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## Editors' Introduction

Just over a decade ago, the Northeastern University Law Journal was conceived as a publication for scholars, practitioners, and students to publish forward-looking, practice-oriented articles with a social justice consciousness reflective of the Law School's overall ethos. In order to achieve that goal, each edition of the Journal focused on a single issue, publishing articles that contributed to the discussion of one timely topic. The issue-specific approach was integrated with the Journal's annual symposium. This integration allowed the Journal to wholistically explore how the given issue affected the practice of law, and vice versa.

The Journal has grown since its formation, both in staff and in content. It has published issues on topics ranging from prisoners' rights to employment, and from education law to data privacy. It has brought leading academics and well-versed professionals to speak on these topics, and it has published significant pieces studying the practical implications of lawyering on these issues. In 2013, to help further the Journal's goal of engaging our academic community in important discussions on relevant legal topics, the Journal launched an online component, Extra Legal. Extra Legal aims to publish shorter, well-timed legal commentaries written by current law students in order to facilitate on-going discussions on emerging legal issues. In so doing, it provides students at the Law School a platform to add their voices to discussions on central legal issues that will directly impact the students' practice of law.

In hopes of expanding discussions to include the most innovative and noteworthy legal issues, the Journal takes another significant step in its development. This issue marks the first edition of the Journal that departs from the narrower topical format. While symposia will remain an important aspect of the Journal's voice and discussion, the new format brings an opportunity to embark on a broader examination of issues through articles on numerous themes. Ultimately, the Journal seeks to engage all topics of legal scholarship, with special attention to articles demonstrative of the connection among public interest, innovation, and the practical application of law. In accordance with the pioneering spirit of Northeastern University School of Law, the Journal seeks to center itself in discussions around evolving ideas of how law can be used to advance the public good.

Yet, even as the Journal looks to the future, it remains committed to the public interest ideals on which it was founded.

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## Habeas Corpus in Three Dimensions Dimension II: Habeas Corpus as a Legal Remedy

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I am solely responsible for the contents of this piece, including certain deviations from the forms prescribed by THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) which have been made at my insistence in the interests of clarity and to facilitate document retrieval by future researchers. For clarification purposes I have also sometimes regularized the capitalization and punctuation in quotations from early sources.

By way of disclosure, I have served as a member of the legal teams pursuing writs of habeas corpus in several of the cases from the current century cited in this article. By way of acknowledgement, I have benefitted greatly from the insights of my co-counsel.

I am most grateful for the collegial support of John Phillip Reid and William E. Nelson of New York University Law School and the thoughtful responses of the participants in the Golieb Research Colloquium in Legal History, where an early version of this article was presented.

Much of the research underlying this article was conducted in the New Hampshire State Archives in Concord during a year-long leave generously funded by Hofstra Law School. The time would have been far less productive (and enjoyable) without the absolutely extraordinary assistance I received from Frank C. Mevers, then the State Archivist, Brian Nelson Burford, then the State Records Manager (now the State Archivist), and John Penney, Armand Dubois, Peter Falzone, William G. Gardner, Benoit Shoja, Pam Hardy, Georgia-Rose Angwin, and Stephen Thomas of the Archives staff. Milli S. Knudsen, a New Hampshire independent scholar who was volunteering at the Archives while I was there, and volunteer Karol Yalcin were responsible for finding a number of the documents that I have relied upon. My work on the New Hampshire materials has also been enriched by the insights of Mary Susan Leahy, Esq., Robert B. Stein, Esq., Eugene Van Loan, Esq., and Richard M. Lambert. Jamie Kingman Rice of the Maine Historical Society provided valuable additional assistance.

Copies of the documents from the New Hampshire State Archives that undergird my descriptions of the cases are available from the reference desk of the Hofstra Law School Library. Some of these records, including ones cited to Provincial Case Files and the Judgment Books of the Superior Court, have also previously been microfilmed by the Genealogical Society of Utah.

The tireless efforts of Hofstra law librarians Patricia Ann Kasting, David Dames and Ann R. Gilmartin and of my assistants Joyce A. Cox and Ryan M. Duck are everywhere reflected in these pages.

I have previewed portions of this installment of the overall project in *Habeas Corpus Past and Present*, 59 FED. LAW. 40 (2012) [hereinafter Freedman, *Past and Present*] and *Liberating Habeas Corpus*, 39 REVS. AM. HIST. 395 (2011) [hereinafter Freedman, *Liberating*].

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### Project Overview

This is the second of three planned articles in a project whose overall title is “Habeas Corpus in Three Dimensions.” The first installment discussed the importance of habeas corpus as a common law writ.<sup>2</sup> This piece considers the significance of the fact that American habeas corpus until the first decades of the nineteenth century was embedded in a system of multiple constraints on government power.<sup>3</sup> The third installment will trace the role of

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2 See Eric M. Freedman, *Habeas Corpus in Three Dimensions Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591 (2011).

3 See generally Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2555 (1998) (viewing “the Constitution as presupposing the continuation of an Anglo-American tradition in which the forms of action – both ‘private remedies’ like suits for trespass and more distinctive remedies like the prerogative writs – evolved in service of a general aspiration that . . . courts were generally available to redress governmental illegality”).



habeas corpus in the system of checks and balances that developed here subsequently.

### I. Habeas Corpus and the Web of Legal Remedies

The argument that follows is simple. Understanding habeas corpus during the colonial and early national periods requires understanding that it was just one strand in a web of public and private legal remedies restraining abuses of government power.

To illustrate, I begin in Part II by telling the story of Captain Isaac Hodsdon of the United States Army, who was accused of wrongfully imprisoning several men in Stewartstown, New Hampshire during the War of 1812. Their first resort was to obtain a writ of habeas corpus from a state court. Hodsdon's return to the writ, that he would not produce the men because one petitioner was a prisoner of war and so beyond the reach of civil authority and that the other was detained on federal charges and so not amenable to a state writ, was – quite appropriately – found contemptuous. He was prosecuted for criminal contempt both by the state and by the private parties concerned, and also held liable in damages in a false imprisonment action. In the midst of all this, the New Hampshire legislature (to whom Hodsdon apparently gave a misleading account of the events) passed a bill to enable him to mount a defense on the merits despite a missed deadline, and ultimately the United States Congress (to which his counsel had been elected in the meantime) indemnified him.

Part III seeks to unravel the many threads of Hodsdon's cat's cradle of a story – one which may have seemed to him simply a tangle of irritations but one in which we can perceive an overall pattern of mutually reinforcing components forming a structure to restrain government power. After a discussion of the power and limits of habeas corpus, this Part presents a number of illustrative cases arising under different legal headings to canvass the range of remedies that litigants could invoke to confine public officials to the lawful exercise of their authority. One important feature these remedies shared was a heavy reliance on the jury to sort out degrees of culpability (e.g., non-liability for actions taken in good faith, *respondet superior* liability).<sup>4</sup> Just as with regard to habeas corpus

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4 See G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J. L. & PUB. POL'Y 643, 655–57 (2012).

itself,<sup>5</sup> legislative enactments had only a peripheral role.<sup>6</sup>

Part IV concludes this article and previews the third part of the overall project.

The novel idea of separation of powers as checks and balances only took root gradually in the new nation. After the overthrow of royal authority, the legislature alone claimed the mantle of the

5 See A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 26–27 (1902); Freedman, *supra* note 2, at 610 n.93 (citing sources).

Notwithstanding some noisy controversy as to whether or not the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, extended to any particular colony at any particular time, see generally D[ANIEL] DULANY [the elder], THE RIGHT OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF THE ENGLISH LAWS 12–13, 18–26 (1722); WILLIAM KILTY, A REPORT OF ALL SUCH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES 176–78 (1811); JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 475 n.29 (1950); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 645 n.206 (2008); Donald E. Wilkes, Jr., *From Oglethorpe to the Overthrow of the Confederacy: Habeas Corpus in Georgia, 1733–1865*, 45 GA. L. REV. 1015, 1029 nn.47–48 (2011), the point was of little practical significance in light of the judges' ample common law habeas powers, see Wilkes, *supra*, at 1023–27; Dallin Oaks, *Habeas Corpus in the States – 1776–1865*, 32 U. CHI. L. REV. 243, 255 (1965), which they used vigorously to perform “their most innovative work.” PAUL D. HALLIDAY, *HABEAS CORPUS FROM ENGLAND TO EMPIRE* 242 (2010).

I have yet to see a colonial case turning on the distinction between the statutory and common law writ, cf. JOHN PALMER, AN IMPARTIAL ACCOUNT OF THE STATE OF NEW ENGLAND: OR, THE LATE GOVERNMENT THERE, VINDICATED (1690), reprinted in THE ANDROS TRACTS 21, 46 (W.H. Whitmore ed., 1868) (responding to charge that administration of Sir Edmund Andros had arbitrarily imprisoned opponent by arguing both that Act did not extend to colonies and that prisoner in any event not entitled to release), and suspect that few if any will be unearthed in the future. See generally JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664–1776, at 504–06 (1944) (noting colonial New York confusion between statutory and common law writ); Eric M. Freedman, *Just Because John Marshall Said it Doesn't Make it So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 579 n.10 (2000) (collecting sources on fluidity of distinction).

6 See *infra* text accompanying notes 170–76; see also Carolyn Steedman, *At Every Bloody Level: A Magistrate, a Framework-Knitter, and the Law*, 30 L. & HIST. REV. 387, 408 (2012) (reporting that notebooks of an English magistrate recording forty years of business “used the word ‘statute’ on only two occasions”); cf. *infra* note 171 (noting exception to statement in text).

People, while the executive and judicial branches had to struggle to assert the legitimacy of their exercises of power.<sup>7</sup> Even though the judges had long held the role of keeping government officials within lawful bounds,<sup>8</sup> judicial independence got off to quite a rocky start in the new nation<sup>9</sup> both because the judges were so closely identified with the Crown and because the common law they administered had no plainly visible democratic source.<sup>10</sup>

That thinking had changed by the middle of the nineteenth

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- 7 See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 323–24 (2008); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE CONSTITUTION* 33 (1990); Tarr, *supra* note 4, at 645 (“In most states, only legislators were directly elected by the people and this fact, combined with their short term of office, encouraged the belief that the legislature embodied the people, whereas other branches did not.”); see also Johann N. Neem, *Who are “The People”?: Locating Popular Authority in Postrevolutionary America*, 39 *REVS. AM. HIST.* 267 (2011) (reviewing current historiography of contested claims to represent “the People”); see generally Roman J. Hoyos, *Who are “the People”?* (July 20, 2015) (unpublished research paper, Southwestern Law School) (on file at <http://ssrn.com/abstract=2633349>) (exploring meaning of term).
- 8 See HALLIDAY, *supra* note 5, at 7, 135–36; *infra* text accompanying notes 293–95.
- 9 The issue of judicial independence soon became entangled with that of judicial review, see SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787*, at 333–36 (2011); see also [Francis Bowen], *The Independence of the Judiciary*, 57 *N. AMER. REV.* 400, 421 (1843); see generally Larry D. Kramer, *The Supreme Court, 2000 Term—Foreward: We The Court*, 115 *HARV. L. REV.* 5, 25–26 (2003) (describing English background).
- 10 See BRENDAN MCCONVILLE, *THE KING’S THREE FACES: THE RISE AND FALL OF ROYAL AMERICA, 1688–1776*, at 8 (2006); KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* 76–77, 99 (2011); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 *WASH. & LEE L. REV.* 787, 789–90 (1999) (observing that at Independence judges were considered dangerous, being regarded “essentially as appendages or extensions of royal authority”).

century<sup>11</sup> and brought us to the point where we rest today.<sup>12</sup>

For the President or the Congress to act without oversight is to exceed the authority granted by the People. For the Judiciary to review the actions of those branches is to exercise authority granted by the People<sup>13</sup> and does not require the permission of the other branches.<sup>14</sup> In utilizing the writ of habeas corpus to implement this understanding, the judiciary not only honors the original purpose of

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- 11 See Ellen Holmes Pearson, *Revising Custom, Embracing Choice: Early American Legal Scholars and the Republicanization of the Common Law*, in *EMPIRE AND NATION: THE AMERICAN REVOLUTION IN THE ATLANTIC WORLD* 93 (Eliga H. Gould & Peter S. Onuf eds., 2005) (describing theories propounded by post-Independence jurists to accomplish this); William E. Nelson, *The Province of the Judiciary*, 37 *J. MARSHALL L. REV.* 325, 355 (2004) (describing how Marshall and other Federalists reconciled democracy and common law). The process has been aptly described by Professor Jessica K. Lowe as “transitioning from the colonial to the republican, from the inherited to the created,” Jessica K. Lowe, *Guarding Republican Liberty: St. George Tucker and Judging in Federal Virginia*, in *SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY* 111, 113 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (discussing Virginia in 1791). These developments will be discussed more fully in the third installment of this project.
- 12 The next paragraph of text is taken from Freedman, *Past and Present*, *supra* note 1, at 41.
- 13 See *THE FEDERALIST*, NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that because judges are empowered by the people judicial review does not “suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.”); see also GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 450–52 (2009) (discussing this argument); James L. Underwood, *Judicial Review in a Legislative State: The South Carolina Experience*, 37 *S.C. L. REV.* 335, 342–43 (1986) (describing how South Carolina rejected claim that judicial review is “an alien elitist practice engrafted on popular government” and accepted idea that “when a court strikes down legislation or an executive act as unconstitutional, it does not . . . stymie the will of the people, but actually effectuates it”). As the third installment of this project will describe, a critical element of the establishment of the legitimacy of checks and balances was a “redefinition of the ‘separation of powers’ by which judges gained . . . equivalent status with legislators and executives as representatives or agents of the sovereign people,” Charles F. Hobson, *The Origins of Judicial Review: A Historian’s Explanation*, 56 *WASH. & LEE L. REV.* 811, 812 (1999). See *infra* Part IV.
- 14 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (“[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge.”).

the writ – making sure that those to whom power has been granted (by the monarch then and by the People now) use it lawfully – but also strengthens the checks and balances that this country has built since Independence to serve the same purpose.<sup>15</sup>

## II. Captain Hodsdon in a Cat's Cradle

The War of 1812 was highly controversial domestically, especially in federalist New England<sup>16</sup> and particularly prior to April 1814 – the period during which the British blockade of the Atlantic Coast exempted ports from Boston northward.<sup>17</sup> One result was widespread smuggling between New England and Canada.<sup>18</sup>

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- 15 See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2010) (unanimous) (noting that checks and balances serve to protect both the liberties of the individual and the prerogatives of the three branches); *Boumediene v. Bush*, 553 U.S. 723, 765–66 (2008) (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.”). See also Freedman, *Past and Present*, *supra* note 1, at 41 (describing John Quincy Adams’s successful argument to this effect in *The Amistad*, 40 U.S. (15 Pet.) 518 (1841)).
- 16 See TROY BICKHAM, *THE WEIGHT OF VENGEANCE: THE UNITED STATES, THE BRITISH EMPIRE, AND THE WAR OF 1812*, at 171–202 (2012); DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 52–53 (1989); J.C.A. STAGG, *MR. MADISON’S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783–1830*, at 253–69 (1983); ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS & INDIAN ALLIES* 9–10 (2010).
- 17 See WALTER R. BORNEMAN, *1812: THE WAR THAT FORGED A NATION* 174, 216 (2004); HICKEY, *supra* note 16, at 152, 214–15; JOHN M. MCCLINTOCK, *HISTORY OF NEW HAMPSHIRE* 501–02 (Boston, B.B. Russell 1889); 2 CHANDLER E. POTTER, *MILITARY HISTORY OF NEW HAMPSHIRE 1623–1861*, pt. 2, at 109 (photo. reprint 1972) (Concord, McFarland & Jenks 1869).
- 18 See PETER ANDREAS, *SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA* 82–88 (2013); JOSHUA M. SMITH, *BORDERLAND SMUGGLING: PATRIOTS, LOYALISTS, AND ILLICIT TRADE IN THE NORTHEAST, 1783–1820*, at 10, 66–94 (2006); STAGG, *supra* note 16, at 364, 380, 470–71; Edward Francis Cloutier, *New England Opposition to the War of 1812*, at 48–65 (June 1957) (unpublished M.A. thesis, University of New Hampshire) (on file with University of New Hampshire library). Smith’s account contrasts the views of this phenomenon as it appeared from the perspective of the capitals of both governments with those from the perspective of the inhabitants — who lived in a rough and poorly surveyed country where personal relationships had much more influence on events than the formal structures of nation-states. See, e.g., SMITH, *supra*, at 6–67, 82–84.

On December 29, 1813, General Thomas H. Cushing of the United States Army wrote from his headquarters in Boston to Captain Isaac Hodsdon:<sup>19</sup>

Sir,

So soon as your company shall have been completed . . . you will march . . . for Stewartstown, [N.H.] . . . The object to be attained by an establishment at Stewartstown . . . is effectually to prevent any intercourse with the enemy . . . It is believed that by interesting the citizens, friendly to the General Government, to watch and report to you, the movements of the inhabitants on both sides of the line, and by sending out small parties by day and by night to the principal roads leading to the enemys country, from Connecticut River to the settlements along the northern boundary of New Hampshire, an effectual stop may be put to all unlawful intercourse in that quarter . . . The act, laying an Embargo<sup>20</sup> will justify you in stopping every person or thing which you may find in motion for the enemys country and you will not fail to make every exertion for carrying it into full and complete effect.<sup>21</sup>

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19 Hodsdon had an extended public career, primarily in the military in Maine. A condensed biographical sketch appears in *HISTORY OF PENOBSCOT COUNTY MAINE* 840, 840–42 (Cleveland, Williams, Chase & Co. 1882).

20 See Act of Dec. 17, 1813, 3 Stat. 88 (“laying an embargo on all ships and vessels in the ports and harbours of the United States”). Section 12 of this statute gave the President authority to employ the armed forces against persons “in any manner opposing the execution of this act or, otherwise violating or assisting and abetting violations of the same.” This act was in effect during the period that Captain Hodsdon took the actions leading to his legal entanglements. It was subsequently repealed by an Act of Apr. 14, 1814, 3 Stat. 123. For the ensuing history see Act of Feb. 4, 1815, 3 Stat. 195; ANDREAS, *supra* note 18, at 83 (noting that the 1815 statute, “passed shortly before the conclusion of the war . . . included a further militarization of customs enforcement, as [armed] forces were increasingly tasked with fighting not only British troops but also smugglers”).

21 Letter from T.H. Cushing to Isaac Hodsdon (Dec. 29, 1813). My source is a copy of the letter in the Maine Historical Society, Coll. 8, Box 1/4. The copy was made by a United States Treasury Department official in April 1850, very possibly in connection with a claim being made by Maine against the federal government around that time for a military expedition Hodsdon had

Events from this point forward can be followed both from newspaper pieces in which the participants exchanged sharply-worded volleys and from court papers, sources which tell similar but not identical stories.<sup>22</sup>

Captain Hodsdon and a party of troops arrived at Stewartstown on January 10, whereupon, as he wrote to a newspaper several months later, he “posted sentinels at the forks and angles of roads for the purpose of detecting citizens who were in the nefarious practice of smuggling.”<sup>23</sup> Hodsdon continued:<sup>24</sup>

At the time of my arrival here, I was informed that Austin Bissel of Colebrook, had recently conveyed a horse and sleigh into the province of Lower Canada, and that he declared openly, that he would in defiance of the laws of the United States, pass to and fro from Canada when he pleased . . . I thought it my duty to apprise him of the impropriety of his behaviour and to state to him the consequences which would probably attend a repetition of the same offence. I therefore on the 11th January directed a sergeant and file of men to conduct him to the garrison. On his arrival at the garrison I conversed with him on the subject of his having made these assertions, &

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led in 1839 to disputed timberlands near the Canadian border. See HISTORY OF PENOBSCOT COUNTY MAINE, *supra* note 19, at 841; STATE OF MAINE, HISTORICAL SKETCH AND ROSTER OF THE AROOSTOOK WAR (1904) (publishing documents relative to the expedition). I speculate that the original 1813 document was at the Treasury to be copied because it had been submitted in connection with Hodsdon’s indemnification claim in the 1820’s, see *infra* text accompanying notes 60–77.

- 22 A detailed account sympathetic to Hodsdon appears in [GEORGIA DREW MERRILL], HISTORY OF COOS COUNTY, NEW HAMPSHIRE 95–97 (Syracuse, W.A. Ferguson & Co. 1888). See also *The Season of Deception*, N.H. PATRIOT, Mar. 8, 1814, at 3 (rebutting claim of rival newspaper that Hodsdon was guilty of military depotism). The various newspaper accounts cited in connection with Hodsdon’s activities were first published in the New England periodicals to which I have cited them and subsequently re-published widely in newspapers from Maine to Washington, D.C.
- 23 Isaac Hodsdon, Letter to the Editor, *To the Public*, N.H. PATRIOT, Mar. 29, 1814, at 3.
- 24 In considering the veracity of this account one relevant consideration might be that it was composed more than a month after the court proceedings described *infra* text accompanying notes 26–32.

in the presence of his father and Joseph Loomis, Esq . . . and after receiving . . . their joint assurance that . . . Bissel would do nothing inconsistent with the laws of the United States he returned to his home, not having been detained more than one hour at the garrison, and that without any restraint.

On the 10th of Feb having obtained evidence that that Charles Hanson of Canaan, Vt. was aiding and assisting in running property into Lower Canada, I arrested him forthwith and transmitted to the District Attorney the evidence against him, together with his situation.

And having obtained abundant respectable information which proved that Sanders Welch Cooper in the employment of Herman Beach of Canaan [had been] running property across the lines to the enemy's territory for five or six months past . . . I thought it proper to apprehend him before he could pilot the enemy's forces into our territory . . . His offences were immediately reported to Titus Hutchinson, Esq. District Attorney for the District of Vermont; and the said Cooper has been taken into custody by the civil authority on a warrant predicated by the said Attorney.

On or about the 10th of February, Charles Hall of Hereford, Lower Canada, came to Stewartstown in the night [evading our patrols by taking a] circuitous route through the snow where there was no road. . . and took up his residence at [a] house [that] has been a common receptacle for Canadians and smugglers.<sup>25</sup> Being apprised of Hall's situation, I have secured him as a proper prisoner of war to the United States.<sup>26</sup>

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25 The elided material describes the house as belonging to Thomas Eames of Northumberland, a person "whose character is notorious for smuggling, and who once fled his country for adding 'ty' to a word in a note of hand, without the consent of the signer," Hodsdon, *supra* note 23, at 3.

26 *Id.* A long and scathing response to this account was published as Letter to the Editor, *To Isaac Hodsdon*, THE [CONCORD] GAZETTE, Apr. 5, 1814, at 1 (demanding to know, "who invested you, most noble captain, with authority to act as Judge, Jury, and Executioner, upon these men?"). See also *infra* text accompanying notes 78–79 (supporting this viewpoint).



On February 24, 1814, Herman Beech, Esq. presented to Justice Arthur Livermore of the New Hampshire Supreme Court an application for a writ of habeas corpus on behalf of Charles Hanson, Sanders Welch Cooper, and Charles Hall, “all citizens of the United States” who had “been arrested by persons claiming to act under the authority of the President of the United States,” and were being confined by Hodsdon “without colour of authority.”<sup>27</sup> The application sought a court order for production of the petitioners “together with the time and causes of their imprisonment on said writ returned before your honor that they be dealt with as to law and justice appertains.”<sup>28</sup>

In order to show that the three applicants were being held by Hodsdon, counsel filed several supporting affidavits.<sup>29</sup> The affidavit of Joseph Loomis, a local judge,<sup>30</sup> reported that he had been at the fort in January “and there saw imprisoned Austin Bissell a private citizen of the United States who has since been discharged.”<sup>31</sup> Loomis continued:

At that time I remonstrated with said Hodsdon against such unreasonable arrests. Said Hodsdon observed that he was acting under the authority of the United States and that he should continue to arrest all such persons as said or did anything disrespectful to the army or the laws.

. . . [T]he conduct of those now commanding the

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27 The document is in the New Hampshire State Archives file *In re Hodsdon*, Strafford County Superior Court Records 1814, Folder 38, Doc. 1. A newspaper account asserts that a similar application had been made to the Court of Common Pleas during the month but denied on the grounds that the writ could not issue from that court. See *Extract of a Letter dated Orford, N.H., February 27, 1814*, FED. REPUBLICAN, Mar. 16, 1814, at 2.

28 *In re Hodsdon*, *supra* note 27, Doc. 1.

29 *Id.*, Docs. 2–6.

30 This detail comes from the clerk’s endorsement to his affidavit, Joseph Loomis Aff., Feb. 15, 1814, *In re Hodsdon*, *supra* note 27, Doc. 2.

31 Bissell’s affidavit dated February 16, 1814 in which he states briefly that he was imprisoned without cause on January 10 and thereafter released is in the *In re Hodsdon* file, *supra* note 27, as Doc. 6. On May 24, 1815, the New Hampshire Supreme Court ordered Hodsdon to pay Bissell a fine of \$50 and court costs of \$18.92. See House Committee on Claims, Report No. 8, 19th Cong., 1st Sess., at 3–4 (Dec. 23, 1825). The context of this report is described *infra* text accompanying notes 60–73.

military post at that place is such as to make the civil wholly subservient to the military law and unless suitable measures are taken to remedy the grievances of the inhabitants of that part of the country many of the peaceable inhabitants will be driven from their homes and be compelled to abandon their property to a lawless military force.<sup>32</sup>

In response to the application, Justice Livermore on February 28 issued an order requiring Hodsdon to produce the prisoners by March 24 at the home of Colonel William Webster in Plymouth.<sup>33</sup> On the night of March 3, Hodsdon moved Hall and Cooper to an Army barracks in Canaan, Vermont under the command of his subordinate, Lieutenant Thomas Buckminster.<sup>34</sup> Justice Livermore's order was

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32 Affidavit of Joseph Loomis, Feb. 15, 1814, *In re Hodsdon*, *supra* note 27, Doc. 2. A substantially similar account of the facts appears in a letter from Coos County dated February 18, 1814 that was printed as *Highly Interesting Communication*, THE CONCORD GAZETTE, Mar. 1, 1814, at 3. Hodsdon's letter cited *supra* note 23 was a response to this account.

33 Writ of Habeas Corpus, Feb. 28, 1814, *In re Hodsdon*, *supra* note 27, Doc. 7. A newspaper account of this appeared as *Capt. Hodgdon [sic] – and Military Despotism*, THE [WINDSOR, VT.] WASHINGTONIAN, Mar. 21, 1814, at 3 (commenting "It is doubted whether Capt. Hodgdon [sic] will permit the writ to be executed.").

34 Affidavit of Jeremiah Eames, Apr. 14, 1814, *In re Hodsdon*, *supra* note 27, Doc. 12. As noted in the second paragraph of Hodsdon's letter to Justice Livermore quoted *infra* text accompanying note 38, Hanson does not appear to have been in Hodsdon's custody.

Moving a prisoner in an attempt to evade a writ of habeas corpus from the New Jersey courts during the Revolutionary War had led to a rebuke to a subordinate from George Washington. See Letter from Elias Dayton to George Washington, June 8, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08636>, ver. 2013-06-10; Letter from Pierre De Peyster to George Washington, June 9, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08644>, ver. 2013-06-10; Letter from George Washington to Pierre De Peyster, June 10, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08650>, ver. 2013-06-10; Letter from George Washington to Elias Dayton, June 11, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08661>, ver. 2013-06-10; Letter from Elias Dayton to George Washington, June 17, 1782, National Archives, available at <http://founders.archives.gov/documents/Washington/99-01-02-08706>, ver. 2013-06-10. See generally HALLIDAY, *supra* note 5, at 240–41 (describing similar

served upon Hodsdon on March 4,<sup>35</sup> and he endorsed upon it:

Stewartstown NH March the 14<sup>th</sup> 1814

I hereby certify that the within named Charles Hanson, Charles Hall, and Sanders Welch Cooper are not imprisoned or detained in my Custody in the State of New Hampshire nor were they on the receipt of the within Writ. Isaac Hodsdon Captain 33d Regt. US Infantry<sup>36</sup>

Perhaps realizing the vulnerability of this literally true but fundamentally evasive return,<sup>37</sup> Hodsdon also wrote an accompanying letter to Justice Livermore:

Sir, Enclosed is a writ commanding me to have before you on the twenty fourth instant Charles Hanson Charles Hall and Sanders Welch Cooper prisoners in my custody together with the time and cause of their imprisonment alias confinement.

Charles Hanson of Canaan Vt. and the only person whom I ever knew by that name is not a prisoner in the custody of any person. But is

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misconduct in period surrounding English Habeas Corpus Act of 1679); *infra* note 116.

35 See Affidavit of Nathaniel Beach, Apr. 12, 1814, *In re Hodsdon*, *supra* note 27, Doc. 11:

[O]n the fourth day of March A.D. 1814 I called at Captain Isaac quarters and asked him to take bonds for Charles Hall and Sanders Welch Coopers appearance to any amount. He said no I cannot for I have had a Writ of Habeas Corpus today ordering me to take them to Plymouth. If I should take bonds they might be out of the way. He then observed that he should not make any return of Charles Hall but holds him as a prisoner of war that he did not know in what way he should make return on the writ whether by taking them down or sending them. He then said that he should not take any council on the subject but consult his own feelings and make such returns as he thought proper.

A similar account appears in the Affidavit of Jeremiah Eames, *supra* note 34, who accompanied Beach on this visit. The March 4 service date is also supported by Rule on Isaac Hodsdon, [Apr. 19, 1814], *In re Hodsdon*, *supra* note 27, Doc. 13.

36 Writ of Habeas Corpus, *supra* note 33.

37 See *infra* note 87 and accompanying text.

about his ordinary business at home and elsewhere.

Charles Hall, of Hereford Lower Canada, now a prisoner of War in the United States barracks at Canaan Vt. under command of Lieutenant Thomas Buckminster, will probably remain at that post until the pleasure of the President of the United States is made known touching that point.

As the civil authority takes no cognizance of prisoners situate[d] like him, I deem it inconsistent with my duty to deliver him into the hands of a civil officer.

Sanders Welch Cooper of Canaan Vt. having been arrested and being in confinement in a Guard house in said Canaan in possession of U.S. troops under command of Lieutenant Buckminster under a charge of furnishing provisions to the enemy. Supported by respectable testimony and a statement of his crimes having been transmitted to Titus Hutchinson District Attorney for the District of Vermont he has sent his complaint and warrant to take him into custody. Your Honor will therefore readily excuse me for not producing the prisoner agreeable to the directions of the enclosed writ.<sup>38</sup>

At this point, counsel for the petitioners sought and obtained from the court an order requiring Hodsdon to show cause in Cheshire at the beginning of May why he should not be held in contempt for having failed to make “any legal and sufficient return” to the writ.<sup>39</sup> Hodsdon responded by providing an affidavit stating:

that being under necessity of repairing to Boston from Stewartstown on public business he left said

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38 Letter from Captain Isaac Hodsdon to Justice Arthur Livermore, Mar. 14, 1814, *In re Hodsdon*, *supra* note 27, Doc. 9.

39 Rule on Isaac Hodsdon, [Apr. 19, 1814], *id.*, Doc. 13. This document recites that it was issued “on motion of Parker Noyes and James Wilson Counsel for the said Hanson Hall and Cooper” but contains no indication of service upon Hodsdon. As will appear in the block quote that follows in text Hodsdon admittedly did receive some version of this document but it may not have contained these items of information, of which he later professed ignorance. *See infra* text accompanying note 49.

Stewartstown [and] on his journey . . . received . . . a copy of an order of the Honorable Supreme Judicial Court to appear before said Court at Cheshire on the first Tuesday of May next to shew cause why an attachment should not be awarded against him for a contempt of and neglecting to make a legal return on a certain writ of Habeas Corpus to him previously directed by the Honorable Arthur Livermore one of the Justices of said Court. That he has no time or opportunity to obtain evidence to appear at said court. But that he has important and necessary testimony that he shall be able to procure by the next term of the said Honorable Court and that he could not safely go to trial without said testimony and writings, and that such is the great necessity of the business which calls him to Boston, having commenced the journey he is altogether unable to appear agreeably to the order of the Honorable Court aforesaid and shew cause as aforesaid.<sup>40</sup>

What had so far been civil contempt proceedings now became criminal contempt proceedings captioned *State v. Isaac Hodsdon*. The court issued a *capias*.<sup>41</sup> Directed to any sheriff or deputy sheriff in the state, it recited the procedural history and commanded the recipient to “apprehend the body of the said Isaac Hodsdon . . . and him safely keep . . . to answer for said Contempt.”<sup>42</sup> Hodsdon was in fact taken into custody and, accompanied by counsel, appeared in August before a Justice of the Peace who took his recognizance for \$500 as well as that of a surety, Jacob M. Currier, in the same

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40 Affidavit of Isaac Hodsdon, Apr. 27, 1814, *In re Hodsdon*, *supra* note 27, Doc. 14.

41 Actually it issued two, but the first was returned *non est inventus*. *Id.*, Doc. 15.

42 *Id.*, Doc. 16. This document described the contempt proceedings, noted *supra* text accompanying note 39, as being commenced “on motion of Parker Noyes and James Wilson Esqs Counsel for the said Hanson Hall and Cooper.” Considering that, as will appear in the next sentence of text, Hodsdon was taken into custody on the authority of this document it seems improbable that he did not see it, but, as noted *supra* note 39, he consistently claimed not to know the identity of those pursuing the private criminal contempt action.

amount for an appearance at the September term of court.<sup>43</sup>

In Hodsdon's account, he did duly appear with his lawyer, John Holmes, who demanded a trial.<sup>44</sup> Hodsdon continued that the Attorney General had responded that:

“although he was unapprized of the nature of the transaction out of which the prosecution originated and although it was commenced by some private person, if the Court should be of an opinion that it was his duty, he would pursue the prosecution.” And the answer from Judge Smith (who was the only Judge on the bench) was that he did not consider that the States Attorney was holden to pursue the prosecution.<sup>45</sup>

The case was, Hodsdon thought, then adjourned until

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43 The apprehension and recognizance are endorsed on the *capias* itself, *supra* note 42, and reported by Hodsdon in Affidavit of Isaac Hodsdon, Feb. 11, 1816, *In re Hodsdon*, *supra* note 27, Doc. 18. The presence of counsel is noted in Statement of the Case, [n.d.], *id.*, Doc. 20.

44 Affidavit of Isaac Hodsdon, Feb. 11, 1816, *id.*, Doc. 18. He also seems to have filed a written justification for not responding to the order served upon him during his trip to Boston. See Affidavit of Isaac Hodsdon, n.d., *id.*, Doc. 17. This contains an apparent slip of the pen that may be of significance. With respect to Cooper the document literally reads:

That Saunders Welch Cooper was held upon suspicion of smuggling until information could be sent to the District Attorney of the District of Vermont and his warrant to arrest him be obtained. And that the District Attorneys warrant was *in* his justification when he returned the Writ of Habeas Corpus and that on the twenty first day of the same month or as soon as an officer could be obtained, Cooper was arrested under the praecipe from the District Attorney and was recognized to appear before the District or Circuit Court of Vermont.

I have emphasized the word “in.” It seems to be unnecessary and the remainder of the sentence reads fine without it. My speculation is that Hodsdon began to write “was in his possession,” but instead decided upon “was his justification,” and inadvertently failed to delete the “in.” If this is correct, Hodsdon's story was variously that he was holding Cooper in expectation of the arrival of a warrant from Vermont (this version), was holding him because he had received a warrant from Vermont, *see infra* text accompanying note 51, and that Cooper had already been arrested on the Vermont federal charges at the time the writ was served, *see infra* text accompanying notes 52, 64.

45 Petition of Isaac Hodsdon, Dec. 7, 1816, Legislative Petitions Collection, New Hampshire State Archives.

February on the same security.<sup>46</sup> The clerk, however, recorded his appearance as being due in November.<sup>47</sup> Hodsdon did not appear then, resulting in an order forfeiting his and Currier's bonds.<sup>48</sup> When Hodsdon got back to the court to explain all this, it responded with an order to the effect that if he paid costs and notified the private prosecutor, he would have his day in court and a trial on the original cause of action as fully as if there had been no default.<sup>49</sup> However, Hodsdon maintained, being ignorant of the identities of the private prosecutors he could not fulfill this condition, and execution was issued against him and Currier for the \$500 bonds.<sup>50</sup>

Hodsdon now turned for relief to the New Hampshire legislature, filing a long petition that (a) provided an account of the procedural history and (b) complained of the injustice of the public-private enforcement framework in which he found himself.<sup>51</sup>

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46 Affidavit of Isaac Hodsdon, *supra* note 43.

47 In his petition, *supra* note 45, Hodsdon had a plausible explanation for the confusion:

[Y]our petitioner begs leave to suggest that the cause of this default was as follows viz. that under the new arrangement of Courts it was required for the first time that the S.J.C. should be holden in Novbr in that county and the Clerk having been accustomed to take recognizance at the September term returnable in February at the time of speaking the recognizance did not recollect that an intermediate Court was to be holden between September and February and afterwards when recording the said recognizance, recollecting the November term, he recorded it in such a manner as to require your petitioner to appear in November.

48 *Id.*

49 *Id.*

50 *Id.*

51 In addition to filing a petition, Hodsdon also had his lawyer, William Merchant Richardson (who had by now become Chief Justice), write a letter to State Representative (later Congressman) Josiah Butler, who had formerly clerked in his office. See CHARLES H. BELL, *THE BENCH AND BAR OF NEW HAMPSHIRE* 72, 230 (Boston, Houghton Mifflin & Co. 1894) (presenting biographical sketches of Richardson and Butler).

Richardson recounted in his letter that the habeas "application was made to Judge Livermore . . . not by the men arrested but by certain characters who thought it not for their interest to have the intercourse with Canada checked," that he had suspected one Curtis Coe, an active Federalist, see RANSOM H. GILLET, *DEMOCRACY IN THE UNITED STATES* 74 (New York, D. Appleton & Co. 1868), as the private prosecutor but had discovered this not to be the case and still did not know "but have understood it was one of Coe's associates in the upper part of the state." In any event, Richardson continued:

As recounted above, when Hodsdon replied by letter to the writ of habeas corpus he reported with respect to Cooper that “a statement of his crimes having been transmitted to Titus Hutchinson District Attorney for the District of Vermont he has sent his complaint and warrant to take him into custody.”<sup>52</sup> The transcription of this letter contained in Hodsdon’s petition to the legislature, however, rendered the last few words as “complaint and warrant & taken him into custody.”<sup>53</sup>

In addition to explaining his non-appearance as resulting from confusion over court dates, Hodsdon in his petition denounced the structure of the legal proceedings against him. The State, he said, had accused him of an “offence of a public nature,” and brought him into court, where the State’s attorney had declined to prosecute.<sup>54</sup> But, he continued, the court had stated that it could not dismiss the charges because it “had not authority [nor was] at liberty to proceed, either to acquit or condemn the accused, until he himself should (if possible) procure some private citizen to prosecute him,” and pursue or settle the private contempt action.<sup>55</sup> Hodsdon called this “unprecedented in the Jurisprudence of every other court, but that of New Hampshire for 1814 and 1815 . . . [Y]our petitioner is ignorant

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I have never doubted that he intended to act honestly and justly, but his situation was a difficult one. I was his counsel, but was so well convinced that his conduct was correct and his case was a hard one that I have taken no fees nor do I ever intend to take any. I hope you will look into his case and exert your self in his behalf as far as is proper.

Letter from William Merchant Richardson to Josiah Butler, Dec. 7, 1816, Collection of Personal Papers, Document Case 5035, Folder 37, New Hampshire State Archives.

Interestingly, as the third installment of this project will discuss further, Richardson in his capacity as Chief Justice was soon to write *Merrill v. Sherburne*, 1 N.H. 199 (1818) (invalidating on separation of powers grounds legislative interference with judicial proceedings).

There is a full discussion of the background of Richardson’s assumption and occupancy of the Chief Justiceship, as well as his low opinion of Livermore, in JOHN PHILLIP REID, *LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL COMPETENCY IN EARLY NATIONAL NEW HAMPSHIRE* 183–86, 191–92 (2012).

52 See *supra* text accompanying note 38.

53 Petition of Isaac Hodsdon, *supra* note 45, at 7. Of course, if this had been so, Hodsdon would have had a much stronger excuse for not producing Cooper than simply the circumstance of his being wanted for an appearance in federal court in Vermont, whether a warrant had arrived or not. See *supra* note 44.

54 *Id.* at 4.

55 *Id.*



who the private prosecutor is, and if he could ascertain who he is, your petitioner would be compelled by the said decree to pay him whatever sum his corrupt inclination might lead him to extort from your petitioner, or not obtain the discharge aforesaid.”<sup>56</sup>

On June 26, 1817, both Houses passed and the Governor signed, “An Act Granting Relief to Isaac Hodsdon in Certain Proceedings had Before the Supreme Judicial Court.”<sup>57</sup> After a recitation of the procedural history, this enactment provided that if Hodsdon appeared at the September term of Strafford Superior Court and tendered security acceptable to the state’s attorney for his continued appearance “to answer for any contempt towards the late Supreme Judicial Court,”<sup>58</sup> the state’s attorney was authorized to discharge Hodsdon and Currier from their prior recognizances. No detailed account of these proceedings has yet surfaced,<sup>59</sup> but the two recognizances were in fact discharged.<sup>60</sup>

On January 31, 1822, Hodsdon signed a petition to Congress seeking compensation for his expenses in connection with his various legal entanglements.<sup>61</sup> In this document Hodsdon recounted that, in conformity with his orders,<sup>62</sup> he had

detected sundry persons who were furnishing the

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56 *Id.*

57 8 LAWS OF NEW HAMPSHIRE: SECOND CONSTITUTIONAL PERIOD, 1811–1820, at 641 (1920).

58 The prior Supreme Court had been abolished in 1816, an episode in the ongoing struggle for control of the New Hampshire judiciary that will be further discussed in the next installment of this project. See JOHN PHILIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 154–62 (2009); see also 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 65 (Alfred S. Konefsky & Andrew J. King eds., 1982); see generally JOHN H. MORISON, LIFE OF THE HON. JEREMIAH SMITH, LL.D. 265–79 (Boston, Charles C. Little & James Brown 1845).

59 However, there is a fair chance that one will surface when resources exist to complete the archival processing of unsorted court papers resident in the New Hampshire State Archives. Recovering this material would likely help to illuminate the issues raised *infra* Part III(B)(1)(b), which are currently obscure, see *infra* text accompanying notes 177–84.

60 See Judgment Book of Superior Court, Vol. H, Feb. 1817 - Sept. 1819, at 270, New Hampshire State Archives.

61 Petition of Isaac Hodsdon, Jan. 31, 1822. This document was submitted with a copy of General Cushing’s orders described *supra* note 21, and the two are attached to each other at the Maine Historical Society, Coll. 8, Box 1/4.

62 See *supra* text accompanying note 21.

Enemy with Provisions . . . some of whom being citizens of the United States were found crossing into the Province of Lower Canada. These your petitioner caused to be conducted from Lower Canada into the United States . . . [Y]our petitioner has been prosecuted in three separate actions for falsely imprisoning those citizens who were found within the Province of Canada, and were brought into the United States and were restrained of their liberty no longer than was necessary for that purpose . . . [Y]our petitioner has been compelled to appear and answer from Court to Court. . . for doing what he was ordered to do by his superior officer, and which if he had omitted the doing of, would have rendered him obnoxious to martial law.<sup>63</sup>

As to the three prisoners sought by the writ of habeas corpus, Hodsdon wrote, one had been at liberty, one “was a prisoner of war and not entitled to any benefit of such a writ,”<sup>64</sup> and “one was in the Custody of the Civil Authority of Vermont at the instance of the District Attorney on a charge for furnishing the enemy with provisions.”<sup>65</sup> None of the three, he said, “were subjects of New

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63 Petition of Isaac Hodsdon, *supra* note 61, at 4. Nothing in the elided material explains the “that purpose.”

64 *Id.* This is a reference to Charles Hall, *see supra* text accompanying note 38, who, Hodsdon, reported, “died before the prosecution was commenced,” Petition of Isaac Hodsdon, *supra* note 61, at 8. Presuming that “the prosecution” refers to Hodsdon’s prosecution for contempt, this would put the date of Hall’s death sometime between March of 1814, when the writ was served, *see supra* note 35 and accompanying text, and late April of that year, when Hodsdon was served with the order to show cause why he should not be held in contempt, *see supra* note 40. If this dating is correct, it is possible that there was never an inquiry (or at least a response to an inquiry) made to Washington as to how Hall should be dealt with. *Cf. supra* text accompanying note 38 (reporting Hodsdon’s statement that Hall would probably remain in military detention until the President’s pleasure were known). In any event I have not been able to locate any such correspondence.

65 *Id.* at 4. As set forth, *supra* note 44, Hodsdon’s accounts on this point displayed considerable variation. Recall that in writing to Justice Livermore Hodsdon had said that “Sanders Welch Cooper of Canaan Vt.” was “in confinement in a Guard house in said Canaan in possession of U.S. troops under command of Lieutenant Buckminster under a charge of furnishing provisions to the enemy.” *See supra* note 38 and accompanying text.

Hampshire nor imprisoned within the State.”<sup>66</sup> Hodsdon accordingly sought reimbursement from “the Government of the United States, the orders of whose officers he has strictly obeyed,” for his expenses “in defending himself in prosecutions brought against him for doing a duty, which he was bound as a subordinate officer to do.”<sup>67</sup>

This petition in due course resulted in a report from the House Claims Committee.<sup>68</sup> In addition to the legal proceedings already noted, this document reported that Cooper had recovered a verdict against Hodsdon in Vermont for \$24.50 in damages and \$35.84 for his conduct in causing Cooper’s arrest by the District Attorney in the federal criminal proceedings,<sup>69</sup> which were ultimately dropped.<sup>70</sup> The committee also reported that on May 24, 1815, the New Hampshire Supreme Court had ordered Hodsdon to pay Bissel a fine of \$50 and court costs of \$18.92.<sup>71</sup> The committee noted that it had obtained confirmation of the facts from “the Honorable John Holmes, now of the Senate.”<sup>72</sup> It continued:

The committee deem it unnecessary to enter into an argument to prove that, where an officer of the Government, acting under its orders, in good

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66 Petition of Isaac Hodsdon, *supra* note 61, at 4. As already noted Hodsdon had made the same statement to Justice Livermore but had not denied that, inasmuch as the men were in the custody of his military subordinate, he had the ability to produce them. See *supra* text accompanying note 36; *infra* note 86 and accompanying text.

67 Petition of Isaac Hodsdon, *supra* note 61, at 4.

68 See House Committee on Claims, Report No. 8, 19th Cong., 1st Sess. (Dec. 23, 1825).

69 See *supra* note 44 (containing Hodsdon’s account of having sent information to the District of Vermont to procure Cooper’s arrest).

70 See MERRILL, *supra* note 22, at 96 (reporting that Cooper was sent to Vermont “to be tried for treason. He was accused of being a smuggler, and of having joined the militia that he might give assistance to those desiring to aid the enemy. He was not tried, however, on account of his youth and the close of the war, and, after his death, years later, his widow obtained a pension for his services”). For an extended biographical sketch of Cooper that passes over this episode see Chester Bradley Jordan, “Saunders W. Cooper,” in 1 PROCEEDINGS OF THE BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE 169 (n.s. 1900). As indicated in the various documents already cited, the most common spelling was “Sanders.”

71 See *supra* note 31.

72 See Report No. 8, *supra* note 68, at 4; see also *supra* text accompanying note 44 (noting Holmes’s appearance as Hodsdon’s counsel).

faith, has been subjected to the payment of money [the officer] has a just claim for indemnity; as this principle has been frequently recognized by different committees, and in several acts of Congress.<sup>73</sup>

The committee accordingly recommended that Congress pass a bill compensating Hodsdon for the amounts assessed against him and the costs of his defense in the various proceedings.<sup>74</sup>

The committee's report aroused a fair amount of newspaper comment. A letter in the *Concord Statesman & Register* attacked the committee's conclusion that Hodsdon was entitled to be paid "both on principle and precedent,"<sup>75</sup> demanding to know why "the injured and insulted people of the United States" should refund the penalties imposed upon "this upstart tyrant" who considered "his epaulette and sword to contain a charm of irresistible power over the civil law" and "shut up republican citizens with. . . as little ceremony as he would pen his pigs."<sup>76</sup> The *New-Hampshire Patriot* responded that Hodsdon had done "his duty in stopping and arresting traitors that were aiding the public enemy," and had been "illegally arrested and fined for executing the orders of his superior officer, . . . which orders were in conformity to law and right."<sup>77</sup>

In any event, the legislation passed and Hodsdon was paid.<sup>78</sup>

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73 Report No. 8, *supra* note 68, at 4.

74 *Id.*

75 *Id.* The full text of the report had been published as *Isaac Hodsdon's Case*, N.H. PATRIOT, Jan. 16, 1826, at 2.

76 Tax Payers, Letter to the Editor, *For the Statesman & Register*, THE CONCORD STATESMAN & REGISTER, Feb. 14, 1826, at 2. The letter noted that the Committee's information had been "confirmed by Mr. Holmes of the Senate, who was counsel for this Capt. Kid." *Id.*

77 N.H. PATRIOT, Feb. 16, 1826, at 2. The two competing views reflected in this paragraph of text mirror a larger political transformation in which military officers were coming to be seen "as apolitical instrument[s] of public policy" rather than political actors like other public officials. See William B. Skelton, *Officers and Politicians: The Origins of Army Politics in the United States Before the Civil War*, 6 ARMED FORCES & SOC'Y 22, 27-28 (1979).

78 See Act of May 16, 1826, 6 Stat. 342, Ch. 54 (compensating Hodsdon for "judgments recovered against him, in the states of New Hampshire and Vermont, by reason of his enforcing the laws of the United States, while acting as a captain . . . during the late war, and for his expenses in defence of a proceeding against him before the Supreme Judicial Court of New Hampshire."); [Annual Report of the Department of War to the Senate], Nov. 26, 1827, at 167 (showing

### III. The Interwoven Strands of Legal Remedies for Government Misconduct

As Hodsdon's story illustrates, those aggrieved by perceived abuses of government power through the early decades of the 19<sup>th</sup> century had a variety of means to achieve legal redress. This section describes, first in the habeas context and then more generally, some of the principal remedies that litigants could invoke to confine public officials to the lawful exercise of their authority. This section also shows that the period was in certain respects a transitional one, which saw some remedies beginning to face challenges.

#### A. Habeas Corpus

Hodsdon would not have encountered his difficulties if he had just appeared in court with the prisoners in response to the writ of habeas corpus and asserted any legal grounds he wished supporting his entitlement to retain them in custody.<sup>79</sup> That is what he should have done, following the contemporaneous example of his superior officer, General Thomas Cushing.<sup>80</sup>

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payment to Hodsdon from appropriated funds of \$423.68, the amount of his approved compensation).

A number of similar cases beginning around 1800 are reported in James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1913–14 (2010), which describes the development of the practice by which courts found wrongdoing by officers but expected them to be routinely reimbursed by Congress if it made the determination that doing so was in the public interest. Under this two-step transparent process the officer assumed the initial risks but Congress effectively provided the immunities that it concluded were necessary for officials to exercise their duties zealously. *Id.* at 1925–26. For another example of this process at work see *infra* text accompanying note 114 (describing case of Andrew Jackson). *Cf. infra* note 266 (observing that modern Supreme Court has failed to acknowledge this history).

79 See *State v. Dimick*, 12 N.H. 194, 197 (1841) (observing that “If the laws of the United States justify the detention of the applicant, there is nothing illegal,” and rejecting on merits claim of soldier for discharge from Army). See also Freedman, *supra* note 2, at 607–08 & 608 n.86 (emphasizing that core principle of writ is that determination of whether or not an imprisonment is lawful is made by a judge); *supra* note 26 (describing 1814 newspaper piece taking same position).

80 The details in the following paragraph are taken from *Commonwealth v. Cushing*, 11 Mass. (10 Tyng) 67 (1814). For a similar case at the same time see *Commonwealth v. Harrison*, 11 Mass. (10 Tyng) 63 (1814) (granting habeas

In March of 1814, Cushing received a writ of habeas corpus from the Massachusetts Supreme Court ordering him to produce a soldier named William Bull, who had allegedly been enlisted in the Army while underage. General Cushing filed a return to the writ explaining that Bull was in custody pursuant to the sentence of a court martial that had convicted him of desertion and personally brought Bull before the court. The court heard full argument from counsel and, construing the relevant federal recruitment statutes,<sup>81</sup> ordered his discharge. Cases like this were common<sup>82</sup> and regularly adjudicated by the state courts.<sup>83</sup>

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corpus discharging from service soldier enlisted as a minor). This latter case was of the type that I have previously dubbed a “nested habeas corpus,” Freedman, *supra* note 2, at 606 n.76. The writ was brought by the captain of a Russian ship claiming the minor’s services as an apprentice. But the court set the minor free, discharging him from the Army and leaving the ship’s captain to pursue whatever legal remedies he might have on the apprenticeship claim. See Oaks, *supra* note 5, at 275–76.

81 Act of Jan. 20, 1813, 2 Stat. 791, Ch. 12, Sec. 5; Act of Jan. 11, 1812, 2 Stat. 671, Ch. 14, Sec. 11.

82 See, e.g., *In re John Lewis Connor*, July 18, 1812, Pennsylvania State Archives, Habeas Corpus 1809–1812. In that case, the Chief Justice of the state Supreme Court directed a writ of habeas corpus to the commander of a Navy gunboat in Philadelphia harbor calling for the production of Connor. The commander responded in a return of the same date that Connor was lawfully enlisted and continued, “I have here in Court the said John Connor . . . to do and be subject to, whatsoever the Court shall consider in his behalf.” On consideration of the matter the Court remanded Connor to his commander. See also *State v. Brearly*, 5 N.J.L. 555 (1819) (holding soldier properly enlisted).

83 See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 375–76 & n.a (1826) (citing cases from Pennsylvania, Maryland, South Carolina, Massachusetts, Virginia, and New York, including *In re Stacy*, described in the next paragraph of text, in which he wrote the opinion); Letter from [President] Thomas Jefferson to [Secretary of War] Henry Dearborn, June 27, 1801 (suggesting, successfully, that Dearborn discharge a minor soldier inasmuch as the father has “a compleat right in Virginia to [take him from] the military by a Habeas Corpus, which any of the state’s [. . .] will give [him]. of this I have known examples,” available at <http://founders.archives.gov/documents/Jefferson/01-34-02-0364>, ver. 2013-06-10. Scholars are in accord on this point, see Freedman, *supra* note 5, at 558 n.66 (collecting sources); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 98 VA. L. REV. 753, 788–89 (2013); see generally Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*, 92 MICH. L. REV. 862, 886–87 (1994).

The state courts lost this authority through the rulings of the Supreme Court in *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871) and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858). See Ann Woolhandler & Michael Collins, *The Story of Tarble’s Case: State Habeas and Federal Detention*, in FEDERAL COURTS

Similarly, in one well-known case during the War of 1812, General Morgan Lewis, the commander of a key American military post, arrested a citizen named Samuel Stacy on suspicion of spying for the British.<sup>84</sup> Lewis ordered a subordinate to confine Stacy, planning to try him as a spy before a court-martial.<sup>85</sup> In response to a writ of habeas corpus from the New York courts Lewis returned that Stacy “is not in my custody.”<sup>86</sup> Chief Justice Kent unsurprisingly considered this return “a contempt of the process,” inasmuch as Lewis had not (and could not have) returned that Stacy was not “in his possession custody or power.”<sup>87</sup> The case, he wrote, called for prompt initiation of contempt proceedings because a “military

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STORIES 141 (Vicki C. Jackson & Judith Resnick, eds., 2010) (describing cases); see also Wilkes, *supra* note 5, at 1062–66 (describing jurisprudence in period between the cases).

Because they are in such tension with the original understanding, see Halliday & White, *supra* note 5, at 682 n.330, and because they are associated with attempts by the federal government to prevent northern state courts from freeing by habeas corpus fugitives claimed to be slaves, see generally Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1355–58, 1440 (2015), these cases are still controversial among many commentators, see ANTHONY GREGORY, *THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING’S PREROGATIVE TO THE WAR ON TERROR* 310 (2013) (calling for cases to be overruled); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1807 (2013) (“Scholars now regard the reasoning of Ableman (and its sequel, Tarble’s Case) as reflecting a deep misunderstanding of the Constitution”) (citations omitted); Richard H. Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1084–85 (2010); John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1740–42 (2012); see generally Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 754, 786–94 (2013), although there is no evidence that the Court is in any way troubled by them.

84 See TAYLOR, *supra* note 16, at 341. See also Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison’s Forgotten War*, 98 NW. U. L. REV. 1567, 1580–92 (2004) (discussing this and similar cases and their modern implications). There is a briefer discussion of the same issues in Jennifer K. Elsea, Cong. Research Serv., R42337, *DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS* 13–14 (2014). Sources relevant to Lewis’s claim of authority are to be found at Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WISC. L. REV. 681, 728 n.308 (2014).

85 See *In re Stacy*, 10 Johns. 328, 330–31 (N.Y. Sup. Ct. 1813).

86 *Id.* at 329.

87 *Id.* at 331–32. Hodsdon, of course, was in just this position. His return that two of the prisoners were not in his custody failed to mention that they were in the custody of an officer under his command, which is doubtless why he

commander is here assuming criminal jurisdiction over a private citizen . . . and contemning the civil authority of the state.”<sup>88</sup> The Chief Justice accordingly ordered that General Lewis be attached for contempt unless he either released Stacy or produced him in court in obedience to the writ of habeas corpus.<sup>89</sup> Stacy was released on the orders of the Secretary of War, who had already concluded that the detention was unjustifiable.<sup>90</sup>

But we should not allow the brightness of habeas corpus in the historical constellation to mislead us into a belief that its rays alone were considered sufficient to chase the shadows of unlawful imprisonments from Earth.

Already in 1799, Alexander Hamilton, in his capacity as the country’s senior military commander,<sup>91</sup> had written to the United States Attorney for the District of New York following the release of a soldier by a Virginia judge to express unease at the growing phenomenon of “the enlargement of soldiers on writs of Habeas Corpus issued by and returnable before state judges.”<sup>92</sup> Hamilton requested a formal legal opinion “on the legality of this practice, and . . . also . . . whether upon such return it is necessary to produce the person who is the object of the Habeas Corpus.”<sup>93</sup> And in issuing such writs some state judges thought it necessary to defend their power to do so.<sup>94</sup>

Furthermore, a nationally publicized episode during the War of 1812, and its highly visible aftermath, re-taught the enduring

felt the need to write his explanatory letter. *See supra* text accompanying note 37.

88 *In re Stacy*, 10 Johns. at 334.

89 *Id.*

90 *See* TAYLOR, *supra* note 16, at 341 & 538 n.71; Wuerth, *supra* note 84, at 1583 & n.103.

91 *See* RON CHERNOW, ALEXANDER HAMILTON 555–60, 562–66, 584 (2004).

92 Letter from Alexander Hamilton to Richard Harison, Aug. 24, 1799, available at <http://founders.archives.gov/documents/Hamilton/01-23-02-0356>, ver. 2013-06-10.

93 *Id.* It would of course be of considerable interest to read any reply from Harison, but I have been unable to locate one. Since both men were in New York City and had long known each other at the New York bar, *see* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 1–2 (Julius Goebel Jr. ed., 1964), there is a chance that Harison told Hamilton informally that he would not write the opinion because it would be unhelpful.

94 *See, e.g.*, *State v. Brearly*, 5 N.J.L. 555, 559–61 (1819) (defending in dictum right of state court to adjudicate matter). An example from a later period appears in *State v. Dimick*, 12 N.H. 194, 197 (1841) (discussed *supra* note 79).



lesson that habeas corpus, state or federal, was ultimately no stronger than the willingness of government officials to honor it.<sup>95</sup>

After arriving in New Orleans to take charge of its defense, General Andrew Jackson on December 16, 1814 put the city under military government.<sup>96</sup> Following a series of engagements highlighted by the American victory at the Battle of New Orleans on January 8, 1815, the British withdrew on January 18.<sup>97</sup> General Jackson's proclamation of martial law, however, remained in effect week after week. The state militia remained in service, the populace became more restless, and General Jackson grew increasingly irritable in treating the city as a military camp that he had the absolute power to control. He even issued an order to a local newspaper on February 21 requiring it to receive official approval of its reporting on the progress of peace negotiations.<sup>98</sup> Because foreign citizens were entitled to release from the militia, a number of militiamen claimed (with a greater or lesser degree of accuracy) to be French citizens and obtained certificates to that effect from the French counsel Louis de Tousard; Jackson responded by ordering Tousard (who had fought for the Americans in the Revolution) and the newly-certified

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95 The episode is the subject of the monograph MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP* (2006) and is well summarized by Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 *CARDOZO L. REV.* 233 (1981). For a recent retelling making full use of these sources see Caleb Crain, *Bad Precedent: Andrew Jackson's Assault on Habeas Corpus*, *THE NEW YORKER*, Jan. 29, 2007, at 78, available at [http://www.newyorker.com/arts/critics/books/2007/01/29/070129crbo\\_books\\_crain](http://www.newyorker.com/arts/critics/books/2007/01/29/070129crbo_books_crain), which the author supplemented with a historiographical note, *Notebook: Jackson and Habeas Corpus*, available at [http://www.steamthing.com/2007/01/my\\_essay\\_on\\_and.html](http://www.steamthing.com/2007/01/my_essay_on_and.html). A very well-sourced account of the events is contained in 2 JAMES PARTON, *LIFE OF ANDREW JACKSON* 304–21 (New York, Mason Brothers 1860); see also ANDREW BURSTEIN, *THE PASSIONS OF ANDREW JACKSON* 212–14 (2003).

For examples of contemporaneous reports in the New Hampshire newspapers see *From New Orleans*, *DARTMOUTH GAZETTE*, May 31, 1815, at 4 (published in Hanover, N.H.), *Trial of General Jackson*, *CONCORD GAZETTE*, May 23, 1815, at 3, and *From New-Orleans*, *THE FARMER'S CABINET*, May 22, 1815, at 1 (published in Amherst, N.H.). Structural weaknesses of the writ are discussed *infra* note 116.

96 See PARTON, *supra* note 95, at 60–61 (reprinting proclamation).

97 See Sofaer, *supra* note 95, at 240; see also PARTON, *supra* note 94, at 259–76.

98 See PARTON, *supra* note 95 at 306–08 (reprinting interchange between Jackson and newspaper); Sofaer, *supra* note 95, at 240–41.

Frenchmen out of the city.<sup>99</sup>

This measure led to an outraged letter to the editor of the *Louisiana Courier*:

[W]e do not know any law authorizing General Jackson to apply to *alien friends* a measure which the President of the United States himself has only the right to adopt against *alien enemies* . . . [I]t is time the citizens accused of any crime should be rendered to their natural judges, and cease to be brought before special or military tribunals, a kind of institution held in abhorrence, even in absolute governments.<sup>100</sup>

Jackson had his soldiers arrest the letter's author, a prominent legislator named Louis Louaillier.<sup>101</sup> As he was being seized he "called on people near-by to act as witnesses, and one of them, a lawyer named Pierre L. Morel, agreed to help him."<sup>102</sup>

Morel first applied to Justice Francois-Xavier Martin of the Louisiana Supreme Court for a writ of habeas corpus. Judge Martin, however, responded, according to his own account, that the court

had determined in the preceding year . . . that its jurisdiction being appellate *only*, it could not issue the writ of *habeas corpus*. Morel was, therefore, informed that the judge did not conceive he could interfere; especially as it was alleged the prisoner was arrested and confined for trial, before a court martial, under the authority of the United States.<sup>103</sup>

Morel then approached United States District Judge Dominick A. Hall "and requested a writ of prohibition against Louaillier's court

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99 See PARTON, *supra* note 95, at 308; Sofaer, *supra* note 95, at 241–42; Crain, *supra* note 95, at 81.

100 Letter to the Editor, *Letter from A Citizen of Louisiana of French Origin*, LA. COURIER, Mar. 3, 1815, reprinted in PARTON, *supra* note 95, at 309–11 (publishing translation of letter to editor originally written in French) (original emphasis).

101 See *id.* at 311; Sofaer, *supra* note 95, at 242. For more on Louaillier, see 2 FRANCOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA FROM THE EARLIEST PERIOD 387–88* (New Orleans, Lyman & Beardslee 1829).

102 Crain, *supra* note 95, at 81.

103 MARTIN, *supra* note 101, at 394–95 (original emphasis). For a summary of the prior case, see *id.* at 402–03.

martial.”<sup>104</sup> Judge Hall, however, “felt that a prohibition could not properly issue without a hearing.”<sup>105</sup> Morel soon returned with an application for a writ of habeas corpus<sup>106</sup> on his client’s behalf, and Judge Hall ordered General Jackson to produce Louailler the following morning.<sup>107</sup> But Morel promised Judge Hall that prior to formal service of the order he would inform General Jackson of it, and did so.<sup>108</sup>

Jackson exploded, arresting Hall and confiscating the writ itself from the hands of the court clerk.<sup>109</sup> The United States Attorney for the District of Louisiana, John Dick, then sought a writ of habeas corpus on Hall’s behalf from a state trial judge, who issued it; Jackson refused to obey it and ordered the arrest of both the judge and Dick.<sup>110</sup> As it became clear that a peace treaty had been signed,

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104 Cf. Freedman, *supra* note 2, at 606 n.77 (discussing “the sometimes obscure overlap between prohibition and habeas corpus”).

105 Sofaer, *supra* note 95, at 242 (footnote omitted). This may well have been Judge Hall’s reasoning but there does not appear to be any direct primary support for the proposition. Cf. MARTIN, *supra* note 101, at 394 (recounting, “Hall expressed a doubt of his authority to order such a writ at chambers, and said he would take some time to deliberate.”).

106 If in fact Hall’s prior concern had been with his authority to act in chambers, this application would have allayed it. Individual federal judges in the early national period routinely issued chambers orders granting writs of habeas corpus. See ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 33–35 (2003).

107 See PARTON, *supra* note 95, at 312 (reprinting documents).

108 See *id.* (reprinting informational note from Morel to Jackson); Sofaer, *supra* note 95, at 242.

109 See Crain, *supra* note 95, at 82.

110 See MARTIN, *supra* note 101, at 403. The judge was not actually arrested, see Sofaer, *supra* note 95, at 243, but the United States Attorney was. See Letter from [United States Attorney] John Dick to [President] James Madison, Mar. 10, 1815, available at <http://founders.archives.gov/documents/Madison/99-01-02-4166>, ver. 2013-06-10:

[Jackson] denied the jurisdiction of the State judge, and immediately ordered him, for issuing the writ, and Me, for praying for it, to be arrested and Confined. The order, as far as it respected Myself, has been executed, and I now Occupy an apartment in the Military barracks, awaiting the turn of Events, or the Caprice of the Commanding General to be released.

The ground assigned by General Jackson for conduct which I must, until better instructed, deem an outrage upon the Constitution and the law, and a violation of the rights of the Citizen and of a Co-Ordinate branch of the government, is the Operation of Martial law, declared by him to exist. This Code, he alleges, annuls all others:

Jackson released his prisoners and discharged the militiamen from service.<sup>111</sup>

When celebrations in the city had died down, Dick moved before Judge Hall for an order requiring General Jackson to show cause why he should not be held in contempt.<sup>112</sup> This was granted, and Jackson appeared in court. The only defense his attorneys would make was a lengthy statement discussing the perceived necessity of his actions; Jackson refused to respond to a series of factual inquiries about his conduct. The upshot was that Judge Hall fined Jackson \$1,000, which he paid, and that the Madison administration sent him a letter expressing its concern.<sup>113</sup> After that, the country's acclaim for the Hero of New Orleans led to the matter fading into the background.<sup>114</sup>

Some decades later, when Jackson's finances were poor and his heroism firmly established in the public mind, his allies in Congress began a movement to have his fine refunded; after an extended political debate as to the propriety of his actions, this was done in 1844.<sup>115</sup>

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the city of New-Orleans is a Camp, and its Military possession, as  
Such, Suspends the power and arrests the operations of the judiciary.

For a further exposition of Jackson's views, see MARTIN, *supra* note 101, at 406–11.

111 See PARTON, *supra* note 95, at 315–16.

112 The account of the proceedings in the remainder of this paragraph is taken from MARTIN, *supra* note 101, at 416–27; PARTON, *supra* note 95, at 317–20; Sofaer, *supra* note 95, at 244–49; and Crain, *supra* note 95, at 83. These accounts differ in points of detail but all concur in supporting the summary in text.

113 See PARTON, *supra* note 95, at 320–21 (reprinting letter of Apr. 2, 1815 from Acting Secretary of War A.J. Dallas to Jackson). For a summary of the further correspondence between the two, see Sofaer, *supra* note 95, at 249–50; see also Crain, *supra* note 95, at 83–84.

114 See PARTON, *supra* note 95, at 321; Sofaer, *supra* note 95, at 250.

115 See ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833–1845*, at 478–79, 490–91 (1984); Sofaer, *supra* note 95, at 250–52; Crain, *supra* note 95, at 84; see generally *supra* note 78. On a personal level, Jackson seems to have reconciled with Judge Hall a few years after the events, see ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767–1821*, at 324 (1977).

When many of the same issues were raised by *Ex Parte Merryman*, 17 F. Cas. 144 (C.C. D. Md. 1861), key players, including Chief Justice Roger Taney and President Abraham Lincoln, had these events much in mind. See WARSHAUER, *supra* note 95, at 200–35 (observing that during the Civil War both men reversed their positions of the 1840's). For a well-done study of *Merryman*, see JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE*

These events must be understood in the context of the web of mutually reinforcing restraints on power that existed until the middle of the 19<sup>th</sup> century.<sup>116</sup> However great or little the usefulness of habeas corpus in specific situations in the 18<sup>th</sup> and early 19<sup>th</sup> centuries,<sup>117</sup> it was not a remedy that existed in isolation.<sup>118</sup> As the

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CIVIL WAR: THE TRIALS OF JOHN MERRYMAN (2011), which I reviewed at 99 J. AM. HIST. 929 (2012).

