



THE KANSAS
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F E A T U R I N G

Editor's Letter

Janet E. Neeley

Addressing Sexual Assault in Criminal Justice, Higher Education and Employment: What Restorative Justice Means for Survivors and Community Accountability

Diana Stanley

Williams Revisited: Sixty Years After the Case that Decided the Kansas Water Appropriation Act

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Including, But Not Limited To, Personal Injury, Disability and Death: The Problems of University Liability Waivers for COVID-19 Protections

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How Compassionate Is It?: Suggestions for Improving the Compassionate Release Statutes in Kansas

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Impacts of *County of Maui v. Hawaii* Wildlife Fund on Clean Water Act Groundwater Regulation and What Comes Next



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ABOUT THE JOURNAL

The *Kansas Journal of Law & Public Policy* was conceived in 1990 as a tool for exploring how the law shapes public policy choices and how public policy choices shape the law. The *Journal* advances contemporary discourse on judicial decisions, legislation, and other legal and social issues. With its three published issues per year, the *Journal* promotes analytical and provocative articles written by students, professors, lawyers, scholars, and public officials.

The *Journal* fosters a broad notion of diversity in public policy debates and provides a forum for the discussion of public policy issues. The *Journal* endeavors to enable the policy-making process through the presentation of diverse treatment and critical analysis on significant policy matters. Our publication also aspires to serve a broad audience of decision-makers and the intellectually curious. We specifically target groups like legislators, judges, educators, and voters—each of which play a valuable role in the legal process.

Non-partisan and student-governed, the *Journal* is an organization devoted to the study, commentary, and analysis of domestic and international legal and social issues. All staff editors of the *Journal* must complete a writing requirement and assist in the preparation of each *Journal* issue through research and article edits. The Editorial Board, which is composed of third-year law students, is responsible for selecting *Journal* content, editing article submissions, and preparing each volume for publication.

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The *Journal* invites well-written, well-researched articles on current issues that offer well-reasoned public policy arguments. The public policy argument must be central and clear. It is the express policy of the Editorial Board “to publish great articles, regardless of the source.”

The *Journal's* mission is to enable diversity in any dialogue about important public policy issues. Submissions are encouraged from all disciplines, and all viewpoints are welcomed.

Furthermore, the *Journal* encourages timely responses to articles it publishes, thereby furthering both public policy debate and the *Journal's* goal of presenting a bona fide dialogue.

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Authors who submit articles should provide the *Journal* with a typed, double-spaced manuscript. Authors who elect to mail their manuscripts should also provide the same in electronic form (*e.g.*, by enclosing a readable USB or by concurrent submission via internet). The *Journal* requests formatting in Microsoft Word only. The *Journal* uses footnote formatting in its publication. Author's citations should conform to the most recent edition of *The Bluebook: A Uniform System of Citation*.

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Dear *Journal* Readers,

Welcome to the first issue of Volume XXXI of the *Kansas Journal of Law and Public Policy*. This first issue presents five articles that address brilliant topics and relevant national and Kansas-specific subjects. Individually, they represent a diverse array of legal topics that relate to citizens and government, alike. I thank the Editorial Board and staff for their tireless work and countless hours. Their devotion to producing an excellent product made this issue possible.

Janet E. Neeley, legal consultant for ValorUS and former Deputy Attorney General of the Criminal Law Division of California, authored our first article. This article considers whether alternative remedies that address sexual violence in the criminal justice system, in institutions of higher education and in the workplace might work better for both survivors and society. Neeley argues there need to be options outside traditional systems for dealing with sexual violence that more effectively prevent future harm and increase reporting. In so doing, Neeley focuses on using restorative justice and therapeutic justice approaches.

The second article was written by Diana Stanley, an Associate Attorney at Depew Gillen Rathbun & McInteer, LC. Her article explores the implications of the 1945 Kansas Water Appropriation Act and the Kansas Supreme Court's 1962 *Williams v. City of Wichita* decision on water law rights. The goal of Stanley's article is to resolve the inconsistencies that resulted from the *Williams* decision. She proposes potential solutions that balance the concerns from the *Williams* dissent and maintain traditional property law principles.

Kaitlyn Filip and Kat Albrecht authored our third article. Filip is a joint J.D. and Ph.D. student at Northwestern University and Albrecht is an Assistant Professor of Criminal Justice and Criminology at Georgia State University and holds a Ph.D., M.A., and J.D. from Northwestern University. Filip and Albrecht investigate the increased use of liability waivers within the university context brought on by the COVID-19 pandemic. The authors argue that graduate students should be recognized as university employees,

and that there should be statutory protections against the use of liability waivers.

The fourth article, written by me personally, was anonymously selected for publication by the preceding Editorial Board of the *Journal*, Volume XXX. It was also awarded the Shapiro Award for Best Paper on Law & Public Policy by the Volume XXX Editorial Board. This article analyzes the Kansas compassionate release statutes and demonstrates why those statutes do not fulfill the legislature's intended purposes. I argue amending the statutes to meet the constitutional standards for inmates' care is the most logical solution in Kansas. I conclude the article with policy proposals to the Kansas State Legislature for amending the statutes.

The final article in the issue was authored by KU Law student and Executive Staff Articles Editor, Riley Cooney. Her article was also selected for publication by the preceding Editorial Board of the *Journal*. Cooney's article discusses the implications of the Supreme Court's 2020 *Hawaii Wildlife Fund v. County of Maui* decision and its impact on groundwater regulation through the Clean Water Act. She argues the EPA needs to draft more specific guidance to determine when discharges to navigable waters through groundwater should require permits.

I hope this first issue is absolutely captivating. I owe a special thanks to my Managing Editor, James Schmidt, for his coordination and organization. Additionally, and on behalf of the entire *Journal* staff, I thank Professors Richard Levy and Lua Yuille for their advice and support throughout the publication process. With that, please enjoy the policy perspectives and scholarship provided in Volume 31, Issue 1, of the *Kansas Journal of Law & Public Policy*.

Audrey M. Nelson
Editor-in-Chief

ADDRESSING SEXUAL ASSAULT IN CRIMINAL JUSTICE, HIGHER EDUCATION AND EMPLOYMENT: WHAT RESTORATIVE JUSTICE MEANS FOR SURVIVORS AND COMMUNITY ACCOUNTABILITY

*By: Janet E. Neeley**

I. INTRODUCTION

The focus on the harm caused by sexual assault and harassment which began as a result of the #MeToo movement is long overdue. The liberating experience of hearing others speak out has sometimes enabled other survivors to do the same.¹ But the same obstacles remain today that have long prevented many survivors from talking publicly about what happened to them behind closed doors. Many still do not feel safe speaking about their experiences. They fear, with good reason, that people will not believe them. Others dread being re-traumatized if they speak out within the criminal justice system or penalized if they report sexual harassment by a work supervisor or academic mentor.²

* The author, Janet E. Neeley, is a legal consultant for ValorUS (formerly known as the California Coalition Against Sexual Assault, or CALCASA) and wishes to thank ValorUS for funding the time to research and write this Article. Prior to April 2019, the author was a deputy attorney general for the State of California for thirty-one years in the Criminal Law Division. In that capacity she chaired the California State Authorized Risk Assessment Tools for Sex Offenders (SARATSO) Review Committee for ten years and was a member of the California Sex Offender Management Board for over ten years. She also drafted numerous bills establishing or amending California laws on risk assessment, treatment, management and registration of people convicted of sex offenses.

¹ Douglas states as follows:

On October 15, 2017, in an effort to highlight the magnitude of sexual abuse, assault and harassment, actress Alyssa Milano tweeted, ‘Suggested by a friend: If all the women who have been sexually harassed or assaulted wrote ‘Me Too’ as a status, we might give people a sense of the magnitude of the problem.’

Kelly Douglas, *How #MeToo Is Changing the Way We Talk About Sexual Assault*, UNWRITTEN (Apr. 2, 2018), <https://www.readunwritten.com/2018/04/02/how-metoo-changing-talk-sexual-assault/> [<https://perma.cc/9HQ9-MRCQ>]. “Milano’s tweet sparked a floodgate of people of all genders and backgrounds to tweet #MeToo as a show of solidarity for other sexual abuse or assault survivors.” *Id.* “Milano’s actions came in response to a number of women in Hollywood opening up about their own experiences, many involving sexual harassment at the hands of well-known film producer Harvey Weinstein.” *Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE UNIV., <https://online.maryville.edu/blog/understanding-the-metoo-movement-a-sexual-harassment-awareness-guide/> [<https://perma.cc/PM2Z-KALH>].

² See, e.g., *Understanding the Me Too Movement*, *supra* note 1.

System responses to sexual assault and harassment play a major part in deterring disclosure. Too often systems are perceived as inflexible, uncaring and unfair³—because many times, they are. It is time to consider whether in some cases, alternative remedies that address sexual violence in the criminal justice system, in institutions of higher education (“IHEs”) and in the workplace might work better for both survivors and society. Such alternatives would still need to provide an assurance of community safety and lessen the possibility of repeat offending.

Alternatives must also protect the constitutional rights of the accused. But survivors’ voices must be heard and options that are not available today in most jurisdictions or on many college campuses should be offered. There need to be system options for dealing with sexual violence that more effectively prevent future harm and increase reporting. The crux of the matter is whether the person who committed a sex offense is willing to admit responsibility and whether the survivor is interested in a restorative justice approach.

A. Healing and Prevention of Recurring Harm Are Linked

The law must begin to consider how healing, forgiveness and accountability can work together to achieve justice and prevent the recurrence of harm. While forgiveness is not the goal of restorative justice, many cultures which practice restorative justice find that it may occur. Restorative justice is rooted in the practices of many different indigenous cultures: “Forgiveness, tolerance, mercy and kindness figure prominently in philosophical and religious traditions . . . and in ancient practices of native peoples in Hawai’i, Canada, New Zealand, Sierra Leone, and elsewhere.”⁴ Forgiveness may accompany acknowledgement of wrong, but current legal rules penalize those who apologize and make both apology and forgiveness less likely.⁵ Forgiveness can benefit the survivor as much, if not more, than the one who caused the harm. Some survivors may seek to forgive their offender, but others seek only to forgive themselves for having unfairly accepted blame that should have gone to their offender. As one writer put it, “Forgiving isn’t something you do for someone else. It’s something you do for yourself. It’s saying, ‘You’re not important enough to have a stranglehold on me.’ It’s saying, ‘You don’t get to

³ See Rachel M. Venema, *Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports*, 31 J. INTERPERSONAL VIOLENCE 872 *passim* (2016); RUSSEL W. STRAND, U.S. ARMY MIL. POLICE SCH., THE FORENSIC EXPERIENTIAL TRAUMA INTERVIEW (FETI), <https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf> [http s://perma.cc/4Q4U-ZC2C].

⁴ See MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 3–4 (2019); see generally Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (the orthodox view is that it is too dangerous to use a process like restorative justice, which can involve face-to-face interaction between parties involved in interpersonal violence, but scholars like Coker note that its use has been used effectively among indigenous peoples in the past).

⁵ See, e.g., CAL. EVID. CODE § 1220 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

trap me in the past. I am worthy of a future.”⁶ Needless to say, there must also be consequences for the perpetrator that accompany this process. Forgiveness may follow when a just outcome is achieved, but it is not necessarily a goal. Putting the survivor’s needs first is the primary goal. Addressing the needs of the larger community through accountability and recidivism reduction is key.

In the experience of one group of Indigenous people in Canada, when the only choice given to the survivor of familial sexual abuse was to file a criminal charge that would involve the offender’s incarceration, the survivor was unwilling to report, which perpetuated the intergenerational cycle of familial sexual abuse.⁷ No one would speak out. When an alternative justice practice began to be used by the Ojibwe of Hollow Water, they found survivors and perpetrators alike began to disclose abuse.⁸ Breaking the silence broke the cycle of violence and promoted accountability and healing.⁹ Not only was power returned to a native people marginalized in the past, through this partnership with the Canadian justice system, but recidivism rates were very low.¹⁰ A study by the Canadian government found that less than two percent of offenders reoffended ten years later.¹¹

Today, Black Americans and female legislators influence restorative justice policymaking which underlies the trend of considering alternative solutions: “The diversification of the United States and the closing of the gender gap in the political arena may be contributing to the construction of justice policy solutions which are less patriarchal and more egalitarian.”¹² The recent impetus in the United States towards prison reform has aided the restorative justice movement: “[R]estorative justice [is] a multifaceted paradigm with the ability to unite and hold together the many faces of justice.”¹³

B. Effective Alternatives to Incarceration May Increase Reporting

Past conventional wisdom held that only incarceration could deter sexual recidivism because these offenders cannot be cured and will not or cannot stop offending. Contrary to popular belief, though, people convicted of sex offenses actually have lower rates of re-offense than other types of criminal offenders.¹⁴

⁶ JODI PICOULT, *THE STORYTELLER* 195 (2013).

⁷ JOE COUTURE, TED PARKER, RUTH COUTURE & PATTI LABOUCANE, *NATIVE COUNSELLING SERVS. OF ALTA., A COST-BENEFIT ANALYSIS OF HOLLOW WATER’S COMMUNITY HOLISTIC HEALING CIRCLE PROCESS* 1–8 (2001). “An impressive low recidivism rate remains unmatched in the justice system.” *Id.* at 23.

⁸ JUDAH OUDSHOORN, MICHELLE JACKETT & LORRAINE STUTZMAN AMSTUTZ, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR SEXUAL ABUSE: HOPE THROUGH TRAUMA* 72 (2015).

⁹ *Id.*

¹⁰ *Id.* at 73.

¹¹ *Id.* (citing COUTURE ET AL., *supra* note 7, at 1–8).

¹² Shannon M. Sliva, *Finally “Changing Lenses?” State-Level Determinants of Restorative Justice Laws*, 98 *PRISON J.* 519, 534 (2018).

¹³ *Id.* (citing Kent Roach, *Changing Punishment at the Turn of the Century: Restorative Justice on the Rise*, 42 *L. & CRIM. J.* 249 (2000)).

¹⁴ PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP’T OF JUST.,

A Bureau of Justice Statistics study found that just five percent of people convicted of sex offenses who were followed for three years after their release from prison in 1994 were arrested for another sex crime.¹⁵ This study also found that within three years, only “3.3% (or 141 of 4,295) of released child molesters were arrested again for committing another sex crime against a child.”¹⁶ This “study of nearly 10,000 [people convicted of sex offenses] found that [they] had a re-arrest rate [twenty-five] percent lower compared to all other criminals.”¹⁷ More recent California studies of the recidivism rates of people convicted of sex offenses are consistent, showing recidivism rates are low.¹⁸ But recidivism is based on whether a new crime is reported.

It is a universally acknowledged truth that reporting rates for sexual assault are much lower than the actual rate of occurrence, whether reported to police, IHEs or employers.¹⁹ While it is not surprising that many people are reluctant to report sexual abuse, the scale of the problem is staggering:

[E]mpirical research both inside and outside of academia shows rates of sexual harassment and sexual violence that are much higher than the number of reports of such conduct to anyone in an official capacity. Indeed, that sexual harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established. With respect to workplace sexual harassment overall, estimates indicate that “only [one percent] of victims participate in litigation.”²⁰

Many sources confirm that much crime goes unreported, often unmentioned at all, hidden by the shame associated with victimization or due to other fears, including the fear of sending loved ones or acquaintances to prison.²¹

RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1 (2003).

¹⁵ *Id.* at 28.

¹⁶ *Id.* at 31.

¹⁷ Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & C.R. L. REV. 1, 35 (2012).

¹⁸ See SEUNG C. LEE, CARLETON UNIV., ALEJANDRO RESTREPO, ANNIE SATARIANO, CAL. DEP'T OF JUST., R. KARL HANSON & PUB. SAFETY CAN., STATE AUTHORIZED RISK ASSESSMENT TOOL FOR SEX OFFENDERS, THE PREDICTIVE VALIDITY OF STATIC-99R FOR SEXUAL OFFENDERS IN CALIFORNIA: 2016 UPDATE (2016), https://saratso.org/pdf/ThePredictiveValidity_of_Static_99R_forSexualOffenders_inCalifornia_2016v1.pdf [<https://perma.cc/F4HC-JJK6>]; R. Karl Hanson, Alyson Lunetta, Amy Phoenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. THREAT ASSESSMENT & MGMT. 102, 111 (2014).

¹⁹ McKenzie Wood & Amy Stichman, *Not a Big Deal? Examining Help-Seeking Behaviors of Sexually Victimized Women on the College Campus*, 62 INT'L J. OFFENDER THERAPY & COMP. CRIM. 1415 *passim* (2016); RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2019 1 (2020).

²⁰ Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 683–84 (2018).

²¹ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1206

If survivors become aware of choices permitting a solution which do not involve their own cross-examination, or require a known perpetrator's incarceration or sex offender registration, their options might be less stark and encourage increased reporting.²²

One observer notes that the current court process, and the roles played by prosecutors and defense counsel,

support cognitive distortions that can be used by sex offenders as ways of justifying sexual offending and, by emphasizing punishment, retribution, and incapacitation, often provide disincentives for sex offenders to undergo treatment. Similarly, "the confrontational adjudicative process of traditional courts encourages advocacy of innocence, discourages acceptance of responsibility, and influences [subsequent acceptance] of treatment once sentenced."²³

When looking at the scholarship investigating "sexual violence, there are many studies examining the development of innovative and alternative justice mechanisms, such as restorative justice"²⁴ Studies agree that the focus of restorative justice should be the sexual assault survivor, and that the survivor's most essential need is to be heard and believed: "Distilling these findings, [one researcher] suggests that the main justice interests of victim-survivors are participation, voice, validation, vindication and 'offender accountability-taking responsibility.'"²⁵ Even in alternative ways of addressing sexual harm, consequences are essential, but individuals who are given the choice may opt to utilize alternatives which do not result in punishment or imprisonment.

A rare example of a true restorative justice option coexisting within a state's criminal justice system was the Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience ("RESTORE") Program, which successfully undertook restorative justice conferences in cases of sexual violence.²⁶ The RESTORE Program found "that survivors are 'not always seeking imprisonment as an outcome of reporting sexual abuse,' particularly

(2015).

²² See OUDSHOORN ET AL., *supra* note 8, at 72. "[W]hen the criminal justice systems gets involved, victims often lose control of their case. . . . If the offender pleads not guilty, the victim will likely be cross-examined by the offender's attorney in an attempt to discredit the victim's story." *Id.* at 38. Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179, 187 (2018) (noting that a positive consequence for one survivor would have been if her perpetrator had access to counseling, rather than prison, so that she "knew it wasn't going to happen again.").

²³ Cucolo & Perlin, *supra* note 17, at 36 (citing Astrid Birgden & Heather Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics and Human Rights*, 23 SEXUAL ABUSE 295, 306 (2011)) (alteration in original).

²⁴ McGlynn & Westmarland, *supra* note 22, at 181.

²⁵ *Id.*

²⁶ Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 *passim* (2014).

those who have experienced abuse in a family setting.”²⁷ A good outcome for some survivors was “unlikely to include a punitive sentence.”²⁸ What survivors wanted was acknowledgement of their experience, and “that punishment be reconceived as a form of institutional forgiving involving the ‘imposition of *consequences* in response to *responsibility* for crime’: to ‘punish with forgiveness.’”²⁹

The discussion of alternative sanctions for sexual violence is similar to the one occurring in the context of addressing intimate partner violence. Unintended consequences of the current criminal justice system’s response to intimate partner violence include unintended effects on survivors, such as negative effects occurring after institution of mandatory arrest policies, the increase in dual arrests, failure to prevent recidivism after criminal justice interventions and policies that ignore the right of victims to choose whether or not to participate in the criminal justice system. The conversation has increasingly turned to alternatives to incarceration as sanctions for domestic violence:

Reducing . . . the use of incarceration or creating alternatives to incarceration is one possibility; employing other justice strategies, like restorative or therapeutic justice, to address intimate partner violence is another. Decreasing the use of the criminal legal system and addressing the unintended consequences of criminalizing domestic violence without abandoning criminalization altogether are also [potentially viable responses]³⁰

In the past, feminist theory held that restorative justice practices should not be used in domestic violence cases due to concerns about victim safety, especially when both parties would have to participate in a facilitated conference or treatment.³¹ Nevertheless, “there has been an increased interest in considering

²⁷ McGlynn & Westmarland, *supra* note 22, at 187.

²⁸ *Id.*

²⁹ *Id.* (citations omitted).

³⁰ Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 58–59 (2017).

³¹ Linda G. Mills, Briana Barocas, Robert P. Butters & Barak Ariel, *A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes*, 3 NATURE HUM. BEHAV. 1284, 1285 (2019) (finding that joint treatment for domestic violence has been rare, both because it was “‘thought to be ineffective’ but also ‘possibly dangerous.’”); *see also* Goodmark, *supra* note 30, at 59, 93–94 (2017) (“Anti-violence advocates have opposed the idea of using alternative dispute resolution in cases involving domestic violence. Concerns have been raised about whether such processes can be made sufficiently safe and whether they will actually hold offenders accountable for their actions. Moreover, having worked for forty years to have domestic violence treated as a crime, advocates are unwilling to risk diluting the power of the criminal legal response by creating parallel or alternative justice systems.”); C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 289–311 (2004); Julie Stubbs, *Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY

restorative [justice] in [domestic violence] criminal cases, including in Austria, Canada, New Zealand, Norway, Arizona, Utah and South Africa.”³²

Additionally, the concern about endemic racism in the United States is driving change to the feminist view about the use of restorative justice in interpersonal violence cases: “[T]he Black Lives Matter movement and research on . . . mass incarceration in the [United States] have” meant feminist perspective may be changing.³³ Advocates are increasingly open “to non-incarceration options for [domestic violence] crimes,” either within or outside the traditional criminal justice system.³⁴ This change has led some researchers to focus on cost-effectiveness of alternatives. A recent review of the ten most rigorous studies of systems using restorative justice principles focused on the recidivism rates of 1,879 people accused or convicted of committing sex offenses.³⁵ The researchers concluded that “on average, use of restorative justice practices cause a modest but highly cost-effective reduction in the frequency of repeat offending.”³⁶ Others are more skeptical about whether restorative justice, properly implemented, is a true cost-saving measure, given the number of players involved, the training required and the follow-up necessary.³⁷

Alternative treatments for domestic violence perpetrators that can enhance batterers’ intervention programs are starting to be used in some jurisdictions, some of which are incorporating restorative justice practices.³⁸ These programs:

provide a particularly promising addition to treatment options for [domestic violence] offenders because, as this and other [restorative justice]-related studies have suggested, it has the potential not only to reduce recidivism given certain conditions, but also to increase satisfaction, address particular offender crimes and characteristics, incorporate an offender’s readiness for change and remorse and engage victims of all types in ways that other programmes have not yet done.³⁹

The shift in thinking about ways feminist theory can coexist with non-carceral sanctions means more options to an unsolved problem can be

VIOLENCE (Heather Strang & John Braithwaite eds., 2002).

³² Mills et al., *supra* note 31, at 41.

³³ *Id.*

³⁴ *Id.*

³⁵ HEATHER STRANG, LAWRENCE W. SHERMAN, EVAN MAYO-WILSON, DANIEL WOODS & BARAK ARIEL, RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMATIC REVIEW 4 (2013), https://restorativejustice.org.uk/sites/default/files/resources/file_s/Campbell%20RJ%20review.pdf [https://perma.cc/2WQR-M35Y].

³⁶ *Id.* at 2.

³⁷ Melanie Randall, *Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law*, 36 DALHOUSIE L.J. 461, 496 (2013).

³⁸ Goodmark, *supra* note 30, at 59.

³⁹ Mills et al., *supra* note 31, at 41.

considered. The current perspective is that the criminal justice system frequently fails victims of gendered violence in two ways.⁴⁰ It either marginalizes them in the process or it fails to address the harm done to them entirely by either declining to file charges or dismissing charges at an early stage.⁴¹ Feminist-led efforts to expand the options available to survivors should work to alter the ineffective traditional criminal justice system. In conjunction with changes to the carceral system, restorative justice can play a key role in expanding prevention education, because “[b]y centrally including community members in restorative approaches to gendered violence, a much more robust connection between violence responses and violence prevention can be made.”⁴²

C. System Change Must Address the Harm Caused to Prevent Future Sexual Harm

Incarceration in the criminal justice setting, expulsion in the higher education arena or termination of employment do not solve the problem of future sexual recidivism. In none of these scenarios is the offender normally required to do anything to address the issues that led to the sexual misconduct. There is no therapeutic intervention required.⁴³ These systems trust, without any evidence that it works, that the mere fact of being sanctioned will produce the desired result—cessation in offending. Or perhaps the desired result is merely ending the possibility of re-offense in the same setting—i.e., at the same campus or workplace, via expulsion or termination.

Association with other criminals in prison may actually lead to increased risk of future re-offense after release.⁴⁴ Incarceration may also result in increased violence after release.⁴⁵ A prison record also makes it harder to obtain employment and establish a proactive social life because of the stigma of being a person formerly incarcerated, and often further harms families and the community in general.⁴⁶ For children in particular, “coming of age with a parent

⁴⁰ Randall, *supra* note 37, at 483.

⁴¹ *Id.*

⁴² *Id.* at 479.

⁴³ In 2006, at least forty-four states and the federal system offered or required participation in in-prison, sex offender-specific treatment programs. See PEGGY HEIL & KIM ENGLISH, CAL. DEP'T OF CORR. & REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 4 (2007), https://www.cure-sort.org/uploads/2/6/6/6/26665362/psot_cdc_r_eport.pdf [<https://perma.cc/54H8-LANP>]. In California, treatment for most people convicted of a sexual offense in California is mandatory only while the person is on probation or parole. CAL. PENAL CODE §§ 1203.067, 3008 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.). If the person is sentenced to community supervision, there is no mandatory sex offender-specific treatment unless court ordered. *Id.*

⁴⁴ McLeod, *supra* note 21, at 1203.

⁴⁵ *Id.*

⁴⁶ McLeod states as follows:

Of separate though equal concern, the violence and dehumanization of incarceration not only shapes those who are incarcerated, but produces destructive consequences for entire communities. People leaving prison are marked by the experience of incarceration in ways that makes the world outside prison more violent and insecure; it becomes harder

incarcerated generally has a substantial and negative impact on [their] life chances.”⁴⁷

In the education and employment contexts, the lack of any effective intervention strategy may lead to what has been called the pass-the-harasser situation.⁴⁸ Colleges often unwittingly participate in a pass-the-harasser scenario. The college hires the accused harasser from another school, unaware that harassment allegations against that faculty member were being investigated, or a college begins to investigate sexual harassment allegations against a faculty member who then moves to another school, usually after resigning prior to being disciplined.⁴⁹ An anecdote about this all-too-common situation illustrates the problem:

A telling recent example involved a Spanish professor hired at a west coast university that was not aware that the same professor had faced complaints of sexual harassment at his previous university on the east coast. In fact, when the west coast institution was disciplining this professor in 2015 for repeated inappropriate conduct toward students, it would not have learned of the earlier allegations of serial harassment but for the faculty member’s own admission. . . . Rather, it is likely that news coverage of a faculty member’s alleged sexual harassment will commonly not include evidence of prior investigations and/or allegations at the professor’s previous university for reasons that parallel the larger discussion of confidentiality.⁵⁰

Similar to the pass-the-harasser scenario is what could be called the pass-the-rapist practice at IHEs. IHEs which find a student responsible for forcible sexual assault usually discipline, and may expel, the perpetrator.⁵¹ The next institution of higher education which admits that person will have no idea of the reason for why the person left the last school,⁵² because only a transcript without

to find employment and to engage in collective social life because of the stigma of criminal conviction. Further, incarcerating individuals has harmful effects on their families. The children, parents, and neighbors of prisoners suffer while their mothers, fathers, children, and community members are confined.

Id. at 1183–84.

⁴⁷ *Id.* at 1184.

⁴⁸ Cantalupo & Kidder, *supra* note 20, at 714–15.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ One article notes that while expulsion for campus sexual assault was once rare, it is becoming something campuses increasingly consider. Elena Kadvany, *Should Student Sex Offenders Be Expelled?*, PALO ALTO WKLY. (Mar. 20, 2015, 8:09 AM), <https://www.paloaltoonline.com/news/2015/03/20/should-student-sex-offenders-be-expelled> [<https://perma.cc/G2WA-QRCC>].

⁵² Kristen Lombardi, *A Lack of Consequences for Sexual Assault: Students Found “Responsible” Face Modest Penalties, While Victims Are Traumatized*, CTR. FOR PUB. INTEGRITY (July 14, 2014, 4:50 PM), <https://publicintegrity.org/education/a-lack-of-consequences-for-sexual-assault/>; Kenny Jacoby, *College Athletes More Likely to Be Disciplined for Sex Assault*, USA TODAY (Dec. 16, 2019, 11:10 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-athletes-more-likely-disciplined-sex-assault/4379153002/> [<https://perma.cc/Q4FN-7RXV>] (find

disciplinary notations will be sent.⁵³ Nor will the student have been required to attend any kind of treatment program or other educational program to address their risk or needs to try to preclude repetition of the same conduct.⁵⁴

It makes sense that employment terminations for sexual harassment are even more likely to hide evidence of the reason for termination. To avoid the risk of civil liability, most businesses are advised not to give the reason for terminating an employee—just the dates of employment.⁵⁵

System change that addresses this neglect of the root causes of the initial act of sexual misconduct would involve giving the low-risk offender the chance to opt into a system that allows for a second chance. A prerequisite is that the offender must be willing to engage in a treatment program that addresses the causes of the act. Such a system might encourage reporting by a survivor who is reluctant to report due to fear of destroying their family or the reputation or career of the offender. Survivors often want to ensure that no one else is victimized and may be more willing to engage with a system that addresses the behavior in a noncriminal context. A restorative justice process gives the sexual assault survivor a chance to be heard in a nonadversarial context and can become part of a healing process as well. It can also give perpetrators a chance to address the root causes of their behavior, a way to make amends and a path to a more functional life.

D. Obstacles to System Change

There are statutory, resource and attitudinal barriers to changing existing justice, campus and workplace systems to incorporate restorative or therapeutic justice alternatives for sexual assault. One such barrier is erected by the very terms of the Violence Against Women Act: “For example, programs that treat both survivor/victims and offenders are ineligible to apply for grant funds made available through the Violence Against Women Act.”⁵⁶ Similarly, other grants

ing that of forty-seven athletes found responsible for sexual offenses, at least eleven transferred and played at other NCAA schools, and another twenty-two transferred to other colleges); Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFPOST (Dec. 6, 2017, 7:49 AM), https://www.huffpost.com/entry/college-rape-transfer_n_6030770 [<https://perma.cc/8NVA-VHXC>].

⁵³ Paul Fain, *Registrars: Transcripts Can Cite Disciplinary Actions*, INSIDE HIGHER ED (Feb. 24, 2016), <https://www.insidehighered.com/quicktakes/2016/02/24/registrars-transcripts-can-cite-disciplinary-actions> [<https://perma.cc/NH7Z-6PVV>] (noting that while in the past noting disciplinary records on college transcripts was frowned on, that may be changing).

⁵⁴ Raina V. Lamade, Elise Lopez, Mary P. Koss, Robert Prentky & Alexandra Brereton, *Developing and Implementing a Treatment Intervention for College Students Found Responsible for Sexual Misconduct*, J. AGGRESSION, CONFLICT & PEACE RSCH. 134, 139 (2018).

⁵⁵ See Suzanne Lucas, *Your Former Employees Want a Reference. Here Is What Your Attorney Thinks About That.*, INC. (Oct. 2, 2014), <https://www.inc.com/suzanne-lucas/your-former-employees-want-a-reference-here-is-what-your-attorney-thinks-about-t.html> [<https://perma.cc/P63-X547>].

⁵⁶ MARY KOSS & MARY ACHILLES, RESTORATIVE JUSTICE RESPONSES TO SEXUAL ASSAULT 10 (2008), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf [h

have restrictions that block the use of innovative new strategies: “Other funds to address victim or offender services are earmarked for continuation of existing programs, resulting in a failure to reward or nurture innovation. . . . [A]vailable federal dollars [often] cover only evaluation costs, not the much more significant costs to develop and operate new programs.”⁵⁷ For many employers, firing someone may be the quick answer to deal with an employee who has sexually harassed another employee. Finally, attitudes about alternatives to incarceration must be addressed. Buy-in by prosecutors will be an obstacle to criminal justice reform and require education about restorative justice’s effectiveness in promoting justice and meaningful accountability.

While system change is possible, it will require thought and political will to overcome preconceptions about how best to deal with sexual assault. It is common knowledge today that most sexual assaults are not perpetrated by strangers.⁵⁸ We know that survivors and their families are often reluctant to prosecute a family member or friend.⁵⁹ Nevertheless, it will take education for key players in the criminal justice system, and the public, to understand that most sexual assaults are not reported and therefore are never addressed through the criminal justice system. The Rape, Abuse, and Incest National Network (“RAINN”) estimates that, based on 2010-2014 U.S. Department of Justice statistics, less than one-third of rapes are reported to police and, of those, only 0.7% result in a felony conviction.⁶⁰

There must be a shift in public thinking about this subject to deal with the historical silence about sexual assault and harassment that enables offenders to continue those behaviors. Only with that shift will the law bend to incorporate remedies that allow society to deal with sexual offending in a variety of ways, including through restorative or therapeutic justice models. The one-size-fits-all system available in most jurisdictions and on most college campuses is a failure.

The vast majority of survivors do not report assaults by family, acquaintances and friends because of the black-and-white system responses then

<https://perma.cc/68SA-K3CU>].

⁵⁷ *Id.*

⁵⁸ MICHELLE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1–2 (2011); Aimee Wodda, *Stranger Danger!*, 18 J. FAM. STRENGTHS, Oct. 2018, at 1.

⁵⁹ McGlynn & Westmarland, *supra* note 22, at 187 (“Survivors are not always seeking imprisonment as an outcome of reporting sexual abuse,” particularly those who have experienced abuse in a family setting.”); Richard Felson & Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67 J. MARRIAGE & FAM. 597 *passim* (2005); Tara N. Richards, Marie Skubak Tillyer & Emily M. Wright, *When Victims Refuse and Prosecutors Decline: Examining Exceptional Clearance in Sexual Assault Cases*, 65 CRIME & DELINQ., 474 *passim* (2019).

⁶⁰ *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/N3JV-VCSA>].

set in motion.⁶¹ Often the system response is simply to move the perpetrator on after probation, prison or college expulsion without addressing the root cause of the behavior, leading to enhanced risks of reoffending.⁶² While the #MeToo movement has partially shone light on what happens when people hesitate to report sexual assault, it has not solved the problem of what to do once a disclosure of sexual assault or harassment is made. The time is now for implementing better solutions to an age-old problem.

II. ALTERNATIVE WAYS OF DEALING WITH SEXUAL MISCONDUCT SO ALL PARTIES PERCEIVE THE RESOLUTION AS FAIR

A. Restorative and Therapeutic Justice Approaches

Restorative justice and therapeutic justice are two different approaches that can, in certain circumstances, replace the traditional system of trial/hearing and punishment/expulsion. In both restorative and therapeutic systems, the person who caused the harm must agree to participate after admitting responsibility for the harm caused.⁶³ In a therapeutic justice model the survivor may opt not to participate, as opposed to the method used in the restorative justice model which operates only if the survivor decides to participate; in some settings, the survivor may choose to appoint a representative to participate in their stead.⁶⁴

Therapeutic justice may be one solution that survivors and the community are willing to embrace. Some researchers note that unlike the criminal justice system, restorative and transformative justice are intended to address the root causes of the behavior: “Therapeutic justice practices are intended to have a positive and therapeutic impact on parties to proceedings . . . by removing any processes that alienate or stigmatise; by ensuring that parties engage with and understand the relevant process; and by giving attention to the underlying reasons for the offending.”⁶⁵ Therapeutic justice processes in the United States

⁶¹ Catharine Richmond & Melissa Richmond, *The Future of Sex Offense Courts: How Expanding Specialized Sex Offense Courts Can Help Reduce Recidivism and Improve Victim Reporting*, 21 CARDOZO J.L. & GENDER 443, 444–56 (2015).

⁶² TRACY VELÁSQUEZ & REAGAN DALY, VERA INST. OF JUST., *THE PURSUIT OF SAFETY: RESPONSES TO SEX OFFENDERS IN THE U.S.* 1, 4 (2001), https://www.vera.org/downloads/Publications/the-pursuit-of-safety-sex-offender-policy-in-the-united-states/legacy_downloads/Sex_offender_reports_summary-1.pdf [<https://perma.cc/FH6L-HLH3>] (“The proportion of imprisoned sex offenders in treatment at any given time ranges widely across states, from nearly none to one-third. Access to jail- and prison-based programs is often limited by the number of treatment beds available, however. For people who are under community supervision, CBT [(cognitive behavioral therapy)] is available in 85 percent of the states we surveyed. However, in most of those, participation in community treatment may depend on ability to pay, which limits access to these programs.”).

⁶³ DAVID R. KARP, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES: REPAIRING HARM AND REBUILDING TRUST IN RESPONSE TO STUDENT MISCONDUCT* 11 (2015) (stating offenders must take active responsibility for their transgressions).

⁶⁴ MARIAME KABA & SHIRA HASSAN, *FUMBLING TOWARDS REPAIR: A WORKBOOK FOR COMMUNITY ACCOUNTABILITY FACILITATORS* 99 (2019).

⁶⁵ CTR. FOR INNOVATIVE JUST., RMIT UNIV., *INNOVATIVE JUSTICE RESPONSES TO SEXUAL*

today traditionally exist within the adversarial system, but usually only after an offender has pleaded guilty.

A major policy reason for considering a restorative or therapeutic justice approach to sexual misconduct is reducing case attrition, i.e., reducing the large numbers of cases in the criminal justice system closed at various stages short of trial. When prosecutors or police close cases short of trial, that premature closure ends in “cutting off survivor victims’ search for acknowledgment of their harm and a concrete response to it.”⁶⁶ Very few cases reported to police in the United States ever result in a finding of guilt at trial—only thirteen percent.⁶⁷ The process, even in the rare case that proceeds to judicial conclusion, may never validate the status of survivors as legitimate. The process does not “provide[] a forum to voice the harm done to them, accord them influence over decisions about their case, or incorporate their input into the consequences imposed.”⁶⁸

One restorative justice approach has been called a dual opt-in system.⁶⁹ This type of system requires that (1) the state’s penal or criminal code or college or employer policies have developed criteria for an alternative sanction/therapeutic model, such as diversion or suspension premised on specific terms regarding treatment participation, and (2) the offender and survivor to opt-in to the program voluntarily.⁷⁰ A dual opt-in system allows specific surrounding circumstances and the individual needs of the survivor and offender to be considered. Alternative placement in a therapeutic justice model in lieu of imprisonment, expulsion from school or termination from employment is a privilege that would come with well-defined requirements.

Failure to comply with those requirements, which should be strictly monitored, would mean incarceration, expulsion or termination. If offenders know they will reject the rehabilitative treatment that is the hallmark of the therapeutic justice model, then they need not opt-in. Traditional sanctions—incarceration, expulsion or termination—would then apply.

If the parties opt to participate in an alternative system there are other choices to be made. Some jurisdictions, colleges or employers may choose to offer a therapeutic justice approach only to low-risk offenders; others may also offer, with the survivor’s consent and participation, a restorative justice model. Both the restorative justice model and the criminal justice’s diversion, or treatment, model share characteristics of a therapeutic justice system that focuses on what Professor Amy Ronner has called the three V’s: voice,

OFFENDING: PATHWAYS TO BETTER OUTCOMES FOR VICTIMS, OFFENDERS AND THE COMMUNITY 12 (2014), <http://mams.rmit.edu.au/qt1g6twlv0q3.pdf> [<https://perma.cc/H56M-2MHD>].

⁶⁶ Koss, *supra* note 26, at 1627.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing Laura M. Monroe, Linda M. Kinney, Mark D. Weist & Denise Spriggs Defeamekpor, *The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment*, 20 J. INTERPERSONAL VIOLENCE 767 (2005)).

⁶⁹ Richmond & Richmond, *supra* note 61, at 461.

⁷⁰ *Id.*

validation, and voluntary participation.⁷¹ In other words, as one proponent of therapeutic justice puts it:

Litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.⁷²

Restorative justice allows survivors the ability to relate what happened outside the context of traditional (and ineffective) questioning techniques: "A consensus of published studies is that survivors need to tell their own stories about their experiences."⁷³ In that way, they can "obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, and receive support that counteracts isolation and self-blame."⁷⁴ It is vital that survivors "have choice and input into the resolution of their violation."⁷⁵ The criminal justice system emphasizes punishment, retribution and incapacitation, which often provides disincentives for people convicted of sex offenses to undergo treatment.⁷⁶ The confrontational adjudicative process of traditional courts encourages advocacy of innocence, in fact presuming it.⁷⁷ The court process discourages acceptance of responsibility and influences subsequent acceptance of treatment once sentenced.⁷⁸ Use of a restorative or therapeutic justice model makes it easier for offenders to deal with the causes of their behavior and provides more assurance to survivors that the behavior will not reoccur.

A final compelling reason to consider restorative or therapeutic justice

⁷¹ Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002).

⁷² Cucolo & Perlin, *supra* note 17, at 34.

⁷³ Koss & Achilles, *supra* note 56, at 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See William Edwards & Christopher Hensley, *Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process*, 45 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 646 (2001).

⁷⁷ *Id.* at 646-47.

⁷⁸ Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection*, 16 SEXUAL ABUSE 351-64 (2004)) (citing Edwards & Hensley, *supra* note 76, at 646-62).

alternatives is that criminal conviction is unlikely to increase the chances for rehabilitation for someone who committed a sexual offense, thereby decreasing the risk of future recidivism. Most sexual offense convictions result in a requirement to register as a sex offender with the state and publication of the person's name and sometimes address and employer on a state registry.⁷⁹ Yet isolation and shame work against the successful reintegration of offenders into the community. Not all offenders are at high risk for reoffending.⁸⁰

A restorative justice approach combines accountability with requiring steps toward change—change in thoughts, behaviors and relationships.⁸¹ The consequences that follow a restorative justice process are not just doing time. Instead, a restorative justice approach incorporated into the criminal justice system can require targeted therapy involving a working partnership with criminal justice professionals and sex offender specific-treatment providers.⁸² This partnership can provide a way forward without imposing the stigma of being a registered sex offender. Empathy for those who have caused harm while offering inclusion in a community aware of the offender's past behavior offers hope for the future which is essential to change—and to lessening the chance of future harm.

The questions asked in a restorative justice setting are:

- (1) Who has been hurt?
- (2) What do they need?
- (3) Whose obligations are they?
- (4) What are the root causes?
- (5) How do we engage relevant stakeholders in addressing these needs and obligations?
- (6) What needs to be done to make things as right as possible, including addressing root causes?⁸³

B. Transformative Justice

A third approach, often referred to as transformative justice, is a “framework that is often in an uncomfortable alliance with the more established and recognized practice of restorative justice.”⁸⁴ Transformative justice is a

⁷⁹ VELÁSQUEZ & DALY, *supra* note 62, at 4.

⁸⁰ R. Karl Hanson, Andrew J. R. Harris, Elizabeth Letourneau, L. Maaik Helmus & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH., PUB. POL'Y, & L. 48 *passim* (2018).

⁸¹ OUDSHOORN ET AL., *supra* note 8, at 52–53.

⁸² One such system is used in Canada. See *Restorative Opportunities Program*, CORR. SERV. CAN. (July 20, 2021), <https://www.csc-scc.gc.ca/restorative-justice/003005-1000-eng.shtml> [<https://perma.cc/9L97-MGRF>].

⁸³ OUDSHOORN ET AL., *supra* note 8, at 25 (2015) (citing HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002)).

⁸⁴ KABA & HASSAN, *supra* note 64, at 22 (quoting Erica Meiner).

political outlook driven by values of prison-industrial complex abolition, harm reduction, and holistic healing which does not rely on the state, meaning the prison-industrial complex or criminal legal system.⁸⁵ It contemplates an outcome outside of the state's criminal justice systems. As far back as 2003, Angela Davis said, "Our most difficult and urgent challenge to date is that of creatively exploring new terrains of justice where the prison no longer serves as our major anchor."⁸⁶

Proponents of a transformative justice approach point to the deadly consequences of ignoring extreme trauma and of trying to address past injustices instead of looking ahead:

Just as battered children have a higher likelihood of growing up to be battered or battering adults, oppressed people who have not had the opportunity to do the work of collective healing can end up assuming oppressor roles to others, and the pattern of feeling victimized, and believing that therefore the world owes us more than it owes other people, is particularly deadly.⁸⁷

Thus, a common response to horrific violence is trying to prevent things that have already happened, "lead[ing] to militarization, to extreme nationalism, and to the kind of opportunism . . . [seeking to promote one's] own group at the expense of others—which of course only continues the cycle [of violence], creating new groups of desperate people" who try to prevent it through ineffective and even counterproductive means.⁸⁸

Another view of transformative justice is simply that it is a way of "creating safety, justice and healing for survivors of violence that does not rely on the state."⁸⁹ In this view, the transformative justice philosophy should be to actively resist the state's criminal injustice system.⁹⁰ Transformative justice asks whether the community, including harmed individuals, can ever truly be healed while unjust caste and patriarchal systems persist.

Leigh Goodmark recounts the efforts of several community-based groups to organize community responses to domestic violence that operate, at the request of survivors, outside the criminal justice system.⁹¹ These organizations use community members who volunteer for prevention activities as well as actually confronting and responding to interpersonal violence.⁹² Tools include safety planning, intervention tools and helping abusers accept accountability.⁹³ These approaches enlist the wider community in the process. Some focus on

⁸⁵ *Id.*

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 6 (citing Aurora Levins Morales).

⁸⁸ *Id.*

⁸⁹ *Id.* at 21 (citing Leah Lakshmi Piepzna-Samarasinha).

⁹⁰ *Id.* (citing Mia Mingus).

⁹¹ Goodmark, *supra* note 30, at 97–100.

⁹² *Id.*

⁹³ *Id.*

relationship skill building.⁹⁴

Other community groups target violence in general, which often includes intervention in domestic violence situations. Safe Streets Baltimore says it disrupts potential community violence that often begins as intimate partner violence.⁹⁵ Safe Streets attempts to connect both abused and abuser with services and supports, including employment training, mental health care and substance abuse treatment.⁹⁶

Some groups choose to organize community accountability alternatives because they do not feel safe asking for help from the criminal justice system. One such group, the Young Women's Empowerment Project, describes being unable to access police because its members are cisgender and transgender women of color who had current or prior experience in the sex work industry.⁹⁷ It developed strategies based on relationship building to interrupt and transform violence.⁹⁸ This group trained facilitators through the Just Practice Collaborative to deal with violence and abuse outside the criminal justice system.⁹⁹

Critical Resistance is a group that advocates for abolition of state-controlled policing and the prison-industrial complex.¹⁰⁰ It states its vision is "the creation of genuinely healthy, stable communities that respond to harm without relying on imprisonment and punishment. . . . We work to build healthy, self-determined communities and promote alternatives to the current system."¹⁰¹ To that end, Critical Resistance lists in its resources a variety of community accountability groups.¹⁰²

INCITE! is another such group. It was formed by women of color and describes itself as "a network of radical feminists of color organizing to end state violence and violence in our homes and communities."¹⁰³ It advocates developing sustainable strategies to address community members' abusive behavior, creating a process for them to account for their actions and transform their behavior.¹⁰⁴ To that end, it provides a list of community resources for developing concrete strategies for community accountability.¹⁰⁵

In 2004, Mimi Kim founded Creative Interventions, with the goal of

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Shira Hassan, *Opening Thoughts*, in KABA & HASSAN, *supra* note 64.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/> [<https://perma.cc/QJ99-S64R>].

¹⁰¹ *Id.*

¹⁰² *Resources*, CRITICAL RESISTANCE, <http://criticalresistance.org/resources/> [<https://perma.cc/Q66P-3S32>].

¹⁰³ *About*, INCITE!, <https://incite-national.org/history/> [<https://perma.cc/UV4J-V5GX>].

¹⁰⁴ *Id.*

¹⁰⁵ *Community Accountability*, INCITE!, <https://incite-national.org/community-accountability/> [<https://perma.cc/Z9YE-WX6K>].

shifting education and resources back to families and communities.¹⁰⁶ Kim believes that transformative justice and community accountability may be more effective than the criminal justice system for the following reasons: It “place[s] knowledge and power among those most impacted by violence . . . mak[ing] support and safety accessible, stop[ping] violence at early stages of abuse, and creat[ing] possibilities for once abusive individuals and communities to evolve towards healthy change and transformation.”¹⁰⁷ Creative Interventions created a toolkit for community action and works with other national organizations.¹⁰⁸

There may be two major obstacles to widespread use of community accountability approaches today. One possible obstacle is the lack of community and connection that many people feel in an increasingly urbanized society. Separated from extended family connections, methods that may work well for cohesive and homogeneous groups who live in smaller geographic areas may be harder to implement in a diverse and fragmented society. It is hard to create accountability when a community is so diffused that it is easy to hide one’s activities from the group.

The other challenge is the lack of resources for alternative ways of addressing violence. Rehabilitative programs and counseling, which have perhaps the best chance of creating long-term change in actions and attitudes, are severely underfunded even within the criminal justice system.¹⁰⁹ Given the increased strength of the Black Lives Matter movement in 2020, the time to address funding mechanisms at the state and local level to support community accountability programs in areas where they have a probable chance of success may have finally come. Calls to reduce police budgets so that other ways of dealing with criminal acts that may be more effective can be funded mean restorative justice alternatives may finally receive budget consideration. The one caveat is that offender reintegration should not supersede survivors’ needs.

III. USING THE RESTORATIVE OR THERAPEUTIC JUSTICE MODEL IN THE CRIMINAL JUSTICE SYSTEM

Restorative justice practices can mean different things to different people. It can mean an offender and a victim moving out of an adversarial courtroom setting into an organized and professionally facilitated meeting space that can

¹⁰⁶ *Our Beginning*, CREATIVE INTERVENTIONS, <https://www.creative-interventions.org/about-ci/> [<https://perma.cc/LG3D-XVZT>].

¹⁰⁷ *Id.*

¹⁰⁸ *Toolkit*, CREATIVE INTERVENTIONS, <https://www.creative-interventions.org/toolkit/> [<https://perma.cc/9RNE-P868>].

¹⁰⁹ See Joan Petersilia, *Beyond the Prison Bubble*, NAT’L INST. JUST. J. (Nov. 2, 2011), <https://nij.ojp.gov/topics/articles/beyond-prison-bubble> [<https://perma.cc/S7FQ-8TKJ>]; see also *The Challenge*, CONVERGENCE, <https://reentryready.convergencepolicy.org/the-challenge/> [<https://perma.cc/HK3H-NWJ2>]; Martiga Lohn, *\$175,000 Per Offender? Get-Tough Sex Predator ‘Treatment’ Busts State Budgets*, ASSOCIATED PRESS (Jan. 12, 2019, 7:43 PM), https://www.cleveland.com/nation/2010/06/175000_per_offender_get-tough.html [<https://perma.cc/39V6-4AYU>].

provide some measure of healing, once the offender has acknowledged the harm caused.¹¹⁰ The survivor, or a representative of the survivor, can describe the experience of the harm they endured and its consequences. The perpetrator acknowledges the harm they caused. Offenders can apologize without fear of legal retribution for the apology, although an apology is not the goal of the process. The system can then explore the appropriate remedies to hold the perpetrator accountable. Diversion programs generally try to rehabilitate an individual with the aim of delaying or avoiding conviction.¹¹¹ Restorative justice programs can also work in tandem with a criminal sentence.

Most people convicted of sex offenses, even those who receive a prison sentence, will be released back into the community at some point.¹¹² In California, the penalty for forcible rape is only three to eight years' imprisonment, which is often shortened by good behavior credits.¹¹³ The penalty for sexual battery, which is intimate touching against the will of the person, is two to four years' imprisonment.¹¹⁴ Where limited or no sex offender-specific treatment options are available during incarceration, there is no reason to believe that the underlying reasons that led to the crime in the first place will have been addressed or changed by the time of prison release.

Restorative justice is an alternative that provides a different pathway to accountability, meaning taking responsibility for wrongdoing. In the context of a restorative justice approach to sexual offending, this means setting boundaries, laying out clear expectations, and providing sex offender specific-treatment and specialized supervision. It means multiple stakeholders working together—for example, as in California's Containment Model approach, described below.¹¹⁵ It

¹¹⁰ Mills et al., state as follows:

Restorative justice can include various approaches to bringing parties together, including victim-offender mediation, family group conferencing, peacemaking, sentencing circles as well as circles of peace [Circles of peace], the restorative-informed approach used in this study, are administered by trained circle keepers, for a designated number of sessions, following each jurisdiction's required length of [domestic violence] offender treatment."

Mills et al., *supra* note 31; see also OUDSHOORN ET AL., *supra* note 8, at 72.

¹¹¹ A diversion program essentially takes a case out of the formal justice system. *What is Diversion?*, VERA INST. OF JUST. (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion> [<https://perma.cc/93S8-RLRJ>]. Often, the program is a form of sentence in which an offender joins a rehabilitation program instead of being sent to prison. *Id.* In some cases, the offender avoids conviction or hides a criminal record. *Id.* Diversion programs have grown in recent decades, in part because research has indicated these courts reduce recidivism. *Id.*

¹¹² For example, in one federal study, the average sentence given to the 4,295 child molesters in the survey was approximately seven years, with three of seven years typically being served. LANGAN ET AL., *supra* note 14, at 1. An older study (1980-86) found the average sentence for a person convicted of a federal sex offense was ninety-one months, and the average probation term for someone sentenced to probation was approximately forty-two months. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SENTENCING AND TIME SERVED 2 (1987).

¹¹³ CAL. PENAL CODE §§ 261, 264 (Deering, LEXIS through 2021 Reg. Sess.).

¹¹⁴ PENAL § 243.4.

¹¹⁵ Sliva, *supra* note 12, at 537.

means empathy for past trauma, because it is likely that many, but not all, men who commit sexual offenses have experienced violence or sexual abuse as children.¹¹⁶ It requires belief in the offender's ability to change, but with community safety having priority. Most of all, it means giving a voice to the survivor and a chance to have the whole focus of the process shifted to address the survivor's needs for validation and to be heard.

Not every person is an appropriate candidate for participation in a process outside the traditional justice system. Criteria for determining which offenders should be considered for alternative justice systems, such as restorative justice, are discussed below.

Incorporating restorative justice principles within the existing criminal justice system is viewed as imperative by some, while others who embrace transformative justice see it as the opposite of what is needed. Recent scholars have attempted to offer a framework for reforming various attempts by the states to create restorative justice options within their own criminal justice systems.¹¹⁷ These scholars note that many attempts at legislating restorative justice by the states illustrates an imperfect or even incorrect understanding of restorative justice itself, creating ineffective and incomplete statutory systems.¹¹⁸ Even Colorado, which has the most extensive statutory scheme incorporating restorative justice elements,¹¹⁹ has failed to create a true restorative justice option. The Colorado system views it as simply a sentencing option, operating in the discretion of the judicial system and prosecutors.¹²⁰

The main point of restorative justice, which is shifting the focus to the survivor and broadening the avenues of accountability to include others harmed, may still be absent in a system that focuses on restorative justice only at the end of the criminal justice process. For example, the Colorado focus is on victim healing rather than reparations. One scholar argues that "a prosecutor can and should agree to offer restorative justice to an offender whenever a victim requests it."¹²¹ In Colorado, the courts cannot order use of restorative justice as a sentencing option in the areas of intimate partner violence, sexual assault, stalking and protective order violations unless the prosecutor agrees.¹²² This leaves the use of restorative justice as a sentencing option in the discretion of prosecutors rather than survivors in most contexts.

¹¹⁶ Jill S. Levenson, Gwenda M. Willis & David S. Prescott, *Adverse Childhood Experiences in the Lives of Male Sex Offenders: Implications for Trauma-Informed Care*, 28 SEXUAL ABUSE 340 *passim* (2016).

¹¹⁷ See, e.g., Lynn S. Branham, "Stealing Conflicts" No More?: *The Gaps and Anti-Restorative Elements in States' Restorative-Justice Laws*, 64 ST. LOUIS U. L.J. 145 (2020); Shannon M. Sliva, Elizabeth H. Porter-Merrill & Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL'Y 456 (2019).

¹¹⁸ Branham, *supra* note 117, at 166; Sliva et al., *supra* note 117, at 503.

¹¹⁹ See Sliva et al., *supra* note 117, at 479–85 & nn.139–79.

¹²⁰ *Id.* at 500.

¹²¹ *Id.* at 485.

¹²² *Id.* at 484–85.

Debate in Colorado still revolves around to what extent, if any, victims of violent crime should have a say in the process used to address the harm.¹²³ Thus, restorative justice as used there is mainly focused on one potential component of restorative justice, victim/offender dialogue after sentencing, rather than a comprehensive restorative justice framework. Further weakening its effect, victims were informed of the victim/offender dialogue sentencing option only through bulk mailing and only recently have further efforts at outreach been made to inform victims of facilitated dialogue options.¹²⁴

Restorative justice is poorly understood by the majority of those who mold the criminal justice system, including prosecutors.¹²⁵ Until this group is better educated about the uses of a true restorative justice system and convinced of its effectiveness in holding offenders accountable, we will continue to see legislation hampered by objections to enactment of restorative justice alternatives. An imperfect understanding of restorative justice and its effectiveness results in piecemeal alternatives that do not result in comprehensive reform. For example, attempts to legislate restorative justice alternatives will fail as long as prosecutors continue to block laws creating confidentiality for statements made by defendants within a restorative justice framework.¹²⁶

While most states have tried various means of incorporating some restorative justice components in their statutes,¹²⁷ very few have endorsed its use

¹²³ *Id.* at 488.

¹²⁴ *Id.* at 488–89.

¹²⁵ Admittedly, this observation is only in the experience of the author, whose legal career was mainly spent as a state deputy attorney general handling criminal appeals and drafting criminal justice legislation.

¹²⁶ Sliva et al., *supra* note 117, at 493–94 (noting that Colorado’s attempt to provide confidentiality is hampered by prosecutorial objections to a statutory extension of confidentiality in a variety of situations within their restorative justice framework). For the same reason, other jurisdictions had to come up with creative workarounds to prosecutors’ objections. Illinois tried to enact a state supreme court rule to this end and was later pursuing a legislative solution. *Id.* The San Francisco District Attorney’s Office entered into a memorandum of understanding with the San Francisco Public Defender’s Office to protect statements made not only for restorative justice purposes but for other collaborative programs. *Id.* Colorado was forced to consider less direct alternatives after confidentiality legislation was blocked, “including implementing district attorney policy, developing memoranda of understanding between district attorney offices and the state public defender’s office, drafting immunity agreements and other case-by-case agreements, and gaining buy-in on statewide best practices.” *Id.*

¹²⁷ Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1030–31 (2019) (noting that some form of restorative justice is being implemented in nearly every state, at state, regional and local levels as statutes or regulations). However, an examination of the California statutes cited as evidence of this trend reveals that the statutory references in California to use of restorative justice principles are permissive and not mandatory. *See generally* CAL. PENAL CODE § 3450 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.); CAL. EDUC. CODE § 48900 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.). Its use in California is very limited and depends on programs being available at the local level. *Id.* There is no state investment in restorative justice, nor any system set up to train facilitators in its use. *Id.* In essence, it is lip service to an undefined concept and is either not being utilized at all or possibly is

to address sexual or gendered violence.¹²⁸ Some view only one U.S. program to have truly experimented with the use of restorative justice in this context.¹²⁹ In 2004, the RESTORE Program used feminist and restorative justice principles in sexual violence cases.¹³⁰ The RESTORE Program operated within the criminal system because it was initiated through prosecutor referrals.¹³¹ An offender could avoid prosecution and a felony classification by completing the program.¹³² The program operated in four stages: (1) referral and intake, (2) preparation, (3) conference and (4) accountability and reintegration.¹³³ RESTORE Program “[e]ligibility was limited to first time offenders, acquaintance rapes, and non-penetrative sex offenses with minimal force.”¹³⁴ Although the RESTORE Program ended in 2007, “it has had a strong influence on the establishment of other programs”¹³⁵

A. Diversion as a Form of Restorative Justice Within the Criminal Justice System

A diversion program essentially takes a case out of the formal justice system, although it is done in partnership with the criminal justice system.¹³⁶ Often, the program is a form of sentence in which an offender participates in a

being used in local contexts that may or may not be truly restorative justice programs. *Id.*

¹²⁸ See, e.g., Donna Coker & Ahjané D. Macquoid, *Alternative U.S. Responses to Intimate Partner Violence*, in COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE 169 (Rashmi Goel & Leigh Goodmark eds., 2015); Clare McGlynn, Nicole Westmarland & Nikki Godden, “*I Just Wanted Him to Hear Me*”: *Sexual Violence and the Possibilities of Restorative Justice*, 39 J.L. & SOC’Y 213, 216 (2012); DAVID R. KARP, JULIE SHACKFORD-BRADLEY, ROBIN J. WILSON & KAAREN M. WILLIAMSEN, CAMPUS PRISM, A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2–5 (2016), http://www.skidmore.edu/campusrj/documents/CAMPUS_PRISM_Report_2016.pdf [<https://perma.cc/4CJE-S4XY>]; Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE ABUSE 242, 242 (2014); Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://www.chronicle.com/article/Why-More-Colleges-Are-Trying/244542> [<https://perma.cc/6ASH-HFK6>]; Deborah M. Weissman, *The Personal is Political-and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 443–44 (2007).

