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Articles

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Letter from the Editor

Andrew Park, The Criminal Law Practitioner

Dear Readers,

We appreciate your continued interest in the Criminal Law Practitioner. With each issue, we strive to publish pieces that are not only exclusively focused on the arena of criminal law, but that engage with fascinating subject matter and prompt thought-provoking discussion.

As the only student-run criminal law publication at the American University Washington College of Law, our work is only possible because of the incredible commitment and effort of a staff that I have had the good fortune to lead this past year. Thank you all for your dedication. I wish our next staff, led by Jordan Hulseberg, much luck and success. I am grateful to our featured authors, Olivia Hinerfeld, Maya Reisman, Lucas Stegman and Alexandra Perona for their thoughtful and fascinating pieces.

If you are interested in more of the Criminal Law Practitioner's publications, please find us at https://www.crimlawpractitioner.org/ for our past issues as well as our staff's weekly blog on the latest issues in criminal law.

The country continues to feel the ripple effects of George Floyd's murder a little over a year ago. As we grapple with the task of deconstructing, reimagining, and changing a criminal legal system that does not work for all, we also must know that this task is not accomplished in a day, in a month, or in a year. As our authors aptly write about, there is much that still needs to be done in many areas of our criminal system, and we hope you continue to join us in moving it forward. The work continues.

Sincerely,

Andrew Park
Editor-in-Chief
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Arrested Development: The Case for Eliminating the Violence Against Women Act's Financial Support for Pro-Arrest Domestic Violence Laws

OLIVIA HINERFELD*

INTRODUCTION

In 1990, the United States Senate Judiciary Committee—chaired by then-Senator Joe Biden—hosted public hearings on violence against women.[1] Seeking to raise public awareness and foster bipartisan support for his newly-introduced Violence Against Women Act ("VAWA"), Biden invited a group of domestic violence and sexual assault victims to testify before the committee.[2] In his opening statement, Biden emphasized the urgency of the legislation: "We cannot afford to wait any longer to treat domestic violence as something other than what it is, a serious crime. These are the reasons why I wrote the Violence Against Women Act of 1990 and why I will continue to press for its enactment . . . ."[3] Over the course of two days, victims came forward to describe their experiences with rape and battery.[4] One witness, Tracey Motuzick, shared:

> I was the victim of abuse for many years, and in 1983 my husband stabbed me thirteen times and broke my neck while the police were on the scene. I nearly died and I am permanently paralyzed, and physically and mentally scarred for my life. I called the police many times the year before this incident and they took him away several times without arresting him . . . I felt as though [the police] were not taking me seriously because I had no bruises. In fact, one officer told me that they would not arrest him unless they witnessed the assault.[5]

* Georgetown Law, J.D. 2021, *cum laude*; Georgetown University, B.S.F.S. 2017. Many thanks to Professor Shon Hopwood and Professor Deborah Epstein for their invaluable advice and feedback, as well as to the editors of the *Criminal Law Practitioner* who have worked so diligently to prepare this Note for publication.

1 *Women and Violence*: *Hearing Before the S. Comm. on the Judiciary*, 101st Cong. (1990); *Violence Against Women: Domestic Violence: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. (1990).

2 *See Throughline*, NPR (Jan. 16, 2020), https://www.npr.org/transcripts/796735042 (interviewing former Senate Judiciary Committee staffer and "Godmother of the Violence Against Women Act" Victoria Nourse about VAWA).

3 *Violence Against Women: Domestic Violence: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 85 (1990). (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary).

4 *Violence Against Women: Domestic Violence: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. (1990).

5 *Id.* at 99 (statement of Tracey Motuzick); *see also Domestic Violence is Target of Bill*, N.Y. TIMES (Dec. 16, 1990), https://www.nytimes.com/1990/12/16/us/domestic-violence-is-target-of-bill.html ("[Motuzick] recounted in emotional testimony how she was repeatedly beaten and verbally threatened by her husband, who was arrested after he put his fist through the windshield of her car . . . Her husband has been in jail for more than 7 years and will be released in June.").

Motuzick's testimony, taken with the statements of fellow victims and expert witnesses, helped spur the passage of VAWA.[6] On September 13, 1994, President Bill Clinton signed VAWA into law as part of the Violent Crime Control and Law Enforcement Act ("1994 Crime Bill").[7] The enactment of VAWA was a watershed moment, marking the first piece of comprehensive federal legislation designed to eliminate violence against women in the United States.[8] It included vital protections and provisions, including grant funding for victim services, civil redress in unprosecuted cases, and full faith and credit to protection orders issued anywhere in the country.[9] President Biden has frequently described VAWA as his proudest legislative achievement from his thirty-six-year career in the Senate.[10]

But VAWA was not a panacea for gender-based violence.[11] In the ensuing twenty-six years, several provisions of VAWA have resulted in unanticipated negative consequences that undermine their positive impact.[12] Motuzick's story in particular helped lay the groundwork for one of VAWA's most damaging provisions: financial incentives for states to enact mandatory arrest laws.[13] Mandatory arrest laws provide that a police officer *must* arrest if he or she finds probable cause for a domestic violence offense.[14] Today, twenty-two states and the District of Columbia have enacted mandatory arrest laws,[15] and the majority of police departments have implemented pro-arrest policies.[16] Although one of the initial motivations behind passing these laws was to deter recidivism,[17] in reality they have endangered domestic violence victims,

6 *See* Helen Dewar, *Senate Gives Up on Healthcare, Passes Crime Bill*, WASH. POST (Aug. 26, 1994), https://www.washingtonpost.com/archive/politics/1994/08/26/senate-gives-up-on-health-care-passes-crime-bill/d988b2c8-da35-4fea-8621-3e5c6ab61845/; Barbara Vobejda, *Battered Women's Cry Relayed Up From Grass Roots*, WASH. POST (July 6, 1994), https://www.washingtonpost.com/archive/politics/1994/07/06/battered-womens-cry-relayed-up-from-grass-roots/709542b9-1ae6-40de-ad37-16feecb6c4d0/ ("Biden met initially with a lukewarm response from women's groups . . . But over the years, opposition has fallen away, women's groups have lined up solidly behind the legislation and Biden has more than 60 cosponsors.").

7 *Crime Bill Signing Ceremony*, C-SPAN (Sept. 13, 1994), https://www.c-span.org/video/?60148-1/crime-bill-signing-ceremony.

8 *History of VAWA*, LEGALMOMENTUM, https://www.legalmomentum.org/history-vawa (last visited Nov. 14, 2020).

9 *Id. But see United States v. Morrison*, 529 U.S. 598 (2000) (declaring VAWA's civil rights remedy unconstitutional).

10 *See, e.g.*, Tara Law, *The Violence Against Women Act Was Signed 25 Years Ago. Here's How the Law Changed American Culture*, TIME (Sept. 12, 2019), https://time.com/5675029/violence-against-women-act-history-biden/; Lindsay Holst, *Vice President Biden: "20 Years Ago Today"*, WHITE HOUSE (Sept. 13, 2014), https://obamawhitehouse.archives.gov/blog/2014/09/13/vice-president-biden-20-years-ago-today.

11 *See* Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), https://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/. *See generally* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (U.C. Press, 2018) (critiquing the effectiveness of criminalization as anti-domestic violence policy and advocating for substantial changes to VAWA).

12 *See* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 148 (U.C. Press, 2020) ("Although often held up as a stunning liberal victory, VAWA was no less carceral than the rest of the Crime Control Bill . . . VAWA's largest appropriation was grant money to states to encourage 'more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women . . . .'") [hereinafter GRUBER].

13 Dirk Johnson, *Abused Women Get Leverage in Connecticut*, N.Y. TIMES (June 15, 1986), https://www.nytimes.com/1986/06/15/weekinreview/abused-women-get-leverage-in-connecticut.html (describing how Tracey Motuzick's (née Thurman) case led to the passage of a mandatory arrest law in Connecticut, colloquially known as the "Thurman Law").

14 David Hirschel, et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 256 (2008) [hereinafter Hirschel, et al.].

15 *See infra* note 63.

16 GRUBER, *supra* note 12, at 82.

17 *See* Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) [hereinafter *Sherman Study*].

exacerbated mass incarceration, and have largely failed to deter repeat offenders.[18]

In this Note, I will demonstrate that mandatory arrest laws have failed to protect many domestic violence victims and have significantly increased the U.S. prison population. To counter these undesirable consequences, I recommend several federal, state, and local actions to more effectively combat domestic violence.[19] In Part One, I will chronicle the history of mandatory arrest laws in the United States, focusing on changes wrought by VAWA. I will also survey the three main types of arrest laws that U.S. jurisdictions have enacted to address domestic violence. In Part Two, I will critique the impact of mandatory arrest laws on victims, perpetrators, and children growing up in violent households. I focus on mandatory arrest laws, rather than pro-arrest statutes more broadly, as the evidence more clearly demonstrates the shortcomings of mandatory arrest laws in the twenty-three jurisdictions that continue to employ them. In Part Three, I will briefly discuss the inadequacies of preferred arrest laws—the main pro-arrest alternative to mandatory arrest laws. Finally, in Part Four, I will suggest a path forward that centers on amending VAWA to eliminate financial incentives for pro-arrest laws and instead investing resources in emergency housing for victims and abusive partners.

I. A Brief History of Mandatory Arrest Domestic Violence Laws

For hundreds of years, society viewed domestic violence as a private family matter.[20] Government actors were reluctant to intervene in the affairs between a husband and wife.[21] Only recently has public opinion shifted in favor of recognizing domestic violence as a crime.[22] In the mid-1970s, women's activists established the battered women's movement, drawing attention to the plight of the millions of women beaten by their partners each year.[23] States and localities explored legislative reforms, with a particular concentration on policing and prosecution

[18] *See infra* Part II.

[19] Throughout this Note, I will use "domestic violence" to describe a pattern of behaviors used by an intimate partner to maintain power and control in a relationship. Domestic violence is also frequently referred to in the literature as "intimate partner violence," "domestic abuse," or "relationship abuse." I choose to use "domestic violence" because this is the most commonly-employed term. *Abuse Defined*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/identify-abuse/understand-relationship-abuse/ (last visited Nov. 14, 2020). For similar reasons, I will use the term "victim" rather than "survivor" when describing people who have experienced domestic violence as this essay focuses on the law-enforcement response to the crime of domestic violence. *See Victim or Survivor?* RAINN, https://www.rainn.org/articles/key-terms-and-phrases (last visited Nov. 14, 2020). Finally, I will generally use female pronouns and identifiers when referring to victims and male pronouns when referring to perpetrators because domestic violence predominantly impacts individuals who identify as women. *National Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/STATISTICS (last visited Nov. 14, 2020). Importantly, however, domestic violence significantly impacts LGBTQIA individuals and the issues same-sex couples face with mandatory arrests are also devastating. *See* David Hirschel & Philip D. McCormack, *Same-Sex Couples and the Police: A 10-Year Study of Arrest and Dual Arrest Rates in Responding to Incidents of Intimate Partner Violence*, VIOLENCE AGAINST WOMEN (2020) (finding that police are more likely to arrest both members of a same-sex couple than a heterosexual couple when responding to a domestic violence incident).

[20] *See generally* Richard Johnson, *Changing Attitudes About Domestic Violence*, 50 L. & ORDER 60 (2002) (presenting a historical overview on the perception of domestic violence within the American criminal justice system).

[21] *See, e.g., State v. Rhodes,* 61 N.C. 453, 453–54 (1868) (holding that a husband had a right to whip his wife with a switch "no larger than his thumb"). The Court added: "The laws of [North Carolina] do not recognize the right of the husband to whip his wife, but our Courts *will not interfere to punish him* for moderate correction of her, even if there had been no provocation for it." *Id.* at 453 (emphasis added).

[22] *See* RACHEL LOUISE SNYDER, NO VISIBLE BRUISES: WHAT WE DON'T KNOW ABOUT DOMESTIC VIOLENCE CAN KILL US (Bloomsbury, 2019) (dismantling common myths about domestic violence in the United States) [hereinafter SNYDER].

[23] *See* DEL MARTIN, BATTERED WIVES (Volcano Press, 1976) (providing a searing portrait of marital violence in the United States); Amy Lehrner & Nicole E. Allen, *Still A Movement After All of These Years?: Current Tensions in the Domestic Violence Movement*, 15 VIOLENCE AGAINST WOMEN 1 (2009).

strategies.[24] It was in this context that mandatory arrest arose as a solution. In this section, I will outline the rise of mandatory arrest laws before, during, and after the enactment of VAWA.

A. *Before VAWA's Enactment: The Duluth Model and the Sherman Study*

The story of mandatory arrest laws begins in Duluth, Minnesota in 1980.[25] In an effort to reform the criminal justice response to domestic violence in the community, several activists came together to found Domestic Abuse Intervention Programs ("DAIP").[26] The Program partnered with eleven local agencies to establish police training, prosecutorial and judicial guidelines, support services for victims, and counseling for batterers, collectively known today as the "Duluth Model."[27] Under the advisement of DAIP, Duluth enacted the nation's first mandatory arrest policy for misdemeanor assaults in 1981.[28] Activists immediately touted the law's success, arguing that it shifted the perception of domestic violence from a personal problem to a criminal one.[29]

Mandatory arrest laws, however, did not receive widespread attention until 1984 when the results of the landmark Minneapolis Domestic Violence Experiment were published.[30] After receiving a grant from the National Institute of Justice ("NIJ"), renowned criminologist Lawrence Sherman conducted an experiment with the Minneapolis Police Department from 1981 to 1982 to study the deterrent effects of police responses to domestic violence (the "Sherman Study").[31] For six months, misdemeanor domestic violence cases were assigned one of three treatments: "arrest,"[32] "send,"[33] or "advise."[34] Following an incident, police officers stayed in touch with parties for a six-month period to measure the frequency and seriousness of any continued domestic violence.[35] In total, the Sherman Study tracked thirty-four police officers and 205 cases.[36] The experiment ultimately revealed that arrest had the strongest deterrent effect on recidivism, though Sherman cautioned against drawing hasty conclusions given the small sample size.[37] In response, the NIJ funded more robust experiments in six other cities: Miami, Atlanta, Omaha, Milwaukee, and Charlotte.[38] Results of the follow-up studies

[24] *See* GRUBER, *supra* note 12, at 66 ("The battered women's movement's carceral turn influenced the larger American carceral turn.").

[25] DOMESTIC ABUSE INTERVENTION PROGRAMS: HOME OF THE DULUTH MODEL, https://www.theduluthmodel.org/about-us/ (last visited Dec. 25, 2020).

[26] Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?,* 43 DEPAUL L. REV. 1133, 1150–51 (1994) [hereinafter Welch].

[27] *See* DOMESTIC ABUSE INTERVENTION PROGRAMS: HOME OF THE DULUTH MODEL, https://www.theduluthmodel.org/about-us/ (last visited Dec. 25, 2020); Matthew Wolfe, *Can You Cure a Domestic Abuser?*, ATLANTIC (Jan. 17, 2020), https://www.theatlantic.com/politics/archive/2020/01/seeking-cure-domestic-violence/604168/.

[28] Welch, *supra* note 26, at 1150.

[29] Welch, *supra* note 26, at 1152.

[30] *Sherman Study*, *supra* note 17.

[31] Lawrence W. Sherman & Richard R. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REPS. 1, 1 (Apr. 1984).

[32] Mandatory arrest of the suspect. *Id.* at 2.

[33] Ordering the offender away from the premises for eight hours. *Id.*

[34] Providing advice and/or mediation to the intimate partners at the premises. *Id.*

[35] *Id.*

[36] *Id.* at 2–4.

[37] *Id.* at 8; Johanna Niemi-Kiesilainen, *The Deterrent Effect of Arrest in Domestic Violence: Differentiating Between Victim and Perpetrator Response*, 12 Hastings Women's L.J. 283, 284–85 (2001); Steve Russell, *Shifting Policies & Stampeding Herds*, 21 Am. J. Crim. L. 321, 322 (1994) ("To Lawrence Sherman's everlasting credit, he has cautioned at every opportunity that the Minneapolis experiment was just an initial step in studying a very large and complicated problem.").

[38] *See* Lawrence W. Sherman, et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. Crim. L. & Criminology 137 (1992); Richard A. Berk, et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. Crim. L. & Criminology 170 (1992); David Hirschel, et al., *Charlotte Spouse Assault Replication Project: Final Report for the National Institute of Justice* (1991); Antony Pate, et al., *Spouse Abuse Replication Project in Metro-Dade County, Florida, 1987–1989*, NIJ (1991); Franklyn

were mixed, with half mirroring the outcome in Minneapolis and half suggesting that arrest actually increased domestic violence.[39]

Nevertheless, the original Sherman Study made an immediate and lasting impact.[40] State and local legislatures wasted little time in drafting their own statutes.[41] By 1992, at least half of states had enacted some form of pro-arrest domestic violence statute, and fourteen states and the District of Columbia had enacted mandatory arrest laws.[42] Even as jurisdictions rushed to enact mandatory arrest laws, researchers began to sound the alarm about their inefficacy. Sherman himself quickly became one of the most vocal detractors, arguing that "mandatory arrest [made about] as much sense as fighting fire with gasoline."[43] But the damage was done. States were eager to demonstrate that they were taking domestic violence seriously,[44] and two years later, significant developments at the national level would inspire a surge of new pro-arrest policies.

B. *The Passage of VAWA: The Murder of Nicole Brown Simpson as a Turning Point*

After the initial rush to enact mandatory arrest laws subsided, legislative efforts to address domestic violence slowed down as many mandatory arrest bills languished in state legislatures for years.[45] All this changed in the summer of 1994[46] when Nicole Brown Simpson and her friend, Ron Goldman, were stabbed to death outside her condominium.[47] Her violent death and the subsequent arrest of her husband, O.J. Simpson, dominated the national news cycle for months and prompted state and local politicians to return their attention to domestic violence legislation.[48]

Only weeks later, state legislatures received another push to enact new laws from Congress. On September 13, 1994—three months after Brown Simpson's murder—President Bill

W. Dunford, et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 Criminology 183 (1990).

39 *See* Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?*, 1996 *U. Ill. L. Rev.* 533, 555 (1996) ("In Omaha, Milwaukee, and Charlotte . . . arrest actually increased domestic violence among some abusers as compared to suspects who were not arrested.").

40 Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. Crim. L. & Criminology 217, 218 (1991).

41 Crystal Nix, *For Police, Domestic Violence is No Longer a Low Priority*, N.Y. Times (Dec. 31, 1986), https://www.nytimes.com/1986/12/31/nyregion/for-police-domestic-violence-is-no-longer-a-low-priority.html (describing evolving arrest laws in Connecticut, New York, and New Jersey).

42 Joan Zorza, *Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. Crim. L. & Criminology 46, 64 (1992); *see also* R. Emerson Dobash, Women, Violence & Social Change 169 (Routledge, 1992) (noting that Connecticut, Oregon, Maine, New Jersey, North Carolina, and Wisconsin had passed mandatory arrest laws); Nicole M. Montalto, *Mandatory Arrest; The District of Columbia's Prevention of Domestic Violence Amendment Act of 1990*, 8 J. Contemp. Health L. & Pol'y 337 (1992).

43 Lawrence W. Sherman, Janell D. Schmidt, & Dennis P. Rogan, Policing Domestic Violence: Experiences and Dilemmas 210 (New York: Free Press, 1992).

44 Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1865 (2002) ("[M]andatory policies represent an important symbolic shift; a declaration that the state no longer condones violence against women.").

45 Nancy James, *Domestic Violence: A History of Arrest Policies and a Survey of Modern Laws*, 28 Fam. L.Q. 509, 513 (1994).

46 Maryclaire Dale, *O.J. Simpson case helped bring spousal abuse out of shadows*, AP (June 12, 2019), https://apnews.com/article/c85957bb9c764313a88659b5837f5245 (writing about the long-term impacts of the O.J. Simpson case and VAWA on the 25th anniversary of Nicole Brown Simpson's murder).

47 Sara Rimer, *Nicole Brown Simpson: Slain at the Dawn of a Better Life*, N.Y. Times (June 23, 1994), https://www.nytimes.com/1994/06/23/us/simpson-case-victim-nicole-brown-simpson-slain-dawn-better-life.html.

48 Charisse Jones, *Nicole Simpson, in Death, Lifting Domestic Violence to the Forefront as National Issue*, N.Y. Times (Oct. 13, 1995), https://www.nytimes.com/1995/10/13/us/nicole-simpson-death-lifting-domestic-violence-forefront-national-issue.html; Barbara Vobejda, *Battered Women's Cry Relayed Up From Grass Roots*, Wash. Post (July 6, 1994), https://www.washingtonpost.com/archive/politics/1994/07/06/battered-womens-cry-relayed-up-from-grass-roots/709542b9-1ae6-40de-ad37-16feecb6c4d0/; *see also* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 Hous. L. Rev. 237, 278–79 (2005) (describing Nicole Brown Simpson's death as a driver for mandatory arrest laws across the United States).

Clinton signed VAWA into law as part of the 1994 Crime Bill.[49] Building on the momentum of the Minneapolis Domestic Violence Experiment and its progeny, the legislation lent national support to mandatory arrest laws by providing financial incentives to jurisdictions that enacted them.[50] Specifically, the Act made jurisdictions that "implement[ed] mandatory arrest or pro-arrest programs and policies in police departments, including mandatory arrest programs and policies for protection order violations" eligible for millions in federal grant funding.[51]

Taken together, Nicole Brown Simpson's murder and VAWA's pro-arrest provisions catalyzed a wave of new mandatory arrest statutes and sent a clear signal to the fifteen jurisdictions with pre-existing mandatory arrest statutes that they were good law.[52] In the following year, mandatory arrest laws were enacted in New York and Mississippi,[53] and five other states followed closely behind.

C. *Evolution of VAWA: Shift Towards Pro-Arrest Language*

Despite a steady increase in criticism from academics and activists about the questionable efficacy of mandatory laws, VAWA was renewed in 2000 and 2005, preserving the provisions related to mandatory arrest in their original form.[54] Not until 2013—nearly twenty years after the original enactment of VAWA—did Congress make any adjustments. After a lengthy legislative battle over VAWA provisions concerning protections for Native Americans, LGBTQ individuals, and undocumented immigrants[55]—and nearly three years after the law expired—Congress passed the 2013 reauthorization bill.[56] Where before VAWA offered "States, Indian tribal governments, or units of local government" access to federal grant money for enacting laws that "encourage[d] or mandate[d] arrests of domestic violence offenders,"[57] the 2013 reauthorization bill removed references to mandatory arrest.[58] In spite of progress on mandatory arrest provisions, the law maintained financial incentives for jurisdictions with pro-arrest policies.[59]

Today, the current version of the bill floundering in Congress includes similar pro-

[49] *The History of the Violence Against Women Act*, NAT'L CTR. DOMESTIC & SEXUAL VIOLENCE (2009) http://www.ncdsv.org/images/OVW_HistoryVAWA.pdf; *Crime Bill Signing Ceremony*, C-SPAN (Sept. 13, 1994), https://www.c-span.org/video/?60148-1/crime-bill-signing-ceremony.

[50] Violence Against Women Act of 1994, Pub. L. No. 103-322.

[51] Violence Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong; § 40231 (1994).

[52] *See* Charlotte Alter, *How the OJ Simpson Case Helped Fight Domestic Violence*, TIME (June 12, 2014), https://time.com/2864428/kardashian-oj-simpson-domestic-violence/ ("[T]he growing awareness about the pervasive danger of domestic violence was instrumental to getting [VAWA] passed through Congress in 1994."); Somini Sengupta, *Domestic Violence Law Set to be Renewed*, N.Y. TIMES (June 11, 2001), https://www.nytimes.com/2001/06/11/nyregion/domestic-violence-law-set-to-be-renewed.html.

[53] Charisse Jones, *Nicole Simpson, in Death, Lifting Domestic Violence to the Forefront as National Issue*, N.Y. TIMES (Oct. 13, 1995), https://www.nytimes.com/1995/10/13/us/nicole-simpson-death-lifting-domestic-violence-forefront-national-issue.html.

[54] Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386 (2000); Violence Against Women and Department of Justice Reauthorization Act, Pub. L. No. 109-162, § 102, 199 Stat. 2960, 2975 (2005); *see also* Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), https://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/ (critiquing VAWA's emphasis on law enforcement as the primary tool to stop domestic violence).

[55] Molly Ball, *Why Would Anyone Oppose the Violence Against Women Act?*, ATLANTIC (Feb. 12, 2013), https://www.theatlantic.com/politics/archive/2013/02/why-would-anyone-oppose-the-violence-against-women-act/273103/.

[56] Violence Against Women Reauthorization Act, Pub. L. No. 113-4 (2013).

[57] *See, e.g.*, Violence Against Women Act of 1994, Pub. L. No. 103-322.

[58] Violence Against Women Reauthorization Act, Pub. L. No. 113-4 (2013).

[59] *Id.*

arrest language, providing federal grant funding to jurisdictions that implement policies and procedures that "encourage arrests of offenders."[60] Notably, the 2021 reauthorization bill goes one step further than the 2013 legislation by retitling the section "Grants to Encourage Arrest Policies" as "Grants to Encourage Improvements and Alternatives to the Criminal Justice Response."[61] This change represents a growing recognition at the federal level that arrest is not the only possible criminal justice response to domestic violence. However, the statute itself maintains the provisions promising grant funding to pro-arrest jurisdictions.[62]

D. *Where Are We Now? The Emergence of Three Types of State Laws*

To date, at least twenty-two states and the District of Columbia have enacted laws mandating arrest when officers have probable cause to believe that a domestic violence incident has occurred.[63] Furthermore, nearly two-thirds of states mandate arrest when officers have probable cause to believe there has been a violation of a restraining order.[64] But mandatory arrest laws are not the only legislative fix for encouraging police response to domestic violence cases. Recognizing that mandatory arrest laws had led to a sharp increase in the arrests of women involved in domestic violence incidents,[65] some jurisdictions searched for alternative approaches. In the wake of the Sherman Study and the enactment of VAWA, states chose one of three types of domestic violence arrest laws: mandatory arrest, preferred arrest, or discretionary arrest.[66]

At least six states have enacted "preferred arrest" laws for domestic violence cases,[67] which strongly recommend rather than require officers to make an arrest in a domestic violence incident.[68] A characteristic example is the Montana preferred arrest statute, which provides that "[a]rrest is the *preferred* response in partner or family member assault cases . . ."[69] Preferred arrest laws seek to avoid the problem of dual arrests—situations in which both parties are arrested[70]—by providing law enforcement with greater discretion.[71] Yet

60 Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021).

