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Editorial and Business Address: Fredric G. Levin College of Law, University of Florida, P.O. Box 117636, 351 Village Dr., 127 Holland Hall, Gainesville, FL 32611. Phone: (352) 273-0906. Email Address: jlpp@law.ufl.edu.

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ARTICLES

NOTES

THE LEGITIMACY AND LIMITS OF PUNISHING "BAD SAMARITANS"

*Luke William Hunt**

Abstract

There are often public calls to codify moral sentiments after failures to help others, and two recent tragedies have renewed interest in one's legal duty to aid another. This Article examines the moral underpinnings and legitimacy of so-called "Bad Samaritan" laws—laws that criminalize failures to aid others in emergency situations. Part I examines the theoretical backdrop of duties imposed by Bad Samaritan laws, including their relationship with various moral duties to aid. This leads to the analysis in Part II, which examines two related questions that are raised when moving from moral to legal duties: First, on what ground does the state have the authority to dictate that one's needs should be met in the way specified by a particular legal duty? Second, does a special relationship exist that legitimizes the establishment of such legal duties?

INTRODUCTION

Consider two recent tragedies. On July 21, 2017, French philosopher Anne Dufourmantelle was sunbathing at Pampelonne Beach, near St. Tropez, when she noticed two children struggling in the water.[1] An orange flag on the beach had just been changed to red—indicating dangerous conditions—yet Dufourmantelle immediately entered the water to try to save the children.[2] Although she drowned after being carried away in a strong current, a lifeguard eventually saved the two

* Luke William Hunt, J.D., Ph.D., Assistant Professor, University of Alabama, Department of Philosophy.

1. *French philosopher Dufourmantelle drowns rescuing children*, BBC NEWS (July 24, 2017), http://www.bbc.com/news/world-europe-40703606 [https://perma.cc/9KK5-2UKF] (describing Dufourmantelle as having written "numerous essays on the importance of taking risks and the need to accept that exposure to any number of possible threats is a part of everyday life.").

2. *Id.*

children.[3] Most people would describe Dufourmantelle's actions as heroic and deserving of the utmost moral praise. Yet many would also describe her act as *supererogatory*—in other words, one that is not morally required because it is beyond the call of duty. After all, most people do not always have the fortitude to rush into danger and face death—even when another's life is hanging in the balance. But perhaps there is a middle ground—a less heroic action that one ought to take in these situations. Maybe dialing 9-1-1 would satisfy one's duty, or ensuring that a lifeguard (if one is on hand) is aware of the emergency. Now consider a situation similar to the one that Dufourmantelle faced—but that played out much differently.

On July 9, 2017, five teenage boys watched Jamel Dunn drown in a pond in Florida.[4] Rather than simply dial 9-1-1, the teens filmed Dunn's drawn-out struggle in a two-minute long video on a cell phone.[5] On the video, the teens laugh and taunt Dunn as he repeatedly screams for help and struggles to stay afloat.[6] They did not report Dunn's death to authorities—though they posted the video of his death on the internet—and Dunn's body was not pulled from the water for five days.[7] The teens were not charged with failing to aid Dunn because—the state attorney's office explained—there is no Florida law "that compels an individual to render, request or seek aid for a person in distress."[8] If there was no legal duty or obligation to aid Dunn, should there have been? Although many would consider it unreasonable for the law to require the level of heroism displayed by Dufourmantelle, should the teens have been required to at least aid Dunn by calling 9-1-1? But even if it is left at that minimal requirement, what is the moral basis and limit of such laws?[9] One might attempt to answer these questions by examining the enactment of so-

3. *Id.*

4. Ralph Ellis, Nick Valencia & Devon Sayers, *Chief to Recommend Charges Against Florida Teens Who Recorded Drowning*, CNN (July 22, 2017), http://www.cnn.com/2017/07/21/us/florida-teens-drowning-man/?iid=ob_lockedrail_topeditorial [https://perma.cc/9MHM-UFSE].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id*. However, the police chief indicated "that he will recommend that the state attorney prosecute the teens under a statute that requires a person with knowledge of a death to notify a medical examiner" (which would be a misdemeanor under that statute). *Id.*

9. A second, related question is the extent to which the omissions of the relevant parties *caused* Dunn's death. I note only two general difficulties with this issue. First, if failures of action are to count as causes of events, then there seems to be no non-arbitrary way to restrict the scope of failures of action that are to be considered causes of events—in this case Dunn's death. Second, the simple fact that the teens may have *prevented* Dunn's death by calling 9-1-1 does not demonstrate that the many other events and circumstances involved in Dunn's death were *insufficient* to cause his death. See Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 253–59 (1980), for a fuller account of these arguments.

called "Bad Samaritan" laws. Unlike "Good Samaritan" laws (which offer legal protection to one who provides reasonable assistance to another in need), Bad Samaritan laws make it a crime to fail to aid others in emergency situations when providing aid would be easy.[10]

There are often public calls to codify our moral sentiments after tragic failures to help others.[11] For example, during the aftermath of Hurricane Sandy, it was revealed that a young woman was refused aid from neighbors after rising water separated her from her two young children; her children were later found dead nearby.[12] The event prompted one commentator in the *New York Times* to suggest that it would be appropriate to enact the following law: "Any person who knows that another is in imminent danger, or has sustained serious physical harm, and who fails to render reasonable assistance, shall be fined up to $5,000.00, imprisoned up to three months, or both."[13] More recently, legal scholars have argued that "certain witnesses who are not physically present at the scene of a crime ["Digital Age Samaritans"] should be held criminally accountable for failing to report specified violent offenses of which they are aware."[14] This Article examines the moral underpinnings and legitimacy of such laws.

Ironically, I say little about the details of Bad Samaritan laws themselves because that is well-covered ground.[15] Instead, Part I

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10. A handful of states have Bad Samaritan laws. See JOEL FEINBERG, HARM TO OTHERS, chapter 4 (1984) (discussed in this section), for more on legal duties to rescue. Although this paper focuses upon Bad Samaritan (duty-to-rescue) laws, many states have passed duty-to-report statutes. Some of these statues are narrowly tailored (e.g., restricting the duty to report to violent crimes against children), while others are broader (e.g., the duty to report criminal activity generally). Many of these laws are based upon special relationships. Somewhat related, there is also "misprision of felony" (concealing one's knowledge of another's criminal activity to the authorities), which often requires active concealment. Of course, more broadly, it should be noted that the criminal law does not come close to complying with, say, Mill's Harm Principle, e.g., harmless crimes might include inchoate crimes (attempt, conspiracy, solicitation), possession crimes, status crimes (public intoxication), and so on—though, there is, of course, debate about what qualifies as "harm."

11. Faith Karimi, *Teens who laughed and recorded a drowning man in his final moments won't face charges*, CNN (June 26, 2018), https://www.cnn.com/2018/06/26/us/florida-teens-no-charges-drowning-man/index.html [https://perma.cc/ZE8Y-VC95]. A friend of Dunn's sister started a petition to change Florida law. *Id*.

12. Jay Sterling Silver, *Can the Law Make Us Be Decent*, N.Y. TIMES (Nov. 7, 2012), https://www.nytimes.com/2012/11/07/opinion/can-the-law-make-bad-samaritans-be-decent.html [https://perma.cc/Q4MF-ZWNS].

13. *Id.*

14. Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1119 (2021).

15. For example, A.D. Woozley addressed the potential problems with Bad Samaritan laws in a well-known article thirty-five years ago. *See* A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); *see also* Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157 (1994) (discussed in this section).

examines the broader, theoretical backdrop of duties imposed by Bad Samaritan laws, including their relationship with various moral duties to aid.[16] This leads to the analysis in Part II, which examines two related questions that are raised when moving from moral to legal duties: First, on what ground does the state have the authority to dictate that one's needs should be met in the way specified by a particular legal duty?[17] Second, does a special relationship exist that justifies the establishment of such legal duties?[18] The answers to these questions are of interest inasmuch as they shed light on the relationships among our actions, our laws, and the well-being of others.

I. RESCUE AND BENEFICENCE

The list of positive moral duties owed by individual persons may include rescue, beneficence, and justice.[19] This Article focuses on the relationship between the first two of these potential duties and how they are related to legal duties to aid: *rescue*, the duty to aid others in emergency situations, and *beneficence*, the duty to promote the well-being of others.[20] To be clear, then, I am interested in the state's authority to compel one in one's *individual* capacity to help another, not the state's authority to address broader principles of *justice* that affect general welfare on an institutional level. Accordingly, this paper would not apply to, say, state mandates requiring the populace to wear masks or get vaccinations to protect the general welfare during a public health emergency such as a pandemic—mandates that strike me as justified and legitimate given institutional demands of *justice*.

The above tripartite conception of positive moral duties implies that rescue and beneficence are distinct. But as almost every undergraduate philosophy student knows, Peter Singer's classic paper on the topic suggests that there are questions about whether duties of rescue and beneficence may be distinguished in nonarbitrary ways. These sorts of questions led Singer to the well-known conclusion that our positive moral duties are conceivably without limit. Whatever one might think of

16. *See infra* Part I.

17. *See infra* Part II.

18. *Id.*

19. See Luke William Hunt, *The Global Ethics of Helping and Harming*, 36.4 HUM. RTS. Q. 798 (2014), for an account of duties of rescue and beneficence in the international context. Positive moral duties typically mean that one is obliged to take some sort of step or action, rather than merely refrain from taking some sort of step or action (i.e., a negative duty).

20. The third potential positive duty, justice, is typically considered an institutional principle, such that an individual's primary duty is to support just institutions. *See* JOHN RAWLS, A THEORY OF JUSTICE 47 (Harvard Univ. Press, 2003). However, others have argued that if individuals have a duty to support just institutions, then they also have a duty to support the just ends those institutions strive to bring about. *See, e.g.*, Liam Murphy, *Institutions and the Demands of Justice*, 27.4 PHIL. & PUB. AFF. 251, 283 (1998).

Singer's argument, the underlying questions are relevant with respect to any positive legal duties the state may impose to aid others in one's *individual* capacity—though, as discussed in Part II, they are relevant in surprising ways.

One of the core questions is whether there is a nonarbitrary way to draw the line between rescue and beneficence. If not, one would seem to be left with some untenable options, including: (1) drawing a line that reflects an arbitrary limit to our positive duties; (2) accepting that we have essentially unlimited positive duties; or (3) accepting that our positive duties are quite limited. There are several prominent theories—including one by Liam Murphy and one by Garrett Cullity—that have attempted to overcome the obstacle presented by the first option, namely locating a nonarbitrary limit to our duty of beneficence.[21] To help motivate the problem, first consider the difficulties that arise when analyzing duties to rescue.

A. *Rescue*

There is no shortage of literature on the question of rescue. The field is rife with colorful moral dilemmas, and a random sampling will likely include runaway trolley cars, drowning babies, and, in some variations, pools full of drowning babies, that are supposed to explain one's moral duties.[22] While these scenarios are instructive in making narrow points—and while it is presumably not impossible that one will find oneself in a pool of drowning babies—there is a reasonable concern that philosophical analysis of these hypothetical situations does not accurately reflect the process by which one actually analyzes moral questions. One worry is that pondering only whether one has the duty to make a split second decision to switch a trolley car from a track with three people tied on it to a track with two people leads to the conclusion that our duties should be based simply on their ability to produce good consequences in even the most unlikely of situations.[23] But as Dunn's case illustrates, rescue is an important practical moral question even if most of us experience such situations rarely.

Joel Feinberg's comprehensive analysis of rescue in *Harm to Others*, which generally argues that there should be a *legal* duty to rescue, is an

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21. Hunt, *supra* note 19, at 800 (considering these three options in the international context regarding the potential duties that affluent states owe to the distant needy).

22. *See, e.g.*, Molly Crockett, *The Trolley Problem: Would You Kill One Person to Save Many Others?*, GUARDIAN (Dec. 12, 2016, 11:49 AM), https://www.theguardian.com/science/head-quarters/2016/dec/12/the-trolley-problem-would-you-kill-one-person-to-save-many-others [https://perma.cc/33J7-XSA3]; Marko Milanovic, *The Drowning Child*, EJIL: TALK! (Sept. 3, 2015), https://www.ejiltalk.org/the-drowning-child/ [https://perma.cc/8WGS-ZMY6].

23. See TALBOT BREWER, THE RETRIEVAL OF ETHICS 69–70 (2009), for an analysis of the potential problems with this way of approaching practical problems.

appropriate starting point.[24] It is representative of a general problem in the project of distinguishing legal and moral duties of rescue from beneficence: drawing a line at the point at which one's duty to rescue ends seems like an arbitrary affair. Feinberg's argument is centered on the distinction between perfect and imperfect duties and determinate and indeterminate persons, and their respective rights (imperfect duties lack determinate recipients with correlative rights, while perfect duties involve determinate recipients with correlative rights).[25] The perfect duty to rescue a determinate person entails that the determinate person has a right to be rescued from harm.[26]

Conversely, the imperfect duty to rescue indeterminate persons does not entail a right of indeterminate persons to be saved.[27] So the teens mentioned earlier would presumably have a perfect duty to attempt to rescue (say, by calling 9-1-1) Dunn, a determinate recipient, who would presumably have a right to be rescued by the teens. But what if one encounters two determinate persons—two persons drowning in a pool, say—and is only capable of saving one? Feinberg seems to blur the perfect and the imperfect, and the determinate and the indeterminate, by arguing that one has an imperfect duty to rescue as many persons as possible.[28] Moreover, each person has a right that the rescuer rescue as many as possible.[29]

But if Feinberg relies on the perfect/imperfect duty dichotomy, a problem arises with the last point about imperfect duties and the rights of multiple determinate persons. In the case involving two determinate drowning persons—only one of whom may be saved—Feinberg seems to say that each drowning person does have a right: a right that the rescuer save one of them if it is only possible to save one. The problem is that this does not seem fundamentally unlike Feinberg's claim that indeterminate persons do *not* have a right to be rescued; this is because the second, determinate drowning person (who cannot be saved) is analogous to one of the many indeterminate, distant needy (who cannot be saved), yet one has a right to be rescued and the other does not.[30]

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24. FEINBERG, *supra* note 10, at 185–86.
25. *Id.* at 134.
26. *Id.* at 134.
27. *Id.*
28. *Id.* at 147.
29. *Id*.
30. See MICHAEL A. MENLOWE, THE PHILOSOPHICAL FOUNDATIONS OF A DUTY TO RESCUE, THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 19–21 (1993), for a discussion of these problems in Feinberg's argument. In any event, if Feinberg's goal is to morally distinguish determinate sets (e.g., of babies) from non-determinate sets (e.g., the distant needy), then it would perhaps be more plausible to argue that one has a *perfect* duty to *use one's discretion* to choose who to save in a determinate set, while saving as many as possible. Each baby would thus have a right against a rescuer that the rescuer select and maximize, not a right to be saved. I will suggest

Why is this so? Here, one may ask to what extent there are factual differences between the duty to rescue as many drowning persons as possible and the duty (or lack thereof) to rescue as many of the distant needy as possible. Of course, there are many factual differences between the two cases, including: (A) physical distance, (B) experiential impact, (C) multiple potential rescuers, and (D) causal nature of aid.[31] However, the important question is the extent to which these factual differences are different in a relevant way.

Through a great many colorful examples, Peter Unger has argued that these and other factual differences are not morally relevant to our duty to rescue the distant needy.[32] They can be summed up in a more general way by treating differences such as (A) and (B) similarly and differences such as (C) and (D) similarly. Regarding (A) and (B), sending $100.00 in the mail to help a dying child over 8,000 miles away obviously has a different experiential impact from pulling a drowning baby from a pool. What is less obvious is how this is relevant. The dying child 8,000 miles away is no less real, and, presumably, one could take a flight to a distant land, make one's way to an Oxfam station (or some other effective organization), contribute $100.00 in person, and experience first-hand the rescue of a dying child. It just so happens that it would be much more efficient, and equally effective, to send the $100.00 in the mail.

The factual differences represented by (C) and (D) have to do with, respectively, the impersonal nature of aiding the distant needy because there are a great many rescuers (all the affluent people in the world) and there are a great many needy persons (all the many distant needy dying around world). However, consider how Dunn's case illustrates (C): You and four friends are relaxing by a pond and notice a man drowning. Assume each of your friends is able to rescue the man easily (by calling 9-1-1, for example), but they do not do so for various reasons. It is difficult to see how your duty to rescue the man is affected by the fact that many others are able to do so.

This seems to be roughly analogous to our situation with respect to the distant needy. The fact that there are many others who could send money to the distant needy does not seem to affect my duty to do so. Conversely, the circumstances represented by (D) illustrate how the sheer volume of those in need make it difficult to see how one's meager $100.00 has any real causal impact. For instance, it is impossible to say that one's $100.00 donation to Oxfam makes a difference to some particular, identifiable child in a distant country. It is certainly true that

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that such moves do not address whether determinate sets are morally different from indeterminate sets.

31. See PETER UNGER, LIVING HIGH & LETTING DIE 33–49 (1996), for a description of these and other factual differences between cases of rescue and distant aid.

32. *Id.*

one's $100.00 donation is a mere drop in the bucket of the millions of other donations, which permit lives to be saved collectively. However, as Unger puts it, it is difficult to see how there is any moral relevance "to the precise character of the causal relations between the well-off and those whom, whether collectively or not, they might help save."[33] In a sense, then, need and necessity are the ends of the stories in cases of both rescue and beneficence.[34]

In spite of Feinberg's complex analysis of duties and rights, we seem to be left where we started, namely, questioning the extent to which there is a moral duty to rescue and whether there is any nonarbitrary way to distinguish such a duty from the duty to help the distant needy (or a duty of beneficence). To be sure, Feinberg's argument seems to suggest that we have a duty to rescue as many people as we are able—at least if they are drowning in a swimming pool in front of us—because those people have a right to be rescued. But if we have a duty to rescue as many people—whether in a swimming pool or otherwise—as we are able, and there is no relevant difference between those in the pool and those in distant lands, we need a more expansive theory regarding duties of beneficence.

B. *Beneficence*

Dunn's case illustrates the move to beneficence. Assuming that a simple call to 9-1-1 could have saved Dunn (seeing as he struggled in the pond for minutes), and assuming that the teens had a moral duty to rescue Dunn in this way, do the teens have the same moral duty to save a dying child in a distant land by simply mailing a $100.00 check to Oxfam?[35] And there is certainly more than one starving child, which raises the question of whether the teens should send a second $100.00 check, and third, and so on, especially if it only means that they will have less disposable income to purchase "weed" (which the teens admitted to smoking around the time Dunn drowned).[36]

One might argue that the Dunn case is not an appropriate example because it would have been difficult for the teens to know with certainty that Dunn—an adult—would die as a result of them not calling 9-1-1

33. *Id*. at 49.

34. Feinberg and others would still want to say that *determinateness* adds something morally significant to rescue situations. There is clearly something factually different in cases when there is a determinate rescuer and rescuee, but, following Unger, it remains unclear what the moral difference is exactly. Perhaps there is a special relationship between determinate rescuers and rescuees—similar to familial or contractual relationships—that precludes the distant needy from possessing rights. I would submit that the nature of rescue relationships seems inherently different than the sorts of special relationships that will be discussed in Part II.

35. Karimi, *supra* note 11.

36. *Id.*

(notwithstanding the fact that they taunted him in the video, saying that he was going to die).[37] That said, the teens would have known at least two facts: (1) Dunn's interests were in jeopardy such that he was in need of assistance, and (2) it was necessary to take easy steps in order to attempt to meet Dunn's need. Similarly, in the case of beneficence, one knows there are persons in distant countries with vital needs. The identities of these persons and precise nature of their needs are not known, but one is quite sure that there are options that may meet the needs of these persons, including sending $100.00 to Oxfam. One does not know exactly how this contribution will help and so—as in Dunn's case—one is only left with certain basic facts: someone is in need, and one can either act or not act upon the various options at one's disposal in an attempt to address those needs.

But there are many people in need. And if the distinction between cases of rescue and cases of beneficence are artificial, then our duties are very extreme indeed. Based in part on the following two principles, this is of course the point that Singer made over forty years ago: (1) "Suffering and death from lack of food, shelter, and medical care are bad," and (2) "[i]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it."[38] Accordingly, if one sees a child drowning in a shallow pond, one ought to pull the child out even if doing so means one's clothes will get muddy, which is insignificant when compared to the death of the child. And for reasons similar to the ones that have been noted (geographic distance, multiple potential rescuers, etc.), Singer argues that his two principles apply to helping the distant needy in the same way they apply to rescuing the child in the pond: We are morally required to give a great deal of our time, money, and resources to things such as famine relief, rather than spending it on "trivia."[39] It would be an understatement to say Singer's paper generated a great deal of disagreement regarding one's duty to help the distant needy.[40] The disagreement may be distilled to the following concern: Although there might be some duty to help the distant needy, there should be some practical way to limit that duty such that one is not reduced to a state of near poverty.[41]

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37. *Id.*

38. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972) (providing an alternative, weaker version of the argument by removing "comparable" from the second premise).

39. *Id*. at 241.

40. *See generally* John Arthur, *Rights and the Duty to Bring Aid*, *in* WORLD HUNGER AND MORAL OBLIGATION 37 (William Aiken & Hugh LaFollette eds., 1977) (responding to Singer's position).

41. *See* Hunt, *supra* note 19, at 807 (making these points about Singer's paper as they relate to duties owed by affluent states to peoples in other states).

Liam Murphy addressed this concern with a comprehensive theory he calls the "collective principle of beneficence," which attempts to make sense of the extreme demands required by the utilitarianism represented in Singer's argument.[42] From the outset, Murphy suggests that the demands of utilitarianism are extreme only because we view them in terms of the partial compliance of others.[43] In other words, our duty to help others seems so extreme because most people do not comply with *their* duty to help others.[44] If everyone did their fair share in aiding the needy, then the demands on each one of us would be reduced drastically.[45] This failure of others to comply with their duty is the basis of Murphy's theory, which accounts for the failure with a "compliance condition."[46] The compliance condition states that one's duty of beneficence should not exceed one's duty under conditions in which everyone else complied fully with *their* duty of beneficence.[47]

The condition implies that the real problem with utilitarianism is not that it is overly demanding, but rather that it does not treat all persons as rational agents who are capable of performing their duty.[48] Although utilitarianism typically disregards those who do not comply with their duty (almost as if they do not exist), the compliance condition affirms that non-compliers are agents who are assigned a certain portion of the work of beneficence.[49] Moreover, one does not have to pick up their slack, so to speak, by performing the portion of work they are failing to perform. The final formulation of Murphy's theory is lengthy and complex, but I take the key points to be as follows:

> (1) Everyone has a duty to take actions that will optimize aggregate well-being.
>
> (2) However, in circumstances in which everyone does not comply with (1), one is not required to sacrifice more than one would have to sacrifice under circumstances in which everyone did comply with (1).
>
> (3) Therefore, in circumstances in which everyone does not comply with (1), one has a duty to take actions—

42. LIAM B. MURPHY, MORAL DEMANDS IN NONIDEAL THEORY 5–6 (2000). *See also* Hunt, *supra* note 19, at 810 (summarizing Murphy's work using a similar analysis to address the extent to which affluent states owe duties of rescue and beneficence to the needs of those in other states).

43. MURPHY, *supra* note 42, at 117.

44. Hunt, *supra* note 19, at 810.

45. *Id.*

46. MURPHY, *supra* note 42, at 97–101. *See also* Hunt, *supra* note 19, at 810.

47. Hunt, *supra* note 19, at 810.

48. MURPHY, *supra* note 42, at 9–13.

49. *Id.*

> within the parameters of (2)—that will optimize aggregate well-being.[50]

This is a compelling theory, but there are two potential problems with the collective principle of beneficence. First, Murphy's theory does not seem adequate unless one adds several rules and prohibitions. For example, if one's individual duty is limited by (2) above, and one complies with (3) above, then what happens if one subsequently encounters a person drowning in a pool—or sees someone in need of a simple call to 9-1-1, such as Dunn? If one has already completed one's duty in (3), then one is under no obligation to take additional actions to help others—regardless of whether those others are 8,000 miles away or face-to-face. Conversely, people who are very bad off would seem to be completely off the hook when it comes to rescuing others. Because the very poor are already the worst off in society, their status may preclude them from being factored into the collective calculus of sacrifice allotments. It is unclear exactly how the collective principle of beneficence would cultivate a duty to rescue in such cases. Murphy acknowledges that we may have to think of rescue as simply a good rule of thumb. Unfortunately, this leads one back to Singer's position that there is no sensible reason to react differently to cases of rescue and beneficence, ultimately leaving the collective principle of beneficence as a somewhat arbitrary limitation of the duty of beneficence.[51]

Garrett Cullity attempted to address some of these problems in *The Moral Demands of Affluence*. Indeed, his theory is said to provide the basis for a nonarbitrary limitation to the duty of beneficence. Rather than base the limitation on the notion of one's fair share of a collective duty, Cullity proposes an "aggregate approach." Cullity suggests that one is excused from the duty of beneficence when the aggregate cost of one's successive contributions of beneficence reaches a certain point.[52] By rejecting the extreme demands of beneficence and embracing an aggregate approach, Cullity gives us the following account of beneficence: one has a duty to give aggregately until going further would worsen one's life by a "requirement-grounding amount" (the sort of

50. *Id.* at 117.

51. Despite its limitations, the collective principle of beneficence is of course an impressive theory for dealing with the extreme demands of utilitarianism because it shifts the burden of beneficence to a collective unit. It seems reasonable to ground institutional and collective principles in our ethical intuitions, but when those principles are reduced to individual experiences it is unclear how exactly they apply to each *one* of us. See BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 102–03 (1985), for an analysis of how institutional theories ultimately lead "back to the original, Kantian, universalistic concerns of such a theory."

52. GARRETT CULLITY, THE MORAL DEMANDS OF AFFLUENCE 82 (2004). In taking this approach, Cullity rejects both the "severe demand" and the "extreme demand" of beneficence (the former is the general view that our duty of beneficence is very demanding, as represented by Singer). *Id*. at 70–82.

goods in which one is justified in having an interest because they would not preclude one from helping a person simply because that person has an interest in such goods)[53] with the caveats that one may (1) live a "non-altruistically directed life" (one that does not comply with the extreme demands of a life-altering duty of beneficence) and (2) seek "commitment goods" (e.g., personal relationships, worthwhile personal projects)[54] within that life.[55]

How is one justified in living a life that rejects the extreme demands of beneficence to which Singer and others have alerted us? Cullity argues that one's right to live a non-altruistic life is based upon the fact that *other* people's interests in the fulfillment of a non-altruistic life provide us with morally compelling reasons to help *them*.[56] In other words, almost no one complies with the extreme demand of beneficence, and the morally compelling reason to help other people does not disappear just because they do not live altruistically focused lives in the way the extreme demand would require. For Cullity, then, it follows that it must be morally permissible for each one of us to likewise pursue such a life, and the outer limit of the duty of beneficence is thus the point at which one can no longer live such a life.[57]

Cullity acknowledges that there is no general way to apply his theory to everyone because the interests of each person vary, as do the things one considers life-enhancing.[58] One person may have requirement-grounding goods (friendships, aptitudes, and so on) that are more expensive than another person's requirement-grounding goods, thus justifying a more expensive lifestyle.[59] Although it seems right to say that the goods that are important to people, as well as the costs of those goods, vary a great deal, it is difficult to say exactly how this should affect one's duty of beneficence. Cullity attempts to address the subjectivity of this question by providing some practical examples regarding how one should generally spend one's money (for instance, some expensive purchases should be considered morally indefensible, such as a car or books for a private library, though expensive tertiary education might be morally defensible because it is life-enhancing).[60]

The problem is not that the implications of Cullity's theory appear puritanical (many seem perfectly reasonable), but rather that the sorts of intuitions underlying the theory can seem to approach the status quo.

53. *Id*. at 150–51.
54. *Id*. at 162–63.
55. *Id*. at 203.
56. *Id*. at 133–36.
57. CULLITY, *supra* note 52, at 146.
58. *Id.* at 180.
59. *Id.* at 181.
60. *Id*. at 180–83.

There is an underlying concern that the approach permits affluent people to more or less continue living as they currently do, while being more conservative in their spending on certain (superficial) items. Moreover, one reaches an impasse if there are disagreements regarding another's fundamental conception of what is "life enhancing," or which goods are morally indefensible. To put it another way, the aggregate approach seems to obscure what it means to say one has a *duty* to do or not do something. In some sense, then, the aggregate approach—like the collective principle of beneficence—can seem to permit one to continue acting the way one is accustomed to acting based upon one's intuitions.[61]

II. FROM MORAL DUTIES TO LEGAL DUTIES

Given the limits of Murphy's and Cullity's (otherwise compelling) theories to constrain duties of beneficence, this part of the Article considers a variation of the third option presented at the outset: the idea that we have limited moral duties that legitimize positive legal duties. In other words, if the distinction between a duty of rescue and a duty of beneficence is in some sense arbitrary, and if the noted theories fail to limit a duty of beneficence in a nonarbitrary way, then the state is constrained in imposing legal duties to aid others in one's individual capacity (e.g., via Bad Samaritan Laws) without some principled, independent basis of authority to do so.[62] Of course, this does not mean that we have few positive moral duties (this Article takes no position on the extent and basis of one's positive moral duties, aside from suggesting that the above theories do not establish clear limits on a duty of beneficence), but rather that we have somewhat limited positive moral duties *that legitimize positive legal duties in one's individual capacity*.

This position is in some sense similar to the argument in political philosophy that one does not have a moral duty to obey the law simply because a need or necessity exists. Rather, a moral duty to obey the law must be based upon the state's legitimacy with respect to the law—even though one may have an independent moral duty to meet a need with

61. It should again be noted that neither Murphy's nor Cullity's theories explicitly account for the problem of rescue. While Murphy relies on "agents' motives and character" in rescue cases, Cullity states the following regarding encountering a rescue situation in which one's aggregate duty had already been met: "I could save the person's life and then, if it costs me anything, take that into account as part of my overall budget for contributing to saving the lives of strangers; or I could let the person die, and spend the whole of that budget on donations to aid agencies." Cullity suggests that the former option would be morally right because failures of rescue are more blameworthy in that they are more "vividly inescapable." MURPHY, *supra* note 42, at 132; CULLITY, *supra* note 52, at 200. Both Murphy and Cullity's solutions seem to be cloaked ways of saying simply that we have good reasons to rescue people.

62. I take the second option—the view that we have essentially unlimited positive duties—to be some form of unrestrained utilitarianism. That option will not be addressed.

which a law is concerned.[63] The position here is that contingent claims of need in cases of rescue and beneficence do not necessarily give rise to legitimate *legal* duties to meet those claims of need (though they might). Rather, the idea is that any legitimate legal requirement to aid others must be based upon the state's claim of authority to impose such requirements. Evaluating the legitimacy of Bad Samaritan Laws can thus be addressed in part by answering the following related questions: (1) On what ground does a state have the authority to dictate that one's needs should be met in the way specified by a particular legal duty? (2) Does a special relationship exist that authorizes the establishment of such legal duties?

The first question has to do with the state's authority to enact duties to aid others. Even if everyone agrees that such laws are *justified*, intrinsically and instrumentally superior to alternative arrangements, that does not necessarily answer the question about the state's authority to impose them. One way to answer the first question is to say that the state must have authority in virtue of its *legitimacy*—the moral right to command (and have its command obeyed) that one's needs should be met in the way specified by a legal duty.[64] There are multiple accounts regarding why a state might have this sort of authority.

Roughly, one might categorize accounts of legitimacy and their correlative duties to obey the law as transactional, natural, or associative.[65] Transactional accounts are based upon our interactions with others and include theories based upon special obligations that arise from consent and general duties that arise from fairness (e.g., one has a general duty to the state in light of the benefits one receives from the state).[66] Natural duty theorists argue that *just* states are legitimate, and one has a moral duty to support just and good states *because* they are just and good.[67] Finally, associative theories claim that states may subject persons

63. This issue was debated in CHRISTOPHER HEATH WELLMAN & A. JOHN SIMMONS, IS THERE A DUTY TO OBEY THE LAW? (2005) (Wellman argues that we have a duty to obey based upon "samaritanism," which, roughly, includes two descriptive premises and one moral premise (the third premise): "(1) states secure vital benefits that (2) could not be secured by any other, non-coercive means….[and (3)] one's normally decisive position of moral dominion can be overridden by particularly urgent, and therefore morally preemptory, concerns." *Id.* at 23. In part II of the book, Simmons argues that samaritanism does not give rise to a moral duty to obey the law, and, here, I invoke Simmons's view to show how positive moral duties to aid others legitimate limited legal duties to aid).

64. See A. JOHN SIMMONS, *Justification and Legitimacy*, *in* JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 130 (2001), for an account of the distinction between a state's justification and its legitimacy.

65. See A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS, ch. 3 (1979) and WELLMAN & SIMMONS, *supra* note 63, at part II, for an account of the weaknesses of each of these theories.

66. SIMMONS, *supra* note 65, at 63–64.

67. See PLATO, *Crito*, *in* PLATO: COMPLETE WORKS (John M. Cooper ed., 1997), for an early account of a natural duty theory (in which Socrates suggests that it would be wrong to disobey

to legitimate authority because states are the kinds of associations that generate obligations; this is analogous to a duty one might owe to one's parent or sibling by virtue simply of occupying the duty–laden role of "son" or "brother."[68]

Each of these theories has significant——though not necessarily conclusive—shortcomings. To be sure, these brief remarks do not scratch the surface of the voluminous work on legitimacy and authority.[69] Defending and justifying one theory or another is not this Article's goal, but it is plausible to think that many liberal states in some sense embrace transactional theories based upon reciprocation and fairness: In the context of liberal societies, persons are often viewed as reciprocators who have a fair share of the collective labor. This means that persons are viewed as having a general duty to the collective because it would be wrong to reap the benefits of the collective as a free rider who takes advantage of others' good faith compliance. The point is that reciprocation is presumed to be central to the ideal of the liberal state: Liberal states are just political societies based upon a collective enterprise in which persons do their part to keep it running.[70] This is notwithstanding theoretical problems with the idea, including that some benefits provided by the collective may not have been accepted voluntarily or explicitly by all members of the collective (though perhaps many benefits are accepted tacitly).[71] But this and other complaints about reciprocation do not undermine the fundamental role that reciprocation seems to play in liberal states. This is not a particularly controversial or dogmatic claim because the idea of reciprocation—in one form or another—is significant in the work of many liberal theorists who embrace pluralism.[72]

This brief sketch of legitimacy does raise an important point about the extent to which states in the liberal tradition may dictate that one's needs

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the law and flee Athens because he has a duty not to harm the state and the moral value of its Law).

68. See RONALD DWORKIN, LAW'S EMPIRE, ch. 2 (1986), for an account of associative theories.

69. The work on legitimacy and authority—not to mention "philosophical anarchism" and states' illegitimacy—is voluminous. See, for example, SIMMONS, *supra* note 65, at 102–21, for an account of how problems with the various theories of legitimacy might lead one to philosophical anarchism.

70. There are of course many liberal philosophers who do not view reciprocation as the *basis* of legitimacy, but this does not mean that reciprocation is not a fundamental aspect of the liberal ideal.

71. *See, e.g.*, SIMMONS, *supra* note 65, at 129.

72. See LUKE WILLIAM HUNT, THE RETRIEVAL OF LIBERALISM IN POLICING 29–30 (2019), in which I draw upon the work of a variety of liberal theorists to support the role of reciprocation in liberal states generally and liberal policing specifically. There, I note that "the ideal of the liberal state does not preclude the possibility that a state's legitimacy could be based upon a combination of factors and theories in addition to reciprocation." *Id*. at 55–56.

should be met in the way specified by a particular legal duty one has in one's individual capacity (rather than the demands of justice in an institutional context). This is in part because each of the theories for legitimacy mentioned above—transactional, natural, and associative—suggest that the state's authority and power is limited. The limit might be based upon the extent to which the citizenry voluntarily divested power to the state, the contours of their associative relationship with the state, or the extent to which it would be fair for them to reciprocate in light of the benefits received from the state.

The extent to which states are limited in these ways highlights a problem with Bad Samaritan Laws: Any limits placed upon such laws are in some sense arbitrary given the shortcomings of the earlier theories (from Part I) to distinguish between rescue and beneficence.[73] If the state has the authority to compel people to engage in easy rescues in their individual capacity, then—given the shortcomings of the earlier theories—there is no nonarbitrary way to limit the state's authority to enact laws that require one to engage in a great many other positive duties to meet the needs of others in one's individual capacity.[74] In a sense, then, Bad Samaritan Laws are conceivably without limits and indicative of unlimited state authority to compel individuals to "do good." Of course, unlimited or arbitrarily limited authority is contrary to the fundamental principles of liberal states, which are presumably constrained by political norms such as the rule of law. A state with a dictate to oversee the moral character of all its citizens is akin to the ultra-paternalistic city-state illustrated in Plato's *Laws*—a state in which "[t]he purpose of the law is not merely to protect one's interests, but rather to make one better off in every respect. . . . to secure a good and virtuous life for the citizens . . . ."[75] Although improving one's moral character might seem like a good idea in principle, it is not typically construed as part of the mandate of liberal states.

Consider further the analogy regarding the legal duty to aid others in one's individual capacity and an argument for the moral duty to obey the law, namely, that the moral duty to obey the law is based upon the simple claim that human beings need government, which necessitates compliance with the law.[76] For example, necessity arguments for obeying

73. *See supra* Part I.

74. I am not suggesting that such a legal requirement would be inconsistent with a moral duty to aid (we may very well have expansive moral duties to aid others beyond easy rescue situations), but rather that such legal requirements may be inconsistent with the state's authority. Moreover, the issue here is the state's authority to require duties of rescue and beneficence in one's *individual* capacity. The state may very well have the authority to promote the general welfare of the polity based upon broader, *institutional* principles of *justice*.

75. Luke William Hunt, *The Law in Plato's Laws: A Reading of the 'Classical Thesis'*, 35 POLIS 102, 124 (2018).

76. WELLMAN & SIMMONS, *supra* note 63, at 121.

the law are derived from natural moral duties, which A. John Simmons has described as grounded either "(a) in the moral importance of advancing some impartial moral good or (b) in some moral duty thought to be owed by all persons to all others as moral equals, regardless of roles, relationships, or transactions."[77] It is thus easy to see how a legal duty to aid others in one's individual capacity may be compared with a necessity argument based upon this understanding of a natural duty.

The intuitions involved in this sort of argument are similar to the ones that form the basis of a legal duty to rescue a drowning child, make a 9-1-1 call, and so on. To put the analogy simply, other persons are our moral equals; they have certain biological needs, which necessitate and justify a legal duty to aid them. Although this is compelling from the perspective of one's individual moral duties, such necessity accounts must show how the claims of those in need of aid authorize a governmental entity to dictate how those needs should be met *legally* by one in one's individual capacity.

In his critique of necessity claims for a duty to obey the law, Simmons argues that it is unclear how a person's needs *authorize* another to dictate anything in particular about that need: "The fact that I am ill and hungry and need care does not on its face seem to give any other person or group authority to dictate to me (and/or others, absent my and/or their consent) in whatever ways are required to meet my need."[78] This point highlights a straightforward difference between moral and legal duties to aid: although a moral duty of rescue or beneficence might be described as a duty to offer aid to one in need, a legal duty to aid is based on governmental authority to compel one to meet the needs of another in a specific way.

There is certainly a strong case that easy rescue situations involving life or death—particularly those in which there exist a determinate number of rescuers and rescuees—generate moral duties of aid.[79] While it might seem intuitive to extend such moral duty to aid to a legal duty to aid, there must be a basis for the government's authority to legally compel one to comply with one's individual, positive moral duties (as opposed to addressing the broader principles of *justice* that affect general welfare on an institutional level).

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77. *Id.* at 121.

78. *Id.* at 131. Simmons analyzes necessity accounts provided by Elizabeth Anscombe and Tony Honoré, who both support their positions with examples of family relationships. However, as Simmons notes, the intuitive correctness of these sorts of examples is based in large part on the traditional conviction that family members owe duties to each other. And while one might argue that there is similar intuitive force regarding claims that one has a duty to rescue another in an emergency situation, the intuition is much less powerful when extended to the distant needy.

79. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 287–88 (1980).

Alison McIntyre supports the intuition by arguing that one's duty to perform easy rescues is based upon one's public duty as a citizen, which is analogous to the public duties of law enforcement and other emergency services.[80] For example, one's community undertakes to protect property against damage from fire by providing fire departments.[81] That said, it would be impractical for communities to appoint "fire monitors" with contractual duties to alert the fire department if they see signs of fire.[82] Instead, this *public* duty is left to the citizens in the same way firefighters perform *public* duties rather than private duties with respect to individuals whose houses need saving: "The state has a duty to protect the general welfare, and one way of carrying out this duty is to 'deputize' citizens to function as part of a monitoring system and, in circumstances in which assistance can be easily provided, as surrogates for professional rescuers."[83] Moreover, McIntyre argues, such emergency assistance "constitutes a reasonable and not excessively burdensome interference with individual liberty because it applies only to cases in which a fairly small effort is able to avert a very great harm and the threat arises out of exceptional circumstances."[84] So one violates a positive duty grounded in a public duty when one fails to perform an easy rescue.

One worry about this argument is that it would also benefit the public if everyone refrained from eating fast food, smoking, and drinking alcohol because public health would be improved significantly, as would the strain on and cost of healthcare. But we do not say the government has the authority to legally compel one to volunteer at homeless shelters, donate to cancer research, eat healthily, or floss daily. There are innumerable needs in society for which there would be an interest in legally compelling others to meet, and it would of course be absurd to try to legally compel one to meet all such needs.

One might object by suggesting that rescue is a particularly important public benefit. In other words, legally compelling one to easily rescue another in a life-or-death situation is of a profoundly different character than legally compelling one to maintain a healthy diet. However, legally compelling society to maintain a healthy diet would save vastly more lives—and vastly more money—than legally compelling society to provide easy rescue in the rare cases one finds oneself in such a situation. So, though it may sound odd, legally compelling one to maintain a healthy diet is arguably far more morally significant than legally compelling one to easily rescue another, at least to the extent one is

80. Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157, 181–82 (1994).

81. *Id.*

82. *Id.* at 181.

83. *Id.* at 181–82.

84. *Id.* at 182.

working within a utilitarian framework. Of course, many are unconvinced by utilitarian arguments because they fail to account for the moral significance of each person, as noted above. This leads to the second issue that must be examined in the context of legal duties to provide aid to others: *special relationships*.[85]

There is good reason to think the state has authority to impose duties of aid with respect to special relationships, including because many states are themselves based upon special relationship theories (e.g., the contractual relationship in social contract theory). For instance, states in the liberal tradition are often viewed as a cooperative scheme in which persons cooperate to produce a morally and prudentially superior condition than the alternatives. By morally superior I mean that such a political community is justified inasmuch as it conceives of persons as free and equal rather than bound by unlimited state authority. Likewise, with respect to the community's prudential superiority, I mean to describe how broadly defined theories in the social contract tradition claim that there are practical reasons for embracing a cooperative political community based upon reciprocity. In other words, schemes based upon reciprocity better preserve the conception of persons as free and equal, such as by enforcing negative duties and dealing with law-breaking. One can see this inasmuch as, say, Locke's political theory is based upon the goal of eliminating inconveniences. A central component of this goal is collectively providing for security by centralizing the right to punish, to eliminate bias, and personal incapacity. The upshot is that many government regulations in fact enhance liberty rather than restrict it.[86]

CONCLUSION

The above sketch of liberal and social contract theory highlights the role of special relationships within those theories. In the same way the

85. McIntyre's argument draws out this point, namely, that there is a substantial gap between the way the law treats one who fails to rescue another with whom one has a special relationship and the way the law treats one who fails to rescue another with whom one has no relationship. The law can be quite strict in the case of the former, though quite lenient in the case of the latter (even if a Bad Samaritan law exists). This brings us back to the discussion of Feinberg's determinateness in Part I. In other words, is there something morally significant about cases in which there is a determinate rescuer and rescuee? Does a special relationship exist between rescuer and rescuee that justifies a legal duty to provide aid? Even if the relationship between determinate rescuers and rescuees is more similar (than indeterminate rescue/beneficence situations) to familial, contractual, and professional emergency service relationships, I assume (based upon the shortcomings of the arguments to distinguish rescue and beneficence in Part I) that they are not sufficiently similar to justify many legal duties to aid. *See generally id.*

86. Or consider how Kant's goal in political philosophy might be described broadly as making justice possible through omnilateral authorization. IMMANUAL KANT, THE METAPHYSICS OF MORALS 30 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797). *See also*, HUNT, *supra* note 72, at 21, for discussion of these points.

state's legitimacy may be based upon a special relationship (e.g., a transactional relationship based upon consent or reciprocation), the state has the limited authority to legally require one to meet the obligations derived from one's special relationships with others. This could be, in part, based upon the state's role of eliminating inconveniences noted above, which prevents one from having to enforce one's agreements with others (or having to punish those who fail to honor their agreements). Although it would of course be difficult to identify exactly which special relationships—and the exact positive duties that exists within those relationships—the state has the authority to enforce, it is perhaps less difficult to identify the broad families of such relationships.

