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ABOUT THE JOURNAL

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we foster a community of like-minded students who are passionately engaged in learning and debate about the critical issues of our time.



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This photo courtesy of Colin Chan (CMC '28) shows the Bridges Auditorium on Pomona College campus in the afternoon.

LETTER FROM THE EDITORS

Dear Reader,

As we present the 12.1 edition of the Claremont Journal of Law and Public Policy, we want to first take a moment to express our gratitude for each one of our writers and editors. Each article in this edition—from the initial brainstorming to the finishing touches—reflects the expertise of the author and the thoughtful contribution of our editorial team. We are especially proud to announce Anna Revill (PO '26) as the winner of this edition's Byron Cohen Award for excellence in research, writing, and analysis, and Liam Lynch (PO '25) as the winner of this edition's Isaac Cui Award for excellence in editing and mentorship.

The Journal's recent work has unfolded against a backdrop of significant legal and policy challenges on-campus, nationally, and globally. This has underscored the necessity of thoughtful analysis—we need to address these pressing issues using evidence-based policymaking. As editors, we have been inspired by the perspectives our writers have brought to these conversations, and we hope that you will feel the same. This edition of our journal brings together four pieces that exemplify both depth and breadth of contemporary legal and policy inquiry.

First, Anna Revill takes on the issue of prosecutorial transparency, making a compelling argument for greater openness in criminal legal proceedings. Revill highlights how prosecutorial discretion, cognitive bias, and weak enforcement have contributed to wrongful convictions. Through a series of case studies, she illustrates the devastating consequences of withheld exculpatory evidence and argues that open file discovery is the most effective reform to ensure due process for all.

Next, Evan Samaro shifts our focus to transportation policy, evaluating the shortcomings of California's high-speed rail project and advocating for a more pragmatic approach that prioritizes local rail development. While acknowledging the long-term potential of high-speed rail, he argues that prioritizing local transit investments would yield more immediate and tangible benefits, particularly for marginalized communities that rely on public transportation.

Nicole Chu examines the Individuals with Disabilities Education Act (IDEA), analyzing how legal language shapes special education rights and accessibility. She underscores the critical role of parental awareness in navigating the complexities of the law and advocating for children with disabilities. Chu highlights systemic barriers within special education and argues that equipping parents with legal knowledge is key to ensuring that IDEA fulfills its promise of providing equitable educational opportunities.

Finally, Victor Hughes Anyomi examines how the U.S. practice of attaching Reservations, Understandings, and Declarations to international human rights treaties affects global accountability. He explores the motivations behind these reservations and their broader implications for both domestic enforcement and international human rights norms. Anyomi ultimately questions whether U.S. engagement with such treaties represents a genuine commitment to human rights or merely a symbolic gesture.

We hope these pieces challenge assumptions, spark conversation, and inspire further exploration of the issues they address. Thank you for engaging with this edition of our Journal. We are honored to share these contributions with you.

Sincerely,

Ari Srivastava Grace Zheng

Co-Editors-in-Chief

SHADY *BRADY*:

A CASE FOR OPEN FILE DISCOVERY

INTRODUCTION

In 2007, Dr. Michael Risinger calculated an empirically justified factual wrongful conviction rate, finding that a minimum of 3.3% and a likely maximum of 5% of convictions are wrong.[1] It is impossible to classify these calculations as *de minimis*; 3.3% means 80,000 innocent people are incarcerated and 168,300 more are under correctional supervision.[2] But what causes this? As Brian Gregory explains, "in the vast majority of exonerations it is the case that the prosecution, law enforcement personnel, or both possessed undisclosed evidence which would tend to prove the innocence of a particular defendant."[3] Since the Supreme Court decreed that there is no general constitutional right to discovery in criminal cases, the *Brady* rule remains the best hope for innocent defendants.[4] The *Brady* rule, established in *Brady v. Maryland* (1963), requires prosecutors to disclose any exculpatory evidence to the defense that is material to guilt or punishment.[5] Exculpatory evidence includes any information favorable to the defendant, such as evidence that could negate guilt, reduce a sentence, or impeach a witness's credibility.[6] Failure to disclose such evidence violates the defendant's constitutional right to a fair trial under the Due Process Clause of the Fourteenth Amendment.[7] However, *Brady* fails to adequately protect factually innocent defendants, allowing for the suppression of crucial evidence.

While policies are often implemented to safeguard vulnerable individuals in the legal system, they can inadvertently inflict harm—*Brady* is a prime example. In the Supreme Court's 1963 decision in *Brady v. Maryland*, our justice system took a definitive stance on the criminal defendant's constitutional right to exculpatory evidence. As a result, "*Brady* rules" are held as one of the primary vehicles in which the justice system strives to protect the wrongfully accused. However, studies conducted by legal and scientific scholars have shown that despite the intentions behind *Brady*, the post-*Brady* criminal court maintains an alarmingly high rate of wrongful convictions. Legal scholars have characterized prosecutorial violation of due process by withholding exculpatory evidence as "an epidemic." The withholding of exculpatory evidence has been documented in approximately 26 percent of exoneration cases since 1989.[8] It is becoming increasingly clear that despite its intended purpose, *Brady* facilitates the suppression of exculpatory evidence commonly associated with wrongful convictions.

This paper is divided into six sections. Section I provides a comprehensive overview of *Brady* rules, including their origins, changes, and what they look like today. Section II provides case studies of *Brady's* failure to protect innocent defendants. Section III explores the shortcomings of *Brady*, with regards to subjectivity and cognitive bias, prosecutorial gamesmanship, and a lack of meaningful enforcement. Section IV will explain why Conviction Integrity Units (CIUs) are not enough to remediate these issues. Section V will make a case for "open file" discovery policies as a potential solution and why they are the best option for mitigating wrongful convictions.

I. OVERVIEW OF *BRADY* RULES

A. The Origins

Brady v. Maryland, a landmark case decided by the United States Supreme Court in 1963, established a fundamental principle regarding the prosecution's duty to disclose exculpatory evidence to the defense.[9] The case originated from the trial of John Brady and his accomplice, Charles Boblit, who were convicted of murder in the state of Maryland. At trial, Brady took the stand and admitted to participation in the crime, but claimed that Boblit committed the killing.[10] Unbeknownst to the defense, Boblit had confessed to the crime—a crucial piece of evidence that was withheld by the prosecution. In his summation to the jury, the defense counsel conceded that Brady was guilty of murder in the first degree but asked that the jury return that verdict without capital punishment.[11] Brady was subsequently convicted and sentenced to death.

The United States Supreme Court held that the withholding of exculpatory evidence from defense counsel by either law enforcement or the prosecution is a violation of the defendant's Constitutional rights. The Court ruled that withholding such evidence violates the Due Process Clause of the Fourteenth Amendment, as it undermines the fairness of a trial. This decision reinforced the prosecution's duty to ensure justice rather than merely secure convictions, becoming a cornerstone of criminal procedure. The "*Brady* rule" has since been pivotal

1 *See* D. Michael Risinger, *Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761 (2006-2007).
2 *See id.*
3 *See* B. Gregory, *Brady is the Problem: Wrongful Convictions and the Case for "Open File"* Criminal Discovery, 46 Univ. S.F. L. Rev. (2012).
4 *See* Brady v. Maryland, 373 U.S. 83 (1963). ("The government's withholding of evidence that is material to the determination of either guilt or punishment of a criminal defendant violates the defendant's constitutional right to due process").
5 *See id.*
6 *See id.*
7 *See id.*
8 *See* Lissa Griffin & Daisy Mason, *The Prosecutor in the Mirror: Conviction Integrity Units and Brady Claims*, 55 Loy. L.A. L. Rev. 1005 (2022).
9 *See* Brady v. Maryland, 373 U.S. 83 (1963).
10 *See id.*
11 *See id.*

in safeguarding defendants' rights and—in theory—protecting against wrongful convictions.

B. Changes in *Brady* Rules

Brady makes up our judiciary system's most important protections for defendants. However, the requirements laid out in *Brady* are not the *Brady* rules we see today. Since its passing, the Supreme Court has increasingly restricted and narrowed the rule established by *Brady*. Three cases have significantly impacted *Brady*: *United States v. Bagley* (1985), *Kyles v. Whitley* (1995), and *United States v. Ruiz* (2002). *United States v. Bagley* held that a defendant's constitutional right to exculpatory information is violated "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[12] This holding rejected the difference between "impeachment evidence" and "exculpatory evidence," meaning that *Brady* applied to evidence that could either prove the defendant's innocence or undermine the credibility of government witnesses. This established a unified standard for decisions to disclose evidence, intending to give prosecutors a clearer obligation to provide all potentially helpful evidence to the defense. However, *Bagley* also significantly raised the standard by introducing the concept of materiality. As we see with the Strickland test for ineffective assistance of counsel,[13] it is exceedingly difficult to prove that the highly subjective standards have been violated.[14] As a result, it has become increasingly harder to prove *Brady* rule violations.

Kyles v. Whitley only heightened the standard of materiality that must be met under *Bagley*. The Court explained that "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation."[15] Further, this holding put prosecutors in charge of determining when exculpatory evidence rises to a level of materiality wherein failure to disclose would deprive the defendant of a fair trial.[16] The extensive issues this creates will be further discussed in later sections.

Finally, *United States v. Ruiz* established that "the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[17] Given that the vast majority of cases in federal and state criminal courts end in a plea bargain, this restricts *Brady's* applicability to about 3% of all criminal cases.[18] *Bordenkircher v. Hayes* (1978) also established that a prosecutor may legally threaten a defendant who wishes to go to trial with severely harsher penalties to encourage a guilty plea. This combination allows prosecutors to threaten innocent defendants and avoid necessary disclosure, all while shielded by the law.

Even when prosecutors technically comply with *Brady* rules, the existing legal framework allows prosecutors to legally suppress exculpatory evidence. *Bagley*, *Bordenkircher*, and *Ruiz* have worked in tandem to create a reality in which prosecutors can make threats of long prison sentences (or even capital punishment) to force a guilty plea, without having any legal obligation to disclose evidence or information that would show the defendant's innocence. *Whitley* and *Bagley* have rendered *Brady* an ineffective protection of due process, even when followed properly. In redefining "material," the Court raised the standard of exactly how "exculpatory" a piece of evidence must be to qualify for mandatory disclosure under *Brady*. *Bagley* directly contradicts the original holding of *Brady*, which asserted that prosecutorial suppression of exculpatory evidence is a violation of a defendant's due process rights. Through these cases, the Court has struck a blow to the central meaning of *Brady's* due process protection.

C. *Brady* Today

Under the current *Brady* framework, the defendant bears the burden to prove that any withheld information was both material and favorable. "Material" information is defined as evidence that influences the determination of the action and is provocative, that is, having a tendency to make a fact more or less probable.[19] A defendant meets this burden if they can show that there is a reasonable probability that the outcome of the trial would have been different had the information been disclosed.[20] Whitley offers the most recent and clearest clarification to test this:

1. "Reasonable probability" is a question of whether the government's failure to disclose this information undermines confidence in the outcome of the trial.
2. "Reasonable probability" is not a sufficiency of evidence test and the defendant does not need to show that the evidence, barring any evidence undermined by the withheld information, is inadequate to support a conviction. Rather, the defendant merely must show that the withheld information can reasonably be taken to put the whole case in a different light.
3. Failure to disclose information which has a reasonable probability of changing the outcome of the trial is inherently harmful, so there is no need for a separate harmless error review.
4. All information not disclosed must be considered collectively.[21]

Brady violations are either discovered during trial, or most commonly, after the defendant is already convicted.[22] The Court can declare a mistrial or prohibit the prosecution from using unfavorable evidence that could be discredited by the withheld information.[23] Given that most *Brady* violations are uncovered post-conviction, however, the most common outcome of *Brady* rule violations is an overturned conviction.[24] If the violations are proven to be intentional or committed knowingly, the prosecutor

12 United States v. Bagley 473 U.S. 667 (1985).
13 *See* Strickland v. Washington 466 U.S. 668 (1984). (The Strickland v. Washington test is a two-part test that the U.S. Supreme Court established in 1984 to determine if a criminal defendant received effective assistance of counsel: deficient performance and prejudice. The defendant must show that their lawyer's performance was so poor that it fell below the standard of a lawyer guaranteed by the Sixth Amendment, or the defendant must show that their lawyer's poor performance prejudiced their defense and deprived them of a fair trial. This means that there is a reasonable probability that the outcome of the trial would have been different if their lawyer had not been deficient).
14 Gregory, *supra* note 3.
15 *See id.*
16 *See id.*
17 United States v. Ruiz 536 U.S. 622 (2002).
18 United States v. Bagley 473 U.S. 667 (1985).
19 *See* Meghan Ryan, *Brady Rule*, Legal Information Inst. (2023). https://www.law.cornell.edu/wex/Brady_Rule. (Last visited Nov. 11, 2024).
20 *See id.*
21 *Id.*
22 *See id.*
23 *See id.*
24 *See id.*

could be subject to sanctions.[25]

II. CASE STUDIES OF WRONGFUL CONVICTIONS DUE TO *BRADY* VIOLATIONS

Beyond empirical evidence, it is essential to appreciate the impact of *Brady* violations on individual lives. The stories of Joe D'Ambrosio, Roderick Johnson, and Henry McCollum serve as stark reminders of the devastating consequences of withholding *Brady* evidence in criminal cases.

Joe D'Ambrosio was sentenced to death in Cuyahoga County, Ohio in 1989.[26] Decades later, it was revealed that during his case, the prosecution had withheld multiple crucial pieces of physical evidence.[27] A motive for a key prosecution witness to have committed the murder was discovered but not disclosed, placing D'Ambrosio at a staggering disadvantage. Additionally, witness statements regarding the date of the murder and the true perpetrator were suppressed.[28] After spending 23 years on death row, D'Ambrosio was finally exonerated in 2012 when a federal district court barred the state from retrying him.[29]

Roderick Johnson's 1997 wrongful conviction in Berks County, Pennsylvania, also resulted from *Brady*-related prosecutorial misconduct.[30] Prosecutor Mark Baldwin deliberately concealed police records documenting a witness's uncharged criminal activity and cooperation with law enforcement.[31] Baldwin lied to the judge when questioned about the withheld evidence and Johnson sat on death row for 23 years before finally being exonerated in 2020.[32]

Henry McCollum and his brother Leon Brown were convicted in 1984 for the rape and murder of a young girl in North Carolina.[33] Despite having an intellectual disability, McCollum was sentenced to death. During the case, prosecutors ignored severe inconsistencies within the confessions and withheld exculpatory evidence. A key witness recanted her statement, and the state found fingerprint evidence at the scene that excluded both McCollum and Brown.[34] In 2004, a cigarette butt found near the victim's body was DNA tested at the request of McCollum. The testing ruled out both McCollum and Brown and instead, matched to Roscoe Artis, who was already serving a life sentence for a rape and murder that occurred three weeks after the original crime.[35] After spending 30 years in prison, McCollum and Brown were released and officially exonerated in 2014.[36] The case report notes, "Henry and Leon's case is not so much a lesson in how wrongful convictions are uncovered as it is a warning of how easily they can be missed entirely…If not for that single cigarette butt, Henry and Leon would likely have remained in prison for the rest of their lives. Henry might have been executed."[37]

These cases exemplify the profound injustice inflicted upon individuals when prosecutors fail to fulfill their obligation to disclose exculpatory evidence, resulting in wrongful convictions and devastating consequences for the innocent. Listening to the stories of individuals reminds us that we are not dealing with statistics—these are human lives. Each person affected by a *Brady* violation has their life altered in a staggeringly negative way and has to cope with the trauma of jail and even death row. It is evident that the flaws within *Brady* that plague our criminal justice system have real-life, devastating consequences.

III. *BRADY'S* SHORTCOMINGS

As Justice Byron White explains, "there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[38] Although *Brady* rules are considered to be our criminal justice system's primary mechanism for protecting the wrongfully accused, studies have shown that wrongful convictions have persisted at an alarming rate after *Brady*.[39] The majority of exonerations have uncovered that prosecutors, law enforcement, or both had withheld undisclosed exculpatory evidence. This reveals a tough truth—*Brady* offers virtually no meaningful protection of the constitutional right to due process of law. Much of this has to do with *Brady's* reliance on the prosecution to uphold the integrity of the criminal justice system. Several factors make this nearly impossible: subjectivity and cognitive bias, prosecutorial gamesmanship, and a lack of meaningful enforcement.

