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ARTICLES

NOTE

ARTICLES

The Relics of Jim Crow: Fair Housing Enforcement in the North and Midwest

CHARLES S. BULLOCK, III* AND CHARLES M. LAMB**

Abstract

This article empirically examines the enforcement of the federal Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968) by 21 Northern and Midwestern states. Specifically, it measures the extent to which Black and Latino Americans received favorable outcomes when they filed Title VIII complaints in these states from 1989 to 2010, using data obtained from the U.S. Department of Housing and Urban Development (HUD) under the Freedom of Information Act.

Basic concepts and data are presented in Part I, while Fair Housing Act enforcement is addressed in Part II. Part III explains the concept of favorable outcomes in cases involving claims of racial and ethnic discrimination in violation of Title VIII and how they are measured. Previous research findings that bear on the analysis are reviewed in Part IV. Then Part V reveals new findings concerning the extent to which these 21 Northern and Midwestern states decided Title VIII complaints in support of Black Americans, whereas Part VI provides similar findings for Latino Americans. Part VII presents a few final comparisons. The last section highlights our findings.

We reach three principal conclusions. First, cooperative federalism is alive and well in the United States. A contentious legal and political issue—fair housing—is absorbed into the workings of intergovernmental relations through Congress's adoption of the concept of substantial equivalency and its operationalization through HUD's Fair Housing Assistance Program (FHAP), which distributes funds to participating state and local civil rights agencies to help HUD enforce Title VIII. Because Title

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* Distinguished Professor of Public and International Affairs, Richard B. Russell Chair in Political Science, and Josiah Meigs Distinguished Teaching Professor at the University of Georgia. We thank Zarifah Shahid, Zachary Niv, and Ethan Siebert for their valuable research assistance.
** Department of Political Science Research Professor at the University of Buffalo, SUNY, Former Equal Opportunity Specialist and Fair Housing Monitor for the Office of Federal Civil Rights Enforcement and the U.S. Commission on Civil Rights, Washington D.C.

VIII requires subnational governments to pass substantially equivalent antidiscrimination housing laws to participate in FHAP, neither a national, state, nor local approach dominates fair housing enforcement.

Second, enforcement of fair housing laws in these 21 Northern and Midwestern states, as measured by favorable outcomes in Title VIII complaints, reveals significant variations in response to Black and Latino complainants. Adjacent states and those with similar demographic characteristics often vary in their responsiveness to Black compared with Latino complaints. For example, New Jersey and New York had similar favorablility rates for Black people but differed markedly with respect to favorable outcomes for Latino complainants.

Third, these comparisons demonstrate that "Jim Crow North" is *a concept that in practice applies to Northern and Midwestern states. Of course, Jim Crow existed in these states primarily in a de facto form, but that approach was successful in establishing and maintaining a system of housing segregation deeply rooted in racial and ethnic discrimination. This finding is important because in the past, even though Southern states lagged far behind the remainder of the country in protecting civil rights, the phenomenon of Jim Crow discrimination was not restricted to the South in the field of housing; it existed in Northern and Midwestern states normally thought of as far more liberal than their Southern counterparts.*

In the future, this nation's alarming political polarization will probably reduce the likelihood of constructive changes in how the Fair Housing Act is enforced in the North and Midwest. President Trump opposes fundamental principles of fair housing law and could influence Americans to resist effective Title VIII enforcement and housing desegregation. Beyond that, conservative Northern and Midwestern hostility to federal fair housing efforts has existed since before the passage of Title VIII. Considering the endurance of housing segregation in the North and Midwest, as well as the questionable enforcement of the Fair Housing Act in those regions, what actions or policies would produce significant changes in these deep-seated trends.

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I. INTRODUCTION

The right to fair housing is designed to combat two deeply rooted American problems: housing discrimination and housing segregation.[1] Highly segregated neighborhoods—urban and suburban—persist throughout much of the United States.[2] In contrast, although flagrant housing discrimination practices have declined since the 1960s,[3] others have emerged to take their place.[4] To make matters worse, fair housing enforcement by federal, state, and local governments frequently remains ineffective and inefficient.[5]

Given these problems, this article examines an important civil rights question: How have the nation's regions outside the South responded

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[1] Several federal laws authorize fair housing rights. The Fair Housing Act of 1968 prohibits discrimination based on race, color, religion, sex, and national origin in the sale, rental, and financing of housing and in the performance of brokerage services. *See* 42 U.S.C. § 3604-05. The Supreme Court unanimously ruled that Congress intended the Fair Housing Act to protect against both discrimination *and* segregation in housing. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211–212 (1972). Congress amended the Fair Housing Act in 1988 to protect persons with disabilities and families with children under the age of eighteen. *See* 42 U.S.C. § 3602(h), (k). Other federal laws expand those rights. Title VI of the Civil Rights Act of 1964 bars discrimination because of race, color, or national origin in any federal or federally assisted program. *See* 42 U.S.C. §§ 2000d–2000d-6. The Equal Credit Opportunity Act of 1974 outlaws discrimination by creditors on grounds of sex, marital status, race, color, religion, national origin, or age. *See* 42 U.S.C. §§ 1691–1691(f). The 1975 Home Mortgage Disclosure Act provides data on the amount and location of home improvement and mortgage loans to identify discrimination by lending institutions when granting loans. *See* 12 U.S.C. §§ 2801–2809. Decades earlier, Section 1982 of the Civil Rights Act of 1866 declared that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Executive Order 11063 proscribes discrimination on account of race, color, creed, or national origin in the sale, lease, or rental of property owned or operated by the federal government. Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 20, 1962).

[2] *See* text accompanying notes 14–22, *infra*. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (discussing how governmental policies were instrumental in the creation and preservation of systemic housing segregation); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICA'S CITIES (2018) (exploring how local policies have created and stratified inter- and intra-city segregation).

[3] *See* RICHARD, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 164 (2018) (finding that by the mid-1970s, blatant residential discrimination had declined and become less of an absolute barrier for Black Americans seeking housing in predominantly white neighborhoods).

[4] *See generally* MARGERY AUSTIN TURNER ET AL., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 (Urban Inst. & U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, 2013), https://www.huduser.gov/portal//Publications/pdf/HUD-514_HDS2012.pdf [https://perma.cc/V8VF-VC9E] (discussing subtle practices of housing discrimination that have arisen since the 1970s).

[5] *See* Charles S. Bullock III, Eric M. Wilk & Charles M. Lamb, *Bureaucratic Effectiveness and Civil Rights Enforcement*, 49 ST. & LOC. GOV'T. REV. 87 (2017); Eric M. Wilk & Charles M. Lamb, *Federalism, Efficiency, and Civil Rights Enforcement*, 64 POL. RES. Q. 392 (2011).

to legal complaints alleging discriminatory housing practices? We initially tackled this question in "Jim Crow North and Fair Housing Enforcement" ("*Jim Crow I*"),[6] which explored favorable outcomes[7] in complaints filed under the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968)[8] in the 13 Northeastern states from Maine to Virginia. One significant finding was that Black and Latino complainants were both *least* likely to achieve favorable outcomes in their Title VIII claims in New York and New Jersey (federal Region II), when compared to the 11 other Northeastern states in Regions I and III.[9] We then focused on aspects of law, race relations, and public policy in New York and New Jersey to help explain their low favorability rates by investigating their levels of residential, school, and economic segregation, as well as their lack of local Fair Housing Assistance Program (FHAP) agencies, which are funded by the U.S. Department of Housing and Urban Development (HUD).[10]

The present study ("*Jim Crow II*") explores how Title VIII has been enforced in 21 Northern and Midwestern states. *Jim Crow II* is intended to clarify and extend our understanding of fair housing enforcement, as many Midwestern states have markedly different demographic characteristics from Northeastern states. For example, do New York and New Jersey continue to rank suprisingly low in favorable outcomes in *Jim Crow II* if we rely on a very different federal classification of Northern and Midwestern states? In *Jim Crow II*, New York and New Jersey are compared to 19 as opposed to 11 states, with Delaware, Maryland, Virginia, and West Virginia dropping out of the rankings and Indiana, Illinois, Michigan, Ohio, Wisconsin, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota added to the equation—will this change in research design appreciably affect our understanding of fair housing enforcement in

[6] Charles S. Bullock III & Charles M. Lamb, *Jim Crow North and Fair Housing Enforcement*, 16 COLUM. J. RACE L. 1193 (2025) [hereinafter "Jim Crow I"]. *Jim Crow I* is organized according to the ten standard federal regions, not the four much larger regions used by the U.S. Census Bureau (*see* Table 1 *infra*) and adopted in *Jim Crow II*. Relying on two different regional conceptions helps us to determine whether our general findings in *Jim Crow I* prevail when we compare Title VIII favorable outcomes using another geographical configuration.

[7] Favorable outcomes in Title VIII complaints and how they are measured are discussed in Section III *infra.*

[8] 42 U.S.C. §§3601–3619, 3631. For different interpretations of Title VIII's legislative history, *see* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149 (1969); Hugh Davis Graham, *The Surprising Career of Federal Fair Housing Law*, 12 J. POL'Y. HIST. 215 (2000); Noah M. Kazis, *The Radical Fair Housing Act*, 111 VA. L. REV. 491, 535-537 (2025); Rigel C. Oliveri, *The Legislative Battle for the Fair Housing Act (1966-1968)*, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 28–39 (Gregory D. Squires ed., 2018); Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247 (2016).

[9] Bullock & Lamb, *supra* note 6, at 1194, 1229.

[10] *Id.* at 1230–1240. FHAP is addressed in text accompanying notes 32–33, 36–49, 57, 61, 71, 79, 121-123, 129-131, 147, and Appendices D and E *infra*.

New York and New Jersey, or will they continue to rank poorly in terms of Title VIII favorable outcomes for people of color?

Part I of *Jim Crow II* presents major concepts and data relating to this study, including levels of Black-white and Latino-white residential segregation from 1980 to 2020. Part II dissects federal, state, and local enforcement of the Fair Housing Act. Part III explains the meaning of favorable outcomes in cases involving claims of racial and ethnic discrimination in violation of Title VIII and how we measure them. Part IV surveys prior research findings relating to the analysis in this article. Part V compares the extent to which these 21 states in the North and Midwest decided Title VIII complaints in favor of Black Americans.[11] Similarly, Part VI compares the extent to which these states resolved Title VIII complaints in support of Latino complainants. After Part VII provides a few final comparisons, the last section underscores our conclusions and core finding, namely that "Jim Crow North" *is* a concept that applies to various degrees to Northern and Midwestern states—not only to New York and New Jersey. Jim Crow North existed, of course, in more of a *de facto* form than it did in the South, but it was nevertheless effective in establishing and maintaining a system of housing segregation thoroughly rooted in racial and ethnic discrimination. This finding is noteworthy because even though Southern states historically lagged considerably behind the remainder of the country in protecting civil rights,[12] the phenomenon of Jim Crow discrimination is not restricted to the South in the field of housing; rather, it existed in states typically viewed as much more liberal.[13]

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[11] The U.S. Census Bureau divides the nation into four major regions. *See infra* Table 1.

[12] *See generally* EARL BLACK & MERLE BLACK, POLITICS AND SOCIETY IN THE SOUTH (1987); V.O. KEY, SOUTHERN POLITICS (1949); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). Yet recent studies document civil rights progress in the South. *See, e.g.,* CHARLES S. BULLOCK III & RONALD KEITH GADDIE, THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH (2009); Charles S. Bullock III, Eric M. Wilk & Charles M. Lamb, *Fair Housing Enforcement in the South and Non-South* 96 SOC. SCI. QUAR. 941 (2015); MATTHEW D. LASSITER & JOSEPH CRISPINO, THE MYTH OF SOUTHERN EXCEPTIONALISM (2009).

[13] There is a growing body of historical literature on the Jim Crow North. *See, e.g.,* RICHARD ARCHER, JIM CROW NORTH: THE STRUGGLE FOR EQUAL RIGHTS IN ANTEBELLUM NEW ENGLAND (2017); MARY BARR, FRIENDS DISAPPEAR: THE BATTLE FOR RACIAL EQUALITY IN EVANSON (2013); MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003); THE STRANGE CAREERS OF THE JIM CROW NORTH: SEGREGATION AND STRUGGLE OUTSIDE OF THE SOUTH (Brian Purnell, Jeanne Theoharis & Komozi Woodard eds., 2019); JAMES R. RALPH, JR., NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT (1993); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996); JEANNE THEOHARIS, KING OF THE NORTH: MARTIN LUTHER KING JR.'S LIFE AND STRUGGLE OUTSIDE THE SOUTH (2025). Of course, the original landmark study of Jim Crow in the South is C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

II. CONCEPTS AND DATA

As seen in Table 1, the U.S. Census Bureau divides the nation into four large regions: Region 1, the Northeast; Region 2, the Midwest; Region 3, the South; and Region 4, the West. This article investigates all states in Region 1 (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont) and all states in Region 2 (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin).

Table 1[14]
U.S. Census Bureau Definitions for Regions and Divisions in the Northeast and Midwest

U.S. Census Bureau: Census Bureau Regions and Divisions			
Region 1: Northeast		**Region 2: Midwest**	
Division 1: New England	**Division 2: Middle Atlantic**	**Division 3: East North Central**	**Division 2: West North Central**
Connecticut Maine Massachusetts New Hampshire Rhode Island Vermont	New Jersey New York Pennsylvania	Indiana Illinois Michigan Ohio Wisconsin	Iowa Kansas Minnesota Missouri Nebraska North Dakota South Dakota

To what extent is racial and ethnic housing segregation found in urban areas of the North and Midwest? According to Table 2, Newark, Milwaukee, Detroit, New York, Chicago, Philadelphia, Cleveland, St. Louis, and Nassau County–Suffolk County, NY, are nine of the ten most Black-white segregated metropolitan areas in the United States.[15] Among

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[14] *Census Bureau Regions and Divisions with State FIPS Codes*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf [https://perma.cc/GKA7-HWG2] (last visited Mar. 27, 2025).

[15] The segregation scores discussed below refer to the "index of dissimilarity," which is discussed in the work of Massey and Denton. *See* Massey & Denton, *supra* note 12, at 20. The index of dissimilarity provides us with "the percentage of blacks [or other racial or ethnic minorities] who would have to move to achieve an 'even' residential pattern—one where every neighborhood replicates the racial [or ethnic] composition of the city." *Id*. Sociologists have long used the index of dissimilarity to measure housing segregation in American cities. *See, e.g.*, KARL E. TAEUBER & ALMA F. TAEUBER, NEGROES IN CITIES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE (1965); Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23 (1994); John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, DIVERSITY AND

the next ten most segregated metro areas in 2020 are Boston, Cincinnati, Indianapolis, Pittsburgh, and Columbus. Highly segregated metro areas in 1980 often remained that way four decades later, even as racial segregation declined in certain areas more than others.[16] Between 1980 and 2020, Black-white residential segregation decreased by less than ten percentage points in metropolitan areas such as Newark, Milwaukee, Detroit, and New York.[17] Conversely, rates of housing segregation fell by more than ten percentage points in Chicago, Philadelphia, Cleveland, St. Louis, Nassau County–Suffolk County, Boston, Cincinnati, Baltimore, Indianapolis, Pittsburgh, and Columbus.[18] Yet many large Northern and Midwestern cities, known as Democratic strongholds, continue to have exceedingly high levels of Black-white segregation, including New York, Chicago, Philadelphia, Detroit, Boston, Minneapolis, St. Louis, and Milwaukee.[19] The political ideology of the leadership of big American cities, therefore, does not dictate that racial housing integration is increasing.

DISPARITIES PROJECT (Brown Univ., 2011), https://s4.ad.brown.edu/Projects/Diversity/Projects/Reports.htm (scroll down to the "3.24.11" article; then click "download report") [https://perma.cc/XXY3-9877].

[16] *See* Table 2 *infra*.

[17] *Id.*

[18] *Id.*

[19] *See, e.g.,* RICHARD M. BERNARD, ED., SNOWBELT CITIES: METROPOLITAN POLITICS IN THE NORTHEAST AND MIDWEST SINCE WORLD WAR II (1990); JON K. LAUCK & CATHERINE MCNICOL STOCK, THE LIBERAL HEARTLAND: A POLITICAL HISTORY OF THE POSTWAR AMERICAN MIDWEST (2025).

Table 2[20]
Black-White Segregation in 50 Metro Areas with the Largest Black Populations, 1980-2020

2020 Rank	Area Name	2020	2010	2000	1990	1980
1	Newark, NJ-PA	76.6	78.0	80.3	82.7	82.9
2	Milwaukee-Waukesha, WI	75.1	79.6	82.2	82.8	83.9
3	Detroit-Dearborn-Livonia, MI	74.5	79.6	85.9	85.6	83.0
4	New York-Jersey City-White Plains, NY-NJ	74.3	79.1	81.2	82.0	81.7
5	Chicago-Naperville-Evanston, IL	73.8	77.1	81.5	85.2	89.1
6	Miami-Miami Beach-Kendall, FL	72.1	73.0	72.4	71.8	79.4
7	Philadelphia, PA	70.2	74.3	77.8	83.3	84.4
8	Cleveland-Elyria, OH	70.0	72.6	77.2	82.8	85.7
9	St. Louis, MO-IL	67.4	70.6	73.4	77.3	81.6
10	Nassau County-Suffolk County, NY	65.5	69.2	73.6	76.4	76.9
11	Boston, MA	64.2	67.8	71.3	73.7	79.9
12	Birmingham-Hoover, AL	61.4	65.0	69.0	70.6	72.8
13	Washington-Arlington-Alexandria, DC-VA-MD-WV	61.2	63.9	65.5	67.8	71.2
14	Cincinnati, OH-KY-IN	60.6	66.9	72.6	76.0	78.2
15	New Orleans-Metairie, LA	60.2	62.9	68.6	68.1	70.1
16	Baltimore-Columbia-Towson, MD	59.9	64.3	67.6	71.4	74.4
17	Indianapolis-Carmel-Anderson, IN	59.8	64.2	70.6	74.7	78.8
18	Los Angeles-Long Beach-Glendale, CA	59.7	65.0	67.3	73.0	81.1
19	Pittsburgh, PA	59.4	63.1	67.4	70.8	73.3
20	Columbus, OH	59.2	60.6	62.8	68.1	72.9
21	Memphis, TN-MS-AR	58.9	62.2	65.7	65.3	68.8
22	Atlanta-Sandy Springs-Alpharetta, GA	58.5	58.2	63.8	66.1	76.9
23	Warren-Troy-Farmington Hills, MI	57.2	57.9	68.1	76.7	80.5
24	Houston-The Woodlands-Sugar Land, TX	57.2	60.7	65.3	65.9	74.2
25	West Palm Beach-Boca Raton-Boynton Beach, FL	56.5	57.3	65.2	75.3	83.3

[20] John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: No Breakthrough in Sight*, DIVERSITY AND DISPARITIES PROJECT (Brown Univ.), 17-18 app. tbl. 1 (2021) https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report08122021.pdf [https://perma.cc/DQ47-SFSL] (last visited Jul. 25, 2025).

Table 2 (cont.)
Black-White Segregation in 50 Metro Areas with the Largest Black Populations, 1980-2020

2020 Rank	Area Name	2020	2010	2000	1990	1980
26	Fort Lauderdale-Pompano Beach-Sunrise, FL	56.0	57.6	61.4	68.9	83.7
27	Jackson, MS	54.9	56.2	56.7	60.8	69.0
28	Baton Rouge, LA	54.1	56.8	59.9	59.5	68.2
29	Fort Worth-Arlington-Grapevine, TX	53.1	56.3	59.5	62.1	78.0
30	Jacksonville, FL	52.8	52.1	53.4	57.8	67.7
31	Oakland-Berkeley-Livermore, CA	52.1	56.6	62.2	68.0	74.0
32	Greensboro-High Point, NC	52.0	54.1	53.8	54.7	59.1
33	Kansas City, MO-KS	51.6	58.6	69.2	72.8	77.6
34	Dallas-Plano-Irving, TX	50.9	55.1	59.1	62.9	78.1
35	Richmond, VA	50.4	53.5	55.6	58.0	63.6
36	Camden, NJ	49.7	52.3	56.2	59.5	60.1
37	Charlotte-Concord-Gastonia, NC-SC	49.7	52.4	51.7	51.3	53.6
38	Tampa-St. Petersburg-Clearwater, FL	49.6	54.3	63.4	69.6	78.2
39	Columbia, SC	49.0	48.3	48.0	50.5	57.4
40	Nashville-Davidson--Murfreesboro--Franklin, TN	49.0	54.0	56.2	59.7	65.1
41	Minneapolis-St. Paul-Bloomington, MN-WI	47.7	50.5	58.0	62.5	67.7
42	Orlando-Kissimmee-Sanford, FL	47.3	49.3	55.1	59.0	71.0
43	Frederick-Gaithersburg-Rockville, MD	47.0	47.9	46.2	42.3	42.9
44	Virginia Beach-Norfolk-Newport News, VA-NC	45.6	46.4	45.7	49.2	59.5
45	Augusta-Richmond County, GA-SC	44.1	44.1	43.1	42.9	46.8
46	Seattle-Bellevue-Kent, WA	43.7	46.6	49.2	56.1	67.7
47	Riverside-San Bernardino-Ontario, CA	41.8	44.0	45.5	43.8	52.7
48	Phoenix-Mesa-Chandler, AZ	41.1	41.3	43.3	50.1	61.4
49	Raleigh-Cary, NC	38.8	41.4	40.5	41.9	46.2
50	Las Vegas-Henderson-Paradise, NV	37.4	35.9	39.2	49.1	62.9

Table 3, which contains data on Latino-white segregation, reveals a different narrative than Black-white segregation in Table 2. Although Newark, Philadelphia, and New York remain among the five most segregated metropolitan areas in the nation for Latino Americans and whites, Milwaukee and Detroit have disappeared entirely from the ranking; taking their place is Cambridge-Newton-Framingham, MA, followed later by Nassau County–Suffolk County, and Minneapolis–St. Paul.[21] Table 3 also verifies the existence of high levels of Latino housing segregation in some Midwestern and many Western metropolitan areas, particularly in California.

[21] *See* Table 3 *infra*.

Table 3[22]
Hispanic-White Segregation in 50 Metro Areas with the Largest Latino Populations, 1980-2020

2020 Rank	Areaname	2020	2010	2000	1990	1980
1	Salinas, CA	61.3	60.9	58.8	56.9	55.1
2	Newark, NJ-PA	61.1	62.6	64.9	67.0	67.0
3	Los Angeles-Long Beach-Glendale, CA	61.0	63.4	63.1	61.1	57.3
4	Philadelphia, PA	60.0	64.4	66.7	70.0	70.2
5	New York-Jersey City-White Plains, NY-NJ	58.8	63.1	65.4	65.0	65.2
6	Chicago-Naperville-Evanston, IL	55.0	57.2	61.5	63.1	65.0
7	Cambridge-Newton-Framingham, MA	54.4	56.8	59.3	55.4	51.3
8	Bakersfield, CA	52.0	52.3	53.5	55.1	54.2
9	Oxnard-Thousand Oaks-Ventura, CA	51.8	54.5	56.1	52.2	53.1
10	Anaheim-Santa Ana-Irvine, CA	51.4	54.1	54.9	49.8	42.4
11	Dallas-Plano-Irving, TX	50.0	51.9	53.4	49.7	48.5
12	Houston-The Woodlands-Sugar Land, TX	49.9	52.5	53.4	47.8	47.7
13	Oakland-Berkeley-Livermore, CA	48.2	48.3	46.9	38.8	36.5
14	Frederick-Gaithersburg-Rockville, MD	47.7	48.8	45.9	36.5	28.5
15	Washington-Arlington-Alexandria, DC-VA-MD-WV	47.3	48.2	48.2	44.0	32.9
16	San Diego-Chula Vista-Carlsbad, CA	47.1	49.6	50.6	45.3	41.8
17	Phoenix-Mesa-Chandler, AZ	46.4	49.3	52.1	48.6	52.2
18	Atlanta-Sandy Springs-Alpharetta, GA	46.3	49.5	51.5	35.2	30.3
19	Nassau County-Suffolk County, NY	46.1	48.5	46.9	42.3	37.1
20	San Francisco-San Mateo-Redwood City, CA	46.1	50.2	52.8	48.3	43.9
21	San Jose-Sunnyvale-Santa Clara, CA	45.4	47.6	50.8	48.0	45.2
22	Fresno, CA	45.3	46.5	46.7	47.7	46.2
23	Miami-Miami Beach-Kendall, FL	45.2	46.1	44.1	50.4	52.7
24	New Brunswick-Lakewood, NJ	44.7	46.9	49.4	45.4	47.3
25	Denver-Aurora-Lakewood, CO	44.6	48.8	50.1	46.5	48.6

[22] Logan & Stults, *supra* note 20, at 22-23 app. tbl. 3. Note that we use the terms "Hispanic" and "Latino" interchangeably throughout this article.

Table 3 (cont.)
Hispanic-White Segregation in 50 Metro Areas with the Largest Latino Populations, 1980-2020

2020 Rank	Areaname	2020	2010	2000	1990	1980
26	Charlotte-Concord-Gastonia, NC-SC	42.9	45.6	48.2	31.7	27.1
27	West Palm Beach-Boca Raton-Boynton Beach, FL	42.9	42.6	42.5	41.7	43.1
28	Tucson, AZ	42.5	46.2	48.8	49.7	52.7
29	Riverside-San Bernardino-Ontario, CA	42.2	42.4	42.5	35.8	38.1
30	Fort Worth-Arlington-Grapevine, TX	42.1	45.6	47.7	44.6	47.5
31	San Antonio-New Braunfels, TX	41.3	46.1	49.8	52.3	57.5
32	Orlando-Kissimmee-Sanford, FL	41.1	40.2	38.7	29.1	28.6
33	Las Vegas-Henderson-Paradise, NV	40.9	42.0	42.4	28.9	22.5
34	Salt Lake City, UT	39.6	42.8	41.0	31.1	31.0
35	Austin-Round Rock-Georgetown, TX	38.9	43.2	45.6	41.7	45.5
36	Minneapolis-St. Paul-Bloomington, MN-WI	38.4	42.6	46.5	35.6	36.4
37	Tampa-St. Petersburg-Clearwater, FL	37.9	40.7	44.4	45.3	49.8
38	Brownsville-Harlingen, TX	37.7	40.2	41.2	39.8	37.6
39	Visalia, CA	37.5	37.5	41.0	39.6	37.6
40	El Paso, TX	37.3	43.1	45.2	49.7	53.8
41	McAllen-Edinburg-Mission, TX	36.6	39.2	39.5	37.9	41.0
42	Corpus Christi, TX	36.3	41.3	45.7	47.5	52.1
43	Sacramento-Roseville-Folsom, CA	36.1	38.8	40.6	37.2	36.9
44	Stockton, CA	34.2	34.1	36.4	36.1	37.7
45	Fort Lauderdale-Pompano Beach-Sunrise, FL	34.2	33.2	31.0	25.9	26.1
46	Modesto, CA	33.6	34.2	35.2	33.3	35.7
47	Albuquerque, NM	32.1	36.4	39.7	40.5	45.0
48	Seattle-Bellevue-Kent, WA	30.0	33.3	30.1	20.3	18.8
49	Portland-Vancouver-Hillsboro, OR-WA	29.9	34.3	34.4	26.0	21.4
50	Laredo, TX	24.4	30.7	28.1	33.8	41.6

Overall, a comparison of Tables 2 and 3 demonstrates that housing segregation remains a more serious problem for Black than Latino Americans. In 2020, the highest segregation score for Latinos was 61.3,[23] a value exceeded by Black Americans in ten Northern or Midwestern metro areas.[24] Five Northern or Midwestern metro areas had Latino segregation scores above 50 compared with 16 in which the Black segregation score was above 50.[25] These data establish greater Black-white than Latino-white

[23] Salinas, CA. *See supra* Table 3.
[24] Newark, Milwaukee-Waukesha, Detroit-Dearborn-Livonia, New York-Jersey City-White Plains, Chicago-Naperville-Evanston, Philadelphia, Cleveland-Elyria, St. Louis, Nassau County-Suffolk County, and Boston. *See supra* Table 3.
[25] Newark, Philadelphia, New York-Jersey City-White Plains, Chicago-Naperville-Evanston, and Cambridge-Newton-Framingham. *See supra* Table 3.

residential segregation in the North and Midwest. Latino-white segregation increased from the 1980 data in three Northern and Midwestern metro areas,[26] while Black-white segregation declined in urban areas in all the states included in Table 2. Sociologists John Logan and Brian Stults write that "these new data mostly reinforce patterns that were observed a decade ago: high but slowly declining black-white segregation, and less intense but hardly changing segregation of Hispanics ... from whites."[27]

III. ENFORCEMENT

Federal, state, and local governments each have the power to pass and enforce fair housing laws, yet Congress *requires* state and local governments to play a special role in enforcing the Fair Housing Act.[28] In Section 3610(f) of the Act,[29] Congress stipulates that when state and local governments pass legislation "substantially equivalent" to Title VIII, they have the first opportunity to enforce the statute—not HUD.[30] Section

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[26] Frederick-Gaithersburg-Rockville, Washington-Arlington-Alexandria, Nassau County-Suffolk County. *See* Table 3 *infra*.

[27] Logan & Stults, *supra* note 20, at 1. For another interpretation of Hispanic-white housing segregation, *see* WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA, 178-182 (2018). On changing levels of Black-white housing segregation, *see id*. at 168-178.

[28] *See* 42 U.S.C. § 3610(f) (2018). For how fair housing laws spread at the state and local levels early on, between 1919 and 1968, *see* Charles S. Bullock III & Charles M. Lamb, *The Diffusion of American Fair Housing Law and Policy*, 105 SOC. SCI. Q. 2039, 2039 (2024) (finding that "[m]yriad state and local laws, constituting breakthroughs that spread horizontally and/or bottom-up, preceded similar requirements in the national Fair Housing Act of 1968 and implementation policies subsequently adopted by the federal bureaucracy." As a result, "[p]rogressive subnational governments can promote the rights of politically marginalized individuals and groups when the national government and other subnational jurisdictions do not."). *Id.* at 2039.

[29] Numerous problems have been experienced in enforcing Title VIII through the years. *See e.g.*, U.S. COMM'N ON C.R.: THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 5–6, 126–137 (1979); U.S. COMM'N ON C.R.: THE FAIR HOUSING ACT OF 1988: THE ENFORCEMENT REPORT 15–21 (1994).

[30] 42 U.S.C § 3610(f) requires in relevant part:

> Referral for State or Local Proceedings. — (1) Whenever a complaint alleges a discriminatory housing practice—(A) within the jurisdiction of a State or local public agency; and (B) as to which such agency has been certified by the [HUD] Secretary under this subsection; the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint. (2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless— (A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral; (B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or (C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction. (3) (A) The Secretary may certify an agency under this subsection only if the Secretary

3610(f)'s requirements have major implications for state and local anti-discrimination law and for intergovernmental cooperation in fair housing enforcement.[31] These requirements mandate that before state or local governments can be certified under HUD's Fair Housing Assistance Program (FHAP) and receive federal funding for their enforcement efforts, they must enact fair housing laws that are substantially equivalent to Title VIII in terms of (1) rights, (2) procedures, (3) remedies, and (4) the availability of judicial review.[32] Substantial equivalency also requires that HUD periodically recertify all FHAP agencies based on their past performance and current practices.[33]

These requirements are directly associated with *cooperative federalism*,[34] which has dramatically influenced the enforcement of fair housing policy for over four decades.[35] Between 1969 and 1979,

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> determines that—(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made; (ii) the procedures followed by such agency; (iii) the remedies available to such agency; and (iv) the availability of judicial review of such agency's action are substantially equivalent to those created by and under this title. (B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

[31] *See generally* Charles S. Bullock III, Charles M. Lamb & Eric M. Wilk, *Cooperative Federalism and Fair Housing Enforcement* 99 SOC. SCI. Q. 728 (2018).

[32] *See* 42 U.S.C §3610(f)(3)(A). For the evolution of FHAP, its standards, and its growth from the late 1970s to recent years, *see* Charles S. Bullock III & Charles M. Lamb, *Race, Fair Housing Enforcement, and the Fair Housing Assistance Program*, 25 RUTGERS RACE & THE L. REV. 213, 230-235 (2025).

[33]*See* 42 U.S.C §3610(f)(5). For a detailed study of FHAP, including its certification standards and its general performance over time, *see id.* For earlier studies exploring different aspects of the FHAP system, *see* Charles M. Lamb & Eric M. Wilk, *Civil Rights, Federalism, and the Administrative Process: Favorable Outcomes by Federal, State, and Local Agencies in Housing Discrimination Complaints* 70 PUB. ADMIN. REV. 412 (2010); Bullock, Wilk & Lamb, *supra* note 5; Wilk & Lamb, *supra* note 5; Charles S. Bullock III, Charles M. Lamb & Eric M. Wilk, *Memo to President Biden on State and Local Fair Housing Enforcement*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2021); Charles S. Bullock III & Charles M. Lamb, *Strengthening American Fair Housing Enforcement: A Proposal*, 28 UC DAVIS SOC. JUST. L. REV. 168 (2024).

[34] Cooperative federalism refers to the longstanding tradition of cooperation among levels of government in the United States, the overlapping of governmental functions, and the sharing of power to address policy issues. *See generally* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015). For early seminal studies on cooperative federalism, *see* DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH CENTURY (1962); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (1966). In contrast to cooperative federalism is the concept of "creative federalism," which assumes a much more dominant role for the national government in developing and overseeing programs at the state and local levels. *See* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (1993).

[35] The role of state and local enforcement in national fair housing policy is in some ways like basic trends in national environmental policy, but primary enforcement responsibility for clean air and other forms of environmental protection rests with state agencies, not the U.S. Environmental Protection Agency or local governments. *See generally* Barry G. Rabe, *Racing to the Top, the Bottom, or the Middle of the Pack? The Evolving State Government Role in*

subnational governments rarely played a meaningful role in HUD's implementation of the Fair Housing Act because (1) FHAP had yet to be fully developed by HUD, and (2) many state and (especially) local governments had not passed fair housing laws substantially equivalent to Title VIII.[36] However, following HUD's eventual development of FHAP in 1979, numerous states and localities received HUD funding to strengthen their antidiscrimination housing laws and help to enforce Title VIII.[37]

The number of FHAP agencies has varied significantly over time.[38] In 1980, only 27 states and 11 localities were eligible for FHAP funding, but those numbers soared to 36 states and 76 localities by the end of the Reagan administration.[39] The 1988 Fair Housing Amendments Act[40] required state and local governments that previously had substantial equivalency status to pass new laws to protect people with disabilities, safeguard families with children from discrimination, and create administrative law judges.[41] Not surprisingly, the number of certified FHAP

Environmental Protection, *in* ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 35, 11th ed. (Norman J. Vig, Michael E. Kraft & Barry G. Rabe eds., 2022).

[36] *See* U.S. COMM'N ON CIV. RTS. (1979), *supra* note 29, at 32-33. Thus, "in FY 1977, twenty-two states had laws certified by HUD as substantially equivalent, yet only seven Title VIII complaints were referred to them that year. Bullock & Lamb, *supra* note 31, at 234. Additionally, "no local jurisdiction had fair housing laws recognized as substantially equivalent in FY 1977." *Id*. Overall, "this created a heavy enforcement workload for HUD during the early years of FHAP's existence, causing a huge backlog of complaints that accumulated into the 1990s." *Id*.

[37] *See* U.S. COMM'N ON CIV. RTS.: PROSPECTS AND IMPACT OF LOSING STATE AND LOCAL AGENCIES FROM THE FEDERAL FAIR HOUSING SYSTEM 5-6 (1992); *see also* Bullock & Lamb, *supra* note 32, at 234-235.

[38] State and local FHAP "agencies were initially paid $500 for each Title VIII complaint that was successfully conciliated or 'for which they produced an acceptable final investigative report.'" Bullock & Lamb, *supra* note 32, at 240. Subsequently, "[t]his payment was raised to $650 in March 1990 and to $800 in October 1991. Reimbursements continued to grow so that by FY 2011, state and local agencies usually received $2,400 for each Title VIII complaint successfully closed within one hundred days of its receipt." *Id*. Given the budgetary problems that many state and local civil rights agencies encounter, the funds HUD provides for processing Title VIII complaints is a critical source of financial support for these agencies.