61 *Id.*

62 *Id.*

63 Alaska Stat. § 18.65.5309(a); Ariz. Rev. Stat. Ann. § 13-3601(B); Colo. Rev. Stat. § 18-6-803.6(1); Conn. Gen. Stat. § 46b-38b(a); D.C. Code Ann. § 16-1031; Iowa Code § 236.12(2); Kan. Stat. Ann. § 22-2307(b)(1); La. Rev. Stat. Ann. § 46:2140; Me. Rev. Stat. Ann. tit. 19-A, § 4012(5); Miss. Code Ann. § 99-3-7(3); Mo. Rev. Stat. § 455.085; Nev. Rev. Stat. Ann. § 171.137(1); N.J. Stat. Ann. § 2C:25-21(a); N.y. Crim. Proc. Law § 140.10(4)(a); Ohio Rev. Code Ann. § 2935.032(A)(1)(a)(i); Or. Rev. Stat. § 133.055(2)(a); R.I. Gen. Laws § 12-29-3(c)(1); S.C. Code Ann. § 16-25-80(B); S.D. Codified Laws § 23A-3-2; Utah Code Ann. § 77-36-2.2(2)(a); Va. Code Ann. § 19.2-81.3(B); Wash. Rev. Code § 10.31.100(2)(c); Wis. Stat. § 968.075(2)(a).

64 David Hirschel, et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Violence*, Dep't of Just. (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf.

65 David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, Nat'l Crim. Just. Reference Serv. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

66 *See generally* April M. Zeoli, Alexis Norris, & Hannah Brenner, *Mandatory, Preferred, or Discretionary: How the Classification of Domestic Violence Warrantless Arrest Laws Impacts Their Estimated Effects on Intimate Partner Homicide*, 35 Evaluation Rev. 129 (2011) (evaluating how states choose to distinguish between mandatory, preferred, and discretionary arrest laws for domestic violence) [hereinafter Zeoli].

67 Ark. Code Ann. § 16-81-113; Cal. Penal Code § 13701(b); Mass. Gen. Laws Ann. ch. 209A § 6(7); Mont. Code Ann. § 46-6-311(2)(a); N.D. Cent. Code § 14-07.1-10(1); Tenn. Code Ann. § 36-3-619.

68 David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, Nat'l Crim. Just. Reference Serv. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

69 Mont. Code Ann. § 46-6-311(2)(a) (emphasis added).

70 David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, Nat'l Crim. Just. Reference Serv. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

71 *See* David Hirschel, et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Violence*, Dep't of Just. (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf (finding that mandatory arrest laws—but not preferred arrest laws—significantly increased the likelihood of dual arrest).

preferred arrest laws pose many of the same problems as mandatory arrest laws.[72] States with mandatory arrest and preferred arrest (i.e. "pro-arrest") laws report significantly higher rates of arrests for domestic violence than states with discretionary laws.[73] Although increasing arrest rates in domestic violence incidents is the obvious goal of pro-arrest policies, these increases have devastating downstream consequences for victims, perpetrators, and their children.[74]

The remaining U.S. jurisdictions grant police officers broad discretion to respond to domestic violence incidents as they deem appropriate.[75] These laws are typically called "discretionary arrest" statutes.[76] An emblematic example is Indiana's domestic violence statute, which states that "[a] law enforcement officer *may* arrest a person when the officer has probable cause to believe the person has committed a domestic battery . . . ."[77] In recent years, researchers have increasingly argued in favor of discretionary arrest laws, as they grant autonomy to victims to advocate in favor of or against the arrest of their abusers.[78]

Although jurisdictions across the United States have experimented with various police responses to domestic violence, current federal and state law reveals an undeniable policy preference for pro-arrest laws over discretionary arrest statutes.

II. The Case Against Mandatory Arrest Laws

Since the 1990s, the United States has experienced a decrease in domestic violence incidents.[79] This drop is frequently attributed to the impact of mandatory arrest laws and other VAWA provisions,[80] but in reality the decrease corresponds with a dramatic overall national decline in violent crime.[81] There is mounting evidence that mandatory arrest laws do not effectively protect domestic violence victims.[82] Similar evidence also weighs against the efficacy of preferred arrest laws;[83] however, I primarily focus on mandatory arrest policies because there is substantially more research and evidence demonstrating their shortcomings. This may be in part because nearly four times as many jurisdictions have adopted mandatory arrest laws as preferred arrest laws.[84] In this section, I will

[72] *See, e.g.*, Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85 (2009) (finding that mandatory and preferred arrest laws are correlated with increased likelihood of intimate-partner homicide) [hereinafter Iyengar].

[73] David Hirschel, et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Violence*, DEP'T OF JUST. (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf.

[74] *See infra* Part II.

[75] *See, e.g.*, ALA. CODE § 15-10-3(a)(8); DEL. CODE ANN. tit. 11 § 1904(a)(4); FLA. STAT. ch. 741.29(3); GA. CODE ANN. § 17-4-20(a); HAW. REV. STAT. § 709-906(2); IDAHO CODE § 19-603(6); 725 ILL. COMP. STAT. 5/112A-30; IND. CODE ANN. § 35-33-1-1(a)(5)(C); KY. REV. STAT. ANN. § 431.005(2)(a); MD. CODE ANN. § 2-204; MICH. COMP. LAWS § 764.15a.

[76] *See, e.g.*, Zeoli, *supra* note 66, at 133.

[77] IND. CODE ANN. § 35-33-1-1(a)(5)(C) (EMPHASIS ADDED).

[78] Zeoli, *supra* note 66, at 133.

[79] U.S. DEP'T OF JUST., FBI, CRIME IN THE UNITED STATES (1995–2019), https://www.fbi.gov/services/cjis/ucr/publications#Crime-in%20the%20U.S.; U.S. DEP'T OF JUST., BJS, NAT'L CRIME VICTIMIZATION SURV. (1973–2019), https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245.

[80] Stacy Teicher Khadaroo, *In U.S., a Decline in Domestic Violence*, CHRISTIAN SCI. MONITOR (Aug. 26, 2014), https://www.csmonitor.com/World/Progress-Watch/2014/0826/In-US-a-decline-in-domestic-violence.

[81] John Gramlich, *Five Facts About Crime in the United States*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/.

[82] *See* Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65 (2015) (finding that mandatory arrest laws reduce the probability of victims reporting intimate partner violence, rather than reducing the incidence of intimate partner violence) [hereinafter Novisky]; *see also* Eve S. Buzawa & Carl G. Buzawa, *The Impact of Arrest on Domestic Violence: Introduction*, 36 AM. BEHAV. SCIENTIST 558 (1993) (contending that arrest for the purposes of deterrence does not always work).

[83] Hirschel, et al., *supra* note 14, at 256.

[84] David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, NAT'L CRIM. JUST. REFER-

demonstrate how mandatory arrest laws fail both victims and perpetrators, and ultimately set up their children to relive cycles of abuse.

A. *Mandatory Arrest Laws Endanger Victims*

When jurisdictions first began implementing mandatory arrest laws, they were buoyed by the promise of deterring repeat offenders and protecting victims. Despite any benefits they may confer, mandatory arrest laws harm the overall victim population by increasing the number of arrests of women,[85] disempowering victims in the aftermath of a domestic violence incident,[86] and disproportionately ensnaring Black and Brown victims in the criminal justice system.[87]

1. Mandatory Arrests Increase the Number of Victims Arrested

First, mandatory arrest laws correlate with a significant increase in dual arrests and arrests of women.[88] Researchers have posited several theories for this phenomenon, but common sense dictates that pro-arrest policies will inevitably lead to more arrests of everyone involved.[89] What is less obvious is the disproportionate impact of mandatory arrest laws on victims.[90] For example, arrest statistics in California reveal that the enactment of the state's mandatory arrest policy increased the arrests of men by sixty percent while simultaneously increasing the arrests of women by a shocking 400 percent.[91] Similarly, a study in Kenosha, Wisconsin, uncovered a twelve-fold increase in the arrests of women relative to before the mandatory arrest law went into effect.[92]

In response to the concerning rise in dual arrests, many states passed "primary aggressor" laws to ensure that police officers appropriately determined who the "real" offender was and only arrested that party.[93] If an officer has probable cause to believe that the primary aggressor harmed the other party, then mandatory arrest jurisdictions require the officer to arrest that person.[94] However, many domestic violence victims believe that their abusive partners will take advantage of this regime by accusing them of being the primary aggressor.[95] Thus, it is unsurprising that many victims knowingly fear calling the police will result in their own arrest.[96]

ence Serv. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

85 *See* David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, Nat'l Crim. Just. Reference Serv. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

86 *See* Welch, *supra* note 27, at 1159.

87 *See* Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-arrest Policies for Girls and Women*, 2 Criminology & Pub. Pol'y 81, 82 (2002).

88 *See* Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 Harv. J. Gender & L. 54, 103 (2017) [hereinafter *Decriminalized*].

89 *See* Hirschel, et al., *supra* note 14, at 260.

90 Gruber, *supra* note 11, at 89.

91 *Id.*

92 Kevin L. Hamberger & Theresa Potente, *Counseling Heterosexual Women for Domestic Violence: Implications for Theory and Practice*, 9 Violence & Victims 125, 126 (1994).

93 David Hirschel & Lindsay Deveau, *The Impact of Primary Aggressor Laws on Single Versus Dual Arrests in Incidents of Intimate Partner Violence*, 23 Violence Against Women 1155, 1156–57 (2017) (noting that at least thirty-four states have enacted primary aggressor laws to respond to the increase in dual arrests).

94 *See* John Hamel, *In Dubious Battle: The Politics of Mandatory Arrest and Dominant Aggressor Laws*, 2 Partner Abuse 224 (2011).

95 *See* TK Logan & Rob Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, Nat'l Domestic Violence Hotline (2015), https://www.thehotline.org/wp-content/uploads/media/2020/09/NDVH-2015-Law-Enforcement-Survey-Report-2.pdf (surveying women about law enforcement responses to partner abuse and finding that more than half said calling the police would make things worse) [hereinafter TK Logan].

96 TK Logan, *supra* note 95 (finding that one in six survey respondents said they were afraid that the police would be violent, would threaten to arrest, or actually arrest them); *see also* Gruber, *supra* note 12, at 89 ("The genie could not be put back in the bottle. Officers arrived on the scene to find two injured parties or just an injured male party, decided that neither aggressor was 'primary,' and continued to make dual arrests.").

The possibility of victim arrest has a devastating impact on domestic violence victims. The threat of arrest makes victims less likely to call for help,[97] which may contribute to an increase in intimate partner homicide.[98] Even absent conviction, a single arrest on a victim's record can have serious consequences.[99] Lingering arrest records can ruin chances to secure employment, loans, and housing.[100] These consequences are even more severe for victims who share children with their abusive partners, as a criminal record could cause a mother to face a loss of custody.[101] Taken together, the impacts of an arrest can lead to higher rates of poverty and criminality.[102] For a domestic violence victim trying to stake out her independence, the lasting effects of an arrest can make leaving an abuser almost impossible.[103] In other words, mandatory arrest laws can have the exact opposite of their desired effect by trapping women in dangerous relationships for fear of their own arrest.

2. Mandatory Arrest Laws Limit Victims' Autonomy

Second, mandatory arrest laws deny victims agency by stripping away their role in the decision to arrest.[104] Given that many relationships characterized by domestic violence involve a dynamic in which abusers exert power and control over their victims,[105] mandatory arrest laws function to further disempower victims by dismissing their preferences.[106] Even if victims do not personally fear arrest, many refuse to seek emergency help because they do not want to see their partners arrested—whether out of love, fear, or dependency.[107] Domestic violence victims are frequently reliant on their abusers for housing and financial support.[108] If calling for help will definitively result in an arrest, then a victim's housing and financial needs may make her less likely to seek emergency support.[109] Relatedly, a victim may refuse to call for help if she knows that a police response will ultimately subject her partner to entanglement with the criminal justice system.[110]

97 Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020), https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html ("The primary deterrent effect of arrest policies, it appears, was deterring women from calling for help.")..

98 *See* Iyengar, *supra* note 72 (hypothesizing that mandatory arrest laws lead to increased homicide due to decreased reporting).

99 *See generally Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, NAT'L ASS'N CRIM. DEF. LAWS. (2014), https://www.nacdl.org/Document/CollateralDamageARoadmaptoRestoreRightsandStatus (discussing the stigma and impacts of arrest or conviction on millions of Americans) [hereinafter *Collateral Damage*].

100 Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WASH. BUS. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402.

101 G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 263 (2005).

102 *See* Karen Dolan & Jodi L. Carr, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, INST. FOR POL'Y STUD. (Mar. 18, 2015), https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf.

103 *Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay (last visited Nov. 16, 2020).

104 Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 Am. Crim. L. Rev. 541, 548 (2014).

105 *See Power and Control Wheel,* DOMESTIC ABUSE INTERVENTION PROGRAMS: HOME OF THE DULUTH MODEL, https://www.theduluthmodel.org/wheels/ (last visited Dec. 25, 2020).

106 Zeoli, *supra* note 66, at 133.

107 *See Responses from the Field: Sexual Assault, Domestic Violence, and Policing*, ACLU (Oct. 2015), https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing (concluding that domestic violence victims' goals do not align with those of the criminal justice system).

108 Nancy Salamone, *Domestic Violence and Financial Dependency*, FORBES (Sept. 2, 2010), https://www.forbes.com/2010/09/02/women-money-domestic-violence-forbes-woman-net-worth-personal-finance.html?sh=4e8d85a71047.

109 *Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay (last visited Nov. 16, 2020) (identifying the possibility of financial ruin as a barrier to escaping an abusive relationship).

110 *See infra* Part II.B.2. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press, 2010) (arguing that mass incarceration

Some researchers posit that removing choice is a desirable outcome for victims because it may limit retaliatory violence by offenders.[111] However, this theory is not firmly rooted in evidence.[112] As previously discussed, mandatory arrest laws are associated with increases in intimate partner homicide[113] and have questionable deterrent effects on revictimization.[114] Law professor Aya Gruber recounts from her days as a public defender, "I observed government actors systematically ignore women's desires to stay out of court, express disdain for ambivalent victims, and even infantilize victims to justify mandatory policies while simultaneously prosecuting the victims in other contexts."[115] The overcriminalization of domestic violence disempowers victims, leaving police with little to no discretion to consider their wishes.[116] Put plainly: mandatory arrest laws do not deter violence, they deter reports of violence.

3. Mandatory Arrest Policies Increase Suffering for Minority Victims

Third, mandatory arrest laws disproportionately harm women of color who are more likely to be victims of crime[117] and more likely to be arrested during a domestic violence incident.[118] According to the Department of Justice, Black women experience domestic violence at a rate thirty-five percent higher than white women,[119] but are less likely to seek out social or medical services due to entrenched distrust of institutional actors.[120] These laws "put minority women at disproportionate risk of future violence, homelessness, financial ruin, deportation, and their own inacarceration,"[121] intensifying inequalities in the American criminal justice system at a time when Black adults are nearly six times as likely to be incarcerated as whites.[122] Undocumented victims also face the unique fear that seeking

operates as the "New Jim Crow" and enables government actors to unleash a bevy of discriminatory policies against "criminals," including measures in housing, education, employment, public benefits, voting rights, and jury duty).

111 *See* Valli Rajah, Victoria Frye, & Mary Haviland, *"Aren't I a Victim?": Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction Violence Against Women*, 12 VIOLENCE AGAINST WOMEN 897 (2006).

112 *See* Zeoli, *supra* note 66, at 134.

113 Iyengar, *supra* note 72.

114 Zeoli, *supra* note 66, at 133; Lawrence W. Sherman, et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992).

115 Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15. J. GENDER, RACE, & JUST. 583, 583–84 (2012).

116 *See generally Decriminalized*, *supra* note 88, at 103 (evaluating the impacts of decriminalizing domestic violence).

117 *See* Asha DuMonthier, Chandra Childers & Jessica Milli, *The Status of Black Women in the United States*, INST. WOMEN'S POL'Y RSCH. 1 (2017) (finding black women disproportionately experience violence at home, at school, on the job, and in their neighborhoods). More than forty percent of Black women experience physical violence by an intimate partner during their lifetimes, compared with 31.5 percent of all women. *Id.* at 119.

118 *See Mandatory Arrests*, BATTERED WOMEN'S JUST. PROJECT, https://www.bwjp.org/our-work/topics/mandatory-arrests.html (last visited Nov. 8, 2020).

119 Patricia Tjaden & Nancy Thoennes, *Full Report on the Prevalence, Incidence, & Consequences of Violence Against Women*, DEP'T OF JUST. (Nov. 2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

120 *See* Katrina Armstrong, et al., *Racial/Ethnic Differences in Physician Distrust in the United States*, 97 AM. J. PUB. HEALTH 1283 (2007) (finding that Black and Hispanic individuals reported higher levels of physician distrust than whites); *see also* Lindsay Wells & Arjun Gowda, *A Legacy of Mistrust: African Americans and the U.S. Healthcare System*, 24 UCLA HEALTH 1 (2020) (noting that the U.S. medical system's "long legacy of discriminating and exploiting black Americans" is a factor contributing to the dramatic racial imbalance of COVID-19 infection).

121 GRUBER, *supra* note 12, at 87. Gruber quotes a domestic violence service provider on the perils of arrest: Victims are afraid that if they call the police, the abuser will be subjected to a racist system of "justice" that leaves black families devoid of fathers . . . and Latino families [are] in fear of having loved ones deported (often back to places they left because of violence and/or economic hardship). *Id.*

122 *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, THE SENTENCING PROJECT (Mar. 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

help could result in the deportation of a family member or partner.[123]

Lawrence Sherman, author of the seminal Sherman Study, has spoken out against the racialized impacts of mandatory arrest laws. In 2015, Sherman followed up with the 1,125 victims involved in the 1988 Milwaukee Domestic Violence Experiment and made the disturbing finding that victims were sixty-four percent more likely to have died if their partners were arrested and jailed than if their partners were warned and allowed to stay at home.[124] The overall sixty-four-percent difference between the arrest and warned group was almost entirely concentrated among the experiment's Black victims, with arrest nearly doubling the death rate among the 529 Black domestic violence victims in the experiment.[125] Expounding upon the alarming correlation between arrest and premature death, Sherman noted that the Milwaukee Experiment provided clear evidence that Black victims of domestic violence were "disproportionately likely to die after arrests relative to white victims."[126] The racialized impacts of mandatory arrest laws on minority domestic violence victims highlight the imperative of sunsetting these policies.

B. *Mandatory Arrest Laws Exacerbate Mass Incarceration*

Though more readily apparent, the harmful effects of mandatory arrest laws on abusive partners merit standalone discussion. At a time when Americans increasingly support dismantling mass incarceration,[127] few studies consider the long-term impacts of mandatory arrest on both victims *and* perpetrators. Despite a recent emphasis on releasing nonviolent drug offenders,[128] meaningful reductions in the prison population cannot be achieved without a substantial decline in prison time for people convicted of violent crimes.[129] Although arrest

[123] GRUBER, *supra* note 12, at 87; *see also* LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, & JUSTICE 80 (Am. Psych. Assn., 2008) ("Immigrant women may be particularly unlikely to choose separation from their partners for reasons having to do with religion, tradition, economic dependence, or a desire to remain part of a community that would not condone such an action.").

[124] Lawrence W. Sherman & Heather M. Harris, *Increased death rates of domestic violence victims from arresting vs. warning suspects in the Milwaukee Domestic Violence Experiment*, 11 J. OF EXPERIMENTAL CRIMINOLOGY 1 (2014) (finding partner arrests for domestic common assault apparently increased premature death for their victims, especially African-Americans).

[125] *Id.* at 9, 17 ("The white subgroup had only a 9% higher death rate after partner arrest than after a partner warning. For the African-American victims, the rate of death after a partner's arrest was 98% higher than it was after a partner's warning.").

[126] *Id.*; Ted Gest, *Do Mandatory Domestic Violence Arrests Hurt Victims?*, CRIME REP. (May 21, 2014), https://thecrimereport.org/2014/05/21/2014-05-domestic-violence-policing-for-wed-icj/.

[127] *See, e.g.*, Carlie Porterfield, *A Whopping 95% of Americans Polled Support Criminal Justice Reform*, FORBES (June 23, 2020), https://www.forbes.com/sites/carlieporterfield/2020/06/23/a-whopping-95-of-americans-polled-support-criminal-justice-reform/?sh=6c34393b3ad2 (reporting that a new poll conducted by AP and the National Opinion Research Center uncovered nearly universal support for criminal justice reform in the wake of George Floyd's death); *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. JUST. (Jan. 25, 2018), https://www.vera.org/blog/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds (reporting that a 2018 poll by Public Opinion Strategies indicated that sixty-eight percent of Republicans, seventy-eight percent of Independents, and eighty percent of Democrats supported criminal justice reform).

[128] *See* Ames Grawert & Tim Lau, *How the First Step Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next ("The First Step Act shortens mandatory minimum sentences for nonviolent drug offenses.").

[129] *See* Todd R. Clear & James Austin, *Mass Incarceration*, ACAD. FOR JUST. (2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/4_Criminal_Justice_Reform_Vol_4_Mass-Incarceration.pdf; James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 25–26 (2012) ("[A]n effective response to mass incarceration will require directly confronting the issue of violent crime and developing policy responses that can compete with the punitive approach that currently dominates American criminal policy.").

can serve as a necessary tool in addressing domestic violence, we should proceed carefully before continuing policies that mandate arrest in situations that do not warrant it. A twenty-first-century approach to combating domestic violence must recognize that "perpetrators suffer when justice is defined only by how many years they must spend in a cage and not by their ability to acknowledge responsibility, take action to repair the harm, and change."[130]

First and foremost, arrest and conviction do not effectively break the cycle of violence. Studies report increases of intimate partner homicides up to sixty percent in jurisdictions with mandatory arrest.[131] Mandatory arrest policies not only fail to deter future violence,[132] but the resulting increase in incarceration may also drive further offending.[133] U.S. prison facilities are often violent and dehumanizing.[134] Many prisoners experience rampant overcrowding and unsanitary conditions.[135] Prisoners also face high levels of physical and sexual violence at the hands of corrections officers and other prisoners.[136] Few prisoners can seek educational and skill-building opportunities while incarcerated, stunting their ability to rehabilitate and become productive members of society.[137] Unsurprisingly, confinement in these conditions leads to high levels of recidivism.[138] In other words, violence begets violence.

Second, mandatory arrest laws subject more people to the dizzying array of consequences of

130 Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 *Am. Crim. L. Rev.* 1569, 1576 (2020).

131 *See* Iyengar, *supra* note 72.

132 *Id.*; *see also* Melissa Gross, et al., *The impact of sentencing options on recidivism among domestic violence offenders: A case study*, 24 Am. Crim. Just. 301, 309 (2000) (determining that jail time and other sentencing options have no effect on recidivism).

133 *See* Marie Gottschalk, Caught: The Prison State and the Lockdown of American Politics 177 (Princeton Univ. Press, 2015).

134 *See* Matt Ford, *The Everyday Brutality of America's Prisons*, New Republic (Apr. 5, 2019), https://newrepublic.com/article/153473/everyday-brutality-americas-prisons ("[R]ecent accounts of inmate deaths and violence across the country . . . paint a grim picture of the brutality that occurs behind prison walls—and the horrifying consequences of America's indifference to it.").

135 Zulficar Gregory Restum, *Public Health Implications of Substandard Correctional Health Care*, 95 Am. J. Pub. Health 1689 (2005); *see* Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019) (granting qualified immunity to prisoner officers in a lawsuit brought by a Texas inmate), *vacated sub nom,* Taylor v. Riojas, 592 U.S. __ (2020) (invalidating the Fifth Circuit's order); *see also* Kirsten Williams, *Supreme Court: Texas Inmate's Unsanitary Conditions Lawsuit Against Prison Officials Can Proceed*, Jurist (Nov. 2, 2020), https://www.jurist.org/news/2020/11/supreme-court-texas-inmates-unsanitary-conditions-lawsuit-against-prison-officials-can-proceed/ ("Inmate Trent Taylor sued ten prison officials . . . for violating his Eighth Amendment rights . . . [after they] forced him to spend six days in a prison cell covered in human feces and overflowing sewage from previous occupants.").

136 *See, e.g.*, Investigation of Alabama's State Prisons for Men, Dep't of Just., Civ. Rts. Div. 34 (Apr. 2, 2019) ("Sexual abuse in Alabama's prisons is severe and widespread, and is too often undetected or prevented by [] staff . . . In reviewing hundreds of reports, we did not identify a single incident in which a correctional officer or other staff member observed or intervened to stop a sexual assault."); *see also* Tom Robbins, *A Brutal Beating Wakes Attica's Ghosts*, N.Y. Times (Feb. 28, 2015), https://www.nytimes.com/2015/03/01/nyregion/attica-prison-infamous-for-bloodshed-faces-a-reckoning-as-guards-go-on-trial.html (discussing three corrections officers who faced gang-related assault charges after brutally beating an inmate at a prison in western New York).

137 Jordan Smith, *How the Federal Government Undermines Prison Education*, Intercept (Feb. 18, 2019), https://theintercept.com/2019/02/18/pell-grants-for-prisoners-education-behind-bars/ ("Access to education behind bars lowers the odds of recidivism by forty-eight percent. So why is there still a ban on Pell Grants for prisoners?"); Emily Deruy, *What it Costs When We Don't Educate Inmates for Life After Prison*, ABC (May 27, 2013), https://abcnews.go.com/ABC_Univision/News/us-fails-educate-inmates-life-prison/story?id=19204306. *Cf.* Erica L. Green, *Financial Aid is Restored for Prisoners as Part of the Stimulus Bill*, N.Y. Times (Dec. 23, 2020), https://www.nytimes.com/2020/12/21/us/politics/stimulus-law-education.html (noting that the $900 billion dollar stimulus enacted by Congress in December 2020 restored Pell grants for incarcerated students, which were banned in the 1994 Crime Bill).