A. Subjectivity and Cognitive Bias

The biggest issue with the holding in *Brady* today is that the prosecutor must determine what evidence should be disclosed to a defendant. As Robert Mosteller explains, "the competitive process of the adversary criminal trial presents inherent challenges to the critical but vague duty 'to do justice.'"[40] The tension between a desire to win and to maintain moral soundness, combined with a requirement for subjective analysis creates a wide array of problems. Legal scholar Brian Gregory explains, "the current *Brady* rule ignores the reality that the significance of a piece of evidence obtained in the course of an investigation is largely in the eye of the beholder."[41] A piece of evidence that may not seem significant to one investigator may have great significance to another individual. Further, the current rule forces prosecutors and appellate judges to engage in speculation (before trial and on appeal) on whether a piece of evidence would "deprive the defendant of a fair trial."[42] As Daniel Medwed explains, "the materiality test forces prosecutors to engage in a bizarre kind of anticipatory hindsight review dependent on an artificial compar-

25 *See id.*
26 *Withholding Favorable Evidence*, Death Penalty Information Center (2024). https://deathpenaltyinfo.org/policy-issues/prosecutorial-accountability/withholding-favorable-evidence. (Last visited Nov. 11, 2024).
27 *See id.*
28 *See id.*
29 *See id.*
30 *See id.*
31 *See id.*
32 *See id.*
33 *Report: How North Carolina Nearly Executed an Innocent Man*, Innocence Project (2024). https://innocenceproject.org/how-north-carolina-nearly-executed-innocent-man/ (Last visited Nov. 11, 2024).
34 *See id.*
35 *See id.*
36 *See id.*
37 *See id.*
38 *See* Weatherford v. Bursey 429 U.S. 545 (1977).
39 Gregory, *supra* note 3.
40 *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, Geo. Mason L. Rev. 257 (2008).
41 Gregory, *supra* note 3.
42 *Id.*

ison of the evidence and the as-of-yet unborn trial record."[43] It is realistically impossible for a prosecutor to accurately predict the impact of a particular piece of evidence on a jury with perfect accuracy.

Another significant issue is the lack of clear guidelines or standards for prosecutors to follow when determining which evidence should be disclosed. Without consistent criteria, prosecutors may vary widely in their interpretation and disclosure practices, leading to inconsistency and potential injustices in the legal system.[44] Additionally, the burden placed on prosecutors to make these decisions can be overwhelming, especially in complex cases where the relevance of evidence may be uncertain. This can further exacerbate the likelihood of errors or oversights in the disclosure process, potentially compromising the defendant's right to a fair trial. As such, establishing clearer guidelines and providing adequate support and resources for prosecutors could help mitigate these challenges and enhance the effectiveness of the *Brady* rule in promoting fairness and transparency in criminal proceedings.

The danger in this speculation is further exacerbated by confirmation bias. While there is limited research on its impacts, the concept of confirmation bias "suggests a natural tendency to review the reports, not for exculpatory evidence that might disconfirm the tested hypothesis, but instead for inculpatory, confirming evidence."[45] Because of this bias, prosecutors have a harder time perceiving an alternate theory of how information could be used by the defense or impact jury decisions. As Jaden Schneider explains in the Columbia Law Review, "[i]f they're trying someone, they believe he is guilty. So they are viewing all the evidence through the prism of confirmation bias."[46] Even a prosecutor with good intentions can still be impacted; cognitive biases like confirmation bias are largely unconscious processes.[47] Confirmation bias cannot be overcome by force of will, good intentions, or training.[48] Consequently, the inherent risk of this bias undermines the reliability and fairness of decisions surrounding *Brady* evidence, highlighting the need for vigilant oversight and systemic reforms to uphold the principles of justice and transparency in criminal proceedings.

The current application of the *Brady* rule presents a significant challenge due to its reliance on subjective assessments by prosecutors and appellate judges. The inherent speculation and the influence of cognitive biases undermine the rule's intended purpose of ensuring fairness and transparency in criminal proceedings. Furthermore, this reliance not only undermines the rule's intended purpose of ensuring fairness and transparency but also erodes public trust in the judicial system. When decisions about evidence disclosure hinge on individual judgments rather than clear and objective standards, it introduces an element of unpredictability and inconsistency into the legal process. This lack of uniformity can result in disparities in treatment among defendants and undermine the credibility of the justice system as a whole. Therefore, addressing the inherent speculation and cognitive biases in applying the *Brady* rule is imperative to restore confidence in the fairness and impartiality of criminal proceedings.

B. Prosecutorial Gamesmanship

According to Bennett Gershman, no rule in criminal procedure has generated as much gamesmanship as the *Brady* rule.[49] This is not surprising, as the subjective nature of *Brady* means its effectiveness depends on the prosecutor's integrity. It requires a prosecutor to balance competing and contradictory objectives and is so subjective that it allows prosecutors to exercise discretion in ways that can harm, rather than promote the search for truth. As Jaden Schneider notes, "simply put, there is a motive to violate *Brady*. There is a motive to 'lose' exonerating needles of evidence in the haystack. Ethics, morals, and decency aside, this makes sense."[50] In these games, as Gershman explains, "prosecutors win almost all the time."[51]

Prosecutorial gamesmanship, often employed in cases of *Brady* violations, involves various strategic maneuvers and tactics by prosecutors to gain an edge or secure a conviction. These strategies can include selective presentation of evidence, aggressive questioning of witnesses, or exploiting procedural loopholes.[52] However, such tactics can often lead to violations of defendants' rights and undermine the principles of fairness and justice, especially in cases where innocent individuals are wrongly accused. Prosecutors may intentionally withhold or downplay exculpatory evidence to strengthen their case or secure a conviction. This misconduct can have devastating consequences, directly leading to a wrongful conviction for innocent defendants.

The harm inflicted by prosecutorial gamesmanship extends beyond individual cases; it erodes public trust in the justice system. When prosecutors prioritize winning at all costs over upholding ethical standards and ensuring fairness, it undermines the integrity of the legal process. Innocent defendants lose faith in their ability to receive a fair trial, while the public's confidence in the justice system diminishes.

Prosecutorial gamesmanship poses a significant threat to the protection of innocent defendants in the criminal justice system. By undermining the *Brady* rules and engaging in unethical tactics, prosecutors jeopardize the fairness of trials and contribute to wrongful convictions. Addressing this issue requires a concerted effort to uphold ethical standards, enforce accountability, and prioritize justice over winning at all costs. Only then can we ensure that innocent defendants receive the protection and fair treatment they deserve.

C. Lack of Meaningful Enforcement

43 Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, (2010).
44 *Id.*
45 *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, NACDL (2024). https://www.nacdl.org/Article/May2013-WhyDoBradyViolationsHappenCogn (Last visited Nov. 11, 2024).
46 Jaden Schneider, *The Politics of Justice: Revisiting Brady*, Colum. Undergrad. L. Rev. (2019).
47 *Id.*
48 *Id.*
49 Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Rsrv. L. Rev. 531, (2007).
50 Schneider, *supra* note 46.
51 Gershman, *supra* note 49.
52 *Id.*

Finally, *Brady* has been rendered moot by a lack of meaningful enforcement and accountability. The infrequent enforcement of state penal laws against prosecutors highlights this problem. Criminal prosecutions for *Brady* violations are rare, and if they do happen, they often consist of mild sanctions like a small fine. Despite the discovery of prosecutorial misconduct, disciplinary actions are exceedingly rare. In California, for example, the State Bar reports that less than 1% of prosecutorial misconduct cases result in disciplinary action.[53] Moreover, individual prosecutors enjoy insulation from civil and criminal liability through *Imbler v. Pachtman* (1976), which grants them immunity when acting within the scope of their duties.[54] The near-complete absence of repercussions incentivizes misconduct and perpetuates a culture of impunity. Civil liabilities for government agencies and municipalities are virtually non-existent due to high standards for proving liability.[55] Although it is possible to sue for *Brady* violations, the stringent criteria make it nearly impossible to hold entities accountable, shielding them from accountability and perpetuating systemic failures.

Furthermore, the ineffectiveness of elections as a means of holding district attorneys accountable is starkly evident in numerous high-profile cases of prosecutorial misconduct. During his tenure as Orleans Parish District Attorney, Harry Connick Sr. oversaw the wrongful convictions of numerous individuals due to suppressed evidence in violation of *Brady*.[56] Despite these miscarriages of justice resulting in five exonerations, Connick was reelected four times, indicating a lack of electoral accountability for prosecutorial misconduct.[57] Similarly, Pontotoc County District Attorney Bill Peterson notoriously secured wrongful convictions through various forms of prosecutorial misconduct.[58] On top of blatant withholding of exculpatory evidence—a blaring *Brady* violation—in the case of Ron Williamson, Peterson is believed to have adopted similar gamesmanship tactics to obtain at least three other murder convictions, including that of Williamson's alleged accomplice Fritz, who was also exonerated.[59] Despite their exoneration in 1999 and Peterson's role in their wrongful convictions, he was repeatedly reelected until his retirement in 2008.[60] This case highlights both a failure of public accountability and a failure of *Brady*.

As Kern County District Attorney, Ed Jagels oversaw wrongful convictions related to the infamous "Satanic Panic." The Kern County child abuse cases sparked a daycare sexual abuse hysteria in the 1980s and 90s. This phenomenon was so widespread that in 1991, the American Bar Association reported that 25% of prosecuting attorneys had handled cases involving satanic abuse.[61] Widespread fear of sexual abuse by satanic worshippers in the public sphere led to an epidemic of accusations, questionable investigative methods, and false accusations. Based on "aggressive and suggestive interviews of children who were thought to be victims, these cases generally included bizarre and implausible claims by the supposed victims, frequently featuring satanic rituals."[62] Under the oversight of Jagels, the cases involved allegations of satanic ritual abuse by a sex ring against as many as 60 children who falsely testified they had been abused. Today, there are 60 "Satanic Panic" exonerations in the National Registry of Exonerations.[63] Nearly 25 years later, there are still innocent people working to prove that they were wrongfully convicted.[64] Despite mounting evidence of prosecutorial misconduct and a multitude of exonerations, Jagels was reelected six times until his retirement in 2010, indicating a significant lack of accountability for prosecutorial wrongdoing, including *Brady* violations.[65]

These cases underscore the urgent need for reforms to enhance accountability and transparency in the electoral process, ensuring that district attorneys are held accountable for their actions and the integrity of the criminal justice system is upheld. The near-total lack of enforcement and accountability mechanisms undermines *Brady* rules' effectiveness. To address these systemic failures, comprehensive reforms are necessary to strengthen enforcement mechanisms and hold prosecutors accountable for misconduct.

IV. WHY ARE CIUs NOT ENOUGH?

In response to the systemic failures and injustices highlighted by instances of *Brady* violations and wrongful convictions, proposed reforms seek to address the deficiencies in the current application of *Brady* rules. This section examines a key proposal aimed at enhancing fairness, transparency, and accountability in criminal proceedings: Conviction Integrity Units (CIUs). A CIU is a division within a district attorney's office dedicated to reviewing and investigating claims of wrongful convictions. CIUs are intended to ensure that justice is served by identifying and ameliorating any errors that may have occurred during the criminal justice process. While CIUs have been relatively successful in post-conviction remediation, they fall short of efficacy in meaningful protections for innocent defendants.[66]

In the early 2000s, the first handful of CIUs were established; as of 2022, there are 93 CIUs in the United States.

53 Gregory, *supra* note 3.
54 Imbler v. Pachtman, 424 U.S. 409 (1976).
55 *See, e.g.*, Michael Tardif and Rob McKenna, *Washington State's 45-Year Experiment in Government Liability*, 29 Seattle U. L. Rev 1 (2005).
56 *See, e.g.*, Connick v. Thompson, 563 U.S. 51 (2011) (J. Ginsburg, dissenting: "the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility").
57 *See e.g.*, *Harry Connick Sr., lightning-rod longtime New Orleans DA, dies at 97*, Politico, https://www.politico.com/news/2024/01/28/harry-connick-sr-lightning-rod-longtime-new-orleans-da-dies-at-97-00138227.
58 *See e.g.*, *Oklahoma District Attorney Bill Peterson to retire*, Innocence Project (2007), https://innocenceproject.org/oklahoma-district-attorney-bill-peterson-to-retire/#:~:text=Bill%20Peterson%2C%20the%20lead%20prosecutor,retire%20after%20January%201%2C%202008.&text=%2C%20who%20were%20wrongfully%20convicted%20in,Sue%20Carter%20in%20Ada%2C%20Oklahoma.
59 *See* John Grisham, The Innocent Man: Murder and Injustice in a Small Town (2006).
60 *See supra* note 57.
61 *See* Cynthia V. Ward, Trauma and Memory in the Prosecution of Sexual Assault (2021).
62 *See Glossary*, The National Registry of Exonerations https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#CSH. (Last Visited Nov. 11, 2024).
63 *See Satanic Panic Exonerations*, National Registry of Exoneration Monthly Newsletter (2024). https://www.law.umich.edu/special/exoneration/Documents/MAY%20NEWSLETTER.pdf (Last visited Nov. 11, 2024).
64 *See* Ward, *supra* note 61.
65 *See id*.
66 Griffin, *supra* note 8.

With origins in the Innocence Movement,[67] CIUs have become a widely used tool for accountability and ensuring the overturning of wrongful convictions. While CIUs have been effective in many cases, several barriers prevent them from serving their full intended purpose, notably accountability and deterrence. For *Brady* violations specifically, Barry Scheck notes several important factors for CIUs to consider.[68] He argues for "a finding of substantial, fact based allegations" in *Brady* cases.[69] Additionally, Scheck believes that communication with the original trial prosecutor should be limited to professional courtesy and gathering historical information to preserve the integrity of the investigation.[70] Scheck further highlights the significance of *mens rea*[71] in CIU *Brady* cases.[72] In his eyes, CIUs need to recognize the difference between *Brady* and due process violations resulting from innocent mistakes and those committed intentionally.[73] Intentional or knowing failure to disclose exculpatory evidence is essential to a CIU for several reasons. These clarifications can increase buy-in and deterrence as prosecutors are more likely to accept dismissal of a charge, internal sanctioning, or changes in training/procedures that result from cases of intentional misconduct.[74] Further, focusing on the most serious and intentional Brady and due process violations would create or strengthen collegial trust in a CIU's work.[75]

CIUs have emerged as a crucial tool in addressing the systemic failures and injustices stemming from *Brady* violations and wrongful convictions. Their relative success underscores their vital role in uncovering prosecutorial misconduct and remedying miscarriages of justice.[76] While CIUs have proven effective in overturning wrongful convictions, they fall short of fully addressing underlying systemic issues and *Brady* rule violations are not an exception.[77] Ethical concerns, including potential collegial conflicts of interest and the absence of standardized disciplinary referrals, pose significant challenges to CIUs' ability to hold prosecutors accountable for their actions.[78] Moreover, the lack of clear guidelines for determining adequate discipline creates room for subjectivity and error, hindering CIUs' effectiveness in promoting accountability and deterrence.[79] It is clear that CIUs, while undeniably important, are not enough to ensure justice for all.

V. A CASE FOR OPEN FILE DISCOVERY

In response to these systemic failures, open file discovery has emerged as a promising solution to remediate issues with Brady rules. Unlike traditional discovery methods, which afford prosecutors considerable discretion in disclosing evidence to the defense, open file discovery mandates the comprehensive disclosure of all evidence in the prosecution's possession. As Daniel Medwed explains, "the best way to guarantee that defendants obtain the exculpatory evidence owed to them under Brady is to require 'open file discovery' where prosecutors must turn over all evidence known to the government, exculpatory and inculpatory alike."[80]

There are countless reasons why the "prophylactic" rule of open file discovery is ideal for preventing *Brady* violations.[81] First and foremost, open file discovery removes the subjectivity involved in the process. Prosecutors would no longer have to speculate on how evidence could be used by the defense or how it could impact a jury.[82] As Robert Mosteller argues, open file discovery "does not rely on the ethical judgment of a prosecutor involved in a fiercely competitive adversary trial process to determine what is exculpatory."[83] Conversely, defendants would not bear the nearly insurmountable burden of proving that withheld evidence would have impacted the outcome of the trial. Moreover, an open file policy is a win-win situation—both the defendants and the prosecution can benefit directly. Defendants who are made aware of the strength of a case against them would be more inclined to accept a plea bargain, significantly lightening caseloads for prosecutors. For defendants, open file policies would "level the playing field," giving them a "bird's eye view" into the case the government has against them.[84]

Although there are definitive benefits, there are some downsides to open file discovery policies. Some argue that open file discovery would shift the balance of power further in favor of the defendant—individuals who, in theory, should receive the benefit of the doubt.[85] As Judge Learned Hand proclaimed nearly a century ago, "[u]nder our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see."[86] Open file discovery could invite abuse by defendants who might intimidate witnesses or fabricate strategies to directly counter the evidence against them.

Open file discovery would also place an added burden on the defense counsel. Rather than having the prosecution

67 *See e.g.*, *Our Work*, The Innocence Project. https://innocenceproject.org/our-work/. (Last visited 1 December 2024) (the Innocence Movement, spearheaded by the Innocence Project, "works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Our work is guided by science and grounded in anti-racism.").
68 *See Barry Scheck Testifies Before Congress on Pretrial Innocence Reforms*, The Innocence Project. https://innocenceproject.org/barry-scheck-testifies-before-congress-on-pretrial-innocence-reforms/ (Last visited Dec. 1, 2024).
69 Griffin, *supra* note 8.
70 *Id.*
71 *See Mens Rea*, Legal Information Institute (2023). https://www.law.cornell.edu/wex/Brady_Rule. (Last visited Dec. 1, 2024). ("refers to criminal intent… Mens rea is the state of mind statutorily required in order to convict a particular defendant of a particular crime… The mens rea requirement is premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct; however, a defendant need not know that their conduct is illegal to be guilty of a crime").
72 Griffin, *supra* note 8.
73 *See id.*
74 *See id.*
75 *See id.*
76 *See id.*
77 Innocence Project, *supra* note 68.
78 *See id.*
79 *See id.*
80 Medwed, *supra* note 43.
81 *See id.*
82 *See id.*
83 Schneider, *supra* note 46.
84 Medwed, *supra* note 43.
85 *See id.*
86 *See id.*

decide what evidence is relevant, the defense would be forced to comb through high volumes of information to find useful evidence. The shifting of this burden would lead to more overworked defense attorneys and lower-quality representation for defendants. This would disproportionately affect low-income and underprivileged defendants who already rely on overworked public defenders. As Brian Fox explains, "open-file discovery would increase the workload for prosecutors, public defenders, and the judiciary. Increased workloads without an increased workforce would result in less time allocated to each defendant at every step of the criminal prosecution."[87] Even though open file discovery is a viable solution to address shortcomings with the *Brady* rule, its implementation could exacerbate existing challenges within the criminal justice system.

