

What's the Big Idea?



**Recommendations for Improving
Law & Policy in the Next
Administration and in the States**



**AMERICAN
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Introduction

Russ Feingold, ACS President

A wise person once said, “everything begins with an idea.”

As a new administration prepares to take the reins of the Executive Branch in Washington, undoubtedly some of its attention and energy will be occupied with the restoration of our democratic institutions and the Rule of Law—both noble and necessary tasks. A fresh start is just what this country needs.

At the same time, the Biden-Harris administration must welcome an influx of “big ideas,” and we at the American Constitution Society are pleased to be of service. We have called upon experts in a variety of law and policy subjects from our nationwide network to offer their top law and policy recommendations in keeping with ACS’s vision that the law be “a force for protecting our democracy and the public interest and for improving people’s lives.”

From immigration and labor law, to democracy and death penalty reform, to reproductive rights and a better response to the COVID-19 pandemic, the proposals in this collection of essays represent the best thinking of a diverse set of scholars and advocates who are dedicated to advancing and defending democracy, justice, equality, and liberty; securing a government that serves the public interest; and guarding against the abuse of law and the concentration of power.

Importantly, the prescriptions they put forward are not solely addressed to the federal government. If the last four years have taught us anything, it’s that states and localities can be critical players in our quest for “a more perfect union.” Just by way of example, one need only review the notable efforts of numerous state attorneys general in recent years to be reminded of the impact that state and local actors can have in defending our democracy.

We know that this is just the beginning, not the end of the good ideas to come, and we look forward to a productive partnership with the administration, as well as state and local leaders, in transforming good ideas into a better reality for us all.



Bring Back Community Decision-Making

Suja A. Thomas*

In this time and in this country, we need decision-making that comes from the community. Although the Constitution guarantees judgments by juries, over time, power has shifted to institutional players such as the police, prosecutors, judges, and lawyers. Juries decide less than four percent of criminal cases and less than one percent of civil cases. Almost invariably, citizens only exercise power in our government through voting. However, citizens possess so much more power. This paper shows the mechanisms contributing to the shift toward institutional decision-making and away from community determinations. It then sets forth a path to bring back the constitutional power of people. The daily regulation of our community by politicians shows that now more than ever, community authority is imperative.

People possess the right to have questions of their liberty and monetary disputes decided by their community. Further, community members have the power to decide these issues as jury members.¹ People have concurrently lost both rights—the right to a jury trial when accused or aggrieved and their right to decide important issues as members of a jury when community members are accused or aggrieved. This shift of authority has had an especially devastating impact on people of color, women, and the poor.

Current Criminal and Civil Justice Systems

The heart of the current criminal justice system is plea bargaining. Plea bargaining, which eliminates community decision-making, is littered with significant problems

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¹ SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

related to bias, conflicts, and lack of competence and resources. When prosecutors decide to charge a person with a crime, they often do not investigate and heavily rely on police reports. Often based on these uninvestigated charges, prosecutors force defendants into a “plea deal” by, in most circumstances, telling a defendant that they will receive a much longer sentence if they want the community—the jury—to decide. For example, Brian Banks, whose story of innocence was featured in a movie, faced five years in prison if he pled guilty versus up to life in prison if he insisted on a jury trial.² The result of coerced decisions like this: Ninety-five percent of criminal defendants plead guilty³—some of whom, like Banks, are innocent. These defendants’ prison terms and criminal records are based primarily on determinations by prosecutors who are ninety-five percent white⁴ as well as by police who also do not reflect the community.⁵ All of this contributes to the mass incarceration of Black people in this country—without a diverse, constitutionally enshrined group of people making these decisions.

In the civil system, other procedures prevent access to community decision-making. In a high percentage of consumer and employment cases, for example, forced arbitration moves cases to paid-by-the-case decision-makers. Over fifty-five percent of workers are subject to such mandatory arbitration.⁶ And more than fifty percent of credit cards require mandatory arbitration.⁷ In these settings, with arbitrators dependent on repeat business from corporations, consumers and employees are less likely to win and corporations are favored. Further, seventy-four percent of arbitrators in the American Arbitration Association (AAA), a major arbitration group, are white men.⁸ Arbitrators are typically judges and lawyers—some of the wealthiest members of communities who also may have very different demographic characteristics from many people in the community. These attributes of the decision-makers could be helping companies win. Consumers won only a third of their cases before the AAA versus over eighty percent in small claims court.⁹ Employees won only twenty-two percent of their cases before the AAA versus thirty-three percent in federal court and fifty percent in state court.¹⁰

Even when cases go to court, judges may dismiss factually intense cases before they reach trial. Here, the community through the jury misses the opportunity to make important determinations. Civil rights cases, including Title VII employment discrimination cases, Title II public accommodation cases, and § 1983 excessive force cases, have been impacted greatly. For example, cases with racist comments can be dismissed by judges without

² *Brian Banks*, CAL. INNOCENCE PROJECT.

³ *#GuiltyPleaProblem*, INNOCENCE PROJECT.

⁴ REFLECTIVE DEMOCRACY CAMPAIGN, *TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS’ CLUB OF ELECTED PROSECUTORS* (2019).

⁵ MIKE MACIAG, *GOVERNING, DIVERSITY ON THE FORCE: WHERE POLICE DON’T MIRROR COMMUNITIES* (2015).

⁶ ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* (2018).

⁷ *Id.*

⁸ 2019 B2B *Dispute Resolution*, AM. ARB. ASS’N, INT’L CTR. FOR DISP. RESOL. (2020); Paige Smith, *Lack of Arbitrator Diversity Is an Issue of Supply and Demand*, BLOOMBERG L. (May 15, 2019) (women and people of color are twenty-six of the roster).

⁹ Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1 (2019).

¹⁰ *Id.*

community input on what constitutes discrimination.¹¹ A study by the Federal Judicial Center found that over seventy percent of employers' motions for summary judgment in employment discrimination cases are granted in full or in part.¹² Juries also rarely decide cases where consumers allege public businesses engaged in race discrimination, such as contentions of following in stores based on race, because those cases are usually dismissed before trial.¹³ Excessive force cases are dismissed as well.¹⁴ So, the community is precluded from deciding many civil rights matters.

Criminal Justice Changes

Much can be done to shift decision-making back to the community in criminal cases. Specifically, the following measures to increase deliberate decision-making will help prevent the rush to judgment that hinders community input. First, prior to issuing charges, prosecutors should be required to investigate—to talk to witnesses and to examine evidence. They should not rely on police reports. Second, in places where grand juries decide whether defendants are charged, prosecutors should present cases to those community decision-makers before proceeding with any plea deal. Third, prosecutors should give all *Brady* exculpatory material to a defendant to consider before pleading guilty.¹⁵ Moreover, penalties for exercising the right to a jury trial should be removed. Prosecutors should present the same charge/sentencing to those who want a jury trial as they present to those who plead guilty. In the absence of those same options for a defendant taking the jury trial, upon the request of the criminal defendant, the prosecutor should be required to give the jury the alternative option to convict on the charge(s) that were originally presented for the plea deal.¹⁶ These patently reasonable steps to slow the rush to judgment and eliminate the penalty for the jury trial give the community the greatest opportunity to fulfill its constitutional role.

Civil Justice Changes

The civil side can also be reformed to give the community back its authority. Assuming that Congress does not legislate to take away the broad authority to arbitrate, the Equal Employment Opportunity Commission should be given additional resources to file

¹¹ SANDRA SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

¹² Memorandum from Joe Cecil & George Cort, Federal Judicial Center, to Judge Michael Baylson, Senior District Judge, E.D. Pa., Table 4 (Aug. 13, 2008); see also Amanda Farahany & Tanya McAdams, *Analysis of Employment Discrimination Claims for Cases in Which an Order was Issued on Defendant's Motion for Summary Judgment in 2011 and 2012 in the U.S. District Court for the Northern District of Georgia*, JUST. AT WORK (Sept. 18, 2013).

¹³ See generally Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. (forthcoming 2021). Note that while settlement can contribute to fewer jury trials, where settlement is pushed along because of non-community devices, settlement also can be problematic.

¹⁴ *Scott v. Harris*, 550 U.S. 372 (2007).

¹⁵ NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018).

¹⁶ Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment*, 43 A.B.A. LITIG., No. 3 (2017). Fifth, in the absence of the same options, prosecutors should cap the difference to a quarter of the sentence if one pleads guilty versus the sentence if one takes the jury trial and is convicted. Some other countries have these requirements. FAIR TRIALS, *THE DISAPPEARING TRIAL: TOWARDS A RIGHTS-BASED APPROACH TO TRIAL WAIVER SYSTEMS* 56 (2017).

hundreds of cases to ensure that discrimination laws in employment are more vigorously enforced. Similarly, the Civil Rights Division of the Department of Justice should be tasked with bringing many more discrimination cases. With the government involved with significant cases, enforcement of the civil rights laws becomes more likely, and where settlement does not occur, the community could be involved in deciding these important cases.

To counter the courts' blockage of the enforcement of Title VII and Title II of the Civil Rights Act of 1964, the executive should issue an order stating that such laws have been too narrowly interpreted and asking the courts to broadly interpret the language in the statutes and leave factual issues to jury determinations. Based on its authority to enforce laws, the executive should also encourage judges to defer to any judge on the same case who thinks there is sufficient evidence of a civil rights violation for the case to proceed to trial.¹⁷ This deference can begin the process of re-examining our treatment of these important, factually intense cases.

To counter the selections in the past of many federal judges who were prosecutors or represented corporations, the executive should also proceed to select judges who reflect the community and have more diverse backgrounds, such as representation of defendants in criminal cases and plaintiffs in civil rights cases. These more diverse selections would likely lead to judges giving more cases to the community to decide.¹⁸

Conclusion

The current jury system is not perfect. For example, jury pools are not sufficiently diverse and peremptory challenges are exercised to exclude appropriate decision-makers. As we start to move back to community decision-making, reform of this jury system can accompany reform of the systematic problems described here.

¹⁷ Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241 (2018).

¹⁸ Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RES. QUAR. 788 (2016).



Restructuring the Balance of Power in Digital Markets

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Amazon, Apple, Facebook, and Google increasingly serve as gatekeepers for digital commerce and communications. Growing evidence suggests that these firms have used their market power in a host of abusive ways, squashing competition and extending dominance across markets. In October, the U.S. House Judiciary Committee's Subcommittee on Administrative, Commercial, and Administrative Law published a report detailing how these dominant platforms have exercised and maintained their power, concluding that these business practices have harmed entrepreneurship and innovation, eroded user privacy, weakened independent journalism and the free press, and undermined economic and political liberties.¹ These findings reinforce a growing public recognition that the unchecked and outsized power of dominant digital platforms threaten democratic values and practice.

Addressing these harms will require rebalancing power in the digital economy, including through legislative reforms. However, the executive branch and federal agencies have an existing set of antimonopoly tools that they should harness. Ways to do so include:

Aggressive Antitrust Investigations and Enforcement Actions

Significant evidence suggests that the dominant digital platforms have established, maintained, and extended their market power through coercive and predatory business practices. The Department of Justice's Antitrust Division and the Federal Trade Commission (FTC) should bring antitrust lawsuits against dominant

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¹ MAJORITY STAFF OF H.R. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMM. AND ADMIN. LAW, 116TH CONG., REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020).

platforms for any anticompetitive conduct. Key will be pursuing structural remedies that redress the underlying incentive and ability to engage in these practices in the first place.