¹²⁹ Randall, *supra* note 37.

¹³⁰ *Id.* at 470.

¹³¹ Koss, *supra* note 26, at 1626.

¹³² *Id.* at 1651–53 (accountability was accomplished through the restorative justice process rather than prosecution and conviction).

¹³³ *Id.* at 1628–30.

¹³⁴ Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT’L L. REV. 377, 395–96 (2014).

¹³⁵ *Id.* at 396 (2014). One other program in Canada has incorporated true restorative justice principles within the criminal justice system to address sexual violence. Randall, *supra* note 37, at 489; see generally B.C. ASS’N OF SPECIALIZED VICTIM ASSISTANCE & COUNSELLING PROGRAMS, RESTORATIVE JUSTICE, DOMESTIC VIOLENCE AND SEXUAL ASSAULT IN CANADA: A SUMMARY OF CRITICAL PERSPECTIVES FROM BRITISH COLUMBIA (2002).

¹³⁶ *What is Diversion?*, *supra* note 111.

rehabilitation program instead of being sent to prison.¹³⁷ Sometimes the offender avoids conviction or can have a criminal record expunged after completion of the required consequences assigned.¹³⁸ Diversion programs have grown in recent decades, in part because research has indicated these programs reduce recidivism.¹³⁹ Diversion programs have a team of probation workers, prosecutors, defense workers, social workers and therapists working together for the benefit of both the person harmed and the one who caused the harm.¹⁴⁰

In a few jurisdictions, a therapeutic justice approach has been incorporated in the criminal justice system via diversion.¹⁴¹ The perpetrator can choose to avoid the most stringent penalty—incarceration—if they agree to participate in a program with strictly defined parameters to address that person’s specific issues. In the criminal justice system, if the requirements of a diversion program are successfully completed, the criminal conviction will be removed from the criminal history.¹⁴² In a therapeutic justice model, the survivor may opt not to participate, while a restorative justice model often requires both parties’ participation.¹⁴³

Of course, this type of proceeding cannot be adversarial or confrontational. For that reason, it is at odds with the constitutional requirements of the rights to confront and cross-examine witnesses.¹⁴⁴ It may also conflict with the right not to incriminate oneself.¹⁴⁵ Similar to a waiver of rights when accepting a plea deal,¹⁴⁶ accused perpetrators who choose to opt into a therapeutic justice model

¹³⁷ *Id.*

¹³⁸ Many states have expungement laws allowing for dismissal of the criminal charge once diversion is successfully completed, and quite a few new expungement statutes were added in 2021. See *Dozens of New Expungement Laws Already Enacted in 2021*, COLLATERAL CONSEQUENCES RES. CTR. (July 7, 2021), <https://ccresourcecenter.org/2021/07/07/dozens-of-new-expungement-laws-already-enacted-in-2021/> [https://perma.cc/8GE8-7G8S].

¹³⁹ Rebecca Neusteter, Megan O’Toole & Mawia Khogali, *Emerging Issues: Alternatives to Enforcement*, CALIBRE PRESS (Aug. 30, 2018), <https://calibrepress.com/2018/08/emerging-issues-alternatives-to-enforcement/> [https://perma.cc/M5UX-LAMZ].

¹⁴⁰ Lauren Sonnenberg, *Can Restorative Justice Go Mainstream?*, CRIME REP. (Nov. 13, 2019), <https://thecrimereport.org/2019/11/13/can-restorative-justice-go-mainstream/>

[https://perma.cc/8LZV-UWK3] (interviewing Robert Weisberg, co-director of the Stanford Criminal Justice Center). California’s Containment Model statutory system requires probation or parole officers, therapists and polygraph examiners to work together after the person who has committed sexual harm is on probation or parole. See *Containment Model*, CAL. SEX OFFENDER MGMT. BD., <https://casomb.org/index.cfm?pid=1231> [https://perma.cc/S5XK-PLY3].

¹⁴¹ Richmond & Richmond, *supra* note 61, at 444–56 (describing the few programs in the United States that incorporate elements of therapeutic justice in their diversion systems).

¹⁴² *Dozens of New Expungement Laws Already Enacted in 2021*, *supra* note 138.

¹⁴³ See generally KABA & HASSAN, *supra* note 64.

¹⁴⁴ See Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 682–87 (2004) [hereinafter Reimund, *The Law and Restorative Justice*]; see also Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution*, 3 APPALACHIAN J.L. 1 *passim* (2004) [hereinafter Reimund, *Is Restorative Justice on a Collision Course*].

¹⁴⁵ Reimund, *The Law and Restorative Justice*, *supra* note 144, at 685.

¹⁴⁶ *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969) (the Court set forth rules to ensure a defendant’s guilty plea is knowing and voluntary: the trial court judge is required to inform the

must clearly understand the rights they are giving up in doing so. The perpetrator must agree to waive those rights to proceed with the alternative sanction. They must be informed of the possible uses of acknowledging their misconduct in the future. For example, in a subsequent criminal prosecution for sexual assault, a prior admission of sexual misconduct even in the therapeutic justice context would be admissible as evidence against the person.¹⁴⁷ Civil liberties must be considered when considering a therapeutic justice approach: “The advantages of treatment and release may come at the cost of a reduction in adversarial protections, but defendants and the legal community seem willing to accept this price.”¹⁴⁸

One such approach was established by legislation in Washington in the late 1970s, before it became political suicide for officials to appear soft on offenders.¹⁴⁹ It was used in Clark and Snohomish Counties for a number of years.¹⁵⁰ Offered only to certain first-time offenders, including people convicted of sex offenses, the district attorney would screen new cases for possible referral to a diversion program.¹⁵¹

Selected probation officers were trained as diversion counselors.¹⁵² A presentence evaluation was done by probation officers and a treatment professional did a psycho-sexual evaluation, which occurred prior to the filing of charges.¹⁵³ The district attorney then made the following offer to those who met the prerequisites:

[The district attorney’s office] will defer further processing of the legal case if [the offender] sign[s] a confession. A contract was offered: follow the treatment recommendations in the psycho-sexual evaluation and a list of rules related to containing further offending behavior. [If there are] no violations of the contract and, in three years, the charges will be dropped. If [the offender] fail[s] to adhere to [their] contract, [they] will be charged and the confession [they] signed will be used in the prosecution.¹⁵⁴

defendant of three constitutional rights—right to a jury trial, right to cross-examine witnesses, and right to remain silent—and obtain a waiver of each.).

¹⁴⁷ Reimund, *The Law and Restorative Justice*, *supra* note 144, at 686.

¹⁴⁸ Richmond & Richmond, *supra* note 61, at 469.

¹⁴⁹ E-mail from Michael A. O’Connell, Michael A. O’Connell & Assocs., to author (Aug. 11, 2019) (on file with author) [hereinafter O’Connell]. O’Connell was involved as a treatment professional at the time that this Washington system was operating from the 1980s to mid-1990s, when he says it became politically unpopular and was discontinued by the district attorneys’ offices, due in part to loss of funding. *Id.* O’Connell said the program worked very well. *See generally* MICHAEL O’CONNELL, CRAIG R. DONALDSON & ERIC LEBERG, *WORKING WITH SEX OFFENDERS: GUIDELINES FOR THERAPIST SELECTION* (1990).

¹⁵⁰ O’Connell, *supra* note 149.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Some offenders who were offered diversion under the Washington program had committed offenses with minors that involved voluntary conduct, as opposed to forcible acts.¹⁵⁵ Sometimes the offenses were committed with the consent of the parties' families, e.g., in cultures sanctioning underage relationships.¹⁵⁶ In other words, what is labeled statutory rape under a state's law may be activity that is condoned or even encouraged by the offender's culture. The diversion counselors were trained about the dynamics of sexual offending, managed the cases well and collaborated with treatment providers and victim advocates.¹⁵⁷ Family reunification was often part of the process.¹⁵⁸

The Model Penal Code has described such an approach: "This diversionary approach uses actuarial information to identify low-risk, prison-bound defendants and sentence them to community supervision or jail (meaning a sentence less than twelve months) in lieu of prison."¹⁵⁹ The Model Penal Code instructs the sentencing commission to "develop actuarial instruments or processes to identify offenders who . . . are subject to a presumptive or mandatory sentence of imprisonment" but present an "unusually low risk to public safety."¹⁶⁰ It "recommends that the sentencing judge have discretion to sentence such offenders to a 'community sanction rather than a prison term.'"¹⁶¹

Restorative justice approaches have been used successfully in the juvenile justice setting in various jurisdictions, including Australia.¹⁶² Evidence behind restorative justice has been robust when it comes to juveniles: "Research evidence demonstrates that restorative justice, compared to court processes, can better reduce recidivism, reduce victims' post-traumatic stress symptoms, increase all parties' satisfaction with the justice process, and increase offender learning and development."¹⁶³

California has also successfully incorporated restorative justice in its juvenile justice system.¹⁶⁴ The system being used in juvenile cases in California can be traced back to Indigenous peoples: "Rooted in the indigenous Maori justice process in New Zealand and in Native American dispute resolution practices, restorative justice principles have proven useful in California juvenile, civil, and even criminal cases."¹⁶⁵ One form of restorative justice is now used in

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (O'Connell noted that this was not an uncommon arrangement in Hispanic families, where at times the boyfriend of an underage daughter might live with her parents).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 70 (2018).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² KARP ET AL., *supra* note 128, at 11.

¹⁶³ *Id.*

¹⁶⁴ *Restorative Justice: Healing California's Youth*, CAL. CTS. NEWSROOM (Aug. 2, 2018), <https://newsroom.courts.ca.gov/news/restorative-justice-healing-californias-youth> [<https://perma.cc/PRG4-TSGY>] (noting that the restorative approach seeks to address harm to victims while weighing the circumstances and life of the offender).

¹⁶⁵ *Id.*

California's seventy-five peer courts—also called teen or youth courts.¹⁶⁶ Students are sentenced to engage in community service, write letters of apology and take part in programs such as counseling or alcohol treatment.¹⁶⁷

In Alameda County, California, a restorative justice youth program used community conferencing to address both felony and misdemeanor juvenile offenses. Between January 2012 and December 2014, 102 youth completed the Restorative Community Conferencing (“RCC”) program.¹⁶⁸ The recidivism rates for this program proclaimed its success:

[O]f those youth, only 13.7% were subsequently adjudicated delinquent within [six] months of completing the program, 18.4% within [twelve] months, and 19.6% within [eighteen] months. Such low recidivism rates stand in stark contrast with the County's youth subsequent adjudication rate of 20.8% within [six] months, 32.1% within [twelve] months, and 36.7% within [eighteen] months. This difference is statistically significant ($p = 0.05$). In other words, within [twelve] months of completing the RCC program, youth were 44% less likely to get a new sustained charge than youth who were processed through the juvenile legal system.¹⁶⁹

The recidivism rate for the RCC participants remained significantly lower than juveniles who participated in the traditional juvenile justice system.¹⁷⁰

As noted above, a model diversionary program incorporating restorative justice concepts was successfully used for adult sexual assault offenders in Pima County, Arizona.¹⁷¹ Survivors chose the restorative justice approach when a felony was charged against an acquaintance or intimate partner, but when the felony was committed by a stranger the standard criminal justice route was chosen.¹⁷² Survivors chose the restorative justice process for misdemeanors involving perpetrators who were strangers to the survivors.¹⁷³ The two major reasons for choosing the restorative justice process were (1) “making sure the

¹⁶⁶ Merrill Balassone, *In Teen Courts, A Second Chance*, CAL. CTS. NEWSROOM (June 9, 2017), <https://newsroom.courts.ca.gov/news/teen-courts-second-chance> [<https://perma.cc/CSL8-DY9T>].

¹⁶⁷ *Id.*

¹⁶⁸ SUJATHA BALIGA, SIA HENRY & GEORGIA VALENTINE, IMPACT JUST., RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST'S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 1 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf [<https://perma.cc/AG7E-A64R>].

¹⁶⁹ *Id.* at 7.

¹⁷⁰ *Id.*

¹⁷¹ “Prosecutors’ referral criteria excluded repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault.” Koss, *supra* note 26, at 1632. Pima County designed this program for survivors who consented to the restorative justice process and for offenders who admitted guilt. *Id.* at 1634. The program excluded those denying guilt out of concern that they might intimidate, verbally abuse, or retaliate against survivor-victims. *Id.*

¹⁷² *Id.* at 1637.

¹⁷³ *Id.*

responsible person doesn't do what he did to anyone else" and (2) "making sure the responsible person gets help."¹⁷⁴ Facilitators were trained to follow a set agenda, including guiding discussion of reparations.¹⁷⁵ Overall, survivors—or their representatives—and perpetrators were satisfied with the process.¹⁷⁶

Texas and Colorado recently considered legislative efforts in this area which generated bipartisan support. These states addressed "how new practices will be funded, who would be eligible to initiate and participate in restorative practices, and what roles prosecutors and judges would take in overseeing programs and participants."¹⁷⁷ The needs of survivors became part of the solution:

If restorative justice strategies are to be successfully promoted as a policy solution, research indicates that the role of victims in restorative justice must be a point of focus for advocates. Policy development should account for victims' rights concerns by implementing protections for victims and setting training requirements. In addition, policy makers and advocates should work closely with victims' protection organizations and lobbyist groups to develop a shared understanding of the concerns and needs of crime victims as they relate to the use of restorative justice practices as state-sanctioned criminal justice processes.¹⁷⁸

In Colorado, "victims' rights advocates became allies rather than oppositional forces."¹⁷⁹ Other marginalized populations with the potential to benefit from more widespread use of restorative justice practices should be consulted as well during the legislative process.¹⁸⁰

In Canada, the Restorative Opportunities Program is offered post-sentencing and uses various victim-offender mediation models.¹⁸¹ In a similar program in New Zealand, panels formed by restorative justice facilitators, survivor and offender specialists and clinical psychologists facilitated communication.¹⁸² This gives survivors a chance to tell their story and participate in developing options to address the harm caused. Research on the Canadian post-sentencing program showed that when restorative justice meetings were done "in the community post-release, participants were significantly more likely to spend a longer period of time under community

¹⁷⁴ *Id.* at 1642.

¹⁷⁵ *Id.* at 1638.

¹⁷⁶ *Id.*

¹⁷⁷ Sliva, *supra* note 12, at 537.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Analysis of the Impact of the Restorative Opportunities Program on Rates of Revocation*, CORR. SERV. CAN. (Nov. 15, 2016), <https://www.csc-scc.gc.ca/research/r-364-eng.shtml> [<https://perma.cc/D7HA-JCU7>].

¹⁸² Kasparian, *supra* note 134, at 397–98.

supervision and were less likely to be revoked than their matched counterparts.”¹⁸³ Specifically, offenders who did not participate “were six times more likely to be revoked post-release.”¹⁸⁴

B. Sex Offense Courts Using a Modified Therapeutic Justice Model

Using a different approach, several New York counties established sex offense courts by 2006.¹⁸⁵ These operate under a modified therapeutic justice model, relying on risk assessments to allow the court to balance rehabilitation with community and victim protection.¹⁸⁶ As some scholars observe, “The hallmark practices of sex offense courts are early intervention, post-disposition monitoring, consistency, and accountability.”¹⁸⁷ Seven key elements of successful sex offense courts are: “(1) criteria for diversion; (2) risk assessments; (3) monitoring; (4) victim outreach; (5) judicial-offender relationships; (6) community of stakeholders; and (7) specialized training, assistance, and evaluation.”¹⁸⁸ One reason for sex offense courts, like the use of drug and domestic violence courts, is that specialization may result in efficiency and cost savings.¹⁸⁹

Although the New York system uses victim outreach—meaning notifications are given to the victim about the offender’s whereabouts¹⁹⁰—as a component, the focus remains on the offender, rather than giving the survivor a voice in the process. A true therapeutic justice approach would have a formalized way to incorporate the survivor’s related experience in the process, whether or not the process becomes more like restorative justice. A specialty court is more likely to know about available counselors or victim support centers, such as rape crisis centers.¹⁹¹ Such referrals are helpful but referring a survivor to counseling should not be the end of their input in the therapeutic justice process.

C. Jurisdictions Focusing on Treatment and Risk Assessment Outside the Context of Therapeutic or Restorative Justice Systems

Regular meetings of involved stakeholders, i.e., courts, probation officers, treatment providers, risk assessment specialists and Global Positioning System tracking personnel, to monitor an offender’s progress have been said to be

¹⁸³ *Analysis of the Impact of the Restorative Opportunities Program*, *supra* note 181.

¹⁸⁴ *Id.*

¹⁸⁵ *Sex Offense Courts: The Next Step in Community Management?*, CTR. FOR CT. INNOVATION (Jan. 25, 2007), <https://www.courtinnovation.org/articles/sex-offense-courts-next-step-community-management> [<https://perma.cc/2CXS-B9C7>]. Pennsylvania and Ohio have also established a limited version of sex offense courts. Richmond & Richmond, *supra* note 61, at 461.

¹⁸⁶ Richmond & Richmond, *supra* note 61, at 459.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 461.

¹⁸⁹ *Id.* at 459.

¹⁹⁰ *See id.* at 464.

¹⁹¹ *Id.*

critical to the New York sex offense court model.¹⁹² In California, some offenders receive probation without first serving jail time.¹⁹³ These offenders, as well as offenders released after jail or prison, must participate in community-based treatment programs as part of a system known as the “Containment Model.”¹⁹⁴ Sex offender-specific treatment is a mandatory component of this model.¹⁹⁵ The model requires communication, at least monthly, between probation officers and treatment providers.¹⁹⁶ Many jurisdictions require monthly or quarterly in-person meetings as well, and those meetings may include other stakeholders, including victim advocates and polygraph examiners.¹⁹⁷ This regular communication is essential to the success of the model.¹⁹⁸

Virginia and California currently use risk assessment to identify low-risk offenders. Virginia uses the assessment to determine who may then qualify for community supervision in lieu of longer prison or jail sentences.¹⁹⁹ California, on the other hand, excludes most offenders from consideration for release to community supervision in lieu of prison, regardless of risk level.²⁰⁰ This is true even if the current offense is not a sex offense, but the offender has a prior conviction for a sex offense.²⁰¹ Community supervision is an alternative to probation or parole. California does permit early release from prison to community supervision of low-risk offenders.²⁰²

The problem with California’s current system for early release of offenders from prison to community supervision in lieu of requiring them to serve a term of parole is that the statutory scheme allows very little time for sex offender-specific treatment during the community supervision term because that term is limited. Sex offender-specific treatment is mandated to occur for at least a year, and up to the entire probation or parole period.²⁰³ But a term of community

¹⁹² See *id.* at 465.

¹⁹³ CAL. PENAL CODE §§ 1203, 1203.016 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

¹⁹⁴ See *Containment Model*, *supra* note 140.

¹⁹⁵ PENAL §§ 290.09, 1203.067, 3008.

¹⁹⁶ PENAL § 290.09(c).

¹⁹⁷ Observation of the author, who has conducted numerous trainings for probation officers, parole agents, judges, attorneys, and treatment providers in California about the containment model.

¹⁹⁸ *Id.*

¹⁹⁹ Collins, *supra* note 159, at 70–72.

²⁰⁰ See PENAL § 1170(h)(3); J. RICHARDS COUZENS & TRICIA A. BIGELOW, FELONY SENTENCING AFTER REALIGNMENT app. 2, at 173 (2017), https://www.courts.ca.gov/partners/documents/felony_sentencing.pdf [<https://perma.cc/7VBX-TM3N>] (only those offenders who are not required to register—mainly those who have committed statutory rape, or voluntary intercourse with a minor age 14 or older—are eligible, because this group is not required to register unless the offender is court-ordered to register at sentencing).

²⁰¹ *People v. Sheehy*, 169 Cal. Rptr. 3d 899, 900 (App. Ct. 2014).

²⁰² Low-risk offenders who obtain early release from prison may be sentenced to community supervision by the county’s probation department, while high-risk offenders must remain on parole after release. CAL. PENAL CODE § 3000.08(b), (d) (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

²⁰³ PENAL §§ 1203.067(b)(1), 3008(d)(1).

supervision ends at one year after release from prison, regardless of treatment completion or success.²⁰⁴ This means treatment often ends before any possibility of rehabilitation can be realized.

Community supervision following incarceration is not, however, a form of therapeutic justice. Whether resolved by plea or trial, the system still focuses on the offender, not the survivor. Incarceration may do little, if anything, to rehabilitate the offender. While post-incarceration treatment may help, the offender still carries the stigma of being a convicted offender, with concomitant results such as duty to register with police, difficulty obtaining employment and housing and barriers to developing prosocial relationships.²⁰⁵

If a three-year diversion program for low-risk offenders was utilized instead, program completion would mean the person did not spend the first years after offending in the company of other criminals, but in working with a treatment provider and probation officer on the issues that led to the offense in the first place. In such a system, the survivor should have a place to be heard, whether directly in a restorative justice setting, or indirectly, as when represented by a victim advocate who is a formal part of a therapeutic justice system. At the end of the successful completion of the three-year program, the offender would not carry the lifelong burden of a criminal history that includes conviction and registration as a sex offender. And the survivor would have had a chance to be heard either directly, in a facilitated restorative justice setting, or vicariously, by the victim advocate's participation in the therapeutic justice process.

IV. THERAPEUTIC JUSTICE OR RESTORATIVE JUSTICE APPROACHES FOR CAMPUS SEXUAL ASSAULT & HARASSMENT

After issuance of the Dear Colleague Letter²⁰⁶ by the Department of Education in 2011 to IHEs in the United States, calling for action to deal with the troubling and high incidence of sexual assault upon college students, campuses sought to address sexual and gender-based misconduct.²⁰⁷ Various

²⁰⁴ PENAL §§ 3451(a), 3456(a)(3).

²⁰⁵ See KRISTEN M. ZOGBA, MICHAEL MINER, RAYMOND KNIGHT, ELIZABETH LETOURNEAU, JILL LEVENSON & DAVID THORNTON, A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 10 (2012) ("A growing body of research shows such laws interfere with community re-entry and adjustment."). In multiple studies, sexual offenders reported

adverse consequences such as unemployment, relationship loss, denial of housing, threats, harassment, physical assault, or property damage as a result of public disclosure.

... Because public identification can lead to social exclusion and underemployment for sex offenders, many end up living in socially disorganized, economically depressed neighborhoods that have fewer resources for mobilizing community strategies to deter crime and protect residents.

Id. (citations omitted).

²⁰⁶ U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/SJ8X-4HYT>].

²⁰⁷ See Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual*

campuses used varying ways to raise awareness of the issue. The national movement fostered policy and procedural changes, often leading to campus investigations and hearings that today nearly resemble a criminal justice approach than the more informal campus student conduct process of yesterday.²⁰⁸ New policies to address campus sexual assault “may have, unintentionally, reinforced adversarial and retributive responses that may actually lead to prolonged trauma for victims, adverse educational outcomes for both parties, and a contested campus climate that reduces reporting and trust in administrators.”²⁰⁹

Adversarial systems often do not meet the needs or expectations of survivors. In response, some campuses began to consider therapeutic or restorative justice alternatives to traditional student conduct hearings and sanctions.²¹⁰ Restorative justice emphasizes a collaborative rather than adversarial approach to campus misconduct involving the survivor, the responsible party and the campus and larger community. Hopefully, such a system will encourage increased reporting and make campuses safer. Currently, only about thirteen percent of campus sexual assault is ever reported.²¹¹

Some legal scholars believe that restorative justice processes on campus should be made part of the formal system used by the school to address Title IX violations. One scholar argues that efforts to reform the school-to-prison pipeline and reverse the damage done by zero-tolerance school policies with restorative justice practice can only be done by implementing legal rules to govern the process.²¹² In her view, lack of uniformity in understanding what restorative justice should be, how it should be implemented and in training those

Assault, CHRON. OF HIGHER EDUC., (Feb. 8, 2017), <https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/> [https://perma.cc/RS6B-FJ9S]; see also Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR NEWS (Nov. 26, 2016), <https://www.wbur.org/news/2016/11/25/title-ix-obama-trump> [https://perma.cc/LMY7-4LNQ] (“So as the OCR began to announce investigations into the mishandling of reported sexual harassment and violence — 344 since 2011, by the count of the Chronicle of Higher Education — colleges and universities began to change their ways, sometimes dramatically.”). The Trump administration did rescind the 2011 Dear Colleague letter which led to so many changes on college campuses after 2011. U.S. DEP’T OF EDUC., *supra* note 206. The current Biden administration is reviewing the regulations implemented during the Trump administration with intent to amend them. Announcement of Public Hearing: Title IX of the Education Amendments of 1972, 85 Fed. Reg. 27,429 (May 20, 2021).

²⁰⁸ See KARP ET AL., *supra* note 128, at 11.

²⁰⁹ *Id.* at 10.

²¹⁰ Nancy Chi Cantalupo, *Decriminalizing Campus Institutional Responses to Peer Sexual Violence*, 38 J. COLL. & U. L. 481 *passim* (2012); Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147 *passim* (2016); KARP ET AL., *supra* note 128, *passim*.

²¹¹ KARP ET AL., *supra* note 128, at 9 (“[O]nly [thirteen percent] of campus rape victims make any kind of report to police or campus officials, including health services, counseling, and conduct administrators. This low reporting rate inhibits a college’s ability to effectively respond to campus sexual violence.”).

²¹² Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583 *passim* (2018).

who must implement it cry out for legislation to set a framework for the use of restorative justice in schools.²¹³ This is the opposite of the approach argued for by proponents of transformative justice, which shuns any control by the state.²¹⁴

A. Keys to Using Restorative Justice on Campus

There are four keys to restorative justice: inclusive decision-making, active accountability, repairing harm, and rebuilding trust.²¹⁵ In the context of sexual assault, inclusive decision-making means the survivor choosing this option and a perpetrator willing to acknowledge the harm caused would sit in a circle with trained facilitators.²¹⁶ The focus is not on the offender, but on the harm created and what should be done about it.²¹⁷ The survivor is able to articulate the harm they experienced. The offender is not a spectator at their own trial, relying on an attorney to speak, but a participant in determining their own sanction.²¹⁸

For this system to work, such an offender must agree to take active responsibility for their actions. These offenders must be willing to fully engage in this process with the aim of making amends for the harm caused. If sanctions are developed with the voluntary engagement of the offender, it is more likely the offender will follow through with the requirements imposed.²¹⁹ Imposition of sanctions without offender buy-in is likely to be viewed as coercive and elicit a lesser level of participation.²²⁰

David Karp describes the functioning of restorative justice in the example of a drunken student who harassed his ex-girlfriend by climbing into her car and refusing to get out of it.²²¹ When she drove to the police station it took several officers to remove him.²²² The officers were involved in the restorative justice conference on campus as members of the community harmed by the offender's actions.²²³ They were skeptical about letting the offender remain on campus.²²⁴ To meet their concerns, the student agreed to do counseling to address anger, relationship and substance abuse issues.²²⁵ The student "agreed to collaborate with the police officers to present a campus workshop on the legal ramifications of alcohol abuse."²²⁶

In a restorative justice model, an offender either understands that they

²¹³ *Id.*

²¹⁴ See discussion *supra* Section II.B.

²¹⁵ KARP ET AL., *supra* note 128, at 3.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 32.

²¹⁹ *Id.* at 31.

²²⁰ See, e.g., *id.* at 12, 21.

²²¹ KARP, *supra* note 63, at 46.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

committed serious harm and can feel remorse or is rational enough to follow through on a commitment to change because they understand that future misbehavior will negatively impact their life. When it becomes apparent that the perpetrator has neither a moral compass nor the will to change for personal reasons, e.g., attaining one's own goals, restorative justice is not the solution. In that case, as when the perpetrator does not admit fault, a criminal trial or traditional campus hearing with evidence presented by both sides is the only possible route.

The focus of restorative justice is on repairing harm rather than punishment. This is a more victim-centered approach than the traditional one, in which all eyes are focused on the offender. In the restorative justice setting, the offender must actively consider how they can make amends to those they hurt—not only the survivor, but others, including the community or campus, friends or colleagues.²²⁷ Making amends extends beyond an apology to the survivor or even monetary reimbursement. It could include things like specific community service or participation in campus events about alcohol use and abuse. Ideally, it includes mandatory treatment specifically designed for those who commit campus sexual assault, such as that developed in the Science-Based Treatment, Accountability, and Risk Reduction for Sexual Assault (“STARRSA”) Project.²²⁸

The final step, rebuilding trust, may be the hardest. It is easier to incarcerate or expel someone than to allow them to remain in the community where they have harmed others. Even with close monitoring, it is hard to trust them to follow through with agreed-on steps for repairing harm. Dialogue that allows all harmed parties—the survivor, those involved from the campus or community, friends or colleagues—to understand that the offender is a complex individual is key. Such a dialogue allows the offender to comprehend the extent of the injuries inflicted, is more likely to lead to genuine remorse and willingness to change than the imposition of punishment without a chance to be heard in a supportive and trauma-informed environment by either survivor or offender.

Restorative justice allows victims to define the harm done to them. Offenders must acknowledge the harm they have caused. The idea is to bring victims, their supporters, and offenders together to craft a plan that holds these offenders accountable and address the harm done. Survivors may choose in the process to confront their perpetrators about how they have been affected, a much more direct form of accountability than that which is available through the

²²⁷ *Id.* at 38; see Mills et al., *supra* note 31, *passim*.

²²⁸ See Lamade et al., *supra* note 54, at 140; see also ROBERT PRENTKY, MARY KOSS, RAINA LAMADE & ELISE LOPEZ, STARRSA COGNITIVE BEHAVIORAL TREATMENT PROGRAM (CBT) MANUAL *passim* (2018), <https://www.dropbox.com/sh/cm5n7n38qn2ispl/AACIRS8VxaKwQswX6NqWSN2Wa?dl=0&preview=CBT+Manual+FV.pdf> [<https://perma.cc/5EPU-H3YP>]; see generally ROBERT PRENTKY, MARY KOSS, RAINA LAMADE & ELISE LOPEZ, FINAL REPORT CAMPUS SEXUAL MISCONDUCT: USING PERPETRATOR RISK ASSESSMENT AND TAILORED TREATMENT TO INDIVIDUALIZE SANCTIONING (2018) (unpublished manuscript) (on file with author) [hereinafter STARRSA FINAL REPORT].

criminal legal system. As Goodmark observed:

Restorative justice has been widely used in criminal cases, most often with juvenile offenders, with very positive results. Both victims and offenders report high levels of satisfaction with both restorative processes and outcomes. Victims who opt for restorative justice “have more information, are more likely to meet with and confront their perpetrator, are more likely to have some understanding of the reasons behind the offending, are more likely to receive some kind of repair for the harm done[.] . . . are more likely to be satisfied with the agreements reached, are more likely to feel better about their experience and are less likely afterwards to feel angry or fearful than those victims whose perpetrators were dealt with by the courts.” Perpetrators, in turn, are more likely to understand the impact of their actions, be held accountable in meaningful ways, and provide the kinds of redress requested by victims.²²⁹

Using trained facilitators is essential to a restorative justice approach to sexual harm.²³⁰ Facilitators should be trained in an apprenticeship model where practice begins with simpler cases and progresses, with support and supervision, to more complex cases. Facilitators must be skilled in all the key stages of a restorative process: pre-conference preparation and assessment, restorative facilitated dialogue and post-dialogue agreement monitoring and support.²³¹ For sexual misconduct cases, it is necessary to have training in restorative practices, student development in higher education and especially trauma-informed gender-based harassment and violence.²³²

Trained facilitators know what the indications of a true apology look like:

- Genuine remorse[;]
- Body language[;]
- Word choice[;]
- Taking responsibility and not making excuses[;]
- Choosing to act differently (walk the talk/actions speak louder than words)[;]
- Being able to observe behaviors over time and explore whether the change is consistent with the apology[;]
- Willingness to come back to the conversation over and over again if necessary[; and]

²²⁹ Goodmark, *supra* note 30, at 94–95.

²³⁰ KARP, *supra* note 63, at 64–66.

²³¹ *See id.* at 25.

²³² *See Campus PRISM: Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*, UNIV. OF SAN DIEGO, <https://www.sandiego.edu/soles/restorative-justice/campus-prism.php> [<https://perma.cc/72GJ-HHAA>]; *see also* KARP ET AL., *supra* note 128, *passim*.

- Importance of being consistent when discussing the issues.²³³

Clinicians who are facilitators may also bring a clearer understanding of the feelings of others and recognize whether the conversations, the insights and the changes are genuine.²³⁴ If there is an apology, they may be able to discern whether “it is from the heart and authentic, not scripted based upon what is expected” of the perpetrator.²³⁵

Indications that an offender is invested in the restorative justice approach may occur when concrete ideas for repairing harm are offered and embraced. These can include an agreement to participate in counseling, activities that pertain to the harm caused, e.g., alcohol abuse awareness training, Alcoholics Anonymous meetings or community service. Students returning to campus after a suspension for sexual misconduct might agree to participate in some form of Circles of Support and Accountability (“CoSA”), a model created to reduce the risk to the community following the release of high-risk offenders from prison.²³⁶

Baltimore, Maryland pioneered a restorative justice approach to school violence that has proven “an effective alternative to suspension and expulsion.”²³⁷ Trained facilitators use community conferencing as “an inclusive way to address conflict between individuals”²³⁸ Restorative Response Baltimore’s “[c]ommunity conferences . . . include those directly involved and affected by an incident and their family members and/or supporters.”²³⁹ Community conferencing “offers participants the opportunity to discuss 1) what occurred, 2) how they were affected by it, and 3) ways to repair any harm and move forward so that it does not happen again.”²⁴⁰ About “[ninety-five percent] of the community conferences in Baltimore have resulted in a written agreement created by all participants, with over [ninety-five percent] compliance with those agreements.”²⁴¹ As a result, “[o]ver [ninety-seven percent] of the young [sex] offenders diverted from the juvenile justice system have been minorities, thereby

²³³ Joan Tabachnick & Cordelia Anderson, *Accountability and Responsibility in the Era of #MeToo*, 31 F. NEWSL., Spring 2019, <http://newsmanager.commpartners.com/atsa/issues/2019-03-13/2.html> [<https://perma.cc/GP82-HU6X>].

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ See, e.g., Robin J. Wilson, Franca Cortoni & Andrew J. McWhinnie, *Circles of Support & Accountability: A Canadian National Replication of Outcome Findings*, 21 SEXUAL ABUSE 4 *passim* (2009).

²³⁷ See *Restorative Practices*, RESTORATIVE RESPONSE BALT., <https://www.restorativeverponse.org/restorative-practices/> [<https://perma.cc/3T7Z-NTTA>] (describing how Restorative Response Baltimore provides trained facilitators who oversee restorative justice services directly on site at schools in Baltimore).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *The Impact of Community Conferencing*, RESTORATIVE RESPONSE BALT., <https://www.restorativeverponse.org/impact-of-community-conferencing/> [<https://perma.cc/4C8R-QMH2>].

providing youth of color with the same alternatives available to many Caucasian young offenders.”²⁴²

Using the community conference techniques developed for schools, Baltimore Restorative Response offers a similar training program for facilitators who can address workplace conflict.²⁴³ By training people in the workplace or on campuses to conduct regular dialogue sessions with staff or faculty, Baltimore Restorative Response offers training which ensures “ongoing-access to a powerful social technology that helps build team cohesion, and can prevent minor conflicts from escalating into formal grievances or legal battles.”²⁴⁴

Schools in the Oakland Unified School District that used a restorative justice approach reduced suspensions for African-American students by forty percent in the first year.²⁴⁵ The Keeping Kids in School Initiative (“KKIS”) developed for California schools maintains that helping young people understand the role the courts play in their lives is an important step in ensuring they do not end up permanently involved in the justice system.²⁴⁶ Restorative justice is an important tenet of KKIS, as well as California Chief Justice Tani Cantil-Sakauye’s Civic Learning Initiative, which launched in 2011 to recognize state public schools for their efforts to engage students in civic learning.²⁴⁷

B. Treatment Programs for Students Found Responsible of Committing Sexual Harm

The traditional system of sanctioning for campus sexual assault does little to prevent future reoffending. The typical disciplinary response is for schools to either suspend students or assign them to write a so-called reflection paper, depending on the seriousness of the misconduct.²⁴⁸ If counseling is available, it is unlikely to be evidence-based and designed to target the individual risk and needs factors associated with sexual offending behaviors.²⁴⁹ Sex offender-

²⁴² *Id.*

²⁴³ *Workplace Dialogue Training Workshop*, RESTORATIVE RESPONSE BALT., <https://www.restorativeresponse.org/workplace-dialogue-training-workshop/> [<https://perma.cc/W5Q7-HE6R>].

²⁴⁴ *Id.*

²⁴⁵ SONIA JAIN, HENRISSA BASSEY, MARTHA A. BROWN & PREETY KALRA, RESTORATIVE JUSTICE IN OAKLAND SCHOOLS IMPLEMENTATION AND IMPACTS: AN EFFECTIVE STRATEGY TO REDUCE RADICALLY DISPROPORTIONATE DISCIPLINE, SUSPENSIONS AND IMPROVE ACADEMIC OUTCOMES 4 (2014), https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/Exec_Summary_-_RJ_OUSD_Report_2014.pdf [<https://perma.cc/Z985-EPCQ>]; *see also* BALIGA ET AL., *supra* note 168, at 8 (“Recidivism rates of Black and Latinx youth who went through the [Restorative Community Conferencing] program were lower at [six], [twelve], and [eighteen] months from program completion compared to the control group.”).

²⁴⁶ *Keeping Kids in School and Out of Court*, JUD. COUNCIL OF CAL., <https://www.courts.ca.gov/v38380.htm> [<https://perma.cc/Z985-EPCQ>].

²⁴⁷ *Cf. generally Civil Learning Initiative*, JUD. COUNCIL OF CAL., <https://www.courts.ca.gov/20902.htm> [<https://perma.cc/85J9-CRB8>].

²⁴⁸ Lamade et al., *supra* note 54, at 139.

²⁴⁹ *Id.*

specific counseling is rarely subsidized by the school.²⁵⁰ When the sexual misbehavior is serious the student is simply expelled.²⁵¹

While expulsion makes one school safer, the next school will suffer, especially if the problems of the student offender who transfers are never addressed. That student will still have the same risk factors that led to the initial sexual misbehavior, and perhaps anger about the way they were treated by the first school. Schools must ensure that the root causes of such behavior are addressed. Without finding a way to meet the student's needs by ensuring participation in a structured counseling setting that uses an approach proven effective to treat offenders, it is all too probable that similar offending behavior will reoccur.²⁵²

Researchers and treatment providers have long known that generic counseling does not target the risk factors demonstrated by sex offenders.²⁵³ As a result, jurisdictions like California that mandate treatment for people convicted of sex offenses also require that the treatment programs meet evidence-based guidelines to provide specific treatment modalities that have been proven effective.²⁵⁴ In California, treatment providers and programs must be certified to do this kind of treatment and agree to follow curriculum certification guidelines set by the California Sex Offender Management Board.²⁵⁵ In Texas, treatment providers for students who are adjudicated responsible for sexual harm must also be certified.²⁵⁶

Campuses need treatment interventions applicable to a variety of sexual misconduct behaviors that are adapted to all students, regardless of sexual orientation or gender identity. Options for treatment locations could include the campus counseling center or clinic, off-campus treatment through an independent provider or off-campus treatment by a licensed or certified therapist affiliated with the university. Some campuses prefer outside providers due to limited counseling center staff capacity, the requirement that students receive

²⁵⁰ *Id.* Except for STARRSA, only one other institution of higher learning that had developed a treatment program for students found to have sexually offended. *Id.* It follows that students at other campuses may have access to mental health services, but these services are not targeted to address their specific needs.

²⁵¹ See BRETT A. SOKOLOW, W. SCOTT LEWIS, SAUNDRA K. SCHUSTER & DANIEL C. SWINTON, ATIXA SEX/GENDER-BASED HARASSMENT, DISCRIMINATION AND SEXUAL MISCONDUCT MODEL POLICY (2015), https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18122345/ATIXA-Model-Policy_07-02-15_Final.pdf [<https://perma.cc/3CQC-3F7G>] (listing the following as possible sanctions: warning, probation, suspension, expulsion, withholding diploma, revocation of degree, transcript notation, and organizational sanctions).

²⁵² Lamade et al., *supra* note 54, at 137 (citing R. Karl Hanson, Guy Bourgon, Leslie Helmus & Shannon Hodgson, *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 CRIM. JUST. & BEHAV. 865 (2009)).

²⁵³ *Id.* at 139.

²⁵⁴ CAL. PENAL CODE § 290.09 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

²⁵⁵ *Id.*; see *Certification*, CAL. SEX OFFENDER MGMT. BD., <https://casomb.org/index.cfm?pid=1215> [<https://perma.cc/2YTW-FXX3>].

²⁵⁶ 22 TEX. ADMIN. CODE § 810.3 (West, Westlaw through 46 Tex. Reg. No. 6306); Lamade et al., *supra* note 54, at 136.

treatment during a period of suspension when they are no longer near the campus and concerns about survivors and perpetrators receiving treatment at the same location.²⁵⁷

In response to these concerns, Robert Prentky, Mary Koss and colleagues at Fairleigh Dickinson University developed the STARRSA Project.²⁵⁸ This project researched the risk factors and treatment needs of perpetrators of campus sexual assault, with the goal of developing a specific curriculum for offenders who were college students.²⁵⁹

The STARRSA Project's goal was to design a risk and needs assessment protocol and an evidence-based treatment curriculum for college students found responsible for sexual assault, most of whom will be considered low-risk offenders.²⁶⁰ Research showed that prevention and educational programs were helpful to provide general knowledge and facilitate skills but insufficient as intervention strategies with responsible perpetrators.²⁶¹

The intervention developed for this population included two Risk-Needs-Responsivity ("RNR") treatment programs and a cognitive behavioral treatment option.²⁶² One program was for low-risk students with protective factors.²⁶³ The other was for high-risk students with behavioral/emotional dysregulation, anger management/impulsivity problems or personality pathology.²⁶⁴ Treatment was deemed more likely to facilitate lasting behavioral and attitudinal change.²⁶⁵ The project found that treatment provides a way to challenge distorted beliefs in a safe environment, as well as to manage complex feelings, "e.g., depression, anger, shame, and guilt," while maintaining respect and rapport.²⁶⁶

STARRSA found "assessing risk factors and needs related to sexual misconduct and [tailoring] treatment accordingly" is the key to successful treatment.²⁶⁷ One example cited in STARRSA's Final Report related to dealing with alcohol abuse:

²⁵⁷ STARRSA FINAL REPORT, *supra* note 228, at 16.

²⁵⁸ Lamade et al., *supra* note 54, at 140 (describing the STARRSA program).

²⁵⁹ *Id.*

²⁶⁰ STARRSA FINAL REPORT, *supra* note 228, at 16.

²⁶¹ See Lamade et al., *supra* note 54, at 136; see generally STARRSA FINAL REPORT, *supra* note 228; ROBERT PRENTKY, MARY KOSS, RAINA LAMADE & ELISE LOPEZ, STARRSA ACTIVE PSYCHOEDUCATION (AP) MANUAL (2018), <https://www.dropbox.com/sh/cm5n7n38qn2ispl/AACIRS8VxaKwQswX6NqWSN2Wa?dl=0&preview=AP+Manual+FV.pdf> [<https://perma.cc/RA5U-NER3>] [hereinafter STARRSA ACTIVE PSYCHOEDUCATION].

²⁶² Lamade et al., *supra* note 54, at 135.

²⁶³ *Id.* at 140.

²⁶⁴ *Id.*

²⁶⁵ See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCH. ASSESSMENT 1 *passim* (2009); Friedrick Lösel & Martin Schmucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 117, 127 (2005).

²⁶⁶ Lamade et al., *supra* note 54, at 140; see generally STARRSA FINAL REPORT, *supra* note 228; STARRSA ACTIVE PSYCHOEDUCATION, *supra* note 261.

²⁶⁷ Lamade et al., *supra* note 54, at 140.

For example, if the student has a problem with alcohol use and alcohol is related to sexual misconduct, then exploring alcohol use will be a relevant treatment need. Responsivity is built into the program, focusing on optimizing the individual's response to treatment by recognizing ethnic, cultural and sexual identity/orientation needs, as well as targeting specific program resources. For example, some students are more readily engaged and responsive to experiential exercises; others more responsive to multimedia videos or Power[P]oint presentations. Recognizing resistance, motivational enhancement techniques are built in to help facilitate engagement and to explore how treatment might be helpful for the particular individual.²⁶⁸

To address campuses' liability concerns, the STARRSA report recommends that the treatment programs it developed for high-risk students occur during a period of suspension, with a treatment provider near the student's home rather than on the campus.²⁶⁹ The materials for providing cognitive behavioral therapy, as well as a psychoeducation manual, are available to treatment providers online.²⁷⁰

In recent years, courts and administrative bodies have begun importing some of the procedural protections and rights afforded to accused persons in the criminal justice system to campus disciplinary proceedings.²⁷¹ However, the regulations adopted in 2020 for Title IX expressly authorize the use of a restorative justice process in lieu of a formal Title IX hearing, if the parties so choose.²⁷² Similarly, legislation adopted by California in 2020 governing campus sexual misconduct in IHEs does not foreclose the use of restorative justice facilitated processes, although mediation is banned.²⁷³

If the accused perpetrator opts-in to an alternate restorative justice system, however, they should be able to waive any rights accorded by law to obtain a sanction that is more nuanced and better designed to address the behavior that occurred. It is likely that a treatment program for low-risk or first-time offenders that replaces incarceration, expulsion or employment termination will reduce the odds of reoffending and increase public and campus safety.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 140–41.

²⁷⁰ See *supra* note 228 for a Dropbox URL to access these online resources.

²⁷¹ See, e.g., *Doe v. Allee*, 30 Cal. App. 5th 1036, 1066 (Cal. Ct. App. 2019); *Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212, 1233 (Cal. Ct. App. 2018); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 60 (Cal. Ct. App. 2018) (these cases imported due process rights from the criminal justice system into the campus disciplinary system); *but see* CAL. EDUC. CODE § 66281.8 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.) (in an effort to abrogate the effect of these rulings, the California Legislature enacted a new statute intended to reinstate rules more commensurate with informal campus disciplinary proceedings).

²⁷² 34 C.F.R. § 106.45 (West, Westlaw through Oct. 21, 2021).

²⁷³ S.B. 493, 2019-2020 Reg. Sess. (Cal. 2020).

V. RESTORATIVE JUSTICE APPROACHES TO ADDRESS SEXUAL HARASSMENT IN THE WORKPLACE

The underreporting of sexual violence is well-documented: “[E]mpirical research . . . shows rates of sexual harassment and sexual violence that are much higher than the number of [official] reports”²⁷⁴ That “sexual harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established.”²⁷⁵ Yet it is estimated that only “[one percent] of victims participate in litigation” against employers for sexual harassment in the workplace.²⁷⁶ Our legal system is geared toward settlement and fewer than five percent of all cases filed in court reach verdict.²⁷⁷ Thus, “the really egregious sexual harassment cases are rarely, if ever, adjudicated by the courts.”²⁷⁸

There are varying definitions of sexual harassment. One is a “series of behaviors that interfere[s] with the victim’s academic or professional performances, limit[s] the victim’s ability to participate in an academic program, or create[s] an intimidating, hostile, or offensive social, academic, or work environment.”²⁷⁹ This definition was intended to be somewhat congruent “with the ‘hostile environment’ prong of federal Title IX legal guidelines and campus policies.”²⁸⁰

The United States Supreme Court has held that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”²⁸¹ Regardless of its legal definition:

the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality. Harassment provides a way for some men to monopolize prized work roles and to maintain a superior masculine position and sense of self. . . . [W]here unwanted sexual misconduct occurs, it is typically a telltale sign of broader patterns of discrimination and inequality at work such as sex segregation and gender stereotyping.²⁸²

²⁷⁴ Cantalupo & Kidder, *supra* note 20, at 683.

²⁷⁵ *Id.* at 683–84.

²⁷⁶ *Id.*

²⁷⁷ *Id.* The conservative estimate seems to be that over ninety percent of cases in general end in guilty pleas. *Criminal Cases*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> [<https://perma.cc/7FFL-D7EX>]; see also Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> [<https://perma.cc/RUW3-DNYK>] (showing that ninety-seven percent of federal cases and ninety-four percent of state cases end via plea bargain).

²⁷⁸ David Sherwyn & Paul Wagner, *We Can Thank Harvey Weinstein for Doing What Congress and the Supreme Court Failed to Do*, 59 CORNELL HOSP. Q. 174, 182 (2018).

²⁷⁹ Cantalupo & Kidder, *supra* note 20, at 690.

²⁸⁰ *Id.*

²⁸¹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

²⁸² U.S. COMM’N ON HUM. RTS., FEDERAL #MeToo: EXAMINING SEXUAL HARASSMENT IN

Even where there is acceptance of the legitimacy of a restorative justice approach as a potential alternative to incarceration for drug offenses,²⁸³ there may be skepticism about its use when the offense is sexual harassment. There are historical reasons why this may be true. Because sexual harassment has been swept under the rug by many institutions and employers for so long, the backlash of #MeToo often advocates a zero-tolerance approach.²⁸⁴ For example, in the higher education arena, students are demanding “more stringent regulation of bad behavior. They want to broaden the scope of what’s forbidden. They want perpetrators to suffer lasting consequences. And they want accountability not just to the person harmed but to the community.”²⁸⁵

Zero tolerance for sexual harassment is the aim of any system of accountability, especially restorative justice. Talking about ways to hold harassers accountable short of termination may at first seem to perpetuate the old approach of ignoring the harassment or minimizing it by administering the equivalent of a slap on the wrist. However, restorative justice does just the opposite. According to Mary P. Koss, the pioneer behind the Arizonan RESTORE Program: “People think restorative justice is ‘soft’”²⁸⁶ Koss adds, “But the reality is, it’s hard. It’s hard accountability.”²⁸⁷

The other objection to offering restorative justice as an alternative to termination in the workplace is liability. Employers are understandably concerned that civil liability for monetary damages will result if they do not respond by terminating the person responsible for the harassment.²⁸⁸ At the same time, government entities and IHEs may have tenure systems that make

GOVERNMENT WORKPLACES (2020), <https://www.usccr.gov/pubs/2020/04-01-Federal-Me-Too.pdf> [<https://perma.cc/W66S-PGME>] (quoting Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 (2018)).

²⁸³ See Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 206–08 (2013).

²⁸⁴ See, e.g., CASE, ZERO TOLERANCE PLEDGE (2018), https://www.case.org/system/files/media/inline/ZeroTolerancePledge_2018%20CASE_DV_0.pdf [<https://perma.cc/34Z2-UUCQ>] (detailing the Council for Advancement and Support of Education’s (CASE) adoption of a zero-tolerance pledge in the wake of #MeToo); Cynthia L. Cooper, *#MeToo Shakes the Legal Landscape on Sexual Harassment*, AM. BAR ASS’N (Aug. 31, 2018), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/summer/metoo-shakes-legal-landscape-sexual-harassment/> [<https://perma.cc/8MGW-8UKL>] (describing how the ABA Commission on Women in the Profession released a manual of resources on sexual harassment policies and procedures).

²⁸⁵ Emma Pettit, *Next Wave of #MeToo*, CHRON. OF HIGHER EDUC. (Feb. 16, 2020), <https://www.chronicle.com/article/the-next-wave-of-metoo/> [<https://perma.cc/52KV-7CCE>].

²⁸⁶ *Id.*

²⁸⁷ *Id.* (quoting Mary P. Koss).

²⁸⁸ See Charles H. Fleischer, *Employment Law 101: Employer Liability for Sexual Harassment, Part 2*, SHRM (Aug. 22, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/business-acumen/pages/employer-liability-for-sexual-harassment.aspx> [<https://perma.cc/2W7F-ANSW>]; see, e.g., THE COST OF SEX-BASED HARASSMENT TO BUSINESSES: AN IN-DEPTH LOOK AT THE WORKPLACE, INT’L CTR. FOR RSCH. ON WOMEN 7 (2018), https://www.icrw.org/wp-content/uploads/2018/08/ICRW_SBHDonorBrief_v4_W ebReady.pdf [<https://perma.cc/SU54-R24M>].

termination a lengthy and difficult pursuit.²⁸⁹ These entities often have mandatory trainings for employees about sexual harassment.²⁹⁰ But as one administrator at Colorado State University observed, “I just don’t think there is an educational workshop or other sanction that can duplicate sitting in front of the person you harmed and hearing how it affected them. I believe it is actually much more difficult to do this than simply showing up to a workshop.”²⁹¹

Today, employers’ fears of allegations of sexual harassment in their organizations extend beyond civil liability, to reputational harm and harm to business interests. As one business reporter observed, “Executives and boards are beginning to look at harassment ‘the same way you think about other risks to your organization’ like security or hacking.”²⁹²

Employees or students who are not satisfied with the outcome when they speak out about sexual harassment are also the people most likely to sue the employer or college. The advantage of a restorative justice approach is that it operates only when chosen by the survivor. Research suggests that harmed

²⁸⁹ See Aisha S. Ahmad, *Why is It So Hard to Fire a Tenured Sexual Predator?*, CHRON. OF HIGHER EDUC. (Oct. 14, 2020), <https://www.chronicle.com/article/why-is-it-so-hard-to-fire-a-tenured-sexual-predator?> [https://perma.cc/7UZ3-E9PW]; see also Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J. COLL. & U. L. 419, 419 (1984) (“One of the most difficult personnel actions that a college or university can take is to terminate the employment of a tenured faculty member for cause.”). Even a non-tenured faculty member with longstanding service or an understanding with the college may have a due process interest in his employment. See *Perry v. Sinderman*, 408 U.S. 593, 603 (1972) (holding that a non-tenured employee had right to employment subject to termination only for cause).

²⁹⁰ Sexual harassment prevention training:

along with other reasonable internal policies geared at preventing and quickly responding to sexual harassment complaints, provides a company with a defense to claim for sexual harassment under Title VII and a way to ensure that no punitive damages will be found. Thus, whether or not training actually works to prevent sexual harassment, it generates a legal benefit that is otherwise unavailable.

Carolina Avellaneda, *Should Your Company Offer Sexual Harassment Prevention Training*, AM. MGMT. ASS’N (Jan. 24, 2019), <https://www.amanet.org/articles/should-your-company-offer-sexual-harassment-prevention-training/> [https://perma.cc/S6VF-ZV5S]. Many states mandate sexual harassment prevention training. See *2021 Sexual Harassment Training Requirements by State*, ONPAY, <https://onpay.com/hr/basics/sexual-harassment-training-requirements> [https://perma.cc/7BTV-7Y6A]; see also *Sexual Harassment Training Requirements by State*, INSPIRED EARNING (Apr. 26, 2021), <https://inspiredelearning.com/hr-compliance/state-specific-compliance-training/sexual-harassment-training-requirements-by-state/> [https://perma.cc/9HHX-4ZED]. Employers are sometimes urged to voluntarily provide such training even in states that do not require it. See EMP. GRP., *Sexual Harassment—Draw the Line*, EMP. GRP.: KNOWLEDGE CTR. (Aug. 9, 2021), <https://theemployergroup.com/blog/sexual-harassment-draw-the-line/> [https://perma.cc/P69R-6HEA]. Advocacy organizations may offer free training to employers about sexual violence in the workplace. See, e.g., *Sexual Violence and the Workplace: Making the Connections*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://campus.nsvrc.org/course/index.php?categoryid=13> [https://perma.cc/TGZ9-ED66].

²⁹¹ KARP, *supra* note 63, at 53 (quoting Paul Osincup, Associate Director of Conflict Resolution and Services at Colorado State University).

²⁹² Jodi Kantor, *#MeToo Called for an Overhaul: Are Businesses Really Changing?*, N.Y. TIMES (Mar. 23, 2018) (quoting Kaye Foster-Cheek), <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html> [https://perma.cc/UW95-83V3].

parties “consistently and strongly” appreciated the opportunity to participate in a well-structured restorative justice process.²⁹³

When participants believed they had a voice, offenders took responsibility, parties were able to talk out what happened and the outcome and process was fair, findings suggest that the survivor was ready afterward to move on with their life.²⁹⁴ This outcome means a win-win for all parties, not just the survivor. The employer is less likely to be sued, the perpetrator has agreed to a process that will ultimately make amends to all persons harmed and society benefits because the chance of a pass-the-harasser scenario is reduced.

When survivors and responsible parties are satisfied with the restorative justice process, employers are less likely to face a lawsuit over their handling of the harassment. Most people resort to civil lawsuits when they are dissatisfied with the way their situation has been handled initially, whether in the criminal justice system or the student conduct disciplinary process. This applies to both the person harassed and the harasser.

An example of how this can work is the Dalhousie dental school case. A group of women dental students discovered that thirteen of their fellow male classmates had created a private Facebook page that contained “misogynistic, sexist and homophobic” material about them.²⁹⁵ They opted to pursue a restorative justice process available at the school.²⁹⁶ They explained:

We were clear from the beginning, to the people who most needed to hear it, that we were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget. Rather, we were looking for a resolution that would allow us to graduate alongside men who understood the harms they caused, owned these harms, and would carry with them a responsibility and obligation to do better.²⁹⁷

The restorative justice process involved a thorough investigation of the claims, regular meetings between facilitators and participants, restorative circles with various groups of participants and a day at the end of the five-month process during which the male students presented what they had learned as a result of the process.²⁹⁸ At the outset, the male students noted, “when we realized the hurt and harm our comments caused for our classmates, faculty and staff we wanted to convey our overwhelming regret.”²⁹⁹ During the restorative process, however:

²⁹³ KARP, *supra* note 63, at 49.

²⁹⁴ *Id.* at 51.

²⁹⁵ JENNIFER J. LLEWELLYN, JACOB MACISAAC & MELISSA MACKAY, REPORT FROM THE RESTORATIVE JUSTICE PROCESS 2 (2015), <https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf> [<https://perma.cc/GM7L-XP5F>].

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 9.

²⁹⁸ *Id.* at 8.

²⁹⁹ *Id.* at 10.

we learned that saying sorry is too easy. Being sorry, we have come to see, is much harder. It takes a commitment to hear and learn about the effects of your actions and an ongoing and lasting commitment to act differently in the future. We have hurt many of those closest to us. We do not ask for our actions to be excused. They are not excusable.³⁰⁰

One commentator observed of the Dalhousie case:

[b]y the end of the process, the men involved took responsibility for their actions, understood how their actions created and reinforced gender-based harms and stereotypes, and committed to addressing those issues. The students have gone on to present their experiences in a number of forums. The learning and change that occurred in this case would most likely not have happened in a punitive process. The justice goals of the female students who had been harmed were met because the process was deliberately designed to help the male students understand the harm caused, rather than simply punishing the behavior.³⁰¹

The restorative justice response to sexual harassment may be the only viable weapon to effect behavioral change in those who sexually harass others. Termination may simply lead to the pass-the-harasser scenario previously discussed in this Article.³⁰² Prevention education, at least as it has traditionally been used, has not been shown effective to end future harassment either.³⁰³ While harassment is hard to measure, and thus program effects are hard to gauge, some studies suggest that grievance procedures and training may not reduce harassment.³⁰⁴

Prevention education of the federal work force provides one clue. By 1987, three-quarters of federal workers had completed training, and, by 1994, four-fifths knew how to file a grievance.³⁰⁵ Yet forty-two percent of women reported in both 1980 and 1987 that they had been harassed in the preceding two years.³⁰⁶ In 1994, forty-four percent reported the same.³⁰⁷ These federal statistics are indicative: "Much of the subsequent research also suggests that sexual harassment grievance procedures and training may be managerial snake oil."³⁰⁸

Typical prevention training reviews the law of sexual harassment, identifies illegal behavior and describes complaint processes and punishments.³⁰⁹ The

³⁰⁰ Goodmark, *supra* note 30, at 96.

³⁰¹ *Id.* at 96–97.

³⁰² See discussion *supra* Section I.C.

³⁰³ Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PROC. NAT'L ACAD. SCI. 12255, 12255 (2019).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 12256.

focus is on how “employees are potential perpetrators, not victims’ allies.”³¹⁰ While this type of training can improve recognition of harassment and knowledge about employer policy and complaint processes, “men who score high on ‘likely harasser’ and ‘gender role conflict’ scales—the men trainers hope to reform—frequently have adverse reactions to this sort of ‘forbidden behavior’ training”³¹¹ The research shows this type of employee training “can exacerbate gender role hostility and propensity to harass among men.”³¹² In fact, they were found to score higher afterward.³¹³ Thus, any positive training effects may be reversed. The takeaway from this study on sexual harassment programs is that manager training, not employee training, may be key.

The type of training that best approximates manager training—bystander intervention training—suggests that it increases the intention to intervene, confidence about intervening and actual intervention.³¹⁴ Research shows that new manager training programs are followed by increases in white, Black, Hispanic, and Asian-American women in management—which ultimately leads to a work environment that takes complaints of harassment seriously.³¹⁵ Women are more likely to believe harassment complaints and less likely to react negatively to training.³¹⁶ The downside is that placing too many women in management, especially white women, is likely to trigger a backlash in and of itself.³¹⁷ At some point, the positive effects of manager training disappear, and negative effects of grievance procedures and employee training appear, in workplaces with the most women managers—especially when those managers are white women.³¹⁸

The April 2020 study on sexual harassment in the federal workplace by the United States Commission on Civil Rights had four takeaways:

1. Implementing department-wide, uniform penalties to be used in disciplinary actions[;]
2. Banning serious perpetrators from receiving promotions and performance awards[;]
3. Ending the practice of reassigning perpetrators to other divisions[;]

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 12258.