Despite these theoretical flaws, implementations of open file discovery have largely resulted in resounding improvements. Between 1996 and 2009, North Carolina implemented a series of open file discovery mandates for felony and felony-misdemeanor cases. Surveys of lawyers in North Carolina in 2017 revealed that the implementation of open file discovery was largely beneficial.[88] The results indicate that open-file discovery can promote more informed guilty pleas, improve pre-plea disclosure of most categories of evidence, and is more efficient in that it reduces discovery disputes and speeds up case dispositions.[89] Further, the study found prosecutors and defense attorneys were generally satisfied with the operation of open-file discovery. The surveyed lawyers also described open file discovery as "promoting trust between defense and prosecution."[90] These results demonstrate the benefits of open file discovery in increasing trust and openness in the pre-trial and trial phases, underscoring its ability to remediate the problems with *Brady* that occur during these phases.[91]

North Carolina serves as a demonstrative case for the success of Open File Discovery. The implementation of open file policies would promote trust, fairness, and equity in our criminal justice system by reducing subjectivity, prosecutorial gamesmanship, and mitigating the impacts of cognitive bias. It would also foster more faith in the justice system. While there are theoretical consequences, the actual implementation of open file policies has revealed that these consequences do not occur in significant ways. Because of their ability to eliminate the issues created by our current *Brady* rules, open file discovery policies present one of the best options for supplementing *Brady* and mitigating due process violations.

CONCLUSION

Although the Constitution does not explicitly guarantee a right to exculpatory evidence, *Brady v. Maryland* was established to safeguard criminal defendants against prosecutorial misconduct and to uphold the integrity of the justice system. However, despite its well-intentioned foundation, the *Brady* doctrine has fallen short of its promise. Subjectivity and cognitive biases, prosecutorial gamesmanship, and inadequate enforcement mechanisms have collectively undermined its effectiveness. Moreover, a series of Supreme Court decisions have narrowed *Brady's* applicability, diminishing its ability to protect the due process rights of defendants.

To address these shortcomings, open file discovery emerges as a compelling reform. While it is not without potential challenges, such as concerns about privacy or resource allocation, the principle of full disclosure of relevant evidence offers a more robust safeguard against wrongful convictions. By increasing transparency and reducing the risk of evidence suppression, open file discovery aligns more closely with the fundamental principles of justice.

It is important to acknowledge that no reform can completely eliminate human error from the justice system. Nevertheless, open file discovery and broader reforms to *Brady* doctrine represent a critical step toward minimizing such errors and reinforcing the presumption of innocence. These changes would not only protect defendants from undue harm but also enhance public trust in the legal system, ensuring it remains a cornerstone of fairness and accountability. By addressing the systemic flaws in evidence disclosure, we move closer to meaningful protection of the core tenet of our justice system, "innocent until proven guilty."

This piece was written by Anna Revill and edited by Dannhi Nguyen.

87 *See* Brian Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 Notre Dame L. Rev., 225, (2013).
88 *See* Miriam H. Baer, *Some Skepticism about Criminal Discovery Empiricism*, 73 Wash. & Lee L. Rev. 347 (2016).
89 *See id*.
90 *See* Jenia I. Turner and Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285 (2016).
91 *See id*.

HIGH-SPEED RAIL OFF-TRACK:

THE CASE FOR CALIFORNIA POLICY-MAKERS TO PRIORITIZE LOCAL RAIL

INTRODUCTION

When the Shinkansen opened between Tokyo and Osaka in 1964, the world of transit changed for good. The world's first high-speed rail line, the Shinkansen, reduced what was a six-and-a-half-hour drive by car to a four-hour ride by train. With upgrades, this would decrease further to only two-and-a-half-hours.[1] A massive ridership success, the Shinkansen's opening showed the possibility of high-speed rail infrastructure—and other countries were hooked. Among those interested in building a high-speed rail line was the U.S. state of California, whose two major cities, Los Angeles and San Francisco, were similarly far apart as Tokyo and Osaka. After passively exploring the possibility of a Californian High-Speed Rail network for decades, it seemed this vision was finally poised to come to fruition in 2008. Californians who went to the polls were greeted with Proposition 1A, a ballot measure which would allocate nine billion dollars in funding for the construction of a high-speed rail network.[2] The proposition passed with 52.62% of the vote, and the California High-Speed Rail Authority (CHSRA) was formed.[3] California was ready to work on a Shinkansen success story of its own.

Over a decade and a half has passed since then. Not a single rail of track has been placed.[4] A project that was seen as the future of infrastructure in California that would cement the state's status as an economic powerhouse has morphed into a hundred-billion dollar headache. Meanwhile, California's cities like Los Angeles have continued to struggle heavily with congestion and walkability. Even San Francisco, which is well known for its robust transit system, the Bay Area Rapid Transit, is desperately in need of funding amid ridership (and revenue) drops in the aftermath of COVID-19. With the California High-Speed Rail Authority running out of money and pushing the construction timeline further and further back, is it time for California lawmakers to pivot their focus to developing local transit? Which strategy would result in the most economic growth and greatest improvement in quality of life? Although high-speed rail networks have enormous economic potential, I argue that the California High-Speed Rail project should be tabled in the short term in favor of upgrading local transit. Furthermore, while both projects have positive economic implications, upgraded local transit would be especially transformational considering California's marginalized communities have an immediate need for effective public transportation. Lastly, while both approaches offer significant climate benefits, there is an imperative to address the climate crisis quickly—and the speed at which local transit can be upgraded should make its development a priority.

I. FUNDING AND POLITICAL WILL FOR HIGH-SPEED RAIL DEVELOPMENT VS. LOCAL TRANSIT

First, while there is a lack of political will for the completion of California High-Speed Rail, lawmakers have demonstrated enthusiasm for upgrading local transit. To understand whether to continue with California High-Speed Rail or to pivot toward a strategy that emphasizes upgrading local infrastructure, it is first imperative to judge whether both are politically feasible options with available funding. After all, if a project is not politically feasible, its benefits are irrelevant—it should be tabled in favor of a project that could both bring about change and be feasibly implemented. Political will has demonstrated itself to be a major problem for California High-Speed Rail. Compromise among stakeholders has led to route diversions which have made the project more expensive, and the project's ballooning costs have made procuring additional funding difficult.

Chief among the problems facing California High-Speed Rail is the project's lack of available funding. California High-Speed Rail is currently funded by a 9.95 billion dollar bond issue approved through the initial ballot proposition.[5] Even in 2008, it was clear that this would not be enough funding for the project to reach completion—the California High-Speed Rail Authority initially estimated the cost of the project would be 33 billion dollars. Since that initial bond issue, the CHSRA has also relied on federal grants, with the Biden administration recently approving another three billion dollars for the program. Combined with state funding and revenue earned from California's cap and trade program, based on a 2023 progress report, the project has only raised 23.5 billion dollars.[6] This is still short of the initial 33 billion dollar estimate, and since then, the cost of the project has only risen dramatically. In the same 2023 report,

1 *See,* Brian Sands, *The Development Effects of High-Speed Rail Stations and Implications for California*, 19 Built Env't 257, 258-259 (1993).
2 *See,* Cal. Sts. & High. Code § 2704.04 (2023).
3 *See, California Proposition 1A, High-Speed Rail Bond Measure (2008)*, Ballotpedia, https://ballotpedia.org/California_Proposition_1A,_High-Speed_Rail_Bond_Measure_(2008) (last visited Nov. 27, 2024).
4 *See,* Ralph Vartabedian, *How California's Bullet Train Went Off the Rails*, The New York Times (October 9, 2022), https://www.nytimes.com/2022/10/09/us/california-high-speed-rail-politics.html (last visited Nov. 27, 2024).
5 § 2704.04, supra note 2.
6 *See,* California High-Speed Rail Authority, 2023 Project Update Report, 38-41 (2023).

the CHSRA projected that the entire system would now cost 106 billion dollars. The first phase of the system—a stretch between Merced and Bakersfield—would cost 32 billion dollars on its own.[7]

It is unclear how the CHSRA aims to achieve much of the remaining funding. Concerningly, much of the authority's funding hopes rested on additional waves of federal funding grants. However, with the election of Donald Trump, who has shown himself to be openly hostile toward California High-Speed Rail (and rail infrastructure more generally), it is likely that the project will not receive any more grants from the federal government in the near future. At the current rate of spending—1.8 million dollars a day—"the train could not be completed in this century."[8] Although inflation played a role in the many budget swells, political compromise is also to blame. In particular, the decision to wind the rail through the Central Valley and focus on this segment first has caused the route to become longer and more expensive. While this route increased the number of Californians the rail could serve to roughly 85%, it also massively increased its costs.[9] This has caused enthusiasm for the California High-Speed Rail to wane amongst lawmakers, including California Governor Gavin Newsom. After his inauguration in 2019, Newsom stated in remarks to the legislature that "[t]he current project, as planned, would cost too much and respectfully take too long..." "...there simply isn't a path to get from Sacramento to San Diego, let alone from San Francisco to L.A."[10] Indeed, attention has begun turning toward work on the segment between Merced to Bakersfield, cutting California's two largest cities out of the initial opening phase.[11] Much of this decision was due to pressure to create jobs in the Central Valley, which has struggled economically. However, because of this decision, the portion of the route that will connect Los Angeles and San Francisco to the line has been delayed indefinitely.

In comparison to the constant downscaling, compromise, and uncertainty that has defined the trajectory of high-speed rail in California, lawmakers and voters have demonstrated a tangible enthusiasm for local transit development. The effort to upgrade Los Angeles' public transportation, in many ways, is an effort which grew in tandem with California High-Speed Rail. In 2008, the same year Proposition 1A passed, voters in Los Angeles County passed Measure R, a ballot measure which raised the sales tax by a half a cent for 30 years to support upgrading transportation infrastructure.[12] While funding for California High-Speed Rail has not been supported by further ballot measures, voters reaffirmed their commitment to upgrading local rail infrastructure by passing Measure M in 2016. Measure M raises the Los Angeles County sales tax by an additional 0.5% to support public transit. This will grow to a 1% increase in 2039 after the expiration of Measure R.[13] In Los Angeles, lawmakers have put major emphasis on upgrading the Metro system in advance of the 2028 Olympics: the "Twenty-Eight by 28" initiative aims to overhaul the system prior to the start of the games.[14] Several of these projects have already been completed. This includes the regional connector, which connected the previously unlinked A and E lines and raised ridership on the lines by over 30%.[15] Other projects under active construction include the K line, which will finally link LAX Airport to the system, and an extension of the Gold Line to Pomona, which will make transportation more accessible to the suburbs east of Los Angeles.[16]

There is similar excitement among officials to upgrade public transportation in the Bay Area—illustrated by massive recent investments in infrastructure. Notable among these projects is Caltrain, the rail service serving the peninsula in the Bay Area. It recently completed a 2.4 billion dollar electrification and modernization of its line.[17] Not only did this modernization cut down travel time substantially and increase service frequency, but it also promoted carbon neutrality by converting the line from diesel to electric train sets. Most importantly, the Caltrain electrification project is a testament to why further funding for California High-Speed Rail should go toward local transit instead. Caltrain faced major funding issues for its modernization program until an agreement was reached with CHSRA to use over 700 million dollars of the bond funds from Proposition 1A towards Caltrain electrification. In exchange, Caltrain would allow California High-Speed Rail to use Caltrain tracks for high-speed service.[18] This deal enabled the project to get back on track, and is proof that the money bound for high-speed rail can have immediate benefits if it is directed toward other projects. This is especially true considering the litany of transit projects currently in search of funding. For example, Bay Area Rapid Transit (BART), a light rail system which runs through San Francisco and its surrounding cities, is facing a gap in funding amidst the economic fallout of the pandemic—and could desperately use a boost in state funding.[19]

In conclusion, while the enthusiasm for high-speed rail was initially high, it has started to wane because of growing costs and uncertainty around how the project will be financed. Conjointly, enthusiasm for local rail has also been high, and unlike for high-speed rail, politicians have demonstrated that they can secure funding and see these projects to completion.

II. ECONOMIC IMPACT OF HIGH-SPEED RAIL VS.

7 *Id.* at 55.
8 Vartabedian, *supra* note 4.
9 *Id.*
10 Dan Walters, *Newsom morphs from bullet train skeptic to booster, but his criticisms remain valid*, Cal Matters (December 10, 2023), https://calmatters.org/commentary/2023/12/newsom-bullet-train-booster-criticisms/ (last visited Nov. 27, 2024).
11 *See,* Andrew Gumbel, *Train to nowhere: can California's high-speed rail project ever get back on track?*, The Guardian (May 29, 2022, at 9:55 EDT), https://www.theguardian.com/us-news/2022/may/29/california-high-speed-rail-bullet-train (last visited Nov. 27, 2024).
12 3 L.A. Cnty. Metro. Transp. Auth. Admin. Code § 20 (2022).
13 *Id.*
14 *See, 28 Projects by 2028,* Metro, https://www.metro.net/28x28/ (last visited Nov. 19, 2024).
15 *Id.*
16 *Id.*
17 *See,* Rohan Bhatia, *Caltrain's long-overdue electrification is the future of accessible, smarter, greener transit*, The Campanile (Oct 6, 2024), https://thecampanile.org/30615/opinion/caltrains-long-overdue-electrification-is-the-future-of-accessible-smarter-greener-transit/ (last visited Nov. 19, 2024).
18 *See,* Michael Cabanatuan, *Caltrain upgrades a step toward high-speed rail*, SFGATE (March 22, 2012), https://www.sfgate.com/bayarea/article/Caltrain-upgrades-a-step-toward-high-speed-rail-3425806.php (last visited Nov. 19, 2024).
19 *See, e.g.*, Sameea Kamal, *Why a Bay Area transit rescue plan is on hold*, Cal Matters (June 1, 2024), https://calmatters.org/politics/capitol/2024/06/california-transit-bay-area-funding/ (last visited Nov. 19, 2024).

LOCAL TRANSIT

Another major consideration for policymakers is whether investing in a California high-speed rail network will have greater economic returns than investing in local transit. In attempting to define economic impact, one must recognize there are many different metrics that can be used, and that a project's economic impact is often asymmetrical (not every group benefits equally). While upgrading local transit and building high-speed rail both come from an impulse to improve public infrastructure, the two would affect the economy in different ways and benefit different groups. While constructing high-speed rail would have a broader economic impact and be particularly beneficial for California's smaller cities, upgrading local transit would do more to incentivize inner-city job growth and spur urban density. Furthermore, the uncertainty of California High-Speed Rail's future means its economic impact is equally uncertain.

To understand how high-speed rail might benefit California, it is important to analyze case studies of the economic impact of high-speed rail in other countries. An analysis of the Japanese Shinkansen and the TGV (France's high-speed rail system) demonstrates high-speed rail's potential for fueling suburban development. Since the opening of the shinkansen in Japan, the small cities outside of Tokyo that were connected to the Shinkansen grew at a much higher average rate than the rest of the country. As Director of the Cardiff Japanese Studies Center Christopher Hood notes, "[l]ooking at population change between 1975 and 1995, those cities with a Shinkansen station saw an average increase of about 32%."[20] This is much greater than the 12% growth across the same period in the rest of the country.[21] Hood hints toward one of high-speed rail's most compelling benefits: it incentivizes the creation of new pockets of urban density and development outside of a city center. This phenomenon is not limited to Japan—when the TGV connected Paris to the city of Vendome in France, "within three years, the price of property in the town had increased 35[%] and real estate exchanges had increased 22[%]."[22] It is clear that when high-speed rail connects suburban and rural locations to major metropolitan areas, urbanization and associated jobs follow. Therefore, for California, the primary economic benefit of high-speed rail would go beyond offering an efficient connection between Los Angeles and San Francisco. California High-Speed Rail would also aid in exporting the economic prosperity of the state's two major metropolitan areas to its smaller cities. Indeed, writing for Built Environment, Brian Sands notes that previous successes of high-speed rail indicate that in California, "a high-speed rail system would reinforce [Los Angeles and San Francisco's] growth and channel it within regions to cities with stations."[23] It does not appear that this economic benefit of high-speed rail is fully appreciated by the CHSRA. As mentioned previously, the authority has shifted its current attention to completing the segment of high-speed rail between Merced and Bakersfield, two small cities in California's Central Valley. While this decision was made because it is easiest to implement, it is shortsighted considering that a primary benefit of high-speed rail is exporting the economic growth of a large city to more distant regions. A plan which recognizes this attribute of high-speed rail would see construction emanating out of Los Angeles and San Francisco, not eventually making its way there in a later phase.

