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ARTICLES

NEW MOTHERS KNOW BEST? SECOND-PARENT CHOICES AT BIRTH

Jeffrey A. Parness 1

Professor Jessica Feinberg recently observed that state laws governing the ability of an individual who gives birth (“gestating parent”) “to exercise meaningful choice within the determination of who is deemed the child’s second legal parent differ drastically depending on factors such as their marital status, the method of the child’s conception, and the gender of the desired second parent.” She found many of the differences “problematic,” having “no underlying theory that provides a consistent explanation for the law’s current approach.” Moreover, she urged “reform . . . to create a more coherent and just legal framework governing the degree of meaningful choice individuals who give birth have in at-birth determinations of the child’s second legal parent.” Reform efforts, she concluded, should primarily focus on “the law’s approach to married gestating parents and the eligibility requirements for establishing parentage through VAPs” (that is, “voluntary acknowledgements of parentage”). Here, she advised “that the gestating parent should be able to exercise a significant degree of meaningful choice in the determination of who is deemed the child’s second legal parent at birth,” with the choice to be given “special weight.”

Professor Feinberg is not the first to urge that significant, if not absolute, deference be given to gestating parents in regard to the determination of a child’s second legal parent at birth. In 2006, Professor E. Gary Spitko concluded, “the biological mother enjoys the right to control access to her child including the right to determine who else shall be allowed to become a parent of the child.” In 2006, Professor Karen Syma Czapanskiy proposed that a birth mother be “empowered to decide whether she will be the child’s sole legal parent or whether she will designate whomever she wants,” with the choice “not constrained by presumptions in favor of her spouse or the child’s biological father.” In 2016, Professor Melanie B. Jacobs, focusing on “at-birth parentage determinations,” opined that “all parents must sign an intentional acknowledgment of parenthood that establishes the maternity and/or paternity of the child.” Under her approach, “a child will have a minimum of one parent,” presumedly the gestating parent. Effectively, she suggests no one else may be a parent at birth, even if married to the gestating parent, unless the biological mother recognizes the parentage of the other person or persons in writing.

In response, this article presents alternative reforms of new mothers-know-best laws. It first reviews the laws on prebirth and at-birth choices of second parents by gestating parents that take effect at birth. It then sets forth some thoughts on more coherent laws on such second-parent choices, recognizing that while some nationwide coherence is compelled by U.S. Supreme Court precedents, certain interstate variations are invited by other Court precedents, meaning coherence must be assessed at times on a state-by-state basis.

FEEDING THE CATS: THE CORRUPTION CONUNDRUM IN THE FAILED ARAB SPRING - EGYPT

Mohamed 'Arafa 21

The Egyptian civil society, across generational, religious, gender, and economic lines and without a charismatic leader, has organized itself at the grassroots level, evidencing the people's power in the face of a strong regime. Public order, security, and stability have deteriorated during the past two decades, with increased crime rates and other forms of abuses of power by individuals (e.g., thugs and small criminal bands), which the police have left somewhat unchecked. The people hold the military in high esteem because, in the last forty years, it has never acted against the general public. To prevent manipulation during the investigations and trials, the Egyptian Attorney General ordered the arrest and freezing of assets of several persons under investigation for corruption, bribery, profiteering, and money laundering according to the Egyptian criminal justice system (e.g., Egypt's Penal Code). Further, after the Attorney General conducted individual investigations to determine how corruption turned into money laundering and how the Egyptian economy is now left holding the bag for what could amount to billions of dollars, some institutional reforms have taken place.

Like its predecessors—the Nasr and Sadat regimes—the Mubarak administration had a military and political establishment. Under former President Mubarak, no one knows precisely how much it grew because its operations, budgets, and profits were secret. This entire sector of the economy was not only beyond civilian control; it was hidden, not taxed, and the military establishment distributed its undisclosed profits as senior leadership saw fit. It fell outside of any type of accountability, was not subject to any operational control, and enjoyed free from import and export duties. The main concerns and goals of the Egyptian people are regime changes, emphasizing the notion that people should govern themselves, democracy, justice (including socio-economic justice), reforming human and civil rights, fighting corruption, and reviving the rule of law. Their slogans were *kefaya* (enough is enough), *alSh'ab youreed isqaat alnizam* (the public wants the regime to fall down), and *No more nickel, No more dime, No more money for Mubarak's crimes*. American and Western ideals and values reflected in the U.S. Constitution and—particularly—Islamic norms and principles have influenced Egyptian society. The current administration is entirely understanding that it must meet these particular goals.

NOTES

A COMPARATIVE ANALYSIS OF MENTAL HEALTH PROFESSIONALS' DUTY TO WARN ACROSS THE UNITED STATES: THE NEED FOR CLEARLY DEFINED LAWS IN LIGHT OF RECENT MASS SHOOTINGS

Alexis M. Hulfachor 123

As rates of mass shootings continue to rise in the United States, the public and legislatures have searched for solutions to curb such violence. Many public officials have turned to mental health

professionals’ duty to warn as a way to prevent acts of mass violence in the future. In light of the critical role mental health professionals play in preventing harm to the public, this Note addresses whether clearly defined duty-to-warn laws could help mental health professionals identify serious threats and interrupt acts of violence in the future. This Note explores the various types of duty-to-warn statutes across the United States and the judicial responses to the introduction of these laws. It also explores the practical problems inherent in the implementation of current duty-to-warn laws, highlighting that ambiguity in the laws arise from lack of clarity in the laws, conflicting duties imposed on therapists, and inexact science of predicting violence. Finally, this Note proposes a model statute designed to provide greater protection to the public, limit needless liability to therapists, and clarify the duty to warn in order to decrease the risk of unnecessary breaches of confidentiality.

ELIMINATION OF CASH BAIL IN ILLINOIS: ACCESSING RISK OF DEFENDANTS USING RISK ASSESSMENT TOOLS

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In recent years, Illinois through the SAFE-T Act moved to eliminate cash bail in its entirety, moving to a new form of pretrial detention. Under the SAFE-T Act, persons are either released (sometimes with conditions), or detained pending trial. This Note argues that Illinois should amend its current statutory framework to mandate the use of a risk assessment tool to help aid decisions about pretrial detention. In support of mandating a risk assessment tool, this Note analyzes pretrial detention schemes in New Jersey, New York, and Illinois. While New Jersey has achieved high appearance rates and has seen success in decreasing jail populations, New York has not seen the same success. This Note concludes that Illinois should adopt a form of the Public Safety Assessment (PSA) as it is used in New Jersey because both pretrial detention statutes focus on the threat to public safety and appearance at court.

A PROPOSAL TO REFORM THE INSTITUTION OF MARRIAGE IN THE POST-DOBBS ERA THROUGH THE TWENTY-EIGHTH AMENDMENT

Allison J. Cozart 185

In the United States, marriage is considered a fundamental right. In the summer of 2022, the Supreme Court ruled on a landmark decision in *Dobbs v. Jackson Women’s Health Organization*. There were significant changes that came from this decision and implications that could heavily affect marriage rights in this country. While the majority opinion focused on overturning the right to abortion, Justice Thomas’s concurrence shed light on the possibility that marriage might have been “wrongfully decided.” Thus, creating an uproar from American citizens across the country. In 2015, the Court recognized same-sex marriage as legally valid and held that all states must recognize marriage between same-sex couples. However, the overtone displayed by Justice Thomas’ dissent has been very troubling in light of the Supreme Court overturning precedents, thus paving the way for *Obergefell v. Hodges* to fall as did *Roe v. Wade*. This Note begins with an analysis of the legal history of marriage rights and posits that there should be a constitutional amendment protecting marriage rights regardless of the “definition” used. This Note is designed to help assist those legislatures in enacting change in this country but also designed to inform American citizens of the volatile state of marriage rights.

NEW MOTHERS KNOW BEST? SECOND-PARENT CHOICES AT BIRTH

Jeffrey A. Parness*

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I. INTRODUCTION

Professor Jessica Feinberg recently observed that state laws governing the ability of an individual who gives birth (“gestating parent”) “to exercise meaningful choice within the determination of who is deemed the child’s second legal parent differ drastically depending on factors such as their marital status, the method of the child’s conception, and the gender of the desired second parent.”¹ She found many of the differences “problematic,” having “no underlying theory that provides a consistent explanation for the law’s current approach.”² Moreover, she urged “reform . . . to create a more coherent and just legal framework governing the degree of meaningful choice individuals who give birth have in at-birth determinations of the child’s second legal parent.”³ Reform efforts, she concluded, should primarily focus on “the law’s approach to married gestating parents and the eligibility requirements for establishing parentage through [voluntary

* Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D. The University of Chicago.

¹ Jessica Feinberg, *Parent Zero*, 55 UC DAVIS L. REV. 2273, 2273 (2022).

² *Id.* at 2275.

³ *Id.*

acknowledgements of parentage].”⁴ Here, she advised “that the gestating parent should be able to exercise a significant degree of meaningful choice in the determination of who is deemed the child’s second legal parent at birth,”⁵ with the choice to be given “special weight.”⁶

Professor Feinberg is not the first to urge that significant, if not absolute, deference be given to gestating parents in regard to the determination of a child’s second legal parent at birth.⁷ In 2006, Professor E. Gary Spitko concluded, “the biological mother enjoys the right to control access to her child including the right to determine who else shall be allowed to become a parent of the child.”⁸

In 2006, Professor Karen Syma Czapanskiy proposed that a birth mother be “empowered to decide whether she will be the child’s sole legal parent or whether she will designate . . . whomever she wants” with the choice “not constrained by presumptions in favor of her spouse or the child’s biological father.”⁹

In 2016, Professor Melanie B. Jacobs, focusing on “at-birth parentage determinations,”¹⁰ opined that “all parents must sign an intentional acknowledgment of parenthood that establishes the maternity and/or

⁴ *Id.* at 2274; *id.* at 2325 (“[T]here are two areas of the law – the framework governing married gestating parents and gender-based VAP eligibility restrictions – that are most clearly in need of legal reform.”); *What’s a Voluntary Acknowledgment of Paternity*, MILLER L. GRP., P.C. (Oct. 28, 2020), <https://www.apmillerlawgroup.com/blog/2020/october/what-s-a-voluntary-acknowledgment-of-paternity-/> (explaining that when an unmarried couple has a child, paternity is established through the signing of a voluntary acknowledgment of paternity).

⁵ Feinberg, *supra* note 1, at 2325.

⁶ *Id.* at 2320. Feinberg reiterated this view (though less categorically) while also discussing deference to second parent choices by gestating parents in settings beyond parentage in spousal and VAP settings. Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 309 (2022). She opined that “there is relatively strong argument that a standard [on new parentage] that does not require the express consent of all existing parents for multi-parentage establishment [three or more parents] through equitable parenthood doctrines and similar mechanisms [as with residential/hold out and de facto parentage] that require an established parent-child relationship is sound, both constitutionally and as a matter of policy.” *Id.* at 320-21, 348. Seemingly on the constitutional front, she aligns with the dissent in *E.N. v. T.R.*, 255 A.3d 1, 42 (Md. 2021), wherein the dissent found an express consent norm covering all parents “fails to sufficiently provide for children’s interests” and would inevitably result in judicial determinations that harm children. *Id.* at 40. She concluded the “express consent of all existing legal parents” is more likely required in parenthood arising from VAPs and assisted reproduction. Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 348 (2022).

⁷ E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother’s Consent to the Biological Father’s Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 99 (2006).

⁸ *Id.* at 147.

⁹ Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 943 (2006).

¹⁰ Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 BUFF. L. REV. 465, 466 (2016).

paternity of the child.”¹¹ Under her approach, “a child will have a minimum of one parent,”¹² presumed to be the gestating parent.¹³ Effectively, she suggests no one else may be a parent at birth, even if married to the gestating parent, unless the biological mother recognizes the parentage of the other person or persons in writing.¹⁴

In response, this article presents alternative reforms of new mothers-know-best laws.¹⁵ Part II reviews the laws on prebirth and at-birth choices of second parents by gestating parents that take effect at birth. Part III contemplates better laws on second-parent choices while recognizing that some nationwide coherence is compelled by U.S. Supreme Court precedents. This article also highlights that certain interstate variations are invited by other court precedents and argues that new laws should be assessed on a state-by-state basis.

II. PREBIRTH AND AT-BIRTH CHOICES OF SECOND PARENTS EFFECTIVE AT BIRTH

A. Introduction

At the time of birth, there are two major avenues for a gestating parent to choose a second legal parent for a child born of consensual sex.¹⁶ They are spousal parentage, a choice usually made before birth (and often before conception),¹⁷ and voluntary acknowledgment of paternity (VAP) parentage,

¹¹ *Id.* at 496 (focusing on at birth acknowledgments, Dean Jacobs suggests that “intentional parenthood” establishment might be undertaken “six or twelve months” after birth).

¹² *Id.*

¹³ *Id.* (“[A]ll parents must sign an intentional acknowledgment of parentage” and “a child . . . may possibly have two, three or more parents.”).

¹⁴ *Id.* at 466 (suggesting “elimination of status-based parentage at birth” and “traditional status-based parentage” includes “genetic connection” and “marriage”).

¹⁵ Noy Naaman, *Timing Legal Parenthood*, 75 ARK. L. REV. 59, 109 (2022) (“I acknowledge that a framework recognizing the richness of becoming a parent has the potential to interfere with a gestational parent’s self-determination or to minimize the role of pregnancy. Indeed, this is a concern that policymakers must consider seriously. And, certainly, it is vital to approach this task with caution, as feminists have been long warning us about the undesired outcomes for mothers of de-gendering family laws But as the suggestions I offer herein reflect, such concerns need not stand in the way of a more inclusive approach to legal parenthood.”).

¹⁶ Feinberg, *supra* note 1, at 2275.

¹⁷ *Id.* at 2277. Spousal parentage can also arise from certain post-birth marriages to those who gave birth to children born of consensual sex. Such marriages are sometimes guided by the 1973 Uniform Parentage Act [UPA] of the National Conference of Commissioners on Uniform State Laws [NCCUSL], the 2000 UPA of the NCCUSL, or the 2017 UPA of the NCCUSL. *See* UNIF. PARENTAGE ACT § 4(d)(3) (UNIF. L. COMM’N 1973) (stating that a “man is a presumed ‘natural father’ with a post-birth marriage and parental acknowledgment, consent, or support”); UNIF. PARENTAGE ACT § 204(a)(1)(C) (UNIF. L. COMM’N 2000) (providing that an “individual is a presumed ‘parent’ with a post-birth marriage and a parentage assertion in a record or a birth certificate recognition”). The UPAs have special provisions on births from assisted reproduction.

a choice usually made right after birth.¹⁸ These two forms of choice differ.¹⁹ Regarding VAP parentage, the gestating parent intentionally chooses a person to become the second legal parent of an expected or existing child.²⁰ In contrast, spousal parentage arises even when newly married couples do not anticipate children will be born into the marriage.²¹ In the case of spousal parentage, the actual choice is to marry, not the choice to rear a child.²²

Other than spousal and VAP parentage, a gestating parent can choose by agreement a second legal parent, effective at the time of birth, for a child born of assisted reproduction (AR).²³ Such a choice is similar to a VAP choice in that it involves a particular expected child.²⁴ However, unlike a VAP choice, AR parent choices by certain agreements generally cannot be made once a child is conceived or born.²⁵

B. Spousal Parentage

As to spousal parentage, Professor Feinberg recognizes that “any proposal” for reform that “gives gestating parents greater power in identifying someone other than their spouse as the child’s second legal parent” would likely “face significant pushback,”²⁶ including opposition founded on lingering “problematic attitudes and beliefs” underlying “the historical subordination of married women to their husbands.”²⁷ In line with her identified core principles, she suggests that for births arising from consensual sex, new laws should allow “gestating parents to opt-out of the

UNIF. PARENTAGE ACT § 5 (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM’N 2017).

¹⁸ Feinberg, *supra* note 1, at 2275. VAP parentage can also arise from prebirth choices that are effective upon birth. Such choices are sometimes guided by the UNIF. PARENTAGE ACT § 304(b), (c) (UNIF. L. COMM’N 2017) (explaining a VAP filed prebirth “takes effect on the birth of the child”).

¹⁹ Feinberg, *supra* note 1, at 2287.

²⁰ *Id.*

²¹ *Id.* at 2276.

²² *Id.* (noting that some courts find that gestating parents may prompt second parentage not by choices, but by waivers of their superior parental rights (wherein earlier consents to shared parentage may help to determine whether there are waivers)). *See, e.g.,* Mullins v. Picklesimer, 317 S.W.3d 569, 578-81 (Ky. 2010). Gestating parents also may prompt opportunities for nonparents (not second parents) to secure allocations of parental responsibilities without affirmative consents by the gestating parents. *See, e.g., In re E.K.*, 511 P.3d 605 (Colo. 2022) (construing COLO. REV. STAT. § 14-10-123(1)(c) (2021)).

²³ Feinberg, *supra* note 1, at 2290.

²⁴ *Id.*

²⁵ UNIF. PARENTAGE ACT § 803 (UNIF. L. COMM’N 2017) (stating an individual consents to AR “by a woman with the intent to be a parent of a child conceived” by AR); *id.* at § 801(3) (stating a surrogacy agreement wherein a “woman agrees to become pregnant”).

²⁶ Feinberg, *supra* note 1, at 2327.

²⁷ *Id.* at 2328. She also finds that an unmarried gestating parent has “significantly greater meaningful choice with regard to who is deemed the child’s second legal parent at birth” for a child born of sex. *Id.* at 2286.

marital presumption regardless of whether their spouse consents.”²⁸ Similarly, Professors Spitko,²⁹ Czapanskiy,³⁰ and Jacobs³¹ propose a mother-knows-best approach to a second-parent choice, even though the spouse of a gestating parent is entitled to a parentage presumption.³²

However, these suggestions are problematic where the spouse has genetic ties, whether through consensual sex or mutually agreed assisted reproduction with a prospective gestating parent.³³ Under the United States Supreme Court precedent in *Lehr v. Robertson*, such a spouse, like the unwed genetic father in *Lehr*, has a constitutionally recognized parental opportunity interest.³⁴ Beyond *Lehr*, there may be additional state constitutional substantive due process interests for a person, including a spouse who is genetically tied to a child, such as custodial interests in raising the child, not simply parental opportunity interests in developing a relationship with the genetic child.³⁵ Moreover, a state may have public policy interests in establishing custodial parentage when there are no federally-mandated interests, such as custodial interests of intended parents of children born to

²⁸ *Id.* at 2329 (discussing Professor Feinberg hints that such an opt-out might be conditioned on its exercise “at the hospital following the child’s birth” that is accompanied by the execution of “some version of voluntary acknowledgement of parentage with someone other than their spouse.” Second parentage for births to married gestating parents arising from assisted reproduction (with or without a surrogate) at times does not arise from spousal parent laws). *See, e.g.*, UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM’N 2017); *Gatsby v. Gatsby*, 495 P.3d 996 (Idaho 2021) (finding Artificial Insemination Act is a controlling statute); Jeffrey A. Parness, *DIY Artificial Insemination: The Not-So-Great Gatsby*, 55 CREIGHTON L. REV. 465, 467 (2022) (criticizing *Gatsby v. Gatsby*).

²⁹ Spitko, *supra* note 8, at 147 (discussing a biological mother should enjoy “the right to control access to her child including the right to determine who else should be allowed to become a parent of the child” and asserting that the right to control access to her child involves an ability to withdraw consent to her spouse’s parentage “at any time prior to the vesting of the status of constitutional parent” in the spouse).

³⁰ Czapanskiy, *supra* note 10, at 943 (stating a biological mother has the power to choose a second parent, unconstrained “by presumptions in favor of her spouse”).

³¹ Jacobs, *supra* note 11, at 496 (suggesting “elimination of status-based parentage at birth,” which includes marriage).

³² Spitko, *supra* note 8, at 147.

³³ *See generally id.* at 141.

³⁴ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (providing unwed biological father of a child born to unwed gestating parents has an “opportunity . . . to develop a relationship with his offspring”). *Lehr* was not extended in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (arguing a biological father of a child born to a gestating parent married to another, in an intact marriage, may be barred, by state law, from asserting a *Lehr* parental opportunity interest). Professor Feinberg observes that not everyone reads *Lehr* this way. Feinberg, *supra* note 1, at 2304 (finding “many scholars disagree” that *Lehr* holds “biological fathers . . . have a constitutionally protected opportunity interest in forming a parent-child relationship,” citing Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 479-83 (2017)); *cf.* Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 350 (1984) (stating constitutional right if biological ties are coupled with “parental performance”).

³⁵ *See Callender v. Skiles*, 591 N.W.2d 182, 191 (Iowa 1999) (stating “liberty interest” of unwed genetic father in child born to a married gestating parent).

gestational surrogates.³⁶ Extending beyond *Lehr*, greater protections of parental interests for spouses with genetic ties could include automatic parentage regardless of whether parental-like relationships were established.³⁷ Such interests now vary interstate, with differences likely to continue.³⁸ Thus, suggestions on any new mothers-know-best laws should take account of interstate variations and, thus, be contextualized to the spousal-parentage laws of particular states.³⁹

Opting out of the spousal-parent presumption is generally easier under current laws for a gestating parent where the spouse has no genetic ties.⁴⁰ Yet, a married gestating parent's choice of a second parent at birth may still be limited, such as where a child is born of extramarital sex and the putative genetic father has childcare standing in a paternity case.⁴¹ Incidentally, as with genetically tied spouses (male or female), unwed parents who are genetically tied to their children have parental opportunity interests under *Lehr* and related state laws.⁴² Such interests may be exercised through

³⁶ See *id.* (stating “liberty interest” of unwed genetic father in child born to a married gestating parent).

³⁷ *Lehr v. Robertson*, 463 U.S. 248, 263 (1983) (discussing dual parental financial support duties would benefit children, as would the potential for positive parent-child relationships with second parents. However, the Court also notes that child custody orders are available on a case-by-case basis when non-gestating genetic parents do not undertake healthy parental childcare).

³⁸ See Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 968 (2016) (stating U.S. Supreme Court deference to state lawmakers as to who are constitutionally protected childcare parents).

³⁹ See generally Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 682-86 (2022) (discussing within a single state, spousal parentage laws should also be contextualized, as one can be, e.g., a spousal parent for child support purposes but not for childcare (custody/visitation) purposes); see also *In re H.S.*, 805 N.W.2d 737, 745-6 n. 4 (Iowa 2011) (reviewing statutes and cases where child support continues past termination of parental rights).

⁴⁰ See generally *Lehr*, 463 U.S. at 262; *Michael H v. Gerald D*, 491 U.S. 110, 128-29 (1989).

⁴¹ See *Michael H.*, 491 U.S. at 111.

⁴² *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

proceedings in paternity⁴³ or maternity,⁴⁴ such as with birth via fertilized egg implantation.⁴⁵

Professor Feinberg supports broad, though not absolute, opt-out powers for married gestating parents as she says second-parent choices deserve “special weight.”⁴⁶ Professors Spitko,⁴⁷ Czapanskiy,⁴⁸ and Jacobs⁴⁹ support even broader options. Yet the *Lehr* precedent and some state constitutional rights and public policies do not allow such broad authority for gestating parents.⁵⁰

C. VAP Parentage

As to VAP parentage, Professor Feinberg opines that laws on “gender-based VAP eligibility restrictions . . . are . . . clearly in need of legal reform.”⁵¹ She suggests, “VAP laws should be amended so that men, women, and non-binary individuals who comply with the relevant procedures are able to establish parentage through VAPs.”⁵² She describes such amendments as “modest reforms,” including changes “eliminating the requirement on some states’ VAP forms relating to the signer attesting to being the child’s biological parent.”⁵³ Such reforms, requiring statutory/regulatory rewrites,

⁴³ See, e.g., *Michael N. v. Brandy M.*, 844 S.E.2d 450, 462 (W. Va. 2020) (stating that a putative father may have standing where he was prevented from developing a parent-child relationship or had developed such a relationship, and no harm would come to child). Any such interests in children born to those married to others can be overridden if state laws protect extant families wherein the children are being well raised. *Michael H.*, 491 U.S. at 129-30 (finding no interests); *id.* at 133 (Stevens, J., concurring) (“I . . . would not foreclose the possibility”); *id.* at 136 (Brennan, J., dissenting) (observing that five justices refuse to foreclose such an interest) (finding a “liberty interest that cannot be denied without due process of law”). Not all states offer similar protection to extant families. See *Callender v. Skiles*, 591 N.W.2d 182, 191 (Iowa 1999) (finding it “unconstitutional under our state constitution” to deny unwed biological father standing to overcome paternity in spouse of birth mother). But see Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 484-85 (2017) (suggesting that recognizing such standing is subject to “heightened scrutiny” where it overrides “the child-rearing decisions of a fit parent,” under *Troxel v. Granville*, 530 U.S. 57 (2000)).

⁴⁴ See *Adoption of Kelsey S.*, 823 P.2d 1216, 1237 (Cal. 1992) (stating an unwed father must commit to parental responsibilities to negate a proposed adoption); *In re Adoption of A.A.T.*, 196 P.3d 1180, 1195 (Kan. 2008).

⁴⁵ See *K.M. v. E.G.*, 117 P.3d 673, 675-76 (Cal. 2005) (outlining that egg donors who were gestating parents, but was partner of gestating parent, was a parent).

⁴⁶ Feinberg, *supra* note 1, at 2325.

⁴⁷ Spitko, *supra* note 8, at 147.

⁴⁸ Czapanskiy, *supra* note 10, at 943 (stating no constraint on gestating parent by presumption in favor of other biological parent).

⁴⁹ Jacobs, *supra* note 11, at 466-68 (eliminating the status-based parentage founded on “genetic connection”).

⁵⁰ See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

⁵¹ Feinberg, *supra* note 1, at 2325.

⁵² *Id.* at 2325-26.

⁵³ *Id.* at 2326.

are surely not modest. Keeping in mind the precedent in *Lehr*, they would undermine the longstanding substantive state public policies on the parental childcare interests/child support duties of the genetic parents of children born of consensual sex.⁵⁴

Similarly, Professor Spitko discusses VAP parentage for individuals with and without genetic ties.⁵⁵ For parents with or without such ties, he contends that VAP parentage is constitutionally protected only where the “biological mother” has “invited” that person to be a second legal parent, as by signing a VAP, and where that person’s “labor” has resulted in “a functional parent-child relationship.”⁵⁶ Under this approach, the gestating parent could seemingly undo a VAP “at any time before” the other VAP signatory developed a functional parent-child relationship.⁵⁷ Professor Spitko’s approach is problematic on several fronts.⁵⁸ It conflicts with current federal guidelines on VAP rescissions (within 60 days) and on VAP challenges (need to show fraud, duress, or material mistake of fact after 60 days).⁵⁹ This approach also invites significant uncertainties and possible litigation, especially where there is no fixed measure of time as to when the other VAP signatory develops a functional parent-child relationship.⁶⁰

Professor Czapanskiy did not speak directly on VAPs.⁶¹ Yet, on the freedoms that should be bestowed upon gestating parents in regard to naming second legal parents at the time of birth, she seemingly supported freedoms whose limits were narrower⁶² than Professor Feinberg’s suggestion of giving

⁵⁴ *Lehr*, 463 U.S. at 262. The childcare interests of genetic fathers in nonmarital children can have state constitutional foundations. *Id.* State constitutional childcare interests of genetic fathers in children born to gestating parents who are married to others has even been recognized in some American states. *See, e.g.*, *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999). The general recognition of child support duties for the genetic parents of children born of consensual sex is recognized in *N.E. v. Hedges* and *In re Stephen Tyler R.* *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004); *In re Stephen Tyler R.*, 584 S.E.2d 581 (W. Va. 2003) (child support duties continue though custodial rights are terminated); *see also* Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421 (2020) (describing the varying American state laws on the child support duties of parents by consent are generally described).