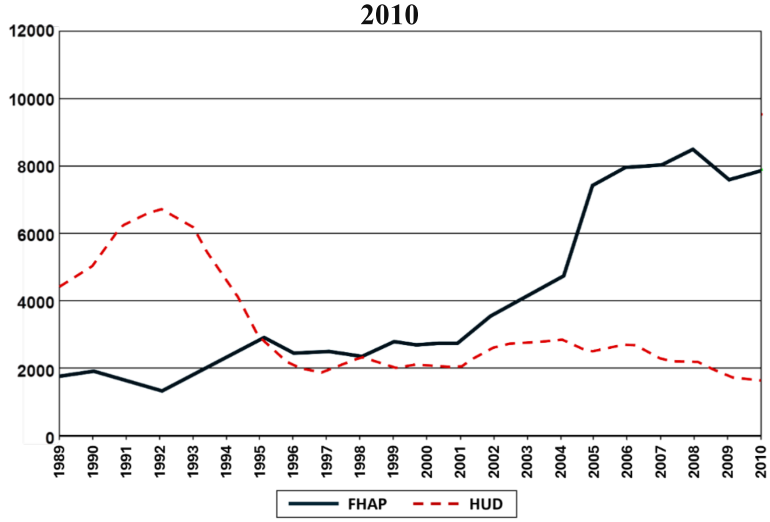
[39] Charles M. Lamb & Jim Twombly, *Taking the Local: The Reagan Administration, New Federalism, and Fair Housing Implementation*, 21 POL'Y. STUD. J. 589, 591 (1993). *See also* Bullock, Lamb & Wilk, *supra* note 31, at 732. With respect to President Reagan, "the 1980 presidential election resulted in a fundamental change in the political mood of Washington." *Id*. at 730. "Because Reagan opposed fair housing policies in the 1960s, . . . fair housing advocates did not expect to see meaningful progress under his administration." *Id*. However, eventually, Reagan's "administration had two significant fair housing achievements." One was a watered-down version of what was passed by Congress in 1988 as the Fair Housing Amendments Act, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (amending 42 U.S.C. §§ 3601-3619 (1982)). The second was the blossoming of the Fair Housing Assistance Program, which was "in keeping with the president's efforts to shrink the federal government." *Id.* at 730-731.

[40] 42 U.S.C. §§ 3601–3619, 3631.

[41] On the Fair Housing Amendments Act of 1988, *see*, *e.g.*, James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989); Michael H. Schill, *Implementing the Federal Fair Housing Act: The Adjudication of*

agencies declined between 1989 and 1992.[42] But with new laws in place, FHAP agencies increased and by 2006 they processed 73% of all Title VIII complaints,[43] as shown in Figure 1.[44]

Figure 1[45]
Title VIII Complaints Processed by HUD and FHAP Agencies, 1989-2010



Complaints, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS 143-176 (John Goering, ed., 2007); Michael H. Schill & Samantha Friedman, *The Fair Housing Amendments Act of 1988: The First Decade*, 4 Cityscape: J. POL'Y DEV. & RES. 57 (1999); U.S. COMM'N ON CIV. RTS., (1994), *supra* note 29.

[42] *See generally* U.S. COMM'N ON CIV. RTS. (1992), *supra* note 37, at 1-14. The Civil Rights Commission questioned whether HUD could effectively enforce the Fair Housing Act without the assistance of a considerable number of state and local FHAP agencies, commenting that "[w]ithout the 'partnership' between HUD and these agencies, effective enforcement of the Fair Housing Amendments Act of 1988 and equal opportunity in housing will not be fulfilled. *Id.*, at 31-32. If this partnership failed, the Commission declared, the effect on HUD would be serious: "Unable to refer complaints to States and localities that are not substantially equivalent, HUD would be inundated with new complaints." *Id*. at 32. Moreover, "[a]t this time, HUD does not appear to have enough staff and other resources to handle its current workload, much less many new complaints," the Commission insisted. "To absorb the full potential increase in enforcement workload, without sacrificing enforcement standards or other fair housing programs, the Commission estimates that HUD's FHEO [Office of Fair Housing and Equal Opportunity] would require a budget increase of approximately $13 million in fiscal year 1993," an amount that would be "very uncertain" given the federal budget deficit at that time. *Id*.

[43] *See* U.S. DEP'T OF HOUS. AND URB. DEV.: THE STATE OF FAIR HOUSING: FY 2005 ANNUAL REPORT ON FAIR HOUSING 46 (2006). In FY 2006, 37 states and 70 localities were eligible for FHAP funding. *Id*. at 42-45.

[44] For details for FY 2023 for all states, by contrast*, see* U.S. DEP'T OF HOUS. AND URB. DEV.: 2023 FISCAL YEAR STATE OF FAIR HOUSING: ANNUAL REPORT TO CONGRESS 96-98 (2024).

[45] Bullock, Lamb & Wilk, *supra* note 31, at 733. Data is based on U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2005) (obtained by the authors under the Freedom of Information Act); and U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2013) (obtained by the authors under the Freedom of Information Act).

By fiscal year 2009, the end point of our data set, a much smaller number of FHAPs existed than at the end of the Reagan administration.[46] Appendices D and E present the list of state and local FHAP agencies in the 21 Northern and Midwestern states in 2009. Of those states that fiscal year, 16 had a state FHAP agency, as did 38 local governments. Only two Northern or Midwestern states had no state FHAP agency in 2009: Kansas and Minnesota.[47] By contrast, Appendix E reveals a complex pattern of local governments participating in FHAP: Iowa led with seven local FHAP agencies, followed by Indiana with six, and Ohio and Pennsylvania with five each. Four additional states—Kansas, Massachusetts, Nebraska, and New York—had between two and four local FHAPs, whereas Illinois and Minnesota had just one each.[48] Only a few large metropolitan areas had local FHAP agencies in 2009.[49] This is unfortunate because major urban areas typically have a heavier mix of people of color who experience discrimination, so they have a compelling need for grassroots civil rights agencies with well-informed personnel about local fair housing matters and past discriminatory practices in the area.[50]

IV. FAVORABLE OUTCOMES

Favorable administrative outcomes in Fair Housing Act cases are outcomes that support a claim, making a benefit or remedy possible to a complainant.[51] Unfavorable outcomes do not confer any benefit or remedy to complainants.[52] There are five categories of enforcement outcomes for Fair Housing Act complaints.[53] One is *administrative closures*, which occur when the government agency overseeing the case—either HUD or a state or local FHAP agency—cannot locate the complainant or respondent, when the complainant refuses to move forward after filing a complaint, or when the agency determines it lacks jurisdiction.[54] *Irrelevant claims* are

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[46] *See* U.S. COMM'N ON CIV. RTS. (1992), *supra* note 37, at 1-5; 2023 FISCAL YEAR STATE OF FAIR HOUSING: ANNUAL REPORT TO CONGRESS *supra* note 44, at 91-95; Bullock, Lamb & Wilk, *supra* note 31, at 731-733.
[47] *See* Appendix D.
[48] *See* Appendix E.
[49] These large metro areas include Boston, Kansas City, Pittsburgh, and St. Louis. *See* Appendix E.
[50] *See* U.S. COMM'N ON CIV. RTS. (1992), *supra* note 37, at 7 (observing that "[b]ecause the [FHAP] agency is located in the community, the staff is usually more knowledgeable about housing conditions and other elements of the local environment than their HUD counterparts. For example, they would be more likely to know of actions taken by local housing or business establishments to circumvent the law.")
[51] Wilk & Lamb, *supra* note 5, at 400.
[52] *Id.*
[53] *See, e.g.,* U.S. DEP'T OF HOUS. AND URB. DEV.: ANNUAL REPORT ON FAIR HOUSING: FY 2012–2013, 26–30 (2014).
[54] *Id.*

administrative closures in which the processing agency decides that a dispute is related to something other than fair housing as defined by Title VIII, such as in landlord-tenant disputes.[55] *Conciliations,* the second possible outcome, are the procedures used by the complainant and respondent to reach a settlement, with a government agency's assistance.[56] A complaint is "conciliated" once an agreement is reached between the parties involved. If conciliation fails, the civil rights agency dealing with the case tries to determine whether the respondent breached the Fair Housing Act.[57] If the processing agency finds reasonable cause to believe that Title VIII was violated, it recommends that adjudication proceed either before an appropriate court or an administrative law judge.[58] These are known as *reasonable cause determinations* or *charges of discrimination*.[59] Lastly, *no reasonable cause determinations* occur when the agency fails to find evidence of a Fair Housing Act violation, and no action is taken on a complaint beyond that.[60]

Of these five categories, a Title VIII complainant can receive a favorable outcome in only two: conciliations and cause determinations. And because all three levels of government handle similar complaints, we can measure whether state and local FHAP agencies provide as many or more favorable results for Title VIII complainants as HUD.[61]

In Parts IV and V of this article, Tables 4 through 7 include information on (1) how favorable outcomes vary across the 21 Northern and Midwestern states, (2) the percentage of a state's total population that is either Black or Latino American, and (3) the number of Title VIII complaints each group filed in each state between 1989 and 2010. The complaint data cover a two-decade span of time for which measures of housing segregation appear in Tables 4 through 7. One proposition tested is

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[55] *Id*. HUD does not separate these from other administrative claims, but we adopt the term "irrelevant claims" to distinguish them from other kinds of administrative claims and actual claims of discrimination.

[56] *Id*. For an examination of the conciliation process and how it influences effective Title VIII enforcement, *see* Bullock, Wilk & Lamb, *supra* note 5.

[57] *Id.* at 89. Or, as explained by HUD, "[u]nless a conciliation agreement is reached during the course of the investigation, HUD or the FHAP agency issues a no reasonable cause determination, if, after concluding its investigation, it finds no reasonable cause exists to believe that a discriminatory housing practice in violation of the Fair Housing Act or substantially equivalent State or local law, respectively, has occurred or is about to occur." U.S. DEP'T OF HOUS. AND URB. DEV.: OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS 2014-2015 (2015) at 143.

[58] U.S. DEP'T OF HOUS. AND URB. DEV.: STATE OF FAIR HOUSING ANNUAL REPORT TO CONGRESS FY 2021 (2022) at 60. For an examination of the role and behavior of HUD ALJs in Title VIII decision-making, *see* Nicholas R. Seabrook, Eric M. Wilk & Charles M. Lamb, *Administrative Law Judges in Fair Housing Enforcement: Attitudes, Case Facts, and Political Control* 94 SOC. SCI. Q. 362 (2013).

[59] U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 53, at 27.

[60] *Id*.

[61] *See* Bullock, Lamb & Wilk, *supra* note 31, at 729–730.

that the size of a particular racial or ethnic group in a state affects whether civil rights bureaucrats decide Fair Housing Act complaints in support of the group members.[62] The percentages of Black and Latino populations shown in Tables 4 through 7 come from the 2000 Census.[63] Because the range of our Title VIII data is from 1989 to 2010, the 2000 Census is the best midpoint for our comparative analysis.

The data used to calculate favorable outcomes are taken from two comprehensive data sets received from HUD under the Freedom of Information Act (FOIA).[64] These data sets provide details on each Title VIII complaint filed between 1989 and 2010, including (1) why it was filed and how it was decided; (2) whether HUD, a state agency, or a local agency resolved the complaint; (3) when it was received and closed; (4) the type(s) of discrimination alleged; (5) whether an agency attempted conciliation and, if so, the dates that conciliation was undertaken and achieved; (6) the number of failed conciliations before success occurred; (7) whether relief was awarded to a complainant and how much; and (8) the reason(s) why a case was closed.[65]

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[62] Political theorists have debated these and related concepts. *See, e.g.*, ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961) (arguing that America is a pluralist democracy in which power is distributed among competing groups and individuals in different policy areas, with leaders normally responding to citizens' preferences, including acceptable degrees of racial and ethnic integration). *See also* MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION (2016) (showing how politicians, judges, and school officials in major U.S. cities favored the preferences of white parents who opposed the desegregation of Black public school students); Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government,* 108 AM. POL. SCI. REV. 605, 611-614 (2014) (finding that city governments are responsive to their citizens). As asserted by Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 447 (2020), "[i]n 1973, 66% of white respondents said that they would support a law allowing a homeowner to discriminate against buyers on the basis of race….It is not surprising then, that scholars have identified 'a dramatic upswing in the number and variety of land-use regulations at the local level,' starting in the 1970s" (quoting Christopher Elmendorf, *Beyond the Double Veto: Land Use Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L. J. 79, 88 (2019)).

[63] U.S. CENSUS BUREAU, U.S. DEP'T OF COM., THE BLACK POPULATION 2000: CENSUS 2000 BRIEF (2001) https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-05.pdf [https://perma.cc/9L6P-4H3Q]; U.S. CENSUS BUREAU, U.S. DEP'T OF COM., THE HISPANIC POPULATION 2000: CENSUS 2000 BRIEF (2001) https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-03.pdf [https://perma.cc/2WM4-2GU4].

[64] U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATA SET (2005) (obtained by the authors under the Freedom of Information Act); U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATA SET (2013) (obtained by the authors under the Freedom of Information Act).

[65] Lamb & Wilk, *supra* note 33, at 414.

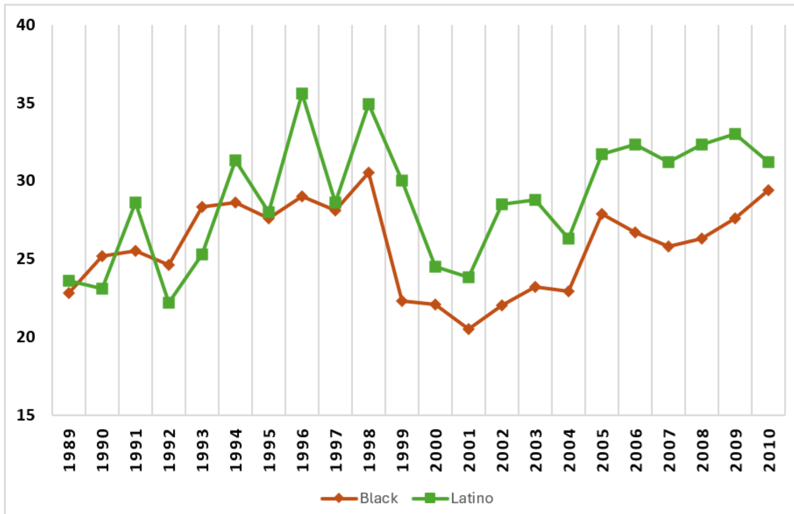
V. PREVIOUS FINDINGS

Although the Jim Crow North historical literature is pioneering regarding Northern and Midwestern housing segregation and discrimination over time, it does not quantitatively compare antidiscrimination housing enforcement in individual states, across major metro areas, or in different parts of the country, including the 21 states examined here.[66] However, the Bullock et al. 2021 study comparing Black and Latino favorable outcomes provides background findings, establishing that nationwide, between 1989 and 2010, Black Americans were more likely than Latino Americans to file Fair Housing Act complaints, but the latter were slightly more likely to obtain favorable results.[67] Figure 2, which is reproduced from Bullock et al. (2021), shows the difference in Title VIII favorable outcomes for Black and Latino complainants from 1989 to 2010.

[66] *See* the Jim Crow North sources *supra* note 13.

[67] Charles S. Bullock III, Charles M. Lamb & Eric M. Wilk, *African American and Latino Discrimination Complaints: Comparing Volume and Outcomes*, 102 SOC. SCI. QUAR. 2676, 2686 (2021) (discovering that "[b]ased on the best estimates of housing discrimination frequency over time …, African Americans have been exposed to a higher incidence of discrimination than Latinos. This led to the first hypothesis: that African Americans would file Title VIII complaints at higher rates than Latinos. The analysis supports Hypothesis 1, with African Americans far more likely to file complaints than Latinos. The gap in complaint volume was largest between 1989 and 1995 in the immediate aftermath of the 1988 [Fair Housing Amendments Act])." In addition, "[f]rom bureaucratic theory, Hypothesis 2 anticipates that even though African Americans filed far more Title VIII complaints than Latinos, the two groups would achieve favorable outcomes at similar rates because bureaucracies are expected to treat all complainants objectively based on the facts and merits of each case. The data show that favorability rates for Latinos are higher than for blacks, but the difference is modest, so we hesitate to reject either hypothesis in favor of the other.") *Id*.

Figure 2[68]
Percentage of Title VIII Complaints Claiming Racial or National Origin Discrimination with Favorable Outcome by Group, 1989–2010



The 2021 Bullock et al. study also suggests four other conclusions related to this article. First, the probability of a favorable outcome is influenced by whether HUD, as opposed to a state or local government, resolves a Fair Housing Act complaint.[69] Second, the "[l]evel of governmental agency affects favorable outcomes for Latinos more than for African Americans."[70] Third, local FHAP agencies decide a higher percentage of Fair Housing Act cases in support of Black and Latino people, followed by HUD, with state FHAP agencies least likely to award favorable outcomes.[71] Note that "[t]his difference is much more pronounced for Title

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[68] *Id.* at 2683. Data is based on U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2005) (obtained by the authors under the Freedom of Information Act); and U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2013) (obtained by the authors under the Freedom of Information Act).

[69] *Id.* at 2687 (concluding that "[c]ompared to HUD, local agencies are most likely to provide favorable outcomes, whereas state bureaucracies are least likely…. Complainants from both groups have less success when appearing before state than before federal agencies.")

[70] *Id.* We suggest a few possible explanations for this finding: "It may be that federal agents have undergone a similar socialization, whereas socialization may vary across the states, with some states informally applying more demanding standards. Other explanations may apply to local agencies. Although there may be greater differences in the training of local authorities than HUD employees, this may be offset by another consideration: geographical proximity may play a role." That means, "[w]hen compared to both the federal and state levels, local civil rights officials are more likely to have firsthand knowledge of problems minorities confront when seeking equal access to housing in their communities." *Id.*

[71] *Id.*

VIII complaints filed by Latinos than for those filed by African Americans."[72] Fourth and finally, "[t]he ethnic composition of a state has a significant effect on the probability of a favorable outcome for Latinos, whereas a state's racial composition has no impact on the outcome for African Americans."[73] Thus, Latinos tend to receive a higher favorable outcome rate in states where they represent a greater percentage of the population.[74]

In our *Jim Crow I* article, we investigated Fair Housing Act enforcement from 1989 to 2010 in the thirteen Atlantic Coast states from Maine to Virginia, covering most of the Northeastern states explored in this study, as well as Delaware, Maryland, Virginia, and West Virginia.[75] *Jim Crow II* extends *Jim Crow I*, which found (1) major variations in Title VIII favorable outcomes across the 13 Northeastern states, (2) that Black complainants are most likely to win Fair Housing Act complaints in federal Region I (the New England states), while (3) Latino people are most likely to succeed in federal Region III (Delaware, Maryland, Pennsylvania, Virginia, and West Virginia).[76] Strikingly, though, (4) both Black and Latino Americans most often receive unfavorable results in federal Region II—New York and New Jersey.[77] As mentioned earlier,[78] our *Jim Crow I* study attributed the low favorability rates in Region II to high levels of residential, educational, and economic segregation, as well as a lack of local FHAP agencies.[79] In the final analysis, that article emphasized that one or more of these four factors probably caused New York and New Jersey's low favorability rates.[80] The analysis presented in *Jim Crow I* did not prove a causal link, but it is plausible that these four factors had a sizable effect on favorable outcomes in New York and New Jersey.[81]

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[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Bullock & Lamb, *supra* note 6.
[76] *Id.* at 1194, 1241–1242.
[77] *Id.* at 1226–1229.
[78] *See supra* text accompanying note 10.
[79] Bullock & Lamb, *supra* note 6, at 1230-1240. These findings led to four recommendations for Region II. "First, working closely with HUD, governors, mayors, and business leaders, New York and New Jersey should develop new incentive programs to dramatically increase the number of certified local FHAP agencies. Second, Congress and the current presidential administration should make certain that funds and other resources are available to new local FHAP agencies in New York and New Jersey to enforce the Fair Housing Act effectively. Third, HUD should play an aggressive role in helping all local jurisdictions in New York and New Jersey to participate in FHAP, including the drafting of new local fair housing laws that are substantially equivalent to Title VIII. Finally, Congress and HUD should hold all FHAP agencies to a higher standard of enforcement performance in race and national origin Title VIII cases generally." *Id.* at 1243–1244.
[80] *Id*. at 1194–1195, 1242.
[81] *Id.* at 1195, 1220, 1230.

VI. NEW FINDINGS FOR BLACK AMERICANS

Table 4 presents evidence of significant differences in favorable outcomes for Black Title VIII complainants in the 21 Northern and Midwestern states.[82] Nebraska leads the way with an impressive 40.7% Black favorability rate, trailed by New Hampshire at 36.2%. However, it should be noted that both states' populations were less than 6% Black, and New Hampshire had very few complaints. Kansas, Missouri, and Rhode Island follow, each having Title VIII favorable outcomes of at least 30%. States like New Hampshire, Iowa, and South Dakota have tiny Black populations (less than 4%) but high to moderate favorability rates (between 28.6% and 36.2%).[83]

Table 4[84]

Ranking Northern and Midwestern States by Title VIII Favorability Rates for Race and National Origin Complaints Filed by Black Americans, 1989–2010

Rank	State	Black Complaints	PCT Fav	PCT Black Pop
1	NE	740	40.70%	5.4
2	NH	69	36.20%	1.7
3	KS	1,430	33.40%	7.1
4	MO	3,602	30.00%	12.5
5	RI	210	30.00%	7.4
6	IA	1,442	29.80%	3.7
7	CT	633	29.50%	11.3
8	PA	2,832	29.40%	11.9
9	SD	49	28.60%	1.8
10	WI	901	28.00%	7.1
11	IL	3,139	27.70%	15.4
12	OH	4,350	27.40%	13.4
13	MI	2,144	25.50%	15.2
14	MA	1,600	24.30%	7.8
15	NY	3,081	23.40%	17.2
16	NJ	1,380	22.90%	14.8
17	VT	35	22.90%	1.5
18	MN	821	22.80%	6.2
19	IN	1,887	22.30%	10.1
20	ME	82	20.70%	1.6
21	ND	57	19.30%	1.6

[82] Table 4's data are displayed another way in Appendix F.
[83] *See* Table 4 *infra*.
[84] Data is based on U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2005) (obtained by the authors under the Freedom of Information Act); and U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2013) (obtained by the authors under the Freedom of Information Act). The percentage of the Black population is based on the 2000 Census.

States with the weakest favorability rates for Black Fair Housing Act complainants appear at the bottom of Table 4: North Dakota at 19.3%, Maine at 20.7%, Indiana at 22.3%, and Minnesota at 22.8%. Of these four states, only Indiana had at least 10% Black residents. Again, New York and New Jersey—usually considered to be liberal states based on the classic Erikson, Wright, and McIver study[85]—exhibit Title VIII favorability rates of only 23.4% and 22.9% respectively, despite each containing huge numbers of Black people in their total population (17.2% and 14.8% respectively).[86] Lastly, while Ohio is at times viewed as more conservative than Michigan,[87] both had moderate rates of favorable outcomes (27.4% compared to 25.5%) and reasonably high percentages of Black inhabitants (13.4% to 15.2% respectively).[88]

How do the findings in Table 4 compare to those in the earlier study investigating *Jim Crow I*?[89] First, the data on Nebraska, Kansas, and Missouri highlight the fact that Fair Housing Act favorable outcomes for Black people in the Midwest exceed those in some Northeastern states customarily viewed as considerably more liberal, including Massachusetts, New Jersey, and New York.[90] However, the liberalism of a state, as measured by Erikson, Wright, and McIver, does not correlate with the incidence of favorable results for Black complainants.[91] Of the 21 Northern and Midwestern states, New York has the highest percentage of Black inhabitants (17.2%), and its Title VIII favorability rate is modestly higher than in New Jersey, Vermont, Minnesota, and Indiana. Still, New York's Black favorability rate is lower than that in 14 other Northern and Midwestern states.[92] Aside from that, Table 4 reveals an interesting finding regarding Massachusetts, which is normally considered one of the country's most liberal states[93]: it ranks fourteenth in Table 4, trailing more conservative Midwestern states like Nebraska, Iowa, and South Dakota.[94] Further, at the lower rungs of Table 4, note that a few Midwestern states

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[85] *See* ROBERT S. ERIKSON, GERALD C. WRIGHT & JOHN P. MCIVER, STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES 16 (1993).
[86] *See* Table 4 *supra*.
[87] *See* Erikson, Wright & McIver *supra* note 85, at 16.
[88] *See* Table 4 *supra*.
[89] *See* Figures 2, 4, and 6 in Bullock & Lamb, *supra* note 6.
[90] Erikson, Wright & McIver *supra* note 85, at 16.
[91] This finding reflects the breadth of the concept of "ideology" being examined and how it is measured. Erickson and colleagues base their research broadly on 122 CBS and *New York Times* surveys and polls, asking the question "How would you describe your views on most political matters? Generally, do you think of yourself as liberal, moderate, or conservative*?" Id*. at 14. Thus, respondents were asked to describe themselves on "most political matters," which could be interpreted as both domestic and international. By contrast, we infer "ideology" based on data pertaining specifically to Fair Housing Act complaints and how they are decided by government agencies. It is not surprising, then, that the correlation between the two is sometimes low.
[92] *See* Table 4 *supra*.
[93] *Id.*
[94] *Id.*

have higher favorability rates despite having a greater percentage of Black population than Northeastern states. Indiana and Vermont, for instance, have similar rates of favorable outcomes, but Indiana has a much larger percentage of Black inhabitants (10.1% compared to 1.5%).[95] Overall, a state's Black percentage population does not correlate with the incidence of favorable Title VIII outcomes (r = -.08).

Four additional findings are seen in Table 5, which displays Table 4's data another way. First, on average, Black Title VIII favorable outcomes were highest in the West North Central Division (29.23%), which includes Nebraska, Kansas, and Missouri, but they were lowest in the Middle Atlantic Division (25.23%), which includes New York and New Jersey. Of these five states, Missouri had the largest number of Black Title VIII complaints filed (3,602), yet it still provided favorable results 30% of the time. Conversely, New York received 3,081 Title VIII complaints over the same period but decided only 23.4% of them favorably for Black complainants. Second, the East North Central Division performed only slightly better with favorable outcomes on average (26.18%) than the Middle Atlantic Division (25.23%). This once more supports the finding that Northeastern and Midwestern states, which are traditionally considered liberal,[96] often fail to provide favorable outcomes when compared to New Hampshire, Rhode Island, and Connecticut in the New England Division and Nebraska, Kansas, and Missouri in the West North Central Division. Third, the states with the lowest favorability rates are North Dakota (19.3%) and Maine (20.7%), but each had few complaints filed (57 and 82 respectively) and tiny percentages of Black residents (1.6% in both states). Beyond New York and New Jersey, other liberal or liberal-leaning Northern and Midwestern states had relatively low levels of favorable outcomes, especially Minnesota (22.8%), Massachusetts (24.3%), and Michigan (25.5%). Fourth, based on racial threat theory, one might anticipate a relationship between the Black percentage of population and unfavorable outcomes—that is, as a higher percentage of Black people move to predominantly white areas, theoretically the percentage of white departures should increase as they may feel an economic, political, or social threat.[97]

Although it is outside the scope of this article to test the racial threat hypothesis, a few observations are appropriate. It is likely that racial threat is at least one factor driving down Title VIII favorable outcomes in New York (23.4%) and New Jersey (22.9%), given their percentage of Black

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[95] *Id.*

[96] Erikson, Wright & McIver *supra* note 85, at 16.

[97] Leading threat theory studies include HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY GROUP RELATIONS (1967); Ryan D. Enos, *What the Demolition of Public Housing Teaches Us About the Impact of Racial Threat on Political Behavior*, 60 AM. J. POL. SCI. 123 (2016); Kim Quaile Hill & Jan E. Leighley, *Racial Diversity, Voter Turnout, and Mobilizing Institutions in the United States*, 27 AM. POL. RES. 275 (1999).

population (17.2% and 14.8% respectively). Compare Illinois (with 27.7% favorable outcomes and 15.4% Black population) and Ohio (with 27.4% favorable outcomes and 13.4% Black population).[98] Similar comparisons are relevant between (1) Massachusetts and Illinois or Ohio, (2) Minnesota and New Jersey, and (3) Wisconsin and Kansas or Rhode Island.[99] In each instance, tests of racial threat would be fundamental to better understanding Jim Crow North and Jim Crow Midwest.

Table 5[100]
Ranking Northern and Midwestern States by Title VIII Favorability Rates for Race and National Origin Complaints Filed by Black Americans, 1989–2010, Using U.S. Bureau of Census Divisions

East North Central Division				
Rank	State	Black Complaints	PCT Fav	PCT Black Pop
1	WI	901	28.00%	7.1
2	IL	3,139	27.70%	15.4
3	OH	4,350	27.40%	13.4
4	MI	2,144	25.50%	15.2
5	IN	1,887	22.30%	10.1
AVERAGE PCT FAV				26.18%

New England Division				
Rank	State	Black Complaints	PCT Fav	PCT Black Pop
1	NH	69	36.20%	1.7
2	RI	210	30.00%	7.4
3	CT	633	29.50%	11.3
4	MA	1,600	24.30%	7.8
5	VT	35	22.90%	1.5
6	ME	82	20.70%	1.6
AVERAGE PCT FAV				27.27%

West North Central Division				
Rank	State	Black Complaints	PCT Fav	PCT Black Pop
1	NE	740	40.70%	5.4
2	KS	1,430	33.40%	7.1
3	MO	3,602	30.00%	12.5
4	IA	1,442	29.80%	3.7
5	SD	49	28.60%	1.8
6	MN	821	22.80%	6.2
7	ND	57	19.30%	1.6
AVERAGE PCT FAV				29.23%

Middle Atlantic Division				
Rank	State	Black Complaints	PCT Fav	PCT Black Pop
1	PA	2,832	29.40%	11.9
2	NY	3,081	23.40%	17.2
3	NJ	1,380	22.90%	14.8
AVERAGE PCT FAV				25.23%

VII. NEW FINDINGS FOR LATINO AMERICANS

Particularly because of its bourgeoning Latino population, the United States is increasingly a multi-racial, multi-cultural nation. Table 6 presents data on Latino favorable outcomes in Fair Housing Act complaints from 1989 to 2010.[101] To what extent are favorable outcomes in Title VIII

[98] *See* Table 4 *supra*.
[99] *Id.*
[100] Data is based on U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2005) (obtained by the authors under the Freedom of Information Act); and U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2013) (obtained by the authors under the Freedom of Information Act). The percentage of the Black population is based on the 2000 Census.

[101] The data in Table 6 are displayed differently in Appendix G *infra*. For data on the increase of the nation's Hispanic population relative to other groups through 2023, *see infra* Appendix H.

Latino complaints comparable in the North and Midwest, and how do they compare to favorable results for Black Americans?

Nebraska again has striking numbers, with 46.3% of all Latino complaints resolved favorably—by far the most successful Fair Housing Act enforcement outcome for any state in Tables 4 and 6.[102] Several Northern and Midwestern states have low Title VIII favorable outcome rates for Latino Americans. As in Table 4, New York appears toward the bottom of Table 6, with a 19.4% favorability rate.[103] The rates of favorable decisions for Latinos correlate positively with Black success (r = .46). Although success rates are similar for the two groups, the range of outcomes for Latino complainants, as reported in Table 6, is greater than it is for Black people.[104] Moreover, the Latino share of the state's population is not correlated with the rate of success (r = .03). A consideration here is the narrow range in the Latino population percentage, which extends from less than 1% in Maine and Vermont to 15.1% in New York.[105]

For the projected Hispanic population growth relative to other groups through 2050, *see infra* Appendix I.

[102] Compare Nebraska's favorable outcomes for Black Americans in Table 4 *supra* to its favorable outcomes for Latino complainants in Table 6 *infra*.

[103] *See* Table 6 *infra*.

[104] Compare the range of outcomes in Table 4 *supra* to the range of outcomes in Table 6 *infra*.

[105] *See* Table 6 *infra*.

Table 6[106]
Ranking Northern and Midwestern States by Title VIII Favorability Rates for Race and National Origin Complaints Filed by Latino Americans, 1989–2010

Rank	State	Latino Complaints	PCT Fav	PCT Latino Pop
1	NE	313	46.30%	5.5
2	KS	192	45.80%	7.0
3	ND	22	45.50%	1.2
4	RI	74	44.60%	8.7
5	IL	476	40.50%	12.3
6	NH	32	37.50%	1.7
7	WI	102	34.30%	3.6
8	PA	440	33.60%	3.2
9	ME	15	33.30%	0.7
10	NJ	270	33.00%	13.3
11	CT	164	31.70%	9.4
12	MO	154	30.50%	2.1
13	OH	217	29.50%	1.9
14	VT	7	28.60%	0.9
15	MN	86	27.90%	2.9
16	IA	167	27.50%	2.8
17	MI	139	25.90%	3.3
18	MA	469	25.20%	6.8
19	SD	12	25.00%	1.4
20	IN	216	22.70%	3.5
21	NY	1,007	19.40%	15.1

The data in Table 6 may be compared to those in the *Jim Crow I* study.[107] Perhaps most importantly, Table 6 confirms that Title VIII favorable outcomes for Latino complainants in the Midwest exceed those in some Northeastern states, including states considered substantially more liberal.[108] This is part of a broader finding that a state's ideological score from Erickson and colleagues is not related to the incidence of favorable rulings for Latino complainants.[109]

In light of the data in Table 6, scholars should thoroughly investigate states like New York and Indiana to gain a better understanding of how Latino Americans' Title VIII complaints were decided and why their favorable outcomes were so low. Why, for example, were favorability rates

[106] Data is based on U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2005) (obtained by the authors under the Freedom of Information Act); and U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2013) (obtained by the authors under the Freedom of Information Act). The percentage of the Latino population is based on the 2000 Census.
[107] *See* Figures 2, 4, and 6 in Bullock & Lamb, *supra* note 6.
[108] Erikson, Wright & McIver *supra* note 85, at 16.
[109] For information on how Erikson, Wright & McIver measured ideology, *see* note 91 *supra*.

in Illinois more than twice those in New York, as the Latino population percentage in these states is roughly similar (15.1% in New York and 12.3% in Illinois)?[110] Despite having generally the same percentage of Latino residents, why was New York's Latino favorable outcome rate (19.4%) significantly less than in neighboring New Jersey (33.0%)?[111]

Table 7 displays the data in Table 6 differently to accentuate four other conclusions. First, Latino rates of favorable outcomes were greatest in the West North Central Division (35.5%) but smallest in the Middle Atlantic Division (26.67%). Of these ten states, New York had the most Latino complaints filed (1,007) but provided favorable outcomes less than 20% of the time. Second, the New England Division had a somewhat better favorability rate (33.48%) than the East North Central Division (30.58%).[112] Third, the states with the lowest rates of Title VIII favorable outcomes for Latino people are New York (19.4%) and Indiana (22.7%), with Massachusetts (25.2%) and Michigan's favorability rates (25.9%) not considerably higher. And fourth, Table 7's data suggests that racial threat theory[113] would not apply as much to Latino as to Black Americans.[114] Take the case of Illinois: 12.3% of its population is Latino, but its Title VIII favorability rate is a robust 40.5%. Similarly, 13.3% of New Jersey's population is Latino, but its favorable outcome rate is 33.0%.

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[110] *See* Table 6 *supra*.
[111] *Id*.
[112] Erikson, Wright & McIver *supra* note 85, at 16.
[113] *See* note 97 *supra* and accompanying text.
[114] *See generally* LEO R. CHAVEZ, THE LATINO THREAT: HOW ALARMIST RHETORIC MISREPRESENTS IMMIGRANTS, CITIZENS, AND THE NATION, 3d ed. (2025).