138 M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach*, 9 Am. L. & Econ. Rev. 1 (2007) (finding that harsher prison conditions lead to more post-release crime); *see also* Kristine Levan, Prison Violence: Causes, Consequences, & Solutions 6 (Routledge, 2016) ("[A] lifetime of recidivism awaits their release from prison.").

ensnarement in the criminal justice system.[139] When jurisdictions began to enact mandatory arrest laws, the desired effect was to increase the arrests of abusive partners.[140] By all accounts, states achieved this goal: arrest rates in mandatory arrest jurisdictions are nearly double the rates in states with discretionary arrest laws.[141] As previously mentioned, a single arrest can have devastating effects on a person's ability to qualify for public housing and benefits, find employment, and maintain financial stability.[142] Studies reveal that employers care less about the specific information conveyed by a criminal record than the fact that its mere existence impugns a candidate's trustworthiness or employability.[143] The stigma of an arrest can make finding employment a herculean task.[144] And when an arrest leads to conviction, the results are even more severe.[145] In many states, former prisoners lose the right to vote, serve on a jury, seek employment in a variety of fields, and maintain full parental rights.[146] Once released, formerly imprisoned men tend to work more and earn less,[147] and they are ten times more likely to experience homelessness.[148] Arrest and conviction perpetrate long-lasting harms on offenders, and public opinion overwhelmingly supports making the American criminal justice system less punitive. Upholding mandatory arrest laws contravenes the goal of reducing mass incarceration.

C. *Mandatory Arrest Laws Do Not Adequately Protect Children*

Finally, mandatory arrest laws' failure to stop domestic violence imposes unfair burdens on the children of victims and perpetrators. Unsurprisingly, children growing up in violent households suffer the economic impacts of their parents' arrest and conviction—they are more likely to experience hunger, homelessness, and poverty.[149] Yet, children suffer much more than the economic consequences of domestic violence. In homes where domestic abuse occurs, there is a forty-five to sixty percent co-occurring rate of child abuse, which is fifteen times higher than

[139] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (New Press, 2010) ("Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.").

[140] *See Sherman Study*, *supra* note 18.

[141] David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, NAT'L CRIM. JUST. REFERENCE SERV. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

[142] *See Collateral Damage*, *supra* note 99.

[143] DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); *see* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/.

[144] *See* Christopher Uggen, et al. *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 Criminology 627 (2014) (finding that even the least serious criminal histories—arrests for misdemeanors that did not lead to convictions—has a negative impact on employment outcomes). "African American men with prison records are all but disqualified from consideration for employment." *Id.* at 648.

[145] *See* Wayne Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1106 (2013) ("[C]onvict status serves as a perpetual badge of infamy, even serving to impugn reputation beyond the grave.").

[146] *See generally* ZACHARY HOSKINS, BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION (Oxford Univ. Press, 2019) (discussing the burdensome measures triggered by conviction, including employment, housing, public assistance, and voting).

[147] Adam Looney, *5 facts about prisoners and work, before and after incarceration*, BROOKINGS INST. (Mar. 14, 2018), https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/.

[148] Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html.

[149] *See* Yumiko Aratani, *Homeless Children and Youth: Causes & Consequences*, NAT'L CTR. FOR CHILD. IN POVERTY (2009), http://www.nccp.org/wp-content/uploads/2020/05/text_888.pdf (identifying domestic violence as a top three contributor to homelessness amongst children); Amy Chanmugam, *Children and Young People in Domestic Violence Shelters*, *in* RISK, PROTECTION, PROVISION AND POLICY (Claire Freeman, Tracey Skelton, & Paul Tranter eds., 2015) (describing the experiences of children living in emergency domestic violence shelters).

the national average.[150] Compared with other children, those who have witnessed domestic violence experience far greater incidence of learning difficulties, self-harm, bed-wetting, depression and anxiety, and aggressive and antisocial behaviors.[151] As previously mentioned, mandatory arrest laws are not effective at deterring recidivism.[152] Thus, one of the most disturbing effects of these laws is to continue the cycle of violence[153] as children who grow up in violent households are more likely to perpetuate or experience violence as adults.[154] So, by failing to stop recidivism, mandatory arrest laws not only make victims and perpetrators less safe—they also endanger children who are more likely to grow up and harm or be harmed by intimate partners.

In sum, mandatory arrest laws harm victims, abusive partners, and their children by increasing incarceration rates, recidivism, and future violence.

III. What About Preferred Arrest Laws?

This Note is not the first piece of writing to acknowledge the misguided nature of mandatory arrest laws. In recent years, several writers have questioned the flawed assumptions animating the original Sherman Study,[155] the devastating impacts of the 1994 Crime Bill on the U.S. prison population,[156] and the dramatic increase in dual arrests and arrests of women.[157] Some of the most recent scholarship addressing the subject argues in favor of states shifting away from mandatory arrest laws and instead instituting preferred arrest laws.[158] Preferred arrest laws are viewed as a desirable middle ground between harsh mandatory arrest models and hands-off police deference models, as they encourage officers to arrest when there is probable cause to do so while allowing officers to exercise discretion when circumstances weigh against arrest.[159] The most recent draft of the VAWA reauthorization bill reflects this recommendation by changing "mandate arrest of offenders" to "encourage arrest of offenders."[160]

This reform does not go far enough. Research suggests that the social, economic, and public health outcomes in jurisdictions with preferred arrest laws are substantially similar to those with

[150] Blake Griffin Edwards, *Alarming Effects of Children's Exposure to Domestic Violence*, PSYCH. TODAY (Feb. 26, 2019), https://www.psychologytoday.com/us/blog/progress-notes/201902/alarming-effects-childrens-exposure-domestic-violence.

[151] Brett V. Brown & Sharon Bzostek, *Violence in the Lives of Children*, 15 CROSS CURRENTS 1 (2003).

[152] *See* Novisky, *supra* note 82.

[153] *Breaking the Cycle of Violence: Recommendations to Improve the Criminal Justice Response to Child Victims and Witnesses*, DEP'T OF JUST. (1999), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/factshts/monograph.htm.

[154] *See* Natalie Wilkins, et al., *Connecting the Dots: An Overview of the Links Among Multiple Forms of Violence*, CDC 1, 5 (2014), https://www.cdc.gov/violenceprevention/pdf/connecting_the_dots-a.pdf.

[155] Welch, *supra* note 26, at 1150; Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020), https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html; Steve Russell, *Shifting Policies & Stampeding Herds*, 21 AM. J. CRIM. L. 321, 322 (1994).

[156] Todd S. Purdum, *The Crime-Bill Debate Shows How Short Americans' Memories Are*, ATLANTIC (Sept. 12, 2019), https://www.theatlantic.com/politics/archive/2019/09/joe-biden-crime-bill-and-americans-short-memory/597547/; Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis.

[157] David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, NAT'L CRIM. JUST. REFERENCE SERV. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

[158] Alayna Bridgett, *Mandatory-Arrest Laws and Domestic Violence: How Mandatory-Arrest Laws Hurt Survivors of Domestic Violence Rather Than Help Them*, 30 Health Matrix 437, 464–65 (2020).

[159] *Id.*

[160] Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021).

mandatory arrest laws.[161] In one nationwide study, researchers found that arrest rates in domestic violence cases were ninety-seven percent higher in states with mandatory arrest laws compared to states with discretionary arrest laws and were 177 percent higher in states with preferred arrest laws compared to states with discretionary arrest laws.[162] Although preferred arrest laws do not have the same negative effects on dual arrests as mandatory arrest laws,[163] their resulting increase in arrests similarly grows the prison population without providing abusive partners with rehabilitation to break the cycle of violence.[164] Despite the growth of domestic violence intervention programs in prisons over the years, new research indicates that participants face similar rates of recidivism as nonparticipants.[165] In short, preferred arrest policies pose similar challenges as mandatory arrest policies without getting at the root causes of domestic violence.

IV. If Not Arrest, Then What? Three Steps to Combat Domestic Violence

The United States cannot arrest its way out of a domestic violence crisis.[166] Undoing the damage of forty years of investing in policing and prosecution to eliminate gender-based violence will require a coordinated response at the federal, state, and local levels.

A. *President Biden Should Advocate for VAWA Reform*

The original enactment of VAWA in 1994 provided institutional support for mandatory arrest laws. It follows that nullifying the harm of mandatory arrest laws includes amending VAWA. In the twenty-seven years since VAWA first became law, its focus on law enforcement and prosecutorial interventions has only increased. At its inception, sixty-two percent of grant funds went to the criminal system; by 2013, over eighty-five percent of grant funds went to policing and punishment.[167] Although VAWA has sat in Senate purgatory for the past three years,[168] President Biden's ascension to the White House is a bellwether for the successful reauthorization of VAWA in 2021. When Senate Republicans blocked the

[161] Hirschel, et al., *supra* note 14, at 256 ("[T]he passage of mandatory and preferred arrest domestic violence laws has resulted in an increase in arrests for intimate partner violence as well as other relationships included under such statutes.").

[162] David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, NAT'L CRIM. JUST. REFERENCE SERV. (July 25, 2008), https://www.ncjrs.gov/pdffiles1/nij/222679.pdf.

[163] Hirschel, et al., *supra* note 14, at 297 ("Leaving the responding officers some discretion when responding to domestic calls is clearly associated with lower dual arrest rates, but it is not totally clear what factors prompt officers to use this discretion.").

[164] Hirschel, et al., *supra* note 14, at 256.

[165] Susan McNeeley, *Effectiveness of a Prison-Based Treatment Program for Male Perpetrators of Intimate Partner Violence: A Quasi-Experimental Study of Criminal Recidivism*, J. INTERPERSONAL VIOLENCE 1 (2019) (determining that the Minnesota Domestic Violence Intervention Pilot Program, based on the Duluth Model, did not lead to any significant differences in recidivism between the comparison group and those who participated in treatment). The author recommends implementing programs for incarcerated domestic violence perpetrators that create a "continuum of care" by commencing shortly before the offender's release, as these types of interventions have shown to aid in reducing recidivism. *Id.* at 18.

[166] *See* SNYDER, *supra* note 22, at 8 ("Domestic violence . . . is an urgent matter of public health.").

[167] Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020), https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html.

[168] Susan Davis, *House Renews Violence Against Women Act, But Senate Hurdles Remain*, NPR (Mar. 17, 2021), https://www.npr.org/2021/03/17/977842441/house-renews-violence-against-women-act-but-senate-hurdles-remain (House passed VAWA 242 to 172 on partisan lines); Allie Strickler, *We Need to Talk About Women & Gun Violence*, SHAPE (Oct. 20, 2020), https://www.shape.com/lifestyle/mind-and-body/violence-against-women-act ("VAWA has now expired, leaving domestic violence survivors, women's shelters, and other organizations that provide much-needed relief to abused women without federal and financial support.").

previous reauthorization of VAWA in 2012 and 2013, then-Vice President Biden entered the fray to get the bill over the finish line.[169] Most significantly, the President has indicated his support for reauthorizing the law next year,[170] especially in light of the effects of COVID-19 on domestic violence victims.[171]

President Biden should seize on the opportunity to propose overdue changes to his landmark legislation. Revising portions of the law that provide financial incentives to states with mandatory arrest laws to support instead preferred arrest laws is a start, but this change does not go far enough. VAWA should eliminate all support for pro-arrest laws and instead redirect grant money to federal housing assistance. Access to safe housing is a key impediment for victims trying to leave their abusive partners,[172] with over half of unhoused women identifying domestic violence as the immediate cause of their homelessness.[173] The COVID-19 pandemic has brought this need into sharp relief,[174] as social distancing measures have required many shelters to reduce their capacity by fifty percent.[175] Opening up millions more in grant funding for housing support would respond directly to one of the direst needs facing domestic violence victims trying to leave their abusive partners safely.

B. *State Legislatures Should Repeal Mandatory Arrest Laws*

In the meantime, state and local governments should not wait for Congress. Over half of states continue to enforce mandatory and preferred arrest policies.[176] One of the only national calls to eliminate mandatory arrest laws comes from the social media campaign "8 to Abolition,"[177]

[169] *See* SNYDER, *supra* note 22, at 14–15 ("The 2013 reauthorization was held up because Republicans didn't want the bill to include same-sex partners, Native Americans living on reservations, or undocumented immigrants who were battered and trying to apply for temporary visas."); Molly Ball, *Why Would Anyone Oppose the Violence Against Women Act?*, ATLANTIC (Feb. 12, 2013), https://www.theatlantic.com/politics/archive/2013/02/why-would-anyone-oppose-the-violence-against-women-act/273103/; Jennifer Epstein, *Biden: 'Neanderthal Crowd' Slowed VAWA Renewal*, POLITICO (Sept. 12, 2013), https://www.politico.com/blogs/politico44/2013/09/biden-neanderthal-crowd-slowed-vawa-renewal-172549.

[170] *The Biden Plan to End Violence Against Women*, JOEBIDEN.COM, https://joebiden.com/vawa/ (last visited Nov. 12, 2020) ("There's no reason the Senate shouldn't pass this reauthorization now and enact it long before President Biden's first day in office. But if they don't, Joe Biden will make enacting the VAWA reauthorization one of his top first 100 day priorities.").

[171] Megan L. Evans, Margo Lindauer, & Maureen E. Farrell, *A Pandemic within a Pandemic—Intimate Partner Violence During Covid-19*, N. ENG. J. MED. (Sept. 16, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2024046 ("Domestic-violence hotlines prepared for an increase in demand for services as states enforced [stay-at-home orders], but many organizations experienced the opposite. In some regions, the number of calls dropped by more than 50%. Experts in the field knew that rates of IPV had not decreased, but rather that victims were unable to safely connect with services.").

[172] *14th Annual Domestic Violence Counts Report*, NAT'L NETWORK TO END DOMESTIC VIOLENCE (Mar. 2020), https://nnedv.org/wp-content/uploads/2020/03/Library_Census-2019_Report_web.pdf (finding that on one day in September 2019, there were 11,336 unmet requests for help nationwide and seventy percent of those requests were for safe housing).

[173] Monica McLaughlin, *Housing Needs of Domestic Violence, Sexual Assault, Dating Violence, and Stalking*, NAT'L LOW INCOME HOUS. COAL. (2017), https://nlihc.org/sites/default/files/AG-2017/2017AG_Ch06-S01_Housing-Needs-of-Victims-of-Domestic-Violence.pdf ("The National Domestic Violence Census found that—in just one 24-hour period in 2015—7,728 requests for shelter and housing went unmet.").

[174] *See* Lisa Backus, *As pandemic grinds on, domestic violence shelters grapple with budget gaps, growing needs*, CT MIRROR (Oct. 18, 2020), https://ctmirror.org/2020/10/18/as-pandemic-grinds-on-domestic-violence-shelters-grapple-with-budget-gaps-growing-needs/ ("[One nonprofit] is wrestling with an 830% increase in costs compared with last year for hoteling victims of domestic violence during the coronavirus pandemic.").

[175] Sierra Smucker, Alicia Revitsky Locker, & Aisha Najera Chesler, *After COVID-19: Prevent Homelessness Among Survivors of Domestic Abuse*, Rand (July 2, 2020), https://www.rand.org/blog/2020/07/after-covid-19-prevent-homelessness-among-survivors.html.

[176] Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020), https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html.

[177] 8 TO ABOLITION, https://www.8toabolition.com/repeal-laws-that-criminalize-survival (last visited Dec. 26, 2020). The campaign calls on states and localities to (1) defund the police, (2) demilitarize communities, (3) remove

which emerged in the wake of the police murder of George Floyd in June 2020.[178] Yet, this call has fallen largely on deaf ears—the campaign's predominant focus on "defunding the police" has sparked controversy and fueled pushback to the campaign's other proposals.[179] That same month, over forty sexual assault and domestic violence state coalitions published an open letter describing their collective failures to support Black, Indigenous, and people of color ("BIPOC") survivors, leaders, and movements.[180] The letter writers endorsed several proposals, including "decriminaliz[ing] survival" by "address[ing] mandatory arrest."[181] The writing is on the wall that mandatory arrest laws make victims, perpetrators, and their children less safe, and jurisdictions should not wait for the federal government to withdraw financial incentives to repeal these statutes.

Then, if the federal government provides more grant funding for emergency housing support for domestic violence victims, states should seize the opportunity to spend these funds. One model for states to consider is the Survivor Resilience Fund in Washington, D.C., which helps domestic violence victims achieve housing stability through emergency financial assistance.[182] Established by the District Alliance for Safe Housing ("DASH") in 2014, the Fund provides flexible grants for rent, security deposits, moving costs, utilities, and any other costs that could threaten a domestic violence victim's housing stability.[183] Grants ranged from $275 to nearly $9,000 and were provided with minimal conditions on how victims could spend them.[184] A recent evaluation of the initiative determined that ninety-four percent of the grant recipients remained safely housed six months after receiving the funds.[185] Plus, all fifty-five domestic violence victims in the study reported improved quality of life after receiving the funds, and over ninety percent stated that they felt more hopeful about the future.[186] Though more research is needed on flexible funding to determine how best to design these programs, the DASH model provides a promising framework for jurisdictions looking to

police from schools, (4) free people from jails and prisons, (5) repeal laws that criminalize survival, (6) invest in community self-governance, (7) provide safe housing for everyone, and (8) invest in care, not cops. *Id.* The call to repeal mandatory arrest laws is included under the fifth proposal. *Id.*

178 Maria Cramer, et al., *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/article/george-floyd.html.

179 *See* Kyle Peyton, Paige E. Vaughn, & Gregory A. Huber, *Americans Don't Support the Idea of Defunding the Police*, WASH. POST (Aug. 31, 2020), https://www.washingtonpost.com/politics/2020/08/31/slogan-defund-police-can-turn-americans-away-movement-against-police-brutality/; *see also* Njeri Mathis Rutledge, *Obama is right about 'defund the police.' A terrible slogan makes it hard to win change.*, USA TODAY (Dec. 7, 2020), https://www.usatoday.com/story/opinion/2020/12/07/obama-is-right-defund-police-damages-reform-progress-column/3850652001/ ("Careless messaging can bring attention to an issue and lead to some wonderful debates, but stirring up controversy alone does not equate to change.").

180 *Moment of Truth*, VIOLENCE FREE COLO. (June 2020), https://www.violencefreecolorado.org/wp-content/uploads/2020/07/Moment-of-Truth.pdf.

181 *Id.* (Given that many jurisdictions have relied on mandatory arrest statutes for nearly three decades, efforts to repeal these statutes must be coupled with educational outreach to communities with high rates of domestic violence so that potential victims are aware that calling the police will no longer definitively lead to arrest.)

182 DISTRICT ALLIANCE FOR SAFE HOUSING: SURVIVOR RESILIENCE FUND, https://www.dashdc.org/programs-services/survivor-resilience-fund/ (last visited Dec. 26, 2020).

183 *Id.*; Peg Hacskaylo, et al., *Safe Housing for Domestic Violence Victims is More than Shelter*, URB. INST. (June 20, 2018), https://housingmatters.urban.org/articles/safe-housing-domestic-violence-survivors-more-shelter.

184 Peg Hacskaylo, et al., *Safe Housing for Domestic Violence Victims is More than Shelter*, URB. INST. (June 20, 2018), https://housingmatters.urban.org/articles/safe-housing-domestic-violence-survivors-more-shelter.

185 Cris M. Sullivan, Heather D. Bomsta, & Margaret A. Hacskaylo, *Flexible Funding as a Promising Strategy to Prevent Homelessness for Survivors of Intimate Partner Violence*, 34 J. INTERPERSONAL VIOLENCE 3017 (2016) (evaluating the District Alliance for Safe Housing's Survivor Resilience Fund in a longitudinal study).

186 Peg Hacskaylo, et al., *Safe Housing for Domestic Violence Victims is More than Shelter*, URB. INST. (June 20, 2018), https://housingmatters.urban.org/articles/safe-housing-domestic-violence-survivors-more-shelter.

meet the dire housing needs of domestic violence victims and their children.

C. *Municipalities Should Focus on Equipping Victims with Resources*

Finally, local communities must recognize that they cannot eliminate domestic violence through arrest alone. Properly enforced discretionary arrest policies have a crucial place in responding to domestic violence emergencies, but arrest should not be the default response. Instead, law enforcement agencies should reexamine the approach of the original Sherman Study through a twenty-first-century lens.[187] The past forty years have made clear that arrest often does not effectively deter domestic violence,[188] but it is worth revisiting the other two treatments in the Minneapolis Domestic Violence Experiment: "send" and "advise."[189]

When Sherman's team conducted the experiment, the "send" control group of police officers instructed abusive partners to leave the scene of a domestic violence incident for up to eight hours.[190] Although Sherman did not deem this approach helpful at deterring domestic violence,[191] the treatment was set up for failure. When police officers instructed alleged perpetrators to temporarily vacate the premises, the offenders had nowhere safe to go. Though the need for temporary housing for victims is acute, local communities should consider investing in temporary housing for accused perpetrators that are non-custodial. Rather than incapacitating offenders in jail for a night (or longer) and marking them with a criminal record, communities can instead incapacitate offenders for a day or two in a designated environment for "cooling down."[192] One benefit of arrest after a domestic violence incident is providing the victim time and space to plan for safety. Furthermore, an arrest allows for violence to deescalate naturally. By providing abusive partners with a non-carceral environment to temporarily separate from the victim, communities can reap the benefits of pro-arrest domestic violence policies without subjecting victims and perpetrators to the negative consequences of an arrest.

Likewise, police officers participating in the Sherman Study were not properly equipped to make use of the "advise" treatment. The researchers instructed first responders to provide advice or mediation to the victim and the perpetrator at the scene of an incident, but police officers often struggle to counsel parties in a domestic violence dispute.[193] Many municipalities have rightly invested in robust domestic violence training for law enforcement, but they should not stop there. Communities must recognize that it is unreasonable to expect police officers to be effective first responders, crime fighters, social workers, investigators, and mediators,[194] and should invest in programs that place highly-trained domestic violence advocates alongside police officers to respond to incidents. One local model to consider is the Washington, D.C. Metropolitan Police Department's recently-launched Domestic Violence Liaison Program in which citizen volunteers ride along with patrol officers in neighborhoods with a high incidence of domestic violence and provide victims with

187 *Sherman Study*, *supra* note 17.

188 *See, e.g.*, Eve S. Buzawa & Carl G. Buzawa, *The Impact of Arrest on Domestic Violence: Introduction*, 36 AM. BEHAV. SCIENTIST 558 (1993).

189 Lawrence W. Sherman & Richard R. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REPS. 1, 1 (Apr. 1984).

190 *Id.* at 2.

191 *Sherman Study*, *supra* note 17, at 267.

192 *Id.* One model to consider is the Israeli government's program to place abusers in hotels rather than forcing women to relocate to shelters. *See* Lee Yaron, *In First, Israel Houses Abusive Men in Hotels to Protect Battered Women*, HAARETZ (May 7, 2020), https://www.haaretz.com/israel-news/.premium-in-first-israel-houses-abusive-men-in-hotels-to-protect-battered-women-1.8826256.

193 TK Logan, *supra* note 95.

194 *See* Barry Friedman, *Disaggregating the Policing Function*, U. PA. L. REV. (2020–21 forthcoming).

resources and information while responding to a call.[195] Volunteers receive forty hours of classroom training from D.C. SAFE, the city's only 24/7 crisis intervention agency for domestic violence.[196] This model takes the pressure off of law enforcement to remember all of the possible support measures a domestic violence victim may need after a dispute and provides both victims and offenders with a neutral resource that is focused on empowerment through information.

Nearly forty years after the Sherman Study, communities should revisit the original treatments and apply the expertise we have gained through decades of domestic violence research.

Conclusion

Although mandatory arrest laws were borne out of a good faith effort to support domestic violence victims and deter abusive partners, in reality, they have exacerbated racial inequalities in the criminal justice system, contributed to mass incarceration, and made victims and children less safe. The United States cannot incarcerate its way out of violent crime. Effectively combating domestic violence will require a coordinated response at the federal, state, and local levels. To start, Congress should begin to right twenty-six years of wrongs by making sensible amendments to the landmark VAWA legislation, such as redirecting grant funding for pro-arrest policies to direct housing support. In the meantime, states should not wait for federal action—they should take immediate steps to repeal mandatory arrest statutes. Finally, local law enforcement agencies should eliminate their pro-arrest policies, and local governments should invest in temporary housing for victims and perpetrators and partner with local advocacy organizations to ensure parties receive timely advice following an incident.

For too long, domestic violence was viewed as a private family matter. In the last forty years, that perception has shifted to viewing domestic violence as a serious crime that can only be addressed through robust policing and prosecution. Society must now move past this view and re-envision domestic violence as a community problem that requires an empathetic and multi-faceted community response.

[195] *Volunteer Opportunity – Domestic Violence Liaison*, MPD, https://mpdc.dc.gov/page/domestic-violence-liaison (last visited Nov. 20, 2020).

[196] D.C. SAFE, https://www.dcsafe.org/ (last visited Nov. 20, 2020).

A New Idea For The Education System In Maryland Juvenile Correctional Facilities

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I. Introduction

Some studies estimate that as many as 70% of children detained in juvenile correctional facilities nationally have learning disabilities.[1] However, only about one-third of these children receive special education services.[2] In 2018, approximately 3,662 children were provided education services in Maryland's juvenile correctional facilities.[3&4] Thirty-seven percent of which had documented learning disabilities.[5] Students with disabilities in Maryland juvenile correctional facilities are entitled to most of the same federal protections available to students with disabilities in public schools, including those provided under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Every Student Succeeds Act.[6] Despite the federal legislative requirements, evidence presented in lawsuits and acquired from audits indicate that the services provided to children in Maryland juvenile correctional facilities are inadequate.[7]

This article first examines the current federal protections available to students with disabilities in juvenile correctional facilities. The article then

1 *See* Peter E. Leone & Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, 17 CHILD. LEGAL RTS. J. 2, 3 (1997) (42% in Arizona, 60% in Florida and Maine); *see also* Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO. EDUC. 218, 224 (2002) (70% in the South).