A short list might include contractual relationships, certain familial relationships, and so-called "seclusion relationships" (situations in which one prevents another from receiving aid from others).[87] So, for example, the state might have the authority to impose a legal duty to rescue those with whom one has a contractual relationship (e.g., a contract in which a caregiver agrees to meet the needs of one who is sick or disabled), a familial relationship (e.g., parents to their minor children),[88] or a seclusion relationship (e.g., situations in which one has secluded the one needing aid so as to prevent others from giving aid). Although these families of special relationships are by no means exhaustive, they highlight the general ways in which a state might have the limited authority to compel one in one's individual capacity to meet the needs of others. While these families of special relationships no doubt require exceptions and caveats, they provide a rough framework for grappling with questions about the legitimacy of laws that require one to rescue another in one's individual capacity

Interestingly, the three types of special relationships above track the three broad theories of a state's legitimacy discussed earlier: (1) agreements to aid others track *transactional* theories of state legitimacy; (2) familial relationships that generate obligations track *associative* theories of state legitimacy; and (3) seclusion relationships track natural

87. Jones v. United States, 308 F.2d 307 (1962) (holding that there is no legal duty to rescue without a special relationship involving (1) a status relationship, such as parent to child; (2) a contractual duty of care; or (3) a seclusion relationship; of course, the court also held that legal duties to rescue exist when there is a statute requiring rescue (e.g., Bad Samaritan Laws)—the issue that this Article addresses).

88. For example, while Locke's general position is that persons are born equally with a set of rights that allow them to govern themselves, minor children are not included among such persons. This is one reason (among others) that states in the liberal and social contract tradition might have the authority to require parents to aid their minor children.

duty theories of state legitimacy inasmuch as it would be just to aid those from whom one secludes others from aiding.[89]

One might think that these three accounts of a state's legitimacy would yield three different conclusions regarding the boundaries of state authority generally and the boundaries of Bad Samaritan laws particularly. This is an apt observation, but, as noted in the last section, one need not take a dogmatic approach with respect to theories about legitimacy and authority. In other words, it seems reasonable to think that a state's legitimacy could be based upon a combination of factors and theories, such that different theories work in tandem to provide a more robust account of legitimacy with respect to a larger swath of people. And regardless of the theory of state legitimacy, there is an overlapping principle of limited state authority within liberal societies—and this principle suggests a shared boundary between different theories of state legitimacy that has implications regarding what can be legislated.[90]

This raises the broader point of the relationship between state authority on the one hand, and, on the other hand, the arbitrariness of the distinction between duties of rescue and beneficence. If the theories of rescue discussed fail to limit a duty of beneficence in a nonarbitrary way, then the state may not legitimately impose legal duties to aid others in one's individual capacity (e.g., via Bad Samaritan Laws) without some independent basis from within its (limited) authority. Otherwise, the state would in a sense have unlimited authority to impose legal duties to aid others. Of course, many state laws—not just Bad Samaritan Laws—might involve arbitrary distinctions given the practical difficulty of line-drawing. The legitimate limit of such other laws is a worthy topic of inquiry, but, here, the point is simply that Bad Samaritan laws raise unique questions given the fundamental nature of their mandate.

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89. These categories are treated as broad families of relationships that lend support to state authority. This Article claims neither that these are the only ways that Bad Samaritan Laws are justified, nor that there are no limitations on Bad Samaritan Laws beyond those discussed herein.

90. It seems right to say that theories of legitimacy and authority (whether based upon transactional, associative, or natural duty theories) do not provide precise limits on the state's authority—with respect to legislation or otherwise. For example, the content of one's consent to authority is unlikely to be spelled out in significant detail; perhaps the clearest account of consent to authority would be that of the roughly 20 million naturalized citizens in the U.S. who took a specific oath to freely support and defend the Constitution, as well as a number of other commitments. From a narrow, jurisprudential point of view, theories such as legal positivism (holding that the existence and content of law depends on social facts and not on its merits or morality) cannot be regarded as sources of obligation to follow the law because that is ultimately a moral issue that brings us back to fundamental questions about political obligation. See Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN, ed. A. Ripstein (Cambridge, 2007), for an overview of these issues. The broader point is that liberal societies are based in part upon a general principle of limited authority that has implications regarding the boundaries of legislation.

This tentative conclusion should be tempered by the central role that reciprocation plays in liberal societies. To be sure, even if one assumed that individual liberty is the only value for which the government exists, a view with which this Article does not agree, there is not a strict inverse correlation between individual liberty and government regulation. Indeed, as noted above,[91] many government regulations in fact enhance liberty rather than restrict it. More broadly, one of the values promoted by liberal states is what we might describe colloquially as "helping each other out" given the role that reciprocation plays in liberal states. These points highlight the well-known tension between the conception of liberal states as cooperative schemes in which persons reciprocate and the limits of such conceptions given liberal theories of legitimate authority. This tension is often focused upon the line between the state's authority to compel one in one's *individual* capacity to help another and the state's authority to address the broader principles of *justice* that affect general welfare on an institutional level.

The upshot is a presumption of reciprocation in liberal states that gives rise to difficult line-drawing exercises with respect to legitimate and illegitimate regulations. A principled way to evaluate the legitimacy of Bad Samaritan Laws is to answer two related questions: (1) On what ground does a state have the authority to dictate that one's needs should be met in the way specified by a particular legal duty? (2) Does a special relationship exist that authorizes the establishment of such legal duties? This Article has sketched answers to those questions, leading to the conclusion that paternalist and moralistic laws—including Bad Samaritan laws—are sometimes justified and certainly not ruled out in liberal states. However, they are limited based upon a variety of grounds, including those that are analogous to the ways in which states might achieve legitimate, limited authority.

91. HUNT, *supra* note 72, at 88 (discussing how freedom-limiting aspects of the state may in fact be a means of protecting freedom, as with Kant's idea of the state's role of "a hindering of a hindrance to freedom").

FISCAL GEOGRAPHY

Eric A. San Juan[*]

Abstract

While the newly published *Opportunity Atlas* maps the effect of hometown on children's life chances, this Article describes geographically sensitive tax provisions in a historical context. Under the recent Federal tax reform, the Opportunity Zone shadows predecessors like the Recovery Zone, GO Zone, Liberty Zone, and Empowerment Zone. While relief from unemployment and poverty attracts legislators' sympathy, underlying these provisions is the ideology of the enterprise zone, or the paradox of the governmentally created free market. This Article analyzes that ideal concept by tracing the history of taxation in barter as well as market economies. Wherever governments have collected tax on a national scale, the fiscal result has been geographic and ultimately economic redistribution. Then the question is whether that redistribution advances horizontal or vertical equity. The legal enforceability of socio-economic rights has become the philosophical afterthought. Classically, the rule of law was posed as freedom from government intervention, but the enterprise zone exemplifies freedom as a legislative artifact. In this context, the incentive effect of the tax zone legislation depends on the economic behavior of the taxpayer. The empirical studies on enterprise zones document modest take-up by the intended taxpayers, whose choices may reflect cultural psychology as much as calculated rationality. There may be neither free market nor rational actor in the enterprise zone. As a creation of tax law, the zone is monitored by the tax collector, who falls into the odd role of facilitator for the incentive provision. Governed by her own behavioral praxis, the revenue agent becomes a functionary on a larger economic stage. In particular, the desuetude of the American inner city and Rust Belt reflect the fiscal geography of Agricultural and Industrial Revolutions past and present. It may take an intervention more heroic than focused tax incentives to revive a "blighted" market.

* Adj. Prof. Georgetown Univ. L. Ctr. Past Chair, Tax Pol'y Comm. Amer. Bar Assoc. Founding member, Core Idea Group (exec. comm.) of Meridian-180.org, the multi-lingual platform of the global policy consortium initiated by the Clarke Program on E. Asian L. & Culture, Cornell Univ. A.B. 1987 Harv. J.D. 1991 *ibid*. M.A. 1996 Univ. of Chicago. The views expressed in this Article are those of the author alone.

I. INTRODUCTION

A. *Economic Geography*

Recent research confirms the determinative effect of geography on residents' life chances. Collaborating with the United States Census, the *Opportunity Atlas* traces the roots of outcomes such as poverty and incarceration "back to the neighborhoods in which children *grew up*."[1] Following a five-year birth cohort, demographers can pinpoint where the thirty-five- to forty-year-old adults now live, whether in prison or at

1. Raj Chetty et al., *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 25147, 2018), https://www.nber.org/papers/w25147.pdf [https://perma.cc/E9FM-MNNU].

large.[2] It turns out that birthplace or hometown predicts adult success. Neighborhoods matter.

The *Opportunity Atlas* sheds new light on an old concern. An earlier notion in social science had posited that poverty "tends to perpetuate itself."[3] Then, the "setting [was] a cash economy, with wage labor and production for profit and with a persistently high rate of unemployment and underemployment, at low wages, for unskilled labor."[4] There, "the culture of poverty" was "both an adaptation and a reaction of the poor to their marginal position in a class-stratified, highly individuated, capitalistic society."[5] Where poverty was a stagnant milieu, one solution could be to leave.

If America was a land of opportunity, part of the attraction was the places to go. In the Unites States, a seminal thesis of cultural geography has been that "the traditional spatial and social allocation of individuals through the lottery of birth is being replaced gradually by a process of relative self-selection of lifestyle, goals, social niche, and place of residence."[6] Here, the advance of "voluntary regions" confirmed the economic influence of geography.[7]

There is more to a place than the effect of individual residence introduced above. "Geography matters because it affects the profitability of various kinds of economic activities, including agriculture, mining, and industry" and "the health of the population."[8] Writ large, the concern extends from birthplace or hometown to the movement of populations and production. Ultimately, productive populations form the tax base.

Now comes the Opportunity Zone (OZ). In this context, it should be no surprise that OZ is attracting attention as a provision of the Federal tax reform under implementation in the Tax Cuts & Jobs Act of 2017 (TC&JA '17).[9] Like its precursors, the OZ legislation offers income tax reduction to businesses in impoverished zones.[10] On one hand, the alleviation of poverty garners popular sympathy. On the other hand, the

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2. *Id.* "For example, 44% of black men who grew up in the lowest-income families in Watts, a neighborhood in central Los Angeles, are incarcerated on a single day (April 1, 2010 – the day of the 2010 Census). By contrast, 6.2% of black men who grew up in families with similar incomes in central Compton, 2.3 miles south of Watts, are incarcerated on a single day." *Id.* at 3.

3. Oscar Lewis, *The Culture of Poverty*, 215 SCI. AM. 19, 21 (1966).

4. *Id.*

5. *Id.*

6. WILBUR ZELINSKY, THE CULTURAL GEOGRAPHY OF THE UNITED STATES 111 (rev. ed. 1993).

7. *Id.*

8. Jeffrey D. Sachs, *Government, Geography, and Growth: The True Drivers of Economic Development*, 91 FOREIGN AFFAIRS 142, 148 (2012).

9. STAFF OF J. COMM. TAX'N, 115TH CONG., GENERAL EXPLANATION OF PUBLIC LAW 115-97 131, 316–17 (Jt. Comm. Print 2018).

10. *Id.*

incentive for entrepreneurs may satisfy those motivated by self-interest. The appeal across the aisle has made various forms of enterprise zone a legislative inevitability over the years. Yet the provisions' economic effectiveness remains an open question.[11]

Already, news reports question who should land in OZ. The online retail behemoth Amazon.com planned to relocate a headquarter office to "Long Island City, the fast-gentrifying Queens neighborhood across the East River from the skyscrapers of midtown Manhattan."[12] There, the company was to enjoy the "Trump Tax Break" although the "[m]edian income around Amazon's planned campus is $130,000, poverty is half the city average and new buildings were going up long before the tax overhaul."[13] If the intent was to lift residents out of poverty, the reported gentrifying effect would be inefficient.[14] Nevertheless, the provision follows a long history of geographically based taxation.

B. *Overview*

This Article will discuss the tax incentive zones in the context of revenue legislation as developed in various locations through history. While no particular provision of the Internal Revenue Code (IRC) need be reduced to any ancient antecedent, general principles may emerge regarding the national collection of revenue wherever producers may have been located. Whatever natural economies may have obtained, increasing complexity was eventually governed by the rule of law. That is, taxation always has been a diagnostic aspect of government inasmuch as the revenue law indicates the extent of horizontal and vertical equity in a national territory. In the end, fiscal geography may help describe the extent to which an advanced economy is distributive.

This Article is organized as follows: Section II begins with the local source of revenue.[15] For reasons drawn from philosophy and social science, historical examples of taxes illustrate this Article. At least

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11. *See* Scott Eastman & Nicole Kaeding, *Opportunity Zones: What We Know and What We Don't*, TAX FOUND. 8 n.26 (Jan. 2019) (warning of the possibility that the incentivized "investments generate employment opportunities that do not match the skills of existing residents").

12. Associated Press, *Amazon's NYC Home in "Opportunity Zone" for Trump Tax Break*, WTOP NEWS (Nov. 14, 2018, 1:18 AM), https://wtop.com/real-estate/2018/11/amazons-nyc-home-in-opportunity-zone-for-trump-tax-break/ [https://perma.cc/5CH2-4FD3].

13. *Id.*

14. Dan Weil, *The Trump Administration Said These Tax Breaks Would Help Distressed Neighborhoods. Who's Actually Benefiting?*, WASH. POST (June 6, 2019, 6:30 AM), https://www.washingtonpost.com/realestate/opportunity-zones-are-loaded-with-tax-benefits-but-will-they-actually-help-residents/2019/06/05/0f80e1c6-7e68-11e9-8bb7-0fc796cf2ec0_story.html [https://perma.cc/9WYG-YUBL] (Although Amazon's N.Y.C. plan dissolved, "experts" continued to "worry that some of the investment may not benefit the intended targets.").

15. *See infra* Section II.

theoretically, if not archaeologically, pristine elements of taxation may be isolated.

Then Section II continues with the question of what the government must do to maintain the contributory capacity of the taxpayer population.[16] Whether glossed as taxation with representation, consent of the governed, or otherwise, the fiscal state must contend with the rule of law and distributive justice. This historical and philosophical context sets the stage for OZ in Section III.[17]

If geographic and economic redistribution has always been a fiscal function, then tax zone legislation may be the latest iteration. The various statutes have combined the entrepreneurial spirit of the free market with the impulse to relieve poverty in a legislatively ingenious, if internally inconsistent, package. Empirically, the results have been modest at best, with respect to either increase in commerce or decrease in unemployment and poverty levels.[18] The lasting effect may lie in law-makers' predilection for demarcating zones.

Section IV delves into the perspective of the individuals involved.[19] The modest take-up rate is a question of behavioral economics for the entrepreneurial taxpayer. The tax incentive may not outweigh the perceived cost of opening a business in the inner city or blighted countryside. Given the business choice, the tax agency may serve as a mirror. Under the incentive provision, the tax collector appears as a collaborator rather than an adversary. This view allows Section IV to characterize the tax official more fully. Just as the taxpayer is not merely a rational actor, the tax collector is no fiscal automaton. Section IV adopts the anthropological innovation of para-ethnography to capture the self-awareness of the collaborator.[20] Where behavioral economics describes taxpayer psychology, para-ethnography describes the bureaucratic praxis of the tax authority. The coordinated actions of these individuals operationalize the tax provisions.

Section V discusses the tax zone legislation in the context of world historical industrial transformation.[21] Incentives operate in an economic context, inasmuch as the federal income tax never drove commerce away from the zones in the first place. So-called urban blight and the Rust Belt were casualties of global industrialization. Consequently, it should be no surprise that tax incentives have not lured business back.

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16. *See infra* Section II.

17. *See infra* Section III.

18. *Opportunity Zones: Facts and Figures*, ECON. INNOVATION GRP., https://eig.org/opportunityzones/facts-and-figures/ [https://perma.cc/VU2X-DAZ2] (Jan. 2020).

19. *See infra* Section IV.

20. *See infra* Section IV.

21. *See infra* Section V.

Section VI concludes as follows: Whatever the flaws of the particular tax zone legislation, the provisions confirm the legislator's intuition that tax is geographically and economically redistributive.[22] In this function, the taxpayer and tax collector may behave as a complementary couple rather than an adversarial pair. In the midst of today's trans-Pacific industrial revolution, the question is how much the fiscal apparatus can stabilize the people's life chances.[23] This harks back to fundamental questions of distributive justice attendant to the advent of "civilized society."[24]

II. HISTORICAL & PHILOSOPHICAL BACKGROUND

To analyze taxation in its component parts, this Article begins with the local source of revenue. Both historically and theoretically, tax law applies to the productive taxpayer who has natural connections to home and culture. In this regard, scholars have observed that "law and ethnography are crafts of place: they work by the light of local knowledge . . . . [A]nthropology and jurisprudence . . . are alike absorbed with the artisan task of seeing broad principles in parochial facts."[25] This Section weaves together the relevant principles of law and social science.[26] Incorporating the essentially parochial taxpayer into a national economy has long been the problem of the social contract.[27] Even where the rule of law prevails, the maintenance of the taxpayer population raises the issue of distributive justice. Among the historical responses to this issue has been the extension of human rights from civil liberties to social entitlements, to wit, the welfare state.[28] While these governmental responses have appeared in advanced economies, they had antecedents in ancient civilizations.[29] The apparatus of fiscal geography has been long

22. *See infra* Section VI.

23. Jan Breman, Int'l Inst. Soc. Stud. Erasmus Univ. Rotterdam, The Great Transformation in the Setting of Asia, Address at the 57th Anniversary of the International Institute of Social Studies 3 (Oct. 29, 2009), https://www.wiego.org/sites/default/files/publications/files/Breman_Transformation.Asia_pdf [https://perma.cc/3H9P-KPQA].

24. Compañía Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

25. CLIFFORD GEERTZ, *Local Knowledge: Fact & Law in Comparative Perspective*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 167 (1st ed. 1983).

26. *See generally* Daniel Blocq & Maartje van der Woude, *Making Sense of the Law & Society Movement*, 11 ERASMUS L. REV. 134 (2018) ("focus[ing] on the evolution of the Law and Society Movement (L&S) – an important alternative site for the empirical study of law and legal institutions").

27. *See* SALLY FALK MOORE, POWER AND PROPERTY IN INCA PERU 1 (1st ed. 1958) ("How was it possible for five million or more relatively primitive people to be organized under one ruler? How were they taxed, how were they governed? These are questions which have been asked since the 16th century and have, more often than not, been answered with extreme naíveté.").

28. *See* discussion *infra* Section II.E.

29. *E.g.*, *id.*

in the making. The mechanism of national taxation with concomitant redistribution lays the philosophical foundation for the latter-day zone legislation.

A. *The Local Source of Revenue*

Throughout world history, civilizations arose where revenue flowed.[30] Specifically, this meant the "geographical and social concentration of a surplus product."[31] Where resources and agriculture were profitable, they could generate revenue that became the "life-blood of government."[32] In sum, government connects far-flung localities.

For example, anthropologists have studied taxation particularly in the sixteenth century Inca Empire in South America. This empire encompassed as many as five million people within a couple million square kilometers.[33] There, the source of wealth was epitomized by gold and silver mines in the first instance, subject to "a local, rather than a national control and exploitation."[34] Nevertheless, "[e]ach region contributed what it specialized in geographically or professionally," whether in crops or skilled handicraft.[35] Then those contributions "went in part to Cuzco [the imperial capital]; in part to support the provincial capital; in part to care for traveling armies and officials as they passed through; in part to maintain newly settled *mitimaes* [the imperially conscripted laborers], probably to support the local population when road work was undertaken, and to maintain some of the poor and people too old to do agricultural labor."[36] To recapitulate, minerals and arable land gave rise to civilization extending beyond the local village, connected by ties, including taxation.

The Inca case is not unique in this respect. It was preceded by other primary examples, such as the South Asian civilization. Arising in the fourth century BCE, the Mauryan dynasty ruled as many as fifty million people in five million square kilometers (which then engulfed the original city of Mohenjo Daro).[37] According to Indian historians, "mines . . . were owned by the state, and were . . . let out to entrepreneurs, from whom the

30. *See* CHARLES ADAMS, FOR GOOD & EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION xxi (2d ed. 1993).

31. David Harvey, *The Right to the City*, NEW LEFT REV. (2008), https://newleftreview.org/issues/II53/articles/david-harvey-the-right-to-the-city [https://perma.cc/S7HK-9WXX].

32. *Bull v. United States*, 295 U.S. 247, 259 (1935).

33. *See* MOORE, *supra* note 27; Peter Turchin et al., *East-West Orientation of Historical Empires and Modern States*, 12 J. WORLD-SYS. RSCH. 219, 222 tbl.1 (2006).

34. MOORE, *supra* note 27, at 40.

35. *Id.* at 124.

36. *Id.* at 34, 110–11.

37. Roger Boesche, *Kautilya's Arthaśastra on War and Diplomacy in Ancient India*, 67 J. MIL. HIST. 9, 12 (2003); Turchin et al., *supra* note 33, at 222.

king claimed a percentage of their output as a royalty."[38] In this case, the mineral resource was locally worked yet accrued to the benefit of the larger kingdom.

The inception of civilization governing an expanse that was national rather than local set forth fundamental issues of law and social science. Production occurred through naturally local agriculture. National collection and redistribution of revenue posed the problem of uniformity. In the Inca example, the *quipu*, a counting device composed of knotted cords (perhaps an American version of the abacus), has been featured in the social science literature as an artifact of accounting.[39] "[W]ell suited to recording the kind of numerical information necessary for an extensive tax and conscription program," the *quipu* rendered a "universal method throughout the empire . . . entirely feasible."[40] The *quipu* iconizes national accountability over a population which is still tied to the land.

The Inca example shows how empires grow from villages. When their army "conquered people already grouped in some political unit, the Inca did not hesitate to employ the administrative machinery they found already functioning."[41] Then, "the folk community was forcefully linked both to a provincial capital and to Cuzco through the imposition of taxes, the Sun cult [the national religion], the Quechua language and the court and high government."[42] In anthropological terms, the connection between the local community and the national institutions was codified by culture. In sum, the "Inca political achievement is precisely in the extension of local government methods to an empire."[43] The significance of the Inca example lies in the pristine connection between the local and the national.

Government on a national scale was inherently redistributive in scope. For the local official, "tenure may have depended on his ability to extract taxes."[44] Tribute came in the form of crops harvested from farms "subdivided into small plots whose produce was allocated for many local purposes and local deities, only a part going to provincial capitals and to Cuzco, to support the official national religion of the realm."[45] Thus, a local collector could have had the ability to divert revenue from imperial to local purposes. In particular, anthropologists have documented that "there were people who, by reason of not being in the family of an able-

38. A.L. BASHAM, THE WONDER THAT WAS INDIA: A SURVEY OF THE CULTURE OF THE INDIAN SUB-CONTINENT BEFORE THE COMING OF THE MUSLIMS 101 (1954).

39. *See* JACOB BRONOWSKI, THE ASCENT OF MAN 101 (1973); CAROLYN WEBBER & AARON WILDAVSKY, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 39 (1986).

40. MOORE, *supra* note 27, at 102.

41. *Id.* at 122.

42. *Id.* at 26, 130.

43. *Id.* at 111.

44. *Id.* at 33.

45. *Id.* at 26.

bodied man, or being able to work themselves, were supported by the community."[46] Accordingly, redistribution was both geographic and economic.

Again, the Inca example resonates with the evolution of civilizations around the world. "After the Mauryan period," for example, "it became usual for kings to pay their officers and favourites not with cash, but with the right to collect revenue from a village or group of villages."[47] Tax collection "often carried other privileges, and usually made the recipient the intermediary between king and taxpayer."[48] Taxation implied delegation.

The redistributive aspect came with the territory of an imperial sovereign. Logistically, "the wider his empire the more power he must delegate to others."[49] In particular, "[t]ax law tells much about the nature of government, the price it exacted and the price it had to pay for self-maintenance."[50] To maintain the loyalty of the population, the government distributed and extracted.

Excessive extraction would have been self-defeating. Instead, the Sanskrit text metaphorically cautioned that "the king should tax as a bee sucks honey, without hurting the flower."[51] The taxpayer and tax collector were symbiotic.

In effect, supralocal taxation spreads the wealth of local taxpayers. Among the fifty states of the United States today, per capita federal liability is progressive.[52] In the richest state of Connecticut, the per capita federal tax is $10,364, and in the poorest state, Mississippi, $2,883.[53] In American history, "the federal income tax has played a key role in enabling the federal government to redistribute the nation's resources in a southward direction."[54] From each, the tax takes according to the ability to pay.

The redistributive effect was no accident. From the inception of the Federal income tax, "Southern politicians supported the Sixteenth

46. MOORE, *supra* note 27, at 25–26.

47. BASHAM, *supra* note 38, at 96.

48. *Id.*

49. MOORE, *supra* note 27, at 106.

50. *Id.* at 2.

51. BASHAM, *supra* note 38, at 109; KUNWAR DEO PRASAD, TAXATION IN ANCIENT INDIA: FROM THE EARLIEST TIMES UP TO THE GUPTAS 27 (1987). From 200 BCE, the *Panchatantra* taught, "The king who tastes his kingdom like/Elixir, bit by bit/Who does not overtax its life,/Will fully relish it," VISHNU SHARMA, PANCHATANTRA 3–4, 83 (Arthur W. Ryder trans., Univ. Chi. Press 1925).

52. *See* Richard Barrington, *Which States Pay the Most Federal Taxes?*, MONEYRATES (Mar. 6, 2019), https://www.money-rates.com/research-center/federal-income-taxes-by-state.htm [https://perma.cc/QW6T-Y6V5].

53. *Id.*

54. Robin L. Einhorn, *Look Away Dixieland: The South and the Federal Income Tax*, 108 NW. U. L. REV. 773, 780 (2014).

Amendment because they believed that the South would benefit."[55] By the time of the New Deal, Progressives advocated for redistribution from the "Northeast" which they "understood essentially as a synonym for industrial and financial capital."[56] After World War II, the income tax enabled "the federal budget to operate as a mighty engine of geographical redistribution."[57] The combination of these fiscal facts and the anti-tax rhetoric mentioned below form an irony in American history.

Across the ideological spectrum, commentators have drawn their own inferences. Since the Inca empire, national taxation along with nationalized (royal) ownership of property (realty) have attracted labels as both *L'Empire socialiste des Inka* and *el estado feudal incaico*.[58] Even today, advocates for nationalized land reform in privatized agrarian economies ironically echo the "overt coercive apparatus" of pre-modern "serfdom."[59] Redistribution may be alternatively socializing or totalizing.[60]

B. *Hypothetical Geography*

In some respects, each civilization may be unique. At the same time, scholars have long presupposed a primordial state from which political evolution proceeded.[61] "Thus in the beginning all the World was *America*—even more so than America is now, because in the beginning no such thing as money was known *anywhere*."[62] In these terms, the eighteenth-century European Enlightenment looked to the New World for a clean slate upon which to inscribe first principles.[63] In South America, before the Spanish arrival, it was true that the Quechua-speaking people conducted a barter economy.[64] From historical instances, philosophers hypothesized an ideal state.[65]

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55. *Id.* at 796.

56. *Id.* at 784.

57. *Id.* at 780.

58. MOORE, *supra* note 27, at 5. *See generally* LOUIS BAUDIN, A SOCIALIST EMPIRE: THE INCAS OF PERU (Arthur Goddard ed., Katherine Woods trans., 1961).

59. *See* ROBERTO MANGABEIRA UNGER, PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS 126 (1987).

60. *See* ERICH FROMM, THE FEAR OF FREEDOM 35 (1942) ("One was born into a certain economic position which guaranteed a livelihood determined by tradition, just as it carried economic obligations to those higher in the social hierarchy.").

61. *See, e.g.*, HARRY ECKSTEIN, REGARDING POLITICS: ESSAYS ON POLITICAL THEORY, STABILITY, AND CHANGE 81 (1992).

62. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. V § 49 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1689).

63. John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1055 (2010).

64. *See* MOORE, *supra* note 27, at 86.

65. Powell & Menendian, *supra* note 63, at 1037.

Subsequently, anthropologists coined "pristine state" as a term of material culture.[66] When the ancient valleys of the Yellow, Nile, Indus, Euphrates, and Tigris Rivers were yet untouched by other civilizations, states "emerged from stratified societies and experienced the slow, autochthonous growth of the specialized formal instruments of social control out of their own needs for these institutions."[67] Additionally, anthropologists introduced Mesoamerica, Andean South America, and Polynesia as pristine states.[68] As evidence and analysis advanced, the concept of the pristine state became less pure.[69] Nevertheless, anthropologists still find comparison useful among archaeological sites of indigenous development, especially in Yoruba and Benin as well as those already mentioned above, including China, Egypt, India, Mesopotamia, Zapotec, and Inca.[70] Specifically in the Yellow River Valley, the original city was engulfed by the Xia dynasty arising in 1800 BCE over 450 thousand square kilometers[71] encompassing 13.5 million people by the second century BCE.[72] Although archaeology is different from the philosophical ideal, this Article refers to examples from civilizations around the world.

The comparability of civilizations throughout the world depends on the circumstances. As noted above, geography comes to life through the course of the historical movements of productive populations. In turn, boundaries move. "A hundred years ago, the frontier between West and East was located somewhere in the neighborhood of Bosnia-Herzegovina. Now it seems to run through every European city."[73] In other words, people experience geography through culture.

Ancient, as well as modern, history reflects the cultural geography of world civilizations. For instance, classical Greece, located in what is now the European Union, had its significant "intellectual links" with the "ancient Egyptians, Iranians and Indians" rather than the

66. *See* Henri J.M. Claessen, *The Emergence of Pristine States*, 15 SOC. EVOLUTION & HIST. 3, 4 (2016).

67. MORTON FRIED, EVOLUTION OF POLITICAL SOCIETY: AN ESSAY IN POLITICAL ANTHROPOLOGY 231 (1967).

68. *See generally* ELMAN R. SERVICE, ORIGINS OF THE STATE AND CIVILIZATION: THE PROCESS OF CULTURAL EVOLUTION (1975).

69. *See* Michael E. Smith, *How Do Archaeologists Compare Early States?*, 35 REVS. ANTHROPOLOGY 5, 7 (2006).

70. *See id.* at 8 tbl.1; Claessen, *supra* note 66, at 23; *see generally* BRUCE G. TRIGGER, UNDERSTANDING EARLY CIVILIZATIONS: A COMPARATIVE STUDY (Cambridge Univ. Press 2003).

71. *See* Rein Taagepera, *Size and Duration of Empires: Growth-Decline Curves, 3000 to 600 B.C.*, 7 SOC. SCI. RES. 180, 189 T.5 (1978).

72. U.N. HUMAN SETTLEMENTS PROGRAMME, 2 MITIGATION, MANAGEMENT AND CONTROL OF FLOODS IN SOUTH ASIA 12 (2002).

73. NIALL FERGUSON, THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST 645 (2006).

contemporaneous Westerners.[74] Historical affinities reflect a changed economic order.

To be clear, the Inca empire was no egalitarian Eden. Rather, it was a "conquest state," comprised of pre-existing tribes colonized by military force.[75] Similarly, other pristine states also arose from war. From the sixth century BCE, the *Taittiriya Upanisad* characterized the organic origin of a kingdom in these terms, "[for] they who have no king cannot fight."[76] Here, history may falsify eighteenth century philosophy and conjecture.

Nowadays, political philosophers disclaim the state of nature. That was not "an actual historical state of affairs, much less . . . a primitive condition of culture."[77] Instead, the "original position" of equality is an imagined pre-political status from which the provisions of the social contract derive by hypothesis.[78] The significance of the status lies in the rationale for leaving it.

C. *Social Contract*

In a civilization or political society characterized in part by taxation, revenue becomes a burden on the taxpayers. Assuming the original state of objective equality, the question of tax fairness arises. Then "it is hard to imagine . . . a successful income tax scheme on a voluntary basis," because the "suspicion that others are not honoring their duties and obligations is increased by the fact that, in the absence of the authoritative interpretation and enforcement of the rules, it is particularly easy to find excuses for breaking them."[79] Consequently, uniform implementation becomes imperative.

The moral implication was apparent at the outset. For example, the sixth century BCE Buddhist monarch Mahasammata stated that the king is entitled to tax his people only

> if he protects them, and that he obtains in addition a share of the religious merit acquired by them, especially by his brahman subjects; if he fails in his duty he has no moral right to receive tax, and reaps a share of all the demerit accruing to his subjects.[80]

The tax collector had to remain on high moral ground for the taxpayer to follow suit.

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74. AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 397 (Harv. Univ. Press expanded ed. 2017).

75. MOORE, *supra* note 27, at 121.

76. BASHAM, *supra* note 38, at 81.

77. JOHN RAWLS, A THEORY OF JUSTICE 12 (Harv. Univ. Press 1971).

78. RONALD DWORKIN, LAW'S EMPIRE 164 (Harv. Univ. Press 1986).

79. RAWLS, *supra* note 77, at 240.

80. BASHAM, *supra* note 38, at 109.

A more calculated rationale for taxation is possible. A utilitarian "thinks that income taxes are just only if they . . . contribute to the greatest long-term happiness, and it does not matter to him whether or not they take the property without the owner's consent."[81] Some civilizations may have been built in part on this premise.

On the other hand, that kind of calculus raises the question of vertical equity. "An economy can be optimal in this sense even when some people are rolling in luxury and others are near starvation as long as the starvers cannot be made better off without cutting into the pleasures of the rich."[82] In short, the persistence of taxes and the government it feeds depends on either coercion or consent.

D. *Rule of Law & Distributive Justice*

Assuming that consent is the desirable basis, taxation should come under the rule of law. There is a range of literature on liberal legality, yet the distinctive characteristic may be nomothetic order where even the sovereign holding political power "feels bound by the law."[83] Accordingly, the New England counterparts to the eighteenth century Enlightenment established a "government of laws and not of men."[84] When the British "Parliament proclaimed its sovereignty over the colonies by retaining a tax on tea of threepence a pound," the Bostonians complained that taxation without representation is tyranny.[85] Currently, these historic slogans may be appropriated for anachronistic purposes, yet the propositions stand. Pre-existing legislation can preclude dictatorship.

Nevertheless, the rule of law would not guarantee fairness. Nineteenth century writers warned of the so-called "tyranny of the majority."[86] Twentieth-century contractarians conceded that "[t]here seems to be no way to characterize a feasible procedure guaranteed to lead to just legislation."[87] Similarly, "when an axiomatic structure, with reasonable-looking axioms, yields the existence of a dictator as an implication of jointly chosen—individually plausible—axioms, this is readily understood as a major embarrassment for that set of propositions."[88] Instead, the question of substantive justice arises.

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81. DWORKIN, *supra* note 78, at 73.

82. SEN, *supra* note 74, at 68–69.

83. FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION 246 (2011).

84. MASS. CONST. pt. 1, art. XXX (1780).

85. WINSTON S. CHURCHILL, 3 HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE AGE OF REVOLUTION 145 (1957).

86. *See* ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA pt. 2, ch. 7 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., Univ. Chi. Press 2002) (1840).

87. RAWLS, *supra* note 77, at 360.

88. SEN, *supra* note 74, at 269.

Where procedure falls short, substantive justice may begin. First comes "the intuitively appealing principle of fairness that if one person slices the cake and the other gets first pick the division of the cake will be fair even if it is unequal."[89] Then comes the more subjective problem of "how to consolidate individual intentions into a collective, group intention."[90] Here, the hermeneutics of jurisprudence may be unavoidable. It would be impossible to "ignore the questions about the internal character of legal argument . . . like innumerate histories of mathematics."[91] The rule of law must be internally consistent.

E. *Social Entitlements*

Extending the rule of law, subsistence, human, or social rights have deep and widespread conceptual roots if not a pedigreed intellectual genealogy. In fifth century BCE China, the *Analects* suggested that "[r]iches and honors acquired by unrighteousness" were unjust.[92] Wealth (or lack thereof) has long been associated with justice (or lack thereof).[93] Nowadays, economists describe this as vertical equity.[94]

Ancient civilizations developed social theories. In the third century BCE, the *Arthaśastra* suggested that during "famine, the king shall show favour to his people by . . . distributing either his own collection of provisions or the hoarded income of the rich."[95] For the state to persist, the population had to be maintained.

Similarly, legal penalties have long recognized wealth, poverty, or socio-economic status. In the first century BCE, the *Laws of Manu* prescribed penalties for theft proportionate to the caste of the thief, lowest for the poorest. Thus, the "guilt of a Sudra shall be eightfold, that of a Vaisya sixteenfold, that of a Kshatriya two-and-thirtyfold . . . That of a Brahmana sixty-fourfold."[96] The punishment fit not only the crime but the social station of the criminal.

At the dawn of the Christian Era, the underprivileged again rose to the fore. The Bible emphasized "the least of these my brethren."[97] In the late

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89. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 437 (3d ed. 1986).

90. DWORKIN, *supra* note 78, at 336.

91. *Id*. at 14.

92. CONFUCIUS, THE ANALECTS OF CONFUCIUS 25 (James Legge trans., Global Grey) (1893).

93. *Cf.* Yan Xu, *No Taxation Without Representation: China's Taxation History & Its Political-Legal Development*, 39 HONG KONG L.J. 515 (2009).

94. *See, e.g.,* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 580 (1986) ("vertical equity … refers to the distribution of costs and benefits across different income groups").

95. KAUTILIYA'S ARTHASHASTRA book IV, ch. III (R. Shamasastry trans. 1915).

96. THE LAWS OF MANU ch. VIII ¶¶ 337–38 (George Bühler trans., Oxford Clarendon Press 1886).

97. *Matthew* 25:40 (King James).

twentieth century, an encyclical would revisit the proposition that "men are obliged to come to the relief of the poor and to do so not merely out of their superfluous goods. If one is in extreme necessity, he has the right to procure for himself what he needs out of the riches of others."[98] Relief from poverty was cast as a right.

Before the theory of consent by the governed, the support of the population may have appeared as a practical consideration. Returning to the Inca example, the pristine fiscal order was inclusive in an imperial style.[99] In particular, some "taxes harvested for the Inca were not even taken to the provincial capital, but remained in local storehouses."[100] From there, the poor, "namely those members of the community too old or ill to do agricultural labor," were "supported in part by the Inca storehouses, as was the whole local population in a year of famine."[101] Additionally, these "local stores were also used to maintain the agriculturalists when they served in local segments of provincial or national projects such as the building and repairing of storehouses, roads, and irrigation works near their own communities."[102] As previously observed, taxation was both economically and geographically redistributive.[103]

In the Inca Empire, acts pursuant to subsistence were sanctioned.[104] According to reported cases, the theft of food from a royal farm resulted in the death penalty; likewise, theft out of vice was punishable by torture.[105] By contrast, theft because of poverty resulted in "slight punishment" or pardon, while theft out of necessity when traveling on the road was forgiven.[106] While these legal cases are older, they were precursors of what was to come.

Originally, the rule of law was associated with the Enlightenment.[107] Then, the individual asserted rights as against the state.[108] At the time of the Industrial Revolution, the concept of the rule of law comported with

98. SECOND VATICAN COUNCIL, GAUDIUM ET SPES pt. II, ch. III, § 2 ¶ 69 (1965).

99. MOORE, *supra* note 27, at 106.

100. *Id.* at 62.

101. *Id.*

102. *Id.*

103. *Id.* at 25–26.

104. *See id.*

105. MOORE, *supra* note 27, at 171.

106. *Id.*

107. *See* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 54 (1976) ("The legal order emerged with modern European liberal society."); *History*, DEMOCRACY WEB, http://www.democracyweb.org/rule-of-law-history [https://perma.cc/A8MU-YA3X] (last visited July 31, 2021) (discussing "The Rule of Law as Bulwark Against Government Tyranny").

108. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION & RECONSTRUCTION xii (Yale Univ. Press 1998) (acknowledging the "conventional" view that "[i]ndividual and minority rights did constitute a motif of the Bill of Rights").

participation in the free market.[109] At that point, the significant legal rights were those applicable to civil society, or civil liberties, as constitutionalized (for instance, the 1789 Bill of Rights).[110] Civil rights had yet to face expansion.[111]

After World War II, the Universal Declaration of Human Rights stated:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[112]

Consequently, social entitlements became rights.[113] The question is, then, whether these rights are enforceable.

If the people in the original state could legislate a fair tax code, hypothetically they would apply certain principles. Specifically, taxation "can be justified only as promoting directly or indirectly the social conditions that secure the equal liberties and as advancing in an appropriate way the long-term interests of the least advantaged."[114] This presumes objective (blind) equality.

Hypothetically, the fair tax code would develop detailed provisions. For example, the fiscal regime could guarantee "a social minimum either by family allowances and special payments for sickness and employment, or more systematically by such devices as a graded income supplement (a so-called negative income tax)."[115] Soon after Professor Rawls made this observation, the U.S. Congress enacted the earned income tax credit (EITC), a refundable wage supplement for low-income workers and their

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109. *See, e.g.*, Com. v. Hunt, 45 Mass. 111, 133 (1842) ("[*Boston Glass Co.*] acknowledges the established principle, that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract.") (citing Boston Glass Manufactory v. Binney, 21 Mass. 425 (1827)); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) ("It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.").

110. *See* U.S. CONST. amends. I–X.

111. *Civil Rights*, CORNELL L. SCH., https://www.law.cornell.edu/wex/civil_rights [https://perma.cc/DC5W-PU6C] (last visited Mar. 1, 2020).

112. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25, ¶ 1 (Dec. 10, 1948).

113. *See id.*

114. RAWLS, *supra* note 77, at 332.

115. *Id*. at 275.

children.[116] Thus, future tax equity could have both historical and philosophical foundations.

The rationale for social entitlements is that without them, civil rights are hollow. The social entitlements include "the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights."[117] As a practical matter, the impecunious cannot enjoy rights like those to private property.

For example, consider a contemporary case of implementation. In Southeast Asia, Judge Pangalangan writes that international human rights like those to health may be "advanced through domestic legislation," yet "have rarely given rise to justiciable rights."[118] In "a fragile democracy like the Philippines, where State institutions are weak," health "was hitherto a family matter, and its burdens absorbed by the private sphere. The international indicia assume that the costs are borne through social security and health insurance, and properly shift them to the public sphere."[119] To the extent that human rights encompass social entitlements, they imply a need for development of the welfare state.

Thus, social justice obtains where the "poor and disadvantaged" people have recourse to the rule of law.[120] Conversely, the rule of law would not accede to reading into "welfare and taxation schemes provisions equality of resources would approve," unless codified in the legislation.[121] Uniform implementation is still necessary.

The various historical sanctions may not form a direct lineage. Nevertheless, precursors to social rights were widespread throughout world civilizations. The social entitlements create "the much further-reaching obligation for the state to use its power for the benefit of its citizens, giving them a right to food, shelter, education," and so forth.[122] "Whether such needs should be formulated in the form of rights is a question often debated, but practically speaking more or less settled in

116. *See* Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 30 § 204 (enacting the predecessor to IRC § 32).

117. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 123 (William Rehg trans., MIT Press 1996).