⁵⁵ Spitko, *supra* note 8, at 132 (stating mother has “the right to invite another adult biologically unrelated to the child into the child’s life to act as a parent”).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See* 42 U.S.C. § 666(a)(5)(D)(ii), (iii); Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412 (2022).

⁵⁹ 42 U.S.C. § 666(a)(5)(D)(ii), (iii). Procedures under which voluntary acknowledgement of paternity is considered a legal finding of paternity are subject to the right of signatory to rescind the VAP before 60 days, or the date of an administrative or judicial proceeding relating to the child if the signatory is a party, whichever is earlier. *Id.* Moreover, the VAP may only be challenged after the 60-day period if the challenger can show fraud, duress or material mistake of fact. *Id.*

⁶⁰ *See, e.g.*, Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412 (2022) (stating functional approaches to childcare parentage vest too much power in judges and disrupt communities of people of color and of LGBTQ orientation).

⁶¹ *See generally* Czapanskiy, *supra* note 10.

⁶² *See generally id.*

“special weight” to the choices of these parents.”⁶³ For example, Professor Czapanskiy stated:

My proposal centers on the birth mother because . . . doing what is good for young children usually means doing what seems best to the child’s key caretaker. In the case of infants, the key caretaker is almost always the birth mother. Under my proposal, she is empowered to decide whether she will be the child’s sole legal parent or whether she will designate another as her parental partner. If she decides to designate a partner, she can designate whomever she wants; she is not constrained by presumptions in favor of her spouse or the child’s biological father. If she decides not to designate a partner, or if someone not designated wants to be designated, a court can overrule her decision only in narrow circumstances designed to protect her capacity to act in the child’s best interests.⁶⁴

In contrast, Professor Jacobs supported “intentional parenthood as the default framework to establish all at-birth parent-child relationships.”⁶⁵ This led her to suggest replacing current VAP practices with a document “similar” to a current VAP that would be “offered to all parents.”⁶⁶ Without such a document, there would be “a minimum of one parent,”⁶⁷ the gestating parent. She then opined that other parents would be possible where recognized by the individual signatures of the gestating parent and all other parents.⁶⁸ A gestating parent is the one parent, at a minimum, who need not sign a form if there is to be no second legal parent at birth.⁶⁹

D. Assisted Reproduction Parentage

Another form of choice of a second legal parent by a gestating parent that is effective at birth involves a child born via assisted reproduction (AR).⁷⁰ An AR agreement regarding a second parent can involve artificial

⁶³ Feinberg, *supra* note 1, at 2320.

⁶⁴ Czapanskiy, *supra* note 10, at 946. Her expressed limits on who can seek to override a gestating parent’s choice of a second parent at birth “includes only the mother’s marital or civil union partner, the child’s biological father, and people who provided the mother with substantial material and nonmaterial support during the mother’s pregnancy and after the birth of the child.” *Id.*

⁶⁵ Jacobs, *supra* note 11, at 469.

⁶⁶ *Id.* at 497.

⁶⁷ *Id.* at 496.

⁶⁸ *Id.* (stating a child will usually always have one parent and “may possibly have two, three or more parents”).

⁶⁹ *Id.* at 475 (“[A] woman who achieves pregnancy through intercourse would be a legal mother so long as she does not relinquish her parental rights.”).

⁷⁰ As Professor Strauss notes, such agreements should not be confused with nonpregnancy contracts. Gregg Strauss, *Parentage Agreements Are Not Contracts*, 90 FORDHAM L. REV. 2645, 2647, 2650 (2022) (stating parentage agreements “share few moral similarities with legal contracts”).

insemination (AI), with or without a genetic surrogate, or a fertilized egg implantation (FEI), with or without a gestational surrogate.⁷¹ A genetic surrogate conceives a child using her own eggs and generally cannot enter an AR agreement until after the child is born.⁷² On the other hand, a gestational surrogate carries a child conceived by the eggs of an intended parent or anonymous donor.⁷³ Unlike genetic surrogacy, gestational surrogates may enter AR agreements with second parents before birth.⁷⁴ Of course, AR births can occur without any prior agreements on second parenthood.⁷⁵ Where there is no earlier agreement, there may be second legal parentage at the time of birth through spousal parentage⁷⁶ or a VAP.⁷⁷

Professor Feinberg differentiates between the laws on AR agreements involving married and unmarried gestating parents, though she does not address any possible differences between AI and FEI births.⁷⁸ For married gestating parents, the laws on such agreements are said not to “expand the class of individuals who can be established at birth as the second parent.”⁷⁹ These laws can only be “utilized to establish the spouse as the child’s second parent.”⁸⁰ She finds that in “every state” the “marital presumption of parentage . . . provides the gestating parent’s spouse with a rebuttable presumption of legal parentage at birth regardless of the method of conception”⁸¹ and “regardless of whether this is what the gestating parent desires.”⁸² She concludes that states should deem a non-gestating spouse (man or woman) to be the second parent even when attempted AR consent by a gestating parent to second parentage does not follow statutory or common law guidelines.⁸³ This constitutes a questionable conclusion given some current state laws.⁸⁴

⁷¹ *Id.* at 2654.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2651.

⁷⁶ Not all spouses of those who bear children will be spousal parents, as where children are born of AR. In Idaho, the statutes on spousal consent to AR births have been deemed “controlling” and thus preemptive of the general spousal parent presumption. *Gatsby v. Gatsby*, 495 P.3d 996, 1002 (Idaho 2021).

⁷⁷ In some states, though, VAPs are unavailable for children born of AR. *See, e.g.*, UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2017) (allowing a VAP to be signed with the gestating parent by “an alleged genetic father” or an “intended parent” under a non-surrogacy AR agreement); *cf.* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2000) (allowing a gestating parent and “a man claiming to be the genetic father” to sign a VAP).

⁷⁸ *See generally* Feinberg, *supra* note 1.

⁷⁹ *Id.* at 2286.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See, e.g.*, *Gatsby v. Gatsby*, 495 P.3d 996, 1002 (Idaho 2021) (stating no “marital presumption” of parentage for a child born of assisted reproduction as the Artificial Insemination Act was

For unmarried gestating parents, Professor Feinberg finds state laws on AR births are problematic where second-parent consent to AR can only be undertaken by “a man.”⁸⁵ The problems for prospective female second parents are unavoidable since VAPs cannot “be utilized to establish the parentage of women” who are not gestating parents.⁸⁶ Here, she is quite correct that there are real problems.⁸⁷

One issue with Professor Feinberg’s approach is that she fails to distinguish second-parent choices by gestating parents for children born of AI and of FEI.⁸⁸ However, distinctions are needed. For example, if *Lehr* or state laws demand that biological ties alone, without genetic ties, are sufficient for parentage, FEI births must be differentiated where three persons (two women and one man) have biological ties.⁸⁹

Regarding parentage with non-surrogacy assisted reproduction births, Professor Spitko opines “constitutional protection or lack thereof” for a sperm donor “should be the same . . . whether the claimant biological father was involved in conception through artificial insemination or through sexual intercourse.”⁹⁰ Thus, the donor may only become a second parent if the donor developed a functional parent-child relationship,⁹¹ the gestating parent invited the donor “into the child’s life to serve as a co-parent,”⁹² and the

“controlling” since it is “the more recent and specifically applicable statute”); *cf.* VT. STAT. ANN. tit. 15, § 705(a) (2018) (discussing a spouse normally has two years from birth to challenge spousal parentage arising from an AR birth).

⁸⁵ Feinberg, *supra* note 1, at 2290 (“In thirteen of . . . sixteen jurisdictions, the law is written in gender neutral terms with regard to the individual who is deemed a legal parent at birth based upon their consent to the unmarried gestating parent’s use” of Assisted Reproductive Technology [or ART, *Id.* at 2283]).

⁸⁶ *Id.* at 2291 (referencing *Id.* at 2289-90).

⁸⁷ The gender bias problems with such AR laws are recognized in *D.M.T. v. T.M.H.* and *In re Parentage of M.F.* *D.M.T. v. T.M.H.*, 129 So.3d 320, 344 (Fla. 2013) [D.M.T.]; *In re Parentage of M.F.*, 475 P.3d 642, 653-54 (Kan. 2020).

⁸⁸ *See generally* Feinberg, at *supra* note 1.

⁸⁹ *Lehr v. Robertson*, 463 U.S. 248, 268 (1983). If *Lehr* is read to demand that DNA ties are important, there are typically only two interested parties. *Id.* Yet such a reading on DNA rather than on the import of nongenetic biological ties clashes with language in certain U.S. Supreme Court precedents on legal parentage protections for a gestating parent. *Id.* Parental rights protection could be grounded on a gestating parent’s “labor,” not on DNA, to use Professor Spitko’s term. *See also* Spitko, *supra* note 8, at 132; *see also* *St. Mary v. Damon*, 309 P.3d 1027, 1036 (Nev. 2013); *see, e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 59, 64-65 (2001) (stating to secure parental custody rights, unwed biological (i.e., DNA connected) father under *Lehr* must also show “real, everyday ties” connecting father to child in order to ensure there is an “opportunity for a meaningful relationship” between father and child; the opportunity for a meaningful parent-child relationship in a gestating parent inheres “in the very event of birth”); *K.M. v. E.G.*, 117 P.3d 673, 680-81 (Kan. 2007) (contemplating dual parentage by acknowledging both egg donor and gestating parent in FEI birth are “mothers” under state parentage laws); *D.M.T. v. T.M.H.*, 129 So.3d 320, 339 (Fla. 2013) (concluding egg donor in FEI birth to former partner had inchoate interest in child that developed into protected due process right to parent).

⁹⁰ Spitko, *supra* note 8, at 134.

⁹¹ *Id.* at 135.

⁹² *Id.*

invitation was not withdrawn at any time prior to the development of that relationship.⁹³ Under some current laws, however, withdrawn invitations are not allowed where AR contracts are enforceable.⁹⁴

Concerning parentage with surrogacy-assisted reproduction births, Professor Spitko discusses a genetic surrogate, who is said to be able to “exclude the biological father from the child’s life” if she changes her mind about intended parentage in the father before he (or his partner) create a functional parent-child relationship.⁹⁵ The withdrawal period again is quite uncertain, extending much longer than the three days under the 2017 Uniform Parentage Act (UPA).⁹⁶

Professor Spitko further discusses parentage when birth is given by a “gestational surrogate” employing a fertilized egg implant, pursuant to a contract, where the sperm donor intends to parent, but the egg donor does not.⁹⁷ Again, the gestating parent “has the right to exclude” the biological father (and any partner) “from parenting the child.”⁹⁸

Professor Spitko also discusses a gestational mother who delivers a child through an FEI where both the sperm and egg donor, pursuant to a contract, wish “to raise the resulting child.”⁹⁹ Here, he deems the egg donor was the “first person to perform sufficient parental labor with the intent to exercise parental authority as constitutional parent,” whereas the gestational surrogate, though giving birth, would not necessarily have a constitutionally protected parent-child relationship.¹⁰⁰ Professor Spitko recognizes that with an FEI leading to birth, the egg donor and gestating parent, who the egg donor intended to be a co-parent, would each be a constitutional parent at birth as each provided “labor,” albeit differently, leading to the birth of a child.¹⁰¹ The sperm donor, even if intended to be a co-parent, would not be a constitutional parent at birth because he, unlike the egg donor, did not undertake sufficient

⁹³ *Id.* at 132 (“A biological mother has a constitutional right to withdraw her consent to the biological father’s parenting of her child at any time before the father’s own constitutional parental rights vest as a result of his labor developing a functional parent-child relationship.”).

⁹⁴ *See, e.g.*, UNIF. PARENTAGE ACT § 707 (UNIF. L. COMM’N 2017) (concerning enforceability of parentage agreements involving non-surrogacy assisted reproduction births, an individual who consents to AR “may withdraw consent at any time before a transfer that results in a pregnancy”); *compare* CONN. GEN. STAT. § 46b-515(a) (2022), *with* WASH. REV. CODE § 26.26A.630(1) (2019).

⁹⁵ Spitko, *supra* note 8, at 137.

⁹⁶ UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM’N 2017). *Compare* COLO. REV. STAT. § 19-4-108(1) (2021) (allowing termination of a genetic or gestational surrogacy pact), *with* § 19-4.5-103(8), (9) (“at any time before a gamete or an embryo transfer.”).

⁹⁷ Spitko, *supra* note 8, at 141.

⁹⁸ *Id.*

⁹⁹ *Id.* at 142.

¹⁰⁰ *Id.* at 143.

¹⁰¹ *Id.* at 144.

“labor” in the conception and during the pregnancy.¹⁰² Again, under this approach, there would be no contract enforcement.¹⁰³

Professor Czapanskiy does not speak directly about parentage with either non-surrogacy or surrogacy-assisted reproduction.¹⁰⁴ However, she proposes generally that “the birth mother is the only person initially assigned as parent to the child,” without distinguishing between births by sex and births by assisted reproduction.¹⁰⁵ Under this approach, a mother can designate another parent at birth, but she may “revoke the designation” if she “changes her mind within the first month of the child’s life.”¹⁰⁶ A gestating parent’s failure to designate a certain person as a second parent can enable that person “to petition to be designated over the mother’s objection.”¹⁰⁷ But such a petition must be sought within 60 days after birth¹⁰⁸ and must demonstrate the petitioner “has provided the mother with substantial material and non-material support, has no history of violence involving the mother, and has the capacity to co-parent with the mother.”¹⁰⁹ As with Professor Spitko, Professor Czapanskiy invites significant and uncertain legal issues, especially with a sixty-day deadline, because there is not much time to provide “substantial” support with the gestating parent’s unilateral control over a genetic parent’s parentage under the law.¹¹⁰

On parentage with non-surrogacy and surrogacy-assisted reproduction births, Professor Jacobs opined that “legislatures should consider intentional parenthood as the default, at-birth parentage establishment model.”¹¹¹ As for what this would entail, she indicated that her “future work will develop a particular implementation strategy.”¹¹² Yet, she contemplated at the time that she would likely support VAP availability at the time of birth regardless of the means of conception, though a VAP should be unavailable to a gestational surrogate if there were a “pre-birth agreement” on intended parenthood excluding the surrogate.¹¹³ However, according to Jacobs, a VAP for a non-gestational parent would require the “requisite intent” to be a parent around the time of birth and an undertaking of “parental obligations to earn the legal

¹⁰² *Id.* at 143; Spitko, *supra* note 8, at 138 (asserting there is no labor by sperm donor); *id.* at 143 (asserting there is extensive labor by egg donor, including needles, anesthesia, and “various medications and hormones over a period of several weeks to manipulate” the “ovulation cycle”).

¹⁰³ *Id.* at 138.

¹⁰⁴ *See generally* Czapanskiy, *supra* note 10.

¹⁰⁵ *Id.* at 946.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 947.

¹⁰⁹ *Id.*

¹¹⁰ Czapanskiy, *supra* note 10, at 947.

¹¹¹ Jacobs, *supra* note 11, at 466.

¹¹² *Id.* at 496.

¹¹³ *Id.* at 497.

parent title.”¹¹⁴ Under Jacobs’ approach, the effect of the VAP would remain uncertain for some time after signing, which is contrary to the federal statutory mandates on VAPs to be employed by states participating in certain federal welfare subsidy programs.¹¹⁵

Beyond VAPs, Professor Jacobs expressed support for the intentional parenthood norms in assisted reproduction birth settings found in the Uniform Parentage Act (the 2000 version, as amended in 2002)¹¹⁶ and the American Law Institute’s “Principles of Dissolution.”¹¹⁷ Here, as with births from consensual sex, “status-based parentage at birth”¹¹⁸ founded on marriage or genetic ties is inappropriate.

III. BETTER LAWS ON SECOND-PARENT CHOICES AT BIRTH

Professor Feinberg urges others to weigh in on “a more coherent and just legal framework”¹¹⁹ governing choices (made pre-birth or at birth) by a gestating parent on “who is deemed the child’s second legal parent at birth.”¹²⁰ Earlier, Professors Spitko, Czapanskiy, and Jacobs argued that second-parent choices by gestating custodial parents be given special weight, if not absolute deference.¹²¹

Where a gestating parent chooses a second parent at birth, whether by marriage, parentage acknowledgment, or an assisted reproduction undertaking, any governing framework must confront some realities and several important questions overlooked by distinguished professors.¹²² One question involves the uncertainties arising from the *Lehr* decision regarding the breadth of the federal constitutional parental opportunity interests for non-gestating genetic parents in their offspring born of consensual sex,¹²³ as well as the similar (or somewhat comparable) parental opportunity interests in children born of assisted reproduction.¹²⁴ With children born of assisted reproduction, genetic donors and gestating parents anticipate future children

¹¹⁴ *Id.*

¹¹⁵ See Jeffrey A. Parness and David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177 (2017) (discussing the mandated federal norms, and recommendations for reforms).

¹¹⁶ Jacobs, *supra* note 11, at 472-73, 482-83 (noting the 2017 UPA had not yet been completed and approved).

¹¹⁷ *Id.* at 480-81 (referring to the ALI’s Principles of the Law of Family Dissolution).

¹¹⁸ *Id.* at 466.

¹¹⁹ Feinberg, *supra* note 1, at 2271.

¹²⁰ *Id.* at 2325.

¹²¹ Spitko, *supra* note 8, at 132; Jacobs, *supra* note 11, at 496.

¹²² Spitko, *supra* note 8, at 132; Jacobs, *supra* note 11, at 496.

¹²³ See generally *Lehr v. Robertson*, 463 U.S. 248 (1983).

¹²⁴ On applying *Lehr* to the interests of non-gestating parents in children born of assisted reproduction, see, e.g., *D.M.T. v. T.M.H.*, 129 So.3d 320, 337 (Fla. 2013) (stating interest of egg donor); *McIntyre v. Crouch*, 780 P.2d 239 (Or. App. 1989) (stating interest of sperm donor, recognized under *Lehr* if there was a parentage agreement with gestating parent).

quite differently than they do for children born of sex.¹²⁵ Agreements are far more likely when assisted reproduction births are anticipated, though the limits on enforceable contracts vary for those involved in non-surrogacy artificial insemination, gestational surrogacy, and genetic surrogacy pacts.¹²⁶

A reality point is that state constitutional interests reliant upon genetic ties for legal parenthood can further limit second-parent choices by gestating parents, as state laws can extend the interests recognized under *Lehr*.¹²⁷ Here, the question arises of whether such interests should vary depending on whether children are born of consensual sex or assisted reproduction.¹²⁸ In the latter setting, there are more likely mutual desires by potential genetic parents to have and raise children.¹²⁹ For now, varying state constitutional interests foreclose a one-size-fits-all approach to mothers-know-best laws.¹³⁰

A further reality point is that the *Lehr* decision and state laws on the parental opportunity interests of those genetically tied to children sometimes extend to those biologically, but not genetically, tied to children.¹³¹ Such an extension occurs with an AR birth to a gestating parent whose conception was prompted by FEI.¹³² The 2017 UPA on surrogacy pacts treats the parental opportunity interests of genetic surrogates and gestational surrogates differently.¹³³ Under the Act, genetic surrogates are given three days after

¹²⁵ See generally Feinberg, *supra* note 1.

¹²⁶ Compare UNIF. PARENTAGE ACT § 701(a) (UNIF. L. COMM'N 2017) (stating non-gestating individual who consents to AR “may withdraw consent before” a transfer that results in a pregnancy), with § 808(a) (stating termination of agreement by gestational surrogate before “embryo transfer”), and § 814(a)(2) (stating termination of agreement by genetic surrogate any time before 72 hours have passed since birth).

¹²⁷ *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

¹²⁸ Not unlike the U.S. Supreme Court after *Lehr*, state court decisions on parentage opportunity interests have chiefly involved births by consensual sex. *But see* D.M.T. v. T.M.H., 129 So.3d 320, 337-39 (Fla. 2013) (applying *Lehr* to a mutually agreed assisted reproduction birth to same sex couple).

¹²⁹ *Lehr*, 463 U.S. at 266.

¹³⁰ *Id.* at 267.

¹³¹ See, e.g., *In re Baby*, 447 S.W.3d 807, 834 (Tenn. 2014) (holding that no prebirth waiver of parental rights by traditional (i.e., gestational) surrogate is required); *Lefever v. Matthews*, 971 N.W.2d 672, 685 (Mich. App. 2021) (explaining that a gestating parent is a “natural parent” under Child Custody Act though there are no genetic ties). Compare *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (explaining that a gestating surrogate is not “natural mother” as she had no gamete contribution), with *P.M. v. T.B.*, 907 N.W.2d 522, 540 (Iowa 2018) (holding that a gestational surrogacy pact is enforceable).

¹³² See, e.g., *In re Baby*, 447 S.W.3d 807, 834 (Tenn. 2014); *Lefever v. Matthews*, 971 N.W.2d 672, 685 (Mich. App. 2021). Compare *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), with *P.M. v. T.B.*, 907 N.W.2d 522, 540 (Iowa 2018).

¹³³ UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017) (mandating that a genetic surrogate “may withdraw consent any time before 72 hours after the birth”); *id.* at § 808(a) (stating termination of gestational agreement “at any time before an embryo transfer”). In Washington and the District of Columbia a genetic surrogate has 48 hours after birth to withdraw consent. WASH. REV. CODE ANN. § 26.26A.765(2) (2019); D.C. CODE ANN. § 16-401(23) (2016) (“traditional surrogate”); *id.* at § 16-411(4). Vermont and Maine follow the Uniform Parentage Act of 2017 on

birth, whereas gestational surrogates must sign a waiver of parentage opportunity prior to conception.¹³⁴

Further questions include whether certain gestating parents whose second-parent choices at birth should be given little or no deference, and whether certain gestating parents whose second-parent choices at birth should be given “heightened” or “special” or “absolute” deference.¹³⁵ The amount of deference given to a gestating parent may depend on the context in which a controversy arises. For example, consider a gestating parent who now seeks to deny legal parentage to one who is biologically tied or contractually tied (in an assisted reproduction birth) to a child.¹³⁶ Can denial of parentage be sanctioned simply because a post-birth suit for wrongful child death based on medical (or other) negligence will yield significant monetary awards to any legal parent?¹³⁷ Perhaps little or no deference should be afforded in this situation. However, there is deference when child custody is at issue.¹³⁸ Questions on deference may need to be answered contextually, though harmony in public policy terms across contexts should be maintained. The professors do not discuss the ramifications of their preferences outside the parental custody context, though custodial rights often define parental rights in other contexts, such as in probate.¹³⁹

Additionally, consider a gestating parent who seeks to deny parentage in an artificial insemination setting to a sperm donor whom that parent earlier

ending “gestational carrier” agreements. VT. STAT. ANN. tit. 15C, § 806(a) (2018) and ME. STAT. tit. 19-A, § 1936(1) (2016).

¹³⁴ UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM’N 2017); *id.* at § 808(a). In Washington and the District of Columbia a genetic surrogate has 48 hours after birth to withdraw consent. WASH. REV. CODE ANN. § 26.26A.765(2) (2019); D.C. CODE ANN. § 16-401(23) (2016); *id.* at § 16-411(4). Vermont and Maine follow the Uniform Parentage Act of 2017 on ending “gestational carrier” agreements. VT. STAT. ANN. Tit. 15C, § 806(a) (2018) and ME. STAT. tit. 19-A, § 1936(1) (2016).

¹³⁵ *See, e.g.,* Sieglein v. Schmidt, 120 A.3d 790 (Md. Spec. App. 2015); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004) (explaining that legal parentage can vary by context. Thus, one can be responsible for child support though ineligible to seek parental child custody/visitation orders). *See, e.g.,* Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 3d 2004) (holding that even in damage recovery settings legal parentage can vary, as between parent beneficiaries for child death in worker’s compensation and in wrongful death proceedings). *See, e.g.,* Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW. 455 (2022) (explaining contextual differences in parentage laws generally).

¹³⁶ *See, e.g.,* Sieglein v. Schmidt, 120 A.3d 790 (Md. Spec. App. 2015); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). *See, e.g.,* Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 3d 2004). *See, e.g.,* Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW.455 (2022).

¹³⁷ *See, e.g.,* Sieglein v. Schmidt, 120 A.3d 790 (Md. Spec. App. 2015); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). *See, e.g.,* Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 3d 2004). *See, e.g.,* Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW.455 (2022).

¹³⁸ *See, e.g.,* ME. STAT. tit. 18-C, § 2-115 (2019) (for purpose of intestate succession, parentage arises under the Parentage Act, ME. STAT. tit. 19-A, § 61 (2016)).

¹³⁹ *See, e.g., id.*

recognized as a second legal parent.¹⁴⁰ Should deference be given where the gestating parent seeks to negate the donor's future parental rights solely due to the negligent acts of a sperm bank in completing or failing to complete the consent forms strictly required by statute?¹⁴¹ Again, perhaps little or no deference should be afforded to the gestating parent in this context. By contrast, absolute deference typically seems warranted where a child's birth resulted from nonconsensual sexual relations, perhaps even where the gestating parent had earlier consented to shared parenting.¹⁴²

More questions involve which safeguards, if any, found in formal adoption laws should be incorporated into the legal guidelines on informal adoption choices by gestating parents regarding second parents that take effect at birth.¹⁴³ For example, some inquiry into a child's interests may be warranted even where a gestating parent's choice receives "special weight."

Finally, there are questions surrounding the forms of consent to second parenthood.¹⁴⁴ A rigorous informed consent analysis should be required with VAPs to ensure a gestating parent fully understands the consequences of these choices. Unlike surrogacy settings, generally there are likely no legal advisors present when VAPs are executed.¹⁴⁵ Similarly, special consent laws seem appropriate for those undertaking do-it-yourself artificial insemination.¹⁴⁶

With few federal law constraints,¹⁴⁷ one reality of future laws on second-parentage choices by gestating parents effective at birth is that the laws will likely continue to vary interstate.¹⁴⁸ Thus, state-by-state analyses will be needed to determine whether there is a "coherent legal framework" on second-parent choices, with different but sensible frameworks possible

¹⁴⁰ *But see In re K.M.H.*, 169 P.3d 1025, 1039-40 (Kan. 2007) (concluding that statutory requirement of written agreement between gestating parent and sperm donor was not followed so there was no opportunity for donor to seek parentage).

