way certain drugs impacted society didn't fit with the way those in charge

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[217] *Id.*

[218] *Compass Pathways Enters into Research Collaboration Agreement with Hackensack Meridian Health to Develop Optimal Clinical Model for Investigational COMP360 Psilocybin Treatment, if FDA-Approved*, COMPASS PATHWAYS (Jan. 16, 2024), https://www.hackensackmeridianhealth.org/en/news/2024/01/16/compass-pathways-enters-into-research-collaboration-agreement-with-hmh.

[219] *See A Dose-Finding Study of MM-120 (LSD D-Tartrate) for the Treatment of Anxiety Symptoms*, NAT'L INST. OF HEALTH, https://clinicaltrials.gov/study/NCT05407064 (last visited Feb. 26, 2025).

[220] LaMotte, *supra* note 183.

[221] *Id.*

wanted. At a minimum, the U.S. should shift from a policy of criminalization to harm reduction.[222]

Harm Reduction

A recent poll by the American Civil Liberties Union shows that "65 percent of voters support ending the war on drugs" and "66 percent support eliminating all criminal penalties for drug possession and investing the resources saved in treatment and addiction services."[223] The simple fact of the matter is that people will always find a way to get high. The history of the war on drugs is proof of that. There is a phenomenon called the Iron Law of Prohibition that states, "the more intense the law enforcement, the more potent the prohibited substance becomes . . . they will become more potent, will have greater variability in potency, will be adulterated with unknown or dangerous substances, and will not be produced and consumed under normal market constraints."[224] This was seen during alcohol prohibition with bathtub alcohol, and it can been seen today with fentanyl and other synthetic opiates.[225] Part of the reason this happens is that traffickers have to minimize the size of their products to avoid detection. The Global Commission on Drug Policy's 2011 report declared that "the global war on drugs has failed, with devastating consequences for individuals and

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[222] Harm reduction is the process of dealing with individuals from a public health standpoint to prevent deaths among drug users rather than just punish their drug use. *See What is Harm Reduction?*, HARM REDUCTION INT'L, https://hri.global/what-is-harm-reduction/ (last visited Feb. 26, 2025).
[223] Jamila Hodge & Nazish Dholakia, *Fifty Years After Then-President Richard Nixon Declared a "War on Drugs," the United States is Still Mired in the Implications of this Wrongheaded, Racist Policy Decision*, VERA INST. OF JUST. (June 17, 2021), https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs.
[224] Mark Thornton, *Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf.
[225] *See* Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL. 156 (2017).

societies around the world."[226] "Repressive efforts directed at consumers impede public health measures to reduce HIV/AIDS, overdose fatalities and other harmful consequences of drug use. "Government expenditures on futile supply reduction strategies and incarceration displace more cost-effective and evidence-based investments in demand and harm reduction."[227]

Thankfully, there is some support for harm reduction in Congress. In 2021, Representative Bonnie Watson Coleman introduced the Drug Policy Reform Act of 2021 that would "transfer regulatory authority over controlled substances from the Department of Justice to the Department of Health and Human Services (HHS).[228] Though the bill did not get very far, it did send an important message to Capitol Hill that public opinion was shifting. Many states and cities have begun to take their own steps towards harm reduction by decriminalizing possession of controlled substances, expanding access to clean syringes, and starting safe-injection sites. While some are opposed to these ideas over fears of promoting drug use, active programs have had great success. "In Washington, D.C., for example, a syringe access program reduced new HIV cases by 70 percent over two years, saving the city an estimated $44.3 million in averted health care costs."[229] There was also an "80 percent drop in new diagnoses of hepatitis B and hepatitis C" in Washington state.[230] These facilities also help people get treatment and other resources. A 30 percent increase in people entering treatment was observed in Vancouver after they opened a safe injection facility.[231] Court diversion programs like

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[226] *War on Drugs,* GLOB. COMM'N ON DRUG POL'Y (2011), https://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf.
[227] *Id.*
[228] Drug Policy Reform Act of 2021, H.R. 4020, 117th Cong. (2021).
[229] Betsy Pearl & Maritza Perez, *Ending the War on Drugs*, CTR. FOR AM. PROGRESS (June 27, 2018), https://www.americanprogress.org/article/ending-war-drugs/.
[230] Pearl, *supra* note 12 (citing Monica S. Ruiz et al., *Impact Evaluation of a Policy Intervention for HIV Prevention in Washington, DC*, 20 AIDS & BEHAV. 2933 (2016)).
[231] *Id.*

Law Enforcement Assisted Diversion (LEAD) permit police to refer people to social services or therapy instead of making arrests related to minor drug offenses. The data showed people in the program were "58 percent less likely to be rearrested" and "33 percent more likely to have an income or benefits, 46 percent more likely to be employed or in vocational training, and 89 percent more likely to obtain permanent housing."[232] Data showed a $2,100 per participant yearly decrease in the expenses of the criminal and judicial systems.[233]

Addressing the Issues with the DEA Scheduling

The DEA has actively fought the de- or rescheduling of substances. Their outright refusal to acknowledge decades of legitimate research and maintain that these substances have "no accepted medical use" is not only factually wrong, but also negatively impacting our society. One of the main reasons that rescheduling is such a huge deal is that by keeping these substances in a category that says there is no accepted medical use, the government is restricting the ability of researchers to get samples of the substances to actually research potential medical uses. Rescheduling would open many pathways for those in the biomedical and mental health fields to explore. In 2022, Dr. Sunil Aggarwal filed a petition with the Ninth Circuit requesting a "review of the Drug Enforcement Administration's (DEA) denial of his petition to transfer psilocybin from schedule I to schedule II."[234] Dr. Aggarwal's petition was granted and the court did not mince words calling the DEA's decision, "arbitrary, capricious, an abuse of discretion" and stating, "the DEA failed

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[232] *Id.* (citing SUSAN E. COLLINS ET AL., LEAD PROGRAM EVALUATION: RECIDIVISM REPORT (2015)) (noting that individuals in the LEAD program were 58% less likely to have at least one arrest before evaluation entry); SEEMA CLIFASEFI ET AL., THE IMPACT OF LEAD ON HOUSING, EMPLOYMENT AND INCOME/BENEFITS (2016).

[233] *Id.* (citing SUSAN E. COLLINS ET AL., LEAD PROGRAM EVALUATION: RECRIMINAL JUSTICE AND LEGAL SYSTEM UTILIZATION AND ASSOCIATED COSTS (2015)).

[234] Aggarwal v. United States Drug Enf't Admin., No. 22-1718, 2023 U.S. App. LEXIS 28598, at *1 (9th Cir. Oct. 27, 2023).

to provide analysis sufficient to allow its 'path' to 'reasonably be discerned.'[235] "Even if we inferred that the DEA does require a substance to meet the five-part test for 'currently accepted medical use' in order to be transferred to schedule II, the DEA failed to explain why Aggarwal's submission did not show that psilocybin met the five-part test."[236] The court ordered the DEA to either "clarify its pathway for denying Aggarwal's petition or reevaluate Aggarwal's petition on an open record."[237] There has been similar arbitrary pushback from the DEA with regard to marijuana rescheduling. Insiders claim that "DEA officials are disputing scientific findings from the U.S. Health and Human Services (HHS) that led it to recommend moving marijuana from Schedule I to Schedule III of the Controlled Substances Act (CSA)."[238] According to the report, DEA officials are skeptical of the health agency's assessment that cannabis has some medicinal value and are worried about problems relating to higher THC potency.[239] Despite the DEA's pushback, there is a loophole that will most likely be used. If the FDA approves Lykos' MDMA drug, it will have an "accepted medical use," and would no longer fall under the language of Schedule I. This would trigger "the Secretary of Health and Human Services to recommend that DEA reschedule MDMA; DEA then has 90 days to issue an 'interim final rule' on their decision to reschedule."[240] The same condition would happen for psilocybin and LSD should their drugs receive FDA approval.

Regardless of what the DEA decides to do, members of Congress have stepped up to attempt to address the issue. U.S.

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[235] *Id.*

[236] *Id.* at *2.

[237] *Id.* at *2-3.

[238] Kyle Jaeger, *DEA Officials Reportedly at Odds with Biden Admin Over Marijuana Rescheduling Push*, MARIJUANA MOMENT (Mar. 11, 2024), https://www.marijuanamoment.net/dea-officials-reportedly-at-odds-with-biden-admin-over-marijuana-rescheduling-push/.

[239] *Id.*

[240] Vincent Joralemon, *The FDA Backdoor to MDMA Rescheduling*, PETRIE-FLOM CTR.: BILL OF HEALTH, https://blog.petrieflom.law.harvard.edu/2024/03/19/the-fda-backdoor-to-mdma-rescheduling/ (last visited Feb. 26, 2025).

Senator Cory Booker and U.S. Senator Rand Paul introduced the Breakthrough Therapies Act which will "remove regulatory hurdles that inhibit research and compassionate use access to potentially lifesaving treatments that are heavily restricted by Schedule I of the Controlled Substances Act."[241] According to them the Act would "resolve these problems by expediting the transfer of substances that receive breakthrough therapy designation from Schedule I to Schedule II" and "eliminate unreasonably burdensome rules and regulations that delay or prevent researchers from studying these breakthrough mental health treatments, and will provide access to these promising therapies for eligible patients who urgently need care."[242] If it passes it would have a massive impact on the future of psychedelic medicine and the way the DEA is involved in the approval process.

Another federal success story was the passing of Representative Dan Crenshaw's Douglas Mike Day Psychedelic Therapy to Save Lives Act in 2023.[243] The bill was included in the National Defense Authorization Act ("NDAA") and created a $75 million research grant program to study the therapeutic side of mushrooms."[244] Representative Crenshaw and

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[241] Press Release, Senator Cory Booker, Booker, Paul, Mace, Dean Introduce Bipartisan Legislation to Promote Research and Access to Potential Life Saving Drugs (Mar. 8, 2023), https://www.booker.senate.gov/news/press/booker-paul-mace-dean-introduce-bipartisan-legislation-to-promote-research-and-access-to-potential-life-saving-drugs.

[242] *Id.*

[243] *Crenshaw's Psychedelic Research Provision Signed into Law*, CONGRESSMAN DAN CRENSHAW (Dec. 22, 2023), https://crenshaw.house.gov/2023/12/crenshaw-s-psychedelic-research-provision-signed-into-law; Matthew Choi, *Congress Greenlights Psychedelic Treatment Bill for Active Duty Service Members Suffering from PTSD*, TEX. TRIB. (Dec. 14, 2023, 3:00 PM), https://www.texastribune.org/2023/12/14/ndaa-congress-psychedelics-ptsd-dan-crenshaw/.