It is true that a Merced-Bakersfield high-speed rail line will bring—and is already bringing—some economic benefit to the region. Many of these economic benefits, however, are associated with the project's construction and not the final product. According to the CHSRA, the program has created 92,000 jobs and has provided seven billion dollars in labor income.[24] While this has helped to induce some growth in the Central Valley, until the rail line is open, this economic growth is purely artificial: the workers could be building anything else and the same effect would be achieved. For instance, there is no metro or local passenger rail system in any of the cities in the Central Valley. Not only would constructing one also create jobs, but it may be quicker and more cost effective. Once the high-speed rail line is open, it is true that it will confer other benefits, such as enhancing interstate mobility, a crucial contributor to state-wide economic growth. As the Authority noted in its 2020 Business plan, "adding the San Francisco to Los Angeles/Anaheim high-speed rail system to the state's transportation network is equivalent to adding a new major airport and a six-lane highway between San Francisco and Los Angeles." [25]The Authority also assured that this would cost less than building these alternatives. However, with the life of California High-Speed Rail in political limbo, could these economic benefits truly be realized? Or will the limited economic benefits from a high-speed rail line not connected to a major city mean that the line will never grow beyond the Central Valley to begin with? These are questions that need to be answered by policymakers.

Constructing local transit also brings with it a unique set of economic benefits. The construction of local transit offers similar benefits to high-speed rail, but after completion, the two diverge in economic impact. While high-speed rail exports the economic benefits from large cities to smaller ones, local transit reinforces a city's existing economic growth and promotes urban density. This conclusion is supported by analysis of the density surrounding BART stations: "Census tracts near BART have, on average, nearly two times as many households per acre than those farther away."[26] Furthermore, the rail system has led to higher occupancy rates in buildings nearby, while "office buildings near BART have outperformed non-BART accessible buildings based on market rents."[27]

Not only does public transit have a material impact on a city's growth, but it also allows residents to live a car-free lifestyle. For this reason, Los Angeles may particularly benefit economically from a major overhaul of its metro system. As of 2019,

20 Christopher P. Hood, *The Shinkansen's Local Impact*, 13 Social Science Japan J., 211, 215 (2010).
21 *Id.*
22 Sands, *supra* note 1, at 271.
23 *Id.*, at 280.

24 *See, Economic Impact Analysis Fact Sheet*, California High Speed Rail Authority (January 18, 2024), https://hsr.ca.gov/wp-content/uploads/2024/01/Agenda-Item-4-FY2022-23-Economic-Impact-Analysis-Fact-Sheet-011824-A11Y.pdf (last visited Nov. 24, 2024).
25 Cal. High-Speed Rail Authority, 2020 Business Plan, 14 (2021).
26 Bay Area Rapid Transit, BART's Role in the Region, 17 (June 2024).
27 *Id.* at 29.

only 6.8% of Los Angeles residents used public transport on their commute to work, ten times less than the 73% who drove to work as a single passenger.[28] Converting these drivers to metro riders could have major economic benefits. For one, gas prices (which are especially high in the state of California) make driving much more expensive than public transit. Car owners benefit economically from a switch to public transit if it can adequately meet their commuting needs. More importantly, upgrading public transit is economically impactful because car ownership itself is a major barrier to work. As analyst Joseph Mengedoth notes, "ownership of a car (or a truck or a motorcycle) increases the probability of work, especially among welfare recipients."[29] This is not to mention that undocumented workers are unable to acquire driver's licenses, making public transport one of the only ways for this group to reliably commute. Therefore, it is troubling that many neighborhoods in Los Angeles have no access to the Metro when it is a crucial tool in providing disadvantaged groups with economic mobility.

Major investment in creating a usable system is necessary to unlock public transit's most significant benefits. Small upgrades to public transit systems do not lead to large, immediate economic benefits because they do not do enough to generate an impression among the public that the system could replace other modes of transportation. This is why urban policy analyst Jenny Schuetz proclaims that "even if rail networks generate long-run economic spillovers to surrounding areas, short-run impacts may be quite limited, especially in regions without strong public transportation usage."[30] For public transport to successfully increase density and accessibility to the labor market, policymakers must therefore be bullish in their approach to upgrading public transit. Los Angeles' aforementioned "Twenty-Eight by 28" program may be a sign that policymakers are now acknowledging this fact. However, to rescue a city like Los Angeles from its car-centricity, more still needs to be done. Perhaps shifting the focus away from high-speed rail and towards local projects could be the catalyst for this development.

III. ENVIRONMENTAL IMPACT OF HIGH-SPEED RAIL VS. LOCAL TRANSIT

Environmental impact is another integral factor in deciding whether policymakers should allocate their resources toward high-speed rail or toward local transit. As awareness of the climate crisis and the role of carbon in it has grown, the carbon output of transportation projects has been subject to greater scrutiny. As the Department of Transportation notes, transportation accounts for 33% of the United States' total carbon emissions—it is the country's single greatest source of carbon output.[31] California has vowed to take a leading role in addressing the climate crisis, aiming to reduce greenhouse gas emissions to a rate 85% below 1990 levels by 2045.[32] A key component of Governor Newsom's plan to achieve this reduction in emissions is to ban the sale of new gas vehicles by 2035.[33] Entry level electric cars, however, remain more expensive than their gas counterparts, not to mention that much of the infrastructure required to support their mass adoption is still unbuilt. Therefore, public transportation will play a vital role in enabling this transition by providing another clean transportation option. With this in mind, there are two factors that must be considered when analyzing high-speed rail and local rail's environmental impact: the extent that the system aids in California's green transition by disincentivizing car ownership, and the carbon emissions produced by the system itself.

A high-speed rail system would be very compatible with a decarbonizing California since it would lead to a net reduction in emissions. However, a lack of clarity in high-speed rail's ability to disincentivize car ownership and usage, alongside constant delays in its construction, complicates the system's value in a clean-energy transition. The CHSRA estimates that the project would run on 100% renewable energy—a compelling argument for its existence as an alternative long-distance transportation method, considering the high number of emissions produced by both car tailpipes and jet engines.[34] Nonetheless, while a high-speed rail connection between San-Francisco and LA would offer a clean alternative from a plane ride or drive between the two cities, the lethargy of the project's construction complicates whether the system would serve much of a role in what Governor Newsom has characterized as a rapid transition. Assuming funding for the project is secured, the current construction timeline would not see the line between Merced to Bakersfield beginning service until 2030.[35]

Even worse, the authority does not have a date for when the rest of the Phase one route would be completed, and no new sources of funding have been identified. Given that an immediate impact is the priority for policymakers, high-speed rail is unlikely to play a significant role in a green transition. Moreover, the implementation of a high-speed rail network is not estimated to lead to any substantial reduction of car usage. The CHSRA claims that the project will lead to a reduction of 10 million miles driven by vehicles a day—which comprises only 1% of current car usage levels.[36] Furthermore, car ownership would likely not be affected at all by a high-speed rail network, since California high-speed rail would only serve long distances and would not

28 *See, e.g.*, Juan Lopez, *Access to Public Transit*, Neighborhood Data for Social Change (February 2019), https://la.myneighborhooddata.org/2019/02/access-to-public-transit/#:~:text=Although%20it%20sounds%20like%20commuters,only%206.8%25%20utilize%20public%20transit (last visited Nov. 29, 2024).

29 Joseph Mengedoth, *Transportation Access as a Barrier to Work*, Econ Focus, Fourth Quarter 2023, at 24.

30 Jenny Schuetz et al., *Can a Car-Centric City Become Transit Oriented? Evidence From Los Angeles*, 20 Cityscape 167, 187 (2018).

31 *See,* Department of Transportation, Dot Report to Congress: Decarbonizing U.S. Transportation, 5 (July 2024).

32 *See,* Cal. Air Resources Board, 2022 Scoping Plan for Achieving Carbon Neutrality, 1 (December 2022).

33 *See,* Coral Davenport et al., *California to Ban the Sale of New Gasoline Cars*, The New York Times (Aug 24, 2022), https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html (last visited Nov. 31, 2024).

34 *See,* California High Speed Rail Authority, 2024 Sustainability Report, 59 (September 2024).

35 *High Speed Rail at a Glance*, California High Speed Rail Authority, https://hsr.ca.gov/high-speed-rail-in-california/statewide/ (last visited November 19, 2024).

36 Dan Walters, *Newsom morphs from bullet train skeptic to booster, but his criticisms remain valid*, Cal Matters (December 10, 2023), https://calmatters.org/commentary/2023/12/newsom-bullet-train-booster-criticisms/ (last visited November 24, 2024).

supplement transportation used for daily activities and most commutes.

Local rail can be similarly environmentally friendly, and unlike high-speed rail, it both discourages car usage and can be implemented on a timescale that aligns with California's climate goals. Many of California's rail systems like BART are fully electric and can easily be switched to renewable electricity sources. BART has recently completed this transformation: "100[%] of BART's contracted electricity supply has been greenhouse gas emission free in recent years."[37] As for rail lines that still rely on older, diesel train sets, electrification is an easy option. The electrification of Caltrain, for one, is a testament to how California's older rail lines can be converted into more modern systems that support the state's climate goals. Not only can local rail meet climate standards, but high-quality local systems have also demonstrated a unique ability to disincentivize car ownership and usage. The fully-electrified BART, for one, has quantifiably resulted in less cars in the areas which it services—"households within a half-mile of a BART station have, on average, 30 percent fewer vehicles."[38] It makes sense why local rail may have a more noticeable impact on car usage; it covers shorter distances than high-speed rail does, which is by far the most common type of car trip. Accordingly, households with access to a strong local transit network may only need to own one car, even if multiple members of the household have to make a daily commute. Another benefit of investing in local transit as a climate mitigation tool is that it can be built or upgraded much more quickly than high-speed rail—electrification of the Caltrain line began in 2017 and was completed by 2024.[39] On the other hand, high-speed rail has been greenlit since 2008 and track has yet to be laid. When dealing with a time-sensitive issue like climate change, the smaller-scale nature of local rail is therefore a significant advantage.

CONCLUSION

When California voters approved Proposition 1A in 2008, they sought out real change—a revitalization of California's public infrastructure. What voters have since gotten, however, is a project riddled with uncertainty. Although they are perhaps less 'flashy' than high-speed rail, the many local rail lines across the state have proven themselves more than deserving of funding. While both types of rail boast large economic potential and can support California's environmental goals, local rail exhibits unique advantages in both categories, all while having more clearly identified sources of funding and political support. Policymakers would be wise to focus on unlocking its potential, even if doing so means California's long-awaited high-speed rail would have to take a back seat.

But with so much time and money already invested in the project, what should happen to California's high-speed rail? The answer may lie with Brightline West, a privately owned company currently constructing a 218-mile high-speed rail line between Los Angeles and Las Vegas. While the segment is longer than the Merced-Bakersfield segment, the company expects that they can finish construction in just four years,bringing the line into service by 2028.[40] Will a private service finally bring the first high-speed rail to the United States? But more importantly, could its opening provide the impetus necessary to drive the enthusiasm for high-speed rail necessary to get California High-Speed Rail off the ground? There is no doubt that California High-Speed Rail would have a positive economic and environmental impact; it is really the lack of political will that has caused the project to stall in the way that it has. Perhaps a demonstration of high-speed rail close to home will be what Californians need to gather the will to finally commit to building such an ambitious project. Only time will tell.

This piece was written by Evan Samaro and edited by Liam Lynch.

37 Bay Area Rapid Transit, *supra* note 26, at 35.
38 *Id.*, at 17.
39 *See,* Bhatia, *supra* note 17.
40 *See, Project Overview*, Brightline West, https://www.brightlinewest.com/overview/project (last visited November 19, 2024).

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT:

AN ANALYSIS OF LANGUAGE, SPECIAL EDUCATION RIGHTS, AND THE POWER OF PARENTAL AWARENESS

INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) acknowledges the right of all children—both disabled and non-disabled—to access a free and appropriate public education (FAPE) and makes a dynamic advocacy tool available to parents of students with special needs: individualized education programs (IEPs).[1] Designed through meetings involving parents, teachers, school administrators, community members, and ideally the impacted student, IEPs detail the accommodations and special services a child requires to meet specific academic and behavioral goals.[2] Before the advent of the IDEA, children with disabilities often received sparse and sporadic instruction in isolated institutions more concerned with managing than with meeting their needs.[3] Just about 20% of students with disabilities attended a public school shortly before Congress passed the Act—a statistic reflecting an educational landscape where disabled children were effectively segregated from their non-disabled peers.[4] The IDEA introduced into this landscape a series of procedures for determining eligibility for accommodations, documenting the capabilities of students experiencing mental and physical challenges, and confirming the implementation of special services and programs. However, parents and school administrators frequently approach IEP meetings—during which the accommodations and services a child needs are documented—with different levels of legal knowledge.[5] This disparity complicates the process of obtaining educational protections through the IDEA and culminates in strained relationships between frustrated parents and overwhelmed school districts.

The IDEA's built-in emphasis on operational compliance over substantive intellectual growth,[6] the abundance of acronyms and abbreviations parents must know to navigate the special education system,[7] the social stigma inhibiting the identification of children who would benefit from additional support,[8] and the inefficiency and litigiousness of the special education system itself intensify the imbalance of knowledge between parents and school administrators.[9] Together, these institutional and societal factors have problematized the translation of the IDEA's policies into practice: Only once parents are equipped with the legal vocabulary, understanding, and resources they need to advocate effectively for the education rights of their children can the gap between the Act's intentions and implementation be reduced. This paper will provide context and commentary on the IDEA's creation of a well-intentioned but inconsistently executed special education system: Section I will examine the connection between the IDEA's history and its contemporary problems. Section II will illustrate the informal methods used to exclude children with disabilities from general education classrooms. Section III will highlight the social and institutional consequences of the intricate, highly specialized language used in special education. Finally, Section IV will explore alternative educational methodologies designed to challenge every student while meeting their physical and emotional needs.

I. HISTORY OF THE IDEA

The legislative history of the IDEA reflects the ongoing evolution of the language used when referring to children with disabilities. The Elementary and Secondary Education Act of 1965 represents the first instance where the federal government directed funds to the states specifically to support public education.[10] In addition to financially fortifying public schools, the Act expanded the funds available to state-run institutions for individuals with then-recognized disabilities—including blindness, deafness, and "mental retardation" (a term whose dehumanizing potential has since been recognized).[11] Via an amendment approved the following year, the Act also created the Bureau for the Education of the Handicapped, a government organization authorized to coordinate special services for disabled students

1 *E.g.,* Nathaniel Ross, *Individuals with Disabilities Education Act (1975)*, Embryo Project Encyclopedia (2022), https://embryo.asu.edu/pages/individuals-disabilities-education-act-1975 (last visited Nov 6, 2024).
2 *See, e.g.,* Abbreviations and Acronyms California Department of General Services, https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Self-Help/Abbreviations-and-Acronyms (last visited Oct 20, 2024) (provides a brief definition of the acronym IEP).
3 *See, e.g.,* Ross, *supra* note 1 (discusses how children with developmental and physical disabilities were "sent to institutions with little to no educational instruction" prior to the IDEA).
4 *Id.*
5 *See* Howard Huncharek et al., *Out from the Shadows: Informal Removal of Children with Disabilities from Public Schools*, Nat'l. Disability Rts. Network, Jan. 2022, https://www.ndrn.org/wp-content/uploads/2022/01/Out-from-The-Shadows-1.pdf (last visited Oct 19, 2024).
6 *See, e.g.,* Catherine K. Voulgarides, *The promises and pitfalls of mandating racial equity in special education*, 103 Phi Delta Kappan 14, 20 (2022), https://journals.sagepub.com/doi/10.1177%2F00317217221082804 (characterizes the IDEA as a "behemoth bureaucracy" more effective at ensuring compliance with its mandates than at consistently creating equitable learning environments for children with disabilities).
7 *See, e.g.*, Abbreviations and Acronyms, *supra* note 2.
8 *See generally* Kelsey Lisle, *Identifying the Negative Stigma Associated with Having a Learning Disability* (Honors Thesis, Bucknell Univ. 2011), https://digitalcommons.bucknell.edu/honors_theses/22 (determined that individuals across the boundaries of age and gender will "stereotype those with [learning disabilities] as having less future life success, as being less attractive, as having less emotional stability, and as being more open to new experiences when compared to their counterparts without LD").
9 *See, e.g.*, Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 Teacher Educ. and Special Educ. 263, 275 (2015), https://journals.sagepub.com/doi/10.1177%2F0888406415575377.
10 *E.g.,* Ross, *supra* note 1.
11 *E.g., id.*

in cooperation with state and local education agencies.[12] Its passage initiated a series of legislation, including the Education of the Handicapped Act of 1970 (EHA), crafted to address the exclusion of most children with disabilities from the opportunities for intellectual growth, social engagement, and professional advancement offered by the public education system.[13]

Congress passed the EHA with the intention of manifesting a reality where students with disabilities, with assistance from federally supported special education programs, could learn alongside their non-disabled peers to the maximum extent possible. An amendment to the Act later introduced a crucial motivation for states to explore inclusive policies: States that neglected to implement programs promoting the integration of students with disabilities would be denied access to federal funds under the amended EHA.[14] By fiscally obligating states to recognize the humanity of children with disabilities, the amendment discouraged nationwide the segregation of students on the basis of disability status. The Education for All Handicapped Children Act (EAHCA) specified the right of all children to a free and appropriate education, thereby codifying the EHA's emphasis on integration.[15] The principle of FAPE mandates that any decision to exclude a child with an IEP from a general education classroom must be justified by the severity of their disability and the necessity of providing special services in a separate setting.[16] FAPE makes public schools responsible for documenting, addressing, and formulating personalized plans to accommodate the learning differences of their disabled student body. Simply put, it creates the expectation that every student—regardless of their disability status—should have equal access to their school's academic curriculum and extracurricular resources.

