LOYOLA JOURNAL OF PUBLIC INTEREST LAW

Lex loci

VOLUME 23:1
FALL 2021

LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
NEW ORLEANS, LA 70118

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Loyola Journal of Public Interest Law

LOYOLA JOURNAL OF PUBLIC INTEREST LAW

Fall Issue, Volume 23:1, 2021.
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Published in Fall and Spring by Loyola University New Orleans College of Law, 7214 St. Charles Avenue, Campus Box 901, New Orleans, Louisiana 70118.

Subscription rates are $10.00 per year in the United States; $16.00 per year elsewhere.

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Citations conform to the BLUEBOOK {20th ed. 2015) with the following modification: Citations to the Louisiana appellate courts omit "Ct." and add the circuit number.

Third-class postage paid at New Orleans, Louisiana and additional mailing offices at Lincoln, Nebraska.

Printed by Christensen Printing, Lincoln, Nebraska.

Subscriptions are automatically renewed each year.

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LOYOLA
JOURNAL OF PUBLIC INTERST LAW

Volume 23, Number 1, Fall 2021

CONTENTS

ARTICLES

COVID EVICTIONS: THE LEGALITY OF NATIONAL EVICTION MORATORIUMS

Connor S. Roberts*

Table of Contents

*Connor Roberts is a second year J.D. candidate at Loyola University New Orleans College of Law and a candidate for the *Journal of Public Interest.* He would like to thank Professor Mitchell F. Crusto, the *JPIL* Board and Staff, and his fellow classmates for their invaluable help in crafting this comment. He would also like to extend a special thanks to Dean Davida Finger for her expert knowledge and guidance in this field of law and her generous sharing of research and data on this important topic.

INTRODUCTION

With the emergence of COVID-19 as a deadly global pandemic, all people's lives have changed in some fashion.[1] When the COVID-19 pandemic began to spread rapidly in America, people were afraid and unsure of how to safeguard themselves and their families against a deadly, invisible threat. Across the country, people began to stockpile supplies and shelter in place to avoid contracting the disease.[2] Unfortunately, these measures could not save the lives of over 500,000 Americans.[3] Since then, multitudes of people have lost their jobs, their housing, and/or loved ones.[4] As a particularly virulent disease, COVID-19 spread along the widening cracks in American society. The fragility of American physical health and intellectual principles allowed the disease to thrive on these deep divisions within American culture. Requiring a cohesive, coordinated response from all citizens and government services to combat this spread, COVID-19 preyed on the severe lack of American social safety nets in healthcare, education, food security, and particularly housing.

The effects of the pandemic have disproportionately impacted the low-income and marginalized communities who were already on the precipice of economic disaster prior to the outbreak of COVID-19.[5] The U.S. Government's bans on evictions were designed to combat the spread of the virus and the subsequent economic fallout, but were the implemented mechanisms legal under the authorizing statute? In this comment, the commentor will focus on COVID-19's effects on minority and low-income renters in light of pre-existing housing issues; the federal eviction moratoriums and their statutory basis; decisions concerning the moratoriums from all levels of the federal court system in response to legal challenges; and the legality and effectiveness of the U.S. Government's attempts to stop the virus through eviction moratoriums in lieu of other potential methods. First, in Section I, by examining the precarious state of renters prior to the pandemic and the exacerbation of these issues during the pandemic; the commentor seeks to show the need for eviction moratoriums during the pandemic. Next, in Section II, the commentor will discuss housing policy and landlord-tenant relationships prior to the pandemic. In Section III, the commentor will outline the specific policies and effects of the CARES Act and Center for Disease Control's eviction moratoriums. In Section IV, the commentor will review and analyze the various interpretations and rulings concerning the nationwide moratorium made by district courts, appellate courts, and the US Supreme Court. Lastly, the commentor will analyze the effectiveness of these moratoriums in combating the spread of COVID-19 and other available options to protect vulnerable renters during a pandemic in light of the legal uncertainty of these moratoriums. By exploring these timely issues as a challenge for the realignment of the

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[1] Mike Patton, *The Impact of Covid-19 on U.S. Economy and Financial Markets*, (Oct. 12, 2020), https://www.forbes.com/sites/mikepatton/2020/10/12/the-impact-of-covid-19-on-us-economy-and-financial-markets/?sh=4dd4826e2d20 [hereinafter, "*Impact"*].

[2] Bailey Aldridge, *Do you Need all Those Disinfectant Wipes? CDC Issues new COVID Cleaning Guidelines*, (Apr. 4, 2021), https://www.mahoningmatters.com/local-news/do-you-need-all-those-disinfectant-wipes-cdc-issues-new-covid-cleaning-guidelines-3606943.

[3] Maggie Astor, *How 530,000 Covid Death Spurred Political Awakenings Across America*, (Mar. 17, 2021) https://www.nytimes.com/2021/03/17/us/politics/covid-survivors.html.

[4] *Id*.

[5] Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America are at Risk*, THE ASPEN INST., (Aug. 7, 2020), http://www.aspeninstitute.org/blogposts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk [hereinafter "*Eviction Crisis"*].

American zeitgeist, the commentor seeks to identify pervasive problems in American society that were present before the pandemic, and which will continue to disproportionately affect the economically most vulnerable once the pandemic-fueled support expires.

I. MASS EVICTIONS AS A RESULT OF THE PANDEMIC

In order to understand why the federal government implemented an eviction moratorium during the pandemic, this section will outline the financial precarity of renters prior to the outbreak of COVID-19; the impacts of COVID-19 upon housing insecurity; and how evictions help spread COVID-19.

A. Housing Insecurity Prior To Covid-19

Even before COVID-19 spread through American cities, millions of adults and children were on the financial precipice of being evicted from their housing.[6] As a result of low wages, increasing rental costs, and minimal federal support; 10.9 million renters spent over half of their total income on housing.[7] Specifically for impoverished households, one out of four low-income renters spend over 70% of their income on rent in 2018.[8] In the 2016 nationwide eviction data, 3.7 million evictions were filed across the country, in which African-American and Latinx renters were disproportionately evicted compared to white renters.[9] Rent-burdened households living in this precarious economic situation lack the financial security to adequately provide for families and cover other costs of living.[10] Additionally, the scarcity of affordable housing forces many families to live in cramped or substandard living conditions in order to survive.[11] To illustrate the lack of available options for low-income renters, 4 million affordable housing units were lost from 2011 to 2017[12] with a shortage of 7 million low-income units available to the poorest of renters.[13] As a result of this preexisting housing precarity, many renters faced the economic and social hardships of the pandemic already on the verge of eviction.

B. Covid-19's Effect on Housing Insecurity

COVID-19 has exasperated the myriad of problems facing the most vulnerable sections of our society by causing widespread job loss and economic hardship.[14] Mitigation efforts aimed at curbing the spread of COVID-19 resulted in numerous closed businesses, and unemployment and lower wages increased at an unprecedented rate for renter households.[15] By July 2020,

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[6] *Id.*
[7] 25% of all renter households were spending over 50% of their income on rent each month in 2018. *America's Rental Housing 2020*, JOINT CTR. FOR HOUS. STUD. OF HARV. U. 4, 26 (2020), https://bit.ly/3iJ95tx.
[8] *American Housing Survey*, U.S. CENSUS BUREAU (2020), https://bit.ly/3iFzF6H.
[9] Emily Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, J. OF URB. HEALTH (Nov. 1, 2020), https://ssrn.com/abstract=3736457.
[10] *Id.*
[11] *Id.*
[12] *The State of the Nation's Housing 2019*, JOINT CTR. FOR HOUS. STUD. OF HARV. U. 4 (2019), https://bit.ly/2GGa9RV.
[13] *The Gap: A Shortage of Affordable Homes*, NAT'L LOW INCOME HOUS. COAL. 1 (Mar. 2020), https://bit.ly/3d9FOa9.
[14] *Eviction Crisis*, *supra* note 5.
[15] *Id.*

almost 50 million Americans filed for unemployment insurance and unemployment rates fluctuated between 11.1% and 14.4% since the start of the pandemic in March.[16] Over 20 million renters live in households that have experienced job loss as a result of COVID-19.[17] COVID-19 disproportionately affected minority workers; job or wage loss affected 61% of Latinx and 44% of African-American workers.[18] The impacts of these economic hardships have been compounded by COVID-19's high mortality in minority populations.[19]

C. Evictions Increase the Transmission of Covid-19

Not only are minorities over-represented in the eviction and job loss statistics, but these groups also face higher threats of serious illness and death due to COVID-19.[20] Low-income populations are often chronically ill or disabled and face social determinants of poor health, such as a lack of access to healthy foods and healthcare.[21] The higher risk of mortality coupled with the preexisting risk of eviction create an existential threat to low-income, minority households. Specifically, in order to mitigate infection from COVID-19, local and state laws required citizens to quarantine at home to stop the spread of the virus. Having sanitary and stable housing is essential for people to safeguard themselves from contracting and spreading the virus- especially when this class of people are statistically prone to higher morbidity rates. By extension, the governmental interest of protecting public health during a pandemic necessitates the need for the Federal Government to protect housing as a fundamental right.

II. HOUSING POLICY PRIOR TO COVID-19

Before delving into the statutory basis for the eviction moratoriums, the general process of evictions must be discussed to fully understand why tenants needed protection during the pandemic. Additionally, the Supreme Court's decision in *Lindsey v. Normet* lays the foundation for the legal framework and trajectory of housing rights in America.

A. Lease-Termination Requirements Pre-COVID-19

Despite varying eviction processes across states, notice of termination is the fundamental requirement for eviction.[22] Notice requirements apply whether the termination is for violating terms of the lease or lapse of the term of the lease.[23] Notice of termination serves an important, threefold function for tenants: 1) the tenant is notified of a violation of the lease and will need to vacate the premises; 2) provides an opportunity for the tenant to remedy an alleged violation; and 3) a tenant can begin to prepare a defense to challenge the eviction.[24]

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] BRIEF OF *AMICI CURIAE* OF THE AMERICAN ACAD. OF PEDIATRICS et al., 4, *Chambless Enter. LLC. v. Ctr. for Disease Control and Prevention et al.*, Civil Action No. 20-cv-01455 [hereinafter *Amici Curiae*].
[21] *Id.*
[22] Shannon Price, *Stay at Home: Rethinking Rental Housing law in an era of Pandemic*, 28 GEO. J. ON POVERTY L. & POL'Y 1, 8 (Fall 2020) [hereinafter *Rethinking Rental Housing*].
[23] *Id.*
[24] *Id.*

First, as a private matter between landlord and tenant, notice allows the tenant to decide whether he or she wishes to challenge the termination of the lease without going to the courts or having any documentation filed in the public record.[25] This option allows tenants to avoid any adverse effects of being formally evicted when searching for future housing. Second, the ability for defendants to remedy the alleged violation of the lease provides an affirmative defense for eviction if the violation has been cured.[26] Lastly, notice of termination provides the tenant with precise reasons on which the landlord has terminated the lease. Therefore, the tenant may adequately prepare for the eviction hearing, and a failure to include a certain ground for termination may preclude the landlord from raising that issue in court.[27]

As stated above, many tenants are on the verge of financial collapse which raises another widespread disparity in termination of leases- legal representation.[28] While notice may help the tenant get their affairs in order to move or challenge the termination, typically low-income tenants rarely have legal representation as opposed to landlord who almost always do.[29] The lack of legal representation for tenants increases their risk of being evicted after court hearings on the matter. This disparity invokes concerns about the equal administration of justice and the right to counsel in legal proceedings, which will be discussed later in this comment.

B. The Supreme Court's Denial of Housing as a Fundamental right in *Lindsey v. Normet*

In the seminal case on housing rights, *Lindsey v. Normet*, the Supreme Court declined to recognize housing as a fundamental right within the provisions of the U.S. Constitution.[30] In this 1972 class action suit, month-to-month tenants refused to pay the landlord until he improved the property, which had been declared unfit for human habitation by local authorities.[31] The landlord threatened to sue under the Oregon Forcible Entry and Wrongful Detainer Statute, so the tenants sued for an injunction and a declaratory judgment that the law was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[32] In addition to procedural arguments under the Due Process Clause, the tenant-plaintiffs argued that "the 'need for decent shelter' and the 'right to retain peaceful possession of one's home'" were fundamental rights under the Equal Protection Clause.[33] In making this argument, plaintiffs hoped that the Supreme Court would evaluate the challenged Oregon statute under strict scrutiny as opposed to rational basis review.

In their controversial decision, the Supreme Court held that the Oregon statute did not violate the Due Process Clause because landlord-tenant relations are not substantively federalized by the Constitution.[34] The court held that Constitution does not require the extension

[25] *Id.*
[26] *Id.* at 9.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 258 (2015) [hereinafter *Occupying*].
[31] *Id.*
[32] *Id.*
[33] *Lindsey v. Normet*, 405 U.S. 56, 73 (1972) [hereinafter *Lindsey*].
[34] *Id.* at 68.

of tenancy while tenant claims are litigated because of the varying nature of substantive state law on this matter.[35] Because the tenants could sue the landlord in a separate action from the one before the court, there is no violation of the Due Process Clause as Oregon does not exclude those defenses in other actions.[36] Further, the Supreme Court held that housing is not a protected right under the Equal Protection Clause and that low-income tenants are not a suspect class.[37] On this issue, the Supreme Court stated:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.[38]

With this holding, the Court firmly established the supremacy of a landlord's property rights over that of a tenant's right to housing under the Constitution.[39] Importantly, the Court determined that the issue of the right to housing is better left to the legislature. Thus, under this decision, it is the direct purview of Congress or state legislatures to protect housing rights.

Despite being based on arguments and theories of Constitutional law, this 1972 decision presciently highlighted the legal issue of the federal government's current dilemma regarding "landlord-tenant relationships"[40]; *i.e.*, what is the legal and most effective method to institute a national moratorium on evictions for the nonpayment of rent? This dilemma and the answer to this legal question will be discussed in the following section.

III. FEDERAL RESPONSE: CARES ACT AND CDC EVICTION MORATORIUM

To combat the spread of COVID-19 and its devastating financial effects, the federal government passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide the means and funds for various sectors of the economy and society to be able to withstand the worsening effects of the pandemic.[41] Specifically regarding moratoriums on

[35] *Id.* at 68-69.
[36] *Id.* at 69.
[37] *Occupying*, *supra* note 30, at 259.
[38] *Lindsey*, *supra* note 33, at 74.
[39] *Occupying*, *supra* note 30, at 259.
[40] *Lindsey*, *supra* note 33, at 74.
[41] Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136 (Mar. 27, 2020) [hereinafter *CARES Act*].

evictions, the CARES Act instituted a 120-day ban on evictions for certain federally-backed rental units.[42] After this measure expired, the Centers for Disease Control and Prevention (CDC) issued an Agency Order that imposed a new eviction moratorium through its agency powers under statutory authority.[43] This section will explain each moratorium and its legal basis respectively.

A. The CARES Act Eviction Moratorium

In its widespread response to the devastating effects of COVID-19 on many aspects of society, Congress passed the CARES Act, which was signed into law on March 27, 2020.[44] This controversial legislation tested the limits of what the government could legally do during a national emergency.[45] Although many critics agreed on the need for a robust legislative package to fight the pandemic, many believed a bill of this size lacked the specific targeting required to help those actually in need.[46] Among other things, the CARES Act instituted federal initiatives to protect homeowners, tenants, and the housing market from the wide-ranging financial impacts of the pandemic.[47] Pertinent to this comment, Section 4024 of the CARES Act instituted a 120-day moratorium on the eviction of tenants in federal public housing and properties secured by federally backed mortgages.[48] The CARES Act provided protections for housing depending on the type of housing provided.

For multifamily units, Section 4023 of the CARES Act provided mortgage forbearance for federally-backed borrowers who were current on mortgage payments and financially impacted by the pandemic for up to ninety days until the end of the Emergency Declaration or December 31, 2020, whichever occurred first.[49] By taking this forbearance, borrowers were required to provide renter protections during the period of forbearance.[50] Pertinently, borrowers under Section 4023 were prohibited from evicting tenants for failure to pay rent and from charging late fees or penalties associated with late payment of rent.[51] Once the forbearance period ended, Section 4023 also required at least thirty days' notice prior to evicting tenants.[52] Importantly, the forbearance and rental protections were self-implementing and required no further action by borrowers.[53]

Additionally, under Section 4024 of the CARES Act, a 120-day eviction moratorium was

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[42] *Id.*
[43] *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 FED. REG. 55,292 (Sept. 4, 2020) *https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-toprevent-the-further-spread-of-covid-19* [hereinafter, *CDC Order*].
[44] *Id.*
[45] Grace Enda *et al.*, *Careful or Careless? Perspectives on the CARES Act*, BROOKINGS INST. (Mar. 27, 2020). https://www.brookings.edu/blog/up-front/2020/03/27/careful-or-careless-perspectives-on-the-cares-act/.
[46] *Id.*
[47] *See id.*; Helen Huang *et al.*, *The U.S. Department of Housing and Urban Development Response to COVID-19 and the Coronavirus Aid, Relief, and Economic Security ("CARES") Act*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 125 (2020) [hereinafter *COVID and the CARES Act*].
[48] *Rethinking Rental Housing*, *supra* note 22, at 23.
[49] *COVID and the CARES Act*, *supra* note 47 at 127.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

implemented for all multifamily units as a self-implementing protection for tenants.[54] Section 4024 precluded eviction actions for failure to pay rent and prohibited late fees and penalties for nonpayment of rent.[55] Lastly, thirty days' notice was required before any tenant could be evicted once the moratorium expired on July 24, 2020.[56]

Pursuant to this moratorium's requirements and scope, only one in four rental units were covered by this ban on evictions.[57] Upon the CARES Act eviction moratorium's expiration on July 24, 2020, housing policy and evictions during the pandemic were entirely in the hands of individual states.[58] Although COVID-19 was still ravaging many regions of the country, states responded in a wide range of ways- from instituting state bans on evictions to complete inaction on this issue.[59] This patchwork response only deepened the crisis facing the American people. Despite failing to provide adequate financial support in tandem with its relatively short prohibition on evictions, the CARES Act effectively stopped the enforcement of some evictions and was the appropriate legal mechanism for this purpose as an act of Congress. Next, this comment will discuss the subsequent attempt to stop evictions by the Department of Health and Human Services (HHS) and the CDC through an Agency Order.

B. Centers for Disease Control's Eviction Moratorium

Roughly two months after the CARES Act eviction moratorium expired, the CDC issued an Agency Order that instituted a national moratorium on evictions for nonpayment of rent, which went into effect on September 4, 2020, and was set to expire on December 31, 2020.[60] After extensions by Congress and President Joe Biden, the CDC's eviction moratorium ended on August 26, 2021. The CDC moratorium did not automatically apply to all tenants and required renters to submit a declaration that they met certain eligibility requirements under penalty of perjury.[61] Under this moratorium, the law required a "covered person" certify that: 1) he used best efforts to obtain all available assistance for rent or housing; 2) he expected to earn less than $99,000 in 2020 income, was not required to report any 2019 income to the IRS, or received a stimulus check under the CARES Act; 3) he was unable to pay the full rent due to substantial loss of income or extraordinary out-of-pocket medical expenses; 4) he was using best efforts to make timely partial payments; and 5) eviction would likely leave him homeless or force her to move into a shared living setting.[62]

Despite this attempt to help vulnerable tenants and stop the spread of COVID-19, the CDC's moratorium had several shortcomings. First, before being extended by the Biden administration, the moratorium was scheduled to end on December 31, 2020, in the midst of what would be one of the worst surges of the pandemic; and it did not protect renters during the

[54] *Id.* at 128.
[55] *Id.* at 129.
[56] *Id.*
[57] *See* Laurie Goodman *et al.*, *The CARES Act Eviction Moratorium Covers all Federally Financed Rentals--That's one in Four US Rental Units*, URB. INST. (Apr. 2, 2020), https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units.
[58] *Rethinking Rental Housing*, *supra* note 22, at 23.
[59] *Id.*
[60] *CDC Order*, *supra* note 43.
[61] *Id.*
[62] *See id.* at 55, 293*; Rethinking Rental Housing*, *supra* note 22, at 23-24.

first six months of the pandemic.[63] While this moratorium helped people from losing their housing during its effective period, the pandemic is still causing serious health and economic effects throughout the country; and thus, only delaying the inevitable surge in evictions or default for rent in arrears.[64] Second, the narrow eligibility and declaration requirements of the CDC's moratorium restricted the legal and practical applicability of this order for *pro se* tenants to easily avail themselves of this protection.[65] Third, the moratorium allowed landlords to initiate eviction proceedings and obtain removal orders for the nonpayment of rent, but it only temporarily prohibited the enforcement of such orders against "covered persons."[66] Lastly, landlords could charge penalties on nonpayment of rent during the term of the moratorium, and renters were required to pay all unpaid rent in full at the end of the moratorium.[67]

Because the economic situation has not significantly improved and unemployment is still rampant, the Supreme Court's decision to end the CDC's moratorium will likely result in the increase of defaults on rent in arrears, the widespread initiation of new eviction proceedings, and the enforcement of delayed removals. Ultimately, multitudes of people will be legally forced to leave their residences and seek new shelter during unfavorable economic conditions amidst the ongoing pandemic. These outcomes will disproportionately and irreparably harm low-income renters unless further actions by federal government are intentionally implemented to be legal and effective during this unique crisis.[68]

Additionally, the inability of renters to pay their rent also affects landlords' ability to make their mortgage payments.[69] Even with some lenders granting mortgage payment forbearance, loan payments are accumulating and will be due at the expiration of the forbearance.[70] Thus, the federal government should stop this cascading series of defaulting payments by appropriating funds to allow tenants to pay rent so property owners can pay their mortgages, which has been implemented to varying degrees of effectiveness.[71] The legal authority of these actions by the federal government were challenged by landlords across the country and was ultimately decided by the Supreme Court, which will be discussed in the following section.

IV. FEDERAL COURT DECISIONS CONCERNING FEDERAL EVICTION MORATORIUMS

[63] *Rethinking Rental Housing*, *supra* note 22, at 24.
[64] This article cites a US Census survey that found that more than 1.4 million Americans "expect" to be evicted within two months with an additional 2.2 million responded "somewhat likely." Neil MacFarquhar, *Evicted Despite a Federal Moratorium: 'I do not Know What I am Going to do'*, N.Y. TIMES (Aug. 11, 2021), https://www.nytimes.com/2021/08/11/us/eviction-moratorium-vegas.html [hereinafter *Evicted Despite a Moratorium*].
[65] *Rethinking Rental Housing*, *supra* note 22, at 24.
[66] *CDC Order*, *supra* note 43.
[67] *Id.*; *see also Rethinking Rental Housing*, *supra* note 22, at 24.
[68] *Evicted Despite a Moratorium*, *supra* note 64.
[69] *Rental Housing: CDC Issues Nationwide Eviction Moratorium on Residential Properties Through 2020*, 53 NO. 19 MORTG. & REAL EST. EXECUTIVES REP. NL 1 (16 Nov. 2020) [hereinafter *Rental Housing: CDC*].
[70] *Id.*
[71] *See id.*

Under the congressionally declared moratorium in the CARES Act, landlords did not challenge Congress' power to legislate a nationwide moratorium on evictions.[72] Once the HHS and CDC invoked their agency powers under a federal statute to ban evictions, landlords began to challenge their authority under the provided statute and its language. This section analyzes these challenges and the judicial decisions regarding the legality of the CDC's eviction moratorium.

A. Unequal Application in District Courts

1. Legal Basis for the CDC Eviction Moratorium

The authority of the CDC to implement such restrictions on evictions and rent payments was hotly contested- many landlords challenged the constitutionality of these orders as exceeding statutory authority or a taking of property without due process or fair hearing.[73] The specific challenges brought by landlords will be discussed later in this article, but the government's attempted statutory basis for the CDC's authority to implement a nationwide eviction moratorium must first be analyzed.

First, Title 42 of the U.S.C.A. Ch. 6A- "Public Health Service" codifies the Public Health Service Act of 1944 ("PHSA") with Subchapter II outlining the general powers and duties of the Secretary of Health and Human Services (HHS) and other agencies within this department- including the CDC.[74] Pertinently, § 361 of the PHSA allows the Surgeon General, with the approval of the Secretary of HHS, the authority "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[75] This provision of the PHSA was codified as "Regulations to Control Communicable Diseases" under 42 U.S.C.A. § 264.[76] Relied upon by the CDC and HHS as the statutory basis for authorizing a nationwide moratorium on evictions, § 264(a) further provides that in carrying out and enforcing regulations, "the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."[77] Challengers to the CDC's moratorium frequently assailed the language of this part of § 264(a) as not granting the authority to implement a nationwide ban on evictions, as will be discussed in more detail later in this comment.

Further, Subsection (c) of 42 U.S.C.A. § 243, permits the Secretary of Health and Human Services:

> to develop (and may take such action as may be necessary to

[72] As mentioned, highlighting the prescience of the Supreme Court's reasoning that "landlord-tenant relationships" are the purview of legislatures in *Lindsey v. Normet*.
[73] *Id.*
[74] *See generally* 42 U.S.C.A. Ch. 6A, Subch. II.
[75] 42 U.S.C.A. § 264(a).
[76] 42 U.S.C.A. § 264.
[77] 42 U.S.C.A. § 264(a).

> implement) a plan under which personnel, equipment, medical supplies, and other resources of the [Public Health] Service and other agencies under the jurisdiction of the Secretary may be effectively used to control epidemics of any disease or condition and to meet other health emergencies or problems. The Secretary may enter into agreements providing for the cooperative planning between the Service and public and private community health programs and agencies to cope with health problems (including epidemics and health emergencies).[78]

Under a public health emergency, these provisions grant the CDC sweeping powers to combat the spread of diseases in partnership with other agencies and public/private health programs.[79] In its order, the CDC affirmed that the Department of Housing and Urban Development (HUD) informed the CDC that:

> all HUD grantees— states, cities, communities, and nonprofits— who received Emergency Solutions Grants (ESG) or Community Development Block Grant (CDBG) funds under the CARES Act may use these funds to provide temporary rental assistance, homelessness prevention, or other aid to individuals who are experiencing financial hardship because of the pandemic and are at risk of being evicted, consistent with applicable laws, regulations, and guidance.[80]

Thus, the CDC's order contemplated a halt in evictions for "covered persons" while other agencies and entities supplemented this effort by disbursing appropriated funds to provide temporary rental assistance.[81]

Despite the exceptional and dire circumstances surrounding the enaction of these unprecedented laws, the American legal system permits offended parties to challenge the constitutionality of such laws and regulations in district courts, as discussed in the following section.

2. Challenges in District Courts

This section reviews various cases brought by landlords in district courts. Across the country, landlords and investment property groups have brought legal challenges against the

[78] 42 U.S.C.A. § 243(c).
[79] *Id.*
[80] *See Rental Housing: CDC*, *supra* note 69.
[81] *See id.*

CDC's eviction moratorium on varying grounds.[82] On a state-by-state basis, the following subsections will analyze the legal challenges and discuss the outcomes of these suits. The first two decisions discussed in this Section upheld the CDC's order as legal, while the last two denied the legality of the moratorium. Adding to the uncertainty of the pandemic, these varying outcomes only intensified the confusion facing low-income renters as to their ability to avail themselves of federal protection.

a. Louisiana

Filed on November 12, 2020 in the federal district court for the Western District of Louisiana, *Chambless Enterprises LLC v. Redfield* challenges the the CDC's eviction moratorium as 1) exceeding the CDC's statutory and regulatory authority, 2) an unconstitutional delegation of Congressional authority, and 3) a failure to comply with the notice-and-comment requirements under the Administrative Procedure Act (APA).[83] In this case, the plaintiffs are a landlord and the Apartment Association of Louisiana, Inc.; and the defendants are the CDC; Director of the CDC, Robert Redfield; Acting Chief of Staff for the CDC, Nina B. Witkofsky; Secretary of HHS, Alex Azar; the HHS; and Attorney General William P. Barr.[84] Plaintiffs sought to set aside the CDC's order and enjoin defendants from enforcing it, and in their opposition, the defendants contend that the plaintiffs have not shown a likelihood of success on the merits, shown irreparable injury, and the injunction is contrary to the public interests.[85] In denying the plaintiff's Motion for Preliminary Injunction, the court held that the plaintiffs have "failed to satisfy the standards necessary for obtaining a preliminary injunction as a matter of law" and "not clearly established their burden of persuasion as to any of the four prerequisites."[86] Substantively, the court found that: 1) the plain and unambiguous text of statute shows intent to defer to judgment of public health authorities about what is necessary; 2) there is no violation of the Non-delegation Doctrine if there is an "intelligible principle" in which the Supreme Court has recognized protecting public health and safety as an intelligible reason for delegation; and 3) notice-and-comment is not required because this is an Order not a rule and the agency has good cause to proceed without it.[87]

b. Georgia

In *Brown v. Azar*, the federal district court for the Northern District of Georgia denied the plaintiff's request for a preliminary injunction on October 29, 2020.[88] The court determined that as a matter of law the plaintiffs had not clearly established their burden of persuasion for the four prerequisites for obtaining a preliminary injunction.[89] In this case, plaintiffs are the National Apartment Association and landlords who are attempting to evict tenants for nonpayment of

[82] Mark Edelstein & Jeffery Temple, *Eviction Moratoriums Face Constitutional Issues: Landlords Challenge NY Law and Federal Judge Strikes Down CDC's Eviction Ban,* (4 Mar. 2021), https://www.mofo.com/resources/insights/210304-eviction-moratoriums-constitutional-issues.html.
[83] *Chambless Ent. LLC v. Redfield*, 508 F. Supp. 3d 101, 108 (W.D. La. 2020).
[84] *Id*. at 106.
[85] *Id.* at 108.
[86] *Id.* at 124.
[87] *Id.* at 111, 116, 118.
[88] *Brown v. Azar*, 497 F. Supp. 3d 1270, 1300 (N.D. Ga. 2020).
[89] *Id.*

rent.[90] Plaintiff Brown sought to invalidate the CDC's orders by filing this action was filed against Alex Azar, Secretary of HHS, HHS, Nina B. Witkofsky, acting chief of staff of the CDC, and the CDC.[91] Initially, the plaintiff's amended complaint contained eight challenges to the CDC's order, but only three are advanced in their Motion for Preliminary Injunction.[92] Plaintiffs contend: 1) that the CDC's order lacks a statutory and regulatory basis; 2) that even if the CDC's order was authorized, it is arbitrary and capricious; and 3) that the CDC's order violates the plaintiff's rights to access the courts.[93]

On the first claim, the plaintiffs argued that the statutory provisions[94] limit the CDC to implementing regulations that directly involve "inspection, fumigation, disinfection, sanitation, pest extermination and destruction of animals or articles believed to be sources of infection."[95] In the alternative, plaintiffs contend that even if the CDC's has the power to issue other types of regulations, the CDC did so without statutory and regulatory authority because: 1) the order is not reasonably necessary to prevent the spread of disease, and 2) the order does not show that the state and local law were insufficient to prevent the spread of disease.[96] On this issue, the court held that it was clearly Congress' intent to imbue the Secretary of HHS with broad power "to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases."[97] Thus, the CDC was authorized to issue the order to "control the COVID-19 pandemic."[98] In analogizing this case to *Independent Turtle Farmers*, unlike the court in *Skyworks*; this court held that the list of measures in the statute is not a limitation on the type of regulation but a grant of authority to enact necessary regulations to combat communicable diseases.[99]

On the second claim that the CDC's order was arbitrary and capricious, plaintiffs argued that: 1) the CDC did not show substantial evidence or relevant data that the eviction moratorium is reasonably necessary to prevent the spread of COVID-19; and 2) the CDC did not demonstrate with substantial evidence that the state and local measures were insufficient to prevent the spread of COVID-19.[100] First, the court determined that the CDC's order explained "in detail" why the temporary eviction moratorium was reasonably necessary.[101] Ultimately, the court's analysis of the CDC's scientific evidence leads it to conclude that the CDC engaged in "reasoned decision-making."[102] Next, in responding to the state measures claim, the court held that the CDC's order plainly states that local measures are insufficient to stop the spread of COVID-19 and do not provide renter protections equal or greater than the protections in the order.[103] Despite the CDC's order lacking an analysis of the mitigation efforts by state and local governments, an analysis of

[90] *Id.* 1273-1275.
[91] *Id.*
[92] *Id.* at 1277.
[93] *Id.* at 1279.
[94] 42 U.S.C. § 264; 42 C.F.R. § 70.2.
[95] *Brown, supra* note 88 at 1279.
[96] *Id.* at 1279-80.
[97] *Id.* at 1280.
[98] *Id.* at 1281.
[99] *Id.* at 1283.
[100] *Id.* at 1286.
[101] *Id.*
[102] *Id.* at 1285.
[103] *Id.* at 1288.

state eviction moratoria lead to the conclusion that tens of millions of Americans could be evicted in the absence of a country-wide eviction moratorium.[104] Specifically, the court mentioned that states where the plaintiffs have rental properties did not currently have a state restriction on evictions.[105]

In response to the plaintiffs last claim regarding access to the courts, the court determined that the order does not apply to all tenants and reasons for eviction, and that the order does not prohibit the plaintiffs from other avenues of recovery or to all procedural aspects of eviction proceedings.[106]

c. Texas

In *Terkel v. Centers for Disease Control and Prevention*, plaintiffs argued that the federal government does not have the authority to order property owners not to evict specified tenants under Article I on the Constitution, and as such, the decision to enact an eviction moratorium is within the State's purview.[107] In this case filed in the federal district court for the Eastern District of Texas, the plaintiffs are Lauren Terkel and various apartment groups; and the defendants are the United States, CDC, HHS, and three HHS officials.[108] Plaintiffs moved for a preliminary injunction and petitioned the court to proceed to a consideration of summary judgment given "the purely legal nature of the merits question and the likely efficacy of declaratory relief," which the court granted pursuant to Fed. R. Civ. Proc. 56(f).[109] The court determined that the issue as presented by the plaintiffs would be decided based on whether the CDC's order is within the "legislative powers" granted to Congress in Article I of the Constitution.[110] In opposition, the defendants sought to justify the CDC's order under the Commerce Clause, and in the alternative, the Necessary and Proper Clause.[111] In its Commerce Clause analysis, the court found that the CDC's eviction moratorium does not have an effect on interstate commerce as "real estate in inherently local" and that the relationship between interstate commerce and evictions under the order are too attenuated.[112] Further, the court was concerned with the lack of historical precedent in this area, stating "[u]nsurprisingly, then, the federal government has never before invoked its commerce power to impose a nation-wide eviction moratorium."[113] In conclusion, the court ultimately granted summary judgment in favor of the plaintiffs and declared the CDC's order unconstitutional; but it did not grant the injunction based on the defendant's representations to the court that it would respect the declaratory judgement.[114]

d. Ohio

On March 10, 2021, the federal district court for the Northern District of Ohio rendered

[104] *Id.*
[105] *Id.*
[106] *Id.* at 1289.
[107] *Terkel v. Ctr. for Disease Control and Prevention*, 521 F. Supp. 3d 662 (E.D. Tex. Feb. 25, 2021).
[108] *Id.* at 665.
[109] *Id.* at 669.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 671-672.
[113] *Id.* at 675.
[114] *Id.* at 676-677.

its decision in the case of *Skyworks, Ltd., et al. v. Centers for Disease Control and Prevention, et al.*[115] The plaintiff, Skyworks, Ltd., manages Clear Sky Realty, Inc. which had tenants who claimed protection from eviction under the CDC's first order.[116] Defendants are the CDC and various officials from the Trump Administration that have been replaced and substituted for officials under the Biden Administration.[117] Plaintiffs claim:

> 1) the CDC's orders exceed the agency's statutory and regulatory authority in violation of the APA; 2) the orders are an unconstitutional exercise of legislative power in violation of Article I, Section 1 of the Constitution; 3) the CDC failed to engage in required notice and comment rulemaking in violation of the APA; 4) and that the Order is arbitrary and capricious in violation of the APA.[118]

With these claims, plaintiffs moved for a preliminary injunction and sought a declaratory judgment, injunctive relief, and attorneys' fees and costs.[119]

In only addressing the merits of the first claim, the court held that the order exceeds the statutory authority granted by Congress to the agency.[120] In this court's opinion, "other measures" does not extend as far as the defendants claim under "the most natural and logical reading of the statute as a whole."[121] In response to the contrary findings of the district courts in *Chambless* and *Brown* (discussed later), the Ohio court characterizes the other courts' interpretation as "strained or forced readings of the statute" that is "stretching to rationalize the governmental policy at issue."[122] In distinguishing *Independent Turtle Farmers of Louisiana, Inc, v. United States*[123], the court determined that in that case the challenged ban was one the Food and Drug Administration (FDA) could reasonably take as permitted by Congress and has little bearing on "the qualitatively different agency action here." [124] Additionally, in this case the CDC's moratorium was not narrowly tailored as in *Independent Turtle Farmers*.[125]

In regard to the plaintiff's requested relief, the court set aside the order as unlawful, granted a declaratory judgement that the order is invalid, and determined that monetary are sufficient relief instead of injunctive relief.[126] In his conclusion, Judge Philip Calabrese states that this case addresses the "limited question" of whether Congress gave the CDC the authority

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[115] *Skyworks, Ltd., et al. v. Ctr. for Disease Control and Prevention, et al.*, No. 5:20-CV-02407, at*1 (N.D. Ohio Mar. 10, 2021) [hereinafter, "*Skyworks*"].
[116] *Id.* at *12 (The tenants have since moved out or abandoned their rental units.).
[117] *Id.* at *13 (pursuant to Rule 25(d)).
[118] *Id.* at *12.
[119] *Id.* at *12-13.
[120] *Id.* at *23.
[121] *Id.*
[122] *Id.* at *25 ("Although the Court reaches a different result than the *Brown* and *Chambless Enterprises* Courts, the language of the statute compels that result.").
[123] *Indep. Turtle Farmers of Louisiana, Inc, v. United States*, 703 F. Supp. 2d 604 (W.D. La. 2010).
[124] *Skyworks*, *supra* note 117 at *26-27.
[125] *Id.* at *27.
[126] *Id.* at *29-30.

to mandate and enforce a nationwide moratorium on evictions and not the "broader policy considerations" or "whether it constitutes sound public policy."[127]

e. Takeaways

The varying decisions across district courts did not provide a clear answer concerning the federal government's ability to implement eviction moratoriums during a national health crisis. While mostly being argued on administrative law grounds and statutory authority, the inconsistent outcomes across district courts only muddied the already legally murky waters of the national eviction moratorium. As such, these decisions caused confusion among renters and landlords alike because of disparate decisions across regional jurisdictions regarding a national policy.[128] In the next section, decisions from US Appellate Courts will give further insights into the legality of the CDC's moratorium.

B. Federal Appellate Court Decisions

When originally writing this article, only one federal appellate court had ruled on an appeal concerning the CDC's eviction moratorium- the United States Court of Appeals for the Sixth Circuit.[129] By the time of updating this article for publication, multiple appellate courts have made rulings on this topic, including decisions in *Brown*, discussed above, and *Alabama Association of Realtors*, which ultimately made its way to the Supreme Court. In this section, these decisions will be reviewed for their legal analysis and reasoning concerning the legality of the CDC's eviction moratorium- prior to the Supreme Court's subsequent decisions on this matter.

1. U.S. Court of Appeals for the Sixth Circuit

On March 29, 2021, the United States Court of Appeals for the Sixth Circuit rendered its decision in *Tiger Lily, LLC, et al. v. HUD, et al*.[130] On appeal from the Western District of Tennessee, the Sixth Circuit denied the government's application for a stay pending appeal and discussed only the first element regarding the likelihood of success on the merits.[131] Regarding the procedural history of this case, the district court denied the plaintiff's preliminary injunction because they did not suffer irreparable injury; and when the government moved for a judgment on the pleadings, the plaintiffs countered with a Rule 56 motion for judgment on the administrative record.[132] Finding that the eviction moratorium exceeded the CDC's statutory authority under 42 U.S.C. § 264(a), the district court granted judgment in favor of the plaintiffs.[133] In response, the government filed an emergency stay and an immediate administrative stay the next day.[134]

In considering whether to stay a judgment pending an appeal, the court considers four factors ("*Nken Factors*"):

[127] *Id.* at *31.
[128] *See Evicted Despite a Moratorium*, *supra* note 64.
[129] *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 992 F.3d 518 (6th Cir. 2021).
[130] *Id.*
[131] *Id.* at 520.
[132] *Id.* at 521.
[133] *Id.* at 522-23.
[134] *Id.* at 521.

> "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'"[135]

In deciding the first element whether the government is likely to succeed on the merits, the court poses a simple question: "did Congress grant the CDC the power it claims?".[136] In reviewing this de novo, the Sixth Circuit's analysis hinges on whether this power is contained within the "other measures" in the statutory language, as seen in all the district court cases discussed above.[137] Here, the Sixth Circuit determined that this "catchall provision" requires the application of *ejusdem generis* canon, and under this interpretation, the statute allows the government the power to intrude on property to sanitize and dispose of infected material but not the power to implement a moratorium on evictions.[138] Thus, the order falls out of the scope of the statute.[139]

Additionally, even if the court interpreted "other measures" to include this power, the Sixth Circuit reasoned that the Public Health Service Act does not grant the CDC the authority to interject itself into the landlord-tenant relationship without "clear, unequivocal textual evidence of Congress' intent to do so."[140] Because regulation of the landlord-tenant relationship is historically in the province of the states, there must be "unmistakably clear" language indicating Congress' intent to supersede this traditional state power.[141] In deciding the government is unlikely to succeed on the merits, the Sixth Circuit only considered the first factor and denied the emergency stay pending appeal.[142]

This decision provides insight into the legality of nationwide evictions during a pandemic from a federal appellate court. Although it was limited in scope regarding a stay pending appeal, the Sixth Circuit analyzed the merits of the government's arguments concerning the statutory authority for the CDC's eviction moratorium. In determining the government was unlikely to succeed on the merits, this is the first federal appellate court to render a decision concerning the legality of a nationwide eviction moratorium.[143]

2. U.S. Court of Appeals for the District of Columbia Circuit

Next, on June 2, 2021, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rendered a decision regarding Alabama Association of Realtors' ("AAR") emergency motion to vacate the administrative stay imposed by the District Court for the District of Columbia on its own summary judgment order in favor of AAR.[144] Procedurally, the action

[135] *Id.* at 522 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation and brackets omitted)).
[136] *Id.*
[137] *Id.*
[138] *Id.* at 522-23.
[139] *Id.* at 523.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 524.
[143] *Id.*
[144] *Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646 at *1 (D.C. Cir. June 2, 2021).

before the D.C. Circuit was an emergency motion to vacate a stay pending appeal filed by AAR.[145] Unlike the *de novo* standard of review implemented by the Sixth Circuit in *Tiger Lily*, the D. C. Circuit reviewed the district court's decision under the deferential abuse-of-discretion standard in applying the *Nken* Factors discussed *supra*.[146] The D.C. Circuit held that the district court did not abuse its discretion in granting a stay, and despite Appellee's objection to the lower court's use of a sliding-scale analysis, the D.C. Circuit determined that the Appellees have not have carried the burden to show that a "vacatur is warranted under the likelihood-of-success standard" that would apply.[147]

In providing their reasoning for this conclusion and acknowledging their "not resolving the ultimate merits of the legal question," the D.C. Circuit first discusses the four reasons why the HHS is likely to succeed on the merits under the first factor.[148] The D.C. Circuit determined that the HHS made a "strong showing" and is likely to succeed on the merits because: (1) the CDC's eviction moratorium falls within the plain language of 42 U.S.C.A. § 264(a); (2) Congress has expressly acknowledged that the agency had the authority to issue its narrowly crafted moratorium under § 264; (3) § 264's additional provisions' text and structure support HHS's authority to temporarily suspense evictions; and (4) HHS is likely to succeed regardless of Appellee's other statutory-construction arguments.[149]

In addressing AAR's arguments concerning statutory interpretation, the D.C. Circuit dispels each assertion by explaining how Congress has the authority to or has empowered the HHS to: (1) regulate rental housing transactions under the Commerce Clause, and (2) take action in areas traditionally left to state authority when regulating interstate transmission of disease.[150]

Lastly, in addressing the remaining elements for a motion to stay, the court highlights the convergence of governmental and public interests to stop the spread of COVID-19 and the Appellees' the lack of evidence to prove irreparable injury to other parties and/or plaintiffs' businesses because of the moratorium's tailored effects.[151] Importantly to this article, the court mentions the "exacting conditions that circumscribe the reach and degree of relief the order provides," in what could be construed as a tacit, yet legally unimportant, admission of the moratorium's shortcomings in providing widespread rental assistance during the pandemic.[152] In concluding, the court notes the obligation for tenants to repay unpaid rent, landlords' rights to recover all rent with interest, and Congress' rental assistance program that is designed to flow to landlords.[153]

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[145] *Id.*
[146] *Id.* (*citing See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843–44 (D.C. Cir. 1977); *see also Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011)).
[147] *Id.*
[148] *Id.*
[149] *Id.* at *1-3.
[150] *Id.* at *3.
[151] *Id.*
[152] *See id*. at *4.
[153] *Id.*

3. U.S. Court of Appeals for the Eleventh Circuit

On July 14, 2021, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's denial of plaintiff-appellees' motion for preliminary injunction in *Brown v.* Azar, as discussed *supra*.[154] Under an abuse of discretion standard of review, the Eleventh Circuit primarily focused its decision on one *Nken* Factor- plaintiff's likelihood "to suffer an irreparable injury during the pendency of their lawsuit absent a preliminary injunction."[155] Despite expressing doubts about the district court's ruling on the first *Nken* Factor, the Eleventh Circuit reasoned that their scope of review did not require addressing the merits of CDC's statutory authority under the "likelihood to succeed" factor because plaintiff's did not carry their burden on the other *Nken* Factors.