[244] Kelly Laco, *'Psychedelics Saved Our Lives': Ex-Navy Seals Including the Lone Survivor Credit Drugs For Helping Them Readjust to Normal Life*, DAILY MAIL (June 19, 2023, 7:33 AM), https://www.dailymail.co.uk/news/article-

Representative Morgan Luttrell are former Navy SEALs. Luttrell, along with his brother Marcus, himself a distinguished former Navy SEAL known as the "Lone Survivor,"[245] as well as Marcus Capone, another former Navy SEAL and founder of TARA Mind, all credit psychedelics with saving their lives after suffering from PTSD.[246] Douglas "Mike" Day, whom the bill is named after was a Navy SEAL who tragically took his own life after being wounded in Iraq. According to Crenshaw psychedelic therapy is "'important' to help treat service members suffering from Post-traumatic Stress Disorder (PTSD) and Traumatic Brain Injuries (TBIs). He said the 'demons that followed' one former SEAL Mike Day home from war led to his eventual suicide."[247]

CONCLUSION

One thing is abundantly clear, the status quo isn't working. This war has gone on for fifty-two years and has cost over $1 trillion and things have only gotten worse.[248] Millions of people have had their lives ruined over mere possession.[249] Drug overdose deaths have jumped from 47,523 in January 2015 to 109,703 in October 2023.[250] It is time to admit that the War on Drugs is a massive failure. Prohibition failed a century ago, and its failure has been repeated over the past five decades. We need to correct many years of misinformation and reexamine these substances with fresh eyes. Like Rep. Crenshaw said "'We

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12204431/Psychedelics-saved-lives-Ex-Navy-SEALs-credit-drugs-helping-readjust-normal-life.html.

[245] LONE SURVIVOR (UNIVERSAL PICTURES 2013). Marcus Luttrell was played by Mark Wahlberg in this film adaptation of his story as the lone survivor of an unsuccessful joint military operation against the Taliban in Afghanistan.

[246] *About Us: Marcus Capone*, TARAMIND, https://taramind.com/team/marcus-capone/ (last visited Feb. 28, 2025); Laco, *supra* note 230.

[247] Laco, *supra* note 230.

[248] Chinni, *supra* note 5.

[249] Pearl, *supra* note 12.

[250] *Provisional Drug Overdose Death Counts*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last visited Feb. 28, 2025).

have to think outside the box, we have to do something new."[251] Only then can we hope to expand our minds and address the root causes of our struggles and help our country heal.

[251] Laco, *supra* note 230.

THE PREROGATIVE OF MERCY: ASSISTING CLEMENCY CLIENTS IN MASSACHUSETTS

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Founding Father and Federalist Paper author Alexander Hamilton opined that "clemency was vital to temper the harshness of criminal codes because 'without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.'"[2] Hamilton and his contemporaries understood the need for a justice system that balanced strict enforcement of the law with the ability to recognize individual circumstances and extend compassion where warranted. Without the ability to make exceptions for people who are guilty but nonetheless deserving of compassion, the justice system would appear excessively harsh, violent, and unkind. The justice system in the United States has certainly been categorized as all those things in the centuries since Hamilton; in light of mass incarceration, systemic inequities, and overly punitive sentencing policies, the current state of the system is seemingly grounded in an unyielding pursuit of punishment over fairness or any other penological goal. At the federal or state level, clemency is one small tool that could provide some merciful balance.

There are many arguments against clemency, for example, undermining the rule of law, the perception of unfairness, impact on victims, and the potential for abuse, among others. As an advocate serving incarcerated individuals with their clemency petitions, I have experienced the challenges and flaws present in our system and specifically when it comes to advancing a clemency petition within the Commonwealth of Massachusetts. Part I of this Article will provide an overview of clemency at the federal level, highlighting some of the ways that clemency has been pulled into the national spotlight during the

[2] MASS BAR ASS'N, *Report of the Mass. Bar Ass'n Clemency Task Force,* 1, 2 (2021) [hereinafter *Clemency Report*] (citing THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The mission of the Task Force was "to examine the process for clemency in Massachusetts including commutation and pardons, and address problems related to the clemency process that result in denial of equal justice under the law and undermine the public trust and confidence in the clemency process and criminal legal system as a whole." *Id.* at 1. The report goes on to identify "major areas for suggested reform after taking into account the feasibility, importance, and potential impact of possible changes to the clemency process." *Id.*

most recent transfer of executive power. This section will also detail arguments against clemency, which are applicable at the federal and state level. Next, the Article will describe how this system works within Massachusetts specifically. Part II of this Article will explore clemency as a tool to remedy systemic inequities, something that can be "actively humanizing and forward looking." [3] Finally, Part III of this Article will detail some of the practical challenges an attorney or applicant may encounter working with an incarcerated individual petitioning for clemency.

I. UNDERSTANDING FEDERAL AND STATE CLEMENCY PROCESSES AND THEIR CRITICISMS

Grace and forgiveness are the foundations of clemency.[4] Yet realistically within many jurisdictions, it fails to deliver on a philosophy that permits those who have committed crimes from being judged or assessed by anything other than that conviction, and critics would argue that would be appropriate. The underutilized vehicle of clemency provides state and federal executives the ability to forgive or reduce the sentences of those convicted of crimes in the United States.[5] The use of this power

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[3] Preston Shipp, *From Punishment to Promise: The Power of Redemption*, ACLU (Aug. 4, 2020), https://www.aclu.org/news/smart-justice/from-punishment-to-promise-the-power-of-redemption.

[4] *See generally* Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 471 (2020) ("[t]he Supreme Court, per Chief Justice John Marshall, described an award of clemency as 'an act of grace,' a description that the Court has reiterated in more recent times, and as a way to 'temper' justice with "mercy.'"). "Clemency scholars often point to Abraham Lincoln as the epitome of a generous, forgiving chief executive . . . . Lincoln considered favorably factors such as an offender's youth, penitent disposition, record of good conduct, prior military service (including those wounded in battle)." *Id.* at 484, n.194 (citation omitted). There is likewise a movement in Massachusetts and several other states to more meaningfully consider characteristics such as youth in sentencing overall. *See* Commonwealth v. Mattis, 493 Mass. 216, 223 (2024).

[5] *See* Alexandra Wood, Note, *Releasing the Steam: An Abolition Constitutionalist Approach to Revitalizing Clemency Proceedings*, 15 NE. U. L. REV. 201, 209 (2023) ("[C]lemency remains a largely unused power.").

can be traced to at least as early as the 7th century and was first used in the United States by President George Washington in 1795 after the Whiskey Rebellion in western Pennsylvania.[6] While it is rooted in the concept of grace,[7]opponents see it as "making law meaningless" or mocking victims of crime.[8] It can be used for the most mundane crimes or the most serious, including murder.[9] Clemency, and in particular pardons (one of the forms of clemency), have come into the national spotlight in the last two presidential administrations—yet most individuals do not know much about the nuances of this power at the federal level, or the differences between federal and state use of this power.

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[6] Colleen Shogan, *The History of the Pardon Power*, THE WHITE HOUSE HIST. ASS'N, (Dec. 2, 2020), https://www.whitehousehistory.org/the-history-of-the-pardon-power. "In 1795, the leaders of the Pennsylvania Whiskey Rebellion were accused of tarring and feathering officials attempting to collect a new federal tax of sixty cents per gallon on whiskey. In referring to one of the leaders as being 'a little short of an idiot,' Washington noted that the government should show mercy." Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 207-08 (1999).

[7] *See* United States v. Wilson, 32 U.S. 150, 160 (1833) ("A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."); *see also In re* Kennedy, 135 Mass. 48, 53 (1883).

[8] Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1308–09 (2004). "Bill Clinton explained his reluctance to grant clemency by saying: 'The appeals process, although lengthy, provides many opportunities for the courts to review sentences and that's where these decisions should be made.'" *Id.* at 1310. "Obama's frequent use of commutations, particularly for prisoners convicted of drug-related crimes, prompted criticism from Republicans, who said it benefited 'an entire class of offenders' and infringed on the 'lawmaking authority' of the legislative branch." John Gramlich, *Biden Granted More Acts of Clemency than Any Prior President*, PEW RESEARCH CTR. (Feb. 7, 2025), https://www.pewresearch.org/short-reads/2025/02/07/biden-granted-more-acts-of-clemency-than-any-prior-president/.

[9] *See* Sarat & Hussain, *supra* note 8, at 1313 ("The power to pardon, of course, is not coterminous with 'sparing life,' as pardons are used for the most mundane of crimes.").

A. The Federal Clemency Power: Statistics and Basics

At the federal level, clemency can take numerous forms, "including pardon, commutation of sentence, remission of fine or restitution, and reprieve."[10] Pardon is the forgiveness of the underlying offense[11] and commutation is a reduction in the original sentence (for example, converting a natural life sentence with no eligibility for parole into a lesser sentence that is eligible for parole).[12] Statistically, remission and reprieve are almost never granted at the federal level, with pardons being the most commonly granted type of application.[13] The authority for this broad power is found in Article II, Section 2 of the Constitution—and was heavily modeled on the English

[10] *Office of the Pardon Attorney*, U.S. DEP'T OF JUST.: OFF. OF THE PARDON ATT'Y (last visited Feb. 12, 2025),

[11] For example, President Trump's pardons of the January 6 insurrectionists. Ali Swenson & Lindsay Whitehurst, *Experts Worry That Trump's Jan. 6 Pardons Will Legitimize Political Violence, Embolden Extremists*, ASSOCIATED PRESS, Jan. 25, 2025, https://apnews.com/article/trump-pardons-jan-6-extremists-capitol-riot-proud-boys-bdd25aa653ceb2a2db6fd3ef2f9bda6e.

[12] Clemency refers to multiple forms of presidential mercy. The two most common forms are pardons, which forgive past crimes and restore civil rights, and commutations, which completely or partially reduce sentences for those in prison or on community supervision. Two less-common forms are remissions, which reduce financial penalties associated with convictions, and respites, which are temporary reprieves that are usually granted to inmates for medical reasons. *See Gramlich*, *supra* note 8.

[13] *See Clemency Statistics*, U.S. DEP'T OF JUST.: OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clemency-statistics (last visited Feb. 12, 2025). This office has statistics on clemency dating back more than a century, beginning with President McKinley in 1900. These numbers do not include "individual members of a class of persons granted pardons by proclamation, such as President Carter's proclamation granting clemency to certain Vietnam era offenders, and persons granted clemency after action by President Ford's Presidential Clemency Board because those petitions were not processed through the Office of the Pardon Attorney." *Id.*; *see also* Colleen Shogan, *The History of the Pardon Power*, THE WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/the-history-of-the-pardon-power (last visited Feb. 12, 2025) ("A reprieve delays the imposition of a sentence or punishment.").

monarchy ("The royal prerogative of mercy").[14] The U.S. Supreme Court has interpreted this power broadly, and it is "not generally subject to congressional modification."[15] The only check on any abuse of this power by a president is impeachment.[16] There is no clear answer as to whether a self-pardon is lawful,[17] although that concept is likely to be tested in the coming years.[18]

Clemency proceedings do not determine whether a party is guilty or innocent and are not part of the trial or adjudicatory process—"[t]hey are conducted by the executive branch, independent of direct appeal and collateral relief proceedings."[19] Scholars disagree about the purposes of the pardon power, with some advocating that it should only be used as an act of mercy to promote justice, and others pushing for a

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[14] U.S. CONST. art II, s2 ("[A]nd he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."); *see also* Brandon Sample, *The History of the Presidential Power* (Dec. 30, 2018), https://clemency.com/history-presidential-pardon.