118. Raul C. Pangalangan, *The Domestic Implementation of the International Right to Health: The Philippine Experience*, *in* ADVANCING THE HUMAN RIGHT TO HEALTH 155 (José M. Zuniga et al. eds., Oxford Univ. Press 2013).

119. *Id.*

120. Adriaan Bedner & Jacqueline A.C. Vel, *An Analytical Framework for Empirical Research on Access to Justice*, L. SOC. JUST. & GLOBAL DEV. J. 7 (Feb. 6, 2011), https://warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/bedner_vel/bedner_vel.pdf [https://perma.cc/XCC5-Q2TG].

121. DWORKIN, *supra* note 78, at 404.

122. Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J.R.L. 48, 66 (2010).

favour with the adoption of these rights into international rights treaties and many constitutions worldwide."[123] A century ago, the "richer countries devoted one percent of their wealth to supporting children, the poor, and the aged; today they spend almost a quarter of it."[124] Philosophically, these social rights may be grounded on the concept of blind justice that favors the least advantaged.

F. *Summary*

History established redistribution as a fundamental fiscal function. From the parochial location of the taxpayer, redistribution was inevitable when states imposed national tax law. Philosophically, the original position of blind equality may have served to naturalize the social contract. Rather than interventions in the hypothetically free market, the organic precursors to socio-economic entitlements may have been the redistributive mechanisms to maintain the productive taxpayer population. Ancient civilizations exemplified geographic as well as economic redistribution. In national taxation, the Inca made efforts "to keep the burden from falling more heavily on one community than another, and demands which could be distributed equally or borne in turn were dealt with this way."[125] Meanwhile, "[l]ocal building and road projects were financed locally, though done in the name of the Inca and Sun" national religion.[126] Thus, geographically sensitive taxation had prehistoric antecedents.

III. LAND OF OPPORTUNITY

In North Atlantic history, the usage of geography followed the needs of the state as it had in other world civilizations. In early twentieth-century Britain, for example, the "activities of the Royal Geographical Society" supported "the technics and mechanics of the management of Empire."[127] By the end of the Century, "[g]eographers now seek, by and large, to contribute to what can best be called 'the technics and mechanics of urban, regional and environmental management.'"[128] The latter may account for the origin of the concept of the enterprise zone in urban planning.

This Section traces the enterprise zone from concept to tax legislation. Harking back to the Enlightenment concept of the state of nature, this

123. *Id.*

124. STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS 322 (2018).

125. MOORE, *supra* note 27, at 67.

126. *Id.* at 68.

127. DAVID HARVEY, *What Kind of Geography for What Kind of Public Policy?, in* SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY 27, 30 (2001).

128. *Id.*

zone was a kind of hypothetically free market.[129] On islands or oases around the world, commerce was to flourish unfettered by tax or other laws. Ironically, the delineation of the zone was a legislative act.

Revisiting the historical and philosophical background, consider the following: In England, the classical political economists had referred to "a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature."[130] Even then, the rule of law enforced property and contractual obligations between private parties.

The ideology of free trade has been authoritatively commemorated in the West.[131] Nowadays, economic historians acknowledge a greater extent of government support for markets. Starting in the seventeenth century, the "creation of global markets for spices, textiles, coffee, tea and sugar were the work of monopoly companies like the Dutch and English East Indian companies, simultaneously0020engaged in a commercial and a naval contest for market shares."[132] The English effort was "intimately linked to the expansion of British imperial power."[133] Then the British Crown supported the "successful creation of the world's largest textile market and cotton-supply chains in the 18th century, which made the nationwide adoption of the spinning jenny and factory system profitable and inevitable."[134] In the nineteenth century, U.S. tax subsidies "drove much of the industrialization of this country, especially the creation of the railroad industry."[135] Twentieth-century social scientists depicted economic development as a "take-off" that they could engineer.[136] Since inception, the free market was an artifact of the social contract.

Who pays for the free market? Today, economists observe that the "'free' market is not free. It is a fundamental public good that is extremely costly to create."[137] This is particularly relevant to the current industrialization in China. Organized as the People's Republic in 1949, China is now the most populous country with 1.38 billion people in 9.6

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129. *See* Bruce Bartlett, *Enterprise Zones: The Good, the Bad, and the Muddled*, 142 TAX NOTES 331, 332 (2014).

130. LOCKE, *supra* note 62, at ch. II, § 4.

131. *See* DOUGLASS C. NORTH & ROBERT THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (Cambridge Univ. Press 1976).

132. NIALL FERGUSON, COLOSSUS: THE PRICE OF AMERICA'S EMPIRE 185 (2004).

133. *Id.*

134. *See* Yi Wen, THE MAKING OF AN ECONOMIC SUPERPOWER: UNLOCKING CHINA'S SECRET OF RAPID INDUSTRIALIZATION xii (2016).

135. *See* Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 106 (1995).

136. W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO 36 (1960).

137. Wen, *supra* note 134, at 11.

million square kilometers.[138] Per capita, China's gross domestic product (GDP) is $16,700.[139] Of GDP, 21.3 percent is captured by tax or other revenue.[140] This is the powerhouse of the ongoing trans-Pacific industrial revolution, supported by the "mercantilist" stance of the PRC.[141] The affirmative creation of the free market may have become a cosmopolitan understanding. If so, the legislation of the enterprise zone forms a logical outgrowth.

Just as the state of nature may never have existed, the free market was a hypothetical condition. By the twenty-first century, American social scientists could observe that capitalism "has lost its capitalists: too much investment is tied up in 'gray capital,' controlled by institutional managers who seek safe returns for retirees."[142] This would pose the entrepreneurial question as under the tax zone incentives: whether corporate investment is the appropriate target.

Inspired by British urban planning, the American tax bills began with relief of economic distress. On one hand, the bills may have contributed to redistributive welfare; on the other hand, their intention was to unleash free enterprise. Over several iterations, the Federal legislation layered incentives to conduct business in distressed areas. In turn, these extended to zones struck by terrorism or natural disaster as well as market failure. While the tax relief may have increased employment, it likewise may have raised rent or the cost of living.[143] Through numerous economic studies cited below, the net effect on impoverished residents has been modest at best. Nevertheless, the popularity of tax zones has not diminished among legislators. In part, this may be due to the enduring conceptual attraction to the state of nature.

A. *Enterprise Zone*

The predecessor of OZ was a brainchild of urban planners.[144] Geographically, "it was Hong Kong's example," which "gave birth to the enterprise zone," or, in other words, a "tax- and regulation-free

138. *See The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/the-world-factbook/ [https://perma.cc/XZN3-WHU3] (last visited July 29, 2021).

139. *Id.*

140. *Id.*

141. *See* Wen, *supra* note 134, at 59.

142. *See* PINKER, *supra* note 124, at 329.

143. *See* Jennifer Forbes, Note, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones & New Markets Tax Credits*, 57 UNIV. ILL. L. REV. 177, 199 (2006).

144. *See* Robert W. Benjamin, *The Kemp-Garcia Enterprise Zone Bill: A New, Less Costly Approach to Urban Redevelopment*, 9 FORDHAM URB. L.J. 659, 660 (1981); David L. Callies & Gail M. Tamashiro, *Enterprise Zones: The Redevelopment Sweepstakes Begins*, 15 URB. L. 231, 233 (1983).

commercial zone."[145] If these Southeast Asian islands were a kind of natural experiment in the free-market economy, urban planners modeled the zone as an area for "all kinds of initiative, with minimal governmental interference or control."[146] Since the initial suggestion in the British urban planning literature a few decades ago, various kinds of zones have been promulgated in Europe and America, including the Netherlands and the United States.[147] A brief comparative profile of the several countries just mentioned will be instructive.

Hong Kong is an island of 1,108 square kilometers.[148] Hong Kong became part of the Qin Empire in the third century BCE, before occupation by the United Kingdom from 1842 to 1997.[149] Now, the Special Administrative Region of the People's Republic of China, Hong Kong has a population of 7.2 million, a per capita GDP of $61,400, and revenue of 23 percent of GDP.[150]

By the fourteenth century, a Malay trading port existed on the 719 square kilometers of Singapore.[151] In 1819, the United Kingdom occupied Singapore, which joined the Malaysian Federation in 1963 but became independent in 1965.[152] Now the population of 5.9 million enjoys a per capita GDP of $94,100.[153] Revenue amounts to 15.7 percent of GDP.[154]

In 1707, the United Kingdom incorporated England and Wales with Scotland.[155] The British Isles now occupy more than 243 thousand square kilometers with a population of 65.6 million people.[156] The per capita GDP is $44,300 while revenue is 39.1 percent of GDP.[157]

In 1579, the Union of Dutch Provinces declared independence from the Hapsburg monarchy in Spain.[158] In 1815, the Dutch formed the Kingdom of the Netherlands.[159] After the 1830 secession of the Kingdom

145. Callies & Tamashiro, *supra* note 144, at 233

146. Peter Hall, *Enterprise Zones: British Origins, American Adaptations*, 7 BUILT ENV'T 5, 6 (1981).

147. *See* Jeffrey M. Euston, C*linton's Empowerment Zones: Hope for the Cities or a Failing Enterprise*, 3 KANS. J. L. & PUB. POL'Y 140, 141 (1994).

148. *See World Factbook*, *supra* note 138, at Hong Kong.

149. Yi-Zheng Lian, *Is Hong Kong Really Part of China?,* N.Y. TIMES (Jan. 1, 2018), nytimes.com/2018/01/01/opinion/hong-kong-china.html [https://perma.cc/4EY6-8MET].

150. *World Factbook*, *supra* note 138, at Hong Kong.

151. *World Factbook*, *supra* note 138, at Singapore.

152. *Id.*; *see also* CHURCHILL, *supra* note 85, at 277.

153. *World Factbook*, *supra* note 138, at Hong Kong.

154. *Id.*

155. CHURCHILL, *supra* note 85, at 54.

156. *World Factbook*, *supra* note 138, at United Kingdom.

157. *See id.*

158. *See* John Lothrop Motley, 3 RISE OF THE DUTCH REPUBLIC: A HISTORY 411 (N.Y., Harper & Bros. Publishers 1856).

159. *World Factbook*, *supra* note 138, at Netherlands.

of Belgium, Holland occupies 41.5 thousand square kilometers and is home to 17.2 million people.[160] The per capita GDP is $53,900 while revenue takes up 43.4 percent of GDP.[161]

In 1776, the thirteen North American colonies declared independence from the United Kingdom.[162] The United States expanded westward to encompass fifty states and over 9.8 million square kilometers by 1959.[163] As the third-largest country, the U.S. population is 335 million.[164] The per capita GDP is $62,530 while revenue as a percentage of GDP is only 17 percent (22 percent including Social Security).[165]

To compare these five countries: three are insular or archipelagic; one is continental; one is a city-state; two are constitutional monarchies; one is a republic; one is a semi-autonomous province of a communist state—yet four are sovereign nation-states. The five countries are all subject to the various effects of physical geography, such as the ecological volatility associated with tropical rather than temperate latitude, or the fact that in "most countries, people cluster near coasts and navigable rivers."[166] In both Hong Kong and Singapore, the marine location for entrepots may have been as attractive to commercial transshipment as their regulatory status. Despite the heterogenous physical and political geography, all these countries impose tax regimes that may be legally comparable.

For example, in 1996 the Netherlands enacted a special measure for metropolitan problems.[167] This rule authorized cities to designate *kansenzones* (Opportunity Zones).[168] Among other municipal benefits, reduction of property tax was a potential incentive.[169] At least among the countries profiled above, a comparatively high tax burden prevails in Holland, making tax reduction attractive there. Across heterogeneous jurisdictions, zones of tax relief remain popular.[170] In a kind of binary opposition, those zones support taxation as an overall structure.

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160. *Id.*

161. *See id.*

162. *The Declaration of Independence, 1776*, OFF. HISTORIAN, https://history.state.gov/milestones/1776-1783/declaration [https://perma.cc/9C9Y-9W5H] (last visited Feb. 26, 2020).

163. *See World Factbook*, *supra* note 138, at United States; Eric Foner & John A. Garraty eds. READER'S COMPANION TO AMERICAN HISTORY 1025 (Eric Foner & John A. Garraty, eds., 1991).

164. *See World Factbook*, *supra* note 138, at United States

165. *Id.*

166. Sachs, *supra* note 8; *See* Jeffrey D. Sachs, *Tropical Underdevelopment* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 8119, 2001).

167. F.A.M. HOBMA & P. JONG, PLANNING AND DEVELOPMENT LAW IN THE NETHERLANDS 11 n.23 (2016).

168. *Id.*

169. *Id.*

170. For example, the *Zones Franches Urbaines* incentivize costly relocation. *See* Thierry Mayer et al., *The Impact of Urban Enterprise Zones on Establishments' Location Decisions: Evidence from France*, 17 CATH. UNIV. LOUVAIN J. ECON. GEOGRAPHY 709, 710 (2015).

B. *Federal Legislation*

In America, tax incentives have a long history.[171] During the nineteenth century Industrial Revolution, state tax exemptions were "aimed at specific industries and regions, [and] were the ideological predecessors of the enterprise zone."[172] Now that industry has waned in many places, the zones have had a series of reincarnations. In 1989, a survey of state enterprise zones concluded that the states benefited from job growth, especially in the inner cities and other areas that otherwise would have suffered from low employment.[173] Enterprise zones were yet to enter federal legislation.

At the end of the twentieth century, members of Congress introduced a series of bills.[174] In 1992, economists speculated about "the likely effects of some of the proposed federal EZ initiatives" based on "the U.S. state and British experiences," particularly that "limited U.S. survey evidence . . . indicates that start-up firms average about 25 percent of 'new' zone businesses."[175] Whatever the uncertainty, President Bill Clinton, "in response to the Los Angeles Riots," the inner city unrest that year, "offered a variation of former legislative proposals."[176] Then Congress adopted the enterprise zone bill.

Congress enacted Empowerment Zones within the Omnibus Budget Reconciliation Act of 1993 (OBRA '93).[177] The legislative history acknowledged that the "Internal Revenue Code does not contain general rules that target specific geographic areas for special Federal income tax treatment."[178] Forbearance from targeting comported with uniformity in taxation and federal law generally. Constitutionally, "all Duties, Imposts and Excises shall be uniform throughout the United States."[179] Otherwise, pre-existing provisions of tax law favored Puerto Rico and the other territorial possessions of the U.S. but arguably reflected their suzerain political status as much as their insular locations.[180] Expressly geographic tax zones were new.

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171. *See* Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 106 (1995).

172. Benjamin, *supra* note 144, at 672-73.

173. *See* RODNEY A. ERICKSON ET AL., PA. ST. UNIV., CTR. FOR REG'L BUS. ANALYSIS, ENTERPRISE ZONES: AN EVALUATION OF STATE GOVERNMENT POLICIES 103 (1989).

174. *See* Benjamin, *supra* note 144 at 661, 674.

175. Leslie E. Papke, *What Do We Know About Enterprise Zones?*, 7 TAX POL'Y & ECON. 37, 62 (1993).

176. Forbes, *supra* note 143, at 183.

177. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 543.

178. Legislative History of the Omnibus Budget Reconciliation Act of 1993, H.R. REP. NO. 102-1034, at 690 (1993).

179. U.S. CONST. art. I, § 8.

180. *See* Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. CAL. L. REV. 1341, 1347 (1993).

Nevertheless, the Congress noted that "low-income housing credit [LIHTC] and qualified mortgage bond provisions target certain economically distressed areas."[181] As of the Tax Reform Act of 1986 (TRA '86), credit had been allocable by state housing agencies toward investors in the cost-basis of the residences of low-income tenants.[182] From 1987–1991, LIHTC was worth $3,246 million as estimated in foregone Federal revenue.[183] Three decades later, commentators would question the efficiency of a tax provision that may have benefited landlords as much as tenants.[184]

In the same legislation, Congress authorized state and local mortgage revenue bonds.[185] These bonds would generate tax-free interest, in the manner of so-called municipal bonds, where the issuer would lend the proceeds to purchasers of homes in low-income Census tracts or other economically distressed areas.[186] Thus, the previous legislation had targeted poor neighborhoods without delineating geographic zones.

C. *Zone of Empowerment*

The first legislative iteration of a zone of empowerment focused on local entrepreneurs. In creating Empowerment Zones or Enterprise Communities out of Census tracts that had significant poverty rates, Congress stated: "[r]evitalization of economically distressed areas through expanded business and employment opportunities, especially for residents of those distressed areas, should help alleviate both economic and social problems, including distress resulting from narcotics and crime."[187] This is because "[i]ncome taxes . . . represent a current cost only if the business is profitable."[188] Nevertheless, tax incentives were the federal answer to local poverty and unrest.

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181. H.R. REP. NO. 102-1034, at 690 (1993).

182. *See* I.R.C. § 42 (2019).

183. STAFF OF J. COMM. ON TAX'N, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT of 1986 1361 tbl.A-2.II (Comm. Print 1987).

184. *See* Laura Sullivan & Meg Anderson, *Affordable Housing Program Costs More, Shelters Fewer*, NAT'L PUB. RADIO (May 9, 2017, 12:31 PM), https://www.npr.org/2017/05/09/527046451/affordable-housing-program-costs-more-shelters-less [https://perma.cc/DH8F-9FKU] (stating that "This program has been described as a subterranean ATM, and only the developers know the PIN."); Chris Edwards & Vanessa Brown Calder, *Kill the Loopholes, Including the One for 'Low-Income Housing*,' WALL ST. J. (Sept. 18, 2017, 6:47 PM), https://www.wsj.com/articles/kill-the-loopholes-including-the-one-for-low-income-housing-1505774844 [https://perma.cc/M7JL-UGXY]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-784T, LOW-INCOME HOUSING TAX CREDIT: ACTIONS NEEDED TO STRENGTHEN OVERSIGHT & ACCOUNTABILITY (2017).

185. *See* H.R. REP. NO. 102-1034, at 690 (1993).

186. *See* IRC § 143.

187. Legislative History of the Omnibus Budget Reconciliation Act of 1993, H.R. REP. NO. 103-111, at 791 (1993).

188. Aprill, *supra* note 180, at 1356.

The Empowerment Zones were located around the country. Initially, the urban zones included: Atlanta, Georgia; Baltimore, Maryland; Chicago, Illinois; Detroit, Michigan; New York, New York; Philadelphia, Pennsylvania; and Camden, New Jersey.[189] Then the rural zones included: Kentucky Highlands, Kentucky; Mid-Delta, Michigan; and Rio Grande Valley, Texas.[190] These were the sites of quantified poverty.

One question was how to keep the economic benefits in these Zones. OBRA '93 contained an "anti-churning" clause.[191] This clause concerned the state governor who applied to the Secretary of Housing & Urban Development (HUD) or of Agriculture for an urban or rural designation, respectively.[192] The governor was to propose a strategic plan that *inter alia* would refrain from assistance with relocation except in the case of a new branch of a business that essentially would not compete against existing employers.[193] Notwithstanding this requirement of the state plan, it remained unclear whether the legislation authorized the Internal Revenue Service (IRS) to deny a tax claim from a relocated business. With respect to the taxpayer, the effect of the state plan may have been merely precatory. Moreover, the original concept of enterprise zones was to attract commerce to otherwise unattractive locales.[194]

In the Empowerment Zones, businesses enjoyed tax reductions. Employers received a 20-percent credit on up to $15,000 of the wages paid to each employee in the Zone.[195] Business owners received a $35,000 increase to the allowance for immediate expensing which covered otherwise depreciable assets.[196] Private business activity could benefit from tax-exempt financing through state or municipally issued exempt facility bonds.[197] From 1994 to 1998, the value of these benefits was $2.492 billion.[198] In sum, the incentives were to employ and invest in infrastructure.

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189. DEP'T OF HOUS. & URBAN DEV'T, INTERIM ASSESSMENT OF THE EZ/EC PROGRAM: A PROGRESS REPORT 1 n.2 (2001).

190. STAFF OF J. COMM. ON TAX'N, 111TH CONG., INCENTIVES FOR DISTRESSED COMMUNITIES: EMPOWERMENT ZONES & RENEWAL COMMUNITIES 3 n.10 (2009).

191. *See* Mildred Wigfall Robinson, *Empowerment Zones & Enterprise Communities Under OBRA '93: A Promising Concept with some Modifications*, 11 J.L. & POL'Y 345, 349 (1995).

192. *See* I.R.C. § 1391(e).

193. *See* I.R.C. § 1391(f)(2)(F).

194. *See* Audrey McFarlane, *Empowerment Zones: Urban Revitalization Through Collaborative Enterprise*, 5 J. AFFORDABLE HOUS. & CMTY. DEV'T L. 35, 36 (1995).

195. *See* I.R.C. § 1396.

196. *See* I.R.C. § 1397A.

197. *See* I.R.C. § 1394.

198. STAFF OF J. COMM. ON TAX'N, 103D CONG., SUMMARY OF THE REVENUE PROVISIONS OF OMNIBUS BUDGET RECONCILIATION ACT OF 1993 39 app. A.II.G (Comm. Print 1993).

In particular, the employer credit was the job incentive. Rather than offering jobs or income directly to the employees, the legislation credited the job creator. This mechanism ensured that the federal subsidy supported the "deserving poor" who worked.[199] Harking back to the Enlightenment theory, the provision favored labor as the source of added value.[200] Despite the significant cost in foregone federal revenue, it remained unclear whether the various provisions would be enough to create a free market oasis.

Additionally, the legislation offered direct grants. In particular, OBRA '93 authorized social service block grants administered by the States.[201] Nevertheless, critics on both ends of the spectrum faulted the legislation where the distressed zones still needed capital.[202] Tax relief and even social service may have been an inapposite response to those who lacked money.[203]

In 1997, urban planners evaluated certain state and federal provisions. They wrote that neither "tax incentives, nor nontax incentives, nor enterprise zone incentives operate to offset the effects of basic state-local tax systems. The locations that offer the highest returns without incentives are pretty much the locations with the highest returns after incentives are included." [204] Evidently, this reported ineffectiveness did not deter legislation that year.

In the Taxpayer Relief Act of 1997 (TpRA '97), Congress extended similar incentives.[205] These covered impoverished Census tracts in the District of Columbia, to be known as the D.C. Enterprise Zone (DCEZ).[206] There the provisions included the following: Employers received the 20-percent wage credit.[207] Business owners received the $35,000 increase to the allowance for immediate expensing.[208] Private business activity could benefit from certain tax-exempt bonds issued by

199. *See* Anne L. Alstott, *The Earned Income Tax Credit & the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 538 n.13 (1995).

200. *See* LOCKE, *supra* note 62, at ch. V § 27. ADAM SMITH, 1 AN INQUIRY INTO THE NATURE & CAUSES OF THE WEALTH OF NATIONS 5 (Edwin Cannan, ed., Methuen & Co. 1904) (1776); FRIEDRICH ENGELS, THE PART PLAYED BY LABOUR IN THE TRANSITION FROM APE TO MAN 7 (1876).

201. *See* 42 U.S.C. §§ 1397–1397n-13.

202. *See* Euston, *supra* note 147, at 146–48.

203. *See generally* JAMES FERGUSON, GIVE A MAN A FISH: REFLECTIONS ON THE NEW POLITICS OF DISTRIBUTION (2015).

204. Peter S. Fisher & Alan H. Peters, *Tax & Spending Incentives & Enterprise Zones*, NEW ENGLAND ECON. REV. 109, 128 (1997).

205. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788.

206. *See* I.R.C. § 1400 (2010) (repealed 2018).

207. *See* I.R.C. § 1400(d) (2010) (repealed 2018).

208. *See* I.R.C. § 1400(a)(2) (2010) (repealed 2018).

D.C.[209] These provisions were worth $582 million in foregone federal revenue.[210]

Additionally, capital gain became tax-free. Technically, a 0-percent rate applied to gain on the sale of qualified DCEZ business assets held for more than five years.[211] This provision was worth $502 million in foregone federal revenue.[212] In short, the incentives were to invest, expand, and sell an enterprise.

For individuals, the provisions included the following: A moderate-income taxpayer purchasing his or her first home in D.C. could receive up to $5,000 in tax credit.[213] The latter provision assumed that the homebuyer generated enough income tax to use the credit. While the former provisions were to benefit business, this credit could attract middle-class homeowners. This provision was worth $74 million in foregone federal revenue.[214]

Moreover, TpRA '97 created a tax-credit bond. The qualified zone academy bond (QZAB) was an alternative to tax-exempt bonds.[215] The legislation allowed to the QZAB holder a credit, rather than an exclusion of interest, at a rate permitting issuance without discount or interest cost.[216] Given a ten percent private business contribution, state and local governments could incur interest-free debt to support elementary or high schools.[217] In effect, the Treasury paid the bondholders by reducing the federal liability that they otherwise had accrued. The legislation allocated $400 million annually for a decade as the face amount of QZABs to be issued by the states in proportion to their impoverished populations.[218] The credit mechanism corresponded dollar-for-dollar to the bondholder's investment return. Yet tax-credit bonds retained the inefficiency of tax-exempt bonds by subsidizing wealthy investors as well as pupils in the needy zone.[219]

Ironically, the ineffectiveness of the original Empowerment Zone legislation was confirmed. The Community Renewal Tax Relief Act of 2000 (CRTRA '00) extended the provisions in Zones that remained economically distressed.[220] The available tax incentives were similar to

209. *See* I.R.C. § 1400A (2010) (repealed 2018).

210. STAFF OF J. COMM. ON TAX'N, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1997 519 (Comm. Print 1997).

211. *See* I.R.C. § 1400B (2010) (repealed 2018).

212. STAFF OF J. COMM. ON TAX'N, *supra* note 210, at 519.

213. *See* I.R.C. § 1400C (repealed 2018).

214. STAFF OF J. COMM. ON TAX'N, *supra* note 210, at 519.

215. *See* I.R.C. § 1397E (2016) (repealed 2017).

216. *See* I.R.C. § 1397E(a) (2016) (repealed 2017).

217. *See* I.R.C. § 1397E(d) (2016) (repealed 2017).

218. *See* I.R.C. § 1397E(e) (2016) (repealed 2017).

219. *See* DANIEL L. SIMMONS ET AL., FED. INCOME TAX'N 269 (7th ed. 2017).

220. *See* Consolidated Appropriations—FY 2001, Pub. L. No. 106-554, 114 Stat. 2763.

those in the original legislation. Employers received the wage credit in the amount of fifteen percent.[221] Business owners received the $35,000 increase to the allowance for immediate expensing.[222] The zero percent rate applied to gain on the sale of qualified business assets held for more than five years.[223] Additionally, CRTRA '00 created an incentive for building in the commercial revitalization zone by allowing either a deduction of half the expenses or a ten year amortization.[224] Toward this end, the legislation allocated $12 million per state annually for 8 years.[225]

Innovatively, CRTRA '00 enacted the New Markets Tax Credit (NMTC).[226] This provision was essentially an incentive to invest in low-income Census tracts.[227] In foregone federal revenue, the estimated cost was $4.391 billion over a decade.[228]

In 2001, the Department of Housing & Urban Development (HUD) reported on the Empowerment Zones.[229] Job growth occurred, while the number of resident- and minority-owned businesses increased substantially.[230] In the late 1990s, business boomed across the country, but it was unclear if the tax incentives were the cause. Of the businesses in the Zones, only eleven percent reported using the employment credits, four percent reported using the expensing provision, and three percent reported using Work Opportunity Tax Credits (WOTC), while sixty-five percent of all the businesses reported no benefits of location in the Zone.[231] The report did "not reach definitive conclusions."[232]

At this point, Congress had enacted a couple of iterations of tax zone legislation that recognized zones of poverty by attempting to attract investors. The provisions were a novel use of taxation to effectuate redistribution, a recurring theme throughout world history. At the same time, the legislation neither pulled the residents out of the impoverished zone nor granted them seed capital.[233]

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221. *See* I.R.C. § 1400H (repealed 2018).

222. *See* I.R.C. § 1400J (repealed 2018).

223. *See* I.R.C. § 1400F (repealed 2018).

224. *See* I.R.C. § 1400I (repealed 2018).

225. *See* I.R.C. § 1400I(d) (repealed 2018).

226. *See* I.R.C. § 45D.

227. *See* I.R.C. § 45D(e).

228. STAFF OF J. COMM. TAX'N, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 106TH CONG. 188 app. at 188, JCS-2-01 (Comm. Print 2001).

229. U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-98-203, COMMUNITY DEVELOPMENT: INFORMATION ON THE USE OF EMPOWERMENT ZONE AND ENTERPRISE COMMUNITY TAX INCENTIVES (1998).

230. DEP'T OF HOUS. & URBAN DEV'T, *supra* note 189, at ii.

231. *Id.* at iii.

232. *Id.* at Foreword.

233. *See* BRUCE K. MULOCK, CONG. RSCH. SERV., RS20381, EMPOWERMENT ZONE/ENTERPRISE COMMUNITIES PROGRAM: OVERVIEW OF ROUNDS I, II & III (2002).

D. *Zones of Crisis*

Then the Congress was overtaken by geopolitical events. The Job Creation & Worker Assistance Act of 2002 (JC&WAA '02) created the New York Liberty Zone—not to remedy endemic poverty—but to help rebuild after the terrorist hijacking that destroyed the World Trade Center on September 11, 2001.[234] At the same time, this tax bill delineated a geographic zone.

In New York City, the legislation enhanced several pre-existing provisions by: increasing WOTC (*i.e.* the credit to employers for wages paid);[235] allowing thirty percent additional depreciation;[236] accelerating depreciation recovery periods especially for commercial leaseholds;[237] allocating $8 billion toward realty bonds;[238] expanding the availability of advance refunding bonds;[239] widening the scope of the immediate expense deduction;[240] and extending from two to five years the period for deferral of gain on involuntary conversion.[241] The estimated cost of the New York Liberty Zone was $5.029 billion in federal revenue to be foregone over a decade.[242] These provisions reflected a private-public partnership to rebuild commercial real estate.

Despite sympathy for the victims, critics faulted the legislation. Legal scholars commented that "it would be difficult to find five square miles on earth less in need of enhanced development incentives than the southern tip of Manhattan, which has a credible claim to being the business and financial capital of the planet."[243] This observation echoes the inefficiency concern with previous provisions, such as LIHTC or tax-advantaged bonds, which benefited the investors as well as the low-income beneficiaries.

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234. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21. This followed the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107–134, which offered tax reduction to affected individuals without delineating a geographic zone for purposes of this Article.

235. *See* I.R.C. § 1400L(a) (repealed 2018).

236. *See* I.R.C. § 1400L(b) (repealed 2018).

237. *See* I.R.C. § 1400L(c) (repealed 2018).

238. *See* I.R.C. § 1400L(d) (repealed 2018).

239. *See* I.R.C. § 1400L(e) (repealed 2018).

240. *See* I.R.C. § 1400L(f) (repealed 2018).

241. *See* I.R.C. § 1400L(g) (repealed 2018).

242. STAFF OF J. COMM. ON TAX'N, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONG. 326 app. (2003).

243. Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 77 (2006).

Thereafter, empirical research on the effect of various tax zone programs reflected incomplete results.[244] In 2003, economists reported that state incentives "tend to increase the rate of business failures in the target areas, offsetting their positive impact in attracting new businesses in the target areas and favoring the growth of EZ businesses that remain on the market."[245] This was the paradoxical result of a policy premised at least in part on displacement.

In 2004, scholars conducted research in various states. The state ''[z]ones did lead to new business activity inside the zones. The number of births [of new businesses] and employment, payroll, and shipments due to those births all increased significantly in the zones post-designation.''[246] The incidence of new business was consistent with prior evaluation. In California, ''the enterprise zone designation raises employment growth about three percent each year during the first six years after the designation," although "this effect does not persist in later years. The number of employees at each business in an enterprise zone also rises more than employment at businesses that do not have the same tax incentives.''[247] At least according to these studies of local programs, the net effect was positive.

Another external event ushered in the next major bill. In the wake of Hurricanes Katrina, Rita, and Wilma, the Gulf Opportunity Zone Act of 2005 (GOZA '05) turned the parishes and counties designated by the federal disaster declaration—some of which were already impoverished—into a tax haven of sorts.[248]

After the legislation of the New York Liberty Zone, GOZA '05 poses the question whether tax relief should be the response to disaster. Historically, taxation has been redistributive. Metaphorically, the contributions of highland compatriots could balance those of flooded lowlanders. As civilizations progress, "a richer and more technologically advanced society can prevent natural hazards from becoming human catastrophes."[249] Here, aid to devastated areas by the federal government may be viewed as an implicit form of insurance—the country as a whole

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244. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-1102, TAX ADMINISTRATION: INFORMATION IS NOT AVAILABLE TO DETERMINE WHETHER $5 BILLION IN LIBERTY ZONE TAX BENEFITS WILL BE REALIZED 2 (2003).

245. Daniele Bondonio, *Do Tax Incentives Affect Local Economic Growth? What Mean Impacts Miss in the Analysis of Enterprise Zone Policies*, CTR. ECON. STUD., Sept. 2003, at 5.

246. Robert Greenbaum & John B. Engberg, *The Impact of State Enterprise Zones on Urban Manufacturing Establishments*, 23 J. POL'Y ANALYSIS & MGMT. 315 (2004).

247. Suzanne O'Keefe, *Job Creation in California's Enterprise Zones: A Comparison Using a Propensity Score Matching Model*, 55 J. URB. ECON. 131 (2004).

248. *See* Gulf Zone Opportunity Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577. This added to and codified provisions similar to those in the Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73.

249. PINKER, *supra* note 124, at 187.

acts to spread the risk of the cost of natural disasters. Specifically, "the income tax system provides a certain level of implicit insurance which emanates from provisions which allow for deduction of losses and, in some instances, deduction of insurance payments, as well as the exclusion of recoveries from insurance companies or the tortfeasors themselves."[250] Inherently, federal government spreads risk across the country, yet this begs the question of taxation. Preference for the disaster zone may convey congressional sympathy for the victim but "distorts tax policy, by, for example, favoring the temporarily afflicted wealthy over the permanently poor."[251] As in the Empowerment Zone where enhancements such as those to depreciation were a bonus inaccessible to the poor, tax relief could be little comfort to a displaced tenant. Nonetheless, GOZA '05 offered numerous provisions.

Incentives to rebuild after the Gulf Coast hurricanes supplemented a score of pre-existing provisions. These included: allowing a credit relative to the wages paid to an employee retained in the GO Zone;[252] enhancing depreciation;[253] allocating toward tax-exempt and tax-credit bonds;[254] expanding the availability of advance refunding bonds;[255] and widening the scope for immediate deduction of demolition expenses.[256] GOZA '05 enhanced, within the disaster zone, the LIHTC and NMTC enacted in TRA '86 and CRTRA '00 respectively.[257] As in the Empowerment Zones, the employment incentive was deployed in the GO Zone. As in the New York Liberty Zone, public-private infrastructure incentives applied in the GO Zone.

GOZA '05 reflected the ecological nature of the disaster. Consequently, businesses in the GO Zone benefited from increased deductibility of: disaster loss of utilities;[258] net operating loss (NOL) on timberland;[259] reforestation expenses;[260] and environmental remediation cost.[261] Builders who restored historic structures received an enhanced rehabilitation credit in the GO Zone.[262] Employers who offered housing to displaced employees received a credit for the cost, which became an

250. Terrence Chorvat & Elizabeth Chorvat, *Income Tax as Implicit Insurance Against Losses from Terrorism*, 36 IND. L. REV. 425, 425–26 (2003).

251. Aprill & Schmalbeck, *supra* note 243, at 87.

252. I.R.C. § 1400R(a) (repealed 2018).

253. I.R.C. § 1400N(d) (repealed 2018).

254. I.R.C. § 1400N(a), (l) (repealed 2018).

255. I.R.C. § 1400N(b) (repealed 2018).

256. I.R.C. § 1400N(f) (repealed 2018).

257. *See* I.R.C. § 1400N(c), (m) (repealed 2018).

258. *See* I.R.C. § 1400N(j) (repealed 2018).

259. *See* I.R.C. § 1400N(i)(2) (repealed 2018).

260. *See* I.R.C. § 1400N(i)(1) (repealed 2018).

261. *See* I.R.C. § 1400N(g) (repealed 2018).

262. *See* I.R.C. § 1400N(h) (repealed 2018).

excludable benefit.[263] Employers could take an extended period to amend their retirement plans to facilitate loans and other withdrawals by hurricane victims.[264] The victim-employees received relief from the ten percent additional tax on early distributions and expanded ability to recontribute withdrawals applied to the purchase of a home.[265] Residential as well as commercial real estate was the object in the GO Zone. In foregone federal revenue, the estimated cost of GOZA '05 was $8.668 billion over a decade.[266]

GOZA '05 was unlike the previous legislation that focused almost exclusively on business. Instead, the hurricane legislation responded to the human tragedy with a number of provisions for individuals, especially low-income taxpayers. GOZA '05 effectively increased the refundable earned income (EITC) and additional child tax credits (ACTC), in part by allowing otherwise excludable combat pay of soldiers to increase earned income.[267] Both the EITC and ACTC supplement the wages of low-income workers, so these provisions are qualitatively distinct from most of the provisions that were for business. Of the overall cost of GOZA '05, $28 million was for the EITC and ACTC enhancements, while another $14 million was attributable to the combat pay provision.[268] These refundable credits were the direct measures of poverty alleviation within the almost $9 billion bill.

Additionally, the Hope Scholarship and lifetime learning credits increased for disaster victims.[269] Of the overall cost of GOZA '05, $55 million was attributable to the education credits.[270]

Under GOZA '05, the deductibility of personal losses and charitable contributions increased.[271] In the case of corporate donations, they had to be for hurricane relief to qualify for the increased deduction limit.[272] Of the overall cost of the bill, $1.174 billion was for the expansion of personal losses, while $91 million was for charitable deductions.[273] Procedurally, the legislation confirmed the extension of tax filing and payment deadlines in the zone.[274] Although GOZA '05 did not target

263. *See* I.R.C. § 1400P (repealed 2018).

264. *See* I.R.C. § 1400Q(d) (repealed 2018).

265. *See* I.R.C. § 1400Q(a), (b) (repealed 2018).

266. STAFF OF J. COMM. ON TAX'N, 109TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 109TH CONG. 792 app. (Comm. Print 2007) [hereinafter JCT STAFF 2007].

267. *See* I.R.C. § 1400S(d) (repealed 2018); I.R.C. § 32(c)(2)(B)(vi).

268. JCT STAFF 2007, *supra* note 266.

269. *See* I.R.C. § 1400O (repealed 2018).

270. JCT STAFF 2007, *supra* note 266.

271. *See* I.R.C. § 1400S(a), (b) (repealed 2018).

272. *See* I.R.C. § 1400S(a)(4)(A)(ii) (repealed 2018).

273. JCT STAFF 2007, *supra* note 266.

274. *See* I.R.C. § 1400S(c) (repealed 2018).

zones by poverty rate, it effectively delineated a geographic area for economic assistance.[275]

Meanwhile, researchers continued to measure the effect of prior legislation. In 2006, the Government Accountability Office (GAO) reported that "improvements in poverty, unemployment, and economic growth had occurred," although the analysis "could not tie these changes definitively to the [empowerment zone (EZ)] designation."[276] At the same time, independent research on the empowerment zones in Baltimore, Chicago, Detroit, and New York, which were otherwise undergoing an urban renaissance of sorts, found that "zone initiatives had little impact.''[277] Thus, the results continued to be ambiguous.

Then regional studies captured countervailing effects within local zones. State ''EZ property values are bid up by businesses seeking to expand or locate operations in the EZs" effectively reducing "amounts that these businesses would otherwise spend on capital assets or labor.''[278] At least in the case of these state programs, the paradox of displacement may have persisted.

Likewise, further study revealed offsetting effects. In 2008, economists found evidence in the empowerment zones of decrease in unemployment and poverty by a few percentage points, accompanied by an increase in the value of housing.[279] Similarly, a 2009 study of the Empowerment Zones confirmed "a sizeable and significant positive effect on home values."[280] Subsequent research would confirm that Texas "EZ designation is associated with increases in home values.''[281] Increased housing value may relate to an increase in rent, which in turn could disadvantage tenants, raising the question of the net effect of zone incentives.[282]

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275. *See* I.R.C. § 1400N(i)(1) (repealed 2018).

276. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-727, EMPOWERMENT ZONE AND ENTERPRISE COMMUNITY PROGRAM: IMPROVEMENTS OCCURRED IN COMMUNITIES, BUT THE EFFECT OF THE PROGRAM IS UNCLEAR 5 (2006).

277. Dierdre Oakley & Hui-shien Tsao, *A New Way of Revitalizing Distressed Urban Communities? Assessing the Impact of the Federal Empowerment Zone Program*, 28 J. URB. AFF. 443, 443 (2006).

278. Jim Landers, *Why Don't Enterprise Zones Work? Estimates of the Extent that EZ Benefits are Capitalized into Property Values*, 36 J. REG'L ANALYSIS & POL'Y 15, 15 (2006).

279. *See* Matias Busso & Patrick Kline, *Do Local Economic Development Programs Work? Evidence from the Federal Empowerment Zone Program* 21 (Yale Univ. Econ. Dep't, Working Paper No. 36, 2008).

280. Douglas J. Krupka & Douglas S. Noonan, *Empowerment Zones, Neighborhood Change & Owner-Occupied Housing*, 39 REG'L SCI. & URB. ECON. 386, 395 (2009).

281. Matthew Freedman, *Targeted Business Incentives & Local Labor Markets*, 48 J. HUM. RESOURCES 311, 311 (2013).

282. *See* Edward L. Glaeser & Joshua D. Gottlieb, *The Economics of Place-Making Policies*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2008, at 155, 201–03.

Researchers analyzed the relocation incentive of NMTC. The researchers inferred that "corporations have most likely shifted investment funds from higher income communities to NMTC-eligible communities.''[283] Later, a think-tank would quantify significant ''NMTC investments per job generated for early-year projects."[284] While the relocation incentive was confirmed, the overall effect may have remained in question.[285]

E. *Zone of Recovery*

Next, Congress continued to respond to events. In 2008, the housing and financial markets crashed in what became known as the Great Recession. Then the tax subtitle of the American Recovery & Reinvestment Act of 2009 (ARRA '09) contained provisions for the Recovery Zone (RZ).[286] In particular, the legislation expanded the portfolio of tax-credit bonds introduced by TpRA '97.[287] The legislation allocated $1.4 billion for each of 2009 and 2010 as the face amount of QZABs to be issued by the states in proportion to their unemployment rates.[288] Similarly, ARRA '09 allocated $10 billion to RZ economic development and $15 million to RZ facility tax-credit bonds.[289] The Zone related to a new incidence of unemployment.

Despite decades of legislation, the economic effects of the various types of zones continued to be indeterminate. In 2010, California researchers stated that "the evidence indicates that enterprise zones do not increase employment."[290] More cautiously, GAO reported: ''Although improvements in poverty, unemployment, and economic growth had occurred in the EZs and ECs, our econometric analysis of the eight urban EZs could not tie these changes definitively to the EZ designation.''[291] To the extent that some evidence was positive, other evidence was not.

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283. Tami Gurley-Calvez et al., *Do Tax Incentives Affect Investment? An Analysis of the New Markets Tax Credit*, 37 PUB. FIN. REV. 371, 371 (2009).

284. MARTIN D. ABRAVANEL ET AL., NEW MARKETS TAX CREDIT (NMTC) PROGRAM EVALUATION 122 (2013).

285. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-913, GULF OPPORTUNITY ZONE: STATES ARE ALLOCATING FEDERAL TAX INCENTIVES TO FINANCE LOW-INCOME HOUSING & A WIDE RANGE OF PRIVATE FACILITIES X (2008).

286. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

287. H.R. REP. NO. 111-16, at 582 (2009) (Conf. Rep.).

288. *See* I.R.C. § 54E (repealed 2017).

289. *See* I.R.C. § 1400U-1 (repealed 2018).

290. Jed Kolko & David Neumark, *Do Some Enterprise Zones Create Jobs?*, 29 J. POL'Y ANALYSIS & MGMT. 5, 5 (2010).

291. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-464R, REVITALIZATION PROGRAMS: EMPOWERMENT ZONES, ENTERPRISE COMMUNITIES & RENEWAL COMMUNITIES 11 (2010).