Vigorous Merger Enforcement that Closely Polices Anticompetitive Transactions by the Dominant Platforms

Several of these firms established or maintained their leading positions through buying up actual or emerging competitors or locking up technologies through acquisitions. Although Apple, Amazon, Facebook, and Google collectively made over 500 acquisitions, the antitrust agencies did not prevent a single transaction and investigated only a handful. Given that analysts are predicting a merger boom and the dominant platforms are sitting on significant piles of cash, antitrust enforcers must be vigilant and diligently block anticompetitive acquisitions, including those involving nascent competitors or firms in adjacent markets. The agencies should also rewrite the merger guidelines to better reflect empirical realities in digital markets, such as entry barriers created by network effects and concentrated control over data.

Utilize the FTC's Rulemaking Powers

The FTC should promulgate rules identifying business practices that constitute “unfair methods of competition,” with an eye to policing structural conflicts of interest, exclusive dealing and other exclusionary practices, and coercive contracts. The FTC should also use its expansive authorities to regularly collect business data and continuously monitor digital markets. Although Congress delegated to the FTC both competition rulemaking and broad information gathering powers, the Commission has neglected to fully use these key tools.

Penalize Serial Lawbreaking with Structural Remedies Rather than with Monetary Fines

Although Facebook and Google have repeatedly violated laws and legal orders, federal agencies have primarily responded with monetary penalties that the dominant platforms can treat as a cost of business. Enforcers should draw on a broader set of remedies, including dismissal of senior management and board directors, reforms to executive pay, individual liability for top executives, and winding down of business lines.²

Prohibit Dominant Digital Platforms from Entering Banking and Financial Services

Permitting Apple, Amazon, Facebook, and Google to expand into banking, finance, and payments would vastly expand their surveillance capabilities, increase their economic power, and potentially threaten the safety and soundness of our financial system. The

² Memorandum from Commissioner Rohit Chopra, Federal Trade Commission, to Commission Staff and Commissioners (May 14, 2018).

Treasury Department, Office of Comptroller Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and Federal Reserve should adhere to the longstanding separation of banking and commerce and prevent dominant digital platforms from entering banking and finance.

Harness Antimonopoly Levers Beyond Antitrust Law

Use antimonopoly levers across federal agencies—including tax policy, federal procurement, trade policy, and small business policy—to promote new business entry and independent business and to prevent further concentration of power among the dominant digital platforms.



Death Penalty: Determine If Capital Punishment Has Outlived Its Use

John H. Blume* and Brendan Van Winkle**

So far this year, the federal government has executed eight people.¹ One despite pleas for leniency from the victims' mother and grandmother.² Another despite the prisoner's dementia and questions of competency.³ And another despite the fact that he was a teenager at the time of the crime, something the federal government had not done in almost seventy years.⁴ The list goes on, and in January, the federal government plans to execute a woman, again something it has not done in almost seventy years.⁵ The federal government scheduled Lisa Montgomery's execution despite her debilitating mental health problems and despite a lifetime of abuse, including repeated gang rapes arranged by her mother so young Lisa could "earn her keep."⁶ All in all, the federal government will execute at least twice as many people in 2020 than it did in the preceding half century,⁷ with more executions scheduled before Inauguration Day.⁸ Undoubtedly, capital offenses are horrible, but it is hard to see what good comes from executions. The Biden administration should determine if capital punishment has outlived its use.

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¹ See, *Outcomes of Death Warrants in 2020*, DEATH PENALTY INFO. CTR. (DPIC) (last visited on Nov. 7, 2020).

² Andrew DeMillo, *Victims' Relatives Most Vocal Opponents of Man's Execution*, AP News (July 13, 3030).

³ Michael Balsamo & Jessica Gresko, *US Executes 2nd Man in a Week; Lawyers Said He had Dementia*, AP News (July 16, 3030).

⁴ See DPIC, *supra* note 1 (Christopher Vialva); see also Jason Chein, *Insight: Adolescent Brain Immaturity Makes Pending Execution Inappropriate*, BLOOMBERG L. (Sept. 17, 2020).

⁵ See U.S. Government Sets Two More Execution Dates, Seeking to Put to Death the First Woman and the Youngest Offender in More Than Six Decades, DPIC News (Oct. 19, 2020).

⁶ See *The Case of Lisa Montgomery*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (last visited on Oct. 31, 2020).

⁷ See DPIC, *supra* note 1; see also *Capital Punishment*, FED. BUREAU OF PRISONS (last visited on Nov. 16, 2020).

⁸ *Id.*

Although the American death penalty is predominantly under the control of state actors,⁹ the President of the United States does have the authority to limit or eliminate the use of the federal death penalty and to set an example that could significantly impact state death penalty practices. Thus, the future, and at a minimum the near future, of the American death penalty could be significantly affected by the actions of the incoming administration. Through executive action, the Biden administration should: (1) immediately put in place a moratorium on federal executions; (2) order a robust study of federal and state death sentencing practices; (3) deauthorize all pending federal death penalty cases pending the results of the study; (4) order the Food and Drug Administration (FDA) to halt importation and interstate transportation of execution drugs and investigate how the drugs are obtained, handled, and used; (5) work with Congress to pass a habeas corpus reform bill; and (6) commute the unjust federal death sentences.

Prosecution policies have historically been decided by the attorney general, and decisions about a moratorium would be the attorney general's to make. President Biden should nominate the right attorney general to implement the moratorium, oversee the nationwide study, and halt all ongoing federal capital prosecutions. The Biden administration, United States Attorneys, and other executive branch actors could try to persuade states to follow suit. Ideally, the American death penalty would be put on hold until the study is complete because anyone put to death during that process, if the death penalty is suffering from systemic defects, will have no recourse.

The federal government did something like a nationwide study in 1990, and the report was turned in to the Chairman of the Committee on the Judiciary, the Honorable Joseph R. Biden, Jr.¹⁰ But the study focused only on the role race played in death sentencing, and it reviewed existing studies rather than conducting its own. The commission found that race influenced death sentencing. Although racial bias may be its greatest evil, the American death penalty has other flaws identified in state specific studies which likely would resonate with a majority of the American people.¹¹ A new, independent, and comprehensive study is needed, and it should include, for example: Does the death penalty serve a legitimate penological purpose given the widespread availability of life without parole as an alternative? What are the financial costs of maintaining a death penalty system and could the resources currently sustaining capital punishment be used more effectively if diverted to other areas of needed criminal justice system reform? What roles do race, gender, socioeconomic status, and mental health play in determining who is sentenced to death?¹²

⁹ States are responsible for more than 99 percent of American executions and more than 97 percent of the people on death row. See *Execution Database*, DPIC (last visited on Nov. 16, 2020); see also *Death Row Overview*, DPIC (last visited on Nov. 16, 2020).

¹⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-90-57, DEATH PENALTY SENTENCING (1990).

¹¹ See, e.g., N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (Jan. 2007); ILLINOIS COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (Apr. 2002).

¹² President Obama ordered a study, but it never materialized. See *Exclusive: Obama Calls the Death Penalty "Deeply Troubling."* MARSHALL PROJECT (Oct. 23, 2015).

The Biden administration should also immediately begin investigating how states are using pharmaceuticals to execute people. It does not take a nationwide study to understand that states are inept at carrying out lethal injections. Indeed, lethal injection was intended to be more humane than earlier methods, but of all execution methods currently in use, it carries the greatest risk of a botched execution.¹³ For example, Joseph Wood “gulped like a fish on land” for ninety minutes when Arizona executed him.¹⁴ The late Senator and Prisoner of War John McCain described it as “torture.”¹⁵ Executions should not involve torture. The FDA should investigate how states and the federal government are obtaining, handling, and using lethal injection drugs and how they have done so in the past.

For years, the FDA has been interested in how states are carrying out executions.¹⁶ In 2011, the FDA caught on that states were importing unapproved execution drugs (thus illegally importing them), and the Drug Enforcement Agency began inspecting prisons to determine the legitimacy of their execution drugs.¹⁷ It went to prisons in Georgia, Tennessee, Kentucky, South Carolina, and Alabama, and the DEA confiscated unapproved execution drugs.¹⁸ Then in 2015, the agency impounded shipments of drugs heading to Texas and Arizona.¹⁹ The Trump administration has since stopped the FDA from interfering with states importing execution drugs, and Texas has sued the FDA to get its impounded drugs back.²⁰ The Biden administration should reverse course and reclaim the FDA’s power to oversee the handling of execution drugs. The FDA should heavily regulate lethal injection drugs and seek to prevent their importation and travel through interstate commerce. Moreover, it could deauthorize drugs and try to make their use illegal, so torturous executions like that of Mr. Wood are not repeated.

Additionally, the Biden administration should work with Congress to pass a habeas corpus reform bill. Federal habeas corpus historically has been one of the primary ways that persons sentenced to death in state courts obtained review by federal courts of their convictions and sentences. Currently, the federal habeas corpus statute, as a result of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), requires death row prisoners to navigate a maze of procedural obstacles, and the federal courts, including the Supreme Court of the United States, have interpreted the statute to demand near unquestioned deference to state court decisions.²¹ As a result, death row prisoners rarely have their convictions or sentences overturned even when there has

¹³ Interview by Steve Inskeep with Austin Sarat, *Death Penalty Expert on Why Lethal Injection Is So Problematic*, NPR (July 25, 2014).

¹⁴ Burgess Everett, *McCain: Arizona Execution ‘Torture’*, POLITICO (July 25, 2014).

¹⁵ *Id.*

¹⁶ Charlie Savage, *Justice Dept. Stops F.D.A. From Regulating Death-Penalty Drugs*, N.Y. TIMES (May 14, 2019).

¹⁷ Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015).

¹⁸ *Id.*

¹⁹ See Savage, *supra* note 16.

²⁰ *Id.*

²¹ See Eve Brensike Primus, *Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time*, ACS ISSUE BRIEF 4–7 (July 2018).

been clear constitutional error.²² People should not be put to death if the trials contained constitutional error, and the fealty given to state court decisions is at odds with the original intentions behind the statute.

Responding to fears that AEDPA would undercut meaningful federal habeas review, President Clinton insisted in his presidential signing statement that “[f]ederal courts will interpret these provisions to preserve independent review of [f]ederal legal claims and the bedrock constitutional principle of an independent judiciary.”²³ Similarly, then-Senators Orin Hatch and Joe Biden, both of whom supported the bill, said explicitly that constitutional error would be enough to warrant relief.²⁴ But the Supreme Court has tortured the statutory language and explicitly said that constitutional error, even clear constitutional error, is not enough. Rather, a federal court’s hands are tied unless the underlying state court decision was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”²⁵ Congress did not intend to limit the availability of federal review to cases involving an “extreme malfunction,” and President Biden should work with Congress to repeal the more onerous provisions of AEDPA and restore a death sentenced inmate’s access to meaningful review by the federal courts.

After halting executions and death sentences, conducting a nationwide study, investigating lethal injection drugs, and working with Congress to pass habeas reform, the Biden administration should turn its attention to the clemency power. Outside of cases of impeachment, the president has unchecked power to commute sentences for offenses against the United States.²⁶ With the stroke of a pen, President Biden could commute every death sentence imposed by the federal government. Such an aggressive executive approach is typically reserved for the politically courageous.²⁷ But depending on what the study of the federal death penalty uncovers, it may be justified. At a minimum, President Biden should commute all federal death sentences demonstrated by the study to have been the result of any detected systemic defects.

²² See, e.g., David Dow & Jeffrey Newberry, *Reversal Rates in Capital Cases in Texas, 2000–2020*, 68 UCLA L. REV. DISC. 2, 12 (2020) (finding of the 151 capital habeas cases out of Texas from 2000 to 2019, only one person was ultimately successful).

²³ President Clinton’s Statement on the Signing of the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (April 29, 1996).

²⁴ Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1)*, 60 WASH. & LEE L. REV. 677, 694–96 (2003).