2 Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005).

3 A note on language: Throughout this writing I use the term "juvenile correctional facilities" to mean institutions where children are sent as a result of a juvenile delinquency adjudication or a criminal conviction, and short-term facilities where children are held while their cases are adjudicated. These facilities are sometimes referred to as therapeutic/rehabilitative centers and schools but operate as such in name only.

4 THE EDUCATION COORDINATING COUNCIL FOR MARYLAND STATE DEPARTMENT OF EDUCATION JUVENILE SERVICES EDUCATION SYSTEM, ANNUAL REPORT 3 (2018), http://marylandpublicschools.org/stateboard/Documents/04232019/TabI-JuvenileServicesUpdate.pdf [hereinafter MSDE JSES 2018 REPORT].

5 *Id.*

6 Individuals with Disabilities Education Act, 20 U.S.C. 1412(a)(1)(A) (2020) ("A free and appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . . ."); Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2020) ("No . . . individual with a disability . . . shall . . . be excluded from the participation in . . . any program or activity receiving Federal financial assistance . . . ."); Americans with Disabilities Act, 42 U.S.C. § 12132 (2020) ("[N]o qualified individual with a disability shall, by reason of disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity . . . ."; Every Student Succeeds Act, 20 U.S.C. § 6434(a)(1) (2020) ("Each State education agency that desires to receive a grant . . . shall submit . . . a plan . . . for meeting the educational needs of neglected, delinquent, and at-risk children and youth. . . .").

7 *See* Erica L. Green, *Criticism leveled at schools for Maryland juvenile offenders*, THE BALTIMORE SUN (Dec. 28, 2015), https://www.baltimoresun.com/education/bs-md-juvenile-education-20151226-story.html; *see also* Erica L. Green, *NAACP requests federal investigation into juvenile justice education*, THE BALTIMORE SUN (Nov. 6, 2015), https://www.baltimoresun.com/maryland/bs-md-ci-juvenile-education-complaint-20151106-story.html; NICK MORONEY, STATE OF MARYLAND JUVENILE JUSTICE MONITORING UNIT, FOURTH QUARTER REPORT AND 2018 ANNUAL REVIEW (2019), https://www.marylandattorneygeneral.gov/JJM%20Documents/JJMU_2018_Annual_Report.pdf [hereinafter MD JUVENILE JUSTICE MONITORING UNIT 2018 REPORT].

focuses on state-specific protections available to students with disabilities in Maryland juvenile correctional facilities. Part IV provides a review of the current state of special education in Maryland juvenile correctional facilities. Finally, the article ends with a set of recommendations to a workgroup currently tasked with reforming the education system in Maryland juvenile correctional facilities.

II. Federal Protections

A. *Legislative History*

Prior to federal government and Supreme Court intervention, states opted for excluding children with disabilities from the public school system altogether rather than educating them.[8] Once the Court decided *Brown* and required racial integration in the schools, parents of students with disabilities began to question why their children were not extended the same opportunity.[9] Also during this time, civil rights advocates were noticing that Black children were significantly overrepresented in special education institutions.[10] The use of racially discriminatory special education designations was an attempt to circumvent the integration that was required by *Brown*.[11] Together, civil rights and disability rights advocates were able to seize on the language in *Brown* to further the rights of students with disabilities and enforce desegregation.[12]

The advocacy from the disability rights and civil rights communities led to the 1965 amendments to the Elementary and Secondary Education Act (ESEA). The amendments established the first federal grant program for students with disabilities and provided funding to institutions and schools dedicated to educating students who were "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require[d] special education".[13] Although the grant provided a new incentive to improve local special education programs, states still found ways to avoid educating students with disabilities.[14]

In 1971, the Pennsylvania Association for Retarded Children (P.A.R.C.) sued the Commonwealth of Pennsylvania because it was excluding students with disabilities from public education.[15] Pennsylvania justified the exclusion based on several statutes, including one that relieved the board of education from educating children that were "uneducable and untrainable" and another that permitted the board to reject students who had not "attained a mental age of five years".[16] The parties entered into a consent agreement that imposed requirements on the Commonwealth that are similar to the ones

8 *See Beattie v. Board of Educ. of Antigo*, 172 N.W. 153, 153 (Wis. 1919) (upholding the expulsion of a student because his physical appearance caused a "nauseating effect upon the teachers and school children" and his slow speech delayed classroom instruction); *see also Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (upholding the expulsion of a student "because he was too weak-minded to derive profit from instruction.").

9 Anthony F. Rotatori et al., *History of Special Education*, 21 ADVANCES IN SPECIAL EDUC. 1, 28 (2011) [hereinafter *History of Special Education*].

10 Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 434 (2001).

11 *Id.*

12 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments . . . It is the very foundation of good citizenship . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

13 Elementary and Secondary Education Act Amendments of 1965, Pub. L. No. 89-313, 79 Stat. 1158, 1161 (1965).

14 *Pennsylvania Ass'n for Retarded Child. v. Pennsylvania*, 343 F. Supp. 1257 (E. D. Pa. 1972).

15 *Id.*

16 *Id.* at 1260-64.

outlined in today's Individuals with Disabilities Education Act.[17]

Shortly after the *P.A.R.C.* decision came the *Mills v. Board of Education of District of Columbia* decision.[18] In *Mills*, the United States District Court for the District of Columbia expanded the *P.A.R.C.* ruling and required the school system to also educate children with behavioral and emotional disabilities.[19] The court held further that a lack of funds does not excuse the exclusion of some children from public education.[20] After *P.A.R.C.* and *Mills*, court decisions in twenty-seven states affirmed the right to education for students with disabilities.[21]

Despite notable advances for students with disabilities in the courts, Black students were still overrepresented in special education classes.[22] Federal legislation was obviously needed, and in 1972 Senator Harrison Williams Jr. introduced a bill in the U.S. Senate that would later become the Education for All Handicapped Children Act of 1975 (EHA).[23] The EHA was another educational grant program that required all students with disabilities receive a free, appropriate public education and that all evaluation procedures for special education classification be free from racial and cultural biases.[24]

Shortly after the EHA was first introduced in the Senate, Section 504 of the Rehabilitation Act of 1973 was enacted (Section 504).[25] The goal of Section 504 was to prevent any program or activity receiving federal financial assistance from discriminating against people with disabilities.[26] Although Section 504 provided important protections for students with disabilities, it did not apply to all state and local governmental entities. Fortunately, Title II of the Americans with Disabilities Act of 1990 (ADA) filled in the gaps left by Section 504 and prohibited all state governmental entities from discriminating against students with disabilities.[27]

In 1990, Congress reauthorized the EHA and changed its name to the Individuals with Disabilities Education Act (IDEA).[28] Last year, around 7.1. million students received special education services under the IDEA (Fourteen percent of total public-school enrollment).[29] In 2002, the U.S. Congress reauthorized the ESEA under President George W. Bush and renamed it the No Child Left Behind Act (NCLBA).[30] The ESEA was reauthorized again under President Barack Obama and renamed Every Student Succeeds Act (ESSA).[31]

B. *The Individuals with Disabilities Education Act*

The contemporary IDEA is largely the same as when it was originally enacted in 1990 and provides the most targeted and comprehensive protections for students with disabilities.[32] The IDEA is a grant-funding statute that conditions a state's receipt of funds on its implementation of

17 *Id.* at 1259-61 (describing an IEP meeting, outlining due process rights, and requiring free and appropriate public education for students with disabilities).

18 *Mills v. Bd. of Educ. of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972).

19 *Id.* at 878.

20 *Id.* at 876.

21 *See History of Special Education*, *supra* note 9. at 29..

22 *Larry P. v. Riles*, 793 F.2d 969, 972 (9th Cir. 1984) (invalidating California's method for determining whether a child should be placed in special education classes because it resulted in the disproportionate placement of Black students in special education classes).

23 S. 3614, 92nd Cong. (1972).

24 Education for All Handicapped Children Act, 20 U.S.C. § 1412 (1975).

25 29 U.S.C. § 701 (1973).

26 *Id.*

27 Lauren A. Koster, *Who Will Educate Me? Using the Americans with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities*, 60 B.C. L. REV. 673, 680 (2019).

28 H.R. REP. No. 101-787, at 53 (1990).

29 NATIONAL CENTER FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION (2020), https://nces.ed.gov/programs/coe/indicator_cgg.asp.

30 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

31 20 U.S.C. § 6301 (2015).

32 20 U.S.C. § 1400 (2020).

the requirements of the Act.[33] The requirements can be categorized into six main pillars: (1) Appropriate Evaluation/Child Find, (2) Individualized Education Plan (IEP), (3) Free and Appropriate Public Education (FAPE), (4) Least Restrictive Environment (LRE), (5) Procedural Safeguards, and (6) Special Provisions for Incarcerated Children with Disabilities.

1. Appropriate Evaluation/Child Find

Under the IDEA, states have an affirmative obligation to identify "[a]ll children with disabilities residing in the State".[34] In order to be appropriate, the identification process must provide a comprehensive evaluation of the student for all areas of suspected disability and must be administered by trained and knowledgeable personnel.[35] The evaluation must also be administered so as to avoid cultural or racial discrimination, including by providing evaluations in the appropriate language.[36] An appropriate evaluation does not subject the student to unnecessary assessments and gathers information from many different sources, including the child's parent and a variety of assessment tools.[37] When parental consent is not obtainable, local education agencies can still proceed with an initial evaluation.[38]

2. Individualized Education Program (IEP)

After a student has been assessed and deemed eligible for services under the IDEA, the child's IEP team must create his IEP. The IEP team is made up of the student's parent(s), special and/or regular education teachers, a representative of the local education agency (LEA), and anyone else with special expertise regarding the child.[39] The student's IEP serves as his curriculum for the year and must be reviewed at least annually.[40] As evinced from the title, the program must be individualized. To be individualized, the program must include a "specially designed instruction" that addresses the "unique needs of the child that result from the child's disability".[41]

Related to the IEP is the requirement that LEAs provide "related services" that would allow the child to benefit from the program. Related services include speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic and evaluation purposes.[42]

3. Free and Appropriate Public Education (FAPE)

The IEP requirement is not met unless it is also "appropriate".[43] The question of what is considered appropriate has been heavily litigated. The Supreme Court first defined an appropriate program as one that would allow a student with disabilities to receive an "educational benefit."[44] The Court took care to emphasize that this did not require an education agency to "maximize" each disabled student's potential.[45] Nevertheless, the new definition still provided little guidance to the

[33] NANCY LEE JONES, CONGRESSIONAL RESEARCH SERVICE AMERICAN LAW DIVISION, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEAIDE AIDEA): SUPREME COURT DECISIONS 1 (2008), https://www.everycrsreport.com/files/20080416_RL33444_1ced29474f7ac579847bda9517de2e472656d0d2.pdf.
[34] 20 U.S.C. § 1412.
[35] *Id.* § 1414(b)(3).
[36] *Id.*
[37] *Id.*
[38] *Id.* § 1414(a)(1)(D)(ii)(I).
[39] *Id.* § 1414(d)(1)(B).A).
[40] *Id.* § 1414(d)(1)(A).
[41] 34 C.F.R. § 300.39(b)(3) (2012).
[42] 20 U.S.C. § 1401(26)(A).)
[43] *See id.* § 1401(9) (requiring states to provide "special education and related services that . . . include an appropriate . . . education in the state involved . . . .").
[44] Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).
[45] *Id.*

courts and left room for varying interpretations.[46] The main question that lingered was whether the Court required "some educational benefit" or a "meaningful educational benefit".[47] In 2017, the Supreme Court clarified that in order to meet its obligation under the IDEA, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[48] The Court explicitly rejected the 10th Circuit test requiring merely more than *de minimis* educational benefit.[49]

4. Least Restrictive Environment (LRE)

The IDEA includes an integration presumption rule, which states:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be reached satisfactorily.[50]

The implementation of the integration presumption rule has led to substantial litigation and the circuit courts have announced different tests to determine when a disabled student can be placed in a more restrictive environment.[51]

5. Procedural Safeguards

There are several procedural safeguards guaranteed to students with disabilities and their parents through the IDEA with respect to the IEP and LRE evaluation process. However, the IDEA provides few procedural safeguards when it comes to disciplining students with disabilities. One provision related to discipline is the requirement that a disabled student remain in her "then-current educational placement" while the proceeding is resolved (also known as the "stay-put" provision).[52] The Court added more protections in *Honig v. Doe* when it created the "ten-day rule," which prohibits a school from suspending a student with disabilities for more than ten days without parental consent or a court order.[53] If a school does choose to suspend a student with disabilities for ten days, the child's IEP team must review the child's IEP to determine "(I) if the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was

[46] *See* Endrew F. v. Douglas County Sch. District, 798 F.3d 1329, 13381340-41 (10th Cir. 2015) (requiring "merely . . . more than *de minimis*"); *see also* P. v. Newington Bd. of Educ., 546 F.3d 111, 119 (2d Cir. 2008) (requiring "more than only trivial advancement"); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 862 (6th Cir. 2004) (requiring a "meaningful educational benefit").

[47] *Endrew F.*, 137 S. Ct. at 989-99. 999

[48] *Id.* at 999.

[49] *Id.* at 1000.

[50] 20 U.S.C. § 1412(a)(5)(A).

[51] Sacramento City Unified Sch. District v. Rachel H., 14 F.3d 1398, 1400-01 (9th Cir. 1994) (requiring a school to consider (1) the educational benefits to the disabled student in a regular education classroom versus a special education classroom, (2) the non-academic benefits to the disabled student of interacting with non-disabled students, (3) the effect of the disabled student's presence on the teacher and other children in the regular education classroom, and (4) the cost of including the disabled student in the regular education classroom); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-49 (5th Cir. 1989) (requiring a school to consider (1) whether the disabled student can be placed in the regular education class with supplementary services, (2) whether the disabled student will receive an educational benefit from the regular education classroom, (3) whether the disabled student will be harmed by being placed in the regular education classroom, and (4) how the disabled student will affect other students in the regular education classroom).

[52] 20 U.S.C. § 1415(j).

[53] Honig v. Doe, 484 U.S. 305, 325-26326 (1988).

the direct result of the local education agency's failure to implement the IEP."[54]

One exception to the *Honig* decision is if a student with a disability presents a serious risk of injury to herself or others.[55] When a student falls into this category, the school may unilaterally place the student in an alternative educational placement for up to forty-five days.[56] A child who presents a serious risk of injury to himself or others may be suspended for up to forty-five days regardless of whether the act he committed was a manifestation of his disability.[57]

6. Special Provisions for Incarcerated Children with Disabilities

All of the provisions in the IDEA apply to children in juvenile correctional facilities. However, not all of the provisions apply to children above the age of eighteen who are placed in adult correctional facilities. For example, children between the ages of eighteen and twenty-one in adult correctional facilities, who had not been identified as students eligible for services under the IDEA prior to incarceration, are not entitled to FAPE.[58] In addition, states do not have to include disabled children convicted as adults in their mandatory performance assessments.[59] Lastly, the IEP team of a disabled student convicted as an adult and placed in an adult correctional facility has the discretion to modify the student's IEP if "the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated."[60]

C. *Section 504 of the Rehabilitation Act of 1973*

Not every student with a disability is eligible for services under the IDEA. However, a student who is not eligible for services under the IDEA may still be eligible for services under Section 504. A student is eligible for services under Section 504 if he has a physical or mental impairment which substantially limits one or more major life activities.[61] A student might be eligible for services under Section 504 but not the IDEA if the student has mobility impairments but does not require special education or physical therapy.[62] Likewise, a student with asthma or diabetes may qualify for services under Section 504 but not the IDEA.[63] Section 504 applies to all state programs or activities receiving or benefiting from federal assistance.[64] This includes juvenile correctional facilities.[65]

The main difference between the application of the IDEA and Section 504 in the education context is that the goal of a Section 504 plan is to provide reasonable accommodations for the student to learn in the regular education classroom environment.[66] The IDEA, on the

54 20 U.S.C. § 1415(k)(1)(E).

55 *Id.* § 1415(k)(1)(G) (allowing the removal of a child with a disability for up to forty-five days if the child "(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local education agency; (ii) knowingly possesses or uses illegal drugsdrugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.").

56 34 C.F.R. § 300.530(g) (2017).

57 20 U.S.C. § 1415(k)(1)(G).

58 34 C.F.R. § 300.102(a)(2)(i).

59 *Id.* § 300.324(d).

60 20 U.S.C. § 1414(d)(7)(B).

61 29 U.S.C. § 705(20)(B) (2020).

62 LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW § 2:53 (4th ed. 2020) [hereinafter DISABILITIES AND THE LAW].

63 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, YOUR RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT 1 (2006), https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf.

64 DISABILITIES AND THE LAW, *supra* note 62, at § 2:2.

65 *Id.*

66 MARYLAND DEPARTMENT OF DISABILITIES, SECTION 504 PLANS, http://mdod.maryland.gov/education/Pages/Section-504-Plans.aspx (last visited Dec. 6, 2020).

other hand, requires special education services that can extend beyond accommodations made to a regular education classroom setting. Reasonable accommodations under a 504 plan can look like a schedule for getting medication for a student with diabetes or a plan for special transportation for a student who uses a wheelchair.[67]

Section 504 also differs from the IDEA in that it does not provide funding to states to implement the accommodations mandated by the legislation.[68] Rather, the states and local jurisdictions are required to fund the accommodations themselves.[69]

D. *Title II of the Americans with Disabilities Act*

Title II of the Americans with Disabilities Act (ADA) ensures equal opportunities for persons with disabilities in state and local government services, including juvenile correctional facilities.[70] The ADA mirrors Section 504 in that it is a broad piece of civil rights legislation that does not provide funding to states to implement its requirements. Further, the standard for a disabled person eligible for services under the ADA is the same as the standard set forth in Section 504.[71]

The main difference between Title II of the ADA and Section 504 of the Rehabilitation Act of 1973 is that Section 504 only applies to entities that receive federal assistance. As a result, local government operations that are funded by the State (i.e., courts) are not subject to the requirements imposed by Section 504. The ADA, on the other hand, applies to "any department, agency, special purpose district, or other instrumentality of a State or local government."[72] In the context of public schools and juvenile correctional facilities, Section 504 and ADA protections are virtually interchangeable.

E. *The Every Student Succeeds Act*

Title I, Part D of the Every Student Succeeds Act (ESSA) is not federal legislation specifically dedicated to students with disabilities. However, the ESSA provides federal funding to state education agencies for the education of incarcerated, neglected, and at-risk children.[73] In exchange for the funds, the state education agencies must comply with reporting requirements regarding education assessment, records transfer, reentry planning, and credit transfer for incarcerated children with disabilities.[74] All fifty states, D.C., and Puerto Rico currently receive funding for Title I, Part D programming.[75]

F. *The United States Constitution*

There is no fundamental right to education under the federal Constitution.[76] As a result, the Supreme Court will only apply rational basis scrutiny to claims brought under the Due Process Clause.[77] Relatedly, the Supreme Court has not yet classified juvenile delinquents as a suspect class under the Equal Protection Clause. There is precedent in education law litigation to support

67 *Id.*

68 Disability Rights Education & Defense Fund, *A Comparison of ADA, IDEA, and Section 504*, https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504/ (last visited Dec. 4, 2020).

69 *Id.*

70 *See* 42 U.S.C. § 12131(1)(A); *see also* Steven E. Gordon, Department of Justice, The ADA in State and Local Courts, Law Enforcement and Detention Facilities, https://www.adainfo.org/sites/default/files/5.2%20Law%20Enforcement_Gordon-1-slide-per-page-handout.pdf.

71 42 U.S.C. § 12102(1)(A).

72 *Id.* § 12131(1)(B).

73 20 U.S.C. § 6434(a).

74 *Id.* § 6301(I)(D).

75 Indiana Department of Education, What the "Every Student Succeeds Act" Means for Youth in and Returning from the Juvenile Justice System, https://www.doe.in.gov/sites/default/files/titlei/essajj-factsheet-final-webinar-version-jan262016.pdf.

76 *San Antonio Independent Sch. District v. Rodriguez*, 411 U.S. 1 (1973).

77 *Id.*

an argument in favor of applying intermediate scrutiny to students in juvenile correctional facilities.[78] Until then, the U.S. Constitution continues to provide very limited protections for students with disabilities in juvenile correctional facilities.

III. Maryland State Protections

The Maryland Constitution requires the formation of "a thorough and efficient" free public school system.[79] However, the Maryland Court of Appeals has held that the aforementioned language did not create a fundamental right to education under the Maryland Constitution.[80] As a result, the Maryland Constitution provides little recourse for students with disabilities in juvenile correctional facilities. However, the Code of Maryland Regulations (COMAR) imposes important education requirements on juvenile correctional facilities.

A. *Code of Maryland Regulations*

Title 13A of the Code of Maryland Regulations (COMAR) is an official compilation of all of the regulations governing the Maryland State Department of Education.[81] The special education provisions largely mirror the safeguards provided by the IDEA.[82] However, the regulations expand on federal laws by specifying state requirements for the re-enrollment of a displaced student and the transfer of school records.[83]

Under the COMAR, all students leaving the custody of the Department of Juvenile Services (DJS) and returning to the public school system must be enrolled in the receiving school no longer than two days after the receiving school has obtained the required documentation.[84] The required documentation includes: (1) proof that the child is in DJS custody (i.e., court order, a letter on DJS letterhead, or the receiving school system's enrollment form signed by a DJS representative), (2) a letter from DJS verifying the child's residential address, and (3) a currently dated (no more than three months old) lease, rent receipt, deed, property tax bill, gas and electric bill, water bill, cable bill, online computer services bill, or noncellular phone bill.[85]

The regulations regarding the transfer of school records are the same for students entering juvenile correctional facilities and those returning to the public school system. The sending school is required to send any IEP or Section 504 plans, immunization records, a birth certificate or other proof of age, and health records.[86] In order to facilitate this process, the COMAR requires that each local school system and juvenile detention facility identify a contact person charged with coordinating and sharing information about incoming and outgoing students.[87] The State Superintendent of Schools is then required to compile a master list of contacts every year and provided it to the Department of Human Services.[88]

B. *Settlement Agreements and Consent Decrees*

All litigation challenging special education services in Maryland's juvenile correctional facilities have ended in settlement agreements or

[78] *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that the State of Texas did not demonstrate a substantial state interest in denying noncitizen children a free public education).
[79] MD. CONST. art. VIII §1 (2020).
[80] *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 786 (Md. App. 983).
[81] MARYLAND STATE DEPARTMENT OF EDUCATION, CODE OF MARYLAND REGULATIONS (COMAR), http://www.marylandpublicschools.org/about/Pages/Regulations/COMAR.aspx.
[82] Md. Code Regs. § 13A.05 (2020).
[83] *Id.* § 13A.08.07.
[84] *Id.* § 13A.08.07.03-1G.
[85] *Id.* § 13A.08.07.03-1C.
[86] *Id.* § 13A.08.07.02-2C.
[87] *Id.* § 13A.08.07.03-4A.
[88] *Id.* § 13A.08.07.03-4B.

consent decrees. In 1985, Earl P. filed a complaint alleging that he was deprived of his right to a free and appropriate education under the Education for the Handicapped Act (EHA).[89] Specifically, Earl P. asserted that records were not transferred in a timely manner and that students with disabilities were not provided services consistent with their IEPs.[90] A consent decree between the parties required all juvenile correctional facilities in the state to create new education programs, develop plans for transferring records between the facilities and local public schools, and train staff on special education requirements.[91]

In 2002, the United States Department of Justice (DOJ) launched an investigation of certain Maryland juvenile correctional facilities.[92] The investigation revealed, *inter alia*, inadequate screening, identification, and assessment of developmental and learning disorders, inadequate clinical assessment, treatment planning, and case management of children with disabilities, and inadequate mental health counseling and rehabilitative services.[93] The DOJ and the State of Maryland eventually entered into a settlement agreement wherein the State agreed to develop procedures to identify children with disabilities and implement IEPs and Section 504 plans in the three juvenile correctional facilities.[94] By 2010 the facilities had complied satisfactorily and the cases were closed.[95]

In 2004, the DOJ and the Maryland Department of Juvenile Services entered into a consent agreement resulting from an investigation by the DOJ into allegations that students with disabilities in certain Maryland juvenile correctional facilities were being denied services they were eligible for under Section 504 and Title II of the ADA.[96] The complainant was deaf and, as a result, the agreement included equitable relief measures tailored towards students who are deaf or hard of hearing.[97] The agreement required, in pertinent part, that the intake staff in all of the juvenile correctional facilities ensure all incoming children are assessed to determine whether they need auxiliary aids or related services.[98] The agreement also required a request for auxiliary aids and services form to be mailed to the child's legal guardian.[99]

C. *Education Monitoring in Maryland Juvenile Correctional Facilities*

The Juvenile Justice Monitoring Unit operates under the Office of the Maryland Attorney General.[100] The Unit investigates juvenile correctional facilities and provides detailed quarterly reports regarding the treatment and services provided to children in the facilities.[101] The reports provide sobering data regarding the facilities' routine failure to comply with federal

89 *See* Consent Decree, *Earl P. v. Hornbeck*, No. N-85-2973 (D. Md. 1985); *see also* Peter E. Leone et al., *Education Services in Juvenile Corrections: 40 Years of Litigation and Reform*, 38 Educ. and Treatment of Child 587, 593 (2015) [hereinafter Leone, *Education Services in Juvenile Corrections*].

90 *See* Leone, *Education Services in Juvenile Corrections, supra* note 87.

91 *See id.*

92 Alexander Acosta, U.S. Dep't of Just. C.R. Division, Investigation of the Cheltenham Youth Facility in Cheltenham, Maryland, and the Charles H. Hickey, Jr. School in Baltimore, Maryland 1 (Apr. 9, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/cheltenham_md.pdf.

93 *Id.* at 18-33.