Table 7[115]
Ranking Northern and Midwestern States by Title VIII Favorability Rates for Race and National Origin Complaints Filed by Latino Americans, 1989–2010, Using U.S. Bureau of Census Divisions

East North Central Division				
Rank	State	Latino Complaints	PCT Fav	PCT Latino Pop
1	IL	476	40.50%	12.3
2	WI	102	34.30%	3.6
3	OH	217	29.50%	1.9
4	MI	139	25.90%	3.3
5	IN	216	22.70%	3.5
AVERAGE PCT FAV				30.58%

New England Division				
Rank	State	Latino Complaints	PCT Fav	PCT Latino Pop
1	RI	74	44.60%	8.7
2	NH	32	37.50%	1.7
3	ME	15	33.30%	0.7
4	CT	164	31.70%	9.4
5	VT	7	28.60%	0.9
6	MA	469	25.20%	6.8
AVERAGE PCT FAV				33.48%

West North Central Division				
Rank	State	Latino Complaints	PCT Fav	PCT Latino Pop
1	NE	313	46.30%	5.5
2	KS	192	45.80%	7.0
3	ND	22	45.50%	1.2
4	MO	154	30.50%	2.1
5	MN	86	27.90%	2.9
6	IA	167	27.50%	2.8
7	SD	12	25.00%	1.4
AVERAGE PCT FAV				35.50%

Middle Atlantic Division				
Rank	State	Latino Complaints	PCT Fav	PCT Latino Pop
1	PA	440	33.60%	3.2
2	NJ	270	33.00%	13.3
3	NY	1007	19.40%	15.1
AVERAGE PCT FAV				28.67%

VIII. FINAL COMPARISONS

Four other general findings are apparent when we return to Tables 4 and 6.[116] First, Latino complainants were more successful than Black complainants in 18 of 21 states, and those differences were at times relatively large (+14.6 percentage points in Rhode Island, +12.8 percentage points in Illinois, +12.4 percentage points in Kansas, and +10.1 percentage points in New Jersey). Second, in the three states where Black people were more successful than Latino complainants, the differences were much smaller (+4.0 percentage points in New York, +3.6 percentage points in South Dakota, and +2.3 percentage points in Iowa). Third, the difference between Title VIII favorable outcomes for Black and Latino complainants were negligible in Indiana, Massachusetts, and Michigan. And fourth, the difference between favorable results for Latino and Black complainants was greater than 10 percentage points in six states—Illinois, Maine, New Jersey, North Dakota, Kansas, and Rhode Island.

[115] Data is based on U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2005) (obtained by the authors under the Freedom of Information Act); and U.S. DEP'T OF HOUS. AND URB. DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY DATASET (2013) (obtained by the authors under the Freedom of Information Act). The percentage of the Latino population is based on the 2000 Census.
[116] Compare the data in Table 6 *supra* to the data in Table 4 *supra*.

IX. CONCLUSION

Residential segregation has long plagued the United States' housing market.[117] We approach this topic by examining the incidence of favorable administrative outcomes[118] in Fair Housing Act complaints between 1989 and 2010 in 21 Northern and Midwestern states that historians refer to as Jim Crow North.[119] We assume that Title VIII complaints are equally meritorious across the states.[120] It follows that fluctuations in the rates of complainants' success from state to state are the product of differences in the processing of Fair Housing Act cases by HUD as well as state and local governments participating in FHAP. Variations in favorability rates could result from differences in the standards applied, training of staff, commitment of supervisors, staff biases, or other factors.[121] The decisions, especially when rendered by FHAPs, may represent the demands of people and groups with the greatest influence at the state and local levels.[122] If housing segregation is the preference of many in a state, FHAPs may decide a lower proportion of Fair Housing Act complaints in support of Black and Latino complainants.[123] Because, nationwide, local FHAPs more often find for complainants than does HUD, another possibility is that where HUD processes all complaints, favorable decisions may be less frequent. Based on nationwide data, state FHAPs are even less responsive to complaints than HUD, suggesting that complainants will be least successful where state FHAPs exist.

Measurement of favorable outcomes is a realistic way to assess the effectiveness of Title VIII enforcement because the lower the favorable outcome rates, the more likely the legislation is not being seriously or

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[117] *See* Bullock & Lamb, *supra* note 6, at tbls. 2 and 3 and accompanying text.
[118] *See supra* notes 51–63 and accompanying text.
[119] *See supra* note 13 and accompanying text.
[120] *See* Bullock & Lamb, *supra* note 6, at 1220, where we make the same assumption.
[121] *See* CHARLES S. BULLOCK, III & CHARLES M. LAMB, EDS., IMPLEMENTATION OF CIVIL RIGHTS POLICY CH. 1 (1984). Chapter 1 of this book argues that successful implementation of civil rights policy is more likely to occur when one or more of ten conditions are met "when (1) policy goals have been clearly stated, (2) precise standards for measuring compliance have been specified, (3) a mechanism for monitoring compliance has been created, (4) an agency responsible for implementing the policy has been set up, (5) personnel responsible for implementation are committed to promoting civil rights, (6) those enforcing the policy enjoy the support of their superiors, (7) the policy beneficiaries are organized and cohesively support implementation, (8) efforts by various agencies responsible for achieving a policy goal are administratively coordinated, (9) the cost-benefit ratio of the situation favors compliance, and (10) the federal government is an active participant on behalf of minorities." These conditions are then considered in subsequent chapters that focus on voting rights, equal education opportunity, equal employment opportunity, desegregation in higher education, and equal housing opportunity.
[122] *See* Bullock & Lamb, *supra* note 6, at 1194, 1219–1220, 1239.
[123] *Id.* at 1219–1220, 1239.

aggressively enforced.[124] Higher rates of favorable outcomes reflect more rigorous enforcement.[125] This, in turn, reveals how various government agencies exercise discretion in civil rights decision making: some states frequently provide favorable outcomes to people of color—which should gradually effect discrimination and segregation over time—while others will not.[126] Based on the research reported here, this approach allows us to compare 21 Northern and Midwestern states to suggest which most likely qualify as Jim Crow North states.

Given this approach to understanding federal, state, and local fair housing enforcement, we reach three broad conclusions. First, cooperative federalism approaches for attacking controversial public policy problems are alive and well in America.[127] In this study, fair housing enforcement is absorbed into the workings of intergovernmental relations through Congress's adoption of the concept of substantial equivalency and its operationalization through HUD's Fair Housing Assistance Program.[128] Because Title VIII requires substantially equivalent fair housing laws to participate in FHAP, neither a national, state, nor local approach dictates fair housing enforcement. Even though fair housing enforcement standards are still usually developed at the federal level,[129] since the 1980s, a successful cooperative federalism program has emerged, with FHAP financial assistance providing an incentive to state and local governments to strengthen fair housing laws—or sometimes to enact a jurisdiction's first housing discrimination law—and to help implement national legislation.[130] As a result, subnational FHAP agencies have usually responded to federal

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[124] As a result, "[i]f there is a solution to breaking the circle of discrimination, …. it may still lie just as much in aggressive and unequivocal fair housing enforcement as in any other approach." Charles M. Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 CATH. U. L. REV. 363, 395 (1981).
[125] *See* Bullock & Lamb, *supra* note 6, at 1221, where we make the same assumption.
[126] *See id*. at 1220, where we make the same assumption.
[127] *See* text accompanying *supra* notes 34–49.
[128] *See* Bullock & Lamb, *supra* note 32, at 231–235.
[129] But *see* Bullock, Lamb & Wilk, *Memo to President Biden on State and Local Fair Housing Enforcement*, *supra* note 33 (explaining how some states have developed more progressive fair housing standards than those contained in Title VIII. California's Fair Employment and Housing Act, for instance, goes far beyond Title VIII by prohibiting not only discrimination on grounds of race, national origin, color, sex, religion, disability, and family status, but also source-of-income, gender, gender identity, gender expression, sexual orientation, ancestry, marital status, genetic information, medical condition, military or veteran status, and hair texture and style.) *See* Cal. Gov't Code §§ 12900-12996.
[130] *See generally* U.S. COMM'N ON CIV. RTS., *supra* note 37. In this 1992 report, the Commission warned that "[w]ithout the 'partnership' between HUD and [FHAP] agencies, effective enforcement of the Fair Housing Amendments Act and equal housing opportunity will not be fulfilled." *Id*. at 31–32. Accordingly, HUD should "be more aggressive in dealing with non-participating State and local agencies. HUD must increase its efforts to achieve participation in the Federal fair housing system of *all* State and local jurisdictions." *Id*. at 33. Among other things, this means "HUD should provide these jurisdictions with sustained and timely assistance with drafting laws that will meet a substantial equivalence review." *Id*.

oversight and direction, taken their enforcement responsibilities seriously, and supported national antidiscrimination housing enforcement in constructive ways.[131]

Second, we focus on how the Fair Housing Act has been enforced in 21 Northern and Midwestern states by calculating favorable outcomes in Title VIII complaints—the extent to which they were decided in support of Black and Latino Americans from 1989 to 2010.[132] Even between adjacent states and states with similar demographic traits, the analysis shows significant variations in favorable outcomes across the North and Midwest. In the North, for example, New Jersey and New York provided similar rates of favorable outcomes for Black people (22.9% compared to 23.4%).[133] Yet New Jersey and New York differed noticeably in terms of favorable outcomes for Latino complainants (33.3% compared to 19.4%).[134] In the Midwest, North Dakota resolved 45.5% of its Latino complaints but only 19.3% of its Black complaints in support of Title VIII complainants.[135] South Dakota, by contrast, reached favorable outcomes for 25.0% of its Latino complaintants and 28.6% of its Black complaintants.[136] More generally, both Black and Latino complainants had a reasonable chance to obtain a favorable outcome from their Title VIII claims in Nebraska, Kansas, Rhode Island, Pennsylvania, and Connecticut (among other states),[137] but Latino complainants were quite likely to lose their claims in New York, Indiana, and Massachusetts (among other states).[138]

Such comparisons demonstrate that governments in different regions of the country vary dramatically in the way they resolve Fair Housing Act complaints. Geography matters, and it makes a significant difference in what state or locality a Title VIII complaint is filed. On the one hand, 18 of 21 states achieved higher rates of favorable outcomes for

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[131] *See generally* Bullock, Lamb & Wilk, *supra* note 31, at 728 (stating that "the Fair Housing Act's substantial equivalency requirement and HUD's Fair Housing Assistance Program have enabled state and local civil rights agencies to play an essential role in enforcing national fair housing policy. Second, there is little difference in the extent to which federal, state, and local agencies provide outcomes favorable to fair housing complainants." And lastly, "local agencies have been most likely to provide favorable outcomes in recent years." It concludes that "[e]ncouraging state and particularly local agencies to participate more actively in fair housing enforcement would strengthen American federalism without significantly affecting complainants' outcomes." *Id*. at 728. Later, we recommend that "from a federalism perspective, all state and local governments should ideally participate in the FHAP program, with many additional jurisdictions passing comprehensive housing discrimination laws. HUD's lower effectiveness . . . and efficiency . . . in handling complaints bolsters the suggestion of assigning greater responsibilities to FHAP agencies.") *Id*. at 741.

[132] *See supra* text accompanying notes 45–55.

[133] *See supra* Table 4.

[134] *See supra* Table 6.

[135] *See supra* Tables 4 and 6.

[136] *Id.*

[137] *Id*.

[138] *See supra* Table 6.

Latino than Black complainants, and those differences at times are large, as in Illinois and Maine.[139] But this is not always the case, as Iowa and New York more often provided favorable outcomes to Black than Latino Americans, though those differences are smaller.[140] The difference between favorable outcomes for Latino and Black complainants is greater than 10 percentage points in Illinois, Maine, New Jersey, North Dakota, and Rhode Island.[141] Elsewhere, the difference between favorable outcomes for Black and Latino complainants is less than a percentage point in Indiana, Massachusetts, and Michigan.[142]

Third, these comparisons suggest that "Jim Crow North" *is* a concept that in practice applies to Northern and Midwestern states. Given this analysis, perhaps Indiana best qualifies as a Jim Crow North state,[143] although others—including but not limited to New York, New Jersey, Massachusetts, Michigan, and Minnesota—should be carefully investigated.[144] This article remains a preliminary examination, though, and more studies are needed to determine whether these conclusions are justifiable and the extent to which they apply elsewhere in the North, the Midwest, and ultimately the West.

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[139] *See supra* Tables 4 and 6.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] Other studies show that Indiana's history is characterized by legal and social traits associated with Jim Crow. For instance, Indiana was the last non-Southern state to force school desegregation, a practice it required until 1949. *See generally* EMMA LOU THORNBROUGH, THE NEGRO IN INDIANA BEFORE 1900 (1993); EMMA LOU THORNBROUGH, INDIANA BLACKS IN THE TWENTIETH CENTURY (2000); RICHARD PIERCE, POLITE PROTEST: THE POLITICAL ECONOMY OF RACE IN INDIANAPOLIS 1920–1970 (2005).
[144] For research addressing Jim Crow in New York and New Jersey*, see, e.g.*, Bullock & Lamb*, supra* note 6; LOGAN & STULTS, *supra* note 15; *Governor Hochul Releases Fair Housing Report Revealing Segregated Housing Patterns and Obstacles to Housing Opportunities Across New York*, GOV. KATHY HOCHUL – NY.Gov (May 5, 2023) https://www.governor.ny.gov/news/governor-hochul-releases-fair-housing-report-revealing-segregated-housing-patterns-and [https://perma.cc/FEF6-YF66]; Purnell, Theoharis, & Woodard, *supra* note 13. For Jim Crow in Massachusetts, Michigan, and Minnesota, *see e.g.*, Purnell, Theoharis & Woodard, *supra* note 13; Sugrue, *The Origins of the Urban Crisis*, *supra* note 13; Sugrue, *Sweet Land of Liberty*, *supra* note 13; Carleton Mabee, *A Negro Boycott to Integrate Boston Schools* 41 NEW ENG. Q. 341 (1968) https://primaryresearch.org/pr/dmdocuments/bh_mabee.pdf [https://perma.cc/S2HR-4MLG]; MINNESOTA EXPERIENCE: *Jim Crow of the North* (Twin Cities PBS, released Nov. 18, 2018) https://www.pbs.org/video/jim-crow-of-the-north-stijws; JIM CROW OF THE NORTH STORIES: *A Racial Border in Minneapolis* (Twin Cities PBS, released Jan. 9, 2023) https://www.pbs.org/video/a-racial-boarder-in-minneapolis-79cw9h/; JIM CROW OF THE NORTH*: Redlining and Racism in Minnesota* (Twin Cities PBS, released Apr. 14, 2021) https://www.youtube.com/watch?v=XWQfDbbQv9E; *Jim Crow Laws: Massachusetts, Michigan, Minnesota and Mississippi*, AMERICANS ALL https://americansall.org/legacy-story-group/jim-crow-laws-massachusetts-michigan-minnesota-and-mississippi [https://perma.cc/S8K9-GY7X] (last visited Oct. 3, 2025).

Further research is also needed to understand the sizable differences in responses to Latino and Black complainants in many states. One way to approach this is provided in *Jim Crow I*,[145] where we studied favorable outcomes in the 13 Northeastern states and discovered that Black and Latino complainants are both least likely to achieve favorable results in New York and New Jersey.[146] We then examined facets of law, public policy, and race relations in these states to help explain their low rates of favorable outcomes by investigating their levels of residential, school, and economic segregation, as well as their lack of local FHAP agencies.[147] Again, those results strongly suggested a causal link.[148]

At present, we can only speculate as to other possible explanations for the evidence of Jim Crow North and Jim Crow Midwest. One plausible explanation for the outcome variations reported here is that, despite efforts to encourage a common interpretation of HUD's Fair Housing Act regulations and enforcement, differences can arise in HUD regional and district offices or in state and local FHAP agencies. Despite attempts to ensure that FHAP agencies apply substantially equivalent standards as HUD, norms may develop in state or local FHAP offices to require different or higher levels of proof of discrimination. Government employees processing Title VIII complaints may be more sensitive to the factual situations outlined in certain cases compared to others. Employees in civil rights agencies may identify with complainants who share their race or ethnicity, especially if they have encountered similar behavior to that alleged in a complaint.[149] Survey research establishes that Black Americans are more likely than whites to believe that racism remains a problem and that Black people more often face discrimination than whites.[150]

It is also conceivable that Latino complainants fare better than Black complainants in Title VIII cases because the unfair practices cited by the former are, overall, more egregious than those encountered by the latter.[151] The Black Civil Rights Movement predates comparable Latino

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[145] Bullock & Lamb, *supra* note 6.
[146] *Id.* at 1194, 1229.
[147] *Id.* at 1230–1240.
[148] *Id.* at 1195, 1220, 1230.
[149] *See* U.S. COMM'N ON CIV. RTS., *supra* note 37, at 7 ("[b]ecause the [FHAP] agency is located in the community, the staff is usually more knowledgeable about housing conditions and other elements of the local environment than their HUD counterparts. For example, they would be more likely to know of actions taken by local housing or business establishments to circumvent the law.").
[150] *See, e.g.*, Massey & Denton, *supra* note 12, at 105; PEW RESEARCH, ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART (2016) https://www.pewresearch.org/social-trends/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/ [https://perma.cc/KWD3-G7AQ].
[151] Bullock, Lamb & Wilk, *supra* note 67, at 2687.

community activism.[152] A longer period of demanding equal treatment may have made Black Americans unwilling to tolerate a wider range of discriminatory behavior. Beyond that, heightened levels of concern around contacting public agencies for fear that it may increase encounters with immigration enforcement may make some Latino people hesitant to file complaints.[153] If Latino Americans are less likely to complain, the complaints they do file may involve more straightforward or severe violations than those filed by Black people.[154]

Regardless of these possible explanations, America's entrenched political polarization will probably reduce the likelihood of constructive changes in Title VIII enforcement in the North and Midwest in the foreseeable future. President Trump staunchly disagrees with basic principles of equal housing opportunity, and his rhetoric and actions may sway some Americans to oppose effective federal, state, and local fair housing enforcement.[155] Moreover, Northern and Midwestern opposition to federal fair housing law and enforcement dates back for decades, being

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[152] Both the Black and Latino Civil Rights Movements have their origins in the early Twentieth Century. However, Black civil rights activism gained full force by the mid-1950s, whereas Latino civil rights activism came of age during the 1960s. *See* Brian D. Behnken, *African American and Latino/a Activism(s) and Relations: An Introduction*, *in* RIGHTS AND BEYOND: AFRICAN AMERICAN AND LATINO/A ACTIVISM IN THE TWENTIETH-CENTURY UNITED STATES 1-19 (Brian D. Behnken, ed., 2016).

[153] *See, e.g.,* Luis Ferre-Sadurni, Ruth Igielnik & Ana Ley, *Under Trump, Immigrants Are More Fearful but Determined to Stay, Poll Finds* https://www.nytimes.com/2025/11/18/us/immigrants-survey-trump.html (last visited Apr. 12, 2026); Julia Ainsley & Laura Strickler, *Trump's Immigration Record So Far: High Arrests, Few Deportations*, NBC NEWS (Jul. 10, 2025) https://www.nbcnews.com/politics/immigration/trumps-immigration-record-far-high-arrests-low-deportations-rcna217752 [https://perma.cc/99AP-F8CM]; Julian E. Barnes, Mark Mazzetti & Hamed Aleaziz, *People Fleeing Immigration Officers Scale a Fence at the C.I.A.*, N.Y. TIMES (Sept. 10, 2025) https://www.nytimes.com/2025/09/10/us/politics/ice-cia-raid.html; Jesus Jiménez et al., *Completely Disrupted: Fear Upends Life for Latinos in L.A*. (Jun. 30, 2025) https://www.nytimes.com/2025/06/30/us/latinos-los-angeles-immigration.html.

[154] Bullock, Lamb & Wilk, *supra* note 67, at 2687.

[155] *See* Bullock & Lamb, *supra* note 6, at 1244–1249. For example, Trump's inflammatory rhetoric was evident during his first administration when he and HUD Secretary Ben Carson insisted that "[t]he crime and chaos in Democrat-run cities" were destroying suburbs and that President Obama's HUD regulations to further fair housing would "abolish single-family zoning, compel the construction of high-density 'stack and pack' apartment buildings," causing the suburbs to "look and feel the way far-left ideologues and technocratic bureaucrats think they should." Donald J. Trump & Ben Carson, Opinion, *We'll Protect America's Suburbs*, WALL ST. J. (Aug. 16, 2020), quoted in Bullock & Lamb, *supra* note 6, at 1244. Trump later attacked President Biden's fair housing proposals, contending that Biden would "abolish the suburbs" and telling voters, "[Y]ou're not going to have low-income housing built right next to you, which drives down your housing value, and a lot of crime comes in." Zack Stanton, *Trump Doesn't Understand Today's Suburbs—And Neither Do You*, POLITICO (Aug. 6, 2020) https://www.politico.com/news/magazine/2020/08/06/suburbs-history-race-politics-391966. *See also* Elie Mystal, *Trump's Slumlord Administration is Gutting the Fair Housing Act*, The Nation (Sept. 24, 2025) https://www.thenation.com/article/politics/trump-fair-housing-act/.

particularly vigorous in the 1960s[156] and during the Nixon administration.[157] Given the persistence of residential segregation in much of the North and Midwest, what combination of factors could trigger dramatic and lasting changes in that fundamental trend?

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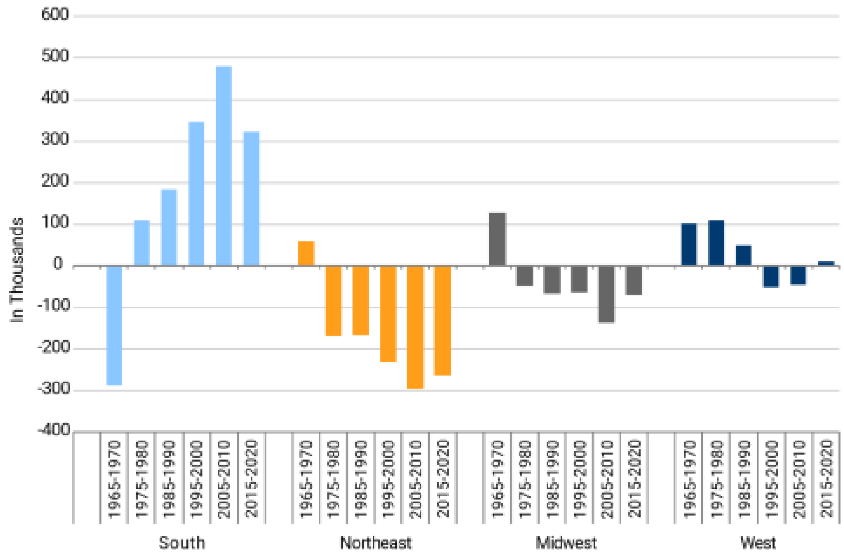
156 This opposition is illustrated in studies of Dr. Martin Luther King's 1966 protests of Chicago's housing segregation. *See* Ralph, *supra* note 13, ch. 3; Theoharis, *supra* note 13, ch. 8. *See also generally* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960 (1998); Sugrue, *The Origins of the Urban Crisis*, *supra* note 13.

157 *See* CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 121–148 (2005).

X. APPENDIX

Appendix A*

Black Net Migration to U.S. Regions, Selected Periods, 1965–2020



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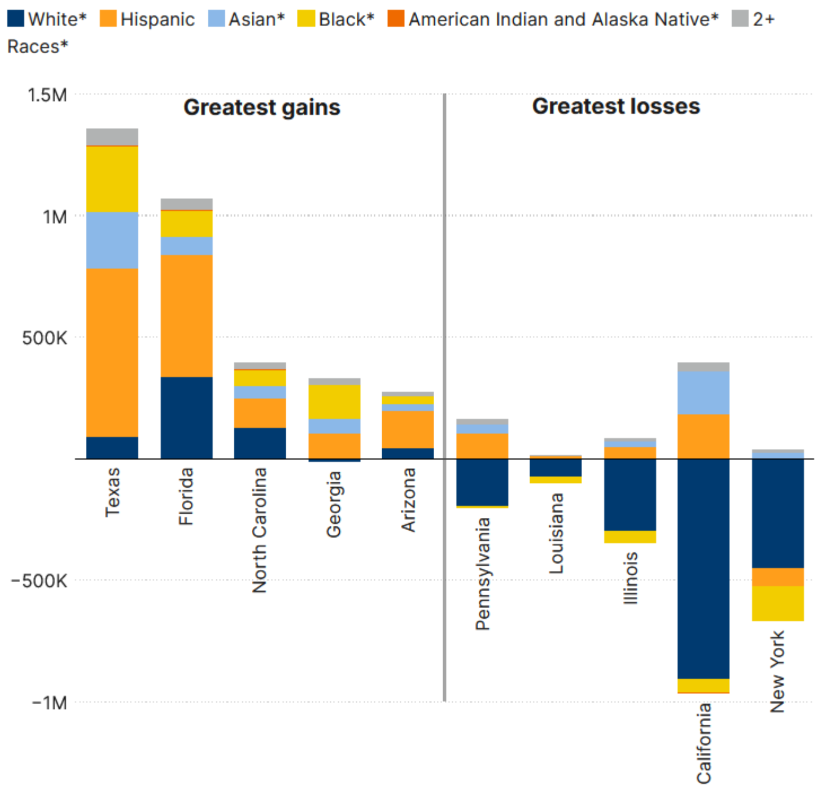
* William H. Frey, *A "New Great Migration" Is Bringing Black Americans Back to the South*, BROOKINGS (Sept. 12, 2022). https://www.brookings.edu/articles/a-new-great-migration-is-bringing-black-americans-back-to-the-south/ [https://perma.cc/XM7E-BNGC].
Note: The 2005–2010 and 2015–2020 net migration represents five times the annual estimated net migration for the 2005–2010 and 2015–2020 periods based on the Census Bureau 2006–2010 and 2016–2020 American Community Surveys.

Appendix B*
States with Greatest Population Gains and Losses by Race-Ethnic Group, 2020–2023**



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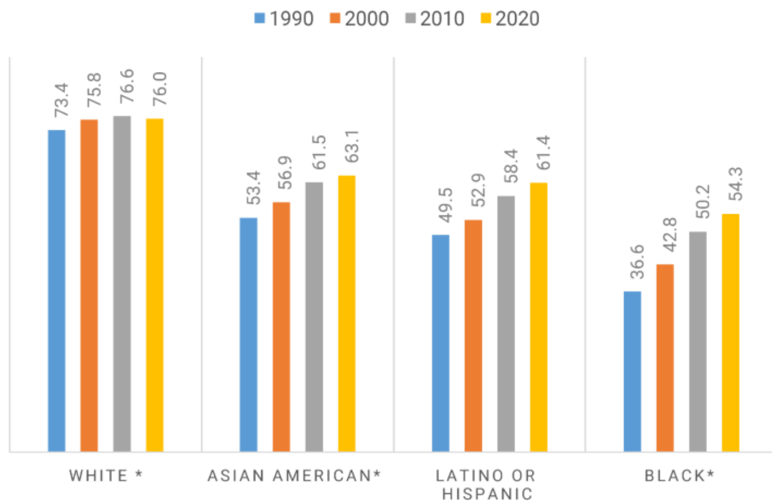
* William H. Frey, *Census Shows America's Post-2020 Population Is Driven by Diversity Especially among the Young*, BROOKINGS (Jul. 24, 2024). https://www.brookings.edu/articles/census-shows-americas-post-2020-population-is-driven-by-diversity-especially-among-the-young/ [https://perma.cc/N6Y3-DXDR].
Note: * designates non-Hispanic members of race; Asian includes Native Hawaiian and Other Pacific Islanders.
** Change from 2020 census date April 1, 2020 to July 1, 2023.

Appendix C*
Share Residing in Suburbs, Race-Ethnic Groups: Major Metropolitan Areas, 1990–2020**



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* William H. Frey, *Today's Suburbs Are Symbolic of America's Rising Diversity: A 2020 Census Portrait*, BROOKINGS (Jun. 15, 2024). https://www.brookings.edu/articles/todays-suburbs-are-symbolic-of-americas-rising-diversity-a-2020-census-portrait/ [https://perma.cc/BKD6-QAFQ]. *Note:* * designates Non-Hispanic members of group; Asian American includes persons identified as Asian, Native Hawaiian, and Other Pacific Islander.

** Major metropolitan areas are 56 metropolitan areas with populations exceeding 1 million in 2020.

Appendix D*
Northern and Midwestern State FHAP Agencies, 2009

Connecticut	Nebraska
Illinois	New Jersey
Indiana	New York
Iowa	North Dakota
Maine	Ohio
Massachusetts	Pennsylvania
Michigan	Rhode Island
Missouri	Vermont

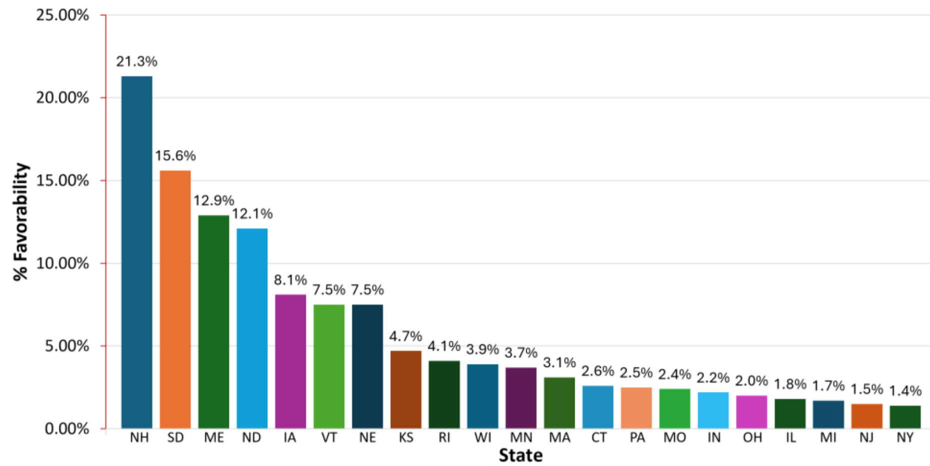
* Authors' calculation of data available in U.S. DEP'T OF HOUS. AND URB. DEV., THE STATE OF FAIR HOUSING: ANNUAL REPORT ON FAIR HOUSING FY 2009 59–61 (2010).

Appendix E[*]
Northern and Midwestern Local FHAP Agencies, 2009

Springfield, IL	Cambridge, MA
Elkhart, IN	Duluth, MN
Evansville-Vanderburgh County, IN	Kansas City, MO
Fort Wayne, IN	St. Louis, MO
Gary, IN	Lincoln, NE
Hammond, IN	Omaha, NE
South Bend, IN	Geneva, NY
Cedar Rapids, IA	Rockland County, NY
Davenport, IA	Westchester County, NY
Des Moines, IA	Canton, OH
Dubuque, IA	Dayton, OH
Mason City, IA	North Olmstead, OH
Sioux City, IA	Parma, OH
Waterloo, IA	Shaker Heights, OH
Lawrence, KS	Erie County, PA
Olathe, KS	Lancaster County, PA
Salina, KS	Pittsburgh, PA
Topeka, KS	Reading, PA
Boston, MA	York, PA

[*] Authors' calculation of data available in U.S. DEP'T OF HOUS. AND URB. DEV., THE STATE OF FAIR HOUSING: ANNUAL REPORT ON FAIR HOUSING FY 2009 59–61 (2010).

Appendix F*
Percent Favorability for Every 1% Black Population in Northern and Midwestern States, 1989–2010 (Descending Sort)



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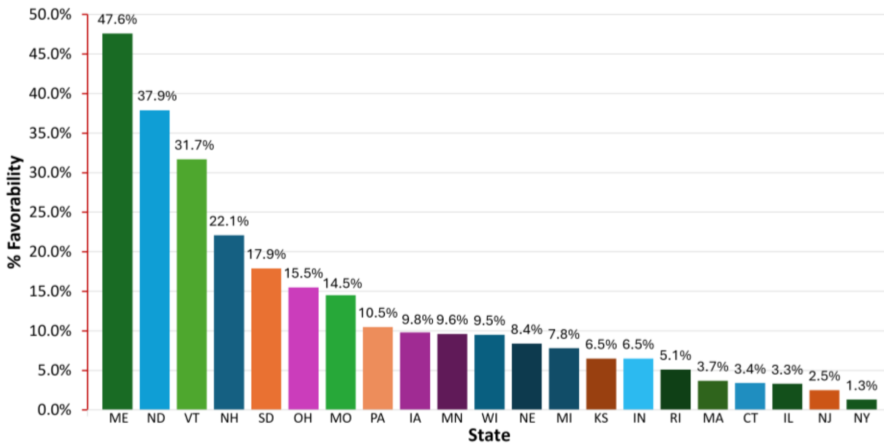
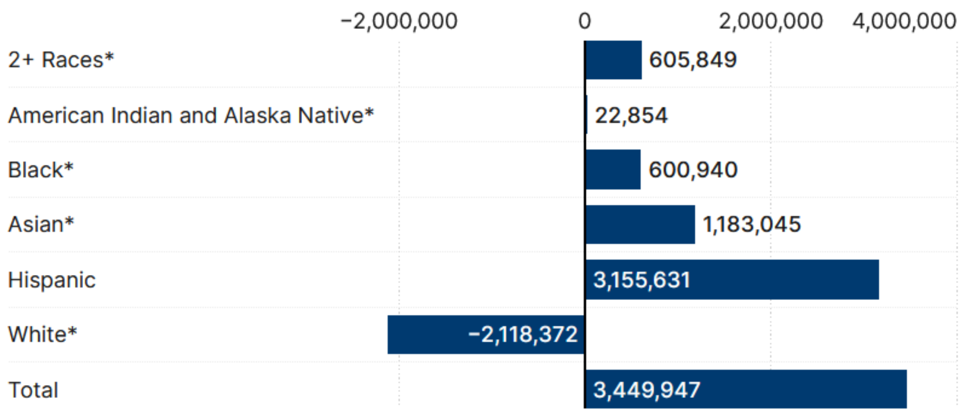
* Aggregated data from U.S. DEP'T OF HOUS. AND URB. DEV. ANNUAL REPORTS TO CONGRESS FY 2014–2023 "HUD COMPLAINT OUTCOMES, BY TYPE" CHARTS [https://perma.cc/T7YB-PBFZ].

Appendix G*
Percent Favorability for Every 1% Latino Population in Northern and Midwestern States, 1989-2010 (Descending Sort)



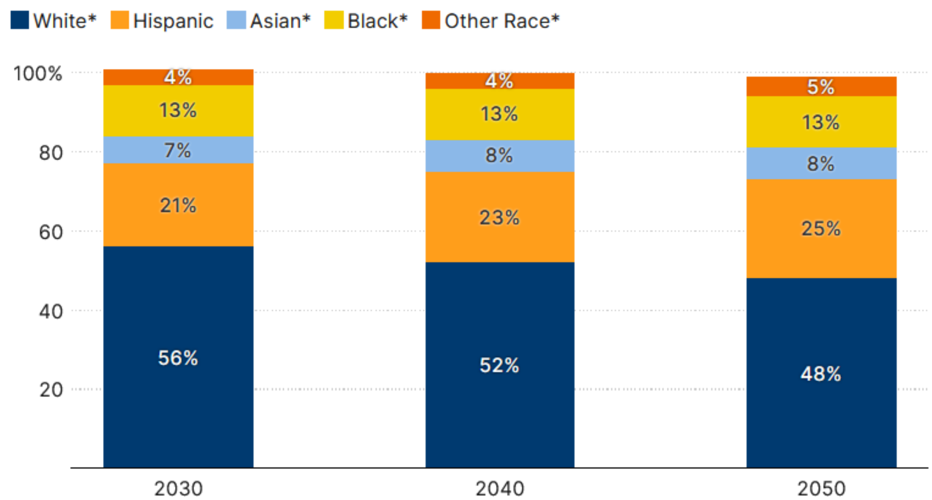
* Aggregated data from U.S. DEP'T OF HOUS. AND URB. DEV. ANNUAL REPORTS TO CONGRESS FY 2014–2023 "HUD COMPLAINT OUTCOMES, BY TYPE" CHARTS [https://perma.cc/T7YB-PBFZ].

Appendix H[*]
Post-2020 U.S. Population Change by Race-Ethnicity, 2020–2023[**]



[*] William H. Frey, *Census Shows America's Post-2020 Population Is Driven by Diversity Especially among the Young*, BROOKINGS (Jul. 24, 2024). https://www.brookings.edu/articles/census-shows-americas-post-2020-population-is-driven-by-diversity-especially-among-the-young/ [https://perma.cc/N6Y3-DXDR].
Note: * designates non-Hispanic members of race; Asian includes Native Hawaiian and Other Pacific Islanders.
[**] Change from 2020 census date April 1, 2020 to July 1, 2023.

Appendix I*
Projected U.S. Race-Ethnic Profiles, Total Population, 2030–2050



* William H. Frey, *Census Shows America's Post-2020 Population Is Driven by Diversity Especially among the Young*, BROOKINGS (Jul. 24, 2024). https://www.brookings.edu/articles/census-shows-americas-post-2020-population-is-driven-by-diversity-especially-among-the-young/ [https://perma.cc/N6Y3-DXDR].
Note: * designates non-Hispanic members of race; Asian includes Native Hawaiian and Other Pacific Islanders.