²⁵ *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

²⁶ U. S. CONST. art. II, § 2, cl. 1.

²⁷ See Statement by Illinois Governor George H. Ryan on Commuting All 157 of the State’s Death Sentences, Jan. 11, 2003.



Renew American Democracy from the Top Down and the Bottom Up

Robert Yablon*

Renewing the promise of American democracy is an urgent challenge. Too many citizens face needless difficulties exercising their fundamental right to vote. In too many places, those in power have manipulated district lines to shield themselves from any meaningful electoral competition. And on too many occasions, officeholders show more regard for big-money interests than for their own constituents. These imperfections have become all the more glaring as norm-breaking opportunists have stoked partisan divisions and sought to delegitimize our electoral institutions—institutions already strained in 2020 by a raging pandemic. We have thus far muddled through, thanks in large part to the resilience of the American people. But we deserve far better, and our long-term democratic survival requires us to act.

Meaningful democratic reform does not come easy. At the federal level, the President has limited authority to alter the electoral system unilaterally. Based on recent experience, we probably should be thankful for that. Transformative change will require legislation or, more ambitiously still, constitutional amendments. No single reform will be a panacea, and Congress already has an array of worthwhile proposals on its radar.¹ High on the priority list should be measures to facilitate voting. This includes making automatic and same-day voter registration the national norm, giving citizens in every state ample absentee and early voting options, and ensuring that no one has an hours' long wait to cast a ballot on

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¹ See For the People Act of 2019, H.R. 1, 116th Cong. (2019).

election day.² It also includes restoring the voting rights of formerly incarcerated citizens immediately upon their release from custody.³ Ending gerrymandering is likewise imperative. We should ensure that electoral districts are drawn pursuant to neutral criteria, with primary responsibility ideally assigned to independent, nonpartisan actors.⁴ Reforms like these should be the bare minimum for any self-respecting democracy.

If such legislation is not yet attainable, what can federal and state actors do today to strengthen our democracy and perhaps pave the way for future reform? As outlined below, the President and other officials can play important convening, agenda-setting, and norm-building roles. State-level actors can do much the same, while also pushing forward with pro-democracy reforms wherever feasible, whether through legislation, direct democracy, or state-court litigation.

Making our Democracy's Health a National Priority

It is vital for our national leaders to champion democratic values and institutions. An initial step is to facilitate dialogue about the challenges our system faces and potential ways forward. Presidents have previously convened commissions to study and recommend action on election-related issues and other matters, and this is an apt moment to do so again.⁵ Specifically, the President should form a high-level bipartisan Commission on Renewing American Democracy tasked with identifying ways to foster broad-based democratic participation and diminish extreme partisan polarization. The Commission should include an array of voices from government, academia, the non-profit community, and the business sector, and it should consider and propose a range of public and private reforms. Policy interventions that have already gained some traction at the state and local levels, such as ranked-choice voting or the public financing of campaigns through matching funds or vouchers, deserve a close look, as do lesser known ideas, such as citizen assemblies.⁶ The Commission should also look beyond our electoral institutions and consider how to address underlying economic, social, and cultural conditions that feed political disenchantment and partisan antipathies. Ideally, the Commission would be a model for the sort of thoughtful, respectful, solutions-oriented discourse that characterizes democracy at its best.

Federal officials should also establish a second task force or commission with a more specific charge: recommending measures to bolster our nation's system of election

² See *Same-Day and Universal Voting Registration*, Empowered Voters Recommendation 2, AM. ACAD. OF ARTS & SCI. (Sept. 1, 2020); *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. OF ST. LEGS. (Sept. 24, 2020); *State Laws Governing Early Voting*, NAT'L CONF. OF ST. LEGS. (Oct. 22, 2020); Hannah Klain et al., *Report: Waiting to Vote*, BRENNAN CTR. FOR JUST. (June 3, 2020).

³ See Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 30, 2020).

⁴ See *Independent Redistricting Commissions*, CAMPAIGN LEGAL CTR. (2020).

⁵ See *Presidential Commission on Election Administration*, BIPARTISAN POL'Y CTR. (last updated Nov. 28, 2020).

⁶ See *Ranked Choice Voting 101*, FAIRVOTE (last updated Nov. 26, 2020); Juhem Navarro-Rivera & Emmanuel Caicedo, *Public Financing for Electoral Campaigns*, DEMOS (June 28, 2017); *Matching Funds Program*, N.Y.C. CAMPAIGN FIN. BOARD (last visited Nov. 30, 2020); *Democracy Voucher Program*, SEATTLE ETHICS AND ELECTIONS COMM'N (last visited Nov. 30, 2020); *Citizen Assemblies*, HEALTHY DEMOCRACY (last visited Nov. 30, 2020).

administration, drawing on the experience of the 2020 election cycle. Pandemic-related disruptions to the voting process and disputes about how to handle them suggest that additional laws and protocols are needed to safeguard voting rights and ensure smooth operations in emergency circumstances. The cynical attempts of some actors to sow doubts about the integrity of the election and to weaponize legal technicalities to challenge the results may similarly call for a response. It might be wise, for example, to adopt clearer and more uniform rules regarding the pre-election processing of absentee ballots and the post-election certification of results, and to address some of the ambiguities and gaps in the Electoral Count Act.⁷ In the wake of the 2000 election, bipartisan action was taken to correct some of the system's most blatant technical flaws.⁸ Similar reflection and action is warranted this time around.

Beyond these big-picture agenda-setting initiatives, at least some concrete executive actions are possible. Thoughtful reformers have suggested, for example, that the President should, among other things, instruct federal agencies to offer voter registration services pursuant to the National Voter Registration Act, direct cybersecurity experts to set national standards for the nation's elections infrastructure, and establish more stringent campaign-finance disclosure requirements for federal contractors.⁹ These may seem like modest steps, but each one serves to reinforce the system's democratic foundations, and incremental changes can add up.

Revitalizing Democracy from the Ground Up

Especially given the prospect of continued federal legislative gridlock, a state-level focus on democratic reform is more important than ever. A growing number of states are already acting to expand voting rights, curb gerrymandering, and counter campaign finance abuses.¹⁰ These states should redouble their efforts and pursue a friendly race to the top. In some states, referenda and ballot initiative mechanisms provide an additional avenue for the enactment of democracy-enhancing policies.¹¹

Success in these states may help to build momentum for change in states where the political climate is not currently conducive to reform. For example, the experiences of states that are securely expanding access to the franchise can offer a stark counterpoint to the false narrative that election integrity requires restrictive voting rules. In some instances, state-court litigation may also be a promising way forward for those seeking to push back

⁷ See Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020); *After the Voting Ends: The Steps to Complete an Election*, NAT'L CONF. OF ST. LEGS. (Oct. 28, 2020); CONG. RES. SERV., COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION (2016).

⁸ See Help America Vote Act of 2002, H.R. 3295, 107th Cong. (2002).

⁹ See Martha Kinsella et al., *Executive Actions to Restore Integrity and Accountability in Government*, BRENNAN CTR. FOR JUST. (Oct. 6, 2020).

¹⁰ See *Voting Laws Roundup of 2020*, BRENNAN CTR. FOR JUST. (Feb. 4, 2020); *Who Draws the Lines?*, LOYOLA LAW SCH. (last visited Nov. 30, 2020); *Campaign Finance Legislation | 2015 Onward*, NAT'L CONF. OF ST. LEGS. (June 6, 2020).

¹¹ See *Forms of Direct Democracy in the American States*, BALLOTEDIA (last updated Nov. 7, 2020).

against democratically dubious practices.¹² State constitutions have an array of provisions that safeguard the right to vote and embrace core principles of popular sovereignty and political equality.

Beyond legal and policy interventions, state and local leaders should strive to build a vibrant democratic culture in their communities. In collaboration with local civic groups and grassroots organizers, they should seek elevate political discourse, promote inclusion, and defuse tensions. To be clear, this is not a call to abandon deeply held principles, paper over real disagreements, or accept false equivalencies. Instead, the idea is simply to offer an alternative to the us-versus-them, zero-sum mindset that leads people to disenfranchise their fellow citizens, gerrymander their political opponents into oblivion, and refuse to acknowledge the legitimacy of election results. For our democracy to thrive, institutional improvements are crucial, but we also need to be able to live with each other.

¹² See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. (forthcoming 2021).



A New Administration Will Mean New Hope for Our Planet

Sambhav (Sam) Sankar*

Of all the critical issues at stake in the 2020 election—and there are many—the environment is at the top of the list. Voters around the country are finally recognizing that fighting pollution and slowing climate change are not niche issues; they’re a matter of basic human rights. We need a president who sees that, too. Here’s a guide for the next administration.

Restoring Regulatory Order

Donald Trump launched the most destructive deregulatory campaign in our nation’s history, much of it focused on eliminating safeguards credited with reducing pollution and improving food and water safety. Fortunately, lasting regulatory change requires public input and decisions based in science, all of which takes time. So, Trump has yet to finalize much of his agenda, and nearly all of what he has finalized is stalled in court thanks to the heroic efforts of NGO- and state-based attorneys.

A new administration should immediately halt ongoing deregulatory activity and swiftly reverse course on agency actions already taken. Where necessary, the administration should begin restorative rulemaking for our bedrock environmental laws—the Clean Air Act, Clean Water Act, the Endangered Species Act (ESA), and especially the National Environmental Policy Act (NEPA).

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Addressing Environmental Injustice

Our environmental regulatory system inflicts grossly inequitable pollution burdens on Black and brown communities already suffering from COVID and other social injustices. This is structural racism, and it is sickening and killing minority communities.

A new administration can take several actions to address this injustice. First, they should dedicate the resources necessary to increase environmental monitoring in our most vulnerable communities. While we need stringent air quality standards, those standards aren't worth the paper they are written on unless we track neighborhood-scale impacts in communities that have been targeted for industrial "development." Residents deserve to know what they are being exposed to, and by whom.

Second, a new administration should order agencies to reform their regulatory processes—including ambient standards, emissions requirements, and food exposure rules—to address the cumulative impacts of pollution. Our laws measure and control toxic exposures in a piecemeal fashion, setting siloed limits for air, water, and food, and treating home, school, and workplace exposures in isolation. This is one way that Black and brown communities end up bearing excessive pollution burdens. It is death (literally) by a thousand cuts.

Third, a new administration must enforce our laws equally and emphatically, not just when it is politically beneficial. For decades, Republican and Democratic administrations alike have heeded relentless industry advocacy and defunded environmental enforcement programs and disregarded the needs of politically disempowered communities. We need a more robust enforcement system to focus efforts where the need is greatest, and we must measure its success by the health improvements it delivers.

Climate and Climate Justice

We have roughly ten years left to avert the worst effects of climate change. We need transformational legislation to pivot us out of the COVID-induced financial crisis and to invest the resources needed to transform our power sector, rebuild our transportation infrastructure, and create a new energy footprint. These laws should be among the first legislative priorities, but even without them, a new administration can do a great deal—most obviously, by re-entering the Paris Agreement and the global stage.

Agencies should be ordered to use all of their existing authorities to alleviate the climate crisis and prepare communities for its impacts. For example, pursuant to the Clean Air Act, the EPA can—and should—commence a disciplined, science-based, and input-driven campaign to promulgate carbon pollution standards. The National Highway Safety Transportation Agency and the EPA can—and should—improve federal vehicle greenhouse gas emission standards and allow states like California to once again lead in vehicle emissions regulation.

The executive branch must also manage public lands in ways that turn them from climate liabilities into climate assets. In particular, the President must call for an immediate moratorium on any further fossil fuel leasing on federal lands pending a full environmental and economic assessment of those programs, and then act according to that analysis. The new administration should also require that all federal forests be managed in ways that maximize the amount of carbon they capture from the atmosphere, and it should promulgate regulations to maintain those management regimes. Actions like these will also help the government address the planet's massive biodiversity crisis.