116 See *infra* Parts III(B)-(E).

117 As Hodsdon's case shows, the very nature of the habeas remedy was such that under some circumstances, even ones involving an unjust imprisonment, it might be of no use, e.g., if the prisoner had been released (like Bissell) or spirited away (like Cooper) prior to service of the writ. See *supra* note 34 and text accompanying notes 30, 33. See also 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730*, at 54 (2013) (noting that utility of writ was limited by need for petitioner to be within control of court). See generally JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM* 256–57 (2011) (observing that although habeas corpus is “indispensable” in safeguarding individual liberty it is “a limited and imperfect tool” because prisoner may be held in secret location or transferred abroad).

Moreover, continuing English controversies over suspensions of the writ, beginning with the American Revolution and continuing through 1801, made clear the potential vulnerability of the writ to majoritarian hostility, see HALLIDAY, *supra* note 5, at 250–56, a vulnerability reinforced in the American context by John Marshall's dicta in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) to the effect that the power of the federal courts to issue writs of habeas corpus (1) did not extend to state prisoners except in very limited circumstances, and (2) was exclusively dependent on Congress. Both views were wrong, see FREEDMAN, *supra* note 106, at 25–46. But the first survived until the enactment of the Habeas Corpus Act of Feb. 5, 1867, 14 Stat. 385 (current version at 28 U.S.C. § 2254), and, as will be discussed at length in the next installment of this project, the second was not repudiated by the Supreme Court until *Boumediene v. Bush*, 553 U.S. 723 (2008).

Meanwhile, as readers of New Hampshire newspapers would have been aware, see, e.g., *Further Suspension of Habeas Corpus*, N.H. GAZETTE, Aug. 12, 1817, at 3; *Foreign News*, May 30, *id.*, July 15, 1817, at 3, there was a controversial partial suspension of the writ in England during 1817–18 in consequence of disorderly protests in support of political and industrial reform. See JOHN PLOWRIGHT, *REGENCY ENGLAND: THE AGE OF LORD LIVERPOOL* 24–25 (1996); Van Vechten Veeder, *The Judicial History of Individual Liberty*, 16 GREEN BAG 529 (1904). See also [Lord] George Gordon Byron, “Beppo,” Canto XLVII (1817), reprinted in *THE POETICAL WORKS OF BYRON* 446 (Robert F. Gleckner ed., 1975) (“England! With all thy faults I love thee still . . . I like the Habeas Corpus (when we've got it)”).

118 From this thought it follows that — notwithstanding the allure of habeas corpus as a subject for legal and historical writing — the efficacy of habeas corpus

next Part discusses, habeas was supplemented by, and often used in tandem with, not just other writs<sup>119</sup> but also many different sorts of legal remedies.<sup>120</sup>

## B. Other Legal Remedies

### 1. Private

#### a. Damages Action

Private actions for damages against public officials for misconduct in office, whether denominated as false imprisonment, malicious prosecution,<sup>121</sup> trespass,<sup>122</sup> negligence, or otherwise, were

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at any one moment is not necessarily a good proxy for how well government power is being constrained by law. A fair assessment of that question requires consideration of all the legal remedies available to those aggrieved. Cf. Freedman, *Past and Present*, *supra* note 1, at 42 (“Relying on a single legal remedy denominated habeas corpus to keep government power in check is a dangerous concentration of eggs in a single basket. . . [T]he existence of belt-and-suspenders systems for constraining the government multiplies the probabilities of success.”) As suggested *infra* Part IV, if the multiple systems are administered by different governmental actors whose incentives are to check rather than collude in each other’s improper aggrandizement so much the better for liberty.

119 See Freedman, *supra* note 2, at 597–608. Thus, for example, an alleged slave might challenge that status bringing a habeas corpus action, *see id.*, at 600–01. But the plaintiff might proceed under a writ of trespass, *see id.* at 600 n.47, or a writ of personal replevin, *see id.*, at 602–03 & nn.56–58. See generally LEA VANDERVELDE, *REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT* 8, 18–21, 49 (2014) (noting significance in Missouri of statutory freedom suits as supplement to habeas corpus).

120 See Meltzer, *supra* note 3. For example, the damages lawsuit by Peter Pearse against Clement March described *infra* text accompanying notes 142–45 took place after Pearse had utilized a writ of certiorari (rather than a writ of habeas corpus) to obtain his release from an imprisonment for contempt. See Freedman, *supra* note 2, at 602, 606–07. Similarly William Licht, who was summarily incarcerated for harboring a potentially indigent stranger, released on bail and awarded a writ of certiorari quashing the proceedings, *see id.* at 607 n.81, then sued the complainants for damages. See *infra* text accompanying notes 146–48.

121 See WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 41 & 195 n.67 (1994 ed.).

122 See *Morgan v. Hughes*, 2 T.R. 225, 231 (K.B. 1788) (“[W]here the immediate act of imprisonment proceeds from the defendant [e.g., a Justice of the Peace

a pervasive feature of the 18<sup>th</sup> and early 19<sup>th</sup> century Anglo-American legal landscape.<sup>123</sup> This section presents some representative colonial and early national cases.<sup>124</sup>

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(“J.P.”)], the action must be trespass, and trespass only; but where the act of imprisonment . . . is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other.”); *see also* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602-1791, at 593-96 (2009) (describing expansion of trespass action in England and colonies during 1760’s to cover illegal searches and seizures).

The case of William Licht, who sued both the J.P. who imprisoned him and the townspeople whose complaint brought about the imprisonment, *see infra* text accompanying notes 146-48, presents a common fact pattern.

- 123 *See* William E. Nelson, *The Legal Restraints of Power in Pre-Revolutionary America: Massachusetts as a Case Study*, 18 AM. J. LEG. HIST. 1, 8-9 (1974); *see also* ELWIN L. PAGE, *JUDICIAL BEGINNINGS IN NEW HAMPSHIRE, 1640-1700*, at 67-68 (1959) (describing successful damages action in 1675 against marshal’s deputy for false imprisonment in civil case); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-17 (1987) (describing Marshall-era suits against revenue officers). With respect to England, numerous examples appear at 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 927-28 (1992); *see also* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 473 (4th ed. 2002). *See generally* Adams v. Dawson, (Unreported, Supreme Court of NSW, Mar. 24, 1827, available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1827/adams\\_v\\_dawson](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/adams_v_dawson)) (reporting award, after directed verdict on liability for plaintiff, of £50 in false imprisonment action against magistrate); Broadbear v. McArthur (Unreported, Supreme Court of NSW, Mar. 14, 1827, available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1827/broadbear\\_and\\_wife\\_v\\_mcarthur\\_et\\_al](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/broadbear_and_wife_v_mcarthur_et_al)) (affirming false imprisonment award of £290 against magistrates); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (1774) (affirming a verdict of £3,000 plus £90 costs recovered in England by a subject of Minorca against the Governor of Minorca for a false imprisonment in Minorca and Spain).

Such suits against officers for misconduct are to be distinguished from claims against the government generally (e.g. for compensation for services rendered or destruction of property), which was the area to which sovereign immunity extended, with the result that the legislature was the proper forum from which to seek redress. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1442-45 (1998) (studying pre-Revolutionary New York); *infra* text accompanying note 287.

- 124 My free mixing of the two periods reflects the fact that there was no relevant change on the American side as a result of Independence. *See, e.g., infra* note 156. *See generally* Richard F. Upton, *Centennial History of the New Hampshire Bar Association*, 15 N.H. B.J. 36, 41 (1973) (“With the advent of the Revolution in

(i) The False Imprisonment Strand and Its Neighbors

A money damages action for false imprisonment might be the only remedy sought against the responsible officer. A straightforward example from New Hampshire is the lawsuit that Richard Sinkler brought against a Justice of the Peace named John Tasker.<sup>125</sup> In October 1785, one Jacob Daniels commenced a criminal prosecution against Sinkler for assault.<sup>126</sup> Tasker ordered Sinkler to find sureties

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1775, the colonial system of courts was continued in effect as was the great body of statute and common law.”). For additional examples from colonial Massachusetts of the sorts of private civil actions described in the next two sections of text, see NELSON, *supra* note 121, at 17–18.

- 125 Because local J.P.’s or magistrates played a central role in the administration of justice, see J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1600–1800*, at 36 (1986) (“The justices of the peace formed the essential link between the victim and the courts.”); HALLIDAY, *supra* note 5, at 147–53; RACHEL N. KLEIN, *UNIFICATION OF A SLAVE STATE: THE RISE OF THE PLANTER CLASS IN THE SOUTH CAROLINA BACKCOUNTRY, 1760–1808*, at 40 (1990); Karen Orren & Christopher Walker, *Cold Case File: Indictable Acts and Officer Accountability in Marbury v. Madison*, 107 AM. POLI. SCI. REV. 241, 244 (2013) (describing powers Marbury would have exercised had he become a Justice of the Peace); Steedman, *supra* note 6, at 395; Edward Surrency, *The Courts in the American Colonies* (pt. 2), 11 AM. J. LEG. HIST. 347, 348–51 (1967); see also JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE 5–118* (1974) (providing detailed account of evolution of office in England before the middle of the 17th century); Patrick Peel, *The American Justice of the Peace, Legal Populism, and Social Intermediation: 1645 to 1860*, Paper Presented to Conference on Colonies and Postcolonies of Law, Princeton University (Mar. 18, 2011) (unpublished manuscript) (on file with Hofstra Law School Library) (discussing differences between social role of American and English J.P.’s), they were a natural target of damages actions, see, e.g., *Casbourn v. Ball*, 96 Eng. Rep. 507 (1773).

Thus, for example, in a single action Jonathan Shaw sued three J.P.’s for “unjustly and illegally” signing distress warrants resulting in his imprisonment for 10 days and claimed £600 in damages. He lost against all three defendants before three separate juries at three levels of proceedings ending in November 1764. See *Shaw v. Moulton*, Judgment Book of Superior Court, Vol. E, May 1764 - Feb. 1767, at 83–84, New Hampshire State Archives.

As to Tasker, the inhabitants of Barnstead (of which he was Town Clerk) had held a town meeting and sent a petition to the legislature in June of 1777 requesting that he be appointed as Justice of the Peace. This is recorded in the legislative petitions file of the New Hampshire State Archives as *Petition of the Inhabitants of Barnstead, January 15, 1778*.

- 126 Private criminal prosecutions are discussed *infra* Part III(B)(1)(b). In this case, Daniel filed a petition with Tasker beginning, “Humbly complaining in



for his good behavior until trial<sup>127</sup> but Sinkler, according to Tasker, refused.<sup>128</sup> The upshot was that Tasker ordered the constable to arrest Sinkler, who remained jailed for five days until eventually getting bailed out.<sup>129</sup> Sinkler sued Tasker for £200 in damages occasioned by the five days of false imprisonment. Tasker responded with a sham plea,<sup>130</sup> with the consequence that Sinkler was awarded the £200 plus costs.<sup>131</sup> On Tasker's appeal, where the action was

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Behalf of the People of the State of New Hampshire . . .,” and alleging that the assault was against the peace and dignity of the good people of the state. The document is to be found in Strafford County Case File No. 132, Strafford County Courthouse, Dover, New Hampshire.

127 This was routine procedure. *See generally* HENRY CARE, ENGLISH LIBERTIES, OR, THE FREE-BORN SUBJECT'S INHERITANCE BEING A HELP TO JUSTICES AS WELL AS A GUIDE TO CONSTABLES 137–39 (photo. reprint 2010) (1703) (describing duties of J.P.'s under English law in taking recognizances and noting, “Where one isailable by law, action lies against the Justice of Peace that committed him” for failing to grant bail).

For a case similar to the one described in text see 1 THE PAPERS OF DANIEL WEBSTER, *supra* note 58, at 428.

128 The lower half of the page containing the petition described *supra* note 126 contains Tasker's order to the sheriff for Sinkler's arrest and on the reverse a note from Tasker recording that “Sinkler Refused to find Bondsmen.” It would appear from the ultimate outcome of the false imprisonment action that Sinkler denied this.

129 The mittimus to the constable is in the same file as described *supra* note 126, along with notes that appear to be from the constable recording the dates of incarceration. These are consistent with the civil complaint described in the remainder of this paragraph of text.

130 The practice of interposing sham pleas, which, depending on the creativity of counsel for the defendant, might result in very amusing pleadings, had the effect that either party could assure that there would not be a trial in the court of first instance. (As to trials on appeal, see Freedman, *supra* note 2, at 609–10.) The practice worked as follows. If defendant put in a bad plea (as in this case, where Tasker's response to the complaint was, “He says he thinks it would be greatly for the peace of Barnstead if said Sinkler were always confined”), plaintiff would (as in this case) move successfully for judgment and defendant would appeal. If defendant put in a good plea, then plaintiff could either (a) move for judgment, which would be denied and plaintiff would appeal, or (b) join issue, in which case a trial would follow. *See* 1 THE PAPERS OF DANIEL WEBSTER, *supra* note 58, at 64; Nelson, *supra* note 123, at 6. The same practice existed in Massachusetts and Connecticut, *see* NELSON, *supra* note 121, at xiii. For a more detailed discussion of the Massachusetts practice *see* William E. Nelson, *The Persistence of Puritan Law: Massachusetts, 1160–1760*, 49 WILLAMETTE L. REV. 307, 366–67 (2013).

131 These proceedings took place in the June term of 1786 and are recorded in the binder containing Judgments and Levies of the Strafford County Court of

tried for the first time,<sup>132</sup> the jury awarded Sinkler £3 damages plus £13.9s.2d in costs; as far as the records reflect he actually was able to collect £9.<sup>133</sup>

Similar simple lawsuits might be brought against other officers.<sup>134</sup> For example, during a clerical ordination service in February 1763, David Ring was allegedly harassing women seated in their portion of a church – “hugging and squeezing them pushing his hand around their necks and under their cloaks,” according to one witness – and was accosted by constable Offin French on the orders of magistrate John Page.<sup>135</sup> An altercation ensued in which, depending on which account one believes, Ring either tendered sufficient money to pay any fine or declared vociferously that he would neither pay nor be placed in the stocks.<sup>136</sup> This led, Ring claimed, to his being placed briefly in the stocks and detained for several hours.<sup>137</sup> It also led to a lawsuit by Ring against both officers.<sup>138</sup> When this was initially tried it led to a jury verdict of £13.15s. against Page

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Common Pleas 1785 to 1790, at 112–15, Strafford County Courthouse, Dover, New Hampshire.

132 See *supra* note 130.

133 The proceedings on appeal are recorded in 1 Strafford County Superior Court Judgment Book, 1774–89, at 387–90, Strafford County Courthouse, Dover, New Hampshire.

134 See, e.g., *Pickering v. Greley*, Judgment Book of Superior Court, Vol. D, May 1760 - Nov. 1763, at 15–18, New Hampshire State Archives (recording claim, rejected by both trial and appeals juries, by John Pickering against Sheriff Richard Greley that Greley had wrongfully imprisoned him for three days on a civil attachment notwithstanding his tender of full amount required).

135 We have particularly good knowledge of the underlying facts in this case because a number of depositions were taken from witnesses living at a distance, and these are to be found in Provincial Case File No. 07956, New Hampshire State Archives. The quote in the text is drawn from the deposition of Ebenezer Stevens taken September 5, 1763 in *id.*

Various instances of criminal prosecutions in Massachusetts from the late 1600's through the mid 1700's arising from the disruption of church services are reported in Nelson, *supra* note 130, at 378. See also Freedman, *supra* note 2, at 614 (reporting 1629 English case of release on habeas corpus of parishioner who disrupted service by laughing at preacher).

136 The first version is in the deposition of Moses Jones taken November 12, 1763, in *id.*, and the second in the deposition of Simon Clough, n.d., in *id.* Cf. *Hill v. Bateman*, 93 Eng. Rep. 800 (1726) (holding that plaintiff stated a valid claim against Justice of the Peace who allegedly imprisoned him for destroying game rather than distraining his goods, which would have covered any penalty).

137 See *Ring v. Page*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 424, New Hampshire State Archives.

138 *Id.*

and nothing against French.<sup>139</sup> Page successfully appealed this on procedural legal grounds,<sup>140</sup> and after remand Ring pushed ahead.<sup>141</sup> This time he recovered nothing at trial or on appeal, and the defendants eventually collected court costs from him.<sup>142</sup>

Sometimes the damages remedy for false imprisonment supplemented the relief that the injured party had already obtained by securing his release through other legal proceedings. Thus, for example, when a Justice of the Peace named Clement March secured the summary incarceration of one Peter Pearse for calling him a blockhead and rogue during a street-corner encounter in late 1769, Pearse gained his release within eight hours through certiorari proceedings.<sup>143</sup> After the underlying contempt proceedings had been quashed without objection,<sup>144</sup> Pearse brought a damages action against March. The latter's initial defense on legal grounds succeeded below but was reversed on appeal.<sup>145</sup> On remand, the jury rendered a verdict for March, but Pearse prevailed on appeal in September 1771, recovering a jury verdict of £7 damages plus costs of £9.10s.<sup>146</sup>

In a similar case in 1770, a Justice of the Peace named Jethro Sanborn, acting on the complaint of two townspeople of Chester, New Hampshire, Stephen Moses and John Ordway, who were seeking to recover a statutory bounty, summarily incarcerated William Licht

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139 *Id.* at 429. The jury's decision regarding French was plainly an exercise of its broad authority to do justice, *see, e.g., infra* text accompanying notes 163–66. As a matter of long-established law all the subordinate officers involved in a false imprisonment could be held liable. *See* 6 JOHN H. BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND*, 1443–1558, at 88 & n.7 (2003).

140 *See* Judgment Book of Superior Court, Vol. D, *supra* note 134, at 429 (ordering that the writ abate on the plea saved below). Provincial Case File No. 07956, New Hampshire State Archives, contains the text of French's plea in abatement that he was misnamed in the action.

141 *See* Ring v. Page, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 88–89, New Hampshire State Archives.

142 *See id.*

143 *See* Freedman, *supra* note 2, at 602 (detailing proceedings).

144 *See id.* at 602 & n.55.

145 Judgment Book of Superior Court, Vol. G, Feb. 1771 - Sept. 1773, at 3–7, New Hampshire State Archives. The defenses contained in the successful plea in abatement below were that Pearse had (1) failed to allege his actual innocence of the contempt charges and (2) been properly convicted of contempt by a court of record, *id.* at 6.

146 These proceedings are detailed in *id.* at 128–32. The trial-level proceedings are collected in Provincial Case File No. 16916, New Hampshire State Archives.

for harboring a potentially indigent stranger.<sup>147</sup> After being released on bail Licht succeeded in having the action terminated through certiorari proceedings.<sup>148</sup> The following year he sued all three men for damages, recovering £6.1s.<sup>149</sup>

## (ii) The Negligence Strand and Its Neighbors

Improper official behavior was not confined to false imprisonments and neither were damages actions.<sup>150</sup>

Thus, for example, in 1766 Nathaniel Woodman of Salem, New Hampshire found himself on the losing end of a lawsuit tried before a Justice of the Peace named John Ober.<sup>151</sup> Ordered to pay the plaintiff 20 shillings, Woodman requested an attested copy of the judgment in order to take an appeal. But, Woodman complained, Ober, “contrary to his . . . office, oath and duty,” refused to provide the document, thereby damaging Woodman to the tune of £10. Woodman recovered 5 shillings plus court costs at the trial level, a sum increased to 30 shillings plus costs when Ober appealed.

In a similar case in 1797, George Jaffrey had prevailed in a civil action against George Fowler, who was imprisoned for the debt

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147 See An Act in Addition to the Act Directing the Admission of Town Inhabitants, Passed June 27, 1766, in 3 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1745–1774, at 395 (Henry Harrison Metcalf ed., 1915); Freedman, *supra* note 2, at 607 n.81 (describing proceedings and providing citations).

148 See An Act in Addition to the Act Directing the Admission of Town Inhabitants, *supra* note 147. Cf. Kevin Costello, *The Writ of Certiorari and Review of Summary Criminal Convictions, 1660–1848*, 128 LAW Q. REV. 443, 452, 459–60 (2012) (suggesting that many certiorari proceedings against summary criminal convictions at King’s Bench were brought to lay a predicate for subsequent trespass or private criminal actions against the convicting magistrate).

149 These proceedings are recorded in Rockingham County Case File No. 144, New Hampshire State Archives. The jury verdict is recorded on a separate slip of paper dated July 30, 1771.

150 One frequent subject of litigation was the legality of a tax imposed by local officials. See Nelson, *supra* note 123, at 7–8 (listing variety of grounds on which such challenges could be made); see generally *infra* note 156. For a New Hampshire example from 1765, see *McCrellis v. Sheppard*, Judgment Book of Superior Court, Vol. E, *supra* note 126, at 201 (recording successful action by McCrellis against Selectmen for taxing him for the support of a Congregational minister, “knowing the plaintiff to be a member of the Church of England”).

151 The account in this paragraph is taken from Judgment Book of the Superior Court, Vol. E, *supra* note 125, at 357–58, New Hampshire State Archives.

and held in custody by the jailer, Thomas Footman.<sup>152</sup> But Footman, Jaffrey charged, “not regarding the duties of his said Office did not safely keep [Fowler] as by law he was required but suffered and permitted him to escape,” losing Jaffrey the benefit of the judgment. Claiming \$200 in damages, Jaffrey sued Theophilus Dame, the county Sheriff, who “was and still is responsible” for Footman’s doings in office.<sup>153</sup> After a sham defensive plea,<sup>154</sup> the action was tried for the first time on appeal. There, the issue was whether the release of Fowler had been with or without Jaffrey’s consent. The jury determined that issue in Jaffrey’s favor, and he was awarded \$148.76 plus costs.

Because cases like this were numerous,<sup>155</sup> it is possible by looking at verdicts to infer some of the distinctions being made by

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152 The account in this paragraph is taken from Judgment Book of the Rockingham County Superior Court, Vol. N, Feb. 1797 - Sept. 1798, at 99–101, New Hampshire State Archives.

153 See An Act to Direct the Mode of Appointment of Deputy-Sheriffs Within This State, Approved Dec. 13, 1796, in 6 LAWS OF NEW HAMPSHIRE: SECOND CONSTITUTIONAL PERIOD, 1792–1801, at 370 (Henry Harrison Metcalf ed., 1917) (providing formal system for registering appointments and discharges of deputy sheriffs and enacting “that the Sheriff in each county shall in all respects be responsible for the Acts, malfeasance, misfeasance and Nonfeasance of each of his Deputies” until the recording of a discharge). On the basis of the pleadings in and results of the cases in the remainder of this section both before and after passage of this act, there is no reason to believe that the statute changed either the substantive tort law or jury behavior, namely to impose liability on the superior when that seemed the just thing to do and not otherwise.

154 See *supra* note 130.

155 For three cases alleging that sheriffs wrongly allowed debtors to go at large, see *Willson v. Reid*, Judgment Book of the Rockingham County Superior Court, Vol. M, Sept. 1793 - Sept 1796, at 377–79, New Hampshire State Archives (recording 1794 lawsuit by Willson against Sheriff Reid alleging Reid’s deputy allowed a defendant in jail under attachment to escape; after sham plea below, Reid defaults on appeal; Willson proves damages and is awarded 10 cents plus costs); *Simpson v. Webster*, Judgment Book of the Rockingham County Superior Court, Vol. L, Apr. 1789 - Apr. 1793, at 96 (recording lawsuit by Simpson against Sheriff Webster alleging Webster allowed a defendant in jail for a judgment to escape; after two victories for Webster below, Simpson in 1790 awarded £41.9s.8d plus costs, which he collects); *Sandborn v. Reid*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 375–77, New Hampshire State Archives (recording lawsuit by James Sandborn and his wife Esther against Deputy Sheriff Rand alleging he allowed a defendant in jail for a judgment to escape; after winning judgment below, Rand defaults on appeal in 1766; Sandborns, who claimed £25 damages, awarded £18 plus costs).

juries,<sup>156</sup> sometimes on the basis of what we would now call issues of fact (e.g. exercise of due care, causation) and at other times on what we would now call issues of law<sup>157</sup> (e.g. official immunity, respondeat

For two cases alleging that sheriffs had mishandled property seizures under process, see *Warner v. Dame*, Judgment Book of the Rockingham County Superior Court, Vol. M, *supra*, at 494–96, (recording 1796 lawsuit by Warner against Sheriff Dame alleging failure of Dame’s deputy to file writ of attachment he had served on debtor; after sham plea below claim rejected by jury on appeal); *Kimball v. Kelly*, Judgment Book of the Rockingham County Superior Court, Vol. J, Sept. 1785 - Sept. 1788, at 4–5 (recording lawsuit by Kimball against Sheriff Kelly alleging failure of Kelly’s deputy to execute a money judgment; after jury verdict for plaintiff below claim rejected by jury on appeal in 1785).

For a number of cases in 17th century Maryland in which creditors sued sheriffs for freeing a prisoner or dissipating his assets, see 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660*, at 123 & 192 n.89 (2008). For a series of similar Massachusetts cases during the following century, see Nelson, *supra* note 130, at 372 & 388 n.427 (describing Petition of Druce). For a similar case from New Hampshire, see *infra* note 268 (describing *Piper v. Greley*).

For an example of a successful case against a South Carolina sheriff for allowing a debtor’s escape, see *Harvey v. Huggins*, 18 S.C.L. (2 Bail.) 252 (1831).

156 In the majority of cases we forced to impute rationales to juries because the available records reveal no more than the allegations of the plaintiff and the legal outcomes. Even when we have somewhat fuller records, *see, e.g., supra* note 135, they rarely include the arguments of counsel, much less the reasoning process of the jury.

The cases of *McGregore v. Packer*, Judgment Book of Superior Court, Vol. F, 1767–1770, at 7–9, New Hampshire State Archives, *McHard v. Packer, id.* at 5–7, and *Clement v. Packer, id.* at 3–5, are illuminating exceptions to the second lacuna. In all three cases creditors claimed that Sheriff Thomas Packer had allowed their debtors to escape from jail on September 1, 1765. Packer prevailed below in all the actions, and on appeal the jury (composed of the same individuals in each case) rendered an “opinion that the Gaol was insufficient when the breach was made,” and gave judgment to Packer. *Id.* at 5, 7, 9.

An exception to the first lacuna is found in *Morey v. Webster*, Judgment Book of the Rockingham County Superior Court, Vol. L, *supra* note 155, at 17–19. This was an action brought by Morey against Deputy Sheriff Webster for carrying off one yoke of oxen and one yoke of steers. After a sham plea below, Webster on appeal put in an extended plea to the effect that “he was a deputy sheriff lawfully authorized and qualified. . .and took the aforesaid oxen and steers by virtue and in obedience to [a writ of execution].” Morey replied to this that “Webster. . .carried away the oxen and steers. . .of his . . . own wrong, and without any such cause as is by the said Webster in his plea alledged.” Issue was joined on this point, resulting in a jury verdict for Webster. *Id.* at 19.

157 To take one common example, in New England tax litigations like those described *supra* note 150, which continued after Independence as before,

superior liability), a distinction that, because of the range of jury discretion, was of little practical significance in civil cases<sup>158</sup> until the early part of the 19<sup>th</sup> century.

Thus, for example, in both *Larkin v. Reid*<sup>159</sup> and *Gile v. Hilton*,<sup>160</sup> a deputy sheriff seems to have seized a wrong tract of land. But in both cases it is plausible on the facts that he was unaware of the true ownership and in both cases the officer prevailed.<sup>161</sup> On the other hand, in *Perley v. Webster*,<sup>162</sup> the plaintiff claimed that one of Sheriff Webster's deputies had been ordered to make a pendente lite attachment and had filed a return detailing the goods seized. But when Perley was granted final judgment, the goods were nowhere to be found. Perhaps the deputy never seized them or perhaps he converted them. But either way, as Perley saw it, the deputy's conduct was clearly culpable. The third jury to hear the case agreed and awarded \$150.00 in damages plus \$181.01 in costs.<sup>163</sup>

In other cases the bases for the jurors' distinctions are

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plaintiffs routinely alleged simply that the tax had been imposed "illegally" and went to the jury on the general issue. See, e.g., *Pickering v. Fabian*, Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 254 (successful action brought in 1792); *Calfe v. Philbrick*, *id.*, Vol. I, Mar. 1782 - Apr. 1785, at 383 (successful action brought in 1784); *Kimball v. Calfe*, *id.* at 384 (successful action brought in 1783); *Weare v. Weare*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 428 (unsuccessful action brought in 1766); see also *Pert v. Odel*, *id.* at 194 (unsuccessful action tried in 1765 alleging that the collection was "against the peace and the laws of the land"); cf. *Langdon v. Clark*, *id.* at 189 (successful action brought in 1764 alleging same in which by agreement town seemingly substituted on appeal for defendant Selectmen). The jurors thus decided both whether the tax was illegal and whether or not the defendant officers knew or should have known of the illegality.

158 As the next installment of this project will report, criminal juries retained their powers longer than civil ones did. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 140–41, 285–86 (2011), which I reviewed at 43 *J. INTERDISC. HIST.* 333 (2012); *infra* note 254.

159 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. O, Feb. 1799 - Sept. 1800, at 236–41, New Hampshire State Archives.

160 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 347–51.

161 The first action was brought against the sheriff, see *Larkin v. Reid*, *supra* note 159, at 236, and the second against the deputy, see *Gile v. Hilton*, *supra* note 160, at 347.

162 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. O, *supra* note 159, at 255–59.

163 *Id.* at 259.

not now clear but the jurors clearly were making distinctions, as shown by the varying outcomes reached on closely similar facts.<sup>164</sup> As to respondeat superior, one might compare the 1759 case of *Monson v. Greley*<sup>165</sup> with the 1771 case of *Packer v. Renkin*.<sup>166</sup> In both instances deputy sheriffs had executed judgments and pocketed the proceeds,<sup>167</sup> resulting in lawsuits against the Sheriff as the party responsible for the conduct of his subordinates. In the first case, the judgment creditor succeeded and in the second he failed. The difference presumably reflects the degree of relative fault that the jurors were willing to attribute to the superior and the subordinate under the circumstances.<sup>168</sup>

So too, George Reid, the Sheriff of New Hampshire's Rockingham County, was sued twice within a few months because different ones of his deputies had failed to serve writs of execution, thereby causing losses to the judgment creditors. On appeal, he

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164 The cases described *supra* note 157 would seem to fall into this class.

165 The case is recorded in Judgment Book of Superior Court, Vol. C, 1755–1757 [*sic* – should be 1759], at 499–500, New Hampshire State Archives. The jury verdict in plaintiff's favor at the trial level was affirmed when the defendant defaulted in appearing for the appeal. *See id.* at 500. Plaintiff in 1760 collected from the deputy as much of her judgment as he had converted. *See id.* at 499. She subsequently pursued the original defendant for the remainder. This was ultimately successful but by that time she was non compos mentis so the money was paid to her daughter for her support. *See Monson v. Banfill*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 27–28, New Hampshire State Archives.

For a similar 1799 case, in which a deputy sheriff pocketed the proceeds of a judgment on which he had executed, suit was brought against the sheriff, he entered a sham plea and defaulted on appeal, and the judgment creditor therefore prevailed, see *Eastman v. Kelly*, Judgment Book of the Rockingham County Superior Court, Vol. O, *supra* note 159, at 161–63.

166 The case is recorded in Judgment Book of the Superior Court, Vol. G, *supra* note 145, at 56–59, New Hampshire State Archives.

167 For similar actions, see *Merrill v. Woodbury*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 16–17, New Hampshire State Archives (recording lawsuit in which Israel Woodbury unsuccessfully sues constable Peter Merrill for converting goods he had seized for the payment of rates); *Sanders v. Woodbury*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 399–400 (recording lawsuit in which Israel Woodbury successfully sues constable Oliver Sanders for pocketing the surplus proceeds of cow he had seized for the payment of rates).

168 The varying jury verdicts against the two defendants in the first trial of David Ring's action described *supra* text accompanying note 139 may reflect similar thinking.



won one of the actions in early 1797<sup>169</sup> and lost one in late 1798.<sup>170</sup>

He was also sued around the same time in an action illustrating the fact that the influence of statutes in damages cases against public officials was peripheral<sup>171</sup> to the point of invisibility.<sup>172</sup> In *Nason v. Reid*,<sup>173</sup> Shuah Nason alleged that Reid had permitted her judgment creditor, the father of her illegitimate child, to escape from the jail to which he had been confined for non-payment of his support obligations. The fact pattern is thus identical to that which we have already seen a number of times in this section.<sup>174</sup> In contrast to the complaints in those cases, Nason's complaint cited a statute – a lineal successor to one that had been in force since at least 1714 – declaring that jailers were liable to judgment creditors for negligently allowing incarcerated judgment debtors to escape.<sup>175</sup>

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169 See *Bartlett v. Reid*, Judgment Book of the Rockingham County Superior Court, Vol. N, Feb. 1797 - Sept. 1798, at 101–03, New Hampshire State Archives. This result reversed a jury verdict in Bartlett's favor.

170 See *Ball v. Reid*, *id.* at 378–80, New Hampshire State Archives. Reid had interposed a sham plea below, see *supra* note 130, and the case was tried for the first time on appeal.

171 See Pearson, *supra* note 11, at 97 (“Present-day readers may find it astonishing to learn how small a part statute law played . . . [u]p to and beyond the Civil War.”); see also Freedman, *supra* note 2, at 610 n.93.

172 An exception to this statement must be made with respect to actions in which plaintiffs sued public officials for misconduct in office in order to collect penalties provided by statute. See Nelson, *supra* note 123, at 9 (providing numerous Massachusetts examples and observing that as a combined result of the private and statutory damages remedies there was “little that one acting on behalf of the government could do without rendering himself liable to an action at law in the event that he wronged another”); see also NELSON, *supra* note 121, at 18. For a New Hampshire example, see *Clendening v. Clark*, Judgment Book of the Rockingham County Superior Court, Vol. O, *supra* note 159, at 57–59, in which plaintiff unsuccessfully claimed that the defendant constable had charged more for the service of a warrant than authorized by statute and sought the statutory penalty of \$30. See An Act Regulating Fees, Approved Dec. 16, 1796, in 6 LAWS OF NEW HAMPSHIRE, *supra* note 153, at 381, 383–84, 387; see also PUBLICOLA, NEW VADE MECUM; OR A POCKET COMPANION FOR LAWYERS, DEPUTY SHERIFFS AND CONSTABLES . . . ADMINISTERING THE LAW OF NEW HAMPSHIRE 25–60, 84–85, 98–100 (Boston, Hews & Goss 1819) (complaining at length that officers regularly charged excessive fees and proposing remedies).

173 The case is recorded in Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 506–07, New Hampshire State Archives.

174 See *supra* note 155 and text accompanying notes 151–54.

175 See An Act Regulating Prisons, Passed Feb. 10, 1791, in 5 LAWS OF NEW HAMPSHIRE: FIRST CONSTITUTIONAL PERIOD, 1784–1792, at 656–57

None of the other plaintiffs had thought it worthwhile to cite the statute.<sup>176</sup> Nor did it seem to make the slightest difference to the progress of this lawsuit. After a sham plea below, the case went to a jury on appeal, which awarded her \$100.87 of the \$300 she had demanded, plus costs.<sup>177</sup>

### b. Criminal Prosecutions

A truly useful history of private prosecution in America has yet to be written. Notwithstanding some initial efforts by

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(Henry Harrison Metcalf ed., 1916) (providing that if any jailer “shall through negligence suffer any prisoner to escape . . . [who was] committed for debt [the jailer] shall be liable to pay the Creditor the full amount of his debt”); An Act for the Regulation of Prisons and to Prevent Escapes, Passed May 15, 1714, in 2 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1702–1745, at 130, 132 (Albert S. Batchellor ed., 1904) (providing that if “the escape of any prisoner happen through the negligence of the [jailer and]. . . if the prisoner so[] escaping were imprisoned for debt the prison keeper shall be answerable to the creditor for the full debt.”).

176 They were surely aware of it because Nason’s lawyer in this case, Edward St. Loe Livermore, was himself the plaintiff’s lawyer in, e.g. *Ball v. Reid*, *supra* note 170, and *Jaffrey v. Dames*, *supra* text accompanying notes 152–54, both of which took place shortly after Nason’s case. In any event, the bar was small and its members interacted closely, sharing their legal knowledge. In Nason’s case Edward Livermore’s adversary was his brother Arthur, who had studied law in his offices. See 1 THE PAPERS OF DANIEL WEBSTER, *supra* note 58, at 152 n.16.

177 See Judgment Book of the Rockingham County Superior Court, Vol. M, *supra* note 155, at 507.

academics,<sup>178</sup> lawyers,<sup>179</sup> and courts,<sup>180</sup> the story of the evolving

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178 See, e.g., JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 7, 39 (1980) (observing that origin of American public prosecutor “presents something of a historical and social puzzle,” and suggesting explanation in varying models available in differing colonies and willingness of populace to experiment); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* (1989) (tracing rise and decline of private prosecution in 19th century Philadelphia); Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1311 (2002) (studying New York and finding “public prosecution evolved from a private model in a slow, uneven manner in response to fears of social disorder”); see also Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673–81 (2010) (surveying historiography); see generally Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012).

179 See, e.g., John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 511–43 (1994) (summarizing historiography and case law in wake of *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)); Brief for The National Crime Victim Law Institute as Amicus Curiae Supporting Respondent at 4–8, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010).

180 The most recent foray of the Supreme Court into the area is *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (dismissing writ of certiorari as improvidently granted). The Supreme Court had agreed to review a challenge by John Robertson to his conviction for criminal contempt arising out of his violation of an order of protection that had been obtained in the District of Columbia courts by his former girlfriend, Wykenna Watson. Robertson resolved a parallel criminal action brought by the government through a plea bargain, which, he claimed, precluded the prosecution brought by Watson. The Court re-wrote the question presented to read “Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States,” *id.*, and granted certiorari, with the apparent intention of answering the question “no.”

After oral argument, however, the Court dismissed the writ of certiorari as improvidently granted, over a dissenting opinion by four Justices who did want to answer the question that way. Of course the reasons for this disposition are purely speculative but it may be that one Justice (perhaps Thomas) who originally voted to grant certiorari concluded from the merits briefing that the original intent was not as clear on a second look as it had appeared to be at first glance, or that the majority concluded, as Watson had argued, that prosecutions for criminal contempt are subject in this respect to a different rule than other criminal cases. See *id.* at 2189–90 (explaining why four Justices rejected that position); Brief for Respondent at 13, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (arguing that Robertson’s argument “rests on an incorrect assertion that there are no relevant differences between criminal contempt proceedings and other criminal proceedings.”). See also Brief for the United States as Amicus Curiae Supporting Respondent at 10–11,

relationship between public and private prosecution on this side of the Atlantic,<sup>181</sup> which varied in the past between jurisdictions<sup>182</sup> and

24–29, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (arguing that unique separation of powers considerations apply to District of Columbia and that Robertson had waived any due process claim).

In the Supreme Court, Watson’s position received considerable support from advocacy groups concerned with the enforcement of domestic orders of protection and child support, who argued that an insufficiency of public resources devoted by prosecutors’ offices to the enforcement of such orders made it vital that the private parties concerned have the ability to prosecute violations of them. See Brief for Domestic Violence Legal Empowerment and Appeals Project and other Domestic Violence Organizations, Scholars, and Professionals as Amici Curiae Supporting Respondent at 7–12, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010); Brief for Family Law Judges, Practitioners & Scholars as Amici Curiae Supporting Respondent at 3–24, *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010); Jordan Weissmann, *Victim Fights for Her Name*, NATL. L.J., Mar. 29, 2010, at 21 (“Advocates for domestic violence victims are sounding the warning about a little-noticed U.S. Supreme Court case that they say could make it much harder for battered women and men to enforce restraining orders against their abusers.”)

- 181 Cf. CLIVE EMSLEY, *CRIME AND SOCIETY IN ENGLAND, 1750–1900*, at 178–215 (2d ed. 1996) (describing evolution of English prosecution system over period); BARRY GODFREY & PAUL LAWRENCE, *CRIME AND JUSTICE, 1750–1950*, at 28–38 (2005) (describing English system of private prosecutions from late 18th to late 19th century); Mark Koyama, *Prosecution Associations in Industrial Revolution England: Private Providers of Public Goods?*, 41 J. LEGAL STUD. 95 (2012) (describing formation of private groups in early 19th century England to prosecute efficiently crimes of concern to them); John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314 (1999) (illuminating pressures converging to alter English private prosecution system in 18th century); Bruce P. Smith, *English Criminal Justice Administration, 1650–1850: A Historiographic Essay*, 25 L. & HIST. REV. 593, 620–21 (2007) (summarizing existing literature on English prosecution practices); Bruce P. Smith, *The Emergence of Private Prosecution in London, 1790–1850*, 18 YALE J.L. & HUMAN. 29 (2006) (controversing prior historical accounts of English developments).
- 182 See Tyler Grove, *Are All Prosecutorial Activities “Inherently Governmental”? Applying State Safeguards for Victim-Retained Private Prosecutions to Outsourced Prosecutions*, 40 PUB. CONT. L.J. 991, 1006–08 (2011); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 290–96 (1989). See generally NELSON, *supra* note 121, at x (“[T]he colonies were initially settled over a span of more than one hundred years . . . by quite diverse peoples, and . . . for distinctly different purposes. What they shared was a willingness to alter received legal doctrine to suit their needs and purposes.”); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 326–27 (1982) (emphasizing that because of geographical and temporal variations, “The character of each colony at its earlier and later

which is still in transition,<sup>183</sup> has not been told in any comprehensive and well-documented way,<sup>184</sup> with the result that much of the recent discussion has taken place with only a shallow grounding in primary sources. “A lot of research remains to be done . . . and the story is

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stages needs to be considered in order to assess the process of change through time”).

183 See, e.g., *State v. Martineau*, 808 A.2d 51 (N.H. 2002) (holding private prosecutions not permitted where imprisonment possible); *Rogowicz v. O’Connell*, 786 A.2d 841 (N.H. 2001) (holding court may not appoint representative of interested party to prosecute criminal contempt action); *Bokowsky v. Rudman*, 274 A.2d 785 (N.H. 1971) (holding public prosecutor may terminate prosecution over objection of private prosecutor); *Grove*, *supra* note 182, at 1007–11 (surveying recent cases in various states). A discussion of current caselaw in the states and lower federal courts appears in Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 11–16, *Robertson*, 130 S. Ct. 2184. See generally Rich Lord, *Privately Funded Prosecutor Pursues Drug Cases in Altoona*, PITTSBURGH POST-GAZETTE, (Dec. 1, 2014), <http://www.post-gazette.com/news/state/2014/12/01/privately-funded-prosecutor-pursues-drug-cases-in-altoona/201411300089>.

184 Because courts and lawyers are operating under this handicap, it might be wise for the former to move with caution before laying down any sweeping rules. Cf. Transcript of Oral Argument, at 41, *Robertson*, 130 S. Ct. 2184:

[Counsel]: The Framers . . . would not have thought it was unconstitutional because private prosecutions . . . were common at the time of the Framers.  
Justice Scalia: Oh, I don’t think that’s right. Private prosecutions were common at the time of the framing?  
You have to go back a long way before they were common.

As a scholar, my observation on this exchange would be that, although evidence contrary to Justice Scalia’s position certainly exists, see *infra* text accompanying notes 185–89, we currently do not have enough knowledge of the circumstances existing at diverse times and places to support a meaningful conclusion one way or the other. Cf. Freedman, *Liberating*, *supra* note 1, at 395 (noting importance to habeas corpus field of recent scholarly publication of numerous cases from English archives).

The normative implications of this observation for purposes of pronouncing a legal rule is of course a separate issue. Cf. FREEDMAN, *supra* note 106, at 38 & nn.17–18. (discussing common law crimes and suggesting that there may well have been sound reasons to repudiate them in *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) notwithstanding contrary original intent); Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 265 & 296 n.125 (discussing contractual outsourcing of prosecution function to private lawyers and finding it inappropriate in light of “concerns about ethics, fairness, transparency, accountability, performance, and the important values advanced by the public prosecution norm”).

on the whole rather murky.”<sup>185</sup>

Hence, I make no claim that Hodsdon’s story is typical of any general practice. But it does illustrate the power of private prosecution as a potential check on government officials.

The key feature of his situation, quite apparent to all concerned, was that the private prosecutor, not the government, had the power to drop the action.<sup>186</sup> The judge in Hodsdon’s case specifically told the state’s lawyer that he was under no obligation to prosecute but told Hodsdon that he would not be off the hook until the private prosecutor was satisfied.<sup>187</sup> This aspect of the matter was central to Hodsdon’s complaint to the legislature.<sup>188</sup>

Indeed, at just the same moment that the New Hampshire legislature was lifting Hodsdon’s default<sup>189</sup> the Governor was asking it to reform the system of private prosecutions, complaining that the ability of the private prosecutor to drop (or, more importantly, not drop) the action left the state in the position of having to pay costs:

Groundless, vexatious and trivial prosecutions, are sometimes commenced and carried on in the name of the State, which subject the county where they are prosecuted to the payment of large bills of cost. In some of these, the prosecutor makes use of the name of the State as an engine to gratify his revenge on the accused, more than for the purpose of convicting and punishing those who have violated the laws.<sup>190</sup>

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185 LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 479 n.29 (1999).

186 *Cf. Robertson*, 130 S. Ct. at 2188–89 (stating that under English and American precedent the government, whether represented by a public prosecutor or a private attorney, had the power to drop the criminal action); Comment, *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 *YALE L.J.* 209, 233 (1955) (surveying existing case law and proposing statutory reform under which court could dismiss prosecution after hearing from both private and public prosecutor).

187 *See supra* text accompanying notes 44–50.

188 *See supra* text accompanying notes 53–56.

189 *See supra* text accompanying notes 57–58 (noting passage of act for Hodsdon’s relief on June 26, 1817).

190 [Annual Message of Governor William Plumer to the New Hampshire Legislature], June 5, 1817, at 12, 21 in *JOURNAL OF THE HONORABLE SENATE, OF THE STATE OF NEW HAMPSHIRE, AT THEIR SESSION, BEGUN AND HOLDEN AT CONCORD, ON THE FIRST WEDNESDAY OF JUNE, ANNO*

Doubtless the exercise of private control over a criminal prosecution sometimes appeared, as indeed it did to Hodsdon,<sup>191</sup> less like a remedy against oppression than an invitation to crush those against whom one bore a grudge.<sup>192</sup> In fact, viewed as one strand in the overall tapestry in which it existed, it was not. As described below,<sup>193</sup> the remedy of private prosecution was itself subject to a meaningful check in the form of an action for malicious prosecution by the wrongfully-prosecuted defendant.<sup>194</sup>

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DOMINI, 1817 (Isaac Hill ed., 1817). No action was taken and Plumer renewed his request, equally unsuccessfully, the following year. See [Annual Message of Governor William Plumer to the New Hampshire Legislature], June 4, 1818, at 289, 290 in 19 NILES' WEEKLY REGISTER (2 N.S.) (H. Niles ed., 1818). See generally 4 WILLIAM BLACKSTONE, COMMENTARIES \*356–57 (denouncing practice of terminating public prosecutions on favorable terms if private prosecutor is satisfied, noting that private prosecutions are “too frequently commenced [] rather for private lucre than for the great ends of public justice”).

191 See *supra* text accompanying note 56 (reporting Hodsdon’s complaint that even if he discovered identity of private prosecutor he “would be compelled . . . to pay him whatever sum his corrupt inclination might lead him to extort”).

192 See Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 HARV. L. REV. 1485, 1502–03 (2011) (arguing due process requires some public official be available to hear defendant’s assertion that private criminal contempt proceeding “is based in personal animosity or a desire for illegitimate private gain – part of a blackmail threat, perhaps, to be withdrawn if the defendant complies with the beneficiary’s wishes.”). See also *supra* note 183 (citing limitations New Hampshire places on private prosecutions today).

193 See *infra* Part III(C)(2).

194 A plaintiff in such an action who demonstrated conditions like the ones hypothesized, *supra* note 192, would be well on the way to prevailing. See *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503–05 (2012) (unanimous) (discussing malicious prosecution actions against private prosecutors as of 1871 and contrasting subsequent development of law as “the prosecutorial function was increasingly assumed by public officials”). Cf. *Private Prosecution*, *supra* note 186, at 232–33 (proposing as part of reform plan continuation of existing rule that private prosecutors be liable for malicious prosecution).

In Hodsdon’s situation, a jury might well take the view that there was nothing at all malicious about a prosecution for contempt being brought by the beneficiaries of a writ of habeas corpus that he had disobeyed. In any event, as a predicate to any malicious prosecution action Hodsdon would have to show that the criminal proceedings terminated in his favor. See *Morgan v. Hughes*, 2 T.R. 225, 232 (K.B. 1788); NELSON, *supra* note 121, at 195 n.67; *supra* note 148. That is a fact which is unknown now but may be known in the future. See *supra* note 59.

## 2. Public Criminal Prosecutions

In a thought-provoking article on a generally overlooked aspect of *Marbury v. Madison*,<sup>195</sup> Karen Orren and Christopher Walker have observed that Attorney General Levi Lincoln might have been indicted for a variety of crimes including non-performance of his duty to deliver the commissions,<sup>196</sup> destruction of official documents, and resistance to the process of a federal court.<sup>197</sup> They add that the same reasoning would apply to Madison and perhaps Jefferson too.<sup>198</sup>

There is nothing implausible about their position, as shown by the broad range of official misconduct that we know to have resulted in criminal prosecutions of officeholders by the government. A few examples of conduct of varying degrees of culpability will illustrate the point.

In a sensational case whose “legal proceedings . . . fill almost an entire volume of *State Trials*,”<sup>199</sup> General Thomas Picton, the first British governor of Trinidad after its acquisition from Spain,<sup>200</sup> was tried and convicted in 1806 at King’s Bench in London for ordering a young native woman to be tortured to secure her confession to participation in a robbery plot.<sup>201</sup> Following a successful motion for a new trial he was tried again at King’s Bench in 1808.<sup>202</sup> This trial

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195 5 U.S. (1 Cranch) 137 (1803).

196 Cf. 1 NELSON, *supra* note 155, at 114 & 189 n.59 (describing 1642 Maryland indictment of officer “for failing to lead an attack against some Native Americans”); Lee Offen, *A Brief Military History of the Colony of Maryland, 1634–1707*, [http://historyreconsidered.net/Maryland\\_1634\\_thru\\_1707.html](http://historyreconsidered.net/Maryland_1634_thru_1707.html) (last visited July 18, 2013) (reporting that the Assembly had called for attack in late 1641 but “Captain Brent refused to force men to serve on the expedition,” thereby depriving it of enough manpower to continue).

197 See Orren & Walker, *supra* note 125, at 243.

198 *Id.* at 47–48. See generally Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677 (1999) (arguing that sitting President may be prosecuted criminally).

199 James Epstein, *Politics of Colonial Sensation: The Trial of Thomas Picton and the Cause of Louisa Calderon*, 112 AM. HIST. REV. 712, 714 (2007).

200 *Id.* at 716.

201 See *id.* at 718–21. See generally BRIDGET BRERETON, *A HISTORY OF MODERN TRINIDAD, 1783–1962*, at 34–38 (1981) (describing “Picton’s Monstrous Tyranny” during a governorship characterized by gross physical brutality to slaves and free people of color).

202 The material in the remainder of this paragraph is taken from Epstein, *supra* note 199, at 724, 724 nn.59–60, 740. Picton’s later career in the military until his death at Waterloo in 1815 is summarized in *id.* at 713, 730, 739 n.133. See THE LONDON GAZETTE, June 22, 1815, at 1214–15 (No. 17028)



resulted in a special verdict by the jury that because torture had been legal in Trinidad at the cession of the island to Britain, Picton had behaved without malice, even if illegally under the applicable British law. In an ordinary case, a court presented with such a verdict would probably have adjudged the defendant guilty while imposing only a nominal punishment. But to have followed that course in this case might have been seen as denigrating the seriousness of the offense. So the court, while remitting Picton's recognizances, simply took no action on the special verdict.

In the middle of 1762, Wyseman Claggett, a New Hampshire Justice of the Peace,<sup>203</sup> was indicted on a charge that he had on December 3, 1761 signed a mittimus bearing the date of November 3, 1761 against one James Dwyer of Portsmouth, resulting in Dwyer's imprisonment for twenty hours, after which, on December 4, 1761, Claggett did

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("Extraordinary Edition" publishing the Duke of Wellington's account of the battle) ("In Lieutenant-General Sir Thomas Picton, his Majesty has sustained the loss of an Officer who has frequently distinguished himself in his service, and he fell gloriously, leading his division to a charge with bayonets, by which one of the most serious attacks made by the enemy on our position was defeated.").

203 See HISTORY OF HILLSBOROUGH COUNTY, NEW HAMPSHIRE 8 (D. Hamilton Hurd ed., Philadelphia, J.W. Lewis & Co. 1885) (reporting that "In the exercise of this office he was strict, severe and overbearing . . . When one person threatened another with a prosecution, it was usual to say, "I will Claggett you."); *infra* text accompanying note 225.

Claggett later served as King's Attorney in a notorious prosecution that resulted in the 1768 hanging of Ruth Blay, who had delivered a stillborn child out of wedlock and concealed its body. See CAROLYN MARVIN, HANGING RUTH BLAY: AN EIGHTEENTH CENTURY NEW HAMPSHIRE TRAGEDY (2010); Carolyn Marvin, *The Hanging of Ruth Blay, December 30, 1768: Separating Fact From Fiction*, 63 HIST. N.H. 3, 8–9, 11, 16 (2009). The case is recorded in Judgment Book of Superior Court, Vol. F, *supra* note 156, at 203–04.

Afterwards Claggett (perhaps remembering that a mob had broken the windows of his house during the Stamp Act crisis, see Jim Piecuch, *Empowering the People: The Stamp Act in New Hampshire*, 49 HIST. N.H. 229, 247 (1994)) became an active revolutionary and served as a post-Independence state official. He is the subject of a number of biographical sketches, notably the detailed and vivid essay Charles H. Atherton, *Memoir of Wyseman Claggett*, in 3 COLLECTIONS OF THE NEW HAMPSHIRE HISTORICAL SOCIETY 24 (J.B. Moore ed., 1832). See also BELL, *supra* note 51, at 264; 2 COLLECTIONS HISTORICAL AND MISCELLANEOUS 145 (J. Farmer & J.B. Moore eds., 1823); Salma Hale, *The Judicial History of New Hampshire Before the Revolution*, 3 GRAFTON & COOS COUNTIES B. ASSOC. J. 53, 77–78 (1895).

wittingly, willingly, unlawfully and wickedly alter the said mittimus with regard to the date thereof as to the month by erasing the word November and interlining the word December in stead thereof and thereby made the said mittimus a new mittimus against the peace of our Lord the King.<sup>204</sup>

Claggett demurred to the indictment and it was quashed by the court, putting an end to the criminal case.<sup>205</sup> This is a disposition that seems reasonable enough because on the pleaded facts the change both corrected a prior error and in any event could have caused Dwyer no harm.<sup>206</sup>

In contrast, in an 1800 case from North Carolina, Secretary of State James Glasgow was indicted for fraudulently issuing a duplicate warrant for land that was allocated to military veterans. He defended on the grounds, *inter alia*, “that no injury is stated to have ensued [from] the act of thus issuing the duplicate.”<sup>207</sup> Rejecting this, the court wrote:

[I]f a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purpose of fraud and wrong, which were committed to him as instruments of benefit to the citizens . . . . If to constitute an indictible misdemeanor a positive injury to an individual must be stated and proved, all those cases must be blotted out of the penal code where

204 Judgment Book of Superior Court, Vol. D, *supra* note 134, at 256. There is another copy of the indictment in Provincial Case File No. 23475, New Hampshire State Archives, which also contains a copy of the altered mittimus.

205 See Judgment Book of Superior Court, Vol. D, *supra* note 134 at 257; Minutes of Superior Court, Box 2, Folder Nov. 1761 - May 1763. On demurrers to the indictment see GOEBEL & NAUGHTON, *supra* note 5, at 598–99.

206 Fortunately for history, the dispute between Claggett and Dwyer did not end at this point. The latter subsequently brought a civil suit that sheds a good deal of light on the surrounding circumstances. See *infra* text accompanying notes 211–34.

207 State v. Glasgow, 1 N.C. (Cam. & Nor.) 264, 275 (1800).

attempts and conspiracies have been so prosecuted.<sup>208</sup>

There were also a relatively few cases of criminal prosecutions against officeholders for breaching duties that had a purely statutory, rather than common law, origin. For example, a series of New Hampshire statutes dating back to the 1600's required the selectmen of towns of specified population to set up grammar schools under pain of monetary penalty.<sup>209</sup> Thus, in 1771 a grand jury indicted the three selectmen of Chester for neglecting this duty, "contrary to the Law of this Province in that case made and provided."<sup>210</sup> Two of the three selectmen appeared, went to a jury trial, were convicted, and fined £10.<sup>211</sup>

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208 *Id.* This ruling was consistent with the well-known decision in *James Bagg's Case*, 77 Eng. Rep. 1271, 1278 (1615), which invalidated as ultra vires the removal of a magistrate from office by a town council while observing that the magistrate was subject to criminal indictment for any misbehavior, and indeed, "if he intends, . . . or conspires with others, to do a thing . . . to the prejudice of the public good . . . but he does not execute it, it is a good cause to punish him."

A recent commentator, noting that "the United States Supreme Court has made pursuing a civil case against a prosecutor or judge practically impossible," through "a host of protections it has given to prosecutors and judges to shield them from liability," see *infra* note 266, has called for a renewed emphasis by the Department of Justice on "federal criminal prosecutions of state judges and prosecutors who flout the law." Brandon Buskey, *Prosecuting the Prosecutors*, N.Y. TIMES, Nov. 27, 2015, at A31.

209 See NATHANIEL BOUTON, A DISCOURSE DELIVERED BEFORE THE NEW HAMPSHIRE HISTORICAL SOCIETY 11–13 (Concord, Marsh Capen & Lyon 1833) (summarizing statutes).

210 The statute then in force was An Act to Regulate the Fines Set on Towns and Select Men for Not Keeping Schools, Passed Jan. 15, 1771, in 3 LAWS OF NEW HAMPSHIRE, *supra* note 147, at 545 (amending An Act for the Settlement & Support of Grammar Schools, Passed May 2, 1719, in 2 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 336 and An Act in Addition to the Act for the Settlement and Support of Grammar Schools, Passed Apr. 25, 1721, in *id.* at 358 to provide that the penalty upon conviction for neglect of the duty to maintain such a school be set at £10).

211 See *King v. Selectmen of Chester*, Judgment Book of Superior Court, Vol. G, *supra* note 145, at 340–41, New Hampshire State Archives. Similar Massachusetts cases during this period are reported in Nelson, *supra* note 130, at 397 n.514.

## C. Interweaving Actions

### 1. Multiple Actions as Reinforcement

As Hodsdon discovered, remedies for official misconduct might be sought in combination. The case of Wyseman Claggett described above<sup>212</sup> provides an example. Even as Claggett was defending against the criminal charges presented by the grand jury, he was also defending against a suit brought by Dwyer for false imprisonment.<sup>213</sup>

An extended narrative of the underlying facts was prepared in connection with this action, possibly by Claggett himself.<sup>214</sup> According to this account, Dwyer agreed with one Gunnison that the latter would build him a new coach body in exchange for an old coach body and some cash.<sup>215</sup> Relying on this arrangement, Gunnison sold the old coach body to Ayers for £80, who took possession of it.<sup>216</sup> At this point, Mrs. Dwyer was heard from, declaring that the old coach body belonged to her estate and that she objected to its sale.<sup>217</sup> On December 2, 1761, Dwyer's lawyer, Shannon, sent Claggett a warrant against Gunnison and Ayers charging theft of the old coach body. Claggett, surprised to see a charge of theft against Gunnison,<sup>218</sup> went to the tavern to get Shannon's explanation of the

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212 See *supra* text accompanying notes 203–06.

213 Documentation of these proceedings is in Provincial Case File No. 23536, New Hampshire State Archives.

214 See State of Case, in *id.* This four-page document is unsigned but sometimes uses “I” for Claggett. It also sometimes uses “the Justice” or “the defendant.” My best guess is that the document was not actually written by Claggett but rather represents notes taken by his lawyer or lawyer's clerk from Claggett's narration. Perhaps supporting this possibility is the fact that the document contains at the end two apparent legal ruminations, “Court open during above transactions,” and “The Justice appears to be in a Judicial Capacity Even after leaving the Tavern,” *id.* at 4. In any event, the document portrays Claggett as reasonable and Dwyer as unreasonable and plainly presents Claggett's viewpoint.

215 See *id.* at 1.

216 See *id.* at 1–2.

217 See *id.* at 1.

218 It would appear that the two men had business dealings with each other as reflected in several suits involving notes of hand. See *Claggett v. Gunnison*, Judgment Book of Superior Court, Vol. D, *supra* note 134, at 280–82; see also *Claggett v. Waldron*, *id.* at 377.

case.<sup>219</sup> In Claggett's version, "I told Shannon I thought the steps taken would not do."<sup>220</sup> Just then, Dwyer appeared with Ayers and the coach body in the custody of Constable Fitzgerald.<sup>221</sup> Gunnison was also summoned.<sup>222</sup> According to Claggett, "I told the Prisoners they were free," and told Dwyer that his criminal complaint was dismissed and that he could bring a civil action if he liked.<sup>223</sup> He then ordered the constable to "put everything in the same condition as before, for this is no robbery."<sup>224</sup> While a convivial punch bowl circulated in the tavern, the constable attempted to return the coach body to Ayers but returned to report that Dwyer had locked it up.<sup>225</sup>

The Justice demanded of Dwyer to open his warehouse and deliver possession of the goods to the constable . . . [H]e was very saucy and said he would not.

The Justice called for a hammer to break open the door which officious Dwyer readily presented. But at the same time impudently told the Justice if he broke open the door he would Claggett him,<sup>226</sup> Parker him,<sup>227</sup> and Livermore him<sup>228</sup> and at the same time clenched his fist and put it up to the face of the Justice. This effectually stopped the operation of the Hammer.<sup>229</sup>

At this this point, on Claggett's account, he told Dwyer that he would have to post a recognizance "for your good behaviour and to answer this insolence at the next Sessions."<sup>230</sup> Dwyer refused, and on December 3, 1761 Claggett reluctantly signed a mittimus

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219 See State of Case, *supra* note 214, at 1.

220 *Id.*

221 *Id.* at 2.

222 *Id.*

223 *Id.*

224 *Id.*

225 See *id.* at 3.

226 See *supra* note 203.

227 This is probably a reference to magistrate William Parker, see BELL, *supra* note 51, at 551, or possibly his father, Judge William Parker, see *id.* at 26.

228 This is most likely a reference to Samuel Livermore, see *id.* at 34, who was then in legal practice and afterward served as Chief Justice and in both Houses of Congress. See *id.* at 36.

229 State of Case, *supra* note 214, at 3.

230 *Id.*

committing him to jail.<sup>231</sup> “[B]y mistake [he] dated it 3d November instead of December which he afterwards at gaol keepers request rectified.”<sup>232</sup>

Dwyer subsequently brought a false imprisonment action against Claggett and Fitzgerald, claiming £1,000 damages for ten days of imprisonment.<sup>233</sup> The initial jury verdict, on June 1, 1762, awarded Dwyer £100 against Claggett and 10 shillings against Fitzgerald. On appeal, this was reduced to a verdict of 5 shillings against Claggett.<sup>234</sup> But the execution of that judgment was suspended, and when neither party appeared to pursue the appeal, the case was dismissed.<sup>235</sup>

## 2. Multiple Actions as Restraint

The system described to this point contained checks and balances. If a particular action were abused the victim might have recourse to a damages action of his or her own. One common fact pattern arose when someone who had been the defendant in a criminal action initiated by a private prosecutor was acquitted and sued the prosecutor for malicious prosecution.<sup>236</sup>

For instance, in a 1762 New Hampshire case, Oliver Farwell launched a private criminal prosecution against Daniel Stearns and others for trespassing on his property, assaulting him, and destroying his crops.<sup>237</sup> Stearns was acquitted in a jury trial and sued Farwell.<sup>238</sup> After losing below, Stearns prevailed on appeal and was awarded damages of £40 plus £34.8s in costs.<sup>239</sup>

An action also lay if instead of bringing a private prosecution

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231 See *id.* at 3–4.

232 *Id.* at 4.

233 Provincial Case File No. 23536, *supra* note 213, New Hampshire State Archives, contains a copy of the Common Pleas docket entry containing this information and that reported in the next sentence of text. It seems probable that Dwyer’s period of actual imprisonment was more like the 20 hours reported *supra* text accompanying note 204. The claim here may be for the period during which he was under recognizance to appear.

234 Judgment Book of Superior Court, Vol. D, *supra* note 134, at 337.

235 See *id.* at 366.

236 See *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503–05 (2012) (unanimous).

237 See *Stearns v. Farwell*, Judgment Book of Superior Court, Vol. E, *supra* note 125, at 72, 74.

238 See *id.* at 75.

239 See *id.*

a person wrongfully brought about the initiation of a public one. For example, in late 1769 one Abraham Libbee of Rye, New Hampshire, complained to a Justice of the Peace that Joseph Jenness had stolen two of his oxen.<sup>240</sup> This resulted in the issuance of a warrant, the seizure of two oxen from Jenness, and the indictment of the latter for theft.<sup>241</sup> After the Attorney General dropped the case Jenness sued Libbee for malicious prosecution, asserting that he had “caused such a misrepresentation of facts to be made to the . . . Grand Jury as induced them” to return the indictment.<sup>242</sup> Jenness prevailed both at trial and on appeal and was eventually awarded £30.8s damages and £14.8s.9d in costs.<sup>243</sup>

Both types of action continued after Independence. Indeed, in *Wedgwood v. Gilman*, plaintiff’s action for damages, which was commenced in 1782 and ultimately proved unsuccessful, alleged that the defendants had wrongfully both (a) instituted a private criminal action for receiving stolen goods that was eventually dismissed for non-prosecution, and also (b) procured his indictment by the State of New Hampshire on the same charges, of which a jury acquitted him.<sup>244</sup>

#### D. The Unifying Strand: The Jury

Regardless of the particular action being pursued against an officeholder, the most powerful legal tool for restraining government power until the early decades of the 19<sup>th</sup> century was the jury.<sup>245</sup> “Juries were expected to check official power, ensuring

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240 See *Jenness v. Libbee*, Judgment Book of Superior Court, Vol. G, *supra* note 145, at 45–47.

241 *Id.* at 47–48. There is a copy of the indictment in Provincial Case File No. 21991, New Hampshire State Archives, endorsed with the prosecutor’s *nolle*.

242 Judgment Book of Superior Court, Vol. G, *supra* note 145, at 48–49.

243 *Id.* at 50. Another example of such an action is *Cotton v. Banfill*, *id.* at 196, in which Banfill, who had been indicted by a grand jury in 1771 for forgery of a deed and acquitted, *see id.* at 164–65, sued Cotton for maliciously procuring his indictment, *see id.* at 297–98. Banfill prevailed below, but Cotton won on appeal, *see id.* at 300.

244 See *Wedgwood v. Gilman*, Judgment Book of the Rockingham County Superior Court, Vol. I, *supra* note 157, at 162. The grand jury indictment of Wedgwood appears in *id.* at 50–51.

245 See Jon P. McClanahan, *The “True” Right to Trial by Jury: The Founders’ Formulation and its Demise*, 111 W.VA. L. REV. 791, 809 (2009). The details are still being uncovered as a result of more fine-grained archival research into particular

that government was not arbitrary or, at least, was less arbitrary.”<sup>246</sup>

This included resisting attempts by judges to coerce verdicts.<sup>247</sup> A look at some New Hampshire cases suggests that when called upon to do so<sup>248</sup> juries consistently played this role in actions of all sorts.

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times and places. See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1003–04 (2010).

- In the decades following Independence juries were doubly weakened. Within the judicial branch they lost their law-declaring powers to judges, see ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939*, at 29–30 (2011) (dating change in civil cases to approximately 1830); Kramer, *supra* note 9, at 31–33, 101, while the judicial branch itself was subject to significant legislative interference. See Freedman, *supra* note 2, at 608 n.88. The judicial branch subsequently recovered some of the lost ground. See *supra* text accompanying notes 11–12. As the next installment will discuss, juries did not. See, e.g., Robertson v. Sichel, 127 U.S. 507 (1888). See generally Renee Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448 (2013); Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195 (2014).
- 246 John Phillip Reid, *The Authority of Rights at the American Founding*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 67, 84 (Barry Alan Shain ed., 2007); see *id.* at 85 (noting “the close association between the right to jury trial and the existence of liberty in the minds of people living in the various common-law jurisdictions”); see also NELSON, *supra* note 121, at 20–21; see generally Jeremiah E. Goulka, *The First Constitutional Right to Appeal: Louisiana’s Constitution of 1845 and the Clash of Common Law and Natural Law Traditions*, 17 TUL. EUR. & CIV. L.F. 151, 154 (2002) (“When Congress enabled Louisiana to apply for statehood in 1811, all that Congress required was a constitution guaranteeing a republican form of government, the right to a jury trial, and habeas corpus relief.”).
- 247 The storied fountainhead of the right of the jury to the independence of its judgment as against that of the judge is in the writ of habeas corpus obtained by Edward Bushell, who served as a member of the jury that acquitted William Penn when tried for preaching in the streets of London. See Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 412–13 (2012). Bushell had been imprisoned for contempt by the trial judge, who desired to see Penn convicted. The case is reported as Bushell’s Case, 124 Eng. Rep. 1006 (1670). See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1815 n.1 (2002) (citing various other reports of case). See also HALLIDAY, *supra* note 5, at 235–36 & 425 n.84. See generally CARE, *supra* note 127, at 123–27. The implications of the case for jury independence in 17th century Pennsylvania are discussed in 2 NELSON, *supra* note 117, at 107–10.
- 248 In *Penhallow v. Cole*, Docket Book of Superior Court, 1699–1738, at 25–26, New Hampshire State Archives, a 1702 case, the jury reported that its verdict would go one way if the Isaac Cole before them was the owner of the subject property



For example, in a case that stirred communal feelings,<sup>249</sup> John Kenniston was tried in May 1718 for the murder of an Indian.<sup>250</sup> The jury acquitted him.<sup>251</sup> The court did not accept the verdict and sent the jury back “to consider further of the case.”<sup>252</sup> But when the jury returned “with the same verdict as at first,” the court accepted it and discharged the prisoner.<sup>253</sup> So too, when Samuel Robie brought a private criminal prosecution in 1704 against a group of men for inciting a riot, the court refused to accept the jury’s initial verdict of acquittal but did so when the jury came back again with the same result.<sup>254</sup> In yet another instance, when the 1721 jury that tried Moribah Ring “for concealing the birth of a bastard child born of her body” adhered to its decision to acquit after being sent back to reconsider, the court accepted the verdict.<sup>255</sup>

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and the other way if not. The court, told the jury that this was an issue for it to decide, whereupon it retired and did so.