"It's Palliative Care": Attorney's Perspectives on Continuing Power of Attorney

Malka Doron* and Israel Doron**

* Doctoral Candidate in the Department of Gerontology at the University of Haifa.
** Head of the Center for Research and Study of Aging at the University of Haifa, Israel Institute Visiting Professor at the School of Social Service Administration at the University of Chicago.

Table of Contents

I. INTRODUCTION

When drafting a Continuing Power of Attorney[1] ("CPoA") for an older person, the attorney helps the principal create a document that encapsulates the significant aspects of their life,[2] wishes, and values. The CPoA serves as a roadmap for potential future incapacity—appointing a surrogate decision-maker and typically providing advance directives. While the final document is crucial, the execution process can be equally valuable, allowing for reflection, essential conversations, and strengthening family connections. Research indicates executing a CPoA in older age can reduce intergenerational ambivalence in the family and enhance psychological and emotional well-being.[3]

The recent introduction of the CPoA in Israel offers an opportunity to explore its impact on older persons, focusing on legal practices that may enhance its therapeutic potential. Such exploration requires considering both legal and gerontological perspectives. While integrating these perspectives remains relatively uncommon in research, such an interdisciplinary approach promises to enrich our understanding of legal planning tools and their potential benefits for older persons.[4]

Since under Israeli law a CPoA can only be drafted by a certified attorney, this research examines CPoA execution from the perspective of attorneys.[5] The interaction between the older principal and their surrogates provides a unique and ostensibly one-time opportunity for older persons to discuss their wishes with their families.[6]

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[1] Also known as durable power of attorney, lasting power of attorney, or enduring power of attorney. In this Article, we will use the acronym CPoA for convenience. The attorney under the CPoA is the designated surrogate decision-maker. In this Article, we will use the phrases surrogate decision-maker and surrogate.

[2] As explained hereafter, under Israeli law, a person can execute a CPoA for property management and personal affairs, including healthcare. Amendment No. 18, *The Legal Capacity and Guardianship Law*, 5722–1962, SH No. 2550, 798 (Isr. 2016), https://www.nevo.co.il/law_html/law00/70325.htm [https://perma.cc/8GR5-WFYV].

[3] *See generally*, Malka Doron & Israel Doron, *Executing a Continuing Power of Attorney by Senior Citizens: Experience and Meaning*, 49 GERONTOLOGY & GERIATRICS J. OF AGING STUD. 65 (2022) (Isr.).

[4] *See* Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 188 (2020) (discussing the focus of elder law); *see also*, Nina A. Kohn, Maria T. Brown & Israel Doron, *Identifying Connections between Elder Law and Gerontology: Implications for Teaching, Research, and Practice*, 25 ELDER L.J. 69, 95 (2017) (discussing the disconnection elder law and gerontology and the drawbacks it poses to both fields).

[5] Amendment No. 18, *supra* note 2, at § 32.14 (also stating that the designated surrogate decision-maker must agree to serve as one). It should be noted that a memorandum proposing amendments to the Legal Capacity and Guardianship Law regarding CPoAs has recently been published for public comment. The proposed legislation suggests allowing principals the option to execute CPoAs without a attorney's involvement. https://tazkirim.gov.il/s/legislativeworkactivity/a13Qu00000UrbjLIAR/%D7%94%D7%A4%D7%A6%D7%94

[6] Doron & Doron, *supra* note 3, at 81. See also Tazkir Hok Ha-Kashrut Ha-Mishpatit Ve-ha-Apotropsut (Tikun Mis. 23) (Ariha Atzmit Shel Yipui Koach Mitmashech Ve-tikunim Shonim) [Legal Capacity and Guardianship (Amendment No. 23) (Self-Editing of Continuing Power of Attorney and Various Amendments) Law (Draft Bill)], 5786-2025

Understanding the attorney's role highlights the discrepancies between the CPoA's potential advantages and its actual execution, offering insights into the process's implications on family relationships, emotional and psychological well-being in older age, and the rights of older persons.

To describe and analyze the attorney's perspective, this article will be constructed in the following manner: Part I of this article provides the research background—including both legal and gerontological aspects—Part II elaborates on the research's methodology, Part III presents the key findings, and Part IV discusses these findings, offering insights and conclusions.

II. BACKGROUND

A. PLANNING FOR OLDER AGE AND LEGAL PLANNING TOOLS

The demographic shift toward increased longevity necessitates extended self-care periods for individuals, often accompanied by the management of age-related physical and cognitive vulnerabilities.[7] Advance planning facilitates more effective management of age-related challenges and promotes the realization of older persons' preferences.[8] Legal planning tools rest on three theoretical frameworks, with personal autonomy at the core. Autonomy is viewed along a spectrum from universal individualism to relationship-dependent autonomy, where social connections shape decisions.[9]

Legal planning tools like the CPoA embody autonomy by allowing older persons to manage aspects of life according to their own preferences and beliefs.[10] The second framework, Preventive Law, focuses on proactively[11] addressing potential legal issues before they

(Isr.), https://tazkirim.gov.il/s/legislativeworkactivity/a13Qu00000UrbjLIAR.[https://perma.cc/JC4X-YRH9]

[7] Allan D. Bogutz, *Elder Law: A Personal Perspective, Theories on Law and Aging: The Jurisprudence of Elder Law 1*, 2 (Israel Doron ed., 2009); Ramona C. Rains, *Planning Tools Available to the Elderly Client*, 19 AM. J. TRIAL ADVOC. 599, 599-600 (1996).

[8] Israel Doron & Ido Gal, *Prevention and Legal Planning in Old Age,* 9 HAMISHPAT 427,430-31 (2004).

[9] Roi Gilbar, *The Involvement of the Family in the Process of Making Healthcare Decisions Regarding a Legally Competent Adult Patient: Bioethical and Legal Aspects*, 13 MOZNEY MISHPAT 43, 46-49 (2020); *see generally*, Shirly Reznitsky et al., *Making Healthcare Decisions Towards the End of Life: From Autonomy to Relationship-Dependent Autonomy*, 13 MOZNEY MISHPAT 237 (2020) (discussing the place of autonomy in patients' decision-making process at the end of life).

[10] While it is widely accepted that the human right to autonomy includes deciding according to one's wishes, even in cases of incapacity, some argue that personal identity requires psychological continuity. This view suggests that advance directives may not be morally valid when a person becomes incompetent. Ben A. Rich, *The Values History: A New Standard of Care*, 40 EMORY L.J. 1109, 1122-24 (1991).

[11] Thomas D. Barton, *Preventive Law for Three-Dimensional Attorneys*, 19 PREVENTIVE L. REP. 29, 29 (2001); *See generally*, Forrest S. Mosten & Lara Traum, *The Family Attorney's Role in Preventive Legal and Conflict Wellness,* 55 FAM. CT. REV. 26 (2017) (discussing how family attorneys can become more proactive, implementing preventive law rather than staying reaction-oriented); *See also*, Emily A. Benfer, James Bhandary-Alexander, Yael

arise:[12] using legal counsel to clarify rights and obligations,[13] identifying vulnerabilities, and devising strategies that consider both legal and emotional factors.[14] The CPoA is an example of this, enabling individuals to prepare for future scenarios and avoid undesirable legal outcomes. The third framework, Therapeutic Jurisprudence, examines the impact of legal processes on individuals' emotional and psychological well-being. It seeks to enhance therapeutic outcomes and reduce negative psychological effects,[15] making it particularly relevant for improving the quality of life for older persons.[16] Legal advice informed by this theory considers the emotional aspects of end-of-life issues and family relationships, guiding clients toward the most therapeutic legal strategies.[17]

The integration of Therapeutic Jurisprudence and Preventive Law[18] creates a comprehensive approach that addresses both legal and psycho-legal aspects, allowing clients to consider the broader implications of their legal affairs.[19] However, attorneys must carefully balance this approach, ensuring their advice remains within professional boundaries while providing nuanced guidance.[20] This integrated perspective is especially crucial in advising older people on advance planning. As it considers the emotional and psychological consequences

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Cannon, Medha D. Makhlouf & Tomar Pierson-Brown, *Setting the Health Justice Agenda: Addressing Health Inequity & Injustice in the Post-Pandemic Clinic*, 28 CLINICAL L. REV. 45, 65 (2021) (discussing preventive law practices to advance health justice for marginalized and exploited populations).

[12] *See generally,* Lous M. Brown, *The Practice of Preventive Law*, 35 J. AM. JUD. SOC'Y 45 (1951); Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189 (2002).

[13] *See generally*, Scott E. Isaacson, *Preventive Law: A Personal Essay*, 9 UTAH B. J. 14 (1996); Jennifer Rosen Valverde, *Preparing Tomorrow's Attorneys to Tackle Twenty-First Century Health and Social Justice Issues*, 95 DENV. L. REV. 539, 550-551 (2018).

[14] Louis M. Brown, *Preventive Medicine and Preventive Law: An Essay that Belongs to My Heart*, 11 L. MED. & HEALTH CARE 220, 223 (1983); s*ee also*, Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1, 16-17 (2006).

[15] Susan Daicoff, *Making Law Therapeutic for Attorneys: Therapeutic Jurisprudence, Preventive Law, and Psychology of Attorneys*, 5 PSYCH., PUB. POL'Y & L. 811, 813-14 (1999); David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*,75 UNIV. MIA. L. REV. 660, 663, 667-70 (2021); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 317 (1998).

[16] *See* generally, Marshall B. Kapp, *A therapeutic approach, in Theories on Law and Aging: The Jurisprudence of Elder Law* 31 (Israel Doron ed., 2009).

[17] *See generally*, Daicoff, *supra* note 14; Wexler, *supra* note 15.

[18] *See generally*, Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459 (1996); Wexler, *supra* note 15, at 318-20; Bruce J. Winick, avid B. Wexler & Edward A. Dauer, *A New Model for the Practice of Law*, 5 PSYCHOL. PUB. POL'Y & L. 795 (1999).

[19] *See generally*, Wexler, *supra* note 15.

[20] *Id.* at 329. Moreover, despite the conceptual adjacency of the two concepts, there is still disharmony between the normative requirements of therapeutic jurisprudence and the practical commitment of preventive law to efficiency. Robert Eli Rosen, *And Tell Tchaikovsky the News: The Wedding of Therapeutic Jurisprudence and Preventive Attorneying*, 5 PSYCH. PUB. POL'Y & L. 944, 948-49 (1999).

of legal planning tools and recognizes an older person's well-being as a legitimate legal goal.

B. CPOA AS A PLANNING TOOL

The CPoA has developed as a legal mechanism to mitigate age-related cognitive decline[21]—offering an alternative to court-appointed guardianship.[22] The CPoA's novelty addressed guardianship's shortcomings, such as infringement on autonomy, excessive complexity, and high costs.[23] Emerging in the United States in the late 1960s, the CPoA emerged as a simpler, more flexible, and more accessible solution.[24] It was particularly valued by some for fostering emotional well-being and noted for its therapeutic value in doing so.[25]

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[21] E.*g*., Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 1-2 (2001) (describing the widespread of the CPoA for property management); Lisa C. McGuire, Jaya K. Rao, Lynda A. Anderson & Earl S Ford, *Completion of a durable power of attorney for health care: What does cognition have to do with it?*, 47 GERONTOLOGIST 457, 457-58 (2007) (describing the development of the CPoA for healthcare affairs).

[22] According to traditional agency law, the agency automatically expires upon the death or incapacity of the principal. As the surrogate decision maker acts as the principal's agent, an *ordinary* power of attorney does not survive the principal's capacity loss, leading to the need to appoint a guardian. *E.g.*, Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 170-71 (2009); Michael N. Schmitt & Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203, 203-04 (1991); Kim Vu-Dinh, *Reforming Power of Attorney Law to Protect Alaskan Elders from Financial Exploitation*, 27 ALASKA L. REV. 1, 5-7 (2010). However, in some jurisdictions, there is no automatic revocation of an ordinary power of attorney upon the principal's incapacity, making any power of attorney a continuing one de facto, depending on the principal's choice. *See e.g.*, H.N. Stelma-Roorda & V.I. Eichelsheim, *Decision-making by and for Adults with Impaired Capacity: The Potential of the Dutch Levenstestament*, 86 INT'L. J. OF L. & PSYCHIATRY 101844, 2 (2023).

[23] *E.g.*, Alexis Rowe, *Overseeing Durable Power of Attorney in Iowa: Discouraging Abuse, Honoring Principals*, 63 DRAKE L. REV. 1201, 1205-06 (2015); Linda S. Whitton, *Durable Powers as a Hedge against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact*, 2 ELDER L.J. 39, 43-45 (1994); *see generally*, Yotam Tolub & Ori Shlomai, *'Not in Therapy': The Shift from Therapy-Centred Language to a Language of Autonomy and Human Rights in the Appointment Procedure of a Guardian for a Person; Following the Enactment of the Legal Capacity and Guardianship Law (Amendment Number 18)*, 32 MEHKAREY MISHPAT 1049 (2020) (providing a comprehensive review of the guardianship system in Israel and further discussion of the obstacles involved in situations of guardianship); Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495 (2016) (reviewing the developments in the guardianship system in the United States since the 80s of the twentieth century and arguing for their limited success in bringing about a substantial change in the practice and culture of this system).

[24] Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 581-84 (1996); *see* Michael Ganner, *Enduring Power of Attorney (EPoA) - Comparison Between Austrian and German Law*, 2015 AUSTRIAN. L.J. 32, 36-37 (2015); Schmitt & Hatfield, *supra* note 22, at 222-23 (discussing the flexible nature of the CPoA for healthcare affairs).

[25] Doron & Doron, *supra* note 3, at 78-81; Marshall B. Kapp, *Legal Standards for the Medical Diagnosis and Treatment of Dementia*, 23 J. LEGAL MED. 359, 385 (2002); *see generally*, Robert D. Fleischner, *Advance Directives for Mental Health Care: An Analysis of State Statutes*, 4 PSYCHOL. PUB. POL'Y & L. 788 (1998).

The CPoA allows a competent adult (the principal) to appoint a surrogate decision-maker to act on their behalf upon incapacitation.[26] To ensure the principal's wishes are honored, these appointments often include advance directives that guide the surrogate's decisions.[27] The surrogate's powers are generally broad and unsupervised[28] —focusing on property management and healthcare affairs.[29] The regulatory frameworks for the CPoA vary significantly across jurisdictions, ranging from minimal requirements[30] to more complex processes involving legal consultation and surrogate consent.[31]

While the CPoA offers flexibility, its relative lack of oversight opens the door to potential abuse.[32] The extent of such abuse, however, is unclear due to limited research and underreporting.[33] Although jurisdictions have implemented various safeguards to address this risk,[34] increasing regulations may compromise the CPoA's simplicity and flexibility and potentially deter surrogate acceptance.[35] The CPoA also faces the risks of rejection or disregard by third parties—particularly if

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[26] Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 8-9 (2007); Stelma-Roorda & Eichelsheim, *supra* note 22; *see also*, Ganner, *supra* note 24.

[27] *See generally*, Whitton, *supra* note 26; Stelma-Roorda & Eichelsheim, *supra* note 22.

[28] Whitton, *supra* note 26, at 10-11; Boxx, *supra* note 21, at 44; *see generally,* Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1 (2006).

[29] Rhein, *supra* note 22, at 171; Whitton, *supra* note 23, at 40-41; Stelma-Roorda & Eichelsheim, *supra* note 22; *see generally*, Ganner, *supra* note 24.

[30] *See e.g.*, Dessin, *supra* note 24, at 584, 607; Linda S. Whitton, *Understanding Duties and Conflicts of Interest - A Guide for the Honorable Agent*, 117 PENN ST. L. REV. 1037, 1039 (2013).

[31] For example, *see* Amendment No. 18, *supra* note 2 (explaining the CPoA framework under Israeli law).

[32] *See generally*, Rhein, *supra* note 22; Thomas E. Simmons & Andrew J. Knutson, *Restraining the Unsupervised Fiduciary*, 66 S.D. L. REV. 208, 208-11 (2021); Vu-Dinh, *supra* note 22, at 6.

[33] Nola M. Ries, *Enduring Powers of Attorney and Financial Exploitation of Older People: A Conceptual Analysis and Strategies for Prevention,* 34 J. OF AGING & SOC. POL'Y 357, 357-58, 361-61 (2022); Rieneke Stelma-Roorda, *The Misuse or Abuse of Continuing Powers of Attorney: What Are Appropriate Safeguards?*, 35 INT'L J. OF L., POL'Y & FAM. 1, 3-4 (2021); Genevieve Mann, *It's Not OK, Boomer: Preventing Financial Power-of-Attorney Abuse of Elders*, 82 MD. L. REV. 181, 200, 228 (2023) (suggesting that the underreporting of financial abuse of older persons derives from their hesitation to report their caregivers or their close relatives, particularly when the designated surrogate decision-maker is the alleged abuser and the principal's incapacity adds to the barriers to disclosure and exposing such abuse).

[34] Amy Jo Conroy, *Curbing the License to Steal: A Discussion of English Law and Possible Reforms for the Durable Power of Attorney*, 44 REAL PROP. TR. & EST. L.J. 31, 50. 52-53 (2009); Mann, *supra* note 33, at 228-35; Ries, *supra* note 33, at 360; Simmons & Knutson, *supra* note 32, at 228-34, 239, 241-42; Vu-Dinh, *supra* note 22, at 12-21; Rhein, *supra* note 22, at 181, 186-87; see *generally,* Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance between Autonomy and Protection,* 1 PHX. L. REV. 343 (2008); Whitton, *supra* note 23, at 59-60.

[35] Stelma-Roorda, *supra* note 33, at 3, 16-17; Whitton, *supra* note 23, at 60; Vu-Dinh, *supra* note 22, at 22-23; *see* Ries, *supra* note 33, at 360; Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document*, 11 MARQ. ELDER'S ADVISOR 307, 340 (2010).

activated long after its execution.[36] Over time, various legal mechanisms have been developed, aiming to address these concerns.[37]

It should also be mentioned that the designation of surrogate decision-makers, usually close family members,[38] formalizes existing familial relationships. However, the nature of informal familial relationships between the parties can lead to misunderstandings about responsibilities.[39] These misunderstandings are often further exacerbated by the surrogates' broad, unsupervised powers and insufficient jurisdictional guidance on behavioral norms.[40] These factors may cause discomfort, family conflicts, and reluctance to accept the role.[41]

C. A CPoA in Israel

The CPoA was established in Israel in 2016 as part of an extensive amendment to the Legal Capacity and Guardianship Law of 1962.[42] The amendment reflected a paradigm shift from a paternalistic model to a rights-based approach emphasizing dignity and autonomy.[43] Under Israeli law, a competent adult can now execute a CPoA for personal affairs (including healthcare affairs), property management, or both,[44] specifying surrogate decision-makers and their authorized domains.

The law delineates eligibility requirements, powers, and actions requiring explicit consent or court approval, for surrogate decision-makers. Surrogates need to consent to assume this role[45] and must act diligently, skillfully, and in good faith to protect the principal's interests—upholding and promoting the principal's dignity, privacy, and autonomy to the extent possible. Surrogate decision-makers are required to provide the principal with relevant information, consider their abilities, and assist in independent decision-making. Surrogates must also help the principal maintain cultural, religious, and social connections. This latter requirement aligns with the concept of relationship-dependent autonomy, emphasizing the intrinsic link between autonomy and one's social connections.[46] The CPoA may

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[36] *See e.g.*, LAURENCE E. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 257-258 (1995); Stelma-Roorda, *supra* note 33, at 20; Stelma-Roorda & Eichelsheim, *supra* note 22, at 8; Rains, *supra* note 7, at 604.
[37] *See e.g.*, Simmons & Knutson, *supra* note 32, at 242; Stelma-Roorda, *supra* note 33, at 20; Rains, *supra* note 7, at 604-605.
[38] Kohn, *supra* note 28, at 7; *see e.g.*, Doron & Doron, *supra* note 3, at 74.
[39] Seal, *supra* note 35, at 340.
[40] *See generally*, Kohn, *supra* note 28.
[41] *Id*.
[42] Amendment No. 18, *supra* note 2.
[43] Draft Bill for the Legal Capacity and Guardianship Law 5775-2014, HH(Gov't.) 890, 2 2-5 (Isr.), https://www.nevo.co.il/Law_word/law15/memshala-890.pdf.
[44] Amendment No. 18, *supra* note 2, at § 32.2(2). The provisions regulating the CPoA are found in § 32.1-32.35. Key points are elaborated in this chapter.
[45] Surrogates may relinquish their position at any time, through written notification.
[46] Reznitsky et al., *supra* note 9.

include advance directives[47] and instructions regarding activation, and can take immediate effect on property management if desired. The principal may also designate individuals to be informed of the surrogate's actions under the CPoA.

Unlike many American jurisdictions, Israeli law requires, to ensure the integrity of the CPoA's execution, that the document to be drafted and deposited with the Guardian General Authorities by a specially trained and impartial attorney. The attorney must conduct a private consultation with the principal, explaining the document's legal implications, alternative options, potential directives, powers requiring explicit authorization, and other relevant details. If any doubts arise regarding the principal's capacity, the attorney is also obligated to refer the principal for a competence assessment. Furthermore, the attorney must attest within the document that all necessary explanations were provided and that the principal acted autonomously and free from undue influence or exploitation.

D. CPoA as a Planning Tool in Older age—The Gerontological Perspective

The aging of the population has generated an increased interest in gerontological research on legal planning tools. Studies on CPoAs have often been grouped together with other legal planning tools, frequently within the broader category of advance directives [48]—and have predominantly focused on healthcare decision-making. Studies specifically addressing CPoA for property management are comparatively scarce and have primarily centered on concerns regarding potential exploitation by surrogate decision-makers.

Research on the use of legal planning tools by older persons indicates a gradual increase over time,[49] though usage remains limited

[47] The surrogates are obligated to prioritize advance directives, as exceptions to this obligation are also outlined within the law.
[48] *See* Shinae Choi, Minjung Kim, & Ian M. McDonough, *Do Older Adults with Alzheimer's Disease Engage in Estate Planning and Advance Care Planning Preparation?*, 23 AGING & MENTAL HEALTH 872 (2019); Eun-Hye G. Yi, *Does Acculturation Matter? End-of-Life Care Planning and Preference of Foreign-Born Older Immigrants in the United States*, 3 INNOV. IN AGING igz012 (2019).
[49] *See* Jing Li, Yongkang Zhang, Holly Prigerson, Rainu Kaushal & Lawrence P. Casalino, *Use of Advance Directives among Older US Adults by Dementia Status: 2012–2016*, 22 J. PALLIATIVE MED. 1493 (2019); Kuldeep N. Yadav, Nicole B. Gabler, Elizabeth Cooney, Saida Kent, Jennifer Kim, Nicole Herbst, Adjoa Mante, Scott D Halpern & Katherine R Courtright, *Approximately One in Three US Adults Completes Any Type of Advance Directive for End-of-Life Care*, 36 HEALTH AFF. 1244 (2017).

both globally[50] and in Israel.[51] For example, recent research[52] on advance care planning ("ACP")[53] among community-dwelling older persons showed that over 65% had completed at least one ACP document. However, approximately 15% had completed ACP documents without discussing them with others. Examining the usage of CPoAs in Israel, the Guardian General's reports[54] show a significant increase in CPoA execution since its establishment under the 1962 Legal Capacity and Guardianship Law: about 5,500 deposits in 2018 rose to 45,156 in 2023. However, a recent study found that although most CPoAs were executed by older persons aged 65 or older, the overall completion proportion among older Israelis remains as low as 4%.[55]

Studies have identified various barriers to adopting legal planning tools, including lack of awareness,[56] difficulty understanding the tools,[57] and socioeconomic factors such as low income[58] and social

[50] *See e.g.*, Sarah Vilpert, Carmen Borrat-Besson, Jürgen Maurer, Gian Domenico Borasio, *Awareness, Approval and Completion of Advance Directives in Older Adults in Switzerland*, 148 SWISS MED. WKLY. w14642 (2018); Ji Eun Lee, Dong Wook Shin, Ki Young Son, Hyun Jung Park, Jae-Young Lim, Mi Soon Song, Yeon-Hwan Park & BeLong Cho, *Factors Influencing Attitudes toward Advance Directives in Korean Older Adults*, 74 ARCHIVES OF GERONTOLOGY & GERIATRICS 155 (2018).

[51] Pesach Shvartzman, Yonatan Reuven, Mordechai Halperin & Sasson Menahem, *Advance Directives—the Israeli Experience*, 49 J. PAIN & SYMPTOM MGMT. 1097 (2015). In 2013, only 0.3% of the older persons in Israel had advance directives, with subsequent studies showing slight improvement. Netta Bentur, Jennifer Shuldiner, Shirli Resnizky, Shelly Sternberg, Leah Aharoni, Avinoam Pirogovsky, & Ben Koren, *Knowledge and Attitudes of Community Physicians and the General Public Regarding End-of-Life and Palliative Care*, Myers-JDC-Brookdale Inst., Research Report RR-698-16 (2016) (Hebrew); Perla Werner & Ile Kermel Schiffman, *Attitudes and Completion of Advance Care Planning: Assessing the Contribution of Health Beliefs about Alzheimer's Disease among Israeli Laypersons*, 17 PALLIATIVE & SUPPORTIVE CARE 655 (2019).

[52] See Kathrin Boerner, Sara M. Moorman, Deborah Carr & Katherine A. Ornstein, *Insufficient Advance Care Planning? Correlates of Planning without Personal Conversations*, 76 J. GERONTOLOGY: SERIES B 104 (2020).

[53] Advance care planning (ACP) refers to a process in which a person discusses their healthcare preferences towards the end of life with their close relatives who act as caregivers. At times, practitioners are also involved. This process is usually concluded with the completion of a written document such as advance directives, a living will, or healthcare CPoA. Kay de Vries, Elizabeth Banister, Karen H. Dening, & Bertha Ochieng, *Advance Care Planning for Older People: The Influence of Ethnicity, Religiosity, Spirituality and Health Literacy*, 26 NURSING ETHICS 1946, 1947 (2019); Yi, *supra* note 48; Werner & Schiffman, *supra* note 51, at 655.

[54] משרד המשפטים [Ministry of Justice], יפויי כוח מתמשכים – נתונים לפי שנים [Continuing Power of Attorney – Data by Years] (Jan. 8 2024), https://www.gov.il/he/pages/30-01-22?chapterIndex=8 (last visited May 18, 2024).

[55] Shirly Reznitsky, Ile Kermel Schiffman, Dana Weiss & Alexander Zablotsky, *Durable Power of Attorney for Older Adults and People with Cognitive Decline: Examining the Implementation of Amendment 18 to the Legal Capacity and Guardianship Law*, R-203-22, Myers-JDC-Brookdale Institute. (2022) (Hebrew).

[56] *See* Vilpert et al., *supra* note 50.

[57] *See* Helen Close, Kamal Sidhu, Hazel Genn, Jonathan Ling & Colette Hawkins, *Qualitative Investigation of Patient and Carer Experiences of Everyday Legal Needs towards End of Life*, 20 BMC PALLIATIVE CARE 47, 56 (2021).

[58] *See* Choi et al., *supra* note 48.

isolation.[59] Conversely, motivators for engagement include older age,[60] health conditions,[61] prior healthcare discussions,[62] the desire to avoid suffering,[63] and family considerations.[64] Personal autonomy is cited as a key motivator for executing a CPoA.[65]

Advance planning is associated with improved quality of end-of-life care and better alignment with care preferences.[66] However, challenges persist, including discrepancies between documented wishes and actual end-of-life preferences— studies indicate inconsistencies in over half of advance directives[67] and a misalignment of surrogates' confidence in knowing principals' wishes with actual knowledge, which highlights the importance of prior discussions.[68] Family dynamics play a significant role in both the execution and implementation[69] of these tools, with studies indicating a preference for family-based decision making,[70] though communication of preferences is often lacking.[71] Our

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[59] *See* Thomas K.M. Cudjoe, Cynthia M. Boyd, Jennifer L. Wolff & David L. Roth, *Advance Care Planning: Social Isolation Matters*, 68 J. AM. GERIATRICS SOC'Y 841 (2020).

[60] *See* Gloria J. Alano, Renee Pekmezaris, Julia Y. Tai, Mohammed J. Hussain, Jose Jeune, Betina Louis, Gabriel El-Kass, Muhammad S. Ashraf, Roopika Reddy, Martin Lesser & Gisele P. Wolf-Klein, *Factors Influencing Older Adults to Complete Advance Directives*, 8 PALLIATIVE & SUPPORTIVE CARE 267 (2010).

[61] *Id.*

[62] *See* Hillary D. Lum, Joanna Dukes, Andrea E. Daddato, Elizabeth Juarez-Colunga, Prajakta Shanbhag, Jean S. Kutner, Cari R. Levy & Rebecca L. Sudore, *Effectiveness of Advance Care Planning Group Visits Among Older Adults in Primary Care*, 68 J. AM. GERIATRICS SOC'Y 2382 (2020).

[63] *See* Alano et al., *supra* note 60.

[64] *See* Doron & Doron, *supra* note 3.

[65] Doron & Doron, *supra* note 3, at 72; Stelma-Roorda & Eichelsheim, *supra* note 22, at 9.

[66] Arianne Brinkman-Stoppelenburg, Judith A.C. Rietjens & Agnes van der Heide, *The Effects of Advance Care Planning on End-of-Life Care: A Systematic Review*, 28 PALLIATIVE MED. 1000 (2014); Maria J. Silveira, Scott Y.H. Kim, & Kenneth M. Langa, *Advance Directives and Outcomes of Surrogate Decision Making before Death*, 362 N.E. J. MED 1211 (2010).

[67] *See* Nauck Friedemann, Matthias Becker, Claudius King, Lukas Radbruch, Raymond Voltz & Birgit Jaspers, *To What Extent Are the Wishes of a Signatory Reflected in Their Advance Directive: A Qualitative Analysis*, 15 BMC MED. ETHICS 52 (2014); Peter H. Ditto, Nikki A. Hawkins & David A. Pizarro, *Imagining the End of Life: On the Psychology of Advance Medical Decision Making*, 29 MOTIVATION & EMOTION 481, 496-99 (2005).

[68] *See* Terri R. Fried, Maria Zenoni, Lynne Iannone, John O'Leary & Brenda T. Fenton, *Engagement in Advance Care Planning and Surrogates' Knowledge of Patient' Treatment Goals*, 65 J. AM. GERIATRICS SOC'Y 1712 (2017).

[69] Sheng-Yu Fan, Huei-Chuan Sung 2, & Shu-Chen Wang, *The Experience of Advance Care Planning Discussion among Older Residents in a Long-term Care Institution: A Qualitative Study*, 28 J. OF CLINICAL NURSING 3451 3455-3456 (2019); Tony Ryan & Jane McKeown, *Couples Affected by Dementia and their Experiences of Advance Care Planning: a Grounded Theory Study*, 40 AGING & SOC'Y 439, 457 (2020)

[70] *See* Deborah Carr & Dmitry Khodyakov, *Health Care Proxies: Whom Do Young Old Adults Choose and Why?*, 48 J. HEALTH & SOC. BEHAV. 180 (2007).

[71] Kristie Cramer, Holly Tuokko & David Evans, *Extending Autonomy for Health Care Preferences in Late Life*, 8 AGING NEUROPSYCH. AND COGNITION 213, 219 (2001) (while participants knew whom they wanted to make healthcare decisions on their behalf, only half had communicated their preferences, and, in most cases, this discussion did not involve their intended decision-maker).

preliminary study highlighted family considerations in CPoA execution, suggesting the tool's potential for promoting well-being and reducing intergenerational ambivalence.[72]

Regarding the possibility of abuse of the CPoA, existing research shows the significant involvement of surrogates in exploitation cases.[73] Family tensions and a principal's lack of understanding of the tool can contribute to such abuse.[74] Other identified risk factors for the financial exploitation of older persons include cognitive decline,[75] insufficient comprehension of the surrogate's role and financial decision-making processes, financial conflicts within the family, inadequate communication, surrogates experiencing pressure due to financial responsibilities, stereotypical assumptions about family and gender roles, and a sense of entitlement to the older person's assets.[76]

E. ATTORNEYS' AND OLDER PERSONS' INTERACTIONS

Understanding the execution of a CPoA in older age requires examining the complex interactions between older principals and the attorneys drafting these documents. Attorneys are guided by duties under the 1962 Legal Capacity and Guardianship Law[77], alongside general professional obligations.[78] While there is no "archetypal older client,"[79] legal services for older persons come with unique challenges.[80] Addressing these challenges can enhance older persons' societal and

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[72] see Doron & Doron, *supra* note 3; *see generally*, Kurt Luescher & Karl Pillemer, *Intergenerational Ambivalence: A New Approach to the Study of Parent-Child Relations in Later Life*, 60 J. MARRIAGE AND FAM. 413 (1998) (noting that intergenerational Ambivalence is a gerontological model, suggesting that family relationships naturally involve contradictory feelings and behaviors. The model captures complex realities, normalizing the coexistence of harmony and conflict in family relationships and linking personal experiences with macro-level processes); Ingrid Arnet Connidis, *Exploring Ambivalence in Family Ties: Progress and Prospects,* 77 J. MARRIAGE AND FAM. 77 (2015).

[73] *See generally*, Cory Bolkan, Pamela Teaster, Holly Ramsey-Klawsnik & Ken Gerow, *Abuse of Vulnerable Older Adults by Designated Surrogate Decision Makers*, 4 INNOV. IN AGING 702 (2020) (comparing to 8% of guardians and 7% of paid representatives).

[74] *See* Kelly Purser, Tina Cockburn, Cassandra Cross & Helene Jacmon, *Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study*, 48 BRI. J. SOC. WORK 887 (2018).

[75] Stelma-Rooda, *supra* note 33, at 4-6 (reviewing factors identified in research as associated with financial exploitation of older persons).

[76] Ries, *supra* note 33, at 363-66. Ries further notes that the studies on financial abuse of CPoAs focus on misuses that occur along a behavioral continuum, beginning with a surrogate acting carefully and fulfilling their duties. The abuse is typically described as unintentional and characterized by relatively minor shifts in behavior over time.

[77] *Legal Capacity and Guardianship Law* § 32.14, *supra* note 2.

[78] The Bar Association Act, 5721-1961, ch. 6, LSI 347 (1961) (Isr.); Israeli Bar Association Rules (Professional Ethics), 5746-1986, K.T. 4965, 1373 (Isr.).

[79] William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 ELDER L.J. 1, 4-6 (1994).

[80] *See* Meital Segal-Reich & Israel (Issi) Doron, *Legal Representation of Older Clients: Models for Resolving the "Who is the Client?" Ethical Dilemma* 51 HAPRAKLIT, 653 (2012)(Isr.); Adams & Morgan, *id*; Meital Segal-Reich, *The Older Client and Their Place in the Attorney-Client Relationship*, GERONTOLOGY & GERIATRICS 41 9. (2014)(Isr.)

familial status, strengthen attorneys' social commitment, and improve the profession's image.[81]

1. *Legal Needs of Older Persons and Accessibility to Legal Services*

The legal needs of older persons are varied and are often intensified by age-related factors, social expectations, and life transitions.[82] Common issues include guardianship, competence assessment, care facilities, trusts, long-term care planning, and estate planning[83], with a greater emphasis on prevention over problem-solving.[84] Notably, it was found that older persons are more likely to discuss healthcare preferences with attorneys than with doctors,[85] emphasizing the significance of legal consultations in executing planning tools.