[15] Shogan, *supra* note 6; *see also* Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 565 (2001) ("The federal courts have also been reluctant to impose restrictions on the pardon power, preferring to rely on the general proposition that 'clemency has not traditionally 'been the business of the courts.'").

[16] Nida et al., *supra* note 6, at 199.

[17] *Id.*; *see also* Paul J. Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 HARV. J. L. & PUB. POL'Y 763, 777 (2021) ("[W]e should consider ourselves fortunate that the issue has not arisen with the regularity necessary to generate a body of case law.").

[18] *See* Nida et al., *supra* note 6, at 212. The authors argue that while a self-pardon "may be constitutional,… no individual should have the ability to place themselves in judgment of their own actions in the public arena. This quagmire in the Constitution ought to be resolved preventatively." *Id*. at 221. "President Nixon considered such a move when he realized the devastating impact that the Watergate scandal would have on his presidency. The Bush administration also reviewed the self-pardon option during the Iran-Contra arms for hostages scandal." *Id.* at 212.

[19] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280 (1998) (Rehnquist, J.) (describing clemency as "simply a unilateral hope"). The "heart of executive clemency" is to grant it as a matter of grace, enabling "the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Id.* at 273.

broader application.[20] Outside of academic discussions, the use of clemency also fluctuates based on societal and political factors (and even the calendar itself, [21] as seen by President Biden in the end of his term in 2024).[22] While there seems to be agreement that pardons should not be bought or sold, there is no agreement about "whether the pardon power should only be used to correct mistakes, for example, to free someone who had been wrongly convicted or, instead, might be used to achieve a variety of… goals."[23] Disagreement about the scope and use of this power has existed since its creation under the U.S. Constitution.

Despite conflicting theories of application of this power, there are many modern-day examples of its use that demonstrate mercy for those guilty of crimes (or at least, what was defined as a crime at the time of conviction). One such example of how pardon has recently operated at a large scale at

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[20] Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L. J. 85, 89 (2002); "[B]ecause the Eighth Amendment and clemency are each designed to help prevent prisoners from suffering more than is their due, the jurisprudence of the former might be helpful in figuring out what the latter requires." *Id.* at 96. *But see infra* Section I.A.1 (noting that some legal scholarship argues that mercy should not be a consideration in clemency in light of the theories of retribution and punishment).

[21] Larkin, *supra* note 17, at 764. "[O]utgoing Presidents, no longer accountable to the electorate and effectively immune from congressional oversight, are freed from any political restraint on their behavior. Some chief executives grant clemency to parties who would never have received it while the political guardrails channeling presidential conduct were still in effect." *Id.*

[22] Press Release, The White House, Fact Sheet: President Biden Commutes the Sentences of 37 Individuals on Death Row, (Dec. 23, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/23/fact-sheet-president-biden-commutes-the-sentences-of-37-individuals-on-death-row/. "President Biden is also the first President ever to issue categorical pardons to individuals convicted of simple use and possession of marijuana, and to former LGBTQI+ service members convicted of private conduct because of their sexual orientation." *Id.*

[23] Strasser, *supra* note 20, at 86 ("Commentators disagree about the purposes of the pardon power, both descriptively and normatively.").

the federal level is with non-violent drug offenses: consider Katrina Polk, a 54-year-old Washington, D.C. resident who pled guilty to a nonviolent drug offense at age eighteen.[24] In April of 2024, President Biden pardoned eleven individuals and commuted [reduced] the sentences of five individuals who were convicted of non-violent drug offenses, including Polk.[25] The Press Release associated with those grants of clemency highlighted the underlying policy behind this action:

> Many of these individuals received disproportionately longer sentences than they would have under current law, policy, and practice. The pardon recipients have demonstrated their commitment to improving their lives and positively transforming their communities. The commutation recipients have shown that they are deserving of forgiveness and the chance at building a brighter future for themselves beyond prison walls.[26]

As of February 2025, President Biden had granted over 4200 pardons or commutations, with the vast majority near the end

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[24] Kathryn Watson, *Biden Grants Clemency to 16 Nonviolent Drug Offenders*, CBS NEWS (Apr. 24, 2024), https://www.cbsnews.com/news/biden-pardons-clemency-nonviolent-drug-offenders/.

[25] *Id.* Under the Biden Administration, there was a late push with a plan to reduce unnecessary incarcerations: "The United States has less than 5% of the world's population but a fifth of its prisoners." Paul Grant, *Biden Pardons 11 People, Commutes Sentences of Five Others, Says White House*, REUTERS (Apr. 24, 2024, 12:24 PM), https://www.reuters.com/world/us/biden-pardons-11-people-commutes-sentences-five-others-says-white-house-2024-04-24/?utm (noting that the plan supports the goal of rehabilitation of those convicted of crimes, as opposed to retribution or punishment).

[26] Press Release, The White House, Statement from President Joe Biden on Clemency Actions, (Apr, 24, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/04/24/statement-from-president-joe-biden-on-clemency-actions-2/?utm; *see also* Grant, *supra* note 25. Note that this use of clemency was both a pardon (forgiveness of the original offense) and a commutation (reduction of the original sentence. Polk went on to get her PhD in public policy and administration. Watson, *supra* note 24.

of his term in 2025.[27] Notably, this group also included his own son, who was facing a possible prison sentence for federal felony gun and tax convictions.[28] Consistent with past trends, this number drastically increased in February 2025, with nearly 1600 petitions granted.[29]

In recent years, clemency has become part of the regular news cycle under the Trump Administration, with some arguing a "supercharged" abuse of the pardon power, transforming the tool from one intended to serve public interest into "a tool for self-dealing."[30] However, this is not without similarity by past presidents—many scholars have suggested the President Jefferson also used the power to free his political allies, rather than as an act of mercy.[31] The original constitutional Framers did not include a restrictions on self-pardons and vested the President with the exclusive right to pardon anyone."[32] The

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[27] *Clemency Statistics*, *supra* note 13. This is significantly more than under the 2016-2020 Trump Administration (238) and double that than under the 2012-2016 Obama Administration (1927). *Id.* President Obama has granted the most clemency petitions of any president since the Nixon Administration. *Id.*

[28] Zeke Miller et al., *Biden Pardons His Son Hunter Despite Previous Pledges Not To*, ASSOCIATED PRESS, https://apnews.com/article/biden-son-hunter-charges-pardon-pledge-24f3007c2d2f467fa48e21bbc7262525 (Dec. 2, 2024, 7:49 AM).

[29] *Clemency Statistics*, *supra* note 13.

[30] Justin Florence & Grant Tudor, *The Presidential Pardon Power Explained*, PROTECT DEMOCRACY (Mar. 18, 2024), https://protectdemocracy.org/work/the-presidential-pardon-power-explained/.

[31] *See* Nida et al., *supra* note 6. "The pardon power went largely unchallenged at a time when the Supreme Court was without a true understanding of its own role until the nation's fourth Chief Justice, John Marshall, defined the Court's role as the interpreter of the Constitution in 1803." *Id.* at 208. This category of presidents that have also been labeled as using the pardon power for political purposes also includes former President Bush. *Id.* at 215.

[32] *Id.* at 205; *see also* Albert W. Alschuler, *Limiting the Pardon Power*, 63 ARIZ. L. REV. 545, 545 (2021):

> In granting this power, the Framers deliberately cast structural safeguards aside. Nevertheless, the presidency of

Supreme Court has noted that any limit to this power "must be found in the Constitution itself."[33] An unsettled question about clemency that may soon be answered during the next presidential administration (potentially by a court that is thought to heavily favor President Trump)[34] is whether he has

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> Donald Trump prompted a search for limits. This Article examines: (1) whether a president may pardon crimes that have not yet happened (or announce his intention to do so); (2) whether he may pardon himself; (3) whether he may use pardons to obstruct justice or commit other crimes; (4) whether criminal statutes should be construed not to apply to the president when they arguably limit the pardon power; (5) whether the Take Care Clause limits the pardon power; (6) whether pardons can deprive victims of due process; (7) whether pardons ever violate the separation of powers by limiting the authority of courts; (8) whether the exception to the pardon power for impeachment cases does more than prevent the president from blocking the impeachment of federal officeholders; (9) whether pardons must specifically identify the crimes pardoned; and (10) whether pardons are invalid when issued as the result of fraud, bribery, or other unlawful conduct.

Id. at 607 (concluding that two of Trump's pardons that appear to justify both criminal prosecution and judicial declarations that the pardons are invalid).

[33] Alschuler, *supra* note 32, at 606; *see also* Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 159 (2017) (arguing that "there is nothing direct in the Constitution forbidding self-pardons, and much emanating from the executive discretion associated with clemency to justify self-pardoning as within the realm of clemency"). "[T]he Framers assumed that any President would exercise his authority, in the words of Alexander Hamilton, with 'circumspection,' 'scrupulousness,' and 'caution.'" Larkin, *supra* note 4, at 496.

[34] *See, e.g.*, Ankush Khardori, *The Supreme Court Gave Trump a Stunning Gift — and Rewrote the Constitution*, Politico (July 2, 2024, 5:00 AM) (noting that a recent decision by SCOTUS gives President Trump immunity from prosecution for conduct involving discussions with Justice Department officials). The ACLU has characterized this decision as the six Republican-appointed justices "abandoning" the Constitution and paving the pay to create new constitutional protections for the president, "while turning way the claims of the powerless." David Cole, *Supreme Court Term Ends with Win*

the authority to pardon himself. President Trump has already publicly stated that he believes he the legal authority to pardon himself to end a Justice Department investigation.[35] This is in conflict with many scholars' opinions that, just like the Justice Department, a president cannot pardon himself.[36] Yet, there is also support for President Trump's position.[37] The 2024-28 presidential administration is likely to provide answers to many of the questions that have risen with respect to the application of clemency throughout its history.

There has been some advocacy to pass legislation at the federal level to increase the use of clemency—and to make it more transparent to address concerns of bias and abuse. For example, The FIX Clemency Act supported by Massachusetts Congresswoman Ayana Pressly.[38] This legislation would create "an independent U.S. Clemency Board" comprised of nine individuals appointed by the President, including a person who is formerly incarcerated.[39] The Board would review applications for a pardon, commutation, or other relief from collateral consequences of convictions and then the recommendations from the Board will be given directly to the President and included in an annual report to Congress.[40] Yet, it is unclear whether such legislation would have sufficient support at the

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for Trump, First Amendment Rights, ACLU (July 10, 2024), https://www.aclu.org/news/civil-liberties/supreme-court-term-ends-with-win-for-trump-first-amendment-rights.

[35] Larkin, *supra* note 17, at 773.

