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NEW YORK STATE RIFLE & PISTOL ASSOCIATION INC. V. BRUEN—AND THE PREDICTIVE QUALITIES OF CLARENCE THOMAS'S POST-*HELLER* DISSENTS FROM DENIALS OF CERTIORARI

ANDREW L. PICKENS†

I. INTRODUCTION

The Supreme Court issued its opinion *District of Columbia v. Heller*[1] in 2008. *Heller* was a landmark decision in which the Court held that the Second Amendment[2] protects an individual citizen's right to keep arms that are "in common use" for traditionally lawful purposes, such as self-defense within the home.[3] The court also confirmed that this right is not connected to nor dependent upon service in an organized militia.[4] In 2010, the Court followed *Heller* with another Second Amendment decision, *McDonald v. City of Chicago*.[5] The *McDonald* Court held that the Fourteenth Amendment makes the rights articulated in *Heller* fully applicable to the states.[6]

Despite opportunities to do so—and despite granting certiorari in a number of other Bill of Rights cases—the Supreme Court declined to hear another firearms case until granting certiorari eleven years later in *New York State Rifle & Pistol Association Inc. v. Bruen*.[7] The Court's refusal to hear Second Amendment cases in this interim drew the ire of certain justices, in particular Clarence

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1. District of Columbia v. Heller, 554 U.S. 570 (2008).

2. This Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

3. *Heller*, 554 U.S. at 627–29, 635.

4. *See id.* at 600.

5. *See* McDonald v. City of Chi., 561 U.S. 742 (2010).

6. *Id.* at 791.

7. N.Y. State Rifle & Pistol Ass'n v. Bruen, 141 S. Ct. 2566 (2021).

Thomas.[8] In dissents from denials of certiorari, Justice Thomas opined on a number of lower court decisions that in his view ran afoul of or simply disregarded *Heller* or *McDonald*.[9] Justice Thomas also expressed frustration with the Supreme Court's reluctance to correct lower courts' refusals to comply with its precedent. He asserted that the Court would have granted review and insisted on compliance had the cases involved some of the Court's more-favored rights, such as those protected by the First or Fourth Amendments.[10]

This article first posits that in the wake of *Bruen*, Justice Thomas's dissents from denials of certiorari after *Heller* and *McDonald* will be useful to anticipate the Supreme Court's direction in future Second Amendment cases. This article compares Justice Thomas's dissents to *Heller* and determines that—though observant of *Heller*—the dissents also ventured beyond *Heller*'s holding in significant ways. Material parts of this extra-*Heller* reasoning informed the majority result in *Bruen*—particularly on the issues of publicly carrying arms and self-defense outside the home.[11]

Second, by examining *Bruen* and comparing it to Justice Thomas's extra-*Heller* reasoning in his dissents from denial of certiorari, this article determines that the correlation between those dissents and the result in *Bruen* is so strong as to indicate that the dissents will be useful in efforts to predict the Court's direction in future Second Amendment cases.

Third, this article notes that in dissents from denials of certiorari, like *Peruta v. California* in 2017,[12] Justice Thomas persuasively argued that the Supreme Court had discriminated against the Second Amendment by refusing to grant certiorari in firearms cases with the same frequency as cases involving the Court's "more-favored" rights, such as those protected by the First

8. *See, e.g.*, Jackson v. City & Cnty. of S.F., 576 U.S. 1013 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

9. *See id.* at 1014 ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.").

10. *See, e.g*, Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) ("abortion, speech, and the Fourth Amendment are three of [the Court's] favored rights. The right to keep arms is apparently this Court's constitutional orphan.").

11. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843, slip op. at 24 (U.S. June 23, 2022); *Jackson*, 576 U.S. at 1015.

12. *See* Peruta v. California, 137 S. Ct. 1995 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

and Fourth Amendments.[13] However, factors such as changes to the court's composition beginning with Neil Gorsuch's 2017 confirmation, the Court's granting certiorari in a firearms case like *Bruen*, and the ultimate 6-3 ruling in that case[14] now may herald an increased willingness on the Court's part to hear Second Amendment issues. If this is the case, then Justice Thomas's dissents will become proportionally more useful as a review of Second Amendment issues in the Supreme Court becomes more frequent.

Finally, this article selects a few issues from Justice Thomas's dissents that in the author's view may be ripe for further development in future case law. These include whether *Bruen*'s "text, history, and tradition" test should apply to restrictions on a citizen's amassing additional arms after that citizen already has arms of a sufficient type and quantity to secure his or her Second Amendment rights or whether some other test, such as a balancing inquiry, should apply instead. These issues also include whether there exists a "core" versus "non-core" distinction or hierarchy of rights within the Second Amendment and if so, what tests properly apply to restrictions on "non-core rights" as compared to the *Bruen* test applicable to "core rights."

II. JUSTICE THOMAS'S POST-*HELLER* DISSENTS FROM DENIALS OF CERTIORARI

A. Heller*'s Clarity on Three Principles*

Commentators have differing views on the public safety implications of *Heller*. Regardless of one's policy preferences, one would be hard-pressed to deny this decision's clarity on three matters. First, the Second Amendment grants citizens an individual right—independent of service in an organized militia—to keep arms that are "in common use."[15] Arms that are "in common use" include modern firearms which were not yet developed or in use at the time of the founding.[16] Second, the amendment includes among its "core" protections the right to defend one's self and one's family in the home (and to use firearms that are "in common

13. *See id.* at 1999.
14. *See Bruen*, slip op. at 6.
15. *See* District of Columbia v. Heller, 554 U.S. 570, 624, 627 (2008).
16. *Id.* at 582.

use" for this purpose).[17] Third, restrictions that have the effect of eliminating a citizen's ability to employ arms that are "in common use" to defend hearth and home are unconstitutional—and no level-of-scrutiny or balancing tests need be applied to so hold.[18]

Justice Thomas consistently invoked *Heller*'s principles as the basis for his pre-*Bruen* dissents from denials of petitions for certiorari.[19] As noted, however, he also opined beyond the precise factual and legal bounds of *Heller* on a number of issues.[20] These include, e.g., the extent to which a certain type of firearm is owned by the United States population as a measure of whether the firearm is in "common use," the ability to carry firearms outside the home or in public places, and the inapplicability of balancing or tiers-of-scrutiny tests in determining the rights of those who already own guns to obtain additional weapons.[21] Some of Justice Thomas's observations are simply mechanical applications of *Heller* to different facts. Other observations—had they been part of a majority decision—would have constituted newly articulated principles of Second Amendment jurisprudence.[22]

Analyses comparing Justice Thomas's dissents from denials of certiorari to the four corners of the *Heller* decision are set out below.

B. 2015—Jackson v. City and County of San

17. *Id.* at 634–35.

18. *Id.*

19. *See, e.g.*, Peruta v. California, 137 S. Ct. 1995, 1996, 1998 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari); Silvester v. Becerra, 138 S. Ct. 945, 945, 950 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari).

20. *See, e.g.*, *Peruta*, 137 S. Ct. 1995, 1997–1999; Friedman v. City of Highland Park, 136 S. Ct. 447, 448 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari).

21. *See* Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (Thomas, J., dissenting from denial of certiorari) (pertaining to whether there is a right to carry firearms in public for self-defense); Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of certiorari) (pertaining to whether there is a right to own "AR-style semiautomatic rifles" and noting the number of people who own such weapons); Jackson v. City and County of S.F., 576 U.S. 1013, 1014–15 (2015) (Thomas, J., dissenting from denial of certiorari) (pertaining to the propriety of a circuit court's decision to use intermediate scrutiny in assessing a city's firearm law).

22. *See Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from denial of certiorari) (contending that a right to own "AR-style semiautomatic rifles" exists under the Second Amendment because approximately five million Americans own such weapons and a majority use them "for lawful purposes").

Francisco*: Immediate Access to a Firearm When It Is Not Carried on the Person and No Intermediate Scrutiny Test for Self-Defense with a Gun in the Home*

In *Jackson v. City and County of San Francisco*, the Ninth Circuit affirmed the denial of a preliminary injunction directed at preventing enforcement of a San Francisco city code that prohibited keeping a handgun in a residence unless the handgun (1) was stored in a locked container or disabled by a trigger lock or (2) was carried on the person of an individual more than eighteen years old or was under the control of a peace officer.[23]

In terms of the need for "immediate self-defense" or other emergency situations, there existed material differences between the San Francisco code in *Jackson* and the District of Columbia statute at issue in *Heller*.[24] In addition to making handgun possession in the home completely unlawful, the statute in *Heller* also required that any lawful firearm in the home (e.g., a long gun) be rendered inoperable for purposes of immediate self-defense.[25] Although not addressing lawful long guns (at the time)[26] , the code at issue in *Jackson* only required that handguns (the type of firearm that *Heller* identified as the "most popular weapon" selected by Americans for self-defense in the home)[27] be rendered inoperable in the home unless carried on the person of an adult or under the control of a peace officer.[28]

In practical effect, the statute in *Heller* was more restrictive than the code in *Jackson*. Both provisions made it impossible to immediately access a handgun for purposes of self-defense while the owner was at home and "sleeping, bathing, changing clothes, or

23. Jackson v. City and Cnty. of S.F., 746 F.3d 953, 958 (9th Cir. 2014), *cert. denied*, 576 U.S. 1013 (2015).

24. *See id.* at 964 (distinguishing the San Francisco Code at issue because it "does not impose the sort of severe burden imposed by the handgun ban at issue in *Heller* . . . [or] substantially prevent law-abiding citizens from using firearms to defend themselves in the home").

25. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

26. This section of the San Francisco Police Code was later amended to include all firearms. *See* S.F., Cal., Bd. of Supervisors Ordinance No. 97-16, § 1 (June 17, 2016) (amending the Police Code to prohibit any person from keeping a firearm within any residence unless the firearm is stored in a locked container or disabled with a trigger lock).

27. *Heller*, 554 U.S. at 629.

28. *Jackson*, 746 F.3d at 958.

otherwise indisposed" and consequently, "most vulnerable."[29] But unlike the statute in *Heller*, the code in *Jackson* did not prohibit an individual more than eighteen years of age from carrying an operable handgun *on his or her person* while in the home.[30]

The Ninth Circuit in *Jackson* upheld the challenged code section by applying an intermediate scrutiny standard.[31] The court concluded the ordinance served a significant government interest by reducing gun-related injuries and deaths resulting from an unlocked gun in the home and the ordinance was substantially related to that interest.[32] The Supreme Court in *Heller*, in contrast, stated that the level-of-scrutiny or balancing tests were not properly applied to core protections of an "enumerated constitutional right" that the Court determined to include "handgun possession in the home" and the ability to have lawful firearms "in the home [and] operable for the purpose of immediate self-defense."[33]

i. Immediate Access to a Handgun for Self-Defense in the Home

Joined by Justice Antonin Scalia, Justice Thomas dissented from the denial of certiorari in *Jackson*.[34] Justice Thomas reasoned that in allowing the San Francisco code to prevent a citizen's immediate access to a handgun in the home when the citizen was sleeping, bathing, changing clothes, or otherwise indisposed,[35] the Ninth Circuit in *Jackson* disregarded *Heller*'s holding that a citizen has a Second Amendment right to access a lawful firearm for "the purpose of immediate self-defense" in the home.[36]

ii. Disapproval of Level-of-Scrutiny Tests, Including Intermediate Scrutiny

Justice Thomas also pointed out that in applying a level-of-scrutiny test, i.e., intermediate scrutiny, to the San Francisco code,

29. Jackson v. City and Cnty. of S.F., 576 U.S. 1013, 1015 (2015) (Thomas, J., dissenting from denial of certiorari); *cf. Heller*, 554 U.S. at 630 (noting that the District of Columbia Statute required "firearms in the home be rendered and kept inoperable").

30. *Compare Heller*, 554 U.S. at 573–75, *with Jackson*, 746 F.3d at 958.

31. *Jackson*, 746 F.3d at 965–66.

32. *Id.*

33. *Heller*, 554 U.S. at 634–35.

34. *Jackson*, 576 U.S. at 1013 (Thomas, J., dissenting from denial of certiorari).

35. *Id.* at 1015.

36. *Id.* at 1015–16.

Jackson likely ran afoul of *Heller* a second time.[37] Per *Heller*, the ability to access a lawful firearm "for the purpose of immediate self-defense" in the home is a "core protection" of the Second Amendment.[38] Consequently, no level-of-scrutiny or balancing test was required to rule that this denial of core protection of an enumerated right is unconstitutional.[39]

iii. Takeaway Points and Predictive Considerations

In *Jackson*, Justice Thomas was likely correct to assert the Ninth Circuit decision disregarded *Heller* in at least two ways: first, in applying an incorrect substantive rule on the scope of the Second Amendment in light of *Heller* and, second, in applying an incorrect standard of review. The takeaway points from Justice Thomas's *Jackson* dissent would be that under *Heller*, (1) the Second Amendment assures citizens of the right to immediately access an operable handgun for purposes of self-defense in the home, and (2) intermediate scrutiny is a balancing test that cannot be properly applied in reviewing restrictions on the right of citizens to keep and use handguns for self-defense in the home.

Nevertheless, important factual distinctions exist between *Jackson* and *Heller*. These distinctions indicate that Justice Thomas would extend Second Amendment rights slightly beyond the facts of *Heller*. That decision involved a complete ban on handgun possession in the home and required that any lawful long gun in the home be disassembled or rendered inoperable by a trigger lock.[40] The *Heller* Court also held that the District of Columbia must permit the petitioner "to register his handgun and must issue him a license to carry it in the home."[41] Justice Thomas's dissent in *Jackson* makes clear that even when the gun is <u>not</u> carried on the person in the home, *Heller*'s determination that the Second Amendment protects immediate access to an operable handgun for purposes of self-defense prohibits requirements that when not

37. *See id.* at 1016 ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

38. *See Heller*, 554 U.S. 634–35.

39. *See id.* at 628–29, 634–35.

40. *See id.* at 628.

41. *Id.* at 635.

carried on one's person, fully assembled guns in the home be kept in a locked container or disabled by a trigger lock.[42]

C. 2015—Friedman v. City of Highland Park*: Reaffirmation of* Heller*'s Three Principles, Plus a Possible Extent-Of-Ownership Metric for Determining Whether a Firearm Is "In Common Use"*

Again joined by Justice Scalia, Justice Thomas dissented from the denial of certiorari of the Seventh Circuit's decision *Friedman v. City of Highland Park*.[43] At issue in *Freidman* was a city code banning possession of many "commonly owned semiautomatic firearms," such as AR-15-style semiautomatic weapons that "the city branded 'Assault Weapons.'"[44] The code also prohibited "Large Capacity Magazines," by which the city meant "nearly all ammunition feeding devices that 'accept more than ten rounds.' "[45]

The first portion of Justice Thomas's dissent criticized the Seventh Circuit's test for whether the code offended the Second Amendment.[46] Justice Thomas disapproved of the Seventh Circuit's limiting "*Heller* to its facts" by reading the decision "to forbid only total bans on handguns used for self-defense in the home" and pronounced that all other questions about the Second Amendment "should be defined by 'the political process and scholarly debate.'"[47] Based on this "crabbed reading," he continued, the Seventh Circuit felt at liberty to adopt a test asking whether the banned firearms were common at the time of ratification of the Bill of Rights in 1791, or alternatively whether the banned firearms relate to the preservation or efficiency of the militia and then also asking whether despite the ban, citizens retain adequate means of self-defense.[48]

42. *Jackson*, 576 U.S. at 1013–14. (Thomas, J., dissenting from denial of certiorari).

43. Friedman v. City of Highland Park, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari).

44. *Id.* at 447.

45. *Id.*

46. *Id.* at 448.

47. *Id.* (quoting Freidman v. City of Highland Park, 784 F.3d 407, 412 (7th Cir. 2015)).

48. *Id.* at 448–49.

i. The Right to Keep and Bear Arms "In Common Use" for Lawful Purposes Such as Self-Defense Independent of Service in an Organized Militia

Fairly viewed, the Seventh Circuit's asking "whether a regulation bans firearms that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well-regulated militia . . . and whether law-abiding citizens retain adequate means of self-defense"[49] appears impossible to reconcile with *Heller*. In the first portion of his analysis, Justice Thomas explained why all three of these inquiries run afoul of the Supreme Court's precedent.[50]

First, asking whether a banned weapon was common at the time the Second Amendment was ratified is at odds with *Heller*'s determination that such inquiries border "on the frivolous."[51] This is because, just as the First Amendment protects "modern forms of communication" and the Fourth Amendment applies to "modern forms of search," the Second Amendment protects arms "not in existence at the time of the founding."[52]

Second, *Friedman*'s statement that the preservation or efficiency of a well-regulated militia was not negatively impacted by the code provision because "states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms"[53] could not be correct given *Heller*'s determination that the right to keep and bear arms is an independent, individual right "not defined by what the militia needs" but "by what private citizens commonly possess."[54] In addition, Justice Thomas noted, "*Congress* retains plenary authority to organize the militia" contemplated in the Second Amendment, not the States.[55]

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49. *Id.* (quoting *Friedman*, 784 F.3d at 410) (internal quotation marks omitted).

50. *Id.*

51. *Heller*, 554 U.S. at 582.

52. *Friedman*, 136 S. Ct. at 448 (quoting *Heller*, 554 U.S. at 582).

53. *Id.* at 448–49 (quoting *Friedman*, 784 F.3d at 410) (internal quotation marks omitted). The Seventh Circuit appears factually mistaken in asserting that a semi-automatic AR-15 rifle constitutes a "military-grade firearm." The military version of the AR-15 rifle, known as the M16, is unlike the AR-15 in that the M16 can be fired in fully automatic mode. *See, e.g.*, *M16 rifle*, WIKIPEDIA, https://en.wikipedia.org/wiki/M16_rifle (last visited Oct. 30, 2022).

54. *Id.* at 449.

55. *Id.* (emphasis original) (quoting *Heller*, 554 U.S. at 600).

Third, *Friedman*'s asking whether law-abiding citizens retain adequate means of self-defense[56] was the wrong inquiry because "*Heller* asks whether the law bans types of firearms commonly used for lawful purposes—regardless of whether alternatives exist."[57] Justice Thomas also noted "[r]oughly five million Americans own AR-style semiautomatic rifles" and the "overwhelming majority of citizens who own and use such rifles do so for lawful purposes," such as self-defense and target shooting.[58] Under *Heller* and *McDonald*, Justice Thomas stated, this number of citizens owning or using the AR-style rifle for lawful purposes was "all that is needed for citizens to have a Second Amendment right to keep such weapons."[59]

ii. Rejection of Balancing Approaches

Justice Thomas directed the second portion of his analysis to reject the Seventh Circuit's interest balancing test. The Seventh Circuit wrote that the ban "'may increase the public's sense of safety,' which alone is a 'substantial benefit.' "[60] Here, Justice Thomas reminded courts that *Heller* "forbids subjecting the Second Amendment's 'core protection . . . to a freestanding "interest-balancing" approach.' "[61] Contrary to this admonition, the Seventh Circuit upheld the city code by balancing the benefits of so-called "assault weapons" against the salutary effects of the challenged code section.[62] The court of appeals conceded that the prohibited weapons "can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers."[63] However, balancing this benefit against the city's prohibition, the court of appeals reasoned,

> [i]f it has no other effect, Highland Park's ordinance may increase the public's sense of safety . . . . If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and

56. *Id.*
57. *Id.* (citing *Heller*, 554 U.S. at 627–29).
58. *Id.* (citing *Friedman*, 784 F.3d at 415 n.3).
59. *Id.* (citing McDonald v. City of Chi., 561 U.S. 742, 767-68 (2010); *Heller,* 554 U.S. at 628–29).
60. *Id.* (quoting *Friedman*, 784 F.3d at 412).
61. *Id.* (quoting *Heller*, 554 U.S. at 634).
62. *See id.* (citing *Friedman*, 784 F.3d at 411–12).
63. *Id.* at 447 (quoting *Friedman*, 784 F.3d at 411) (internal quotation marks omitted).

> makes the public feel safer as a result, that's a substantial benefit.[64]

Justice Thomas dismissed this rationale, noting *Heller* makes clear that interest-balancing is an improper standard when a core protection of the Second Amendment such as self-defense is at issue.[65]

iii. Takeaway points and predictive considerations

Compared to *Heller*, most (though not all) points in the first part of Justice Thomas's dissent appear quite sound. First, *Heller* rejected the argument that the Second Amendment only protects arms in existence at the time of the Bill of Rights ratification (almost to the point of mocking it).[66] Second, *Heller* confirmed the Second Amendment grants individual citizens the right to keep arms in common use for purposes of self-defense,[67] and it emphasized that Congress has the plenary power to call forth and organize the militia.[68] Third, Justice Thomas's point that the scope of the individual right to keep arms is defined "not by what the militia needs, but by what private citizens commonly possess" is also well-grounded in *Heller*'s language.[69] The *Friedman* prohibition extended to homes located within the city limits,[70] and preventing citizens from using an arm in common use for self-defense in the home would plainly impinge on a core protection of the Second Amendment under *Heller*.[71]

But on this third point, it does not necessarily follow from *Heller* that ownership and use of a certain type of firearm by five million citizens suffice to show that type of arm is "in common use" for purposes of *Heller*'s analysis. Justice Thomas seems to have assumed that in a nation of roughly 258 million adults,[72] five million

64. *Friedman*, 784 F.3d at 412.
65. *Friedman*, 136 S. Ct. at 449 (citing *Heller*, 554 U.S. at 634).
66. *See Heller*, 554 U.S. at 582.
67. *Id.* at 628–29.
68. *See id.* at 596.
69. *Friedman*, 136 S. Ct. at 449 (citing *Heller*, 554 U.S. at 592, 627–29).
70. *Id.* at 447; *see Friedman*, 784 F.3d at 407.
71. *See Heller*, 554 U.S. at 624, 634, 636.
72. *See* Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts and Zoe Caplan, *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021),

Americans' possession and use of AR-style semiautomatic rifles for lawful purposes demonstrates this rifle is in common use for purposes of *Heller*.[73] Five million owners in a population of 258 million translates to a national ownership rate of only about 2 percent.

Heller did not rely on a numerical yardstick or "percentage-of-the-population-who-own" type of metric to determine if a given type of arm is in common use.[74] *Heller* simply observed that "handguns are the most popular weapon chosen by Americans for self-defense in the home" such that a "complete prohibition of their use is invalid."[75] But by way of comparison, a 2017 Gallup poll found that 42 percent of U.S. households reported owning a gun.[76] In the same year, the Pew Research Center found that among all gun owners, 72 percent stated that they own a handgun.[77] While gun ownership rates may have increased since 2017, looking at these numbers together suggests roughly 30 percent of the U.S. adult population may own a handgun. Obviously, there is a difference between a roughly thirty-percent ownership rate for handguns and a 2 percent ownership rate for AR-style rifles. Justice Thomas may not have given this difference due consideration in concluding that five million law-abiding owners (roughly a 2 percent ownership rate) make the AR-style rifle sufficiently in common use to fall under *Heller*'s protections.[78]

In the second part of his analysis, Justice Thomas was plainly correct to observe that *Heller* had disapproved of balancing tests for

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https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html.

73. *See Heller*, 554 U.S. at 627. "Common" is defined as "occurring or appearing frequently." *Common*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/common (last visited Oct. 25, 2022).

74. *See generally Heller*, 554 U.S. at 624–28 (discussing what types of weapons are considered "in common use").

75. *Id.* at 629.

76. *See* Christopher Ingraham, *There Are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 19, 2018, 10:31 AM), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership.

77. *See* Kim Parker et al., *America's Complex Relationship With Guns, No. 1: The Demographics of Gun Ownership*, PEW RSCH. CTR. (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership.

78. *See generally Heller*, 554 U.S. at 624–28.

determining whether restrictions on citizens possessing arms in common use for defense in the home are constitutional.[79]

At bottom, a comparison to the facts and language in *Heller* shows three of the four points in Justice Thomas's *Friedman* dissent are well-grounded in the four corners of *Heller*. Where Justice Thomas appears to want to expand *Heller* is by using some type of numerical metric for gauging whether a firearm is sufficiently in common use to warrant Second Amendment protection as well as using a lower numerical threshold for protection that might be suggested in *Heller*.

D. 2017—Peruta v. California*: A Portending of* Bruen*'s Holding of a Right to Public Carry and Criticism of the Court's Failure to Grant Certiorari in Second Amendment Cases with the Same Frequency as Cases Involving Other Amendments*

In *Peruta v. California*, Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari in a Ninth Circuit case upholding restrictions on the public carry of firearms.[80] At issue was a California statute generally prohibiting citizens from openly carrying firearms and also prohibiting concealed carry unless a citizen could demonstrate the "good cause" required to obtain a concealed-carry permit.[81] The county sheriff where the petitioners resided interpreted "good cause" to mean that the applicant must "show a set of circumstances that distinguish the applicant from the mainstream and cause him to be placed in harm's way."[82] The sheriff's policy specified that "'concern for one's personal safety' does not 'alone' satisfy this requirement."[83] This formulation meant that the "typical citizen fearing for his personal safety—by definition—cannot distinguish himself from the

79. *Compare* Friedman v. City of Highland Park,136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) (noting *Heller* forbids subjecting Second Amendment core protections to balancing tests) *with Heller*, 554 U.S. at 634 (noting core protections of Second Amendment, like core protections of other enumerated rights, are not subject to a freestanding "interest-balancing" approach).

80. Peruta v. California, 137 S. Ct. 1995 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

81. *Id.* at 1996 (citing CAL. PENAL CODE §§ 25850, 26150, 26155, 26160, 26350).

82. *Id.* (quoting Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1169 (9th Cir. 2014) (internal quotation marks and alterations omitted)).

83. *Id.* (quoting *Peruta*, 742 F.3d at 1148).

mainstream."[84] As a consequence, ordinary law-abiding citizens could not obtain a concealed carry permit.[85]

The petitioners were San Diego County residents who were unable to qualify for concealed-carry permits, and because California generally banned the open carry of firearms, they were also unable to "bear firearms in public in any manner."[86] The district court granted summary judgment in favor of the state, and the petitioners appealed.[87] The Ninth Circuit reversed, holding that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense . . . constitutes 'bear[ing] Arms' within the meaning of the Second Amendment."[88]

The Ninth Circuit sua sponte granted rehearing en banc.[89] But on rehearing, the court declined to "answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly in public."[90] Instead, the en banc court held only that "the Second Amendment does not preserve or protect a right of a member of the general public to carry *concealed* firearms in public" and reversed the panel decision on those grounds.[91]

Much of Justice Thomas's criticism of the Ninth Circuit en banc decision was directed to the court of appeals dodging the real issue. In limiting its decision to whether the Second Amendment protected a right of concealed carry, the Ninth Circuit avoided the petitioners' actual challenge.[92] That challenge was whether the Second Amendment protects a "general right to public carry"—whether open *or* concealed—not a right to concealed carry alone.[93] Had the en banc court addressed the true issue, i.e., "the right to carry firearms in public in some fashion,"[94] Justice Thomas opined, "it likely would have been compelled to reach the opposite result."[95]

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84. *Id.* (quoting *Peruta*, 742 F.3d at 1169) (alterations omitted) (emphasis omitted) (internal quotation marks omitted).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1997 (quoting *Peruta*, 742 F.3d at 1166).

89. *See id.*

90. *Id.*(quoting Peruta v. Cnty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016)(en banc)).

91. *Id.* (quoting *Peruta*, 824 F.3d at 924) (emphasis added).

92. *Id.*

93. *Id.*

94. *Id.* at 1998.

95. *Id.*

i. A Portending of the Right to Public Carry

Justice Thomas's dissent plainly finds some support in *Heller*'s language. In *Heller*, the Court determined that the phrase "bear Arms" as used in the Second Amendment means "to wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person."[96] And as Justice Thomas wryly remarked, it was "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen."[97] Quoting a Third Circuit dissent, Justice Thomas also reasoned that to "speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping' in derogation of the [*Heller*] Court's holding that the verbs codified distinct rights but would also be awkward usage given the meaning assigned the terms by the Supreme Court."[98]

Turning to historical sources, Justice Thomas noted that the earlier panel opinion had pointed to many cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction that taken together strongly suggest that the right to bear arms includes the right to publicly bear arms in some manner.[99] *Heller* had credited one case in particular, *Nunn v. State*,[100] with "perfectly captur[ing] the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause."[101] In *Nunn*, the Georgia Supreme Court struck down a ban on open carry, though it upheld a ban on concealed carry—thus suggesting that while some regulation on public carry is permissible, a complete ban is not.[102]

Justice Thomas also reminded the court that *Heller* emphasized self-defense as "the *central component*" of the Second Amendment right and noted that while that purpose may be "most

96. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 584 (2008) (citation omitted) (quotation marks omitted).

97. *Id.*

98. *Id.* (quoting Drake v. Filko, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting)).

99. *Id.*

100. Nunn v. State, 1 Ga. 243, 251 (1846).

101. *Heller*, 554 U.S. at 612.

102. *Peruta*, 137 S. Ct. at 1998 (citing *Nunn*, 1 Ga. at 251).

acute" in the home, it should not be limited to the home.[103] Rather, "'[s]elf-defense has to take place wherever the person happens to be,' and in some circumstances, a person may be more vulnerable in a public place than in his own house."[104]

To be fair to the Ninth Circuit's en banc opinion, one must note that Justice Thomas directed much of his dissent to suggest that some right to carry firearms outside the home must be protected under the Second Amendment's "bear Arms" language when the right to carry or bear arms outside the home was not at issue in *Heller*. The Supreme Court in *Heller* did determine that self-defense is a central component of the Second Amendment and that the need to exercise this right is most acute in the home.[105] Although a right to carry arms outside the home for purposes of self-defense finds support in the text and non-Supreme Court authorities that *Heller* cited, the issue was not presented in that case.

To be fair to Justice Thomas, one should realize his dissent acknowledges that public carry was not the issue in *Heller*. This appears to be why Justice Thomas posited his frustration with the Court's declining to grant certiorari, not, as in *Friedman*, on the lower court's flouting the black-letter law of *Heller*.[106] Rather, Justice Thomas pointedly criticized the Court's repeated refusals to grant certiorari on the gun-carry issue. With straightforward math, he demonstrated a large discrepancy in the court's granting certiorari in many cases involving the First and Fourth Amendments while at the same time refusing to grant review in Second Amendment cases despite numerous opportunities to do so.[107] Describing the discrepancy as "inexcusable," Justice Thomas concluded, "[t]he Court's decision to deny certiorari . . . reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."[108]

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103. *Id.* (quoting *Heller*, 554 U.S. at 599, 628) (emphasis original).

104. *Id.* at 1998–99 (citation omitted).

105. *Heller*, 554 U.S. at 599.

106. *See* Friedman v. City of Highland Park, 136 S. Ct. 447, 449–50 (2015) (Thomas, J., dissenting from denial of certiorari).

107. *Peruta*, 137 S. Ct. at 1999 (noting that at the time, twenty-six states had asked the Court to resolve the issue and at least four federal Courts of Appeal and three state courts had decided cases addressing public carry with results on both sides of the issue; further noting that the Court had not heard argument in a Second Amendment case in seven years, while in this same period, the Court had heard thirty-five cases turning on the meaning of the First Amendment and twenty-five turning on the meaning of the Fourth Amendment).

108. *Id.*

ii. One Takeaway Point Predictive of the Result in *Bruen* and Another That May Be Predictive of an Increased Willingness in the Court to Hear Second Amendment Issues

Of the two principal takeaways from this dissent, the first was plainly predictive. Justice Thomas signaled his view that the reasoning—albeit not the holding—of *Heller* indicates the Second Amendment protects some type of right to bear or carry firearms outside the home. As discussed below, the Supreme Court in *Bruen* subsequently ruled in favor of a right to public carry.[109] The *Bruen* Court's 6-3 ruling in favor of public carry demonstrates that Justice Thomas's positions in his earlier dissents from denials of certiorari were predictive of the direction of the current Court on the meaning of the Second Amendment.[110]

Second, comparing the number of opportunities the court took to grant certiorari in cases involving other amendments to declined opportunities in Second Amendment cases suggests the court was avoiding Second Amendment issues. Justice Thomas was uncomfortable with what he viewed as a type of discrimination against the Second Amendment. Given the 6-3 ruling in *Bruen* and the Court's current composition, other justices may also be of the view that the Court's avoidance of Second Amendment issues cannot be excused. This may foreshadow a more active Second Amendment docket in the Supreme Court.

E. 2018—Silvester v. Becerra*: The Additional Rejection of Balancing Tests and Lower Courts' Refusal to Follow Precedent; Tentative Endorsement of a Text, History, and Tradition Approach; and Disapproval of Balancing Tests for Subsequent Purchasers*

The Supreme Court again denied certiorari on a Ninth Circuit case and Justice Thomas again dissented in *Silvester v. Becerra*.[111] At issue was a California Penal Code provision requiring citizens who were not peace officers or special permit holders to

109. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

110. *Id.* at 2111.

111. Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari).

wait ten days after initiating the purchase of a firearm before taking delivery of the gun.[112] The prohibition applied to all types of firearms, whether handguns, rifles, or shotguns.[113] The petitioners challenged the code provision "as applied to 'subsequent purchasers'—individuals who already own a firearm according to California's [Automated Firearms Systems] database and individuals who have a valid concealed-carry license."[114]

i. More Rejection of Balancing Tests or Tiers-of-Scrutiny

Justice Thomas's dissent in *Becerra* primarily focused on the standard of review that the Ninth Circuit and other courts of appeals applied in Second Amendment cases post-*Heller*.[115] Courts of appeals generally had evaluated Second Amendment claims "under intermediate scrutiny."[116] As Justice Thomas explained, several jurists disagreed with this approach, "suggesting that courts should instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment."[117]

Though acknowledging *Heller* "did not definitively resolve the standard for evaluating Second Amendment claims," Justice Thomas affirmed that *Heller* had "rejected two proposed standards."[118] The first rejected standard was the "freestanding interest-balancing approach, which would have weighed a law's burdens on Second Amendment rights against the government interests it promotes."[119] The second was "rational basis scrutiny."[120] This standard would make the Second Amendment "redundant

112. *Id.*

113. *See id.*

114. *Id.* at 946.

115. *Id.* at 945.

116. *Id.* at 947.

117. *Id.* at 947–48 (citing Tyler v. Hillsdale County Sheriff's Dept., 837 F.3d 678, 702–03 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment); Houston v. City of New Orleans, 675 F.3d 441, 451–52 (5th Cir. 2012) (Elrod, J., dissenting), *opinion withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Thomas acknowledged that he also had questioned this tiers-of-scrutiny jurisprudence. *Id.* at 948 n.4 (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2335–42 (2016) (Thomas, J., dissenting)).

118. *Id.* at 948.

119. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)) (internal quotation marks omitted).

120. *Id.* (quoting *Heller*, 554 U.S. at 628 n.27) (internal quotation marks omitted).

with the separate constitutional prohibitions on irrational laws" in that the amendment "would have no effect."[121]

Justice Thomas also found fault in the Ninth Circuit's purporting to apply "intermediate scrutiny" to California's ten-day waiting period when in reality, the court's approach did not "resemble anything approaching that standard."[122] "[I]ntermediate scrutiny requires a reasonable fit between the law's ends and means."[123] Justice Thomas concluded that the Ninth Circuit's analysis more closely resembled a "rational-basis review that requires only that a law be rational at a class-based level."[124] Opining that the Ninth Circuit would not have applied this standard to "any other constitutional right,"[125] Justice Thomas then rebutted the court's reasoning on three grounds.[126]

First, the state's evidence in support of the waiting period was no more than rational speculation unsupported by evidence or data.[127] The state's sole response to the argument that the waiting period would not deter a subsequent purchaser contemplating violence because that purchaser could simply use the gun he already possessed was that the subsequent purchaser might want a "larger capacity weapon that would do more damage when fired into a crowd."[128] But the state presented no evidence to support this position.[129] The state's showing in the district court consisted of one anecdotal example of a subsequent firearm purchaser who committed an act of gun violence, given by an expert who conceded that a waiting period would have done nothing to deter that individual.[130] In Justice Thomas's view, this showing amounted to no evidence (there were not even anecdotes supporting a waiting period) and could not suffice under an intermediate scrutiny standard.[131]

Second, even had the state presented more than "'speculation and conjecture' to substantiate its concern about high-capacity weapons," the Ninth Circuit did not explain why the

121. *Id.*
122. *Id.*
123. *Id.* (citation omitted); *see also id.* at 949–50.
124. *Id.*
125. *Id.*
126. *Id.* at 948–50.
127. *Id.* at 948.
128. *See id.* at 949 (citation omitted) (internal quotation marks omitted).
129. *Id.*
130. *Id.*
131. *Id.*

ten-day waiting period was "sufficiently tailored to [this] goal."[132] The waiting period was not limited to high-capacity weapons but all kinds of firearms.[133] It also included exceptions for peace officers and special permit holders who, like subsequent purchasers, had demonstrated a history of responsible gun ownership.[134] In the past, California's waiting period had also been shorter and limited to handguns; the state presented no evidence as to why the longer waiting period was needed versus the older scheme.[135] Hence, while purporting to address the first part of intermediate scrutiny by insisting that its test "requires only that the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,"[136] the Ninth Circuit abdicated on the second part. That is, the Ninth Circuit failed to ensure that the "law not 'burden substantially more [protected activity] than is necessary to further [the government's] interest.' "[137]

Third, Justice Thomas criticized the Ninth Circuit's failure to defer to the district court's factual findings, as appellate courts must do in applying intermediate scrutiny.[138] That the district court's findings pertained to physical or documentary evidence as opposed to credibility determinations did not diminish the requirement that the Ninth Circuit review the findings for clear error only.[139] The Ninth Circuit failed to observe this standard.[140]

ii. Criticism of Lower Courts' Treatment of the Second Amendment as a Second-Class Right

Addressing the Ninth Circuit judges' perceived policy leanings, Justice Thomas expressed skepticism as to whether, had the appeal instead involved a waiting period on the exercise of other constitutional rights, such as a delay for women seeking an

132. *Id.* (citations omitted).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 949–50.
137. *Id.* at 950 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 214 (1997) (internal quotation marks omitted).
138. *Id.*
139. *Id.*
140. *Id.*

abortion[141] or a five-day waiting period before one could a obtain a license to exercise one's First Amendment rights by nude-dancing,[142] the Ninth Circuit would have applied a standard that it labeled "intermediate scrutiny" but in reality was only rational-basis review.[143] Criticizing this "double standard," Justice Thomas did not shy from forceful language, stating "in the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text."[144]

iii. Additional Criticism of the Supreme Court's Failure to Insist on Compliance with Precedent

Justice Thomas also again voiced frustration with other members of the Supreme Court. The Court had declared in *McDonald* that "the Second Amendment is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' "[145] But since that time, he asserted, the Court's "continued refusal to hear Second Amendment cases only enables this kind of defiance" in the lower courts.[146] "If this case involved one of the Court's more favored rights," such as abortion, speech, or the Fourth Amendment, he continued, "I sincerely doubt we would have denied certiorari." Justice Thomas concluded, "[t]he right to keep and bear arms is apparently this Court's constitutional orphan.[147] And the lower courts seem to have gotten the message."[148]

iv. Takeaway Points, Including the Issue of Whether Balancing Tests Are Appropriate in the Case of Subsequent Purchasers

A synopsis of Justice Thomas's dissent in *Silvester* would include three points. First, *Heller* indicates that balancing tests are

141. *Id.* at 951 (citing Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 917 (9th Cir. 2014)).
142. *Id.* (citing Kev, Inc. v. Kitsap Cnty., 793 F.2d 1053, 1060 (9th Cir. 1986)).
143. *See id.* at 951.
144. *Id.*
145. *Id.* at 952 (quoting McDonald v. City of Chi., 561 U.S. 742, 780 (2010)).
146. *Id.* at 951.
147. *Id.* at 952.
148. *Id.*

improper in evaluating restrictions on enumerated rights like those in the Second Amendment. Second, even if balancing tests were proper, the Ninth Circuit's purported intermediate scrutiny analysis appeared almost deliberately incomplete in that the court failed to explain how the waiting period was narrowly tailored to achieve its goal. Third, the Supreme Court had demonstrated a pattern of failing to correct deviations from *Heller*—and given this inaction, lower courts were misapplying the law or ignoring precedent. Justice Thomas suggests that this inaction resulted from members of the Court being hostile to the Second Amendment in a way they would not be hostile to more favored rights.[149]

On the first point, Justice Thomas is correct that the Supreme Court precedent has stated the Bill of Rights' enshrinement of enumerated rights in the Second Amendment prevents courts from using interest-balancing tests to deprive citizens of the right to use firearms—including handguns—for self-defense in the home (and perhaps for lawful purposes elsewhere).[150] Nevertheless, the Ninth Circuit's upholding of the waiting period in *Silvester* did not deprive the petitioners of the right to use all firearms to defend themselves in the home or for other lawful purposes.[151] The petitioners were "subsequent purchasers" who presumably already owned firearms adequate to this task.[152] *Heller* did not address the right of a citizen who already owns a handgun or other firearm in common use to acquire additional firearms after her right to defend herself in the home or against state tyranny had presumably been secured by already owned firearm(s). It is not clear from *Heller* if a balancing or tiers-of-scrutiny test would be improper when it does not affect a citizen's already secured Second Amendment rights.