Research on older persons' legal needs is limited but indicates that, despite significant needs, legal services for this demographic are often inadequate,[86] exacerbating their social and economic vulnerability and marginalization.[87] This gap stems from a lack of awareness, uncertainty about resource availability,[88] and a tendency not to seek legal help actively or challenge situations.[89] Additional barriers include skepticism toward legal systems,[90] stereotypes about attorneys[91], fear of generating family antagonism,[92] geographical and mobility issues,[93] financial concerns,[94] and cultural differences, particularly for ethnic minorities.[95] Findings specific to CPoAs indicate that execution costs present difficulties.[96]

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[81] Reich-Segal & Doron, *id*, at 657.
[82] Subhajit Basu & Joe Duffy, *Providing Legal Information and Advice to Older People: As Much a Question of Accessibility as Affordability*, 1 EUR. J. L. AND TECH. 1, 2–3 (2010).
[83]LAWRENCE A. FROLIK, *LATER LIFE LEGAL PLANNING,* in *THEORIES ON LAW AND AGING: THE JURISPRUDENCE OF ELDER LAW* 11 (Israel Doron ed., 2009).
[84] *See generally,* Wayne Moore, *Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach*, 41 EMORY L. J. 805, 812 (Summer1992); In Israel, typical legal issues for older people include inheritances, healthcare and financial planning, property transfers, social rights, consumer issues, and Holocaust survivor rights. Segal-Reich, *supra* note 80, at 14.
[85]*See generally,* Mercedes Bern-Klug & Elizabeth A. Byram, *Older Adults More Likely to Discuss Advance Care Plans With an Attorney Than With a Physician*, 3 GERONTOLOGY AND GERIATRIC MED. 1 (2017) (suggesting that this is due to the private nature of the attorney-client interaction and adequate discussion time).
[86] *See* Basu & Duffy, *supra* note 82; Adams & Morgan, *supra* note 84, at 11.
[87]*See* Basu & Daffy, *supra* note 82.
[88]Adams & Morgan, *supra* note 84, at 11; Basu & Daffy, *supra* note 82, at 18.
[89] Basu & Daffy, *supra* note 82, at 7, 18.
[90] *Id.* at 7.
[91]Adams & Morgan, *supra* note 84, at 11.
[92] *See* Basu & Daffy, *supra* note 82, at 7.
[93]*Id.* at 9; Adams & Morgan, *supra* note 84, at 12.
[94]Basu & Daffy, *supra* note 82, at 13; Adams & Morgan, *supra* note 84, at 24.
[95]Basu & Daffy, *supra* note 82, at 14.
[96] Doron & Doron, *supra* note 3, at 78; Close et al., *supra* note 57, at 8.

2. *Interactions Between Attorneys and Older Persons*

Research on attorney-client interactions with older persons highlights key aging-related characteristics. Some characteristics stem from individual aging experiences, while others relate to broader societal views on aging. A primary characteristic is the unequal power dynamic between attorneys and older clients, despite the conceptual agency relationship.[97] The complexity of legal processes and the attorney's expertise create an imbalance, with the attorney holding more power as the dominant party.[98] This dynamic is often amplified by social status disparities between attorneys and their clients.[99] Recent studies on executing CPoAs reveal older clients' significant dependence on drafting attorneys,[100] with notaries potentially influencing clients to grant broad powers to surrogates, sometimes limiting the clients' autonomy.[101] Aging characteristics and stereotypes further increase age-related disadvantages and existing power disparities.[102]

Another characteristic involves intergenerational gaps[103] and prevailing ageist stereotypes,[104] which can influence attorney-client interactions. These biases may lead to paternalistic behavior and disregard for older clients' wishes. Attorneys must be vigilant against such biases when representing older clients.[105] In this context, a study on the implementation of the amendment to the 1962 Legal Capacity and Guardianship Law found that 30% of participating attorneys expressed ageist views, supporting competence certification for persons over 85 executing a CPoA.[106]

Finally, age-related functional limitations require attorneys to adapt meeting environments that suit older clients. This includes accessible locations, ergonomic seating, good lighting, noise reduction, and clear communication using simple language and readable documents. These adjustments help ensure respectful and effective engagement with older clients throughout the legal process.[107]

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[97] Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 751-52 (2007).
[98] *Id.* at 752–53.
[99] *Id.* at 753.
[100] Doron & Doron, *supra* note 3, at 81.
[101] Stelma-Roorda & Eichelsheim, *supra* note 22, at 6.
[102] Adams & Morgan, *supra* note 84, at 20, 28.
[103] Reich-Segal & Doron, *supra* note 80, at 689.
[104] Adams & Morgan, *supra* note 84, at 8-9; Stolle, *supra* note 18, at 465, 478.
[105] Stolle, *Id.*; Adams & Morgan, *supra* note 84, at 20.
[106] Reznitsky et al., *supra* note 56.
[107] *See generally* Rebecca C. Morgan, *The Practical Aspects of Practicing Elder Law: Creating an Elder-Friendly Office*, 38 FAM. L.Q. 269 (2004).

3. *Ethical Dilemmas Involved in Providing Legal Services for Older Persons*

Legal literature identifies two main ethical dilemmas in serving older clients: client identity and legal capacity.[108] Client identity is critical as it defines the individual to whom the attorney's professional obligations are owed[109] and for whom the attorney acts. The identity dilemma arises from family involvement and the older person's role in the family.[110] Attorneys must balance the client's autonomy with potential family conflicts, especially when families manage the older persons' affairs because of age-related limitations. Family members frequently initiate consultations, attend meetings, and cover fees,[111] sometimes pushing for actions significantly affecting the older person's assets or finances. Attorneys must navigate these complexities carefully, as prioritizing the client's interests can strain family relations and undermine the client's wishes for family involvement.[112]

The competence dilemma affects both the attorney-client relationship and legal actions—such as executing a CPoA. While competence should be presumed,[113] doubts may necessitate professional evaluation.[114] The dynamic and action-specific nature of competence[115] further complicates this issue.

Despite significant research, there is a lack of interdisciplinary[116] studies on the dynamics among principals, families, and attorneys when executing a CPoA in older age, both globally and in Israel. Given attorneys' central role in this process in the Israeli context, this study explores CPoA execution from their perspective, considering the unique aspects of attorney-older-client interactions. This study examines drafting practices to better understand their contribution to promoting autonomy, fulfilling Preventive Law objectives, reducing intergenerational ambivalence and enhancing therapeutic benefits for older persons. It also explores the impact of these practices on the social and familial status of older individuals. Therefore, this research

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[108] Reich-Segal & Doron, *supra* note 80, at 661-662.
[109] *See* Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994).
[110] *See* Reich-Segal & Doron, *supra* note 80; Adams & Morgan, *supra* note 84, at 14-15.
[111] Reich-Segal & Doron, *supra* note 80, at 655; Collett, *supra* note 114, at 1461.
[112] Reich-Segal & Doron, *supra* note 80, at 674; Adams & Morgan, *supra* note 84, at 14.
[113] Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. REV. 54, 68 (1991).
[114] Reich-Segal & Doron, *supra* note 80, at 662; Adams & Morgan, *supra* note 84, at 20. Under Israeli law attorneys are required to refer the principal to an expert for a competency opinion if they have any doubts about the principal's competence to execute the CPoA. § 32.14.2, The 1962 Legal Capacity and Guardianship Law, *supra* note 2.
[115] Adams & Morgan, *supra* note 84, at 19; Kelly Purser & Karen Sullivan, *Capacity Assessment and Estate Planning-the Therapeutic Importance of the Individual*, 64 INT'L J. OF L. AND PSYCHIATRY 88, 89-90 (2019).
[116] Kohn et al., *supra* note 4, at 95.

provides a deeper understanding of CPoA execution in older age within family dynamics.

III. METHODOLOGY

A. METHODOLOGICAL FRAMEWORK

This study employs a qualitative phenomenological approach to examine attorneys' lived experiences[117] in drafting CPoAs for older persons under the 1962 Guardianship and Legal Capacity Law. Through a process of mutual reflection between participants and the researchers, the study uncovered the essence and meaning of these experiences, while minimizing presuppositions.[118] Specifically, the study utilized an interpretative phenomenological approach which suggested that understanding an experience often requires deeper exploration beyond initial interpretations.[119] This method involved a double hermeneutic process: Participants interpret their own experiences during data collection, and researchers then delve deeper into identifying underlying meanings and patterns. The approach emphasized caution in generalizing and staying closely connected to individual expressions of the experience.[120]

B. THE RESEARCH TOOL

The study employs semi-structured in-depth interviews, allowing participants to express their experiences, thoughts, feelings, attitudes and perceptions regarding the drafting of CPoAs for older persons.[121] The interview guide provided a structured framework while still enabling participants to share detailed and authentic accounts, which facilitated the extraction of meaningful insights related to the CPoA drafting process.[122] The interview guide—developed based on the literature review and research objectives— explored four key areas. The first, professional background, delved into how the attorneys' professional backgrounds influenced their approach to providing legal services, particularly CPoAs, to older persons. For example, attorneys were asked: "To what extent is providing legal service to older persons part of your day-to-day work?" The second, the CPoA drafting process, examined the drafting process itself, including its objectives, its steps, communication with clients and their families, and the challenges encountered. For example, attorneys were asked, " Describe a case where you drafted a CPoA for an older person." The third was the significance of drafting CPoAs for older persons. This area probed the

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[117] ROBERT SOKOLOWSKI, INTRODUCTION TO PHENOMENOLOGY 2 (2000).
[118] JONATHAN A. SMITH & ISABELLA E. NIZZA, ESSENTIALS OF INTERPRETIVE PHENOMENOLOGICAL ANALYSIS 17 (2022).
[119] Smith & Nizza, *supra* note 118, at 6-8.
[120] Smith & Nizza, *supra* note 118, at 8-9.
[121] *See* GENNIFER MASON, QUALITATIVE RESEARCHING 52-53, 62-75 (1996)
[122] *Supra* note 121, at 62-75.

significance that participants attached to drafting CPoAs, considering both personal and professional contexts. For example, attorneys were asked, " From your perspective, what is your role as a attorney in drafting a CPoA for an older person?" Lastly, the fourth area, insights and retrospective and prospective outlook, explored participants' reflections on past experiences as well as their thoughts on future practices. For example, attorneys were asked, "In your opinion, what specific considerations should attorneys prioritize when drafting a CPoA for older persons?"

The interviews were conducted in person and planned for an hour and a half each, striking a balance between encouraging thorough discussion and avoiding participant fatigue.[123] Each interview was transcribed promptly following its completion. The presentation of interview data in the findings chapter adhered to the principle of preserving the essence and content of each interview.[124]

C. Population and Sampling

The population of the study was Hebrew-speaking attorneys who had been certified to draft CPoAs under Israeli law and had drafted at least five CPoAs for older persons. We interviewed 16 attorneys, as presented in the participants' table below.

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[123] ASHER SHKEDI, WORDS OF MEANING 72 (2003).
[124] Shekdi, *supra* note 123, at 211-212.

Participants

Gender	Age	Areas of Practice[125]	Workplace
Female	47	Family Law, Inheritance, Civil Law	Private sector
Male	55	Older Persons Attorney	Private sector
Male	65	Law, Non-legal	Private sector
Female	53	CPoAs, Wills, Personal and Commercial Contracts	Private sector
Female	53	CPoAs, Wills	Private sector
Female	55	Family Mediation, Divorce, Wills, CPoAs, Prenups	Private sector
Female	42	Wills, CPoAs, Prenups and Shared Lives, Mediation	Private sector
Female	55	Family Law, Inheritance	Private sector
Female	59	Family Law, Inheritance, Guardianship	Private sector
Male	44	Civil Litigation, Real Estate, Labor Law, Inheritances and Wills, CPoAs	Private sector
Female	45	Real Estate, Intrafamilial Contracts	Private sector
Female	54	Attorney and Mediator	Private sector
Female	39	Civil Law, CPoAs, Inheritances and Wills, Real Estate	Private sector
Male	70	Real Estate, Inheritances and Wills, Commercial Law	Private sector
Female	46	Wills, CPoAs, Real Estate	Private sector
Female	44	Therapeutic Jurisprudence, Healthcare Law	Private sector, and nonprofit organization

[125] As defined by the participants.

D. Participant Recruitment

The study used purposeful sampling to select participants who could provide in-depth insights into the studied phenomenon.[126] The final sample size was based on theoretical saturation, with recruitment ending once no new significant information was uncovered during interviews.[127] Participants were recruited through postings on professional social networks and through direct outreach to acquaintances and colleagues. Two participants contacted the researchers after learning about our preliminary study.[128] Prospective participants were informed about the research objectives, assured of their anonymity, and asked to sign an informed-consent form. The study was approved by the Ethics Committee of the University of Haifa, No. 502/22.

E. Analysis Method

The data analysis followed a structured qualitative approach.[129] It began with a holistic reading of the interviews to gain an overall sense of the participants' experiences. The data were then systematically coded and categorized into themes by breaking down the text for detailed analysis. These coded segments were later reconstructed into a cohesive framework through theoretical conceptualization. Finally, the findings were cross-checked against the raw data to ensure they accurately represented the participants' experiences. This method provided a thorough understanding of the phenomenon while staying true to the participants' lived experiences.

F. Credibility

The study adheres to established principles of trustworthy qualitative research. Comprehensive documentation of all stages, including interview transcripts and analytical processes, was maintained. The report features rich data presentation with extensive direct quotations and detailed thematic connections. This approach allows verification that the findings and conclusions accurately represent participants' experiences and enables readers to independently evaluate the research outcomes' validity.[130] This rigorous methodology enhances the study's overall trustworthiness and credibility.

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[126] Michael Quinn Patton, *Two Decades of Developments in Qualitative Inquiry: A Personal, Experiential Perspective*, 1 QUALITATIVE SOCIAL WORK 261, 273 (2002).

[127] BARNEY G. GLASER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH 61-62 (1967).

[128] Doron & Doron, *supra* note 3.

[129] Lea Kacen & Michal Kromer-Nevo, מבוא לניתוח נתונים איכותני (*Introduction to Qualitative Data Analysis*), in ניתוח נתונים במחקר איכותני (Data Analysis in Qualitative Research) 1, 4-6 (Lea Kacen & Michal Kromer-Nevo eds., 2010).

[130] Shakdi, *supra* note 123, at 233. 235-36.

IV. FINDINGS

The research revealed four central themes informing attorneys' perspectives on drafting CPoAs for older persons: (A) providing legal services to older persons; (B) the attorney's engagement in drafting a CPoA for older persons; (C) the principal's engagement in executing a CPoA in older age; and (D) the family's engagement in executing a CPoA in older age.

A. PROVIDING LEGAL SERVICES TO OLDER PERSONS

The first central theme extends beyond solely CPoA execution, highlighting various aspects of providing legal services to older persons. Three sub-themes reflect the participants' experiences in offering these services, especially when drafting a CPoA.

1. *Providing Legal Services to Older Persons as an Area of Expertise*

The first sub-theme highlights the emerging specialization in legal services for older persons. Participants emphasized that providing legal services to this demographic, particularly in drafting CPoAs, necessitate a multidisciplinary approach beyond mere legal expertise. They stressed the importance of understanding aging's various facets, including gerontological, medical, and social aspects. This perspective was exemplified by one participant who stated: "I think that, in its essence, it is a very interdisciplinary field. And when I provide legal services to older persons, I can't help but know, or try to understand, the medical aspects that exist, the geriatric aspects, the gerontological aspects, relationships within a family."[131]

This participant and others noted that older persons have different worries and concerns compared to younger ones, highlighting the need for attorneys to engage in ongoing professional development to effectively serve this group. In this context, all interviewees indicated that legal services for older persons constitute a significant part of their work, with one of them exclusively identifying as a attorney for older persons.

Another aspect of this sub-theme is the notion of comprehensive legal planning for older age. Most participants reported that when advising older persons on a CPoA, they offer broader guidance on preparing for the challenges of later life. They reported conducting comprehensive assessments of their older clients' preparedness for later life to ensure both the client's peace of mind and consistency among various legal planning tools.

2. *Characteristics of Providing Legal Services to Older Persons*

The interviews revealed distinct characteristics of providing legal services to older persons. Participants largely agreed that advising

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[131] Interview No. 16.

older persons requires more patience, attentive listening, and empathy than advising younger clients. They reported that consultations with older persons tend to be longer and often encompass personal narratives. As one participant articulated:

> We need more patience, humanity, and caring because these are not meetings that tick by in half an hour. You can't. They talk about their lives, their grandchildren, their children, and their travels abroad. It's more personal and human than, like, the young people who are: "OK, come on, we are here. Give me a 7-minute executive summary, and let's get out of here." [132]

Participants noted the need to gently steer conversations back to relevant legal matters without rushing the client. They also reported the frequent need to repeat explanations due to various challenges associated with advanced age and the complexity of legal issues. One participant observed:

> They often forget things they were told. I mean, let's say in the second meeting or after a draft comes out, they don't understand something, and I say, I remind you that we talked about it. You know, a lot of people don't have patience: "What? We talked about it, like what do you want?" So, I understand there is nothing to do. Part of this is also short-term memory. In older people, it is always less good. And part of it is simply because it's a lot of things.[133]

Empathy and patience are also crucial because these consultations often involve discussing difficult topics and undesirable future scenarios. As one interviewee explained, "Everything is not simple because [older clients] talk about things that are very relevant at this phase, such as the fear of death, diseases, the activation of the power of attorney, and loss of lucidness. These are things that bother them."[134]

Some participants stated that providing legal services to older persons requires both professional and personal maturity. They suggested that younger attorneys might struggle to fully understand the complexities of aging, which often fall outside their life experience. These characteristics of providing legal services to older persons led many interviewees to see their role as extending beyond traditional legal practice, incorporating elements of psychological and social work. As one participant expressed, "You're not just a attorney. You're their psychologist, you're the social worker, and I think there's crying in almost every meeting. Really. If it's about the very sensitive document that needs to be drafted, and if it's also suddenly a family story that comes up." [135]

[132] *Id.*
[133] Interview No. 2.
[134] Interview No. 6.
[135] Interview No. 7.

Another key characteristic frequently cited by the participants was the need to make legal services more accessible to older clients, given potential physical and cognitive limitations. This includes reading documents aloud, simplifying legal terms, speaking louder, and assisting with technical tasks like printing documents. Many participants offered to visit clients' homes to draft a CPoA, acknowledging the potential difficulties older persons may face in traveling to an office. Participants also reported tailoring their explanations about the CPoA to account for early cognitive decline.

Lastly, interviewees noted that providing legal services to older persons often involves other family members. Some explained that, for older clients, having family present can provide a sense of security. Additionally, the involvement of family members designated as surrogate decision-makers under the CPoA was considered essential since they would eventually carry out the principal's wishes if the document was activated.

3. *Characteristics of Drafting a CPoA*

The third sub-theme highlights the unique characteristics of drafting CPoAs within the broader context of legal services for older persons. First, all interviewees noted that the CPoA's novelty contributes to uncertainty in drafting and implementation once activated. They mentioned significant variations among attorneys in drafting practices—such as the number of consultations required, the scope of resolutions included, fees, and advice given. Advice particularly varied regarding financial matters—like bank activities, investments, and gift-giving authority. Many of the participants emphasized the lack of consistent procedures among financial institutions for honoring CPoA instructions, which make it difficult for attorneys to draft documents that provide the necessary future certainty. This challenge led many interviewees to warn principals that their surrogates might face difficulties when the CPoA is activated. Additionally, some mentioned the ongoing adjustments in the Guardian General's guidelines as further challenging the drafting process, and expressed concern that the continuously evolving guidelines might require re-execution of already-signed documents. This concern seems to be particularly significant for "silent" CPoAs, which lack explicit advance directives for surrogate decision-makers.

The interviews revealed that attorneys rely on professional social networks like WhatsApp and Facebook for peer consultation and collaborative learning to navigate current legal uncertainties. Additionally, participants reported an ongoing dialogue between attorneys and the Guardian General authorities at the Ministry of Justice to address ad hoc, emerging issues.

Additionally, the interviews revealed a heightened sense of professional responsibility in drafting CPoAs for older persons, given the tool's role in transferring decision-making authority when the principal lacks capacity. One interviewee emphasized the magnitude of this responsibility: "The main thing is that I can't make mistakes. In this type of document, if there's a mistake, the person won't be here, competent and lucid, to correct it. If you make an error, they suffer the consequences. So, you can't take any risks." [136]

Consequently, participants stressed the importance of thorough and up-to-date legal knowledge, clear communication with clients about the legal issues involved, prompt preparation of the documents, and anticipation of various future scenarios relevant to the unique familial dynamics of each principal. They also expressed concerns about unforeseen circumstances that the CPoA might not adequately address. Given this significant responsibility, interviewees highlighted the importance of the mandatory training requirement and subsequent optional programs for attorneys drafting these documents.[137]

Third, the interviews exposed the crucial role of advance directives, often described as the core of the CPoA. All interviewees stressed the need to meticulously tailor these directives to each principal's specific wishes, needs, and circumstances. Interviewees also argued that failing to include comprehensive advance directives means the attorney is not fulfilling their professional duty. One interviewee illustrated this point:

> Do they support one of the children? Does one of the children have a limitation that requires financial assistance from the parents, and do they want to continue this support, yes or no? It should be documented. For me, the heart of a CPoA is the advance directives. A attorney who drafts a CPoA without advance directives has not done their job. It's clear to me. They didn't ask the right questions. They didn't understand the purpose of the document. [138]

This interviewee further stressed that omitting advance directives undermines the law's intent to prioritize the individual's wishes, forcing surrogates to make decisions based solely on what they believe to be in the principal's best interest.

Participants highlighted that crafting advance directives requires a comprehensive understanding of the principal's personal narrative to accurately reflect the principal's intentions and values. Participants reported that eliciting the principal's family narrative was integral to achieving such an understanding in the CpoA-drafting process. All interviewees mentioned that they conduct extensive inquiries into the principal's life, family history, and intrafamilial dynamics. Special emphasis is placed on scrutinizing familial dynamics that may precipitate future conflicts and on safeguarding the principal

[136] *Id.*
[137] This requisite represents a unique requirement within the Israeli legal landscape. It calls for attention to this domain's distinctive challenges and ethical considerations.
[138] Interview No. 9.

from possible abuse of the CPoA. Another strategy mentioned involved conducting the initial consultation at the principal's residence. Several participants noted that meeting in the principal's home creates a more relaxed and intimate atmosphere, encouraging open discussion about family relationships and personal preferences. This strategy reportedly provides more comprehensive information, helping the attorney better represent the principal's interests in drafting the CPoA.

B. The Attorney's Engagement in Drafting a CPoA for Older Persons

The second central theme focuses on the attorney's engagement in drafting a CPoA for older persons. This encompasses the motivational factors driving their engagement, the challenges of accurately documenting principals' wishes and preferences, the attorneys' role as gatekeepers of the principal's capacity, and the perceived significance of their involvement in this process.

1. *Motivational Factors for Drafting CPoAs for Older Persons*

The interviews revealed various motivations of attorneys for drafting CPoAs for older persons. Some participants conceptualized this practice as a form of social calling, citing this altruistic perspective as a primary impetus for their work. In this context, participants emphasized the perceived psychological benefits of the CPoA execution process for principals, enhancing their sense of well-being and security. Several interviewees elaborated that the comprehensive compilation of financial information required for CPoA drafting helps principals organize their personal affairs, fostering a sense of order and control in their lives. Additionally, personal experiences with loss of capacity in close family members drove some attorneys' engagement, as they shared these narratives to highlight the benefits of CPoAs in reducing bureaucratic challenges and promoting peace of mind.

Some participants identified intrinsic satisfaction as a significant motivational factor, attributing it to the engaging nature of consultations with older principals, the opportunity to develop a profound understanding of their clients, and exposure to positive familial dynamics during and after the process. Several interviewees contrasted this practice domain with the emotional strain typically associated with adversarial legal proceedings.

Lastly, some participants cited financial considerations as a motivator, explaining that the CPoA-drafting process is generally accomplished within a relatively brief timeframe compared to other legal matters. Furthermore, they noted that the comprehensive nature of the tool—intersecting with various aspects of life (including guardianships, wills, familial relations, and asset distribution)—facilitates the identification and articulation of its necessity to potential clients, leading them to utilize methods like lectures to raise awareness among the general population.

2. *Articulating the Principal's Wishes*

All interviewees emphasized the paramount importance of accurately articulating the principal's wishes when drafting a CPoA. Several interviewees conceptualized the CPoA as a tool embodying human dignity and personal autonomy, yet participants also identified the process of discerning the principal's authentic volition as a primary challenge, necessitating a nuanced understanding of the individual and familial dynamics within which they operate. Interviewees reflected on two aspects of this challenge. First, they discussed the matter of identifying the principal's genuine wishes and distinguishing them from the potentially divergent desires of family members. One of the interviewees noted, "This requires us to be extremely sensitive to the family dynamics, ensuring there is no exploitation, abuse, or coercion of the individual." [139]

Second, interviewees spoke about identifying and resolving internal conflicts within the principal's expressed wishes. Another interviewee explained:

> [T]here was a man in his eighties, married to a young woman my age. When I asked him where he would like to stay if, God forbid, he was not lucid, he said he didn't want to be a burden, so he preferred to be taken to a nursing home. I told him to wait and not think about being a burden. I asked him to close his eyes and think about where his heart would feel most comfortable if he were not lucid. He then said, of course, at home. So[,] we agreed: he would like to stay at home, but if, despite the help of a caregiver, he becomes a heavy burden, or if intensive hospital care, doctor visits, re-hospitalizations, etc., are required, then he entrusts [his family] to decide on a nursing home. [140]

Here, interviewees reported presenting principals with comprehensive overviews of available options and their legal implications. Some indicated that they may offer their professional opinion on these options; however, they all stressed that the ultimate decision-making authority rests solely with the principal. Interviewees often reported conducting initial consultations privately to ascertain and uphold the principal's genuine wishes. However, several interviewees noted that older clients often prefer the presence of a trusted companion.

Another challenge related to articulating the principal's wishes is ensuring the CPoA's practicality and ease of implementation. This requires balancing a client's desire to have their directives cover every preference and avoiding overly complex instructions that could impede a surrogate's actions. Interviewees reported sometimes needing to alert principals about potential challenges their appointed surrogates might face in fulfilling certain requests.

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[139] Interview No. 4.
[140] *Supra* note 134

3. *The Attorney as the Gatekeeper of the Principal's Capacity*

Israeli law requires attorneys drafting CPoAs to be certain of the principal's competence to execute the document.[141] This emerged as a significant topic in the interviews, highlighting the attorney's role as a gatekeeper of the principal's capacity. Most interviewees reported beginning their assessment of capacity during initial telephone contact, engaging in brief conversations to gauge the principal's understanding and autonomy in decision-making. Even when initial contact was made through family members, attorneys insisted on direct communication with the principal. Attorneys' judgment of competence involves asking the principal questions about personal and familial circumstances and assessing the principal's engagement and ability to answer life-related questions, and the overall ease of conversations.[142] However, interviewees also acknowledged limitations of their ability to assess competence definitively, as one participant explained:

> You know, attorneys are ordinary people; they don't have psychological or psychiatric training, nor is there an expectation for them to sit down with someone and provide a diagnosis in five minutes. Ultimately, it's about getting a general impression to see if the person is lucid and understands you. I ask fairly simple questions, and if they struggle with those, I understand I cannot proceed with them. [143]

Two interviewees revealed their reservations about the attorneys' role as the arbiters of the principal's competence, particularly in complex scenarios in which medical opinions and attorneys' assessments diverge.

The interviews also revealed the convenience of obtaining medical opinions that assess the principals' capacity. About half the participants adhered to an "if there is doubt, there is no doubt" approach, routinely referring to medical opinions in cases of uncertainty. Reasons for referrals included previous psychiatric treatment, family reports about the principal's increased forgetfulness or confusion, and potential family conflicts. One interviewee explained that she would ask for a professional opinion in instances where the explanation of the document proves challenging, even if the principal appears competent. Another interviewee reported asking for such an opinion when the principal was approaching ninety years old and had hearing difficulties. Notably, some interviewees emphasized that age alone does not determine competence. Two participants noted the limitations of medical opinions,

[141] § 32.14.2, The 1962 Legal Capacity and Guardianship Law, *supra* note 2.

[142] Concurrently, some interviewees emphasized the necessity for cautious interpretation of cognitive indicators. These interviewees stressed the importance of not hastily equating instances of confusion or forgetfulness with incompetence, particularly in the context of the potential future activation of the CPoA.

[143] Interview No. 10.

stressing that attorneys retain responsibility for ensuring the principals' comprehension of the CPoA even with positive medical assessments.

4. *The Attorney's Perceived Significance in Executing a CPoA in Older Age*

Participants emphasized three key aspects of their professional contribution: proactivity, facilitating discourse about the older person's wishes, and navigating the document's complexity and implications.

Interviewees explained that principals often lack comprehensive knowledge of what can be included in the CPoA. Therefore, they adopted a proactive approach[144], using self-developed questionnaires to broach diverse topics by presenting principals with considerations they may not have contemplated, thereby prompting more thorough cognitive engagement with the subject matter. As one interviewee stated:

> Most of my clients arrive with very limited ideas about who will handle the money and medical matters, usually focusing on who will be responsible for the money. I then introduce them to other relevant considerations, such as whether they want to receive treatment at home or elsewhere, and their preferences for advanced end-of-life care… I also discuss what will happen when one partner needs to stay and care for the other, recognizing that the remaining partner may not always be able to do so. I raise questions about relationships, which they often don't understand. They have a simple concept of a will: take the money, divide it among the children, and that's it. They wonder why it's important to consider their relationship with their son or daughter-in-law and how this affects the power of attorney. [145]

Some participants further indicated that they often provide guidance to principals in their decision making process to facilitate future implementation of the CPoA. One interviewee suggested that this proactivity contributes to the principal's sense of security and well-being, stating, "I think that the more the attorney addresses various issues, bringing them up as needed (not always it is necessary to bring up [things]), the more protected you feel. Because, wow, I dealt with this issue; I dealt with that issue, you know?" [146]

Participants also highlighted the attorney's role regarding the older person's preferences, as a facilitator of discourse. These participants noted that executing a CPoA provides an opportunity to

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[144] The attorneys' pattorneys' proactivityis also reflected when drafting a CPoA, when they take the opportunity to provide older clients with comprehensive legal planning for older age, as detailed in the first theme.

[145] *Supra* note 136

[146] Interview No. 13.

discuss age-related issues and end-of-life decisions often avoided in everyday conversation. Some interviewees indicated that they perceive this aspect of their role as one of their primary objectives when drafting CPoAs for older persons. As one interviewee stated: "This is an opportunity to come and say what is important to you, who you would like to make decisions, how decisions should be made, so this is the great value I see in this. Now, I'll tell you something personal: my parents recently made a CPoA, which is also funny because I always say (when I talk to people or give lectures about the CPoA) that this is not an easy process. And I say, I've been doing this for six or seven years, and I haven't had this conversation with my parents . . . I know today what is important to ask, and I couldn't do it. Until they finally said: we must do it. They took a attorney, and then we sat together, and there was an opportunity to talk about some of these things. So, I often feel that this is my place." [147]

Some interviewees also observed that principals occasionally used them as intermediaries to communicate preferences that might face resistance or lack of empathy from family members.

This subtheme's final component addresses the CPoA's complex and wide-ranging effects on principals' lives. Interviewees noted the CpoA's intricate legal provisions make it difficult for nonattorneys to understand. Moreover, the document requires decisions that have significant legal implications across multiple life domains. Concerns about potential abuse add to this complexity. Participants suggested that without a attorney's guidance, there is a risk of creating inadequate or exploitable documents.

One interviewee offered a contrasting view, suggesting the CPoA invites a participatory socio-psychological discourse potentially incongruous with attorneys' adversarial approach. This perspective proposed a reassessment of attorneys' involvement if the tool were simplified.

C. The Principal's Engagenent in Executing a CpoA in Older Age

This third central theme focuses on the principal's involvement in the process. It encompasses the principal's status as the client, the nature of the attorney—principal relationship, and the principal's cognitive and emotional processes.

1. *The Principal Is the Client*

Participants unanimously agreed that the principal is the sole client when drafting a CPoA, with most explicitly stating that surrogate decision makers are not considered clients. Consequently, attorneys

[147] Interview No. 12.

focused on collaborating with principals to understand their needs and preferences, often clarifying this relationship to surrogates, as exemplified by one participant's statement: "Sometimes the surrogate decision-makers themselves call you, asking why this and why that. I try to explain to them that, with all due respect, you are not the client. The client is the parent. This is what they wanted." [148]

Recognizing the principal as the client shaped the attorneys' efforts to protect their interests throughout the process. Participants stressed the need for protective mechanisms to prevent potential abuse by surrogates, such as appointing multiple surrogates for mutual oversight; limiting surrogates' powers, particularly in financial matters (some interviewees reported advising principals against granting surrogates the authority to make loans or donations); and designating someone to monitor the surrogate's actions under the CPoA.

2. *The Nature of the Attorney-Principal Relationship*

The attorney-principal relationship is another key focus of this theme. As one interviewee observed, "You are writing your soul into the document, so you need to connect with the person sitting in front of you." [149]

That said, interviewees acknowledged their initial outsider status in the process, recognizing the difficulty that principals face when sharing personal details with an unfamiliar individual and the apprehensions that may manifest when engaging with attorneys. To build trust, participants reported employing strategies like offering services at the principal's home, allowing family participation during initial meetings (if desired) and fostering open dialogue before discussing CPoA specifics. They emphasized transparency and the assurance of attorney_client privilege to encourage openness. Additionally, some preferred informal settings for the CpoA-signing meeting to promote comfort among all involved.

Some participants emphasized the importance of ensuring a positive experience for principals, focusing on humanity and sensitivity beyond legal outcomes. Two participants highlighted the need to maintain professional boundaries, noting that while a close rapport often develops, attorneys must remember their professional role and avoid crossing into personal territory.

3. *The Principal's Cognitive and Emotional Processes*

The third subtheme focuses on the various aspects of the principal's cognitive and emotional processes throughout the document's execution. Interviewees identified several motivations for older persons to execute a CPoA, including avoiding guardianship,

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[148] *Supra* note 143
[149] *Supra* note 135

managing healthcare decisions, asserting autonomy, easing family burdens, and reducing future uncertainties. Social influence and peer recommendations also played a role, with many interviewees pointing out that older persons expressed interest in executing a CPoA after hearing about it in social circumstances. Besides those reasons, interviewees also mentioned that the substantial costs associated with the process often serve as a deterrent to executing the tool. In this respect, participants noted that many underestimate the complexity and extent of legal work required for an effective CPoA.

Second, the interviewees further revealed the challenges faced by older principals during the process when required to confront scenarios of vulnerability, as one interviewee explained: "First and foremost, asking for help—coming and saying, acknowledging that you need the help of someone. That, and being open to someone interfering in your life. It's a huge challenge. And also asking for help from your close ones to come and assist you if something happens to you. Because for many people, it's not self-evident, not receiving help, and more so, not asking. The request, there's something in the request, in "I need", that expresses weakness, vulnerability, sensitivity, which people don't like, we all, each in our own way, don't like to expose ourselves to these things." [150]

Another interviewee noted that the process necessitates making immediate decisions about future scenarios, which some principals also find difficult. Consequently, many older persons require time to acclimate to the CPoA concept and process. This adaptation period can extend the execution process, making it challenging for attorneys to balance completing the task promptly with ensuring the client's readiness.

Another significant obstacle for principals is the document's complexity. The CPoA's length and legal language often result in physical and mental fatigue, as one interviewee explained: "Reading six pages is physical fatigue. Okay? And there was one who said: Leave it. I don't want to. Too much written, I don't understand what you want. What are these sentences?"[151]

This interviewee mentioned that some documents have been delayed for several years as principals find it hard to handle the document's complexity. Other interviewees pointed out that this complexity is also challenging for surrogate decision-makers and suggested simplifying the tool to make it more accessible. Additionally, the technical aspects, like gathering and organizing personal financial information, were reported as adding further burden for many older clients. To address the complexities of the CPoA, two interviewees

[150] *Supra* note 139.
[151] Interview No. 3.

reported a policy of creating a supplementary document, signed by both parties, confirming that the attorney explained the CPoA or that it reflects the principal's wishes, to prevent misunderstandings and potential complaints against the attorneys.

Another aspect of the principals' challenges, as revealed by interviewees, was that principals often struggle with the need for control and certainty during the CPoA process. This manifests through principals constantly seeking detailed information about timelines, stages of the process, and activation mechanisms. Some principals try to manage future uncertainties by creating overly exhaustive advance directives despite the practical limitations of this approach.

Finally, analysis of the interviews found that the process has significant therapeutic benefits for principals. Participants reported that upon completion, principals often feel peace of mind, security, and empowerment, believing they have taken an important step for themselves and their families. Many interviewees noted that they intentionally focus on giving the principals visibility and a voice, as one said, "Within the process itself, the person feels important, wanted, and that their position is decisive."[152]

This sentiment highlights the psychological value of the principal's active participation. The attorney's approach, which respects the principal's wishes and encourages surrogates' adherence to these preferences, fosters the principal's sense of importance. Thus, the attorney's support of the principal's agency and decision-making authority closely relates to the therapeutic benefits of the process.