In several other cases it would appear that the interchange between court and jury simply reflected poor communications rather than any attempt at judicial coercion. In *Wincoll v. Tuttle*, a hybrid civil-criminal case from 1708 that is documented in Provincial Case File No. 15990, New Hampshire State Archives, the jury, unsurprisingly, seems to have been confused about just what it was to do. The court sent the jury back twice until it returned a verdict specifying the sum stolen, from which the court computed the amount the defendant owed (thrice the amount stolen) and also sentenced him to be whipped or pay a fine. See Docket Book *supra*, at 48–49. In the 1708 case of *Dole v. Green*, Docket Book, *supra*, at 52, the jury was sent back simply to “make their verdict plain.”

249 The court took special pains to provide translation services “to prevent all cause of complaint from the Indians,” Docket Book, *supra* note 248, at 116–17, and the Governor’s Council ordered “that the Indians that are coming on this special occasion of Kenniston’s tryal be allowed sixteen pence pr. man pr. day, during the time of the present court.” See 3 PROVINCIAL PAPERS OF NEW HAMPSHIRE 734 (Nathaniel Bouton ed., 1869) (Council order of May 12, 1718). See generally Nelson, *supra* note 130, at 334 (noting that in 17th century Massachusetts, “Special efforts were made to treat Native Americans in particular, fairly”).

250 See Docket Book, *supra* note 248, at 119.

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.* at 32–33.

255 See Superior Court Minute Entry of Feb. 13, 1722, New Hampshire State Archives. Details may be found in Provincial Case File No. 18208, New Hampshire State Archives. All the cases in this paragraph of text illustrate the general point that the independent judgment of the jury was given special weight in criminal cases. See William E. Nelson, *Law and the Structure of Power*

Turning to a nominally civil case, in *Stanyon v. Weare*<sup>256</sup> the former had been successfully sued for damages for assaulting a constable, but the appeals jury overturned it. The Court required the jury to deliberate further but accepted its decision once it returned with the same decision.<sup>257</sup>

*Wibird v. Sheafe*, a case with clear political overtones,<sup>258</sup> is an actual civil action and an instructive one.<sup>259</sup> Appellants sought reversal of a decision below that ruled in favor of the customs collector in a dispute over four bags of wool and the appeals jury ruled in their favor.<sup>260</sup> The court refused to accept the verdict and sent the jury back three times to reconsider.<sup>261</sup> But it adhered to its

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*in Colonial Virginia*, 48 VAL. U.L. REV. 757, 864–65 (2014); *see generally supra* note 158.

256 Details of the case may be found in Provincial Case File No. 17294, New Hampshire State Archives.

257 *See* Superior Court Minute Entry of Aug. 13, 1723, New Hampshire State Archives.

258 There is in the library of the New Hampshire Supreme Court an anonymous manuscript, 2 DECISIONS OF THE SUPERIOR COURT OF JUDICATURE – N. HAMPSHIRE PREVIOUS TO 1816 (1824), that appears to be the notes of a student studying with then-retired Chief Justice Jeremiah Smith, *see* BELL *supra* note 51, at 61, which contains at 130 a notation on this case, presumably reflecting the judge’s teaching: “Juries formerly in this State were sent out often by the Court if they did not like the Judgment or Verdict, particularly in Masonian cases but if the Jury persisted in their first verdict, they prevailed over the Court.” The Masonian reference is to a politically-charged series of land disputes that roiled the justice system of the colony for many of its early years and was not ultimately resolved until 1790, *see* WILLIAM HENRY FRY, NEW HAMPSHIRE AS A ROYAL PROVINCE 25–65, 209–320 (1908); PAGE, *supra* note 123, at 181–234; 29 PROVINCIAL PAPERS OF NEW HAMPSHIRE iv–vi (Albert S. Batchellor ed., 1891); Theodore B. Lewis, *Royal Government in New Hampshire and the Revocation of the Charter of the Massachusetts Bay Colony, 1679–1683*, 25 HIST. N.H. 3 (1970). As revealed by his frequent appearance in the index to the above volume of the Provincial Papers, Richard Wibird was an active participant in these controversies. *See* 29 PROVINCIAL PAPERS, *supra*, at 678. Sheafe, for his part, moved in and out of government as factional control shifted, *see, e.g.*, 1 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1679–1702, at 635 (Albert S. Batchellor ed., 1904), and this lawsuit arose from actions he took at a time when he was the deputy customs collector, *see* PAGE, *supra* note 123, at 149–51.

259 Details may be found in Provincial Case File No. 15810, New Hampshire State Archives.

260 Docket Book, *supra* note 248, at 19.

261 *Id.*

views and the court ultimately accepted its verdict.<sup>262</sup> Intriguingly, and reflecting the degree to which the concept of separation of powers was not the same in the colonial period as it became in the United States by the middle of the 19<sup>th</sup> century,<sup>263</sup> the last word on this case was not spoken in court. In early 1702, the Council issued a supersedeas to bring the case before it and deprive the claimants of their victory.<sup>264</sup>

As to the substance of jury decisionmaking, we have already seen that New Hampshire juries, like those elsewhere,<sup>265</sup> had until the early 19<sup>th</sup> century broad authority to decide for themselves what would today be considered by the Supreme Court as legal issues for judges to decide,<sup>266</sup> such as the scope of respondeat superior liability

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262 *Id.*

263 See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1060–64 (1997) (arguing that emergence of ideal of judicial independence was critical historical development); see *infra* text accompanying notes 297–98.

264 Docket Book, *supra* note 248, at 25.

265 See, e.g., CARE, *supra* note 127, at 121–23 (commenting that without power over law jurors in England would “be only tools of oppression, to ruin and murder their innocent neighbours with the greater formality”); Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35 (2005) (recounting Virginia history); Nelson, *supra* note 11 (summarizing results of research into various states).

266 The point is solidly established in the scholarly literature. See, e.g., JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 4–8 (2004); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WISC. L. REV. 377 (1999); Jonathan Lahn, *The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and its Challenge for Contemporary Society*, 57 CLEV. ST. L. REV. 553, 557–72 (2009); William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1655–56 (2008).

A famous supporting case is *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (reporting jury charge by Chief Justice John Jay in original action in Supreme Court incorporating Justices’ unanimous view: “[A]s on the one hand it is presumed that juries are the best judges of the fact; it is on the other hand, presumable that the courts are the best judges of the law. But still both objects are lawfully within your power of decision.”); see generally John T. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1920–22 (1983) (describing background of case); Charles Warren, *The First Decade of the Supreme Court of the United States*, 7 U. CHI. L. REV. 631, 642 (1940) (describing trial); Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208 (2013) (analyzing procedures employed in case). A comprehensive opinion in *United States v. Courtney*, 960 F. Supp. 2d

and official immunity.<sup>267</sup>

1152 (D.N.M. 2013), by Judge James O. Browning rejects an effort by a modern criminal defendant to apply the case, *id.* at 1160.

Chief Justice Jay's statement of the rule is consistent with the teaching of the Zenger trial described in the next paragraph of text.

The power of this idea is illustrated by *Shannon v. Thompson*, Judgment Book of Superior Court, Vol. F, *supra* note 156, at 358–61. There, the defendant in a land dispute had successfully gotten the action abated for a defect in the pleading of title. When plaintiff appealed in 1769 the judges were divided. This did not result in an affirmance, as we might expect today, but rather in a reversal and a remand for trial by a jury. In any event, even if the plea in abatement had been upheld on appeal plaintiff could simply have done as Ring did in his lawsuit described *supra* text accompanying notes 139–41, *viz.*, made the appropriate correction and pursued his action. See NELSON, *supra* note 121, at 20; see also GOEBEL & NAUGHTON, *supra* note 5, at 587–88 (noting that same rule existed in criminal cases so plea was “of little advantage to the prisoner”).

267 See *supra* text accompanying notes 165–70. See also Nelson, *supra* note 255, at 874–75 (2014) (noting 18<sup>th</sup> century Virginia legal environment in which judges were not immune from civil liability but juries distinguished between judicial mistakes and judicial oppression).

In attempting over the last thirty-five years or so to build without historical justification, see *Wyatt v. Cole*, 504 U.S. 158, 166–67 (1992); *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (acknowledging that Court has “completely reformulated qualified immunity along principles not at all embodied in the common law”), a framework under which protecting officers from unwarranted personal liability is a duty to be performed by judges, see *Pearson v. Callahan*, 555 U.S. 223 (2009) (unanimous); *Pfander & Hunt*, *supra* note 78, at 1872, the Court has created an “incoherent” muddle, “shot through with inconsistency and contradiction” and unmoored from any functional justifications, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208–09 (2013); see Donald L. Doernberg, *Taking Supremacy Seriously, The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 456–57 (2011) (Court has reasoned backwards from a cost-benefit analysis to unsupportable history to reach results that lack even “the veneer of constitutional respectability”); John M. Greabe, Iqbal, Al-Kidd and Pleading Past Constitutional Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines From Constitutional Tort Law, 20 WM. & MARY BILL RTS. J. 1, 5 (2011) (describing this as “an area of the law that has been appropriately criticized as a conceptual disaster area”). For a notable recent criticism of the Court's performance, see Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245–50 (2015).

The situation originates in a double failure. The first is that the Court ahistorically ignores the role of juries. The second is that the Court has failed to acknowledge the way in which the competing considerations of individual accountability and zealous performance of official duty were balanced from

Thus, for example, in the famous 1735 trial of John Peter Zenger for libeling the Governor and Council of New York,<sup>268</sup> Chief Justice James de Lancey told Zenger's lawyer, 80-year old Andrew Hamilton, that

the jury may find that Zenger printed and published those papers, and leave it to the court to judge whether they are libelous; you know this is very common; it is in the nature of a special verdict,

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the early national period onwards: through the safety net of Congressional indemnification once the court system had decided on the occurrence of wrongdoing. See *supra* note 78. See also Nelson, *supra* note 11, at 356 (arguing “*Marbury* is important because it was one part of a larger process of constitutional development that directed the people to exercise their sovereign lawmaking power through centralized legislative institutions, like Congress, rather than through local entities like juries”). See generally JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 90–94, 104–05 (2011) (describing efforts of Union officials to secure federal legislation to protect themselves against damages verdicts arising out of wartime measures). Cf. Kit Kinports, *The Supreme Court's Quiet Expansion of the Qualified Immunity Defense*, at 1 (forthcoming Minnesota Law Review Headnotes) (on file at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2648920](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2648920)) (observing that in elaborating doctrines designed to shield officials from having to engage in the litigation process “the Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congressional intent underlying § 1983”).

At minimum, the Court should disavow the “remarkable feat of judicial creativity” represented by its most recent “judge-made body of immunity law,” Pfander & Hunt, *supra* note 78, at 1923, and recognize that the creation of immunity rules is a legislative, not judicial, function. See John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 Const. Comment. 189 (2008); see also Woolhandler, *supra* note 123, at 483 (noting that legislative power in area “should lessen judicial concern” over damages actions, whose historic purpose has been “to enforce constitutional and statutory limits on government”). Going farther, it is far from obvious that there is any empirical basis to distrust the ability of jurors to sort out the relevant considerations. But they would have to take this power both from legislators and from judges while legislators, judges, and executive officials would all predictably resist, inasmuch as these are just the actors “the jury was meant to check.” See Thomas, *supra* note 245, at 1239.

268 For an account of the case situating it within the common law legal system, see Nelson, *supra* note 245, at 1018–20. For a general overview, see Paul Finkelman, *Politics, the Press, and the Law: The Trial of John Peter Zenger*, in AMERICAN POLITICAL TRIALS 21–42 (Michael R. Belknap ed., rev. ed. 1994). The classic monograph remains LIVINGSTON RUTHERFORD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL (1904).

where the jury leave the matter of law to the court.<sup>269</sup>

269 *The Trial of John Peter Zenger, for Libel, New York City, 1735*, in 16 AMERICAN STATE TRIALS 1, 16 (John D. Lawson ed., 1928). See Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 257 (1920) (noting deep common law roots of jury's right to return special verdict in both civil and criminal actions).

Sometimes, as in the case of General Picton described *supra* text accompanying note 202, the jury's insistence on rendering a special verdict rather than a general verdict of guilty was a clear message to the judges of its desire for a lenient sentence. Thus, for example, we find a Massachusetts jury in 1667 insisting on adhering to a special verdict that the defendant was lying in bed with a man that was not her husband, rather than rendering a general verdict that she was guilty of adultery. See *Colony v. Bullojne*, reprinted in 3 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630–1692, at 191–93 (1928). For discussions of the case see John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 152, 191 (Hall et al. eds., 1984); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 913 n.244 (1994); Nelson *supra* note 130, at 328; Carolyn B. Ramsey, *Sex and Social Order, The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J. L. & HUMAN. 191, 215 (1998) (reviewing MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996)).

But although special verdicts were “common,” see William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664–1776*, 38 HOFSTRA L. REV. 69, 129–30 (2009), they were frequently delivered in contexts that did not raise any suspicion that the court was attempting to coerce the jury. See Nelson, *supra* note 130, at 317–19 (discussing Massachusetts). In such situations, the jury — consistent with the understanding of all participants in the Zenger case as described *infra* notes 270, 275 and text accompanying notes 269–75 — might by its own choice decide to follow the court's view of the law. The remainder of this footnote presents some examples from the New Hampshire archives.

In the 1735 case of *Jacob v. Hoag*, the subject of Provincial Case File No. 14969, New Hampshire State Archives, the crux was whether Jacob could recover on an earlier judgment notwithstanding an alleged oral promise to refrain from executing on it. The lower court found for Jacob and on Hoag's appeal the appeals jury returned as its verdict that if the “circumstances be sufficient in law to find a verdict upon then we of the jury find for the appellee,” Jacob. The court determined that the evidence “was sufficient in point of law,” and Jacob was granted an execution. These proceedings are recorded in Docket Book, *supra* note 248, at 197–98, as well as in a Superior Court minute for February 1, 1735 to be found in Superior Court Minutes, 1699–1750, Box 1, Folder 1734–1735, New Hampshire State Archives.

In the 1738 case of *Nutter v. Briant*, the former unsuccessfully sued the latter for title to land. The verdict of the jury on appeal was for affirmance “in case the laws of England (at the decease of Anthony Nutter in the year 1685) were those by which this province was governed. But if not we find for the appellent one ninth part of the sixty acres which was Anthony Nutters.” On

Hamilton responded to the judge, "I know . . . the jury may do so; but I do likewise know that they may do otherwise. I know

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consideration of this verdict the court was of the opinion "that the laws of England in 1685 are the laws by which this province at that time was governed. It is therefore considered by the court that the former judgment be and hereby is affirmed." The verdict, rendered February 6, 1738, is to be found among the papers in Provincial Case File No. 18115, New Hampshire State Archives, and the court proceedings are recorded in a Superior Court minute to be found in Superior Court Minutes, 1699–1750, Box 1, Folder 1738–39, New Hampshire State Archives.

In the same year, in *Piper v. Greley*, documented in Provincial Case File No. 12010, New Hampshire State Archives, Piper sought damages against Greley, an under-sheriff, because Greley had taken Piper's judgment creditor, Ebenezer Godfrey, into custody but neither put him in jail nor taken bond from him, with the result that Godfrey absconded. As recorded in Docket Book of the Superior Court, *supra* note 246, at 252, the jury hearing Piper's appeal from his loss below decided that there should be an affirmance "if detaining the Body of Ebenezer Godfrey answers the same end [as] shutting the man up in Gaol according to the law of the province and if not they reverse." The court took cognizance of that question, ruled that "the officer['s] detaining the defendant in his custody answer'd the same end as if he had been shut up in Gaol according to the law of the Province," and ordered an affirmance. *Id.* These proceedings are also recorded in a Superior Court Minute Entry of Aug. 13, 1723, New Hampshire State Archives.

In the 1759 case of *Mason v. Tuttle*, documented in Provincial Case Files Nos. 027467 and 06873, New Hampshire State Archives, Ebenezer Tuttle sued for trespass. The jury found specially that the land had belonged to Tuttle's late father, John, but that his will had not bequeathed it nor was Ebenezer the oldest son. The jury decided that the land should go to whichever party had the right to it under the laws of the Province, an issue that the court on appeal decided in Mason's favor. See Judgment Book of Superior Court, Vol. C, *supra* note 165, at 514–17; Superior Court Minute Entry of Nov. 13, 1759, New Hampshire State Archives.

In *Moulton v. Hill* in 1763, the endorsee of a note payable in lumber sued the maker. The jury hearing plaintiff's appeal made special findings setting forth the endorsements on the document and concluded that plaintiff should prevail "if such note is by law endorsable." The court gave its "opinion that the note in the case is a negotiable note," and ordered judgment for the plaintiff. See Judgment Book of Superior Court, Vol. D, *supra* note 134, at 599–61; Superior Court Minute Entry of July 5, 1763, New Hampshire State Archives.

The 1798 case of *Haven v. Colbath* was an action on a note payable in three installments. The jury found the full amount for the plaintiff, "subject to the opinion of the Court" as to whether plaintiff was now limited to a third of that amount. The court concluded that "by law" plaintiff was so limited and ordered the entry of judgment accordingly. See Judgment Book of the Rockingham County Superior Court, Vol. N, *supra* note 152, at 398–400. In 1799, plaintiff, overcoming a defense of *res judicata*, recovered on the remaining two installments. See *id.*, Vol. O, *supra* note 159, at 227–31.

they have the right beyond all dispute, to determine both the law and the fact.”<sup>270</sup> He then argued to the jury:

A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of opinion that there is no falsehood in Mr. Zenger’s papers . . . you ought to say so; because you do not know whether others (I mean the court) may be of that opinion. It is your right to do so, and there is much depending on your resolution.<sup>271</sup>

The outburst of popular rejoicing that followed when the jury accepted this argument and found Zenger not guilty is well-known to history.<sup>272</sup> Less remarked-upon is the fact that in his charge to the jury the Chief Justice had, although with little grace,<sup>273</sup> agreed with Hamilton’s position.<sup>274</sup> Had DeLancey accepted the argument of the Attorney General – that the jury was only empowered to decide the fact of publication, a fact that Hamilton had quite dramatically conceded in the first few sentences of his argument,<sup>275</sup> but not whether the words were libelous – the Chief Justice would never have sent the case to the jury to decide.<sup>276</sup>

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270 *The Trial of John Peter Zenger*, *supra* note 269, at 16.

271 *Id.* at 35. See generally Nelson, *supra* note 254, at 873–74 (suggesting that jury was more likely to exercise its independent law-finding powers where issue involved public liberty and that counsel might argue this explicitly).

272 See *The Trial of John Peter Zenger*, *supra* note 269, at 4.

273 See *id.* at 38 (prefacing substantive direction set forth *infra* note 274 with “The great pains that Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of the judges; and his insisting so much upon the conduct of some judges in trial[s] of this kind, is done no doubt with a design that you should take very little notice of what I might say upon this occasion”).

274 See *id.* at 38–39 (charging jury that issue of “whether the words as set forth in the information make a libel . . . is a matter of law . . . which you *may* leave to the court”) (emphasis supplied).

275 See *id.* at 7.

276 See William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149, 1151 (2014) (“Note that Chief Justice DeLancey did not direct the jury that it must leave the law to the court. By implication, he agreed with the defense counsel’s argument and told the jury . . . that it had the authority to determine the law by itself.”); see also Alschuler & Deiss, *supra* note 269, at 873; Nelson, *supra* note 269, at 153.



### E. The Dual Strand: Legislative Intervention

There is a familiar *trompe d'oeil* image that is, viewed one way, of a fresh-faced young woman and, viewed another, is of a wizened old one.<sup>277</sup> So too, legislative involvement in individual cases during the early national period presented two very different aspects. From one viewpoint, the one that is the focus of this installment of my overall project, legislative intervention might be a means for an individual to achieve substantive justice in litigated matters or at

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Another example of counsel successfully taking the position that Hamilton did in *Zenger* is to be found in *Sawyer v. Perman*, documented in Provincial Case File No. 029003, New Hampshire State Archives. In this fascinating land dispute, involving a chain of title passing without challenge through a Black couple who had been emancipated by will, the plaintiff appealed from the grant of a demurrer below. Before the case went to the jury on appeal, “the appellant moved the court to order the counsel to draw up a Special Verdict.” The appellees opposed this motion, framing a disagreement between the parties as to “whether the Court had by Law a Power to order a Special Verdict where the point or points in question were only matters in law.” Minute Entry of Superior Court for June 29, 1762 in Minutes of Superior Court, *supra* note 205. After consideration of that issue at the next term, the court sent the case to the jury for a general verdict, which it rendered in favor of the appellees. See Judgment Book of Superior Court, Vol. D, *supra* note 134, at 288–90; Minute Entry of Superior Court for Nov. 9, 1762 in Minutes of Superior Court, *supra* note 205.

As the reference to counsel in the previous paragraph indicates, there is good reason to believe that juries rendering special verdicts were often following a roadmap that had previously been agreed upon by the lawyers. For example, in *Walton v. Greley*, documented in Provincial Case File No. 03184, New Hampshire State Archives, plaintiffs’ title depended on a conveyance by only two of the three administrators of an estate. Plaintiffs prevailed below and on defendant’s appeal the jury returned a detailed special verdict in November 1762, determining that “if two administrators only . . . can legally execute a deed . . . they find for appellees [but] otherwise they find for the appellant.” See Judgment Book of Superior Court, Vol. D, *supra* note 134, at 337–38. As recorded in a Minute Entry of Superior Court for Nov. 9, 1762 in Minutes of Superior Court, *supra* note 205, the court concluded that the conveyance was good and ordered judgment for the appellees. Subsequently, in August 1765, defendant brought an action for review, which resulted in a special verdict in the same terms as the first one—a most implausible coincidence unless both juries were working from a common template. The reviewing court, agreeing with the prior legal judgment, ordered judgment for the plaintiffs. See Judgment Book of Superior Court, Vol. E, *supra* note 125, at 203–06.

277 An example appears at <http://www.justriddlesandmore.com/images/Illusions/woman1.jpg> (last visited July 27, 2013).

least, as in Hodsdon's case, the opportunity to achieve it.<sup>278</sup> From a second viewpoint, the one that is the focus of the next installment of my overall project, legislative intervention might be a means to weaken the independent authority of the court system.<sup>279</sup> And, of course, depending on one's view of substantive justice, legislative action in any particular situation might be calculated to achieve both,<sup>280</sup> just as an image may simultaneously depict a young woman and an old one.

With full awareness of this latter constraint, I seek in this section to present some examples of cases falling into the first category, deferring a discussion of those in the second to my next installment.

In many situations, a legislative act was simply intended to

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278 See *supra* text accompanying notes 57–58 (describing legislative act designed to relieve Hodsdon of inadvertent default).

279 This might take place either piecemeal, through legislative interference with fully-adjudicated judgments, or wholesale, through structural attacks like the abolition of entire courts or the removal of particular judges whose opinions were displeasing. See REID, *supra* note 58, at 9–17.

280 For example, if the legislature were to grant an individual relief from judicial application of a harsh legal rule, this might be praised as achieving substantive justice or criticized as undermining judicial autonomy.

Consider, for example, the picture that emerges from reading An Act to Impower the Superior Court of Judicature to Render Complete and Perfect Judgment for Damages and Costs in an Action Brought at Said Court by Zebulon Marsh Against Edward Hilton and to Award Execution Thereon, Passed February 1786, in 5 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 110 together with *Marsh v. Hilton*, Judgment Book of the Rockingham County Superior Court, Vol. J, *supra* note 155, at 267. In 1771, Edward Hilton sued Zebulon Marsh for slander, alleging that Marsh had accused Hilton, a married man, of having had sexual relations with (among other women) Marsh's wife. Hilton lost the first round but prevailed on appeal the following year. In 1773, Marsh brought another appeal, which – doubtless in consequence of the Revolution – was not heard until 1779. At that point, Marsh won a jury verdict ordering that Hilton return the damages he had won and pay court costs. But Hilton objected that inasmuch as Marsh held a judgment payable in the prior legal tender he could not be ordered to pay it nor could the court tax costs. Lacking equitable powers, see *infra* note 281, the court was unwilling to make the appropriate alteration. After “a full and fair hearing of the parties appearing,” the New Hampshire state legislature in 1786 enacted a statute enabling the court to perfect the prior judgment as may be “just and equitable . . . notwithstanding any objections which have been or may be made thereto on account of said Judgment's being incomplete or otherwise,” Act, *supra*, at 111–12, with the result that Marsh was granted a verdict in current money, which he collected in 1787, see *Marsh v. Hilton*, *supra*, at 269, 270.

relieve the litigant of the consequences of a procedural misfortune.<sup>281</sup> Thus, for example, in 1700, the New Hampshire provincial legislature granted Abraham Clements a new opportunity to appeal because between the time of a case that had resulted in a ruling against him and the scheduled appeal in Superior Court, “the government being changed the said Superior Court was altered and at the next Superior Court that was held the Judges [ruled that the appeal] could not

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281 In the case of New Hampshire this meant that the legislature in many individual lawsuits, including the one described *supra* note 280, was serving as a substitute for the equity courts that the state’s republican government had been unwilling to create after the Revolution. See REID, *supra* note 58, at 67–68; see also [Chief Justice] Frank R. Kenison, *The Judiciary Under the New Hampshire Constitution, 1776–1976*, in NEW HAMPSHIRE AMERICAN REVOLUTION BICENTENNIAL COMMISSION, *THE FIRST STATE CONSTITUTION* 12, 13 (1977) (“Equitable relief was available only by special legislative action. Not until 1832 did the legislature vest the courts with full authority to grant equitable relief.”); see generally WILLIAM PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 171 (1965) (noting similar situation prior to Independence in those American colonies that lacked chancery courts).

An example is to be found in the Petition of John Dustin, June 16, 1786, Legislative Petitions File, New Hampshire State Archives. The quotations in the next paragraph are taken from the petition and the endorsements thereon.

Filed by his mother on behalf of the imprisoned Dustin, the petition recounted that he had been incarcerated for more than a year on an execution for debt and “is almost in despair, seeing no probability of relief from said confinement.” He could not take the debtor’s oath to secure his release, Dustin explained, because he owned land. But he could not sell the land to apply to the debt because the creditor held the deed as security. “In this unhappy situation your petitioner has no prospect but of living in confinement the remainder of his days unless your Honours will interpose in his behalf and point out some way for his release.” On the day this petition was filed both Houses issued an order directing that a hearing be held later in the week and that in the meanwhile the creditor’s attorney be served with a copy of the petition so that he “may appear and show cause (if any he hath) why the said Dustin may not be liberated from his confinement.”

After a brief delay to allow service to be effected, see *Journal of the New Hampshire House of Representatives*, June 20, 1786, New Hampshire State Archives, the House, after “hearing and considering” the petition, voted on June 23, 1786 that Dustin be permitted to take the debtor’s oath provided that the Justices before whom he did so should agree that he had no property other than the deed in question. See *id.*, June 23, 1786. The upper house concurred the same day. See *Journal of the New Hampshire Senate*, June 23, 1786, New Hampshire State Archives.

be tried before them.”<sup>282</sup> Similarly, when Hugh Tallent wound up on the wrong end of a judgment for £47.16s.9d as a result of “not knowing of a summons which had been left by the . . . deputy sheriff between the boards and ceiling of [his] house,” the New Hampshire state legislature gave him a second chance, with the result that the ultimate 1789 judgment against him (which he paid in pieces until 1794) was for £27.<sup>283</sup> In another case, Elizabeth Lamson’s second chance turned out less satisfactorily for the parties involved. She was sued as administratrix of her late husband’s estate for the balance due on a £50 note of hand after she had only been able to scrape together £27.15s. as a partial payment. She lost by default because the lawyer who was supposed to take care of it for her forgot about the matter.<sup>284</sup> The New Hampshire state legislature determined in 1786 that she “be restored to her law, that the default aforesaid be taken off, & that she be permitted to . . . defend said action.”<sup>285</sup> But when the time came, she, perhaps knowing that she was insolvent, defaulted once more.<sup>286</sup> In any event, the second default judgment went uncollected.<sup>287</sup>

In other situations, as in claims for money damages against the government, the legislature was the only available forum.<sup>288</sup>

In yet other cases, aggrieved citizens in the early national period turned on their own initiative to the legislature where they might once have turned to the courts. For example, when in 1714 Charles Banfield, a constable in Portsmouth, New Hampshire, was incarcerated for not remitting taxes to the Selectmen even though he had done his best to collect them from the recalcitrant townspeople, he sought a writ of habeas corpus and the court brokered an

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282 See An Act to Allow Abraham Clements a New Trial in the Superior Court, Passed June 12, 1700, in 1 LAWS OF NEW HAMPSHIRE, *supra* note 258, at 671.

283 See An Act to Restore Hugh Tallant to His Law, Passed Feb. 27, 1786, in 5 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 124; Johnson v. Tallant, Judgment Book of the Rockingham County Superior Court, Vol. L, *supra* note 155, at 3. For descriptions of similar cases see HAMBURGER, *supra* note 7, at 526–29 (Massachusetts) and REID, *supra* note 58, at 67–68 (New Hampshire).

284 This is the recital of the facts contained in An Act to Restore Elizabeth Lamson to Her Law, Passed Dec. 25, 1786, in 5 LAWS OF NEW HAMPSHIRE, *supra* note 175, at 202.

285 *Id.* at 203.

286 See Lamson v. Tilton, Judgment Book of the Rockingham County Superior Court, Vol. J, *supra* note 280, at 380.

287 See *id.*

288 See REID, *supra* note 58, at 9; Desan, *supra* note 123, at 1442–45.

arrangement for his prompt release.<sup>289</sup> In a remarkably similar case in 1784, James Rundlet chose another route. He petitioned the New Hampshire legislature<sup>290</sup> setting forth that he was one of the constables of the town of Epping to collect tax for 1782, that he had attended to his duty as constable in collecting the tax as fast as was in his power, but that “the extreme scarcity of Money [had] prevented his collecting the whole.” As a result, he was in jail notwithstanding his ability to pay at least part of the necessary sum. Rundlet continued that if he were “liberated it would be in his power soon to collect a sum sufficient to enable him to settle with the Treasurer, but if not he must either pay the Taxes of his delinquent Townsman out of his own estate or remain in Gaol how long he knows not.” On April 12, the legislature granted the petition, ruling that Rundlet should pay over the amount he had collected and be granted 60 days to pay the remainder.

#### **IV. Preview: The Slow Development of Separation of Powers as Checks and Balances**

The third installment of this project will situate the writ of habeas corpus in the context of the system of checks and balances that evolved here during the first half of the nineteenth century.<sup>291</sup>

Although it is sometimes loosely said that the English system had no separation of powers, this is imprecise.<sup>292</sup> “Separation of powers” as we know it today consists of:

(a.) assigning duties to the government instrumentality best able to perform them, taking into account both efficiency and policy considerations. Thus, for example, courts not cabinets should try criminal charges against individuals. This concept, whose focus is at the level of the particular governmental action at issue, might be

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289 The case is fully described in Freedman, *supra* note 2, at 597–98; *see also id.* at 611–12.

290 *See* Petition of James Rundlet, Apr. 1, 1784, Legislative Petitions File, New Hampshire State Archives. The quotations in the remainder of the paragraph are drawn from this document. The disposition recorded in the last sentence of the paragraph is recorded by endorsement on the document.

291 *See* Eric M. Freedman, *Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U. L.J. (forthcoming 2016).

292 The remainder of this paragraph is drawn from Freedman, *Liberating*, *supra* note 1, at 396.

called “allocation of roles.”<sup>293</sup>

(b.) assigning duties to various branches in furtherance of the structural purpose of having them limit each others’ power.<sup>294</sup> This concept, whose focus is at the architectural level, is encapsulated in the American term “checks and balances.” Its premise is that in general requiring interaction between the branches before any problem can be finally disposed of will lead to decisionmaking that is both substantively sounder and more consistent with the goals of a representative non-tyrannical government than giving a single branch the first and last word.

The British system of government in the North American colonies understood and largely respected allocation of roles. The distribution of powers to particular officials, which judges and juries enforced through habeas and other legal remedies, had the effect of insuring that individuals were treated justly and in accordance with law. Indeed, because the Crown was presumed to desire that the law be obeyed,<sup>295</sup> subjects could judicially invoke the law against the King himself.<sup>296</sup>

The case of Hodsdon — a subordinate executive officer accused of abusing his powers — illustrates that judicial enforcement of separation of powers in the sense of allocation of roles passed uncontroversially into American law.<sup>297</sup>

But because government power had ultimately flowed from the Crown rather than the People during the colonial period, there had been no sense then that in keeping individual officeholders

293 Aziz Huq has given this principle the name “institution matching.” See Aziz Z. Huq, *The Institution Matching Canon*, 106 Nw. U. L. REV. 417 (2012).

294 See THE FEDERALIST NO. 51, at 320–22 (James Madison) (Clinton Rossiter ed., 1961) (advocating “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place.”).

295 See Timothy Endicott, *Habeas Corpus and Guantanamo Bay: A View From Abroad*, 52 AM. J. JURIS. 1, 28–29 (2009).

296 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”); HAMBURGER, *supra* note 7, at 71–73, 80–81, 97–98, 101, 113–14, 194–217, 234.

297 See Kramer, *supra* note 9, at 38; see also HAMBURGER, *supra* note 7, at 217, 319, 391, 612–14 (noting that situating the well-recognized power of judicial review within a structure of separation of powers could lead to political conflict with the other branches).

within their prescribed roles the judges were also promoting good government by reinforcing the overall structure of a consciously divided system, one in which “the interior structure of the government” was so contrived “that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>298</sup> Separation of powers as checks and balances was a new concept<sup>299</sup> and, as the next installment will describe, took some time to work out.

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298 THE FEDERALIST NO. 51, *supra* note 294, at 320.

299 See G. Edward White, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145, 1160 (2010) (persuasively criticizing HAMBURGER, *supra* note 7, for drawing normative conclusions from historical data without recognizing this point). See also Halliday & White, *supra* note 5, at 673.





## Risky Standing: Deciding on Injury

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## Introduction

If someone increases your risk of further harm, does this fact alone give rise to a case against them? Even when you have not yet suffered the further harm, and when the odds that you will suffer the further harm remain unclear, does the mere increased risk of that harm give you standing to open the courthouse door? Or is your injury too speculative?

This is the problem of “probabilistic standing,” or standing based on “probabilistic injury”—the mere increased risk of some further harm.<sup>2</sup> The question arises because federal courts are constitutionally limited to hearing only actual cases or controversies, cases where a plaintiff has suffered an “injury in fact” that is “sufficiently concrete” to confer standing.<sup>3</sup> While some instances of increased risk are sufficient to support standing,<sup>4</sup> “not all risks constitute injury.”<sup>5</sup> Otherwise, “the entire requirement of ‘actual or imminent injury’ would be rendered moot” because “all hypothesized, non-imminent ‘injuries’ could be dressed up as ‘increased risk of future injury.’”<sup>6</sup>

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- 2 *Compare, e.g.,* Amnesty Int’l USA v. Clapper, 667 F.3d 163, 198 (2d Cir. 2011) (Livingston, J., dissenting from denial of rehearing in banc) (“Probabilistic injury has . . . never been recognized by the Supreme Court or this Circuit as sufficient as a general matter to constitute injury in fact for the purposes of Article III standing . . .”), *panel op. rev’d*, 133 S. Ct. 1138 (2013), *with* Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1162 (2013) (Breyer, J., dissenting) (citing *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139 (2010); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978)) (noting that “courts have often found *probabilistic* injuries sufficient to support standing” and identifying two Supreme Court cases as examples).
  - 3 U.S. CONST. art. III; *Raines v. Byrd*, 521 U.S. 811, 830 (1997); *see also* Reilly v. Ceridian Corp., 664 F.3d 38, 41 (3d Cir. 2011) (“Constitutional standing requires an ‘injury-in-fact, which is an invasion of a legally protected interests that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’”) (quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 290-91 (3d Cir. 2005)).
  - 4 *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1160 (2013) (Breyer, J., dissenting) (collecting cases).
  - 5 *Kerin v. Titeflex Corp.*, 770 F.3d 978, 983 (1st Cir. 2014); *see also* *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005).
  - 6 *Ctr. for Law & Educ.*, 396 F.3d at 1161.

Unfortunately, courts have exhibited increasing disarray over the proper way to analyze the problem,<sup>7</sup> and so a framework is needed. This Article aims to provide one. As Part I explains, injury in fact is not a factual inquiry, but an irreducibly normative endeavor: what constitutes an “injury” necessarily reflects value judgments and standards that cannot be reduced to (nonnormative) facts, such that there is *always* a decision to be made about what constitutes injury.<sup>8</sup> My central claim is that cases of increased risk are particularly difficult because they require two such normative choices, first as to the existence of a primary interest, and then as to the existence of a “safety interest”—a secondary, derivative interest in minimizing the risk of harm to the primary interest. Plaintiffs who bring suit based on increased risk, like victims of mere data breach who sue based on increased risk of identity theft, bring suit based on purported injury to this safety interest.

But, as Part I also explains, the existence of the primary interest does *not* entail the existence of a safety interest in minimizing the risk of harm to the primary interest. A choice must be made as to each. This explains why identify theft can be an injury, while the increased risk of identity theft may not be: individuals have a primary interest in the exclusive use of their legal identities, but do not necessarily have a safety interest against increased risk of identity theft from particular sources, like mere data breach.

Here’s the rub: once the necessity of making *two* choices is recognized, we might sensibly ask *who* should make these determinations. Probabilistic standing presents particular difficulty because, although courts are adept at making the first choice, it is not obvious that the courts are the branch whose expertise is best suited—in most cases—to make the second normative choice, a choice that is essentially about risk management. Accordingly, apart from some narrow exceptions, courts generally decline (and should decline) to recognize probabilistic injury absent a statutory or regulatory hook establishing a safety interest in minimizing risk of harm from a particular source. Part II shows that courts generally behave in this

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7 See *infra* Part I; see also *Kerin*, 770 F.3d at 980 (“[T]he law of probabilistic standing is evolving.”); *Katz v Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012) (noting “disarray” in “the applicability of this sort of ‘increased risk’ theory [to] data privacy cases”).

8 See *infra* Part I.C.1; see also *infra* note 98 (distinguishing between uses of the word “normative”).

manner, and Part III argues that they do so with good reason. Part III concludes by explaining, contrary to some misinterpretations of existing standing doctrine, that statutes can indeed create standing, how they do so, and why a contrary decision next term in *Spokeo, Inc. v. Robins*<sup>9</sup> would be problematic.

## I. Probabilistic Standing: Developing the Start of a Framework

### A. Standing & Increased Risk as Injury: The Doctrinal Confusion

Article III of the Constitution limits the authority of federal courts to hearing only actual cases or controversies.<sup>10</sup> Standing doctrine governs which litigants meet this constitutional requirement, such that they are entitled to seek relief in court.<sup>11</sup> “This [standing] requirement ‘is founded in concern about the proper—and properly limited—role of the courts in a democratic society.’”<sup>12</sup>

To establish that they have standing, plaintiffs must demonstrate three elements: injury in fact, traceability, and redressability.<sup>13</sup> That is, they must demonstrate that they have suffered or will “imminently” suffer an “invasion of a legally protected interest” (injury in fact) that has been caused by the defendant (traceability) and that it is “‘likely,’ as opposed to merely ‘speculative,’” that the injury will be mitigated by the relief sought (redressability).<sup>14</sup> “[T]hese requirements share a common purpose—namely, to ensure that the judiciary, and not another branch of government, is the appropriate forum in which to address a plaintiff’s complaint.”<sup>15</sup> These requirements are

9 82 U.S.L.W. 3689 (U.S. Apr. 27, 2015) (No. 13-1339). Arguments were heard on November 2, 2015.

10 U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992).

11 This Article concerns constitutional standing, or “Article III” standing. Plaintiffs who satisfy Article III standing must also satisfy what is known as “prudential standing.” Unlike Article III standing, prudential standing is largely discretionary. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

12 *Blum v. Holder*, 744 F.3d 790, 795–96 (1st Cir. 2014) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009)).

13 *Lujan*, 504 U.S. at 560–61.

14 *Id.*

15 *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)); see also *Blum*,

jurisdiction: federal courts cannot constitutionally hear cases failing to meet them.<sup>16</sup>

Cases involving *increased risk* of future injury create mischief for this doctrine. Although “[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III,” threatened harms might be sufficient if the injury is “certainly impending.”<sup>17</sup> That is, courts do not always require plaintiffs to “await the consummation of threatened injury to obtain preventative relief” provided that the threatened injury is “imminent” or “certainly impending.”<sup>18</sup> But the difficulty is that what is meant by “imminent” or “certainly impending” remains ambiguous, poorly defined, and inconsistently applied.<sup>19</sup> For example, some cases apply the phrase as a requirement about the likelihood or certainty of occurrence, while others have applied the requirement as one concerning temporal distance—a related, but distinct, concern.<sup>20</sup> And only two years ago the Court divided over

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744 F.3d at 795–96 (“This [standing] requirement ‘is founded in concern about the proper—and properly limited—role of the courts in a democratic society.’” (quoting *Summers*, 555 U.S. at 492–93)).

16 See *Lujan*, 504 U.S. at 560–61.

17 See *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002) (“The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements.”).

18 *Babbitt*, 442 U.S. at 298 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

19 See, e.g., *Nat’l Res. Def. Council v. EPA*, 464 F.3d 1, 6–7 (D.C. Cir. 2006) (“[W]hether . . . any scientifically demonstrable increase in the threat of death or serious illness is sufficient for standing . . . has given rise to a conflict among the circuits.” (quotation marks and citations omitted)).

20 See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1160 (2013) (Breyer, J., dissenting) (collecting cases). The two uses are related in that, intuitively, the closer temporally the threatened harm is, the greater the certainty that the harm will occur because there is less time for other events to intervene. Courts often use such heuristics, and with good reason. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 360 (Harvard rev. ed. 1999) (explaining the implications of uncertainty about the farther future for rational decision-making and planning).

This intuitive relationship may also explain the criticism that the question of probabilistic standing is not so much about injury in fact and constitutional standing as it is about prudential standing and ripeness. The attempt to re-characterize future injuries as present ones shows that, despite overlap, the two problems remain distinct: those who allege “present” injuries based on the increased risk are suggesting that the case is already ripe because the harm has

whether “certainly impending” is a necessary or merely sufficient condition to find injury in fact.<sup>21</sup>

There also appears room for recognizing *probabilistic injuries*—for finding that an increased risk is *itself* injury in fact.<sup>22</sup> In these cases, plaintiffs argue that there are not one, but *two* injuries grounding their claim: (1) the future, threatened harm that may or may not occur; and (2) the present harm that is the costs imposed by the increased risk, like emotional distress, chilling effects, and mitigation efforts.<sup>23</sup> Courts have found such probabilistic injuries sufficient for

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*already* occurred. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014) (“[T]he Article III standing and ripeness issues in this case ‘boil down to the same question.’” (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007))); *see also id.* (collecting cases). There may also be cases where the standing requirement of traceability and ripeness overlap. *See, e.g.*, *MedImmune*, 549 U.S. at 128 n.8 (“The justiciability problem that arises, when the party seeking declaratory relief is himself preventing the complained-of injury from occurring, can be described in terms of standing (whether plaintiff is threatened with ‘imminent’ injury in fact ‘fairly . . . trace[able] to the challenged action of the defendant’), or in terms of ripeness (whether there is sufficient ‘hardship to the parties [in] withholding court consideration’ until there is enforcement action).” (internal citations omitted)).

- 21 *Compare Clapper*, 133 S. Ct. at 1147 (majority opinion) (collecting cases) (“[W]e have repeatedly reiterated that ‘threatened injury *must* be *certainly impending* to constitute injury in fact’ . . . .” (first emphasis added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))), *with id.* at 1160 (Breyer, J., dissenting) (“Sometimes the Court has used the phrase ‘certainly impending’ as if the phrase described a *sufficient*, rather than a *necessary*, condition for jurisdiction.” (collecting cases)); *see also* *Pennsylvania v. West Virginia*, 262 U.S. at 593 (“If the injury is certainly impending that is enough.”); *Babbitt*, 442 U.S. at 298 (same).
- 22 This is so despite some readings of Supreme Court precedent in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as suggesting otherwise. *See* *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996) (describing this interpretation before rejecting it), *cited with approval* in *Massachusetts v. EPA*, 549 U.S. 497, 525 n.23 (2007).
- 23 *See, e.g.*, *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 155 (2010) (recognizing that “[a] substantial risk of gene flow injures respondents in several ways” that are in addition to the gene flow injury, should it occur); *Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 74 (1978) (identifying as direct and present injury the emission of non-natural radiation into the environment given “generalized concern about exposure to radiation and the apprehension flowing from the uncertainty” about health consequences); *Kerin v. Titeflex Corp.*, 770 F.3d 978, 981–82 (1st Cir. 2014) (collecting cases) (“Cases claiming standing based on risk . . . potentially involve two injuries.”); *see also, e.g.*, *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014) (recognizing “[t]wo types of injuries [that] may confer Article III

standing in cases ranging from medical harm to environmental risk, and have acknowledged the possibility for such recognition in others, like products liability.<sup>24</sup> And although the Supreme Court has not yet definitively spoken, it has recognized probabilistic injury, at least nominally.<sup>25</sup>

But while there is room in the doctrine for recognizing probabilistic injuries, its extent remains unclear and courts have repeatedly expressed the need for caution.<sup>26</sup> As the D.C. Circuit has recognized, if all increased risk constituted injury, then the entire requirement would be eviscerated: “all hypothesized, non-imminent ‘injuries’ could be dressed up as ‘increased risk of future injury.’”<sup>27</sup> It is not surprising, then, that the Supreme Court has cautioned that some purported probabilistic injuries (and responses thereto) constitute little more than an effort to “manufacture standing.”<sup>28</sup> And so, as the First Circuit has suggested, just because the probabilistic injury “is present, satisfying imminence, that injury may still be *speculative*.”<sup>29</sup>

But while some courts have suggested caution, others have held that “even a small probability of injury is sufficient to create a case

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standing” in First Amendment challenges (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56–57 (1st Cir. 2003)); see also *Clapper*, 133 S. Ct. at 1163 (Breyer, J., dissenting) (“In some standing cases, the Court has found that a reasonable probability of *future* injury comes accompanied with *present* injury that takes the form of reasonable efforts to mitigate the threatened effects of the future injury or to prevent it from occurring.”).

24 See, e.g., *Kerin*, 770 F.3d at 980–81 & n.1.

25 See, e.g., *Massachusetts v. EPA*, 549 U.S. at 525–26 (holding that “[t]he risk of catastrophic harm” to Massachusetts’ coastline from climate change satisfied the requirement); *id.* at 525 n.23 (citing relevant circuit cases for the proposition that “[t]he more drastic the injury that government action makes more likely, the lesser the increment in probability to establish standing”); see also *Clapper*, 133 S. Ct. at 1162 (Breyer, J., dissenting) (identifying cases in which the Court “found *probabilistic* injuries sufficient to support standing” (citing *Monsanto*, 561 U.S. 139; *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978))). But see *Massachusetts v. EPA*, 549 U.S. at 520 (emphasizing that “the Commonwealth is entitled to special solicitude in our standing analysis”); Robert Terenzi, Jr., Note, *When Cows Fly: Expanding Cognizable Injury-in-Fact and Interest Group Litigation*, 78 *Fordham L. Rev.* 1559, 1584 & n.212 (2009) (suggesting the Court “only allowed the suit to proceed” because of states’ special status).

26 See, e.g., *Kerin*, 770 F.3d at 982; *Baur v. Veneman*, 352 F.3d 625, 633–34 (2d Cir. 2003) (limiting holding to “the specific context of food and drug safety suits”).

27 *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005).

28 *Clapper*, 133 S. Ct. at 1143 (majority opinion).

29 *Kerin*, 770 F.3d at 982.

or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability.”<sup>30</sup> And so the doctrinal confusion continues as to when an increased risk is concrete rather than speculative.<sup>31</sup> A solution is needed.

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- 30 Vill. of Elk Grove Vill. v. Evans, 997 F.2d 328, 329 (7th Cir. 1993) (citing Pennell v. San Jose, 485 U.S. 1, 8 (1988)) (describing increased risk of flooding as a probabilistic injury).

Further compounding the difficulty in interpreting these lines of cases is that the distinction between the analysis of injury in fact, causation, and redressability is somewhat murky. To some extent, this reflects an ambiguity in the case law about the distinction between the three parts of the test. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (“While each of the three prongs of standing should be analyzed distinctly, their proof often overlaps.”); see also *Amnesty Int’l USA v. Clapper*, 667 F.3d 163, 167 (2d Cir. 2011) (Lynch, J., concurring in denial of rehearing in banc) (noting disagreement about whether the panel opinion had “somehow muddle[d] these well-established requirements” or “analyze[d] each element separately and in detail”), *panel op. rev’d*, 133 S. Ct. 1138 (2013). But another possibility is that the relationship between these requirements is integral to the analysis of increased risk as injury in fact. See *infra* note 206; see also *infra* note 216.

- 31 The examples of doctrinal confusion are too numerous to discuss at length. Here are a few examples:

First, in addition to those identified in the text concerning the elasticity of “imminence” and “certainly impending,” it is uncertain whether the existence of a “substantial risk” that the harm will occur is sufficient. Compare *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (“[F]uture injury may suffice if the threatened injury is ‘certainly impending,’ or there is a “substantial risk” that the harm will occur.” (emphasis added) (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n.5)), with *Clapper*, 133 S. Ct. at 1150 n.5 (expressing doubt that the “substantial risk” standard is relevant . . . [or] distinct from the ‘clearly impending’ requirement”). But see *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 693 (7th Cir. 2015) (reasoning that *Clapper* “did not jettison the ‘substantial risk’ standard” while treating it as an independent standard).

Second, if “substantial risk” survives as an independent standard, there remains ambiguity about what it means for risk to be “substantial.” Some cases have held that a small likelihood of a severe harm suffices, while others refuse to do so. Compare *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996) (“The more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing.”), and *Vill. of Elk Grove*, 997 F.2d at 329 (“[E]ven a small probability . . . is sufficient.”), with *Clapper*, 133 S. Ct. at 1147 (suggesting that any likelihood standard must be consistent with the “requirement that ‘threatened injury . . . be *certainly impending*’” (emphasis added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))), and *Reilly v. Ceridian Corp.*, 664 F.3d 38, 44–45 (3d Cir. 2011) (suggesting that many cases where increased



risk was held sufficient were really cases in which “the damage has been done” but is not yet quantifiable). *Cf. Mountain States*, 92 F.3d at 1235 (identifying a case where “the court found enhanced risk of fire an adequate injury, not even mentioning the issue of risk quantification” (citing *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978))). Part of the problem is clear: determining whether a risk is “substantial” requires the courts to opine both on the severity of the injury and the likelihood of its occurrence—issues about which reasonable minds might differ, and which are not ordinarily part of the injury-in-fact inquiry, where even “an identifiable trifle will suffice.” *Gaston Copper*, 204 F.3d at 156 (quoting *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996)); *see also* *Conservation Council v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) (“[A]n identifiable trifle, if actual and genuine, gives rise to standing.” (internal quotation marks omitted)); *Kerin*, 770 F.3d at 982–83 (recognizing room for disagreement about size and significance of risk). *Compare Baur*, 352 F.3d at 637 (“[E]ven a moderate increase in the risk of disease may be sufficient . . . .”), *with Terenzi*, *supra* note 25, at 1592 (suggesting that the *Baur* court “ignored . . . that the chances of [actual harm] were *miniscule*” (emphasis added)); *id.* at 1562, 1585–87.

Further complicating matters is that different standards appear to apply in different types of cases. Some courts have identified as “an open question” whether *Clapper*’s “admittedly rigorous standing analysis should apply in a case that presents neither national security nor constitutional issues.” *E.g.*, *Moyer v. Michaels Stores, Inc.*, No. 14-C-561, 2014 WL 3511500, at \*5 (N.D. Ill. July 14, 2014); *cf. Clapper*, 133 S. Ct. at 1147 (“[O]ur standing inquiry has been especially rigorous when reaching the merits . . . would force us to decide whether an action taken by one of the other two branches . . . was unconstitutional.” (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997))). But a more relaxed standard is applied to pre-enforcement challenges. *See Susan B. Anthony List*, 134 S. Ct. at 2342 (“[A] plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’” (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979))). At least one commentator seems to suggest that viewing the Court’s limitations on injuries sufficient for standing in this manner—as going to “the *type* of [that] injury, not the *size* of that injury”—resolves the tension between the Court’s “refus[al] to abandon its rhetorical stance that any trifle suffices for standing” and the Court’s limitation of “the types of injuries that may support standing.” *See* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 67 n.60, 69 n.73 (2012). Even so, courts are not consistent in their treatment of certain categories. *Compare, e.g., Clapper*, 133 S. Ct. at 1147 (noting extra rigor for constitutional challenges to executive or legislative action), *with Baur*, 352 F.3d at 637 (collecting cases) (suggesting when “risk of harm arises from an established government policy” this counts in favor of standing); *see also, e.g.*, Miles L. Galbraith, Comment, *Identity Crisis: Seeking a Unified Approach to Plaintiff Standing for Data Security Breaches of Sensitive Personal Information*, 62 AM. U. L. REV. 1365, 1379 (2013) (“The Court applied a seemingly lower bar [in *Doe*] than in *Lujan* [by] acknowledging that a plaintiff who was . . . ‘greatly

Some scholars have responded by suggesting that courts stop trying to distinguish cases and instead recognize all such increased risks as injury.<sup>32</sup> Courts sympathetic to this direction suggest leaving it to the merits.<sup>33</sup> Such calls are not altogether different from calls to eschew standing doctrine in its entirety.<sup>34</sup> But whatever merit there may be to such proposals, they do little to advance doctrinal clarity. The Supreme Court is unlikely to adopt either proposal—to weaken the standing requirement by recognizing all increased risks as injury, or to eschew the requirement in its entirety.<sup>35</sup> And, because standing is a *jurisdictional* question coming prior to the merits, it cannot be avoided: proceeding to the merits without addressing standing effectively answers the standing question in the affirmative, in contravention of case law recognizing that there are limits.<sup>36</sup> This

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concerned and worried because' of potentially 'devastating consequences' of the exposure of his social security number . . . had standing under Article III." (quoting *Doe v. Chao*, 540 U.S. 614, 617, 624–25 (2004); *Doe*, 540 U.S. at 641 (Ginsburg, J., dissenting)) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570–71 (1992))).

32 See, e.g., Hessick, *supra* note 31.

33 See, e.g., *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 571, 575 (6th Cir. 2005) (“[A] vast increase in the risk of injury clearly establishes an injury in fact, but to require a plaintiff to so clearly demonstrate her injury in order to confer standing is to prematurely evaluate the merits of her claims.”); cf. Galbraith, *supra* note 31, at 1377 (“With a lack of clear definitions to guide the application of the standing doctrine, courts often erroneously apply the doctrine as a decision on the merits under the pretense of a jurisdictional inquiry.”) (citing Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466 (2008)); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

34 See, e.g., Tushnet, *supra* note 33, at 664–665; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167, 222–23 (1992) (arguing “that the injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process . . . us[ing] highly contestable ideas about political theory to invalidate congressional enactments, even though the relevant constitutional text and history do not call for invalidation at all”); cf. Galbraith, *supra* note 31, at 1377.

35 Cf. *Raines*, 521 U.S. at 819 (noting that the Court “ha[s] always insisted on strict compliance with this jurisdictional standing requirement”).

36 See *id.* at 820 (“[W]e must put aside the natural urge to proceed directly to the merits . . . .”); *Sutton*, 419 F.3d at 573 (“Though the court . . . did not specifically address whether the plaintiff had standing, by reaching the merits . . . it clearly found a sufficient injury in fact to confer Article III standing.”); see also *supra* notes 26–29 and accompanying text (discussing limitations on standing).

Article explores a more likely solution that takes seriously the courts' repeated admonition that the requirement of "actual or imminent injury" has teeth and that recognizing all increased risks as injury would "render[] [it] moot."<sup>37</sup>

### **B. Data Breach & Leaks: The Latest Example of the Disarray**

The latest example of the disarray appears in the circuit split over standing for victims of "mere data breach." Mere data breach provides a useful case study because it is a paradigmatic case of probabilistic injury that, though sympathetic, is not obviously sufficient for injury in fact.<sup>38</sup> It's also reasonably accessible, but unresolved: courts that have considered the problem have exhibited diametrically opposing views.<sup>39</sup>

A "data breach" occurs when a third party illicitly gains unauthorized access to data stored by another entity.<sup>40</sup> The manner in which this occurs varies, as does the extent of what is known about the third party's intentions. Sometimes a website is breached,<sup>41</sup> or a hacker gains access to a system containing large numbers of records,<sup>42</sup>

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Note, however, that this does not preclude the possibility that, in some cases, the standing and merits analysis may overlap (e.g., where injury arises from the violation of a statutorily created right). See *infra* Part III. Rather, it is only to suggest that there is not overlap in *all* cases, and so proceeding directly to the merits as a matter of course is improper.

37 Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005).

38 See Galbraith, *supra* note 31, at 1379–82 (suggesting that most district courts deny standing for "plaintiffs whose data has been breached, but not yet misused," but that an increasing minority of courts have begun to recognize standing following the Seventh Circuit's 2007 decision in *Pisciotta* (citing *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629 (7th Cir. 2007))).

39 Compare *Pisciotta*, 499 F.3d at 634 (finding standing for mere data breach), and *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (same), with *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43–45 (3d Cir. 2011) (denying standing). See also Galbraith, *supra* note 31, at 1378–79 ("A survey of district court rulings in data breach cases reveals a history of inconsistent outcomes . . .").

40 Data breach, in the sense used here, differs from other forms of data mishandling in that the data was not intentionally or accidentally released; rather, a third party accessed the data without the aid or permission of the entity storing the data.

41 See, e.g., *Pisciotta*, 499 F.3d at 632.

42 See, e.g., *Reilly*, 664 F.3d at 40.

other times, hardware containing records is stolen.<sup>43</sup> “[T]he scope and manner of access [in some cases] suggests that the intrusion was *sophisticated, intentional and malicious*”;<sup>44</sup> in others, little is known about “whether the hacker read, copied, or understood the data.”<sup>45</sup>

But in each of these cases, those whose personal information has been compromised face an increased risk that their information will be misused, and are encouraged to take measures, including credit monitoring, to mitigate the risk.<sup>46</sup> The harm risked ranges from the mundane, like fraudulent charges that are quickly reimbursed, to the severe and possibly irreparable, like damaged credit ratings or criminal records.<sup>47</sup>

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43 See, e.g., *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1322 (11th Cir. 2012) (discussing plaintiffs’ allegations that they “bec[a]me victims of identity theft” when thieves stole a healthcare company’s unencrypted laptops that contained plaintiffs’ personal information); *Krottner*, 628 F.3d at 1140 (finding standing where an unencrypted laptop containing information about approximately 97,000 employees was stolen from Starbucks).

44 *Pisciotta*, 499 F.3d at 632 (emphasis added).

45 See, e.g., *Reilly*, 664 F.3d at 40.

46 See, e.g., Fed. Trade Comm’n, *Identity Theft*, CONSUMER INFORMATION, <http://www.consumer.ftc.gov/features/feature-0014-identity-theft> (last visited Sept. 12, 2015) [hereinafter *FTC Advice*] (providing links and advice, including to [identitytheft.gov](http://identitytheft.gov), the “federal government’s one-stop resource to help you report and recover from identity theft”).

47 Some of these severe harms are difficult to quantify, owing to lost opportunity costs (as with damaged credit ratings) or jarring repercussions for an individual’s personal identity (as where victims are subjected to personal, non-legal blame in addition to legal blame for the criminal acts of their illicit alter egos). See *FTC Advice*, *supra* note 46 (discussing credit ratings); Christopher P. Couch, Comment, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 ALA. L. REV. 583, 586 (2002) (collecting sources) (providing examples of how the effects of identity theft can accumulate, as where it leads to loss of employment); *Murray v. Bank of Am., N.A.*, 580 S.E.2d 194, 197–98 (S.C. Ct. App. 2003) (recounting how an identity-theft victim was “arrested in front of her son” and the ensuing psychological and physiological effects); see also *United States v. Karro*, 257 F.3d 112, 121 (2d Cir. 2001); Amanda Blades, Note, *Can’t Get No Satisfaction: The Consequences of Pisciotta v. Old National Bancorp*, 499 F.3d 629 (7th Cir. 2007) for *Potential Victims of Identity Theft*, 33 S. ILL. U. L.J. 509, 510–11 (2009).

Although some of the damage caused when stolen information results in damages ratings or a criminal record can now be undone, the process remains arduous and the risk of further harm “linger[ing].” See, e.g., Fed. Trade Comm’n, *Recovery Steps*, IDENTITY THEFT, <https://www.identitytheft.gov/Steps> (last visited Sept. 12, 2015); Lilia Rode, Comment, *Database Security Breach Notification Statutes: Does Placing Responsibility on the True Victim Increase Data Security?*, 43 Hous. L. REV. 1597, 1601 (2007); cf. *United States v. Williams*,

Where a party claims that actual identity theft<sup>48</sup> resulted from the breach, courts have generally found injury in fact.<sup>49</sup> Courts have also found standing even where the remedy sought only addresses *future* damage, provided that actual identity theft has been alleged.<sup>50</sup> The Seventh Circuit recently held that even mere misuse of data short of identity theft, like fraudulent charges, could ground standing for an entire class of data breach victims, including those who had not yet suffered any damage.<sup>51</sup> In these cases, evidence of actual misuse is taken to move the risk from the realm of the hypothetical into the concrete.<sup>52</sup>

But there is little consensus about whether a mere data breach without actual identity theft or even data misuse, constitutes injury in fact, and the circuits are split.<sup>53</sup> This is not surprising, in light

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- 355 F.3d 893, 898 (6th Cir. 2003) (discussing how some identity thieves use stolen information “to ‘breed’ . . . new or additional forms of identification”).
- 48 See *Identity Theft*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “identity theft” as the “unlawful taking *and use* of another’s person’s identifying information for fraudulent purposes” (emphasis added)). In the context of data breach, courts are not always clear about the necessity of economic harm to show “actual” identity theft. Compare *Resnick*, 693 F.3d at 1322–24 (recognizing allegations that plaintiffs “have become victims of identity theft *and have suffered monetary damages as a result*” (emphasis added)), with *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 692–93 (7th Cir. 2015) (rejecting argument that reimbursement undermines claimed-of injury).
- 49 See, e.g., *Resnick*, 693 F.3d at 1322–24.
- 50 In *Lambert v. Hartman*, 517 F.3d 433 (6th Cir. 2008), for example, the plaintiff alleged that she suffered identity theft when her traffic citation was published online. *Id.* at 435–36. The Sixth Circuit rejected the argument that the plaintiff lacked standing because she limited “her remedy to credit monitoring relief.” *Id.* at 437. Even so, the court’s decision appears grounded on the allegation of actual identity theft, including “actual financial injuries.” *Id.*
- 51 See *Remijas*, 794 F.3d at 692–93; cf. *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (collecting cases) (“For each claim, if . . . standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.”).
- 52 See *Lambert*, 517 F.3d at 437 (“Although this [increased risk of future identity theft] is somewhat ‘hypothetical’ and ‘conjectural,’ her actual financial injuries are sufficient to meet the injury-in-fact requirement.”).
- 53 Compare *Pisciotta v. Old Nat’l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007) (finding standing for mere data breach), and *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (same), with *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43–45 (3d Cir. 2011) (denying standing); see also *Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012) (“The courts of appeals have evidenced some disarray about the applicability of this sort of ‘increased risk’ theory in data privacy cases.”); *Krottner*, 628 F.3d at 1143 (suggesting the Sixth Circuit

of the general confusion over increased risk cases discussed above. Some, including the Seventh and Ninth Circuits, have held that the increased risk is sufficient, analogizing to cases of increased risk of medical and environmental harm.<sup>54</sup> But others, including the Third Circuit, have called these analogies “skimpy” and declined to find injury in fact.<sup>55</sup>

To illustrate the differences in approach, consider the three major circuit cases forming the split. These are factually similar. In the earliest circuit case, *Pisciotta v. Old National Bancorp*,<sup>56</sup> banking-services applicants sought “compensation for past and future credit monitoring services” after learning the bank’s website had been breached.<sup>57</sup> Although the investigation’s results remain under seal, the Seventh Circuit stated that “the scope and manner of access suggests that the *intrusion* was sophisticated, intentional and malicious.”<sup>58</sup> But “the plaintiffs did not allege any *completed direct* financial loss to their accounts” or that they “*already had been*” victims of identity theft.<sup>59</sup>

Similarly, in the Ninth Circuit case of *Krottner v. Starbucks Corp.*,<sup>60</sup> an unencrypted laptop containing information about

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would *not* find standing for mere data breach (citing *Lambert*, 517 F.3d at 437)); *cf. Lambert*, 517 F.3d at 437 (noting in dicta that an allegation of having been “exposed to the risk that people have accessed [the plaintiff’s] personal information on the internet and will be able to use that information to commit future acts of identity theft” was “somewhat ‘hypothetical’ and ‘conjectural’”).

The district courts exhibit a similar disarray. For opinions denying standing, see, for example, *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1051–53 (E.D. Mont. 2009); *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006); *Bell v. Acxiom Corp.*, No. 4:06-cv-00485, 2006 WL 2850042, at \*2 (E.D. Ark. Oct. 3, 2006); *Giordano v. Wachovia Sec., LLC*, No. 06-476, 2006 WL 2177036, at \*5 (D.N.J. July 31, 2006).

For opinions finding standing, see, for example, *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1020–22 (N.D. Cal. 2012); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.*, 580 F. Supp. 2d 273, 280 (S.D.N.Y. 2008); *McLoughlin v. People’s United Bank*, No. 3:08-cv-00944, 2009 WL 2843269, at \*4 (D. Conn. Aug. 31, 2009).

54 See *Pisciotta*, 499 F.3d at 634; *Krottner*, 628 F.3d at 1142.

55 *Reilly*, 664 F.3d at 43–44.

56 499 F.3d 629 (7th Cir. 2007).

57 *Id.* at 631–32, 635 (noting that plaintiffs sued on theories of negligence and contract).

58 *Id.* at 632 (emphasis added).

59 *Id.*

60 628 F.3d 1139 (9th Cir. 2010).

approximately 97,000 employees was stolen from Starbucks.<sup>61</sup> Only one named plaintiff alleged that a third party used his information to open a bank account unsuccessfully.<sup>62</sup> The other named plaintiffs alleged only that they suffered “generalized anxiety and stress,” and spent a “substantial amount of time” monitoring their accounts.<sup>63</sup> None alleged any *damage* from actual identity theft, and the opinion provides no other information about the thief’s intentions.<sup>64</sup>

Finally, in the Third Circuit case of *Reilly v Ceridian Corp.*,<sup>65</sup> the payroll firm Ceridian suffered a breach during which a hacker gained access to its system containing the information of about “27,000 employees at 1,900 companies.”<sup>66</sup> According to the opinion, “[i]t is not known whether the hacker read, copied, or understood the data.”<sup>67</sup>

In all three cases, the plaintiffs sought damages for “past and future credit monitoring services,” and did so primarily on state-law theories of negligence and contract.<sup>68</sup> The harms alleged in each case boiled down to: “(1) hav[ing] an increased risk of identity theft, (2) incurr[ing] costs to monitor their credit activity, and (3) suffer[ing] from emotional distress”<sup>69</sup>—the latter two being direct responses to the first, the increased risk. *None* of these plaintiffs alleged that they had suffered *actual* identity theft, and only one lone plaintiff in *Krottner* could even allege an attempt.<sup>70</sup>

Despite the similarities in the nature of the injury alleged, the circuits varied in their analysis, even among those that agreed about the end result. The Seventh Circuit offered only a sweeping

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61 *Id.* at 1140.

62 *See id.* at 1141–42 (noting the absence of any financial loss).

63 *Id.*

64 *Id.* at 1141 (noting that when Starbucks notified plaintiffs of the breach a month after it occurred, it claimed it had “no indication that the private information has been misused”).

65 664 F.3d 38 (3d Cir. 2011).

66 *Id.* at 40.