[36] *Id.*

[37] *Id.*; *see also* Jonathan Turley, *Yes, Donald Trump Can Pardon Himself, But it Would be a Disastrous Idea*, USA TODAY (June 4, 2018, 6:12 P.M.), https://www.usatoday.com/story/opinion/2018/06/04/donald-trump-self-pardon-constitutional-impeachment-column/667751002/. "Whether a president can grant himself a pardon is a question that has long fascinated academics. It has never been answered since, thankfully, no president had had the reason or the temerity for such a self-dealing abuse of power." *Id.*

[38] *See The Fix Clemency Act*, CONGRESSWOMAN AYANNA PRESSLEY, https://pressley.house.gov/the-fix-clemency-act/ (last visited Jan. 10, 2025).

[39] *Id.*

[40] *Id.*; *see also* H.R.6234, 117TH Cong. (2021).

federal level when there is republican control of all three branches of government.[41]

1. Arguments Against Clemency: Weighing Mercy Against Other Strong Considerations

There are numerous arguments against clemency, often focusing on concerns about fairness, justice, and public safety. Within legal scholarship, academics disagree about whether mercy is even an appropriate consideration in clemency,[42] but at least in Massachusetts this consideration is explicitly written into the executive clemency guidelines.[43] This section will focus on three of the major criticisms: (1) clemency is unfair to victims and their families; (2) clemency undermines the rule of law and settled convictions; and (3) clemency has tremendous potential for abuse.[44] While all of these are significant considerations that should be balanced in any clemency process, this Article takes the position should not defeat the right to use the process of this constitutionally enshrined power. However, that does not extend to the concept that all grants of clemency would be appropriate; just that the process should be available to incarcerated

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[41] *See* Olivia Beavers et al., *GOP Holds Onto House Majority — Clinching the Trifecta*, POLITICO (Nov. 13, 2024, 11:04 PM), https://www.politico.com/news/2024/11/13/republicans-win-house-control-00187509 .

[42] Larkin, *supra* note 4, at 485 (highlighting arguments that debate whether mercy is consistent with justice in light of the sentencing justifications of incapacitation and retribution).

[43] *See infra* Section I.B.

[44] IAN O'DONNELL, FOR AND AGAINST CLEMENCY, JUSTICE, MERCY, AND CAPRICE: CLEMENCY AND THE DEATH PENALTY IN IRELAND 54, 62-69, 82 (2017); *see generally* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 26 (2015) ("When the Framers spoke of the pardon power, they noted that it was necessary because prevailing criminal law might be too severe."); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J. L. & PUB. POL'Y 833, 878 (2016) ("Presidents now must consider not only the effect that clemency may have on the immediate victims of a crime and their families, but also the political fallout from angering the victims' rights movement.").

individuals and that process should transparently weigh all relevant considerations in arriving at a decision.

Addressing the first criticism, it is undeniable that clemency in many, if not most cases will cause emotional distress to victims and co-victims (or secondary victims, such as family).[45] Victims and their families consider pardon or commutation as undermining their suffering and the justice they believe was served through the offender's punishment.[46] In many clemency processes, the impact of the release of an individual who has done harm to victim or their families is a necessary part of the clemency process. For example, in Pennsylvania, the survivors of homicide victims are entitled to

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[45] Victims' relatives are often called "co-victims" or secondary victims. John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law*, 58 WASHBURN L. J. 1, 11 (2019). For example, many law enforcement members and their families were outraged over the Jan. 6 pardons. *See, e.g.*, Luke Broadwater, *A Betrayal, a Mockery': Police Express Outrage Over Trump's Jan. 6 Pardons*, N.Y. TIMES (Jan. 21. 2025), https://www.nytimes.com/2025/01/21/us/politics/jan-6-pardons-police.html. One victim was noted as saying the pardon was a miscarriage of justice and an insult to those who risked their lives defending democracy. *Id.* Another example is the 17-year sentence of former judge Michael Conahan that was commuted by President Biden. Maya Yang, *Victims of Kids for Cash Judge Outraged By Biden Clemency*, GUARDIAN (Dec. 14, 2024, 2:10 PM), https://www.theguardian.com/us-news/2024/dec/14/kids-for-cash-judge-biden-pardon?utm. Conahan was sentenced for accepting millions of dollars in illegal payments in exchange for sending more than 2,300 children to private juvenile detention centers. One victim's mother was quoted as saying:

> Conahan's actions destroyed families, including mine, and my son's death is a tragic reminder of the consequences of his abuse of power…. This pardon feels like an injustice for all of us who still suffer. Right now I am processing and doing the best I can to cope with the pain that this has brought back.

Id. This particular commutation was interwoven with the impact of the release to house arrest of many non-violent, incarcerated individuals during the COVID-19 pandemic and jail overcrowding issues.

[46] *See* Yang, *supra* note 45.

participate in the commutation process in various forms, such as submitting a letter or appearing at the hearing.[47] And while that opportunity is essential, it can be excruciatingly painful for the victims that have to relive these circumstances as part of their involvement in the process.[48] The inclusion of this perspective for consideration, while forcing renewed trauma on victims, is a "moral cacophony," both necessary and paradoxical.[49] The voices of victims must be heard and respected,[50] and this, in my view, is the most challenging argument against the exercise of clemency.

In the face of this primary criticism of the use of clemency, it is important to highlight that not all victims or families are opposed to the release of those convicted of crimes against them or their family members. For example, in the petition for William Allen in Massachusetts, the family members of his victim testified in his support at his hearing.[51] Mr. Allen

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[47] Regina Austin, *"Second Looks, Second Chances"": Collaborating with Lifers Inc. on A Video About Commutation of LWOP Sentences*, 22 U. PA. J. L. & SOC. CHANGE 71, 86 (2019).

[48] Robert C. Ross, *Clemency Petitions from an Executive Branch Perspective*, 67 BOSTON BAR. J. (Special Edition 2023: Community Justice Reimagined) (Aug. 31, 2023), https://bostonbar.org/journal/clemency-petitions-from-an-executive-branch-perspective/ ("[the] crime had a specific (and often immeasurable) impact on the victim"); *see also* Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88 (2020) ("[R]etraumatization refers to additional traumatization during a survivor's interactions with professionals and processes in the justice system").

[49] Anthony V. Alfieri, *Mercy Lawyers*, 82 N.C. L. REV. 1297, 1314 (2004) (describing how difficult it is "to hear of guilt pronounced by offender voices of contrition and remorse" and to consider forgiveness for an offender). *But see* Austin, *supra* note 47, at 86 (noting that there is lack of data of what victims really want from the justice system and society has created a narrative that victims want vengeance for closure).

[50] *But see* Austin, *supra* note 47, at 86 (highlighting the argument that there should be a limitation on the consideration of the feelings of victims' survivors in commutation).

[51] *Have Mercy: Public Support Tips the Scales Toward Justice*, MCDERMOTT WILL & EMERY, https://www.mwe.com/legal-case-studies/have-mercy-public-support-tips-the-scales-toward-justice/ (last visited Jan. 16, 2025) [hereinafter *Have Mercy*]. Mr. Allen's circumstances were quite unique, perhaps the "perfect" candidate for clemency:

was later granted a commutation of his original life without parole sentence, successfully applied for parole, and is currently out of prison.[52] Similarly, in the petition of Quintin Jones in Texas, the victim's sister was strongly in favor of clemency for the convicted Jones.[53] This did not persuade the deciding body;

> There is no question that under then-applicable felony murder law, William Allen was guilty of first-degree murder, even though he did not directly cause the death of the victim. He participated in a robbery with a co-defendant, during which crime he drove the car and kept hostages at knifepoint in an apartment bathroom while the co-defendant encountered the victim and killed him in the living room. While the co-defendant received a second-degree sentence because of a plea bargain, Mr. Allen refused to plead and received a first-degree sentence. The family of the victim of his crime, notably, supported his commutation.

Ross, *supra*, note 48; *see also* Northeastern Univ. Sch. of Law, *A Conversation with William Allen, Correcting a Fundamental Unfairness Through the Clemency Process*, YOUTUBE (Nov. 29, 2022), https://www.youtube.com/watch?v=6MLZPOyMhoM.

[52] Deborah Becker, *William Allen Released From Prison After Life Sentence Commuted*, WBUR (May 12, 2022), https://www.wbur.org/news/2022/05/12/william-allen-released-from-prison-after-life-sentence-commuted (noting that Allen's release marked the first time in a quarter century that a first-degree murder sentence was commuted in Massachusetts).

[53] *Quintin Jones is on Death Row for Killing his Great-Aunt. The Victim's Sister is Pleading for Clemency*, CBS NEWS (May 14, 2021 9:02 AM), https://www.cbsnews.com/news/quintin-jones-death-row-great-aunt-sister-clemency/. Jones accepted responsibility for killing his aunt for drug money, and he was sentenced to death—while on death row, the victim's sister wanted to prevent his sentence from being carried out:

> "I love him very much," she told CBS News' Omar Villafranca. [She] said she and Bryant were extremely close. She does not believe Jones should die. "I think the governor should spare him, because he has changed and he's a different person than he used to be," she said. Writer Suleika Jaouad wrote a recent opinion article advocating for Jones' clemency because she believes he has transformed his life. "He had an unimaginably difficult childhood of abuse and

Jones was executed on May 19, 2021.[54] The victim impact and the reaction of the victim and the community should be at the forefront of any consideration of clemency, and it is a layered and complicated issue for those seeking this remedy. In reality, most clemency applications will face significant resistance from victims and families, thus exposing the "multiple complexities" of clemency practice and victims' rights.[55]

Second, critics argue that clemency can weaken the authority of the legal system by overriding judicial decisions and established sentences, potentially leading to a perception of favoritism or inconsistency.[56] When executive power is used to alter or erase penalties handed down by the courts following a conviction, it can undermine the legitimacy of judicial processes and erode public trust in the justice system.[57] This is especially

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> violence and addiction and neglect, but as he said to me, his childhood did not excuse what he did," she said.

Id.

[54] Jolie McCullough, T*exas Executed Quintin Jones for Murdering his Great Aunt. Supporters Questioned if Race Played a Factor in his Clemency Rejection*, TEX, TRIB. (May 19, 2021), https://www.texastribune.org/2021/05/19/texas-execution-quintin-jones/ (arguing that because a white man in a similar situation was spared, the parole board's rejection was racially motivated in light of the support for clemency from the victim's family).

[55] *See* Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89, 126 (2015)

[56] Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J. L. REFORM 817, 838 (2016) ("Transparency in the clemency process can prevent arbitrariness, discrimination, and political favoritism by allowing media and public scrutiny and allowing applicants to challenge deficiencies."); *see also* Phillip John Strach, *Ohio Adult Parole Authority v. Woodard: Breathing New "Life" into an Old Fourteenth Amendment Controversy*, 77 N.C. L. REV. 891, 922 (1999) ("clemency operates only as an outlet for mercy, which the executive may use on behalf of society when society (through the executive) deems it necessary to override the judicially imposed sentence").