More recent studies emphasized positive effects. In 2011, economists found that state and federal programs had "positive, statistically significant impacts on local labor markets in terms of the unemployment rate, the poverty rate, the fraction with wage and salary income, and employment.''[292] In 2012, a study of the NMTC found "modest" but "positive effects of subsidized investment in disadvantaged neighborhoods."[293]

In 2013, economists announced that the Federal ''EZ designation substantially increased employment in zone neighborhoods and generated wage increases for local workers without corresponding increases in population or the local cost of living.''[294] Other experts on the Empowerment Zone countered: "If the goal of policy makers is to induce relocation, it seems that even this modest objective may come at a cost of destroying jobs and establishments in areas that compete with targeted places.''[295] The offsetting effect persisted.

In 2014, regional scholars concluded that in the Empowerment Zone, ''the tax incentives offered by the program notably enhance the quality of business environment for firms in the area while modestly improving the quality of life for the individuals living in the area.''[296] Decades of studies seemed to point to modest effects at best.[297]

F. *Land of OZ*

Nevertheless, the current Zone followed the previous versions.[298] TC&JA '17 repealed the tax-credit and advance refunding bonds while carving new OZs out of low-income Census tracts.[299] If nominated by the Governor and certified by the Treasury Secretary,[300] an OZ also may be a tract whose median family income does not exceed 125 percent of that

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292. John C. Ham et al., *Government Programs Can Improve Local Labor Markets: Evidence from State Enterprise Zones, Federal Empowerment Zones & Federal Enterprise Community*, 95 J. PUB. ECON. 779, 779 (2011).

293. Matthew Freedman, *Teaching New Markets Old Tricks: The Effects of Subsidized Investment on Low-Income Neighborhoods*, 96 J. PUB. ECON. 1000, 1013 (2012).

294. Matias Busso et al., *Assessing the Incidence & Efficiency of a Prominent Place Based Policy*, 103 AM. ECON. REV. 897, 897 (2013).

295. Andrew Hanson & Shawn Rohlin, *Do Spatially Targeted Redevelopment Programs Spill Over?*, 43 REG'L SCI. & URB. ECON., 86, 99 (2013).

296. C. Lockwood Reynolds & Shawn Rohlin, *Do Location-Based Tax Incentives Improve Quality of Life & Quality of Business Environment?*, 54 J. REG'L SCI. 1, 1 (2014).

297. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-500, NEW MARKETS TAX CREDIT: BETTER CONTROLS & DATA ARE NEEDED TO ENSURE EFFECTIVENESS 24 (2014).

298. *See* SEAN LOWRY & DONALD J. MARPLES, CONG. RSCH. SERV., R45152, TAX INCENTIVES FOR OPPORTUNITY ZONES: IN BRIEF (2019).

299. *See* Budget Fiscal Year, 2018, Pub. L. No. 115-97 §§ 13404, 13532, 131 Stat. 2054.

300. *See* I.R.C. § 1400Z-1(b).

of the contiguous low-income community.[301] Thus, an OZ need not itself be poverty stricken.

The tax benefits in OZ include the following:[302] An exclusion applies to gain on an investment in a qualified opportunity fund (QOF), while a deferral applies to reinvestment.[303] The legislation effectively deems basis to increase the longer an investment remains in the QOF.[304] In turn, the QOF is a corporation or partnership that invests in OZ business.[305]

Already, the Treasury has certified zones. There "are roughly 8,700 opportunity zones throughout the U.S. spanning aging Rust Belt towns, low-income areas of major cities and rural swaths of the West."[306] Like landscapes everywhere, the North American fiscal geography is an artifact of Agricultural and Industrial Revolutions past and present. Over a decade, the estimated value of the provisions is $1.6 billion in foregone Federal revenue.[307]

Less than a year after enactment, a journalist editorialized as follows: "Opportunity Zones weren't created as a way to achieve specific social goals but as a way to lower taxes on real estate ventures and shares of stock that are usually held by the rich."[308] This commentary resonates with that on LIHTC—the first generation of poverty zone tax legislation—now dubiously associated with "slum-lords."[309]

Notwithstanding the lack of empirical confirmation, the presentation of business tax cuts as a potential relocation incentive has proven irresistible to legislators over the decades. Through the legislation, Congress has delineated geographic zones of poverty as the beneficiaries of tax redistribution. Economists have observed modest take–up by entrepreneurs.

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301. *See* I.R.C. § 1400Z-1(e)

302. *See* H.R. REP. NO. 115-466, at 537–38 (2017) (Conf. Rep.).

303. *See* I.R.C. § 1400Z-2.

304. *See* H.R. REP. NO. 115-466, *supra* note 302, at 400.

305. *See* I.R.C. § 1400Z-2(d).

306. Laura Davison, *IRS Unveils Proposed Rules for Tax Law's Big Capital Gains Break*, BLOOMBERG (Oct. 19, 2018), https://pbn.com/irs-unveils-proposed-rules-for-tax-laws-big-capital-gains-break-opportunity-zones/ [https://perma.cc/5UXQ-7E42]. *See also* Brett Theodos *et al. An Early Assessment of Opportunity Zones for Equitable Development Projects*, URBAN INST. (June 2020), https://www.urban.org/research/publication/early-assessment-opportunity-zones-equitable-development-projects/view/full_report [https://perma.cc/WX5H-ATAB]; Patrick Kennedy & Harrison Wheeler, *Neighborhood-level Investment from the U.S. Opportunity Zone Program: Early Evidence*, U.C. BERKELEY (Apr. 12, 2021), https://www.urban.org/research/publication/early-assessment-opportunity-zones-equitable-development-projects/view/full_report [https://perma.cc/56DX-TYQJ].

307. H.R. REP. NO. 115-466, *supra* note 302, at 688.

308. Alex Daniels, *Will New Tax-Law Policy Help Needy Communities or Luxury Condo Developers?*, CHRON. PHILANTHROPY (Oct. 15, 2018), https://www.philanthropy.com/article/Opportunity-Zones-Help-for/244790 [https://perma.cc/G2SH-UXHQ].

309. Sullivan & Anderson, *supra* note 184.

G. *Summary*

Inescapably, federal taxation is geographically redistributive. Where a place is economically determinative, federal taxation also may redistribute economically. Paradoxically, the free-market potential may have spurred the proliferation of the legislative intervention in the poverty zone. The welfare state grew to accommodate commercial investors. As codified, taxation is incorporated into the rule of law. Yet questions of equity and efficiency persist. The tax zone legislation deliberately disrupts the horizontal equity between similarly situated taxpayers, incentivizing relocation. The question is whether the resulting effect on vertical equity was worth it. Geographically, the legislation targeted distressed areas but not necessarily the low–income residents. Beyond some incentives to earn income, most of the benefits accrued to outside investors, whose businesses could have the effect of raising rent and the cost of living for poor locals. If this was not the intended result, the legislation was inefficient in allocating benefits.

This is not to mention the complexity and distortion of business choices by the tax incentive. As the legislative premise, tax reduction was the incentive for the entrepreneur to do business in the zone rather than a similarly situated site. Yet exponents of free trade characterize "the invisible hand of free markets" as "the force through which individuals and businesses put economic resources to their greatest value."[310] In the enterprise zone as well as elsewhere in fiscal geography, the "tax code . . . gets in the way of free commerce . . . ."[311] In sum, the legislative creation of a market may not be free. While there is no return to the state of nature, the land of OZ may not be the home of rationality.

IV. TRAVELERS IN THE LAND OF OZ

Generally, national tax law operates on the local taxpayer. Traditionally, the discipline of public finance assumed a rational actor who, as an enlightened individual, optimized the benefit for the cost. In the case of the zoned incentives, the tax benefit may have been infrequently worth the cost of doing business in the inner city or blighted countryside. In the perception of the entrepreneurial taxpayer who was the subject of the incentives, the cost of doing business in an inhospitable market may have been too high. This Section considers the perspective of the taxpayer whose behavior is not merely economic but also psychological. The question of the take–up rate of tax incentives becomes one of behavioral economics.

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310. PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR & PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM, at 8 (2005).

311. *Id.*

Once the taxpayer is characterized as a psychological actor, this Section extends that characterization to the tax collector. Neither are government officials automatons. Instead, they too have a behavioral rationale that in their case may be described as bureaucratic praxis. Assuming the reality of the welfare state where the roles of taxpayer and tax collector are not diametrically opposed, the issue becomes one of coordination. In the case of the zones and other taxes, the legislation may not neatly fit the needs of the targeted taxpayer. As a practical matter, it may fall to the tax collector or other revenue agent to tailor the results. The accommodation of local needs within federal law returns to historic themes in fiscal geography.

A. *The Psychological Taxpayer*

If a zone of opportunity offers tax reduction, will people move there? While a cost-minimizing rational actor would move, the experience detailed above has yielded mixed results. What else drives people? While ancient history began with agricultural subsistence, a more nuanced analysis may help.[312] First, "the meaning of subsistence cannot be established independent of particular historical and cultural circumstances if . . . definitions of social wants and needs were produced under a given mode of production rather than immutably held down by the Malthusian laws of population."[313] Where even subsistence is an artifact, lower tax may not be enough incentive to move to a bad neighborhood.

Second, people are not rational actors. Especially in industrial society, "[e]conomic man himself has given way to the psychological man of our times—the final product of bourgeois individualism."[314] Psychology raises "a more primitive question as to whether individuals actually do behave in the manner postulated, i.e., maximizing the expected utility . . . by considering the probabilistic impact . . . ."[315] Instead, "the individuals are guided . . . by something much simpler, viz., just a desire to record one's true preferences."[316] Individuals in the bourgeois society appear to express themselves rather than their calculated best interest.

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312. SARAH BLAFFER HRDY, MOTHERS & OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING 4–5 (2009) (explaining that, as early as the Pleistocene, anthropologists observe, ecological pressure to survive through cooperation yielded "[r]eflexively altruistic impulses" that turned out to be "better than" the "self-interested" calculus of "rational actors").

313. DAVID HARVEY, ECONOMIC GEOGRAPHY (1974), *reprinted in* POPULATION, RESOURCES & THE IDEOLOGY OF SCIENCE, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY 61 (2001).

314. CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS xvi (1979).

315. SEN, *supra* note 74, at 195.

316. *Id.* at 259.

In the twenty-first century, commercial consumption has become experiential. "Social media have encouraged younger people to show off their experiences rather than their cars and wardrobes, and hipsterization leads them to distinguish themselves by their tastes in beer, coffee, and music."[317] The millennial generation may lead an advance beyond acquisitive accumulation.

At the same time, the marketplace of ideas is flooded. Through the mass media, "[t]ruth has given way to credibility, facts to statements that sound authoritative without conveying any authoritative information."[318] According to American historians, "[t]rust in journalism began to weaken during the Vietnam War, when reporters dutifully repeated the government's lies about the trajectory of the conflict."[319] Then journalistic credibility "rebounded during Watergate, but it never returned to its 1950s and 1960s heights, when Walter Cronkite was dubbed the most trusted man in America."[320] When even the news may be fake, a reader needs to become a consumer advocate.

The reactions have been defensive. In particular, psychologists diagnose "identity-protective cognition, in which people cling to whatever opinion enhances the glory of their tribe and their status within it."[321] Then it becomes critical which "intuition of 'tribe' we are born with . . . ."[322] Naturally, this instinctive notion "cannot be a nation-state, which is a historical artifact of the 1648 Treaties of Westphalia."[323] Nevertheless, people may seek solace in received social identities especially during periods of economic distress and disruption.[324]

Defensive reactions may relate to risk aversion. Generally, psychological actors "fight harder to prevent losses than to achieve gains."[325] Risk aversion may be more motivating than opportunity.

On the other end of the spectrum, money may not be enough. At higher income levels, "there is consumption satiation" when "work is done for reasons barely connected with the income it provides to the

317. PINKER, *supra* note 124, at 135.

318. LASCH, *supra* note 314, at 74.

319. Nicole Hemmer, *Five Myths About Cable News*, WASH. POST (Nov. 9, 2018), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-cable-news/2018/11/09/59e0b088-e3aa-11e8-ab2c-b31dcd53ca6b_story.html [https://perma.cc/J4EY-JB5Y] [hereinafter *Five Myths*]; *see* NICOLE HEMMER, MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA & THE TRANSFORMATION OF AMERICAN POLICY (2016).

320. *Five Myths*, *supra* note 319.

321. PINKER, *supra* note 124, at 379.

322. *Id.* at 450.

323. *Id.*

324. *See generally* KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY (2018).

325. DANIEL KAHNEMAN, THINKING: FAST & SLOW 305 (2011).

'labourer'."[326] Those reasons include "self-regard and achievement" for which "money is a proxy" in the case of "the billionaire looking for the extra billion."[327] This sentiment is captured in a best-selling journalist's interview of an executive, who explained: "A man wants to get to the top of the corporation . . . how much more money can you make? . . . It's the power, the status, the prestige."[328] A land of opportunity may not attract a seeker of prestige locations.

In the tax incentive zones, decades of economic studies reflected modest take-up rates. Evidently, the reduction in tax itself has not been enough to induce the significant establishment of business in the inner city or blighted countryside. That is, the tax reduction may not outweigh the expense or perceived cost of locating in an unattractive area. In this equation, the psychological identity of the taxpayer subject to the incentive cannot be ignored.

B. *The Practical Bureaucrat*

To mirror the economic or rather psychological behavior of taxpayers, consider the behavior of tax collectors.[329] They enforce the rule of law, assuming a modern salaried bureaucracy. In the popular imagination, enforcement has fueled the "mutually hostile views held by tax collectors and taxpayers."[330] In the case of the IRS, the bureaucracy developed as follows.

In the twentieth century, the theory fit the problem. When the U.S. taxpayer population expanded exponentially, mass production became an inevitable solution to processing the myriad tax returns. Early in this century, the leading socio-legal scholar who visited America from Germany observed that standardization enabled government offices to process a great volume of cases with formal disinterest at the cost of substantive discretion, *viz* "without regard for persons" in a "dehumanized" manner.[331] At the time, bureaucracy meant efficient modernization.

Mass production expanded under a model of scientific management.[332] Eponymously, American engineer Frederick Winslow Taylor articulated this, describing an operation that "divided skills into a

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326. J. A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 176 (1971).

327. KAHNEMAN, *supra* note 325, at 342.

328. STUDS TERKEL, WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY & HOW THEY FEEL ABOUT WHAT THEY DO 538 (1974).

329. *See* Eric A. San Juan, *Bureaucratic Praxis*, 83 MISS. L.J. 1, 2 (2014) (Supp.).

330. DAVID BURNHAM, A LAW UNTO ITSELF: POWER, POLICY AND THE IRS 42 (1989).

331. MAX WEBER, *Bureaucracy* (1913), *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 215–16 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

332. TAXPAYER ADVOCATE SERV., 2012 ANNUAL REPORT TO CONGRESS, 206–07 (2012).

sequence of simple procedures to be taught to workers and monitored by management."[333] In 1911, Taylor recommended "accurate records . . . of the amount of work done by each man and of his efficiency," to justify adjustments of "each man's wages" to be "raised as he improves, [while] those who fail to rise to a certain standard are discharged . . . ."[334] In 1925, the Bureau of Internal Revenue established an Efficiency-Record Section for personnel functions as well as training of income tax examiners and technicians.[335] Even today, any particular revenue agent may develop efficiency in one skill or program, but few IRS employees (mostly high-level executives) understand the tax code as a whole. As a result, a treasury functionary may not comprehend how a provision affects the taxpayer's circumstances. Then critics complained that Taylorism induced a clerk to "'forget' or not think about the intellectual content of the text he is reproducing."[336] Despite the alienation inherent in Taylor's scientific management, it programmed adherence to the rules.

By the same token, the expanding inventory of tax returns made examination of any one rare. As a practical matter, the tax collectors would have to exercise tolerance. The latter turns out to be an administrative prescription for accepting at face value a taxpayer's return or claim below a statistical threshold.[337] The result is not lawless but rather a "gapless" effect.[338] Contrary to the crude version of legal realism, administrative law depends not merely on what the official "ate for breakfast."[339] If their advisors knew what would constitute an acceptable return, coordination between the taxpayers and the tax collector substantiates the rule of law.

If the taxpayer and the tax collector effectively coordinate, the tax bureaucracy may be a locus where the rule of law is realized. Traditionally, social scientists may have focused on courts, but

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333. Smithsonian Institute, *Carbons to Computers: A Short History of the Birth & Growth of the American Office*, SMITHSONIAN EDUC., http://www.smithsonianeducation.org/scitech/carbons/scimgmt.html [https://perma.cc/9LMU-JF32] (last visited Aug. 1, 2021).

334. FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 23 (1919) (quoting from presentation to American Society of Mechanical Engineers, June 1903).

335. The Efficiency-Record Section later merged into the Personnel Div. *See* IRS, HISTORICAL FACT BOOK: A CHRONOLOGY, 1646-1992, at 99, 109, 114; 1920 Comm'r of Internal Revenue Ann. Rep., at 12–13; 1922 Comm'r of Internal Revenue Ann. Rep., at 11; 1924 Comm'r of Internal Revenue Ann. Rep., at 7.

336. ANTONIO GRAMSCI, *Taylorism & the Mechanization of the Worker*, *in* THE GRAMSCI READER: SELECTED WRITINGS, 1916-1935 (David Forgacs ed. 1988). *See* Robert Kanigel, *Taylor-made*, 37 SCI. 18 (N.Y. Acad. of Sci. 1997); MICHAEL MACCOBY, THE LEADERS WE NEED 22–23 (2007).

337. *See* Treas. Inspector Gen. Tax Admin. Rep. 2008-30-158 (Sept. 16, 2008) ("IRS Needs to Evaluate Tolerance Levels to Ensure that Program Objectives Are Met").

338. MAX WEBER, *Economy & Law (Sociology of Law)*, *in* 2 ECONOMY AND SOCIETY 657 (Guenther Roth et al. eds., 1978).

339. DWORKIN, *supra* note 78, at 153.

"institutions of justice" refers not only to "institutions specially assigned the task of resolving disputes, but rather applies to all institutions addressed to provide a remedy."[340] (This is not to mention that "many people prefer to bring their grievances to non-state institutions, including traditional or religious leaders, trade unions, NGOs,"[341] or the like). As anthropologists have noted, "[t]ax law tells much about the nature of government," not just about revenue.[342]

C. *The Para-Ethnographer*

Just as taxpayers are psychological actors rather than cost-benefit calculators, tax collectors are not mere automatons. On one hand, it would be "low-minded sentimentalism" to assume "that everyone is constantly motivated only by simple self-interest—and nothing else."[343] On the other hand, it would be "high-minded sentimentalism" to assume that "all human beings (and public servants in particular) try constantly to promote some selfless 'social good.'"[344] Instead, tax collectors and other bureaucrats have their own behavioral praxis.

Assuming the rule of law, bureaucrats act in an official, not personal, capacity. In particular, tax collectors must "treat all members of their community as equals, and the individual's normal latitude for self-preference is called corruption in their case."[345] Like other officials who make determinations of fact, the tax collector "will develop, in the course of his training and experience, a fairly individualized working conception of law on which he will rely, perhaps unthinkingly, in making these various judgments and decisions, and the judgments will be, for him, a matter of feel or instinct rather than analysis."[346] Official judgment, subject to administrative oversight by inspectors general as well as judicial review by courts, is different from personal preference. As a precursor of government oversight, even "the Inca could take any matter out of the governor's hands if he chose."[347] An official judgment must be consistent with the position of the government as a whole.

Nevertheless, human judgment has been deemed necessary whenever rules and regulations were not internally consistent. In the United States and other industrial economies, the complexity of the revenue code is

340. Bedner & Vel, *supra* note 120, at 6.
341. *Id*. at 8.
342. MOORE, *supra* note 27, at 2.
343. SEN, *supra* note 74, at 38.
344. *Id.*
345. DWORKIN, *supra* note 78, at 174.
346. *Id*. at 256.
347. MOORE, *supra* note 27, at 113.

legendary.[348] The bureaucrat's experience at negotiating bewildering complexity *vis-à-vis* the taxpayer can be ethnographic in nature. This type of experience has been captured by the journalist's now historic interview of a social insurance worker, who said, "After I got to OEO [the Office of Economic Opportunity] it became more and more obvious to me that a lot of these rules were wrong, that rules were not sacrosanct."[349] In some cases, the bureaucrat may sympathize with the taxpayer more than with the government.

Anthropologists have captured the self-awareness of the bureaucrat. For an informant like the one interviewed, they have coined the term "para-ethnography."[350] The latter describes bureaucratic praxis much as behavioral economics describes taxpayer psychology.

When and where the rule of law has codified the concept of economic opportunity or social rights, bureaucratic judgment becomes more important. If the question is the affirmative obligation of the government rather than merely a check on executive power, "the judiciary alone is not sufficient to protect citizens, which is a logical result of the rise of the welfare state."[351] Consequently, ombudsmen "have been adopted by many countries."[352] In the United States, the Social Security Administration employs approximately 1,500 administrative law judges in 166 hearing offices across the country.[353] By comparison, the IRS stations a Local Taxpayer Advocate in each of the fifty states.[354] These quasi-judicial bureaucrats play an intermediary role between the government and taxpayers.

For example, the IRS deploys administrative discretion in various ways. In the context of natural disaster, the IRS instructs its operators to accept at face value a telephone call asserting that the caller is an "affected taxpayer" although not domiciled in the federally declared disaster zone.[355] Consequently, the caller avails him- or herself of extensions of time to file returns and pay taxes.[356] In routine tax

348. *See* STAFF OF J. COMM. ON TAX'N, 114TH CONG., COMPLEXITY IN THE FEDERAL TAX SYSTEM (Comm. Print 2015).

349. TERKEL, *supra* note 328, at 345.

350. *See* DOUGLAS R. HOLMES & GEO. E. MARCUS, FAST CAPITALISM: PARA-ETHNOGRAPHY & THE RISE OF THE SYMBOLIC ANALYST 44 (2006).

351. Bedner, *supra* note 122, at 70.

352. *Id.*

353. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-37, SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES & EVALUATION NEEDED TO ENHANCE ACCURACY & CONSISTENCY OF HEARINGS DECISIONS 9 (Dec. 2017).

354. *See* I.R.C. § 7803 (2019).

355. IRM 25.16.1.8.1 (June 26, 2018).

356. *See* I.R.C. § 7508A (2019).

examinations, receipts or documentation may be required.[357] In disaster, IRS protocols recognize the exigency of the circumstances.

More generally, the IRS can waive penalties for failure to timely file returns or pay taxes.[358] The grounds would be reasonable cause, based on ordinary business care and prudence, which the IRS has applied to a range of circumstances from illness to ignorance of the law.[359] "Death, serious illness, or unavoidable absence of the taxpayer, or a death or serious illness in the taxpayer's immediate family, may establish reasonable cause for filing, paying, or depositing late[.]"[360] Logistically, these facts are natural events in human life. In the case of ignorance, the IRS will consider the taxpayer's education as well as the objective facts of the case relevant to taxation.[361] The latter includes: any previous application of the tax to the taxpayer; any previous penalty on the taxpayer; recent changes in the tax forms or law which the taxpayer could not reasonably be expected to know; and the level of complexity of the tax or compliance issue.[362] On the other hand, the level of education may characterize an individual as a participant in society and not merely as a taxpayer. As discussed above, social entitlements, such as those to health, education, and welfare, may enable citizens to avail themselves of the rule of law. To the extent that the IRS can grant relief in view of personal characteristics, the bureaucracy may become more humane if more subjective.

In the twenty-first century, proposals emerged for the IRS role in social entitlements. Provisions such as the EITC, first-time home buyer credit, and refundable premium tax credit for low-income patients under the Affordable Care Act highlighted the tax collector's role in welfare administration.[363] Incidentally, the Health Insurance Marketplace Exchange may be the grandest federal act of market creation in this century.[364]

Consequently, commentators proposed that the IRS create a new office of Deputy Commissioner for social benefits.[365] Although neither the Congress nor the Administration acted on the proposal, it underscored the extent to which tax expenditures had made the revenue agency an all-around fiscal facilitator of both collection and disbursement. Change in bureaucratic behavior would become inevitable.

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357. *See* I.R.C. § 6001 (1982).
358. *See* I.R.C. § 6651 (2019).
359. *See* 26 C.F.R. § 301.6651-1(c) (2004).
360. IRM 20.1.1.3.2.2.1 (Nov. 25, 2011).
361. IRM 20.1.1.3.2.2.6. (Nov. 25, 2011).
362. *Id.*
363. *See* I.R.C. §§ 32, 36, 36B (2010).
364. *See* I.R.C. § 36B(b)(2)(A).
365. *See* TAXPAYER ADVOCATE SERV., 1 2010 ANN REP. TO CONG. 23.

If the IRS and other government agencies conduct themselves according to internal rationales, critics may fear the "Deep State."[366] Conspiracy theorists demonize "the government's massive security apparatus as conducted by the federal defense and intelligence agencies."[367] Other skeptics "see ordinary imperfect human beings and ordinary human institutions, acting too often with greed, fear, and with messy self-interests."[368] Both view the Deep State as "a vast, self-perpetuating bureaucracy whose aim is singular: to exist again tomorrow and the day after, to replicate itself, to be indestructible and nearly impossible to disrupt."[369] It is an important sociological observation that organizations, especially governmental entities, exist independently of their members.[370] Nonetheless, government bureaucracies in particular are creatures of law. As exemplified above, reasonable cause is a statutory concept. Consequently, lawmakers can regulate the bureaucracy. Self-perpetuation of the Deep State should not become the legislator's excuse.

In the tax incentive zones, Congress intended to encourage commerce. Originally, the Empowerment Zones were for local business rather than those that relocated. Yet the face of the tax code allowed the relevant credits and deductions based on the prescribed criteria. In processing the applicable returns, the IRS would not have seen who relocated or not. As a mass data processor, the IRS mechanically allowed the claims that met the requirements. In microcosm, the tax collector was merely a programmed mechanism. Had Congress wished the IRS to apply broader criteria, the legislature could have done so. Of course, that could have led to differing judgments and potential disputes. As it happened, the tax legislation resulted in mechanical application. Whether particular enterprises attracted community enthusiasm, the credits and deductions fell where they did.

D. *Summary*

The effect of the zone incentives, like other tax legislation, depends on the reaction of the taxpayer. In turn, a taxpayer acts in tandem with a revenue agent. Traditionally, the taxpayer and tax collector were

366. JASON CHAFFETZ, THE DEEP STATE: HOW AN ARMY OF BUREAUCRATS PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA 9 (2018).

367. *Id*.

368. *Id*.

369. *Id*.

370. *See* MICHAEL HERZFELD, THE SOC. PRODUCTION OF INDIFFERENCE: EXPLORING THE SYMBOLIC ROOTS OF W. BUREAUCRACY (Bruce Kapferer & John Gledhill eds., 1992); EMILE DURKHEIM, THE DIV. OF LABOR IN SOCIETY 329 (George Simpson trans., 1960). Bureaucracies may be creatures of law to the extent that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST NO. 48 (James Madison).

conceptualized as an adversarial pair. When a tax provision makes an incentive rather than a liability, it becomes easier to see the revenue agent as a reflective partner of the taxpayer. This characterization more easily extends to other official functionaries in the welfare state. The collectors may see themselves as collaborators who navigate the bureaucracy on behalf of the taxpaying citizen. Both taxpayers and tax collectors are people under economic and legal parameters that condition but do not preempt their decision-making. This calls to mind the symbiosis between taxpayer and tax collector as described by ancient texts.

V. GLOBAL TRANSFORMATION

Geographic redistribution always has been the effect of national tax law. At the same time, economic redistribution has been the practice of civilizations that sought to maintain their productive taxpayer population. The tax zone provisions fit into this history. However, instead of redistributing from rich to poor, much of this legislation seeks to lure capital into poor neighborhoods. The results have been modest at best.

There may be no surprise here. The modest incentive effect of the tax reduction offered in the poverty zones may be no surprise to the extent that the federal income tax never drove business out in the first place. In U.S. history, the so-called urban blight and heartland Rust Belt developed in the context of industrial transformation. While the complete economic history lies beyond the scope of this Article, an overview of the relevant context follows.

In the mid-twentieth century, the Great Migration occurred.[371] This led a largely African American population from obsolescent agrarian work northward to new manufacturing jobs. Subsequently, the inner city became the site of "'white flight,' a process by which white households left central cities to avoid living in racially diverse neighborhoods or jurisdictions."[372] It's unclear if this flight may have been motivated in part by increasing property tax rates which in America are state rather than federal imposts.[373] Recent econometric research confirms that "whites responded to this black influx by leaving cities" where any "indirect effect on housing prices" accompanying a migration-induced

371. *See* JAMES R. GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION 3 (1989).

372. Leah Platt Boustan, *Was Postwar Suburbanization "White Flight"? Evidence from the Black Migration*, 125 Q.J. ECON. 417, 418-19 (2010) [hereinafter Boustan I]. *See also* LEAH PLATT BOUSTAN, COMPETITION IN THE PROMISED LAND: BLACK MIGRANTS IN NORTHERN CITIES & LABOR MARKETS 148 (Princeton Univ. P. 2017) ("white households left central cities to avoid fiscal/political interactions with black arrivals through shared municipal elections and public schools").

373. Boustan I, *supra* note 372, at 420.

increase in demand was not the "sole cause" of their departure.[374] Assuming the pre-existing population was not merely rational optimizers, it may be no surprise that their geographic decision reflected their psychological identity. To the extent that the empirical studies have not applied this reasoning to the tax zone legislation, a topic for future research persists.

A case in point is the Rio Grande Valley. Designated an Empowerment Zone, the formerly agrarian area remains impoverished.[375] "When agricultural jobs were plentiful along the border, generations of people came to South Texas for work."[376] Now, "sectors such as agriculture have shrunk."[377] Many *colonia* communities that remain in the "vast, arid region" have "no access to drinkable water."[378] Physical geography may be as much to blame for the barren landscape as any federal income tax burden.

As of the late twentieth century, American industry was in decline. Geographers observed that the "manufacturing sectors of central cities, which have always been more vulnerable to expressions of organized discontent or political regulation, have been reduced to zones of . . . high unemployment."[379] In particular, "cities like Chicago, New York, Los Angeles, and Baltimore have seen their traditional blue-collar manufacturing employment cut in half in the last 20 years" of the past Century.[380] If so, it is no wonder that the first Empowerment Zone legislation was a response to the Los Angeles Riots.

As American industry declined, technology proliferated across the Pacific. Specifically, the "rise of China" became "no doubt one of the most important events in world economic history since the Industrial Revolution."[381] Like the eighteenth and nineteenth century Great Transformation in the North Atlantic, the current industrialization in Asia would be disruptive on a world-historic scale.[382] This is the context in which the U.S. landscape changed.

Similarly, the Rust Belt formed upon the obsolescence of the heavy industry that had dotted the American countryside. Geographers noted that the "dispersal and creation of many new jobs in rural settings has

374. *Id*. at 417.

375. *See* JORDANA BARTON ET AL., FED. RESERVE BANK OF DALLAS, LAS COLONIAS IN THE 21ST CENTURY: PROGRESS ALONG THE TEXAS-MEXICO BORDER 2 (2015).

376. *Id.*

377. *Id.* at 10.

378. *Id.* at 1, 3.

379. DAVID HARVEY, JUSTICE, NATURE & THE GEOGRAPHY OF DIFFERENCE 337 (1996).

380. *Id*.

381. Wen, *supra* note 134, at ix.

382. *See generally* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLICY & ECONOMIC ORIGINS OF OUR TIMES (1944).

facilitated capitalist control over labor."[383] Thus, rural and urban facilities had been the location not only of agriculture but also "electronics and other supposedly ultra-modern industries."[384] Those jobs were superseded by world-wide industrialization, especially in Asia. Economists confirm the developing "global middle [class], which mostly consists of Chinese and Indians, has enjoyed massive growth over the past few decades."[385] Social scientists agree "the world's poor have gotten richer in part at the expense of the American lower middle class."[386] This is not to mention that "Japan's lost decade and the collapse of the Soviet Union are largely responsible for the slow growth of this cohort."[387] Lower middle-class resentment, caused by economic displacement, can fester in the East as well as in the West. The Rust Belt was a casualty of economic history.

Federal income taxation would not have been the cause of the technological transformation of the world economy. Consequently, it may be no surprise that the tax zone incentives have not lured commerce back to the mines and industrial plants in the hinterland or inner cities. To the extent that the empirical studies have not analyzed the legislation in this light, the topic remains open for future research.

Meanwhile, the geographic intuition of the legislature is undeniable. Since the time of the first lawmakers, the legislature has imposed taxation not merely to collect the revenue for public functions but effectively to redistribute the national wealth. Any flaw in the tax zone concept by exception proves the rule of redistributive taxation over the long course of economic history. The lesson may be that market creation requires an intervention more heroic than narrow tax incentives.

At the dawn of the twenty-first century, the American political economy had reached an equilibrium. The post-World War II bipolarity had subsided, yet the United States remained a superpower. At that point, the reigning consensus between the major electoral parties was such that third-party candidates could describe themselves as "Demicans" versus "Republocrats."[388] Among other world-historical events, the Sinocentric industrial revolution emerged. Lately, the U.S. presidential election featured perhaps the most notorious socialist candidate since Eugene

383. MICHAEL KEITH & STEVE PILE, PLACE AND THE POLITICS OF IDENTITY 43 (1993).

384. *Id.*

385. Homi Kharas & Brina Seidel, *What's Happening to the World Income Distribution? The Elephant Chart Revisited* 15 (Brookings Inst. Global Econ. & Dev. Program, Working Paper No. 114, 2018).

386. PINKER, *supra* note 124, at 113.

387. Kharas & Seidel, *supra* note 385.

388. A prominent supporter of the 3rd-party candidate said, "I am going to vote for Ralph" Nader, who "will draw votes from Bush as well as Gore . . . both Republocrats and Demicans." ROB ROSENTHAL & SAM ROSENTHAL, PETE SEEGER: IN HIS OWN WORDS (2015); *see supra* note 10 and accompanying text.

Debs as well as a victor associated with white nationalism.[389] In the end, the electorate had stark ideological choices (both voiced by white, patriarchal authority figures).[390]

Meanwhile, the Rust Belt and urban blight had become economic casualties. Then the disruption would afford political opportunities for previously marginalized interests across the spectrum.[391] To the extent that disruption of entrenched power itself opens opportunity, the future had begun.

VI. CONCLUSION

This Article has described the OZ provision as the latest in a series of tax zone incentives enacted over the past few decades. To evaluate the effectiveness of these bills, this Article reviewed the relevant economic literature. Moreover, the theory underlying the legislation is understandable in the context of the historical and philosophical foundation in local and national taxation, or fiscal geography. Thus, tax zones represent a nexus of law and social science.

Taxation begins with the taxpayer, wherever he or she lives. There the taxpayer produces revenue on the farm, in the shop, or elsewhere. When production generates a surplus over subsistence, taxpayers build civilizations. These complex states require coordination by law and economic distribution throughout the society. Fundamental questions of justice arise.

Historically, solutions followed. The maintenance of the parochial population was a natural exigency, and national taxation was geographically and economically redistributive. Anthropologists observed that the "interlocking of local and national interests has a contemporary (one might even say a universal) flavor of competition for resources and power."[392] Since geography may determine where there is a feast or a famine, the national fiscal function could equalize life chances.

Currently, the tax incentive zones reflect the long-standing propositions. Where a population forms a pocket of poverty, lawmakers

389. James Hohmann, *Bernie Sanders Has a Eugene V. Debs Problem*, WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/01/22/the-daily-202-bernie-sanders-has-a-eugene-v-debs-problem/ [https://perma.cc/X3AR-VF2G]; Jonathan Allen, *In the Dark Corners of White Nationalism, the Talk is of Trump*, NBC News (Oct. 30, 2018), https://www.nbcnews.com/politics/politics-news/dark-corners-white-nationalism-talk-trump-n926221 [https://perma.cc/U2ZW-E34N].

390. *See* Dana Milbank, *Bernie is the Left's Version of Trump*, WASH. POST (Apr. 3, 2019), https://www.washingtonpost.com/opinions/bernie-sanders-has-emerged-as-the-donald-trump-of-the-left/2019/04/02/66a516f4-5576-11e9-8ef3-fbd41a2ce4d5_story.html [https://perma.cc/YMC8-CEJH].

391. *See* ROBERTO UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 70 (2004).

392. MOORE, *supra* note 27, at 72.

may be inclined toward relief of economic distress. Federal tax legislation may be a suitable vehicle for geographic redistribution. At the same time, the legislators may wish to create markets for commercial production. Thus, the Empowerment Zones were supposed to incentivize local entrepreneurs. Responding to acts in the nature of war and disaster, the Liberty and GO Zones were for reconstruction in rich and poor cities, respectively. In the Great Recession, the Recovery Zone was for areas of unemployment. Now the OZ is for equity investment in poverty zones. Over decades of experience, the economic effect of the various tax incentives has proven modest at best.

The effect of the tax incentive zones fits into a larger analytic context. At a microeconomic level, incentives apply to rational actors. Yet the taxpayer to whom the zone offered the incentive may have behaved psychologically rather than rationally. Among the psychological factors would have been the perception of the inner city or "blighted" countryside. At this point, the role of the tax collector was to allow the applicable credits or deductions mechanically. It remained with Congress to authorize proactive welfare or business administration.

As a matter of fiscal geography, taxation is not merely the measurement of the codified ability to pay. The preparation of returns and collection of revenue are the government's center of gravity. The counterposed behavior of taxpayers and officials is an essential encounter in the state's expansion or contraction. Taxation needs to balance between psychological and cultural as well as economic and legal norms.

At a macroeconomic level, global transformation has occurred. By the twenty-first century, American industrial growth was on the decline relative to that in China. Although focused federal income tax reduction could shift some economic distress among the 50 states, the zone provisions may be no match for world-historic forces. In the ongoing trans-Pacific industrial revolution, socioeconomic disruption is certain. The question remains which measures the countries may adopt to ensure the life chances of their inhabitants.

A PALATABLE OPTION FOR SUGAR-COATED PALATES: LABELING AS THE LIBERTARIAN PATERNALISM INTERVENTION THAT AMERICAN CONSUMERS NEED

*Nicholas G. Miller**

Abstract

Addressing nutritional health for Americans has proven uniquely challenging in a marketplace flooded with non-nutritious food products. Compounding the issue, consumers consistently misjudge the contents of these processed foods and undervalue their pernicious effect. At the same time, consumers are wary of overly intrusive or paternalistic government interventions, such as bans and portion limits. This Article reflects on the effectiveness (or lack thereof) of previous attempts by the FDA to combat public health threats. Finally, this Article proposes a path forward, with growing political momentum, that builds on the innovative food labeling models being tested in markets around the world.

* J.D. 2021, UCLA School of Law; B.S.E., Concentration in Entrepreneurship and Innovation, 2016, Wharton School, University of Pennsylvania. Special thanks to Professor Michael T. Roberts, Director of the Resnick Center for Food Law and Policy at UCLA School of Law, for invaluable assistance in developing this Article.

INTRODUCTION

How has the land of the free become the home of the overweight? An increase in obesity is part of a larger epidemic of chronic disease stemming from the harmful dietary patterns of Americans. These harmful dietary patterns include a rise in the proportion of empty calories in the form of added sugars from processed foods and sweetened beverages, which leave little room in the diet for nutritious foods.

This Article explores how the Food and Drug Administration (FDA)—the executive agency charged with insuring food safety—can respond to the nutrition crisis with an incremental approach that relies on labeling. Part I will describe the origins of the FDA and the traditional limitations on its power as contextual background to a discussion of the FDA's authority to regulate relative to the checks of the legislative and judicial branches.[1]

Part II explains how the FDA's original goal of protecting against contamination and unsanitary food preparation has evolved into responding to the health risks imposed by non-nutritious foods.[2] The modern nutrition crisis is analyzed, along with the related issues of consumer awareness and the bounds of rational decision-making by consumers. Furthermore, the FDA's ability to respond to nutritional issues is examined, insofar as the FDA is hampered by its position in a fragmented regulatory system where overlapping agencies, such as the United States Department of Agriculture (USDA), hold the reins. The FDA is also limited by political forces, such as lobbying by industries that do not want to be restricted (as illustrated by two examples of failed regulatory efforts by the FDA), and by practical budgetary restraints.

Part III examines the increased use of food labeling and argues that labeling is an ideal tool for countering the limitations faced by the FDA in promoting good nutrition.[3] This argument is supported by tracing the strong statutory basis for the FDA's authority over labeling, which has been reinforced by legislation such as the Nutrition Labeling and Education Act of 1990 (NLEA). The effects of the NLEA are then examined, including the standardization of labels, which has helped mitigate the effects of a fragmented food regulatory system by consolidating power with the FDA. The usefulness of this incremental approach, which relies on labeling, is then discussed by reviewing a 2016 rule that the FDA released which updated the original nutrition panel with a mandatory "added sugar" disclosure.

Finally, Part IV proposes additional incremental changes that the FDA could implement to build on the 2016 rule on added sugar, and to promote more informed decision-making by consumers.[4] This Article advocates for front-of-label solutions that are meant to serve as a "nudge" for consumers. These nudges could include clear visual indicators for products that contain an excessive amount of non-nutritious ingredients, such as sugar or salt.

1. *See infra* Part I.
2. *See infra* Part II.
3. *See infra* Part III.
4. *See infra* Part IV.

I. THE FDA'S ORIGINAL MANDATE TO ADDRESS FOOD SAFETY

The United States Food and Drug Administration (FDA) is a federal agency that was originally tasked primarily with enforcing hygienic and sanitary food quality standards.[5] The parameters of that authority are set out by a series of broad statutes that have been interpreted by judicial decisions and further legislation.[6] The FDA's early history in regulating food safety provides a reference point with which to contrast the challenges the FDA now faces in attempting to regulate nutritional health risks.

A. *Historical Origins of the FDA*

Agricultural safety in the United States has been monitored since the mid-1800s by the United States Department of Agriculture (USDA).[7] However, the start of the modern, consumer-oriented era of food regulation, overseen by the FDA and the USDA, came into existence in only 1906.[8] That year, Congress enacted the Federal Meat Inspection Act (FMIA), which empowered the modern USDA, as well as the Pure Food and Drugs Act (PFDA), which empowered the modern FDA to regulate misbranding and adulteration.[9] These landmark Acts were passed in the wake of outcries over Upton Sinclair's *The Jungle*, which documented the disturbingly unsanitary conditions in American meat factories.[10] Sinclair's account prompted President Theodore Roosevelt to commission his own investigation, which resulted in a damning report, despite frantic cleanup efforts by the meat packing industry.[11] The rising public pressure compelled Congress to act, leading to the passage of these two monumental 1906 acts—FMIA and PFDA—by a landslide.[12] These two acts laid the framework for the modern FDA and USDA.[13]

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5. U.S. FOOD & DRUG ADMIN., FDA FUNDAMENTALS (Jan. 8, 2021), https://www.fda.gov/about-fda/fda-basics/fda-fundamentals [https://perma.cc/3XE6-UKB8]; *see* U.S. FOOD & DRUG ADMIN, WHEN AND WHY WAS FDA FORMED? (Mar. 28, 2018), https://www.fda.gov/about-fda/fda-basics/when-and-why-was-fda-formed [https://perma.cc/H2DS-XJKC].

6. *See* discussion *infra* Parts I.B, I.C.

7. U.S. FOOD & DRUG ADMIN., FDA HISTORY, https://www.fda.gov/about-fda/fda-history [https://perma.cc/3R4K-Z6K5] (last visited June 29, 2018).

8. *Id.*

9. *See* U.S. FOOD & DRUG ADMIN., MILESTONES IN U.S. FOOD & DRUG LAW, https://www.fda.gov/about-fda/fda-history/milestones-us-food-and-drug-law [https://perma.cc/36F3-VV82] (last visited Jan. 31, 2018).

10. James Harvey Young, *The Pig That Fell into the Privy: Upton Sinclair's The Jungle and the Meat Inspection Amendments of 1906*, 59 BULL. HIST. MED. 467, 470, 476 (1985).