94 *See* Leone, *Education Services in Juvenile Correction*, *supra* note 87, at 594; *see also* Amended Settlement Agreement between U.S. and Md. Regarding Conditions at Three Juvenile Justice Facilities at 14-20, No. 1:05-CV-01772 (May 17, 2007), https://www.clearinghouse.net/chDocs/public/JI-MD-0003-0005.pdf.

95 *See* Order of Final Dismissal, No. 1:05-CV-01772 (Aug. 19, 2010), https://www.clearinghouse.net/chDocs/public/JI-MD-0003-0010.pdf.

96 Settlement Agreement between U.S. and Md. Dep't of Just., No. 204-35-220 (Mar. 29, 2004), https://www.ada.gov/mdjs.htm.

97 *Id.*

98 *Id.*

99 *Id.*

100 *See Generally* Juvenile Justice Monitoring Unit, https://www.marylandattorneygeneral.gov/Pages/JJM/default.aspx.

101 *Id.*

and state mandates to provide special education services to its students.[102]

IV. The State of Special Education in Maryland Juvenile Correctional Facilities

In 2018, approximately 37% of the students in Maryland juvenile correctional facilities had documented learning disabilities.[103] Because there is no systematic screening process that identifies a child's disability when he enters a juvenile correctional facility, many more students may have entered the facilities with unidentified disabilities.[104] There is also no systematic screening process to ensure students have up-to-date evaluations.[105] Further, after a disabled student has completed her time in the facility, her earned credits do not automatically transfer to her local school district.[106] Although the nature of juvenile correctional facilities themselves provide some obstacles to the proper implementation of special education services, the constant shifting of the responsibility for education oversight over the facilities has also contributed the inadequacies. Fortunately, the Maryland State Legislature has created a pilot program to focus exclusively on the issue of education in the juvenile correctional facilities.

Maryland's secure correctional facilities for children are all operated by the Department of Juvenile Services (DJS).[107] Originally, DJS was responsible for educating all of the children in its care.[108] In June 2004, the responsibility shifted to the Juvenile Services Education System division of the State Department of Education (JSES).[109] The JSES oversees and provides educational services to children in thirteen of the fourteen DJS correctional facilities.[110] The outlying facility, the Silver Oak Academy (SOA), is licensed to a private company.[111]

In 2018, the Maryland State Legislature created the Juvenile Services Education County Pilot Program.[112] The pilot program places oversight of education in the juvenile correctional facilities in the hands of county boards of education and requires a workgroup to provide proposals for education reform.[113] The only facility participating in the pilot program is the Alfred D. Noyes Children's Center in Rockville, Maryland.[114] Approximately 30% of the children detained in the Alfred D. Noyes Children's Center have a diagnosed learning disability.[115]

The workgroup tasked with drafting the reform proposals is comprised of one Maryland Senator, one member of the House of Delegates, the State Superintendent of Schools (or a designee), the Secretary of Juvenile Services (or

[102] *See* MD JUVENILE JUSTICE MONITORING UNIT 2018 REPORT, *supra* note 7, at 61.
[103] *See* MSDE JSES 2018 REPORT, *supra* note 4.
[104] *See* MD JUVENILE JUSTICE MONITORING UNIT 2018 REPORT, *supra* note 7, at 61.
[105] *Id.*
[106] *Id.* at 62.
[107] *See generally* MARYLAND DEPARTMENT OF JUVENILE SERVICES, https://djs.maryland.gov/Pages/detention/Detention.aspx (last visited Apr. 27, 2021. 6, 2020).
[108] *See generally* MARYLAND MANUAL ON-LINE, DEPARTMENT OF JUVENILE SERVICES, https://msa.maryland.gov/msa/mdmanual/19djj/html/djjd.html (last visited Apr. 27, 2021. 6, 2020).
[109] *See* Md. Code, Educ. § 22-302 (2020); *see also* MARYLAND STATE DEPARTMENT OF EDUCATION, JUVENILE SERVICES EDUCATION SYSTEM, http://marylandpublicschools.org/programs/pages/jse/index.aspx (last visited Apr. 30, 2021. 6, 2020).
[110] MARYLAND STATE DEPARTMENT OF EDUCATION, JUVENILE SERVICES EDUCATION SYSTEM SCHOOL OVERVIEW, http://marylandpublicschools.org/programs/Pages/JSE/schoolsoverview.aspx (last visited Apr. 30, 2021. 6, 2020).
[111] *See* MD JUVENILE JUSTICE MONITORING UNIT 2018 REPORT, *supra* note 7, at 2.
[112] H.B. 1607, 438th Gen. Assemb., Reg. Sess. (Md. 2018) [hereinafter H.B. 1607].
[113] MSDE JSES 2018 REPORT, *supra* note 4.
[114] JACK R. SMITH, OFFICE OF THE SUPERINTENDENT OF SCHOOLS, INNOVATIVE APPROACHES TO ALTERNATIVE EDUCATION, https://go.boarddocs.com/mabe/mcpsmd/Board.nsf/files/BEBM275914C2/$file/Innovative%20Approaches%20Alt%20Ed%20190729.pdf.
[115] *Id.*

a designee), the Public Defender of Maryland (or a designee), an academic expert in education in institutional settings, a teacher who works in a juvenile services education program in Maryland, an administrator who works in a juvenile services education program in Maryland, one representative of a criminal justice or civil rights advocacy group, one representative of the disability rights advocacy group, a superintendent of a local public school system in Maryland, and a member of a county board of education.[116] The pilot will end on June 30, 2021.[117] The workgroup will need to present their findings on (1) whether the pilot program provided a better model for meeting the education needs of children in correctional facilities, (2) an "adequate and appropriate" formula for funding education services for children in correctional facilities, (3) whether children in correctional facilities should follow a 9-month or 12-month academic calendar, (4) how to ensure that students in correctional facilities receive academic credit when they are transferred back to public school, (5) how to address staffing challenges in the current juvenile correctional education system, (6) how to ensure that students in correctional facilities have access to postsecondary options, and (7) how to eliminate disparities between students educated in juvenile correctional facilities and students educated in public schools.[118] The pilot program has been endorsed by the ACLU of Maryland and the Maryland Attorney General's Juvenile Justice Monitoring Unit.[119]

[116] H.B. 1607, *supra* note 110, § 2(b).
[117] H.R.1607, 441st Gen. Assemb., Reg. Sess. (Md. 20182020).
[118] *Id.*
[119] *See* Toni Holness, ACLU Maryland, Testimony for the House Ways and Means and Judiciary Committees, https://www.aclu-md.org/sites/default/files/field_documents/hb_1607_juvenile_education_pilot_program_luedtke.pdf; *see also* MD JUVENILE JUSTICE MONITORING UNIT 2018 REPORT, *supra* note 7, at 63.

V. Recommendations

An analysis of the special education services provided to students in the juvenile correctional facilities is notably excepted from the tasks assigned to the Juvenile Services Education County Pilot Program workgroup. The workgroup will be unable to provide suitable suggestions without considering the needs of students with disabilities. For example, the question of whether students should follow a nine-month or twelve-month academic calendar may vary depending on whether the student requires special education. Additionally, the workgroup cannot appropriately address staffing challenges and funding formulas in the facilities without acknowledging the need for teachers and other staff members trained in special education.

The Juvenile Services Education County Pilot Program workgroup should focus their attention on improving education services for children with disabilities in Maryland's juvenile correctional facilities because of the high percentage of students with disabilities in the facilities. Improving conditions for the most vulnerable children will only positively affect neurotypical students. The following are specific proposals for the workgroup to consider before it presents its findings to the legislature.

A. *Recommendation 1: Extending Child Find Obligations*

In Maryland, the responsibility to appropriately evaluate children with disabilities between the ages of three and twenty-one falls to the local school system of each jurisdiction.[120] There is no systematic screening process that identifies children's disabilities when they enter a

[120] Md. Dep't of Disabilities, Education, http://mdod.maryland.gov/education/Pages/Special-Education-Servcies.aspx (last visited Dec. 6, 2020).

Maryland juvenile correctional facility.[121] There is also no systematic screening process for ensuring that students have up-to-date evaluations.[122] As a result, unless a child has been identified by the school system as having a disability, the child will go without special education services in the juvenile correctional facility.

The Mississippi Department of Education has taken an intersectional approach to fulfilling its Appropriate Evaluation/Child Find obligations under the IDEA.[123] In 2015, the agency produced a procedure manual for public agencies to implement the requirements of the IDEA.[124] The manual requires twelve public agencies, including state and local juvenile detention centers, to designate an agency and/or district-level Child Find Coordinator responsible for coordinating all activities related to identifying and evaluating children with disabilities.[125]

In order to comply with its Child Find obligations, Maryland must extend the responsibility to identify and evaluate children with disabilities beyond the local school systems. An intersectional system like the one implemented in Mississippi would require public agencies that frequently come into contact with children in juvenile correctional facilities to identify and evaluate more students with disabilities. Probation officers, correctional staff, law enforcement officers, social workers, and medical professionals must all be required to participate in the Child Find process.

Moreover, the intake processes in juvenile correctional facilities must include a method for determining whether a student requires special education services. Just as the 2004 settlement agreement required a Request for Auxiliary Aids Services form be mailed to every child's guardian, a similar form could be developed to encompass requests for any special education services. Likewise, local law enforcement agencies referring children to juvenile correctional facilities should be required to fill out forms indicating any known special needs.

B. *Recommendation 2: Closing Loopholes in Data Collection*

Each State requesting Title I, Part D funding under the Every Student Succeeds Act must submit a plan for meeting the educational needs of incarcerated, neglected, and at-risk children, and a method for assessing the effectiveness of the programs.[126] In its 2018 plan, the Maryland State Department of Education vowed to work with local education agencies and correctional facilities to implement a transition plan for incarcerated youth that would ensure record or credit transfer.[127] The plan also summarized three means by which the State would measure the effectiveness of its education programs for students served under Title I, Part D of the ESSA: (1) a ten percent increase of long-term students who improve their reading grades by half to one full grade level, (2) a ten percent increase of long-term students who improve their math grades by half to one full grade level, and (3) a five percent increase in student outcomes (i.e., school

[121] MD JUVENILE JUSTICE MONITORING UNIT 2018 REPORT, *supra* note 7, at 61.

[122] *Id.*

[123] Miss. Dep't of Education, Office of Special Education, Procedures for State Board Policy 7219 Vol. 1: Child Find Evaluation and Eligibility (2015), https://content.schoolinsites.com/api/documents/0c303274288b4fbd88f23a5920070dad.pdf.

[124] *Id.* at 2.

[125] *Id.* at 1-2. (The twelve public agencies include the Department of Human Services and Local Offices, the Department of Mental Health and Regional Community Mental Health Centers, the State and Local Departments of Health, the Department of Corrections, the State and Local Juvenile Detention Centers, the Schools for the Deaf and for the Blind, the School for Math and Science, the School of the Arts, Head Start agencies, university-based programs, physicians, nurse practitioners, and other primary healthcare providers, and private and parochial schools.)

[126] 20 U.S.C. § 6434(a).

[127] Md. State Dep't of Education, Maryland Every Student Succeeds Act (ESSA) Consolidated State Plan 1, 62 (Sep. 17, 2018), http://marylandpublicschools.org/about/Documents/ESSA/ESSAMDSubmissionConsolidatedStatePlan091718.pdf.

enrollment, credit accrual, vocational, GED, or post-secondary education opportunities).[128] The wording used in Maryland's plan allows the State Department of Education to measure its programs' effectiveness based on the performance of *all* students served by Title I, Part D, not just students in juvenile correctional facilities.

Loopholes like this one allow juvenile correctional facilities to escape their state and federally mandated obligations by giving the impression that student performance is adequate when it is actually deteriorating. The Attorney General's Juvenile Justice Monitoring Unit has already shown it is capable of collecting data and producing comprehensive reports about the conditions in the juvenile correctional facilities. One regular, comprehensive, and widely-distributed report about the status of special education services in the juvenile correctional facilities would prevent any falsifications or misleading assessments.

C. *Recommendation 3: Expediting Data Sharing*

In Maryland, there is no systematic screening process that identifies children's disabilities when they enter a juvenile correctional facility.[129] Further, after students with disabilities have completed their time in the facility, their earned credits do not automatically transfer to their local school district.[130] Both of these issues can be remedied by a statewide process for sharing information between juvenile correctional facilities and public schools.

The State of Indiana has developed a data sharing system wherein each student is assigned unique "Student Test Number".[131] The State Department of Education is responsible for maintaining a database that tracks all student transfers using the Student Test Number.[132] As a result, students attending school in a juvenile correctional facility remain associated with their Student Test Number and teachers are able to access information about special education status and attendance on the database.[133] Maryland would benefit from implementing a similar process and maintaining a statewide database with pertinent student information.

D. *Recommendation 4: Addressing Funding Challenges*

In the fiscal year 2019 application for IDEA funding, the Maryland State Superintendent of Schools certified that the state was in complete compliance with the requirements of the IDEA.[134] The State Superintendent allocated less than $55,145 of the state's IDEA funds to students with disabilities in correctional facilities.[135] There is no doubt that public schools in Maryland are in need of the federal funding provided by the IDEA. However, the meager funding dedicated to students with disabilities in juvenile correctional facilities is unjustifiable.

Although Maryland could likely use more funding for public education in general, the main problem is not just a lack of funding to pay teachers competitive salaries. The state does not have a dedicated funding pool for students with disabilities in juvenile correctional facilities. Public schools are given priority for federal funds for students with disabilities and students in

128 *Id.*

129 Md. Juvenile Justice Monitoring Unit 2018 Report, *supra* note 6, at 61.

130 *Id.* at 62.

131 American Youth Policy Forum, *Leveraging the Every Student Succeeds Act to Improve Educational Services in Juvenile Justice Facilities* 1, 4 (Jan. 2018), http://www.aypf.org/wp-content/uploads/2018/01/Leveraging-ESSA-to-Improve-Outcomes-for-Youth-in-Juvenile-Justice-Facilities.pdf.

132 *Id.*

133 *Id.*

134 Md. Office of the State Superintendent, Karen B. Salmon, Annual State Application Under Part B of the Individuals with Disabilities Education § 3, I-2, http://marylandpublicschools.org/programs/Documents/SpecialEd/IDEAGrants/MDPartBFederalApplicationFFY2019IDEAFunds.pdf.

135 *Id.* at III-3.

juveniles correctional facilities suffer as a result. In developing its funding formula, the workgroup must ensure that children with special education in juvenile correctional facilities receive their share of the federal funding the state receives for special education. The work group must develop a method to track the special education funding provided to children in juvenile correctional facilities and avoid mingling those funds with the funds provided to children with disabilities in public schools.

VI. Conclusion

Maryland has all of the tools it needs to properly implement special education in its juvenile correctional facilities. There is no need for additional laws, regulations, or methods for data collection. The main task for the Juvenile Services Education County Pilot Program workgroup is to take all of the data and resources that are already available and develop an efficient and effective model for education oversight and implementation in the juvenile correction facilities. The workgroup must focus on the need for adequate special education in the facilities in order for the proposals to succeed.

Rebalancing the Scales: Why the Reliance Interests of Law Enforcement Should Be Irrelevant to Questions of Constitutional *Stare Decisis*

LUCAS S. STEGMAN

"I can't help but wonder, well, should we forever ensconce an incorrect view of the United States Constitution for perpetuity, for all states and all people, denying them a right that we believe was originally given to them because of 32,000 criminal convictions in Louisiana?"[1]
-Associate Justice Neil Gorsuch

I. Introduction

Answering the thorny question of when an erroneous precedent should be overruled requires a court to thread a particularly treacherous needle. Recognizing that "[o]verruling precedent is never a small matter,"[2] the Supreme Court put a hefty thumb on the scale in favor of retaining precedents, even if they were wrongly decided. In many circumstances, the doctrine of *stare decisis* counsels against overruling past cases simply because a modern court would have reached a different result.[3] However, *stare decisis* is not an "inexorable command."[4] Given sufficient justification, a past decision may be overturned if there are "strong grounds for doing so."[5]

When assessing whether a case should be overruled despite the general rule of *stare decisis*, courts will consider a number of factors.[6] The precise articulation of these factors varies from case to case,[7] but the reliance interests engendered by the previous decision are almost always considered.[8] This article focuses on one aspect of those reliance interests: specifically, how the Supreme Court weighs reliance interests of law enforcement, including police officers and prosecutors, when reevaluating a criminal procedure precedents.

Traditionally, reliance interests of law enforcement did not bear on the question of whether precedents that determined the proper scope of constitutional rights should be overruled. However, in recent years, some members of the

1 Oral Argument at 50:54, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924), https://www.oyez.org/cases/2019/18-5924.

2 *Kimble v. Marvel Ent., LLC*. 576 U.S. 446, 454 (2015).

3 *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

4 *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

5 *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2478 (2018).

6 *See, e.g.*, *id.* at 2478–79.

7 *Compare Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (discussing four *stare decisis* factors), *with Janus*, 138 S. Ct. at 2478–79 (discussing five *stare decisis* factors).

8 *See, e.g.*, *Janus*, 138 S. Ct. at 2478–2479; *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."); *but see Wayfair, Inc.*, 138 S. Ct. at 2098 (cautioning that only "legitimate reliance interest[s]" are weighed in the *stare decisis* contexts (alteration in original) (citing United States v. Ross, 456 U.S. 798, 824 (1982))).

Court have suggested these law enforcement reliance interests are highly relevant to questions of constitutional *stare decisis*. Specifically, Justice Alito's dissents in *Arizona v. Gant* and *Ramos v. Louisiana* suggest the reliance interests of police officers in having consistent rules of procedure[9] and not having to retry criminal defendants can cut sharply in favor of retaining precedents which are constitutionally incorrect.[10] This position is troubling as it suggests police practices which are clearly unconstitutional can be upheld because of the Government's interest in continuing those practices—as well as a vested interest in not having to correct its previous constitutional violations.

This article takes a different perspective and argues Justice Alito's weighing of the reliance interests of law enforcement is unfaithful to the history and doctrine of *stare decisis* and gives short shrift to the fundamental rights of criminal defendants. Instead, the Court should hew to the opposite standard: that law enforcement reliance interests can never trump the constitutional rights of criminal defendants in a *stare decisis* analysis.

Part II of this Article will discuss the doctrine of *stare decisis* generally and how its applied with less force when constitutional rights are at issue. Part III will discuss how, traditionally, law enforcement reliance interests were not factored into the *stare decisis* analysis, particularly in the criminal procedure context. Part IV will discuss how some members of the Court reject this approach to law enforcement reliance interests, with a particular emphasis on Justice Alito's dissents in *Arizona v. Gant*[11] and *Ramos v. Louisiana*.[12] Part V will critique these dissents and argue considering law enforcement reliance interests is inconsistent with the history and practice of *stare decisis*, ignores existing doctrines to protect those interests, and tips the scales towards retaining precedent favoring law enforcement at the expense of defendants' rights. Finally, part VI will suggest an alternative approach: a categorical rule making law enforcement reliance interests irrelevant to the *stare decisis* analysis when constitutional rights of criminal defendants are at stake.

II. The Doctrine of Stare Decisis

A. *The Contours of Stare Decisis*

The doctrine of *stare decisis* reflects a "policy judgment" that a legitimate and administrable judicial system requires the Court to stay its hand from overruling every incorrect precedent.[13] The Court has long recognized that "no judicial system could . . . work if it eyed each issue afresh in every case that raised it."[14] From this vein, Justice Brandeis famously declared that "*[s]tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[15] Some commenters may disagree with that premise[16] but the importance of *stare decisis* in contemporary jurisprudence cannot be denied.

Of course, *stare decisis* is not ironclad.[17] Indeed many of the Court's "most notable and

9 *See Arizona v. Gant*, 556 U.S. 332, 359–60 (2009).
10 *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1436–38 (2020).
11 *Arizona v. Gant*, 556 U.S. 332, 359–60 (2009).
12 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1436–38 (2020).
13 *See Agostini v Felton*, 521 U.S. 203, 235 (1997); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173 (2006) (noting the views of Justice Powell).
14 *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (citing Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921)).
15 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).
16 Some members of the Court have maintained that a strict adherence to *stare decisis* would be "a betrayal of the judge's duty to follow the law and thus of the rule of law itself." Farber, *supra* note 13, at 1173–74 (discussing the views of Justice Scalia and his dissent in *South Carolina v. Gathers*, 490 U.S. 805 (1989)); *see also* Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).
17 *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The doctrine of stare decisis . . . is not . . . an inexorable command.") (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

consequential decisions have entailed overruling precedent."[18] If a litigant can show that there is a "special justification" for deviating from an incorrect ruling of the Court, the erroneous precedent may be overruled.[19] However, the burden a litigant must overcome to show this special justification varies depending on the type of precedent at issue.[20]

For example, the doctrine of *stare decisis* is perhaps at its strongest when the Court interprets a statute, the Court applies a more weighty form of *stare decisis*.[21] There are several interlocking reasons for this application. First, the Court recognizes if it has erroneously interpreted a statute, "Congress remains free to alter what [the Court] ha[s] done."[22] Second, the Court presumes if Congress did not alter the underlying legislation, it has acquiesced to the Court's precedents about that legislation—and has perhaps relied on them.[23] Finally, the Court may hesitate to overrule statutory interpretation precedents because of concern about interfering with the separation of powers between the judiciary and the legislature.[24]

In contrast, *stare decisis* is at its lowest ebb in cases involving interpretations of the Constitution,[25] including in cases that involve the constitutional rights of criminal defendants.[26] The Court recognizes its decisions interpreting the Constitution "can be altered only by constitutional amendment or by overruling [its] prior decisions."[27] Indeed, the "practical impossibil[ity]" of any institution besides the Court correcting an erroneous constitutional precedent has led the Court to be more willing to overrule such precedents.[28]

B. *The Modern Stare Decisis Test*

When the Court is deciding whether to overrule a precedent, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming [or] overruling a prior case."[29] The Court has traditionally considered a number of factors, including: the quality of the reasoning in the previous decision; the workability of the current rule; the

[18] *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1411–12 (2020) (Kavanaugh, J., concurring in part) (citing, among others, the decisions in Obergefell v. Hodges, Citizens United v. Federal Election Commission, Crawford v. Washington, Gideon v. Wainwright, and Mapp v. Ohio).

[19] *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

[20] *See Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

[21] *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . . ."). For a thorough discussion of the use of *stare decisis* in the realm of statutory interpretation, *see generally* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

[22] *See Patterson*, 491 U.S. at 173; *see also* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

[23] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998); Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423 (1986); *cf.* Barrett, *supra* note 21, at 322, 330–31 (describing and criticizing the "acquiescence" rationale of statutory *stare decisis*).

[24] *See Patterson*, 491 U.S. at 172 (stating that *stare decisis* has special force in the statutory interpretation context in part because "the legislative power is implicated"); Barrett, *supra* note 21, at 323–27 (discussing the separation-of-powers rationale for statutory *stare decisis*). However, not all Justices agree with this—or with the overall proposition that precedent should weigh more heavily in cases of statutory interpretation. *See* Gamble v. United States, 139 S. Ct. 1960, 1987–88 (2019) (Thomas, J., concurring).

[25] *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019) ("The doctrine [of *stare decisis*] is at its weakest when we interpret the Constitution . . . .") (internal citations omitted); Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013) ("The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

[26] *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).

[27] *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

[28] *See Payne*, 501 U.S. 808, 828 (1991).

[29] *See Casey*, 505 U.S. 833, 854 (1992).

prior decision's consistency with other rulings; developments since the initial decision; and reliance on the precedent.[30] Additionally, the Court has also looked to whether "experience has pointed up the precedent's shortcomings,"[31] as well as to the age of the precedent.[32] Some commenters, including Justice Kavanaugh,[33] have argued that the Court has offered relatively little guidance on how to apply—and balance—this buffet of factors, and have accordingly proposed alternative, simpler tests.[34]

The remainder of this Article will focus on one of the factors that appears both in the traditional *stare decisis* test and in Justice Kavanaugh's "diet menu" of *stare decisis* factors: the reliance interests engendered by the precedent.[35] This factor has caused a great deal of disagreement between the members of the Court, with the Justices sharply divided on how it should apply when a criminal procedure precedent is being reevaluated.[36]

III. Reliance Interests and the Payne Approach

A. *Multiple Types of Reliance Interests*

An inquiry into the reliance interests at stake, the Court has explained, is a "legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."[37] This inquiry "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."[38] It could be argued that the consideration of reliance interests represents a form of judicial humility, a recognition that overruling precedent will have "practical effects" and should be done only after a "sober appraisal of the disadvantages" of doing so.[39] Indeed, when there is a great deal of "legitimate" reliance at stake, this may "provide[] a strong reason for adhering to established law," even if it is erroneous.[40] On the other hand, the absence of any reliance interests is not a sufficient justification on its own for overturning a precedent.[41]

However, reliance interests are not necessarily created equal, as demonstrated by the broad language of *Payne v. Tennessee*.[42] In *Payne*, the Supreme Court rejected an argument to uphold a prior decision excluding victim impact evidence at sentencing proceedings on *stare decisis* grounds.[43] Chief Justice Rehnquist, writing for the Court, opined "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."[44] This language encapsulates an important principle that runs throughout the Court's *stare decisis* jurisprudence: reliance interests are most relevant with respect to precedents implicating "the commercial context," such as contract law or property law, where "advance planning of great precision is most obviously a necessity."[45] Though the court

30 *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018).

31 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

32 *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he relevant factors in deciding whether to adhere to the principles of *stare decisis* include the antiquity of the precedent . . . .").

33 See *Ramos*, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part).

34 *See id.* (proposing a three-part test).

35 *See id.* at 1405; *id.* at 1415 (Kavanaugh, J., concurring in part).

36 *Compare id.* at 1406–07, *and id.* at 1409–10 (Sotomayor, J., concurring in part), *and id.* at 1419–20 (Kavanaugh, J., concurring part), *with id.* at 1436–38 (Alito, J., dissenting).

37 *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018).

38 *Casey*, 505 U.S. 833, 855 (1992).

39 *Ramos*, 140 S. Ct. at 1415 (2020) (Kavanaugh, J., concurring in part) (citing Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 AM. BAR ASS'N 334 (1944)).