[57] *But see* Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 352, 256 (2003) (noting that the clemency power has also been used to "restore" trust in a

true if clemency appears arbitrary, driven by political motives, or disproportionately favors individuals with influence, wealth, or connections. Such perceptions can create a sense that the law does not apply equally to all, fostering resentment among the public and diminishing the system's credibility. Furthermore, critics worry that frequent or poorly justified acts of clemency may discourage confidence in judicial decisions, sending a message that court rulings can easily be overturned based on subjective or external considerations rather than the rule of law.[58] However, this criticism only carries weight in the case of those who are legitimately guilty of their crimes.[59] Furthermore, this criticism is weakened when a system of clemency also takes into consideration broader systemic inequities or unfairness.[60]

Third, and related to the above, there is significant potential for abuse.[61] The clemency process can be vulnerable to misuse, with decisions potentially influenced by corruption, political pressure, or personal relationships rather than fairness or justice.[62] Clemency might create the impression of unequal treatment, especially if it appears to favor the wealthy, politically

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system in the case of miscarriages of justice or correction of the malfeasance and misfeasance of other actors in the criminal justice system).

[58] *See generally* Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 308 (2003) (noting that critiques advanced against the use of clemency include nonpolitical factors, which result in the inconsistent application of clemency). This undermining of the rule of law through clemency is now happening against a backdrop of a more wide scale erosion of the rule of law nationally. William R. Bay*, The ABA Supports the Rule of Law*, ABA (Feb. 10, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-supports-the-rule-of-law/.

[59] *See* Rapaport, *supra* note 57, at 356.

[60] *See infra* Section II.

[61] *See infra* Section I.B.

[62] This has been demonstrated by both Republican and Democrat executives throughout the years. Editorial, *The Bipartisan Abuse of the Pardon*, LAS VEGAS REV. J. (Jan. 25, 2025, 9:00 PM), https://www.reviewjournal.com/opinion/editorials/editorial-the-bipartisan-abuse-of-the-pardon-3270413/. *See generally* Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1845-46 (2002) (noting that studies establish that even more than two decades ago, clemency was being abused).

connected, or high-profile individuals over ordinary citizens. At the federal level, and in many state processes, the clemency process has "no fixed criteria" and are left to the "vast unguided discretion of the executive."[63] Despite these concerns, supporters of clemency argue that it plays a crucial role in correcting injustices, addressing overly harsh sentences, and recognizing individual circumstances that legal processes may overlook. This Article suggests that the overhaul to the system in Massachusetts and the new 2024 Clemency Guidelines will serve as a more transparent model for clemency at the state and federal level that may alleviate some of these criticisms.

B. Overview of the Clemency Process in Massachusetts

Clemency varies at the state level.[64] Consistent with federal law, there are different forms of clemency in Massachusetts—pardons and commutations. Pardons are forgiveness for the convicted individual's underlying offense and would eliminate the record of the crime.[65] Commutations do

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[63] "More likely, clemency and pardon grants can damage the system's moral credibility because they are commonly seen as one more example of an offender escaping the punishment he or she deserves by getting early release without evidence of remorse or atonement." Paul H. Robinson & Muhammad Sarahne, *The Opposite of Punishment: Imagining A Path to Public Redemption*, 73 RUTGERS U. L. REV. 1, 23, 25 (2020).

[64] "Clemency procedures vary from state to state. In 15 states, the governor has full and sole authority to grant clemency: Alabama, Arkansas, California, Colorado, Kentucky, Mississippi, New Jersey, New Mexico (although it has abolished the death penalty, two inmates remain on death row), North Carolina, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wyoming. In seven states—Arizona, Delaware, Florida, Louisiana, Oklahoma, Pennsylvania, and Texas—the governor must have the recommendation of clemency from a board or advisory group. In Georgia, Nebraska, Nevada, and Utah, a board or advisory group has the sole discretion to grant clemency." *Clemency and Pardons*, ACLU: SMART JUSTICE, https://www.aclu.org/issues/smart-justice/parole-and-release/clemency-and-pardons (last visited Feb. 12, 2025).

[65] *Pardons and Commutations*, MASS. GOV, https://www.mass.gov/info-details/pardons-and-commutations (last visited Jan. 10, 2025); *Executive*

not forgive underlying offenses but reduce the period of incarceration for the convicted individual.[66] The Governor's power of clemency derives from the Massachusetts Declaration of Rights, the state constitution:

> The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.[67]

While once more widely used, clemency in the Commonwealth dropped significant in the early 1980s, "likely a function of a broader shift toward more retributive penal practices that began in the 1970s."[68] Unfortunately, and inequitably, clemency

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Clemency Process, MASS. GOV https://www.mass.gov/info-details/executive-clemency-process (last visited Jan. 10, 2025).

[66] *Pardons and Commutations*, *supra* note 65; *Executive Clemency Process*, *supra* note 65; *see also* Ross, *supra* note 48 ("A pardon offers forgiveness for the underlying offense, whereas a commutation is the substitution of a lighter sentence for a more severe sentence and, unlike a pardon, does not "do away with the conviction.").

[67] MASS. CONST. pt. 2, ch. II, § 1, art. VIII, *amended by* MASS. CONST. amend. LXXIII. The Declaration of Rights has its roots in the 1780 Constitution of the Commonwealth of Massachusetts, drafted by John Adams. This is "the world's oldest functioning written constitution. It served as a model for the United States Constitution, which was written in 1787 and became effective in 1789." *John Adams and the Massachusetts Constitution*, MASS. GOV, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution (last visited Jan. 10, 2025).

[68] BEN NOTTERMAN, WILLIE HORTON'S SHADOW: CLEMENCY IN MASSACHUSETTS (NYU L. Sch. Ctr. on Admin. of State Crim. L. State Clemency Proj. ed. 2019), https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA_Accessible.pdf. Willie Horton was an incarcerated individual in

has been a rare occurrence in Massachusetts in prior decades until the most recent administration.[69] It is an intersection of intricate legal procedures with a heavily political process, neither of which have historically had significant transparency.[70]

The clemency process in Massachusetts is [overly] complicated. It starts with the incarcerated petitioner (with or without counsel) filing a petition with the Advisory Board of Pardons, a body that also handles parole petitions.[71] After "review and investigation," if the Board determines that the petition warrants a hearing, a public hearing will be held.[72] They determine which petitions are worthy for a hearing by relying on Clemency Guidelines that are specific to the governor in office.[73] The hearings are an opportunity for the Board to hear directly from the incarcerated individual, but also other stakeholders, including victims and secondary victims.[74] Following the hearing, the Board will submit its recommendation to the Governor. The Board is supposed to include its reasoning for the recommendation, making specific reference to the Guidelines.[75] Upon receipt of a favorable

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Massachusetts sentenced to life without parole. *Id.* at 6. In June 1986, Horton did not return from a weekend furlough and later assaulted a man before repeatedly raping the man's fiancé. *Id.* Then-Governor Dukakis "endured a crucible of public rage in the media," and a shadow of fear and reluctance has hung over the clemency power since that time. *Id.* "The tendency to reflexively overhaul a criminal justice policy after a single violent crime, regardless of the policy's overall success, became known as the 'Willie Horton effect.'" *Id.*

[69] *Pardons and Commutations*, *supra* note 65; *Executive Clemency Process*, *supra* note 65.

[70] *See Pardons and Commutations*, *supra* note 65; *Executive Clemency Process*, *supra* note 65; *Clemency Report*, *supra* note 2, at 2 ("The guidelines that apply to clemency in Massachusetts similarly characterize clemency 'an integral part of the correctional process.'").

[71] *Executive Clemency Process*, *supra* note 65.

[72] *Id.* This is supposed to be done within ten weeks of the petition being filed. OFF. OF THE GOVERNOR, COMMONWEALTH OF MASS., EXECUTIVE CLEMENCY GUIDELINES (2023) [hereinafter HEALEY GUIDELINES].

[73] *Executive Clemency Process*, *supra* note 65.

[74] *Id.*

[75] *Id.* This is supposed to be done within 6 months of the hearing. HEALEY GUIDELINES, *supra* note 72.

recommendation from the Board, the Office of the Governor will evaluate the petition.[76]

The Governor has the prerogative to return a petition to the Board for further action.[77] If the Governor takes no action within 90 days following a recommended denial from the Board, the petition is considered denied.[78] Whenever the Board recommends that the Governor grant a petition and the Governor does not take any action with respect to the recommendation within one year, the Board and the petitioner are supposed to presume that the Governor disagrees with that recommendation and clemency is again denied.[79] Per the Massachusetts Constitution, a grant of clemency also requires the "advice and consent" of another body called the Governor's Council.[80] No decision by the Governor to grant clemency is given effect unless it is approved by this Council.[81] And, despite attempts to force past governors to increase the use of clemency in Massachusetts, the judiciary has been clear that no court can compel a governor to act when it comes to clemency.[82]

Most individuals who vote in Massachusetts are not even aware of the roles or composition of either board that is involved in clemency processes. The Advisory Board of Pardons is basically the Parole Board by another name that reviews applications for clemency and provides recommendations to the Governor.[83] Its role is to evaluate cases, conduct hearings, and offer expert advice to guide the Governor's decision-making in

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[76] *Executive Clemency Process*, *supra* note 65.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Executive Clemency Process*, *supra* note 65; MASS. CONST. pt. 2, ch. II, § 1, art. VIII, *amended by* MASS. CONST. amend. LXXIII.
[81] *See id.*
[82] *See* Foster v. Comm'r of Corr., 146 N.E.3d 408, 411-12, (Mass. 2020) (citing Dist.t Att'y for the Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980) (holding that the "judicial branch cannot control executive clemency")).
[83] NOTTERMAN, *supra* note 68.

matters of clemency.[84] This is intended to provide transparency and ensure that all voices are considered in the decision-making process.[85] The Advisory Board of Pardons is composed of the same members as the Parole Board, which means it includes individuals with expertise in corrections, law, psychology, and social work. This works to ensure that clemency decisions are informed by a broad understanding of justice, rehabilitation, and public safety.[86] The board currently consists of seven members appointed by the Governor, each serving a five-year term.[87] Members are often chosen for their expertise in criminal justice, corrections, psychology, or social work. The Advisory Board of Pardons is a constitutionally established body that plays a key role in the state's executive branch.[88]

The second group that needs to give its stamp of approval to a clemency application is the Governor's Council. This body is unique to Massachusetts and has its roots in the colonial era.[89] As noted, the council reviews recommendations for clemency after they have been forwarded by the Advisory Board of Pardons. The Governor's Council consists of eight elected members who serve two-year terms (unlike the Parole Board,

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[84] *Executive Clemency*, MASS.GOV, https://www.mass.gov/executive-clemency (last visited Jan. 30, 2025).

[85] *See* HEALEY GUIDELINES, *supra* note 72.

[86] *But see* NOTTERMAN, *supra* note 68 (noting that previously, the Board consisted primarily of law enforcement).