Without a showing of what type of firearm(s) the petitioners in *Silvester* already owned, Justice Thomas's suggestion that a balancing test would always be improper under *Heller* may be hasty.

149. *See id.* at 951 (suggesting that certiorari would not have been denied had the case involved "one of the Court's more favored rights").

150. *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008); *See also Heller*, 554 U.S. at 634–35 (stating that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms," including handguns, "in defense of hearth and home."); McDonald v. City of Chi., 561 U.S. 742, 780 (2010) (noting that the personal right to keep and bear arms was protected for "lawful purposes, most notably for self-defense within the home"—but not limiting that right to self-defense within the home).

151. *See Silvester*, 138 S. Ct. at 946.

152. *See id.* (noting that "petitioners allege that the waiting period is unconstitutional as applied to subsequent purchasers").

If a citizen's ability to defend herself is already secured because of her ownership and possession of, e.g., a 9 mm semi-automatic pistol, a 20-gauge semi-automatic shotgun, and a scoped AR-15 semi-automatic rifle, then applying some type of balancing test to the citizen's acquisition of *additional* firearms might not run afoul of *Heller*. Whether due to inadequate factual development in the district court or other reasons, neither Justice Thomas nor the Ninth Circuit touched on this issue.

At bottom, a categorical rejection of balancing or tiers-of-scrutiny tests as applied to citizens who already own firearms both in common use and adequate to the tasks of self-defense and resisting tyranny may not be required under *Heller*. But it may not be inconsistent with *Heller*, either.

On the second point, Justice Thomas's criticisms of the speculative and incomplete nature of the Ninth Circuit's balancing analysis are articulate and responsible.[153] The best that can be said of the Ninth Circuit's balancing test is that there is a slight possibility that reasonable minds might disagree on whether the test was so loosely applied that it constituted a rational-basis review.

As for Justice Thomas's third point, the figures he previously cited in *Peruta* on the number of times the Court declined to grant review in Second Amendment cases—while during the same time granting review in many First and Fourth Amendment cases—[154] likely would not have changed greatly between the time of his 2017 dissent in *Peruta* and the 2018 dissent in *Silvester*. The third point also appears well-grounded.

v. Predictive Considerations

Under *Heller*, interest-balancing or level-of-scrutiny tests should not be applied to laws that deprive citizens of core Second Amendment rights.[155] But *Heller* did not foreclose applying levels-of-scrutiny tests to laws that place limits on a citizen's access to additional arms after that citizen's Second Amendment rights are secured by arms that he already possesses.[156] Justice Thomas's

153. *See id.* at 949–50.

154. Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

155. *See Silvester*, 138 S. Ct. at 948.

156. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (stating that "the Constitution leaves the District of Columbia a variety of tools for combating [gun violence], including some measures regulating handguns").

dissent suggests that he supports prohibiting the use of balancing or level-of-scrutiny tests in that situation also.[157] In addition, Justice Thomas indicated his preference for adopting a test that asks whether a challenged law complies with the text, history, and tradition of the Second Amendment.[158]

Both points concretely illustrate Justice Thomas's support for moving beyond the precise bounds of *Heller* and holding that Second Amendment challenges must be reviewed by asking whether a challenged law complies with the text, history, and tradition of that amendment. And as explained below, *Bruen* adopted a text, history, and tradition approach to analyzing the Second Amendment—again confirming that certain of Justice Thomas's dissents were predictive of the Supreme Court's direction on the Second Amendment.[159]

F. 2020—Rogers v. Grewal*: Endorsement of the Text, History, and Tradition Approach as Consistent with Heller's Rejection of Two-Step Balancing, Apparent Discomfort with "Core" vs. "Non-Core" Distinctions under the Second Amendment, and a Structure for Viewing Public Carry as a "Core" Protection in Any Event*

Joined by Justice Brett Kavanaugh in two of three parts of the opinion, Justice Thomas dissented from the denial of certiorari in the Third Circuit decision *Rogers v. Grewal*.[160] At issue in *Rogers* was a New Jersey statute requiring that to obtain a permit to carry a handgun, a private citizen must "demonstrate 'that he has a justifiable need to carry a handgun.' "[161] That is, the applicant was required to "specify in detail the urgent necessity for self-protection as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than the issuance of a permit to carry a handgun."[162]

157. *See Silvester*, 138 S. Ct. at 947–48 n.4.

158. *See id.*

159. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

160. Rogers v. Grewal, 140 S. Ct. 1865 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

161. *Id.* at 1865 (quoting N.J. STAT. ANN. § 2C:58-4(c) (West 2019)).

162. *Id.* (citation omitted) (internal quotation marks omitted).

The petitioner sought a permit because his employment required him to service automated teller machines in high-risk neighborhoods, but he could not make the required showing and his application was denied.[163] The petitioner sought review on the issue of whether New Jersey's "near-total prohibition on carrying a firearm in public" violated the Second Amendment, made applicable to the states by the Fourteenth Amendment.[164]

i. The Text, History, and Tradition Test; Rejection of Two-Step Balancing

Again acknowledging that *Heller* did not provide a "precise standard for evaluating all Second Amendment claims," Justice Thomas nevertheless insisted that the decision "did provide a general framework to guide lower courts."[165] "Consistent with [*Heller*'s] guidance," he continued, "many jurists have concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms."[166]

In Justice Thomas's view, some courts had claimed that *Heller* lacked clarity on how to analyze future cases and used this "self-created" analytical vacuum to create a "two-step inquiry" applying "tiers of scrutiny on a sliding scale."[167] These courts first asked "whether the challenged law burdens conduct protected by the Second Amendment."[168] If so, those courts proceeded to their second step, i.e., determining the appropriate level of scrutiny.[169] These courts generally "consider 'how close the law comes to the core of the Second Amendment right' and the 'severity of the law's burden on the right.' "[170] Depending on their analysis of these two factors, those courts then applied what purports to be either intermediate or strict scrutiny—"at least recognizing that *Heller* barred the application of rational basis review."[171]

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163. *Id.*
164. *Id.* at 1866 (citing McDonald v. City of Chi., 561 U.S. 742, 750 (2010)).
165. *Id.*
166. *Id.* (citation omitted).
167. *Id.* (citation omitted).
168. *Id.* at 1867 (quoting United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) (internal quotation marks omitted)).
169. *Id.*
170. *Id.* (quoting *Chovan*, 735 F.3d at 1138).
171. *Id.* (citing *Chovan*, 735 F.3d at 1137).

Rejecting these two-step tests as "entirely made up,"[172] Justice Thomas expressed multiple concerns. His first was that the Second Amendment itself provides "no hierarchy" of rights in which "core" rights cannot be subjected to level-of-scrutiny or balancing tests, but "peripheral rights" are subject to such tests.[173]

Second, Justice Thomas opined that nothing in the Supreme Court's precedent supported this type of two-step inquiry, which had been described as a "tripartite binary test with a sliding scale and a reasonable fit."[174] Justice Thomas protested that—despite *Heller*'s rejection of interest-balancing tests that place the Second Amendment on one side and government interests on the other[175]—so many courts of appeals had adopted interest-balancing schemes that one scholar had contended the "interest balancing approach has ultimately carried the day, as lower courts systematically ignore the Court's actual holding in *Heller*."[176]

Elaborating on the history of public carry issues and other concerns later in the dissent, Justice Thomas asserted third that there was a split of authority among courts on whether "good cause" or "justifiable need" restrictions on public carry violate the Second Amendment. The majority of states that regulated public carry in varying degrees had not imposed such a restriction, but a handful had.[177] Federal courts of appeals were divided on the issue. For example, the D.C. Circuit held that a law limiting public carry to those with a "good reason to fear injury to [their] person or property" violates the Second Amendment.[178] In contrast, the First, Second, Third, and Fourth Circuits have upheld the constitutionality of licensing schemes with "justifiable need" or "good reason" requirements, applying an intermediate scrutiny standard.[179] From Justice Thomas's perspective, granting certiorari

172. *Id.*

173. *Id.*

174. *Id.* (quoting Duncan v. Becerra, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017)) (internal quotation marks omitted).

175. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting)).

176. *Id.* (citing Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012); *see also Rogers*, 140 S. Ct. at 1867 (stating that "with what other constitutional right would this Court allow such blatant defiance of its precedent?").

177. *Id.* at 1874.

178. *Id.* (citing Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017)).

179. *Id.* at 1875 (citing Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018)); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); United States v. Masciandaro, 638 F.3d 458, 460 (4th Cir. 2011)).

presented the opportunity to provide "much-needed guidance" to lower courts, ensure adherence to Supreme Court precedent, and resolve a split of authority among lower courts.[180]

ii. The Question of "Core" vs. "Non-Core" Protections or a Hierarchy within the Second Amendment

Analyzing the first of Justice Thomas's concerns helps evaluate the second and third. On the first concern, the point may not be as clear as Justice Thomas indicated. *Heller* stated that the Court knew of "no other enumerated constitutional right whose core protection has been subjected to a free-standing 'interest-balancing' approach."[181] This statement indicates that applying balancing tests to "core protections" of constitutional rights is improper.[182] However, it also may beg the question of what exactly constitutes a "core protection" of the Second Amendment per *Heller*—as compared to protections that might be "non-core."

As discussed above, one core protection of the Second Amendment under *Heller* is the individual right to possess and maintain arms that are in common use in an immediately operable condition for use in the defense of "hearth and home."[183] Under *Heller*, this "core protection" might include also a right to bear arms for purposes of self-defense outside the home.[184] But that point was not expressly made in the four corners of the *Heller* opinion because the facts there were confined to the petitioner's "seeking the right to render a firearm," including a handgun, "operable and carry it about his home only when necessary for self-defense."[185]

iii. Viewing Public Carry as a Core Right

On the other hand, *Heller* is explicit that at the time of ratification of the Second Amendment in 1791, the phrase "bear arms" was "unambiguously used to refer to the carrying of arms outside of an organized militia."[186] Given that citizens would not

180. *Id.*
181. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).
182. *See id.* at 634–35.
183. *Id.* at 635.
184. *See, e.g.*, *id.* at 584–85.
185. *Id.* at 576.
186. *Id.* at 584.

have confined their activities to the home, the fact that the right to "bear arms" exists separately from service in an organized militia suggests that citizens would have the right to carry arms outside the home (subject to the requirement that such arms be of a type in common use).[187]

In addition, the Supreme Court's post-*Heller* decision in *McDonald* stated that the "central holding in *Heller*" was that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[188] This language suggests two things. First, it indicates that the Second Amendment protects the right to keep and bear arms for several lawful purposes. Second, the phrase "most notably" indicates that the right to keep and bear arms for self-defense in the home may enjoy some type of elevated status versus other Second Amendment rights. *McDonald* thus may be consistent with some type of "soft" hierarchy of rights, despite Justice Thomas's objections.[189]

Nevertheless, a hierarchy—or the existence of both "core" and "non-core" rights—within the Second Amendment does not necessarily require that the right to keep and bear arms in the home be more protected than, e.g., the right to keep and bear arms outside the home. It also does not require that "core" rights be immune to levels-of-scrutiny or balancing tests while "non-core" rights are subject to such tests. Stated another way, keeping and bearing arms for purposes of self-defense may be a core protection not subject to balancing tests, regardless of whether those arms are kept or carried inside or outside the home.

A post-*McDonald* decision helps illustrate this point. Quoting *Heller*, the Supreme Court in *Caetano v. Massachusetts* stated the "Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those not in existence at the time of the founding."[190] *Caetano* accordingly held that a Massachusetts law prohibiting possession of a stun gun was "inconsistent with *Heller*" when applied to a woman carrying a stun gun not in her home but outside her workplace where she had been threatened by an abusive

187. *Id.* at 627.

188. McDonald v. City of Chi., 561 U.S. 742, 780 (2010).

189. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

190. Caetano v. Massachusetts, 577 U.S. 411, 411 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582) (internal quotation marks omitted).

ex-boyfriend.[191] Making no reference to balancing tests, the Court vacated the state supreme court decision affirming the woman's conviction under the Massachusetts law and remanded the case for proceedings that did not "contradict[] this Court's precedent."[192]

Caetano dealt with stun guns, not firearms. Yet, *Caetano* emphatically states—in a context outside the home—that the Second Amendment prima facie applies "to all instruments that constitute bearable arms."[193] This lends support to the view that while core and non-core protections might exist under the Second Amendment, carrying arms outside the home for purposes of self-protection may be a core right or may at least rank at the top of any hierarchy.

iv. Takeaway issues—Whether There Exists a Core versus Non-Core Distinction and What Test Controls

At a minimum, there may be support in *Heller* for a core vs. non-core hierarchy of rights within the Second Amendment. But there also may be support in precedent such as *Caetano* for the view that—however any hierarchy may be calibrated—the right to carry arms outside the home for purposes of self-defense ranks at or near the top of this hierarchy or it is a core right. In that sense, Justice Thomas could be incorrect in asserting that the Court's Second Amendment jurisprudence includes no hierarchy of core vs. non-core rights—though he may also be correct in the view that the right to carry arms in common use for self-defense outside the home is sufficiently core that no balancing test can be applied to it.

Justice Thomas thus may have been off base on his first concern, but he is likely spot on with his second: interest-balancing or level-of-scrutiny tests cannot be applied to uphold good cause or justifiable need restrictions on carrying commonly used firearms outside the home for purposes of self-defense. Rather, those restrictions need to be judged per the text, history, and tradition test used in *Heller*.[194]

This view would also mean that Justice Thomas was correct on his third concern—a split of authority exists among the federal

191. *See id.* at 412–13 (Alito, J., concurring).
192. *Id.* at 412.
193. *Id.* at 411.
194. *See Rogers*, 140 S. Ct. at 1866 (citing *Heller*, 554 U.S. at 635).

courts of appeals—with at least one court using a standard consistent with *Heller* to determine that "good reason" requirements for public carry violate the Second Amendment and others deviating from *Heller* by applying the intermediate level of scrutiny to validate such requirements.[195] A circuit split and circuit courts' failure to observe Supreme Court precedent both constitute proper bases for the court to grant certiorari,[196] and Justice Thomas was on solid ground in pointing these out as bases for his dissent.

v. Predictive Considerations

Predictions stemming from Justice Thomas's dissent in *Grewal* would begin first with the observation that he would reject balancing tests in favor of a text, history, and tradition approach. He would also reject any hierarchy of core versus non-core rights within the Second Amendment. But in rejecting a core vs. non-core distinction, Justice Thomas might skirt the precise language of *Heller* that stated keeping operable, in-common-use firearms for purposes of immediate self-defense in the home was a core protection.[197] Such language suggests that non-core protections may also exist under the Second Amendment.

However, that core and non-core protections exist within the Second Amendment would not necessarily mean that the right to carry in-common-use firearms outside the home is not a "core" protection. On the contrary, Justice Thomas is correct in interpreting *Heller* to confirm that, at the time of the founding, "bear" arms meant to "carry" arms outside the home for use in defense against violence by the state or private individuals.[198] In addition, *Caetano* supports the view that carrying outside the home for purposes of self-defense is a "core" protection.[199]

In sum, Justice Thomas might technically be incorrect under *Heller*'s language to reject the existence of any hierarchy of rights within the Second Amendment. Nevertheless, his analysis in *Rogers* exhibits a willingness to take this position.[200] Also, as discussed below—in addition to validating Justice Thomas's position on the

195. *See id.* at 1874–75.
196. *Id.*; *see also Caetano*, 577 U.S. at 412.
197. *See Rogers*, 140 S. Ct. at 1867 (quoting *Heller*, 554 U.S. at 634).
198. *Heller*, 554 U.S. at 584, 594.
199. *See Caetano*, 577 U.S. at 411.
200. *See Rogers*, 140 S. Ct. at 1868.

text, history, and tradition approach—*Bruen* showed that even if a core vs. non-core distinction exists, Justice Thomas was correct that public carry for self-defense purposes is a core protection.[201]

III. THE DECISION IN *BRUEN*

Finally, after an eleven-year hiatus, the Supreme Court granted certiorari in the Second Amendment case *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*[202] in 2021. In *Bruen*, the petitioners challenged a New York statute requiring that an individual who wants to carry a firearm outside his home or place of business for purposes of self-defense obtain a license to "have and carry" a concealed "pistol or revolver."[203] To obtain this license, the applicant was required to prove that "proper cause exists" to issue it.[204] The statute did not define "proper cause," but courts held that to make the required showing, the applicant must "demonstrate a special need for self-protection distinguishable from the general community."[205] Living in an area noted for criminal activity did not suffice; New York courts required "evidence 'of particular threats, attacks, or other extraordinary danger to personal safety.' "[206]

The petitioners who challenged the New York statute were law-abiding adults.[207] They faced no special dangers but wanted to carry a handgun for general self-defense purposes.[208] Their applications were denied—though one petitioner was issued a permit that would allow him to carry a concealed gun for purpose of outdoor activities like hunting, fishing, hiking, and camping; another was allowed a permit to carry a weapon to and from work.[209] The petitioners' challenge was dismissed in the district court, and that dismissal was affirmed by the Second Circuit.[210] The Supreme Court granted review.[211]

201. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).
202. *Id.* at 2125.
203. *Id.* at 2123 (citing N.Y. Penal Law Ann. § 400.00(2)(f) (West 2022).
204. *Id.*
205. *Id.*
206. *Id.* (citing *In re* Martinek, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 2002)).
207. *Id.* at 2124–25.
208. *Id.* at 2125.
209. *Id.*
210. *Id.*
211. *Id.*

A. Acknowledgment of Prevalence in Lower Courts of a Two-Step Test Viewing the Core Self-Defense Right as Limited to the Home

This time authoring a majority opinion, Justice Thomas acknowledged that the courts of appeals had generally coalesced around a two-step framework.[212] Justice Thomas previously discussed this approach in his *Rogers v. Grewal* dissent.[213] He again addressed it in *Bruen*, noting that at the first step, the courts of appeals generally held the government may justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood."[214] The courts of appeals purported to ascertain the original scope of the right based on its historical meaning.[215] If the government could prove that the regulated conduct fell beyond the Second Amendment's original scope, "then the analysis can stop there; the regulated activity [wa]s categorically unprotected."[216] If, however, the historical evidence at that step was "inconclusive or suggests that the regulated activity is *not* categorically unprotected," the courts generally proceeded to step two.[217]

At the second step, courts often analyzed "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."[218] The courts of appeals applying this two-step test usually maintained "that the core Second Amendment right is limited to self-defense *in the home*."[219] If a core Second Amendment right were burdened, some courts applied "strict scrutiny" and asked whether the government can prove that the law is "narrowly tailored to achieve a compelling governmental interest."[220] Otherwise, they applied intermediate scrutiny and considered whether the government had shown that the regulation is "substantially related to the achievement of an important

212. *Id.*

213. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

214. *Bruen*, 142 S. Ct. at 2126 (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).

215. *Id.* (citing United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017)).

216. *Id.* (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).

217. *Id.* (emphasis original) (quoting *Kanter*, 919 F.3d at 441).

218. *Id.*

219. *Id.* (emphasis original) (quoting Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018)).

220. *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).

governmental interest."[221] The respondents and the United States as amicus curiae largely agreed with this approach, arguing that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right.[222]

B. Rejecting the Lower Courts' Two-Step Approach

The *Bruen* Court categorically rejected this two-step approach as "one step too many."[223] The Court acknowledged that the first step was "broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."[224] Nonetheless, the second step of the courts of appeals' framework was inconsistent with *Heller* or *McDonald* that do not support applying means-end scrutiny in the Second Amendment context.[225] Instead, this precedent demonstrated the "government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[226]

The *Bruen* Court also noted that *Heller* had examined analogous arms-bearing rights in state constitution contemporaries of the Second Amendment, the work of founding-era scholars who interpreted the Second Amendment in their writings, discussions of the Second Amendment in Congress and public discourse after the Civil War, post-Civil War commentary, and understandings of arms-bearing rights in sources ranging from 4 William Blackstone, Commentaries on the Law of England 148–49 (1769) to early twentieth century Supreme Court authority.[227] *Heller* showed the Court focused on constitutional text and history and it "did not invoke any means-end test such as intermediate or strict scrutiny."[228] To the contrary, *Heller* and *McDonald* "expressly rejected the application of any 'judge empowering' interest-balancing inquiry that 'asks whether the statute burdens the protected interest in a way or to an extent that is out of proportion to the statute's salutary

221. *Id.* (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).
222. *Id.* at 2127.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 2128.
228. *Id.*

effects upon other important governmental interests.' "[229] And "[n]ot only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States" urged the Court to adopt in *Bruen*.[230]

C. A Test for Protected Activity Based on Text and History, Subject to Rebuttal by a Historical Tradition Allowing the Restriction

After confirming *Heller*'s rejection of two-step tests, the Court spelled out the standard articulated in *Bruen*:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[231]

D. Validation from the Standards Applied to Other Amendments

Justice Thomas further validated this standard by noting it accords with approaches that the Court uses to protect other constitutional rights, such as restraints of freedom of speech under the First Amendment, the right of criminal defendants to be confronted with witnesses against them under the Sixth Amendment, and claimed violations of the Establishment Clause of

229. *Id.* at 2129 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (quotation marks and citations omitted).

230. *Id.* Per Justice Thomas, the intermediate scrutiny test, *i.e.*, "ask[ing] whether [a] statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," simply expressed a classic formulation of intermediate scrutiny in a slightly different way. *Id.* (quoting *Heller*, 554 U.S. at 689–90 (Bryer, J., dissenting) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988) (asking whether the challenged law is "substantially related to an important government objective")).

231. *Id.* at 2129–30 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

the First Amendment.[232] The *Bruen* Court acknowledged this test "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[233] In some cases, "that inquiry will be straightforward."[234] "[O]ther cases implicating unprecedented societal concerns and dramatic technological changes may require a more nuanced approach."[235]

E. Protected Arms Are Bearable Arms, Including Those Not in Existence at the Time of the Founding

Justice Thomas also set out helpful principles for courts in their future analyses, including the definition of "Arms" as used in the Second Amendment. Citing *Heller* and *Caetano*, he reminded jurists that the definition of "Arms" extends prima facie to all instruments that constitute bearable arms, even those not in existence at the time of the founding.[236] "Arms" also means non-firearm modern instruments facilitating self-defense, such as stun guns.[237]

F. Reasoning by Analogy and Two Metrics: How and Why a Restriction Burdens the Right to Self Defense

Bruen also confirmed that in addressing present-day firearms regulations, the historical inquiry would often entail reasoning by analogy. Determining whether a historical regulation is a proper analog for modern firearm regulation requires analyzing "whether the two regulations are 'relevantly similar.' "[238] Without surveying all factors making regulations relevantly similar, Justice Thomas advised that *Heller* and *McDonald* consider "at least two metrics: how and why the regulations burden a law-abiding citizen's right to self-defense."[239]

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232. *Id.* at 2130.
233. *Id.* at 2131.
234. *Id.*
235. *Id.* at 2132.
236. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 582 (2008)).
237. *Id.* (citing Caetano v. Massachusetts, 577 U.S. 411, 411–12 (2016)).
238. *Id.* (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).
239. *Id.* at 2132–33.

G. The Mechanics of Applying the Test in Bruen

In *Bruen*, the inquiry proved relatively straightforward. As law-abiding adults, the two petitioners were plainly part of "the people" whom the Second Amendment protects.[240] It was also indisputable after *Heller* that handguns are weapons "in common use" for self-defense purposes.[241] Under *Heller*, this left the question of whether the Second Amendment protected the conduct denied to the petitioners by the New York statute—carrying handguns publicly for self-defense.[242]

i. The Text Protects Public Carry

The Court in *Bruen* had little trouble concluding that the Second Amendment protects public carry. In *Heller*, the Court had determined that the right to bear arms refers to the right to "wear, bear, carry . . . upon the person or in the clothing or in the pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[243] "Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."[244] Rather, "the definition of 'bear' naturally encompasses public carry."[245]

Echoing his dissent in *Peruta*, Justice Thomas wrote, "[m]ost gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table."[246] Instead, "[a]lthough individuals often 'keep' firearms in their home . . . most do not 'bear' (i.e., carry) them in the home beyond moments of actual confrontation" so that to "confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections."[247]

Though acknowledging that *Heller* stated the need for self-defense is "perhaps 'most acute' " in the home, Justice Thomas clarified that *Heller* "did not suggest that the need was insignificant

240. *Id.* at 2134.
241. *Id.*
242. *Id.*
243. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 584 (2008)).
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 2134–35.

elsewhere."[248] On the contrary, "[m]any Americans hazard greater danger outside the home than in it."[249] The Court accordingly concluded that the Second Amendment's plain text presumptively guarantees petitioners a right to bear arms in public for self-defense.[250]

ii. The State's Inability to Show the Restriction Was Consistent with the Nation's Historical Tradition of Firearm Regulation

The respondents in *Bruen* conceded the Second Amendment guarantees a general right to public carry.[251] But they argued that the amendment permits a state to condition handgun carrying in areas frequented by the general public on a showing of non-speculative need for armed self-defense in those areas.[252] To support that position, the *Bruen* Court determined the respondents were required to show that New York's proper-cause requirement is consistent with the United States' historical tradition of firearm regulation.[253] In attempting to carry that burden, the respondents pointed to a variety of historical sources from periods beginning in the 1200s to the early 1900s. The court categorized these offered periods as (1) medieval to early modern England, (2) the American colonies and early Republic, (3) antebellum America, (4) Reconstruction, and (5) the late 19th and early 20th centuries.[254]

a. The Linchpin—Rights Have the Scope That the People Understood Them to Have When They Were Adopted.

The Court made two observations before beginning its examination of the respondents' historical references. First, the linchpin principle for analyzing amendments is that "constitutional rights are enshrined with the scope they were understood to have

248. *Id.* at 2135 (quoting *Heller*, 554 U.S. at 628).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 2135–36.

when the people adopted them."[255] The Second Amendment was adopted in 1791, and the Fourteenth was adopted in 1868. Accordingly, "[h]istorical evidence that long pre-dates either date may not illuminate the scope of the right."[256]

Similarly, courts must be careful not to give "post-enactment history more weight than it can rightly bear."[257] Where a governmental practice has been open, widespread, and unchallenged since the early days of the republic, that practice should guide the interpretation of ambiguous constitutional provisions.[258] "But to the extent later history contradicts what the text says, the text controls."[259] In *Heller*, for example, the Court noted that because post-Civil War discussions "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."[260]

b. The People's Understanding of the Right to Keep and Bear Arms Was the Same at the Adoption of the Fourteenth Amendment as at the Time of the Bill of Rights.

Second—because a state statute was at issue—New York was bound by the right to keep and bear arms under the Fourteenth Amendment, not the Second Amendment.[261] Under the Fourteenth Amendment, rights enumerated in the Bill of Rights have the same effect against the states as against the federal government.[262] The Court in *Bruen* acknowledged that there exists some scholarly debate as to whether courts should rely on the understanding of the Bill of Rights in 1868 when the Fourteenth Amendment was ratified, rather than in 1791 when the Bill of Rights was ratified.[263] *Bruen* did not address this issue because the public's understanding of the right to keep and bear arms as it

255. *Id.* at 2136 (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (emphasis added) (internal quotation marks omitted)).
256. *Id.*
257. *Id.*
258. *Id.* at 2137 (internal quotation marks and citations omitted).
259. *Id.*
260. *Id.* (quoting *Heller*, 554 U.S. at 614) (internal quotation marks omitted).
261. *Id.*
262. *Id.*
263. *Id.* at 2138.

pertained to carry outside the home was the same in 1791 as in 1868.[264]

c. The State's Inadequate Showing of Historical Tradition

This article will not address in detail the *Bruen* Court's analysis of the respondents' sources from each of the above five periods. Nevertheless, a summary of the Court's views on the sources from each of these periods follows.

Medieval to Early Modern England – The Court found these references ambiguous in nature[265]—as well as too old to have persuasive force given that they dated as early as 1285, 1327, or 1328.[266]

The Colonies and Early Republic – The Court found the respondent's colonial references contained insufficient evidence of any recognized practice of regulating public carry.[267] What few statutory restrictions existed on public carry were directed to "unusual" weapons (a historical fact acknowledged in *Heller*)[268] and concealed carry.[269] Late eighteenth- and early nineteenth-century statutes paralleled earlier statutes or simply prohibited bearing arms in a manner that was intended to spread "fear" or "terror" among the people.[270]

Antebellum America – Post-ratification restrictions proliferated but generally fell into three categories: common-law offenses, statutory prohibitions, or "surety" statutes.[271] Common-law offenses typically included "affray" or going about armed "to the terror of the people," but there was no evidence that such limitations were meant to impair the right of peaceable public carry.[272] Statutory restrictions may have prohibited concealed carry but indicated that prohibitions on open carry would conflict with

264. *Id.*

265. *See, e.g.*, *id.* at 2140 ("Henry VIII's displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy . . . handguns threatened Englishmen's proficiency with the longbow.").

266. *See id.* at 2139.

267. *Id.* at 2142.

268. *Id.* at 2143 (citing District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

269. *Id.*

270. *Id.* at 2144.

271. *Id.* at 2145.

272. *Id.*

the Constitution.[273] All told, antebellum state court decisions evinced a consensus that states could not statutorily prohibit all public carry.[274] Surety statutes required certain individuals to post bonds before carrying weapons in public.[275] But these statutes were conditioned upon a satisfactory showing by another citizen of a "reasonable cause to fear injury" "or breach of the peace" from the person required to post the bond.[276]

The Court summarized antebellum laws: "[u]nder the common law, individuals could not carry deadly weapons in a manner likely to terrorize others."[277] Though "surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying.[278] Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly."[279]

Reconstruction – Here, the Court discussed historical sources showing that freed Black Americans possessed and exercised "the *same* right to own and carry arms that *other* citizens have."[280] That Black Americans had this right allowed them to "publicly carr[y] weapons to defend themselves and their communities."[281]

The Court also acknowledged that two Texas cases from the 1870s had upheld statutory prohibitions on carrying pistols other than "holster pistols," pistols useful and proper to an armed militia, or pistols not adapted to being carried in a concealed manner without "reasonable grounds for fearing an unlawful attack on his person."[282] Similarly, a West Virginia case upheld a prohibition on the public carry of handguns, reasoning that no handguns of any kind were protected by the Second Amendment.[283] Although acknowledging these cases provided some support for the respondents' arguments on New York's proper-cause requirement,

273. *Id.* at 2146.
274. *Id.*
275. *Id.* at 2148.
276. *Id.* (quoting MASS. REV. STAT., ch. 134, § 16 (1836)).
277. *Id.* at 2150.
278. *Id.*
279. *Id.*
280. *Id.* at 2152 (emphasis original).
281. *Id.* at 2151.
282. *Id.* at 2153 (quoting 1871 TEX. GEN. L. § 1) (internal quotation marks omitted).
283. *Id.* (citing W. VA. CODE § 148-7 (1887); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891)).

the court was unwilling to give these isolated state court decisions "disproportionate weight."[284]

The Nineteenth and Early Twentieth Centuries – Due to their "temporal distance from the founding," Justice Thomas wrote, gun regulation laws in the late nineteenth century "cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."[285] Moreover, the respondents' use of nineteenth-century laws was flawed. First, the respondents largely relied on restrictions in pre-state, western territories that were localized, few in number, and presented little counterweight to "overwhelming evidence of an otherwise enduring American tradition permitting public carry."[286] The territorial system was a transitional structure that employed legislative improvisations which might not be tolerated as a permanent setup.[287] Accordingly, the territories' laws are not instructive.[288] The handful of temporary territorial laws cited "governed less than 1% of the population" and thus were irrelevant to the norms of more than 99 percent of the American population.[289] Second, because territorial laws rarely were subject to judicial scrutiny, there was no basis to judge their perceived legality.[290] Lastly, the territorial laws were short-lived as some that were challenged were held unconstitutional; others did not survive the territory's admission to the Union as a state.[291]

The respondents also identified one state law in Kansas that directed cities with populations of more than fifteen thousand to pass ordinances prohibiting public carry.[292] The Court reasoned that even if the three affected cities had enacted the prohibitions, the law would have reached only 6.5% of Kansas's total population.[293] In the Court's view, these figures could not demonstrate that Kansas meaningfully restricted public carry, let alone that states generally had a tradition of doing so.[294]

After reviewing these five categories of historical sources, the Court concluded the respondents had "not met their burden to

284. *Id.* at 2153.
285. *Id.* at 2154.
286. *Id.*
287. *Id.*
288. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 614 (2008)).
289. *Id.* at 2155.
290. *Id.*
291. *Id.*
292. *Id.* at 2155.
293. *Id.* at 2156.
294. *Id.*

identify an American tradition justifying [New York's] proper-cause requirement."[295]

H. The Second Amendment's Status as Co-equal with Other Bill of Rights Guarantees

The *Bruen* Court took pains to emphasize that the Second Amendment is "not a second-class right, subject to an entirely different body of rules than other Bill of Rights guarantees."[296] In holding the New York proper-cause requirement violated the amendment, the Court remarked:

> We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.[297]

IV. POINTS FROM JUSTICE THOMAS'S DISSENTS THAT BECAME PART OF *BRUEN*—AND ISSUES WHICH MAY ARISE IN A POST-*BRUEN* ENVIRONMENT

Justice Thomas made several points in his post-*Heller*, post-*McDonald* dissents that found a home in *Bruen*.[298] Other significant issues arising from those dissents, though left unaddressed in *Bruen*, may become important to Second Amendment jurisprudence going forward. Addressing the dissents in chronological order, one should note the following:

Jackson: *Bruen* confirmed Justice Thomas's view that the Ninth Circuit had applied an incorrect standard of review (essentially, intermediate scrutiny) in the context of restrictions on

295. *Id.*

296. *Id.* at 2121 (quoting McDonald v. City of Chi., 561 U.S. 742, 780 (2010)).

297. *Id.* at 2156.

298. *See, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari); *see also Bruen*, 142 S. Ct. at 2118 (affirming that balancing tests are not properly applied in the Second Amendment context).

handguns in the home for purposes of self-defense.[299] Although not at issue in the case, *Bruen*'s conclusion that the Second Amendment protects a right to public carry for self-defense means that a right to carry exists in one's home.[300] *Bruen* confirmed Justice Thomas's positions in *Jackson*.

Friedman: *Bruen* validated Justice Thomas's insistence that lower courts comply with *Heller*'s determinations for the Second Amendment—just as lower courts must comply with Supreme Court precedent governing other Bill of Rights guarantees. One point in particular from *Friedman* was cemented in *Bruen*—balancing tests are not proper to determine whether restrictions on keeping and bearing arms for either self-defense or resistance to a tyrannical government pass constitutional muster.[301]

However, *Bruen* had no occasion to address whether some type of numerical yardstick, e.g., the percentage of the population owning a type of arm, could be applied to determine if that type of arm is sufficiently in common use to qualify for Second Amendment protection.

***Peruta*:** This dissent was plainly predictive of the *Bruen* Court's determination that the right to bear arms set out in the Second Amendment included the right to the public carry of arms in common use for purposes of self-defense.[302] The dissent was also predictive of the fact that because Second Amendment cases were historically underrepresented on the Supreme Court's docket, the Court, if for no other reason than to avoid the appearance of discriminating against the Second Amendment, would at some point need to address the public-carry issue.[303]

The 6-3 ruling in *Bruen* with the reality of the Supreme Court's current composition also suggests that Justice Thomas's *Peruta* dissent may be a harbinger of an increased willingness on the part of the Court for hearing Second Amendment cases with a frequency more closely resembling that for cases involving other amendments.[304]

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299. *See, e.g.*, Jackson v. City & Cnty. of S.F., 576 U.S. 1013, 1015 (2015) (Thomas, J., dissenting from denial of certiorari); *see also Bruen*, 142 S. Ct. at 2156.

300. *See Bruen*, 142 S. Ct. at 2156.

301. *See Friedman*, 136 S. Ct. at 449; *see also Bruen*, 142 S. Ct. at 2118.

302. *See* Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari).

303. *Id.*

304. *Id.*

***Silvester*:** As in *Peruta*, Justice Thomas's dissent rejected interest-balancing tests, in particular intermediate scrutiny.[305] Justice Thomas also expressly rejected rational-basis review, confirming his position that tiers-of-scrutiny tests are improper in Second Amendment jurisprudence.[306] In addition, Justice Thomas demonstrated a positive view of a test asking whether the challenged law complies with the text, history, and tradition of the Second Amendment. All of these positions found permanent footing in *Bruen*.

Using forceful language, Justice Thomas also did not hesitate to criticize the lower court's treatment of the Second Amendment as effectively giving an enumerated right less regard than rights with no textual basis in the Constitution, and he again criticized the Supreme Court for failing to correct lower courts' deviations from the court's precedents.[307] Given the Court's granting certiorari in *Bruen*, the 6-3 result in that case, and the court's current composition, *Silvester* reinforces the view that the court may be more willing to grant review in future Second Amendment cases—and correct federal courts of appeals' or state supreme courts' deviation from precedent.

Left open is the question of whether Justice Thomas and other justices in the *Bruen* majority would apply the text, history, and tradition test to restrictions on a citizen's ability to obtain additional arms after the citizen already has arms of a sufficient quantity and type to protect his or her Second Amendment rights. The issue of what limits on subsequent purchaser's rights are proper in a post-*Bruen* world may be so unique that they may not be addressed by the Supreme Court going forward. However, most gun owners state they possess more than one firearm.[308] The question of what limits may be placed on a citizen's amassing firearms beyond those reasonably needed to secure the citizen's Second Amendment rights is not so unusual that it would not be raised in the future. Here again, the positions that Justice Thomas voiced in

305. *See* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari).

306. *Id.*

307. *Id.*

308. Two-thirds of gun owners say they own more than one gun, including twenty-nine percent who own five or more guns. Parker et al., *supra* note 77.

his dissents could guide lower courts wishing to address the issue in a manner consistent with *Heller*, *McDonald*, and *Bruen*.[309]

***Rogers*:** By the time of his *Rogers* dissent, Justice Thomas was vocally in the camp of jurists advocating text, history, and tradition as the framework indicated by *Heller* for evaluating Second Amendment claims. He decried the courts of appeals' intermediate or strict scrutiny balancing tests as entirely made up. As noted, both of these positions bore fruit in *Bruen*.[310] On the other hand, although *Heller* may support some type of core versus non-core distinction within the Second Amendment, Justice Thomas appears dismissive of any such hierarchy.

Bruen demonstrated that, even if a core versus non-core hierarchy can be said to exist, the "keep and bear" language in the Second Amendment means the right to carry in public is a core protection on the same level as the right to keep arms articulated in *Heller*. Whether a gradation of core vs. non-core rights exists within the Second Amendment and if so what protections might fall into each of these categories are issues left for future decisions.

V. CONCLUSION

Bruen incorporated into Second Amendment jurisprudence the following positions from Justice Thomas's post-*Heller* dissents from denials of certiorari: (1) in evaluating restrictions on citizens' ability to keep and bear arms sufficient for self-defense against public or private violence, balancing or levels-of-scrutiny tests employing strict or intermediate scrutiny (or rational-basis review) cannot be applied; rather, the restrictions are to be judged with a text, history, and tradition test to determine if the restriction is consistent with the nation's history of firearm regulation; (2) lower courts' defiance of Supreme Court precedent on the Second Amendment should not be tolerated; (3) the Second Amendment is on par with other amendments, such as the First and Sixth Amendments—and the Supreme Court should protect it with the same zeal and frequency it applies to other Bill of Rights guarantees; and (4) the right to bear arms as stated in the Second

309. *See, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari); *see also N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2118 (2022).

310. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari); *see also Bruen*, 142 S. Ct. at 2118.

Amendment includes the right to carry arms that are in common use for general self-defense purposes.

The predictive nature of Justice Thomas's dissents on these issues suggests that his dissents will be predictive of other Second Amendment issues coming before the Court in the future. Also, given its current composition, the Court may demonstrate an increased appetite for granting review in Second Amendment cases.

Two issues suggested by Justice Thomas's dissents for future examination are: (1) whether *Bruen*'s text, history, and tradition test applies to restrictions on a citizen's amassing additional arms after that citizen already has arms of a sufficient type and quantity to secure his or her Second Amendment rights or whether some other test, such as a balancing inquiry, should apply, and (2) whether there exists a core versus non-core distinction or hierarchy of rights within the Second Amendment and, if so, what tests properly apply to restrictions on non-core rights as compared to the *Bruen* test applicable to core rights. Regardless of whether these precise issues are raised in the future, the Second Amendment bar will benefit from an understanding of Justice Thomas's post-*Heller* dissents from denials of certiorari as Second Amendment challenges to firearm restrictions will likely become more frequent.