¹⁴¹ *But see id.*

¹⁴² *See, e.g.*, 750 ILL. COMP. STAT. ANN. 46/622 (2015) (construed in *In re D.S.*, 197 N.E.3d 92 (Ill. App. 1st 2021) to demand absolute deference, disagreeing with the statutory reading in *Deaver v. Jordan*, 2020 IL App (5th) 200084-U).

¹⁴³ *Cf.* 750 ILL. COMP. STAT. ANN. 50 (1998).

¹⁴⁴ *See* CAL. FAM. CODE § 7613.5(a) (2020) (seeking to ensure informed consent in this setting by providing a form contract, which when used, will be enforced).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See* Jeffrey A. Parness, *Federal Constitutional Childcare Parentage*, 90 ST. JOHN'S L. REV. 965 (2016) (explaining the significant, and troubling, dependence on state laws for defining who are federal constitutional custodial parents). *See also* Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183 (2020) (explaining the limits on expanding federal constitutional childcare parentage via state laws).

¹⁴⁸ On the significant, and troubling, dependence on state laws for defining who are federal constitutional custodial parents, *see* Jeffrey A. Parness, "Federal Constitutional Childcare Parentage," 90 ST. JOHN'S L. REV. 965 (2016). On the limits of expanding federal constitutional childcare parentage via state laws, *see* Jeffrey A. Parness, "Unconstitutional Parenthood," 104 MARQ. L. REV. 183 (2020).

across borders.¹⁴⁹ Consider, for example, the analyses necessary on the variations in state laws on challenges to spousal parentage where a marital family is extant and where the unwed biological father of a child born of sex into the family seeks to undo the spousal parent presumption in the spouse.¹⁵⁰ Consider, as well, the necessary analyses when there are interstate variations in parentage laws and relevant acts in two or more states involving assisted reproduction.¹⁵¹ Further, consider how a state's presumption of joint custody upon marriage dissolution impacts the state policies on mothers-know-best laws that are effective at birth.¹⁵² At some point, given the U.S. Supreme Court's recent limits on recognizing new unenumerated constitutional liberty interests (including extending the parental "care, custody and control" interests in the *Troxel*¹⁵³ case),¹⁵⁴ Congress may choose to enter the fray on second-parent choices at birth to establish some national uniformity.¹⁵⁵

Whatever the federal law limits, in-state analyses seeking a "coherent legal framework" for mothers-know-best laws on choosing second parents at birth should take account of the state's laws on the second-parent choices of gestating parents that take effect long after birth. Such laws include

¹⁴⁹ See Jeffrey A. Parness, *Federal Constitutional Childcare Parentage*, 90 ST. JOHN'S L. REV. 965 (2016); see also Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183 (2020).

¹⁵⁰ Such potential variations were condoned in *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

¹⁵¹ See Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235 (2014) (describing one same sex couple's inquiry into where to secure a genetic surrogacy birth that is least likely to prompt issues of the couple's parentage). See generally Jeffrey A. Parness, *Choosing Parentage Laws in Multistate Conduct Cases*, 35 J. AM. ACAD. MATRIM. LAW. 669 (2023).

¹⁵² See, e.g., ARK. CODE ANN. § 9-13-101(a)(1)(A)(iv)(a) (2021) (creating a "rebuttable presumption that joint custody is in the best interests of the child" in a "divorce or paternity matter"); see also W. VA. CODE ANN. § 48-9-102 (2022) (creating a rebuttable presumption that "equal (50-50) custodial allocation is in the best interests of the child"). Cf. MO. ANN. STAT. § 452.375 (2023) (no presumption).

¹⁵³ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁵⁴ On those limits, see, e.g., Jeffrey A. Parness, *Dobbs Unenumerated Parental Custody Rights and Interests*, 14 CONLAW NOW 117 (2023).

¹⁵⁵ U.S. Const. amend. XIV, § 5. The legitimate constitutional bases for such Congressional action are murky, with perhaps legislation to "enforce" substantive due process. Congress could also effectively prompt (though not absolutely mandatory) second-parent guidelines by employing its spending authority and tying state financial subsidies to following uniform norms, as it has done with VAPs. See, e.g., Jeffrey A. Parness and Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 BALT. L. REV. 53, 56-63 (2010).

residential/hold-out parentage laws,¹⁵⁶ de facto parentage laws,¹⁵⁷ and formal adoption laws.¹⁵⁸ Where there exists broad support for validating second-parent choices effective after birth and legitimate reasons to await validation until sometime after birth—as with laws respectful of affording parental opportunity interests to grasp parenthood, laws seeking to assure the chosen second parent has accepted parental-like responsibilities, and laws seeking to protect a child’s best interests—there is less need for laws that validate second-parent choices by gestating parents effective at birth.¹⁵⁹

¹⁵⁶ There are two basic statutory types of residential/hold out parentage laws. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973) (stating a “man is presumed to be the natural father” (or a person per judicial interpretation) if he receives a child into his (or the person’s) home and “openly holds out the child as his (or the person’s) natural child.”); *cf.* *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005). The other type, usually arising from either the 2002 UPA or the 2017 UPA, involves a “man” or an “individual” who resides in the same household with the child and “openly holds out the child as one’s own for the first two years of the child’s life.” UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM’N 2002) (“man”); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (“individual”); UNIF. PARENTAGE ACT § 203(1) (UNIF. L. COMM’N 2002) (recognizing a form of residential/hold out parentage by envisioning “a parent by estoppel,” who is “not a legal parent” but who “lived with the child since the child’s birth,” while holding out and accepting full and permanent responsibilities as parent as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities).

¹⁵⁷ UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM’N 2017) (recognizing, unlike its predecessors, “de facto” parenthood as a form of childcare parentage for those without biological or formal adoption ties. This parenthood is dependent upon meeting far more explicit terms than is required by residential/hold out parentage. For de facto parentage, an existing legal parent must have “fostered or supported” a “bonded and dependent relationship” between the child and the nonparent which is “parental in nature;” the nonparent must have held out the child as the nonparent’s own child and undertaken “full and permanent” parental responsibilities; and the nonparent must have “resided with the child as a regular member of the child’s household for a significant period of time.”). PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c), 3.02(1)(c); RESTATEMENT OF THE LAW: CHILD. AND THE L. § 1.72(a) (AM. L. INST., TENTATIVE DRAFT 2023) (recognizing types of “de facto” parentage for those without biological or formal adoption ties, with each type requiring both common residence and consent by an existing legal “parent.”).

¹⁵⁸ MONT. CODE ANN. § 42-4-309 (2021) (providing deference to a custodial gestating parent’s wish on the formal adoption of that parent’s child, including stepparent adoptions. In stepparent adoptions, a custodial gestating parent, when in the child’s best interests, can request the court to “waive the requirement of a preplacement evaluation and the 6-month postplacement evaluation and report and grant a decree of adoption”). *See also* MONT. CODE ANN. § 42-4-310 (2021) (requiring an adopting stepparent to obtain an order terminating the parental rights of any noncustodial parent by the time of a petition to adopt). *See also* ALA. CODE § 26-10A-27(1) (1975) (requiring a stepparent pursuing adoption to have resided with the adoptee for a year unless the court waives this requirement “for good cause shown”). In non-step-parent adoptions, *see generally* Teri Dobbins Baxter, *Respecting Parents’ Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS UNIV. L. REV. 905, 907 (2015) (reviewing relevant laws while arguing “that fit parents who choose to voluntarily terminate their rights and consent to adoptions of their children have a constitutional right to choose who will adopt and raise their children”).

¹⁵⁹ MONT. CODE ANN. § 42-4-309 (2021); *see also id.* at § 42-4-310; *see also* ALA. CODE § 26-10A-27(1) (1975). In non-step-parent adoptions, *see generally* Teri Dobbins Baxter, *Respecting Parents’*

IV. CONCLUSION

Professor Feinberg invites others to join her in seeking “a more coherent legal framework”¹⁶⁰ that recognizes a “gestating parent should be able to exercise a significant degree of meaningful choice in the determination of who is deemed the child’s second legal parent at birth.”¹⁶¹ She concludes that reform efforts should focus primarily on “the law’s approach to married gestating parents and the eligibility requirements for establishing parentage through VAPs.”¹⁶² She follows Professors Spitko, Czpanskiy, and Jacobs, who all earlier supported significant, if not exclusive, control by gestating parents over second-parent choices that take effect at birth.¹⁶³

This article accepts the invitation. It comments on spousal parenting and VAP laws regarding gestating parents’ choices of second-parents at birth.¹⁶⁴ It also adds thoughts on second-parent choices in assisted reproduction settings.¹⁶⁵ Specifically, this article posits that the legal framework for mothers-know-best laws must take into consideration variations in state laws. Moreover, the amount of deference afforded to the gestational parent may need to be answered contextually, while still maintaining harmony in public policy terms across such contexts.

Others should join Professors Feinberg, Spitko, Czpanskiy, Jacobs, and myself in reflecting on gestational-parent choices of second parents effective at birth. We all seemingly agree that spousal, VAP, and AR laws are in need of serious reconsideration. Family structures, proposed uniform laws, and state statutes and precedents have all changed dramatically in recent years.¹⁶⁶ Legal recalibrations are necessary to protect not only gestating parents, but also the parental privacy interests of others and the best interests of children, especially given the somewhat scant and unlikely future of U.S. Supreme Court precedents on those warranting custodial parentage.¹⁶⁷

Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children, 67 RUTGERS UNIV. L. REV. 905, 907 (2015).

¹⁶⁰ Feinberg, *supra* note 1, at 2325.

¹⁶¹ *Id.* at 2320 (providing the choice should be given “special weight”).

¹⁶² *Id.* at 2325.

¹⁶³ *See id.* at 2271.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ Spitko, *supra* note 8; Jacobs, *supra* note 11; Feinberg, *supra* note 1.

¹⁶⁷ Spitko, *supra* note 8; Jacobs, *supra* note 11; Feinberg, *supra* note 1.

FEEDING THE CATS: THE CORRUPTION CONUNDRUM IN THE FAILED ARAB SPRING-EGYPT

Mohamed 'Arafa*

I. INTRODUCTION

There are records of bribes and bribery laws from ancient times.² Archaeologists recently found a 3,400-year-old Assyrian archive, which listed the names of “employees accepting bribes.”³ The Egyptian Pharaoh Horemheb (1314-1342 B.C.) issued the first recorded law providing a secular criminal penalty for bribetaking.⁴ The Horemheb Edict declared that any judge who procured a reward from one litigant and failed to hear the other complainant was guilty of a “crime against justice” and subject to capital punishment.⁵ However, this intimidation apparently did not stop the practice of judicial bribery from spreading beyond Egypt.⁶

Numerous religions proscribe corruption.⁷ Consequently, it is imperative to utilize social and religious values, standards, and norms that condemn corruption in the fight against it.⁸ For example, Moroccans interpret corruption as bribery, which *Ibn Al-Atheir* identified as “reaching the target

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² See generally Shafik 'Allam, *Egyptian Law Courts in Pharaonic and Hellenistic Times*, 77 J. EGYPTIAN ARCHAEOLOGY 109, 109-21 (1991).

³ *Id.* (providing a review of the first millennium B.C. reveals a new terminology in documents from the reign of Psammetichus I onwards—instead of the old *qnbt*-councils—indicating real law courts); *Id.* (discussing the major reform of the judiciary and arguing that the Egyptian law courts appealed to during the Ptolemaic period were the natural continuation of this earlier legal system).

⁴ Timothy A. Martin, *The Development of International Bribery Law*, 14 NAT. RES. & ENV'T 95, 95 (1999).

⁵ *Id.*

⁶ 2 DONALD B. REDFORD, *THE OXFORD ENCYCLOPEDIA OF ANCIENT EGYPT* 114-16 (2001). For further discussion regarding Horemheb's Code, see generally AHMAD IBRAHIM HASSAN, *FALSFET WA TARIKH AL-NOZOM AL-KANOUNIA WA AL-EGTMA'YIA [THE PHILOSOPHY AND HISTORY OF LEGAL AND SOCIAL SYSTEMS IN ANCIENT EGYPT]*, (Alex. Univ. Press Egypt 2003).

⁷ See, e.g., Leila Shadabi, *The Impact of Religion on Corruption*, 12 J. BUS. INQUIRY 102, 104 (2013) (“Everyone agrees that corruption is a negative phenomenon and is prohibited by religions like Islam and Christianity.”).

⁸ For further details on the Islamic stance of the corrupt behavior, see Mohamed 'Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?*, 18 GOLDEN GATE ANN. SURV. INT'L & COMP. L. 171 (2012).

through compliment.”⁹ No modern developed state can exist without a regime that guarantees necessary punishments to curb corruption.¹⁰

A. How Corruption Started in the Arab Republic of Egypt: Historical Background and Overview¹¹

In Egypt, since the turn of the century, corruption has been broadly and openly debated by the media, civil society, and academic organizations and has become the focus of attention by many stakeholders.¹² Corruption is no longer taboo, and the general public is fully cognizant of its toll on the country’s political stability and the danger it poses to economic growth and social development.¹³ Corruption has become a ruling social law that governs various aspects of Egyptian life.¹⁴ For example, political corruption was the basis of the military regime that continued for three decades and suppressed social freedoms, practiced torture and barbarity, and destroyed institutions in apparent desecration of fundamental human rights, causing Egypt to achieve

⁹ IBN AL-ATHIR, AL-KĀMIL FI AL-TĀRĪKH [THE COMPLETE HISTORY], 227 (al-Baktaba al-Assrya, Beirut 2008).

¹⁰ *Id.*

¹¹ See AHMED ZAYED, CULTURAL FRAMEWORK GOVERNING THE ATTITUDE AND CHOICE OF EGYPTIANS: A STUDY OF TRANSPARENCY AND INTEGRITY VALUES AND CORRUPTION 6 (Wardany 2009). The Transparency and Integrity Committee (TIC) is a permanent committee charged with studying means and suggesting mechanisms to enhance transparency, accountability, and the fight against corruption in the state’s administrative apparatus, as well as the public sector. SALEH AHMED ET AL., NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 38 (Transparency Int’l Secretariat 2009), available at https://www.transparency.org/files/content/pressrelease/20110214_TI-S_Egypt_NIS_2009.pdf. With respect to the roots of corruption in Egypt, recent studies have shown that Egyptian politicians and businessmen are among the most corrupt persons in society, followed by security and law enforcement officers (police) and then local councils. *Egypt Risk Report*, GAN INTEGRITY (Sept. 30, 2020), <https://www.ganintegrity.com/country-profiles/egypt/>. Furthermore, the latest research by international organizations and national agencies have advised about the forms of corruption accomplished or initiated by those who occupy public position that involve immunity from legal proceedings. *Id.* It is noteworthy that observers are in favor that corruption in Egypt is ubiquitous and that the use of *wasta* (“mediation” or “influence”) and facilitation payments are indispensable for doing business. Andrew Puddephatt, *Corruption in Egypt*, GLOBAL PARTNERS & ASSOCIATES, March 2012, at 5, available at <https://www.gp-digital.org/wp-content/uploads/pubs/Corruption-in-Egypt-Report-new-cover.pdf>. Thus, the country faces major challenges in combating both grand and petty corruption. *Id.*

¹² See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 24 (Transparency Int’l Secretariat 2009).

¹³ See, e.g., *id.* at 147 (“[A]nti-money laundering law was proposed due to the increasing concern of the government over the danger of this phenomenon and its detrimental effect on Egypt’s economy.”). In this respect, corruption is understood as the abuse of public office for private gain. *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/en/what-is-corruption> (last visited Sep. 29, 2023). See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 20 (“[R]ecent World Business Environment survey documented widespread corruption in interactions between business and government, with most firms interviewed indicating that ‘informal payments’ are frequently paid for services, in particular to tax and customs officials.”).

¹⁴ See *id.* at 24.

emergency status.¹⁵ Additionally, economic corruption was the reason for numerous developments in Egypt during that time.¹⁶

Many Egyptians suffered oppression through corruption.¹⁷ In Mubarak's era,¹⁸ they watched the gloomy reality of the fall of senior and junior figures in all fields, including the diverse media and governmental institutions.¹⁹ Egypt lost much of its media leadership in this era when its economic drive was congested; favoritism spread with destructive consequences for economic growth and social sustainability.²⁰

¹⁵ See, e.g., BERTELSMANN STIFTUNG, BTI 2022 COUNTRY REPORT: EGYPT (BTI Transformative Index 2022), available at <https://bti-project.org/en/reports/country-report/EGY#pos6> (explaining that the military regime after the 1952 revolution repressed all forms of opposition). Even now, Egypt has approximately 60,000 political prisoners, and the practice of forced disappearance, torture, and extrajudicial killings are not uncommon. *Id.*

¹⁶ See, e.g., *id.* (noting how economic policies under President Gamal Abdel Nasser's regime were internally contradictory, resulting in severe economic crisis and stagnation in development).

¹⁷ See Amal T. Kabesh, *Political upheaval in Egypt: Disavowing troubling states of mind*, 20 PSYCHOANALYSIS, CULTURE & SOC'Y 343, 346–47 (2015) (noting that President Hosni Mubarak's regime was, for good reason, widely perceived to be corrupt and that the corruption continued after Mubarak's resignation, eventually leading to the imprisonment and oppression of Muslim Brotherhood supporters). Efforts undertaken to combat corruption by the Egyptian Public Prosecutor and Anti-Corruption agencies—in particular after the falling down of Mubarak's regime—have increased, and extra efforts will be made to find the most effective measures to tackle corruption. See, e.g., NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 22 (explaining how the media and press have played an increased role in enhancing transparency and unveiling corruption in a healthy way. In doing so, the current government will draw on other successful research, practice, and expertise by states and regional as well as international organizations).

¹⁸ See, e.g., Timothy M. Phelps, *Revolution might not be a cure for Egypt's extreme poverty*, L.A. TIMES (Feb. 20, 2011, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2011-feb-20-la-fg-egypt-return-20110220-story.html>; *Egypt: A Nation in Waiting*, AL JAZEERA (Jan. 27, 2011), <https://www.aljazeera.com/videos/2011/1/27/a-nation-in-waiting-2>; Michael Blackman, *Hosni Mubarak, Egyptian Leader Ousted in Arab Spring, Dies at 91*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/world/africa/hosni-mubarak-dead.html#:~:text=Hosni%20Mubarak%2C%20the%20former%20autocratic,He%20was%2091>.

¹⁹ See Andrew Heiss, *The Failed Management of a Dying Regime: Hosni Mubarak, Egypt's National Democratic Party, and the January 25 Revolution*, 29 J. THIRD WORLD STUD. 155, 159–60 (2012) (explaining that one of Mubarak's party management strategies was to control and manipulate the growth of the elite circle and that the emergency law allowed Mubarak to incarcerate, disappear, and torture dissidents and other enemies of the state). Every day, we hear of a new corruption crime or the arrest of a big corruption figure. See, e.g., Sophia Saifi & Azaz Syed, *Former Pakistan PM Khan given three years in jail after guilty verdict in corruption trial*, CNN WORLD NEWS (Aug. 5, 2023, 8:03 AM), <https://www.cnn.com/2023/08/05/asia/imran-khan-guilty-corruption-intl/index.html>. Such a series of corruption cases only confirms the desire to maintain absolute tyranny and conduct illicit acts. See *id.* (reporting that Khan was found guilty of unlawfully selling state gifts during his tenure as prime minister from 2018 to 2022). Corruption is the opposite of reform as it represents the tyranny of those in authority. See George T. Abed & Hamid R. Davoodi, *Corruption, Structural Reforms, and Economic Performance in the Transition Economies*, INT'L MONETARY FUND, July 2000, at 4–14 (analyzing how corruption is a symptom of lagging reform).

²⁰ See STIFTUNG, *supra* note 15 (“For decades, Egypt has made insufficient use of human, financial and organizational resources, favoring loyalty over competences and merits, and favoring patriarchal dominance over equality between the sexes, generations and social classes.”).

Eliminating the corruption that has become a part of daily life²¹ requires eradicating its roots.²² One of these roots was Emergency Law No. 162 of 1958, which gave police the power to undertake many actions, including putting individuals in jail while evading the courts' political monopoly, and undoubtedly affected economic performance, leading to the parasite capitalism that ruined small enterprises.²³ Beyond this, many other economic factors are affected by corruption in its various forms, such as political, parliamentary, fiscal, administrative, or moral.²⁴

Therefore, this article's principal objective is to describe the *status quo* of corruption and present an analysis of the Egyptian position on corruption from both philosophical and legal perspectives. First, such an analysis mandates a historical philosophy concerning corruption and its forms in Egyptian society during the military regime, along with the current administration and a critical assessment thereof. Secondly, it examines the existing legal framework with respect to corruption and its various related crimes. This article will not only shed light on the circumstances that gave rise to the current dilemma but also on how, through history, a country develops anti-corruption policies that either lead to cooperation or confrontation with other countries. Later, this article concludes by critically analyzing the current criminal legal framework in the Egyptian Penal Law No. 58 of 1937 and the Egyptian Criminal Procedural Law No. 150 of 1950 and their recent amendments, in addition to other criminal laws on corruption.²⁵ This article ultimately calls into question the capability of empire and democracy to cohabitate.

²¹ See *id.*

²² See Manar Shorbagy, *Understanding Kefaya: The New Politics in Egypt*, 29 ARAB STUD. Q. 39, 54 (2007) ("Egypt's politics has been characterized by a near total monopoly by the ruling regime which maintains a legal framework that is highly restrictive for both political parties and civil society."). Law No. 162 of 1958 (Emergency Law), *Al-Jarida Al-Rasmiyya*, 1958 (Egypt), available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=111245.

²³ See *id.*

²⁴ See ALINA ROCHA MENOCAL ET AL., WHY CORRUPTION MATTERS: UNDERSTANDING CAUSES, EFFECTS AND HOW TO ADDRESS THEM 14–28 (U.K. DEP'T FOR INT'L DEV. 2015), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf (examining several factors that facilitate corruption, including economic, political, administrative, social and cultural factors). Recently there has been a kind of corruption linked to entrepreneurs' loans from banks. See, e.g., Quinn Owen, *Startup CEO charged in \$175 million fraud case*, ABC NEWS (Apr. 4, 2023, 10:34 PM), <https://abcnews.go.com/Business/startup-ceo-charged-175-million-fraud-case/story?id=98363900> (reporting that tech start-up CEO Charlie Javice was arrested and charged with fraud for allegedly lying to J.P. Morgan Chase).

²⁵ In addition to the Egyptian anti-bribery provisions, there are a significant number of other provisions in either criminal legislation or other laws and regulations with punishments for acts similar to bribery. Among these are those which penalize the actions of receipt or the passing of rewards to public officials for purposes of influencing their decisions in the discharge of their public functions. See, e.g., Law No. 80 of 2002 (Anti-Money Laundering Law "AMLL"), *Hosni Mubarak*, 2002 (Egypt), as amended by Law No. 78 of 2003, *rabea alakhar*, 2003 (Egypt); Law No. 62 of

II. THE DAILY LIFE OF CORRUPTION IN EGYPT BEFORE THE WHITE REVOLUTION (CONVENTIONAL CORRUPTION)²⁶

It is difficult to define corruption comprehensively. Corruption is not a logical concept but a phenomenon that cannot be curbed once embedded in the ruling regime because it protects and is protected by the ruler.²⁷ Theoretically, corruption is a form of conduct that departs from ethics, morality, tradition, law, and civic virtue.²⁸ Robert Klitgaard defined it as “[a] person’s illegal preference of his own interest, neglecting others’ and the principles to which he declared commitment.”²⁹ According to the United

1975 (Illicit Enrichment Apparatus “IEA”), *Al-Jarida Al-Rasmiyya*, 7 July 1975 (Egypt); Law No. 11 of 1968 (Illegal Profiting Apparatus “IPA”), 1968 (Egypt) as modified by Law No. 2 of 1977, *al-Sadat*, 1977 (Egypt).

²⁶ In Egypt and the wider Arab world, the protests and subsequent changes in the government have generally been referred to as the 25th of *Thawrat 25 Yanāyir* (January Revolution), *Thawrat al-Horeya* (Freedom Revolution), or *Thawrat al-Ghadb* (Rage Revolution), and less frequently, *Thawrat al-Shabāb* (the Revolution of the Youth), and *al-Thawrah al-baydā’* (Lotus Revolution, or White Revolution). See *Egyptian Panel Lifts Death Toll in Protests*, WALL ST. J. (Apr. 20, 2011, 12:01 AM), http://online.wsj.com/article/SB10001424052748704740204576273071880564288.html?mod=fox_ausralian; see also Ahmad Fatemi, *Egypt: The Bread and Freedom Revolution*, GLOB. REVOLUTION (Feb. 5, 2011), <http://aglobalrevolution.wordpress.com/2011/02/05/egypt-the-bread-and-freedom-revolution/>; *Egyptian-American Leaders call for U.S. support of “Lotus Revolution”*, CNN (Jan. 28, 2011, 10:59 PM), <http://www.cnn.com/2011/WORLD/africa/01/28/egypt.press.club/index.html>; *White Revolution in Egypt*, GULF DAILY NEWS (Feb. 13, 2011), <http://www.gulf-daily-news.com/NewsDetails.aspx?storyid299386>.

²⁷ TI defined corruption as “the abuse of entrusted power for private gain.” *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/en/what-is-corruption> (last visited Sept. 30, 2023). It also defined it as the officials’ behavior in the public or governmental sector, whether such officials are politicians or civilian employees, to illegally enrich themselves or their relatives through their given authority. *Id.* Corruption has also been defined as part of an agency/principal problem, where “an agent violates the trust of his or her principal through self-enrichment or through illegally enriching a political party.” CHARLES K. ROWLEY & FRIEDRICH G. SCHNEIDER, READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 552 (Springer 2008th ed. 2008). For example, when a legislator takes a kickback from a specific category of businessmen to enact and pass a statute in their favor, even if the application of this law would be detrimental to the rest of the community and the public interest, this act is considered a betrayal from the legislator who was entrusted and delegated by the general public to act on their behalf and achieve positive outcomes benefiting them and the society in general. See, e.g., *id.*

²⁸ Kenneth M. Dye, *Corruption and Fraud Detection by Supreme Audit Institutions*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 299, 304 (Anwar Shah ed., 2007).