³¹³ *Id.* at 12556.

³¹⁴ See Dominic J. Parrott, Kevin M. Swartout, Andra Teten Tharp, Danielle M. Purvis & Volkan Topalli, *Speak Up! Prosocial Intervention Verbalizations Predict Successful Bystander Intervention for a Laboratory Analogue of Sexual Aggression*, 32 *SEXUAL ABUSE* 220, 220–43 (2019); Sidney Bennett, Victoria L. Banyard & Katie M. Edwards, *The Impact of the Bystander’s Relationship with the Victim and the Perpetrator on Intent to Help in Situations Involving Sexual Violence*, 32 *J. INTERPERSONAL VIOLENCE* 682, 682–702 (2017).

³¹⁵ Dobbin & Kalev, *supra* note 303, at 12258.

³¹⁶ *Id.* at 12259.

³¹⁷ *Id.*

³¹⁸ The tipping point seems to be about twelve percent for white women in managerial positions. *Id.*

and]

4. Embracing and training employees regarding bystander intervention.³¹⁹

The study went on to recommend that Congress “should establish a federal ombudsperson, empowered to investigate alleged sexual harassment claims of complainants who may not have adequate recourse through available channels where existing agency structures may be compromised by conflicts.”³²⁰ Private employers could embrace a similar structure by appointing an ombudsperson either outside the organization, or one within the organization without ties that might compromise neutrality, to handle sexual harassment complaints when it appears the existing complaint structure is not working. Such an ombudsperson should have the facilitator training required for one doing restorative justice work because this is ultimately the process that will need to be used, in addition to any penalties assigned following disciplinary findings.

Research involving surveys of survivors show “that grievance procedures incite retaliation and rarely satisfy victims. Even in workplaces with manager training, which is generally effective, grievance procedures do no good.”³²¹ In addition, “the [United States Equal Employment and Opportunity Commission]’s Select Taskforce on the Study of Harassment in the Workplace recommended that employers offer alternative complaint systems” which share some features with restorative justice processes.³²²

Companies may be afraid to make their efforts public, fearing that new initiatives to address harassment will be used against them as an admission of past indifference. But some have announced new measures. Microsoft eliminated forced arbitration for employees making sexual harassment claims and offered other choices because it did not want to pressure women to stay silent.³²³ The Screen Actors Guild introduced a clear code of conduct on harassment, detailing prohibited behavior.³²⁴ Facebook publicized its sexual harassment policy.³²⁵ New York University banned romantic relationships between faculty members and undergraduates or anyone over whom they exercise supervisory authority.³²⁶ Even cities have joined this trend: “. . . Seattle

³¹⁹ U.S. COMM’N ON HUM. RTS., *supra* note 282, at 6.

³²⁰ *Id.*

³²¹ Dobbin & Kalev, *supra* note 303, at 12259.

³²² *Id.*

³²³ See Samantha Cooney, *Microsoft Can’t Make Women Settle Sexual Harassment Cases Privately Anymore. Here’s Why That Matters*, TIME (Dec. 19, 2017, 5:19 PM), <https://time.com/5071726/microsoft-sexual-harassment-forced-arbitration/> [<https://perma.cc/HM74-XHQY>].

³²⁴ See generally SAG-AFTRA, CODE OF CONDUCT ON SEXUAL HARASSMENT (2018), https://www.sagaftra.org/files/sag-aftra_code_of_conduct_f2_2.pdf [<https://perma.cc/A857-YVAE>].

³²⁵ See generally Sheryl Sandberg & Lori Goler, *Sharing Facebook’s Policy on Sexual Harassment*, FACEBOOK, (Dec. 8, 2017), <https://about.fb.com/news/2017/12/sharing-facebooks-policy-on-sexual-harassment/> [<https://perma.cc/TY7T-Q6VD>].

³²⁶ See generally *Policy on Consensual Intimate Relationships*, N.Y. UNIV. (Jan. 21, 2018),

enacted new city rules and procedures to ensure respectful behavior on construction sites.”³²⁷

In 2018 it was reported that entrepreneurs were developing new systems for women to report their experiences and for businesses to understand what is transpiring.³²⁸ TEQuitable is a platform that “connects workers with real-world support and can send companies anonymized alerts about complaints.”³²⁹ Other platforms also allow survivors to share their stories: “Callisto, which is used on campuses to report sexual assaults, is being adapted for workplace use.”³³⁰ Similarly, “Vault . . . helps women save evidence and, like Callisto, shows users if others have named the same offender.”³³¹

Dealing with harassment of women in white-collar businesses may look different than women who work in industries like food service and cleaning.³³² These blue-collar industries have typically offered workers fewer protections.³³³ Union organizers recognize the challenge: “Organizers who work with female janitors, fast food workers, hotel housekeepers, nannies and eldercare providers say that women in those fields have become more willing to speak up. But it’s not clear whom they should tell.”³³⁴

One alternative is using an independent ombudsperson who can hear complaints confidentially and talk through victims’ options.³³⁵ Tech start-ups have led the way:

Tech start-ups have devised their own alternatives, including virtual ombudspersons and reporting systems. Online reporting may address a common #MeToo and #WhyIDidn’tReport criticism—employer confidentiality clauses prevent victims from learning that their harasser has done it before. Online, victims can report harassment when they choose to but embargo reports until others complain about the same harasser.³³⁶

It is not clear whether the ombudspersons being used in these newer

<https://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/policy-on-consensual-intimate-relationships.html> [<https://perma.cc/3UHC-NZPZ>].

³²⁷ Kantor, *supra* note 292.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² See Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html> [<https://perma.cc/62F4-HXZH>].

³³³ See generally Krista Lynn Minnotte & Elizabeth M. Legerski, *Sexual Harassment in Contemporary Workplaces: Contextualizing Structural Vulnerabilities*, 13 SOCIO. COMPASS 1 (2019); Marita P. McCabe & Lisa Hardman, *Attitudes and Perceptions of Workers to Sexual Harassment*, 145 J. SOC. PSYCH. 719 (2010).

³³⁴ Kantor, *supra* note 292.

³³⁵ See Dobbin & Kalev, *supra* note 303, at 12259.

³³⁶ *Id.*

systems have the extensive training required for facilitators doing restorative justice work. To the extent that their training is rigorous, and the process viewed as fair by all parties, there is some hope for reduction in workplace harassment. If this can be accomplished by changing behavior and even attitudes rather than by terminating the employee who has committed sexual harassment, so much the better for society.

VI. CHALLENGES TO ADOPTION OF RESTORATIVE JUSTICE OPTIONS FOR SEXUAL HARASSMENT AND ASSAULT

The use of restorative justice options depends in part on the choices of the parties involved. Viewed in a larger context, campus communities must be ready to acknowledge that alternatives to expulsion or employment termination can be acceptable. There are challenges to adoption of options that permit responsible parties to remain on campus, either as students or academics. Even if there is no verified incident of past harassment, the current political climate on campus may be in no mood to tolerate retention of educators found responsible for sexual harassment.³³⁷ Public education about restorative justice options may be necessary before students and others are ready to accept remedies for sexual harassment short of employment termination.

One survivor, who ultimately found that forgiveness of her rapist was the one thing that set her free, experienced a wave of community anger and disapproval over her choice.³³⁸ What happened in her case illustrates that society at-large may still have a hard time with the concept of restorative justice, at least in the context of sexual assault.

As the international #MeToo movement against sexual predators and sexual harassment exposes the misconduct of men in positions of authority, a new theme is resisting the tendency of survivors to want to forgive. In one case, the survivor contacted her rapist and after eight years of communicating by e-mail they met to explore reconciliation and forgiveness.³³⁹ Their book prompted protests that it glamorized a rapist;³⁴⁰ their TED talk garnered over four million views.³⁴¹ One reporter noted:

[Society] can't require every rape survivor to not just talk with but collaborate with her rapist. Yet the interest in their story is a testament to people's hunger for a new approach[: restorative justice]. . . .

³³⁷ See Pettit, *supra* note 285.

³³⁸ Thordis Elva & Tom Stranger, *Can I Forgive the Man Who Raped Me?*, GUARDIAN (Mar. 5, 2017, 4:30 PM), <https://www.theguardian.com/books/2017/mar/05/can-i-forgive-man-who-raped-me-thordis-trust-elva-thomas-stranger-south-of-forgiveness-extract> [<https://perma.cc/7ASY-5T3K>].

³³⁹ Katie J. M. Baker, Opinion, *What Do We Do with These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> [<https://perma.cc/9FS5-JKQG>].

³⁴⁰ *Id.*

³⁴¹ *Id.*

Restorative justice is complex and imperfect. It relies on perpetrators to first admit wrongdoing—facilitators aren't always neutral parties—and it often requires victims to communicate with their assailants. But its emphasis is on repairing and preventing harm, not on indefinite, often ineffective punishment.³⁴²

The rape described above occurred when the survivor was a sixteen-year-old high school student.³⁴³ Thordis Elva tells how her decision to confront and forgive her rapist engendered societal backlash:

Victim-blaming deepens the shame that many survivors feel and lessens the likelihood that they speak up about their experiences. The reality is that there is no 'right' reaction to having your life ripped apart by violence. I knew that my collaboration with Tom [(the rapist)] would be controversial, and the reactions of internet trolls didn't surprise me. But I am concerned with how quick some people were to judge the 'wrong' way in which I worked through my experience. I wasn't 'angry enough', I should've pressed charges, I was setting a 'dangerous precedent', I should be 'ashamed'. Although I made it clear that my forgiveness wasn't for my perpetrator but for myself and that without it, I wouldn't be alive, I was still told that I should not have forgiven.³⁴⁴

Forgiveness is not the object of restorative justice. Sometimes it occurs but it is not the goal:

Forgiving under government pressure is not really forgiveness, and it places further burdens on people already victimized. Legal procedures that require apologies also undermine genuine expression of remorse. . . . Making legal room for individuals to forgive those who have harmed them should not mean pressuring them to forgive. . . . Accountability for others is a crucial step before forgiveness can be possible.³⁴⁵

As one commentator said, "We should guard against turning to forgiveness solely because more robust justice is unavailable."³⁴⁶

Restorative justice options must go hand in hand with systems that hold offenders accountable in other ways, e.g., the criminal justice system and the campus disciplinary system, and systems, like mediation, put in place to deal with sexual harassment in the workplace or academia. Survivors must be free to choose to stay outside formal justice processes and opt for community accountability if that is a viable option.

³⁴² *Id.*

³⁴³ Elva & Stranger, *supra* note 338.

³⁴⁴ *Id.*

³⁴⁵ See MINOW, *supra* note 4, at 161–62.

³⁴⁶ *Id.* at 162.

Another challenge to adoption of new workplace policies and processes related to sexual harassment in the workplace is backlash. In a study aimed at determining whether the #MeToo movement had made a difference in reports of sexual harassment in the workplace, researchers found that fewer women reported sexual coercion and unwanted sexual attention following the #MeToo movement.³⁴⁷ The statistics are compelling: “In 2016, [twenty-five percent] of women in their survey had reported being sexually coerced, and in 2018 that number had declined to [sixteen percent.]”³⁴⁸ Likewise, reports of “unwanted sexual attention declined from [sixty-six percent] of women to [twenty-five percent.]”³⁴⁹ Nonetheless, despite this gradual decline, researchers observed “an increase in reports of gender harassment, from [seventy-six percent] of women in 2016 to [ninety-two percent] in 2018.”³⁵⁰ According to a recent review of the statistics, “data suggests that while blatant sexual harassment — experiences that drive many women out of their careers — might be declining, workplaces may be seeing a ‘backlash effect,’ or an increase in hostility toward women.”³⁵¹

Dealing with this type of backlash requires businesses to prioritize eliminating gender bias. They can offer bystander intervention training, adopt zero-tolerance policies on sexual harassment and respond promptly to complaints.³⁵² Again, this may come down to making sure that managers or ombudspersons have the disposition and proper training to handle complaints of sexual harassment. Companies can use training that focuses on identifying microaggressions and unconscious bias.³⁵³ Such an approach might not only encourage respectful behavior but also empower peers and managers to step in when they see bullying or harassing behavior.³⁵⁴

Community education about restorative justice options related to sexual assault and harassment will be necessary to shift thinking about punishment and its alternatives. The current national climate is looking for ways to deal with wrongdoing short of broad mass incarceration.³⁵⁵ But extending current thinking about restorative justice options to sexual abuse and harassment will be more

³⁴⁷ Stefanie K. Johnson, Ksenia Keplinger, Jessica F. Kirk & Liza Barnes, *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo> [https://perma.cc/RAH2-KMPX].

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ See generally Joelle Emerson, *Don't Give up on Unconscious Bias Training—Make It Better*, HARV. BUS. REV. (Apr. 28, 2017), <https://hbr.org/2017/04/dont-give-up-on-unconscious-bias-training-make-it-better> [https://perma.cc/26FV-ZT6L].

³⁵⁴ *Id.*

³⁵⁵ Michael Waldman, Adureh Onyekwere, Inimai M. Chettiar & Priya Raghavan, *Ending Mass Incarceration: Ideas from Today's Leaders*, BRENNAN CTR. FOR JUST. (May 16, 2019), <https://www.brennancenter.org/our-work/policy-solutions/ending-mass-incarceration-ideas-todays-leaders> [https://perma.cc/ZM3N-MCQB]; *Ending Mass Incarceration*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration> [https://perma.cc/SCT3-ZGMB]; see generally Eaglin, *supra* note 283; McLeod, *supra* note 21.

challenging due to outrage over the way past allegations of sexual assault and harassment were swept under the rug. It will take dialogue for communities to understand that restorative justice is not another way of pretending that sexual assault or harassment did not happen. Instead, it is one viable and effective way of dealing with the behavior and preventing recurrence when the survivor chooses that option, and the perpetrator is willing to admit fault.

VII. SECOND CHANCES: WHO SHOULD BE OFFERED ALTERNATIVE SANCTIONS?

A. Sanctions for Low-Risk Offenders Who Have Committed Sexual Harm

The use of alternatives to the ultimate sanctions of incarceration, expulsion or employment termination should be limited to situations in which the perpetrator has not previously been sanctioned for sexual misconduct or reliably identified as a serial offender, e.g., by testimony of a witness under oath in a criminal case. In other words, the perpetrator is at this point presumably still at lower risk for reoffending.³⁵⁶ The hope is that offering meaningful alternatives for rehabilitation that allow someone to avoid prison, stay in college or keep their job will motivate such offenders to participate in a meaningful way in cognitive based therapy or educational curriculums designed to address the individual's particular issues.

Some argue that rehabilitation of low-risk offenders is neorehabilitation, meaning that these offenders might have done better without intervention, while those most in need of rehabilitating, high-risk offenders, are not offered the same chance.³⁵⁷ In this view, rehabilitative criminal justice efforts should focus on high-risk offenders. In the context of sexual offending, however, the repercussions of even minor sexual assault is so profound for many survivors that communities are not prepared to take a chance on releasing high-risk offenders to community-based rehabilitative programs. Even though harsher sanctions may not be the most effective way to prevent recidivism, punishment may be viewed as more appropriate due to the psychological damage often caused by sexual assault.³⁵⁸

³⁵⁶ See generally AMY PHENIX, YOLANDA FERNANDEZ, ANDREW J. R. HARRIS, MAAIKE HELMUS, R. KARL HANSON & DAVID THORNTON, *STATIC-99R CODING RULES REVISED – 2016* (2016). When scoring for risk on a widely used risk assessment instrument, the Static-99R, one ignores offenses which were committed prior to the most recent offense if the offender was not caught and sanctioned for the earlier offenses. See *id.* at 38. The reason is that the person's risk does not increase until they are caught and sanctioned for the sexual offense(s), and then they repeat that behavior. *Id.* at 39.

³⁵⁷ Eaglin, *supra* note 283, at 211–12.

³⁵⁸ See Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney & Juanita Baker, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 *ANALYSES SOC. ISSUES & PUB. POL'Y* 137, 154–55; Hanson et al., *supra* note 80, at 48–63; CAL. SEX OFFENDER MGMT. BD., *RECOMMENDATIONS REPORT* (2010) (finding that serious traumatization of survivors impacts public policies on those who have sexually offended but urging evidence-based public policies be considered, noting even high-risk offenders who do not reoffend become low-risk over time).

Research focusing on people convicted of sexual offenses reveals that the number of offenses committed is not important in classifying those likely to reoffend.³⁵⁹ Rather, research shows that offenders who are sanctioned for sexual offenses yet go on to commit another sexual offense, despite being previously sanctioned, are the ones at higher risk for reoffending.³⁶⁰ Those who commit more than one, or even a cluster of sexual offenses, before they are caught and sanctioned are at no higher risk to commit another offense than those who are caught and sanctioned after the first offense.³⁶¹

In other words, being high risk is related to having been sanctioned and then committing another sexual offense.³⁶² Thus, in considering who should qualify for alternative treatment as a low-risk offender, the standard should not be whether this is the person's first such offense, but whether it is the first offense for which the person will have received a meaningful sanction.

That said, sometimes a first offense is so egregious that society is not willing to tolerate offering a second chance. In other words, the harm rendered was so violent or extreme that even if the offender's empirically determined risk of reoffending is not demonstrably high, society is unwilling to offer that person any alternative to incarceration, expulsion or termination from employment. According to one scholar, "One may earn the label of a 'high-risk' offender simply because they (or more accurately, people who share their characteristics) are statistically more likely to commit or be arrested for a low-level offense in the subsequent years."³⁶³

The decision about whether a particular offender merits placement in an alternative therapeutic justice model must be left to the decider of fact. It must be informed by risk assessment as well as factors about the nature of the offense itself. In the higher education or employment setting, the survivor should also have a voice. In the criminal justice system, allowing survivors' wishes to influence punishment is more problematic.

Studies have verified the utility of treatment in rehabilitating persons who have sexually offended, thus reducing the incidence of reoffending: "Hanson and his colleagues conducted a meta-analysis on treatment and found that [seventeen] percent of untreated subjects reoffended, whereas [ten] percent of treated subjects did so. When recidivism rates for sex and nonsexual violent crimes were combined, [fifty-one] percent of untreated and [thirty-two] percent of treated subjects reoffended."³⁶⁴

However, most such studies have looked at samples of high-risk

³⁵⁹ See PHENIX ET AL., *supra* note 356, at 12.

³⁶⁰ This concept, known as pseudo-recidivism, is explained in the Coding Rules for the Static-99R, an assessment instrument used by trained professionals to assess risk of future sexual offending. *Id.*

³⁶¹ *Id.* at 38–40.

³⁶² See *id.*

³⁶³ Collins, *supra* note 159, at 95.

³⁶⁴ Hal Arkowitz & Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not.*, SCI. AM. (Apr. 1, 2008), <https://www.scientificamerican.com/article/misunderstood-crimes/> [<https://perma.cc/BZ5A-XRKS>].

offenders.³⁶⁵ Because “[l]ow-risk offenders have such a low base rate of reoffending, it is difficult to use recidivism as a marker of change for this population.”³⁶⁶ Thus, if a new model of treatment is to be used with low-risk offenders in lieu of incarceration, expulsion or termination from employment, other measures of treatment success may need to be developed. A new treatment modality may be evaluated by focusing on whether a person has met the goals of treatment. Examples of treatment goals include development of empathy, increased awareness of personal boundaries or offensive behavior, decreased use of inappropriate sexually related speech or increased awareness of bases of power and power differentials, e.g., between employer and employee or clergy and parishioner.³⁶⁷

Research about those convicted of sexual offenses has shown that high-risk offenders benefit most from treatment.³⁶⁸ Simply put, this means that high-risk offenders had further to go and therefore made more dramatic, and demonstrable, changes. It does not mean that low-risk offenders cannot benefit from treatment—when treatment follows evidence-based guidelines and the dosage, i.e., length of treatment, is calibrated to each offender’s risk. As an example of how treatment that does not follow research-based guidance can backfire, one study found recidivism rates of low-risk offenders who participated in intensive treatment in a halfway house setting with high-risk offenders actually increased.³⁶⁹

A program designed to prevent recidivism by imposing a sanction short of incarceration, expulsion or employment termination must focus on the low-risk individual’s needs and risk potential. Such programs must not mix high-risk offenders with low-risk offenders. The rate of change for low-risk offenders may be more subtle since their offending patterns have not been as egregiously obvious.³⁷⁰ Nevertheless, rehabilitation for low-risk offenders is clearly necessary. Change in ways of thinking about the world and how we relate to others is hard and takes time for anyone.

³⁶⁵ E-mail from Lea Chankin, Consulting Psych., Cal. Sex Offender Mgmt. Bd. & Cal. State Authorized Risk Assessment Tools for Sex Offenders (“SARATSO”) Comm., to author (July 8, 2019) (on file with author) [hereinafter Chankin].

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Craig Dowden & D.A. Andrews, *Effective Correctional Treatment and Violent Reoffending: A Meta-Analysis*, 42 CANADIAN J. CRIMINOLOGY 449, 460 (2000); Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systemic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 312 (2007); D.A. Andrews, Ican Zinger, Robert D. Hoge, James Bonta, Paul Gendreau & Francis T. Cullen, *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 374 (1990).

³⁶⁹ ROGER PRZYBYLSKI, U.S. DEP’T OF JUST., *THE EFFECTIVENESS OF TREATMENT FOR ADULT SEX OFFENDERS* (2015); Brian Lovins, Christopher T. Lowenkamp & Edward J. Latessa, *Applying the Risk Principle to Sex Offenders: Can Treatment Make Some Sex Offenders Worse?*, 89 PRISON J. 344 *passim* (2009).

³⁷⁰ See Chankin, *supra* note 365.

B. Identifying Low-Risk Offenders

Empirical risk assessment instruments for offenders are designed to work only within the criminal justice context. In that context, risk levels are heavily based on factors relating to prior criminal offending. Even then, risk assessment instruments are not designed to determine sentencing choices. Rather, they are designed to measure risk in order to target treatment strategies and supervision terms and conditions.

In California, a judge is provided with an offender's static risk assessment score prior to sentencing, without being told how to use it.³⁷¹ California has a determinate sentencing law with set sentencing triads and specified factors relating to which triad a judge must choose—upper, middle or lower.³⁷² As a result, the risk assessment score is really only relevant to whether an offender is offered probation instead of prison, when that is a possibility based on the nature of the offense.³⁷³ It may also be relevant to whether an offender is ordered to register as a sex offender.³⁷⁴

Some jurisdictions are using empirical risk assessment to determine a variety of non-penal options for those who have sexually offended. One commentator found at least three different uses of risk assessments in various jurisdictions:

Jurisdictions have integrated risk predictions into at least three different sentence-location decisions: (1) whether to sentence a defendant to probation or incarceration, (2) whether to divert otherwise prison-bound offenders to jail or probation, and (3) whether to suspend part or all of a prison sentence for one spent in the community.³⁷⁵

This approach, using risk assessment to determine who can safely be placed back in the community, whether it be the community at large, the college campus or the workplace, has significant advantages. Rather than expelling the offender from the community, whether it be in the general public, freedom versus prison or campus or workplace, the person is allowed to remain there in order to receive the treatment or education required to become a safe and functional member of that community. Community safety must also be considered, so recidivism rates are important: “Meta-analytic research demonstrates that on average, completion of treatment is associated with reduced sexual recidivism. However, this effect depends on the quality of treatment, and likely on the dosage [(amount of time in treatment)].”³⁷⁶

Virginia uses risk assessment scores to determine who is granted local

³⁷¹ CAL. PENAL CODE § 1203c(a)(2) (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

³⁷² PENAL § 1170(b).

³⁷³ See PENAL § 1203(b)(1).

³⁷⁴ See PENAL § 290.006.

³⁷⁵ Collins, *supra* note 159, at 69–72.

³⁷⁶ PHENIX ET AL., *supra* note 356, at 8.

incarceration—jail—in lieu of prison.³⁷⁷ While this type of diversion shortens the incarceration as well as changing its placement, it does nothing to rehabilitate, treat or educate. California allows a judge to impose a split sentence, incarceration followed by community supervision, based on actuarial information.³⁷⁸ Again, while such a sentence may make it more feasible for an individual to participate in treatment or educational curriculum, those components do not seem to be a mandatory part of a split sentence. In contrast, an offender sentenced in California to probation or prison is mandated to participate in sex offender-specific treatment.³⁷⁹

Social science research about offenders led to the development of the RNR principle.³⁸⁰ This type of risk assessment “identifies who should be targeted for correctional intervention.”³⁸¹ It also found that while sex offender-specific treatment “decreases recidivism amongst higher risk offenders, . . . [it may actually] increase recidivism rates amongst low-risk offenders.”³⁸² Because of these findings, “the risk principle dictates that recidivism reduction efforts should target those with the higher risk of recidivism, whereas low-risk offenders should be ‘identified and excluded . . . from intensive correctional programs.’”³⁸³ As a consequence, low-risk offenders should not be mixed with high-risk offenders in treatment groups even outside prison because the result may be to elevate the risk of those who were initially low risk for recidivism.

Two risk assessment instruments are being used to identify low-risk offenders who qualify for alternative sentencing in some jurisdictions. The Level of Services Inquiry-Revised (“LSI-R”) and the Correctional Offender Management Profiling for Alternative Sanctions (“COMPAS”) are risk assessment tools designed to identify both risk of reoffending and criminogenic

³⁷⁷ Collins, *supra* note 159, at 70–71.

³⁷⁸ Collins states as follows:

Since 2015, California Rules of Court have allowed courts to consider risk assessment information in determining the length and conditions of an individual’s period of mandatory supervision. Mandatory supervision, like probation, is a period of supervised release in the community. However, ‘[m]andatory supervision . . . is not probation.’ Whereas probation is a period of community supervision that replaces a period of incarceration, mandatory supervision is a period of community supervision that follows incarceration. When sentencing individuals convicted of specified lowlevel crimes, California courts ‘must suspend execution of a concluding portion’ of the sentence ‘as a period of mandatory supervision.’ Notably, however, California judges do not consider imposing a split sentence until they have already ruled out a sentence of probation.

Id. at 71–72 (alterations in original).

³⁷⁹ CAL. PENAL CODE § 290.09(a)(1) (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

³⁸⁰ See generally JAMES BONTA, PUB. WORKS & GOV’T SERVS. CAN., OFFENDER REHABILITATION: FROM RESEARCH TO PRACTICE (1997), https://www.d.umn.edu/~jmaahs/Deinquency%20and%20Juvenile%20Justice/Community%20Corrections/bonta_effective_intervention.pdf [<https://perma.cc/3Y5Z-NWYL>].

³⁸¹ Collins, *supra* note 159, at 81 (emphasis omitted).

³⁸² *Id.*

³⁸³ *Id.*

needs of offenders.³⁸⁴ The LSI-R describes itself as “a quantitative survey of offender attributes and their situations relevant to level of supervision and treatment decisions.”³⁸⁵ The COMPAS “provide[s] decisional support for the Department of Corrections when making placement decisions, managing offenders, and planning treatment.”³⁸⁶ California uses both of these instruments after sentencing—not before—to inform treatment and placement decisions.³⁸⁷

C. Sex Offender Specific-Treatment Should Be an Essential Element of Alternative Sanctions

Jurisdictions that are using risk assessment to inform alternative sanctions, such as diversion, tout the community safety aspects of that approach.³⁸⁸ However, unless such alternative sanctions involve more than merely shortening sentences or lengthening community supervision periods, the chance of these approaches increasing public safety and reducing recidivism through rehabilitation is not optimal.

The most effective system would not just lessen traditional sanctions. It would require a mandatory evidence-based treatment program designed to lessen the risk of reoffending by someone who is a first-time offender. This would include an assessment of the individual risk and needs of that offender so recidivism risk could “be reduced through appropriate and effective rehabilitative programming.”³⁸⁹

The same principle applies to sanctions imposed in the campus discipline system. Instead of suspension or lesser sanctions that alone do not address the individual issues that prompted the wrongdoing, the sanction should include a specialized treatment program along the lines of the one developed by the STARRSA Project.³⁹⁰

Additionally, for those in the criminal justice system, the emphasis of supervision should be using terms and conditions that target a particular individual’s risk factors. As one observer noted, “Studies suggest that treatment-based supervision strategies targeting a probationer’s particular risk factors are more effective than sanctions in reducing recidivism, yet most probation officers

³⁸⁴ See Merry Morash, *A Great Debate Ove Using the Level of Service Inventory-Revised (LSI-R) With Women Offenders*, 8 CRIMINOLOGY & PUB. POL'Y 173, 174–75 (2009).

³⁸⁵ *Id.*

³⁸⁶ Tim Brennen, William Dietrich, & Beate Ehret, *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 CRIM. JUST. & BEHAV. 21, 21 (2009).

³⁸⁷ See *Rehabilitative Process*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/rehabilitation/about/process/> [<https://perma.cc/9NYV-QMEA>]; see also *Risk Assessment Instruments*, SARATSO, <https://saratso.org/index.cfm?pid=1360> [<https://perma.cc/3568-FK4E>] (California utilizes the LS/CMI version of LSI-R).

³⁸⁸ See *Diversion Programs*, U.S. ATT'Y'S OFF. D.C. (Mar. 3, 2021), <https://www.justice.gov/usao-dc/diversion-programs> [<https://perma.cc/4G25-GA99>]; see also *Pretrial Diversion*, NAT'L CONF. OF STATE LEGS. (Sept. 28, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx> [<https://perma.cc/GP55-X2BT>]; *What is Diversion?*, *supra* note 111.

³⁸⁹ Collins, *supra* note 159, at 84.

³⁹⁰ See discussion *supra* Section IV.B.

spend their time in control-related activities—taking urine samples, searching homes.”³⁹¹

California requires sex offender-specific treatment for every person convicted of a sex offense, even though there is no specified curriculum for low-risk offenders that differentiates them from high-risk offenders.³⁹² The programming used for offenders who are required, in California, to participate in sex offender-specific treatment after conviction for a registrable sexual offense, is based on the RNR principle:

The need principle identifies what to target in the offender to reduce [the] risk of recidivism. The principle dictates that correctional intervention should be directed toward the offender’s “criminogenic needs,” also referred to as “dynamic” (or changeable) risk factors. The “crime producing needs” that are most commonly targeted for correctional intervention are substance abuse; antisocial attitudes and association with antisocial peers; and lack of empathy, problem solving, and self-control.

The responsivity principle dictates how such correctional intervention should be delivered. It suggests that treatment should be delivered in a way that is the most accessible and engaging to the offender based on her mental and emotional condition, level of motivation, and cognitive functioning. In sum, the RNR principle aims to “assess[] an offender’s risk of reoffending, match[] supervision and treatment to the offender’s risk level, and target[] the offender’s criminogenic needs or dynamic risk factors with the social learning and cognitive-behavioral programs most likely to effect change in the offender’s behavior.”³⁹³

There are challenges to requiring treatment as an alternative sanction. First, general mental health counseling is inadequate to address the risk of future offending.³⁹⁴ Rather, treatment must be aimed at controlling behaviors and follow a protocol proven successful in reducing sexual recidivism.

Second, cost is an issue. If treatment is part of sanctioning, whether in the criminal justice, campus or employment setting, it must be available to all—not just to those who can afford it. For example,

there may be an impermissible power imbalance if courts start ordering . . . [sex offender-specific treatment] for which the state’s legislature has not provided adequate funding. Yet if the judiciary needs the permission or help of the legislature to effectively administer . . . [such a program, e.g., sex offense-specific courts which use sex

³⁹¹ Goodmark, *supra* note 30, at 107.

³⁹² See *Certification*, *supra* note 255.

³⁹³ Collins, *supra* note 159, at 81–82.

³⁹⁴ See Lamade et al., *supra* note 54, at 139.

offender-specific treatment as part of their sanctioning, there are] the obvious problems of underfunding and legislative inertia.³⁹⁵

D. Practicalities in Determining Risk and Dangerousness

To qualify for placement in a treatment program addressing the needs of low-risk offenders, the offender should not have been previously arrested or convicted for a sexual offense. This is easily verifiable in the criminal justice setting. Investigators may find it more difficult, however, to determine if a person suffered a prior sanction for sexual violence or harassment when addressed outside the criminal justice system.

Records pertaining to students are protected under the Family Educational Rights and Privacy Act (“FERPA”), the federal privacy law protecting student records.³⁹⁶ Records of reasons for discipline or termination in employment are usually kept confidential by employers for liability reasons.³⁹⁷ Thus, relying on official records is unlikely to tell the whole story even if they are available. A respondent’s statement that they had not previously suffered such a sanction would need independent verification.

In the educational context, the burden could be placed on the responsible party. In order to qualify for placement in a program that would enable the party responsible for sexual assault to remain as a student at an IHE, the person would have to provide evidence that they were never previously sanctioned by suspension or expulsion for sexual misconduct as a student. This would mean requesting their own academic record at previous IHEs and sharing them with campus investigators. The responsible party would simply agree to sign a waiver allowing past IHEs or employers to divulge such information.

Another way would be to have the responsible party voluntarily take a single-issue polygraph examination to determine if they were sanctioned in the past for such behavior. The polygraph would not ask for an admission of past behavior, to avoid issues of self-incrimination. Instead, it would ask if the person had been sanctioned in the past for such conduct, either in the context of higher education or in the workplace.

Finally, a different solution would require IHEs to make such information

³⁹⁵ Richmond & Richmond, *supra* note 61, at 469.

³⁹⁶ 20 U.S.C.A. § 1232(b)(1) (West 2013). The Family Educational Rights and Privacy Act (“FERPA”) is a federal law that protects the privacy of student education records. *See id.* The law applies to all schools that receive funds under an applicable program of the United States Department of Education. *See id.*

³⁹⁷ *See* Gerard Morales & Barbara McCloud, *Workplace Disciplinary Investigations and Confidentiality: Striking the Right Balance*, 50 PRAC. LAW. 25, 25 (2004) (“[Employers] need to implement workplace harassment and conduct policies to avoid serious and potentially crippling exposure. And to encourage employee cooperation—and avoid additional tort liability—they have to make sure that investigations into disciplinary matters are kept confidential.”); *see also* Alison Doyle, *What Can Employers Say About Former Employees?*, BALANCE CAREERS (Nov. 18, 2020), <https://www.thebalancecareers.com/what-can-employers-say-about-former-employees-2059608> [<https://perma.cc/WN68-MZZQ>].

available to a student's subsequent IHE in the event of a student misconduct matter involving sexual misconduct. A law requiring schools to note on transcripts when a student was sanctioned for sexual misconduct would still be subject to FERPA,³⁹⁸ however, it is unclear whether that note would be accessible in a subsequent student conduct proceeding. The California State Legislature passed a bill in 2015 to require colleges in California to note student discipline for sexual misconduct on college transcripts, but it was vetoed by the governor.³⁹⁹

A person accused of sexual harassment in the workplace would need to provide evidence to the employer that they have never been disciplined, fired or allowed to resign for past sexual harassment in order to keep their job. Particularly in the employment context, this evidence might be hard even for accused perpetrators to obtain from past employers. Employers often disclose only dates of prior employment upon inquiry. A single-issue polygraph examination would be the easiest solution when past employers refuse to divulge such information even at the request of the perpetrator.

VIII. CONCLUSION

It is possible that solutions based in transformative justice concepts of community accountability can coexist with restorative justice and criminal justice systems. One key principle should be the deciding factor in determining how a transformative justice approach for sexual and domestic violence could function alongside criminal justice and restorative justice alternatives. That key issue is whether the person in the instant case under consideration has sexually offended before and been sanctioned for it. In both sexual assault and domestic violence, which are often co-extant, research shows only a small percentage are serial convicted offenders.⁴⁰⁰

For that high-risk group of serial offenders, criminal justice solutions may be the only alternative that can protect the community. Similarly, in the campus and workplace, sanctions such as expulsion and employment termination could be reserved for those at highest risk of reoffending, which usually means those whose record shows repeat offending resulting in sanctions. Before more extreme sanctions are imposed on first-time offenders there can be an escalating system of community accountability solutions or restorative justice options available to the parties in lieu of criminal justice alternatives. Embracing alternatives to traditional and ineffective ways of changing the culture of sexual

³⁹⁸ See FAM. POL'Y COMPLIANCE OFF., U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (2007), <https://permanent.fdlp.gov/gpo14871/postsec.pdf> [<https://perma.cc/FJ44-PK79>]; Fain, *supra* note 53.

³⁹⁹ Assemb. B. 968, 2015-2016 Reg. Sess. (Cal. 2015) (vetoed by the governor).

⁴⁰⁰ See Hanson et al., *supra* note 80, at 59; see also EVE BUZAWA, GERALD T. HOTALING, ANDREW KLEIN & JAMES BYRNE, U.S. DEP'T OF JUST., RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING: FINAL REPORT 93-94 (1999), <https://www.ojp.gov/pdffiles1/nij/grant/s/181427.pdf> [<https://perma.cc/A8SU-4PH9>].

and domestic violence may be the only way to effect meaningful change and protect communities.

WILLIAMS REVISITED: SIXTY YEARS AFTER THE CASE THAT DECIDED THE KANSAS WATER APPROPRIATION ACT

By: Diana Stanley*

I. INTRODUCTION

*“Tonight, we pray for water. Cool water.”*¹

Almost sixty years ago, the Kansas Supreme Court issued its final decision in *Williams v. City of Wichita*.² In *Williams*, the court upheld the constitutionality of Kansas’s water regulatory scheme. While not discussed much beyond water law seminar courses, the opinion was a fundamental natural resource law decision in Kansas and throughout the Western United States.³ And yet, taken in the broader context of property law, the reasoning in *Williams* is problematic due to its inconsistent application of precedent. This article aims to take a comprehensive look back at *Williams* to reexamine the assumptions Kansas courts have made about water rights and ask if there is a way to get *Williams*’s result without throwing out traditional property law principles.

The story of *Williams* begins with the controversial passage of the 1945 Kansas Water Appropriation Act (“KWAA”).⁴ This act transformed the state’s water law system from riparian common law to a permitted prior appropriation

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¹ MARTY ROBBINS, *Cool Water*, in GUNFIGHTER BALLADS AND TRAIL SONGS (Columbia Records 1959).

² *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962) (upholding the constitutionality of the state’s new water permitting scheme by asserting the groundwater users only had a license to use water rather than a vested property interest).

³ Many scholars have cited *Williams* in the context of their own state water law debates. See, e.g., Roger Tyler, *Underground Water Regulation in Texas*, 39 TEX. B.J. 532, 538 n.28 (1976) (“The host of articles written after *Williams v. City of Wichita* . . . was decided are worthy of reading.”); Richard S. Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721, 752 n.155 (1963); James Munro, *South Dakota and the Water Impasse*, 11 S.D. L. REV. 255, 272 (1966).

⁴ Kansas Water Appropriation Act of 1945, ch. 390, § 1, 1945 Kan. Sess. Laws 665 (codified at KAN. STAT. ANN. § 82a-701 (West 2009)).

scheme.⁵ Like many controversial pieces of legislation, KWAA's opponents challenged its constitutionality.⁶ The Kansas Supreme Court determined that KWAA was not a governmental taking in *Williams*, making it “the most important case in Kansas water law history.”⁷

Williams's impact soon spread beyond Kansas. A year after the decision, the Oklahoma state legislature passed its first regulatory reform for riparian water rights.⁸ The year after that, the South Dakota Supreme Court adopted a similar approach to Kansas in *Knight v. Grimes*⁹ and solidified a *Williams*-esque view toward water regulation.¹⁰ To date, a slew of courts, including judiciaries in Arizona,¹¹ California,¹² Indiana,¹³ Missouri,¹⁴ North Dakota,¹⁵ South Dakota,¹⁶ and Washington¹⁷ have cited and referenced *Williams* in their own water law decisions. As such, the opinion and the principles established by it lurk in the background of water regulation—the Invisible Man at the inn while burglaries—takings—are happening all over town.¹⁸ As eastern states are increasingly water-stressed and reconsidering their own regulatory schemes,¹⁹

⁵ The riparian doctrine is, “[t]he rule that owners of land bordering on a waterway have equal rights to use the water passing through or by their property.” *Riparian-Rights Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). In contrast, the prior appropriation doctrine is “[t]he rule that, among the persons whose properties border on a waterway, the earliest users of the water have the right to take all they can use before anyone else has a right to it.” *Prior-Appropriation Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). Professor Frank Trelease provides a thorough, albeit dated, explanation of the application of both systems in his work *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24 (1954).

⁶ See *infra* Section III.A.

⁷ John C. Peck, *Water Law in Kansas History*, 61 J. KAN. B. ASS'N 39, 43 (1992).

⁸ Todd S. Hageman, Note, *Water Law: Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183, 186–87 (1994).

⁹ *Knight v. Grimes*, 127 N.W.2d 708, 712–14 (S.D. 1964).

¹⁰ The *Knight* decision is interesting because it does not explicitly cite *Williams*, but it does reference two decisions which *Williams* gave retroactive approval to—*State v. Knapp*, 207 P.2d 440 (Kan. 1949) and *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan. 1956). A later South Dakota case made the historical connection somewhat more explicit. *Belle Fourche Irrigation Dist. v. Smiley*, 176 N.W.2d 239, 245 (S.D. 1970) (“[T]he decision in the *Knight* case concerned with underground waters is equally applicable to surface water. *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578.”).

¹¹ *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1329 (Ariz. 1981).

¹² *In re Waters of Long Valley Creek Stream Sys.*, 599 P.2d 656, 663 n.6 (Cal. 1979) (citing *Williams* and its precursor Kansas cases).

¹³ *City of Valparaiso v. Defler*, 694 N.E.2d 1177, 1181 (Ind. Ct. App. 1998).

¹⁴ *Higday v. Nickolaus*, 469 S.W.2d 859, 866 (Mo. Ct. App. 1971).

¹⁵ *Baeth v. Hoisveen*, 157 N.W.2d 728, 732 (N.D. 1968).

¹⁶ *Parks v. Cooper*, 676 N.W.2d 823, 834 (S.D. 2004); *Belle Fourche Irrigation Dist. v. Smiley*, 176 N.W.2d 239, 245 (S.D. 1970).

¹⁷ *In re Deadman Creek Drainage Basin in Spokane Cnty.*, 694 P.2d 1071, 1077 (Wash. 1985).

¹⁸ H.G. WELLS, *THE INVISIBLE MAN* (Edward Arnold 1897).

¹⁹ See, e.g., Michael A. Wehrkamp, Comment, *Groundwater Allocation in Ohio: The Case for Regulated Riparianism and its Likely Consequences Under McNamara*, 40 U. TOL. L. REV. 525 (2009) (discussing problems with groundwater regulation in the eastern United States given increased demand and strain on aquifers).

the case is becoming even more relevant.

Scholars analyzing KWAA and *Williams* tend to take a global view and focus on how the Act and the case were necessary for the state's conservation program. But reexamining *Williams* shows that this was also a conflict between rural and urban Kansans with policy and ethical implications. Moreover, in pursuit of getting to a policy-focused result, Justice Fatzer's majority opinion went through legal gymnastics of property law.²⁰

Scholars too often gloss over this because they see having a settled rule for water rights as essential. As one student author commented in the 1980s: "For all of the shortcomings of the *Williams* decision it is probably better left alone With almost twenty years having passed since *Williams*, it is too late to upset the system."²¹ In other words, because we like the rule and it has been around a long time, it does not matter that it does not make sense. This article attempts to put the shortcomings of *Williams* to bed by proposing alternative solutions to its property law problems.

In Section II, this piece explores the legislative background behind the Kansas Water Appropriation Act. Section III looks at post-1945 Equus Beds litigation before moving on to the role of the urban-rural divide. Section IV takes a deep dive into Justice Fatzer's majority and Justice Schroeder's dissent. This section looks at the arguments in the context of the judges' personal backgrounds and in the wider scope of property law. Finally, Section V looks for possible solutions to the outstanding questions raised by Justice Schroeder.

II. PASSING OF THE 1945 KANSAS WATER APPROPRIATIONS ACT

When I was around ten years old, my parents sent me north from our home in Wichita to stay with my grandparents outside of the state capital for a week. My grandfather took me out to Perry State Park, where a famous two-hundred-year-old cottonwood tree once stood.²² This was Kansas, but not one I was familiar with. Unlike flat Wichita, where people can see a storm coming from miles away, this part of the state had rolling hills and leafy green forests.

Kansas was settled from the east to the west.²³ The eastern third of Kansas

²⁰ Glenn E. Opie, *Constitutional and Administrative Law*, 12 U. KAN. L. REV. 143, 146 (1963) ("In reflecting upon the decision as it presently stands in Kansas, the writer cannot help but feel that the holding of the court is grounded heavily in concepts as to what is desirable public policy and would fall somewhere within the rationale said to have been employed by the late Mr. Justice Cardozo, who in his decisions has been popularly reported to first ask what as a matter of justice ought to be done and then find the rule of law which would support the conclusion.").

²¹ Gary H. Hanson, *Water Law—Kansas Water Appropriation Act—Water May Not Be Appropriated without the Approval of the Chief Engineer—F. Arthur Stone & Sons v. Gibson*, 31 U. KAN. L. REV. 342, 352 (1982).

²² See Mike Belt, *Champion Trees Lost to Storms*, LAWRENCE J. WORLD (May 12, 2006, 12:00 AM), https://www2.ljworld.com/news/2006/may/12/champion_trees_lost_storms/ [<https://perm.a.cc/L27T-6VY6>].

²³ John C. Peck, *Evolving Water Law and Management in the U.S.: Kansas*, 20 U. DENV. WATER L. REV. 15, 16 (2016).

has a widely different climate than the rest of the state.²⁴ Like I observed as a child, Eastern Kansas experiences greater rainfall and there are more rivers and streams.²⁵ In contrast, the rest of the state relies primarily on groundwater and is increasingly arid closer to the Colorado border.²⁶ Because the eastern third was settled before the west, state courts originally adopted riparian common law for surface water disputes.²⁷ But soon enough, the Kansas Legislature added prior appropriation law into the mix by passing irrigation statutes requiring permitting for certain diversions.²⁸

The flashpoint for Kansas water law, however, was not over the differences between riparian and prior appropriation schemes. Rather, it was a fight over groundwater. Because early geologists did not realize that surface and groundwater are hydrologically connected,²⁹ courts in many states formed different governing rules for the water sources.³⁰ In Kansas, the court followed the absolute ownership theory—sometimes called the English Rule—which gives property owners an absolute right to draw water from their property.³¹

The “confusion”³² from this mixing of groundwater law, riparianism, and prior appropriation³³ led to litigation over the Equus Beds Aquifer in south central Kansas.³⁴ In the early 1940s, Wichita sought a permit from the Kansas Division of Water Resources (“DWR”) to appropriate water from wells in neighboring Harvey County for municipal use.³⁵ Apparently believing that permit approval would be a foregone conclusion, the City of Wichita had already drilled the wells and constructed a piping system for the water “at the cost of approximately \$2,500,000.”³⁶ Several cities in Harvey County opposed the

²⁴ See *DWR Map Library*, KAN. DEP'T OF AGRI., <https://agriculture.ks.gov/divisions-programs/dwr/dwr-library/maps> [<https://perma.cc/75BQ-MZJJ>] (Aug. 27, 2021, 10:27 PM) (Graphs with average annual rainfall and aquifer recharge).

²⁵ *Id.*

²⁶ *Id.*

²⁷ John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 U. KAN. L. REV. 735, 736 (1995).

²⁸ 1889 Kan. Laws, ch. 165, § 1 (codified at Kan. Gen. Stat. § 42-109, repealed by Water Appropriation Act of 1945, ch. 390, § 25, 1945 Kan. Sess. Laws 665 (West 2009)).

²⁹ See Joe Gelt, *Managing the Interconnecting Waters: The Groundwater-Surface Water Dilemma*, WATER RES. RSCH. CTR. (1994), <https://wrc.arizona.edu/publications/arroyo-newsletter/managing-interconnecting-waters-groundwater-surface-water-dilemma> [<https://perma.cc/6UDJ-AN4Z>] (discussing in ‘Hydrology and Geology’ the interconnected nature of surface and groundwater and explaining that this connection was not well understood).

³⁰ See *Roath v. Driscoll*, 20 Conn. 533, 543 (1850) and *Frazier v. Brown*, 12 Ohio St. 294, 311 (1861), for examples of this early caselaw phenomenon.

³¹ Peck, *supra* note 27, at 736–37; *City of Emporia v. Soden*, 25 Kan. 588, 589 (1881).

³² *Williams v. City of Wichita*, 374 P.2d 578, 581, 587 (Kan. 1962).

³³ Kansas was overwhelmingly a riparian state. But there were hints of prior appropriation doctrine. For example, in *Clark v. Allaman*, 80 P. 571 (Kan. 1905), the court recognized that some Kansans followed prior appropriation rules as a “local custom[]” but such customs did not have the force of law. *Id.* at 580. The 1886 irrigation statute also had a prior appropriation element. *Id.* at 582.

³⁴ Peck, *supra* note 27, at 738.

³⁵ *State ex rel. Peterson v. Kan. State Bd. of Agri.*, 149 P.2d 604, 605 (Kan. 1944).

³⁶ *Id.*

permit, and the county attorney filed an action asserting DWR lacked authority to grant such permits.³⁷ As there was no comprehensive water legislation, the Kansas Supreme Court agreed.³⁸ Going further, the court reinforced Kansas's traditional conceptions of property law over groundwater rights, saying,

[U]nderground waters are part of the real property in which they are situated. The owner of land may convey or grant the underground water, or the right to take it from the land, by an appropriate instrument in writing to the same extent that he might convey or grant any other portion of the real property; or a party, having the right of eminent domain, may appropriate underground water to his use by condemnation proceedings.³⁹

The court's decision meant that Wichita could not quantify its water rights. Nor could the city have a guaranteed supply of water every year.⁴⁰

In response, then-Governor Andrew Frank Schoeppel⁴¹ created a Commission to study Kansas water law and propose regulatory solutions.⁴² Within ten months, the Kansas Legislature passed the Water Appropriation Act.⁴³ To say that KWAA represented a sharp change in Kansas water rights is somewhat of an understatement.⁴⁴ In one stroke, the legislature converted ownership of water from private to state hands by dedicating “[a]ll water within the state of Kansas . . . to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.”⁴⁵

Not only did KWAA transform the surface water regulatory scheme, it also affected the common law groundwater doctrine. The state could now limit future groundwater withdrawals by denying permits.⁴⁶ It could also grant permits to

³⁷ *Id.* at 606.

³⁸ *Id.* at 611.

³⁹ *Id.* at 608.

⁴⁰ *Id.* at 605–06.

⁴¹ Like many of the characters in this story, Governor Schoeppel started his career as a small-town attorney in rural Kansas. *Gov. Andrew Frank Schoeppel*, NAT'L GOV. ASS'N, <https://www.nga.org/governor/andrew-frank-schoeppel/> [<https://perma.cc/XR4G-MG3V>]. His motivations behind water reform may have been tied to general resource consolidation and use efforts for World War II. In his 1943 address to the Kansas Legislature, he noted the resource and manpower strain caused by the war effort and the need to address “changed conditions that [Kansas leaders] are called now upon to deal.” *Message of Governor Andrew F. Schoeppel to the 1943 Kansas Legislature*, KAN. STATE LIBR., <https://kgi.contentdm.oclc.org/digital/collection/p16884coll3/id/236> [<https://perma.cc/8FXA-9Q7N>]. On the other hand, scholar John Peck located one contemporary source which tied the act's passage more directly to the Dust Bowl. John C. Peck, *Legal Responses to Drought in Kansas*, 62 U. KAN. L. REV. 1141, 1154 n.95 (2014).

⁴² Peck, *supra* note 27, at 738.

⁴³ Kansas Water Appropriation Act of 1945, ch. 390, § 2, 1945 Kan. Sess. Laws 665 (codified at KAN. STAT. ANN. § 82a-702 (West 1945)).

⁴⁴ Peck, *supra* note 27, at 737.

⁴⁵ *Id.* at 741.

⁴⁶ *Cf. New Applications and Permits*, KAN. DEP'T OF AGRIC., <https://agriculture.ks.gov/divisions-programs/dwr/water-appropriation/new-applications-and-permits> (“Some areas of the state are

municipalities, even if it meant that neighboring landowners would be unable to drill new wells in the area. In the past, that sort of action would probably have required compensating the landowners for their impaired water rights.

III. EQUUS BEDS LITIGATION AND THE LEAD UP TO *WILLIAMS*

After the passage of KWAA, there was a flurry of scholastic and state activity over its implementation.⁴⁷ But the real cloud on the horizon was the reaction of the courts. While there was an initial litigation hiccup over riparian rights in *State ex rel. Emery v. Knapp*,⁴⁸ much of the Act's constitutionality over groundwater and destruction of vested property rights was still up for debate. Unfortunately, it would take almost ten years of litigation between the city of Wichita, neighboring towns, and farmers before the state's highest court would issue a decision.⁴⁹ A brief overview of this litigation also shows underlying rural-urban dynamics at the heart of the *Williams* decision and KWAA.

A. *The Fight Over the Equus Beds*

Litigation was brewing back at the Equus Beds. The Equus Beds are a large aquifer system composed of "extremely permeable gravel and sand" overlaying the "ancestral Smokey River."⁵⁰ It lies under "portions of McPherson, Harvey, Reno, and Sedgwick counties."⁵¹ For these areas, the aquifer serves as the sole source of fresh groundwater for all municipal, industrial, and agricultural uses.⁵² As noted in the *Peterson* case, Wichita had been trying to expand its municipal

considered fully appropriated, based on safe yield, which now are closed to further new appropriations.")

⁴⁷ See, e.g., John Scurlock, *Constitutionality of Water Rights Regulation*, 1 U. KAN. L. REV. 125 (1953); EARL B. SHURTZ, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER: BULL. 3, KAN. WATER RES. BD. (1956) [hereinafter SHURTZ, 1956]; EARL B. SHURTZ, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER: BULL. 5, KAN. WATER RES. BD. (1960) [hereinafter SHURTZ, 1960]. Water Law was also the topic of the University of Kansas Law Review's second symposium. Earl B. Shurtz, *Foreword*, 5 U. KAN. L. REV. 491 (1957).

⁴⁸ *State ex rel. Emery v. Knapp*, 207 P.2d 440, 442 (Kan. 1949) (involving a question on riparian reservoir rights from the Republican River).

⁴⁹ These cases appear to have been first litigated in 1953. *Cities of Hesston & Sedgwick v. Smrha*, 336 P.2d 428, 431 (Kan. 1959). *Williams* was decided in 1962 and stated as follows:

This court takes judicial notice of the many years of protracted litigation that has taken place in state and federal courts over Wichita's municipal well operations in the Equus Beds in Harvey County and is of the opinion that a ruling here on the constitutionality of the Act will have a settling effect on the general controversy which has too long kept ground water users throughout the state in uncertainty and confusion.

Williams v. City of Wichita, 374 P.2d 581, 581 (Kan. 1962).

⁵⁰ *Baumann v. Smrha*, 145 F. Supp. 617, 620 (D. Kan.), *aff'd*, 352 U.S. 863 (1956).

⁵¹ Michael T. Dealy, *Management of the Equus Beds Aquifer in Southcentral Kansas: Are We Measuring Up?*, 15 KAN. J. L. & PUB. POL'Y 525, 528 (2006). See Appendix A for a map of this area from *Williams*, 374 P.2d at 582.

⁵² See Appendix A for a map of this area from *Williams*, 374 P.2d at 582.

well supply into other counties for some time.⁵³ In the 1940s, the city bought twenty-five well sites in Harvey County.⁵⁴ The wells created cones of depression and caused water levels to decline on surrounding farms.⁵⁵

In the early 1950s, Wichita sought to expand its municipal drilling for another 25,000 acre-feet of water per year.⁵⁶ Faced with declining water tables and Wichita's expansion, landowners and cities in Harvey and McPherson Counties sued the state water agency. This litigation over the Equus Beds is best understood as four interwoven strands of cases. Each case featured roughly the same cast of characters and pitted the cities of Harvey and McPherson Counties against DWR and the City of Wichita. Even if one of the usual suspects were not originally in the litigation, they would often plead in as interested parties or ask to write intervening briefs.

The saga began with three cases in 1956, two at the state level and one at the federal level. On the state side, the Kansas Supreme Court heard initial interlocutory appeals in *City of McPherson v. Smrha*⁵⁷ and *Cities of Hesston & Sedgwick v. Smrha*.⁵⁸ R.V. Smrha was the Chief Engineer of DWR—hence the case names.⁵⁹ In *City of McPherson*, three municipal water users challenged DWR's decision to grant Wichita well permits.⁶⁰ Similarly, in *Cities of Hesston & Sedgwick*, five Harvey County municipalities and a private landowner opposed DWR's well permit decisions.⁶¹

In both these cases, DWR sought to quash the suit on the basis that the cities sued before a 1955 amendment to KWAA which explicitly allowed water users to challenge agency decisions in court.⁶² The trial court judge, Alfred Schroeder, denied DWR's motion and the Kansas Supreme Court affirmed.⁶³

These initial cases are significant for two reasons. First, they mark the first appearance of the authors of both the majority and the dissent of the *Williams* opinion. Harold R. Fatzer, the majority's author, represented DWR. Alfred Schroeder, the author of the dissent, was the trial court judge. The local press even quoted Schroeder saying that he found "the state's condemnation and water

⁵³ State *ex rel.* Peterson v. Kan. Bd. of Agri., 149 P.2d 604, 605–06 (Kan. 1944); *Baumann*, 145 F. Supp. at 620.

⁵⁴ *Baumann*, 145 F. Supp. at 620.

⁵⁵ *Id.*

⁵⁶ *Id.* at 621. For context, "[a]n acre-foot of water is equivalent to 325,851 gallons." *Irrigation & Water Use*, U.S. DEP'T OF AGR., <https://www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use/> [<https://perma.cc/8B6Q-2B6E>].

⁵⁷ See *City of McPherson v. Smrha*, 293 P.2d 239 (Kan. 1956).

⁵⁸ See *Cities of Hesston & Sedgwick v. Smrha*, 293 P.2d 241 (Kan. 1956).

⁵⁹ *City of McPherson*, 293 P.2d at 240.

⁶⁰ *Id.*

⁶¹ *Cities of Hesston & Sedgwick*, 293 P.2d at 241. "Sedgwick" is both a municipality in Harvey County and the name of a Kansas county. *Williams v. City of Wichita*, 374 P.2d 578, 582 (Kan. 1962) (providing a map showing both Sedgwick County and the City of Sedgwick).

⁶² *Cities of Hesston & Sedgwick*, 293 P.2d at 241; *City of McPherson*, 293 P.2d at 239–40.

⁶³ *Cities of Hesston & Sedgwick*, 293 P.2d at 241.

laws ‘inadequate.’”⁶⁴

Second, these cases were the beginning of a war of attrition that went up and down the judicial escalator for issues both minor and major. For example, one protracted fight was over whether Wichita and DWR could dismiss the private landowner in *Cities of Hesston & Sedgwick* because he died before the issue was finally settled.⁶⁵ On the other hand, *Cities of Hesston and Sedgwick* also saw a significant 1959 opinion where the case’s new trial court judge—Schroeder, who had since been elected⁶⁶ to the Kansas Supreme Court—found the 1945 Act unconstitutional.⁶⁷ Harvey County Judge George Allison had abruptly declared the act unconstitutional *sua sponte* “after two so-called pre-trial hearings” and without any pleadings.⁶⁸ The state supreme court found the judge could not consider constitutionality during a purely procedural part of the litigation.⁶⁹ They then promptly remanded it back down to the lower courts.⁷⁰

Over in the federal courts, the District of Kansas saw an Equus Beds case in 1956. In *Baumann v. Smrha*, a farmer challenged KWAA as unconstitutional because it violated the Fourteenth Amendment of the United States Constitution.⁷¹ Like the other cases, the plaintiffs sought declaratory and injunctive relief against Wichita’s proposed well expansion.⁷² The federal court ruled that the *Knapp* decision effectively overturned previous Kansas caselaw—

⁶⁴ *Judge Urges Water Peace*, PARSONS SUN, Mar. 22, 1956, at 2. Judge Schroeder urged that peaceful negotiations begin:

It is now clear to me that the present Kansas laws relative to both condemnation and water are inadequate. This is evidenced by the fact that almost a score of individual court actions have been fought by the present parties on these questions, and if the same course is followed, with many more to come.

Id.

⁶⁵ *Cities of Hesston & Sedgwick v. Smrha*, 351 P.2d 204, 205 (Kan. 1960).

⁶⁶ Until 1956, the Kansas Supreme Court was elected with the governor retaining the power to fill vacancies. This changed with a state constitutional amendment after the 1956 “Triple-Play” incident. See R. Alton Lee, *The Triple Switch: How the Missouri Plan Came to Kansas*, J. KAN. BAR ASS’N 28 (Jan. 2004) [hereinafter Lee, *The Triple Switch*], <https://www.washburn.edu/reference/cks/politics/pdf/triple.switch.pdf> [<https://perma.cc/4UPM-T7ZP>]; Sam Zeff & Matt Hodapp, TV, *The Triple Play, and the Man from Dodge*, HUMANITIES KAN. (Apr. 19, 2016), <https://www.humanitieskansas.org/get-involved/kansas-stories/people/tv-the-triple-play-and-the-man-from-dodge> [<https://perma.cc/G6ME-H3EK>]; R. ALTON LEE, SUNFLOWER JUSTICE: A NEW HISTORY OF THE KANSAS SUPREME COURT 232 (2014) [hereinafter LEE, SUNFLOWER JUSTICE].

⁶⁷ *Cities of Hesston & Sedgwick v. Smrha*, 336 P.2d 428, 435 (Kan. 1959).