11. *Id.* at 475–76 (describing stomach-churning conditions in a factory where a pig that slid into a latrine was fished out, only to be returned to the production line, after it had passed the cleaning stage).

12. *See* WHEN AND WHY WAS FDA FORMED?, *supra* note 5; MILESTONES, *supra* note 9.

13. HISTORY, ART & ARCHIVES, HISTORICAL HIGHLIGHTS: THE PURE FOOD AND DRUG ACT,

Over the past century, the FDA has grown much larger to keep up with the sprawling food industry. The FDA now consists of nine center-level offices and thirteen headquarter offices.[14] The FDA regulates all food, except meat, poultry, and some egg products.[15] The FDA defines itself as a "science-based agency," which is reflected in its guidance of the food industry, and it claims to be insulated from political pressures.[16] The structure of the modern FDA, with its limited authority, is a result of a handful of statutes and judicial decisions.

B. *Legislative Development of the FDA's Statutory Authority*

Food safety legislation began with the Federal Meat Inspection Act (FMIA) and the Pure Food and Drug Act (PFDA) in 1906.[17] Over the last century, Congress has added countless amendments and pieces of legislation, but the most comprehensive was the 1938 Food Drug and Cosmetics Act (FDCA).[18]

The FDCA filled in many of the gaps from the PFDA in 1906, which it replaced. The FDCA authorized standards for the identification and quality of products, as well as making court injunctions a viable remedy for enforcement.[19] The FDCA also introduced major changes, such as labeling requirements, which reflected the FDA's evolving role and its attempt to stay ahead of the rapidly developing food industry.[20] Congress drafted the FDCA in broad language and empowered the FDA to enforce prohibitions on products that are "injurious to health," as well as products that are "false or misleading in any particular."[21] Supporters of an expansive role for the FDA saw this language as providing a great deal of additional authority, while for challengers it provided fodder for claims of ambiguity as to the scope of the FDA's power. Some FDA officials in the decades since the enactment of the FDCA have interpreted the

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https://history.house.gov/Historical-Highlights/1901-1950/Pure-Food-and-Drug-Act/ [https://perma.cc/5MRZ-V2EM] (showing that the Pure Food and Drugs Act was passed by a vote of 204 to 17 on June 23, 1906) (last visited July 28, 2021).

14. U.S. FOOD & DRUG ADMIN., FDA ORGANIZATION CHARTS, https://www.fda.gov/about-fda/fda-organization/fda-organization-charts [https://perma.cc/2FB3-EM9C] (last visited Dec. 13, 2019).

15. U.S. FOOD & DRUG ADMIN., LAWS ENFORCED BY FDA, https://www.fda.gov/regulatory-information/laws-enforced-fda [https://perma.cc/7VK5-SRWL] (last visited Dec. 13, 2019).

16. Rebecca L. Goldberg, *Administering Real Food: How the Eat-Food Movement Should--And Should Not--Approach Government Regulation*, 39 ECOLOGY L. Q. 773, 787 (2012).

17. MICHAEL T. ROBERTS, FOOD LAW IN THE UNITED STATES 79 (2016).

18. MILESTONES, *supra* note 9.

19. 21 U.S.C. §§ 332, 341–50 (2018); MILESTONES, *supra* note 9.

20. Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 62 (1984).

21. Peter Barton Hutt, *Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act*, 50 FOOD & DRUG L. J. 101, 102 (1995) (letter by the then Assistant General Counsel for the FDA in 1971); 21 U.S.C. §§ 342–43.

agency's mandate to protect public health broadly as authorization to promulgate regulations that provide creative and innovative food safety solutions.[22]

Congress has periodically enacted new legislation as the food landscape changes. When the public's interest in nutrition heightened in the 1960s, the FDA began to rely increasingly on regulation through labeling.[23] That trend towards labeling was initially codified through major acts such as the 1966 Fair Packaging and Labeling Act to regulate labels on goods shipped interstate.[24] That 1966 Act was later reinforced by the 1990 Nutrition Labeling and Education Act (NLEA), which required all foods to bear labels and preempted portions of state authority.[25]

In practice, the FDA is often constrained by its limited budget and by the need to please both the public and the food industry while not overstepping boundaries set by Congress and the judiciary.[26] The result is that the FDA often acts responsively, rather than proactively, by acting only when a situation becomes urgent.[27] Thus, the courts have adjudicated some food safety issues that could have been better addressed by the FDA.[28]

C. *Judicial Interpretation of Food Safety Laws*

To understand how the FDA can best create solutions for modern nutrition issues, it is important to understand the way in which the FDA's actions have been limited by the courts. Not long after the passage of the 1938 Food Drug and Cosmetics Act, Congress enacted the Administrative Procedure Act (APA), a critical piece of legislation that acted as a check on administrative agencies.[29] The APA provided, in part, that litigants had a right to judicial review when "suffering legal wrong

22. Hutt, *supra* note 21, at 102 (letter from 1971 by Peter Barton Hutt, the Assistant General Counsel at the time, who wrote "I am not at all certain that the Food and Drug Administration has begun to explore the full reaches of existing statutory authority.").

23. ROBERTS, *supra* note 17, at 4.

24. MILESTONES, *supra* note 9.

25. *Id.* (NLEA standardized certain food terms, preempting state power to regulate terms like "low fat").

26. *See* Andrea T. Borchers et al., *The History and Contemporary Challenges of the US Food and Drug Administration*, 29 CLINICAL THERAPEUTICS 1, 2 (2007); 5 U.S.C. § 801; *see, e.g.*, RENEE JOHNSON, CONG. RESEARCH SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 10 (2016) (noting that FDA in 2012 said it would need an additional 400 to 450 million dollars to effectuate the changes from the FSMA).

27. Borchers, *supra* note 26, at 1.

28. Hutt & Hutt II, *supra* note 20, at 72; Hutt, *supra* note 21, at 105.

29. ROBERTS, *supra* note 17, at 18.

because of agency action, or adversely affected . . . by agency action."[30] This legislation provided the basis for judicial review of agency actions.

Early decisions by the Supreme Court, starting in the 1950s, revealed a tendency towards a liberal construction in the authority of administrative bodies, particularly with regard to food and drug law and the need to protect the consumer.[31] That liberal line of thinking was somewhat inconsistently followed by circuit courts that interpreted the scope of the 1938 Food Drug and Cosmetics Act.[32] However, in 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[33] the Supreme Court increased the power of federal agencies by holding that courts should defer to agency interpretations of statutes.[34]

There are two key principles that modern courts typically rely on to adjudicate challenges to agency powers: (1) Title 5 U.S.C. § 706 prohibits regulation that is "arbitrary [and] capricious;"[35] and (2) *Chevron* further clarifies that courts must defer to agency interpretation when the scope of an agency's power is unclear.[36]

Thus, while the APA gives litigants the right to seek redress for oversteps by administrative agencies, the bar is fairly high, and agency actions are presumed to be valid unless proven otherwise.[37] Despite some mixed results in the lower courts, the Supreme Court has ruled in favor

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30. 5 U.S.C. § 702.

31. *See* 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951) ("By the Act of 1906, 34 Stat. 768, as successively strengthened, Congress exerted its power to keep impure and adulterated foods and drugs out of the channels of commerce. The purposes of this legislation, we have said, 'touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.").

32. *See, e.g.*, Int'l Nutrition, Inc. v. U.S. Dep't of Health & Human Servs., 676 F.2d 338, 341 (8th Cir. 1982) (finding "Remedial legislation, such as the [Food Drug and Cosmetics] Act, should be given a liberal construction consistent with its statutory purpose"; United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 246 (2d Cir. 1977) ("Yet, when we are dealing with the public health, the language of the Food, Drug and Cosmetic Act should not be read too restrictively, but rather as 'consistent with the Act's overriding purpose to protect the public health'").

33. 467 U.S. 837 (1984).

34. *Id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of *deference to administrative interpretations*.").

35. 5 U.S.C. § 706 (providing in part that courts "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

36. City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (finding that a "court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority")) There have also been recent challenges to *Chevron* though, *see* Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) (passed by the House, attempting to reign in *Chevron* Deference as a violation of the separation of powers).

37. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356 (2016).

of agency actions on challenges of arbitrariness in over ninety percent of cases, as of 2016.[38] A broad view of the purpose of the FDCA—which gives the FDA greater latitude—was specifically endorsed in a recent 2014 case in which the Supreme Court wrote that "[t]he FDCA statutory regime is designed primarily to protect the health and safety of the public at large,"[39] which is in line with previous non-restrictive readings of the FDCA.[40]

Because of *Chevron*, the courts have not been a significant obstacle to FDA actions in recent years. The more pointed limitations that the FDA faces now come from Congress, which responds to both industry lobbyists and consumers, who often underestimate dietary health risks.

II. THE FDA'S CHALLENGES IN ADDRESSING THE ISSUE OF NUTRITION

Upton Sinclair's spotlight on food preparation and production in the early 1900s lifted a curtain into the unseemly world of unsanitary food and patently false advertising and sparked sixty years of food safety legislation.[41] Starting in the late 1950s a new focus emerged, led by nutrition scientists, concerning the nutrient quality of food in American diets and the overconsumption of particular ingredients, such as fat and sugar.[42] Just as unsanitary food issues had eventually caught the attention of President Theodore Roosevelt, protecting consumers from dietary risks caused by malnutrition was eventually addressed by President John F. Kennedy. In a speech to Congress in 1962, President Kennedy laid out the Consumer Bill of Rights noting that American consumers did not know "whether one prepared food has more nutritional value than another."[43]

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38. *Id.* at 1355.

39. POM Wonderful L.L.C. v. Coca-Cola Co., 573 U.S. 102, 108 (2014).

40. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 246 (2d Cir. 1977) ("Yet, when we are dealing with the public health, the language of the Food, Drug and Cosmetic Act should not be read too restrictively, but rather as 'consistent with the Act's overriding purpose to protect the public health.'"). *But see* INST. OF MED. & NAT'L RSCH. COUNCIL, ENHANCING FOOD SAFETY: THE ROLE OF THE FOOD AND DRUG ADMINISTRATION 296 (Robert B. Wallace & Maria Oria eds., 2010) (arguing for new, more clearly defined legislation, because the FDA may be more vulnerable to challenges, due to the ambiguity of broadly stated statutory authority).

41. *See supra* discussion in Part I.B.

42. Dariush Mozaffarian et al., *History of Modern Nutrition Science—Implications for Current Research, Dietary Guidelines, and Food Policy*, BRIT. MED. J. 1, 1–2 (2018), https://www.bmj.com/content/361/bmj.k2392 [https://perma.cc/6AT2-Y7CN].

43. 108 CONG. REC. 4167–71 (1962) (statement of President Kennedy) (Kennedy outlining rights in speech to Congress, such as the right to safety; to be protected against the marketing of goods which are hazardous to health or life); *see also* Paul Diller, *Combatting Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 975 (2013) (providing a modern formulation of the right to nutrition under a constitutional basis).

Unlike the regulation of unsanitary food, this new era of food regulation, which focused on a healthy diet, did not catch hold as quickly.[44] The nutritional health issue was again addressed in 1969 during the White House Conference on Food and Nutrition Health.[45] These talks laid the groundwork for hearings in Congress. The ensuing debates, beginning in the 1970s, have continued today over the role of food regulators in modifying American diets.[46]

Because everyone interacts with food daily, it is easy for decision makers in power to believe that the solutions to diet-related health risks are simple and intuitive. As a result, nutrition policy is often shaped by one-dimensional oversimplification of the factors leading to poor dietary health.[47] For example, in the 1970s, as the public (and food industry marketers) became increasingly focused on the content of their food, there was a growing debate over whether fat or sugar was the primary culprit contributing to poor diet.[48] This oversimplified view left room for only one target, which was fat, while sugar largely escaped notice and criticism.[49] This selection was reflected in the publication of Congress's first dietary guidelines in 1980, which focused on reducing fat in diets.[50] At the same time, food regulators such as the FDA have tried to fill in the gaps left by inadequate legislation regarding sugar, and have been met with great resistance.[51] That resistance comes from consumers who do not fully understand the risks of their dietary choices within a greater nutrition crisis, and from industry, which profits from the sale of unhealthy foods.[52]

A. *The Nutritional Health Crisis*

In recent years, trends of nutritional deficiencies are emerging that can be traced not to a lack of food altogether, but to the unavailability of nutritious food. Many people have only nutrient-poor food options.[53] While this paper focuses on trends within the United States, food insecurity is a global problem, as are increasing rates of obesity and diet-

44. *See* Diller, *supra* note 43, at 975.

45. David Kessler, *The Evolution of National Nutrition Policy*, 15 ANN. REV. NUTRITION xiii, xvi (1995).

46. *Id.*

47. Mozaffarian et al., *supra* note 42, at 1–5.

48. *Id*. at 1–2.

49. *Id.* Some saw this as a result of industry influence.

50. Kessler, *supra* note 45.

51. *See* Jennifer L. Pomeranz, *The Bittersweet Truth About Sugar Labeling Regulations: They are Achievable and Overdue*, 102 AM. J. PUB. HEALTH e14, e14, e16 (2012).

52. *See* Mozaffarian et al., *supra* note 42, at 5.

53. FOOD & AGRIC. ORG. UNITED NATIONS, THE STATE OF FOOD SECURITY AND NUTRITION IN THE WORLD 90 (2019), http://www.fao.org/state-of-food-security-nutrition/en/ [https://perma.cc/L4WN-GPBP] (FAO report examining the state of food security and nutrition worldwide).

related disease.[54] Perhaps most troubling, the prevalence of high-calorie, low-nutrient processed foods has been linked to higher rates of child obesity.[55] Joint studies by world health organizations have linked dietary health diseases with greater access to processed foods.[56]

1. Impact of Processed Foods

The United States has been hit particularly hard by the epidemic of malnutrition and the associated comorbidities such as obesity—which affected 42.4% of Americans as of 2021.[57] The increase in obesity is particularly pronounced in the youth population.[58] Americans now live in an environment characterized by an overabundance of food that is low in nutrient value but high in calories.[59] The rise in these nutrient-deficient, processed foods is often attributed, in part, to the role of the government in propping up agricultural producers.[60]

The culprit in the rise in malnutrition may be not only the increase in processed foods, but also what these processed foods are replacing. The Center for Disease Control found that less than ten percent of Americans were getting their recommended daily value of fruits and vegetables.[61]

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54. *Id.* In 2018, 1.3 billion people experienced "moderate food insecurity" globally, which is characterized in part by the need to choose nutritionally inferior food products.

55. UNITED NATIONS CHILDREN'S FUND (UNICEF) ET AL., LEVELS AND TRENDS IN CHILD MALNUTRITION 2 (2019), https://www.who.int/nutgrowthdb/jme-2019-key-findings.pdf?ua=1 [https://perma.cc/R8MF-BJDR] (2019 report on trends in child malnutrition. Just since 2000, the number of overweight children grew by 10 million).

56. *Id.* The report also identifies marketing reach and decreases in physical activity as contributors.

57. CTR. FOR DISEASE CONTROL & PREVENTION, ADULT OBESITY FACTS, https://www.cdc.gov/obesity/data/adult.html [https://perma.cc/K4ST-XRHF] (last visited Jan. 26, 2021) (CDC on rising rates of obesity in the United States).

58. CTR. FOR DISEASE CONTROL & PREVENTION, CHILDHOOD OBESITY FACTS, https://www.cdc.gov/obesity/data/childhood.html [https://perma.cc/GLN3-WFZX] (last visited July 29, 2021).

59. Deborah L. Rhode, *Obesity and Public Policy: A Roadmap for Reform*, 22 VA. J. SOC. POL'Y & L. 491, 496 (2015).

60. *Id.* However, the common thinking that oversupply of processed foods may be attributed specifically to subsidies has been challenged by a recent literature review arguing that overproduction would occur even without subsidies, and thus do not affect the consumer prices. The authors theorize that subsidies benefit the farmers and don't cheapen the products. They conclude that the overproduction is a result of deregulation of standardized price, which incentives overproduction by small and midsized farmers to hedge their risk, because they cannot adjust the growth of their crops to match market shifts. FOOD & WATER WATCH & PUB. HEALTH INST., DO FARM SUBSIDIES CAUSE OBESITY?: DISPELLING COMMON MYTHS ABOUT PUBLIC HEALTH AND THE FARM BILL 3–4 (2011), https://www.foodandwaterwatch.org/wp-content/uploads/2021/09/Farm-Subsidies-Obesity-Report-Oct-2011.pdf [https://perma.cc/88LU-Q2WN]. Regardless of the cause of increased processed food production, the baseline assumption—that there is a ubiquity of processed foods in the United States—remains undisputed.

61. *See* CTR. FOR DISEASE CONTROL, MAKING HEALTHY EATING EASIER, https://www.cdc.gov/nutrition/about-nutrition/pdfs/Nutrition-Fact-Sheet-H.pdf [https://perma.cc

That diet deficiency has taken its toll on American health for the last several decades, leading to "dietary risk" becoming the leading factor for mortality in the United States as of 2016.[62]

2. Overconsumption of Sugar and Associated Health Effects

While nutritional deficiencies are generally the result of many lifestyle and dietary decisions, sugar has been consistently identified as a major contributor to poor health.[63] In particular, many Americans consume excessive amounts of sugar through their consumption of sugar-sweetened beverages.[64] Because sugar is such a major source of calories for Americans, many studies have been conducted on its effect. These studies have found that sugar promotes weight gain, among other deleterious effects.[65] With the connection of sugar to chronic disease now apparent, many prominent health organizations have recommended reductions in the intake of sugar in American diets, generally capping consumption at ten percent of daily calories.[66] Despite clear guidance, Americans continue to consume far too much sugar.[67] The cause of

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/UCP3-S6BF] (last visited Dec. 13, 2019) (CDC Division working from local to national level to encourage healthier eating).

62. The US Burden of Disease Collaborators, *The State of US Health, 1990-2016: Burden of Diseases, Injuries, and Risk Factors Among US States*, 319 JAMA 1444, 1451, 1469 (2018) ("Dietary Risk" was found to be the leading factor for death, as it was a factor in over half a million deaths in 2016. Dietary risk was assessed in part by questions that gauged the amount of fruits and vegetables individuals consumed.).

63. Vasanti S. Malik et al., *Sugar-sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review and Meta-analysis*, 98 AM. J. CLINICAL NUTRITION 1084, 1084 (2013).

64. *Id.* (Sugar sweetened beverages remain the top source of calories for Americans, despite modest decreases between 2000 and 2008 in consumption.).

65. *Id.* at 1084 (systematic meta-analysis of 32 different medical studies through March of 2013 found consumption of sugar associated with weight gain); *see also* WORLD HEALTH ORGANIZATION GUIDELINE: SUGARS INTAKE FOR ADULTS AND CHILDREN 3 (2015) (Reduced sugar intake is associated with body weight reduction. Sugar is also associated with dental cavities.); Miriam B. Vos et al., *Added Sugars and Cardiovascular Disease Risk in Children*: *A Scientific Statement From the American Heart Association*, AM. HEART ASS'N J., May 9, 2017, at e1018, e1022, e1024 (AHA concludes there is strong evidence of cardiovascular disease risk among children with high consumption of sugary beverages).

66. *See* Rachel K. Johnson et al., *Dietary Sugars Intake and Cardiovascular Health*, AM. HEART ASS'N J., Sept. 15, 2009, at 1011, https://ahajournals.org/doi/pdf/10.1161/circulationaha.109.192627 [https://perma.cc/DGV2-VAHH]; *see also* WORLD HEALTH ORGANIZATION GUIDELINE: SUGARS INTAKE FOR ADULTS AND CHILDREN 3 (2015) (recommending sugar intake be limited to 10% of daily energy intake).

67. *See* Linda Searing, *The Big Number: Americans Consume 17 Teaspoons of Added Sugar Daily. That's Way too Much*, WASH. POST (Nov. 2, 2019), https://www.washingtonpost.com/health/the-big-number-americans-consume-17-teaspoons-of-added-sugar-daily-thats-way-too-much/2019/11/01/318c9f6e-fbed-11e9-8190-6be4deb56e01_story.html [https://perma.cc/3Y9G-R73F].

irrational sugar consumption may be linked to consumer misunderstanding and lack of awareness about the risks.[68]

B. *Low Consumer Awareness—Requires a New Education Effort*

Despite the high rates of mortality from diet-related risks, consumers continue to choose unhealthy products.[69] Food experts hypothesize that this may be due to the average consumer's limited ability to assess the effect that the foods they consume will have on their health and weight.[70] After all, less than one of every ten Americans can accurately assess the amount of calories they should be consuming daily,[71] and over ninety percent of people underestimate the number of calories in unhealthy foods.[72]

With such a wide array of products on the market, consumers are simply unable to keep track of which products are healthy.[73] Even when consumers are paying attention while shopping for their young children, they often choose products with high levels of sugar and salt; parents make these poor choices, in part, because they are unable to assess the nutritional value from front labels that misdirect them with vague health claims.[74] The toddlers consuming these unhealthy products may see up to 800 advertisements for junk food annually, shaping their attitude towards food products and brands when their associations are most malleable.[75]

This limited decision-making ability of consumers, coupled with the inundation of processed foods that are aggressively advertised and promoted, has created a perfect storm for malnutrition to thrive.[76] Agencies, such as the FDA, have had difficulty responding to this crisis due to the disaggregated nature of food regulation and due to political barriers.[77]

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68. *Id.* (noting that "sugars are often present in foods not thought of as sweetened: soups, bread, cured meats, and ketchup").

69. *Id.*

70. Rhode, *supra* note 59, at 499.

71. *Id.*

72. *Id.*

73. Catherine Boudreau, *Why We Don't Know what to Eat to Stay Healthy*, POLITICO (Nov. 1, 2019), https://www.politico.com/newsletters/morning-agriculture/2019/11/01/why-we-dont-know-what-to-eat-to-stay-healthy-781975 [https://perma.cc/H9SU-EB2A].

74. Laura Reiley, *Sweet Excess: How the Baby Food Industry Hooks Toddlers on Sugar, Salt and Fat*, WASH. POST (Oct. 17, 2019), https://www.washingtonpost.com/business/2019/10/17/sweet-excess-how-baby-food-industry-hooks-toddlers-sugar-salt-fat/ [https://perma.cc/TZT9-6SE3].

75. *Id.*

76. *See id.*

77. *Id.*

C. *Bureaucratic Obstacles to Sweeping Changes by the FDA*

Efforts to regulate nutrition can take many forms, from the most intrusive, such as outright bans of unhealthy foods, to less restrictive options, such as required disclosures, education, and restrictions on marketing to children.[78] The FDA has a key role in the regulation of nutrition but struggles to balance consumer protection with industry demands.[79] As the National Research Council explained: "Although food safety is the responsibility of everyone, from producers to consumers, the FDA and other regulatory agencies have an essential role. In many instances, the FDA must carry out this responsibility against a backdrop of multiple stakeholder interests, inadequate resources, and competing priorities."[80]

In attempting to navigate this gauntlet of competing interests, the FDA has seen mixed results. Its power has been expanded in some areas, such as labeling, where it appears to be making steady progress, most notably with the passage of the 1990 Nutrition Labeling and Education Act.[81] However, in other areas, the FDA's authority has been severely restricted, such as with the passage of the 1994 Dietary Supplement Health and Education Act,[82] which prohibits the FDA from regulating supplements as drugs.[83] One major obstacle in addressing nutritional health is the lack of coordination with other agencies, such as the USDA, which may also have different stakeholders, such as farmers.[84]

1. Limited by Operating Within a Fragmented Food Regulatory System

In the United States, there is a complex web of local, state, and federal overseers that seek to protect consumers by regulating the trillion-dollar food industry.[85] The sprawling regulatory system has been repeatedly examined by outside government accountability offices over the past four decades and found to be highly fragmented and lacking in cohesion.[86] That fragmentation creates both redundancy and uncertainty in legislative

78. *See* Rhode, *supra* note 59, at 493.

79. *See* INST. MED. & NAT'L RSCH. COUNCIL, *supra* note 40.

80. *Id.* at 9.

81. *Id.* at 433.

82. *Id.* at 27–28.

83. *See infra* Part II.C.2.ii discussion on caps and DSHEA.

84. *See* Rhode, *supra* note 59, at 30.

85. *See* JOHNSON, *supra* note 26, at 1 (providing an overview of the regulatory bodies and legislative jurisdiction within congress for food safety).

86. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-74, FOOD SAFETY: A NATIONAL STRATEGY IS NEEDED TO ADDRESS FRAGMENTATION IN FEDERAL OVERSIGHT 3 (2017) [hereinafter GAO FRAGMENTATION REPORT] (examining the U.S. food regulatory system, with main findings that it is highly fragmented, and recommending a national strategy to address this issue, potentially led by the Executive Office of the President).

attempts to regulate food safety.[87] Furthermore, agency responses to crises such as malnutrition and the obesity epidemic are handicapped when uncertainty as to the extent of the agency's power prevents them from taking effective action.[88] Food safety has been labeled a "high-risk" area due to the lack of coordination, leaving regulatory agencies vulnerable to fraud and mismanagement.[89]

Food in the United States is regulated by at least sixteen federal agencies and is mainly governed by thirty different federal laws—not to mention the myriad state and local agencies and ordinances.[90] The system of oversight extends to a variety of contexts, from the Federal Trade Commission for regulating the advertising of food, to the Center for Disease Control for foodborne illness management, and even to the National Marine Fisheries Service, which has power over the labeling of seafood.[91] These examples illustrate the breadth of regulatory jurisdiction among administrative agencies overseeing food safety, with many of the agencies playing a relatively minor role.

The two main pillars of food safety protection are the USDA, via its Food Safety and Inspection Service (FSIS), and the FDA, which falls under the Department of Health and Human Services.[92] The USDA, via FSIS, handles the regulation of meat and poultry while the FDA is responsible for regulating the safety of all other food.[93] Thus, the FDA is responsible for regulating 80 to 90 percent of the U.S. food supply while FSIS is responsible for the remaining 10 to 20 percent.[94] However, despite the FDA's significantly larger scope, the FDA's budget was approximately 20 percent smaller than that of FSIS in 2016.[95] Congress appears to have recognized this discrepancy, and momentum is building towards making the funding more proportionate to the scope of the agencies' oversight.[96] Thus, that 20 percent gap has since disappeared, and the FDA budget has exceeded the FSIS budget from 2019 to 2021.[97]

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87. JOHNSON, *supra* note 26, at 14 (congressional committees often uncertain as to who has jurisdiction on a given food law issue, leading to duplication and overlaps).

88. *But see* INST. OF MED. & NAT'L RSCH. COUNCIL, *supra* note 40, at 7–8 (advising rollout of new "risk-based" systematic approach of identifying and addressing the most urgent food safety issues but acknowledging that current fragmentation would be an impediment and recommending the integration of federal, state and local food systems).

89. GAO FRAGMENTATION REPORT, *supra* note 86, at 4.

90. *Id.* at 6; JOHNSON, *supra* note 26, at 5 (FDA works with over 400 state agencies nationwide).

91. JOHNSON, *supra* note 26, at 2, 7; GAO FRAGMENTATION REPORT, *supra* note 86, at 6–7.

92. GAO FRAGMENTATION REPORT, *supra* note 86, at 6.

93. JOHNSON, *supra* note 26, at 1–2.

94. GAO FRAGMENTATION REPORT, *supra* note 86, at 20 n.50.

95. *Id.*

96. JOHNSON, *supra* note 26, at 9.

97. Amber D. Nair, CONG. RESEARCH SERV., R46851, FY2020 and FY2021 Agricultural Appropriations: Federal Food Safety Activities 3 tbl. 1 (2021).

a. Influence of Agriculture Interests

While the regulatory jurisdictions of the FDA and USDA are mostly discrete, oversight of these two main agencies by Congress has been consolidated. Both agencies are overseen and have their funding administered by the Agriculture Subcommittee within Congress.[98] The fact that the Agriculture Subcommittee wields this power over funding is an institutionalized example of the deeply entrenched principle that the solvency of American farmers is paramount when executing food law and policy.[99] Thus, a linkage has developed between food assistance programs and supporting agricultural producers, which helps explain why the USDA (tasked primarily with food *production*) administers the Supplementary Nutrition Assistance Program (SNAP), rather than the FDA (tasked primarily with public health and food supply *safety*).[100]

A partial reconfiguration of the bifurcated system might reassign food programs, such as SNAP, to the FDA. SNAP is currently administered by the USDA's subgroup, known as the Food and Nutrition Service, whose mission statement lists two potentially competing goals: "reduce hunger by providing children and low-income people access to food [and] . . . a healthful diet," and doing so "in a way that supports American agriculture."[101] A question for further scholarly exploration is what happens when the two goals conflict, and whether the FDA might not be subject to such competing pressures. Either way, the bifurcated responsibility provides an obstacle to the FDA in responding to the nutrition crisis with sweeping action, because the FDA has typically had difficulty coordinating with an entirely different agency. While there is a recognition of the problems inherent in the USDA-FDA bifurcated system of food safety oversight, that division has existed since the beginning of the modern era of food regulation and has been repeatedly re-endorsed by legislators.[102]

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98. *Id.* at 13–14.

99. *See* JACOB E. GERSEN ET AL., FOOD LAW: CASES AND MATERIALS 650–51 (Rachel E. Barkow et al. eds., 2019) (discussing the linkage between buying surplus food from American farmers and hunger programs, codified in the Emergency Food Assistance Program, as part of a deeply rooted connection between farmers and the administration of nutritional assistance).

100. *Id*. at 651; *see also* U.S. DEP'T OF AGRIC., USDA STRATEGIC GOALS, https://www.usda.gov/sites/default/files/documents/usda-strategic-goals-2018-updated-1.pdf [https://perma.cc/3MS6-H5GL] (last visited Aug. 28, 2021) (USDA Strategic goals for 2108–2022 focused mostly on producers); U.S. FOOD & DRUG ADMIN., WHAT WE DO, https://www.fda.gov/about-fda/what-we-do [https://perma.cc/VGA8-AXBM] (last visited Jan. 7, 2021) (FDA mission statement focused on public health).

101. U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., ABOUT FNS, https://www.fns.usda.gov/about-fns [https://perma.cc/F6YD-KX37] (last visited Jan. 7, 2021).

102. *See* JOHNSON, *supra* note 26, at 2–3.

b. Dietary Guidelines

The paradigm of this disjointed regulatory system is the national dietary guidelines, which direct the FDA's nutritional priorities, but are created by the USDA.[103] These guidelines have been released every five years by the USDA since 1980.[104] While the guide purports to reflect only the "current body of nutrition science" to help "guide Americans to make healthy food and beverage choice," the reality is that millions of dollars are spent by major food conglomerates in lobbying during their creation.[105] Furthermore, because the USDA's priorities are intertwined with those of farmers and suppliers, the USDA sometimes supports perverse or misleading guidelines that represent compromises not fully aligned with the FDA's nutritional health initiatives.[106] However, the USDA's formulation of dietary guidelines is not the only process subject to industry influence. All food policies must make their way through the political process, subject to both industry and consumer demands.

2. Political Feasibility Limits from Industry and Consumers

Despite the mounting scientific evidence of the health costs imposed by dietary risks, the FDA still faces resistance from Congress against its attempts to regulate nutrition. This is because Congress is influenced by

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103. AGATA DABROWSKA, CONG. RESEARCH SERV., R43733, REVISION OF THE NUTRITION FACTS LABEL: PROPOSED RULES 1–3 (2014) (guidelines are created by a panel of nutrition experts and form the basis for nutrition policy).

104. Barbara O. Schneeman, *Evolution of Dietary Guidelines*, 103 J. AM. DIETETIC ASS'N 5–9 (2003).

105. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., ABOUT THE DIETARY GUIDELINES PURPOSE, https://health.gov/our-work/food-nutrition/about-dietary-guidelines [https://perma.cc/P3LY-PTYQ] (Dec. 29, 2020); *see, e.g.*, Markham Heid, *Experts Say Lobbying Skewed the Dietary Guidelines*, TIME (Jan. 8, 2016), https://time.com/4130043/lobbying-politics-dietary-guidelines/ (meat industry influence); Arielle Duhaime-Ross, *New US Food Guidelines Show the Power of Lobbying, Not Science*, THE VERGE (Jan. 7, 2016), https://www.theverge.com/2016/1/7/10726606/2015-us-dietary-guidelines-meat-and-soda-lobbying-power [https://perma.cc/5786-TDUH] (on meat and soda conglomerate influence); Karen Perry Stillerman, *"Big Food" Companies Spend Big Money in Hopes of Shaping the Dietary Guidelines for Americans*, UNION CONCERNED SCIENTISTS (June 6, 2019), https://blog.ucsusa.org/karen-perry-stillerman/big-food-companies-spend-big-money-in-hopes-of-shaping-the-dietary-guidelines-for-americans [https://perma.cc/S4AU-96WR] (on food companies spending many millions of dollars to effect decision-making).

106. *See, e.g.*, Michael R. Taylor, Senior Fellow and Director, Resources for the Future, Address at the Nutrition Labeling and Education Act (NLEA) 10th Anniversary 39–40 (Jan. 31, 2003) (transcript available at the U.S. Food and Drug Administration website), https://www.fda.gov/media/85806/download [https://perma.cc/3GZE-5JDY] ("[I]t was the label that we had recommended, but with an interesting kind of compromise, and there is a compromise in that label. The reason you've got the column of 2,000 and 2,500, you know, the nutrients—you know what I'm talking about. I forgot. But where we show the daily value of fat and other nutrients under a 2,000- and 2,500-calorie scenario is, I believe, the President or the staff knew a way of cutting the baby with USDA…. We won, I think, on 'lite.' We lost on restaurants.").

industry lobbyists and consumer opinion. Because the FDA's statutory authority is phrased fairly broadly, its authority to regulate nutrition has mostly been derived from their mandate to protect public health and was only formally reinforced in 1990 with the Nutrition Labeling and Education Act.[107] Thus, the FDA has had to find the limits of their power by trial and error. This process has shown that, while some efforts might have been effective health interventions if implemented, they were politically infeasible and may have created backlash that limited the FDA's later ability to intervene on nutrition concerns. Hence, the solution proposed in this Article is for the FDA to take a more cautious approach through incremental change. The following two subsections trace previous attempts to regulate that are illustrative of the risks to the FDA's authority from implementing interventions that both the public and industry perceive as overly restrictive. The first was a ban on saccharine, and the second was a limit on dietary supplements.

a. Ban on Artificial Sweeteners

In the 1970s, studies on artificial sweeteners, such as saccharine, indicated a risk of a carcinogenic effect on rats—which later studies hypothesized might similarly affect humans.[108] The FDA attempted to respond to this potential threat by removing saccharine from the list of ingredients that it deemed "generally recognized as safe" (GRAS)—an expansive list of ingredients that do not require pre-market approval by the FDA.[109] The FDA was able to use this reclassification as a tool to monitor temporarily the risks posed by saccharine until they could more conclusively prove its safety.[110]

A few years later, alarmed by the possible link to cancer, the FDA attempted to implement a full ban on saccharine in the market.[111] The ban lasted for about a week.[112] After extensive public outcry, the FDA's authority was curtailed and the Senate passed the Saccharine Study and

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107. Kessler, *supra* note 45, at 20.

108. *See, e.g.*, P.G.N. Kramers, *The Mutagenecity of Saccharin*, 32 MUTATION RES. 81 (1975) (finding mixed results in review of 17 studies of saccharin on mutagenicity); *see also* Melvin Dwaine Reuber, *Carinogenicity of Saccharine*, 25 ENV. HEALTH PERSPS. 173 (1978) (National Institute of Health study showing carcinogenic effects of saccharine on rats, which indicated potential effects for human consumption as well).

109. U.S. FOOD & DRUG ADMIN. GENERALLY RECOGNIZED AS SAFE *(GRAS)*, https://www.fda.gov/food/food-ingredients-packaging/generally-recognized-safe-gras [https://perma.cc/ZVA3-4SXR] (last visited Dec. 13, 2019); Harold M. Schmeck Jr., *F.D.A. Removes Saccharin from List of Safe Foods*, N.Y. TIMES, Jan. 29, 1972, at 27.

110. *Id.*

111. Schmeck, *supra* note 109, at 27.

112. Jesse Hicks, *The Pursuit of Sweet: A History of Saccharine*, CHEM. HERITAGE MAG., May 2, 2010, at 31 (Congress received over a million letters that week about the ban prompting swift action and the passage of the Saccharine Study and Labeling Act).

Labeling Act of 1977, which placed a two-year moratorium on bans of saccharine.[113] While the FDA has occasionally been successful in complete bans, such as in the more recent efforts with trans fats, that success has only come after conclusive evidence of health risks, a sustained public education effort, willingness from the public, and cooperation with industry.[114]

b. Supplements and DSHEA Response

Limitations on the production of certain products, or on the claims printed on the products, are among the most restrictive options the FDA can use. Attempts to use these restrictions did not fare well when applied to the massively popular dietary supplement market. The effort began in 1962, following a wave of increased attention about dietary health.[115] The FDA first tried to place limits on dietary supplements that contained high levels of vitamins.[116] That effort quickly drew industry and consumer attention, and the FDA backed down after intense consumer protest.[117]

Undeterred, the FDA continued to monitor dietary supplements, expressing renewed interest in the 1970s in the regulation of potentially toxic overuse of supplements.[118] However, in 1976, in response to sustained lobbying efforts, Congress passed the Vitamin-Mineral Amendment (known as the "Proxmire Amendment" after a leading senator) which prevented the FDA from regulating supplements as a drug, regardless of potency.[119]

Finally, the FDA efforts came to a head in the 1980s, following several adverse health incidents linked to supplements. A single supplement containing L-Tryptophan caused 1,500 cases of illnesses and 39 deaths.[120] Following these incidents, and with expanded authority from the passage of the Nutrition Labeling and Education Act (NLEA) in 1990, the FDA started putting together a task force in 1991 to treat

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113. *Id.*

114. CTR. FOR DISEASE CONTROL, *TRANS FAT: THE FACTS*, https://cchealth.org/eh/food/pdf/Trans-Fat-The-Facts.pdf [https://perma.cc/9B4W-5G6P] (last visited Aug. 28, 2021); U.S. FOOD & DRUG ADMIN., *TRANS FAT*, https://www.fda.gov/food/food-additives-petitions/trans-fat [https://perma.cc/A2MH-NBYK] (last visited Dec. 13, 2019) (FDA on history of trans fat regulation leading to ban in 2018, with leeway for industry to comply by 2020).

115. Azizi Rahi, *"Supplement" the DSHEA: Congress Must Invest the FDA with Greater Regulatory Authority over Nutraceutical Manufacturers by Amending the Dietary Supplement Health and Education Act*, 98 CAL. L. REV. 439, 442 (2010).

116. *Id.*

117. *Id.*

118. *Id.*

119. *See* Michael A. McCann, *Dietary Supplement Labeling: Cognitive Biases, Market Manipulation & Consumer Choice*, 31 AM. J.L. & MED. 215, 238 (2005).

120. *See* DONNA V. PORTER, CONG. RESEARCH SERV., RL30887, DIETARY SUPPLEMENTS: LEGISLATIVE AND REGULATORY STATUS 2 (2002).

supplements as drugs for approval.[121] When the supplement industry learned of this effort, a massive grassroots campaign was initiated to call for greater restrictions on the FDA's authority.[122] The result was the enactment in 1994 of the Dietary Supplement Health and Education Act (DSHEA). The DSHEA was widely viewed as restricting the FDA's authority over supplements. The DSHEA explicitly prohibited the rollout of the NLEA to supplements because they were not considered equivalent to food for regulatory oversight.[123]

Despite demonstrative evidence that the majority of consumers view dietary supplements as a substitute for drugs, DSHEA was enacted, specifically preventing the regulation of dietary supplements as drugs.[124] The DSHEA also shifted the burden to the FDA to prove that the supplements are *not* safe or effective, rather than requiring the industry to prove their safety and efficacy.[125] Thus, supplement regulation serves as a sobering example of FDA action that did not yet have sufficient support to override industry power and consumer preferences.

3. Limitations from Budgetary Constraints

Finally, in addition to the limitations from operating with a fragmented regulatory environment and from parameters set by Congress, the FDA's power is also limited simply by its budget. Furthermore, nutrition represents a disproportionately small percentage of the FDA's budget, at just 2%, while food safety is allocated the remaining 98%—which is one billion dollars.[126] The overall budget shortfall remains a problem today, as evidenced by the underfunding of the most recent major piece of legislation, the 2011 Food Safety and Modernization Act (FSMA).

The FSMA was a major statutory expansion of the FDA's power, which passed the political gauntlet. The FSMA was enacted by Congress to better control food poisoning outbreaks, and it is viewed as one of the most consequential pieces of legislation in food law since the Pure Food

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121. *See* Rahi, *supra* note 115, at 443.

122. *See* PORTER, *supra* note 120, at 4 (grassroots efforts mobilized health supplement industry all over the country, even offering discounts on products for supporting letters and petitions).

123. *See id.* at 3; *see also* United States v. Two Plastic Drums, 984 F.2d 814, 819 (7th Cir. 1993) (similarly restricting FDA authority over supplements by holding that black currant oil, as part of a supplement, was not a food additive and thus supplier did not bear burden of proving its safety).

124. *See* McCann, *supra* note 119, at 221 (citing studies indicating that 80% of consumers took supplements as a substitute for drugs).

125. Rahi, *supra* note 115, at 441.

126. *See* U.S. GOV'T ACCOUNTABILITY OFF, GAO-18-174, FOOD SAFETY AND NUTRITION: FDA CAN BUILD ON EXISTING EFFORTS TO MEASURE PROGRESS AND IMPLEMENT KEY ACTIVITIES (2017).

and Drug Act of 1938.[127] Despite the ambitious goals laid out in the FSMA, the FDA has been slow to roll out a similarly ambitious plan, likely due, in part, to a budget shortfall of over $400 million to make the changes.[128] Given these practical economic constraints, an economically efficient model is sorely needed.

III. FDA'S SHIFT TO LABELING AS AN INCREMENTAL APPROACH TO IMPROVING NUTRITION

As Part I one of this Article discussed, the FDA has a variety of tools available within the broad mandate of protecting public health that originated with revelations about food safety at the turn of the twentieth century. In the modern era of food regulation (in the last fifty years), the concern with public health has taken on new dimensions, moving beyond the original protections against contamination and adulteration and on to nutritional quality.

This part examines the origins of food labeling, the most effective tool for combatting nutritional deficiencies in an age of abundant processed foods and consumer ignorance. Labeling is an incremental approach that addresses the problems laid out in Part II because it is politically favored, insulated from the challenges of a disaggregated system by uniform labels, and is the best tool for educating consumers.

A. *FDA Has Clear Authority Over Labeling*

Previous efforts to regulate goods that the public or industry opposed have faced pushback from Congress, resulting in limitations to the FDA's powers.[129] Hence, there is a need to make political calculations when choosing the best tool by examining which tools have been endorsed by Congress and accepted by consumers. Over the last few decades, Congress has favored labeling. The next section traces the development of that labeling authority, which the FDA can wield as a more effective approach than other regulatory approaches because it is politically favored.

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127. *See* AMANDA HEMMERICH ET AL., FARM & FOOD LAW: A GUIDE FOR LAWYERS IN THE LEGAL SERVICES FOOD HUB NETWORK 44 (MAINE ED. 2014), http://www.legalfoodhub.org/wp-content/uploads/2014/05/Farm-and-Food-Law-Guide-Maine_May-2015.pdf [https://perma.cc/N3Z9-928S] (Congress expanded the FDA's regulatory oversight to include farms that produce raw produce, an area not previously in their purview, and the FSMA also created sweeping changes for farmers heightening their responsibility for maintaining safety standards); *see also* ROBERTS, *supra* note 17, at 8; MILESTONES, *supra* note 9 (much of the overall goal was to enhance safety by integrating local and state regulation with federal oversight by the FDA).

128. JOHNSON, *supra* note 26, at 10 (FDA reports in their 2012 budget that they would need 400 to 450 million dollars of additional funding to meet FSMA goals).