ELIMINATING FOOD DESERTS: NO SIMPLE RECIPE FOR SUCCESS

ASHLEY OLDFIELD†

I. INTRODUCTION

For many, providing a healthy dinner for their families is a simple matter, starting with a short drive to the nearest supermarket. However, for those living in a food desert[1]—an area with limited access to fresh food due to the lack of a grocery store—providing a nutritious meal is more difficult.[2] Residents of such areas often live more than a mile from the nearest large grocery store, lack adequate transportation, and face a host of unhealthy food options, such as gas station fare and fast food.[3] The recent COVID-19 pandemic exacerbated these difficulties and highlighted the need for change.[4]

Historically, land planners were slow to address food access in urban design.[5] However, as awareness of the issue increased at the federal level and in the media, land planners began utilizing the

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1. The term "food desert" itself is not without critics. Some note that it implies food inaccessibility is a natural occurrence rather than the result of social and economic inequities, while others point out its negative connotation that falsely portrays what might be a vibrant community. CAITLIN MISIASZEK ET AL., JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, BALTIMORE CITY'S FOOD ENV'T: 2018 REPORT 11 (2018).

2. *Id.*

3. *Id.*

4. *See* Scott Haskell, *How the Covid-19 Pandemic Affects Food Deserts*, MICH. ST. UNIV. INST. FOR FOOD L. AND REGULS. (Feb. 2, 2021), https://www.canr.msu.edu/news/how-the-covid-19-pandemic-affects-food-deserts; Nathaniel Meyersohn, *Groceries Were Hard to Find for Millions. Now It's Getting Even Worse*, CNN BUS. (June 9, 2020), https://www.cnn.com/2020/06/09/business/food-deserts-coronavirus-grocery-stores/index.html.

5. BARBARA MCCANN, ROBERT WOOD JOHNSON FOUND., CMTY. DESIGN FOR HEALTHY EATING: HOW LAND USE AND TRANSP. SOLUTIONS CAN HELP 21 (2006) (noting that in a survey of twenty-two planning agencies in the United States in 1998, only six addressed food access in their comprehensive plans, and of those six, only three gave it significant attention).

tools at their disposal to improve access to healthy food.[6] This Paper suggests that land planning tools can be used to alleviate food inaccessibility by increasing the number of healthy food vendors, improving transportation systems, and encouraging healthy food consumption. Nevertheless, land planning alone is unlikely to redress the problem of food inaccessibility. Therefore, land planning should be considered as just one piece of a larger system addressing the underlying causes of food inaccessibility.[7]

II. WHAT IS A FOOD DESERT?

The phrase "food desert" first gained traction in the United Kingdom during the 1990s as the government sought to address health inequalities in urban neighborhoods.[8] Since then, a food desert has become loosely known as an area with limited access to fresh foods, usually because of the lack of a supermarket.[9] The U.S. Department of Agriculture ("USDA") provides a tool—the Food Access Research Atlas—to measure food access based on several different indicators, including distance to a supermarket, vehicle availability, and income level.[10]

Although there are various ways to define food deserts using the Food Access Research Atlas,[11] the commonly stated definition is a census tract where at least either five hundred people or 33 percent of the population lives more than one mile from the nearest large grocery store for an urban area or more than ten miles

6. *See generally* Nathan A. Rosenberg & Nevin Cohen, *Let Them Eat Kale: The Misplaced Narrative of Food Access*, 45 FORDHAM URB. L. J. 1091 (2018) (examining the emergence of food access as a policy issue, current approaches to increasing food access, and possible alternatives to those approaches).

7. While this Paper will note some of the other tools that may be used, a fuller discussion is beyond the scope of this Paper.

8. Rosenberg & Cohen, *supra* note 6, at 1094–97.

9. *See, e.g.*, Marian Wright Edelman, *Urban Food Deserts Threaten Children's Health*, HUFFINGTON POST (Jan. 4, 2010), https://www.huffpost.com/entry/urban-food-deserts-threat_b_410339 (describing food deserts as "areas with no or distant grocery stores"); Melissa Farley, *Winston-Salem's Food Insecurity Dilemma*, MEDIUM (Apr. 26, 2017), https://medium.com/@farlmr13/winston-salems-food-insecurity-dilemma-ee6a418021bc (describing food deserts as "parts of the country absent of fresh produce and other healthful whole foods [that] suffers from a lack of grocery stores, healthy food providers (such as farmers markets), and a lack of transportation among citizens").

10. U.S. DEPT. OF AGRIC., FOOD ACCESS RSCH. ATLAS, https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation.

11. *Id.*

for a rural area.[12] Under this definition, over 6 percent of the U.S. population lives in such areas.[13] When the distance to the nearest grocery store drops to a half-mile or more, the portion of the U.S. population living in a food desert rises to over 17 percent.[14] The people living in these areas tend to be low-income and to be people of color.[15]

Many critics argue that the USDA's definition of food desert belies the problem.[16] First, the USDA definition ignores the economic and social disparities impacting food accessibility and instead focuses exclusively on proximity to food retailers.[17] Second, the definition focuses on large grocery stores, disregarding the many small businesses that may offer a wide variety of fresh, healthy foods.[18] Third, the USDA definition does not measure the ease with which residents in a particular neighborhood can access stores.[19] As a result of some of these concerns, several localities have created their own food desert measures that allow them to account for the unique circumstances of their localities.[20]

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12. *Id.*; CONG. RSCH. SERV.: DEFINING LOW-INCOME, LOW-ACCESS FOOD AREAS (FOOD DESERTS) (2021) (the USDA's definition notably measures the straight-line distance, not the actual distance someone would have to travel to reach a store); Emily M. Broad Leib, *All (Food) Politics is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL'Y REV. 321, 327 (2013).

13. U.S. DEP'T OF AGRIC., *supra* note 10.

14. *Id.*

15. JUDITH BELL ET AL., POL'Y LINK & THE FOOD TRUST, ACCESS TO HEALTHY FOOD AND WHY IT MATTERS: A REVIEW OF THE RSCH. 9 (2013).

16. *See, e.g.*, Broad Leib, *supra* note 12, at 326–27; Rosenberg & Cohen, *supra* note 6, at 1113–16.

17. Rosenberg & Cohen, *supra* note 6, at 1113–16.

18. For example, the many small stores in San Francisco's Chinatown offer hundreds of healthy food options. MCCANN, *supra* note 5, at 6.

19. Broad Leib, *supra* note 12, at 326–27 (noting the many factors that go into an individual's ability to access foods, including social distance and transportation availability).

20. N.Y.C. DEP'T OF CITY PLAN. ET AL., GOING TO MARKET: NEW YORK CITY'S NEIGHBORHOOD GROCERY STORE AND SUPERMARKET SHORTAGE 5, 14, http://www.nyc.gov/html/misc/pdf/going_to_market.pdf (explaining that the New York City Department of City Planning developed the Supermarket Need Index to identify areas that have "the highest levels of diet-related diseases and largest populations with limited opportunities to purchase fresh foods." This index takes into account factors such as population density, vehicle availability, household income, rates of diabetes and obesity, and capacity for new stores.); *see also* AMANDA BUCZYNSKI ET AL., JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, MAPPING BALTIMORE CITY'S FOOD ENVIRONMENT: 2015 REPORT 12 (2015) (noting how Baltimore developed its own Food Environment Map based on four factors: "distance to supermarket, household income, vehicle availability, and supply of healthy food in retail food stores.").

III. HOW DID FOOD DESERTS DEVELOP?

The development of food deserts has been attributed to the flight of middle- and upper-class, largely white residents from cities to suburbs during the 1970s and 1980s.[21] This "white flight" is blamed on "massive disinvestment in urban areas" resulting from a range of factors, including manufacturing job loss, highway construction, and federal home mortgage and housing policies.[22] As these residents with higher buying power relocated, supermarkets followed, finding that larger stores targeting an automobile-oriented population could be more easily developed and maintained in the suburbs.[23] As a result, many low-income urban areas lost a significant portion of their large grocery stores.[24]

IV. WHAT'S SO BAD ABOUT FOOD DESERTS?

While food inaccessibility has been a problem long in the making, the prevalence of food deserts has garnered increasing attention at federal, state, and local levels in recent years as policymakers argue that increased food access will result in improved health and education outcomes.[25] Meanwhile, food

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21. *See, e.g.*, Jarrett Thibodeaux, *A Historical Era of Food Deserts: Changes in the Correlates of Urban Supermarket Location, 1970–1990*, 3 SOC. CURRENTS 186, 187–88 (2016).

22. *See id.* at 187; MCCANN, *supra* note 5, at 15; Rosenberg & Cohen, *supra* note 6, at 1099.

23. Kameshwari Pothukuchi, *Attracting Supermarkets to Inner-City Neighborhoods: Economic Development Outside the Box*, 19 ECON. DEV. Q. 231, 232–33 (2005) (discussing the difficulties of urban locations: land assembly, site preparation, financing, crime (real or imagined), and operations costs, such as rent, labor, and insurance).

24. Rosenberg & Cohen, *supra* note 6, at 1099 (noting that Chicago, Los Angeles, Manhattan, and Brooklyn lost half of their large grocery stores between 1970 and 1988).

25. *See generally* Broad Leib, *supra* note 12, at 324–25 (explaining the entrenched economic and social barriers that are responsible for creating food deserts and weaknesses in the federal response to food deserts); FACT SHEET: THE BIDEN-HARRIS ADMIN. ANNOUNCES MORE THAN $8 BILLION IN NEW COMMITMENTS AS PART OF CALL TO ACTION FOR WHITE HOUSE CONF. ON HUNGER, NUTRITION, AND HEALTH (2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/28/fact-sheet-the-biden-harris-administration-announces-more-than-8-billion-in-new-commitments-as-part-of-call-to-action-for-white-house-conference-on-hunger-nutrition-and-health (noting that on September 28, 2022, President Biden hosted the White House Conference on Hunger, Nutrition, and Health and announced over eight billion dollars in new private- and public-sector commitments to meet the administration's goals, which include improving food access and integrating nutrition and health); Peter Grier, *Michelle Obama Says "Let's Move" On Obesity in American Kids*, THE CHRISTIAN SCI. MONITOR (Feb. 9, 2010), https://www.csmonitor.com/USA/2010/0209/Michelle-Obama-says-Let-s-Move-on-obesity-in-American-kids (noting in 2010, then-First Lady Michelle Obama launched the Let's Move! initiative to address childhood obesity. One of the five pillars of the initiative was to improve access

justice advocates consider food accessibility a social justice issue, asserting that everyone should have fair access to food regardless of their social or economic status.[26] Thus, the call for more supermarkets, urban agriculture, farmers' markets, and the like has a broad base of support.[27] These supporters identify a host of studies bolstering their contention that increased proximity to healthy foods is the panacea for a variety of health, education, and social problems.[28] Some commentators, however, point to other studies that show increasing the number of healthy food retailers in an area does little to make healthy food more accessible and does not change people's eating habits.[29] These commentators view the push for more supermarkets and farmers' markets with a critical eye, seeing it as a flashy and superficial fix that fails to address the real obstacles to food access: poverty and racism.[30] Given the conflicting evidence regarding the efficacy of increasing the prevalence of healthy food retailers, these concerns warrant further research. However, such concerns are beyond the scope of this Paper.

Many studies are touted as linking food deserts to poor eating habits, obesity, and other diet-related diseases.[31] One study assessed the association between food accessibility and obesity in New Orleans, Louisiana.[32] The researchers calculated the BMIs of approximately four thousand randomly selected adults based on

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to healthy, affordable foods); P'SHIP FOR A HEALTHIER AM., LET'S MOVE, https://www.ahealthieramerica.org/articles/let-s-move-84 (last visited Nov. 20, 2022) (noting that Let's Move sought to increase access through the Healthy Food Financing Initiative that provided "financing for developing and equipping grocery stores, small retailers, corner stores, and farmers markets selling healthy food in underserved areas"); LET'S MOVE, HEALTHY CMTYS., https://letsmove.obamawhitehouse.archives. gov/healthy-communities (last visited Nov. 20, 2022).

26. Avi Brisman, *Food Justice as Crime Prevention*, 5 J. FOOD L. & POL'Y 1, 7 (2009) (describing how food justice advocates argue that "no individual, group of people, or community should live without an adequate supply of nutritious, affordable food because of economic constraints or social inequalities").

27. *See, e.g.*, Rosenberg & Cohen, *supra* note 6, at 1102–06.

28. *See, e.g.*, BELL ET AL., *supra* note 15, at 12–13; Broad Leib, *supra* note 12, at 321–22.

29. *See, e.g.*, Rosenberg & Cohen, *supra* note 6, at 1106–08 (citing numerous studies finding "little to no relationship between proximity to retailers of healthy food and increased purchasing or consumption of healthy food").

30. *See, e.g., id.* at 1115–16; Heather Tirado Gilligan, *Food Deserts Aren't the Problem*, SLATE (Feb. 10, 2014), https://slate.com/human-interest/2014/02/food-deserts-and-fresh-food-access-arent-the-problem-poverty-not-obesity-makes-people-sick.html.

31. BELL ET AL., *supra* note 15, at 7; Rosenberg & Cohen, *supra* note 6, at 1106–08.

32. *See generally* J. Nicholas Bodor et al., *The Association between Obesity and Urban Food Environment*, 87 J. URB. HEALTH 771 (2010) (assessing associations between access to food retail outlets and obesity in New Orleans).

the participants' self-reported height and weight.[33] The researchers then determined the number of each food retailer type within 1.2 miles of the center of the census tract in which the participant resided.[34] An analysis of this data revealed that "respondents with greater supermarket access were less likely to be obese, while greater fast food and convenience store access was predictive of higher obesity odds."[35] Another study of senior citizens in rural communities found an association between an increased distance to the nearest grocery store and a decreased consumption of fruits and vegetables.[36] Researchers have also noted an association between living in a food desert and adverse coronavirus outcomes.[37]

On the other hand, evidence that proximity to healthy food may not be a cure-all for the nation's health problems has started to grow. For example, a 2012 study of young people in California between the ages of five and seventeen found no relationship between the food environment and the quality of the participants' diets.[38] This study examined the consumption of fruits, vegetables, and other food and drink items in comparison to the prevalence of particular types of food outlets, such as fast food restaurants, convenience stores, and supermarkets in the home and school neighborhoods of the studied youth.[39] The study "found no evidence to support the hypotheses that improved access to supermarkets . . . improves diet quality or reduces BMI among Californian youth."[40] Perhaps even more telling is the USDA's own

33. *Id.* at 772, 774.

34. *Id.* at 773–74.

35. *Id.* at 779.

36. *See generally* Joseph R. Sharkey et al., *Food Access and Perceptions of the Community and Household Food Environment as Correlates of Fruit and Vegetable Intake among Rural Seniors*, 10 BMC GERIATRICS 1 (2010) (examining the spatial challenges to good nutrition faced by seniors who reside in rural areas and how spatial access influences fruit and vegetable intake).

37. *E.g.*, Juliana Sung et al., *Associations of Food Deserts and Coronavirus Severity in Pregnancy*, 24 AM. J. OBSTETRICS & GYNECOLOGY 788, 788–89 (2021) (finding, in a study of pregnant women with coronavirus, that symptomatic patients requiring hospitalization "were significantly more likely to reside in a food desert" than asymptomatic patients); Matthew J. Belanger et al., *Covid-19 and Disparities in Nutrition and Obesity*, NEW ENG. J. MED. 1 (2020) (noting how "[u]pstream forces, including a lack of access to healthy foods, a preponderance of low-quality nutrition, and higher rates of food insecurity, result in a higher prevalence of obesity and chronic diseases and so are ultimately responsible for the increased morbidity and mortality from Covid-19 in disadvantaged populations").

38. Ruopeng An & Roland Sturm, *School and Residential Neighborhood Food Environment and Diet among California Youth*, 42 AM. J. PREVENTIVE MED. 129, 129–30 (2012).

39. *Id.* at 130.

40. *Id.* at 131.

2016 report on food deserts.[41] Drawing from several national food studies, the USDA concluded that proximity to supermarkets had a "limited impact on food choices," while factors such as product price, income, education, and personal preference were likely more determinative.[42] These mixed results demonstrate that the prevalence of healthy food retailers is just one factor in the health of residents in a particular community.

Some commentators have also suggested that residing in a food desert may have an impact on children's learning and social development.[43] These commentators tie food accessibility to food insecurity,[44] defined as "limited or uncertain availability of or inability to acquire nutritionally adequate, safe, and acceptable foods due to financial resource constraint"[45] and food insufficiency,[46] which refers to "an inadequate amount of food intake due to resource constraint."[47] A 2005 study found associations between food insecurity and insufficiency among six- to twelve-year-old children that included poorer mathematics scores, increased grade repetition and absenteeism, and higher rates of anxiety, aggression, and depression.[48] The study did not, however, directly link the prevalence or proximity of supermarkets to its findings.[49] In 2020, the COVID-19 pandemic "doubled the percent of households with children who are food insecure from 14% to 28%."[50]

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41. *See* Michele Ver Ploeg & Ilya Rahkovsky, *Recent Evidence on the Effect of Food Store Access on Food Choice and Diet Quality*, U.S. DEP'T OF AGRIC. (May 2, 2016), https://www.ers.usda.gov/amber-waves/2016/may/recent-evidence-on-the-effects-of-food-store-access-on-food-choice-and-diet-quality.

42. *Id.*

43. *See, e.g.*, Broad Leib, *supra* note 12, at 322 ("Increased food access has been linked to results as diverse as improved educational outcomes and crime reduction"); Ryelle Seymour, *Food Deserts Are Ripe for Business*, 44 B.C. ENV'T. AFF. L. REV. 421, 422 (2017) ("Lack of access to healthy food is not only linked to higher rates of diet-related disease and death, but also impacts educational outcomes, as well as crime").

44. *See, e.g.*, Broad Leib, *supra* note 12, at 321–22; Seymour, *supra* note 43, at 452.

45. Diana F. Jyoti et al., *Food Insecurity Affects School Children's Academic Performance, Weight Gain, and Social Skills*, 135 J. NUTRITION 2831, 2831 (2005).

46. *See, e.g.*, Broad Leib, *supra* note 12, at 321–22; Seymour, *supra* note 43, at 423.

47. Jyoti et al., *supra* note 45, at 2831.

48. *Id.*

49. *See generally id.* (linking food insecurity generally to developmental consequences for girls and boys).

50. Sarah Bleich et al., *Why Partisan Politics Keeps 14 Million Hungry Children from Getting the Food They Need*, USA TODAY (Oct. 28, 2020), https://www.usatoday.com/story/opinion/2020/10/28/how-politics-keeps-14-million-american-kids-getting-enough-food-column/6051427002.

In sum, the evidence is unclear on exactly what role proximity to healthy food retailers plays in the well-being of individuals. Nonetheless, communities seeking to provide improved access to healthy food have several land planning tools at their disposal.

V. HOW CAN LAND PLANNING INCREASE FOOD ACCESS?

Land planners have several tools at their disposal to increase food access, such as various forms of zoning, tax, and financing incentives.[51] Local efforts to increase food access through land planning techniques should focus on three areas: (1) increasing the number of healthy food vendors, (2) improving transportation systems, and (3) increasing healthy food consumption. As previously noted, land planning should be just one part of a larger system working to correct the root causes of food inaccessibility.

A. Increasing the Number of Healthy Food Vendors

Since food deserts have been framed as having a lack of healthy food options, land planning efforts to increase food accessibility have largely been directed at increasing the number of healthy food vendors. In many cases, this has involved attempts to attract a large grocery store to an area. Increasing the number of farmers' markets, mobile food vendors, and improving offerings at small convenience stores have also played a role.[52] Local governments can use both zoning and financial incentives to

51. *See* Broad Leib, *supra* note 12, at 322 ("Many recent local actions focus explicitly on increasing healthy-food access, including amending zoning codes . . . ."); Joel Gittelsohn et al., *Increasing Healthy Food Access for Low-Income Communities: Protocol of the Healthy Community Stores Case Study Project*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH, no. 2, 2022, at 1, 1–2 (describing how, to "[i]mprov[e] healthy food access to low-income communities[,]" localities have developed "policies such as sugar-sweetened beverage (SSB) and junk food taxes, super-market financing initiatives, and staple foods ordinances . . . .").

52. *See* Broad Leib, *supra* note 12, at 335 (stating that "[l]ocal governments can also increase healthy-food access by permitting food trucks and mobile food vendors. Food trucks can increase access to healthy ready-to-eat foods, helping to alleviate concerns about minimal cooking skills or equipment"); Gittelsohn, *supra* note 51, at 2 (stating that "there has been a push both nationally and locally to entice new supermarkets to open in low food access areas . . . ."); Heather D'Angelo et al., *Small Food Store Retailers' Willingness to Implement Healthy Store Strategies in Rural North Carolina*, 42 J. CMTY. HEALTH 109, 113 (2017) ("show[ing] promise for working with retailers in rural settings to increase healthy food availability in small food stores").

achieve their goal of increasing the prevalence of healthy food vendors in their communities.

Perhaps the most popular and publicized method of increasing the prevalence of healthy food vendors is to encourage the development of full-service grocery stores through financial and zoning incentives.[53] In New York City, the FRESH Program ("Food Retail Expansion to Support Health") "promotes the establishment and expansion of grocery stores in underserved communities by lowering the costs of owning, developing, and renovating retail space."[54] To qualify for the FRESH Program, a store must: (1) be located in an eligible area, (2) be a minimum of five thousand square feet, (3) devote at least 50 percent of its retail space to food products for home preparation and consumption, (4) devote at least 30 percent of its retail space for perishable goods, and (5) devote at least five hundred square feet for fresh produce.[55] Financial incentives for qualified stores include real estate tax reductions, sales tax exemptions for building materials, and reduced mortgage recording taxes.[56] The FRESH Program also offers zoning incentives, such as additional floor area in mixed-use buildings, reductions in the required number of parking spaces, and larger as-of-right stores in light manufacturing districts.[57] Since the FRESH Program's inception, nearly thirty stores have been designated as FRESH stores and benefited from the program's financing or zoning incentives.[58] The majority of these stores are located in Harlem, the Bronx, and Brooklyn.[59]

Los Angeles offers another example of local efforts to eliminate food deserts by incentivizing the development of grocery stores. In 2006, the city partnered with the Community Redevelopment Agency of Los Angeles to create the Grocery Store

53. *See* Broad Leib, *supra* note 12, at 334–36 (describing how local governments in cities like Philadelphia, New York City, and Baltimore have used "a range of financial and zoning incentives to encourage redevelopment of supermarkets and other healthy retailers").

54. THE CITY OF NEW YORK, ONENYC 250: HEALTHY LIVES 22 (2019) https://onenyc.cityofnewyork.us/wp-content/uploads/2019/05/OneNYC-2050-Healthy-Lives.pdf.

55. *Rules for Special Areas: FRESH Food Stores*, N.Y.C. DEP'T OF CITY PLAN., https://www1.nyc.gov/site/planning/zoning/districts-tools/fresh-food-stores.page.

56. *Food Retail Expansion to Support Health (FRESH) Program: About*, N.Y.C. BUS., https://www1.nyc.gov/nycbusiness/description/food-retail-expansion-to-support-health-fresh-program.

57. *FRESH Food Stores*, *supra* note 55.

58. *Food Retail Expansion to Support Health (FRESH)*, N.Y.C. ECON. DEV. CORP., https://edc.nyc/program/food-retail-expansion-support-health-fresh.

59. *Id.*

and Sit-Down Restaurant Incentive Package to attract grocery stores to southern Los Angeles.[60] Along with loans, grants, tax credits, and reduced utility costs, the program offers "assistance in identifying and assembling potential sites [and] expedited review by the City Planning Department and Building and Safety Department."[61] In addition, the Healthy Grocery Stores Project in Los Angeles has advanced the establishment of a conditional use permitting process for new grocery stores and renovations of existing grocery stores.[62] This initiative suggests that stores being developed or renovated in non-food desert areas be required to pay a fee into a fund allocated for grocers opening or renovating stores in food deserts.[63]

Greater access to healthy foods can also be achieved through farmers' markets and mobile food vendors.[64] Although the establishment of a farmers' market or mobile food vendor would not technically change an area's food desert status under the USDA definition, these types of retailers are desirable because they are "far less complicated, time-consuming, and expensive" to develop than a traditional grocery store.[65] Although the process of establishing a farmers' market may be much simpler than developing a grocery store,[66] it is not without costs and difficulties. Many cities require farmers' markets to obtain a conditional use permit or variance to operate.[67] To encourage the establishment of farmers' markets, cities can amend their zoning ordinances to include farmers' markets as permitted or allowed use, thereby eliminating the need for this type of permit.[68] Mobile food vendors selling fresh fruits and vegetables have also grown in popularity,[69] although they sometimes face additional zoning challenges. For example, in 2012, a chef in

60. Nicky Bassford et al., *Food Desert to Food Oasis, Promoting Grocery Store Development in South Los Angeles*, CMTY. HEALTH COUNCILS, INC., 1, 11 (2010), https://suprmarkt.la/wp-content/uploads/2017/09/Food-Desert-to-Food-Oasis.-Promoting-Grocery-Store-Development-in-South-Los-Angeles.pdf.

61. *Id.*

62. Seymour, *supra* note 43, at 434.

63. *Id.*

64. Broad Leib, *supra* note 12, at 335.

65. *Id.* at 335.

66. *Id.* at 336.

67. *Establishing Land Use Protections for Farmers' Markets*, NAT'L POL'Y & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY & PUB. HEALTH L. & POL'Y, 1, 3 (Dec. 2009), https://www.ca-ilg.org/sites/main/files/file-attachments/resources__establishing20land20use20protections20for20farmers2720markets_final_091203.pdf?1441322984.

68. *Id.* at 8–9.

69. Broad Leib, *supra* note 12, at 335–36 (describing mobile food vendors operating in New York City, Chicago, and rural areas of New Mexico).

Charlotte, North Carolina sought to create a mobile farmers' market offering fresh fruits and vegetables in neighborhoods without grocery stores.[70] However, the city's zoning ordinances limited where and when mobile vendors could operate.[71] The city eventually modified its ordinance to extend to mobile farmers' markets the same use as other produce stands, including in residential neighborhoods.[72]

Another option to increase healthy food accessibility is to improve the quality of the food sold at existing small food retailers in a community, such as convenience stores.[73] These stores usually stock highly processed, pre-packaged foods and limited fresh produce.[74] However, cities can require, encourage, and incentivize these small stores to stock healthy food items. This may take the form of an ordinance requiring licensed grocery stores (including corner stores and gas stations) to sell a certain amount of basic food items.[75] Other ordinances could also be amended to remove some of the hurdles to selling fresh produce.[76] Cities can also encourage small stores to stock healthy foods voluntarily through programs that provide education on how to store and prepare fresh produce as well as free marketing materials and shelving.[77]

If land planning is successful in increasing the prevalence of healthy food retailers in a community through a large-scale grocery store, farmers' markets, or improved small retailers, additional steps

70. Chuck McShane, *Mobile Market Plan Meets Zoning Obstacle*, UNIV. OF N.C. CHARLOTTE URBAN INST. (Apr. 16, 2014), https://ui.uncc.edu/story/mobile-farmers-markets.

71. *Id.*

72. CHARLOTTE, N.C. MUN. CODE § 12.539 (2019), https://charlottenc.gov/planning/Rezoning/Documents/Revised%20Zoning%20Ordinance/ZoningOrd_Chapter12.pdf.

73. CTRS. FOR DISEASE CONTROL & PREVENTION, HEALTHIER FOOD RETAIL: AN ACTION GUIDE FOR PUB. HEALTH PRACTITIONERS 48 (2014), https://www.cdc.gov/nccdphp/dnpao/state-local-programs/pdf/healthier-food-retail-guide-full.pdf.

74. *Id.*

75. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 203 (2018), https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT10FOCO_CH203GRST (requiring grocery stores to offer for sale a certain amount of staple food items, including dairy, animal or vegetable proteins, fruits and vegetables, juice, whole grains, and legumes).

76. *See* MCCANN, *supra* note 5, at 6.

77. *See, e.g.*, Fran Daniel, *Forsyth County Stores Provide Access to Food in Areas Considered Food Deserts*, WINSTON-SALEM J. (July 16, 2016), https://www.journalnow.com/news/local/forsyth-county-stores-provide-access-to-food-in-areas-considered/article_91e0b044-f3c5-510b-92f7-e436abf8c8bd.html (describing the Healthy Corner Store Network in Forsyth County, N.C.).

may also need to be taken to enable and encourage residents to take advantage of their neighborhood's new offerings.[78]

B. Improving Transportation Systems

For several reasons, efforts to increase the prevalence of healthy food vendors are not always enough to ensure access to food. Due to a lack of suitable land and other factors, it is simply infeasible for a grocery store to be developed in certain neighborhoods.[79] Large parcels of land may not be available, while "assembling a multitude of smaller parcels . . . many with unclear titles [and] cleaning up brownfields" present additional challenges.[80] Meanwhile, farmers' markets often focus on fresh produce and other perishable items without offering other staples like cereals, crackers, and canned goods. Thus, residents may still need to travel some distance to purchase all their needed items. In these situations, cities must work "to better connect inner city residents to more distant supermarkets."[81]

Transportation-related issues can be a significant barrier to accessing healthy foods.[82] Over two million households in the U.S. do not own a vehicle and live more than a mile from the nearest

78. For example, local governments may need to work with farmers' markets to ensure they have electronic benefit transfer (EBT) machines to accept Supplemental Nutrition Assistance Program (SNAP) benefits. Broad Leib, *supra* note 12, at 336. In addition, the purchase of healthy foods can be incentivized. The 2014 Farm Bill created the Food Insecurity Nutrition Incentive (FINI) grant program that provides funding to local organizations to support programs that encourage SNAP participants to purchase more fruits and vegetables. U.S. DEP'T OF AGRIC., FOOD INSECURITY NUTRITION INCENTIVE GRANT PROGRAM, https://www.nifa.usda.gov/sites/default/files/grant/FY%202018%20Food%20Insecurity%20Nutrition%20Incentive%20(FINI)%20Final.pdf. The format of the incentive programs varies from offering tokens and loyalty cards to coupons, vouchers, and automatic discounts, but many provide a dollar-for-dollar match for the purchase of fresh produce. GRETCHEN SWANSON CTR. FOR NUTRITION, FOOD INSECURITY NUTRITION INCENTIVE GRANT PROGRAM FINDINGS, https://www.centerfornutrition.org/her-fini.

79. Broad Leib, *supra* note 12, at 336–37; HANNAH BURTON, THE FOOD TR., STIMULATING SUPERMARKET DEV.: A NEW DAY FOR PHILA. (2004), https://nextcity.org/pdf/Stimulating_Supermarket_Development-_A_New_Day_for_Philadelphia.pdf. (developing a supermarket in an urban area can cost 30 percent more than developing one in a suburban area).

80. Kami Pothukuchi, *Inner City Grocery Retail: What Planners Can Do*, PROGRESSIVE PLAN. 1, 12 (2004), http://www.plannersnetwork.org/wp-content/uploads/2012/07/PlannersNetwork_No158_062607.pdf.

81. *Id.*

82. For example, in Detroit, almost a quarter of the residents surveyed considered lack of transportation as their primary obstacle to accessing healthy food. *See* FAIR FOOD NETWORK, STRENGTHENING DETROIT VOICES (2013), https://fairfoodnetwork.org/wp-content/uploads/2017/01/FFN_SDV-TTH-Infographic_Print.pdf.

supermarket.[83] Thus, many of these people likely rely on public transit or non-motorized forms of transportation, such as walking or biking.[84] The onset of the COVID-19 pandemic highlighted the transportation-related difficulties of obtaining food as transit systems in many major cities implemented temporary limits on the number of passengers[85] and reduced services.[86] These issues regarding transportation cannot be resolved by a single entity but must be addressed collaboratively by government transportation and planning authorities, food retailers, and non-governmental organizations.

Public transportation can be prohibitive to food access if bus fares are high or if the rider must take multiple lines to reach a store.[87] Thus, city planners and transportation authorities should work together to provide convenient and low-cost public transportation that connects residents of food deserts with healthy food retailers. Cities can design or modify their bus routes with food accessibility in mind[88] or create special grocery bus lines.[89] One early example of this is seen in Knoxville, Tennessee. In the early 1980s, Knoxville created the Food Policy Council which worked with the Knoxville Transportation Authority Board to extend bus lines from impoverished areas to grocery stores.[90] The council also joined with the Knoxville Transit Authority to establish a special "grocery bus" that provided round-trip transportation to grocery stores for only one dollar.[91]

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83. BELL ET AL., *supra* note 15, at 11.

84. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 73, at 100.

85. *See, e.g.*, Nathan Layne, *Overnight Closure of New York Subways May Presage Bigger Changes*, REUTERS (May 1, 2020), https://www.reuters.com/article/us-health-coronavirus-newyork-subway/overnight-closure-of-new-york-subways-may-presage-bigger-changes-idUS KBN22D55D; Katie Canales, *Almost All of San Francisco's Public Transit Will Be Shut Down as the City Continues to Fight the Coronavirus Disease*, BUS. INSIDER (Apr. 7, 2020), https:// www.businessinsider.com/san-franciscos-public-transit-coronavirus-shutting -down-2020-4.

86. *See* Matt Haines, *Pandemic Worsens "Food Deserts" for 23.5 Million Americans*, VOA NEWS (May 19, 2020), https://www.voanews.com/a/usa_pandemic-worsens-food-deserts-235-million-americans/6189526.html.

87. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 73, at 107.

88. *See, e.g.*, *id.* at 106 (Los Angeles); WINSTON-SALEM & FORSYTH CNTY. PLAN. & DEV. SERVS. DEP'T, FOOD ACCESS REP. 6 (2016), https://www.cityofws.org/DocumentCenter/ View/6829/06-23-2016-Forsyth-County-Food-Access-Report.pdf (Winston-Salem).

89. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 73, at 107 (discussing the grocery bus line created in Austin, Texas, which takes food desert residents to supermarkets in other neighborhoods).

90. KNOXVILLE-KNOX CNTY. FOOD POL'Y COUNCIL 6 (2012), http://www.knoxfood. org/wp-content/uploads/2018/04/2012-Food-Policy-Council-Case-Study-12.10.12.pdf.

91. *Id.*

Cities can also increase food accessibility by improving conditions for pedestrians and cyclists.[92] Many people do not have access to public transportation and may have to walk or bike to food retailers.[93] Even where public transportation to healthy food retailers is available, neighborhood residents will likely still need to walk or bike to bus stops. Cities need to provide and maintain sidewalks, bike lanes, street lighting, and safe street crossings.[94] These measures can help reduce the risk of traffic injuries and crime that residents may be wary of when walking to nearby stores.[95] An effort to improve the streets in urban neighborhoods can be seen in Winston-Salem, North Carolina. The city's comprehensive plan has identified twelve major roadways as "growth corridors" in need of improvement.[96] The first roadway encompasses several areas considered food deserts.[97] Improvements will focus on providing landscaping, improved pedestrian facilities, and accommodation for bicycles to support the urban, neighborhood business district.[98]

Ideally, local governments should consider all modes of transportation together when addressing food accessibility in a neighborhood. Smart Growth America, a nonprofit organization involved in urban planning and development, created the Complete Streets approach as a guide for communities in designing their streets to provide safe access for those driving, walking, biking, and using public transportation.[99] Even with improved public transit and pedestrian accessibility, some groups of people may still

92. SMART GROWTH AM. & NAT'L COMPLETE STS. COAL., COMPLETE STREETS MEAN EQUITABLE STREETS, http://old.smartgrowthamerica.org/documents/cs/factsheets/cs-equity.pdf (last visited Nov. 1, 2022).

93. *Id.*

94. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 73, at 104.

95. *Id.*

96. *See* CITY-CNTY. PLAN. BD., THE LEGACY 2030 UPDATE 40 (2013), https://www.cityofws.org/DocumentCenter/View/479/Chapter-3—Growth-Management.pdf.

97. WINSTON-SALEM & FORSYTH CNTY. PLAN. & DEV. SERVS. DEP'T, PETERS CREEK GROWTH CORRIDOR PLAN 1 (2019) https://www.cityofws.org/DocumentCenter/View/2617/Peters-Creek-Corridor-Plan-PDF?bidId=.

98. *Id.*

99. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 73, at 104.

be unable to reach food retailers.[100] Efforts to fill these transportation gaps must look beyond land planning techniques.[101]

C. Improving Healthy Food Consumption

Increasing access to healthy food vendors and improving public transportation does not guarantee that residents will make better food choices.[102] Several studies measuring the effect of a new supermarket on an underserved community have shown no significant change in the residents' food buying or eating habits.[103] As a result, some local governments have sought to increase healthy food consumption by requiring vendors to offer healthy foods or by restricting residents' access to unhealthy foods.[104] Proponents of these methods reason that residents will be more likely to choose healthy foods if there are more healthy options and fewer unhealthy options available.[105] This Section will discuss the potential zoning mechanisms for increasing healthy food consumption and their effectiveness. The Section will also address charges of paternalism and discrimination arising from attempts to use zoning to improve people's eating habits.[106]

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100. For example, senior citizens, people with disabilities, and those with young children may have difficulty accessing traditional public transportation or be unable to walk extended distances. *Id.* at 109.

101. One way to bridge these transportation gaps could be through shuttle services operated independently by local governments, food retailers, and non-governmental organizations or by partnerships between these groups. *Id.* at 109–10. For example, several supermarket chains in Los Angeles offer free shuttle services to customers who spend a minimum amount at their stores. *Id.* at 109. In southeast Michigan, the Chelsea Area Transportation System collaborated with a local farmers' market to provide senior citizens transportation between several senior citizen centers and the market. *Id.* at 110.

102. Rosenberg & Cohen, *supra* note 6, at 1106.

103. *Id.* at 1106–07.

104. *See, e.g.*, Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2251 (2007) (discussing trans-fat bans in New York City and Philadelphia); Susan M. Kansagra et al., *Reducing Sugary Drink Consumption: N.Y.C.'s Approach*, AM. J. PUB. HEALTH 61, 63 (2015) (discussing USDA's denial of New York City's request "to remove sugary drinks from the list of allowable purchases through the Supplemental Nutrition Assistance Program"); Jennifer Medina, *In South L.A., New Fast-Food Spots Get a "No, Thanks,"* N.Y. TIMES (Jan. 15, 2011), https://www.nytimes.com/2011/01/16/us/16fastfood.html (discussing moratorium on new fast food restaurants in South Los Angeles).

105. JULIE SAMIA MAIR ET AL., THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY 9–20 (2005), https://www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-publicshealth/research/_pdf/ZoningFastFoodOutlets.pdf.

106. Rebecca L. Goldberg, *No Such Thing as a Free Lunch: Paternalism, Poverty, and Food Justice*, 24 STAN. L. & POL'Y REV. 35, 55 (2013).

Performance zoning that focuses on the effects of land use could be used to promote healthy food choices by requiring food vendors, such as food trucks, fast food establishments, and other restaurants, to offer a certain number of healthy alternatives.[107] One example of a city requiring vendors to offer healthy foods is Boston, Massachusetts. Food trucks operating on public land in the city must offer at least one healthy food option.[108] Additionally, as noted above, New York City's FRESH Program requires stores to dedicate at least five hundred square feet to fresh produce to qualify for its incentives.[109]

Another method to encourage healthy food consumption is using zoning to restrict access to unhealthy foods, primarily by regulating fast food restaurants.[110] There are several approaches to regulating fast food restaurants. First, a locality could entirely ban fast food restaurants either directly through a specific provision in the zoning code or indirectly through an exclusive list of permitted uses that does not include fast food outlets.[111] Los Angeles pursued the former option in 2010 by banning new free-standing fast food restaurants in South Los Angeles as part of a public health effort.[112] Second, a locality could restrict fast food restaurants by regulating

107. MAIR ET AL., *supra* note 105, at 25.

108. Press Release, City of Bos. Mayor's Office, Mayor Menino Announces New Food Truck Set to Serve up Tasty Treats on Boston's Streets (July 12, 2011), http://www.bostonplans.org/news-calendar/news-updates/2011/07/12/new-food-trucks-set-to-serve-up-tasty-treats-on-bo (noting how [t]he healthy food option cannot "include fried foods, trans-fats, or high fructose corn syrup" and must include "at least three of the following: fruits, vegetables, whole grains, low-fat dairy, reduced fat or lean meats that are grilled, broiled or baked").

109. THE CITY OF NEW YORK, *supra* note 54.

110. There is no consensus on what constitutes a "fast food restaurant," causing to some manipulation of the phrase to fit the desired outcome. For example, the justification for the fast food ban in South Los Angeles discussed below cited statistics stating that 45 percent of restaurants in South Los Angeles were fast food restaurants while only 16 percent of restaurants in other parts of the city were fast food restaurants. Roland Sturm & Aiko Hattori, *Diet and Obesity in L.A. County 2007–2012: Is There a Measurable Effect of the 2008 "Fast-Food Ban"?*, 133 SOC. SCI. & MED. 205, 211 (2015). This count, however, considered any restaurant with seating for less than ten as a fast food restaurant, no matter the type of food served. *Id.* In contrast, the actual ordinance defined a fast food restaurant as "any establishment which dispenses food for consumption on or off the premises, and which has the following characteristics: a limited menu, items prepared in advance or prepared or heated quickly, no table orders, and food served in disposable wrapping or containers." *Id.* at 206.