Good Governance

The President must re-establish fundamentals of good governance. His agencies should safeguard scientific integrity in all decision-making and appoint talented scientists to serve on key advisory panels. He can also promote transparency by ordering agencies, including the Justice Department, to ensure that their records are complete and available for review. Finally, he should appoint judges who recognize the central role the federal government must play in protecting the environment and addressing the climate crisis, who believe that the rule of law (and the laws of science) transcend politics, and who understand that people must be able to access courts in order to enforce our environmental laws.

State and Local Opportunities

Much of our environmental law has federal foundations; nothing can substitute for a muscular federal role in implementing the Clean Air Act, Clean Water Act, ESA, and NEPA. But if the federal government isn't receptive to tackling environmental injustices, states will have to take the lead. When it comes to climate, they can't afford not to act. A few states have already passed comprehensive mandates for reducing carbon emissions and increasing renewable energy supplies. New York's Climate Leadership and Community Protection Act is a powerful example: it not only mandates changes in electricity sector policy, but also drives infrastructure changes through building codes and financial incentives, targets transportation infrastructure changes to reduce carbon emissions, and ensures that all communities have access to clean energy solutions and experience the job-creating benefits of a clean energy transition.

We can do this. And we have to.



Transparency's Critical Role in Strengthening Public Trust in Government

Noah Bookbinder* and Mia L. Woodard**

Introduction

Government by consent is a relationship of trust. Underlying the consent of the governed is the understanding that officials who hold positions of public trust will use their powers to further the interests of the people. Even the appearance of self-dealing can undermine the legitimacy of our democratic system as it calls into question whether the government is holding up its end of the bargain.

Although we are currently nearing record lows¹ in public trust of government, every four years our executive branch has an opportunity to reset and for the President of the United States to renew that trust. This work demands an ethical and transparent approach to government that must be set at the top. In addition to requiring a commitment to ethical conduct as a condition of government employment (like a more robust ethics pledge), the administration should expand transparency measures that open its dealings to public scrutiny.

To be meaningful, the transparency measures should be designed for layman citizen access, requiring proactive disclosures that put the onus on agencies to make information publicly available as opposed to placing the burden on members of the public to navigate a Freedom of Information Act (FOIA) system that is

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¹ See *Public Trust in Government Near Historic Lows*, PEW RES. CTR. (Sept. 24, 2019).

fraught with bureaucratic hurdles and delays² whenever possible. Given the ongoing crisis of government distrust,³ the administration's transparency agenda should make accessible information that allows the public to investigate potential corruption. The following recommendations would help to bolster an open and honest government by expanding public access to key information on its top influencers.

Publish White House Visitor Logs

Visitor logs provide meaningful insight into who the president and staff are meeting with on policy matters. Civil society has long sought disclosure of these records, created by the United States Secret Service in the performance of their protective duties, because they help the public understand who was influencing White House policy.

During the Obama administration, the White House disclosed visitor logs on a monthly basis, subject to narrow limitations and exceptions. Under its White House Voluntary Disclosure Policy,⁴ nearly 6,000,000 records⁵ were released. These records have proven tremendously valuable in revealing the interest groups and individuals that may shape a president's decisions and legislative proposals. The Trump administration discontinued publication of visitor logs, closing a window into its operations and fueling legal action.⁶ They should be easily accessible to the general public.

The president should direct the Secret Service to publish a searchable, sortable, downloadable online database of visitors to the White House, the Vice President's residence, and any location where the president and / or vice president is meeting with individuals or groups to conduct official business. It should include at least 1) the name of each visitor, 2) the name of the individual who requested clearance for each visitor, 3) the date and time of entry for each visitor, 4) a brief and accurate description of the nature of the visit, as well as 5) confirmation that the guests were actually present.

Disclose Political Donors Affiliated with Federal Contractors

The post-*Citizens United v. FEC* proliferation of billions in unaccountable corporate money influencing our elections already shocks the conscience, but there is a special category of corporate donors that raises the stakes even higher: federal contractors.⁷ Since 2000, American taxpayers have paid the top ten federal contractors approximately \$1.5 trillion.⁸

² See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-406R, FREEDOM OF INFORMATION ACT: FEDERAL AGENCIES' RECENT IMPLEMENTATION EFFORTS (2020).

³ See *Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RES. CTR. (Sept. 14, 2020).

⁴ White House Press Disclosure, President Barack Obama, White House Voluntary Disclosure Policy Visitor Access Records (2009).

⁵ See Melanie Garunay, *More than 5.99 Million Records Released*, WHITE HOUSE BLOG (Dec. 30, 2016).

⁶ See Jordan Libowitz, *CREW and Others Sue for White House Visitor Logs*, CITIZENS FOR RESP. & ETHICS IN WASH. (Apr. 10, 2017).

⁷ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁸ See *Requiring Government Contractors to Disclose Political Spending*, BRENNAN CTR. FOR JUST. (Mar. 9, 2015).

With the federal expenditure of taxpayer money comes the responsibility of ensuring that these spending decisions are made in the best interest of the people and not as a political favor. Even the suspicion of corruption in government contracting decisions undermines public confidence in government.

Federal law prohibits contracting entities from making direct contributions to political candidates or parties.⁹ Nothing, however, prevents those who stand to profit from these entities' federal contracts (i.e., officers, directors, controlling shareholders) from making direct donations to candidates and parties, nor is there anything stopping these individuals or PACs from making unlimited contributions to dark money groups that allow contractor-affiliated individuals to hide their identities and escape public scrutiny.

The president should take action to expose the scale and scope of contractor-affiliated influence in elections by issuing an executive order requiring entities vying for federal contracts to disclose any contributions made by affiliated PACs and individuals to candidates, parties or third-party political groups over a specific dollar amount in the six years prior to submitting the bid. The information should be disclosed to agencies' procurement offices, which should within thirty calendar days publish the information online in a searchable, sortable, downloadable format.

Proactively Disclose Ethics Waivers

Presidents Obama and Trump have required executive branch appointees to sign an ethics pledge designed to reduce potential conflicts of interest. However, in some cases, the president or his designee has granted waivers to appointees despite an apparent conflict,¹⁰ when they believed allowing the staffer in question to work on certain matters was in the public interest because of the individual's prior experience or knowledge. Public access to these waivers and related documents sheds light on whether such waivers are used appropriately. The current administration has repeatedly failed in this regard.¹¹

Similarly, other waivers granted to non-appointee executive branch employees who are required to adhere to ethical obligations, including avoidance of conflicts,¹² are largely kept out of public view. While Designated Agency Ethics Officials (DAEOs) are required to make these records available upon request (which would require awareness of the waivers' existence),¹³ they are not required to proactively disclose these records.

The president should increase public access to these ethics waivers by directing the White House Counsel and Office of Government Ethics (OGE) Director to compile them in a

⁹ 52 U.S.C. § 30119.

¹⁰ See Kate Ackley, *House Democrats Seek Details of Trump Ethics Waivers*, ROLL CALL (May 17, 2019).

¹¹ See Megan R. Wilson, *Senators Call for Disclosure of Administration's Ethics Waivers*, HILL (Aug. 2, 2017).

¹² 18 U.S.C. § 208.

¹³ U.S. OFF. OF GOV'T. ETHICS, RECORDS MANAGEMENT AND RELEASE (Sept. 20, 2020).

central clearinghouse managed by OGE and post them in an online searchable, sortable, and downloadable format. Further, all agency ethics waivers should be issued in writing and promptly filed with OGE for public inspection.

Address FOIA Inefficiency

FOIA allows the public access to key government information, but poor implementation has hindered that mission. According to a report of the 2018-2020 FOIA Advisory Committee, “[t]he number of FOIA requests filed annually across all agencies has generally increased every year during the past decade.”¹⁴ Technology such as e-discovery is available for more efficient responses to requests, but only a modest number of agencies use the technology for FOIA processing.¹⁵

FOIA backlogs impede the public’s ability to scrutinize and hold the government accountable for their actions. To begin addressing this systemic problem, the president should issue a presidential memorandum on transparency directing the Office of Government Information Services (OGIS) to implement an agency-wide e-discovery program and the Office of Management and Budget (OMB) to identify categories of documents that should be uniformly proactively disclosed online in a searchable, sortable and downloadable format.

Conclusion

The foregoing recommendations are offered with the acknowledgement that, while a comprehensive overhaul of our transparency and ethics regimes would require congressional action, there are steps the president can take unilaterally to help rebuild public trust through increased transparency.

¹⁴ FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, REPORT TO THE ARCHIVIST OF THE UNITED STATES 8 (July 9, 2020).

¹⁵ FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, DRAFT REPORT TO THE ARCHIVIST OF THE UNITED STATES 22 (May 20, 2020).



Building Immigration Policy Back Better

Anil Kalhan*

Since 2017, President Trump and his allies have hurtled the politics and policy of immigration in xenophobic directions to an extent without modern precedent, and with devastating effect.¹ The Trump presidency has instituted hundreds of restrictionist measures, including high profile initiatives that have prompted significant public controversy and many less prominent, often technical measures that have erected a sprawling, “invisible wall” and placed millions at heightened risk of deportation.² With the onset of the novel coronavirus pandemic, the administration has intensified this crackdown further, using the outbreak as a pretext to institute even more sweeping restrictions that it previously had tried but failed to achieve.

Because these measures have been implemented almost entirely through executive action, rather than new legislation, the next administration will be well-positioned to roll back many of them—that is, provided that it commits the resources, energy, and political capital required. But even as it seeks to dismantle the Trump immigration legacy, the new administration should also lay the foundation for a more fundamental paradigm shift away from the entrenched regime of comprehensive immigration severity that enabled the Trump presidency’s xenophobic crackdown in the first place.³ In both its executive actions and legislative agenda on immigration, the new administration has an opportunity to

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¹ See Todd Schulte, *Tearing Families Apart*, FWD.US (Sept. 29, 2020).

² See Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL’Y INST. (July 2020); Diane Rish, *Dismantling the “Invisible Wall” Against Legal Immigration, Brick by Brick*, AM. IMMIGR. LAWS. ASS’N (Mar. 21, 2018).

³ See Anil Kalhan, *Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump*, 9 DREXEL L. REV. 261 (2017).

embrace the more ambitious objective, as it has in other policy domains, to “build back better” in the aftermath of Trump.⁴

Rolling Back Trumpism

Experts have provided detailed recommendations for specific actions that the next administration should take across different areas of immigration policy, and many of those recommendations can and should be swiftly implemented.⁵ However, fully rolling back the Trump presidency’s immigration legacy requires more than detailed technocratic attention to specific policies. Several broad principles should guide the new administration’s efforts.

First, the new administration and its allies must commit the political capital and resources necessary to roll back Trump-era policies promptly and to the maximum extent feasible. The Trump White House achieved success in its immigration agenda by being relentlessly attentive to the details of their implementation in the federal bureaucracy.⁶ The new administration needs to be similarly relentless in making reversal of those same measures a high priority and should therefore appoint personnel who are committed to energetically seeing reforms through in their implementation. The new administration also must be prepared, along with its political allies, to forcefully defend its actions and lean into the fights when it faces political criticism or litigation in response, which it will.

Second, the new administration should institute meaningful efforts to ensure accountability and redress for wrongdoing and ethical breaches under its predecessor. Most notably, for example—although by no means exclusively⁷—the need for accountability is readily apparent in the Trump presidency’s policy of forcibly separating children from their parents at the border, which experts have concluded amounts to torture.⁸ In addition to working more diligently to reunite separated children with their families, the new administration should establish mechanisms to investigate and publicly disclose the facts surrounding the development and implementation of that policy, to

⁴ See *Build Back Better: Joe Biden’s Jobs and Economic Recovery Plan for Working Families*, JOEBIDEN.COM (last visited Nov. 30, 2020).