Amendments made in 1990 to the EAHCA—renamed the Individuals with Disabilities Education Act—acknowledged the entitlement of children with autism and traumatic brain injuries to the educational privileges listed in the IDEA.[17] They also obligated schools to provide transition planning services to students with IEPs aged 16 and up preparing to move beyond the K-12 system.[18] The 1997 amendments to the IDEA confirmed the right of suspended and expelled children with disabilities to continue accessing instruction while clarifying the disciplinary actions schools can take against disabled students.[19] The most recent reauthorization of the Act, IDEA 2004, established protocols for systematically identifying and quantifying the academic performance of students with learning disabilities and increased the credentials required to secure a position as a special education instructor in a primary subject.[20]

Even as a piece of legislation, the IDEA's development signals key information about the shifting perception, position, and privileges of disabled students within the public education system. The Elementary and Secondary Education Act—whose title does not make reference to disabled students—prioritized strengthening the financial resources of public schools over integrating general and special education classrooms. By contrast, the Education of the Handicapped Act—whose name specifically refers to the American population of disabled students—fiscally induced public schools to begin transitioning eligible children with disabilities to mainstream classrooms. Significant implications also accompanied the renaming in 1975 of the EHA to the Education for All Handicapped Children Act—which codified the right of every child to access a free education in an environment compatible with their needs and intellect, with additional support if necessary. The inclusion of the words "All" and "Children" in the Act's revised title reflected its new core objective: to formalize the education rights of all children with disabilities by more precisely detailing what a free and appropriate public education encompasses. The broader title of the Act's most recent iteration—the Individuals with Disabilities Education Act—signals its wider scope. The IDEA offers the protections specified in the EAHCA to individuals with a more diverse range of disabilities. This revision demonstrates a growing societal awareness of the vast range of mental and physical challenges capable of impacting a child's life at school. The Act's replacement of the phrase "Handicapped Children" with "Individuals with Disabilities" also indicates how the language used to address disabled students has shifted away from emphasizing their disabilities to highlighting their personhood.[21]

The frequency and fundamentality of these revisions evince the instability of the American public education system but also its capacity for improvement: Over the course of about 30 years, the IDEA expanded its protections to individuals experiencing a wider range of mental and physical challenges, solidified the right of disabled students to access the same educational services as their non-disabled peers, and created conventions for identifying the learning environment most appropriate for a child with a disability. In principle, if not always in practice, the IDEA prevents public schools from denying children with disabilities access to an education tailored to their needs.

II. INCONSISTENCIES IN THE IDEA'S IMPLEMENTATION

In the same year the EAHCA codified the right of disabled children to a free and appropriate public education, the Supreme Court decided in *Goss v. Lopez* that students facing suspension are entitled to a notice and a hearing under the Fourteenth Amendment's due process clause.[22] The Court categorized a student's right to attend school as a constitutionally guaranteed

12 *E.g., id.*
13 *See, e.g., id* (elaborates on how the EHA and successive legislation promoted the integration of children with disabilities into general education classrooms).
14 *E.g., id.*
15 *E.g., id.*
16 *E.g.*, Andrew Lee, *What Is and Isn't Covered Under FAPE*, Understood, https://www.understood.org/en/articles/what-is-and-isnt-covered-under-fape (last visited Dec 1, 2024).
17 Ross, *supra* note 1.
18 *E.g.*, Carlos Ramalho, *A Description of the Individuals with Disabilities Education Act (IDEA)*, Living Independently for Today and Tomorrow, https://lifft.org/wp-content/uploads/Carlos-Ramalho-A-Description-of-the-Individuals-with-Disabilities-Education-Act-IDEA.pdf (last visited Nov 28, 2024).
19 *E.g.*, Ross, *supra* note 1.
20 *E.g.*, *id*.
21 *See* Ramalho, *supra* note 18 (describes how the renaming of the EAHCA indicated "a shift in language and societal values" by highlighting the humanity of individuals with disabilities).
22 Goss v. Lopez, 419 U.S. 565 (1975).

property interest—a conclusion influenced by the legal obligation of the suspended students who originally filed the suit in Ohio to be physically present at school.[23] In effect, *Goss v. Lopez* holds public schools accountable for following minimum due process procedures (i.e. providing adequate notice and an opportunity to self-advocate) before issuing a suspension. The amount of protection afforded to students facing suspension generally fluctuates with the duration of their proposed enforced absences.[24]

Public school administrators, however, are not obligated to adhere to due process procedures if they remove a student from the classroom using informal means. In a report titled *Out from the Shadows*, a team of lawyers, educators, and activists commissioned by the National Disability Rights Network identified three methods used by school districts to circumvent acknowledging the due process rights of children excluded from mainstream learning environments: homebound tutoring programs, shortened school days, and "transfers to nowhere."[25] Disabled children assigned to homebound tutoring programs not only receive minimal instruction with minimal support but also lose access to the social engagement and special services they could expect at school.[26] The curricula of homebound tutoring programs are truncated, often covering topics from only two disciplines, English and math, and altogether excluding units in science, social studies, foreign languages, and physical education.[27] Homebound tutoring programs fail at providing children with disabilities the type of compassionate, comprehensive education described in the IDEA but succeed at decreasing the amount of resources schools must devote to identifying and accommodating the unique needs of their disabled student body. Children placed on homebound instruction cannot access the full academic curriculum of their schools, interact with their peers, obtain support from their teachers, or receive the behavioral and transition services key in preparing them for life post-graduation. They also cannot put as large of a financial strain on their school districts. Sometimes for this reason alone, they are systematically eliminated from their communities, isolated, and ignored.[28]

Children experiencing behavioral challenges are also frequently subject to shortened school days.[29] As opposed to adhering to predetermined behavioral intervention plans (BIPs), schools will send children with disabilities home early sporadically, but regularly enough to impact their education, or at a fixed time each day.[30] These children, although they receive some instruction, are nevertheless precluded from utilizing all the educational and special services their schools are compelled by the IDEA to offer. "Transfers to nowhere" involuntarily remove disabled students from generalized education classrooms by placing them in programs that cannot accept new students, stipulate entrance requirements the students cannot fulfill, or simply do not exist.[31] These children receive no instruction from their schools, let alone special services, and are effectively excluded from the public school system altogether.

Children with disabilities removed from school using these informal tactics are not afforded any of the protections specified in *Goss v. Lopez*. No oral or written notice is provided to their families, and no hearings are held to assess the connection between their disabilities and behavioral disruptions.[32] These removal techniques exacerbate the misalignment between the purpose and execution of the IDEA—a document plagued by an overemphasis on compliance with its many rules and regulations and an underemphasis on substantive intellectual growth.[33] Schools with limited budgets serving mostly students of color often lack the resources necessary to provide disabled children the additional support they deserve inside and outside the classroom.[34] The IDEA nonetheless obliges these schools to remain in compliance by documenting all the special services and accommodations required by the disabled members of their student bodies in IEPs and establishing BIPs to manage disruptive in-class behavior.[35] The IEPs and BIPs generated under such circumstances misrepresent the educational experiences of the children they are designed to assist: A gap forms between the non-compliant lived experiences of underserved disabled students and the compliant reality illustrated in their well-established but poorly executed IEPs and BIPs.[36] This gap is most conspicuous in impoverished schools with high populations of minority students.[37] A school's likelihood of being cited for racial inequities can, in fact, be predicted using its geographical location, relative wealth, and student population's socioeconomic and racial composition.[38] In its current form, the IDEA fails to consider the link between a child's race, level of financial security, and likelihood of accessing a free and appropriate public education. Instead, the Act pressures disadvantaged schools to direct resources into complying with its mandates on paper while leaving unaddressed the unique needs and education rights of their most vulnerable students.

III. SOCIAL AND INSTITUTIONAL FACTORS LIMITING PARENTAL AGENCY

Parents attempting to secure educational accommodations under the IDEA on behalf of their children face two critical obstacles: (1) the stigma affecting how children with disabilities are socially perceived and (2) the intricacy and inefficiency of the special education system itself. In a 2011 study, psychologist Kelsey Lisle identified how culturally entrenched negative perceptions about the future life success, attractiveness, and emotional stability of individuals with learning disabilities perpetuate a generalized cycle of bias.[39] This cycle of bias may discourage parents reluctant to assign labels to their children relating to their disabilities from seeking pivotal accommodations and services.[40]

23 *Id.*
24 *E.g.*, Huncharek et al., *supra* note 5.
25 *Id.*
26 *Id.*
27 *Id.*
28 *See id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *See* Voulgarides, *supra* note 6.
34 *See id.*
35 *Id.*
36 *See id.*
37 *See id.*
38 *Id.*
39 Lisle, *supra* note 8.
40 *See* Tanya Liberman, *Assembly Bill Policy Committee Analysis*,

California Assembly Bill 2173[41] and the amendments made in 2022 to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education (approved by the New York State Education Department)[42] aimed to tackle this problem by shifting the legal language parents encounter during IEP meetings. Both the Bill[43] and the amendments[44] replaced the phrase "emotional disturbance" with the term "emotional disability" in the laws of the states where they were passed. Previously, parents advocating for the educational rights of students experiencing even common depressive and anxiety disorders could not begin IEP negotiations without labelling their children "emotionally disturbed" in California and New York.

The approval of the bill and the amendments gives credence to the tangible consequences of stigmatizing language on the implementation of the IDEA, which can include the under-identification of qualifying students and the exclusion of disabled students from conversations about their education.[45] Unwilling to expose their students to stigmatizing language concerning their disability, school administrators—with the support of parents—will encourage children capable of self-advocating to not attend IEP meetings.[46] Children in this position are persuaded to refuse an opportunity to formally enumerate their academic strengths, shortcomings, triggers, and the accommodations they need to perform at their best.

Aside from stigmatizing language, parents engaging with the special education system must also learn to master a legal vocabulary dense with abbreviations, acronyms, and semi-intuitive shorthand. The special education division of the Office of Administrative Hearings, a California state agency responsible for hearing administrative disputes, lists on their website over 100 acronyms and abbreviations frequently referenced in IEPs, IEP meetings, and due process hearings.[47] The intricate language used in special education forces disabled students from low-income families to rely on the ability of their parents to develop legal competencies robust enough to effectively negotiate with school administrators. In these contexts, differences in the legal literacy of poorly informed parents and well-prepared school administrators can lead to disabled students unjustly being denied crucial educational privileges and protections.

Dense terminology forms just one component of special education's overall status as an increasingly legalized sector of K-12 public schooling.[48] Even higher-income parents capable of filing lawsuits to protect the education rights of their children can encounter costly disputes with judges and educators.[49] The highly individualized and often ambiguous nature of cases concerning the educational privileges of children with disabilities makes consistently applying the IDEA's detailed mandates difficult for judges.[50] This difficulty creates a high potential for expensive disagreements between parents, litigators, educators, and judges to occur over prolonged periods of time.[51] In 2023, for example, Irvine Unified School District (IUSD) spent over $1 million fighting a lawsuit filed by Sharon Landers and Joseph Gagliano years before.[52] Landers and Gagliano, who moved their dyslexic daughter from a public school to a specialized private school after discovering the insufficiency of her adapted curriculum, filed a due process case to obtain tuition reimbursement from the school district.[53] The duration and costliness of the legal battle between IUSD and Landers and Gagliano reflects the dysfunctionality of special education at large—a system guided by specific and well-meaning but oftentimes impractical and inflexible rules and regulations.

IV. SOLUTIONS

Michael Wehmeyer, an author who started working in special education around the time the EACHA was passed, proposes moving away from focusing on the weaknesses experienced and obstacles faced by disabled students towards honing the strengths and acknowledging the achievements of every student.[54] In its current form, the IDEA conceptualizes special education as a program of instructional and behavioral services designed to help children with disabilities academically and personally develop in environments compatible with their unique needs. Determining the accommodations a disabled child requires to remain involved in school and the extent to which they should be schooled alongside their peers, however, can be a complicated task for perplexed parents and overburdened school administrators. Even after these determinations have been made, school districts often struggle to implement the accommodations and deliver the services specified in IEPs on a consistent basis. Wehmeyer—as an educator with decades of experience—argues for a complete reconceptualization of the special education system: As opposed to only providing additional support to students with disabilities, he asserts, educators should work towards delivering personalized assistance to every child in their classroom.[55] He contends that every child, regardless of disability

Assembly Comm. on Educ., https://trackbill.com/s3/bills/CA/2023/AB/2173/analyses/assembly-education.pdf (last visited Dec 2, 2024) (highlights the urgent necessity of passing CA AB2173 by explaining how the "stigma associated with [the 'emotional disturbance'] label may deter parents from seeking eligibility for services").

41 *Id.*

42 *Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance,"* N. Y. State Educ. Dep't, https://www.nysed.gov/memo/special-education/permanent-adoption-amendments-sections-2001-and-2004-regulations-commissioner (last visited Oct 19, 2024).

43 Lieberman, *supra* note 40.

44 Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance New York State Education Department, *supra* note 42.

45 *See* Lieberman, *supra* note 40.

46 *See id* (explains how the reluctance of teachers and guardians to "include the youth [in the IEP process] when they know 'emotional disturbance' is going to be discussed" can impact the quality of the accommodations and special services disabled students generally receive).

47 Abbreviations and Acronyms California Department of General Services, *supra* note 2.

48 *See, e.g.*, Zirkel, *supra* note 9 (refers to special education as "the most legalized segment of P-12 schooling").

49 *See id*.

50 *See id*.

51 *See, e.g.*, *id*.

52 Sara Randazzo, *Why One School District Spent $1 Million Fighting a Special Education Student*, The Wall St. J., (Feb. 23, 2024), https://www.wsj.com/us-news/education/why-one-school-district-spent-1-million-fighting-a-special-education-student-8b44ecca (last visited Dec 1, 2024).

53 *Id*.

54 Michael Wehmeyer, *From Segregation to Strengths: A Personal History of Special Education*, 103(6) Phi Delta Kappan 8, 13 (2022), https://journals-sagepub-com.ccl.idm.oclc.org/doi/10.1177/00317217221082792 (last visited Oct 21, 2024).

55 *Id.*

status, deserves to have their strengths appreciated, weaknesses accommodated, and sensitivities respected.[56] From his perspective, the special education standard of considering and meeting the needs of every student should be transferred to general education classrooms.[57]

The educational methodologies that best align with Wehmeyer's reenvisioning of the general education system are the Multi-Tiered System of Supports (MTSS) and Response to Intervention (RTI) frameworks.[58] MTSS delivers the same core instructional services to every student while providing supplemental intervention to students struggling to meet grade-level-specific goals. Under an MTSS model, educators assign students to a universal, strategic, or intensive instructional tier—with the ultimate aim of helping students in the intensive tier transition to the strategic tier and those in the strategic tier move to the universal tier.[59] The assessments teachers utilize to determine tier assignments form the RTI framework—an instructional tool crafted to formulate thorough academic profiles recording every student's challenges and opportunities for success.[60]

Responses to the MTSS/RTI model have acknowledged the capacity of the dual framework to evaluate the needs and promote the intellectual growth of individual students but also its tendency to increase the workloads of educators.[61] Instructors who implement MTSS and RTI techniques in their classrooms have reported feeling overwhelmed by the responsibility of providing academic intervention to students with and without IEPs and disillusioned by the lack of movement of students within the strategic and intensive tiers.[62] Often, more students than can easily be managed require intensive support—an issue amplified by the reality that public school districts rarely increase their budgets to account for the abundance of children who need supplemental assistance and the minimal number of students who benefit from little help.[63] Educators have also described experiencing the daily dilemma of choosing whether to prioritize students with IEPs over students who require support but do not have disabilities documented.[64]

The regular underidentification of children eligible for protections under the IDEA—a result of the disparity in the legal knowledge and resources of parents and school districts—is at least partially responsible for the difficulties with implementing MTSS/RTI cited by educators. As a result of underidentification, students who might qualify for accommodations but do not have a documented disability—even in classrooms structured to adhere to MTSS/RTI—struggle to have their needs understood and met. However, if parental awareness of special education rights increases, the impact of two problems with executing the dual framework highlighted by educators will contract. If more parents acquire a strong understanding of the educational privileges the IDEA affords their children, underidentification will decrease and a larger number of qualifying students will have their disabilities and special needs documented in IEPs. Teachers will be more prepared to interact with students experiencing mental, behavioral, and physical challenges—given that they will possess information beforehand about the precise learning differences of those students. The presence of an IEP relieves teachers from having to determine how an eligible child's undocumented disability impacts their education over the course of the year using RTI procedures. In this scenario, educators will also be faced less frequently with the dilemma of whether a struggling child with an IEP should be prioritized over a struggling child without one, since a higher number of eligible children will have IEPs on file.