²⁹ See generally ROBERT KLITGAARD, CONTROLLING CORRUPTION (Univ. of Cal. Press 1988). See also Robert Klitgaard, *What Can Be Done?*, in CORRUPTION 36 (The UNESCO Courier 1996). See, e.g., Robert A. Sparling, *Impartiality and the Definition of Corruption*, 66 POL. STUD. J., no. 1, 2018, at 376, 377. The Anti-Bribery Moroccan Society defined corruption as “[t]he unacceptable practice due to the misuse of a political, economic, administrative or judicial authority for the person’s own interest, harming the public interest.” See, e.g., Marcus Bauer, *Public Anticorruption in Morocco and Tunisia: A Comparative Study*, INT’L IMMERSION PROGRAM PAPERS 99 (2019) (“In 2018, Morocco and Tunisia were tied as the 73rd least corrupt countries in the world. However, although many of their reforms have been similar, Morocco’s and Tunisia’s anticorruption regimes are different in a number of crucial respects, mostly relating to their different forms of government.”); *Id.* (discussing the differences and similarities between the current anticorruption

Nations Development Programme (UNDP), there are two sorts of corrupt behavior: spontaneous and institutionalized.³⁰ In this regard, spontaneous corruption is usually found in cultures observing robust ethics and morals in public service.³¹ Institutional corruption is often found in societies where corrupt behavior is common, practiced openly, and even considered crucial to conducting business.³²

One Egyptian scholar defined three types of corruption: extortive corruption, manipulative corruption, and nepotistic corruption.³³ These definitions help shed light on the corruption in Egypt. First, extortive corruption occurs when an average person gives a bribe in order to meet their essential needs or defend their rights.³⁴ Second, manipulative corruption occurs when a person attempts to influence another's decision in favor of a particular person, party, or category in any field.³⁵ Third, nepotistic corruption is favoritism of relatives and other close persons in posts and advantages.³⁶ Nepotistic corruption is also known as cronyism and patronage.³⁷ The court decisions after the 2011 Egyptian Revolution have exposed the “nitty-gritty” details of how cronyism was quite extensive under former President Mubarak and how “the networks of privilege” operated.³⁸

efforts in Morocco and Tunisia and examine how public corruption manifests itself, the root causes of public corruption, and the history and the current status of public corruption and the government's response). *See also* Dye, *supra* note 28, at 299 (examining the fraud and corruption issues confronting Supreme Audit Institutions (SAIs) and offering some strategies and ideas for improvement).

³⁰ NORMAN ABJOENSEN, *COMBATTING CORRUPTION, IMPLICATIONS OF THE G20 ACTION PLAN FOR THE ASIA-PACIFIC REGION 21* (Anne Sahler & Akim Enomoto ed. 2014).

³¹ *Id.*

³² *Id.*; *see also* Amr Adly, *Mubarak (1990-2011): The State of Corruption*, ARI THEMATIC STUD.: THE POLITICS OF CORRUPTION, ARAB REFORM INITIATIV (2011); *see generally* MAHMMOUD NAGIUB HOSNI, SHARH KANUN AL-'UQUBAT, AL-KSEM AL-KHAS, AL-GRA'MM AL-MODRAA BELMASLAHA AL-'AMA [THE EXPLANATION OF EGYPTIAN PENAL LAW—THE SPECIAL PART: THE CRIMINAL OFFENCES AGAINST THE PUBLIC INTEREST], (Cairo Univ. Press 1972).

³³ *See generally* SYED H. ALATAS, *THE PROBLEM OF CORRUPTION* (Times Books Int'l 1986) (distinguishing and explaining extortive, manipulative, and nepotistic corruption).

³⁴ *See generally id.*

³⁵ *See generally id.*

³⁶ *See generally id.*

³⁷ *See generally id.*

³⁸ *See generally id.* In addition, favoritism is problematic from both legal and procedural perspectives, because the appointment of candidates is not based on their skills, experiences, and academic credentials which is ineffective to the work efficiency. *See* Judy Nadler & Miriam Schulman, *Favoritism, Cronyism, and Nepotism*, MARKKULA CTR. FOR APPLIED ETHICS, <https://www.scu.edu/government-ethics/resources/what-is-government-ethics/favoritism-cronyism-and-nepotism/> (last visited Nov. 26, 2023). It was stated that the Egyptian Administrative Judiciary may withdraw an administrative decision that was issued based on fraud, in favor of a certain person. *See generally* Baudouin Dupret, *Administrative Law*, HAL OPEN SCI. 4 (May 26, 2020), <https://hal.science/hal-02624566/document>. However, a report by TI, on the compliance of the Egyptian legal system with the UNCAC, found that the current legislation does not fully comply with the UNCAC requirements regarding hiring, retention, promotion, and retirement of public officials. *See* JUDGE ASHRAF-AL-BAROUDI & HUSSEIN HASSAN, *LEGISLATION IN EGYPT: AN*

Furthermore, corruption under the former regime can be seen throughout the nation in many ways, including an accumulation of citizen's economic encumbrances; negligence on the administrative level, particularly with public funds; a tendency to link proficiency standards to illegitimate gains; and a general lack of respect for the government.³⁹

Corruption in Egypt and throughout the Middle East represents the “permanent moan” from citizens who feel they have no right to citizenship.⁴⁰ Corruption is everywhere in these countries and cripples the whole community.⁴¹ One can argue that in developed countries—concerning confronting corrupt practices—corrupt officials are subject to criminal investigation and trial even while they hold power.⁴² Developed countries enjoy a democratic climate, which gives no public official the right to breach the law, even if they are the Head of State.⁴³ They are thoroughly investigated and subjected to punishment if proven guilty.⁴⁴ For instance, in France, former Minister of Communications Alain Carignon faced a criminal sentence of three years in prison for corruption.⁴⁵ In addition to the political

ANALYSIS OF COMPLIANCE WITH THE UN CONVENTION AGAINST CORRUPTION (Transparency Int'l 2011), available at https://www.transparency.org/files/content/pressrelease/20110630_TI-S_Legislation_in_Egypt.pdf.

³⁹ See generally Amr Adly, *Politically-Embedded Cronyism: The Case of Post-Liberalization Egypt*, 11 J. BUS. & POL. 4 (2017). Furthermore, TI reported that the most governmental areas that are subject to corruption in developing countries are: (1) governmental purchases (public procurements, goods and services, and utilities), (2) division and sale of lands and real estate, (3) tax, excise laws, and customs fees, (4) public official's appointments, and (5) regional rule administrations in the governorates. *Id.*

⁴⁰ For example, the Mubarak regime, its former National Democratic Party (NDP), and the government stole a citizens' role in political life, through detention for decades and security reports for public appointment. *Hosni Mubarak: A Living Legacy of Mass Torture and Arbitrary Detention*, AMNESTY INT'L (Feb. 25, 2020), <https://www.amnesty.org/en/latest/news/2020/02/hosni-mubarak-legacy-of-mass-torture/>.

⁴¹ *CPI 2022 for Middle East & North Africa: Corruption Fuels Ongoing Conflict*, TRANSPARENCY INT'L (Jan. 31, 2023), <https://www.transparency.org/en/news/cpi-2022-middle-east-north-africa-corruption-fuels-ongoing-conflict>.

⁴² See generally *Senior French Politician Gets 3 Years in Jail*, N.Y. TIMES (Nov. 17, 1995), <https://www.nytimes.com/1995/11/17/world/senior-french-politician-gets-3-years-in-jail.html>. In Sweden, judicial authorities decided to hold a criminal interrogation with the former Deputy Prime Minister Mona Sahlin for financial infractions. *Swedish official under investigation*, UNITED PRESS INT'L (Oct. 18, 1995), <https://www.upi.com/Archives/1995/10/18/Swedish-official-under-investigation/5779813988800/>.

⁴³ See S.W.R. DE A. SAMARASINGHE, *DEMOCRACY AND DEMOCRATIZATION IN DEVELOPING COUNTRIES* 14–15 (Data for Decision Making Project 1994), available at <https://efaidnbmnnnibpajpcglclefindmkaj/https://www.hsph.harvard.edu/international-health-systems-program/wp-content/uploads/sites/1989/2020/04/No-7-1.pdf> (explaining that rich, industrialized countries generally enjoy democratic institutions and freedoms).

⁴⁴ This is especially true the case in the United States of America. See generally *Steps in the Federal Criminal Process*, U.S. DEP'T JUST., <https://www.justice.gov/usao/justice-101/steps-federal-criminal-process> (last visited Nov. 6, 2023) (explaining the required steps in the federal criminal process, including criminal investigation and sentencing).

⁴⁵ *Senior French Politician Gets 3 Years in Jail*, N.Y. TIMES (Nov. 17, 1995), <https://www.nytimes.com/1995/11/17/world/senior-french-politician-gets-3-years-in-jail.html>.

functions in a democratic society, the media is also free from governmental pressure.⁴⁶ For instance, the media played a prominent role in exposing corrupt performances in the Watergate,⁴⁷ Whitewater,⁴⁸ and Berlusconi scandals, among many other examples.⁴⁹

However, corruption is routine in developing countries, and citizens anticipate it in all daily transactions.⁵⁰ Worse, although officials routinely transgress the law, they often avoid interrogation and penalty.⁵¹ Often, government officials attempt to convince the people that the government is not corrupt.⁵² Corrupt people, specifically high-ranking officials, frequently go unchecked to such an extent that the nation itself is seen as corrupt.⁵³ For example, ministers, senior officers, and People's Assembly Members (PAM) are often involved in crimes such as misappropriating public funds and

Further, in Sweden, judicial authorities decided to hold a criminal interrogation with the former Deputy Prime Minister Mona Sahlin for financial infractions. *Swedish official under investigation*, UNITED PRESS INT'L (Oct. 18, 1995), <https://www.upi.com/Archives/1995/10/18/Swedish-official-under-investigation/5779813988800/>.

⁴⁶ See generally Salieg L. Munestri, *Watergate Scandal Reassessed: Mass Media's Watchdog Role and Its Impact on American Political System*, 7 J. KOMUNIKASI MASSA 121 (2014).

⁴⁷ See generally *id.* (reexamining the Watergate Scandal and its impact on media and journalism). The Watergate scandal was a United States political scandal in the 1970s that resulted from the break-in to the Democratic National Committee headquarters at the Watergate office complex in Washington, D.C. *Id.* at 122. The Watergate scandal ultimately led to the resignation of the President of the United States, Richard Nixon. *Id.* It also resulted in the indictment, trial, conviction, and incarceration of several Nixon administration officials. *Id.* at 123-24. For further discussion on this scandal, see generally Joe Palazzolo, *From Watergate to Today, How FCPA Became so Feared*, WALL ST. J. (Oct. 2, 2012, 12:01 AM), <https://www.wsj.com/articles/SB10000872396390444752504578024791676151154>.

⁴⁸ See *Lewinsky Scandal*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/reference/encyclopedias-almanacs-transcripts-and-maps/lewin-sky-scandal> (last visited Nov. 6, 2023); see also Ernest Dumas, *Whitewater Scandal*, ENCYCLOPEDIA ARK. (June 16, 2023), <https://encyclopediaofarkansas.net/entries/whitewater-scandal-4061/>.

⁴⁹ See, e.g., Stephan Faris, *Berlusconi Sex Scandal: Ruby Tells Her Story*, TIME (Jan. 20, 2011), <http://www.time.com/time/world/article/0,8599,2043352,00.html>.

⁵⁰ Specifically, corruption creates social systems compliant to its practices and influences societies and the social relationships they contain. James Lewis, *Social impacts of corruption upon community resilience and poverty*, 9 JÀMBÁ: J. DISASTER RISK STUD., no. 1, 2017, at 7, available at <https://jamba.org.za/index.php/jamba/article/view/391/668>. Accordingly, wherever systemic corruption persists, attempts to induce and inculcate resilience to crises and hazards may be unlikely to succeed in the long run. *Id.*

⁵¹ For example, in the 1990s, a former Minister of Interior conspired with the corrupt people in obtaining illicit capital and private interests for his family. See generally Cassandra, *The Impending Crisis in Egypt*, 49 MIDDLE E. J. 1 (1995). He was the first minister that dealt in sales and purchases relations with prisoners in a detention camp. *Id.*

⁵² At the very least, they attempt to hide their illicit assets with the help of bankers, lawyers, accountants and real estate agents. See *What Is Corruption?*, TRANSPARENCY INT'L, <https://www.transparency.org/en/what-is-corruption> (last visited Nov. 6, 2023) (explaining how corruption can happen in the shadows).

⁵³ See Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, INT'L MONETARY FUND, May 1998, at 10 (noting that corruption is typically associated with state activities and especially with discretionary and monopoly power of the state).

cooperating to expedite various criminal violations.⁵⁴ Corruption uses the public interest to facilitate private interests.⁵⁵ Consequently, it exists in several patterns and levels in developing countries.⁵⁶ One of the most significant patterns is “top corruption,” which involves the corruption of high-ranking government officials and is particularly common in African nations following independence.⁵⁷ Accordingly, the government seems analogous to a palace where an individual controls while a cluster of beneficiaries seeks to benefit private interests.⁵⁸ In sum, it is the social system that is responsible for corruption and its culture, making it an acceptable notion, particularly “grand” corruption.⁵⁹

The most significant cause of corruption in Egypt has been dictatorship because tyranny makes absolute corruption possible.⁶⁰ Moreover, personal relationships and unofficial traditions play a vital role.⁶¹ Another important

⁵⁴ See, e.g., *Congressman George Santos Charged with Fraud, Money Laundering, Theft of Public Funds, and False Statements*, U.S. DEP’T OF JUST. (May 10, 2023), <https://www.justice.gov/usao-edny/pr/congressman-george-santos-charged-fraud-money-laundering-theft-public-funds-and-false> (reporting that George Anthony Devolder Santos, a United States Congressman representing the Third District of New York, was indicted for, among other things, theft of public funds).

⁵⁵ Cf. Roberto B. Kukutschka et al., *Building Political Integrity to Stamp Out Corruption: Three Steps to Cleaner Politics*, TRANSPARENCY INT’L (Jan. 23, 2020), <https://www.transparency.org/en/news/building-political-integrity-to-stamp-out-corruption-three-steps-to-cleaner-politics> (“Political integrity means exercising political power consistently in the public interest, i.e., not to sustain power holders’ own wealth or position, and independent of private interest.”).

⁵⁶ See generally RONALD WRAITH & EDGAR SIMPKINS, *CORRUPTION IN DEVELOPING COUNTRIES* (Routledge 2013 ed. 1963) (reviewing corruption in the developing countries of Africa).

⁵⁷ In fact, a significant percentage of African citizens regard their government officials to be corrupt. *Citizens Speak Out About Corruption in Africa*, TRANSPARENCY INT’L (July 11, 2019), <https://www.transparency.org/en/news/citizens-speak-out-about-corruption-in-africa>.

⁵⁸ Gamal Essam El-Din, *A Tale of Two Banks*, AHRAM ONLINE (Jan. 23/29, 2003), <https://english.ahram.org.eg>.

⁵⁹ *Id.* “Grand Corruption” includes complicated network operations, including arrangements and measures that are difficult to be unveiled, and it usually includes senior officials in the state and even the President himself. Maíra Martini, *Fighting Grand Corruption: Challenges and Successes*, TRANSPARENCY INT’L, May 14, 2015, at 2. In addition, this sort of corruption is also found in companies to which some former state officials have contributed by creating chances for these corporations to earn millions, smuggling most of it abroad. See, e.g., *id.* at 4 (“Corrupt officials frequently use complex corporate structures to hide their identities and easily evade taxes and/or launder the proceeds of corruption or other crimes.”). The government seemed to have suddenly discovered the spread of corruption among these companies, including tax evasion, illegal positions, continuous violations, questionable practices, and depositor’s rights not being guaranteed. See, e.g., Osama Kamal, *Al-Rayyan: from fact to fiction*, AHRAM ONLINE (Aug. 18, 2011), <https://www.masress.com/en/ahramweekly/27456> (“Al-Rayyan is marked out by a clever script, competent direction, and generally lively performances . . . [O]ne of the country’s top businessmen in the 1980s, al-Rayyan, once handled nearly 5.2 billion EGP in investment funds, and nearly 200,000 people trusted him with their life savings. However, al-Rayyan’s business empire, which had branched out into every sector of the Egyptian economy, came crashing down when the government passed a law in 1988 aiming to regulate fund-management companies.”).

⁶⁰ See Mahmoud Hashem, *Egypt’s decade of dictatorship and repression*, PEOPLES DISPATCH (July 13, 2023), <https://peoplesdispatch.org/2023/07/13/egypts-decade-of-dictatorship-and-repression/>.

⁶¹ See generally Mohamed ‘Arafa, *Dreams without Illusions: The Bureaucratic Cholesterol, Administrative Corruption and the Future of a Real Democratic Middle East*, 53 NEW ENGLAND

cause of corruption is the significant influence of the administrative bureaucratic regime.⁶² The lack of strong political associations able to control the bureaucratic systems enables them to work only for their private interests, using various kinds of administrative corruption.⁶³

While most developing countries remain poor, a few are evolving more rapidly.⁶⁴ This means corruption will spread among the region through the domination of personal loyalty over national values.⁶⁵ According to the report prepared by Transparency International (TI) on *Corruption and Human Rights: Making the Connection*, corrupt activities may transgress human rights directly, indirectly, or remotely.⁶⁶ The distinction between the three kinds of violations is significant, as not every corrupt deed is in itself a violation of a human right; it may lead to the breach of a human right;

L. REV. (2021) (“[B]ut rather the administration of the government’s affairs and the conditions required for operative governance, which can be understood as orderly legal rule and collective action to control corruption, especially the code of conduct technique. So, it emphasizes corruption as a rampant disease in the Middle East, especially in the field of public administration, defined as the variety of guiding general principles that regulate how governments administer their affairs. Public administration is defined as the diversity of structures, procedures and practice, and public sector reform regarding the diversity of public service delivery mechanisms (marketization, commercialization, privatization, and contracting out). It is also defined as the administrative reforms, the bureaucratic organizational change and procedural reform concerning corruption, personnel administration, budgeting, financial management, and e-government. Governance comprises all the processes of overriding, whether undertaken by the government/state, a market, a network, or over a social system; and whether through the laws, legal norms, power, or language of an organized society. Thus, it relates to the processes of communication and decision-making among the actors involved in a collective problem that lead to the creation, fortification, or reproduction of social norms and institutions. In other words, it could be described as the political processes that exist in and between formal institutions. A variety of entities (governing bodies) can govern whose responsibility and authority it is to make binding decisions in a given geopolitical system (such as a state) by establishing laws and rules.”).

⁶² Osama Kamal, *Al-Rayyan: from fact to fiction*, AHARAM ONLINE (Aug. 18, 2011), <https://www.masress.com/en/ahramweekly/27456>.

⁶³ *Id.*

⁶⁴ See Lucia Elmi, *Top 5 Fastest Developing Countries*, BORGENT PROJECT (Mar. 19, 2020), <https://borgenproject.org/top-5-fastest-developing-countries/> (listing the top five fastest developing countries).

⁶⁵ See Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, 35 FIN. & DEV. 7, 9 (1998) (noting that accountability is typically weak and that political competition and civil liberties are often restricted in developing and transition countries). A person cannot access any governmental or administrative association service except through bribery or kickback, which is called several names as *ikramia* or *baksiesh* (grant, fee or tips). See generally DAVID MONTERO, KICKBACK: EXPOSING THE GLOBAL CORPORATE BRIBERY NETWORK (Viking 2018) (examining how corporate bribery and kickbacks around the world undermine democracy and the free market system). Corruption also spreads through subordination; when corruption spreads among the upper level, it subsequently transfers to the general public, or it may move like an endemic from one organization to another. See Tanzi, *supra* note 53, at 6, 7 (explaining that the practice of bribery is likely to be cumulative in time, eventually resembling the spreading of contagious disease).

⁶⁶ MAGDALENA S. CARMONA, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 27–28 (Int’l Council on Hum. Rts. Pol’y 2009).

therefore, the causal link between the corrupt conduct and the violated human right, should at every time be recognized.⁶⁷

(a) Direct Violations: A corrupt performance is considered to be a direct abuse of a human right when it is deliberately and intentionally committed with the purpose of violating it, meaning that the violation was predictable and that the official abstained from averting it.⁶⁸ For instance, the right to health and the principle of non-discrimination may be diminished by an act of corruption, when the hospital staff gives more attention and care to patients who pay them inducements or bribes or when the medical supplies in public hospitals are missing because they were subject to prohibited deals conducted by the official in charge.⁶⁹ Such an act violates Article 12.1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which provides for “[T]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁷⁰

(b) Indirect Violations: An indirect violation occurs when a corrupt activity is an indispensable factor in a chain of events, the presence of which together leads to the violation of a human right.⁷¹ Furthermore, corruption indirectly affects people experiencing poverty by decreasing their net income and depleting public resources, funds, policies, and programs.⁷²

(c) Remote Violation: Remote violation occurs when individuals are suppressed from opposing or protesting, which unequivocally infringes upon the right to political participation, the prohibition of torture, and several other rights.⁷³

A. Types of Corruption in Egypt

Corruption in Egypt takes several forms. To better understand its different forms, the following sections examine its principal types.

⁶⁷ Julio Bacio-Terracino, *Corruption as a Violation of Human Rights*, INT’L COUNCIL ON HUM. RTS. POL’Y (Jan. 2008) (manuscript at 10).

⁶⁸ Amira M. Emara, *The Impact of Corruption on Human Rights in Egypt*, 10 ASIAN ECO. & FIN. REV. 5, 574-89 (2020).

⁶⁹ See, e.g., Matthieu Hanf et al., *Corruption Kills: Estimating the Global Impact of Corruption on Children Deaths*, 6 PLOS ONE 11, 3-6 (2011) (finding high levels of corruption to be correlated with poor health-related outcomes, including higher infant and child mortality rates).

⁷⁰ Emara, *supra* note 68, at 574-89 (emphasis added); see also G.A. Res. 2200A (XXI), at 3, 8 (Dec. 16, 1966).

⁷¹ See Bacio-Terracino, *supra* note 67, at 11 (“[E]ven when there is not a direct connection, corruption may nonetheless be an essential contributing factor in a chain of events that eventually leads to a violation, and as such corruption indirectly violates human rights.”).

⁷² See generally Emara, *supra* note 68.

⁷³ See Bacio-Terracino, *supra* note 67, at 8 (explaining how corruption can lead to human rights violation without violating human rights, thus operating as a remote cause of such violation).

1. *Political and Administrative Corruption*

Following the introduction of a liberal reform policy, the Egyptian economy demonstrated remarkable economic growth.⁷⁴ The former National Democratic Party (NDP) dominated the political landscape in Egypt from its establishment in 1978 until the resignation of the late President M. Hosni Mubarak on February 11, 2011.⁷⁵ Upon gaining office after former President M. Anwar El-Sadat's assassination in 1981, Mubarak declared a state of emergency, which has been in force ever since.⁷⁶ The political environment was characterized by a powerful executive branch and a lack of legislative control, as many policy areas (e.g., interior, defense, and justice) lie outside legislative authority.⁷⁷ Moreover, the 1971 Egyptian Constitution, replaced by the 2012 Egyptian Constitution, subordinated the legislative and judicial branches to the executive.⁷⁸

⁷⁴ See generally Abdelmonem L. Mohamed Kamal & Mostafa E. AboElsoud, *Modeling economic growth factors in Egypt: A quantile regression approach*, 9 HELIYON 2 (2023) (investigating the sources of Egypt's economic growth over the course of four generations of reforms from 1991 to 2019).

⁷⁵ See generally Charles R. Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75 (2000) (examining certain facets of the leadership of Hosni Mubarak, one of Middle East's authoritarian technical bureaucrats).

⁷⁶ See generally *id.* (examining certain facets of the leadership of Hosni Mubarak, one of Middle East's authoritarian technical bureaucrats). The current constitutional document regarding the emergency status provides that "[t]he President of the Republic shall declare, after consultation with the Cabinet, a state of emergency in the manner regulated by law. Such proclamation must be submitted to House of Representatives within the following seven days. If the declaration takes place when the House of Representatives is not in session, a session is called for immediately. In case the House of Representatives is dissolved, the matter shall be submitted to the *Shoura* Council, all within the period specified in the preceding paragraph. The declaration of a state of emergency must be approved by a majority of members of each Council. The declaration shall be for a specified period not exceeding six months, which can only be extended by another similar period upon the people's approval in a public referendum. The House of Representatives cannot be dissolved while a state of emergency is in place." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, as amended, 2019 art. 154.

⁷⁷ See Davidson, *supra* note 75, at 80 ("Egypt's domestic political environment ha[d] not undergone major structural reform for decades and remain[ed] a highly restricted autocratic political system, controlled by a dominant executive and [Mubarak's] political supporters.")

⁷⁸ See ANDREA TETI, POLITICAL AND SOCIAL CHANGE IN EGYPT: PRELUDES TO THE JANUARY UPRISING 1 (Arab Transformations Project 2017), available at https://www.jstor.org/stable/pdf/resrep14103.4.pdf?refreqid=fastly-default%3A6d1598ad90186f073e973a5028756599&ab_segments=&origin=&initiator=&acceptTC=1 ("Under the 1971 constitution and its successors, the country was given a bicameral legislative system, with a weak upper house many of whose members were appointed by the President."); see also Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1017 (2012) (explaining how the 1971 Constitution culminated in "increased centralization of presidential power, the dismantling of judicial independence, and the systematic infringement of basic rights"). Thus, political corruption can be found in fraudulent elections, supporting the emergency law, and human rights basic violations on different levels. See Sahar F. Aziz, *Revolution without Reform: A Critique of Egypt's Election Laws*, 45 GEO. WASH. INT'L L. REV. 1, 27-47 (2013) (illustrating both the parliamentary

Reports by Transparency International confirm an escalation in the wasting of public funds and the retreat of the government's role in fighting corruption, including embezzlement, misappropriation of public funds, seizure, bribery, and forgery.⁷⁹

Administrative corruption is apparent in many fields.⁸⁰ Favoritism is rampant in the private sector for those close to the former regime.⁸¹ Those close to the prior government were given special benefits, control over central projects, and simplified loans without commercial guarantees.⁸² The Forum for Development and Human Rights Dialogue (FDHRD) issued a report on February 26, 2008, analyzing corruption within municipalities, which stated that “during 2007, the amount of squandered funds reached EGP 454 million and that the amount of embezzled money in municipalities reached EGP 14 million.”⁸³ This type of corruption can also be seen in a

and presidential elections in Egypt after the ouster of Mubarak and the domination of Islamists and the irregularities which Egyptian elections suffered from).