⁶⁸ SHURTZ, 1960, *supra* note 47, at 47–48 n.199. Shurtz’s report reproduced the lower court decision: “[KWAA] is unconstitutional, being in violation of the 14th Amendment of the United States Constitution, having no provision for notice, right to be heard, compensation or other requirements of due process of law.” *Id.*

⁶⁹ *Cities of Hesston & Sedgwick*, 336 P.2d at 435. Judge Allison did eventually get his day in court—he was also the judge in *Williams* that declared the 1945 Act unconstitutional. See *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962). Because the cases had the same plaintiff attorneys, one could safely guess the plaintiff in *Williams* knew at least how Judge Allison would rule on their merits.

⁷⁰ *Cities of Hesston & Sedgwick*, 336 P.2d at 435.

⁷¹ *Baumann v. Smrha*, 145 F. Supp. 617, 619 (D. Kan.), *aff’d*, 352 U.S. 863 (1956).

⁷² *Id.* at 621.

it did not⁷³—and that even though prior caselaw may have established a vested property right, “departure . . . in a subsequent decision does not . . . constitute a deprivation of property.”⁷⁴

The result of all this litigation was that the state needed a decisive Kansas Supreme Court opinion to settle the 1945 Act’s constitutionality.⁷⁵ The question was which case would get there first. *Williams v. City of Wichita*—the latecomer to the game—was the winner. The *Williams* case started in 1958 as an injunction against the City of Wichita and its hired drilling operator.⁷⁶ The plaintiff, Don Williams, was a farmer whose property value dropped after Wichita installed wells.⁷⁷ Because Schroeder and Fatzer were not involved in the lower court decision, they did not need to recuse themselves.⁷⁸ Still, the case took its time—and one interlocutory appeal up to the state’s highest court—before getting there.⁷⁹

B. Motivations of the Cities and the Rural-Urban Divide

Before addressing the decision, it is necessary to take a short detour to ask why small towns in Harvey and McPherson Counties were so against Wichita having municipal wells. This detour is necessary because its policy implications likely had a direct impact on the legal reasoning in *Williams*. Perhaps an initial reading of these cases leads to cynical economics—if Wichita is exporting water down to Sedgwick County, there would be less water for farmers to expand their operations in the future. Subsequent water regulatory schemes in areas like Colorado suggest differently.

As cities expand, they tend to use up water supplies in their near proximity.⁸⁰ In Colorado, the traditional solution for growing cities was to buy farmland and permanently convert the water rights from agricultural to

⁷³ The main problem with interpreting *Knapp* as such is that its opinion explicitly noted that neither party challenged section 702, which dedicates all water in the state. *State ex rel. Emery v. Knapp*, 207 P.2d 440, 447 (Kan. 1949). Kansas courts do not consider the constitutionality of statutes “on [their] own motion.” *Williams*, 374 P.2d at 598 (Schroeder, J., dissenting).

⁷⁴ *Baumann*, 145 F. Supp. at 625.

⁷⁵ *Williams*, 374 P.2d at 581 (“This court takes judicial notice of the many years of protracted litigation that has taken place in state and federal courts over Wichita’s municipal well operations . . . and is of the opinion that a ruling here . . . will have a settling effect . . .”).

⁷⁶ *Williams v. City of Wichita*, 334 P.2d 353, 354 (1959).

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ Robert I. McDonald, Katherine Weber, Julie Padowski, Martina Flörke, Christof Schneider, Pamela A. Green, Thomas Gleeson, Stephanie Eckman, Bernhard Lehner, Deborah Balk, Timothy Boucher, Günther Grill & Mark Montgomery, *Water on an Urban Planet: Urbanization and the Reach of Urban Water Infrastructure*, 27 GLOBAL ENV’T. CHANGE 96, 96 (2014) (“Past research has shown that as cities grow in population, the total water needed for adequate municipal supply grows as well. . . . Cities by their nature spatially concentrate the water demands of thousands or millions of people into a small area, which by itself would increase stress on finite supplies of available freshwater near the city center.”).

municipal use.⁸¹ This process is called “buy-and-dry” because the cities buy the land and export the water elsewhere.⁸² The rural counties with buy-and-dry deals saw steep declines in their local economies and property tax bases.⁸³ Since there were fewer productive farms and farmers to run them, the county towns hollowed out as well.⁸⁴ Dry farms mean fewer customers at the local feed store, fewer readers for the newspaper, and fewer people getting a nice dinner in town.

In the present, *Williams*'s particular conflict over the Equus Beds is done,⁸⁵ but the rural-urban divide persists.⁸⁶ One of the long-term ethical dilemmas posed by legislating water use conservation is that it preserves water for the future. But such legislation denies people in the present self-determination—something the Kansas Groundwater Management District Act poetically describes as, “the right of local water users to determine their destiny.”⁸⁷ There

⁸¹ Peter D. Nichols, Leah K. Martinsson & Megan Gutwein, *All We Really Need to Know We Learned in Kindergarten: Share Everything (Agricultural Water Sharing to Meet Increasing Municipal Water Demands)*, 27 COLO. NAT. RES. ENERGY & ENV'T. L. REV. 197, 200 (2016).

⁸² *Id.*; see Kate Mailliard, *Expanding Pockets, Shrinking Farms: How the Buy and Dry Method Created Vulnerability in the Farming Labor Market*, 22 U. DENV. WATER L. REV. 723 (2019); Liz Baker, *In Colorado, Farmers and Cities Battle Over Water Rights*, KAN. PUB. RADIO (May 28, 2016, 5:07 PM), <https://www.npr.org/2016/05/28/479866079/colorado-towns-farmers-battle-over-water-rights> [<https://perma.cc/Y3XD-E4BZ>]; but see Ryan McLane & John Dingess, *The Role of Temporary Changes of Water Rights in Colorado*, 17 U. DENV. WATER L. REV. 293, 294–95 (2014).

⁸³ Nichols et al., *supra* note 81, at 197.

⁸⁴ Baker, *supra* note 82.

⁸⁵ The City of Wichita now gets much of its water from Cheney Reservoir, built in the 1960s. *History, Wichita Project*, BUREAU OF RECLAMATION, <https://www.usbr.gov/projects/index.php?id=403> [<https://perma.cc/HEK8-9YSC>]. The rest of Wichita's water still comes from the city's municipal wells in the Equus Beds. Amy Bickel, *Data Indicates that Water Levels Up at Equus Beds Aquifer, Other Sites, but Ogallala still Ails*, HUTCHINSON NEWS (Feb. 15, 2017, 12:01 AM), <https://www.hutchnews.com/news/20170214/data-indicates-that-water-levels-up-at-equus-beds-aquifer-other-sites-but-ogallala-still-ails> [<https://perma.cc/KTY5-BHSD>]. Despite additional water coming from the Cheney Reservoir, another cold war over the Equus Beds began thirty years after the *Williams* decision. After the droughts in the mid-1990s, Wichita began pursuing an Aquifer Storage and Recovery (ASR) Project, in which it could inject excess stormwater from the Arkansas River back into the aquifer. Amy Bickel, *Wichita's Quest for Water During Drought Draws Concerns from Farmers*, HIGH PLAINS J. (July 17, 2018), https://www.hpj.com/ag_news/wichita-s-quest-for-water-during-drought-draws-concerns-from-farmers-others/article_70c02a88-86ab-11e8-ba56-df6b4ae686e2.html [<https://perma.cc/PJ2W-45FH>]. The project was controversial—in large part because of concerns over how it would affect a large salt plume headed toward the Wichita well field. *Id.* There is ongoing litigation over how the ASR project impacts water credits. See Memorandum of Support for Revised Motion for Summary Judgment, In the Matter of the City of Wichita's Phase II Aquifer Storage and Recovery Project in Harvey and Sedgwick Counties, Kansas, Sept. 25, 2019, 2019-09-25_memo-in-support-of-rev-sj-signed.pdf [<https://perma.cc/RA2Z-393E>].

⁸⁶ For a more thorough coverage of the rural-urban divide, see Ann Eisenberg, *The Bundys are Poster Boys for America's Rural/Urban Divide*, L.A. TIMES (Nov. 23, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-eisenberg-bundy-trial-las-vegas-20171123-story.html> [<https://perma.cc/X3YM-TXP3>].

⁸⁷ Kansas Groundwater Management District Act of 1972, ch. 386, § 1, 1972 Kan. Sess. Laws 1416 (codified at KAN. STAT. ANN. § 82a-1020 (West 1972)).

is also the practical reality that water may be preserved for the future, but there may be no one living in rural Kansas to enjoy it. Instead, “it is likely that the groundwater saved and conserved for the future [will] eventually be pumped for municipal use, not irrigation.”⁸⁸

While reading popular accounts on groundwater mining, one sometimes gets a sense of naïve realism.⁸⁹ Naïve realism is the perception that one’s beliefs are objective and that those who disagree are either ignorant or irrational.⁹⁰ For example, in one 2011 *New York Times* op-ed, the author asserted: “The true threat is . . . agriculture as it’s currently practiced on the Great Plains by the farmers themselves The aquifer is being wasted and polluted.”⁹¹ The reality is that farmers are often acutely aware of their irrigation’s costs. As a Kansas farmer noted, “People think that we waste our water out here . . . and we just kind of grin because we work so hard to use that water.”⁹²

Still, city dwellers have a point. Kansas farmers have been traditionally slow to act to prolong depleted water supplies.⁹³ And Kansas government has been slow to stop them.⁹⁴ Without some outside authority, the state risks its

⁸⁸ John C. Peck, *Groundwater Management in the High Plains Aquifer in the USA: Legal Problems and Innovations*, in *THE AGRICULTURAL GROUNDWATER REVOLUTION: OPPORTUNITIES AND THREATS TO DEVELOPMENT* 304 (M. Giordano & K.G. Villholth eds. 2007).

⁸⁹ Bill Conerly, *Water in Abundance, At a Price: Our Grandchildren’s Economy*, *FORBES* (Jan. 18, 2020, 7:30 AM), <https://www.forbes.com/sites/billconerly/2020/01/18/water-in-abundance-at-a-price-our-grandchildrens-economy/#26e51ef41a68> [<https://perma.cc/EPD8-T9D3>]; Brad Plumer, *How Long Before the Great Plains Runs Out of Water?*, *WASH. POST* (Sept. 12, 2012, 9:20 AM), <https://www.washingtonpost.com/news/wonk/wp/2013/09/12/how-long-before-the-midwest-runs-out-of-water/> [<https://perma.cc/6PPL-HNGP>]; *contra* Jim Malewitz, *In Drought Ravaged Plains, Efforts to Save a Vital Aquifer*, *PEW CHARITABLE TRS.* (Mar. 18, 2013), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/03/18/in-drought-ravaged-plains-efforts-to-save-a-vital-aquifer> [<https://perma.cc/8WY3-AAP7>]; *see also* Amy Hardberger, *Water is a Girl’s Best Friend: Examining the Water Valuation Dilemma*, 62 *KAN. L. REV.* 893, 928 (“Farmers are often maligned for their water use quantities and frequent wasteful practices; however, when water is diverted to cities, it is for all municipal uses . . .”).

⁹⁰ Leaf Van Bowen, *Naïve Realism*, in *ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY* (Roy F. Baumeister & Kathleen D. Vohs eds., 2007), <https://sk.sagepub.com/reference/socialpsychology/n359.xml> [<https://perma.cc/6G2D-8KNQ>].

⁹¹ Julene Blair, *Running Dry on the Great Plains*, *N.Y. TIMES* (Nov. 30, 2011), https://www.nytimes.com/2011/12/01/opinion/polluting-the-ogallala-aquifer.html?_r=1& [<https://perma.cc/6TU5-S78R>].

⁹² Lindsay Wise, *A Drying Shame: With the Ogallala Aquifer in Peril, the Days of Irrigation for Western Kansas Seem Numbered*, *KAN. CITY STAR* (July 24, 2015, 4:27 PM), <https://www.kansascity.com/news/state/kansas/article28640722.html> [<https://perma.cc/WP6N-8DV5>].

⁹³ Karen Dillon, *Running Out of Water, Running Out of Time*, *Ch. 7*, *KAN. LEADERSHIP CTR. J.* (2018), <https://klcjournal.com/in-dealing-with-the-ogallala-aquifer-western-kansas-is-running-out-of-water-and-time/> [<https://perma.cc/55DV-NUA>] (“Critics, including environmentalists, say that the odds against Brownback’s control-your-own-destiny path to conserving the aquifer are just too daunting Unless irrigators are given clear incentives or punishments to adjust their behavior, very little will change, other activists say.”).

⁹⁴ In the time since the passage of KWAA, parts of the Ogallala Aquifer have declined over 60% from its original saturation. DONALD O. WHITTEMORE, JAMES J. BUTLER, JR. & B. BROWNIE

groundwater becoming a victim to the tragedy of the commons.⁹⁵

In his 1960 report on Kansas water law, Professor Earl Shurtz commented on the “neglect of interrelatedness of economic activities [in] conservation policies.”⁹⁶ While Shurtz was referring more to the need to create conservation programs that considered activities like oil and gas,⁹⁷ the sentiment can also apply here. When developing a conservation policy, some of the first questions should be (1) what are we saving water for and (2) for whom are we saving it? If the ultimate policy decision is that the water must be conserved for municipal or nonagricultural uses, then so be it. But that decision needs to come with recognition that there are ethical implications of telling rural residents to stop irrigating or telling residents to move away from their communities to solve their problems.⁹⁸

As a final take away on the rural-urban policy dynamic in *Williams*, this divide plays directly into the jurisprudence underpinning the arguments. As scholar Ann Eisenberg has written,

Property rights are a key symbol of the urban/rural divide. According to social science and legal scholarship, rural residents are more likely to associate land with absolute ownership Urban residents, on the other hand, are more used to obeying rules that limit property freedoms to make city life more livable for all.⁹⁹

WILSON, KAN. GEOLOGICAL SURV., STATUS OF THE HIGH PLAINS AQUIFER IN KANSAS 3 (Tech. Series 22, 2018), <https://www.kgs.ku.edu/Publications/Bulletins/TS22/> (showing a map of the decline at Figure 4). As Kansas water law practitioner Dave Stucky has written, “Most places in Kansas are, simply put, over-appropriated.” David Stucky, *How Does the Division of Water Resources Determine Whether to Grant a New Water Right?*, KAN. WATER L. (Aug. 30, 2019), <https://kswaterlaw.com/how-does-the-division-of-water-resources-determine-whether-to-grant-a-new-water-right/> [<https://perma.cc/5XD7-ETG9>].

⁹⁵ See SHURTZ, 1960, *supra* note 47, at 9. (“The inadequacy of our concepts of private property in the allotting of common supplies often leads to greedy scrambles . . .”).

⁹⁶ SHURTZ, 1960, *supra* note 47, at 8; Cf. Karen Dillon, *Running Out of Water, Running Out of Time*, Ch. 4, KAN. LEADERSHIP CTR. J. (2018), <https://klcjournal.com/in-dealing-with-the-ogallala-aquifer-western-kansas-is-running-out-of-water-and-time/> [<https://perma.cc/55DV-NUA>] (“But the situation isn’t only about politics. It’s also about economics, and the consequences can be felt all the way down to the level of the family farm.”).

⁹⁷ SHURTZ, 1960, *supra* note 47, at 8.

⁹⁸ See Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C.L. REV. 189, 212 (2020) (“This line of thinking also raises the question of whether it is ethically objectionable to mandate mobility, or whether the onus is on public entities to provide basic services to existing communities”); see also, Karen Dillon, Kan. Leadership Ctr., *Chapter 1*, in *RUNNING OUT OF WATER, RUNNING OUT OF TIME: DEALING WITH THE OGALLALA AQUIFER IN WESTERN KANSAS* (2018), <https://klcjournal.com/in-dealing-with-the-ogallala-aquifer-western-kansas-is-running-out-of-water-and-time/> [<https://perma.cc/X3Q4-JGPL>] (“Instead of just fighting over who gets to use water, we’re increasingly in conflict over who doesn’t get to use it and who decides that.”).

⁹⁹ Eisenberg, *supra* note 86.

IV. THE WILLIAMS DECISION

Into this litigious and social fray comes Justice Fatzer's *Williams v. City of Wichita* opinion. To set the stage for the intellectual conflict in the split decision, Harold R. Fatzer was a life-long public servant.¹⁰⁰ He grew up in the small town of Fellsberg and after graduating from Kansas State University and Washburn School of Law, he returned home to Edwards County to be the county attorney.¹⁰¹ Eventually, he was appointed the Attorney General of Kansas in 1949 by Republican Governor Frank Carlson.¹⁰² In this role, his office had the dubious obligation of representing the state in *Brown v. Board of Education*.¹⁰³ Governor Fred Hall appointed him to the Kansas Supreme Court in 1956.¹⁰⁴

Justice Alfred Schroeder authored the *Williams*' dissent. Like Fatzer, Schroeder grew up in a small town and later rose to Chief Justice of the Kansas Supreme Court.¹⁰⁵ Also like Fatzer, Schroeder's tenure as Chief Justice was marked by an intense drive to modernize the state's judicial system.¹⁰⁶

And yet, Schroeder was his own man. He grew up in Newton along the Equus Beds¹⁰⁷ and majored in agricultural economics at Kansas State University.¹⁰⁸ From there, he attended Harvard Law.¹⁰⁹ After returning to Harvey County, he was elected Probate Judge in 1946 and then District Court judge of Harvey and McPherson Counties in 1952.¹¹⁰ He successfully ran for the Kansas Supreme Court in 1957—beating out Fatzer's protégé in the state Attorney General's office, Paul Wilson.¹¹¹ Schroeder was a staunchly conservative judge and a farmer at heart. After he retired, he lived at his Greenwood County ranch until his death.¹¹²

The background on these judges is necessary for two reasons. First, both men make appearances in the litigation leading up to *Williams*—Fatzer

¹⁰⁰ See generally Washburn Law Journal Editors, *Dedication*, 7 WASHBURN L.J. 0 (1967).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ LEE, SUNFLOWER JUSTICE, *supra* note 66, at 165; After the United States Supreme Court issued its *Brown* decision, Fatzer wrote to Chief Justice Earl Warren to congratulate him on his opinion. Letter from Harold Fatzer to Chief Justice Earl Warren (May 20, 1954), <https://www.kansasmemory.org/item/211844/page/1> [<https://perma.cc/5PSU-DA3C>]. Fatzer wrote that: “[His] office felt constrained to attempt to sustain the Kansas statute as it had theretofore interpreted by the Kansas Supreme Court.” *Id.*

¹⁰⁴ Washburn Law Journal Editors, *supra* note 100.

¹⁰⁵ *Schroeder Serves Decade as Chief Justice*, 56 J. KAN. B. ASS'N 7 (1987).

¹⁰⁶ *Id.*; *The Hon. Harold R. Fatzer 1910-1989*, 58 J. KAN. B. ASS'N 14 (1989).

¹⁰⁷ *Schroeder Serves Decade as Chief Justice*, *supra* note 105, at 7.

¹⁰⁸ *Alfred Schroeder*, KAN. STATE UNIV, https://www.ageconomics.k-state.edu/alumni-resources/distinguished_alumni/alfred-schroeder/index.html [<https://perma.cc/N5S6-WDL3>].

¹⁰⁹ *Schroeder Serves Decade as Chief Justice*, *supra* note 105, at 7.

¹¹⁰ *Id.*

¹¹¹ *Id.*; Sandra Craig McKenzie, *Paul Wilson: Kansas Lawyer*, 37 U. KAN. L. REV. 1, 22, 53 (1988). Wilson is now better known as one of the most distinguished law professors to ever grace the University of Kansas Law School faculty.

¹¹² See *Schroeder Serves Decade as Chief Justice*, *supra* note 105, at 7; *Former Kansas Chief Justice Dies*, IOLA REG., Sept. 9, 1998, at 2.

defending the Division of Water Resources and Schroeder as a lower court judge.¹¹³ Second, it gives some context on their judicial philosophies. As historian R. Alton Lee has noted about this period of Kansas judicial history:

[H]istorical background is vital not only because it was within this context that judges shaped Kansas law, but also because the political processes involved them directly, as they were nominated by political parties, campaigned for political office, and sometimes participated in partisan activities while on the bench until the mid-twentieth century.¹¹⁴

Justice Fatzner formed his opinion as a former state attorney general and was perhaps more favorable to the interests of urban Kansans, while Justice Schroeder was perhaps more interested in the consequences to the Kansas farmers bearing the brunt of the Act's effects.

A. Fatzner's Majority

The majority asserted that prior courts were simply confused about the nature of groundwater rights.¹¹⁵ As Justice Fatzner wrote, "the confusion . . . in our decisions that has resulted in the application of the common-law rule may be attributed to a lack of understanding of the meaning of the term 'ownership.'"¹¹⁶ Rather than having ownership over the corpus of groundwater—as Kansans had since before the state entered the Union—property owners only had a license to the water.¹¹⁷ Because they only had a license, the state did not need to compensate landowners or provide them notice when those rights could be abridged.¹¹⁸

The court reasoned that it was not possible for landowners to have physical possession of every water molecule under a piece of property. Quoting from a *Corpus Juris Secundum* section, Judge Fatzner wrote, "There can be no ownership in seeping and percolating waters in the absolute sense, because of their wandering and migratory character, unless and until they are reduced to the actual possession...of the person claiming them."¹¹⁹ Justice Fatzner went on to say, "the use of the term 'ownership'...has never meant that the overlying owners had a property or proprietary interest in the corpus of the water itself."¹²⁰

The majority acknowledged that having water rights—unused or otherwise—adds value to the land.¹²¹ Losing those rights completely could be a

¹¹³ *Cities of Hesston & Sedgwick v. Smrha*, 293 P.2d 241, 241 (Kan. 1956).

¹¹⁴ LEE, *SUNFLOWER JUSTICE*, *supra* note 66, at xii.

¹¹⁵ *Williams v. City of Wichita*, 374 P.2d 578, 587 (Kan. 1962).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 588.

¹¹⁸ *Id.* at 595.

¹¹⁹ *Id.* at 588 (quoting 93 C.J.S. *Waters* § 90, p. 765).

¹²⁰ *Id.*

¹²¹ *Id.* at 594.

taking.¹²² Justice Fatzer distinguished the 1945 Act by asserting that the Act did not require surface owners to seek a permit before drilling a well.¹²³ Instead, it merely subjected them to the “hazard of injunction” should they drill and impair some other permit that the state had granted.¹²⁴ Instead of a vested property right, landowners have the privilege of using the state’s water.¹²⁵ And privileges can be taken away.

The court concluded with some language about its neutral role in this litigation saying, “it is not for this court to decide matters of policy, nor indeed, to weigh the beneficial results of any particular legislative policy It is our duty to declare the law as it exists. We are not responsible for its consequences.”¹²⁶ Given that the 1945 Act was the direct result of a socio-political conflict between Wichita and its neighbors, this seems disingenuous. Almost every judicial decision is shaped by policy in some way. Even decisions decided on precedent are ultimately relying on another set of cases that made a policy decision. Nothing about the *Williams* litigation—from the judges penning the decision to the law—was truly neutral.

B. *Schroeder’s Dissent*

Under the majority’s opinion, landowners do not own groundwater because it is impossible to wholly reduce it to actual possession.¹²⁷ So why was Justice Schroeder so incensed to the point of implying the other judges were communists?¹²⁸ Schroeder’s dissent can be broken down into two main critiques. First, he takes issue with majority’s ownership classification for the corpus of water. Second, he thought the historical interplay between the state legislature and the courts showed a prior vested property interest.

1. Theories of Ownership

Before examining Schroeder’s criticism on water ownership, it is necessary to step back and understand general theories of subsurface property. The common law maxim for subsurface ownership is *cuius est solum, eius est usque ad coelum et ad inferos* or “whoever’s is the soil, it is theirs all the way to Heaven and all the way to Hell.”¹²⁹ In other words, if a property owner has ownership in

¹²² *Id.*

¹²³ *Id.* The state now requires landowners seek a permit before drilling a well due to a subsequent KWAA amendment. KAN. STAT. ANN. § 82A-711 (West 1999).

¹²⁴ *Williams*, 374 P.2d at 579; § 82A-711.

¹²⁵ *See id.* at 594–95.

¹²⁶ *Id.* at 594.

¹²⁷ *Id.* at 588.

¹²⁸ *Id.* at 596 (Schroeder, J., dissenting) (“If such *arbitrary* exercise of the *police power* of the state withstands the federal constitutional test of due process, the formula has been found, and the precedent is established, by which all private property within Kansas may be *communized* without cost to the state.”).

¹²⁹ ALISON CLARKE, PRINCIPLES OF PROPERTY LAW 284 n.69 (2020). This sentiment was more mockingly described by William Empson in the 1920s:

Your rights extend under and above your claim
Without bound; you own land in Heaven and Hell;

fee simple, they own everything underneath the surface. That includes gravel, sand,¹³⁰ precious minerals, uranium,¹³¹ and even the void pore spaces in the subspace.¹³²

The discovery of oil and gas threw a proverbial wrench into this concept. One of the early concerns in oil and gas was that other producers could commit subsurface trespass or conversion.¹³³ In other words, producers could drill near a property line and steal hydrocarbons that had previously been underneath the adjacent property.¹³⁴ Hydrocarbons, like water, are migratory, and it can be difficult—if not impossible—to know their exact movements through the subsurface.¹³⁵

To resolve these disputes, state courts adopted one of two variants of the *ad caelum* doctrine. In “ownership in place” states, landowners physically own every hydrocarbon molecule underneath their property.¹³⁶ Once the molecules leave their property, they no longer own them.¹³⁷ In “exclusive right to take” states, property owners own an exclusive license to take any hydrocarbons while the molecules are in the bounds of their property.¹³⁸ But since the property owner cannot physically control the individual molecules, the property owner can only “own” them upon capture.¹³⁹ As a final gloss, jurisdictions following either theory tend to recognize oil and gas leases as granting a *profit a prendre*, or an exclusive right, for the operator to take oil and gas off the property.

In the oil and gas context, while the theories are different, the practical application is usually the same as it is rare to see a landowner totally barred from drilling. That is why scholars like Professor E. Kuntz have said that the difference between the ownership in place and exclusive right to take theories is

Your part of earth's surface and mass the same,
Of all cosmos' volume, and all stars as well.

William Empson, *Legal Fiction*, in IMMORTAL POEMS OF THE ENGLISH LANGUAGE 578 (Oscar Williams ed., 1958).

¹³⁰ Cf. *Wulf v. Shultz*, 508 P.2d 896, 899–900 (1973) (holding that fee simple owners did not bargain away the right to mine limestone and similar argillaceous materials when they signed an oil and gas lease).

¹³¹ *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) (notoriously deciding whether uranium was included in a deed conveyance).

¹³² See Joseph A. Schremmer, *Pore Space Property*, 2021 UTAH L. REV. 1, 14 (2021), for a more thorough explanation of pore-spaces and its ownership.

¹³³ William Lyndon Storey, *Oil and Gas-Deviation of Wells from the Vertical-Liability for Subsurface Trespass*, 16 TEX. L. REV. 543, 545–46 (1938).

¹³⁴ Cf. *id.*

¹³⁵ “Hydrocarbon: An organic chemical compound of hydrogen and carbon, called petroleum. The molecular structure of hydrocarbon compounds varies from the simplest, methane (CH₄), a constituent of natural gas to the very heavy and very complex.” PATRICK H. MARTIN & BRUCE M. MARTIN, WILLIAM & MEYERS, 8 OIL & GAS L. § 482.2 (LexisNexis Matthew Bender 2020).

¹³⁶ E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.4, 58 (1987); BLACK'S LAW DICTIONARY 1215–16 (9th ed. 2009).

¹³⁷ KUNTZ, *supra* note 136, § 2.4 at 58.

¹³⁸ *Id.*

¹³⁹ *Id.*

like describing a checkered pattern.¹⁴⁰ Regardless of if one describes the pattern as black squares on white or white squares on black, the result is the same.¹⁴¹ As such, many states have tempered their theoretical approaches over the years. For example, Texas—the long champion of the ownership in place theory¹⁴²—softened its stance in cases like *Coastal Oil and Gas Corp. v. Garza Energy Trust*.¹⁴³ But none of these developments had happened in 1962, at the time of the *Williams* decision.

Kansas is an ownership in place state.¹⁴⁴ In fact, the Kansas Supreme Court had reaffirmed its commitment to this rule nine months before it issued the *Williams* decision in *Shepard v. John Hancock Mutual Life Insurance Co.*¹⁴⁵ In that case, the court distinguished between royalty interests and mineral interests for the purposes of construing a deed.¹⁴⁶ Royalty interests are a type of personal property interest created by oil and gas leases.¹⁴⁷ In contrast, mineral rights, or subsurface rights, means present real ownership of subsurface hydrocarbons.¹⁴⁸ Justice Fatzer incidentally wrote this opinion.¹⁴⁹

In summary, in 1962, Kansas landowners “owned” every hydrocarbon in the subterranean space of their property. This was true even though hydrocarbons are migratory and property owners could not physically possess every hydrocarbon molecule in the subsurface. In contrast, the *Williams* majority found landowners did not own their groundwater because water is migratory and property owners cannot physically possess every water molecule in the subsurface.¹⁵⁰ Unlike with right to take states with oil disputes, this ownership distinction mattered.

Justice Schroeder took issue with this dichotomy. As he hinted in a dissent he wrote several years after *Williams*, Schroeder perceived the entire subsurface as real property, and he balked at any characterization that limited this.¹⁵¹ If a substance was naturally occurring and underground, it was real property, and the

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Patrick M. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 770, 802–03 (1992).

¹⁴³ *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 4 (Tex. 2008) (finding no trespass for fracing company whose fracing liquids went onto another property). Interestingly enough, Texas has not softened its stance on ownership-in-place ownership of groundwater. See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).

¹⁴⁴ *N. Nat. Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.*, 217 P.3d 966, 974 (Kan. 2009) (quoting *Mobil Oil Corp. v. Kan. Corp. Comm’n*, 608 P.2d 1325 (Kan. 1980)); see *Richards v. Shearer*, 64 P.2d 56 (Kan. 1937).

¹⁴⁵ *Shepard v. John Hancock Mut. Life Ins. Co.*, 368 P.2d 19, 24 (Kan. 1962) (“The term ‘mineral interest’ means an interest in and to oil and gas in and under the land and constitutes present ownership of an interest in real property.”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 23.

¹⁴⁸ *Id.* at 24.

¹⁴⁹ *Id.* at 21.

¹⁵⁰ *Williams v. City of Wichita*, 374 P.2d 578, 604 (Kan. 1962) (Schroeder, J., dissenting).

¹⁵¹ *Mobil Oil Corp. v. Kan. Corp. Comm’n*, 608 P.2d 1325, 1338 (Kan. 1980).

government needed to compensate landowners for taking it away.

With this theory in mind, Schroeder vigorously disagreed with the majority's migratory particle argument. First, he commented that since "water is homogeneous in character," the loss of particular water molecules is irrelevant.¹⁵² If one gallon of water moves to the south of a property line, there is likely another gallon coming into the property in the north.¹⁵³ Schroeder goes on to say that there are other examples for commodities where one does not need actual possession in order to own its corpus.¹⁵⁴ For example, if a farmer deposits wheat to a grain elevator and receives a warehouse receipt in exchange, the farmer has a property right to that grain.¹⁵⁵ It does not matter that the grain is fungible and that the farmer will be unable to withdraw the exact kernels that she deposited.¹⁵⁶

In summary, Justice Schroeder found the majority's characterization of the corpus of water inconsistent with Kansas's other theories of subsurface ownership. In fairness to his position, even if one disagrees with the application of the ownership in place theory to groundwater, it still needs to be addressed due to the theory's ubiquity in Kansas caselaw. For the majority to ignore it makes the exclusion seem purposeful and suggests they knew it was a weakness to their argument.

2. Historical Underpinnings to the Schroeder Dissent

To bolster his criticism of the majority's ownership theory, Justice Schroeder looked to the historical understanding of water rights in Kansas and other western states. After citing to various Kansas cases that had explicitly referred to water rights as real property,¹⁵⁷ he noted that the text of KWAA suggested that the state legislators were aware their actions affected valuable property rights.¹⁵⁸ Particularly damning in Schroeder's view was that the City of Wichita itself acknowledged unused water rights were real property when it acquired additional well sites in 1953.¹⁵⁹ Wichita bought the water rights from a

¹⁵² *Williams*, 374 P.2d at 604.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 604–05.

¹⁵⁷ *E.g.*, *id.* at 596 (citing *State ex rel. Peterson v. Kan. Bd. of Agric.*, 149 P.2d 604 (Kan. 1944)); *id.* at 597 (citing *Arensman v. Kitch*, 165 P.2d 441 (Kan. 1946)); *Clark v. Allaman*, 80 P. 571, 578–79 (Kan. 1905).

¹⁵⁸ *Williams*, 374 P.2d at 599 ("The legislature, however, recognized that *private property rights* to 'unused' water were taken from the common law owners in 82a-702."). It was apparent at the time that at least the Equus Bed water rights were valuable. As one contemporary news article explained,

An equus bed farmer, at least in years past, had no holes in his socks, his bank account didn't need replenishing every Monday, and he thought a 12-bushel corn crop was a flat failure. His land was fertile and his reputation as a good farmer was secure, but essentially the difference between the equus bed farmer and his kind in other parts of Kansas was answered by one word—water.

Gene Byer, 'Equus Farmer' Position Shaken, PARSONS SUN 5 (Sept. 1, 1954).

¹⁵⁹ *Williams*, 374 P.2d at 601.

Harvey County farming couple.¹⁶⁰ In the water rights assignment, the landowners conveyed, “[a]ll of the water bearing sands and water rights now, or at any time . . . in or under said tracts”¹⁶¹ Schroeder took this as Wichita’s apparent lack of faith in KWAA’s constitutionality.¹⁶² Given that landowners in Harvey County had been fighting Wichita’s well field expansion to the point it led to the passage of KWAA, the city cannot be blamed for being cautious contract drafters.

This value-based analysis tracks with more recent Kansas takings decisions. In *Creegan v. State*, landowners challenged the state transportation agency’s violations of a restrictive covenant as a taking.¹⁶³ The Kansas Court of Appeals focused most of its analysis on whether there was a physical taking.¹⁶⁴ The Kansas Supreme Court noted that the real question was whether “the right to a certain amount of legal control . . . was vaporized. This right . . . was one of the ‘sticks’ in the valuable ‘bundles of sticks’ [the plaintiffs] paid for when they acquired their land.”¹⁶⁵

The dissent also highlighted the difference between Kansas and other states that had adopted permitting schemes that included groundwater. Most of the states with regulated prior appropriation schemes were populated by the Desert Land Act of 1877.¹⁶⁶ The Desert Land Act had a water provision that subsequent courts interpreted to mean that the federal government had not given individual property owners ownership over water rights, but delegated ownership to the states.¹⁶⁷ Kansas was not admitted under the Desert Land Act, and property owners got their water rights directly from United States patents.¹⁶⁸ Since Kansas technically never owned the groundwater, the state could not claim ownership a hundred years later like L. Frank Baum’s Ozma telling Dorothy she was the real ruler of Oz all along.¹⁶⁹

Schroeder’s ideas about the Desert Land Act have not been discussed in depth in the legal literature, and to do so here would be beyond the scope of this article. In the thirteen states where the Desert Land Act applies,¹⁷⁰ they all have

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Schroeder also highlighted other sections of the deed as evidence. To avoid rehashing Schroeder’s argument, this article omits every deed section that the justice ably handled there.

¹⁶² *Id.* at 602.

¹⁶³ *Creegan v. State*, 391 P.3d 36, 36 (Kan. 2017).

¹⁶⁴ *Id.* at 43.

¹⁶⁵ *Id.*

¹⁶⁶ *Williams*, 374 P.2d at 603; Desert Land Act of 1877, ch. 107, § 3, 19 Stat. 377 (codified at 43 U.S.C.A. § 323 (West 1921)); see also Memorandum for the Assistant Att’y. Gen., Land & Nat. Res. Div., *Federal “Non-Reserved” Water Rights*, 348 n.38 (1982).

¹⁶⁷ *Williams*, 374 P.2d at 604.

¹⁶⁸ *Id.*

¹⁶⁹ L. FRANK BAUM, *THE MARVELOUS LAND OF OZ* 270 (1904).

¹⁷⁰ California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. Desert Land Act, § 3. But note that not all of property in California was distributed under the Desert Land Act—leading to some of the state’s water law battles.

fairly settled prior appropriation systems. In contrast, Nebraska, Oklahoma, and Texas—which like Kansas, are not covered by the Desert Land Act—have all struggled over water ownership and takings issues.¹⁷¹

The main takeaway from Schroeder's historical discussion is that once something has been established as a property right, it is difficult and potentially unconstitutional to do away with it without compensation.¹⁷² The police power is broad, but Schroeder believed that “[t]here are acts which the federal or state legislature cannot do without exceeding their authority. They may not violate the right of private property.”¹⁷³

As a final note on Justice Schroeder, he remained adamant in his view of groundwater ownership long after his *Williams* dissent. Nearly twenty years after *Williams*, he once again dissented from the majority in the last major constitutional challenge to KWAA, *Arthur Stone (and) Sons v. Gibson*.¹⁷⁴ Even if people disagree with Schroeder's conception of property rights, they must at least admire his consistency. Considering his role in the trial courts for Harvey and McPherson Counties, he essentially opposed the 1945 Act as a judge for over twenty-five years.

V. WAYS FORWARD BEYOND WILLIAMS

Justice Schroeder raised valid concerns about KWAA's constitutionality in his dissent that Kansas courts have never fully dealt with. Notably, in a later case on KWAA's constitutionality, the court noted Schroeder's “vigorous” dissent before extensively quoting from the *Williams* majority—thereby acknowledging the tenor of Schroeder's words without dealing with his argument.¹⁷⁵ So with sixty years of perspective and more water litigation on the horizon as the Ogallala Aquifer dries out,¹⁷⁶ what are actual answers to Schroeder's concerns?

¹⁷¹ *Wasserburger v. Coffee*, 141 N.W.2d 738 (Neb. 1966); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972 (Cal. 1935); *Franco-American Charolaise v. Okla. Water Res. Bd.*, 855 P.2d 568 (Okla. 1990); DAVID H. GETCHES, SANDRA B. ZELLMER & ADELL L. AMOS, *WATER LAW: IN A NUTSHELL* 197 (5th ed. 2015).

¹⁷² *Williams*, 374 P.2d at 609; *but see id.* at 589. The majority bypassed this by clarifying that a property right had never been established.

¹⁷³ *Id.* (citing *Calder v. Bull*, 3 U.S. 386 (1786)).

¹⁷⁴ *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1174 (Kan. 1981) (Schroeder, J., dissenting). Justice Schroeder ended his dissent with a bit of irony:

I am the only present member of the Kansas Supreme Court who participated in that decision. Here, ironically, counsel for the Kansas State Board of Agriculture argues *stare decisis* to uphold Supreme Court decisions since 1962, whereas the identical argument was made by the landowner *Williams* to uphold decisions of the Supreme Court prior to 1962 to affirm the trial court and have the Act declared unconstitutional, when *Williams v. City of Wichita* was decided.

Id. at 1175–76.

¹⁷⁵ *Id.* at 1170 (“The Act . . . was found constitutional . . . in *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962), an exhaustive opinion to which Justice Schroeder, now Chief Justice Schroeder, *vigorously* dissented . . .”) (emphasis added).

¹⁷⁶ The Kansas Division of Water Resources is reviewing a dispute between Groundwater Management District No. 2 and the City of Wichita. *See WICHITA ASR, KAN. DEP'T OF AGRIC.*,

This section provides three potential solutions. As noted in the subsections, none of these theories are sufficient on their own. Rather, a court would likely need to use some hybrid combination in supporting its decision.

A. *Water is different because it is important.*

When I initially posed the question of how water could be distinguished from the rest of the subsurface to other observers of water law, the first response I received was that water was just different and more important than the rest of the underground.¹⁷⁷ This is a valid point. After all, people can still use real property if they pump all the hydrocarbons out. It is much more difficult to develop property without water. And since the state would never be able to afford compensating all of Kansas for their water rights, landowners must go without. Stated more directly, this argument is that the courts must treat water as a license for reasons of public policy.

It would not be the first time that the Kansas Supreme Court has taken a position contrary to the rest of its property law for public policy reasons. In *Jason Oil v. Littler*, the court recently rejected applying the rule against perpetuities to term mineral interests based on public policy grounds.¹⁷⁸ Even though applying the rule against perpetuities would be logically correct, it would upend decades of Kansas oil and gas deals.¹⁷⁹ Given that *Williams* has now been the rule for sixty years, it could be justified in saying public policy merits treating water as a license.

<https://agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/aquifer-storage-and-recovery/wichita-asr> [https://perma.cc/ZK2J-GPWH]. The Audubon of Kansas is also in litigation with the agency over water right enforcement for the Quivira Wildlife Refuge. *Audubon of Kansas Files Suit to Restore Quivira National Wildlife Refuge's Water Rights*, AUDUBON OF KAN. (Jan. 18, 2021), <https://www.audubonofkansas.org/aok-news.cfm?id=218> [https://perma.cc/6QMJ-XEV9]. Another case worth considering is *Garetson Bros. v. Am. Warrior, Inc.*, 435 P.3d 1153 (Kan. 2019), *rev. denied* (Sept. 9, 2019). *Garetson* is notable because it was a water rights enforcement case. Enforcement cases are very rare due to their unpopularity. The Garetsons had a prima facie enforcement case—they had a prior vested water right and there was a clear impairment by a junior water user. *Id.* But they withdrew their initial complaint for years due to local outcry. *Id.* at 1158 (explaining that the Garetsons withdrew their complaint with DWR and refiled it several years later); Ian James & Steve Reilly, *Pumped Beyond Limits, Many U.S. Aquifers in Decline*, DESERT SUN (Dec. 10, 2015, 8:33 AM), <https://www.desertsun.com/story/news/environment/2015/12/10/pumped-beyond-limits-many-us-aquifers-decline/76570380/> [https://perma.cc/4P4K-QMNK] (interviewing the Garetsons and describing how they received “death threats” after filing their complaint). The fact that water users reached the point where they would willingly sue another permit holder should be a warning sign for water law observers.

¹⁷⁷ I posed this question to water law practitioners from Kansas, Oklahoma, and Colorado. These conversations were informal and there was no expectation that I would be citing these people in a published article. Takings caselaw can be politically contentious. As such, I am protecting their privacy.

¹⁷⁸ *Jason Oil Co. v. Littler*, 446 P.3d 1058, 1066 (Kan. 2019) (“[E]xpanding the Rule to void the future interest following the reserved defeasible term mineral interest in this case serves no valid purpose or public policy, but rather it would be a nonsensical act of legal formalism.”).

¹⁷⁹ *Id.*

Still, the fact that the first solution to the *Williams* problem is that the court should declare it so under some sort of judicial fiat is a sign of how the world has changed since 1962. Remember that in Justice Fatzer's majority, he explicitly denied that the court was making a policy decision.¹⁸⁰ While once eschewed, judicial policymaking has slowly become "standard and legitimate."¹⁸¹ Of course, this begs the question of whether judges are the right people to make certain policy decisions.¹⁸² This is the old legal formalism versus legal realism debate among constitutional law scholars.¹⁸³ Unlike in the 1950s, Kansas Supreme Court judges are not elected. That is why resource allocation policy questions are usually put in the hands of the executive and legislative branches.

In this case, the question is a little different from other legal process questions. The Kansas Legislature did make a policy decision to switch to a permitted groundwater system—they just decided not to compensate anyone for it. Is that a policy decision better left to the courts?

Also, any time that people argue that government should do something without compensating property owners because policy outweighs a particular property interest, it is worth returning to Justice Oliver Wendall Holmes's words in *Pennsylvania Coal Co. v. Mahon*:

In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change¹⁸⁴

KWAA was undoubtedly a key step in conserving water for future Kansans, but it was also a political move that shifted the burden of Wichita's water woes onto its neighbors. Assuming, as this article does, that a vested property interest existed before *Williams*, this solution allows the Kansas Supreme Court to declare that interest nonexistent because the justices think it is good policy. And while it may be good policy for water conservation, policies abolishing property on policy alone are arguably a step toward tyranny.¹⁸⁵

¹⁸⁰ *Williams v. City of Wichita*, 374 P.2d 578, 594 (Kan. 1962).

¹⁸¹ Edward L. Rubin & Malcolm M. Feeley, *Velazquez and Beyond: Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 617 (2003) ("This, of course, leaves an important question open. Judicial policy making may be standard and legitimate, but is it a good idea? This question is a crucial one in assessing the value of litigation against the government. Modern litigants very often go to court because they want to obtain a decision that declares new public policy, and they sometimes obtain such a decision whether they wanted it or not.").

¹⁸² See *id.*

¹⁸³ *Id.* at 619–20.

¹⁸⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

¹⁸⁵ *Williams*, 374 P.2d at 596 (Schroeder, J., dissenting) (implying the majority had "communized" private property).

B. Water is different because of its properties.

For the devotees of the ownership in place theory, another solution is to characterize water as different from subsurface minerals because of its properties. The majority in *Williams* notes that water in the Equus Beds flows at about three-acre feet a day.¹⁸⁶ Oil has a higher viscosity than water¹⁸⁷ which means that hydrocarbon particles migrate at a slower rate through the subsurface. In other words, hydrocarbons look more attached to the real property than water particles.

The Equus Beds do have a faster flow rate than other aquifers. For example, the east to west groundwater flow in the Ogallala Aquifer is about a foot per day.¹⁸⁸ That is still probably a faster rate than oil reservoirs. On the other hand, hydrocarbons and groundwater are both fluids that have usually mixed with other minerals and mixtures underground. Both require digging wells to access the resource, albeit considerably deeper in the case of oil.

Another option is to focus on the hydrological connection between surface and groundwater. There are no rivers of hydrocarbons—at least not naturally occurring ones.¹⁸⁹ The *Williams* majority made a passing attempt at this point, but it was more in reference to Schroeder’s Desert Land Act discussion than as a justification for asserting water use is a license and not a property right.¹⁹⁰ Of course, there is also a lot more water on the planet than hydrocarbons.

Likewise, hydrocarbons do exist on the planet’s surface naturally at petroleum seeps like the California Oil Sands.¹⁹¹ Petroleum seeps are usually

¹⁸⁶ *Id.* at 584.

¹⁸⁷ Water has a dynamic viscosity of 0.8949 centipoise at 25 degrees Celsius. *Water*, NAT’L LIBR. OF MED. ¶3.2.11 <https://pubchem.ncbi.nlm.nih.gov/compound/water#section=LogP> [<https://perma.cc/SK9V-ABMC>]. In contrast, Kansas crude oil has a much higher viscosity. See J. P. Everett & Charles F. Weinaug, *Physical Properties of Eastern Kansas Crude Oils*, KAN. GEOLOGICAL SURV. BULL. 114 (1955).

¹⁸⁸ EDWIN D. GUTENTAG, FREDERICK J. HEIMES, NOEL C. KROTHER, RICHARD R. LUCKEY & JOHN B. WEEKS, GEOHYDROLOGY OF THE HIGH PLAINS AQUIFER IN PARTS OF COLORADO, KANSAS, NEBRASKA, NEW MEXICO, OKLAHOMA, SOUTH DAKOTA, TEXAS, AND WYOMING 1 (1984), <https://pubs.usgs.gov/pp/1400b/report.pdf> [<https://perma.cc/SD4C-7T7P>].

¹⁸⁹ Let us just say that “Oil Creek” near where Colonel Drake struck oil earned its name. See LELAND R. JOHNSON, THE HEADWATERS DISTRICT: A HISTORY OF THE PITTSBURGH DISTRICT, U.S. ARMY CORPS OF ENGINEERS 123–24 (1979); DANIEL YERGIN, THE PRIZE 27–29 (1991).

¹⁹⁰ *Williams*, 374 P.2d at 588.

¹⁹¹ ALEJANDRA BADIA & ERICK BURREN, A CITIZEN MONITOR’S GUIDE TO HYDROCARBONS § 2.0 (2010),

https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/384.pdf [<https://perma.cc/67HT-YAM9>]. Humans have known about natural petroleum seeps for thousands of years. For example, the Dead Sea was called the Asphalt Lake by ancient writers and was the site of the “first known war for control of a hydrocarbon deposit” in 312 B.C.E. WILLIAM SMITH, DICTIONARY OF GREEK AND ROMAN GEOGRAPHY 10–11 (1854), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0064:id=palaestina-geo> (“Its common name among the classical authors . . . is “Asphaltitis Lacus” (ἀσφαλτίτις λίμνη), or simply ἡ ἄσφαλτῆτις.”); see Arie Nissenbaum, *Dead Sea Asphalt: Historical Aspects*, 62 AM. ASS’N PET. GEOLOGY BULL. 837 (1978), <https://archives.datapages.com/data/bulletns/1977-79/data/pg/0062/0005/0800/083>

caused by pressure systems in virgin reservoirs that move hydrocarbons to the surface where they mix with surface water.¹⁹² That is why one of the early oil collection methods was to soak rags in rivers and streams.¹⁹³

Also, while surface and groundwater are hydrologically connected, some aquifers are less connected to surface waters than others. The High Plains Aquifer, for example, exhibits poor connectivity to some of the alluvial aquifers.¹⁹⁴ For every water right in the Equus Beds that is fast flowing and connected to the Arkansas River, there is a water right on the High Plains Aquifer which is slow migrating and can be mined for economic benefit.

Neither the migration nor the connectivity theories are particularly satisfying solutions for Schroeder's broader point about historically vested property rights. Both would require a similar assumption that previous Kansas courts had never directly acknowledged real property ownership for water. It would at least bolster the theoretical position that the substances should be treated differently.

C. Water is a property interest, but it can be limited under the government's police power.

A third solution that is similar to the public policy option is to acknowledge that the property interest exists, but assert the interest can be limited under the police power without compensation.¹⁹⁵ The police power is the ability to "direct the activities of persons within [a government's] jurisdiction" in support of the general welfare and the public interest.¹⁹⁶ Local and state governments use the police power regularly on real property for things such as zoning.¹⁹⁷ It is also

7.htm?doi=10.1306%2FC1EA4E5F-16C9-11D7-8645000102C1865D [https://perma.cc/7HNK-LJA6] (actual text noting the first hydrocarbon conflict).

¹⁹² See *What Are Natural Oil Seeps?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/resources/what-are-natural-oil-seeps.html> [https://perma.cc/BQ5K-KZXX].

¹⁹³ Ryan Schnurr, *The Oil Pipelines Putting the Great Lakes at Risk*, BELT MAG. (July 28, 2017), <https://beltmag.com/oil-pipelines-great-lakes-risk/> [https://perma.cc/RT6F-W3DP] ("Along Oil Creek near Titusville, in northwestern Pennsylvania, small amounts of crude would percolate. To collect it, people soaked blankets in pools of oily water, wrung them into a pan, and boiled the mixture down. Sometimes they could skim oil right off the surface of the water.").

¹⁹⁴ P.A. Macfarlane, G. Misgna & R. W. Buddemeier, *Aquifers of the High Plains Region*, KAN. GEOLOGICAL SURV. (2000), <http://www.kgs.ku.edu/HighPlains/atlas/ataqhpr.htm> [https://perma.cc/YE5Y-RZE4].

¹⁹⁵ In fact, at least one source posits the police power was the reasoning behind the majority's decision. GETCHES ET AL., *supra* note 171, at 233 (citing *Williams*, 374 P.2d at 595 for the proposition that, "The police power is extensive enough to justify permit systems and strict regulatory schemes so long as vested property rights are respected.").

¹⁹⁶ William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1057 (1980); see also *Gibbons v. Ogden*, 22 U.S. 1 (1824) (first time coining the idea of the government's police power).

¹⁹⁷ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENV'T AFFS. L. REV. 683, 683 (2001).

commonly used in oil and gas for governmental restrictions requiring permitting or well set back distances.¹⁹⁸ Using the police power in the oil and gas context is not new—there are law review articles about it going back to the 1930s.¹⁹⁹

It is worth noting, however, that Kansas's justification for oil and gas regulation has its roots in a fundamentally different property assumption. Kansas regulates oil and gas as a way to protect correlative rights of reservoir owners.²⁰⁰ In the early years of the oil and gas industry, operators drilled too many wells close together in the same formations.²⁰¹ This practice damaged the formations²⁰² and precipitated price crashes.²⁰³ One of the solutions to this problem was a legal theory called correlative rights. Correlative rights, as described by scholar E. Kuntz, "is simply a term to describe such reciprocal rights and duties of the owners in a common source of supply."²⁰⁴ This concept became "an explicit part of most state conservation regulation, be it pooling, unitization, spacing or proration."²⁰⁵ In other words, the state of Kansas can regulate oil well-spacing as a way to regulate property owners with a common interest in a specific reservoir. It is not designating hydrocarbons as public property or prohibiting existing mineral owners from producing oil and gas.

Taking a step back from oil and gas regulation, the government's police power is broad, but it is not infinite. As Justice Holmes suggested in *Pennsylvania Coal Co.*, limitations or destructions on private property rights based on the police power can reach a point where they would constitute a taking under the Fifth and Fourteenth Amendments.²⁰⁶ Likewise, Brandeis's famous

¹⁹⁸ Joseph R. Dancy & Victoria A. Dancy, *Regulation of the Oil and Gas Industry by the Oklahoma Corporation Commission*, 21 TULSA L. J. 613, 630–31 (1986) ("The power to establish drilling and spacing units is an attribute of the police power inherent in every sovereign state."). See generally 1 SUMMERS OIL AND GAS Ch. 5 (3d ed.) (explaining setback regulations); 1 SUMMERS OIL AND GAS § 4:9 (3d ed.) (explaining the police power's role in early conservation statutes).

¹⁹⁹ See generally Elizabeth C. Davis, *Police Power: Validity of Oil and Gas Conservation Statutes*, 19 CAL. L. REV. 416 (1931) (examining the state of conservation statutes to prevent waste from overproduction).

²⁰⁰ See *Bay Petroleum Corp. v. Corp. Comm'n of Kan.*, 36 F. Supp. 66, 68 (D. Kan. 1940).

²⁰¹ See Owen L. Anderson, *The Evolution of Oil and Gas Conservation Law and the Rise of Unconventional Hydrocarbon Production*, 68 ARK. L. REV. 231, 232–39 (2015).

²⁰² Schremmer, *supra* note 132, at 31.

²⁰³ Tara Kathleen Righetti & Joseph A. Schremmer, *Waste and the Governance of Private and Public Property*, 93 U. COLO. L. REV. (forthcoming 2022) ("Such rapid production far exceeded the capacity of transportation facilities and the demands of the market, causing volatile and, at times, disastrously low prices.").

²⁰⁴ E. Kuntz, *Correlative Rights of Parties Owning Interests in a Common Source of Oil or Gas*, in PROCEEDINGS OF THE SEVENTEENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 225 (Armine Carol Ernst ed., 1966).

²⁰⁵ Bruce M. Kramer, *Basic Conservation Principles and Practices: Historical Perspectives and Basic Definitions*, FED. ONSHORE OIL & GAS POOLING & UNITIZATION 1-1 (ROCKY MT. MIN. L. FOUND. 2006).

²⁰⁶ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); see also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (allowing regulation of brickyards under the police power but noted that an absolute prohibition on the action would be an overreach); but see *Miller v. Schoene*, 276 U.S. 272 (1928) (allowing officials to cut down healthy cedar trees to prevent blight to orchards).

dissent in *Pennsylvania Coal Co.* focused on the government's ability to limit ownership where conduct causes a nuisance.²⁰⁷ The Supreme Court of the United States added to this discussion in cases like *Penn Central Transportation Co. v. City of New York*²⁰⁸ and *Agins v. City of Tiburon*.²⁰⁹

The *Penn Central* Court distinguished between physical and economic takings and found that physical invasions are more likely to be considered takings over interference "from some public program adjusting the benefits and burdens of economic life to promote the common good."²¹⁰ In *Agins*, the court created a two-part test which found land restrictions were not takings if the restriction "substantially advance[d] legitimate state interests," and the property owner was not denied "economically viable use of his land."²¹¹ Economically viable is now typically understood as a restriction that makes the property right valueless.²¹²

Under the *Agins* rule, then, large parts of KWAA such as requiring permits or well monitoring are valid exercises of the police power. It is less clear on whether actually denying permits would be a valid exercise of the police power. One of the goals of KWAA is to deny permits if there is not enough water in a basin or an aquifer to accommodate a new user. If a landowner has a preexisting property right to drill for water, the state can use the police power to make them register before they do it. If the state denies the permit and thus totally restricts the landowner's ability to exercise their unused water rights, then it has effectually made that right valueless.

One suggested solution for this problem is to treat these water rights as part of the larger bundle of sticks. While landowners would lose unused water rights, their properties would probably still be economically viable. There is an example of this in the pleadings for *Williams*. The plaintiff's injury was that his land value dropped from \$300 per acre to \$100 per acre after Wichita started drilling.²¹³ That meant he could not continue to irrigate corn and alfalfa, but the land was still worth something and he could continue to farm it.²¹⁴ Likewise, there are no investment expectation damages from denying a permit for unexercised water rights.

²⁰⁷ *Pa. Coal Co.*, 260 U.S. at 417 (Brandeis, J., dissenting); see also Robert M. Washburn, *Land Use Control, the Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162, 181 (1993).

²⁰⁸ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

²⁰⁹ *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²¹⁰ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

²¹¹ *Agins*, 447 U.S. at 260.

²¹² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) ("When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

²¹³ *Williams v. City of Wichita*, 374 P.2d 578, 583 (Kan. 1962).

²¹⁴ *Id.*

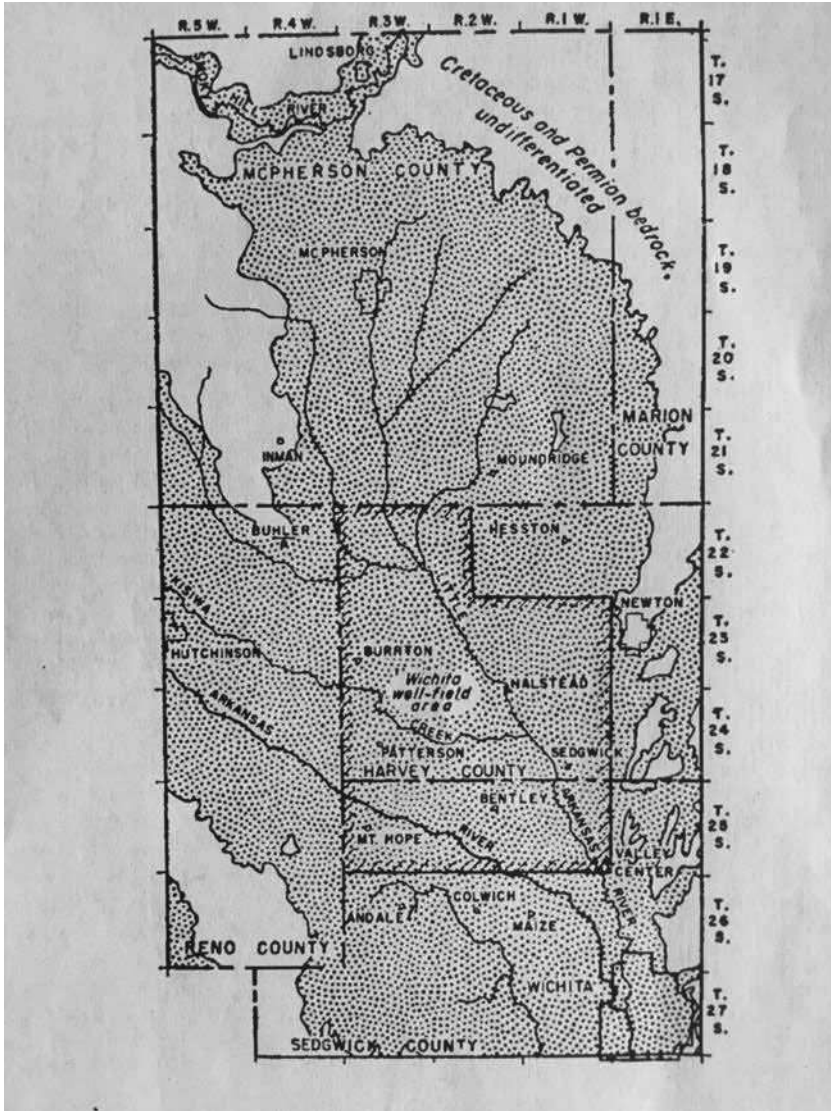
VI. CONCLUSION

Sixty years ago, the Kansas Supreme Court threw out the rule it had been using for groundwater and adopted a new one. In the time since *Williams*, some things have changed, but many others have not. Irrigators are still irritated by state actions they perceive as takings. Urban Kansans keep using water without questioning where it is coming from. And drop by drop, the groundwater in many of the state's aquifers is drying up.

If there is one lesson to take away from the historical and social background of *Williams*, it is that the state's regulation of water rights came out of a rural-urban divide going back to the 1930s. That rural-urban divide did not just shape the legislation, but it also shaped the jurisprudence of the judges writing the opinions.

As climate change and groundwater mining mean a shrinking amount of water to go around, it seems more litigation over it is inevitable. So, the next time that this issue makes it up to the state's highest court, let it be a chance to finally put *Williams'* inconsistencies to bed—if only because courts in other states are watching.

Appendix A: Map of the Equus Beds included in *Williams v. City of Wichita*²¹⁵



²¹⁵ *Id.* at 592.