129. *See generally* Henry I. Miller, *Failed FDA Reform*, 21:3 REGULATION 24, 28–29 (1998), https://www.cato.org/sites/cato.org/files/serials/files/regulation/1998/7/v21n3-ftr2.pdf [https://perma.cc/XLY7-BRUU].

1. Origins and Development of Food Labeling Authority

The FDA has been the primary agency tasked with labeling since the passage of the Food Drug and Cosmetics Act (FDCA) in 1938. The FDCA has been continually amended since 1938 with provisions to ensure standards of identity for food to avoid misbranding.[130] With the heightened focus on nutritional health beginning in the 1960s, support for labeling rose in tandem, as illustrated by President Kennedy's address to Congress outlining a Consumer Bill of Rights which included a labeling right for a consumer to "be given the facts he needs to make an informed choice."[131]

This momentum carried through to 1966, when Congress enacted the Fair Packaging and Labeling Act (FPLA), which required that labels include a standardized statement of identity, net quantity, and place of origin.[132] The Act placed labels that travelled in interstate commerce under federal agency jurisdiction (primarily the Federal Trade Commission and the FDA), and required that the labels be informative and honest.[133] In the 1970s, the FDA attempted to increase their influence, as they did with other forms of regulation, but found greater success in labeling than they had with attempts at outright bans or limitations on products.[134] Thus, the FDA was able to implement nutrition-oriented changes such as the Nutrition Quality Guidelines for popular items like frozen dinners, which were given an endorsement by the federal government on the label if they met the nutrient content criteria.[135]

The relative success of food labeling has led to its recognition as an integral tool for public education by the FDA, which now considers labeling a major tool in the mission to protect consumers.[136] Further, subsequent amendments to acts such as the FDCA made clear that the FDA would have the ultimate say in what labels passed muster.[137] Food

130. 21 U.S.C. § 341 (2018).

131. Kennedy, *supra* note 43.

132. FED. TRADE COMM'N, FAIR PACKAGING AND LABELING ACT: REGULATIONS UNDER SECTION 4 OF THE FAIR PACKAGING AND LABELING ACT, https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-packaging-labeling-act [https://perma.cc/S8SB-N7BZ] (last visited Jan. 7, 2021).

133. *See* 15 U.S.C. § 1451 (prohibiting unfair and deceptive packaging and requiring labels to enable consumers to obtain accurate information about the quantity of contents); *see also* MILESTONES, *supra* note 9.

134. *See supra* Part II.C.2 (discussing the failed attempts to ban saccharine and limit vitamin composition and usage); Hutt & Hutt II, *supra* note 20, at 67–70.

135. *Id.* at 69.

136. U.S. FOOD & DRUG ADMIN., IS IT REALLY 'FDA APPROVED?', https://www.fda.gov/consumers/consumer-updates/it-really-fda-approved [https://perma.cc/7U5X-EMPP] (last visited Dec. 13, 2019); Kessler, *supra* note 45, at 20.

137. Margaret Rosso Grossman, *Food Labels and Labeling in the United States*, 10 EUR.

would be considered mislabeled if it failed to meet regulatory requirements set out by the FDA for both the principal display panel (front of label) and information panel (side or back of label).[138] The labeling requirements generally fall within two categories: affirmative statement requirements and permissible claims.

2. Types of Label Requirements—Affirmative and Permissible Claims

The basic dichotomy of labeling is requirements for affirmative statements (e.g., statement of identity, net quantity, and ingredients) and standards for permissible claims (additional information that labels may include).[139] Affirmative requirements are less controversial—and subject only to rational basis review by courts[140]—when the FDA requires producers to include only information about their products, as opposed to suppressing speech.[141] For that reason, this Article focuses on recommendations and analysis of affirmative requirements (also known as compelled speech). Affirmative labeling represents an incremental approach compared to outright bans and is more clearly within the bounds of FDA jurisdiction.[142]

The permissibility of claims made by producers is the area where much of the modern era of food litigation has taken place because of its implications on the curtailment of the first amendment right to speech.[143] Many of these disputes center on claims of health benefits asserted on the labels of food, such as positive effects on a disease or general wellbeing

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FOOD & FEED L. REV. 160, 160 (2015).

138. *Id.*; 21 U.S.C. § 343.

139. ROBERTS, *supra* note 17, at 232.

140. Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J. L. & POL'Y 53, 80 (2016) (explaining that as long as factual information is being compelled, the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* indicates rational basis review is the appropriate standard).

141. *Id.* at 54 (discussing a trend in regulation towards compelled speech on labels, in light of the harsh review by the Supreme court for restrictions on commercial speech).

142. *See* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (establishing the prevailing standard for affirmative (or "compelled") speech of rational basis review when "the State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial speech").

143. There has been a long line of cases litigating the issue of commercial speech restriction beginning with *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), the bedrock case laying out a four-part test for the evaluating whether a limitation infringes on the right to commercial free speech:

1) Threshold requirement that the content must not be inherently misleading
2) Government must have a substantial interest
3) Regulation must directly and materially advance the government's goal
4) The regulation must be narrowly tailored.

made by producers trying to entice customers.[144] Until the enactment of the Nutrition Labeling and Education Act (NLEA) in 1990, health claims were heavily monitored and it was difficult for them to pass muster given the stringent standard that they require pre-market approval in the same way as drugs.[145] A shift away from treating health claims for food with the same standard as health claims for drugs is just one of the many changes that was introduced by the sweeping legislation of the NLEA in 1990.[146]

3. Labeling is the Least Paternalistic Intervention

Another major benefit of labeling is that it may be the most palatable option to consumers in balancing their autonomy to make choices about their health, despite this personal choice narrative being fueled by industry framing.[147] Surveys have shown considerably more support for labeling options that provide information than for taxes on unhealthy foods such as sugary beverages.[148] Thus, there is support for what has been termed "libertarian paternalism," in which interventions are designed to alter consumer behavior without restricting their choice or providing economic incentives.[149] This approach is also consistent with recommendations from the National Research Council, which identified "public acceptance" as a factor to consider when assessing the risks for a new food regulation initiative.[150]

B. *Label Standardization Negates Fragmentation in the Regulatory Environment*

Fragmentation within the regulatory environment for food safety is often cited as a source of inefficiency.[151] Labeling presents a workaround for that problem because the FDA has clear authority over labeling. Following the Nutrition Labeling and Education Act, the FDA was given

144. Mara A. Michaels, *FDA Regulation of Health Claims Under the Nutrition Labeling and Education Act of 1990: A Proposal for a Less Restrictive Scientific Standard*, 44 EMORY L.J. 319, 323 (1995).

145. *Id.* at 319.

146. *Id.* at 319–20.

147. *See* Laura Nixon et al., *"We're Part of the Solution": Evolution of the Food and Beverage Industry's Framing of Obesity Concerns Between 2000 and 2012*, 105 AM. J. PUB. HEALTH 2228 (2015) (for commentary on the concerted efforts of the food industry to frame health issues as a personal choice debate).

148. Sarah E. Gollust et al., *Americans' Opinions About Policies to Reduce Consumption of Sugar-Sweetened Beverages*, 63 PREVENTIVE MED. J. 201 (2014) (results of survey show the smallest amount of support for taxes and portion control at just above 20%, while large prominently displayed labels with calorie information garnered support from 65%).

149. Rhode, *supra* note 59, at 501.

150. *See* INST. MED. & NAT'L RSCH. COUNCIL, *supra* note 40, at 8.

151. *Supra* Part II.C.

unilateral control over the standardized nutrition label that is required for all food products.

1. Nutrition Labeling and Education Act of 1990 and Rise of Uniform Labels

The 1990 NLEA marked the most influential new piece of legislation to empower the FDA since the 1938 Food Drug and Cosmetics Act.[152] It was passed on the heels of a more extensive investigation and report by the Institute of Medicine into dietary risks from poor nutritional health and the utility of labeling as a balanced policy solution.[153] The main purposes of the NLEA were: (1) to make labels clearer; (2) to help consumers make healthier choices; and (3) to incentivize the food industry to improve the nutritional quality of their food.[154] The NLEA created clear and enforceable standards with a single label requirement, and was able to be enacted in part because the FDA worked with industry leaders to garner the necessary political support.[155]

2. Expressly Preempts State Requirements

Another critical way in which the NLEA and the standardized label consolidate power for the FDA is that Congress explicitly preempted state laws that conflicted with the NLEA provisions.[156] Thus, the NLEA not only bolstered the FDA's federal authority, but also eliminated fragmentation and conflicts resulting from state authority.[157] This is important because states all have different views on how much regulation there should be of nutrition, with some viewing even minor regulations as impinging on the autonomy of industry and consumers.[158] In conflicts of law disputes, courts have generally applied Congress' explicit preemptive requirements.[159]

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152. Fred R. Shank, *The Nutrition Labeling and Education Act of 1990*, 47 FOOD & DRUG L.J. 247 (1992); 21 U.S.C. § 343-1 (2018).

153. INST. MED., NUTRITION LABELING: ISSUE AND DIRECTIONS FOR THE 1990S (1990), http://www.nap.edu/catalog/1576.html [https://perma.cc/BC3H-FHCX] [hereinafter 1989 IOM Report] (report by the Institute of Medicine, sponsored by the FDA and USDA, tasked with analyzing nutrition health issues and the appropriateness of labeling solutions).

154. Kessler, *supra* note 45, at 21.

155. *See, e.g.*, Taylor, *supra* note 106, at 49 ("[I]t was the food industry, after all, that got us from food labeling rules to food labels.").

156. *See, e.g.*, 15 U.S.C. § 1461.

157. *See* INST. MED. & NAT'L RSCH. COUNCIL, *supra* note 40, at 5–7.

158. Rhode, *supra* note 59, at 492, 500, 502 (explaining that regulators face pushback in jurisdictions all around the country due to fear of market failures from paternalistic policies).

159. *See, e.g.*, Grocery Mfrs. of Am., Inc. v. Gerace, 755 F.2d 993, 1001 (2d Cir. 1985) ("Compliance with both the state and federal requirements is impossible. To the extent that it attempts to regulate the labeling of alternative cheese, the New York law is preempted."), *aff'd sub nom.* Gerace v. Grocery Mfrs. of Am., Inc., 474 U.S. 801, 801 (1985).

C. *Labeling is an Economically Efficient Approach to Nutrition Regulation*

The FDA is often limited by the resources it has available, hence its longstanding goal to create programs that are efficient in promoting health.[160] Labeling is a strong option in advancing this goal because it spreads the cost throughout industry and requires less costly enforcement effort by the FDA to maintain.[161] More ambitious, hands-on initiatives, such as those proposed in the 2011 Food Safety and Modernization Act, which involve direct oversight of produce suppliers, have resulted in shortfalls of hundreds of millions of dollars in funding.[162] By contrast, some more modest proposals, such as calorie disclosures, are viewed as low cost initiatives that are cost effective relative to other types of government interventions.[163]

D. *2016 Nutrition Panel Update by FDA Exemplifies the Incremental Approach*

In a much overdue update, the FDA published a new rule in May of 2016 which was designed to reflect "new scientific information, including the link between diet and chronic disease."[164] These changes mark the first major update to the Nutrition Facts Panel in over twenty years since its introduction in 1993, as the FDA increasingly focuses on improving dietary health through more informed consumer choice.[165] The 2016 label update provides a recent example of the feasibility of incremental change via labeling that avoids the pitfalls of previous failed regulations because: (1) it built on existing labeling authority (politically favored); (2) in an area where FDA power is consolidated (fragmentation

160. *See* Hutt, *supra* note 21, at 103–04 ("[W]e must set priorities and develop programs designed to achieve the greatest impact possible from the limited resources available.").

161. *1989 IOM Report*, *supra* note 153, at 265 (discussing strategies of promoting dietary changes and noting that there are more personalized methods than labeling, but that they would be inefficient for large populations, whereas labeling strikes a good balance).

162. JOHNSON, *supra* note 26, at 10.

163. Rhode, *supra* note 59, at 523; *see also* Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, WIS. L. REV. 1161, 1191–92 (2004) (discussing the relatively low cost of nutritional requirements on menus for fast food restaurants).

164. U.S. FOOD & DRUG ADMIN., CHANGES TO THE NUTRITION FACTS LABEL, https://www.fda.gov/food/food-labeling-nutrition/changes-nutrition-facts-label [https://perma.cc/UG6Q-F52H] (last visited Oct. 12, 2020).

165. *Statement from FDA Commissioner Scott Gottlieb, M.D., on an Updated Approach for Including Added Sugar Information on the Nutrition Facts Labels of Pure Maple Syrup and Honey*, U.S. FOOD & DRUG ADMIN. (Sept. 6, 2018) [hereinafter *Statement from FDA Commissioner*], https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-updated-approach-including-added-sugar-information [https://perma.cc/7WKZ-EJR4].

less of an issue); and (3) it did not require excessively cost-intensive overhauls for the FDA or industry.

1. Changes Including Added Sugar and Daily Value

The 2016 update includes a few key changes and follows on the heels of the 2015–2020 Dietary Guidelines for Americans, published every five years.[166] Those changes include more prominent displays of the calorie count and servings per container, as well as an update to serving sizes to represent more accurately the actual eating habits of Americans.[167] Perhaps the most surprising update, though, was the change to the way in which sugar must now be listed on the label.

The FDA now requires an "added sugars" (non-naturally present sugar) entry on the nutrition label, both in grams and as a percentage of the daily value.[168] This follows on the inclusion of strong evidence within the Dietary Guidelines that it is difficult to obtain the necessary nutrients for a healthy diet when sugar represents more than 10% of one's daily caloric intake.[169] It remains to be seen whether the courts will endorse this form of compelled speech, considering the strongly supported public health objectives.[170] The FDA also followed recommendations from a 2010 report by the Institute of Medicine, suggesting that labels list all forms of sugar (e.g., high fructose corn syrup, glucose, fructose) as one ingredient, so that consumers could accurately assess the proportion of sweeteners in total.[171] Needless to say, these changes did not come about without resistance from the sugar-related industries.

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166. *Id.*

167. *See* U.S. FOOD & DRUG ADMIN., THE NEW AND IMPROVED NUTRITION FACTS LABEL – KEY CHANGES (Jan. 2018), https://www.fda.gov/media/99331/download [https://perma.cc/N7Z5-SETP] (reprinted in Appendix A for full visual illustration of changes); *see also* Dabrowska, *supra* note 103, at 5 (2014) (noting changes to "Reference Amount Customarily Consumed," since data for original reference was gathered in 1977 and 1988, and habits have changed).

168. U.S. FOOD & DRUG ADMIN., ADDED SUGARS: NOW LISTED ON THE NUTRITION FACTS LABEL 1, 2 (Mar. 2020), https://www.fda.gov/media/135299/download [https://perma.cc/RZ6F-K7W8].

169. *Id.* at 2; *Statement from FDA Commissioner*, *supra* note 165; Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33,742, 33,813 (May 27, 2016) (to be codified at 21 C.F.R. pt. 101).

170. *See* Colleen Smith, *A Spoonful of (Added) Sugar Helps the Constitution Go Down: Curing the Compelled Commercial Speech Doctrine with FDA's Added Sugars Rule*, 71 FOOD & DRUG L.J. 442 (2016) (discussing the unresolved nature of compelled speech doctrine and arguing that an added sugars requirement is different from the existing jurisprudence because it is not necessarily addressing deceptive practices).

171. *See* INST. MED. & NAT'L RSCH. COUNCIL, *supra* note 40; *see also* Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. at 33803.

2. Industry Influence on the "Added Sugar" Debate

Almost immediately after the FDA's announcement of the proposed "added sugar" addition to the nutrition label, sugar-related industries—termed "Big Sugar" by the press—voiced opposition.[172] "Big Sugar" claimed the evidence was lacking, even though many of the leading domestic and international health organizations had published well-supported conclusions that American rates of sugar intake were too high.[173] While consumer-oriented organizations such as the Center for Science in the Public Interest had long supported this change, the sugar industry had been running its own campaign of influence for decades.[174] That industry influence had an effect in many of the major channels that drive public opinion and legislation.

In the public domain, the food industry has employed a complex, multipronged campaign, promoting their most controversial views through non-profits that they fund, as well as through trade associations, so as not to damage their individual brands.[175] In fact, food executives have admitted as much, saying that they use non-profits to promote more proactive and irreverent criticisms specifically because donations are anonymous.[176] Perhaps more insidious, though, is the effect food executives have had on research conclusions.

Because sugar consumption is quite high, there have been many studies on the effect of sugar consumption on weight gain, and then systematic reviews analyzing the findings of those studies in the aggregate. However, a comprehensive meta-analysis of the effect of financial industry funding or conflicts of interest on the findings of those systematic reviews reveals likely bias.[177] From the eighteen systematic reviews identified, in the twelve where there was not a conflict of interest, ten of them found consumption of sugar-sweetened beverages to be a risk

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172. *See* Roberto A. Ferdman, *Why the Sugar Industry Hates the FDA's New Nutrition Facts Label*, WASH. POST (May 20, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/05/20/why-the-sugar-industry-hates-the-fdas-new-nutrition-facts-label/ [https://perma.cc/46PJ-WQ6E].

173. *See* Roberto A. Ferdman, *The Crucial FDA Nutrition Label Battle You Probably Don't Know About, but Should*, WASH. POST (July 2, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/02/the-crucial-fda-nutrition-label-battle-you-probably-dont-know-about-but-should/ [https://perma.cc/8DX7-6V3B]; *see also* Appendix B for visual graph of American consumption as compared to health guidelines from leading institutions.

174. *See* Ferdman, *supra* note 172.

175. *See* Nixon et al., *supra* note 147, at 2231 (industry used a variety of tactics, often promoting more controversial narratives, such as obesity not being a significant health risk, through nonprofits that they funded, rather than directly from the companies).

176. *Id.*

177. *See* Maira Bes-Rastrollo et al., *Financial Conflicts of Interest and Reporting Bias Regarding the Association between Sugar-Sweetened Beverages and Weight Gain: A Systematic Review of Systematic Reviews*, 10 PLOS MED. 1 (2013) (meta-analysis of meta-analyses on the effect of financial interests on research conclusions).

factor for weight gain.[178] By contrast, of the six systematic reviews that had conflicts of interest in funding, only one found a positive association between sugar consumption and weight gain.[179]

All of this may begin to sound similar to the story of "Big Tobacco" and its efforts to mislead the public. In fact, that conclusion is not far off, as studies have also found that corporations in the food industry manipulated evidence in ways not accepted by the scientific community, similar to the ways in which the tobacco industry misled health officials.[180] Thus, the finalization of the 2016 labeling rule after just two years of discussion represents a small but critical step forward against daunting obstacles from industry opponents.

IV. THE FDA'S FUTURE IN PROMOTING NUTRITION

The 1990 Nutrition Education and Labeling Act, as well as the recent 2016 updates to the rules by the FDA, indicate that there is the most political momentum for solutions to nutrition concerns in the labeling domain. Focusing on the FDA's clearly established power to regulate labeling, the agency can inform consumers of the health risks of food products while respecting individual freedom of choice. Thus, a strategy for the next steps in addressing nutritional deficiencies should be focused on improving labeling to communicate more effectively with consumers. Two related improvements that may advance consumer absorption of vital information would be focusing on nutritional nudges and using visual front-of-package solutions. Labeling interventions of this sort have already shown promising results in other countries facing similar nutrition crises by curbing consumption of unhealthy products.[181]

A. *Focusing on Nutritional Nudges via Informative Labeling*

An update to the nutrition panel was the first step in providing consumers with more accurate information. However, consumers still have had difficulty in comprehending and using labels in their current form.[182] Thus, the FDA should look more carefully at ways in which the

178. *Id.*

179. *Id.*

180. *See* Gary Jonas Fooks et al., *Corporations' Use and Misuse of Evidence to Influence Health Policy: A Case Study of Sugar-Sweetened Beverage Taxation*, 15 GLOBALIZATION AND HEALTH 1 (2019).

181. *See* Andrew Jacobs, *Sugary Drink Consumption Plunges in Chile After New Food Law*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/health/chile-soda-warning-label.html?algo=identity&fellback=false&imp_id=561700973&imp_id=83508295&action=click&module=Science%20%20Technology&pgtype=Homepage [https://perma.cc/7EX9-YSH5] (coverage of new study finding dramatic decrease in sugar consumption following an aggressive effort in Chile to educate consumers about the sugar content of food products).

182. *See* Jane Kolodinsky, *Persistence of Health Labeling Information Asymmetry in the United States: Historical Perspectives and Twenty-First Century Realities*, 32(2) J.

presentation and manner in which information is communicated may have an effect on the consumers. One approach is to design methods of communication that point the consumer in the right direction. These signposts for the consumer are known as "nudges" by experts.[183]

The main benefit of nudges is that they preserve the autonomy of the decision makers—the consumers—by not mandating what they must choose or providing economic incentives, but still guiding their decision towards the rational (or healthy) path.[184] These nudges should be designed by a special team within the FDA and be simple and intuitive indicators for consumers at the point of purchase. An example of this method would be requiring the industry to highlight or use a red font on rows in the nutrition label where an ingredient reaches a certain threshold (e.g., greater than 100% of daily value for sugar or salt per serving). The most intuitive place for these signals though is the front of the package.

B. *Front of Package Labeling and Visuals*

A slightly more aggressive method—and logical next step—is to require disclosures on the front of labels. Front-of-package solutions have been increasing in popularity in other countries and could provide models for the FDA.[185] For example, the FDA could adopt the UK system known as the Multiple Traffic Light System, which uses the familiar three-color system of stoplights to indicate the relative healthiness of a food.[186] This could be used in conjunction with a system of highlights on the nutrition facts label, which is consistent and color-coordinated. Such a system would also be in line with the findings of the second phase of an extensive report, which the FDA partially funded, by the Institute of Medicine on front-of-package solutions.[187] That report found four important attributes of successful labeling systems: (1) simple and understandable; (2) presented as interpretive guidance, not facts; (3) ordinal (scale of relative value); and (4) easily identifiable and communicated.[188]

The concept of front-of-label health information in the United States is certainly not new, but has historically been a battleground of first

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MACROMARKETING 193 (2012).

183. Cass R. Sunstein, *Nudging: A Very Short Guide*, 37 J. CONSUMER POL'Y 583 (2014).

184. *Id.*

185. Elsa Savourey, *Supermarket Heuristics: Behavioral Insights into the U.S. Nutrition Labeling Policy*, 23 VA. J. SOC. POL'Y & L. 89, 114 (2016); *see also* Jacobs, *supra* note 181 (describing a system that was implemented in 2016 in Chile that includes black stop signs on products that are high in calories or non-nutritious ingredients such as sugar).

186. Gyorgy Scrinis & Christine Parker, *Front-of-Pack Food Labeling and the Politics of Nutritional Nudges*, 38 UNIV. DENVER L. & POL'Y 234, 235 (2016).

187. *See* INST. MED., *Report Brief,* FRONT-OF-PACKAGE NUTRITION RATING SYSTEMS AND SYMBOLS: PROMOTING HEALTHIER CHOICES (Oct. 2011), https://www.nap.edu/resource/13221/frontofpackagereportbriefFINAL.pdf [https://perma.cc/Q7RQ-EG5T].

188. *Id.* at 2.

amendment rights, with an industry seeking to include health claims designed to entice buyers.[189] Serious attempts to require front-of-package disclosures or warnings have taken place, so far, only at local levels in cities such as San Francisco for sugar and New York for salt-content, with mixed results.[190] Thus, while the FDA may have the statutory authority to require additional front-of-label information, it remains to be seen if the judiciary will interpret such actions as an infringement on commercial speech rights, particularly for visual graphics, which are more controversial.[191]

CONCLUSION

The FDA has come a long way from its origins in protecting consumers from the horrendously unsanitary practices of meat factories. The challenges the FDA faces have evolved as well, as we have entered an era of abundant but nutrient-poor food. In this new era, the FDA must find solutions that make consumers aware of the degree of peril they are taking when choosing to consume unhealthy foods, so that they can make better dietary choices.

Labeling is likely the best path forward to accomplish the FDA's goals of protecting consumers, due to its political feasibility, clear statutory basis, and relative economic efficiency. Reform of the nutrition panel alone will not be sufficient to address all nutrition concerns. Therefore, the FDA should consider front-of-package labeling options, focused on guiding consumers to healthier choices, and ideally causing industry to shift their offerings over time.

189. *See supra* Part II.A.2.

190. See *supra* Part III.A.2 for a discussion on affirmative labeling; N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009) ("In light of *Zauderer*, this Circuit thus held that rules 'mandating that commercial actors disclose commercial information' are subject to the rational basis test."); Am. Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749, 757 (9th Cir. 2019) ("On this record, therefore, the 20% requirement is not justified and is unduly burdensome when balanced against its likely burden on protected speech.").

191. *See* Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J. L. & POL'Y 53, 69 (2016) (discussing use of visual pictures in compelled speech debate).

The New and Improved Nutrition Facts Label – Key Changes

U.S. FOOD & DRUG ADMINISTRATION

The U.S. Food and Drug Administration has finalized a new Nutrition Facts label for packaged foods that will make it easier for you to make informed food choices that support a healthy diet. The updated label has a fresh new design and reflects current scientific information, including the link between diet and chronic diseases.

1. Servings

The number of "servings per container" and the "Serving Size" declaration have increased and are now in larger and/or bolder type. Serving sizes have been updated to reflect what people actually eat and drink today. For example, the serving size for ice cream was previously 1/2 cup and now is 2/3 cup.

There are also new requirements for certain size packages, such as those that are between one and two servings or are larger than a single serving but could be consumed in one or multiple sittings.

2. Calories

"Calories" is now larger and bolder.

3. Fats

"Calories from Fat" has been removed because research shows the type of fat consumed is more important than the amount.

4. Added Sugars

"Added Sugars" in grams and as a percent Daily Value (%DV) is now required on the label. Added sugars includes sugars that are either added during the processing of foods, or are packaged as such (e.g., a bag of table sugar), and also includes sugars from syrups and honey, and sugars from concentrated fruit or vegetable juices. Scientific data shows that it is difficult to meet nutrient needs while staying within calorie limits if you consume more than 10 percent of your total daily calories from added sugar.

5. Nutrients

The lists of nutrients that are required or permitted on the label have been updated. Vitamin D and potassium are now required on the label because Americans do not always get the recommended amounts. Vitamins A and C are no longer required since deficiencies of these vitamins are rare today. The actual amount (in milligrams or micrograms) in addition to the %DV must be listed for vitamin D, calcium, iron, and potassium.

The daily values for nutrients have also been updated based on newer scientific evidence. The daily values are reference amounts of nutrients to consume or not to exceed and are used to calculate the %DV.

6. Footnote

The footnote at the bottom of the label has changed to better explain the meaning of %DV. The %DV helps you understand the nutrition information in the context of a total daily diet.

Current Label

Nutrition Facts

Serving Size 2/3 cup (55g)
Servings Per Container About 8

Amount Per Serving	
Calories 230	Calories from Fat 72
	% Daily Value*
Total Fat 8g	**12%**
Saturated Fat 1g	**5%**
Trans Fat 0g	
Cholesterol 0mg	**0%**
Sodium 160mg	**7%**
Total Carbohydrate 37g	**12%**
Dietary Fiber 4g	**16%**
Sugars 12g	
Protein 3g	
Vitamin A	10%
Vitamin C	8%
Calcium	20%
Iron	45%

* Percent Daily Values are based on a 2,000 calorie diet. Your daily value may be higher or lower depending on your calorie needs.

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

New Label

Nutrition Facts

1 8 servings per container
Serving size **2/3 cup (55g)**

2 **Amount per serving**
Calories **230**

	% Daily Value*
3 **Total Fat** 8g	**10%**
Saturated Fat 1g	**5%**
Trans Fat 0g	
Cholesterol 0mg	**0%**
Sodium 160mg	**7%**
Total Carbohydrate 37g	**13%**
Dietary Fiber 4g	**14%**
Total Sugars 12g	
4 Includes 10g Added Sugars	**20%**
Protein 3g	
5 Vitamin D 2mcg	10%
Calcium 200mg	15%
Iron 8mg	45%
Potassium 235mg	6%

6 * The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

Transitioning to the New Label

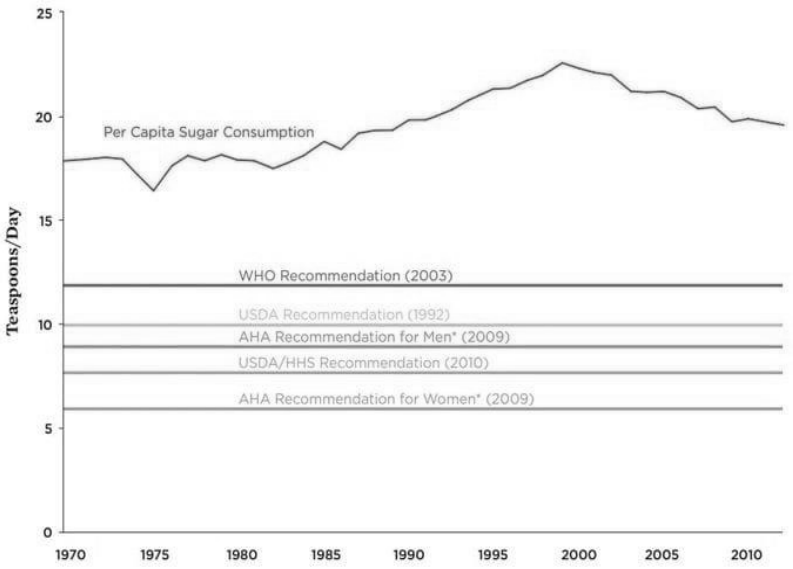
Manufacturers still have time to begin using the new and improved Nutrition Facts label, so you will see both label versions for a while. However, the new label is already starting to appear on products nationwide.

For more information about the new Nutrition Facts label, visit:
www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm

January 2018

Source: *The New and Improved Nutrition Facts Label- Key Changes*, U.S. Food & Drug Admin. (Jan. 2018), https://www.fda.gov/media/99331/download [https://perma.cc/P85U-QG4U].

FIGURE 1. Per Capita Sugar Consumption in the United States: Actual versus Recommended



The per capita consumption of sugar in the United States far exceeds the limits recommended by several scientific and governmental institutions including the WHO, the HHS, the USDA, and the AHA (CHPP 2010; AHA 2009; WHO 2003b; CHPP 1992). Starting in 2012, the USDA is using a new methodology for calculating per capita consumption, which is expected to lead to lower estimates (Strom 2012). Regardless of the decline in sugar consumption since 2000 (which is largely attributable to the replacement of regular sodas with their diet versions), the fact remains that Americans are consuming, on average, more than twice the recommended levels of sugar.

* AHA recommendations are based on a 2,200-calorie diet for men and an 1,800-calorie diet for women (AHA 2009). All other standards are based on a 2,000-calorie diet.

Source: Robert A. Ferdman, *The Crucial FDA Nutrition Label Battle You Probably Don't Know About But Should*, WASH. POST (July 2, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/02/the-crucial-fda-nutrition-label-battle-you-probably-dont-know-about-but-should/ [https://perma.cc/9AY6-JJML].

THE PLIGHT OF CYNTOIA BROWN: CAN SAFE HARBOR LAWS PREVENT THE PROSECUTION OF CHILD SEX TRAFFICKING VICTIMS?

Nickera Rodriguez[*]

Abstract

In the United States, child sex trafficking has run rampant for decades. Minors who are in poverty or apart of the foster care system are particularly vulnerable to sex trafficking. Despite the fact that these children are victims of their traffickers, states across the nation have consistently detained and charged sex trafficked minors with prostitution and related offenses, and in more grave circumstances, murder. This Article examines the notable, recent case involving child sex trafficking victim, Cyntoia Brown, and identifies the necessity to implement robust Safe Harbor laws in each state throughout the country. Adopting Safe Harbor laws will decrease prosecution of minor child sex trafficking victims for prostitution and related offenses, and increase rehabilitation services to prevent recidivism of victims.

* Nickera Rodriguez earned her Bachelor's degree from the University of Central Florida in 2014 and earned her Juris Doctor degree from the University of Florida Levin College of Law in 2020. Currently, she practices civil rights and employment law in Alexandria, Virginia. She would like to extend her profound appreciation to Professor Gail Mathapo for her guidance and feedback in writing this Note, and to the editors of the *University of Florida Journal of Law and Public Policy* for their insightful comments and feedback.

INTRODUCTION

On August 7, 2019, Cyntoia Brown walked free from the Tennessee Prison for Women after serving 15 years of a life sentence.[1] Cyntoia's case drew national attention, from high-profile advocates to A-list celebrities such as Kim Kardashian-West and Rihanna, who championed for her release.[2] The outrage came after Cyntoia was convicted at the age of 16 for aggravated robbery and first-degree murder of 43-year-old real estate agent, Johnny Allen, who picked her up for sex at a local Nashville Sonic Drive-In.[3] "Criminal justice reform advocates portrayed Brown's case as an example of the unreasonable incarceration of a teenager who was a victim of sex trafficking."[4] Yielding to public pressure regarding Cyntoia's case, former Tennessee governor Bill Haslam took rare steps and granted Cyntoia clemency and commuted her life sentence.[5]

Human sex trafficking is a modern-day form of slavery. Over the last two decades, human sex trafficking has received increasing attention from the media, advocates, and policymakers. The issue is that much of the attention focuses on international problems—with stories of teenage mail-order brides and child prostitution in Asia and Europe.[6] However, child sex trafficking is plaguing the world, including the United States. The exact number of child victims of sex trafficking in the United States is unknown.[7] However, the Polaris Project reported more than 48,000

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1. *See* Mariah Timms & Natalie Neysa Alund, *Cyntoia Brown, sentenced to life at 16, released from prison. Here's what you need to know*, USA TODAY (Aug. 7, 2019, 12:05 PM), https://www.usatoday.com/story/news/nation/2019/08/07/cyntoia-brown-released-nashville-prison-after-serving-15-years/1941329001/ [https://perma.cc/X5UV-ZY46].

2. Madeline Holcombe & Leanna Faulk, *Cyntoia Brown was released from a Tennessee prison today. Here are 4 things to know about her case*, CNN (Aug. 7, 2019, 7:29 AM), https://www.cnn.com/2019/08/07/us/cyntoia-brown-release-wednesday/index.html [https://perma.cc/C3TS-532B].

3. *See* Bobby Allyn, *Cyntoia Brown Released After 15 Years In Prison For Murder*, NPR (Aug. 7, 2019, 12:24 PM), https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder [https://perma.cc/6TEZ-PLYB].

4. *Id.*

5. *See* Christine Hauser, *Cyntoia Brown is Granted Clemency After 15 Years in Prison*, N.Y. TIMES (Jan. 7, 2019), https://www.nytimes.com/2019/01/07/us/cyntoia-brown-clemency-granted.html [https://perma.cc/KWH6-4E6L].

6. *See* CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 19 (Ellen Wright Clayton et al. eds., 2013) [hereinafter CONFRONTING EXPLOITATION].

7. *See Myths, Facts, and Statistics*, POLARIS, https://polarisproject.org/myths-facts-and-statistics/ [https://perma.cc/8MNH-XWKB] (last visited Oct. 25, 2020).

contacts were made to their trafficking hotline in 2019;[8] and the number of cases in the United States increases every year.[9] In an attempt to combat these staggering numbers, the federal government has made human trafficking a crime and is attempting to hold traffickers accountable for their actions.[10] The Trafficking Victims Protection Act of 2000 and its subsequent reauthorizations define human trafficking as:

> a) [S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
>
> b) [T]he recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[11]

Further, according to the National Conference of State Legislatures, every state and the District of Columbia has enacted laws establishing criminal penalties for human traffickers who profit off of sexual servitude and forced labor.[12] Despite the enactment of federal and state legislation that is purported to protect children from exploitation and sexual abuse, minors who participate in prostitution are still treated as criminal and delinquent under the criminal justice system. As of 2018, only twenty-three states and the District of Columbia prohibit the criminalization of minors for prostitution.[13] Thus, the majority of states are still allowing minors to be detained, arrested, and prosecuted for prostitution and other related offenses. States are failing to consider the fact that minor sex-trafficking victims suffer from "immediate and long-term physical, mental, and emotional harm."[14] Researchers have promulgated the sentiment that "[a] nation that is unaware of these problems or disengaged

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8. *2019 Data Report: The U.S. National Human Trafficking Hotline*, POLARIS, https://polarisproject.org/wp-content/uploads/2019/09/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf [https://perma.cc/46LU-UU7J] (last visited Nov. 10, 2020) (reporting 63,380 total situations of human trafficking identified through the Polaris Trafficking Hotline from December 2007 through December 2019).

9. *See 2019 U.S. National Human Trafficking Hotline Statistics*, POLARIS, https://polarisproject.org/2019-us-national-human-trafficking-hotline-statistics/ [https://perma.cc/3L4C-PNGP] (last visited Oct. 25, 2020).

10. 22 U.S.C. § 7102(11) (effective Jan. 14, 2019).

11. *Id.*

12. Anne Teigen & Karen McInnes, *Human Trafficking State Laws*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx [https://perma.cc/4TT2-MYHJ] (last visited Oct. 25, 2020).

13. *See, e.g.*, *National State Law Survey: Non-Criminalization of Child Sex Trafficking Victims*, SHARED HOPE INT'L 3 (2018), http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Non-Criminalization-of-Juvenile-Sex-Trafficking-Victims.pdf [https://perma.cc/34SN-3CFG].

14. CONFRONTING EXPLOITATION, *supra* note 6, at 19.

from solving them unwittingly contributes to the ongoing abuse of minors and all but ensures that commercial sexual exploitation and sex trafficking of minors will remain marginalized and misunderstood."[15] One possible solution to this problem is for every state to stop the prosecution of minor human-trafficking victims and to pass Safe Harbor laws to protect these victims.

This Note will proceed to do four things. First, Part I discusses *Brown v. State*,[16] Cyntoia's case, and analyzes the court's decision in upholding her conviction.[17] Then, in understanding the court's reasoning, Part II will discuss the current criminalization of minor human-trafficking victims in the United States.[18] Part III explores Safe Harbor laws and why they are more beneficial than prosecuting minor human-trafficking victims for sexual offenses.[19] Finally, Part IV concludes in hopeful register by arguing that Safe Harbor laws should be enacted in every state while criminal prosecution of child sex-trafficking victims should be prohibited.[20]

I. CYNTOIA'S STORY: *BROWN V. STATE*

Cyntoia Brown did not live an easy life growing up. Months before her legal troubles started, she ran away from her adoptive parents' home and was using drugs and alcohol and staying with a number of different people in Nashville, Tennessee.[21] In July of 2004, a sixteen-year-old Cyntoia met someone called "Cut Throat," who was twenty-four years old, and began using drugs with him.[22] Cyntoia testified at her trial that "Cut" was nice to her at first, but subsequently, he began to verbally and physically abuse her as well as sexually assaulting her and forcing her to prostitute herself.[23] She was forced to give any money she made to Cut.[24]

On the night of August 6, 2004, Cyntoia left the hotel she stayed in with Cut and walked over to a local Nashville Sonic Drive-In restaurant.[25] Johnny Allen picked up Cyntoia and asked her if she was up for "any action," meaning he wanted to pay to have sex with her.[26] Allen drove Cyntoia to his home where he proceeded to try to kiss her, offer her wine,

15. *Id.*
16. No. M2013-00825-CCA-R3-PC, 2014 WL 5780718 (Tenn. Crim. App. Nov. 6, 2014).
17. *Id.* at *21; *see infra* Part I.
18. *See infra* Part II.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *Id.* at *4.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Brown*, 2014 WL 5780718, at *4.
26. *Id.*

and show her a gun he owned.[27] Cyntoia found Allen to be "weird" and she asked him if she could take a nap before they "make love."[28] As she pretended to sleep, Allen allegedly touched Cyntoia and kept getting in and out of the bed she was in.[29] Cyntoia began to panic as she thought that Allen's behavior was rather odd.[30] Cyntoia testified to the court that Allen had grabbed her "really hard" before he got into the bed and rolled over to grab something.[31] Cyntoia thought that he was going to reach for a gun, so she reached over to a nearby "nightstand on her side of the bed, took a gun out of her purse, and fired the gun one time."[32]

As she fled Allen's house, Cyntoia drove his truck to her hotel and told Cut that she believed she had shot someone.[33] Cut instructed her to drive Allen's truck to a Walmart parking lot and the following day she called 911.[34] The police found Allen laying face-down on his bed with a gunshot wound to the back of the head.[35] Officers found Allen's truck in the Walmart parking lot, and arrested Cyntoia at her hotel.[36] Cyntoia was tried as an adult and found guilty of first degree premeditated murder and aggravated robbery.[37] Cyntoia was sentenced to life in prison for the murder charges and she was given a concurrent twenty-year sentence for the robbery conviction.[38]

On appeal, the Court of Criminal Appeals of Tennessee affirmed Cyntoia's murder convictions but modified her conviction from "especially aggravated robbery" to "aggravated robbery," for which her twenty-year sentence was reduced to eight years.[39] In 2014, Cyntoia appealed the "denial of her petition for post-conviction relief from her convictions of first-degree premeditated murder, first degree felony murder, and especially aggravated robbery and resulting concurrent sentences of life and eight years."[40] In her appeal, she contended that her mandatory life sentence was unconstitutional and that she was denied due process, among other claims.[41] Cyntoia argued that her automatic life sentence constituted cruel and unusual punishment because she would not

27. *Id.* at *5.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Brown*, 2014 WL 5780718, at *5
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at *1.
36. *Id.*
37. *Brown*, 2014 WL 5780718.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

be eligible for parole for fifty-one years and thus, would serve a longer term of incarceration than an adult who received a life sentence.[42] Cyntoia attempted to cite to the United States Supreme Court's decision in *Miller v. Alabama*, in which the Court held that "a mandatory sentence of life without the possibility of parole for juvenile offenders violated the United States Constitution's Eighth Amendment prohibition against cruel and unusual punishment."[43] The court, in her appeal, found that *Miller* was not applicable as she would be eligible for parole.[44] Ultimately, the court affirmed the post-conviction court's denial of the petition for post-conviction relief, and left Cyntoia to serve out the remainder of her sentence.[45]

One glaring issue with Cyntoia's case is that the court failed to consider her background and upbringing when deciding her fate.[46] Cyntoia grew up in an abusive home.[47] Cyntoia's biological mother also testified at her daughter's trial that she drank copious amounts of alcohol while she was pregnant with Cyntoia.[48] During her post-conviction appeal, the court discussed the results from physical and psychological testing that was performed on Cyntoia.[49] A psychologist testified that Cyntoia "had a 'remarkable' I.Q. of 134 but that she did not function like a typical person with such high intelligence."[50] The same psychologist also stated that Cyntoia was born with alcohol-related neurodevelopment disorder (ARND), and that she was suffering from the disease at the time that she shot Allen.[51] The psychologist's testimony also suggested that Cyntoia's ARND likely contributed to how she perceived the events on the night she shot Allen.[52] Nevertheless, the court found that the evidence and diagnosis of ARND was not so compelling that a jury would not have convicted her.[53] The failure of the court to take these types of factors into account is just one small problem when it comes to the penalization of minor human trafficking victims.

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42. *Id*. at *20.
43. *Brown*, 2014 WL 5780718 at *21 (citing Miller v. Alabama, 567 U.S. 460, 489 (2012)).
44. *Id.*
45. *Id.*
46. *See id.* at *20.
47. *See* AJ Willingham, *Why Cyntoia Brown, who is spending life in prison for murder, is all over social media*, CNN (NOV. 27, 2017, 11:13 AM), https://www.cnn.com/2017/11/23/us/cyntoia-brown-social-media-murder-case-trnd/index.html [https://perma.cc/QUS5-ZAY2].
48. *Brown*, 2014 WL 5780718, at *6.
49. *See id.* at *6–12.
50. *Id.* at *7.
51. *Id.*
52. *See id.* at *7.
53. *Id.* at *12.