Several advocacy organizations are already making a concerted effort to increase parental awareness about the rights of children with disabilities: Parent to Parent of Washington State maintains an online space for parents of children with special needs to exchange resources and discuss legal, medical, and general news in the disability rights sphere.[65] Led by individuals with disabilities and parents of disabled children, The Disability Rights Education and Defense Fund offers legal advocacy, training, and education and assists in public policy and legislative development.[66] The Michigan Disability Rights Coalition promotes disability pride by raising awareness and celebrating the lives of people with disabilities,[67] and the Inclusive Education Project in California provides educational programming on special education rights to parents and teachers and connects low-income families with free legal aid.[68]

These organizations and the IDEA jointly aim to create a social environment where the rights of individuals with disabilities are well-established and well-respected. As a document, the IDEA asserts the right of every disabled American child to a free public education designed to meet their unique needs in a supportive environment. It specifies protocols for documenting the accommodations and special services a student requires and provides opportunities for parents to directly influence the education of their children through IEP meetings. At the moment, imbalances in the legal literacy of parents and school administrators are preventing disabled students from accessing critical educational supports and educators from maximizing the potential of more inclusive pedagogical techniques. Parental awareness of special education rights is therefore key, not just to enforcing the protections listed in the IDEA, but also to exploring how special education methodologies can increase the quality of instruction in general education classrooms.

This piece was written by Nicole Chu and edited by Ashley Son.

56 *Id.*
57 *Id.*
58 *See, e.g.*, Rachel Brown-Chidsey, *MTSS in the Classroom: Special Education Teachers' Experiences with a Multi-Tiered System of Supports*, 32(5) Exceptionality 349, 363 (2024), https://doi.org/10.1080/09362835.2024.2389073.
59 *E.g., id.*
60 *E.g., id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*

65 *E.g.*, Advocacy Organizations Special Education Support Center (2023), https://specialeducationsupportcenter.org/agencies-advocates/advocacy-organizations/ (last visited Dec 1, 2024).
66 *E.g.*, Listing: Advocacy Groups for People with Disabilities (2024), https://www.sralab.org/lifecenter/resources/listing-advocacy-groups-people-disabilities (last visited Dec 2, 2024).
67 *E.g.*, *id.*
68 *Our Story*, The Inclusive Educ. Project, https://www.inclusiveeducationproject.org/our-story (last visited Dec 2, 2024).

U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS TO UNITED NATIONS HUMAN RIGHTS TREATIES:

IMPLICATIONS FOR INTERNATIONAL ACCOUNTABILITY

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INTRODUCTION

Beginning in the 1970s, the United States developed an approach that balanced its commitment to international human rights treaties with domestic considerations. To that end, the U.S. ratified UN treaties with specific conditions. These conditions, which form the core focus of this paper, are expressed as reservations, understandings, and declarations (RUDs) attached to U.S. treaty ratifications,[1] often justified on the debatably broad basis of protecting constitutional sovereignty. U.S. RUDs have long been a subject of critique.[2] This paper explores how this exceptionalism prevents international accountability by fostering environments where human rights violations can proliferate abroad, particularly in the context of U.S.-based far-right groups financing and influencing anti-LGBTQ+ policies abroad. Given the rise of these groups and their financial and ideological involvement in shaping regressive laws in countries such as Uganda, Kenya and Ghana, it is necessary to assess how these RUDs facilitate impunity for these actors. Part I provides an analysis of the legal and constitutional justifications for U.S. exceptionalism regarding RUDs. In Part II, I discuss how far-right groups exert legal, financial, and ideological influence in Africa, to promote anti-LGBTQ+ agendas while perpetuating violence and rights suppression under the guise of cultural preservation. Part III analyzes provisions within select treaties that may implicate the U.S. and its cronies in human rights violations if the U.S. had fully ratified them. I also analyze mechanisms within and outside of these treaties such as indirect state responsibility, due diligence obligations, domestic legislation, and soft law mechanisms that could potentially hold U.S. actors accountable if the U.S. were a full participant. Part IV concludes the paper with potential reforms and policy recommendations for reconciling U.S. sovereignty and constitutional concerns with international human rights responsibilities. My analysis of U.S. treaty behavior and the global implications of its domestic ideological exports does not intend, whether consciously or not, to undermine the significance of its national sovereignty or constitutional principles. Rather, I hope to make the case for reconsidering the intersection of constitutional protectionism and international human rights responsibilities.

I. UNITED STATES' RUDS TO HUMAN RIGHTS TREATIES: LEGAL AND CONSTITUTIONAL JUSTIFICATIONS

A. Historical Foundations of Reluctance: The Treaty-Making Process in the United States

Historically, the constitutional framework of the United States was not designed with human rights treaties in mind.[3] As Bradley and Goldsmith detail, the treaty making process outlined in section 2 of Article II, of the Constitution initially envisaged agreements focusing on international trade, peace, and other bilateral matters between *sovereign nations* (emphasis mine).[4] These treaties were primarily outward-facing, governing the U.S. external relations, and rarely required direct interference with the nation's domestic affairs.[5] The Constitution's treaty making clause was thus designed to reflect this narrower focus, which also influenced the Senate's advice-and-consent role, a safeguard against treaty overreach into domestic policy.

However, in the aftermath of the Second World War, the urgent demands of global politics, coupled with bold imaginative vision, created an ideal landscape for exploring ways to secure lasting peace and shared prosperity, particularly in the field of human rights. The Nuremberg Trials, held to prosecute war crimes and crimes against humanity, set a powerful prece-

1 Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 Nw. J. Int'l Hum. Rts. Art. 7, ¶ 3 (2005).https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1018&context=njihr (last visited Nov. 9, 2024).

2 Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 342-50 (1995); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 Geo. Wash. J. Int'l L. & Econ. 49, 50 (1997); M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States*, 42 DePaul L. Rev. 1169, 1173 (1993); Lori Fisler Damrosch, *The Role of the United States Senate 'Self-Executing' and 'Non-Self-Executing' Treaties*, 67 Chi.-Kent L. Rev. 515, 532 (1991).

3 Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 400 (2000).

4 *Id.*

5 Pierre-Hugues Verdier & Mila Versteeg, *Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey*, in The Oxford Handbook of Comparative Foreign Relations Law (Curtis A. Bradley ed., 2019), https://doi.org/10.1093/oxfordhb/9780190653330.013.8 (last visited Nov. 9, 2024).

dent by establishing that individual accountability and the protection of fundamental human rights are essential pillars of international law. The world's second major conflict of the twentieth century, another "war to end all wars" prompted leading officials and policy experts to reconsider the value of intergovernmental organizations and multilateral collaboration. Although the Cold War complicated these ambitions, it did not halt the drive to form a new wave of global institutions, embodied by the United Nations system. These developments in international law introduced treaties that sought to regulate states' internal affairs, particularly their treatment of individual citizens. Modern multilateral treaties, such as the International Covenant on Civil and Political Rights (ICCPR), demanded a shift in paradigm by binding nations to protect a broad array of rights within their own territories, a position which did not hitherto exist.[6] Although President Carter signed the ICCPR in 1977, it was not until fifteen years later in 1992 that the U.S. Senate ratified it. Ash notes how this delay reflects the historical ambivalence of the U.S. toward binding international human rights treaties, especially those perceived as encroaching on its legal and political sovereignty.[7]

B. American Constitutional Exceptionalism and Sovereignty Concerns

Central to the United States' skepticism toward human rights treaties is the idea of constitutional exceptionalism. This reflects an enduring belief that the U.S. Constitution is a self-sufficient guarantor of justice and rights that should not be subordinated to international frameworks.[8] The irony of this position is particularly stark especially when considered against the backdrop of the domestic realities in the U.S. at the time, particularly in the latter half of the 20th century. The U.S. was grappling with ongoing civil rights violations, from systemic racial discrimination to the criminalization of marginalized communities. Senator Bricker and other Southern senators were particularly concerned because ratification of the treaties would invalidate thousands of laws which discriminated against minorities,[9] a path they were certain the U.S. was not prepared to tread. Senator Bricker himself noted in 1951 that his purpose for introducing the Bricker resolution was "to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection."[10]

Senator Bricker's resolution, which eventually evolved into the Bricker Amendment,[11] represented the apex of this concerted effort to render the various UN human rights treaties under consideration after World War II ineffective.[12] Although the amendment ultimately did not pass, it influenced U.S. treaty policy by ensuring that subsequent treaties were often approached with RUDs to align international obligations with the same domestic laws that perpetuated discrimination and marginalization.[13] This phenomenon also led to the development of the 'conditional consent' strategy that allowed the U.S. to come across as a participant in the global human rights discourse without necessarily surrendering what it viewed as essential elements of its sovereignty while also not fully committing to the protection of human rights.

C. Analysis of the Law Governing Treaties

1. The "Object and Purpose" Argument

Treaty law is primarily regulated by the Vienna convention on the Law of Treaties (VCLT), which was opened for signing in 1969 and became effective from 1980.[14] Although the United States has not ratified the VCLT, it nonetheless remains fully binding on the U.S. by reason of Customary International Law (CIL), which Shaw describes as constituting a) State Practice (material fact) and b) *Opinio Juris* (psychological element).[15] State practice is the actual practice of states which indicates the existence of a consistent and general practice,[16] while *opinio juris* refers to the belief or recognition by states that a certain practice is obligatory as a matter of law.[17] Customary international law arises when both of these elements are present and demonstrate that certain practices are accepted as legally binding by the international community. An evaluation of whether the VCLT can accurately be regarded as constituting customary international law properly so called, and in the truest sense of the term falls outside the remit of this paper. However, it is sufficient to assert, as officials from the executive branch have previously affirmed, that the Convention indeed mirrors the principles of customary international law.

Of much relevance though is Article 19 of the VCLT, which provides that a State may make a reservation upon signing, ratifying, accepting, approving, or acceding to a treaty unless the treaty prohibits reservations, allows only specified reservations excluding the one proposed, or if the reservation conflicts with the treaty's object and purpose. One of the foremost contentions put forth by scholars is that U.S. reservations to treaties like the ICCPR, and other such treaties violate the treaty's "object and purpose" and are consequently invalid under Article 19 of the Vienna Convention.[18] In the context of the

6 Christine Min Wotipka & Kiyoteru Tsutsui, *Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001*, 23 Sociological F. 724 (2008).
7 Ash, *supra* note 1, page 4.
8 John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in American Exceptionalism and Human Rts 304 (Michael Ignatieff ed., 2005).
9 Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 Hum. Rts. Q. 309, 321 (1988).
10 *Congressional Record*. 82nd Cong., 1st sess., 1951. Vol. 97, pt. 8: 8263; Duane A. Tananbaum, *The Bricker Amendment Controversy: Its Origins and Eisenhower's Role*, 9 Dipl. Hist. 73 (1985).
11 Philip A. Grant, *The Bricker Amendment Controversy*, 15 Presidential Stud. Q. 572 (1985).
12 John B. Whitton & J. Edward Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 Am. J. Int'l L. 23, 23–56 (1954), https://doi.org/10.2307/2194733 (last visited Nov. 21, 2024).
13 Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 400 (2000), https://www.jstor.org/stable/3312731 (last visited Nov. 10, 2024).
14 Vienna Convention on the Law of Treaties (1969) - United Nations. United Nations, Treaty Series.
15 Malcolm N. Shaw, Int'l L. (Cambridge University Press 2021).
16 Justice Canada, *State Practice and Opinio Juris - Polygyny and Canada's Obligations under International Human Rights Law*, https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap5.html (last visited Nov. 20, 2024).
17 *See generally*, Peter Malanczuk, Akehurst's Modern Introduction to Int'l L. (7th rev. ed. Routledge 1997).
18 Ryan Goodman, *Human Rights Treaties, Invalid Reservations, And State Consent* (2016); Ved P. Nanda, *The United States Reservation to the Ban on*

ICCPR, it has been argued that some U.S. reservations, such as those related to prohibitions on the death penalty for juveniles or protections against inhumane treatment,[19] directly undermine core human rights provisions central to the ICCPR.[20] By reserving the right not to fully comply with these protections, the U.S. is seen as contradicting the ICCPR's essential aims of safeguarding human dignity, equality, and fundamental rights.

Evidence supporting this contention includes interpretations by the United Nations Human Rights Committee (UNHRC), which oversees ICCPR implementation.[21] The Committee has emphasized that reservations that conflict with the ICCPR's core rights and protections can render those reservations invalid.[22] For instance, General Comment No. 24 by the UNHRC explicitly states that reservations incompatible with the treaty's primary goals should not be permitted, and that such reservations "will not be effective in modifying the treaty obligations of the reserving party."[23] This includes U.S. reservations that significantly dilute protections guaranteed under the ICCPR, as these undermine the treaty's core purpose of advancing universal human rights, broadly said.[24] Consequently, the argument by other scholars that the U.S. RUDs to human rights treaties do not violate the treaties' "object and purpose" rests on very problematic reasoning, especially when we consider the fundamental nature of human rights protections.

The "object and purpose" of human rights treaties lie in establishing minimum, universal standards that transcend individual state interests. Reservations that limit compliance to align with domestic law (especially when that law conflicts with widely accepted human rights standards) can distort these universal protections. Therefore, by conditioning its obligations on domestic standards, the U.S. risks creating exceptions that undermine the universal reach of these rights, potentially setting a dangerous precedent for selective compliance around the world.

2. Other Minor Arguments

Some other scholars argue that Article 27 of the VCLT says nothing about reliance on domestic law as a justification for not consenting to a treaty obligation and that consequently, the provision has no bearing on the validity of RUDs which do not claim any right of nonperformance by the U.S. with respect to treaty provisions that it has ratified.[25] However what they fail to recognize is that, article 27 of the VCLT, unequivocally states that a country cannot invoke its internal law as justification for failing to perform its international treaty obligations. This is a foundational principle that is intended to prevent states from evading their obligations by citing domestic legal issues. Their assertion downplays this principle by suggesting that Article 27 solely addresses "nonperformance" and has no relevance to RUDs. The usage of RUDs allows a state to limit its obligations under the treaty, which in effect can be perceived as a workaround to full treaty compliance—something that runs counter to the spirit of Article 27's emphasis on the supremacy of international obligations.[26] Their assertion also implies that RUDs do not impact the U.S.' performance concerning ratified treaty provisions. However, in practice, RUDs can significantly alter the extent and nature of a state's obligations, especially if they are used to narrow the scope of treaty compliance.[27] The selective adherence or modification of treaty provisions can dilute the intended universal applicability and consistency of international law, potentially undermining the treaty's effectiveness and eroding the principle of *pacta sunt servanda* (agreements must be kept).[28]

Another famous argument is that the claim by other scholars that the U.S. cannot formulate reservations against treaty provisions already binding under customary international law is flawed, because those provisions aren't binding customary law, and even if they were, the U.S. has effectively opted out of them.[29] First of all, this position claims that provisions in, say the ICCPR to which the United States has attached significant reservations, are unlikely to reflect binding CIL. As mentioned earlier this paper shall not attempt a diagnosis of what constitutes CIL and what doesn't. However, suffice it to say that CIL is not solely dependent on whether each individual state complies; rather, it evolves from widespread, consistent state practice that is undertaken with a sense of legal obligation (*opinio juris*).[30] Their position assumes that because the United States has adopted reservations, the reserved provisions cannot constitute CIL, an assumption that fails to recognize that customary norms, once established, bind all states, including those that may attempt to derogate through reservations, especially when fundamental rights are concerned.[31]

Bradley and Goldsmith also provide an example of a customary international law ban on executing juveniles that is particularly illustrative. Many scholars and international bodies argue that there is indeed substantial state practice and *opinio juris* opposing juvenile executions, suggesting that it constitutes CIL.[32] However, their position dismisses this by suggesting the U.S. has effectively "opted out" of this norm.[33] This position

the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1311 (1993).

19 *Id.*

20 *Id.*

21 ICCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant.

22 *Id.*

23 General Comment 24(52), *supra* note 12.

24 Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1332 (1993).

25 *Id.*

26 Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 Yale L.J. 1 (2016-2017).

27 Centre for Global Legal Challenges, General Principles Regarding the Legal Validity of RUDs; A Report of the Center for Global Legal Challenges (Yale Law Sch. 2015), https://law.yale.edu/sites/default/files/yale_glc_legal_validity_of_ruds_2015.pdf (last visited Nov. 9, 2024).

28 United Nations, Peremptory Norms of General int'l Law (Jus Cogens), https://legal.un.org/ilc/reports/2019/english/chp5.pdf (last visited Nov. 15, 2024).

29 Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, 97 Am. J. Int'l L. 401 (2003).

30 Peter Malanczuk, Akehurst's Modern Introduction to int'l Law (7th rev. ed., Routledge 1997).

31 United Nations, *Peremptory Norms of General International Law (Jus Cogens)*, https://legal.un.org/ilc/reports/2019/english/chp5.pdf (last visited Nov. 15, 2024).

32 Harmen Van der Wilt, *State Practice as Element of Customary International Law: A White Knight in International Criminal Law?*, 20 Int'l Crim. L. Rev. 784 (2019).

33 Curtis A. Bradley & Jack L. Goldsmith, *The Juvenile Death Penalty and International Law*, 52 Duke L.J. 485 (2002).

ignores that states cannot unilaterally "opt out" of a well-established CIL norm by entering a reservation to a treaty provision that mirrors it, especially when such norms pertain to human rights or jus cogens (peremptory norms), which are universally binding and non-derogable.[34] Their position also seems to imply that the United States can "opt out" of CIL through treaty reservations, which is legally questionable. In cases where a treaty provision codifies CIL, reservations do not negate the state's underlying customary obligation.[35] It is trite that if a treaty codifies an existing customary norm, a reservation to that treaty does not absolve the reserving state from the customary obligation.[36]

This introductory section of the paper has demonstrated how the United States' reliance on RUDs reflects its constitutional exceptionalism and ambivalence toward fully embracing binding international human rights obligations. This foundational discussion now transitions to examining the legal, financial, and ideological mechanisms through which U.S.-based groups exploit these gaps to promote anti-LGBTQ+ agendas in foreign nations.