D. The Family's Engagement in Executing a CPoA in Older Age

The fourth central theme informing attorneys' perspectives focuses on familial engagement in drafting the CPoA. This includes when family members initiate the CPoA execution, trust as a prerequisite for executing a CPoA, family participation in the drafting process, and executing a CPoA as a potential trigger for intergenerational conflict.

1. *When Family Members Take the Initiative*

The interviews indicate there are times when the initial contact with the attorney is made, not by the older person who will execute the CPoA, but by their family members. This often happens when the principal is very old or when family members notice a decline in the principal's abilities. Nearly all interviewees stressed the need for caution when someone other than the principal makes first contact. As

[152] *Id.*

one interviewee noted "[i]n cases where a child reaches out instead of the parent, there could always be some hidden motive."153

Such situations may indicate potential familial exploitation, as one interviewee described: "A woman came to me, the daughter—I never even met the principal—and [the daughter] was very involved in her [mother's] account, doing all sorts of things with Social Security and other stuff. [The daughter] asked me to write all sorts of things, and there was the issue that her mother didn't speak Hebrew at all, only Russian. I told her upfront that if we proceed with the power of attorney, there needs to be an external translator, not a family member. She kept insisting that she would translate, and I felt it wasn't right. I ended the process before even meeting the mother."[154]

The interviewees indicated that even if exploitation isn't suspected, the family initiative raises concerns about the older person's cognitive status and ability to execute the document. To address these issues, interviewees reported asking targeted questions to assess the principal's cognitive state, understand why they weren't initially involved, and identify close family dynamics. Interviewees further emphasized their practice of transitioning to direct communication with the principal after the initial contact to ensure the principal understands the CPoA and is willingly executing it.

2. *Trust as a Prerequisite for Executing a CPoA*

Almost all interviewees emphasized that a CPoA relies on trust between the principal and their immediate family members, who are typically the chosen surrogate decision-makers.[155] Trust is critical—both in choosing the surrogate and in defining the powers granted to them. As one interviewee explained: "I explain to the principal when they choose their surrogate decision-maker and when they talk to me about their wishes: Think about it as if you own a company and you appoint a CEO. The CEO doesn't just clock in, right? You trust them. It's a position of trust. You want them to bring the company to the best results. So now apply this to yourself, and you want someone you trust completely. If you have the slightest doubt, don't appoint that person because the purpose of the CPoA is to provide peace of mind. So, if that surrogate doesn't give you peace of mind, don't appoint them."[156]

The interviews indicated that selecting a surrogate decision-maker is a critical decision for the principal when executing a CPoA, with attorneys playing a key role in guiding this choice. Thus, interviewees often advise appointing not only the spouse of the

[153] *Supra* note 133.
[154] Interview No. 11.
[155] Two interviewees noted that a request to appoint surrogates outside the immediate family circle would be perceived as atypical and necessitate further inquiry to understand the rationale behind it.
[156] *Supra* note 135.

principal, but also their children. This is because the CPoA is future-oriented, and spouses—often being close in age—may struggle with the role's demands when activated. Therefore, it is often essential to assess the principal's trust in their children.

Proponents of appointing all children cite benefits— such as reducing potential conflicts, creating checks and balances, and sharing decision-making burdens, especially for difficult decisions, like moving a parent to a care facility. One interviewee noted that joint decision-making by all children is appropriate for decisions affecting the parent's quality of life and longevity. However, interviewees also acknowledged the delicate balance required when principals are hesitant to appoint all their children. As one participant explained: "Not every family is harmonious. And not every child. I mean, it's true that bankrupt individuals are prohibited from being appointed as surrogate decision-makers for property management, but there are those who are not bankrupt but have files in the Law Enforcement and Collection System Authority or have holes in their pockets."[157]

The trust required in defining the scope of powers granted to surrogates was also highlighted. Some interviewees warned against overly specific advance directives, suggesting that appointing trusted surrogates should allow for broader powers, enabling the surrogates to act more easily and efficiently.

3. *Family Participation in the Process*

The interviews indicate that family involvement, especially from prospective surrogates, is essential when executing a CPoA. This is due to the need for their consent to assume the role[158] and their future responsibility in implementing the principal's directives once the CPoA is activated.

Interviewees generally preferred involving family members after understanding the principal's wishes. Some expressed concerns about excessive family involvement, emphasizing the need to balance family participation with the principal's autonomy. As one participant stated: "I want them to strengthen their own thinking because the children can sway them, which is legitimate. It's always a question of influence. Influence, as we are taught, is acceptable in will law, as this is akin to a living will versus a non-living will, right? Influence is allowed. Undue influence is prohibited. Influence is not a bad word. But first, they need to know what they want. Therefore, the primary work is to consolidate with them, both verbally and in writing. After that, make any changes you want."[159]

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[157] *Supra* note 136.
[158] § 32.14.4, The 1962 Legal Capacity and Guardianship Law, *supra* note 2.
[159] Interview No. 14.

The interviews also uncovered valuable contributions to family engagement in the process, including raising overlooked issues, assisting with technical aspects, and facilitating discussions about the principal's wishes.

Interviewees additionally stressed the importance of securing family support for the principal's wishes for the implementation of the principal's directives. They emphasized mediating the principal's desires to family members, to minimize resistance and foster respect for these wishes. Finally, interviewees pointed out that when appointing multiple surrogates, it is crucial that they understand their responsibilities as outlined in the CPoA and demonstrate the ability to cooperate. Without such understanding and collaboration, the principal's intentions may be undermined when the CPoA is activated.

4. *Executing a CPoA as a Potential Trigger for Intergenerational Conflicts*

All participants observed that executing a CPoA can expose hidden family issues and cause conflicts. These conflicts may stem from various sources, such as financial inequalities, emotional tensions, disparate expectations of involvement among adult children, and disagreements between surrogates. Some interviewees suggested that CPoAs are best suited to families without pre-existing conflicts, as in contentious family environments CPoAs may serve as a premature catalyst for inheritance disputes.

All interviewees viewed conflict prevention as an integral part of their role. Their primary strategy involved early identification of potential friction points through comprehensive information gathering about the principal and their family dynamics. This allowed for targeted preparation and tailored solutions in advance. Interviewees stressed that depending on the specific familial dynamics, analogous circumstances could precipitate diverse conflict; therefore different preventive strategies were necessary. Preventive measures to address potential familial conflicts included establishing decision-making protocols among surrogates to address potential future disagreements, requiring collective decisions for significant matters, and advising principals against granting surrogates the authority to make donations or loans.

Notably, certain interviewees remarked that, while striving to prevent future conflicts, they do not perceive their role as family dispute resolvers. Others advocated addressing issues openly, as one participant said: "It's better than having things remain beneath the surface, because they will emerge. In my worldview and experience, things hidden under the rug are just there, brewing beneath. I always say it's better to bring them out in a protected environment. Let's talk about it. Let's talk first with the parents and then maybe with the children about the jealousy between the children. Can cooperation be achieved? Add a dispute resolution clause. You tell me—these are your children. You tell me how you want them to resolve conflicts. And it calms them. I see it as part of my work."[160]

These interviewees emphasized that drafting a CPoA could exhibit characteristics akin to mediation. Nonetheless, some interviewees emphasized the importance of maintaining clear boundaries, noting that attorneys are not therapists and that the CPoA itself should not be misconstrued as a therapeutic tool.

V. DISCUSSION

Existing literature highlights the CPoA's therapeutic potential as a legal-planning tool.[161] The current study explored the execution of a CPoA in older age from the perspective of the attorneys who draft these documents—revealing their importance in shaping the process. This understanding can help identify legal practices that enhance the therapeutic benefits of the tool.

The findings suggest that attorneys drafting CPoAs for older persons operate within a multidimensional arena where the principal, law, and the surrogate decision-makers intersect. To draft a CPoA that best serves the older principal, attorneys must navigate not only legal principles and regulations but also gerontological aspects related to family dynamics. This interdisciplinary and multidimensional perspective aligns with the principles of the Multidimensional Model of Law and Aging,[162] which explains how laws advance the status of older persons by examining the various legal dimensions within which laws function.[163]

Discussing the findings through the lens of the Multidimensional Model enables a comprehensive examination of how the attorney may contribute to enhancing the status and well-being of older persons. Each dimension of the attorney's role maintains its own focus while simultaneously interacting with the other dimensions, and the attorney navigates these dimensions fluidly throughout the document's drafting process. We identified six dimensions in which attorneys operate when drafting CPoAs for older persons.

A. THE LEGAL PRINCIPLES DIMENSION

This dimension forms the foundation of the model and encompasses the fundamental tenets that underpin every legal system. These principles are broad, constitutional ideas applicable to a diverse

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160 Interview No. 9

161 Doron & Doron, *supra* note 3, at 78-81; Kapp, *supra* note 25; Fleischner, *supra* note 25.

162 Generally, Israel Doron, *A Multi-Dimensional Model of Elder Law, in* THEORIES ON LAW AND AGING: THE JURISPRUDENCE OF ELDER LAW 59 (Israel Doron ed., 2009).

163 *Id.* at 72.

array of legal issues within the given system.[164] The cornerstone legal principle underlying the CPoA is personal autonomy.[165] In Israel, the CPoA was included in the law as part of a broader reform of the Legal Capacity and Guardianship Law, emphasizing individual choice over perceived best interests.[166] This dimension incorporates the legal praxis of document drafting, intrinsically linked to the articulation and actualization of the principal's autonomy.

The findings suggest that the attorneys viewed this dimension as not only fundamental to document drafting, but also as a primary challenge. A key difficulty was identifying the principal's authentic will, especially in family contexts. Strategies outlined by interviewees show a legal practice that prioritizes finding the appropriate balance between the principal's personal will and consideration of family influences within the broad spectrum of the notion of personal autonomy.[167] Interviewees emphasized the importance of articulating the principal's authentic will and the authority of their convictions throughout the process while also acknowledging the role of family members. This reflects a person-centered relational approach to autonomy[168], thus integrating liberal personal autonomy with relational-dependent autonomy and highlighting the importance of social connections in supporting autonomy. It also fosters environments in which individuals feel recognized and valued.[169]

This approach is exemplified by the unanimous emphasis on advance directives, implementing practices for gaining a holistic view of family dynamics and understanding the principal's personal narrative to reflect their wishes accurately. Furthermore, the findings suggest the therapeutic implications of executing a CPoA in older age, which stem from the visibility and voice given to the principals and from the attorneys intentionally cultivating an environment that facilitates these therapeutic consequences.

An additional aspect of this challenge relates to the principal's inevitable dependence on their surrogates if the CPoA is activated. Harding explains that autonomy only encompasses the right to make decisions, not their implementation.[170] However, our findings indicate that attorneys see it as their duty to ensure the principal's wishes are both expressed and carried out. This expands their role beyond the

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[164] *Id*. at 59-60.
[165] See above, chapter I(A) of this article.
[166] *Draft Bill for the Legal Capacity and Guardianship Law, supra* note 43.
[167] *Supra* note 152.
[168] *Generally*, Rosie Harding, *Legal Constructions of Dementia: Discourses of Autonomy at the Margins of Capacity*, 34 J. OF SOC. WELFARE AND FAMILY L. 425 (2012). (While Harding's discourse focuses on individuals with dementia, the principles elucidated in her work regarding individual autonomy in decision-making processes are deemed broadly applicable and pertinent to our case).
[169] *Id*. at 432-433.
[170] *Id*. at 429.

dimension of core legal principles, particularly in securing the principal's family support for the principal's wishes.

B. The Protective Dimension

The protective dimension focuses on the legal system's response to safeguarding older people from challenges such as poverty, exploitation, or neglect.[171] For the CPoA, this dimension is crucial because of the tool's vulnerability to abuse. Concomitant with various legislatively regulated protective measures for the principal,[172] attorneys drafting CPoAs view the protection of older principals as an integral component of their role.

First, interviewees unanimously view the principal as the sole client when executing a CPoA. This distinction is crucial, given that legal services for older persons often involve other family members. The involvement of family members designated as surrogates in executing CpoAs is legally required[173] and necessary for implementing the principal's wishes. However, by defining only the principal as client, attorneys established their ethical stance, professional obligations,[174] and role as protectors of the principal's interests.

Accordingly, the profound sense of responsibility expressed by the interviewees in accompanying their role in drafting the document is also tied to the protective dimension of their role. This responsibility has prompted the interviewees to adopt practices to safeguard principals' interests by incorporating protective mechanisms into the document against potential abuse by surrogates, especially when family members initiate the CPoA. Most common protective strategies include checks and balances among surrogates, clear articulation of the principal's wishes, and restrictions on financial actions.

The findings reveal the inevitable tension between the necessity of incorporating protective mechanisms in the CPoA and the essential trust in the designated surrogate decision-makers. [175] This reflects the intergenerational ambivalence inherent within the social structure of family relationships.[176] As will be further discussed, attorneys may be able to mitigate the negative consequences of this ambivalence by mediating the need for various preventive strategies in a manner that reduces the surrogates' resistance and gathers support toward fulfilling the principal's wishes.

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[171] Doron, *supra* note 149, at 62.
[172] See above, chapters I(B) —(C) of this article.
[173] The 1962 Legal Capacity and Guardianship Law § 32.14.4.
[174] *See generally,* Collett, *supra* note 114.
[175] *See* Stelma-Roorda, *supra* note 33, at 24 for the CPoA's foundation in trust means abuse risk cannot be eliminated.
[176] *See generally*, Lüscher & Pillemer, *supra* note 73.

Another aspect of the protective dimension in the role of attorneys drafting CPoAs for older persons relates to their function as gatekeepers of the principal's competence. This component of their role is derived from the legal provisions governing the tool and is fundamentally intended to ensure, to the extent possible, that the principal is executing the CPoA of their own volition, free from coercion, exploitation, or pressure.[177] The variability found in when to seek expert opinions on competence highlights the need for careful consideration to avoid paternalism and ageism.[178]

C. THE FAMILIAL & INFORMAL SUPPORTIVE DIMENSION

This dimension of the multidimensional model focuses on how the law strengthens the social support networks of older persons, recognizing their vital role in promoting rights and improving the quality of life of this demographic.[179] The CPoA inherently embodies this dimension, as it is designed to facilitate more expeditious and flexible action by the appointed surrogates compared to the guardianship system, thus enhancing their capacity to act on behalf of the principal. Beyond this, our findings indicate that attorneys see supporting these networks as part of their role, recognizing the principal's reliance on their surrogates when the CPoA is activated.

Therefore, attorneys view facilitating the responsibilities of future surrogates, whether in practical, bureaucratic, or decision-making aspects, as crucial to their work. Strengthening these networks is vital for ensuring the effective implementation of the CPoA. A key strategy identified revisits the drafting of clear and detailed advance directives, which not only express the principal's autonomy but also guide surrogates in understanding and fulfilling the principal's wishes. This aspect of the attorneys' work addresses the challenge identified in the literature— indicating a prevalent absence of intrafamilial discussions regarding older persons' wishes and preferences,[180] and maximizes the potential of the CPoA as a unique opportunity for such a discussion to take place.[181]

However, the findings point to a potential tension between the need for detailed directives and the necessity to create a document that allows surrogates to act efficiently— particularly when dealing with third parties, as detailed advance directives may reduce surrogates' flexibility to act. Thus, attorneys are required to balance these factors to protect the principal's interests, which include ensuring the document remains practical. As the findings suggest, this balancing act often involves guiding principals in making decisions that will facilitate

[177] § 32.14.2, The 1962 Legal Capacity and Guardianship Law.
[178] Reznitsky et al., *supra* note 56; Adams & Morgan, *supra* note 84, at 20.
[179] Doron, *supra* note 149, at 64-5.
[180] Cramer et al., *supra* note 72.
[181] Doron & Doron, *supra* note 3, at 81.

surrogates' actions while safeguarding against potential abuse of the tool.

It is noteworthy that this dimension of the attorneys' work is particularly significant now, as the CPoA is still being assimilated into society, and uncertainty remains about how third parties— especially financial institutions, will interpret and accept this tool. Attorneys address this uncertainty by drafting comprehensive advance directives, guiding surrogates and third parties about the principal's wishes and helping surrogates infer the principal's likely preferences in unanticipated situations. By doing so, attorneys actively contribute to the broader societal acceptance of the CPoA, bridging the gap between the legal framework of the tool and its practical application.

Finally, this dimension also addresses the potential for CPoAs to trigger family conflicts that could hinder the implementation of the principal's directives. Legal practices in this respect involve setting clear expectations for surrogates and defining their roles to ensure they understand their responsibilities. This aspect of their work intersects with the preventive dimension (to be discussed thereafter), highlighting the attorneys' role in both supporting the principal's social networks and preempting potential disputes.

D. The Preventive Dimension

The preventive dimension of the multidimensional model highlights how the law reduces unwarranted interference in older persons' lives by offering legal planning tools that allow individuals to shape their lives according to their worldviews and desires proactively.[182] The CPoA, being a legal planning tool, aligns with this dimension. Our findings suggest that this preventive dimension is also present in the practices of attorneys drafting these documents, specifically in two ways: assisting principals in planning decision making processes for when their independence may diminish and preventing, to the extent possible, family conflicts related to the CPoA.

Attorneys adopt a proactive stance within the preventive dimension, as evidenced by interviewees introducing relevant topics to include in the CPoA and helping principals plan for various future scenarios. The advice offered is tailored to each principal's specific situation, with significant effort invested in understanding their goals, motivations, and family dynamics. This process involves creating a comprehensive family profile, identifying and mitigating potential friction points, and addressing relationship aspects that could lead to abuse of the tool. Notably, in preventing family conflicts, the findings suggest that tailored advice often leads to different recommendations

[182] Doron, *supra* note 149, at 66.

for ostensibly similar future legal issues—a phenomenon characteristic of preventive-law practice.[183]

The findings highlight a strong focus on older principals' emotional well-being during CPoA execution, with some attorneys feeling a sense of mission in their work. Their approach and practices for providing comfort and security to principals align with therapeutic jurisprudence principles and implement the conceptual proximity between preventive law and therapeutic jurisprudence[184], often making psychological well-being a primary objective. This emphasis on emotional aspects was found to be characteristic of legal services for older persons, influencing both clients' and attorneys' perceptions of the attorney's role. However, this approach raises concerns about potentially overstepping professional boundaries,[185] with interviewees acknowledging the need to respect and stay within the limits of their legal role.

E. The Empowerment Dimension

The empowerment dimension focuses on legislation that aims to enhance older persons' agency and social standing. This is done by facilitating access to information about their rights, assisting in realizing these rights, and enabling their active participation in society, thereby potentially reshaping perceptions of their societal role. [186] This dimension is evident in multiple ways in the attorneys' role when drafting CPoAs for older persons. First, practices that enhance the accessibility of this tool, such as public awareness lectures and personalized accommodations during the drafting process, empower older persons by giving them greater autonomy in planning for their future. Thus, the findings suggest that the CPoA is increasingly permeating the social discourse of older persons, which indicates an awareness of the need for advance planning for potential loss of decision-making capacity, as well as the available options for such planning. Additionally, the proactive role of attorneys in guiding older principals through the complexities of the CPoA, such as raising relevant issues and aligning the CPoA with other planning documents, underscores their role in facilitating the use of this tool in line with the principals' intentions. This aspect of the empowerment dimension is also relevant to the finding regarding the need for enhancing accessibility of legal services to older persons in general, as merely providing information about legal rights and options is often insufficient. The services must be accessible for older persons to exercise their rights effectively.[187]

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[183] Brown, *supra* note 14, at 223.
[184] *See generally,* Stolle, *supra* note 18; *see generally,* Winick et al., *supra* note 18
[185] Wexler, *supra* note 15, at 329.
[186] Doron, *supra* note 149, at 68-69.
[187] See above, chapter I(E)(1) of this article.

Another aspect of this dimension relates to principals' status in the process. By identifying the principals as the clients, attorneys place them in a position of power, allowing them to maintain control of the attorney-client relationship and its objectives. Efforts taken to amplify the principals' voices and prioritize their wishes in shaping the CPoA contribute significantly to the empowerment of the older principals and help mitigate the typical power imbalance in attorney-older-client relationships.[188] This aspect of the empowerment dimension also carries therapeutic implications for the emotional and psychological well-being of the older principals. The findings indicate that by giving voice and visibility to the principals, attorneys contribute to their sense of security and peace of mind, aligning with the principles of therapeutic jurisprudence.[189]

F. The Discourse Construction Dimension

The findings bring to light an additional dimension in the practice of attorneys drafting CPoAs for older persons: the discourse construction dimension.[190] This dimension encompasses legal practices that help facilitate and mediate conflicting family discourse about the older principal's wishes while supporting the advancement of the principal's rights. The first aspect of this dimension encompasses practices addressing the tension arising from the attorney's role as an external party in family discussions. The findings show that attorneys are highly aware of their status as outsiders, which can potentially constrain open communication and impede the attorney's ability to draft a document optimally serving the principal's interests. To mitigate this tension, attorneys use strategies to build trust, transparency, and comfort with principals (and their surrogates), such as offering services in the principal's home or allowing time for informal conversations.

These practices are particularly significant for the attorney's role in enabling family discussions about the older principal's wishes, especially when mediating these wishes to family members, to reduce resistance and prevent potential conflicts. By establishing trust with the principal, attorneys can leverage their outsider status and professional role to effectively communicate the principal's wishes to family members, fostering their support.

The second aspect of this dimension involves the mediating practices associated with supporting the principals' decision-making processes. This aspect was revealed as intrinsic to the attorneys' work in drafting CPoAs, as they often actively engage with principals on decisions like choosing surrogate decision-makers or incorporating

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188 Wald, *supra* note 102.

189 Daicoff, *supra* note 15; Yamada, *supra* note 15.

190 *See* Doron, *supra* note 149, at 71, while this dimension is not delineated in the multidimensional model, it aligns with one of the model's core principles- its receptiveness to the identification of additional dimensions.

directives into the CPoA. As mentioned previously, attorneys provide guidance beyond presenting available legal options, encompassing broader considerations like the feasibility of implementing the directives and preventing family disputes.

Both aspects of this dimension reflect an interdisciplinary approach to drafting CPoAs for older persons, aligning with legal principles of autonomy, preventive law, and therapeutic jurisprudence while recognizing the importance of the principal's familial context. This approach considers intergenerational family dynamics to ensure that the CPoA meets the principal's needs. Thus, the attorney's work within this dimension can mitigate the intergenerational ambivalence inherent in the document execution process.[191]

The comprehensive view of all dimensions within which attorneys operate when drafting CPoAs for older persons reveals the complexity and diversity of their responsibilities. Attorneys must navigate multiple interrelated dimensions, each contributing to the advancement of the principals' rights and well-being. Moreover, conceptualizing the attorneys' roles through the perspective of the multidimensional model explains the findings on the emergence of providing legal services for older persons as a distinct specialization. The multidimensional examination reveals that attorneys' work extends beyond narrow legal advice and encompasses broader aspects of aging and intergenerational family dynamics. Accommodating these various dimensions is integral to providing legal services to older persons, as evidenced by the findings.

VI. CONCLUSION

The CPoA is a novel legal planning tool in Israel, and the legal practices surrounding its execution are still evolving. Attorneys drafting these documents for older persons play a crucial role in shaping both individual outcomes and broader social and legal norms regarding the protection and empowerment of older persons. The perspective of the multidimensional model emphasizes that attorneys must navigate not only legal intricacies but also complex familial and psychological landscapes. Therefore, an interdisciplinary approach is needed to address the unique challenges associated with aging and intergenerational relationships. By adopting this perspective, we can better appreciate how appropriate and tailored legal practices can contribute to safeguarding older persons without unduly infringing upon their autonomy or perpetuating ageist assumptions.

[191] Doron & Doron, *supra* note 3, at 79-80.

A. RESEARCH LIMITATIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH

The study investigated the process of executing a CPoA in older age from the perspective of attorneys drafting the document, with an in-depth examination of the experience among the study participants. However, the sample size limits the ability to generalize findings to the entire population of attorneys or older persons.

Research on legal services for older persons is limited, offering many opportunities for future studies. In this context, it would be valuable to explore whether this area continues to develop as a distinct legal specialization. Regarding CPoAs, following quantitative research could enhance our understanding of legal practices in executing CPoAs and their impact on older persons' emotional well-being and rights.

NOTE

POLICING PRESENCE: SEATTLE'S SOAP ORDINANCE AS AN UNCONSTITUTIONAL USE OF ZONING POWER

Caledonia J. Strelow*

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* Executive Senior Editor, *Southern California Review of Law & Social Justice*, Volume 35; J.D. Candidate 2026, University of Southern California Gould School of Law; B.A. Political Science 2023, Texas Christian University. Many thanks to Professor Ken Swenson for his guidance and thoughtfulness on this topic. Thank you also to my parents, Alexandria and Peter Strelow, who instilled in my brothers and me the importance of education, tolerance, decency, and compassion.

I. INTRODUCTION

Seattle, Washington recently adopted the Stay Out of Areas of Prostitution (SOAP) bill, reinstating elements of a repealed prostitution loitering law and codifying a new crime under the guise of addressing public safety and community welfare. The ordinance introduces exclusion zones and SOAP Orders aimed at deterring sex work-related crimes and other crimes within and around a well-known Seattle hub for prostitution and sex trafficking.[11] By restricting access to specific areas based on individuals' criminal histories, the SOAP Ordinance effectively operates as a zoning law found within Seattle's criminal code rather than within traditional zoning codes. But unlike traditional zoning, it is a zoning code directed at people, not uses, within designated zones. Moreover, as will be discussed, it is not directed at people's activity within the designated zones, but their mere physical presence within the zone on the theory that a person might engage in a prohibited use. This broad use of police powers to enforce exclusionary zoning not only raises significant constitutional concerns, including potential violations of due process and the right to travel, but also perpetuates the marginalization of vulnerable communities.

The SOAP Ordinance is an unconstitutional form of land use regulation which overlooks the systemic issues driving prostitution and sex trafficking, relying instead on measures intended to control what happens in a specific geographic area, with the effect of displacing people rather than resolving the underlying target issues. As such, an analysis of the SOAP Ordinance underscores broader tensions between performative public safety initiatives and the need to issue zoning regulations based not on moral panic but on equitable, evidence-based policy solutions.

This Note proceeds as follows: Part II provides an overview of Seattle's SOAP Ordinance, detailing its legislative background, objectives, and immediate legal implications. Part III explores the SOAP Ordinance's functionality as a land use regulation, examining how it mirrors restrictive zoning laws despite its codification as a criminal statute. Part IV presents the constitutional challenges the SOAP Ordinance may face, concluding that it fails both rational basis and strict scrutiny review under established legal precedent. Part V considers the broader unintended consequences of the SOAP Ordinance, particularly its implications for zoning precedent, due process concerns, and its practical inefficacy in addressing the underlying community issues derived from voluntary prostitution and

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[1] SEATTLE, WASH. ORDINANCE 127086 (2024) (text available at https://perma.cc/2V65-BUCU) (hereafter the "SOAP Ordinance").

involuntary sex trafficking. Finally, Part VI offers concluding thoughts on the SOAP Ordinance's role in perpetuating exclusionary zoning and criminalization policies in urban governance.

II. SEATTLE'S NEW "STAY OUT OF AREA OF PROSTITUTION" LEGISLATION

On September 17, 2024, the Seattle City Council passed in an 8-1 vote the "Stay Out of Areas of Prostitution" ("SOAP") bill.[2] The SOAP Ordinance reinstates, with certain revisions, a prostitution loitering law which was unanimously repealed by the City Council in 2020.[3] The original ordinance was repealed based on two flaws: (1) it only applied to sex workers, rather than solicitors or facilitators (colloquially known as "pimps"), and (2) it disproportionately impacted and targeted people of color.[4] The September 2024 law reinstated "prostitution loitering" as a misdemeanor,[5] and makes "promoting prostitution loitering" a gross misdemeanor.[6] Both charges are aimed at expanding prostitution penalties to include sex solicitors and facilitators rather than just sex workers.[7]

A. FRAMING THE SOAP ORDINANCE

The SOAP Ordinance creates an exclusion zone along Seattle's Aurora Avenue, spanning from North 85th Street to North 145th Street.[8] This exclusion zone covers an area well-known for prostitution which historically has functioned as a hub for both local and interstate sex trafficking.[9] Under the SOAP Ordinance, Seattle judges may issue a two year exclusion from this area ("SOAP Order") to solicitors arrested for prostitution loitering and people charged with the new crime of promoting prostitution loitering.[10]

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[2] Barnini Chakraborty, *Seattle Passes Controversial SOAP and SODA Bills Targeting Prostitution and Drugs*, WASH. EXAMINER (Sept. 18, 2024, 3:15 PM), https://perma.cc/E7NK-V659.

[3] Daniel Beekman, *Seattle City Council Passes Drug, Prostitution 'Stay Out' Zones*, THE SEATTLE TIMES (Sept. 17, 2024, 7:33 PM), https://perma.cc/T2UK-LGDQ.

[4] Sara J. Green, *Prostitution Loiter Law, Stay-Out Zone Proposed to Disrupt Aurora 'Track'*, THE SEATTLE TIMES (Aug. 1, 2024, 8:02 PM), https://perma.cc/VR2Z-Q92A.

[5] *See* the SOAP Ordinance at 12A.10.010 § B ("A person is guilty of prostitution loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to commit prostitution.")

[6] *See* the SOAP Ordinance at 12A.10.030 § A ("A person is guilty of promoting loitering for the purpose of prostitution if, acting other than as a prostitute or as a customer thereof, engages in conduct with the intent to cause another to commit the crime of loitering for the purpose of prostitution.")

[7] *Id.*

[8] *See* the SOAP Ordinance at 12A.11.050 (map of SOAP Zone 1).

[9] *See* the SOAP Ordinance at 2 (". . . it is believed that Seattle is second only to the Figueroa Street neighborhood in Los Angeles in terms of the total street value of sex work. . .").

[10] Green, *supra* note 4 ("Unless otherwise ordered by the court, a SOAP order issued under

Due to an amendment to the bill following public comment, judges are barred from issuing SOAP Orders to sex workers based on convictions of prostitution loitering and promoting prostitution loitering.[11] However, and regardless of that carve out, judges can still issue a SOAP Order to anyone charged with or convicted of a crime within a SOAP zone if they find "a nexus between the offense and prostitution-related crimes."[12] Thus, as one critic pointed out, ". . . it's easy to imagine how sex workers still wind up charged under these laws for working together or talking to one another, which police could easily classify as 'promoting' one another's prostitution."[13] Any person issued a SOAP Order violates it by entering the exclusion zone without court approval and is thus subject to arrest for a gross misdemeanor offense which carries "a maximum penalty of 364 days in jail and/or a $5,000 fine."[14]

Councilmember Cathy Moore, who introduced the SOAP Ordinance bill, cited "a loud outcry from Aurora Avenue North neighborhoods . . . [which have] seen a dramatic increase in visible commercial sexual exploitation, escalating reported gunfire and general violence associated with it" as the impetus for the anti-prostitution legislation.[15] She additionally stated upon the bill's passage that "[t]his legislation also sends a clear message to those who perpetuate and profit from the harm and trauma of commercial sexual exploitation that there will now be consequences for their actions."[16]

As part of its stated purpose, the SOAP Ordinance dictates "it is the intent of this ordinance to create a tool to disrupt Seattle's sex trade and target sex traffickers, pimps, and solicitors while centering the need for diversion, referral to services, safe house placement, substance abuse treatment . . . for those who are being commercially

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this Chapter 112A.11 as a condition of sentence shall terminate two years from the date of issuance. SOAP orders issued as pretrial conditions of release shall terminate upon dismissal of the criminal charge.")

[11] Helen Smith, *Seattle City Council Approves 'Stay Out' Zones for People with Drug, Prostitution Arrests*, KING5 SEATTLE (Sept. 17, 2024, 10:51 PM), https://perma.cc/7B2L-FVET. ("An amendment to the ordinance, proposed by Moore, limits SOAP orders to buyers and promoters of sex trafficking"). *See also* Green, *supra* note 4, at 2 ("While police would again be able to arrest women involved in prostitution under the law, the legislation emphasizes diversion programs and offering women services, safe houses and hopefully, an exit strategy to get out of the sex trade. First-time sex buyers could also be allowed to participate in educational programming, so they understand how their behavior is contributing to the exploitation and violence inherent in the sex trade…")

[12] Elizabeth Nolan Brown, *Seattle's 'Stay Out' Zones Will Curb Civil Liberties, Not Crime*, REASON (Sept. 23, 2024, 11:30 AM), https://perma.cc/34TN-V5E6 (quoting the SOAP Ordinance at 12A.11.020 § B).

[13] *Id.*

[14] The SOAP Ordinance at 12A.11.020 § C.

[15] *Seattle City Council Passes Legislation Combating Commercial Sexual Exploitation*, SEATTLE CITY COUNCIL BLOG, (Sept. 17, 2024), https://perma.cc/MF2C-A4QA.

[16] *Id.*

sexually exploited and trafficked."[17] In the summer of 2024, the SOAP Ordinance bill garnered broad, bipartisan support from the Seattle City Council, evidenced by the eventual 8-1 vote in favor of the bill in September.[18]

Yet critics of the SOAP Ordinance have argued that the law, while performative, remains profoundly harmful in that it targets marginalized groups rather than addressing the root causes of issues like addiction, gun violence, and sexual exploitation.[19] Some activists note that attempts to "banish" sex workers does more for those outside of the embattled industry than those working voluntarily or involuntarily within it: "[a]ll the city council has done is put them out of sight and out of minds of the people who claim to represent us."[20] Realistically, critics posit, SOAP Orders will cause a mere geographical shift, whereby prostitution will simply "migrate" to other areas of the city.[21]

Moreover, as one sex worker noted during a public comment on the SOAP Ordinance, "[t]his policy will make many of us more dependent on pimps to find clients" given the compounding forces of heightened legal risk in sex work and potential dwindling of sex solicitors in exclusion zones.[22] Critics also take issue with the lack of immediate investments in housing and treatment options and question the city's ability to enforce the SOAP Ordinance effectively or fairly, given its depleted police force and ongoing financial distress.[23] The ACLU of Washington, in response to the passage of the SOAP Ordinance, criticized the "cruel" nature of exclusion zones, citing their proven ineffectiveness to "achieve their intended goals" through punitive measures.[24] Even some supporters of the SOAP Ordinance

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[17] The SOAP Ordinance at 4.
[18] Bill Kaczaraba, *Seattle City Council President: Stay Out Zones Are 'Better Than Nothing,'* MY NORTHWEST POLITICS (Sept. 19, 2024, 1:15 PM), https://perma.cc/X3WJ-PN9U.
[19] Beekman, *supra* note 3. *See also* the SOAP Ordinance at 3 (claiming that "the majority of violent crime in that corridor [within the SOAP Ordinance zone] is associated with pimps and sex traffickers profiting off the victimization of individuals under their control").
[20] *Group Planning 'No to Banishment Zones!' Rally in Cal Anderson Against City's Stay Out of Drug Area Law*, CAPITOL HILL SEATTLE BLOG (Dec. 13, 2024, 1:56 PM), https://perma.cc/5L44-CKX5.
[21] Brown, *supra* note 12, at 2.
[22] Chakraborty, *supra* note 2, at 2.
[23] Beekman, *supra* note 3.
[24] Jazmyn Clark, *ACLU-WA Statement on The City of Seattle's Passage of Drug, Prostitution 'Stay Out' Zones*, ACLU WASH., (Sept. 18, 2024), https://perma.cc/YEH8-2HFM. *See also* Letter from Jazmyn Clark, Smart Just. Pol'y Program Dir., ACLU of Wash. to Seattle City Att'y Ann Davison and Seattle City Councilmembers (Aug. 7, 2024) (https://perma.cc/5TU6-YFB5) ("These proposals not only cruelly target our most vulnerable populations and expand police powers to harass our neighbors, they also perpetuate the failed policies of criminalizing poverty and substance use disorder. Additionally, these proposals raise serious constitutional concerns and have significant

were not exactly effusive. One journalist, highlighting the perspectives of less idealistic supporters, noted "[t]he more you hear public officials talk about Seattle's proposed 'Stay Out' zones, the more you seem to hear, 'Well, it's better than nothing.'"[25]

As community backlash against the SOAP Ordinance has been prominent, Councilmember Tammy Morales, the sole holdout vote against the SOAP Ordinance, has also been outspoken in her opposition to the legislation which she argues lacks "truly meaningful solutions to the problems we seek to address."[26] Further, she warned that the SOAP Ordinance ". . . may scratch an itch to make council members feel like they are doing something to address public safety, but to claim these laws will address any of these problems is dangerous, and it is the epitome of performative."[27] In a press release issued on the day the SOAP Ordinance bill passed, Morales echoed what activists had critiqued about the legislation: "I am truly disheartened that we are having these conversations again as a city when there are documented solutions that we could be working toward implementing to address the root causes of violence."[28] Citing antidemocratic practices within the City Council coupled with a pattern of undue silencing of opposing perspectives, Morales announced her resignation from Seattle City Council on December 4, 2024.[29]

In tandem with passing the SOAP Ordinance, the Seattle City Council also passed a "Stay Out of Drug Area" ("SODA") bill with an 8-1 vote.[30] Councilmember Tammy Morales was, again, the sole dissenter.[31] Like the SOAP Ordinance, the SODA Ordinance enables judges to issue exclusionary orders as a condition of pretrial release or post-conviction once a person is arrested in certain drug abuse hubs across Seattle for a drug-related crime or any crime with a "nexus" to

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flaws and should be rejected.").