INCLUDING, BUT NOT LIMITED TO, PERSONAL INJURY,
DISABILITY AND DEATH: THE PROBLEMS OF UNIVERSITY
LIABILITY WAIVERS FOR COVID-19 PROTECTIONS

By: Kaitlyn Filip* & Kat Albrecht**

I. INTRODUCTION

On September 8, 2020, Graduate Student Instructors (“GSIs”) at the University of Michigan began what would be the longest strike in the forty-five-year history of the Graduate Employees’ Organization (“GEO”).¹ At the beginning of the 2020 academic year, hundreds of graduate instructors refused to teach.² They demanded the right to work remotely during the COVID-19 pandemic, demanded increased COVID-19 testing and contact tracing, and made additional demands around program milestones, financial support, and defunding the campus police.³ The eight-day strike was extremely disruptive to the workings of the university because graduate students are involved in teaching 3,500 of the college’s courses.⁴ The strikers were joined by research assistants, campus dining workers, and unionized construction workers and truck drivers who refused to work on campus during the strike.⁵ They also

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¹ See *History*, GRADUATE EMPS.’ ORG., <https://www.geo3550.org/about/history/> [<https://perma.cc/NFJ5-ADKF>].

² Lilah Burke, *Close to Open Revolt*, INSIDE HIGHER ED (Sept. 16, 2020, 3:00 AM), <https://www.insidehighered.com/news/2020/09/16/unrest-and-strikes-hit-university-michigan> [<https://perma.cc/T25T-THTE>].

³ *GEO’s Demands for A Safe and Just Pandemic Response for All*, GRADUATE EMPS.’ ORG. (Sept. 4, 2020, 2:34 PM), <https://www.geo3550.org/2020/09/04/geos-demands-for-a-safe-and-just-pandemic-response-for-all/> [<https://perma.cc/J8RG-WGMH>] (listing formal demands made by the GEO to University administration preceding the strike action).

⁴ Burke, *supra* note 2.

⁵ *Id.*

received support of over 700 faculty members⁶, 1,300 scholars⁷ and United States Representative Rashida Tlaib.⁸

Michigan's COVID-19 response was the subject of copious criticism and protest before the strike began.⁹ Students and faculty noted that the University of Michigan's testing program was deficient.¹⁰ There was limited testing of residence hall and Greek life students when they arrived on campus; the voluntary testing program capped at 3,000 tests a week for a school of over 48,000 students and thousands of additional faculty and staff.¹¹ The University also claimed that instructors were not being coerced into working in person, but would not write a policy to guarantee the right to remote work.¹² Graduate students felt coerced and misled in having to make decisions about in-person teaching in the early summer of 2020 when community spread was lower.¹³ Financial strain disproportionately affects low-wage instructors like graduate students who felt pressured to teach the twenty-five to thirty percent of Michigan courses being offered in person.¹⁴ Finally, Michigan was criticized for not being

⁶ *Faculty Letter Supporting GEO Strike*, GOOGLE DOCS (Sept. 10, 2020), https://docs.google.com/document/d/1YtYuQ2keYhrWU6kAn2D3anAfG40U0dwmIeI_MxTKFg/edit [<https://perma.cc/YUL3-2EJC>] (showing the Google Doc where faculty signatures in support of the GEO strike are displayed. According to the document, signers had to fill out a Google Form at <https://forms.gle/ioVrUYHHNHpJ2PaD9> to sign the letter. At the time of last access, there were 712 signatures on this form).

⁷ *Scholars Support GEO Strike*, GOOGLE DOCS (Sept. 16, 2020), https://docs.google.com/document/u/2/d/e/2PACX-1vT65fXj_K2F793vC1K-VY1TG-bWUkyZsSBS4td3JMZV6Zzbq3W4JyIXc5Tq7T31E8BTDGyWiD0Nbp/pub?fbclid=IwAR0K3q68cOdXW8mQcAA0Uk5Us2t_GNk1ZrEpl7uCl-0leQuHigSjK5xWmpU [<https://perma.cc/Y6SK-LA4G>] (showing the Google Doc where scholars' signatures in support of the GEO strike are displayed. Scholars here are distinguishable from faculty in that they can be scholars affiliated with places other than the University of Michigan. According to the document, signers had to fill out a Google Form at https://docs.google.com/forms/d/1Kez3txXS-Kq5CCF432F6sYx8MMNQ_MP4wnPrqDm4q7s/closedform#responses to sign the letter. At the time of last access, there were 1,307 signatures on this form).

⁸ See Rashida Tlaib (@RashidaTlaib), TWITTER (Sept. 14, 2020, 5:42 PM), <https://twitter.com/rashidatlaib/status/1305638066401546247> [<https://perma.cc/V647-EPVV>] (showing Representative Rashida Tlaib's retweet of a news article about the GEO strike with the comment, "Union-busting via the courts is unbecoming of a leading public institution with a rich history of labor organizing. This is shameful. I stand with @geo3550 [the official Twitter account of GEO] and the mass student, faculty, & staff movement to demand safe working and living environments at U-M. #StrikeForSafeCampus").

⁹ See Lilah Burke, *Consultation Theater*, INSIDE HIGHER ED (Sept. 4, 2020), https://www.insidehighered.com/news/2020/09/04/university-michigan-faculty-say-administration-has-not-been-transparent?_gl=1*3rb5z3*_ga*MTUyNTUyMDUwNS4xNjMwMzYyMzM0*_ga_F07KT3P0SW*MTYzMTk5MmMTUwN4yLjAuMTYzMTk5MTU1MS4w [<https://perma.cc/ZP4G-FBB9>].

¹⁰ *Id.*

¹¹ Burke, *supra* note 2; *Facts & Figures*, UNIV. OF MICH. (July 2021), <https://umich.edu/facts-figures/> [<https://perma.cc/7H8M-XPKM>].

¹² Burke, *supra* note 2.

¹³ *Id.*

¹⁴ Martin Slagter, *From COVID Testing to Cops, University of Michigan Graduate Students Explain Why They're Striking*, MLIVE (Sept. 8, 2020, 3:57 PM), <https://www.mlive.com/news/ann->

transparent with models of COVID-19 risks and estimates, declining to share data by claiming the data was not reliable, and not representing the concerns of faculty in the reopening plan.¹⁵

The strike was a risky move by GEO because public employee strikes in Michigan are illegal¹⁶ and the GEO's contract with the University of Michigan has a no-strike clause.¹⁷ The University has no legal obligation to continue to pay striking workers, exacerbating potential financial precarity.¹⁸ In response to the strike, the University of Michigan filed a complaint in Washtenaw County's 22nd Circuit Court alleging that the GSIs were in violation of both the Michigan Public Employment Relations Act and the GEO collective bargaining agreement. The University of Michigan asked the court to order striking members back to work via temporary restraining orders and preliminary injunctions.¹⁹ The strike continued until September 16, 2020, when GEO members voted 1,074 yea and 239 nay with sixty-six abstentions to accept the University of Michigan's bargaining offer. The accepted proposal created a stronger and more transparent COVID-19 testing program, enabled graduate students to appeal any decision requiring them to work on campus, and made improvements to proposed childcare subsidies.²⁰ Also on September 16, 2020, a faculty senate vote of no-confidence in University of Michigan's President Mark Schlissel narrowly passed 957 yea and 953 nay with 184 abstentions.²¹

arbor/2020/09/from-covid-testing-to-cops-university-of-michigan-graduate-students-explain-why-theyre-striking.html [https://perma.cc/7X6L-8VW4].

¹⁵ Burke, *supra* note 2.

¹⁶ MICH. COMP. LAWS ANN. § 423.202 (West 1947).

¹⁷ *GEO-UM Contract 2020-2023*, GRADUATE EMP'S. ORG., <https://www.geo3550.org/rights-benefits/our-contract/> [https://perma.cc/J5KL-KH9E] ("The Union, through its officials, will not cause, instigate, support or encourage, nor shall any Employee take part in, any concerted action against or any concerted interference with the operations of the University, such as the failure to report for duty, the absence from one's position, the stoppage of work, or the failure, in whole or part, to fully, faithfully, and properly perform the duties of employment."); see also James David Dickson, *UM Grad Student Employees Vote to Strike Starting Tuesday*, DETROIT NEWS (Sept. 7, 2020, 12:13 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/09/07/um-grad-student-employees-strike/5738469002/> [https://perma.cc/5B4R-Z6PD].

¹⁸ See *The Right to Strike*, NAT'L LAB. RELS. BD., <https://www.nrlb.gov/strikes> [https://perma.cc/QV6D-56HT] (explaining that backpay is possible for a successful strike but not guaranteed).

¹⁹ Leah Graham, Barbara Collins, Emma Stein & Liat Weinstein, *University of Michigan Asks Court to Issue Injunction to Halt Graduate Student Strike*, MICH. DAILY (Sept. 14, 2020), <https://www.michigandaily.com/section/administration/university-asks-court-issue-injunction-end-graduate-students-ongoing-strike> [https://perma.cc/6BJ9-CBJU]; Martin Slagter, *Full Complaint Details University of Michigan's Battle with Graduate Employees on Strike*, MLIVE (Sept. 15, 2020, 12:19 PM), <https://www.mlive.com/news/ann-arbor/2020/09/full-complaint-details-university-of-michigans-battle-with-graduate-employees-on-strike.html> [https://perma.cc/PE3U-5RBY].

²⁰ Rick Fitzgerald, *GEO Votes to Accept University's Offer, End Strike*, UNIV. REC. (Sept. 17, 2020, 4:39 PM), <https://record.umich.edu/articles/geo-votes-to-accept-u-m-offer-end-strike/> [https://perma.cc/T2HD-GGV9].

²¹ James Iseler, *Faculty Senate Reverses Schlissel No-Confidence Vote Finding*, UNIV. REC. (Sept. 19, 2020), <https://record.umich.edu/articles/faculty-senate-reverses-schlissel-no-confidence-vote->

The graduate workers at the University of Michigan are not the only graduate students fighting for expanded protections in light of the COVID-19 pandemic. Graduate students at Brown University won emergency funds for COVID-19 relief and those at the University of Illinois at Chicago won mental health counselling and expanded paid sick leave.²² Despite these victories, graduate student workers at some schools continue to feel forced to teach classes in person and uncertain about the existence of university policies to keep them safe.²³

Graduate students are not alone in encountering potentially unsafe working conditions. Nor are they alone in encountering what the bulk of this paper addresses: liability waivers and unclear data on COVID-19 transmission within the workplace. However, graduate students are in a legally unique situation. Although their unions have had success, they are not formally recognized by the National Labor Relations Board (“NLRB”) and are not technically considered employees.²⁴ As such, graduate students make a uniquely good case study for digging into the problems of workplace safety and guaranteed remote work during the COVID-19 pandemic. This paper analyzes employer liability during a pandemic—including the information that employers share—to look at worker protections both generally and through the lens of our specific case study.

The paper proceeds as follows. Part II looks at potential liability for companies during COVID-19 and how that liability might be waived. This paper concludes that the risk for companies without liability waivers is relatively low and that the waivers themselves are uniquely unenforceable. Part III looks at this liability scenario within the employment framework. This paper ultimately concludes that there is no additional liability risk for employers and that the waivers are likely less enforceable in the employment context. In Part IV, this paper takes a closer look at university liability waivers and data portals to

finding/ [<https://perma.cc/R4LC-H7FK>]. A faculty senate vote of no confidence is a means by which a university faculty can express opposition to the administration or an individual within the administration at a university. However, scholars report that such votes are larger symbolic or ineffective, more often serving to damage the relationship between the faculty and administration further. See generally Joseph Petrick, *No Confidence in No-Confidence Votes*, 93 *ACADEME* 52, 52 (2007) (describing no confidence votes as ineffective and offering an alternative process).

²² Danielle Douglas-Gabriel, *It's Emotionally Exhausting': Grad Student Workers Feel the Stress of the Pandemic*, *WASH. POST* (Sept. 3, 2020, 7:00 AM), https://www.washingtonpost.com/local/education/its-emotionally-exhausting-grad-student-workers-feel-the-stress-of-the-pandemic/2020/09/03/87ed6bc6-e7bb-11ea-970a-64c73a1c2392_story.html [<https://perma.cc/R33B-WF24>].

²³ See *id.* (showing comments made by Ohio State PhD student, Colin Sweeney, and others that describe the accommodations for remote teaching as so narrow as to exclude many graduate student workers, leaving them no option to avoid in-person teaching during the COVID-19 pandemic).

²⁴ The NLRB guidance on this issue changes between administrations. On March 15, 2021, the NLRB withdrew a 2019 proposed rule blocking undergraduate and graduate students from formal union recognition. *Jurisdiction-Nonemployee Status of University and College Students Working in Connection with Their Studies*, 84 Fed. Reg. 49691 (proposed Sept. 23, 2019); *Jurisdiction-Nonemployee Status of University and College Students Working in Connection with Their Studies*, 86 Fed. Reg. 14297 (withdrawn Mar. 15, 2021). At the time of this writing, no graduate student unions have been formally recognized.

examine a unique work environment. This offers a more complete picture of the issues at stake. Finally, the paper concludes with a call for increased worker protections for graduate students and workers, both in the pandemic context and beyond.

II. CONTRACTING AROUND COVID-19 LIABILITY GENERALLY

This section first outlines the potential tort liability issues facing companies if a worker or customer contracts COVID-19 in connection with that business. Then, this section discusses the possibility of contracting around that tort liability and the potential defenses to that contracting. Specifically, this section addresses the following questions: whether there is tort liability for businesses when an employee or customer contracts COVID-19, what measures and practices influence that liability, whether that business can contract around that liability via waivers, and what would nullify the enforceability of the liability waivers? This section of the paper concludes, ultimately, that there is very little legal liability for businesses that contribute to worker risk.

In 2020, as government officials and administrative agencies began implementing restrictions and guidelines on the operation of businesses, those businesses began deploying liability waivers en masse to insulate themselves from liability arising from the spread of COVID-19.²⁵ Over a year after the pandemic took hold in the United States' collective imagination and policy, it remains an open question whether businesses need to avail themselves of measures to insulate themselves from liability, and, if they do, whether liability waivers can and do perform the work companies want them to do.

The legal analysis in this section suggests two things. First, there is an incredibly small risk for companies to be held liable for spread of the virus given unique but not unlikely circumstances. Second, a liability waiver offers very limited and specific protections for a company from that risk in court. From this, this paper initially concludes that the legal function of the liability waiver is not to stand up in court, but to dissuade parties from taking legal action against the other party to the contract.

A. *The Questions of Negligence and Causation: At What Point Could There be Liability for Businesses?*

The law is unclear on the question of liability for businesses in the midst of a global pandemic. Although lawsuits have begun—notably on wrongful death of employees and nursing home residents—the pandemic has slowed the already slow process of obtaining relief in wrongful death cases.²⁶ Furthermore, the

²⁵ Mary Kate McCoy, *Liability Waivers For COVID-19 Are Popping Up Everywhere. What Do They Mean?* WISC. PUB. RADIO (June 22, 2020, 5:30 AM), <https://www.wpr.org/liability-waivers-covid-19-are-popping-everywhere-what-do-they-mean> [<https://perma.cc/UQ39-B7RZ>].

²⁶ See, e.g., Tom Polansek, *Tyson Foods Suspends Employees After Lawsuit Alleges Managers Bet on Workers Catching COVID-19*, REUTERS (Nov. 19, 2020, 2:17 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-tyson/tyson-foods-suspends-employees-after-lawsuit-alleges->

differences in public knowledge available between initial lawsuits filed in March 2020 and the timeframe of our liability waiver study represents a radically different landscape vis-a-vis assumption of the risk. As discussed in the introduction, different stages of the pandemic offer different risk parameters. Although potential COVID-19 liability is still an open question, we can analogize how liability works for businesses and corporations generally from cases involving other infectious diseases, such as tuberculosis and HIV, and from guidance from the Centers for Disease Control and Prevention (“CDC”) and the Occupational Safety and Health Administration (“OSHA”).

The standard of care for businesses in dealing with potential COVID-19 liability is cognizable with respect to what a reasonably prudent person would do to minimize the risk of foreseeable future harm.²⁷ This potential duty can include the duty to warn about that foreseeable risk.²⁸ This is not a blanket duty to warn and, at least in the university context, has not been established to require a customized warning.²⁹

In the case of individual liability, an individual who is aware that they have a contagious disease must take the necessary steps to prevent the spread of the disease.³⁰ The degree of diligence required is dependent upon the nature of the disease in question and the likelihood of contagion.³¹ This standard is more complicated for individuals who might not be aware they have the disease, for individuals who are indirectly connected to an infected third party, and for businesses.

Courts become incredibly specific about the nature of the duty in the business context. The Fifth Circuit Court of Appeals, for example, held that the duty to warn exists for a private business insofar as that business is specifically and knowingly subjecting workers to a danger that is relatively rare and location

managers-bet-on-workers-catching-covid-19-idUSKBN27Z2ZF [https://perma.cc/2B5D-PAW W]; see, e.g., Complaint, *Evans v. Walmart, Inc.*, No. 2020L003938 (Cir. Ct. Cook Cnty., Apr. 6, 2020) (receiving multiple continuances for COVID-19 related reasons); see Greg Land & Amanda Bronstad, *Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle*, LAW.COM (July 30, 2020, 5:37 PM), <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/> (last visited Sept. 26, 2021).

²⁷ *Randolph v. Ariz. Bd. of Regents*, 505 P.2d 559, 561 (Ariz. Ct. App. 1973) (holding that the University did not have an affirmative duty to customize warnings on infectious diseases where, here, the illness in question would disproportionately impact the black plaintiff).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Mussivand v. David*, 544 N.E.2d 265, 269 (Ohio 1989) (articulating this as the general standard of care in a case where a man with venereal disease had unprotected sex with a woman who then had unprotected sex with her husband); *Earle v. Kuklo*, 98 A.2d 107, 109 (N.J. Super. Ct. App. Div. 1953) (holding that a landlord who knowingly rents property to tenants, that caused them to be exposed to tuberculosis, is liable for the tenants’ contraction of the disease); *Skilling v. Allen*, 173 N.W. 663, 663–64 (Minn. 1919) (establishing that a physician has a duty to report a child’s scarlet fever diagnosis to public health authorities as well as to that child’s parents who have a risk of contracting the disease due to their relationship to the child).

³¹ *Earle*, 98 A.2d at 109.

specific.³² The duty to warn in the business context is incredibly narrow despite the greater knowledge available to businesses compared to the individuals who interact with them.

Furthermore, in the case of infectious diseases, the causation issue is a massive challenge for defendants and is the place where most of the legal analysis within this paper centers. This issue is significantly exacerbated by COVID-19's highly contagious nature coupled with long incubation periods.³³ From a commonsense standpoint, it is incredibly difficult to determine a definitive source of an individual's particular infection. One can ascertain various probabilities based on travel routines, use of personal protective equipment ("PPE") by themselves and others, and known exposure to a person who has tested positive. However, the determination of a definitive source is nearly impossible outside of relatively closed bubbles—for example, prisons and nursing homes—particularly without widespread and coordinated contact tracing.

Establishing that a party is legally responsible for the transmission of a disease requires the plaintiff to establish their damages were possibly caused by the defendant's conduct or negligence.³⁴ The case of airborne respiratory illnesses has historically been distinguishable from asbestos exposure—whereby courts will consider particular sources as factors in the development of a resultant cancer—because courts understand asbestos-related diseases to be the result of cumulative exposure.³⁵ Given the substantially more prevalent nature of COVID-19, it seems likely a plaintiff's burden is even heavier absent a clear closed interpersonal bubble.

The question of liability in the workplace is often a question of industry standards and regulatory recommendations. Courts are generally reticent to supersede industry standards or guidance from regulatory agencies.³⁶ As long as businesses are engaging in precautions consistent with their competitors and those recommended by the CDC, WHO, or OSHA, liability is much more difficult to establish. Of course, it remains an open question of what liability may be at stake in conjunction with the flagrant disregard of regulatory recommendations and common sense.

Furthermore, in the employment context, there exists the question of

³² See *Crim v. Int'l Harvester Co.*, 646 F.2d 161, 164 (5th Cir. 1981).

³³ Betsy J. Grey, *Causal Proof in the Pandemic*, 10 WAKE FOREST L. REV. ONLINE 124, 147 (2020), <http://www.wakeforestlawreview.com/2020/10/causal-proof-in-the-pandemic/> [<https://perma.cc/EDK6-EHQ3>].

³⁴ See, e.g., *Miranda v. Bomel Constr. Co., Inc.*, 115 Cal. Rptr. 3d 538, 545–46 (Cal. Dist. Ct. App. 2010) (establishing that the defendant was entitled to summary judgment because plaintiff's damages were only *possibly* caused by the defendant's negligence).

³⁵ *Id.* at 546 (establishing that a case of Valley Fever potentially caused by the disturbance of soil in California cannot be tied to a specific construction company, unlike in asbestos cases).

³⁶ See, e.g., Michael R. Lied, *Expert May Rely on OSHA Standards and Industry Guidelines to Support Opinion*, A.B.A. (Dec. 17, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-evidence/practice/2020/experts-osha-standards/> (last visited Aug. 30, 2021).

workers' compensation exclusivity. In many jurisdictions, workers' compensation exclusivity stipulates that workers cannot sue their employer for harms if they are receiving workers' compensation for the same offense.³⁷ However, in California, workers' compensation generally does not apply in questions of illness potentially acquired through the workplace unless the job subjects the worker to heightened risk compared to the general public.³⁸ Therefore, employer liability pertaining to the spread of an infectious disease in the workplace is likely not an applicable issue except in the case of a person at heightened risk such as a healthcare worker.³⁹ Additionally, workers' compensation exclusivity would not apply where there is fraudulent concealment.⁴⁰ This becomes a potential issue in cases where employers are in some way concealing the existence of the injury or its relationship to the employer.

Finally, Congress has demonstrated intent to shield companies from liability in COVID-19 related lawsuits.⁴¹ This is in addition to industry-specific calls for legal immunity.⁴² All together, these factors illustrate how much discretion businesses have in determining the conditions of the workplace during COVID-19 and how little recourse individuals may have should those precautions prove to be insufficient.

B. Contracting Around COVID-19 Liability

All but three states allow for the use of liability waivers to contract around some degree of tort liability. The exceptions are Louisiana, Montana, and Virginia; liability waivers are not enforceable at all in these states.⁴³ In other

³⁷ Loretta F. Samenga, *Workers' Compensation: The Exclusivity Doctrine*, 41 LAB. L.J. 13, 13 (1990).

³⁸ *Bethlehem Steel Co. v. Indus. Accident Comm'n*, 21 Cal.2d 742, 743-44 (Cal. Dist. Ct. App. 1943).

³⁹ Here, the question of heightened risk is conceptually sticky. Essential workers who are expected to perform their essential job functions in public (and interacting with a nonzero volume of strangers) are at more risk from their job than the average remote office worker, but states thus far limit workers' compensation to first responders and there have been not yet been any successful challenges to this presumption.

⁴⁰ CAL. LAB. CODE § 3602(b)(2) (Deering 2021).

⁴¹ Natalie Andrews, *Mitch McConnell Wants to Shield Companies from Liability in Coronavirus-Related Suits*, WALL ST. J. (April 29, 2020, 11:12 AM), <https://www.wsj.com/articles/house-delays-return-to-capitol-amid-uncertainty-over-next-round-of-coronavirus-stimulus-11588091849> (reporting that Senate Majority Leader Mitch McConnell told Republicans that he wants to shield companies from COVID-related liability).

⁴² Maura Dolan, Harriet Ryan & Anita Chabria, *Nursing Homes Want to be Held Harmless for Death Toll. Here's Why Newson May Help Them*, L.A. TIMES (April 23, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-04-23/nursing-homes-legal-immunity-coronavirus-deaths> [<https://perma.cc/KP2R-NFNW>].

⁴³ Briana Clark, Cezanne Harrer, Katie Jacobs & Kimberly O'Donnell, *COVID-19 Liability Waivers and Minors – Reopening Considerations*, JD SUPRA (July 25, 2020), <https://www.jdsupra.com/legalnews/covid-19-liability-waivers-and-minors-86945/> [<https://perma.cc/H2PS-G58L>].

states, such as New York, liability waivers may not be enforceable in concert with an employer/employee relationship.⁴⁴ However, there are some instances—including employment relationships and arrangements that are not classified as employer/employee—where the use of liability waivers might successfully prevent litigation.⁴⁵

Before this sub-section examines the enforceability of these waivers, it is worth noting that there are several reasons why a company may want to institute liability waivers even if they are unlikely to be enforced or if they are unlikely to be held liable even without the use of the waiver. First, COVID-19 creates a profoundly uncertain legal situation. Even over a year into the pandemic, case law is thin on COVID-19 specific issues and analogous statutory guidance is non-existent. It makes sense that, given the opportunity, businesses would want to protect themselves from the uncertain prospect of legal liability. This protection comes at the expense of the long-term public interest of public health because of its focus on mitigating tenuous legal potentialities and damages over mitigating and preventing harms that might lead to legal responsibility.

Second, waivers work rhetorically to discourage lawsuits. Contracts, as agreements, do not require judicial intervention to be fulfilled; they only require judicial intervention to be enforced.⁴⁶ Plenty of unenforceable contracts are signed and fulfilled every day either because there is no dispute about their terms or because the disputes do not reach the courts. As the legal system operates in part on the assumption that keeping parties out of court is an efficient solution, liability waivers can have a chilling effect on pending litigation even if the waivers are not enforceable.

1. Contracting Around COVID-19 Liability for Customers

Liability waivers are familiar terrain in the landscape of interaction between businesses and customers. They are a regular feature of any activity that can be seen as remotely dangerous, from yoga classes to skydiving excursions. What is relatively new in the COVID-19 era is the use of liability waivers for protection against legal liability in the infectious disease realm where the activity connected to the waiver is not otherwise dangerous. As a result, the COVID-19 era ushers in the use of liability waivers in businesses that have not historically waived liability for customers: movie theaters, bars and restaurants, and, as we will discuss further, universities.

The law is better equipped to protect customers than other types of non-company constituents. However, there is no reason to believe that the risk for company liability is higher when considering a company's potential duty to

⁴⁴ *Richardson v. Island Harvest, Ltd.*, 89 N.Y.S.3d 92, 93–94 (N.Y. App. Div. 2018) (holding that employers and employees have unequal bargaining positions due to the necessity of employment and the employee's relative lack of understanding and that there exists a public policy interest in preventing employers from contracting around their duty to maintain a safe workplace).

⁴⁵ That possibility has not yet materialized and looks increasingly unlikely.

⁴⁶ Individuals can and do make and fulfill promises that a court might not actually enforce. A roommate agreement is a potentially innocuous example of this: it might not be a contract before the courts, but it might look like one stylistically and behave as one socially.

protect customers versus employees or independent contractors in the case of a highly contagious illness. In fact, the ability to establish causation may be substantially more difficult for temporary visitors compared to more consistent workers.

2. Contracting Around COVID-19 Liability for Workers or Employees

Although this issue will be addressed more fully in the next section as the paper narrows in focus to the university workplace, it is worth flagging some of the unique issues involved in contracting around COVID-19 liability in the workplace here.

Because the COVID-19 pandemic is medically and discursively unique, the law around liability for businesses for their workers is itself also unique. The ways businesses must deal with COVID-19 is not particularly analogous to the ways businesses have addressed other pandemics or public health crises such as HIV, tuberculosis, H1N1, or Valley Fever. HIV, perhaps the closest analogue to the contemporary pandemic, was predominantly an issue of employee privacy.⁴⁷ There is simply not a body of law or scholarship that discusses infectious disease in the workplace.

The predominant issue that comes up when thinking about the use of liability waivers in the employment context during COVID-19 is the question of the exclusive remedy of workers' compensation. As is discussed in the following section, the exclusive workers' compensation remedy precludes certain tort claims from proceeding because they are best handled with the strict liability of workers' compensation.⁴⁸ Employers cannot be held responsible for workers' compensation twice.

C. Defenses to Contract: Unconscionability

This final sub-section discusses the ways a liability waiver might be unenforceable. Defeating a hypothetically enforceable contract would most reasonably be achieved with a claim of unconscionability. Ordinarily, unconscionability is an extraordinarily difficult legal argument. Courts evaluate

⁴⁷ See generally Jana Howard Carey & Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 304 (1987). Public discourse on the HIV epidemic existed in an interesting pocket of employment discrimination law. It was an open question whether an employer could openly discriminate against an employee who was HIV+. The question mixed sexuality discrimination with disability discrimination and predated both the Supreme Court ruling on sexuality discrimination and the 1990 Americans with Disabilities Act ("ADA"). Following the passage of the ADA, HIV positive status is legally protected. There is a resounding lack of case law and legal scholarship on workplace liability for sex workers exposed to HIV during their jobs although pornography companies and sets have historically employed the use of HIV liability waivers as standard clauses within their contracts. P.J. Huffstutter, *See No Evil*, L.A. TIMES (Jan. 12, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-jan-12-tm-porn-story.html> [<https://perma.cc/E9JK-HFHJ>]. There is, unfortunately, a paucity of information available on the handling of HIV in the sex work industry.

⁴⁸ Samenga, *supra* note 37, at 13.

contracts for both procedural and substantive unconscionability.⁴⁹ Substantive unconscionability refers to the actual terms of the contract and procedural unconscionability references the procedures taken when entering into the contract.⁵⁰ In evaluating procedural unconscionability, courts consider bargaining disparity between parties, the contesting party's ability to understand the terms of the contract, prior course of dealing between the parties, and the contesting party's lack of meaningful alternatives.⁵¹ In evaluating for substantive unconscionability, courts look to the language of the contract for inordinate one-sidedness and unfair surprise.⁵²

Frequently, courts will find that a liability waiver is not procedurally unconscionable when the person signing the waiver is signing to engage in an activity that is known to be dangerous.⁵³ For example, a waiver signed by a customer immediately prior to skydiving—a dangerous activity—is not procedurally unconscionable and has become industry standard.⁵⁴

On some occasions, liability waivers for customers have been found to be unconscionable, and thus unenforceable, based on unequal bargaining power that created a “substantial opportunity for abuse.”⁵⁵ In *Ash*, a New York court declined to enforce a liability waiver between a public dental clinic and its patients because such waivers created a fundamentally inequitable system for lower income dental patients whereby care would be governed by different standards.⁵⁶

Some states operate under the assumption that employer and employee relationships are unique and that there is a public interest reason to not enforce liability waivers. New York courts, for example, tend to not enforce such liability waivers.⁵⁷ Employees require employment, they lack meaningful alternatives, they are less likely to understand liability waivers, and there is public interest in not contracting away the employer's duty to ensure safe work environments.⁵⁸

Offering a defense to contract may require more resources from a party, in time and court costs, than not doing so. However, that does not mean, as this paper has argued, that these contracts will not be de facto fulfilled. A contract

⁴⁹ Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

⁵⁰ *Id.*

⁵¹ See, e.g., *Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co.*, 408 N.E.2d 403, 410 (Ill. App. Ct. 1980) (articulating Illinois rules for evaluating procedural unconscionability in the relationship between a buyer and a seller).

⁵² See, e.g., *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 267 (Ill. 2006).

⁵³ See, e.g., *Cahalane v. Skydive Cape Cod, Inc.*, No. 134251, 2016 Mass. Super. LEXIS 189, at *16 (Mass. Dist. Ct., July 20, 2016).

⁵⁴ *Id.*

⁵⁵ *Ash v. N.Y. Univ. Dental Ctr.*, 564 N.Y.S.2d 308, 311–12 (N.Y. App. Div. 1990).

⁵⁶ *Id.* at 312.

⁵⁷ See *Johnston v. Fargo*, 77 N.E. 388 (N.Y. 1906); see *Richardson v. Island Harvest, Ltd.*, 89 N.Y.S.3d 92 (N.Y. App. Div. 2018).

⁵⁸ *Johnston*, 77 N.E. at 390; *Richardson*, 89 N.Y.S.3d at 94.

does not have to be judicially enforceable to have an impact on legal proceedings. The next section of this paper considers some of the stakes of that legal reality and what it means to work under employer-controlled conditions with a presumption against legal recourse.

III. THE STAKES OF CONTRACTING AROUND COVID-19 LIABILITY IN THE WORKPLACE

Although the previous section includes some introductory material on the legal questions around COVID-19 liability in the workplace, this section offers a more comprehensive account. This paper looks to the bigger picture at how contracting works in the United States' workplace with particular attention to how employment contracts can and should be modified for employees, how they function under collective bargaining conditions, and what is at stake for independent contractors.

Each of these three subsections analyzes a different method of whether businesses can be held liable for exposure. Or, at least, the subsections analyze how each legally recognized category of work offers a different level of protection for the worker with respect to the terms of their contracts.

The occurrence of a global pandemic represents substantial changes in employment conditions. For healthcare workers, the pandemic has represented a sizable shift in the nature and burden of the job, including overwhelming working conditions that spill over into a worker's personal life.⁵⁹ For workers who have been able to work from home during the pandemic, the pandemic has represented a sizable shift in terms of hours, responsibilities, and resources.⁶⁰

⁵⁹ Mehrdad Eftekhari Ardebili, Morteza Naserbakht, Colleen Bernstein, Farshid Alazmani-Noodeh, Hamideh Hakimi & Hadi Ranjbar, *Healthcare Providers Experience of Working During the COVID-19 Pandemic: A Qualitative Study*, 49 AM. J. INFECT. CONTROL 547, 550–51 (2020); Katie Pearce, *COVID-19 Ushers in Decades of Change for Nursing Profession*, JOHNS HOPKINS UNIV. HUB (Oct. 19, 2020), <https://hub.jhu.edu/2020/10/19/nursing-changes-covid-19/> [<https://perma.cc/L37Z-Z8V6>].

⁶⁰ See Kathryn Vasel, *Here's How the Pandemic Has Changed Work Forever*, CNN BUS. (Dec. 21, 2020, 3:41 PM), <https://www.cnn.com/2020/12/21/success/job-change-remote-work-pandemic/index.html> [<https://perma.cc/JNP3-3225>]; see also Derek Thompson, *The Workforce is About to Change Dramatically*, ATLANTIC (Aug. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/just-small-shift-remote-work-could-change-everything/614980/> [<https://perma.cc/B2NE-PLN7>] (focusing on changes to the US workplace, largely focusing on office workers and issues related to remote work); Anne Helen Petersen, *You're Still Not Working From Home*, CULTURE STUDY (Oct. 11, 2020), <https://annehelen.substack.com/p/youre-still-not-working-from-home> [<https://perma.cc/3MHL-BNDR>] (focusing on how the cultural stress of the pandemic and the lack of real material support fundamentally alter a remote worker's orientation to work). Most at issue in the conversation about remote work is how the compensation structure does or does not accommodate the idea that the remote worker is functionally, when working from their home, funding the usual overhead of an office space (rent, electricity, heating and cooling, internet), but also in how oversight changes with a shift from physical shared spaces to anxiety over remote worker productivity and, in some cases, surveillance. Bobby Allyn, *Your Boss is Watching You: Work-From-Home Boom Leads to More Surveillance*, NAT'L PUB. RADIO (May 13, 2020, 5:00 AM), <https://www.npr.org/2020/05/13/854014403/your-boss-is-watching-you-work-from-home->

For essential workers who have continued to work in person, the pandemic has dramatically increased the job's level of danger given the increased potential exposure.⁶¹

As this paper will discuss, education workers work within a hybrid model. Educators working in both kindergarten through twelfth grade ("K-12") and university environments have inhabited the space between fully remote and fully in-person, often switching back and forth and sometimes with minimal notice.⁶² As the classroom experience remains ambiguous, so too does the research experience for graduate students and faculty. The nature of academic work is intensely bifurcated during a pandemic. Although conditions have broadly changed for all disciplines, academics in science, technology, engineering, and mathematics ("STEM") tend toward engaging in the most public-facing work. Lab environments are more difficult, if not impossible, to replicate remotely. As is discussed in the next section, this broad differentiation makes the question of graduate students as workers increasingly difficult; academics look even less like legally recognizable workers amid a pandemic.

Even beyond the responsibilities and roles of academics, universities, and, to some extent, K-12 schools, are incredibly varied environments. Universities house a wide variety of workers, including academics who have long done much of their non-teaching work remotely, administrators, residence and food service staff who maintain public-facing operations, and janitorial and security staff who continue to work in person even if universities are closed. Universities house a wide variety of pandemic-era work.

Graduate students typically tend to float between essential and non-essential categories of workers. Across and among institutions, there lacks standardization of whether graduate students will be responsible for teaching and performing other responsibilities in person.⁶³ This can remain ambiguous at

boom-leads-to-more-surveillance [https://perma.cc/ME6T-VLBW].

⁶¹ Jimmy O'Donnell, *Essential Workers During COVID-19: At Risk and Lacking Union Representation*, BROOKINGS (Sept. 3, 2020), <https://www.brookings.edu/blog/up-front/2020/09/03/essential-workers-during-covid-19-at-risk-and-lacking-union-representation/> [https://perma.cc/CQ4L-P3KT]; Clare Hammonds, Jasmine Kerrissey & Donald Tomaskovic-Devey, *Stressed, Unsafe, and Insecure: Essential Workers Need a New, New Deal*, UNIV. OF MASS. AMHERST (June 5, 2020), <https://www.umass.edu/employmentequity/stressed-unsafe-and-insecure-essential-workers-need-new-new-deal> [https://perma.cc/6492-DLJL].

⁶² Emma García, Elaine Weiss & Ivey Welshans, *What Teaching is Like During the Pandemic—and a Reminder that Listening to Teachers is Critical to Solving the Challenges the Coronavirus Has Brought to Public Education*, ECON. POL'Y INST. (Oct. 7, 2020, 1:54 PM), <https://www.epi.org/blog/what-teaching-is-like-during-the-pandemic-and-a-reminder-that-listening-to-teachers-is-critical-to-solving-the-challenges-the-coronavirus-has-brought-to-public-education/> [https://perma.cc/B8JW-E63L]; Michelle D. Miller, *Going Online in a Hurry: What to Do and Where to Start*, CHRON. OF HIGHER EDUC. (Mar. 9, 2020), <https://www.chronicle.com/article/going-online-in-a-hurry-what-to-do-and-where-to-start/> [https://perma.cc/KU8X-VSB4]; Kevin Gannon, *How to Make Your Online Pivot Less Brutal*, CHRON. OF HIGHER EDUC. (Mar. 12, 2020), <https://www.chronicle.com/article/how-to-make-your-online-pivot-less-brutal/> [https://perma.cc/QFK4-KYFW].

⁶³ Different graduate students may have different responsibilities including STEM student

the beginning of each academic term.

By and large, changes in working conditions are largely not a legal question. The differences across departments and institutions—and from year-to-year in many programs—is a difficult legal question: are graduate student workers cognizable as a single class, despite their substantial differences? The pandemic has also caused substantial changes to the graduate student working environment making some of these differences more apparent and eliminating other differences. However, the effect is broadly the same: employers have broad discretion in determining their employees' job duties.

This section examines whether workers have any rights with respect to their employment circumstances and whether they have any additional or modified rights due to COVID-19. Then it examines whether liability waivers may alter those rights and conditions. From this analysis, the section concludes that the rights landscape for workers during COVID-19 is especially bleak and that, although the liability waivers may not themselves be enforceable, they do not need to be enforceable for workers to have limited rights and remedies from increased exposure.

This ultimately raises several questions that are addressed in the remainder of this paper. First, what are the stakes and consequences of not holding employers accountable for the spread of a highly infectious and deadly virus in their workplaces? Second, what are the stakes of not even defining those employers as such in the first place? Third, what could and should be done to offer protections for vulnerable workers?

A. Revising Employment Contracts

Outside of the specific pandemic context, employers have a relatively high level of control over working conditions absent a collective bargaining agreement. Most law concerning employment contracts involves the question of whether there exists a contract that successfully rebuts the presumption of at will employment relationships.⁶⁴

Tort lawsuits against employers and coworkers are generally problematic in employment law. There is some room for maneuvering outside of the

requirements to be in in-person labs to do research. Teaching loads can vary by department: some graduate students are instructors of record, some act as teaching assistants, and some may have fellowships in lieu of teaching requirements. Expectations for how labs and classes are conducted can vary by the needs of the department or principal investigator.

⁶⁴ The at-will rebuttable presumption in employment law begins with the assumption that employers have the latitude to modify terms and conditions of employment at-will for legitimate, non-discriminatory reasons. Courts generally allow parties to contract around that presumption with contracts that define terms or specify that termination must be for just cause. *See, e.g.*, *Spacesaver Sys. v. Adam*, 98 A.3d 264, 280 (Md. 2014) (holding that a modified employment contract with a just-cause termination provision successfully rebutted the at-will employment presumption); *Hinkel v. Sataria Distrib. & Packaging, Inc.*, 920 N.E.2d 766, 771 (Ind. Ct. App. 2010) (holding that additional promises for job stability outside a fully integrated contract are not enforceable without additional consideration).

workers' compensation structure, but that is the presumptive mode of relief for workplace related injury in most situations.⁶⁵

In most non-discriminatory contexts, workers do not have access to remedies from their employers for harms caused by those employers. Worse, in most instances, employees do not have access to remedies in employment discrimination cases given the continued prevalence of mandatory arbitration provisions and the frequency with which summary judgment is granted in employment discrimination cases, particularly in federal courts.⁶⁶

Even in the case of workers who are classified as employees—whose positions have more security—there are real limitations because of the extraordinary nature of the pandemic. Furthermore, it is unlikely that COVID-19 can be considered an imminent danger in the way OSHA guidance articulates that workers can refuse dangerous work.⁶⁷ This guidance, which theoretically gives employees the right to refuse to work without fear of retaliation, only allows such a refusal upon meeting four conditions:

1. Failure of the employer to eliminate the danger when asked, if possible;
2. A refusal to work in good faith or with genuine belief that there is a reasonable apprehension of death or serious injury;
3. A reasonable person would agree that such a danger exists; and
4. There isn't enough time to complete an OSHA inspection.⁶⁸

Furthermore, it is currently unlikely that COVID-19 could legally be considered an imminent danger. It is not a hazard that is unique to the workplace. Its nature—being a highly contagious airborne virus with a very long incubation period combined with a country-wide failure to contact trace—creates a causation issue. There is a fundamental lack of recourse for workers either to

⁶⁵ Samenga, *supra* note 37, at 13.

⁶⁶ See generally Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 864 (2020) (arguing that mandatory arbitration provisions are particularly harmful in discrimination cases due to the dignitary harms at play in the tort of discrimination); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018) (focusing on the particular problem of secrecy in the employment discrimination case whereby mandatory arbitration is “less an ‘alternative dispute resolution’ mechanism than it is a magician’s disappearing trick or mirage”); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519 (2010) (“Whatever the reasons, the greatest impact of this change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers”); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011) (“Research confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal.”).

⁶⁷ Occupational Safety & Health Admin., *Workers’ Right to Refuse Dangerous Work*, U.S. DEP’T OF LAB., <https://www.osha.gov/workers/right-to-refuse> [<https://perma.cc/L78Q-LLXE>].

⁶⁸ See *id.*

refuse to work under unsafe conditions without fear of retribution or to hold their employers accountable for mitigating dangers related to public-facing work.

In sum, pandemic-related liability waivers and indemnification agreements will likely be unenforceable. They can protect against negligence but not gross negligence or willful conduct.⁶⁹ It is unclear if an employer's failure to provide PPE, require masks, or inform employees about potential contact constitutes gross negligence or willful conduct. If it does, liability waivers would be unenforceable.⁷⁰ For COVID-19 purposes, the potential for viable negligence claims is very low. Therefore, pandemic related liability waivers and indemnification agreements will likely fail.

B. Concerted Activity and Collective Bargaining

The National Labor Relations Act ("NLRA") grants workers a right to refuse to work under unsafe conditions, as long as that refusal is part of concerted activity.⁷¹ The NLRB does not necessarily require workers to be protected by an officially organized and recognized union for the activity to count as concerted.⁷² Instead, the NLRB requires only that workers have an honest belief that working under certain conditions would not be safe or healthy.⁷³ This can be true even with safer activities or reasonable employer actions.⁷⁴

Furthermore, dangerous conditions might be sufficient to invalidate a no strike provision in an employment contract or collective bargaining agreement.⁷⁵ Therefore, even beyond a work stoppage, unionized workers may have additional recourse to strike. However, employers may still maintain the power here. OSHA, CDC, WHO, and industry guidelines and standards may undermine a worker's claim that the work environment is abnormally dangerous. In other words, although there is a relationship between the workplace and increased risk for public-facing employees during the pandemic, potential recourse is incredibly shaky.

Even though striking and refusing to work is generally protected, striking is a high stakes tactic. Employers are barred from permanently replacing employees who participate in a protected safety strike, but employers are not required to pay striking workers and can retain temporary replacements.⁷⁶ That said, striking is still an avenue uniquely available to unionized workers.

⁶⁹ See *Gross v. Sweet*, 400 N.E.2d 306, 310–11 (N.Y. 1979).

⁷⁰ See e.g., National Labor Relations Act, 29 U.S.C.S. § 157 notes to decisions IV.B.45. (LexisNexis 1947) (The NLRA protects concerted activity generally; concerted activity is action taken "with or on behalf of other employees" concerning the terms and conditions of employment).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385 (1974); *TNS Inc.*, 329 N.L.R.B. 602, 603 (1999).

⁷⁶ *The Right to Strike*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/strikes> [<https://perma.cc/JL5B-8DZL>].

Finally, the NLRB has historically been skeptical of employers requiring employees to waive their right to file charges.⁷⁷ The NLRB does not allow the barring of class action suits through waivers although they are loath to support the imposition of waivers that remove access to litigation or arbitration.⁷⁸ Although it is much more protective of class actions, it does not seem likely that the NLRB would be hospitable to the enforcement of liability waivers for workers who are protected with a union.⁷⁹

C. Independent Contractors

Independent contractors lack some of the presumptions afforded in the traditional employee/employer relationship. Namely, there is no longer a workers' compensation exclusivity question due to the lack of workers' compensation, and the company is potentially liable in the same way as in any other contractual relationship. However, when workers are classified as independent contractors, they are presumed to have more control over their own terms and conditions of employment when making a potential liability waiver.

Although an independent contractor—such as an office building cleaner or a dining service provider for a university—may have more room to claim liability in the case of COVID-19 exposure caused by their employer if they can establish causation, this one potential legal win is not the full story.⁸⁰ Independent contractors, specifically gig workers, have long fought their classification as independent contractors because it often comes with reduced hours, reduced wages, the reduced collective bargaining ability, and a lack of benefits including sick leave and other paid time off.⁸¹

Limited indemnification for a long-shot potential lawsuit pales in comparison to the benefits of employee status. Liability waivers are a symptom of a much larger problem brought to light by the risk of illness in the COVID-19 era.

⁷⁷ See *U-Haul Co. of Cal.*, 347 N.L.R.B. 375, 388 (2006).

⁷⁸ *D.R. Horton, Inc.*, 357 N.L.R.B. 2, 4 (2012); *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774, 794 (2014).

⁷⁹ See *Murphy Oil USA, Inc.*, 361 N.L.R.B. at 794.

⁸⁰ In the janitorial and dining examples, the individual workers may very well be employees. Following the passage of California's Prop. 22 that affirmed gig workers' status as independent contractors, the status of Lyft and Uber drivers as independent contractors is relatively certain at the time of this writing. However, in January 2021, drivers and the Service Employees International Union (SEIU) sued in the California Supreme Court seeking to overturn that ballot measure, claiming that it puts illegal constraints on the drivers' power to organize. Chris Mills Rodrigo, *Drivers, Unions Sue to Strike Down California's New Rules for Gig Workers*, THE HILL (Jan. 12, 2021, 1:46 PM), <https://thehill.com/policy/technology/533854-drivers-unions-sue-to-strike-down-californias-new-rules-for-gig-workers> [https://perma.cc/W6TA-UWJ6].

⁸¹ Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH (July 31, 2019), <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/> [https://perma.cc/W9FH-C7YV].

D. The Specific Problem of the Graduate Student Worker

If liability waivers are a symptom of a larger problem, the problem gets even larger and messier when looking at graduate student workers. Graduate students' unique position within the university as neither students nor employees functionally throws away the analysis we have done up to this point. Graduate student workers fit into none of the above categories. As is discussed in the next section, this opens the door for a wide-ranging set of workplace issues that shed light on general legal inequities in employment and labor law.

IV. CASE STUDY: THE UNIVERSITY

This section of the paper narrows the focus to the case study of higher education to demonstrate how the COVID-19 pandemic has fostered precarious employment conditions for workers. Precarious employment leaves workers especially vulnerable to data opacity and so-called liability waivers as they attempt to make decisions about their health and employment during a global pandemic. First, this section presents a brief introduction to new challenges in higher education because of COVID-19. Second, we conduct a data audit of 102 schools' public-facing COVID-19 data to understand what information stakeholders actually have access to when they make decisions about risk. Third, the case study focuses on graduate student workers who have a robust legal history of trying to win legal status as workers and evaluate their position at the university during the COVID-19 pandemic. Fourth, this section presents examples of liability waivers that undergraduate students and graduate student workers are being asked to sign to be on campus where, in some cases, they are required to be present in-person to retain their employment. This section of the paper concludes with a brief analysis of the potential impacts of these waivers in the context of the current data-scape of COVID-19 and general precarity of graduate student workers.

The COVID-19 pandemic created undeniable effects on education, forcing schools to take unprecedented and untested actions very rapidly. As early as March 2020, half of the world's students were no longer attending school in-person.⁸² This included a vast majority of US colleges and universities who necessarily transitioned to distance learning.⁸³ With this vast change in university structure came significant consequences and novel challenges.⁸⁴

⁸² *Half of World's Student Population Not Attending School: UNESCO Launches Global Coalition to Accelerate Deployment of Remote Learning Solutions*, U.N. EDUC., SCI., & CULTURAL ORG. (Mar. 19, 2020), <https://en.unesco.org/news/half-worlds-student-population-not-attending-school-unesco-launches-global-coalition-accelerate> [<https://perma.cc/2SSL-PL66>].

⁸³ Nicole Johnson, George Veletsianos & Jeff Seaman, *U.S. Faculty and Administrators' Experiences and Approaches in the Early Weeks of the COVID-19 Pandemic*, 24 *ONLINE LEARNING J.* 6, 6 (2020).

⁸⁴ Though the principal concern of this article is the liability strategies and consequences of reopening schools at the college level, it should be noted that debates about whether schools should re-open at all dominated the discussion of American education at both the K-12 and postsecondary

Importantly, the consequences and challenges of COVID-19 are not felt equally across a university. Scholar Shaun Harper lists twelve of these challenges, which though not exhaustive, provide a useful framework for considering the interconnectedness of university systems and unequal burdens of harm during COVID-19.⁸⁵

These challenges include:

1. heightened risks for essential workers,
2. disproportionate job loss for employees of color,
3. violence directed at Asian students and employees,
4. the effects of travel bans,
5. trauma and grief support,
6. the impact of infected university members on vulnerable families and communities,
7. putting Black student athletes at higher risk,
8. heightened harm for underfunded institutions that traditionally serve people of color,
9. digital access inequity,
10. increasing housing and food insecurity,
11. racism in online education, and
12. the racialization of stakeholder feedback.⁸⁶

Each of these pose new complex liability challenges that all exist within the reality that students, employees, and teachers have contracted COVID-19 in massive numbers, sometimes fatally. By May 26, 2021, there have been over 700,000 COVID-19 cases at over 1,900 colleges.⁸⁷

levels. Debates attempted to weigh disease concerns with psycho-social impacts and possible mitigation strategies, with some notable authors treating school re-opening before vaccination saturation plausible with strict mitigation strategies. *See generally* Ronan Lordan, Garret A. FitzGerald & Tilo Grosser, Editorial, *Reopening Schools During COVID-19*, 369 *SCIENCE* 1146, 1146 (2020); Vijesh S. Kuttiatt, Ramesh P. Menon, Philip Raj Abraham & Shilpa Sharma, *Should Schools Reopen Early or Late?—Transmission Dynamics of COVID-19 in Children*, 87 *INDIAN J. PEDIATRICS* 755, 755 (2020). However, other scholars quickly critiqued the feasibility of the mitigation strategies and the myriad of structural inequality concerns that would need to be addressed for successful online or in-person instruction. *See generally* Shelby Carvalho, Jack Rossiter, Noam Angrist, Susannah Hares & Rachel Silverman, *Planning for School Reopening and Recovery After COVID-19*, *CTR. FOR GLOB. DEV.* 3 (2020) (recommending policymakers directly weigh risks of strategic mismanagement including deaths, further closures, and additional waivers of COVID-19).

⁸⁵ *See generally* Shaun Harper, *COVID-19 and the Racial Equity Implications of Reopening College and University Campuses*, 127 *AM. J. EDUCATION* 153, 153–60 (2020) (describing each of the aforementioned themes at length).

⁸⁶ *Id.*

⁸⁷ *Tracking Coronavirus Cases at U.S. Colleges and Universities*, *N.Y. TIMES* (May 26, 2021),

Even so, financial and political pressures including furloughs, revenue loss, and student dissatisfaction have driven many universities to reopen even as COVID-19 cases continue to rise.⁸⁸ The largest part of this motivation is undoubtedly financial as the scale of current and potential financial losses are massive costing billions of dollars and potentially altering enrollments for years to come as students reject the notion of paying full price for online education.⁸⁹ Students and university workers have been critical of reopening plans even as students return to campus in droves. Students have expressed doubts that social distancing measures will actually be followed,⁹⁰ service workers worry about exposure with lack of rights to return to work post-COVID,⁹¹ and faculties at schools like Pennsylvania State University and Georgia Tech have published open-letters criticizing the lack of science-based evidence in mitigation strategies and limited input gathered from faculty, staff, and graduate employees.⁹² Work recently published in the *Indiana Law Journal Supplement* delivers the damning critique that “[t]he socially responsible decision is to deliver compassionate, healthy, and first-rate online pedagogy,” but universities in large numbers refuse to do so and must confront questions of liability for their role in spreading a deadly pandemic disease to their own students, employees, and faculty.⁹³

A. Data Transparency and COVID-19

There is currently no standard for how much data universities are required to make available to students and workers who are faced with decisions about returning to campus during the COVID-19 pandemic. While most universities provide some amount of data to the public, the quality, detail, and comprehensibility of that data varies dramatically. This lack of data transparency and data communication puts students and workers in a position where they are making important decisions that affect their health and even signing liability agreements testifying to acceptance of risks without having enough information to make informed risk decisions.

To better understand the landscape of COVID-19 data availability, we

<https://www.nytimes.com/interactive/2021/us/college-covid-tracker.html> [<https://perma.cc/ETN9-FJJN>].

⁸⁸ Jyoti Madhusoodanan, *University Reopening Plans Under Fire*, 369 *SCIENCE* 359, 359 (2020).

⁸⁹ Mark S. Wrighton & Steven J. Lawrence, *Reopening Colleges and Universities During the COVID-19 Pandemic*, 173 *ANNALS INTERNAL MED.* 664, 664 (2020).

⁹⁰ See Terry Nguyen, *Colleges Say Campuses Can Reopen Safely. Students and Faculty Aren't Convinced*, *VOX* (June 26, 2020, 9:17 AM), <https://www.vox.com/the-goods/21303102/college-reopening-fall-coronavirus-students-faculty-worry> (last visited Oct. 5, 2021).

⁹¹ Natalie Alms, *College Food Service Workers Worried About Coronavirus Risks*, *CAROLINA PUB. PRESS* (Nov. 9, 2020), <https://carolinapublicpress.org/39677/college-food-service-workers-worried-about-coronavirus-risks/> [<https://perma.cc/F5S9-SJDE>].

⁹² Madhusoodanan, *supra* note 88, at 359.

⁹³ Peter H. Huang & Debra S. Austin, *Unsafe at Any Campus: Don't Let Colleges Become the Next Cruise Ships, Nursing Homes, and Food Processing Plants*, 96 *IND. L.J. SUPPLEMENT* 25, 25 (2020).

conducted an audit of over 100 universities and their public-facing COVID-19 data offerings. We used school rankings from U.S. News and selected the top 100 ranked schools, which ended up being 102 schools due to tie-breaking procedures put in place by U.S. News.⁹⁴ We designed a sampling system to ensure that we studied the public-facing offerings of well-resourced institutions, but also to ensure that we analyzed the data offerings of a wide variety of school types: private schools, public schools, religious institutions, larger schools, and smaller schools. Importantly, we searched for each school's COVID-19 data using an extremely simple key word phrase "[Name of School] covid data." This likely means that schools have other data that we did not retrieve with our simple search. However, the goal of this university audit is not to be comprehensive, but rather to replicate what an average individual would find first if they wanted to know about COVID-19 cases at their university.

We found that all 102 schools had public-facing COVID-19 data. However, we also found that the specific information and presentation of that information varied wildly across schools in the sample. This means that some students and workers have a lot of public-facing information to use to make decisions while other students and workers have very little public-facing information to use in making the same decisions. Instead of pointing to schools that performed poorly in a given category, the following section highlights schools that were able to do a better job in that category both as evidence of feasibility and as a reflection of better data practices that should be implemented across all universities.⁹⁵ The problems across COVID-19 data can be grouped into four themes. First, this sub-section discusses the benefits of dynamic and updated data. Second, this sub-section evaluates the ways in which specific pieces of information can better assist affected groups in making informed decisions. Third, this sub-section describes the benefits of creating data dashboards that are accessible and understandable. Fourth, this sub-section analyzes how focus on effective visualization can assist translation of COVID-19 data to stakeholders. Lastly, this subsection emphasizes the particular conceptual challenge of graduate students in analyzing this data.

1. Dynamic and Updating Data

The first barrier to equipping university community members with the information they need to make informed decisions about risks is simply not providing usable data. Every school in this sample of 102 schools offered some public-facing data, but some offered data in very limited quantities with no meaningful context. Schools in this category might just list the number of COVID-19 positive cases in the previous semester or the number of positive

⁹⁴ 2021 *Best National University Rankings*, U.S. NEWS & WORLD RANKINGS (2021), <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Sept. 23, 2021).

⁹⁵ We also worried that pointing to a specific school as an isolated failure in a given category would distract from the larger landscape of failures in this arena. Unfortunately, data is so inconsistently and incompletely available that schools succeeding in a given area are rarer than schools failing in that area. Importantly, we do not mean to suggest that the schools we cite here as good examples in a particular category are excelling or not excelling in all other categories.

cases per week. However, without information about specific and historical time periods or with relevant comparison groups, such as the number of negative tests, this data is extremely difficult to place into a meaningful context. These data offerings were also often static and not easily updatable in a way that allows stakeholders to see changes over time. This leaves students and employees in the dark about how university risk mitigation strategies translate into changes in COVID-19 positivity rates. Static information about a dynamic pandemic—where medical guidelines and best practice suggestions are actively changing—disadvantages students and workers.⁹⁶ Without this information, there is no hope for a reasonable person to weigh the risks of being on campus.

A better presentation of data is seen by the dynamic and updating COVID-19 Response Dashboard presented by the University of Wisconsin-Madison.⁹⁷ Rather than projecting static and vaguely aggregated data, University of Wisconsin-Madison provides daily snapshots, weekly briefings, and aggregated historical data in chart form that makes it much easier to see what the current positivity rate is and how it has changed over time.⁹⁸ The University of Denver also provides daily information about the number of tests and number of positive tests and usefully plots daily data for the larger Denver County.⁹⁹ This gives students easy access to comparative information about the larger context of COVID-19 in the area on a daily basis.

2. Providing Data to Facilitate Informed Risk Decisions

Even schools that provided dynamic data varied widely in exactly what data they presented. In reviewing the sample, we generated several types of data that are not consistently presented but should be since they provide important information that facilitates decision making and risk evaluation. First, many universities did not sufficiently break down the types of roles at the university when displaying data results. Most common was a breakdown of students and staff. However, both categories conceal groups with extremely different levels of risk. For example, a faculty member teaching online classes and a campus dining hall worker have vastly different risk profiles even though they both fall into the category of staff. Similarly, many universities did not clearly distinguish between undergraduate students and graduate student workers even though the roles of these groups differ dramatically. Specifically, graduate students often teach courses and work in essential laboratory functions so they would have different levels of contact with the campus community.

⁹⁶ See generally Carlos del Rio & Preeti N. Malani, *2019 Novel Coronavirus—Important Information for Clinicians*, 323 JAMA 1039, 1039 (2020); Carlos del Rio & Preeti N. Malani, *COVID-19—New Insights on a Rapidly Changing Epidemic*, 323 JAMA 1339, 1339 (2020) (showing two articles published 2 months apart that explain rapid changes in medical recommendations surrounding COVID-19).

⁹⁷ *COVID-19 Response Dashboard*, UNIV. OF WIS. MADISON, <https://covidresponse.wisc.edu/dashboard/> [https://perma.cc/7DLU-VNB4].

⁹⁸ See *id.*

⁹⁹ *COVID-19 Dashboard*, UNIV. OF DENVER, <https://www.du.edu/coronavirus/dashboard> [https://perma.cc/XKY5-F7RY].