⁷⁹ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 24 (attributing the intensification to the inability of the popular and party associations to oversee the monetary flow inside the government). *Cf. id.* at 59 (explaining that no clear regulations concerning the overseeing of fund disbursement by candidates or political parties exist). They are also incapable of assessing the regional markets, international businesses, abuse of public funds, political donations, and the inability of the laws to enforce the officials to disclose their incomes. *Cf. id.* at 15 (“Integrity mechanisms governing public officials including laws and regulations . . . need to be effectively implemented.”). Anti-corruption in Egypt will not take place except after accomplishing democracy, the role of the state foundations, strengthening values of punishment, and supervision of the Parliament in addition to reinforcing its ability to penalize the executive authority's members in cases of negligence. *See id.* at 27-28 (explaining that punishing corrupt parties is not sufficient for fighting corruption and that fundamental changes in the bureaucratic system and machinery of society are necessary). Law No. 89 of 1998 inspired by the UNCITRAL Model Law on the Procurement of Goods, Construction, and Services and the World Bank's Model Laws of Procurement, which is issued by Ministry of Finance, contains provisions regarding conflict of interests, prohibiting officials and employees in agencies/authorities from participating, whether personally or through intermediaries, in bidding/tendering offers to law enforcement agencies. Law No. 89 of 1998 (Tenders and Auctions Law), *monakasat*, 1998 (Egypt). Also, this law stipulates that public tenders and public auctions must be subject to “Publicity Principles.” *Id.* Article 2 states, “Since all public bids and auctions follow the principles of rationality, equal opportunity, and free competition, they must be declared in daily newspapers and other widespread information media.” *Id.* at art. 2. Also, the executive regulation of this law set instructions for contract bidding conditions, the execution of contracts for labor, supplies, and the required steps. *See id.* However, not enough effort is exerted in inspecting and investigating the documents presented by the officials, which include incorrect, misleading, falsified, and distorted data. *See, e.g., id.* at art. 2 (discussing the executive regulations). *See generally* ACCOUNTABILITY STATE AUTHORITY, <https://asa.gov.eg/page.aspx?id=1> (last visited Dec. 18, 2023) (explaining its tasks in fighting corruption, money laundering, and financial crimes in Egypt along with recent accountability standards)

⁸⁰ *See Egypt Risk Report*, GAN INTEGRITY (Sept. 30, 2020), <https://www.ganintegrity.com/country-profiles/egypt/>.

⁸¹ *See id.*

⁸² *See, e.g.,* ‘Arafa, *supra* note 61.

⁸³ *Id.* Privatization is the process of transferring ownership of a business, enterprise, agency or public service from the public sector to the private sector. *See generally* DAVID PARKER & DAVID S. SAAL, INTERNATIONAL HANDBOOK ON PRIVATIZATION (Edward Elgar Publ'g 2005) (explaining that

myriad of other fields, including privatization, the system of assessing assets, properties, and lands owned by corporations and banks, the credit system, and the trafficking of money abroad via authorized banking channels.⁸⁴ Moreover, in the agricultural sector, there were various types of wrongdoings, including issues with cancer-causing herbicides and the ruining of several vital commodities in the Egyptian economy.⁸⁵

Regarding Egypt's compliance with economic and social rights obligations, a Joint Non-Governmental Organization reported to the Office of the High Commissioner for Human Rights (HCHR) in 2010 that

privatization refers to transfer of any government function to the private sector, including governmental functions like revenue collection and law enforcement); ROGER L. KEMP, *PRIVATIZATION: THE PROVISION OF PUBLIC SERVICES BY THE PRIVATE SECTOR* (McFarland 2007).

⁸⁴ See generally Paul Cook & Colin Kirkpatrick, *Assessing the Impact of Privatization in Developing Countries*, in *INTERNATIONAL HANDBOOK ON PRIVATIZATION* (David Park & David S. Saal ed. 2005); see also Sabine Frerichs, *Egypt's Neoliberal Reforms and the Moral Economy of Bread: Sadat, Mubarak, Morsi*, 48 *REV. OF RADICAL POL. ECON.* 610, 610–32 (2016), available at <https://journals.sagepub.com/doi/full/10.1177/0486613415603158>.

⁸⁵ See Reuters, *Egypt Detains Former Minister over Pesticides*, *DAILY NEWS EGYPT* (Oct. 5, 2012, 1:03 PM), <https://dailynewsegypt.com/2011/07/11/egypt-detains-former-minister-over-pesticides/> (“An Egyptian investigating judge ordered a former agriculture minister detained for questioning over accusations that he allowed the import of cancer-causing pesticides. . . . [Y]oussef Wali, who served as agriculture minister under former President Hosni Mubarak from 1982 to 2004, was also suspected of squandering 200 million Egyptian pounds. . . .”); see also MENA, *Mubarak agriculture minister Wali to stand trial on 20 April in corruption case*, *AHRAM ONLINE* (Jan. 9, 2019), <https://english.ahram.org.eg/NewsContent/1/64/321460/Egypt/Politics-/Mubarak-agriculture-minister-Wali-to-stand-trial-o.aspx>; *Egypt's Criminal Court annuls assets freeze of Mubarak era agriculture minister Youssef Wali*, *AHRAM ONLINE* (Mar. 21, 2018), <https://english.ahram.org.eg/NewsContent/1/64/293197/Egypt/Politics-/Egyptys-Criminal-Court-annuls-assets-freeze-of-Muba.aspx>; Robert Springborg, *Patrimonialism and Policy Making in Egypt: Nasser and Sadat and the Tenure Policy for Reclaimed Lands*, 15 *MIDDLE E. STUD.* 49, 49–69 (1979). One of the cases that shocked Egyptian society was that of Youssef ‘Abdel Rahman, one of the pillars in the former Ministry of Agriculture. He faced charges of bribery, ill-gotten money, abuse of power, and importing and using banned insecticides. See generally Gamal Essam El-Din, *Agriculture Feels the Heat*, *AHRAM ONLINE* (Jan. 30, 2003), <https://english.ahram.org.eg/WriterArticles/Gamal-Essam-El-Din/289/1760.aspx> (“the trial of Youssef Abdel-Rahman, Agriculture Minister Youssef Wali’s . . . is already causing ripples in political and economic circles.”); *Id.* (“The Cairo Criminal Court sentenced and fined all officials in this case. The defense counsel claimed that there was no legal evidence for bribery and incompetence as the accused’s delegation as a legal advisor in the Ministry of Agriculture was ended at that time. The court responded that his character as a public official still existed as he committed the crime and performed the job duties in a way that made him an “actual official” according to the Egyptian Penal Code’s bribery provisions.”). Also, it has been reported that the Agriculture Minister, Amin Abaza, who served under the ousted President Mubarak, was arrested and stood trial in the Isma‘ilia Criminal Court for unlawfully seizing, confiscating, willful damage to public property, and facilitating the acquisition of state-owned land in the Sinai Peninsula along with other defendants. Isma‘ilia Criminal Court sentenced Abaza and the other businessmen to three years in prison for charges of seizing (facilitating acquisition) and squandering EGP 35 million in state funds to establish illusory public projects. See Reuters, *Egypt Sentences 11 to Death Over Riot Between Al-Masry and Al-Ahli Fans*, *NBC UNIVERSAL* (June 9, 2015, 7:32 AM), <https://www.nbcnews.com/news/world/egypt-sentences-11-death-over-riot-between-al-masry-al-n372151#>.

“Egyptians have not been enjoying just and favorable work conditions.”⁸⁶ Government policies have further exacerbated the already severe employment situation by promoting temporary contracting in the public sector, fixing wages below the global averages, and allowing unfair dismissal and abuse by employers.”⁸⁷

Corruption extends to the transportation and communication sectors, encompassing telecommunications, housing, construction, land privatization, infrastructure development, and the procurement and transportation of weapons.⁸⁸ One famous corruption case within the housing sector involves a project named “*Ibni Beitak*.”⁸⁹ The project was supposed to provide youth and low-income individuals with plots of land with an area of 150 m² per piece, for a value of EGP 70/m², and a total value of EGP 10,500.⁹⁰ Then, the property owner would construct a housing unit on 50% of the land surface area, noting that they were allowed to build two upper units with a total built-up area of 225 m².⁹¹ The architectural, construction, health, and electricity drawings were free of charge to the national citizens.⁹² Likewise, the Ministry was supposed to provide financial support of EGP

⁸⁶ See, e.g., U.N. OFF. OF THE HIGH COMMISSIONER, EGYPT: A SELECTIVE SUBMISSION ON COMPLIANCE WITH ECONOMIC AND SOCIAL RIGHTS OBLIGATIONS (7th Sess. Hum. Rts. Council 2010), available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session7/EG/JS4_UPR_EGY_S07_2010_JointSubmission4.pdf (discussing the compliance with economic and social rights obligations); *Id.* (“[F]ocus[ing] on Egypt’s compliance with its obligations in relation to the respect, protection, and fulfillment of economic and social rights. It presents and analyses [sic] key data relating to the enjoyment of people’s rights to an adequate standard of living, the right to work, the right to education, the right to health and the right to social security. It also presents data on poverty and the implications of trade liberalization on the realization of economic and social rights in Egypt. The report also includes a set of recommendations for remedial action.”).

⁸⁷ *Id.*

⁸⁸ *Id.*; see generally Ewan Sutherland, *Bribery and Corruption in Telecommunications – New Approaches to Licensing*, INT’L ASS’N FOR MEDIA & COMM’N RSCH, June 2013 (explaining why licensing reforms are required for reducing corruption in the telecommunications sector).

⁸⁹ See generally Taha Gado, *Corruption Under Knees in Ibni Beitak Project: Corruption is a Continuous Offer in Ibni Beitak Project*, YAHOO NEWS (Feb. 14, 2009), <http://abnybetak.maktoobblog.com/1587243/الفساد-للركب-في-مشروع-ابني-بيتاك/>; see also DAVID SIMS & TIMOTHY MITCHELL, EGYPT’S DESERT DREAMS: DEVELOPMENT OR DISASTER? (The Am. Univ. in Cairo Press rev. ed. 2018).

⁹⁰ See generally DAVID SIMS & TIMOTHY MITCHELL, EGYPT’S DESERT DREAMS: DEVELOPMENT OR DISASTER? (The Am. Univ. in Cairo Press rev. ed. 2018).

⁹¹ See generally *id.*

⁹² ‘Arafa, *supra* note 61. As a consequence of Egypt’s economic transformations in the past era, the phenomenon of eviction from agricultural land and housing became ubiquitous. See generally BUREAU DEMOCRACY, HUM. RTS. & LAB., 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – EGYPT (U.S. DEP’T OF STATE 2008), available at <https://www.refworld.org/docid/47d92c5216e.html>. Subsequently, numerous corruption cases were attributed to the right to housing. In 2007, the office of complaints on human rights violations received a lot of complaints concerning the administrative evacuation of ten families, in a way breaching their right to housing, without prior notification of the demolition date, and without negotiating with them any compensation or alternative accommodation. *Id.*

15,000 to each citizen.⁹³ However, the Administrative Control Authority attributed acts of corruption to the Ministry of Housing and arrested the public officials in charge of the project, along with the Chairman of one of the private contractors, on charges of bribery amounting to EGP 2 million for the installation of pipes and water lines by direct order.⁹⁴

Corruption in Egypt can be seen indirectly through the annual economic and military assistance, specifically grants from the United States Agency for International Development (USAID Program) given to the Egyptian government.⁹⁵ This funding has regularly been used to fund corrupt behaviors in various sectors, including the press,⁹⁶ the healthcare field,⁹⁷ and the

⁹³ See generally SIMS & MITCHELL, *supra* note 90.

⁹⁴ ‘Arafa, *supra* note 61. This contradicts the principle provided in Article 34 of the Egyptian Constitution regarding adequate housing as a given right, which was confirmed by the Egyptian Supreme Constitutional Court, in its decision in the al-Mah. kamah al-Dustūriyah al-‘Ulyā [Supreme Constitutional Court], case no. 1, session of 2 Jan. 1975, year 4, p. 203.

The principle provides that:

“Private ownership shall be safeguarded and may not be put under sequestration except in the cases specified by the law and under a court judgment. It may not be expropriated except for the public benefit and against a fair compensation in accordance with the law.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 34.

⁹⁵ *Egypt*, USAID, <https://www.usaid.gov/egypt> (last visited Nov. 27, 2023).

⁹⁶ The Egyptian Criminal Court has sentenced Anas El-Fiqqi, the former Press, Media, and Information Minister, to seven years in prison, dismissal from his public office, and referring the civil action on the grounds of *renvoi* to be adjudicated by the competent court for squandering public funds from the State Radio and Television Union. See MAHMOUD C. BASSIOUNI, CHRONICLES OF THE EGYPTIAN REVOLUTION AND ITS AFTERMATH: 2011–2016 377 (Cambridge Univ. Press 2017). Also, it sentenced Osama El-Sheikh, the former head of the union, to five years on the same charges. *Id.* at 377. The court convicted them for profiteering and wasting public funds. *Egyptian court acquits 3 ex-ministers, convicts 1*, EMIRATES 24/7 (July 5, 2011), <https://www.emirates247.com/news/world/egyptian-court-acquits-3-ex-ministers-convicts-1-2011-07-05-1.406100>. They were convicted of squandering \$1.6 million by paying over the odds for a television drama series. *Id.* Prosecutors charged El-Fiqqi with granting broadcasting rights to Egypt’s premier football league in 2009, 2010, and 2011 . . . causing the State to incur 1.89 million EGP in losses. *Court sentences 2 former regime officials to prison*, EGYPT INDEP. (Sep. 28, 2011), <https://www.egyptindependent.com/court-sentences-2-former-regime-officials-prison/>. Also, the court found El-Sheikh guilty of squandering 19 million EGP in public funds, for purchasing and airing . . . at inflated prices without approval from the specialized evaluation and pricing panels. See MAHMOUD C. BASSIOUNI, CHRONICLES OF THE EGYPTIAN REVOLUTION AND ITS AFTERMATH: 2011–2016 377 (Cambridge Univ. Press 2017); see also *Mubarak’s information minister convicted*, SYDNEY MORNING HERALD (Sep. 28, 2011, 9:00 PM), <https://www.smh.com.au/world/mubaraks-information-minister-convicted-20110928-1kxfy.html> (“An Egyptian court has convicted Hosni Mubarak’s powerful information minister on corruption charges and sentenced him to seven years in prison.”).

⁹⁷ See generally SOHA BAYOUMI, HEALTH AND SOCIAL JUSTICE IN EGYPT: TOWARDS A HEALTH EQUITY PERSPECTIVE, (UNESCO 2016), available at https://en.unesco.org/inclusivepolicylab/sites/default/files/analytics/document/2019/4/wssr_2016_chap_30.pdf (examining Egypt’s striking health inequities); see also Ahmed Feteiha, *Five years on, Damietta’s Agrium controversy reignites*, AHARAM ONLINE (Nov. 14, 2011), <http://english.ahram.org.eg/NewsContent/3/12/26480/Business/Economy/Five-years-on,-Damiettass-Agrium-controversy-reignites.aspx> (“Since 2008, local activists in Damietta have fought to preempt construction of a contentious fertilizer production plant.”). For further elaboration on corruption cases in these various sectors, see Adly, *supra* note 39, at 7-19

tourism, oil, and gas sectors.⁹⁸ Many others are also included in the circle of corruption.⁹⁹ Finally, in terms of police brutality and the security and law enforcement sector's misuse of power,¹⁰⁰ corrupt practices commence upon

(discussing three cases that deal with land allocation, two with the privatization of publicly-owned enterprises, and one with the sales and exportation of natural resources, *i.e.*, natural gas).

⁹⁸ See generally Diana Elassy, *Corruption and the fall of an Empire*, EGYPT OIL & GAS (Dec. 29, 2014), <https://egyptoil-gas.com/features/corruption-and-the-fall-of-an-empire/> (discussing one of the most recent corruption cases in the Egyptian Oil and Gas Industry); see also Tamim Elyan, *Top Egyptian officials involved in facilitating Israel gas deal*, say leaked documents, DAILY NEWS EGYPT (Oct. 6, 2012), <https://www.dailynewsegypt.com/2011/06/27/top-egyptian-officials-involved-in-facilitating-israel-gas-deal-say-leaked-documents/>; Mohamed Fadel Fahmy, *Israel gas deal sparks attacks in Egypt*, CNN (May 14, 2011, 1:57 PM), <http://www.cnn.com/2011/WORLD/meast/05/14/egypt.israel.al.Sabil.gas/index.html>; Rana M. Taha, *Salem and Fahmy imprisoned over Israel gas deal*, DAILY NEWS EGYPT (Dec. 29, 2020), <https://www.dailynewsegypt.com/2012/06/28/court-rules-15-years-for-hussein-salem-and-sameh-fahmy-for-israel-gas-deal/> (“A Cairo Criminal Court convicted the former Minister of Petroleum and the business tycoon for selling Egyptian natural gas to Israel at below market rate. Fahmy received a sentence of 15 years in jail and was removed from position, by orders of the court, and businessman Hussein Salem was also found guilty and sentenced to 15 years *in absentia*. The defendants were found guilty of harming the national interests of the country and wasting public funds by selling and exporting natural gas to Israel at below market rates . . . All of the defendants in the case were collectively fined roughly 2.5 billion USD. Further, several members of prominent petroleum government bodies were also convicted, and received between three, seven, and ten years in jail.”).

⁹⁹ A crucial step to prevent any manipulation during the investigations and trials was made by former Egyptian Attorney General, who ordered the freezing of the assets—such as real estate, movable property, and liquid assets—of a number of persons under investigation, including their wives, and their adult and minor children. See, e.g., Deya Abaza, *Assets freeze about-face signal struggle within Egypt's judiciary*, AHRAM ONLINE (Mar. 21, 2013), <https://english.ahram.org.eg/NewsContent/3/0/67380/Business/0/Asset-freeze-aboutface-signals-struggle-within-Egy.aspx>. For instance, the steel tycoon Ahmad ‘Ezz, the former NDP Organization Secretary and former political power broker, was recently sentenced to ten years in prison and fined the equivalent of about 11 million USD for economic corruption, seven years for money laundering, and 37 years for other corrupt acts. See David D. Kirkpatrick & Heba Afify, *Steel Tycoon with Links to Mubarak Is Sentenced*, N.Y. TIMES (Sep. 15, 2011), <https://www.nytimes.com/2011/09/16/world/middleeast/egypt-sentences-mubarak-era-tycoon-ahmed-ezz-to-prison.html>; see also *Former tourism minister Garana sentenced to 5 years*, AHRAM ONLINE (May 10, 2011), <https://english.ahram.org.eg/NewsContent/1/64/11780/Egypt/Politics-/Former-tourism-minister-Garana-sentenced-to--years.aspx> (“Egypt former tourism minister found guilty of corruption . . . [G]arana was found guilty of corruption and violation of auction laws in buying land in the resort area of Al’Ain Al-Sohkna”); *Egypt jails former trade minister Rachid in absentia*, BBC NEWS (June 25, 2011), <https://www.bbc.com/news/world-middle-east-13916180> (explaining that Egypt’s former Trade Minister Rachid Mohamed Rachid has been sentenced to five years in prison *in absentia* for embezzling public funds).

¹⁰⁰ Based on Focus Group Discussions held in Cairo, June 2009. In practice, and especially in the last three years, several police officers have been convicted of torturing innocent citizens, but not of corruption. See *Egypt police jailed for killing*, BBC NEWS (Nov. 28, 2007), http://news.bbc.co.uk/2/hi/middle_east/7117309.stm; Amro Hassan, *EGYPT: Police officer imprisoned for torturing suspect*, L.A. TIMES (Nov. 8, 2009, 8:18 AM), <https://www.latimes.com/archives/blogs/babylon-beyond/story/2009-11-08/egypt-police-officer-imprisoned-for-torturing-suspect>. It should be remembered that Egypt is a party to the United Nations Anti-Torture Convention (as is the United States) and has adopted national implementing legislation since 1985 making it a crime under Egyptian Law for anyone to engage in torture and the treaty went into force in 1987. See, e.g., HEBA MORAYEF, “WORK ON HIM UNTIL HE

entry into the Police Academy and include activities such as torture, abuse of authority, and even killing in police stations.¹⁰¹

In a recent bombshell case, the United States Attorney for the Southern District of New York indicted U.S. Senator Robert (Bob) Menendez, his wife Nadine Arslanian Menendez, and three New Jersey businessmen for participating in a years-long bribery scheme.¹⁰² The indictment alleges that Menendez and his wife accepted hundreds of thousands of dollars in bribes from the businessmen in exchange for Menendez's agreement to use his official position to protect and enrich them and to benefit the Government of Egypt.¹⁰³ The sweeping indictment includes three charges: (a) conspiracy to commit bribery, (b) conspiracy to commit honest services fraud, and (c) conspiracy to commit extortion under color of official right, along with some forfeiture allegations.¹⁰⁴ The Attorney General said,

[T]hree New Jersey businessmen who collectively paid hundreds of thousands of dollars of bribes, including cash, gold, a Mercedes Benz, and other things of value—in exchange for Senator Menendez agreeing to use his power and influence to protect and enrich those businessmen and to benefit the Government of Egypt. My Office is firmly committed to rooting out corruption, without fear or favor, and without any regard [for] partisan politics.¹⁰⁵

CONFESSES": IMPUNITY FOR TORTURE IN EGYPT (Hum. Rts. Watch 2011), available at <https://www.hrw.org/report/2011/01/30/work-him-until-he-confesses/impunity-torture-egypt>; see also G.A. Res. 39/46 (XXVII) (Dec. 10, 1984).

¹⁰¹ See, e.g., *Egypt police beat, detain blogger says rights group*, REUTERS (Feb. 9, 2009, 10:29 AM), <https://www.reuters.com/article/oukin-uk-egypt-blogger/egypt-police-beat-detain-blogger-says-rights-group-idUKTRE51853F20090209>.

¹⁰² See Press Release, U.S. ATT'Y OFF. FOR THE S. DIST. OF N.Y., *U.S. Senator Robert Menendez, His Wife, And Three New Jersey Businessmen Charged With Bribery Offenses* (Sep. 22, 2002), <https://www.justice.gov/usao-sdny/pr/us-senator-robert-menendez-his-wife-and-three-new-jersey-businessmen-charged-bribery> ("Robert Menendez Allegedly Agreed to Use His Official Position to Benefit Wael Hana, Jose Uribe, Fred Daibes, and the Government of Egypt in Exchange for Hundreds of Thousands of Dollars of Bribes to Menendez and His Wife Nadine Menendez, Which Included Gold Bars, Cash, and a Luxury Convertible.")

¹⁰³ See *id.*

¹⁰⁴ See, e.g., Alex Hammer, *Egyptian Businessman, 40, Accused of Bribing Sen. Bob Menendez, 69, Arrested by Feds on Corruption Charges at JFK and Freed on \$5million Bond*, DAILY MAIL (Sep. 27, 2023), <https://www.dailymail.co.uk/news/article-12564401/Egyptian-businessman-accused-bribing-Sen-Bob-Menendez-arrested-JFK.html> ("Egyptian businessman accused of bribing New Jersey Sen. Bob Menendez for legislative favors . . . The bribes, feds say, came in exchange for Menendez agreeing to use his power and influence to personally enrich . . . and to benefit the Government of Egypt. He's accused of helping facilitate meetings and dinners between Menendez, the senator's wife Nadine, and Egyptian military and intelligence officials in a secret bid to increase US aid to Egypt.")

¹⁰⁵ *Id.*

Menendez's wife worked with an Egyptian-American businessman and introduced Egyptian intelligence and military officials to her husband.¹⁰⁶ Those introductions helped establish a corrupt agreement in which the businessmen—with assistance—provided bribes to the Senator and his wife in exchange for his actions to benefit Egypt and the businessmen, among others.¹⁰⁷ As part of the scheme, the Senator provided sensitive, non-public United States government information to Egyptian officials and took steps to secretly aid the Government of Egypt.¹⁰⁸ For example, in or around May 2018, he provided—via text messages—Egyptian government officials with non-public (not classified) information regarding the number and nationality of persons serving at the U.S. Embassy in Cairo, Egypt.¹⁰⁹ Such information could pose significant operational security concerns if disclosed to a foreign government or made public.¹¹⁰ Further, he wrote a letter on behalf of Egypt to other U.S. Senators advocating for them to release a hold on \$300 million in aid to Egypt and also conveyed to Egyptian officials that he would approve or remove holds on foreign military financing and sales of military equipment to Egypt in connection with his leadership role on the Senate Foreign Relations Committee.¹¹¹

In exchange for Menendez's commitment to carry out these and other additional actions, one of the businessmen promised financial benefits to his wife.¹¹² These benefits included three \$10,000 checks, gold, and cash,

¹⁰⁶ Patricia Zengerle, *Menendez Indictment Prompts Calls in US Congress for Egypt Aid Rethink*, REUTERS (Sep. 27, 2023), <https://www.reuters.com/world/menendez-indictment-prompts-calls-us-congress-egypt-aid-rethink-2023-09-26/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (“Charges that Senator Bob Menendez accepted bribes in exchange for wielding his influence to aid the Egyptian government prompted calls in the U.S. Congress . . . for the Biden administration to rethink \$235 million in military aid to Cairo [C]hair of the Senate Foreign Relations Committee’s Middle East subcommittee, said . . . the committee would investigate the allegations and Egypt’s involvement.”).

¹⁰⁹ *See, e.g.,* Perry Stein et al., *Sen. Bob Menendez of New Jersey Indicted on Federal Bribery Charges, Gold bars and envelopes stuffed with cash were part of an alleged corruption scheme with the New Jersey senator’s wife*, THE WASHINGTON POST (Sep. 22, 2023), <https://www.washingtonpost.com/national-security/2023/09/22/menendez-indictment/> (“Sen. Robert Menendez (D-N.J.) and his wife Nadine have been indicted on bribery charges . . . [for] a corrupt scheme involving gold bars, stacks of cash and using the senator’s powerful position to secretly benefit the Egyptian government [T]hose bribes included cash, gold, payments toward a home mortgage, compensation for a low-or-no-show job, a luxury vehicle, and other things of value.’ [He is] charged with conspiracy to commit bribery and conspiracy to commit honest services fraud . . . [and] conspiracy to commit extortion as a public official. He also allegedly secretly wrote a letter for the Egyptian government to lobby other U.S. senators to release some \$300 million in U.S. aid to Egypt.”).

¹¹⁰ *See, e.g., id.*

¹¹¹ *Id.*

¹¹² *See, e.g.,* Shayna Jacobs & Mark Berman, *Sen. Menendez and His Wife Plead Not Guilty to Federal Bribery Charges*, THE WASHINGTON POST (Sep. 27, 2023), <https://www.washingtonpost.com/national-security/2023/09/27/bob-menendez-bribery-arraignment-new-york-court/> (“Sen. Bob Menendez and his wife pleaded not guilty to federal bribery charges . . . appearing in

sourced partly from IS EG Halal, a New Jersey company he operated with financial support.¹¹³ The Egyptian Government granted IS EG Halal a monopoly on certifying U.S. food exports to Egypt as compliant with halal standards, even though neither the businessman nor his company had experience with halal certification.¹¹⁴ Despite the efforts of a U.S. official to explain why this monopoly was detrimental to U.S. interests, Menendez reiterated his demand that the USDA refrain from interfering with IS EG Halal's monopoly.¹¹⁵

2. Legislative Corruption

Using force or violence against a member of an election or referendum committee or threatening force to prevent someone from casting his vote in an election or referendum or sway his vote a certain way is prohibited by law.¹¹⁶ Furthermore, Law No. 175 of 2005 on the People's Assembly regulates election propaganda and political campaigns.¹¹⁷ The law prohibits offering gifts, aid, or any type of direct or indirect benefits, as well as using any state-owned, public, or parasternal-owned facility and foreign funding.¹¹⁸ This law complements the rules on campaign funding, which are regulated by the Higher Election Committee (HEC).¹¹⁹ Currently, to evade corrupt

court . . . they were indicted . . . and accused of participating in a brash scheme to abuse his powerful position, enrich themselves and secretly aid the Egyptian government.”).