40 *Janus*, 138 S. Ct. 2448, 2484 (2018) (citing Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202–03 (1991)).

41 *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

42 *Payne*, 501 U.S. 808 (1991).

43 *See id.* at 827–30.

44 *Id.* at 828.

45 *Casey*, 505 U.S. 833, 855–56 (1992); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) ("[R]

has rejected arguments that reliance interests are only applicable in the commercial context,[46] this is where they bear the most weight.[47] But even then, reliance interests are not outcome determinative.[48]

The *Payne* Court did not stop there; Chief Justice Rehnquist continued, saying that "the opposite is true in cases such as the present one involving procedural and evidentiary rules."[49] *Payne* overturned precedents holding introduction of victim impact evidence during sentencing for capital crimes in violation of the Eight Amendment.[50] Part of *Payne*'s reasoning was this kind of constitutional rule of criminal procedure engenders no reliance interests.[51] But that raises an important follow-up: when, if ever, do rules of criminal procedure create reliance interests?

B. *Reliance Interests for Criminal Defendants and Law Enforcement After* Payne

The broad language of *Payne* would suggest that any reliance interests in rules of criminal procedure claimed by defendants or law enforcement are irrelevant to the *stare decisis* analysis. With respect to defendants, that has certainly been the case—the Supreme Court has repeatedly rejected claims that defendants have "legitimate" reliance interests in rules of criminal procedure which are more protective than constitutionally required.[52] Indeed, the *Payne* Court disposed of the defendant's claimed reliance interests in a single sentence.[53] In *Montejo v. Louisiana*, Justice Scalia dismissed the idea that a criminal defendant would have a reliance interest in the prophylactic rule of *Michigan v. Jackson*.[54] He wrote that "eliminating [*Jackson*] would not upset expectations. Any criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with police on his own."[55]

Payne itself left unanswered whether the reliance interests in procedural rules are equally weak when applied to precedents relied upon by law enforcement.[56] However, the Court in *Payne* addressed this question in 1991. Speaking to the Fourth Circuit Judicial Conference, Chief Justice Rehnquist contrasted the reliance interests in commercial cases, where "parties have shaped their conduct in reliance on a certain part of the law," with procedural and evidentiary rules in criminal trials, where "you simply don't have that

eliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions.").

46 *See Casey*, 505 U.S. at 855–56; Lawrence v. Texas, 539 U.S. 558, 577 (2003); Michael Vitiello, *Payne v. Tennessee: A "Stunning Ipse Dixit"*, 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 165, 189 n.155 (1994).

47 *See, e.g.*, *Citizens United*, 558 U.S. at 365.

48 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) (rejecting a precedent declaring vertical price-fixing *per se* illegal, despite significant reliance interests).

49 *Payne*, 501 U.S. at 828.

50 *See Payne*, 501 U.S. at 827–30 (overturning *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

51 *See id.* at 828; Wayne LaFave et al., 1 CRIMINAL PROCEDURE § 2.9(b) n.12 (4th ed. Dec. 2020) ("A criminal defendant obviously would not have shaped his conduct in reliance upon such an evidentiary prohibition."); *see also* Vitiello, *supra* note 46, at 183. ("The Court stated that reliance and predictability are not particularly important in a case like *Payne* . . . .").

52 *See Payne*, 501 U.S. at 828; United States v. Ross, 456 U.S. 798, 824 n.33 (1982) ("Any interest . . . that may be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedent clearly would not be legitimate."). Some scholars disagree, contending that criminal defendants do have legitimate reliance interests in rules of criminal procedure. *See* Michael Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 50 GEO. WASH. L. REV. 68, 129 (1991).

53 *See Payne*, 501 U.S. at 828; Vitiello, *supra* note 46, at 183.

54 475 U.S. 625 (1986), overruled by Montejo v. Louisiana, 556 U.S. 778 (2009). This rule forbade the police from initiating interrogation of a criminal defendant once they had requested representation by counsel. *Id.*

55 *Montejo*, 556 U.S. 778, 793 (2009).

56 *See* LAFAVE ET AL., *supra* note 51 ("But the Court spoke of evidentiary and procedural rulings in general, and not just those that dealt with the exclusion of evidence to the benefit of the defendant.").

sort of reliance at all."[57] Rehnquist did admit that "to a certain extent, you have it on the part of the [S]tate," which has invested resources which would be frustrated by a finding of error.[58] But the Chief Justice went on to say that because the Supreme Court decides only "cases and controversies," a conviction can be reversed even if upsets these reliance interests[59]—a conclusion bolstered by other doctrines, like that of *Teague v. Lane*, which prevents newly-announced rules of criminal procedure from automatically applying on habeas review.[60]

The Chief Justice's broad pronouncement was reinforced in later decisions,[61] perhaps most clearly eighteen years later in Justice Stevens' majority opinion in *Arizona v. Gant*.[62] Overturning a broad reading of precedent from *Belton v. New York*, which authorized the inspection of containers in arrestee's cars as part of the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement,[63] Justice Stevens held that this precedent established no legitimate reliance interests.[64] He rejected the argument that significant resources expended in training police officers to follow the existing procedure was a reliance interest that would bear heavily on the *stare decisis* analysis.[65] Justice Stevens went further, declaring that:

> The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence.[66]

This portion of the *Gant* opinion appears to stand for the proposition that the *Payne* rule cuts equally against defendants and law enforcement. Yet if *Gant* represents the clearest statement by the Court, holding the reliance interests of law enforcement should not bear on the *stare decisis* inquiry in constitutional cases, it also represents the debut of a new viewpoint in dissent: that the reliance interests of law enforcement can trump the constitutional rights of criminal defendants.

IV. A New Approach to Law Enforcement Reliance Interests

A. *Considering Law Enforcement Reliance in* Gant, Montejo, *and* Gamble

In *Gant*, Justice Alito's dissent[67] rejected almost every aspect of the majority's discussion of reliance interests. The dissent admitted reliance interests are most substantial in the context of property and contract rights;[68] however, Justice Alito contended the Court recognized that law enforcement could have legitimate reliance interests in *Dickerson v. United States*,[69] which

57 *Id.*
58 *Id.*
59 *Id.*
60 *See id.*; *see also Teague v. Lane*, 489 U.S. 288 (1989).
61 *See United States v. Gaudin*, 515 U.S. 506, 521 (1995) ("We do not minimize the role that *stare decisis* plays in our jurisprudence. That role is somewhat reduced, however, in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior." (internal citations omitted) (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).
62 *Gant*, 556 U.S. 332, 349 (2009)
63 *See New York v. Belton*, 453 U.S. 454 (1981).
64 *See Gant*, 556 U.S. at 349.
65 *Id.*
66 *Id.*
67 *Gant*, 556 U.S. at 358–60. The portion of the dissent focusing on the reliance interests of law enforcement as a reason to adhere to the doctrine of *stare decisis* was joined by three other members of the Court: Justice Kennedy, Justice Breyer, and Chief Justice Roberts.
68 *Id.* at 358 *Gant*, 556 U.S. at 358 (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).
69 *Id.* at 359–60 (citing Dickerson v. United States, 530 U.S. 428 (2000)). There is reason to critique the proposition that

relied on *stare decisis* to uphold the landmark rule of *Miranda v. Arizona*.[70]

The dissent argued *Belton* engendered substantial reliance interests because it had been "widely taught in police academies and . . . law enforcement officers ha[d] relied on the rule in conducting vehicle searches during the past [twenty-eight] years."[71] Indeed, the dissent seemed incredulous that "this seemingly count[ed] for nothing" with the *Gant* majority.[72] The dissent went on to say there is "no authority" to support the proposition that *stare decisis* should be weaker when applied to a precedent upholding the constitutionality of a law enforcement practice.[73]

Gant was the first in a line of several cases where certain members of the Court suggested the reliance interests of police officers and prosecutors are relevant to the constitutional *stare decisis* analysis. In *Montejo*, for example, Justice Alito's concurrence again suggested if there are "real and important law enforcement interests at stake," this can weigh heavily on the *stare decisis* analysis.[74] Justice Scalia, writing for the Court, acknowledged law enforcement reliance interests, but implied they may be weaker when precedent favors criminal defendants, because "if a State *wishes*" to give stronger protections to defendants than are constitutionally required, "it obviously may continue to do so."[75]

The reliance interests of law enforcement and prosecutors also weighed, at least implicitly, on the Court's judgment in *Gamble v. United States*.[76] In *Gamble*, the Court upheld a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment that allowed for successive prosecutions in state and federal courts based on the doctrine of dual sovereignty.[77] Though Justice Alito's majority opinion focused primarily on how the challenger failed to show sufficient historical and legal support for his position,[78] Justice Gorsuch's dissent saw the specter of prosecutorial reliance interests in the majority opinion.[79] According to Justice Gorsuch, the majority "worrie[d] that overturning the separate sovereigns rule could undermine the reliance interests of prosecutors in transnational cases[,] who may be prohibited from trying individuals already acquitted by a foreign court."[80] Though the majority stopped short of relying explicitly on prosecutorial reliance interests,[81] Justice Gorsuch's concern is not unfounded. At the *Gamble* oral argument, Justice Alito expressed significant concerns about the reliance interests at stake.[82]

B. *Considering Law Enforcement Reliance Interests in* Ramos v. Louisiana

The issue of law enforcement reliance resurfaced in the 2020 in the case of *Ramos v. Louisiana*.[83] In *Ramos*, a Louisiana prisoner asked the Court to overturn his second-degree murder

Dickerson weighed the reliance interests of law information against constitutional rights. *See infra* notes 104–09 and accompanying text.

70 *Dickerson*, 530 U.S. at 443 (upholding Miranda v. Arizona, 384 U.S. 436 (1966)).

71 *Gant*, 556 U.S. at 359.

72 *Id.*

73 *See id.*

74 *See Montejo*, 556 U.S. 778, 800 (2009) (Alito, J., concurring). The posture of *Montejo* made for a strange lineup on this issue. In his dissent, Justice Stevens uncharacteristically—and contrary to his opinion in *Gant*—chided the majority for "cast[ing] aside the reliance interests of law enforcement," as well as broader societal reliance interests. *Id.* at 809–10.

75 *Id.* at 793.

76 *Gamble v. United States*, 139 S. Ct. 1960 (2019).

77 *See id.* at 1969.

78 *See id.* at 1969–78.

79 *See id.* at 2009 (Gorsuch, J., dissenting).

80 *Id.* Justice Gorsuch rejected this argument, stating that the reliance interests in "double-prosecut[ing] and double-punish[ing]" cannot outweigh the constitutional rights of criminal defendants in a *stare decisis* analysis. *See id.* at 2008–09 (Gorsuch, J., dissenting).

81 *See id.* at 1967.

82 Oral Argument at 01:16:33, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646), https://www.oyez.org/cases/2018/17-646.

83 *Ramos* , 140 S. Ct. 1390 (2020).

conviction on the grounds that his constitutional rights were violated when he was convicted by a non-unanimous jury.[84] Ramos argued this procedure violated his Sixth Amendment right to a jury trial, as incorporated by the Due Process Clause of the Fourteenth Amendment.[85] However, he had an uphill climb, as the Court had previously upheld non-unanimous jury verdicts as constitutional in *Apodaca v. Oregon*.[86] Because of this precedent, the Justices had to contend with *stare decisis*,[87] despite that they had already concluded the original meaning of the Sixth Amendment supported Ramos' claim.[88] The Court considered the traditional stare decisis factors and ultimately concluded these factors weighed in favor of supporting a ruling which abandoned *Apodaca* and reversed Ramos' conviction.[89]

When considering the *stare decisis* factors, the Court comprehensively discussed the reliance interests at stake.[90] At the time the Court granted certiorari, two states allowed for non-unanimous jury verdicts: Louisiana and Oregon.[91] The Court divided the reliance interests of state law enforcement into two categories. First, the Court acknowledged Louisiana and Oregon would likely have to retry defendants whose cases were pending on direct appeal if it overruled *Apodaca*.[92] Second, the states claimed reliance interest in the finality of their criminal convictions and worried overruling *Apodaca* would allow thousands of prisoners convicted since that decision to challenge their conviction on habeas review in the federal courts.[93]

The majority held neither of these claimed reliance interests weighed on the *stare decisis* inquiry. With regards to the burden of retrying the defendants whose cases were currently on appeal, the Court noted that the number of defendants affected was relatively small and that "new rules of criminal procedures" usually "impose a cost" on state law enforcement. Therefore, such a cost could not ossify existing rules of criminal procedure.[94] With regard to the second claimed reliance interest, the Court noted the "worries outstrip the facts" because new rules of criminal procedure do not normally apply on habeas review under the doctrine of *Teague v. Lane*.[95]

Justice Alito wrote a vigorous dissent focused in part on the "enormous reliance interests of Louisiana and Oregon."[96] Contending those states would "face a potential tsunami of litigation" by prisoners seeking to challenge the validity of their convictions, Justice Alito would have retained *Apodaca*.[97] First, he noted the significant burden of retrying defendants whose cases were on direct appeal, arguing "there is no guarantee that all the cases affected by [the majority's] ruling can be retried. In some cases, key witnesses may not be available . . . ."[98] He also noted "it remains to be seen whether the criminal justice systems of Oregon and Louisiana have the resources to handle the volume of cases in which convictions will be reversed."[99]

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84 The jury in Ramos' case voted to convict by a vote of 10-2. *Id.* at 1394.

85 *See id.*

86 *Apodaca v. Oregon*, 406 U.S. 404, 413-14 (1972).

87 Several justices in the majority disputed the precedential force of *Apodaca* because Justice Powell's concurring opinion, which provided the fifth vote to affirm the defendant's conviction, was based on reasoning completely at odds differing from the Court's incorporation jurisprudence. *See Ramos*, 140 S. Ct. at 1402–04. However, that discussion is outside the scope of this Article.

88 *See Ramos*, 140 S. Ct. at 1395–97.

89 *See id.* at 1405–06.

90 *Id.* at 1402-05.

91 *Id.* at 1394. Puerto Rico also allowed non-unanimous jury verdicts. *Id.* at 1426.

92 *See id.* at 1406.

93 *See id.*

94 *See id.*

95 *See id.* at 1407 (citing *Teague v. Lane*, 489 U.S. 288, 311–12 (1989)).

96 *See id.* at 1436 (Alito, J., dissenting). This part of Justice Alito's dissent was joined by Justice Kagan and Chief Justice Roberts. *Id.* at 1425.

97 *See id.* at 1436 (Alito, J., dissenting) ("What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon.")

98 *Id.* at 1437 (Alito, J., dissenting).

99 *Id.*

Second, Justice Alito considered the other reliance interest advanced by Louisiana and Oregon—the danger that prisoners with final convictions would petition the federal courts for collateral review of their cases— and found it to "weigh decisively against overruling *Apodaca*."[100] He found the majority's invocation of *Teague* to be of little comfort, as the Court ultimately punted on the question of whether a new rule about jury unanimity would fall under one of *Teague*'s exceptions and therefore apply retroactively.[101] In Justice Alito's mind, the mere possibility, no matter however slim, that a new ruling could apply retroactively should factor into the *stare decisis* analysis.[102] He concluded by remarking that though "the plight of defendants convicted by non-unanimous juries is important and cannot be overlooked," that could not settle the *stare decisis* issue: otherwise, the doctrine "would never apply in a case in which a criminal defendant challenges a precedent that led to a conviction."[103]

V. Critiquing the Approach of the *Gant* and *Ramos* Dissenters

At first glance, Justice Alito's repeated invocation of law enforcement reliance is convincing. His approach, however—in both in *Ramos* and in earlier opinions, including his dissent in *Gant*—of weighing these reliance interests against the constitutional rights of all criminal defendants in the nation should not be adopted by the Court. It is inconsistent with past practice; it is contrary to the principles of *stare decisis*; it ignores existing doctrines protecting reliance interests; and it would have the effect of insulating incorrect precedents that favor law enforcement from reconsideration.

A. *Weighing the Reliance Interests of Law Enforcement is Counter to Historical Practice*

The Court's long history of overruling precedent does not support Justice Alito's approach. Prior to the dissent in *Gant*, no member of the Court had suggested an unconstitutional police practice should be continued because of the reliance interests at issue.[104] Justice Alito's contention, that *Dickerson* first recognized that the reliance interests of law enforcement are a legitimate consideration is misleading.[105] The *Dickerson* Court did decline to overrule *Miranda* because of *stare decisis*, including a significant concern about upsetting reliance interests.[106] However, the reliance interests the Court was concerned about were the reliance of the American people as a whole; the *Dickerson* majority opined that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[107]

Accordingly, the *Dickerson* Court concluded the *Miranda* prophylactic rule, even if not constitutionally required, should be retained because of the society's reliance interests of a society that has come to expect its continued

[100] *See id.* ("These cases on direct review are only the beginning. Prisoners whose direct appeals have ended will argue that today's decision allows them to challenge their convictions on collateral review, and if those claims succeed, the courts of Louisiana and Oregon are almost sure to be overwhelmed.")

[101] *See id.*

[102] *See id.* at 1438 (Alito, J., dissenting) ("Whatever the ultimate resolution of the retroactivity question, the reliance here is not only massive it is concrete. In my view, it weighs decisively against overruling *Apodaca*.").

[103] *Id.*

[104] *But see Hubbard v. United States*, 514 U.S. 695, 722–23 (1995) (O'Connor, J., dissenting) (suggesting that law enforcement reliance interests could support retaining an erroneous interpretation of a statute).

[105] *See Gant*, 556 U.S. 332, 359 (2009) (Alito, J., dissenting); *see also* David L. Berland, Note, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*, 2011 U. ILL. L. REV. 695, 719 (2011) (finding strong law enforcement reliance interests in *Gant* and *Dickerson*).

[106] *See Dickerson v. United States*, 530 U.S. 428, 443 (2000).

[107] *Id.*

existence.[108] This is a far cry from the argument proffered by the *Gant* dissent that a police practice violating a defendant's constitutional rights can be retained because law enforcement' reliance interests.[109] Justice Alito's attempts to mold *Dickerson* to fit the *Gant* dissent by quoting the petitioner's brief and noting that the opinion does not explicitly include the words "societal reliance" do not reflect the actual holding of *Dickerson*.[110]

Justice Alito's contention in *Ramos*, that the burden of retrying and resentencing defendants can provide a basis for refusing to overrule unconstitutional precedent, is even more at odds with past practice.[111] As the *Ramos* majority recognized, the Court has overruled dozens (if not hundreds) of unconstitutional precedents affecting law enforcement investigation, trial, and sentencing practices without allowing the government's reliance interests to sway its analysis.[112] In *Crawford v. Washington*, for example, the Court took a major departure from previous Confrontation Clause jurisprudence affecting the criminal justice machinery of the entire federal government and all fifty states.[113] *Booker v. United States* produced a greater disruptive effect still, requiring the resentencing of thousands of defendants.[114] And yet, even in those landmark decisions, the potential burdens imposed on law enforcement did not affect the Court's constitutional decision-making.[115]

Decisions that overturn an existing precedent upon which a conviction or sentence is based, like *Crawford*, will almost always result in resentencing and retrial burdens.[116] If the Court accorded significant weight to the disruptive effects on law enforcement every time it overruled a decision of criminal procedure, it is likely that the Court "would never correct its criminal jurisprudence at all."[117]

B. *Weighing the Reliance Interests of Law Enforcement is Counter to* Stare Decisis *Doctrine*

Additionally, the treatment of law enforcement reliance interests in the *Ramos* and *Gant* dissents does not comport with the Court's usual application of the doctrine of *stare decisis*. First, as *Payne* described, reliance interests bear most heavily on the *stare decisis* analysis where commercial conduct is at issue.[118] This weighty application is to protect the expectations of private parties, who may rely on these decisions when planning for the future and entering into binding legal commitments.[119] The landscape of *Ramos* and *Gant* is quite different because these cases are not commercial and do not implicate

[108] *See id.*; *see also* Alexander Lazaro Mills, Note, *Reliance by Whom? The False Promise of Societal Reliance in* Stare Decisis *Analysis*, 92 N.Y.U. L. Rev. 2094, 2128 (2017) ("[T]he Court clarified that the reliance interests to which it referred in *Dickerson* were not the government reliance interests of police departments, but rather societal reliance on *Miranda*.").

[109] *See Gant*, 556 U.S. at 358–60 (Alito, J., dissenting).

[110] *Compare Gant*, 556 U.S. at 359–60 (Alito, J., dissenting), *with Dickerson*, 530 U.S. at 443.

[111] *See Ramos*, 140 S. Ct. 1390, 1438 (2020) (Alito, J., dissenting).

[112] *See id.* at 1406; *see also id.* at 1410 (Sotomayor, J., concurring in part).

[113] *See Crawford v. Washington*, 541 U.S. 36 (2004).

[114] *See United States v. Booker*, 543 U.S. 220 (2005). Justice Alito, in dissent, distinguishes the burden of retrial in *Ramos* and the burden of resentencing in *Booker*. *Ramos*, 140 S. Ct. 1390, 1436–37 (2020) (Alito, J., dissenting). The weight of the burden may be a colorable difference, but this does not undermine the argument that the costs of adjusting to a new constitutional rule of criminal procedure, no matter how burdensome, are irrelevant to the *stare decisis* analysis.

[115] *See Ramos*, 140 S. Ct. at 1406.

[116] *See id.* at 1409–10 (Sotomayor, J., concurring in part) ("Opinions that force changes in a State's criminal procedure typically impose . . . costs."); *id.* at 1419 (Kavanaugh, J., concurring in part) ("[T]hat consequence almost arises ensues when a criminal-procedure precedent that favors the government is overruled.").

[117] *Id.* at 1409–10 (Sotomayor, J., concurring in part) ("[W]ere this Court to take the dissent's approach—defending criminal procedure opinions as wrong as *Apodaca* simply to avoid burdening criminal justice systems—it would never correct its criminal jurisprudence at all.")

[118] *See Payne*, 501 U.S. 808, 828 (1991).

[119] *See Casey,* 505 U.S. 833, 855–56 (1992).

the rights of private parties.[120] Instead, they fall within the category of "procedural and evidence rules," that *Payne* said represents the nadir of reliance interests (and of *stare decisis* as a whole).[121]

It should be noted the distance between the highest and lowest points of reliance interests may exist more in theory than in practice. As Justice Sotomayor pointed out in her *Ramos* concurrence, the Court has not hesitated in recent years to overrule precedents which bear heavily on commercial conduct, "threatening vast regulatory and economic consequences."[122] And yet, members of the Court who shrug aside those consequences[123] also attempt to invoke the protection of law enforcement reliance interests for bare procedural rules, such as in *Ramos* and *Gant*.[124]

There is a second way that Justice's Alito invocation of law enforcement reliance interests is inconsistent with *stare decisis* doctrine. Both in his dissenting opinions[125] and in oral argument,[126] Justice Alito has implied that without this consideration, *stare decisis* will never apply to challenges against rules of criminal procedure which favor law enforcement. However, this fails to account for the many other factors the Court considers when determining whether to adhere to a prior decision. As previously discussed above, the Court weighs the workability of the precedent, the strength of the precedent's reasoning, and numerous other factors when determining whether *stare decisis* counsels restraint.[127] The fact that law enforcement reliance interests do not enter the analysis does not mean *stare decisis* has no application to rules of criminal procedure; it simply means this one factor will not enter be considered as a factor the calculus.

This point is perhaps best exemplified in *Gamble*, where reliance interests entered the equation only obliquely and did not play a significant role in the Court's decision.[128] Nevertheless, the Court concluded the other *stare decisis* factors counseled against reconsidering the separate sovereigns rule.[129] There is no reason to think this decision would be any different going forward: if a challenger fails to meet its burden under the many other *stare decisis* factors, the Court will adhere to the prior precedent, even if it this precedent favors law enforcement.

C. *he Reliance Interests of Convicted Defendants Go to Retroactivity, not* Stare Decisis

The *Ramos* dissent also argued law enforcement reliance interests are further implicated because a declaration that unanimous jury verdicts are constitutionally required could potentially have a retroactive effect, causing the re-litigation of thousands of final convictions.[130] This logic is not limited to the circumstances of *Ramos* and could apply whenever a constitutional rule of criminal procedure is altered. However,

120 *See Ramos,* 140 S. Ct. at 1409 (Sotomayor, J., concurring).
121 *See Payne*, 501 U.S. at 828.
122 *See Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring) (citing Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018), and South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)).
123 *See Janus*, 138 S. Ct. at 2484 (opinion of Alito, J.).
124 *Ramos*, 140 S. Ct. at 1437 (Alito, J., dissenting); Arizona v. Gant, 556 U.S. 332, 358 (2009).
125 *See Ramos*, 140 S. Ct. at 1438 (Alito, J., dissenting) ("Nevertheless, the plight of defendants convicted by non-unanimous votes is important and cannot be overlooked, but that alone cannot be dispositive of the *stare decisis* question. Otherwise, *stare decisis* would never apply in a case in which a criminal defendant challenges a precedent that led to a conviction.")
126 Oral Argument at 01:18:36, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) ([T]here have been many decisions of this Court that . . . have rejected some claims that have been asserted under the Fourth Amendment, under . . . Fifth Amendment right against self-incrimination, under the Sixth Amendment jury trial right and the right to ineffective assistance of counsel, under the Eighth Amendment, right against cruel and unusual punishment. And if any of these was challenged you would say . . . there can never be reliance because . . . it involves an individual right, [so] we put *stare decisis* aside?"), https://www.oyez.org/cases/2018/17-646.
127 *See supra* notes 30–34 and accompanying text.
128 *See Gamble*, 139 S. Ct. 1960, 1967 (2019).
129 *See id.* at 1969.
130 *See Ramos*, 140 S. Ct. at 1437 (Alito, J., dissenting).

Justice Alito's argument does not stand up to scrutiny. Although undoubtedly burdens exist with relitigating thousands of formerly-final convictions—burdens that may, as the *Ramos* dissent warns, "overwhelm" the state courts[131]— those burdens are relevant only to the consideration of whether a new rule should apply retroactively, not whether an existing rule is entitled to *stare decisis* protection.