67 *Id.*

68 *Pisciotta v. Old Nat’l Bancorp.*, 499 F.3d 629, 631–32, 635 (7th Cir. 2007); *Krottner*, 628 F.3d at 1141. The plaintiffs in *Reilly* also alleged violation of the New Jersey Identity Theft Prevention Act. *See Reilly v. Ceridi[a]n Corp.*, No. 10-5142, 2011 WL 735512, at \*2 (D.N.J. Feb. 22, 2011), *aff’d*, 664 F.3d 38, 41 (3d Cir. 2011).

69 *Reilly*, 664 F.3d at 40; *see Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1141–42 (9th Cir. 2010); *Pisciotta*, 499 F.3d at 632.

70 *See Krottner*, 628 F.3d at 1141 (noting that even the lone plaintiff who could allege an attempted account opening “d[id] not allege that he suffered any financial loss”); *see also Reilly*, 664 F.3d at 42; *Pisciotta*, 499 F.3d at 632.

statement that “the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant’s actions.”<sup>71</sup> The Circuit offered no further analysis, citing a handful of cases, not all on point.<sup>72</sup>

By contrast, the Ninth Circuit found that the increased risk argument required analysis. It addressed “‘generalized anxiety and stress’ as a result of the laptop theft” and “increased risk of future identity theft” as *independent* injuries, concluding that the former was easily “sufficient to confer standing” but conceding—unlike the Seventh Circuit—that the latter posed a challenge.<sup>73</sup> Although the Ninth Circuit ultimately agreed with the Seventh Circuit and relied on similar authority, it did not clearly explain why the threatened harm was “real and immediate, not conjectural or hypothetical,” or the difference the fact that an actual attempt at identity theft may have made to its analysis.<sup>74</sup> It noted only that if plaintiffs had sued not over a stolen laptop, but over the risk that the laptop would be stolen, the court would have found “the threat far less credible.”<sup>75</sup>

The Third Circuit parted ways and dismissed for lack of standing.<sup>76</sup> The court reasoned that the allegations were of “hypothetical, future injury,” not one “certainly impending,” because the “contentions rely on speculation that the hacker . . . read, copied, and understood their personal information,” intended to misuse it, and was capable of so doing.<sup>77</sup> The court added that “[u]nless and until these conjectures come true, [plaintiffs] have not suffered any injury; there has been no misuse of the information, and thus, no harm.”<sup>78</sup>

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71 *Pisciotta*, 499 F.3d at 634.

72 *Id.* at 634 & n.3 (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264–65 (2d Cir. 2006); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574–75 (6th Cir. 2005); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947–48 (9th Cir. 2002); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000)). The Seventh Circuit also collected its own precedent finding probabilistic standing. *See id.* at 634 & n.4. For a discussion of the relevance of these cases, *see infra* Part II and note 171.

73 *Krottner*, 628 F.3d at 1142.

74 *Id.* at 1141–43 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *cf. Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 691–94 (7th Cir. 2015).

75 *Krottner*, 628 F.3d at 1143.

76 *Reilly v. Ceridian Corp.*, 664 F.3d 38, 40 (3d Cir. 2011).

77 *Id.* at 42–43.

78 *Id.* at 42.



The court's treatment of *Pisciotta* and *Krottner* was curious. First, the court distinguished them, reasoning that, in those cases, "the threatened harms were significantly more 'imminent' and 'certainly impending' than the alleged harm here" as evidenced by investigations revealing the "sophisticated, intentional and malicious" nature of the hacking attempt in *Pisciotta*, and allegations of an actual attempted misuse in *Krottner*.<sup>79</sup> The Third Circuit reasoned that, by contrast, in *Reilly*, "all that is known is that a firewall was penetrated."<sup>80</sup> But the Third Circuit also expressed skepticism as to whether there should have been standing in *Pisciotta* and *Krottner* at all: The court criticized its sister courts as having "simply analogized data-security-breach situations to defective-medical-device, toxic-substance-exposure, or environmental-injury cases" without "making a determination as to whether the alleged injury was 'certainly impending.'"<sup>81</sup> The court rejected the analogy to medical monitoring, noting that in those cases "the damage has been done" even though the extent is not yet quantifiable, and, even if that were not so, "[c]ourts resist strictly applying the 'actual injury' test when the future harm involves human suffering or premature death."<sup>82</sup> The court rejected the environmental analogy, reasoning that environmental harm is seldom reversible, unlike harm from identity theft.<sup>83</sup> This part of the opinion suggests that the court did not so much distinguish *Pisciotta* and *Krottner* as disagree about the correct application of constitutional standing requirements to mere-data-breach cases, creating a circuit split.<sup>84</sup>

This Article suggests that neither side of the split quite gets it right because both miss the underlying conceptual problem, and so fail to ask the right questions. Once one recognizes the normative choices that must be made, it is no longer apparent that the courts are the right branch to determine probabilistic injury in all cases. We turn to a sketch of this framework next.

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79 *Id.* at 44.

80 *Id.*

81 *Id.*

82 *Id.* at 45.

83 *Id.*

84 *Id.* at 44.

### C. Introducing “Double-Normative Theory”: Before Risk Becomes an Injury, There Must First Be an Interest

Probabilistic standing leads to so much confusion and disagreement because it exacerbates the problems created by assuming that “whether there is an ‘injury’ can be answered as if it were a purely factual matter—as if the existence of injury depended on some brute fact, not on evaluation, and not on law.”<sup>85</sup> This trap has long been recognized to cause problems in the ordinary, nonprobabilistic standing case.<sup>86</sup> But it is particularly acute for probabilistic harm because the normative choice must be made twice.<sup>87</sup>

This section sketches a framework for understanding the problem, and its implications for what may be relevant to the inquiry. It begins with an argument that injury in fact is not a factual inquiry, but an irreducibly normative endeavor—that is, a normative endeavor that cannot be reduced to a series of factual inquiries. Second, this conclusion is applied to increased risk, with the conclusion that the normative choice must be made twice, once with respect to the threatened interest and once with respect to an interest in not having the first interest threatened. That is, I argue that it does not follow from having a primary interest that one also has a secondary “safety interest” in avoiding risk of harm to the primary interest. This explains why, for example, identity theft could be an injury even if increased risk of it is not. It also provides an inroad to the central thesis of this Article, that different decision makers—*i.e.*, branches—may make the two choices. Finally, a suggestion is made for how to characterize this interest in avoiding a particular threat.

#### 1. Finding Actualized Injury: A Normative Choice

The difficulty with injury in fact is that the doctrine, at least in its inception, was conceptually flawed.<sup>88</sup> The doctrine was intended to simplify the standing inquiry by “shifting from a complex inquiry of law (is there a legal injury?) to an exceedingly simple, law-free

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85 Sunstein, *supra* note 34, at 188–89.

86 *See id.* at 188–91.

87 *See infra* Part I.C.2.

88 For a similar view, see William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 231 (1988) (describing the injury-in-fact requirement as “a singularly unhelpful, even incoherent, addition to the law of standing”).

inquiry into fact (is there a factual harm?).”<sup>89</sup> Courts have described this sort of “factual harm,” or “injury,” as simply an “adverse effect” on an individual’s “interests.”<sup>90</sup> But this presents a problem: absent recognition of normative facts (a topic for another time),<sup>91</sup> there is no such thing as a “factual” harm or even a “factual” interest.<sup>92</sup> That is, insofar as courts claim to “discover” pre-existing injury—injury that exists independently of legal norms—courts are making a false claim.<sup>93</sup>

This problem can be made plain by attempting to identify what such a “fact” might look like. The most straightforward way to do so is to define “injury” as an effect on an individual that that individual *dislikes*, or an effect on something the individual likes to which the individual *objects*. These would be descriptions about the mental state of the individual, and so lacking in normative content. But this approach would do little to differentiate between those plaintiffs with standing and those without. All plaintiffs can point

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89 Sunstein, *supra* note 34, at 188.

90 See, e.g., *Doe v. Chao*, 540 U.S. 614, 624–25 (2004) (“[A]n individual subjected to an adverse effect has injury enough to open the courthouse door.”); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining “injury in fact” as “an invasion of a legally protected interest”).

91 See, e.g., 2 DEREK PARFIT, *ON WHAT MATTERS* 263–69 (Oxford 2011) (summarizing conflicting theories of extent to which normative claims may be true or false—or capable of being true or false).

92 This Article uses “fact” to denote descriptive facts that are independent of values or interpretations. There, of course, may be facts about what values or interpretations someone holds or has made, but the values and interpretations themselves are not matters of “fact.” This is narrower than the philosophical usage of “fact” as simply something that is capable of being true or false. Cf. *Fact*, BLACK’S LAW DICTIONARY (10th ed. 2015) (defining “fact” as “something that actually exists; an aspect of reality” or “[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation”).

This Article uses “normative” to mean reflecting values or a choice of standards. See Sunstein, *supra* note 34, at 188–89 (using a similar concept); PARFIT, *supra* note 91, at 267–69; *Normative*, SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* (Oxford 2d rev. ed. 2008). “Normative” can also mean “reason-giving.” See John Broome, *Is Rationality Normative?*, 2 *DISPUTATIO* 161, 162–63 (Nov. 2007) (special issue) (explaining the distinction); see also PARFIT, *supra* note 91, at 267–69 (discussing additional uses of “normative”).

93 See, e.g., Sunstein, *supra* note 34, at 167, 185–86, 188–89.

to an effect they dislike; otherwise, why come to court?<sup>94</sup> And so it cannot be that courts are using “injury” in this manner. Courts often deny standing, and when they do, they deny that an event harming something the plaintiff likes (e.g., threatened extinction of a valued species, racial stigmatization of one’s children) adversely affects the plaintiff’s own interests.<sup>95</sup>

But then, what *are* courts doing? The answer is that courts, in making these determinations, are not *describing* the world, but making *judgments* about what sets of facts entitle which plaintiffs to seek judicial relief.<sup>96</sup> As Professor Cass Sunstein has observed, such “judgment[s] may be right, but [they] ha[ve] little to do with facts or concreteness.”<sup>97</sup> “Injury” is thus a normative concept, not a descriptive one.<sup>98</sup>

That courts necessarily make judgments may seem “obscure.”<sup>99</sup> Some “injuries” appear so obvious (being punched) that it is difficult to see them as reflecting normative judgments. But this is because there is a long tradition of characterizing the event as an injury, and of recognizing the interests in question (bodily integrity). That a judgment has long been made does not make the judgment any less normative; time does not convert a judgment into a nonnormative factual description.

Of course, as alluded to above, you might suggest that there are *normative facts* about what constitutes “injury.”<sup>100</sup> If there were, then courts could “discover” injury rather than “judging” there to be injury (assuming such facts are discoverable). But we should avoid, where possible, assuming that the courts have adopted controversial

94 *Id.* at 189 (“[I]n every case, the person who brings a lawsuit believes that she has indeed suffered an injury in fact.”).

95 *See Lujan*, 504 U.S. at 562–67; *Allen v. Wright*, 468 U.S. 737, 753–57 (1984).

96 Sunstein, *supra* note 34, at 189; *cf. id.* at 177 (“The relevant [early English and American] practices suggest not that everyone has standing, nor that Article III allows standing for all injuries, but instead something far simpler and less exotic: people have standing if the law has granted them a right to bring suit.”).

97 *Id.* at 189. This is not to deny that facts play a role; there should not be a difference in judgment about whether there is an injury unless there is a difference in facts. But a difference in facts does not, without more, entail a difference in judgment about whether there is an injury.

98 *See supra* note 92. For a similar view, see *Fletcher*, *supra* note 87, at 231–32, 248–49 (“[I]njury can only be assessed against some normative structure.”); *see also id.* at 231 n.61 (collecting literature making similar arguments).

99 *See Sunstein*, *supra* note 34, at 189–90.

100 *See, e.g., PARFIT*, *supra* note 91, at 263–69.

meta-ethical positions to understand a given doctrine, particularly given some members of the courts' self-professed general disdain for value theory—or, at least self-professed disdain for needing to rely on the fruits of practical philosophy.<sup>101</sup> That they are likely incorrect about that does not affect our project: the absence of such moral inquiry in ruling on standing suggests that the inquiry into “injury in fact” is not concerned with normative *facts*, even supposing such facts exist.

Thus, if used beyond the descriptive sense offered of likes and dislikes, “injury” is irreducibly normative—that is, the value-laden standards upon which injury in fact depends cannot be “reduced” to a nonnormative factual inquiry. But that “injury in fact” is normative is not the problem. Rather, the trouble arises from the insistence that normative choices need not be made (and, as suggested in the note, such trouble may not be limited to doctrinal confusion).<sup>102</sup> Once we accept that normative choices must be made, for the reasons set forth above, we can proceed to the next question: what are the appropriate sources of these normative choices? That is, where and by whom ought they be made?

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101 See, e.g., Sam Baker, *Justice Scalia: 'Not My Job' to be 'Moral Philosopher'*, BRIEFING ROOM: THE HILL'S POLITICAL NEWS BLOG (Oct. 1, 2013, 1:01 AM), <http://thehill.com/blogs/blog-briefing-room/news/325677-justice-scalia-not-my-job-to-act-as-moral-philosopher>.

102 This insistence that choices need not be made also masks the full force of the Court's claim of interpretative power if common misreadings of standing doctrine—like that of *Lujan*—are correct. Those misreadings take the Court to be asserting that Congress cannot create legal interests, the violation of which give rise to standing, because the courts are just “discovering” pre-existing injury rather than “creating” it. The purpose of this section has been to argue that, insofar as courts claim to “discover” pre-existing injury—injury that exists independently of legal norms—courts are making a false claim. Claiming sole power of such discovery is already a claim of tremendous interpretative power; recognizing that courts cannot be “discovering” suggests that the Court's claim of tremendous interpretive power (under the misreading of *Lujan*) is really a much stronger power-grab than simply rejecting Congress's ability to define injury. It is to claim the power to define an injury requirement divorced from the notion of “legal injury,” and divorced from any other discernable normative framework. This is troubling, and a further reason to reject the old reading.

For a discussion of why such misreadings are not correct, see *infra* Part III.B.

## 2. Finding Probabilistic Injury: Two Normative Choices

Probabilistic injuries create such disarray, in part because they require at least two normative choices, and in part because there are different ways to characterize the injury. This subsection discusses the two choices; the next subsection discusses the characterization. It is important to recognize that probabilistic injuries require two normative choices because it opens the possibility that these normative choices about what constitutes harm will not or ought not be made by the same decision maker.

The need to make two choices stems from the relationship between the two injuries alleged in probabilistic standing cases: (1) the future, threatened harm that may or may not occur; and (2) the present harm that is the increased risk itself, as measured by the costs it imposes (*e.g.*, emotional distress, cost of mitigation).<sup>103</sup> The second, probabilistic injury is related to the first injury that is threatened, but is distinct from it.

The second, probabilistic injury is related to the first injury in the following way: it depends on the recognition that, should the future threatened harm occur, it would constitute an injury—an adverse effect on some cognizable interest. Call this interest that is threatened the “primary interest.” If there is no primary interest, then we cannot ask whether increased risk of injury to that primary interest is itself injurious, for there is no injury of which there could be an increased risk. The existence of the primary interest is a necessary condition. And so, in deciding whether an increased risk of harm to some primary interest is itself an injury, we must first decide that there is a primary interest that would be injured by the threatened harm. This is the first normative choice.

This first normative choice is necessary to finding an increased risk of harm injurious, but it is not sufficient. This is because the two injuries are distinct. The increased risk, if injurious, is an injury

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103 See *supra* note 23 and accompanying text. There are several possible meanings to the word “risk.” Usually, we mean the increased *probability* of some harm. But there are also different notions of “probability.” One is the likelihood relative to an agent’s beliefs; another is the likelihood relative to the agent’s evidence (or possible evidence); and one is some objective notion of chance. For the most part, we can remain agnostic between them. I use “increased risk” to denote increased probability, relative to the available evidence, of some harm. Whether the probability relative to the available evidence tracks some other, objective sense of risk does not matter for purposes of this Article.

regardless of whether the future harm to the primary interest occurs. But for there to be an injury, there must be an adverse effect on *some* interest. And so, whether increased risk of an adverse effect on the primary interest itself constitutes injury depends on a second normative choice about whether there is some secondary interest in not bearing the costs imposed by the increased risk. By “primary” and “secondary,” I mean only to distinguish between two related interests, where the existence of one (the secondary interest) is dependent in some way on the existence of the other (the primary interest).<sup>104</sup>

Even accepting that a normative choice must be made as to primary interests, it might be easy to miss that the choice must also be made as to the secondary, derivative “safety interest” in mitigating risk to the primary interest from particular sources. That is, it might be easy to miss that the existence of a primary interest, although a necessary condition, is not a sufficient condition for the existence of the secondary “safety interest.”

One reason it is easy to miss stems from standardly accepted axioms about the structure of the good—about what makes one state of affairs better or worse for an individual than some other state of affairs. One of these, Bernoulli’s hypothesis, is that “[o]ne alternative is at least as good for a person as another if and only if it gives the person at least as great an expectation of her good.”<sup>105</sup> (There may be good reasons to reject this hypothesis, particularly in other contexts, but defending it is not our project.<sup>106</sup>)

From these assumptions, it is quite easy to show that a state of affairs where there is an increased risk of harm to a person’s primary interests (*i.e.*, increased risk of some future harm) is less good for that person than a state of affairs without the increased risk (assuming

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104 There are some complications about how to classify and count these interests, but they are not relevant for our purposes. For example, “latent” injuries, or injuries where some small damage at an earlier time (*e.g.*, a herniated disk in one’s back, damage to cells from radiation) can manifest in greater damage at a later time (*e.g.*, back pain, cancer), are difficult to classify because we lack clarity about how to count the injuries (*i.e.*, Is a herniated disk an injury separate and distinct from the back pain arising out of it? Or is an ultimately painful herniated disk a single injury that warrants higher damages than a nonpainful one?). *Cf.* Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 990–95 (2003) (discussing a related counting problem created by recognizing risks as harms and chances as benefits).

105 See JOHN BROOME, *WEIGHING GOODS: EQUALITY, UNCERTAINTY, AND TIME* 142 (Blackwell 1995).

106 See *id.* at 53–55, 142.

it is not offset by some other benefit). This is because the increased risk of harm (without some offsetting increased chance of benefit) reduces the plaintiff's expectation of her good.<sup>107</sup> And so, because a state of affairs is at least as good for a person as another if and only if it gives her as great an expectation of her good, the state of affairs with the increased risk is not at least as good as the state of affairs without the risk.

This result may be why some commentators argue that the threat of future injury is itself an injury.<sup>108</sup> By increasing a person's risk of harm from, say, identity theft, a data breach makes the situation worse for the person. Although the likelihood and severity of harm may affect *how* bad it is for her, the likelihood and severity of the harm risked do not affect *that* it is bad for her.

But, as already noted, the question of whether there is an "injury in fact" is *not* the same as the question of whether one alternative is worse for an individual. It is *not* the case that adverse effects on anything that makes up an individual's good constitutes injury, because it is not the case that the court recognizes, as interests, all those things that make a state of affairs better or worse for an individual.<sup>109</sup> While the likelihood and severity of the harm risked may ultimately prove relevant, these alone cannot establish that there is an injury, because they do not establish whether, for a given cognizable primary interest, reducing the risk of adverse effects to that interest is *itself* a legally cognizable interest. Again, judgment is required.

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107 See *id.* at 142–48.

108 See, e.g., Hessick, *supra* note 31, at 65–70.

109 *Id.* at 65 n.51 (citing *Allen v. Wright*, 468 U.S. 737, 759 (1984) (refusing standing despite a personal interest against racial stigmatization)); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (refusing standing despite a personal interest in governmental compliance with the law). Hessick acknowledges that there is a tension created by the Court's "refus[al] to abandon its rhetorical stance that any trifle suffices for standing" and the Court's limitation of "the types of injuries that may support standing." Hessick, *supra* note 31, at 67 n.60 (collecting cases). This tension can be resolved, as Hessick seems to suggest, by recognizing that the Court's limitation on injuries that may support standing go to "the *type* of [that] injury, not the *size* of that injury." *Id.* at 69 n.73 (emphasis added) (collecting cases) (arguing for retention of the "identifiable trifle standard"). This Article parts ways with Hessick in arguing that these normative decisions about the types of interests, effects, and harms that constitute an "injury" cannot be avoided.



Accordingly, probabilistic injuries necessarily involve two normative choices: one about primary interests, and one about a secondary, derivative interest in not having increased risk of harm to the primary interest. This in turn affects what counts as an “injury” when the alleged injury is certain, and when increased risk of recognized injuries itself constitutes an injury.

This is why identity theft can be an injury, while the increased risk of it might not be: it does not follow from the fact that individuals have a primary interest in the exclusive use of their legal identities that they also have a secondary interest against increased risk of harm to their primary interest.<sup>110</sup> This is not to suggest that increased risk of identity theft is *not* an injury; only that, if it is an injury, it is not an injury *solely* in virtue of the fact that identity theft is an injury. As argued, a choice must be made as to each.

That two choices must be made is also likely the reason probabilistic injury creates particular confusion within the standing doctrine: it highlights the fundamental conceptual mistake that injury in fact is “not normative,” which infects standing doctrine as applied to both probabilistic and actual injuries. The “hidden normative assumptions” are more pervasive for probabilistic injuries because decisions must be made twice.

Part I.C.1 concluded that the question remained where and by whom ought the normative choice about injury to primary interests be made. Probabilistic injuries involve two choices, and a central theme of this Article is that it is not obvious that the normative decision maker need be (or even should be) the same for both.

### **3. Characterizing the Interest Harmed by Increased Risk**

Once we recognize that a choice must be made about the *existence* of the secondary interest, there remains a question about how to characterize it—that is, about what the scope of the interest is. One option, which I identify only to set aside, is that it is simply a general interest in maximizing the expected value of the primary interest. There are reasons to be wary of this characterization—a major one being the breadth of injury that would result—but we

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110 See *Identity Theft*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining “identity theft” as the “unlawful taking *and use* of another’s person’s identifying information for fraudulent purposes” (emphasis added)).

can set it aside in any event. A different characterization of the secondary interests involved is available, more plausible, and has been suggested by the courts. This characterization conceptualizes the potential interest in a manner evidenced by the impact it has on other, present interests. For ease of reference, call this potential interest a *particularized* “safety interest.”

A particularized safety interest is an interest in avoiding a particular threat—threatened harm from a particular source or type of source.<sup>111</sup> It is an interest in not having to pay to insure against risk of harm created by that source, and an interest in being free of psychological worry about that particular risk. When one has a safety interest in avoiding harm from a particular source, and harm is threatened by that source, financial and other costs incurred in mitigating the risk—and emotional distress in response to the risk—constitute injuries.

As an illustration, suppose that a factory dumps chemicals into a river. As a result, you choose to not swim in the river; or, after having used the river, you become distressingly worried about damage from the chemicals.<sup>112</sup> If you have a particularized safety interest in avoiding risk from the presence of those chemicals in the river, then these responses—refraining from swimming or becoming distressed—constitute injuries. But if you have no such particularized safety interest, they do not.

Although particularized safety interests have been implicitly recognized,<sup>113</sup> the difficulty is that the resulting harm is generally not directly caused by the defendants, but consists in the plaintiff’s response. This makes the presence of purported “damages” an unreliable gauge for whether injury in fact has been satisfied, because there must be a way to determine when such “damages” are indeed injury rather than self-inflicted.<sup>114</sup> This, and other complications

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111 By denying that *any* increased risk is sufficient for injury in fact, the courts have effectively held that there is no *general* avoidance interest, but only interests in mitigating *particular* risks.

112 This example is based on *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

113 See, e.g., *id.* at 183–84; *Doe v. Chao*, 540 U.S. 614, 617–18 (2004).

114 Cf. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014) (“[A]lthough one of the alleged injuries is present, satisfying imminence, that injury may still be speculative.”); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011) (“[C]osts incurred to watch for a speculative chain of future events based on

for judicial recognition of safety interests will be explored more thoroughly in Part III.

For now, there may be those who are skeptical that this double-normative theory could be illuminating. They might insist that the answer, at least for mere-data breach plaintiffs, is evident. But those who think so tend to fall into diametrically opposed camps: The first insists that the analogy to medical and environmental harm case law solves the problem.<sup>115</sup> The second reasons that those cases form a limited exception, and that the injury in the case of mere data breach is far too speculative.<sup>116</sup> Part II offers an alternative approach for thinking about the answer.

## II. Types of Risky Standing: Surveying Potential Analogies to Mere Data Breach

Many have suggested that the increased risk of harm posed by mere data breach is analogous to increased risk of medical and environmental harms that courts have found sufficient for standing.<sup>117</sup> Credit monitoring has a natural parallel to medical monitoring, while other preventative actions, like freezing accounts, may be analogized to preventative actions taken in the face of pollution. And mere data breach plaintiffs, like those facing medical or environmental harm, may suffer some level of emotional distress.

The *prima facie* plausibility of these analogies may be the reason why some courts have assumed they could rely on these analogies to find standing for victims of mere data breach without much explanation. For example, the Seventh Circuit opinion in *Pisciotta* accomplishes its task in a single paragraph and three footnotes.<sup>118</sup> Similarly, although the Ninth Circuit provided a more extended discussion in *Krottner v. Starbucks Corp.*,<sup>119</sup> it did little to explain why it found the threat of identity theft from a stolen laptop

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hypothetical future criminal acts are no more ‘actual’ injuries than the alleged ‘increased risk of injury’ . . .”).

115 See, e.g., *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142–43 (9th Cir. 2010); *Pisciotta v. Old Nat’l Bancorp.*, 499 F.3d 629, 634 & n.3 (7th Cir. 2007); Galbraith, *supra* note 31.

116 See, e.g., *Reilly*, 664 F.3d at 43–46.

117 See, e.g., *Krottner*, 628 F.3d at 1142–43; Galbraith, *supra* note 31.

118 See *Pisciotta*, 499 F.3d at 634.

119 628 F.3d 1139 (9th Cir. 2010).

to be sufficiently more credible than other examples of threatened injury it would have rejected.<sup>120</sup>

But although these analogies seem plausible, it is not obvious that they are borne out in the case law. Part of the difficulty is that there is a temptation to treat these cases as establishing one, consistent approach to probabilistic standing—category by category—that directly recognizes increased risk of injury as *itself* an injury. As I will argue, the reality is somewhat different.

First, many cases that are treated as examples of probabilistic standing do not directly concern increased risk, but rather the vindication of a statutory right to monitoring remedies.<sup>121</sup> The violation in these cases is *not* the increased risk of harm, but the *deprivation* of the right. Even though these provide a mechanism for managing risk-as-harm, they do not do so by recognizing increased risk of harm itself as sufficient for injury in fact, but attempt to address the harm extra-judicially in the first instance.

Second, of those cases relied upon that do directly concern increased risk, all but one involved a statutory or regulatory framework that at least established a legal interest in not having to bear the costs of increased risk.<sup>122</sup> This category is related to the first, but functions slightly differently: there is not an existing entitlement to, e.g., monitoring, of which the plaintiffs have been deprived. Rather, the plaintiffs have *responded* to the risk with self-help or similar, and the cost of this *response* to the increased risk constitutes the “injury.” That is, the first line of recourse is through the courts—but because the other branches have provided a basis for doing so.

Such statutes and regulatory schemes are helpful—indeed, this Article’s central thesis is that, in most cases of probabilistic harm, they are necessary—but it is important to recognize that in the first two categories of probabilistic standing cases, a finding of injury in fact sufficient for standing is made against the statutory (or regulatory) backdrop that identifies a safety interest in avoiding the particular risk at issue.

This leaves one type of case standing (pun intended) that directly recognizes an increased risk of *medical* harm without reliance

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120 See *id.* at 1143 (“[F]or example, if no laptop had been stolen, and Plaintiffs had sued based on the risk that it would be stolen at some point in the future—we would find the threat far less credible.”).

121 See *infra* Part II.A.

122 See *infra* Part II.B.

on or reference to a statutory or regulatory scheme. The leading example is the Sixth Circuit's decision in *Sutton v. St. Jude Medical S.C., Inc.*,<sup>123</sup> which found standing based on increased risk of medical harm from defective heart-valve implants.<sup>124</sup> But even here, there is recognition that the increased risk stems from a defective medical device—that is, even in this case, there is an implicit concession that the increased risk is not tolerable.<sup>125</sup> This strongly suggests that pure probabilistic standing, without a “statutory hook” or other concession, is the exception and not the rule.<sup>126</sup>

Analyzing the cases in this manner, by their legal similarities rather than in the more traditional manner of topical relation (*i.e.*, “medical-harm cases” or “environmental cases”), reveals an interesting pattern.<sup>127</sup> In cases of probabilistic injury, courts are more likely to recognize a safety interest—and so increased risk as harm—where that safety interest has been recognized by the political branches. This suggests a tentative answer to the question introduced in Part I.C, about who should make the two normative choices in the case of probabilistic standing and whether the same political actor should make both. While courts generally decide the contours of primary interests, the executive and legislature play an important role in determining the contours of safety interests. If this answer to the question introduced in Part I.C is correct, it suggests that the relevant issue in cases of mere data breach is not whether the harm is analogous to medical or environmental harm, but whether existing

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123 419 F.3d 568 (6th Cir. 2005).

124 *Id.* at 570–75.

125 *Id.* at 571, 575 (presuming true allegations that medical device was defective).

126 *Cf.* *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014) (recognizing two categories of probabilistic standing cases, one “linked to a statute or regulation or standard of conduct that allegedly has been or will soon be violated,” and one not).

127 The reason for this traditional approach may be that courts sometimes discuss probabilistic injury in this topical manner in an effort to limit which increased risks may constitute injury. *See, e.g.*, *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (doubting, though declining to decide, that “enhanced risk generally qualifies as sufficient injury to confer standing” and limiting holding to “the specific context of food and drug safety suits”). For examples of this traditional approach, *see, e.g.*, *Terenzi*, *supra* note 25; *Galbraith*, *supra* note 31, at 1372 (arguing that “a robust and sound analogy exists in tort cases that confer standing to plaintiffs on the basis of an increased risk of future harm in defective medical device, toxic substance exposure, and environmental injury cases”).

statutory and regulatory schemes governing data protection establish a safety interest in avoiding increased risk of identity theft. The normative argument in favor of this approach is reserved to Part III.

### A. Vindication of a Right to Monitoring Remedies

Some cases cited as establishing that there can be standing based on increased risk of medical harm from, e.g., exposure to toxins, need not rely on such risk at all. Rather, one of the other branches has established a program for managing that risk that creates entitlements to some remedy for the risk, like medical monitoring. In so doing, these programs recognize that the individuals who have been exposed had a safety interest in avoiding the increased risk from that exposure, and have also developed an appropriate remedy for the harm to that interest. If the entitlement fails in some respect, plaintiffs can bring suit to vindicate that right. Because the entitlement was created to mitigate the increased risk, courts—like the Ninth Circuit in *Krottner*—treat these as cases establishing that increased risk of medical harm satisfies injury in fact.<sup>128</sup> But this is, strictly speaking, not correct.

For example, in *Pritikin v. Department of Energy*,<sup>129</sup> the plaintiff, Pritikin, had been exposed to toxic substances, resulting in “severe[] damage[]” to her thyroid.<sup>130</sup> As a result, Pritikin qualified for a medical-monitoring program that the Agency for Toxic Substances and Disease Registry had been statutorily required to institute at the nuclear reservation that had caused the exposure.<sup>131</sup> When the Agency failed to implement the program,<sup>132</sup> Pritikin sued the Department of Energy to force implementation.<sup>133</sup> The Ninth Circuit held that Pritikin’s inability to obtain the statutorily-required medical monitoring satisfied injury in fact.<sup>134</sup>

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128 See *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142–43 (9th Cir. 2010) (citing *Pritikin v. Dep’t of Energy*, 254 F.3d 791, 796–97 (9th Cir. 2001)).

129 254 F.3d 791 (9th Cir. 2001).

130 *Id.* at 794.

131 *Id.* at 793–94.

132 *Id.* at 794 (explaining that the failure was due to funding disputes).

133 *Id.*

134 *Id.* at 796–97. Although the Ninth Circuit found that Pritikin had satisfied injury in fact, it denied standing for lack of traceability and redressability. *Id.* at 801.

Though cited by one of the leading mere data breach cases as providing authority for increased risk as injury in fact,<sup>135</sup> *Pritikin* is not directly on point: *Pritikin* had *already* qualified for a statutorily-required medical-monitoring program, and sought to compel the program's implementation.<sup>136</sup> That is, *Pritikin* sought to rectify an existing violation of a private right that had already been granted, to wit, a statutorily-created right to the medical monitoring. Her injury was not merely the increased risk from toxic exposure, but the improper denial of medical monitoring to which she was entitled. This is confirmed by the opinion's characterization of her injury: "Pritikin's inability to receive medical screening due to [the Agency's] failure to implement the . . . medical monitoring program establishes a cognizable injury."<sup>137</sup>

These cases could provide a model for mere data breach plaintiffs, but only if the legislative or executive branches act first. The best way to manage the risks of mere data breach may be to create such an entitlement program to credit-monitoring. Like in *Pritikin*, the model would make agencies, not courts, the arbiters of whose exposure from mere data breach entitled them to such relief. This Article does not take a position on whether such a program is appropriate; rather, that to the extent *Pritikin* provides a model for addressing the risk from mere data breach, it does not provide a model of directly recognizing the increased risk as sufficient for injury in fact.

### **B. Increased Risk as Injury in Presence of Statutory or Regulatory Scheme Creating a Safety Interest**

Like the first type of case in which the injury is a *denial* of an existing entitlement to monitoring, the second type of case relied upon as establishing probabilistic standing also occurs against a statutory or regulatory backdrop for addressing increased risk. But this second type of case is more on point than the first: unlike the first, the alleged injury is not the deprivation of a statutory entitlement (as in *Pritikin*), but the cost of self-managed responses to an increased risk

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135 See *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010).

136 *Pritikin*, 254 F.3d at 793–95. It might also be observed that, strictly speaking, *Pritikin* was so qualified because she had already suffered *actual* damage to her thyroid and endocrine system. *Id.*

137 *Id.* at 797.

of future harm.<sup>138</sup> This second type of case *does* establish probabilistic standing, but in cases where the alleged injury has a statutory or regulatory “hook” that establishes the existence of particularized safety interests.<sup>139</sup>

Many of the so-called “environmental cases” fall into this category. For example, in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,<sup>140</sup> the representative plaintiff alleged that Gaston Copper’s hazardous discharges upstream, in violation of the Clean Water Act,<sup>141</sup> adversely affected his use of a lake downstream and his home’s property values.<sup>142</sup> The court held that these allegations satisfied injury in fact.<sup>143</sup> In so doing, the court essentially recognized that the plaintiff had a safety interest in avoiding the risk imposed by Gaston Copper’s hazardous discharges.<sup>144</sup> Accordingly, the plaintiff’s response to that risk—avoiding or mitigating the risk from

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138 See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–85 (2000); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156–57 (4th Cir. 2000).

139 Cf. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014) (observing that probabilistic standing cases fall into two categories, one occurring against a statutory or regulatory backdrop); see also *Gaston Copper*, 204 F.3d at 156–57 (emphasizing that plaintiff “alleged precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act” and that plaintiff’s “fears [were] reasonable and not based on mere conjecture” in light of “reports show[ing] over 500 violations of the [defendant] company’s discharge limits”); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) (“[T]he threshold question of citizen standing under the CWA is whether an individual can show that *she* has been injured in her use of a particular area because of concerns about violations of environmental laws, not whether the plaintiff can show there has been actual environmental harm.”); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) (“[W]hen an agency has devoted a large portion of its decision-making resources to comparing alternatives’ different effects on wildfire, and pointed to non-trivial variations in risk, it would take some rather dramatic piece of information to persuade us that the difference is so trivial that persons physically close to the potential fire cannot question the decision.”).

140 204 F.3d 149 (4th Cir. 2000).

141 Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C. § 1251 *et seq.*

142 *Gaston Copper*, 204 F.3d at 152–53.

143 *Id.* at 160–61; see also *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002).

144 See *Gaston Copper*, 204 F.3d at 156 (“[Plaintiff] has alleged precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act.”).



the pollutants by reducing recreational and other uses of the lake—constituted injury.<sup>145</sup>

Courts rely on these cases to find probabilistic standing for other types of injury because such opinions depend, in part, on an understanding of the nature of environmental harm as probabilistic.<sup>146</sup> But a closer look reveals that, to the extent these cases establish probabilistic standing—and recognize safety interests—they do so against the backdrop of Congressional action taken to deal with the enforcement of environmental standards aimed at preventing these very risks.<sup>147</sup> In such cases, plaintiffs need not show *actual* harm to the environment, only that concerns about the increased risk of it—as evidenced by the violation of the statute or regulatory scheme—“injured [their] use” of the environmental feature in question.<sup>148</sup>

This emphasis on statutory or regulatory standards in grounding particularized safety interests is not unique to environmental cases. For example, the Second Circuit has applied this approach to find that the increased risk of food-borne illness could constitute injury in fact.<sup>149</sup> In *Baur v. Veneman*, the plaintiff, “a regular consumer of meat products,” brought suit to challenge a

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145 See, e.g., *id.* at 153 (explaining that plaintiff had responded to pollution of a lake by limiting the time his family spent swimming in the lake and reducing the number of fish they eat from the lake). Indeed, the court in *Gaston Copper* characterized the injury in this manner, as the impact on other interests that was the cost of avoidance. *Id.* at 160–61 (“[Plaintiff]’s reasonable fear and concern about the effects of Gaston Copper’s discharge, supported by objective evidence, directly affect his recreational and economic interests. This impact constitutes injury in fact.”).

Another environmental case relied upon to find standing in mere data breach cases, *Central Delta Water Agency v. United States*, 306 F.3d 938 (9th Cir. 2002), exhibits similar features. In *Central Delta*, the plaintiffs alleged that the U.S. Bureau of Reclamation’s operational plan implementing a federal water management project was “highly likely” to violate the terms of the Bureau’s permit and cause damage to the plaintiffs’ crops. *Id.* at 947. The Ninth Circuit emphasized that “to require actual evidence of environmental harm, rather than an increased risk based on a violation of the statute, misunderstands the nature of environmental harm, and would undermine the policy of the . . . Act.” *Id.* at 948 (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000)).

146 *Gaston Copper*, 204 F.3d at 160 (“Threats or increased risk thus constitutes cognizable harm. Threatened environmental injury is by nature probabilistic.”).

147 See *id.* at 151 (summarizing the Clean Water Act’s history); *id.* at 156 (“[T]he legislative branch has invited precisely [this] type of suit . . .”).

148 See, e.g., *Pac. Lumber*, 230 F.3d at 1151.

149 *Baur v. Veneman*, 352 F.3d 625, 628 (2d Cir. 2003).

USDA policy that permitted downed livestock to be used in food following a post-mortem inspection.<sup>150</sup> Although the plaintiff had not alleged that any actual harm had yet resulted (to himself or others) due to the enhanced risk, the court found that the enhanced risk in the food and drug context could constitute injury in fact, and that the risk in question was not speculative.<sup>151</sup> Notably for our purposes, both holdings—one as to the existence of a safety interest in avoiding increased risk, and one as to its scope—relied in part on the statutory scheme and agency findings. As to the first, the court emphasized that the “tight connection between the type of injury [enhanced risk] which [plaintiff] alleges and the fundamental goals of the statutes which he sues under . . . reinforce[ed] [his] claim of cognizable injury.”<sup>152</sup> As to the second, the court identified as a “critical factor[] . . . weigh[ing] in favor of concluding that standing exists . . . the fact that government studies and statements confirm several of [the plaintiff]’s key allegations” concerning the risk.<sup>153</sup>

The First Circuit recently recognized the role statutory and regulatory schemes play in finding standing based on increased risk in a products liability case concerning increased risk of damage from lightning strikes.<sup>154</sup> The court refused to base its decision on the legendary “capriciousness of . . . lightning,” and instead “proceed[ed] cautiously” to determine whether the plaintiff’s allegations that the product, a type of gas piping, presented risk sufficient to find injury.<sup>155</sup> In doing so, the court reasoned that “cases claiming standing based on risk fall into at least two categories”: one in which “the present injury is linked to a statute or regulation or standard of conduct that

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150 *Id.* at 627–28, 630.

151 *Id.* at 632–35, 639.

152 *Id.* at 635 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000)); *see also* Terenzi, *supra* note 25, at 1591 (“The [Baur] court used this nexus to substantiate its analytical leap in extending the range of cognizable injuries to include enhanced risk of exposure in food and drug cases.”).

153 *See Baur*, 352 F.3d at 637 (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002)). The court also recognized as a “critical factor[]” the fact that the alleged risk “ar[ose] from an established government policy.” *Id.*; *cf.* *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996) (relying on findings in agency’s environmental impact statement concerning increased risk of wildfire posed by challenged policy and the rejected alternatives).

154 *Kerin v. Titeflex Corp.*, 770 F.3d 978, 980–82 (1st Cir. 2014).

155 *Id.* at 980–81.

allegedly has been or will soon be violated,” and one in which “the present injury has not been [so] identified and so is entirely dependent on the alleged risk of future injury.”<sup>156</sup> Because the plaintiff conceded that the product met the relevant regulatory standards—which took into account the risk—the court found that the plaintiff could not hang his hat on the former.<sup>157</sup> And so, because he had failed to allege that the standards were inadequate, that actual damage had clearly been caused by the product, or “facts sufficient to assess the likelihood of future injury,” the court found “the alleged risk of harm . . . too speculative to give rise to a case or controversy.”<sup>158</sup>

Finally, there is precedent for finding a particularized safety interest in avoiding harm from the misuse of one’s personal data where such an interest has been created by statute. Notably, the Supreme Court *has* recognized “‘generalized anxiety and stress’” resulting from compromised data to be sufficient for standing, even where it is the “*only* present injury.”<sup>159</sup> In *Doe v. Chao*,<sup>160</sup> a government agency, through poor practices, disclosed Doe’s Social Security number in violation of the Privacy Act.<sup>161</sup> Doe alleged that he suffered emotional distress upon learning of the disclosure.<sup>162</sup> Although his injury was insufficient to sustain a cause of action under the Privacy Act, the Court held that Doe’s “emotional affliction” satisfied injury in fact.<sup>163</sup>

The facts of *Doe* may not provide an exact analogy to those of most mere data breach cases—in *Doe*, the disclosure resulted directly from improper data handling rather than a breach<sup>164</sup>—but otherwise the cases are strikingly similar. The important distinction between the cases is not the factual difference, but a potential legal one: the decision in *Doe* rested on a statutory interest not relied upon in most

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156 *Id.* at 982.

157 *Id.* at 983.

158 *Id.* at 985.

159 *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (emphasis added) (citing *Doe v. Chao*, 540 U.S. 614, 617–18, 624–25 (2004)).

160 540 U.S. 614 (2004).

161 *Id.* at 617–18 (citing 5 U.S.C. § 552a(b)).

162 *Id.* (noting Doe’s “allegations that he was ‘torn . . . all to pieces’ and ‘greatly concerned and worried’ because of the disclosure of his Social Security number and its potentially ‘devastating’ consequences” (internal quotation marks omitted)).

163 *Id.* at 617–18, 625 (“[A]n individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act.”).

164 *Id.* at 617.

data breach cases.<sup>165</sup> The Court in *Doe* based its standing decision on the language of the Privacy Act:

[T]he reference in § 552a(g)(1)(D) to “adverse effect” acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue.<sup>166</sup>

The holding in *Doe* suggests that emotional harm in response to data compromise *can* constitute injury in fact—at least where a statutory hook is available to establish a safety interest in certain uses of one’s personal information. This is promising for victims of mere data breach, supposing that there are statutes identifying a particularized safety interest in avoiding increased risk of identity theft caused by a breach or similar.<sup>167</sup> However, this Article does not resolve whether existing legislation is adequate to do so. As discussed in Part III, further work remains to be done in articulating the conditions under which a statutory or regulatory scheme creates such interests,<sup>168</sup> and the goal of this Article is limited to arguing for the relevance of such schemes to the injury-in-fact inquiry.<sup>169</sup>

### C. Judicially-Created Probabilistic Standing: The Sutton Exception for Medical and Other Severe Harms

Although most of the central cases cited to support probabilistic standing do so against the backdrop of a statutory or

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165 Recall that the claims in the leading mere data breach cases are predicated on state law theories of contract and negligence. See *supra* note 68 and accompanying text.

166 *Doe*, 540 U.S. at 624 (citing 5 U.S.C. § 552a) (explaining that the Court’s holding that emotional distress is insufficient for a cause of action does not “deprive the language recognizing a civil action by an adversely affected person of any independent effect” because it has this “limited but specific function”).

167 Cf. *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 706–07 (D.C. 2009) (discussing case involving “mixed common-law and statutory grounds”).

168 For example, there is a question of whether legislation like the Privacy Act (which apply only to federal actors) and state notification statutes without private causes of action can establish safety interests in contexts where the plaintiffs’ claims do not arise within such a scheme. See *supra* note 165.

169 For a discussion of why courts *should* privilege statutes, see *infra* Part III.A.

regulatory scheme, there is at least one narrow exception for cases of extreme medical harm. In other cases, without the backdrop of a statutory or regulatory scheme identifying particularized safety interests, courts are careful to limit the exception.<sup>170</sup>

For example, in the Sixth Circuit case of *Sutton v. St. Jude Medical S.C., Inc.*,<sup>171</sup> one of a growing number of medical-monitoring cases,<sup>172</sup> the plaintiff class had received implants of defective heart-bypass devices. The plaintiffs sought creation of a medical-monitoring fund for detection and device removal.<sup>173</sup> Sutton alleged that the device had caused “severe and disabling medical conditions” in “numerous patients,” requiring removal “and/or monitoring for further harm, including death,” and that he had “suffered economic losses and large medical expenses” in addition to increased risk of severe medical complications.<sup>174</sup> The Sixth Circuit found that the increased risk was sufficient for standing, characterizing the increased risk as the injury itself.<sup>175</sup> The court added that requiring the plaintiffs to wait for a “physical injury before allowing any redress whatsoever is both overly harsh and economically inefficient.”<sup>176</sup>

Of the medical-harm opinions cited, *Sutton* presents the closest analogy to mere data breach because it recognizes a safety interest in avoiding increased risk of harm from medical devices by directly characterizing the injury as increased risk.<sup>177</sup> Cases like *Sutton* therefore appear to offer direct support for judicial recognition of particularized safety interests that may be injured even absent

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170 See, e.g., *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014) (“Cases falling in this . . . category require greater caution and scrutiny because the assessment of risk is both less certain, and whether the risk constitutes injury is likely to be more controversial.”); *Baur v. Veneman*, 352 F.3d 625, 635 (2d Cir. 2003) (emphasizing that the “tight connection between the type of injury . . . allege[d] and the fundamental goals of the statutes . . . sue[d] under . . . reforc[es] [plaintiff]’s claim of cognizable injury”).

The one exception to this general trend among courts appears to be the Seventh Circuit, which has adopted a more expansive view of probabilistic standing. See, e.g., *Pisciotta v. Old Nat’l Bancorp.*, 499 F.3d 629, 634 & n.4 (7th Cir. 2007) (collecting cases).

171 419 F.3d 568 (6th Cir. 2005).

172 See *id.* at 571 (noting the trend).

173 *Id.* at 569–70.

174 *Id.* at 569.

175 *Id.* at 572.

176 *Id.* at 575.

177 See *id.* at 571 (recognizing that medical devices differ from toxic exposure in that whether the device will be harmful or beneficial may vary by individual).

a statutory or regulatory scheme. And plaintiffs' classes may be pleased to see that the number of medical increased-risk cases are growing.<sup>178</sup>

But the prevalence of such cases does not suggest support for broader rulings. Many courts have taken pains to emphasize that these cases form a "narrow" exception, and not the rule.<sup>179</sup> Such language would not appear to be the usual limiting rhetoric, but grounded in concern about the potential expansiveness of probabilistic injury.<sup>180</sup> And because the exception—the "departure from the general rule"—is justified on public health grounds, it is not readily extended to increased risk of other sorts of harm.<sup>181</sup> Indeed, courts have signaled that their rulings may be so limited even in cases similarly justified on public health grounds against the backdrop of a statutory or regulatory framework.

Where courts have been willing to apply this exception more expansively and find standing for increased risk, there is often an implicit concession that the risk posed is intolerable.<sup>182</sup> For example, courts have found standing where the risk posed by a product defect—as that from car airbags that deploy randomly without crashes—

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178 *See id.*

179 *See, e.g.,* *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 690–91 (S.D. Ohio 2006) ("Although, the Sixth Circuit has in certain instances found standing based on future harm, those cases not only act as a narrow exception to the general rule of courts rejecting standing based on increased risk of future harm, but are also factually distinguishable from the present case."); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 45 (3d Cir. 2011); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005) ("Outside of increased exposure to environmental harms, hypothesized 'increased risk' has never been deemed sufficient 'injury.'").

180 *Cf. Ctr. for Law & Educ.*, 396 F.3d at 1161 (recognizing the danger of deeming increased risk as injury that "all hypothesized, non-imminent 'injuries' could be dressed up as 'increased risk of future injury'"); *see also supra* notes 149–153 and accompanying text.

181 *See Reilly*, 664 F.3d at 45 (rejecting extension of medical harm cases to data breach); *Key*, 454 F. Supp. 2d at 691 (citing *Stollenwerk v. Tir-West Healthcare Alliance*, No. Civ. 03-0185PHXSRB, 2005 WL 2465906, at \*4 (D. Ariz. Sept. 6, 2005), *aff'd in part, rev'd in part*, 254 Fed. App'x 664 (9th Cir. 2007) (unpublished) (affirming summary judgment dismissing mere data breach claims, but seemingly on the merits)); *see also Stollenwerk*, 2005 WL 2465906, at \*4 (discussing justification for "departure" from general rule under state law).

182 *See Kerin v. Titeflex Corp.*, 770 F.3d 978, 983–84 (1st Cir. 2014) (citing *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 718–23 (5th Cir. 2007)) (distinguishing products defects cases based on whether "defect was essentially conceded").

gives rise to a product recall.<sup>183</sup> By contrast, in other cases, where plaintiffs have conceded that the challenged product met the relevant regulations and failed to “contest th[o]se regulations,” courts have denied standing, effectively deferring to the regulatory assessment that the risk was tolerable.<sup>184</sup>

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This analysis has proved fruitful. By considering legal similarities between cases, we can see that courts generally *do* treat probabilistic standing differently where there is a statutory or regulatory framework to establish safety interests. Where there is a statutory or regulatory framework to establish safety interests, courts are more likely to find standing.<sup>185</sup> Where there is not, courts are more reticent.<sup>186</sup>

The double-normative framework introduced in Part I.C helps make sense of this pattern. In most probabilistic standing cases, the central judgment as to whether there is a particularized safety interest that is violated by increased risk from a particular source is made by the political branches, not the courts. Cases in which courts make this determination without such assistance form the exception to the rule. Viewing the cases in this manner offers some descriptive clarity about what the courts are doing in action, if not in word. The final part of this Article will argue that the courts are correct to do so.

### III. Statutes, Metaphysics, & Coase: Creating Risky Standing

We return to where we began: by asking the question often forgotten, of *who* should decide whether there are certain safety interests. But it may be helpful to the reader to remind how we arrived at that question.

Recall that in Part I, I argued three points about the appropriate way to think about probabilistic injury: First, I argued that injury in fact is not a factual inquiry, but an irreducibly normative endeavor—that is, that what constitutes an “injury” reflects value judgments

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183 See *Cole*, 484 F.3d at 718–23; cf. *Kerin*, 770 F.3d at 983–84.

184 See, e.g., *Kerin*, 770 F.3d at 984 (denying standing, noting that “[t]his is not a case of regulatory silence, but of regulatory approval of the ‘defective’ product, after a study of the risks,” and noting that the plaintiff “does not contest these regulations”).

185 Cf. *id.* at 982 (making a similar point).

186 See, e.g., *id.* at 984; *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014).

and standards that cannot be reduced to (nonnormative) facts, that there is *always* a decision about what constitutes injury.<sup>187</sup> Second, this conclusion applies to increased risk, with the result that the normative choice must be made twice, once with respect to the threatened interest and once with respect to an interest in not having that first interest threatened. That is, it does not follow from having a primary interest that one also has a secondary interest in avoiding harm to that primary interest—unless and until the relevant political actor decides that it does. This explains why identity theft can be an injury, while the increased risk of it may not be. Third, I suggested that the appropriate way to characterize this interest is as an interest in not having an increased risk of harm to the primary interest from *particular* sources—such that the cost of mitigating the risk from those sources itself constitutes an injury. Essentially, the question about increased risk is: who pays the extra cost of insuring against it? If you have a safety interest, you should not need to pay that “extra” cost. If you don’t, then any measures you take to do so—however prudent—do not constitute injury.

This left the question: who decides whether there is a safety interest against risk from a particular source? By considering cases based on their legal similarities, Part II discovered that courts generally rely on the judgment of the political branches—the executive and the legislature—that increased risk from particular sources is intolerable. This is why plaintiffs who cannot point to a statutory or regulatory violation generally face an uphill battle.<sup>188</sup>

Here, I argue that they do so with good reason. The political branches are best suited to make judgments about which sources of risk provide objective cause for concern, such that a response on the part of a private individual is reasonable, *and* that such a response constitutes injury—both reflections of the (policy) judgment that such a response is necessary given the risk, but not a cost the individual should have to bear. Because the political branches are best suited to make these judgments, their judgment should be the dominant factor in making the second normative choice about whether the plaintiff had a safety interest against being subjected to the increased risk alleged. That courts generally follow those judgments and limit

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187 See *supra* Part I.C.

188 See, e.g., *Kerin*, 770 F.3d at 983 (“[T]he plaintiff, who always carries the burden of establishing standing, faces a more difficult task when alleging enhanced risk without alleging a statutory or regulatory violation (actual or imminent).”).



probabilistic standing to cases where statutes or regulations have identified cognizable safety interests is a happy coincidence.

These conclusions may appear surprising in light of the present controversy over whether statutes can create standing. The controversy began with a misreading of *Lujan v. Defenders of Wildlife*,<sup>189</sup> and is the central issue in a case before the Court this term, *Spokeo, Inc. v. Robins*. As Part III.C suggests, a decision in *Spokeo* that strictly denies the political branches the ability to create interests sufficiently concrete as to give rise to standing is both against the weight of precedent and would be misguided.

In closing, we return to our paradigmatic case of mere data breach. Although this Article does not provide an answer, it does offer guidance for courts adjudicating these cases.

### A. The Important Function of Statutes & Regulations in Identifying Cognizable Safety Interests

To answer the question of *who* should make the normative choice about safety interests in response to particular risks, we must revisit the nature of the decision that is to be made. Recall that a safety interest is an interest in avoiding a particular threat—threatened harm from a *particular* type of source.<sup>190</sup> It is an interest in not having to pay to insure against risk of a potential harm from that source, and an interest in being free of psychological worry about that particular risk. When harm is threatened from that type of source, therefore, costs—financial or otherwise—incurred in mitigating the risk and emotional distress constitute injuries. Suppose, for example, that a factory dumps chemicals into a river. As a result, you choose to not swim in the river; or, after having used the river, you become distressingly worried about damage from the chemicals.<sup>191</sup> If you have a safety interest in avoiding risk from the presence of those chemicals in the river, then these responses—refraining from swimming or becoming distressed—constitute injuries. But if you have no such safety interest, they do not.

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189 504 U.S. 555 (1992).

190 By denying that *any* increased risk is sufficient for injury in fact, the courts have effectively held that there is no *general* avoidance interest, but only interests in mitigating *particular* risks.

191 This example is based on *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 176, 181–82 (2000).

Although safety interests have been implicitly recognized,<sup>192</sup> the difficulty is that the resulting harm to the plaintiff is generally not directly caused by the defendants, but consists of the plaintiff's response. Indeed, a safety interest is an interest in *not* needing to take such measures or bearing the emotional burden. This leads to three complications.

First, courts have expressed particular wariness when addressing self-help and emotional responses of increased-risk plaintiffs because there is a danger that they are based on subjective concerns.<sup>193</sup> Most recently, the Supreme Court held that plaintiffs “cannot manufacture standing merely by [making expenditures] based on their fears of hypothetical future harm that is not certainly impending.”<sup>194</sup> But courts have also held that responses to “reasonable fear and concern about the effects [of pollution], supported by objective evidence”<sup>195</sup> that a threat is “reasonably impending”<sup>196</sup> constitute injury in fact. So the first complication is that a response, mitigating or emotional, to increased risk must in some sense be objectively reasonable, or warranted, by the nature of that risk—and a test is needed to determine whether the risk is such that responding is objectively reasonable.<sup>197</sup>

Second, even where a response might be objectively reasonable, this does not entail that there is a safety interest.<sup>198</sup> Risk might be analogized to nuisance cases: the defendant's action alone is insufficient to create the alleged injury; rather, it is the response on the part of the plaintiff to the actions of the defendant that creates

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192 See, e.g., *id.* at 183–84; *Doe v. Chao*, 540 U.S. 614, 617–18 (2004); see also *supra* Part II.

193 See, e.g., *Laidlaw*, 528 U.S. at 184–85 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 n.8 (1983)).

194 *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013).

195 *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (citing *Laidlaw*, 528 U.S. at 182–85) (emphasis added).

196 *Katz v. Pershing, LLC*, 672 F.3d 64, 79 (1st Cir. 2012) (discussing the environmental-case analogy).

197 Cf. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014).

198 See *supra* Part I.C; see also *Clapper*, 133 S. Ct. at 1147–48 (rejecting the “objectively reasonable likelihood” test as inconsistent with the “certainly impending” standard). But see *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 693 (7th Cir. 2015) (continuing to apply the test even after *Clapper*).

the conflict.<sup>199</sup> As argued in Part I.C, whether there is injury depends on to whom the law has assigned an *interest*.<sup>200</sup>

This problem is particularly acute for probabilistic injuries not only because, as argued in Part I.C, two normative choices must be made, but also because just about anything anyone does alters others' risk of future harm. Were "all . . . 'increased risks' deemed injurious, the entire requirement of 'actual or imminent injury' would be rendered moot because all hypothesized, non-imminent 'injuries' could be dressed up as 'increased risk of future injury.'"<sup>201</sup> To combat this problem of pervasive potential injury in the form of increased risk, the courts have attempted to distinguish between "realistic" and "speculative" risks, but with limited success. As argued in Part II, the real test appears to be whether a specific safety interest has been created.<sup>202</sup> For example, in *Laidlaw*, the factory's pollution did *not actually* increase the risk of bodily harm from using the river; even so, the Court held that the plaintiffs' decision to refrain from river use constituted injury—not an attempt to "manufacture" standing.<sup>203</sup>

Nor can anxiety and stress—on its own—ground injury such that we may avoid this choice about who holds an interest in cases of increased risk. Anxiety and stress may be a reasonable response to many risks: a competitive co-worker increases the risk you might not keep your job, and competent police increase the risk you might not keep your freedom.<sup>204</sup> But you have no interest in avoiding the

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199 See Stuart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1173 (1989) (reviewing R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988)) ("[I]t takes two to tort."); see also R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960) (recognizing the reciprocal nature of the problem).

200 See Schwab, *supra* note 199, at 1173 ("Lawyers and economists typically think the polluter causes the pollution problem, the spark-generating railroad causes the fire hazard, and the crop-trampling cows harm the farmer. But Coase's approach emphasizes that the problem is reciprocal and that the law makes a choice in protecting these 'victims.'").

201 Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005).

202 See *supra* Part II.

203 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–84 (2000).

204 Cf. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 172–73 (2d Cir. 2011) (Raggi, J., dissenting from denial of rehearing en banc), *panel op. rev'd*, 133 S. Ct. 1138 (2013) (suggesting that "every mobster's girlfriend who pays for a cab to meet with him in person rather than converse by telephone" does not have standing though they "would be acting on a not-irrational fear of Title III interception").

increased risk of harm from these sources, and so your anxiety and stress, however reasonable, is not injurious.

These two difficulties are related to a generally unrecognized third: even where a risk provides an objective basis for response and the law could assign a personal safety interest in avoiding it, the best way to manage the risk may be in conjunction with managing other similar risks (e.g., car insurance) or through a regulatory system. That is, an individualized approach (assigning particularized safety interests) may not be the most effective approach for addressing a group of related risks; a systemic approach may be preferred.

Unlike the injury from being punched, which is generally recognized and agreed upon, there may be little consensus about any of the three difficulties just raised with respect to probabilistic injuries. There may be widespread disagreement about the existence of a particular risk, let alone its size or credibility; about whether such a risk merits a response; and about whether that response should come from private parties protecting themselves, from government regulation of the risk's source, or some combination thereof. There is even likely to be disagreement about how to evaluate the answers to these three difficulties. Some might believe that efficiency-maximizing concerns dominate; others might believe some risks, like risks to the environment, are intolerable even where efficient. The more complicated the causal chain, as with environmental harm, the greater the disagreement is likely to be. (Readers interested in how this discussion relates to the distinction between injury-in-fact and the other standing requirements are directed to the footnote.<sup>205</sup>)

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205 Earlier, I observed that cases addressing probabilistic standing often blur the distinction between the three standing requirements of injury in fact, causation, and redressability, and that this blurring increases the difficulty of interpreting the relevant case law with respect to injury in fact. *See supra* note 30. We can now see how this murkiness in the distinction between injury in fact, causation, and redressability in probabilistic standing cases may not only reflect an ambiguity in the case law, but an important conceptual link between the three that makes the relationship between the requirements integral to the analysis. This link is partly evidentiary. Following a suggestion by Judge Posner, a probabilistic harm is sufficiently concrete if the remedy sought would mitigate the risk: if the remedy sought would mitigate the risk, then it seems likely that the increased risk alleged is both significant and meaningfully linked to the defendant's actions. *Cf. Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993).

But the link is also conceptual. Judgments about when increased risk constitute injury are difficult and require expertise: as with whether a given

As with all cases of injury, a normative judgment must be made.<sup>206</sup> But there remains an open question of who should make it. Which institutional decision maker is appropriate for a given type of decision depends, to some extent, on the “relative strengths and weaknesses” of those decision makers “to address the social issue involved.”<sup>207</sup> This, in turn, depends on the kinds of considerations involved in making the decision.<sup>208</sup> That courts often make the normative decision about the primary interests threatened does not entail that courts are the appropriate branch to make the second normative decision about the existence and scope of a secondary interest in avoiding harm to that primary interest.<sup>209</sup> This is because the kinds of considerations involved differ, and so other institutional decision makers may be better placed to make the relevant decisions.

In particular, resolving the disagreements about risk just noted depends first on technical expertise in risk assessment and subject-specific expertise on the underlying subject matter. The appropriate decision maker may need both the time and capacity to

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risk is “significant,” the extent to which it is traceable to a particular source or is remediable may be controversial and may be affected by the normative choice concerning injury. For example, in a regime where everyone is expected to purchase their own credit monitoring, it is not clear that increased risk of identity theft from mere data breach would be mitigated by the relief sought through the courts (credit monitoring) or that the increased risk is caused by the breach rather than the plaintiff’s failure to acquire adequate monitoring coverage. That is, in the case of probabilistic injury, the three requirements are conceptually linked, for the judgment that there is traceability and redressability may depend on the judgment that there is injury, and vice-versa. For this reason, it is unsurprising that statutes resolving difficulties about causation and redressability also resolve difficulties with injury, and vice-versa. *Cf. infra* note 216; *see also* *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014) (“Where statutory rights are asserted, . . . our cases have described the standing inquiry as boiling down to ‘essentially’ the injury-in-fact prong.”), *cert. granted*, 135 S. Ct. 1892 (2015).

206 *See supra* Part I.C.1 (arguing that whether a harm is injury requires a normative judgment).

207 Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366–67 (1984) (arguing for a “comparative institutional approach to constitutional law”); *see also, e.g.*, Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 727 (2008).

208 *Cf. Merrill, supra* note 207, at 746–53.

209 *See supra* Part I.C.2 (recognizing that there are two such decisions for probabilistic injuries and suggesting that the normative decision maker need not be the same for both).

investigate before reaching conclusions, and to maintain a degree of flexibility about its decisions once made. These are not typically areas in which courts excel: Courts, unlike the political branches, generally lack expertise about risk assessment or expertise in the relevant field (e.g., environment, big data).<sup>210</sup> Courts, also unlike the political branches, have a limited capacity for investigative fact-finding, being largely constrained both by the cases before them and the evidence proffered by the litigants<sup>211</sup>—a particular problem in the case of risk, where large numbers can significantly improve the analysis. Finally, although courts proceed on a case-by-case basis, permitting some flexibility, they are bound by their prior decisions in a way that the political branches are not.

These concerns are compounded by the political decisions that need to be made about the disvalue of risk in certain contexts. Ordinarily, where such disagreement exists, it is resolved through the political process.<sup>212</sup> But courts are not ordinarily called upon to make such policy decisions, and with reason. Because courts, unlike the political branches, depend on litigants to come before them, the larger population lacks representation to make its views known in a given case (except, perhaps, through amicus briefs). And the unelected nature of judges that permits them to be (relatively) impartial adjudicators also insulates courts from needing to respond to the changing views of the electorate—again, unlike the political branches. Court decisions on these fraught policy questions in the case of risk may be seen as arbitrary—and so not legitimate—except insofar as such decisions track the judgment of the political branches. Indeed, as Parts I and II suggested, court decisions concerning increased risk as injury are in a disarray—except insofar as they generally track the judgments of the political branches.<sup>213</sup>

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210 See, e.g., William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 421 (“The conventional wisdom is that agencies have greater ‘expertise’ than courts in figuring out instrumental applications.”); *id.* at 421–24 & n.32 (providing examples but acknowledging the absence of empirical data supporting the “conventional wisdom”).

211 Cf. Merrill, *supra* note 207, at 753 (distinguishing between big-picture “legislative facts” and case-specific “adjudicative facts”); *id.* at 758 (discussing courts’ shortcomings in this respect in the context of preemption).

212 Cf. Eskridge, *supra* note 210, at 423–26 (making a similar argument with respect to statutory interpretation).

213 See *supra* Part I.A, especially note 31 and accompanying text, and Part II.

Given the difficulties just articulated in the case of threatened harm and the relative strengths of the various branches, courts are not the appropriate authority for establishing, in most cases, a safety interest against a *particular* source of increased risk.<sup>214</sup> Rather, finding such an interest frequently requires the kind of analysis generally left to other branches.

A statute serves to create a legally cognizable interest by identifying a particular source of risk.<sup>215</sup> This serves three functions: it identifies that the risk is an *objective* cause for concern; it establishes that a response to that risk is reasonable; and it assigns a safety interest, determining not only that a response on the part of a private individual is reasonable given the objective cause for concern, but also that such a response constitutes an injury—a reflection of the (policy) judgment that individuals should not have to mitigate or insure against the risk because such individual responses are not the best way to manage the risk.

Consider again the factory that dumped chemicals into a river, and the plaintiffs who refrained from swimming and whose property values suffered as a result. Are the plaintiffs overreacting or do those chemicals offer an objective basis for concern? In what concentrations and under what conditions? Is the potential risk at a level where a response is reasonable? Is the best way to manage that risk for the factory to stop dumping or for the swimmers to stop swimming?

This is exactly the case that the Court confronted in *Laidlaw*. The Court held that these responses constituted harm to the plaintiffs' "recreational, aesthetic, and economic interests,"<sup>216</sup> implicitly recognizing that the plaintiffs had a safety interest against risk posed by a certain amount of dumped pollutants that had been established by

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214 *But see* Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc., 471 F.3d 277, 284–87 (1st Cir. 2006) (“[C]ourts are capable of assessing probabilistic injuries.”).

215 Statutes may also help resolve the disagreements about traceability and redressability discussed *supra* notes 30 & 205. *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . .”); *see infra* Parts III.B & III.C.

216 *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183–84 (2000).

the Clean Water Act. As discussed above,<sup>217</sup> the Court distinguished the plaintiffs' case from a case where "'subjective apprehensions' that [the alleged future harm] would even *take place* were not enough to support standing" on the basis that the plaintiffs' concerns about using the river were "entirely reasonable" in light of the "continuous and pervasive *illegal* discharges of pollutants."<sup>218</sup> The Court held that this was so even though the "permit violations at issue . . . did not result in any health risk or environmental harm."<sup>219</sup> Rather, the statutory framework established that a particular level of pollutants provided an objective basis for concern, that a response was therefore reasonable, and that the individuals had an interest in not having to so respond, such that their responses constituted injury in fact. But these decisions underpinning the injury, about what chemicals and at what concentration present intolerable risk of harm, were based on expert analysis and political judgment of the sort appropriately left to the other branches, not the courts.

Return to our central example of mere data breach. Like environmental harm, mere data breach is no exception to the general—or default—rule that safety interests are best created by statute or regulation. Commentators argue that mere-data-breach plaintiffs should succeed on the merits, or companies will be insufficiently incentivized to protect against breach.<sup>220</sup> But it is not clear that this is the best way to mitigate the risk of identity theft. For example, there is a strong information-forcing argument *against* mitigating risk through credit-monitoring damages: The breached company is in the best position to identify the existence of a breach, and to put data-breach victims on notice that they should monitor their credit. Subjecting companies to suit—let alone liability—for the mere fact of a data breach might have a chilling effect on providing notice and, where notice of known breaches is required, diligently monitoring for breaches. State statutes governing data breach suggest that state legislatures at least have recognized notice as being an important objective: nearly all have notice requirements; none provide for liability

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217 See *supra* text accompanying note 203.

218 See *Laidlaw*, 528 U.S. at 184–85 (emphasis added) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 n.8 (1983)).

219 *Id.* at 181 (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 602 (D.S.C. 1997) (district court opinion)).