111. MAIR ET AL., *supra* note 105, at 40.

112. Medina, *supra* note 104. The ordinance "dovetailed with an initiative to encourage supermarkets and stores with presumably healthier fare to move in." Adam Chandler, *Why the Fast-Food Ban Failed in South L.A.*, THE ATL. (Mar. 24, 2015), https://www.theatlantic.com/health/archive/2015/03/why-the-fast-food-ban-failed-in-south-la/388475.

their distance from places like schools, churches, and hospitals.[113] One example where this is done is in Detroit, Michigan. Detroit's zoning ordinance requires a minimum of five hundred feet between a fast food restaurant and an elementary, middle, or high school.[114] A third option is regulating the density of fast food restaurants.[115] This entails limiting the number of such establishments by spacing requirements or per unit space.[116] This form of zoning is often used to preserve the unique character of a locality, but it could also be used for public health purposes.[117]

Although zoning to restrict fast food accessibility has been frequently suggested,[118] the effectiveness of such zoning on improving eating habits is questionable.[119] South Los Angeles's ban on new fast food restaurants is a telling example. Proponents of the ban credited the initial one-year moratorium enacted in 2008 as contributing to the opening of the area's first new supermarket in a decade.[120] However, a 2015 study found no evidence that the ban had improved residents' diets or reduced obesity.[121] In fact, obesity rates in the areas under the ordinance actually "increased faster than in other parts of the city."[122] Nonetheless, the researchers did suggest that perhaps the ordinance failed because it only targeted

113. MAIR ET AL., *supra* note 105, at 51–52.

114. Broad Leib, *supra* note 12, at 340. This ordinance has been in effect since 1978 without any legal challenges. MARYAM ABDUL-KAREEM ET AL., HARRISON INST. FOR PUB. L., USING ZONING TO CREATE HEALTHY FOOD ENV'TS IN BALTIMORE CITY 16 (2009), https://urbanhealth.jhu.edu/_pdfs/hbr_index_food/baltimorecity_2010_zoningcreatinghealthyfoodenvironments.pdf.

115. MAIR ET AL., *supra* note 105, at 50.

116. *Id.*

117. *See id.* at 48–51 (explaining the use of zoning "to preserve the unique character of the area and to ensure that the area continues primarily to serve the retail needs of the surrounding community").

118. *See, e.g.*, Marice Ashe et al., *Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants*, 92 AM. J. PUB. HEALTH 1404, 1407 (2003) (discussing nutrition and land use); *see* Freeman, *supra* note 105, at 2257 (discussing the option of imposing land use requirements on fast food restaurants to reduce appeal and availability); *see generally* MAIR ET AL., *supra* note 105 (discussing the restriction of fast-food accessibility and its impact on consumer health).

119. *See* Freeman, *supra* note 104, at 2250 (explaining that other unhealthy eating habits impact the effectiveness of zoning on improving healthy eating habits).

120. *See* Medina, *supra* note 104 (explaining no new stand-alone fast food establishments have opened in the South Los Angeles area since the City Council's 2008 one-year moratorium).

121. *See* Press Release, Rand Corp., No Evidence that Los Angeles Fast-Food Curbs Have Improved Diets of Cut Obesity (Mar. 19, 2015), https://www.rand.org/news/press/2015/03/19.html.

122. *Id.*

new stand-alone fast food restaurants thereby allowing other small food retailers to proliferate.[123]

Even if such efforts are determined to be effective, critics still contend that the use of zoning to change people's dietary habits is inappropriate because it is paternalistic and perhaps even discriminatory.[124] Strong paternalism involves "one party taking action to benefit a second party without the second party's consent, and in a way that is either coercive or involves a restriction of liberty."[125] Thus, government restrictions on fast food that affect a discrete group are seen as a paternalistic effort to limit the group's ability to make food choices for themselves.[126]

Critics of paternalistic laws argue that: (1) policymakers socially separated from their target populations may create "ineffective, unnecessary, or harmful laws" because they lack the necessary understanding of those populations, (2) this separation can lead to a distrust of the policymakers, (3) such laws may deprive the disadvantaged of their rights and perpetuate discrimination, and (4) such laws prevent communities from solving their problems in the way they see fit.[127] On the other hand, proponents of paternalistic laws argue that: (1) the benefits of paternalistic laws outweigh any reductions in autonomy, (2) the preferences of the disadvantaged have been substantially influenced by external forces such that government paternalism is justified, (3) such laws are also used to benefit the general population, and (4) such laws may advance substantive equality by "leveling the playing field."[128] Given these various factors, it is unsurprising that there appears to be no clear consensus among those most concerned with food justice and the wellbeing of low-income or minority neighborhoods as to

123. *See* Sturm & Hattori, *supra* note 98, at 205–11 (discussing how regulations only impacted stand-alone fast food establishments).

124. *See* Goldberg, *supra* note 106, at 65–66 (discussing paternalism toward the poor reflected in two policy initiatives).

125. *Id.* at 65.

126. *See, e.g.*, Karl Vick, *L.A. Official Wants a Change of Menu*, WASH. POST (July 13, 2008), http://www.washingtonpost.com/wpdyn/content/article/2008/07/12/AR2008071201557_2.html (describing how critics of Los Angeles' proposed ban on new fast food restaurants called the councilwoman behind the proposal a "fascist" and a "nanny-stater").

127. *See* Goldberg, *supra* note 106, at 75–76 (explaining the critics of paternalistic laws arguments).

128. *Id.* at 70–75.

whether paternalistic laws are ever justifiable, and if so, under what circumstances.[129]

One way to alleviate concerns regarding government paternalism is to involve the affected groups in the decision-making process.[130] This applies not only to efforts to restrict access to unhealthy foods but to all the land planning techniques addressed in this Paper. When local governments "work closely with their constituents [and] learn how the community purchases and prepares food," they can "respond to the community's unique needs[] and implement targeted and effective policy interventions."[131] Land planning decisions are simply more effective and successful when the people impacted by them have a say in their development.[132] Nonetheless, community involvement is no guarantee of success[133] perhaps because of the myriad of factors that go into people's food choices.[134]

VI. CONCLUSION

In conclusion, food inaccessibility is a complicated issue with no simple solution. Although this Paper recognizes the weaknesses of using land planning techniques to address food inaccessibility, that does not mean that such efforts should be abandoned. Particularly in light of the COVID-19 pandemic, local governments should continue to use whatever tools are at their disposal to ensure everyone has fair and equal access to food. Increasing the number

129. *See generally id.* (discussing the lack of consensus concerning paternalism; "scholarship suggests several reasons why such paternalism might make sense, but it also touches on many reasons to be wary of it").

130. *See id.* at 67 ("[W]hat we need when we make decisions affecting the well-being of other people is correct intuition about their needs and an attitude of respect for their autonomy."); *see also* Margaret Sova McCabe, *Reconsidering Federalism and the Farm: Toward Including Local, State and Regional Voices in America's Food System*, 6 J. FOOD L. & POL'Y 151, 161 (2010) ("[A]n essential element of a more effective food system is individual empowerment to shape it.").

131. Broad Leib, *supra* note 12, at 329.

132. *See id.* at 329–33 (contrasting New York City's decision made without community input to bulldoze six hundred community gardens with Chicago's food system plan created after twenty-six public meetings).

133. *See* Goldberg, *supra* note 106, at 88–89 (demonstrating how, for example, the decision to ban fast food in South Los Angeles did at least appear to have fairly significant community involvement and support); *see also id.* (explaining how the ordinance was spearheaded by a city councilwoman representing a district within South Los Angeles and had the support of two community groups); *see also id.* at 89 (emphasizing that two-thirds of South Los Angeles residents aware of the initial moratorium supported it).

134. *See* Ver Ploeg & Rahkovsky, *supra* note 41.

of healthy food vendors, improving transportation systems, and encouraging healthy food consumption could very well be effective if used in conjunction with interventions that also address the underlying poverty found in many of the areas considered food deserts.[135]

135. *See generally* Rosenberg & Cohen, *supra* note 6 ("The goal should be to create policies that build capital within communities and distribute our country's substantial wealth more equitably, while providing living wages and labor standards so that people can have time and money to provide for their needs.").

TRAUMA-INFORMED LEGAL ADVOCACY

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I. INTRODUCTION

A trauma-informed approach in legal practice can reduce the re-traumatization of victims, provide recognition of the role trauma plays in the attorney-client relationship, and provide legal professionals with the opportunity to increase connections to their clients and improve advocacy.[1] Part Two of this article defines trauma and adverse childhood experiences and the impact they have on clients. It then explores indicators of trauma and how they may present case barriers if the attorney is not trauma informed. Part Three explores ways attorneys can tailor their practice of law to be trauma-informed with clients, support staff, and other professionals. It demonstrates how a trauma-informed practice enhances client resilience and case outcomes. Finally, Part Four explores how trauma-informed practice enhances the attorney's compliance with the Model Rules of Professional Conduct.

This article will explore sensitive matters that may be triggering for some readers. The article examines aspects of child physical and sexual abuse, child neglect, domestic violence, and suicidality. If you are contemplating suicide or are experiencing emotional distress, please contact your local Lawyer Assistance Program. A directory is in the footnote below.[2]

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1. *See generally* Talia Kraemer & Eliza Patten, *Establishing a Trauma-Informed Lawyer-Client Relationship (Part One),* 33 CHILD L. PRAC. 193, 198 (2014) (describing generally the benefits of trauma-informed legal practice to the lawyer and client, how trauma can affect the relationship between lawyer and client, and how to engage in trauma-informed legal practices).

2. *Directory of Lawyer Assistance Programs*, A.B.A., https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/?fbclid=IwAR0VYecyELQWjTHJlJqLuvLqbXNIZyxLP3_NETl1eWn-VO8f5uy7n77eenA (last visited Dec. 16, 2022).

II. UNDERSTANDING TRAUMA AND ADVERSE CHILDHOOD

A. Experiences "Trauma" Defined

"Trauma is an emotional response to a terrible event like an accident, rape, or natural disaster."[3] Trauma may result in both short- and long-term reactions for the person who experienced the terrible event.[4] Although the term "traumatized" is often used for less-than-traumatic experiences, like saying "The last season of *Game of Thrones* was awful; I am so traumatized!" genuine traumatic events are much more severe. Trauma results from exposure to incidents or series of incidents that are "emotionally disturbing or life-threatening with lasting adverse effects on the individual's functioning and mental, physical, social, emotional, and/or spiritual well-being."[5] It can occur "as a result of violence, abuse, neglect, loss, disaster, war and other emotionally harmful experiences."[6] Traumatic events can happen to anyone, regardless of age, gender, socioeconomic status, race, ethnicity, geographical location, or sexual orientation.[7]

Attorneys provide a professional service to people who are either planning for, protecting against, or actively involved in a legal dispute that may involve traumatic experiences. Attorneys may be entering their clients' lives at a time of great turmoil and possibly as a result of trauma the client or the client's family members have experienced. Death, rape, violence, disasters, commercial sexual exploitation, neglect, and life-threatening illnesses are just some examples of potentially traumatic experiences.[8] The attorney's role is to represent their client's interests in legal disputes. Therefore, attorneys can be uniquely positioned to help clients through whatever traumatic experience might have landed them in court. Through effective case management with a trauma-informed

3. *Trauma*, AM. PSYCH. ASS'N, http://www.apa.org/topics/trauma (last visited Oct. 25, 2022).

4. *Id.*

5. *What is Trauma?*, TRAUMA-INFORMED CARE IMPLEMENTATION RES. CTR., https://www.traumainformedcare.chcs.org/what-is-trauma (last visited Oct. 25, 2022).

6. SAMHSA'S TRAUMA AND JUSTICE STRATEGIC INITIATIVE, SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 2 (2014), https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf.

7. *Id.*

8. *See Understanding Childhood Trauma*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/child-trauma/understanding-child-trauma (last visited Oct. 25, 2022).

approach, attorneys can pave the way for better case outcomes while simultaneously promoting resilience for the clients they serve.[9]

Attorneys utilizing a trauma-informed approach do not take off their "attorney hat" and shift into a therapeutic role. Rather, taking a trauma-informed approach is a mechanism by which the attorney enhances their effectiveness by responding to the physical, emotional, psychological, sociological, and physiological needs of the client.[10] Just as an attorney representing a client in a personal injury case may be more effective by having an understanding of medical terminology relevant to that injury, so too are attorneys representing clients who have experienced trauma more effective when they shift and tailor their practice and communication strategies for those clients' cases.[11] To adopt a trauma-informed approach, attorneys must first be trauma-informed, educating themselves about what trauma is, its prevalence, and its impact on clients. Second, attorneys must commit to engaging in trauma-informed practices, which is when an attorney shifts how they communicate, litigate, represent, and interact with clients based on that understanding of trauma and responses to trauma in a way that minimizes additional harm to the client and their family.[12]

B. Adverse Childhood Experiences

Clients may have experienced a wide range of potentially traumatic events, even as children. Clients may even experience the effects of childhood trauma well into adulthood. Attorneys working in family law, particularly in child welfare, may be appointed to serve as a guardian ad litem representing a child's best interests or

9. *See generally* Vivianne Mbaku, *Trauma-Informed Lawyering*, NAT. CTR. ON L. AND ELDER RTS. 1–2, https://ncler.acl.gov/files/trauma-informed-lawyering.aspx (explaining the benefits to the lawyer and client of "trauma-informed lawyering," including improved case outcomes for the lawyer and client and reducing re-traumatization) (last visited Oct. 25, 2022).

10. *See generally* Kraemer & Patten, *supra* note 1, at 200–01 (describing generally the procedures to be used in trauma-informed care and the reasons for them, including the increased effectiveness to an organization providing a trauma-informed approach and better serving the needs of the traumatized individual).

11. *See* Albert Averbach, *Medical Arsenal of a Personal Injury Lawyer*, 12 CLEV.-MARSHALL L. REV. 195, 203 (1963) (explaining the benefits to a personal injury lawyer understanding medical terms and facts); *see generally* Kraemer & Patten, *supra* note 1, at 198 (describing generally the benefits to legal practice of trauma-informed care).

12. *See generally* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 371 (2016) (describing how an attorney should shift practices to adjust to a client's trauma and minimize further harm).

as a court-appointed counsel representing a caregiver. Particularly when working on cases involving children, but even when working on cases involving only adults, it is important to understand Adverse Childhood Experiences ("ACEs") and their long-term impact on clients.

According to the Centers for Disease Control and Prevention ("CDC"), ACEs are potentially traumatic events that occur in childhood.[13] "ACEs are linked to chronic health problems, mental illness, and substance use problems" in adulthood.[14] They can "negatively impact education, job opportunities, and earning potential."[15] Unfortunately, ACEs are also common, with the Centers for Disease Control and Prevention reporting that about 61 percent of adults surveyed across twenty-five states reported they have at least one type of ACE, and one in six experienced four or more types of ACEs.[16]

The impact of ACEs was first discovered by the CDC-Kaiser Permanente Adverse Childhood Experiences Study conducted from 1995 to 1997 with 17,337 exams and confidential surveys regarding childhood experiences and current health status and behaviors (commonly referred to as the "original ACE Study").[17]

"[ACEs] are categorized into three groups: abuse, neglect, and household challenges" and "all ACE questions refer to the respondent's first 18 years of life."[18] ACEs include experiencing emotional abuse, physical abuse, sexual abuse, having a mother treated violently, experiencing substance abuse in the household, experiencing mental illness in the household, experiencing parental separation or divorce, having an incarcerated household member, experiencing emotional neglect, and experiencing physical neglect.[19]

13. *Fast Facts: Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/aces/fastfact.html (last visited Oct. 25, 2022).

14. *Id.*

15. *Id.*

16. *Id.*

17. *About the CDC-Kaiser ACE Study*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/aces/about.html (last visited Oct. 25, 2022).

18. *Id.*

19. *Id.*

Experiencing ACEs can cause long-term, lasting impacts for children who have experienced them, even well into adulthood.[20] The correlation between one's ACEs score and outcomes is inverse, meaning the higher the ACEs score, the worse the outcomes.[21] Impacts include negative health conditions, increased health risk behaviors, and socioeconomic challenges.[22] Higher ACE scores are correlated to higher risk for negative health conditions including depressive disorder (44 percent), chronic obstructive pulmonary disease (27 percent), asthma (24 percent), kidney disease (16 percent), stroke (15 percent), coronary heart disease (13 percent), cancer (6 percent), diabetes (6 percent), and being overweight or obese (2 percent). Associated increased health risk behaviors include smoking (33 percent) and heavy drinking (24 percent). Finally, a higher ACE score correlates with increased socioeconomic challenges such as unemployment (15 percent), obtaining less than a high school education (5 percent), and no health insurance (4 percent).[23] It is estimated that up to 1.9 million cases of heart disease and 21 million cases of depression could be avoided by preventing ACEs.[24] Children who experience ACEs die on average twenty years earlier than those with no ACEs.[25]

These statistics seem bleak. However, children who have experienced ACEs can go on to live healthy lives. Resiliency, "the ability to bounce back from life's difficulties," can play a role in improving outcomes for children.[26] Resiliency is shaped both by biological and developmental characteristics and external influences.[27] Positive influences are called protective factors, and protective factors are the antidote to ACEs.[28]

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20. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Adverse Childhood Experiences (ACEs) Preventing Early Trauma to Improve Adult Health*, CDC VITAL SIGNS (Nov. 2019), https://www.cdc.gov/vitalsigns/aces/pdf/vs-1105-aces-H.pdf.

21. *See* Melissa T. Merrick et al., *Vital Signs: Estimated Proportion of Adult Health Problems Attributable to Adverse Childhood Experiences and Implications for Prevention – 25 States, 2015-2017*, 68 CDC MORBIDITY & MORTALITY WKLY. REPS. 999, 1001 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6844e1.htm.

22. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 20 (percentages have been rounded to the nearest whole number) (citing Merrick et al., *supra* note 21).

23. *Id.*

24. *Id.*

25. Kerry Jamieson, *Resilience: A Powerful Weapon in the Fight Against ACEs*, CTR. FOR CHILD COUNSELING (Aug. 2, 2018), https://www.centerforchildcounseling.org/resilience-a-powerful-weapon-in-the-fight-against-aces.

26. *Id.*

27. *Id.*

28. *Id.*

In fact, a 2017 study called "The Welsh Adverse Childhood Experience (ACE) and Resilience Survey examine[d] individual and community factors that may offer protection from the harmful impacts of ACEs."[29] Conducted by the National Health Service in Wales, it found that overall, having a high resiliency rating like "having supportive friends, opportunities to engage with their community, people to look up to, and other sources of resilience in childhood more than halved the current mental illness in adults with four or more ACEs from 29% to 14%."[30] Likewise, "individuals reporting constant personal support from at least one parent during childhood had lower levels of current mental illness than those without such parental support across all ACE levels."[31] The study concluded, "personal, relationship, and community resilience resources such as social and emotional skills, childhood role models, peer support, connections with school, understanding how to access community support, and a sense that the community is fair to you are strongly linked to reduced risks of mental illness across the life course."[32] "High childhood resilience is related to substantial reductions in lifetime mental illness and potentially offers protections even in those with no ACEs."[33] Most intriguing for the purposes of this article is that access to sources of resilience in adulthood continues to be associated with lower levels of current mental illness, and "[f]ocus should include developing opportunities for individuals to increase their resilience resources across the life course, to offer protection from the adverse effects of ACEs as well as trauma that may occur in adulthood."[34]

Attorneys can promote resilience in their adult and child clients. "[I]ndividuals with higher ACE counts reported lower levels of childhood support . . . from professionals [], and had lower perceptions of the supportiveness of services as adults."[35] Adults who have experienced ACEs are not getting the support from professionals that they need, and their perception of the services

29. Karen Hughes et al., *Sources of Resilience and Their Moderating Relationships with Harms from Adverse Childhood Experiences*, PUB. HEALTH WALES, NHS TRUST & BANGOR INST. OF HEALTH & MED. RSCH. 5 (2018), https://www.wales.nhs.uk/sitesplus/documents/888/ACE%20&%20Resilience%20Report%20(Eng_final2).pdf.

30. Jamieson, *supra* note 25 (citing Hughes et al., *supra* note 29).

31. Hughes et al., *supra* note 29, at 23.

32. *Id.* at 7.

33. *Id.*

34. *Id.* at 37.

35. *Id.* at 8.

professionals refer them to is low. With this knowledge, attorneys can shift their case management and communication with clients to accommodate clients' perceptions in a way they feel more meaningfully supported. If attorneys know at the outset that clients with high ACEs scores feel less supported, they can focus on building an attorney-client relationship where that support is more apparent, building a stronger rapport than they may otherwise have.

C. Impact of Trauma and ACEs on Clients

Responses to experiencing trauma are not uniform. Some individuals may exhibit signs of post-traumatic stress disorder ("PTSD"), while others may exhibit more subtle responses.[36] "How an event affects an individual depends on many factors, including the characteristics of the individual, the type and characteristics of the event(s), developmental processes, the meaning of the trauma, and sociocultural factors."[37] Responses can be both short- and long-term. "Initial reactions [] can include exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, confusion, physical arousal, and blunted affect."[38] Individuals can experience reactions that are "emotional, physical, cognitive, behavioral, social, and developmental."[39]

i. Emotional

Emotionally, individuals who have experienced trauma may even after the initial reaction feel "anger, fear, sadness, and shame" (although they may not be able to recognize or articulate those feelings).[40] It can be difficult for individuals to regulate their emotions, and substance abuse is one of the methods individuals use in an attempt to regain control of their emotions.[41] These individuals may also engage in self-harm, disordered eating, or

36. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., TREATMENT IMPROVEMENT PROTOCOL 57: TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVS. 59 (U.S. Dep't of Health and Human Servs. No. 14-4816, 2014), https://www.ncbi.nlm.nih.gov/books/NBK207191.

37. *Id.*

38. *Id.* at 61.

39. *Id.*

40. *Id.*

41. *Id.* at 63.

compulsive behaviors.[42] Traumatic stress generally evokes one of two extremes: overwhelmingness or numbness.[43] Individuals may feel anxious, depressed, helpless, and in a state of panic.[44]

ii. Physical

Individuals who have experienced trauma may present with physical conditions. "Common physical disorders and symptoms include somatic complaints; sleep disturbances; gastrointestinal, cardiovascular, neurological, musculoskeletal, respiratory, and dermatological disorders; urological problems; and substance use disorders."[45] While more research is forthcoming on the biology of trauma, what scientists do know "is that exposure to trauma leads to a cascade of biological changes and stress responses."[46] These are associated with "PTSD, other mental illnesses, and substance use disorders."[47]

A person may also present with hyperarousal, which is when they are hypervigilant as "the body's way of remaining prepared."[48] "It is characterized by sleep disturbances, muscle tension, and a lower threshold for startle responses and can persist years after trauma occurs."[49]

Although it serves as a means of self-protection after trauma, it can be detrimental. Hyperarousal can interfere with an individual's ability to take the necessary time to assess and appropriately respond to specific input, such as loud noises or sudden movements. Sometimes, hyperarousal can produce overreactions to situations perceived as dangerous when, in fact, the circumstances are safe.[50]

Sleep disturbances are also common. Individuals who have experienced trauma may experience "early awakening, restless sleep, difficulty falling asleep, and nightmares."[51] Additional

42. *Id.*
43. *Id.*
44. *FAQ: Common Reactions to Traumatic Events*, MASS. INST. OF TECH. MED., https://medical.mit.edu/faqs/common-reactions-to-traumatic-events#faq-2 (last visited Nov. 2, 2022).
45. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 36, at 64.
46. *Id.* at 65.
47. *Id.*
48. *Id.*
49. *Id.* at 65.
50. *Id.* at 65–66.
51. *Id.* at 66.

physical manifestations of trauma responses may include fatigue, headaches, stomachaches, increased heart rate, and elevated blood pressure.[52]

iii. Cognitive

Some cognitive changes in individuals who have experienced trauma may include cognitive errors, excessive or inappropriate guilt, idealization, trauma-induced hallucinations or delusions, and intrusive thoughts and memories.[53] Cognitive errors present when an individual misinterprets a situation as dangerous, even when it really is not, because it reminds them of past trauma.[54] Individuals may also experience "survivor guilt," wherein they feel guilty because others who also experienced the traumatic event did not survive.[55] Idealization can present as trauma bonding, where a person develops an emotional attachment to their perpetrator of interpersonal trauma (similar to Stockholm syndrome that involves "compassion and loyalty toward hostage takers").[56] When individuals experience hallucinations and delusions, "they are biological in origin" and "contain cognitions that are congruent with trauma content."[57] Finally, individuals who have experienced trauma may experience "thoughts and memories associated with the trauma."[58] "[They] can easily trigger strong emotional and behavioral reactions, as if the trauma was recurring in the present."[59]

Cognitively, individuals who have experienced trauma may also experience difficulty concentrating, difficulty making decisions, memory disturbances, flashbacks, preoccupation with the event, a sense that things are not real, worrying, or experiencing amnesia of the event.[60] Individuals "often believe that others will not fully understand their experiences, and they may think that sharing their feelings, thoughts, and reactions related to the trauma will fall

52. MASS. INST. OF TECH. MED., *supra* note 44.
53. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 36, at 66.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. MASS. INST. OF TECH. MED., *supra* note 44.

short of expectations."[61] Trauma impacts an individual's perceptions of the world, the future, and the self.[62]

iv. Behavioral

Behavior is often a reflection of emotions, and emotions are often a reflection of experiences. Therefore, it can be expected that experiencing trauma may impact behavior. "Some people reduce tension or stress through avoidant, self-medicating (e.g., alcohol abuse), compulsive (e.g., overeating), impulsive (e.g., high-risk behaviors), and/or self-injurious behaviors. Others may try to gain control over their experiences by being aggressive or subconsciously reenacting aspects of the trauma."[63]

Behavior can also be "consequences of, or learned from, traumatic experiences."[64] Consequential behavior may include changes in sleeping patterns, eating patterns, decreased personal hygiene, withdrawal, neediness, or not wanting to be alone.[65] Likewise, behavior may be learned from trauma. The feeling of helplessness, for example, may have been a learned feeling from a traumatic event and may present as a behavior when that person struggles with decision-making.[66] Another example of learned trauma behavior is a child who has experienced child sexual abuse mimicking the abusive behavior while playing with dolls.

v. Social

If trauma impacts emotions, and relationships are forged on emotional exchanges, it can be expected that trauma can impact individuals on a social level. Individuals may either lean more into their relationships or withdraw from them.[67] For example, a child who experienced trauma perpetrated by a trusted adult[68] may

61. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 36, at 68.

62. *See id.* (diagramming the "Cognitive Triad of Traumatic Stress" that is comprised of: (1) views of the world, (2) views about self, and (3) views about the future).

63. *Id.* at 70.

64. *Id.*

65. MASS. INST. OF TECH. MED., *supra* note 44.

66. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 36, at 70.

67. *See id.* at 74.

68. *See* RAPE, ABUSE, & INCEST NAT'L NETWORK, *Children and Teens: Statistics*, https://www.rainn.org/statistics/children-and-teens (last visited Nov. 2, 2022) (In many cases, child sexual abuse is perpetrated by a person the victim knows. Among cases reported to law enforcement, 93% of perpetrators are known to the victim.).

experience difficulty forming healthy attachments.[69] "Early betrayal can affect one's ability to develop attachments, yet the formation of supportive relationships is an important antidote in the recovery from traumatic stress."[70] People who experience trauma may have outbursts, feel ashamed of their reactions, and perceive that no one will understand and pull away, believing they are a burden to others.[71]

Consequential and learned behaviors may also prove to be impediments to a person's relationships and may hinder the development of new, healthy relationships.[72] For example, if a person as a result of trauma develops impulsive behaviors, they may have difficulty in self-regulating their words, actions, and reactions in social settings. Likewise, individuals who as a result of trauma engage in self-medication may experience difficulty interacting in social settings wherein self-medicating is taboo or have difficulty self-regulating alcohol consumption in social settings.

vi. Developmental

Trauma occurring early in life can have "enduring negative effects on brain development."[73] "Experiencing many ACEs, as well as things like racism and community violence, without supportive adults, can cause what's known as toxic stress. This excessive activation of the stress response system can lead to long-lasting wear-and-tear on the body and brain."[74] Furthermore,

> [l]earning how to cope with adversity is an important part of healthy development. While moderate, short-lived stress responses in the body can promote growth, toxic stress is the strong, unrelieved activation of the body's stress management system in

69. *See* Hilary I. Lebow, *How Childhood Trauma May Affect Adult Relationships*, PSYCHCENTRAL (June 10, 2021), https://psychcentral.com/blog/how-childhood-trauma-affects-adult-relationships.

70. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 36, at 74.

71. *See id.*

72. *See id.*

73. *Id.* at 75.

74. HARV. UNIV. CTR. ON THE DEVELOPING CHILD, *ACEs and Toxic Stress: Frequently Asked Questions*, https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions (last visited Nov. 2, 2022); *see also* HARV. UNIV. CTR. ON THE DEVELOPING CHILD, *Toxic Stress Derails Healthy Development*, https://developingchild.harvard.edu/resources/toxic-stress-derails-healthy-development (last visited Nov. 2, 2022).

> the absence of protective adult support. Without caring adults to buffer children, the unrelenting stress caused by extreme poverty, neglect, abuse, or severe maternal depression can weaken the architecture of the developing brain, with long-term consequences for learning, behavior, and both physical and mental health.[75]

Significant neglect[76] can even "cause more lasting harm to a young child's development than overt physical abuse."[77] Having responsive caregivers is essential to a child's healthy development.

Healthy brain architecture depends on a sturdy foundation built by appropriate input from a child's senses and stable, responsive relationships with caring adults. If an adult's responses to a child are unreliable, inappropriate, or simply absent, the developing architecture of the brain may be disrupted, and subsequent physical, mental, and emotional health may be impaired. The persistent absence of "serve-and-return" interaction acts as a "double whammy" for healthy development: not only does the brain not receive the positive stimulation it needs, but the body's stress response is activated, flooding the developing brain with potentially harmful stress hormones.[78]

Toxic stress can cause significant and lasting developmental disruptions.[79] Children who are not exposed to regular "serve-and-return" interactions are not getting the interactions they need to shape healthy brain architecture.[80] Therefore, addressing toxic stress in child welfare is critical, and brain science should inform the attorney's client interactions and case management.

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75. *Toxic Stress Derails Healthy Development*, *supra* note 74.

76. HARV. UNIV. CTR. ON THE DEVELOPING CHILD, *InBrief: The Science of Neglect*, https://developingchild.harvard.edu/resources/inbrief-the-science-of-neglect-video (last visited Nov. 2, 2022) (defining significant neglect as "the ongoing disruption or significant absence of caregiver responsiveness").

77. *Id.*

78. *Serve and Return*, HARV. UNIV. CTR. ON THE DEVELOPING CHILD, https://developingchild.harvard.edu/science/key-concepts/serve-and-return (last visited Nov. 2, 2022).

79. *See id.*

80. *See id.*

D. Indicators and Barriers of Trauma and ACEs in Cases

Trauma and ACEs may have been experienced by any of an attorney's clients. Attorneys, by nature of being helping professionals, are positioned to encounter individuals who have experienced trauma. Put another way, one thing the entire list of ACEs has in common is that they are all instances when an attorney may get involved or when the person who experienced the ACE may encounter the legal system. Whether it be a substance-abuse-related criminal charge, a dissolution, a child removal proceeding, or probate, attorneys may encounter individuals who experience trauma and/or ACEs, and attorneys may encounter individuals at the time when that trauma and/or ACE has the most significant impact on their lives.

"Those who require the most help may be the hardest to reach."[81] However, attorneys are often the best-positioned individuals to cultivate a client's resilience while representing their interests in court..[82] When a client's traumatic experience or ACE must be encountered in a legal setting, they can manifest as case barriers.[83] Understanding the impact trauma and ACEs have on clients will better prepare attorneys to mitigate case barriers early in the attorney-client relationship. Examples of case barriers include:

A client who has experienced trauma and/or ACEs may exhibit . . .	***Which may cause or appear to cause the client to . . .***
Shame	Be less than forthcoming about their experience
Difficulty sleeping	Appear late to court or meetings
Difficulty concentrating	Not understand and therefore not follow the attorney's instructions or excessively contact the attorney for already provided information
Self-medication	Experience substance use disorders
Impulsive behaviors	Make decisions that provide short-term benefits while being

81. Hughes et al., *supra* note 29, at 8.
82. *See generally* Kraemer & Patten, *supra* note 1, at 199.
83. *See id.* at 198.

	detrimental in the long-term
Memory disturbances	Be unable to recall the sequence of events chronologically or remember key facts later making their story seem inconsistent
Fear	Be reluctant to testify
Avoidance	Not return phone calls
Trauma bonding with the perpetrator	Refuse to cooperate or seek for the case to be dismissed
Hyperarousal	Appear jumpy, nervous, and excessively responsive to loud noises or large spaces
Skepticism	Distrust turning to social workers, law enforcement, and the justice system for help
Dissociation	Appear as if they do not care
Insufficiently developed social skills	Appear as disrespectful

The second column in the above chart may be succinctly categorized as "case barriers." An attorney, judge, or jury that does not understand trauma may view a client who exhibits these behaviors as disinterested, uncredible, inconsistent, disrespectful, difficult, unreliable, and time-consuming.[84] This characterization can lead the attorney to lash out at the client by asking "What is wrong with you?" rather than the more trauma-informed approach of asking "What happened to you?" a response that addresses the problematic behaviors as something to treat rather than something to punish. "Trauma-informed care or services are characterized by an understanding that problematic behaviors may need to be treated as a result of the ACEs or other traumatic experiences someone has had, as opposed to addressing them as simply willful and/or punishable actions."[85]

It can be frustrating for an attorney when they are in a situation where they are surprised with information from opposing

84. *See generally* Mbaku, *supra* note 9, at 1, 3 (recognizing that lawyers' misunderstanding of trauma responses may lead them to ask the incorrect questions "What is wrong with you? Why are you so ____?" instead of "What happened to you?").

85. *ACEs and Toxic Stress: Frequently Asked Questions*, *supra* note 74 (emphasis original).

counsel, law enforcement, or child protective services because they wish the client had disclosed the information earlier so any damage to the case's strength could be mitigated.[86] Oftentimes, surprise information creates barriers to the attorney's effective representation.[87] Attorneys may think, "I am representing this client, and I cannot do my job if they will not be transparent with me; we are on the same team!"

A trauma-informed attorney transitions their thinking about the situation and would reflect: "What about the developed attorney-client relationship made the client either (1) not know the information they withheld was important or (2) made them uncomfortable in being fully transparent?" Put another way, the trauma-informed attorney would refocus the problem on creating a relationship and environment that transitions the question of "What is wrong with you?" or "Why did you?" to "What happened to you?" They would refocus the response from that of punishment and blame to a response reflecting an understanding that the problematic behavior may be a result of trauma or ACEs. When trauma-informed attorneys reframe how they think about a problem, they can then promote the client's resilience and become a protective factor.[88] Trauma-informed attorneys can do this by shifting their communication with clients in a way that tells them they are genuinely believed, working with clients in a nonjudgmental manner, and treating clients with the compassion and dignity they deserve and may have never previously experienced.

Adopting trauma-informed techniques promotes resilience for clients, improves case outcomes, benefits the attorney and support staff, and strengthens the professional community. "The attorney-client privilege is the oldest privilege recognized by Anglo-American jurisprudence."[89] However, such a longstanding privilege

86. *See generally* Kraemer & Patten, *supra* note 1, at 199 (outlining how a client's past trauma may lead to a reluctance to disclose relevant information, which "can create many barriers" for the lawyer).

87. *See generally id.*

88. *See generally* Mbaku, *supra* note 9, at 1–2 (stating that "trauma-informed practice assists lawyers in connecting to their clients, creating better legal outcomes and more robust advocacy"); *see also* Jamieson, *supra* note 25 (identifying positive external influences as protective factors that foster resilience).

89. Stephen Forte, *What the Attorney-Client Privilege Really Means*, SMITH GAMBRELL RUSSELL (2003), https://www.sgrlaw.com/ttl-articles/916/#fnref:1; *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (demonstrating early recognition of the attorney-client privilege).

is pointless if clients continue to feel unable to be fully transparent with their attorney despite such strong evidentiary protections.[90] By being trauma-informed, attorneys can build the attorney-client relationship necessary to make the client comfortable enough to be more transparent, thereby strengthening their cases by enhancing the attorney's capacity for effective representation.

The attorney and support staff also benefit from modeling trauma-informed techniques. Attorneys are "the most frequently depressed occupational group in the United States and are 3.6 times more likely to suffer from depression than nonlawyers."[91] When attorneys create an environment of compassion with clients and staff, the attorney is better equipped to recognize and address their fatigue.[92] Attorneys can then develop the self-care skills to better recognize and address signs of compassion fatigue and burnout. When attorneys model a trauma-informed approach, they also develop a culture wherein attorneys and support staff have permission to be vulnerable, authentic, and practice self-care before compassion fatigue and burnout develop. By being trauma informed, the attorney acknowledges many professionals have experienced trauma themselves; when that is acknowledged, the attorney can practice while reducing re-traumatization to those they work and serve with.

III. TAILORING YOUR LEGAL PRACTICE WITH A TRAUMA-INFORMED APPROACH

Once an attorney has an understanding of trauma, ACEs, and their impact on clients, they can tailor their legal practice to respond to clients in a way that promotes resilience. Taking a trauma-informed approach effectively promotes resilience for clients, strengthens the client's case, promotes self-care among

90. *See generally* Forte, *supra* note 89 (outlining that the rationale of attorney-client privilege is to encourage the client's "willing[ness] to communicate to counsel things that might otherwise be suppressed").

91. Michael S. Webb, *Dissenting From Death: Preventing Lawyer Suicide*, A.B.A. (Nov. 24, 2021), https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2021/voice-of-experience-november-2021/dissenting-from-death-preventing-lawyer-suicide.

92. *See generally* Mbaku, *supra* note 9, at 2 (identifying self-care as an integral component of an effective trauma-informed approach that allows the lawyer to avoid and recognize secondary trauma and compassion fatigue).

attorneys and support staff, and promotes collaboration in the attorney's professional community.

A trauma-informed approach is supported by the American Bar Association. In a 2018 resolution, the American Bar Association articulated its support for attorneys using trauma-informed and evidence-based approaches and practices for system-involved children and youth exposed to violence.[93] Like this article, the American Bar Association resolution urges attorneys to recognize trauma's impact on children, respond through legal representation reflecting that awareness, and collaborate with other professionals to support resiliency.[94] Attorneys can begin the transition to a trauma-informed approach by shifting how they interact with clients.

A. Clients—Generally

A trauma-informed approach with clients should be implemented threefold: (1) before the attorney meets with a prospective client, (2) during the meeting and/or representation, and (3) after the meeting and/or representation has concluded.

Before the attorney meets with a prospective client, they can take steps to ensure their practice is fully utilizing a trauma-informed approach. During the meeting and throughout the representation, the attorney can utilize tactics to tailor their communication and case management in anticipation of and in response to potential traumatic client responses. Finally, the attorney can develop trauma-informed approaches to continue enhancing and reinforcing client resilience once the representation is complete.

i. Clients—Before Representation

Before the attorney ever meets with a prospective client, they can begin taking a trauma-informed approach in the way the attorney and/or the firm is presented using a variety of tactics. Attorneys should consider modeling trauma-informed techniques in the firm's environment, gaining cultural competency, understanding racial and historical trauma, providing resources,

93. *Child Trauma*, A.B.A. (Sept. 24, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/child-trauma.

94. *Id.*

exhibiting transparency, ensuring intake processes are trauma-informed, training trauma-informed staff, and acknowledging biases.

The first tactic the attorney can use is to ensure they are providing an inclusive, welcoming environment. At a minimum, attorneys should plan to meet with clients in a space that provides accommodations, making it as accessible as possible. The attorney should make sure all meeting spaces are accessible to persons with disabilities and that they have reliable access to services like language interpretation. For attorney-client privilege and other practical reasons,[95] it is important that attorneys use professional interpreters rather than leaning on other individuals (like the client's family members) to translate. The attorney can make sure the infrastructure needed to meet with clients in an inclusive, welcoming manner is in place before they meet with the client.

Attorneys practicing family law should especially be prepared to interact with clients for whom acquiring childcare arrangements are difficult or impossible. Attorneys serving as a guardian ad litem should expect their clients to be children. While certainly there are many considerations regarding whether to allow a child to be present for the adult-client meeting, the attorney can at a minimum ensure the waiting areas of the office are equipped with family-friendly items (such as toys and child-themed magazines) to help serve as a distraction for the child. Having something in the waiting area for all ages can help the client feel the attorney was anticipating their needs.[96] This can lessen the traumatized client's potential feeling of being an inconvenience and reduce the anxiety that the attorney might not be welcoming and kind to them and their situation. Another seemingly simple environmental example would be to include tissues in rooms where the attorney meets with clients. This serves to normalize having emotional responses for the client and shows the client the attorney anticipated their needs in advance. The client may feel less of a

95. Clients may be reluctant to be fully transparent if they are reluctant to disclose that information to the person(s) accompanying them. Also, perpetrators can use the victim's language barrier as a means to further control and limit the victim's access to services. To ensure the client has the full ability to be as transparent and safe as possible, the attorney should insist on meeting with the client alone and utilize a reputable interpreting service.