Under the second *Nken* Factor, plaintiffs asserted three irreparable injuries: (1) the order exceeded Congress' given authority which illegally deprived them of their constitutional right of access to the courts; (2) the order wrongfully deprived them of access to their unique property; and (3) their inability to never recover unpaid rent because their tenants are "necessarily 'insolvent.'"[156]

In response to the first injury, the court declines to stretch their precedents to include an irreparable injury for this type of violation.[157] Next, for the second injury, the court addresses the plaintiff's assertion that being temporarily deprived of their property is a "'*per se* irreparable injury'" by determining that their precedents have never established a *per se* rule that any interference with an interest in real property is irreparable.[158] Lastly, for the final injury, the court held that other sufficient remedies, such as monetary damages, other civil relief and/or usual methods for collecting unpaid rent under a civil judgment, that become available at a later date will weigh heavily against a claim for irreparable harm.[159] Ultimately, the plaintiffs failed to carry their burden for proving irreparable harm by showing that "*their* tenants are unlikely to repay them" and not just tenants in general.[160]

In concluding, the Eleventh Circuit held that, in light of insufficient evidence and the availability of civil judgment collection methods, plaintiff-appellees did not meet their burden of proving that an irreparable injury was likely.[161]

Worth noting, the D.C. Circuit would later deny plaintiffs' second, emergency appeal of the district court's decision denying their application to vacate stay once the CDC extended the moratorium three days after its expiration.[162] The district court acknowledged that the *Nken*

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[154] *Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1224 (11th Cir. 2021).
[155] *Id.*
[156] *Id.* at 1225.
[157] *Id.* at 1226.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 1228 (emphasis in original).
[161] *Id.*
[162] *Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*,141 S.Ct. 2485, 2488 (2021). *Id.*

Factors had since shifted in the plaintiffs' favor, but the law of the case precluded the court from vacating the stay considering the D.C. Circuit's earlier decision.[163]

C. Supreme Court Rulings

As these undecided legal issues and questions percolated through district and appellate courts without resolution, the Supreme Court eventually had the opportunity to decide this matter. In ruling on two applications to vacate stay in *Alabama Association of Realtors v. Department of Health and Human Services*, the Supreme Court provided clarity to the legal uncertainty surrounding the CDC's nationwide moratorium on evictions.

First, on June 29, 2021, the Chief Justice Roberts and the Supreme Court denied Alabama Association of Realtors' application to vacate stay 5-4, with Justices Thomas, Alito, Gorsuch, and Barrett acknowledging they would grant the application. Justice Kavanaugh wrote a concurring opinion that provided insight to the Court's perspectives on the issues regarding the CDC's moratorium at that time. At the outset, Justice Kavanaugh clearly states that he agrees with the District Court and the applicants that the CDC exceeded its statutory authority by issuing the eviction moratorium.[164] Despite agreeing on legal grounds, he cites the moratorium's upcoming expiration (roughly one month at this time) and the opportunity for more congressional rental assistance to be disbursed during that time as reasons for denying the application. The Justice concludes that in his view, "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."[165]

Second, and more importantly, the Supreme Court ultimately vacated the U.S. District Court for the District of Columbia's stay pending the Government's appeal and rendered enforceable the district court's decision in favor of AAR.[166] On August 26, 2021, in a 6-3 Per Curiam opinion, the Supreme Court held that the applicants are likely to succeed on the merits of their argument that the CDC exceeded its authority in absence of an express authorization for this action from Congress.[167]

After a detailed review of the procedural and factual history, the Supreme Court ruled that they agreed with the district court that the stay was no longer justified under the *Nken* Factors.[168] In examining the applicant's likelihood of success on the merits, the Supreme Court narrowly interpreted the statutory language and ruled that the CDC claimed too much authority under §361(a).[169] Specifically, the Court requires more express statutory language when authorizing an agency to use powers of "vast 'economic and political significance.'"[170] Also, the Court requires "exceedingly clear language" when Congress seeks to alter the balance of power between the federal and state government and the Government's power over private property.

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[163] *Id.* at 2487.
[164] *Id.* at 2488 (J. Kavanaugh, *concurring*).
[165] *Id.*
[166] *Id*. at 2486.
[167] *Id.*
[168] *Id.* at 2488.
[169] *Id.*
[170] *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The Court cites *Lindsey v. Normet* to establish that the moratorium invades the traditionally state-controlled area of landlord-tenant relationships.[171]

In concluding its analysis, the Court plainly stated that, "[t]he equities do not justify depriving the applicants of the District Court's judgment in their favor."[172] In support of this determination, the Court offers examples of equities that favor landlords in this issue, including: (1) the order has put applicants, and millions of other landlords at risk of the irreparable harm on unpaid rent with no guarantee of eventual recovery; (2) many landlords are of "modest means"; (3) the prohibition of eviction precludes applicants from exercising their fundamental property right to exclude use; and (4) the decrease in the Government's interests while the applicant's harm increased.[173] Acknowledging the public's strong interest in stopping the spread of COVID-19, the Supreme Court nonetheless finds that the judicial system "does not permit agencies to act unlawfully even in pursuit of desirable ends."[174]

D. Eviction Moratoriums Stymie the Spread of COVID-19

After analyzing several court decisions regarding the legality of the CDC's eviction moratorium, the evidence concerning the effectiveness of the moratorium in stopping the spread of COVID-19, which some courts and the defendants relied upon, should also be discussed. The purpose of the CDC's eviction moratorium was based on the premise that "facilitating self-isolation, supporting stay-at-home and social distancing directives, and reducing the risk of overcrowded living environments" could prevent the spread of COVID-19.[175] The findings of this cited study suggest that ten weeks after lifting their moratoriums states had 1.6 times the cases of COVID-19 and 2.1 times the cases after sixteen weeks when compared to states that maintained their moratoriums.[176] Additionally, states that ended moratoriums had a 5.4 times higher mortality rate than states that did not.[177] Nationally, the study found that lifting moratoriums lead to 433,700 excess cases and 10,700 excess deaths over the course of the study period.[178] The study suggests that these increased effects grew over time due to "mounting displacement, crowding, and/or homelessness as evictions proceeded."[179]

Pertinent to the thesis of this comment, the study contends that, as fundamental causes of eviction risk, structural racism and poverty evince as comorbidities and lack of access to adequate healthcare, which create a vulnerability to COVID-19 in minority communities and low-income households.[180] While delaying evictions without preventing them, moratoriums help

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[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Kathryn M. Leifheit, et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, at 2 (Nov. 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739576 (This article has yet to undergo formal peer review and is being released as a preprint due to the time sensitive nature of the research.) [hereinafter *Moratorium Study*].
[176] *Id.* at 4.
[177] *Id.*
[178] *Id.* at 5.
[179] *Id.*
[180] *Id.*

stymie the spread of COVID-19.[181] By means of offering a solution to this issue, the study suggests that lawmakers should consider: 1) extending federal, state, and local eviction moratoriums; 2) expanding rent relief measures; and 3) instituting "legal and supportive protections to prevent future evictions, COVID-19 transmission, and associated harms."[182] In the following section, some of these potential solutions will be discussed in terms their practicality, effectiveness, and ability to combat the tragedy of enforcing evictions during a pandemic in America.

V. Federal Eviction Moratoriums: Problem or Solution?

As the disparate outcomes in the mentioned cases suggest, the legality of federal eviction moratoriums was not easily determined. As discussed above, many federal courts interpreted the statutes and its granted powers differently. Despite the evidence described above suggesting eviction moratoriums help limit the spread of infectious diseases, the legality of the government's methods is critical to effectively stopping the disease as a long-term solution. Although Congress and the CDC were attempting to combat an unprecedented pandemic with widespread effects, the means must be legal to satisfy the ends. The cited cases provide insight to judicial interpretation of the legality of the measures being currently used and the need for clearer policy on this matter. An eviction moratorium under the offered statute was ineffective policy and did not provide a clear legal rule or basis, which adversely affected millions of vulnerable Americans. Because the relied upon statute was legally challenged and found to be lacking, Congress should have and must now pass laws that give clearer intent regarding national eviction moratoriums and the powers of the HHS and CDC during a public health emergency.

In order to avoid the issue of moratoriums entirely, the federal government could provide financial assistance to tenants specifically to pay rent.[183] The U.S. Department of the Treasury implemented the Emergency Rental Assistance program to do just that.[184] Under this program, close to $50 billion was appropriated to cover the needs of renters who "face deep rental debt and fear evictions and the loss if basic housing security."[185] In order to fight "an affordable housing crisis that predated the pandemic . . . that has exacerbated deep disparities that threaten the strength of an economic recovery," these funds were allocated to state and local governments to disperse amongst renters to cover the costs of rent, rent in arrears, and utilities.[186] This program requires that ninety percent of the funds cover these cost in direct financial assistance.[187] Thus, initiatives like the Emergency Rental Assistance Program eliminate the need to implement eviction moratoriums altogether while still achieving the same goals. Unfortunately, many states have been slow to disperse the emergency rental assistance money to tenants, which only frustrated vulnerable tenants further.[188] Despite the dire need for people to

[181] *Id.* at 6.
[182] *Id.*
[183] *Moratorium Study*, *supra* note 177 at 6.
[184] *Emergency Rental Assistance Program*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *See Evicted Despite a Moratorium*, *supra* note 66 (Federally: $3 billion disbursed of $47 billion allocated; Georgia: $16 million paid out of $989 million; and Florida: $23.2 million paid out of $871 million).

remain in their current housing during a pandemic, the government must find means that legally and effectively meet this desired end. The COVID-19 pandemic has exposed festering issues within our society and the government's inability to counter the pandemic's widespread effects.

CONCLUSION

As COVID-19 fundamentally changed the landscape of the American economy and society, millions of vulnerable people are still on the cusp of losing their homes to eviction. Although evictions under these exceptional circumstances invoke a harsh image of landlord-tenant relations, the issues at play were present before, and were only exasperated by, the harrowing economic and social conditions imposed by the pandemic. Before and eventually after the pandemic ends, Americans cannot afford rent, which is the ultimate root of this isue.[189] The CARES Act and CDC eviction moratoriums were necessary under the circumstances to help stop the spread of COVID-19. Despite the scientific support for these methods and the dire need for them, the Supreme Court found the statutory basis for the CDC's moratoriums to be legally insufficient as exceeding statutory authority. These inadequacies highlight the need for Congress to enact laws concerning this important issue. Additionally, the government has other financial means to protect peoples' housing that are legal and direct during national health emergencies. Thus, despite the scientific and moral support of national eviction moratoriums, their dubious legal standing requires more straightforward methods that effectively protect people from being evicted during pandemics. Hopefully, COVID-19 and the publicly scrutinized legal battles over the eviction moratorium will be the catalyst for a reexamination of the American rental-housing system and the institution of new protections for vulnerable renters.

Update from author: When the original version and substance of this article was written and submitted in May of 2021, the topics and legal issues of this comment were still undecided and up to much debate – prior to the recent Supreme Court decisions. In deciding whether to leave the comment in its original form or to update it with five months of highly relevant developments, the author ultimately decided to retain most of the original substance *and* update the legal analysis with the relevant decisions. Even though most were not the subject of U.S. Appellate or Supreme Court decisions, the author wanted to retain the lengthy district court analysis on this question, because they were novel at the time, the only jurisprudential guidance on the issue, and will likely give rise to future legal questions. As such, this comment still endeavors to explore the dire need for and nuances of effective implementation and legal uncertainty of national eviction moratoriums during a pandemic. The commentor updated the published version of this article with relevant legal decisions and events as of December 2, 2021.

[189] Jerusalem Demsas, *I Changed My Mind on Rent Control*, VOX (Dec. 2, 2021), https://www.vox.com/22789296/housing-crisis-rent-relief-control-supply. "According to the National Low Income Housing Coalition, the share of households who are rent-burdened (or who spend more than 30 percent of their income on rent) has been increasing; in 2017, nearly half of all renter households in the US fit in the category."

FOOD FOR THOUGHT: EXPANDING THE PANDEMIC-EBT PROGRAM TO PROVIDE EMERGENCY FOOD ASSISTANCE FOR ALL

Brandan Bonds*

Table of Contents

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INTRODUCTION

In the United States, hunger affects millions of people every day because of their inability to pay for food and lack of access to food.[1] According to the United States Department of Agriculture (USDA), in 2019, 35.2 million people lived in food-insecure households.[2] Statically, low-income people face much higher rates of food insecurity than the general population and the situation is particularly dire for poor people of color.[3] This comment will look to a solution for this hungry and somewhat neglected population.

Hunger advocates traditionally focus advocacy efforts on children through the National School Lunch Program (NSLP)[4], the poor through the Supplemental Nutrition Assistance Program (SNAP)[5], and the elderly through Meals on Wheels and SNAP[6]. Although Congress grants waivers during national emergencies, some of these programs still may exclude people who do not meet certain eligibility requirements based on employment or income.[7] A solution would require including adults in programs without strings attached and, further, automatically enrolling all adults who may not normally participate in federal assistance programs but experience food insecurity because of national emergencies.

In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA) creating the Pandemic-EBT program (P-EBT).[8] This program provides "children" who receive free or reduced lunch and are unable to attend school for at least five consecutive days, food assistance for the meals they would receive at school during the COVID-19 pandemic.[9] As Congress revisits this program, they should expand P-EBT to include low-income adults. Under this scheme, adults who are normally ineligible for federal food assistance would automatically qualify for temporary emergency food assistance without needing to meet eligibility criteria of other federal programs. The benefits to such a program would be tremendous. This policy would help move people out of food insecurity, reduce the burden of local organizations who provide food assistance, and increase the overall quality of life during national emergencies.

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[1] Christiana Silva, *Food Insecurity in the U.S. by the Numbers*, NPR (Sep. 27, 2020, 4:30 PM), https://www.npr.org/2020/09/27/912486921/food-insecurity-in-the-u-s-by-the-numbers.

[2] Alisha Coleman-Jensen et. al, *Household Food Security in the United States in 2019*, U. S. DEPT. OF AGRIC. 11 (Sep. 2020), https://www.ers.usda.gov/webdocs/publications/99282/err-275.pdf?v=1859.2.

[3] *Hunger is a Racial Equity Issue*, MOVE FOR HUNGER, https://moveforhunger.org/hunger-racial-equity-issue (last visited Apr. 8, 2021).

[4] *National School Lunch Program*, FOOD RSCH. & ACTION CTR., https://frac.org/programs/national-school-lunch-program (last visited Apr. 7, 2021).

[5] *Why Lamakers Must Strengthen SNAP*, FEEDING AMERICA, https://www.feedingamerica.org/take-action/advocate/federal-hunger-relief-programs/snap (last visited Apr. 8, 2021).

[6] *Speak Up for Seniors*, MEALS ON WHEELS, https://www.mealsonwheelsamerica.org/take-action/advocate (last visited Apr. 8, 2021).

[7] See *SNAP: COVID-19 Waivers by State*, U.S. DEP'T. OF AGRIC., FOOD & NUTRITION SERV., https://www.fns.usda.gov/disaster/pandemic/covid-19/snap-waivers-flexibilities (last visited on Apr. 8, 2021)

[8] *Congress Passes the Families First Coronavirus Response Act; FRAC Calls for a More Comprehensive Stimulus Package*, FOOD RSCH & ACTION CTR (Mar. 18, 2020), https://frac.org/news/senate-passes-the-families-first-coronavirus-response-act-food-research-action-center-calls-for-more-comprehensive-stimulus-package.

[9] Families First Coronavirus Response Act of 2020, Pub L. No. 116-127, 134 Stat. 177 (2020).

This comment first defines the problem of food insecurity, provides an overview of food insecurity during the COVID-19 pandemic, and explains the approaches to food insecurity. The second section describes the proposed legislative solution to food insecurity during national emergencies. The third section explores the possible benefits and challenges of expanding the program. Finally, the comment concludes that expanding the P-EBT program to provide for more Americans is a viable way to reduce food insecurity and hunger during national emergencies.

I. BACKGROUND

Like many social policies, hunger policy has many moving parts. This section breaks down that landscape. First, this section defines the terms "hunger" and "food insecurity" as they are used in this comment. The next subsection examines some of the latest data on hunger and food insecurity during the COVID-19 pandemic. Finally, this section briefly describes the existing federal approaches to food insecurity during the COVID-19 pandemic, namely the SNAP and the P-EBT programs.

A. What Are Hunger And Food Insecurity?

"Food insecurity" has largely replaced "hunger" as the focus of organizing, action, and policy around food access. Thus, it's important to define both terms, what they mean, and how they are measured. In 2006, the USDA introduced new language to describe various ranges of food security in the United States. The USDA separates "food security" into two categories: high food security and marginal food security.[10] The department contrasts "high food security," defined as "no reported indications of food-access problems or limitations" with "marginal food insecurity," defined as, "one or two reported indications – typically of anxiety over food sufficiency or shortage of food in the house. Little or no indication of changes in diets or food intake."[11]

Similarly, the USDA divides "food insecurity" into two categories: low food security and very low food security.[12] "Low food security" occurs when households "reports […] reduced quality, variety, or desirability of diet. Little to no indication of reduced food intake.".[13] "Very low food security" refers to reports of multiple indications of disrupted eating patterns and reduced food intake."[14]

The USDA describes "hunger" as "a potential consequence of food insecurity, that, because of prolonged, involuntary lack of food, results in discomfort, illness, weakness, or pain

[10] *Definitions of Food Security*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Sep. 9, 2020), https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security/.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

that goes beyond the usual uneasy sensation."[15] Thus, "'hunger' is an individual-level physiological condition that may result from food insecurity."[16]

This comment uses both the terms "food insecurity" and "hunger." While "food insecurity" will typically describe the conditions described above as "low food security" and "very low food security," some research referenced may use other definitions and those will be distinguished as appropriate. This comment also uses the term "hunger" as described above, as the prolonged, involuntary lack of food. Because food insecurity usually, but not always, causes hunger, the proposed expansion of P-EBT in this comment only targets food insecurity and the hunger that results from it.

B. Food Insecurity During COVID-19

The sharp decline of the economy during the COVID-19 pandemic unsurprisingly led to an increase in the number of new individuals (both adults and children) experiencing or at heightened risk of food insecurity. Unemployment and poverty are two factors that heavily influence food insecurity rates.[17] In 2019, the overall food insecurity rate was the lowest it had been in more than twenty years.[18] The COVID-19 pandemic was the first economic recession in the United States since the Great Recession, which began in 2007.[19] By the end of March 2020, claims for unemployment insurance were at nearly seven million, a record high.[20] The unemployment rate for April rose to 14.7%, illustrating the largest monthly increase and the highest rate of unemployment since the federal government first began collecting such data in 1948.[21] Feeding America, a national hunger relief organization, "estimates that 45 million people (1 in 7), including 15 million children (1 in 5) experienced food insecurity in 2020."[22] The organization projects that figure will reduce to 42 million in 2021.[23]

Prior to the pandemic, "significant racial disparities in food insecurity existed" and have not diminished. Economic recovery for communities of color, especially Black communities, has

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[15] *Id.*

[16] *Id.*

[17] Mark Nord et. al., *Prevalence of U.S. Food Insecurity Is Related to Changes in Unemployment, Inflation, and the Price of Food*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. 13 (June 2014), https://www.ers.usda.gov/webdocs/publications/45213/48167_err167.pdf?v=9114.2.

[18] Coleman-Jensen et. al., *supra* note 2 at 8.

[19] Elizabeth Schulze, *The Coronavirus Recession is Unlike any Economic Downturn in US History*, CNBC (Apr. 8, 2020, 12:33 PM), https://www.cnbc.com/2020/04/08/coronavirus-recession-is-unlike-any-economic-downturn-in-us-history.html.

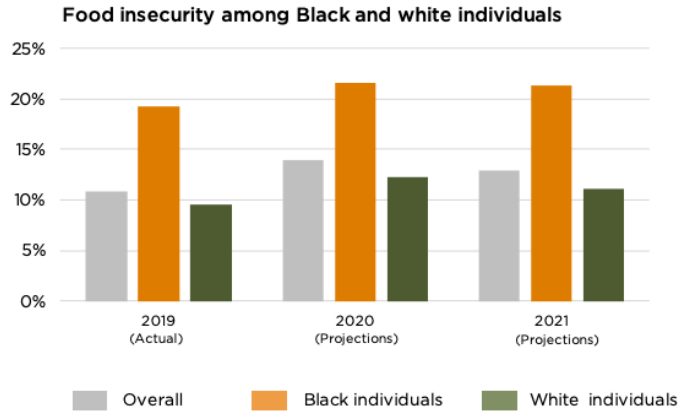
[20] Paul Davidson, *Millions of New Unemployment Claims Expected as Layoffs Continue to Surge*, USA TODAY (Apr. 9, 2020, 7:47 AM), https://www.usatoday.com/story/money/2020/04/08/coronavirus-initial-jobless-claims-data-show-millions-laid-off/2973032001/.

[21] *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU OF LABOR STATISTICS (May 13, 2020), https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full#:~:text=The%20unemployment%20rate%20in%20April,to%2023.1%20million%20in%20April.

[22] *The Impact of the Coronavirus on Food Insecurity in 2020 & 2021*, FEEDING AMERICA 1, 3 (Mar. 3 2021), https://www.feedingamerica.org/sites/default/files/2021-03/National%20Projections%20Brief_3.9.2021_0.pdf

[23] *Id.* at 7.

been even slower.[24] Feeding America estimates no significant reduction in the number of Black food-insecure individuals and expects food insecurity among Black individuals to continue to remain significantly higher than other races.[25]



Source: Feeding America

To combat food insecurity during the pandemic, many families relied on local food banks and soup kitchens for daily meals. Ja Nelle Pleasure's family in Kansas City, Kansas knows this all too well. [26]Her family once had a tradition was to spin a globe, put a finger down, and cook a dish from the country where it landed.[27] After the pandemic began and Ms. Pleasure lost her job, the tradition came to an end.[28] Ms. Pleasure's experience with food insecurity, like many, began prior to the pandemic. She suffered a stroke in 2018, which made focusing on her career as an artist increasingly difficult.[29] When her husband left her after her stroke, Ms. Pleasure was left with a single stream of income to feed her three kids, who were then sixteen, fourteen, and ten years old.[30] When she lost her job due to the pandemic, she lost the remaining income she earned as an artist. With schools closed, her kids lost access to meals.[31] Although she received $125 per month through the P-EBT program, that money barely helped feed her three boys, who she says "eat like grown men, like a football team".[32] Like most families struggling to make it through the pandemic, Ms. Pleasure doesn't waste anything; she lines her kitchen counter with jars of pickled vegetables from the garden and stacks her freezer with leftovers.[33] A self-proclaimed "coupon queen," Ms. Pleasure takes advantage of store sales when she can, adding to the stockpile of pantry items lining the walls of her garage.[34] The Pleasure family, unlike many families facing food insecurity, can rely upon their garden for fresh fruits and vegetables. The plot sits on the

[24] *Id.* at 5.
[25] *Id.*
[26] Dana Cronin, *For One Food Insecure Family, The Pandemic Leaves 'No Wiggle Room'*, NPR (Sep. 27, 2020 5:23 PM), https://www.npr.org/2020/09/27/914018048/for-one-food-insecure-family-the-pandemic-leaves-no-wiggle-room.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

edge of a community garden near their home where they grow everything from herbs to greens and strawberries.[35] Every day, Ms. Pleasure uses vegetables grown in her garden to cook meals for the families. She claims that it helps saves money because fresh vegetables are expensive at the grocery store.[36] Although Ms. Pleasure takes these steps to provide for her family, it's often not enough. She still visits the local food pantry where her sons used to volunteer for assistance. While there, she told people that she was helping a friend or family member because she was too embarrassed and ashamed to experience food insecurity.[37] The experience of being participants at a food bank caused a little confusion for her children and made her feel like "less of a parent."[38]

Source: Dana Cronin / Harvest Public Media / NPR

The Pleasure family is far from alone in their struggle for food. Although programs like P-EBT takes weight off her shoulders, Ms. Pleasure now worries whether her family will have power at home. When asked if she had to choose between power and food, Ms. Pleasure notes that she'd rather her kids eat than have lights because they can use candles.[39] After all, even it was in the dark, she says she's always been able to put some kind of food on the table.[40]

C. The Federal Approaches to Food Insecurity

While Congressional action to increase investment in federal food programs helped American families weather the pandemic, many families turned to charitable food assistance to make ends meet. In and outside of crises, charitable organizations can help supplement food budgets for federal program participants. However, for households with incomes that exceed

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

federal eligibility limits, charitable programs may be the only option. This section describes the legislation Congress passed to provide immediate financial and food assistance to families and the federal programs dedicated to food security and hunger relief in America.

1. The CARES Act

When the pandemic began, Congress swiftly acted to pass the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[41] The legislation extended unemployment insurance benefits for laid off workers, provided funding for hospitals, research, and treatment for the Coronavirus.[42] One of the major components of the CARES Act was direct payments to individuals of up to $1,200.[43] The Act also provided a number of food and agriculture-related benefits, including funding to ensure children and low-income families have continued access to affordable, nutritious food, and to ensure farmers have the financial resources they need to offset the immediate economic impacts of the virus.[44] For agriculture provisions, Congress provided the USDA with $9.5 billion to provide financial support to farmers and ranchers impacted by the virus.[45] The funding also provided specifically for special crops, produces who supply local food systems and farmers' markets, restaurants and schools, and livestock producers such as cattlemen and women, and dairy farmers.[46] For food provisions, the Congress allocated $24.6 billion for domestic food programs representing about 50% of the total agricultural program funding in the bill.[47] Anticipating an increase in the federal food programs, Congress also provided $15.8 billion to improve access to SNAP in the event costs or participation exceeded budget estimates.[48] The bill also set aside $300 million for SNAP improvements in underserved areas such as Indian reservations and U.S. territories.[49] In addition to enhancing funding for SNAP, child nutrition programs such as the School Breakfast Program and the National School Lunch Program received $8.8 billion in additional funding, representing 18% of the total funding.[50] Together, these buckets represent about 98% of the food and agriculture provisions in the CARES Act. The remaining 2% of funding (approximately $916 million) was allocated for enhancing staff and services in several key mission areas all focused on support for rural areas in America.[51]

In addition to federal one-time funding, the federal government has many programs that work to alleviate hunger and food insecurity across the country, with some programs specifically adapted to regional and community needs. The programs with the largest reach during the

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[41] Susan Davis, Claudia Grisales, and Kelsey Snell, *Senate Passes $2 Trillion Coronavirus Relief Package*, NPR (Mar. 25, 2020, 8:21 PM), https://www.npr.org/2020/03/25/818881845/senate-reaches-historic-deal-on-2t-coronavirus-economic-rescue-package.
[42] *Id.*
[43] *What's in the CARES Act for Food and Agriculture*, AMERICAN FARM BUREAU FEDERATION (Mar. 26, 2020), https://www.fb.org/market-intel/whats-in-the-cares-act-for-food-and-agriculture.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] American Farm Bureau, *supra* note 43.
[50] *Id.*
[51] *Id.*

Coronavirus pandemic are the SNAP program, authorized through the Farm Bill[52] and the P-EBT program, authorized through the FFCRA.[53] The next two subsections briefly explain these two important programs.

2. The SNAP Approach

SNAP is a monthly benefit program. Every month authorized state agencies provide eligible recipients with an allotment of benefits loaded onto an EBT (Electronic Benefit Transfer) card.[54] In order to be eligible for the program, a recipient's net income must be at or below 130% of the poverty line,[55] which, in 2021, is $12,880 for an individual.[56] To calculate allotment of benefits, the USDA's uses the Thrifty Food Plan.[57] Under this plan, SNAP expects families receiving benefits to spend thirty percent of their net income on food.[58] For example, for a twenty-five-year-old male, the Thrifty Food Plan is $194 per month. If that man's individual income is $200 per month after taking account of any deductions, he would receive $134 per month in SNAP benefits or $194 minus $60, which is thirty percent of $200. The maximum monthly benefit for an individual in 2021 is $204 and the estimated average benefit for an individual is $138.[59] Once the state agency loads the benefits onto the recipients EBT card, the recipient can then use that card, similar to a debit card, to make approved purchases at approved retail stores, which includes most food in grocery or convenience stores.[60]

Since March 2020, § 2302(a)(1) of the FFCRA authorized emergency allotments to SNAP recipients to help address food needs during the pandemic.[61] The emergency allotments granted the maximum benefit for household size, minus the monthly base benefit.[62] This meant

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[52] The Farm Bill is a large omnibus piece of legislation that includes agricultural trade, agricultural commodity support, agricultural conservation, nutrition, and other areas. SNAP is one of the largest programs in the Farm Bill and makes up the majority of the Nutrition Title (Title 4). Nutrition spending comprises about 76% of the total Farm Bill spending. Congress can amend SNAP with each new iteration of the Farm Bill though the Nutrition Title of the Bill. Congress renews the bill every five years. *What is the Farm Bill*, NATIONAL SUSTAINABLE AGRICULTURE COALITION, https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/ (last visited Apr. 9, 2021).

[53] Food Rsch. & Action Ctr. #1, *supra* note 4.

[54] 7 U.S.C. § 2016 (2018).

[55] *Id.* at § 2014(c); *A Quick Guide to SNAP Eligibility and Benefits*, CTR. ON BUDGET & POLICY PRIORITIES (Sep. 1, 2020), https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits#_ftn3.

[56] Annual Update of the HHS Poverty Guidelines Notice, 86 Fed. Reg. 7732, 7732-34 (Jan. 13, 2021). 130% of the poverty line would be $16,744.

[57] CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 55.

[58] Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, February 2021, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Feb. 2021), https://fns-prod.azureedge.net/sites/default/files/media/file/CostofFoodFeb2021.pdf.

[59] CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 55.

[60] 7 U.S.C. § 2016(b) (2018).

[61] Families First Coronavirus Response Act of 2020, *supra* note 9.

[62] *SNAP Emergency Allotments – Guidance*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Apr. 1, 2021), https://www.fns.usda.gov/snap/emergency-allotments-guidance-040121#:~:text=Since%20March%202020%2C%20SNAP%20households,little%20or%20no%20additional%20support.

that families at or near the maximum benefit received little or no additional support.[63] To some, the language of the § 2302(a)(1) of the FFCA instructed the USDA to increase benefits to all people in the SNAP program.[64] However, others believed the emergency money shouldn't itself shouldn't exceed maximum allotment levels.[65] At the time, the Trump Administration did not interpret the term "emergency allotment" to mean an extra layer of funding to apply to existing benefits.[66] The USDA argued that emergency money should go only to households that did not receive maximum allotments – which was around 60% of forty million Americans who receive SNAP benefits.[67]

In July 2020, attorneys at Community Legal Services in Philadelphia, Pennsylvania sought an injunction against the USDA to prevent the agency from implementing § 2302(a)(1) as written.[68] In *Gilliam v. U.S. Department of Agriculture*, SNAP recipients alleged that the USDA misinterpreted 2302(a)(1) by imposing an artificial limitation on the amount of emergency allotments SNAP recipients can receive.[69] The plaintiffs argued the USDA's interpretation violated the Administrative Procedure Act, which governs how agencies interpret statutes.[70] The district court granted the injunction because the injunction would be narrowly tailored to Pennsylvania households, and would further "avoid irreparable harm" to the plaintiffs.[71] In other words, the court limited the scope of relief afforded to statewide.[72] The Trump Administration appealed the district court's decision but the plaintiffs settled the suit in the Biden Administration, and recipients will receive around $712 million in retroactive SNAP benefits.[73]

The SNAP program is a powerful food insecurity and hunger alleviation tool that the federal government manages. Through the monthly EBT structure, SNAP preserves individuals' dignity and teaches valuable skills in financial management.[74] However, under its current design

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[63] *Id.*

[64] Kate Giammarise, *Lawsuit Says Federal Agency is Wrongly Denying Emergency Food Stamps to Poor Pennsylvanians*, PITTSBURGH POST-GAZETTE (Jul. 17, 2020, 1:15 PM), https://www.post-gazette.com/news/social-services/2020/07/17/Lawsuit-says-federal-agency-is-wrongly-denying-emergency-food-stamps-to-poor-Pennsylvanians/stories/202007170086.

[65] *Id.*

[66] Alfred Lubrano, *Poorest Pennsylvanians to Receive Retroactive Food Stamp Benefits Thanks to Local Attorneys*, THE PHILADELPHIA INQUIRER (Apr. 1, 2021), https://www.inquirer.com/news/food-stamps-snap-benefits-usda-community-legal-services-biden-20210401.html.

[67] *Id.*

[68] *CLS and Morgan Lewis File Lawsuit Challenging Denial of Emergency SNAP Benefits for the Poorest Pennsylvanians*, COMMUNITY LEGAL SERVICES OF PHILADELPHIA (Jul.17, 2020), https://clsphila.org/public-benefits/covid-snap-lawsuit/.

[69] *Gilliam v. U.S. Dep't of Agric.*, 486 F.Supp.3d 856, 860 (E.D. Pa. 2020).

[70] *Id.*

[71] *Id.* at 881.

[72] *Id.*

[73] Lubrano, *supra*, note 66.

[74] *See* Benefit Redemption Patterns In The USDA Supplemental Nutrition Assistance Program (SNAP): Fiscal Year 2017 (Summary), U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Sep. 2020), https://www.fns.usda.gov/sites/default/files/resource-files/SNAPEBT-BenefitRedemption-Summary.pdf. (finding that SNAP recipients redeem more than 75% of their monthly benefit in the first two weeks after receipt.

which restricts eligibility only to people at or below 130% of the poverty line, it is unable to provide for millions of food-insecure people who desperately need it during emergencies.[75]

3. The Pandemic-EBT Approach

The FFCRA authorized creation of a sister-program of SNAP focused on child food insecurity during the Coronavirus pandemic called Pandemic-EBT.[76] The goal of P-EBT is to provide families whose children qualify for free or reduced-price meals with the funds that otherwise would go to schools to provide them with breakfast and lunch.[77] Children are eligible for P-EBT meal replacement benefits if they received free or -reduced price meals prior to the pandemic and their school closed for at least five days due to the pandemic.[78]

States implement the P-EBT program through four different models.[79] The first implementation model is by direct issuance to SNAP recipients and by application for all other children.[80] In this model, parents or guardians must submit applications for P-EBT benefits for children who did not participate in SNAP prior to the pandemic.[81] The second model is by direct issuance to children who participate in the SNAP program other federal assistance programs such as Temporary Assistance for Needy Families (TANF), Medicaid, Foster Care, etc.[82] Families not enrolled in a federal assistance program must submit an application.[83] In the third implementation model, states directly issue benefits to the majority of eligible children, with applications required only for a subset of children, either by design from the beginning, or as a backup for when direct issuance was not successful in reaching some eligible children.[84] For example, Arizona created an application for children missed by their direct issuance process and for children who became eligible for free or reduced-price meals after schools closed in March.[85] In the fourth model, states directly issued benefits to all students who qualified for free or reduced-price school meals.[86]

There are other issues that make getting P-EBT benefits in the hands of families a little challenging. The issues include issuing the cards to children or heads of households, communicating and troubleshooting with families, staffing state offices, perhaps most importantly, targeted communication outreach and marketing so that low-income families are aware of the program.

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[75] CTR. ON BUDGET & POLICY PRIORITIES, *supra*, note 55.

[76] Families First Coronavirus Response Act of 2020, *supra*, note 9.

[77] *Lessons from Early Implementation of Pandemic-EBT*, CTR. ON BUDGET & POLICY PRIORITIES 1 (Oct. 30, 2020), https://www.cbpp.org/sites/default/files/atoms/files/10-8-20fa.pdf.

[78] *Id.* at 4.

[79] *Pandemic-EBT Implementation Documentation Project*, FOOD RSCH. & ACTION CTR. 24 (Sep. 2020), https://frac.org/wp-content/uploads/P-EBT-Documentation-Report.pdf.

[80] *Id.* at 25.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 26.

[85] *Id.*

[86] *Id.*

The Brookings Institute estimates that the P-EBT program lifted between 2.7 million and 3.9 million children out of hunger. [87] P-EBT serves an important need for low-income families facing childhood food insecurity. It provides a competent legal framework that Congress could broaden in its scope to serve other constituencies.

For millions of food-insecure adults and children who have sufficient income to render them ineligible for SNAP or P-EBT, a gap exists. These are single adults who earn above 130% poverty line - adults who earn $12,881 or more and households of three who earn $28,549 or more. These people are barely making enough to get by and also not getting any government assistance, so in theory – are doing even worse. It's a classic "catch-22" because they are not rich enough to feel secure, and not poor enough to qualify for government assistance.

II. EXPANDING P-EBT TO MEET THE NEEDS OF ADULTS

The prior subsection explained how the current legislative framework to food insecurity lacks ability to provide for more food-insecure families during national emergencies. As described above, the current system of feeding America's working-class adults and families is expensive and does not fully alleviate food insecurity or hunger. Many working-class adults and families face increasing healthcare costs and poor educational performance related to food insecurity and hunger.[88] This, then, begs the question: what is the appropriate legal framework? This section proposes an expansion of P-EBT that would allow adults who are ineligible for federal food assistance to access temporary food assistance during emergencies. The section begins by arguing that everyone has a universal right to food. The section then describes the proposed legal framework to accomplish this during national emergencies.

The partial solution outlined in this comment to the problem of food insecurity and hunger in national emergencies is three-pronged. The first prong broadens eligibility from school children to adults. This proposal eliminates the current exclusion of adults by simply replacing language in § 1101(b) of the FFCRA from "households with eligible children" to "all households".[89] The second prong ties eligibility to a higher poverty line. This proposal increases the number of families and adults eligible for federal food assistance during emergencies by capturing the millions of middle-income families who the government often neglects.

The third component of the program is to actively facilitate enrollment in P-EBT during national emergencies. Standing on the shoulders of the widely supported FFCRA during the Coronavirus pandemic, states should automatically enroll people in P-EBT according to income

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[87] Megan Leonhardt, *'No Excuses for Inaction': Experts Urge Congress to Extend Program Providing Free School Replacement Meals for Kids*, CNBC (Sep. 18, 2020 11:29 AM), https://www.cnbc.com/2020/09/18/experts-urge-congress-to-extend-program-providing-free-meals-for-kids.html.

[88] John Cook and Ana Paula Población, *Estimating the Health-Related Costs of Food Insecurity and Hunger*, BREAD FOR THE WORLD INST. (Jan. 7, 2016), https://www.bread.org/sites/default/files/downloads/cost_of_hunger_study.pdf.

[89] A household consists of all people who occupy a housing unit and includes the related family members and all the unrelated people who share the housing unit. *Subject Definitions*, U.S. Census Bureau, https://www.census.gov/programs-surveys/cps/technical-documentation/subject-definitions.html#:~:text=A%20household%20includes%20the%20related,who%20share%20the%20housing%20unit. (last visited Apr. 8, 2021)

data reported to the federal government for tax purposes. The fourth component is to develop a communication plan that strategically reaches eligible people. Similar to what the federal government does during the COVID-19 pandemic, the federal government should provide strategic guidance to states to ensure consistent and accurate messaging about the program. This section describes each of these portions of this proposed federal program to tackle food insecurity during national emergencies.

A. Everyone Has A Universal Right to Food

After World War II, the deadliest conflict in human history, millions of people were left homeless and began to live uncertain lives as refugees. After the war, a committee, chaired by Eleanor Roosevelt, widow of American president Franklin D. Roosevelt, came together to write a document that "declared" certain rights that everyone in the world should have. [90] These universal rights became the Universal Declaration of Human Rights (UDHR).[91] The UDHR lists several fundamental human rights that are universally protected.[92] Article 25, Section 1 of the UDHR provides that,

> Everyone has the right to a standard of living adequate for the health and well0being of himself and of his family, including, food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[93]

The United Nations (UN) General Assembly adopted the UDHR on December 10, 1948. Although American citizens do not enjoy an explicit constitutional right to food, as recently as December 10, 2020, on the 75th anniversary of the founding of the U.N., the United States, with other nations, recommitted itself to the UDHR. The joint statement reads that each signatory recognizes the ". . . .foundational ideal that certain principles are so fundamental as to apply to all human beings, everywhere, at all times."[94] The United States' recommitment to the UDHR explicitly supports a right to food for everyone and Congress should take action to enshrine this right into the Constitution of the United States. The U.S. Congress has even taken action to codify its commitment to food security by passing the Global Food Security Act (GFSA).

The Global Food Security Act of 2016 was signed into law by former President Barack Obama and recognized the critical role of food security in development and national security.[95] The bipartisan legislation provided for the continuation and enhancement of Feed the Future, the president's global hunger and food security initiative, and increased accountability mechanisms

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[90] *History of the Declaration*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/history-of-the-declaration (last visited May 14, 2021).
[91] *Id.*
[92] *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited May 14, 2021).
[93] *Id.*
[94] *Joint Statement on the Universal Declaration of Human Rights*, U.S. MISSION TO THE UNITED NATIONS (Dec. 10, 2020), https://usun.usmission.gov/joint-statement-on-the-universal-declaration-of-human-rights/.
[95] *The Global Food Security Act*, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (Apr. 15, 2019), https://www.usaid.gov/feed-the-future/vision/global-food-security-act.

to evaluate its impact at home and abroad.[96] President Trump signed the GFSA Reauthorization Act of 2017 on October 11, 2018 which provided for an additional five years, sending a strong message that America remains committed to ensuring that people have access to food.[97]

America's recent recommitment to the UDHR coupled with passage and reauthorization of the GFSA support an argument that Americans enjoy an implicit human right to food. During times of crisis and emergencies that are outside of human control, Congress should act to provide food for all Americans as a basic human right. The proposed changes to the P-EBT program will enhance a model that most States already implement and further signal to the international community that food security is a priority for the United States.

B. Broaden Eligibility from Schoolchildren to Adults

The eligibility requirements of the P-EBT program already discussed significantly limit the number of people who qualify for benefits. First, Congress must remove the exclusion of adults from receiving P-EBT benefits.[98] Currently, P-EBT is only available to "eligible children " who, if not for the closure of the school the child attends during a public health emergency, would receive free or reduced price school meals.[99] A "child" includes "an individual, regardless of age, who is determined by a State educational agency to have one or more disabilities, or who attends any nonresidential public or nonprofit private school of high school grade."[100] By simply replacing "households with eligible children" in § 1101(b) with "all households," Congress would permit the participation of millions of food-insecure households who are unable to secure food during public emergencies. Since "households"[101] include all people who occupy a housing unit, P-EBT could reach more people because children and adults can participate regardless of whether they attend a school.

Congress should also broaden the definition of "school" for the P-EBT program. The term "school" has the meaning as defined in the Richard B. Russell National School Lunch Act.[102] Under this definition, "school" means, "any public or nonprofit private school of high school grade or under, and any public or licensed nonprofit private residential child care institution (including but not limited to orphanages and homes for the mentally [disabled]".[103] A broader definition of "school" should include institutions of higher education such as technical schools, community colleges, and traditional baccalaureate colleges and universities. If Congress chose not to expand P-EBT to adults, broadening the definition of "school" is a reasonable and politically feasible alternative.

Congress must also remove the minimum closure requirements for schools. Under the current P-EBT model, the Secretary of Agriculture "shall not provide assistance . . . in the case

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[96] *Id.*
[97] *Id.*
[98] Families First Coronavirus Response Act of 2020, *supra* note 9.
[99] *Id.* at § 1101(h)(1).
[100] 42 U.S.C. § 1760 (d).
[101] *Subject Definitions*, *supra* note 89.
[102] Families First Coronavirus Response Act of 2020, *supra* note 9 at § 1101(h)(2).
[103] 42 U.S.C. § 1760(d)(5).

of a school that is closed for less than five consecutive days."[104] A closure requirement connected to school closures for a certain number of days would not work under a reformed model because most adults do not attend elementary or secondary schools that P-EBT provides for. A better approach is to establish a minimum closure requirement that begins on the date that the federal government declares a national emergency or natural disaster.

These changes would provide the greatest access to P-EBT for adults and children in a way that simplifies the law, rather than further complicates it. These strategies also have the greatest political feasibility, to the extent that any P-EBT expansion is currently politically feasible.

C. Tie P-EBT Eligibility to A Higher Poverty Guideline

In addition to increasing access to P-EBT by changing the eligibility requirements, loosening restrictions on household income is another important change. The second prong of the federal program to expand P-EBT revolves around the federal poverty guidelines. The federal poverty guidelines are a simplification of the poverty thresholds that federal agencies use for administrative purposes such as for determining financial eligibility for certain federal programs.[105] Once Congress expands the P-EBT program to include adults, Congress should rethink the categorical eligibility requirements. Currently, P-EBT recipients must receive free or reduced price lunch for school meals.[106] A student from a household at or below 130 percent of the poverty income threshold is eligible for free lunch.[107] A student from a household with an income between 130 percent and up to 185 percent of the poverty threshold is eligible for reduced price lunch.[108] Although the P-EBT program includes children from middle-income families, a federal program for adults must include adults whose income fall above 130 percent. The expanded P-EBT program should include middle-income families whose income falls between 130 percent and 185 percent.

Congress can accomplish this by changing the explicit language of § 1101(b) to provide benefits for "households up to 185 percent of the poverty line" instead of "households with eligible children". This alteration could become complicated if a person in a household participates in another federal assistance program and create a problem of double-dipping from multiple federal programs at one time. As Congress debates its step forward in addressing the unemployment crisis that exists in many states, a proposal to significantly expand P-EBT to more recipients would likely not be met graciously because of the stigma largely associated with federal benefits and unemployment.

D. Automatically Enroll Adults and Families Who Meet The Poverty Guidelines

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[104] Families First Coronavirus Response Act of 2020, *supra* note 9 at § 1101(c).

[105] *Frequently Asked Questions Related to the Poverty Guidelines and Poverty*, U.S. DEP'T OF HEALTH & HUMAN SERV., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty#differences (last visited May 7, 2021).

[106] Families First Coronavirus Response Act of 2020, *supra* note 9 at § 1101(h)(1).

[107] *Child Nutrition Programs Income Eligibility Guidelines (2021-2022)*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Mar. 4, 2021), https://www.govinfo.gov/content/pkg/FR-2021-03-04/pdf/2021-04452.pdf.

[108] *Id.*

The third prong of the expanded federal program revolves around the direct enrollment of adults and families. Because states execute the eligibility determinations for P-EBT, this plan requires that state governments be responsible for enrolling additional adults and families into P-EBT.[109] Similar to SNAP, the program would enroll adults and families based on data obtained through other programs. However, distinctions between SNAP and automatic enrollment of students in P-EBT are necessary. Primarily, SNAP is contingent on a particular income relative to the federally determined poverty line.[110] However, the need-based programs through the Department of Education (which is what the current P-EBT model pulls from) include the cost of attendance in their need determination which fluctuates depending on location and other things.[111] Therefore, it would be impractical for state agencies to directly enroll recipients in the "if free-reduced school lunch, then P-EBT" manner. Instead, if the Internal Revenue Services (IRS) compiles financial data through income taxes, state agencies could then use this data to enroll qualified adults and families.