220 See, e.g., *Blades*, *supra* note 47, at 525–26.



for the fact of mere breach.<sup>221</sup> Moreover, reputational incentives and the cost of actual identity theft suits may incentivize companies to provide credit monitoring to data-breach victims that is tailored to the nature of the breach, even absent lawsuits (as some have already done).<sup>222</sup> Finally, there are those who suggest that with the increasing prevalence of data collection and sharing, data breach is a virtual certainty, suggesting that credit monitoring and identity insurance may be the new normal—just another cost of doing business—and that it is not clear that the mere fact of a data breach meaningfully increases the risk that one’s identity will be compromised. Indeed, one of the first studies about breach notifications indicated that “consumer reactions to breach notification are quite relaxed.”<sup>223</sup> This suggests that there is room for disagreement about the appropriate emotional response to a breach, and so too about whether increased stress and anxiety from a breach is injury or an irrational emotional response.<sup>224</sup>

These arguments are not meant to show that standing should be denied;<sup>225</sup> rather, they provide support for the claim that determining the appropriate method for mitigating risk caused by mere data breach is more complicated than might first appear, and depends on the kinds of information and considerations generally left to policy-makers to determine.

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221 See *Security Breach Notification Laws*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 22, 2015), <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx#1> (compiling state notification statutes and noting that Alabama, New Mexico, and South Dakota are the only states without security breach laws); Baker & Hostetler LLP, *Key Issues in State Data Breach Notifications Laws: Data Breach Charts*, DATA PRIVACY MONITOR (2015), [http://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data\\_Breach\\_Charts.pdf](http://www.bakerlaw.com/files/Uploads/Documents/Data%20Breach%20documents/Data_Breach_Charts.pdf) (collecting information about state statutes).

222 See, e.g., *Reilly v. Ceridian Corp.*, 664 F.3d 38, 40 (3d Cir. 2011); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1141 (9th Cir. 2010); cf. *Rode*, *supra* note 47, at 1628–31.

223 See *Rode*, *supra* note 47, at 1626–27.

224 Here is an example of why allegations of injury premised on emotional responses to increased risk are insufficient: they depend on recognition of the increased risk as itself injurious.

225 Indeed, it is the central point of this Article that to answer the question of standing in the case of mere data breach, we must analyze whether the existing statutes and regulations create a particularized safety interest against increased risk of identity theft that is caused by mere data breach. For reasons alluded to *infra* in Parts III.B and III.C, this work is beyond the scope of the Article.

Statutes, state or federal, can resolve these difficulties. The availability of a remedy for a violation of environmental permits or mere data breach reflects the judgment, by the legislatures, that the risks posed by the violations are credible, warrant a response, and are best insured against by the violating entity. Availability of a remedy suggests not only that the increased risk is redressable (another standing requirement), but also that response—and the response taken by the plaintiff, in particular—is reasonable, thereby reflecting the *existence* of both a safety interest, and a credible threat that adversely affects that interest, satisfying injury in fact.<sup>226</sup> This is not to claim the stronger thesis that courts cannot find probabilistic standing without a statutory or regulatory backdrop, only the weaker thesis that courts are right to be exceptionally cautious in doing so.<sup>227</sup>

### **B. Resolving a Previous Puzzle About Statutory Creation of Standing: *Lujan v. Defenders of Wildlife***

This claim about the role of statutes and regulations in creating standing might seem surprising. Some commentators have assumed that Article III limits on Congress’s power mean that statutes have *no* role to play in establishing standing.<sup>228</sup> This assumption is plainly false. The Court has long held that Congress can “creat[e] [statutory] legal rights, the invasion of which creates standing.”<sup>229</sup> Moreover, the

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226 See *supra* Part I.C.

227 Cf. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014) (“Cases falling in this . . . category [*i.e.*, where plaintiffs do not allege a statutory or regulatory violation] require greater caution and scrutiny because the assessment of risk is both less certain, and whether the risk constitutes injury is likely to be more controversial.”).

228 For discussion of the confusion about statutes and Article III standing, see Fletcher, *supra* note 88, at 230 (“[T]he Court has characterized the Article III requirement of injury as something that Congress cannot satisfy by the creation of a statutorily protected interest.”); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 69–70 (explaining how *Massachusetts v. EPA* “is . . . deeply threatening to the views of standing held by the four [dissenting] Justices . . . who believe[] that Congress’s power to create statutory rights is ultimately limited by Article III requirements”); Sunstein, *supra* note 34, at 209–11 (“By far the most important and novel holding in *Lujan* was that Congress cannot grant standing to citizens.”). *But see* Sunstein, *supra* note 34, at 209, 235–36 (casting doubt on the reach of this “important and novel holding”).

229 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *see also, e.g.*, *Havens Realty Corp. v. Cole-*

Court has repeatedly held that injury in fact may exist “solely by virtue of [such] statutes.”<sup>230</sup> However, in light of the false assumption’s prevalence, this section addresses and attempts to dispel its modern source.

The mistaken view that Article III bars Congress from creating standing (in any manner) arises from a common misreading of the

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man, 455 U.S. 363, 373–74 (1982) (collecting cases) (explaining that because “Congress ha[d] . . . conferred on all ‘persons’ a legal right to truthful information about available housing” testers who posed as potential buyers or renters to “collect[] evidence of unlawful steering practices” had standing to sue); *id.* at 373 (“This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, ‘[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.’” (quoting *Warth*, 422 U.S. at 500)); Sunstein, *supra* note 34, at 190 & n.129 (arguing that the outcome in *Havens* “had nothing to do with ‘injury in fact,’” but rather “everything to do with the set of legal rights that Congress had conferred”); *see also* *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring))).

230 *See Lujan*, 504 U.S. at 578 (emphasis added); *Havens*, 455 U.S. at 373 (collecting cases); *Warth*, 422 U.S. at 500 (collecting cases); *see also* *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973) (collecting cases) (“Congress may not confer jurisdiction on Art[icle] III federal courts to render advisory opinions, . . . . [b]ut Congress may enact statutes creating legal rights, the invasion of which creates standing, even though *no injury would exist without the statute.*” (emphasis added) (citations and internal quotation marks omitted)).

Court's precedent,<sup>231</sup> and culminates in a misreading of the Court's 1992 decision in *Lujan v. Defenders of Wildlife*.<sup>232</sup>

In *Lujan*, environmental organizations sought review of a rule promulgated by the Secretary of the Interior under the Endangered Species Act ("ESA").<sup>233</sup> Section 7(a)(2) of the ESA imposed consultation obligations on the Secretary and agencies for actions taken that might adversely affect endangered or threatened species.<sup>234</sup> The new rule reinterpreted this consultation requirement to be more

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231 For example, then-Professor (now Judge) Fletcher's influential piece *The Structure of Standing* states that "the Court has characterized the Article III requirement of injury as something that Congress cannot satisfy by the creation of a statutorily protected interest." Fletcher, *supra* note 88, at 230. Fletcher's sole authority is what he characterizes as a "strong version of the requirement" from *Warth v. Seldin*, in which the Court recognized that although "Congress may grant an express right of action to [those] otherwise . . . barred by prudential standing rules," Article III required such plaintiffs to have suffered "a distinct and palpable injury." *Id.* at 230–31 (quoting *Warth*, 422 U.S. at 501). But the Court did not hold that this "distinct and palpable injury" was something Congress could not create through "the creation of a statutorily protected interest." To the contrary, in the *very same passage* relied upon by Fletcher, the Court also states that "[t]he actual or threatened injury required by Art[icle] III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" *Warth*, 422 U.S. at 500 (emphasis added) (quoting *Linda R.S.*, 410 U.S. at 617 n.3).

Why might Fletcher have come to this (mistaken) view? The passage from *Warth* concerns Congress's ability to allow plaintiffs to seek relief based on "the legal rights and interests of others," relying on (but not explaining) the distinction between Congressional conferral of a right of action and Congressional creation of legal rights the invasion of which constitutes injury. *Id.* at 501; *see infra* text accompanying notes 241–251.

232 504 U.S. 555 (1992); *see Sunstein, supra* note 34, at 168–97 (summarizing the history).

233 *See Lujan*, 504 U.S. at 557–58 (citing Endangered Species Act of 1973 (ESA), Pub. L. No. 93–205, 87 Stat. 884, 892 (codified as amended at 16 U.S.C. § 1536)).

234 This section provided in relevant part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

*Lujan*, 504 U.S. at 558 (quoting ESA § 7(a)(2) (codified as amended at 16 U.S.C. § 1536(a)(2))).

limited in geographic scope than as previously interpreted, such that it would not apply to activities abroad.<sup>235</sup>

The plaintiffs' primary "claim to injury [was] that the lack of consultation with respect to . . . activities abroad" had "increas[ed] the rate of extinction of endangered and threatened species" in habitats that the plaintiffs had previously visited, thereby increasing the risk that plaintiffs would "be deprived of the opportunity" to view the species again should they return.<sup>236</sup> Plaintiffs also alleged—and the court below found—that they had "suffered a 'procedural injury'" because the ESA's citizen-suit provision in combination with the consultation requirement of § 7(a)(2) had created a "'procedural righ[t]" in "all 'persons'" to the required consultation.<sup>237</sup>

The Supreme Court rejected both claims to injury, but it is the rejection of the second, procedural injury that has been misunderstood. In rejecting the procedural injury, the Court held that the injury-in-fact requirement could not be satisfied "by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."<sup>238</sup> This holding is the source of the problem, as it has been interpreted by some commentators and later courts to mean that statutory provisions, like citizen-suit provisions, cannot create injury in fact.<sup>239</sup>

Such interpretations are mistaken. In rejecting procedural injury of this sort, the Court did not hold that Congress could not create legal rights, the invasion of which would constitute injury. Rather, the Court held that Congress may not create freestanding procedural rights to sue that are not linked to the creation or existence of a specific right (and attendant injury).<sup>240</sup> Far from holding that

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235 See *Lujan*, 504 U.S. at 558–59 (explaining that the previous regulation interpreted the consultation requirement to apply to actions taken abroad in addition to those taken in the United States or at sea).

236 *Id.* at 562–64.

237 *Id.* at 571–72 (emphasis added).

238 *Id.* at 573.

239 See, e.g., Sunstein, *supra* note 34, at 209–11 ("By far the most important and novel holding in *Lujan* was that Congress cannot grant standing to citizens."); Terenzi, *supra* note 25, at 1582 (same). But see Sunstein, *supra* note 34, at 209, 235–36 (casting doubt on the reach of this "important and novel holding").

240 *Lujan*, 504 U.S. at 572 & n.7; see also *id.* at 572 (emphasizing that "[t]his is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs," like procedural requirements for obtaining licenses).

Congress cannot create legal rights that, if violated, give rise to standing, the Court expressly emphasized that “[n]othing in this [decision] contradicts the principle that ‘[t]he . . . injury required by Art[icle] III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”<sup>241</sup> The *Lujan* Court expressly recognized that Congress has the power, as it has always had, to create legal rights, thereby “broadening . . . the categories of injury that may be alleged in support of standing.”<sup>242</sup> As Justice Kennedy’s concurrence clarified, the issue was not *whether* Congress could create a right the violation of which would constitute injury in fact, but *whether* Congress had succeeded in doing so through the combination of the citizen-suit provision and section 7(a)(2) of the ESA.<sup>243</sup>

This much straightforwardly precludes the mistaken conclusion that statutes cannot create standing. And so, the reader may wonder, why is there so much confusion?

The confusion arises from the distinction the Court made between statutorily creating legal interests the violation of which constitutes injury (which is permitted) and statutorily conferring standing on those without injury (which is not permitted).<sup>244</sup> Although there is a distinction, it is tenuous: broadening the categories of injury upon which suit may be brought will usually *also* broaden the class of individuals who can bring suit.<sup>245</sup> That is, by conferring new rights upon plaintiffs—plaintiffs who, without such rights, would not have been injured—Congress has effectively “conferred standing.” This may explain why the holding has been misread, and taken to be in tension with Justice Kennedy’s concurrence that “Congress has

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241 *Id.* at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

242 *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

243 *Id.* at 580 (Kennedy, J., concurring).

244 *Id.* at 578 (majority opinion).

245 Sunstein has alluded to this difficulty, but without expressly identifying it:

By creating citizen standing [under the ESA], Congress in essence created the relevant property interest and allowed citizens to vindicate it. To this extent, Congress did indeed create the requisite injury in fact, and the Court should have recognized it as such. If a problem remains, perhaps it lies in Congress’ failure to be explicit on the point. This may ultimately be the meaning of Justice Kennedy’s concurring opinion, and if so it remains possible for Congress to solve the problem through more careful drafting.

Sunstein, *supra* note 34, at 206.

the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”<sup>246</sup>

But this difficulty does not provide reason to read *Lujan* as precluding Congress from indirectly creating standing. Rather, the question is: what must Congress do to successfully create legal rights the violation of which is concrete injury? Justice Kennedy’s concurrence suggests a solution. The problem, he suggests, is not that Congress could not create such an interest, but that the statute in question fails to do so. He writes:

In exercising this power [to define injuries sufficient for standing], however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on “any person . . . to enjoin . . . [any] agency . . . alleged to be in violation of any provision of this chapter,” it does not of its own force establish that there is an injury in “any person” by virtue of any “violation.”<sup>247</sup>

Justice Kennedy appears to call for greater specificity in the statutory creation of an interest, the violation of which is sufficient for standing.<sup>248</sup> The statute must expressly define the interest and identify “the class of persons” to have it.<sup>249</sup> It cannot create standing for an individual to bring suit to “vindicate the public’s nonconcrete interest in the proper administration of the laws,” unless the violation of that interest also affects a concrete, personal interest.<sup>250</sup> That

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246 *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Justice Kennedy appears to have agreed that his position was consistent. *See id.* (“I do not read the Court’s opinion to suggest a contrary view.”). *Cf. Terenzi*, *supra* note 25, at 1582 (suggesting the majority’s failure to adopt Justice Kennedy’s concurrence meant “the practical effect of the holding ‘was to clarify that Congress *could not statutorily create a right of action* in persons who have not met the constitutional requirement of injury in fact’” (emphasis added)).

247 *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (quoting 16 U.S.C. § 1540(g)(1)(A)).

248 *Cf. Sunstein*, *supra* note 33, at 206, 230–31 (suggesting that this is the meaning of Kennedy’s concurrence).

249 *Lujan*, 504 U.S. at 580 (Kennedy concurring).

250 *Id.* at 581.

concrete, personal interest can be created by statute, but must be done so explicitly.

### C. Looking Forward: *Spokeo, Inc. v. Robins* & Its Implications for Probabilistic Standing

Although some commentators were confused by *Lujan*, the Courts of Appeals generally were not. Many have continued to find that “the violation of a statutory right is usually a sufficient injury in fact to confer standing.”<sup>251</sup> This echoes the proposition from earlier Supreme Court case law that “[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . . .’”<sup>252</sup>

But this longstanding wisdom may be called into question when the Supreme Court decides *Spokeo, Inc. v. Robins* later this term, a case concerning whether a plaintiff has suffered injury in fact solely in virtue of a violation of his statutory rights under the Fair Credit Reporting Act (“FCRA”).<sup>253</sup>

The case arose when Thomas Robins sued a website operator, Spokeo, Inc., under the FCRA for publishing inaccurate personal information about him, his education, and his wealth.<sup>254</sup> His allegations of injury were “sparse,” limited to allegations that the publication had violated his rights under the FCRA, and led to his continued unemployment, lost wages, and emotional distress.<sup>255</sup>

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251 *Robins v. Spokeo*, 742 F.3d 409, 412 (9th Cir. 2014), *cert. granted*, 82 U.S.L.W. 3689 (U.S. Apr. 27, 2015) (No. 13-1339) (citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)).

252 *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)).

253 15 U.S.C. § 1681 *et seq.*; see *Robins*, 742 F.3d at 410, *cert. granted*, 82 U.S.L.W. 3689 (U.S. Apr. 27, 2015) (No. 13-1339). The Supreme Court granted certiorari on April 27, 2015. Arguments were heard on November 2, 2015. Granting of certiorari in this case was unusual in several ways, including that the “Supreme Court granted cert . . . despite the Solicitor General’s recommendation against it.” See Christin McMeley, et al., *Supreme Court Grants Cert in Spokeo v. Robins*, PRIVACY & SEC. L. BLOG (Apr. 27, 2015), <http://www.privsecblog.com/2015/04/articles/marketing-and-consumer-privacy/supreme-court-grants-cert-in-spokeo-v-robins/>.

254 *Robins*, 742 F.3d at 410 (explaining that Spokeo is a website operator that “provides users with information about other individuals” like “occupation, economic health, and wealth”).

255 *Id.* at 410–11.



Although the FCRA does not require a showing of “actual damages” for willful violations,<sup>256</sup> the district court dismissed for lack of standing, concluding that Robins had both “failed to plead an injury in fact and that any injuries pled were not traceable to Spokeo’s alleged violations.”<sup>257</sup>

The Ninth Circuit reversed.<sup>258</sup> The court reasoned that precedent in standing cases involving statutory rights had “establish[ed] two propositions”: first, that “Congress’s creation of a private cause of action” implies an intent to create a statutory right, and second, that “the violation of a statutory right is usually a sufficient injury in fact to confer standing.”<sup>259</sup> Because the FCRA creates a private cause of action for mishandling of one’s own personal credit information without requiring a showing of actual damages, Congress had created such a right.<sup>260</sup> Since Robins successfully alleged that his rights had been violated, he had suffered injury in fact.<sup>261</sup>

In so concluding, the Ninth Circuit recognized that “the Constitution limits the power of Congress to confer standing,” but found that such limits were not applicable.<sup>262</sup> Article III limits Congress to creating “statutory right[s] . . . [that] protect against ‘individual, rather than collective, harm.’”<sup>263</sup> Because the FCRA protects such individualized interests “in the handling of [one’s own] credit information,” the limitation barring abstract, undifferentiated rights to sue was inapplicable.<sup>264</sup> And since Robins alleged that

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256 See *id.* at 412 (collecting cases) (“Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . damages of not less than \$100 and not more than \$1,000 . . .” (quoting 15 U.S.C. § 1681n(a))).

257 *Id.* at 411 (summarizing procedural history).

258 *Robins*, 742 F.3d 409.

259 *Id.* at 412 (collecting cases).

260 *Id.* at 412–13.

261 *Id.* at 413–14.

262 *Id.* at 413 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)); see also *id.* (noting that Congress is not permitted “to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts” (quoting *Lujan*, 504 U.S. at 577)).

263 *Id.* at 413. (quoting *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009)).

264 *Id.* at 413–14.

“Spokeo violated *his* statutory rights, not just the statutory rights of other people,” the court concluded he had suffered injury in fact.<sup>265</sup>

Although it is not the purpose of this Article to argue for the correct outcome, a few comments are warranted in light of the potential losses—and gains—for the evolution of probabilistic standing.

We begin with the framing of the issue. The petitioner Spokeo has framed the issue as:

[w]hether Congress may confer Article III standing upon a plaintiff *who suffers no concrete harm*, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.<sup>266</sup>

Embedded in these stark terms is the same assumption, introduced in Part I, that infects standing doctrine more generally, namely, that whether there is a “concrete harm” is a question of fact. In so doing, the stark terms of Spokeo’s brief disguise what is at stake: whether Congress can create substantive statutory *rights*. For if a “bare violation of a federal statute” granting such rights cannot constitute “concrete harm,” then any attempt by Congress to create new statutory entitlements—the value of which is either difficult to quantify or cannot be reduced to economic terms—would be meaningless.

This Article provides an example of what would be lost should the Court agree with Spokeo’s framing of the issue. As argued, we should not assume that the normative decisions concerning injury in fact must always be made by the courts. To the contrary, the political branches play a vital role in making judgments about interests and injury where such interests are more abstract absent a statute (*e.g.*, intellectual property), are difficult to measure (*e.g.*, reputational harms), and—as was the focus here—where judgments about the appropriate assignment of interests depends on intricate policy

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265 *Id.* (explaining that, for these reasons, Robins was “among the injured” (citing *Lujan*, 504 U.S. at 578)). The Ninth Circuit also found causation and redressability, based on the statutory violation. *Id.* at 414 (“When the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied.”).

266 Brief for Petitioner at \*i, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 2, 2015) (emphasis added).

judgments about risk measurement and management. A decision that deprived Congress this ability would only serve to plunge standing doctrine farther into chaos.<sup>267</sup>

This is not to suggest that Congress can create merely procedural rights to bring suits for violation of the statute. The error, if there is one, in the Ninth Circuit opinion which the Court will review this term, may be the first of its “two propositions”: that “Congress’s creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right,”<sup>268</sup> and by implication, that Congress *succeeded* in doing so. The lesson may be not that Congress cannot create standing in the manner suggested by Justice Kennedy, but that more effort ought be invested in stating standards by which Congress may do so.

This is consistent with the thesis argued for in this Article. Indeed, this Article has shown another area of standing doctrine where further research into the questions of how and under what conditions a statute can create a freestanding statutory entitlement would help enhance the doctrine.

## Conclusion

Standing doctrine concerning when, and whether, the mere increased risk of some further injury *itself* constitutes injury sufficient to open the courthouse door is in a disarray. The latest example is that of mere data breach: cases brought by plaintiffs whose personal information has been compromised as a result of a breach at an entity holding their data. This Article has attempted to provide a new framework for analyzing this type of probabilistic standing, or standing based on the mere increased risk of some further harm.

Part I diagnosed the source of the disarray in standing doctrine as a failure to recognize that “injury in fact” is an irreducibly normative concept, not a factual one. That is, whether there is “injury in fact”

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267 See, e.g., Jacklyn Wille, *Upcoming Spokeo Decision Could Have Big Effect on ERISA Litigation, Attorneys Say* BNA PENSION & BENEFITS BLOG (June 19, 2015) <http://www.bna.com/upcoming-spokeo-decision-b17179927997/> (reporting on attorneys’ concerns about potential implications of *Spokeo* for ERISA-based surcharge claims “in cases involving alleged statutory violations that aren’t accompanied by financial or other loss”).

268 *Robins*, 742 F.3d at 412 (citing *Fulfillment Servs. Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 619 (9th Cir. 2008)).

cannot be reduced to descriptive facts about what has happened. Absent the existence of irreducibly normative facts (and, in light of the Court's stance on moral philosophy, even in their presence), a choice must be made regarding whether there is an injury in fact.

Probabilistic standing presents particular difficulty for the courts because this normative choice about the existence of an interest (and so an injury) must be made *twice*. This is why identity theft may be an injury while the increased risk of it is not. The "hidden normative assumptions" that infect ordinary standing are more pervasive, creating further difficulty (and disarray) in the case of probabilistic standing.

Once we recognize that *two* choices must be made, we can sensibly ask whether they should be made by the same political decision maker.

Part II offered a descriptive answer: courts are more likely to find standing where the political branches have provided a statutory or regulatory framework establishing a legal interest in not having to bear the costs of increased risk. This became clear by comparing cases based on their legal similarities, rather than by following the more traditional approach of grouping the cases topically.

Part III argued the normative answer to the question: courts have good reason to be cautious about finding increased risk sufficient for injury in fact absent a statutory or regulatory framework. This is because the political branches' expertise is best suited to make judgments about which sources of risk provide objective cause for concern, such that a response on the part of a private individual is reasonable, *and* that the best way to manage such a risk is to deem it injury.

In closing, this analysis leaves two questions open. First, what steps must Congress take to successfully identify and create particularized safety interests in avoiding risk from particular sources? Second, what are the exceptional circumstances that merit courts finding increased risk as injury, even absent a statutory or regulatory framework? The Supreme Court will hopefully provide guidance on the first question later this term when it decides *Spokeo, Inc. v. Robins*. This Article provides a framework for further work exploring the answer to the second.

## **A Human Rights Perspective on Education and Indigenous Peoples: Unpacking the Meaning of Articles 14 and 15 of the UN Declaration on the Rights of Indigenous Peoples**

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## V. Conclusion: Measuring Success and Other Implementation Questions

### I. Introduction

Not long ago, “education” was the primary tool used by dominant societies to achieve the dual aims of forcible assimilation and cultural destruction against Indigenous Peoples. The kinds of practices put in place ranged from the forcible removal of young children from their families and communities to residential boarding schools, to the more subtle practice of having Indigenous children be schooled in a language other than their mother tongue. Efforts at forced assimilation through education extended beyond the classroom and included stereotypic portrayals of Indigenous Peoples in stories, film, laws, and other publically disseminated materials. These portrayals led to a further decline in the cultural, emotional, physical, and spiritual well-being of Indigenous Peoples. They also contributed significantly to the negative stereotypes of Indigenous Peoples that live on today in the media, in textbooks, in the classroom and elsewhere. Equally relevant is the impact that these educational practices had on the political and economic well-being of the individual and the group. They alienated Indigenous Peoples from their own roots, while at the same time creating significant barriers to fully participating in the dominant society in which they now found themselves. Yet education as a human right is intended to achieve just the opposite. It is intended to “[develop fully] the human personality and the sense of its dignity,” to “enable . . . persons to participate effectively in a free society,” and to “strengthen . . . respect for [all people’s] human rights and fundamental freedoms” by “promot[ing] understanding, tolerance and friendship among . . . nations and . . . groups.”<sup>2</sup>

It is against this backdrop that Article 14 of the UN Declaration on the Rights of Indigenous Peoples (“the Declaration”) was formulated. Not surprisingly, one of the primary aims of this provision (along with aspects of Article 15) is to put into place a set of principles that, once implemented, will work to correct these injustices.

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2 International Covenant on Economic, Social, and Cultural Rights art. 13, ¶ 1, *opened for signature* Dec. 16, 1996, 993 U.N.T.S. 3 [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26 (Dec. 10, 1948) [hereinafter Univ. Decl.].

However, the provision is not merely aimed at righting past wrongs or even ongoing harms that may be perpetuated through educational systems that were built, in part, on flawed ideologies. Rather, Article 14 is written in a manner that seeks to ensure that Indigenous Peoples, as individuals and as self-determining communities, are able to fully realize the positive aims that can be derived from the recognition and fulfillment of the fundamental right to education.

Thus, Article 14 takes on a special meaning and purpose in terms of repairing, restoring, and strengthening Indigenous communities and cultures through education. In looking at the history of this provision, its language, and its place within established international human rights norms, these aims are to be achieved through linkages with other basic rights, such as the rights of self-determination, non-discrimination, and cultural and linguistic integrity. For instance, Article 14 provides for the right of Indigenous Peoples to develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning.<sup>3</sup> It also includes the right of Indigenous individuals to have access to these or other similarly situated educational systems or programs.<sup>4</sup> In addition to promoting and protecting Indigenous ways of learning and teaching, Article 14 articulates a more general right of non-discriminatory access to all levels and forms of education within the State, thereby ensuring that Indigenous pupils are placed on an equal footing with non-Indigenous pupils.<sup>5</sup> Finally, it ensures that any action that a State takes with respect to the education of Indigenous individuals is done in partnership with Indigenous communities.<sup>6</sup>

Article 15 of the Declaration expands the reach of Article 14 to include the elimination of inaccurate, prejudicial, and distorted information in public documents and educational materials.<sup>7</sup> In particular, it states that Indigenous Peoples have the right to have “their cultures, traditions, histories and aspirations . . . appropriately reflected in education.”<sup>8</sup> Similar to Article 14, States are required under Article 15 to work with Indigenous Peoples to not only combat

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3 United Nations Declaration on the Rights of Indigenous People, G.A. Res. 61/295, A/61/L.67, (Sept. 13, 2007) [hereinafter UNDRIP].

4 UNDRIP, *supra* note 3, art. 14(2).

5 *See generally* UNDRIP, *supra* note 3, art. 14.

6 UNDRIP, *supra* note 3, art. 14(3).

7 *See generally* UNDRIP, *supra* note 3, art. 15.

8 UNDRIP, *supra* note 3, art. 15(1).

prejudice and discrimination in education, but to actively develop educational tools that “promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.”<sup>9</sup>

Section II of this article begins with a closer look into the history behind Articles 14 and 15’s protection of education for Indigenous Peoples. Understanding the origins of the stories subsumed within these articles helps us to better understand some of the purposes and principles articulated in the Preamble of the Declaration. They include such things as the need to address “historic injustices” (including “doctrines, policies, and practices” that promote “superiority of peoples or individuals”), to respect and promote cultural “diversity and richness,” to ensure that “indigenous families and communities . . . retain shared responsibility for the upbringing, training, education and well-being of their children,” and to “[re]affirm the fundamental importance of the right to self-determination of all peoples.”<sup>10</sup> From there we will explore the meaning behind the different clauses of Articles 14 and 15, drawing from the drafting history, but also from a wider understanding of the Declaration itself and some of the fundamental norms that are a focal point of this instrument.

In Section III we will consider the international legal framework that is embedded in different aspects of Articles 14 and 15, helping us discern which aspects of these articles are established concepts of international law and which parts are still emerging norms. Given the well-articulated nature of the basic right to education in a wide variety of international instruments, it will come as no surprise that most of what is reflected in the Declaration relating to Indigenous education is also recognized as a matter of conventional or customary international law. As a compliment to and further articulation of international law, regional laws and domestic practices are explored in Section IV, with emphasis on “best practices.” The article ends with a brief discussion of some of the implementation issues that States and Indigenous Peoples may face as they move forward with fulfilling the aims of Articles 14 and 15, and how they might begin to measure success in this area.

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9 UNDRIP, *supra* note 3, art. 15(2).

10 UNDRIP, *supra* note 3, pmb.



## II. History and Meaning of Articles 14 and 15

*“A liberating education nurtures empathy, a commitment to community, and a sense of self-worth and dignity.”<sup>11</sup>*

### A. Brief History of Indigenous Peoples and Education

The stories of how nation States used education as a tool to further the aim of forced assimilation are familiar to anyone who has written or worked in the area of Indigenous education. They have been retold in numerous studies and writings.<sup>12</sup> What follows is a brief synopsis of this history.

Although the international community has long recognized education as essential to the well-being and development of individuals and communities, State policies and actions around the world have too frequently prevented Indigenous Peoples from receiving a truly empowering education. This has been achieved

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- 11 INDIGENOUS KNOWLEDGE AND EDUCATION: SITES OF STRUGGLE, STRENGTH, AND SURVIVANCE 160 (Malia Villegas, Sabina Rak Neugebauer & Kerry R. Venegas eds., 2008).
- 12 See U.N. Comm’n on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶¶ 26–75, 118–30, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.2 (Vol. III) (Mar. 11, 1986) (by Jose R. Martinez Cobo) [hereinafter *Study of Problem of Discrimination*, Vol. III] (note this study was originally published as a series of reports from 1981 to 1983); U.N. Comm’n on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶¶ 89–162, 428–94, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Vol. V) (Mar. 1987) (by Jose R. Martinez Cobo) [hereinafter *Study of the Problem of Discrimination*, Vol. V]; U.N. Comm’n on Human Rights, *Addendum to Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and Education*, ¶ 10(j), U.N. Doc. E/CN.4/2005/88/Add.4 (Dec. 15, 2004) (by Rodolfo Stavenhagen) [hereinafter *Stavenhagen*]; see generally Austl. Human Rights and Equal Opportunity Comm’n, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, <http://www.austlii.edu.au/au/other/IndigLRes/stolen/index.html>; Indian Residential Schools Settlement Agreement (Can. May 8, 2006), <http://www.residentialschoolsettlement.ca/Settlement.html>; MARGARET JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940* (2009); PETER FARB, *MAN’S RISE TO CIVILIZATION* 257–59 (1968) (as cited in Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 16 (1998)); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47 (2008).

in a variety of ways: passively by ignoring or failing to consider the economic, cultural, and linguistic realities of Indigenous Peoples and actively by deliberately minimizing or excluding aspects of their language and culture from educational program design and execution. However, the unwillingness of State-run educational programs to value and incorporate Indigenous languages and cultures has an even more disturbing past than mere neglect. According to one UN study on the issue, “[t]here are countless examples from many parts of the world from the early and mid-1800s onwards and up to the mid-1900s and even longer where the intention to destroy an indigenous group [through education] . . . has . . . been overtly expressed.”<sup>13</sup>

Many nation States born of the process of conquest and colonization embraced the idea of “assimilation” to the extreme, removing Indigenous children from their families and communities to boarding schools or other similar institutions. The dominant State language, culture, and religion were forced upon these students to the exclusion of anything indigenous; and many were subjected to physical, psychological, and even sexual abuse. One scholar described the process and its impact this way:

[Indigenous] children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian—dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated . . . in the English language, wearing store-bought clothes and with their hair short and their emotionalism toned down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.<sup>14</sup>

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13 U.N. Permanent Forum on Indigenous Issues, *Forms of Education of Indigenous Children as Crimes Against Humanity?*, ¶ 31, U.N. Doc. E/C.19/2008/7 11 (Feb. 11, 2008) (by Robert Dunbar & Tove Skutnabb-Kangas) [hereinafter Permanent Forum 2008]. See generally U.N. Permanent Forum on Indigenous Issues, Forum Expert Grp., *Indigenous Children’s Education and Indigenous Languages*, U.N. Doc. E/C.19/2005/7 (2005) [hereinafter Permanent Forum 2005].

14 FARB, *supra* note 12. See generally JACOBS, *supra* note 12; Austl. Human Rights and Equal Opportunity Comm’n, *supra* note 12; Canada’s Indian Residential Schools Settlement Agreement, *supra* note 12.

Even when States established schools in or near Indigenous communities, these schools were often geared towards assimilation, causing Indigenous communities to identify education in schools as a symbol of their overall marginalization. Moreover, national education often reinforced negative stereotypes and discriminatory views of Indigenous Peoples in its general curricula.<sup>15</sup>

Not surprisingly, the harms caused by these educational policies have been intergenerational. Children raised in assimilationist schools suffered from low self-esteem, familial dislocation, and alienation from their native languages, cultures, and communities. They were prevented from learning the values and traditional practices of their peoples, which in turn severely hampered their ability to later transmit these to their own children. Their ability to become active participants in the socio-economic and political structures of their communities was also hampered. In addition, the discriminatory content of national curricula adversely impacted the way that Indigenous students were perceived by their non-Indigenous peers.<sup>16</sup> Thus, while we often think about education as a force of empowerment, empathy, and strength, just the opposite has been true for Indigenous Peoples throughout history.

However, the human rights issues surrounding education and Indigenous Peoples are not merely historical. According to recent UN studies, Indigenous Peoples still face a number of difficulties, most notably in the area of discrimination.<sup>17</sup> An additional issue is the ongoing disconnect between mainstream education and Indigenous knowledge and learning. A fundamental purpose of education is to provide individuals with the necessary tools to participate fully and successfully in society.<sup>18</sup> Yet, for Indigenous Peoples, this idea of participating successfully in society takes on its own meaning and purpose. As one scholar of Indigenous knowledge puts it:

[Indigenous knowledge] serve[s] as the basis for a pedagogy of place that shifts the emphasis from

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15 See, e.g., *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶¶ 329–72. The issue of mascots is a contemporary example of this problem. See, e.g., *Stolen Identities: The Impact of Racist Stereotypes on Indigenous People*, *Hearing Before the Comm. on Indian Affairs*, 112th Cong. 3 (May 5, 2011), <http://www.indian.senate.gov/hearings/upload/66994.PDF>.

16 See Stavenhagen, *supra* note 12, ¶10.

17 See Stavenhagen, *supra* note 12, ¶10.

18 See ICESCR, *supra* note 2, art. 13.

teaching about local culture to teaching through the culture as students learn more about the immediate places they inhabit and their connection to the larger world within which they will make a life for themselves . . . As Indigenous people reassert their world views and ways of knowing in search of a proper balance between . . . “two worlds,” they offer insights into ways by which we can extend the scope of our educational systems to prepare all students to not only make a living, but to make a full-filling and sustainable life for themselves [and their communities].<sup>19</sup>

Most educational systems available to Indigenous Peoples tend to impose upon them teaching methods and curricula that were originally designed for a non-Indigenous cultural and linguistic context.<sup>20</sup> As a result, very few Indigenous students receive the tools they need to find a “proper balance” between two worlds.

Thus it should come as no surprise that a main purpose of Article 14 of the Declaration is to remedy the historical and contemporary inequalities in education. Relying on consultation with Indigenous representatives and studies produced by UN bodies, the Working Group on Indigenous Populations (“WGIP”) sought to identify in Article 14 some of the central mechanisms that States needed to put into action in order to begin to equalize the standard and quality of education for Indigenous Peoples.<sup>21</sup> Three means for eradicating discrimination and inequality that kept recurring in the WGIP’s discussions were: (a) self-determination in the creation and management of Indigenous schools, (b) instruction in the pupils’ Indigenous language, and (c) instruction within the context of the

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19 INDIGENOUS KNOWLEDGE AND EDUCATION: SITES OF STRUGGLE, STRENGTH, AND SURVIVANCE, *supra* note 11, at 4 (quoting Ray Barnhardt). See also U.N. Expert Mechanism on the Rights of Indigenous Peoples, *Study on Lessons Learned and Challenged to Achieve the Implementation of the Rights of Indigenous Peoples to Education*, ¶¶ 43–50, U.N. Doc. A/HRC/12/33 (June 26, 2009) [hereinafter U.N. Expert Mechanism, *Lessons Learned*].

20 See *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶¶ 61, 283. See e.g., U.N. Subcomm. on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its 16th Sess.*, ¶ 66, U.N. Doc. E/CN.4/Sub.2/1998/16 (Aug. 19, 1998) [hereinafter WGIP 16th Sess. Rep.].

21 See WGIP 16th Sess. Rep., *supra* note 20.

pupils' Indigenous culture.<sup>22</sup> What follows is a brief narrative of these important themes. The legal framework surrounding each theme is dealt with in Section III of this article.

## B. The Meaning of Article 14

What does this history tell us about the right to education under Article 14 of the Declaration? It demonstrates that there are collective and individual aspects to this right that need to be considered and addressed, and that these aspects include other important human rights norms, such as non-discrimination, cultural integrity, and self-determination. In the language of human rights law, Article 14 ensures the right of self-determination in education through the development of Indigenous educational systems and initiatives.<sup>23</sup> It ensures cultural integrity rights by recognizing Indigenous ways of knowing and learning.<sup>24</sup> And it expands our understanding of the right to non-discrimination by ensuring that Indigenous students have access to a culturally and linguistically relevant education.<sup>25</sup> By linking together these core human rights precepts, the collective and individual aspects of Article 14 can be realized.

### 1. Self-determination in Education

The first theme recognized in Article 14 is one of self-determination. According to Ole Henrik Magga, former chairperson of the United Nations Permanent Forum on Indigenous Issues ("UNPFII"), "the right to preserve and to develop [Indigenous] reservoir[s] of knowledge is a fundamental aspect of self-

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22 See WGIP 16th Sess. Rep., *supra* note 20, ¶ 52. See generally *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12; Cynthia Price Cohen, *The Sacred and the Profane: Second Annual Academic Symposium in Honor of the First Americans and Indigenous Peoples Around the World: Development of the Rights of the Indigenous Child Under International Law*, 9 ST. THOMAS L. REV. 231 (1996).

23 See UNDRIP, *supra* note 3, art. 14(1) ("Indigenous people have the right to establish and control their educational systems and institutions. . .").

24 UNDRIP, *supra* note 3, art. 14(1) ("Indigenous peoples have the right to . . . education in their own languages, in a manner appropriate to their cultural methods of teaching and learning."); UNDRIP, *supra* note 3, art. 14(3) ("States shall, in conjunction with indigenous peoples, take effective measures . . . to have access, when possible, to an education in their own cultures and provided in their own language.").

25 See UNDRIP, *supra* note 3, art. 14(2).

determination . . . Education is the door to [this] knowledge.”<sup>26</sup> By preserving and enhancing this knowledge, Indigenous Peoples can work to further many of the aspects of self-determination recognized under international law, including “freely determin[ing] their political status[,] freely pursu[ing] their economic, social and cultural development[, and] . . . freely dispos[ing] of their natural wealth and resources.”<sup>27</sup>

Education that is focused on and drawn solely from the dominant culture (sometimes called assimilationist education) violates the core principles of Indigenous self-determination. First, it fails to provide Indigenous communities with the type of empowering education envisioned by well-established universal human rights norms, including the “full development of the human personality and the sense of its dignity.”<sup>28</sup> In fact, such an education achieves the opposite by suppressing Indigenous cultures and languages and alienating Indigenous individuals from their families and communities.<sup>29</sup> Second, it furthers the economic, social, and political marginalization of Indigenous Peoples: “today formal education and especially subtractive education, the use of a dominant non-indigenous language as the teaching language (together with non-indigenous curricula and teaching methods)[,] play an increasingly important role in reproducing the powerless economic and political status of indigenous peoples.”<sup>30</sup>

Article 14 advocates an opposite approach, one that embraces Indigenous self-determination in education, both in terms of redressing and repairing the intergenerational harms inflicted on Indigenous Peoples through education, as well as finding ways to prevent similar harms from recurring in the future. Key aspects of accomplishing these goals include the establishment and

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26 U.N. Chairperson of Permanent Forum on Indigenous Issues, *Speech on Indigenous Peoples' Perspectives on Quality Education* (Jan. 8, 2003) (by Ole Henrik Magga), [http://web.archive.org/web/20050415131355/http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous Education.htm](http://web.archive.org/web/20050415131355/http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm) [hereinafter *Indigenous Peoples' Perspectives on Quality Education*]. See also U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, at ¶¶ 6, 70.

27 ICESCR, *supra* note 2, art. 1; International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

28 ICESCR, *supra* note 2, art. 13.

29 See *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶¶ 234–35; see also WGIP 16th Sess. Rep., *supra* note 20, ¶¶ 54–55, 72.

30 Permanent Forum 2008, *supra* note 13, ¶ 26.

management of Indigenous schools, as well as partnering and consulting with Indigenous communities prior to the establishment of state educational systems or programs.<sup>31</sup> Studies on education and retention support this approach. For instance, “[i]ndigenous children were more likely to attend school if their communities participated in all decisions about the content and management of their educational systems,” and if the “schools . . . harmonized with their culture and traditions in a language they understood.”<sup>32</sup>

As discussed more fully in the domestic practice section of this article, changes such as these are beginning to take hold in some parts of the world. They include both Indigenous controlled schools, as well as changes in how Indigenous knowledge and educational needs are researched and incorporated not only in Indigenous educational settings but in educational settings generally.<sup>33</sup> As former Chairman Magga notes “combin[ing] the best from [Indigenous] traditions with the best of [other] traditions. This is quality in a true sense.”<sup>34</sup> In the end, whatever the chosen curricula, research suggests that the context and content should be driven by the Indigenous community it seeks to serve, which is consistent with notions of self-determination in education. Article 14 reflects this conclusion.

## 2. Linguistically Pertinent Education

The second theme recognized in Article 14 relates to a linguistically pertinent education, where the interrelatedness between the right to education and the right to language is well established.<sup>35</sup> Experts in education have long articulated the benefit of teaching children in their mother tongue:

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- 31 See, e.g., Stavenhagen, *supra* note 12, ¶ 10; *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶¶ 177–80, 373.
  - 32 Press Release, The Permanent Forum on Indigenous Issues, Focusing on Education, Speakers in Permanent Forum on Indigenous Issues Stress Importance of Attention to Language, Culture, Traditional Knowledge, U.N. Press Release HR/4841 (May 19, 2005) [hereinafter UNICEF Press Release].
  - 33 See *infra* notes 299–331 and accompanying text. See generally Permanent Forum 2005, *supra* note 13; U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19.
  - 34 *Indigenous People’s Perspectives on Quality Education*, *supra* note 26.
  - 35 See Stavenhagen, *supra* note 12, ¶ 18. See also Permanent Forum 2008, *supra* note 13; Permanent Forum 2005, *supra* note 13.

It is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically, it is the system of meaningful signs that in his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally, he learns more quickly through it than through an unfamiliar linguistic medium.<sup>36</sup>

This principle is supported by other educational and linguistic research, which shows, among other things, that using the mother tongue as the main teaching language during the first six to eight years increases students' likelihood of success in the classroom (including increasing their chances of becoming competent in the dominant language).<sup>37</sup> Thus, while learning to read and write in the country's official language is important to ensure full participation within the wider society, instruction in the mother tongue as the first medium of education ultimately fosters this and other equally important educational goals by creating an environment conducive to learning. In fact, this increased classroom success is, in turn, "closely associated with upward socio-economic mobility."<sup>38</sup>

Yet State dominated languages are often the language of choice where Indigenous students are concerned. Two studies conducted by the UN Permanent Forum on Indigenous Issues ("UNPFII") demonstrate the many harmful consequences that flow from what has been called "[s]ubtractive education – teaching . . . the dominant language at the cost of the mother tongue and thus subtracting from the children's linguistic competence."<sup>39</sup> This is contrasted with "additive education" in which children "learn their mother tongues . . . , in addition to learning a dominant language."<sup>40</sup> The

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36 U.N. Educ., Sci., and Cultural Org. [UNESCO], *The Use of Vernacular Languages in Education*, 11, U.N. Doc. ED 16/8 (Sept. 1953).

37 See Permanent Forum 2005, *supra* note 13, ¶¶ 6–9, 14; Permanent Forum 2008, *supra* note 13, ¶ 9. See also U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶¶ 74–80.

38 AJIT K. MOHANTY AND GIRISHWAR MISRAI, *PSYCHOLOGY OF POVERTY AND DISADVANTAGE* 135–36 (Concept Publishing Company) (2000) (quoted in Permanent Forum 2005, *supra* note 13, ¶ 15).

39 Permanent Forum 2008, *supra* note 13, ¶ 11. See also Permanent Forum 2005, *supra* note 13, ¶¶ 15–18.

40 Permanent Forum 2008, *supra* note 13, ¶ 11.



harmful consequences flowing from subtractive education include higher dropout rates and lower educational scores. Other negative socio-economic and psychological consequences include higher rates of unemployment, lower incomes, feelings of exclusion and loss, and an increase in the number of teenage and adult suicides.<sup>41</sup> Not surprisingly, all of these elements are interconnected. As one Ojibway elder describes it: “Our language is dying, that is the first sign of deterioration. Our native style of life has to be based on four elements – heritage, culture, values, language – and if you take one away it begins to break down. Then we have the symptoms of this breakdown, alcoholism[,] . . . abuse,” and poverty.<sup>42</sup>

Because of the harmful effects from subtractive education, Article 14 embodies an important principle: Indigenous children have a right “to be taught to read and write in their own . . . language or in the language most commonly used by the group to which they belong.”<sup>43</sup> However, it is not only the Indigenous individual that is affected by a policy of subtractive education. Such practices greatly impact the intergenerational transmission and survival of Indigenous languages. According to the UNPFII studies:

Subtractive teaching subtracts from the child’s linguistic repertoire, instead of adding to it. In this enforced language regime, children . . . or at least their children, are effectively transferred to the dominant group linguistically and culturally. This also contributes to the disappearance of the world’s linguistic diversity . . . Optimistic estimates of what is happening suggest at least 50% of today’s spoken languages may be extinct . . . around the year 2100 . . . Most of the disappearing languages are indigenous languages, and . . . [e]ducation is one of the most important direct causal factors in this disappearance.<sup>44</sup>

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41 Permanent Forum 2008, *supra* note 13, ¶ 20.

42 Permanent Forum 2008, *supra* note 13, ¶ 10.

43 Permanent Forum 2005, *supra* note 13, ¶ 23.

44 Permanent Forum 2005, *supra* note 13, ¶¶ 4–5. *See also* U.N. High Comm’r for Refugees [UNHCR], Int’l Expert Grp. Meeting on Indigenous Languages, *Human Rights Legal Framework and Indigenous Languages*, ¶ 2, U.N. Doc. PFII/2008/EGM1/15 (Jan. 8–10, 2008) (“ . . . from an approximate number of 6700 languages that are believed to exist today, over 3000 are in serious danger of disappearance. Indigenous peoples’ languages represent at least 4000 languages

The use of these languages in educational systems and programs is therefore vital to their preservation.<sup>45</sup> Moreover, the value of doing so extends beyond mere linguistics. Language is “not only . . . a means of communication, but . . . the basis of identification for an ethnicity, and . . . a repository of [traditional] knowledge.”<sup>46</sup> Consequently, use of Indigenous languages in schools and programs is vital to both preserving Indigenous languages and transmitting Indigenous knowledge to future generations. In the end, then, what Article 14 seeks to foster is a linguistic model that promotes good educational goals (as well as rights) for Indigenous individuals and their communities.

### 3. Culturally Pertinent Education

The final theme in Article 14 is cultural integrity. As earlier noted, education is much more than a vehicle for learning basic skills. Many Indigenous Peoples view education as a holistic system, designed to teach a child that all things in life are related.<sup>47</sup> This system of learning is often tied to the kinship community. In his book *Look to the Mountain: An Ecology of Indigenous Education*, Gregory Cajete describes how family and community can define the content and process of a child’s education: “The living place, the learner’s extended family, the clan and [community] provide[] the context and source for teaching. In this way, every situation provide[s] a potential opportunity for learning . . . [where] basic education [is]

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of the world’s linguistic diversity and most of the indigenous languages belong nowadays to the category of languages seriously endangered.”) [hereinafter *Human Rights Legal Framework*].

- 45 UNESCO has identified nine factors that are important predictors of the viability of a language: (1) “absolute number of speakers;” (2) “proportion of speakers within the total population;” (3) “availability of materials for language education and literacy;” (4) “response to new domains and media;” (5) “type and quality of documentation;” (6) “government and institutional language attitudes and policies, including official status and use;” (7) “shifts in domains of language use;” (8) “community member’s attitudes toward their own language;” and (9) “intergenerational language transmission.” UNESCO, *A Methodology for Assessing Language Vitality and Endangerment* (2002–2003), [www.unesco.org/new/en/culture/themes/endangered-languages/language-vitality/](http://www.unesco.org/new/en/culture/themes/endangered-languages/language-vitality/).
- 46 U.N. Comm’n on Human Rights [UNCHR], Prevention of Discrimination: Prevention of Discrimination and Protection of Indigenous Peoples, Rep. of the Working Grp. on Indigenous Populations on its 23rd Sess., July 18–22, 2005, ¶ 46, U.N. Doc. E/CN.4/Sub.2/2005/26 (Aug. 12, 2005).
- 47 See *Indigenous Peoples’ Perspectives on Quality Education*, *supra* note 26, ¶ 2.

not separated from the natural, social, or spiritual aspects of everyday life.”<sup>48</sup> It is this “cumulative knowledge” derived from the community and passed from generation to generation that shapes the identity of the individual and the group, and that ensures a future existence for both.

An important goal of education under international law is to strengthen a student’s identity. Yet education for Indigenous students has often had the contrary effect. For instance, when they are taught exclusively the histories and ways of life of peoples other than their own, Indigenous students end up having no historical or contemporary figures with whom they can identify and whom they can emulate.<sup>49</sup> This further alienates them from their own cultures and communities. Yet in the process of losing that important connection to community and culture, they often fail to gain access to another.<sup>50</sup> Incorporating Indigenous history, knowledge, values and customs into the curricula helps to prevent this type of individual and communal alienation. As one Indigenous organization in Canada noted, “children will continue to be strangers in Canadian classrooms until the curriculum recognizes [Indigenous] customs and values, [Indigenous] languages, and the contributions which the [Indigenous] people have made to Canadian history.”<sup>51</sup> From a group standpoint, an educational system that incorporates Indigenous knowledge and

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48 GREGORY A. CAJETE, *LOOK TO THE MOUNTAIN: AN ECOLOGY OF INDIGENOUS EDUCATION* 33 (Kavaki Press 1994). See also *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶ 203; *Indigenous Peoples’ Perspectives on Quality Education*, *supra* note 26, ¶ 4. See e.g., WGIP 16th Sess. Rep., *supra* note 20, ¶ 66. See also U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶¶ 43–50 (another good description of what “traditional education” can look like).

49 For example, in Chile,

[a] young Mapuche boy from the Cho-Chol region will certainly find it easier to understand that one cow plus another cow makes two cows, than that one orange plus another orange makes two oranges. He is familiar with cows and interested in them because they belong to his environment. As for oranges, he has never seen them growing, he is unfamiliar with the tree that produces them, and he therefore finds it difficult to picture them.

*Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶ 296. See also U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶¶ 69–70.

50 See e.g., *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶¶ 197, 200, 234–35. See also, e.g., WGIP 16th Sess. Rep., *supra* note 20, ¶¶ 54–55, 72.

51 NAT’L INDIAN BHD., *INDIAN CONTROL OF INDIAN EDUCATION* 26 (1972) (as cited in *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶ 199).

practices into its curricula not only stimulates the curiosity of an individual student, it also helps to preserve and protect his or her heritage for future generations.

Thus far we have identified the major themes of Article 14 and the context behind them. In Section III of this article we will explore how these themes fit within existing international human rights structures.

### C. The Meaning of Article 15

Like Article 14, Article 15 is focused on the role of education in the promotion and protection of Indigenous rights. It implicates similar human rights norms as Article 14, but is distinct in that it is aimed at the public recognition of “the dignity and diversity” of Indigenous cultures and more broadly at the general promotion of “tolerance, understanding and good relations among indigenous peoples and all other segments of society.”<sup>52</sup> These objectives have the effect of broadening the *raison d’être* of Article 15 beyond the themes already explored in Article 14.

Article 15 of the Declaration affirms the belief that reflecting the diversity of Indigenous cultures in a respectful and dignified manner, particularly in the realms of education and public information, is a critical step in the process of improving relations between Indigenous and non-Indigenous peoples.<sup>53</sup> Article 15 embraces the concept of “cultural pluralism” or “diversity of cultures,” as it is sometimes called, but does so within the unique context of the rights and histories of Indigenous Peoples. The movement for acceptance of cultural plurality began several decades ago at the grassroots level and has gained international and regional support. In some countries, the movement has been characterized within the realm of “multiculturalism,” which has been defined as a “systematic and comprehensive response to cultural and ethnic diversity, with educational, linguistic, economic

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52 UNDRIP, *supra* note 3, art. 15.

53 For the sake of brevity, the term “culture” is being used to encompass the various facets of culture addressed in Article 15 including tradition, history, and aspirations. However, the use of the abbreviated term “culture” is not meant to detract from the complexity of the concept as it is presented in Article 15 or the recognition of culture as holistic, dynamic, and integral to the identity and self-determination of Indigenous Peoples.

and social components and specific institutional mechanisms.”<sup>54</sup> The concept of multiculturalism is important in its own right in terms of its significance for bringing about societal harmony. However, as applied, it may not adequately capture those aspects of Indigenous rights that are unique and different from ethnic minority rights. As one scholar notes, Indigenous Peoples have specific legal and political concerns that are “often associated with land and identity,” but may be overlooked in any conversation on “multiculturalism.”<sup>55</sup> It is this broader understanding of the right to the dignity and diversity of cultures that is reflected in Article 15 of the Declaration. Article 15 can also be said to address what social scientists have termed “alienating violence.”<sup>56</sup> Alienating violence can be found where there are State policies “that threaten to destroy the cultural identity of an entire [people].”<sup>57</sup> Article 15 aims to ameliorate such policies by promoting tolerance and understanding for Indigenous Peoples’ diverse cultures through education.

Why educational systems? For many people, educational curricula form the foundation upon which their cultural and societal ideas are built. Along with lessons learned from one’s family and community, education is one of the most important formative forces contributing to the shaping of an individual’s worldview and sense of self. According to education experts,

the explicit and implicit messages about inter-group relations that children receive in school shape the form and sensitivities of young minds with respect to other human beings. If education is to contribute to economic

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54 UNESCO, Mgmt. of Soc. Transformations, *Multiculturalism: A Policy Response to Diversity*, pmb., (Apr. 1995), <http://www.unesco.org/most/sydpaper.htm> [hereinafter *Multiculturalism: A Response*].

55 Christine Inglis, UNESCO, Mgmt. of Soc. Transformations, *Multiculturalism: New Policy Response to Diversity*, <http://www.unesco.org/most/pp4.htm#un>.

56 Jamil Salmi, *Violence, Democracy, and Education: An Analytical Framework*, PROMOTING SOCIAL COHESION THROUGH EDUCATION: CASE STUDIES AND TOOLS FOR USING TEXTBOOKS AND CURRICULA 9–12 (Eluned Roberts-Schweitzer ed., 2006), <http://books.google.com/books?id=galFCzv4WSsC&pg=PP7&lpg=PA1&dq=Textbooks,+Respect+for+Diversity,+and+Social+Cohesion&output=html>.

57 “In Morocco, for example, the Berbers, [an Indigenous group] who comprise[s] 60 percent of the total population, do not have official recognition in schools or in the media.” *Id.* at 12.

and social development, it is critical that we understand those messages and the means of their transmission.<sup>58</sup>

This has proven particularly true in the case of Indigenous Peoples, where the negative consequences of cultural discrimination against Indigenous students, particularly in the way they are perceived by other students, are well documented.<sup>59</sup>

The promotion of culturally and linguistically appropriate educational systems under Article 14 is critical to addressing this legacy of discrimination and marginalization, but such developments alone are not enough. Change that is substantive and sustainable must address one of the root causes, namely the way in which non-Indigenous peoples perceive and understand the diversity of Indigenous cultures, traditions, histories and aspirations. Thus, Article 15 endeavors to engage States, and in turn non-Indigenous peoples, in the processes that are primarily responsible for shaping our ideas about “self” and “other” – through accurate educational materials and other public information.

Thus far we have attempted to identify the normative aspects of Article 14 and 15 that are relevant to the advancement of Indigenous Peoples rights to education. We have also worked to place these norms within a historical narrative that helps us better understand the purposes behind these provisions. This next section will consider these provisions within the context of existing international instruments and practices.

### III. Issues and Analysis of International Legal Framework

#### A. International Legal Framework for Article 14

This section demonstrates two key points: (1) the larger rights that make up Article 14 – non-discrimination, cultural and linguistic integrity, self-determination, and education – are established principles of international law; and (2) even within the basic right to education, there is a fair amount of existing international law to support Article 14’s formulation of this right. The UN Declaration

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58 *Id.* at iv.

59 *See* Stavenhagen, *supra* note 12, ¶ 10(h). Similar arguments can be made with respect to informational systems generally, particularly as it relates to the media, an issue addressed in Article 16 of the Declaration. *See* UNDRIP, *supra* note 3, art. 16.

seeks to ensure that these long-established human rights are extended fully and equally to Indigenous Peoples.

This section explores the existing international legal framework for the protection and advancement of Indigenous education. It is not intended to provide a comprehensive look at the right to education. Rather, it highlights aspects of that right that are relevant to the realization of the aims articulated in Article 14 of the Declaration, and that ultimately establish the binding nature of these aims. It begins with a brief introduction into the right of education generally and then covers more specifically the aims articulated in Article 14 of the Declaration. Subsumed within this discussion are the comments and recommendations of various UN human rights bodies.

### *The Right to Education*

The 1948 Universal Declaration of Human Rights (“UDHR”) proclaimed that “[e]veryone has the right to education[, which] shall be free . . . in the elementary and fundamental stages.”<sup>60</sup> This proclamation of rights was followed by widely adopted treaties that addressed more specifically the key aspects of the right to education, and include the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)<sup>61</sup> and the Convention on the Rights of the Child (“CRC”).<sup>62</sup> In particular, the ICESCR requires States to actively pursue a system of schools at all levels, with primary education being compulsory and free for all, secondary education being generally available and progressively free, and higher education being equally accessible to all.<sup>63</sup> There are other more specific instruments that create legally binding obligations relating to Indigenous Peoples and education. In particular, ILO Convention (No. 169), *Concerning Indigenous and Tribal Peoples in Independent Countries*, provides for the right of Indigenous Peoples “to acquire education at all levels.”<sup>64</sup>

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60 Univ. Decl, *supra* note 2, art. 26.

61 See ICESCR, *supra* note 2, arts. 13–14.

62 See Convention on the Rights of the Child, G.A. Res. 44/25, arts. 28–29, U.N. Doc A/44/49 (Sept. 2, 1990) [hereinafter CRC].

63 See ICESCR, *supra* note 2, art. 13. See also U.N. Comm. on Econ., Soc. and Cultural Rights, *General Comment 13: The Right of Education (Art. 13)*, ¶ 25, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter CESCR Gen. Cmt. No. 13].

64 Int’l Labour Org., *Convention C169 – Indigenous and Tribal Peoples Convention*, art. 26 (adopted June 27, 1989) [hereinafter ILO Con. No. 169]. The Convention has been ratified by 20 countries, but is also being used by regional and domestic

This includes the right to a linguistically and culturally appropriate education that is developed with and controlled by Indigenous Peoples.<sup>65</sup> Various provisions of the CRC similarly provide for the rights of children to have access to a culturally appropriate education.<sup>66</sup>

The various human rights instruments cited above also speak to the aims and objectives of education, which include “full[y] develop[ing] . . . the human personality and the sense of its dignity, . . . enabl[ing] . . . persons to participate effectively in a free society, . . . strengthen[ing] . . . respect for [all people’s] human rights and fundamental freedoms,” and “promot[ing] understanding, tolerance, and friendship among all nations . . . and groups.”<sup>67</sup> In terms of general legal obligations, the Committee on Economic, Social and Cultural Rights (CESCR) notes that “[t]he right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil.”<sup>68</sup> The obligation of respect requires States not to interfere with or hinder the enjoyment of the right to education. The obligation to protect requires States to take measures to prevent others from interfering with this right. And the obligation to fulfill denotes an obligation on the part of States “to take positive measures that enable and assist individuals and communities to enjoy the right to education.”<sup>69</sup>

Non-discrimination is an additional norm relevant to the full realization of the right to education. According to the CESCR, States “have [an] immediate obligation[] in relation to the right to

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bodies as evidence of customary law as it relates to Indigenous Peoples. *See generally* Int’l Labour Org., *Application of Convention No. 169 by Domestic and International Courts in Latin America* (2009), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_123946.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf) [hereinafter *Domestic and International Courts in Latin America*]. *See e.g.*, *Cal (on behalf of the Maya Village of Santa Cruz) & Coy (on behalf of the Maya Village of Conejo) v. Attorney-Gen. of Belize & Minister of Nat. Res. & Env’t, Claims Nos. 171 and 172 of 2007*, Supreme Court of Belize, Judgment of 18 Oct. 2007, unreported; *Sawhoyamaya Indigenous Cmty v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006)*. Corte Constitucional [Constitutional Court], Mar. 21, 2007, Sentencia C-208/07. Moreover, the educational provisions of the ILO track the rights that are part of widely adopted treaties, such as the ICESCR and CRC.

65 *See* ILO *Con. No. 169*, *supra* note 64, arts. 27–28.

66 *See, e.g.*, CRC, *supra* note 62, art. 29(c); Permanent Forum 2005, *supra* note 13, ¶ 23.

67 ICESCR, *supra* note 2, art. 13(1); Univ. Decl., *supra* note 2, art. 13(1).

68 CESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 46.

69 CESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 47.



education . . . [to ensure] that the right “will be exercised without discrimination of any kind.”<sup>70</sup> Article 29 of ILO Convention 169 deals directly with the linkages between educational aims and non-discrimination, noting that “[t]he imparting of . . . knowledge and skills that will help children belonging to the peoples concerned to participate fully and on equal footing in their own community and in the national community shall be the aim of education.”<sup>71</sup> Thus, States have a duty under international law to provide for the right to education by means that most appropriately ensure equal opportunity for each individual member of society. This relationship between the right to non-discrimination and the right of education is explored more fully below.

In terms of recent international initiatives, the Education for All Movement, of which the UN Educational, Scientific, and Cultural Organization (UNESCO) is the lead agency, embodies many of the educational rights advanced under international human rights law.<sup>72</sup> This movement includes “six internationally agreed education goals [designed] to meet the learning needs of all children, youth and adults by 2015.”<sup>73</sup> These goals include: (1) expanding early childhood care and education, (2) providing free and compulsory primary education for all, (3) promoting learning and life skills for young people and adults, (4) increasing adult literacy, (5) achieving gender parity and gender equality, and (6) improving the quality of education.<sup>74</sup> These goals align well with the educational rights of Indigenous Peoples outlined in the Declaration and are being advanced through a number of UNESCO-sponsored programs.<sup>75</sup>

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70 CESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 43.

71 ILO *Con. No. 169*, *supra* note 64, art. 29.

72 The Education for All [EFA] movement includes an array of participants including 164 governments, UNESCO, UNICEF, and World Bank, to name a few. See UNESCO, *Education for All [EFA]*, [www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/](http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/) (last visited Jan. 11, 2016).

73 UNESCO, *Education for All Goals*, [www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/efa-goals/](http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/efa-goals/) (last visited Jan. 11, 2016) [hereinafter *Education for All Goals*].

74 *Id.*

75 See UNESCO, Div. for the Promotion of Quality Educ., *UNESCO's Work on Indigenous Education*, <http://unesdoc.unesco.org/images/0013/001355/135576eo.pdf> [hereinafter *UNESCO's Work on Indigenous Education*]. See also UNESCO, *Education*, <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/languages-in->

Finally, the right to education is a fundamental right, as well as an essential means by which other important human rights are realized.<sup>76</sup> As former Special Rapporteur on the Right to Education, Katarina Tomasevski once stated, the right to “[e]ducation operates as a multiplier, enhancing . . . all . . . rights and freedoms where [it] is effectively guaranteed, while [jeopardizing them all] where [it] is . . . violated.”<sup>77</sup> This understanding of the right to education is particularly relevant given the concerns of Indigenous Peoples discussed earlier: the right to education is essential to, and can only be fully achieved by, the realization of other important human rights, such as the right to Indigenous self-determination and the right to cultural and linguistic integrity.<sup>78</sup> The international legal framework that supports the intersection of these rights is explored next.

### 1. Article 14(1): Indigenous Educational Systems

Article 14(1) involves two aspects of the right of self-determination: (a) the right of Indigenous Peoples to be in charge of the creation and control of schools serving their communities; and (b) the right of Indigenous Peoples to provide an education in their Indigenous languages and within their Indigenous cultures. Both major UN human rights covenants, the International Convention

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education/indigenous-education/ (last visited Jan. 11, 2016) [hereinafter UNESCO *Education*]; UNESCO, *Local and Indigenous Knowledge Systems*, <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/> (last visited Jan. 11, 2016) [hereinafter UNESCO *Local and Indigenous Knowledge Systems*].

76 See CESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 1. See also U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶¶ 5–6:

Education is recognized as both a human right in itself and an indispensable means of realizing other human rights and fundamental freedoms, the primary vehicle by which economically and socially marginalized peoples can lift themselves out of poverty and obtain the means to participate fully in their communities. Education is increasingly recognized as one of the best long-term financial investments that States can make.

77 Katarina Tomševski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable*, 3 RIGHT TO EDUC. PRIMERS 1, 10 (2001). See also KATARINA TOMŠEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 7 (2006) [hereinafter HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME].

78 See HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME, *supra* note 77, at 29–31 (for a discussion of language as well as discrimination in education).

on Civil and Political Rights (ICCPR) and the ICESCR, protect the right of self-determination, which includes the right of all peoples to “freely determine their political status” as well as to “freely pursue their economic, social and cultural development.”<sup>79</sup> Education is a key aspect of a people “freely determining” and achieving these ends.

The first part of paragraph 14(1) includes the right to develop and maintain non-governmental schools, as well as exercising control and authority over government-funded schools serving Indigenous communities. In terms of non-governmental schools, States have a responsibility under the ICESCR to respect the right of “individuals and bodies to establish and direct educational institutions.”<sup>80</sup> Article 27(3) of ILO Convention 169 similarly articulates that “governments shall recognise the right of [Indigenous] peoples to establish their own educational institutions and facilities.”<sup>81</sup> Under international law, this right is limited only in the sense that the schools must meet “minimum standards” established by the State in consultation with Indigenous Peoples.<sup>82</sup>

However, international human rights law does not limit the right to self-determination in education to the establishment and control of private schools. On the contrary, States have an obligation to assist Indigenous Peoples in establishing government-funded educational facilities and initiatives within their own communities. This is reflected in the ICESCR, which requires states to take “deliberate, concrete, and targeted” steps to provide “free” education at the primary school level, and to develop “system[s] of schools at all levels.”<sup>83</sup> The CRC similarly requires States to provide “free” and “available” primary education, as well as secondary education that is generally “available and accessible” to all children.<sup>84</sup> ILO Convention 169 mirrors these international standards, requiring that State-supported schools be “developed and implemented in co-operation with [Indigenous communities] to address their special needs, and

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79 ICESCR, *supra* note 2, art. 1(1); ICCPR, *supra* note 27, art. 1.

80 ICESCR, *supra* note 2, art. 13(4).

81 ILO *Con. No. 169*, *supra* note 64, art. 27(3).

82 See Int'l Labour Org., *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual*, 12 (Dumas-Titoulet Imprimeurs rev. ed. 2003), [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/instructionalmaterial/wcms\\_088485.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/instructionalmaterial/wcms_088485.pdf) [hereinafter *ILO Convention Manual*]. See also ICESCR art. 13, ¶ 4, *supra* note 2.

83 ICESCR, *supra* note 2, art. 13; CESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 43.

84 CRC, *supra* note 62, art. 28.

[to] incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.”<sup>85</sup>

Indigenous-run schools and initiatives are also consistent with the right of parents and guardians under the ICESCR to direct the “religious and moral education of their children” and to choose schools for their children “other than those established by the public authorities.”<sup>86</sup> The CRC provides more specifically that “the education of a child shall be directed to . . . [t]he development of respect for the child’s parents, his or her own cultural identity, language and values.”<sup>87</sup> Similar treaty provisions can be found in the UNESCO Convention Against Discrimination in Education (CADE).<sup>88</sup>

The second part of Article 14(1) deals with the right of Indigenous Peoples to an education consistent with their cultural methods of teaching and learning and in their own language. This is consistent with both the CRC and the ICCPR, which protect the right of Indigenous individuals “in community with . . . other members of [their] group, to enjoy [their] own culture . . . or to use [their] own language.”<sup>89</sup> The CRC takes this one step further when noting that a child’s education should “be directed to . . . the development of . . . his or her own cultural identity, language and values.”<sup>90</sup> ILO Convention 169 mirrors this legal mandate, recognizing the right of Indigenous students to be educated in their own language.<sup>91</sup> Since children learn best in their mother tongue for all the reasons previously discussed, the right to be taught in their own language is inextricably linked to the right to achieve the same level of proficiency as non-Indigenous children in basic skills and subjects.