II. THE CRIMINALIZATION OF MINORS WHO ARE VICTIMS OF HUMAN TRAFFICKING

A. *Tennessee's Laws Regarding Victims of Human Trafficking*

Cyntoia is just one of almost two hundred minors who have been sentenced to Tennessee's 60-year mandatory minimum life sentence, which is "the toughest [sentencing guidelines] in the nation according to the Sentencing Project."[54] Over the years, following Cyntoia's conviction, serious debates arose regarding Tennessee's laws, the need for juvenile justice reform, the need for more rights for victims, and the possibility of rehabilitation of minors who have committed crimes.[55] Following years of advocacy by lawmakers, Tennessee now has laws to protect victims of sex trafficking from being prosecuted for sex offenses such as prostitution. Tennessee currently recognizes a defense to prostitution when the person charged with prostitution is a victim of involuntary labor servitude, sex trafficking, or is a victim as defined by the Trafficking Victims Protection Act.[56] It is worth exploring how Tennessee concluded that minors who are human trafficked should not be prosecuted for sexual offenses such as prostitution.

In 2010, the Tennessee Bureau of Investigation and the Vanderbilt Center for Community Studies jointly conducted a study in order to shine light on the disturbing crime of human sex trafficking.[57] The goal of the study was to qualify and quantify the issue of sex trafficking in the U.S. and specifically within Tennessee.[58] The researchers' findings were "shocking."[59] Focus groups, which were composed of FBI agents, police officers, district attorneys, and other state officials, discussed how the state laws in place for prostitution and minor sex trafficking did not deter crime and were not sufficient.[60] The focus groups also stated that prostitution laws are typically enforced against individual prostitutes rather than against the pimps or traffickers.[61]

The Director of the Tennessee Bureau of Investigation ultimately concluded that the state needed to institute more serious consequences in

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54. Christine Hauser, *Cyntoia Brown is Freed from Prison in Tennessee*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/us/cyntoia-brown-release.html [https://perma.cc/LA3G-5XW7].

55. Christine Hauser, *Cyntoia Brown Inspires a Push for Juvenile Criminal Justice Reform in Tennessee*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/us/cyntoia-brown-tennessee-criminal-justice.html [https://perma.cc/DDP9-7KBF].

56. TENN. CODE ANN. § 39-13-513(e) (West 2015).

57. TENN. BUREAU OF INVESTIGATION, *Tennessee Human Sex Trafficking Study: The Impact on Children and Youth* iv (2011).

58. *Id.* at 7.

59. *Id.* at iv.

60. *Id.* at 27, 30.

61. *Id.* at 35.

order to prosecute human trafficking under Tennessee's laws.[62] He stated that "heavier sentences for offenders who subject their minor victims to violence and sex slavery as well as allowing victims to sue their captors under civil laws for damages would put a more stringent penalty on a horrendous crime."[63]

In 2011, following the Tennessee Bureau of Investigation's study, lawmakers at the Tennessee Senate 107th General Assembly finally acknowledged the victims of human trafficking.[64] Senators acknowledged that "the trafficking of human beings for sexual servitude and forced labor is considered second only to transfer of arms as the largest and fastest growing illegal activity in the world."[65] The senators also recognized that:

> [C]hildren are victims of human sex trafficking, they are commercially sexually exploited by traffickers who enslave them and sell them for the purpose of sexually pleasuring customers who rape, molest and sexually abuse these children; and [] children in the child welfare and juvenile justice systems are especially preyed upon by human traffickers because of vulnerabilities they exhibit subsequent to extreme trauma, maltreatment, pervasive neglect, and behavioral health problems experienced by these children in their lives.[66]

Shared Hope International, a non-profit organization whose goal is to prevent sex trafficking and restore and bring justice to women and children who have been victims of sex trafficking, gives each state in the U.S. report cards to inform the public on how well a state is doing passing laws to fight child sex trafficking.[67] In 2017, Tennessee's Report Card received an "A" grade.[68] Shared Hope found that Tennessee imposed heavy penalties for sex trafficking and provided tools to assist law enforcement in their investigations.[69] Although Tennessee did not have perfect laws, due to a lack of specialized protective responses for victims that left them vulnerable and potential bars to victim compensation, the state was still fairing much better than a lot of states in the country.[70]

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62. *Id.* at iv.

63. TENN. BUREAU OF INVESTIGATION, *supra* note 57.

64. National Human Trafficking Resource Center Hotline Act, 2011 Tenn. Laws Pub. Ch. 435 (codified at TENN. CODE ANN. § 39–13–312 (West 2020)).

65. *Id.*

66. *Id.*

67. *See What We Do*, SHARED HOPE INT'L, https://sharedhope.org/what-we-do/ [https://perma.cc/HHY4-Y8L5] (last visited Nov. 1, 2020).

68. *Tennessee Report Card*, SHARED HOPED INT'L (2017) https://sharedhope.org/PIC frame7/reportcards/PIC_RC_2017_TN.pdf [https://perma.cc/LUW9-JBPA].

69. *Id.*

70. *Id.*

Shared Hope even tweeted on September 20, 2019, "TN has recently been ranked at the top of Shared Hope International's list of states that have made the most impact on cracking down on sex trafficking."[71] It is fair to assume that had Tennessee's current laws been in place at the time Cyntoia was convicted, she may have been spared from serving 15 years in prison for her crimes. Unfortunately, many child sex trafficking victims meet the same fate as Cyntoia as their states have yet to adopt laws that prohibit the prosecution of minor sex trafficking victims for prostitution and other offenses.

B. *A Look at Other States' Laws Regarding Victims of Child Sex Trafficking*

Shared Hope reports that over the past seven years, forty-seven states have raised their "report card grade" and that more than half of the states have an "A" or "B" grade.[72] However, there are gaps that still exist—namely the laws that provide protections for child sex trafficking victims against penalties for prostitution and other related offenses.[73] As of 2018, the following states do not have state laws that completely prohibit the criminalization of minors for prostitution: Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington, and Wisconsin.[74]

An important issue to highlight in discussing the existing laws in those states is understanding the stigma behind prostitution. Prostitution, although one of the world's oldest professions, has long been frowned upon.[75] Prostitution is viewed as a crime that decreases public morale and those who participate in the activity are seen as displaying deviant behavior that is contrary to society's values.[76] But adopting that view of prostitution fails to account for those victims who are not voluntary sex workers. Many child sex trafficking victims can be forced into

71. @SharedHope, TWITTER (Sept. 20, 2019, 12:30 PM), https://twitter.com/SharedHope/status/1175084749007855617?s=20 [https://perma.cc/T5W5-K396].

72. Sarah Bendtsen, *Progress Without Protection: How State Laws Are Punishing Child Sex Trafficking Victims*, SHARED HOPED INT'L (June 13, 2018), https://sharedhope.org/2018/06/13/progress-without-protection-how-state-laws-are-punishing-child-sex-trafficking-victims/ [https://perma.cc/NVW9-KEDV].

73. *Id.*

74. Sonia Lunn, *Safe Harbor: Does Your State Arrest Minors For Prostitution?*, HUM. TRAFFICKING SEARCH (2018), https://humantraffickingsearch.org/safe-harbor-does-your-state-arrest-minors-for-prostitution/.

75. *See* Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J. L. & FEMINISM 69, 69 (1998).

76. *See id.*

prostitution by way of physical, mental, or sexual abuse.[77] Certain groups of people may be more prone to becoming victims, including minority communities and those who face economic hardships.[78]

Further, there is an assumption that minors involved in prostitution are complicit in their victimization, and this assumption leads to the punitive treatment of these minors within the criminal justice system.[79] But this assumption is incorrect and fails to acknowledge the risks that minors involved in prostitution face. Minors involved in the sex industry are prone to physical and sexual violence, increased exposure to sexually transmitted diseases, and drug and alcohol abuse.[80] Being that minor child sex trafficking victims face such serious and life-threatening physical and psychological problems as a result of participating in prostitution, it's perplexing that many states still allow minors to be prosecuted.

This raises the question—why do a majority of states not have laws prohibiting the prosecution of minors for prostitution and related offenses? There are various arguments in favor of and in opposition to decriminalization. Many argue that removing the discretion of police officers, district attorneys, and judges from the prosecution process takes away an effective means of rescuing children.[81] These so-called children's advocates argue that a "comprehensive approach" is necessary and can only be accomplished by leaving every available option in place—even if that includes arrest and detention—if it ensures that officials are handling the situations on a case-by-case basis.[82]

In order to move forward to decriminalization of these sexual offenses, it must be understood what exactly that means. Decriminalization refers to changing something that is currently illegal into something that is no longer a crime.[83] This differs from legalization which would make the crime of prostitution legal and would entail the

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77. *Fact Sheet: Human Trafficking*, DEP'T OF HEALTH & HUM. SERVS., https://www.acf.hhs.gov/otip/fact-sheet/resource/fshumantrafficking [https://perma.cc/T63W-LU9W].

78. Heidi Box, *Human Trafficking and Minorities: Vulnerability Compounded by Discrimination*, HUM. RTS. & HUM. WELFARE 28, 28 (2011), www.du.edu/korbel/hrhw/research digest/minority/Trafficking.pdf [https://perma.cc/N9KV-SGT4].

79. *See* Stephanie R. Fahy, *Safe Harbor of Minors Involved in Prostitution: Understanding How Criminal Justice Officials Perceive and Respond to Minors Involved in Prostitution in a State with a Safe Harbor Law* 11 (Dec. 2015) (unpublished Ph.D. dissertation, Northeastern University), https://pdfs.semanticscholar.org/095f/79478897878b0024c691c6a384dbc99f3362.pdf [https://perma.cc/6PNM-U7G3].

80. *Id.*

81. Brenda Zurita, *Children in Prostitution: What to Do?*, CONCERNED WOMEN FOR AM. REP. 2 (July 2012), https://concernedwomen.org/images/content/CWA_Decriminalization-of-Prostitution-for-Minors2012.pdf [https://perma.cc/ZMT2-77FY].

82. *Id.*

83. *Id.* at 5.

government regulating the act and the taxation of those who choose to participate in it.[84]

Developing these specialized, non-punitive laws in response to juvenile sex trafficking remains a complex challenge for many states. Shared Hope identified the following three common challenges in adopting and implementing specialized laws for victims of child sex trafficking: (1) the lingering misconception that minors can be prostitutes; (2) a lack of alternative and appropriate placement options and services for youth survivors; and (3) the diverging opinions regarding the optimal way to engage youth survivors in long-term services.[85]

There is conflict in many states, where they have been praised for their strong laws that attempt to address child sex trafficking yet continue to arrest minors for their crimes. A prime example is Kansas, who as of 2018 received an "A" score for their child sex trafficking laws.[86] Despite this grade, the state had more than seventy-nine minor human trafficking victims between 2013 and 2018 who were detained and sentenced to an average of thirty-three days in a juvenile detention facility.[87] A Kansas judge also came under fire in February 2019 after he claimed that two teenagers, aged thirteen and fourteen, acted as "aggressors" in an exploitation situation where a sixty-seven-year-old male paid the two to have sex.[88]

Some states with the worst laws pertaining to child sex trafficking victims include Maine, New Mexico, New York, South Dakota, and Wyoming.[89] What causes the laws of these states to be ranked among the worst? Maine's prostitution law allows for an affirmative defense for those who are victims of sex trafficking, but victims must prove they were compelled to commit the prostitution.[90] Wyoming's human trafficking laws criminalize child sex trafficking,[91] but the definition of commercial

84. *See id.*

85. Bendtsen, *supra* note 72.

86. Linda Smith & Karen Countryman-Roswurm, *Child Victims of Sex Trafficking Receive Mixed Messages: If We Aren't 'Aggressors' Then Why are We Arrested?*, SHARED HOPED INT'L (Mar. 13, 2019), https://sharedhope.org/2019/03/13/child-victims-of-sex-trafficking-receive-mixed-messages/ [https://perma.cc/TR42-UJ5D].

87. *Id.* (citing *Modern Day Slavery: A look at Kansas' human trafficking laws*, KAKE (Apr. 13, 2017, 7:03 PM), https://www.kake.com/story/34486055/modern-day-slavery-a-look-at-kansas-human-trafficking -laws [https://perma.cc/TY3K-C37X]; Johnathan Shorman, *Dozens of possible child trafficking victims have been jailed in Kansas*, WICHITA EAGLE, https://www.kansas.com/news/politics-government/article212698514.html (June 22, 2018, 1:11 PM)).

88. *Id.*

89. *Protected Innocence Challenge Toolkit*, SHARED HOPE INT'L 21–26 (2018), https://sharedhope.org/wp-content/uploads/2018/11/2018ProtectedInnocenceChallengeToolkit.pdf [https://perma.cc/JE92-PZ48].

90. *See* ME. REV. STAT. ANN. tit. 17-A, § 853-A(4) (2020).

91. *See* WYO. STAT. ANN. § 6-2-706(a) (West 2020).

sexual services in the statute requires proof that the minor was under the ongoing control of a third-party trafficker.[92]

The Federal Bureau of Investigation's Uniform Crime Reporting program shows an average of 1,100 to 1,200 arrests each year for minors in prostitution.[93] The question then is how can states lower the number of arrests of minors for prostitution while also protecting the child sex trafficking victims. The answer is for states to adopt Safe Harbor laws in order to protect minor sex trafficking victims in relation to prosecution for prostitution and other sexual offenses.

III. WHAT MAKES A SAFE HARBOR LAW: ENSURING PROTECTION FOR VICTIMS

In order to recognize the benefit of Safe Harbor laws, it is important to understand what exactly they are and why there was a need for them in the first place. A Safe Harbor law is one that "(1) prevents minors (any child under 18) from being prosecuted for prostitution and (2) directs juvenile sex trafficking victims to non-punitive specialized services."[94] Safe Harbor laws were originally developed by the states to address the inconsistencies with how child commercial sex victims were treated.[95] State laws were penalizing adults who had sex with children.[96] However, the problem was that the laws were not applied regularly when adults purchased sex with minors.[97] The result was children being arrested and convicted of prostitution.[98] Thus, the response to combat this issue was to enact Safe Harbor laws.[99]

The enactment of Safe Harbor laws helps ensure that the justice system protects minors from unjust criminalization. Further, because these laws direct minors to child protection proceedings rather than juvenile delinquency hearings, minors have access to specialized services and resources that otherwise would not be available to them.[100]

Safe Harbor laws essentially have two components: legal protection and provision of services. Because traffickers often target homeless minors and those who ran away from home, these at-risk youth are at an

92. *See* WYO. STAT. ANN. § 6-2-701(a)(xiv) (West 2020).

93. Zurita, *supra* note 81, at 16.

94. *Fact Sheet: Safe Harbor Laws*, NAT'L COUNCIL OF JEWISH WOMEN (Sept. 2016), https://www.ncjw.org/wp-content/uploads/2017/07/Fact-Sheet_Safe-Harbor_Updated-2016.pdf [https://perma.cc/HTA8-98CW] [hereinafter *Fact Sheet*].

95. *Human Trafficking Issue Brief: Safe Harbor*, POLARIS (2015), https://polarisproject.org/wp-content/uploads/2019/09/2015-Safe-Harbor-Issue-Brief.pdf [https://perma.cc/VM5T-ZRXD] [hereinafter *Issue Brief*].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Fact Sheet*, *supra* note 94.

increased risk for prosecution.[101] Safe Harbor laws can ensure that trafficked victims are treated as victims, and not as criminals. The legal protection component grants immunity from prosecution where a minor was induced or compelled to commit certain types of offenses.[102] Legislation can alternatively provide for the establishment of diversion programs that will afford "a means for charges to be dismissed if the child completes a specialized services program."[103] Safe Harbor laws, through the provision of services component, require that states provide access to specialized services for survivors including medical (physical and psychological) care, safe housing options, educational programs, and counseling services.[104] Both the legal protection and provision of services components are necessary in order to reduce the trauma of survivors and rehabilitate them.[105]

New York was the first state to enact a Safe Harbor law, and that law did not go into effect until 2010.[106] As of 2015, "two-thirds of states had passed some version of 'Safe Harbor' legislation to move from a prosecutorial to a victim services focus for child sex trafficking victims."[107] According to the Polaris Project, "[m]ost states that have passed [S]afe [H]arbor legislation have limited the scope of the protections to children that have been commercially sexually exploited," meaning that Safe Harbor provisions are only applicable to children who have engaged in prostitution or prostitution-related offenses.[108]

Even though the number of states which have some form of Safe Harbor laws may seem large, many problems still exist in those states which have enacted Safe Harbor legislation. Most of the states that have passed Safe Harbor laws have legislation that varies significantly from that of other states, meaning there is no uniformity across the board.[109]

One reason for the large variance across the United States is that each state has a variety of choices they have to make when drafting legislation in response to minor sex trafficking.[110] First, states must decide whether to decriminalize youth prostitution and provide immunity or whether to create a diversion program.[111] Although some states use a unique or

101. *Id.*
102. *Issue Brief*, *supra* note 95.
103. *Id.*
104. *Id.*
105. *Id.*
106. SARAH WASCH ET AL., AN ANALYSIS OF SAFE HARBOR LAWS FOR MINOR VICTIMS OF COMMERCIAL SEXUAL EXPLOITATION: IMPLICATIONS FOR PENNSYLVANIA AND OTHER STATES (2016) (Executive Summary).
107. *Id.*
108. *Issue Brief*, *supra* note 95.
109. WASCH ET AL., *supra* note 106, at 2.
110. *Id.*
111. *Issue Brief*, *supra* note 95.

blended approach, the majority of states have implemented legislation that falls into one of four categories: immunity without referral, immunity with referral, law enforcement referral to a protective system response, or a diversion process.[112]

Immunity without referral provides "immunity from prostitution-related charges to direct juvenile sex trafficking victims away from a punitive response but does not statutorily direct them into an alternative system or specialized response for access to services."[113] On the other hand, *immunity with referral* provides "immunity from prostitution-related charges and directs juvenile sex trafficking victims to an alternative system or specialized response for access to services."[114] *Law enforcement referral to a protective system response* "does not make minors immune from prostitution charges but directs or allows law enforcement to refer minors suspected of prostitution offenses to child welfare or other system-based services instead of arrest."[115] Finally, a *diversion process* "does not make minors immune from prostitution charges but allows or requires juvenile sex trafficking victims to be directed into a diversion program through which victims can access specialized services and avoid a delinquency adjudication."[116]

Second, after states decide whether to decriminalize and provide immunity, they must decide how to provide services and which services to provide.[117] Most states provide services to sex trafficking victims through their state child welfare system.[118] In other states, the agency that oversees the juvenile justice system is designated to aid child sex trafficking victims.[119]

A. *Immunity vs. Diversion Programs*

Twenty states and the District of Columbia legislatively provide prosecutorial immunity for child sex trafficking victims.[120] Most states that provide criminal immunity only do so for the offense of prostitution, but some states have laws that also extend immunity to crimes committed as a result of being trafficked.[121] For example, Kentucky, Montana, and Oklahoma "require proof that a child is trafficked before they can benefit from criminal and/or juvenile court immunity. Kentucky provides

112. WASCH ET AL., *supra* note 106, at 3.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. WASCH ET AL., *supra* note 106, at 1–3.
118. *See id.* at 2.
119. *Id.* at 6, 12.
120. RICH WILLIAMS, NAT'L CONF. OF STATE LEGISLATURES, SAFE HARBOR: STATE EFFORTS TO COMBAT CHILD TRAFFICKING 4 (2017).
121. *See id.*

immunity to trafficked youth for status offenses, crimes like truancy and underage drinking, if the child committed the act as a result of being trafficked."[122] Further, Oklahoma's Safe Harbor laws require "that any criminal charges . . . be dropped if, at a preliminary hearing, it is found to be more likely than not that the youth is a victim of human trafficking or sexual abuse."[123] Many states provide even more protection than Kentucky, Montana and Oklahoma.[124] Tennessee's laws provide that if police determine that a person who is arrested for prostitution is under the age of eighteen, that person will automatically become immune to prosecution for prostitution.[125]

At least twenty-nine states and the District of Columbia have established diversion programs for youth offenders.[126] With diversion programs, laws vary across states on which officials have the authority to divert, whether the child must first admit guilt or be charged with a crime, and whether the child will be designated by officials as a youth in need of services.[127] Washington's state law allows prosecutors to divert minors, while Utah's law requires police to refer children who are engaging in prostitution to the Department of Child and Family Services.[128] By contrast, New York leaves the discretion for youth diversion to a judge.[129]

Lastly, eighteen states and the District of Columbia provide for both immunity and diversion opportunities for child sex trafficking victims.[130] In these cases, state law could prohibit a child under a certain age from being charged for prostitution and could also allow them to be eligible for treatment under state established programs.[131]

Diversion programs are considered to be the less protective measure.[132] As a result, there is a growing preference among legal scholars and policy advocates for the adoption of immunity from prosecution for prostitution and related offenses.[133] This preference for immunity was reflected by action taken by the Uniform Law Commission

122. *Id.*
123. *Id.*
124. *See id.*
125. WILLIAMS, *supra* note 120, at 4.
126. *Id.* at 5.
127. *Id.*
128. *Id.*
129. WASCH ET AL., *supra* note 106, at 2.
130. WILLIAMS, *supra* note 120, at 5.
131. *See id.*
132. *See* WASCH ET AL., *supra* note 106, at 12 (noting that juvenile diversion programs have high rates of negative life outcomes, including substance abuse, mental health issues, unemployment, lack of education, and homelessness).
133. *See id.* at 10.

(ULC) and the American Bar Association (ABA).[134] In 2011, the ABA House of Delegates passed a resolution that urged states to stop prosecuting child sex trafficking victims for prostitution and related offenses, and urged them to instead provide services.[135] Thereafter, the ULC came up with the Uniform Act on Prevention of and Remedies for Human Trafficking (Uniform Act), which was meant to serve as a guide for state legislators when drafting minor human trafficking laws.[136] The Uniform Act clearly recommends the immunity approach when dealing with child human trafficking. Section Fifteen of the Uniform Act provides for "Immunity of Minor" with the following language: "An individual is not criminally liable or subject to a [juvenile-delinquency proceeding] for [prostitution] or [insert other nonviolent offenses] if the individual was a minor at the time of the offense and committed the offense as a direct result of being a victim."[137]

However, even if a state has an immunity provision in its Safe Harbor law, that does not mean the law fully protects the minor victim. State Safe Harbor laws vary from allowing an investigative "hold and release" or an arrest complete with arraignment and prosecution.[138] At the prosecution, in many states the minor is allowed an affirmative defense, which will negate or defeat the criminal liability or unlawful conduct.[139] This practice is known as conditional or secondary immunity.[140] Further, no state Safe Harbor law currently protects minors from criminal liability for felony prostitution and trafficking-related offenses.[141] Thus, a state like Tennessee, which has a robust immunity provision for simple prostitution offenses, does not protect aggravated prostitution or promotion of prostitution, both of which are felonies, and a minor could face additional charges for being in the child sex trafficking business.[142]

Therefore, although immunity provisions may be the prevailing choice over diversion programs, states must enact more protective and robust legislation if they are going to keep youth safe. The point of Safe Harbor laws is to protect youth and keep them from being committed to the juvenile justice system. If current laws allow for schemes that rely on arrest and institutionalization, the goal of Safe Harbor remains unmet. States should commit to actual and full immunity from criminal and

134. *Issue Brief*, *supra* note 95.

135. *Id.*

136. *Id.*

137. NAT'L CONF. OF COMMISSIONERS ON UNIF. ST. LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING, § 15 (2013).

138. Brendan M. Conner, *In Loco Aequitatis: The Dangers of "Safe Harbor" Laws for Youth in the Sex Trades*, 12 STAN. J. C.R. & C.L. 43, 82 (2016).

139. WASCH ET AL., *supra* note 106, at 2.

140. *See* Conner, *supra* note 138, at 103.

141. *Id.* at 85.

142. *Id.*

juvenile delinquency proceedings, and this immunity should not just extend to prostitution and similarly related offenses. States should also carefully consider all offenses that might stem from the child sex trafficking trade. Further, proponents for Safe Harbor laws argue that states should enact "a prohibition on arrest, temporary protective custody, and law enforcement and guardian-initiated petitions for dependency or abuse or neglect proceedings."[143]

B. *Victims' Services*

In addition to providing immunity or diversion services for sex trafficking minors, Safe Harbor laws also seek to enhance and improve the quality of current services that are offered to victims. Services range from education and counseling to mental and physical treatment. Services may be offered through a referral to the state's public child welfare system, or they may be offered through specialized programming established by the state which responds to the unique needs of the population that is affected.[144] The idea of victims' services is easier said than done. Service providers must gain the trust of the juvenile victims if the therapy and treatment services are to be effective.[145]

Unfortunately, due to how new Safe Harbor legislation is, there is not much data to compare the outcomes of youth who are referred to social services versus those who go through the juvenile justice system.[146] However, some steps are being taken to evaluate the benefits of social services. The Minnesota Department of Health and Human Services was the first of its kind to evaluate its Safe Harbor program. Minnesota's No Wrong Door model treated sexually exploited minors as victims and provided for these youth to receive trauma-informed support rather than being processed through the criminal justice system.[147] Minnesota then released "The Safe Harbor First Year Evaluation Overview," which evaluated the model framework after one year.[148] The report found that out of 163 independent referrals made by child welfare agencies, law enforcement, and other youth-serving systems in the state, 129 minors accepted and participated in the services.[149] Furthermore, the report found that the victims participated in the services voluntarily, as there were no

143. *Id.* at 107.

144. WASCH ET AL., *supra* note 106, at 5.

145. *Id.*

146. *Id.* at 6.

147. *Safe Habor/No Wrong Door*, MINN. DEP'T OF HUM. SERVS., https://mn.gov/dhs/partners-and-providers/program-overviews/child-protection-foster-care-adoption/safe-harbor/ [https://perma.cc/TQU7-6QNS] (last updated Nov. 5, 2020).

148. *See* JULIE ATELLA ET AL., SAFE HARBOR FIRST YEAR EVALUATION REPORT 1 (2015).

149. WASCH ET AL., *supra* note 106, at 6.

pending charges against them.[150] Some recommendations from the report were for the state to expand the age limit, to increase funding for the program, and to develop more transportation, housing, and 24-hour services for victims.[151]

Different states require different services as a part of their Safe Harbor legislation. Texas, for example, requires the governor to create a program that provides "comprehensive, individualized rehabilitation services to child sex trafficking survivors."[152] Alabama requires that all social and community services be made available to child sex trafficking victims.[153] Michigan law requires agencies that currently supervise minors to give special attention to children if they are given information that indicates they are a trafficking survivor, though it is unclear what exactly is meant by "special attention."[154]

Unfortunately, these types of programs can be costly and can only be effective if states allocate or create funds for them. As of 2017, at least twenty-five states have created funds in their state treasury to pay for anti-trafficking efforts and survivor services.[155] Minnesota has invested more than $8 million into its Safe Harbor efforts.[156] Louisiana established the Exploited Children's Special Fund, which provides funds to pay for services and treatment that is administered by the Department of Children and Family Services.[157] Funding can also be used for other purposes, including to arrest and prosecute child sex traffickers and to train state personnel.[158] If victims' services are to serve their purpose, states must ensure that they are not only providing the framework for what services are available to child sex trafficking victims but that they are appropriating enough funds to run these programs and services successfully.

C. *Additional Components of Safe Harbor Laws*

In addition to immunity and victims' services provisions, robust Safe Harbor laws should include provisions that push for increased penalties for child traffickers and provide training programs for state personnel.

Currently, every state criminally penalizes traffickers, and at least forty-four states have increased penalties when the crimes are committed

150. *Id.*
151. *Id.*
152. WILLIAMS, *supra* note 120, at 6.
153. *Id.* at 7.
154. *Id.*
155. *Id.* at 5.
156. *Id.* at 6.
157. *Id.*
158. *See* WILLIAMS, *supra* note 120, at 6.

against children.[159] If the penalties were harsher for child sex traffickers, it would deter individuals from participating in the crime. If there were fewer individuals who traffic children, this would ultimately lead to fewer prosecutions of child sex trafficking victims.

States have undertaken different approaches to these increased penalties for traffickers. In Mississippi, it is a misdemeanor to solicit a prostitute, but if a person under the age of eighteen is solicited, then the solicitation is classified as a felony.[160] Massachusetts makes labor trafficking punishable by five to twenty years in prison, but if the person trafficked is under eighteen years old, then the punishment can be life in prison.[161] Other states threaten to impose large fines on the trafficker depending on the age of the victim.

For state personnel to be better equipped to identify and respond to human trafficking survivors, they must be properly trained to handle victims and their situations. State legislators must step in to create training programs and requirements for the responding state personnel. Only thirty-eight states and the District of Columbia have enacted trafficking laws that include a training requirement provision.[162] These training laws include various components such as: "who must be trained, who must be involved in the development of training programs, appropriate coursework, risk assessment indicators for victim identification and collaboration standards between state agencies."[163] If state personnel are better equipped to recognize and properly respond to child sex trafficking victims, this can lead to fewer arrests of minors and an increase in the use of victims' resources.

D. *When the Court Got it Right: In re B.W.*[164]

In 2010, the Texas Supreme Court set a new national precedent by ruling that a child who is below the legal age of consent cannot be found guilty of prostitution.[165] Across the United States, there had been prosecutions and convictions of youth for prostitution, but *In re B.W.* was the first appeal of its type to be heard by a state supreme court. [166]

In this case, B.W. waved over an undercover officer who had been driving by in an unmarked vehicle, and she offered to engage in oral sex with him for twenty dollars.[167] B.W. was arrested for prostitution and,

159. *Id.* at 7.
160. *Id.*
161. *Id.* at 8.
162. *Id.*
163. *Id.*
164. 313 S.W.3d 818 (Tex. 2010).
165. WASCH ET AL., *supra* note 106, at 11.
166. *Id.*
167. *In re B.W.*, 313 S.W.3d at 819.

even though the charges were dismissed after it was revealed that she was only thirteen years old, the charges were refiled.[168] Before her trial, she was examined by a psychologist who found that B.W. had a history of sexual and physical abuse and she had an untreated substance abuse issue.[169] The trial court found that B.W. engaged in delinquent conduct and the offense of prostitution.[170] In its holding, the Supreme Court of Texas stated that a child under the age of fourteen could not be charged with prostitution because the child lacks the capacity to consent to sex.[171]

The Texas Supreme Court highlighted the importance of child welfare agencies in child prostitution cases, noting that these types of agencies provide "services within a purely rehabilitative setting" without the stigma of being deemed a prostitute.[172] The Court further illustrated the help these agencies can provide to at-risk youth. For example, if these agencies can provide counseling, education, and other services for child sex trafficking victims, they are doing far better in terms of rehabilitation than the majority of juvenile justice facilities. Like adult prisons, juvenile justice facilities typically fail to provide the appropriate treatment and rehabilitation services for children to reintegrate back into society upon their release.[173] Children in these facilities are usually not provided psychological treatment, education, or other services.[174] Thus, upon their release, juveniles are likely to face difficult lives where they deal with lack of employment, homelessness, substance abuse, and so forth. Additionally, it is likely that they will continue to be victims of human trafficking as it is a life already known to them. That is why the provision of services to child sex trafficking victims is of the utmost importance. Ultimately, more states, and courts for that matter, should follow Texas's lead to ensure the protection of child sex trafficking victims.

IV. UNIVERSAL SAFE HARBOR LAWS: A VIABLE SOLUTION

Sex trafficking of children is commonly "overlooked, misunderstood, and unaddressed" in the United States.[175] Researchers have concluded that the consequences of this include that:

- Victims and survivors of these crimes face immediate and long-term social, legal, and health consequences.

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 826.
172. *Id.* at 825.
173. *See* WASCH ET AL., *supra* note 106, at 12.
174. *Id.*
175. CONFRONTING EXPLOITATION, *supra* note 6, at 1.

- Exploiters and traffickers, who often operate undetected or without serious penalties, contribute to and benefit financially from the exploitation and abuse of minors.
- People who purchase or trade sex with underage individuals engage in and help fuel demand for the exploitation and abuse of minors.[176]

Victims and survivors are suffering in this country because we have overlooked the problem and left it unaddressed for too long. In this case, ignorance is not bliss. In order to remedy the long-standing problem, every state should adopt robust Safe Harbor laws to protect child sex trafficking victims. It is important to acknowledge that even states which currently have Safe Harbor laws on the books do not offer full protection or services to victims.

Child sex trafficking is happening in our communities, cities, and states. Although certain demographics may be more susceptible to child sex trafficking, it can happen to anyone—regardless of race, religion, age, gender, or socioeconomic status. If communities were made more aware of this dire issue, they could push for a change with their state officials. The public should be made aware that minors involved in prostitution and similar offenses are first and foremost victims. Once there is an increased awareness with the public, law enforcement and state legislatures may prioritize the issue of child human trafficking.

One method that states have utilized to improve the legislation and adoption of Safe Harbor laws is by creating task forces. At least twenty-four states have legislatively created task forces to help improve responses to the issue of human trafficking.[177] "Many of the entities are charged with addressing trafficking generally, while at least eleven states have groups charged with addressing child trafficking specifically."[178] Legislators have assigned these task forces many various duties including making policy recommendations and improving public awareness of trafficking crimes.[179] If every state adopted measures to create tasks forces, it may potentially lead to every state implementing Safe Harbor laws. As some advocates have argued, Safe Harbor legislation should shift to voluntary, low-threshold services that focus on a model that reduces harm to victims and benefits all youth engaged in the sex trade.[180] Only then will the ultimate goal of Safe Harbor laws be a reality.

176. *See id.*
177. WILLIAMS, *supra* note 120, at 3.
178. *Id.*
179. *Id.*
180. Conner, *supra* note 138, at 102.

CONCLUSION

Cyntoia Brown's case was not only a tragedy, but an injustice. Despite being a sixteen-year-old who was entangled in the prostitution industry at the time of her crime, she was ultimately convicted and sentenced to life in prison. The criminal justice system failed to protect Cyntoia; instead, the system chose to overlook the circumstances surrounding her crime and to condemn her to an excessive sentence. But Cyntoia was lucky, as she was released after serving only fifteen years of her life sentence; many other minors in similar circumstances are not as fortunate.

Child sex trafficking is a real, cognizable problem here in the United States. The increasing number of child sex trafficking victims is alarming and an important issue that needs to be addressed by our community leaders. Unfortunately, in trying to combat the issue of prostitution and similar offenses, minors have been treated as the criminal rather than the victim. Many states have a long history of prosecuting minors for sex offenses when these minors should be protected as they are themselves the victims of a crime. Although efforts have been made by the federal government and by individual state legislatures, too many states follow the trend of criminalizing victims.

Safe Harbor laws are the solution to this longstanding issue. Safe Harbor laws have an underlying goal to decrease prosecution of child sex trafficking victims and to increase access to victims' services and resources that facilitate rehabilitation. Failure to implement Safe Harbor legislation leads to a never-ending cycle of recidivism for victims well into their adulthood. Robust Safe Harbor legislation should be implemented in every state so that victims not only are provided immunity from juvenile justice proceedings, but also are provided with services that range from education and counseling to mental and physical treatment. Safe Harbor legislation will be more beneficial than harmful, and state legislatures need to be proactive to protect the victims of child sex trafficking.

THE FUTURE OF STATUTORY CAPS ON NONECONOMIC DAMAGES IN FLORIDA MEDICAL MALPRACTICE ACTIONS: CONSTITUTIONAL OR NOT?

Allison Mangan[*]

Abstract

Florida courts rely on the same legislative findings to both uphold noneconomic damage caps in medical malpractice actions in some scenarios and strike down the same caps in others. However, Florida's position does not mirror the nationwide stance on this issue. After offering an overview of the national trend regarding the caps—an analysis of the Florida caps and corresponding cases—this Note will explain some inconsistencies in Florida case law. It will further discuss the future of Florida's medical malpractice caps in the wake of a newly constructed conservative Supreme Court.

* Allison Mangan earned her Bachelor's degree and Juris Doctor degree from the University of Florida in 2017 and 2020, respectively. She is now practicing at Holland & Knight, LLP in Tampa, Florida.

I. INTRODUCTION

A. *Nationwide Caps on Noneconomic Damages in Medical Malpractice Actions*

Across America, states disagree regarding the constitutionality of applying caps to noneconomic damages in medical malpractice actions.[1] The debate surrounding capping of damages has "good policy reasons" and "good arguments on both sides [as to] whether the caps can withstand constitutional scrutiny."[2] This issue is a relevant and interesting area of study because persuasive case law exists on both sides of the argument. For context, medical malpractice cases can result in verdicts awarding three potential types of damages: economic, noneconomic, and punitive damages.[3] While states vary in the exact definitions of each particular type of damage,[4] the essence of each damage category is similar throughout the country.[5] Economic damages are damages relating to a patient's actual economic loss, which can include medical expenses, future care, and lost earnings.[6] Noneconomic damages are for seemingly intangible losses, for example, amount of pain and suffering associated, loss of consortium, or a decline in life quality.[7] Punitive damages are awards, usually high in value, that attempt to punish the conduct of the defendants involved, as well as to encourage others to avoid acting in the same manner as the defendant in the case.[8]

Many states began discussing caps on noneconomic damages as a result of a national "medical malpractice crisis."[9] Caps on noneconomic damages, specifically, are discussed as a solution for a variety of reasons. Those in the medical profession—including medical professionals, hospital personnel, and other providers of health care—advocate for damage caps because such caps help to combat the high cost of administering care to patients, the high insurance premiums for doctors and hospitals, and "help with risk management due to the certainty of the

1. CTR. FOR JUST. & DEMOCRACY, CAPS ON COMPENSATORY DAMAGES: A SUMMARY, https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary [https://perma.cc/D3L9-TL54] (August 22, 2020).

2. Sue Ganske, *Noneconomic Damage Caps in Wrongful Death Medical Malpractice Cases – Are They Constitutional?*, 14 FLA. ST. U. BUS. REV. 31, 50 (2015).

3. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damage Caps Constitutional – An Overview of State Litigation*, 33 J. L. MED. & ETHICS 515, 516 (2005).

4. Ganske, *supra* note 2, at 31 n.6 (citing for example Fla. Stat. § 766.202(3) (2014)).

5. *See* Kelly & Mello, *supra* note 3, at tbl.1.

6. Ganske, *supra* note 2, at 31.

7. *Id.*; JUSTIA, *Noneconomic Damages*, https://www.justia.com/injury/negligence-theory/non-economic-damages/ [https://perma.cc/4LTJ-DVP5] (last updated Apr. 2018).

8. Ganske, *supra* note 2, at 31–32.

9. Kelly & Mello, *supra* note 3, at 515.

maximum owed for these damages."[10] Such costs are a concern for many states that explore and pass caps on noneconomic damages.[11] Conversely, those seeking unlimited noneconomic damages argue that their nonphysical losses should be compensated, regardless of the difficulty in quantifying such damages.[12]

There is no uniformity between states as to whether to cap noneconomic damages.[13] In fact, state caps on damages "have been upheld under some state constitutions, while at the same time being struck down in other states with almost identical constitutional provisions."[14] The question of constitutionality in many states turns specifically on whether the statute or constitutional amendment violates equal protection.[15] In states where equal protection violations are advanced, plaintiffs argue that the existence of caps on noneconomic damages separates them into two distinct groups: "those whose injuries are valued below the cap . . . " who are allowed to collect their full damages, and "those with damages in excess of the cap (typically the most severely injured)," who are barred from recovering a portion of their losses.[16] States respond to these arguments with support or opposition through different mechanisms, including statutory provisions authorizing caps, constitutional amendments authorizing caps, or the state courts' striking down of such provisions.[17]

The constitutionality of statutory provisions or constitutional amendments regarding caps on medical malpractice noneconomic damages can also turn on the argument that such caps violate the constitutional right to access of courts.[18] A typical state provision for access to courts is that the courts of the state are available to every person, guaranteeing remedy for injury without undue delays.[19] It is important to note that state courts have interpreted this right of access to courts in varying manners—so it is necessary to look at state court opinions in each state to see exactly what its particular right of access to courts means.[20] Many state courts rule that "the rights protected by open-courts provisions [are] relatively narro[w] and hold that they are not

10. Ganske, *supra* note 2, at 33.

11. W. Kip Viscusi, *Medical Malpractice Reform: What Works and What Doesn't*, 96 DENV. L. REV. 775, 777 (2019).

12. Jared R. Love, *The "Soft Cap" Approach: An Alternative for Controlling Noneconomic Damages Awards*, 52 WASHBURN L.J. 119, 120 (2012).

13. CTR. FOR JUST. & DEMOCRACY, *supra* note 1.

14. Kelly & Mello, *supra* note 3, at 518.

15. Ganske, *supra* note 2, at 35 nn.42 & 48–49, 36 n.57.

16. Kelly & Mello, *supra* note 3, at 522.

17. Ganske, *supra* note 2, at 33.

18. Kelly & Mello, *supra* note 3, at 518.

19. *Id.*

20. *Id.*

significantly impinged by damage caps."[21] States that rule in this manner typically uphold the caps.[22] Other states have ruled that the caps on noneconomic damages violate the state right to open courts because "[the caps] denied catastrophically injured patients the right to collect their full damages award without creating any remedy."[23] Both arguments, as will be discussed below, hold merit.

B. *Florida's Approach to Capping Noneconomic Damages in Medical Malpractice Actions*

In Florida, specifically, statutory authority determines the amount of noneconomic damages in a medical malpractice action.[24] The Florida Legislature codified Florida Statute Section 766.118 in 2003 to purportedly combat "a medical malpractice insurance crisis of unprecedented magnitude."[25] The Florida Statutes define noneconomic damages as including "nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses."[26] Florida Statutes Section 766.118 also includes six different categories of noneconomic damages that are to be capped in litigation.[27] The categories to be capped include noneconomic damages relating to: negligence of practitioners and nonpractitioner defendants in medical malpractice and wrongful death actions; practitioners and nonpractitioner defendants providing emergency services and care in medical malpractice actions; and practitioners providing services and care to a Medicaid recipient.[28] Florida Statutes Section 766.207(7)(b) also caps noneconomic damages at $250,000 per incident if the parties agree to arbitration of the medical malpractice claim.[29] In tandem with this section, Florida Statutes Section 766.209(4)(a) caps damages for parties who decline arbitration to $350,000.[30] This statute is triggered when the plaintiff who brings the action rejects the defendant's offer to engage in

21. *Id.* at 519.

22. *See, e.g.*, Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 905 (Mo. 1992) (en banc), *overruled by* Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (reversing the lower court's judgment "to the extent that it caps non-economic damages").

23. Kelly & Mello, *supra* note 3, at 519.

24. FLA. STAT. § 766.118 (2019).

25. 2003 Fla. Laws 416.

26. FLA. STAT. § 766.202(8) (2019).

27. *Id.* § 766.118.

28. *Id.* § 766.118(6).

29. *Id.* § 766.207(7)(b).