⁵ See Doris Meissner & Michelle Mittelstadt, *At the Starting Gate: The Incoming Biden Administration’s Immigration Plans*, MIGRATION POL’Y INST. (Nov. 2020); see also *A Vision for America as a Welcoming Nation: AILA Recommendations for the Future of Immigration*, AM. IMMIGR. LAWS. ASS’N (Nov. 30, 2020); *As Trump Prepares Immigration Rally in Arizona, Over 200 Organizations Release ‘2021 Immigration Action Plan’, Offering Blueprint to Undo Damage Wrought by Trump, Transform America’s Immigration System*, IMMIGR. HUB (Aug. 18, 2020); T. Alexander Aleinikoff & Donald Kerwin, *Improving the U.S. Immigration System in the First Year of the Biden Administration*, ZOLBERG INST. ON MIGRATION AND MOBILITY (last updated Nov. 10, 2020); *Immigration Priorities for a Biden Administration*, NAT’L IMMIGR. F. (Nov. 11, 2020).

⁶ See Gabby Orr & Andrew Restuccia, *How Stephen Miller Made Immigration Personal*, POLITICO (Apr. 22, 2019).

⁷ See Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. (forthcoming 2021); see also Hamed Aleaziz, *ICE Expelled 33 Immigrant Children Back To Guatemala After A Judge Said They Couldn’t*, BUZZFEED NEWS (Nov. 24, 2020); Antonia Noori Farzan, *Iranian Student Turned Around at the Airport was Deported Despite Order from a Federal Judge, Attorneys Say*, WASH. POST (Jan. 22, 2020); Matt Katz, *ICE Swiftly Deports Uzbek Man After He Alleges Being Beaten in Custody*, GOTHAMIST (Sept. 22, 2020); Miranda Bryant, *Allegations of Unwanted ICE Hysterectomies Recall Grim Time in US History*, GUARDIAN (Sept. 21, 2020).

⁸ See Michael D. Shear, Katie Brenner & Michael S. Schmidt, *‘We Need to Take Away Children,’ No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020); see also Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SECURITY (Oct. 18, 2018).

provide redress to children and families who suffered harms, and to ensure that officials at any level who directed, authorized, participated in, or condoned misconduct are held accountable.⁹ For wrongdoing that is less severe, less severe responses may be appropriate, but disclosure and proportionate forms of accountability remain essential—not only to penalize individuals who are culpable, but to deter future officials from similarly engaging in wrongdoing and flouting the rule of law.

Finally, the new administration should directly confront the broader context that has enabled the Trump presidency’s xenophobic agenda. For years, Trump has dehumanized and incited supporters to scapegoat immigrants, often in openly racist terms, while his Republican Party allies have acquiesced or joined him with impunity. The new president and other administration officials should forcefully repudiate this toxic discourse and find creative ways to contribute—on a regular and ongoing basis—to the development of a fundamentally different discourse about immigrants and immigration in the years to come.

Reconstructing Immigration Policy

Ultimately, the new administration should aspire to effect a paradigm shift in the regulation of immigration, moving away from the punitive regime of comprehensive immigration severity that has dominated immigration policy for decades and that directly enabled the Trump presidency’s policies. In its proposals for pandemic relief and economic recovery, the incoming administration has pledged to “build back better,” echoing an emergent approach to international post-disaster recovery that emphasizes creating sustainability, building resilience in affected communities, and reducing vulnerability to future disasters.¹⁰ Analogous principles should guide the new administration’s approach to recovery from the Trump administration’s damage to immigration policy.

The most durable means of achieving a paradigm shift would be through legislation, and the new administration certainly should pursue meaningful reforms in Congress. When doing so, however, it should avoid the flawed notion, as described (and criticized) by Frank Sharry, that taking a “hard stance on enforcement” might successfully “win over. . . support for comprehensive immigration reform.”¹¹ This largely discredited approach—which previous administrations have incorporated into both their enforcement practices and their legislative proposals—not only has failed to achieve reform. It also has further deepened and consolidated the overly punitive nature of the existing regime—thereby exacerbating some of the very dysfunctions in need of legislative reform in the first place. The new administration should break this self-defeating cycle, using its legislative agenda more creatively instead to articulate and build support for a fundamentally different framework.

⁹ See Denise Bell, *US Officials Involved in Policy of Family Separation Must Be Investigated*, GLOBE POST (Nov. 20, 2020).

¹⁰ See Report, Global Facility for Disaster Reduction and Recovery, *Building Back Better in Post-Disaster Recovery* (2020).

¹¹ See Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How the Right Went for Broke and the Left Fought Back in the Fight over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269, 288 (2017).

Wherever possible, the new administration also should build that kind of framework into its interpretation, implementation, and enforcement of existing laws, with careful attention to the ways in which executive actions can create the foundation for subsequent legislation.¹² While the Trump administration turned every aspect of immigration policy into a potential occasion for either excluding individuals from the United States or initiating removal proceedings, the new administration should use the opportunity created by a moratorium on deportations—which it already has pledged—to develop and articulate a different conception of the place of enforcement in immigration policy. Immigration enforcement is civil and administrative in nature, not criminal and punitive, and it also must reflect and embody principles of proportionality, due process, transparency, and accountability. Moreover, sound administration of immigration policy also requires attention to a range of other social, economic, and humanitarian objectives that are embodied in the immigration laws and that are no less important than enforcement.

In addition to rebalancing these objectives in the administration of immigration policy, the new administration should make its civil enforcement practices less punitive—for example, by minimizing the use of detention, barring ICE officers from mischaracterizing themselves as “police,” and making greater use of mechanisms that treat civil enforcement practices as occasions for individuals to come into compliance with legal requirements, rather than exclusively as occasions for detention, deportation, and other punitive responses.¹³ It also should make sure that the Justice Department’s statutory interpretation approaches and litigation strategies are aligned with the full range of values and principles reflected in the immigration laws, rather than aggressively interpreting statutory language in enforcement-maximizing fashion, as previous administrations often have done.

Finally, the new administration should reclaim and center rule of law values in its immigration policy agenda.¹⁴ As Tom Jawetz has explained, while immigration restrictionists have long deployed heavy doses of “law and order” rhetoric in support of their agenda, the immigration system itself has long failed to fulfill and encourage respect for rule of law principles. Those longstanding failures have worsened under the Trump presidency, which has gutted judicial independence of the immigration courts and whose officials have often defied judicial directives and legal requirements altogether.¹⁵ In both its executive actions and its legislative reform agenda, the new administration should make clear not only that a modernized immigration system that “builds back better” is consistent with rule of law values, but also that respect for the rule of law depends upon a fundamental paradigm shift.¹⁶

¹² See Tom Jawetz, *The President and Immigration Law: Restoring Faith in Our Immigration System Through Enforcement Discretion and Reform*, JUST SECURITY (Oct. 14, 2020).

¹³ See Press Release, Congresswoman Nydia M. Velázquez, Velázquez Seeks to Block Immigration Feds from Identifying as Local Police (July 11, 2019); see also Jawetz, *supra* note 12.

¹⁴ See Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019).

¹⁵ See Koh, *supra* note 7.

¹⁶ *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JOEBIDEN.COM (last visited Nov. 30, 2020).

The Continuing Importance of State and Local Engagement

In the coming years, state and local governments will continue to have important roles to play in shaping the politics and policy of immigration, both in cooperation and conflict with the federal government. While restrictionists have long urged states and localities to adopt various enforcement-oriented measures, many states and localities have recognized the constructive roles they can play in support of immigration—as institutions directly working to integrate and support immigrants as community members; as sources of alternative, potentially broader conceptions of immigrants’ rights; as influences on federal actors who seek their cooperation; and as focal points for building and asserting opposition to restrictionist policies at the federal level.¹⁷

During the Bush and Obama administrations, states and localities increasingly implemented initiatives to pursue these objectives, including more comprehensive immigrant integration programs; efforts to extend occupational licensing opportunities; efforts to expand access to government benefits, programs, and services; and policies limiting state and local participation in federal immigration enforcement activities.¹⁸ The Trump presidency’s anti-immigration crackdown has prompted many states and localities to become even more active defenders of immigration and immigrants’ rights¹⁹—perhaps most visibly through litigation directly challenging some of the Trump presidency’s high profile measures and other actions by state attorneys general, but also through a broad constellation of less visible ways that build upon the roles that states and localities already had come to play during previous administrations.²⁰

Even with a new administration that professes support for immigration, states and localities should remain engaged with immigration issues in these same ways. While states and localities will find additional opportunities to cooperate with the new administration in support of immigrant communities, there also will continue to be occasions in which the interests of their constituents prompt state and local governments to challenge federal immigration enforcement policies and practices, as they periodically did under the Obama administration.²¹ And with the federal government less hospitable to the restrictionist agenda, anti-immigration advocates likely will renew and intensify efforts to pursue restrictionist measures at the state and local levels—thereby heightening the importance of state and local responses in their own backyards.

¹⁷ See Anil Kalhan, *Immigration Enforcement and Federalism after September 11, 2001*, in *IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE*, (Ariane Chebel d’Appollonia & Simon Reich, eds., 2008).

¹⁸ See Anil Kalhan, *A Comprehensive Approach to “Immigrant-Friendly” State and Local Policies*, 2 DREXEL POLICY NOTES 7 (2015).

¹⁹ See Jonathan Miller, *Beyond the Courts: The Role of State and Local Governments in Supporting Immigrant Communities in the Trump Era*, ACS BLOGS (July 17, 2018).

²⁰ See Terri Gerstein, *The People’s Lawyer, For All the People: State Attorneys General and Immigrants’ Rights*, ACS ISSUE BRIEF (June 2020).

²¹ See Anil Kalhan, *Rahmmigration, Romneygration, and Federalism*, DORF ON L. BLOG (July 25, 2012).

Conclusion

While the Trump presidency has found success in implementing its sweeping anti-immigration measures, it never has enjoyed strong public or congressional support for its radical agenda. To the contrary, even as restrictionism and xenophobia have been ascendant among conservative political, legal, and judicial elites, polls steadily have found that majorities of Americans oppose the Trump presidency's immigration agenda and continue to hold positive views about immigration.²² In fact, public support for immigration has grown stronger during Trump's presidency, including among Trump's own supporters.²³ With this deep reservoir of public support for a new direction, the incoming administration and its allies should be neither tentative nor apologetic about seeking to do more than merely to roll back the Trump presidency's specific policy initiatives. Only by working to more fundamentally to overhaul the underlying institutions, practices, and laws that Trump inherited—which enabled his presidency to implement its restrictionist agenda so readily—will it be possible to fully turn the page and minimize the risk of a future president causing similar damage to immigration policy.

²² *Memo: Voters Across the Political Spectrum Oppose Trump's Immigration Policies*, DATA FOR PROGRESS (Nov. 3, 2020).

²³ See Mohamed Younis, *Americans Want More, Not Less, Immigration for First Time*, GALLUP (July 1, 2020); *Majority of Voters Say Growing Number of Newcomers to the U.S. Strengthens American Society*, PEW RES. CTR. (Sept. 10, 2020).