II. NEOCOLONIALISM IN THE CONTEXT OF U.S. FAR-RIGHT GROUPS AND THEIR ANTI-LGBTQ+ AGENDA IN AFRICA

A. Legal, financial, and ideological ways through which far-right groups influence foreign legislation outside of the U.S.

The decolonization process of the African continent did not necessarily dismantle the hierarchical structures of knowledge and power past relations of outright domination embodied. When Nkrumah spoke of neocolonialism as the worst form of imperialism,[37] he did not envision the multifaceted strategies that would later emerge, to allow former imperial powers and their ideological satellites to maintain their influence. This wave of neocolonialism operates less overtly than traditional colonial domination by employing soft power tactics, financial incentives, and cultural hegemony to secure its objectives. I discuss these in greater detail below.

1. General Influence in Uganda

When the U.S. began legalizing gay marriages, many extreme American evangelical groups recognized they were fighting a losing battle on their home turf and shifted their focus to places where they could exert greater influence.[38] Uganda, which was seen as a fertile ground for this "anti-gay" ideology due to a majority conservative Christian base quickly became their target. The movement quickly gained traction in 2009 after top-American evangelical leaders headlined a three-day conference in Kampala on "exposing the homosexuals' agenda," promoting the false, revisionist notion of a traditional Ugandan family. Anthropological and historical evidence suggests that diverse sexual orientations and gender identities have existed across African societies for centuries, including pre-colonial Uganda.[39]

These evangelical groups have since spent years and tens of millions of dollars spreading homophobia in Uganda and beyond. From 2007-2020, at least half of 54 million dollars (total sum spent in Africa by evangelical groups) were spent in Uganda for that purpose.[40] U.K.-based media platform openDemocracy published a 2020 report that revealed that more than 20 American Christian groups, known for their campaigns against LGBTQ+ rights, access to safe abortion, contraceptives and comprehensive sex education, have spent at least $54 million (€49.5 million) in Africa since 2007.[41] Their combined efforts led to the passage of the first version of the Anti-Homosexuality Act, 2014. However, pressure from the White House, international activist groups and certain governments caused Uganda's Constitutional Court to declare the Act invalid on procedural grounds.[42]

Family Watch International (FWI) is an Arizona-based anti-LGBTQ+ domestic and international legislative and policy organization that works in countries to peddle regressive anti-LGBTQ+, anti-reproductive rights and abstinence-only education beliefs. The group was behind one of the biggest anti-LGBTQ+ and anti-comprehensive sex education convenings in Uganda, which was in April 2023.[43] In April 2020, FWI co-sponsored an inter-parliamentary conference on family values and sovereignty just weeks after Uganda's parliamentarians had voted in favor of the anti-gay bill. They have also been coaching high-ranking Ugandan politicians and religious leaders for years to support their extreme and oppressive positions on gender and sexual diversity.[44] FWI has supported public campaigns and rallies in Uganda that promote anti-LGBTQ+ sentiments (One Million Man March). The group operates under the leadership of founder and longtime anti-LGBT and anti-choice activist Sharon

34 Malcolm N. Shaw, International Law (Cambridge Univ. Press 2021).
35 Curtis Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 Duke J. Comp. & Int'l L. 30 (2010). For example, the ICCPR's provisions on the right to life and the prohibition on inhumane treatment are widely accepted as reflecting CIL, if not *jus cogens* norms.
36 Int'l Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General int'l Law (Jus Cogens), (2022); Thus, by attaching reservations to these provisions, the United States cannot simply ignore or avoid its obligations under CIL.
37 Kwame Nkrumah, *Introduction to Neo-Colonialism*, Marxists Internet Archive, https://www.marxists.org/subject/africa/nkrumah/neo-colonialism/introduction.html (last visited Jan. 26, 2025).
38 Emma Anderson, *The Unholy Relationship Between Uganda's Anti-LGBTQ+ Law and US Evangelicalism*, Chicago Council on Global Affairs (June 8, 2023), https://globalaffairs.org/commentary-and-analysis/blogs/unholy-relationship-between-ugandas-anti-lgbtq-law-and-us (last visited Nov. 18, 2024).
39 Stephen O. Murray, Will Roscoe & Marc Epprecht, Boy-Wives and Female Husbands: Studies in African Homosexualities (State Univ. of N.Y. Press 2021), https://dx.doi.org/10.1353/book.83859 (last visited Nov. 20, 2024).
40 Lydia Namubiru & Soita Khatondi, *Exclusive: US Christian Right Pours More than $50m into Africa*, openDemocracy (Oct. 29, 2020), https://www.opendemocracy.net/en/5050/africa-us-christian-right-50m/ (last visited Nov. 20, 2024).
41 *Id*.
42 Despite this legal victory for LGBTQ+ rights advocates, the backlash was significant. Supporters of the law doubled down, framing the invalidation as a result of foreign interference and a threat to Uganda's sovereignty and cultural values. In the years that followed, new iterations of anti-LGBTQ+ legislation were introduced, with proponents seeking to rally local and regional support. Meanwhile, LGBTQ+ individuals in Uganda faced heightened stigma, discrimination, and violence, as public sentiment was inflamed by ongoing political rhetoric and media campaigns.
43 Emerson Hodges, *Despite Denials, Harsh Anti-LGBTQ+ Law in Uganda Appears to Be Based on U.S. Rhetoric and Pseudoscience*, SPL Center Blog (Feb. 13, 2024), https://www.splcenter.org/ (last visited Nov. 22, 2024).
44 Sanderson, *supra* note 1.

Slater. The National Centre on Sexual Exploitation (NCOSE), a Washington DC-based organization, has also been involved in promoting anti-LGBTQ+ sentiments in Uganda. Its efforts to make inroads in Uganda have been continuing for at least a decade, according to information on the organization's own website.[45]

2. General Influence in Kenya

Kenya has been a particular focal point of the U.S. Christian right for years. In 2010, the American Centre for Law and Justice (ACLJ), founded by televangelist Pat Robertson, opened an office in Nairobi, around the time that Kenya was debating a new constitution that included controversial addendums to its penal code regarding abortion.[46] The ACLJ pledged to lend financial support to help defeat the constitution. It has also supported the criminalization of same-sex intimacy. Due to their being neighbouring countries, all the U.S.-far right groups promoting anti-LGBTQ+ laws in Uganda have also been active in Kenya. As a result, much may not be said about their individual means of influence in Kenya.

The WCF, an anti-LGBT hate group based in Rockford, Ill., holds a yearly major gathering (Tbilisi in May) that often showcases anti-LGBT and anti-choice sentiment.[47] It also helps organize and co-sponsor smaller, so-called "regional conferences" throughout the year in various parts of the world. The organization held an African Regional Conference of Families in Nairobi in 2016 that addressed various topics, including "pressure from the West to legalize abortion and same-sex unions"; "erosion of parenting responsibilities"; "family attack by media"; and "adoption of liberal laws."[48]

3. General Influence in Ghana

In 2019, Ghana had its first "family values" conference in response to LGBTQ+ activism that arose in the country. The conference was hosted by the World Congress of Families in collaboration with Family Renaissance International, which the Human Rights Campaign calls "one of the most influential American organizations involved in the export of hate."[49] One of the highlights of the conference, for attendees, was the presence of U.S. ultra-conservative organizer Brian Brown, the president of the World Congress of Families (WCF). Brown made a name for himself pushing Californians to outlaw same-sex marriage at the ballot. He continues to lead the National Organization for Marriage.[50] Sharon Slater, who was actively involved in the passage of the anti-LGBTQ Act in Uganda was also a speaker at the Conference.

At WCF's Accra conference, the delegates proposed the formation of legal teams to mount constitutional and legal challenges within six months to a year. Despite the COVID-19 pandemic, their timeline wasn't far off. The Conference though held in 2019 laid the foundation for the 2023 bill. The Anti-LGBT Bill in Ghana was spearheaded by a cross-party group of Members of Pasrliament, (MP) led by opposition MP Sam George, a prominent anti-gay figure. Backing the bill was the National Coalition for Proper Human Sexual Rights and Family Values, which is linked to right-wing conservative groups like the U.S.-based World Congress of Families and Spain's CitizenGo.[51] These groups actively oppose LGBTQ+ and abortion rights globally.[52] The Coalition has promoted its agenda in Ghana through high school outreach and successfully blocked comprehensive sex education in 2019, labeling it a plot to "brainwash" Ghanaians.[53] In 2021, the group lobbied for the anti-LGBT bill, suggesting that LGBTQ+ individuals refusing conversion therapy "should be put in jail".[54]

Between 2016 and 2021, at least $5 million in aid from Europe and the U.S. supported projects linked to Ghanaian churches whose leaders actively opposed LGBTQI+ rights and backed the anti-LGBT bill, according to CNN's analysis of financial data and communication with the donors. Notably, over $140,000 of U.K. and U.S. taxpayers' money from 2018-2020 went to the Christian Council of Ghana (CCG), a group of 29 churches that publicly opposed LGBTQ rights in 2020.[55]

This part of the paper details how U.S.-based far-right groups strategically deploy legal, financial, and ideological influence in African nations like Uganda, Kenya, and Ghana, among others, to advance anti-LGBTQ+ agendas under the guise of cultural preservation. Next, I explore how such activities violate human rights norms under UN treaty obligations and the broader implications of these violations for international accountability.

III. VIOLATIONS OF HUMAN RIGHTS NORMS UNDER UN TREATY OBLIGATIONS BY U.S.-BASED FAR-RIGHT GROUPS

A. Violations of Human Rights Norms Under Select

45 Jason Wilson, *Revealed: How a US Far-right Group is Influencing Anti-gay Policies in Africa*, The Guardian (May 30, 2024), https://www.theguardian.com/world/article/2024/may/30/us-far-right-group-influencing-anti-gay-policy-africa (last visited Nov. 9, 2024).

46 Mia Gingerich, *Right-wing Media Figures Defending Uganda's Anti-Gay Law Are Connected to Organizations that Helped Inspire It*, Media Matters for America (Apr. 17, 2023), https://www.mediamatters.org/ (last visited Nov. 22, 2024).

47 Hatewatch Staff, *World Congress of Families Gathering in Tbilisi Showcases anti-LGBT Rhetoric and Conspiracy Theories*, SPL Center (June 1, 2016), https://www.splcenter.org/hatewatch/2016/06/01/world-congress-families-gathering-tbilisi-showcases-anti-lgbt-rhetoric-and-conspiracy (last visited Nov. 24, 2024).

48 *Id.*

49 David McKenzie & Nimi Princewill, *How a US Group with Links to the Far-right may have Influenced a Crackdown on Ghana's LGBTQ Community*, CNN (Oct. 8, 2021), https://edition.cnn.com/2021/10/08/africa/ghana-lgbtq-crackdown-intl-cmd/index.html (last visited Nov. 19, 2024).

50 *Id.*

51 Emmanuel Akinwotu, *Explainer: What Makes Ghana's Anti-gay Bill so Extreme?*, The Guardian (Aug. 3, 2022), https://www.theguardian.com/global-development/2022/aug/03/explainer-what-makes-ghana-draft-anti-gay-lgbtq-bill-so-extreme (last visited Nov. 19, 2024).

52 *Id.*

53 *Id.*

54 Josh Milton, *LGBT+ Ghanaians Should be Hunted Down and Forced into Conversion Therapy, Bigot tells MPs*, PinkNews (Dec. 7, 2021), https://www.thepinknews.com/2021/12/07/ghana-lgbt-law-moses-foh-amoaning/ (last visited Nov. 10, 2024).

55 Claire Provost & Nana Darkoa, *Exclusive: Millions in Western Aid Flowed to Churches in Ghana Despite Years of Campaigning against LGBTQI+ Rights*, CNN (Dec. 13, 2022), https://edition.cnn.com/2022/12/13/africa/us-europe-aid-lgbtqi-ghana-churches-investigation-as-equals-intl-cmd-dg/index.html; When presented with the findings of CNN's analysis, donors whose aid went to projects for or by religious organizations that oppose LGBTQI+ rights said that all such support stopped before the legislation was proposed, or that the funding was given under now-outdated guidelines.

UN Treaties

1. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR establishes a framework for the protection of civil and political rights, including non-discrimination, the prohibition of torture, and the protection of freedoms of expression and association. Article 2(1) mandates that state parties ensure the rights recognized in the Covenant are protected "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[56] The UN Human Rights Committee has explicitly stated that sexual orientation falls within the purview of "other status."[57] Therefore, by promoting anti-LGBTQ+ policies that criminalize or marginalize individuals based on their sexual orientation or gender identity, it is my contention that U.S. far-right groups facilitate states' violations of this provision.

Article 7 prohibits torture and cruel, inhuman, or degrading treatment or punishment.[58] The enactment of anti-LGBTQ+ laws, often accompanied by police brutality,[59] forced "conversion therapy,"[60] and violent enforcement practices,[61] constitutes a direct violation of this provision. It is again my contention that the involvement of U.S. far-right actors like the FWI, NCOSE, RID, etc., in drafting and lobbying for such legislation implicates them as enablers of state-sponsored torture under this provision. The U.S. has made reservations limiting the definition of "cruel, inhuman, or degrading treatment or punishment" in article 7 of the ICCPR.

It is equally important to note that the far-right groups' influence generates an environment where LGBTQ+ individuals and organizations are unable to exercise their rights to freedom of expression as provided for by Article 19 and freedom of association according to Article 22. To the extent that these groups support and fund laws that criminalize LGBTQ+ advocacy and dissolve civil society organizations defending LGBTQ+ rights like in Ghana, they contravene the fundamental principles of pluralism and free expression envisioned by this provision.

Article 26 further guarantees equality before the law and the equal protection of the law without discrimination.[62] Anti-LGBTQ+ laws promoted by U.S.-based groups violate this principle by creating legal frameworks that explicitly discriminate against LGBTQ+ individuals. For instance, laws penalizing consensual same-sex relationships in Ghana and Uganda render LGBTQ+ individuals legally inferior, thereby breaching the equality guarantees of Article 26. The U.S. has made an understanding that legal distinctions made in U.S. law are not inconsistent with article 26 or article 2.

Most importantly, the U.S. has made a declaration to the effect that the ICCPR as a treaty is non-self-executing. Consequently, it does not create a private cause of action in the U.S. However, the non-self-executing status of the ICCPR in the U.S. does not fully absolve U.S.-based entities, including far-right groups, from ethical accountability or international scrutiny. The U.S., as a state party to the ICCPR, holds an obligation to ensure that its domestic actors do not facilitate or contribute to violations of these treaty provisions abroad. When these groups engage in activities that enable or embolden human rights abuses in other countries, they exploit loopholes in international enforcement mechanisms while undermining the foundational purpose of the ICCPR. The enforcement of these provisions in the U.S., despite its non-self-executing status, primarily falls to the federal government, specifically through the Department of Justice and the State Department. These agencies are tasked with investigating and prosecuting domestic actors who violate or enable violations of the treaty's principles abroad.

2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR enshrines economic, social, and cultural rights that are necessary for ensuring human dignity. Much like the ICCPR, the ICESCR includes a non-discrimination clause in Article 2(2), which prohibits distinctions of any kind.[63] Consequently, the exclusion of LGBTQ+ persons from social protections like in Ghana, employment opportunities like in Uganda, and healthcare services like in Kenya, often exacerbated by laws which were funded by U.S.-based actors, constitutes a clear violation of this provision.

Further, Article 12 obliges state parties to ensure the right to the highest attainable standard of physical and mental health.[64] Anti-LGBTQ+ laws, which stigmatize LGBTQ+ individuals and drive them away from healthcare systems, particularly in relation to HIV/AIDS treatment and prevention, directly violate this provision. I argue that far-right groups' involvement in promoting such laws makes them complicit in perpetuating public health disparities and undermining states' ICESCR obligations.

The United States has signed but not ratified ICESCR. Without ratification, the treaty does not have binding legal effect in the U.S. As such, it does not impose any direct legal obligations on the U.S. government or its entities under international law. As a result of non-ratification, the U.S. is not required to report to the Committee on Economic, Social and Cultural Rights, which oversees ICESCR compliance. Under the VCLT, by signing the ICESCR, the U.S. is obligated to refrain from acts that would defeat the object and purpose of the treaty, even without ratification. This creates a soft legal obligation to avoid

56 ICCPR, art 2(1).
57 Gemma MacArthur, *Securing Sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future*, Equal Rts. Trust (2015), https://www.equalrightstrust.org/resources/securing-sexual-orientation-and-gender-identity-rights-within-united-nations-framework-and-system-past-present-and-future (last visited Nov. 11, 2024)
58 ICCPR, art 7.
59 Fed. Research Div., Libr. of Cong., Bias, *Discrimination, and Violence Against LGBTQI+ Communities*, U.S. Department of State 2023, https://www.loc.gov/static/services/federal-research-division/our-federal-research/documents/LGBTQI-Communities_Report.pdf (last visited Nov. 24, 2024).
60 Clause 19(6) of the Bill.
61 T.E. Coleman, E.Y. Ako & J.G. Kyerematen, *A Human Rights Critique of Ghana's Anti-LGBTIQ+ Bill of 2021*, 23 Afr. Hum. Rts. L. J. 96 (2023), https://www.ahrlj.up.ac.za/images/ahrlj/2023/volume_1/COLEMAN.pdf (last visited Nov. 24, 2024).
62 ICCPR, art 26.
63 ICESCR, art 2(2).
64 ICESCR, art 12.

regressive actions that undermine economic, social, and cultural rights.