96. *See generally* Kraemer & Patten, *supra* note 1, at 200 (identifying "proactive support" as a component of a trauma-informed lawyer-client relationship in which the lawyer "[a]nticipate[s] issues that may arise during" the representation).

burden because being prepared with tissues shows them that they probably were not the first person to cry in the office.

The second trauma-informed tactic attorneys can adopt before meeting with a prospective client is to be culturally competent. Attorneys work with clients from a wide array of cultures. Being intentional about understanding aspects of prospective clients' cultures and honoring them can serve as a protective factor in promoting client resilience. The key is understanding the client is the best expert on their culture. Therefore, it can be helpful to work with the client to identify what is culturally important to them. The infrastructure for those conversations and information collection can be created ahead of time, such as having standard questions in client intake forms and interviews identifying matters of the client's cultural importance. Attorneys can consult clients about what aspects of their culture are important to them and how the attorney can ensure they are honored throughout the legal process. However, the attorney must understand this to be an ongoing conversation throughout the representation, since neither the attorney nor the client can predict all the ways in which the legal system might impede on or overlap with the cultural needs and identity of the client.

Attorneys should also acknowledge the impact of racial trauma and historical trauma on their clients. For example, Black clients may have a legitimate fear of law enforcement due to racial trauma and ongoing instances of police brutality against the Black community.[97] Clients who have experienced racial and/or historical trauma may be scared about interacting with the justice system as a whole.[98] Likewise, clients who have immigrated without legal status may also be extremely fearful of the possible implications for them and their families, such as separation and deportation.[99] Attorneys should honor those feelings by being honest and transparent. They must ask about their client's concerns and help make a plan to

97. *See generally* Sirry Alang et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars,* 107 AM. J. PUB. HEALTH 662, 663 (2017) (explaining how excessive police force might create feelings of helplessness in the Black community).

98. *See generally Racial Trauma*, MENTAL HEALTH AM., https://www.mhanational.org/racial-trauma (last visited Nov. 10, 2022) (explaining how racial trauma can affect various aspects of an individual's life).

99. *See generally* Bob Glaves, *Immigration and Access to Justice: A Much Bigger Problem Than It Needs to Be*, CHI. BAR FOUND. (Feb. 28, 2017), https://chicagobarfoundation.org/blog/bobservations/immigration-access-justice-much-bigger-problem-needs (identifying fear of detainment or deportation as an additional barrier immigrants without legal status face in gaining access to justice).

minimize those concerns when possible. A client who fears for their life, separation from their child, or deportation cannot adequately endure a legal process until those fears are addressed and they are supported.[100]

The third trauma-informed tactic attorneys should use before meeting with a prospective client is to evaluate the resources they provide. The attorney should ask, "Am I providing adequate information about resources to the clients we serve?" Take note of what resources look like in the law office. If a person who has experienced trauma were to be sitting in the office waiting area or looking at the law firm's website, what says to them "There is help for me." Are the resources provided and promoted by an attorney trauma-informed and accessible?

The fourth trauma-informed tactic attorneys should use before meeting with a prospective client is to evaluate the law firm's transparency. It can be helpful when working with clients who have experienced trauma to be proactively transparent. Have you ever watched a commercial and not quite understood what the product or service was that the commercial purported to promote? Attorneys should strive for the opposite. Prospective clients should not have that type of confusion. The law firm's website should clearly outline what type of law the attorneys practice, who works there, and what the client can expect when they reach out. Clients who have experienced trauma will inevitably have to tell their story to the person who becomes their legal advocate. When a client can gauge to whom and in what type of environment that storytelling will happen, they will become more comfortable. A client might be asking themselves, "Does anyone at this law firm look like me? Do they defend people charged with the same things my perpetrator did to me?" Will they be compassionate?"

Fifth, attorneys should proactively review their standard form documents, such as retainer agreements and client intake forms to ensure they are trauma informed. The attorney can review form documents to make sure they are culturally competent and welcoming. For example, attorneys can proactively indicate their law firm is welcoming to transgender and non-binary people by asking on their intake forms for preferred names and pronouns. It is then critical that the attorney and staff honor and respect those preferences throughout the representation. Attorneys should also

100. *See generally id.*

ensure form documents reflect transparency, such as being clear about the scope of representation, fees, and how fees are calculated.

Sixth, attorneys should ensure support staff have been fully trained in a trauma-informed approach. The first people clients will likely encounter in the law firm are support staff. Attorneys can proactively ensure staff are trained in trauma-informed approaches as well.[101]

Seventh, attorneys should acknowledge their biases, because everyone has them. We are all human. As humans, we carry potential biases against individuals, whether it is their profession, race, gender, or even biases against certain caregiving roles, such as fathers or mothers. Attorneys should research reputable implicit bias training and consider incorporating it into regular law firm training. Once biases have been identified, attorneys and staff can create a plan for reducing their influence in case management. For example, it can be difficult to keep in mind that a client living in poverty does not equate to the client committing child neglect.. It is so easy to impute personal expectations and standards of living on others. Acknowledging these biases can be critical so attorneys and staff can check them periodically throughout case management.

Finally, the attorney should strive to use words reflecting their understanding of how trauma impacts the client. For example:

Instead of asking . . .	***Try . . .***
Why didn't you tell me the whole story?	I believe you. I am here if anything else comes to mind.
Why were you late?	Is there a time of day that works best for you? *or* Let's plan to meet beforehand to go over some things.
Why don't you understand what I just explained? *or* As I said previously . . .	What questions do you have for me? *or* I know this is all so very new to you; what can I elaborate on?

101. *Infra* Part II.

Why aren't you quitting [substance]? Don't you care about getting your kids back?	Other clients have had great success with [successful program]; would you like for me to send you the information?

ii. Clients—During Representation

During the attorney's representation of the client, they should implement trauma-informed tactics for client communication and case management. The difference between the trauma-informed tactics implemented before and during representation is that the tactics implemented during representation must remain fluid and responsive to a particular client's needs, whereas tactics implemented before representation can be uniform.

The first trauma-informed tactic the attorney should use during representation is to be transparent. The transparent attorney is clear about both case barriers and expectations. Clients who have experienced trauma, particularly children who have been neglected or abused, have likely been lied to, coerced, and manipulated into situations. Attorneys have the opportunity to demonstrate to that child that the legal profession will not further traumatize them. Attorneys must be transparent with clients, even with bad news. It will be much better for a client to hear that there is a case barrier from the attorney—their advocate—rather than experiencing it and learning about it for the first time in court. For example, imagine a survivor of child sexual abuse who first learns there is a problem with the prosecution's case against her perpetrator at trial when it came out during the investigator's testimony that a case delay was a result of the investigator's recorder getting wet and ruining some recorded interviews of witnesses on it. The survivor is then devastated and feels betrayed as if a secret that could have ruined the case was kept from her. However, had that situation been explained to her earlier, the prosecutor or investigator would have had the opportunity to explain that it would not be a huge barrier and could have explained ways in which they could have mitigated any damage to the case without the victim experiencing significant additional anxiety or feeling betrayed.

So too attorneys should be transparent about roles and expectations. Attorneys can outline roles and expectations in retainer agreements but having a meaningful conversation with clients is especially important when working with clients who have experienced trauma. This is true not only of the nature of the attorney-client relationship in general but in outlining the attorney's expectations for each meeting. For example, when an attorney asks the client to come into the office to practice their testimony, the attorney should explain that they will be asking the client questions as if they were on the witness stand. The attorney should further explain that testimony practice will entail the client detailing the nature of their victimization. The attorney should refrain from "sugarcoating" the situation when it comes to explaining to victims what they are being asked to do. They should also be patient and kind when the client has questions, proactively ask them what the attorney can do to make their experience less difficult, and reassess their comfort level regularly throughout the process.

Second, attorneys should strive to make the environment of their client interactions as trauma-informed as possible. For example, the law firm's conference room might be large and intimidating. That can be a very effective negotiation strategy when meeting with opposing counsel. However, just as law enforcement should interview victims and perpetrators using starkly different techniques, so too should attorneys meet with clients and opposing counsel in different environments and use different tones. Maslow's hierarchy of needs tells us individuals must attend to their basic physical and psychological needs before they can attend to needs like self-actualization.[102] So if a client is hungry, they are not well-equipped to tell their story. When a client does not feel safe, like in the above example of racial trauma, they are not well-equipped to trust someone new like an attorney. When a juvenile client is worried about when they will get to visit their parents again, they are not well-equipped to be transparent about the facts of their case. Attorneys need to make sure they are meeting with clients in safe, comfortable spaces and in a manner that validates their concerns. For example, an attorney might decide to meet a child at school

102. Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCH. (Apr. 4, 2022), https://www.simplypsychology.org/maslow.html#%3A~%3Atext%3DThere%20are%20five%20levels%20in%2Cesteem%2C%20and%20self%2Dactualization.

rather than having them come to the law firm's office, ensuring they are not meeting during lunch or recess to reduce resentment. Keeping Maslow's hierarchy of needs in mind, meeting the child at school may be effective if that is where the child feels safest.

Third, regardless of where the attorney and client meet, the attorney should allow plenty of time and provide flexible timeframes for meetings. The attorney should permit ample time for questions and practice patience and active listening, even when the client asks questions the attorney thinks were already addressed and explained. The attorney should remember how trauma can impact a client's ability to concentrate and cognitively digest new information, particularly when it relates to their traumatic experience.

Fourth, the attorney should ask open-ended questions, which means letting the client tell their narrative on their terms. Due to the impact of trauma, clients may have suppressed memories, and they may not be able to tell their narrative chronologically. It is a normal coping mechanism to experience memory lapses, and attorneys must be flexible in collecting information. While the attorney is the legal expert, the client is the only expert on their experience. Attorneys should listen, and actively listen, to what clients are saying. Through active listening, the attorney may pick up small things the client says that while initially seeming unimportant could be key information in corroborating the evidence in their case.

Fifth, the attorney should engage in a strengths-based approach. The attorney should ask about the client's and the case's strengths. For example, the attorney could ask, "What is strong about your case? What do you think your strengths are?" Assessing the strengths of a case can be just as beneficial as case barriers. The attorney who can articulate a case's strengths knows what to focus on in litigation, what the client is already proficient at, and acknowledges to the client that they are strong and capable, which promotes client confidence. By taking a strengths-based approach, attorneys acknowledge that their clients are the experts of their own lives and needs.

Sixth, the attorney should adapt their language when communicating with the client. Attorneys should use language the client understands and language that signifies compassion. Some legal terms and jargon can carry stigmatization and can be re-traumatization. So too attorneys may use words or phrases that are

not even in the law but carry stigmatization and traumatization. For example:

- "Incest" is a Kentucky statutory criminal offense. However, some survivors may feel "incest" implies there was no force.
- "Statutory rape" is a term often used to signify a sex offense between an adult and a minor. When "statutory rape" is used, it can make a survivor feel like their rape is being kneecapped as a "less-than version" of rape or that it implies they gave consent. Attorneys need not categorize offenses as "statutory;" is not all rape statutory?

Attorneys can garner a lot of information by asking clients how they perceive their experience of victimization and honoring that.[103] Words carry great significance and meaning in court, and it may be inappropriate to ignore the actual legal jargon in a courtroom setting. However, attorneys can be proactive with clients by explaining why certain terms are being used in court.

Seventh, attorneys should respect client boundaries. Often, clients who experience trauma have had their physical and emotional boundaries crossed, or they were not able to form healthy boundaries as children. Attorneys can promote resiliency in clients by respecting their personal and emotional boundaries whenever possible. As a start, the attorney can help the client establish healthy boundaries by explaining the attorney's role and managing the client's expectations for response time, case outcomes, and expenses. Then, the attorney should model healthy boundaries to the client in the attorney's professional relationships with the court, opposing counsel, staff, and clients. Additionally, the attorney can help the client maintain healthy boundaries through legal advocacy when others cross the client's boundaries.

iii. Clients—After Representation

The attorney should also engage in trauma-informed practice after the representation of the client is complete. The attorney can be trauma informed in how they end the relationship,

103. *See* Katz & Haldar, *supra* note 12, at 375 (discussing the benefits of allowing survivors "to tell their side of the story" and voice their own perspectives).

providing resources and referrals, and empowering the client to advocate for change.

First, the attorney should exercise trauma-informed care when ending the attorney-client relationship. The attorney should articulate that the representation is complete and provide the client in writing with information on what, if any, steps are next. For example, if an attorney has represented a client in a domestic violence case resulting in a protective order, the attorney should communicate in writing when the protective order will expire and what the client should do leading up to that date.

Second, the attorney should ensure the client has appropriate resources and referrals. Depending on the case, clients may benefit from a case tracking system, such as VINELink;[104] mental health counseling; attorney referrals for adjacent legal matters, such as immigration; public benefits information and contacts; contacts for victim advocacy for any associated criminal matters the client may be involved; and more. Providing resources and referrals and doing so in writing is critical because clients who have experienced trauma may have difficulty remembering and trouble accessing them.

Third, the attorney could empower the client to advocate for changes in law and policy. Some clients may not want to resort to advocacy, and the attorney should respect that. However, if an attorney has a client who finds resiliency in advocating for change, the client may benefit from having the attorney encourage and empower them with the legal knowledge and background to be successful. Attorneys can help the client navigate the process of making legislative or regulatory changes that could result in better outcomes for future cases. Even if a case does not result in a positive outcome for the client, the client may nonetheless experience resilience through knowing their story may help someone else.

B. Professional Communities

Attorneys can promote trauma-informed practice by being trauma-informed when they work within their professional communities. Likewise, attorneys can use their professional

104. VINE: EMPOWERED BY INFO., https://vinelink.com/#state-selection (last visited Nov. 2, 2022).

communities to enhance the attorney's trauma-informed techniques.

i. Support Staff

Attorneys and support staff may have experienced trauma firsthand and may experience secondary or vicarious trauma through their work. If the attorney expects staff to be trauma informed with clients, so too the attorney should model trauma-informed techniques when working with staff. Do staff feel empowered to take a day off work to tend to their own fatigue without feeling guilty? Is the attorney checking in with them in a meaningful way? Do staff feel valued?

The attorney should take a strengths-based approach with staff just as they do with clients. Attorneys can help build staff confidence by highlighting their successes and having them self-assess their strengths. The attorney can also incorporate self-care strategies into the workplace to demonstrate that self-care is a priority. Examples include incorporating a regular work lunch, having a work walking break, and incorporating yoga and meditation in the office.

The attorney should take time to learn from their staff about trauma-informed techniques. Often, the first person a prospective or current client speaks to is the support staff. It can be a major step for someone who is experiencing trauma to make that first phone call. What is the reaction they are receiving? Is it compassionate, welcoming, and listening? Or are attorneys piling on so much work on their staff that they feel compelled to pass the client on or to abruptly silence the caller? Again, support staff are not therapists, but staff who realize they are encountering clients who have experienced trauma and that they may be the first person a client opens up to are better equipped to respond in a trauma-informed manner.

Support staff may also be collecting intake information from clients. Attorneys should review with support staff the importance of utilizing best practices, such as asking open-ended questions, actively listening, and being prompt. If staff are trauma informed, it sets the tone for the client that their experience with the firm will be trauma-informed as well.

Support staff may also be a great source for brainstorming trauma-informed techniques specific to the firm. Whether it is

documentation gathering, making the office waiting area more welcoming and accommodating, or adjusting how the office communicates with clients, trauma-informed support staff may be better positioned to identify needed changes and effectively implement them.

ii. Professionals in Other Disciplines

Attorneys should acknowledge trauma's prevalence among the other professionals they work with. Attorneys may be working with other attorneys, court staff, child protective services, and others. The attorney should proactively brainstorm ways they can model trauma-informed care among those professionals.

Attorneys can be trauma informed by seeking out opportunities to collaborate with professional partners.[105] While doing so, attorneys must respect the importance of their work and the value added to improving systems. Fostering an environment where the professionals are all working toward the client's objectives when possible can be value added to the client's ability to be resilient. Attorneys should take time to understand the professionals' objectives while maintaining the client's confidentiality.

Juvenile court is unique in the legal profession in that at least initially, everyone's goal is typically and statutorily the same: maintain a safe family unit. Zealous advocacy does not necessarily mean the advocacy is adversarial. When attorneys can work with professional partners to obtain united objectives, they are better equipping their clients for long-term success.

Attorneys can also lean on other disciplines to enhance the client's resilience. For example, guardians ad litem may look to Court-Appointed Special Advocates ("CASAs") when assessing a child's best interest. Sometimes, CASAs have the opportunity to build a stronger rapport with the child, the child's family, and other caregivers. Families may be more inclined to trust a CASA volunteer than someone working in the justice system like a social worker, law enforcement officer, or attorney. That trust can build a relationship wherein the CASA volunteer may be able to help the family assess its strengths and assist in developing a plan for long-term success.

105. *See generally* Kraemer & Patten, *supra* note 1, at 198 (encouraging attorneys "to consult other resources and mental health professionals working directly with [their] clients to better understand the impact of a client's experiences with trauma").

Some professionals also bring the added benefit of looking at the case from a different perspective. With social workers, law enforcement officers, and attorneys often carrying extremely heavy caseloads, CASAs sometimes work with just one family and may be better equipped to develop the rapport that other professionals cannot. Attorneys should also consider other professionals such as teachers, healthcare professionals, in-home services (such as Health Access Nurturing Development Services ("HANDS")), child advocacy centers, domestic violence and rape crisis centers, and more.

iii. Self

Finally, attorneys should be trauma informed themselves. Attorneys can prioritize their well-being by engaging in self-care. Self-care can be especially important when attorneys start to feel compassion fatigue or burnout sets in. Attorneys experience compassion fatigue when their ability to empathize with others becomes compromised.[106] They experience burnout when that exhaustion overwhelms them, and that can lead to low job satisfaction.[107] Attorneys may also experience secondary trauma from working with clients who have experienced traumatic events.[108] They can become stressed as a direct result of hearing clients describe the trauma that occurred to them.[109]

It is difficult to identify when a person needs to take a moment to themselves. Oftentimes, attorneys have such heavy workloads that it may seem like self-care is another item on a to-do list. Attorneys cannot always be expected to do their best; otherwise, their best would just be their normal. Implementing a consistent self-care plan can help address compassion fatigue and burnout before the attorney realizes it is happening. If attorneys are not trauma informed themselves, they are susceptible to compassion fatigue and burnout, which if untreated, can lead to repercussions

106. *See* Lee Norton et al., *Burnout & Compassion Fatigue: What Lawyers Need to Know*, 84 UMKC L. REV. 987, 989 (2016) (identifying "numbness" and "inability to remain engaged with and connected to people" as signs of compassion fatigue).

107. *Id.* at 988 ("The universal lament of professionals who suffer from burnout is, 'I hate my job.'").

108. Mbaku, *supra* note 9, at 2.

109. *See generally id.* (recognizing secondary trauma as a condition that "resembles post-traumatic stress disorder").

for their work and their clients.[110] To be truly trauma informed, attorneys must model a healthy relationship with themselves, those they work with, and those they serve. This may mean seeking therapeutic help when appropriate and encouraging staff to do so as well.

IV. THE TRAUMA-INFORMED APPROACH AS A METHOD OF ENHANCING COMPLIANCE WITH RULES OF PROFESSIONAL CONDUCT

Attorneys must adhere to the Rules of Professional Conduct in the states in which they are licensed. The trauma-informed approach enhances the attorney's compliance with the Model Rules of Professional Conduct.

A. Competence

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[111]

Attorneys must have "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[112] When attorneys work with clients who have experienced trauma, they do a more thorough job when they take a trauma-informed approach.[113] The trauma-informed attorney is more prepared, and the client is more prepared to handle the case and approach the case in a way that promotes resilience for the client. Attorneys cannot compellingly advocate for clients' needs if they have not taken the time to understand and thoroughly assess their needs with their clients.

Attorneys should also exhibit more legal competence when they have an understanding of matters underlying a case or impacting a client. For example, when representing clients who

110. *See generally*, *supra* note 106, at 988–89 (explaining how attorneys can be susceptible to compassion fatigue and burnout as well as outlining the negative impacts of each).

111. MODEL CODE OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

112. *Id.*

113. *See* Mbaku, *supra* note 9, at 1 ("Integrating trauma-informed practices provides lawyers with the opportunity to increase connections to their clients and improve advocacy.").

have experienced child abuse or neglect, attorneys are more competent when they understand the nature of what their clients have experienced. Attorneys are better equipped to represent victims of child sexual abuse when they understand how perpetrators groom victims, families, and communities. An attorney who does not understand grooming—the process by which a perpetrator gains the trust and isolates the victim to begin sexually abusing them—may not understand why a victim delayed disclosure, recanted after disclosure, or developed a trauma bond with their perpetrator. If an attorney represents a victim of child sexual abuse and is not competent in the psychological components of trauma, they may not be as thorough and prepared at the hearing or able to evaluate what is in the child's best interest. Attorneys should strive to obtain at least a basic knowledge of the underlying components of any case, just as an attorney would want to understand what a transmission is when working on a lemon law case regarding a faulty transmission.

B. Scope of Representation & Allocation of Authority Between Client & Lawyer

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[114]

This rule provides the route for attorneys to empower clients. Scope of representation and allocation of authority requires lawyers to respect clients' decisions concerning objectives and to consult with clients about the means by which they pursue those objectives. The attorney must also abide by the client's decisions regarding whether to settle.

Attorneys should take care not to impute their own case analysis onto the client in an attempt to sway their decision. Attorneys can articulate their experience with similar cases in the past and give them a legal analysis of the facts they have but should refrain from imputing on their clients what is "best" for them. Attorneys empower clients not by treating them as vulnerable but by doing the opposite. Attorneys can help clients realize they have power, they are believed, and they are capable.

Clients who have experienced trauma in the form of child abuse and their nonoffending families may have often been in situations where they did not control what they did, or what they said, or have the ability to vocalize what they needed. The attorney-client relationship might be the first relationship the client has had that gave them any authority, much less the authority to control the case objectives. Therefore, they may be less vocal about their objectives and may require the attorney to build rapport by showing they genuinely believe them and will respect the objectives and boundaries the client sets. There is power in promoting resiliency by the attorney modeling an appropriate agency relationship and

114. MODEL CODE OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

respect for the client's authority. Likewise, when the attorney consults the client about how their objectives are pursued, the attorney communicates that the client's opinions matter.

There is also power in relinquishing being the expert. The attorney may know the best legal strategy to "win" a case, but they cannot know if the means are in line with the client's objectives without consulting them. For example, an attorney may be debating whether to call a child to testify about violence the child witnessed in a home domestic violence case. While it may be beneficial for the case outcome, calling the child to testify may not be in line with the client's objective if they wish to minimize the child's exposure to court and not subject them to testifying.

Attorneys might also think about this rule in terms of representing a caregiver in a dependency, neglect, and abuse proceeding in which the child has been temporarily removed from that caregiver. If the goal is to have the child returned to the caregiver under safe circumstances, there are many means by which that goal could be achieved. Sometimes, the means to achieving that goal could be to work on and complete a child protective services case plan. In that instance, the attorney should consult with the client about what they need to be successful in completing their case plan and perhaps work to renegotiate components of the plan. Only by being trauma informed can the attorney know what strengths their client brings to the case—and every client brings strengths—and what barriers the client might have in completing the case plan. Then, through consultation, the attorney can maneuver how the client can reach that objective and tailor the means to the client's strengths. When the attorney discusses objectives with clients, they should gain an understanding of both short- and long-term objectives and strive to utilize means consistent with both.

C. Diligence

"A lawyer shall act with reasonable diligence and promptness in representing a client."[115]

In addition to being ethical, being diligent and prompt is being trauma informed. When representing clients who have experienced child abuse, diligence is demonstrated when the

115. MODEL CODE OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983).

attorney shows care and is conscientious of the child's trauma while managing the case. Attorneys demonstrate trauma-informed diligence by demonstrating reliability and prompt responsiveness.

For example, while working in government, the author received complaints from constituent child abuse victims and their families. The most common complaint was that no one was doing anything on the case. The constituents reported abuse, felt like their case was "falling through the cracks," and felt that no one cared. When the author looked into the cases, typically they were being pursued, but there were often unexpected delays or communication barriers. By being prompt and precise with clients and proactive in communication, attorneys honor the role they have throughout the process.[116]

D. Communications

The Model Rules of Professional Conduct provide guidance for adequate and appropriate attorney-client communication. Rule 1.3 states:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.[117]

116. This is true even in instances where attorneys are not legally representing the victim, such as a prosecutor in a criminal prosecution.

117. MODEL CODE OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

The communications rule includes the term "reasonable," "reasonably," and the phrase "reasonably necessary" when outlining what attorneys must do to comply.[118] Reasonableness may vary from case to case, and clients who experience trauma may need increased communication to meet the reasonableness requirement.

Remembering that trauma impacts memory should inform the attorney that more frequent communication and reminders may be necessary. Attorneys should not only be understanding of this but be proactive in providing the information in multiple ways, such as reiterating important deadlines and court dates in writing.

Attorneys must be especially cognizant of maintaining the confidentiality of clients who have experienced trauma. Clients may have perpetrators, current or past, who could use phone numbers, emails, or addresses to harm or threaten harm to the client. For example, the attorney should be extremely cautious when calling clients who have experienced domestic violence. They should be careful and selective about what they say in a voicemail because a perpetrator may have access to the client's phone. Attorneys should become familiar with local and state rules providing for the redaction of contact information of clients who have experienced violence.

Attorneys should also communicate with transparency about the public nature of court proceedings. They should explain which proceedings are confidential and which are open to the public. Attorneys should prepare the client thoroughly for testifying, so they are as equipped and comfortable as possible when that time comes. The attorney should also be as open with clients as possible about the scope of questioning they might encounter with opposing counsel.

Attorneys must understand that when a person has experienced domestic violence or abuse from another, their interests are inherently adverse, even if the matter is uncontested. Abuse creates a power imbalance. It simply is not trauma informed to represent both the perpetrator and the victim, even when the subject matter of the case is not specific to the violence because that power and control permeate throughout the entire relationship. Attorneys cannot expect traumatized clients to be forthcoming and

118. *Id.*

to genuinely have authority over their objectives when their manipulator is a client, too.

V. CONCLUSION

Traumatic experiences can have an incredible and long-lasting impact on the people exposed to them. Attorneys are often poised to represent clients who have experienced trauma. Attorneys who utilize a trauma-informed approach to practicing law can enhance their client's resilience—their ability to "bounce back"—and enhance their advocacy and case outcomes. There are a number of ways attorneys can be trauma informed with clients before, during, and after representation. Likewise, attorneys should be trauma informed with support staff and other professionals and model self-care. Finally, the attorney who uses trauma-informed practice enhances their ethical compliance with the Model Rules of Professional Conduct.

THE OBJECTIVE OBSERVER STRIKES OUT: A COMPARATIVE ANALYSIS OF *BATSON* REFORM IN WASHINGTON STATE

FINLEY RIORDON†

I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory strikes against potential jurors, also known as veniremen, based solely on their race.[1] Yet, the practice remains pervasive in American courts.[2] Indeed, there are few areas of American life where racial discrimination is as blatant, commonplace, and tolerated as in the jury selection process.[3]

Racial bias in the jury selection process affects all citizens and the fairness of our justice system. For one, trying a Black defendant before a mostly or all-white jury deprives the defendant of her constitutional right to trial by an impartial jury.[4] Studies also show that racially diverse juries return fairer and more credible verdicts than racially homogenous juries.[5] People of different races and ethnicities approach, question, and evaluate information

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1. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986); *see also* Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.").

2. *See generally* Emmanuel Felton, *Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection*, WASH. POST. (Dec. 23, 2021, 3:00 PM), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html (echoing the ongoing discussion of eliminating racial discrimination in jury selection).

3. *See generally id.*

4. *See* Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1615–16 (1985); *see also* Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 848 (1976).

5. Samuel Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 609–610 (2006).

differently, forcing diverse juries to consider a wider range of perspectives.[6] In turn, a racially and ethnically diverse jury will generally spend more time deliberating, make fewer errors, and perform its fact-finding duties more effectively.[7] And it's not just criminal defendants whose rights are affected when racial and ethnic minorities are kept out of the jury box—minority citizens have a right to serve their communities as members of a jury.[8]

In 1986, the Supreme Court in *Batson v. Kentucky* sought to cure the unconstitutional practice of race-based peremptory strikes in jury selection through a three-part framework, ultimately requiring a judicial finding of purposeful discrimination as the motivation for the strike for it to be unconstitutional.[9] But over thirty years later, the practice remains a prominent feature of jury selection in America.[10] In 2018, Washington became the first state to substantially alter the *Batson* framework with General Rule 37 ("GR 37").[11] Under GR 37, a court must deny a peremptory strike if it determines that an objective observer aware of implicit, institutional, and unconscious biases could view race or ethnicity as a motivating factor for the challenge.[12]

This Comment explores the implications, impact, and success of GR 37 four years after its enactment. Part II explains the traditional *Batson* framework and its critiques. Part III introduces GR 37 and explains key differences between the rule and *Batson*. Part IV conducts a comparative analysis of pre- and post- GR 37 case law in Washington to evaluate GR 37's success at eliminating the unfair exclusion of veniremen based on their race or ethnicity.

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6. Edward S. Adams, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 709 (June 1998).

7. Sommers, *supra* note 5, at 608–609; *see also id.*

8. Powers v. Ohio, 499 U.S. 400, 409 (1991).

9. *See* Batson v. Kentucky, 476 U.S. 79, 85–86 (1986) (describing the efforts of the Court to "eradicate racial discrimination" from the jury selection process).

10. *See generally* Jeffery S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 583–589 (1994) (examining judicial decisions and concluding that few Batson challenges succeed); *see also* Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html.

11. *See* Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37 (2018)); *see also Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, AM. C.L. UNION (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury.

12. WASH. CT. GEN. R. 37(d), (f) (2018).

Finally, Part V argues that GR 37 is not the most effective tool for curing racial discrimination in jury selection but rather, the most effective, beneficial, and meaningful solution is the outright elimination of peremptory strikes.

II. *BATSON*: AN OVERVIEW

In 1880, the Supreme Court first held that purposeful exclusion of Black citizens from jury service violates the Equal Protection Clause of the Fourteenth Amendment.[13] In the decades that followed, the Court engaged in "unceasing efforts to eradicate racial discrimination" in the selection of juries.[14] Yet, nearly 100 years later, the Court had made little progress in achieving this goal.[15] In 1986, in *Batson v. Kentucky*, the Court addressed a considerable source of discrimination in jury selection—race-based peremptory strikes, establishing a three-part procedural framework premised on a finding of purposeful discrimination.[16]

A. Traditional Batson *Framework*

In step one, *Batson* requires a criminal defendant to make a prima facie showing of racial discrimination.[17] This includes proving that the defendant is a member of a cognizable racial group and that the prosecutor has exercised a peremptory strike to remove members of her race from the venire.[18] If the defendant meets her burden in step one, the burden shifts to the State at step two to provide a race-neutral reason for the strike.[19] Finally, step three shifts the burden back to the defendant to show that the

13. Strauder v. West Virginia, 100 U.S. 303, 305 (1880) (while also holding that a criminal defendant has no right to a "petit jury composed in whole or in part of persons of his own race").

14. *Batson*, 476 U.S. at 85.

15. *See id.* (noting the span of time between 1880, when the court first held that purposeful exclusion of Black citizens from jury service violates the Equal Protection Clause, and 1986, when the court sought to cure the unconstitutional practice of race-based peremptory challenges).

16. *Id.* at 94–97.

17. *Id.* at 96.

18. *Id.*; *see also id.* at 97 (The trial court then decides "if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination").

19. *Id.* at 97.

offered justification is pretextual and the true purpose or intent behind the strike was racial discrimination.[20]

B. Why Batson *Fails*

From *Batson*'s inception, Justice Marshall expressed disbelief that the Court's decision would "end the racial discrimination that peremptories inject into the jury-selection process."[21] History has proved him correct. *Batson* is largely regarded as a "toothless" failure, and rightfully so.[22] In fact, some jurists argue that post-*Batson*, racially motivated peremptory strikes are easier to perpetrate, describing the process as "better organized and more systematized than ever before."[23] This appears to be at least partially true. For example, at a statewide prosecutor training conducted by the North Carolina Conference of District Attorneys, prosecutors in the state received a *Batson* "cheat sheet" of race-neutral reasons to offer if challenged.[24] It included reasons like "leaning away from questioner," "arms folded," and "monosyllabic" responses.[25]

Batson fails for several reasons. For one, its purposeful discrimination standard is relatively easy to evade. Pretextual questions are easy to invent and hard to disprove.[26] Indeed, only those attorneys who are "unapologetically bigoted" or "painfully unimaginative" are unable to circumvent *Batson*'s purposeful

20. *Id.* at 94 (Notably, if the State offers a race-neutral justification that the court accepts, whether the defendant has made a prima facie case becomes irrelevant.); *see* Hernandez v. New York, 500 U.S. 352, 360 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made prima facie showing becomes moot.").

21. *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

22. Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (1999) ("Only the most overtly discriminatory or impolitic lawyer can be caught in Batson's toothless bite and, even then, the wound will be only superficial.").

23. Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.").

24. State v. Clegg, 867 S.E.2d. 885, 907 (N.C. 2022).

25. Order Granting Motions for Appropriate Relief at 4–5, State v. Golphin, 97 CRS 47314–15 (N.C. Super. Ct. Dec. 13, 2012).

26. *See* Jonathan Abel, Batson's *Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 720 (2018) ("The prosecutor has so much freedom that she practically cannot get caught unless she picks a demonstrably false or explicitly race-based justification.").

discrimination standard.[27] This is because "stupid" race-neutral reasons are acceptable under *Batson*, which does not require that the offered reason for the strike be persuasive or even logical so long as it is honestly held.[28]

Moreover, *Batson*'s purposeful discrimination standard does nothing to protect against unconscious bias, which poses perhaps the biggest threat to the constitutionality and legitimacy of the jury selection process.[29] It also does nothing to encourage prosecutors to reexamine their own possible biases.[30] Under *Batson*, the State carries its burden in step two even when the justification "results in a racially disproportionate impact" so long as there is no "proof of racially discriminatory intent or purpose."[31] This framework does not account for the reality that due to systemic racism, Black Americans are more likely to distrust law enforcement and experience negative interactions with police.[32] Indeed, participation in the jury selection process may even facilitate these negative opinions about the judicial process in minority communities, which in turn can be used as a reason for striking a minority venireman.

Further, *Batson* challenges are traditionally reviewed for clear error or abuse of discretion.[33] When reviewing for clear error

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27. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011) (describing *Batson* as "ineffective as a lone chopstick").

28. *See* Johnson v. California, 545 U.S. 162, 171 (2005) (describing how "even if the State produces only a frivolous or utterly nonsensical justification for its strike [,]" the *Batson* objection may still be denied).

29. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.").

30. Order Granting Motions for Appropriate Relief at 4–5, State v. Golphin, 97 CRS 47314–15 (N.C. Super. Ct. Dec. 13, 2012) ("[T]rainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.").

31. Hernandez v. New York, 500 U.S. 352, 359–60 (1991) (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).

32. *See* Lauren McLane, *Our Lower Courts Must Get in "Good Trouble, Necessary Trouble," and Desert Two Pillars of Racial Injustice*—Whren v. United States *and* Batson v. Kentucky, 20 CONN. PUB. INT. L.J. 181, 204–05, (2021) (stating that Black Americans distrust law enforcement more than white Americans because of the history of racism within law enforcement and the criminal legal system).

33. *See Hernandez*, 500 U.S. at 364 ("*Batson's* treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases.").

or abuse of discretion, an appellate court must defer to the conclusions of the lower court—even if it disagrees—so long as the conclusion is not clear, manifest error.[34] Such a deferential standard of review makes it very difficult for appellate courts to provide defendants with any meaningful remedy.

Finally, the on-the-spot nature of a *Batson* challenge is awkward and uncomfortable for judges.[35] Granting a defendant's *Batson* challenge requires a judge to publicly conclude as a matter of law that the strike-opponent (1) has racist motivations, and (2) is lying about those motivations in open court. Naturally, judges are reluctant to make these accusations about their professional colleagues, which results in fewer successful *Batson* challenges.[36]

For these reasons, commentators have long been calling for the elimination of peremptory strikes.[37] Others, however, feel that peremptory challenges are too valuable to abandon, noting that peremptory challenges serve as an important check against biased jurors and allow counsel to create the most favorable jury for their client.[38] In turn, these commenters advocate for a modification of the *Batson* framework through blind voir dire or by limiting the

34. *See* Ulysses Gene Thibodeaux, *The Changing Face of Jury Selection:* Batson *and Its Practical Implications*, 56 LA. B.J. 408, 410 (2009) ("A trial court ruling on discriminatory intent, however, must be sustained unless it is clearly erroneous. Given the propensity for affirmance under this standard or an abuse of discretion standard, a trial court's ruling is virtually immune to reversal.").

35. *See* Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir. 2010) ("No judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges based on forbidden racial considerations."); *see also* Miller-El v. Dretke, 545 U.S. 231, 267–68 (2005) (describing a *Batson* challenge as "awkward" for the trial judge).

36. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1085 (2009) ("[R]epeated contact may lead to a close relationship and bond between the judge and the prosecutor. It therefore makes sense that the trial judges they appear in front of day after day would be reluctant to take prosecutors to task publicly.").

37. *See* Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, U. ILL. L. REV. 1407, 1415 (2018) (discussing the persistent call for the abolition of peremptory strikes); Batson v. Kentucky, 476 U.S. 79, 107 (1986) ("The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.").

38. *See* Richard Fausset & Tariro Mzezewa, *Nearly All-White Jury in Arbery Killing Draws Scrutiny*, N.Y. TIMES (last updated Nov. 24, 2021), https://www.nytimes.com/2021/11/04/us/ahmaud-arbery-killing-trial-jury.html ("Some legal scholars critical of *Batson* believe that peremptory strikes still have their place, serving as an important check against biased jurors.").

number of peremptory challenges each side may exercise.[39] Washington, however, chose to implement general rule 37 (GR 37), a race-conscious, affirmative rule designed to eliminate intentional and unintentional racial bias from the jury selection system.[40]

III. *BATSON*, BE GONE: GR 37

A. Background

GR 37 evolved from decades of demand for judicial reform in Washington State. The Washington judiciary has been embroiled by public concern and outcry over its disparate treatment of minority citizens since a 1980 study revealed an alarmingly disproportionate racial makeup of the state's incarcerated population.[41] In response to public criticism, the judiciary engaged in passive conversations about reform for the next few decades. This did little to improve the public perception of the judiciary in Washington State. In fact, in 2011, two then-justices suggested that Black citizens were disproportionally incarcerated by the state simply because Black citizens committed a disproportionate number of crimes.[42]

In the years since, the somewhat disgraced judiciary has employed task forces, legal scholars, and committee reports to root out the cause of disparate treatment and recommend ways it could improve its treatment of minority citizens.[43] In 2013, in *State v.*

39. *See* Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL'Y 323, 338 (2003); Fausset & Mzezewa, *supra* note 38.

40. *See* Order No. 25700-A-1221, *In re Proposed New Rule General Rule 37 —Jury Selection* (Wash. Apr. 5, 2018).

41. *See* Rsch. Working Grp., Task Force on Race and the Crim. Just. Sys., *Preliminary Report on Race and Washington's Criminal Justice System,* 87 WASH. L. REV. 1, 4 (2012) ("In 1980, of all states, Washington had the highest rate of disproportionate minority representation in its prisons.").

42. *See generally* Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 22, 2010, 5:11 PM), https://www.seattletimes.com/seattle-news/two-state-supreme-court-justices-stun-some-listeners-with-race-comments ("State Supreme Court justices Richard Sanders and James Johnson stunned some participants at a recent court meeting when they said African Americans are overrepresented in the prison population because they commit a disproportionate number of crimes.").

43. *See* Annie Sloan, *"What to Do about* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 242–43 (2020) (describing the Washington State Legislature commissioning a study to examine racial disparity, and finding that "bias pervaded the state legal system.").

Saintcalle, the Washington Supreme Court declared that it would begin "formulating a new, functional method to prevent racial bias in jury selection" and "find the best alternative to the *Batson* analysis."[44] Five years after the Court's declaration in *Saintcalle*, Washington became the first to substantially alter the *Batson* framework with GR 37.[45] The historic new rule has spurred *Batson* reform efforts in other parts of the country as well. While California recently adopted a rule similar to GR 37, Arizona went even further, becoming the first state to eliminate the exercise of peremptory strikes outright.[46]

B. Framework: An Objective Inquiry

The most notable difference between GR 37 and *Batson* is the elimination of the purposeful discrimination requirement.[47] That is, where *Batson* requires a finding of purposeful discrimination, GR 37 explicitly does not. Instead, the Rule instructs trial courts to deny a peremptory challenge "if an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge[.]"[48] The Rule goes on to provide that, for its purposes, "an objective observer is aware that implicit, institutional, and unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[49]

The Rule also lists a set of non-exhaustive factors that a court should take into consideration when making its determination. Such factors include whether a reason might be disproportionately

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44. Saint v. Saintcalle, 309 P.3d 326, 338 (Wash. 2013).