Labor Law Reform Opportunities 2020

Sharon Block* and Benjamin Sachs**

The diminishing strength of the labor movement has led to significant erosion of the economic well-being of millions of American workers for decades. As the rate of unionization has dropped, wages have stagnated and our political system has become less and less responsive to the interests of anyone but the wealthiest. The pandemic and recession have made this ebbing power a threat to workers' physical well-being in a very real sense—too many face a stark choice between continuing to draw a paycheck and entering an unsafe workplace with no effective way to have a voice in their employer's—or the nation's—pandemic response. As we have seen all too clearly, the threat is most acute for low-wage workers who are disproportionately women and workers of color.

While workers' frustration and fear has led, by some accounts, to an upswing in collective action, these actions are unlikely to significantly change the power dynamic in our economy or political system. Our federal labor law is simply incapable of translating this activity into the kind of collective power necessary to address these threats. That's why we have put forth recommendations to fundamentally rewrite American labor law in a project we call, Clean Slate for Worker Power.¹

Sadly, the urgency of the need for reform may be greater than the political will to enact needed legislation in Congress. Workers cannot wait for Congress to act at the scale needed. And though we continue to believe that the best answer is federal

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¹ CLEAN SLATE FOR WORKER POWER, cleanslateforworkerpower.org (last visited Nov. 30, 2020).

labor law reform, we recommend consideration of the following administrative measures and state law reforms in the interim.

We note, however, that even this second-best pathway is risky. The NLRA has been interpreted by the Supreme Court to have a broad preemptive effect, blocking some executive action and state regulation of collective bargaining and collective action. Considering the urgency of the project of building worker power, we would encourage a new administration and state policymakers to consider the risk but to act.

Federal Agency Actions

Conditioning Procurement and Federal Financial Assistance

Even before the massive pandemic relief legislation, the federal government spent approximately \$1 trillion per year on federal goods and services. Even more federal funds are spent on other types of federal financial assistance, such as grants, subsidized healthcare and federally backed loans. Receipt of these forms of assistance is a privilege for corporations. That privilege should come with responsibilities to create decent jobs, and any true definition of a decent job must include respect for the right to engage in collective bargaining. Executive orders that set high standards for recipients of federal funds should accompany any new pandemic relief legislation that subsidizes creation of contact tracing, green energy and care economy jobs. At a minimum, employers who have a record of violating workers' right to collective bargaining should be precluded from receiving federal financial assistance, and recipients of such assistance should be required to maintain neutrality if their employees choose to unionize. Consideration also should be given to a requirement that recipients of federal financial assistance provide for workplace safety stewards and establish workplace safety committees.

Labor Standards Enforcement Partnership

We are coming through a time when federal labor standards enforcement agencies have failed profoundly at their responsibility to protect American workers. During the pandemic, as thousands of workers were sickened and died as a result of exposure to COVID on the job, the Occupational Safety and Health Administration sat on the sidelines, refusing to hold employers accountable for these dangerous conditions. Similarly, the Wage and Hour Division spent most of the pandemic fighting for the narrowest possible interpretation of lifesaving paid leave provisions. And the NLRB has refused to issue complaints when workers tried to stand up for themselves. A new administration could rebuild trust with workers by adopting partnerships with worker organizations as a key feature of a new enforcement strategy. These partnerships provide several power-building advantages for worker organizations: they can offer resources that facilitate organizing and give workers the courage to stand up for their rights.

Restore NLRB and Optimize Processes for Pandemic Conditions

The Trump NLRB has wrought an extreme rollback of workers' collective bargaining rights. A new administration must start re-empowering workers by appointing members of the NLRB who will be true to the purpose of the Act: "to encourage[e] the practice and procedure of collective bargaining." In addition to undoing the damage done by the Trump NLRB leadership, a new Board must also address the ways that the pandemic has made traditional modes of organizing exceedingly difficult if not impossible. We would encourage a new NLRB to adopt new rules for holding representation elections virtually, ensuring workers access to digital means of communication, and allowing on-line expressions of support for union representation.

State and Local Actions

Just Cause Dismissal Standards

A powerful way to protect worker organizing is to end at-will employment and adopt just-cause protections for all workers. Although the NLRA protects workers from retaliation for exercising their rights under the statute, at-will employment makes it far too easy for employers to provide pretextual reasons for dismissals.

Enable Collective Bargaining for Workers Outside the NLRB

The one area where it is pretty clear that states can legislate collective bargaining rights is for workers outside the protection of the NLRA. Until federal law clears up the massive misclassification of gig workers, states can fill in the void by enacting collective bargaining rights for ride hail drivers, food app delivery drivers, and others now treated as independent contractors. In addition, more states can enact Domestic Workers Bills of Rights and farmworker bargaining bills.

Mandate Safety Stewards and Sectoral and Workplace Safety Committees

When it comes to workplace safety and health, legal reforms to ensure worker power and voice are critical. To ensure that workers have the power they need to demand safe and healthy workplaces, and to ensure that there are mechanisms in place to channel this voice into meaningful change, we recommend the following reforms: 1) All workplaces should have a "safety steward" elected by workers and charged with ensuring compliance with safety and health rules; 2) in all workplaces, a workplace safety and health committee should be elected by workers and charged with adapting and implementing safety and health rules for that workplace; and 3) all sectors of the economy should have a safety and health commission charged with negotiating baseline health and safety rules for all firms in the sector.



A Better Response to COVID-19

Polly J. Price*

The next presidential term will commence exactly one year after the first confirmed U.S. case of COVID-19. The U.S. has since recorded the highest number of COVID-19 deaths and infections in the world. Because an estimated ninety percent of Americans remain vulnerable to infection, the next administration will continue to face the greatest public health threat in more than a century, even if a vaccine does become widely available.¹

Shamefully, COVID-19 has devastated nursing homes and has disproportionately harmed Blacks, Latinos, and Native Americans. The U.S. failed to respond adequately in the early stages of the coronavirus pandemic despite ample warning and the observed experience of other countries. It has continued to fail: Nursing homes and other long-term care facilities have experienced preventable deaths long after we have known how to protect their residents.²

Clearly, a state-by-state, piecemeal approach doesn't work, especially with uneven resources for reliable and affordable testing and contact tracing, a continuing and increasingly severe shortage of personal protective equipment (PPE), and the varying political will of state and local elected leaders regarding proven social distancing measures. Controlling a pandemic would never have been easy, but this is especially true in one of the most fragmented public health systems of any nation. In the U.S., control of contagious disease threats is divided among

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¹ See Shuchi Anand et al., *Prevalence of SARS-CoV-2 Antibodies in a Large Nationwide Sample of Patients on Dialysis in the USA: A Cross-Sectional Study*, LANCET (Sept. 25, 2020).

² See Priya Chidambaram et al., *Racial and Ethnic Disparities in COVID-19 Cases and Deaths in Nursing Homes*, KAISER HEALTH NEWS (Oct. 27, 2020).

more than 2,500 state, local, and tribal public health departments. Many of these are underfunded and understaffed in normal times and lack the scientific expertise to advise state governors and coordinate an effective response.

But it is not too late to implement a robust national strategy to save lives. The administrative apparatus of the federal government should be used immediately to frame a national response centered around three policy priorities: (1) ensure sufficient medical supplies, especially PPE, for medical providers, nursing home, and assisted living staff; (2) establish a national testing policy, providing greater immediate testing capability to state and local governments; and (3) restore the credibility of the lead federal agencies for pandemic response—the FDA and CDC—without which the public may not be willing to accept a vaccine.

Use the Federal Government’s Purchasing and Contacting Authority to Ensure an Adequate, Affordable, and Properly Distributed Supply of Critical Medical Supplies, Especially PPE

Critical medical supplies such as personal protective equipment are still scarce. Pre-existing scarcities and a lack of central coordination have left state and local governments and private entities scrambling for critical medical supplies and equipment. Competition for such supplies has driven costs up precisely when the groups seeking to buy them are suffering pandemic-driven financial constraints. The consequent shortages have led to a higher number of preventable deaths, particularly among the elderly and most vulnerable populations.

Existing federal executive authority should be used to coordinate the production, acquisition, and distribution of critical supplies and equipment. Federal agencies routinely invoke the Defense Production Act for critical military equipment purchases and in disaster response following hurricanes. But this option has been barely used for critical medical supplies despite widespread shortages driving up prices for all healthcare providers. As one report noted, “The federal response to COVID-19 shortages has been a surprising and tragic example of . . . executive underreach.”³

Federal authority and purchasing power should be used to encourage production of needed materials by guaranteeing payment to the producers and orchestrating allocation of supplies to the states, possibly by deploying state health departments to distribute materials. These federal executive powers should also be used to restore, enhance, and administer the depleted national stockpile of emergency supplies.

³ Evan Anderson and Scott Burris, *Assuring Essential Medical Supplies During a Pandemic: Using Federal Law to Measure Need, Stimulate Production, and Coordinate Distribution*, 173, in PUB. HEALTH L. WATCH, ASSESSING LEGAL RESPONSES TO COVID-19 (August 2020).

The Nation Needs a Coherent Testing Policy, With Widely Available Rapid Tests

The capacity to conduct widespread tests with rapid results is slowly improving, but many experts believe the U.S. requires far more testing, with quicker turn-around, to control outbreaks and inform targeted quarantine. This is essential to keep schools and workplaces open.

Lack of a coordinated testing policy has left nursing homes, for example, forced to pay for tests that are markedly less accurate than lab-based diagnostics.⁴ In communities with high rates of infection, a typical nursing home requires hundreds of tests a week. To make matters worse, state agencies responsible for protecting nursing home residents seem to be failing at the job, while the Center for Medicare and Medicaid Services could do far more to ensure safety.⁵ Add to this the burden of new federal reporting rules, which sometimes conflict with state and local health agency mandates, and the difficulty is only enhanced.

A testing policy coordinated at the federal level, ideally by the CDC, would make the most reliable rapid tests available at fixed, predictable cost to the highest priority users. The CDC should also use its public health emergency authority to coordinate reporting requirements among the several levels of government, with the objective of imposing a single clear set of standards that will generate clear, consistent, and useful disease data.

Restore Confidence in American Scientific Expertise Through Coordinated Messaging

Since the beginning of the pandemic, the presentation of scientifically sound information to the public has been systematically undercut in the service of political agendas. The jumbled messaging eroded the public's confidence in what the experts have to say. Whether the public will accept an eventual vaccine is largely dependent upon public trust in the FDA, as is public willingness to follow CDC recommendations for limiting the spread of COVID-19. We need a massive advertising campaign to instill trust in a COVID-19 vaccine, one that is especially targeted toward communities where vaccine skepticism is long-standing.

The Executive Branch must assume responsibility for designating a single, scientifically-qualified national voice on public health policy and use its resources to build public confidence in that voice. That voice should originate from the CDC, which has the statutory mandate to respond to and communicate about infectious disease. Coordinating testing, supply management, and public presentation under the CDC's auspices would

⁴ See Andrew Jacobs, *Testing Hell: Gift of Devices to Nursing Homes Brings New Problems*, N.Y. TIMES (Sept. 29, 2020).

⁵ See Carrie Teegardin, *Report Reveals Testing Botched, No Hand Soap During Deadly Outbreak at Georgia Nursing Home*, ATLANTA JOURNAL-CONSTITUTION (Nov. 13, 2020).

be optimal, as would the consistent support of the President to develop a coordinated national effort.

While historically state and local health departments took the leading role in contagious disease outbreaks, modern conditions mandate a far greater federal role. Congress never intended that the federal government should sit on its hands during a pandemic crisis while delegating all critical response functions to state and local governments. Material development and distribution, testing resources and regulation, and message coordination are three areas in which the Executive Branch must assume its responsibility for development of the necessary nationwide pandemic response.⁶

⁶ For additional priorities for the federal branch and state governments, see the recommendations of leading legal experts in PUB. HEALTH L. WATCH, ASSESSING LEGAL RESPONSES TO COVID-19 (August 2020).