Although educational systems and initiatives are subject to “minimum [governmental] standards,” a culturally and linguistically relevant education is consistent with this requirement, particularly when one considers some of the primary aims of a universal education,

85 ILO *Con. No. 169*, *supra* note 64, art. 27, ¶ 1.

86 ICESCR, *supra* note 2, art. 13, ¶ 3.

87 CRC, *supra* note 62, art. 29, ¶ 1.

88 UNESCO, Convention Against Discrimination in Education, arts. 2(b), 5(1)(b), 429 U.N.T.S. 93, (Dec. 14, 1960), [http://portal.unesco.org/en/ev.php-URL\\_ID=12949&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html) [hereinafter UNESCO CADE]; Univ. Decl., *supra* note 2, art. 26, ¶ 3.

89 ICCPR, *supra* note 27, art. 27; CRC, *supra* note 62, art. 30.

90 CRC, *supra* note 62, art. 29, ¶ 1.

91 ILO *Con. No. 169*, *supra* note 64, art. 28.

such as the “[full] development of the child’s personality, talents and mental and physical abilities” and “[t]he development of respect for the child’s parents [and for] his or her own cultural identity, language and values.”<sup>92</sup> As earlier explained, an education that is devoid of or demeaning of a child’s cultural or linguistic context has the opposite effect, impairing her ability “to participate effectively in a free society” or to develop fully “the human personality” or “[its] sense of . . . dignity” as articulated in the ICESCR.<sup>93</sup> This interpretation of international law finds support in the general comments of the CESCR and the Committee on the Rights of the Child.<sup>94</sup>

Many other United Nations human rights bodies have reached similar conclusions regarding the need for the development of linguistically and culturally relevant educational systems for Indigenous Peoples. For instance, the OHCHR International Expert Group on Indigenous Languages concluded in 2008 that

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92 CRC, *supra* note 62, art 29(1). See also ICESCR, *supra* note 2, art. 13.

93 ICESCR, *supra* note 2, art. 13(1). Many of the same educational objectives quoted in this paragraph are also reflected in numerous international instruments: U.N. Charter art. 1, ¶ 3; Univ. Decl., *supra* note 2, art. 26(2); UNESCO CADE, *supra* note 88, art 5(1)(a); World Conference on Education for All, Jomtien, Thailand, Mar. 5–9, 1990, *World Declaration on Education*, art. 1, [www1.umn.edu/humanrts/instreet/educonference1990.html](http://www1.umn.edu/humanrts/instreet/educonference1990.html); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993), <http://www.un-documents.net/ac157-23.htm>; U.N. Secretary-General, *Plan of Action for the United Nations Decade for Human Rights Education 1995–2004: Human Rights Education - Lessons for Life*, ¶ 2, U.N. Doc. A/51/506/Add.1 (Dec. 12, 1996), [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionfortheUnitedNationsDecadeforHumanRightsEducation,1995-2004\(1996\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/PlanofActionfortheUnitedNationsDecadeforHumanRightsEducation,1995-2004(1996).aspx).

94 CESCR General Comment No. 13 notes that education must be “relevant, culturally appropriate and of good quality,” as well as “flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.” CESCR Gen. Cmt. No. 13, *supra* note 63, ¶¶ 6(c)–(d). The U.N. Committee on the Rights of the Child not only agreed with the CESCR in its General Comment No. 1, but went on to clarify that the right to education is not completely fulfilled when the curriculum limits the benefits a group can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage that group’s participation in the learning process. U.N. Committee on the Rights of the Child, *General Comment No. 1: The Aims of Education*, ¶¶ 9–10, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001). (In paragraph 10, the Committee was using the extreme example of how curricula could perpetuate gender discrimination, but it is clear that the Committee means for the example to apply to any group suffering from discrimination.)

“[i]nternational contemporary law provides the legal framework for the protection of the use of one’s own language” and that the protection of this right is interrelated to the “cultural and physical survival” of Indigenous Peoples.<sup>95</sup> Similarly, the UNPFII has recommended “that all education programmes for Indigenous children . . . be based on the insights from solid research over many years that mainly mother tongue medium . . . bilingual education is superior to all other forms of education practices in order to achieve literacy and generally effective learning.”<sup>96</sup> Finally, the OHCHR Expert Seminar on Indigenous Peoples and Education highlighted in 2004 the obstacles to Indigenous Peoples’ full enjoyment of their right to education, including the lack of linguistically and culturally appropriate education that is shaped and directed by Indigenous Peoples.<sup>97</sup>

## 2. Article 14(2): Non-discrimination in Education

Article 14(2) of the Declaration specifically addresses the right of non-discrimination in “all levels and forms” of State-sponsored education.<sup>98</sup> Article 14 of the Declaration directly responds to historical and contemporary discrimination against Indigenous Peoples specifically in State education systems. It also identifies central mechanisms that States need to put into place to eradicate discrimination and equalize education for Indigenous Peoples, including self-determination in the creation and running of schools, as well as the advancement and support of linguistically and culturally relevant instruction. Beyond mere access to existing State institutions, it affirms Indigenous pupils’ right to receive education to the same extent and of the same quality as non-Indigenous pupils. In other words, its goal is to provide education that ultimately enables Indigenous pupils to participate in society on an equal footing with non-Indigenous pupils regardless of differences in backgrounds and needs. This is consistent with the mandate under international

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95 *Human Rights Legal Framework*, *supra* note 44, ¶¶ 29–30.

96 Permanent Forum 2005, *supra* note 13, ¶ 32. *See generally*, Permanent Forum 2008, *supra* note 13.

97 Stavenhagen, *supra* note 12, ¶ 10.

98 UNDRIP, *supra* note 3, art. 14(2).

law that States secure and protect the right to education without discrimination.<sup>99</sup>

The principles of equality and non-discrimination take on special meaning with respect to the right to education. Just as education is a prerequisite for the enjoyment of other human rights,<sup>100</sup> so too is non-discrimination an important prerequisite for the enjoyment of one's right to education. All the major international human rights instruments relating to education address this issue of non-discrimination in education, including the ICESCR, the CRC, and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>101</sup> UNESCO's CADE is perhaps the most comprehensive in this regard. It prohibits States from: (1) denying any individual or group "access to education of any type or at any level," (2) providing them with an "education of an inferior standard," or (3) inflicting on them "conditions which are in-compatible with the dignity of man."<sup>102</sup> The duties of a State under this Convention include "abrogat[ing] . . . statutory provisions . . . [or] practices which involve discrimination in education" and advancing a "national policy [that] . . . promote[s and ensures] equality of opportunity and . . . treatment."<sup>103</sup> ILO Convention 169 similarly provides for education of Indigenous Peoples "on at least an equal footing with the rest of the national community."<sup>104</sup> Moreover, States have "immediate obligations" to meet this duty of non-discrimination in education.<sup>105</sup> Indigenous students who are in schools that hamper their academic success by ignoring their linguistic and cultural needs do not benefit from the right to education on an "equal footing" with the rest of society and are in fact being subjected to "education of an inferior standard."<sup>106</sup>

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99 See Univ. Decl., *supra* note 2, art. 2; U.N. Charter art. 1, ¶ 3 (aiming to promote non-discrimination as it relates to all human rights); ICESCR, *supra* note 2, art. 2(2); CRC, *supra* note 62, art. 2(1).

100 See U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶¶ 5–6.

101 See ICESCR, *supra* note 2, art. 2(2); CRC, *supra* note 57, art. 2(1); United Nations International Convention on the Elimination of All Forms of Racial Discrimination, arts. 5(e), 7, Mar. 7, 1966, *entered into force* Jan. 4, 1969, S Exec. Doc. C 95-2 5, 660 U.N.T.S. 195 [hereinafter CERD].

102 UNESCO CADE, *supra* note 88, art. 1.

103 UNESCO CADE, *supra* note 88, arts. 3–4.

104 ILO Con. No. 169, *supra* note 64, art. 26.

105 CDESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 43.

106 ILO Con. No. 169, *supra* note 64, art. 29; UNESCO CADE, *supra* note 88, art. 1(1)(b).

More specifically, when considering issues of non-discrimination in education, States must be cognizant of how UN bodies have defined a meaningful education. According to the CESCR, education “in all its forms and at all levels” should be “available, accessible, acceptable and adaptable.”<sup>107</sup> For instance, the right to education requires that schools at all levels be physically “available” to all potential students. States must therefore increase the available infrastructure of schools for Indigenous Peoples to meet whatever need exists.<sup>108</sup> Second, schools must be “accessible” without discrimination, including on the basis of economic status, race, culture, language, sex, or religion.<sup>109</sup> Thus, States must go beyond simply opening school enrollment to all who need it, and take further steps to “enhance equality of educational access for individuals from disadvantaged groups,” including Indigenous Peoples.<sup>110</sup> However, State responsibility toward Indigenous Peoples does not end with merely facilitating the unrestricted access of Indigenous pupils to existing State schools. Rather, education must “adapt” to the particular needs and best interests of each child. Under international law, this includes the “imparting of general knowledge and skills” that will help Indigenous children “participate fully and on an equal footing in their own community *and* in the national community.”<sup>111</sup> In order to meet the goals of preparing Indigenous pupils for a blended way of life, State curricula will therefore need to be adaptable, incorporating Indigenous ways of knowing and learning

107 CESCR Gen. Cmt. No. 13, *supra* note 63, ¶ 6. In her 1999 Preliminary Report, the Rapporteur on the Right to Education “structured [governmental obligations corresponding to this right generally] into a 4-A scheme, denoting the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability.” U.N. Commission on Human Rights, *Preliminary Report of the Special Rapporteur on the Right to Education*, 55th Sess. Prov. Agenda Item 10, U.N. Doc. E/CN.4/1999/49 (Jan. 13, 1999). The 4-A Scheme is also explained in great detail in HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME, *supra* note 77.

108 See CESCR Gen. Cmt. 13, *supra* note 63, ¶ 6(a).

109 See CESCR Gen. Cmt. 13, *supra* note 63, ¶¶ 6(b), 7.

110 See CESCR Gen. Cmt. 13, *supra* note 63, ¶ 26. Some meaningful steps articulated by the CESCR and by Martínez Cobo include creating fellowship systems and economic subsidies; as well as providing such things as adequate clothing, transportation to schools, or other necessary accommodations. See CESCR Gen. Cmt. 13, *supra* note 63, at ¶ 26; *Study of the Problem of Discrimination*, (Vol. V), *supra* note 12, ¶ 97(g). See also ICESCR, *supra* note 2, art. 13(2)(e).

111 ILO *Con. No. 169*, *supra* note 64, arts. 28(2), 29. See also ICESCR, *supra* note 2, art. 13(1) (emphasis added).



in addition to general knowledge and skills needed for survival outside of the Indigenous community. On the issue of “*acceptability*,” the CESCR has made it clear that under international law “the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.”<sup>112</sup> Thus, non-discrimination in the education of Indigenous pupils includes, at minimum, curricula and teaching methods relevant to and consistent with the cultural and linguistic needs and concerns of students and their families.

Under international law, a State can establish, maintain, or permit separate educational systems or programs for religious, cultural, or linguistic reasons without running afoul of the principle of non-discrimination.<sup>113</sup> However, schooling that looks on its face to be equal, but actually limits Indigenous pupils to an “education of an inferior standard” (particularly as it relates to educational outcomes) would run afoul of this principle.<sup>114</sup> These points are further illustrated in the next section on “effective measures.”

### **3. Article 14(3): Effective Measures, Right of Access and Consultation**

Under paragraph 14(3) of the Declaration, States must “in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.”<sup>115</sup> In ascertaining the meaning of this clause, we are faced with the initial question of whether paragraph (3) stands alone or is in some way connected to the other paragraphs of Article 14. A review of the drafting history of this provision suggests that paragraph (3) compliments paragraphs (1) and (2), as well as imposes additional obligations on States. The seven commas and

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112 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 6.

113 See e.g., UNESCO CADE, *supra* note 88, art. 2(b). See also CESCR Gen. Cmt. 13, *supra* note 63, ¶ 33.

114 UNESCO CADE, *supra* note 88, art. 1(b). See also *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Aug. 31-Sept. 8, 2001, U.N. GAOR, U.N. Doc. A/CONF.189/12, ¶ 123(b)–(e) (2002) (by Durban).

115 UNDRIP, *supra* note 3, art. 14(3).

nine clauses of this provision make it difficult to ascertain its meaning. However the drafting history supports the following interpretation, which is consistent with international law precepts: First, Article 14(3) requires States to take affirmative steps to ensure that all the rights articulated in Article 14 are met. Second, it requires States to take these steps in consultation with Indigenous Peoples. Third, it independently requires States to address, when possible, the unique situation of Indigenous individuals living outside their community, often as the result of State removal policies. This section explores each of these requirements within the context of international law and Article 14 generally.

Research on the evolution of Article 14 through the WGIP indicates that the three independent paragraphs of Article 14 are related in one key respect: the “*States shall, in conjunction with indigenous peoples, take effective measures*” language of paragraph 14(3) represents a positive obligation on States to facilitate the rights encompassed in 14(1) and 14(2).<sup>116</sup> Thus, paragraph (3) of Article 14 represents to some degree the practical application of the first two paragraphs, requiring States to take “*effective measures*” to facilitate the right to self-determination in education under 14(1) and the right to non-discrimination under 14(2). This includes affirmative steps to ensure that Indigenous pupils have access to linguistically and culturally appropriate education. This duty to take “*effective measures*” is consistent with a State’s general obligation under international law.

According to the CESCR, States have a specific and continuing “obligation to move as expeditiously . . . as possible” toward the full realization of the right to education.<sup>117</sup> More specifically, a State has the duty to “respect, protect and fulfil” the right to education.<sup>118</sup> Thus, States can comply with aspects of Article 14(3) by meeting their international obligations. For instance, “respecting” Indigenous Peoples’ right to education would include not interfering or placing undue restrictions on their right to establish culturally and linguistically appropriate educational programs and systems. Some examples of this lack of respect given by the UN Special Rapporteur include national policies and practices that require “birth certificates

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116 See *Human Rights Legal Framework*, *supra* note 44, ¶ 22.

117 CESCR, *General Comment No. 3: The Nature of States Parties Obligations*, art. 2, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter CESCR Gen. Cmt. 3]; CESCR Gen. Cmt. 13, *supra* note 63, ¶ 56.

118 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 46.

for the enrolment of children and the denial of indigenous names, long hair, and traditional dress at school.”<sup>119</sup> Additionally, States can “protect” Indigenous individuals’ rights to education by ensuring that others do not interfere with their basic rights. Finally, given the significant disparities that exist between Indigenous and non-Indigenous peoples in the area of education, largely due to a long history of discriminatory practices, compliance with Article 14(3) will require States to “fulfill” their international obligations by taking affirmative steps to equalize and ensure a right to Indigenous education. This could include such things as committing additional resources to provide for schools and appropriately trained teachers within Indigenous communities, as well as making changes to state-wide curricula to ensure bilingual and intercultural programming.<sup>120</sup>

Some States may have concerns, when meeting their duty to take “*effective measures*,” with using governmental resources to support special measures for Indigenous Peoples. However, such expenditures are consistent with international principles on non-discrimination. According to the CESCR, “special measures intended to bring about de facto equality . . . for disadvantaged groups is not a violation of the right to non-discrimination [in] education, so long as such measures do not lead to the maintenance of unequal . . . standards for different groups.”<sup>121</sup> In terms of potential “disparities in spending,” such disparities constitute discrimination under international law only insofar as they “result in *differing qualities* of education.”<sup>122</sup> Indeed, not providing adequate resources to ensure the same quality of education between Indigenous and non-Indigenous students would be inconsistent with a State’s duty to “take steps” and with its mandate of non-discrimination.

Government responsibility for funding Indigenous educational systems under Article 14(3) is also compatible with the right of Indigenous self-determination, particularly Indigenous Peoples’ right to control the development, establishment, and maintenance of government-funded systems. In fact, ILO Convention 169 assumes that given the problems of poverty created by past governmental discrimination and neglect, it will not be economically feasible for many Indigenous groups to develop and maintain schools that

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119 Stavenhagen, *supra* note 12, ¶ 10(d).

120 See Stavenhagen, *supra* note 12, ¶ 10.

121 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 32.

122 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 35 (emphasis added).

adequately serve the needs of their pupils without the financial help of State governments and other entities.<sup>123</sup>

Some States have expressed concern that their resources may be insufficient to comply fully with the requirements of Article 14(3) in terms of *effective measures*, or alternatively, that other more immediate societal concerns take precedence over compliance with these requirements. In working through these questions, States can be guided by CESCR's General Comment No. 3, which requires States to use "all resources that are at its disposition" to meet its "minimum core obligation" with respect to the right of education, including "ensur[ing] the widest possible enjoyment" of this right "under the prevailing circumstances."<sup>124</sup>

Article 14(3) of the Declaration requires that States take effective measures "*in conjunction with indigenous peoples.*" This duty of consultation is a crucial aspect of not only Article 14, but the Declaration generally.<sup>125</sup> States have a history of making unilateral decisions affecting Indigenous Peoples, often to their detriment. This is particularly true in the context of Indigenous education, where educational policy was often set by the State with an aim of advancing the State's own goals (such as forced assimilation). Today, international human rights law requires States to consult with and seek the consent of Indigenous Peoples and their families on matters such as the education of their children.<sup>126</sup>

Finally, research on the evolution of Article 14(3) through the WGIP suggests that Article 14(3)'s "*when possible*" clause relates solely to the issue of children living outside their communities and therefore does not limit a State's obligation generally under Article 14. It was added to later versions of Article 14 to address State concerns with being able to, in all circumstances, provide "access" to children "living outside their communities" to a culturally and linguistically

123 See ILO Con. No. 169, *supra* note 64, art. 27; ILO Convention Manual, *supra* note 82, at 18, 68–72.

124 CESCR Gen. Cmt. 3, *supra* note 117, ¶¶ 10–11.

125 See UNDRIP, *supra* note 3, arts. 11(2), 12(2), 15(2), 17(2), 19, 22(2), 27, 30, 31(2), 36(2), 38.

126 See CESCR Gen. Cmt. 13, *supra* note 63, ¶ 47: "The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education." See CRC, *supra* note 62, art. 29(1); ICESCR, *supra* note 2, art. 13(3); UNESCO CADE, *supra* note 88, arts. 2(b), 5(1)(b); Univ. Decl., *supra* note 2, art. 26(3).

appropriate education.<sup>127</sup> One of the reasons that the clause “including those living outside their communities” was added to paragraph 3 of Article 14 was to specifically acknowledge and address the history of forcible assimilation and removal of Indigenous Peoples. As one UN study notes, such removals have had a “negative effect[] on the preservation of indigenous languages and cultures.”<sup>128</sup> In any case, this obligation to ensure that indigenous individuals living outside their communities “*have access, when possible, to an education in their own culture and provided in their own language*” is consistent with the duty of States under international law to eradicate discrimination in all sectors of society and address the needs of all individuals no matter where they are physically situated.<sup>129</sup>

### B. International Legal Framework for Article 15

The imperative of promoting respect for the diversity of cultures and tolerant co-existence between the peoples of the world has long been recognized by the international community. Indeed, the United Nations was founded in part to foster these sentiments so

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127 See UNCHR, *Consideration of a draft United Nations Declaration on the Rights of Indigenous Peoples: Information received from intergovernmental organizations*, ¶ 5, E/CN.4/1995/WG.15/3 (Oct. 10, 1995) [hereinafter IGO Rep.]; see generally UNCHR, *Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32*, U.N. Doc. E/CN.4/1997/102 (Dec. 10, 1996). As one intergovernmental organization noted before the Working Group, “indigenous children living outside their communities have the right to education in their own culture and language at the State’s expense, which could be difficult to implement in many countries due to resource constraints.” See IGO Rep., *supra* note 120, ¶ 5. In order to ensure country support, various proposals were advanced, such as this proposed remedy by the representative of Canada that “[i]ndigenous children living outside their communities should have adequate opportunities to education in their own culture and language, *where demand and resources allowed*” (emphasis added). Ultimately the Working Group settled on the language “when possible.” *Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32*, *supra* note 127, at 156.

128 Stavenhagen, *supra* note 12, ¶ 10(j). This direct link between the damage that has been done by displacement and an opportunity for reparations from the States involved may also speak to the “when possible” language, not just because of lack of available resources, but because not all countries have removal or displacement issues.

129 UNDRIP, *supra* note 3, art. 14(3); See CESCR Gen. Cmt. 13, *supra* note 63, ¶¶ 6, 31–37.

as to create a more peaceful world.<sup>130</sup> Article 15 of the Declaration is aligned with the foundational goals of the United Nations, articulating means by which some of these goals may be achieved. This section will investigate the international mechanisms associated with the two themes of Article 15: (1) the right to the “dignity and diversity of cultures” and (2) the right to the elimination of “prejudice” and “discrimination” and the promotion of “tolerance, understanding, and good relations among indigenous peoples and all other segments of society.”<sup>131</sup> Since this article is centered on the right to education, this section focuses on those aspects of Article 15 that rely on “education” as a primary means of achieving these ends. However, Article 15 was clearly intended to cover other “public information” disseminated within a State. It should be noted at the outset, that UNESCO has been at the forefront of promoting these aims. The work carried out by UNESCO is extensive. Thus, what follows is a sampling of some of UNESCO’s achievements, along with other key international works.<sup>132</sup>

### 1. The Right to Dignity and Diversity of Cultures

The right to take part in all aspects of one’s culture is a well-established international norm and a prominent theme throughout the Declaration. Article 15 is centered on a closely related right under international law that has to do with safeguarding the dignity and diversity of cultures. This right goes beyond the right to practice one’s culture, to include protecting and promoting the diversity of cultural expressions, particularly in the context of education and other publically available information.

This right to “dignity and diversity” of cultures has long been recognized by the international community as an ethical imperative

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130 See e.g., U.N. Charter, pmbl. (one aim of the charter is to “practice tolerance and live together in peace with one another as good neighbours”); Univ. Decl., *supra* note 2, pmbl. (promoting “universal respect for . . . human rights and fundamental freedoms” and “a common understanding of these rights and freedoms”).

131 UNDRIP, *supra* note 3, art. 15.

132 See UNESCO, *UNESCO and the Issue of Cultural Diversity: Review and strategy 1946–2004* (Katérina Stenou ed., revised Sept. 2004), <http://portal.unesco.org/culture/en/files/12900/10958784163DivCult-BilanStrategies-ENG-sept04.pdf/DivCult-BilanStrategies-ENG-sept04.pdf>. See generally *Multiculturalism: A Response*, *supra* note 54.

to promoting tolerance and non-discrimination, and in preventing conflict. Thus, many of the foundational international human rights documents set the groundwork for Article 15 of the Declaration. For instance, the ICESCR recognizes the right of persons “[t]o take part in cultural life” and obligates States to take steps to ensure the “full realization of this right.”<sup>133</sup> In 1992, the CESCR held a day of “general discussion on the right to take part in cultural life,” at which time it urged States to pay particular attention to promoting non-discrimination between cultures, “since no hierarchy of cultures exist[s], all [being] equal and therefore ha[ving] an equal right to protection.”<sup>134</sup> In 2008, a second conference was held by the CESCR in which the linkages between “[t]he right to take part in cultural life” and the safeguarding of “cultural diversity” were highlighted. The participants further noted the role of States in the promotion of “*cultural identity* as a factor of mutual appreciation among individuals, groups, nations and regions.”<sup>135</sup> Thus, Article 15 of the Declaration effectively tracks the rights, obligations, and goals of the ICESCR by acknowledging a right to the dignity and diversity of cultures and connecting this right to the promotion of non-discrimination and tolerance. Similar to the CESCR, the Human Rights Council sees cultural diversity as both a right and a means of promoting societal harmony.<sup>136</sup>

UNESCO, perhaps more than any other international intergovernmental body, has been at the forefront of this international movement to safeguard cultural diversity. In 2001, UNESCO put forth one of the first international instruments focused on cultural

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133 ICESCR, *supra* note 2, arts. 15(1)(a), (2).

134 CESCR, Summary record of the 17th meeting, ¶ 47, U.N. Doc. E/C.12/1992/SR.17 (Dec. 11, 1992), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1992%2fSR.17&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1992%2fSR.17&Lang=en).

135 CESCR, *Day of General Discussion: Right to take part in cultural life under article 15(1) (a) of the Covenant*, comments submitted by the International Labor Organization, ¶ 2, U.N. Doc. E/C.12/40/12 (May 9, 2008), [www2.ohchr.org/english/bodies/cescr/docs/discussion/ILO.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/discussion/ILO.pdf) [hereinafter *Right to take part in cultural life under article 15(1)(a) of the Covenant*]. See also U.N. Int’l Human Rights Instruments, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents*, U.N. Doc. HRI/MC/2006/3 (May 10, 2006), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/419/42/PDF/G0641942.pdf?OpenElement>.

136 See UNHRC, *General Comment No. 23: The rights of minorities*, ¶¶ 6.1, 7, 9, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 2004).

diversity and the exercise of cultural rights. The UNESCO Universal Declaration on Cultural Diversity (UDCD) positions cultural diversity as a core human right upon which social, economic, and cultural development are layered.<sup>137</sup> It posits that as “the common heritage of humanity,” cultural diversity is “essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together . . . Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity.”<sup>138</sup> This makes the defense of cultural diversity an “ethical imperative, inseparable from respect for human dignity.”<sup>139</sup>

These objectives were recognized once again in 2005 when UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention’s objectives are reminiscent of Article 15 of the Declaration in that it seeks, among other things, to “protect and promote the diversity of cultural expressions” and “encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace.”<sup>140</sup> Similar to Article 15 of the Declaration, the UNESCO Convention emphasizes the importance of cultural diversity to all peoples, and in particular Indigenous Peoples, singling out public information and education as means of protecting and enabling cultural expression.<sup>141</sup> For Indigenous Peoples who have had their unique cultures suppressed and distorted throughout history, this guarantee of cultural diversity in the ICCPR, the ICESCR, ILO Convention 169, and the UNESCO documents is a matter of survival.

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137 See UNESCO, Universal Declaration on Cultural Diversity, U.N. Doc. CLT-2002/WS/9 (Nov. 2, 2001), <http://unesdoc.unesco.org/images/0012/001246/124687e.pdf#page=67> [hereinafter UDCD].

138 *Id.* arts. 1–2.

139 *Id.* art. 4.

140 UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 1, U.N. Doc. CLT-2005/CONVENTION DIVERSITE-CULT REV (Oct. 20, 2005), <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [hereinafter Protection and Promotion of Diversity Convention]. The Convention defines cultural diversity as “the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.” *Id.* art. 4.

141 See *id.* pmb1. The Convention’s preamble illuminates a myriad reasons why cultural diversity must be protected and promoted, many of which provide support for Articles 14 and 15 of the UNDRIP.



## 2. Education and Other Public Information as Vehicles for Promoting the Dignity and Diversity of Cultures

We have already discussed the ability of education to be an agent of either positive or negative social, economic, and political change. Article 14 of the Declaration affirms Indigenous Peoples' right to education, whereas Article 15 affirms the notion that States have a duty to ensure that the *content* of educational materials are reflective of Indigenous Peoples' cultural diversity. This formative influence of education and other public information has been widely acknowledged in a variety of international documents.

As noted earlier, UNESCO has emphasized education as an arena where cultural diversity must be respected and promoted.<sup>142</sup> For instance, Article 5 of UNESCO's UDCD states that "all persons are entitled to quality education and training that fully respect their cultural identity."<sup>143</sup> Article 6 extends this right even further when it calls on States to ensure that

all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.<sup>144</sup>

Article 10 of the Convention on Diversity similarly obligates States to promote and protect the diversity of cultural expression through educational and public awareness programs.<sup>145</sup>

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142 See generally UDCD, *supra* note 137, art. 10. See also Protection and Promotion of Diversity Convention, *supra* note 140.

143 UDCD, *supra* note 137, art. 5.

144 UDCD, *supra* note 137, art. 6. UNESCO has laid out steps States can take to implement these aims, which also rely on the mechanisms of education and public information: "Promoting through education an awareness of the positive value of cultural diversity and improving to this end both curriculum design and teacher education . . . Encouraging the production, safeguarding and dissemination of diversified contents in the media . . ." UDCD, Annex II, *supra* note 137, ¶¶ 3, 7, 12.

145 See Protection and Promotion of Diversity Convention, *supra* note 140, art. 10.

ILO Convention 169 is also in line with Article 15 of the Declaration in that it calls for States to actively engage in a cooperative collaboration with Indigenous Peoples in order to correct discriminatory practices in education. The Convention, as interpreted by the ILO, provides for the development of educational programs “in co-operation with indigenous peoples . . . that . . . incorporate indigenous histories, knowledge, technologies, value systems and social, economic and cultural aspirations.”<sup>146</sup> This includes the development of textbooks and other educational materials that offer a fair and accurate portrayal of Indigenous societies and cultures.<sup>147</sup>

### 3. Education as a Vehicle for Promoting Tolerance, Understanding and Good Relations

Education and public information are seen as two key means of achieving important cultural diversity rights for Indigenous Peoples. However, Article 15 of the Declaration goes one step further, pairing the language of rights with a movement to identify and advance mutual interests among Indigenous Peoples and other segments of society. It asserts a right to accurate information as a means of promoting “[non-]discrimination, . . . tolerance, understanding and good relations” between and among societal groups.<sup>148</sup> A number of international instruments advance similar aims.

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146 *Right to take part in cultural life under article 15(1)(a) of the Covenant*, *supra* note 135, ¶ 4.

147 As discussed earlier, examples of misrepresentation of Indigenous Peoples in educational curriculum and public information are not difficult to find. By way of example, one Spanish language teacher analyzed how certain textbooks depicted “ancient monuments as wonders to behold, yet fail[ed] to acknowledge the destruction of these same cultures during colonization.” The teacher goes on to note how these materials present “lighter-skinned, more European-looking Latin Americans . . . in more prestigious settings” and the indigenous-looking Latin Americans “as service workers.” See Sandy Shedivy, *Lies My Spanish Textbooks Tell*, RETHINKING SCHOOLS, Spring 2007, [http://www.rethinkingschools.org//cmsandler.asp?archive/21\\_03/lies213.shtml](http://www.rethinkingschools.org//cmsandler.asp?archive/21_03/lies213.shtml). See also Maxel J. Ferguson & Dan B. Fleming, *Native Americans in Elementary School Social Studies Textbooks*, 23 J. AM. INDIAN EDUC. 10 (1984); Vincent Greaney, *Textbooks, Respect for Diversity, and Social Cohesion*, in PROMOTING SOCIAL COHESION THROUGH EDUCATION (Eluned Roberts-Schweitzer ed., 2006), <https://openknowledge.worldbank.org/bitstream/handle/10986/6985/354060Promotin101OFFICIAL0USE0ONLY1.pdf?sequence=1>.

148 UNDRIP, *supra* note 3, art. 15(1).

UNESCO has been in the forefront of articulating and advancing a State's duty to foster tolerance and understanding through cultural education and information. A contemporary to the ICCPR and ICESCR, UNESCO's 1966 Declaration on the Principles of Cultural Co-operation describes the aim of international cultural cooperation to be the "spread [of cultural] knowledge . . . [t]o develop peaceful relations and friendship among . . . peoples and bring about a better understanding of each other's way of life."<sup>149</sup> The Declaration elaborates on the importance of cultural cooperation, with a particular eye to the role of education in promoting "a spirit of friendship, international understanding and peace."<sup>150</sup> Then in 1995, UNESCO put forth a Declaration of Principles of Tolerance, in which it defined tolerance in a way that closely tracks the rights and obligations of Article 15 of the Declaration. Tolerance includes:

respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace . . .<sup>151</sup>

Not surprisingly the Declaration of Tolerance cites education as one of the most effective means of combating intolerance.<sup>152</sup>

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149 UNESCO, Declaration of the Principles of International Cultural Co-operation, art. 4 (Nov. 4, 1966), <http://unesdoc.unesco.org/images/0011/001140/114048e.pdf#page=82>.

150 *Id.* art. 10.

151 UNESCO, Declaration of Principles on Tolerance, art. 1 (Nov. 16, 1995), [http://www.unesco.org/webworld/peace\\_library/UNESCO/HRIGHTS/124-129.HTM](http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/124-129.HTM).

152 "Education for tolerance should be considered an urgent imperative . . . [I]t is necessary to promote systematic and rational tolerance teaching methods that will address the cultural, social, economic, political and religious sources of intolerance – major roots of violence and exclusion. Education policies and programmes should contribute to development of understanding, solidarity and tolerance among individuals as well as among ethnic, social, cultural, religious and linguistic groups and nations." *Id.* art. 4.

In 1999, UNESCO put forth a Declaration on a Culture of Peace, with aims that in many respects mirror those articulated in Article 15 of the Declaration, such as promoting mutual respect and understanding among groups, reducing inequalities and eliminating discrimination, and advancing understanding, tolerance and solidarity among cultures.<sup>153</sup> Like Article 15, the UNESCO Declaration on Peace states that education is a “principal means to build a culture of peace” and that “[t]he educative and informative role of the media contributes to the promotion of a culture of peace” as well.<sup>154</sup>

There are many other international instruments that operate under a similar premise of promoting peace and tolerance through cultural education, including the UDHR and the ICESCR. Article 26 of the UDHR asserts that education should be utilized to “promote understanding, tolerance and friendship among all nations, racial or religious groups, and . . . further the activities of the United Nations for the maintenance of peace.”<sup>155</sup> Article 13 of the ICESCR similarly states that one of the primary purposes of education is to “strengthen the respect for human rights and fundamental freedoms,” and to “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.”<sup>156</sup> Building on the underlying principles of the UDHR and the ICESCR, Article 7 of CERD obligates States to “undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups.”<sup>157</sup>

The CRC similarly recognizes the important function performed by public information and education.<sup>158</sup> Article 17 of the CRC calls for States Parties to “ensure that . . . child[ren] ha[ve] access to information . . . from a diversity of national and international sources” and directs States Parties to encourage the dissemination of “information and material of social and cultural benefit to the

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153 See Declaration on a Culture of Peace, G.A. Res. 53/243 A., art. 1, U.N. Doc. A/RES/53/243 A (Sept. 13, 1999), [www.un-documents.net/a53r243a.htm](http://www.un-documents.net/a53r243a.htm).

154 *Id.* arts. 4, 7. See generally G.A. Res. 53/243 B, Programme of Action on a Culture of Peace, U.N. Doc. A/RES/53/243 B (Sept. 13, 1999), <http://www.un-documents.net/a53r243b.htm> (giving specific implementation strategies).

155 Univ. Decl., *supra* note 2, art. 26.

156 ICESCR, *supra* note 2, art. 13.

157 CERD, *supra* note 101, art. 7.

158 See CRC, *supra* note 62, arts. 17–29.

child.”<sup>159</sup> In terms of education, Article 29 of the CRC states that it should be directed at children’s development of their own cultural identities and values, as well as recognition and understanding of the values, traditions, and cultures held by other peoples.<sup>160</sup> Children should learn “in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.”<sup>161</sup> The CRC has highlighted in particular the links between the goals of education and “the struggle against racism, racial discrimination, xenophobia and related intolerance.”<sup>162</sup>

Thus, Article 15 of the Declaration merely reiterates what has long been an accepted part of international law and policy: that the promotion of tolerance and understanding are important aspects of human rights law, and that education and other sources of information are the primary means by which to fulfill these rights

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159 See CRC, *supra* note 62, art. 17.

160 See CRC, *supra* note 62, art. 29, ¶ 1(c).

161 See CRC, *supra* note 62, art. 29, ¶ 1(d).

162 Convention on the Rights of the Child, *General Comment No. 1: The Aims of Education*, U.N. Doc. CRC/GC/2001/1 ¶ 11 (Apr. 17, 2001), <http://www.refworld.org/docid/4538834d2.html> [hereinafter *CRC, Gen. Cmt. 1*].

Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values reflected in article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena. Emphasis must also be placed upon the importance of teaching about racism as it has been practiced historically, and particularly as it manifests or has manifested itself within particular communities . . . . In addition, the school environment itself must thus reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin . . . . The term “human rights education” is too often used in a way which greatly oversimplifies its connotations. What is needed, in addition to formal human rights education, is the promotion of values and policies conducive to human rights not only within schools and universities but also within the broader community.

*Id.* at ¶¶ 11, 19.

for Indigenous Peoples and all segments of society. Chief Justice Yazzie of the Navajo Nation Supreme Court perhaps summed it up best when he said “[i]f we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value and dignity of each other’s societies.”<sup>163</sup>

#### **IV. Regional Law and Domestic Practices**

Many of the international norms discussed above have begun to work their way into regional and domestic spheres. While implementation remains a pressing problem, progress is being made on these fronts primarily due to the advocacy efforts of Indigenous Peoples. This section begins with a brief look at some of the existing regional norms that align with the educational aims of the Declaration. We then take a look at some domestic developments and practices in this area. Through the exploration of regional and domestic case studies, we are able to identify some common factors that aid in the promotion of the right to education for Indigenous Peoples. Similarly, it helps us to identify some of the common issues faced by States and Indigenous Peoples. Ultimately what we take away from our examination of these case studies is that the educational norms articulated in the Declaration are making their way into domestic practices and that the domestic practices are in turn enriching our understanding of what those norms entail both in terms of interpretation as well as challenges.

##### **A. Regional Human Rights Obligations**

Regional instruments are generally in accord with international norms in recognizing not only a universal right to education, but one that is culturally and linguistically appropriate as well.<sup>164</sup> These instruments similarly speak to the need for community-driven learning and educational development. The following discussion is not a comprehensive look at all the regional norms relating to the aspects of the Declaration explored in this article, but rather a representative sample of those materials. Moreover, given space constraints, the regional section is focused primarily on regional

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163 Lisa Driscoll, *Tribal Courts: New Mexico’s Third Judiciary*, 31 N.M. BAR BULL. 5 (1993) (quoting Chief Justice Robert Yazzie of the Navajo Nation Supreme Court).

164 See *infra* notes 168–200.

instruments. However, in order to gain a fuller understanding of where the regions are with respect to Indigenous rights that arise in the context of education – such as self-determination, non-discrimination, and cultural and linguistic integrity – case law in those regions should also be considered.

### *The Americas*

The Charter for the Organization of American States (OAS) recognizes that the “[r]apid eradication of illiteracy and expansion of educational opportunities for all” is integral to the important goals of creating “equality of opportunity” in other spheres of life and in encouraging “full participation of [its] peoples in decisions relating to their own development.”<sup>165</sup> To this end, and similar to the ICESCR, the American Convention on Human Rights obligates States to progressively adopt measures that ensure the full realization of the right to education.<sup>166</sup> The American Declaration on the Rights and Duties of Man also provides for a “right to education” that prepares individuals “to attain a decent life, to raise [their] standard of living, and to be . . . useful member[s] of society.”<sup>167</sup> Both the Convention and the Declaration address the right of non-discrimination and equality in education.<sup>168</sup> As earlier discussed, to participate fully and equally as a “member of society,” States will need to develop educational programs and systems that speak directly to the political,

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165 Organization of American States, Charter of the Organization of American States art. 34(h), Apr. 30, 1948, 119 U.N.T.S. 3, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.pdf](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf) [hereinafter OAS Charter].

166 See American Convention on Human Rights art. 26, Nov. 22, 1969, *entered into force* July 18, 1978, 1144 U.N.T.S. 123 [hereinafter American Convention].

167 According to the Inter-American Court on Human Rights, this Declaration is the controlling text that “defines the human rights referred to in the Charter” for those OAS member States that have not ratified the American Convention. Organization of American States, American Declaration of the Rights and Duties of Man, art. I, O.A.S. G.A. Res. XXX, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948) [hereinafter American Declaration]. See also ROBERT F. KENNEDY MEM’L CTR. FOR HUMAN RIGHTS, RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICAS 13 n.39 (2008), [http://www.law.virginia.edu/pdf/news/hrclinic\\_report.pdf](http://www.law.virginia.edu/pdf/news/hrclinic_report.pdf) [hereinafter RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICAS].

168 See American Declaration, *supra* note 167, art. 12; American Convention, *supra* note 166, arts. 1, 24.

economic, cultural, and linguistic needs of Indigenous Peoples. Both the Inter-American Commission and the Inter-American Court have, within the context of the American Convention, articulated a right to education that both “respects [the] cultural traditions” of Indigenous communities “and guarantees the protection of their own language.”<sup>169</sup>

With regard to incorporating Indigenous knowledge and culture into education, various OAS instruments already recognize “the right to take part in the cultural life of the community,” as well as “the duty of man to preserve, practice and foster culture by every means within his power.”<sup>170</sup> The OAS Charter further provides that in working toward “meet[ing] . . . educational needs,” States are “bound to preserve and enrich the cultural heritage of the American peoples.”<sup>171</sup> Finally, the OAS Charter identifies education and culture as pathways “toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress.”<sup>172</sup>

In recent years the OAS has been working on two additional instruments that address the educational and identity rights of

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169 *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 211, 301 (Aug. 24, 2010), [www.corteidh.or.cr/docs/casos/articulos/seriec\\_214\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf) (within the context of the right to life under Article 4 of the American Convention, in 2010, the Inter-American Court of Human Rights ordered Paraguay to “guarantee [indigenous] children access to basic education, paying special attention to ensuring that the education provided respects their cultural traditions and guarantees the protection of their own language. To this end, [the Court also directed] the State [to] . . . consult the Community as necessary”). Previous to the 2010 *Xákmok Kásek* case, the Inter-American Court directed Paraguay to provide two other indigenous groups with bilingual education that included their mother tongue. *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 230 (Mar. 29, 2006). See also *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 221 (June 17, 2010).

170 American Declaration, *supra* note 167, art. 13, pmb1. See also OAS Charter, *supra* note 165, art. 34. OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights art. 14, Nov. 17, 1988, O.A.S. Treaty Ser. No. 69, <http://www.oas.org/juridico/english/treaties/a-52.html>. [hereinafter Protocol of San Salvador].

171 OAS Charter, *supra* note 165, art. 48. In the context of adult education, OAS States are also bound to “give special attention to the eradication of illiteracy” by “strengthen[ing] adult and vocational education systems” and “ensur[ing] access to] . . . the benefits of culture.” OAS Charter art. 50, *supra* note 165.

172 OAS Charter, *supra* note 165, art. 47.



Indigenous Peoples.<sup>173</sup> The one most directly on point, Article 14 of the Draft American Declaration on the Rights of Indigenous Peoples (OAS Declaration), includes the three major elements found in Article 14 of the Declaration: the right of Indigenous Peoples to control their own educational systems, the right to have access to all levels of education without discrimination, and the right to a culturally and linguistically relevant education. In line with Article 15 of the Declaration, the OAS Declaration also upholds a right to education that “promote[s] harmonious intercultural relations.”<sup>174</sup>

This norm of promoting respect for cultural diversity in education was reaffirmed in the 1998 Summit of the Americas, in which OAS member States agreed that the content of education should be “enhanced” to promote “respect and appreciation for the cultural diversity of peoples.”<sup>175</sup> States further pledged to “[d]evelop . . . educational strategies” that would promote human rights, as well as peace and tolerance among societies.<sup>176</sup> Most relevant to Article 15 of the Declaration, OAS States affirmed the need to “[s]upport activities in the field of education aimed at improving the participation of indigenous populations and communities in society. Such activities would seek to strengthen the identity of indigenous populations and promote respectful coexistence among different social groups in communities and States.”<sup>177</sup> Thus many OAS States

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173 See OAS, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples (Outcomes of the Eighteenth Meeting of Negotiations in the Quest for Points of Consensus), GT/DADIN/doc.334/08 rev. 11 corr. 1 (June 4, 2015), <http://www.oas.org/council/CAJP/Indigenous%20documents.asp#Record> [hereinafter Record of the Current Status of the Draft American Declaration]. See also OAS, Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, A-68 (June 5, 2013), [http://www.oas.org/en/sla/dil/docs/inter\\_american\\_treaties\\_A-68\\_racism.pdf](http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-68_racism.pdf).

174 Record of the Current Status of the Draft American Declaration, *supra* note 173, art. 14(5). The most recent Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples cites Article 14 (Education) as having been “approved” as well as paragraph 1 of Article 12 (Right to cultural identity and integrity). However, the remainder of Article 12 seems to still be under negotiation. See generally Record of the Current Status of the Draft American Declaration, *supra* note 173.

175 OAS, Second Summit of the Americas, Plan of Action, 37 I.L.M. 947. ¶ 1 (Apr. 19, 1998), <http://www.summit-americas.org/chileplan.htm>.

176 *Id.*

177 *Id.* ¶ 4(23).

have recognized through various regional instruments the core principles of Articles 14 and 15.

### *Africa*

The African (Banjul) Charter on Human and Peoples' Rights recognizes the core aspects articulated in Article 14 of the Declaration, including the right to education (Article 17(1)), culture (Article 17(2)), non-discrimination (Article 2) and various collective rights like the right to self-determination (Articles 19 to 24).<sup>178</sup> Additionally, similar to Article 15 of the Declaration, the African Charter expresses a commitment to cultural pluralism and the equal promotion of cultures for all members of a community.<sup>179</sup> Article 25 of the Charter specifically obligates States to utilize education and public information to comply with their duty to advance these various rights throughout society.<sup>180</sup>

The African Charter on the Rights and Welfare of the Child emphasizes the role that education plays in the overall "development of [a] child's personality, talents, and mental and physical abilities" and links those educational aims to "the preservation and strengthening of positive African morals, traditional values and cultures."<sup>181</sup> In line with Article 15 of the Declaration, it affirms that education should "foster[] respect for human rights and fundamental freedoms" and "prepar[e] . . . the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups."<sup>182</sup> This Charter also recognizes the rights and duties of parents to choose their children's schools, so long as those schools "conform to . . . minimum standards . . . approved by the State."<sup>183</sup>

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178 See African Charter on Human and Peoples' Rights, June 27, 1981, *entered into force* Oct. 21, 1986, 21 I.L.M. 58, <https://www1.umn.edu/humanrts/instree/z1afchar.htm>.

179 *Id.* arts. 17, 22, 29.

180 *Id.* art. 25.

181 African Charter on the Rights and Welfare of the Child, 1990, art. 11, ¶¶ 2(a), (c) *entered into force* Nov. 29, 1999, O.A.U. Doc. CAB/LEG/24.9/49, <https://www1.umn.edu/humanrts/africa/afchild.htm> [hereinafter African Charter on the Rights and Welfare of the Child].

182 *Id.* art. 11, ¶¶ 2(b), (d).

183 *Id.* art. 11, ¶ 4. For a comprehensive look at the region's views on Declaration, see Willem Van Genugten, *The African Move Towards the Adoption of the 2007*

In October of 2000, the African Commission on Human and Peoples Rights established the Working Group on Indigenous Populations/Communities with a mandate to, among other things, study the relationship between the African Charter on Human Rights and the “well-being of indigenous communities,” and to make “appropriate recommendations for the monitoring and protection of the rights of indigenous communities.”<sup>184</sup> The Working Group’s report includes a section on the right to education, noting that “[l]iteracy rates are poor for most indigenous peoples and often school attendance is less than 50% below the national level.”<sup>185</sup> The Working Group highlights some reasons for these numbers that are consistent with the underlying concerns that informed the drafting of Article 14 of the Declaration:

Since most of them live at the periphery of their respective countries, it is often very difficult if not impossible for [Indigenous] children to walk to school. Their nomadic lifestyle is often blamed for this, rather than the inability of governments in Africa to adjust to the varying needs of different communities within their borders.<sup>186</sup>

The Working Group went on to identify some of the pressing questions facing African countries with respect to Indigenous education, including the issue of what role culture and language should play in ensuring access to education. In particular, the Working Group acknowledged that

[i]t is known that an education system that assumes aspects of dominant cultural perceptions towards indigenous peoples tends to be alien and non-accepting of them. This tends to lead to a high drop-out rate due to discrimination by teachers

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*Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures*, 104(1) AM. J. INT’L L. 29 (2010).

184 African Comm’n on Human & Peoples’ Rights, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, 10–11 (Transaction Publishers 2005), [www.iwgia.org/iwgia\\_files\\_publications\\_files/African\\_Commission\\_book.pdf](http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf) [hereinafter *Report of the African Commission*].

185 *Id.* at 55.

186 *Id.* See also Genugten, *supra* note 183.

and other students; absenteeism when the children join their parents for gathering, herding or other activities; intensification of poverty and reliance on government hand-outs due to unemployment . . . .<sup>187</sup>

The Working Group has singled out Namibia's treatment of the San people in particular as "a useful example of how appropriate education models can be developed" to benefit Indigenous Peoples.<sup>188</sup> This example is discussed more fully below.<sup>189</sup>

### *Europe*

The European Social Charter likewise identifies education as a key component to "protect[ing individuals] against poverty and social exclusion."<sup>190</sup> The same document also echoes international

187 *Report of the African Commission, supra* note 184, at 55.

188 *Report of the African Commission, supra* note 184, at 56. *See also* U.N., CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, Jul 28-Aug. 15, 2008*, U.N. Doc. CERD/C/NAM/12, 73d Sess. (Aug. 19, 2008), <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD.C.NAM.CO.12.pdf>.

189 The African Commission and its working group are also attempting to address the reluctance on the part of some African governments to distinguish between Indigenous and non-Indigenous Peoples. It is also seeking to address serious threats to the survival of indigenous cultures, such as land dispossession and negative stereotyping and discrimination. How it is choosing to do this is through the promotion of collaboration and dialogue between States and indigenous communities, through among other things, "regional sensitization seminars," the first of which was held in Yaounde, Cameroon in 2006. These educational techniques, undertaken in a spirit of collaboration and good relations between various segments of society, are similar in many key respects to the use of education and public information as a means of combating prejudice, eliminating discrimination and promoting tolerance under Article 15 of the Declaration. *See generally* African Comm'n on Human and Peoples' Rights, *Report of the Regional Sensitisation Seminar: The Rights of Indigenous Populations/Communities in Central Africa*, Sept. 13–16, 2006, [www.achpr.org/files/special-mechanisms/indigenous-populations/idp\\_seminar\\_cameroun\\_2006\\_en.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/idp_seminar_cameroun_2006_en.pdf). *See also* About, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, [www.achpr.org/mechanisms/indigenous-populations/about/](http://www.achpr.org/mechanisms/indigenous-populations/about/) (last visited Nov. 15, 2015).

190 Council of Eur., *European Social Charter (Revised)* art. 30, CETS No.163 (*entered into force* Jan. 7, 1999), <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> [hereinafter *European Social Charter*].

law in requiring member States to “provid[e] for the establishment or maintenance of institutions and services sufficient and adequate” to ensure children and young people with an education aimed at their “right . . . to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities.”<sup>191</sup> In line with these principles is the recognition of parents’ right to educate their children “in conformity with their religious, philosophical and pedagogical convictions.”<sup>192</sup>

Europe has also considered the important issues of language in a child’s educational development. Most of the legal development has been around minority rights generally, which are a separate concern from those of Indigenous Peoples. However, these laws help us to better understand where European countries stand on the more general issue of language and schooling, which in turn may be relevant to various Indigenous Peoples throughout Europe, most notably the Sami peoples. For instance, Article 19(12) of the European Social Charter calls for member States “to promote and facilitate, as far as practicable, the teaching of the migrant worker’s mother tongue to the children of the migrant worker.”<sup>193</sup> Other regional language instruments include the Framework Convention for the Protection of National Minorities, which underlines the necessity for national minorities to participate in the decision-making process, especially when the issues being considered affect them directly.<sup>194</sup> The Convention acknowledges the right of national minorities to “set up and to manage their own private educational and training establishments,” and requires States to “foster knowledge of the culture, history, language and religion of their national minorities.”<sup>195</sup> Additionally, the European Charter for Regional and Minority Languages obligates States to make minority languages available in

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191 *Id.* art. 17.

192 Charter of Fundamental Rights of the European Union, art. 14(3), Dec. 7, 2000, (*entered into force* Dec. 1, 2009), 2000/C 364/01; [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, (*entered into force* Sept. 3, 1953), 213 U.N.T.S. 222 Protocol No. 1, <http://www1.umn.edu/humanrts/instree/z17euroco.html> [hereinafter European Convention for the Protection of Human Rights and Fundamental Freedoms].

193 *European Social Charter*, *supra* note 190, art. 19(12).

194 See Council of Eur., *Framework Convention for the Protection of National Minorities* art. 15, 34 I.L.M. 351 (Feb. 1, 1995), <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdac> [hereinafter *European Framework Convention*].

195 *Id.* arts. 12–13.

pre-school, primary school, and secondary level schools, as well as in higher education and vocational and technical schools.<sup>196</sup>

Other influential non-treaty standards include the Hague Recommendations Regarding the Education Rights of National Minorities, which were meant to serve as a general framework for States. The recommendations recognize, among other things, the right to equality and non-discrimination, the right of national minorities to establish and manage their own schools, and the right of individuals to learn in their native tongue at pre-school, kindergarten and primary levels.<sup>197</sup> The High Commissioner on National Minorities, who was responsible for drafting the Recommendations, has said “[i]t is clear that education is an extremely important element for the preservation and the deepening of the identity of persons belonging to a national minority.”<sup>198</sup> This reading of regional law is strengthened by the European Court of Human Rights’ decision in *Cyprus v. Turkey*, in which the Court ruled that the lack of any Greek-medium education at the secondary level in Turkish-controlled Cyprus amounted to a denial of the right to education.<sup>199</sup>

The European Union has also begun to consider policies that address the EU’s involvement in supporting the rights and concerns of Indigenous Peoples in other parts of the world. In 1998, the Council of the European Union adopted a resolution that provides guidelines for this purpose.<sup>200</sup> The resolution was created with input from Indigenous groups and recognizes that “Indigenous cultures constitute a heritage of diverse knowledge and ideas, which is a

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196 See *id.* art. 8.

197 See Org. for Sec. and Co-operation in Eur., High Comm’r on Nat’l Minorities, *The Hague Recommendations Regarding the Education Rights of National Minorities* arts. 1, 2, 8, 11–12 (1996), [www.unesco.org/most/ln2pol6.htm](http://www.unesco.org/most/ln2pol6.htm) [hereinafter *The Hague Recommendations Regarding the Education Rights of National Minorities*].

198 *Id.* intro, ¶ 4. See also European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *supra* note 192.

199 *Cyprus v. Turkey*, 23 Eur. Ct. H.R. 478 (2001) (holding that Article 2 of Protocol 1 of the European Charter for the Protection of Human Rights and Fundamental Freedoms had been violated which states that “no person may be denied the right to education . . . in conformity with their own religious and political convictions”).

200 UNHCHR, *Guide for Minorities Pamphlet No. 14: The European Union: Human Rights and the Fight against Discrimination* (2001), [www.ohchr.org/Documents/Publications/GuideMinorities14en.pdf](http://www.ohchr.org/Documents/Publications/GuideMinorities14en.pdf) [hereinafter *Pamphlet No. 14*].

potential resource to the entire planet,” consistent with the aims of Article 15 of the Declaration.<sup>201</sup>

The regional instruments discussed above articulate and reinforce educational structures that can be particularly beneficial to Indigenous Peoples. The instruments touch on many facets of the educational system, including Indigenous involvement in the creation and operation of educational systems, use of non-dominant languages in curriculum reform and development and incorporation of different ways of knowing and learning with regards to education and schooling. As we will see below, these regional norms, along with international law, are shaping law and practice at the domestic level.

## B. Domestic Practices

As demonstrated in section II of this article, an Indigenous person’s full educational potential is tied to his or her ability to learn in a linguistically and culturally-relevant environment that is shaped and controlled by Indigenous Peoples and that is free of discrimination. Both the UN Declaration and regional norms recognize these essential aspects of the right to education for Indigenous Peoples. This section highlights some country practices supporting Article 14’s central goal of equalizing the standard and quality of education for Indigenous Peoples, and Article 15’s goal of promoting the dignity and diversity of Indigenous educational knowledge. They do not include all the different initiatives happening on the part of States or Indigenous Peoples. A more comprehensive exploration of these practices and the challenges that they present can be found in our larger study on Indigenous education.<sup>202</sup> Readers might also want to consult the most recent UN study on Indigenous education entitled *Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education*.<sup>203</sup>

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201 *Id.*

202 Lorie M. Graham, *The Right to Education and the UN Declaration on the Rights of Indigenous Peoples*, (Suffolk University Law School Research Paper, No. 10-61 2010) (on file at [http://www.afn.ca/uploads/files/education/28\\_2010\\_nov\\_lorie\\_graham\\_suffolk\\_law\\_school\\_education\\_and\\_undrip.pdf](http://www.afn.ca/uploads/files/education/28_2010_nov_lorie_graham_suffolk_law_school_education_and_undrip.pdf)).

203 U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶ 86.

From the various case studies, we are able to discern some key factors that aid in the promotion of the right to education for Indigenous Peoples, as well as to identify some common challenges faced by States and Indigenous Peoples. Additionally, the case studies demonstrate that the international norms that make up the educational provisions (e.g., self-determination in education; non-discrimination and cultural and linguistic integrity) are making their way into domestic law-making and policy initiatives,<sup>204</sup> Indigenous

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204 The clearest example is perhaps Bolivia, a country that has undergone a series of legislative changes in favor of Indigenous Peoples' rights, starting with the adoption of UNDRIP into national law in November 2007. See Law No. 3760 [3039] GO (Bol.) (Nov. 7, 2007), <http://www.ine.gob.bo/indicadoresddhh/archivos/trabana/Ley%20N%203760.pdf> [hereinafter Bolivia's Law 3760]. See also PARL. OF REPUBLIC OF THE CONGO, *Act. No. 5–2011 on the Promotion and Protection of Indigenous Populations*, (Feb. 25, 2011), [www.iwgia.org/images/stories/sections/regions/africa/documents/0368\\_congolese\\_legislation\\_on\\_indigenous\\_peoples.pdf](http://www.iwgia.org/images/stories/sections/regions/africa/documents/0368_congolese_legislation_on_indigenous_peoples.pdf) [hereinafter *Congolese Act on the Promotion and Protection of Indigenous Populations*]. See also Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People, *The Situation of Indigenous Peoples in the Republic of Congo*, ¶¶ 40–48, U.N. Doc. A/HRC/18/35/Add.5 (July 11, 2011) (by James Anaya), [www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add5\\_en.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add5_en.pdf) [hereinafter *The Situation of Indigenous Peoples in the Republic of Congo*]. Mexico conducted a consultative process with indigenous peoples with the goal of reforming its current General Education Law in ways that would make it more compliant with both UNDRIP and ILO Convention 169. See COMISIÓN NACIONAL PARA EL DESARROLLO DE LOS PUEBLOS INDÍGENAS, *Consulta Para La Reforma a La Ley General de Educación 2011–2012: Informe Final*, (2013), [www.cdi.gob.mx/index.php?option=com\\_content&view=article&id=1741&Itemid=200048](http://www.cdi.gob.mx/index.php?option=com_content&view=article&id=1741&Itemid=200048). Similar efforts are also being made within Mexico's National Conference of Governors in an effort to bring state/regional laws into further compliance with UNDRIP. See Conferencia Nacional de Gobernadores, *100 Propuestas para Construir una Nueva Política de Desarrollo Social y Pueblos Indígenas*, 55 (July 2012), [www.conago.org.mx/Comisiones/Actuales/DesarrolloSocialPueblosIndigenas/documentos/100PropuestasCODESPI.PDF](http://www.conago.org.mx/Comisiones/Actuales/DesarrolloSocialPueblosIndigenas/documentos/100PropuestasCODESPI.PDF). In June 2011, the US Senate Committee on Indian Affairs held an oversight hearing to review UNDRIP's implications on US Domestic Policy. Transcript of the hearing is available at [www.indian.senate.gov/hearings/upload/060911CHRG-112shrg67606.pdf](http://www.indian.senate.gov/hearings/upload/060911CHRG-112shrg67606.pdf). Finally, the Paraguayan government's Institute for Indigenous Peoples states on its website that Paraguay holds itself to be subject to UNDRIP. See INSTITUTO PARAGUAYO DEL INDÍGENA, *EL INDI*, <http://www.indi.gov.py/pagina/2-el-indi.html> (last visited Jan. 7, 2016). Other examples can be found throughout this section.



Peoples' advocacy efforts,<sup>205</sup> and court decisions.<sup>206</sup>

### 1. Factors

Read together, the case studies suggest the following factors that aid in State promotion of the right to Indigenous education: (1) meaningful dialogue and ongoing consultation with Indigenous Peoples in the legal and educational reform process; (2) laws that recognize and solidify Indigenous Peoples' cultural and linguistic

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205 See e.g., Nat'l Congress of Am. Indians, *2012 White House Tribal Nations Summit: Tribal Leader Briefing Book* (2012), <http://www.ncai.org> (search in search bar for "2012 Full Briefing Book," then follow link titled "2012 WH TNS – Full Briefing Book.pdf" under "Results") [hereinafter *Tribal Leader Briefing Book*], where there was a push by indigenous nations for full implementation of the U.N. Declaration on the Rights of Indigenous Peoples in the US. In 2012, indigenous leaders of the British Columbia Assembly of First Nations also stated in their Proposed National First Nations Education Legislation that "any national legislation regarding First Nations education . . . [should] be measured against the principles of the Convention on the Rights of the Child and the UNDRIP." British Columbia Assembly of First Nations, 9th Annual General Meeting, Res. 04/2012 3 (Nov. 27, 2012), [www.bcafn.ca/files/documents/04-2012BCAFNResolutionnationalFNeducationlegislation.pdf](http://www.bcafn.ca/files/documents/04-2012BCAFNResolutionnationalFNeducationlegislation.pdf). Also in 2012, the Tasmanian Aboriginal Centre, in Australia, drew from the UN Declaration when submitting comments to the Australian Parliament Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into Language Learning in Indigenous Communities. See Tasmanian Aboriginal Centre, *Submission to the Expert Mechanism on the study on indigenous peoples' languages and cultures*, 1, 4 (Feb. 22, 2012), [www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/SubmissionsStudyLanguages.aspx](http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/SubmissionsStudyLanguages.aspx) (follow "Tasmanian Aboriginal Centre" Link on Site). Finally, Indigenous peoples from the Barents Euro-Arctic Region were "[g]uided by the purposes and principles of the UN Declaration" when adopting their most recent resolution and Action Plan. See Resolution from the 2nd Barents Indigenous Peoples' Congress 2012 (Feb. 9–10, 2012), [www.barentsindigenous.org/2nd-barents-indigenous-peoples-congress-resolution.5021269-198961.html](http://www.barentsindigenous.org/2nd-barents-indigenous-peoples-congress-resolution.5021269-198961.html) (follow "English Version" Link).

206 For example, in 2007, Colombia's Constitutional Court relied on the various aspects of ILO Convention No. 169 discussed in Part III of this article that relate directly to the education norms advanced in the UN Declaration. See *Domestic and International Courts in Latin America*, *supra* note 64, at 116–20; *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 211, 301 (Aug. 24, 2010), [www.corteidh.or.cr/docs/casos/articulos/seriec\\_214\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf); *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 230 (Mar. 29, 2006); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 221 (June 17, 2010).

rights; (3) a comprehensive educational strategy that is informed by the history and needs of the different Indigenous Peoples of a State; (4) promotion of Indigenous-controlled educational systems, programs, and initiatives; (5) the embracing and promoting of Indigenous ways of knowing and learning throughout society; and (6) steps to engage regional and international expertise and resources with and on behalf of Indigenous Peoples. These factors interrelate with one another and can often occur simultaneously. For instance, the first factor, the duty of consultation, informs all the remaining factors, since consultation should occur throughout the process. Additionally, subsumed within any comprehensive strategy will be laws and policies that recognize and promote Indigenous languages and cultures, and that embrace Indigenous-controlled initiatives. Some countries are farther along than others in carrying out these different factors, but many are in the process of making aspects of Articles 14 and 15 a reality. Below we offer some examples of those initiatives, using the factors as our guide. While space limitations prevent us from offering a critique of these initiatives, some of that information can be found throughout the footnotes.

### *Meaningful Dialogue and Ongoing Consultation*

The duty of consultation and seeking consent is a crucial aspect of Article 14 and the Declaration generally. In addition to being a stand-alone right, consultation is also a necessary predicate to recognizing and exercising Indigenous Peoples' right of self-determination in education. Consultation ensures community involvement in all stages of the educational process, including promoting changes in educational policy and curricula that meet Indigenous Peoples' unique linguistic and cultural needs. As earlier explored, consultation and consent are predictors of higher school attendance and academic success for Indigenous students. Equally important, consultation ends the historic trend of imposing unwanted or irrelevant educational programs and initiatives on Indigenous Peoples without their consent.

Many countries are beginning to acknowledge and implement this duty to consult. For instance, both the U.S.<sup>207</sup> and

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207 For instance, in the U.S. all projects funded under Indian Education Act of 1972 "must be developed and conducted with the cooperation of the tribes, parents, and students so that the Indian future in education can be determined in full

Canada<sup>208</sup> have adopted legislation and policies that require them to partner with Indigenous Peoples in the development of educational initiatives affecting Indigenous students. Bolivia has created by law Indigenous advisory groups, known as the Educational Councils of Native Peoples (CEPOs), to ensure consultation with each of the main Indigenous groups (Aymara, Quechua, and Guarani) as well as the peoples of the Amazon.<sup>209</sup> These initiatives are designed to ensure input in the formulation of educational policy at the national level.<sup>210</sup> Guyana's constitution has established a similar mechanism for consultation through the Indigenous Peoples' Commission (IPC).<sup>211</sup> The IPC's mandate "includes offering recommendations on . . . educational policies to advance the interest of indigenous people and the promulgation of [their] cultural heritage and language."<sup>212</sup>

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conjunction with Indian desires and decisions." U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE INDIAN EDUCATION ACT: REFORMATION IN PROGRESS* 8 (DHEW Publication No. OE 76-02403 1976). *See also, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1975); The Indian Education Act of 1972, Pub. L. No. 92-318, 86 Stat. 235, 334-45 (1972).

208 *See, e.g.*, First Nations Education Act, S.B.C. 2007, c. 40, art. 3 (Can.), [www.bced.gov.bc.ca/legislation/schoollaw/firstnations\\_school\\_act.pdf](http://www.bced.gov.bc.ca/legislation/schoollaw/firstnations_school_act.pdf); First Nations Jurisdiction over Education in British Columbia Act, S.C. 2006, c. 10 (Can.), <http://laws-lois.justice.gc.ca/eng/acts/F-11.75/page-4.html>. *See also* Royal Commission on Aboriginal Peoples, *Report of the Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (1996) (which envisions a renewed partnership with Aboriginal people based on four principles: recognition, respect, sharing and responsibility).

209 Ley N° 070, Ley de 20 de Diciembre de 2010, *Ley de la Educación*, "Avelino Sinañi – Elizardo Pérez," art. 92(c) (Bol.) (Dec. 20, 2010), <http://www.cedib.org/wp-content/uploads/2013/06/Ley-070.pdf>.

210 The CEPOs have existed in Bolivia since 1994. World Bank, *The Bolivian Education Reform 1992–2002: Case Studies in Large-Scale Education Reform*, COUNTRY STUDIES, Nov. 2003 (by Manuel E. Contreras & Maria Luisa Talavera Simoni), at 48, [www.oei.es/oeivirt/Bolivian.pdf](http://www.oei.es/oeivirt/Bolivian.pdf) [hereinafter *The Bolivian Education Reform 1992–2002*].

211 *See* CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA ACT, § 212S, [www.oas.org/juridico/mla/en/guy/en\\_guy-int-text-const.pdf](http://www.oas.org/juridico/mla/en/guy/en_guy-int-text-const.pdf). *See also* Guyana's Response to the UN Expert Mechanism 2011-2012 UNDRIP Questionnaire, 10 (Feb. 24, 2012), <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Declaration/Guyana.doc> [hereinafter *Guyana's Response to the UN Expert Mechanism*]. Guyana's constitution has included this IPC provision since 2001. In 2010, the first IPC was sworn in. *See Indigenous People's Commission sworn in*, GUYANA CHRONICLE ONLINE (Sept. 17, 2010), <http://guyanachronicle.com/indigenous-peoples-commission-sworn-in/>.

212 *See Guyana's Response to the UN Expert Mechanism*, *supra* note 211, at 11.

In the case of the Sami, the Norwegian government must, pursuant to a 2005 agreement with the Norwegian Sami Parliament, consult with the Sami Parliament regarding “matters that may affect Sami interests directly,” including education.<sup>213</sup> Congolese Act No. 5-2011 similarly requires the Congolese government to consult with Indigenous Peoples “in a suitable manner and [to] implement[] culturally appropriate mechanisms for those consultations before any consideration, formulation or implementation of legislative or administrative measures, or development programmes and/or projects which are likely to affect them directly or indirectly.”<sup>214</sup> Finally, in Colombia in 2007, the Constitutional Court held that the government could not make any decisions regulating the education of Indigenous Peoples, including the methods that would be used to recruit and select teachers, without first consulting the affected communities in a manner that was culturally appropriate to each specific community.<sup>215</sup> The court relied on the various aspects of

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213 See Procedures for Consultations between the State Authorities and The Sami Parliament [Norway], Section 2, NAT'L CONGRESS (May 11, 2005), <http://nationalcongress.com.au/wp-content/uploads/2012/11/ProceduresforConsultationsState-AuthoritiesandSami-Parliament.pdf>. See also Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People, *The Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland*, ¶¶ 16–17, U.N. Doc. A/HRC/18/35/Add.2 (June 6, 2011) (by James Anaya) [hereinafter *The Situation of the Sami People*]. For a critique of where Norway is in terms of meeting its obligations with respect to consultation, see *The Situation of the Sami People*, ¶ 39.