45. Note that the court had previously modified the first prong of *Batson*. *See* City of Seattle v. Erikson, 398 P.3d 1124, 1131 (Wash. 2017) ("We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury.").

46. *See New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of* Batson, NAT'L. L. REV. (Dec. 2, 2020), https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson; Paul Davenport, *Arizona Supreme Court Will Be the First State to End Peremptory Challenges to Potential Jurors*, THE ARIZ. REPUBLIC (Aug. 29, 2021, 2:52 PM.), https://www.azcentral.com/story/news/local/arizona/2021/08/29/arizona-supreme-court-first-state-end-peremptory-challenges/5644533001.

47. GR 37 only alters the third prong of *Batson*. The other two steps remain in place. *See* WASH. CT. GEN. R. 37(c) (2018) ("A party [or the court] may object to the use of a peremptory challenge to raise the issue of improper bias."); WASH. CT. GEN. R. 37(d) ("Once raised, the objecting party must articulate reasons for the challenge.").

48. WASH. CT. GEN. R. 37(e) (2018).

49. WASH. CT. GEN. R. 37(f) (2018).

associated with a particular race or ethnicity, or whether other prospective jurors provided similar answers but were not the subject of a peremptory strike.[50] Similarly, GR 37 provides a list of presumptively invalid reasons that cannot justify a peremptory challenge because these reasons have historically been "associated with improper discrimination in jury selection in the State of Washington."[51]

The crux of GR 37 is its "objective inquiry" standard.[52] Under *Batson*, much of the court's ruling relied on the credibility and demeanor of the parties during voir dire.[53] However, under GR 37, the court is not required to scrutinize the credibility and demeanor of the parties.[54] It does not matter if the prosecutor has a reputation as being very credible or if her demeanor is proper. The objective observer aware of purposeful, implicit, institutional, and unconscious bias is simply uninterested in these observations when concluding whether race could have been a motivating factor in the exercise of the peremptory. Similar to *Batson*, however, GR 37's objective observer is also uninterested in the logic or persuasiveness of the prosecutor's offered justification for exercising the strike.

IV. A COMPARATIVE ANALYSIS

Comparing pre- and post-GR 37 case law, the difference in the number of successful challenges is stark. From 1995 to 2017, the Washington state appellate courts reversed a peremptory challenge only once.[55] Applying GR 37, the court of appeals has reversed peremptory challenges on racial or ethnic grounds six times, while the supreme court has reversed twice.[56] The court of appeals has

50. WASH. CT. GEN. R. 37(g)(i)(ii) (2018).

51. WASH. CT. GEN. R. 37(h) (2018).

52. *See* State v. Briggs, 776 P.2d 1347, 1361 (1989) (citing Gardner v. Malone, 376 P.2d 651, 654 (1962)).

53. State v. Hicks, 181 P.3d 831, 839 (Wash. 2008) (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1984)) ("As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'").

54. *See* WASH. CT. GEN. R. 37(e), (g) (2018) (listing no formal requirement under determinations and circumstances considered for the court to analyze a party's credibility and behavior).

55. State v. Cook, 312 P.3d 653 (Wash. Ct. App. 2013).

56. *See* State v. Lahman, 488 P.3d 881 (Wash. Ct. App. 2021); State v. Omar, 460 P.3d 225 (Wash. Ct. App. 2020); State v. McCrea, No. 37416-5-III, 2021 WL 1550839 (Wash. Ct.

affirmed a trial court's grant of a peremptory challenge four times.[57] Interestingly, the judiciary chose to publish only the "successful" applications of GR 37, publishing all but one opinion where it found a violation of GR 37 but not a single opinion where it failed to find a violation.[58]

A. Applying the Objective Inquiry Standard

This change in tune is attributable to the design of GR 37, which prohibits much of what *Batson* allowed. For example, in *Saintcalle*, Juror 34—a Black woman—indicated during voir dire that she may have difficulty serving on a jury for a murder trial, as she knew someone who had recently been murdered.[59] Relying on these statements as justification, the State moved to peremptorily strike the venireman.[60] The trial court allowed the strike, finding the justification to be race-neutral and supported by the credibility and demeanor of the venireman and prosecutor—despite the State questioning Juror 34 at approximately three times the rate it questioned the rest of the venire. [61]

Although the supreme court in *Saintcalle* ruled that the trial court's decision was not clearly erroneous, it was concerned with the unilateral degree to which the State questioned Juror 34 in comparison to the rest of the jury pool.[62] The court noted that disparate questioning of a minority venireman can, in some circumstances, provide evidence of discriminatory purpose.[63] But, applying a *Batson* analysis, it reasoned that asking follow-up questions, even in a disparate amount, was not enough to support

App. Apr. 20, 2021); State v. Pierce, 455 P.3d 647 (Wash. 2020); State v. Orozco, 496 P.3d 1215 (Wash. Ct. App. 2021).

57. *See* State v. Tesfasilasye, No. 81247-5-I, 2021 WL 3287706 (Wash. Ct. App. Aug. 2, 2021); State v. Cobbs, No. 80802-8-I, 2021 WL 2420136 (Wash. Ct. App. June 14, 2021); State v. Bongo, No. 81045-6-I, 2021 WL 1091506 (Wash. Ct. App. Mar. 22, 2021); State v. Pieler, No. 80244-5-I, 2021 WL 778095 (Wash. Ct. App. Mar. 1, 2021).

58. *See Lahman,* 448 P.3d 881; *Omar*, 460 P.3d 225; *Pierce*, 455 P.3d 647; *Orozco*, 496 P.3d 1215; *but see McCrea*, 2021 WL 1550839; *Tesfasilasye*, 2021 WL 3287706; *Cobbs*, 2021 WL 2420136; *Bongo*, 2021 WL 1091506; *Pieler*, 2021 WL 778095.

59. State v. Saintcalle, 309 P.3d 326, 330–31 (Wash. 2013).

60. *Id.* at 332.

61. *See id.* at 340.

62. *Id.* at app. A (showing statistics that the State asked each venireman an average of 4.5 questions, while it asked Juror 34 a total of 17 questions).

63. *Id.* at 340 ("[D]isparate questioning of minority jurors can provide evidence of discriminatory purpose because it can suggest that an attorney is 'fishing' for a race-neutral reason to exercise a strike.").

a finding of purposeful discrimination.[64] Under GR 37, evidence that the State exercised a peremptory challenge against a more rigorously questioned minority juror is likely to lead the objective observer to conclude that the peremptory challenge was motivated by race.[65] Thus, if *Saintcalle* had been decided post-GR 37, the court likely would have reached a different holding.

Further, unlike in *Batson*, GR 37 severely limits the ability of counsel to rely on a venireman's general tone or attitude as justification for a peremptory challenge, as "such characterizations ha[ve] been historically associated with improper jury discrimination in jury selection."[66] These provisions allow appellate courts in Washington State to reverse under circumstances not permitted under *Batson*. For example, in *State v. Thomas*, decided nine years before the implementation of GR 37, the Washington Supreme Court upheld a peremptory exercised against Juror 33, the only Black member of the venire.[67] In *Thomas*, the court accepted as valid justification the State's characterization of Juror 33 as "clearly [ ] hostile toward the State."[68]

Only two years after the implementation of GR 37, the court of appeals reached the opposite conclusion under remarkably similar circumstances. In *State v. Omar*, the defendant justified his peremptory strike against Juror 16, who "appeared to be of Asian descent," because he "didn't like some of [Juror 16's] responses" and "felt uncomfortable about the way she was responding."[69] Unlike in *Thomas*, the *Omar* court rejected this characterization of a juror's demeanor as "at best, nebulous" and insufficient to support a peremptory strike.[70]

Under GR 37, the objective observer is also likely to conclude the strike was race-based if "a reason might be disproportionately associated with a race or ethnicity."[71] For instance, in *State v. Bowman*, the State peremptorily struck Juror 5, a Black woman, from the venire.[72] The State's proffered reason for

64. *Id.*

65. WASH. CT. GEN. R. 37(g)(ii) (2018).

66. State v. Omar, 460 P.3d 225, 228 (Wash. Ct. App. 2020); *see also* WASH. CT. GEN. R. 37(i) (2018).

67. State v. Thomas, 208 P.3d 1107, 1115–16 (Wash. 2009).

68. *Id.* at 1115.

69. *Omar*, 460 P.3d at 228.

70. *Id.*

71. WASH. CT. GEN. R. 37(g)(iv) (2018).

72. *See* State v. Bowman, No. 73069-0-I, slip op. at 4 (Wash. Ct. App. Jan. 23, 2017).

the strike was concern "about her perspective on the world and criminal justice system."[73] The State was primarily concerned with statements Juror 5 made about having a nephew in prison for murder, whom she "would like to believe was innocent" and about a self-perceived inability to render a guilty verdict.[74] The trial court and the court of appeals were convinced by the State's justification and upheld the strike.[75]

If *Bowman* had been decided under the GR 37 framework rather than the traditional *Batson* framework, a different outcome may have been reached on appeal. For example, in *State v. Pierce*, the supreme court rejected the State's exercise of a peremptory challenge against Juror 6, potentially the only Black member of the venire.[76] Juror 6 had a brother who was convicted of attempted murder, and she expressed during voir dire that his conviction and sentencing "left a bad taste in her mouth."[77] The State cited these statements in support of peremptorily striking her from the venire.[78] The State also relied on statements made by Juror 6 regarding her "strong opinion[ ]" that "the system, or at least parts of the system, did not treat her brother fairly."[79] As all these reasons are invalid under GR 37, the court reversed the peremptory strike.[80] While under *Batson* the court of appeals upheld a peremptory strike justified by the venireman's potentially negative view of the legal system, the supreme court reversed on those same grounds under GR 37.

B. "Possibilities, not Actualities."[81]

However, the objective inquiry standard under GR 37 does not always yield a different result from the *Batson* framework. For example, in *State v. Tesfasilasye*, which was decided a year after *Pierce*

73. *Id.* (The State offered four race-neutral reasons for striking Juror 5: she had a nephew in prison for murder, whom she "would like to believe" was innocent; she "would not be able to sit in judgment of others;" her answers were "hard to track;" and it did not feel as though she was "completely forthcoming about her job.").

74. *Id.* at 5.

75. *See id.* at 8.

76. State v. Pierce, 455 P.3d 647, 654 (Wash. 2020).

77. *Id.*

78. *Id.* at 653–54.

79. *Id.*

80. *Id.*

81. State v. Lahman, 488 P.3d 881, 886 (Wash. Ct. App. 2021) ("GR 37 was written in terms of possibilities, not actualities.").

and is unpublished, the State exercised a peremptory challenge against Juror 25—a racial or ethnic minority—because of her belief that a relative was unfairly convicted of sexual assault.[82] The prosecutor also expressed concerns regarding "her ability to truly be fair and impartial in this case" based on her personal experiences.[83] Tesfasilasye objected to the strike, arguing that the State's justification was invalid under GR 37.[84] The State disagreed, contending that it did not strike Juror 25 because her son had been convicted of a crime, but because Juror 25 had "taken a position in that case about what happened in that case without being fully informed" and the State was concerned that her perceptions of injustice would spill over into this case.[85] The trial court accepted the State's reasoning and granted the peremptory challenge.[86]

The appellate court affirmed the lower court's grant of the peremptory challenge, reasoning that the "record here is sufficient to dispel any concern that an objective observer could view race as a factor" in the exclusion of the minority venireman.[87] The holding in *Tesfasilasye* contradicts the analysis set forth by the supreme court in *Pierce*.[88] It fails to consider that distrust or skepticism in the judicial system might be disproportionately associated with race or ethnicity, which the text of GR 37 mandates, and instead characterized the situation as "easily distinguishable from the more

82. State v. Tesfasilasye, No. 81247-5-I, 2021 WL 3287706 at *4 (Wash. Ct. App. Aug. 2, 2021) ("The challenge was based on Juror 25's belief that her son had not committed the alleged sexual assault of which he was convicted and was unduly punished for it, that the victim's version of events was significantly different than her son's story of what had occurred, and that the circumstances of her son's crime were similar to this case.").

83. *Id.* at *3 (emphasis added) ("So in my personal opinion, I mean, *not just from this experience but just overall*, you know, there are definitely circumstances where laws get in the way to having a fair outcome or justice being done, if you will, so."); *see also id.* at *6 (The State also struck Juror 3, a Hispanic man, because he expressed a need for the State to present concrete evidence of the defendant's guilt before he would feel comfortable to vote guilty. The prosecutor felt that such evidence "would be frankly impossible to find in most legitimate otherwise strong sex offense cases.").

84. *Id.* at *3.

85. *Id.* at *4.

86. *See id.*

87. *Id.* at *8.

88. *See also* State v. Pierce, 455 P.3d 647, 654 (Wash. 2020) (illustrating that the *Pierce* court did not discuss or even mention criminal convictions and/or distrust of law enforcement being disproportionately associated with racial and ethnic minority communities).

general contact with the criminal justice system referenced in GR 37(h)(iii)."[89]

It is difficult to reconcile the distinctly different outcomes in *Pierce* and *Tesfasilasye*. In both cases, the challenged veniremen were racial or ethnic minorities who expressed concerns about the fairness of the legal system, based on their personal experiences. In *Pierce*, GR 37's objective observer recognized that racial or ethnic minorities are more likely to experience negative encounters with law enforcement and in turn are more likely to hold negative beliefs about the legal system. But that same objective observer in *Tesfasilasye* did not.[90] Perhaps this is because the objective observer in *Tesfasilasye* was more concerned with the existence of discrimination rather than the appearance of discrimination. So, who is the objective observer, and what problem is she trying to solve?

The purpose of GR 37 seems to have evolved in the four years since its enactment. From its text, the purpose of the rule appears quite clear: to eliminate the unfair exclusion of veniremen based on their race or ethnicity. In application, the purpose is blurred. As the court of appeals explains in *State v. Latham*, "GR 37 was written in terms of possibilities, not actualities. The rule recognizes the trial process must be free from the appearance of discrimination, regardless of actual motives or intent."[91]

So, what is the purpose of the new rule? Is its purpose to eliminate racial bias in the jury selection process? Or is it to eliminate the *appearance* of racial bias in the jury selection process? The latter is consistent with the court's prior reasoning in *Saintcalle*, where it describes *Batson*'s corrosive effect on the public's confidence in the fairness of the judicial system as "perhaps the most damaging" of its failures.[92] It's also consistent with the text of

89. State v. Tesfasilasye, No. 81247-5-I, 2021 WL 3287706 at *4 (Wash. Ct. App. Aug. 2, 2021).

90. Notably, the Washington Supreme Court agreed and reversed the appellate court's holding in *Tesfasilasye* in October of 2022. State v. Tesfasilasye, No. 100166-5, 2022 WL 5237738, at *1 (Wash. Oct. 6, 2022) ("One of the State's proffered reasons for the strike—that the juror might be biased because her son had, in her view, been treated unfairly by the criminal legal system—is presumptively invalid."). *Id.* at *7.

91. State v. Lahman, 488 P.3d 881, 886 (Wash. Ct. App. 2021); *See also* State v. Listoe, 475 P.3d 534, 546 (Wash. Ct. App. 2020) (Melnick, J., concurring) (describing GR 37 as requiring "the peremptory challenge to be denied if an objective observer *could* view race or ethnicity as a factor in the exercise of the peremptory challenge, not whether we *would* or do view race or ethnicity as a factor.").

92. State v. Saintcalle, 309 P.3d 326, 333 (Wash. 2013).

GR 37, which requires the peremptory challenge to be denied when based on pure speculation, an objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge, not whether a judge *would* or *does* view race or ethnicity as a factor.

The Washington Supreme Court reversed *Tesfasilasye* on October 6, 2022, and remanded the case for a new trial.[93] In reversing the opinion of the appellate court, the supreme court addressed the distinction between "could view" and "would view" in GR 37.[94] "If the standard was 'could view,' of course many more peremptory challenges would need to be denied than if the standard was 'would view[,]'" the court explained.[95] It worried that a "would view" standard "would not be meaningfully different" than *Batson*'s "purposeful discrimination" standard.[96]

The court further explained that the "would view" standard "would have required judges to endorse 'an accusation of deceit or racism' in order to sustain a challenge to a peremptory strike."[97] Under the "could view" standard, however, "a judge is required to deny a peremptory challenge when the effect is discriminatory regardless of whether there was discriminatory purpose."[98] Thus, the court takes a dichotomous approach to the two standards. The court describes the objective observer as the average reasonable person.[99] In practice, this rigid dichotomy needlessly strips the objective observer of her sense of reasonableness. Requiring a judge to deny a peremptory strike if an objective observer would reasonably view the exercise of the strike as race-based does not necessarily require the judge to "endorse an accusation or deceit or racism."

It is important to understand the difference between aiming to eliminate the unfair exclusion of minority veniremen from the jury box and aiming to eliminate the appearance of the unfair exclusion of minority veniremen from the jury box. Both succeed in reducing racial discrimination in jury selection, but the latter

93. *Tesfasilasye*, 2022 WL 5237738, at *8. Notably, *Tesfasilasye* was the first GR 37 case to reach the supreme court since the rule was adopted by the court in 2018.

94. *Id.* at *6.

95. *Id.*

96. *Id.*

97. *Id.* (internal quotations omitted) (quoting Proposed New GR 37—Jury Selection Workgroup, Final Report, app. 2 (2018) (quoting State v. Saintcalle, 309 P.3d 326, 338 (Wash. 2019))).

98. *Id.*

99. *See* State v. Jefferson, 429 P.3d 467, 480 (Wash. 2018) (explaining an objective inquiry is not a question of fact but rather based on the average reasonable person).

seems to do so at the expense of creating the fairest jury for the defendant.[100] As *Tesfasilasye* illustrates, there is a risk that reasonableness is lost when the primary objective is to rid the process of the appearance of racial bias. By focusing on could instead of would, the objective observer's discretion is limited. She is effectively unable to balance her newfound knowledge of implicit, institutional, and unconscious bias with the circumstances and rationale behind each exercise of a peremptory strike. Criminal defendants and taxpayers may end up paying the price.

C. De Novo Review

While the text of GR 37 itself does not instruct the courts to apply a particular standard of review, GR 37 challenges are reviewed de novo by appellate courts.[101] This is a drastic departure from the highly deferential clear error standard of review the court applied under *Batson*.[102] In establishing de novo review for GR 37 appeals, the supreme court reasoned that the question posed to the objective observer—could she conclude that race or ethnicity was a factor—is not one of fact but of law.[103] It is "an objective inquiry based on the average reasonable person," which does not require the appellate court to defer to the lower court.[104] In reviewing GR 37 challenges de novo, the appellate court stands "in the same position as does the trial court."[105] It makes its own determinations about what an objective observer could conclude based on the totality of circumstances from the record.

De novo review is clear improvement from clear error review.[106] It allows for judicial remedy to flow more freely through Washington's appellate courts, which are no longer required to

100. *See* Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1938 (2015) ("When jury verdicts become an exercise in popular sovereignty, we lose sight of whether the verdicts are correct. We celebrate the process without focusing on the results.").

101. *See Jefferson*, 429 P.3d at 480 (describing de novo review as "a change from *Batson*'s deferential, 'clearly erroneous' standard of review").

102. *See Saintcalle*, 309 P.3d at 332 (deciding the trial court did not clearly err through application of the *Batson* decision).

103. *See Jefferson*, 429 P.3d at 480.

104. *Id.*

105. *Id.*

106. *See* Purkett v. Elem, 514 U.S. 765, 776 (1995) (Stevens, J., and Breyer, J., dissenting) ("In many cases, a state trial court or a federal district court will be in a better position to evaluate the facts surrounding peremptory strikes than a federal appeals court. But I would favor a rule giving the appeals court discretion, based on the sufficiency of the record, to evaluate a prosecutor's explanation of his strikes.").

accept unsatisfactory rationale as legitimate grounds for peremptory strikes. For example, in *State v. Bennett*, decided pre-GR 37, the court of appeals disagreed with the trial court's factual finding that the State engaged in purposeful discrimination but was unable to reverse on appeal.[107] The appellate court believed that the justification offered by the State did appear to be race-neutral but, nevertheless, it could not say that the trial court's contrary conclusion was clearly erroneous.[108] Accordingly, it affirmed.[109] If the *Bennett* court had applied a GR 37 analysis rather than the *Batson* analysis, it likely would have reached a different result.

For example, in *State v. McCrea*, the court of appeals found—contrary to the determinations of the trial court—that at least two of the peremptory challenges exercised by the State violated GR 37.[110] In *McCrea*, the trial court expressed its concerns sua sponte regarding the validity of three of the State's seven exercised peremptory challenges.[111] The prosecutor responded by telling the court that he was strategically striking from the back as he noticed defense counsel was striking from the front.[112] He also pointed to a previous conviction and a scheduling conflict regarding two racial or ethnic minority veniremen whom he sought to strike.[113] The trial court accepted this puzzling justification and granted the peremptory challenges.[114] Reviewing the record de novo, the appellate court reversed and remanded, concluding that an

107. *See* State v. Bennett, 322 P.3d 815 (Wash. Ct. App. 2014) ("[W]e do not substitute our judgment for that of the trier of fact. Whether the facts are as the parties allege is for the trial judge to determine, not this court.").

108. *Id.* at 818 ("Although we agree that his proffered explanations appear race-neutral and would have supported a conclusion that they were race-neutral, we cannot overturn the trial court's contrary evaluation . . . .[A]n appellate court simply is not in a position to find persuasive that evidence which the trier of fact found to be unpersuasive.").

109. *Id.*

110. State v. McCrea, No. 37416-5-III, 2021 WL 1550839, at *1 (Wash. Ct. App. 2021).

111. *Id.* at *1–*2 (Jurors 13, 35, 44, and 46 all appeared to the court to be members of a minority group. However, there was some debate between the court and the prosecutor as to the race or ethnicity of Jurors 35, Mr. Rojas, and 46, Mr. Castro. The court argued those were "Hispanic or Spanish" sounding surnames, while the prosecutor argued he didn't notice the juror's races or ethnicity's and "would not presume anyone is any race." The prosecutor also disagreed with the court's characterization of Juror 13, Ms. Vargas, as being Native American, arguing he "wouldn't presume she's Native, with a Spanish last name. If I were to make any presumption, I would have assumed she was of Spanish descent, possibly Caribbean, Dominican, Puerto Rican, or Cuban[.]").

112. *Id.* at *1–*2.

113. *Id.* at *2–*3.

114. *Id.* at *3.

objective observer "could view race or ethnicity" as a factor in "at least the striking of Jurors 44 and 35."[115]

But de novo review presents challenges as well. As a practical matter, the appellate court is not standing in the same position as the trial court. Many provisions of GR 37 rely heavily on the physical observations of attorneys and the court. Notably, appellate judges are not present to make these necessary physical observations. This significantly complicates the application of GR 37 and undercuts the power of de novo review.[116] Put simply, a *Batson* challenge is not a pure question of law. Ruling on a *Batson* challenge necessarily requires the court to make determinations about race or ethnicity of veniremen. These factual findings are based on the perceptions and visual observations of the parties and the court. Thus, an appellate court is necessarily forced to rely upon the conclusions of the lower court.[117]

In *State v. Listoe*, the State peremptorily struck Juror 17—the only Black man in the venire.[118] Reversing the lower court, the court of appeals held that, under GR 37, the State could not strike a venireman for answering a question differently than any other member of the venire when that venireman is the only racial or ethnic minority on the venire.[119] It reasoned that "implicit bias and disparate experience might still be a factor when the only member of a racially cognizable group on the venire provides a different response to a hypothetical scenario from almost all the other prospective jurors."[120]

In *Listoe*, the appellate court relied entirely on the lower court's findings regarding the races and ethnicities of the entire

115. *Id.* at *4–*5 (as the court found two violations of GR-37, it declined to reach the question of whether the State continued to violate GR-37 in striking Jurors 44 and 46).

116. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (describing the "inevitably clumsy fit between any objectively measurable standard and the subjective decision making at issue" in a *Batson* challenge).

117. *See* State v. Orozco, 496 P.3d 1215, 1220 (Wash. Ct. App. 2021) ("GR 37 is not about self-identification; it is evaluated from the viewpoint of an objective observer."); State v. Lahman, 488 P.3d 881, 885, n.6 (Wash. Ct. App. 2021) ("We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group. In many cases, a trial judge will need to make a record about the apparent racial and ethnic makeup of a jury panel in order to facilitate review on appeal.");.

118. State v. Listoe, 475 P.3d 534 (Wash. Ct. App. 2020).

119. *Id.* at 541; *but see* State v. Cobbs, No. 80802-8-I, 2021 WL 2420136, at *8 (Wash. Ct. App. 2021) (the court of appeals upheld a peremptory challenge of a minority venireman even though she was the sole juror who responded in the affirmative to a question the State asked all the jurors: "Does anyone here think they wouldn't be a good juror?").

120. *Listoe*, 475 P.3d at 541.

venire in holding that the objective observer could view the exercise of the strike as racially motivated. Crucial to the holding was Juror 17's status as the only member of a cognizable minority group in the venire. The appellate court, however, was not present to make this observation itself, and the record on appeal is not clear about Juror 17's race. The trial court stated that Juror 17 was "an *apparent* minority member of our jury panel."[121] Listoe stated that the challenged juror "was the only African American on the jury panel," and the court agreed that it "*appears* to be the case."[122] Nevertheless, de novo review allowed the appellate court to reach a different legal conclusion from the facts in the record.

The text of the rule itself also requires courts to be aware of the racial makeup of the venire to consider provisions like "whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge."[123] In *State v. Pieler*, the State exercised a peremptory challenge against Juror 17, who "appear[ed] to be 'potentially East Asian.'"[124] The State's offered justification for the strike was "that Juror 17 refrained from alcohol use and was too young to drink legally."[125] However, as the defendant argued, Juror 17 was not unique in these regards. Two other 18-year-old jurors in the same row as Juror 17 also indicated that they did not drink and given their age, were not legally permitted to.[126] Of these three veniremen, Juror 17 was the only apparent person of color.[127]

The "could view" standard, however, acts as a saving grace in this regard. Whether the objective observer would view race or ethnicity as a motivation for the strike depends on the race and ethnicity of the veniremen. Under the "could view" standard, the actual race or ethnicity of the venire is not as important, or as *Pieler* and *Listoe* evince, important at all in the GR 37 analysis, which operates on appearances rather than actualities.[128] As the court of

121. *Id.* at 545 (Melnick, J., concurring).

122. *Id.*

123. WASH. CT. GEN. R. 37 (g) (iii).

124. State v. Pieler, No. 80244-5-I, 2021 WL 778095, at *2 (Mar. 1, 2021) (The trial court noted on record that "it did not know Juror 17's race or ethnicity and stated 'He may be a person of minority status or color, I can't tell.'").

125. *Id.* at *4.

126. *Id.* at *4.

127. *Id.*

128. State v. Lahman, 488 P.3d 881, 885 n.6 (Wash. Ct. App. 2021) ("We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group.").

appeals explained, "GR 37 teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution."[129]

Although the courts describe the GR 37 analysis as "purely objective,"[130] the Rule is premised on visual observations, which are inherently subjective. These observations are not generally, if ever, observable from a cold record.[131] As Judge Rich Melnick explains in his concurrence in *Listoe*, this makes de novo review difficult to apply on appeal.[132] Practically speaking, an appellate court cannot determine for itself whether a juror indeed "appears" to be Black or Native American from the record alone.[133] And as a matter of public policy, determinations about the race and ethnicity of the venire should not be made by lawyers and trial courts. It is, after all, "hard to imagine that any judge or lawyer would be able to determine every potential juror's race solely through visual observation."[134]

D. Does That Woman Look Black to You?

At both the trial and appellate court levels, the determination about a juror's race or ethnicity is based on the perceptions and visual observations of the parties and the court.[135] It is not based on self-identification by the veniremen themselves.[136] In one instance, the Washington Court of Appeals even decided

129. *Id.* at 885.

130. *Id.*

131. State v. Listoe, 475 P.3d 534, 546 (Wash. Ct. App. 2020) (Melnick, J., concurring).

132. *Id.* ("A de novo review of the record poses many problems. Although we are supposed to put ourselves in the same position of the trial court, we are unable to view the jury panel. We are unable to determine the racial and ethnic makeup of the potential jurors de novo."); *see also Lahman*, at 885 ("As an appellate court, we are unable to physically observe any juror's appearance. In some circumstances, this might hamper our de novo GR 37 analysis.").

142. *Listoe*, 475 P.3d at 546 (Melnick, J., concurring).

134. *Id.*

135. *See* State v. Orozco, 496 P.3d 1215, 1220 (Wash. Ct. App. 2021) ("GR 37 is not about self-identification; it is evaluated from the viewpoint of an objective observer."); *Lahman*, 488 P.3d at 885, n.6 ("We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group. In many cases, a trial judge will need to make a record about the apparent racial and ethnic makeup of a jury panel in order to facilitate review on appeal.").

136. State v. Listoe, 475 P.3d 534, 546 (Wash. Ct. App. 2020) (Melnick, J., concurring) ("The test for whether a person is of a particular race or ethnicity seems to be based on the visual observations of the court and the parties. It is not based on self-identification.").

that having an Asian surname "is enough to raise the concern that the objective observer could perceive" a juror as a racial or ethnic minority." [137]

The application of de novo review is even more problematic in circumstances where the challenged juror's race or ethnicity is in dispute. In *State v. Orozco*, the record failed to indicate and the parties disagreed about the race of the challenged juror.[138] Defense counsel argued the juror was Black.[139] The State argued that because venire Juror 25 did not self-identify as Black, and because neither party nor the court asked her race the court could not know or assume her race.[140] With no clarification in the record apart from defense counsel's statements that the juror "appeared to be an African American female," the appellate court was forced to substitute its best judgment.[141] Noting that "it would have been helpful for the trial court to make a record about the apparent racial and ethnic makeup of the jury panel to better facilitate review," the court gave the defense the benefit of the doubt and concluded "that an objective observer could have perceived venire juror 25 to be a person of color."[142] It subsequently reversed and remanded the case for a new trial.[143]

Reversing a criminal conviction and remanding for a new trial based solely on the word of defense counsel alone has serious implications. For one, remanding for a new trial is very expensive, although there is more at stake than money. *Orozco* demonstrates the potential for a particularly opportunistic defendant to exploit the rule and benefit at the expense of the court, the taxpayer, and racial- and ethnic-minority citizens.[144] To be sure, convictions obtained even in part on racial biases should be reversed. But given the costly remedy and difficulty of formulating an objective test to measure inherently subjective decision-making, it would be both

137. *Lahman*, 488 P.3d at 885.
138. *Orozco*, 496 P.3d at 1220.
139. *Id.* at 1218.
140. *Id.* at 1220.
141. *Id.*
142. *Id.*
143. *Id.* at 1221; *but see* State v. Cobbs, No. 80802-8-I, 2021 WL 2420136, at *9 (Wash. Ct. App. 2021) (where statements from defense counsel that the challenged veniremen was the only racial minority on the venire was *not* enough to support that statement where "nothing in the record indicates that juror number nine was the 'sole member of a racially cognizable group' on the jury").
144. *Orozco*, 496 P.3d 1215.

more efficient and effective to eliminate peremptory challenges outright.

It is extremely difficult, if not impossible, to determine someone's race or ethnicity based on their appearance alone. This difficulty merely underscores a larger problem within the rule: the observations themselves. GR 37's observational method collapses cultural and ethnic boundaries, rendering self-identity irrelevant. It has the power to reduce a venireman's entire cultural identity down to the color of their skin—a Dominican man becomes just "Black;" a Hawaiian woman, just "Asian."[145] Even if the goal of GR 37 is to rid the jury selection process of the appearance of racial bias rather than actual bias itself, a system that determines the race or ethnicity of a venireman based on the court's visual observations does not seem to get the job done. Yet, it seems to fit if the question GR 37 asks is, how could an objective observer view this person? As white? Black? Hispanic? Native American? Asian? Pacific Islander?

This procedure for determining race also implicates a web of social issues. For one, it facilitates cultural appropriation. This is an ongoing problem in America. Celebrities make themselves appear "blacker" through make-up and traditionally black hairstyles and invidiously profit off minority communities.[146] Another issue is white-passing, where Black people with light skin and straight hair are perceived as white and treated better as a result.[147]

Moreover, consider Hilaria (a.k.a. Hillary Baldwin), Alec Baldwin's wife, who spent years impersonating a Spanish immigrant.[148] Hillary told people she was born in Mallorca, Spain, spoke in a fake accent, and once even acted like she forgot the English word for "cucumber."[149] In reality, she is a white woman from Connecticut.[150] How could the objective observer characterize her race? And why would the judiciary rely on attorneys and judges

145. WASH. CT. GEN. R. 37(g)(iii) (2018).

146. *See* Cady Lang, *Keeping Up with the Kardashians Is Ending. But Their Exploitation of Black Women's Aesthetics Continues*, TIME (June 10, 2021, 5:28 PM), https://time.com/6072750/kardashians-blackfishing-appropriation; *see also* Brennan Carley, *A Very Recent History of Celebrity Cultural Appropriation*, VULTURE (June 5, 2014), https://www.vulture.com/2014/06/recent-history-of-celebrity-cultural-appropriation.html.

147. *See* Kelly McWilliams, *The Day I Passed for White*, TIME (Nov. 19, 2021, 8:43 AM), https://time.com/6116209/passing-for-white.

140. *See* Alex Abad-Santos, *Hilaria Baldwin's Accent and Suspect Origin Story, Explained*, VOX (Dec. 28, 2020, 5:40 PM), https://www.vox.com/22203597/hilaria-baldwin-spanish-accent-ancestry-explained.

149. *See id.*

150. *See id.*

to make identifications about race and ethnicity instead of asking members of the venire to identify their own race and ethnicity?

To be clear, there is no evidence or reason to think that anyone would represent themselves as a minority race to increase their chances of serving on a jury. Nevertheless, it seems perverse and antithetical for a rule that was created to combat decades of racial discrimination to entrust the very institutions that perpetuated that discrimination to decide who does and who does not get protected under GR 37.

Race and ethnicity are not always objectively discernible. Relying on pure speculation about a person's race or ethnicity—regardless of accuracy—to reverse convictions, remand new trials, and impanel objectively bad veniremen is not a legitimate method to cure racial bias in jury selection. It does not effectuate a fair and impartial jury that will reach the right outcome even though that is what the Constitution requires.[151]

V. CONCLUSION

Race-conscious affirmative rules like GR 37 seem to neither preserve the value of peremptory challenges, prioritize the defendant nor eliminate racial bias in jury selection in a meaningful way. The only way to actually eliminate the evil of racial discrimination in jury selection and impanel the fairest possible jury for defendants is the full elimination of peremptory strikes. Opponents argue that peremptory strikes as a tool to assemble the most favorable jury for a defendant are too valuable to get rid of; but in a way, GR 37 seems like the worst of both worlds. It does not go as far as to eliminate peremptory challenges outright but what is left is almost a shell of the once powerful tool. Under the Rule, an attorney is prohibited from peremptorily striking an objectively bad juror with an ambiguously ethnic last name or dark skin, even if that juror was sleeping, hostile, or biased. To be fair, in a world without peremptory challenges, bad jurors would still end up in the jury box, but GR 37 feels overly superficial.

While GR 37 is a vast improvement over the traditional *Batson* framework, it is not the most effective solution. On one hand, it has substantially increased the number of successful *Batson*-like challenges in Washington. On the other, its focus on

151. U.S. CONST. amend. VI.

appearances misses the mark. It is difficult to apply with consistency, does not prioritize the defendant's right to trial by an impartial jury, and makes problematic assumptions about veniremen's racial and ethnic identities by forcing lawyers and judges to hypothesize about the race or ethnicity of members of the venire based solely on looks and last names. So, what has GR 37 gained? Is it that judges can walk away saying they have taken a progressive and radical stance against racial discrimination? Is that really what they have done?

THE CASE FOR MEDICAL CANNABIS IN NORTH CAROLINA

AREN HENDRICKSON†

Hemp. Marijuana. Pot. Mary Jane. Weed. The plant *Cannabis sativa L.* ("cannabis") goes by many names. An annual herbaceous plant native to Asia and now found worldwide,[1] cannabis is popularly known today—and outlawed in North Carolina—because of its psychoactive properties.[2] But, cannabis was not always illegal, and the use of cannabis fibers for clothing, rope, and other products dates back to the Middle Ages.[3] More recently, a growing body of scientific research has supported medicinal uses for cannabis, and many states have legalized the production and sale of cannabis for medical purposes.[4] North Carolina could be the next state to legalize medical cannabis with the proposed North Carolina Compassionate Care Act, also known as Senate Bill 711, which could be voted on this year.[5]

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1. Navdeep Kaur et al., *Uses of Raw Products Obtained from Hemp: Fiber, Seed, and Cannabinoids*, UNIV. OF FLA. INST. OF FOOD AND AGRIC. SERVS. EXTENSION 1 (Sept. 16, 2021), https://edis.ifas.ufl.edu/publication/AG459.

2. Elizabeth Thompson, *What Is the State of Medical Marijuana Legalization in North Carolina?*, N.C. HEALTH NEWS (Apr. 20, 2022), https://www.northcarolinahealthnews.org/2022/04/20/what-is-the-state-of-medical-marijuana-legalization-in-north-carolina (noting that North Carolina has outlawed marijuana despite still allowing the sale of THC products, which are comprised of less than .03% of "the substance most responsible for marijuana's impact on a person's mental state").

3. Kaur et al., *supra* note 1, at 1.

4. *State Medical Cannabis Laws*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last updated Feb. 3, 2022). Additionally, more than a dozen states have legalized marijuana for adult recreational use. *Id.*

5. S. 711, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

Section I of this comment briefly summarizes the history of cannabis law in the United States and describes the movement toward cannabis legalization specifically for medicinal purposes. Section II explains the current legal status of cannabis in North Carolina, and Section III analyzes the proposed medical cannabis bill. Finally, Section IV argues in favor of medical cannabis in North Carolina and examines the broader legal implications of a regulatory transition from an illicit substance to a legally prescribed medical treatment.

I. BACKGROUND: TREND IN LEGALIZING MEDICAL CANNABIS

Before describing the modern trend in legalization of medical cannabis, it is important to understand the history of cannabis law in the United States. Almost a century ago, Cannabis was legal and completely unregulated at the federal level.[6] The first national regulation of cannabis started with the Marihuana Tax Act of 1937.[7] Later, the Controlled Substances Act of 1970 completely outlawed cannabis.[8] While cannabis remains federally illegal, in the 21st century, many states passed legislation legalizing cannabis for medical or recreational purposes.[9]

A. Brief History of Cannabis Law in the United States

The presence of cannabis in the United States dates back to the early 1800s, when it was used as both a medicine and an industrial textile.[10] Cannabis was even listed as a legitimate medical compound in the United States Pharmacopeia in 1851.[11] With the

6. *See Did You Know…Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about/history/did-you-know/marijuana (last modified Dec. 20, 2019) (discussing the history of federal cannabis regulation in the United States).

7. *Id.* (explaining the passage of the Marihuana Tax Act of 1937, which regulated the importation, cultivation, possession and/or distribution of marijuana in the United States for the first time).

8. Controlled Substances Act, 21 U.S.C. § 812.

9. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

10. Mark Tancig et al., *Industrial Hemp in the United States: Definition and History*, UNIV. OF FLA. INST. OF FOOD AND AGRIC. SERVS. EXTENSION 1–2 (Sept. 16, 2021) https://edis.ifas.ufl.edu/publication/AG458.

11. Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 23 J. PAIN & PALLIATIVE CARE PHARMACOTHERAPY 120, 121 (2009).

turn of the 20th century, opinions on cannabis began to change.[12] Stories in the popular press told frightening tales of a dangerous drug from Mexico that produced homicidal rages in some of its users, and politicians began speaking out against the substance.[13] The movement to criminalize cannabis was motivated at least in part by Americans' racial fears toward Mexicans.[14] Other powerful actors, such as the timber industry, had economic incentives to suppress hemp production.[15] By the 1930s, several state governments had banned the substance.[16]

The Marihuana Tax Act of 1937 was the first federal legislation on cannabis, under which the importation, cultivation, possession, and distribution of cannabis was regulated and taxed.[17] In theory, the Marijuana Tax Act only made the recreational possession and sale of cannabis illegal and imposed a tax on those who imported, prescribed, cultivated, or sold cannabis for medical or industrial purposes.[18] While medical and industrial uses of cannabis remained legal, the tax and accompanying paperwork made medical research and the use of cannabis for industrial fiber uneconomical.[19]

The Controlled Substances Act of 1970 ("CSA") outlawed cannabis entirely.[20] Controlled substances are drugs that are considered easily abusable, and under the CSA, drugs are categorized into five schedules depending on both the level of abuse potential and the recognized medical uses for the drug.[21]

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12. *See* U.S. CUSTOMS & BORDER PROT., *supra* note 6 (contrasting marijuana regulation in the early 20th century from the modern marijuana regulation in the United States at the federal level).