Police Liability Reimagined: Vicarious Municipal Liability for Constitutional Deprivations

Teresa E. Ravenell*

Despite decades of reforms, policing in the United States has reached a crisis point in 2020. The rallying call to “Defund the Police” is, at its base, a demand to legislatures to overhaul our current system and reimagine policing in the United States. This essay proposes one single step Congress can take to reimagine police liability and accountability in the United States that will have five big effects. It also provides parallel state and local reform alternatives.

Logistically, police reform in the United States is challenging, in part, because of the differences amongst departments. Most policing occurs on a local level, and there are approximately 18,000 different police departments in the United States. Departments range in size, training, and regulations. These differences are further complicated by variations in state laws, police union contracts, and indemnification agreements. Accordingly, reform measures that work in one city will not necessarily work elsewhere. Nevertheless, there are some common threads connecting all police departments. Federal legislation offers an opportunity for uniform, widespread reform.

The United Constitution governs the conduct of all law enforcement officials and 42 U.S.C. § 1983 allows victims of police misconduct to bring a civil suit against government officials for constitutional deprivations.¹ As the U.S. Supreme Court recognized in 1980, “section 1983 was intended to not only provide compensation

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¹ 42 U.S.C. § 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations.”² The text of § 1983 is plain, simple, and powerful. Yet, over the last sixty years, the Supreme Court’s interpretation of the statute has stripped it of much of its power.

Section 1983 allows persons deprived of a federally protected right to bring a federal civil action against the persons responsible for that deprivation. As the Court noted in *Mitchum v. Foster*, “[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.”³ Yet, under the current doctrine both municipalities and individual defendants are shielded from liability. Causation requirements protect the former and qualified immunity guards the latter. Moreover, in the few cases where an individual defendant faces liability, the municipality almost always indemnifies the official. The irony of all of this is that § 1983 has almost no deterrent effect on individual bad actors and provides municipalities with little incentive to adopt broader reform measures.

Federal Reform of 42 U.S.C. § 1983

This project poses one “big idea”: Congress should amend § 1983 to make municipalities vicariously liable. Vicarious liability and the respondeat superior doctrine make an “employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.”⁴ In the context of 42 U.S.C. § 1983, a municipality should be liable when its law enforcement officials deprive a person of a constitutional right.

This one “big idea” will have five big effects. Amending § 1983 to make municipalities vicariously liable will: (1) simplify causation requirements; (2) negate the need for qualified immunity; (3) promote reform by ensuring those best positioned to implement change—municipalities—have the financial incentive to adopt necessary reforms; (4) increase the likelihood meritorious plaintiffs are compensated for their injuries; and (5) promote transparency in municipal budgetary decisions.

Vicarious Liability Will Simplify Causation Requirements

The Supreme Court has held that municipalities are persons for purposes of § 1983 liability. Yet, the Court has held that to establish liability, § 1983 plaintiffs must prove they were deprived of a constitutional right and that the municipality caused the deprivation through its policy or custom. This is often easier said than done.

² *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

³ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

⁴ *Respondeat Superior*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Section 1983 plaintiffs often struggle to identify an unconstitutional policy or custom. Occasionally, a plaintiff will be able to identify a policy or custom that directs unconstitutional conduct. Frequently, however, plaintiffs will need to show that the municipality failed to adopt a new or different policy and the failure amounted to deliberate indifference. In practice, a plaintiff can only do this if the municipality creates and retains incident reports and disciplinary records. Many municipalities do not, and current liability rules create a perverse incentive for them not to do so—if plaintiffs are unable to identify prior incidents of misconduct, the municipality often can avoid liability.

Vicarious Liability Will Make the Qualified Immunity Defense Unnecessary

Unable to establish municipal liability, § 1983 plaintiffs often sue individual police officials. Yet, qualified immunity is a judicially created doctrine that shields these same officials from monetary liability if the law was not “clearly established.”⁵ There are so many things wrong with this defense. Not only is it conceptually difficult for courts to apply the doctrine, but there are many procedural issues surrounding the doctrine. “As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁶

In *Harlow v. Fitzgerald*, the seminal case for qualified immunity, the Court reasoned that § 1983 litigation resulted in certain “social costs”—it distracted officials from their duties, inhibited their discretionary action and deterred “able people from public service.” Qualified immunity was intended to reduce these costs by resolving § 1983 claims early in the litigation process and shielding officials from liability.

Vicarious liability will achieve these very same aims and qualified immunity will be unnecessary. If the fear of personal liability distracts, inhibits, and deters government officials, vicarious liability, like qualified immunity, should alleviate all these concerns. With vicarious liability, government officials will know their employer ultimately will shoulder financial responsibility for their misconduct. Accordingly, they can act without fear of liability, which seems to be one of the primary aims of the qualified immunity defense. The drawback, of course, is that there may be instances in which one wants to hold the individual official personally liable. However, in practice, even when they are denied qualified immunity, police officials rarely pay for their misconduct.⁷

Vicarious Liability Will Promote Reform

Individual liability is a poor way of preventing future violations and is based upon flawed assumptions about how information is disseminated. The qualified immunity defense assumes that “a reasonably competent public official should know the law governing his

⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

⁶ *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

⁷ Municipalities almost always indemnify individual defendants. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). Widespread indemnification is usually a consequence of police union agreements or state or municipal statutes.

conduct.”⁸ Yet, the very idea that, in practice, police officials are monitoring case law and interpreting judicial opinions is absurd. Rather, police officials rely on their superiors to develop and, as necessary, amend policies that reflect current legal rules. This reliance reflects the reality that municipalities, as compared to individual police officials, are far better positioned to avoid constitutional violations. As Peter Schuck has explained,

Unlike individual low-level officials, agencies control most of the resources, constraints, incentives, and conditions that actually influence officials’ behaviors toward the public. They can recruit different types of personnel and train and retrain them to perform their duties in particular ways. They can reward and punish officials for conforming to and departing from those norms, and they can develop new modes of supervision and control.⁹

Indemnification is a better choice than individual liability and a step in the right direction. Yet, municipalities may be able to “opt out” of indemnification. Even more problematic, with indemnification, municipalities routinely benefit from officers’ qualified immunity; if the officer is entitled to qualified immunity there is no need for the municipality to indemnify him or her. This allows municipalities to treat misconduct as a “one-off situation” that can be dismissed, minimized, or rationalized as cheaper than reform. Vicarious liability, however, puts an onus on municipalities to review every instance of liability. Regular assessments will increase the likelihood municipalities identify problematic behaviors and patterns and, when necessary, adopt new or different policies or offer individual officers additional training or counseling.¹⁰ This, in turn, should reduce the likelihood of recurrences in the future.

Vicarious Liability Will Better Ensure Compensation

The Supreme Court’s interpretation of § 1983 places liability primarily on individual officials. This, however, does little to advance one of § 1983’s primary goals—compensation. Police officials, like most Americans, are not in a position to satisfy a financial judgment against them. When § 1983 plaintiffs depend entirely upon individual police officials to compensate them for their injuries, they will find themselves without a remedy. Making municipalities vicariously liable will better ensure that victorious plaintiffs will be compensated for their injuries.

Promote Transparency in Municipal Budgetary Decisions

Finally, vicarious liability has the potential to make municipalities more accountable to their constituents by promoting transparency in municipal budgets. One criticism of indemnification is that it often shifts the cost of liability to taxpayers (i.e.,

⁸ *Harlow*, 457 U.S. at 818–19.

⁹ See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 104–05 (1983).

¹⁰ To the extent that police unions impede municipal efforts to hold officers accountable for their misconduct, vicarious liability gives municipalities a clear incentive to rethink their role and, where warranted remove the obstacles that stand between them and the reform measures they should undertake to reduce future liabilities.

municipal residents). The current system of liability—individual liability followed by indemnification—often obscures police misconduct. Vicarious liability may encourage municipalities to rethink how they budget and allocate costs. For example, municipalities can include police liability as a line item in municipal budgets. Doing so would lead to increased transparency and promote conversations about the true cost of misconduct and who bears these burdens, because municipal money spent on police misconduct necessarily funnels money away from other municipal projects.

State and Municipal Level Reforms

The following are steps state and local governments can take to complement and supplement federal action:

State Level Reforms

- Eliminate state immunities for police officials.
- Require municipal indemnification of police officials.
- Examine and reconsider police union contracts and police collective bargaining agreements.

Municipal Level Reforms

- Implement data collection measures to identify patterns of misconduct.
- Include police liability as line item in police department budget and invite public comment.
- Examine and reconsider police union contracts and police collective bargaining agreements.
- Coordinate civil litigation and police training and discipline.

Conclusion

Imagine a civil system where officials are responsible for the constitutional violations and municipalities are responsible for their officials. Congress imagined this system when it passed the Klu Klux Klan Act of 1871.

Yet, over the past sixty years the Supreme Court has stripped this statute of much of its power. By creating so many absolute immunities and limiting municipal liability, the Supreme Court has forced liability down the chain of command until it has fallen on the shoulders of individual executive officials. To correct this misalignment the Court created qualified immunity.

Today, we find ourselves with a with a civil rights system where victims have no remedy and officials have little accountability. Fortunately, the solution does not require that we create a new system. We simply need to strip away the elements encumbering our current system. Congress should amend § 1983 to make municipalities vicariously liable. This one big idea will have many big effects.



Stop Privileging Religious Liberty Over All Other Interests

Caroline Mala Corbin*

Religious liberty is a core constitutional value. Unfortunately, it has been too often wielded as a sword to privilege the religious observer's interests over all others. No constitutional right is absolute, and religious liberty is no exception. I therefore propose, especially in the middle of a pandemic, the elimination of religious exemptions for vaccines. I also recommend that state and federal Religious Freedom Restoration Acts (RFRAs) be amended to make clear that they do not create a religious right to discriminate. Finally, I urge that governments cease their promotion of Christian prayers and symbols. Government-endorsed Christianity strengthens Christian nationalism, a divisive movement that espouses religious hierarchies.

Eliminate Religious Exemptions for Vaccines

The novel coronavirus has taken an enormous toll on the United States. According to the Johns Hopkins Coronavirus Resource Center, over seven million Americans have been sickened with COVID-19, with more than 200,000 dying.¹ Few families have not felt its impact. Moreover, the burden has not fallen equally, with studies finding significant racial disparities. According to the CDC, compared to white non-Hispanic Americans, the number of cases has been 2.8 times higher among Native Americans, 2.8 times higher among Hispanic Americans, and 2.6 times higher among African Americans.²

Sometime in 2021, there will (hopefully) be a fully-vetted vaccine against COVID-19 that has been proven safe and effective for both adults and children. It will not be a

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¹ Johns Hopkins Coronavirus Resource Center (last visited Dec. 1, 2020).

² COVID-19 Hospitalization and Death by Race/Ethnicity, CTR. FOR DISEASE CONTROL AND PREVENTION (last updated Nov. 30, 2020).

panacea, but together with other scientifically-supported health measures, it will be critical to controlling the pandemic. But the vaccine will not succeed if people do not take it. Currently, all states require that children be vaccinated for certain preventable diseases, such as polio and measles. These laws will need to be expanded to add COVID-19 to the list and to cover adults as well as children.

The problem is that most states also allow exemptions from mandatory vaccination laws. Some exceptions are unavoidable: certain people cannot physically tolerate vaccines due to medical conditions. But most states also allow exemptions based on moral or religious objections.³ Only five states—California, Mississippi, West Virginia, New York and Maine—have no nonmedical exemptions. Several eliminated them after preventable outbreaks, where herd immunity failed because too many people had opted out.⁴ More states will need to eliminate religious exemptions for precisely the same reason: we cannot achieve herd immunity if too many people refuse COVID-19 vaccines.