In order for state agencies to enroll adults and families in P-EBT, the IRS, which maintains income records, must release the aid information to the necessary state agencies. This plan would be similar to the successful interagency coordination used in the current P-EBT model with the USDA and U.S. Department of Education. Drafters could use the language directly from other legislation, which requires appropriate access to information and includes penalties for misuse of information. The details of the income tax sharing scheme must be defined by federal regulation. It would also be necessary for the statute and regulations to define the exact criteria for automatic enrollment because this would make the program more predictable for everyone.

E. Develop A Strategic Communication Plan to Reach Eligible Participants

The fourth prong in implementing this program surrounds strategic communication. As with any new benefit or resource for families, effective communication is critical to success. People who do not normally participate in federal benefit programs can often be confused about what the benefit is, what steps they need to take to access it, and how to use it. A national emergency or natural disaster complicates rollout of a program like P-EBT. Therefore, states should use three different strategies to inform and educate potential participants about P-EBT.

First, states must communicate to the public. Under the current P-EBT model, the USDA Food and Nutrition Service required all participating states to conduct a public information campaign about P-EBT.[112] "[A]ll states [used] basic communication strategies, such as issuing press releases and posting information [about] state websites."[113] Most states also "used social media platforms" like Twitter and Facebook "to spread the word … and answer frequently asked

[109] *State Guidance on Coronavirus P-EBT in Schools*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Nov. 16, 2021), https://www.fns.usda.gov/snap/state-guidance-coronavirus-pandemic-ebt-pebt-schools.
[110] CTR. ON BUDGET & POLICY PRIORITIES, *supra*, note 55.
[111] *How Aid is Calculated,* U.S. DEP'T OF EDUC., Office of Federal Student Aid, https://studentaid.gov/complete-aid-process/how-calculated (last visited on Dec. 4, 2021) (noting that the basic eligibility criteria for federal aid includes subtracting one's expected family contribution from the cost of attendance to determine the amount of financial need, and thus how much need-based aid one can receive).
[112] CTR. ON BUDGET & POLICY PRIORITIES, *supra*, note 77 at 9.
[113] Food Rsch. & Action Ctr. #2, *supra*, note 79 at 50.

questions."[114] Anti-hunger and child advocacy organizations also partnered with mutual aid organizations that worked directly with families to inform them about P-EBT benefits and related procedures.[115] This basic communication strategy must continue under the new program.

Second, states must communicate through mutual aid and anti-hunger organizations. Often, mutual aid and faith-based organizations have the closest relationship to families. States should identify these organizations and encourage them to share certain information with potential participants. The shared information should include general information about P-EBT that details what it is, who qualifies, how benefits are calculated, and where participants can use the benefits. It should also describe how participants should apply for and receive benefits if the state opts to use its own application process.

Third, states must communicate directly with adults and families who qualify for P-EBT. This strategy may cause confusion in cases where an adult or family participates in another federal program. States should directly contact these individuals to ensure that they are aware of the P-EBT benefits and how to use them properly. One area that state governments might also address when considering direct communication is language translation of documents. Because some families may consist of people who speak English as a second language or do not speak English at all, it is important that all communications and applications are translated where the need exists. States might also offer language interpretation services over the phone or in person at emergency shelters and where federal resource offices are located. Although communication strategies may look different in each state, there must be constant, consistent communication for P-EBT to be successful.

By implementing this four-pronged program, the federal government could make strides in curbing food insecurity and hunger in communities. More needy households would be eligible for P-EBT by removing the exclusion of adults and altering the categorical eligibility. Through effective communication and information sharing, state agencies could directly enroll low- and middle-income households in P-EBT.

III. BENEFITS & CHALLENGES OF P-EBT EXPANSION

The four-pronged approach of addressing P-EBT benefits for adults has many benefits beyond simply reducing food insecurity and hunger. The following section is intended to describe some of these potential benefits and outline where more research must be conducted to understand whether P-EBT access for adults can achieve these benefits. The subsequent section will describe some administrative hurdles faced by implementing the program outlined in this comment.

A. Benefits of a P-EBT Program for Adults

[114] *Id.* at 50-51.
[115] *See Strategies to Ensure States Reach All Eligible Families With P-EBT*, FOOD RESEARCH & ACTION CTR. 1 (Jan. 2021), https://frac.org/wp-content/uploads/Strategies-to-Ensure-States-Reach-All-Eligible-Families-With-P-EBT.pdf for a comprehensive list of strategies organizations can use to ensure eligible individuals can access P-EBT.

The primary benefit of the P-EBT program is the alleviation of food insecurity and hunger during national emergencies. However, the benefits may extend beyond simply providing food. Adults and families may attain greater financial independence because they are not spending as much money as they normally would on groceries. This financial independence has the potential to instill a sense of dignity and build financial management skills. Adults and families would then be able to navigate out of national emergencies with less debt than they may have otherwise incurred. This reduced burden may ultimately free up time and resources, allowing adults to pursue better or more satisfying job opportunities and endeavors that may ultimately increase their income. For younger Americans, allowing college students to eat at a lower cost may prevent the continued cycle of poverty related to subpar academic performance. Additionally, if college students gain further financial security due to P-EBT benefits, those students may be less dependent on financial assistance from their parents.

Beyond the financial benefits, participation in P-EBT could help low and middle-income families develop necessary healthy cooking skills that they may not yet have. Since P-EBT benefits are restricted to grocery items, adults and families could develop and maintain cooking skills that are essential to healthy and cost-efficient eating. These skills will help contribute to life-long food security.[116]

Although the USDA temporarily provides SNAP benefits to eligible college students during the COVID-19 pandemic[117], universities may also benefit from the expansion of P-EBT to middle-income college students, because colleges worried about access to food on their campuses may not have to contribute funds to meal plans to increase their accessibility to low and middle-income students.

Other benefits may be more measurable; namely, the number of middle-income people who apply for and use benefits under a new program. Middle-income families are extremely important to our economy. Their temporary participation and experience with P-EBT could inform commonsense policy improvements in the future. The adults and families who would participate in P-EBT would also come to understand, by either first- or second-hand experiences, the benefits and drawbacks of federal entitlement programs. The program outlined in this comment could provide P-EBT greater visibility nationwide and decrease stigma among other recipients.

B. Challenges in Administering P-EBT Changes

Because expanding P-EBT would require a substantial federal investment, policymakers must closely examine the how the program might be designed for accessibility to a larger group of people. Any policy proposal of this magnitude will likely face significant challenges in its

[116] Jennifer Utter, Ph.D. and Megan Winkler, Ph.D., *Self-Perceived Cooking Skills in Emerging Adulthood Predict Better Dietary Behaviors and Intake 10 Years Later: A Longitudinal Study*, 50 J. OF NUTRITION EDUC. & BEHAV. 494 (Apr. 17, 2018), https://www.jneb.org/article/S1499-4046(18)30086-1/fulltext (finding confidence in cooking ability led to fewer fast-food meals and more frequent preparation of meals with vegetables in adulthood).
[117] *Students*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Mar. 25, 2021), https://www.fns.usda.gov/snap/state-guidance-coronavirus-pandemic-ebt-pebt-schools (stating that The Consolidated Appropriations Act, 2021 temporarily expanded student eligibility to new groups from January 16, 2021 through the end of the public health emergency.

effective administration. Congress and federal agencies may resolve many of these challenges through continued research. One possible difficulty with administering this program is ensuring that citizens who participate in one federal assistance program cannot concurrently, and potentially fraudulently participate in the P-EBT program. Although eliminating fraud in any federal benefit program is virtually impossible, political leaders always point to fraud as a legitimate reason to reduce funding for entitlement programs.[118] A possible solution to this problem may be to restrict the program to only one person from a physical residential address. However, this alteration would shrink the program significantly and people who are food insecure or hungry and live with other people who are not their family members, would not be able to benefit from P-EBT.

Public health emergencies and natural disasters often produce long-term economic challenges that the government cannot resolve quickly.[119] When science and public health become politicized, it can cause unexpected delays in recovery. As a practical matter for P-EBT, politicians might be uncomfortable with allowing people to receive benefits for an indefinite amount of time. In drafting legislative language that expands options for the states, Congress could limit people to only receiving P-EBT benefits for five months during a national emergency or natural disaster or even require strict reporting requirements to ensure that the changes to P-EBT do not incentivize long-term reliance on this emergency program.

An additional hurdle facing the program is access to healthy grocery stores and online stores.[120] Because the current P-EBT model require participants to shop at pre-approved brick and mortar retailers, many families, particularly low-income families, lack access to healthy and nutritious food items. Furthermore, like the SNAP program, P-EBT forbids the use of benefits on hot foods. Therefore, P-EBT must be used to purchase raw ingredients or packaged foods which require kitchen preparation. The expanded program would require the USDA to permit purchases of hot food items in locations determined to be food deserts.[121] P-EBT participants across America who live in food deserts would be able to use mobile applications like UberEATS or DoorDash to find and order hot food near them. It would also require the USDA to create a waiver for online purchases. In addition to allowing hot food purchases via UberEATS or Door Dash, this waiver would allow participants to shop online from retailers like Amazon, Walmart,

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[118] Scott Cohn, *Trump Proposal to Crack Down on Food Stamp Fraud Reignites a Heated Debate*, CNBC (Aug. 30, 2019, 8:00 AM), https://www.cnbc.com/2019/08/30/trump-plan-to-crack-down-on-food-stamp-fraud-reignites-heated-debate.html.

[119] *See Long-Term Recovery Issues and Case Studies*, BUS. CIVIC LEADERSHIP CTR. 2 (Aug. 2007), https://www.uschamberfoundation.org/sites/default/files/publication/ccc/disasterrecoveryreport0708.pdf.; Sara Johnson and Nariman Behravesh, *The COVID-19 Pandemic Will Hurt Long-Term Economic Growth*, IHS MARKIT (Aug. 24, 2020), https://ihsmarkit.com/research-analysis/the-covid19-pandemic-will-hurt-longterm-economic-growth.html (noting that IHS Markit estimates that by 2030 the level of real gross domestic product for key developed economic could be 2% to 5% lower compared with a no-pandemic scenario).

[120] Jeannette E. Warnert, *Grocery stores steer consumers toward unhealthy choices*, UNIV. OF CAL., DIV. OF AGRIC. & NAT. RESOURCES (Jul. 26, 2019), https://ucanr.edu/blogs/blogcore/postdetail.cfm?postnum=30911 (noting that prices of many produce items in convenience stores in low-income neighborhoods were more than double the county's average supermarket prices.

[121] Food deserts are places where residents lack access to affordable nutritious foods like fruits, vegetables, and whole grains. Instead of grocery stores or farmers' markets, these areas often have convenience stores and gas stations with limited shelf space available for healthy options, thus making nutritious foods virtually inaccessible. Merritt Daniels, *What is a Food Desert*, GEORGIA RURAL HEALTH INNOVATION CTR. (Aug. 11, 2020), https://www.georgiaruralhealth.org/blog/what-is-a-food-desert/.

Publix, or Kroger so they can adhere to CDC public health guidance like social distancing if they or a family member cannot travel or be in public. Federal law could begin to require states to offer this kind of waiver in the event of natural disasters where P-EBT participants cannot shop at brick-and-mortar grocery stores.

Lastly, national emergencies that occur from natural disasters like hurricanes, floods, or wildfires may make blanket implementation complicated. These types of disasters that often destroy entire communities may prevent people who are temporarily displaced from accessing P-EBT benefits in the communities where they live. Even if they qualified for benefits, they would not be able to use them in the traditional way people use benefits. Therefore, where a significant number of people are affected by natural disasters, the USDA should immediately enroll qualified participants in P-EBT and grant a waiver that permits purchasing from online retailers. The communication items for these communities should note participating retailers and restaurants where participants can use their benefits.

The above challenges to expanding P-EBT to everyone are not insurmountable. Further research may help illuminate the best path forward because other federal benefit programs may have components that coincide with P-EBT. Federal, state, and local governments must continue to partner with mutual aid and advocacy organizations to find innovative solutions to the problem of food insecurity and hunger in America's especially during emergencies.

CONCLUSION

The status of food insecurity and hunger during the Coronavirus pandemic remains alarming. Although the Biden-Harris Administration has made improvements in expanding access to P-EBT in its current form, the federal government is well situated to make changes to the administration of P-EBT that can benefit millions more people.

Since the pandemic began, U.S. Senators Kristen Gillibrand (D-NY), Lisa Murkowski (R-AK), and Bob Casey (D-PA) have all introduced legislation to tackle food insecurity through enhancements to SNAP or to federal child nutrition programs.[122] On March 21, 2021, Representative Barbra Lee (D-CA) introduced the Improving Access to Nutrition Act which would eliminate SNAP's arbitrary three-month time limit and ensure that all people have access to nutrition assistance and stay healthy while seeking full-time work.[123] Additionally, Representative Jimmy Gomez (D-CA) introduced the Enhanced Access To SNAP Act (EATS Act) of 2021 on March 16, 2021.[124] This legislation would amend the Food and Nutrition Act of 2008 to treat attendance at institutions of higher education the same as work for the purpose of determining eligibility to participate in SNAP.[125] Simply put, it expands participation in SNAP to college students. Unfortunately, neither bill enjoys bipartisan support. Because there is bipartisan support to increase access to food, the bill's sponsor may like have to compromise on some details of their legislation if it will see any affirmative action in congressional committees. The

[122] *Bills We're Supporting*, FOOD RESEARCH & ACTION CTR., https://frac.org/action/bills-we-are-supporting (last visited May, 14, 2021).
[123] Improving Access to Nutrition Act, H.R. 1753, 117th Cong. (2021).
[124] Enhanced Access To SNAP Act, H.R. 1919, 117th Cong. (2021)
[125] *Id.*

good news is that the Biden-Harris Administration is slowly taking steps to move the needle on food insecurity.

Through the American Rescue Plan, President Biden acted to reduce food insecurity by increasing food stamps by more than $1 billion a month.[126] The legislation also gave low-income children $1 each day to purchase snacks and increased an allowance of fresh produce for pregnant women and children.[127] The most important, ambitious, an encouraging component is the USDA's effort to feed about 34 million kids in the largest summer food program in U.S. history.[128] The legislation expanded P-EBT for the summer to include children younger than six who live in households that currently receive SNAP benefits. Although these are great enhancements to P-EBT and mark an extreme shift in policy around poverty and hunger from the previous Trump Administration, the Biden-Harris Administration still has opportunities at its disposal to alleviate hunger. Craig Gunderson, a professor of agricultural and consumer economics at the University of Illinois at Urbana Champaign, suggests the Biden Administration take three steps to alleviate hunger: (1) increase maximum SNAP benefits, (2) expand eligibility for SNAP, and (3) protect the agricultural supply chain underpinning any increases so that it can continue to produce affordable food.[129] Gunderson argues that the tools to nearly eliminate food insecurity are at the Biden Administration's disposal, and, if used, would constitute a monumental achievement for food security.[130]

The recommendations proposed in this comment are to eliminate the disqualification of adults and initiate an automatic enrollment of eligible adults and families into the P-EBT program. This new program has the potential to dramatically affect food insecurity and hunger in communities nationwide. This comment did not address the federal economic impact of significantly expanding P-EBT and further research is necessary to complete a full economic analysis of the program described above.

Beginning with SNAP and then moving to P-EBT, this program could be part of an eventual movement to consolidate all federal benefits into a single application similar to what college students submit for federal aid. The government could eventually even move to automatically enroll eligible participants in federal programs when an individual files his or her taxes.

The P-EBT expansion outlined in this comment is only one proposed piece in the greater fight to end food insecurity and hunger in communities. In addition to the points of further research mentioned throughout this comment, researchers, potentially through the USDA, must work to continue to fully understand and identify solutions to food insecurity during national emergencies.

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[126] Nicole Goodkind, *Biden Administration Takes Credit for Reducing Hunger, Pushes for Permanent Changes*, FORTUNE (May 12, 2021, 2:00 PM), https://fortune.com/2021/05/12/biden-administration-hunger-crisis-food-insecurity-american-rescue-plan/.
[127] *Id.*
[128] Cory Turner, *USDA Moves to Feed Millions of Children Over The Summer*, NPR (Apr. 26, 2021 3:30 PM), https://www.npr.org/2021/04/26/990860172/usda-moves-to-feed-millions-of-children-over-the-summer.
[129] Craig Gunderson, *The Biden Administration Can Eliminate Food Insecurity in the United States – Here's How*, The Conversation (Feb. 2, 2021, 8:11 AM), https://theconversation.com/the-biden-administration-can-eliminate-food-insecurity-in-the-united-states-heres-how-153029.
[130] *Id.*

SAVE OUR COMMUNITY STAGES: HOW PROVIDING FEDERAL RELIEF TO COMMUNTIY THEATRES DURING COVID-19 CAN BENEFIT ALL NONPROFITS

Lindsey O'Neal*

Table of Contents

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INTRODUCTION

In March 2020, the world came to a halt due to the COVID-19 pandemic. As a result, nearly 200,000[1] businesses permanently shuttered their doors while a multitude of others temporarily closed or operated at partial capacity after quarantine ended. The entertainment industry and live performance venues were among the businesses that felt the hit the hardest. Where the purpose of live performances is to entertain crowds of people, quarantine and social distancing restrictions cut the ability to do so immensely. The theatre industry particularly depends on the capability to sit hundreds to thousands of strangers in one room to watch a theatrical performance. With the world still not operating at full capacity, theatres are struggling to keep their doors open through the end of the pandemic, with community theatres having a particularly difficult time due to their small business nature. Without government assistance to stay afloat through the pandemic, community theatres may not survive,[2] and the community theatre industry may become a fraction of what it once was.

In an effort to combat the challenges that theatres and other live performance venues are facing in the pandemic, Congress passed the Save Our Stages Act[3], now officially named the Shuttered Venue Operators Grant Program (SVOG),[4] to give the Small Business Administration (SBA) the ability to grant funding to eligible live venue operators.[5] However, even though the Act will provide relief to small live performance venues across the country, as well as larger commercial theatres, the original wording of the Act excluded community theatre stages because they did not meet the eligibility requirement of having paid artists as employees;[6] community theatres are nonprofit organizations whose artists are volunteers.[7] After this discovery, community theatres pushed back and argued that the Act's language needed to be changed in order to include them.[8] The SBA subsequently changed their eligibility requirements which made community theatres eligible to apply for the grant.[9] Even with this expansion, community

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[1] As of April 2021. Ruth Simon, *Covid-19's Toll on U.S. Businesses? 200,000 Extra Closures in Pandemic's First Year*, THE WALL STREET JOURNAL (Apr. 16, 2021, 9:43 AM), https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619.

[2] Along with the 9 million small businesses in the United States that fear they will have to permanently shut down. Khristopher J. Brooks, *9 Million U.S. Small Businesses Fear They Won't Survive the Pandemic*, CBS NEWS (Feb. 10, 2021, 12:50 PM), https://www.cbsnews.com/news/small-business-federal-aid-pandemic/. ("Three out of every 10 small businesses in the U.S. say they likely won't survive 2021 without additional government assistance during the coronavirus pandemic… Considering there are roughly 30 million small businesses in the U.S., that means 9 million small firms are at risk of closing for good this year.")

[3] Hereinafter referred to as "the SOS Act" or "the Act."

[4] *See* NIVA | NAT'L INDEP. VENUE ASS'N (Mar. 18, 2021), https://static1.squarespace.com/static/5e91157c96fe495a4baf48f2/t/605ba3f82036e87ab23504fc/1616618488449/NIVA-BACKGROUNDER.pdf. While SVOG is the official title of the grant program, it is still also known as the SOS Act. Both names will be used interchangeably throughout this Comment.

[5] SOS Act, § 4258, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/senate-bill/4258.

[6] Jennifer Fierro, *Recently Passed Save our Stages act a Flop for Community Theatres*, DAILYTRIB.COM, https://www.dailytrib.com/2021/02/01/save-our-stages-act-a-flop-for-community-theaters/ (last visited Nov. 11, 2021); Chris Peterson, *"Save our Stages" act Leaves Community Theatres out in the Cold*, ONSTAGE BLOG (Jan. 7, 2021), https://www.onstageblog.com/editorials/save-our-stages-act-will-leave-community-theatres-out-in-the-cold.

[7] Peterson, *supra* note 6.

[8] Christopher Arnott, *Community Theatres Deemed Eligible for Save our Stages Funding After Local Challenge*, HARTFORD COURANT (Feb. 18, 2021), https://www.courant.com/ctnow/arts-theater/hc-ctnow-community-theaters-added-to-save-our-stages-20210218-bnoauafa3neafewjwaeqq3a4pi-story.html.

[9] *Id.*

theatres will be some of the last to apply for the grant because they are in third tier of a three-tier application system.[10] Consequently, community theatres across the country will have to close their doors permanently because they may not be able to receive relief.

This Comment proposes that the federal government should enact legislation so that nonprofit organizations are not excluded from protection during natural disasters simply because they have volunteers as their employees, and that there should be a fund in place reserved for nonprofits to turn to during natural disasters. Part I of this Comment focuses on the importance of community theatres and how theatres in general have been impacted by the COVID-19 pandemic. Part II describes the efforts taken to lobby Congress to create a bill like the SOS Act and provide relief for live performance venues, and it details how theatres were enduring the pandemic through grants primarily before Congress passed the Act. Part II also discusses the provisions of the SOS Act and how the SBA has expanded it recently and how the American Rescue Plan has also provided some relief to live entertainment venues. Additionally, Part II further discusses how the SVOG program has been extended for performance venues. Part III of this Comment discusses proposed solutions to enact legislation or provide funding to grant relief to nonprofit organizations during natural disasters. Finally, this Comment concludes that enacting such legislation is a viable method to aid these nonprofit businesses in keeping their doors open during and after the COVID-19 pandemic, which would in turn help the communities they are located in.

I. SETTING THE STAGE

A. The Importance Of Community Theatres

To understand why it is pertinent to be concerned that community theatres have not received the relief they need during the pandemic, it is necessary to discuss the importance of community theatres. The theatre provides patrons an avenue to escape everyday life and enter a different world. It provides accounts of real-life events as well as fictional stories that prompt thought, dialogue, and joy. It is also a powerful and useful tool to convey a message to its viewers. Community theatres provide these avenues on a smaller scale as opposed to a large theatre such as one on Broadway. Community theatres are small theatres where a community puts on performances for enjoyment and not as jobs.[11] In contrast to large, professional theatre productions, community theatres do not involve "professional stage production, with scripts written by famous writers and artistic scenery created by professional artists."[12] Instead, "community theatre takes its inspiration from the life of the community itself," and "[t]he actors, who are community members, take an active part in all stages of production."[13] Moreover, "[c]ommunity theatres involve more participants, present more performances of more

[10] *Id.*
[11] See *Community Theatre*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/community%20theater (last visited May 5, 2021).
[12] Amnon Boehm, *Community Theatre as a Means of Empowerment in Social Work: A Case Study of Women's Community Theatre*, J. OF SOC. WORK 283, 284 (2003).
[13] *Id.*

productions, and play to more people than any other performing art in the country."[14] Because performances are put on by the theatre's respective community, "those involved represent a diversity of age, culture, life experience, and strong appreciation of the importance of the arts."[15]

1. A Path to the Theatre and Film Industry

In addition to drawing people from different backgrounds together, one of the important aspects of community theatres is that they provide aspiring actors a start to their career and the ability to hone their craft. In fact, numerous actors that occupy television and movie screens today got their start in community theatre, such as Chris Evans, Kristen Bell, Anna Kendrick, Emma Stone, and Kristin Chenoweth to name a few.[16] Community theatres are a way for actors to get their foot in the door of the theatre and film industry—the Anthony Bean Community Theatre in New Orleans, LA describes itself as "a vehicle to enter New Orleans' booming 'Hollywood South' film industry."[17] Even if an individual has a 9 to 5 job and is not attempting to become a professional actor, community theatre is a place they can go to fulfill their joy of live performance as a hobby. Regardless of the reason or the way that people participate, an introduction into the theatre and film industry is not the only important aspect of community theatres, and there are ample positive impacts they have on society.

2. Positive Social Impact

One of the positive impacts that community theatres have on society is the social impact. Community theatres draw people together and prompt discussions about other cultures or sensitive issues in the community. Theatre also inspires people and helps build long-lasting relationships within the community it has created. The theatre is home to many diverse individuals, and it allows people in communities to "express themselves in a safe, welcoming environment."[18] It is a place where disadvantaged individuals can go, and it allows diverse groups of people to interact with each other when they may not normally do so.[19] This inspires discussion about others' life experiences, leading to a more connected community as "diverse groups can share common experiences, hear new perspectives and better understand each other."[20] This allows individuals to recognize and appreciate other people and experiences which they are not typically exposed to. Additionally, participation in cultural activity, such as

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[14] *Community Theatre Impact & History*, AACT, https://aact.org/community-theatre-impact-history#:~:text=Community%20theatre%20enriches%20the%20lives,the%20importance%20of%20the%20arts (last visited May 5, 2021).
[15] *Id.*
[16] Robert Peterpaul, *7 Famous Actors who got Their Start in Community Theatre*, THEATRE NERDS, https://theatrenerds.com/7-famous-actors-got-start-community-theatre/ (last visited Nov. 11, 2021).
[17] *Anthony Bean Community Theatre & Acting School*, ANTHONY BEAN THEATRE, http://www.anthonybeantheater.com/ (last visited May 5, 2021).
[18] Lionheart Theatre, *How the Arts Impact Communities*, LIONHEART THEATRE COMPANY (Aug. 3, 2015), https://lionhearttheatre.org/how-the-arts-impact-communities__trashed/.
[19] *Id.*
[20] Sarah Sidman, *5 key Ways the Arts Drive Economic & Community Development*, AMS. FOR THE ARTS (Feb. 4, 2016), https://blog.americansforthearts.org/2019/05/15/5-key-ways-the-arts-drive-economic-community-development.

community theatre, directly correlates to an increase in civic and social engagement,[21] including voting, volunteering, and charitable work.[22] This naturally follows the principle that community arts projects promote learning the necessary skills for civic and social engagement, "such as negotiating, public speaking, planning, and decision making."[23] Moreover, those who attend showcases for community arts programs—at least once per year—have a higher level of social tolerance towards racial minorities and LGBTQIA+ individuals.[24] Bringing people together, fostering civic and social engagement, and increasing social tolerance are only a few of the positive social impacts that community theatres have on communities.

Community theatre also leaves a long-lasting impact on community youth. "Early exposure to the arts improves educational outcomes and builds confidence, creativity and discipline in our children, teaching them about empathy, creative problem solving and self-expression."[25] In addition to being entertaining, theatre can be educational. Students who attend a Shakespeare play at their local community theatre may get a better sense of the material than they would from just reading it in the classroom.[26] Moreover, children and teenagers that are socially and economically disadvantaged show greater outcomes in academics and civic engagement when they have high levels of arts engagement compared to children and teenagers that are not engaged in arts experiences.[27] Academically, "[t]eenagers and young adults of low socioeconomic status (SES) who have a history of in-depth art arts involvement show better academic outcomes than do low-SES youth who have less arts involvement."[28] Additionally, similar to adults, teenagers with high arts experiences are more likely to be civically engaged "as evidenced by comparatively high levels of volunteering, voting, and engagement with local or

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[21] Jennifer L. Novak-Leonard & Alan S. Brown, *Beyond Attendance: A Multi-Modal Understanding of Arts Participation*, NAT'L ENDOWMENT FOR THE ARTS, 61 (2008) https://www.arts.gov/sites/default/files/2008-SPPA-BeyondAttendance.pdf. ("Respondents who reported both creative and attendance-based arts activit[ies] between May 2007 and May 2008 were six times as likely as those who reported no arts participation to do volunteer or charity work in their community… the pattern of results suggests that Americans who attend arts programs and who express themselves creatively through the arts are also more engaged civically, socially, and physically.").

[22] *Id.*; Kelly LeRoux & Anna Bernadska, *Impact of the Arts on Individual Contributions to U.S. Civil Society*, ART WORKS 6, https://www.arts.gov/sites/default/files/Research-Art-Works-Chicago.pdf.

[23] Kelly LeRoux & Anna Bernadska, *Impact of the Arts on Individual Contributions to U.S. Civil Society*, ART WORKS 6, https://www.arts.gov/sites/default/files/Research-Art-Works-Chicago.pdf.

[24] *Id.* at 17.

[25] Sidman, *supra* note 20.

[26] Keenimages, *Supporting the Arts—Why Community Theatre is Important*, INDIE BIRDS (Dec. 29, 2018), https://www.indiebirds.com/supporting-the-arts-why-community-theatre-is-important/.

[27] JAMES S. CATTERALL ET AL., NAT'L ENDOWMENT FOR THE ARTS, THE ARTS AND ACHIEVEMENT IN AT-RISK YOUTH: FINDINGS FROM FOUR LONGITUDINAL STUDIES 24 (2012), https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf. The National Endowment of the Arts conducted a 2012 study to "examine[] the academic and civic behavior outcomes of teenagers and young adults who have engaged deeply with the arts in or out of school." *Id.* at 8.

[28] *Id.* at 12. Specifically, the study found that: (1) eighth graders who had high levels of arts engagement during their years in elementary school had higher test scores in science and writing than that of their low-arts-engaged peers; (2) high schoolers who had high levels of arts engagement were more likely to complete a calculus course and had higher G.P.A.s in math than students that did not have arts experiences; (3) high schoolers with arts-rich experiences had higher overall G.P.A.s than their peers (the study observed this with high-SES high school students as well); (4) high-arts-engaged eighth graders and high schoolers were more likely to aspire to college; (5) high-arts-engaged high schoolers enrolled in competitive four-year colleges at a higher rate; (6) students who had high arts experiences in high school were three times more likely to earn a bachelor's degree than student that lacked arts experiences. *Id.* at 12-16.

school politics."[29] At the same time, while community theatre is valuable for academic and civic aspects, it also promotes creativity and confidence in young people.[30]

3. Positive Individual Impact

Another positive impact that community theatres have on society is the impact on the individual. Like young people, participating or observing theatre increases creativity in adults as well.[31] Additionally, being involved in theatre has a positive psychological impact on adults. For one, it gives individuals a greater "sense of belonging or attachment to a community."[32] It also increases one's self-esteem,[33] and it gives a stronger sense of empowerment.[34] While these intrapersonal and interpersonal impacts are significant, they are not the only positive effects that community theatres have on society.

4. Positive Economic Impact

Lastly, in addition to the positive social and individual impacts, it is no question that the community theatre industry has a positive economic impact on communities.[35] One of the main reasons for this is that it increases tourism.[36] For instance, "[a]s a community's art programs become stronger, more visitors tend to come to the area to take part," and tourists "may learn of an event while they are in town and decid[e] to stay longer."[37] In addition to tourism, communities with arts programs "attract more residents to the area, which in turn attracts more businesses,"[38] thus promoting growth which leads to more investments in the community.[39]

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[29] *Id.* at 17. The study found this result in both low-SES and high-SES students. *Id.*
[30] Joshua Guetzkow, *How the Arts Impact Communities: An Introduction to the Literature on Arts Impact Studies* 11 (2002), https://culturalpolicy.princeton.edu/sites/culturalpolicy/files/wp20_-_guetzkow.pdf; Sydney R. Walker, It's Not All Just Child's Play: A Psychological Study on the Potential Benefits of Theatre Programming with Children 8 (May 2014) (Thesis, Univ. of Maine) https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=1197&context=honors; LionHeart Theatre, *What Kids get out of the Community Theatre Experience*, LIONHEART THEATRE COMPANY (Aug. 3, 2015), https://lionhearttheatre.org/what-kids-get-out-of-the-community-theater-experience__trashed/.
[31] Guetzkow, *supra* note 30, at 11.
[32] *Id.* at 3.
[33] *Id.*
[34] *See generally* Boehm, *supra* note 12.
[35] *See* Lionheart Theatre, *supra* note 18.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

Furthermore, a multitude of community theatres qualify as nonprofits,[40] and in a 2015 study[41] evaluating the nonprofit art industry's economic impact, Americans for the Arts[42] found that, "nationally, the industry generated $166.3 billion of economic activity during 2015—$63.8 billion in spending by arts and cultural organizations and an additional $102.5 billion in event-related expenditures by their audiences. This activity supported 4.6 million jobs and generated $27.5 billion in revenue to local, state, and federal governments."[43] Community theatres are a part of the nonprofit art industry with significant contributions to the economy; losing these businesses because they must close their doors due to COVID-19 would negatively impact that economic contribution considerably.

All in all, the social, individual, and economic impacts that community theatres have on society show that they are an essential aspect of our communities, and these reasons illustrate why their closing is an issue. Even so, as community theatres are just a part of the larger theatre industry that has come to a halt, community theatres are not the only stages that have been negatively impacted by the COVID-19 pandemic.

B. THE EFFECT OF COVID-19 ON ALL THEATRES

Community theatres were among the many live performance stages that had to close their doors due to the pandemic.[44] For example, on March 12, 2020, every production from Broadway to high school plays were completely shut down.[45] Additionally, Broadway theatres remained closed until September 14, 2021—seventeen to eighteen months after the initial shut down that was only supposed to last one month.[46] Theatres were "among the first to shut down at the start of the pandemic,… and will be among the last to reopen."[47] In addition to theatres shutting their

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[40] Doug Bechtel, *Why a Non-Profit Theatre Company?*, THE HOME OF PROFESSIONAL AMATEURS, http://www.communitytheater.org/articles/business/nonprofit.asp (last visited May 5, 2021). ("Section 501(c) of the IRS Code lists almost two dozen types of organizations which may be exempt from federal income taxes… Section 501(c)(3), which refers to organizations formed exclusively to accomplish 'religious, charitable, scientific, literary or educational' purposes. Community theaters fall into this classification.") In these instances, the community theatre may pay its employees, but it cannot compensate a board member or an officer as a high percentage of its gross income. Also, most of community theatres' income comes from public support—i.e. ticket sales—further solidifying them as a nonprofit. As long as community theatres do not contribute to political candidates, take part in any of the "forbidden activities" listed by the Internal Revenue Service (IRS), provide the IRS with "financial statements for a period of operation," then they will be able to qualify as a nonprofit. *Id.*

[41] This study is known as Arts and Economic Prosperity V—Americans for the Arts' "fifth study of the nonprofit arts and culture industry's impact on the economy." *National Findings*, AMS. FOR THE ARTS, https://www.americansforthearts.org/by-program/reports-and-data/research-studies-publications/arts-economic-prosperity-5/learn/national-findings (last visited May 5, 2021).

[42] "Founded in 1960, Americans for the Arts is the nation's leading nonprofit organization for advancing the arts and arts education." AMS. FOR THE ARTS, https://www.americansforthearts.org/ (last visited May 5, 2021).

[43] *National Findings*, *supra* note 46.

[44] *Coronavirus in Context: The Impact of COVID-19 on Theatre and Entertainmen*t, WEBMD (June 22, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-ahrens-elizabeth-stanley.

[45] *Id.*

[46] Johnny Oleksinski & Juliet Norman, *Here's Which Broadway Shows Are Reopening and How to Get Tickets*, NY POST (June 29, 2021, 10:53 AM), https://nypost.com/article/broadway-shows-whats-reopening-when-and-how-to-get-tickets/.

[47] Caitlin Murphy, *Local Independent Theatre, Performing Arts Venues to Receive Federal aid Through "Save Our Stages" Act*, WENY NEWS (Jan. 25, 2021, 12:35 PM), https://www.weny.com/story/43105568/local-independent-theater-performing-arts-venues-to-receive-federal-aid-through-save-our-stages-act.

doors and cancelling shows that companies prepared and rehearsed for months, "subscriptions and ticket sales [had to be] refunded and there [were] massive layoffs in all 50 states."[48] Within the first few months of the pandemic shutdown, financial losses in America's nonprofit arts sector were estimated to be $3.2 billion.[49] In addition to financial loss, the unemployment rate of actors raised from 24.7% in 2019 to 52.3% in 2020.[50] However, actors were not the only employees of theatres that lost their livelihood—lighting technicians, set designers, costume designers, carpenters, stage managers, and others also became suddenly unemployed.[51] Tens of thousands of individuals that relied on their salary from theatre productions have been cut off from their income for over a year, which has caused worry about paying for necessities such as food, rent, and utilities.

Moreover, theatres themselves still have had operating costs that they could not pay such as rent, mortgages, utilities, and insurance even with no performances going on.[52] While theatres could have applied for the Paycheck Protection Program (PPP) that was signed into law as part of the original CARES Act[53] on March 27, 2020,[54] this relief was not viable to support them because the PPP was not really made for live venues.[55] The PPP provides loans to small businesses to help keep their employees on payroll.[56] However, forgiveness of the loan depends on 60%[57] of the proceeds being used for payroll costs.[58] This is an issue for theatres and live performance venues in general because it has been unsafe for venues to re-open, so there were no employees to re-hire.[59] Additionally, it "penalizes companies with many part-time employees" because funding was available to businesses with fewer than a full headcount of 500 employees, and many live venues depend on part-time employees, so they exceeded that number.[60] Moreover, the PPP focuses on payment of payroll, but that is not the main or even largest

[48] MaryAlice Parks, *Coronavirus may Have Devastated the Theatre World. Artists are Adapting*, ABC NEWS (Mar. 26, 2020, 11:23 AM), https://abcnews.go.com/Business/coronavirus-devastated-theater-world-artists-adapting/story?id=69750362.
[49] *Nonprofit Arts Organizations Across the Country are in Economic Freefall Because of COVID-19 and our Federal Government Must Help*, AMS. FOR THE ARTS (Mar. 18, 2020), https://www.americansforthearts.org/news-room/press-releases/nonprofit-arts-organizations-across-the-country-are-in-economic-freefall-because-of-covid-19-and-our.
[50] Greg Guibert & Iain Hyde, ANALYSIS: COVID-19'S IMPACT ON ARTS AND CULTURE 5, https://www.arts.gov/sites/default/files/COVID-Outlook-Week-of-1.4.2021-revised.pdf.
[51] Parks, *supra* note 47.
[52] *See* Peterson, *supra* note 6; Fierro, *supra* note 6.
[53] *What do Businesses Need to Know About Paycheck Protection Program Loan Forgiveness?*, PAYCHEX (May, 5, 2021), https://www.paychex.com/articles/compliance/payroll-protection-program.
[54] Emily Cochrane & Sheryl Gay Stolberg, *$2 Trillion Coronavirus Stimulus bill is Signed into law*, THE NEW YORK TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html.
[55] *About NIVA*, #SAVEOURSTAGES, https://www.saveourstages.com/about-us (last visited May 5, 2021).
[56] *Paycheck Protection Program*, SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program (last visited May 5, 2021).
[57] Lowered from 75%. *PPP and Loan Forgiveness: Latest Guidance and Changes Under the PPP Flexibility act*, NOSSAMAN LLP (June 8, 2020), https://www.nossaman.com/newsroom-insights-ppp-and-loan-forgiveness-latest-guidance-and-changes-under-the-PPP-flexibility-act.
[58] *PPP Loan Forgiveness*, SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness (last visited May 5, 2021).
[59] *About NIVA*, *supra* note 55.
[60] *Id.*

expense that live venues and theatres incur—their main expenses are operating costs, so they need funding to cover those until they can fully and safely re-open.[61]

However, even with no relief funding available to them, theatres have found ways to adapt to the changes and restrictions.[62] Since theatres cannot operate at full capacity and all live performances have ceased, they have developed creative ways to put on performances.[63] Some have written new scripts specifically for outdoor spaces, where patrons can either sit in their cars or bring their own lawn chairs and watch the performance in a park.[64] Others have turned to Zoom[65] to give virtual performances.[66] These performances may be a previous play that the theatre has performed before or "live staged readings of plays and musicals."[67] Still, even with adapting to this new normal they have created, theatres and their employees are struggling to stay afloat, and they need government assistance to survive. Even before COVID-19, community theatres had to find creative and necessary methods to stay open.

1. How Theatres Were Staying Afloat Before Their S.O.S.

During the pandemic, community theatres have had to find ways to survive without any government assistance. Among the other methods that were mentioned in the above section, theatres can also apply for non-government assistance programs and relief funds that have been created as a result of the pandemic,[68] but those resources cannot provide relief to all venues in need. Additionally, as discussed later in Part II Section D: The American Rescue Plan, the National Endowment for the Arts (NEA), a federal agency that provides funding to support arts learning and projects,[69] has also been given funding to provide to live performance venues with relief, but that funding is limited.[70] Nonetheless, even before the pandemic, community theatres still had to struggle and find ways to stay up and running.[71] Before the shutdown, theatres mainly

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[61] *Id.*
[62] *See* Mark Loewenstern, *How Live Theatre is Innovating its way Through the Pandemic*, BARRON'S (Oct. 15, 2020), https://www.barrons.com/articles/how-live-theater-is-innovating-its-way-through-the-pandemic-51602599501.
[63] *Id.*
[64] *Id.*
[65] Zoom is a cloud platform for video, voice, content sharing, and chat that allows businesses, organizations, schools, and other groups to meet virtually. *About Us*, ZOOM, https://explore.zoom.us/about (last visited May 5, 2021).
[66] Loewenstern, *supra* note 62.
[67] *Theatre Community Rallies, Adapts During COVID-19 Pandemic*, AUBURN UNIVERSITY (Apr. 23, 2020), http://ocm.auburn.edu/experts/2020/04/230928-theatre-community-covid19.php.
[68] *See generally SDCF COVID-19 Resource List*, STAGE DIRECTORS AND CHOREOGRAPHERS FOUND., https://sdcfoundation.org/conversations-community/sdcf-covid-19-resource-list/ (Aug. 14, 2020). The Stage Directors and Choreographers Foundation provides a list of resources for arts organizations and artists struggling from the impacts of the pandemic. This list includes websites to search for grants and funds as well as actual grants among other resources. These resources include general funds as well as state specific funds, and they cover a wide range of arts programs and artists including theatre, dance, music, and art.
[69] NAT'L ENDOWMENT FOR THE ARTS, https://www.arts.gov/ (last visited May 5, 2021).
[70] *Americans for the Arts and Americans for the Arts Action Fund React to Passage of American Rescue Plan*, AMS. FOR THE ARTS (Mar. 10, 2021), https://www.americansforthearts.org/news-room/press-releases/americans-for-the-arts-and-americans-for-the-arts-action-fund-react-to-passage-of-american-rescue.
[71] Holly Lucas, *Why is it so Hard to Make a Profit in Community Theatre?*, ONSTAGE BLOG (June 4, 2019), https://www.onstageblog.com/editorials/2019/6/4/why-is-it-so-hard-to-make-a-profit-in-community-theatre.

had to rely on their sales from performances, donations from fundraising, and grant programs, including possible funding from the NEA.[72]

a. Performances and Donations from Fundraising

Putting on theatre performances is an expensive endeavor, and most community theatres just try to break even.[73] Accordingly, making a profit is not common.[74] Before the pandemic, a main source of income for community theatres was ticket sales from performances.[75] Even then, planning to put on a sold-out show for every performance was unrealistic, so theatres had to plan for a hopeful 75% of ticket sales,[76] which would only cover a portion of their expenses.[77]

The rest of their revenue would have to come from donations and fundraising events.[78] These fundraising events would be essential and could include marketing efforts and phone calls to donors,[79] putting on a smaller performance once a year in addition to a usual large production, carol singing at supermarkets, mini-concerts, raffles, and even smaller efforts like bake sales.[80]

This "revenue [would be] funneled back into the theater and the many expenses that arise, including rent, insurance, electricians, play royalties and utilities, not to mention the sets and costumes associated with each show."[81] Theatres would try to keep these expenses low by volunteering their time and borrowing costumes, sets, props, and even chairs for the audience from regional theatres as well as using conference rooms in hotels, restaurants, or old barns as rehearsal spaces and places to build large sets.[82] However, even while attempting to reduce costs, it would be difficult for these venues to make their payments on time.[83] Consequently, theatres would have to turn to additional methods to get the funding they need.

b. Grant Programs

In addition to their revenue from ticket sales and donations from fundraising, many community theatres were able to apply to grant programs.[84] These programs would include government and foundation grants[85] or even private grants from businesses you would least

[72] *See* Kevin Brass, *What It Takes to Keep a Community Theatre Running*, THE WALL STREET JOURNAL (Nov. 3, 2014) https://www.wsj.com/articles/what-it-takes-to-keep-a-community-theater-running-1414965272
[73] *Id.*
[74] Lucas, *supra* note 71.
[75] Brass, *supra* note 72.
[76] Lucas, *supra* note 71.
[77] *See* Brass, *supra* note 72. (The Aspen Community Theatre in Aspen, CO had an annual budget of about $120,000 in 2014, and "[a]bout 30% of that money comes from one major fundraising campaign a year, a mailer targeting its donor base. Revenue from the show covers the remaining 70%.")
[78] *Id.*
[79] *Id.*
[80] Lucas, *supra* note 71.
[81] Brass, *supra* note 2.
[82] *Id.*
[83] *Id.*
[84] Lucas, *supra* note 71.
[85] *Fundraising and Grants*, AACT, https://aact.org/fundraising-grants (last visited May 5, 2021).

expect.[86] For example, The American Theatre Wing is a New York City based organization that "invest[s] financial and educational support in creatives designed to make theatre," and they "provide grants and scholarships" to American theatres.[87] They have four different grants that they award to individuals and theatre companies for different accomplishments in theatre, such as theatre education and song-writing for musicals.[88] There are also grants available in different locales for theatres and other arts programs that are a quick Google search away. For instance, the Arts Council New Orleans[89] has a page on their website dedicated to different grants available for arts programs to apply to.[90] The different types of grants that theatres can apply for range from grants specifically for theatre equipment[91] to general grants for any type of project that a theatre is working on.[92]

Moreover, even before the pandemic, the NEA has had grants that arts organizations could apply to for funding through its principal grants program, Grants for Arts Projects,[93] where it "awards more than $120 million annually with each grant dollar matched by up to nine dollars from other funding sources."[94] These grants are offered to "nonprofit and musical theatre fields for the production or presentation of traditional or classical repertoire, new plays and musicals, development laboratories, showcases, artist residencies, work for young audiences, experimental work, community-based work, outdoor historical dramas, and puppetry."[95] The NEA has provided funding to theatre and musical theatre programs totaling $335.5 million since the year after its inception in 1966.[96]

However, even with the copious amounts of grant programs that community theatres could apply to, there was never a guarantee that they would receive many or any at all, so they still had to persevere to obtain earnings just to break even. These methods community theatres use to acquire their revenue illustrate how assiduously they had to work just to secure funding while they were open pre-pandemic, and now they are struggling even more without the ability to put on performances. Therefore, government assistance is necessary to provide relief and keep community theatres' doors open. To obtain this government assistance, the National Independent

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[86] Lucas, *supra* note 71. (One community theatre group "was sent a generic email by a supermarket about a grant scheme they were running,…and they ended up getting £1000 from it.")
[87] *About the Wing*, AMERICAN THEATRE WING, https://americantheatrewing.org/about/ (last visited May 5, 2021).
[88] *Grants*, AMERICAN THEATRE WING, https://americantheatrewing.org/grants/ (last visited May 5, 2021).
[89] The Arts Council New Orleans is "a private, nonprofit organization dedicated to supporting arts and culture in" New Orleans. *About the Arts Council New Orleans*, ARTS COUNCIL NEW ORLEANS, http://www.artsneworleans.org/about/ (last visited May 5, 2021).
[90] *Grant Programs*, ARTS COUNCIL NEW ORLEANS, http://www.artsneworleans.org/grants/ (last visited May 5, 2021).
[91] *Grants for Theatre Equipment*, ILLUMINATED INTEGRATION (Jan. 6, 2021), https://illuminated-integration.com/blog/grants-for-theater-equipment/.
[92] *Theatre: Funders*, INSIDE PHILANTHROPY, https://www.insidephilanthropy.com/fundraising-theater-grants (last visited May 5, 2021).
[93] *Grants for Arts Projects: Program Description*, NAT'L ENDOWMENT FOR THE ARTS, https://www.arts.gov/grants/grants-for-arts-projects/program-description (last visited May 5, 2021).
[94] *Theatre Facts Sheet*, NAT'L ENDOWMENT FOR THE ARTS (2019), https://www.arts.gov/sites/default/files/Theater_FactSheet_7.15.19.pdf.
[95] *Theatre & Musical Theatre Fact Sheet*, NAT'L ENDOWMENT FOR THE ARTS (2016), https://www.arts.gov/sites/default/files/Theater_fact_sheet_nov2016.pdf.
[96] As of 2016. *Id.*

Venue Association (NIVA) formed to respond to the S.O.S from live performance venues and began their lobbying efforts to acquire relief for these businesses.[97]

II. THE PERFORMANCE

A. Lobbying to Obtain Relief

In an effort to survive the negative effects live venues experienced during the pandemic lockdown, NIVA began lobbying Congress to provide federal aid to these venues and became the driving force behind getting the SOS Act passed.[98] Created in April 2020, just a few weeks after the country went into lockdown, NIVA is comprised of a group 3,000 independent venues from all 50 states and D.C. that have been shut down during the pandemic.[99] NIVA launched a grassroots movement called #SaveOurStages[100] where NIVA members and fans sent 2.1 million emails to their elected officials and implored them to support the SOS Act.[101] A group of 600 well-known artists[102] and comedians[103] even signed a letter to Congress urging them to provide financial support to live performance venues.[104]

After the initial lobbying through this movement, Senators John Cornyn (R-TX) and Amy Klobuchar (D-NY) introduced the SOS Act on July 22, 2020.[105] Within one month, former Senate Minority leader Charles Schumer (D-NY) joined as a co-sponsor for the bill.[106] However, despite the facts that the bill was introduced, gained widespread support from elected officials, and was included in the updated HEROES Act,[107] it took five additional months of lobbying and negotiation before the Act passed in the $900 billion second federal COVID-19 relief package.[108] Even after the Act was signed into law on December 27, 2020, live performance venues were not able to apply for the grant until April 8, 2021.[109]

While the remarkable lobbying and negotiating efforts of NIVA were essential to the passing of the SOS Act, the Act itself was primarily music-venue focused—not arts venues in general.[110] Consequently, community theatres were excluded from applying for the grant because

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[97] NIVA, *supra* note 4.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] #SAVEOURSTAGES, https://www.saveourstages.com/ (last visited May 5, 2021).
[102] Such as Lady Gaga, Willie Nelson, Billie Eilish, and Billy Joel. NIVA, *supra* note 3.
[103] Such as Tiffany Haddish, Jay Leno, and Jerry Seinfeld. *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] The Heroes Act, H.R. 6800, 116th Cong. (2019-2020) (enacted). https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/SUPP_SEP_01_ALL_xml.2020.9.28.1753.pdf.
[108] NIVA, *supra* note 4.
[109] Andrew Marquardt, *Indie Music Venues will Finally be Able for Stimulus Money Starting April 8*, FORTUNE (Mar. 19, 2021, 1:24 PM), https://fortune.com/2021/03/19/indie-music-venues-federal-stimulus-funding-sba-sos-act-svog-applications-april-8/.
[110] Arnott, *supra* note 8; Heather Bushman, *Save Our Stages Act Passes with COVID-19 Stimulus bill*, ALLIGATOR (Jan. 11, 2021, 8:24 AM), https://www.alligator.org/article/2021/01/save-our-stages-act-passes-with-covid-19-

they were not eligible under the original application requirements of the SOS Act. The exact provisions of the Act are discussed further in the next section.