Harvard University is one school that did separate undergraduate student and graduate student worker test results, and their outcome data makes it clear why such a disaggregation is necessary. Image 1 is a screenshot taken of Harvard's data dashboard showing cumulative COVID-19 testing and cases since June 1, 2020.¹⁰⁰ Harvard provides test totals and positive test totals for each group.¹⁰¹ Calculating the different positivity percentages demonstrates that graduate positivity profiles and undergraduate positivity profiles are substantially different. Undergraduate students at Harvard University have a positivity percentage of 0.052%, but graduate student workers have a positivity percentage of 0.163% which is over three times more.¹⁰²

Image 1: Harvard University COVID-19 Dashboard¹⁰³

Cases & Testing: Cumulative Since June 1, 2020

Total positive cases	Total undergraduate student positive cases ⁶	Total graduate student positive cases ⁶	Total faculty, staff, or other affiliates positive cases ⁷
547	31	140	376
Total tests conducted	Total undergraduate student tests	Total graduate student tests	Total faculty, staff, or other affiliates tests
289,057	59,727	85,566	143,764

The University of California Berkeley accomplishes this task in a different way by hosting an interactive dashboard that allows users to select a role—graduate, undergraduate, faculty/staff, other—and then projects the data specifically pertaining to the selected groups.¹⁰⁴ More specificity across groups that we expect to have different levels of risk is another way that universities can help campus community members make more informed assessments of risk. It

¹⁰⁰ *Harvard University-Wide COVID-19 Testing Dashboard*, HARVARD U., <https://www.harvard.edu/coronavirus/testing-tracing/harvard-university-wide-covid-19-testing-dashboard> [https://perma.cc/V4PC-542B].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Coronavirus Dashboard—Testing*, UNIV. OF CAL. BERKELEY, <https://coronavirus.berkeley.edu/dashboard/> [https://perma.cc/WK9D-2GMU].

also helps alleviate role confusion. For example, at some universities, graduate student workers are recognized formally by the university as employees, but at others they are students. Data specificity can help solve that confusion.

Another type of information that stakeholders need to make informed decisions is more meaningful information about identified cases of COVID-19. Universities do need to weigh privacy concerns when dealing with individual medical data, but many universities do not differentiate in the public-facing data whether individuals who tested positive have been on campus. This leaves students and workers having to guess whom the data is referring to when the university already has access to that information anyway.

Some schools have balanced these concerns while still providing critical information. One example is the University of California Merced, Image 2 , who gives the date of the positive test, some general affiliation information about the individual, whether they reside on or off campus, but most importantly the date that the individual was last on campus.¹⁰⁵ This information seems critical to deciding to come to campus because persons testing positive who have not been on campus are surely meaningfully different from those who have been on campus consistently and tested positive.

Image 2: University of California Merced Covid-19 Dashboard¹⁰⁶

Case Information

Last Updated: December 16, 2020

Reported Date	Affiliation	Residence	Last Day on Campus	Status
12/14/2020	Employee	Off Campus	5/22/2020	Active
12/14/2020	Student	Off Campus	3/17/2020	Active
12/14/2020	Student	Off Campus	12/13/2020	Active
12/14/2020	Student	Off Campus	12/1/2020	Active
12/14/2020	Student	Off Campus	N/A*	Active
12/14/2020	Student	Off Campus	N/A*	Active
12/13/2020	Student	Off Campus	12/11/2020	Active
12/13/2020	Student	Off Campus	12/8/2020	Active

¹⁰⁵ *Archived COVID-19 Case Information*, UNIV. OF CAL. MERCED (Dec. 16, 2020), <https://doyourpart.ucmerced.edu/archived-case-information> [<https://perma.cc/MLR7-68T6>].

¹⁰⁶ *Id.*

The University of California San Diego (Image 3) provides even more detailed information, giving specific worksite information, such as campus buildings where someone tested positive and the dates when a COVID-19 positive individual was present at that specific location.¹⁰⁷ This information would allow students to make specific updating decisions. For example, it would allow students to decide whether to avoid going to certain places or offices on campus as the COVID-19 situation on campus changes. This serves to provide community members with a more accurate tool for assessing personal risk.

Image 3: University of California San Diego Covid-19 Dashboard¹⁰⁸

Potential Workplace Exposure	
Potential Workplace Exposure	
COVID-19 positive individuals were present at the following locations:	
UC San Diego Worksite Location	On-site infectivity dates
Eleanor Roosevelt College Asia Hall	1/10/21 - 1/13/21
Eleanor Roosevelt College Earth Hall	1/3/21 - 1/5/21 and 1/10/21-1/13/21
Muir College Tenaya	1/8/21 - 1/13/21
Warren College Douglas Hall	1/4/21 - 1/7/21 and 1/10/21 - 1/13/21
Muir College - Tamarack	1/9/21 - 1/12/21
Revelle Beagle Hall	1/9/21 - 1/12/21
Revelle Galathea Hall	1/9/21 - 1/12/21
Rita Atkinson Residences	1/3/21 - 1/5/21 and 1/9 - 1/12
Warren College Brennan Hall	1/9/21 - 1/12/21
Seventh College West Tower 1	1/9/21 - 1/11/21
Central Mesa Building 9226	1/5/21 - 1/7/21 and 1/9/21 - 1/10/21
Eleanor Roosevelt College North America Hall	1/3/21 - 1/5/21 and 1/8/21 - 1/10/21
One Miramar Street - Building 2	1/8/21 - 1/10/21
One Miramar Street - Building 4	1/9/21 - 1/10/21
Pepper Canyon East Apt - Bldg 400	1/8/21 - 1/10/21
Revelle Argo Hall	1/3/21 - 1/5/21 and 1/7/21 - 1/10/21

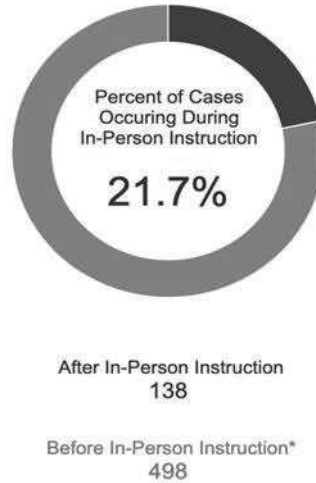
Note: If you were present at the same worksite during the dates listed in the table above, please review the information on how to get tested and the COVID-19 related benefits and resources that are available to you at: <https://think.ucsd.edu/safety/resources/public-health/covid-19/notifications.html>

Finally, we also found that many universities did not make it clear how policy or instructional changes at the university itself may correlate with changes to the COVID-19 testing data. For example, many schools listed low positive rates without being expressly clear that the university was not open or was open in a very limited sense during those periods of low positivity. Without additional information, someone making a risk assessment would have a distorted view of the actual risk. Image 4, from the Clemson University COVID dashboard, is an example of leveraging data presentation to communicate instructional changes.¹⁰⁹

¹⁰⁷ *UC San Diego COVID-19 Daily Dashboard*, UNIV. OF CAL. SAN DIEGO, <https://returntolearn.ucsd.edu/dashboard/index.html> [https://perma.cc/5CP8-LJCE?type=image].

¹⁰⁸ *Id.*

¹⁰⁹ *COVID-19 Dashboard*, CLEMSON U., <https://www.clemson.edu/covid-19/testing/dashboa>

Image 4: Clemson University Covid Before/After In-Person¹¹⁰

This specific chart demonstrates how a change to in-person instruction has correlated with positivity rates. This is much more targeted and useful information for students deciding if they want to take in-person courses and graduate workers and faculty deciding if they want to teach remotely or in-person.

3. Presenting Accessible and Understandable Data

A third theme we saw across the sample of 102 schools' public COVID-19 data was a lack of accessibility and clarity in the way the data was presented. First, many of the dashboards were not easily translatable to mobile applications or the method for doing so was not clear. This is an accessibility issue in an era where forty-six percent of people primarily use their smartphones for internet browsing even if they have another device.¹¹¹ Schools also did not often provide clear pathways to finding information in more accessible forms. North Carolina State University was an example of a school who did provide clear and accessible pathways through clear and hyperlinked accessibility information at

rd.html [<https://perma.cc/F5C3-BQWH?type=image>].

¹¹⁰ *Id.*

¹¹¹ Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RSCH. CTR. (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/#:~:text=At%20that%20time%2C%20just%208,lower%20levels%20of%20broadband%20adoption> [<https://perma.cc/4YPL-N9HW>].

the very top of their COVID-19 dashboard.¹¹²

Universities were also inconsistent in defining key terms needed to understand the data presented in data dashboards, were unclear about what information was excluded from the dashboards, or obfuscated how updates to the way data is displayed on the dashboards may change the appearance and meaning of the results. A counter example is Worcester Polytechnic Institute's data dashboard that has a specific section called "Dashboard Definitions" where they define the terms on the dashboard, but also link to pages with more information about the meanings of "students in isolation" and "students in quarantine."¹¹³ The University of Massachusetts at Amherst also provides information about who created the dashboard and a list of updates to the dashboard, with the date and specific change.¹¹⁴ All of these data transparency sources serve to empower users of the data who are reliant upon the data to make important decisions about their health and well-being.

4. Leveraging Effective Visualizations

A fourth theme we identified across the sample was a need to provide effective visualizations. Some universities presented no visualizations of the data at all, leaving students to read a spreadsheet-style list of cases. This obfuscates trends in the data by virtue of making it appear that there are no trends at all. However, even universities that did include visual trends often did not focus enough on the readability of those visualizations. For example, if a school conducts 10,000 COVID-19 tests in a given week and three were positive, a stacked column chart would render the three positive tests nearly impossible to see. This becomes an issue if the same school the next week conducts 10,000 COVID-19 tests and sixty come back positive. The sixty positive cases will still be difficult to see, even though they represent a twenty-fold increase in positive cases. Brown University found a solution to this problem by reporting the number of positive tests in a side window adjacent to the trendline and in a floating box over the trend data rather than solely relying on a type of stacked chart.¹¹⁵ Universities should prioritize delivering information in an understandable format that facilitates accurate assessment of risk.

Some universities pursued another strategy of communicating risk information by literally putting a "campus risk-level" or "campus operation status" graphic on top of their data dashboard. Provided that the definition of

¹¹² *Protect the Pack: Data Tracking*, N.C. STATE U., <https://www.ncsu.edu/coronavirus/testing-and-tracking/> [<https://perma.cc/N9XZ-GGM5>].

¹¹³ *COVID Testing Dashboard*, WORCESTER POLYTECHNIC INST., <https://www.wpi.edu/we-are-wpi/health-and-safety/dashboard> [<https://perma.cc/YZM6-DSGB>].

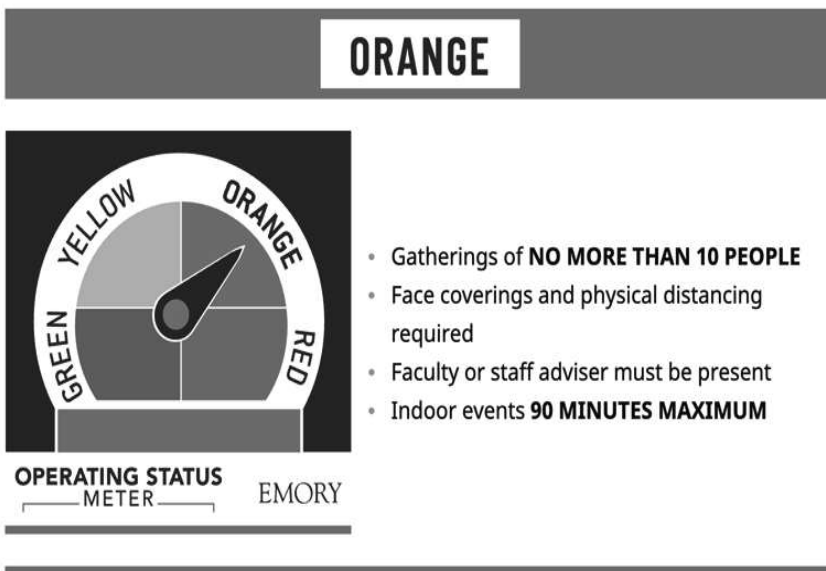
¹¹⁴ See *Biostatistics and Epidemiology Team Develops UMass Amherst COVID-19 Dashboard*, UNIV. OF MASS. AMHERST (Aug. 30, 2020), <https://www.umass.edu/sphhs/news-events/biostatistics-and-epidemiology-team-develops-umass-amherst-covid-19-dashboard> [<https://perma.cc/DCZ4-HNWH>]; *COVID-19 Dashboard*, UNIV. OF MASS. AMHERST, <https://www.umass.edu/coronavirus/dashboard> [<https://perma.cc/DQN6-S9TU>].

¹¹⁵ See *COVID-19 Dashboard*, BROWN UNIV., <https://healthy.brown.edu/testing-tracing/dashboard> [<https://perma.cc/5B3H-E7WY>].

these risk-levels is easily available, this can be another useful way to contextualize risk. Emory University, Image 5, displays a graphic risk-level, attaches it to a color classification system normatively associated with risk, and gives a bulleted list of what that risk-level means for quick and easy interpretation.¹¹⁶

Image 5: Emory University Operating Condition Status¹¹⁷

The current campus operation status is orange. The operating status is reviewed daily.



While the specific discussion here might make it seem that universities are all presenting data in useful and transparent ways, the opposite is true. Our audit of 102 schools' COVID-19 data exposed serious flaws in the ways that data is communicated to students and workers who are deciding whether to return to campus. We found that some schools were able to make strategic choices in their data presentation to be more transparent and informative about the state of COVID-19 on their campuses, which serves as evidence that such transparency measures are feasible. The presence of dynamic data, key types of information,

¹¹⁶ See *Operating Condition Status*, EMORY UNIV. (Sept. 2, 2021), <https://www.emory.edu/forward/policies-guidelines-protocols/operating-condition-status.html> [<https://perma.cc/85WP-SZ9A>].

¹¹⁷ *Id.*

accessible and understandable presentation, and optimal use of visualizations are important factors that contribute to how students and employees conceptualize COVID-19 risks. The data itself is an important part of the landscape of university liability and responsible communication of risk during the COVID-19 pandemic.

5. The Emphasis on Students

Questions of legal liability and campus safety have predominantly focused on undergraduate and professional students returning to campus rather than campus workers. Indeed, many universities have continued to offer students the option of whether to take classes online or in-person even as they mandate that staff, graduate students, and faculty return to campus, often without an individual-level choice. A professor at Georgia State explained in a Vox story about campus reopening that,

Right now, students can choose not to attend, but faculty and graduate students are required to teach . . . [f]or us to be exempt we have to show our human resources department that we're high risk. But even if I live with somebody at home who is high risk, that doesn't constitute an exemption.¹¹⁸

Importantly, colleges are not staffed only by tenured faculty with stable jobs and statistically higher salaries. Colleges rely heavily on adjunct and graduate student labor that is low-paid and often does not include health insurance.¹¹⁹ Current workplace regulations are largely ineffective to protect these workers. Moreover, many university workers might not be considered employees at all, including graduate students that teach classes, work in laboratories, and provide essential services to universities.

B. Graduate Labor is Legally Unique

Graduate students operate in a grey area of the university, where they are simultaneously both employees and students. Their entitlement to legal protections, healthcare, and salary are at the mercy of how the institution treats and defines them in a given situation. While graduate students are often ignored in narratives about higher education, they make up a substantial percentage of university students and workers.

There are approximately three million graduate students enrolled at institutions in the United States.¹²⁰ For comparison, there are more current

¹¹⁸ Nguyen, *supra* note 90.

¹¹⁹ Data from the Department of Education in 2018 shows that only 54% of college instructors are employed as full-time workers. See *Characteristics of Postsecondary Faculty*, NAT'L CTR. FOR EDUC. STAT. (May 2020), https://nces.ed.gov/programs/coe/indicator_csc.asp#:~:text=In%20fall%202018%2C%20of%20the,46%20percent%20were%20part%20time [https://perma.cc/88DV-5443].

¹²⁰ *Postbaccalaureate Enrollment*, NAT'L CTR FOR EDUC. STAT. (May 2021),

graduate students in the United States than there are residents of Wyoming, Vermont, Alaska, and North Dakota combined.¹²¹ These graduate students occupy a simultaneous space of education and labor, commonly teaching courses, staffing laboratories, producing research for the university, and taking their own courses. Importantly, graduate students often receive stipends to cover their living expenses during their five-to-seven-year academic programs. Nationally, students who receive funding earn between \$13,000 and \$34,000 which varies by program, discipline, school, and location.¹²² Graduate students use these stipends to cover costs like rent, student fees, and sometimes health insurance and research fees. Though graduate stipends are often insufficient to meet basic living expenses, many programs prohibit graduate students from holding other employment under the auspices of keeping them focused on their academic programs.¹²³

1. The Question of Graduate Student Worker Classification

While graduate students consider themselves full-time employees, most universities fund graduate students for only nine months and conceptualize graduate students as trainees instead of employees.¹²⁴ Furthermore, though graduate students are often compensated for their labor under the assumption they are part-time workers, a recent survey of more than 6,000 graduate students found that seventy-six percent work more than forty hours a week within the program, and over twenty percent report working more than sixty-one hours per week on average.¹²⁵ Graduate students have attempted to negotiate with universities for higher pay or medical care, but these efforts have been substantially impeded by a lack of legal clarity on the precise role of graduate students at the University.¹²⁶

https://nces.ed.gov/programs/coe/indicator_chb.asp [<https://perma.cc/Z3HR-MTNX>].

¹²¹ See *State Population Totals and Components of Change: 2010-2019*, U.S. CENSUS BUREAU (Apr. 20, 2021), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html#par_textimage_1574439295 [<https://perma.cc/K2V5-45SE>] (presenting data of state populations that we used to make this calculation).

¹²² Colleen Flaherty, *Grad Students' 'Fight for \$15'*, INSIDE HIGHER ED (Oct. 26, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/10/26/graduate-student-assistants-campus-across-us-are-pushing-15-hour-what-they-call#:~:text=Nationally%2C%20stipends%20for%20funded%20students,minimum%2C%20not%20necessarily%20a%20target> [<https://perma.cc/BL6T-27P8>].

¹²³ Zeb Larson, *The Need for Outside Jobs in Grad School*, INSIDE HIGHER ED (July 3, 2019), <https://www.insidehighered.com/advice/2019/07/03/more-grad-students-should-be-allowed-to-take-jobs-outside-academe-opinion> [<https://perma.cc/ER5Q-P87F>].

¹²⁴ Flaherty, *supra* note 122.

¹²⁵ Chris Woolston, *Overextended and Stressed* (graph), in *PhDs: The Tortuous Truth*, NATURE (Nov. 13, 2019), <https://www.nature.com/articles/d41586-019-03459-7> [<https://perma.cc/UGN6-TC52>].

¹²⁶ Graduate student unions, particularly at private institutions, have largely relied on being informally recognized by the university. See, e.g., Dani Grace & Sarah Roach, *University Opposes Graduate Student Unionization Effort*, GW HATCHET (Mar. 9, 2018, 5:36 PM), <https://www.gwhatchet.com/2018/03/09/university-opposes-graduate-student-unionization-effort/> [<https://perma.cc/F5GU-YTBJ>]. The informal recognition is particularly necessary given the

In recent legal cases, University administrators have argued that graduate students who work as research or teaching assistants are still primarily students and not employees for the purposes of Section 2(3) of the NLRA because getting a doctorate requires research and teaching.¹²⁷ Essentially, endorsement of this legal argument would allow universities to entrench student status by simply mandating extra teaching service as a degree requirement. In 2001, the NLRB held in *Brown University* that both research and teaching assistants were “statutory employees,” after applying a 2000 NLRB board decision made in *New York University*.¹²⁸ This ruling seemed to establish that graduate students were in fact workers, entitling them to the right to unionize on the grounds that students were employees by providing teaching and research services for pay.¹²⁹ *New York University* itself was a break with longstanding legal precedent and the application to *Brown University* was considered a landmark decision for graduate workers. However, the *Brown University* decision was reversed in 2004 and the NLRB held that graduate students did not have the right to unionize under federal law.¹³⁰

This reversal was highly contentious, and even as *Brown University* was being used to legally justify the denial of union recognition for graduate students at New York University, *Brown University* was being criticized by then-NLRB Acting Regional 2 Director Elbert F. Tellem.¹³¹ While the actual decision went against the New York University students who had sued for union recognition, Tellem introduced language that laid the groundwork for overturning *Brown University* in 2016.¹³² On August 23, 2016 students at Columbia University won back their employee status and unionization rights despite significant pushback by universities.¹³³ Yale, Brown, Cornell, Dartmouth, Harvard, MIT, the University of Pennsylvania, Princeton, and Stanford filed amicus briefs opposing both graduate student unionization and employee status arguing that doing so would inevitably infringe on academic freedom.¹³⁴ While *Columbia*

NLRB’s frequent back and forth on the issue. See Ash Tomaszewski, *An Update on Graduate Student Unions and the NLRB*, ONLABOR (Feb. 23, 2021), <https://onlabor.org/an-update-on-graduate-student-unions-and-the-nlr/> [<https://perma.cc/FPR6-3MCG>].

¹²⁷ Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW. 243, 246–47 (2004).

¹²⁸ See *Brown Univ.*, 342 N.L.R.B. 483 (2004).

¹²⁹ See *N.Y. Univ.*, 332 N.L.R.B. 1206 (2000).

¹³⁰ *Brown Univ.*, 342 N.L.R.B. at 500.

¹³¹ Steven Greenhouse, *N.Y.U. Teaching Assistants’ Unionization Hopes Get a Boost*, N.Y. TIMES: CITY ROOM BLOG (June 20, 2011, 12:49 PM), <https://cityroom.blogs.nytimes.com/2011/06/20/n-y-u-teaching-assistants-unionization-hopes-get-a-boost/> [<https://perma.cc/TQ9Z-66QM>].

¹³² *Id.* (criticizing the decision for being “premised on a university setting as it existed 30 years ago” when the role of graduate students and teaching assistants was different, with far less emphasis on their teaching roles).

¹³³ See *Columbia Univ.*, 364 N.L.R.B. 1 (2016); Noam Scheiber, *Grad Students Win Right to Unionize in an Ivy League Case*, N.Y. TIMES (Aug. 23, 2016), <https://www.nytimes.com/2016/08/24/business/graduate-students-clear-hurdle-in-effort-to-form-union.html> [<https://perma.cc/66UU-JPJM>].

¹³⁴ Abby Jackson, *America’s Most Elite Colleges Have Joined Forces to Bust a Union*, BUS.

University is presently intact, a 2019 rule proposal by the NLRB would strip the graduate students of both employee status and rights to unionization.¹³⁵ According to Cornell Law professor Risa Lieberwitz, this rule proposal is unusual, since it departs with the tradition of making decisions on a case-by-case basis, but the current NLRB board is extremely politically conservative and seems focused on overruling precedent that expanded employee rights to unionize.¹³⁶ Although this might not represent the future of graduate student labor under a Democratic administration, it does characterize one direction in which the pendulum can swing.¹³⁷

Therefore, despite decades of legal battles and the current existence of dozens of graduate student unions, graduate student legal status remains precarious and unclear. The presence of legal action and unions also belies the truth on the ground at many universities. Even at universities where graduate students have won some labor protections or wage gains, students are often unable to assert any power against supervisors or the university at large.¹³⁸ Their power is largely vested in the university who can choose to recognize the union or not at will.¹³⁹ This becomes particularly perilous in the COVID-19 era where graduate students must often choose between their health, the health of vulnerable family, or receiving their stipend payments or health insurance. In June 2020, a Boston University student shared an email from their university explaining how campus policies would affect graduate student teachers (see Image 6).¹⁴⁰

INSIDER (Mar. 2, 2016, 6:54 AM), <https://www.businessinsider.com.au/nine-elite-universities-filed-an-amicus-brief-against-allowing-graduate-students-the-ability-to-unionize-2016-3> [<https://perma.cc/5DTJ-44N5>].

¹³⁵ Jurisdiction-Nonemployee Status of University and College Students Working in Connection with Their Studies, 86 Fed. Reg. 14297 (Mar. 15, 2021).

¹³⁶ See *id.*; Katie Langin, *Proposed Rule Deals Blow to Grad Student Unions*, 365 SCIENCE 1365, 1365 (2019).

¹³⁷ See Tomaszewski, *supra* note 126.

¹³⁸ The University of Michigan GEO example is salient here: despite their recognition, the University still can exert a great deal of pressure due to their broad ability to prevent strikes.

¹³⁹ In circumstances whereby a bargaining unit is not formally recognized as a union by the NLRB, the employer may still respect the unit. This is a legally precarious position as the NLRB is unlikely to enforce agreements or offer recourse in the event of employer violations. See *Your Right to Form a Union*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-right-to-form-a-union> [<https://perma.cc/RL3W-QMQV>].

¹⁴⁰ Ian Nurmi (@i_nurmi), TWITTER (June 23, 2020, 10:54 AM), https://twitter.com/i_nurmi/status/1275457100454465542 [<https://perma.cc/U686-782T>] (showing a tweet from the public Twitter account of Ian Nurmi, a PhD Candidate at Boston University, as linked in Nguyen, *supra* note 90).

**Image 6: Boston University Graduate Student Teaching Policy
(June 23, 2020)¹⁴¹**

Because PhD students with teaching assignments are both students and teachers, you are in a unique situation. The LfA model is predicated on in-person teaching and simultaneous remote participation, so all faculty and teaching fellows are expected to be on campus. However, there are some new additional policies for PhD students you should be aware of:

1. You must let your PhD program know before August 1 whether you will be able to return to campus by September 1. Although conditions could change, if you are returning to Boston from out of town, you should allow for a possible 14-day quarantine period upon return. You may take classes remotely during the quarantine period and you will receive your stipend during that time. .
2. Teaching fellows who are concerned about teaching on-campus and who are in a COVID-19 high-risk category, as defined by the CDC, who live with someone in a high-risk category, or are pregnant, may apply for a workplace adjustment for the fall semester utilizing the process outlined [here](#).
3. Continuing students with teaching service appointments for fall 2020 who are unable to return to the BU campus by September 1 will be expected to take a leave of absence. Medical insurance will not be provided by the university while a student is on a LoA. Alternatively, you may attend classes remotely without stipend support in the fall, and we will postpone your receipt of your fellowship to a later semester.

After acknowledging the dual role of graduate students as both teachers and students, the policy states that students unable to teach on campus must take an unpaid leave of absence with no medical insurance.¹⁴² Boston University later sent a second email saying that graduate students could retain their health insurance by enrolling as full-time students, though they would still not receive payment.¹⁴³ Graduate and undergraduate students who do return to campus are not just confronted with the obstacle of COVID-19, they are faced with new disease mitigation measures and changes in structure and format of teaching and research. They are also oftentimes greeted by a novel liability phenomenon: COVID-19 health liability waivers.

C. The Problem of University Liability Waivers

1. What They Say

Many universities have attempted to deal with COVID-19 elevated risks using pseudo-liability waivers that require students or workers to release the university from liability for illness or even death via COVID-19.¹⁴⁴ In some cases, students feel required to sign these waivers in order to access their emails

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Grace Ferguson (@fergusonreports), TWITTER (June 30, 2020, 3:36 PM), <https://twitter.com/fergusonreports/status/1278064914158850048> [<https://perma.cc/R7XK-PWTY>] (showing a tweet from the public Twitter account of Grace Ferguson, Campus News Editor at Boston University, as linked in Nguyen, *supra* note 90).

¹⁴⁴ Greta Anderson, *Colleges Seek Waivers from Risk-Taking Students*, INSIDE HIGHER ED (Aug. 3, 2020), <https://www.insidehighered.com/news/2020/08/03/students-asked-sign-liability-waivers-return-campus> [<https://perma.cc/E2NE-YBMA>].

or student accounts.¹⁴⁵ This section shares three examples of these liability waivers to demonstrate the facially legally binding documents that graduate and undergraduate students are being asked to sign in order to work.

One type of COVID-19 liability waiver identified was one that very bluntly reveals itself as a liability statement, requiring signers to acknowledge that they alone will bear the potentially fatal risk of COVID-19. Image 7 is a liability waiver from Wallace State University which specifically asks students to sign a statement saying:

I voluntarily agree to assume all the foregoing risks and accept sole responsibility for any injury to myself (including, but not limited to, personal injury, disability, and death) illness, damage, loss, claim, liability, or expense, of any kind . . . I hereby release, covenant not to sue, discharge, and hold harmless the College, its employees, agents, and representatives, of and from the Claims, including all liabilities, claims, actions, damages, costs or expenses of any kind arising out of or relating thereto.¹⁴⁶

If legally binding, this waiver would effectively render the University completely blameless and legally untouchable from any consequences arising out of COVID-19. And, strikingly, its language seems all-encompassing: as graduate students are not legal experts, this is likely sufficient to stymie any attempts at litigation following exposure.

¹⁴⁵ See *Pittsburgh Students Criticize Universities Pushing What Some See as COVID-19 'Liability Form'*, PA. CAP.-STAR (Aug. 13, 2020), <https://www.penncapital-star.com/covid-19/pittsburgh-students-criticize-universities-pushing-what-some-see-as-covid-19-liability-forms/> [<https://perma.cc/FJ4P-MVHL>] (explaining that a COVID-19 waiver would pop up when students at Pittsburg University would log in to try and access their student email accounts. Savvy students were able to get around the pop-up and access their accounts).

¹⁴⁶ *Assumption of the Risk and Waiver of Liability Relating to Coronavirus/COVID-19*, WALLACE STATE CMTY. COLL., https://www.wallacestate.edu/Content/Uploads/wallacestate.edu/files/marketing/COVID-19_WSCC_Warning_Waiver_v1.pdf [<https://perma.cc/E3RN-M5H9>].

Image 7: Wallace State University Waiver of Liability¹⁴⁷



ASSUMPTION OF THE RISK AND WAIVER OF LIABILITY RELATING TO CORONAVIRUS/COVID-19

The novel coronavirus, COVID-19, has been declared a worldwide pandemic by the World Health Organization. COVID-19 is extremely contagious and is believed to spread mainly from person-to-person contact. As a result, federal, state, and local governments and federal and state health agencies recommend social distancing and have, in many locations, prohibited the congregation of groups of people.

Wallace State Community College ("the College") has put in place preventative measures to reduce the spread of COVID-19; however, the College cannot guarantee that you will not become infected with COVID-19. Further, attending the College, participating in College-led classes, trainings or labs could increase your risk of contracting COVID-19.

By signing this agreement, I acknowledge the contagious nature of COVID-19 and voluntarily assume the risk that I may be exposed to or infected by COVID-19 by attending the College and that such exposure or infection may result in personal injury, illness, permanent disability, and death. I understand that the risk of becoming exposed to or infected by COVID-19 at the College may result from the actions, omissions, or negligence of myself and others, including, but not limited to, College employees, other students, vendors or affiliates and their families.

I voluntarily agree to assume all of the foregoing risks and accept sole responsibility for any injury to myself (including, but not limited to, personal injury, disability, and death), illness, damage, loss, claim, liability, or expense, of any kind, that I may experience or incur in connection with my attendance at the College or participation in College activities ("Claims"). On my behalf, I hereby release, covenant not to sue, discharge, and hold harmless the College, its employees, agents, and representatives, of and from the Claims, including all liabilities, claims, actions, damages, costs or expenses of any kind arising out of or relating thereto. I understand and agree that this release includes any Claims based on the actions, omissions, or negligence of the College, its employees, agents, and representatives, whether a COVID-19 infection occurs before, during, or after participation in any College services.

Signature of Student	Date
Print name of Student	
Signature of Parent/Guardian (if student under 18)	Date
Print Name of Parent/Guardian (if student under 18)	

A second distinguishable type of liability document is one that includes large amounts of information on risk mitigation or assurances directed toward students, followed by a statement asking students to take on a voluntary assumption of the risks. Image 8, Excerpts from The University of New Hampshire's Informed Consent Agreement, demonstrates this.¹⁴⁸ The full

¹⁴⁷ *Id.*

¹⁴⁸ *Informed Consent Agreement for Students Participating in On-Campus Programming for the Fall Semester*, UNIV. OF N.H., <https://www.unh.edu/sites/default/files/departments/stud>

document is four pages long, with the liability statement coming at the very end.¹⁴⁹ Most of the document focuses on the university plan for risk mitigation, with a conclusion requiring students to “assume the risks associated with being at the University of New Hampshire including the risk of exposure to COVID-19.”¹⁵⁰ The document ends with a statement requiring the students to acknowledge a personal obligation to make the campus reasonably safe and a statement of universal consent for all university activities.¹⁵¹

**Image 8: Excerpts from The University of New Hampshire’s
Informed Consent Agreement¹⁵²**

**Informed Consent Agreement for
Students Participating in On-campus
Programming for the Fall Semester**

The University of New Hampshire (UNH) is looking forward to welcoming students, faculty and staff back to our campuses for in-person instruction. We will need the help, cooperation and participation of you and every other member of our university community to maintain a reasonably healthy and safe environment. While none of us can ensure each campus will be free from the risk of contracting COVID-19, by working together we can manage and mitigate the risk. We ask you to help reduce the risk of transmission by staying current on information about the virus provided by public health officials and experts. UNH has established and implemented public university-wide protocols [COVID-19 website page](#) designed to limit the spread of COVID-19 on its campuses and to help safeguard vulnerable persons on its campuses, in the **Town of Durham**, in the cities of **Manchester** and **Concord**, and in the wider community for the 2020-21 academic year.

ent_life/informed_consent_agreement_for_unh_students_july.16.2020.pdf [https://perma.cc/6G2R-GPYG].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

Please Read Carefully Before Signing:

By signing below, I understand the **University of New Hampshire's** approach to on-campus learning during the COVID-19 pandemic. I understand that my decision to return to on-campus programming is voluntary. I understand that UNH cannot guarantee my health or immunity from infection. I understand there are risks of exposure to the virus from symptomatic and asymptomatic carriers. I recognize that the risks of exposure to COVID-19 include sharing space with others and engaging in interpersonal communications. I assume the risks associated with being at the University of New Hampshire including the risk of exposure to COVID-19. I affirm my obligation to cooperate in making the campus reasonably safe, and consent to attending all university activities.

Students at the University of New Hampshire School of Law chapter of the People's Parity Project initiated a letter writing campaign in response to UNH's waiver citing among their chief concerns lack of adequate information for students to make informed decisions, lack of time for students to make informed decisions, and a lack of trust between the student body and the administration.¹⁵³ UNH law students also expressed concern about the legal language in the agreement and its similarities to a liability waiver.¹⁵⁴ Despite this language, UNH made a statement saying the agreement is not a liability waiver and that students who sign retain rights to sue the university.¹⁵⁵ UNH claims what the agreement actually does is that,

By signing the Informed Consent Agreement a student agrees to partner with their institution to help keep the entire community healthy . . . student also acknowledges the coronavirus is a general public risk and the university system cannot guarantee they will not contract the coronavirus . . . The decision of whether or not to attend a university system institution in the fall resides with the student (and the student's family).¹⁵⁶

Students remain unconvinced.

Some universities have received backlash for COVID-19 liability waivers and have since amended the language surrounding injury, illness, permanent disability, or death. Notably, Penn State University has received criticism for both the wording of their document and the way it was deployed.¹⁵⁷ Titled "The

¹⁵³ *Open Letter to UNH Administration*, ACTION NETWORK, <https://actionnetwork.org/petitions/open-letter-to-unh-administration/> [<https://perma.cc/F9KJ-QRCM>].

¹⁵⁴ Anderson, *supra* note 144.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Jocelyn Grzeszczak, *Penn State Students Must Sign COVID Waiver Discharging Liability for 'Illness, Permanent Disability or Death'*, NEWSWEEK (Aug. 12, 2020, 2:01 PM), <https://www.>

Penn State COVID-19 Compact,” the original version of the document included requirements, guidelines, and a risk statement.¹⁵⁸ Students reported that they were unable to access their student accounts and important information about finances, registration, and medical insurance without agreeing to the Compact.¹⁵⁹

The original risk language of the August statement read, “I assume any and all risk of exposure to COVID-19 that may result from attending Penn State, or participating in Penn State activities, and I acknowledge that exposure or infection may result in personal injury, illness, permanent disability, or death.”¹⁶⁰ Notably, this compact was released only one month after the university announced that a Penn State student, 21-year-old Juan Garcia, died of respiratory failure from COVID-19.¹⁶¹ After receiving backlash about the wording, specifically that the university was availing themselves of all responsibility and blaming students for potentially long-term health effects, Penn State amended the risk language in the waiver to be more moderate.¹⁶² The revised language stated, “Even with the mitigation steps taken by Penn State and my compliance with this Compact, I acknowledge that Penn State cannot prevent the risks of exposure to COVID-19 that may result from attending Penn State or participating in Penn State activities.”¹⁶³ The full text of the amended acknowledgement is displayed in Image 9.¹⁶⁴ Though Penn State amended the risk statement, they did not amend the policy where all students must confirm the compact or clarify that the document in question contained none of the standard legal intentions of a liability waiver.¹⁶⁵

newsweek.com/penn-state-students-must-sign-covid-waiver-discharging-liability-illness-permanent-disability-1524695 [https://perma.cc/9USW-NDCU].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Penn State Provides Updated Compact Option for Students*, PENN STATE NEWS (Aug. 13, 2020), <https://news.psu.edu/story/628278/2020/08/13/campus-life/penn-state-provides-updated-compact-option-students> [https://perma.cc/LQG5-CU32].

¹⁶¹ *Penn State Student Dies of COVID-19 Complications in Allentown*, PENN STATE NEWS (July 2, 2020), <https://news.psu.edu/story/624840/2020/07/02/administration/penn-state-student-dies-covid-19-complications-allentown> [https://perma.cc/YXM7-FXTB].

¹⁶² See *Penn State Provides Updated Compact Option for Students*, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ See *The Penn State COVID-19 Compact*, PENN STATE UNIV. (Aug. 2020), https://studentaffairs.psu.edu/sites/default/files/SCovidCompact_Aug20.pdf [https://perma.cc/B2CS-7B2Z].

¹⁶⁵ *Penn State Provides Updated Compact Option for Students*, *supra* note 160.

Image 9: Excerpt from Penn State Covid-19 Compact¹⁶⁶**PennState**

Carefully read the following statement. You must acknowledge that you understand what it says. In a world filled with important things, this one is really important; please treat it that way.

Acknowledgment

I acknowledge that the Centers for Disease Control, the Commonwealth of Pennsylvania, and the Pennsylvania State University have issued rules and precautions that may, or may not, be effective in mitigating the spread of COVID-19, and that it is my responsibility to follow these and other directives to protect myself and others from the substantial risks posed by this virus. Even with the mitigation steps taken by Penn State and my compliance with this Compact, I acknowledge that Penn State cannot prevent the risks of exposure to COVID-19 that may result from attending Penn State or participating in Penn State activities.

I acknowledge that the Penn State Student Code of Conduct outlines sanctions, including suspension or expulsion from the University, that may be imposed should I fail to comply with reasonable directives from University or other officials, including the requirements stated above. And I affirm that I will deliberately engage in practices that discourage the spread of coronavirus.

I understand that I must consult with the Office of Student Disability Resources, if I have a medical or other condition that may affect my ability to adhere to the commitments stated above, and that reasonable accommodations will be considered on a case-by-case basis.

If, at any point, I am unable to sustain these commitments to my fellow students and our community, I shall remove myself from the campus and complete the semester remotely. If I do not choose to take this step, I understand that I shall have forfeited the privilege of remaining on campus, and that the University may, in the interest of public health and safety, take administrative action to prohibit me from participating in any in-person campus activities, including residing in residence halls, attending classes, or joining any other pursuit that otherwise would be available to me.

In short, I recognize that I may forfeit my opportunity to continue as a student at Penn State if I fail to honor these critically important public health considerations with the sincere and earnest spirit in which they are expressed.

Finally, I understand that I am exempt from the terms of this Compact if I am enrolled in an entirely remote learning experience, will not be on any Penn State campus, and will not reside in communities surrounding any Penn State campus. However, I acknowledge that should I reside or visit any Penn State campus or surrounding community for any reason and for any period of time, all terms and expectations of this Compact will apply to me.

¹⁶⁶ *The Penn State COVID-19 Compact, supra* note 164.

2. What the Waivers Do

As Sections II and III of this paper elucidate, these agreements are almost certainly not enforceable in general. Additionally, these waivers are unenforceable because they are the product of an extraordinarily poor information environment. As this section has illustrated, graduate student workers fundamentally lack the information to make a meaningful and significant choice about what they are signing. Furthermore, graduate students lack meaningful alternatives as these waivers often work analogously to user agreements whereby graduate student workers must sign in order to participate in basic functions of their jobs, e.g., accessing email or student accounts, or to receive payment or benefits.

This type of waiver need not be judicially enforceable in order to have an impact on the parties who sign it. These types of waivers undoubtedly have a chilling effect on potential litigation. As graduate students must performatively sign away their rights before performing their jobs, they are unlikely aware of the rights they do still retain. They are also, as low-paid precarious workers, unlikely to challenge the official language of the documents that they do sign. Graduate student workers are signing away their rights functionally but not legally.

V. CONCLUSION AND POLICY RECOMMENDATIONS

From the foregoing set of data and issues, this paper concludes with three major recommendations. First, schools must take measures to increase their data transparency and accuracy. Second, graduate student workers must be recognized by the NLRB as workers. Third, there must be statutory protections against the flagrant use of liability waivers to preempt tort suits against companies and universities. Although some of these recommendations are particularly urgent amid the ongoing pandemic, these conclusions outlive it as well; risk will always be a part of the university and employment landscapes and these recommendations allow universities and employers to manage more effectively and ethically going forward.

First, as our analysis of university data collecting and sharing demonstrates, there are ways in which universities can and do provide adequate and accurate information to ensure all stakeholders can make fully informed decisions. To summarize our findings from Section IV, universities can, and in minimal instances do, take measures to provide dynamic and updated data about the campus cases and risk, provide accessible and understandable data to their stakeholders, and utilize effective visualizations. This allows not only for more informed decision making at the individual level—allowing for graduate student workers to decide, if applicable, whether to teach in-person or whether to take a leave of absence if possible—it is good public health practice in general.

Second, it is evident from the University of Michigan case described in the introduction that graduate student workers fare better when acting collectively.

Although many universities have recognized their graduate students as workers and have entered into collective bargaining agreements with those students, legal recognition would allow those agreements to function as more than polite promises. Graduate students do important work for the university and their classification and legal recognition as workers would emphasize that labor and ensure that their power comes not from their employer but from their status.

Finally, as this paper has demonstrated, the power of liability waivers comes not from their enforceability, but instead, from their use as a deterrent to future litigation. Because they exclusively originate from the party bearing more power to control the conditions of employment and originate from the party who is often more familiar with the law or better represented legally, they operate from a place of extraordinary bargaining disparity. As such, they ought not be able to function symbolically. Liability waivers ought to be affirmatively banned. As it stands, the burden of testing their enforceability falls to the individuals theoretically waiving their rights and protections: individuals with less bargaining power and less access to capital and legal resources. As a matter of both public policy and public health, courts and legislatures ought to focus on offering protections to those who are more vulnerable.

HOW COMPASSIONATE IS IT?: SUGGESTIONS FOR IMPROVING THE COMPASSIONATE RELEASE STATUTES IN KANSAS

By: Audrey Nelson*

I. INTRODUCTION

In a chaotic video taken on a cell phone by an inmate at Lansing Correctional Facility and posted to YouTube, one inmate can be heard yelling, “Y’all want to give us no healthcare? This is what we do!”¹ The inmates took over their cell block and ransacked the correctional officer’s office in protest of the poor conditions within the prison and lack of medical treatment they were receiving.² Inmates have never received the best medical treatments while incarcerated.³ The standard of care in prisons “lags far behind community health standards,” and the COVID-19 crisis is currently highlighting this unfortunate reality.⁴ Prisons are the ultimate breeding ground for spreading disease. This is due to the close confinement with others, the lack of available hygienic options, and the lack of access to preventative care, amongst other things.⁵

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¹ Reddebrek, *Inmate Video of Riot in Lansing Correctional Facility Kansas (Strong Language)*, YOUTUBE (Apr. 10, 2020), <https://www.youtube.com/watch?v=2qN6ntbmuI8> [https://perma.cc/5U8Q-JYJT].

² *Id.*

³ See generally B. JAYE ANNO, NAT’L COMM’N ON CORR. HEALTH CARE, *Historical Overview: The Movement to Improve Correctional Health Care*, in CORRECTIONAL HEALTH CARE 10 (2001) (putting the medical treatment of inmates in a historical context).

⁴ JUSTIN HANSFORD, TASNIM MOTALA, CHIJINDU OBIOFUMA & NATALIE LAROCHE, THE CONTRADICTION OF COLORBLIND COVID-19 RELIEF: BLACK AMERICA IN THE AGE OF A PANDEMIC 21 (Lauren Jenkins & Billi Wilkerson eds., 2020), <https://docs.google.com/document/d/1vEX8NVdrNlmPjCubnptLZHm58bqfTuf65TJ0oniaEc/edit> [https://perma.cc/G6XU-LLGJ].

⁵ Burton Bentley II, *The Growing Litigation Battle Over COVID-19 in the Nation’s Prisons and Jails*, LAW (Aug. 25, 2020, 6:00 PM), <https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails/> [https://perma.cc/A6JH-54ZH].

Since the COVID-19 crisis began in March 2020, sixteen Kansas correctional facility residents have died and over 6,200 inmates have tested positive for the virus.⁶ A fifty-year-old man with significant underlying health conditions was one of the first victims taken by COVID-19 at the Lansing Correctional Facility.⁷ Kansas Governor Laura Kelly released six inmates in early May 2020, but these release efforts were halted when the COVID-19 outbreaks began in the prisons.⁸ By June 2021, over 200 inmates sought relief through clemency applications, which are submitted to the Prisoner Review Board (“PRB”), then passed to Governor Kelly for her consideration.⁹ Governor Kelly only granted eight of those applications.¹⁰ Kansas’s poor response to the COVID-19 crisis in prisons led the American Civil Liberties Union (“ACLU”) to file a class-action lawsuit against the State on behalf of the inmates in April 2020.¹¹ Additionally, in the midst of the COVID-19 crisis, Kansas terminated its contract with Corizon, the medical care provider for its correctional facilities.¹² Corizon not only failed to properly care for inmates during the COVID-19 crisis,

⁶ NANCY BURGHART, KAN. DEP’T OF CORR., KDOC COVID-19 STATUS, <https://www.doc.ks.gov/kdoc-coronavirus-updates/kdoc-covid-19-status> [<https://perma.cc/7BXD-6996>]. This data does not include the number of COVID-19 cases and deaths in county jails across Kansas. Because jails are more transient than prisons, it is more likely than not that the numbers of COVID-19 cases are higher in jails compared to in prisons. See Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW CHARITABLE TRS. (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities> [<https://perma.cc/69JE-EC4P>].

⁷ Stuart Harmon, *Prison Officials in Kansas Ignored the Pandemic. Then People Started Dying*, YOUTUBE (July 2, 2020), <https://www.youtube.com/watch?v=3HsJOixMvVs> [<https://perma.cc/QB6E-SQK9>].

⁸ Kan. City Star Ed. Bd., Editorial, *Only 6 Kansas Inmates Released Amid COVID-19 Outbreak. Why Hasn’t Gov. Kelly Done More?*, KAN. CITY STAR (May 4, 2020), <https://www.kansascity.com/article242477236.html> (last visited Sept. 20, 2020).

⁹ See Sherman Smith, *Kansas Governor Grants Clemency to 8, Embracing ‘Political Risk’ in Rare Use of Power*, KAN. REFLECTOR (June 24, 2021, 3:00 PM), <https://kansareflector.com/2021/06/24/kansas-governor-grants-clemency-to-8-embracing-political-risk-in-rare-use-of-power/> [<https://perma.cc/492V-3DBZ>]. See *The Clemency Project: Clemency Explained and Filing for Clemency*, AM. C.L. UNION KAN., <https://www.aclukansas.org/en/campaigns/clemency-project-clemency-explained-and-filing-clemency> [<https://perma.cc/5YTX-T3J9>], for a discussion on what clemency is and a breakdown of the clemency process in Kansas.

¹⁰ Smith, *supra* note 9. One of the eight inmates was Christopher McIntyre, a man with terminal stage four cancer, whose application was granted based on functional incapacitation. Noah Taborda, *Kansas Man Battling Terminal Cancer Released from Lansing Prison*, KAN. REFLECTOR (Apr. 13, 2021, 6:04 PM), <https://kansareflector.com/2021/04/13/kansas-man-battling-terminal-cancer-released-from-lansing-prison/> [<https://perma.cc/YP53-GA9S>].

¹¹ *Hadley et al. v. Zmuda et al.*, AM. C.L. UNION KAN. (Apr. 2020), <https://www.aclukansas.org/en/cases/hadley-et-al-v-zmuda-et-al> [<https://perma.cc/WQ8E-XYTL>]. The Prison Policy Initiative and the ACLU conducted a study that graded states’ responses to the COVID-19 crisis in jails and prisons, and Kansas received an F+. EMILY WIDRA & DYLAN HAYRE, *FAILING GRADES: STATES’ RESPONSES TO COVID-19 IN JAILS & PRISONS* (2020), https://www.prisonpolicy.org/reports/failing_grades.html [<https://perma.cc/249V-4A5W>].

¹² Nicole Asbury, *Kansas Switches its Medical Provider for Prisons After Years of Sharp Criticism*, KAN. CITY STAR (Apr. 19, 2020), <https://www.kansascity.com/article242084326.html> (last visited Oct. 1, 2020).

but the company also failed to meet its contractual obligations to care for inmates over the past several years.¹³

The treatment in Kansas prisons is poor for an average, healthy inmate. Elderly and sick inmates are dealing with this poor care in addition to their numerous health problems. So, what options are available for these more vulnerable inmates? Kansas currently has two compassionate release statutes, sections 22-3728 and 3729 of the Kansas Statutes Annotated, through which inmates may apply to seek relief.¹⁴ Although the name compassionate release implies the state is showing inmates some sort of mercy in their old age or infirm conditions, arguably no real compassion is being shown to these inmates.

The state of Kansas must change its compassionate release statutes in light of the COVID-19 crisis, which has only illuminated inmates' poor medical treatment in state correctional facilities. This mistreatment significantly impacts elderly inmates, inmates with potentially life-threatening pre-existing conditions, and chronically ill inmates. Kansas's current compassionate release statutes do not provide a clear and effective path for these inmates to seek relief, therefore the Kansas State Legislature must add new language and amend the existing language of the current statutes.

Section II of this article examines the history of compassionate release in the United States and in Kansas. Section III identifies the current literature discussing compassionate release and the relevant arguments for and against it. Section IV discusses the current issues regarding medical mistreatment in Kansas correctional facilities and the inefficacy of the current compassionate release laws.

In Section V, this article proposes several amendments to sections 22-3728 and 3729 based on compassionate release laws in other states and the FIRST STEP Act at the federal level. This article argues that changing the language of the current compassionate release statutes is the most effective solution. The current statutes are vague and permit the PRB and its chairperson too much discretion which leads to ineffectual laws that do not fulfill their intended purposes. The proposal set forth in this article aims to amend the language within the current statutes to set specific age requirements for elderly inmates and expand the compassionate release application time frame available to terminally ill inmates. This article also suggests adding new provisions to enhance clarity: language including chronically ill inmates, a time frame for the PRB to adhere to, allowing inmates to appeal a PRB decision, creating notification procedures to inform inmates of their compassionate release eligibility, and a reporting requirement for the PRB to increase legislative accountability. Section V of this article also explores the implications of amending the current compassionate release statutes and the potential for pushback from prosecutors who often

¹³ *Id.*; Nicole Asbury, 'No Consideration': Kansas Criticizes Prison Medical Provider's COVID-19 Response, KAN. CITY STAR (Apr. 21, 2020), <https://www.kansascity.com/news/politics-government/article242177371.html> (last visited Oct. 1, 2020).

¹⁴ KAN. STAT. ANN. § 22-3728 (2014); KAN. STAT. ANN. § 22-3729 (2012).

oppose inmates' pleas for compassionate release.

II. BACKGROUND

A. *Compassionate Release in the United States*

Congress passed the first compassionate release statute during the tough-on-crime era in the Sentencing Reform Act of 1984.¹⁵ This Act removed the possibility of parole for federal inmates and created the U.S. Sentencing Commission, which then published the Federal Sentencing Guidelines.¹⁶ These guidelines led to a substantial increase in incarceration due to mandatory minimum sentencing.¹⁷ In an attempt to strike a balance, this Act allowed federal courts to reduce inmates' sentences based on "extraordinary and compelling circumstances" that arose over the course of their incarceration, including age or terminal illness.¹⁸ It was up to the Bureau of Prisons ("BOP") to identify inmates who qualified and then bring that to the attention of the court by filing a motion for sentencing reduction on the inmate's behalf.¹⁹ The court ultimately made the final decision on the motion based on criteria found under 18 U.S.C. § 3582(c)(1)(A).²⁰ In this sense, the power the BOP held to initially file those motions gave them a gatekeeping role in compassionate release cases.²¹

Former President Donald Trump signed the FIRST STEP Act of 2018 into law with the strong bipartisan support of twenty-eight senators co-signing the bill.²² Groups across the political ideological spectrum supported passage of the FIRST STEP Act, including the Koch brothers on the right and the ACLU on

¹⁵ FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/9EQK-6J7D>]; see generally *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/XB8G-GPD5>] (citing statistics comparing incarceration rates between 1980 and 2018).

¹⁶ Lynn S. Adelman, *The Tough-on-Crime Law Democrats are Overlooking*, WASH. POST (June 30, 2019), <https://www.washingtonpost.com/opinions/2019/06/30/theres-another-tough-on-crime-law-democrats-should-focus-their-criticism/> [<https://perma.cc/Q8GE-S9AP>].

¹⁷ *Id.*; *The FIRST STEP Act: What & Why*, RED, https://stoprecidivism.org/the-first-step-act-what-why/?gclid=EAIaIqobChMI-ZrXr7OZ7AIVgobACh0FiwHvEAAYASAAEgK5YPD_BwE [<https://perma.cc/9P5Q-G23M>]. Mandatory minimum sentencing led to lengthened time served. "Before reform, inmates served between 40-70% of their sentences, but after reform they served between 87-100% of their sentences." Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATL. MAG. (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/PXP8-SJCG>].

¹⁸ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 1.

¹⁹ *Id.*

²⁰ *Id.*; 18 U.S.C.A. § 3582(c)(1)(A) (West 2018).

²¹ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 1.

²² USA Today Ed. Bd., *Opinion, Vote on FIRST STEP Act to Reform 'Out of Whack' Prison Sentences*, USA TODAY (Dec. 4, 2018, 1:36 PM), <https://www.usatoday.com/story/opinion/2018/12/03/first-step-act-let-senate-vote-prison-sentences-editorials-debates/2143884002/> [<https://perma.cc/5AV8-3QZ4>].

the left.²³ FIRST STEP stands for “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person.”²⁴ This Act’s goal was to undo some of the damage created by harsh sentencing guidelines.²⁵ It did so by updating and expanding the compassionate release terms first created in the Sentencing Reform Act.²⁶

The FIRST STEP Act gave inmates the option to apply for compassionate release directly with the courts, rather than wait for the BOP to initiate the process.²⁷ Inmates gained the ability to appeal the denial or neglect of their compassionate release application after thirty days of no response from the BOP.²⁸ The Act updated the “extraordinary and compelling circumstances” language from the Sentencing Reform Act of 1984.²⁹ It changed the age requirements for elderly inmates and differentiated between debilitating and terminal medical conditions.³⁰ The FIRST STEP Act requires the BOP to notify the families of inmates who have been diagnosed with a terminal condition within seventy-two hours of the diagnosis.³¹ The BOP must also assist with a request for compassionate release if asked by the inmate, their family, partner, or attorney.³² The changes made in the FIRST STEP Act increased federal inmates’ accessibility to compassionate release.

B. Compassionate Release in Kansas

Compassionate release is well over forty years old at the federal level, but the Kansas compassionate release statutes are less than twenty years old. The Kansas State Legislature passed the first compassionate release statute in 2002 with section 22-3728, and section 22-3729 followed eight years later in 2010.³³ These two statutes cover separate types of compassionate release: that based on functional incapacitation and that based on terminal illness. These statutes are relatively similar, but they establish two different mandatory processes for the inmates to apply. Substantively, both statutes have remained mostly unchanged since the legislature passed them in 2002 and 2010.

1. Compassionate Release based on Functional Incapacitation

Section 22-3728 allows for the early release of inmates who are considered

²³ *Id.*

²⁴ *The FIRST STEP Act: What & Why*, *supra* note 17.

²⁵ *Id.* Mandatory minimum sentencing, the three-strike rule, and the war on drugs all contributed to mass incarceration. Marginalized communities, especially Black people, feel the impact of these laws at disproportionate rates and they continue to be decimated by the effects. *See Coates, supra* note 17.

²⁶ First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194.

²⁷ *Id.*

²⁸ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3.

²⁹ *Id.* at 2–3.

³⁰ *Id.*

³¹ *Id.* at 4.

³² *Id.*

³³ KAN. STAT. ANN. § 22-3728 (2014); KAN. STAT. ANN. § 22-3729 (2012).

so functionally incapacitated they are no longer considered a threat to the public.³⁴ Senator U.L. Gooch originally introduced this statute 2001 to help chronically ill inmates at the end of their lives so that they would not have to die in prison.³⁵ An important provision of this statute is the exclusion of people who are imprisoned for off-grid offenses, people serving life sentences without the eligibility of parole, or those who have received the death penalty.³⁶ Off-grid offenses include the most serious criminal offenses: capital murder, first-degree murder, treason, terrorism, illegal use of weapons of mass destruction, and certain sexual offenses.³⁷ Inmates incarcerated for any of those crimes are not eligible for compassionate release.

The PRB has the discretion to determine whether an inmate is functionally incapacitated.³⁸ No specific guidelines are in place to determine an inmate's functional incapacitation. The statute merely identifies factors that the PRB must consider when reaching this determination:

- whether the person's current condition has been confirmed by a doctor;
- the person's age and their personal history;
- their criminal history;
- the length of their sentence and how long they have served;
- the nature and circumstances of the offense;
- the risk or threat to the community if the inmate is released;
- whether a release plan has been established; and
- any other factors it finds relevant.³⁹

The mandatory process under section 22-3728 requires the inmate to first apply for a functional incapacitation finding with the Secretary of Corrections.⁴⁰ If the Secretary of Corrections approves the application, the PRB then reviews it and a final decision regarding the inmate's release is made.⁴¹ If granted, the PRB creates a supervised release plan for each inmate to adhere to upon their release. The PRB can revoke an inmate's compassionate release if the terms of their release plan are violated, their functionally incapacitated condition

³⁴ § 22-3728.

³⁵ *Hearing on S.B. 339 Before the S. Fed. & State Affs. Comm. Meeting*, 2001-2002 Leg. Sess. (Kan. 2001) (statement of Sen. Gooch, Member, S. Fed. & State Affs. Comm.).

³⁶ § 22-3728(d)-(e).

³⁷ KAN. SENT'G COMM'N, KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 2019, at 14 (2019), https://www.sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/2019-drm-text-final.pdf?sfvrsn=8152fd3f_0 [<https://perma.cc/42DW-CHQ5>].

³⁸ § 22-3728.

³⁹ § 22-3728(a)(8)(A)-(H).

⁴⁰ FAMS. AGAINST MANDATORY MINIMUMS, KANSAS 1 (2018), https://famm.org/wp-content/uploads/Kansas_Final.pdf [<https://perma.cc/TJP9-222C>].

⁴¹ *Id.*

significantly diminishes, or the inmate becomes a threat to public safety.⁴² The Secretary of Corrections acts as a gatekeeper to those considered for compassionate release, much like the BOP in the Sentencing Reform Act. Furthermore, the PRB can deny an application for essentially any reason, creating a secondary hurdle to an inmate's compassionate release.

2. Compassionate Released based on Terminal Illness

Section 22-3729 allows for the release of inmates who have terminal medical conditions that will likely cause death within thirty days.⁴³ Representative Bill Feuerborn introduced this statute to the Kansas State Legislature in 2010.⁴⁴ A father's testimony about his daughter—who was an inmate with terminal cancer—was the catalyst to pass this new statute.⁴⁵ The father described that three to four weeks before his daughter's death she could hardly stand.⁴⁶ When she finally was released, her condition deteriorated to the point that her family did not think she was even aware that she was home.⁴⁷ She was released with the extraordinary assistance of the Secretary of Corrections, but she died the following day.⁴⁸ Her father went on to say, "it serves no purpose to hold a dying person in prison when they cannot even stand alone."⁴⁹

The limitations of the functional incapacitation statute were another impetus for enacting this statute. Section 3728 requires the PRB to wait a minimum thirty-day period before making a decision.⁵⁰ Within those thirty days the prosecutor, court, and victim or victim's family are given notice of the compassionate release application and notice of the application is also published in the newspaper.⁵¹ Section 22-3729 provides a procedure for an inmate who will likely not survive that thirty-day waiting period.⁵²

As with the functional incapacitation statute, compassionate release based on terminal illness excludes people who are imprisoned for off-grid offenses.⁵³ Under this statute, an application must be submitted to the PRB's chairperson and they choose to grant or deny the application.⁵⁴ The chairperson has the sole

⁴² § 22-3728(a)(5)–(6).

⁴³ KAN. STAT. ANN. § 22-3729 (2012).

⁴⁴ *Hearing on H.B. 2412 Before the H. Comm. on Corr. & Juv. Just.*, 2009-2010 Leg. Sess. (Kan. 2010) (statement of Rep. Feuerborn).

⁴⁵ KAN. LEG. RSCH. DEP'T, REPORT OF THE JOINT COMMITTEE ON CORRECTIONS & JUVENILE JUSTICE OVERSIGHT TO THE 2010 KANSAS LEGISLATURE 4-17 (2009).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Hearing on H.B. 2412 Before H. Comm. on Corr. & Juv. Just.*, *supra* note 44 (statement of Rep. Feuerborn).

⁴⁹ KAN. LEG. RSCH. DEP'T, *supra* note 45, at 4-17.