13. *See generally* Matt Thompson, *The Mysterious History of "Marijuana"*, NAT'L PUB. RADIO (July 22, 2013, 11:46 AM), https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana (discussing the racial dimension of the anti-cannabis animus that caused the drug to be viewed with "a whole new identity" in the United States).

14. *Id.*

15. *See* Jared L. Hausmann, *Sex, Drugs, and Due Process: Justice Kennedy's New Federalism As A Framework for Marijuana Liberalization*, 53 U. LOUISVILLE L. REV. 271, 277 (2015) (indicating that, because the paper industry regarded hemp as better than wood pulp for paper production, the timber industry stood to benefit from the Marihuana Tax Act of 1937).

16. U.S. CUSTOMS & BORDER PROT., *supra* note 6.

17. *See* Marihuana Tax Act of 1937, ch. 553, § 2(a), 50 Stat. 551, 551–552 (1937).

18. *Id.*

19. U.S. CUSTOMS & BORDER PROT., *supra* note 6.

20. *See* Controlled Substances Act, 21 U.S.C. § 812.

21. *Id.*

Schedule I drugs are defined as drugs that have the highest abuse potential and no accepted medical use, and they may never be prescribed, dispensed, or administered.[22] Meanwhile, drugs that are categorized as Schedule II or lower have recognized medical uses and may be prescribed under certain conditions, even though there is still potential for abuse.[23] Cannabis is classified as a Schedule I drug, which puts it in the same category as heroin and a schedule higher than other drugs such as morphine, fentanyl, and codeine.[24]

Lasty, it is important to note that under the Agricultural Act of 2014, growing industrial hemp became federally legal on a trial basis for the first time since 1970.[25] Industrial hemp is defined as the plant *Cannabis sativa L.* with a tetrahydrocannabinol ("THC") level below 0.3% on a dry-weight basis.[26] Four years later in the 2018 Farm Bill, industrial hemp was removed from the definition of marijuana in the CSA.[27] Thus, growing hemp for industrial purposes like fiber, CBD products, or food products is now legal, though only with a license.[28]

B. The Movement to Medical Legalization

In 1996, California became the first state to legalize cannabis for medicinal purposes.[29] The California Legislature twice passed a bill legalizing the medical use of cannabis prior to 1996, but both bills were vetoed by the governor.[30] This led political activists to bring the issue directly to the people of California through a ballot initiative.[31] The California Compassionate Use Act gives California citizens the right under state law to obtain and use cannabis when

22. *See generally* Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, 48 HOSP. PHARMACY 473, 474 tbl.1 (2013) (identifying the qualities of scheduled controlled substances and providing examples that fall within each classification).

23. *Id.*

24. *Id.*

25. Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 912, 912–13.

26. 7 U.S.C. § 1639o(1).

27. Agriculture Improvement Act of 2018, Pub. L. 115-334, § 12619, 132 Stat. 5018 (codified as amended at 21 U.S.C. § 802).

28. 7 U.S.C. § 1639q(b).

29. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2022).

30. Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 280 (2019).

31. *Id.*

recommended by a physician for the treatment of "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief."[32] State prohibitions on possession and cultivation of cannabis no longer applied to such patients, their primary caregivers, or their prescribing physicians.[33]

California's legalization of medical cannabis preceded much of the scientific research on the efficacy of cannabis as a pharmaceutical.[34] Instead, arguments in support of medical cannabis relied more on anecdotal evidence from medical professionals.[35] For example, a 1991 survey found that 44% of American oncologists had recommended smoking cannabis to at least one of their chemotherapy patients.[36] Such anecdotal evidence was enough to sway public opinion, and the California Compassionate Use Act passed with the support of 55.6% of California voters.[37]

California's legalization of medical cannabis started a wave of legislation across the country. Only two years after California passed its act, Alaska, Nevada, Oregon, Washington, and Arizona had legalized medical cannabis.[38] Some states passed medical cannabis laws like California, by ballot initiative.[39] Other states legalized medical cannabis through legislation, and one state, Florida, passed medical cannabis through a constitutional amendment.[40] As of this comment, thirty-seven states and the District of Columbia have legalized medical cannabis; more than a dozen of those states have gone one step further and legalized cannabis for recreational use as well.[41] Nevertheless, under federal law, cannabis remains an illicit substance with "no recognized medical use," creating legal uncertainty on the validity of state laws,

32. § 11362.5(b)(1)(A).

33. § 11362.5.

34. Grossman, *supra* note 30, at 303.

35. *Id.* at 304.

36. *44% of Cancer Specialists in Survey have Advised Patients to Smoke Pot*, DESERET NEWS (May 1, 1991, 2:00 AM), https://www.deseret.com/1991/5/1/18918400/44-of-cancer-specialists-in-survey-have-advised-patients-to-smoke-pot.

37. Grossman, *supra* note 30, at 282.

38. *Id.* at 308.

39. *Id.*

40. *Id.*

41. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

federal preemption, and the proper balance of power between state and federal governments.[42]

II. CURRENT STATUS OF CANNABIS IN NORTH CAROLINA

North Carolina is in the minority of states that still criminalize the medicinal use of cannabis.[43] North Carolina has its own Controlled Substances Act and, similar to the federal CSA, categorizes different substances into schedules.[44] Unlike the federal CSA, North Carolina categorizes cannabis as a Schedule VI drug, defined as a drug that has "no currently accepted medical use…*or* a relatively low potential for abuse…*or* a need for further and continuing study to develop scientific evidence of its pharmacological effects."[45] Any person who manufactures, sells, delivers, or possesses with intent to sell or deliver cannabis is guilty of a felony, while any person who possesses cannabis is guilty of a misdemeanor.[46]

The North Carolina Controlled Substances Act does provide an explicit and narrowly tailored exemption for the use of hemp extract.[47] Under the Act, hemp extract is defined as an extract from the cannabis plant that has "less than nine-tenths of one percent tetrahydrocannabinol by weight."[48] However, the exemption is limited only to those who possess hemp extract to treat epilepsy, and the person must possess a certificate of analysis alongside the hemp extract that proves compliance with the THC threshold.[49] Furthermore, industrial hemp is grown as an agricultural commodity in North Carolina in accordance with the 2018 Farm Bill.[50] Hemp and hemp-derived products are a budding new

42. *See generally* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62(5) VAND. L. REV. 1421, 1422 (2009).

43. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

44. *See* N.C. GEN. STAT. § 90-94 (2022).

45. *Id.* (emphasis added).

46. § 90-95.

47. § 90-94.1.

48. § 90-94.1(a).

49. § 90-94.1(b)(1)–(2).

50. Farm Act of 2018, 113 N.C. Sess. Laws 1, 3–4 (codified at N.C. GEN. STAT. § 106-568.51 (2022)).

industry for the state, with approximately 1,500 licensed growers and 1,200 registered processors in North Carolina.[51]

III. NORTH CAROLINA'S PROPOSED MEDICAL CANNABIS LAW

Now, a bill before the North Carolina General Assembly proposes to legalize medical cannabis for certain conditions.[52] Titled the North Carolina Compassionate Care Act, it would create a framework for prescribing and selling medical cannabis.[53] The primary sponsors of the bill are Democratic Senator Paul Lowe and two Republican Senators, and it has received bipartisan support from Senate committees on health care, judiciary, and finance.[54] The following section describes the proposed regulatory framework for North Carolina medical cannabis and then compares it to the laws of other states that have legalized medical cannabis.

A. Proposed Regulatory Framework

The North Carolina Compassionate Care Act is premised on legislative findings that "modern medical research has found that cannabis and cannabinoid compounds are effective at alleviating pain, nausea, and other symptoms,"[55] and that allowing the use of medical cannabis would "preserve and enhance the health and welfare of [North Carolina] citizens."[56] The bill would allow physicians to prescribe cannabis to patients with a "debilitating medical condition,"[57] which is defined as one of the following conditions:

(a) Cancer
(b) Epilepsy
(c) Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS)

51. Alice Manning Touchette, *Hemp: North Carolina's Budding Industry*, N.C. STATE UNIV. COLL. OF AGRIC. AND LIFE SCIS. (Dec. 2, 2021), https://cals.ncsu.edu/news/hemp-north-carolinas-budding-industry.

52. Charles Duncan, *Medical Marijuana Bill Could Be Back on Track in N.C. Legislature Next Year*, SPECTRUM NEWS 1 (Dec. 21, 2021, 12:10 PM), https://spectrumlocalnews.com/nc/charlotte/politics/2021/12/21/medical-marijuana-bill-could-be-back-on-track-in-n-c–legislature-next-year.

53. *Id.*

54. *Id.*

55. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.111(1) (N.C. 2021).

56. § 90-113.111(2).

57. § 90-113.112(7).

(d) Amyotrophic lateral sclerosis (ALS)
(e) Crohn's disease
(f) Sickle cell anemia
(g) Parkinson's disease
(h) PTSD (subject to evidence of a traumatic event, such as combat service or a violent assault)
(i) Multiple sclerosis
(j) Cachexia
(k) Severe or persistent nausea related to end-of-life care or bedridden condition
(l) Terminal illness with a life expectancy of less than six months
(m) Any condition requiring hospice care.[58]

In addition, the bill would establish a Compassionate Use Advisory Board under the Department of Health and Human Services.[59] The Board would have the authority to add "any other serious medical condition or its treatment"[60] to the list of conditions eligible to use medical cannabis. The Board would be comprised of eleven members: seven members appointed by the Governor, two by the House Speaker, and two by the Senate President.[61] Of the seven members appointed by the Governor, three must hold a medical doctorate, and one of the three must be board-certified in addiction medicine.[62] Other required members include a research scientist with expertise in cannabis, a pharmacist, a patient that would be eligible to use cannabis under the act, and the parent of a minor patient eligible to use cannabis.[63] The Board members would meet at least twice a year to review petitions to add debilitating medical conditions to the list, which would be done with a majority vote.[64]

Patients with a medical cannabis prescription would receive a registry card similar to the identification cards used in other states, and the state would maintain a registry of all medical cannabis patients.[65] The bill also includes requirements and restrictions for

58. § 90-113.112(7)(a)–(n).
59. § 90-113.113.
60. § 90-113.112(7)(o).
61. § 90-113.113(a)(1)–(3).
62. § 90-113.113(a)(1)(a)–(c).
63. § 90-113.113(a)(1)(d)–(g).
64. § 90-113.113(e)–(f).
65. Duncan, *supra* note 52.

physicians who would be eligible to prescribe medical cannabis.[66] Such restrictions include a limit on the number of prescriptions a physician can write at one time and a ban on on-site advertising at a medical cannabis center.[67] Physicians must also complete continuing medical education courses on prescribing medical cannabis.[68] Outside of the initial physician visit during which a patient is diagnosed with a debilitating medical condition, health insurance would not be required to reimburse the cost of medical cannabis.[69]

Physicians, patients, and primary caregivers would be exempted from criminal liability for the possession of cannabis.[70] However, patients and caregivers may not possess any more cannabis than an "adequate supply,"[71] defined in the bill as a thirty-day supply based on the prescribed amount.[72] The proposed bill would not affect North Carolina law relating to the nonmedical use and possession of cannabis.[73] Furthermore, the bill explicitly states that it "shall not be construed"[74] to require any accommodation of medical cannabis use in a correctional facility, place of education, or place of employment, nor would the smoking or vaping of cannabis be allowed in a public place.[75]

Finally, to oversee the growth and processing of cannabis for medical use, the North Carolina Compassionate Use Act would establish a Medical Cannabis Production Commission.[76] Also composed of eleven members, the Commission would include representatives from the cannabis industry and law enforcement.[77] The Commission would oversee the issuance of medical cannabis supplier licenses and have the power to make rules regarding the qualifications and requirements for licensure.[78] For example, to obtain a supplier license, an applicant must have been a resident of

66. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.114 (N.C. 2021).
67. § 90-113.114(c), (l).
68. § 90-113.114(a).
69. § 90-113.141(7).
70. *See* § 90-113.111(3) (intending to change existing North Carolina laws to shield patients and their doctors from criminal and civil penalties).
71. § 90-113.127(c)(3).
72. § 90-113.112(1).
73. § 90-113.141(2).
74. § 90-113.141.
75. § 90-113.141(6).
76. § 90-113.118(a), (k)(1)–(2).
77. § 90-113.118(a).
78. *Id.* § 90-113.118(h), (k).

North Carolina for at least two years prior to the date of the application and have documented expertise in producing cannabis.[79] Further, a supplier license would not come cheap: a supplier would have to pay a $50,000 license fee, $10,000 each year to renew the license, and 10% of their annual proceeds to the North Carolina Department of Health and Human Services.[80]

The Commission could approve no more than ten supplier licenses, and each supplier would be limited to no more than four dispensing centers.[81] The bill strictly limits both where and when dispensaries could operate.[82] Additionally, suppliers would be strictly prohibited from advertising cannabis in public or making claims about the health benefits related to cannabis use.[83] Finally, medical cannabis products would have to be third-party tested at independent laboratories licensed through the state before they could be sold to consumers.[84]

B. Comparing North Carolina's Proposal to Other State Laws

Eighteen states have legalized cannabis for medicinal purposes but have not legalized it for adult recreational use.[85] These state laws provide a useful comparison to assess the propriety of North Carolina's proposed regulatory framework, including the medical conditions that would be covered under the act and the protections from discrimination provided to patients who use medical cannabis.

i. Medical Conditions Eligible for Cannabis Use

North Carolina's medical cannabis bill has been described by one of the senators backing it as one of the tightest in the nation.[86] Notably missing from the list of debilitating medical

79. *Id.* § 90-113.120(c)(3)(a), (c)(9).

80. *Id.* §§ 90-113.120(c)(7)–(8), 113.122(b).

81. *Id.* § 90-113.118(h).

82. *See Id.* § 90-113.129(a)–(b) (prohibiting a licensed medical cannabis center from being located near a school or church and limiting its hours of operation to between 7:00 a.m. and 7:00 p.m.).

83. *Id.* § 90-113.131(c).

84. *Id.* § 90-113.130(a).

85. NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

86. Duncan, *supra* note 52.

conditions eligible for a cannabis prescription in North Carolina is chronic pain.[87] Chronic pain is enumerated in many other states' medical cannabis laws as a condition eligible for a cannabis prescription, including West Virginia, Pennsylvania, Florida, and Ohio.[88] Additional conditions included in other state medical cannabis laws but absent from North Carolina's include seizure disorder (more general than epilepsy), chronic traumatic encephalopathy, glaucoma, traumatic brain injury, Tourette's syndrome, and inflammatory bowel disease.[89]

The North Carolina bill is "targeted to various medical conditions"[90] and attempts to avoid "legalization in a more profound sense."[91] However, the bill leaves out many medical conditions that could be considered debilitating, and patients with such conditions may benefit from access to medical cannabis.[92] Physicians, rather than legislators, are better positioned to determine when a patient has a medical condition and symptoms that could be alleviated from cannabis.[93] Now that the medicinal benefits of cannabis are being recognized, physicians should be able to prescribe it to all patients in need of its therapeutic effects without undue interference from the legislature. A broader list of conditions, like those in other state medical cannabis laws, is more equitable and provides North Carolina citizens with greater access to a full range of medical care options.

87. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.112(7) (N.C. 2021) (providing a list of debilitating medical conditions not including chronic pain as a standalone condition).

88. W. VA. CODE § 16A-2-1(a)(30)(N) (2022); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.103 (West 2021); FLA. STAT. § 381.986(2)(m) (2022); OHIO REV. CODE ANN. § 3796.01(A)(6)(m) (West 2020).

89. *E.g.*, OHIO REV. CODE ANN. § 3796.01(A)(6) (West 2020).

90. Duncan, *supra* note 52 (quoting Sen. Paul Lowe, "Anybody can't just go out and get medical marijuana. It's not legalization in a more profound sense at all. But it's targeted to various medical conditions.").

91. *Id.*

92. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.112(7) (N.C. 2021) (providing a list of qualifying debilitating medical conditions but leaving out many others that could be considered as debilitating as well).

93. *See generally* Steven E. Weinberger et al., *Legislative Interference with the Patient-Physician Relationship*, 367 NEW ENG. J. MED. 1557, 1557 (2012) (finding that the American legislators should not overstep the proper limits of their role in health care by dictating patients' interactions with their health care providers and should follow the principles of putting patients' best interests first).

ii. Protection from Discrimination

While public opinion on cannabis use has shifted dramatically in the past decade, there is still a stigma associated with cannabis that is absent from other forms of medical treatment.[94] This leaves medical cannabis patients vulnerable to discrimination because of their status as a cannabis user. As a result, some state medical cannabis laws provide explicit protections from discrimination for cannabis patients.[95] For example, Ohio's medical cannabis law explicitly provides that a person's status as a registered medical cannabis user "shall not be used as the sole or primary basis"[96] for rejecting the person as a tenant, disqualifying a patient for medical care (such as placement on an organ transplant list), or the determination of parental rights.[97] However, Ohio law does not provide cannabis patients with protection from employment discrimination, such as an employer's decision to fire or refuse to hire someone because of their status as a medical cannabis user.[98]

In contrast, the Pennsylvania statute provides similar protections as the Ohio law and additionally provides protection against employment discrimination.[99] Under Pennsylvania law, no employer may "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee"[100] solely based on such employee's status as a medical cannabis user.[101] This does not extend to any accommodation of cannabis use on the premises of the employer.[102] Protections against discrimination for medical cannabis users are discussed below under the broader implications of the legalization of medical cannabis.

94. *See, e.g.*, Semyon Melnikov et al., *The Effect of Attitudes, Subjective Norms and Stigma on Health-Care Providers' Intention to Recommend Medicinal Cannabis to Patients*, 27 INT'L J. NURSING PRAC., 2020, at 1, 3.

95. *See, e.g.*, OHIO REV. CODE ANN. § 3796.24(A)–(F) (West 2016); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103 (West 2016).

96. OHIO REV. CODE ANN. § 3796.24(B) (West 2016).

97. § 3796.24(B)(2), (C), (F).

98. § 3796.28(A)(2).

99. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)–(c) (West 2016).

100. § 10231.2103(b)(1).

101. *Id.*

102. § 10231.2103(b)(2).

IV. North Carolina Medical Cannabis Legalization and Its Implications

Legalization of medical cannabis would "enhance the health and welfare of [North Carolina] citizens,"[103] as a growing body of medical research continues to show that cannabis does provide therapeutic benefits.[104] However, the transition from a regulatory scheme that treats cannabis as an illegal substance to one where cannabis is a legally prescribed medical substance is a complicated process. While North Carolina should legalize medical cannabis, it raises additional questions regarding how cannabis use is and ought to be treated in society. For example, cannabis patients may face discrimination in employment because of their status as medical cannabis users.[105] Other implications include whether cannabis use is permissible to consider in adjudications of parental rights and whether cannabis would be covered in driving under the influence ("DUI") laws.[106]

A. Medical Cannabis Should Be Legalized

While the medicinal effects of cannabis were uncertain in 1996 when California passed the nation's first medical cannabis law, California's legalization prompted more scientific research into cannabis and its compounds.[107] To date, the Food and Drug Administration ("FDA") has approved one drug, Epidiolex, that is derived from cannabis.[108] It is used for the treatment of childhood seizure disorders.[109] The FDA has also approved two other

103. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.111(2) (N.C. 2021).

104. *See, e.g.*, Cohen, *supra* note 11, at 122.

105. *See* Iris Hentze, *Cannabis & Employment Laws*, NAT'L CONF. STATE LEGISLATURE (Nov. 1, 2021), https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx.

106. *See* H.R. 576, 2021 Gen. Assemb., Reg. Sess. § 90-730.1(l)–(m) (N.C. 2021); *Drugged Driving: Marijuana–Impaired Driving*, NAT'L CONF. STATE LEGISLATURES (Sept. 8, 2022), https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx.

107. *See* Grossman, *supra* note 30, at 303–04 (stating that when California's medical cannabis law passed, "scientific evidence for the medical effectiveness of smoked cannabis remained preliminary, at best" and the available studies paled in comparison to the size and scale required for FDA approval).

108. Kaur et al., *supra* note 1, at 3.

109. *Id.*

therapeutic drugs, Marinol and Syndros, that include a synthetic form of THC as an active ingredient.[110]

Multiple peer-reviewed, published studies have found that smoking cannabis "effectively relieved chronic neuropathic pain"[111] associated with HIV.[112] Another study found that smoking cannabis significantly ameliorated the symptoms associated with hepatitis C chemotherapy—extreme fatigue, nausea, muscle aches, loss of appetite, and depression—and enabled 42% more patients to complete their course of chemotherapy compared to patients who did not use cannabis.[113] Furthermore, medical cannabis can also serve as an alternative to highly addictive opioids for the treatment of pain.[114] This is one of the reasons cited by House Majority Whip Representative John Hardister in support of the bill: "I think that doctors ought to have the ability to prescribe it. I think that in many ways . . . medical marijuana is less addictive and harmful than some of the opioids that are currently legal."[115]

With a growing body of scientific evidence demonstrating the therapeutic effects of cannabis,[116] it is outdated for a state or federal government to deny people with debilitating medical conditions access to cannabis. Criminal punishment for the use of cannabis, particularly when used to alleviate medical symptoms, does not serve the public interest and in fact, harms public health.[117] For example, cannabis is responsible for half of all U.S. drug arrests, and such arrests disproportionately impact people of

110. *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FOOD & DRUG ADMIN., https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd (last visited Sept. 2, 2022).

111. Cohen, *supra* note 11, at 122–23.

112. *Id.*

113. *Id.* at 123.

114. Babasola O. Okusanya et al., *Medical Cannabis for the Reduction of Opioid Dosage in the Treatment of Non-Cancer Chronic Pain: A Systematic Review*, 9 SYSTEMATIC REVS. 167, 172 (2020).

115. Duncan, *supra* note 52.

116. *See, e.g.*, COMM. ON HEALTH EFFECTS OF MARIJUANA, THE NAT'L ACADS. OF SCI. ENG'G AND MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 85 (2017) (listing the therapeutic benefits for patients with chemotherapy-induced nausea, chronic pain, and multiple sclerosis).

117. *See* Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 111 (2018) (stating that the prohibition of access to marijuana by pain patients is "exacerbating a public health crisis").

color.[118] Legal or illegal, people are using cannabis, and many are using it for its medicinal effects.[119]

State legalization of medical cannabis will offer North Carolina citizens safer access to cannabis products. State regulation and testing of cannabis products will provide consumer protection and safety benefits for those who use cannabis products. As opposed to purchasing cannabis on the black market, North Carolinians with registry cards will be able to purchase cannabis from licensed suppliers and have a guarantee on the products they receive.[120] Likewise, consumers will be able to choose from a variety of cannabis products tailored to their needs. Moreover, legalization of cannabis has broad public support in North Carolina, with 73% of North Carolina adults supporting legalization for medical use and 54% supporting legalization for both medical and adult recreational use.[121]

B. Broader Implications of Cannabis Legalization

If medical cannabis is legalized in North Carolina, it will create broader implications regarding how medical cannabis use is treated in society compared to other prescription drugs. As argued above, the use of cannabis for medicinal purposes should no longer be criminalized; rather, it should be legalized and regulated. While public opinion on cannabis has shifted significantly in the past decade, it still carries the stigma of being a federally illicit drug. The legalization of cannabis raises the question of whether employers can or should continue to enforce "drug-free workplace" policies that would penalize an employee for their use of medical cannabis.[122] Other questions include whether courts should properly consider cannabis use in adjudications of parental rights and the use of cannabis prior to operating a motor vehicle.

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118. AM. C.L. UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013).

119. *See generally Marijuana and Public Health*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/marijuana/data-statistics.htm (last updated June 8, 2021) (stating that cannabis is the most used federally illegal drug with about 18% of Americans having used it at least once in 2019).

120. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. §§ 90-113.115(a), 113.120(c)(3), 113.130(a) (N.C. 2021).

121. ELON UNIV. POLL, NORTH CAROLINA OPINIONS ABOUT MARIJUANA 3 (2021), https://www.elon.edu/u/elon-poll/wp-content/uploads/sites/819/2021/02/Elon-Poll-Report-021121.pdf.

122. *See, e.g.*, Jay M. Zitter, Annotation, *Propriety of Employer's Discharge of or Failure to Hire Employee Due to Employee's Use of Medical Marijuana*, 57 A.L.R.6th 285 (2010).

i. Employment Policies Around Cannabis Use

It is not uncommon for employers to have "drug-free workplace" and "zero-tolerance" policies and to drug test prospective and current employees.[123] These policies would not ordinarily extend to an employee's use of a prescription drug to treat a medical condition.[124] Now that cannabis is viewed in many states as a medical treatment, and if North Carolina passes the Compassionate Use Act, should cannabis be treated differently than other prescription drugs by employers? Should an employer be able to fire, refuse to hire, or discipline an employee because of their status as a registered cannabis user?

There may certainly be valid reasons for an employer to prohibit the use of cannabis on employer property or prohibit an employee to be under the influence at work, and North Carolina's proposed bill explicitly excludes any construction of the bill that would require an employer to accommodate medical cannabis use at work.[125] However, the drug testing methods employers utilize will only determine if an employee uses cannabis at all, not whether an employee was under the influence while on the job.[126] Individuals can test positive for cannabis weeks or even months after use, and medical cannabis use outside of work hours has little to no demonstrated effect on work performance.[127]

Pennsylvania's medical cannabis statute provides employees who use medical cannabis with certain protections.[128] Specifically, an employer may not fire, refuse to hire, or institute other disciplinary actions against an employee solely because of their

123. *See, e.g., Changing Laws, Attitudes Pushing Employers to Explore Alternatives to Drug Tests*, 29 No. 10 N.C. EMP. L. LETTER 7 (Womble Bond Dickinson LLP) Nov. 2019.

124. Such employer drug policies focus on the use of *illegal* drugs, and cannabis has become a hybrid: illegal at the federal level but legal at the state level. *See Now's the Time to Consider Marijuana Policy*, 29 No. 1. N.C. EMP. L. LETTER 4 (Womble Bond Dickinson LLP) Feb. 2019 (explaining the "legal and practical implications" that this complexity brings to the workplace).

125. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.141(6) (N.C. 2021).

126. *Changing Laws, Attitudes Pushing Employers to Explore Alternatives to Drug Tests*, *supra* note 123.

127. *Cannabinoid Screen and Confirmation (Urine)*, UNIV. OF ROCHESTER MED. CTR., https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=cannabinoid_screen_urine (last visited Sept. 15, 2022) (stating that THC can be detected on average ten days after casual use and two to four weeks after frequent use); *SDSU Professor Finds After-Hours Cannabis Use Has No Impact on Workplace Performance*, SAN DIEGO STATE UNIV. (2022), https://business.sdsu.edu/about/news/articles/2020/07/sdsu-professor-cannabis-research-on-workplace-performance.

128. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)(1) (West 2016).

cannabis use.[129] Other methods for assessing impairment at work may be as or more effective as drug tests to protect employers from employees who may come to work impaired.[130] Such "impairment tests" have existed since the 1990s and use methods to measure alertness or impairment from a variety of causes including drug and alcohol use, illness, or fatigue.[131] Furthermore, employers can train supervisors to recognize signs of impairment in employees at work.[132] After all, an employee can be just as impaired at work because of alcohol use rather than cannabis use, but employees remain free to consume alcohol outside of work hours.

Some examples of alternative drug policies employers could adopt that are more equitable than "zero tolerance" include: prohibiting the use of cannabis at the workplace, although employers could allow employees to take breaks to use cannabis as an accommodation of a disability under the American with Disabilities Act ("ADA"); prohibiting employees from any cannabis use unless they have a valid prescription; disciplining employees who test positive for cannabis unless they have a prescription; or barring employees who use cannabis only from certain safety-sensitive positions (e.g., a position that requires operation of heavy machinery).[133] Unless an employer is subject to the federal Drug-Free Workplace Act, it will be up to employers to develop or modify their drug policies in reaction to state legalization of cannabis use.[134]

Public policy, including the right to privacy, the right to decide one's own medical care, and the right to a reasonable accommodation of a disability, disfavors allowing an employer to fire an employee simply for their use of medical cannabis.[135] As cannabis law further develops, employees may have a statutory or common law cause of action against an employer who discharges them for their status as a legal cannabis user.[136] For example, a

129. *Id.*

130. *Changing Laws, Attitudes Pushing Employers to Explore Alternatives to Drug Tests*, *supra* note 123.

131. *Id.*

132. *Id.*

133. *Now's the Time to Consider Marijuana Policy*, *supra* note 124.

134. *Id.*

135. *See generally* Zitter, *supra* note 122 (noting cases that have been brought under these provisions, though not always successfully).

136. *See, e.g.*, Palmiter v. Commonwealth Health Sys., Inc., 260 A.3d 967, 977 (Pa. Super. Ct. 2021) (holding that plaintiff could plausibly bring a private statutory action under the

Pennsylvania court held that the state's medical marijuana statute provided a private right of action to an employee alleging wrongful discharge because of cannabis use.[137] The common law tort of wrongful discharge in violation of public policy may be another form of redress for an aggrieved ex-employee.[138]

ii. Parental Custody

Another implication of medical cannabis legalization is the proper role, if any, cannabis use should play in adjudications of parental rights. As previously stated, cannabis, once considered an illicit and dangerous substance, is now treated by many state laws as a valid medical treatment.[139] However, in at least one North Carolina case, a mother's prescription for and use of medical cannabis in another state was a factor the court considered in awarding primary custody to the child's father.[140] In *Atkinson*, the mother of a middle-school-aged child used medical cannabis in the evenings while at home with her child.[141] The court relied on the mother's cannabis use to support its conclusion that there had been a "substantial change in circumstances affecting the welfare [of the child]."[142] The North Carolina Court of Appeals affirmed the lower court's findings and awarded primary custody to the child's father.[143]

Some state medical cannabis statutes provide protection for registered cannabis users against such parental rights adjudications.[144] For example, Ohio law provides that the use, possession, or administration of medical cannabis "shall not be the sole or primary basis for . . . an allocation of parental rights."[145] North Carolina's proposed medical cannabis bill does not provide any explicit protections for parents who obtain prescriptions for

Medical Marijuana Act and a wrongful discharge action against her employer for termination based on her use of medical marijuana).

137. *Id.*

138. *See* RESTATEMENT (THIRD) OF EMP. L. § 5.01 (AM. L. INST. 2015).

139. *See* NAT'L CONF. STATE LEGISLATURES, *supra* note 4.

140. Atkinson v. Chamberlin-Spencer, No. COA17-941, 2018 WL 1386607, at *1–*4 (N.C. Ct. App. Mar. 20, 2018).

141. *Id.* at *1, *3.

142. *Id.* at *3.

143. *Id.* at *1, *5.

144. *See, e.g.,* OHIO REV. CODE ANN. § 3796.24(B) (West 2016); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(c) (West 2016).

145. OHIO REV. CODE ANN. § 3796.24(B)(2) (West 2016).

cannabis.[146] The North Carolina Legislature should consider adopting language in the bill similar to that included in Ohio's law. Parents should not fear a loss of parental rights because they obtain a medical cannabis prescription to treat debilitating medical conditions.

iii. Driving Under the Influence

Cannabis, specifically THC, is an intoxicating substance that can impair motor skills and other cognitive abilities needed to operate a motor vehicle, similar to alcohol.[147] Because of this, the legalization of cannabis for either medical or adult recreational use raises the question of what level of cannabis intoxication would be deemed "under the influence" and thus prohibit operation of a motor vehicle. However, there is little data available on the relationship between cannabis dose and level of impairment, and available technology is still developing the ability to perform accurate roadside sobriety tests for cannabis use, such as a breathalyzer for alcohol.[148]

Some states that have legalized cannabis use have set per se legal limits for the level of cannabis in an individual's system that constitutes driving under the influence.[149] For example, West Virginia sets the impairment limit at three "nanograms of active tetrahydrocannabis per millimeter of blood in serum"[150] above which a cannabis patient may not operate a vehicle, other heavy equipment, or perform other employment tasks considered a safety risk.[151] While North Carolina's proposed medical cannabis bill does not "permit the operation of any vehicle, aircraft, train, or boat while under the influence of cannabis,"[152] the state will have to decide what level of cannabis intoxication constitutes 'under the influence' for enforcement of DUI laws. This issue is not unique to

146. *See* S. 711, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

147. Aviv Weinstein et al., *A Study Investigating the Acute Dose-Response Effects of 13 mg and 17 mg 9-tetrahydrocannabinol on Cognitive-Motor Skills, Subjective and Autonomic Measures in Regular Users of Marijuana*, 22 J. PSYCHOPHARMACOLOGY 441, 442 (2008).

148. *See* Franjo Grotenhermen et al., *Developing Limits for Driving Under Cannabis*, 102 ADDICTION 1910, 1915 (2007).

149. Kristin Wong et al., *Establishing Legal Limits for Driving Under the Influence of Marijuana*, 1 INJURY EPIDEMIOLOGY, no. 26, 2014, at 1, 4–5.

150. W. VA. CODE § 16A-5-10(1) (2022).

151. § 16A-5-10(1)(C), (4).

152. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.141(4) (N.C. 2021).

cannabis, however, and such decisions can be made using the best available social and biological scientific evidence.

V. CONCLUSION

With a bill proposed in the senate, North Carolina may join the majority of states that have legalized cannabis for medicinal use. Changing public and professional opinions and a growing body of scientific evidence justify the legalization of cannabis for medicinal purposes, and such a measure has popular support in North Carolina.[153] Across the country and in North Carolina, however, legalization creates broader implications regarding the regulatory transition from cannabis as an illicit, criminally sanctioned substance to a legal medical treatment. While this transition presents challenges that must be analyzed and addressed under a new regulatory framework for medical cannabis, ultimately, legalization of medical cannabis in North Carolina will "preserve and enhance the health and welfare of [North Carolina] citizens."[154] The bill should be enacted.

153. *North Carolina Opinions about Marijuana*, *supra* note 121, at 3.
154. S. 711, 2021 Gen. Assemb., Reg. Sess. § 90-113.111(2) (N.C. 2021).

HEALTH CARE SHARING, NOT HEALTH CARE SCARING: THE NEED TO REGULATE HEALTH CARE SHARING MINISTRIES LIKE MAINSTREAM INSURANCE

HANNAH NOREM†

I. INTRODUCTION

Health care delivery in the United States is an undoubtedly broken system, but some Americans have exploited a regulatory loophole to save money on their health care to their peril. More than a few Americans have turned to Health Care Sharing Ministries ("HCSMs") to cut their health care costs, only to end up footing the bill when they become gravely sick or injured.[1] HCSMs have existed in some form since the early 1900s when religious groups would "bear each other's burdens" and pay for group members' medical expenses.[2] HCSMs are legally defined as a "religious exemption" in federal law for health insurance purposes, meaning they are not actually health insurance, though they have the words "health care" in their name, and many HCSMs operate like mainstream health insurance.[3] To be considered an HCSM under federal law, an organization has to be a nonprofit organization in existence continually since December 31, 1999 and

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1. *See, e.g.*, Sara Machi, *"I Looked at How Much Insurance Covered, and It Said 'Zero'" | Fenton Mom Thought She Signed Up for Insurance. Then the Bills Came.*, KSDK-TV (Feb. 18, 2020, 7:15 PM), https://www.ksdk.com/article/news/investigations/she-thought-she-signed-up-for-insurance-but-then-the-bills-came-now-shes-on-the-hook-for-160-k/63-294e1ebb-a96f-45a1-88b4-3ae52f0c1c7b.

2. *Galatians* 6:2; Laura Santhanam, *1 Million Americans Pool Money in Religious Ministries to Pay For Health Care*, PBS NEWSHOUR (Jan. 16, 2018, 5:46 PM), https://www.pbs.org/newshour/health/1-million-americans-pool-money-in-religious-ministries-to-pay-for-health-care.

3. 26 U.S.C. § 5000A(d)(2)(B) (2022).

contain "members . . . which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed."[4]

With the rise of the Affordable Care Act ("ACA") and the individual mandate that penalized Americans for not having health insurance, HCSMs took advantage of their religious exemption under federal law and doubled their membership from 200,000 to 530,000 in 2016.[5] In 2021, the membership of HCSMs was 865,000 Americans.[6] While the federal individual mandate was discontinued starting with the tax year 2019, five states and the District of Columbia have enacted their own individual mandate, making the loophole of cheaper health insurance provided by HCSMs still appealing to many Americans.[7]

The attraction of HCSMs is their cost savings over ACA-backed plans, with some families saving thousands of dollars a year over mainstream health insurance.[8] For some, the religious underpinnings of HCSMs are also appealing, as HCSMs advertise the biblical foundation of sharing others' expenses.[9] However, HCSMs carry more risk than mainstream insurance plans.[10] While members pay into HCSMs with the hope their medical bills will be covered by other members, "there is no coverage [and] no guarantee of payment" with HCSMs.[11]

This means HCSM members may save money in the short term through lower healthcare-related financial contributions, but

4. *Id.*

5. Kimberly Leonard, *Christians Find Their Own Way to Replace Obamacare*, U.S. NEWS & WORLD REP. (Feb. 23, 2016), https://www.usnews.com/news/articles/2016-02-23/membership-for-health-sharing-ministries-soars-under-obamacare.

6. *By The Numbers*, ALL. OF HEALTH CARE SHARING MINISTRIES, http://ahcsm.org/about-us/data-and-statistics (last visited Sept. 8, 2022).

7. Anne Newhouse, *Status of the State Individual Health Insurance Coverage Mandates*, INT'L FOUND. OF EMP. BENEFIT PLANS (Feb. 13, 2020), https://blog.ifebp.org/index.php/status-of-the-state-individual-health-insurance-coverage-mandates.

8. *See* Mark Tosczak, *Cost-sharing Ministries Becoming Popular Alternative to ACA Plans*, N.C. HEALTH NEWS (Jan. 8, 2018), https://www.northcarolinahealthnews.org/2018/01/08/cost-sharing-ministries-becoming-popular-alternative-aca-plans.

9. *See* Reed Abelson, *It Looks Like Health Insurance, But It's Not. "Just Trust God," Buyers Are Told*, N.Y. TIMES, (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/health/christian-health-care-insurance.html (highlighting the role that religion plays in HCSMs).

10. JoAnn Volk, Emily Curran, & Justin Giovannelli, *Health Care Sharing Ministries: What Are the Risks to Consumers and Insurance Markets?*, COMMONWEALTH FUND (Aug. 8, 2018), https://www.commonwealthfund.org/publications/fund-reports/2018/aug/health-care-sharing-ministries.

11. Abelson, *supra* note 9.

they can be saddled with thousands of dollars in medical bills for routine procedures because HCSMs can decide what they will and will not cover on a whim.[12] Even if medical conditions are included as covered in an HCSM's marketing materials, the HCSM can refuse to put members' shared contributions toward members' medical bills, leaving them with thousands of dollars of debt.[13] HCSMs exploit people who sign up thinking they will save money by joining an HCSM, causing them to foot a bill they would have never had with mainstream health insurance.[14] Because HCSMs are exempt from federal oversight and consumer protections of health care plans put forth by federal and state insurance regulators, HCSM members are out of luck if their organization opts not to cover their medical expenses.[15]

This Comment proposes that HCSMs be regulated more similarly to mainstream health insurance options, like through the actions of a state department or division of insurance ("DOI"), to increase consumer protection in the event of denial of claims or cancellation of coverage. Section II provides an overview of how the IRS regulates HCSMs similarly to more mainstream health insurance options. Section III provides a framework for how HCSMs are currently regulated on both the federal and state levels. Section IV describes how ordinary consumers are duped by the unregulated practices of HCSMs, showing that some consumers have successfully brought civil fraud actions against their HCSMs. Finally, Section V proposes a nuanced regulatory scheme for HCSMs that allows for religious freedom but provides consumers recourse if their coverage is arbitrarily denied by their HCSM, using Alaska as a case study.

12. *See, e.g.*, Sean P. Murphy, *She's Stuck With $75,000 in Bills After Her "Health Care Sharing Ministry" Refuses to Pay*, THE BOSTON GLOBE (June 1, 2021, 3:43 PM), https://www.bostonglobe.com/2021/06/01/business/shes-stuck-with-75k-bills-after-her-health-care-sharing-ministry-refuses-pay-up.

13. *See, e.g.*, Seaborn Larson, *Montanans Find Insurance Alternative, Pitfalls, with Health Care Sharing Ministries*, COMM'R OF SEC. AND INS., MONT. STATE AUDITOR (Aug. 9, 2021), https://csimt.gov/news/montanans-find-insurance-alternative-pitfalls-with-health-care-sharing-ministries.

14. *See* Sarah Salvadore, *Health Cost Sharing Ministries Leave Many Out in the Cold, Critics Say*, NAT'L CATH. REP. (May 13, 2020), https://www.ncronline.org/news/justice/health-cost-sharing-ministries-leave-many-out-cold-critics-say.

15. Simone Hussussian, *The Health-Sharing Duck*, THE REGUL. REV. (Feb. 26, 2020), https://www.theregreview.org/2020/02/26/hussussian-health-sharing-ministries.