While the U.S. cannot be held legally accountable for violating ICESCR provisions, its actions and actions of entities based in the U.S. can be scrutinized and condemned through soft mechanisms, such as UN special procedures, civil society reports, and international public opinion. In any case, certain provisions of the ICESCR, such as the right to non-discrimination, may be considered customary international law, which makes them binding on all states, including the U.S., regardless of ratification. International accountability for violations of these norms could still apply.

3. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The CAT obligates state parties to prevent acts of torture and inhuman or degrading treatment. Anti-LGBTQ+ laws and practices, supported by U.S.-based far-right actors, frequently result in such abuses. Forced "conversion therapy", widely condemned as a form of psychological and physical torture, has been mandated by legislators in environments where far-right ideologies have resulted in the passage of anti-lgbtq+ legislation like in Ghana.[65] The funding and legitimization of actors promoting such practices amount to complicity in torture. Anti-LGBTQ+ laws frequently result in the arbitrary detention of LGBTQ+ individuals, often accompanied by physical abuse and extortion. Such practices also constitute violations of CAT's core prohibitions.

The U.S., in ratifying the CAT provided an understanding to the effect that the definition of torture in Article 1 of the CAT applies only to acts specifically intended to inflict severe physical or mental pain or suffering. The effect of this is a narrower scope compared to broader interpretations used by other states or international bodies. The U.S. has also declared the treaty to be non-self-executing, meaning that it does not automatically create enforceable rights in domestic courts.

4. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Anti-LGBTQ+ laws disproportionately harm lesbian, bisexual, transgender, and gender-nonconforming women, further compounding existing gender inequalities and violating several provisions of CEDAW. Article 2 obliges states to pursue all necessary measures to eliminate discrimination against women.[66] Consequently, by supporting laws that exacerbate discrimination against gender-nonconforming women, far-right actors undermine these obligations and perpetuate structural gender-based violence. Article 5 requires states to modify cultural patterns and eliminate prejudices based on stereotyped roles.[67] The far-right's promotion of rigid gender norms and punitive measures against those who challenge them directly contravenes this obligation and entrenches discriminatory cultural practices.

The United States has not ratified the CEDAW. While the U.S. signed CEDAW in 1980, indicating its intent to consider ratification in the future, it has not taken the additional step of ratifying the treaty, which would make it legally binding. Without ratification, the U.S. is not legally bound by the provisions of CEDAW. It is not obligated to implement the treaty's requirements or to report periodically to the CEDAW Committee, which monitors compliance among state parties. However, by signing CEDAW, the U.S. is obligated under the VCLT not to act in ways that defeat the object and purpose of the treaty. However, this creates only a minimal obligation and does not impose substantive legal obligations.

5. The Convention on the Rights of the Child (CRC)

The CRC obliges state parties to protect children from all forms of discrimination, violence, and exploitation. The discrimination LGBTQ+ youth face in Ghana due to far-right-influenced policies contravenes Article 2, which guarantees equal rights to all children.[68] Article 19 requires states to protect children from all forms of abuse.[69] Laws that legitimize violence against LGBTQ+ youth, whether in schools or homes, facilitated by far-right ideologies, directly breach this obligation. Article 24 obliges states to ensure children's access to healthcare.[70] The stigma and exclusion associated with anti-LGBTQ+ policies obstruct LGBTQ+ youth's access to essential health services, further violating their rights under this article.[71]

B. Accountability Mechanisms Beyond Treaty Obligations

1. Indirect State Responsibility in Customary International Law Attribution and Indirect Responsibility

Customary international law, as codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), provides a framework for addressing indirect state responsibility. Article 2 establishes that an act must be attributable to the state and constitute a breach of an international obligation.[72] However, indirect responsibility emerges under Articles 5, 8, and 16, which address situations where non-state actors operate under state instruction or with significant state oversight or where a state aids or assists another in violating international law. The role of U.S.-based far-right actors in influencing African states to adopt repressive anti-LGBTQ+ legislation could implicate the United States under these provisions. Article 16, for instance, states that a state that "aids or assists" another state in committing an internationally wrongful act is complicit if the aiding state knows of the circum-

65 UN Independent Human Rights Experts, Draft Bill on "Proper Sexual Rights and Ghanaian Family Values Bill 2021" - An Analysis, U.N. Doc. https://ghana.un.org/en/139914-draft-bill-proper-sexual-rights-and-ghanaian-family-values-bill-2021-analysis-un-independent (last visited Jan. 26, 2024).
66 CEDAW, art 2.
67 CEDAW, art 5.
68 CRC, art 2.
69 CRC, art 19.
70 CRC, art 24.
71 Katelyn M. Sileo et al., *Assessing LGBTQ+ Stigma among Healthcare Professionals: An Application of the Health Stigma and Discrimination Framework in a Qualitative, Community-based Participatory Research Study*, 27 J. Health Psychol. 2181 (2022).
72 ARSIWA, art 2.

stances of the act and its illegality.[73] U.S. complicity may arise if the government, aware of these actors' activities, fails to regulate or prevents them from financing and influencing such legislation.

The principle of transboundary harm, established in the Trail Smelter Arbitration (1938), is relevant in cases where activities within a state's jurisdiction cause foreseeable harm beyond its borders. While traditionally applied in environmental law,[74] the principle has gained traction in human rights contexts.[75] The U.S. could be deemed responsible if it permits organizations within its territory to engage in activities that foreseeably lead to human rights abuses in other states.

A critical question arises regarding the direct attribution of non-state actors' actions to the U.S. Under ARSIWA, the threshold for attribution requires substantial control by the state. U.S.-based far-right organizations, while domiciled in the U.S., act autonomously. This autonomy could potentially shield the U.S. from direct attribution under international law. However, it must be noted that the doctrine of due diligence (explored below) mitigates this critique by shifting the focus from direct attribution to the state's obligation to regulate non-state actors. The duty lies on the U.S., as the host state, to enact preventive measures, even if it does not directly control the actors. This framing aligns with the preventive obligations under customary international law and soft law frameworks like the UN Guiding Principles on Business and Human Rights (UNGPs).

2. Positive and Negative Due Diligence Obligations

Due diligence imposes both positive and negative obligations on states.[76] Positive obligations require states to take reasonable measures to prevent foreseeable harm, including regulating private actors whose activities could lead to human rights violations.[77] Negative obligations require states to refrain from enabling or facilitating such violations.[78]

The Due Diligence Principles in International Law clarify that states must regulate domestic entities whose actions foreseeably contribute to violations abroad. The principle is exemplified in cases of transnational environmental harm (*Trail Smelter Arbitration*) and extends to human rights violations through the UNGPs and the Maastricht Principles on Extraterritorial Obligations.[79] These principles place the onus on states like the U.S. to prevent U.S.-based far-right actors from financing and legitimizing discriminatory laws in Africa.

Consequently, the U.S. has a duty to monitor, regulate, and, where necessary, restrict the activities of non-state actors operating within its jurisdiction. This paper contends that failure to exercise due diligence in this regard would render the state responsible for omissions leading to foreseeable human rights violations, as outlined in the Maastricht Principles. In the case of U.S.-based far-right groups, their activities demonstrably result in the enactment of laws that violate internationally recognized human rights, including the principles of non-discrimination, equality, and freedom from torture.[80]

3. Alien Tort Statute (ATS)

The ATS, a domestic U.S. statute, permits non-U.S. citizens to bring claims for violations of international law in U.S. courts. In its seminal decision in *Filártiga v. Peña-Irala* (1980),[81] the U.S. recognised torture as a violation of international law actionable under the ATS. However, the recent case of *Kiobel v. Royal Dutch Petroleum Co.* (2013),[82] has limited the extraterritorial reach of the ATS, requiring a stronger nexus to U.S. territory. Despite these restrictions, the ATS remains a potential avenue for holding far-right actors accountable, particularly in cases where funding, training, or lobbying occurs on U.S. soil. The plaintiffs in such cases would need to demonstrate a clear link between the defendants' actions and the resulting human rights violations abroad. I should however note that the ATS has several procedural and jurisdictional limitations. The requirement and the reluctance of courts to adjudicate politically sensitive matters (the "political question doctrine") limit its effectiveness as a tool for addressing transnational human rights violations.[83]

4. Soft Law Mechanisms and Normative Accountability

The UNGPs guarantees the responsibilities of states and businesses to respect human rights. While non-binding, they establish clear guidelines for regulating private actors engaged in transnational activities. States are encouraged to adopt national action plans incorporating the UNGPs into domestic legislation, which the U.S. could use to monitor and regulate far-right organizations.

The OECD Guidelines similarly establish soft law standards for responsible business conduct. Far-right organizations that operate as incorporated entities could be scrutinized under these guidelines, particularly in cases involving financial support for discriminatory policies. Although soft law mechanisms lack the coercive force of treaty obligations, its normative influence should by no means be underestimated. As one scholar asserts, they serve as precursors to binding obligations and provide a basis for advocacy, capacity-building, and reputational accountability.[84]

This part has explored how the actions of U.S.-based groups violate key provisions of international human rights treaties, as well as mechanisms of indirect state responsibility, due diligence, domestic legislation, and soft law frameworks that

73 ARSIWA, art 16.
74 Elisa Carpanelli, Int'l. Human Rts. Law and Transboundary Environmental Harm: Trends and Challenges, in Trends and Challenges in Int'l. Law (Marta Arcari, Irini Papanicolopulu & Laura Pineschi eds., Springer 2022).
75 *Id.*
76 Alice Ollino, *The Nature of Due Diligence Obligations, in Due Diligence Obligations in International Law*, 64–130 Cambridge Univ. Press (2022).
77 Centre for Law and Democracy, Submission to the UN High Commissioner for Human Rights on the Practical Application of the Guiding Principles on Business and Human Rts. to the Activities of Technology Companies (UNHCHR 2022).
78 *Id.*
79 Brigitte Cottier & Thomas Gammeltoft-Hansen, *The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 25 Eur. J. Int'l. L. 213, 213–34 (2014).
80 Global Project Against Hate and Extremism, *Mapping the Far Right: The Movement's Conferences Illuminate Its Growing Transnational Networks* (2024).
81 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
82 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
83 Rachel Lopez, *The Judicial Expansion of American Exceptionalism*, 6 Duke F. for L. & Soc. Chance 1, 1–29 (2014).
84 Bini Saroj & Abba Kolo, *Soft Law in International Investment Law*, BuID Doctoral Research Conference (Mar. 29, 2024).

could hold these actors accountable. Building on this, the next part provides policy recommendations to reconcile U.S. sovereignty concerns with its international responsibilities.

IV. POLICY RECOMMENDATIONS FOR RECONCILING U.S. SOVEREIGNTY AND CONSTITUTIONAL CONCERNS WITH INTERNATIONAL HUMAN RIGHTS RESPONSIBILITIES

The challenge of aligning U.S. sovereignty and constitutional principles with international human rights obligations requires pragmatic solutions. These reforms and policy recommendations I offer consider the constitutional framework of the U.S., its geopolitical position, and the need to effectively address the extraterritorial activities of U.S.-based entities implicated in human rights violations.

A. Strengthening Domestic Law

1. Enact Targeted Human Rights Legislation

The U.S. Congress should consider enacting legislation that specifically addresses the extraterritorial actions of private entities, particularly those implicated in human rights abuses abroad. Such legislation should establish clear guidelines for corporate and organizational accountability without infringing on any constitutional protections. The content of the legislation should feature explicit prohibitions on financing, lobbying, or materially supporting foreign laws or policies that contravene internationally recognized human rights norms. It should also contain mechanisms for mandatory disclosure of foreign lobbying activities related to discriminatory policies. Provisions for civil liability that allows affected individuals to seek redress in U.S. courts should also feature in such legislation. A legislation of this kind would fill gaps left by existing frameworks like the Alien Tort Statute (ATS), which have limited extraterritorial reach.[85]

2. Expand the Foreign Corrupt Practices Act (FCPA)

The FCPA could be also amended to include provisions addressing human rights-related corruption, such as financial inducements to foreign officials for enacting discriminatory laws or policies. A broader definition of corruption to include actions that promote systemic human rights violations, such as anti-LGBTQ+ legislation would be necessary. Another way is to enhance enforcement mechanisms to include partnerships with international human rights organizations for monitoring compliance. Ultimately, the FCPA should expand to align with U.S. interests in combating corruption while also indirectly addressing human rights abuses, making it a politically feasible reform.

B. Enhancing Executive Branch Engagement

The executive arm could issue an executive order requiring federal agencies to monitor and report on the activities of U.S.-based entities involved in lobbying for or financing discriminatory policies abroad. The Department of State, in collaboration with the Department of Justice and Treasury, would have to create a database of entities implicated in human rights abuses. Agencies could impose sanctions or recommend prosecutions for violations of existing laws, such as the Global Magnitsky Human Rights Accountability Act.

C. Leveraging Civil Society and Soft Law Mechanisms

Soft law mechanisms, such as the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises, provide flexible frameworks for addressing transnational human rights impacts. As a way forward, the U.S. could mandate public reporting for U.S.-based organizations engaged in transnational activities by requiring disclosure of financial ties to discriminatory policies abroad, and collaborating with international human rights organizations to monitor compliance with soft law principles.[86]

D. Constitutional Constraints on Speech and Association and Federalism Concerns

One argument by critics is that regulating U.S.-based far-right groups' transnational lobbying or advocacy could infringe on First Amendment rights. A proposed recommendation is that regulations should focus on conduct rather than speech and should target the material support provided to discriminatory policies rather than the ideological content of advocacy. Such a distinction aligns with precedents like *Holder v. Humanitarian Law Project* (2010), which upheld restrictions on material support to terrorist organizations without infringing on free speech.[87] Considering the boundary of speech, regulations drafted should make a clear distinction between advocacy that amounts to mere expression of beliefs (protected under the First Amendment) and acts that provide tangible support to entities engaged in activities contrary to the ICCPR standards.

Another argument is that extraterritorial regulation infringes on state prerogatives under U.S. federalism. A proposed recommendation is that extraterritorial regulation can be framed as a matter of foreign affairs, firmly within the purview of the federal government. Precedents like *Zschernig v. Miller* (1968) affirm that foreign relations issues are a federal concern.[88] Conse-

85 It would also mitigate constitutional concerns by framing the law narrowly to regulate specific harmful conduct without overreaching into areas protected by the First Amendment.

86 Because soft law mechanisms avoid the rigidity of binding treaties while creating norms that influence behavior, this will allow for enhanced transparency that empowers civil society actors to hold organizations accountable.

87 561 U.S. 1 (2010): The Court held that it cannot avoid the constitutional issues in this litigation by accepting plaintiffs' argument that the material-support statute, when applied to speech, should be interpreted to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That reading is inconsistent with §2339B's text, which prohibits "knowingly" providing material support and demonstrates that Congress chose knowledge about the organization's connection to terrorism, not specific intent to further its terrorist activities, as the necessary mental state for a violation.

88 389 U.S. 429 (1968): The appellants, residents of East Germany, are the heirs of an American citizen who died intestate in Oregon, leaving personal property. Appellees include members of the State Land Board who petitioned the Oregon probate court for the escheat of the personally pursuant to Ore.Rev.Stat. § 111.070. That section provides for escheat where a nonresident alien claims personality unless (1) there is a reciprocal right of a United States citizen to take property on the same terms as the citizen of a foreign nation, (2) American citi-

quently, that approach should mitigate any federalism challenges.

CONCLUSION

My analysis has shown how U.S. reservations, understandings and declarations to UN international treaties, rooted in constitutional exceptionalism, now embolden far-right groups to export regressive anti-LGBTQ ideologies to Africa. From Uganda's Anti-Homosexuality Act, 2023 to Ghana's Promotion of Proper Human Sexual Rights and Ghanaian Family Values Act, 2023, the ripple effects of U.S. exceptionalism collide with international human rights norms and exposes gaps in treaty compliance and enforcement. Bearing this in mind, it becomes not just advisable but imperative and compelling to consider ways to ensure accountability and strengthen treaty adherence. As my analysis has shown, reconciling U.S. sovereignty concerns and constitutional principles with international human rights obligations requires a balanced, legally grounded approach. This paper recommends targeted legislation, expanded anti-corruption measures, and executive oversight in order to address gaps in accountability for international human rights violations. Also, leveraging soft law frameworks enhances transparency, while focusing on conduct over speech and situating extraterritorial regulation within federal foreign affairs authority ensures constitutional fidelity. These strategies offer a pathway for aligning U.S. constitutional frameworks with global human rights commitments.

This piece was written by Victor Hughes Anyomi and edited by Graham Robbins.

zens have the right to receive payment here of funds from estates in the foreign country, and (3) foreign heirs have the right to receive the proceeds of Oregon estates without confiscation. The court held that each of the three provisions of § 111.070 involves the State in foreign affairs and international relations, matters which the Constitution entrusts solely to the Federal Government.



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