⁵⁰ *Hearing on H.B. 2412 Before H. Comm. on Corr. & Juv. Just.*, 2009-2010 Leg. Sess. (Kan. 2010) (statement of Roger Werholtz, Sec'y of Corr.); KAN. STAT. ANN. § 22-3728(a)(3) (2014).

⁵¹ § 22-3728(a)(3).

⁵² *Hearing on H.B. 2412 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 50 (statement of Roger Werholtz, Sec'y of Corr.).

⁵³ KAN. STAT. ANN. § 22-3729(d) (2012).

⁵⁴ § 22-3729(a)(3).

discretion in determining whether to release an inmate with a terminal medical condition. When making this determination, they must consider certain factors, such as:

- the person's age and their personal history;
- their criminal history;
- the length of their sentence and how long they have served;
- whether they are a danger to the community;
- whether a release plan has been established; and
- any other factors they deem relevant.⁵⁵

Unlike the functional incapacitation statute, the chairperson must also consider whether a physician has confirmed the person's terminal condition and whether that condition is likely to cause death within thirty days.⁵⁶ This is a difficult needle to thread because the combination of the restrictive timeline and the vagueness of the overall statute. A terminally ill inmate granted compassionate release must adhere to a post-release supervision plan upon release.⁵⁷ The statute provides for the revocation of release if the individual violates a term of the release plan, medically improves or does not die within thirty days, or the inmate is labeled a threat to the public by the PRB chairperson.⁵⁸

In February 2020, Kansas Representative Dennis "Boog" Highberger and Scott Schultz, Executive Director of the Kansas Sentencing Commission, introduced House Bill 2469 to the Committee on Corrections and Juvenile Justice in the Kansas State Legislature.⁵⁹ House Bill 2469 proposed an extension to the time frame in section 3729(a)(2) from thirty days to ninety days to increase the number of inmates who could successfully be released under the statute.⁶⁰ The committee amended the bill to allow compassionate release based on terminal illness within 120 days of expected death.⁶¹ It passed the House Committee of the Whole with a resounding 120 yeas and only five nays.⁶²

⁵⁵ § 22-3729(a)(7)(B)–(H).

⁵⁶ § 22-3729(a)(7)(A).

⁵⁷ § 22-3729(a)(4).

⁵⁸ § 22-3729(a)(4)–(5).

⁵⁹ See H.B. 2469, 2019-2020 Leg. Sess. (Kan. 2020) (as introduced to the H. Comm. on Corr. & Juv. Just.); see *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, 2019-2020 Leg. Sess. (Kan. 2020) (statement of Rep. Highberger, Member, H. Comm. on Corr. & Juv. Just.).

⁶⁰ H.B. 2469; *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 59 (statement of Rep. Highberger, Member, H. Comm. on Corr. & Juv. Just.).

⁶¹ H.B. 2469, 2019-2020 Leg. Sess. (Kan. 2020) (as amended and passed by the H. Comm. on Corr. & Juv. Just.).

⁶² *House-Final Action-Passed as Amended*, 2019-2020 Kan. Leg. Sess. (Kan. 2020) (Feb. 26, 2020),

http://www.kslegislature.org/li_2020/b2019_20/measures/vote_view/je_20200226095449_856647/ [<https://perma.cc/RR4E-6QF5>].

Sadly, this bill died in the Senate Committee on the Judiciary, most likely because of the growing COVID-19 crisis occurring at the time.⁶³ However, the almost unanimous support for this bill in the House indicates the Kansas State Legislature may be willing to amend the current compassionate release statutes in the near future.

3. The Decisionmaker: Prisoner Review Board

The Prisoner Review Board (“PRB”) holds substantial power regarding granting compassionate release. The Kansas State Legislature originally established this body in 1885 as the Board of Pardons to help the governor review commutation and pardon applications and to make recommendations to the governor.⁶⁴ That board went through numerous changes over almost 150 years, including name changes, changes to the number of board members, appointment procedure, board member job duties, and the necessary qualifications to sit on the board.⁶⁵

Kansas renamed this administrative body the Prisoner Review Board in 2011.⁶⁶ Former Kansas Governor Sam Brownback abolished the Kansas Parole Board in Executive Reorganization Order No. 34 and established the PRB, which was codified in Chapter 75, Article 52, Section 152 of the Kansas Statutes Annotated.⁶⁷ This new board is comprised of three members that are appointed by the Secretary of Corrections and serve at the Secretary’s pleasure.⁶⁸ The only prerequisite for a position on the PRB is current employment within the Department of Corrections.⁶⁹ Whereas, in the past, requirements were in place to balance political ideologies, interests, and to gain input from people of various professions.⁷⁰ Previously, the governor nominated board members and they were appointed subject to Senate approval. Therefore, the process provided a check on the executive’s power.⁷¹ Currently, the Secretary of Corrections has no comparable check on their power. And while the PRB and its chairperson have all the authority to grant—or more likely deny—these applications, the statutes do not provide any check on that power either. The compassionate release statutes specifically prohibit review of the PRB’s decisions by other

⁶³ *Bill History on H.B. 2469*, 2019-2020 Kan. Leg. Sess. (Kan. 2020), http://www.kslegislature.org/li/b2019_20/measures/hb2469/ [<https://perma.cc/Z8ET-678G>].

⁶⁴ See CJ Perez, *Historical Overview of Kansas Paroling Authorities*, KAN. DEP’T OF CORR., <https://www.doc.ks.gov/prb/overview> [<https://perma.cc/7HYZ-37LP>] (last updated July 9, 2020).

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ Exec. Reorg. Ord. No. 34, KAN. STAT. ANN. § 75-52-152 (2011).

⁶⁸ Perez, *supra* note 64.

⁶⁹ § 75-52-152. While it is not within the scope of this paper, it is important to note the current members of the PRB are not statutorily required to have any formal training or additional qualifications. Future legislative proposals should focus on amending the statutory requirements for a position on the PRB to include such requirements to ensure competency in the role as a PRB member.

⁷⁰ Perez, *supra* note 64.

⁷¹ *Id.*

administrative agencies and courts.⁷² Three people on the PRB decide the lives of all inmates seeking compassionate release in Kansas.

III. LITERATURE REVIEW

Compassionate release is an interesting legislative phenomenon. Political actors on both the left and the right have found different reasons to support compassionate release legislation. Conservatives favor it because of their goal of reducing government spending.⁷³ Liberals favor it because it favors human rights.⁷⁴ Either way, compassionate release is ethically and legally justifiable because the financial costs to society of incarcerating debilitatingly ill inmates outweigh the benefits.⁷⁵ Much of the current literature surrounding compassionate release examines its overall impact on society and financial impact on the State. This section addresses that literature and addresses other proposed solutions that have been introduced to the Kansas State Legislature.

Inmate recidivism rates are common issues in compassionate release discourse. Some are concerned with the safety risks of releasing inmates back into society. However, inmates serving sentences for dangerous and violent off-grid offenses, like murder, are ineligible for compassionate release.⁷⁶ These requirements reduce the likelihood of violent offenders being released and committing additional violent crimes. Compassionate release statutes also allow revocation of release if candidates violate the terms of the release plan, which encourages compliance with release conditions.⁷⁷

Considering the population of inmates that qualify for compassionate release, the problem of recidivism is low. Scott Schultz said, “as prisoners age or experience declining health, their threat to public safety lessens.”⁷⁸ Evidence

⁷² KAN. STAT. ANN. § 22-3728(a)(7) (2014); KAN. STAT. ANN. § 22-3729(a)(6) (2012). The PRB is currently an unchecked extension of the executive branch. The provisions discussed in this article bring up a host of constitutional issues, including the right to life and potential violations of the Fourteenth Amendment, which must be addressed. Additionally, the prohibition against judicial review is a usurpation of the court’s ability to check decisions made by an executive agency like the PRB. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (establishing the principle of judicial review, which allows courts to declare legislative and executive acts unconstitutional).

⁷³ See generally REPUBLICAN PLATFORM 2016, REPUBLICAN NAT’L COMM. 8 (2020) (the Republican National Committee used the same, unchanged platform in 2020 as it did in 2016).

⁷⁴ 2020 DEMOCRATIC PARTY PLATFORM, DEMOCRATIC NAT’L COMM. 38 (2020) (“Democrats believe prisoners should have a meaningful opportunity to challenge . . . unconstitutional conditions in prisons. We also believe that too many of our jails and prisons subject people to inhumane treatment . . .”).

⁷⁵ Brie A. Williams, Rebecca L. Sudore, Robert Greifinger & R. Sean Morrison, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, ANNALS OF INTERNAL MED. (July 19, 2011), <https://www.acpjournals.org/doi/10.7326/0003-4819-155-2-201107190-00348> [<https://perma.cc/996K-HWJE>].

⁷⁶ § 22-3728(e)–(f); § 22-3729(d).

⁷⁷ § 22-3728(a)(5); § 22-3729(a)(4).

⁷⁸ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.* 1, 2019-2020 Leg. Sess. (Kan. 2020) (statement of Scott Schultz, Exec. Dir., Kan. Sent’g Comm.).

shows that recidivism reduces with age.⁷⁹ Generally, inmates over the age of fifty have a recidivism rate of fifteen percent, but those released through the compassionate release program have an average recidivism rate of 3.5 percent.⁸⁰ Additionally, older inmates that do recidivate “do so later in the follow-up period, do so less frequently, and commit less serious recidivism offenses.”⁸¹ Because of their condition, it is highly improbable that terminally ill inmates would go on to commit crimes in the little time they have left if they are released. Schultz added that “the costs of housing these offenders and their dignity can be saved without sacrificing public safety.”⁸² The problem of recidivism that may be a concern for other populations of inmates is not necessarily the same for elderly and sick inmates who would be granted compassionate release under the proposed amendments.

The Supreme Court held that the Eighth Amendment imposes a duty to provide humane conditions of confinement, which includes access to adequate medical care amongst other things.⁸³ Two feasible options exist to meet this duty: 1) the State increases healthcare spending in prisons to comply with the Eighth Amendment; or 2) the State updates and modifies the compassionate release statutes. *Estelle v. Gamble*⁸⁴ and *Farmer v. Brennan*⁸⁵ are two Supreme Court cases that control procedures for the medical mistreatment of inmates. In *Estelle*, the Court held that “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain.”⁸⁶ The Court narrowed the definition of deliberate indifference in *Farmer* and created a subjective test for determining whether deliberate indifference existed.⁸⁷ Kansas inmates with pre-existing and chronic medical conditions have an argument the State has shown them deliberate indifference during the COVID-19 crisis.⁸⁸ Courts have held that a failure to timely respond to symptoms of a dangerous disease in a high-risk patient may be grounds for an Eighth Amendment violation if the inmate becomes extremely ill, suffers complications to pre-existing diseases, or dies.⁸⁹ The State must protect vulnerable inmates’ Eighth

⁷⁹ Lindsey E. Wylie, Alexis K. Knutson & Edie Greene, *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH. PUB. POL. & L. 216, 217 (2018), <https://www.apa.org/pubs/journals/features/law-law0000161.pdf> [<https://perma.cc/7AES-LXEX>].

⁸⁰ *Elderly in Prison and Compassionate Release*, AM. CONSERVATIVE UNION FOUND., <https://conservativejusticereform.org/issue/elderly-in-prison-and-compassionate-release/> [<https://perma.cc/HS53-HA63>].

⁸¹ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 78, at 2 (statement of Scott Schultz, Exec. Dir., Kan. Sent’g Comm.).

⁸² *Id.*

⁸³ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

⁸⁴ *See Estelle v. Gamble*, 429 U.S. 97 (1976).

⁸⁵ *See Farmer*, 511 U.S. at 832.

⁸⁶ *Estelle*, 429 U.S. at 104.

⁸⁷ *Farmer*, 511 U.S. at 837 (holding that for deliberate indifference to exist a “prison official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference.”).

⁸⁸ *See Hadley et al. v. Zmuda et al.*, *supra* note 11.

⁸⁹ Michael J. Bentley, Erin D. Saltaformaggio & Michael Casey Williams, *Constitutional Lessons*

Amendment rights.

To comply with the Eighth Amendment, Kansas must increase spending on medical care inside of prisons. Healthcare costs for elderly and sick patients are significantly higher compared to their younger and healthier counterparts. Overall, forty percent of incarcerated people have at least one reported chronic health condition.⁹⁰ That percentage increases in older inmate populations, where approximately eighty-two percent of incarcerated people over the age of sixty-five have chronic health conditions.⁹¹ Moreover, inmates over the age of fifty-five have an average of three chronic health conditions.⁹² On top of treatment for numerous chronic conditions, elderly inmates may require special accommodations due to physical limitations.⁹³ In 2004, the National Institute of Corrections (“NIC”) estimated the annual cost of healthcare for elderly inmates is between \$60,000 and \$70,000 per inmate, compared to the \$27,000 it cost to care for the general population of inmates.⁹⁴ This is consistent with data showing prisons spend double for inmates with one chronic condition and five times more for inmates with at least three chronic conditions.⁹⁵ The average cost per inmate has most likely only increased since 2004, but the 2004 data published by the NIC is still used in elderly incarceration research.⁹⁶ The growing population of elderly and chronically ill inmates will make caring for these inmates even more expensive in the years to come.⁹⁷

for *Prisons Amid COVID-19 Outbreak*, LAW360 (Mar. 27, 2020), <https://www.bradley.com/insights/publications/2020/03/constitutional-lessons-for-prisons-amid-covid19-outbreak> [<https://perma.cc/G2AL-Q826>].

⁹⁰ HANSFORD ET AL., *supra* note 4, at 20.

⁹¹ Wylie et al., *supra* note 79, at 217.

⁹² TINA CHIU, IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 5 (Apr. 2010), https://www.vera.org/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf [<https://perma.cc/87FE-6R33>].

⁹³ B. JAYE ANNO, CAMELIA GRAHAM, JAMES E. LAWRENCE & RONALD SHANSKY, CORRECTIONAL HEALTH CARE ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 10 (2004), <https://s3.amazonaws.com/static.nic.gov/Library/018735.pdf> [<https://perma.cc/Q8FF-63N8>]. Elderly inmates may have difficulty with narrow doorways, stairs, and a lack of handrails, they struggle to get to and from their beds if they sleep on the top bunk, and they may suffer from incontinence. TCR Staff, *The Rising Cost of Incarcerating the Elderly*, CRIME REP. (May 17, 2018), <https://thecrimereport.org/2018/05/17/the-rising-cost-of-punishing-the-elderly/> [<https://perma.cc/Q97R-XGZ7>].

⁹⁴ ANNO ET AL., *supra* note 93, at 11.

⁹⁵ PEW CHARITABLE TRS., PRISON HEALTH CARE: COSTS AND QUALITY 24 (2017), https://www.pewtrusts.org/-/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf [<https://perma.cc/KA2L-ZHJE>].

⁹⁶ E.g., AM. C.L. UNION, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 27 (2012), https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf [<https://perma.cc/3J33-Z8K7>].

⁹⁷ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 78, at 1 (statement of Scott Schultz, Exec. Dir., Kan. Sent’g Comm.); MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE UNITED STATES 10 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [<https://perma.cc/53E9-Q78J>].

In addition to a growing number of elderly and ill inmates, studies show that incarcerated people age at a rate seven to ten years faster than their non-incarcerated counterparts.⁹⁸ Lack of access to healthcare, drug and alcohol abuse, and other patterns of unhealthy living prior to entering prison are all contributing factors to the rapid aging process of incarcerated people.⁹⁹ This means a fifty-five-year-old inmate has the health conditions of a sixty-five-year-old who is not incarcerated. A majority, close to fifty-nine percent, of state inmates who died during their incarceration were fifty-five years old or older.¹⁰⁰ Older inmates require a higher level of care earlier on than someone who is not incarcerated, costing the State more money overall.

There is a cost-shifting benefit for the State to release elderly and sick inmates. Kansas is one of seven states that revokes Medicaid coverage to individuals entering prison.¹⁰¹ Less than one percent of inmates in Kansas currently qualify for Medicaid because of the stringent restrictions currently in place.¹⁰² Consequently, the cost of medical care for ninety-nine percent of inmates is on the State. However, once Kansas releases inmates from prison, inmates can qualify and apply for Medicaid.¹⁰³ The State ends up saving money that it would have spent on the inmate's healthcare because Medicaid is partially funded through the federal government. Medicare coverage continues when an older individual is incarcerated.¹⁰⁴ To receive Medicare benefits post-release, the person must be enrolled in Medicare prior to incarceration, but Medicare will not pay for care during incarceration.¹⁰⁵ People incarcerated at a younger age but are now older most likely would not have qualified for Medicare at the time of incarceration.

Advocates often propose Medicaid expansion as a solution to this problem¹⁰⁶, but the Kansas State Legislature has consistently rejected Medicaid expansion bills for the last three years. The most recent bill introduced in the

⁹⁸ Wylie et al., *supra* note 79, at 217.

⁹⁹ *Id.* To be sure, poor medical treatment in prisons only seems to exacerbate these factors.

¹⁰⁰ MARGARET E. NOONAN, BUREAU OF JUST. STATS., MORTALITY IN STATE PRISONS, 2001-2014 at 6 (2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf> [<https://perma.cc/2G2D-983R>]. For context, the average life expectancy was seventy-eight years in the United States in 2018. JIAQUAN XU, SHERRY L. MURPHY, KENNETH D. KOCHANEK & ELIZABETH ARIAS, NAT'L CTR. FOR HEALTH STATS., MORTALITY IN THE U.S., 2018 at 1 (2020), <https://www.cdc.gov/nchs/data/databriefs/db355-h.pdf> [<https://perma.cc/6ULY-4ZC7>].

¹⁰¹ Nomin Ujyediin, *How Medicaid Expansion Would Shift the Cost of Health Care in Kansas Prisons and Jails*, KAN. CITY UNIV. RADIO (Jan. 31, 2020), <https://www.kcur.org/health/2020-01-31/how-medicaid-expansion-would-shift-the-cost-of-health-care-in-kansas-prisons-and-jails> [<https://perma.cc/8RMJ-EYJG>].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Medicare Coverage During Incarceration*, MEDICARE INTERACTIVE, <https://www.medicareinteractive.org/get-answers/medicare-health-coverage-options/medicare-and-incarceration/medicare-coverage-during-incarceration> [<https://perma.cc/URP6-JY2A>].

¹⁰⁵ *Id.*

¹⁰⁶ See LYNDA ZELLER & JACKI PROKOP, UNDERSTANDING HEALTH REFORM AS JUSTICE REFORM: MEDICAID, CARE COORDINATION, AND COMMUNITY SUPERVISION 9 (2020).

2020 legislative session sought to expand access to Medicaid to between eighty and ninety percent of inmates.¹⁰⁷ The bill would have also increased the share of Medicaid costs that the federal government would cover.¹⁰⁸ This plan would greatly benefit inmates, but the Kansas State Legislature's historical unwillingness to expand Medicaid¹⁰⁹ makes this an implausible short-term solution. A better option is for the State to reallocate the funds spent housing elderly and dying inmates in prison towards protecting the public by releasing those inmates.¹¹⁰

In 2019, the Kansas Criminal Justice Reform Commission ("KCJRC") recommended the legislature repurpose a building within the Department of Corrections to use as a separate facility for elderly inmates.¹¹¹ The creation of a separate housing facility for elderly inmates is an alternative to amending the compassionate release statutes, but it poses some of the same barriers as the Medicaid expansion solution, like cost, and poses new barriers, like the limited number of inmates it could help. Separate housing would only scratch the surface of fixing prison conditions for elderly incarcerated people in Kansas.

The KCJRC's recommendation required the State to spend approximately ten million dollars to make the necessary renovations, and the new facility would cost about 8.3 million dollars a year to operate.¹¹² In addition to the financial impact, the facility would only add between 200 and 250 beds for elderly male inmates.¹¹³ In 2020, the Kansas Department of Corrections housed 670 inmates over the age of sixty.¹¹⁴ This means the facility would house less than one-third of the geriatric inmates serving time within the Kansas correctional system, leaving others to remain in traditional facilities that do not support their medical needs. A separate facility would not solve the actual problem of poor medical care within Kansas prisons. The State would still need to increase spending for elderly inmates' medical care. Although the conditions within an alternative facility might be a minor improvement for elderly inmates, that does not diminish the fact that they are nearing the ends of their lives. They would be alone and without family, while having a host of uncomfortable, painful medical conditions. The possibility of them dying alone in prison would be very real.

¹⁰⁷ Ujjiyediin, *supra* note 101.

¹⁰⁸ *Id.*

¹⁰⁹ See *Kansas and the ACA's Medicaid Expansion*, HEALTHINSURANCE, <https://www.healthinsurance.org/medicaid/kansas/> [<https://perma.cc/HM84-YG38>].

¹¹⁰ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 78, at 2 (statement of Scott Schultz, Exec. Dir., Kan. Sent'g Comm.).

¹¹¹ KAN. CRIM. JUST. REFORM COMM'N, REPORT TO THE 2020 KANSAS LEGISLATURE 0-12 (2019), <http://www.kslegresearch.org/KLRD-web/Committees/2019InterimDocs/2019-KS-Criminal-Justice-Reform-Commission-report.pdf> [<https://perma.cc/3AU5-MCFY>].

¹¹² *Id.* at 0-25.

¹¹³ *Id.* at 0-12.

¹¹⁴ KAN. DEP'T OF CORR., ANNUAL FISCAL REPORT 18 (2020), <https://www.doc.ks.gov/publications/Reports/fy-2020-annual-report> [<https://perma.cc/K9NK-GCV4>].

IV. THE CURRENT SITUATION IN KANSAS CORRECTIONAL FACILITIES

A. Problems with Medical Care in Kansas Prisons

The healthcare problems within prisons made evident by the COVID-19 crisis are not new, and Kansas must begin seriously considering the health of vulnerable inmates. The Kansas Department of Corrections entered a nine-and-a-half-year contract with Corizon in 2014, paying the company approximately seventy million dollars a year.¹¹⁵ Corizon failed to meet its contractual obligations by delaying, postponing, and failing to provide treatment to inmates one-third of the time between July 2015 and December 2018.¹¹⁶ This translates to approximately fifty-nine weeks that inmates went without proper medical care. Over the course of five years, whistleblowing former employees, inmates' families, and inmates themselves have sued Corizon 660 times nationwide for malpractice.¹¹⁷ The Department of Corrections audited Corizon for nine performance standards in 2018, and the company was only compliant in one category.¹¹⁸ Corizon was at less than ten percent compliance for sick calls, intake assessments, and care for inmates with chronic health conditions.¹¹⁹ Despite this, Kansas retained the company's services for its inmates until April 2020, when it chose to sever its contract in the middle of the COVID-19 crisis. The new healthcare provider, Centurion, may not be any better than Corizon.¹²⁰ The parent company of Centurion, Centene, and its subsidiaries have faced numerous lawsuits regarding the medical mistreatment of inmates resulting in wrongful deaths.¹²¹ It is still too early to determine the current level of care Centurion is providing Kansas inmates, but its track record is not good.¹²² Kansas inmates

¹¹⁵ Keith Bradshaw, Exec. Dir. Contract Programs & Finance, KDOC Medical Contract Presentation to House Corrections and Juvenile Justice 2 (Feb. 20, 2019), <https://www.doc.ks.gov/newsroom/legislative/2019/feb-20-2019> [<https://perma.cc/7RKK-7PE7>].

¹¹⁶ Asbury, *supra* note 13.

¹¹⁷ Matthew Clarke, *Neither Fines nor Lawsuits Deter Corizon from Delivering Substandard Health Care*, PRISON LEGAL NEWS, Mar. 3, 2020, at 24, 24 <https://www.prisonlegalnews.org/news/2020/mar/3/never-fines-nor-lawsuits-deter-corizon-delivering-substandard-health-care/#:~:text=According%20to%20the%20American%20Civil,with%20%E2%80%94%20usually%20for%20inadequate%20staffing> [<https://perma.cc/P48P-K5TV>]; Matthew Clarke, *Numerous Lawsuits Filed Against Corizon Nationwide; Company Loses Contracts*, PRISON LEGAL NEWS, Aug. 30, 2017, at 32, 32, <https://www.prisonlegalnews.org/news/2017/aug/30/numerous-lawsuits-filed-against-corizon-nationwide-company-loses-contracts/> [<https://perma.cc/Y342-GZ9X>].

¹¹⁸ Chad Marks, *Kansas Slaps Corizon Health with Millions in Fines for Contract Violations*, PRISON LEGAL NEWS, May 3, 2019, at 48, 48 <https://www.prisonlegalnews.org/news/2019/may/3/kansas-slaps-corizon-health-millions-fines-contract-violations/> [<https://perma.cc/7BRR-3SBJ>]. The Department of Corrections audits based on complaints it receives from inmates and their families. *Id.*

¹¹⁹ *Id.*

¹²⁰ Asbury, *supra* note 13.

¹²¹ Lauren Castle, *New Arizona Prison Health-Care Provider has History of Problems, Donations to Politicians*, AZ CENTRAL (July 10, 2019), <https://www.azcentral.com/story/news/local/arizona/2019/07/10/new-arizona-prison-health-care-provider-centurion-has-history-problems-corizon/1622620001/> [<https://perma.cc/J262-RMG5>].

¹²² See *id.*; see, e.g., Elise Kaplan, *Jail Health Care Provider Terminates Contract*, ALBUQUERQUE

deserve better.

There are numerous examples of inmates' medical needs not being met in Kansas prisons. In October 2015, Marques Davis, a diabetic inmate at El Dorado Correctional Facility, complained of an infected bug bite on his arm.¹²³ The inmate took a sick call request with him when he picked up his insulin after being given antibiotics for the infection with no follow-up or improvement.¹²⁴ It was discovered that he had contracted antibiotic-resistant MRSA.¹²⁵ In October 2017, Marques Davis, a twenty-seven-year-old inmate at the Hutchinson Correctional Facility, died from a type of meningitis that infected his brain.¹²⁶ Davis repeatedly sought out medical treatment and complained of blurry vision, numbness in his legs, and slurred speech, to name only a few symptoms.¹²⁷ He endured these symptoms for eight months before the infection inevitably caused other health problems and took his life.¹²⁸

Most recently during the COVID-19 outbreak in prisons, the Kansas Secretary of Corrections, Jeff Zmuda, accused Corizon of not providing enough personal protective equipment to inmates, not hiring enough nurses to meet the high demand of cases, and even sending inmates back to their cells with fevers.¹²⁹ Governor Kelly issued a state of emergency in mid-March 2020, but Corizon did not establish quarantining or testing procedures for COVID-19 or begin isolation management until April 8, 2020.¹³⁰ That was the first time inmates received any personal protective equipment, had their temperatures taken, or were given a COVID-19 test.¹³¹ This was the same week the riot broke out at the Lansing Correctional Facility.¹³²

An inmate at the Lansing Correctional Facility, Rachad Austin, said he

J. (Apr. 25, 2021, 10:04 PM), <https://www.abqjournal.com/2383953/jail-health-care-provider-terminates-contract.html> [<https://perma.cc/8FGQ-5UB9>] ("Their [Centurion's] reputation nationally is that they are in the bottom half in terms of quality. . .").

¹²³ Andy Marso, *Locked Out of Care: Brain Fungus Death Points to Extensive Problems in Kansas Prisons*, KAN. CITY STAR (Apr. 28, 2019), <https://www.kansascity.com/article229423849.html> (last visited Aug. 29, 2021).

¹²⁴ *Id.* The cost of healthcare within Kansas correctional facilities is not within the scope of this article, but a sick call costs an inmate two dollars, and prison jobs only pay nine cents per hour. Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [<https://perma.cc/ST8T-PGW5>]. A single sick call would require almost twenty-three hours of work. *Id.* If an inmate does not have a prison job, they must rely on family and friends to put money on their books just so they can see a doctor.

¹²⁵ Marso, *supra* note 123.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Asbury, *supra* note 13.

¹³⁰ *Id.*

¹³¹ Harmon, *supra* note 7.

¹³² See Anna Spoerre, *Lansing Prisoners Riot Over Healthcare, Video Purports; Kansas Officials Investigate*, KAN. CITY STAR (Apr. 10, 2020), <https://www.kansascity.com/news/local/article241912816.html> (last visited Aug. 29, 2021); see also Reddebek, *supra* note 1 (portraying a video of the riot in Lansing Correctional Facility).

shared a space with people who tested positive for COVID-19.¹³³ Austin was serving four years for a drug charge.¹³⁴ He entered prison with a collapsed lung, which put him at greater risk of having complications if he contracted COVID-19.¹³⁵ Austin tested positive for COVID-19 less than forty days before his release date, but he was able to return home to the care of his fiancée at the end of his sentence.¹³⁶

Sherman Wright, also an inmate at the Lansing Correctional Facility, is fifty-six years old and currently serving year thirty-two of a sixty-nine-year prison sentence for multiple counts of robbery.¹³⁷ He has serious underlying health conditions such as diabetes, asthma, and high blood pressure.¹³⁸ He tested positive for COVID-19 and felt like he received a death sentence.¹³⁹

Mr. Wright does not currently qualify for compassionate release for terminal illness under section 22-3729. The broad language and vagueness of section 22-3728 makes it unclear if he would qualify for compassionate release based on functional incapacitation. Release under section 22-3728 seems relatively unlikely considering the small number of people that have been released under this statute. Furthermore, Mr. Wright was one of the over 200 inmates that applied for clemency.¹⁴⁰ Mr. Wright and his family felt confident he would be granted clemency because he used the last thirty-two years in prison building skills to be utilized upon his release, such as welding, maintenance, cooking, and public speaking.¹⁴¹ Unfortunately, Governor Kelly did not grant Mr. Wright's application for clemency.¹⁴² Sherman Wright, and the many inmates like him, do not deserve to be subjected to a medically dangerous environment. They deserve the opportunity to be in control of their health and to seek treatment for their medical conditions outside of prison.

¹³³ Harmon, *supra* note 7.

¹³⁴ KAN. DEP'T. OF CORR., *Rachad Hakeem Austin*, KAN. ADULT SUPERVISED POPULATION ELEC. REPOSITORY, <https://kdocrepository.doc.ks.gov/kasper/search/results> [<https://perma.cc/8RN2-PN> CM].

¹³⁵ Harmon, *supra* note 7.

¹³⁶ *Id.*

¹³⁷ *Id.* Mr. Wright's sentence would have only been between ten- and fifteen-years imprisonment had he been charged under Kansas's current sentencing guidelines. Katie Bernard, *Kelly Granted Clemency to Eight Kansans. Hundreds of Applications Remain on Her Desk*, KAN. CITY STAR (June 28, 2021, 6:42 AM), <https://www.kansascity.com/article252373013.html> (last visited Nov. 11, 2021).

¹³⁸ Harmon, *supra* note 7.

¹³⁹ *Id.*

¹⁴⁰ Bernard, *supra* note 137.

¹⁴¹ *Petition of the Week: March 1st-March 5th*, AM. C.L. UNION KAN. (Mar. 1, 2021), https://www.aclukansas.org/en/publications/petition-week-march-1st-march-5th?fbclid=IwAR17CmQo-KUS1Oex46IV3g8WHv6CEPJ7H1A4sjnTUBeb7mZ1xadJkIk01_E [<https://perma.cc/XA3N-VBAE>].

¹⁴² Bernard, *supra* note 137.

B. Efficacy of the Current Compassionate Release Laws

The efficacy of the current Kansas statutes requires further examination. Many more federal inmates have been released under the FIRST STEP Act compared to the number of Kansas inmates granted compassionate release under sections 22-3728 and 3729. By July 2019, under the FIRST STEP Act, 3,000 federal inmates were released, and reduced sentencing was granted for almost 1,700 federal inmates nationwide.¹⁴³

The procedural barriers of both Kansas statutes have made it next to impossible for inmates to get any relief. As of 2018, only seven inmates over the course of nine years had been released because of functional incapacitation.¹⁴⁴ Zero functional incapacitation release applications were reviewed by the PRB in 2019.¹⁴⁵ The ACLU assisted twenty inmates applying for functional incapacitation release in 2020, however the PRB reported only reviewing one functional incapacitation application.¹⁴⁶ Since the terminal illness compassionate release statute was updated in 2014, only two terminally ill inmates are known to have been released on that basis.¹⁴⁷ Kansas contends that an average of one inmate per year is granted compassionate release based on a terminal illness.¹⁴⁸ Even if this is true, one inmate per year is not enough. There is no way of knowing how many terminal illness applications were submitted and accepted or denied because Kansas does not require the PRB to disclose that information.¹⁴⁹ Inevitably, this means that terminally ill inmates have applied for compassionate release just to die in prison awaiting chairperson approval.

V. PROPOSED AMENDMENTS, FUTURE IMPLICATIONS & POTENTIAL OPPONENTS

A. What Is Missing from Sections 22-3728 and 3729?

Increasing the clarity of sections 22-3728 and 3729 will not only benefit the inmates who need it, but it will also aid the PRB and its chairperson in making more consistent compassionate release decisions. Decisionmakers, like the PRB, “have little to no incentive to grant approval for release and may err

¹⁴³ Dale Chappell & Douglas Ankney, *First Step Act Update: Over 1,600 Sentences Reduced, 3,000 Prisoners Released*, PRISON LEGAL NEWS, Sept. 9, 2019, at 54, 54 <https://www.prisonlegalnews.org/news/2019/sep/9/first-step-act-update-over-1600-sentences-reduced-3000-prisoners-released/> [<https://perma.cc/N2CR-QX7S>].

¹⁴⁴ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 40, at 5.

¹⁴⁵ KAN. DEP'T OF CORR., ANNUAL FISCAL REPORT 48 (2019), <https://www.doc.ks.gov/publications/Reports/fy-2019-kdoc-annual-report> [<https://perma.cc/Y774-SQM9>].

¹⁴⁶ *Petition of the Week: January 25th-29th*, AM. C.L. UNION KAN. (Jan. 29, 2021), <https://www.aclukansas.org/en/publications/petition-week-january-25th-29th> [<https://perma.cc/DT7G-2PFC>]; KAN. DEP'T OF CORR., *supra* note 114, at 67.

¹⁴⁷ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 40, at 9.

¹⁴⁸ *Hearing on H.B. 2469 Before the H. Comm. on Corr. & Juv. Just.*, *supra* note 59 (statement of Rep. Highberger, Member, H. Comm. on Corr. & Juv. Just.).

¹⁴⁹ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 40, at 9.

on the side of caution. . . when [there is] no formal guidance on when to allow an application to proceed.”¹⁵⁰ With concrete guidelines, more qualified inmates will submit applications, and the PRB will be more likely to grant those applications. These proposed amendments aim to address the broad language and overall vagueness of the current statutes. This section analyzes other states’ compassionate release statutes and the federal FIRST STEP Act to provide suggestions for the Kansas State Legislature’s consideration. Kansas could implement any combination of these suggestions to improve its existing statutes, though it should really enact all of them.

1. Specific age requirement for elderly inmates

The functional incapacitation statute, section 22-3728, must be amended to include a provision specifically for elderly inmates. The inclusion of specific age requirements will enhance the clarity of this compassionate release statute. Currently, section 22-3728 does not require an inmate to be a specific age to qualify for functional incapacitation, but the PRB may take the inmate’s age into consideration when making its decision.¹⁵¹ The discretionary nature of this statute may seem like a benefit to inmates because no age requirement means that any inmate can apply for functional incapacitation release if they meet the other statutory requirements. However, the vague language of the current statute makes it difficult for inmates to determine whether they do qualify. This may deter them from applying at all. It is difficult for inmates to write and file an application on their own and their ability to secure counsel’s advice may be limited while incarcerated. An amendment creating an age requirement would help older inmates clearly identify themselves for compassionate release. Inmates and the PRB could then easily determine whether the age requirements are met.

Twenty-five states have specific compassionate release statutes for elderly inmates.¹⁵² Some states, but not all, specify age requirements for these inmates, which ranges between fifty-five and seventy years old.¹⁵³ The NIC defines an elderly inmate as being aged fifty years or older.¹⁵⁴ Several states have time served requirements in addition to a minimum age requirement.¹⁵⁵ For example, Maryland requires its elderly inmates seeking compassionate release be sixty years old and have served at least fifteen years of their sentence.¹⁵⁶ The time

¹⁵⁰ U.S. DEP’T OF HEALTH & HUM. SERVS., AGING, REENTRY, AND HEALTH COVERAGE: BARRIERS TO MEDICARE AND MEDICAID FOR OLDER REENTRANTS 11 (2018), <https://aspe.hhs.gov/system/files/pdf/260296/Reentry.pdf> [<https://perma.cc/Q6TP-MAKF>].

¹⁵¹ KAN. STAT. ANN. § 22-3728(a)(8)(B) (2014).

¹⁵² See PRICE, *supra* note 97, at 28–33.

¹⁵³ See *id.*

¹⁵⁴ Brie A. Williams, Mark F. Stern, Jeff Mellow, Meredith Safer & Robert B. Greifinger, *Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Healthcare*, 102 AM. J. PUB. HEALTH 1475, 1476 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464842/> [<https://perma.cc/Z7LZ-MS9B>].

¹⁵⁵ See PRICE, *supra* note 97, at 28–33.

¹⁵⁶ FAMS. AGAINST MANDATORY MINIMUMS, MARYLAND 5 (2018), https://famm.org/wp-content/uploads/Maryland_Final.pdf [<https://perma.cc/H4H9-GXM8>].

served requirement ranges amongst the states between five and thirty years.¹⁵⁷ In Oklahoma, elderly inmates can also satisfy the time served requirement by completing at least one-third of their sentence.¹⁵⁸

On the federal level, the FIRST STEP Act redefined compassionate release for elderly inmates. The Act differentiates between non-medical, medical, and other elderly inmates.¹⁵⁹ Each category of elderly inmate has different criteria required for compassionate release. Inmates who were sentenced for a violent crime after the age of sixty years old are not eligible for compassionate release under the FIRST STEP Act.¹⁶⁰

A non-medical elderly inmate is one whose medical conditions do not contribute to their need for release. These inmates fall under the new law, meaning they were sentenced after 1987.¹⁶¹ Inmates must be at least seventy years old and have served at least thirty years of their sentence to qualify under this category.¹⁶² Medical elderly inmates have other criteria to meet. They must be sixty-five years old or older, with serious or chronic medical conditions related to aging, have deteriorating mental or physical health that inhibits their ability to function while incarcerated, and conventional treatments would not promise substantial benefits to their mental or physical health.¹⁶³ They must also have served at least fifty percent of their sentence.¹⁶⁴ The BOP also considers factors related to the inmate's risk of recidivating: the age they were when they committed the crime for which they are incarcerated, whether the inmate suffered from the same medical conditions at the time of the offense, and whether the inmate suffered from the same medical conditions at the time of sentencing.¹⁶⁵ Elderly inmates that do not fall within the first two categories can still qualify for compassionate release under the other category. This applies to inmates who are at least sixty-five years old and who have served the greater of ten years or seventy-five percent of their sentence.¹⁶⁶

There are a wide range of possibilities to consider when establishing an age requirement for compassionate release. Other states and the FIRST STEP Act provide guidance for the state legislature to consider when choosing which age requirements would be the most beneficial to elderly Kansas inmates.

¹⁵⁷ See PRICE, *supra* note 97, at 28–33.

¹⁵⁸ FAMS. AGAINST MANDATORY MINIMUMS, OKLAHOMA 4 (2018), https://famm.org/wp-content/uploads/Oklahoma_Final.pdf [<https://perma.cc/7N6B-VGJB>].

¹⁵⁹ U.S. DEP'T OF JUST., COMPASSIONATE RELEASE/ REDUCTION IN SENTENCE: PROCEDURES AND IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G), at 6 (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [<https://perma.cc/5XVA-UMX2>].

¹⁶⁰ *Id.* at 7.

¹⁶¹ *Id.* at 6.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

2. Time frame requirements for inmates with a terminal illness

Kansas has the most restrictive time frame in the entire country for inmates with terminal illness seeking compassionate release.¹⁶⁷ The timeline in place is so severe it most likely prevents terminally ill inmates from being released before they die. Most states define a terminally ill inmate as being diagnosed with a fatal disease or having six months or less to live.¹⁶⁸ However, there is variation of time frames amongst the states of anywhere between six months and eighteen months.¹⁶⁹ Section 22-3729(a)(1) restricts terminal illness to a person who will likely pass within only thirty days.¹⁷⁰ This is in stark contrast with Arkansas's statute, which goes as far as granting medical parole or early home detention for a person who expects to live for only two more years.¹⁷¹ Although the Kansas House of Representatives took affirmative steps to amend section 22-3729(a)(1) from thirty to 120 days in the 2020 legislative session, the bill ultimately failed in the Senate.¹⁷²

The FIRST STEP Act defines a terminal medical condition as one that reduces the person's life expectancy to within eighteen months or the person must receive a diagnosis of a disease or condition with an end-of-life trajectory.¹⁷³ In conjunction with the inmate's diagnosis of a terminal disease, the BOP also takes into consideration their prognosis, other serious health conditions, and any functional impairment for the purpose of determining the inmate's ability or inability to re-offend.

A time frame longer than thirty days is not only possible but preferred by other states and the federal government, and Kansas must follow suit if it wants efficacious legislation. The reality of the lengthy compassionate release process should be considered in conjunction with inmates' terminal illnesses when amending the time frame requirement in section 22-3729.

3. Terminology defining chronically ill inmates

Chronic health conditions are more prevalent amongst incarcerated people compared to the general population.¹⁷⁴ A study conducted by the National Commission on Correctional Healthcare suggested that chronic diseases may even be underdiagnosed in correctional institutions.¹⁷⁵ An appropriate level of care for inmates with severe or debilitating illnesses is difficult, and sometimes

¹⁶⁷ PRICE, *supra* note 97, at 16.

¹⁶⁸ ANNO ET AL., *supra* note 93, at 12.

¹⁶⁹ See PRICE, *supra* note 97, at 28–33.

¹⁷⁰ KAN. STAT. ANN. § 22-3729(a)(1) (2012).

¹⁷¹ FAMS. AGAINST MANDATORY MINIMUMS, ARKANSAS 3 (2018), https://famm.org/wp-content/uploads/Arkansas_Final.pdf [<https://perma.cc/5L5F-WXBM>].

¹⁷² H.B. 2469, 2019-2020 Leg. Sess. (Kan. 2020).

¹⁷³ U.S. DEP'T OF JUST., *supra* note 159, at 4.

¹⁷⁴ I.A. Binswanger, P.M. Krueger & J.F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the US Compared with the General Population*, 63 J. EPIDEMIOLOGY & COMTY. HEALTH 912, 914 (Aug. 2009), https://www.researchgate.net/publication/26710528_Prevalence_of_chronic_medical_conditions_among_jail_and_prison_inmates_in_the_USA_compared_with_the_general_population [<https://perma.cc/A3Q5-4RTW>].

¹⁷⁵ ANNO ET AL., *supra* note 93, at 21.

impossible, to obtain in a correctional setting.¹⁷⁶ Prison conditions also oftentimes exacerbate the experience of chronic illness.¹⁷⁷ The Centers for Disease Control and Prevention finally included incarcerated individuals among high-risk populations for COVID-19 in January 2021.¹⁷⁸ Thus, the conditions of incarceration make inmates some of the most vulnerable people in our society. For these reasons, inmates with chronic illnesses must also be eligible for compassionate release in Kansas.

The most common chronic conditions that impact inmates are:

- cancer,
- kidney, liver, heart, and lung diseases,
- hypertension or high blood pressure,
- asthma,
- an immunocompromised state—from HIV/AIDS or other autoimmune diseases,
- neurological impairments, such as dementia,
- type I and II diabetes,
- epilepsy,
- blood disorders, and
- stroke.¹⁷⁹

The FIRST STEP Act does not include chronic conditions as a stand-alone criterion that could qualify a federal inmate for compassionate release. But the Act does include debilitating medical conditions which it defines as an incurable, progressive illness or a debilitating injury from which they will not recover.¹⁸⁰ When determining whether an inmate fits either of these criteria, the BOP considers whether the inmate is completely disabled or only capable of minimal self-care with limited mobility for fifty percent of the day.¹⁸¹ The Act does not list specific diseases or illnesses that constitute, or could lead to, debilitating medical conditions.

¹⁷⁶ Andreas Mitchell & Brie Williams, *Compassionate Release Policy Reform: Physicians as Advocates for Human Dignity*, 19 AM. MED. ASS'N J. ETHICS 854, 855 (Sept. 2017), <https://journalofethics.ama-assn.org/article/compassionate-release-policy-reform-physicians-advocates-human-dignity/2017-09> [<https://perma.cc/9T8M-QRQ2>].

¹⁷⁷ HANSFORD ET AL., *supra* note 4, at 20.

¹⁷⁸ *FAQs for Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html#accordion-5fd10f075cc9c-card-1> [<https://perma.cc/2BKP-QXW5>].

¹⁷⁹ See *Hadley et al. v. Zmuda et al.*, *supra* note 11; see also *People Living in Prisons & Jails*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/living-prisons-jails.html> [<https://perma.cc/WJX3-95MD>].

¹⁸⁰ U.S. DEP'T OF JUST., *supra* note 159, at 5.

¹⁸¹ *Id.*

Chronic diseases, like aging, are progressive.¹⁸² They worsen over time, can become debilitating and painful, and can eventually cause death. In 2014, eighty-seven percent of inmate deaths in state prisons were caused by illness.¹⁸³ Heart disease and cancer are two common chronic conditions that are major causes of death in prisons across the country.¹⁸⁴ Inmates with chronic conditions should be eligible for compassionate release in Kansas and therefore, chronic illness must be added to the criteria listed in the Kansas compassionate release statutes.

4. A statutory time frame for the PRB to provide a timely answer to an inmate's request for compassionate release

Under the current Kansas statutes, the PRB and its chairperson do not have to adhere to any particular time frame when making compassionate release decisions. A time frame prevents applications from falling through the cracks because the “lack of time frame means delays are inevitable.”¹⁸⁵ A time frame gives inmates a better understanding of the compassionate release process and how long it may take to get a PRB decision. More importantly, a statutory time frame holds the PRB accountable to the inmates who seek compassionate release. The clarity of a time frame is “especially important in the cases of inmates who are nearing the end of life and for anyone else whose incarceration is more burdensome due to age or illness.”¹⁸⁶

California and Minnesota are two states in particular that include statutory time frames for compassionate release applications.¹⁸⁷ The medical parole processing statute in California outlines a time frame for every step of the compassionate release application process, including for assessments, reviews, and recommendations.¹⁸⁸ In Minnesota, the process must be initiated and completed by a case manager within twenty working days of the application.¹⁸⁹ The FIRST STEP Act gives the BOP thirty days to respond to an inmate's application for compassionate release.¹⁹⁰ If the BOP fails to respond within thirty days, the inmate has the ability to bring this to the attention of the courts by filing a motion.¹⁹¹ This increases the BOP accountability to inmates seeking compassionate release.

5. The ability to appeal a decision by the PRB and its chairperson

Currently, Kansas inmates have no chance at relief if their compassionate release application is denied by the PRB. Inmates deserve to have their

¹⁸² ANNO ET AL., *supra* note 93, at 36.

¹⁸³ NOONAN, *supra* note 100, at 5.

¹⁸⁴ *Id.*

¹⁸⁵ PRICE, *supra* note 97, at 15.

¹⁸⁶ *Id.* at 18.

¹⁸⁷ *Id.*

¹⁸⁸ CAL. CODE REGS. tit. 15, § 3359.2 (2011).

¹⁸⁹ FAMS. AGAINST MANDATORY MINIMUMS, MINNESOTA 1 (2018), https://famm.org/wp-content/uploads/Minnesota_Final.pdf [<https://perma.cc/UV7B-J2GN>].

¹⁹⁰ First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194.

¹⁹¹ *Id.*

application reviewed by another decision-making body. Inmates are either incredibly sick or elderly when they seek compassionate release. However, it is rare to find a state that does allow for inmates to appeal the decisions made on their compassionate release applications. Alaska is one state that permits inmates to seek reconsideration of their application within thirty days of the decision, and Alaska's Board must rule within sixty days afterwards.¹⁹² Despite the fact that very few states allow inmates to appeal compassionate release decisions, it is a right that is warranted under these inmates' circumstances and it must be included in amending sections 22-3728 and 3729. Not only do the current Kansas statutes limit an inmate's ability to appeal the PRB's decision, but they also prevent the judiciary from reviewing those decisions as well.¹⁹³

Under the FIRST STEP Act, federal inmates can appeal the denial or neglect of their application for compassionate release in two different ways. First, an inmate can file a motion to the court after exhausting all administrative rights available to appeal the BOP's failure to make a motion on their behalf.¹⁹⁴ All administrative rights are exhausted when the BOP rejects the warden's recommendation for it to file a motion for compassionate release or when the warden refuses to recommend the BOP file a motion for compassionate release.¹⁹⁵ The inmate can appeal the warden's denial through the Administrative Remedy Program, which allows inmates to seek a formal review of issues relating to their confinement.¹⁹⁶ Second, an inmate can appeal thirty days after delivering their request for compassionate release to the warden if the warden has not responded to the request.¹⁹⁷

6. Notification procedures to inform inmates of their eligibility to apply for compassionate release

Statutes are often difficult to read and understand, making them largely inaccessible to the average person. Inmates are at an additional disadvantage because the confines of their incarceration limit their ability to learn and research legal issues. Notification procedures would alleviate this problem by informing inmates of the compassionate release criteria and their eligibility for release. Without notification procedures, presumably many inmates currently qualify but do not know and would not know how to begin the application process. Elderly, sick, and dying inmates should be provided information about their available options. These inmates should not bear the burden of navigating the difficult compassionate release application process without guidance. Notification procedures, along with more specific criteria known to the inmates and the PRB,

¹⁹² PRICE, *supra* note 97, at 19; FAMS. AGAINST MANDATORY MINIMUMS, ALASKA 5 (2018), https://fam.org/wp-content/uploads/Alaska_Final.pdf [<https://perma.cc/8PVV-DRQC>].

¹⁹³ KAN. STAT. ANN. § 22-3728(a)(7) (2014); see *supra* note 72, for more information on judicial review and why limiting it is unconstitutional.

¹⁹⁴ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3.

¹⁹⁵ *Id.* at 3–4.

¹⁹⁶ *Id.* at 4; U.S. DEP'T OF JUST., ADMINISTRATIVE REMEDY PROGRAM 1 (2014), https://www.bop.gov/policy/progstat/1330_018.pdf [<https://perma.cc/V7XE-L339>].

¹⁹⁷ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 15, at 3.

should increase the number of inmates applying for and being granted compassionate release.

States that notify inmates of their compassionate release eligibility do so in different ways. New Mexico, Alabama, and California are all states that have notification procedures for their incarcerated inmates who may qualify for compassionate release.¹⁹⁸ New Mexico requires its correctional facilities to provide a copy of the compassionate release policy and a form to fill out every year for every inmate over the age of sixty-five.¹⁹⁹ In Alabama, applications and release forms are provided to correctional medical care providers and are available in every facility for distribution to inmates.²⁰⁰ Alabama also requires the Department of Corrections to create an annual list of all inmates eligible for compassionate release, and that list must be updated every six months.²⁰¹ Similarly, Department of Corrections doctors in California identify and recommend individuals who might meet the eligibility criteria for compassionate release.²⁰² These are all procedures that would be relatively easy for Kansas to implement into its own compassionate release statutes.

Families Against Mandatory Minimums, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and the National Association of Criminal Defense Lawyers founded the Compassionate Release Clearinghouse ("Clearinghouse") in February 2019.²⁰³ The Clearinghouse's goal is to identify vulnerable federal inmates who are eligible for compassionate release or those who have applied and have been denied or ignored by the BOP.²⁰⁴ The Clearinghouse helped to release more than forty federal inmates in less than a year.²⁰⁵

Although the Clearinghouse is a pro-bono effort and was not enacted through Congress, the state legislature can pass legislation to create a similar organization in Kansas. One option is to establish a sub-group of the PRB to identify qualified inmates and help them through the compassionate release process. A Clearinghouse organization enacted through legislation would carry more enforcement power than the pro-bono organization operating at the federal level. This option comes with costs and benefits that must be weighed, but it should be considered as an alternative to the previously suggested notification procedures.

¹⁹⁸ PRICE, *supra* note 97, at 16.

¹⁹⁹ *Id.*; FAMS. AGAINST MANDATORY MINIMUMS, NEW MEXICO 1 (2018), https://famm.org/wp-content/uploads/New-Mexico_Final.pdf [<https://perma.cc/UXU9-SCGY>].

²⁰⁰ PRICE, *supra* note 97, at 16; FAMS. AGAINST MANDATORY MINIMUMS, ALABAMA 1–2 (2018), https://famm.org/wp-content/uploads/Alabama_Final.pdf [<https://perma.cc/5V6B-8ZB3>].

²⁰¹ FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 200, at 2.

²⁰² PRICE, *supra* note 97, at 16; FAMS. AGAINST MANDATORY MINIMUMS, CALIFORNIA 1 (2018), https://famm.org/wp-content/uploads/California_Final.pdf [<https://perma.cc/FG79-J76B>].

²⁰³ *Our Work, The Compassionate Release Clearinghouse*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/our-work/compassionate-release/> [<https://perma.cc/PLZ9-TBEA>].

²⁰⁴ *Id.*

²⁰⁵ *Id.*

The downside of creating something like the Clearinghouse is that it would cost the state more money than the other notification procedure alternatives because it would mean hiring more people and utilizing more resources. An upside is that some of the PRB's decision-making power would shift to other qualified individuals. The addition of a Clearinghouse organization would help ensure inmates applying for compassionate release meet the necessary qualifications. This would streamline the overall process for the PRB and cut down the time inmates spend waiting for the PRB's decision.

7. Annual reporting requirements for the PRB

The PRB should produce an annual report on the status of compassionate release applications from the previous year and present this report to the Kansas Department of Corrections and the Kansas State Legislature. This report should include how many people applied for compassionate release, how many applications were granted or denied, the PRB's reasoning for each decision, and the number of applications that went without a PRB decision. The PRB must be held accountable to the inmates and the state legislature. The legislature should check that their legislation benefits the group it intends to benefit. If not, the legislature can continue to amend the statutes and work through the problems that have not been addressed. Only thirteen states are required by statute to track and report compassionate release statistics, eight states publicly share some of those statistics, and only three states are required to make those statistics public.²⁰⁶

New York, New Mexico, and Massachusetts are three states that statutorily require annual reports, which are all very similar in substance.²⁰⁷ Annual reports in New York, New Mexico, and Massachusetts require information on the nature of the illnesses or conditions of the applicants being granted medical parole.²⁰⁸ All three states also must include data about inmates whose release was revoked and the reason for revocation.²⁰⁹ Massachusetts and New York require data about the total number of compassionate release applications, the number of applications granted, the number of applications denied and the reasons for the denial, and the counties inmates are released to.²¹⁰ Interestingly, the Massachusetts annual report requires the inclusion of data about the race and ethnicity of each inmate applying for medical parole and data about the race and ethnicity of each inmate granted or denied medical parole.²¹¹ Massachusetts also

²⁰⁶ PRICE, *supra* note 97, at 19; Emily Widra & Wanda Bertram, *Compassionate Release was Never Designed to Release Large Amounts of People*, PRISON POL'Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/> [https://perma.cc/ABM8-5HUS].

²⁰⁷ PRICE, *supra* note 97, at 19.

²⁰⁸ N.Y. EXEC. LAW § 259-r(9) (West 2021); N.M. STAT. ANN. § 31-21-25.1(A)(3) (West 1994); MASS. GEN. LAWS ch. 127, § 119A(i)(iii) (West 2018).

²⁰⁹ § 259-r(9); § 31-21-25.1(A)(3); ch. 127, § 119A(i)(vii).

²¹⁰ § 259-r(9); ch. 127, § 119A(i)(i), (ii), (iv), (v).

²¹¹ PRICE, *supra* note 97, at 19; *see also* ch. 127, § 119A(i) (relating to this article's earlier discussion on the relationship between mandatory minimum sentencing and the impact it has on marginalized communities).

tracks inmates who have applied for medical parole more than once.²¹²

The FIRST STEP Act requires the Director of the BOP to produce an annual report and present it to the House and Senate Judiciary Committees.²¹³ The report provides a comprehensive analysis of the requests for sentence reductions from the previous year. The annual report must include the number of inmates granted and denied compassionate release, how much time elapsed between the time the warden received the request and when the final decision was made, and the number of inmates who died while their request was pending.²¹⁴

B. Implications for Inmates Granted Compassionate Release & Compassionate Release Opposition

Additional factors must be considered when amending the compassionate release statutes. One major unanswered question is what happens to inmates after they have been granted compassionate release: where they go, who are they with, what do they do, and how well are they able to adjust to life in the general population. The legislature must consider who may oppose change to the compassionate release statutes in Kansas. Prosecutors are some of the most influential opponents to compassionate release. These are tangential issues to the topic of this article, but they are necessary to consider when suggesting legislative changes.

1. Post-Release Supervision Plans & Revocation

Re-entry from prison is often characterized by “high mortality rates, homelessness, reincarceration for parole violations, and heavy use of emergency medical services.”²¹⁵ The current compassionate release statutes attempt to combat those problems by requiring that a post-release supervision plan be established before an inmate is granted compassionate release.²¹⁶ The release plan must include details of where the inmate will reside, where they will be seeking treatment, and who will provide that treatment.²¹⁷

One concern of newly released inmates is being able to stick to the terms of their release plan. Sections 22-3728 and 3729 both allow for revocation of an inmate’s release upon violation of the release plan.²¹⁸ People with felony convictions may be barred from living in public housing or living with family members already residing in low-income housing, which leads to a high-risk of residential instability for inmates post-release.²¹⁹ An inmate may also be

²¹² Ch. 127, § 119A(i)(vi).

²¹³ U.S. DEP’T OF JUST., *supra* note 159, at 16.

²¹⁴ *Id.* at 16–17.

²¹⁵ Williams et al., *supra* note 154, at 1479.

²¹⁶ KAN. ADMIN. REGS. § 45-700-1(c) (2002).

²¹⁷ *Id.*

²¹⁸ KAN. STAT. ANN. § 22-3728(a)(5)–(6) (2014); KAN. STAT. ANN. § 22-3729(a)(4)–(5) (2012).

²¹⁹ Melissa Li, *From Prisons to Communities: Confronting Re-entry Challenges and Social Inequality*, AM. PSYCH. ASSOC. (Mar. 2018), <https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities#> [<https://perma.cc/FN4K-ACUG>]; HANSFORD ET AL., *supra* note 4, at

ineligible to receive public assistance depending on why they were incarcerated.²²⁰ Oftentimes places of business will not hire people with a criminal record, leaving inmates to work low-skill jobs for very little money.²²¹ The Clearinghouse, discussed previously in this article²²², has social workers assisting inmates during re-entry, another reason to establish a similar group in Kansas.²²³ Inmates granted compassionate release require a larger safety net of resources than traditionally released inmates because of their compounded health conditions. These challenges may disrupt the re-entry process and result in an unintentional violation of a release plan.

2. Ease of Inmate Assimilation Post-Release

Inmates may face other difficulties after being granted compassionate release. It is highly probable that inmates seeking compassionate release for terminal illness or functional incapacitation have been incarcerated for decades. Society has most likely changed significantly during the course of an inmate's incarceration. This may be something the PRB should consider when making these decisions. The proliferation of technology within the past twenty years may pose a challenge for some elderly inmates. Inmates that were incarcerated for many years may find it difficult to make simple, everyday decisions.²²⁴ An inmate's ability to adapt back into modern society is vital to their success upon release.

C. A Potential Fight from Prosecutors

The PRB has the discretion to hold a formal hearing before making a final decision on a functional incapacitation compassionate release application.²²⁵ At this hearing, any prosecuting attorney, judge, crime victim, or member of the victim's family can give their comments regarding the inmate requesting release.²²⁶ At the federal level, prosecutors have voiced strong opposition to requests for compassionate release, especially during the COVID-19 crisis. The reasoning is often not because the inmate's conditions do not qualify them for compassionate release, but because the inmate failed to exhaust the

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²²⁰ Li, *supra* note 219.

²²¹ *Id.* Before the COVID-19 crisis, twenty-seven percent of formerly incarcerated people were unemployed, a rate five percent higher than the national unemployment rate in the United States. HANSFORD ET AL., *supra* note 4, at 26.

²²² See *supra* Section V.A.6., for the discussion on the Compassionate Release Clearinghouse.

²²³ *COVID-19 Compassionate Release Project*, NAT'L. ASS'N OF CRIM. DEF. LAWS. (May 4, 2020), <https://www.nacdl.org/Content/crvolunteers> [<https://perma.cc/L8SX-VK2M>].

²²⁴ Floyd Bledsoe, a Project for Innocence exoneree, spoke with my Project for Innocence class in the Fall of 2020. When asked about difficulties of life post-incarceration, Mr. Bledsoe said that even going to the grocery store and choosing which type of ketchup to buy was a challenge for him. After years of not having any choices, the vast expanse of options now available was very overwhelming to him. Mr. Bledsoe also noted that it was hard to adapt to new technology. He commented that everyone now is always on their phones.

²²⁵ KAN. STAT. ANN. § 22-3728(a)(4) (2014); KAN. ADMIN. REGS. § 45-700-2(b)(1) (2002).