¹¹³ See, e.g., *id.*

¹¹⁴ See, e.g., *id.*

¹¹⁵ See, e.g., *id.*

¹¹⁶ See Law No. 107 of 2013 (Anti-Protest Law), 2013 (Egypt), available at <https://www.refworld.org/docid/551a5f2a4.html> (discussing the anti-demonstration law). Vote-buying is a contemporary phenomenon in Egypt that is spreading significantly even after January revolution. See generally *Egypt: Freedom in the World 2023 Country Report*, FREEDOM HOUSE, <https://freedomhouse.org/country/egypt/freedom-world/2023> (last visited Nov. 26, 2023). This is one of the main problems discovered in the parliamentary and presidential election process. *Id.* It has been reported by many NGOs that monitored the latest parliamentary elections, vote-buying is still a major problem. *Id.* This phenomenon is especially evident in the poor and remote levels in society where socio-economic circumstances are weak and political and social awareness is low. *Id.* This phenomenon should be curtailed by supporting both the institutional and legal framework, while concurrently refining the voter's culture, registration system, and ensuring effective, fair, transparent supervision, and control of elections whether parliamentary or presidential.

¹¹⁷ See generally Law No. 38 of 1972, *majlis al-sha' aab/al-nwab* 1972 (Egypt) as amended by Laws No. 16/1974, 109/1976, 14/1977, 21/1979, 22/1979, 23/1979, 114/1983, 188/1986, 201/1990, 13/2000, 167/2000, 12/2002, 175/2005, 149/2009, Decree Law 108/2011, Decree Law 120/2011, and Decree Law 123/2011, available at <https://aceproject.org/ero-en/regions/mideast/EG/Law%20No.%2038%20of%201972%20-%20english.pdf>.

¹¹⁸ *Id.* at art. 11.

¹¹⁹ According to the election law, any person who violates the provisions of Item 6 of the rules should be penalized by no less than one-year imprisonment and/or a fine of EGP 50,000-100,000 (USD 9,000-18,000). Moreover, the funds received should be confiscated. *Id.* Moreover, violators of any other rules should be penalized by at least three months imprisonment and/or a fine of EGP 5,000-20,000 (USD 900-3,600). *Id.* Article 87 of the *de facto* 2012 Constitution states that:

practices, the National Electoral Commission (NEC) is exclusively responsible for handling referendums and managing presidential, parliamentary, and local elections.¹²⁰ The NEC must prepare a database of voters, input the division of districts, exercise control over electoral funding and expenditure, oversee electoral campaigns, supervise the elections of trade unions and other organizations, and other procedures up to the announcements of results.¹²¹ To guarantee impartiality and autonomy, voting and counting votes in elections and referendums run by the NEC must be administered by its affiliated members under the supervision of the Board.¹²² Moreover, the Egyptian Constitution requires members of the Commission to be furnished with the necessary securities that enable them to perform their role with neutrality, fairness, and independence.¹²³

Article 109 of the 2014 Egypt Constitution, amended in 2019, requires that:

No House of Representatives member may, throughout his tenure, whether in person or through an intermediary, purchase or rent any piece of state property, or any public-law legal persons, public sector companies, or the public business sector. Nor is he allowed to lease, sell or barter with the state any part of his own property, nor conclude a contract with the state as vendors, suppliers, contractors or others. Any such actions shall be deemed void. A member must submit a financial disclosure upon taking office, upon leaving it and at the end of every year. If, because of or in relation to his membership, he should receive cash or in-kind gifts, ownership thereof reverts to the state treasury. The foregoing is organized by law.¹²⁴

The Mubarak administration regime did not follow either constitutional or legislative norms in this regard.¹²⁵ According to Article 28 of the

The Court of Cassation shall have final jurisdiction over the validity of memberships in both chambers. Challenges shall be submitted to the Court within a period not exceeding 30 days from date on which the final election results are announced. A verdict must be passed within 60 days from the date on which the challenge is filed. . . . [W]here a membership is deemed invalid, it becomes void from the date on which the verdict is reported to the chamber.

CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 26 Dec. 2012; *see also* ABROGATED CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, 22 May 1980, 25 May 2005, 26 Mar. 2007, as replaced, 20 Mar. 2011 [hereinafter Abrogated Egypt Constitution], at art. 93 (Egypt). Also, each member is subject to investigation by the Ethics Committee for his or her behavior as a member of the Parliament, which takes place in practice. *But see* ABROGATED EGYPTIAN TEMPORAL CONSTITUTIONAL DECLARATION, arts. 28, 32-34, 39-40 (Egypt).

See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 208.

¹²⁰ *See id.*

¹²¹ *Id.* at art. 210.

¹²² *Id.* at art. 209.

¹²³ *Id.* at art.109; *cf.* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 26 Dec. 2012, art. 88.

¹²⁴ *See* Sahar F. Aziz, *Revolution without Reform: A Critique of Egypt's Election Laws*, 45 GEO. WASH. INT'L L. REV. 1, 6 (2013) ("As witnessed with the NDP under the Mubarak regime, laws can be

Republican Resolution Decree, Members of Parliament (MPs) are not allowed to occupy government or public sector jobs during their membership except in cases of promotion, transfer between organizations, judicial decisions, or as prescribed by law.¹²⁶ These exceptions created a network of corrupt interests between the previous regime and government officials.¹²⁷ Law No. 62 of 1975 on illicit gains requires MPs to file asset disclosure forms.¹²⁸ According to Article 5, a judicial committee is formed to inspect asset disclosure procedures.¹²⁹ The Illicit Enrichment Apparatus (IEA) supports these committees by receiving asset disclosure forms and asking for explanations about complaints and has the right to request the Administrative Control Authority (ACA) to investigate cases of alleged illicit enrichment.¹³⁰ In practice, it is necessary to periodically check any increase in the wealth of any public official or their spouse or minor children.¹³¹

manipulated to guarantee certain electoral outcomes that further entrench the dominant party.”); *see also* Law No. 38 of 1972, *majlis al-sha‘aab/al-nwab* 1972, art. 11 (Egypt) as amended by Laws No. 16/1974, 109/1976, 14/1977, 21/1979, 22/1979, 23/1979, 114/1983, 188/1986, 201/1990, 13/2000, 167/2000, 12/2002, 175/2005, 149/2009, Decree Law 108/2011, Decree Law 120/2011, and Decree Law 123/2011, available at <https://aceproject.org/ero-en/regions/mideast/EG/Law%20No.%2038%20of%201972%20-%20english.pdf>.

¹²⁶ *See* Law No. 38 of 1972, *majlis al-sha‘aab/al-nwab* 1972, art. 28 (Egypt) as amended by Laws No. 16/1974, 109/1976, 14/1977, 21/1979, 22/1979, 23/1979, 114/1983, 188/1986, 201/1990, 13/2000, 167/2000, 12/2002, 175/2005, 149/2009, Decree Law 108/2011, Decree Law 120/2011, and Decree Law 123/2011, available at <https://aceproject.org/ero-en/regions/mideast/EG/Law%20No.%2038%20of%201972%20-%20english.pdf>. Recently, the public prosecution requested all supervisory bodies complete criminal investigations about the corporations that were privatized during that time. *See Egypt: 10-Year Prison Sentence for Atef Ebeid and Youssef Wali*, ALLAFRICA (Mar. 1, 2012), <https://allafrica.com/stories/201203020159.html>. Former Prime-Minister Dr. ‘Atef Ebeid faced corruption charges concerning illegal privatization. *See id.* The Giza Criminal Court sentenced him and the former Agriculture Minister Youssef Wali to ten years in jail for squandering more than EGP 700 million of public funds by selling the protected nature reserve of *Bayadeya* Island in Luxor. *Id.* The court ordered the defendants to pay back EGP 796 million, the value of the squandered funds, in addition to another equal amount in fines. *See id.*

¹²⁷ *See generally* Philip Marfleet, *Mubarak’s Egypt – Nexus of Criminality*, 2 STATE CRIME J. 112 (2013) (examining how the Egyptian state became an avenue for channeling public resources into private hands through complex relations of privilege among oligarchs and officials).

¹²⁸ Law No. 62 of 1975 (Illegal Profit-Making), *Al-Jarida Al-Rasmiyya*, 1975 (Egypt).

¹²⁹ *Id.* at art. 5.

¹³⁰ *Id.*

¹³¹ *See id.* Moreover, the CAO is authorized to audit the asset disclosures of the Speakers of the House at the beginning and at the end of their term limits as well as every five years, if they stay in office. NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 24. Furthermore, the Egyptian government has enacted several laws in line with international agreements concerning the free access to information such as Money Laundering Combat Law (Law No. 80 of 2002) and its amendment by (Law No. 181 of 2008), Law of the Central Bank, Banking and Exchange (Law No. 88 of 2003), and National Council for Human Rights (Law No. 4 of 2003). *Id.* at 55. The issue is even more difficult in practice; MPs are not obliged to publish their assets or those of their families. *Id.* In this regard, there are several laws that protect the privacy of citizens, such as related bank information, as banks are not allowed to reveal citizens’ accounts information to anyone but the account holder or investigation authorities. *Id.* The People’s Assembly and the *Shoura* Council were not among the foundations that are subject to the auditing of the CAO and have their own

Transparency and integrity in the Parliament suffer because an increasing number of Members of Parliament engaged in business are not subject to clear rules regarding conflict of interests.¹³² One example of this issue is the case of a businessman who was accused of anti-competitive behavior and used his position in the Parliament to block amendments to a business-related law in 2008.¹³³ Scholars have suggested that legislative corruption transpires when the law protects crimes or is designed to favor a particular person.¹³⁴ It should be noted that cronyism is the distribution of property rights and entitlements to those in powerful positions who are closely tied to the state.¹³⁵ Cronyism may not always be illegitimate or illegal.¹³⁶ Instead, it can undertake delicate forms of close ties between the state and big businesses without infringing the law or damaging the overall economy.¹³⁷ The main problem with cronyism is that it takes place at the expense of free market competition.¹³⁸ In the case of Ezz Steel, Ahmad Ezz's formal and informal power positions allowed him to tailor the anti-trust law in order to secure his monopolistic position in the domestic market.¹³⁹

independent budget; however, they are subject to internal audit and the Illicit Enrichment Law. *Id.*; see also Law No. 38 of 1972, *Al-Jarida Al-Rasmiyya*, 1972, art. 35 (Egypt).

- ¹³² NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 55.
- ¹³³ For further discussion on 'Ezz steel monopolization, see Hany Abdel Massih Ghaly, Competition Law and Policy in Developing Countries: The Case of the Egyptian Steel Monopoly (May 2011) (LL.M. thesis, Am. Univ. in Cairo) (on file with Am. Univ. in Cairo AUC). It has been reported that 'Ezz's monopolizing the steel industry in Egypt by holding more than 60% of the market share. *Id.* at 33. This report estimated 'Ezz's wealth to be 18 billion Egyptian pounds). See, e.g., Law No. 3 of 2005, Hosni Mubarak, 2005 (Egypt), available at <https://www.gafi.gov.eg/English/StartaBusiness/Laws-and-Regulations/PublishingImages/Pages/TradeLaws/Law%20No%203%20of%202005%20Promulgating%20the%20law%20on%20Protection%20of%20Competition%20and%20Prohibition%20of%20Monopolistic%20Practices.pdf> (promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices and its Proposed Amendments in January and June 2008).
- ¹³⁴ See, e.g., Phil Williams & Roy Godson, *Anticipating Organized and Transnational Crime*, 37 CRIME, L. & SOC. CHANGE 311, 321 (2002) (“[C]orruption which in the old system was used to benefit the political elites now becomes a major instrument used by organized crime to protect itself.”).
- ¹³⁵ See Naresh Khatri et al., *Cronyism: a cross-cultural analysis*, 37 J. INT’L BUS. STUD. 61, 62 (2006) (defining cronyism as “a reciprocal exchange transaction where party A shows favor to party B based on shared membership in a social network at the expense of party C’s equal or superior claim to the valued resource.”).
- ¹³⁶ See Didier Jacobs, *Extreme Wealth Is Not Merited* 9 (Nov. 2015) (unpublished discussion paper) (on file with Oxfam Int’l) (“Cronyism is lower in the ladder of demerit than crime because it is not always illegal, and its soft form—lobbying—not always harmful.”).
- ¹³⁷ Adly, *supra* note 39, at 4.
- ¹³⁸ See Randall G. Holcombe, *Crony Capitalism: By-Product of Big Government*, 17 INDEP. REV. 541, 556 (2013) (concluding that significant government oversight of the economy can breed cronyism, which in turn can induce businesses to turn away from entrepreneurial activity that contributes to the economy’s productivity).
- ¹³⁹ See Salma El-Wardani, *Money, power and law-twisting: The makings of the real Ezz empire*, AHARAM ONLINE (May 7, 2011), <https://english.ahram.org.eg/News/11480.aspx> (“The case of Ezz Steel is the classic example of how political power meshed with monopolistic business strategies to create personal empires amid a shaky national economy.”).

3. *Judicial Corruption*¹⁴⁰

Egypt's former President, Hosni Mubarak, attempted to make the judicial authority totally subordinate, but judges have recently been requesting judicial independence from government control, in addition to complete judicial supervision over parliamentary and presidential elections.¹⁴¹

The Minister of Justice is not a member of the judicial staff.¹⁴² Rather, he is "one of the executive authority members as he is subject to the cabinet."¹⁴³ The position of Minister of Justice is a political position that judges are prohibited from occupying while active because it is not independent of the executive branch.¹⁴⁴ In other words, the Justice Minister is not an active judge, so the primary issue is whether he serves judges or the ruling regime.¹⁴⁵ This creates constitutional legitimacy issues.¹⁴⁶ The most

¹⁴⁰ It should be noted that an effective justice system would enhance Egyptian citizens to have confidence in their right to express their concerns about the wrongdoings of corrupt officials.

¹⁴¹ Mohamed A. 'Arafa, *Mubarak Criminal Liability: Is It a Fair Trial after the Revolution or a Drama Series?*, 1 REVISTA CONTRAPONTO 181, 196 n.74 (2014). By the same token, the case of judicial independence may be a legislative corruption because the corrupt legislative body blocks issuing an operative active law. *Id.* The parliament retained the old law to keep the judicial system under the domination of the executive authority. *Id.*

¹⁴² See generally Mohamed 'Arafa, *The Unexpected Trials of Egyptian Leaders: Is It a Question of Law or Politics?*, 12 US. CHINA L. REV. 6 (2015). After the White Revolution, a number of former ministers and high-ranking officials have not been the subject to formal cross-examination and investigation, among whom are former Minister of Justice Mamdouh Mar'ie who is known for his role in the forged ballots scandal during the 2005 presidential and parliamentary elections. 'Arafa, *supra* note 142, at 197 n.177. He was asked to appear before the Inspector-General of the Ministry of Justice to answer some reports accusing him of various misdeeds. *Id.* He did not appear before the Inspector-General, claiming health conditions. *Id.* Among the reports, his interference in the work of judges at the Illegitimate Gain Agency resulted in the resignation of the Head of the Agency in 2008. *Id.*

¹⁴³ 'Arafa, *supra* note 142, at 197.

¹⁴⁴ *Id.* at 196. Article 72 of Law No. 46 of 1972 prohibits any court from having political attitudes. *Id.* at 197 n.80; see also Law No. 46 of 1972 (Judicial Authority Law), *Al-Jarida Al-Rasmiyya*, 1972, art. 72 (Egypt). It also bans judges from involvement in any political activity. *Id.* Moreover, judges are not permitted to be designated to elections in the People's Assembly or to regional or political organizations except after resignation. *Id.* According to Article 74 of the same law, judges are not allowed to disclose information regarding the legal proceedings of any case. *Id.*

¹⁴⁵ 'Arafa, *supra* note 142, at 196-97 (highlighting that it is very important that judges be able to investigate and prosecute without enduring any external interference or feel any pressure from outside).

¹⁴⁶ *Id.* at 196 n.76. It should be noted that Chapter Three, Sub-section I (General Provisions) of the Egyptian Constitution regarding the Judicial Authority provides in Articles 184, 185, 186, and 187 respectively that:

The Judicial Authority shall be independent, vested in the courts of justice, which shall issue their judgments in accordance with the law. Its powers are defined by law. Interference in the affairs of the judiciary is a crime that is not forfeited by the passing of time. Every judiciary body shall administer its own affairs; each shall have an independent budget and be consulted on the draft laws governing its affairs, by the means that are regulated by law. Judges are independent, cannot be dismissed, are

significant issue is that judicial reform is considered a main condition for independence, democracy, and political neutrality.¹⁴⁷ It is worth mentioning in this regard that there are strict codes of conduct and ethics for members of the judiciary, precluding conflict of interest and nepotistic rules.¹⁴⁸ For example, according to Article 72 of Law No. 46 of 1972, “no judge is allowed to be employed or perform any commercial act, or perform any act that could threaten the independence and dignity of the judiciary.”¹⁴⁹ The Supreme Council of the Judiciary (SCJ) prevents judges from carrying out any act or conduct inconsistent with their duties and functions.¹⁵⁰ Moreover, courts are forbidden from expressing political thoughts.¹⁵¹

Regarding the acceptance of gifts, Law No. 47 of 1978 for State Employees prohibits members of the national judiciary from accepting or requesting gifts, hospitality, commissions, or advances from individuals to whom they provide public services.¹⁵² However, this rule is not being fully

subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment and disciplinary actions against them are defined and regulated by the law. When delegated, their delegation shall be absolute, to the destinations and in the positions defined by the law, all in a manner that preserves the independence of the judiciary and the accomplishment of its duties. Sessions in court shall be public, unless, in consideration of public order or morals, the court deems them confidential. In all cases, the verdict shall be given in an open session.

See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, arts. 184-87. See, e.g., CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 26 DEC. 2012, arts. 168-71; cf. ABROGATED TEMPORAL CONSTITUTIONAL DECLARATION, arts. 26-27, 29, 31, 39-40, 59 (Egypt).

¹⁴⁷ ‘Arafa, *supra* note 142, at 196 n.76. A long time ago, the executive authority represented in the Ministry of Justice sought to control judicial relations. See Nathan J. Brown, *Egypt’s Judges in a Revolutionary Age*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 22, 2012), <https://carnegieendowment.org/2012/02/22/egypt-s-judges-in-revolutionary-age-pub-47254> (“But some judges, activists, and intellectuals chafed at the remaining elements of executive influence over judicial affairs. In a variety of structural ways, the Ministry of Justice and the presidency retained some influence.”). The Judges’ Club remained as a source of desirability for its members away from Ministry of Justice and the Minister who inhabits a political party position, representing the executive and the judicial authority. See *id.*

¹⁴⁸ See generally NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 83-84.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Ahmed Aboulenein, *How Egypt’s Crackdown on Dissent Ensnared Some of the Country’s Top Judges*, REUTERS INVESTIGATES (Oct. 18, 2016), <https://www.reuters.com/investigates/special-report/egypt-judges/> (“Article 73 of Egypt’s Judiciary Act prohibits judges from practicing politics and bans a judge sitting on a case from expressing political opinions.”). See also ‘Arafa, *supra* note 142, at 181, 197 n.80; NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 84 (providing Article 75 stipulates: Judges who are related to each other by ties of parenthood or alliance by marriage, up to the fourth degree, may not sit in the same judicial circuit. Further, the public prosecutor, or one of the parties to the case or defense counsel in charge of his defense may not be one who is tied up by such relationship with any of the judges examining the case. The proxy of an attorney at law, who entertains such relationship with the judge, shall be disregarded unless the proxy was given after examination of the case by the judge).

¹⁵² NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 84.

applied in practice.¹⁵³ Moreover, there are no provisions in Law No. 46 of 1972 concerning the protection of prosecuting attorneys and judges in corruption cases.¹⁵⁴ One of the leading cases of judges being inspected for corruption charges occurred in 2007 when twenty judges were referred to and adjudicated by the disciplinary committee for failing to implement their responsibilities according to high standards.¹⁵⁵

For example, several violations occurred in the most recent 2010 parliamentary elections.¹⁵⁶ “The judiciary, consequently, claimed that investigations be held.”¹⁵⁷ “Nevertheless, the judges surprisingly found that those that demanded investigations to be held were referred to a disciplinary court without following the legal measures.”¹⁵⁸ Therefore, “judges demanded a new law to ban interference from the executive.”¹⁵⁹ “[H]owever, certain political powers lead some corrupt journalists to describe the judicial authority as a *state inside the state*.”¹⁶⁰

¹⁵³ *Id.* (“Article 65 of Law No. 142/2006 permits [working in other courts or international organizations], after the issuance of a presidential decree and after taking the opinion of the general board of the court to which the judge belongs or the Attorney General, and with the approval of the Supreme Council.”).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ ‘Arafa, *supra* note 142, at 197. See also Jack Shenker, *Egypt’s rulers tighten grip amid claims of election fraud and intimidation*, THE GUARDIAN (Nov. 30, 2010, 13:13), <https://www.theguardian.com/world/2010/nov/30/egypt-poll-electoral-fraud-claims> (“[V]iolations include ballot-stuffing, vote-buying, and the exclusion of opposition representatives, civil society monitors and journalists from polling stations.”).

¹⁵⁷ ‘Arafa, *supra* note 142, at 197 n.78.

¹⁵⁸ *Id.* (“Less than 25% of the population shared in the elections, with the government party-fielded candidates winning 90% of the seats in Parliament.”).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 181, 197 (emphasis added). For further discussion on the judicial corruption in Egypt and its independence (and the current *status quo*), see Sahar Aziz, *Theater or Transitional Justice: Reforming the Judiciary in Egypt*, in TRANSITIONAL JUSTICE IN THE MIDDLE EAST AND NORTH AFRICA (Chandra Sriram ed., Oxford Academic 2017) (explaining the rule of law and judicial independence in the context of the Egyptian transition). She “argues that while many external observers have viewed the Egyptian judiciary as relatively independent, political control by the Mubarak regime limited that independence successfully and rendered the judiciary conservative. Further, while the concept of rule of law has been operational in the country, rather than a thick understanding of rule of law, there has been a hybrid version, of thin rule of law combined with rule by law. These phenomena operate in the context of patterns of patronage and the “deep state” to limit the prospect of reform.” *Id.* Sahar F. Aziz, *Independence Without Accountability: The Judicial Paradox of Egypt’s Failed Transition to Democracy*, 120 DICK. L. REV. 667, 670 (2016) (“Although the judiciary had long advocated for reforms to the Judicial Authority Law to remove formal executive controls over judicial affairs, their motive lied more in their desire for complete judicial autonomy from the executive rather than improving judicial governance through accountability measures.”).

4. *Media, Press, and Information Corruption*

The press is a public, independent authority that delivers its message according to the Constitution and the law.¹⁶¹ Media is a component of civil society with the highest effect on public opinion.¹⁶² In other words, the press must deliver its message unrestricted and independently to serve society by all means of expression that reflect the tendencies of public opinion and help shape and direct it.¹⁶³ The delivery of information by the press must occur within the substantial parameters of society while safeguarding civil liberties, rights, and duties and respecting the privacy of individuals, according to the Constitution and the law.¹⁶⁴

The press is responsible for promoting transparency through circulating information among the public.¹⁶⁵ Although the number of groups promoting transparency, integrity, and eliminating corruption has increased, their

¹⁶¹ *TIMEP Brief: Press Freedom in Egypt*, THE TAHRIR INST. FOR MIDDLE E. POL'Y (May 24, 2019), <https://timep.org/2019/05/24/timep-brief-press-freedom-in-egypt/>.

¹⁶² See generally W. Phillips Davison, *public opinion*, ENCYCLOPEDIA BRITANNICA (Aug. 17, 2023), <https://www.britannica.com/topic/public-opinion> (“Mass media and social media, to varying extents, play another important role by letting individuals know what other people think and by giving political leaders large audiences.”).

¹⁶³ See generally Mohamed ‘Arafa, *The Archeology of the Freedom of Information Laws: Egypt ‘Fake-News Laws’*, 20 FLORIDA C. L. REV. 1, 74-75 (2020) (“Recently, the Egyptian media has confronted challenges directed to its freedom and independence as a result of the ambiguous laws and the regulatory agenda that lacks the definition and determination of both the public (state) and private media, where such monitoring framework is considered as a pressure on the Egyptian media. Based on the acts directed against reporters and media in Egypt, international human rights organizations . . . criticize the lack of freedom of the press in Egypt, where numerous journalists have been jailed, and several websites blocked, including those of independent media and right groups, claiming that such online websites support terrorist groups and radical ideology and that they report fake news about the country’s political *status quo*, which is considered as spreading fear and alarm and is a threat to the nation’s national security.”).

¹⁶⁴ *Id.* at 75-76 (“Suppression of information found on the internet around the globe, including in the Middle East, is not a new phenomenon. Freedom of speech and expression facilitated by the internet can pose a threat to autocratic leaders globally who seek to maintain strict control over both the content their citizens consume and the content they post. It is significant that the advocacy role played by civil society groups in promoting this influential capacity, through their ability to act politically on public information, is revealed. While Egypt has lately adopted its constitutional norms on access to information, worries and doubts arise about Egyptian citizens’ genuine ability to access information held by the public institutions. The long culture of bureaucratic secrecy, politico economic environment, and the legal framework instead inflame exclusionary policies concerning access to public information . . . as believed necessary for national security and protecting public order.”).

¹⁶⁵ *Contra* Press Release, U.N. Special Rapporteur David Kaye & Fionnuala Ni’Aloáin, Egypt extends its assault on freedom of expression by blocking dozens of websites-UN experts warn (Aug. 30, 2017), <https://www.ohchr.org/en/press-releases/2017/08/egypt-extends-its-assault-freedom-expression-blocking-dozens-websites-un> (“Limiting information as the Egyptian Government has done, without any transparency or identification of the asserted ‘lies’ or ‘terrorism,’ looks more like repression . . .”).

impact has not been felt.¹⁶⁶ Various restrictions are placed upon the official daily newspapers, especially regarding corruption-related stories within the government.¹⁶⁷ While the Constitution and other laws guarantee the right of

¹⁶⁶ See Amy A. Holmes, *The Attack on Civil Society Outside Cairo*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 26, 2017), <https://carnegieendowment.org/sada/67810> (“It appears the state is attempting to silence or subdue virtually the entire spectrum of civil society, including activists across the political spectrum, cultural initiatives, independent media outlets, feminist organizations, Nubian associations, and even co-working spaces or cafes where young people gather.”). See generally Muhammad Shukri, *Egypt’s Brotherhood Accused of Trying to Control Media*, BBC NEWS (Aug. 13, 2012), <https://www.bbc.com/news/world-middle-east-19245300>.