30. *Id.* § 766.209(4)(a).

a binding arbitration to determine damages.[31] Section II of this Note will delve further into these statutes and the rationale behind passing each.[32]

The Florida Supreme Court has invalidated two of the caps listed in section 766.118.[33] In *Estate of McCall v. United States*,[34] the court held that the statutory cap on wrongful death noneconomic damages in medical malpractice actions is a violation of equal protection under the Florida Constitution.[35] Further, in *North Broward Hospital District v. Kalitan*,[36] the Florida Supreme Court also held that statutory caps on noneconomic damages for personal injury in medical malpractice actions violate the equal protection clause of Florida's Constitution.[37] Sections III and IV of this Note, respectively, will describe these two cases and explore the reasoning behind the two invalidations.[38]

In contrast, in *University of Miami v. Echarte*,[39] the Florida Supreme Court upheld caps for noneconomic damages when parties agree to arbitrate the claim despite constitutional challenges.[40] The *Echarte* court found the caps regarding arbitration in Florida Statutes Sections 766.207 and 766.209 constitutional.[41] Because of the nature of benefits a plaintiff receives when a claim goes to arbitration, the Florida Supreme Court deemed the state constitutional right of access to courts was met.[42] Other constitutional challenges, including equal protection, were not discussed at length in the majority opinion.[43] Section VI will describe the reasons that the arbitration cap has been deemed constitutional and arguments for and against this policy.[44]

The Florida Supreme Court also continues to uphold statutory caps in other scenarios. For example, section 766.118(4) codifies a statutory cap of $150,000 per claimant and $300,000 total for all claimants in an action arising out of the negligence of a practitioner providing emergency services and care.[45] There is no case law overturning these particular

31. *Id.*
32. *See infra* Section II.
33. Estate of McCall v. U.S., 134 So. 3d 894, 916 (Fla. 2014); N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).
34. *Estate of McCall*, 134 So. 3d 894.
35. *Id.* at 916.
36. 219 So. 3d 49 (Fla. 2017).
37. *Id*. at 59.
38. *See infra* Sections III, IV.
39. Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993).
40. *Id.* at 197–98.
41. *Id.* at 190–91.
42. *Id.* at 194.
43. *Id.* at 191.
44. *See infra* Section VI.
45. FLA. STAT. § 766.118(4) (2019).

caps.[46] Additionally, the Florida Supreme Court upholds caps for noneconomic damages awarded to Medicaid recipients.[47] The ability of the Florida Supreme Court to support some caps while striking down others calls for an analysis of each cap to determine what makes the court take stances on different sides of the Florida Constitution for the respective caps. With the makeup of Florida's Supreme Court shifting to a more conservative bench,[48] the upholding of statutory caps on noneconomic damages is likely. Section VII will delve into the potential future of statutory caps in Florida.[49]

II. FLORIDA'S STATUTORY CAPS

A. *Florida Statutes Section 766.118*

The Florida Legislature passed Florida Statute Section 766.118 as part of a response to the spike of medical malpractice insurance costs and a supposed crisis in the medical malpractice liability industry.[50] A regarded crisis is "often the impetus for policy action."[51] In reaction to the impetus caused by such a crisis, the Legislature passed this statute and claimed that the high insurance rates in Florida were "forcing physicians to practice medicine without professional liability insurance, to leave Florida, [and] to not perform high-risk procedures, or to retire early from the practice of medicine."[52] After reviewing findings from a task force put together by the governor, the Legislature found that the creation of statutory caps on noneconomic damages would potentially reduce the high cost of medical malpractice insurance.[53] Further, the Legislature, in enacting this statute, reasoned that no possible "alternative measure" besides the caps would result in a similar combating of the purported crisis.[54]

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46. Besides *Estate of McCall v. United* States and *North Broward Hospital District v. Kalitan*, the only other case law that Westlaw shows overturning a provision of 766.118, which follows the holding in *North Broward Hospital District*, is *Port Charlotte HMA, LLC v. Suarez*, 210 So. 3d 187, 190 (Fla. 2d DCA 2016).

47. FLA. STAT. § 766.118(6) (2019).

48. Editorial, *The Most Conservative Florida Supreme Court in Decades*, SUN SENTINEL (Jan. 22, 2019, 1:50 PM), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html [https://perma.cc/TMT8-DFYK].

49. *See infra* Section VII.

50. 2003 Fla. Laws 416.

51. Viscusi, *supra* note 11, at 777.

52. Estate of McCall v. United States, 134 So. 3d 894, 909 (Fla. 2014).

53. *Id.* at 930 & n.12.

54. *Id.* at 926 (quoting 2003 Fla. Laws 416: "The Legislature further finds that there is no alternative measure of accomplishing such result without imposing even greater limits upon the ability of persons to recover damages for medical malpractice.").

The statute lays out the following limitations on noneconomic damages.[55] Subsection 2(a) of section 766.118 caps noneconomic damages "for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants" to $500,000 per claimant.[56] Subsection 2(b) of section 766.118 states, "if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants . . . shall not exceed $1 million."[57] If the injury does not result in permanent vegetative state or death, the total noneconomic damages are capped at $1 million if there is a determination of "manifest injustice" or "special circumstances" that occur, and the "trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient."[58] Catastrophic injury is defined in the statute to include spinal cord injuries, certain amputations, severe brain or head injuries, severe motor or sensory injuries, severe neurological injuries, and certain burns.[59] The statute "provides no guidance on how one would determine that death or an injury placing one in a 'permanent vegetative state' could not be considered catastrophic or particularly severe."[60]

The statute continues to further differentiate rewards based on what person causes the medical negligence.[61] If a nonpractitioner defendant causes a medical injury, the cap for noneconomic damages is $750,000, instead of $500,000.[62] Again, if the injury results in a permanent vegetative state or death, or a "catastrophic injury" caused by the nonpractitioner defendant, the damage award is capped at $1,500,000.[63]

The statute additionally mandates a cap for noneconomic damages for negligence of practitioners providing emergency services and care at $150,000 per claimant, and the total noneconomic damages for all claimants to be a maximum of $300,000.[64] Lastly, the statute prescribes a cap of $300,000 for noneconomic damages per claimant for actions arising out of medical malpractice "committed in the course of providing medical services and medical care to a Medicaid recipient."[65] Similar to the other provisions of this statute, the defendant's identity in the action

55. FLA. STAT. § 766.118 (2019).
56. *Id.*§ 766.118(2)(a).
57. *Id.* § 766.118(2)(b).
58. *Id.*
59. *Id.* § 766.118(1).
60. William E. Adams Jr., *Tort Law: 2001-2003 Survey of Florida Law*, 28 NOVA L. REV. 317, 319 (2004).
61. *See* FLA. STAT. § 766.118.
62. *Id.* § 766.118(3)(a).
63. *Id.* § 766.118(3)(b).
64. *Id.* § 766.118(4)(a)–(b).
65. *Id.* § 766.118(6).

is also dispositive the maximum award.[66] For a nonpractitioner defendant, the noneconomic damages cap is at $750,000 per claimant.[67]

It is key to note, however, the report relied on by the Legislature in passing these statutory caps did not seem to be as factually sound as the Legislature took it to be.[68] The report, authored by the Academic Task Force for Review of the Insurance and Tort Systems (Task Force), detailed the current state of medical malpractice insurance, litigation costs, and premiums.[69] The Task Force reported, "the size and increasing frequency of the very large [medical malpractice] claims were found to be a problem."[70] This problem, the Task Force found, was creating an alleged medical malpractice crisis, causing an exodus of physicians, drastically high insurance rates, and problems for the Florida medical community.[71] The *McCall* court, however, found the Task Force's findings to be "dubious and questionable at the very best."[72] The *McCall* court noted that, according to a 2003 report, the number of physicians in Florida grew from 1991 to 2001.[73] This seems to suggest that some of the reasons for passing the statute were unfounded, self-conclusive, and not indicative of evidence that there was in fact a crisis in the Florida medical malpractice liability industry.[74] Additionally, the growing cost of medical malpractice insurance was not necessarily due to the high noneconomic damage rewards but included an ebb and flow in the market and a reduction in the number of available insurers.[75] The lack of evidentiary support in this report[76] ultimately led to the court's decision to render certain portions of the statute unconstitutional.[77] This will be discussed later in Sections IV and V of this Note.[78]

B. *Florida Statutes Section 766.207*

Similarly, Florida Statutes Section 766.207 aimed to fight the high cost of medical malpractice insurance.[79] In addition to the reasons

66. *See id.* § 766.118.
67. FLA. STAT. § 766.118(5)(a).
68. *See* Estate of McCall v. United States, 134 So. 3d 894, 906 (Fla. 2014).
69. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (1993).
70. *Id.*
71. *Estate of McCall*, 134 So. 3d at 906.
72. *Id.* at 909.
73. *Id.* at 906.
74. R. Jason Richards, *Capping Non-Economic Medical Malpractice Damages: How the Florida Supreme Court Should Decide the Issue*, 42 STETSON L. REV. 113, 133 (2012).
75. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE, 9–10 (2003).
76. *Id.*
77. *Estate of McCall*, 134 So. 3d at 909.
78. *See infra* Sections IV, V.
79. 2003 Fla. Laws 416.

mentioned above regarding a purported medical malpractice crisis, the Legislature added reasons for targeting noneconomic damages specifically.[80] The Legislature stated that targeting "arbitrary" noneconomic damages would result in cheaper medical malpractice insurance, as a part of its effort to balance the interest of the harmed individual with society's overarching interest in reducing the cost of medical liability insurance.[81] Florida's reasoning echoes that of other state legislatures that have discussed targeting noneconomic damages.[82] Such reasoning supports capping noneconomic damages, as opposed to other types of damages, because "[i]t is politically unpopular to suggest that injured persons should not be fully compensated for their economic losses."[83] Further, the fact that many juries return very different awards of noneconomic damages when a similar injury results can raise questions of "horizontal equity."[84]

Florida Statutes Section 766.207 allows for either party to request that a medical arbitration panel determine the amount of damages in the case if the plaintiff's reasonable grounds for medical malpractice are intact after a pre-suit investigation is complete.[85] The statute continues on and places the cap on noneconomic damages at $250,000 per incident.[86] It is important to note, however, that when a claim under this statute goes to arbitration, a defendant "who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section."[87] This means that the defendant is admitting liability—something that dramatically reduces a plaintiff's costs, time, and effort in litigating and proving its case.[88] The statute also provides, in subsection (7), that the defendant must promptly pay the arbitration award, attorney's fees and costs (up to fifteen percent of the award), and the cost of arbitration.[89] Because medical malpractice cases can take years to litigate, resolve, and ultimately produce payment,[90] this provision, too, provides a substantial benefit to a medical malpractice plaintiff that agrees to arbitration.

80. *Id.*
81. *Id.*
82. *E.g.*, 2012 Mich. Pub. Acts 608.
83. Kelly & Mello, *supra* note 3, at 516.
84. *Id.* at 517.
85. Univ. of Miami v. Echarte, 618 So. 2d 189, 193 (1993).
86. FLA. STAT. § 766.207(7)(b) (2019).
87. *Id.* § 766.207(7)(h).
88. Viscusi, *supra* note 11, at 789.
89. *Echarte*, 618 So. 2d at 193.
90. Viscusi, *supra* note 11, at 781.

C. *Florida Statutes Section 766.209*

Florida Statutes Section 766.209 governs the effects of a plaintiff's failure to accept the defendant's offer to arbitrate.[91] As discussed above, in Florida Statutes Section 766.207, arbitration offers a claimant in a medical malpractice action a slew of benefits.[92] This corresponding section details the consequences of not accepting voluntary binding arbitration.[93] First, the statute allows for a jury trial if neither party agrees or requests to arbitrate the claim.[94] If the defendant refuses an offer to arbitrate, the damages in the jury trial will be awarded pursuant to Florida Statutes Section 766.118—which as discussed above, would result in *no* cap on economic damages.[95] If, however, the plaintiff fails to agree to arbitration requested by the defendant, then caps enter into play.[96] Since the case will obviously then proceed to trial, "[t]he damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident."[97] The statute then specifically discusses the Florida Legislature's intent with respect to passing such a cap.[98] It sets out a rationale based on the balancing of both litigants' interests: "such [a] conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result . . . ."[99] This statute and its reasoning have been upheld despite constitutional challenges before the Florida Supreme Court.[100]

III. THE *MCCALL* CASE

In *Estate of McCall v. United States*, the Florida Supreme Court, in a plurality decision, declared the statutory cap on wrongful death noneconomic damages recoverable in an action for medical malpractice to be unconstitutional under the equal protection clause of the Florida Constitution.[101] *McCall* is the first case from the Florida Supreme Court

91. FLA. STAT. § 766.209 (2019).
92. *Id.* § 766.207.
93. *Id.* § 766.209.
94. *Id.* § 766.209(2).
95. *Id.* § 766.209(3).
96. *Id.* § 766.209(4)(a).
97. FLA. STAT. § 766.209(4)(a).
98. *Id.*
99. *Id.*
100. *See, e.g.*, Univ. of Miami v. Echarte, 618 So. 2d 190 (1993).
101. Estate of McCall v. United States, 134 So. 3d 894, 916 (2014).

to declare a portion of section 766.118 unconstitutional.[102] The court answered a certified question of state constitutional law: "Does the statutory cap on wrongful death noneconomic damages, Fla. Stat. § 766.118, violate the right to equal protection under article I, section 2 of the Florida Constitution?"[103]

In *McCall*, the decedent's parents and surviving son filed an action against the United States on behalf of the decedent's estate, as the medical negligence occurred at a clinic of the United States Air Force.[104] The deceased in *McCall* died as a result of medical negligence relating to the delivery of her child.[105] After the estate prevailed on its claim for wrongful death, the United States District Court for the Northern District of Florida "concluded that the Petitioners' noneconomic damages, or nonfinancial losses, totaled $2 million, including $500,000 for [the deceased]'s son and $750,000 for each of her parents."[106] The court, however, limited those damages pursuant to section 766.118.[107] On appeal, the Eleventh Circuit certified the question above regarding the constitutionality of caps for the Florida Supreme Court.[108]

Article I, section 2 of the Florida Constitution, which is Florida's equal protection clause, states, "[a]ll natural persons, female and male alike, are equal before the law."[109] The court conducted an equal protection analysis to determine whether the statute was constitutional using the rational basis test, as no suspect class or fundamental right existed.[110] The court applied the rational basis test as follows: "(1) whether the challenged statute serves a legitimate governmental purpose, *and* (2) whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose."[111] In carrying out this test, the court investigated the Legislature's factual findings.[112] To conduct an investigation "to invalidate an entire enactment is relatively rare."[113]

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102. *Florida Supreme Court Finds $1 Million Noneconomic Damages Cap Unconstitutional*, 9 WESTLAW J. MED. MALPRACTICE 1, 1 (2014) [hereinafter *Florida Supreme Court*].

103. *Estate of McCall*, 134 So. 3d at 897 (all caps in original).

104. *Id.* at 897, 917.

105. *Id.* at 898–99 (citing Estate of McCall v. United States, 642 F.3d 944, 946–47 (11th Cir. 2011)); *see also Florida Supreme Court*, *supra* note 102, at 1.

106. *Estate of McCall*, 134 So. 3d at 899.

107. *Id.*

108. *Id.*

109. FLA. CONST. art. I, § 2.

110. *Estate of McCall*, 134 So. 3d at 901.

111. *Id.* at 905 (quoting Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1095 (Fla. 2005)).

112. *Id.* at 901; *see also* James Bush & James Edgar, *Florida Medical Malpractice Claims: Elimination of Noneconomic Damages Caps*, 15 HEALTH L. LITIG. 3 (2017).

113. Bush & Edgar, *supra* note 112, at 3.

The first prong of the rational basis test was not satisfied.[114] The court reasoned, "aggregate caps or limitations on noneconomic damages violate equal protection guarantees under the Florida Constitution when applied without regard to the number of claimants entitled to recovery."[115] After the application of a cap to noneconomic damages, regardless of the number of claimants in this case, the court found that multiple claimants would be in a worse position than an individual claimant.[116] The "modest amount" saved by this statute in light of the unfair treatment to multiple claimants caused the court to rule the statute failed to meet the first prong of the analysis.[117] Further, the court found no relationship to a legitimate state objective.[118] The Florida Legislature relied on reports that that the jury awards of noneconomic damages were a significant factor in the medical liability insurance rates.[119] The court determined, however, that these findings were "not fully supported by available data."[120]

The second prong also failed, according to the court.[121] In passing the statute, the Senate Judiciary Committee listened to testimony regarding the "purported health care crisis."[122] Transcripts of debates in the Florida Senate prove that the Legislature heard that the number of doctors and medical school applicants had increased, and there was no closing of emergency rooms due to medical malpractice.[123] The Florida Senate also heard testimony that the caps would not affect the rates of medical liability insurance.[124] The court reasoned that because of this testimony, as well as other materials made available to the Legislature, there was an unfounded belief that this statute was necessary.[125] Based on this reasoning, the court found no rational basis and held that the wrongful death noneconomic damages cap was unconstitutional under the equal protection clause of the Florida Constitution.[126]

Conservative Chief Justice Polston, joined by Justice Canady, another conservative justice, wrote the dissenting opinion in *McCall*.[127] In regards to the plurality opinion's analysis of the statute's equal protection

114. *Estate of McCall*, 134 So. 3d at 900–01.
115. *Id.* at 901.
116. *Id.* at 901–02.
117. *Id.* at 903.
118. *Florida Supreme Court*, *supra* note 102, at 1.
119. *Estate of McCall*, 134 So. 3d at 906.
120. *Id.*
121. *Id.* at 908.
122. *Id.*
123. *Id.*
124. *Id.* at 910.
125. *Florida Supreme Court*, *supra* note 102, at 2.
126. *Estate of McCall*, 134 So. 3d at 916.
127. *Id.* at 922; *see also* SUN SENTINEL, *supra* note 48.

violation, Chief Justice Polston focused in on three key areas: the legislative findings, the rational basis test standard, and the Florida Supreme Court's precedent in deciding similar issues.[128] First, the dissent suggested that there were in fact legitimate "legislative findings that indicated the state was in the midst of a medical-malpractice-insurance 'crisis' in 2003 that threatened the quality and availability of health care," and that the court should not ignore those findings.[129] Polston argued, in opposition to the plurality's opinion that the legislative findings were unfounded, that the Legislature's efforts in investigating this crisis included "issu[ing] a report on the issue, h[o]ld[ing] public hearings, hear[ing] expert testimony, and review[ing] another report prepared by the Governor's Task Force that recommended a per incident cap to remedy the problem."[130] The Legislature also undertook other steps, besides the caps, to solve this problem: tighter regulation of the industry and license requirements, which were not found unconstitutional.[131]

Second, the dissent argued that the rational basis test was clearly satisfied with regard to the statute.[132] Calling the rational basis analysis a relatively easy standard to meet, Chief Justice Polston's main argument was that the judicial branch, in rendering this statute unconstitutional, overstepped its constitutional boundaries.[133] He argued that the judiciary, under a rational basis analysis, must not decide if the statute at issue provides the *best* solution, only that it takes aim at a legitimate goal and is related rationally to that goal.[134] Chief Justice Polston also stated that the plurality did not take into account the fact that the noneconomic damage caps were rationally related to the crisis.[135] Scholars agree with this argument, that under rational basis review, "[l]aws subject to this level of review are almost always upheld, even if the classification is not the best method for accomplishing the law's stated goal."[136]

The dissent also pointed out inconsistences in the court's equal protection analysis in relation to its own precedent.[137] Chief Justice Polston pointed out that the court in *Pinillos v. Cedars of Lebanon Hospital Corp.*,[138] deemed the capping of damages to be rationally related

128. *Estate of McCall*, at 924, 932.

129. News Service of Florida, *Florida Supreme Court Throws Out Malpractice Caps*, ORLANDO SENTINEL, Mar. 13, 2014, https://www.orlandosentinel.com/news/os-xpm-2014-03-13-os-medical-malpractice-damages-20140313-story.html [https://perma.cc/BU3J-EJ5H].

130. *Estate of McCall*, 134 So. 3d at 923 (Polston, C.J., dissenting).

131. 2003 Fla. Laws 416.

132. *Estate of McCall*, 134 So. 3d at 927 (Polston, C.J., dissenting).

133. *Id.* at 932.

134. *Id.* at 927.

135. *Id.* at 930–31.

136. Kelly & Mello, *supra* note 3, at 522.

137. *Estate of McCall*, 134 So. 3d at 927 (Polston, C.J., dissenting).

138. 403 So. 2d 365 (Fla. 1981).

to attempts to solve the perceived medical malpractice crisis,[139] arguing that "[t]his Court has employed the rational basis test in its prior decisions involving equal protection challenges to limitations on damages in medical malpractice cases," and such caps have been upheld.[140]

IV. THE *KALITAN* CASE

North Broward Hospital District v. Kalitan[141] expanded the Florida Supreme Court's reasoning in *McCall,* rendering the statute regarding noneconomic damages in personal injury cases unconstitutional.[142] The court affirmed the Fourth District's decision to hold statutory caps on personal injury medical malpractice actions unconstitutional.[143] In *Kalitan*, the plaintiff suffered severe injuries as a result of carpal tunnel surgery.[144] The plaintiff went in for this relatively routine surgery, which required her to be placed under anesthesia.[145] During this surgery, an anesthesia tube perforated her esophagus.[146] The plaintiff eventually needed additional lifesaving surgery to correct the perforation, was entered into a drug-induced coma for an extended period of time, and continued to need therapy and suffered continual pain, mental anxieties, and mental disorders as a result.[147]

After hearing the case, the jury awarded the plaintiff $4,718,011 in total damages, $4,000,000 of which were attributed to noneconomic, pain and suffering damages.[148] As a result of post-trial motions, and pursuant to the statutory caps on noneconomic damages in section 766.118, the trial court reduced the jury award while also applying the increased cap for the finding of a substantially serious or "catastrophic" injury.[149] On appeal, the Fourth District ruled that the trial court erred, and following *McCall*, the trial court should have awarded the full amount of damages.[150]

The Florida Supreme Court, using an equal protection analysis, upheld the Fourth District's decision and rendered the subsections unconstitutional.[151] To begin its analysis, the court looked at whether the

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139. *Id.* at 367.

140. *Estate of McCall*, 134 So. 3d at 927 (Polston, C.J., dissenting); *Pinillos*, 403 So. 2d at 367.

141. 219 So. 3d 49 (Fla. 2017).

142. *Id.* at 59.

143. *Id.* at 51, 59.

144. *Id.* at 51; Bush & Edgar, *supra* note 112, at 3–4.

145. *Kalitan*, 219 So. 3d at 51.

146. *Id.*

147. *Id.*

148. *Id.* at 52.

149. *Id.*

150. Bush & Edgar, *supra* note 112, at 4.

151. *Id.*

statutory caps were rationally related to the alleged medical malpractice crisis.[152] The court created a hypothetical to illustrate that a less severely injured claimant, entitled to up to $500,000 in recovery, may end up recovering more of his or her full compensation than a severely injured person who will max out at a recovery of $1,500,000.[153] The court could not rationalize why the Legislature would limit recovery between claimants and category of injury; therefore, the court concluded there was no rational basis for such recovery.[154]

The court reasoned through its decision by looking at the classifications that the statute created regarding "classes of medical malpractice victims."[155] Subsection (2) of section 766.118 create these classifications: "Section 766.118(2) provides a cap of $500,000 in noneconomic damages to a plaintiff who suffers from a practitioner's negligence and increases the cap to $1 million in the event of death, permanent vegetative state, or 'catastrophic injury' where a manifest injustice would occur unless increased damages were awarded."[156]

The court noted that the statute defined catastrophic injury to include "instances that range from amputation of a hand to severe brain or closed-head injury."[157] The court felt that this distinction would create arbitrary awards for plaintiffs with injuries that differ significantly in true damage.[158] The court found that this portion of the statute discriminated unequally between claimants.[159]

The court then considered if there was a legitimate state objective the Legislature was attempting to achieve.[160] Looking to its rationale in *McCall*, the court again stated that the reports relied upon by the Legislature were largely unfounded.[161] Further, the court explained that no evidence supported the continuation of a medical malpractice crisis.[162] In fact, the court argued, the evidence actually pointed to a decline in the perceived emergency situation.[163] After the caps on noneconomic damages failed the rational basis test, the court declared the caps on noneconomic damages to be unconstitutional and in violation of Florida's equal protection clause.[164] This decision, together with the Florida

152. *Kalitan*, 219 So. 3d at 58.
153. *Id.*
154. *Id.*
155. *Id.* at 57.
156. *Id.*; *see* FLA. STAT. § 766.118(2) (2019).
157. *Kalitan*, 219 So. 3d at 57.
158. *Id.* at 57–58.
159. *Id.*
160. *Id.* at 58.
161. *Kalitan*, 219 So. 3d at 59; *see Florida Supreme Court*, *supra* note 102, at 2.
162. *Kalitan*, 219 So. 3d at 59.
163. *Id.*
164. *Id.* at 56; Bush & Edgar, *supra* note 112, at 4.

Supreme Court's decision in *McCall*, effectively overturned caps for noneconomic damages in medical malpractice cases in the state of Florida.[165]

Again, Justice Polston met the plurality and concurring opinions with opposition in his "impassioned dissent."[166] Two other conservative justices joined Polston's dissent.[167] The opinion reiterated that the statute in question "easily passes constitutional muster" under the rational basis test.[168] The dissent, similar to the *McCall* dissent, spoke about the Legislature's efforts to combat an ongoing crisis and why capping noneconomic damages could potentially offer a solution.[169] Arguing that the judiciary overstepped its boundaries, Justice Polston stated, "it is immaterial that the majority of this Court disagrees with the Legislature's evidence regarding whether there was (or currently is) a medical malpractice crisis in Florida."[170] The Florida Supreme Court rarely reweighs legislative findings.[171] Instead, Justice Polston argued, the judiciary should have applied the "proper" rational basis analysis and found that enacting caps is rationally related to a legitimate government interest, even if the judiciary could identify a "better" method.[172] By questioning the Legislature's findings, the majority inserted itself into a purely legislative function.[173]

V. THE *ECHARTE* CASE

In the case of *University of Miami v. Echarte*,[174] the Florida Supreme Court upheld two statutory caps, Florida Statutes Sections 766.207(7)(b) and 766.209(4)(a), that limited noneconomic damages in the context of arbitration.[175] The court reversed the Third District Court of Appeal's decision holding these two statutes unconstitutional.[176] In this case, doctors at the University of Miami treated a minor child for a brain tumor, and issues during the operation resulted in the amputation of the minor child's right hand and forearm.[177] The minor child and her parents

165. Bush & Edgar, *supra* note 112, at 4.

166. Jill F. Bechtold & Alison H. Sausaman, *State of Emergency? A Flurry of New Case Law Creates Uphill Battles for Defending Medical Malpractice Claims in Florida*, 36 No. 3 Trial Advoc. Q. 33, 35 (2017).

167. *Kalitan*, 219 So. 3d at 60 (Polston, J., dissenting).

168. *Id.*

169. *Id.* at 61.

170. *Id.*

171. Bush & Edgar, *supra* note 112, at 4.

172. *Kalitan*, 219 So. 3d at 61 (Polston, J., dissenting).

173. *Id.* at 63.

174. 618 So. 2d 189 (Fla. 1993).

175. *Id.* at 190.

176. *Id.* at 198.

177. *Id.*

brought suit and alleged negligence on the part of the university, and the university subsequently requested arbitration between the two parties to determine damages.[178] In response, the plaintiffs filed a motion for declaratory judgment to render the portions of the Florida Statutes regarding arbitration caps unconstitutional.[179]

The trial court held the statutes unconstitutional on various grounds, and the Third District affirmed the grounds, but only discussed the right of access to courts.[180] Here, the Florida Supreme Court did the same, but explicitly stated that "the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or the non-delegation doctrine."[181] The court discussed the duties and completion of pre-suit requirements from both claimants and defendants and the applicability of Florida Statutes Sections 766.207 and 766.209.[182] The court then applied a right of access to courts test in analyzing these statutes.[183]

Kluger v. White[184] is the seminal case in Florida regarding the right of access to courts.[185] In *Kluger*, the Florida Supreme Court discussed the right of access to courts and developed a test to determine whether a statute infringed this right.[186] The test is as follows:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law…, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[187]

Thus, according to this test, either the two statutes at issue need to establish a reasonable alternative to the right that is being taken away, or the Legislature must prove that there is an overwhelming public need for

178. *Id.*

179. *Id.*

180. *Echarte*, 618 So. 2d at 191; *see* Carol A. Crocca, Annotation, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245 § 7 (originally published 1995).

181. *Echarte*, 618 So. 2d at 191.

182. *Id.* at 193.

183. *Id.* at 194.

184. 281 So. 2d 1 (Fla. 1973).

185. *Echarte*, 618 So. 2d at 193 (stating that *Kluger* is the seminal case on constitutional challenges to right of access).

186. *Kluger*, 281 So. 2d at 4.

187. *Id.*

the right to be abolished, and no other measure is available to combat the issue.[188]

First, the court determined whether sections 766.207 and 766.209 gave plaintiffs a corresponding gain in order to recover the noneconomic damages they seek.[189] The court stated that the plaintiff receives "prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial."[190] In addition to admission of liability by the defendants (and fees and costs saved in proving liability), the plaintiffs also benefited from a relaxed standard of evidence in arbitration proceedings.[191]

Second, the court found that even though the first prong of the *Kluger* test was satisfied, the second portion of the test would also be met.[192] This prong "requires a legislative finding that an 'overpowering public necessity' exists, and further that 'no alternative method of meeting such public necessity can be shown.'"[193] Here, the court recognized the legitimacy of a medical malpractice crisis.[194] The *Echarte* court detailed factual findings, as discussed above, in the legislative report: an increase in medical malpractice insurance premiums, an increase in specialty premiums, and the burden upon current physicians to survive in such a climate.[195] In discussing the second prong, the court deferred to the Legislature's findings and the existence of a "crisis," during which there is an overwhelming public necessity for these caps to exist.[196] The court explicitly stated that the caps are necessary and can help to abate the present medical malpractice crisis.[197]

There are two dissenting opinions in *Echarte*. Justice Shaw, in his dissent, argued that the statutes fail the *Kluger* test, and thus, violate the constitutional right of access to courts.[198] First, Justice Shaw found that the first prong of the *Kluger* test was not satisfied, as arbitration did not offer the plaintiff a remedy that fully redressed the injuries suffered.[199] He then discussed the second prong of the *Kluger* test.[200] Agreeing with Justice Barkett's analysis, discussed below, Justice Shaw found no

188. *Echarte*, 618 So. 2d at 194.
189. *Id.*
190. *Id.*
191. Crocca, *supra* note 180.
192. *Echarte*, 618 So. 2d at 195.
193. *Id.*; see Crocca, *supra* note 180.
194. *Echarte*, 618 So. 2d at 196.
195. *Id.*
196. *Id.* at 197.
197. *Id.* at 196.
198. *Id.* at 199 (Shaw, J., dissenting).
199. Tracy Carlin, *Medical Malpractice Caps Move From the Legislature to the Courts: Will They Survive?*, 78 FLA. B.J. 10, 12 (2004).
200. *Echarte*, 618 So. 2d at 199 (Shaw, J., dissenting).

overwhelming public necessity or inability to implement an alternative method.[201] In making this argument, Shaw discussed "that even the task force pointed to other methods of meeting the alleged public necessity, e.g., vigilant management of medical malpractice."[202]

Chief Justice Barkett's dissent discussed her belief that the caps violate not only access to courts, but also equal protection.[203] Her dissent vigorously opposed the finding that the Task Force's report outlines a public necessity that warrants a limited access to courts.[204] Further, she stated that there is no finding that a reasonable alternative method could not similarly aid in remedying the crisis.[205] In regards to her equal protection analysis, Justice Barkett offered comments that the Legislature creates two categories of victims—ones who will be fully compensated by this statute, and ones who will not.[206] She, therefore, would have found the statutes unconstitutional under both the equal protection and access to courts clauses of the Florida Constitution.

VI. THE INCONSISTENCES IN CASE LAW REGARDING NONECONOMIC DAMAGE CAPS

After close analysis of these cases, it is clear that there are inconsistencies in the Florida Supreme Court's judicial opinions as to the constitutionality of caps on noneconomic damages. The three cases discussed above, *McCall*, *Kalitan*, and *Echarte*, all continue to be regarded as good law. The reasoning in each of these opinions, however, is at odds with each other in a few crucial areas.

The first, and perhaps most obvious, inconsistency in the opinions is the way in which the Governor's Task Force Report was treated. In both *McCall* and *Kalitan*, this report, relied on by the Legislature in carrying out its findings, was harshly criticized.[207] Language such as, "dubious,"[208] "questionable,"[209] and unsound,[210] represent how the majority of the court in these two cases felt about the report.[211] In fact, the court went as far as to conduct its own investigation into the report's findings because it garners so much suspicion towards the results.[212] In

201. Carlin, *supra* note 199.
202. *Id.*
203. *Id.*
204. *Echarte*, 618 So. 2d at 198 (Barkett, C.J., dissenting).
205. *Id.*
206. *Id.*
207. *See* Estate of McCall v. United States, 134 So. 3d 894, 906 (Fla. 2014); N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).
208. *Estate of McCall*, 134 So. 3d at 909.
209. *Id.*
210. *Id.*
211. *See id.* at 906; *Kalitan*, 219 So. 3d at 59.
212. Bush & Edgar, *supra* note 112, at 3.

Echarte, however, the court used the report to advance its own argument.[213] The *Echarte* Court specifically stated, "[t]he Legislature's factual and policy findings are supported by the Task Force's findings in its report."[214] Now, it is important to remember that in *McCall* and *Kalitan*, the ideological makeup of the court was different from the makeup of the court in *Echarte*. That is clear from looking at the dissents in the three cases. The dissents in *McCall* and *Kalitan*, written by a conservative justice, advocated for a return to the principals detailed in *Echarte*.[215] It seems that the majority of the court praised the report when the report's findings coincided with its position regarding the noneconomic damage caps. A solution to this inconsistency could be for future courts to take an active, bipartisan look at the "findings of fact and history" of Task Force findings and Legislative reports and find a way to reconcile the differing case law on this issue.[216] While the constitutionality of such economic provisions are obviously dealt with at a state level, the Florida Supreme Court seems to be applying a test more stringent than the traditional rational basis test to the argument that such caps violate equal protection according to the Florida Constitution.

Another blatant inconsistency that has yet to be resolved by Florida law is the fact that Florida has caps in certain situations and not in others.[217] One way to reconcile this potential problem is to look at the situations where caps are applied and where they are not. In wrongful death and medical malpractice actions, the plaintiff does not receive a benefit if caps are applied.[218] In arbitration, it is more readily apparent that a plaintiff receives some sort of benefit in return for arbitration: a relaxed evidentiary standard, admission of liability by the defendant, and fees and costs paid for by the defendant.[219] One can at least partially rationalize a cap in this scenario because the plaintiff incurs substantial benefits if the case is arbitrated.[220]

An argument can also be made, however, that despite these benefits, an arbitration plaintiff may not be fully compensated to the amount that a full jury trial would have given the plaintiff. It is easy to imagine a situation in which a plaintiff has a particularly egregious claim, where both punitive and noneconomic damages would potentially be very high, where the "commensurate benefits" of arbitration would not begin to even scrape the surface of a jury trial verdict. This is a clear hole in the

213. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993).
214. *Id.*
215. *Estate of McCall*, 134 So. 3d at 922; *Kalitan*, 219 So. 3d at 60.
216. Carlin, *supra* note 199, at 14–15.
217. *See id.*
218. *Estate of McCall*, 134 So. 3d at 919–20.
219. *Echarte*, 618 So. 2d at 194.
220. *See id.*

body of case law that the Florida Supreme Court has put out in the last thirty years. Consistency in case law regarding a supposed medical malpractice crisis, rational basis precedent, and outlook on legislative findings can remedy some of these variances in the caps on noneconomic damages.

The Florida Supreme Court's position to overturn the caps, and the manner in which it did so (by conducting an equal protection analysis), deviates from the "normal" outcomes nationwide.[221] As previously discussed, much of the reasoning cited by the court dealt with a distrust of the legislative findings.[222] The national trend of questioning legislative findings is that "most state courts have been hesitant to overturn damages caps, even in the face of judicial doubt about their efficacy."[223] Most state courts are unmotivated to question "the important responsibility that state legislators have to thoroughly evaluate the evidence supporting damages caps before adopting legislation."[224] Nationwide, the case law suggests that if no heightened scrutiny is applied to the damages cap, the cap will survive such a rational basis analysis.[225] This is because the caps may have a stabilizing effect on insurance premiums that a court must take into account.[226] However, as far as a constitutional challenge in terms of access to courts, Florida's *Echarte* decision echoes most case law across the country "in states in which courts have interpreted open-courts provisions to impose substantive restrictions on legislatures' ability" to impose caps or other remedies-limiting legislation.[227] However, the overarching approach for access to courts "continues to view open-courts guarantees as procedural guarantees only, leaving legislatures free to admit or abolish remedies and causes of action."[228]

VII. THE FUTURE OF NONECONOMIC DAMAGE CAPS IN FLORIDA

It will be interesting to see how the current Florida Supreme Court deals with the previously discussed inconsistencies in upcoming decisions. The makeup of the Florida Supreme Court has recently changed as a result of newly elected Florida Governor Ron DeSantis's appointments.[229] The new justices are Barbara Lagoa, Robert Luck, and

221. Bryston C. Gallegos, *Tort Reform Under Constitutional Fire*, 96 DENVER U. L. REV. 17, 17–18 (2018).

222. *Estate of McCall*, 134 So. 3d at 909.

223. Kelly & Mello, *supra* note 3, at 516.

224. *Id.*

225. *Id.* at 523.

226. David M. Studdert et al., *Medical Malpractice*, 350 NEW ENG. J. MED. 283 (2004).

227. Kelly & Mello, *supra* note 3, at 520.

228. *Id.*

229. Sun Sentinel Editorial Board, *The Most Conservative Florida Supreme Court in Decades*, SUN SENTINEL (Jan. 22, 2019, 1:50 PM), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html [https://perma.cc/TMT8-DFYK].

Carlos Muñiz.[230] The three newly appointed conservative justices are considered to be younger and likely "could shape the direction of the court for years to come."[231] Because of these three new additions, conservative justices, including Chief Justice Canady, Justice Polston, and Justice Lawson, now dominate the court.[232]

Because the dissents in both *McCall* and *Kalitan* were written by a conservative justice, joined by other conservative justices, there is reason to suspect that these decisions may be reversed. Upon appointment, "[DeSantis has] made it clear . . . that he expects [the new justices] to reverse a half-century of what he and some conservatives consider 'activist' decisions of the Florida Supreme Court."[233] Both *McCall* and *Kalitan* could fall into this category.

It is important to remember that Justice Polston, in his *Kalitan* dissent, specifically called out the majority for overstepping the bounds of the judiciary branch.[234] Justice Polston argued, as he did in *McCall*, "[f]or a majority of this Court to decide that a [medical malpractice] crisis no longer exists, if it ever existed, so it can essentially change a statute and policy it dislikes, improperly interjects the judiciary into a legislative function."[235] This largely echoes a sentiment that the judicial branch promoted, while taking an activist stance, its own interests when not overturning the statutory caps on noneconomic damages.

Further, the more liberal Justice Barkett took the position in her dissenting opinion in *Echarte* that the cap violated equal protection.[236] This stance has been characterized as "liberal judicial activism."[237] While this was only a dissenting opinion, the majority opinions in *McCall* and *Kalitan* echoed many of the sentiments that Justice Barkett advocated.[238] Therefore, if the issues presented in *McCall* and *Kalitan* come up to the Florida Supreme Court, some of the reasoning used to overturn the caps

230. *Id.*

231. John Kennedy, *DeSantis Appoints Third Florida Supreme Court Justice, Completing Conservative Makeover*, HERALD-TRIB. (Jan. 22, 2019, 10:21 AM), https://www.heraldtribune.com/news/20190122/desantis-appoints-third-florida-supreme-court-justice-completing-conservative-makeover [https://perma.cc/VB4K-6GJY].

232. Sun Sentinel Editorial Board, *supra* note 229.

233. *Id.*

234. *See* N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 60 (Fla. 2017) (Polston, J., dissenting).

235. *Id.* at 63; *see also* Estate of McCall v. United States, 134 So.3d 894, 922 (Fla. 2014) (Polston, J., dissenting) ("I respectfully dissent because the plurality disregards the rational basis standard prescribed by our precedent as well as the Legislature's policy role under Florida's constitution.").

236. Carlin, *supra* note 199, at 14.

237. Ed Whelan, *This Day in Liberal Judicial Activism–May 13*, NAT'L REV. (May 13, 2015, 12:00 PM), https://www.nationalreview.com/bench-memos/day-liberal-judicial-activism-may-13-ed-whelan-5/.

238. *See Estate of McCall*, 134 So. 3d at 916; *Kalitan*, 219 So. 3d at 56.

may be construed as activism by the judicial branch and used to reverse the invalidation of the caps.[239]

However, if the current Florida Supreme Court wants to overturn the decisions in both *McCall* and *Kalitan*, it faces an additional challenge. Both of these cases suggest that the medical malpractice crisis has ended.[240] In *Kalitan*, the Florida Supreme Court suggested the crisis had ended by stating, "in *McCall*," the court opined that "there [was] no evidence of a continuing medical malpractice crisis justifying the arbitrary application of the statutory cap, [so] we reach the same conclusion with regard to the unconstitutionality of the caps in the present case."[241] This statement, now included in precedent, may hinder the court from attempting to reinstate such caps. If the court wishes to overturn these decisions and uphold the caps, there will likely need to be evidence that the medical malpractice crisis is indeed ongoing. This could potentially require more legislative findings regarding the existence of such a crisis, and, as previously discussed, legislative findings are often debated by the makeup of the court. Or, will the court decide to implement an investigation of its own? If this topic reaches the new makeup of the Florida Supreme Court, it will be interesting to see how the existence of a perceived medical malpractice crisis is dealt with. Additionally, because *Echarte* has not been overturned by the court, it is possible that the new conservative majority may use *Echarte* as precedent if the issues in *McCall* or *Kalitan* were brought before the court.[242]

VIII. CONCLUSION

The issue of capping noneconomic damage awards is one on which many states disagree.[243] In Florida, specifically, there have been landmark decisions both allowing and disallowing caps in varying situations.[244] This can likely be attributed to an ever-changing ideological makeup of the Florida Supreme Court, as well as available findings, information, and reports.

In 1993, in *Echarte*, the Florida Supreme Court upheld Florida Statutes Sections 766.207(7)(b) and 766.209(4)(a), which limit noneconomic damages when the parties either agree to arbitrate or the plaintiff denies the defendant's request to arbitrate.[245] The majority found that the statute, and the commensurate benefits it gave plaintiffs, passed

239. *See Estate of McCall*, 134 So. 3d at 916; *see also Kalitan*, 219 So. 3d at 56.

240. *Kalitan*, 219 So. 3d at 57.

241. *Id.*

242. *See Estate of McCall*, 134 So. 3d at 897; *Kalitan*, 219 So. 3d at 58.

243. CTR. FOR JUSTICE & DEMOCRACY, *supra* note 1.

244. *See, e.g.*, *Estate of McCall*, 134 So. 3d at 916; *Kalitan*, 219 So. 3d at 59; Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993).

245. *Echarte*, 618 So. 2d at 191.

constitutional challenge in terms of the right to equal protection and access to courts.[246] It largely relied on the existence of a medical malpractice crisis.[247]

In 2014, in *McCall*, the Florida Supreme Court struck down Florida Statutes Section 766.188 as unconstitutional and in violation of the equal protection clause of the Florida Constitution.[248] The previous existence of a medical malpractice crisis was discredited, and the arbitrary way section 766.118 classified plaintiffs did not pass the rational basis analysis conducted by the court.[249] As a result, in a wrongful death case, noneconomic damages could not be capped.[250]

In 2017, the Florida Supreme Court further extended its reasoning in *McCall* by holding that in medical malpractice actions the noneconomic damages cap was unconstitutional.[251] Again finding no evidence of a medical malpractice crisis, the court argued that separating medical malpractice victims into certain categories of recovery violated equal protection.[252]

Echarte has not yet been overturned, and the existence of caps on noneconomic damages still exists.[253] The Florida Supreme Court has yet to reconcile its treatment of a Task Force report in *Echarte* with its treatment of the same report in *McCall* and *Kalitan*. The inconsistences in Florida case law may have impacts in the coming years on medical malpractice litigation and plaintiffs' recoveries. The makeup of the Florida Supreme Court in 2019 has shifted to largely conservative justices.[254] These justices may take the opportunity to build on the vigorous dissents in *McCall* and *Kalitan* to overturn the unconstitutionality of the wrongful death and medical malpractice action caps. National rulings also point to a potential overturn of such damage caps.[255] Florida's highest court has taken a heightened approach to traditional rational basis, potentially to the point of overstepping into the Legislature's duties. Regardless, it would aid Florida's potential claimants to have a clear body of case law, or a clear, bipartisan analysis of this perceived "medical malpractice crisis."[256]

246. *Id.*
247. *Id.* at 196.
248. *Estate of McCall*, 134 So. 3d at 916.
249. *Id.* at 912.
250. *Id.* at 916.
251. N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).
252. *Id.* at 58.
253. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993).
254. Kennedy, *supra* note 231.
255. Kelly & Mello, *supra* note 3, at 516.
256. *Id.* at 515.