B. The Save Our Stages Act

After months of lobbying and negotiations while live performance venues struggled to stay open, on December 21, 2020, Congress passed the $900 billion Coronavirus Response and Relief Act Supplemental Appropriations Act, which included Section 324: Grants for Shuttered Venue Operators (formerly the Save Our Stages Act).[111] The package had "$15 billion set aside for independent venues, Broadway theaters, movie theaters, talent agencies and museums."[112] Of that $15 billion, $10 billion was exclusively set aside for live venues.[113] Under the provisions of the Act, the SBA has been charged with distributing the funds and has the authority "to make grants to eligible live venue operators, producers, promoters, or talent representatives to address the effects of the COVID-19 (i.e., coronavirus disease 2019) pandemic on certain live venues."[114] The SBA may provide live venues grants equal to 45% of their gross revenue from 2019, with a maximum amount of $10 million[115] for a single grant.[116] The funding aids "in payroll and benefits for venue employees, rent and mortgage, utilities, insurance, and other business expenses,"[117] and can only be used to pay these operating costs.[118] Moreover, costs incurred from March 1, 2020 to December 31, 2021 are allowable expenses.[119] However, businesses that applied for a PPP loan after December 27, 2020 (the day the Act was signed into law) will not be eligible to apply for the SVOG.[120] This presented a problem as businesses were struggling to stay open without any assistance during the months after the Act went into law since venues were not able to apply for grant funding until April 2021.[121]

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stimulus-bill; *SAVE OUR STAGES ACT (Community Theatres Excluded From Funding)*, CURTAIN CALL (Jan. 1-31, 2021), https://www.curtaincallinc.com/shows/save-our-stages-act-community-theatres-excluded-from-funding/.

[111] Josh Terry, *Independent Venues Finally got a $15 Billion Bailout. What's Next?*, VICE (Jan. 12, 2021, 11:48 AM), https://www.vice.com/en/article/m7a5g3/independent-entertainment-music-venues-save-our-stages-bailout.

[112] Jon Blistein, *Save Our Stages: How an Industry Hail Mary Became Live Music's $15 Billion Lifeline*, ROLLING STONE (Dec. 22, 2020, 4:51 PM), https://www.rollingstone.com/music/music-features/live-music-save-our-stages-relief-1107081/.

[113] Michael Broerman, *Save our Stages act Passes in Congress, Paving the way for Billions in Grants*, LIVE FOR LIVE MUSIC (Dec. 22, 2020), https://liveforlivemusic.com/news/save-our-stages-act-passed-congress/.

[114] S. 4258, *supra* note 5.

[115] This amount was lowered from that $12 million was proposed in the original bill introduced to Congress by Sens. Cornyn and Klobuchar. *Id.*

[116] *Shuttered Venue Operators Grant*, SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/shuttered-venue-operators-grant#section-header-1 (last visited May 5, 2021); STATEMENT FROM THE NATIONAL INDEPENDENT VENUE ASSOCIATION REGARDING PASSAGE OF THE SAVE OUR STAGES ACT, NAT'L INDEP. VENUE ASS'N (Dec. 21, 2020), https://static1.squarespace.com/static/5e91157c96fe495a4baf48f2/t/5fe1386e76f612648cb483f2/1608595566029/sos+act+passage+%281%29.pdf.

[117] Bushman, *supra* note 110.

[118] Broerman, *supra* note 113.

[119] Bushman, *supra* note 110.

[120] *Updated Information on "Shuttered Venue Operators Grant" Program*, KPMG, https://home.kpmg/us/en/home/insights/2021/03/tnf-updated-information-shuttered-venue-operators-grant-program.html (last visited May 5, 2021).

[121] Marquardt, *supra* note 109.

To apply for the SVOG, applications are processed under a three-tier system. The first priority level stipulates that "[i]n the first 14-day period, applications from eligible entities that have faced 90% or greater earned revenue loss between April 2020 through December 2020 due to the COVID-19 pandemic," would be processed.[122] Further, the second priority level specifies that "[i]n the second 14-day period following the initial period, applications from eligible entities that have faced 70% or greater earned revenue loss between April 2020 through December 2020 due to the COVID-19 pandemic," would be processed next.[123] Finally, the third priority level states that "[a]fter the first 28-day period, applications from entities that suffered a 25% or greater earned revenue loss between one quarter of 2019 and the corresponding quarter of 2020," would be the last to be processed.[124] After these priority periods, businesses that suffered a 70% or greater loss for the most recent quarter may apply for a supplemental grant in addition to the one they received in the first, second, or third priority periods.[125] To ensure that the grant funding is not completely depleted within the first two priority periods, the funds given out in the first two periods "cannot exceed 80% of the total funds appropriated under the SVOG program."[126] Moreover, $2 billion is specially reserved for eligible applicants with up to 50 full-time employees.[127]

To be eligible to apply for the SVOG, the business entity must "have been fully operational as of February 29, 2020, and currently be open (or intend to re-open)."[128] Additionally, venues must have had at least a 25% drop in revenue on quarter of 2020.[129] Moreover, eligible businesses may be nonprofits, state or local government agencies, or even for-profit entities.[130] However, businesses that are "publicly traded company[ies], have offices in more than one country, have 500 or more employees, received 10% or more of their funding from the federal government, or have offices in more than ten states" will not qualify for the grant.[131] This stipulation is effective in that it excludes publicly traded and multinational corporations, and it illustrates the purpose of the Act to get relief funding in the hands of live venues that needed it most.[132] Furthermore, for live venues to qualify, they must sell tickets or have a cover charge for patrons to attend most performances.[133] Also, venue artists "must be paid fairly. They cannot perform for free or solely for tips."[134] This last eligibility requirement is where the issue lies for community theatres.

1. How the Act Excluded Community Theatres

[122] *Updated Information on "Shuttered Venue Operators Grant" Program*, *supra* note 120.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Andy Gensler, *Not Saved by Save our Stages: Majority of Live Businesses will not Benefit From new Relief Bill*, POLLSTAR (Dec. 30, 2020, 12:43 PM), https://www.pollstar.com/article/not-saved-by-save-our-stages-majority-of-live-business-will-not-benefit-from-new-relief-bill-147062.
[132] Blistein, *supra* note 112.
[133] Fierro, *supra* note 6.
[134] *Id.*

The original SVOG certainly provided relief to commercial theatre venues, such as Broadway, but it excluded smaller community theatres.[135] The stipulation that in order to receive aid, artists cannot play for free or solely on tips presented a problem for community theatres.[136] This is due to the fact that most community theatres do not pay their performers since the community is volunteering their time to put on performances.[137] Even though it is possible that this language was included so as to distinguish live performance venues from restaurants or bars that offer live music not in a professional manner, it directly impacted community theatres negatively and excluded them as well.[138] The "'paid fairly' clause" exemplifies the argument that the SOS Act was created primarily as a relief for music venues and not arts venues in general.[139] While "[t]he lack of pay for actors is unfortunate, [] it is a legitimate business plan that community theatres have followed for decades, [and] it gives amateurs performance opportunities they would otherwise never get."[140]

Furthermore, even though community theatres do not pay their performers, they still have other expenses such as rent and utilities[141] and other overhead expenses such as insurance and accounting, as well as fees for the rights to the plays and musicals that they perform. [142] Moreover, even though the actors are volunteers, the rest of the crew is comprised of professionals that are paid employees of the theatre, including the directors, lighting and sound technicians, stage and costume designers, and others.[143] Additionally, community theatres are having to upgrade to their facilities to make COVID-related improvements such as touchless sinks and other touchless bathroom equipment as well as new ticketing systems for online sales.[144]

Without the funds from SVOG or revenue that cannot be earned until it is safe to re-open, many community theatres will have to close permanently since they will not be able to keep the theatre buildings running.[145] Consequently, while larger theatres, like that of Broadway, would be able to receive grant relief under this stipulation, small community theatres were left in the dust. As a result of this, community theatres began their own lobbying efforts to obtain relief and called for an expansion of the eligibility requirements from the SBA.

C. Eligibility Expansion from The Small Business Administration

[135] Peterson, *supra* note 6; Christopher Arnott, *Community Theatres, Shut out of COVID Relief Funding, Lobby for Help*, HARTFORD COURANT (Jan. 19, 2021, 6:00 AM), https://www.courant.com/ctnow/arts-theater/hc-ctnow-community-theater-ineligible-covid-relief-20210119-e34rel2lgrgmjegen2jtce5kxm-story.html [hereinafter Arnott #2].
[136] *Id.*
[137] Peterson, *supra* note 6.
[138] Arnott, *supra* note 8.
[139] *Id.*; *See* Gensler, *supra* note 131.
[140] Arnott #2, *supra* note 135.
[141] *Id.*
[142] Fierro, *supra* note 6.
[143] Arnott #2, *supra* note 135.
[144] *Id.*
[145] Peterson, *supra* note 6.

Soon after the passing of the SVOG, community theatres realized that they were not eligible to apply for the grant,[146] so members of the community theatre industry began to lobby Congress to change the Act's language and expand the types of venues that may be eligible to apply for the grant.[147] Lou Ursone of Stamford's Curtain Call Inc., "a nonprofit theatre in Stamford, CT with multiple performance spaces, shows year-round,. . . and lots of educational programs,"[148] spearheaded the lobbying to change the eligibility requirements.[149] He challenged the bill's language by arguing that the definitions of venues that were eligible to apply for the grant were "based on perceptions of music venues, not arts venues in general."[150] Ursone brought the "pay-the-artist provision" to Congress's attention and explained that it excluded community theatres from applying because they do not pay actors, but community theatres are still "established art institutions which can have professional staffs, million-dollar budgets, and serve audiences in tens of thousands."[151] After lobbying his state legislators, Senators Richard Blumenthal (D-CT) and Chris Murphy (D-CT) and Congressman Jim Himes (D-CT) wrote letters in support of this challenge to change the grant's eligibility requirements.[152] Other theatre celebrities lent their support by writing letters as well.[153]

Ursone's lobbying efforts, emphasis on the importance of community theatres, and explanation of how their exclusion from the grant is detrimental, resulted in the SBA's ultimate agreement to change the wording of the requirements since they are the agency that has the task of distributing the funds.[154] The new language does not change the SOS bill itself, but it changes the SBA's stipulated requirements, now stating that "actors need not be paid as long as production personnel are paid," allowing community theatres to be eligible to apply for grant funding.[155] However, even with the ability to apply, it may be unlikely that community theatres will receive the necessary amount of grant funding they need to cover their operating costs.[156] This is due to the fact that they are in the third priority tier of the three-tier application system, so there is concern that by the time the SBA processes applications for smaller nonprofits like community theatres, the grant funding will be largely depleted.[157] Therefore, even considering the triumph of expanded the eligibility requirements, the concern remains of whether it will be enough. However, due to the recent passing of the American Rescue Plan, there have been new developments that would better help live venues stay afloat during this time. These developments are discussed further in the next section.

D. The American Rescue Plan

[146] Arnott #2, *supra* note 135; Peterson, *supra* note 6; Fierro, *supra* note 6.
[147] Arnott #2, *supra* note 135.
[148] *Id.*
[149] Arnott, *supra* note 8.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* ("[I]ncluding Justin Paul, the Connecticut-raised composer of 'Dear Evan Hansen,' and 'Frozen' songwriter Kristen Anderson-Lopez.")
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

In addition to expansion of the bill's language, the American Rescue Plan further provides relief to live venues. On March 11, 2021, President Biden signed the American Rescue Plan into law, which includes amendments to the SOS Act's provisions provided by Senate Majority Leader Schumer.[158] As previously noted, the prior language of the Act prohibited eligible businesses from applying for SVOG funding if they applied for a loan from the PPP after December 27, 2020.[159] The Amendment to the Act in the American Rescue Plan made it possible for venues to apply for both; businesses could apply for a PPP loan and also for SVOG funding when the applications were made available.[160] This would allow venues to receive relief while they were waiting to apply for SVOG since, at the time the American Rescue Plan was enacted, there was no set date that the SBA would start accepting applications.[161] However, any money that a venue received from PPP would be deducted from their SVOG funds.[162]

Additionally, the American Rescue Plan added $1.25 billion to the SOS Act, which raised the $15 billion package to $16.25 billion.[163] It also allocated $135 million to the NEA for distribution to live performance venues and to provide further relief.[164] In April 2021, when the SBA began accepting applications for SVOG funding, the NEA was developing guidelines and application materials to distribute funds to those arts programs and organizations that needed it most.[165] It was not certain at that point in time whether community theatres would be able to apply for this relief because the guidelines had not been developed yet.[166] What was known was that 40% would be allocated to regional arts organizations and state arts agencies to distribute funds through their own programs.[167] The other 60% would be awarded directly by the NEA, and it "[would] not require cost share/matching funds from the grantees."[168] Eventually, the NEA released their grant application and distribution requirements for their 60% of the funding more than three months after the American Rescue Plan was enacted,[169] but while this grant will be helpful to numerous arts organizations, community theatres will not be able to receive much

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[158] *National Independent Venue Association Applauds Passage of American Rescue Plan and President Biden Signing it Into law Today*, NIVA (Mar. 21, 2021), https://static1.squarespace.com/static/5e91157c96fe495a4baf48f2/t/604a78390a1d70000bb067a6/1615493177899/AMerican+Rescue+Plan+%281%29.pdf.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Americans for the Arts and Americans for the Arts Action Fund React to Passage of American Rescue Plan*, *supra* note 70.
[164] *Id.*
[165] *FAQs on the American Rescue Plan and the Arts and Creative Industries*, NAT'L ENDOWMENT FOR THE ARTS, https://www.arts.gov/COVID-19/american-rescue-plan-and-arts-and-creative-industries-faqs (Apr. 29, 2021); *National Endowment for the Arts to Receive Funds from American Rescue Plan to Help Save Organizations and Jobs in the Arts Sector*, NAT'L ENDOWMENT FOR THE ARTS (Mar. 12, 2021), https://www.arts.gov/about/news/2021/national-endowment-arts-receive-funds-american-rescue-plan-help-save-organizations-and-jobs-arts-0.
[166] *FAQs on the American Rescue Plan and the Arts and Creative Industries*, *supra* note 165.
[167] *National Endowment for the Arts to Receive Funds from American Rescue Plan to Help Save Organizations and Jobs in the Arts Sector*, *supra* note 165.
[168] *Id.*
[169] *Applications Open for Arts and Culture Relief Funds From the American Rescue Plan*, AMS. FOR THE ARTS (June 23, 2021), https://www.americansforthearts.org/news-room/legislative-news/applications-open-for-arts-and-culture-relief-funds-from-the-american-rescue-plan.

relief from this funding as there is not much available.[170] Despite this, the amendment of the SOS Act in the American Rescue Plan granted a glimmer of hope to community theatres as it provided more opportunities to receive relief and keep their doors open. However, there is still more that needs to be done as this may not be enough since community theatres may be some of the last to apply for the relief that is available.[171] The road to receive relief from the SVOG has been a long one that is ongoing. The next section discusses how live venues have just recently started receiving aid.

E. Grant Extensions

After the enactment of the American Rescue Plan, the SBA began taking applications for SVOG funding on April 8, 2021.[172] However, the application portal almost immediately began to have issues with venues stating that they could not upload their requisite documentation to apply.[173] The portal reopened on April 26, 2021, and venues were eventually able to submit an application for funding.[174] Five months after the SVOG program was created in December 2020, the SBA finally began distributing the funding in June 2021.[175] However, the first 50 venues that received funding were just a small fraction of the venues that requested help.[176] At that time, the SBA received 13,783[177] applications that requested a total of $11.4 billion in relief, and only 50 recipients were awarded SVOG funding in this first round.[178]

The SBA stopped taking initial applications for funding on August 20, 2021, and by then, they awarded around $9 billion in grants to more than 11,500 businesses.[179] Even though the application closed for the original SVOG funding, the SBA sent invitations to live venues "that received an initial grant and reported at least a 70% reduction in 2021 first-quarter revenue as compared to the same period in 2019" to apply for supplemental SVOG awards.[180] This supplement would allow "recipients to extend the time to use their grant funds for expenses accrued through June 30, 2022, and lengthen their budget period to 18 months from the initial grant's disbursement date."[181]

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[170] *See Americans for the Arts and Americans for the Arts Action Fund React to Passage of American Rescue Plan*, *supra* note 70; *see NEA Announces American Rescue Plan Grants to Local Arts Agencies*, AMS. FOR THE ARTS (Nov. 18, 2021), https://www.americansforthearts.org/news-room/legislative-news/nea-announces-american-rescue-plan-grants-to-local-arts-agencies.
[171] Arnott, *supra* note 8.
[172] Jeff Drew, *SBA Reports First 50 Shuttered Venue Operator Grants*, J. OF ACCT. (June 4, 2021), https://www.journalofaccountancy.com/news/2021/jun/sba-reports-first-shuttered-venue-operator-grants.html.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] As of June 3, 2021. *Shuttered Venue Operators Grant Public Report*, SMALL BUS. ASS'N OFF. OF DISASTER ASSISTANCE, (June 3, 2021), https://www.sba.gov/sites/default/files/2021-06/SVOG%20Public%20Report%20-%20Midday%20June%203%202021-508_0.pdf.
[178] Drew, *supra* note 172.
[179] Jeff Drew, *Shuttered Venue Operators Grant Program Enters Supplemental Phase*, J. OF ACCT. (Aug. 30, 2021), https://www.journalofaccountancy.com/news/2021/aug/sba-loans-svog-shuttered-venue-operator-grant-program-enters-supplemental-phase.html.
[180] *Id.*
[181] *Id.*

In addition to this supplement, Senators John Cornyn and Amy Klobuchar introduced the "SOS Extension Act" in September 2021.[182] This Bill would extend the time for venues to use the SVOG funds they received from December 2021 to spring 2023.[183] More precisely, this Bill allows venues to use the grant funding for costs incurred from March 1, 2020 through March 11, 2023.[184] This extension stems from the more than six-month delay that occurred between the passage of the SOS Act and the time venues actually started receiving funds, and it would only extend the timeline that funds may be used, but it would not add funds to the program.[185] Since the original Act only allowed the funding to be used for costs incurred through December 31, 2021, many eligible venues were not able to incur normal costs until they actually received the funding since they were not able to rehire employees, repay rent, or upgrade their spaces by the previous end date.[186] The extension would allow these venues to properly use their grant funding for actual costs from reopening.[187]

However, even with the distribution of SVOG funding and the introduction of the SOS Extension Act, this relief is coming at a time when community theatres and other live venues have been struggling for over a year.[188] Therefore, there should be procedures in place to ensure that community theatres, as well as other nonprofits, have the proper relief to survive should another natural disaster occur. Possible solutions to combat this issue are discussed further in the next section.

III. CURTAIN CALL – PROPOSED SOLUTIONS

Even with live venues finally receiving the aid they have needed, the pandemic is ongoing, and there still lies the possibility that community theatres will not receive needed relief, causing them to close permanently.[189] While the previous expansion of relief for live performance venues have helped some those businesses, it is imperative that protective measures be put in place to provide aid to nonprofits, such as community theatres, in case another natural disaster occurs. One possible measure would be to enact legislation to protect nonprofit organizations by making them one of the first on the list to receive funding to cover overhead costs and unemployment compensation for paid employees in case another mass shutdown occurs. The fact that nonprofits mainly have volunteers as their employees should not exclude them from receiving federal aid. Another possible measure would be to have federal funding set aside so that it is available to provide relief to nonprofit organizations during natural disasters, similar to the Disaster Relief Fund (DRF) managed by the Federal Emergency Management Agency (FEMA).[190] Both of these proposed solutions would ensure that all nonprofits, not just

[182] Jem Aswad, *Senators Introduce Bill to Extend 'Save Our Stages' Grant Deadline for Indie Venues*, VARIETY (Sept. 29, 2021, 10:31 AM), https://variety.com/2021/music/news/senators-extend-save-our-stages-indie-venues-1235077155/.
[183] *Id.*
[184] Save our Stages Extension Act, H.R. 5429, 117th Cong. (2021-2022).
[185] Aswad, *supra* note 182.
[186] *Id.*
[187] *Id.*
[188] *See id.*; *see* Drew, *supra* note 172.
[189] Arnott, *supra* note 8.
[190] *Disaster Relief Fund: Monthly Reports*, FEMA, https://www.fema.gov/about/reports-and-data/disaster-relief-fund-monthly-reports (last visited May 5, 2021).

community theatres, receive the necessary relief in case they are forced to shut down due to a national emergency or natural disaster again. The solutions are discussed further in the following sections.

A. Legislation to Ensure That Nonprofits Are Not Excluded from Federal Relief

As mentioned above, the first proposed solution is that there should be legislation enacted to protect nonprofit organizations during a federal emergency or disaster. It is crucial that all businesses receive some type of aid during such a disaster to prevent permanent closure. However, the fact that nonprofits' employees are unpaid volunteers should not preclude these organizations from receiving relief. Even though the term "nonprofit" illustrates that these organizations do not operate primarily with the goal to make a profit,[191] they still need to be able to run their organization, and to do so, they must have employees at the helm that are not just volunteering their time, but that are dedicated to it as their full-time job. Similar to for-profit businesses, nonprofits also have "to pay reasonable salaries to officers, employees, or agents for services rendered to further the nonprofit corporation's tax-exempt purposes," even though they "rely on volunteers for most of the essential work."[192] In addition to paying their payroll employees, nonprofits also have overhead costs, such as the expenses previously discussed that community theatres incur.[193] Thus, it is just as important that nonprofits receive federal relief during a shutdown, just as it is for for-profit businesses.

A possible way to ensure that nonprofits are not excluded from relief would be to add a facet into federal employment law to protect nonprofit volunteers. Currently, the Fair Labor Standards Act (FLSA) has provisions that cover employees of businesses that engage in interstate commerce.[194] In the private sector, employers should not allow their employees to volunteer their time, or else they may be liable for wage complaints and potential lawsuits.[195] On the other hand, "in the public sector, employees have a bit more freedom when it comes to volunteering, although the FLSA [requires] that employees not volunteer their usual job duties to their employer."[196] However, the FLSA does not cover volunteers that are not employees of such businesses, and in fact, " [a] volunteer generally will not be considered an employee for FLSA purposes if the individual volunteers freely…"[197] By adding a section into federal

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[191] *What is a Nonprofit? Explanation of the Types of Nonprofits, Definition, and the Difference Between "Public Charities" and "Foundations"*, FOUND. LIST (Aug. 13, 2021), https://www.foundationlist.org/news/what-is-a-nonprofit-the-types-of-nonprofits-definitions/.

[192] Joanne Fritz, *Nonprofit Salaries: Laws and Average pay*, THE BALANCE SMALL BUS. (June 30, 2021), https://www.thebalancesmb.com/can-nonprofits-pay-staff-2501893#:~:text=Both%20state%20law%20(which%20governs,most%20nonprofits%20have%20paid%20staff.

[193] *(Mis)Understanding Overhead*, NAT'L COUNCIL OF NONPROFITS, https://www.councilofnonprofits.org/tools-resources/misunderstanding-overhead#:~:text=Based%20on%20the%20990%2C%20a,Fundraising%20make%20up%20overhead%20costs.&text=These%20are%20the%20costs%20often,only%20one%20program%2C%20others%20many (last visited May 5, 2021).

[194] Chron Contributor, *Labor Laws & Volunteering at Your Workplace*, CHRON, https://smallbusiness.chron.com/labor-laws-volunteering-workplace-25747.html (July 27, 2020).

[195] *Id.*

[196] *Id.*

[197] *Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. WAGE AND HOUR DIV.,

employment law that allows volunteers to be considered employees of nonprofits for purposes of applying for federal relief, all nonprofit organizations would be able to receive aid without having to fight for it as community theatres have had to.[198]

Even if volunteers of nonprofits are not considered employees for these purposes, legislation that declares that any future bills that grant federal relief to businesses may not exclude those that do not pay a portion of their workers because they are volunteers, such as the actors in community theatres, would be beneficial to all nonprofits. While some bills may attempt to do so to only provide aid to certain types of businesses that need relief the most, even those types of bills must include all the businesses that fall under its umbrella. For example, the SOS Act has shown that a bill that is generally meant to grant relief to "live performance venues" must include all performance venues, and not just certain ones, such as live music venues. While the Act attempted to do this, the stipulation that artists must be paid excluded an essential part of performance venues—community theatres.[199] By enacting legislation that stipulates that businesses that do not pay their volunteers may not be excluded from federal relief, all nonprofit organizations will be guaranteed protection from possible exclusion from aid in the future. Besides enacting legislation, another way to protect community theatres and other nonprofits is to have a federal fund available for these organizations in case of another natural disaster.

B. Federal Fund for Nonprofits During Natural Disasters

If a federal fund is in place specifically for nonprofits in case of a natural disaster or federal emergency, then these organizations will not have to lobby and struggle to obtain relief as community theatres had to do during the pandemic.[200] The fund could be similar to that of the DRF which is managed by FEMA.[201] The DRF "is an appropriation against which FEMA can direct, coordinate, manage, and fund eligible response and recovery efforts associated with domestic major disasters and emergencies that overwhelm State resources."[202] However, while the DRF "helps state, local, tribal, and territorial governments and certain types of private nonprofit organizations,"[203] the funding that the DRF provides is mainly for "federal disaster support activities" such as protection and debris removal.[204]

The federal fund proposed in this Comment that is reserved for nonprofits in the case of a natural disaster or federal emergency differs from others because the funding would be used to help these organizations cover their employee payroll and overhead costs so that they can continue running. Whether the fund is held and distributed through certain federal agencies that may oversee a specific type of nonprofit, such as the NEA would for community theatres, or whether another federal agency is created explicitly to oversee nonprofit organizations and to

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs14a.pdf (last visited May 5, 2021).
[198] Arnott, *supra* note 8.
[199] Peterson, *supra* note 6.
[200] Arnott, *supra* note 8.
[201] *Disaster Relief Fund: Monthly Reports*, *supra* note 190.
[202] *Id.*
[203] *Assistance for Governments and Private Non-Profits After a Disaster*, FEMA, https://www.fema.gov/assistance/public (last visited May 5, 2021).
[204] *Disaster Relief Fund: Monthly Reports*, *supra* note 190.

distribute funds, having a fund available specifically for nonprofits during a disaster would be extremely beneficial for these organizations. Through either of these proposed solutions, all nonprofits, including community theatres, will have the assurance that they will be protected in case they need to shut down during a disaster. Such protection is necessary as these organizations are a vital part of our communities.

CONCLUSION

As the above discussion shows, it is evident that community theatres are an important aspect of society. From the positive individual and social impacts to the economic contribution that community theatres make, it would be a detriment to our communities if these venues became essentially nonexistent due to the pandemic shutdown. In fact, the Entertainment Industry as a whole is a significant feature of our culture, which is evidenced by the fact that Congress passed the SOS Act in the first place.[205] Without that relief, thousands of live performance venues would have had to close their doors permanently, and the country would have suffered a great loss. However, while the SOS Act attempted to provide relief to live music venues, the wording of the Act overlooked another important live performance venue—community theaters.[206]

While the SBA's expansion of the eligibility requirements, the enactment of the American Rescue Plan, and the introduction of the SOS Extension Act appear to have remedied that oversight, it may not be enough to help these theatres before they are able to reopen at full capacity. Thus, the enactment of legislation or the creation of a federal fund is necessary to protect these venues and to ensure relief in the case of a natural disaster or federal emergency. If enacted, these changes would benefit all nonprofits, even after the COVID-19 pandemic. Without either of these measures, these organizations will be left sinking when another disaster occurs. Therefore, it is imperative that they are protected as they are a significant aspect of our communities. The pandemic brought the world to a standstill, and every individual had to adapt to a new normal. As the country begins to emerge from the shutdown, some of the adaptations from virtual living will follow us into the path back to normalcy. It is necessary that Congress follow suit by protecting nonprofit organizations, including community theatres, in case a disaster should cause them shut down again.

[205] *See generally* SOS Act, S. 4258, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/senate-bill/4258.
[206] *Id.*

A TIME FOR JUST RECKONING? TEMPORALITY, LAW, AND TRANSACTIONAL JUSTICE IN CHANGING SOCIETIES

Cosmas Emeziem*

Table of Contents

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INTRODUCTION

When is it apt to implement a transitional justice process? What temporal considerations can impact transitional justice processes? If a country such as Spain,[1] Australia,[2] or Canada[3] decides to embark on a transitional justice program, what timeline should the program? What

[1] Omar G. Encarnacion, *Democracy Without Justice in Spain: The Politics of Forgetting* (Univ. of Pa. Press, 2014) (highlighting the general avoidance of thoroughgoing transitional justice in Spain despite the known records of violence during the regime of General Francisco Franco—October 1, 1936 – November 20, 1975. Many a scholar and public commentators affirm that Spain should enact a transitional justice program covering this period because of the vast cases of state-sponsored human rights violations). *See* further Alexandra García, *Transitional (In)Justice: An Exploration of Blanket Amnesties and the Remaining Controversies Around the Spanish Transition to Democracy*, 43 INT'L J. OF LEGAL INFO. 75, 75–135 (2019); Jonah S. Rubin, *Transitional Justice against the State: Lessons from Spanish Civil Society-Led Forensic Exhumations*, 8 INT'L J. OF TRANSITIONAL JUST. 99, 99–120 (2014); I. Kovras, *Explaining Prolonged Silences in Transitional Justice: The Disappeared in Cyprus and Spain*, 46 COMPAR. POL. STUD. 730, 730-756 (2013); B. Bevernage, & L. Colaert, *History From the Grave? Politics of Time in Spanish Mass Grave Exhumations*, 7 MEMORY STUD. 440, 440–456. (2014).

[2] The debate is also ongoing for Australia as to what form of transitional justice the country should enact. This discussion has persisted despite the recent efforts aimed at racial harmony and justice in the country. *See generally*, Mark McMillan, & Sophie Rigney, *Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment*, 41 ETHNIC AND RACIAL STUD. 759, 759-777, (2018); Matilda Keynes, *History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia*, 13 INT'L J. OF TRANSITIONAL JUS. 113, 113-133 (2019) (drawing examples from Australia while investigating the current scholarly efforts to use transitional justice to meet questions of settler injustice). The many cases of deaths in custody by Australian aborigines is a factor that often raises the conversation for a thoroughgoing transitional justice program in Australia to uproot the systemic foundations of these injustices towards aborigines. *See* Eddie Cubillo, *Real Action Needed on Aboriginal Deaths in Custody*, UNIVERSITY OF MELBOURNE: PURSUIT (April 13, 2021), https://pursuit.unimelb.edu.au/articles/real-action-needed-on-aboriginal-deaths-in-custody; Rachel Knowles, *Federal Government not Keeping Track of Indigenous Deaths in Custody*, NATIONAL INDIGENOUS TIMES (March 29, 2021), https://nit.com.au/federal-government-not-keeping-track-of-indigenous-deaths-in-custody; *Deaths Inside: Every Indigenous Death in Custody Since 2008 Tracked*, THE GUARDIAN (April 5, 2021), https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody; Katie O'Bryan & Ronli Sifris, *Transitional Justice Measures and the Legacy of Human Rights Violations in Colonial Contexts* : *Submission to the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non- Recurrence*, MONASH UNIVERSITY: CASTAN CENTRE FOR HUM. RTS. L. at *4 (May 21, 2021), https://www.monash.edu/__data/assets/pdf_file/0008/2582891/Castan-Centre-for-Human-Rights-Law-Transitional-Justice-Submission-May-2021.pdf (highlighting the need for Transitional justice in colonial contexts and some of the current impediments to it. The Report notes the limited efforts at finding the truth about human rights abuses thus:

> there have been no comprehensive truth commissions at a Commonwealth level. However, there has been a *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, which was established between 1995 and 1997 amid concerns among Aboriginal and Torres Strait Islander peoples that the 'general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services.)

[3] The debates and calls for a detailed transitional justice are also strong in Canada. *See generally* Rosemary Nagy, *Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada*, THE INT'L J. OF HUM. RTS. (2021). Some of the reasons sustaining the debate are subsisting gaps in the protection of indigenous peoples' rights. These include gender-based violence/disappearances of indigenous women and children, violation of indigenous rights through business activities such as mining, sewage management, and water use rights. *See* Colin Luoma, *Closing the Cultural Rights Gap in Transitional Justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls*, 39 NETH. Q. OF HUM. RTS. 30, 30–52 (2021).

factors would determine the choice? In the larger epistemological[4] foundations of transitional justice, what informs the near avoidance of colonial and settler-colonial[5] [6] human rights violations in transitional justice efforts in mature democracies?[7] [8]These and several other related questions are relevant puzzles in transitional justice. A meaningful answer to these questions is

[4] There is evident privileging of post-conflict and post-authoritarian foundations of transitional justice. Hence, recognizing sources of norms, knowledge about transitions, and questions for the search for better transitional justice processes default to this paradigm. This default position has substantial implications for the canon of transitional justice. One of the readily noted implications is that it minimizes colonial and indigenous concerns—especially in established democracies as issues within the mainstream of transitional justice. Second, it limits the use of transitional justice to solve economic, social, and cultural rights problems. While detailing substantial work on transitional justice efforts worldwide, a recent report of the United Nations Rapporteur on Transitional Justice did not present anything on the [settler-colonial] case for transitional justice. It seems that this is not an omission but an epistemic choice. *See* Fabián Salvioli, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, United Nations Human Rights Commission*, A/HRC/48/60, 13 September–1 October 2021. The *post jus bellum* approach requires further scholarship beyond this article.

[5] J Balint and J Evans, et al. *Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach*, 8 INT'L J. OF TRANSITIONAL JUST. 194, 194-216 (2014).

[6]Some scholars believe that the involvement of indigenous peoples in the international rights movement has contributed enormously to the regeneration of interests about the rights of indigenous peoples and how to recognize, respect, protect, and remedy them when these are violated. Kristen A. Carpenter, and Angela R. Riley, *Indigenous Peoples, and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014).

[7] Some scholars have answered this question by arguing that it fits into the larger politics of international law and transitional justice. The structure of international law and its evolution currently depends on many foundations laid down by colonialism and conquest. The foundations include nation-states as they are currently constituted, the structure of international relations, and the epistemic and doctrinal explanations of norms, treaties, and customs of international law. These self-reproducing foundations are not easily alterable without the cooperation of the world's powerful countries, many of which are former colonial powers. However, there is an increasing call for the 'decolonization' and shifting of the geography of transitional justice. *See generally* N. Henry, *From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies*, 9 INT'L J. OF TRANSITIONAL JUST. 199, 199–218 (2015); J. Corntassel, & C. Holder, *Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru*. 9 HUM. RTS. REV. 465, 465–489 (2008); Jeffrey Atteberry, *Turning in the Widening Gyre: History, Corporate Accountability, and Transitional Justice in the Postcolony*, 19 CHICAGO J OF INT'L L. (2019). (Atteberry has a critical view of transitional justice and argues that "insofar as transitional justice is concerned with questions of historical transition; its own conception of history must be decolonized if it hopes to develop a historical understanding of the social processes at work within the post colony and to develop policies and strategies for interrupting the future operation of those processes.") Otherwise, transitional justice may potentially perpetuate aspects of colonial paradigms that do not necessarily serve the interest of post-colonial peoples. *See also* MICHAEL HUMPHREY, *Reentering Histories of Past Imperial Violence: Kenya, Indonesia, and the Reach of Transitional Justice*, *in* DECOLONIZATION, SELF-DETERMINATION, AND THE RISE OF GLOBAL HUMAN RIGHTS POLITICS 262–282 (A. Dirk Moses, Marco Duranti, & Roland Burke eds., 2020); L. Veracini, *Settler Colonialism: A Theoretical Overview*. London: Palgrave Macmillan (2010). Some of these questions of colonial violations of human rights and the need for reckoning and reparations as pathways of transitional justice have been coming up in Court cases lately in England and Germany. *See Ndiki Mutua & 4 Others v. The Commonwealth Office (2012) EWHC 2678 (QB)* (the Royal Court of Justice was asked to adjudicate on issues of violence meted out by the British Colonial Office to the indigenous community in Kenya); David M. Anderson, *Mau Mau in the High Court and the 'Lost' British Empire Archives: Colonial Conspiracy or Bureaucratic Bungle*?, 39 J. OF IMPERIAL AND COMMONWEALTH HIS. 699, 699-716 (2011); *see also Rukoro v. Federal Republic of Germany*, 976 F.3d 218 (2nd Cir. 2020) (the United States Court of Appeals for the Second Circuit, upon hearing the claims and case of the plaintiffs seeking "damages for the enslavement and genocide of the Ova Herero and Nama peoples in what is now Namibia as well as property they alleged Germany expropriated from the land and peoples," held that as Germany is a foreign sovereign, and the only path for the exercise of jurisdiction over Germany is if the claims fit into the exceptions under the Foreign Sovereign Immunities Act. Having found that these claims did not fall into any of those exceptions, the Court dismissed the plaintiffs' claims).

[8] P. Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. OF GENOCIDE RSCH. 387, 387–409 (2006).

crucial for any serious attempt to reckon with mass violations of human rights through a transitional justice process. As the call[9] for just reckoning becomes more strident, and the transitional justice canon assumes more prominence in the field, there is a need to interrogate the temporal dimensions of just reckoning processes. It is timely to do so, and avoiding it will only weaken, the transitional justice canon.

This article is divided into five parts (I, II, III, IV, and V). Part I captures the background, and sets the stage for the discourse on time, in transitional justice processes. It identifies the scholarly gap as it currently exists in the field of transitional justice, and thus, sets the agenda for the entire work. Part II unpacks the basic concept of temporality, and its relationship to law, and society in transitional justice. It explains how transitional justice processes are essentially surrounded by temporal contexts, and why this phenomenon should engender a deeper analysis by scholars in the field. It notes how these temporal contexts can be dispositive, in determining the framing, processes, means, and potential outcomes of transitional justice measures. In other words, the temporal contexts, and consideration of mechanisms in different communities can create complex situations. Scholars and policymakers should be aware of these potentially complex situations, and anticipate them in designing, and implementing transitional justice programs. That way, the complications can be avoided or mitigated—were they to be impossible to avoid.

Part III discusses the ways of overcoming some of the complexities that may inhere in transitional justice programs in different societies. Precisely, this section will try to pre-equip scholars and policy makers with the tools to overcome potentially complex temporal hurdles in transitional justice settings. Part IV highlights the value of carefully calibrated and organized forms of dialogues, as critical to any effort at definitively settling questions of temporal challenges in transitional justice. It affirms the indispensability of dialogue in the human societies as the basis of democratic transformation and just reckoning. Part V concludes with suggestions for legal development in the field. Hopefully, this work will set up a scholarly agenda for all persons, and institutions, interested in the field of transitional justice. The discussion contributes to making transitional justice a more efficient framework for deepening democracy, and the protection of human rights, rule of law, and overall community peace and harmony in changing societies. The importance of this investigation, and articulation of the temporal dimensions of transitional justice is hinged on four solid foundations. First is the universality of justice and human rights. All human beings are endowed with human rights and are entitled to justice for any violation of these rights. Second, it contributes towards overcoming the politics of transitional justice cannon. In other words, it helps scholars to understand the privileging of certain underpinning ideas—such as what societies should implement transitional justice programs—about the subfield. Third, it responds to the current pivot towards international law history. The historical look at international law helps us have a view of the timelines and ideas such as sovereignty, and equality and how these have informed the lives of different communities within nation states. Finally, it helps society to recognize places and spaces for

[9] Recent efforts in this respect can be seen in the many symposia and concentration of the legal academy on the issues relating to social justice and the reformation of unjust systemic gaps in law and society. *See* Jasmine E. Harris, *Reckoning with Race and Disability (Reckoning and Reformation: Reflections and Legal Reponses to Racial Subordination and Structural Marginalization)*, YALE L. FORUM ONLINE, *https://www.yalelawjournal.org/pdf/HarrisEssay_a4tipb29.pdf*.

societal reflection and just reckoning. Spaces of violence could be physical and epistemic. It is physical when for instance we are looking at concentration camps, lynching grounds, torture chambers, and such other spaces. It could be epistemic when we are considering erasure, or convenient forgetfulness of such subjects in the cannon of legal studies and transitional justice. This is significantly so in the prevailing international law cannon, which circumscribes transitional justice as merely a post-conflict or post-authoritarian justice. [10]

As to the universality of justice and human rights, it is now trite that human rights have neither geographical nor sovereign boundaries. The Universal Declaration of Human Rights (UDHR) notes that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[11] In the same vein, the canon of transitional justice makes universal claims about global humanity, justice, and general accountability for human rights violations.[12] The status of the violators is immaterial to accountability.[13] Transitional justice claims universal jurisdiction[14] and the responsibility[15] of states to investigate, prosecute and punish acts of human rights violations even in times of war, amongst other things. [16] That being the case, the epistemic foundations of transitional justice must transcend political and economic divides—within nation

[10] *See generally,* Yukiko Koga, *Between the Law: The Unmaking of Empire and Law's Imperial Amnesia*, 41 LAW & SOC. INQUIRY 404, 402-434 (2016) (Exploring the absence of law through erasure of imperial colonial subjects in the legal framework after empire. Drawing from the Japanese experience, the author notes that "between the law is an optic that makes visible uneven legal terrains that embody temporal and spatial disjuncture, rupture, and asymmetry").