II. HCSMs AND THE IRS

In 2020, the IRS proposed a rule that permits employers to reimburse employees who pay into HCSMs for their membership, like a health insurance premium.[16] The IRS proposed this rule in response to an executive order signed by President Trump in 2019.[17] In explaining this rule, the IRS stated that "expenditures for . . . health care sharing ministry memberships are amounts paid for medical care as defined in [Internal Revenue Code] section 213(d)."[18] In the proposed rule, HCSMs are considered to be "insurance covering medical care."[19] Though the IRS is careful to clarify that its classification of HCSMs as insurance for tax purposes does not mean HCSMs should be considered insurance under state or federal regulations, this proposed rule further muddies the waters and begs the question: should HCSMs be regulated more like mainstream insurance options?[20]

The IRS will take final action sometime in 2022 on the HCSM rule.[21] If the IRS were to finalize the rule as it stands today, Americans would be able to deduct the monthly amounts paid to HCSMs on their 2022 taxes.[22] The IRS proposed this rule out of a directive from President Trump to "propose regulations to treat expenses related to certain types of arrangements, potentially including direct primary care arrangements and healthcare sharing ministries, as eligible medical expenses under Section 213(d)."[23] While this rule has the potential to cause chaos within the limited risk pool of mainstream health insurance, if a taxpayer can deduct their HCSM payments from their taxes the same way one can

16. Katie Keith, *New Proposed Rule On Health Care Sharing Ministries and Direct Primary Care*, HEALTH AFFS. BLOG (June 11, 2020), https://www.healthaffairs.org/do/10.1377/forefront.20200611.714521/full.

17. *See* Exec. Order No. 13,877, 80 Fed. Reg. 30,849 (June 27, 2019).

18. Certain Medical Care Arrangements, 85 Fed. Reg. 35,399 (June 10, 2020).

19. Christina Cousart, *Proposed IRS Rule Would Incentivize Health Care Sharing Ministries and Direct Primary Care Arrangements*, THE NAT'L ACAD. FOR STATE HEALTH POL'Y (June 15, 2020), https://www.nashp.org/proposed-irs-rule-would-incentivize-health-care-sharing-ministries-and-direct-primary-care-arrangements.

20. *See id.*

21. RIN 1545-BP31, OFF. OF INFO. AND REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1545-BP31 (last visited Sept. 27, 2022).

22. *See* Keith, *supra* note 16.

23. Press Release, Internal Revenue Serv., Proposed Regulations Address Direct Primary Care Arrangements and Health Care Sharing Ministry Memberships (June 8, 2020), https://www.irs.gov/newsroom/proposed-regulations-address-direct-primary-care-arrangements-and-health-care-sharing-ministry-memberships.

deduct health insurance premiums, it would further solidify the claim that HCSMs ought to be regulated more closely to mainstream health insurance.[24]

III. HCSMs AND FEDERAL/STATE REGULATORS

On a state level, thirty out of the fifty states have "safe harbor" provisions exempting HCSMs from the state insurance code.[25] While some states subject HCSMs to further requirements, like annual audits or providing a written disclaimer to consumers, most states largely leave HCSMs alone.[26] For example, in North Carolina, the DOI does not regulate HCSMs due to "an exception in state law that allows for [HCSMs] to operate outside of state regulation if they meet the exception requirements."[27] The exception requirements include that the HCSM "publishes a monthly written statement that all members have access to that lists the total dollar amount of the qualified medical needs submitted to the HCSM as well as the amount published or assigned to the members for their contribution."[28] While the North Carolina DOI states multiple times on its website that HCSMs are *not* insurance, it concedes that HCSMs "may meet the needs of some consumers."[29]

At the federal level, a similar laissez-faire attitude controls, though four members of Congress wrote to the Federal Trade Commission ("FTC") Chairman in October 2021 expressing their concern about "the absence of decisive federal action" regarding HCSMs.[30] This letter urged the FTC to "take immediate action to protect consumers" from the deceptive marketing practices of HCSMs.[31]

In comparison, mainstream health insurance companies are federally regulated by the ACA.[32] There are grandfathered health

24. *See* Keith, *supra* note 16.

25. Volk et al., *supra* note 10.

26. *See id.*

27. *Alternate Plans*, N.C. DEP'T OF INS., https://www.ncdoi.gov/consumers/health-insurance/alternate-plans (last visited Feb. 22, 2022).

28. *Id.*

29. *Id.*

30. Letter from the Hon. Jared Huffman to Samuel Levine, Acting Chairman of the FTC, Bureau of Consumer Protection (Oct. 27, 2021), https://huffman.house.gov/imo/media/doc/final_ftc_health_shares_letter_1027.2021.pdf.

31. *Id.*

32. *See generally Rights and Protections*, HEALTHCARE.GOV, https://www.healthcare.gov/health-care-law-protections/rights-and-protections (last visited Feb. 22, 2022) (identifying consumer protections in health insurance law).

insurance plans that share similarities with HCSMs in that they had to exist before a certain date and are not required to incorporate some aspects of the ACA in their plans, like providing preventative care.[33] However, the grandfathered plans are still required to cover children up to age twenty-six and cannot cancel a consumer's coverage arbitrarily, making even the grandfathered plans more regulated and amiable to consumers than HCSMs.[34] While there are fewer federal protections to raise grievances with one's health insurance company than state-based insurance protections, there are still some in place, like the right to appeal a denial of a claim or a cancellation of coverage.[35] In stark contrast, claims can be denied by HCSMs at any time with no recourse for the consumer.[36]

IV. WOLF IN SHEEP'S CLOTHING: DECEPTIVE PRACTICES OF HCSMS

The health care market in the United States is complicated, to say the least.[37] A great deal of data shows that consumers make bad decisions concerning their health care because it is such a confusing industry.[38] Consequently, it is easy for the average person to fall prey to the alluring marketing of HCSMs that tout similar-seeming plans to mainstream health insurance for a lower price.[39] Many of the heartbreaking stories about HCSMs involve consumers who in a bind purchased an HCSM plan, and only after accruing thousands of dollars of medical bills found their expenses denied

33. *What Is a Grandfathered Plan? How Do I Know If I Have One?*, KAISER FAM. FOUND., https://www.kff.org/faqs/faqs-health-insurance-marketplace-and-the-aca/what-is-a-grandfathered-plan-how-do-i-know-if-i-have-one (last visited Feb. 22, 2022).

34. *Grandfathered Health Insurance Plans*, HEALTHCARE.GOV, https://www.healthcare.gov/health-care-law-protections/grandfathered-plans (last visited Feb. 22, 2022).

35. *How to Appeal an Insurance Co. Decision*, HEALTHCARE.GOV, https://www.healthcare.gov/appeal-insurance-company-decision (last visited Feb. 22, 2022).

36. *See* Abelson, *supra* note 9.

37. *See generally* Tony Pistilli, *Health Care Sharing Ministries*, THE ACTUARY MAG. (Dec. 2021), https://theactuarymagazine.org/health-care-sharing-ministries (explaining the complexities of HCSMs).

38. *See e.g.*, Margot Sanger-Katz, *It's Not Just You: Picking a Health Insurance Plan Is Really Hard*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/upshot/choosing-health-insurance-is-hard.html.

39. *See, e.g.*, Press Release, Cal. Dep't of Ins., Dep't Issues Cease and Desist Order to Protect Cal. Consumers from Misleading Health Plans Known as "Health Care Sharing Ministries" (Mar. 10, 2020), https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release026-2020.cfm.

by their HCSM.[40] While HCSMs are, by their accounts, clear about telling consumers that the products they sell are not insurance, courts have found differently.[41] The following court decisions have discussed the remedies that consumers may have against some fraudulent practices of HCSMs in some jurisdictions.[42]

Many of the lawsuits discussed below were brought by consumers against Aliera Companies ("Aliera").[43] As of January 2022, fourteen states have brought lawsuits against Aliera, alleging it has scammed consumers out of millions of dollars.[44] The lawsuits allege that Aliera took consumers' money as health insurance premiums, but because it had no obligation to pay out any member claims under the auspices of an HCSM, pocketed members' money without paying members' bills.[45] Other states, short of filing a lawsuit, have issued cease and desist orders for Aliera and its subsidiaries.[46] These states have justified the orders by asserting the state's insurance-regulating body "has cause to believe that the acts, practices, transactions, and course of business engaged in by The Aliera Companies, Inc. . . . and Trinity Healthshare, Inc. . . . may be conducted in an illegal and improper way."[47]

LeCann v. Aliera Cos. was a class-action lawsuit brought in the United States District Court in the Northern District of Georgia in

40. *See, e.g.*, Jenna Carlesso, *Best of 2020: "I'm Relying on Prayer." Complaints Pile Up Against Health Care Sharing Ministries as State Mounts a Defense*, THE CONN. MIRROR (Dec. 30, 2020), https://ctmirror.org/2020/12/30/best-of-2020-im-relying-on-prayer-complaints-pile-up-against-health-care-sharing-ministries-as-state-mounts-a-defense.

41. *See, e.g.*, Jeremy Chisenhall, *Lexington Judge Rules Health Insurance Company Lied, Awards $4.7 Million Judgment*, LEXINGTON HERALD-LEADER (Nov. 30, 2021, 3:33 PM), https://www.kentucky.com/news/local/counties/fayette-county/article256219082.html.

42. *See, e.g.*, Emilee Larkin, *Christian Group's Insurance Plan Called a Fraud by New York*, COURTHOUSE NEWS SERV. (Oct. 20, 2020), https://www.courthousenews.com/christian-groups-insurance-plan-called-a-fraud-by-new-york.

43. *See* Samantha Liss, *Healthcare Sharing Ministry "Sham" Faces Suit for Allegedly Defrauding Consumers in California*, HEALTHCARE DIVE (Jan. 13, 2022), https://www.healthcaredive.com/news/healthcare-sharing-ministry-sham-lawsuit-california-aliera/617130.

44. *Id.*

45. *Id.; see also* Jackson v. Aliera Cos., 462 F. Supp. 3d 1129 (W.D. Wash. 2020) (holding that plaintiffs sufficiently pled Aliera and its subsidiaries were not considered HCSMs under Washington insurance regulations); Duncan v. Aliera Cos., No. 2:20-cv-00867-TLN-KJN, 2021 U.S. Dist. LEXIS 172376, at *2 (E.D. Cal. Sept. 9, 2021) (alleging that Aliera and its subsidiaries sold "inherently unfair and deceptive health care plans to California residents").

46. *See, e.g.*, Cease and Desist Order at 1, Aliera Cos., Inc. and Trinity Healthshare, Inc., No. MC 19-109 (Conn. Ins. Comm'r Dec. 2, 2019), https://portal.ct.gov/-/media/CID/1_Orders/Order-MC-19-109.pdf?la=en.

47. *Id.*

2021.[48] Aliera was a for-profit business incorporated in 2015.[49] This is distinct from how HCSMs are required to operate under federal law which requires HCSMs to be nonprofit businesses for federal tax purposes.[50] Aliera was family-run, with Shelly Steele serving as the CEO and her son, Chase Moses, serving as its president.[51] Ironically, Ms. Steele's husband and Mr. Moses's father, Timothy Moses, spent seven years in federal prison for securities fraud and perjury in the early 2000s.[52] In their complaint, the many plaintiffs in *LeCann* alleged that at some point after Aliera's incorporation, Steele and Chase Moses planned to make money off of the HCSM exception found in federal and state laws, exploiting Georgia consumers.[53]

In this plan, Aliera partnered with an existing HCSM, Anabaptist HealthShare, to market and sell HCSM plans to Aliera's customers.[54] Anabaptist HealthShare is a recognized HCSM and has been meeting the health-sharing needs of the Anabaptist community for many years.[55] In 2016, Aliera and Anabaptist HealthShare formed a limited liability company, Unity Healthshare, LLC ("Unity"), which gave an exclusive license to Aliera to market and sell legitimate health sharing plans to Georgia consumers under the Unity name.[56] However, in 2018, when it came out that Timothy Moses was a convicted felon and that Aliera was not using the HCSM member payments for members' health care needs, the working relationship with Anabaptist HealthShare soured, and Anabaptist HealthShare ended its partnership with Aliera.[57]

For Aliera, the termination of its partnership with Anabaptist HealthShare meant that it could no longer market and sell HCSM plans to consumers because it was incorporated too late

48. LeCann v. Aliera Cos., No. 1:20-cv-2429, 2021 U.S. Dist. LEXIS 115827, at *1 (N.D. Ga. June 22, 2021).

49. *Id.* at *4.

50. 26 U.S.C. § 5000A(d)(2)(B) (2022).

51. *LeCann*, 2021 U.S. Dist. LEXIS 115827, at *4.

52. *Atlanta Exec Headed to Jail for "Pump and Dump" Fraud Scheme*, ATLANTA BUS. CHRON. (Feb. 17, 2006), https://www.bizjournals.com/atlanta/stories/2006/02/13/daily49.html.

53. *LeCann*, 2021 U.S. Dist. LEXIS 115827, at *4–5.

54. *Id.* at *7.

55. *About AHS*, ANABAPTIST HEALTHSHARE, https://www.sharing.health/about-us (last visited Feb. 23, 2022).

56. *LeCann*, 2021 U.S. Dist. LEXIS 115827, at *7.

57. *Id.* at *7–8.

for it to be considered a legitimate HCSM on its own.[58] However, in ensuing litigation between Anabaptist HealthShare and Aliera, Aliera was able to keep "possession of the Unity membership roster, all Unity HCSM plans, all HCSM plan assets, all Unity intellectual property, including the website, and Unity's employees" after the conclusion of its relationship with Anabaptist HealthShare.[59] This effectively meant that Aliera could continue the operation of Unity by a different name, creating an unlicensed HCSM that consumers still paid into believing it was a legitimate health-sharing system.

After the relationship with Anabaptist HealthShare and Unity ceased, Aliera created a new company, Trinity Healthshare, Inc. ("Trinity"), in June 2018.[60] The only employee of Trinity was William Thead III, who had been previously employed with Aliera and even officiated Chase Moses's wedding.[61] Because the relationship with an existing HCSM had been severed, Unity and Trinity's continued marketing and selling of health sharing plans to consumers was illegal, as Aliera's operation of Unity and Trinity did not constitute an HCSM under either state or federal law.[62]

The plaintiffs in *LeCann* were individuals who, like many other HCSM members, had extensive medical bills that were not paid out by any Aliera-based company though they religiously paid their "premiums" to the HCSM.[63] After trying to appeal their claims through some of the procedures indicated in their Aliera/Unity/Trinity membership guides, they created a class of affected persons and sued in federal court.[64] The plaintiffs brought the following claims:

> money had and received, unjust enrichment, breach of contract and breach of covenant of good faith and fair dealing, conversion, breach of fiduciary duty/ confidential relationship, intentional or negligent misrepresentation, violation of the Georgia Fair Business Practices Act ("GFBPA"), O.C.G.A. 10-1-390

58. *See id.* at *7.
59. *Id.* at *8.
60. *Id.* at *9.
61. *Id.*
62. *Id.* at *10.
63. *See id.* at *10–12.
64. *Id.* at *20.

> et seq., violation of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. 10-1-370 et seq.

Aliera moved to dismiss the class action because the named plaintiffs did not properly resolve their disputes per Aliera/Unity/Trinity's stated procedures and moved in the alternative to compel arbitration.[65] However, the district court dismissed both motions.[66] The court ruled that nothing in the Aliera membership guides required certain types of resolution before commencing suit and the *Aliera "HCSM" contracts were insurance contracts*, which prevented the named plaintiffs from being compelled into arbitration.[67] Although Aliera was not affiliated with an HCSM at the time this lawsuit was filed, Aliera's contracts were loosely based on its former relationship with an HCSM. Due to this loose connection to an HCSM, the court ruled the Aliera contracts were *insurance contracts* and not an HCSM membership agreement. The court's ruling that the Aliera contracts were insurance contracts and not a membership agreement of an HCSM would open the door to regulating HCSMs in a more similar fashion to mainstream health insurance.

Albina v. Aliera Cos. is a case out of the United States District Court for the Eastern District of Kentucky.[68] While there was no trial due to Aliera filing for bankruptcy in December 2021, the district court granted a default judgment to the plaintiffs and made several important legal conclusions.[69] The first is that the contract the plaintiffs signed with Aliera constituted an insurance contract under Kentucky state law.[70] The second was that while HCSMs are exempt from regulation under Kentucky state law, Aliera did not constitute a legal HCSM.[71] The court concluded this since, among other things, "Aliera did not match specific participants who have financial, physical, or medical needs with participants who choose

65. *Id.* at *101.

66. *Id.*

67. *Id.* at *101–102.

68. Albina v. Aliera Cos., No. 5:20-cv-496, 2021 U.S. Dist. LEXIS 149903 (E.D. Ky. Aug. 10, 2021).

69. Default Judgment Against the Aliera Cos. at 1–4, Albina v. Aliera Cos., No. 5:20-cv-496, 2021 U.S. Dist. LEXIS 149903 (E.D. Ky. Aug. 10, 2021) (No. 75-1).

70. *Id.*; KY. REV. STAT. ANN. § 304.1-030 (2022) (defining "insurance" as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks'").

71. Default Judgment Against the Aliera Cos. at 1–4, Albina v. Aliera Cos., No. 5:20-cv-496, 2021 U.S. Dist. LEXIS 149903 (E.D. Ky. Aug. 10, 2021) (No. 75-1).

to assist with those needs," as a legitimate HCSM would do.[72] Additionally, Aliera, doing business as Trinity, did not abide by the Kentucky HCSM regulations because it failed to complete an annual independent audit.[73] The fiscal year 2018 was the last year it complied with this regulation.[74]

Moreover, the court criticized Aliera's and its subsidiaries' business practices within the state of Kentucky. The court ruled that Aliera misled the class members into entering insurance contracts with Aliera when they fully believed they were joining a legal HCSM.[75] The court concluded that Aliera's failure to abide by Kentucky insurance regulations was "to the damage of class members."[76]

Because the Aliera contracts are considered valid insurance contracts under Kentucky state law, the court ruled that the plaintiffs and class members were entitled to rescind their contracts with Aliera or reform them to conform with state law.[77] With whatever choice each class member makes, they are entitled to rescission or reformation damages, respectively.[78] If a class member were to reform their contract with Aliera, they would be entitled to receive the amount of the total bills submitted to Aliera.[79] This could be a lot of money, as the class total for unpaid medical bills

72. Ky. Rev. Stat. Ann. § 304.1-120 (LexisNexis 2022) (outlining the requirements for a religious organization to be exempt from the health insurance regulation in Kentucky, notably requiring the HCSM to include the following message in at least 10-point font on all its documents: "NOTICE: UNDER KENTUCKY LAW, THE RELIGIOUS ORGANIZATION FACILITATING THE SHARING OF MEDICAL EXPENSES IS NOT AN INSURANCE COMPANY, AND ITS GUIDELINES, PLAN OF OPERATION, OR ANY OTHER DOCUMENT OF THE RELIGIOUS ORGANIZATION DO NOT CONSTITUTE OR CREATE AN INSURANCE POLICY. PARTICIPATION IN THE RELIGIOUS ORGANIZATION OR A SUBSCRIPTION TO ANY OF ITS DOCUMENTS SHALL NOT BE CONSIDERED INSURANCE. ANY ASSISTANCE YOU RECEIVE WITH YOUR MEDICAL BILLS WILL BE TOTALLY VOLUNTARY. NEITHER THE ORGANIZATION OR ANY PARTICIPANT SHALL BE COMPELLED BY LAW TO CONTRIBUTE TOWARD YOUR MEDICAL BILLS. WHETHER OR NOT YOU RECEIVE ANY PAYMENTS FOR MEDICAL EXPENSES, AND WHETHER OR NOT THIS ORGANIZATION CONTINUES TO OPERATE, YOU SHALL BE PERSONALLY RESPONSIBLE FOR THE PAYMENT OF YOUR MEDICAL BILLS."); Default Judgement Against the Aliera Cos., *supra* note 71.

73. Default Judgement Against the Aliera Cos., *supra* note 71.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 2–3.

78. *Id.* at 3.

79. *Id.*

was over $3 million.[80] The court even went so far as to exhort class members to choose the contractual remedy that nets them the greatest award.[81] The total class damage amount, assuming that each member of the class chose the most individually lucrative option, was $4,696,124.[82] While the members of the Kentucky class may never see this full amount due to Aliera's protracted and costly bankruptcy proceedings, it is unique that a judge would take the time and effort to publicly eviscerate a company when filing a default judgment.[83]

These two cases show that courts have very little tolerance for the deceptive and fraudulent practices of HCSMs. The judiciary believes there is no room in the law for average consumers to believe they are paying into health insurance and then not receive the benefit of health insurance coverage.[84] While many of the Aliera-associated cases are stayed pending Aliera's bankruptcy proceedings, what happens when a legitimate HCSM is taken to court over its refusal to pay a member's claims?[85]

The Supreme Court of Kentucky heard *Commonwealth v. Reinhold* in 2010.[86] This case involved the Medi-Share program, which was a program run by the American Evangelistic Association for people to voluntarily join and pay the medical expenses of other members.[87] Each potential member was required in their application to certify they would comport their lives to biblical standards, including things like "attend[ing] church regularly, not us[ing] tobacco or illegal drugs, and refrain[ing] from abusing legal substances such as alcohol."[88] The Medi-Share application process included many disclaimers an applicant had to read to

80. *Id.*

81. *Id.* at 3–4.

82. *Id.* at 4.

83. *See* Todd Bookman, *Former Customers of Bankrupt N.H. Health Care Sharing Ministry Unlikely to Get Large Refunds,* N.H. PUB. RADIO (Dec. 16, 2021), *https://*www.nhpr.org/nh-news/2021-12-16/sharity-ministries-bankrupt-nh-refunds-trinity-health-share.

84. *See, e.g.*, Default Judgment Against the Aliera Cos., *supra* note 71.

85. *See* Order at 3, LeCann v. Aliera Cos., No. 1:20-cv-2429, 2021 U.S. Dist. Lexis 115827 (N.D. Ga. June 22, 2021) (No. 81) (ordering that for LeCann v. Aliera Cos., "all proceedings and pending motions in this action are hereby STAYED. The Court ADMINISTRATIVELY CLOSES this case. In the event the Bankruptcy Court dismisses the Involuntary Petition or lifts the stay, or if there is some other change in the proceedings before the Bankruptcy Court, Plaintiffs may move to reopen the case at that time.").

86. Commonwealth v. Reinhold, 325 S.W.3d 272 (Ky. 2010).

87. *Id.* at 273.

88. *Id.* at 273–74.

know how to appeal an adverse decision and stated that a Medi-Share plan was not an insurance policy.[89]

Instead of a class of individuals filing suit against the HCSM due to their individualized damages, *Reinhold* is unique because it involved a state represented by its Attorney General suing an HCSM.[90] In its lawsuit, the state of Kentucky alleged that Medi-Share, the American Evangelistic Association, and the Christian Care Ministry (another program run by the American Evangelistic Association) were engaged in the unauthorized sale of insurance in Kentucky.[91] In a bench trial, the trial court ruled that Medi-Share contracts did not constitute insurance contracts under Kentucky law, and even if the agreements *could* be considered insurance, the religious organization exemption in Kentucky law would preclude them from state insurance regulations.[92] The Kentucky Court of Appeals agreed with the trial court that Medi-Share agreements were not insurance but did not believe that the religious organization exemption would additionally preclude them from regulation.[93] The issues left for the Supreme Court of Kentucky to decide were (1) whether Medi-Share agreements constituted insurance under Kentucky law, and (2) whether Medi-Share as an organization fell under the religious organization exemption from insurance regulation under Kentucky law.[94]

The Kentucky Supreme Court held that Medi-Share agreements were considered insurance under Kentucky law.[95] The Court reached its conclusion by looking at the commitment contract consumers had to agree to become a Medi-Share member.[96] Because members were required to pay their monthly membership share to Medi-Share to remain eligible for Medi-Share

89. *Id.* at 274 (stating the disclaimer for appealing Medi-Share's coverage decision was as follows: "I understand that Christian Care Ministry (CCM) matches a Medi-Share member's medical need with other Members who have volunteered, in faith, to share in meeting needs through the biblical concept of Christian mutual sharing. I further understand that all money comes from the voluntary giving of Members, not from the Christian Care Ministry, and that the Christian Care Ministry is not liable for the payment of any medical bills. I will accept the decisions made during the Appeal Process by the 'Seven Member Appeal Panel' described in the Guidelines and will bring no suit, legal claim or demand of any sort against CCM for unpaid medical expenses.").

90. *Id.* at 275.

91. *Id.*

92. *Id.*

93. *Id.* at 275–76.

94. *Id.*

95. *Id.* at 278.

96. *Id.* at 274.

to cover that member's potential medical expenses, the court held there was a shifting of risk from an individual to a pool of individuals characteristic of an insurance contract.[97] Additionally, Medi-Share's advertising focused less on the charitable aspect of a legitimate HCSM and instead on the individual cost savings enjoyed by Medi-Share members, further obscuring its charitable and religious foundations.[98]

The court further held that Medi-Share did not meet the religious organization exemption under Kentucky law.[99] There are many requirements in Kentucky law for a religious organization to be exempted from insurance regulation with which Medi-Share did not comply.[100] The *Reinhold* court held that for an organization to qualify for the exemption, it had to meet *every element* of KRS 304.1-120(7).[101] Because members' shares are paid directly to Medi-Share who then pays them out to members who have medical expenses, the "direct sharing" provision in KRS § 304.1-120(7)(d) was not satisfied, preventing Medi-Share from falling under the Kentucky religious organization exception.[102]

Courts have not expressed particular appreciation for the place that HCSMs hold in the health insurance system in the United States.[103] Consequently, it is important to consider how, if at all, HCSMs could be brought in line with the more legally comfortable regulations of mainstream health insurance. The next section details what greater regulation at the state level could look like. Alaska is used as a basis for a case study because of its nuanced health care delivery landscape.

V. NEXT STEPS: PROPOSED REGULATION OF HCSMS – AN ALASKA CASE STUDY

When looking at a jurisdiction that would benefit from greater regulation of HCSMs, Alaska is a clear choice. Due to the

97. *Id.* at 277.
98. *Id.* at 278.
99. *Id.* at 279.
100. Ky. Rev. Stat. Ann. § 304.1–20(7) (LexisNexis 2022).
101. *Reinhold*, 325 S.W.3d at 279 (citing Harris v. Commonwealth, 793 S.W.2d 802, 809 (Ky. 1990) (Leibson, J., dissenting)).
102. *Id.*
103. *See* Ann Neumann, *The Patient Body: The Politics of Healthcare Sharing Ministries*, THE REVEALER (July 25, 2017), https://wp.nyu.edu/therevealer/2017/07/25/the-patient-body-the-politics-of-health-care-sharing-ministries (discussing efforts of courts in Kentucky, Washington, and Oklahoma to shut down HCSMs).

remote location of the state, only one mainstream insurer is available on the ACA Marketplace for Alaskans.[104] Consequently, mainstream health care premiums are very high, causing many Alaskans to either have paid the federal penalty for not having health insurance when it was in place or enroll in a cheaper but riskier HCSM.[105] HCSMs have used Alaskans as success stories for all the bills the HCSM was able to cover, making the last frontier of Alaska seem like an appealing environment for HCSMs.[106]

In Alaska, mainstream health insurance companies are regulated by the Alaska DOI.[107] The DOI's "most important function is consumer protection" by ensuring Alaskan consumers are not taken advantage of by insurers.[108] The DOI received eighty-nine complaints about health and accident insurers in 2020, which was the largest amount of complaints for any type of insurer.[109] The DOI assists Alaskans in claim-handling delays, claim denials, cancellations, and seven other consumer complaints areas pertaining to health insurers.[110] However, none of these protections extend to Alaskans enrolled in HCSMs because they do not meet the federal definition of health insurance.[111]

It is certainly important and constitutional to respect the religious foundation and autonomous nature of HCSMs. However, if HCSMs are going to continue to operate alongside mainstream health insurance, consumers must be afforded at least some of the consumer protections other health insurers have to abide by. It is

104. Press Release, Lisa Murkowski, Sen. from Alaska, United States Senate, Murkowski Speaks to Alaskan Perspective of Short-Term Health Insurance Plans (Oct. 11, 2018), https://www.murkowski.senate.gov/press/release/murkowski-speaks-to-alaskan-perspective-of-short-term-health-insurance-plans-.

105. *Id.*

106. *See Member Almost Loses Hand After Car Crash in Hazardous Alaska Weather, Kathy Beach, Homer, Alaska,* CHRISTIAN HEALTHCARE MINISTRIES, https://chministries.org/testimonials/member-almost-loses-hand-after-car-crash-in-hazardous-alaska-weather (last visited Feb. 22, 2022).

107. *About Us,* ALASKA DIV. OF INS., https://www.commerce.alaska.gov/web/ins/AboutUs/AbouttheDivision.aspx?TSPD_101_R0=0890181cafab2000644764627515 92d4092b4498ca90ed0bf7ffbad2eaa46058fa937a9d1f75b6dc086a5a93f5143000fa06c28477125e5bd9c9043dec5b6f040be29171b2beeb24348248a39b3442fba9401742cc8506c5c0f81373aea1d72d (last visited Feb. 22, 2022).

108. *Id.*

109. Lori Wing-Heier, 2021 ANNUAL REPORT: ALASKA DIV. OF INS., https://www.commerce.alaska.gov/web/Portals/11/Pub/INS_AnnualReport_2021.pdf (last visited Feb. 23, 2022).

110. *How We Can Help,* ALASKA DIV. OF INS., https://www.commerce.alaska.gov/web/ins/Consumers/Complaints.aspx (last visited Feb. 22, 2022).

111. Volk et al., *supra* note 10.

possible to be faithful to an organization's religious foundations *and* provide avenues for consumers to seek recourse if their outcome is not as they hoped. Below is a proposed idea for what greater state regulation of HCSMs might look like in the state of Alaska and should be considered by other states.

The DOI in Alaska derives its power from Title 21 of the Alaska Statutes.[112] Title 21 has a provision that exempts HCSMs from being regulated as insurance in Alaska that was added in 2016.[113] The exemption was sponsored by a state senator who wrote the bill after realizing nothing in the Alaska Statutes prevented the State of Alaska from treating HCSMs like mainstream health insurance.[114] This statutory provision explicitly states "[t]his title does not apply to a health care sharing ministry."[115] Thus, the Alaska Legislature would have to amend Alaska's statutes to strike this provision from law to regulate HCSMs like other health insurance. As the original state senator feared, that legislative act would create the opportunity for HCSMs to be treated and regulated like health insurance in Alaska, as HCSMs would then be subject to Title 21.[116]

There are four main benefits of regulating HCSMs under Title 21: the ability to resolve coverage disputes in court, the mandatory coverage of preexisting conditions, coverage of mental health and substance abuse treatment, and the ability for state prosecutors to seek criminal charges against HCSMs if they were to defraud Alaskans.[117]

When a person joins an HCSM, they do not sign a legally enforceable contract but rather a "voluntary agreement" to pay into the cost-sharing pool.[118] This means there are no legal avenues for

112. *See* ALASKA STAT. § 21.03.010 (2022).

113. § 21.03.021(K).

114. Jennifer Ransom, *Legislation Aims to Free Up Faith-Based Health Care Options in Alaska,* CATH. ANCHOR – NEWSPAPER OF THE ARCHDIOCESE OF ANCHORAGE (Feb. 2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=1353.

115. § 21.03.021(K).

116. Ransom, *supra* note 114.

117. *See* Alaska Stat. § 21.07.005(2) (2022) (providing that health insurers ensure that covered individuals have the opportunity to resolve grievances); § 21.54.110 (requiring health insurance providers to cover some pre-existing conditions and providing when not covering those conditions is permissible); § 21.54.151 (providing that insurers cover mental health and substance abuse problems when covered by Title 21); § 21.36.360(a–c) (providing the right to bring criminal charges against fraudulent and criminal insurers and providing definitions for fraudulent and criminal activity by insurers).

118. Amy Livingston, *Health Care Sharing Ministries: A Good Alternative to Health Insurance?*, MONEY CRASHERS (Mar. 11, 2021), https://www.moneycrashers.com/health-care-sharing-ministries-alternative-insurance.

recourse if an HCSM member has their medical bills denied by the company, save filing a lawsuit for fraudulent business practices.[119] This lack of legal remedy is based partly on the religious foundation of HCSMs.[120] At least one HCSM has the requirement in their membership agreement that all members must "[a]gree that when you have a dispute with a fellow Christian, and your fellow Christian is willing to submit that dispute to fellow believers for resolution, you are not to sue each other in the civil courts or other government agencies."[121] If HCSMs fell under the purview of Title 21, Alaskans could enjoy the consumer protections available under other sections of Title 21, like having an opportunity to resolve grievances with their HCSM.[122] This is perhaps one of the most important protections afforded by state insurance regulators, as consumers who join HCSMs have no outside assistance if their claims are denied.[123]

Additionally, making HCSMs subject to Title 21 of Alaska's statutes protects consumers from being denied coverage due to some preexisting conditions.[124] While HCSMs deny ever turning potential members away due to preexisting conditions, they will not cover any expenses related to a preexisting condition in most circumstances.[125] When preexisting conditions can be as common as diabetes or sleep apnea, the refusal to cover expenses relating to those conditions like insulin and anticonvulsants can make life very

119. *Id.*

120. The religious cost-sharing principle stated by many Christian-based HCSMs comes out of the Apostle Paul's first letter to the church in Corinth, where he exhorts the believers to settle disputes among themselves and not take them into the secular court system: "When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints?" *1 Corinthians* 6:1 (NRSV). This was likely less a commentary about the secular court system in Corinth but rather about settling disagreements among church members, not individuals trying to settle disagreements with large nonprofit organizations.

121. *Member Requirements*, SAMARITAN MINISTRIES, https://samaritanministries.org/resources/requirements (last visited Feb. 22, 2022).

122. *See* ALASKA STAT. § 21.07.005 (2022).

123. *See, e.g.*, Jenny Deam, *Buyer Beware: When Religion, Politics, Health Care and Money Collide,* HOUSTON CHRON. (July 6, 2019), https://www.houstonchronicle.com/business/article/Buyer-Beware-When-religion-politics-health-14065418.php.

124. *See* ALASKA STAT. § 21.54.110 (2022).

125. Mike Miller, *HCSM Myth #9: People with Pre-existing Conditions Are Turned Away,* SAMARITAN MINISTRIES (Sept. 1, 2011), https://samaritanministries.org/blog/hcsm-myth-9-people-with-pre-existing-conditions-are-turned-away.

expensive for HCSM members with chronic conditions.[126] Under the ACA, no non-grandfathered health insurance plan can deny coverage to a consumer based on preexisting conditions.[127] This consumer protection is mostly repeated in Title 21, which states "[a] health care insurance plan offered, issued for delivery, delivered, or renewed in the group market may not contain a preexisting condition exclusion."[128] Denying coverage due to a preexisting condition is another dangerously unregulated aspect of HCSMs that can leave a consumer responsible for thousands of dollars in medical bills.[129]

Another positive impact of regulating HCSMs under Title 21 is coverage of mental health and substance abuse treatment for Alaskans.[130] Title 21 states that "[a] health care insurer that offers a health care insurance plan in the group market shall comply with the mental health or substance use disorder benefit requirements established under 42 U.S.C. 300gg-26." Thus, if HCSMs were regulated under Title 21, they would be required to provide mental health and substance abuse treatment to the point of the annual limits specified in the HCSM plan.[131] HCSMs are not currently required to provide any coverage for mental health and substance use disorders.[132] This poses a very real challenge in Alaska, where "[n]ine of the 10 leading causes of death in Alaska can be associated with substance abuse as a potential contributing cause of death."[133] Additionally, over a quarter of Alaskan adults who experienced severe psychological distress reported not seeking the mental

126. *See generally Don't Worry: Marketplace Insurance Covers Pre-existing Conditions*, HEALTHCARE.GOV (Aug. 10, 2017), https://www.healthcare.gov/blog/whats-a-pre-existing-condition.

127. *Can I Get Coverage If I Have a Pre-existing Condition?*, DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/answers/health-insurance-reform/can-i-get-coverage-if-i-have-a-pre-existing-condition/index.html (last visited Feb. 22, 2022).

128. § 21.54.110.

129. *See, e.g.*, P'SHIP TO PROTECT COVERAGE, UNDER-COVERED: HOW "INSURANCE-LIKE" PRODUCTS ARE LEAVING PATIENTS EXPOSED 16 (Mar. 25, 2021), https://www.nami.org/NAMI/media/NAMI-Media/Public%20Policy/Undercovered_Report_03252021.pdf (providing an example of an HCSM member being stuck with thousands in medical bills when the HCSM refused to pay).

130. *See* ALASKA STAT. § 21.54.151 (2022).

131. *Id.*; 42 U.S.C. § 300gg-26 (2022).

132. Volk et al., *supra* note 10.

133. STATE OF ALASKA EPIDEMIOLOGIC PROFILE ON SUBSTANCE USE, ABUSE, AND DEPENDENCY 48 (July 2019), https://dhss.alaska.gov/dph/Epi/injury/Documents/sa/SubstanceAbuseEpiProfile_2019.pdf.

health care they needed due to cost barriers, which could be ameliorated through insurance coverage.[134]

Finally, if HCSMs were regulated under Title 21, prosecutors could bring criminal charges against a person who fraudulently sells an HCSM to people who genuinely believe what they are signing up for is mainstream health insurance.[135] If an insurance agent sells an HCSM plan to an Alaskan who believes it is mainstream health insurance, the agent could be criminally liable for their actions if that person's claim is not paid out by the HCSM.[136] Under Title 21, it is illegal to "collect[] a sum as premium or charge for insurance if the insurance has not been provided or is not in due course to be provided, subject to acceptance of the risk by the insurer, by an insurance policy authorized under this title."[137] This threat of criminal liability for fraudulently marketing HCSMs as quasi-health insurance will hopefully further incentivize the Alaskan insurance industry to do the right thing and discourage predatory, unregulated HCSMs from doing business in Alaska.

This greater regulation from the State of Alaska would better protect consumers from being left in the dust with their medical bills when the HCSM refuses to cover medical expenses. While the greater regulation may increase costs for HCSMs, that increase would perhaps convince some HCSM members to join the pool of people in mainstream health insurance. This may lower health care costs across the board for consumers.[138]

VI. CONCLUSION: MORE REGULATION CAN BE GOOD REGULATION

HCSMs are complicated vehicles for health insurance cost reduction. Before the ACA and its standardization of American health coverage, HCSMs served a small market of consumers who would indeed bear each other's burdens by pooling resources to pay out to members when they fell on hard times.[139] However, the

134. Hanke Heun-Johnson et al., THE COST OF MENTAL ILLNESS: ALASKA FACTS AND FIGURES 15 (Aug. 2019) https://healthpolicy.usc.edu/wp-content/uploads/2019/11/AK-Chartbook-v1-2019.pdf.

135. ALASKA STAT. § 21.36.360 (2022).

136. *Id.*; Carlesso, *supra* note 40 (illustrating how consumers legitimately believe they are signing up for health insurance when they join an HCSM).

137. § 21.36.360.

138. Volk et al., *supra* note 10.

139. Santhanam, *supra* note 2.

current health care market is so convoluted to the point that some HCSMs have preyed on consumers with their similar appearance to health insurance. These consumers believed the monthly amount they were paying to the HCSM was an insurance premium.[140] This consumer confusion, combined with the lack of consumer protections for HCSMs on the federal and state level, has left many consumers out to dry with mounting medical bills and nowhere to seek recourse. While a few consumers have successfully sued their HCSM, many more are left with mounting bills and nowhere to turn for assistance.[141]

For HCSMs to continue operating in a world without a federal individual mandate, consumer protections must be instituted that respect the religious nature of HCSMs while also giving the consumer somewhere to go if they face difficulty with their HCSM. Some proposed state regulations would require HCSMs to cover the ten basic categories of health benefits under the ACA and allow state prosecutors to file charges against those HCSMs who defraud consumers.[142] While the most egregious behavior of HCSMs will be reined in by state regulation, both state and federal governments have a long way to go to regulate these out-of-control companies before consumers are protected from the risky, unregulated nature of HCSMs. If no regulation is put in place, godly, moral people will continue to be taken advantage of with little recourse to save them from their time of trial.[143]

140. Volk et al., *supra* note 10.

141. *See, e.g.*, *LeCann*, 2021 U.S. Dist. LEXIS 115827 at *3; Moeller v. Aliera Cos., No. CV 20-22-H-SHE, 2021 U.S. Dist. LEXIS 122532, at *13 (D. Mont. June 30, 2021).

142. *See generally 10 Essential Health Benefits Insurance Plans Must Cover Under the Affordable Care Act*, FAMILIES USA (Feb. 9, 2018), https://familiesusa.org/resources/10-essential-health-benefits-insurance-plans-must-cover-under-the-affordable-care-act.

143. Helaine Olen, *Health-care Sharing Ministries Promise Relief from High Insurance Costs. But There's a Catch.*, WASH. POST (Nov. 25, 2019), https://www.washingtonpost.com/opinions/2019/11/25/health-care-sharing-ministries-promise-relief-high-insurance-costs-theres-catch.