[87] *Board Member Profiles*, MASS.GOV, https://www.mass.gov/info-details/board-member-profiles (last visited Feb. 12, 2025). For example, currently on the Board is Sarah B. Coughlin, a licensed clinical social worker, an alcohol and drug counselor, and a certified recovery coach supervisor. She was confirmed to the Board in September 2023 . *Id.* The board also includes attorneys, former probations officers, a social worker, and a psychologist. *Id.*

[88] *Governor's Power to Pardon*, MASS.GOV, https://www.mass.gov/news/governors-power-to-pardon (last visited Feb. 12, 2025).

[89] *See* Nicci Kadilak, *Massachusetts Governor's Council: What You Need to Know*, BURLINGTON BUZZ (July 29, 2024), https://www.burlington.buzz/civic-engagement/massachusetts-governors-council-what-you-need-to-know/.

whose members are appointed).[90] Each member represents a specific district within the state.[91] The role and operation of both boards are essential to the clemency process within the Commonwealth, yet most Massachusetts voters do not have a strong understanding of who they are or what they do when it comes to clemency. However, there has been a push in recent years (bolstered by some high-profile grants of clemency) to increase visibility to this space.[92]

1. The Healey Guidelines: A Shift Towards Opportunity for Mercy

As noted, each Massachusetts governor has the authority to issue their own version of clemency guidelines. On October 31, 2023, Governor Maura Healy issued her clemency guidelines.[93] These are markedly different than those used by any other administration in Massachusetts history, explicitly outlining the ways in which Governor Healey will use executive clemency to address unfairness and systemic bias.[94] For the first time, the Guidelines will take into consideration factors like "the

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[90] *Governor's Council*, MASS.GOV, https://www.mass.gov/orgs/governors-council (last visited Jan. 29, 2025).
[91] *Id.*
[92] *See, e.g.*, *Clemency Report*, *supra* note 2; *Have Mercy*, *supra* note 51; *see also Clemency Initiative*, GREATER BOS. LEGAL SERVS., https://www.gbls.org/clemency-initiative (last visited Feb. 12, 2025); Naila Awan & Katie Rose Quandt, *Executive Inaction: States and the Federal Government Fail to Use Commutations as a Release Mechanism*, PRISON POL'Y INITIATIVE (Apr. 2022), https://www.prisonpolicy.org/reports/commutations.html (noting increased advocacy around the use of clemency in Massachusetts).
[93] Press Release, Governor Maura Healey, Governor Healey Issues New Clemency Guidelines to Center Fairness and Equity in Criminal Justice System, (Oct. 31, 2023) https://www.mass.gov/news/governor-healey-issues-new-clemency-guidelines-to-center-fairness-and-equity-in-criminal-justice-system [hereinafter Healey Guidelines PR]; *see also* HEALEY GUIDELINES, *supra* note 72.
[94] HEALEY GUIDELINES, *supra* note 72 ("With all these factors in mind, the Governor intends to use clemency to make our Commonwealth more compassionate and more just.").

petitioner's age at the time of the offense, health, post-offense behavior, race, ethnicity, gender and sexual identity, as well as whether they are a survivor of sexual assault, domestic violence or human trafficking."[95]

In evaluating a petitions for clemency, Governor Healey's Guidelines focus primarily on three factors: (1) the Governor views executive clemency as a means of addressing unfairness in the criminal justice system; (2) the Governor will use executive clemency to ensure accountability with compassion; and (3) the character and behavior, particularly post-offense behavior, of the petitioner will be considered in evaluating all clemency applications.[96] As noted, these areas of focus represent a significant shift from those used by former Governor Charlie Baker.[97] The key differences between the two sets of guidelines are as follows:

- For the first time, the guidelines explicitly state that clemency will be used to address systemic biases and unfairness in the criminal justice system. While acknowledging the importance of clemency, the Baker Guidelines did not explicitly focus on systemic biases or the specific personal circumstances of petitioners.
- The new guidelines do not specify a minimum time served before a petitioner serving a life sentence can be considered for clemency, allowing for more

[95] Healey Guidelines PR, *supra* note 93; *see also* Larkin, *supra* note 4, at 484, n.194 (noting that these individualized assessments trace back at least to President Lincoln).

[96] HEALEY GUIDELINES, *supra* note 72; *see* Austin Sarat, *Massachusetts Governor Offers a New Way of Thinking About Crime, Justice, and Clemency*, VERDICT (Nov. 2, 2023), https://verdict.justia.com/2023/11/02/massachusetts-governor-offers-a-new-way-of-thinking-about-crime-justice-and-clemency (reporting that one commentator noted the guidelines "offer a model that may transform the understanding of executive clemency across the country and, at the same time, return it to what it once was in the United States.").

[97] As one Governor reflected on the political challenges that face governors in granting clemency, he noted: "There's no political credit." Hanna Liebman Dershowitz & Rachel Van Etten, *Reflections on the Rewriting the Sentence II Summit on Alternatives to Incarceration*, 36 FED. SENT'G REP. 114, 125, (2024).

individualized assessments. In contrast, the Baker Guidelines specified that the governor was unlikely to consider commuting a life sentence for first-degree murder until the petitioner had served at least fifteen years.

- Finally, the Healey Guidelines aim to make clemency more accessible by considering a broader range of factors and focusing on rehabilitation, personal growth, and reintegration into society.[98] The Baker Guidelines were more restrictive, emphasizing the seriousness of offenses and setting higher thresholds for consideration.

Wasting no time, and shortly into her term, Governor Healey granted significantly more pardons in her first year in office than the prior governor.[99] These Guidelines represent a more progressive and inclusive approach, focusing on rectifying systemic injustices and considering the individual circumstances of petitioners, whereas Governor Baker's guidelines were more conservative and stringent in their criteria. [100] Clemency has the potential at both the federal and state level to balance the branches of government,[101] as well as

[98] The factor of "age" also has overlap with another space that Massachusetts is pioneering, namely the recognition of the most updated neuroscience research into brain development. Nik DeCosta-Klipa, *3 Things to Know About Gov. Maura Healey's New Guidelines for Pardons*, WBUR (Nov. 1, 2023), https://www.wbur.org/news/2023/11/01/massachusetts-maura-healey-clemency-pardons-guidelines-newsletter.

[99] *Id.* ("Healey has recommended more pardons (13) in her first year in office than any Massachusetts governor since Michael Dukakis").

[100] Healey Guidelines PR, *supra* note 93. Lieutenant Governor Driscoll was quoted as saying: "Executive clemency has the power to not only make a positive difference in the lives of individual petitioners, but also to make our state fairer and more equitable…. The Governor has said from day one that our administration is going to apply an equity lens to everything we do, and we are seeing the results – an administration-wide equity assessment, new and diverse councils and commissions, eleven pardons and now these updated guidelines."

[101] Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 17 (2015) ("It is clear that the Framers intended the pardon power not only to be a vehicle

to redress long standing inequities that have plagued incarceration.[102] By explicitly calling out "mercy" in the new Guidelines,[103] they offer a potential model at the state and federal level to revisit the original purpose of this executive power that has been absent.

II. CLEMENCY AS A TOOL TO REMEDY SYSTEMIC INEQUITIES WITHIN MASSACHUSETTS

Healey's Guidelines acknowledge that systemic biases—such as racial, socioeconomic, and gender disparities—have historically influenced the outcomes of criminal justice processes.[104] Under those guidelines, clemency is framed in a way that Hamilton likely would have supported: as a mechanism to address inequities and ensure that individuals

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for the ancient value of mercy but also to play a role in the balance between the branches of government.").

[102] Ashley Nellis, *Mass Incarceration Trends*, THE SENT'G PROJECT (May 21, 2024), https://www.sentencingproject.org/reports/mass-incarceration-trends/. Nellis describes the trends in incarceration rates since the 1970s, as well as pointing out significant disparities for people of color:

> People of color remain massively overrepresented in prisons, accounting for nearly 7 in 10 people in prison. Systemic causes range from a history of racial and ethnic subordination to ongoing police tactics that unfairly ensnare people of color into the system, and also include charging and sentencing practices that create stiffer punishments for people of color.

Id.

[103] *See* HEALEY GUIDELINES, *supra* note 72 ("By issuing clemency, a governor can do what is right rather than what is merely expedient – correcting legal errors, righting systemic wrongs, addressing historical injustices, exercising compassion, showing mercy, promoting equity, and fighting racism.").

[104] These biases also extend to the clemency process itself. *See, e.g.*, Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 949 (2015) ("[W]hat little clemency activity that persists continues to distribute unevenly across gender, racial and ethnic groups, geography, governors' political affiliation, and over time.").

disproportionately affected by systemic injustice are afforded opportunities for relief.[105] Racial disparities in Massachusetts prisons and jails are more severe than in many other states.[106] The Massachusetts prison population is growing increasingly older and more costly to incarcerate.[107]

This is particularly true when the focus is solely on those incarcerated at MCI Framingham.[108] Clemency seems like a particularly useful tool for this much smaller segment of prisoners; while some have argued that clemency is ineffective since it has such a small impact on prison populations, MCI Framingham has such a small population to start with that it would be an impact that was felt more significantly. In addition, there are particular attributes of the facility and the prisoners that would make them more likely to fit within the scope of Governor Healey's aims for clemency. When it is "the final check separating life and death," attention to principles that center systemic inequalities throughout our system should be prioritized.[109]

A. History of MCI Framingham

Massachusetts has a lower rate of female incarceration compared to other states.[110] The state's only facility for incarcerated women is the Massachusetts Correctional Institution – Framingham (MCI-Framingham), a medium

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[105] *See* HEALEY GUIDELINES, *supra* note 72.
[106] *Clemency Report*, *supra* note 2, at 4 ("'Among those sentenced to incarceration, Black and Latinx people sentenced to incarceration receive longer sentences than their White counterparts.' Other disparities occur in charging decisions, jury trials, and plea bargaining.") (citation omitted).
[107] Buckman v. Comm'r of Corr., 138 N.E.3d 996, 1002 (Mass. 2020).
[108] This population includes individuals who were assigned female at birth and trans women, both of whom are housed at MCI Framingham. *See, e.g.*, Kosilek v. Misi, 630 F. Supp. 3d 328, 331 (D. Mass. 2022).
[109] Heise, *supra* note 58, at 308–09.
[110] *Highest and Lowest Female State Imprisonment Rates (per 100,000 U.S. Female Residents),* THE SENT'G PROJECT, (July 7, 2024) https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls/.

security prison that houses women serving sentences, awaiting trial, or civilly committed.[111] Currently, less than 200 (although this number is likely closer to 175) individuals are housed at this facility.[112] Originally called the Sherborn Reformatory for Women, MCI Framingham was built in 1877 to house women convicted of minor offenses,[113] such as drunkenness and vagrancy (which were often linked to poverty and social inequity). The institution's focus was initially on rehabilitation rather than punishment.[114] As incarceration rates rose in the

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[111] *MCI Framingham*, MASS.GOV, https://www.mass.gov/locations/mci-framingham (last visited Feb. 12, 2025).