¹⁶⁷ *Freedom House in the World 2007- Egypt*, FREEDOM HOUSE (April 16, 2007), <https://www.refworld.org/docid/473c55c21f.html> (“Foreign publications and Egyptian publications registered abroad are subject to direct government censorship. Independent newspapers were allowed to open in 2005, but limitations on press freedom still abound, especially when reporters attempt to cover issues the government does not want to highlight.”). On the National Media Council, according to the 2014 Constitution, Article 211 states that: “The National Media Council is an independent entity that has a legal personality, enjoys technical, financial and administrative independence, and has an independent budget. The Council is regulating the affairs of radio, television, and printed and digital press, among others. The Council is responsible for guaranteeing and protecting the freedom of press and media stipulated in the Constitution; safeguarding its independence, neutrality, plurality and diversity, preventing monopolistic practices; monitoring the legality of the sources of funding of press and media institutions; and establishing the controls and regulations necessary to ensure the commitment of press and media outlets to adhere to professional and ethical standards, and national security needs as set out by law. The law determines the composition of the Council, its system of operation, and stipulates the conditions of employment for its staff. The Council is to be consulted on bills and regulations related to its field of operation.” See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 211. Moreover, “[t]he Press is a public independent authority that delivers its message according to the Constitution and Law.” *Id.* Article 212 identifies the determinants of the work of the press, stating that: “The National Press and Media Association is independent, manages state-owned press and media institutions, and undertakes the development of them and their assets, and ensures their development, independence, neutrality and their adherence to sensible professional, administrative and economic standards...” See *id.* at arts. 212 & 213. See also ABROGATED EGYPT CONSTITUTION, arts. 206-07 (Egypt); *cf. id.* at art. 13. Also, Egyptian civil society and the media have advanced a number of independent anti-corruption drives. See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 15 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>. In this respect, Article 188 of the Penal Code restrains media contribution by imposing heavy fines and punishments for corruption accusations. *Id.* Articles 70, 71, and 72 of the current Constitution states, “Freedom of the press, printing, publication and mass media shall be guaranteed. The media shall be free and independent to serve the community and to express the different trends in public opinion and contribute to shaping and directing in accordance with the basic principles of the State and society, and to maintain rights, freedoms and public duties, respecting the sanctity of the private lives of citizens and the requirements of national security. The closure or confiscation of media outlets is prohibited except with a court order. Control over the media is prohibited, with the exception of specific censorship that may be imposed in times of war or public mobilization.” “Freedom to publish and own newspapers of all kinds is a guaranteed subject of notification for every natural or juridical Egyptian person. The establishing of radio stations, television broadcasting, and digital media is regulated by law.” In other words, freedom of press and printing, along with paper, visual, audio and digital distribution is guaranteed. Egyptians—whether natural or legal persons, public or private—have the right to own and issue newspapers and establish visual, audio and digital media outlets. Newspapers may be issued once notification is given as regulated by law. The law shall regulate ownership and establishment procedures for visual and radio broadcast stations in addition to online newspapers. It is prohibited to censor, confiscate, suspend or shut down Egyptian newspapers and

journalists to find and publish information, some laws and regulations hinder journalist practices, including free speech.¹⁶⁸ By the end of 2007, the number of laws used to confine media independence had amplified.¹⁶⁹ This was possible because of the contradictory provisions in the Constitution, Penal Code, Emergency Law, Media Law, religious regulations, and laws specific to associations, unions, the Ministry of Information, and the Higher Council.¹⁷⁰ No formal rules govern political advertising, though there is evident bias in state-owned media towards former National Democratic Party figures.¹⁷¹ Numerous cases have been reported of mistreatment of journalists who tackled corruption issues or criticized political figures, police, or the

media outlets in any way. Exception may be made for limited censorship in time of war or general mobilization. No custodial sanction shall be imposed for crimes committed by way of publication or the public nature thereof. Punishments for crimes connected with incitement to violence or discrimination amongst citizens, or impugning the honor of individuals are specified by law. The state shall ensure the independence of all press institutions and owned media outlets, in a way that ensures their neutrality and expressing all opinions, political and intellectual trends and social interests; and guarantees equality and equal opportunity in addressing public opinion. *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 70-71.

¹⁶⁸ *Freedom House in the World 2007- Egypt*, FREEDOM HOUSE (April 16, 2007), <https://www.refworld.org/docid/473c55c21f.html> (“Freedom of expression is restricted by vaguely worded statutes criminalizing direct criticism of the president, the military, and foreign heads of state, as well as speech that is un-Islamic, libelous, harmful to the country’s reputation, or disruptive to sectarian coexistence.”).

¹⁶⁹ *See generally* Sahar Aziz, *To Stop Corruption, Egypt Needs a Freedom of Information Law*, HUFFINGTON POST (May 23, 2012, 2:36 PM), https://www.huffpost.com/entry/to-stop-corruption-egypt_b_1538999 (“But for Egypt to achieve sustainable democracy, many reforms remain to be implemented, the most important of which is public access to information that permits meaningful government accountability. Without accurate information, Egyptians cannot adequately stop the rampant corruption debilitating the nation’s economy and political system. Nor can the media serve as an effective check on government abuse.”).

¹⁷⁰ *See Freedom House in the World 2007- Egypt*, FREEDOM HOUSE (April 16, 2007), <https://www.refworld.org/docid/473c55c21f.html> (“The Emergency Law restricts many other basic rights. It empowers the government to wiretap telephones, intercept mail, search persons and places without warrants, and indefinitely detain without charge suspects deemed a threat to national security.”). The *Kanun al-Tawaar’e* (Emergency Law) gives authorities broad powers to constrain civil liberties and order suppression or closure of the print media. In short, the law is used to enforce government censorship and make the media fiscally dependent on the government. *See* Law No. 162 of 1958 (Emergency Law), *Al-Jarida Al-Rasmiyya*, 1958, (Egypt), available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=111245; Daniel Williams, *Egypt Extends 25-Year-Old Emergency Law*, THE WASHINGTON POST (May 1, 2006), <https://www.washingtonpost.com/archive/politics/2006/05/01/egypt-extends-25-year-old-emergency-law-span-classbankheadmubarak-had-vowed-to-replace-far-reaching-measure/378a716c-3f1c-483b-9498-15c672f81cc5/>. It should be kept in mind that Egypt’s notorious emergency law expired on May 31, 2012, ending 31 years of absolute powers to arrest and detain for a police force accused of severely abusing its extensive authority. Associated Press, *31-year-old emergency law ends in Egypt*, DESERET NEWS (June 1, 2012, 12:18 AM), <https://www.deseret.com/2012/6/1/20416023/31-year-old-emergency-law-ends-in-egypt>.

¹⁷¹ *See* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 12 (“Other problems include . . . the existence of public media bias in favour of the ruling party.”).

former state security police apparatus.¹⁷² Further, state-owned newspapers and television channels do not broadcast any news about internal corruption involving people in authority.¹⁷³

Law No. 180/2018, adopted in 2018, created regulations for information disseminated by the press and media and created the Supreme Council for Media Regulation (SCMR).¹⁷⁴ Enforcement of this law creates alternative portrayals of events and silences opposition, including opinions that challenge the main state narrative and the voices of marginalized individuals.¹⁷⁵ The legislation prevents press entities, media channels, and online websites from reproducing or broadcasting anything that contradicts the Egyptian Constitution, professional ethics, public order, or morals.¹⁷⁶ It also includes provisions to prevent content that calls for bans on breaching the rule of law or incites discrimination, racism, violence, hatred, or fanaticism.¹⁷⁷ The statute empowers the SCMR to prevent the dissemination of foreign publications, announcements, or media content from abroad based on national security attitudes and allows the SCMR to avert circulation of any explicit sexual or religious content or sects to upset public order.¹⁷⁸

Additionally, several laws restrict the freedom of news and information sharing, including Law No. 2 of 1975, amended by Law No. 22 of 1983; Law No. 356 of 1954, which prohibits citizens from accessing any government archives, records, and documents; the Penal Code under Article 80;¹⁷⁹ and

¹⁷² See *USCIRF Annual Report 2008 - Egypt*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM (May 1, 2008), <https://www.refworld.org/docid/4855699d37.html> (“Under the Emergency Law, the security forces mistreat and torture prisoners, arbitrarily arrest and detain persons, hold detainees in prolonged pretrial detention, and occasionally engage in mass arrests.”); *Freedom House in the World 2007- Egypt*, FREEDOM HOUSE (April 16, 2007), <https://www.refworld.org/docid/473c55c21f.html> (“In May 2006, several journalists critical of the government were brutally assaulted, and in one case murdered, by unidentified assailants. One Egyptian American reporter for a U.S.-based newspaper was sexually assaulted by plainclothes security officials the same month as she attempted to cover the judges’ story; a female reporter for *al-Dustur* suffered the same fate.”); NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26 (“The most important topics the council reports have tackled include: mistreatment of prisoners and detainees, abuse of power by some policemen in the treatment of prisoners and citizens . . .”).

¹⁷³ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 131. See also *Attacks on the Press 2006: Egypt*, COMM. TO PROT. JOURNALISTS (Feb. 5, 2007, 11:35 AM), <https://cpj.org/2007/02/attacks-on-the-press-2006-egypt/>.

¹⁷⁴ Law No. 180 of 2018 (Law on Press, Media and the Supreme Council for Media Regulation), *Al-Jarida Al-Rasmiyya*, 2018, vol. 34 bis(h) (Egypt).

¹⁷⁵ ‘Arafa, *supra* note 142, at 106-07.

¹⁷⁶ *Id.* at 107-08.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 109-11.

¹⁷⁹ See, e.g., Sahar F. Aziz, *Revolution without Reform: A Critique of Egypt’s Election Laws*, 45 GEO. WASH. INT’L L. REV. 1, 27–47 (2013); NATIONAL INTEGRITY SYSTEM STUDY EGYPT 2009, *supra* note 12, at 132. See also George Sadek, *Egypt: Female Tourist Convicted of Spreading False Rumors That Damage Country’s Reputation*, THE LIBR. OF CONG. (Sept. 12, 2018), [https://www.loc.gov/item/global-legal-monitor/2018-09-12/egypt-female-tourist-convicted-of-spreading-false-rumors-that-damage-countrys-reputation/#:~:text=Article%2080\(d\)%20of%20](https://www.loc.gov/item/global-legal-monitor/2018-09-12/egypt-female-tourist-convicted-of-spreading-false-rumors-that-damage-countrys-reputation/#:~:text=Article%2080(d)%20of%20)

the Emergency Law No. 162 of 1958, which gives the President authority to govern and censor the media.¹⁸⁰ However, the current Egyptian Constitution reads:

Information, data, statistics, and official documents are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency. The law shall organize rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information. State institutions shall deposit official documents with the National . . . Archives once they are no longer in use. They shall also protect them, secure them from loss or damage, and restore and digitize them using all modern means and instruments, as per the law.¹⁸¹

Furthermore, the Press Law prescribes professional standards for journalists and reads:

In regard to what is published, the journalist has to respect the standards and ethics provided for by the constitution and the provisions, keeping in all his activities to the necessities of honor, loyalty, honesty, and the ethics of [the] profession and its traditions to preserve society's ideals and values, without violating any of the citizens' rights or harming any of their liberties.¹⁸²

Moreover, according to the Code of Journalistic Honor, journalists' ethical standards are numerous and include the search for the truth, honesty, loyalty, accuracy, and objectivity.¹⁸³ Professional organizations governing

20Egypt%27s,years%27%20imprisonment%20and%20a%20fine. (“Article 80(d) of Egypt’s Penal Code states that whoever deliberately spreads false information or rumors abroad about the internal conditions of the country that might weaken the country’s financial credibility or harm the country’s national interests is punishable by six months to five years’ imprisonment and a fine.”). Article 80/D was added to the Penal Code as part of a package of crimes and misdemeanors emanating from abroad harmful to State national security. See Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973, art. 80 (Egypt).

¹⁸⁰ NATIONAL INTEGRITY SYSTEM STUDY EGYPT 2009, *supra* note 12, at 132. Sometimes, corrupt laws corrupt the media too because media will be frightened by the corrupt laws. *Id.*

¹⁸¹ See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 68 (describing access to information and official documents).

¹⁸² NATIONAL INTEGRITY SYSTEM STUDY EGYPT 2009, *supra* note 12, at 132.

¹⁸³ *Id.* at 133 (“The Code of Journalistic Honour states that ‘any violation of the regulations mentioned will be considered a breach of Egyptian Journalists’ Syndicate Law 76/1970 and Press Law 96/1996.’”). However, only some of these codes are integrated into the Press Law, and breaking these codes can subject the journalist to punishment ranging from a monetary penalty to imprisonment. In short, media corruption is present when media does not follow their codes, spreads fake news, and supports a presidential candidate at the expense of another. *Id.*

media ethics include the Journalists Union and the Supreme Council for the Press (JUHCP).¹⁸⁴ However, no rules exist on conflicts of interest or gifts and hospitality.¹⁸⁵ “In fact, there are not even rules on current employment restrictions, as in reality many journalists work as advisors to businessmen or ministers while retaining their jobs as journalists.”¹⁸⁶ This facilitates corruption within the press and media sector.¹⁸⁷

The National Media Council (NMC) governs the affairs of radio, television, and printed and digital press, among others.¹⁸⁸ The Council must guarantee “the freedom of media in all its forms, safeguard plurality, fight centralization and monopoly, protect the interests of the public, and establish controls and regulations ensuring the commitment of media to adhere to professional and ethical standards, to preserve the Arabic language, and to observe the values and constructive traditions of society.”¹⁸⁹ Along with that regulatory body, The National Press and Media Association (NPMA) “manages State-owned press and media organizations and undertakes the development of them and their assets to maximize their national investment value and ensure their adherence to sensible professional, administrative, and economic standards.”¹⁹⁰

Against this succinct backdrop of corruption in Egypt, it is essential to focus on Egypt’s relative international status concerning corruption before analyzing the institutional and legal framework regarding this crime in the current domestic Egyptian laws.

III. EGYPT ANTI-CORRUPTION: THE INTERNATIONAL *STATUS QUO*?

Formally speaking, international actors are dynamic in the country through various measures.¹⁹¹ They work in the Egyptian legal framework in three forms: (1) international non-governmental organizations (INGOs) that focus on the Arab world, (2) international organizations that emphasize human rights and corruption, and (3) foundations that pursue cooperation

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (“There are also no rules on post-employment restrictions.”).

¹⁸⁶ *Id.*; see, e.g., *Editor to Face Trial over Mubarak ‘Health Scare’*, MAIL & GUARDIAN (Sep. 11, 2007), <https://mg.co.za/article/2007-09-11-editor-to-face-trial-over-mubarak-health-scare/>.

¹⁸⁷ See Tarek Atia & Mohamed Abdel-Rahman, *Egypt: Zig-zag Politics and the Scourge of Paid-for Journalism*, ETHICAL JOURNALISM NETWORK, <https://ethicaljournalismnetwork.org/egypt> (last visited Sep. 30, 2023).

¹⁸⁸ Rasha Allam, *Egypt*, MEDIA LANDSCAPES, <https://medialandscapes.org/country/egypt> (last visited Nov. 30, 2023).

¹⁸⁹ See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, arts. 211-13.

¹⁹⁰ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2012, 26 DEC. 2012, art. 216.

¹⁹¹ See generally NATIONAL INTEGRITY SYSTEM STUDY EGYPT 2009, *supra* note 12, at 173.

with the government or civil society.¹⁹² Most organizations include transparency and honesty as part of their undertakings, but it is not their sole activity.¹⁹³

Generally, international actors work sensibly concerning corruption and transparency problems to dodge conflict with the government.¹⁹⁴ Corruption issues are considered to be matters of national sovereignty, and the Egyptian general public would not be comfortable with such an intervention in domestic affairs.¹⁹⁵ Instead, their efforts are focused on reinforcing the aptitude of Egyptian society.¹⁹⁶ Further, they are committed to promoting respect for the principles of anti-corruption instruments in the public and private sectors by proposing and promoting policies, legislation, and constitutional amendments.¹⁹⁷

For example, Transparency International, an organization focused on stopping corruption and promoting transparency, produces a yearly report titled the Corruption Perceptions Index (the “CPI Report”).¹⁹⁸ The CPI Report “ranks 180 countries and territories around the world by their perceived levels of public sector corruption, scoring on a scale of 0 (highly

¹⁹² *Id.* (“INGOs include organizations such as the Cairo Institute for Human Rights Studies (CIHRS), Arab Organization for Human Rights (AOHR), Arab Program for Human Rights Activists, Arab Penal Reform Organization, as well as the Arab Centre for the Independence of the Judiciary and the Legal Profession (ACIJLP).”). These international organizations include the United Nations Office for Drugs and Crime (UNDOC), which is a global leader in the fight against illicit drugs, corruption, and international crime. *Id.* UNDOC’s purpose is to enrich capacity building and public social awareness of societies in fighting corruption as a universal crime, among its other acts. *Id.* Additionally, the UNDOC Global Program against Corruption (GPAC) acts as a focal point for the UNODC field office network in the development and application of anti-corruption projects, which are designed to increase local abilities over time. *Id.* GPAC also contributes through programs and various projects that ascertain and apply good practices in preventing and restricting corruption, and it has generated multiple technical and policy guides, such as the Anti-Corruption Handbook. *Id.*

¹⁹³ *See generally* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 174-75 (Transparency Int’l Secretariat 2009).

¹⁹⁴ *See generally id.*

¹⁹⁵ *See generally id.* (“[S]ome international actors work with the judiciary and legislature to enhance their capacity to tackle issues related to anti- corruption.”).

¹⁹⁶ *See* Hala El Said, *Foreword: Development, a right for all: Egypt’s pathways and prospects*, U.N. DEV. PROGRAM (2021), https://www.undp.org/sites/g/files/zskgke326/files/migration/arabstates/English_RiB_Sep-12.pdf (“At the heart of all these efforts comes the strategic objective of improving the quality of life for Egyptian citizens by intensifying investment in human capital, conducting serious reforms, and implementing major development projects and initiatives in education, health, housing and utilities, in order to provide adequate housing and a decent life for Egyptians . . .”).

¹⁹⁷ *See generally* UNITED NATIONS CONVENTION AGAINST CORRUPTION 9 (U.N. Off. on Drugs and Crime-Vienna 2004), available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf. However, some international actors work with the judiciary and legislature to improve their ability to tackle issues related to anti-corruption. *See generally id.*

¹⁹⁸ *See generally* About, TRANSPARENCY INT’L, <https://www.transparency.org/en/about> (last visited Nov. 27, 2023); *Corruption Perceptions Index*, TRANSPARENCY INT’L, <https://www.transparency.org/en/cpi/2022> (last visited Nov. 30, 2023).

corrupt) to 100 (very clean),” and provides recommendations for combatting corruption going forward.¹⁹⁹ Based on these reports, the perception of corruption in Egypt shows a concerning trend.²⁰⁰ As of 2022, Egypt ranks 130th out of 180 countries with a score of 30 out of 100.²⁰¹ This means that Egypt has dropped 32 spots since 2010, indicating that the perception of corruption in Egypt has only gotten worse.²⁰²

In this respect, numerous universal agreements highlight the issue of global corruption and attempt to battle it, one of which is the 2003 African Union Convention on Preventing and Combating Corruption (AUC).²⁰³ The basic core of this document is to endorse and support development in Africa by averting, identifying, punishing, and eradicating corruption.²⁰⁴ The main principles of the AUC are respect for democratic foundations, the rule of law, popular contribution, good governance, respect for human rights, transparency and accountability, the advancement of social justice, and the attack on corruption.²⁰⁵ Egypt is, however, a signatory to the United Nations Convention Against Corruption (UNCAC) of 2003, which is relatively similar to the AUC, but also designates the persons that can be held liable for corrupt acts and shapes definite anti-corruption policies.²⁰⁶ However, the details surrounding much of the application of those policies are left up to the individual signatories.²⁰⁷ In Egypt, the bodies tasked with anti-corruption enforcement include the Administrative Control Authority (ACA) and the Illicit Gain Enrichment Office (IGE).²⁰⁸

¹⁹⁹ *Corruption Perceptions Index*, TRANSPARENCY INT’L, <https://www.transparency.org/en/cpi/2022> (last visited Nov. 30, 2023).

²⁰⁰ CORRUPTION PERCEPTIONS INDEX 2022 (Transparency Int’l 2023), available at https://images.transparencycdn.org/images/Report_CPI2022_English.pdf.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See generally* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 174. *See also* African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003, 43 I.L.M. 5 [hereinafter African Convention], available at https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf. The African Union defines corruption with special details; Article 4.1(a) defines corruption as “the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.” *Id.* at 7. This section is then followed by eight other precise definitions of corruption, leaving little room for an excuse of vagueness or misunderstanding. *Id.* at 7-8. The Council is responsible for supporting anti-corruption instruments, gathering information on corruption and the conduct of the multinational corporations working in Africa, providing advice for governments, proposing rules and controls for the performance of government servants, and the inauguration of firms. *See id.*

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *See* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 9; NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26-27.

²⁰⁷ *See generally* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197.

²⁰⁸ *Id.*

Egypt ratified the UNCAC in 2005 but is not a party to either the OECD Anti-Bribery Convention of 1997 or the Inter-American Convention of 1996 on tackling corruption.²⁰⁹ Egypt does not have a specific anti-corruption law, but active and passive bribery, attempted corruption, abuse of office, abuse of public resources or funds for private gain, and extortion are criminalized by the Penal Code of 1937.²¹⁰ The treaties mentioned above aim to promote and encourage measures to battle corruption more efficiently through promoting, facilitating, and supporting international cooperation, mutual and technical legal assistance,²¹¹ the appropriate management of public affairs and assets, enhancing accountability, and confirming the state's sovereignty through non-interference in internal affairs.²¹² In addition, they criminalize acts closely correlated with or connected to corruption, such as money laundering, concealing or holding the revenues of corruption, and assisting or encouraging corruption.²¹³ Furthermore, they allow the freezing and

²⁰⁹ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26-27. *See generally* Mohamed A. 'Arafa, *Battling Corruption within a Corporate Social Responsibility Strategy*, 21 *IND. INT'L. & COMP. L. REV.* 397 (2011) ("Many see corruption as a problem pertaining exclusively to white-collar workers and administrative and government officials [C]orruption is a crosscutting and devastating phenomenon, be it political, social, economic, or cultural."). *Id.* at 400.

²¹⁰ In other words, political will—as an integral part of the political spectrum—plays a critical role in fighting corruption because integrity is the basis for both political and constitutional legitimacy of governance. NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 146. The Anti-Money Laundering Law and its subsequent amendments criminalize money laundering. *Id.* The law only refers to public sector and private-public sector corruption, whereas business-to-business corruption is not covered. *Id.*

²¹¹ *See generally* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 33-39 (explaining national and international purposes of Article 1 and focusing on the importance of mutual legal assistance in Article 46). The UN Convention Against Corruption focused on techniques used to extradite criminals, legal assistance in the fields of criminal investigation, the necessary legal procedures, and the cooperation needed to execute laws, including measures of joint interrogations between concerned countries and special criminal investigative devices. *See generally* MAHMOUD C. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE* (Oxford Univ. Press 2007).

²¹² *See generally* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 9-17 (explaining anti-corruption policies and practices in managing public affairs and assets in Chapter II). It is noteworthy, that the UNCAC is comprised two types of provisions: preventive and punitive. *Id.* Concerning the prevention, these articles focus on the following issues: policies and practices to fight corruption through implementation mechanisms; agencies battling corruption; the principles of the public sector and its procedures; the finances of the public sector; access to information and public reports; awareness, training, and public education; and the principals of the private sector and setting its operative regulations, including accounting and auditing. *Id.* (articulating preventative provisions in Chapter II). Turning to the punitive articles, the UNCAC called on national governments to adopt the necessary legislations and other procedures to criminalize acts considered corrupt *per se*. *Id.* at 17-29 (mandating criminalization of certain acts in Chapter III).

²¹³ *Id.* (mandating criminalization of certain acts in Chapter III).

confiscation of assets acquired through corruption.²¹⁴ Also, the UNCAC permits compensation for harm caused by corruption.²¹⁵

A long time ago, the Egyptian People's Assembly ratified the UNCAC, which means, under the Egyptian Constitution, it is an integral part of the domestic Egyptian legal system.²¹⁶ It follows that it acquired binding legal force requiring implementation, specifically on the procedural level.²¹⁷ The UNCAC indeed raises a sequence of concerns in terms of negotiating the national sovereignty of the state.²¹⁸ Both law and political will are indispensable in any strategy to combat corruption, as a social vision is

²¹⁴ *Id.* at 42-48 (explaining that Article 20 concerns an increase of assets for public officials through illicit enrichment and Chapter V lists several provisions regarding asset recovery.).

²¹⁵ UNITED NATIONS CONVENTION AGAINST CORRUPTION 26, 43 (U.N. Off. on Drugs and Crime-Vienna 2004), available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (explaining that Article 35 requires that victims of corruption have the right to initiate legal proceedings for compensation and Article 53 regards the ability of the courts to order the offender to compensate another that was harmed). These conventions highlighted that restoring the assets to their legal owners was one of the essential principles in addition to the protection of witnesses, informants, and victims of corruptive acts. *See id.* at 43. However, such protection was not included in the AU treaty. *See* African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003, 43 I.L.M. 5, available at http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited Nov. 27, 2023).

²¹⁶ *See* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26. The current constitutional text in this domain provides:

The President of the Republic represents the state in foreign relations and concludes treaties and ratifies them after the approval of the House of Representatives. They shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution. With regards to any treaty of peace and alliance, and treaties related to the rights of sovereignty, voters must be called for a referendum, and they are not to be ratified before the announcement of their approval in the referendum. In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution or which leads to concession of state territories.

Compare CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 152, *with* ABROGATED EGYPT CONSTITUTION, art. 151 (Egypt), *and* ABROGATED TEMPORAL CONSTITUTIONAL DECLARATION, art. 56/6 (Egypt), which states, "The Supreme Council of the Armed Forces deals with the administration of the affairs of the country. To achieve this, it has directed the following authorities [to] represent the state domestically and abroad, sign international treaties and agreements, and be considered a part of the legal system of the state." *See generally* 'ALI AL-KAHWAJI, AL-MO'AHADAT AL-DAWLIYA AMAM AL-QADI AL-JINA'AI [THE INTERNATIONAL CONVENTIONS BEFORE THE CRIMINAL JUDGE], 7-40 (Alexandria Univ. Press 1997). This was confirmed by the Egyptian Supreme Constitutional Court, in its ruling in the al-Mah.kamah al-Dustūriyah al-'Ulyā [Supreme Constitutional Court], case no. 1, session of 2 Jan. 1975, year 4, p. 150, concerning "the necessity to interpret the provisions of the international treaties in the context of good faith and in accordance with the ordinary meaning of their words, without prejudice to the merits of the treaties or their purposes."

²¹⁷ *See* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26 ("[I]n 2005 the Government of Egypt ratified the United Nations Convention Against Corruption (UNCAC), signaling the increased interest in tackling the issue of corruption in a more effective manner.").