[11] *Universal Declaration of Human Rights art. 1*, Dec. 10, 1948, https://www.un.org/sites/un2.un.org/files/udhr.pdf. Further to this is *Article 2 of the UDHR*, which notes that no distinction of any kind shall be made based on the political, jurisdictional, or international status of the country or territory to which the person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty. For a general discourse on the provisions of the Universal Declaration of Human Rights, *see* Ş. İlgü Özler, *The Universal Declaration of Human Rights at Seventy: Progress and Challenges*, 32 ETHICS & INT'L AFFAIRS 395, 395–406 (2018); Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L. J., 251, 252. (2008); Mary A. Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998); Tracy E. Higgins, *Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights Introduction: Locating Culture, Identity, and Human Rights Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 225 (1998-1999).

[12] Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State,* 50 CASE W. RSRV. L. REV. 127, 129 (1999).

[13] Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*. 18 WORLD POLICY J. 101, 102, 106-107 (2001); Sonia Cardenas, *The Pinochet Effect: Transnational Justice in the Age of Human Rights The Pinochet Affair: State Terrorism and Global Justice En el borde del mundo: Memorias del juez que procesó a Pinochet*, 18 EUR. J. OF INT'L L. 367, 368-71 (2007).

[14] Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction,* 30 EUR. J. OF INT'L L., 779, 780, 783 (2019). (Arguing that, contrary to some views that universal jurisdiction is waning, it has been quietly expanding and one of the contributing factors to this is the adoption of the Rome Statute of the International Criminal Court and the activities of that court so far).

[15] Juan E Méndez, *Accountability for Past Abuses,* 19 HUM. RTS. Q. 255, 271 (1997).

[16] Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses,* 19 AM. UNIV. INT'L L. REV. 2, 301, 339-341 (2003); Roht-Naomi Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 462-64 (1990).

states and internationally.[17] There is therefore a need to make the canon of transitional justice more robust and less preoccupied with post conflict situations. The further case for a more robust use of transitional justice as expressed above is because beyond post conflict situations, there are transitional justice possibilities and necessities in many states around the world. These states are not necessarily post-conflict in nature, but they have difficult social, political, and economic issues that could benefit from a carefully implemented transitional justice process.[18] For example, the systemic exclusion of indigenous communities is an ongoing reality in many otherwise stable democracies. This reality of exclusion is exemplified in the prevailing problems of social and environmental justice.[19] These situations, which do not have bright line authoritarian domination or post-conflict outlook, present critical challenges for experts and policy makers. Sometimes it makes it difficult to delineate the timelines of reckoning and answer some of the other complex questions of transitional justice.[20] The structures are also complicated because of the vested interests that these societies have created over time.

Beyond the universality of human rights, the politics[21] of international law has also led to a growing sense that transitional justice is increasingly conceived and implemented more in developing and less powerful states.[22] The use of the instrumentalities of transitional justice have become prevalent in nascent democracies—whether as criminal tribunals,[23] truth commissions,[24]

[17] Of course, there are political dimensions to the idea of universal jurisdiction, however, many states are inclined towards abiding by the principle. *See generally*, Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. OF INT'L. L. 1, 5 (2011); Alberto Luis Zuppi, *Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice*, 63 LA. L. REV. 390, 322-329 (2003).

[18] The Greensborough Truth Commission of 2004 in the United States underscores the value that transitional justice can bring to mature democracies such as the United States. What is significant is that many of the programs are likely to be community-based instead of a general national transitional justice project. However, it shows that community justice situations can benefit from transitional justice mechanisms, even in mature democracies. *See generally* Jill E. Williams, *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, 72 L. AND CONTEMP. PROBS. 143, 147 (2009); David Androff, *A Case Study of a Grassroots Truth and Reconciliation Commission from a Community Practice Perspective*, 18 J. OF SOC. WORK 273, 274, 276-78 (2018).

[19] Carmen Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 152, 154-56 (2015).

[20] For instance, the debate about reparations for slavery, Jim Crow, and racial violence in America has many angles, including justice, fairness, reconciliation, ethics, and the period of consideration. However, if scholars carefully study these issues, it is possible to develop and adapt transitional justice frameworks to meet the specific situations. For a general contribution on the debate about reparations, *see* Susan S. Kuo, & Benjamin Means, *A Corporate Law Rationale for Reparations*, 62 BOS. COLL. L. REV. 799, 836 (2021); Valorie Douglas, *Reparations 4.0: Trading in Older Models for a New Vehicle*, 62 ARIZ. L. REV. 840, 872 (2020).

[21] Anne Orford, *International Law, and its Others* (Cambridge Univ. Press ed., 2006); Martti Koskenniemi, *The Politics of International Law – 20 Yeas Later*, 20 EUR. J. OF INT'L. L7, 11-12 (2011); Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. OF INT'L AFFS. 1, 10-12 (2004).

[22] Laurel E. Fletcher & and Harvey M. Weinstein, *How Power Dynamics Influence the "North- South" Gap in Transitional Justice*, 36 BERKELY J. OF INT'L L., 190, 205-06 (2018).

[23] Diane F. Orentlicher, *Politics by Other Means: The Law of the International Criminal Court*, 32 CORNELL INT'L L. J. 489, 493 (1999); Sascha-Dominick Dov Bachmann & Naa A. Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?*, 29 WASH. L. REV. 247, 274 (2020).

[24] Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 THE MOD. L. R., 1, 1-2 (2000).

hybrid courts,[25] memorials,[26] and such other mechanisms. At other times it looks at countries of Eastern Europe[27] —also emerging from the Soviet bloc—while carefully avoiding many other countries of the global North—implicated by colonial[28] human rights violations—such as Canada, the United States, France,[29] and Belgium.[30]

This delineation of both emerging democracies[31] and mature democracies reiterates the critique of international law as privileging the existing structures of international law as made by former empire states, though it professes the universality of frameworks and norms.[32] One example of this is the near total insulation of colonial violence from the interrogative lens of transitional justice.[33] Thus, a reckoning with this epistemology, and its externalities for global justice and human rights is critical and cannot be meaningfully done without reexamining the temporal dimensions of transitional justice and the norms that underpin them. [34] These norms (or lack thereof) underpinning temporality are essential in developing transitional justice that is responsive to the justice needs of the 21st century international society.[35]

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[25] NERGIS CANEFE, *Hybrid Courts, Transitional Justice, and Displacement in the Global South*, in TRANSITIONAL JUSTICE AND FORCED MIGRATION: CRITICAL PERSPECTIVES FROM THE GLOBAL SOUTH 52–80 (Nergis Canefe ed. 2019).

[26] Memorials have become very significant in the field in recent years. No matter the mechanism, adopting some sort of memorialization is often advocated either as a way of acknowledging the victims and restoring their dignity or as a way of constructing sites of public conscience and healing. It may also be a function of the politics of remembrance. This is especially so in situations of civil wars whereby there is disagreement about whose pain is worthy of remembrance. *See generally* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV., 203, 203 (2006) (on the obligation to recognize victims); Angel David Nieves & Ali Khangela Hlongwane, *Public and "Memorial Architecture" in the New South Africa: The Hector Pieterson Memorial and Museum, Soweto, Johannesburg*, 8(3) SAFUNDI 351, 351-368 (2007).

[27] *See generally*, Brianna Brown, *Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past*, E-INT'L. RELS. 1, 10 (2015).

[28] Carsten Stahn, *Reckoning With Colonial Injustice: International Law as Culprit and as Remedy?* 33 LEIDEN J. OF INT'L. L. 823, 823–835 (2020).

[29] M. Bessone, *The Colonial Slave Trade, Slavery and Structural Racial Injustice in France: Using Iris Marion Young's Social Connection Model of Responsibility,'* CRITICAL HORIZONS 1, 1-2 (2019).

[30] Priya Pillai, *Truth Commissions and Colonial Atrocities: Moving the Needle Further Towards State Responsibility*? OPINIO JURIS (April 27, 2019), http://opiniojuris.org/2019/04/27/truth-commissions-and-colonial-atrocities-moving-the-needle-further-towards-state-responsibility/.

[31] *See* Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 281 (2008) (Highlighting some of the dynamics of transitional justice which privileges Western liberal democratic ideas. It also shows some of the problems arising from decontextualized approaches arising from this liberal democratic disposition).

[32] *See generally* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (Princeton Univ. Press, 2005). (Kennedy argues that though human rights offer a great vocabulary for good international engagement, it has also sometimes served as a vocabulary of power by the center against the periphery).

[33] In a related investigation of coloniality and the evolution of international law, Antony Anghie has highlighted how the analytical frameworks of international law have minimized the colonial structures. He therefore argues that "that colonialism, rather than being a peripheral concern of the discipline, is central to the formation of international law and, in particular, its founding concept, sovereignty." *See generally*, Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 739—753 (2006).

[34] For a general look at the time issues in criminal trials relating to transitional justice see M. Davidović, *Reconciling Complexities of Time in Criminal Justice and Transitional Justice*, 21 INT'L. CRIM. L. REV. 935, 935-961 (2021).

[35] *See* N. Mueller-Hirth, *Temporalities of Victimhood: Time in the Study of Post-Conflict Societies*, 32 SOC. FORUM 186, 186-206 (2017). (showing the scarce literature on temporality in post-conflict society).

Remarkably too, transitional justice responds to the increased pivot by international law to history[36] as a crucial lens through which humankind can understand the nature and evolution of international human rights and its different iterations and intersections.[37] This is further hinged on the truism that time gives meaning and bearing to history and the entire course of human encounters. It is one paradigm for gazing into the remote while imagining the multifaceted future. That history also reveals the participants, collaborators, and corporations with significant roles in historical violations of human rights. For instance, recent litigations about the role of Japanese corporations in the violation of human rights during World War II draws attention to the unanswered questions of just reckoning despite the passage of time.[38] If we consider that non-repetition is a critical plank of the value of transitional justice, we could see the need for this careful interrogation of the temporal[39] aspects of transitional justice, since it aims to preempt future social breakdown, and consequent violation of human rights.

Time also serves as a bivouac upon which societies can take a breather, and reckon with the past, in order to chart a just path forward. It helps societies recognize spaces and places for societal reflection with the goal or reckoning, reconciliation, renewal, and redemption. These professed goals of transitional justice often require anchorage on time and space. For example, public memorials and monuments are sometimes established on scenes of human rights violations. [40]In recent years, Tulsa, Oklahoma has become a point of reckoning with racial prejudice in response to an event that took place 1921.[41] Images from that time are critical in appreciating the harm that was done and thus enable the public to better envision the restitution measures that society must adopt.

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[36] Koskenniemi suggests that part of the reason for this pivot to the history of international law is:

> *The dramatic increase in the 1980s and 1990s of international legal institutions and recourse to legal vocabularies in international policy created expectations about the spread of the "rule of law" and the pacific settlement of international disputes that failed to be met by the beginning of the new millennium. The narrative about the progress of peace and justice that accompanied the rise of new institutions—the World Trade Organization, human rights treaty bodies, the International Criminal Court—was undermined by heightened religious and social conflict, often accompanied by domestic and international violence in a way that threw a shadow on the new institutions.*

See Marti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMPLE INT'L. & COMP. L.J. 2 (2013).

[37] ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 96–108 (Oxford Univ. Press 1992); JOSÉ-MANUEL BARRETO, *Imperialism and Decolonization as Scenarios of Human Rights History*, in HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY, AND INTERNATIONAL LAW 140, 144–51 (José- Manuel Barreto ed., 2013).

[38] *See* Timothy Webster, *Discursive Justice: Interpreting World War II Litigation in Japan*, 58 VA. J. OF INT'L L. 161, 161-226 (2018).

[39] Z Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT'L. CRIM. L. REV. 848, 848-877 (2021).

[40] *See generally* JUDY BARSALOU & VICTORIA BAXTER, THE URGE TO REMEMBER: THE ROLE OF MEMORIALS IN SOCIAL RECONSTRUCTION AND TRANSITIONAL JUSTICE, 1-23 (United States Institute of Peace ed., 2007).

[41] *See* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 68-122 (2005); Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67, 67-148 (2001), Richard Luscombe, *Tulsa Massacre: Centennial of White Mob Rampage to be Commemorated in Oklahoma*, THE GUARDIAN (May 30, 2021), https://www.theguardian.com/us-news/2021/may/30/tulsa-race-massacre-100th-anniversary-oklahoma.

Time is also significant in understanding reckoning with human rights violations considering the shift of the frameworks from special platforms such as Nuremberg,[42] Rwanda,[43] Yugoslavia,[44] and ICC[45] to mainstream human rights understandings in international law—especially the transitional justice canon. While the evolution of international accountability for human rights violations has privileged these platforms in the past, the increasing reality is that accountability must go beyond these platforms in order to align with universal human rights principles. For example, the discovery of mass graves[46] such as that of Native American children in Canada[47] immediately elicited a consciousness about when that reality was created.[48] Society is now forced to answer a few questions.[49] What led to the children's deaths and their concealment from public knowledge? How long have they been there, and how may society

[42] John Q. Barrett, *The Nuremberg Trials: A Summary Introduction*, 39 LOY. L.A. INT'L & COMP. L. REV. 336, 336 (2016-2017).
[43] Diane Orentlicher, *Owning Justice and Reckoning with Its Complexity*, 11 J. INT'L CRIM. JUST. 517, 517 (2013).
[44] Pauline Kienlen, *International Justice v. Local Peace - Case Study of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Reconciliation Process in the Balkans*, 5 VIENNA J. ON INT'L CONST. L. 632, 632 (2011).
[45] Shahram Dana, *Law, Justice & Politics: A Reckoning of the International Criminal Court*, 43 J. MARSHALL L. REV. xxiii, xxiii (2010).
[46] Mass graves as foundations of transitional justice processes have been receiving attention lately. The UN Special Rapporteur on Extra Judicial Killings has also emphasized the need to preserve these mass graves as they offer critical evidence for transitional justice and accountability. *See generally* Adam Rosenblatt, *International Forensic Investigations and the Human Rights of the Dead*, 32 HUM. RTS. Q. (Nov 2010).
[47] The mass graves of Canada and the need for historical reckoning in established democracies is an intriguing topic that has yet to receive detailed scholarly articulation and social reckoning. However, there remains vested interests and politics in minimizing the troubling reality. Part of the effort is to pigeonhole these issues as isolated or a question for the Catholic Church. However, the 'civilizing mission' of settler colonialism was a very violent ideology-especially for first nations. Thus, it was the direct outcome of a policy of assimilation and civilization. *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE (Lawrence: University of Kansas Press 1995); Eric D, Weitz, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION (Princeton Univ. Press 2005).
[48] Leyland Ceceo, *Canada Discovers 751 Unmarked Graves at Former Residential School*, THE GUARDIAN (June 24, 2021), https://www.theguardian.com/world/2021/jun/24/canada-school-graves-discovery-saskatchewan.
[49] For the first time, the Canadian Historical Association has acknowledged the fraught history of settler colonialism in Canada as it relates to first nations as a Genocide. The Association noted the problematic history and the reticence of historians towards portraying that history without varnish. The Association noted that:

> *the Canadian Historical Association which represents 650 professional historians from across the country, including the main experts on the long history of violence and dispossession indigenous peoples experienced in what is today Canada, recognizes that history fully warrants our use of the word genocide. The recent confirmation of hundreds of unmarked graves at former Indian Residential Schools in British Columbia and Saskatchewan is part of the wider history of the physical erasure of indigenous peoples in Canada. Sadly, the recent news out of Kamloops and Marieval will not be the last and we fully expect further announcements to be made from coast to coast to coast…finally, we recognize that historians, in the past, have often been reticent to acknowledge this history as genocide. As a profession, historians have therefore contributed in lasting and tangible ways to the Canadian refusal to come to grips with this country's history of colonization and dispossession. Our inability, as a society, to recognize this history for what it is, and the ways that it lives on into the present, has served to perpetuate the violence. It is time for us to break this historical cycle. We encourage Canadians to recognize this history for what it is: genocide*.

See Canadian Historical Association, *Day Statement: The History of Violence Against Indigenous Peoples Fully Warrants the Use of The Word "Genocide,*" https://cha-shc.ca/news/canada-day-statement-the-history-of-violence-against-indigenous-peoples-fully-warrants-the-use-of-the-word-genocide-2021-06-30.

reckon with it to ensure non-repetition? What philosophies[50]were used to justify such violations?[51] These temporally sensitive questions are crucial to any meaningful reckoning for the communities involved.

These questions are further underscored by the fact that, transitional justice is encapsulated in time. Thus, transitional justice, as a set of measures such as criminal trials, truth commissions, memorialization, and apologies, effected by societies and aimed at reckoning with gross violations of human rights, deals with issues implicated by time. These measures, in a way, chronicle the violations and their significance to society. While some individual violators may be unreachable because of death, difficult legal infrastructure, lack of evidence, immunities, and nonexistence of political will, the impact of these violations are often present in society. Therefore, transitional justice measures are aimed at providing recognition accountability, reconciliation, redemption, and renewal. [52] Such accountability measures are often seen as defining moments in the life of the community in question—though the prevailing structure of the field is overly focused on individual rights and violations.[53] Transitional justice is often a point of departure from these violations of human rights with the hope of charting a new course for justice and respect for human rights.

This Article is premised on the foundation that there is a time dilemma in transitional justice that is under-theorized. It makes a case for a deeper inquiry, into the nature and ramifications of the issues of time inherent in the canon of transitional justice. It draws attention to the potential misuse of time, especially in seeking to portray historical and continuing injustices as "things of the past." It calls attention to the limitations of a liberal narrative that is ambivalent to colonial realities, and their perpetuation of contested histories and memories, which are often implicated in current human rights questions. The continuing latent impact of

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[50] *See* Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 96 THE AM. J. OF INT'L L.4, 995-1000 (Oct. 2002); *see generally* ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (Cambridge Univ Press 2005). *See further* Michael Freeman, *Speaking About the Unspeakable: Genocide and Philosophy*, 8 J. OF APPLIED PHIL., 1, 3—17 (1991). (Arguing that genocide is understudied by philosophy and calls for deeper dive into the philosophical study of genocide because the current "social-scientific approaches to genocide have been criticized because of their commitment to logical empiricism, which is held to be epistemologically and ethically inadequate").

[51] Often, these types of discoveries trigger many questions for scholars and the public. Nevertheless, it is arguable that no matter what question arises, there is an element of time in the entire stream of debates. It may come in the form of the period between the said event and its discovery. It may equally arise from what can be called the prevailing thinking at the time of the violation. And in international law, there has been cases whereby arguments have been made that an event such as colonial appropriation of territory is not a crime because, at the time of such appropriation, it was not considered a crime. This view is problematic in that it is an attempt to escape responsibility. Equally, it seeks to superimpose the views of the violator on the victims such as a former colonial power claiming that its acts of violations under colonial circumstance was not a crime cognizable by international law. *See* I.C.J. REPORT LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965, *Advisory Opinion*, 95-174 (2019) (discussing the relevant period of time for the purpose of identifying the applicable rules of international law).

[52] Frank Haldemann, *Another King of Justice: Transitional Justice as Recognition,* 41 CORNELL INT'L. L. J. 676, 676 (2008).

[53] *See* Rosemary Nagy, *The Bounds of Transitional Justice, and the Canadian Truth Commission,* 7 INT'L J. OF TRANSITIONAL JUST. 52, 52-73 (2013) (Using the Canadian TRC on the Indian Residential School System, the author notes the view in the field that such transitional justice efforts should not just be about individual rights but the more significant questions of social (in)justice in society).

these violations arising from imperial encounters require a more rigorous review. It argues that scholars should do more, to undrape the various time issues inherent in transitional justice. Such scholarly intervention will enhance the effectiveness of transitional justice measures in the search for the effectual protection of human rights in changing societies in the 21st century and beyond.

There may be constraining factors that impede an in-depth theorization about the temporality questions of transitional justice, such as political interests, and lack of resource. However, the field would gain a lot if scholars devoted more attention to these temporal questions. The work product of such scholarship will further shape and amplify democratic dialogues and policymaking in transitional justice. At a time of mounting calls for reckoning with systemic injustice, accountability for abuse of public powers, and an end to exclusionary policies, especially in mature democracies and settler colonial societies,[54] [55] [56]this topic is apt. It contributes immensely to our understanding, and implementation of reckoning programs in changing societies. This is even more beneficial to floundering democracies, as it provides them with smart reform tools for justice and democracy. It will help states to design interventions that are necessary to forestall egregious violations of human rights, or their repetition were they to occur despite the preventive efforts. Even in states with stable democracies, it could enhance the community disposition of their law enforcement institutions. Such interventions will serve to restore justice, and confidence in communities who, often, recall transgenerational traumatic encounters with law enforcement. Indeed, it will allow states to articulate and execute reconciliatory measures that enhance unity and foster a healthy democracy.

The foregoing discourse takes us to the triangular relationship between time, law, and society. Understanding this trifecta—law, time, and society in transitional justice—is important in the effort to reimagine transitional justice and make it more effective in just reckoning

[54] For general views on the complex ramifications of transitional justice for settler states see Sophie Rigney, *The Hopes and Discontents of Indigenous–Settler Reconciliation*, 11 INT'L J. OF TRANSITIONAL JUST. 359, 359–368.
[55] Augustine S J Park, *Settler Colonialism, Decolonization and Radicalizing Transitional Justice,* 14 INT'L J. OF TRANSITIONAL JUST. 260, 260–279.
[56] Matilda Keynes, *History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia*, 13 INT'L J. OF TRANSITIONAL JUST. 113, 113–133.

projects. The trifecta of law,[57] time,[58] and society[59] often forms the foundations for proposing or opposing reckoning and reconciliation in transitional societies.[60] [61] In law, as in society, time

[57] Arguments about the unviability of transitional justice are often based on law. In other words, the law can be used to maintain the status quo, thereby limiting the chances of a transformative encounter through the known institutions of law. In South Africa, there was a concern about the continuing role of the apartheid-era courts in the new South Africa. One solution to this that came out of the Truth and Reconciliation process and other transitional efforts was to create a new South African Constitutional Court. *See* Stephen Ellmann, *The Struggle for the Rule of Law in South Africa*, 60 N.Y.L. SCH. L. REV. 57, 57-104 (2015-2016); *see generally*, JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978) (highlighting how the idea of "the rule of law" can be ambiguous in the hands of a system that believes in the ideology of racial inferiority of some people, and how that determines the human rights questions within that system. In the US system, the debates about affirmative action and how the Supreme Court of the United States has dealt with it illustrates the difficulty inherent in seeking transformative human rights experience through judicial deliberations. Thus, public interest litigations can only do so much); Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What it Got Wrong*, NY TIMES, March 30, 2019; Angela Onwuachi-Willig & Kevin Johnson, *Cry Me A River: The Limits of 'A Systemic Analysis of Affirmative Action in American Law Schools'*, 7 BERKELEY J. OF AFRICAN AM. L. AND POL. 1 (2005). Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. 281 (2016); *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

[58] Many scholars use the passage of time as an excuse for avoiding a public dialogue about past atrocities. This is, even so, when the atrocities are still ongoing. This is especially so in situations where the atrocities conferred political and economic privileges. Thus, talking about these atrocities is inherently political and a ready source of anxiety even in mature democracies. Even where they are not considered political, they are believed to have considerable policy implications. *See* generally Elazar Barkan, *AHR Forum: Truth and Reconciliation in History, Introduction: Historians and Historical Reconciliation*, 114 AM. HIST. REV. 899, 899–913 (October 2009); DAVID L. PHILLIPS, UNSILENCING THE PAST: TRACK TWO DIPLOMACY AND TURKISH-ARMENIAN RECONCILIATION (Berghan Books, 2005).

[59] For instance, the global demonstrations about the death of George Floyd have led to questions about whether America and other parts of the world are ready to acknowledge that Black lives matter. It takes a social commitment for these critical dialogues to take effect. *See* Bruno Carvalho, *Latin America is Ready for Its Black Lives Matter Reckoning*, NY TIMES (June 29, 2020).

[60] David Tolbert, *Quo Vadis: Where Does Human Rights Movement Go from Here*, GEORGIA J. OF INT'L AND COMP. L. (2018).

[61] Richard A. Epstein, *The Case Against Black Reparations*, 84 BOSTON UNIV. L. REV. 1177 (2004). (Arguing that the statute of limitation had caught up with the claims for reparations for slavery because "the causes of action for slavery and segregation accrued when the injuries were inflicted, so that the statutes in question have long run unless some tolling exception applies." *Ibid* at 1184.) The plausibility of this argument is fragile considering the enduring impact and deprivations arising from slavery, segregation, and racialized economic and social opportunities that are the daily staple of Blacks and other people of color in America. The argument also highlights the potential use of law to forestall access to justice in societies—a theme illustrated by Kafka in his writings on law and access to justice. Sometimes, it is not the use of law expressly but the establishment of cumbersome procedures and processes through which social justice questions may be articulated and enforced within the society. So, while the law is manifestly rich in just ideals, it may be radically impervious because the accepted means of justice and reckoning are deliberately complex. *See* FRANZ KAFKA, BEFORE THE LAW (1915); Kevin D. Williamson, *The Case Against Reparations: A Reply to Ta-Nehisi Coates*, NATIONAL REVIEW (May 24, 2014), https://www.nationalreview.com/2014/05/case-against-reparations-kevin-d-williamson/; David Brooks, *The Case for Reparations: A Slow Convert to the Cause*, N.Y. TIMES (March 7, 2019); BORIS I. BITTIKER, THE CASE FOR BLACK REPARATIONS (Beacon Press, 1973); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/. For more thoughts on reparations *see* A. Michele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV., 1255 (2020); Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 FORDHAM L. REV. 2271, 2290 (2006); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations As Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043 (2010); Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 UNIV. OF MEMPHIS L. REV., 367—407(2003).

occupies a principal place.[62] Events and activities map the landscape of societies and weave the tapestry of memory.[63] In seeking solutions for many crucial justice questions in changing societies, the community must look backward to move forward.[64] Doing this demands a bold intention to correct anomalies[65] and insulate the community against future repetition of human rights violations.[66] It is an opportunity to engrave "never again"[67] on the foundational stones and beacons of society. The nature of these events—whether violent, systemic, or superficial—does not derogate from their capacity to shape societies and their trajectories. For example, the killing of students by law enforcement in Soweto in 1976 for demonstrating against the apartheid education system is deeply etched in the memory of the South African society. It is also a critical [t]imestamp in the overall quest for a new South Africa marked by equality.[68] Such events can upend democracy and lead to some of the most egregious violations of human rights, such as genocides and crimes against humanity.

In other words, we are all products of time, and so is society.[69] For example, time determines the transition between one election and the other, informs prison sentences, and

[62]Jon Kertzer, *Time's Desire: Literature and the Temporality of Justice.* 5 LAW, CULTURE, AND THE HUMANITIES 266, 266–87 (2009).

[63] In a sense, the law can also be the society's archive evidencing the systemic injustice. However, we must not forget the limitations of law as an institution in preserving the memory of violation, considering that many human rights violations do not come to court. For instance, colonial human rights violations, genocides, and other forms of crimes against humanity often do not end in court. *See generally* STEWART MOTHA & HONNNI VAN RIJSWIK, LAW, MEMORY, VIOLENCE: UNCOVERING THE COUNTER ARCHIVE (Routledge 2016).

[64] Deciding how backward society should look in reckoning and providing for repair, reconciliation, and restorative justice, in general, is also a crucial limb of the time significant questions in international law and transitional justice. It has been used to dismiss the case for reparation for slavery. The argument is that slavery era is now too remote to warrant a just reckoning. *See generally* David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55, 55-109 (2010).

[65] Terri Daley, *Maryland Has Created a Truth Commission on Lynchings—Can it Deliver?* THE CONVERSATION (June 14, 2019), https://theconversation.com/maryland-has-created-a-truth-commission-on-lynchings-can-it-deliver-118154.

[66]*See generally* NATASCHA MUELLER-HIRTH & SANDRA RIOS OYOLA, TIME AND TEMPORALITY IN TRANSITIONAL AND POST CONFLICT SOCIETY (Routledge 2020).

[67] Michelle D. Bonner, *'Never Again': Transitional Justice and Persistent Police Violence in Argentina,* 8 INT'L J. OF TRANSITIONAL JUST. 235, 235–255 (2014).

[68]Jane Perlez, *Soweto Students Recall '76 Uprising*, N.Y. TIMES (June 16, 1989), https://www.nytimes.com/1989/06/16/world/soweto-students-recall-76-uprising.html; Jason Burke, *Soweto Uprising 40 years on: the Image that Shocked the World*, THE GUARDIAN (June 16, 2016), https://www.theguardian.com/world/2016/jun/16/soweto-uprising-40-years-on-hector-pieterson-image-shocked-the-world.

[69] The exploration of time and society can be viewed from many angles. The rise and fall of societies in time is one popular way of doing so. It could also be to see the changes in the architecture of law and rights in that society. *See generally*, JOSEPH A TAINTER, THE COLLAPSE OF COMPLEX SOCIETIES (1988); BEN EHRENREICH, DESERT NOTEBOOKS AND A ROADMAP FOR THE END OF TIME (2020).

affects even marble pieces like monuments[70] and other changes in society. Today, monuments[71] [72] to confederate soldiers[73] [74]have become platforms of contention[75] in America.[76] [77] [78]It has some similarities to the *#Rhodesmustfall*[79] movement in South Africa[80] and the UK.[81] And because time is a constant in the public sphere, it can also affect demography, and other issues entangled with power[82] and structures in changing societies. These changes could create anxiety[83] and, if not well managed, may become justifications for further violations of human rights.[84] Little wonder then that time is a subject matter of rigorous scientific inquiry.[85]

[70] For instance, the value of confederate monuments in public spaces has been a central debate in recent times in America. *See* Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes,"* 91 TEMPLE L. REV. 1, 1-40 (2018). ("Now Congress has voted ….to remove monuments to confederates within the rotunda of the Capitol. For many these monuments do not speak of the values of equality and justice which America professes. Yet for some others, it represents a time which America is not proud—a time of segregation, racial superiority, and war to keep some members of the community subjugated."); Nicholas Fandos, *House Votes to Purge Confederate Statues From the Capitol,* N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/29/us/politics/house-confederate-statues-vote.html.
[71] Alexis Coe, *Yes, Take Down the Confederate Statues. But the Founders are Different.*, THE WASHINGTON POST (July 14, 2020).
[72] Jasmine Aguilera, *Confederate Statues Are Being Removed Amid Protests Over George Floyd's Death. Here's What to Know*, TIME (June 24, 2020), https://time.com/5849184/confederate-statues-removed.
[73] Gregory S. Schneider, *Confederate Statue Taken Down in Charlottesville Near the Site of Violent 2017 Rally*, THE WASHINGTON POST (September 12, 2020).
[74] Andrew Restuccia & Paul Kiernan, *Toppling of Statutes Triggers Reckoning Over Nation's History,* THE WALL STREET JOURNAL (June 23, 2020), https://www.wsj.com/articles/trump-seeks-to-protect-monuments-from-vandals-with-tougher-sentences-11592922449.
[75] Gillian Brockwell, *Counties with More Confederate Monuments Also Had More Lynchings, Study Finds*, THE WASHINGTON POST (October 13, 2021), https://www.washingtonpost.com/history/2021/10/13/confederate-monuments-lynchings-report-virginia/
[76] Phillip Morris, *As Monuments Fall, How Does the World Recon With a Racist Past?*, THE NATIONAL GEOGRAPHIC (June 29, 2020), https://www.nationalgeographic.com/history/2020/06/confederate-monuments-fall-question-how-rewrite-history/#close.
[77] Tyler Stiem, *Statue Wars: What Should We do With Troublesome Monuments?*, THE GUARDIAN (September 26, 2018).
[78] Alisha Ebrahimji, et al, *Confederate Statues are Coming Down Following George Floyd's Death. Here's What We Know*, CNN (July 1, 2020).
[79] Simukai Chigudu, *Rhodes Must Fall in Oxford: A Critical Testimony*, 12 CRIT. AFRICAN STUD. 302, 302-312 (2020).
[80] A. Ahmed, *#RhodesMustFall: How a Decolonial Student Movement in the Global South Inspired Epistemic Disobedience at the University of Oxford*. 63 AFRICAN STUD. REV. 281, 281-303 (2020).
[81] Amit Chaudhuri, *The Real Meaning of Rhodes Must Fall*, THE GUARDIAN (March 16, 2016), https://www.theguardian.com/uk-news/2016/mar/16/the-real-meaning-of-rhodes-must-fall.
[82] Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY, 105-134 (Jean Allain, ed., 2012).
[83] James A. Piazza, *White Demographic Anxiety and Support for Torture of Terrorism Suspects, Studies in Conflict & Terrorism* (2020).
[84] DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE (Oxford Univ. Press, 1981).
[85] *See generally* MARTIN HEIDEGGER, BEING AND TIME (State Univ. of N.Y. Press, 2010).

In the same vein, the law as temporality[86] [87] [88] is a recognized canon in jurisprudence and legal philosophy in general.[89] However, it does not enjoy the prominence of 'central texts/themes'[90] [91] or issues of jurisprudence. For example, subjects such as legal validity,[92] legitimacy,[93] morality[94],[95] private rights,[96]duty,[97] ownership,[98] and obligation[99] are ubiquitous in legal theory.[100] We cannot say the same about time. The elevation of legal theory as pure rational

[86] Renisa Mawani, *Law as Temporality: Colonial Politics and Indian Settlers,* 4 U.C. IRVINE L. REV. 65 (2014); CAROLE J. GREENHOUSE, A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES 175–210 (Cornell Univ. Press, 1996); PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (Cambridge Univ. Press, 2001); Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1670 (2010).

[87] The spatial-temporal whole in narrative and memory is an idea that is attributed to the Russian philosopher and literary critic Mikhail Bakhtin (1895-1975). The idea of chronotope has permeated the walls of legal philosophy and jurisprudence in general. *See* James Cresswell & Paul, *Sullivan Bakhtin's Chronotope, Connotations, and Discursive Psychology: Towards a Richer Interpretation of Experience*, 17 QUAL. RESEARCH IN PSYCH., 1, 121-142 (2020); Santiago Abel. Amietta, *In Ambiguous Times and Spaces: The Everyday Assemblage of Lay Participation to Argentine Courthouses*, SOC. & L. STUD. (October 2020).

[88] *See generally* A.W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY AND THE JURY (Oxford Univ. Press, 2012).

[89]*See generally* MARIANA VALVERDE, CHRONOTOPES OF LAW: JURISDICTION, SCALE AND GOVERNANCE (Routledge, 2015).

[90] I use the term "central texts" in two senses. First, to broadly represent the major canons of Western legal jurisprudence. This is done because of the vast legal diffusions and transplants that ensued across cultures and legal traditions in the last 400 years. 'Discovery, conquest, slavery, colonization, trade, and globalization have meant the transmission of legal ideas across many legal traditions—especially from Europe to the rest of the world. Secondly, I use it in the conservative sense to focus on the texts, that have shaped the common law tradition in contemporary history. No doubt, every history of the common law has to be seen as representative since many aspects of the common law tradition has its complicated ancestry. The tradition has also undergone mutations as it moves for instance the American tradition and the complex regimes found in the former colonies of Britain. *See generally* Frederic William Maitland & Frederick Pollock, The *History of English Law Before the Time of Edward I*. (2013); R. C. Caenegem, *The Birth of the English Common Law* (2 ed. 1988); Christopher W. Brooks, *English History and the History of English Law 1485–1642*, Law, Politics and Society in Early Modern England 1–10 (2009); John Henry Merryman Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (2007); David Scott Clark, John Henry Merryman & John Owen Haley, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* (LexisNexis 2010).

[91] Often the central issues in jurisprudence and legal philosophy are such issues as law, law and morality, law and obligation, law and justice, rights, liberty, equality, egalitarianism, legitimacy, authority, and more. *See generally* H.L.A. HART, THE CONCEPT OF LAW (Oxford, 2012); NIGEL E. SIMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW, AND RIGHTS (2013); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Bloomsbury, 1977); RONALD DWORKIN, LAW'S EMPIRE (Harvard Univ. Press, 1986*)*; JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press, 1971); ROBERT NOZICK, ANARCHY STATE AND UTOPIA (1974).

[92] *See generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (Oxford, 2012); Seow Hon Tan, *Validity and Obligation in Natural Law Theory: Does Finnis Come Too Close to Positivism,* 15 REGENT U. L. REV. 195, (2003); Maris Kopcke, LEGAL VALIDITY: THE FABRIC OF JUSTICE (Bloomsbury Publishing, 2019).

[93] Stephen Perry, *Hart on Social Rules, and the Foundations of Law: Liberating the Internal Point of View,* 75 FORDHAM L. REV. 1171, 1171-1209 (2006).

[94] Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 4, 616-45 (1949).

[95] William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731-1753 (1993).

[96] Felix S. Cohen, *Dialogue on Private Property,* 9 RUTGERS L. REV. 2, 357-387 (1955).

[97] Alan D. Cullison, *A Review of Hohfeld's Fundamental Legal Concepts*, 16 CLEV. MARSHALL L. REV. 559-573 (1967).

[98] G. P. Wilson, *Jurisprudence, and the Discussion of Ownership*, 15 THE CAMBRIDGE L. J., 216–229 (1957).

[99] Roscoe E. Hill, *Legal Validity and Legal Obligation*, 80 Y. L. J. 1, 47-75 (1970).

[100] *See generally* Hart, *supra* note 91.

science and the uneasy relationship between law and science[101] may explain some of the law's minimization of time since time is often stipulated in legal instruments. [102] It can also be attributed to the impact of legal positivism[103] and its concerted effort to delimit the province of jurisprudence.[104]

Law operates not just in the realm of ideas but in the interstices of society. Throughout history,[105] some events and encounters have redefined societies and established several ramifications for their legal and normative systems. These events and their legal and norm-creating impact show timelines and patterns of social evolution. These timelines alter the laws, regulations, norms, and lived experiences of people worldwide. For example, such dates as 1648[106] and 1652[107] carry significant weight in the law and the reality of different communities around the world. These timelines equally continue to influence governance and priorities in humankind's affairs, even in established democracies.

[101] Robin Feldman, *Historic Perspectives on Law & Science*, 2009 STAN. TECH. L. REV. 1 (2009).
[102] *See generally* DAVID FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW (Times Books, 2004), DAVID FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW (Freeman and Co., 1999); Ronald Dworkin, *Social Sciences and Constitutional Right—the Consequences of Uncertainty*, 6 J.L. & EDUC.. 3 (1977); Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEO. L.J. 1341 (1987); Dean Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111 (1997); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HAR. L. REV. 443 (1899); Karl N. Llewellyn, *The Theory of Legal ―Science*, 20 N.C. L. REV. 1 (1942); Howard T. Markey, *Jurisprudence or "Juriscience"?*, 25 WM. & MARY L. REV.. 525 (1984); Roscoe Pound, *Law and the Science of Law in Recent Theories*, 43 Y. L. J. 525 (1934) (interrogating the tensions and complex relationships between law and science. The study of time is deeply embedded in science and not too much of the waters of that science has seeped into the stream of law).
[103] Daniel Priel, *Toward Classical Legal Positivism*, 101 VA. L. REV. 4, 987 (2015); Charles Barzun & Dan Priel, *Jurisprudence, and its History*, 101 VA. L. REV. 4, 849 (2015).
[104] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832; ed. W.E. Rumble, Cambridge 157, 1995). (The views of Austin shaped many of the subsequent perception of law properly so called [positive law] in contrast to moral law which conceives law as what law ought to be or as influenced by natural principles).
[105] *See generally* MICHEL FOUCAULT, WRONG-DOING, TRUTH-TELLING: THE FUNCTION OF AVOWAL IN JUSTICE (2014).
[106] The Treaty of Westphalia altered the trajectory of Europe and modern international law. Amos S Hershey, *History of International Law Since the Peace of Westphalia*, 6 THE AM. J. OF INT'L L. 1, 30-69 (1912); MARTI KOSKENNIEMI, A HISTORY OF INTERNATIONAL LAW HISTORIES (Bardo Fassbender & Anne Peters ed., 2012); Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?* 2 J. OF THE H. OF INT'L L. 148, 148–77 (2000); Derek Croxton, *The Peace of Westphalia of 1648, and the Origins of Sovereignty*, 21 INT'L HIS. REV. 569, 569–91 (1999); Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. OF INT'L L. 20, 20–41 (1948); Randall Lesaffer, *The Westphalia Peace Treaties, and the Development of the Tradition of Great European Peace Settlements prior to 1648*, 18 GROTIANA N.S. *71*, 71–95 (1997); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORGANIZATION 251, 251–87 (2001).
[107] The Arrival of the Dutch in Southern Africa remains a marker in terms of the evolution of the justice and the legal system in South Africa. *See generally* ALBIE SACHS, JUSTICE IN SOUTH AFRICA (Univ. of Ca. 1973).

In the United States of America, such dates as 1619,[108] 1620,[109] 1776,[110] 1863,[111] and 1964/65[112] evoke different memories in different populations of the country.[113] These dates are important for law-making, access to the promises of the Constitution, and sustenance of the governing public order. Our business dealings are also dependent upon laws that have time stamps—including the time of offer, acceptance, and delivery.[114] However, for litigation and business transactions, practical concerns about time are often preempted in law. It can be argued that when judges sit down to hear cases, they are not concerned with the ontological, deontological, or even epistemic issues of time. There is no space for all that in the briefs and memorials that we file in courts—except in special circumstances where 'time' is essential to the litigation. Even then, time is a given. It must be taken from the statute books, rules, or court procedures as preestablished. The law provides, and the rules of court, and procedures capture the remainder.

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[108]Recent journalistic works by the New York Times focusing on the year 1619 continues to stimulate much debate about the history and values of democracy in America—especially as it relates to the erasure or otherwise obfuscation of race as a foundational issue in the founding and democratic evolution of the United States of America. *See* Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES (August 14, 2019); Linda Villarosa, *Myths About Physical Racial Difference Were Used to Justify Slavery-And Are Still Believed by Doctors Today*, N.Y. TIMES (August 14, 2019); Mary Elliot & Jazmine Hughes, *Most Americans Still Don't Know the Full Story of Slavery. This is the History You Didn't Learn In School*, N.Y. TIMES (August 14, 2019); Kevin M. Kruse, *What Does a Traffic Jam in Atlanta Have to do With Segregation? Quite a Lot*, N.Y. TIMES (August 14, 2019).

[109] The Arrival of the Pilgrims in America and the beginning of the Republic has always been the gospel of the founding of America. The 1619 Project has complicated that orthodox [h]istory and scholars are vigorously debating it. *See* George L. Haskins, *The Legal Heritage of Plymouth Colony*, 110 UNIV. OF PENN. L. REV. 847 (1962); Julia L. Ernst, *The Mayflower Compact: Celebrating Four Hundred Years of Influence on U.S. Democra*cy, 95 N.D. L. REV., 1 (2020); Daniel L. Dreisbach, *Introduction: Christianity and American Law*, in GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY, 1–15 (Daniel L. Dreisbach & Mark David Hall eds., 2019).

[110] The Declaration of Independence 1776 is another pillar our national history and constitutional evolution. It has been described as the frame of the constitution and continues to inspire great constitutional literature in our time. *See* Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis,* 32 U. RICH. L. REV. 107 (1998); Carlton F. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701 (2001); Alexander Tsesis, *Self-Government, and the Declaration of Independence*, 97 CORNELL L. REV., 693 (2012).

[111] Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do we or Should we Care What the Answer Is?*, 5 UNIV. OF ILL. L. REV., 1135 (2001).

[112] *See* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, 527-552 (2014); Kenneth W. Mack, *Foreword: A Short Biography of the Civil Rights Act of 1964 (Symposium on the fiftieth Anniversary of the Civil Rights Act of 1964)*,67 SMU L. REV., 229-246 (2014); Gerald Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law,* 49 ST. LOUIS UNIV. L. J. 1147, 1147-1154 (2004).

[113] Kunal M. Parker, *Law "In" and "As" History: The Common Law in the American Polity, 1790–1900,* 1 U.C. IRVINE L. REV. 587, 587–609 (2011); *see generally* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM (2011).

[114] For instance, segregation laws essentially kept a temporal and spatial leash on African Americans for decades. While many of these laws may have been repealed, the social, economic, and political structures they forged still determine the outlook of African American communities. This can be seen in the geography of poverty, access to healthcare, education, and employment in America today. Unless there is a deliberate public engagement with these issues, the marginality and structural inequities will subsist. *See generally See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (Norton, 2017); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 173-232 (2019).

In contrast, society and democratic contestations do not replicate this preemptive inclination of contractual arrangements, and procedural orderings.[115] Except where constitutions may provide, the redress of mass injustices do not often subscribe to statutes of limitations.[116] The debate about statutes of limitations, and reparations[117] has featured prominently in the search for accountability for sexual violence against children.[118] And the long life span of voter suppression and segregation has not stopped the pursuit of equal opportunity in America.[119] Thus, societies are continuously in some form of self-dialogue at different levels. Different forms, levels, intersections, and iterations of that dialogue are carried on from one generation to the other. The intergenerational nature of this dialogue is sometimes a reflection of the refusal to recognize and redress human rights violations.[120]

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[115] The law and society scholarly tradition is founded on the premise that law must be understood in its context. It holds as a central canon the understanding that law is not autonomous but deeply embedded in the structural foundations of society. Thus, in understanding the problems of society and law—and potentially providing sustainable answers to them—it is essential to consider this relationship between law and society. *See generally* Lynn Mather, *Law and Society, in* THE OXFORD HANDBOOK OF POL. SCI. (Robert E. Goodin, ed. 2011).