214 Congolese Act On the Promotion and Protection of Indigenous Populations, *supra* note 204, art. 3. See also *The Situation of Indigenous Peoples in the Republic of Congo*, *supra* note 204, ¶ 48. For a critique of what additional steps Congo needs to take, see generally *The Situation of Indigenous Peoples in the Republic of Congo*, *supra* note 204.

215 The Court was responding here to a claim filed against the constitutionality of a regulation regarding the public competition process for recruitment of teachers for public schools. The Court deemed the regulation inapplicable for recruitment of teachers for schools located in indigenous territories, because the regulation had been created without prior consultation with indigenous communities. See *Domestic and International Courts in Latin America*, *supra* note 64, at 116–20. The United Nations has made critiques of steps that Colombia needs to take in order to more fully comply with this and other similar Constitutional Court decisions. James Anaya, U.N. Human Rights Council, *The Situation of Indigenous Peoples in Colombia: Follow-up to the Recommendations Made by the Previous Special Rapporteur*, ¶¶ 44–48, 56, 78–79, U.N. Doc. A/HRC/15/37/Add.3 (May 25, 2010), [http://unsr.jamesanaya.org/docs/countries/2010\\_report\\_colombia\\_en.pdf](http://unsr.jamesanaya.org/docs/countries/2010_report_colombia_en.pdf).

ILO Convention 169 discussed in Part III of this article that relate directly to the norms advanced in the UN Declaration.

There are other various examples of consultation in practice. New Zealand, through its Ministry of Education, has undertaken extensive consultation with the Māori peoples to develop a “Māori Education Strategy.”<sup>216</sup> The Malaysian government has sought the assistance and guidance of Indigenous education groups in the region of Sabah, for developing Kadazandusun language curricula for use in state schools.<sup>217</sup> And recently in the U.S., the federal government held consultation meetings with tribal leaders and Indigenous organizations in a series of “listening” and “learning” sessions, designed to formulate a strategy relating to the educational needs of

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216 See generally Ministry of Education, *Ka Hikitia: Managing for Success-Māori Education Strategy (2008–2012)* (rev. ed. 2009), <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KaHikitia2009PartOne.pdf> (pt. 1) and <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KaHikitia2009PartTwo.pdf> (pt. 2) [hereinafter *Managing for Success-Māori Education Strategy*]. See also *ILO Convention Manual*, *supra* note 82, at 66. New Zealand undertook a form of consultation using the Internet to seek input on the creation of its *Ka Hikitia – Accelerating Success 2013–2017 program from parents, learners, education professionals and community organizations*. See *Me Kōrero – Let’s Talk!*, TE KETE IPURANGI (Sept. 25, 2012), <http://temangoroa.tki.org.nz/Stories/Me-Korero-Let-s-Talk>; Ministry of Education, *Board Alert: Me Kōrero – Let’s Talk! Survey Results Out Now*, NEW ZEALAND EDUCATION GAZETTE (July 29, 2013), <http://www.edgazette.govt.nz/Articles/Article.aspx?ArticleId=8824> [hereinafter *Me Kōrero – Let’s Talk!*].

217 Rita Lasimbang & Trixie Kinajil, *Changing the Language Ecology of Kadazandusun: The Role of the Kadazandusun Language Foundation*, in 1(3) CURRENT ISSUES IN LANGUAGE PLANNING 415, 419 (2000) [hereinafter *Changing the Language Ecology of Kadazandusun*]. See also Rita Lasimbang, *To Promote the Kadazandusun Languages of Sabah*, in 34(2) ASIAN/PACIFIC BOOK DEVELOPMENT 10 (2004) [hereinafter *To Promote the Kadazandusun Languages of Sabah*]; *About*, KLF E-NEWSLETTER, <http://klfnews.wordpress.com/about/> (last visited Oct. 29, 2015) [hereinafter *About KLF*].

Native students.<sup>218</sup> Paraguay<sup>219</sup> and Mexico<sup>220</sup> are also currently in the process of consultations with Indigenous representatives regarding educational reform for Indigenous Peoples. And in 2011, following a visit by the UN Special Rapporteur for the Rights of Indigenous Peoples, Australia undertook “more than 470 consultation meetings in over 100 hundred [sic] towns and communities” as part of the process of reforming its Northern Territory program.<sup>221</sup>

As more countries acknowledge through their laws and policies the duty of consultation in education, the more robust the practice will become. These experiences will in turn help to identify some of the challenges States and Indigenous Peoples face in meeting this obligation.<sup>222</sup> Various international experts, such as the UN Special Rapporteur on the Rights of Indigenous Peoples,

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218 Pursuant to a memo issued by President Obama in November 2009, “requiring federal agencies to develop plans of action for consultation and coordination with [IPs],” the U.S. Department of Education conducted its first ever nationwide consultation effort in 2010. U.S. DEP’T OF EDUC., TRIBAL LEADERS SPEAK: THE STATE OF AMERICAN INDIAN EDUCATION, 2010 (2011), <http://www2.ed.gov/about/inits/ed/indianed/consultations-report.pdf>. Consultations have continued in 2011 and 2012 and are required by President Obama’s 2011 Executive Order 13592 for “Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities.” See Exec. Order No. 13592 (Dec. 2, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/02/executive-order-13592-improving-american-indian-and-alaska-native-educat>.

219 See *Se reunió comisión de estructuración de la ley de Educación Indígena*, MINISTERIO DE EDUCACIÓN Y CULTURA (Mar. 28, 2012), [http://www.mec.gov.py/cms\\_v2/entradas/292099-se-reunio-comision-de-estructuracion-de-la-ley-de-educacion-indigena](http://www.mec.gov.py/cms_v2/entradas/292099-se-reunio-comision-de-estructuracion-de-la-ley-de-educacion-indigena).

220 See generally *Consulta Para la Reforma de la Ley General de Educación, Fase Consultiva—Cuadernillo 2a*, COMISIÓN NACIONAL PARA EL DESARROLLO DE LOS PUEBLOS INDÍGENAS (2012), [www.cdi.gob.mx/consultaeducacion/cuadernillo\\_faseconsultiva\\_junio12.pdf](http://www.cdi.gob.mx/consultaeducacion/cuadernillo_faseconsultiva_junio12.pdf).

221 Parliament of Australia, *Stronger Futures in the Northern Territory: Policy Statement*, at 1 (Nov. 2011), <https://www.yumpu.com/en/document/view/28257391/stronger-futures-in-the-northern-territory-policy-statement-pdf-/3>; U.N. Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Situation of Indigenous Peoples in Australia*, U.N. Doc. A/HRC/15/37/Add.4 (June 1, 2010) (by James Anaya), [http://unsr.jamesanaya.org/docs/countries/2010\\_report\\_australia\\_en.pdf](http://unsr.jamesanaya.org/docs/countries/2010_report_australia_en.pdf) [hereinafter *Situation of Indigenous Peoples in Australia*].

222 In order for meaningful dialogue to take place between States and indigenous groups, the format to be followed for consultation needs to be fluid, because it must adapt to the needs, culture, and societal structures of each people concerned. This level of flexibility can be difficult for States, especially when

have already begun to offer guidance to States on the contours of this “duty to consult and the objective of obtaining consent.”<sup>223</sup> What these examples demonstrate, however, is the beginning of a major ideological shift on the part of States that have historically practiced a more paternalistic approach to Indigenous educational issues.

*Legal Reform on Cultural and Linguistic Rights*

Another important factor to the educational reform process is legal reform that addresses the linguistic and cultural rights contained in Articles 14 and 15 of the Declaration. Domestic legal structures, as well as a host of political factors, will influence whether these reforms take place through constitutional amendments, simple legislation, or court-mandated rules. Whatever the avenue for reform, such steps must be consistent with the duty of States to consult and cooperate directly with Indigenous Peoples.

Bolivia is a particularly useful example as it was the first country to incorporate all of the provisions of the Declaration into national law.<sup>224</sup> Colombia has likewise incorporated into its national law all of the provisions of ILO Convention 169, which, as discussed previously, is very closely aligned with the Declaration in regard to education rights.<sup>225</sup> Some other examples include the constitutions of Bolivia<sup>226</sup>

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coupled with financial and geographic challenges. However, these challenges can only be met by States embracing the duty of consultation in the first place.

223 See, e.g., U.N. Secretary-General, *Rights of Indigenous Peoples: Note by the Secretary General*, ¶¶ 15–18, U.N. Doc. A/66/288 (Aug. 10, 2011), <http://unsr.jamesanaya.org/docs/annual/2011-ga-annual-report-en.pdf>.

224 See Bolivia’s Law 3760, *supra* note 204. See also Morse Caoagas Flores, UNESCO, Div. for Soc. Policy and Dev. Secretariat of the Permanent Forum on Indigenous Issues, *The Role of ILO in the Promotion and Protection of Indigenous Languages*, Int’l Expert Group Meeting on Indigenous Languages, 7, PFI/2008/EGM1/14 (Jan. 8–10, 2008) [hereinafter *The Role of ILO in the Promotion and Protection of Indigenous Languages*].

225 See Ley 21 de 1991 [Law 21 of 1991] (Colombia) (Mar. 6, 1991), <http://colombia.justia.com/nacionales/leyes/ley-21-de-1991/gdoc/>.

226 REPÚBLICA DEL BOLIVIA CONSTITUCIÓN DE 2009, art. 17, <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html> (“Every person has the right to receive an education at all levels in a manner that is universal, productive, free of charge, integral and intercultural, without discrimination.”) (quotation translated by author).

and Guatemala,<sup>227</sup> and Congolese Act No. 5-2011,<sup>228</sup> which echo Article 14(2) of the Declaration in guaranteeing the right to education without discrimination. Ecuador,<sup>229</sup> Guatemala,<sup>230</sup> Mexico,<sup>231</sup> Nepal,<sup>232</sup> and

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- 227 REPÚBLICA DE GUATEMALA CONSTITUCIÓN DE 1985 CON LAS REFORMAS DE 1993, art. 74 (Nov. 17, 1993), <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html>. See also RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICA, *supra* note 167, at 88 (“Article 71 obligates the State to provide education without discrimination.”).
- 228 *Congolese Act On the Promotion and Protection of Indigenous Populations*, *supra* note 204, art. 17 (“The State guarantees the right to access to education at all levels falling under the national educational system to all indigenous children without discrimination.”). See also *New Congolese law ‘significant’ step for indigenous rights – UN expert*, UN NEWS CENTRE (Jan. 7, 2011), [www.un.org/apps/news/story.asp?NewsID=37223&Cr=indigenous&Cr1](http://www.un.org/apps/news/story.asp?NewsID=37223&Cr=indigenous&Cr1).
- 229 See REPÚBLICA DEL ECUADOR CONSTITUCIÓN DE 1998, art. 84, ¶ 11 (June 5, 1998), <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html> (“The State shall recognize and guarantee to indigenous towns, in accordance with this Constitution and the law, the respect to public order and human rights, the following collective rights: . . . To access a quality education. To rely on the system of intercultural bilingual education.”) (quotation translated by author). See also *id.*, ¶ 13 (Ecuador has also defined a right of self-determination for Indigenous Peoples, which includes the right to “formulate priorities in plans and projects for the development and improvement of their economic and social conditions; and to adequate financing from the State”) (quotation translated by author). This would necessarily include educational projects and programs.
- 230 REPÚBLICA DE GUATEMALA CONSTITUCIÓN DE 1985 CON LAS REFORMAS DE 1993, art. 76 (Nov. 17, 1993), <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html>. (“Educational system and bilingual instruction. The administration of the educational system shall be decentralized and regional. In the schools established in areas with predominately indigenous populations, instruction should preferably be imparted in a bilingual format.”) (quotation translated by author).
- 231 See MEXICAN CONSTITUTION, c. I, art. 2, § B, ¶ II (amend. 2009) <http://historicaltextarchive.com/sections.php?action=read&artid=93> (“To eliminate the scarcities and leftovers that affect indigenous people and communities, these authorities have the obligation to: . . .II. Guarantee and increment the levels of education, favoring bilingual and bicultural education, literacy, completion of basic education, vocational training, and mid-superior and superior education. Establish a system of grants for indigenous students at all levels. Define and develop educational programs of regional level that recognize the cultural heritage of their peoples, in agreement with the laws about the matter and in consultation with indigenous communities. Stimulate the respect and knowledge of the diverse cultures that exist in the nation.”).
- 232 INTERIM CONSTITUTION OF NEPAL 2063 (2007), pt. III, § 17, ¶¶ 1, 3, [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf) (“Right relating to education and culture: (1) Every community shall have the right to



Panama<sup>233</sup> have gone a step further and included in their constitutions language that promotes either bilingual education or education in the mother tongue for Indigenous Peoples. Finland, Norway, and Sweden also recognize the right to mother tongue education through domestic legislation.<sup>234</sup> The constitutions of Argentina,<sup>235</sup> Bolivia,<sup>236</sup> Brazil,<sup>237</sup> Colombia,<sup>238</sup> and Venezuela<sup>239</sup> and the Mexican “General Law

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get basic education in its own mother tongue, as provided in law. . . . (3) Every community residing in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage.”).

- 233 See Georgetown University y organización de Estados Americanos, *Soberanía nacional: Análisis comparativo de constituciones de los regímenes presidenciales*, BASE DE DATOS POLÍTICOS DE LAS AMÉRICAS (1998), <http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#pan>. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, art. 88 (“Aboriginal languages shall be the object of special study, conservation and dissemination and the State shall promote bilingual literacy programs in indigenous communities.”) (quotation translated by author).
- 234 See Language Act (Act No. 423/2003) § 4 (Fin.); Act concerning the right to use the Sami language in dealings with public authorities and courts (Svensk författningssamling [SFS] 1999:1175) § 8 (Swed.); Act on the Sami Parliament (Act No. 974/1995) § 9 (Fin.); Act of June 1987 (Act No. 56/1987) §§ 3–8 (Nor.) (concerning the same thing (the Sami parliament) and other Sami legal matters).
- 235 See ARGENTINE REPUBLIC CONSTITUCIÓN DE 1994, c. IV, § 17, POLITICAL DATABASE OF THE AMERICAS (July 16, 2008), [http://pdba.georgetown.edu/Constitutions/Argentina/argen94\\_e.html#firstpartch1](http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html#firstpartch1) (“To guarantee respect for the identity and the right to bilingual and intercultural education. To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education”). For a critique of additional steps that Argentina needs to take, see James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, *The Situation of Indigenous Peoples in Argentina*, ¶¶ 60–67, U.N. Doc. A/HRC/21/47/Add.2, [http://unsr.jamesanaya.org/docs/countries/2012-report-argentina-a-hrc-21-47-add2\\_en.pdf](http://unsr.jamesanaya.org/docs/countries/2012-report-argentina-a-hrc-21-47-add2_en.pdf).
- 236 REPÚBLICA DEL BOLIVIA CONSTITUCIÓN DE 2009, art. 17, <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>.
- 237 CONSTITUICAO FEDERAL [C.F.] [CONSTITUTION] art. 210, ¶ 2 (Braz.) (“Regular elementary education shall be given in the Portuguese language and Indian communities shall also be ensured the use of their native tongues and their own learning methods”).
- 238 See CONSTITUCION POLITICA DE COLOMBIA [C.P.] art. 10 (“The education provided in communities with their own linguistic traditions will be bilingual.”); *id.* at art. 68 (“The members of ethnic groups will have the right to training that respects and develops their cultural identity.”).
- 239 See *Derechos de los Pueblos Indigenas, Comparacion de Constituciones*, “Venezuela,” art. 121, BASE DE DATOS POLITICOS DE LAS AMERICAS (Feb. 21, 2013), <http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#ven> (“The State shall

on Linguistic Rights of Indigenous Peoples”<sup>240</sup> all establish a right for Indigenous Peoples to education that is not only bilingual, but also inter-cultural. This is parallel to the second part of the Declaration’s Article 14(1). The constitutions of Mexico<sup>241</sup> and Nepal,<sup>242</sup> as well as domestic legislation in Norway,<sup>243</sup> also guarantee the general rights of Indigenous Peoples to the promotion and preservation of language and culture.

Along this same vein, some countries, like Bolivia,<sup>244</sup> Mexico<sup>245</sup> and New Zealand,<sup>246</sup> have taken an additional step in protecting the rights reflected in both Articles 14 and 15 of the Declaration, by giving Indigenous languages “official” or “national language” status, recognizing that they are of equal importance to the dominant languages of these countries and of fundamental value to preserving the dignity and diversity of all cultures within the national society. Mexico’s General Law on Education reflects Article

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promote the appreciation and dissemination of the cultural manifestations of the indigenous peoples, who have the right to their own education, and an education system of an intercultural and bilingual nature.”) (quotation translated by author).

- 240 Ley General de Derechos Lingüísticos de los Pueblos Indígenas, Diario Oficial de la Federación [DO], art. 11, Mar. 13, 2003 (2006) (Mex); see Government analysis: Comision Nacional para el Desarrollo de los Pueblos Indígenas, *La Vigencia de los Derechos Indígenas en Mexico*, 29 (Dec. 2007), [www.cdi.gob.mx/derechos/vigencia\\_libro/vigencia\\_derechos\\_indigenas\\_diciembre\\_2007.pdf](http://www.cdi.gob.mx/derechos/vigencia_libro/vigencia_derechos_indigenas_diciembre_2007.pdf); see also *The Role of ILO in the Promotion and Protection of Indigenous Languages*, *supra* note 224, at 206; U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶ 56.
- 241 MEXICAN CONSTITUTION, c. I, art. 2, § A, ¶ IV (amend. 2009) <http://historicaltextarchive.com/sections.php?action=read&artid=93> (“A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination, and, in consequence, autonomy to: . . . IV. Preserve and enrich their languages, awareness of their heritage, and all the elements that constitute their culture and identity”). *The Role of ILO in the Promotion and Protection of Indigenous Languages*, *supra* note 224, at 6.
- 242 INTERIM CONSTITUTION OF NEPAL 2063 (2007), pt. III, § 17, ¶¶ 1, 3, [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf).
- 243 CONSTITUTION OF THE KINGDOM OF NORWAY OF 1988 art. 110, § a (“It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life”).
- 244 REPÚBLICA DEL BOLIVIA CONSTITUCIÓN DE 2009, art. 5, § I, <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>.
- 245 *General Law on Linguistic Rights of Indigenous Peoples*, *supra* note 240, art. 4. See *generally* note 240 for more information on this law.
- 246 Māori Language Act of 1987, art. 3 (N.Z.). <http://www.legislation.govt.nz/act/public/1987/0176/latest/DLM124116.html>.

15's approach to education even more explicitly when it states that one of the objectives of State-sponsored education is to "promote the Nation's linguistic plurality [as well as] respect for indigenous peoples' linguistic rights."<sup>247</sup> In New Zealand, the U.S., and Canada, protection for Indigenous Peoples' educational rights can also be found in treaties. For instance, in New Zealand, the Māori language ("te reo Māori") is protected under the Waitangi Treaty as "taonga" (a valued Māori treasure).<sup>248</sup> In the U.S. and Canada, various treaties recognize the right of Indigenous Peoples to education, language, and cultural practices within their territories.<sup>249</sup> Indigenous treaty rights and aboriginal rights were given further protection in Canada's constitutional reform process.<sup>250</sup> In the U.S., language and cultural rights are also promoted through legislative initiatives.<sup>251</sup> Additionally, there is a bill pending in the U.S. Congress that is being promoted

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247 Ley General de Educación, D.O.F., art. 7, § IV (July 13, 1993) (Mex.), [http://www.diputados.gob.mx/LeyesBiblio/pdf/137\\_200415.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/137_200415.pdf) (quotation translated by author).

248 *Managing for Success-Māori Education Strategy*, *supra* note 216, at 11, 25.

249 For the U.S., *see, e.g.*, Treaty with the Cherokee, 14 Stats 799, art. V (July 19, 1866), <http://digital.library.okstate.edu/kappler/Vol2/treaties/che0942.htm#mn36>; Treaty of Hellgate, US-Creeks, 12 Stat. 975, art. 5 (July 16, 1855), [http://www.fws.gov/pacific/ea/tribal/treaties/flatheads\\_1855.pdf](http://www.fws.gov/pacific/ea/tribal/treaties/flatheads_1855.pdf); Indian Self-Determination and Education Assistance Act of 1975, 25 USC § 450 (1975) (amend. in 1988), (was later created with the intent of making it easier for the federal government to enter into contracts with tribes where the government could commit to provide federal services that were under the control of the indigenous community). For Canada, *see, e.g.* Tsawwassen First Nations Treaty, [http://www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1\\_Tsawwassen\\_First\\_Nation\\_Final\\_Agreement.PDF](http://www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1_Tsawwassen_First_Nation_Final_Agreement.PDF); *see also* Education Jurisdiction Framework Agreement (July 5, 2006), [http://www.fnesc.ca/Attachments/Jurisdiction/PDF's/Ed\\_Agreement.pdf](http://www.fnesc.ca/Attachments/Jurisdiction/PDF's/Ed_Agreement.pdf); First Nations Education Act, S.B.C. 2007, c. 40, art. 3 (Can.), [www.bced.gov.bc.ca/legislation/schoollaw/firstnations\\_school\\_act.pdf](http://www.bced.gov.bc.ca/legislation/schoollaw/firstnations_school_act.pdf). For more examples of Canadian treaties, *see infra* note 253.

250 While there is much debate (in scholarship and case law) as to the scope and meaning of this constitutional provision, education in one's own language, culture, and community has been a central or inherent aspect of aboriginal society and thus a crucial aspect of aboriginal rights. *See, e.g.*, Jerry Paquette & Gerald Fallon, *First-Nations Education and the Law: Issues and Challenges*, 17 EDUC. & L. J. 347, 366–75 (2008).

251 *See, e.g.*, Native American Languages Act, 25 U.S.C. § 2901 (1990); Esther Martinez, Native American Languages Preservation Act of 2006, Pub. L. No. 109–394, 120 Stat. 2705; Native American Graves Protection and Repatriation Act, Pub. L. No. 101–601, 104 Stat. 3048 (1990); Indian Arts and Crafts Act of 1990 (IACA), 25 U.S.C. § 305 (2003).

by the National Indian Education Association and other Indigenous groups known as the *Native CLASS Act*, which appears to have been formulated with Article 14 in mind.<sup>252</sup>

Yet there are many challenges that countries face in the implementation of these laws, particularly in countries where educational policy is spread across sections of the country or is assigned to localities that are not well-versed in the rights of Indigenous Peoples. For example, in Canada there are differences between provinces. British Columbia, where Indigenous Peoples have negotiated treaties that recognize their autonomy, has been able to make great strides in realizing educational rights for its people.<sup>253</sup> In other places, where there are discrepancies in laws and funding relating to reserve and province schools, the overall educational achievement for Indigenous students is often lower and the rate of adult illiteracy higher.<sup>254</sup> While Indigenous education policy in

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- 252 See *The Native Class Act*, National Indian Education Association, [http://niea.org/data/files/policy/native\\_class\\_act\\_draft.pdf](http://niea.org/data/files/policy/native_class_act_draft.pdf) (The Native CLASS Act includes, among other things, provisions relating to language and culture based education, tribal control of educational systems, teacher training in indigenous languages and culture; and support for tribal colleges and higher education.). For a current critique of where the US is in terms of meeting its obligations with respect to indigenous education, see *Tribal Leader Briefing Book*, *supra* note 205, at 3.
- 253 *First Urban Treaty in B.C. History Takes Effect Today*, TSAWWASSEN FIRST NATION, OFFICE OF THE PREMIER (Apr. 3, 2013), [www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2009OTP0060-000606.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0060-000606.htm); *B.C. And First Nation Sign Education Agreement*, OFFICE OF THE PREMIER, FIRST NATIONS EDUC. STEERING COMM. (July 5, 2006) [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2006OTP0117-000907.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2006OTP0117-000907.htm); *First Nations Jurisdiction over Education in British Columbia Act 2006*, GOV'T OF CANADA, c. 10 (Dec. 12, 2006), <http://laws-lois.justice.gc.ca/eng/acts/F-11.75/page-1.html>. Nunavut also has an autonomous government that was formed as a result of the Nunavut Act and the Nunavut Land Claims Agreement (NLCA) and has the potential to really shape education to benefit its large Inuit population. For some background information on the Nunavut Act and the NLCA, see generally Barry Dewar, *Nunavut and the Nunavut Land Claims Agreement—An Unresolved Relationship*, POLICY OPTIONS (July–Aug., 2009), <https://jsis.washington.edu/canada/file/Dewar,%202009.pdf>. For a discussion of the NLCA's potential to benefit Inuit educational needs, see generally THOMAS R. BERGER, *Conciliator's Final Report: "The Nunavut Project," Nunavut Land Claims Agreement Implementation Contract Negotiations for the Second Planning Period, 2003–2013* (Mar. 1, 2006), <http://www.tunnigavik.com/documents/publications/2006-03-01%20Thomas%20Berger%20Final%20Report%20ENG.pdf>.
- 254 See, e.g., *Canada's First Nations Stand Up for Education, Demand Their Issues Be A Part of Federal Election Now*, NATIONTALK (Sept. 26, 2008), <http://nationtalk.com>.

the U.S. is formed at a national level, there are nevertheless a wide spectrum of local laws and policies that impact Indigenous Peoples, with some individual states within the United States taking additional efforts to promote Indian education.<sup>255</sup> The next factor offers ways in which to bring about uniform improvements in the recognition of educational rights for Indigenous Peoples, while providing for differences in cultures, languages, and histories.

### *Comprehensive Educational Strategy*

It is important that countries create a plan for implementing the educational rights of Indigenous Peoples that is comprehensive, but also responds to the unique needs of each Indigenous group. In other words, the plan must identify and address a variety of issues in education that impact all Indigenous Peoples, whether it be the need for reforms relating to the recognition of bilingual education or community-controlled schools, while at the same time addressing the particular needs of a community, such as the rate of removal of children from that community and the impact that removal has had on the transmission of the community's language and cultural norms. In some countries where educational policy is most effectively addressed at the local level, a nation-wide policy statement that embraces the norms in Article 14 and 15 (self-determination in education for Indigenous Peoples, non-discrimination, cultural and linguistic integrity) may be sufficient to set the groundwork for the development of successful regional and local educational strategies.

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ca/story/canadas-first-nations-stand-up-for-education-demand-their-issues-be-a-part-of-federal-election-now/; *See generally* Assembly of First Nations, *First Nations Education Action Plan* (May 31, 2005), <http://www.nvit.ca/docs/assembly%20of%20first%20nations%20first%20nations%20education%20action%20plan.pdf>.

- 255 *See, e.g.*, MONT. CODE ANN. § 20-1-501 (West 2015). This state law was intended to ensure that all educational personnel have an understanding and awareness of Indian nations. This law is part of a larger effort on the part of the State of Montana and the Indigenous Peoples of that area to implement Article X, Section 1(2) of the Montana Constitution, which states that “[t]he state recognizes the distinct and unique cultural heritage of American Indians and is committed in its educational goals to the preservation of their cultural integrity.” MONT. CONST. art. X, § 1, ¶ 2. For more information, *see* Indian Education for All (2000), <http://www.montanatribes.org/files/IEFA-Law.pdf>; *see also* MONTANA OFFICE OF PUBLIC INSTRUCTION, Indian Education, “Indian Education 101,” *available at* <http://opi.mt.gov/programs/indianed/>.

In other countries, the strategy itself might need to be formulated at the national level. Both types are represented in the examples below. Regardless of the approach, however, Indigenous groups need to be actively engaged in shaping the country's strategy.

New Zealand is undoubtedly the clearest example of a State working with its Indigenous Peoples to develop an action plan that tackles a broad array of educational issues represented in Articles 14 and 15 of the Declaration. Much of this work tracks increased awareness at the international level of Indigenous Peoples' rights, including participation by the Māori in the drafting process of the Declaration.<sup>256</sup> In the 1970s and 1980s, the Māori began concerted efforts to revitalize and strengthen the Māori language (“*te reo Māori*”).<sup>257</sup> These efforts led to the establishment of the first *kura kaupapa Māori*, a language school setting for the teaching of Māori language and culture.<sup>258</sup> It also led to the passage of the Māori Language Act in 1987, which made *te reo Māori* one of the three official languages of New Zealand.<sup>259</sup> This was consistent with the Treaty of Waitangi, which recognizes *te reo Māori* as *taonga*, a valued Māori treasure.<sup>260</sup> In 1998, the Ministry of Education in New Zealand began “extensive consultation” with the Māori peoples to develop

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256 See (20 April 2010) 662 NZPD 10229, <http://www.parliament.nz/en-nz/> (search in search bar for “Ministerial Statements – UN Declaration on the Rights of Indigenous Peoples – Government Support;” then follow first link with same title in search results); see also Pita Sharples, *Supporting UN Declaration restores NZ’s mana*, BEEHIVE.GOV.T.NZ (Apr. 20, 2010), [www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana](http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana).

257 See Part 3: *Historical and current context for Māori education*, CONTROLLER AND AUDITOR-GENERAL (Aug. 2012), [www.oag.govt.nz/2012/education-for-maori/part3.htm](http://www.oag.govt.nz/2012/education-for-maori/part3.htm) [hereinafter *Historical and current context for Māori education*]; See also WAITANGI TRIBUNAL, *Wanaganga Capital Establishment Report*, c. 2 (1999), [https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_68595986/Wai718.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68595986/Wai718.pdf) (Like other indigenous peoples throughout the world, the Māori of New Zealand have come through a long history of being subjected to educational practices aimed at assimilating them to European culture and language and at maintaining their status at the outer fringes of society).

258 See *Historical and current context for Māori education*, *supra* note 257.

259 See *History of the Māori Language*, MINISTRY FOR CULTURE AND HERITAGE (Jul. 30, 2015), <http://www.nzhistory.net.nz/culture/maori-language-week/history-of-the-maori-language>.

260 See Māori Language Act of 1987, art. 3 (n. 2); see also *Historical and current context for Māori education*, *supra* note 257.

a “Māori Education Strategy.”<sup>261</sup> The new education strategy of New Zealand, released in 1999, focused on “rais[ing] the quality of . . . education for Māori [students]” at both *kaupapa Māori* and non-Māori schools<sup>262</sup> and on “supporting greater involvement and authority of Māori in education.”<sup>263</sup> In 2005 this strategy was reaffirmed and updated to ensure continuity of commitment to Māori education.<sup>264</sup> In 2006, New Zealand sought feedback from leading Māori academics on further steps that could be taken.<sup>265</sup> In 2007, the year that the UN Declaration was adopted, a draft of the revised strategy, “*Ka Hikitia—Managing for Success*,” was released, at which time the government began broader consultation through community meetings, presentations to educators, and written submissions.<sup>266</sup> The final *Ka Hikitia* strategy was released for implementation from 2008 to 2012, with a mid-term review scheduled half way through.<sup>267</sup> In 2013, New Zealand completed the process of consulting members of the Māori community (including Māori learners) and educational professionals for purposes of informing the redevelopment of the *Ka Hikitia* strategy for another five years (through 2017).<sup>268</sup>

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261 *Managing for Success—Māori Education Strategy*, *supra* note 216, at 12.

262 In New Zealand, schools that are not Māori-immersion schools are known as “English-medium” schools. The learning of *te reo Māori* also occurs at “English-medium” schools. See *Managing for Success—Māori Education Strategy*, *supra* note 216, at 24.

263 *Managing for Success—Māori Education Strategy*, *supra* note 216, at 12; U.N. Expert Mechanism, *Lessons Learned*, *supra* note 15, at n. 14 (lists *Ka Hikitia* as a positive example of some good goals to set). Other specific examples of some good goals to set are “greater participation, improved literacy skills, lower truancy rates, and the gaining of meaningful qualifications.” U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶ 57. See also Report of the Special Rapporteur on the rights of indigenous peoples, *The situation of Māori people in New Zealand*, Human Rights Council, 18th Sess., ¶ 58, U.N. Doc. A/HRC/18/35/Add.4 (May 31, 2011) (by James Anaya), [www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add4\\_en.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add4_en.pdf) [hereinafter Anaya].

264 See *Managing for Success—Māori Education Strategy*, *supra* note 216, at 12.

265 See *Managing for Success—Māori Education Strategy*, *supra* note 216, at 2, 13.

266 See Ministry of Education, *New Zealand Schools: Ngā Kura o Aotearoa (2007)*, at 45 (Sept., 2008) [https://www.educationcounts.govt.nz/\\_data/assets/pdf\\_file/0019/143038/2007-New-Zealand-Schools.pdf](https://www.educationcounts.govt.nz/_data/assets/pdf_file/0019/143038/2007-New-Zealand-Schools.pdf).

267 See *Managing for Success—Māori Education Strategy*, *supra* note 216, at 39.

268 See *Me Kōrero – Let’s Talk!*, *supra* note 216. See generally Ministry of Education, *Ka Hikitia: Accelerating Success—The Māori Education Strategy (2013-2017)* (2013), <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KaHikitiaAcceleratingSuccessEnglish.pdf> [hereinafter *Accelerating Success—Māori Education Strategy*].

As part of its comprehensive strategy, concerted efforts have been made throughout to recognize, preserve, and strengthen the Māori language as a national treasure.<sup>269</sup> Efforts have also been made to support and strengthen Māori schools where Māori language and culture are taught,<sup>270</sup> to increase student achievement, to increase student access to Māori teaching, to increase community involvement in education, and to increase the number of Māori language teachers and teaching materials.<sup>271</sup> New Zealand has also made efforts to increase Māori presence at tertiary institutions,<sup>272</sup> and to increase awareness and acceptance of Māori culture, language, and issues amongst the general population.<sup>273</sup> Finally, New Zealand has created a “measurable gains framework” to measure the success of its Māori education program.<sup>274</sup>

Other examples exist as well. For instance, pursuant to consultation efforts with Indigenous groups, Bolivia began in 2013 to implement a new national curriculum and to revamp its entire national education system. Under the new system, the different Indigenous communities are writing their own “regional curricula” to be used in

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269 Māori Language Act of 1987, art. 3 (N.Z.). <http://www.legislation.govt.nz/act/public/1987/0176/latest/DLM124116.html>.

270 See *ILO Convention Manual*, *supra* note 82, at 66. See also WGIP 16th Sess. Rep., *supra* note 20, at ¶ 63 (explaining in further detail a portion of New Zealand’s Māori language program, which is directed at both children and adults).

271 *Managing for Success-Māori Education Strategy*, *supra* note 216, at 12, 19, 24, 34.

272 Mason Durie, *Indigenous Higher Education: Māori Experience in New Zealand* 7 (Nov. 1, 2005), <http://www.massey.ac.nz/massey/home.cfm> (search in search bar for “Indigenous Higher Education: Māori Experience in New Zealand; then follow link with same name under search results).

273 *Managing for Success-Māori Education Strategy*, *supra* note 216, at 19, 25.

274 See *Helpful Rubrics*, MINISTRY OF EDUCATION/ TE TAHUHU O TE MATAURANGA, <http://appraisal.ruia.educationalleaders.govt.nz/Inquiry-cycle/Identifying-priorities-for-Maori-students/What-to-use/Helpful-rubrics> (last visited Dec. 8, 2015); *Accelerating Success-Māori Education Strategy*, *supra* note 268, at 55, 59. See also Anaya, *supra* note 263, ¶ 59 (discussing gains and challenges presented in New Zealand on the issue of Indigenous Education); see also *Tertiary Education Performance Report*, TERTIARY EDUCATION COMMISSION 2010 18 (2010), [www.tec.govt.nz/Documents/Publications/Tertiary-Education-Performance-Report-2010.pdf](http://www.tec.govt.nz/Documents/Publications/Tertiary-Education-Performance-Report-2010.pdf); see generally Stephen May et al., *Bilingual/Immersion Education: Indicators of Good Practice, Final Report to the Ministry of Education* 91 (2004) (explaining “[d]espite the significant advances made on its behalf in recent years, bilingualism in Māori and English is still viewed as subtractive by many – perhaps still, the majority – of the wider Aotearoa/New Zealand community.”).



the schools serving these communities.<sup>275</sup> The national government is also committing to publishing Indigenous language alphabets and teaching materials.<sup>276</sup> Special programs will be implemented to increase Indigenous access to teacher training programs too.<sup>277</sup> Finally, the government of Bolivia has helped establish three new Indigenous universities that are being operated with input and representation from the surrounding Indigenous communities.<sup>278</sup> This is in addition to a scholarship program for Indigenous students who want to study at non-Indigenous universities.<sup>279</sup>

With the aim of developing a comprehensive strategy to “preserve, revitalize and promote Aboriginal languages and cultures,” Canada conducted a national study.<sup>280</sup> This study resulted in a 2005 report informed by discussions with elders, community groups, First Nations, Inuit and Metis organizations, as well as scholarly research

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275 See *Informe del Gobierno del Estado Plurinacional de Bolivia Sobre los Derechos de los Pueblos Indígenas* (Jan. 2012), <http://www.ohchr.org/documents/issues/ipeoples/emrip/declaration/bolivia.doc> [hereinafter *Bolivia's Response to the UN Expert Mechanism*]. See also Organización de Estados Iberoamericanos, *Bolivia: Encuentro Pedagógico determina implementar nuevo currículo educativo desde 2013*, (Dec. 24, 2012), [www.oei.es/noticias/spip.php?article11583](http://www.oei.es/noticias/spip.php?article11583) [hereinafter *Bolivia: New Curriculum 2013*] (indicating that 2013 is the start date for Bolivia's new national curriculum). See, e.g., *Educación comienza socialización del currículo regionalizado en la ciudad de Cochabamba*, MINISTERIO DE EDUCACIÓN (Sept. 23, 2011), <http://www.minedu.gob.bo/index.php/component/k2/2-noticias-pasadas/180-educación-comienza-socialización-del-currículo-regionalizado-en-la-ciudad-de-cochabamba> (explaining how Indigenous groups in Bolivia were beginning the process of writing their own “regional” curricula); Organização dos Estados Ibero-americanos, *Bolivia: Consejo Educativo del Pueblo Indígena Mojeño entrega currículo regionalizado* (Oct. 16, 2012), [www.oei.es/noticias/spip.php?article11245](http://www.oei.es/noticias/spip.php?article11245) (announcing that the Education Council of the Mojeño Indigenous People has completed and submitted to the Bolivian government its own “regional” curricula); Ministerio de Educación, *Ministerio de Educación recibe Currículo Regionalizado de la nación Tacana* (Jan. 25, 2013), <http://www.minedu.gob.bo/index.php/component/k2/2-noticias-pasadas/443-ministerio-de-educacion-recibe-curriculo-regionalizado-de-la-nacion-tacana> (announcing that the Tacana Nation has also completed and submitted to the Bolivian government its own “regional” curricula).

276 See *Bolivia's Response to the UN Expert Mechanism*, *supra* note 275, at 18.

277 See *Bolivia's Response to the UN Expert Mechanism*, *supra* note 275, at 19.

278 See *Bolivia's Response to the UN Expert Mechanism*, *supra* note 275, at 20.

279 See *Bolivia's Response to the UN Expert Mechanism*, *supra* note 275, at 20.

280 Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures* (June 2005), <http://www.afn.ca/uploads/files/education2/towardanewbeginning.pdf> [hereinafter *Towards a New Beginning*].

and writings.<sup>281</sup> However, severe funding cuts have impeded the full implementation of these efforts.<sup>282</sup> Since the 1960s, the U.S. has conducted several national studies on Indigenous education relating to its domestic policy of promoting Indigenous self-determination.<sup>283</sup> In 2005, 2007, 2009 and 2011, the U.S. government undertook a “National Indian Education Study” to assess the condition of Indigenous education nationwide.<sup>284</sup> And most recently in November of 2011, the U.S. Department of Education released a report detailing the challenges and concerns regarding education that tribal leaders and educators had expressed during the Department’s nationwide consultation efforts.<sup>285</sup> All of these efforts culminated in a 2011 Executive Order that calls for the creation of a comprehensive plan of action that addresses issues in Indigenous education at all levels

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281 See generally *id.*

282 See Valerie Galley, *Reconciliation and the Revitalization of Indigenous Languages*, in *RESPONSE, RESPONSIBILITY, AND RENEWAL: CANADA’S TRUTH AND RECONCILIATION JOURNEY* 241, 253 (Gregory Younging et al. eds., 2009), [www.ahf.ca/downloads/trc2.pdf](http://www.ahf.ca/downloads/trc2.pdf); Assembly of First Nations, *National First Nations Language Strategy* 4 (July 5, 2007), <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyLanguages/AssemblyFirstNations4.pdf>.

283 See PRESIDENTIAL TASK FORCE ON INDIAN AFFAIRS, *A FREE CHOICE PROGRAM FOR AMERICAN INDIANS, FINAL REPORT* (Dec. 23, 1966); SENATE SPECIAL SUBCOMM. ON INDIAN EDUC., COMM. ON LABOR & PUB. WELFARE, *INDIAN EDUCATION: A NATIONAL TRAGEDY – A NATIONAL CHALLENGE*, S. Rep. No. 91-501 (1969); U.S. DEP’T OF EDUC., *INDIAN NATIONS AT RISK: AN EDUCATIONAL STRATEGY FOR ACTION: FINAL REPORT OF THE INDIAN NATIONS AT RISK TASK FORCE* iii (1991), <http://www2.ed.gov/rschstat/research/pubs/oieresearch/research/natatrisk/report.pdf>. Prior to the early 1970s, the general policy of the federal government toward indigenous education was one of forced assimilation into the dominant society. See JON REYHNER & JEANNE EDER, *A HISTORY OF INDIAN EDUCATION* (1989). In many cases, indigenous languages, cultures, and histories were forbidden at federally sponsored schools.

284 See NAT’L CTR. FOR EDUC. STATISTICS, *NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (NAEP): NATIONAL INDIAN EDUCATION STUDY* (June 7, 2012), <http://nces.ed.gov/nationsreportcard/nies/> (covers June 2005, 2007, 2009 and 2011).

285 U.S. DEP’T OF EDUC., OFFICE OF ELEMENTARY AND SECONDARY EDUC., OFFICE OF INDIAN EDUC., WHITE HOUSE INITIATIVE ON TRIBAL COLLEGES AND UNIVERSITIES, *TRIBAL LEADERS SPEAK: THE STATE OF AMERICAN INDIAN EDUCATION, 2010, REPORT OF THE CONSULTATIONS WITH TRIBAL LEADERS IN INDIAN COUNTRY* (2011), [www2.ed.gov/about/inits/ed/indianed/consultations-report.pdf](http://www2.ed.gov/about/inits/ed/indianed/consultations-report.pdf).

and that is based on direct consultation with Indigenous groups.<sup>286</sup> The Australian Government likewise has recently conducted a longitudinal evaluation across three years to determine the level of effort that has been going into improving outcomes for Indigenous students.<sup>287</sup> This study was one of the sources used in updating the Aboriginal and Torres Strait Islander Education Strategy in 2015.<sup>288</sup>

Though comprehensive planning is best, there are many examples worldwide of smaller, more specific efforts that serve to illustrate some of the challenges that States are commonly facing, such as the ongoing shortage of qualified teachers and adequate teaching materials, lack of access to schools, and discrimination in the classroom. Thus, for instance, in order to increase the number of well-trained bilingual and bicultural teachers, the U.S. has made special grants available for the training of teachers of Indigenous children in both public and reservation schools.<sup>289</sup> In Mexico, in order to overcome a social stigma attached to bilingual teaching, the country has offered bilingual teachers higher pay than monolingual teachers.<sup>290</sup> Also in Mexico, to address the need for teaching

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286 See White House Initiative on American Indian and Alaska Native Education, *Tribal Colleges and Universities*, U.S. DEPT OF EDUC., [www.ed.gov/edblogs/whiaiane/tribal-colleges-and-universities/](http://www.ed.gov/edblogs/whiaiane/tribal-colleges-and-universities/) (last visited Nov. 20, 2015); Exec. Order No. 13592, 76 Fed. Reg. 76, 603 (Dec. 8, 2011); *Tribal Leader Briefing Book*, *supra* note 205, at 32.

287 See ACIL Allen Consulting, *Evaluation of the Aboriginal and Torres Strait Islander Education Plan 2010–2014* 1–6 (Nov. 2014), <http://www.scseec.edu.au/> (search in search bar for “Aboriginal and Torres Strait Islander Education Plan 2010–2014;” then follow link of same name; then follow link to ACIL Allen Evaluation Report).

288 Education Council, *National Aboriginal and Torres Strait Islander Education Strategy 2015* (2015), [http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/ATSI%20documents/NATSI\\_EducationStrategy\\_v3.pdf](http://www.scseec.edu.au/site/DefaultSite/filesystem/documents/ATSI%20documents/NATSI_EducationStrategy_v3.pdf).

289 Education Amendments of 1974, Pub. L. No. 93–380, 88 Stat. 484 (1974); OFFICE OF EDUC. (DHEW), WASH. D.C. OFFICE OF INDIAN EDUC., *THE INDIAN EDUCATION ACT OF 1972: ANSWERS TO YOUR QUESTIONS*. REVISED, (1980), <http://files.eric.ed.gov/fulltext/ED196637.pdf>; Ari Glogower, *The Indian Education Act of 1972* (June 28, 2005) (unpublished paper for EDSE 500: Principles of Secondary Classroom Instruction, Mississippi Teacher Corps) (on file at <http://www.untahbasintah.org/papers/indianeducationact.pdf>).

290 Carla Paciotto, *The Tarahumara of Mexico*, in *STABILIZING INDIGENOUS LANGUAGES* 155, 160 (Gina Cantoni ed., rev. ed. 2007), [http://www.afn.ca/uploads/files/education2/stabilizing\\_indigenous\\_languages.center\\_for\\_excellence\\_in\\_education\\_2007.pdf](http://www.afn.ca/uploads/files/education2/stabilizing_indigenous_languages.center_for_excellence_in_education_2007.pdf); *Ministerio de Educación crea Bono Específico por Bilingüismo*, DEGUATE.COM (Aug. 14, 2007), [www.deguate.com/artman/publish/educa\\_noticias/Ministerio\\_de\\_Educacion\\_crea\\_Bono\\_Especifico](http://www.deguate.com/artman/publish/educa_noticias/Ministerio_de_Educacion_crea_Bono_Especifico)

materials in Indigenous languages for the Tarahumara people of Chihuahua, a standardized written form was created from the five different dialects of the Tarahumara language, and this in turn was used to develop standardized materials and a basic vocabulary.<sup>291</sup> The State of Chihuahua, Mexico, is also attempting to help rural children avoid having to attend boarding school by allowing funding for day schools with a minimum of eight students.<sup>292</sup> Regional governments in Russia are similarly experimenting with providing a boarding school alternative in the form of “itinerant schools, which travel with reindeer herders.”<sup>293</sup> Finland offers financial incentives to schools in the Sami homeland area that teach in Sami.<sup>294</sup> At the university level, many of Colombia’s State-run universities provide affirmative action programs for ethnic minorities (Indigenous Peoples and Afro-Colombians).<sup>295</sup>

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por\_B\_10986.shtml. See also RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICAS, *supra* note 167, at 90.

291 Paciotto, *supra* note 290, at 155, 159.

292 Paciotto, *supra* note 290, at 155, 160.

293 See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Situation of Indigenous Peoples in the Russian Federation*, Human Rights Counsel, ¶ 67, U.N. Doc. A/HRC/15/37/Add. 5 (June 23, 2010) (by James Anaya), [http://unsr.jamesanaya.org/docs/countries/2010\\_report\\_russia\\_en.pdf](http://unsr.jamesanaya.org/docs/countries/2010_report_russia_en.pdf). For a critique of what additional steps Russia needs to take see *id.* ¶¶ 66–73, 92–94.

294 Act on the Fin. of Educ. and Culture (1705/2009) (Fin.); see Answers by the Government of Finland, Questionnaire to Governments for Preparing Pre-Sessional Submissions to the United Nations Permanent Forum on Indigenous Issues (UNPFII), [www.un.org/esa/socdev/unpfii/documents/session\\_10\\_finland.pdf](http://www.un.org/esa/socdev/unpfii/documents/session_10_finland.pdf). “However, there is no legislation or policy that guarantees education in the Sami language outside the core Sami area, where the majority of Sami students live, even though for years the Sami Parliament has proposed to extend the provisions of the Act on the Financing of Education and Culture throughout the whole country.” *The Situation of the Sami People*, *supra* note 204, ¶ 70.

295 For example, the National University in Bogotá reserves 2% of its admissions per field of study for members of these groups. The required entrance exam score is lower for ethnic minorities, and student loans are available to them that can be pardoned in whole or in part depending on if the student returns to serve her community after graduation and for how long. *Programa Especial para la Admisión de Bachilleres Miembros de Comunidades Indígenas*, UNIVERSIDAD NACIONAL DE COLOMBIA, <http://admisiones.unal.edu.co/home/pregrado/programa-especial-para-la-admision-de-bachilleres-miembros-de-comunidades-indigenas> (last visited Nov. 20, 2015). Colombia’s Constitutional Court has upheld this type of affirmative action as constitutional. Corte

Perhaps one of the biggest challenges for countries is in the development of educational strategies that are directly tied to the varying needs of Indigenous communities. In the U.S., for example, Indigenous educators have shown frustration at the achievement measures imposed by a national set of standards known as “No Child Left Behind” (NCLB), because it precludes the possibility of applying different methods of measuring achievement to different methods of knowing and learning.<sup>296</sup> Similar to the U.S., Australia’s “Closing the Gap” campaign focuses on comparing Indigenous students with non-Indigenous students, which may not promote measures specifically tailored to Indigenous students.<sup>297</sup> One way to ensure a better educational match is for States to collaborate and work with Indigenous communities on setting standards, consistent with the idea of self-determination in education.<sup>298</sup> New Zealand is undertaking such an approach by setting learning goals that are born from a Māori perspective.<sup>299</sup>

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Constitucional [C.C.] [Constitutional Court], Sentencia T-110/10 (Feb. 16, 2010), [www.corteconstitucional.gov.co/relatoria/2010/t-110-10.htm](http://www.corteconstitucional.gov.co/relatoria/2010/t-110-10.htm).

296 John Reyhner, *Promoting Human Rights Through Indigenous Language Revitalization*, 3 INTERCULTURAL HUM. RTS. L. REV. 151, 184 (2008). Recently, the federal government sought to add flexibility to the requirements of NCLB, by allowing states and the Bureau of Indian Education to apply for waivers of certain NCLB requirements in exchange for comprehensive plans for improving educational outcomes that are created in consultation with tribes as well as teachers, schools, parents and other community stakeholders. See *ESEA Flexibility*, U.S. DEPT. OF EDUC., [www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html](http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html) (last visited Nov. 20, 2015). Some tribes have chosen either to not participate in the BIE’s flexibility request or to request variations to the BIE’s request. See generally *BIE ESEA Flexibility Request*, BUREAU OF INDIAN EDUC. (OBM number 1810-0581) (June 7, 2012), [www2.ed.gov/policy/eseaflex/bie.pdf](http://www2.ed.gov/policy/eseaflex/bie.pdf).

297 *Indigenous Education: The Challenge of Change*, EARLY CHILDHOOD AUSTRALIA, <http://www.earlychildhoodaustralia.org.au/our-publications/every-child-magazine/every-child-index/every-child-vol-16-4-2010/indigenous-education-challenge-change-free-article/> (last visited Nov. 20, 2015). For general information on the goals of the Closing the Gap Campaign, see *Closing the Gap in Indigenous Disadvantage*, COUNCIL OF AUSTRALIAN GOVERNMENTS, [www.coag.gov.au/closing\\_the\\_gap\\_in\\_indigenous\\_disadvantage](http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage) (last visited Nov. 20, 2015).

298 *Situation of Indigenous Peoples in Australia*, *supra* note 221, ¶¶ 53–55, 62, 95.

299 *Managing for Success-Māori Education Strategy*, *supra* note 216, at 19; For further information on the background research behind New Zealand’s choice to create a more Māori-focused approach, see Ministry of Education/ Te Tahuhu o Te Matauranga, *Overview* (last updated Aug. 22, 2015), <http://www.education.govt.nz/ministry-of-education/overall-strategies-and-policies/the-maori->

Some of the examples above represent comprehensive efforts and others suggest a more piecemeal approach. In all cases, implementation remains a challenge for States and Indigenous Peoples. Examples under factors four, five, and six suggest some progress on this front; as well as ways for addressing these shortcomings.

*Indigenous-Controlled Educational Systems, Programs, and Initiatives*

One of the primary aims of Article 14 is to promote Indigenous self-determination in education through Indigenous-controlled systems and initiatives. The examples below show that countries are beginning to embrace these ideas. Yet the rights articulated in Article 14 encompass more than mere administrative control. It involves Indigenous cultures and values serving as “the point of departure for knowledge generation and learning.”<sup>300</sup> As discussed in Section II, a culturally pertinent education is crucial to strengthening the identity of Indigenous students, stimulating their curiosity, and preserving and protecting their cultural heritage for future generations. However, in many parts of the world, incorporating Indigenous cultures into the classroom requires a significant pedagogical shift after long periods of assimilative practices.

Some examples of these shifts are found in educational initiatives of the Sami parliaments and Nordic States. For instance, in Sweden, they have established six state/public schools, operated by a Sami school board, which go from the pre-school level to upper secondary and offer curriculum that incorporates Sami language and culture.<sup>301</sup> Moreover, the Sami school board not only oversees the Sami schools and the Sami educational programs, but also has been active in providing guidance on how to include the Sami perspective

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300 UNESCO's *Work on Indigenous Education*, *supra* note 75, at 9. See also RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICAS, *supra* note 167, at 104.

301 Nat'l Sami Info. Centre & Ministry of Agric., Food and Consumer Affairs, *The Sami—an Indigenous People in Sweden* 18, 40, 42, 43, 47, 52 (Edita Västra Aros, 2005), [www.samer.se/2137](http://www.samer.se/2137) [hereinafter *The Sami—an Indigenous People in Sweden*]. The Swedish Sami have also established a Sami library that “has a large collection of literature in Sami, as well as literature about the Sami and Sami affairs . . . . The Sami Library not only has non-fiction, but also works of fiction by Sami writers.” *Id.* at 55.

in a wide variety of subjects, such as science, art, mathematics, social studies and sports.<sup>302</sup> Initiatives established by the Government of Nunavut, in Canada, provide another example of self-determination in education. As a self-governing territory, Nunavut is able to create a holistic approach to knowledge generation and learning by, among other things, incorporating “Inuit Societal Values” into its governing structure,<sup>303</sup> using Inuktitut as a working language,<sup>304</sup> and offering curriculum and school programs that likewise reflect Inuit language and culture.<sup>305</sup>

An example of a school that is effectively integrating Indigenous knowledge, culture, and language into its curricula is the Oneida Nation School in the U.S. The elementary and secondary school’s philosophy involves “revitaliz[ing] . . . Oneida Language and Culture by using Oneida ideas and materials most meaningful to [Oneida] Students.”<sup>306</sup> The *Ahkwesahsne Mohawk Board of Education* (AMBE) schools—located on the Canadian side of the U.S.-Canada border—have been recognized for sharing one of the most successful First Nations programs of its kind.<sup>307</sup> AMBE’s initial Mohawk language

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302 Alie van der Schaaf, *Sami: The Sami Language in Sweden*, 8–9 (Mercator-Education 2001), [www1.fu.nl/mercator/regionale\\_dossiers/PDFs/saami\\_in\\_sweden.pdf](http://www1.fu.nl/mercator/regionale_dossiers/PDFs/saami_in_sweden.pdf). For a current critique of where Sweden is in terms of meeting its obligations with respect to indigenous education, see *The Situation of the Sami People*, *supra* note 213, ¶ 69.

303 *About Nunavut*, NUNAVUT DEPARTMENT OF EXECUTIVE AND INTERGOVERNMENTAL AFFAIRS, <http://www.gov.nu.ca/eia/information/about-nunavut> (last visited Dec. 9, 2015).

304 *See generally* Inuit Language Protection Act, S.Nu. 2008, c 17 (Can.), <http://www.canlii.org/en/nu/laws/stat/snu-2008-c-17/108144/part-1/snu-2008-c-17-part-1.pdf>. For further information on the implementation of this Act, *see generally* Government of Nunavut, *Uqausivut: The Comprehensive Plan Pursuant to the Official Languages Act and the Inuit Language Protection Act (2012-2016)* (Nov. 2012), <http://www.ch.gov.nu.ca/en/Uqausivut.pdf>.

305 *See generally* Education Act, S.Nu. 2008, c 15 (Can.), <http://www.canlii.org/en/nu/laws/stat/snu-2008-c-15/109409/part-1/snu-2008-c-15-part-1.pdf>.

306 ONEIDA NATION SCHOOL SYSTEM, EXECUTIVE SUMMARY: ONEIDA NATION ELEMENTARY SCHOOL 3 (Feb. 28, 2013), <http://www.advanc-ed.org/oasis2/u/par/accreditation/summary/pdf;jsessionid=4FDAB7340769DE1280F8641D40DCE54F?institutionId=22362>. For a full description of the fundamental Oneida values that the school hopes to instill in its students, *see Oneida Nation High School: Core Values*, SOVEREIGN ONEIDA NATION OF WISCONSIN, <http://www.oneidanation.org/Schools/HSPage.aspx?id=36679> (last visited Jan. 28, 2016).

307 *See* GEORGE TAYLOR FULFORD, ET. AL., SHARING OUR SUCCESS: MORE CASE STUDIES IN ABORIGINAL SCHOOLING 40–42, 48–51 (2007).

curriculum was developed in 1988, but continues to be adapted to the needs of the community, most recently incorporating a K-4 language immersion program in one of its three schools.<sup>308</sup> Across the St. Lawrence River, another Mohawk public school in the U.S. offers courses in the Mohawk (Kanienketha) language, from primary through secondary levels, and a course in native culture, “cover[ing] everything from the creation story to contemporary times.”<sup>309</sup> Diné College, formally the Navajo Community College, is a great example of an institution of higher education that applies traditional Navajo educational principles to advanced learning through the study of Diné language, history, and culture.<sup>310</sup> In Norway there is a Sami University (Sámi Allaskuvla) that attracts students from all corners of the Sámi territory (Norway, Finland, Sweden, and Russia).<sup>311</sup> The university offers courses in teaching, journalism, Sámi language and literature and Sámi Traditional and Applied Arts; all taught from a “Sámi or indigenous perspective.”<sup>312</sup>

In Australia, Indigenous groups have developed Aboriginal language centers that seek to preserve and promote local languages.<sup>313</sup> Bolivia has also successfully supported a Bilingual Intercultural

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308 *Id.* See also Kaweienón:ni (Margaret) Peters, AMBE Skahwatsí:ra Ensures Language Survival by Endorsing Partnerships with Other Kanien’kéha Programs and Communities, *INDIAN TIME* (Apr. 17, 2008), <http://www.indiantime.net/story/2008/04/17/news/ambe-skahwatsra-ensures-language-survival-by-endorsing-partnerships-with-other-kanienkha-programs-and-communities/032720121744300760040.html>.

309 Shannon Burns, *Mohawk Educator Praised for Promoting Cultural Awareness, Pride*, *INDIAN COUNTRY TODAY* (Mar. 5, 2008), <http://indiancountrytodaymedianetwork.com/2008/03/05/mohawk-educator-praised-promoting-cultural-awareness-pride-79455>.

310 *About*, *DINÉ COLLEGE*, <http://www.dinecollege.edu/about/about.php> (last visited Nov. 20, 2015).

311 *Education*, *SÁPMI*, [www.eng.samer.se/servlet/GetDoc?meta\\_id=1261](http://www.eng.samer.se/servlet/GetDoc?meta_id=1261) (last visited Nov. 20, 2015).

312 *Society*, *SÁMI ALLASKUVLA/SÁMI UNIVERSITY COLLEGE*, <http://samas.no/en/taxonomy/term/2> (last visited Nov. 20, 2015).

313 For instance, the Wangka Maya Pilbara Aboriginal Language Centre focuses on preserving, analyzing, and recording local languages. See *About Wanga Maya*, *WANGKA MAYA PILBARA ABORIGINAL LANGUAGE CENTRE*, <http://www.wangkamaya.org.au/about-wangka-maya> (last visited Nov. 20, 2015); *Permanent Forum on Indigenous Issues: Agenda Item 7: Report of the “International Expert Group Meeting on Indigenous Languages,”* *AUS. HUMAN RTS. COMM’N*, <http://www.humanrights.gov.au/permanent-forum-indigenous-issues-agenda-item-7-report-international-expert-group-meeting-indigenous> (last visited Nov. 20, 2015).



Education Project that was largely designed by the Guarani people themselves.<sup>314</sup> The project promotes literacy in Spanish and Guarani, as well as incorporating Guarani history and culture.<sup>315</sup> The Kadazan people in the island of Borneo, Malaysia, have likewise worked to develop the Kadazandusun Language Foundation, which has, among other things, helped local schools and teachers draft a Kadazandusun language curriculum.<sup>316</sup> In Chad, where many schools are run by the communities that they serve, the government supports community input on the curriculum as well as providing funds that enable parents' associations to appoint community teachers.<sup>317</sup> Finally, Uganda has created a program for the Karamajong people that encourages community participation in creating a curriculum that adapts to a nomadic lifestyle, is taught by members of the community, and includes "areas of study that are directly relevant to the Karamajong way of life such as crop production, livestock, health and peace and security."<sup>318</sup>

These are just some of the many examples that Indigenous Peoples are pursuing in an attempt to promote the right to education for their children. State support for these types of initiatives is a crucial part of their success along with the next factor, which focuses on creating awareness in the larger society as to the value and importance of Indigenous knowledge and information.

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314 *The Bolivian Education Reform 1992–2002*, *supra* note 210.

315 *See The Bolivian Education Reform 1992–2002*, *supra* note 210.

316 *Changing the Language Ecology of Kadazandusun*, *supra* note 217. *See also About KLF*, *supra* note 217; *To Promote the Kadazandusun Languages of Sabah*, *supra* note 217; Kadazandusun Language Foundation, "About," FACEBOOK, [https://www.facebook.com/klf6392g/info?tab=page\\_info](https://www.facebook.com/klf6392g/info?tab=page_info) (last visited Jan. 28, 2016).

317 Though community schools are not exclusive to indigenous communities, the autonomy that communities have in the operation of these schools resonates with the vision behind Article 14 of the Declaration. *See ILO & African Comm'n on Human and People's Rts., Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries*, 83 (2009), [www.ilo.org/wcmsp5/groups/public/--ed\\_norm/--normes/documents/publication/wcms\\_115929.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_norm/--normes/documents/publication/wcms_115929.pdf) [hereinafter *ILO Overview Report*].

318 *Id.*

*Embracing and Promoting Indigenous Ways of Knowing and Learning Throughout Society*

The previous four factors and related initiatives can only be realized if there is some recognition by the larger community of the values inherent in Indigenous systems and structures. States can begin to accomplish this Article 15 goal by using education as a vehicle to promote tolerance, understanding, and good relations between cultures. Some examples of this follow.

As indicated above, Mexico has acknowledged the importance of this aim in its General Law on Education.<sup>319</sup> The state of Montana in the U.S. has begun furthering this aim by implementing courses for educational personnel designed to educate them on federal Indian policy and tribal sovereignty, as well as deepen their understanding and awareness of Indigenous issues.<sup>320</sup> New Zealand is making similar attempts to combat prejudice by creating awareness among teachers<sup>321</sup> and increasing the exposure of the non-Māori population to Māori issues, language, and culture.<sup>322</sup> Perhaps one of the more comprehensive plans to combat discrimination as prescribed in Article 15 of the Declaration is Taiwan's Education Act for Indigenous Peoples, which states that

[f]or the purposes of promoting mutual understanding and respect among different ethnic groups, intercultural education should encourage learning between and about different cultures; as such, educational institutions of all types at all levels shall adopt culturally appropriate approaches for teaching Indigenous students, while utilizing, as teaching material, culturally based curriculum / curricula that reflect the rich diversity of Indigenous Peoples' deeply embedded cultural values, traditions, languages, protocols, ceremonies, histories, customs, and practices.<sup>323</sup>

319 Ley General de Educación, *supra* note 247, art. 7(IV).

320 See MONT. CODE. ANN. §§ 201–501 (West 2015). See also Indian Education for All, *supra* note 255 (for overview of law).

321 *Managing for Success-Māori Education Strategy*, *supra* note 216, at 19.

322 *Managing for Success-Māori Education Strategy*, *supra* note 216, at 19, 25.

323 *Education Act for Indigenous Peoples*, art. 20, COUNCIL FOR INDIGENOUS PEOPLES (Jan. 29, 2014), [www.apc.gov.tw/portal/docDetail.html?CID=74DD1F415708044A&DID=3E651750B40064679056ED1F4F06701A](http://www.apc.gov.tw/portal/docDetail.html?CID=74DD1F415708044A&DID=3E651750B40064679056ED1F4F06701A); see

Taiwan has also made Indigenous language instruction available in many schools.<sup>324</sup> In this way, even non-Indigenous students have the option of fulfilling their Taiwanese language requirement with an Indigenous language.<sup>325</sup> Finally, in 2013, Bolivia began to implement a new nationwide curriculum that was created in consultation with Indigenous Peoples and focuses on changing the discriminatory attitudes toward Indigenous Peoples that have been prevalent in Bolivia since its colonization.<sup>326</sup> It is also aimed at promoting and increasing awareness of Indigenous cultures, languages, and beliefs among the general population.<sup>327</sup>

Legal reforms like those outlined in factor two help with re-educating the wider population regarding Indigenous Peoples. For instance, making Indigenous languages into official or nationally-recognized languages—as is being done in places such as Bolivia, Mexico, and New Zealand—is a key step to promoting the dignity and diversity of cultures within a society. Educational strategies that support and promote Indigenous initiatives in education, as we saw in factor four, also give public credence to Indigenous ways of life and create opportunity for Indigenous knowledge and perspectives to be shared with others. Indigenous-controlled educational facilities, such as the tribal colleges in the U.S., in which Indigenous and non-Indigenous students study side-by-side, offer “rare forums” in which

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*also The Rules and Regulations Implementing the Education Act for Indigenous Peoples*, COUNCIL FOR INDIGENOUS PEOPLES (Aug. 4, 2014), [www.apc.gov.tw/portal/docDetail.html?CID=74DD1F415708044A&DID=3E651750B4006467365FE117B125035C](http://www.apc.gov.tw/portal/docDetail.html?CID=74DD1F415708044A&DID=3E651750B4006467365FE117B125035C).

324 Tony Coolidge, *In 10 Years Taiwan's Indigenous Peoples Redefined Their Image*, 3(2) CULTURAL SURVIVAL QUARTERLY (May 7, 2010), [www.culturalsurvival.org/publications/voices/taiwan/10-years-taiwan-s-indigenous-peoples-redefined-their-image?page=1](http://www.culturalsurvival.org/publications/voices/taiwan/10-years-taiwan-s-indigenous-peoples-redefined-their-image?page=1).

325 See REPUBLIC OF CHINA YEARBOOK c. 17: Education (2008).

326 See *Bolivia: New Curriculum 2013*, *supra* note 275 (confirming that 2013 is the Article regarding 2013 as the start date for Bolivia's new national curriculum). For further explanation on what Bolivia means when it talks about “decolonization” in education, see Miguel Apaza Tanga, *Una Educacion Descolonizadora*, LA PATRIA (Mar. 26, 2012), <http://lapatriaenlinea.com/?t=una-educacion-descolonizadora&nota=102068>.

327 For an explanation of the strategy behind Bolivia's new national curriculum, see Ana Janneth Márquez Pinto, *Análisis de la ley Avelino Siñani- Elizardo Pérez*, LA PATRIA (Mar. 21, 2012), <http://lapatriaenlinea.com/?t=analisis-de-la-ley-avelino-sinani-elizardo-perez&nota=101580>. See also *Bolivia's Response to the UN Expert Mechanism*, *supra* note 275, at 17–20.

“face-to-face communication and exchange foster increased personal, cultural and political respect and understanding.”<sup>328</sup>

Public apologies and reparation plans for past wrongs, such as removal of Indigenous children, also go a long way in both educating the public and promoting an avenue for healing. Such an approach has been taken in Australia,<sup>329</sup> Canada,<sup>330</sup> and Sweden.<sup>331</sup> At the end of its civil war, Guatemala also included Indigenous Peoples in the signing of peace accords, where Guatemala committed to protecting Indigenous Peoples linguistic and cultural rights (including rights relating to education).<sup>332</sup> However, follow-through with these initiatives (such as the establishment of a truth and reconciliation commission in Canada relating to the forcible removal of Indigenous children to boarding schools)<sup>333</sup> is a necessary step in the process of promoting tolerance and understanding between Indigenous cultures and the wider society, as well as in the process of healing.<sup>334</sup>

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328 FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 32 (1997).

329 *Full Text of Australia's Apology to Aborigines*, CNN (Feb. 12, 2008), [www.cnn.com/2008/WORLD/asiapcf/02/12/australia.text/index.html](http://www.cnn.com/2008/WORLD/asiapcf/02/12/australia.text/index.html).

330 *Statement of Reconciliation*, (Jan. 7, 1998), [www.edu.gov.mb.ca/k12/cur/socstud/foundation\\_gr9/blms/9-1-4e.pdf](http://www.edu.gov.mb.ca/k12/cur/socstud/foundation_gr9/blms/9-1-4e.pdf) (quoting Canada's "Statement of Reconciliation" contained in Minister of Indian Affairs and Northern Development of Canada, *Gathering Strength, Canada's Aboriginal Action Plan* (1997)).