The Supreme Court has already recognized that allowing thousands of prisoners to challenge their final convictions every time a rule of criminal procedure is changed would be unworkable. Accordingly, the Court has decided only a very narrow subset of decisions could potentially apply retroactively. In *Teague v. Lane*, the Court held that in addition to new substantive rules, the only rules of criminal procedure that would apply retroactively on habeas review are "watershed rules" implicating the fundamental fairness of trials.[132] This latter standard is incredibly difficult to satisfy—so difficult, in fact, that the Court has never identified such a watershed rule.[133] For example, such landmark decisions as *Crawford v. Washington*,[134] *Batson v. Kentucky*,[135] and *Ring v. Arizona*[136] did not apply retroactively. If those decisions which implicated fundamental issues such as the proper scope of the Confrontation Clause did not apply retroactively, it is hard to imagine what would.[137]

The *Ramos* dissent raises the prospect that the right to a unanimous jury right could be one of those rare "watershed" exceptions to *Teague*, so meaning that law enforcement reliance interests are would be implicated.[138] Not only is it incredibly unlikely the unanimous jury right would be the first-ever *Teague* exception, it would not make a difference to the *stare decisis* analysis because *stare decisis* is a completely different inquiry to retroactivity. The risk of thousands of prisoners challenging their final convictions does raise significant reliance concerns, but those concerns are addressed during the retroactivity analysis—a doctrine calibrated to address those reliance interests.[139] To consider those interests again during the *stare decisis* analysis would "double count[]" the reliance interests of law enforcement and tip the scales towards retaining precedent abridging criminal defendants' constitutional rights.[140]

D. *Considering Law Enforcement Reliance Interests Would Prejudice Criminal Defendants*

The *Ramos* dissent declared "[it] is imperative [that] the Court should have a body of *neutral* principles on the question of overruling precedent. The doctrine [of *stare decisis*] should not be transformed into a tool that favors particular outcomes."[141] Considering law enforcement

131 *Id.*

132 *See Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion) (noting Congress has erected further barriers to habeas review). *See* 28 U.S.C. § 2254 (1996).

133 *See Ramos*, 140 S. Ct. at 1407.

134 *See Whorton v. Bockting*, 549 U.S. 406, 421 (2007) (determining Crawford v. Washington, 541 U.S. 36 (2004), did not apply retroactively).

135 *See Allen v. Hardy*, 478 U.S. 255, 261 (1986) (per curiam) (determining that Batson v. Kentucky, 476 U.S. 79 (1986), did not apply retroactively).

136 *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (determining that Ring v. Arizona, 536 U.S. 584 (2002), did not apply retroactively).

137 *See Beard v. Banks*, 542 U.S. 406, 417 (2004) (The Court suggesting *Gideon v. Wainwright* would fall within this exception if considered after *Teague*); *see also* Beard v. Banks, 542 U.S. 406, 417 (2004).

138 *Ramos*, 140 S. Ct. at 1437–38 (Alito, J. dissenting) (The dissent also suggesting *Teague* might not apply because some members of the majority suggest *Apodaca* was not actually a binding precedent). However, this view was not endorsed by a majority of Justices in *Ramos* and may be unique to the strange split in *Apodaca*, applying only in this instance.) *Id.*

139 *Ramos*, 140 S. Ct. at 1407. Indeed, the Supreme Court has already heard oral argument in Edwards v. Vannoy, which will determine whether *Ramos* applies retroactively. The argument focused a great deal on Louisiana's reliance interests. *See generally* Edwards v. Vannoy, OYEZ (Dec. 2, 2020), https://www.oyez.org/cases/2020/19-5807.

140 *Ramos*, 140 S. Ct. at 1407.

141 *Id.* at 1432 (Alito, J., dissenting).

reliance interests would do just that – it would , skewing the *stare decisis* analysis against criminal defendants.

It is long established criminal defendants have no reliance interests in precedents that are more protective than the Constitution requires.[142] Similarly, the Court suggested in *Montejo* that law enforcement has no legitimate reliance interest in overly protective rules because "[i]f a state wishes to abstain from [a police practice], it obviously may continue to do so."[143] Therefore, outside the very narrow[144] *Dickerson* exception where a protective rule has become embedded in the national consciousness,[145] the reliance interests prong of the *stare decisis* test will never weigh in favor of retaining precedent that is more protective than constitutionally required.

On the other hand, if the Court were to adopt the arguments in the *Gant* and *Ramos* dissents, the reliance interests of law enforcement would be a significant, possibly decisive, factor when the Court decides whether to overrule a precedent that abridges the constitutional rights of criminal defendants.[146] This creates a clear imbalance where reliance interests only matter if the precedent being overruled favors law enforcement; otherwise, it is excluded from the analysis. This cannot be right; not only does it turn *stare decisis* into a "tool that favors [a] particular outcome[]," it does not adequately consider the importance of the rights at issue.[147]

These are not statutory or procedural rights granted by the fiat of Congress; in cases like *Gant* and *Ramos,* law enforcement is infringing on the constitutional rights of criminal defendants. And it disrespects the nature of these fundamental rights to allow their continued infringement because it would be inconvenient for law enforcement to learn new procedures or retry defendants. Refusing to overrule an unconstitutional precedent on the basis of these reliance interests would allow these rights to be infringed "in perpetuity" and would permit "the one-time need to retry defendants [or retain police officers] . . . to inter a constitutional right forever."[148]

VI. The Better Approach: A Categorical Rule

Ramos will not be last time the Court is asked to overrule a precedent allowing the rights of criminal defendants to be unconstitutionally abridged. In the future, the Court could take two approaches to weighing law enforcement reliance interests during the *stare decisis* analysis.

The Court could adopt the approach urged by the dissenters in *Gant* and *Ramos*,[149] as well as some commenters,[150] that constitutional rights may be abridged in perpetuity if law enforcement reliance interests are strong enough. Though there are many reasons to criticize this approach, it might still win the day: four current Justices joined the dissents in *Gant* and *Ramos*.[151]

However, the Court should adopt the opposite approach: that law enforcement reliance interests

142 *See Montejo*, 556 U.S. 778, 793 (2009). *See also* Payne v. Tennessee, 501 U.S. 808, 828 (1991); United States v. Ross, 456 U.S. 798, 824 n.33 (1982). *See also supra* notes 52–55 and accompanying text.

143 *Montejo*, 556 U.S. 778 at 793.

144 *See id.* at 793 n.4 (rejecting the argument there are any societal reliance interests in retaining the Michigan v. Jackson rule).

145 *See Dickerson*, 530 U.S. 428, 443 (2000).

146 *See Ramos*, 140 S. Ct. 1390, 1436–38 (2020) (Alito, J., dissenting); Arizona v. Gant, 556 U.S. 332, 358–59 (2009) (Alito, J., dissenting).

147 *Ramos*, 140 S. Ct. at 1432 (Alito, J., dissenting).

148 *Id.* at 1408.

149 *See Ramos*, 140 S. Ct. at 1436–38 (Alito, J., dissenting); Arizona v. Gant, 556 U.S. at 358–59 (2009) (Alito, J., dissenting).

150 *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 456, 458 (2010)(suggesting government reliance should "receive direct and detailed consideration"); *see also* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1492 (2013).

151 *See Ramos*, 140 S. Ct. at 1425–40 (Alito, J. dissenting) (joined by Justices Kagan and Chief Justice Roberts); *Gant*, 556 U.S. at 355–65 (Alito, J. dissenting) (joined by Justices Breyer and Chief Justice Roberts).

are categorically irrelevant when considering whether or not to overrule a prior criminal procedure precedent. This would best comport with the traditional understanding of *stare decisis* and would also recognize the supremacy of fundamental constitutional rights, especially in the context of criminal prosecutions. Under this view, the scale of the law enforcement reliance would be completely irrelevant to the analysis. For example, even if the non-unanimous jury rule had been adopted in all fifty states, it would not bear on the decision to overrule *Apodaca*. This appears to be the approach endorsed in *Gant*[152] and in *Ramos,* where Justice Gorsuch stated:

> [T]he dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. *Whether that slice turns out to be large or small*, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties.[153]

This categorical rule, hinted by these prior decisions, would be limited in scope. First, the categorical rule would not apply to the retroactivity analysis, which is specifically designed to account for law enforcement reliance interests. A state would be free to argue that the potential disruptive influence weighs against applying a new procedural rule retroactively, as Louisiana did while arguing that *Ramos* should not apply retroactively in *Edwards v. Vannoy*.[154]

Second, this categorical rule would be limited to issues of constitutional rights. Law enforcement reliance interests would remain relevant to the force of *stare decisis* in cases of statutory interpretation, as has long been the case.[155] All this categorical rule would do is prevent the temporary reliance interests of law enforcement from "ensconc[ing] an incorrect view of the United States Constitution for perpetuity, for all states and all people . . . ."[156]

VII. Conclusion

As the Court itself has stated, *stare decisis* is "essential to the respect accorded to the judgments of th[is] Court and to the stability of the law."[157] *Stare decisis* entails a complex weighing of a variety factors, including the reliance interests engendered by the previous decision. However, those reliance interests, even when they are widely used among law enforcement, cannot justify the continuing violation of constitutional rights. To suggest otherwise, as the dissenters in *Arizona v. Gant* and *Ramos v. Louisiana* have done, is to distort the history and doctrine of *stare decisis*, skew a purportedly neutral analysis in favor of law enforcement, and disrespect the nature of the rights at stake. Indeed, "[t]he Constitution demands more than the continued use of flawed criminal procedures—all because the Court fears the consequences of changing course."[158]

[152] *See Gant*, 556 U.S. at 349 ("It is clear that if a practice is unconstitutional, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence.").

[153] Ramos, 140 S. Ct. 1390,at 1408 (2020) (emphasis added).

[154] *See* Transcript of Oral Argument at 4, Edwards v. Vannoy, No. 19-5807 (2019) OYEZ (Dec. 2, 2020), https://www.oyez.org/cases/2020/19-5807.

[155] *See, e.g.*, *Hubbard*, 514 U.S. 695, 723 (1995) (O'Connor, J., dissenting) (suggesting that the reliance interests of law enforcement are relevant when deciding whether to overrule an opinion interpreting the federal false statements statute, 18 U.S.C. § 1001).

[156] See Transcript of Oral Argument at 58, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (18-5924).

[157] *Lawrence*, 539 U.S. 558, 557 577 (2003).

[158] *Ramos,* 140 S. Ct. at 1410 (Sotomayor, J., concurring).

Disparity of Relief: How Current Human Trafficking Laws Fall Short for Victims

By Alexandra M. Perona*

Introduction

Maria[1] is a twenty-two-year-old single mother. She is struggling to support her children in her hometown in Mexico. Maria learns from a woman in town that she could get a waitressing job in a U.S. town. She has reservations, but she decides to take the offer since she needs the money to take care of her children. Upon arrival, her living conditions were different from what she had been told. Maria was brought to the United States with a group of other individuals. As soon as they were taken to their housing, all passports were confiscated. They slept in a small room with little to no light and nowhere to place their clothing. Neither Maria nor the other workers could go anywhere without someone else present.

Instead of working at a restaurant, Maria and the others are forced to work on a secluded farm. Given the farm's remote location, Maria and the other workers could not reach out for help. They only interact with each other and the farm's owners. Maria works for eighteen hours a day with limited access to food and water in the dead of summer. When workers ask one of the supervisors for a break, the supervisors yell and tell them to get back to work.

After a few weeks, Maria receives her first paycheck. The thought of sending money back to her children keeps her going. But her paycheck is significantly less than she expected. A few weeks go by, and Maria does not receive another paycheck. More weeks go by. Maria speaks to her boss about her paycheck, as best as she can in her broken English. What she is met with is her boss's aggressive reaction. He demeans Maria and tells her to get back to work. He grabs her hair and kicks her repeatedly. He reminds her about her family obligations and what will happen to her children if she keeps complaining. Reality sets in.

In another town, a fifteen-year-old girl, Zoey[2], gets ready to meet up with her boyfriend. Zoey has been having issues at home and is an occasional runaway. Her boyfriend picks her up in his red Mustang. They have been dating for a couple of months, and he has been showering her with gifts. He buys her clothes, flowers, shoes, and gives her attention. One day, the fairytale becomes a nightmare. Zoey's boyfriend becomes controlling and begins to isolate her. He takes her phone and her learner's permit. He says she needs to pay him back for the gifts he has given her. Zoey's boyfriend starts taking her to roadside motels and sometimes even homes. He tells Zoey she needs to have sex with other men. He tells her how to talk to clients to get more money from them. He also tells her to sell drugs to clients to make extra money for him. So, Zoey does what he says out of fear.

One day, Zoey's boyfriend notices a hickey on Zoey's neck. He reacts in a jealous rage. He

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1 This is a fictious narrative built from a composite of real human trafficking cases from the following source: AEquitas, Polaris Report, National Human Trafficking Hotline (NTRC), UNWomen, and Department of Justice (DOJ).

2 *Id.*

starts punching her, pulling her hair, and calling names. Zoey wishes to escape, but she is filled with fear. She has seen him when he gets violent, both physically and verbally. Her boyfriend took her phone, so she cannot call for help. She is scared to call the police because she was selling drugs. Eventually, Zoey makes her escape. Living on the run and with no money, she shoplifts to survive. One day, she gets caught by the police. She explains everything.

What both Maria and Zoey have experienced is human trafficking. But under current state and federal laws, their cases would be treated differently given the surrounding circumstances. There are two types of human trafficking: sex trafficking and labor trafficking. Based on the facts, Zoey would be considered a sex trafficking victim while Maria would be considered a labor trafficking victim. Maryland's current human trafficking laws are narrowly tailored and fall short of adequately providing victim relief for human trafficking victims compared to labor trafficking. In contrast, at the federal level, victim relief is applied equally, with both types of victims being eligible for mandatory restitution.[3] Maryland's current human trafficking laws require reform to provide a balanced approach for both types of human trafficking. The current approach disproportionately favors sex trafficking, and, thus, leads to inadequate victim relief for labor trafficking victims.

Section I will analyze the differences in defining elements of human trafficking, specifically by comparing Maryland's human trafficking statutes and the Uniform Act on the Prevention of and Remedies for Human Trafficking (UAPRHT). Section II will also discuss how the UAPRHT is preferred for clarity and a balanced approach for defining human trafficking. Finally, Section III will discuss and analyze victim relief law shortcomings under Maryland law for criminal relief via affirmative defenses and vacatur judgment along with restitution for victims. Changes in law to adequately serve victims will be discussed.

I. Definitions and Elements of Human Trafficking

Ma*ryland's "Human Trafficking" Statutes*

In general, states vary in their approach to defining human trafficking. This is based on various reasons, such as the type of trafficking that is a major issue within the state. In the state of Maryland, legislators have opted to separate sex trafficking and labor trafficking. In 2007, Maryland's pandering statute was "amended to be changed to human trafficking."[4] Later on, in 2019, Maryland's legislature redefined the state's human trafficking to just be "sex trafficking."[5]

However, in 2019, the Maryland General Assembly redefined human trafficking as another way of referring to sex trafficking or forced prostitution.[6] One may wonder why the law split up the two aspects of human trafficking. Maryland's emphasis on human trafficking just being sex trafficking may be due to the state's issue with drug trafficking and sex trafficking.[7]

[3] *See* Trafficking Victims Protection Act, 18 U.S.C.A. § 1595 (2018).

[4] *Rogers v. Maryland*, 226 A.3d 261, 270 (Md. 2020); *see also* Human Trafficking and Prostitution Offenses, Md. Code Ann., Crim. Law §11-303 (2019).

[5] *Rogers*, 226 A.3d at 271.

[6] Md. Code. Ann., Crim. Law § 3-1102.

[7] *See generally* United States Attorney's Office for the District of Maryland (USAO), *Member of the Jenifer Drug Trafficking Organization Sentenced to 10 Years in Prison*, (2015)https://www.justice.gov/usao-md/pr/member-jenifer-drug-trafficking-organization-sentenced-10-years-prison-0 ; *see also* USAO, *Maryland Man Facing Federal Indictment For Sex Trafficking and Drug Distribution*, (2020) https://www.justice.gov/usao-md/pr/maryland-man-facing-federal-indictment-sex-trafficking-and-drug-distribution; USAO, *Delaware Man Sentenced to 25 Years in Federal Prison for Sex Trafficking a 15-Year-Old Girl*, (2020) https://www.justice.gov/usao-md/pr/delaware-man-sentenced-25-years-federal-prison-sex-trafficking-15-year-old-girl;_USAO, *Five Indicted*

In 2014, Maryland's Human Trafficking Task Force (Task Force) reported that it encountered roughly 396 human trafficking survivors, 381 of whom were sex trafficking survivors.[8] Likewise, several of the U.S Attorney General's cases for the District of Maryland involved sex trafficking minors throughout the state.[9] Thus the emphasis on sex trafficking may be due to the prevalence of sex trafficking of minors cases. Furthermore, law enforcement believes that the prevalence or "hot spot" of sex trafficking could be because of Maryland's proximity to "I-95, I-70, BWI Airport" along with the socio-economic mix between the wealthy and poor in the state.[10] There is less coverage and evidence of labor trafficking cases in Maryland because prior to 2019, labor trafficking was not a crime.[11] Thus, any potential labor trafficking cases were deferred to the federal government via Homeland Security Investigations (HSI).[12]

By carving out labor trafficking as an aspect of human trafficking, Maryland also created notable differences between the two statutes. For example, in the human trafficking or "sex trafficking" statute, there are little to no definitions that define the elements of human trafficking.[13] However, there is substantial information provided on what types of conduct or related activities are covered under the statute. The Maryland Human Trafficking Statute prohibits the following:

> "(a)(1) A person may not knowingly:
>
> (i) take or cause another to be taken to any place for prostitution;
>
> (ii) place, cause to be placed, or harbor another in any place for prostitution;
>
> (iii) persuade, induce, entice, or encourage another to be taken to or placed in any place for prostitution;
>
> (iv) receive consideration to procure for or place in a house of prostitution or elsewhere another with the intent of causing the other to engage in prostitution or assignation;
>
> (v) engage in a device, scheme or continuing course of conduct intended to cause another to believe that if the other did not take part in sexually explicitly performance, the other or a third person would suffer physical restraint or serious physical harm; or
>
> (vi) destroy, conceal, confiscate, . . . government identification document of another while otherwise violating or attempting to violate this subsection."[14]

In Zoey's case, all elements under the human trafficking statute are likely to be met. First, Zoey's trafficker-boyfriend took her to roadside hotels and homes where he had her engage in

In Sex Trafficking Conspiracy, (2014) https://www.justice.gov/usao-md/pr/five-indicted-sex-trafficking-conspiracy; USAO, *Prince George's County Man Indicted On Charges Of Sex Trafficking and Sexual Exploitation Of A Minor* (2018) https://www.justice.gov/usao-md/pr/prince-george-s-county-man-indicted-charges-sex-trafficking-and-sexual-exploitation-minor.

8 *See* Ron Cassie, *Children of the Night- Sex Trafficking is Maryland's dirty open secret.*, Baltimore Magazine (Mar. 2017) https://www.baltimoremagazine.com/section/community/sex-trafficking-is-maryland-dirty-open-secret.

9 *See* USAO, *see also* USAO, *Maryland Man Facing Federal Indictment For Sex Trafficking and Drug Distribution*, (2020) https://www.justice.gov/usao-md/pr/maryland-man-facing-federal-indictment-sex-trafficking-and-drug-distribution; *see also* USAO, *Delaware Man Sentenced to 25 Years in Federal Prison for Sex Trafficking a 15-Year-Old Girl*, (2020) https://www.justice.gov/usao-md/pr/delaware-man-sentenced-25-years-federal-prison-sex-trafficking-15-year-old-girl.

10 *See* Cassie, *supra*, at 8..

11 *See* Md. Code Ann., Crim. Law § 3-1202; *see also* Telephone Interview with Lindsey Carpenter, Asst. State's Attorney for Frederick County State's Attorney Office (Apr. 7, 2020).

12 *See* Md. Code Ann., Crim. Law § 3-1202.

13 *See generally* Md. Code Ann., Criminal Law § 3-1101(2020) (add parentetical).

14 *Id.* § 3-1102 (2020).

commercial sex.[15] Second, like the statute's first element, Zoey's trafficker-boyfriend placed Zoey in the locations where he had her engage in commercial sex.[16] Zoey's trafficker-boyfriend is like the defendant in *Lindsey*, who had an active role in placing the victim in a hotel room.[17] Third, Zoey was induced and enticed to engage by her trafficker-boyfriend because he would shower her with gifts such as clothes and attention.[18] He used their relationship to exploit her to engage in commercial sex. Zoey's trafficker-boyfriend is like the defendant in *Coleman,* who enticed a minor victim by promising her that he would "spoil her" and that she would make money if she attended a house party with him.[19]

It is unclear whether the fourth element is met, as "consideration" is not defined. But, if the statute interprets "consideration" in the contract sense, then a prosecutor would need to show that the trafficker-boyfriend had customers agreed to have sex with Zoey for money. As such, it is unclear what is needed to mee the element. The fifth element is likely met because Zoey's trafficker-boyfriend's physical and verbal abuse made Zoey feel forced to comply with his wishes because she feared for her safety.[20] Finally, the sixth element is met because Zoey's license was taken from her while her trafficker-boyfriend forced her to engage in commercial sex. Zoey's trafficker-boyfriend could allege there is insufficient evidence to convict him, but his conduct, as analyzed above, shows otherwise. He could try to cite any of Zoey's prior sexual behavior as mitigating factors, but this will likely fail.[21]As such, Zoey's case is likely to meet the elements of the human trafficking statute. Thus, her trafficker-boyfriend will likely be convicted under the Maryland statute.

In contrast, Maryland's labor trafficking statute takes a different approach compared to the human trafficking statute. Maryland's Labor Trafficking Statute defines elements of labor trafficking prior to stating the actual crime of labor trafficking. For example, "coercion" and "debt bondage" are defined as follows:

> (b) "Coercion" includes actual or threatened:
>
> (1) use of physical force against an individual;
>
> (2) restraint, abduction, isolation, or confinement of an individual against the individual's will and without lawful authority;
>
> (3) control or direction of the activity of an individual through debt bondage;
>
> (4) destruction . . . or possession of an actual or purported passport, immigration document, or governmental identification document of an individual;

15 *See id.* § 3-1102(a)(1).

16 *Id.* § 3-1102(a)(1)-(2).

17 *See Lindsey v. Maryland*, 176 A.3d 741, 745, 748 (Md. Ct. Spec. App. 2018)(determining the defendant's actions in securing a hotel room for the sex trafficking victim was sufficient to sustain his human trafficking conviction); *see also Carr v. Virginia*, 816 S.E.2d 591, 596-97 (Va. Ct. App. 2018) (holding the defendant's involvement in getting the victim to resume prostitution to provide living expenses for him and the other co-defendants and using her prostitution earnings to pay the defendant's hotel room was sufficient to establish his guilt.).

18 Md. Code Ann., Criminal Law § 3-1102 (a)(3).

19 *See Coleman v. Maryland*, 183 A.3d 834, 836-37, 838-40 (Md. Ct. Spec. App. Md. 2018)(holding there was sufficient evidence to sustain sex trafficking conviction because the defendant enticed the minor victim to leave her "home" so she could make money.).

20 *See* Md. Code Ann., Criminal Law § 3-1102(a)(5); *see also Carr*, at 596 (determining the defendant and his co-defendants "forced" the victim to return to the hotel under duress and that she only complied because she was "threatened".).

21 *See Lindsey*, at 756 (holding that victim's alleged prostitution on another occasion is not relevant for determining whether defendant had forced her to prostitute herself on date in question.); *see also Coleman*, at 842 (holding a victim's prior sexual history does not make them less of a human trafficking victim.).

> (5) infliction of serious psychological harm to an individual; . . .
>
> (7) exposure . . . that would tend to subject an individual to criminal or immigration proceedings;
>
> (8) notification to an agency or unit of the State or federal government that an individual is present in the United States in violation of federal immigration law . . . .
>
> (d) "Debt bondage" means the status or condition of an individual who provides labor, services, or sex acts to pay a real or alleged debt where:
>
> (1) value of the labor . . . is not applied toward the liquidation of the debt;
>
> (2) the nature of the labor . . . is not limited or defined; or
>
> (3) the amount of debt does not reasonably reflect . . . things of value for which the debt was incurred.[22]

As seen above, the labor trafficking statute provides extensive definitions of affiliated terms such as coercion including threatened "control or direction of the activity of individual through debt bondage."[23] But, only "general" and "conspiracy" elements are provided while there is less information provided on what types of conduct are prohibited.[24]

Maryland's Labor Trafficking statute states as follows:

> (a) "A person may not knowingly:
>
> (1) Take, place, harbor, persuade, induce, or entice another by force, fraud, or coercion to provide services or labor; or
>
> (2) Receive a benefit . . . from the provision of services or labor by another that was induced by force, fraud, or coercion.
>
> (b) A person may not aid or conspire with another to commit a violation of subsection (a) . . . ."[25]

In Maria's case, it is unclear whether she would meet all elements of the statute. She was enticed to take a waitressing job in the U.S. because it would help her financially provide for her kids as a single mother.[26] Additionally, the supervisors at the farm and the owner of the farm benefitted from her work in the farm gathering crops.[27] However, there are issues with Maria's case as well under the current statute. In Maria's case, there were several individuals involved in her trafficking. A Maryland prosecutor could try to charge all the individuals involved in Maria's trafficking with conspiracy to commit labor trafficking. But that option may also be problematic as well.

[22] *See* Md. Code Ann., Criminal Law § 3-1201(b), (d)(2020).
[23] *Id.* § 3-1201(b)(3).
[24] *Id.* § 3-1202 (2020).
[25] *Id.* § 3-1202(a)(b).
[26] *Id.* § 3-1202(a)(1).
[27] *Id.* § 3-1202(a)(2); *but see Davis v. Texas*, 488 S.W. 3d 860, 863-67 (Tex. App. 2016)(holding that the defendant's conviction could not be supported because forced labor did not include sexual conduct and insufficient evidence of non-sexual labor or services.); *see also Kansas v. Releford*, 2017 WL 6546895, at *3-5 (Kan. Ct. App. Dec. 22, 2017) (dismissing aggravating human trafficking charge because the defendant's behavior only "heavily persuaded" the victim to have sex, but was not for "recruiting, harboring, transporting" the victim for the purpose of "subjecting the person to involuntary servitude or forced labor.").