[116] For instance, while there is evident lack of judicial sympathy to the call for reparations—especially for state sanctioned racial violence—the call for reparations has not abated within the civil rights and social justice community. See generally, Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005).

[117] Katrina M. Wyman, *Is There a Moral Justification For Redressing Historical Injustices?* 61 VAN. L. REV. 127 (2008); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES, 30-45, 169-215 (W.W. Norton & Co., 2000).

[118] Timothy J. Muyano, *A Not so Retro Problem: Extending Statutes of Limitations to Hold Institutions Responsible for Child Sexual Abuse Accountable under State Constitutions*, 63 VILL. L. REV. 47-72(2019).

[119] As at the time of this piece, there are contestations in many State Houses and in the Congress about voting rights and equitable access of all American citizens to the exercise of that legitimating right. The tension and continuous quest for equal voting right was illustrated in the recent case of *Brnovich, Attorney General of Arizona, ET AL. v. Democratic Committee ET AL*.. In the case the Democratic party had alleged that Arizona's Electoral regulation …had discriminatory intent against racial minorities. While the majority dismissed this claim, Justice Elena Kegan in a stirring dissent noted that:

> *If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out. Section 2, the provision at issue here, guarantees that members of every racial group will have equal voting opportunities. Citizens of every race will have the same shot to participate in the political process and to elect representatives of their choice. They will all own our democracy together—no one more and no one less than any other. If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was—and remains—so necessary. Because a century after the Civil War was fought, at the time of the Act's passage, the promise of political equality remained a distant dream for African American citizens. Because States and localities continually "contriv[ed] new rules," mostly neutral on their face but discriminatory in operation, to keep minority voters from the polls. South Carolina v. Katzenbach, 383 U. S. 301, 335 (1966). Because "Congress had reason to suppose" that States would "try similar maneuvers in the future"—"pour[ing] old poison into new bottles" to suppress minority votes […] What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness and protects against its basest impulses. What is tragic is that the Court has damaged a statute de- signed to bring about "the end of discrimination in voting." I respectfully dissent."*

[120] There is scholarship—especially in the field of ethics—that justifies the intergenerational view of historical justice questions and how best to make amends for them. *See generally* Daniel Butt, *Inheriting Rights to Reparations: Compensatory Justice and the Passage of Time*, 20 ETHICAL PERSP., 245, 245—269 (2013).

Consequently, temporal distances or spatial dimensions do not ordinarily circumscribe questions of accountability and reckoning in society's dialogue about justice and fairness. Historical injustices are not erased by the passage of time.[121] Sometimes, the passage of time can heighten the hunger for justice. In many cases, injustices become even more visible and intense with the effluxion of time. When societies ignore these problems, they usually lead to social rupture and further violations of human rights. Ignoring the strident problems neither guarantees justice nor democratic flourishing. While history studies epochs, powers, and civilizations, the law underpins, justifies, and orders much of history's paths.[122] Law legitimizes power[123] and gives it an enduring legacy.[124] Where the law does not provide justice, it provides pacification and centralizes ideas about coexistence, including principles of right and wrong, moral culpability and notions of justice. In other words, law has an intrinsic capacity for public transformation. In transitional societies, these extensions of law and justice are subjects of great deliberations. In all that deliberative exploration, time is of the essence, because deferring the conversations, and redress is not in the best interest of society.

On the international law sphere, some scholars have framed the law and its entanglements with temporality through the metaphor of geology.[125] Law and its engagement with society can be viewed from geological perspectives and timelines.[126] The timelines reveal law and society's growth, make-up, structures, and evolution. While history may tell of society's developments, geology presents the facts as seen in society's sediments and layers. It does not just focus on epochs, but also looks at the different layers of social structures, and law's evolution in the respective generations.[127]

This has the unique advantage of presenting different dimensions. Instead of the linear perception of progress from one generation to another, which is often seen in the field, it establishes a nuanced picture of the evolutions—revealing the social cataclysms and not-so-

[121] For general readings on historical injustice and the quest for justice, *see*, Stephen Kershnar, *Are the Descendants of Slaves Owed Compensation for Slavery*? 16 J. OF APPLIED PHIL. 95, 95—101 (1999); David Miller, *David Owen on Global Justice, National Responsibility and Transnational Power: A Reply*, 37 REV. OF INT'L STUD. 2029, 2029-2034; George Sher, *Ancient Wrongs and Modern Rights*, 10 PHIL. AND PUB. AFFS. 3, 3-17 (1984); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 4—28 (1992); Daniel Butt, *Repairing Historical Wrongs and the End of Empire*, 21 SOC. AND LEGAL STUD. 227, 227-242 (2012).

[122] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 8–21, 54–60 (Basic Books, 2000).

[123] Sol Picciotto, *International Law: The Legitimation of Power in World Affairs*, in THE CRITICAL LAWYERS' HANDBOOK 2, 13-29 (P. Ireland & Per Laleng, eds., 1997).

[124] Roger Taney's Interpretation in *Scott v. Sanford* did one remarkable thing, the judicial endorsement of the noxious view of inherent inferiority and exclusion of African-Americans from the halls of citizenship and freedoms contained in the Declaration of independence and the Constitution." *See* the dictum of Roger Taney in *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

[125] For more on the geology of international law *see* Joseph H. H. Weiler, *The Geology of International Law – Governance Democracy and Legitimacy*, 64 GERM. Y.B. OF INT'L LAW 547, 547-562 (2004).

[126] There has also been a discussion about the spatial and geographical dimensions of law. See generally NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHICS OF POWER 29– 31(1994); NICHOLAS K. BLOMLEY, THE LEGAL GEOGRAPHICS READER: LAW, POWER AND SPACE (Nicholas Blomley et al. eds., 2001).

[127] For a general diet on international law and temporality see Christian Djeffal, *International Law and Time: A Reflection of the Temporal Attitudes of International Lawyers Through Three Paradigms*, 45 NETH. YEARBOOK OF INT'L L. 93, 93–119 (2014); Kathryn McNeilly, Are *Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change*, 28 SOC. & LEGAL STUD. 817, 817-838 (2019).

violent developments. Thus, we see the structures, the fractures, and some of the debris of society. For transitional justice, this is a great metaphor. It is crucial because it furnishes society with evidence of less recorded developments. What is found in the sediments may well evidence the erasures—layered over injustices—that continue to tug at society's heart. It then allows for reckoning, remediation, reconciliation, healing, redemption, and renewal.

For smart societies, just reckoning can be carefully accomplished through transitional justice mechanisms. Transitional justice reckoning with society's realities, via restoration, as opposed to retribution, ensures just peace, law, and order. Furthermore, this geological perspective is a brilliant way of looking at transitional societies' evolution and the reality or otherwise of meaningful and transformative transitional justice. It enables society to see the backdrop from which the community's human rights emerge. In established democracies, this perspective can help reveal the systemic flaws, and provide pacific correctional tools. From these foundations, this article explores time issues in transitional justice and how societies can navigate them. It suggests pathways for legal development, and transitional justice in general. Since time is a susceptible factor in transitional justice, it is ripe for deeper scholarly contemplation and rigor.

I. TEMPORALITY IN TRANSITIONAL JUSTICE

From the foregoing, temporality[128] expresses the state of existing within or being related to time.[129]It has many branches and ramifications for transitional justice in changing societies. In law, there is an apparent gap in the existing literature, especially as it relates to comprehensive framework of analysis.[130] This gap implicates transitional justice and should be the concern of scholars and policy makers interested in achieving sustainable goals in transitional and rapidly changing societies. To further underscore this and move the discourse, I highlight the roots of the idea of temporality and how it interacts with subjects of transitional justice such as reparations and memorials.

A. Tracing the Roots

Etymologically, "temporal" or "temporality" is traceable to the Latin word *temporalis* or *temporalitas*. It is a noun relating to the state of existing within time or having some relationship with time.[131] Temporality finds expressions in law in several ways. Some of the expressions of time in law are found in the maxims and doctrines of equity. Such expressions like "equity aids

[128] Rebecca French, *Time in the Law*, 72 U. COLO. L. REV. 663, 668 (2001).
[129] Carol J. Greenhouse, *Just in Time: Temporality and Cultural Legitimation of Law*, 98 Y. L. J. 1631, 1631 (1989).
[130] Liaquat A. Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55, 58 (2016). (The author, while acknowledging that "[t]emporality is an integral part of law," made a strong effort to develop a framework of analysis about temporality. He proposes a model based on four general principles of law's temporality— (1) the principle of temporal correlations, (2) the principle of temporal inertia, (3) the principle of temporal triggers (4), and the principle of temporal cooperation.)
[131] In another sense, it may be used to refer to 'a secular possession, especially the properties and revenues of a religious body or a member of clergy. This paper uses the word temporality as it relates to time and not to secular possession of property or powers by ecclesiastical bodies. *Temporality*, Bryan A. Garner (Ed), Black's Law Dictionary (10th ed. 2014).

the vigilant and not the indolent,"[132] and "the first in time is first in right,"[133] are popular maxims in law. Their resonance is felt everywhere in such branches of law as criminal liability, torts, contracts,[134] property rights,[135] trust,[136] and general procedural requirements in both criminal and civil litigations. [137]

On its part:

> *Transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.*[138]

Sometimes, the transitional justice effort comes at the end of a seemingly interminable period of pain, torture, and human rights violations, either through conflict or dictatorships. The effort is often provoked by the discovery of little-known sites of violations, such as concentration camps, mass graves, or records in the archives about such violence. Thus, in transitional justice, time assumes a definitional nature. For example, what time is definitional in a reparation process? How much of the past should be explored for the transitional justice project? Where does it end in terms of future recommendations for remedial measures such as affirmative actions? A significant problem in transitional justice is the issue of time and how it intersects and interacts with society's legal foundations and the approaches, mechanisms, and solutions to be adopted. This problem is not surprising considering several aspects of society, such as history, memory, violence, legal exclusion, and judicial precedents, which are all entangled in post-conflict and post-authoritarian states.[139]

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[132] John Young & Stephen Spitz, *SUEM - Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175, 188 (2003). For Common Law oriented scholars, the maxims are pretty familiar. They are neither normatively exhaustive nor procedurally determinate. However, the maxims of equity represent an attempt to give a precise articulation of the principles which guided the decisions of the Courts of Chancery. They were initially formulated to ameliorate the hardships caused by the rigors of the Common Law. Hence, equitable remedies in law such as equity of redemption, specific performance, rectification were developed pursuant to these principles. Over time, the Courts of Chancery were merged with the Common Law Courts—via the English Judicature Acts, thereby making the principles of essential parts of the English common law. Henry E. Smith, *Equity as Meta-Law*,130 Y. L. J., 1050, 1128 (2021). The temporal dimensions of equity are seen in cases involving time limitations, such as laches and prescription. They can be very definitive in probate proceedings and property law in general. It may be necessary to see what significance this has in transitional situations, especially in considering exclusive expropriations of proprietary rights policies in such communities. It resonates deeply over questions of restitution, reparation, land reform, and compensations. This issue can be further theorized to understand transitional justice's underpinnings and economic aspects. It is, however, beyond the scope of the present research to delve into this otherwise fascinating concern.

[133] *See generally*, Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 NEB. L. REV. 359, 359-388 (1985). The issues of priorities in law are often delineated by statutory or procedural provisions. But society and human rights evolution often do not track carefully considered timelines.

[134] *See* Kelvin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 UNIV. OF DETROIT MERCY L. REV. 609, 609-656 (1996-1997).

[135] *See* Kahn, *supra* note 130; Frederic Putnam Storke, *Priority Between Equitable Interests*, 8 ROCKY MTN. L. REV. 1, 6-7 (1935); Ralph W. Aigler, *Operation and Effect of Recording*, 20 MICH. L. REV. 344, 344-6 (1922).

[136] Greenhouse, *supra* 129.

[137] *Id*.

[138] *See* U.N. Secretary General, *United Nations Approach to Transitional Justice*, U.N. Doc. (March 2010).

[139] Ruti Teitel, *Transitional Justice: Postwar Legacies (Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy)* 27 CARDOZO L. REV. 1615, 1617 (2005-2006).

Temporality is also important in older democracies' desire to build more harmonious, and inclusive communities. This can only continue to be so as the democratic principles these communities continue to broaden. Therefore, this article further claims that the problem of temporality is complicated, because transitional justice must look back to envision the future. This makes the problem fascinating, and delicate at the same time. It is fascinating because of the potential capacity to complicate a hitherto presumed settled narrative of the nation-state or community. It is delicate because of the uneasiness and politically sensitive nature of what might be uncovered.

Many myths and utopias underpin the outlook of nation states. [140] The complication of the state's sacralized narratives and myths is epoch-making and can create anxieties for those with vested interests in the accepted orthodoxy. Sometimes, these anxieties are borne out of what is conceived or imagined as changing legal foundations, or demography which has implications for existing order. That existing order may be founded on racial superiority, religious homogeneity, or immigrations and these can be serious issues of political contestations in nation states—with significant human rights violations in extreme situations.[141] The recapture of human rights violations and the mass publicity surrounding those violations create expectations of remedial measures. These expected measures may range from symbolic measures such as a public apology[142] to concrete acts of state such as victims' compensation, reparations, and public memorialization. It is not surprising that the debates become even more strident in cases where reparations are in the purview. This informs the need to look at typical temporality issues that arise in transitional justice.

B. Typical Temporality issues in Transitional Justice

Several temporal issues are implicated in transitional justice. First, in post-authoritarian and post-conflict situations, such issues as the period of reckoning and amnesty involve temporality. Many post-conflict societies utilize amnesty and truth commissions for the purpose of reckoning. Whatever the mechanism adopted by these societies, the society often must decide

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[140] *See generally* Sylvia Walby, *The Myth of the Nation-State: Theorizing Society and Politics in a Global Era*, 37 SOC. 529, 529-546 (2003); BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (Verso, 1983) (espousing the idea that nation states are imagined communities. Thus, although each member of that community may not get to meet with every other member of the community, there is a sense of communion which they all share); Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. UNIV. L. REV. 183, 183-211(2020) (highlighting the interesting debate about the extent of national powers based on the view in the some part of the legal academy that America is a nation state founded on the idea of enumerated powers and limited government); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 251-287 (2001) (highlighting also how international relations mobilizes myths and utopias to anchor the development of a given approach to international relations).

[141] Arthur L. Rizer III, *The Ever-Changing Bogeyman: How Fear Has Driven Immigration Law and Policy*, 77 LA. L. REV. 244, 244-286 (2016) (discussing immigration policy and how it is easily motivated by social, cultural and political anxieties).

[142] K. McEvoy, et al., *Apologies in Transitional Justice* (United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence UN. Res. A74/147, 1-21, 2019); Courtney Jung, *Canada, and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society* (2009) SOC. SCI. RSCH. NETWORK 1, 1-2 (2009).

the timeline to cover and the length of time within which belligerents and alleged violators should take advantage of the proclaimed amnesty. The proclaimed timeline may begin from the time of the violent seizure of power to the cessation of belligerence.[143] It may also go beyond that in order to deal with foundational issues like constitutional frameworks, self-determination, diversity, and state formation.

Second, these temporal issues often present dilemmas such as the search for justice, the subjects to covered, and imposed time limitations. If societies set up commissions of inquiry or truth commissions, within what length of time should the commission issue a report? How far forward or backward should it look in determining their recommendations? These are crucial elements of that dilemma. These crucial issues and dilemmas of time deserve more rigorous scholarship, especially because they can determine the outcome of transitional justice projects. The scholarly focus on transitional justice mechanisms seems to have obscured the importance of filling this gap in the transitional justice literature. Often, the time factor is treated as a political question. Hence, they are easily incorporated in peace agreements and similar accords.

In mature or older democracies, the considerations and incentives are different. But the issues and questions are remarkably similar. First, mature democracies wrestle with how to reckon with legacies of historical injustices and mass atrocities. Be it violence against indigenous communities, dispossession, slavery, or colonialism, these societies face justice dilemmas with acute temporal dimensions. There are also the question of what time frames the community should revisit and what measures will better suit their respective circumstances. If, for example, there is a need to provide restitution or reparations,[144] what timeline should be considered?

Some scholars also use the time distances to dismiss the need for reckoning and transitional justice in general. Quite a few pundits have also suggested that the direct victims of some of these historical injustices are dead and society should "let the dead past bury itself."[145] Such dismissiveness is a significant contributor to the overall tension, and transmission of trauma from one generation to the other. Some other missed points are that transitional justice does not focus on only one method of reckoning. Sometimes a national recognition of these historical violations is enough to heal the community and engender a redemptive impact on society. [146] Such recognition creates a fresh hope of non-repetition of the violations. Equally, transitional justice has many tool kits[147] that can be applied to different issues within the larger scheme of the transitional justice project.

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[143] This is somewhat the Nuremberg paradigm of transitional justice and accountability. *See* Brianne McGonigle Leyh, *Nuremberg's Legacy Within Transitional Justice: Prosecutions Are Here to Stay,* 15 WASH. U. GLOB. STUD. L. REV. 559, 561 (2016).

[144] Ta-Nihise Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

[145] Richard A. Epstein, *The Case against Black Reparations*, 84 Boston University Law Review 1177-1192 (2004); A. J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J. OF L. & POL. 183, 183-229 (2006); Afua Hirsch, *The Case for British Slavery reparations can no Longer be Brushed Aside*, THE GUARDIAN (July 9, 2020).

[146] *See* Frank Haldemann, *Another King of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L. J. 675, 675-737(2008).

[147] *See generally* RUTI TEITEL, TRANSITIONAL JUSTICE (Oxford Univ. Press, 2001).

For example, in the United States, there is an ongoing dialogue about the foundations of racial inequality[148] and how to reconcile that history within the community. The conversations about the failure of postbellum reconstruction[149] and the consequent imposition of Jim Crow regulations[150] are unfinished. This conversation is indicative of how the issue of time in transitional societies is deeply fascinating. The debates surrounding Confederate monuments also highlight the temporality issues that simmer in changing societies. [151] For first nations and aborigines, the respect and faithful implementation of settler treaties remain a live issue.[152] The same can be said of the continued violation of first nations' groves and water resources in the search for hydrocarbons and other underground resources.

No matter the perspective adopted in the debate about monuments, the question of the time of construction, the events, or the time and nature of values they sought to elevate are significant in any measure adopted to solve the problem. [153] Memorials that may seek to capture those periods will always seek to redraw society's temporal dimensions. Thus, unless communities pay more attention to the intricate nature of these debates' temporal dimensions, enacting meaningful transitional justice process can be nearly impossible. This intentional engagement with the time issues of transitional justice, also means that the promised dividends of democracy, such as equality before the law and respect for the dignity of all are continually reviewed and enhanced for the benefit of all. It is also argued that understanding temporality is relevant to solving other problems that implicate community resilience, harmony, diversity, cooperation, and peace in society.

Further, democracy is not a destination. It is created and strengthened through continuous dialogues in society. Aspects of that dialogue are vertical—engaging different structures and levels of the society. The dialogue is also horizontal in that it engages other communities, interests, orientations, media, and institutions within states and across state boundaries.[154] Transitional justice offers a way of tapping into the wealth of dialogues and assisting

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[148] *See* Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1183, 1183-1256 (2021).

[149] *See generally* Eric Foner, *Black Reconstruction in America*, 112 S. ATL. Q. 409, 409-418 (2013); John Hope Franklin, *Mirror for Americans: A Century of Reconstruction History*, 85 AM. HIST. SOC'Y 1, 1-14 (1980); W. E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: 1860-1880 (The Free Press, 1935).

[150] *See id.*, Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593-1654 (2019) (discussing the long-life span of Jim Crow in the Jury system which is at the core of our criminal justice system. The author argues that "the Jim Crow jury never fell. Over a century later, state- sanctioned racial discrimination in jury selection remains ubiquitous, and the racialcomposition of juries continues to shape substantivetrial outcomes").

[151] *See* Lucas Lixinski, *Confederate Monuments and International Law*, 35 WIS. L. J. 549, 549-608 (2018).

[152] The respect and faithful treatment of colonial treaties and what it means for transitional justice and the call for reckoning in established democracies. For general discussions on treaty making between colonial powers and indigenous communities, *see* BRADFORD MORSE, *Indigenous-Settler Treaty Making in Canada*, in HONOUR AMONG NATIONS?: TREATY AND AGREEMENTS WITH INDIGENOUS PEOPLES, 50 (Marcia Langton ed. 2004); Harry Hobbs and George Williams, '*The Noongar Settlement: Australia's First Treaty,*' 40 SYDNEY L. REV. 1, 1 (2018); Harry Hobbs, George Williams, *Treaty making in the Australian Federation*, 43 MELB. UNIV. L. REV. 178, 178-232 (2019).

[153] Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FL. L. REV. 627, 633 (2019).

[154] *See* Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251, 251-283 (2009) (discussing the role, the media can play in a successful transitional dialogue or otherwise).

democracies—nascent and mature—to create frameworks that will enhance justice, equity, and fairness.[155]

C. Communities and their Temporality Contexts

These highlighted temporality issues can be found across different communities. It is important to note that communities are never homogenous across the world. Yet there is one humanity, and one human rights, as recognized and adopted by states in such international instruments as the Universal Declaration of Human Rights,[156] the International Covenant on Civil and Political rights, and the Convention against Genocide.[157] Thus, communities must be creative by taking into consideration their specific needs, while remaining faithful to these instruments, which are the minimum of transitional justice. This creative wisdom is the only approach that can guarantee that the specific needs of society are central, when debating the time issues implicated by transitional justice projects.

In other words, temporal issues give different dynamics to different societies and laws. Indeed, time and change are intertwined and the perception of these are complex issues in societies. [158] Therefore, they must be carefully studied considering the specific contexts of these societies. Questions of temporality can equally influence the socio-cultural significance of laws in different societies because changes in society and related cultural adjustments are sometimes the forerunners of changes in the law. For example, the increased desegregation of America beginning in the 1960's arose from the social movements and changes.[159] These changes in turn brought about changes in law which further resonated across society and influenced notions such as miscegenation[160] and anti-same sex laws.[161]

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[155] Colleen Murphy, *How Nations Heal*, BOSTON REVIEW (January 15, 2021), https://bostonreview.net/articles/colleen-murphy-transitional-justice/.

[156] The *Universal Declaration of Human Rights (UDHR)* recognizes that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." *See* paragraph 1 of the Preamble to the *UDHR* (December 10, 1948), https://www.un.org/sites/un2.un.org/files/udhr.pdf.

[157] ICCPR *UNTS No. 14668/999/171* (19 Dec. 1966).

[158] Brian M. Stewart, *Chronolawgy: A Study of Law and Temporal Perception*, 67 UNIV. OF MIAMI L. REV. 303, 303-328 (2012). *See generally* J. T. Fraser, *Time Felt, Time Understood*, 3 KRONOSCOPE, 15 (2003); Thomas Hylland Eriksen, *Stacking and Continuity: On Temporal Regimes* in POPULAR CULTURE IN 24/7: TIME AND TEMPORALITY IN THE NETWORK SOCIETY 141 (Robert Hassan & Ronald E. Purser eds., 2007).

[159] Darren Lenard Hutchinson, *Social Movements and Judging: An Essay on Institutional Reform Litigation and Desegregation in Dallas, Texas*, 62 SMU L. REV. 1635, 1635-1656 (2009); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1598, 1598-1622 (2003). *See also* Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?* 8 CT. PUB. INT. L. J. 38, 38-83 (2009) (arguing that there is systemic classism and racism in America and to achieve a non-racial society, there is a need for some social movement. Else, the *status quo* will not change).

[160] Peggy Pascoe, *Miscegenation Law, Court Cases and Ideologies of "Race" in Twentieth Century America*, 83 J. OF AM. HIST. 44, 44-69 (1996).

[161] *See, e.g., Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIRCUIT 157-165 (2015).

At other times, changes in law nudge society in a different direction.[162] There is thus, a constant dialogue between law and society which can be theorized and studied in temporal terms. Only through a careful appreciation of this constant deliberation between law and society, can practitioners and policymakers, in transitional justice situations, fully understand the felt necessities, the areas of tensions, and the justifications and ideological underpinnings of the prominent problems in that society.

Even for stable democracies, such as Canada and Australia, there have often been debates about where to put the beacon of time, and how far into the past the transitional justice effort may look. It is also often debated whether it is necessary to continue reparative efforts such as affirmative action in perpetuity or provide a one-time social intervention to usher in the direly needed reconciliation in ways that are beneficial to society.[163] In societies founded on unshifting ideologies of *right vs. left*, deciding what to do to achieve public good, can be difficult.

One clear example is the recent attempt to introduce legislation in the United States Congress to create a commission to study the impact of slavery on African Americans and potential restorative justice measures to be undertaken by the state.[164] The text of *H. R. 40*, now pending before the US Congress, has the following introduction:

> "a bill to address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American Colonies between 1619 and 1865, and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes."[165]

The drafters of the Bill chose a clear timeline of focus –1619 to 1865. This proposal was made in 2017—152 years after 1895. On its face, the Bill raises temporal and political questions concerning the established narrative of the society and who, if anyone, may bear responsibility in restoration and reparation. While there is a linear narrative about the progress of civil and political rights in America, the ongoing deliberations about that history has been complicated by the 1619 project. There are also vibrant debates about ideological issues, such as the debate between those who believe that, the past is past, and those who want to study the past, for

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[162] Shai Stern, *"Separate, Therefore Equal"; American Spatial Segregation from Jim Crow to Kiryas Joel*, 7 THE RUSSELL SAGE FOUNDATION J. OF SOC. SCI. 67, 67-90 (2021) (discussing Jim Crow laws such as town planning laws and sundown laws and how they created a microsocieties in America); Frances L. Edwards & Grayson Bennett Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. OF AF. AM. L & POL. 145, 145-167 (2010).

[163]Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 367-483 (2004); Lee C. Bollinger, *Race and Higher Education Commentary Series "What Was Once Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence informed by the Reality of Race in America*, 129 HARV. L. REV. FORUM 281, 281-289 (2016).

[164] *See supra*, Coates note 142; K. A. Dilday, *The Struggle Against Poverty Needs to be a Collective Fight*, THE ATLANTIC (June 2019), https://www.theatlantic.com/ideas/archive/2019/06/reparations-are-not-answer-poverty/592594/; ; Patricia Cohen, *What Reparations for Slavery Might Look Like in 2019*, NEW YORK TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html.).

[165] *See* H.R. Rep. No. 40, at 1 (2017).

reparations and restorative justice.[166] While this debate is alive in the social sciences, the law and transitional justice do not under-theorizes it. This reticence, and frequently missing deliberative voice of the law, is an incredible lacuna in the field. Hence the need for scholars to complicate the canon of transitional justice by making time a solid part of the framework.

This demurring about time is very uncharacteristic of the general fields of law and equity, where time and temporality are ubiquitous and foundational in many respects. Such maxims as delay defeats equity, and that priority may have significant litigation outcomes is taken for granted in property law and other areas of law—both substantively and procedurally. But in transitional justice, a delay may operate otherwise. The time issues in transitional justice are different and more complicated in three critical ways. First, they implicate the question of who may be considered a victim of violation and what measures of redress may be adopted. In this regard, some nuanced concerns arise, especially considering that the direct victims of violations may have passed away decades ago. What happens when all direct victims have died out? Since it is generally not legitimate to punish one for another's fault, is it not potentially destabilizing to revisit these violations? Further complicating this issue is the fact that in some cases there are no clear recorded trace of the victims.[167]

Remarkably, a delay may not necessarily defeat the process but instead may give room for a more dispassionate evaluation of the foundational problems that led to such egregious human rights violations. However, it may be practically wise to postpone transitional justice efforts because of the perpetrators' domineering capacity to continue the violations, or push society back onto the path of violence. In that dynamic of peace vs. justice, the pragmatic becomes a deferred transitional justice effort. Thus, the passage of time can also create the objective distance needed to have an open, thorough, and meaningful interrogation of the issues. [168] This should be borne in mind especially in responding to the objections to transitional justice in mature democracies. In many cases, pieces of evidence may be lost, or witnesses may disappear or be unable to testify for one reason or another. However, the overarching difference is that the length of time between human rights violations and the transitional justice effort does not necessarily diminish the transformative capacity of transitional justice. This tension is seen in the dilemma of peace vs. justice in transitional justice. Time might also create a distance between both the victims and the perpetrators to such an extent that the claimed violations and call for restoration or restitution would be deemed too remote from the present to warrant any meaningful attention.[169] Recall the argument about 'what happened a long time ago.' Hence the

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[166]Adjoa Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition for Reparations in America (N'COBRA) and its Antecedents*, 10 WOMEN, GENDER & SEXUALITY STUD.S RSCH., (2010); Lee A. Harris, "*Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 421 (2003); Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 UNIV. OF PENN. L. REV. 677, 677-727 (1999); Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations*?, 19 BC Third World L. J. 429, 429-476 (1998).

[167] *See generally* Monique Crettol, *Anne-Marie La Rosa, The Missing and Transitional Justice: The Right to Know and the Fight Against Impunity,* 88 INT'L REV. OF THE RED CROSS 355, 355-362 (2006); Marco Sassòli & Marie-Louise Tougas, *The ICRC and the Missing*, 84 INT'L REV. OF THE RED CROSS 727, 727-750 (2002).

[168] *See generally* Cynthia M. Horne, *The Timing of Transitional Justice Measures*, *in* POST-COMMUNIST TRANSITIONAL JUSTICE: LESSONS FROM TWENTY-FIVE YEARS OF EXPERIENCE, 123–147 (Cambridge Univ. Press, ed. 2015).

[169] *Id.*

question—how can you expect someone to be responsible for something done by their ancestors 200 years ago?

The second point is that time is at the heart of the tension between historical contests and the search for truth. Nation-states have vested historiographies, and transitional justice reckoning may complicate the gilded narratives of the state. Of course, it is often the case that the dominant history may not represent the proper nuance of national history. For instance, the dominant narrative may indeed be what an authoritarian regime had approved. It becomes even more critical to consider that the erasure of evidence is a typical operative model for authoritarian regimes. Even in stable democracies like Canada, the lack of voices from the marginal communities before this era may have tilted the narrative of history on one side of the scale. Hence, investigating violations becomes not only an attempt to search for the truth but a process with a genuinely upending potential that may create anxieties about 'revision' of hitherto accepted history. This tension makes temporality in transitional justice different from standard time issues found in litigation. The potential deconstruction inherent in transitional justice measures also heightens the difference.[170]

There is undoubtedly some litigation with remarkable 'constitutional moment' possibility[171] which may significantly produce the same type of tension and anxieties. But it is slightly different because the violation is continuing at the time of litigation, making the matter a live issue rather than a past violation requiring investigation. Of course, the outcome of litigation may predicate the establishment of a transitional justice mechanism like truth commissions to further help in the actualization of the reliefs and promises arising from the judgment.

That takes us to the third point: societal restoration, reconciliation, and reclamation of the public sphere are preeminent in transitional justice efforts. Though individual cases of restorative justice might exist, they are perceived as contributing more to social schemes than unique schemes. The broader needs of society are emphasized above the limited satisfaction of individuals who may have been especially affected by violence during the reign of terror and abuse. This approach does not demonstrate the depreciation of individual interests, rather, it demonstrates that these interests are pursued within a framework that balances that with the transformative interests of transitional justice. For example, *Azanian People's Organization & Others vs. The President of the Republic of South Africa & others CCT 17/96*[172] concerned the death in custody of one of the foremost anti-apartheid leaders, Steve Biko, in 1977. His family had argued against amnesty for apartheid-era violators of civil rights by the South African Truth and Reconciliation Commission. The South African Constitutional Court overruled the challenge on the justification, among other things, that there was a need for "understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for

[170] *See generally* Marloes van Noorloos, *A Critical Reflection on the Right to the Truth about Gross Human Rights Violations*, 21 HUM. RTS. L. REV. 874, 874-898 (2021) (critically exploring the nuanced relationship between the right to truth and the larger questions of national history).
[171] Such as US Supreme Court's *Brown v. Board of Education of Topeka*, 347 US 483 (1954).
[172] *Azanian People's Organization (AZAPO) & 3 Others. v. The President of the Republic of South Africa,* CCT 17/96, 1, 5 Constitutional Court of South Africa (July 27, 1996).

victimization."[173] Related to this is the steep cost of individual prosecutions, both in terms of money and time. In the final analysis, criminal prosecution does not allow for full and unfettered disclosure, and often, the perpetrators are the only ones with the information about victims. Other measures such as amnesty give society an opportunity to achieve more meaningful reconciliation.[174] All of these considerations incentivize transitional societies to focus more on community reform's overall ends rather than on individual cases and retribution.

Be that as it may, one perceptible reason for this discourse is the highly political nature of the temporal issues involved in transitional justice situations. Transitional justice efforts often possess structurally transformative capacities. Hence, the existing order in society is often keen to maintain privileges or determine how the future of the society might be affected by transitional justice. These are important issues to consider and preempt, when conceiving, designing, and implementing transitional justice programs.

II. OVERCOMING THE HURDLES

We have seen several temporal issues that hound transitional justice. The answers to these temporal puzzles are crucial to the success or failure of transitional justice efforts. The fact that nuanced reflections are needed to overcome these issues cannot be overemphasized, else they frustrate the efforts at building a harmonious society through justice and deepened democratic practice. This article identifies three important, but by no means exhaustive, structures through which societies can overcome these hurdles. They are *contextualization*[175] and *enshrining of cycles of autonomous processes* that will enhance equal justice and the flourishing of democracy. Finally, there is a need to have clear *indicators* of society's human rights health and a constitutional mandate to review and update these indicators periodically.[176] Thus, while the indicators are continuously rejuvenated, the constitutional jurisprudence is also enriched in ways that guarantee stability without enshrining imperviousness in society. Such a system ensures legal flexibility and human wellbeing in society for all people.

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[173] *Id.* at 4. Recall that the South African Truth Commission was aimed at promoting full disclosure of what happened during the noted period with a view to facilitating restoration of human and civil dignity of victims, affording victims and opportunity to relate their account of the violations, and recommending appropriate reparation measures.

[174] Many scholars agree as to the limits of punishment based transitional justice measures and the need to be dynamic. *See generally*, Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties, and Complementarity at the International Criminal Court,* 60 HARV. INT'L L. REV. 1, 3 (2019).

[175] Padraig McAuliffe, *Transitional Justice, Institutions and Temporality: Towards a Dynamic Understanding,* 21 INT'L. CRIM. L. REV. 817, 818-819 (2021). (Discussing the "impact of institutionalization of governance, bureaucracy and rule of law on the timeframes employed for transitional justice. It argues that the urgency of transitional justice has consistently given way to temporally extended justice projects").

[176] The increased collaboration of law with other disciplines means that there can be developed some empirical processes for evaluating these processes. *See generally* Hugo Van De Merwe, et. al., MEASURING TRANSITION JUSTICE: IMPACT ASSESSMENT APPROACH TO MEASURING TRANSITIONAL JUSTICE (ROUTLEDGE, 2021); Pierre Hazan, *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, 88 INT'L REV. OF THE RED CROSS 861 (2006); Brandon Stewart & Eric Wiebelhaus-Brahm, *The Quantitative Turn in Transitional Justice Research: What Have We Learned About Impact?*, 1 TRANSITIONAL JUST. REV. 97, 97-133 (2017).

A. Imaginative Transplant of Transitional Justice Mechanisms

When looking for solutions in any legal system or tradition, it is not unusual for scholars and policy makers to search for adaptable frameworks in other legal traditions.[177] Transitional justice situations vary in many respects, but transitional justice is not immune to legal borrowings. However, mechanisms or norms should be adopted with an eye towards the dynamics of the specific situations. This is because temporal dynamics and questions of injustice and human rights violations are often intertwined with societal dynamics. The context of each case determines how the temporal hurdles to transitional justice can be overcome, hence the proposal for contextualizing each situation and carefully evaluating what approaches will best achieve envisaged transitional justice goals. For example, if the questions of injustice arose in colonial encounters, the current circumstances are different both in time and place. Though the colonial experience has certain common paradigms such as domination and exploitation, it differs in approach and impact in Latin America, Australia, Africa, and Asia. Thus, the geography, geology, and genealogy of each of these colonial encounters have their own peculiarities, and they must be carefully interrogated when choosing mechanisms and frameworks for transitional justice in any society.

Similarly, the competing interests and stakeholders in any transitional justice settings are often context driven.[178] For example, settler colonialism and non-settler colonialism produced different interests and stakeholders. In South Africa, Australia and Canada, for example, the issues implicated by colonial settlement are different from that in Kenya. There is also a regional dimension to the different impacts of colonialism. For instance, there is a critical difference between the colonial experience in southern Africa vis-à-vis west Africa and other parts of Africa. The desire to settle in southern Africa gave rise to apartheid societies, but this was not the case for West Africa. Thus, any meaningful attempt at overcoming the temporal huddles in these contexts must pay attention to these significant dynamics.

B. Cycles of Independent/Autonomous Review Systems

Establishing independent and autonomous systems to deal with some of the time sensitive issues in transitional justice such as recommendations and other policy prescriptions can help societies to overcome the huddles presented by these issues. These systems can be made self-executing as a way of reducing the politics and contestations about them. Self-executing

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[177] Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 116-120 (1997); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 1-27 (1974) (discussing the challenges of legal transplant. The lessons are healthy for understanding how to adapt instruments and mechanisms for transitional justice); Mathias Siems, *Malicious Legal Transplants*, 38 LEGAL STUDS. 103, 103–119 (2018) ("it is frequently assumed that legal transplants can help law makers in choosing the best ideas from elsewhere in the world. However, this paper suggests that there can also be cases of 'malicious' legal transplants. It explains why such transplants emerge and how they may be prevented. This discussion fills a gap in the normative debate about legal transplants: while it is valuable to identify good models, it is equally important to understand how the impact of malicious ideas can be prevented').

[178] Laurel E. Fletcher & Harvey M. Weinstein, *Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals*, J. OF HUM. RTS. PRAC. 1, 1-22 (2015); Sam Szoke-Burke, *Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights*, 50 TX. INT'L L. J. 466, 466-494 (2015).

processes are processes that do not require further deliberation or legislation to occur and are designed to function effectively without further support or intervention by policymakers and other stakeholders in changing societies.

Ex ante self-executing processes guarantee questions of terminating sources of violation of human rights, such as mining and pollution activities. They do not depend on the goodwill of stakeholders. They are autonomous in their operations, financing, and other significant engagements. A possible example is a victim's compensation fund or an endowment whose funding and operation are not dependent on the state or any other relevant institution. In that case, the funds and management are vested and secured in a trust fund or other similar instruments.

Many times, transitional justice's failure to institute mechanisms that are self-executing may mean that the recommendations or general outcomes of these projects are never turned into policies. Sometimes victims are completely neglected both in the process and execution of the recommendations arising from the project. This is especially so when considering victims compensations and other reparative measures.[179] The negative externality of this is the disillusionment that follows in the aftermath of these projects. This has led to critical remarks by some scholars—especially as it concerns truth commissions.[180] Self-executing foundations can also be inserted in the laws that establish the transitional justice mechanisms. Thus, it preempts pressures from stakeholders which can defeat the outcome of these projects.

C. The Use of Indicators

In recent years, the use of indicators to measure policy outcomes has become popular. This is especially so in the area of economic policy. Such issues as ease of doing business are estimated based on indicators. In the same manner, scholars have argued for the development of indicators as tools with which society can measure the success of transitional justice projects.[181] Transitional justice questions also need a set of indicators to help mitigate the issues with these mechanisms. Such indicators can help us preempt the temporal issues that implicate transitional justice. Transitional societies can enshrine clear indicators of justice, equity, and fairness in the state's foundational law: the constitution. The need for these entrenched constitutional regimes explains why many transitional societies engage in creating a constitution and carefully allocating power. These constitutionally guaranteed frameworks can include indicators of the outcome of constitutionally guaranteed actions.

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[179] *See generally* Simon Robins, *Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations*, 11 HR & ILD 41, 41-58 (2017) (discussing how transitional justice has critically failed victims. However, the author acknowledges the recent shift towards considering the interest of victims in transitional justice. It is left to be seen whether this shift will refocus transitional justice since such a pivot will implicate socioeconomic and cultural rights).

[180] *See generally* Johannes Langer, *Are Truth Commissions Justice Hot-Air Balloons? A Reality Check on the Impact of Truth Commission Recommendations*, 29 DESAFÍOS 177, 177-210 (2017).

[181] *See generally* Paige Arthur, *Notes from the Field: Global Indicators for Transitional Justice and Challenges in Measurement for Policy Actors*, 1 TRANSITIONAL JUST. REV. 283, 283-308 (2016); United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools* (2011).

Such indicators can be periodically reviewed to ensure that the proposed changes are taking place. This creates a feedback loop that maintains a constant check on society's human rights health. Such indicators should include access to education, health care, housing, water and sanitation, and equal civil and political rights. Socioeconomic and cultural rights are indispensable in bridging the gap and assuaging historical human rights violations. The painful reality of the modern era is that violations of the past like enslavement, segregation, forced removals, and economic genocide have continued to impact the victims and their descendants. These violations have been transmitted intergenerationally in the form of trauma, lack of accumulated wealth, and hyper inequality in general.

III. THE PERMANENCE OF DIALOGUES

Dialogue is the soul of living societies.[182] Only the dead are impervious to dialogues. Civilizations that fail to dialogue are often civilizations on the cusp of ruins. Legal traditions are alive to the extent that they are self-reflective and open to a continuous dialogic encounter with legal problems in that society. With the emergence of new technologies and increased adjustment of community realities such as populations, environmental resilience, and inequality, the need for communicative engagement of different facets of society has become even more acute. In our time, the life and ardor of democracy is the dialogue that it engenders—within itself and amongst the diverse communities that make up any polity. This intergroup dialogue and its capacity to improve our collective understanding of the ethos and ideals of democracy is irreplaceable. Constitutional dialogues allow for growth and helps society to overcome temporal inertia that inhibit equal justice.[183] The failure of dialogue is often a recipe for violence. The dialogue of changing and transitional justice societies must happen in three key dimensions: institutional, community, and individual. The breakdown into these levels does not suggest a sharp division. Indeed, most meaningful dialogues often happen simultaneously at the three different levels. This effort enriches the treasury of justice and pulverizes the soil of democracy in every society.[184]

A. Dialogues at the Institutional Level

Institutions are critical to society and the delivery of the public good. They are the nerves and arteries through which the signals and lifeblood of society flow. To those marginalized or othered by institutions, life becomes a vast masterpiece of both subtle and apparent violations. The design of institutions is a critical question in transitional justice efforts. It could be the institution of housing and town planning. It could be the institution of healthcare, water, and

[182] LAUREN SWAYNE BARTHOLD, *OVERCOMING POLARIZATION IN THE PUBLIC SQUARE: CIVIC DIALOGUE* (2020).
[183] *See generally* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS (G. Sigalet et al. ed., Cambridge Univ. Press 2019).
[184] *See generally* Knut Traisbach, *A Transnational Judicial Public Sphere as an Idea and Ideology: Critical Reflections on Judicial Dialogue and its Legitimizing Potential*, 10:1 GLOBAL CONSTITUTIONALISM 186, 186-207 (2021).

sanitation. Like justice, corrections, and law enforcement institutions, some of these institutions are entangled with society's entire fabric.[185]

Thus, if any institution, such as policing or corrections, is designed, intentionally or otherwise, to produce a disparate impact on certain populations, it can absolutely produce devastating results. This is because laws can be used to legitimize the egregious violations of the human rights of the targeted members of the group[186] Hitler instituted a secret service institution that presaged the human rights violations of the Nazi regime.[187] The secret police service was the linchpin of Nazism. Such institutional abuse was also evident in the system of slavery that operated in America in the antebellum era.[188] In the postbellum era, segregation, redlining, and other structural exclusion of Blacks and other Americans of color testify to what roles institutions can play in enshrining and sustaining human rights violations, and propagating vile ideologies.[189] A self-examination of these institutions can identify and overcome temporally significant issues in the evolution of just societies and accountability when the rights of citizen are violated. This will also enhance transitional justice.

In other contexts, the procedural aspects of institutions can be the source of egregious violations of human rights. These processes may also have temporal dimensions in that they are representative of eras of repressive regime. Processes can often be used to scuttle constitutional guarantees of human rights, thereby rendering the guarantees null. For instance, sentencing procedures, jury selection, and bail proceedings have a disparate impact on Black communities in America.[190] It is beyond question that many of these policies show manifest neutrality when examined from a distance. However, their entanglements with other aspects of society, like racial prejudice, make their manifest neutrality a façade of the inherent inequities which such procedures and processes produce.[191]

Not surprisingly, these institutions often prove impervious to change even in the most forward-looking societies. Their inertia frustrates transformative democracy and has the extra capacity to give the human beings that operate them a lax conscience[192] because the institutions

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[185] No state institutions like the media can also play crucial roles in setting an agenda for national and institutional dialogues about injustice and human rights violations in general. Lisa J. LaPlante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251 (2009).
[186] *See generally*, Richard D. Heideman, *Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials*, 39 LOY. L.A. INT'L & COMP. L. REV. 5 (2017); Cynthia Fountaine, *Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich*, 10 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 198, 198-242 (2020).
[187] Jerome Hall, *Police and Law in a Democratic Society*, 28 Ind. L. J. 133, 133-177 (1953).
[188] William W. Fisher III, *Ideology and Imagery in the Law of Slavery - Symposium on the Law of Slavery: Theories of Democracy and the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1051-1083 (1992) (Slavery and systemic violence against minorities in the antebellum America).
[189] Levinson, *supra* note 111.
[190] Thomas W. Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1593-1654 (2019); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Y. L. J. 1, 1-265 (2013).
[191] *See generally* Robert P. Burns, KAFKA'S LAW: *THE TRIAL* AND AMERICAN CRIMINAL JUSTICE (Chicago, 2014); Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. REV. 891, 891-1007 (2004).
[192] *See generally* David Luban, *A Theory of Crimes Against Humanity*, 29 Y. J. INT'L L. 85, 85-167 (2004); Hanna Arendt, ORIGINS OF TOTALITARIANISM (Harcourt, 1951).

are typical. Moreover, it is hard to attribute the negative aspects of the institutions to specific individuals within the system. Having been alienated from the systems they operate, the operators themselves often do not see the enduring harms they cause. Due to such indifference,[193] there is often no limit to the harm that can be unleashed on citizens. Interrogating these institutions, therefore, becomes 'unpatriotic.'