331 See *The Sami—an Indigenous People in Sweden*, *supra* note 301, at 63.

332 *Agreement on Identity and Rights of Indigenous Peoples*, Annex §§ G(d), (g), U.N. Doc. A/49/882, S/1995/256 (Mar. 31, 1995). The Agreement on a Firm and Lasting Peace acknowledged that “[r]ecognition of the identity and rights of indigenous peoples is essential for building a multi-ethnic, multicultural and multilingual country of national unity”. See *Agreement on a Firm and Lasting Peace*, Annex II, U.N. Doc. A/51/796, S/1997/114 (Dec. 29, 1996); see also *Agreement on Social and Economic Aspects and Agrarian Situation*, Annex, U.N. Doc. A/50/956 (May 6, 1996); for background see *Negotiating Rights: The Guatemala Peace Process* (Conciliation Resources 1997), [www.c-r.org/accord/guatemala](http://www.c-r.org/accord/guatemala).

333 Official Court Notice, Indian Residential Schools Settlement (2007), [www.residentialschoolsettlement.ca/summary\\_notice.pdf](http://www.residentialschoolsettlement.ca/summary_notice.pdf).

334 Some countries have been criticized for not following through on their reconciliation commitments, which undermines the initial process of creating awareness and respect. See, e.g. *The Apology to Stolen Generations*, RECONCILIATION AUSTRALIA (Feb., 2011), <https://www.reconciliation.org.au/wp-content/uploads/2013/12/Apology-fact-sheet.pdf>; RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICAS, *supra* note 167, at 85–96.

These are just a few examples of how non-Indigenous sectors of society can learn about, promote, and respect the knowledge and information that Indigenous Peoples have to offer to the larger society. As States work to improve relations between cultures, this will in turn improve educational outcomes for Indigenous Peoples.

*Regional and International Expertise and Resources*

It can be both financially and logistically difficult for States and Indigenous Peoples to accomplish all that is encompassed in Articles 14 and 15 of the Declaration on their own. Hence, it is important that they be willing to seek out regional and international partnerships that can assist them in creating and implementing educational reforms. A notable example is an international partnership between Guatemala, Indigenous language and education organizations, and UNESCO in the creation of the Mayan Bilingual and Intercultural Education for Elementary School project, which incorporates Mayan language and culture.<sup>335</sup> This program of study is complimented by an extensive Mayan bilingual intercultural teacher training program. According to UNESCO, “[t]he project has been successful because it adopted an educational approach taking ancestral culture and values, as well as present indigenous practices in different regions of Guatemala, as the point of departure for knowledge generation and learning.”<sup>336</sup> UNESCO has worked with local communities on a number of other successful bilingual education programs.<sup>337</sup> Studies conducted by

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335 Components of the program include learning and the use of the mother language and the predominant language, learning and use of Mayan Vigesimal Mathematical System and Western Decimal Mathematical System, learning and experiencing a complementary system of indigenous Mayan values and universal values, learning about different Mayan indigenous art expressions and those of different cultures, and learning to identify and analyze the world based on Mayan knowledge and universal principles. *UNESCO's Work on Indigenous Education*, *supra* note 75, at 9. *See generally* UNESCO, Project “Mobilization for Mayan Education” (PROMEM), *Final Report (Systemization of Project's Outcomes) 1994–2004* (2004), <http://unesdoc.unesco.org/images/0014/001413/141346eo.pdf> [hereinafter *UNESCO, Mobilization for Mayan Education*].

336 *UNESCO's Work on Indigenous Education*, *supra* note 75, at 9. *See also* RIGHT TO EDUCATION OF AFRO-DESCENDANT AND INDIGENOUS COMMUNITIES IN THE AMERICAS, *supra* note 167, at 104.

337 UNESCO has also worked with local educational groups to develop the Project for the Mobilization for Support of Mayan Education (PRONEM/UNESCO). PRONEM was developed in response to the 1994 First Congress

UNESCO and others suggest that bilingual programs in Guatemala have improved the schooling outcomes of Indigenous children and “led to a reduction in repetition rates, with cost savings estimated at US \$5 million a year.”<sup>338</sup>

Similarly, Namibia has collaborated with Ju/’hoan community leaders and non-governmental organizations to open and obtain teaching materials for the Baraka School in Nyae Nyae, which teaches San learners in their Ju/’hoan language in grades one through three.<sup>339</sup> In the case of the San, international attention helped to secure resources and assistance from outside of Namibia as well as within. Between 1991 and 1998, the number of San students enrolled in schools doubled.<sup>340</sup> Yet Namibia acknowledges what is true in many parts of the world, the ongoing challenges in the implementation of these programs.<sup>341</sup> Another example of successful partnership is the country of Chad, which has established nomadic schools for Indigenous Peoples with the support of UNICEF and GTZ.<sup>342</sup> These nomadic schools are run by the communities themselves.<sup>343</sup> An example at the university level involves collaboration among UNESCO, a Swedish University, a Bolivian University and Indigenous groups, in which university-level courses have been offered to Indigenous

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on Mayan Education. See UNESCO, *Mobilization for Mayan Education*, *supra* note 335, at 21. The fundamental objectives of the program involve “promoting the development of bilingual and multicultural education, particularly Mayan education, as a catalyst for the integral development of the peoples that make up the Guatemalan population.” See UNESCO, *Mobilization for Mayan Education*, *supra* note 335, at 24 (quoting the main document of Mobilization Project to Support Mayan Education, Netherlands, 519/GUA/12).

338 UNESCO, The EFA Global Monitoring Report Team, *Education for All by 2015: Will we make it?* 120 (Oxford University Publishing 2008), <http://unesdoc.unesco.org/images/0015/001547/154743e.pdf>. See also Emilio Porta & Jose Laguna, UNESCO, *Guatemala Country Case Study*, 2008/ED/EFA/MRT/PI/58/REV (2007) (Country profile prepared for the *Education For All Global Monitoring Report 2008, Education for All by 2015: will we make it?*), <http://unesdoc.unesco.org/images/0015/001555/155575e.pdf>.

339 James Suzman, *An Assessment of the Status of the San in Namibia*, LEGAL ASSISTANCE CENTRE 128 (2001) [www.lac.org.na/projects/lead/Pdf/sannami.pdf](http://www.lac.org.na/projects/lead/Pdf/sannami.pdf).

340 *Id.* at 125.

341 These challenges include extreme poverty, racial discrimination, lack of consistent education in the mothertongue, and low literacy rates among parents, to name a few. See *id.* at 217.

342 *ILO Overview Report*, *supra* note 317, at 84.

343 *ILO Overview Report*, *supra* note 317, at 84.

Peoples in the Andean region of Bolivia.<sup>344</sup> Additional examples can be found in various UNESCO documents outlining its collaborative efforts with state educational ministries and local partners.<sup>345</sup>

## 2. Issues and Challenges

In addition to the six factors explored above, these case studies also help us to identify some of the roadblocks to meaningful implementation. Some of the most common issues that arose include: (1) inadequate funding in terms of educational reform and poverty related initiatives; (2) lack of available technical and other such expertise in the areas of Indigenous educational reform, especially in terms of linguistic and cultural implementation; (3) logistical obstacles in reaching certain segments of the population; and (4) an inability to ensure that the mandates and goals of the State are being met at various levels of authority, particularly in local areas where entrenched views regarding Indigenous Peoples often hamper even the most well-intentioned and well-thought out initiatives. The studies also suggest a need for a cohesive mechanism to ensure that Indigenous Peoples are not only consulted in the reform process, but are actively leading the charge with respect to these reforms. Similar issues were identified in a recent UN study on Indigenous education, and included, among other things, lack of consultation and control by Indigenous Peoples over educational initiatives.<sup>346</sup>

Closer examination of the case studies, which is beyond the scope of this article, will offer States and Indigenous Peoples the best insight on ways forward with respect to these Article 14 and 15 issues. For instance, while many States are hampered by inadequate funding, the case studies suggest that there are a number of important steps that can be taken that require little to no funding, such as providing

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344 KAWSAY UNIV., [www.kawsay-bolivia.org/](http://www.kawsay-bolivia.org/) (last visited Oct. 30, 2015). For further information see UNHRC, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Mission to Bolivia*, A/HRC/11/11 ¶ 61 (Feb. 18, 2009) (by Rodolfo Stavenhagen), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/109/15/PDF/G0910915.pdf?OpenElement>; Leonel Cerruto A., *La experiencia de la Universidad Indígena Intercultural Kawsay (UNIK)*, in INSTITUCIONES INTERCULTURALES DE EDUCACIÓN SUPERIOR EN AMÉRICA LATINA 123–154 (Daniel Mato ed., 2009), [www.iesalc.unesco.org.ve/dmdocuments/biblioteca/libros/capitulos/INSTITUCIONES\\_INTERCULTURALES/II\\_CAP\\_4.pdf](http://www.iesalc.unesco.org.ve/dmdocuments/biblioteca/libros/capitulos/INSTITUCIONES_INTERCULTURALES/II_CAP_4.pdf).

345 See, e.g., UNESCO's *Work on Indigenous Education*, *supra* note 75.

346 U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶ 86.

official recognition to language and cultural rights or consulting with and utilizing the expertise found within and among Indigenous communities, as the Māori example demonstrates. In terms of infrastructure and development needs, the case studies suggest that international and regional involvement, as well as creating networks among and between States and Indigenous Peoples, such as in the case of Sami, can be useful tools. These are just a few of the many lessons that can be learned by exploring more thoroughly the educational practices of states, regional bodies, and Indigenous Peoples.

## V. Conclusion: Measuring Success and Other Implementation Questions

Article 14 and related aspects of Article 15 represent well-established legal obligations under international law. Conventional and customary law guarantees not only the right to education for Indigenous Peoples, but the rights to self-determination, non-discrimination, and cultural and linguistic integrity in education as well. The settled nature of these rights is being impacted further by the fact that regions and countries have begun to incorporate portions of Article 14's approach to eliminating discrimination and promoting self-determination in education, most notably through cultural and linguistic measures. Section IV offers a sampling of these efforts. However, many questions remain on the implementation of these norms. Further guidance from regional and international bodies on this issue of implementation will be needed in the years to come, and some of those efforts are already underway.<sup>347</sup>

There are several normative tools that States and Indigenous Peoples might look to in order to assist them in measuring successful implementation of the right to Indigenous education. The first is the "4-A Scheme" referenced earlier in our discussion of non-discrimination in education.<sup>348</sup> According to the CESCR "education in all its forms and at all levels shall exhibit the following interrelated and essential features": *availability, accessibility, acceptability, and adaptability*.<sup>349</sup> *Availability* refers to "[sufficient quantity of] functioning educational

347 U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19.

348 HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME, *supra* note 77.

349 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 6; HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME, *supra* note 77.



institutions and programmes;” *accessibility* refers to “institutions and programmes” that are “physically” and “economically” “accessible to everyone, without discrimination” of any kind; *acceptability* includes “the form and substance of education” that is “relevant, culturally appropriate” and otherwise acceptable to students and parents (subject to minimum governmental standards); *adaptability* refers to education that is “flexible” and adaptable to the “changing needs” of societies, communities and students, particularly with respect to their “diverse social and cultural settings.”<sup>350</sup> In “considering the . . . application of these ‘interrelated and essential’” aspects of the right to education, “the best interests of the student” is of primary concern.<sup>351</sup> Thus, the 4-A scheme could serve as a useful framework for both establishing and evaluating state initiatives relating to Indigenous education.

However, this framework is by no means the only avenue of measuring how well a State is doing in terms of meeting its international obligations relating to Indigenous education. Earlier we mentioned the UNESCO “Education for All” strategy, which is designed to promote certain educational needs of students by 2015. The six goals relevant to that movement<sup>352</sup> align well with the aims articulated in Article 14 of the UN Declaration and thus can serve as a useful tool to achieving success in the implementation of this provision. Additionally, the Office of the United Nations High Commissioner for Human Rights has recently put forth an important document entitled *Human Rights Indicators: A Guide to Measurement and Implementation* (2012).<sup>353</sup> The document is aimed at assisting those engaged in “identifying, collecting, and using indicators to promote the implementation of human rights nationally” and thus could serve as a guide to developing, as well as assessing, domestic laws and programs.<sup>354</sup>

One final question that arises in the context of implementing the right to education for Indigenous Peoples, is the concern

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350 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 6(a)–(d).

351 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 7.

352 *Education for All Goals*, *supra* note 73. See UNESCO’s *Work on Indigenous Education*, *supra* note 75; UNESCO *Education*, *supra* note 75; UNESCO *Local and Indigenous Knowledge Systems*, *supra* note 75.

353 See OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, HR/PUB/12/5 4 (2012) [www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf).

354 *Id.* (see in particular Table 6, Illustrative Indicators on the Right to Education).

articulated by some countries regarding the potential effects of Article 14 on non-Indigenous populations. For instance, some States may fear that adapting education to the particular needs of Indigenous Peoples will negatively affect their nation's unity. Others may be concerned about the effect that changing curricula to meet Indigenous students' needs may have on non-Indigenous students who are attending the same schools. Some of these concerns are dealt with in the implementation of Article 15 of the Declaration, which speaks to, among other things, the role of diversity in education in the promotion of tolerance, understanding, and good relations. Additionally, as the CESCR notes, non-discrimination in education means that "education must be accessible to all, especially the most vulnerable groups, in law and fact."<sup>355</sup> Thus, the concept of equality in education takes into consideration the need for specially designed programs or institutions that ensure that quality education is accessible to Indigenous students as a matter of fact. In other words, while the instruction or programs or institutions may not look the same in all cases, they ensure the same educational aims and objectives, most notably the "full development of the human personality."<sup>356</sup> On the question of impact, state programs that "integrate indigenous perspectives and languages into mainstream education" are not only benefitting indigenous students and their teachers in terms of "enhance[d] educational effectiveness," but also creating "greater awareness, respect for and appreciation of other cultural realities" for "non-indigenous students and teachers."<sup>357</sup>

On the larger question of national unity, Jose R. Martinez Cobo, author of the first UN study on discrimination against Indigenous populations, perhaps stated it best when he explained that

national unity does not necessarily imply cultural uniformity and the disappearance of different cultures, which can in fact enrich this unity by giving it many different shades and facets and strengthened and deepened contributions since each individual and each group would participate on the basis of his or its own identity and cultural patterns. It is therefore desirable,

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355 CESCR Gen. Cmt. 13, *supra* note 63, ¶ 6(b)(i).

356 Univ. Decl., *supra* note 2, art. 26, ¶ 2; *see also*, ICESCR, *supra* note 2, art. 13, ¶ 1; CESCR Gen. Cmt. 13, *supra* note 63, ¶ 4.

357 U.N. Expert Mechanism, *Lessons Learned*, *supra* note 19, ¶¶ 51–52.

and even necessary, to respect and strengthen . . . indigenous culture[s] simultaneously with the efforts to provide a better knowledge of the dominant culture.<sup>358</sup>

The recognition and support for cultural diversity and tolerance within a State's educational structure, as required under Articles 14 and 15 of the Declaration, is thus not only consistent with basic human rights precepts, it also enhances the learning and understanding of all students who are being served by that system.

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358 See *Study of the Problem of Discrimination*, (Vol. III), *supra* note 12, ¶ 234.



## **Ebola and the Public Readiness and Emergency Preparedness Act: Defining the Outer Boundaries of Unreviewable Administrative Action**

*Samuel C. Bauer<sup>1</sup>*

### **I. Introduction**

On December 9, 2014, in response to the Ebola epidemic in West Africa, the Secretary of Health and Human Services (the “Secretary”) invoked the “Public Readiness and Emergency Preparedness Act” (“PREPA”), to provide protections for drug companies working on three vaccines developed to combat the Ebola virus.<sup>2</sup> While there is little doubt that the development of a successful vaccine against Ebola would be a major public health victory, the Secretary’s use of PREPA shines a spotlight on a little known but constitutionally problematic law.

Enacted in 2005, as the country worried about the possibility of pandemic influenza,<sup>3</sup> PREPA was inserted into an unremarkable military appropriations bill just two days before it cleared the House and Senate.<sup>4</sup> The new provision was slipped in “without Congressional debate or public scrutiny.”<sup>5</sup> PREPA grants the Secretary unreviewable authority to provide tort immunity for claims arising from “covered countermeasures” during a public health emergency.<sup>6</sup> Democratic leadership in the Senate “alleged that then-Senate Majority Leader Bill Frist and others ‘cut a back room deal’ at the last minute to

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2 Ebola Virus Disease Vaccines, 79 Fed. Reg. 73314 (Dec. 10, 2014).

3 Wendy E. Parmet, *Pandemics, Populism and the Role of Law in the H1N1 Vaccine Campaign*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 113, 118 (2010).

4 H.R. 2863, 109th Cong. (2005).

5 Joanna B. Apolinsky & Jeffrey A. Van Detta, *Rethinking Liability for Vaccine Injury*, 19 CORNELL J.L. & PUB. POL’Y 537, 561 (2010); see also B. Kurt Copper, *High and Dry? The Public Readiness and Emergency Preparedness Act and Liability Protection for Pharmaceutical Manufacturers*, 40 J. HEALTH L. 65, 66 n.4 (2007); Angela Marino, *The Cost of a Countermeasure: The Expansive Liability Protection of the Public Readiness and Emergency Preparedness Act of 2005*, 20 U. FLA. J.L. & PUB. POL’Y 199, 201 (2009).

6 42 U.S.C. § 247d-6d (2012).

give massive liability protections to drug companies.”<sup>7</sup> Despite this criticism, the bill, including PREPA, passed on December 30, 2005.<sup>8</sup> Since its enactment in 2005, PREPA’s liability protections have been deployed fourteen other times, covering countermeasures for H1N1, H5N1, Anthrax, Smallpox, Botulism, and Acute Radiation Syndrome.<sup>9</sup>

While the lack of democratic process is troubling, of greater concern is PREPA’s staggeringly broad abrogation of tort remedies and delegation of unfettered discretion to the Secretary. The Act strips courts of the ability to review *any* of the Secretary’s actions, including defining the scope and duration of the emergency declarations, determining what products and programs are entitled to immunity from tort claims, and making individual administrative compensation decisions in lieu of those claims. Although the liability protections provided to manufacturers and drug companies create an incentive to develop and stockpile vaccines that could save lives, this article argues that PREPA raises serious constitutional questions.

In the wake of the 2014 Ebola epidemic in West Africa, developing innovative countermeasures to ensure the nation is prepared for an emergency has never been a more timely or important objective. But without some form of liability protection, companies claim they would not invest in new countermeasures to combat pandemic threats. Weighed against that significant public health goal are the twin aims of tort law: deterring tortious behavior and compensating injured individuals. Whenever new, relatively untested vaccines enter the market, concerns for serious injuries are heightened.

Current events underscore the competing policy concerns of the Act, and PREPA has never been more relevant in public discourse than it is right now. The Ebola epidemic has catapulted the Act onto the global policy stage; after announcing the declaration the Secretary noted that “[a]s a global community, we must ensure that legitimate concerns about liability do not hold back the possibility of developing

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7 Apolinsky & Van Detta, *supra* note 5, at 560 (internal quotation marks omitted).

8 Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

9 *Countermeasures Injury Compensation*, HEALTH RESOURCES AND SERVS. ADMIN., <http://www.hrsa.gov/cicp/about/index.html> (last visited Jun. 22, 2015).

an Ebola vaccine, an essential strategy in our global response to the Ebola epidemic in West Africa.”<sup>10</sup>

First, this paper will briefly describe the social and political landscape leading to the most recent PREPA declaration and prior federal laws that laid the foundation for the law’s enactment. Then, specific provisions of the Act’s statutory scheme will be discussed in detail. Section II narrows the focus onto one specific provision that strips any court of the ability to review the Secretary’s actions. Sections II.A and II.B address due process concerns raised by the jurisdiction-stripping component of PREPA, and Section II.C frames the lack of judicial involvement in Article III terms. Finally, Section III turns to policy issues: Section III.A examines the availability of judicial review in other more discretionary areas of administrative law, and Section III.B highlights federalism concerns with PREPA’s abrogation of state tort remedies. The paper concludes with a call for an amendment to PREPA that provides judicial review of U.S. Department of Health and Human Services (“DHHS”) action.

#### A. The Post-9/11 World Created New Pandemic Threats.

In the wake of the September 11 attacks and anthrax scares, a “mass-casualty bioterror event” no longer seemed to be the stuff of science-fiction movies.<sup>11</sup> The subsequent outbreaks of Severe Acute Respiratory Syndrome (SARS) in 2003 and concerns about avian influenza in 2005, coupled with scientists’ warnings that a large-scale pandemic was “inevitable,” fueled public fears of a pandemic threat.<sup>12</sup> Recognizing that the country was “woefully unprepared for a pandemic or major biological attack,” Congress sought to incentivize drug manufacturers to develop and stockpile vaccines in the event of an emergency by offering some form of tort immunity to the companies.<sup>13</sup>

Understandably, legislators wanted to ensure the country would be adequately prepared for an outbreak of an infectious disease.

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10 *Secretary Burwell Issues Declaration Under PREP Act to Support Development of Ebola Vaccines*, U.S. DEPT OF HEALTH & HUMAN SERVS. (Dec. 9, 2014), <http://www.hhs.gov/news/press/2014pres/12/20141209a.html>.

11 Lincoln Mayer, *Immunity for Immunizations: Tort Liability, Biodefense, and Bioshield II*, 59 STAN. L. REV. 1753, 1754 (2007).

12 *Id.*; see also Parmet, *supra* note 3, at 115–18.

13 Mayer, *supra* note 11, at 1754.

Many in Congress, however, agreed with the industry's assertions that tort law stood as a roadblock to investment in countermeasures for new epidemics.<sup>14</sup> Put simply, drug manufacturers claimed experimental countermeasures were high risk and low profit.<sup>15</sup> Although all drugs carry risks of tort liability for companies, those risks are particularly acute for companies developing countermeasures for new and emerging deadly diseases because the products are relatively untested.<sup>16</sup> Those diseases are usually so rare in the population that there are significant ethical barriers to human clinical testing.<sup>17</sup> Compounding the "inherent risks in the biodefense market" are the unpredictability of pandemics and terrorist attacks and the possibility that no countermeasures will even be purchased.<sup>18</sup> Many commentators agree that liability protection is a prerequisite to drug manufacturers entering the large-scale vaccine market for such diseases, given the relatively low profit margins of vaccines and the lengthy and expensive research and development timelines.<sup>19</sup>

PREPA is not the first time Congress has authorized some form of immunity to the private drug manufacturing sector as a quid pro quo for either a benefit to the public – here, in the form of increased readiness for an outbreak – or in exchange for a company's participation in and funding of an administrative no-fault scheme to provide those injured with compensation. For example, the National Childhood Vaccine Injury Act ("NCVIA") requires plaintiffs injured by covered vaccines to file an administrative claim and limits

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14 See generally George W. Conk, *Will the Post 9/11 World Be A Post-Tort World?*, 112 PENN ST. L. REV. 175, 217 (2007) ("The synergy of anthrax and 9/11 spurred the fear that anything is possible . . . [and] a series of federal legislative measures which afforded liability protections to health care workers, drug, vaccine, and medical device manufacturers."); Copper, *supra* note 5, at 66–67 ("PREPA represents another attempt by Congress to respond to the widespread concerns of disease outbreak in this era of bioterrorism by shielding pharmaceutical manufacturers from liability for injuries caused by countermeasures employed to combat a public health emergency.").

15 See Mayer, *supra* note 10, at 1757.

16 See *id.* at 1758. However, critics of this rationale point to the fact that the number of lawsuits manufacturers actually face is comparatively small, and concerns about crushing liability are therefore inflated. See Copper, *supra* note 4, at 85.

17 Mayer, *supra* note 10, at 1758.

18 *Id.* at 1757–58.

19 See, e.g., Copper, *supra* note 5, at 78–80, 81–82; Mayer, *supra* note 11, at 1757.



tort remedies.<sup>20</sup> Indeed, “since 1976, Congress has consistently coupled liability protection for vaccine makers with limitations on compensation for injured parties.”<sup>21</sup> Expanding on the model of the NCVIA, the Smallpox Emergency Personnel Protection Act (“SEPPA”) was enacted in 2003 and created an exclusive no-fault administrative remedy for injuries caused by covered smallpox vaccines.<sup>22</sup> Unlike the NCVIA, however, claimants under SEPPA “who were unhappy with their award could not bring a civil action; nor could they obtain review in any court.”<sup>23</sup>

In 2005, SEPPA provided the model for PREPA’s significant liability protections.<sup>24</sup> Although PREPA was undoubtedly the legislative response to fears of a mass bioterror attack or a pandemic, it was shaped by the concerns of drug manufacturers who saw the mass production of experimental countermeasures as risky and economically inefficient.<sup>25</sup> In order to facilitate market participation of companies with the resources to mass-produce vaccines, therefore, Congress had to sweeten the deal.

NCVIA, SEPPA, and PREPA demonstrate that Congress has long found the rationales for handing tort immunity to drug manufacturers – unmanageable risks and low returns – to be persuasive. But where prior statutes in the same vein took a scalpel to tort remedies, PREPA lops them off entirely. For example, while SEPPA provided immunity from claims arising from the administration of smallpox vaccines *only*, PREPA authorizes the Secretary to preempt tort claims relating to *any product characterized as a covered countermeasure*.<sup>26</sup>

Against this backdrop, the paper turns to PREPA’s statutory scheme.

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20 42 U.S.C. §§ 300aa-10 to -11 (2009); see Parmet, *supra* note 3, at 133–34.

21 Parmet, *supra* note 3, at 133.

22 See 42 U.S.C. §§ 239a–239h. For an extensive discussion of these statutes and their repercussions on public perception of health law, see Parmet, *supra* note 3, at 135–36.

23 Parmet, *supra* note 3, at 136; see 42 U.S.C. § 239a(f)(2).

24 Parmet, *supra* note 3, at 136.

25 Peter H. Meyers, *Fixing the Flaws in the Federal Vaccine Injury Compensation Program*, 63 ADMIN. L. REV. 785, 816 (2011) (noting PREPA was driven by “a desire to protect industries that were too big or important to fail”).

26 Conk, *supra* note 14, at 227 (“If the SEPPA is a saber, narrowly drawn—limited to a single product with generally well-known risks, and for a limited time—then [PREPA] is a blunderbuss.”).

## B. PREPA's Expansive Liability Protections are Unprecedented.

The broad policy rationales behind PREPA and the mechanisms by which it provides liability protections are not unique.<sup>27</sup> What is unique is PREPA's seemingly boundless reach.

PREPA provides covered manufacturers and persons broad immunity from tort liability during a "public health emergency" as declared by the Secretary.<sup>28</sup> The Act provides little guidance as to what constitutes a public health emergency, and instead authorizes the Secretary to declare immunity when she *thinks* there is an emergency.<sup>29</sup> Liability protections extend to any loss arising from a "covered countermeasure," which is defined as "a qualified pandemic or epidemic product; a security countermeasure; or a drug, biological product, or device that is authorized for emergency use [by the FDA]."<sup>30</sup> The Secretary's declaration, published in the Federal Register, specifies the countermeasures entitled to protection and the period during which the emergency declaration is in effect.<sup>31</sup>

The argument that PREPA impermissibly delegates overbroad authority to an administrative agency is one possible angle for a constitutional attack.<sup>32</sup> Although successful non-delegation challenges are rare,<sup>33</sup> PREPA's grant of authority to the Secretary comes about as close to unfettered discretion as could be imagined: "The first striking aspect of [PREPA's] liability coverage is the breadth

27 See Meyers, *supra* note 25, at 816–17.

28 See 42 U.S.C. § 247d(a) (2012) ("If the Secretary determines . . . that a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, the Secretary may take such action as may be appropriate . . ."); *id.* § 247d–6d(a)(1) ("[A] covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by . . . a covered countermeasure if a declaration . . . has been issued with respect to such countermeasure.").

29 See 42 U.S.C. § 247d–6d(b)(1) (authorizing a declaration where the Secretary finds a disease is a public health emergency, or where it poses a "credible risk" that it could eventually be).

30 42 U.S.C. § 247d–6d(i)(1).

31 *Id.* at § 247d–6d(b)(1)–(2).

32 See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (holding that so long as the enabling statute provides an "intelligible principle" to guide the administrative body to which authority is delegated, it will withstand scrutiny).

33 *Id.* at 373 (noting that only twice have statutes been struck down on delegation grounds, and the Court has consistently "upheld, again without deviation, Congress' ability to delegate power under broad standards").

of the statutory language itself.”<sup>34</sup> Specifically, the Secretary has wide latitude to define the scope of a “public health emergency” and what constitutes a “covered countermeasure.” Where some statutes define a public health emergency with specificity,<sup>35</sup> PREPA does not, and absent further elaboration nearly anything could conceivably be labeled an emergency regardless of its actual magnitude.

Likewise, the “covered countermeasures” entitled to immunity during an emergency could be just about anything. For example, PREPA’s sweep is so broad that manufacturers of a common painkiller like aspirin could conceivably be subject to liability protections should the Secretary decide it is an effective countermeasure to combat the public health emergency of widespread heart disease. While granting an agency wide discretion to administer a statute is not by itself problematic, the Secretary’s authority to declare a public health emergency is *unreviewable*.<sup>36</sup> Regardless of whether or not PREPA could withstand a non-delegation challenge,<sup>37</sup> the fact remains that the Secretary of Health and Human Services has unreviewable power to redefine the parameters of state tort law.

Several other specific provisions of PREPA bear mentioning. First, during a public health emergency declaration, any conflicting state laws are expressly preempted.<sup>38</sup> The only exception to the broad immunity afforded “covered” manufacturers is for “willful misconduct,”<sup>39</sup> which is defined as an act or omission done “intentionally to achieve a wrongful purpose; knowingly without legal or factual justification; and in disregard of a known or obvious risk.”<sup>40</sup> A claimant must prove willful misconduct by clear and convincing evidence<sup>41</sup> and is subject to heightened pleading standards.<sup>42</sup> If that demanding standard was not enough, the Secretary can choose to further restrict the scope of recovery by redefining what constitutes

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34 Mayer, *supra* note 11, at 1764.

35 See Rebecca Haffajee et al., *What is a Public Health “Emergency?”*, 371 NEW ENG. J. MED. 986 (2014).

36 42 U.S.C. § 247d–6d(b)(7) (2012).

37 The Supreme Court found that a statutory command to the EPA to “protect the public health” constituted an intelligible principle and rejected a non-delegation challenge, *see Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475–76 (2001), suggesting PREPA might also withstand scrutiny on that ground.

38 42 U.S.C. § 247d–6d(b)(8) (2012).

39 *Id.* § 247d–6d(d)(1).

40 *Id.* § 247d–6d(c)(1)(A).

41 *Id.* § 247d–6d(c)(3).

42 *Id.* § 247d–6d(e)(3).

willful misconduct through regulations.<sup>43</sup> Additionally, willful misconduct claims are subject to a robust regulatory defense: if FDA regulations govern the misconduct alleged to be “willful” and no enforcement steps have been initiated by that agency, the claim is barred.<sup>44</sup>

As a replacement for the state tort claims it abrogates, PREPA establishes a no-fault scheme, administered by the DHHS, “for purposes of providing timely, uniform, and adequate compensation to eligible individuals for covered injuries.”<sup>45</sup> A “covered injury table” and regulations as promulgated by the Secretary determine individual eligibility for compensation.<sup>46</sup> Claims are filed with the Health Resources and Services Administration (“HRSA”), a division of DHHS.<sup>47</sup> All determinations of what injuries are “covered” are unreviewable by any court.<sup>48</sup> The compensation provisions are coextensive with those of SEPPA, and authorize redress for medical expenses, lost income, and death benefits.<sup>49</sup> Unlike traditional tort claims, PREPA abolishes the collateral source rule, and places limitations on non-pecuniary (e.g., pain and suffering) loss.<sup>50</sup> Commentators have challenged these compensation provisions as inadequate.<sup>51</sup>

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43 *Id.* § 247d–6d(c)(2)(A).

44 *Id.* § 247d–6d(c)(5).

45 *See id.* § 247d–6e(a). Notably, the bill does not appropriate any funds, but rather authorizes Congress to do so at its discretion. *Id.* § 247d–6e(b)(1). In June 2009, the Secretary invoked PREPA protections in response to the H1N1 outbreak, and President Obama signed an appropriations bill that allocated money to the DHHS fund. *See* Pub. L. No. 111-32, 123 Stat. 1859 (2009). In theory, however, if a future budget crisis or political gridlock means no funds are allocated in the wake of a declaration, then victims may go without compensation altogether. Thus, to some extent, PREPA’s “success lies in Congress’ [sic] pocketbook.” Copper, *supra* note 5, at 105.

46 42 U.S.C. § 247d–6e(b)(4)–(5) (2012).

47 *See* HEALTH RESOURCES AND SERVICES ADMINISTRATION, COUNTERMEASURES INJURY COMPENSATION, <http://www.hrsa.gov/cicp/filingbenefits/index.html>.

48 42 U.S.C. § 247d–6e(b)(5)(C).

49 *Id.* § 247d–6e(b)(2); 42 U.S.C. §§ 239(b)–(e).

50 *Id.* § 247d–6d(e)(7)–(8).

51 Meyers, *supra* note 25, at 827; *see also* Michael Greenberger, *The 800 Pound Gorilla Sleeps: The Federal Government’s Lackadaisical Liability and Compensation Policies in the Context of Pre-Event Vaccine Immunization Programs*, 8 J. HEALTH CARE L. & POL’Y 7, 8 (2005).

Finally, there is the jurisdiction-stripping provision - the focus of this paper - which blocks judicial review of the Secretary's actions. All determinations by the Secretary, including the initial public emergency declaration and its scope, eligibility for benefits, and the processes used to determine eligibility, are unreviewable by any court: "No court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, *any action* by the Secretary . . . ." <sup>52</sup>

Despite its expansive liability protections and its limitations on tort recovery, in the post-September 11 world statutes like PREPA may be viewed as "a valiant effort to protect the public against a very real threat." <sup>53</sup> However, that objective must be weighed against the cost of denying injured claimants their traditional method of recovery. One commentator warns that "tort law will continue to be eroded by attrition, by lopping off remedies--especially by limiting damages and expanding immunities--unless we are able to grab hold of the public's conscience and consciousness to bring home the point that liability in tort is not some form of punishment, erratically inflicted." <sup>54</sup> This paper looks past the policy issues, however persuasive, and argues PREPA has gone too far in allowing the Secretary to abrogate tort claims and handing drug manufacturers a free pass from liability. <sup>55</sup>

### C. Summary of Argument

Despite the fact that the Act has been used fourteen times, the discourse about PREPA's constitutionality is largely confined to the academic sphere. <sup>56</sup> Given the robust preemption and jurisdiction-stripping provisions of the statute, it seems that is where the challenges may remain; no one thus far has tried to take DHHS to court. This paper attempts to fill in the blanks and provide potential arguments for a constitutional claim challenging PREPA.

The problem with PREPA is not that it delegates substantial authority to an executive agency, or that it preempts specific tort

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52 42 U.S.C. § 247d-6e(b)(5)(C); § 247d-6d(b)(7) (emphasis added).

53 Copper, *supra* note 5, at 105.

54 Conk, *supra* note 14, at 177.

55 This paper seeks to carry forward Professor Parmet's argument, *supra* note 3, at 144 n.231, and hone her broadside on PREPA into a narrower constitutional attack.

56 See, e.g., articles cited *supra*.

claims, or even that the Secretary has exceptionally wide latitude to implement its provisions. Instead, the most constitutionally suspect aspect of PREPA is that it expressly precludes judicial review of *all claims*, even those challenging the constitutionality of the Act. As a result, PREPA's jurisdiction-stripping provision raises several constitutional and policy concerns.

PREPA implicates due process in three ways. First, denying review of constitutional claims is not included within Congress's well-established power to restrict federal court jurisdiction, and on that basis alone PREPA, as drafted, violates due process. In other words, Congress could *in theory* deny review of all claims related to the administration of the Act except a claim that it is unconstitutional either on its face or as applied (e.g., DHHS action violates the establishment or equal protection clauses in some way). Second, individual claimants, after losing their traditional channel of redress in tort during a public health emergency, can bring administrative claims for compensation but those decisions are unreviewable by any court. I will argue that due process requires judicial review. That argument is bolstered by Article III's mandate that any Article I courts adjudicating private rights must be subject to judicial oversight, and PREPA provides none. Third, and closely related, is the problem that a litigant could not even *bring* a constitutional challenge based on the lack of judicial process for individual claims.

There are also important policy rationales for amending the statute to allow access to the courts. Specifically, while there are circumstances where administrative action is inherently discretionary and could not function under the constant scrutiny of the courts, compensation decisions are not among them. Eligibility for compensation under PREPA is based on a "covered injury table" predetermined by the Secretary – which, unlike hiring and firing decisions of national officials, for example – can *easily* be reexamined by the courts. But even the more discretionary actions taken under PREPA, including defining the scope and duration of a public health emergency declaration, should not be entirely unreviewable. A comparison between the statutory scheme governing immigration decisions and PREPA reveals that even in areas of law historically entrusted to executive discretion, judicial oversight still plays an important and necessary function. The final policy concern is federalism. With PREPA DHHS has a powerful, unreviewable weapon to abrogate state law tort claims, and when deployed it impinges on the one of the states' core functions - regulating the health and safety of its citizens.

The following analysis will show that in order to satisfy due process and Article III constraints, PREPA would need to be amended to allow some form of judicial review. This note proposes limited review of agency action in a statutory framework similar to that adopted by Congress when it granted plenary executive power over immigration. At a minimum, due process requires an amendment similar to that in the Immigration and Naturalization Act, to the effect of: “Nothing in this provision or any other shall be construed as precluding review of constitutional claims.” PREPA should be further amended to allow judicial review of both the emergency health declarations *and* denials of individual relief. While the entitlement to judicial review of DHHS decisions is not as amply supported as it is for review of constitutional claims, this paper argues due process, buttressed by policy concerns, requires it.

## II. PREPA’s Jurisdiction-Stripping Provision is Unconstitutional

At the outset, and before analyzing a possible constitutional challenge to PREPA, it is worth reiterating the policy rationales behind the law. Profit-driven companies cannot expect great returns investing in countermeasures that, at most, would be used to treat a relatively small number of people (who might never need them again), or more likely than not would never be sold at all. Experimental drugs also carry unpredictable risks of tort liability for the already reluctant companies, and PREPA provides the carrot necessary to stimulate their participation in the market. Despite these rationales, PREPA’s sweeping reach raises serious constitutional concerns.

First, the statute strips claimants of the ability to bring *any* constitutional claims that are related to the implementation of the statute, such as a First Amendment challenge. Second, PREPA denies litigants a forum for a constitutional claim aimed at the inadequacy of the administrative scheme (i.e., that procedures used resulted in a denial of compensation and deprived a constitutional right). Finally, to the extent PREPA precludes judicial review of any individual administrative claims, it denies an additional procedural safeguard mandated by due process.

### A. Due Process Requires Judicial Process.

It is a well-settled precept of Article III jurisprudence that because Congress has the discretion to create inferior federal

tribunals as it sees fit, it can restrict their jurisdiction.<sup>57</sup> Article III § 2 cl. 1 therefore describes the outer limits of the judicial power, where “Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies” but cannot add to them.<sup>58</sup> That basic proposition has remained largely untouched, and this paper does not suggest that Congress does not have the power to restrict lower federal court jurisdiction.<sup>59</sup> However, a limitation on that power is the principle that Congress cannot determine what cases federal courts may hear in a way that violates other constitutional provisions; it can revoke federal jurisdiction, but only in a manner that is not itself unconstitutional.<sup>60</sup> Indeed, “more and more of the modern commentary has turned to the constitutional guarantees of individual rights, particularly those in the Bill of Rights, as promising sources of restraints on congressional power over jurisdiction.”<sup>61</sup>

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57 See, e.g., *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (“The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.”); see generally ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* § 3.3 at 200 (6th ed. 2012).

58 *Sheldon*, 49 U.S. at 449.

59 Congress’s ability to restrict either the appellate or original jurisdiction of the Supreme Court is another matter - and a separate analysis - that is beyond the scope of this paper.

60 See, e.g., Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42 (1981) (“Congress can substantively restrict the jurisdiction of the Supreme Court and of the lower federal courts. When it does so, however, it is fully bound by the constraints of the Constitution.”); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 514 (1974) (“While Congress does not have unfettered control over lower court jurisdiction such that it could in effect abolish the courts by obliterating their jurisdiction, it is also clear that some degree of congressional control, consistent with the Constitution, is valid.”); but see Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982). There is, of course, a wealth of scholarship on the ability of Congress to restrict federal court jurisdiction, a survey of which is beyond the scope of this paper. While alternate theories about congressional control over federal jurisdiction have emerged, see CHEREMINSKY, *supra* note 55, at § 3.3, many scholars have agreed that the Constitution provides limitations on that power.

61 Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 916 (1984).



In *Webster v. Doe* the Supreme Court construed narrowly a federal statute that granted discretion to the director of the CIA in making employment termination decisions, “in part to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”<sup>62</sup> Although the Court hinted at a “serious” constitutional issue but declined to elaborate further, Professor Chemerinsky notes that “[t]here is a strong argument that due process would be violated if the effect of the jurisdictional restriction is that no court, state or federal, could hear a constitutional claim.”<sup>63</sup> In contrast, in his dissent in *Webster* Justice Scalia rejected the notion that “all constitutional violations must be remediable in the courts.”<sup>64</sup> Pointing to provisions in Article I that barred judicial review of certain actions by members of Congress, Justice Scalia concluded that “[c]laims concerning constitutional violations committed in these contexts . . . cannot be addressed to the courts.”<sup>65</sup> Thus, “recognition that the Due Process Clause does not require a remedy for every constitutional violation throws into doubt the prevalent assumption of another pocket of due process law that the Constitution requires judicial review of all constitutional claims.”<sup>66</sup>

Whatever the merits of Justice Scalia’s dissent, the Court has been reluctant to allow statutes with jurisdiction-stripping components to bar all review of constitutional claims: “[T]he Supreme Court has consistently read statutes purporting to preclude judicial review as allowing a judicial determination of whether the broad outlines of an administrative scheme satisfy constitutional requirements.”<sup>67</sup> Furthermore, “on several occasions the Supreme Court went out of its way to narrowly construe federal statutes that appeared to preclude all judicial review.”<sup>68</sup> For example, the Court in *Johnson v. Robison* reached the same conclusion as it did in *Webster v. Doe*, reading a statute narrowly to allow judicial consideration of constitutional claims.<sup>69</sup> The Court in *Johnson* drew a distinction

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62 *Webster v. Doe*, 486 U.S. 592, 603 (1988).

63 CHEMERINSKY, *supra* note 57, at 201.

64 *Webster*, 486 U.S. at 612 (Scalia, J., dissenting).

65 *Id.*

66 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993).

67 *Id.* at 333.

68 CHEMERINSKY, *supra* note 57, at 210.

69 *Johnson v. Robison*, 415 U.S. 361, 367 (1974).

between precluding review of an administrator's legal and factual conclusions, and review of a constitutional challenge addressed to the administrative scheme generally.<sup>70</sup>

The Court has continued to highlight the important distinction between statutory and constitutional claims, where judicial review of the former may not be available. In *Dalton v. Specter*, for example, the Court considered a challenge to the President's failure to comply with the complex procedural requirements of an act authorizing the President to shut down naval bases by executive order.<sup>71</sup> Although the Court failed to speak clearly as to whether review would remain available for a constitutional challenge, it did emphasize that the limitation on review being upheld applied only to statutory claims. The Court stated: "[t]he claim that the President exceeded his authority under the 1990 Act is not a constitutional claim, but a statutory one," and thus "cannot be reviewed."<sup>72</sup>

Hypothetical situations illustrate the due process issues with PREPA. Suppose that in crafting the eligibility criteria for compensation by regulation, as the Secretary is statutorily required to do, she adds a provision that states: "no African Americans may bring administrative claims for compensation." Clearly, someone injured by a covered countermeasure but barred from bringing the claim has been denied equal protection in violation of the Fifth Amendment. Or, suppose that in declaring the initial public health emergency, the Secretary limits the reach of PREPA's immunity to countermeasures administered by hospitals affiliated with a particular religion. We know that PREPA denies courts subject matter jurisdiction to review the Secretary's decisions with respect to eligibility and who is entitled to immunity.<sup>73</sup> In both cases there is a constitutional violation but the litigant cannot bring either claim under the black letter law of the statute.

The line of cases above strongly suggests that due process for a constitutional claim requires *judicial process* notwithstanding the fact that PREPA purports to bar consideration of all claims.<sup>74</sup>

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70 *Id.*; see also *Marozsan v. United States*, 852 F.2d 1469, 1471–72 (7th Cir. 1988) (finding that because the plaintiff "allege[d] serious constitutional violations," review of the *methods*, not the executive agency's decision itself, was proper).

71 *Dalton v. Specter*, 511 U.S. 462, 474 (1994).

72 *Id.* at 476–77.

73 See 42 U.S.C § 247d–6e(b)(5)(C) (2012); *id.* § 247d–6d(b)(7).

74 Fallon, *supra* note 66, at 333–34.

Therefore, in order to satisfy due process, if a plaintiff brought a constitutional challenge to PREPA the court would have to interpret the jurisdiction-stripping provision as narrowly as possible to allow adjudication of the claim. Any other construction of PREPA would be unconstitutional.

### **B. PREPA Deprives Plaintiffs of a Property Interest Without Due Process.**

The above reading of *Webster* and its progeny suggest a litigant can sidestep the jurisdiction-stripping provision by alleging a constitutional violation. First and Fifth Amendment challenges are two examples described above. This section analyzes a different constitutional claim, one framed as the lack of procedural due process for all administrative claims filed with DHHS. In other words, one potential constitutional claim that requires judicial review is the lack of process for compensation claims. The traditional balancing inquiry to determine the adequacy of process weighs in favor of allowing judicial review of all decisions related to individual eligibility for compensation during an emergency.

The first step of due process analysis is, as always, defining the constitutionally protected interest that was deprived by the government.<sup>75</sup> Then, the process accompanying the deprivation is examined under the familiar *Mathews v. Eldridge* test, which requires balancing “three distinct factors:” 1) the private interests affected; 2) the risks of erroneous deprivation and the probable value of additional procedural safeguards; and 3) the government’s interest, including any burden the additional requirements would carry with them.<sup>76</sup>

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75 *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972) (“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.”).

76 424 U.S. 319, 335–36 (1976).

## 1. A Valid Cause of Action in Tort is a Protected Property Interest.

The Supreme Court has long recognized a state-created cause of action to be a “species” of property protected by due process.<sup>77</sup> Property interests are individual entitlements “grounded in state law.”<sup>78</sup> A tort claim for personal injury caused by a product is a state-created entitlement to seek relief before a court: “A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State . . . .”<sup>79</sup> During the pendency of a public health emergency, plaintiffs are deprived of that property interest when PREPA’s broad immunity precludes all tort claims arising from covered countermeasures. The question then becomes whether adequate procedural safeguards accompanied the deprivation.

## 2. Due Process Requires Judicial Review of Individual DHHS Compensation Decisions.

Turning to the process provided, there are three potential hurdles to clear. First, a legislative determination that certain causes of action are no longer available may constitute all the process that is due. Second, and closely related, is the notion that Congress can eliminate state law claims through its preemptive power. Finally, although there has been a deprivation of a property interest, injured plaintiffs can simply file an administrative claim with DHHS instead to seek compensation. Each will be addressed in turn.

In *Martinez v. California*, the Supreme Court upheld against constitutional attack a state statute conferring immunity on officials for parole decisions.<sup>80</sup> Although the Court acknowledged that the immunity statute deprived plaintiffs of a valid property interest in a tort claim, “the State’s interest in fashioning its own rules of tort law is paramount to any discernible federal interest.”<sup>81</sup> In finding that the statute did not deprive the plaintiff of due process, the Court bolstered

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77 *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

78 *Id.* at 430.

79 *Id.* at 431.

80 *Martinez v. California*, 444 U.S. 277 (1980).

81 *Id.* at 282.

its holding by pointing to the fact that an “immunity defense, like an element of the tort claim itself, is merely one aspect of the State’s definition of that property interest.”<sup>82</sup> The Court fleshed out the rationale two years later in *Logan v. Zimmerman Brush Co.*, noting that “the State remains free to create substantive defenses or immunities for use in adjudication-*or to eliminate its statutorily created causes of action altogether,*” and therefore “the legislative determination provides all the process that is due.”<sup>83</sup>

With PREPA, arguably Congress has a “paramount” interest in preparing the nation for public health emergencies that outweighs any individual entitlement to recovery in tort, and its legislative determination to immunize certain manufacturers from suit provides “all the process that is due.” Although it might seem that *Logan* and *Martinez* preclude a due process challenge to PREPA on the merits, the claim does not necessarily falter. Those two cases dealt with state-created rights that were subsequently abrogated or modified by the state. In effect, the state was limiting a right it itself established. At least that part of the rationale is undercut by the fact that the *federal government*, through PREPA, eliminates state causes of action where the state has made no decision to do so.

But this distinction raises the specter of another familiar concept: preemption. While it is true that the federal government is eliminating state-created tort causes of action, who is to say that is not simply a valid exercise of its preemptive power? In other words, *why couldn’t* the federal government, as it has many times before, choose to extinguish someone’s tort claim? Thus, a litigant faces two roadblocks: 1) *Martinez* suggests legislative decisions to immunize particular groups of people may survive due process scrutiny; and 2) if *Martinez* does not apply, Congress could simply fall back on its preemptive power to remove a subset of tort claims.

Without straying too far afield from the due process analysis, the “ultimate touchstone” in every preemption cases is, above all else, congressional intent.<sup>84</sup> To be sure, Congress was crystal clear that PREPA preempts conflicting state law.<sup>85</sup> But the determination as to how far that preemption reaches, and who is immune from suit, belongs to the Secretary through the emergency declaration process.

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82 *Id.* at 282 n.5.

83 *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432–33.

84 *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

85 *See* 42 U.S.C. § 247d–6d(b)(7).

In effect, Congress has *not* spoken clearly as to what specific claims are preempted, but instead authorized the Secretary to essentially preempt particular claims as she sees fit. Moreover, the usual result of a preemption defense is that the tort claim is barred altogether and there is no remedy. Through PREPA, Congress went 95% of the way there but failed to deliver the knockout blow; rather than wiping out tort claims arising from covered countermeasures completely, leaving the injured with nothing, Congress chose to put a limited administrative remedy in their place. A total preemption leaves nothing to challenge, but if Congress chooses to create a substitute remedial scheme it should not be immune from due process scrutiny simply because the claims were validly preempted.

Other cases bolster the argument that the existence of an alternative remedy alone does not save a statute from constitutional attack. Although plaintiffs lose their traditional method of recovery in tort under PREPA, a counter argument to a due process claim would be that DHHS' adjudicative procedures provide all the process that is due. However, providing a substitute remedy, without more, does not necessarily provide due process. For example, in *Logan* the plaintiff challenged a state employment commission procedure that deprived him of a hearing through no fault of his own.<sup>86</sup> The Court explicitly rejected the argument that an independent tort cause of action against the state supplied constitutionally adequate process and found the plaintiff was entitled to a hearing on the merits of his employment discrimination charge.<sup>87</sup>

Similarly, the Court in *Cleveland Board of Education v. Loudermill* rejected the premise that post-termination administrative hearing procedures, without more, satisfied due process.<sup>88</sup> Taken together, *Logan* and *Loudermill* can be read to suggest that *some* adjudicative procedure in place of a state cause of action (or vice versa) will not defeat a due process claim. Therefore, although PREPA provides an administrative remedy where a tort action would normally lie, that should not end the inquiry.<sup>89</sup>

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86 *Logan*, 455 U.S. at 422.

87 *Id.* at 436–37.

88 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547–48 (1985).

89 Of course, the Court in *Logan* confronted the same remedies PREPA contemplates, but inverted; where PREPA provides an administrative remedy in place of a tort claim, the issue in that case was whether a negligence action against the state instead of an administrative hearing provided due process. The Court found that it did not.

There are also several *Mathews v. Eldridge* private interests at stake that suggest judicial review of DHHS compensation decisions is required. First, PREPA denies potential litigants use of established adjudicatory procedures.<sup>90</sup> Perhaps most obvious is a litigant's interest in recovering for loss caused by someone's negligence. Recovery of damages under PREPA is significantly more limited than what common law tort would allow, which strengthens the argument that DHHS decisions should be reviewable. The finality of the deprivation is also a relevant consideration.<sup>91</sup> If DHHS denies an administrative claim, the courts provide no recourse.

But the government interests are also significant; health and security policies hang in the balance, and the government needs the ability to respond quickly and effectively to emergencies. If drug manufacturers are hesitant about participating in response efforts because of liability concerns, that interest is impeded. Moreover, the government has an interest in ensuring that the companies tasked with developing countermeasures won't have to expend valuable resources defending lawsuits. That interest is arguably satisfied by redirecting grievances to an administrative forum without any involvement of the courts. However, the procedural shortfall is not that a claimant has lost a tort suit, but that the administrative claims process is unreviewable. That can be remedied without substantial burden on the government, and without reworking the entire statutory framework, simply by allowing judicial review of the DHHS claims process.

Added to the due process balance is the risk of erroneous deprivation. It is entirely plausible that the relatively untested Ebola vaccines, for example, could cause some potentially unforeseen and unpredictable injury.<sup>92</sup> The same vaccines have been granted "Emergency Use Authorization," which means they can be used without FDA approval. How can we know what the side effects of untested vaccines are? In creating eligibility criteria DHHS might

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90 See *Logan*, 455 U.S. at 429–30.

91 *Id.* at 434.

92 After successful trials on monkeys, researchers began human testing for one of the covered Ebola vaccines just recently in October 2014. *NIH Begins Early Human Clinical Trial of VSV Ebola Vaccine*, NAT'L INSTS. OF HEALTH (Oct. 22, 2014), <http://www.nih.gov/news/health/oct2014/niid-22.htm>. The fact that the three covered vaccines are referred to as "investigational" shows that, clearly, they have not been thoroughly tested as compared to other vaccines on the market.

not account for all valid compensable injuries, and a claimant would be erroneously denied relief altogether.<sup>93</sup>

For example, suppose someone infected with Ebola is administered one of the experimental vaccines and sustains serious injuries. Because the injuries were unpredictable, she is denied relief under DHHS's compensation system. Judicial review of the DHHS decision would allow her to present evidence in court to show how the vaccine caused her injury. To date, only four cases of Ebola have been diagnosed in the U.S.<sup>94</sup> Assuming (and hoping) it does not turn into an epidemic here, it cannot be said that such a small number of people receiving treatment would overburden the courts with review of administrative claims.<sup>95</sup>

In sum, to the extent that PREPA's jurisdiction-stripping provision is read as denying a judicial forum for a constitutional claim, it is constitutionally suspect. One possible constitutional claim is that the lack of judicial review of DHHS decisions regarding compensation for injury during a public health emergency violates due process. The foregoing factors, coupled with the idea that a substitute remedy alone does not automatically guarantee due process, compel the conclusion that PREPA does not provide constitutionally adequate process without judicial review of individual administrative claims.

### **C. PREPA Raises Further Constitutional Concerns by Relegating a Judicial Function to a Legislative Court Without Any Oversight.**

The tort claims Congress has abrogated through PREPA lie at the core of the judicial power. When Congress chooses to relegate a judicial function to an administrative agency, the Supreme Court

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93 The likelihood of that situation is not entirely clear, but the statute does have a safety net to the extent that eligibility criteria are "based on compelling, reliable, valid, medical and scientific evidence." 42 U.S.C. § 247d-6e(b)(4) (2012). The hope is that DHHS expertise would minimize the risk of erroneous deprivation, but again the problem is how untested the vaccines are.

94 *Cases of Ebola Diagnosed in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last updated Dec. 16, 2014), <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html>.

95 Of course, in the event of an actual epidemic the government could potentially call for mass vaccinations, but there is no indication that will happen beyond speculation.



has held the judiciary should retain at least some oversight to satisfy Article III's constitutional requirements.<sup>96</sup>

In authorizing DHHS to adjudicate claims for compensation during a public health emergency, Congress has created a legislative tribunal. While “[t]he Supreme Court’s jurisprudence concerning congressional power to substitute legislative courts and administrative agencies for ‘constitutional courts’ created under article III has long abounded with confusion,”<sup>97</sup> some guiding principles have emerged. Generally, legislative courts are permissible in four circumstances: (1) for United States possessions and territories; (2) for military matters; (3) for civil disputes between the United States and private citizens; and (4) for criminal matters or for disputes between private citizens where the legislative court serves as an adjunct to an Article III court that reviews the legislative court’s decisions.<sup>98</sup>

The Court has attempted to draw a distinction between disputes involving the government and private citizens, or “public rights,” and disputes involving private citizens only, or “private rights.”<sup>99</sup> Although the distinction is not always clear, “it suffices to observe that a matter of public rights must at a minimum arise between the government and others.”<sup>100</sup> By contrast, a case involving a private right is one that concerns “the liability of one individual to another under the law as defined.”<sup>101</sup> Public right matters can be removed from judicial cognizance without any condition, but private right disputes lie at the core of the judicial power.<sup>102</sup>

As “inherently judicial” matters, private rights can be adjudicated in an Article I tribunal only so long as it acts as an “adjunct” to an Article III court and is subject to substantial oversight.<sup>103</sup> In the private rights context, an Article I court’s role is more limited, and any order must be appealable to an Article III court.<sup>104</sup> One consistent theme emerging from the maze of Article III jurisprudence is that any

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96 See CHEMERINSKY, *supra* note 57, at 229 (summarizing case law).

97 Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916 (1988).

98 CHEMERINSKY, *supra* note 57, at 229.

99 *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982).

100 *Id.* (internal quotation marks omitted).

101 *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

102 *N. Pipeline Const. Co.*, 458 U.S. at 70; *see also* *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855).

103 See CHEMERINSKY, *supra* note 57, at 246.

104 *N. Pipeline Const. Co.*, 458 U.S. at 78–79.

congressional attempt to delegate private rights to legislative courts warrants heightened judicial scrutiny.<sup>105</sup> Fears of encroachment on the judicial power supply the primary rationale.<sup>106</sup>

The initial civil tort claims preempted by PREPA during an emergency are undoubtedly private rights. Specifically, plaintiffs injured by medical products would normally sue manufacturers or those who administer them<sup>107</sup> under a traditional theory of tort liability. When PREPA's liability protections are invoked, however, the injured party files a claim with the federal government instead. Arguably, the dispute then becomes public in nature. Moreover, DHHS is not deciding the merits of the initial tort claim - the fault of the defendant - in lieu of a "constitutional court," but instead determining whether an injury is eligible for compensation regardless of fault. While the public versus private right distinction defies a bright-line rule, how administrative claims under PREPA are characterized is crucial to determining whether it encroaches on a judicial function in violation of Article III.

The Court confronted a similar situation in *Crowell v. Benson*, the leading administrative law decision on the issue, and determined the dispute was private in nature.<sup>108</sup> In that case, an admiralty statute allowed sailors to file claims for worker's compensation with the United States Employees' Compensation Commission.<sup>109</sup> Unlike PREPA, however, any compensation awarded by the Commission would come directly out of the employer's pockets, and not the taxpayer's.<sup>110</sup> The Court found that "[t]he present case . . . is one of private right, that is, of the liability of one individual to another under the law as defined.<sup>111</sup> By contrast, public rights are limited to disputes "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."<sup>112</sup> Because the Commission had fact-finding authority but any legal questions

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105 *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854 (1986).

106 *Id.* at 853-54.

107 The analysis in this section focuses on the products liability claims that would be displaced, as opposed to medical malpractice claims.

108 *Crowell v. Benson*, 285 U.S. 22 (1932).

109 *Id.* at 36.

110 *Id.* at 38.

111 *Id.* at 51.

112 *Id.* at 50.

were reviewable in an Article III court, the tribunal could properly adjudicate private rights.<sup>113</sup>

Some “familiar illustrations” of public rights include “administrative agencies created . . . in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, *public health*, the facilities of the post office, pensions and payments to veterans.”<sup>114</sup> DHHS is obviously an agency created to regulate public health. However, the “state law character of a claim,” while not a talisman to establish a private right, is a significant factor in the analysis.<sup>115</sup> Additionally, in *Crowell* the injured worker had a choice: pursue a state law remedy if it was available or file an administrative claim.<sup>116</sup> Absent a willful misconduct claim, an injured claimant under PREPA is confined to a single administrative remedy and has no other choice of forum. Although it is not entirely clear whether PREPA properly administers public rights or gives DHHS impermissible jurisdiction over traditional private right disputes, sensitivity to separation of powers concerns should weigh in favor of judicial oversight.

Beginning with *Crowell v. Benson*, the Court has accepted a limited role for legislative courts as fact-finding “adjuncts” for private rights. The issue with PREPA is that Article III courts have no involvement whatsoever and DHHS decisions are final. Although any attempt to characterize administrative claims under PREPA as public or private in nature further underscores the difficulty in drawing the line between the two, judicial review would alleviate constitutional concerns in these gray areas.

### **III. Policy Considerations Favor the Provision of Judicial Review Under PREPA.**

#### **A. Even Discretionary DHHS Action Under PREPA Should be Subject to Judicial Oversight.**

Turning away from constitutional issues and towards important principles of administrative law, the pervasive theme of

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113 *Id.* at 49, 51.

114 *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.22 (1982) (emphasis added) (quoting *Crowell*, 285 U.S. at 51).

115 *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854 (1986).

116 *Crowell*, 285 U.S. at 37–38.

agency discretion surfaces in the analysis of PREPA. On the one hand, some agency functions are so purely discretionary that judicial review serves little purpose. On the other, the rationale for greater deference becomes more attenuated once you enter areas of law that are less discretionary. PREPA falls in the latter category.

The Administrative Procedure Act (“APA”) ordinarily provides a vehicle for judicial review of administrative action: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>117</sup> Moreover, there is a “strong presumption in favor of judicial review of administrative action.”<sup>118</sup> However, the entitlement to judicial review under the APA is not absolute, and is limited “to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law.”<sup>119</sup> Given PREPA’s provision explicitly eliminating judicial review, the APA is of little use.

Even in the absence of an express provision like PREPA’s, courts often decline review of discretionary acts of executive officials. The Court in *Webster v. Doe* considered a claim brought under the APA, challenging the director of the Central Intelligence Agency’s decision to terminate an employee because he posed a threat to national security.<sup>120</sup> Concluding the National Security Act committed hiring decisions to the Director’s absolute discretion and thus fell outside the scope of the APA, the Court pointed to an “overriding need for ensuring integrity in the Agency.”<sup>121</sup> Given national security concerns, “employment with the CIA entails a high degree of trust that is perhaps unmatched in Government service,” which justifies the NSA’s “extraordinary deference to the Director in his decision to terminate individual employees.”<sup>122</sup>

If the National Security Act is at one extreme of the spectrum of deference accorded to executive agencies, PREPA should be somewhere near the opposite end. When actual national security issues are on the line, there should be a larger sphere of protected

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117 5 U.S.C. § 702 (2012).

118 *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *see also* *Kucana v. Holder*, 558 U.S. 233, 251 (2010).

119 5 U.S.C. § 701(a)(1)–(2) (2012).

120 *Webster v. Doe*, 486 U.S. 592 (1988).

121 *Id.* at 601.

122 *Id.*

agency action.<sup>123</sup> Moreover, the judiciary should not second-guess executive authority conferred by Congress when important fiscal and other large-scale policy issues are implicated.<sup>124</sup> But adjudicating individual claims for compensation does not warrant the “extraordinary deference” found appropriate in *Webster*. Those decisions do not involve national security or large-scale policy issues. In other words, the smaller the scale, the harder it becomes to defend granting absolute discretion to an executive agency.

The executive branch’s wide latitude in administering the Immigration and Nationality Act (“INA”)<sup>125</sup> supplies helpful comparisons. Congress has conferred its plenary power over immigration to the executive branch, and when “a statute gives a discretionary power to an officer . . . he is made the sole and exclusive judge.”<sup>126</sup> At least within the immigration context, that notion has gone largely undisturbed, and was codified by amendments to the INA.<sup>127</sup> Specifically, 8 U.S.C. § 1252 precludes judicial review of denials of discretionary relief for aliens facing removal proceedings, among other things.<sup>128</sup> Importantly, however, the jurisdictional bar *does not* “preclud[e] review of constitutional claims or questions of law.”<sup>129</sup>

In the world of immigration law, executive power is plenary and based largely on inherently discretionary decisions: “Immigration practice is now, and will likely remain, much more discretionary, more ad hoc, and much less judicially regulated than many other legal areas . . .”<sup>130</sup> In contrast, denying judicial review of DHHS decisions related to compensation under PREPA’s administrative scheme is problematic because DHHS’ decisions are not inherently discretionary. An entitlement to compensation under PREPA is based largely on whether an injury falls within a class of injuries – described

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123 *Id.*

124 *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (“How the President chooses to exercise the discretion Congress has granted him is not a matter for our review.”).

125 8 U.S.C. §§ 1101–1381 (2015).

126 *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis added).

127 *See* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996).

128 8 U.S.C. § 1252(a)(2)(B) (2005).

129 *Id.* § 1252(a)(2)(D).

130 Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 713–14 (1997).

by regulation – to which a vaccine can ordinarily be tied.<sup>131</sup> There is little room for executive discretion in such a situation. Similarly, in the immigration context, determining whether a petitioner seeking relief falls within certain enumerated statutory categories is non-discretionary and therefore courts retain jurisdiction to review those decisions.<sup>132</sup>

But even more discretionary DHHS actions, including choosing to invoke PREPA by declaring a public health emergency, defining the scope of immunity, and compiling “covered” injuries, should be subject to review. Claims in Immigration Court can go up to the federal appellate courts for review of legal questions.<sup>133</sup> If an area of law so “inherently discretionary” as immigration is subject to considerable judicial oversight, so too should DHHS in administering PREPA.

DHHS does not require extraordinary deference to perform its job properly, and Congress has not assigned an inherently discretionary function to DHHS that would warrant minimal judicial scrutiny. Because even those executive agencies that have significant discretion to perform their functions are subject to limited judicial review, PREPA should be amended to provide the same.

## **B. PREPA Disturbs the State / Federal Balance of Power.**

PREPA’s broad grant of unreviewable authority to DHHS also implicates federalism issues, a final concern that should compel Congress to reconsider the jurisdiction-stripping provision. Specifically, PREPA displaces an important function of state tort law by negating any deterrent effect civil suits would have had on tortious manufacturers. Tort law’s concurrent goal of fully compensating injured parties is also disserved by PREPA’s strict limitations on recovery.

Compensation through tort claims is the primary method of redressing personal injury, and those claims are usually within the province of *state courts*: “Throughout our history the several States

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131 42 U.S.C. § 247d–6e(b)(4)–(5) (2012).

132 *See, e.g., Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1148 (10th Cir. 2005) (finding the jurisdiction-stripping provision of the INA does not reach non-discretionary determinations, such as whether the noncitizen has been physically present in the United States for ten years).

133 *See generally* 8 U.S.C. § 1252(a)(2)(D).

have exercised their police powers to protect the health and safety of their citizens.”<sup>134</sup> Thus, “the ‘States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”<sup>135</sup> State tort law is one such means to regulate the health and safety of citizens, and although “the Federal Government has played an increasingly significant role in the protection of the health of our people,”<sup>136</sup> the Court has often looked at state tort law as a complementary and concurrent form of regulation.<sup>137</sup>

Although Congress has long used its Article I powers to regulate matters related to health, PREPA challenges the constitutional role accorded to the state by granting the Secretary unreviewable authority to extinguish state tort claims. As Justice Stevens noted in his dissent in *Geier*, because federalism is driven by the conception “of States as separate sovereigns,” the courts “have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries . . . are within the scope of the States’ historic police powers” and not to be displaced absent a clear showing from Congress.<sup>138</sup>

There is a valid concern that PREPA undercuts state tort law’s concurrent goals of deterrence and compensation: “Compensation and deterrence are inextricably linked in traditional tort but are decoupled in a no-fault scheme in which the government pays all claims. Such schemes thus call for extra attention to deterrence mechanisms.”<sup>139</sup> Because PREPA’s fund is filled by taxpayer dollars, the deterrent effect of state tort law is effectively wiped out, at least with respect to the products or actions covered by DHHS declaration.

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134 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

135 *Id.* (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

136 *Id.*

137 *See Wyeth v. Levine*, 555 U.S. 555, 574 (2009) (holding tort claims were not preempted in part because state law comports with Congress’s intent to have dual channels of consumer protection).

138 *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting). Of course, this case resurrects the preemption issue that has been lurking in the analysis. In Section II.B.2, the question was whether a legislative determination that specific tort claims are unavailable provides all the process that is due. Here, the question becomes why Congress can’t, as it has many times before, preempt tort claims and therefore eliminate their deterrent effect.

139 Mayer, *supra* note 11, at 1776.

In other words, the loss is effectively shifted to the injured party and other taxpayers. Moreover, because the products can be used without regular FDA authorization, there is a significant risk of harm, making an entitlement to full compensation all the more important. Because it negates the deterrent effect of tort suits and limits recovery, PREPA disturbs the state and federal balance of power.

#### **IV. Conclusion**

Although PREPA is not the first statute that has granted tort immunity to private drug manufacturers, its delegation of unfettered discretion to the Secretary of Health and Human Services is unprecedented. PREPA appears to have built off of a line of statutes that immunize certain drug manufacturers and replace traditional state remedies in tort with administrative schemes. PREPA, however, not only provides immunity to covered members of the private drug industry, but also shields administrative action from all judicial review.

Most problematic is the possibility that all claims related to the administration of PREPA, including constitutional ones, are unreviewable by any court. While taking away jurisdiction from lower federal courts is certainly within the bounds of Congress's power, due process requires a judicial forum for constitutional claims. Congress should therefore amend the jurisdiction-stripping provision to allow, at a minimum, judicial review of constitutional claims. Ideally, it would also provide judicial review of compensation decisions and other discretionary DHHS action to satisfy due process and Article III constraints and alleviate policy concerns.