Overall, it is more difficult to determine the outcome of Maria's case, as the case law in most states tends to focus on sex trafficking rather than labor trafficking. Likewise, since the enactment of the labor trafficking statute, no cases have been brought on appeal. There may be an inability to tie all actions to all the traffickers involved. Additionally, because there are multiple traffickers involve in Maria's case, the case would have multiple co-defendants. Furthermore, Maria may need to take the stand to prove her case. Because she is illegally present in the U.S., she may be hesitant to testify. Although, she may have remedies under federal law through the TVPA, which will be analyzed later in this paper.

Clarity of Human Trafficking under the UAPRHT

As stated previously, prior to 2019, any potential labor trafficking cases in Maryland were deferred to HSI.[28] Under Maryland law, "victims of human trafficking" include both sex trafficking and labor trafficking.[29] Although, the two types being separate and distinct crimes, [30] Maryland would avoid confusion and provide a balanced, consistent approach for both types of human trafficking by adopting the Uniform Act on the Prevention of and Remedies for Human Trafficking (UAPRHT).

In 2013, the Uniform Law Commission (ULC) drafted the UAPRHT. The ULC is a nonpartisan organization that seeks to aid states with drafting and promoting enactments of uniform state laws to bring "clarity and stability to critical areas of state statutory law."[31] The UAPRHT was created to have a comprehensive, victim-centered approach to human trafficking.[32] The UAPRHT has five sections, such as general provision, offenses and penalties, victim protections.[33] Furthermore, the UAPRHT does not have a "one size fits all" approach, but gives states discretion with the UAPRHT's eight optional sections. [34] Thus, states like Maryland can choose how to tailor their laws after adopting the UAPRHT. Furthermore, the optional sections aid in providing provisions that states are missing, such as victim relief laws. The UAPRHT also defines human trafficking as applying to the following crimes: "trafficking of an individual"; "forced labor"; "sexual servitude"; "patronizing a victim of sexual servitude"; and "patronizing a minor for commercial sexual activity."[35] What may be problematic

is that trafficking of an individual can include forced labor and sexual servitude.

Like Maryland, the UAPRHT defines terms for elements. For example, the UAPRHT defines "coercion" in the following ways:

> (A) "Use or threat of force against, abduction of, serious harm to, or physical restraint of, an individual; . . .
>
> (B) (C) the abuse or threatened abuse of law or legal process . . .
>
> (F) use of debt bondage . . . ."[36]

The UAPRHT provides a balanced approach by defining human trafficking as both sex trafficking and labor trafficking. This balanced approach will help provide more attention

[28] *See* Telephone Interview Carpenter, *supra* note 11.

[29] *See* Md. Code Ann., State Gov't § 7-301(f) (2020).

[30] *Id.*

[31] *See* Uniform Law Commission (ULC), *Overview: About Us*, (2020) https://www.uniformlaws.org/aboutulc/overview

[32] *See* Joseph A. Colquitt, *Attacking Human Trafficking Through Legislative Change*, 52 Wake Forest L. Rev. 457, 463 (2017); *see also* ULC, *Overview: About Us*, (2020) https://www.uniformlaws.org/aboutulc/overview

[33] *See* Colquitt, at 468.

[34] *See* Colquitt, at 464; *see also* Uniform Act on Prevention of and Remedies for Human Trafficking, National Conference of Commissioners on Uniform State Laws, (July 2013), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1ce62a67-ea79-3180-dc1c-386411260499&forceDialog=0

[35] *See* UAPRHT § III.A. https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1ce62a67-ea79-3180-dc1c-386411260499&forceDialog=0.

[36] *Id.* § 2(2)(A),(C),(F).

to labor trafficking who are often forgotten about. Additionally, UAPRHT's section for definitions of terms and elements applies to both sex trafficking and labor trafficking. Thus, prosecutors will know what is needed to build a human trafficking case, and thus be more effective in prosecuting traffickers. Furthermore, comments for the definitions are provided to give context. Terms like "coercion" and "debt bondage" are defined and apply equally across the board to the different types of human trafficking statutes. Currently, under Maryland law, Zoey would be considered both a human trafficking and sex trafficking victim, while Maria would only be considered a labor trafficking victim. Furthermore, terms and the way crimes are structured are like current Maryland law, so a shift to the UAPRHT would not be as much of a dramatic change.

Maryland would greatly benefit by adopting the UAPRHT. Because Maryland's current "human trafficking" statute only applies to sex trafficking, investigators and prosecutors may narrowly limit human trafficking to sex trafficking. Unlike current Maryland law, the UAPRHT defines human trafficking as including both "sexual servitude [sex trafficking] and forced labor [labor trafficking]."[37] Thus, by adopting the UAPRHT in Maryland, there would be a balanced approach to both types of human trafficking because the UAPRHT makes it clear that human trafficking is not just sex trafficking. Under the UAPRHT, both Zoey and Maria would be clearly classified as human trafficking victims.[38]

The outcomes in Zoey's and Maria's case would likely have a positive change should Maryland adopt the UAPRHT. Under the UAPRHT, "commercial sexual activity" is "sexual activity for which anything of value is given . . . or received, by a person."[39] Additionally, for sex trafficking or "sexual servitude" someone has either "[made] available a minor for . . . engaging . . . in commercial sexual activity," or "used coercion or deception to compel an adult to engage in commercial sexual activity."[40] So in Zoey's case, a prosecutor would need to show is that her trafficker-boyfriend made Zoey available for engaging in commercial sexual activity. Here, that element is likely met as Zoey's trafficker-boyfriend was transporting her to hotels and coerced her into having commercial sex.

Likewise, labor trafficking or "forced labor" occurs when a person "knowingly uses coercion to compel an individual to provide labor services . . . except when . . .permissible under federal law . . . ."[41] So, in Maria's case, a prosecutor would need to show that Maria's employers knowingly used coercion to compel her labor services. That is likely to be met here, as Maria felt compelled to comply with her employers due to their abusive behavior and threats towards her family.

Co*nclusion*

There is a disproportionate focus on sex trafficking even though labor trafficking is recognized as being part of human trafficking as well. However, the disproportionate focus on sex trafficking can be seen at the state level. In Maryland's case, its "human trafficking" statute only covers sex trafficking with labor trafficking being a separate crime. By adopting the UAPRHT, Maryland can establish a flexible standard, so there is less confusion on what is classified as "human trafficking" because the UAPRHT provides discretion on what provisions states can adopt. Having a clear and flexible standard for defining terms and elements of human trafficking will help provide clarity. A balanced approach to both types of human

[37] *Id.* § 3(a)(1)-(2).
[38] *See* id. § 3(a)(1)-(2) (classifying trafficking as both "forced labor" and "sexual servitude.).
[39] *Id.* § 2(3).
[40] *Id.* § 5(a)(1)-(2).
[41] *Id.* §4(a)

trafficking will enable labor trafficking victims to receive adequate victim relief.

II. Victim Relief Laws

History

When Congress enacted the Trafficking Victims Protection Act (TVPA), there was recognition that victims were not provided adequate services.[42] Likewise, in 2013, the ULC recognized that although some states have recognized the need for anti-trafficking legislation, there needs to be a comprehensive and expansive approach for victim assistance.[43] Given human trafficking's history, relief laws are limited to sex trafficking, prostitution, or other sex-related crimes. This leaves labor trafficking victims at a disadvantage because most victim relief seems tailored only to sex trafficking victims. Thus, both types of human trafficking victims are not provided balanced, adequate relief. For example, under New York law, prostitution and loitering judgments may be "vacated" if the crimes occurred while the victim, the criminal defendant, was being sex trafficked.[44]

Relief is also limited to crimes that were committed as a direct result of being trafficked. A victim would be covered by "vacatur" laws if she was being trafficking while arrested for prostitution.[45] However, if she was arrested for drug dealing, and the drug dealing was not directly related to her trafficking, she likely would not be granted relief. But as a matter of policy, victims should not be penalized for nonviolent offenses they are forced to commit at the direction of their traffickers. Some states vary in their approaches to providing relief for victims. In Wisconsin, victims are not held criminally liable for commercial sex acts or other criminal acts that are either committed as a direct result or incident to being a victim of a human trafficking victim.[46] In Oklahoma, victims are provided affirmative defenses for crimes they commit.[47] Most state victim relief laws do not adequately serve human trafficking victims because affirmative defenses are only provided for prostitution.[48] Circumstances that victims face are also not taken into consideration.[49]

Victim relief laws need to be expanded to non-violent offenses committed by victims

42 *See* 22 U.S.C.A. §7101(17)-(20).

43 *See* UAPRHTUAPRHT, *Divergence in Existing States Laws and the Benefits of Uniformity*, at 2.

44 Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 Wash. & Lee J. Civil Rts. & Soc. Just. 177, 183 (citing N.Y. Crim. Pro. Law § 440.10(1)(i) (McKinney Supp. 2020) (providing that a defendant can file a motion for relief from judgment where the crime was the result of sex trafficking).

45 *Id.*

46 *See* Zornosa, at 193 (citing Wis. Stat. Ann., § 939.46(1)(m) (West 2015) ("providing victims [of] human trafficking or child trafficking with an affirmative defense for any offense committed as a direct result of the violation of human trafficking or child trafficking without regard to whether anyone was prosecuted or convicted for the violation of human trafficking or child trafficking").

47 *Id.* (citing Okla. Stat. Ann. tit. 21, § 748(D) (West 2015) ("providing an affirmative defense to prosecution for a criminal offense if, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking").

48 *See* Matthew Myatt, *The "Victim-Perpetrator" Dilemma: The Role of State Safe Harbor Laws in Creating a Presumption of Coercion for Human Trafficking Victims*, 25 Wm. & Mary J. Race, Gender & Soc. Just. 555, 589 (citing Isabella Blizard, *Chapter 636: Catching Those Who Fall, an Affirmative Defense for Human Trafficking Victims*, 48 U. Pac. L. Rev. 631, 633, 644 (2017) ("Because the survivor has recently left her traumatizing situation, deep psychological and emotional issues may surface that could render her unable to explain the depth of her exploitation, which could ultimately present 'some difficulties in convincing the jury that she is a trafficking victim.'"; *see also* N.Y. Penal Law § 230.01 (McKinney 2018) (providing an affirmative defense to defendants whose participation in an offense was a result of having been a victim of prostitution or sex trafficking).

49 *See* Myatt, at 589 (explaining a variety of factors regarding victims such as language and trauma barriers making them "less likely to cooperate with law enforcement or their legal counsel" quoting Blizard, *supra* note 48, at 644 (noting "victims of trafficking are unlike victims of other crimes – they don't actively seek to involve law enforcement due to their unique type of trauma.").

while trafficked because there is a presumption of coercion.[50] By limiting the expansion to non-violent offenses, it provides states like Maryland a balanced approach.[51] Internationally, labor trafficking has a significant percentage of all human trafficking cases, but in the United States only 11 percent of labor trafficking cases get reported.[52] Additionally, when victims do not fit stereotypes or norms that society has, they are more likely to be subject to punishment like undocumented migrants.[53]

Victim Relief in Maryland

Maryland currently lacks in providing adequate victim relief for human trafficking victims. This inadequacy is due to a variety of reasons. The state does not provide judicial discretion, but rather leaves it up to the State's Attorney's Office in the jurisdiction to determine a survivor's request for vacatur prior to submission to the court.[54] Additionally, Maryland lacks a Safe Harbor law, which provide "immunity for those under eighteen who are charged with prostitution or other non-violent misdemeanor charges related to their victimization."[55] Frederick County's State's Attorney's Office also recognizes that Maryland is lacking in "victim contact and services."[56] There was an attempt in creating a vacatur statute that would have "altered the eligibility for filing certain motions to vacate judgment," but the bill did not pass in the 2019 Maryland General Assembly.[57]

The only law Maryland has for human trafficking victims is the motion to vacate judgment.[58] However, Maryland's vacatur judgment is problematic. Victims are only provided relief in one of two scenarios:

> a) A person convicted under § 11-303 . . . may file a motion to vacate judgment if, when the person committed the act or acts of prostitution, . . . was acting under duress . . . by an act of another . . . in violation of Title 3, Subtitle 11 [Human Trafficking] or the prohibition against human trafficking under federal law . . . .
>
> b) A defendant in a proceeding under this section has the burden of proof.[59]

What is concerning about the vacatur law is the way it written. To begin, victims would only be eligible for relief if convicted for prostitution. In Zoey's case, she would face several hurdles. First, she would need to have a prostitution conviction to be eligible for vacated judgment.[60] Because

50 *See id.* at 593 ("call[ing] for a rebuttable presumption that extends to all non-violent crimes").

51 *See id.* at 594, 596 (narrowed to hold victims accountable for crimes with a violent nature but broad enough to not just cover prostitution would best serve victims) citing Samantha M. Meiers, *Removing Insult from Injury: Expunging State Criminal Records of Persons Trafficked in the Commercial Sex Trade*, 47 U. Tol. 211, 217, 229 (2015).

52 *See* Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 Denv. L. Rev. 1, 20 (2016) (citing Int'l Labour Office, *Ilo Global Estimate of Forced Labour: Results & Methodology*, 13 (2012) http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf); *see* also Jonathan Martens et al., *Int'l Org. For Migration, Counter Trafficking & Assistance to Vulnerable Migrants: Annual Report of Activities 2011*, at 18 (2012) https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Annual_Report_2011_Counter_Trafficking.pdf.

53 *See* Balgamwalla, at 21.

54 *See* Erin Marsh et al., *Grading Criminal Record Relief Laws for Survivors of Human Trafficking*, at 16 Polaris Project (Mar. 2019). https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf

55 *See* Frederick Human Trafficking Task Force, *Final Report to the County* Council, at 9 (Jan. 2018) https://frederickcountymd.gov/DocumentCenter/View/302370/PDF-Human-Trafficking-Report?bidId=

56 *Id.* at 11.

57 *See* Maryland Human Trafficking Task Force, *Maryland's General Assembly 2019 Session Wrap-Up* (Apr. 12, 2019) http://www.mdhumantrafficking.org/news/2019/4/12/maryland-general-assembly-2019-session-wrap-up

58 *See* Md. Code Ann., Crim. Proc. § 8-302 (2019).

59 *See id.*

60 *Id.* § 8-302(a), (e).

Zoey is a minor, she will likely meet the burden of proving that she was engaged in prostitution under duress of another.[61] Zoey is like the victim in *New York v. L.G.*, who was forced to engage in prostitution when she was a minor.[62] Conversely, Zoey would likely have a harder time meeting the burden if she was an adult. Regardless of whether an adult or a minor, Zoey would also need to show that her trafficker's actions were in violation of either Maryland's human trafficking law or U.S. human trafficking laws.[63]

As a result, Maryland's vacatur law creates a narrow application that inadequately provides criminal relief for human trafficking victims. It does not make sense to limited vacated judgment only to sex-related offenses when victims are forced by traffickers to commit non-sex related offenses.[64] As seen in Zoey's case, she was not only forced to engage in commercial sex, but her trafficker-boyfriend required her to sell drugs to clients. Zoey should also have the option of asserting duress. Duress is defined as while under threat of another, the defendant engaged in unlawful conduct, because she thought there was no other way to avoid imminent death or serious bodily harm.[65] Zoey only engaged in commercial sex and drug dealing because she feared for her safety due to her trafficker-boyfriend's violent conduct.[66] It is also difficult to determine how successful Zoey would be in a motion for vacatur in Maryland, as it is rare for victims to move for vacatur judgment, even with a prostitution conviction.[67] However, Zoey's status as a minor may aid her.

Maryland permits asset forfeiture when there are violations of the Human Trafficking law.[68] Forfeiture of a trafficker's property is permitted when:

> 1) . . . a motor vehicle used in connection with a violation of and conviction under § 3-1102 or § 3-1103 [Sex Trafficking];
>
> 2) money used in connection with a violation of and conviction under the human trafficking law, found in close proximity to or at the scene of the arrest for a violation . . .
>
> 3) . . . real property used in connection with a violation of and conviction § 3-1102 or 3-1103.[69]

Like the vacatur judgment law, the asset forfeiture law has its various flaws. In Zoey's case, she would likely get restitution from her trafficker's property because she is considering a sex trafficking victim under Maryland's human trafficking statute. But Zoey's trafficker first needs to be found to be in violation and convicted for human trafficking under said statute prior to her receiving relief. Maria would be unable to get anything because she is classified as a labor trafficking victim, which is not included in the asset forfeiture statute.[70] The asset forfeiture law seems to give restitution to victims, but the statute is confusing. The way the statute is written,

61 *See* Md. Code Ann., Crim. Law § 3-1102(d), (f).

62 *See New York v. L.G.*, 972 N.Y.S.2d 418, 420-22 (Crim NY-Queens County 2013) (finding the victim was forced into prostitution and shuffled through different trafficker-pimps from the ages of twelve to eighteen).

63 *See* Md. Code Ann., Crim. Proc. § 8-302(a).

64 *See* Zornosa, *supra* note 44, at 185.

65 *See id.* 186 (citing Paul H. Robinson, *1 Criminal Law Defenses* § 21 (2014)).

66 *See L.G.*, 972 N.Y.S.2d at 424 (holding the victim's weapon possession conviction was eligible under the vacatur statute because the crime was connected to "coerced trafficking activity" since the victim carried a pocketknife for protection from "unpredictable and potentially violent situations involving 'johns,' and was told to do so by her trafficker"); *but see* New York v. P.V., 100 N.Y.S.3d 496, 499-500 (holding the victim's assault and harassment convictions were ineligible for vacatur because they did not result from a "prostitution-related arrest charge" as required by the vacatur statute).

67 *See* Telephone Interview with Lindsey Carpenter, *supra* note 11.

68 *See id.* § 13-502.

69 *Id.*

70 *See id.*

> only the state or a governing body can take the trafficker's property.[71] However, even if the statute did provide restitution to human trafficking victims, it would be limited to only sex trafficking victims. This is because labor trafficking victims are treated differently, and thus would not be provided restitution.[72]

Expanding Victim Relief

By adopting the UAPRHT and aspects of DHS' Blue Campaign, states like Maryland can take a balanced approach by both combating violent crime while also providing victim relief. The UAPRHT has several provisions for victim protections when it comes to criminal relief. These provisions include victim confidentiality, past sexual behavior, immunity of a minor, affirmative defense of victim, and motion to vacate judgment and expungement conviction.[73] When it comes to past sexual behavior, reputation or opinion, that evidence is not admissible unless permitted under rape shield law(s) or when the prosecution is using the evidence for demonstrating a pattern by the human trafficking defendant.[74] This provision is interesting because it builds off current evidence rules related to character by preventing victim blaming. Furthermore, when the victim is a minor, the UAPRHT states the following for immunity:

> a) An individual is not criminally liable . . . to a [juvenile-delinquency proceeding] for [prostitution] or [insert other non-violent offenses] if the individual was a minor at the time . . . and committed the offense as a direct result of being a victim.
>
> b) An individual who has engaged in commercial sexual activity is not criminally liable . . . if the individual was a minor at the time of the offense . . . .[75]

Like the rest of the UAPRHT, there are basic provisions that serve as a template with optional sections that can be adjusted by states in accordance with other relevant state laws. For example, Maryland may define "non-violent crimes" differently than Virginia. Here, it is up to states to determine what "other non-violent offenses" that minors have immunity for. However, should a state choose not to adopt the immunity for minors, the ULC recommends that minors be referred to a "state-sponsored diversion program whereby a criminal conviction may be dismissed and expunged when a minor has undertaken certain counseling and educational programs."[76] This approach is preferred because minors should be treated as victims who were taken advantage of for "their immaturity and special vulnerability."[77]

Minors lack the maturity and capacity to be held accountable for their actions, especially when their actions are influenced by the adults trafficking them. Although minor victims have committed a crime, rehabilitation would be preferable because having a criminal record would negatively impact a minor victim's future. Likewise, adult victims are also provided protections. Adult victims charged with "prostitution or … other non-violent offenses" can claim that the crimes were a "direct result" of their victim status.[78] Finally,

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71 *See* Md. Code Ann., Crim. Proc. § 8-302.

72 *See generally* Md. Code Ann., Crim.S Proc. § 13-501.

73 *See* UARHT: Victim Protections §§ 13-17. https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1ce62a67-ea79-3180-dc1c-386411260499&forceDialog=0. *See* UAPRHTUAPRHT: Victims Protections §§ 14- 17. https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1ce62a67-ea79-3180-dc1c-386411260499&forceDialog=0.

74 *See id.* § 14.

75 *Id.* § 15(a)-(b).

76 *Id.* at comment. https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=-1ce62a67-ea79-3180-dc1c-386411260499&forceDialog=0.

77 *Id.*

78 *Id.* § 16.

the UAPRHT provides a motion to vacate and expunge a conviction, which states:

> a) An individual convicted of [prostitution] or [insert other nonviolent offenses] committed as a direct result of being a victim may apply . . . to vacate the conviction and expunge the record . . . . The court may grant the motion . . . on a finding that . . . participation . . . was a direct result of being a victim.
>
> b) No official determination or documentation is required to grant a motion . . . but an official determination or documentation from a federal, state, local, or tribal agency . . that the individual was a victim at the time of the offense creates a presumption that the individual's participation was a direct result of being a victim.[79]

In Zoey's case, she would be guaranteed criminal relief protections because she was a minor when she engaged in commercial sex.[80] Additionally, should Maryland include drug dealing as a non-violent offense, she could avoid that conviction as well. For Maria, she would likely be better off under the TVPA and other federal labor-related statutes, given her immigration status. Having theses victim protection provisions greatly aids victims because under current Maryland law, adequate victim relief is lacking. Maryland would also benefit from adopting aspects of DHS' Blue Campaign. To begin, Maryland should work to establish trust with victims as soon as possible. Furthermore, Maryland can transfer its structure of working with special victims to the human trafficking context. For example, in Montgomery County, the Special Victims Division (SVD) has Victim-Witnesses Coordinator who works alongside prosecutors to inform victims what options they have, such as getting a protective order. Like the Blue Campaign, law enforcement in Maryland could "explain their role in a trafficking victim's case" and have the victim coordinator work with them, aiding with support sources.[81] Likewise, given human trafficking's sensitive and traumatic nature, having a victim centered approach would incentivize Maryland to "develop, expand, or strengthen victim service programs for victims of trafficking" to potentially receive grants under the TVPA.[82]

An*alysis of Victim Relief*

When it comes to victim relief, there is either disproportionate focus on sex trafficking or no laws on the books. This is especially true at the state level. For example, Maryland's vacatur judgment only applies to prostitution convictions or victims of human trafficking, which is just sex trafficking. Additionally, affirmatives defenses at the state level are limited to sex-related crimes that directly result from the trafficking of a victim. Thus, victims are not provided adequate relief, because crimes they commit that are neither sex-related nor directly resulted from their trafficking are ineligible for relief. However, at the federal level, there is more relief provided to victims. For example, there is mandatory restitution for both victims of labor trafficking and sex trafficking. Furthermore, labor trafficking victims are provided relief in the immigration relief via the "T" visa.

Some states may hesitate in expanding victim criminal relief due to competing interests: combating violent crime and providing victim

[79] *Id.* § 17(a)-(b).
[80] *Id.* § 17(b).
[81] *See* Department of Homeland Security (DHS): *Interviewing Victims of Human Trafficking for Law Enforcement*, U.S. Department of Homeland Security (May 2018) https://www.dhs.gov/blue-campaign/awareness-training?utm_source=bluecampaign_carousel&utm_medium=web&utm_campaign=dhsgov).
[82] *See* Myatt, *supra* note 48, at 580 (citing the TVPA, 22 U.S.C.A. § 7105(b)(2)(A)).

relief. States like Maryland can take a balanced approach by implementing vacatur judgments and affirmatives defenses. Specifically, Maryland can expand victim defenses for non-violent crimes committed while trafficked, even if the crime is not related to their trafficking. Enacting these initiatives will best serve human trafficking victims and the community at large. First, it provides recognition that victims do not always have "clean hands" and may be forced to commit crimes when trafficked. Second, by limiting to non-violent offenses, victims are still held accountable for violent offenses. It will further recognize that victims are not just implicated in sex-related crimes, but they are also implicated in other crimes like drug trafficking.

III. Conclusion

Maryland's current human trafficking law disproportionately favors sex trafficking and thus insufficiently provide adequate relief for labor trafficking victims. Human trafficking legislation has a complex history. Beginning at the international stage at the UN, human trafficking laws were shaped and influenced by prostitution and sex-related crimes. Given this influence, sex trafficking was disproportionately focused on by state legislators compared to labor trafficking. While there seems to be a movement towards a balanced approach, statutes fall short of adequately serving both types of human trafficking victims.

The disproportionate focus is reflected in statutes, especially at the state level. For example, in Maryland, its "human trafficking" statute is just a sex trafficking statute, while labor trafficking is classified as a separate crime. By classifying sex trafficking and labor trafficking as two distinct and different crimes in Maryland, it creates the impression that human trafficking is just sex trafficking. By adopting the UAPRHT, definitions would be more consistent, as the UAPRHT applies definitions of terms and elements equally among sex trafficking and labor trafficking. This would also provide prosecutors more clarity on what is needed to build human trafficking case. Having this balanced approach will also enable labor trafficking victims to receive victim relief.

Currently, victim relief laws are not too common and tend to favor sex trafficking victims, especially at the state level. In Maryland, vacatur judgment is only available for prostitution convictions. Furthermore, additional affirmatives defense only cover sex-related crimes. States can best serve both types of human trafficking victims by expanding victim relief laws to non-violent offenses committed by human trafficking victims during their trafficking. Adopting this stance will properly serve victims and society, because it considers the non-sex related, non-violent crimes committed by the victim, but allows the state to combat violent crime. By reforming current human trafficking laws so there a balanced approach for both sex trafficking and labor trafficking, victim relief will be adequately provided to both types of human trafficking victims.

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