Thus, institutional level dialogues are inescapable for transitional societies. Such dialogues must pay heed to the temporal aspects of the problems noted, or the ameliorative measures may not meet the needs of the society. This does not mean simply organizing some diversity seminars or training, though there is no harm in doing so. Dialogue also entails a deliberate resolve to encounter the institution and reflect on its frameworks, policies, and procedures to ensure that its normative and functional foundations are not producing violent outcomes for persons or groups of persons in society. Understanding the way that institutions reproduce human rights violations is key to changing these bad outcomes. This change can only come through a purposeful self-reflection that takes account of the timelines of these violations and the institutional frameworks used to legitimize them.

This self-reflective dialogue is indispensable in changing societies, and it is one way of overcoming the temporal difficulties of human rights violations. Transitional justice methods such as truth commissions, general commissions of inquiry, and expert studies ameliorate notable difficulties in institutions and set new paradigms to avoid repetition. Societies confronted by temporality issues in transitional justice can embrace regular and phased institutional dialogues to overcome the challenge and give society a fair chance of healing and democratic transformation.

B. Dialogues at the Community Level

When violations of human rights occur, they are usually both individual and communitarian. They are individual to the extent that they violate the specific rights of persons within the community. They are also communitarian in that that they violate the fundamental ethos and harmony of the society. When the violations are crimes like genocide and crimes against humanity, they also implicate an entire clan, ethnic group, or nationality.[194] In all these circumstances, dialogues are essential in recapturing the soul of the community, reconciliation, and healing in the community.[195]Dialogues are also useful in overcoming rights violations at the

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[193] Elie Wiesel, *The Perils of Indifference - Nobel Peace Prize Speech (Excerpt)* April 12, 1999.
> *Indifference elicits no response. Indifference is not a response. Indifference is not a beginning; it is an end. And, therefore, indifference is always the friend of the enemy, for it benefits the aggressor—never his victim, whose pain is magnified when he or she feels forgotten. The political prisoner in his cell, the hungry children, the homeless refugees—not to respond to their plight, not to relieve their solitude by offering them a spark of hope is to exile them from human memory. And in denying their humanity, we betray our own. Indifference, then, is not only a sin, it is a punishment.*

[194] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26 February 2007, at http://www.icj-cij.org/docket/files/91/13685.pdf (discussing the nature of genocide in international law); *Prosecutor v Akayesu, Case No ICTR-96–4-T*, Judgment of 2 September 1998 (exploring rape in war as an element of genocide).

[195] Daniel Shapiro, *Reconciliation Systems Design: A Systematic Approach to Collective Healing in Post Conflict Societies,* 26 HARV. NEG. L. REV. 193, 193-264 (2021).

community level, especially when such violations are linked to the communities' histories and wellbeing.

For example, ethnic cleansing and genocide was perpetrated during the civil war in Rwanda.[196] This destroyed the bonds of the community. It required dialogues to heal different levels of society and create a new pathway to common living. Thus, the Gacaca courts allowed for some public intergroup dialogue level as a pathway to healing, truth, reconciliation, and social cohesion.[197] Though experts are still interrogating the quality of that dialogue and its extent of healing, the dialogue has been considered a positive addition to transitional justice infrastructure in post-conflict societies. These community intergroup dialogues are also a special way of giving the community the ownership of the processes. When communities participate in these processes through community dialogue, they develop a sense of coownership and thus mitigate potential failures and feelings of imposition which can undermine transitional justice processes.

In established democracies, community dialogues are also indispensable to bridge the gap between different communities. This is especially so when considering minorities and indigenous communities' rights and their encounter with colonialism[198] and European settler domination.[199] In Latin America and Australia, this is a critical issue.[200] The continuing violence in many of these places, has been linked to the refusal to give indigenous communities and tribes an equal opportunity to participate, and help set national building and organizing parameters.[201] These dialogues can help obviate the intergenerational traumas especially when they lead to acknowledgement, reconciliation, and commitment to better futures.[202]

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[196] Zachary D. Kaufman, *Lessons from Rwanda: Post-Genocide Law and Policy*, 31 STAN. L. & POL'Y REV. 1, 1-21 (2019).

[197] *See* Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. OF DISP. RES. 355, 355-398 (2004); Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENGLAND INT'L, & COMP. L. REV. 41, 41-55 (2007).

[198] Augustine S. J. Park, *Settler Colonialism and the South African TRC: Ambivalent Denial and Democratization Without Decolonisation*, 20 SOC. &. LEGAL STUDS. 1, 1-22 (2021).

[199] Bill Rolston & Fionnuala Ní Aoláin, *Colonialism, Redress and Transitional Justice: Ireland and Beyond*, 7 STATE CRIME J. 329, 329-348 (2018); Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U. L. REV. 1, 3-108 (2014).

[200] A. D. Moses, *Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency*, 15(2) CITIZENSHIP STUDS. 145, 145-159 (2011).

[201] *Id.*; *see generally* Matilda Keynes, *History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia*, 13 INT'L J. OF TRANSITIONAL JUST. 113, 113-133 (2019) ("the article draws on the particular experience of Australia, a country which, since the late 1980s, has sustained an official reconciliation agenda that has produced limited structural reforms for Aboriginal people, and which continues to neglect First Nations people's own proposals for reconciliation and reform"); P. Arthur, *Indigenous Self Determination and Political Rights: Practical Recommendations for Truth Commissions*, in STRENGTHENING INDIGENOUS RIGHTS THROUGH TRUTH COMMISSIONS: A PRACTITIONER'S RESOURCE 37, 37-48 (Rice González, Ed., 2012).

[202] *See generally* BREAKING INTERGENERATIONAL CYCLES OF REPETITION: A GLOBAL DIALOGUE ON HISTORICAL TRAUMA AND MEMORY (Pumla Gobodo-Madikizela, ed., 2016).

There have been some instances of performative encounters without meaningful transformation.[203] It is also common to hear arguments that these indigenous communities' and minorities' lived experiences are removed from the rest of society. Thus, such arguments as "this violation happened in the past, and I should not be held accountable for my ancestors' mistakes" are current in some parts of the community and legal academy.[204] Such arguments ignore the fact that the call for reckoning through dialogic encounters does not mean a call for retribution. It is a call for restoration—the restoration of dignity, humanity, and worth of these communities who have experienced continuous human rights violations.

C. Dialogues at the Individual Level

Dialogues at the individual level are often the primary test of the community's willingness to engage in a broader reflection of justice, human rights, and reconciliation. Individual dialogues also happen within the institutional structure, or the platforms created for community and intergroup dialogues. For example, stakeholder dialogues and initial discussions with Mandela, F. W. DE clerk, and Desmond Tutu contributed immensely to the success of the transitional justice process in South Africa. It helped bridge the gap of ideas, timelines, and norms, which formed the Truth and Reconciliation Commission's desideratum in South Africa.[205]

The country also facilitated dialogues at the individual level.[206] Victims were given a platform through the Truth and Reconciliation project to meet with their assailants. The opportunity served three important objectives. First, it gave the victims and opportunity to forgive their assailants and thus find closure for the trauma, loss, sometimes death of a family

[203] One significant critic in the field of transitional justice has been the failure to produce real transformation. Some of these are based on the temporal limitations embedded in the societies and the proceeds leading to the enactment of the transitional justice mechanism. *See generally,* Nelson Camilo Sánchez, Rodrigo Uprimmy Yepes, *Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures*, INTER-AMERICAN HUM. RTS. INST. 123, 123-157 (2011); Amnesty International, *Colombia: The Victims and Land Restitution Law: An Amnesty International Analysis*, *AI Index: AMR 23/018/2012* (17 April 2012).

[204] Gregory Kane, *Why the Reparations Movement Should Fail*, 3 U. MD. L.J. RACE RELIG. GENDER & CLASS 189, 189-208 (2003).

[205] *See generally* Bill Keller, *Mandela and Dissident, Liberator and Statesman*, NEW YORK TIMES (December 5, 2013) https://www.nytimes.com/2013/12/06/world/africa/nelson-mandela_obit.html. *See generally* NELSON MANDELA, LONG WALK TO FREEDOM (Little, Brown, & Co. 1994); Stanley Uys & Dan van der Vat, *The Most Rev. Desmond Tutu Obituary: Anglican Archbishop who Fought Against Apartheid in South Africa and Led the Subsequent Truth and Reconciliation Commission*, THE GUARDIAN (December 26, 2021). The respected Bishop was considered a moral voice against apartheid foresighted in seeking dialogue with the white minority government). DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (Penguin, 2000). The end of apartheid in South Africa was the wide consultations through the Convention for Democratic South Africa (CODESA). CODESA is mindful of painful legacies of apartheid had the objective designing a framework for establishing a government bases democratic ideals healing the divisions of the past, nondiscrimination on grounds of race, sex, creed etc., ensure social justice and set in motion a process of drawing up and establishing a constitution that will ensure these. *See generally, Convention for Democratic South Africa (ODESA) Declaration of Intent* (20 December 1991); *South Africa Peace Accord* (September 14, 1991)(This accord was signed by more than forty organizations in South Africa).

[206] *See* Volume 3 Report of the Truth and Reconciliation Commission of South Africa, 4 (October 29, 1998) (the volume was dedicated to individual testimonies of violence. "On average, 140 victims and 160 violations were mentioned in every 100 statements. In total, 46 696 violations involving 28 750 victims were reported to the Commission").

member during the apartheid era or during the time of conflict and oppression. Second, it allowed the offenders, some of whom were law enforcement officials, to acknowledge the harm done to the individuals and society. It gave them an opportunity to reclaim their own lost humanity.

Such recognition also has the quality of restoring a sense of self-worth to the victims which was lost during the violent era.[207] Denying or refusing to tell the truth about what transpired and false accusations as an excuse for crimes, such as disappearances, lynching, bombing, or burning of homes, is one of the most difficult aspects of lack of accountability in diverse and changing societies.[208] To tell the truth is to restore the timeline and acknowledge the humanity of those who were violated. To do otherwise is to perpetuate the violence and declare the victims worthless. Denial is the first sanctuary of violent legal and political regimes, and just dialogues allow for accountability and rebuild belief in our common humanity. Finally, such dialogues help us gain valuable insight into the institutional structures or gaps that made it possible for such violence to happen. It helps our legal imagination so that we can design institutions and frameworks that can guarantee non-repetition and, in the case that these institutions fall short, access to just and remedial measures.

Even when the victims are dead, their descendants, privies or such other successors are still able to recall and vicariously share in the transmitted trauma.[209] Hence the need for individual dialogues, which may mean dialoguing with a family whose member was a victim of unjust paradigms in society. The importance of individual dialogue is further emphasized by the fact that every human being has an inherent worth. This intrinsic worth of the human person means that no one should be considered worthless or unworthy of a just reckoning and humane existence. In changing societies, the need to keep emphasizing this principle cannot be overemphasized. It resonates with the quests for equal humanity and justice of those who came before. The self is the center of all human struggle for meaning in society. It is this self-expressed in so many ways such as citizenship, self-autonomy, self-determination, that forms the bed rock of just societies. To encourage dialogues, even informal ones, unlocks possibilities and helps members of society deal with significant justice issues that could easily lead to social rupture and egregious violations of human rights.

CONCLUSION

Temporality deals with time or matters related to time. These matters are often predetermined by agreements, legislation, court procedures, and other instrumentalities in law. Hence, they are not often recondite debates except when they are not stipulated. In changing societies and transitional justice, the temporal dynamic is different. Therefore, many questions about reform, reconciliation, healing, memorialization, reparations, prosecution, and public apologies are all implicated by time. In other words, they are also temporality issues. More so, the canons of justice in transitional justice entails restoration, rehabilitation, and, sometimes,

[207] *Id.*
[208] *Id.*
[209] Cyril Kenneth Adonis, *Exploring the Salience of Intergenerational Trauma among Children and Grandchildren of Victims of Apartheid-Era Gross Human Rights Violation*, 16 INDO-PACIFIC JOURNAL OF PHENOMENOLOGY 1, 1-17 (2016).

restitution. Temporality considerations equally emphasize these. Hence, the consideration of the timeline of events and the significant factors that indicate violations are critical to the transitional justice processes and dialogues.

These questions are not predetermined, and often, violent elements threaten redress and restoration in times of transitions. Therefore, articulating transitional justice's temporal dynamics can be recondite, if not seemingly impossible. But it is more problematic in transitional and changing societies to gloss over human rights violations because of temporal and spatial distance. The debilitating concerns about systemic injustice and human rights violations in society do not disappear because they are ignored. Rather, ignoring them encourages impunity and entrenches hate, resentment, pains, and intergenerational traumas.[210] Therefore, many communities are walking on eggshells in terms of intergroup relationships because of their layers of unattended questions and violations of human rights. Consequently, there is an intergenerational transmission of problems that can lead to social ruptures and, in extreme circumstances, civil wars.

To guarantee peace, unity, and economic sustainability, societies in transition must courageously embrace the dialogue which transitional justice offers. The opportunities for dialogue offered by transitional justice can help societies reflect on their normative and functional foundations in ways that allow for reforms of the institutional foundations of justice. Where such reflections to demand that societies redesign or replace an institution, the society should be willing to do so. In South Africa, the apartheid system was incurably bad. [211] Thus, it was not a question of reform since no amount of reform could save it from its motivating force: white South Africa's racial superiority. A lot of institutional restructuring also took place in Eastern Europe at the end of the Cold War. The reforms touch on law enforcement, economic institutions, justice sector and civil liberties.[212]

Intergroup dialogues[213] can also help society overcome the difficulties linked to temporality. In the end, no society can endure peace, justice, and fairness without a consistent deliberation regarding the fundamental problems of society. Healing, reconciliation, and peace come through fairness, accountability, equity, and restorative justice. These often mean looking at the past and interpreting it with a view to a more just and harmonious future. No nation or society can endure harmoniously for too long, by engaging in deception or ignoring resilient questions of (in)justice because those violations are deemed to be temporally distant.[214] Healing comes by justice, and the hour for justice is always now. Healing comes from truth,

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[210] *Id.*

[211] Joel Nichols, James W. McCarty III, *When the State is Evil: Biblical Civil (Dis)Obedience in South Africa* 85, ST. JOHNS L. REV. 593, 593-626 (2011); Joe W. Pitts, *Judges in an Unjust Society: The Case of South Africa*, 15 DENV. J. INT'L L. & POL'Y 49, 49-94 (1986).

[212] David Kennedy, David E. Webb, *Integration: Eastern Europe and the European Economic Communities*, 28 COLUM. J. OF TRANSNATIONAL L. 633, 633-675 (1990).

[213] Yuko Otake & Teisi Tamming, *Sociality and Temporality in Local Experiences of Distress and Healing: Ethnographic Research in Northern Rwanda*, TRANSCULTURAL PSYCH. (October 2020).

[214] Recent research "sheds light on when might be a relatively ideal *window of time* to pursue justice and engage in peacebuilding efforts without engendering pejorative reactions from either side to the conflict." *See* Mengyao Li, et. al., *Close or Distant Past? The Role of Temporal Distance in Responses to Intergroup Violence From Victim and Perpetrator Perspectives*, 1 PERS. AND SOC. PSYCH. BULLETIN (2020). One thing clear in the essay is the need for reconciliation and healing across the communities that were involved in the conflict.

remembrance, and accountability. Societies that do not remember are societies with neither conscience nor memory. Without memory, justice, and human dignity, societies are nothing but organized spaces of aggrandizement and violence of all against all.[215]

[215]AURELIUS AUGUSTINE, CITY OF GOD BOOK IV, VOL. 1, 135 (Macus Dodds, ed. Trans., Project Gutenberg, 2014), (Without justice, what are kingdoms, but robber bands on a large scale).

DATA, DEFERENCE, AND NON-DISCLOSURE: SHEDDING LIGHT ON LOUISIANA'S DEATHS BEHIND BARS FROM 2015-2019

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Table of Contents

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I. INTRODUCTION

Incarceration and the conditions within jails, prisons, and youth detention centers, are the least transparent aspect of the criminal legal system.[1] This lack of transparency serves to hide and obscure the experiences of people forcibly confined in these spaces; people who are blamed for society's ills and therefore deemed less worthy of protection and rights.[2] The disproportionate incarceration rates of Black, Indigenous, and Latino communities,[3] the harsh and extended sentences for low-level property and drug crimes,[4] the volatile and often unconstitutional conditions inside carceral facilities,[5] and the continued rate of violent crimes during the most heightened season of mass incarceration[6] undermine claims that the criminal legal system produces fair and impartial justice.[7]

Carceral spaces are also historically associated with death. Prison staff, not judges, jury members, or prosecutors, administer the actual execution of people sentenced to death.[8] Even for those not sentenced to execution, incarceration is still deadly. Interactions with the carceral system can increase a person's risk of premature death.[9] Public health scholars have documented higher rates of infectious diseases, chronic medical conditions, substance use, and mental health disorders for people in prisons compared to the non-incarcerated population.[10] Yet, these same carceral spaces, at least in theory, should be safer and healthier environments, due to the unique authority government actors possess to protect against certain types of harms and maintain a secure setting free of weapons and substances that plague some free communities.

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[1] *See generally*, Andrea C. Armstrong, *No Prisoner Left Behind: Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435 (2014).

[2] For a discussion about pacification as a strategy for blaming vulnerable populations for societal ills see *Criminalization of Immigration: Contexts and Consequences, chapter 2* "The Problematization of Immigration as a Pacification Strategy" by Michelle Sanchez, Rich Furman & Alissa R. Ackerman.

[3] Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 80 – 81 (2016).

[4] Mugami Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 716 (2019) (discussing the popular "three-strikes law" that mandates life sentences for the third occasion that someone is convicted of a non-violent, low level offense such as stealing less than $200.); Earl Smith, Angela J. Hattery, *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, 15 Race, Gender & Class, 79, 91 (2008) ("We argue that the drug laws that require the long-term incarceration of non-violent, mostly African American men, are in place at least in part to ensure a pool of labor that can be "cordoned off' and then exploited: their surplus value extracted by multinational corporations and private prison companies.").

[5] Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. REV. 1, 16 (2019).

[6] Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*, 7 N.Y. PRESS (2019).

[7] *See* Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 67-68 (2003); Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*, 3 (2019).

[8] *See* S. Frank Thompson, *I Know What It's Like to Carry Out Executions*, THE ATLANTIC (Dec. 3, 2019), https://www.theatlantic.com/ideas/archive/2019/12/federal-executions-trauma/602785/.

[9] As local jail populations increase, so do the death rates attributed to infectious disease, chronic lower respiratory disease, drug use, and suicide. Sandhya Kajeepeta et al., *Association Between County Jail Incarceration and Cause-Specific County Mortality in the USA, 1987–2017: A Retrospective, Longitudinal Study*, LANCET PUB. HEALTH 240, 247 (Feb. 2021), https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930283-8.

[10] Christopher Wildeman & Emily A Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, LANCET 1464, 1467 (Apr. 2017), https://www.hivlawandpolicy.org/sites/default/files/Wildeman_Mass%20incarceration%2C%20public%20health%2C%20and%20widening%20inequality%20in%20the%20United%20States.pdf.

This Article presents the first in-depth study of carceral deaths in Louisiana.[11] The data and analysis focus on deaths that occurred in jails, prisons, and youth detention centers. There are important differences, and similarities, among these different types of institutions. Nationally, jails, prisons, and youth detention centers typically hold different populations, though in Louisiana, this distinction is less clear. In general, jails confine three categories of people: people accused of a crime, but who are denied or cannot afford to post bail; people who have been convicted of misdemeanor crimes with sentences of one year or less; and people who are accused of violating judicially set conditions of their release through probation or parole after a conviction. In contrast, prisons typically only hold people who are serving a sentence for a felony crime after their conviction. In Louisiana, however, approximately 50% of people convicted of felony crimes serve their sentence in a local jail, instead of a state operated prison.[12] Youth detention centers include those operated by the state for youth convicted of crimes and those operated by local authorities for youth accused, but not yet adjudicated for a crime, as well as those serving sentences. These institutions also differ in the types of services and care provided, based on the general population they serve. Jails hold people for shorter amounts of time and tend to offer fewer programming and educational opportunities than prisons, which are designed for longer-term incarceration. Similarly, jails may not provide certain types of long-term medical care, such as for chronic conditions such as kidney disease, while prisons often contain significant populations of people requiring these types of medical services. Regardless of the category of population housed, all of these carceral spaces also benefit from extended judicial deference for their policies and practices.

All jails, prisons, and youth detention centers are also obligated under the U.S. Constitution to provide the health and safety of the people remanded to their respective institutions. The legal standards governing violation of these obligations may differ, however, depending on the type of institution. In general, the Due Process Clause of the Fourteenth Amendment governs conditions for people held pretrial[13] and the Eighth Amendment's prohibition of "cruel and unusual punishment" applies to people held pursuant to a conviction.[14] For youth held in detention centers, a majority of circuit courts have held that the Due Process Clause of the Fourteenth Amendment is the appropriate legal standard.[15]

Despite these differences, all of these institutions are designed to be secure facilities. Staff and visitors are subject to searches to prevent the introduction of contraband, such as drugs, weapons, and cell phones, to the facility. People who work in these facilities and have contact with incarcerated populations receive training on security and safety as a condition of their employment. Movement within the facility is usually tightly controlled and often requires passage through additional security doors within the facility itself. Areas are patrolled by security

[11] Data analyzed in this report are also presented visually in the policy report *Louisiana Deaths Behind Bars 2015-2019* (June 2021), https://www.incarcerationtransparency.org/wp-content/uploads/2021/06/LA-Death-Behind-Bars-Report-Final-June-2021.pdf. The dataset used for this analysis is also available for download at: https://www.incarcerationtransparency.org/?page_id=3837. All statistics on deaths in Louisiana prisons, jails, and detention centers from 2015-2019 in this report are based on original research and analysis based on this dataset.
[12] La. Dep't of Pub. Saf. & Corr., Briefing Book, 19 (July 2021), https://s32082.pcdn.co/wp-content/uploads/2021/10/0m-Full-Briefing-Book.pdf.
[13] *Bell v. Wolfish*, 441 U.S. 520 (1979) (applying Fourteenth Amendment).
[14] *Estelle v. Gamble*, 429 U.S. 97 (1976) (applying Eighth Amendment).
[15] Rudy Estrada & Jody Marksamer, *The Legal Rights of Young People in State Custody*, 5, 13 n. 28 (June 2006).

staff and often guards are assigned to patrol specific "beats," or areas of the facility. In these highly-controlled and regulated environments, deaths should be the exception, and not the norm. Thus, when deaths do occur, they deserve attention and analysis.

When a person dies behind bars, their family may have questions, including how and why their loved one died. As a society that collectively remanded their loved one to a jail, prison, or youth detention center, we owe those families an answer. But transparency and accountability can also serve other important purposes. Internal facility analysis may reveal inadequate policies or practices and may prevent future deaths. Externally, the transparency of the facility's actions and their review may enhance the legitimacy of the institution as a whole, as well as provide for broader accountability to family members and tax-paying residents. Part I of this Article connects judicial deference for carceral administrators to the deaths of incarcerated people. Part II describes recent efforts by law students at Loyola University New Orleans College of Law to collect data about deaths in custody across Louisiana. Further, an initial review of the data reveals 786 known deaths in prisons, jails, and youth detention centers throughout Louisiana from 2015-2019. This Article concludes with recommendations about enhancing safety for incarcerated people and creating more transparent reporting mechanisms.

A. Legal and Policy Deference to Carceral Administrators

Courts have gone on a winding journey to determine what level of deference the judiciary should give to carceral officials' actions. On the one hand, judges assume that carceral staff, as representatives of government authority, are committed to respecting the constitutional rights of incarcerated people.[16] On the other hand, judges also recognize that "judicial intervention is indispensable if constitutional dictates are going to be observed in our nation's prisons."[17] From this point of view, carceral facilities are unruly places that must be monitored in order to ensure constitutional mandates are protected behind carceral walls. However, over time, the Supreme Court has concluded that judicial review of carceral actors should not be too exacting and that a rational basis standard appropriately recognizes the expertise of carceral administrators.

Carceral officials have unique power and control over nearly every aspect of an incarcerated person's life and death. Officials control when people eat, who they can talk to, when they sleep, what they wear, and so much more.[18] Despite this unique authority over individuals, courts grant officials significant leeway by relying on a high standard of deference when reviewing carceral officials' actions. "[F]ar from achieving a balance between appropriate deference and appropriate constitutional enforcement, the Court's prisoners' rights case law seems instead to be a jurisprudence of evasion, justified by talismanic reference to the need to defer."[19]

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[16] Melvin Guttermann, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857, 904 (1992).
[17] *Id*. at 903 (citing Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring in the judgment)).
[18] *See generally*, *La. Dept. of Public Safety and Corrections Basic Jail Guidelines* (April 2019). https://www.incarcerationtransparency.org/wp-content/uploads/2021/10/Basic-Jail-Guidelines-as-of-April-2019.pdf
[19] Sharon Dolovich, *Forms of Deference in Prison Law*, FED. SENT'G REP., Vol. 24, No. 4, 245, 249 (2012).

In modern judicial doctrine, courts began deferring to carceral officials when the Supreme Court decided *Turner v. Safley* in 1987. In *Turner*, the Supreme Court lowered the standard it used to analyze prison rules from intermediate scrutiny[20] to rational basis.[21] *Turner* concerned a challenge by an incarcerated person to a prison policy that prohibited him from sending certain mail to people incarcerated in other facilities, as well as a policy that restricted marriage by an incarcerated person.[22] The Court rejected applying a more exacting strict scrutiny standard because it would "seriously hamper [carceral officials'] ability to anticipate security problems and to adopt innovative solutions to the tractable problems of prison administration."[23] In lieu of intermediate scrutiny, the Court outlined a lower rational basis standard for analyzing constitutional challenges to prison rules: a carceral regulation is reasonable when (1) it is rationally related to a legitimate government interest; (2) no "alternative means of exercising the right" exists; (3) the accommodation of the right will have a limited impact on guards, inmates, and "prison resources generally;" and (4) there are no reasonable alternatives to the regulation.[24] With its new four-part test, the Supreme Court translated carceral official deference into a rational basis test.[25]

However, *Turner*'s holding was not uncontested. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, concurred in part and dissented in part, reminding us that "if the standard can be satisfied by nothing more than a 'logical connection' between the regulation and any legitimate penological concern . . . it is virtually meaningless."[26] Stevens recognized that the prison officials actually had little expertise to justify the ban on communication between incarcerated people across facilities.[27] In fact, when an administrator of the prison system testified that he was, "certain" prisoners would communicate about overthrowing the prison, he later had to admit that he was merely speculating about the content of mail between incarcerated people.[28]

Later in *Thornburgh v. Abbott*, the Supreme Court reaffirmed the *Turner* reasonableness standard as the appropriate deference with which to review carceral officials' actions.[29] Applying the *Turner* test, the Court determined that the federal Bureau of Prisons provided "facially valid"[30] reasons for its rejection of certain outside publications within the prison upon a finding that the material threatened the security of the facility.[31] Fearing arbitrariness in prison

[20] Procunier v. Martinez, 416 U.S. 396, 400, 409-09 (1974) (applying an intermediate scrutiny test to prison rules surrounding mail coming into and leaving the prison, relying on free people's First Amendment Right to free speech to avoid the issue of whether incarcerated people on their own hold robust freedom of speech guarantees).
[21] Jennifer A. Mannetta, *The Proper Approach to Prison Mail Regulations: Standards of Review*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 209, 215 (1998) (citing *Turner v. Safley*, 482 U.S. 78 (1987)).
[22] *Turner v. Safley*, 482 U.S. 78, 81-82 (1987). The court upheld the restrictions on correspondence but found the marriage policy to be overbroad. *Turner v. Safley*, 482 U.S. 100-01 (1987).
[23] *Id.* at 89.
[24] *Id.* at 89-91.
[25] Sharon Dolovich, *Forms of Deference in Prison Law*, FED. SENT'G REP., VOL. 24, NO. 4, 245, 246 (2012).
[26] *Turner v. Safley*, 482 U.S. 78, 100 (1987) (J. Stevens, concurring in part, dissenting in part).
[27] Stevens' suspicion that carceral officials lack expertise can be seen in our research outlined below. Infra I.B.3
[28] *Id.* at 109.
[29] *Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989).
[30] *Id.*
[31] *Id.* at 403.

officials' findings, Stevens again dissented, noting that the *Turner* standard is "manipulable,"[32] and gives carceral officials too much leeway to relegate prisoners' and others' rights.[33] Though the majority opinion claims the *Turner* standard is "not toothless,"[34] the reasonableness standard introduced in *Turner* has shifted the balance between fundamental rights for incarcerated people and carceral discretion to maintain security and order in favor of carceral administrators.

More recently, in *Beard v. Banks*, the Supreme Court considered a challenge to a prison rule that restricted certain prisoner's access to newspapers, books, and other reading material when in a segregation unit,[35] more commonly known as solitary confinement.[36] The incarcerated plaintiff argued that the rule would not survive the rational basis test put forth in *Turner* because it "[bore] no reasonable relation to any legitimate penological objective."[37] The prison defended its restrictions as a way to incentivize good behavior: prisoners could earn access to the luxuries such as newspapers if they behaved.[38] The court granted the defendant prison official's motion for summary judgment, dismissing the case, and rejected the Court of Appeal's position that the prison official needed to prove that his "deprivation theory of behavior modification had any basis in real human psychology, or had proven effective."[39] Instead, the Supreme Court concluded that the appellate court's opinion gave "too little deference to the judgment of prison officials about such matters."[40] Even at the summary judgment stage, when a court is meant to view the facts in the light most favorable to the non-moving party,[41] the lower level of scrutiny allowed the Supreme Court to ignore the prison official's lack of actual evidence to instead focus on his penological interests.

When the judiciary doctrinally defers to carceral officials, it may actually be deferring to sometimes harried and subjective decision-making. Lower-level prison staff may be under-trained to address the complexity of issues that arise in carceral spaces.[42] Shifts may be short-staffed, due to difficulties in recruiting, training, and retaining entry level staff.[43] The decisions made by individual guards may not be subject to internal oversight or review.[44] In some cases,

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[32] *Id.* at 427 (Stevens, dissenting).
[33] Stevens was also concerned about the First Amendment rights of the publishers of the rejected material and that of the free people sending mail into the facility. *Id.* at 430 (Stevens, dissenting).
[34] *Id.* at 414.
[35] *Beard v. Banks*, 548 U.S. 521, 527 (2006).
[36] Hope Metcalf et al., *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies*, 2-3, (June 2013), https://law.yale.edu/sites/default/files/area/center/liman/document/Liman_overview_segregation_June_25_2013_TO_POST_FINAL(1).pdf (providing overview of nomenclature).
[37] *Banks*, 548 U.S. at 527.
[38] *Id*. at 530.
[39] *Id.* at 535.
[40] *Id.*
[41] *Id.* at 555 (Ginsberg, dissenting).
[42] Melvin Guttermann, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857, 900 (1992) ("Prison administrators relinquish supervisory control to guards who deal with inmates intimately on a daily basis. As a result, subordinate custodial personnel, often undereducated and undertrained, exercise independent and sometimes capricious discretion in meting out severe disciplinary sanctions.").
[43] *Id.*
[44] *Id.* (quoting Philip J. Hirschkop & Michael A. Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 811-12 (1969)).

the judiciary may be deferring to staff at facilities that otherwise fail to promote transparency[45] and accountability[46] independent of judicial oversight.

Even when deaths behind bars are public knowledge, there are additional barriers for accountability beyond judicial deference to carceral officials. In Colorado, for example, advocates have criticized the delays in prosecutorial charges for homicides behind bars, even in cases in which video surveillance footage of the homicide exists.[47] Even when a court is actively involved, litigation to address the causes of death can be complex and may take years to resolve.[48] In 2015, a class action lawsuit was brought against Louisiana State Penitentiary ("LSP") documenting years of medical neglect that lead to preventable deaths.[49] In 2021, the District Court ruled that LSP's medical care violated the Eighth Amendment because the medical care was so egregious that it constituted cruel and unusual punishment.[50]

For deaths behind bars that are preventable, these daily decisions by carceral staff and administrators, and the deference accorded to those decisions, matter. The conditions in which deaths occur (i.e. the access to and availability of health care, solitary confinement, housing and work assignments) are accorded significant judicial deference, even when these conditions may contribute to a preventable death. By reducing judicial oversight over decisions by carceral administrators, which in some cases may be linked to deaths of incarcerated people, we also reduce opportunities for reform and improvement of death outcomes behind bars.

B. Deaths As Signifiers

When someone who has not been sentenced to death dies in government custody, it represents a failure in our system of incarceration. In addition to that individual's family and community losing someone they loved, families often have little recourse and are usually provided with very little information about how their loved one died. More broadly, communities who seek information about those who have died in jails and prisons face a number of hurdles in obtaining it. Often, the information about people who died in custody is only reported to the federal government and used for statistical purposes. Academic attempts to obtain a deeper examination and understanding of why and how people die in custody have faced a number of hurdles, including a lack of cohesive and sustained federal reporting, a lack of accountability for

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[45] Only 89.7% of jails in Louisiana submitted data to the BJS for its 2019 census of jails. New Jersey, Arkansas, Mississippi, New Mexico were the only states with worse response rates. *See, U.S. Dep't of Justice, Bur. of Justice Statistics, Census of Jails*, 49 (2005-2019), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cj0519st.pdf.

[46] Dr. Raman Singh, Chief Medical and Mental Health Director of Louisiana Department of Corrections recommended that staff not "dig too deep" into the deaths of incarcerated people in order to avoid liability. Coupled with the inadequately investigated death reports presented, the district court judge found credible an expert witness's testimony that staff had "misrepresented the facts of the patient's death." *Lewis v. Cain*, No. 3-15-CV-318, 2021 U.S. Dist. LEXIS 63293, *60 (Mar. 31, 2021).

[47] *See* Jordan Steffen, *Slow Prosecution of Prison Murders Worries Defense, Experts*, THE DENVER POST (Feb. 22, 2014), https://www.denverpost.com/2014/02/22/slow-prosecution-of-prison-murders-worries-defense-experts/.

[48] *See e.g., Brown v. Plata*, 563 U.S. 493, 514-517 (2011) (recounting history of litigation); *Jones v. Gusman*, 515 F. Supp. 3d 520, 526-538 (E.D. La. 2021) (recounting history of litigation).

[49] The Court discussed seven such preventable deaths, *Lewis v. Cain*, No. 3-15-CV-318, 2021 U.S. Dist. LEXIS 63293, *19, *26, *34, *36, *38, *43, *44 (March 31, 2021), and alluded to others. *Id.* at *112.

[50] *Id.* at *102.

agencies who fail to report, and, in practice, opposition from state and local law enforcement agencies to release the information under public records laws.

Within this context of judicial deference and carceral secrecy, deaths behind bars can be a key indicator to better understand and address conditions of confinement in jails, prisons, and other detention settings.[51] As an initial matter, people who die behind bars were not judicially sentenced to death, thus the majority of deaths behind bars are not an expected or predictable consequence of their criminal sentence.[52] This is especially true for people who died in jails before their guilt or innocence was determined by a court. Approximately 20% of deaths of people in jails and state and federal prisons nationally were of people detained pretrial from 2001-2018.[53] In addition, deaths behind bars are particularly noteworthy because mortality rates for incarcerated people are generally lower than the general population.[54] Moreover, incarcerated people are highly dependent on the carceral facility to provide for their basic needs, as incarcerated people are not free to access the services or resources they require on their own. Thus, when deaths do occur behind bars, it is critical to understand how these deaths occurred and their implications for the broader obligation of carceral spaces to maintain a humane and safe custodial environment.[55]

Mortality rates for incarcerated people are generally lower than the general population for two reasons. First, the confinement of incarcerated people limits their exposure to certain causes of death in the free world. Accidental unintentional injuries were the third highest cause of the death in the U.S. in 2019.[56] Within this category, two of the three most prevalent causes of death —accidental poisoning, motor-vehicle traffic, and falls[57]—are less likely for incarcerated populations. Carceral spaces, by definition, are highly controlled areas that regulate the

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[51] *See* Margaret Noonan & Scott Ginder, *Understanding Mortality in State Prison: Do Male Prisoners Have an Elevated Risk of Death?*, 16 JUST., RSCH, & POL'Y 65, 66 (2016).

[52] People sentenced to life without parole are not technically sentenced to death, but their sentence is also in effect, a death sentence. *See generally*, Judith Lichtenberg, *Against Life Without Parole*, 11 WASH. U. J. REV. 39 (2018).

[53] According to the Bureau of Justice Statistics, from 2001 to 2018, 86,173 people died nationwide in jails and federal and state prisons, of which 18,299 died in local jails. National death data was compiled from the following three resources: *see* E. Ann Carson, *Mortality in State and Federal Prisons, 2001-2018 - Statistical Tables*, 1 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/msfp0118st.pdf, at 1 (reporting 67,874 deaths in federal and state prisons); E. Ann Carson, *Mortality in Local Jails, 2000-2018 - Statistical Tables*, 12 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/mlj0018st.pdf, at 6 tbl.1 (reporting a total of 11,106 deaths from 2008-–2018). For the years 2001–2007, 7,193 people died in custody in jails. Margaret Noonan, Bureau of Just. Stat., U.S. Dep't of Just., Mortality in Local Jails 2000–2007, 7 tbl.8 (2010), https://bjs.ojp.gov/content/pub/pdf/mlj07.pdf. [https://perma.cc/8CZX-Q9R7] (listing total number of deaths 2000–2007). Thus, the total number of deaths in jails 2001–2018 is 18,299.

[54] E. Ann Carson, U.S. Dep't of Justice, Bureau of Justice Statistics, Mortality in State and Federal Prisons, 2001-2018 – Statistical Tables, 2 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/msfp0118st.pdf, ("State prisoners had a lower overall mortality rate (319 per 100,000) than did adult U.S. residents (419 per 100,000) in 2018 when the data were adjusted for differences in age, sex, and race or ethnicity between the two populations.").

[55] *See e.g. Farmer*, 511 U.S. at 832 (noting the U.S. Constitution "imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.") (internal citations omitted).

[56] Jiaquan Xu, Sherry L. Murphy, Kenneth D. Kochanek, & Elizabeth Arias, *Deaths: Final Data for 2019, 70 National Vital Statistics Reports* 1, 1 (July 26, 2021), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-08-508.pdf.

[57] *Id.* at 43 (Table 7 indicating subcategories of accidental death).

movement and behavior of people within them.[58] For people who visit, work, or live in these secure facilities, entrance and exit from the facility is monitored and subject to search, limiting their ability to bring contraband items inside the facility.[59] Contraband is broadly defined in carceral spaces and includes items that would be legal to possess if not incarcerated. For example, contraband in Louisiana includes drugs and weapons, but also includes alcohol, cell phones, electronic equipment, unauthorized food or clothing, and money, among other items.[60] Accidental poisoning deaths, which was the leading cause of accidental unintentional injuries generally in the U.S.,[61] includes deaths related to drug overdoses from legal and illegal narcotics and poisoning due to alcohol, carbon monoxide, and pesticides. All of these items would constitute contraband in most detention facilities and therefore should be unavailable to incarcerated people. Similarly, incarcerated people are less likely to be involved in motor vehicle accidents causing death. The National Safety Council estimates that over 42,000 people died in the U.S. in 2020 due to motor vehicle accidents.[62] However, as a deliberately contained population that does not have freedom of movement, incarcerated individuals are less likely to encounter the safety hazards of road travel.

Second, as self-contained, supervised, and continuously operated facilities, assistance (medical or security) is more physically proximate than for the general population; thus, incarcerated people also may have lower mortality rates. Prisons, jails, and most detention centers operate continuously, twenty-four hours a day, seven days a week, three hundred and sixty-five days a year. These carceral facilities, particularly for larger prisons, centralize services and resources that may be far-flung or difficult to access in free communities. For example, a free person experiencing medical distress is likely geographically further away from life-saving equipment than an incarcerated person in a facility with a medical unit behind bars. Dixon Correctional Institute in Louisiana,[63] a state operated prison, includes a dialysis unit, but even smaller facilities, like Lincoln Parish jail contain basic life-saving equipment, such as defibrillators.[64] Similarly, a free person violently attacked is likely geographically more distant

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[58] *See* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America's Prisons*, VERA INST. FOR JUST., 445 (June 2006), https://www.vera.org/publications/confronting-confinement.

[59] *See Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 326-329 (2012) (discussing rationale and case law on contact visits & searches of people admitted); *Walter Pavlo Corrections Officers Often Key to Contraband Introduced Into Prison*, FORBES (Sep. 30, 2021), https://www.forbes.com/sites/walterpavlo/2021/09/30/corrections-officers-often-key-to-contraband-introduced-into-prison/?sh=4d818b41ce4a.

[60] La. R.S. 14:402.

[61] Jiaquan Xu, Sherry L. Murphy, Kenneth D. Kochanek, & Elizabeth Arias, *Deaths: Final Data for 2019*, 70 NAT'L VITAL STAT. REP. 1, 2 (July 26, 2021) https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-08-508.pdf (noting "unintentional poisoning has been the leading mechanism of injury mortality since 2011.").

[62] National Safety Council, *Motor Vehicle Deaths in 2020 Estimated to be Highest in 13 Years, Despite Dramatic Drops in Miles Driven* (Mar. 4, 2021), https://www.nsc.org/newsroom/motor-vehicle-deaths-2020-estimated-to-be-highest.

[63] Andrea Armstrong, Bruce Reilly, & Ashley Wennerstrom, *Study Brief: Adequacy of Healthcare Provided in Louisiana State Prisons*, 2 (May 2021), https://www.incarcerationtransparency.org/wp-content/uploads/2021/05/Adequacy-of-Healthcare-Provided-in-Louisiana-State-Prisons.pdf.

[64] *See Staff Report, Man Dies in Lincoln Parish Detention Center*, NEWS STAR (Sep. 9, 2016), https://www.thenewsstar.com/story/news/local/2016/09/09/man-dies-lincoln-parish-detention-center/90143126/ (discussing use of defibrillator prior to transfer of Mr. Willie Bias to the hospital and eventual death). Notably, this

from security assistance by police than an incarcerated person from the nearest correctional officer. While there may be other barriers to accessing medical care or security assistance, such as staff training and facility policies, physical proximity would suggest that incarcerated people are at least closer to potentially life-saving assistance than non-incarcerated people.

Within these controlled spaces, where exposure to death is more limited, incarcerated people may also be uniquely vulnerable to death. First, people in prisons and jails are fully dependent on the facility for the provision of basic goods and services. Incarcerated people are not free to seek their own healthcare[65] or other goods and services beyond those offered by the facility. Thus, if the facility fails to deliver adequate services, particularly in the realm of healthcare, death may result. In addition, incarcerated populations often have significant health issues and are a uniquely vulnerable population. Scholars, policy officials, and advocates all agree that incarcerated populations often have significant medical and mental health needs, in some cases higher than non-incarcerated people. "Among people in U.S. prisons and jails, chronic conditions such as hypertension, diabetes, heart disease and asthma are two to three times more prevalent, and rates of serious mental health problems are three to four times higher as well."[66] Suicide rates are also higher for incarcerated people compared to non-incarcerated people.[67]

In Louisiana, 40% of individuals incarcerated for a conviction have experienced mental illness and 20% of the convicted population has been diagnosed with a serious mental illness.[68] For the approximately 15,000 incarcerated people housed in a state prison "in [fiscal year] 2020, roughly 6,000 people had hypertension, over 400 had heart disease, about 1,200 had been diagnosed with diabetes, roughly 1,600 had COPD, and about 300 had cancer. In terms of communicable disease, over 400 people were HIV positive, and about 1,500 had Hepatitis C."[69] Beyond diagnoses, nationally and in Louisiana, excessive and/or mandatory sentences have contributed to an increasingly elderly prison population, who often have higher health care needs. The average age of the prison population in Louisiana in 2020 was 40.5 years old, compared to 34.9 years old in 2010.[70] And 25% of the Louisiana prison population are over 50 years old. Thus, the medical and mental health needs of people incarcerated are likely to increase in the future.

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death was not provided to students seeking death records from this jail, who only received a single record for a death in 2018.

[65] *See e.g. Gamble*, 429 U.S. at 103 (noting "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.").

[66] William Lee Vail et al., *Bringing it all Back Home: Understanding the Medical Difficulties Encountered by Newly Released Prisoners in New Orleans, Louisiana – A Qualitative Study, Health and Social Care in the Community*, 1, 2 (2017).

[67] For prison suicide rates, *see generally* Shaoling Zhong, Morwenna Senior, et al., *Risk Factors for Suicide in Prisons: A Systematic Review and Meta-Analysis*, LANCET PUB. HEALTH, 164 (Mar. 2021), https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930233-4. For jail suicide rates, *see* Tom Meagher & Maurice Chammah, *Why Jails Have More Suicides than Prisons*, THE MARSHALL PROJECT (Aug. 8, 2015), https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons.

[68] Rebecca Atkinson et al., *Study Brief: Severe Mental Illness among Louisiana's Incarcerated*, LSU HEALTH SCI. CTR. - NEW ORLEANS 2 (Mar. 2021).

[69] Armstrong, Reilly, & Wennerstrom, *supra* note 63 at 2.

[70] La. Dep't of Safety and Corr., Briefing Book, 20 (July 2020) (listing average age at 40.5 years), La Dep't of Safety and Corr., Annual Report 2009-2010, 12 (2010).

Deaths are also expensive for facilities. Settlements and legal judgments for preventable deaths behind bars can cost millions of dollars, in addition to the significant expenditures to defend against these wrongful death cases. In one of the largest settlements for wrongful death behind bars in California, Alameda County and Corizon Health Inc, the private health care provider, agreed to pay 8.3 million dollars for the death of Martin Harrison.[71] Insurance premiums for facilities may also increase where there is evidence of prior wrongful deaths. A study of deaths in East Baton Rouge Parish Prison found that insurance premiums for that facility, in which 44 people died from 2012 to 2020, increased by 71% from 2011 to 2018.[72]

Last, patterns in deaths behind bars may signal broader challenges in carceral conditions. For example, if suicides tend to occur in certain jail cells, such as segregation cells, this could be an indication that those cells may be less observable from the guard station in a direct observation unit. In response, facilities could increase their required patrols in those areas or arrange for people on suicide watch to be housed closer to medical personnel. Similarly, if facility administrators see a pattern of heart disease deaths at younger than average ages, this may have implications for the food and exercise allowed for incarcerated people.