Eliminating nonmedical exemptions from vaccine laws will have the added benefit of avoiding preventable outbreaks like the whooping cough and measles outbreaks that have occurred in recent years.

Amend Federal and State RFRAs to Preclude Challenges to Civil Rights Protections

Slowly but surely, the United States is moving towards greater LGBTQ equality. In 2015, the Supreme Court struck down as unconstitutional same-sex marriage bans in *Obergefell v. Hodges*. In 2020, in *Bostock v. Clayton County*, the Court held that “sex” in Title VII of the Civil Rights Act covers sexual orientation and gender identity. In one fell swoop, it has become illegal in the entire nation, not only select states or municipalities, to fire or demote someone just because they are gay or transgender. It is likely only a matter of time before courts find that federal laws that ban discrimination based on “sex” in areas such as education (Title IX⁵), housing (Fair Housing Act⁶), and health care are similarly inclusive.⁷

A loophole to full equality remains, however, in the form of religious liberty challenges to anti-discrimination laws. In particular, the federal Religious Freedom Restoration Act⁸ (applicable to federal laws) and its state counterparts⁹ (applicable to state laws) provide that religious objectors are entitled to an exemption from any law that imposes a substantial burden on their faith unless the law passes strict scrutiny. Strict scrutiny, which

³ *States with Religious and Philosophical Exemptions From School Immunization Requirements*, NAT’L CONF. OF ST. LEGS. (June 26, 2020).

⁴ Lena H. Sun, *California Vaccination Rate Hits New High After Tougher Immunization Law*, WASH. POST (Apr. 13, 2017); Aleksandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccinations – But Most States Retain It*, PEW RES. CTR. (June 28, 2019).

⁵ 20 U.S.C. § 1681 et seq.

⁶ HOUSING DISCRIMINATION UNDER THE FAIR HOUSING ACT, U.S. DEP’T OF HOUSING AND URB. AFF. (last visited Dec. 1, 2020).

⁷ *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (June 12, 2020).

⁸ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

⁹ *State Religious Freedom Restoration Acts*, NAT’L CONF. OF ST. LEGS. (May 4, 2017).

requires that the law be the only way to achieve a compelling government interest, is a hard standard to satisfy.

Moreover, these laws are already expansive in scope, in large part due to the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* (2014).¹⁰ To start, the Supreme Court held that in addition to religious individuals and nonprofits, even the multi-million dollar for-profit Hobby Lobby Stores, Inc. can bring a RFRA claim. In addition, the *Hobby Lobby* Court counseled lower courts to be deferential to religious objectors' claims of substantial burden. Consequently, if a religious baker or a religious social service organization claims that it substantially burdens their faith to hire an LGBTQ person or provide services to an LGBTQ family, the Supreme Court will probably agree.

Thus, the pivotal question is whether anti-discrimination laws will pass strict scrutiny. In *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission* (2018),¹¹ when Justice Kennedy was still on the bench, the Supreme Court avoided answering that question. The Supreme Court today may not be so hesitant.

To prevent the misuse of RFRA to create a "religious right to discriminate," both federal and state versions should be amended to make clear that RFRA claims may not be asserted against civil rights protections. Indeed, such an amendment to the federal law was proposed in the Do No Harm Act.¹² Similar amendments ought to be enacted to close this potential loophole to anti-discrimination laws.

To Avoid Exacerbating Christian Nationalism, End Government-Sponsored Christianity

Christian nationalism is not a new phenomenon, but it is ascendant again.¹³ Christian nationalism maintains that the United States is, has always been, and should always remain, a Christian nation, and that the United States government must further Christian values. It envisions a perfect overlap between religious identity and national identity.

If America is a Christian nation, it follows that true Americans are Christian. The corollary is that non-Christians are not real Americans. In short, Christian nationalism necessarily implies a hierarchy based upon religion, with Christian insiders who truly belong and non-Christian outsiders who do not.

Polls reveals that this religion-based hierarchy is not a hypothetical but a real problem in the United States.¹⁴ One found that thirty-two percent—that is, almost a third—of Americans said that being a Christian is "very important" to being a true American, and another nineteen percent said it was "somewhat important."¹⁵

¹⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹¹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

¹² Do No Harm Act, H.R. 1450, 116th Cong. (2019).

¹³ Paul Rosenberg, *Sociologist Andrew Whitehead: How Christian Nationalism Drives American Politics*, SALON (Feb. 29, 2020).

¹⁴ June 2015 Survey, PUB. RELIGION RES. INST. (2015).

¹⁵ Bruce Stokes, *What It Takes to Truly Be 'One of Us'*, PEW RES. CTR. (Feb. 1, 2017).

Moreover, this in-group/out-group dichotomy of who truly belongs to the polity has concrete consequences. In fact, a growing body of social-science literature has found that those with strong identification with Christian nationalism have more hostile attitudes towards out-groups, religious and otherwise, and more tolerance for policies that negatively impact them. That is, it does not simply lead to symbolic exclusion; it may lead to actual exclusion.

Government-sponsored Christianity both reflects and exacerbates Christian nationalism. Causation is not all one-way—it rarely is. The government, however, does play a significant role in shaping social and political norms. When the government supports Christian prayers and Christian symbols, it is also—whether explicitly or not, and intentionally or not—supporting Christian nationalism, which, at its core, is about a union of the state with Christianity.

Consequently, government at all levels should end the practice of promoting state Christianity. Governments should eliminate prayers before legislatures, as they tend to be overwhelming Christian.¹⁶ They should reverse laws mandating the availability of Bible study classes in public high schools.¹⁷ And governments should stop displaying Christian symbols like nativity scenes to celebrate holidays or Latin crosses to memorialize war dead.¹⁸ There is no shortage of American texts and symbols, such as the U.S. Constitution and the bald eagle. Unlike the symbols of a single-faith tradition, which do not speak to other religious observers, never mind those who live without religion, these symbols would represent American values shared by everyone.

¹⁶ *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014).

¹⁷ David Badash, *Bills Requiring Public Schools to Teach the Bible are Flooding State Legislatures – Some are Becoming Law*, NEW CIV. RTS. MOVEMENT (May 8, 2019).

¹⁸ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).



Congress Needs to Enact A Reproductive Justice New Deal

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The promise of *Roe v. Wade* in many ways seems a dream deferred or more elusive in the wake of Justice Ruth Bader Ginsburg's passing. In 1973, in a 7-2 decision, the Supreme Court decriminalized abortion, making it legal to terminate a pregnancy. According to the Court, the right to terminate a pregnancy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. . . [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The opinion, written by Justice Blackmun, a Nixon appointee, spoke to the realities of women's lives.

Justice Blackmun wrote, "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." The Court found, "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved." As the Court acknowledged, forcing women to continue unwanted pregnancies could "force upon the woman a distressful life and future," including "[p]sychological harm." The Court acknowledged that both mental and physical health could be taxed by childcare, and opined, "bringing a child into a family already unable, psychologically and otherwise, to care for it," could be devastating. That was nearly fifty years ago.

Today, with Justice Ruth Bader Ginsburg off the Court, the fragility of abortion rights is glaringly apparent. What may be less visible, however, are the devastating risks to reproductive health, privacy, and autonomy apart from abortion and how

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those risks are magnified for vulnerable communities of color and LGBTQ people. This is why we need a Reproductive Justice New Deal or Bill of Rights.

Today, a pregnant person is fourteen times more likely to die by continuing the pregnancy versus having an abortion. The United States leads the developed world in maternal mortality, ranking well below peer nations as well as those with greater economic vulnerabilities. The devastating scale of this hits close to home: Texas and Louisiana rank as the deadliest places in the developed world to give birth.

Nationally, Black women are nearly four times as likely as their white counterparts to experience death related to pregnancy. The data is even more severe at the local levels where the rates magnify, resulting in gross disparities. For example, in some southern states, Black women risk death during pregnancy at rates ten times that of white counterparts. Sadly, among many of the former confederate states, Black women's reproductive safety and health remain vulnerable.

Even while women in the United States experience deadly tolls in pregnancy and childbirth, myriad laws make it more difficult for a pregnant person to terminate a pregnancy in the U.S. These laws include mandated waiting periods, forced vaginal ultrasounds, restricting coverage in private insurance plans, state mandated counseling and transfer agreements, unnecessary and arbitrary facility requirements, and bans on telemedicine—to name a few. Several states, including Alabama, Kentucky, Louisiana, Mississippi, Missouri, and Ohio enacted laws to ban abortion even in cases of rape and incest, providing no exceptions. Those laws have yet to go into effect due to court injunctions.

However, it is not only the threat to abortion rights and staggering rates of maternal mortality that should concern policymakers. Rollbacks to sex education in schools are commonplace along with “abstinence only” content in place of rigorous, science-based curricular on human biology. The results are not surprising: the U.S. leads the developed world in teen sexually transmitted infections. These infections, if untreated, can later result in aggravated health harms, including cervical cancer.

Contraceptive access suffers vulnerability too, through pharmacists claiming a religious freedom to avoid filling prescriptions for birth control, including for couples, and the Trump administration issuing a rule to “protect” the “conscience rights” of all Americans. The Trump rules extend “conscience protections to Americans who have a religious or moral objection to paying for health insurance that covers contraceptive. . . services.” These agency rules have largely gone unnoticed in popular media, but they are no less relevant than concerns related to abortions. This is especially so considering the Supreme Court's 2014 ruling in *Burwell v. Hobby Lobby*. In that case, the Court's all-male, conservative majority ruled that the Religious Freedom Restoration Act of 1993 (RFRA) allowed for-profit companies to deny contraceptive coverage to female employees who would otherwise be entitled to such coverage if the religious objection did not exist.

Finally, recent allegations of forced sterilizations in immigrant detention centers are also worrying and speak to the need for legal intervention and protections. Sadly, this is nothing new; Black women experienced reproductive horrors during chattel slavery, and in many cases their reproductive rights barely improved during Jim Crow, when eugenics policies resulted in coercive state sterilizations—so much so that in Mississippi forced sterilization against Black women became known as the “Mississippi Appendectomy.”

For the victims—poor white women, Indigenous women, Latinas, and Black women—this was state sponsored terrorism. Even in the 1970s, states continued to carry out these practices. In 1974, Alabama sterilized sisters Mary Alice and Minnie Relf when aged fourteen and twelve, respectively. Years later, a lawsuit filed by the Southern Poverty Law Center on behalf of the Relf sisters revealed that federally funded programs sterilized 100,000 to 150,000 people each year. Clearly, some of those sterilizations may have been voluntary, but the majority were likely facilitated through coercive means.

In Puerto Rico, it is estimated that one-third of its female population was sterilized. So common it was called, “la operación” (the operation). It’s unknown how many American women in total suffered this fate—or continue to as *Buck v. Bell* was never overturned. That coercive sterilizations might take place in U.S. custody reeks of bygone eugenics policies sanctioned by the Supreme Court in *Buck v. Bell* nearly 100 years ago.

For all these reasons and more, it is time for a Reproductive Justice New Deal. A law is needed that does more than codify *Roe v. Wade*, as the Women’s Health Protection Act (WHPA) aims to do. That, too, is not enough. During the Trump administration basic public health and safety for girls, women, and LGBTQ populations came under attack. Instead, we need a cultural shift in politics. First, policy is needed that protects a full range of reproductive health services, including contraception, prenatal healthcare, post-natal care, and abortion. Second, reproductive rights are human rights and should be regarded as such not only by the Biden-Harris administration, but also every administration that follows. Finally, the efforts to advance reproductive health, rights, and justice must be understood as the continued fight for equality, inclusion, and belonging in our democracy.