²²⁶ § 45-700-2(b)(1)(B).

administrative rights, or the time frame requirements had not yet been met.²²⁷

Another argument frequently made by prosecutors is that an inmate's illnesses should not cut their sentence short. For example, in Miami, an elderly inmate with numerous health conditions sentenced to life in prison recently sought compassionate release.²²⁸ The prosecutor argued that any health problems would not contribute to extraordinary and compelling circumstances needed to grant compassionate release because a life sentence meant the inmate would die in prison regardless.²²⁹ In Texas, a prosecutor told an incarcerated former judge that because "his age and medical conditions did not get in the way of him committing his crimes, [then] he should not be able to hide behind them now to avoid the consequences of his actions."²³⁰ Prosecutors may always strongly oppose compassionate release. It is a prosecutor's job to incarcerate people for the crimes they allegedly commit and to ensure that inmates see their sentence through, despite whatever unfortunate circumstances have fallen upon them. However, the legislature can counter this problem by changing the compassionate release statutes.

VI. CONCLUSION

The FIRST STEP Act provided relief for inmates in federal prisons, but there has been little relief for Kansas state inmates. Sections 22-3728 and 3729 of the Kansas Statutes Annotated leave a lot of problems unresolved because of the broad language, vague requirements, and high level of PRB discretion. Kansas must change the language of its compassionate release statutes. The most vulnerable people, elderly and sick inmates, deserve the opportunity to seek the relief they need outside of prison. Solutions to the problems in Kansas can be found in other states' compassionate release provisions and the FIRST STEP Act. The suggestions made in this article are to aid the Kansas State Legislature in finding the best solution to help vulnerable inmates incarcerated in Kansas correctional facilities.

²²⁷ See Neena Satija, 'Come On, We're Human Beings': Judges Question Response to Coronavirus Pandemic in Federal Prisons, WASH. POST (May 13, 2020), https://www.washingtonpost.com/investigations/come-on-were-human-beings-judges-question-response-to-coronavirus-pandemic-in-federal-prisons/2020/05/12/925e5d32-912a-11ea-a9c0-73b93422d691_story.html [https://perma.cc/93K9-28TT]; see Walter Pavlo, *Federal Prosecutors Across The Country Oppose Many Common Sense Motions For Compassionate Release*, FORBES (Apr. 15, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/15/federal-prosecutors-across-the-country-oppose-many-common-sense-motions-for-compassionate-release/?sh=6d12e3da75a0> [https://perma.cc/CK8L-SB2G].

²²⁸ C.J. Ciaramella, *Federal Prosecutors Argue COVID-19 is Just 'One More Way to Perish in Prison'*, REASON FOUND. (Sept. 25, 2020), <https://reason.com/2020/09/25/federal-prosecutors-oppose-covid-19-is-just-one-more-way-to-perish-in-prison/> [https://perma.cc/X537-LMW8].

²²⁹ *Id.*

²³⁰ Angela Morris, *Prosecutors: His Age Never Interrupted His Crimes, So This Ex-Texas Judge Shouldn't Get Compassionate Release*, TEX. LAW. (May 18, 2020), <https://www.law.com/texas-lawyer/2020/05/18/prosecutors-his-age-never-interrupted-his-crimes-so-this-ex-texas-judge-shouldnt-get-compassionate-release/> [https://perma.cc/CN9A-QPA].

IMPACTS OF *COUNTY OF MAUI V. HAWAII WILDLIFE FUND*
ON CLEAN WATER ACT GROUNDWATER REGULATION
AND WHAT COMES NEXT

By: Riley Cooney*

I. INTRODUCTION

In April 2020, the United States Supreme Court issued a decision long anticipated by those impacted by Clean Water Act regulations in *County of Maui v. Hawaii Wildlife Fund*.¹ The Court held that the Clean Water Act (“CWA”) requires a permit for a discharge of pollutants from a point source² to navigable waters if the pollutants travel through groundwater in between, so long as there exists a “functional equivalent of a direct discharge from the point source into navigable waters.”³ The Court gave a non-exhaustive list of factors to help lower courts determine when groundwater discharges are “functional equivalents” to discharges directly into navigable waters.⁴ This decision comes after decades of confusion over whether the CWA covers discharges of pollutants to groundwaters that ultimately end up in surface waters. It establishes a single fact-based test rooted in hydrologic science to determine when the CWA triggers liability. However, there is likely to be much confusion for polluting parties, state agencies, and the U.S. Environmental Protection Agency (“EPA”) as to the application of the Court’s new standard.

Although the Court attempted to clarify uncertainty about when groundwater pollution requires a permit under the CWA, more guidance from the EPA would further reduce confusion. By giving clearer, more specific guidance, EPA could reduce confusion and the risk of a trail of patchwork judicial decisions. The CWA has been the center of similar conundrums in the past. For example, the infamous 2006 *Rapanos v. United States* decision, where the Court was tasked with determining the bounds of the CWA’s jurisdiction.⁵

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¹ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

² A point source is defined as “any discernible, confined and discrete conveyance.” 33 U.S.C.S. § 1362(14) (LexisNexis 2021).

³ *County of Maui*, 140 S. Ct. at 1468.

⁴ *Id.* at 1476–77.

⁵ *See Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion) (considering whether the

The Court ultimately published five opinions that offered no clear standard to determine when wetlands fall under CWA jurisdiction.⁶ Lower courts and agencies were left with little guidance on the proper test for identifying “waters of the United States.”⁷ With something as important as water quality hanging in the balance, consistent application of the CWA is critical. To reduce confusion in lower courts, help landowners determine when CWA permits are necessary, and better protect the nation’s waters, EPA should release a new regulation or interpretive statement to give further instruction on how to determine when a discharge into groundwater is the functional equivalent of a direct discharge into navigable waters.

The goals of this paper are (1) to situate the issue of indirect discharges to navigable waters through groundwater within the context of the CWA’s National Pollutant Discharge Elimination System, (2) to summarize the Supreme Court’s findings in *County of Maui v. Hawaii Wildlife Fund* and discuss the possible implications for CWA permitting and water quality protection, and (3) to make a case for why EPA needs to draft more specific guidance that relies heavily on scientific research to determine when discharges to navigable waters through groundwater should require permits. Part II of the paper positions the issue as it existed before the Supreme Court’s April 2020 decision. It summarizes key provisions of the federal Clean Water Act, details how the Environmental Protection Agency has interpreted the statute as it applies to groundwater discharges and describes the split decisions in the circuits on the issue. Part III analyzes the Supreme Court’s decision in *County of Maui v. Hawaii Wildlife Fund* and discusses the prevalent opinions in the legal community for how the decision will change the way the CWA is enforced. Part IV discusses the ambiguity left behind by the Supreme Court’s opinion and discusses further the gaps in groundwater pollution regulation and policy. Part V proposes possible solutions and ways EPA can expand and clarify the functional equivalent test.

II. BACKGROUND: THE CLEAN WATER ACT AND GROUNDWATER DISCHARGES

To fully appreciate the impact of *County of Maui*, it is important to understand basic provisions of the Clean Water Act (“CWA”) and how courts have determined its applicability to discharges through groundwater. It is not

CWA has jurisdiction over wetlands adjacent to tributaries connected to traditional navigable waters).

⁶ Justice Scalia wrote for a plurality of four Justices and required there to be a “continuous surface connection.” *Id.* at 742; *but see id.* at 779 (Kennedy, J., concurring) (requiring a “significant nexus” between the wetlands in question and navigable waters).

⁷ *See, e.g.*, ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT: CASES AND MATERIALS 899–903 (4th ed. 2016); Kristen Clark, Note, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENV’T. L. & POL’Y REV. 295 (2014); Bill Currie, *Opening the Floodgates: The Roberts Court’s Decision in Rapanos v. United States Spells Trouble for the Future of the Waters of the United States*, 18 VILL. ENVTL. L.J. 209 (2007).

disputed that the CWA prohibits discharges from point sources to navigable waters⁸ and that groundwater is not included in the category of navigable waters.⁹ However, a circuit split, and a string of vague and inconsistent EPA regulations, showed it was not clear if the CWA extended liability for discharges that traveled through groundwater but ultimately ended up in navigable waters.

A. Key Provisions of the Clean Water Act

The Act's stated purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁰ One main provision within the CWA designed to meet this purpose is the National Pollutant Discharge Elimination System ("NPDES"), which requires parties to obtain a permit to discharge pollutants from a point source to navigable waters.¹¹ Permits can be issued by EPA¹² or states can seek authority from the EPA Administrator to administer a permitting program.¹³ A permit is required for "any addition of any pollutant to navigable waters from any point source."¹⁴ Currently, forty-seven states have NPDES permitting authority.¹⁵ A "point source" is defined as "any discernable, confined and discrete conveyance" and includes any pipe, ditch, channel, tunnel, well, and concentrated animal feeding operation, among others.¹⁶ Nonpoint sources are all those that are not point sources, including agricultural runoff or stormwater discharges.¹⁷ Navigable waters are defined as "the waters of the United States."¹⁸ The exact limits of the scope of "waters of the United States" has long been difficult to define;¹⁹ however, this dispute was not at issue in *County of Maui*, nor did it directly impact when indirect discharges through groundwater trigger CWA jurisdiction. Violations of the NPDES permitting program can be significant: the penalty for unlawful discharges is

⁸ 33 U.S.C.S. § 1311(a) (LexisNexis 2021) (prohibiting "the discharge of any pollutant by any person"); § 1362(12)(A) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"); § 1342(a) (allowing discharge of a pollutant with an NPDES permit).

⁹ The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22250, 22251 (Apr. 21, 2020) (expressly excluding groundwater from the definition of "waters of the United States").

¹⁰ § 1251.

¹¹ § 1311(a); § 1342(a)(1).

¹² § 1342(a).

¹³ § 1342(b).

¹⁴ § 1362(12)(A).

¹⁵ EPA issues NPDES permits in Massachusetts, New Hampshire, New Mexico, Washington D.C., U.S. territories, and on federal and tribal lands. See *NPDES Permits Around the Nation*, ENVT'L PROT. AGENCY, <https://www.epa.gov/npdes-permits> [<https://perma.cc/5JTU-HLE4>].

¹⁶ § 1362(14).

¹⁷ *Id.*

¹⁸ § 1362(7).

¹⁹ *About Waters of the United States*, ENVT'L PROT. AGENCY, <https://www.epa.gov/wotus/about-waters-united-states> [<https://perma.cc/8MMX-8SEB>]; see also *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

\$55,800 per day.²⁰

Historically, the CWA has excluded discharges of pollutants into groundwater from its NPDES program.²¹ This is because the perceived Congressional intent was for provisions of the CWA to apply to groundwater only when the statute stated so explicitly.²² For example, in CWA § 102(a), the Administrator shall “. . . prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and *groundwaters* and improving the sanitary condition of surface and *underground waters*.”²³ Therefore, because the definition of “discharge of pollutants” under § 502(12) states “any addition to any pollutant to navigable waters,” and not “to navigable waters *and groundwaters*,” it is presumed that Congress did not intend for the NPDES permitting program to apply to groundwater.²⁴ However, some courts have reasoned that even if Congress did not intend to comprehensively regulate groundwater under the CWA, Congress did not intend to exempt groundwater from all regulation.²⁵

Because states can petition for permitting power, the CWA serves as an example of cooperative federalism, in which there is some overlap between state and federal authority.²⁶ In the context of the CWA, the Supreme Court has described cooperative federalism as “a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’”²⁷ Congress gives states two choices: they may regulate activity according to federal standards, or they may regulate by state standards, which are subject to federal preemption.²⁸ This regulation model has been successful for implementation of the CWA and other environmental statutes, but it has been used to argue against attempts to expand CWA jurisdiction in effort to preserve state authority.²⁹

²⁰ See 40 C.F.R. § 19.4, Table 1 (2020).

²¹ *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001).

²² CRAIG, *supra* note 7, at 914.

²³ *Id.* (emphasis added) (citing § 1252(a)).

²⁴ *Id.*; see §§ 1342, 1362(12).

²⁵ See, e.g., *Idaho Rural Council*, 143 F. Supp. at 1180 (stating “whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation’s rivers and streams.”); see also *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989–90 (E.D. Wash. 1994) (holding that Congress intended to regulate discharges that result in pollutants entering surface waters, even through groundwater).

²⁶ Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 178–79 (2018).

²⁷ *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (describing the difference between state and federally issued permits and its significance) (quoting § 1251(a)).

²⁸ *New York v. United States*, 505 U.S. 144, 167 (1992).

²⁹ Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENV'T. L. & POL'Y REV. 47, 452 (2018).

B. Circuit Split on Indirect Discharges through Groundwater

In 2018, when *County of Maui* was making its way through the appellate process, other circuit courts were addressing the same issue but not all reached the same conclusion on when the CWA required a point source permit. Most circuits to rule on this issue hold that the CWA requires permitting for indirect discharges through groundwater on some level, though they rely on different reasonings and tests to reach that conclusion.³⁰ The Sixth Circuit was the only circuit to hold that the CWA excludes pollutants that travel through any nonpoint intermediary en route to navigable waters are excluded by the CWA, regardless of whether the pollutants originated from a point source.³¹

When reviewing the district court decision in the *County of Maui* case, the Ninth Circuit adopted a “fairly traceable” standard to overturn the district court decision and hold that the CWA required the County wastewater treatment plant to have a permit to discharge in its underground wells.³² The Ninth Circuit’s decision relied on conclusions from a scientific tracer dye study that found a hydrologic connection between the wells and the Pacific Ocean.³³ The Ninth Circuit found the County liable because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to navigable waters such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimus*.³⁴

The Court “[left] for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability,”³⁵ indicating the Ninth Circuit did not intend for the fairly traceable standard to include all indirect discharges through groundwater.

Similarly, in *Upstate Forever v. Kinder Morgan Energy Partners*, the Fourth Circuit held that seepage from a gasoline pipeline spill that moved through groundwater before release into a river qualified as a “discharge of a pollutant” and thus required a permit.³⁶ The Fourth Circuit held that if there is a “direct hydrological connection” between groundwater and navigable waters, it

³⁰ See e.g., *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018) (holding that discharges into groundwater require a permit when pollutants are “fairly traceable” from the point source to navigable waters); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018) (holding CWA applies when there is a “direct hydrologic connection” between groundwater and navigable waters); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510–11 (2d Cir. 2005) (holding that it was improper to require both the cause of pollution and any intervening land to qualify as point sources to trigger CWA liability).

³¹ See *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018); see also *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 931, 938 (6th Cir. 2018) (both cases holding that surface water pollution via leakage from coal ash ponds into underground aquifers did not trigger CWA liability).

³² See *Haw. Wildlife Fund*, 886 F.3d at 749.

³³ *Id.* at 742–43.

³⁴ *Id.* at 749.

³⁵ *Id.*

³⁶ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 641 (4th Cir. 2018).

is covered under CWA.³⁷ The Fourth Circuit noted that there was “no functional difference” between its direct hydrological connection standard and the Ninth Circuit’s fairly traceable standard, but the direct hydrological connection concept may be narrower.³⁸

In reaching these conclusions, both the Ninth and Fourth Circuits relied on language from Justice Scalia, who wrote for a plurality of four Justices in *Rapanos v. United States*.³⁹ *Rapanos* considered the kinds of connected waters that fall under CWA jurisdiction. In that opinion, Justice Scalia stated, “the Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.”⁴⁰ The Fourth and Ninth Circuits reasoned, similarly, that because the CWA did not require a discharge directly to navigable waters, it also did not require a discharge directly from a point source.⁴¹ Under this reasoning, “from” merely indicates a starting point and implies no directness requirement, so it matters not that the pollution traveled through groundwater—so long as the pipeline was the origin and navigable waters were the destination.⁴² The legislature’s choice to write the CWA to say “discharge” and not “direct discharge” may be evidence of congressional intent that the CWA cover both direct and indirect discharges to navigable waters.⁴³

The Second Circuit also held that pollutants need not be released directly from a point source into navigable waters to trigger CWA jurisdiction.⁴⁴ In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit reasoned that if it were required for both the cause of pollution and any intermediate, intervening land to qualify as point sources for the discharge to fall under NPDES jurisdiction, courts would be “impos[ing] a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them.”⁴⁵

The Sixth Circuit, however, explicitly disagreed with both the Fourth and Ninth Circuits in two simultaneously released decisions, *Kentucky Waterways All. v. Kentucky Utilities Company*⁴⁶ and *Tennessee Clean Water Network v. Tennessee Valley Authority*.⁴⁷ Both cases involved seepage from coal ash ponds that traveled through groundwater before ending up in surface waters.⁴⁸ It was

³⁷ *Id.* at 651.

³⁸ *Id.* at 651 n.12.

³⁹ *Rapanos v. United States*, 547 U.S. 715, 719 (2006).

⁴⁰ *Id.* at 743 (emphasis in original) (citing 33 U.S.C.S. § 1362(12)(A) (LexisNexis 2021)).

⁴¹ See *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018).

⁴² See *Upstate Forever*, 887 F.3d at 650–51.

⁴³ Allison R. White, *Bridge Over Troubled Waters? Ninth Circuit Makes Waves Refusing to Narrow Clean Water Act in Hawaii* *Wildlife Fund v. County of Maui*, 30 VILL. ENVTL. L.J. 351, 371 (2019).

⁴⁴ *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510–11 (2d Cir. 2005).

⁴⁵ *Id.*

⁴⁶ *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018).

⁴⁷ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 438 (6th Cir. 2018).

⁴⁸ *Id.* at 446; *Ky. Waterways All.*, 905 F.3d at 938.

undisputed that the coal ash ponds in each case were point sources and that navigable waters were the destination; still, the Sixth Circuit held neither case was a violation of the CWA.⁴⁹ The Sixth Circuit rejected the CWA's application to cases of hydrologically connected groundwater, stating that coal operations such as these fall under the jurisdiction of the Resource Conservation and Recovery Act.⁵⁰ The Circuit reasoned that arguments relying on the *Rapanos* plurality err because, in their view, Justice Scalia "sought to make clear that intermediary point sources do not break the chain of CWA liability; the opinion says nothing of point-source-to-nonpoint-source dumping. . . ."⁵¹ According to the Sixth Circuit, if pollutants go through an intermediary, such as groundwater, they are no longer coming "from" a point source, and the CWA does not apply.⁵²

Some scholars agreed with most circuits that the regulation of some groundwater discharges is supported by the scope of the language used in the CWA and is consistent with the purpose of the CWA.⁵³ Others were more in line with the Sixth Circuit, advocating against any kind of decision that could broaden the scope of the CWA's jurisdiction too much and create other problems.⁵⁴ However, with no clear test for determining if, or when, an indirect discharge through groundwater required permitting, all were hoping for either EPA or the Supreme Court to offer a more concrete rule.

C. EPA Rules Before County of Maui

EPA has published multiple interpretations to address the dispute between circuits. In April 2019, the agency released an interpretive statement concluding that the CWA excludes "all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water."⁵⁵ EPA also emphasized that the language of the statute indicates that state authorities should be responsible for regulating groundwater discharges and not federal regulations.⁵⁶ In reliance on the statute's text, structure, and legislative history,

⁴⁹ *Tenn. Clean Water Network*, 905 F.3d at 446; *Ky. Waterways All.*, 905 F.3d at 938.

⁵⁰ *Ky. Waterways All.*, 905 F.3d at 927–28.

⁵¹ *Id.* at 936.

⁵² *Id.* at 934.

⁵³ See, e.g., Kaela Shiigi, Note, *Underground Pathways to Pollution: The Need for Better Guidance on Groundwater Hydrologically Connected to Surface Water*, 46 *ECOLOGY L.Q.* 519, 546–47 (2019); see also Heather Foxx, *The Jurisdiction of the Clean Water Act Includes Some Discharges into Groundwater*, AM. BAR ASS'N (Aug. 27, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/wr/20180826-the-jurisdiction-of-the-clean-water-act/ (last visited Oct. 10, 2021).

⁵⁴ See Scott Yager & Mary-Thomas Hart, *The Tipping Point Source: Clean Water Act Regulation of Discharges to Surface Water Via Groundwater, and Specific Implications for Nonpoint Source Agriculture*, 23 *DRAKE J. AGRIC. L.* 439 (2018).

⁵⁵ Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16811 (proposed Apr. 23, 2019).

⁵⁶ *Id.*

EPA reasoned that “Congress purposely structured the CWA to give *states* the responsibility to regulate such releases under state authorities.”⁵⁷ EPA was adamant that Congress intended to grant the states, not the federal CWA, the power to regulate groundwater.⁵⁸ The agency opened comment for this proposed rule in February 2018—less than one month after the Ninth Circuit’s decision in *Hawai’i Wildlife*—seemingly to clarify the disagreement among the courts. In its explanation for the rule, EPA rejected the Fourth Circuit’s direct hydrological connection standard, the Ninth Circuit’s fairly traceable standard, and the standard set by the Sixth Circuit, which required pollution to be added directly to navigable waters.⁵⁹ Also worth noting is that EPA only cited one EPA publication from 1990 and did not give any scientific analysis to support its position.⁶⁰ This interpretation by EPA is not consistent with the Supreme Court’s decision in *County of Maui*, and EPA will be forced to either rescind or revise this rule to acknowledge that there are times when discharges through groundwater do require NPDES permits.

Before the 2019 statement, EPA applied the CWA to hydrologically connected groundwater. In a 2001 proposed rule concerning *NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs* (“CAFO rule”), EPA suggested polluters undergo a factual inquiry to determine whether there is a “direct hydrologic connection” between pollutants discharged to surface waters via groundwater.⁶¹ The direct hydrological connection language did not end up in the final rule,⁶² and EPA never established specific criteria for assessing the directness of a hydrologic connection,⁶³ but this was not the first, nor the last, time EPA used that language.⁶⁴ In fact, EPA sided with

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* at 16814.

⁵⁹ *Id.* at 16813.

⁶⁰ *Id.* at 16812; see also Brief for Aquatic Scientists and Scientific Societies as Amici Curiae Supporting Respondents at 31, *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260) [hereinafter Brief for Aquatic Scientists].

⁶¹ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960 (proposed Jan. 12, 2001) (codified at 40 C.F.R. pts. 122, 412).

⁶² National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7175, 7216 (proposed Feb. 12, 2003) (codified at 40 C.F.R. pts. 122–23, 412).

⁶³ James W. Hayman, *Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act*, 5 BARRY L. REV. 95, 99 (2005) (citing 66 Fed. Reg. 2960, 3016 (Jan. 12, 2001)).

⁶⁴ See National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47997 (proposed Nov. 16, 1990) (codified at 40 C.F.R. pts. 122–24) (first regulation to state that groundwater with a “hydrological connection” to surface water is not exempt from the NPDES program); also see Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64892 (proposed Dec. 12, 1991) (codified at 40 C.F.R. pt. 131) (stating that CWA “requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters”).

the environmental groups in *Hawai'i Wildlife*, arguing there was a direct hydrological connection between the injection wells and the Pacific Ocean.⁶⁵ Though the Ninth Circuit rejected the direct hydrological connection standard and opted for the more broad fairly traceable test,⁶⁶ the Fourth Circuit used this standard.⁶⁷

Some groups were concerned that the *County of Maui* decision would expand the definition of navigable waters, thus altering previous definition statements issued by EPA over what is included in the term “navigable waters.” Much litigation and debate has surrounded the intended scope of the CWA’s “navigable waters,” which is only ambiguously defined by the statute as “waters of the United States.”⁶⁸ Two days before the Court handed down *County of Maui*, EPA published a final rule in the federal register that revised the definition of “waters of the United States.”⁶⁹ The rule defined four categories of waters included within the revised definition: (1) territorial seas and traditional navigable waters; (2) perennial and intermittent tributaries that contribute surface water to those waters; (3) lakes, ponds, impoundments; and (4) wetlands adjacent to jurisdictional waters.⁷⁰ The rule also listed some specific waters excluded from this definition, including groundwater.⁷¹ However, this rule was vacated in August 2021 by the District Court of Arizona.⁷² EPA announced its plan to revise this rule on June 9, 2021, though the rulemaking process is still in its early stages.⁷³ Until EPA releases a new rule, the pre-2015 regulatory regime controls.⁷⁴

However, the Court’s *County of Maui* decision did nothing to help define the scope of the navigable waters definition; it only addressed the question of which groundwater discharges that travel through groundwater to navigable waters require NPDES permits.⁷⁵ Even the Ninth Circuit, whose fairly traceable

⁶⁵ See Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 13–20, *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (No. 15-17447).

⁶⁶ *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020).

⁶⁷ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), *vacated*, 140 S. Ct. 2736 (2020).

⁶⁸ 33 U.S.C.S. § 1362(7) (LexisNexis 2021).

⁶⁹ The Navigable Waters Protection Rule: Definition of “Waters of the United States”, 85 Fed. Reg. 22250 (proposed Apr. 21, 2020) (codified at 33 C.F.R. pt. 328).

⁷⁰ *Id.* at 22251.

⁷¹ *Id.* at 22251–52.

⁷² *Pascua Yaqui Tribe v. United States EPA*, No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 163291, at *18 (D. Ariz. Aug. 30, 2021).

⁷³ Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41911 (Aug. 4, 2021).

⁷⁴ Current Implementation of Waters of the United States, ENVT’L PROT. AGENCY, <https://www.epa.gov/wotus/current-implementation-waters-united-states> [https://perma.cc/6RHW-V9S8].

⁷⁵ Christina Sartorio Ku & Agnes Antonian, *Navigating the Scope of ‘Navigable Waters’ after ‘Maui’*, N.J. L. J. (Oct. 15, 2020, 12:00 PM), <https://www.law.com/njlawjournal/2020/10/15/navigating-the-scope-of-navigable-waters-after-maui/?slreturn=20210903192430>

standard was the broadest of all interpretations, was explicit in refusing to expand the definition of “waters of the United States” to include groundwater.⁷⁶

III. THE COUNTY OF MAUI V. HAWAII WILDLIFE FUND DECISION

The conflict in *County of Maui* arose from a wastewater treatment plant operated by the County of Maui on Maui Island, Hawaii.⁷⁷ Each day, the facility partially treated four million gallons of water and then pumped it into underground wells.⁷⁸ The water then traveled about a half-mile underground before it is dumped into the Pacific Ocean.⁷⁹ The polluted water contributed to the destruction of a nearby coral reef.⁸⁰ In 2012, several environmental groups brought suit against the county, claiming the county was unlawfully discharging pollutants into navigable waters without a permit.⁸¹ The District Court held in favor of the environmental groups, stating that that the “path to the ocean is clearly ascertainable” and therefore the discharge was “functionally one into navigable water.”⁸² The Ninth Circuit affirmed, stating that a permit is required when “the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”⁸³ The county filed a writ of certiorari in 2018 and the United States Supreme Court granted certiorari in 2019.⁸⁴

A. The Supreme Court Decision: Establishing the Functional Equivalent Standard

In a six-to-three decision, the Court held that the CWA requires a permit if “the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.”⁸⁵ Justice Breyer delivered the majority’s opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh.⁸⁶

This holding falls right in the middle of the circuit court split. The Court

[<https://perma.cc/228P-5JMV>].

⁷⁶ *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 746 n.2 (9th Cir. 2018) (stating the court’s decision does not suggest the CWA regulates all groundwater), *vacated*, 140 S. Ct. 1462 (2020).

⁷⁷ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1469 (2020).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *The Clean Water Case of the Century*, EARTHJUSTICE (Apr. 23, 2020), <https://earthjustice.org/features/supreme-court-maui-clean-water-case> [<https://perma.cc/Y3NX-U4UF>].

⁸¹ *Id.*

⁸² *Haw. Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 998 (D. Haw. 2014), *aff’d*, 886 F.3d 737 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020).

⁸³ *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020).

⁸⁴ *County of Maui, Hawaii v. Hawaii Wildlife Fund*, SCOTUSBlog (Aug. 26, 2020), <https://www.scotusblog.com/case-files/cases/county-of-maui-hawaii-v-hawaii-wildlife-fund/> [<https://perma.cc/MPF5-H4EV>].

⁸⁵ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

⁸⁶ *Id.*

acknowledged the need to find the right balance between over-regulation and under-regulation.⁸⁷ Specifically, the Court attempted to find the balance between the too-broad interpretation by the Ninth Circuit and avoiding a narrow interpretation where virtually all groundwater discharges are excluded from CWA regulation.⁸⁸ The Court held that the Ninth Circuit’s “fairly traceable” standard was too broad because it would require a permit for the dumping of pollutants that might take 100 years to reach navigable waters.⁸⁹ On the other hand, the Court rejected the rule from the 2019 EPA interpretation—and, in effect, the conclusions drawn by the Sixth Circuit—that all groundwater dumping is excluded, stating that such a rule created an unintended loophole to CWA requirements.⁹⁰ Under this reasoning, polluting sources could avoid obtaining permits by simply moving their pipes a few yards to ensure pollutants must travel through groundwater before reaching surface waters.⁹¹ Ultimately, the Court held that “the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.”⁹² Justice Kavanaugh joined the majority but wrote a separate concurrence to emphasize the importance of Justice Scalia’s textualist reasoning in the *Rapanos* plurality.⁹³

The Court stated that certain factors will determine if a discharge is functionally equivalent to a direct discharge, including, but not limited to:

1. The time it takes the pollutant to reach navigable waters;
2. The distance the pollutant must travel through groundwater;
3. The nature of the material through which the pollutant travels;
4. The extent the pollutant is changed chemically or diluted in transit;
5. The amount of pollutant that enters the navigable waters;
6. The manner the pollutant enters the navigable waters; and
7. The degree to which the pollutant “has maintained its specific identity.”⁹⁴

The Court went on to suggest that factors such as time and distance likely are the most important factors to determine when a discharge through groundwater is functionally equivalent to a direct discharge.⁹⁵

⁸⁷ *Id.* at 1471–73.

⁸⁸ *Id.* at 1470–71.

⁸⁹ *Id.* at 1470.

⁹⁰ *Id.* at 1473.

⁹¹ *Id.*

⁹² *Id.* at 1476 (emphasis added).

⁹³ *Id.* at 1478 (Kavanaugh, J., concurring).

⁹⁴ *Id.* at 1476–77.

⁹⁵ *Id.*

B. A Win for Environmentalists?

The team fighting Maui County felt the decision was a big win because it could lead to solutions to the problem of degrading coral reefs around the islands.⁹⁶ Hannah Bernard of the Hawaii Wildlife Fund stated that the decision “provides us a pathway forward to stop this practice of illegally injecting wastewater into the ground.”⁹⁷ The area was once home to pineapple and sugar cane fields, and the wastewater was used to irrigate the crops.⁹⁸ When those fields went fallow, the county sought other means of disposing of the water.⁹⁹ A suggested solution is to use the wastewater to water golf courses, resorts, and agricultural fields.¹⁰⁰ In filing suit against Maui County, the goal was never to make the county pay—rather, to find a solution that avoided dumping wastewater that is harmful to coral reefs into the ocean.¹⁰¹

However, the holding might not provide the sweeping protections outside of Maui that environmental groups were hoping for. Initial reactions were split on how much impact this case will have on pollution discharges through groundwater. Earthjustice, a nonprofit environmental law organization that aided the Hawaii Wildlife Fund in litigating the case before the Supreme Court, called it the “Clean Water Case of the Century.”¹⁰² David Henkin, the Earthjustice attorney who argued the case before the Court, called the decision a “huge victory for clean water.”¹⁰³ Others see the decision as having little influence, calling it “The Blockbuster Clean Water Case That Wasn’t.”¹⁰⁴ Abigail Jones, vice president of Legal and Policy at PennFuture, a Pennsylvania-based environmental nonprofit organization, was among those less confident about the magnitude of the case’s impact.¹⁰⁵ Jones stated that though the *County of Maui* decision appears to be positive for the environmental community, it does “little overall to change how courts—and EPA historically—view the CWA’s permitting authority over indirect discharges generally and for indirect

⁹⁶ Lila Fujimoto, *Supreme Court Decides Against County*, MAUI NEWS (Apr. 24, 2020), <https://www.mauinews.com/news/local-news/2020/04/supreme-court-decides-against-county/> [https://perma.cc/T6VW-JJRR].

⁹⁷ *Id.*

⁹⁸ Lee Imada, *Injection Wells Ruling Opens County Up to Civil Penalties*, MAUI NEWS (Jan. 27, 2015), https://savewestmaui.com/news_mauinews_150127.htm [https://perma.cc/QW5F-GHQN].

⁹⁹ *Id.*

¹⁰⁰ Fujimoto, *supra* note 96.

¹⁰¹ Imada, *supra* note 98 (David Henkin is quoted saying the environmental groups were willing to settle in order to find an alternate to the injection wells).

¹⁰² *The Clean Water Case of the Century*, EARTHJUSTICE (Apr. 23, 2020), <https://earthjustice.org/features/supreme-court-maui-clean-water-case> [https://perma.cc/Y3NX-U4UF].

¹⁰³ *Id.*

¹⁰⁴ Abigail Jones, *The Blockbuster Clean Water Act Case That Wasn’t*, AM. BAR ASS’N (Oct. 5, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2020-21/fall/the-blockbuster-clean-water-act-case-wasnt/ (last visited Oct. 10, 2021).

¹⁰⁵ *Id.*

discharges to groundwater specifically.”¹⁰⁶ The environmental community can celebrate that the CWA survived another attempt to drastically narrow its protections.¹⁰⁷

At the same time, the regulated community can celebrate that the scope of the CWA was not expanded such that nearly every discharge would require an NPDES permit. Both sides can claim a bit of victory, but neither side got entirely what it wanted. The Supreme Court did not widen the CWA to include regulation of all indirect discharges through groundwater, like the environmental advocacy community may have wished, but the regulated community may still have concern that even this much smaller step toward full groundwater regulation is too much.

Before the *County of Maui* decision, many stakeholders advocated against policy that would widen the scope of the CWA to regulate groundwater pollution. Individual liberty advocates generally opposed to regulation were worried that an expansion would undermine the rights of property owners if their land-use choices affected groundwater.¹⁰⁸ A main point of contention brought up in oral argument¹⁰⁹ and by observers in their initial responses was that residential septic tank systems would now be subject to the permitting program.¹¹⁰ This point was also raised in amicus briefs, arguing that this would expand the NPDES program’s reach to unmanageable proportions.¹¹¹ However, the Court addressed this argument by stating EPA has already been regulating some discharges through groundwater for over thirty years and has yet to see such an expansion, and even if it did happen, permitting authorities have tools such as general permits to handle recurring situations.¹¹²

Additionally, advocates against expanding the CWA to include groundwater regulation were worried that it would undermine the states’ authority to regulate nonpoint sources, thus “unavoidably upset[ing] the statute’s cooperative framework.”¹¹³ While the Supreme Court did not expand the CWA to include regulation of all groundwater pollution—only groundwater pollution that is functionally the same as polluting surface water—there is still concern that even this much smaller step toward groundwater regulation is too much.¹¹⁴

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Schiff, *supra* note 29, at 452.

¹⁰⁹ Transcript of Oral Argument at 40, *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260).

¹¹⁰ Erik C. Baptist, *The Potentially Enormous Impacts of the Supreme Court’s County of Maui v. Hawaii Wildlife Fund Decision*, WILEY (May 7, 2020), <https://www.wiley.law/alert-The-Potentially-Enormous-Impacts-of-the-Supreme-Courts-County-of-Maui-v-Hawaii-Wildlife-Fund-Decision> [<https://perma.cc/5LNT-NNCQ>].

¹¹¹ Brief for State of West Virginia et al. as Amici Curiae Supporting Petitioner, *County of Maui v. Haw. Wildlife Fund*, 139 S. Ct. 1164 (2020) (No. 18-260) [hereinafter *West Virginia et al.*].

¹¹² *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020), *citing* 40 C.F.R. § 122.44(k).

¹¹³ Schiff, *supra* note 29, at 452.

¹¹⁴ Ellen M. Gilmer & Amena H. Saiyid, *SCOTUS Clean Water Act Test ‘Devastating’ for Industry*

Another concern raised since the decision came down is a fear the factor test will lead to longer and more costly litigation over questions of whether a discharge is covered by the NPDES program.¹¹⁵ Instead, advocates against expanding the CWA would have preferred a bright-line rule.¹¹⁶

Regardless of initial reactions, courts have begun to apply the functional equivalent standard. Following the Supreme Court Decision, the U.S. District Court for the District of Hawaii applied the functional equivalent standard in an order on July 26, 2021.¹¹⁷ The Court granted a summary judgment motion filed by the Plaintiffs—Hawaii Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association—stating that the county is required to obtain a permit under the Clean Water Act.¹¹⁸ Following this result, the county will have an option to appeal the District Court decision, but if it does not appeal, a settlement agreement from 2015 will take effect.¹¹⁹ This agreement will require the county to spend \$2.5 million on infrastructure so the wastewater can be used for irrigation purposes in Maui.¹²⁰

The Supreme Court's decision also vacated the judgment in *Kinder Morgan* and remanded it to the Fourth Circuit for consideration in light of *County of Maui*.¹²¹ However, the case settled in October 2020, with Kinder Morgan choosing not to further appeal the case and agreeing to pay \$1.5 million to the county where the gas pipeline spill occurred.¹²²

IV. THE AMBIGUITY LEFT BEHIND: WHY EPA NEEDS A MORE SPECIFIC RULE

Though former EPA Administrator Andrew Wheeler was initially uncertain about whether issuing a new guidance or interpretive rule was necessary,¹²³ EPA did release a new guidance just before the Trump Administration left office.¹²⁴

(3), BLOOMBERG LAW (Apr. 23, 2020), <https://news.bloomberglaw.com/environment-and-energy/supreme-courts-clean-water-act-test-devastating-for-industry> [<https://perma.cc/6LT7-CB4K>].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Haw. Wildlife Fund v. County of Maui, No. CV 12-00198 SOM/KJM, 2021 WL 3160428, at *12 (D. Haw. July 26, 2021).

¹¹⁸ *Id.* at *1.

¹¹⁹ Nick Grube, *Maui County Loses Again in Federal Court Over Pollution Discharges*, HONOLULU CIV. BEAT (July 16, 2021), <https://www.civilbeat.org/2021/07/maui-county-loses-again-in-federal-court-over-pollution-discharges> [<https://perma.cc/D44F-22GB>].

¹²⁰ *Id.*

¹²¹ *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, 140 S. Ct. 2736 (2020).

¹²² *Clean Water Fun Set Up After South Carolina Gas Spill Suit*, AP NEWS (Oct. 24, 2020), <https://apnews.com/article/water-quality-lawsuits-greenville-us-supreme-court-south-carolina-ad09f087608c63002ae93733ad3f51d0> [<https://perma.cc/R8VY-LLFY>].

¹²³ Ellen M. Gilmer, *EPA Hopes to Respond Soon to SCOTUS Maui Decision, Wheeler Says*, BLOOMBERG LAW (July 29, 2020), <https://news.bloomberglaw.com/environment-and-energy/epa-hopes-to-respond-soon-to-scotus-maui-decision-wheeler-says> [<https://perma.cc/HKE3-RBVR>].

¹²⁴ Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program, 86 Fed.

In January 2021, EPA issued guidance on how to apply the *County of Maui* decision.¹²⁵ However, this guidance included an eighth factor to be considered in the functional equivalent analysis that was not included by the Supreme Court in its decision: “the design and performance of the system or facility from which the pollutant is released.”¹²⁶ Though the Court was explicit that the seven factors listed in its decision are not all-inclusive,¹²⁷ there was immediate concern that this eighth factor was not consistent with the Court’s intent.¹²⁸ Pursuant to a President Biden Executive Order requiring EPA to review, and if necessary revise, all regulations and policies undertaken by the previous administration that do not protect public health and the environment¹²⁹ EPA rescinded the January 2021 guidance in September 2021.¹³⁰ First, EPA reasoned that the guidance was inconsistent with the *County of Maui* decision because it added the eighth factor addressing the system’s design and performance.¹³¹ The agency stated this factor was different than those identified by the Supreme Court because it introduced an element of intent on the part of the regulated parties.¹³² Second, EPA stated the guidance was issued without proper deliberation within EPA and with its federal partners.¹³³

It is not clear whether EPA intends to release another guidance that is more consistent with the Court’s test, and the exact implications of this decision are still unfolding. However, it is apparent that the “functional equivalent” standard is still ambiguous. The *County of Maui* majority even acknowledged this weakness in its decision.¹³⁴ One of the biggest concerns of the dissenting justices was that the majority’s new standard would be difficult to apply consistently.¹³⁵ As stated by Justice Alito, “If the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules

Reg. 6321 (Jan. 21, 2021).

¹²⁵ *Id.*

¹²⁶ RADHIKA FOX, RESCISSION OF THE JANUARY 2021 GUIDANCE DOCUMENT, APPLYING THE SUPREME COURT’S *COUNTY OF MAUI V. HAWAII WILDLIFE FUND* DECISION IN THE CLEAN WATER ACT SECTION 402 NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM 1 (2021).

¹²⁷ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476–77 (2020).

¹²⁸ Several states and environmental groups criticized the guidance when it was still a draft. See *Twelve AGs Filed Comments Criticizing EPA Guidance on Implementation of Supreme Court’s Maui Clean Water Act Decision*, STATE ENERGY & ENV’T IMPACT CTR., N.Y.U. SCH. OF LAW (Jan. 11, 2021), <https://stateimpactcenter.org/ag-actions/twelve-ags-filed-comments-criticizing-epa-guidance-implementation> [https://perma.cc/K2UX9N4K].

¹²⁹ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

¹³⁰ *EPA Rescinds Previous Administration’s Guidance on Clean Water Act Permit Requirements*, ENV’T’L PROT. AGENCY (Sept. 16, 2021), <https://www.epa.gov/newsreleases/epa-rescinds-previous-administrations-guidance-clean-water-act-permit-requirements> [https://perma.cc/7RTE-87CS].

¹³¹ FOX, *supra* note 126, at 1.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020).

¹³⁵ *Id.* at 1482 (Thomas, J., dissenting).

that can be applied with a modicum of consistency.”¹³⁶ The Court gave some general guidance for how to interpret it, but it really only gave two ends of the spectrum and left instances that fall in the middle for the lower courts, state agencies, and EPA to clarify.¹³⁷

A. Other Statutes Leave Gaps in Groundwater Regulation

Other federal statutes provide some protections against groundwater pollution, but as was the case in *County of Maui*, these statutes do not adequately prevent contamination of surface waters through groundwater. The Safe Drinking Water Act (“SDWA”) was enacted to “assure that the water supply systems serving the public meet minimum national standards to protect consumers from harmful contaminants.”¹³⁸ The SDWA protects groundwater by setting maximum contaminant levels for drinking water.¹³⁹ Groundwater pollution has significant implications for drinking water: an estimated 145 million Americans get their tap water from a groundwater source.¹⁴⁰ The SDWA provides the main authority to regulate pollutants in groundwater that may impact human health.¹⁴¹ However, the SDWA only protects groundwater that is supplying a public water system,¹⁴² but more than forty-three million people get their water from private groundwater wells.¹⁴³ SDWA compliance does not automatically mean CWA compliance either.¹⁴⁴ The CWA “intends to improve the biological integrity of aquatic environments,” while the SDWA “intends to improve human health and aesthetic quality of drinking water.”¹⁴⁵ These distinct goals address different environmental issues.¹⁴⁶

The Resource Conservation and Recovery Act (“RCRA”) also provides

¹³⁶ *Id.* (Alito, J., dissenting).

¹³⁷ Duncan M. Greene, Rachael L. Lipinski & Sophia E. Amberson, *U.S. Supreme Court Holds Clean Water Act Covers Groundwater in Limited Circumstances*, 10 NAT. L. REV. 115 (2020), <https://www.natlawreview.com/article/us-supreme-court-holds-clean-water-act-covers-groundwater-limited-circumstances> [https://perma.cc/3FRU-9E4E].

¹³⁸ H.R. REP. NO. 104-632, at 7 (1996).

¹³⁹ 7 U.S.C.S. § 300g-1(a) (LexisNexis 2021).

¹⁴⁰ *Groundwater Awareness Week*, CTRS. FOR DISEASE CONTROL & PREVENTION (2021), <https://www.cdc.gov/healthywater/drinking/groundwater-awareness-week.html> [https://perma.cc/TV93-UJ4S].

¹⁴¹ Jonathan R. Eaton, Note, *The Sieve of Groundwater Pollution Protection: A Public Health Law Analysis*, 6 J. HEALTH & BIOMED. L. 109, 128 (2010).

¹⁴² Michael C. Blumm & Steven M. Thiel, *(Ground)Waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction*, 46 ENVTL. L. 333, 339 (2016).

¹⁴³ *Groundwater Awareness Week*, *supra* note 140.

¹⁴⁴ Michael J. Van Zandt & Sean G. Herman, *Practitioner Insights: Maui Groundwater Case Shows Government Retreat is Bad for Everyone*, BLOOMBERG LAW (May 16, 2018), https://www.bloomberglaw.com/document/XA8UFVQK000000?bna_news_filter=environment-and-energy&jcsearch=BNA%2520000001634c4edd89a3737edfa1b30000#jcti [https://perma.cc/P3FB-PUXA].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

some protections for groundwater. This statute regulates the generation, transport and treatment, storage, and disposal of hazardous waste by requiring all generators and transporters of hazardous wastes to have a permit from EPA or an authorized state agency.¹⁴⁷ Permits help ensure facilities meet specific design standards, operating requirements, closure requirements, and groundwater monitoring requirements to reduce risk and contain hazardous materials.¹⁴⁸ However, because RCRA focuses only on protecting groundwater from hazardous waste, it does not prevent groundwater pollution from other sources.¹⁴⁹

B. State Regulation Is Not Enough on Its Own

The *County of Maui* Court highlighted that the structure of the CWA indicates, “Congress intended to leave substantial responsibility to the States,” regarding groundwater pollution and nonpoint pollution.¹⁵⁰ Advocates against all groundwater discharge regulations at the federal level point to the states to fill in the gaps left behind.¹⁵¹ This framework, while successful, rests on having a strong federal component. Additionally, leaving groundwater pollution regulation completely up to the states has not been entirely effective. Though the intent of Congress was for the states to have a critical role in implementing the CWA’s permitting programs,¹⁵² it is doubtful that the waters not protected by the federal CWA were intended to be left wholly unprotected.

A recent survey comparing state groundwater policies showed that only half of states have laws that recognize a connection between surface water and groundwater.¹⁵³ The survey also revealed that not all states have laws explicitly addressing groundwater quality.¹⁵⁴ The piecemeal regulation that results from different state strategies makes federal regulation extremely difficult. Differences in state regulation could result in polluting industries choosing to operate or litigate in states with less restrictive regulation,¹⁵⁵ which can lead to many problems. Groundwater is not confined by state boundaries, and neither is water pollution, so what happens in one state can affect another.¹⁵⁶ A lack of federal-level regulation of groundwater pollution thereby allows entities to pollute without experiencing the consequences.¹⁵⁷ This result goes against the

¹⁴⁷ 42 U.S.C.S. §§ 6922–25 (LexisNexis 2021).

¹⁴⁸ Blumm & Thiel, *supra* note 142 at 340, *citing generally* 40 C.F.R. § 264.

¹⁴⁹ *Id.*

¹⁵⁰ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

¹⁵¹ Yager & Hart, *supra* note 54, at 466.

¹⁵² CRAIG, *supra* note 7 at 852–53.

¹⁵³ Sharon B. Megdal, Andrea K. Gerlak, Robert G. Varady & Ling-Yee Huang, *Groundwater Governance in the United States: Common Priorities and Challenges*, 53 GROUNDWATER 677, 681–82 (2014).

¹⁵⁴ *Id.*

¹⁵⁵ Anna Makowski, *Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act’s Jurisdictional Scope of Groundwater Pollution*, 91 OR. L. REV. 495, 526 (2012).

¹⁵⁶ Blumm & Thiel, *supra* note 142 at 341–42.

¹⁵⁷ Foxx, *supra* note 53.

purpose of the CWA to preserve and protect the biological integrity of water bodies.¹⁵⁸

Proponents against federal-level regulation argue the CWA's purpose is to foster cooperative federalism by leaving room for the states to create regulations over pollution sources outside the scope of the CWA.¹⁵⁹ However, many states have taken steps to prevent the formation of regulations to protect waters left unprotected by the scope of the CWA.¹⁶⁰ A 2013 survey of state water regulations showed that many states have laws that restrict state agency ability to regulate pollution to waters not covered under federal laws.¹⁶¹ The study found that thirty-six states have laws restricting state agency authority to regulate and protect waters left unprotected by the CWA.¹⁶² Thirteen states have laws that prohibit the regulation of waters more strictly than federal requirements, and twenty-three more have laws that make it more difficult to set stricter regulations.¹⁶³ If the federal statute is meant to be the floor that states can build from, and many states are choosing to put a ceiling an inch above that floor, it does not appear that states are filling the gaps left open by the CWA.¹⁶⁴ States can still make changes to protect waters that are not protected by CWA, but these changes must be made at the legislative level first, and then at the agency level, making the process longer and more difficult.

Furthermore, states do not have the resources needed to pick up the slack. The aforementioned state groundwater survey revealed that only half of state agencies have sufficient capacity to carry out enforcement responsibilities.¹⁶⁵ For example, in the 2021 Kansas state budget, Governor Laura Kelly allotted \$74.8 million to the Kansas Department of Health and Environment's environmental division.¹⁶⁶ This number is down from 2008, when the budget for the environmental division was \$82.4 million¹⁶⁷ and because the Kansas Department of Health and the Environment is responsible for more than just water pollution prevention,¹⁶⁸ only a part of this budget will go toward clean

¹⁵⁸ *Id.*

¹⁵⁹ Schiff, *supra* note 29 at 452; *see also* Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 937 (6th Cir. 2018) (arguing that efforts to meet CWA's purpose to protect and maintain biological integrity of nation's waters must also meet CWA's purpose of "fostering cooperative federalism.").

¹⁶⁰ ENV'T L. INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 36 (2013).

¹⁶¹ *Id.* at 1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2.

¹⁶⁵ Megdal et al., *supra* note 153 at 681–82.

¹⁶⁶ KAN. DIV. OF BUDGET, FY 2021 GOVERNOR'S BUDGET REPORT VOL. 2 281–83 (2020).

¹⁶⁷ Sarah Spicer, *Environmental Agencies May Not Have the Funding to Keep Our Water Clean, Report Says*, WICHITA EAGLE (Oct. 19, 2020), <https://www.kansas.com/news/politics-government/article246400820.html> (dollar amount adjusted for inflation) [<https://perma.cc/NE5U-FXKL>].

¹⁶⁸ *About KDHE*, KAN. DEP'T OF HEALTH & ENV'T, <https://www.kdheks.gov/mission.html> [<https://perma.cc/2R7S-4S6X>].

water enforcement. A decreasing budget could mean less enforcement resources and ultimately higher cases of noncompliance.

This problem will be amplified if agencies must devote more resources than average to apply the *County of Maui* functional equivalent test to determine if tributary groundwater discharges require a permit. This was a concern expressed in an amicus brief authored by nineteen states and two governors.¹⁶⁹ Because so many states have assumed NPDES permitting authority, the state agencies would be the ones who would have to bear the burdens of an expanded permitting program.¹⁷⁰ This would take away valuable resources from other regulatory programs under the state agency authority.¹⁷¹ This concern is valid in light of the shrinking budgets of many state environmental agencies.¹⁷² However, as previously discussed, the *County of Maui* decision did not expand the NPDES permitting program as much as it could have. By refusing to adopt the Ninth Circuit’s broad fairly traceable standard and being careful to avoid any circumstance where all discharges would require a permit, the Court vastly narrowed the scope of indirect discharges that require permits.¹⁷³ Still, further guidance issued by EPA would help alleviate the burden on state agencies.

C. *The Importance of Science in Functional Equivalence Determinations*

It is impossible to “restore and maintain the chemical, physical, and biological integrity of the Nations waters” without considering “the scientific reality of connections between point sources and surface waters through groundwater.”¹⁷⁴ Since the CWA was enacted, our understanding of underground water sources has greatly improved.¹⁷⁵ Technology and tools for testing such as tracer dye studies—like the one used in *County of Maui*—permit officials to better understand how much pollutants are ending up in navigable waters even after traveling through groundwater.¹⁷⁶ It is now much more evident how connections between groundwater and surface water function, which presumably should make regulation easier. Some scholars are arguing that a new EPA rule should place a great emphasis on scientific guidance.¹⁷⁷ For example, an agency with scientific expertise could provide guidance to determine when a sufficient hydrological connection is present between groundwater and surface water.¹⁷⁸ Incorporating the improved understanding, knowledge, and technology developed since 1972 into “revised legislative authority may create the certainty

¹⁶⁹ West Virginia et al., *supra* note 111.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² ENV’T INTEGRITY PROJECT, THIN GREEN LINE 25 (2019).

¹⁷³ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1470 (2020).

¹⁷⁴ Brief for Aquatic Scientists, *supra* note 60 at 5.

¹⁷⁵ Philip M. Quatrochi, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. AFF. L. REV. 603, 603–04 (1996).

¹⁷⁶ Shiigi, *supra* note 53 at 547–48 (2019).

¹⁷⁷ *Id.* at 553.

¹⁷⁸ *Id.*

that the regulated community demands and deserves.”¹⁷⁹

Generally, there has been some push in the legal community to rely on interdisciplinary methods to better incorporate biological and ecological research with policymaking.¹⁸⁰ Professor Robert Adler, a law professor specializing in water law and environmental law, has written several articles about this topic.¹⁸¹ Adler argues that an “ongoing interaction between science and regulation is healthy because additional scientific understanding can reduce the risk of poorly targeted regulation.”¹⁸² The interaction of regulation and science can help avoid unnecessary regulation of harms that are found to be less threatening than initially thought.¹⁸³

Specifically, the Supreme Court took a step toward this interdisciplinary approach in the *County of Maui* decision. One of the amicus briefs cited by Justice Breyer in the majority opinion was submitted by hydrologists that thoroughly explained the scientific phenomena connecting groundwater to surface water.¹⁸⁴ The factors listed in the functional equivalent test reflect many of the hydrologic processes described in the brief.¹⁸⁵ In reflecting on the Court’s decision, some of the authors of the brief argued that the functional equivalent test might be more applicable than Justice Alito feared in his dissenting opinion.¹⁸⁶ They reiterate that there are scientific tools available that can aid determinations for when groundwater pathways are discernable and confined conveyances so as to be the functional equivalents to direct discharges.¹⁸⁷ Future EPA guidance could expand on the factors listed by the majority and identify scientific tools available to help state agencies and lower courts apply the functional equivalent standard.

V. RECOMMENDATIONS FOR FURTHER EPA GUIDANCE

In many ways, the Supreme Court got it right. In the specific case of the wastewater treatment plant in Maui County, the wastewater will no longer be dumped into the Pacific Ocean and pollute the coral reefs unless the County gets

¹⁷⁹ Van Zandt & Herman, *supra* note 144.

¹⁸⁰ See Robert W. Adler, *Transactional Ecology and Environmental Law*, 50 ENVTL. L. 703, 704–05 (2020).

¹⁸¹ See e.g., *id.*; Robert W. Adler, *Coevolution of Law and Science: A Clean Water Act Case Study*, 44 COLUM. J. ENVTL. L. 1 (2019); Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249 (2003).

¹⁸² Robert W. Adler, *Coevolution of Law and Science: A Clean Water Act Case Study*, 44 COLUM. J. ENVTL. L. 1, 4–5 (2019).

¹⁸³ *Id.*

¹⁸⁴ Brief for Aquatic Scientists, *supra* note 60.

¹⁸⁵ *Id.*

¹⁸⁶ Thomas Harter, Steph Tai & Karrigan Bork, *Supreme Court Ruling Finds Old, New Middle Ground on Clean Water Act’s Application to Groundwater*, CAL. WATERBLOG (Apr. 26, 2020), <https://californiawaterblog.com/2020/04/26/supreme-court-ruling-finds-old-new-middle-ground-on-clean-water-acts-application-to-groundwater/> [<https://perma.cc/GD7V-GPXC>].

¹⁸⁷ *Id.*

an NPDES permit.¹⁸⁸ As Justice Sotomayor noted during oral argument, there was a failure somewhere in the application of the CWA: “If [the county] followed all the laws, and they still are polluting, they’re getting away with it. So, something failed. The preventative measures of this law were not followed and something failed.”¹⁸⁹ The Court’s functional equivalent test corrected this failure by providing an avenue for determining when indirect discharges through groundwater require permits.

Additionally, the nature of the factors in the test, such as time and distance, imply a fact-based, case-by-case analysis for determining what indirect discharges are functionally equivalent to direct discharges.¹⁹⁰ Fact-based analysis is likely the correct approach to assess functional equivalence, as bright-line rules might put too much emphasis on any one factor¹⁹¹ or create a lack of redress in situations that do not quite fit the rule.¹⁹² Additionally, topography, geology, and climate create great variation in the hydrologic characteristics of certain groundwater connections, including frequency, magnitudes, timing, duration, and rate.¹⁹³ It does not make sense to regulate something that can be so diverse with one uniform, bright-line rule. Thus, the goal of any EPA guidance on this issue should not be to draw lines, but rather to help parties in their fact-specific determinations. The January 2021 guidance attempted to give more clarity in applying the functional equivalent standard on a case-by-case basis, but it did so in a way that strayed too far from the Supreme Court’s reasoning.¹⁹⁴ However, EPA could still release a new guidance that gives clarity on the standard that is still consistent with the Court’s decision.

EPA should release more specific criteria rooted in hydrological science for each of the factors. For example, issuing guidance on tracer dye studies—like the one used in *Maui*¹⁹⁵—could be very helpful for finding ways to measure time and distance, the two most important factors identified by the Court.¹⁹⁶ Another possibility is for EPA to issue guidance about different types of materials that pollutants are likely to travel through if discharged into groundwater. The third factor identified by the Court is “the nature of the

¹⁸⁸ Provided that, on remand, the Ninth Circuit holds that the injection wells are a functional equivalent to a direct discharge.

¹⁸⁹ Transcript of Oral Argument at 71, *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260).

¹⁹⁰ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476–77 (2020).

¹⁹¹ Allison L. Kvien, Note, *Is Groundwater that is Hydrologically Connected to Navigable Waters Covered Under the CWA? Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 MINN. J. L. SCI. & TECH. 957, 990 (2015).

¹⁹² Shiigi, *supra* note 53 at 547, n.214.

¹⁹³ Brief for Aquatic Scientists, *supra* note 60 at 6.

¹⁹⁴ Fox, *supra* note 126.

¹⁹⁵ *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 742–43 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020) (describing the tracer dye study used to show a hydrologic connection between the injection wells and the ocean).

¹⁹⁶ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

material through which the pollutant travels.”¹⁹⁷ One important characteristic that varies from material to material is porosity.¹⁹⁸ The porosity of the rocks and soil in aquifers can affect the aquifer storage capacity, the rate at which water moves through the aquifer, and the type and rate of interactions between surface water and groundwater.¹⁹⁹ These characteristics can impact several of the Court’s factors, including time, dilution, and amount of pollutant that enters navigable waters.²⁰⁰ If EPA can give guidance on the type of rock and soil materials that lead to greater dilution, slower flow rates, and more pollutant absorption, polluters may have a better idea of the likelihood their discharge is a functional equivalent to a direct discharge.

In giving more concrete guidance, EPA can alleviate the uncertainty that state agencies, lower courts, and polluters are bound to face when interpreting the functional equivalent test. Before the Court’s *County of Maui* decision, there was a call for more clarity; without it, polluters were faced with a difficult decision between risking a CWA citizen suit or applying for an expensive and possibly unnecessary CWA permit.²⁰¹ This is essentially what happened to Maui County, which chose to risk a lawsuit by failing to secure, or apply for, a permit.²⁰² The ambiguity of the CWA’s application to the County’s situation was evident, as it brought them all the way to the Supreme Court. The Court solved some of this ambiguity, but with so many fact-specific factors,²⁰³ there are likely to be more disputes in the future.

EPA could elaborate on the factors identified by the Court and give guidance on how to measure, identify, and apply them. Further clarity could avoid a situation like what took place after the Court’s *Rapanos* decision: a cluster of lower court decisions attempting to apply the plurality’s confusing significant nexus test on a case-by-case basis.²⁰⁴ Issuing guidance on the different types of aquifers, their relationship to surface waters, and their relative locations could also greatly help polluters and permitting authorities apply the functional equivalent test. Again, guidance from EPA should not implicate bright line rules but give instructions for how to assess each factor so all factors can be considered together as accurately as possible for each case.

VI. CONCLUSION

Whether the CWA applies to scenarios of pollutant discharges into

¹⁹⁷ *Id.* at 1476.

¹⁹⁸ Brief for Aquatic Scientists, *supra* note 60 at 8.

¹⁹⁹ *Id.*

²⁰⁰ *County of Maui*, 140 S. Ct. at 1476–77.

²⁰¹ Van Zandt & Herman, *supra* note 144.

²⁰² *Id.*

²⁰³ *County of Maui*, 140 S. Ct. at 1476–77.

²⁰⁴ Eric Wolff, *The SCOTUS Water Muddle*, POLITICO (Apr. 24, 2020), <https://www.politico.com/newsletters/morning-energy/2020/04/24/the-scotus-water-muddle-787099> [<https://perma.cc/CCR8-ZXZ7>] (quoting a former Justice Department attorney that the *Maui* decision “repeated the error of *Rapanos*”).

groundwater that impact surface water has a long history of confusion and uncertainty. With its decision in *County of Maui*, the Court laid out a new standard for determining when groundwater discharges trigger CWA liability.²⁰⁵ The functional equivalent test has many strengths as a fact-based approach consistent with the goals of the CWA, but EPA should issue further guidance on the Court's factors to reduce potential negative consequences. Further clarity that avoids bright line rules will limit confusion in the lower courts, avoid a surge in citizen suits, and will help state agencies and individual parties determine when an NPDES permit is necessary.

²⁰⁵ *County of Maui*, 140 S. Ct. at 1476.



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