[25] Kaczaraba, *supra* note 18.

[26] Brown, *supra* note 12, at 2.

[27] Chakraborty, *supra* note 2, at 2.

[28] City Council News Releases, *Councilmember Morales' Statement on the Passage of SODA/SOAP Legislation*, SEATTLE CITY COUNCIL BLOG (Sept. 17, 2024), https://perma.cc/PU4W-T6N4.

[29] Lauryn Bray, *Tammy Morales' Issue with City Council Is Democratic, Not Personal*, SOUTH SEATTLE EMERALD (Dec. 10, 2024, 3:36 PM), https://perma.cc/XR8Q-DZ39. (When asked to elaborate on the ways in which the City Council interferes with the responsibilities of non-partisan Central Staff members, Morales pointed to the fact that the SOAP legislation passed despite evidence of its ineffectiveness: "I think it just speaks to the interference with what is supposed to be an objective branch of our legislative department, because if there is factual evidence that shows that you know a specific legislation will not be effective if it gets passed, the public has a right to know that the council is essentially passing things off of faith, right?").

[30] SEATTLE, WASH. ORDINANCE 120835 (2024). *See* https://perma.cc/7ABS-6QT4 (the "SODA Ordinance").

[31] Brown, *supra* note 12.

illegal drug activity.[32] Some critics have characterized the SODA Ordinance as an unwelcome "throwback to the War on Drugs that didn't work over decades."[33] Still, both new pieces of legislation passed as enough members of the Seattle City Council believed that "getting drugs and prostitutes off the streets is a necessity," and that the SOAP and SODA Ordinances are the best measure for doing so.[34] While the SODA Ordinance is closely related to the SOAP Ordinance and provides some context for the passage of the SOAP Ordinance as well as similarities in its application and impact, this analysis will focus on the SOAP Ordinance.

B. Prostitution Externalities as a Driving Force

The SOAP Ordinance attempts to alleviate negative externalities. The term externality is an economic one, which describes "a side effect or consequence of an activity that is not reflected in the cost of that activity, and not primarily borne by those directly involved in said activity."[35] Further, "[e]xternalities can be caused by either production or consumption of a good or service and can be positive or negative."[36] From this lens, the SOAP Ordinance treats prostitution and sex trafficking as the primary "illicit economic activit[ies]" which are marked by coercion, gun violence, rape, physical assault, other "horrific acts of violence" borne by those directly involved in such activities.[37]

The SOAP Ordinance further describes the negative externalities that flow from those primary activities, including the systematic recruitment of underaged girls in nearby schools and "significant negative quality-of-life and economic impacts to residents and businesses on Aurora Avenue North, as well as to those in adjacent residential neighborhoods."[38] In other words, the SOAP Ordinance legislates from the premise that there are dire and problematic aspects of prostitution and sex trafficking for those within the industry but also unintended consequences for those who happen to live and work near hubs of prostitution and sex trafficking. Much of this is indisputable—there are grim realities of sex work which can certainly make areas untenable.

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32 The SODA Ordinance at 3.
33 Beekman, *supra* note 3, at 4.
34 Chakraborty, *supra* note 2, at 3.
35 *Externality Definition*, TAX FOUND. GLOSSARY, https://perma.cc/73AV-X348.
36 *Id.*
37 *See* the SOAP Ordinance at 1–3. (Describing "the sex trade" and its implications for those within the SOAP Zone).
38 *Id.* (Claiming that ". . . independent academics and neighborhood residents have observed an increase in the sex trafficking of minors in King County in the last three years").

Importantly, the SOAP Ordinance claims that there are two primary activities creating negative externalities for Seattle communities: prostitution and sex trafficking.[39] Of course, without context, prostitutes engaging in sex work and those forced to engage in sex work due to being trafficked may be impossible to visually differentiate and thus perhaps difficult to legally separate. Still, conflating sex work such as voluntary prostitution with the sex work done involuntarily by victims of sex trafficking is harmful to both groups—regardless of whether they create similar negative externalities.

Prostitution is only one facet of sex work, which is "the exchange of sexual services for money or goods, including housing, food, drugs, or basic necessities. . . [and] may involve working independently, with others, or for a third party."[40] Sex work itself encompasses a broad range of work where some forms of sex work are criminal and prohibited by prostitution laws.[41] Other forms, such as strip dancing, are not criminal but are regulated by alcohol or zoning laws.[42] Regardless of which form of sex work one engages in, that person may do so "for a variety of reasons, which could include choice, circumstance, and coercion."[43] For as many reasons as one may choose or not choose to engage in sex work, there are just as many avenues through which that work is undertaken.[44] Unfortunately, "street-based sex work tends to be the most precarious because it is the most public and visible and therefore the most subjected to harassment, policing, and criminalization."[45] When referenced by the SOAP Ordinance, "prostitution" implies voluntary street-based sex work.[46]

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[39] *See* the SOAP Ordinance at 12A.10.010 § A(2).
[40] YALE GLOB. HEALTH JUST. P'SHIP, SEX WORK VS. TRAFFICKING: HOW THEY ARE DIFFERENT AND WHY IT
MATTERS: ISSUE BRIEF, (June 2020), https://perma.cc/VV3F-44N4.
[41] Ronald Weitzer, *Sex Work, Gender, and Criminal Justice Get Access Arrow, in* THE OXFORD HANDBOOK OF
GENDER, SEX, AND CRIME 508 (Rosemary Gartner & Bill McCarthy eds., 2014).
[42] *Id.*
[43] *Beyond the Stereotypes: A Deep Dive into Sex Work*, HUM. RIGHTS CAMPAIGN, https://perma.cc/8HAP-AR63.
[44] YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 40 (sex workers may do their work in various settings, offering more "hidden" online services such as video or messaging communication or private escort services, as opposed to more obvious or noticeable street-based services).
[45] *Id.*
[46] *See* the SOAP Ordinance at 12A.10.010 § A(2) (defining "[c]ommit prostitution" which "means to engage, agree, or offer to engage in sexual conduct with another person in exchange for a fee but does not include sexual conduct engaged in as part of any stage performance, play, or other entertainment open to the public").

Sex trafficking, on the other hand, is utterly different due to its *involuntary* nature — where one is forced rather than choosing to engage in sex work.[47] Trafficking is "the intentional movement of someone through force, fraud, or coercion into any labor sector" meaning that "the crime of 'trafficking' can be experienced by sex workers, but not all people in the sex trade are trafficked."[48] Further, not all sex trafficked persons are compelled to engage in street-based sex work but rather may be coerced to engage in escorting, adult entertainment, or other forms of less public, obvious sex work.[49] Notably, in the US, more people are trafficked into agricultural and domestic labor than into the sex trade.[50]

There are many schools of thought about the ethicality of voluntary sex work. Some argue that sex work is an act of reclamation which "does not perpetuate patriarchal systems and structures" and instead is emblematic of "political power and agency."[51] Others argue that sex work is inherently exploitative, profoundly dangerous, and subjects sex workers to heightened risk of violence, sexually transmitted disease, and trauma-related mental health issues.[52]

Given the varying perspectives on the morality of sex work, there are also varying perspectives on how to legally address it. Some argue for the decriminalization or even full legalization of consensual sex work, including prostitution.[53] Various scholars who are advocating for the abolition of prostitution-related crimes argue if prostitution is criminalized because of the immoral, and thus impermissible, exchange of sex for money, then other socially acceptable arrangements should also be barred; for example, dating or marrying someone of a higher socioeconomic status for financial security.[54] The complex discussion regarding the ethicality and legality

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[47] HUM. RIGHTS CAMPAIGN, *supra* note 43.
[48] YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 40 at 1.
[49] *Id.*
[50] FREEDOM NETWORK USA, HUMAN TRAFFICKING AND SEX WORKERS RIGHTS, (2015), https://perma.cc/U9MB- AJEX.
[51] *See Unpacking Harmful Myths Around Sex Work*, THE EQUITY INST., (Apr. 27, 2020), https://perma.cc/HYE8- Q95T; Alyssa Morterud, *Damaging Misconceptions About Sex Workers*, SEXUAL HEALTH ALL., (Oct. 25, 2021), https://perma.cc/B57T-XARP.
[52] Sonia Sodha, *Selling Sex is Highly Dangerous. Treating it Like a Regular Job Only Makes It Worse*, THE GUARDIAN, (Nov. 21, 2021), https://perma.cc/SD7E-SGQA.
[53] *It's Time to Decriminalize Sex Work,* ACLU, (July 3, 2023), https://perma.cc/D6RZ-XDVT. (Comparing decriminalization which "refers to the removal of criminal penalties for the buying and selling of sexual acts, specifically those categorized as prostitution" with legalization which "removes criminal penalties for certain incidents of buying and selling of sexual acts, i.e. prostitution, provided the participants comply with relevant regulations").
[54] Amit Pundik, *Why Offences Specific to Prostitution are Unjustified*, 85 MOD. L. REV. 847, (2022) ("prostitution- specific offences should be extended to other types of sexual relations or the criminalisation of prostitution should be abolished").

of prostitution is beyond the scope of this article and is relevant only insofar as it contextualizes negative externalities as the basis of the SOAP Ordinance relies.

To toe the line on a controversial issue such as the ethicality and legality of prostitution, diversion programs are one common approach governments adopt to lessen the negative outcomes sex workers like prostitutes may experience and mitigate the negative externalities for communities in which they work. Prostitution diversion programs are typically "special programs that combine comprehensive assessments, court monitoring, and an array of supportive services" whereby "the idea is that by linking victimized women to services and support, the justice system can potentially help them build new lives."[55]

The SOAP Ordinance itself is not a prostitution diversion program, particularly in the sense that it heightens criminal and financial penalties for those in violation of SOAP Orders.[56] However, the SOAP Ordinance does mention prostitution diversion programs and highlights the growing need for them in light of the legislation, even noting that one key issue with the former SOAP legislation was that it did not include any provisions for diversion.[57] Yet, even if revised in other ways, the SOAP Ordinance still only calls for diversion programs but fails to provide funding or a coherent structure for their creation. In turn, "there is no established system for the Seattle Police Department to provide diversion and referral services to adults who are commercially sexually exploited."[58] This is troubling as the SOAP Ordinance allows sex workers to be issued SOAP Orders and penalized while simultaneously issuing vague guidelines relating to diversion: "[t]o minimize harm caused by the criminal legal system to survivors of commercial sexual exploitation, diversion, referral to social services, safe house placement, and other alternatives to booking are the preferred disposition when enforcing Sections 12A.10.010 and 12A.10.020."[59]

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[55] Sarah Schweig et. al., *Prostitution Diversion Programs*, CENTER FOR CT. INNOVATION (2012), https://perma.cc/DCF3-NLU3.

[56] *See* the SOAP Ordinance at 4 (Stating ". . . it is the intent of this ordinance to create a tool to disrupt Seattle's sex trade and target sex traffickers, pimps, and buyers while centering the need for diversion, referral to services, safe house placement, substance abuse treatment, and other alternatives to booking for those who are being commercially sexually exploited and trafficked"). See also Chrysanthi Leon & Corey Shdaimah, *Targeted Sympathy in 'Whore Court': Criminal Justice Actors' Perceptions of Prostitution Diversion Programs*, 43 LAW & POL'Y 126, 142 (2021) (in exchange for engaging in prostitution diversion programs, those charged with prostitution related offenses often have their charges reduced or dismissed).

[57] *Id.* at 1.

[58] *Id.* at 4.

[59] *Id.* at 9.

However, diversion programs aimed at lowering instances of prostitution are controversial both in academic settings and in judicial ones. Such programs have been critiqued for being "generally incoherent in their purpose and claims, opaque in their data collection, and under-resourced and insufficiently integrated (and thus relatively unaccountable) with very mixed outcomes."[60] Further, diversion programs have been deemed "paternalistic" in that they rely on "targeted sympathy" for sex workers as exclusively victims in order to "determine who is deserving and what they get, as well as which aspects of their needs and hopes are addressed."[61]

Thus, with diversion as only a partial, and perhaps ineffective, solution to mitigating the negative externalities of prostitution and sex work, legislation like the SOAP Ordinance is more understandable. Such legislation can be seen as an extreme and perhaps desperate governmental attempt to regulate undesirable activities which are so often unreachable. This approach, however, runs afoul of judicial standards.

III. THE SOAP ORDINANCE AS A LAND USE REGULATION

The SOAP Ordinance is unique and perhaps confusing in that it seeks to create "zones" yet claims to have no relation to zoning or land use laws and is found instead in Seattle's criminal code.[62] Based on the SOAP Ordinance's description by its authors and characterization by its proponents, it functions not as a land use regulation but as a deterrence tool designed to minimize crimes related to prostitution and sex trafficking which trickle down and create a host of other undesirable community outcomes in a specific zone.[63] As Councilmember Tammy Morales highlighted, "Seattle is not using zoning powers to enforce the SOAP Ordinance. The authors are using 'zone' colloquially to refer to the areas affected, but this is about judicial orders to keep people out of those areas. We are not amending the land use code in any way."[64]

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[60] *Reports on Prostitution "Diversion" Programs*, YALE GLOB. HEALTH JUST. P'SHIP, (2018), https://perma.cc/9XG9-NJR5. (Noting also that "Some affected populations appreciate the less punitive approach and offers of support, while others feel there is no real commitment to their rights or health and that the services offered do not match their actual desires and structural needs").

[61] Leon & Shdaimah, *supra* note 56, at 142.

[62] The SOAP Ordinance at 1. *See also* Seattle Criminal Code, https://perma.cc/DZV6-CFRP (The SOAP Ordinance is codified in "Title 12A - Criminal Code.").

[63] Green, *supra* note 4.

[64] E-mail from Tammy Morales, Councilmember, Seattle City Council, to Caledonia Strelow (Oct. 9, 2024, 10:04 am PST) (on file with author).

A. STRATEGIC CODIFICATION DOES NOT DICTATE THE APPLICABLE STANDARD OF REVIEW

The concepts of controlling the use of property in a specific area and minimizing negative impacts from what occurs on a property in a specific area are not mutually exclusive.[65] In fact, zoning developed to minimize negative impacts on the use of property.[66] The SOAP Ordinance's original purpose of being slotted into Seattle's criminal code is not in itself determinative of the constitutionality or legality of the law, just as placement of a contract clause under a certain heading should not be determinative of interpretation.[67]

The SOAP Ordinance functions to limit the movement of certain individuals into or through a particular zone based on some past wrongdoing—here, promoting, participating in, or procuring sex work by voluntary or involuntary participants. Given this restriction on movement and the theme of undesirable sexual behavior, there appears to be parallels to, or potential inspiration drawn from, how several states and municipalities have historically treated convicted sex offenders.[68] Aside from the underlying difference in offenses triggering exclusion orders, SOAP Orders differ logistically from the laws that restrict the movement of sex offenders. Whereas laws pertaining to sex offenders typically restrict them from entering a perimeter around physical landmarks known to have children,[69] the SOAP Ordinance blocks off one large area of the city where those subject to SOAP Orders cannot travel without advance permission, without reference to physical locations that might have some relationship to their past wrongs.[70]

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[65] Nathaniel Meyersohn, *The Invisible Laws that Led to America's Housing Crisis*, CNN, (Aug. 5, 2023, 3:12 AM), https://perma.cc/ZJ7N-6ETG.

[66] *Id.* ("Zoning laws protected millions of Americans' home values, stopped development of projects that could turn small villages into larger towns and larger towns into cities, and delegated control to local homeowners and government over how land in their neighborhoods was used.")

[67] *Practical Guidance: Commercial, Clause Description - Miscellaneous: Headings,* BLOOMBERG LAW, https://perma.cc/CBG7-UHG3. ("Headings in an agreement generally are intended as a means of organizing the text, not to provide contractual rights or obligations.")

[68] U.S. DEP'T OF JUST., SEX OFFENDER RESIDENCY RESTRICTIONS: HOW MAPPING CAN INFORM POLICY (July 8, 2024), https://perma.cc/6ZU6-CDP9. ("Laws that restrict where registered sex offenders may live have become increasingly popular during the past decade. As of 2007, some 27 states and hundreds of municipalities had enacted laws that bar sex offenders from residing near schools, parks, playgrounds and day care centers.")

[69] *Id.* (Noting that "the specified distance from a school or other venue is typically 1,000 feet but varies from 500 to 2,500 feet, depending on the jurisdiction.")

[70] *See* the SOAP Ordinance at 12A.11.050 (map of SOAP Zone 1, zone of exclusion which applies to all persons subject to SOAP Orders, regardless of where prior crimes were committed).

Moreover, the SOAP Ordinance's exclusion zone—which per the law is subject to be expanded to other areas of the city or altered—spans many large city blocks.[71] There are approximately three miles between the northern end of the SOAP Ordinance's zone and the southern end, or an hour-long walk.[72] This seems extreme when comparing the SOAP Ordinance's sprawling perimeter even to the most relaxed restrictions on sex offenders. For instance, a 2,500-foot perimeter around a restricted landmark means that a sex offender could still travel up to about half a mile away from the excluded landmark area. Thus, the SOAP Ordinance's exclusion zone, purely from a geographical sense, is more restrictive—and therefore more punitive—than even the most liberal sex offender limitations on travel.

Given how restrictive the SOAP Ordinance's zones are on the ability of affected individuals to use the land within the zone, it appears that the SOAP Ordinance is a land use law preventing individuals from any use within a restricted zone without regard to the underlying acts which led to the imposition of the restriction. The SOAP Ordinance prohibits them from buying or renting property in the SOAP zone.[73] It prevents them from conducting lawful business in the SOAP zone.[74] It prevents them from visiting family or friends in the SOAP zone.[75] It prevents them from accessing government services in the SOAP zone.[76] It prevents them from obtaining medical services in the SOAP zone.[77] All of this remains true despite its placement in the criminal code.

The fact that the SOAP Ordinance does not claim to be a land use regulation and is not codified within Seattle's land use laws does not preempt it from being one. A zoning ordinance does not have to be explicitly called a zoning ordinance and can be found in other areas of the municipal code.[78] In fact, Supreme Court precedent has illustrated that zoning ordinances can be part of a broader set of land-use regulations intended to promote the social value of land without necessarily being labeled as zoning ordinances.[79] Therefore, zoning

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[71] *See* the SOAP Ordinance at 3 (". . . regular re-evaluation is required to understand whether a Stay Out of Area of Prostitution (SOAP) zone needs to be changed, reduced, added, or expanded, based on data, to retain the efficacy of the policy and minimize unintended consequences. . .").
[72] *See* the SOAP Ordinance at 12A.11.050 (map of SOAP Zone 1).
[73] The SOAP Ordinance at 12A.11.030 § C.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] RESTATEMENT OF THE LAW, FOURTH PROPERTY § 2 (AM. L. INST. 2022) (explaining that a comprehensive plan, which includes zoning regulations, may be found within the zoning regulations themselves or in various ordinances, resolutions, and policy statements of a town).
[79] City of L.A. v. Alameda Books, 535 U.S. 425 (2002).

regulations can be embedded within other legislative documents and do not need to be explicitly identified as zoning ordinances.

Further, zoning ordinances in Washington state can be integrated into various other areas of municipal codes beyond explicitly labeled zoning sections. For instance, zoning regulations can be incorporated into comprehensive zoning ordinances that regulate multiple aspects such as the height of buildings, land use, and other related matters. Municipal courts have jurisdiction to try violations of all city ordinances, including criminal provisions of such ordinances, which implies that zoning ordinances can be enforced through criminal proceedings.[80] Moreover, Washington municipal courts have exclusive original criminal jurisdiction over all violations of city ordinances, further supporting the possibility of inclusion of zoning ordinances within municipal criminal codes.[81]

Furthermore, in *State v. Work,* 449 P.2d 806, 807 (Wash. 1969), the Washington Supreme Court emphasized that criminal statutes, including those related to zoning, must be "clear and unambiguous so that individuals of ordinary intelligence do not have to guess at their meaning."[82] This principle was applied in the context of a zoning ordinance, demonstrating that zoning regulations can indeed be codified in and thus enforced under municipal criminal codes.[83] Thus, the SOAP Ordinance being found outside of Seattle's land use laws and claiming no relation to them does not dictate that the law is not subject to the standard of review used for zoning ordinances.

Setting aside for the moment the constitutionality and enforceability of the content of the SOAP Ordinance, if it is deemed an exercise of zoning power, that power is traceable to Washington's police power. States derive their zoning power from their inherent police power, which allows them to regulate private conduct to promote public health, safety, morals, and general welfare.[84] Thus, this power is not granted by the U.S. Constitution but instead is an inherent aspect of state sovereignty.[85] This power, however, is not unlimited. The Supreme Court has long recognized that zoning is a legitimate exercise of police power so long as zoning measures "find their justification in the police power exerted in the interest of the public."[86]

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[80] WASH. REV. CODE ANN. § 35.20.030 (LexisNexis).
[81] *Id.*
[82] State v. Work, 449 P.2d 806, 807 (Wash. 1969).
[83] *Id.*
[84] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 557 (2012) ("Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States").
[85] *Id.*
[86] Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121 (1928) ("Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and

States often delegate zoning authority, including the ability to adopt zoning laws and regulations, to their local governments through enabling acts.[87] The landmark case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), confirmed the ability of local governments to exercise those delegated police powers to zone.[88] Importantly, Washington state has delegated zoning authority to municipalities, including Seattle, which may divide their jurisdictions into zones, regulate land use, create rules for building structures, and issue other related standards.[89] Furthermore, the Washington Supreme Court in *Nelson v. Seattle*, 395 P.2d 82 (1964) recognized that Seattle had and was exercising zoning power pursuant to a direct grant of police power from the state constitution.

Working from the premise that the SOAP Ordinance is in fact a zoning ordinance, it may best be characterized as creating a restrictive overlay zone. The Center for Land Use Education describes overlay zoning as a regulatory tool that layers a specialized district over existing zones, adding provisions and specific regulations or incentives to protect resources or guide development to targeted areas.[90] As such, "[o]verlay zones are placed over one or more existing zoning districts, creating a new area subject to two sets of regulations and stipulations, those in the underlying zoning district and those in the overlay."[91] Municipalities in Washington state are explicitly authorized to issue restrictive overlay zones as part of their delegated zoning authority.[92] Such zones may be used to regulate both publicly and privately held

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unreasonable upon the use of private property or the pursuit of useful activities." (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894))).

[87] *See* RESTATEMENT OF THE LAW, FOURTH PROPERTY § 1.1 (AM. L. INST. 2022) ("All 50 states have set forth enabling acts that authorize local governments to zone").

[88] Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding the constitutionality of local zoning ordinances unless its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

[89] WASH. REV. CODE ANN. § 35A.63.100 (LexisNexis). *See also* WASH. REV. CODE ANN. § 35.22.195 (LexisNexis) (confirming that cities adopting a charter under the state constitution have all powers conferred upon incorporated cities and towns by state laws, which includes zoning authority).

[90] CTR. FOR LAND USE EDUC., PLANNING IMPLEMENTATION TOOLS: OVERLAY ZONING (Nov. 2005), https://perma.cc/4GRV-9W3U.

[91] JOHN R. NOLON ET. AL., LAND USE AND SUSTAINABLE DEVELOPMENT LAW CASES AND MATERIALS 724 (9th ed. 2017).

[92] WASH. REV. CODE ANN. § 35.63.110 (LexisNexis) ("For any or all of such purposes the council or board, on recommendation of its commission, may divide the municipality or any portion thereof into districts of such size, shape and area, or may establish such official maps, or development plans for the whole or any portion of the municipality as may be deemed best suited to carry out the purposes of this chapter and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land").

land, however "[t]hese powers [to create restrictive zones per § 35.63.110] do not contemplate the restriction or authorization of land use on the basis of *ownership by particular persons*."[93] This clarification that Washington may not use restrictive overlay zones to control which people may use property, whether private or public, is notable particularly in light of Supreme Court dicta in *Shelley v. Kraemer*, 334 U.S. 1, 10–11 (1948).

> Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee . . . . It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance.[94]

Thus, the language of § 35.63.110 indicates that municipalities, including Seattle, are authorized to issue restrictive overlay zones for the land itself, but not for the *people* permitted to own or otherwise use the land. This interpretation is justified given that "use" of land, even if not expressly stated like "ownership" of land under *Shelley,* also constitutes a fundamental aspect of "enjoyment of property rights" whereby "ownership" would be inconsequential if "use" was not also protected.[95] Thus, the SOAP Ordinance, particularly through its implementation of SOAP Orders, poses an issue in that it creates a restrictive overlay zone which is implicitly person- oriented rather than use-oriented. In other words, the SOAP Ordinance may run afoul of Washington's enabling act because it bars only certain individuals from entering or "using" the land that falls within the SOAP zone. Of course, the Seattle City Council has the power to create restrictive overlay zones: "it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."[96] However, the SOAP Ordinance does not, on its face, seek to "regulate or restrict" such activities, but rather to restrain the access certain citizens have to that area of the city. This confusion of the true scope of restrictive overlay zoning is just one preliminary issue the SOAP Ordinance poses.

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[93] Clark v. Sunset Hills Mem'l Park, 273 P.2d 645, 650 (Wash. 1954).
[94] Shelley v. Kraemer, 334 U.S. 1, 10–11 (1948) (holding that while private individuals may enter racially restrictive covenants, state-court enforcement of such covenants constitutes state action in violation of the Equal Protection Clause of the Fourteenth Amendment).
[95] *Id.*
[96] WASH. REV. CODE ANN. § 35.63.110 (LexisNexis).

B. PERPETUATING THE EXCLUSIONARY ETHOS OF ZONING

Importantly, zoning was not an original concept the Constitution's framers visualized. Zoning's absence in the Constitution comports with the spirit of liberty crucial to the founders, as "it was widely understood that forcing people to conform their properties to a set of permissible uses was constitutionally impermissible; it was simply an invalid exercise of the police power."[97] Prior to zoning ordinances, individuals had certain recourse "[i]f someone's property impaired another's or otherwise constituted a nuisance, as a private individual could file a lawsuit. Or the government, pursuant to its narrow police power to regulate public health and safety, could regulate a harmful use."[98] Until around the start of World War I, much of the United States operated under this legal framework, with even the largest and most populous cities remaining unzoned.[99]

At the turn of the 20th century, however, the United States underwent significant population growth and demographic shifts due to an influx of immigrants and internal migration.[100] In response, some of the earliest zoning laws that emerged were explicitly crafted to exclude those immigrants and marginalized groups from established, wealthier neighborhoods.[101] On the West Coast, notably including in Seattle, restrictive codes were implemented to drive out new Chinese communities.[102] On the East Coast, in Manhattan, zoning aimed to shield upscale residents and shoppers on Fifth Avenue from interactions with immigrant factory workers.[103] And of course, across the country, ordinances sought to bar Black communities from moving into white neighborhoods, cementing segregated housing as just one deleterious implication of widespread zoning.[104]

Despite those zoning efforts to separate certain populations, courts sometimes struck down obviously racially motivated laws. Perhaps most notably, the Supreme Court in *Buchanan v. Warley* held that Louisville's racial restrictions on property sales violated a seller's property rights.[105] Of

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[97] *The Zoning Trap: How Local Planners Decide How We Live*, INST. FOR JUST., https://perma.cc/CJX7-MVY7 (citing *Eubank v. Richmond*, 226 U.S. 137, 144 (1912) (Criticizing a city ordinance which permitted two-thirds of the property owners on a street to request that the street committee determine the building line for that street, "It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.").
[98] *Id.*
[99] *Id.*
[100] Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market,* THE WHITE HOUSE BLOG, (June 17, 2021), https://perma.cc/5SHA-JFLG.
[101] *The Zoning Trap: How Local Planners Decide How We Live*, *supra* note 97.
[102] Tate Twinam, *The Long-Run Impact of Zoning: Institutional Hysteresis and Durable Capital in Seattle, 1920– 2015*, 73 REG'L SCI. AND URB. ECON. 155, (Nov. 2018).
[103] Cara Eckholm, *When Did New York's Streets Get So Hollow?*, THE N.Y. TIMES, (Feb. 7, 2024), https://perma.cc/HH3P-EL5F.
[104] Rouse et al., *supra* note 100.
[105] *Buchanan v. Warley*, 245 U.S. 60 (1917).

course, this decision did little to halt Kentucky's or other states' attempts to enforce racial segregation through other means.[106] Thus, the exclusionary ethos underscoring modern zoning was only strengthened.

By the 1920s, a new approach emerged at the federal level when then-Secretary of Commerce and soon to be president, Herbert Hoover, spearheaded the creation and promotion of the Standard State Zoning Enabling Act (SZEA).[107] This model legislation granted local governments the authority to enact zoning laws, a power previously reserved for states. The SZEA appealed to state and local governments not only for its support of single-family homeownership and bolstering of industry but also for its ability to facilitate socioeconomic segregation.[108] While explicit racial segregation remained legally untenable, the SZEA provided a blueprint for achieving similar outcomes under the guise of economic zoning. Thus, the act was carefully crafted by legal experts to withstand judicial scrutiny, enabling localities to pursue exclusionary practices with minimal risk of legal challenges.[109]

With strong federal backing, zoning rapidly gained traction, though its constitutionality remained unresolved until the Supreme Court's decision in *Euclid v. Ambler Realty* in 1926.[110] This case centered on a zoning ordinance that restricted most land to low-density residential use, conflicting with Ambler Realty's plans for industrial development.[111] The lower court held for the property owners, criticizing the ordinance as an effort to exclude low-income individuals, including immigrants and minorities.[112] The Supreme Court reversed, upholding the constitutionality of zoning and endorsing the policy of segregating land uses—ultimately favoring single-family homes and dismissing concerns about arbitrariness—asserting that zoning served public health, safety, morals, and welfare.[113]

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[106] *Id.* at 80–81 (". . .there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges").

[107] Stuart Meck, The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute, 3 WASH. U. J. L. & POL'Y 295 (2000).

[108] *The Zoning Trap: How Local Planners Decide How We Live*, *supra* note 97.

[109] *Id.*

[110] Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable").

[111] *Id.*

[112] *The Zoning Trap: How Local Planners Decide How We Live*, *supra* note 97.

[113] *Euclid v. Ambler Realty Co.*, 272 U.S. at 397 ("The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. . . [which] concur in the view that the segregation of

Following *Euclid*, zoning expanded far beyond its original purpose, becoming a pervasive regulatory tool influencing everything from residential and commercial development to landscaping and household arrangements.[114] The Supreme Court has since repeatedly upheld such zoning regulations, granting local governments wide latitude to enforce aesthetic judgments and restrictions on living arrangements. Still, the widespread use of zoning ordinances prioritizes government-imposed land-use decisions over individual property rights and market dynamics. By leaving the determination of a property's "best use" to local governments—often catering to existing property owners—zoning has systematically favored uses that increase property values while excluding those that might benefit lower-income residents.

Even with the exclusionary ethos of zoning in mind, what Seattle did by creating SOAP Orders, if viewed as a regulation of where individuals may travel, is still a surprising use of local regulatory powers. The SOAP Ordinance diverts from the long judicial history of protecting municipalities' ability to regulate where formal businesses may be established but avoiding dictating which types of people may be present in certain areas.

The Supreme Court has long recognized that some businesses, due to their services or patrons, may create undesirable outcomes for their neighbors. In the landmark case of *City of L.A. v. Alameda Books*, the Supreme Court clarified the standards for municipalities to justify zoning ordinances aimed at mitigating the secondary effects of adult businesses, including illicit prostitution.[115] There, Los Angeles had relied on an old "comprehensive study of adult establishments" which "concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities."[116] In response to those findings, the city adopted a zoning ordinance which prohibited certain adult entertainment stores from operating within 1,000 feet of each other or within 500 feet of religious institutions, schools, or parks.[117] Notably, that ordinance created a much smaller perimeter than the SOAP Ordinance creates.[118] The Court in *Alameda Books* determined that municipalities are not

residential, business, and industrial buildings will make it easier to provide fire apparatus. . . increase the safety and security of home life; greatly tend to prevent street accidents. . . decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.").

[114] *The Zoning Trap: How Local Planners Decide How We Live*, *supra* note 97.

[115] City of L.A. v. Alameda Books, 535 U.S. 425 (2002).

[116] *Id.* at 430.

[117] *Id.*

[118] *See* the SOAP Ordinance at 12A.11.050 (map of SOAP Zone 1).

obligated to conduct new empirical studies to support ordinances so long as they reasonably base their actions on existing research or the experiences of other cities.[119] Only a plurality in *Alameda Books* found that those opposed to a zoning regulation may present evidence questioning the reasoning behind the ordinance's adoption, but not the ordinance's ongoing effectiveness.[120]

Under *Alameda Books*, the Los Angeles ordinance was deemed a valid exercise of police power given that it was designed to promote the city's interest in reducing crime.[121] Thus, the SOAP Ordinance likely meets this low bar for citing community issues deriving from high levels of prostitution within the relevant neighborhoods.[122] However, this alone is not sufficient to comport with constitutional requirements, as discussed below.[123]

Following the Court's holding in *Alameda Books,* similar restrictions on adult entertainment establishments have been upheld in the Ninth Circuit. For example, in *Dream Palace v. County of Maricopa*, the Ninth Circuit upheld a county's prohibition on the provision of "adult services" during certain hours so that adult entertainment businesses could operate thirteen hours per day on Sunday and seventeen hours per day on every other day.[124] The court's holding in *Dream Palace* supports the idea that regulations limiting the hours of operation of adult businesses, rather than merely the location of them, can serve as an effective and constitutionally valid way to mitigate secondary effects associated with such businesses, including prostitution.[125] However, not just illicit prostitution itself, but secondary effects can be targeted by such ordinances. The Ninth Circuit has also clarified that secondary effects do not have to be criminal to be subject to restrictive zoning measures, the undesired activity must simply be one contrary to public health, safety, or welfare.[126] In line with that broad authority, the SOAP Ordinance's implementation of SOAP Orders creates a permanent bar on activity (being present) within a particular zone (the SOAP zone) for particular individuals (those convicted of certain prostitution related crimes).

[119] *Alameda Books*, 535 U.S. at 442.
[120] *Id.*
[121] *Id.* at 452.
[122] *See* the SOAP Ordinance at 1–3. (Describing "the sex trade" and its implications for those living within the SOAP Zone).
[123] *See* discussion *infra* Part IV.
[124] Dream Palace v. Cnty. of Maricopa*,* 384 F.3d 990, 1013 (9th Cir. 2004).
[125] *Id.* See also Renton v. Playtime Theatres, 475 U.S. 41 (1986) (Holding that regulations should not be so restrictive that they effectively ban new adult businesses but must provide adult businesses a reasonable opportunity to operate and should not have physical or legal barriers that make operating an adult business impossible).
[126] Fantasyland Video, Inc. v. Cnty. of San Dieg*o*, 505 F.3d 996, 10003 (9th Cir. 2007).

Further, Washington courts have held in line with *Alameda Books* and *Dream Palace.* For instance, a zoning ordinance which regulated adult entertainment establishments and limited their proximity to certain residential zones in Spokane Valley, Washington was upheld as constitutional in 2015.[127] There, the zoning ordinance, like in *Alameda Books*, was passed following a study which found adverse secondary effects of adult entertainment establishments: "[t]he city based this determination [to issue new licensing regulations] on studies and police reports demonstrating the adverse impacts generated by adult entertainment businesses, including public sexual conduct, possible spread of sexually transmitted disease, prostitution, and other criminal conduct."[128] Again, this ordinance was tied to the use of *property* within certain portions of the city in order to mitigate adverse secondary effects. This is in contrast to the SOAP Ordinance, which goes further to regulate the *movement* of individuals to mitigate adverse secondary effects.