C. Federal Death Data Collection

Facility-level data and detailed information about who dies in government custody is a difficult undertaking. Currently, there is no single national source for data by facility. While there is federal data collection, authorized by Congress, and analysis by state, these efforts have been dogged by non-compliance and vague definitions, providing at best, a broad overview of the causes of death. Recent changes internally by the U.S. Department of Justice (DOJ) on which bureau collects the data has also complicated data collection efforts.

> In 2000, Congress passed the Death in Custody Reporting Act (DCRA) of 2000, which: required recipients of Violent Offender Incarceration/Truth-in-Sentencing Incentive grants to submit data to DOJ on the death of any person who is in the process of being arrested, en route to be incarcerated, or incarcerated at a municipal or county jail, state prison, or other local or state correctional facility (including juvenile facilities).[73]

Although the Act technically expired in 2006,[74] the DOJ Bureau of Justice Statistics continued to collect and analyze the data. Then, in 2014, Congress passed the DCRA of 2013.[75] This law

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[71] Heny K. Lee, *$8.3 Million Settlement in Death of Alameda County Inmate*, SFGATE.COM (Feb. 10, 2015), https://www.sfgate.com/bayarea/article/8-3-million-settlement-in-death-of-Alameda-6073319.php.
[72] Andrea Armstrong & Shanita Farris, *Dying in East Baton Rouge Parish Prison*, 22 (2018), https://static1.squarespace.com/static/5fe0e9cce6e50722511b03cc/t/600895d13eefba64a65bbc53/1611175377849/Dying-in-East-Baton-Rouge-Parish-Prison-Final.pdf.
[73] 42 U.S.C. 13704 (2000) (P.L. 106-297); Nathan James & Kristin Finklea, *Programs to Collect Data on Law Enforcement Activities: Overview and Issues*, CONG. RSCH SERV., 6 (Mar. 11, 2021), https://crsreports.congress.gov/product/pdf/R/R46443.
[74] *Id.* at 6.
[75] 42 U.S.C. 3750 & 3791 (2014) (P.L. 113-242).

> requires states to submit data to DOJ regarding the death of any person who is detained, under arrest, in the process of being arrested, en route to be incarcerated, or incarcerated at a municipal or county jail, a state prison, a state-run boot camp prison, a boot camp prison that is contracted out by the state, any state or local contract facility, or any other local or state correctional facility (including juvenile facilities).[76]

Federal agencies are also required to report under this law. If states do not provide the data under the DCRA, they face a 10% reduction in their funding through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. Following the DCRA's passage, the government made little progress toward implementing it. A 2018 Office of Inspector General Report found that "if implemented as planned, the state DCRA data collection will duplicate other Department efforts, which is an inefficient use of resources, creates confusion, and may yield incomplete data."[77]

This inefficiency stems from how the different agencies within the Department of Justice collect death in custody data. Prior to 2020, the Bureau of Justice Statistics (BJS) collected death in custody data through its Mortality in Correctional Institution (MCI) series. However, state participation in this data collection is voluntary. BJS began the MCI data collection in 2000 in response to the passage of the DCRA of 2000, and "collects many, but not all, of the elements outlined in the DCRA reauthorization, but because MCI is collected for statistical purposes only, it cannot be used for DCRA enforcement."[78] Under the 2000 DCRP, BJS collected form CJ-9 for local jails and form CJ-10 for private or multi-jurisdictional jails for quarterly reporting.[79] Forms CJ-9A and CJ-10A are summary forms that were used for reporting at the end of each calendar year. Historically, the delay between data collection and publication of analysis averaged two years. For deaths in custody that occurred during the 2019 calendar year, BJS does not expect to publish the results until the end of 2021.[80]

Separate from BJS, beginning with fiscal year 2019, the DOJ began requiring state and local law enforcement agencies to report their death in custody data quarterly to the Bureau of Justice Assistance (BJA) under the 2013 DCRA.[81] BJA is a separate unit within the DOJ, which administers grants for states and localities. Those who fail to provide the quarterly information are subject to a 10% reduction in their Byrne JAG funding.[82] However, there is no public information about which agencies have been subject to the penalty for failing to report death data. Generally, "[s]tates are responsible for establishing their own policies and procedures to

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[76] James & Finklea, *supra* note 73, at 7.
[77] Michael E. Horowitz, *Review of the Department of Justice's Implementation of the Death in Custody Reporting Act of 2013*, DEPARTMENT OF JUST. OFF. OF INSPECTOR GEN. (Dec. 2018), https://oig.justice.gov/reports/2018/e1901.pdf.
[78] Bureau of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))*, https://www.bjs.gov/index.cfm?ty=tp&tid=19 (internal citations omitted).
[79] Bureau of Justice Statistics, *Death in Custody Statistical Tables: Methodology*, https://www.bjs.gov/content/dcrp/methodology.cfm.
[80] E. Ann Carson, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., https://bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program#methodology-0 (last visited Oct. 25, 2021).
[81] James & Finklea, *supra* note 73, at 7; *see also id.* at 30, https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag-faqs.pdf.
[82] *Id.*

ensure they collect and submit complete data."[83] Further, rather than individual prisons and jails reporting directly to the federal government, "[s]tate departments of corrections and local jails now report their death information on a quarterly basis to centralized state agencies, which compile and submit these data to BJA."[84] Further, the DOJ is not required to publicly publish the state data reported to BJA—unlike the annual reports that BJS would publish annually—but the BJA data is maintained internally and "may be subject to Freedom of Information Act requests."[85] Further complicating the reporting requirements for states, in 2018, BJS indicted it would continue to collect data through the MCI program "because it complements BJS's overall correctional research, which includes a broader analysis of the nationwide prison population."[86] However, in 2021, BJS informed facilities that it would be closing its online portal for data collection.[87]

The data collected by BJA will ultimately be less helpful in understanding deaths behind bars in the United States. The BJA has published the data collection instrument[88] for individual deaths, though submissions will be online and facilities do not need to fill out individual forms for each death. The data collected will differ significantly from the data collected previously by BJS and in many instances, will result in less specific information on deaths in custody. First, the BJA questions do not ask for the facilities average daily population, making it difficult to calculate a facility's mortality rate. Second, because the state collects and submits the information, the BJA data will not include facilities where there are zero deaths in a calendar year. This omission is particularly problematic, since on average, according to historic BJS data, 75-80% of jails do not have a death in a calendar year. For advocates looking to understand best practices, this omission will make it more difficult to identify those facilities with strong policies and practices that reduce the possibility of death. Third, the BJA data simply does not collect a series of data points previously collected by BJS, including: decedent offenses, trial status, mental health stays, location of deaths and incidents leading to death, medical examiner review, pre-existing conditions, and types of medical care received for illness related deaths. Fourth, the BJA data as to cause of death will be much less specific, particularly for illness-related causes of death. BJA does not disaggregate deaths due to AIDS, unlike BJS. More broadly, BJA allows facilities to identify "natural causes" as the cause of death, without requiring any additional information on the specific disease, illness, or issue actually causing death. In contrast, using the BJS data, analysts can assess prevalence and outcomes for certain illnesses, such as cancer, pneumonia, and heart or kidney disease, for incarcerated populations versus non-incarcerated populations. Considering that illness-related deaths are the leading cause of death behind bars,

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[83] James & Finklea, *supra* note 73, at 7 (citing U.S. Department of Justice, OJP, Bureau of Justice Assistance (BJA), *Death in Custody Reporting Act, Performance Measurement Tool, Frequently Asked Questions*, 2 (Feb. 2020), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/DCRA-FAQ_508.pdf).

[84] E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000–2019 – Statistical Tables*, Department of Justice, Bureau of Justice Statistics, 31 (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf.

[85] James & Finklea, *supra* note 73, at 7.

[86] Horowitz, *supra* note 77, at 14.

[87] U.S. Dep't of Justice, Bur. of Justice Statistics, *Mortality in Correctional Institutions (MCI) (Formerly Deaths in Custody Reporting Program (DCRP))*, https://bjs.ojp.gov/data-collection/mortality-correctional-institutions-mci-formerly-deaths-custody-reporting-program.

[88] *Death In Custody Reporting Act Reporting Form*, DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE (Jul. 2019), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/DCRA-Performance-Measure-Questionnaire_508.pdf.

the omission of more specific information beyond "natural causes" undermines the usefulness of the entire data series. Though this is the first year of BJA implementation, without significant changes, implementation of DCRA 2013 will result in less, instead of more, transparency on deaths behind bars.

Since 2000, the federal government has attempted to track death in custody data for statistical purposes through the DOJ. Submitting this data was largely voluntary and there was no mechanism for holding facilities accountable for failing to report their deaths in custody. In 2013, when Congress attempted to enforce the reporting of deaths in custody, it inadvertently made data reporting simultaneously more complex (by changing the forms that facilities use to report and the reporting agency) and less specific (by collecting less and more generalized data). Further this change in reporting did not go into effect for state and local governments until fiscal year 2019, leaving the 2013 DCRA an unenforceable mandate for over five years. Today, although jurisdictions are subject to a reduction in federal funding if they fail to report to the BJA, there is no evidence that the DOJ has used this enforcement mechanism. Further, reporting to the BJA is not publicly available, making it difficult for the public to hold these facilities accountable.

D. Practical Challenges in Data Collection

In practice, law students seeking to obtain records about deaths in custody in Louisiana under the Public Records Law have faced numerous challenges from state and local officials. During the Fall 2019 and Fall 2020 semesters, thirty-two Loyola Law students filed public records requests with 132 facilities, including all prisons, jails, juvenile detention centers (state and locally operated), and federal facilities within the state. During that process, 69% of facilities responded. Of the remaining facilities, students faced a number of challenges including: (1) facilities not honoring the requests, (2) facilities not maintaining formal records or having incomplete records of deaths, (3) a lack of consistent coding or categorization of death data, and (4) facilities incorrectly claiming that state or federal privacy laws preclude them from releasing the data.

First, although students were able to obtain responses from the majority of the 132 facilities that they submitted public records requests to, thirty-eight of those facilities, or 29%, did not respond despite repeated requests over two years. Most notably, none of the federal facilities have provided records to date, which were requested under federal public records law, the Freedom of Information Act. Lasalle Corrections, which is a private corporation and operates several local facilities in Louisiana, has also failed to consistently provide records. Under Louisiana Public Records Act, once a custodian receives a public records request, they are required to either provide the records, provide a basis for not making them available within five days, or provide a reasonable timeframe in which they will gather and produce the records.[89] In some cases, students educated local staff on their obligations under the Act, which then produced the requested records.

Second, alternative sources of information when facilities fail to report are not comprehensive or consistent. For example, students requesting records from Webster Parish Jail

[89] La. R.S. § 44:32-35.

did not receive a response to their requests. However, the state agency, Louisiana Department of Public Safety and Corrections, provided a 2017 death record for an individual legally under DPSC custody, but who was housed at Webster Parish Jail.[90] Additionally, students found two news articles that reported on deaths that occurred at the facility in 2018 and 2019.[91] While these news articles serve as proof that individuals died while incarcerated, they do not provide any official documentation from the facility. Reliance on news sources also means that for some records, we have incomplete data entries since not all of the data elements consistently appear in each news report. News reports are simply not a reliable alternative to formal government reporting. Media reports do not have comparable specificity on the causes or circumstances of death and may not be comprehensive of all deaths occurring behind bars in a particular facility.

Third, even when facilities do report their data to BJS, they do not have uniform functional definitions for cause of death or other information reported, creating inconsistencies or differences in the data between facilities. Thus, while we can analyze the data as produced by facilities, we must also be clear that the data may contain errors or even bias in the categorization of deaths. For example, an incarcerated person who overdosed and had a seizure then ultimately died, may be reported as "Drugs" in one parish or as "Medical" in another. Neither one is technically incorrect, but the coding inconsistency can impact data analysis.

Last, some facilities have cited state or federal privacy laws, or the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") privacy rules, in its rationale for failing to provide death in custody data via a public records request. While HIPAA does protect incarcerated individuals' protected health information for up to fifty-years after their deaths,[92] there are exceptions to the HIPAA rules that would allow disclosure of this information.[93] For example, carceral facilities may disclose protected health information for research purposes when, among other things, the researcher affirms that the information will be used for the research.[94] Additionally, the protected health information of decedents may be revealed to researchers when the disclosure is necessary for research purposes.[95] Such research includes

[90] https://www.incarcerationtransparency.org/wp-content/uploads/2021/03/2017-Webster-Parish-Jail-Webster-CJ9s.pdf

[91] https://www.incarcerationtransparency.org/wp-content/uploads/2021/03/2018-Webster-Parish-Jail-Webster-Articles.pdf; https://www.incarcerationtransparency.org/wp-content/uploads/2021/03/2019-Webster-Parish-Jail-Webster-Articles.pdf

[92]https://www.hhs.gov/hipaa/for-professionals/faq/1500/do-hipaa-protections-apply-to-the-health-information-of-individuals/index.html

[93] 45 CFR § 164.512(i)(1)(iii) ("Release of medical reports and information to a routine user requires a written request stating the reason for the information; however, the inmate's consent is not required. Routine uses for physical and mental health records have been published in the Federal Register, 67 FR 11712 (5/14/02)."); Charles E. Samuels, Jr., *Program Statement: Health Information Management*, DEP'T OF JUST., FED. BUREAU OF PRISONS, 5 (Mar, 2, 2015) https://www.bop.gov/policy/progstat/6090_004.pdf.

[94] 45 CFR 164.512(i)(1)(ii) ("(ii)Reviews preparatory to research. The covered entity obtains from the researcher representations that: (A) Use or disclosure is sought solely to review protected health information as necessary to prepare a research protocol or for similar purposes preparatory to research; (B) No protected health information is to be removed from the covered entity by the researcher in the course of the review; and (C) The protected health information for which use or access is sought is necessary for the research purposes.").

[95] 45 CFR 164.512(i)(1)(iii) ("(iii) Research on decedent's information. The covered entity obtains from the researcher: (A) Representation that the use or disclosure sought is solely for research on the protected health information of decedents; (B) Documentation, at the request of the covered entity, of the death of such individuals;

research "designed to develop or contribute to generalizable knowledge."[96] Furthermore, researchers do not need to obtain pre-approval before asking for personal health information when conducting secondary research sourced for a separate primary purpose.[97] While there are important ethical questions about the release of cause of death information for specific individuals, facility administrators, who may also be held legally liable for preventable deaths, may have a conflict of interest in making these determinations.

Despite these challenges with data collection and analysis, the data that is newly available through the efforts of Loyola Law students offers a picture about who has died behind bars and how they are dying.

II. THE DATA

From 2015 to 2019, at least 786 incarcerated people died behind bars in prisons, jails, and detention centers across Louisiana. This report is the first comprehensive collection and analysis of deaths behind bars in Louisiana, based on public records requests filed with 132 facilities across the state.

Black men ages 55-60 serving a sentence post-conviction are the largest impacted population by deaths behind bars, comprising 11% of all known deaths. None of the 786 known deaths were judicially sentenced to death row. All were either detained before their trial, serving a judicially determined sentence for a set number of years or life, or were detained for a parole or probation violation. The overwhelming majority of people died of medical causes, with the highest rates for heart disease and cancer. Approximately half of known medical deaths were related to a pre-existing medical condition, indicating that half of medical related deaths were due to conditions first diagnosed by prison or jail medical staff. Though suicides were only approximately 6% of deaths, they were more likely to occur in parish jails and within those jails, almost half occurred in segregation, more commonly known as solitary confinement.

A. Project Overview

Louisiana leads the nation in incarceration.[98] We hold more people, per capita, than any other state in the South, easily outpacing our neighboring states. Our state and federal government are constitutionally obligated to provide safe and humane conditions for incarcerated people, including constitutionally adequate healthcare.[99] These obligations arise from the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I §§ 2 and 20 of the Louisiana State Constitution.

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and (C) Representation that the protected health information for which use or disclosure is sought is necessary for the research purposes.").

[96] 45 CFR 164.501.

[97] *Recommendations on the Interpretation and Application of § 104(d)(4) the "HIPAA Exemption"*, HHS.GOV, https://www.hhs.gov/ohrp/sachrp-committee/recommendations/attachment-b-december-12-2017/index.html

[98] Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sep. 2021), https://www.prisonpolicy.org/global/2021.html.

[99] The U.S. Supreme Court has held that the U.S. Constitution requires the provision of medical and mental healthcare to incarcerated people consistent with the level of care provided in community. *See e.g. Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Brown v. Plata*, 563 U.S. 493 (2011).

At the same time, prisons, jails, and detention centers in Louisiana operate without independent oversight, mandatory standards, or public transparency. Parish jails are only required to report deaths of people detained pending trial to their local coroner. Prisons, parish jails, and private prisons are only required to report deaths of people serving sentences to the Louisiana Department of Public Safety and Corrections (DPSC) headquarters and the local coroner. Some facilities, but not all, will issue individual press releases when a death behind bars occurs. DPSC publishes limited and generalized data on causes of death for incarcerated people convicted of a crime in its quarterly Briefing Book, but does not provide demographic or facility information. Though most Louisiana facilities annually report deaths in custody to the BJS, federal analysis based on these deaths in custody reports do not provide facility level information or disaggregate state data by race, age, or length of stay.

This project, through collecting and publishing data on deaths behind bars, aims to increase transparency of these public institutions and better understand how and why people die behind bars. Subsequent reports will compare the data collected on Louisiana deaths to national trends, as well as examine issues related to the data collection effort, including differential public records costs, facility and parish compliance, and the use of redactions by responding facilities.

Louisiana is relatively unique in the U.S. for using local jails to house approximately 50% of people serving their state sentence in a local jail. Jails are traditionally operated by local sheriffs and are primarily for people detained pretrial. They are designed for short-term housing and therefore often lack more robust services essential for people serving long term sentences, including appropriate healthcare, recidivism prevention programming, and skills training. Prisons, on the other hand, are operated by the state and are primarily for people serving a judicially determined sentence after being convicted of a crime. As a result of this bifurcated system, the DPSC prioritizes state prison beds for people with longer sentences or serious health needs. Local jails and private operators, such as LaSalle Corrections, house the remaining state population of 50%, in addition to their traditional pretrial populations. Jails and private operators receive a per diem per person per day, which costs the state approximately $175 million for fiscal year 2019-2020.[100] The per diem rate paid by the state during the time period of this study, 2015 to 2019, was $24.39.[101]

Beyond jails and prisons, Louisiana also has a growing immigration detention population, housed in federally or privately operated prisons and parish jails through contracts with local sheriffs. After the legislature enacted significant reforms in 2017 pursuant to recommendations by the Louisiana Justice Reinvestment Initiative Taskforce, Louisiana anticipated a 10% reduction in population within 10 years. As those reforms have been implemented, jails and private facilities have turned to immigration detention to fill the recently emptied beds. There are also four "secure custody" juvenile detention centers operated by the state Office of Juvenile Justice, as well as thirteen locally operated "non-secure custody" juvenile detention centers.

[100] La. Dep't Pub. Safety & Corr., Briefing Book, 76 (July 2020) (a copy of this source is on file with the editors of the Loyola Journal of Public Interest Law).

[101] This rate was increased for fiscal year 2019-2020 to $25.39 and for fiscal year 2020-2021 and thereafter to $26.39. Act No. 245, La. Reg. Session (2019) (codified as amended at La. Rev. Stat. 15:824(B)(1)(a)).

B. Methodology

During the Fall 2019 and Fall 2020 semesters, Loyola Law students filed public records requests with 132 facilities, including all prisons, jails, juvenile detention centers (state and locally operated), and federal facilities. Students requested records of deaths in custody, including any records prepared and submitted to the U.S. Department of Justice's Bureau of Justice Statistics (BJS).[102] BJS publishes separate mortality reports for jails and prisons, with their latest reports for each (April 2021) analyzing data from 2000-2018. The data released by BJS, however, does not provide for analysis by facility and state data is not disaggregated by race, age, or length of stay. Students also reviewed news and court litigation databases for their assigned parishes (counties) to identify unreported deaths occurring behind bars.

Of the 132 facilities included in this study, we received responses from 69% of facilities. Twenty-nine percent of facilities (38) did not respond to our repeated public records requests over two years, in violation of Louisiana Public Records Act § 44:1 et seq. The project has also not received any death data from federal agencies operating detention centers in Louisiana, which is particularly troubling as the number of people detained for immigration violations has soared since 2017.[103] In contrast, the state DPSC, which administers eight state prisons holding approximately 16,000 people, fully responded to our requests, and also sent responses for people legally under their custody but serving their sentence in local jails. All data utilized in this report, including documents actually received, is available for download and more refined analysis at www.incarcerationtransparency.org.

C. Who is Dying?

The demographics of those incarcerated, and further, those who are dying while incarcerated, do not reflect the general population of Louisiana. Namely, Black and brown Louisianans are disproportionately represented in Louisiana's prisons and jails[104] and, as this data indicates, they also disproportionately die while in custody. The same is true for men.

The Equal Protection Clause, which protects against intentional discrimination for certain characteristics such as race and gender, is one of the few constitutional rights that is applied the same, whether a person is incarcerated or not.[105] The Equal Protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[106] To prove an Equal Protection Clause violation, courts review prison or jail official actions under

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[102] Forms collected include CJ-9/CJ-9A (jails), NPS-4/NPS-4A (prisons), CJ-10/CJ-10A (private facilities) and NPS-5/NPS-5A (juveniles). Students also received correspondence from some facilities indicating there were zero deaths in that facility.

[103] *See* Laila Hlass & Mary Yanik, *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana*, 3, TUL. UNIV. IMMIGR. L. CLINIC (May 2021), https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf.

[104] *Incarceration Trends in Louisiana*, VERA INST. OF JUST., 1 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-louisiana.pdf.

[105] *Prisoners' Rights*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/prisoners%27_rights (last visited Nov. 20, 2021).

[106] U.S. Const. Amend. XIV, sec 1.

strict scrutiny, the highest level of constitutional review.[107] All discrimination claims must show discriminatory intent.[108] However, proving discriminatory intent in the carceral setting can be challenging.[109]

1. Race

In Louisiana prisons and jails, the majority of those who died while in government custody are Black. More specifically, of the 786 known deaths from 2015 to 2019, Black people were 58.40% (459) of deaths and white people were 39.69% (312) of deaths. Of the remaining 14 deaths, seven were listed as Hispanic and the remaining were either listed as "other" or "unknown." When broken down by cause of death, Black people accounted for the majority of medical deaths, drug deaths, deaths by violence, and deaths by "other" means. Conversely, white people made up a majority of deaths that were accidental or by suicide.

More broadly, deaths behind bars in Louisiana reflect other patterns of race in incarceration, with African-Americans overrepresented given their share of the state population. African Americans are 67.5% of people committed to state custody after conviction, compared to whites at 32.1% and "Other" at 0.4%.[110] In juvenile settings, African Americans are 81% of youth in secure custody and 75% in non-secure custody.[111] Demographic data by race of incarcerated people is only available for people serving convictions (whether in prison or jail) and for youth in secure and non-secure care, but is not available overall for locally-operated jails.

2. Sex

Similar to race, known deaths by gender reflect broader incarceration patterns. Excluding people held pretrial or for immigration, adult men comprise 95.3% of people serving their sentence after conviction.[112] In juvenile settings, boys are 94% of youth held in secure custody and 84% of youth held in non-secure custody.[113] Of the 786 death records reviewed, 95.42% were for men (750) versus 4.45% for women (35). Medical deaths were the leading cause of death for both men and women, followed by suicide. Deaths as a result of drugs or accidents were exclusively male.

3. Age

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[107] *Johnson v. California*, 543 U.S. 499, 515 (2005).
[108] *Id.*; *Ionescu v. Wells* , No. CV 309-089, 2011 U.S. Dist. LEXIS 79955 (S.D. Ga. July 1, 2011).
[109] *Chapter Three: Your Rights in Prison*, JAILHOUSE LAW. HANDBOOK, https://www.jailhouselaw.org/your-rights-prison (last visited Nov. 20, 2021).
[110] La. Dep't Pub. Safety & Corr., Briefing Book, 19 (July 2020), https://s32082.pcdn.co/wp-content/uploads/2020/08/Full-BB-Jul-20.pdf.
[111] Office of Juv. Justice, *Fiscal Year 2017 Annual Report on Youth Served*, 6 & 10 (2017), https://ojj.la.gov/wp-content/uploads/2018/01/Act499TrendReportFY2017_-finalforwebsite-1.pdf.
[112] La. Dep't Pub. Safety & Corr., Briefing Book, 19 (July 2020) (a copy of this source is on file with the editors of the Loyola Journal of Public Interest Law).
[113] Office of Juv. Justice, *Fiscal Year 2017 Annual Report on Youth Served*, 6 & 10 (2017), https://ojj.la.gov/wp-content/uploads/2018/01/Act499TrendReportFY2017_-finalforwebsite-1.pdf.

Louisiana has one of the oldest prison populations in the nation due to mandatory minimum and multi-bill sentencing laws. For context, if the number of those "serving life sentences without parole in Texas, Arkansas, Mississippi, Alabama and Tennessee in 2017 were added together, the sum would still fall below the number of people serving life in Louisiana that same year."[114] Approximately 25% of people serving sentences in Louisiana are over 50 years old (up from 20% five years ago). The average age of people serving sentences post-conviction in Louisiana is 40 years old for men and women alike, up from 36 years old 5 years ago. Known deaths behind bars in Louisiana range in age from 13-96 years old. Overall, people ages 55-60 years old make up 19.24% of deaths, with people ages 61-66 at 17.13%, and 49-54 at 15.92%.

When we examine age of death by the type of facility, we see the same pattern for DPSC, with the highest percentage of deaths for people ages 55-60 (21.68%), followed closely by 61-66 years old (20.07%) and 49-54 (16.31%). Deaths in parish jails and private facilities skew younger. In parish jails, people ages 37-42 years old have the highest incidence of death (13.02%), followed closely by ages 49-54 (12.50%), then ages 43-48 (11.98%). In private facilities, people ages 49-54 (18.75%) have the highest incidence of death, then ages 37-42 (15.63%).

4. Trial Status

Approximately 85% of known deaths behind bars were of people serving a sentence for conviction of a crime. These deaths occurred primarily within DOC prisons (558 deaths for 70.99% of total deaths), but people with convictions also died serving their sentence in parish jails (76 for 9.67% of deaths), private facilities (31 deaths or 3.94%), and juvenile facilities (2 deaths). Pretrial deaths, i.e. deaths of people who had not yet had a trial determining their guilt or innocence, are 14.38% of all known deaths from 2015-2019, including two juveniles.

D. Where are they dying?

People may be incarcerated in different types of facilities, such as a prison, a jail, or a youth detention center. For adults, where someone is housed while in custody influences whether the incarcerated person has access to educational programming, job training, and—depending on where the facility is located geographically—the ability to have family visits and maintain community ties. However, incarcerated people do not have a constitutional right to be housed in a specific kind of facility or in a specific geographic location.[115] This creates a unique problem in Louisiana, where about half of the prison population is housed in parish jails.

Within a given facility, people may be incarcerated in different types of housing units. The largest are general dorms, which include rows of bunkbeds and communal restrooms and showers. People may also be housed in cells, which can also vary in size accommodating usually two to ten people. Segregation cells, on the other hand, incarcerate at most two people, but more often just one, who are not allowed to interact with other people and often are only

[114] Julie O'Donoghue, *Louisiana may Look at Changing Medical Release for Sick, Dying Incarcerated People - Again*, LA ILLUMINATOR (May 13, 2021), https://lailluminator.com/2021/05/13/louisiana-may-look-at-changing-medical-release-for-sick-dying-incarcerated-people-again/.
[115] *See generally Meachum v. Fano*, 427 U.S. 215 (1976); *Olim v. Wakinekona*, 461 U.S. 238 (1983).

allowed to leave the cell for one to two hours a day. Medical facilities both, on site and off site, may incarcerate people while they undergo routine medical procedures like detoxification from drugs or alcohol. People may also experience their incarceration through a work release program or in transit between two other locations. Every location can be deadly.

Additionally, once admitted to a facility, incarcerated people do not have a right to be housed in a specific area or housing unit of the facility. Instead, classification is determined by prison administrators.[116] Protective custody, which is housing separate from the general population, is not an affirmative right, although incarcerated people may sue carceral actors for failure to protect them when carceral administrators assign housing without assessing potential threats to the incarcerated person. To prevail on a failure to protect claim in Louisiana, incarcerated people must prove both that carceral actors had "reasonable cause to predict the harm" and that they failed to prevent it.[117] However, an "adequate reason to anticipate harm" may not include mere reports of threats when such reports are par for the course inside the facility.[118] Thus, incarcerated people may have little decision-making power as to where they are incarcerated even when they report unsafe conditions.

1. Type of Facility

Of the 786 known deaths, the majority occurred within state prisons, though deaths occurred in all types of facilities during the 2015-2019 period of review. More specifically, 71% of deaths occurred in state prisons, 24% of deaths in custody occurred in parish jails, 4% occurred in private prisons or jails, and four juveniles died while in a youth facility—making up less than 1% of deaths overall.

2. Location of Death within Facility

Almost three-quarters of deaths (72.6%) occurred in a medical facility, which is consistent with medical illness being the leading cause of known deaths. While the "unknown" death location appears large at 8.27%, a review of those records indicates the majority of those deaths occurred in medical facilities outside of the prison or jail. Deaths in segregation, which make up 3.18% of all deaths, may indicate challenges for custodial supervision and/or reflect the unique isolation of segregation cells. Segregation, more commonly known as solitary confinement, is usually employed for discipline for rule violations, protective custody, or for close observation/suicide watch. In segregation, a person is typically allowed out of their six by eight foot cell for one to two hours each day, but is otherwise isolated from human interaction and may be deprived of other privileges, including visitation or participation in programming. In addition to these locations, 13.38% of deaths occurred in a cell, 1.40% occurred while the incarcerated person was in transit, 1.15% occurred at work, 0.25% or two deaths occurred at a temporary holding facility, and one death, or 0.13% occurred at a courthouse.

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[116] *Basic Jail Guidelines: State Offenders Housed in Local Jail Facilities*, La. Dep't of Corrs. 18 (Apr. 2019), https://www.incarcerationtransparency.org/wp-content/uploads/2021/10/Basic-Jail-Guidelines-as-of-April-2019.pdf.
[117] *Aucoin v. Larpenter*, No. 2021 CA 0064, 2021 La. App. LEXIS 1294 at *8-*9.
[118] *Parker v. State*, 282 So. 2d 483, 486 (La. 1973).

E. Why are they dying?

Carceral facilities have a duty to provide "basic sustenance, including adequate medical care"[119] and mental healthcare[120] to incarcerated people. Courts have repeatedly stated that a failure to do so violates the U.S. Constitution and thus "is incompatible with the concept of human dignity and has no place in civilized society."[121] The vast majority of deaths (85.75%) were related to medical illness. Contrary to popular culture depictions of prisons and jails, known deaths due to violence are a relatively small percentage, 1.53%, of deaths behind bars. The second leading cause of death at 6.23% are completed suicides. Drug overdoses are third at 3.56% and though a small overall proportion of deaths, these overdoses occurred close in time to admission but also after years of being incarcerated. On average, people were incarcerated for 962 days before ultimately dying due to drug use.

1. Medical

The leading causes of medically-related deaths behind bars are cancer and heart attacks. Approximately 10% of known deaths from 2015 to 2019 were due to respiratory illness. Some of the deaths within the "all other" category concern deaths at facilities that either redacted the medical cause of death, failed to provide descriptive details on the cause of death, or described the deaths as the result of "natural causes." Additional deaths within this category included deaths due to sickle cell, complications from hernia surgery, Alzheimer's disease, and gastric ulcers, among others.

A total of 672 medically-related deaths were reported. The largest percentage (41.82%) of medical deaths were attributed to heart diseases. Cancer made up 19.79% of medical deaths, while 10.42% were attributed to respiratory diseases. Liver diseases were 6.85% of medical deaths, followed by brain diseases at 4.46%. Sepsis claimed 3.13% of deaths and AIDS at 2.08%. Kidney and detoxification related deaths held the least percentages with 1.04% and 0.15%, respectively, and 10.27% of medical deaths were described as "all other."

On average, less than half of known deaths were due to a medical condition that existed prior to detention behind bars, indicating that the medical condition in 53% of cases was initially diagnosed after admission to a carceral facility. Only medical deaths due to three diseases (HIV/ AIDS, liver, and kidney diseases) were more likely to be due to a pre-existing condition prior to incarceration. The development of, and death from, other diseases during incarceration is likely related to the length of sentences in Louisiana and may implicate the general lack of preventative health care for incarcerated adults under the age of 50 years old.

Most causes of medical deaths were not pre-existing conditions. Of the people who died from brain diseases, 27% had a pre-existing condition before their incarceration. Forty-one percent of cancer deaths and 48% of heart disease deaths were caused by a pre-existing condition. Of respiratory deaths, 44% died from a pre-existing condition and of sepsis deaths,

[119] *Brown*, 563 U.S. at 511.
[120] *Id.* at 545 (holding that "[t]he medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment.").
[121] *Id.* at 511.

48% were caused by a pre-existing condition. Of the "all other" medical deaths, 38% were caused by a pre-existing condition. The one detox related death was not caused by a pre-existing condition. Seventy-one percent of HIV/AIDS deaths were attributed to pre-existing conditions. Seventy four percent and 86% of liver and kidney deaths, respectively, were caused by a pre-existing condition.

Notably, the medical and dental care that Louisiana DOC provides to incarcerated people, specifically at Louisiana State Prison, also known as Angola, has been the subject of an ongoing federal lawsuit, *Lewis v. Cain*. In March 2021, a federal judge found that the medical care provided at Angola contained system wide deficiencies that rose to the level of cruel and unusual punishment under the Eighth Amendment. Namely, prison officials were "deliberately indifferent to the serious medical needs of [those incarcerated and failed] to address and/or correct known deficiencies."[122]

2. Suicide

Carceral actors also have a duty to prevent incarcerated people's self-inflicted harm, but only when that harm is foreseeable.[123] In these lawsuits, plaintiffs must prove that carceral staff knew or should have known that an incarcerated person was at risk of harming themselves.[124] Moreover, plaintiffs must prove that carceral staff breached the standard of care typical of the facility.[125] In Louisiana, a person who attempts suicide can also face additional criminal charges for "self-mutilation," which carries a consecutive sentence of up to two years.[126]

Almost two-thirds of the completed and known suicides in state prisons occurred in a person's cell and only 7% occurred in segregation. In contrast, suicides in segregation were more common in youth detention centers and parish jails. Suicides in segregation are of particular concern, since segregation settings usually entail a higher level of individual supervision or observation than general shared cell or dorm settings, combined with more restrictive policies on items allowed in a segregation cell. Forty-three percent of all completed suicides in parish jails occurred in segregation cells, raising questions about the degree of observation performed by custodial and medical staff. All but two of these segregation parish jail suicides were hangings.

In DOC facilities, 64% of suicides occurred in a cell, while 21%, 7% and 7% occurred in a medical facility, segregation, and in transit, respectively. Juvenile facilities saw 67% of its suicides happen in segregation and 33% occurred in a cell. Parish facilities had the most diversity of suicide locations. Forty three percent of suicide in a parish facility occurred in a cell, 43% occurred in segregation, and courthouses, temporary holding cells, transit, and work location saw

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[122] *Lewis*, 2021 U.S. Dist. LEXIS 63293, at *85.
[123] *Leonard v. Torres*, No. 2016 CW 1484R, 2017 La. App. LEXIS 1721, *8 (La. App. 1 Cir. Sept. 26, 2017).
[124] *Id.* at *9.
[125] *Scott v. State*, 618 So. 2d 1053, 1058 (La. Ct. App. 1st Cir. 1993).
[126] *See* La. Rev. Stat. § 14:404 (Westlaw through Reg. Sess. And Veto Sess. (2021)). Rocky Chaney was booked with "self-mutilation" while on suicide watch for a previous suicide attempt at Acadia Parish Jail. Ben Myers, *At Acadia jail: No Mental Health Care, Botched Watch Logs and two Suicides in six Weeks*, ACADIANA ADVOCATE (Dec. 11, 2019)
https://www.theadvocate.com/acadiana/news/article_deb89daa-16aa-11ea-bfd3-5722016d439c.html. *See also* https://www.incarcerationtransparency.org/wp-content/uploads/2021/01/Chaney-Rocky-Acadia-2019-CJ9.pdf

3% each. Half of the suicides in privately run facilities occurred in a cell, while the other half occurred in a medical facility.

3. Drugs

The penalty for smuggling drugs and other controlled dangerous substances[127] in Louisiana is the same for possession or possession with the intent to distribute controlled dangerous substances outside of carceral settings.[128] Furthermore, in Louisiana, incarcerated people face additional charges if they introduce contraband such as drugs into a carceral facility.[129] People convicted of introducing contraband while incarcerated must serve their additional sentence consecutively with their original sentence.[130]

Drug overdoses are a relatively small proportion of overall deaths and similar to suicides, are more likely to occur in parish jails than other types of facilities. Drugs causing death included cocaine, heroin, methamphetamines, fentanyl, ibuprofen, synthetic cannabinoids, and inhaled hydrocarbons.

Drug related deaths occurred in different types of facilities after differing average days of incarceration. For DOC facilities, drug related deaths occurred on average after 3,970 days of incarceration. In privately run facilities, 1,253 average days had passed before a drug related death. One hundred eighty one days on average passed before a drug-related death in parish facilities.

Known drug-related deaths appeared to be increasing in number over time. The lowest proportion of drug-related deaths was in 2015 at 1.7% of overall known deaths behind bars. By 2019, drug-related deaths were 7% of overall deaths for the year. All drug overdose deaths behind bars from 2015-2019 were male.

Twenty-eight drug related deaths occurred between 2015 and 2019, and these deaths also increased over time. Three drug related deaths occurred in 2015, and four happened in 2016. In 2017, seven drug related deaths occurred. This number fell to five in 2018, but drug-related deaths peaked in 2019 with nine deaths.

4. Accident

Deaths due to accidents behind bars are not typically actionable in court. Accidents may be caused by a carceral actor's negligence. However, a carceral actor's negligence is not sufficient to bring a claim against them because mere negligence does not constitutionally necessitate compensation in the carceral setting.[131]

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[127] La. Rev. Stat. § 14:402(D)1 (Westlaw through Reg. Sess. And Veto Sess. (2021)).
[128] La. Rev. Stat. § 14:402(D)1 (Westlaw through Reg. Sess. And Veto Sess. (2021)), referencing La. Rev. Stat. § 40:961 et seq.
[129] *Id.*
[130] La. Rev. Stat. § 14:402(D)2 (Westlaw through Reg. Sess. And Veto Sess. (2021)).
[131] *Davidson v. Cannon*, 474 U.S. 344, 347 (1986).

Deaths due to accidents behind bars primarily involved head injuries leading to traumatic brain injuries. One death is reported as "accidental" but concerns an officer-involved shooting after the person's apparent failure to heed the previously fired warning shot. For deaths in cells, three of the accidental deaths were due to head injuries, of which one is described as the result of falling down. The fourth death did not indicate how the injury leading to death was sustained. Of the four deaths occurring as a result of work, two involved drowning (one when a boat collapsed on the Mississippi River); one involved falling from the bed of a truck travelling down a U.S. highway; and one involved an unspecified "accidental injury to self" at work.

Of the fourteen deaths by accident, four deaths each occurred at work or in cells. Three accidental deaths occurred in medical facilities, and two occurred while in transit. One accidental death occurred in segregation.

5. Violence

Deaths stemming from violence within the prison are not as common as movies and television shows generally depict. Nationwide, deaths from homicide amounted to 2.3% of all deaths in local jails between 2000-2018 and, from 2001-2018, amounted to 2% of deaths in state prisons and 3% in federal prisons.[132] The most recent data from the BJS shows that 2018 saw the most prison deaths since BJS started counting deaths in 2001.[133] There were 120 homicides in state and federal facilities in 2018, which was double the rate of homicide of U.S. residents.[134] In Louisiana, nine people were killed inside state or federal prisons in 2018.[135] It is also unclear how many of those deaths were investigated by local district attorney's offices.

The types of legal claims available for violent deaths behind bars will depend in some instances on the trial status of the decedent. For claims of excessive force, if the decedent was convicted, the Eighth Amendment's Cruel and Unusual Punishment Clause applies.[136] In these cases, courts apply a more exacting and subjective standard that assesses whether the officer knew the force applied was unreasonable.[137] In contrast, for those who are held in jail pre-trial, their excessive force claims are governed by the Fourteenth Amendment Due Process clause.[138] Compared to Eighth Amendment claims, an excessive force claim would only need to show that the force applied was unreasonable, regardless of the knowledge of the officer. For violence between incarcerated people, carceral officials nevertheless have a duty to keep those incarcerated safe, protected, and in humane conditions.[139] Under the Eighth Amendment, a prison official can be held liable for failing to protect those incarcerated if he or she "knows that

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[132] *Mortality in Local Jails 2000-2018*, supra note 53; *Mortality in State and Federal Prisons, 2001-2018, supra* note 53.
[133] *Mortality in State and Federal Prisons, 2001-2018, supra* note 53.
[134] BJS does not differentiate between homicides caused by other incarcerated people and those caused by staff through use of force. *Id.* at 2.
[135] *Id*. at 17. Note that this number is for deaths in state and federal prisons, whereas the data in this Article does not include federal prisons.
[136] *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015) (citing *Whitley v. Albers*, 475 U.S. 312 (1986); *Hudson v. McMillian*, 503 U.S. 1 (1992)).
[137] *See generally* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018).
[138] *Id.*
[139] *See generally Farmer*, 511 U.S. at 825.

[an incarcerated person] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[140]

Deaths due to violence were one of the least common forms of deaths behind bars in Louisiana. Twelve deaths due to violence were reported between 2015 and 2019. Only one violent death was reported in 2015, while violent deaths peaked in 2016 with six reports. In both 2017 and 2018, three deaths were attributed to violence. Zero violent deaths were reported in 2019. Two-thirds of deaths due to violence occurred in cells, the majority of which involved assaults and blunt force trauma leading to head injuries. This would seem to indicate that the violence was not a product of contraband or homemade weapons, but does implicate the supervision and observation policies of these facilities. The timing of these deaths was evenly spread across morning, afternoon, evening, and overnight. Notably, two of the three reported violent deaths that occurred in East Baton Rouge Parish Prison happened in the evening.

F. Data Takeaways

While not all deaths behind bars are necessarily preventable, prisons and jails should ideally have lower death rates than the general public due to the physical proximity of medical care behind bars, 24-hour staffing and supervision, and reduced probability of certain types of deaths, such as car accidents, due to incarceration. A person's risk of death behind bars should not depend on their facility assignment. Although DOC prioritizes placement of people with serious medical needs in select state prisons, such as Louisiana State Penitentiary, medical-related deaths also occurred in parish jails where there are less robust medical systems in place.

Death behind bars can impact anyone incarcerated, regardless of their crime or guilt or innocence. Some incarcerated people died relatively early in their judicially determined sentences. Others died after completing the majority of their sentence while enrolled in work release programs designed to aid their transition home. Fourteen percent of deaths were of people who had only been accused of a crime, without a chance to prove their innocence, or to be found guilty.

Prison, jail, and youth detention administrators can and should use this data to compare the operation of their individual facilities to others. In some cases, the trends identified implicate institutional policies and practices, which should be reviewed with the aim of decreasing deaths behind bars. State and local leaders should officially collect, track, analyze, and publish this data for the public. This data serves as an important baseline for future research and analysis, but continued transparency of our public institutions is needed for sustainable improvements and public support.

III. CONCLUSION

The process of documenting the 786 people who died while in the custody of Louisiana's prisons, jails, and detention centers from 2015-2019 reveals deep holes in how state and federal agencies respond to and track these incidents. As succinctly stated by Dr. Michael Pulsis in his expert testimony to the court on medical care at Louisiana State Penitentiary, "[i]f you don't look

[140] *Id.* at 847.

for problems, you don't find them."[141] Further, the current legal landscape surrounding judicial deference to carceral institutions makes it difficult to hold these facilities accountable when a death does occur. Given current precedent and findings from collecting the death in custody data in Louisiana, the following recommendations would improve the government's ability to better document deaths, prevent them, and increase transparency when they do occur.

1. Enhance the safety in carceral institutions through robust changes to prison deference jurisprudence. The terms "order" and "security" are often invoked, but rarely defined in court jurisprudence. Universal definitions will remove ambiguity, clarify the limit to judicial deference, and signal that courts recognize the limitations of deference in the carceral setting.

2. Create more reliable, consistent, and public data by modifying the 2013 Deaths in Custody Reporting Act and developing comprehensive, independent oversight at the state level. At the federal level, Congress should amend the 2013 DCRA to create consistency between the federal agencies that collect this data and ensure that data be made publicly available and in a timely manner at the facility level. At the state level, the Louisiana Legislature should enact legislation to (1) mandate the collection, analysis, and publication of death records statewide at the facility level and (2) create independent oversight over deaths at local jails, state prisons, and other detention facilities to review these results and propose policies and practices that would further prevent deaths behind bars.

3. Release older adults from prisons through existing compassionate release, medical parole, and medical probation programs. Data indicates that nearly all, or 96%, of the deaths from elderly incarcerated people were due to medical illness. Nearly half of those were due to pre-existing medical conditions. Further, the incarcerated population in Louisiana is continuing to age, due to Louisiana's sentencing laws. Only 2.4% of the prison population was incarcerated for a crime that they committed after the age of 55, indicating a low risk of reoffending for this age group if released.

4. Improve medical and mental healthcare in prisons, jails, and youth detention centers. Our data reveals that over half of medical related deaths were exclusively diagnosed and treated while incarcerated. While our analysis did not focus on whether or not medical deaths were preventable or not, improved healthcare may lessen the probability of death behind bars.

[141] Jessica Pishko, *At Angola Prisons, 'People are Suffering. People are Dying'*, THE APPEAL, https://theappeal.org/at-angola-prison-people-are-suffering-people-are-dying/.