[112] *Women's Incarceration Conditions and Reentry Project*, PRISONER'S LEGAL SERVS. OF MASS., https://plsma.org/womens-project/ (last visited Feb. 12, 2025). Also reporting respondents in the report have experienced or witnessed sexual misconduct by staff. Some experienced physical violence by staff, and others have been threatened with physical violence by staff. Transgender women incarcerated in men's prisons reported sexual misconduct from both correctional staff and incarcerated men. The Massachusetts Department of Correction ("DOC") reports that 70% of women in its custody have an open mental health case. *See* Michael Goldstein, *A Renewed Vision of Justice at Framingham: Uniting a Prison's Past and Future*, CRIMSON (Nov. 18, 2021), https://www.thecrimson.com/article/2021/11/18/framingham-retrospection/ ("As of July 26, 2021, the prison is only at 30 percent capacity, making it the least occupied medium-security prison in Massachusetts. And, in 2019, only 4.1 percent of the women in prison in the U.S. were incarcerated for violent crimes, while the majority of women in prison — 59.2 percent — were incarcerated for drug-related crimes.").

[113] MASS. DEP'T OF CORR. MCI FRAMINGHAM, VOLUNTEER ORIENTATION HANDBOOK (2025), https://www.bc.edu/content/dam/bc1/schools/mcas/arts%20council/PDF/PAO_orientationhandbook.pdf; Shelby Grebbin, *Inside the Fight to Document the Horrors at America's Oldest Women's Prison*, DIGBOSTON (Dec. 17, 2020), https://digboston.com/inside-the-fight-to-document-the-horrors-at-americas-oldest-womens-prison/. "[T] his is the oldest all-women's prison still in operation in the U.S. At its inception, prison reformers saw Sherborn as an opportunity to implement a more gendered mode of punishment rather than relegating women to isolated corners of male-dominated institutions." Grebbin, *supra.*

[114] Goldstein, *supra* note 112 ("[T]he Reformatory faced its downfall when the state began worrying about… progressive treatment of crime that prioritized humanity over the strict hand of the law.").

20th century, the reformatory expanded to accommodate women convicted of more serious crimes.[115] It transitioned from a reformatory model to a state prison,[116] though rehabilitation programs persisted. Like many prisons at the time, MCI Framingham reflected broader social inequalities, with incarcerated women of color often facing harsher treatment and fewer opportunities for rehabilitation (and arguably, this is still true today).

The 1960s and 1970s saw growing attention to the treatment of incarcerated women.[117] By the 1980s, the prison system in Massachusetts and across the U.S. became more punitive, with an emphasis on longer sentences and stricter conditions.[118] MCI Framingham became known for consistent over capacity, exacerbating issues like inadequate healthcare and programming.[119] While the overcrowding issue has resolved due to decreasing incarceration rates, many issues still exist. The prison population at MCI Framingham reflects systemic inequities, with a disproportionate number of incarcerated

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[115] Grebbin, *supra* note 113.

[116] *Id.*

[117] *See, e.g.*, LINDA K. HOLT, MASS. DEP'T OF CORR. WOMEN COMMITTED TO THE MASSACHUSETTS DEPARTMENT OF CORRECTION, 1970 TO 1980 (1981), https://www.mass.gov/doc/237commitspdf/download (noting that societal changes have fostered an increase in attention and research pertaining to incarcerated women).

[118] DORIS LAYTON MCKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1 (2001), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf ("The strong emphasis on rehabilitation that existed for the first seven decades of the 20th century gave way in the 1970s to a focus on fairness and justice, by which sentences reflected "just deserts" rather than a utilitarian motive. Sentencing practices later moved toward a crime-control model that emphasized incarceration as a way to reduce crime in the community; this crime-control model became increasingly popular during the 1980s and 1990s.").

[119] Alison Kuznitz, *Inmates Say $50 Million for New Mass. Prison Would be Better Spent on Rehabilitation*, MASSLIVE (June 28, 2023, 5:55 AM), https://www.masslive.com/politics/2023/06/inmates-say-50-million-for-new-mass-prison-would-be-better-spent-on-rehabilitation.html.

women being low-income and women of color.[120] Many are survivors of trauma, domestic violence, and substance use disorders. MCI Framingham's history underscores the evolving challenges and injustices of the criminal justice system, particularly as they relate to women. Its legacy serves as a case study in the broader struggle to balance accountability, rehabilitation, and equity and which theory of sentencing should control in the Commonwealth.[121]

The Massachusetts Department of Correction is actively pursuing the construction of a new women's prison, with experts estimating a cost of $50 million to Massachusetts taxpayers.[122] There has been significant pushback from a variety of groups, including the incarcerated women themselves, as well as members of the Massachusetts legislature.[123] After a prior jail and prison construction moratorium was vetoed by Governor Baker, there is momentum to get a similar 5-year ban in front of Governor Maura Healey, who is thought to be more likely to support it.[124] One potential solution would be to increase the use of clemency at MCI Framingham where constitutional under the

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[120] Susan Sered, *Unwarranted Restrictions, Gratuitous Harm—Women and Prison Security Classification in Massachusetts*, SCHOLARS STRATEGY NETWORK (Aug. 26, 2024), https://scholars.org/contribution/unwarranted-restrictions-gratuitous-harm-women.

[121] Joseph R. Nolan & Laurie J. Sartorio, *Theories of Punishment*, *in* 32 MASS. PRAC., CRIMINAL LAW § 7 (3d ed. 2024) ("There are several schools, teaching a variety of theories regarding the object of punishment") (including public safety, retribution, reformation, and deterrence).

[122] Sered, *supra* note 120. ("In the wake of the Legislature's 2024 failure to vote on the Prison Construction Moratorium Bill—which passed last year but was vetoed by then Governor Baker—it is more crucial than ever to look closely at DOC policies and practices that impact the continued incarceration of women"); *see also* An Act Establishing a Jail and Prison Construction Moratorium, S. 1979, 193rd Sess. (Mass. 2023-2024), https://malegislature.gov/Bills/193/S1979.

[123] Kuznitz, *supra* note 119.

[124] *Id.* ("Melissa Cordle, who's been incarcerated for the last 38 years, told lawmakers that constructing a new prison would only transfer and perpetuate the issues at MCI-Framingham. Cordle, 73, advocated for alternatives like relief for elderly inmates who pose a low threat to society").

Guidelines to reduce its population and potentially create solutions for a smaller population of incarcerated individuals.

B. Demographics and Conditions at MCI Framingham

As of July 2024, Framingham had an operational capacity of 469, and reported that it had 214 individuals housed there.[125] This includes people with life without parole ("LWOP") sentences, as well as individuals waiting in a pretrial stage (21% of the 214) or individuals who are under civil commitment (6% of the 214).[126] Of the 214, 64% are white, 20% are black, and 9% are Hispanic.[127] Fifty women are serving a LWOP sentence.[128] Of particular relevance when it comes to the Guidelines:

> Incarcerated women are overwhelmingly survivors of violence and trauma. The vast majority of women in MCI-Framingham are mothers separated from their children. There are 7 women in their 70s and 10 women in their 60s in Framingham. Women are suffering from a range of significant illnesses and receiving inadequate healthcare…. Women express a need for mental health care and treatment that cannot happen inside prison.[129]

The conditions at Framingham have been well documented by groups like Families as Justice for Healing and Prisoners Legal Services.[130] For example:

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[125] *July 2024 MA DOC Institutional Fact Card*, MASS.GOV, https://www.mass.gov/doc/institutional-fact-cards-july-2024/download (last visited Jan. 19, 2025).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Families as Justice for Healing, *Pass the Jail and Prison Construction Moratorium*, PRISONERS' LEGAL SERVS. OF MASS., https://plsma.org/wp-content/uploads/2023/03/Moratorium-Bill-Info-Sheet.pdf (last visited Feb. 12, 2025).
[130] *See, e.g.*, Sarah Nawab, *The Way Home: The Urgency of Decarcerating Women and Girls in Massachusetts*, PRISONERS' LEGAL. SERVS. OF MASS. (Oct. 30,

> The overwhelming majority of women interviewed and surveyed for the report stated that they had either experienced or witnessed sexual misconduct or harassment by correctional or other staff. Women also reported experiencing physical violence, threats of violence, and verbal bullying from staff. Women incarcerated throughout the Commonwealth reported pervasive retaliation for reporting staff sexual misconduct, and several women reported that they had experienced physical and sexual violence prior to incarceration as well, indicating that incarceration is compounding existing trauma. Women reported experiences and conditions in Massachusetts prisons and jails that have exacerbated mental illness and reported that mental health care is woefully inadequate to virtually nonexistent.[131]

In the report detailing these conditions, Attorney Nawab and Prisoner's Legal Services push for the increased use of "existing but underutilized" options for decarceration, including clemency.

2024), https://plsma.org/wp-content/uploads/2024/10/The-Way-Home-The-Urgency-of-Decarcerating-Women-in-Massachusetts-2024_10_30-FINAL.pdf. From a terminology standpoint, Nawab highlights why it can be important to use specific terms when working in this space: "Terms such as 'inmate,' 'offender,' 'convict,' and 'criminal' are harmful and dehumanizing because they reduce people in prisons and jails to their incarcerated status, and this dehumanization normalizes harm toward people trapped in carceral systems." *Id.* at 1. In working within MCI Framingham and on clemency petitions, I have taken my lead on language choices based on the way that the individuals housed there refer to themselves.

[131] Nawab, *supra* note 130, at 2. PLS and Nawab point out that "[w]ith the increased attention given to the use of clemency, as seen in the updated Executive Clemency Guidelines, the time is ripe to grant clemency to women incarcerated in Massachusetts." *Id.* at 15.

III. PRACTICAL CHALLENGES TO CLEMENCY

My work with clemency began in 2020 in directing law-student research on the clemency process under the Baker Guidelines.[132] This work was a very small piece of support for the Report and Recommendations from the Women's Bar Foundation to provide recommendations to update the Guidelines and the overall process for clemency in Massachusetts.[133] For the following two years, I continued to lead student projects related to clemency and oversaw research assistants in various projects related to this topic. Upon the launch of the Women's Bar Foundation Clemency Project,[134] I volunteered as a pro bono attorney to take on a clemency petition for an incarcerated individual within MCI Framingham. Fortunately, a petition under the Healey Guidelines has a higher likelihood of being granted than under any of the prior guidelines from the past decades (the executive branch has long been impacted by "the Shadow of Willie Horton"[135] and the risk

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[132] *See supra* Section I.B.1.

[133] *Clemency Report*, *supra* note 2.

[134] *See generally Women's Prison and Re-Entry Project*, WOMEN'S BAR FOUND., https://wbawbf.org/wbf/pro-bono-projects/womens-prison-and-re-entry-project (last visited Feb. 12, 2025).

> The Clemency Pro Bono Project is an expansion of the Women's Bar Foundation's Women's Prison and Re-Entry Project. The Clemency Project was created because clemency, whether in form of a pardon after release from incarceration or commutation of a sentence, has become rare in Massachusetts. The project matches elder women who have served more than ten years of their sentence with attorneys who help them complete their Petition for Commutation and represent them in their hearing.

Id.