C. Zoning's Connection to Banishment and The Right to Travel

Importantly, the issues which the SOAP Ordinance seeks to address are not unique to Seattle nor is the legislation the first unique approach to addressing such issues. Outside of the Ninth Circuit and Washington courts, other states and municipalities have grappled with the effects of prostitution and sex trafficking hubs like the one the SOAP Ordinance regulates. Of the myriad issues such laws must address is legislating in a manner which does not constitute illegitimate banishment or "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country for a specified period of time, or for life."[129] While overt banishment from one's home country may be a penological tool of the past, state and local laws such as the SOAP Ordinance offer a more covert means of banishing citizens it deems undesirable.[130]

In fact, Seattle is not the first city to create a specialized zone for deterring prostitution. Oregon's Supreme Court in *State v. Lhasawa* upheld Portland's Prostitution Free Zone ("PFZ") as constitutional.[131] There, a central aspect of the defendant's challenge was that the PFZ

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[127] City of Spokane Valley v. Dirks, No. 33140-7-III, 2015 Wash. App. LEXIS 2549 (Ct. App. Oct. 22, 2015).
[128] *Id.* at *9.
[129] *Banishment*, BLACK'S LAW DICTIONARY (4th ed. 1951).
[130] Michael Armstrong, *Banishment: Cruel and Unusual Punishment*, 11 U. PENN. L. REV. 758, 760 (1963) (". . . at the state level banishment exists as a practical fact.")
[131] State v. Lhasawa, 55 P.3d 477 (Or. 2002).

violated the Fifth Amendment's and Oregon's constitutional protection against double jeopardy, given that a precursor for receiving an order to stay out of the PFZ was one's criminal arrest for prostitution-related crimes.[132] The court disagreed that there was a double jeopardy concern, holding instead that "although there is or will be only one formal criminal proceeding, the 'punishment' of exclusion has no real connection to that proceeding," but instead "arises out of a separate process, which is initiated by an individual police officer's decision to arrest a suspected offender on prostitution charges and which may, if the offender desires, involve a hearing in court before the exclusion takes effect."[133] Of course, the procedure for issuing a SOAP Order of exclusion under the SOAP Ordinance is slightly more stringent given that "[a] judge or judge pro tempore of the Seattle Municipal Court may issue a SOAP order to anyone *charged* with, or *convicted* of, any violation of prostitution-related crimes."[134]

The defendant in *Lhasawa* also argued that the order to stay out of the PFZ for three months following arrest was a form of illegitimate banishment.[135] However, the court likewise rejected that argument given the several exceptions within the PFZ legislation which allowed the defendant and others subject to such order to travel through the PFZ for legitimate reasons as well as the narrow exclusion from one part of Portland rather than the whole jurisdiction.[136] Of course, Portland's PFZ, which the court deemed was "neither criminal punishment nor jeopardy for purposes the Double Jeopardy Clause of the Fifth Amendment" is decidedly different from the SOAP Ordinance's zone at a minimum in terms of how long an exclusion order stays in effect.[137]

Courts in California have also weighed in on zoning ordinances designed to mitigate prostitution. As part of its discussion for upholding the constitutionality of sex offender restrictions on movement, the court in *In re Pham* compared such restrictions to the PFZ examined by the

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[132] *Id*. at 481.
[133] *Id. See also* State v. Williams, 35 P.3d 1088 (Or. 2001) (holding that defendant's arrest for violating an order to stay out of Portland's PFZ for 90 days following an arrest for prostitution was constitutional).
[134] The SOAP Ordinance at 12A.11.020 § A (emphasis added).
[135] *Lhasawa*, 55 P.3d at 482.
[136] *Id*. at 483 (". . . the exclusion ordinance expressly provides for variances to protect the health, welfare, and well- being of the targeted individuals, and even mandates the granting of variances for such persons who reside or work in a PFZ. . . By contrast, the historical punishment of banishment stripped offenders of home, citizenship, and livelihood. Because the exclusion ordinance allows offenders to avoid those consequences, we do not deem it comparable.")
[137] *Id.* at 488. *But see* Green, *supra* note 4 (Seattle's SOAP orders can last up to two years).

Oregon Supreme Court in *Lhasawa*.[138] The petitioners in *In re Pham* argued that the restrictions which applied to them as sex offenders constituted banishment in that it limited their fundamental rights to engage in community or find adequate housing.[139] Ultimately, the court in *In re Pham* agreed with the Oregon Supreme Court on the central question of what constitutes banishment: "[d]oes exclusion from a part of the community equal banishment? We conclude the answer is 'no.'"[140] The petitioners in *In re Pham* also posited that the restrictions on their ability to be within 2000 feet of schools or parks was "unconstitutional because it infringes on their right to travel."[141] The court quickly dismissed that contention given the petitioners' status as parolees which dictates that they are subject to certain conditions which, so long as non- oppressive, remain constitutional.[142]

More recently, California courts have stressed the importance of ensuring the right to travel for those under certain stay-out orders analogous to SOAP Orders.[143] For instance, in barring a proposed plan for San Francisco's issuance of stay-out orders for those convicted of drug related crimes within the "Tenderloin Drug Abatement Area," the court in *People v. Aguilar-Benegas* emphasized that such orders must have reasonable travel exceptions in order to avoid constituting banishment.[144] The court held that the legislation was too restrictive on the right to travel, even for parolees, because it "prohibits mere presence in the exclusion zone, at any time of the day or night and for any reason. It would preclude defendants from entering the area for any purpose, including accessing vital social and health services."[145]

While the holdings in the preceding cases are not binding on Seattle courts which may ultimately be faced with questions regarding the SOAP Ordinance's constitutionality; the parallels in underlying facts of the legislation may be highly persuasive. Moreover,

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[138] *In re Pham*, 124 Cal. Rptr. 3d 697 (2011).
[139] *Id.* at 700.
[140] *Id.* at 702.
[141] *Id.* at 703.
[142] *Id.* ("Although parolees retain constitutional protection against arbitrary and oppressive official action[,] [parole conditions] may govern a parolee's residence, his associates or living companions, his travel, his use of intoxicants, and other aspects of his life") (quoting Terhune v. Superior Court, 76 Cal. Rptr. 2d 841, 846 (1998))).
[143] *See* People v. Moran, 376 P.3d 617, 622 (2016) ("although not explicitly guaranteed in the United States Constitution, '[t]he right to travel, or right of migration, now is seen as an aspect of personal liberty which, when united with the right to travel, requires 'that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.'") (quoting Tobe v. City of Santa Ana, 892 P.2d 1145, 1162 (Cal. 1995)) (quoting *Shapiro v. Thompson* 394 U.S. 618, 629 (1969)).
[144] People v. Aguilar-Benegas, No. CGC-20-586732, 2021 Cal. Super. LEXIS 153907.
[145] *Id.* at *35.

Washington courts utilize a similar definition of "banishment" and understanding of the right to travel as those jurisdictions.[146] Washington courts have held that "banishment orders encroach on an individual's constitutional right to travel, which includes the right to travel *within* a state."[147] Further, banishment orders are subject to strict scrutiny due to their constitutional implications: to survive strict scrutiny, a banishment order must be narrowly tailored to serve a compelling governmental interest.[148]

Some scholars critiqued the former iteration of Seattle's SOAP regulations as one such instance where banishment orders were not narrowly tailored to serve a government interest but instead merely bolstered police power to an alarming and impermissible degree.[149] Such critiques emphasized the problematic way that the former SOAP legislation lowered the bar for probable cause and inappropriately relied on "a basic premise of American criminal law: that the threat of punishment will deter people from criminal behavior . . . if hassled frequently enough in a given place, the banished will get the message and simply leave."[150]

While courts have pondered the extent to which someone must be barred from a jurisdiction in its entirety to constitute banishment, some scholars have pointed to the lived experiences of those under exclusion orders as evidence that banishment perhaps cannot be simplified to a purely geographical evaluation. "The areas from which people are banned often comprise significant parts of the city and may include the entire downtown core in which social and legal services are concentrated."[151]

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[146] *See e.g.,* State v. Schimelpfenig, 115 P.3d 338, 339 (Wash. 2005).
[147] *Id.* (emphasis added) (citing *Shapiro* at 630–31).
[148] State v. Alphonse, 197 P.3d 1211, 1220 (Wash. 2008) (Factors considered in determining whether a banishment is narrowly tailored include (1) whether the restriction protects the safety of the victim or witness, (2) whether it is punitive rather than rehabilitative, (3) whether it is unduly severe and restrictive in light of the defendant's history in and ties to the community from which they are banished, (4) whether the defendant can petition to temporarily lift the restriction, and (5) whether there are less restrictive means which would similarly satisfy the state's compelling interest).
[149] Steve Herbert & Katherine Beckett, *'This is Home for Us': Questioning Banishment From the Ground Up*, 11 SOCIAL & CULTURAL GEOGRAPHY 231, (2010).
[150] *Id.* at 235–36. (noting also that SOAP "lower[s] the standard of probable cause the police need to meet to make an arrest. An officer need merely note a person is in a place, and then determine whether that person is prohibited from that place, usually via a check of the relevant database on a patrol car computer terminal. An officer does not need to find evidence of criminal activity, such as a promise or actual exchange of money for drugs or sex").
[151] *Id.* at 235.

IV. THE UNCONSTITUTIONALITY OF THE SOAP ORDINANCE

Accepting the premise that the SOAP Ordinance, despite its placement in Seattle's criminal code, is in fact a zoning ordinance designed to create a restrictive overlay zone applicable to people subject to SOAP Orders, then that zoning ordinance must conform with certain constitutional standards. The controlling law in regard to evaluating the constitutionality of zoning ordinances derives from the Supreme Court's decision in *Euclid v. Ambler Realty* in 1926.[152]

In the landmark case *Euclid,* the Supreme Court held that zoning ordinances only violate the Fourteenth Amendment's Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[153] The meaning of "public health" and "safety" within the standard set forth by *Euclid* has been held to encompass concerns such as the danger of fires, structural collapses, and unsafe overcrowding which certain business activities may create when undertaken within primarily residential areas.[154] Thus, zoning ordinances can be used to mitigate health risks which accompany unregulated urban development and land use.[155] The meaning of "general welfare" "is broad and inclusive," encompassing the "spiritual as well as physical, aesthetic as well as monetary."[156] The use of "morals" within the rational basis standard set forth in *Euclid* is less established but may encompass regulations that uphold societal standards of decency and morality.[157]

A. THE SOAP ORDINANCE FAILS *EUCLID* RATIONAL BASIS REVIEW

Importantly, the court in *Euclid* emphasized that all zoning ordinances are presumed valid, with the burden of proof to show their

[152] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[153] *Id.* at 395.
[154] *See Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 733 (1995) (The purpose of zoning restrictions on the number of occupants permitted to reside in a given structure is "to protect health and safety by preventing dwelling overcrowding").
[155] *Id.*
[156] *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (quoting *Berman v. Parker*, 348
U.S. 26, 33 (1954)).
[157] Paris Adult Theatre I v. Slaton*,* 413 U.S. 49, 108–109 (1973) (Douglas, J., dissenting) ("The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry. . . And much legislation . . . is grounded, at least in part, on a concern with the morality of the community. But the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined").

invalidity lying with the party challenging the ordinance.[158] Still, under this rational basis standard, zoning ordinances must be justified by the exercise of police power in the interest of the public so that such regulations and any associated restrictions bear a substantial relation to public interest and are not "exercised in a standardless, hence arbitrary and capricious manner."[159] Thus, to comport with the Due Process Clause, "[l]egislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon . . . the pursuit of useful activities."[160] In sum, the substantive due process claim concentrates on whether the government's restrictions are reasonable in relation to the public interest which it serves.[161]

In light of this, the SOAP Ordinance fails rational basis review under *Euclid* and its progeny.[162] Focusing on the SOAP Ordinance's creation of SOAP Orders, it is evident that the zoning ordinance does not, as written, serve "public health, safety, morals, or general welfare."[163] The portions of the SOAP Ordinance which enable "[a] judge or judge pro tempore of the Seattle Municipal Court [to] issue a SOAP order to anyone charged with, or convicted of, any violation of prostitution-related crimes," represent a "clearly arbitrary and unreasonable" restriction.[164] In part, the SOAP Ordinance claims:

> This Section 12A.10.040 is enacted as an exercise of the police power of the City of Seattle to protect the public *peace*, *health*, *safety*, and *welfare*, and its provisions shall be liberally construed to accomplish those purposes. The express purpose of this legislation is to promote the health, safety, and welfare of the general public, and not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefitted by the terms of this legislation. The specific intent of

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[158] *Euclid*, 272 U.S. at 395 ("where the equitable remedy of injunction is sought . . . not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.")

[159] *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976).

[160] Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121 (1928).

[161] *Id.*

[162] The SOAP Ordinance's reinstatement of "prostitution loitering" as a misdemeanor and creation of "promoting prostitution loitering" as a gross misdemeanor may violate the Constitution or other legal authorities but are not relevant to this zoning rational basis analysis.

[163] *Euclid*, 272 U.S. at 395.

[164] The SOAP Ordinance at 12A.11.020 § A.

> this legislation is to provide guidance to police officers enforcing the crimes described in subsection 12A.10.040.A of the Seattle Municipal Code and increase public safety.[165]

First, issuing SOAP Orders as a means of protecting public health, in its most literal interpretation, is an unfounded solution to the well documented prevalence of post-traumatic stress disorder and sexually transmitted diseases that many sex workers endure.[166] SOAP Orders do little to lessen sex workers' exposure to the causes of such health issues, given the probability of migrating away from the area within the SOAP Ordinance's exclusion zone to find work and the lack of concrete alternative resources provided by the SOAP Ordinance.[167] Neither is the general public's health is serviced by excluding certain individuals from entering parts of the city, since only those who engage in prostitution and related activities bear the direct risks of health issues associated with the sex work industry. Thus, there can be no genuine justification from a public health perspective to warrant the restrictive nature of issuing SOAP Orders.

Similarly, there is no substantial relationship between issuing SOAP Orders and promoting public safety. From a traditional zoning lens under *Euclid*, one can analogize the sex work as the target of the SOAP Ordinance with other zoning ordinances which regulate urban development. For the latter, regulations ensure that buildings are structurally sound, are not so densely constructed to avoid safety concerns, and so on. However, for the former, issuing SOAP Orders does nothing to physically protect residents within the SOAP Ordinance's exclusion zone nor Seattle citizens more broadly from tangible dangers. If anything, the SOAP Ordinance claims to protect certain populations exclusively: young girls in nearby schools and those already providing sex work within the SOAP Ordinance's exclusion zone.[168] Those groups, by this logic, would be safer if sex solicitors and facilitators are unable to access the areas commonly associated with prostitution. Yet, unlike inanimate structures, all parties can physically move—voluntarily or involuntarily—inside or outside of the SOAP Ordinance's exclusion zone.

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[165] The SOAP Ordinance at 12A.10.040 § I ("Policies governing arrests for prostitution and prostitution loitering") (emphasis added).
[166] *See* Sodha, *supra* note 52.
[167] Brown, *supra* note 12.
[168] *See* the SOAP Ordinance at 1–2. (Claiming that ". . . independent academics and neighborhood residents have observed an increase in the sex trafficking of minors in King County in the last three years" and "women and minor girls being trafficked along Aurora Avenue North are regularly subject to horrific acts of violence perpetrated by both traffickers and buyers of sex").

That issue of practicality aside, it is curious that the SOAP Ordinance posits to serve "public safety"[169] yet relies on issuing SOAP Orders for explicitly prostitution-related offenders to mitigate negative externalities of prostitution and claiming to thereby deter perpetrators of gun violence, "street gangs," and others who threaten public safety.[170] Of course, no zoning ordinance can or should have to ensure public safety on every metric in order to pass rational basis review, but it is troubling that the SOAP Ordinance cherry-picks engaging in even voluntary prostitution as a compelling reason to exclude individuals from parts of Seattle rather than targeting the root causes of other, perhaps more compelling, public safety concerns. This undermines the feasibility of public safety serving as a justifiable exercise of police power, given that the SOAP Ordinance scapegoats one type of offense, prostitution, which may indeed be non- violent, non-disruptive, and consensual in nature.

Further, the SOAP Ordinance somewhat bluntly attempts to promote "morals" by decreasing the instances and convenience of sex work. However, as aforementioned, given the widely debated and undoubtedly divisive ideas surrounding the ethicality of sex work, banishing those under SOAP Orders it is not a convincing moral basis for legislating in this manner.[171] It is also counterintuitive, yet perhaps strategic that the SOAP Ordinance's stated goal is to "protect the public peace, health, safety, and welfare."[172] This seemingly regurgitates verbatim the standard set forth in *Euclid* save for the justification for zoning ordinances which aim to promote morals.[173] Of course, just because the SOAP Ordinance claims to promote peace, health, safety, and welfare—but makes no similar assertion regarding morals—does not mean that it actually achieves the former group of goals, nor does it prove that it is not rooted in misplaced moralistic concerns over sex work.

Finally, aside from justifications based on "public health, safety, [or] morals[,]" issuing SOAP Orders could be justified in the broader "general welfare" category under *Euclid*.[174] Realistically, this category appears to be a major driving force for the SOAP

[169] The SOAP Ordinance at 12A.10.040 § I.
[170] The SOAP Ordinance at 2.
[171] *Compare Unpacking Harmful Myths Around Sex Work*, The Equity Inst., (Apr. 27, 2020), https://perma.cc/HYE8-Q95T, *and* Alyssa Morterud, *Damaging Misconceptions About Sex Workers*, Sexual Health All., (Oct. 25, 2021), https://perma.cc/B57T-XARP, *with* Sodha, *supra* note 52.
[172] The SOAP Ordinance at 12A.10.040 § I.
[173] *See Euclid*, 272 U.S. at 395.
[174] *Id.*

Ordinance.[175] As one of the only effects of prostitution which does not impact those within the industry, the SOAP Ordinance points to "significant negative quality-of-life and economic impacts to residents and businesses on Aurora Avenue North, as well as to those in adjacent residential neighborhoods."[176] From this perspective, SOAP Orders are clearly seeking to improve the "physical, aesthetic as well as monetary" status of neighborhoods in and around the SOAP Order exclusion zone.[177] While on its face these are legitimate interests which zoning ordinances are permitted to address, SOAP Orders, to the extent they constitute banishment or otherwise run afoul of the right to travel or other civic norms, are arguably extreme and unjustified. For instance, it would not seem a slippery slope to use a government's police power to simply remove from an area any person or type of work deemed sufficiently (and often subjectively) unsavory as a means of increasing the status of a neighborhood.

Given the vague yet simultaneously restrictive measures SOAP Orders facilitate, particularly in light of the lack of proper purpose for the SOAP Ordinance under *Euclid*, it is evidence that SOAP Orders may be "unnecessary and unreasonable" limitations on "the pursuit of useful activities."[178] Thus, because there is no rational basis for the SOAP Ordinance's implementation of SOAP Orders, the legislation fails rational basis review and is an unconstitutional exercise of police power to issue zoning ordinances.

B. THE SOAP ORDINANCE FAILS STRICT SCRUTINY REVIEW

Additionally, the SOAP Ordinance is unconstitutional under a strict scrutiny standard of review, which is used in place of the rational basis standard of review "when a zoning law infringes upon a protected liberty," and therefore, any ordinance "must be narrowly drawn and must further a sufficiently substantial government interest."[179] Here, the fundamental right implicated by the SOAP Ordinance arises because SOAP Orders infringe on the right to travel.[180]

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[175] *See Seattle City Council Passes Legislation Combating Commercial Sexual Exploitation, supra* note 15.
[176] The SOAP Ordinance at 3.
[177] *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (quoting Berman v. Parker, 348
U.S. 26, 33 (1954)).
[178] Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121 (1928).
[179] Schad v. Mount Ephraim, 452 U.S. 61, 69 (1981).
[180] *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (applying strict scrutiny to a one-year residency requirement for welfare recipients because it infringed on the fundamental right to travel).

Given that "banishment orders encroach on an individual's constitutional right to travel, which includes the right to travel within a state," the SOAP Ordinance must be evaluated under a strict scrutiny standard of review.[181] The SOAP Ordinance's creation of SOAP Orders is not narrowly tailored to serve a substantial governmental interest. Rather, the SOAP Ordinance merely cites mitigating violence in, improving quality of life for neighbors of, and aiding sex trafficking victims within the exclusion zone as the impetus for regulating the movement of certain individuals.[182] Without a coherent purpose for the SOAP Ordinance's existence, it is implausible that SOAP Orders could be narrowly tailored to meet such vague goals associated with safety and morality. Thus, under a strict scrutiny analysis of the SOAP Ordinance, the issuing of SOAP Orders is an unconstitutional exercise of police powers to zone.

The procedures governing the oversight of people under SOAP Orders and the limited exceptions on those restrictions further evidence the key issue that the SOAP Ordinance is an arbitrary regulation with little to no relation to promoting the public interest under *Euclid*. For instance, there is a low bar for law enforcement to be able to arrest persons within the SOAP exclusion zone: "[i]f a police officer has probable cause to believe that a person is subject to an order . . . and that a willful violation of that order is occurring in the officer's presence, the officer may arrest that person without a warrant or other process."[183] This authority alone appears to be a troubling expansion of police power under the "guise" of due process which could result in the justification of profiling or other discriminatory policing practices within the exclusion zone.[184]

Further, the SOAP Ordinance grants minimal exceptions which would otherwise protect the right to travel and make the issuance of SOAP Orders less akin to banishment. The SOAP Ordinance explicitly allows people subject to a SOAP Order to "[transit] through a SOAP zone on public transportation, as long as the person does not enter or exit the public transportation in the SOAP zone."[185] Those subject to SOAP Orders are also able to move within the exclusion zone for purposes of "participating in a scheduled court hearing, attending a scheduled meeting with legal counsel within a prohibited

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[181] *See* State v. Schimelpfenig, 115 P.3d 338, 339 (Wash. 2005) (holding that "banishment orders encroach on an individual's constitutional right to travel, which includes the right to travel *within* a state").
[182] *See generally* the SOAP Ordinance.
[183] The SOAP Ordinance at 12A.11.030 § B ("A person who knowingly violates the terms of a SOAP order by entering a prohibited area when the order is in effect is guilty of a gross misdemeanor").
[184] *See* Wash. *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121 (1928).
[185] The SOAP Ordinance at 12A.11.030 § C.

area, or attending a court-ordered services appointment during standard business hours within the prohibited area."[186]

Beyond those carve outs, there is nothing else in the SOAP Ordinance that provides guidance on how individuals under SOAP Orders should navigate securing authorization for other, justifiable reasons to enter the SOAP exclusion zone.[187] Nor is there a clear procedure for disputing the issuance, terms, or duration of a SOAP Order.[188] Nor is there any articulation of how such stringent rules of exclusion and criminalization of ordinary activities serves a legitimate government interest, let alone an explanation of how such provisions are narrowly tailored to achieve that end.[189]

Thus, the SOAP Ordinance is unconstitutional under strict scrutiny review, as it unjustifiably infringes upon the fundamental right to travel by imposing sweeping and arbitrary restrictions through SOAP Orders. Lacking a narrowly tailored framework to advance a compelling governmental interest, the SOAP Ordinance instead relies on vague and unsupported justifications related to public safety and morality, while simultaneously expanding police authority and failing to provide essential procedural safeguards for affected individuals.

V. UNINTENDED CONSEQUENCES

Beyond those carve outs, there is nothing else in the SOAP Ordinance that provides guidance on how individuals under SOAP Orders should navigate securing authorization for other, justifiable reasons to enter the SOAP exclusion zone.[190] Nor is there a clear procedure for disputing the issuance, terms, or duration of a SOAP Order.[191] Nor is there any articulation of how such stringent rules of exclusion and criminalization of ordinary activities serves a legitimate government interest, let alone an explanation of how such provisions are narrowly tailored to achieve that end.[192]

The SOAP Ordinance is not just constitutionally unsound given its failure to pass rational basis or strict scrutiny review; it is

[186] *Id.*
[187] *See generally* the SOAP Ordinance.
[188] The SOAP Ordinance at 12A.11.030 §. ("the court shall consider the requested modification or termination by allowing for a process by which the person subject to the order can provide relevant testimony and other evidence in support of the request").
[189] *See generally* the SOAP Ordinance.
[190] *See generally* the SOAP Ordinance.
[191] The SOAP Ordinance at 12A.11.030 §. ("the court shall consider the requested modification or termination by allowing for a process by which the person subject to the order can provide relevant testimony and other evidence in support of the request").
[192] *See generally* the SOAP Ordinance.

problematic legislation for myriad other reasons as well. Namely, while attempting to target negative externalities of prostitution and sex trafficking, the SOAP Ordinance brings its own set of counterproductive side effects which outweigh whatever claimed benefits the Seattle City Council credits it with. As discussed below, these implications, despite the intentions of Seattle's City Council, make the SOAP Ordinance not just legally questionable but practically inefficient.

A. THE OVERSIGHT OF DUE PROCESS PRECEDENT

Even though the SOAP Ordinance functions as a land use regulation, the Due Process Clause is implicated by the SOAP Ordinance given its placement in the criminal code.[193] Criminal statutes that lack sufficient definiteness or specificity may be deemed "void for vagueness" due to either their lack of clarity which makes it impermissibly difficult to adhere to the law or for their enablement of inequitable enforcement.[194] Void for vagueness statutes may violate the Due Process Clause by failing "to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[195] Moreover, a criminal law may be deemed void for vagueness because it fails to articulate applicable standards and thus produces inconsistent or otherwise unjust enforcement.[196]

Therefore, in defining a criminal offense and the implications of it, statutes must provide "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[197] Beyond the carve outs for transiting through the SOAP exclusion zone or entering it for court-related activities, the SOAP Ordinance does not acknowledgment how those who are under SOAP Orders should behave.[198] Taken at face value, the SOAP Ordinance dictates that a person subject to a SOAP Order cannot: visit family or friends, buy or rent property, conduct lawful business, access government services, or

[193] Seattle Criminal Code, https://perma.cc/DZV6-CFRP (The SOAP Ordinance is codified in "Title 12A - Criminal Code.").
[194] *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).
[195] Musser v. Utah, 333 U.S. 95, 97 (1948). *See also* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("Vague laws offend several important values … because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings.")
[196] *See also* Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982); *Grayned*, 408 U.S. at 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.")
[197] Kolender v. Lawson, 461 U.S. 352, 357 (1983).
[198] *See generally* the SOAP Ordinance.

obtain medical services in the SOAP exclusion zone.[199] Further, there is little guidance on how those subject to SOAP Orders should navigate gaining permission to enter such zones.[200]

Under the SOAP Ordinance, those issued SOAP Orders are presumably able to request its modification or termination, yet the process for doing so is immensely vague: "the court shall consider the requested modification or termination by allowing for a process by which the person subject to the order can provide relevant testimony and other evidence in support of the request."[201] Assuming a person subject to a SOAP Order is not successful in modifying or terminating the restriction, "a SOAP order issued. . . as a condition of sentence shall terminate two years from the date of issuance," or, for "orders issued as pretrial conditions of release . . . upon dismissal of the criminal charge."[202]

This ambiguity, considering what's at stake for someone under a SOAP Order thus raises legitimate procedural Due Process concerns. For an individual to face incarceration for a gross misdemeanor charge, fines, and up to two years of exclusion from three miles of the city—yet to have no decipherable statutory recourse or clearly drawn standards—indicates the SOAP Ordinance is void for vagueness and directly clashes with Due Process precedent.[203]

B. THE SLIPPERY SLOPE FOR ZONING PRECEDENT

The SOAP Ordinance is a land use regulation regardless of its codification as a criminal statute, which if upheld upon future legal challenges, will create a slippery slope for zoning precedent. As aforementioned, zoning powers have vastly changed and expanded over the past century.[204] Still, land use regulations issued under states' police powers can arguably be beneficial for ensuring safe urban development and maximizing beneficial uses of land.
However, the SOAP Ordinance does neither. Instead, the SOAP Ordinance opens the door for other cities and states to implement zoning ordinances not to mitigate externalities, which is already controversial in many cases, but to use zoning as a punitive measure for particular groups of people.

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[199] *Id.*
[200] The SOAP Ordinance at 12A.11.030 § B ("A person who knowingly violates the terms of a SOAP order by entering a prohibited area when the order is in effect is guilty of a gross misdemeanor").
[201] *Id.*
[202] *Id.* at 15.
[203] *See* The SOAP Ordinance at 12A.11.020 § C. (penalties for violating a SOAP Order); 12A.11.050 (map of SOAP Zone 1).
[204] Rouse et al., *supra* note 100.

Given the emphasis that the SOAP Ordinance places on cracking down on the *crime* of prostitution as a means to an end for improving the Seattle neighborhoods surrounding the SOAP Ordinance exclusion zone, it is foreseeable that future legislation may draw inspiration from the way in which, here, zoning is used as a criminal enforcement mechanism. This could be likely given the relatively low cost of implementing legislation like the SOAP Ordinance when compared to funds necessary for implementing more traditional law enforcement frameworks. Importantly, the SOAP Ordinance seeks to address high levels of crime by banishing those participating in crime within a certain area. This strays from cases in which businesses were properly barred from operating in certain places given their causation and connection to crime in certain areas.[205] Thus, just as critics of the former SOAP legislation have noted, this iteration of the SOAP Ordinance continues to erode the beneficial and necessary aspects of zoning and creates dangerous precedent for using zoning ordinances veiled as criminal codes for cracking down on crime so that "police power to exercise their authority here is largely unchecked" at the expense of certain, already marginalized groups' rights.[206]

In another sense, not only does the SOAP Ordinance create a slippery slope for the conflating of zoning ordinances and criminalization, but it also likewise has foreseeable consequences for further normalizing banishment zones. Logically, if courts approve the SOAP Ordinance's creation of SOAP Orders based on the undesirability of allowing those affiliated with prostitution or sex trafficking into a particular part of the city, then other justifications could also be rationalized. The risk that the SOAP Ordinance creates is thus clear: it paves a path where it is legally sound for people to be barred from places based on some characteristic or former crime they may not have even been convicted of. This, of course, is a troubling but ultimately foreseeable consequence.

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[205] *See* Young v. Am. Mini Theatres, 427 U.S. 50, 71(1976) (Upholding adult entertainment zoning: ". . . the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited.").

[206] Herbert & Beckett, *supra* note 149, at 235–36. (Criticizing banishment legislation like the former SOAP Ordinance for creating "an inability to maintain social contacts; reduced access to services; loss of work; and reduced physical security").

C. AMBIGUOUS GOALS INEFFECTIVELY YET HARMFULLY EXECUTED

The SOAP Ordinance not only poses a threat in that it creates a slippery slope for future legislation, but also in that banishment remains an ineffective solution to addressing systemic communal issues which perpetuate the economy for prostitution and sex trafficking and thus fuel negative externalities.

First, it is evident that people with SOAP Orders can engage in the same undesired behaviors elsewhere.[207] In this sense, the negative externalities that the presence of people under SOAP Orders create will not be eradicated but will instead simply relocate—perhaps still impacting the same surrounding communities. This reality pokes holes in the claimed goal of the SOAP Ordinance to disrupt sex trafficking given that sex traffickers can easily move their operations and continue the same coercive and violent tactics while avoiding SOAP Order penalties.[208] Voluntary sex workers can similarly relocate and resume the undesired activities.

It is also troubling that the SOAP exclusion zone can be expanded given that more areas of the city could become off limits for individuals with SOAP Orders, only worsening the constitutional concerns the SOAP Ordinance currently presents.[209] Ultimately, the geographic nature of SOAP Orders means that the SOAP Ordinance only temporarily lessens instances of prostitution and sex trafficking, if at all, yet implicitly, if not directly, pushes the problems into other Seattle neighborhoods.

The SOAP Ordinance is just one example of laws designed to relocate people who are deemed unfit to exist within a certain space and are thus unwelcome. One of the most common communities ousted in this way is the unhoused population. Unhoused persons are often subject to laws aimed at "geographically and socially marginalizing and banishing them to remote places."[210] In fact, on June 28, 2024, the Supreme Court held that cities can arrest and banish homeless individuals sleeping or sheltering outdoors in their jurisdiction while

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[207] Brown, *supra* note 12.
[208] The SOAP Ordinance at 3 (Claiming that "the majority of violent crime in that corridor [within the SOAP Ordinance zone] is associated with pimps and sex traffickers profiting off the victimization of individuals under their control").
[209] *See* the SOAP Ordinance at 3 (". . . regular re-evaluation is required to understand whether a Stay Out of Area of Prostitution (SOAP) zone needs to be changed, reduced, added, or expanded, based on data, to retain the efficacy of the policy and minimize unintended consequences. . .").
[210] ACLU, OUTSIDE THE LAW: THE LEGAL WAR AGAINST UNHOUSED PEOPLE 4 (Oct. 2021), https://perma.cc/WQK9-UCWW.

simultaneously offering no aid or support to the unhoused population.[211] The Court in *City of Grants Pass v. Johnson* found that the ordinance in question did not criminalize the status of homelessness, which would be unconstitutional, but the activities associated with homelessness, such as sleeping outside.[212] Yet, with no other options made available, there is a fine line, or no line at all, between the status of being homeless and the activities associated with being homeless, especially when the government has no obligation to provide resources to mitigate those activities.

When comparing this logic to the SOAP Ordinance, it is difficult to see how SOAP Orders criminalize anything other than the *status* of formerly being involved in prostitution or sex trafficking. It is also evident that, just as homeless people have to live somewhere after banishment, those entrenched in the sex work industry often have to continue working in it and will simply relocate to do so. Moreover, those individuals may have other reasons to return to the SOAP exclusion zone that extends beyond what limited statutory carve outs permit them to. In sum, there is both the pressure to move elsewhere to continue the problematic activities which resulted in one being banished while also perhaps the pressure to return to the SOAP exclusion zone for some other reason despite the threat of penalty that doing so brings.

Another profound way that the SOAP Ordinance proves ineffective is that it provides only loose guidelines for differentiating between those who are voluntarily participating in prostitution versus involuntarily participating in sex trafficking. This is problematic in many senses but particularly when coupled with the reality that the SOAP Ordinance fails to establish diversion programs, counseling, or other assistance to those who want to but require help in exiting the sex work industry.[213] By further criminalizing and financially burdening sex workers with "a maximum penalty of 364 days in jail and/or a $5,000 fine," the SOAP Ordinance only perpetuates the need to engage in the industry.[214] Put simply, the SOAP Ordinance presumes that by threatening the financial stability and freedom of people involved in the sex work industry, particularly those with SOAP Orders—while failing to provide any social services to supplement whatever benefits were gained by the undesired behavior—that somehow, Seattle will be a safer place due to becoming a less appealing hub for sex work.

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[211] Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (holding that the practice of penalizing those sleeping outside where no shelter is available constitutes cruel and unusual punishment), *overruled by* City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).
[212] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2219 (2024).
[213] *See generally* Leon & Shdaimah, *supra* note 56; Schweig et. al., *supra* note 55.
[214] The SOAP Ordinance at 12A.11.020 § C.

As discussed, zoning is only one arena in which the SOAP Ordinance can be legally challenged. There are many other concerns that the SOAP Ordinance raises in terms of discrimination, freedom of assembly, the right to travel, and so on. With that in mind, it is possible that a court may strike down the SOAP Ordinance not as the result of an unfavorable zoning analysis but for some other reason. Or, unfortunately, the SOAP Ordinance could also remain unchallenged or even upheld by a court. Still, the unique implications the SOAP Ordinance has on zoning precedent and literature merits full consideration.

VI. CONCLUSION

The SOAP Ordinance represents a troubling misuse of police powers to implement exclusionary zoning under the pretense of public safety. By embedding zoning principles within the criminal code, the SOAP Ordinance attempts to circumvent established legal frameworks designed to regulate land use, raising serious constitutional questions about its legitimacy. Rather than addressing the systemic issues driving prostitution and sex trafficking, SOAP Orders merely displace these activities to other areas, exacerbating the harm to marginalized communities in the process. This flawed approach not only undermines the rule of land use law but also diverts attention and resources from sustainable, community-based public-safety solutions.

Revisiting and reframing the SOAP Ordinance is essential to ensure that Seattle's policies align with constitutional standards for issuing zoning ordinances and foster genuine social progress. As such, the SOAP Ordinance underscores broader tensions between performative public safety initiatives and the need for approaching zoning from an equitable, evidence-based, and additive lens.

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