[135] NOTTERMAN, *supra* note 68. As one author notes, every jurisdiction has their own "Willie Horton." Austin, *supra* note 47, at 87 (noting the biggest obstacle to clemency is the possibility that a released individual will recidivate, which undermines the process and poses a threat to the future of any politician who approved the release). Governor Healey has taken steps

of unpopular political decisions). This work is replete with difficulties, however this section will touch upon three: (1) lack of public support for clemency petitions, as compounded by victim opposition; (2) the complexity of the process, which is not always transparent, and (3) the hurdle of the "perfect" petition.

A. Non-Use of Clemency Historically Equates to Lack of Public Awareness or Support

Governor Healey does not have an easy task in building public support for an increased use of clemency—at both the federal and state level, a "cycle of disfavor and disuse is difficult to break without concerted action."[136] The prior administration granted just three commutation petitions, and it is not a term that the public is familiar with or understands.[137] While the use of clemency was much more robust prior to 1971, it has been in steep decline since.[138] The lack of clemency in the past decades at both the federal and state level affirmatively signals that clemency is unimportant.[139] However, Healey has embraced the

already in the first year of her Guidelines that demonstrate she is less likely to be deterred from granting clemency than past governors, assuming that petitions are able to survive the Advisory Board and Governor's Council.

[136] *See* Barkow & Osler, *supra* note 44, at 14.

[137] *See* Lucie Gulino, *Clemency in Massachusetts and its Potential for Revitalization*, MASS. LAWYERS BLOG (Jan. 27, 2023), https://www.bostonlawyerblog.com/clemency-in-massachusetts-and-its-potential-for-revitalization/ ("Massachusetts has a fraught history with clemency and has strongly disfavored this post-conviction remedy for decades.").

[138] *Id.*

[139] Barkow & Osler, *supra* note 44, at 13. "The pardon attorney, embedded among prosecutors, protects the work of those prosecutors above all else. The president, in turn, fails to use the pardon power. Clemency falls out of the public eye, and the failure to use the pardon power only affirms the continuing negativity of the pardon attorney." *Id.* at 14. Governor Baker granted three commutations, all of which were incredibly strong petitions: "Despite differing evaluations of whether each petitioner 'did it,' these three men shared a thorough acceptance of responsibility for their actions, remarkable determination, and extremely compelling stories of how they

idea of revitalizing clemency, with an early move in 2024 to pardon all people convicted of simple marijuana possession in Massachusetts.[140]

Governor Healey's proactive use of clemency has garnered significant public attention and support.[141] By issuing new Guidelines aimed at centering fairness and equity in the criminal justice system, Healey has been commended by various legal and civil rights organizations—for example, the Massachusetts Bar Association praised her openness to input from reform-minded professionals, noting that the Guidelines reflect a more fair and equitable approach to the clemency process. [142] The ACLU of Massachusetts also expressed gratitude, emphasizing that pardons and commutations are vital tools for addressing historic wrongs and systemic failures.[143]

While this seems to represent a collective appreciation for her commitment to justice reform and equity, none of Healey's clemency grants have yet commuted the sentence of someone convicted of LWOP. There are petitioners in the

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had remade their lives in prison. These are the reasons why Governor Baker commuted their prison sentences." Ross, *supra* note 48.

[140] Walter Wuthman, *Healey Announces Sweeping Pardons for Simple Possession of Cannabis*, WBUR (Mar. 13, 2024), https://www.wbur.org/news/2024/03/13/massachusetts-governor-pardon-marijuana-possession ("In a move she described as "nation-leading" in scope and ambition, Gov. Maura Healey on Wednesday unveiled plans to pardon all people convicted of simple marijuana possession in Massachusetts"). Healey's plan was later approved.

[141] *See, e.g.*, Sam Doran, *Parole Board Sends More Petitions to Governor's Desk*, WWLP (Oct. 9, 2024, 7:26AM), https://www.wwlp.com/news/state-politics/parole-board-sends-more-petitions-to-governors-desk/. An attorney involved in one of the few commutations granted during the Baker Administration is quoted as saying: "the number [of petitions] that have made it to the desk are encouraging" and "Gov. Healey has recommended more pardons than any governor in modern history, and she is absolutely to be commended for that." *Id.*; *see also Massachusetts Governor Adds to Number of Individuals Eyed for Pardons*, ASSOCIATED PRESS (May 24, 2024, 3:07PM) (noting approval of Healey's blanket pardon to those convicted of misdemeanor marijuana charges going back decades — an estimated tens of thousands of individuals, or more).

[142] Healey Guidelines PR, *supra* note 93.

[143] *Id.*

process of applying for this exact relief currently, and the public reaction (and victim opposition) to granting a petition like that as of yet remains unknown.[144] Victim opposition to clemency petitions will be the most significant hurdle going forward, and as noted previously, is an immensely significant consideration that should be carefully and thoughtfully approached.

B. The Complicated Massachusetts Clemency Process

A second hurdle is how complicated it is for a low income, incarcerated individual with no legal training to file for pardon or commutation. As described, the process for filing a clemency petition in Massachusetts is incredibly complicated, more so than many other states.[145] As one practitioner noted, "Obtaining clemency is a rare occurrence – combining legal and political processes with little guidance. The journey from petition to pardon involves uncertainty for petitioners and their attorneys alike."[146] Determining which U.S. state has granted the most clemency petitions is challenging due to variations in record-keeping and the diverse nature of clemency processes across states. However, some states are recognized for their more frequent and regular use of clemency: for example, contrast Massachusetts with the neighboring Connecticut.[147]

[144] "People can change. People are capable of rehabilitation and transformation, and those folks who've managed to undergo that process themselves really can add a lot of value to our communities and a lot of potential is being wasted continuing the incarceration of those folks … for the rest of their lives. So, there's a lot of need for clemency." Liebman Dershowitz & Van Etten, *supra* note 97, at 125.

[145] *See generally Clemency Procedures by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/policy/clemency/clemency-by-state (last visited Jan. 24, 2025).

[146] William G. Cosmas, Jr., *From Here to Clemency: Navigating the Massachusetts Pardon Process*, 59 BOS. BAR. J. 2 (2015), https://bostonbar.org/journal/from-here-to-clemency-navigating-the-massachusetts-pardon-process/. In 2014, Cosmas represented a successful petitioner for clemency in Massachusetts. *Id.*

[147] *Executive Pardon: A National Survey*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Feb. 28, 2022), https://ccresourcecenter.org/2022/02/28/executive-pardon-a-national-survey/.

Connecticut is described as frequently granted clemency with a regular process; at the other end of the spectrum (currently) is Massachusetts, described as "rare" in granting clemency.[148] While Governor Healey's Guidelines make it more likely that clemency will be granted, the process will inevitably be slow and confusing. This is a barrier for pro se applicants and attorneys interested in taking a case pro bono.

Relatedly to the complexities of the process, prior to the WBF Clemency Project there were little consolidated resources or training for attorneys interested in taking a case in this space with no prior background in clemency. Many people who are incarcerated and are eligible to apply do not have a legal background, or the financial ability to hire an attorney. There is not necessarily a market for a newer attorney to make a full-time practice just doing clemency, or pathways from any of the Boston law schools to get attorneys knowledgeable and aware of this space. Luckily, the WBF Clemency Project is slowly changing this difficulty in the process—and as more petitions are granted, and more attorneys volunteer their time and build knowledge, more resources will be available despite the lack of transparency or complexity of the process.[149]

Finally, there is not always clarity on why a petition was granted a hearing or recommended for commutation or pardon, which can make it very hard to use that kind of "precedent" as persuasive in future cases. And a past decision being categorized as only persuasive, not binding, is an important distinction—"unlike a court, neither the Governor nor the Governor's Council is 'bound' to treat seemingly like cases alike."[150] Perhaps under the new Guidelines when the first LWOP commutation petition is filed, there will be a turning point to try and see what type of application is the best "precedent" for a woman from MCI

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[148] *Id.* (noting that in at least 18 states, the practice of pardoning has continued to thrive over the years as an integral part of the justice system even when it has been severely curtailed in others).
[149] *See Women's Prison and Re-Entry Project, supra* note 134.
[150] Ross, *supra* note 48.

Framingham serving a natural life sentence.[151] Clemency's "life and death consequence" should require that its application in Massachusetts "be clear, evenhanded, and transparent."[152]

C. The Hurdle of the "Perfect" Petition

A final challenge from a non-exhaustive list of difficulties in the process in Massachusetts is the idea of a perfect petition. While there are numerous obstacles to securing a commutation, the need for an exceptionally compelling petition stands out as a high bar. National or state level studies of clemency are scant and unhelpful.[153] There is no clear, consistent framework outlining precisely what makes a petition successful, leaving applicants and their advocates navigating a complex and often opaque process. But what we know from the two petitions that commuted the sentences of two men serving LWOP here in the Commonwealth is that they had incredibly strong petitions under any set of guidelines.

For example, William Allen. He was originally convicted of LWOP under a felony murder statute that no longer exists in the Commonwealth.[154] So, if tried today, he would not have received the sentence that he did that prevented any possibility of release. He was a model prisoner with participation in endless programs and no disciplinary record.[155] He had the support not only of the secondary victims, but also of the prosecutor and Judge who were originally involved in his LWOP sentence.[156] Mr. Allen, while certainly deserving of the chance for mercy through

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[151] Political factors can and do create variation in the application and approval of clemency and they deserve attention. "These political factors include a governor's background, age, education, political party, religion, election, and whether he or she is legally trained. Turning to structural factors, conventional wisdom suggests that administrative boards rather than governors are better positioned to buck public opinion and, therefore, more likely to grant clemency petitions." Heise, *supra* note 58, at 261.

[152] *Id.* at 310.

[153] *See id.*

[154] *Have Mercy*, *supra* note 51.

[155] *See id.*

[156] *Id.*

clemency, had an application that most other petitioners will not. The two petitions granted by Baker demonstrated overwhelming evidence of rehabilitation, unwavering community support, and other factors (changes in law) that made them nearly unimpeachable. This raises concerns about equity and accessibility—if only the most exceptional cases receive favorable outcomes, what does that mean for the vast majority of incarcerated individuals seeking clemency? The current system appears to demand not just a meritorious case but an almost unattainable level of perfection, making clemency an option for only a select few rather than a meaningful avenue for justice and redemption.

IV. CONCLUSION

The revitalization of clemency under Governor Healey is a significant shift in Massachusetts policy, particularly in its explicit recognition of systemic inequities and emphasis on mercy. This centralization of the concept of mercy aligns with the original purpose behind this executive power. While the new Guidelines create unprecedented opportunities for relief, particularly for those incarcerated at MCI Framingham who may have compelling cases under the broader consideration factors, significant hurdles remain in the practical implementation of clemency. The historical lack of public support, complexity of the process, and the apparent requirement for near-perfect petitions will continue to present substantial challenges. Moving forward, the success of clemency as a tool for justice in Massachusetts will depend on sustained commitment to transparency, public education, and the development of clearer frameworks for evaluation of petitions.