²¹⁸ *See* Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis*, 2 NOTRE DAME J. INT'L & COMPAR. L. 100 (2011). However, these concerns are balanced by the utility of making the government legally and politically bound to eradicate corruption. *Id.*

required.²¹⁹ The existence of that vision will pave the way for the rule of law.²²⁰

The very sustenance of free market exchange and competition depends on elementary institutions that can endorse and distribute even property rights, preserve the rule of law, and regulate anti-competition, conflict of interest, fraud, and corruption.²²¹ Unfortunately, Egypt did not take this track.²²² The weakness of institutional arrangement refers to the situation where the state has no capability to uphold equal property rights, enforce the law (it even interrupts it systematically), or regulate the irregularities of information and power misdeeds.²²³ If escape from the underdevelopment of Egypt is sought, an accurate examination of its causes should be undertaken to decide the optimal role of the general public before the government

²¹⁹ See generally UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 6 (“[N]eed to construct a strategy that has a coherent vision.”).

²²⁰ See *id.* at 53. In 2009, the Global Forum on Fighting Corruption and Safeguarding Integrity, hosted in Doha, Qatar, centered on the theme: “*Strength and Unity: Working Together Against Corruption.*” See Press Statement, Doha, Qatar, “Strength in Unity: Public-Private Partnerships to Fight Corruption” (Nov. 7, 2009), <https://2009-2017.state.gov/j/inl/rls/rm/131695.htm>. Discussions were focused on the following five points: the role of the legislature, offices of prosecution and judiciary institutions, launching a culture of integrity, public private partnership in procurement, need for reforms in public and private sector, and global financial crisis and corruption. *Id.* Following this conference, Egypt adopted a National Anti-Corruption Strategy with ten main objectives that cover prevention and criminalization of corruption. *Egypt Adopts a National Anti-Corruption Strategy*, U.N. DEV. PROGRAM (Dec. 16, 2014), <http://www.undp-aciac.org/resources/ac/newsDetails.aspx?nid=1198>.

²²¹ See generally Amr Adly, *Too Big to Fail Egypt’s Large Enterprises After the 2011 Uprising*, CARNEGIE ENDOWMENT FOR INT’L PEACE, March 2017, at 3, available at https://carnegieendowment.org/files/CMEC_65_Adly_Final_Web.pdf (“Greater economic autonomy of big business from the state means that large enterprises will have to rely less on political connections to secure profits and market share. They will instead become more market oriented. Moreover, the absence of strong particularistic interests and informal ties with the state may lead these enterprises to develop a broader concept of their collective welfare. This may encourage greater transparency and market operations free of state intervention.”).

²²² In other words, the free market policy proved to be the equivalent of a state profiting in the case of transitional economies. See Dina Jadallah, *Economic Aid to Egypt: Promoting Progress or Subordination?* 3 CLASS, RACE AND CORP. POWER 2 (2015). See, e.g., Sufyan Alissa, *The Political Economy of Reform in Egypt*, CARNEGIE ENDOWMENT FOR INT’L PEACE, Oct. 2007, at 5, available at https://carnegieendowment.org/files/cmec5_alissa_egypt_final.pdf; see Michele Dunne & Mara Revkin, *Egypt: How a Lack of Political Reform Undermined Economic Reform*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 23, 2011), <https://carnegieendowment.org/2011/02/23/egypt-how-lack-of-political-reform-undermined-economic-reform-pub-42710> (“Among the supreme ironies of the legacy of U.S. policy in Egypt is that the economic reforms Washington invested in for decades are at risk of unraveling due to the lack of serious political reforms. The United States aggressively pursued economic reform in Egypt . . . [and] deteriorating economic conditions will make it difficult for Egypt’s new leadership to resist populist tendencies.”).

²²³ *Id.* at 7. See generally GALAL AMIN, *EGYPT IN THE ERA OF HOSNI MUBARAK* (The Am. Unvi. in Cairo Press rep ed. 2012) (discussing the Egyptian society and the Egyptian state in the half-century or more that has elapsed since the Nasserite revolution, this time focusing on the era of President Mubarak and explaining the linkage between corruption and poverty, the struggle of the middle class, and the vexing issue of presidential succession, and Egypt’s foreign policies).

regulates economic activity and combats corruption and bribery.²²⁴ This ambition may be fulfilled by abandoning neo-liberal prescriptions and implementing feasible legal policies.

Having discussed the major corruption phenomena in Egypt, it is important to examine the legal framework—statutory and institutional—regarding the basic features of various Egyptian anti-corruption policies and anti-bribery laws, especially under the current administration.

IV. CORRUPTION AND BRIBERY UNDER EGYPTIAN ANTI-CORRUPTION LAWS

The Transparency and Integrity Committee provides a review of corruption and bribery legislation in Egypt.²²⁵ The Committee has two central goals.²²⁶ First, it strives to identify the role of laws, decrees, and regulations in hindering corruption while enhancing transparency and integrity values through an institutional framework.²²⁷ Second, it is meant to reassure the adoption of social and economic “impact assessments” for any alteration in

²²⁴ See generally ‘Arafa, *supra* note 61 (“In the meantime, the specter of corruption endures to haunt the country. Prior to Mubarak’s exile, Egypt was described—and even still is—as ‘a state where wealth fuels political power and political power buys wealth’ [T]he current government claims that it is proceeding with thoughtful speed towards a civilian democracy and battling corruption. Addressing the legacy of corruption under Mubarak and others will remain a priority for Egyptians and a basis for skepticism towards the new political order and economic stability. Thus, corruption has several features on the national level, all seen in Egypt, like, accumulating citizen’s economic encumbrances as consumers; negligence on the administrative level, particularly to public funds; tendency to link proficiency standards to illegitimate gains; and a public lack of respect for the government, laws, rules, and norms. The Administrative Prosecution Authority presented a recent study in its annual report on the causes of the spread of bribery and administrative corruption in Egypt and effective ways to eliminate it. The report mentioned “poor moral and religious education; lack of [effective] supervision and follow up; delays in the adjudication of disciplinary sentences for bribery crimes in a manner that does not achieve public and private deterrence, and [the] poor salaries of public employees [along with] the large number of services accomplished by a limited number of employees.”). For example, the Egyptian Supreme Constitutional Court supported the right to work, in its ruling decision in the al-Mah.kamah al-Dustūriyah al-‘Ulyā [Supreme Constitutional Court], case no. 1, session of 2 Jan. 1975, year 4, p. 448. It stipulated that:

Work is a right and duty, guaranteed by the State in its legislation or by any other measures—the different qualities of performance among the employees is the basis for differentiating between them—the objective conditions alone constitute the standard of work evaluation and the determination of the merited remuneration.

However, “[i]t should be pointed out that the next civil service regulation, law no. 47/1978, did not restore the necessary symmetry between an academic qualification and a job category. It only followed the other laws by stating the need to fulfil the requirements of a job description (Article 20). This can be described as a fallback from professionalism or simply de-professionalism of public administration.” Sarah Nasreldeen, *Professionalism Criteria in the Egyptian Civil Service System: An Analytical Study*, 45 ARAB J. ADMIN. 1, 8 (2022).

²²⁵ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12.

²²⁶ See *id.* at 8.

²²⁷ See *id.*

legislation affecting daily life.²²⁸ Indeed, battling corruption requires a continuous legislative and regulatory reform process to create simple, straightforward, adaptable, and appropriate laws.²²⁹ It is also crucial that an institutional mechanism is created to evaluate legislative and administrative remedies to achieve the most adequate procedures available.²³⁰

A. Current Statutes Enhancing Transparency and Integrity Standards (The National Legislative Framework)

Historically, Egypt possessed elaborate and extensive criminal laws, including those aimed at corruption and fraudulent performances.²³¹ Egyptian law has also established a legal framework to curb corruption, which is close to the requirements of the UNCAC.²³² Examples include proscriptions on bribery, which is usually committed by a public employee, clergy member, director, or board of directors member.²³³ Bribery could occur in a corporation, association, syndicate, institution, or even an organization legally carrying out public interest.²³⁴ The prohibition applies to every director or employee under articles 103 to 111 of the Second Chapter of the Penal Code No. 58 of 1937.²³⁵ Its successive amendments apply to every person who has offered or aided a bribe or the embezzlement of public funds under articles 112 to 119.²³⁶ The law does not stop at punishing only

²²⁸ See *id.* This would represent the recent techniques and methodologies of transparency and integrity through supporting societal participation. *Id.*

²²⁹ See *id.*

²³⁰ See generally *id.* Article 5/3 of the UNCAC reads: “Each State Party shall endeavor to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.” UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 9.

²³¹ See Mustafa Marie, *The Ancient Egyptians rigorously fought corruption*, EGYPT TODAY (Dec. 6, 2020, 1:38), <https://www.egypttoday.com/Article/4/95029/The-Ancient-Egyptians-rigorously-fought-corruption> (“The ancient Egyptians set harsh punishments for those accused of treason or corruption.”). Nonetheless, recently Egypt moved toward launching decentralized local government, assigning more powers to local units, promoting popular contribution as well as inspiring community involvement instead of being reliant on the central government. Thus, under the new government, the two main pillars of reform include decentralization and administrative restructuring. The prominence of the latter is demonstrated by the fact that local government servants represent a huge percent of all governmental officials. For further details on centralization and decentralization policies, see generally ‘Arafa, *supra* note 61.

²³² See JUDGE ASHRAF-AL-BAROUDI & HUSSEIN HASSAN, LEGISLATION IN EGYPT: AN ANALYSIS OF COMPLIANCE WITH THE UN CONVENTION AGAINST CORRUPTION (Transparency Int’l 2011), available at https://www.transparency.org/files/content/pressrelease/20110630_TI-S_Legislation_in_Egypt.pdf.

²³³ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT, *supra* note 12, at 146.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

the embezzler but goes on to penalize each servant who unintentionally causes serious harm to the entity where they work.²³⁷

Other examples include prohibitions on non-justified illicit enrichment, abuse of power, peddling in influence, money laundering, and tax evasion.²³⁸ There are several other statutes regulating work in various sectors, such as the Central Bank Law and Banking Systems No. 120 of 1975 (and its presidential decrees concerning the confidentiality of bank accounts and credit law), the Capital Market Law No. 95 of 1992, and the Incentives and Investment Guarantees Law No. 8 of 1997.²³⁹ The Mubarak administration launch monitoring systems and regulatory procedures to fight corruption.²⁴⁰ Egypt also established a system for contracting the administrative bodies based on transparency through Law No. 89 of 1998 on bids and tender offers (Public Procurement).²⁴¹ Additionally, many more Egyptian laws involve

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Ahmed Alaa Fayed, *The Current Status of Corruption in Egypt*, 10 CONTEMP. ARAB AFF'S 4, 510-21 (2017) ("Given that corruption was one of the primary reasons that pushed the Egyptian masses to rally in 2011, it is important to look at its current status to see whether the levels of corruption have increased, decreased or remained the same since. [T]he current status of corruption in Egypt according to different national and international perception indices . . . to explain why corruption remains prevalent in Egypt, it looks at the different anticorruption efforts accomplished by the state and non-governmental organizations after 2011.").

²⁴⁰ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT, *supra* note 12, at 119-27.

²⁴¹ *Id.* at 105-09 ("[A] form of external control mechanism is GAGS, which is responsible for different issues including maintaining registries of parties banned from participating in bids/tenders."). Practically speaking, such a complaint mechanism does not work in an operative manner, which is time wasting and has lengthy procedures. See *id.* In addition to the above, the legislators issued numerous legislations with a supervision and regulatory nature on how to manage and regulate public funds and assets, and how to protect them against corruption. See *id.* Among these legislations is the Law of Financial Controller No. 53 of 1973 and its amendments concerning public funds which clarified the appropriate ways and suitable techniques to use public funds, the entities responsible to audit and control the final accounts and the financial statements of the units cited in the State's General Budget, along with the procedures followed in case of violation. See *id.* at 42. Further, the Government Accountability Act No. 1127 of 1981 as it represents a financial and administrative assessment and inspection tool for the rules to be obeyed by the managerial apparatus in executing the State's Public Budget, and the registration, recording, and laying out of their financial transactions. See *id.* It further includes the principles of financial accountability. See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 42 (Transparency Int'l Secretariat 2009). Government Accountability aims to ensure financial checking before expenditures are made, certifying the internal supervision of the administrative apparatus funds, justifying expenditure, publicizing the outcomes of executing the State's Budget, detecting the obligations of the governmental entities and following up on their reliability. See *id.* at 105-09. Moreover, there is another cluster of laws in which the Egyptian lawmakers created a legal framework for employees—including the employment process, the relationship with the employer, and the discipline of the workers—in order to ensure the appropriate and accurate handling of work and to fight delinquency that may be committed by the official, which leads to the impediment of the development process. See *id.* at 84. One of these laws is the Law No. 47 of 1978, which prohibits civil servants and government officials from accepting gifts, hospitality or rewards, or taking commissions or loans in consistent with their duties and tasks. See *id.*; Law No. 43 of 1979 (promulgating the law of the local government system), 1979 (Egypt); see NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 159, 166.

attacking corruption.²⁴² These laws broadly apply to civil servants in all government bodies, including municipalities, governorates, and ministries.²⁴³ The laws forbid various sorts of misconduct by public officials and are supplemented by many decrees (presidential executive orders) and regulations governing public officials' conduct in the governmental apparatus.²⁴⁴

More significantly, when selecting the legal reform strategy to fight corruption, the following factors should be considered: the current international standards and norms that fit the particular circumstances of the country, the value of the rule of law prevalent in a country, and the institutional resources available to design the strategy.²⁴⁵ The legal framework should integrate provisions correlated with preventing corrupt practices, enable relevant institutions to combat corruption and cover disciplinary and penal matters.²⁴⁶

²⁴² See generally NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12. For example: Law No. 62 of 1975 concerning Illicit Enrichment, *Id.* at 167; Law No. 5 of 1991 on Civil Leadership Positions in the State Administrative System, *Id.* at 37; Law No. 144 of 1988 establishing the Central Auditing Authority, Law No. 80 of 2002 (Anti-Money Laundering Law “AMLL”), Hosni Mubarak, 2002, art. 75 (Egypt), as amended by Law No. 78 of 2003, *rabea al akhar*, 2003 (Egypt); NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 121; Law No. 35 of 1984 on the Judicial Authority, *Id.* at 112; and Law No. 117 of 1958 concerning Administrative Prosecution Authority, all involve attacking corruption. *Id.* at 120.

²⁴³ See generally *id.* In this sense, governors and mayors have the authority to enact regulations and issue rules to govern and regulate the work of the public officials—including work time, location, schedule, and leaves, prohibition of certain wrongdoings, and implementation of administrative penalties thereof which range from warning to dismissal to disciplinary trial. See *id.* at 159-71 (explaining regional and local governments in Egypt and their responsibilities.).

²⁴⁴ Fayed, *supra* note 239. See generally NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 146-47.

²⁴⁵ See generally UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197. Since Egypt signed the UNCAC in 2003 and ratified it in 2005, it has been referred to as the legal, technical, and reference framework approved by world nations as a guide to anti-corruption efforts. See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26; Aram Khaghaghordyan, *International Anti-corruption Normative Framework: The State of the Art*, HERTIE SCH. OF GOVERNANCE, Oct. 2014, available at https://www.againstcorruption.eu/wp-content/uploads/2015/12/D1.1_Part3_International-Anti-corruption-Normative-Framework.pdf (“[T]he UNCAC . . . has been recognized as a reference framework for the fight against corruption . . .”).

²⁴⁶ See UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 9. A corruptive act may entail both disciplinary and penal action. In a landmark decision in al-Mah. kamah al-Dustūrīyah al-‘Ulyā [Supreme Constitutional Court], case no. 2, session of 22 May 1961, the Egyptian Supreme Court has stated:

If the Disciplinary—Administrative—law is separate from the Penal Law, on the basis of the different characteristics of each law and the scope of its application, nonetheless, the same act could result in disciplinary fault that necessitate disciplinary accountability and a criminal conduct proscribed by the law . . . [I]t added as an example that stated,] Bribery as a breach of public [d]uty and as a contravention to the provisions of the Penal Law comprises both disciplinary fault and a crime, [which] requires the coordination of the State [a]dministrative, and judicial apparatus to combat this crime without impairing the jurisdiction of any of them.

B. The Institutional Framework: Anti-Corruption Agencies (ACAs)

The Egyptian legislation launched numerous agencies, authorities, and institutions in charge of mobilizing corruption in both the private and public sectors.²⁴⁷ Most of these agencies have been established by law to address corruption, but none are politically independent.²⁴⁸ They are all closely connected to the President, Prime Minister, or Minister of Justice.²⁴⁹ However, the law authorizes certain privileges for many of these agencies to guarantee independence; some have direct and integral competency, while others have complementary roles.²⁵⁰ As corrupt behavior represents a rampant disease, the new Constitutional framework plays a fundamental role.²⁵¹ The new charter directly addresses corruption for the first time in Egypt's constitutional history.²⁵² It establishes a new commission for battling corrupt acts, strengthens the values of integrity and transparency standards, improves the national strategy concerned with such matters, fights conflicts of interests, promotes the adoption of codes of conduct in numerous areas, guarantees the implementation of said policy in harmonization with other independent regulatory bodies, and oversees the concerned agencies specified by law.²⁵³ The new Constitution regarding the regulatory agency for corrupt practices stipulates the following:

The National Anti-Corruption Commission combats corruption, deals with conflicts of interest, promotes and defines the standards of integrity and transparency, develops the national strategy concerned with such matters, ensures the implementation of said strategy in coordination with other independent bodies, and supervises the concerned agencies specified by law. The Central Auditing Organization has control over state funds and any other body specified by law. The Central Bank stipulates monetary, credit, and banking policies, supervises their implementation, monitors the

²⁴⁷ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 120-27.

²⁴⁸ See *id.* In this regard, countries usually require various bodies to prevent, detect, and prosecute corruption. *Anti-corruption Models: Models of Anti-Corruption Institutions*, NETWORK OF ANTI-CORRUPTION PROSECUTORS, <https://www.iap-association.org/NACP/Anti-Corruption-Models> (last visited Nov. 27, 2023). For greater efficiency and success, their commitments should be clearly defined. See generally UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197. Some countries use multi-purpose organizations that assimilate preventive anti-corruption roles and law enforcement powers. *Anti-corruption Models: Models of Anti-Corruption Institutions*, NETWORK OF ANTI-CORRUPTION PROSECUTORS, <https://www.iap-association.org/NACP/Anti-Corruption-Models> (last visited Nov. 27, 2023). Others launch bodies committed to prevention and designate specified autonomous anti-corruption law enforcement institutes. *Id.*

²⁴⁹ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 120-27. The agencies are required to make annual progressive reports, but these are not made publicly available and are only presented to the President, the Minister of Justice or the Interior Minister. See *id.* at 124-25.

²⁵⁰ See *id.*

²⁵¹ See *id.* at 19.

²⁵² See *id.*

²⁵³ See *id.*

performance of the banking system, works to establish price stability, and has exclusive rights to issue currency. All of the above shall be in accordance with the overall economic policy of the State.²⁵⁴

The Constitution also provides:

[T]he state is committed to fighting corruption, and the competent control bodies and organizations are identified by law. Competent oversight bodies and organizations commit to coordinating with one another in combating corruption, enhancing the values of integrity and transparency in order to ensure the sound performance of public functions, preserve public funds, and develop and following up on the national strategy to fight corruption in collaboration with other competent control bodies and organizations, in the manner organized by law.²⁵⁵

In the same vein, the most essential legal anti-corruption agencies in Egypt are:

1. *The Central Auditing Organization* (CAO), governed by Law No. 144 of 1988, is responsible for managing, inspecting, and allocating public funds.²⁵⁶ It oversees the financial and administrative activities of civil service agencies, companies, and banks that receive public funds.²⁵⁷ The CAO also assists the Parliament in scrutiny.²⁵⁸ The supervision the CAO performs is comprised of accounting and legal aspects, monitoring

²⁵⁴ See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, arts. 215-21 (discussing independent bodies and regulatory agencies; creation of each independent body or regulatory agency; and reporting by independent bodies and regulatory agencies). In other words, “[i]ndependent bodies and regulatory agencies are identified by law. These bodies and agencies have legal personality, and technical, financial and administrative independence, and are consulted about draft laws and regulations that relate to their fields of operation. These bodies and agencies include the Central Bank, the Egyptian Financial Supervisory Authority, the Central Auditing Organization, and the Administrative Control Authority [F]or the creation of each independent body or regulatory agency, a law is issued defining its competencies, regulating its work and stipulating guarantees for its independence and the necessary protection for its employees and the rest of their conditions, to ensure their neutrality and independence. The President of the Republic appoints the heads of independent bodies and regulatory agencies upon the approval of the House of Representatives with a majority of its members, for a period of four years, renewable once. They cannot be relieved from their posts except in cases specified by law [I]ndependent bodies and regulatory agencies notify the appropriate investigative authorities of any evidence of violations or crimes they may discover. They must take the necessary measures with regards to these reports within a specified period of time” *Id.*

²⁵⁵ *Id.* at art. 218 (discussing fighting corruption).

²⁵⁶ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 75-77 (according to Law No. 144 of 1988, “The CAO is an independent organisation [sic] with public legal personality subordinated to the president of the Republic.”).

²⁵⁷ *Id.* at 75-79.

²⁵⁸ *Id.* at 75-77.

- performance, following up on the implementation of an action plan, and controlling decrees issued for financial violations.²⁵⁹
2. *The Administrative Control Authority (ACA)*, governed by Law No. 54 of 1964 and its amendments, investigates the motives behind work and production incompetence.²⁶⁰ This includes revealing the deficiencies of the administrative, technical, and financial systems that block the systematic processing of operations in public entities.²⁶¹ The ACA also recommends methods to prevent corruption and supervises the implementation of laws, decisions, and regulations.²⁶² The ACA is Egypt's anti-corruption watchdog.²⁶³ Moreover, the ACA is responsible for exposing administrative and financial infractions, including criminal offenses committed by employees while performing their duties.²⁶⁴ Generally, the ACA has legal authority to investigate public sector corruption and make arrests accordingly.²⁶⁵
 3. *The Administrative Prosecution Authority (APA)* was created by Law No. 117 of 1958 to check and investigate all public officials.²⁶⁶ The APA is maintained by a large, qualified, professional, skilled staff that interrogates administrative, technical, and economic crimes and may hand over culprits to the criminal courts.²⁶⁷ The APA also serves as an internal recording and reporting mechanism where public officials may direct their complaints of corruption.²⁶⁸
 4. *The Illegal Profiting Apparatus (IPA)* was established by Law No. 11 of 1968 under the authority of the Ministry of Justice to examine alleged illegitimate income and unjust enrichment.²⁶⁹ Public officials must disclose their assets and those of their spouses and children upon taking office and present a financial statement regarding their financial status.²⁷⁰ The IPA collects reports concerning corrupt practices from the general public and private and public employees.²⁷¹ The system periodically

²⁵⁹ *See id.* at 75-79.

²⁶⁰ *Id.* at 120.

²⁶¹ *Id.*

²⁶² NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 120 (Transparency Int'l Secretariat 2009). The ACA is also assigned with the task of investigating citizens' complaints of any breach of the laws, investigating negligence in achieving work obligations, and examining the complaints of negligence, misadministration or plundering. *Id.* at 123. Also, the ACA is authorized to scrutinize and examine public servants' asset disclosures and to hand over the suspects to the Illegal Gain Department. *Id.*

²⁶³ *Id.* at 120.

²⁶⁴ *Id.* at 123.

²⁶⁵ *Id.*

²⁶⁶ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 120 (Transparency Int'l Secretariat 2009).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 125.

²⁶⁹ *Id.* at 121.

²⁷⁰ *Id.*

²⁷¹ *See USCIRF Annual Report 2008 - Egypt*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (May 1, 2008), <https://www.refworld.org/docid/4855699d37.html>. However, the IPA does not inspect all

- inspects and records any upsurge in the public officials' wealth or their immediate family.²⁷²
5. *The Judicial Authority* created by Law No. 46 of 1972 and Law No. 47 of 1972 of the State Council and its different agencies (e.g., Attorney General) is one of the most critical entities, which is in charge of defending the community's interest and combating corruption in all its forms.²⁷³
 6. *The Consumer Protection Association*, governed by Law No. 67 of 2007, aims to protect consumers and safeguard interests against harmful and fraudulent practices defined by Law No. 67 of 2006.²⁷⁴
 7. *The Protection of Competition and Prohibition of Monopoly Association* was established by Law No. 3 of 2005 to protect competition, prohibit monopolistic practices, exclude unfair competition, and punish detrimental transactions or dealings.²⁷⁵
 8. *The Egyptian Money Laundering Combating Unit (EMLSU)* was established in 2002 by the Anti-Money Laundering Law No. 80 of 2002 with amendments through Law No. 78 of 2003.²⁷⁶ The EMLSU is a financial intelligence unit responsible for combating money laundering, processing criminal proceeds, and combating the financing of terrorism in financial institutions in Egypt.²⁷⁷ Article 2 “defines money laundering and criminalizes the laundering of funds from a variety of criminal activities such as resources or monies from narcotics and drug

corruption cases, but rather forwards cases to investigative consultants. *Id.* If the investigative specialists do not find evidence to support charges, Law No. 2 of 1977 also imposes penalties on people that report corruption incorrectly or with “bad intentions.” *Id.* In cases where asset disclosures are proven to be falsified or deceitful, the IPA refers the case to the competent criminal courts. *Id.*

²⁷² *See id.*

²⁷³ *See* RAJEEV PILLAY ET AL., EVALUATION OF UNDP'S REGIONAL COOPERATION FRAMEWORK FOR THE ARAB STATES (2002 – 2005) (U.N. Dev. Programme 2005); ADDIS ABABA, ECONOMIC COMMISSION FOR AFRICA: ANNUAL REPORT 2007 (U.N. Econ. & Soc. Council 2007). However, the public prosecutor has always been viewed as one of the basic guards of society's public interests and the defender against corruption crimes. *Id.* The public prosecutor himself, or by his delegates, initiates criminal actions against employees or public servants for any misdemeanors committed while carrying out their jobs. *Id.* The public prosecutor also brings actions for crimes that involve public employee's negligence or recklessness that results in severe destruction to the assets and interests of the agency the employee works for, or is entrusted with. *Id.* Finally, the public prosecutor is responsible for initiating criminal motions for crimes related to companies' members or boards of directors that are subject to the provisions of the General Business Sector Law No. 203 of 1991. *Id.* In addition to these agencies, the National Security Agency created by Law No. 100 of 1971 have a significant role in fighting the corrupt activities. *See World Report 2021: Egypt*, HUM. RTS. WATCH (Mar. 29, 2020), <https://www.hrw.org/world-report/2021/country-chapters/egypt>.

²⁷⁴ *See* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note, at 12.

²⁷⁵ *See* Youssry Saleh & Partners, *Egypt: Egyptian Competition Law Overview*, MONDAQ (July 12, 2019), <https://www.mondaq.com/antitrust-eu-competition-/824900/egyptian-competition-law-overview>.

²⁷⁶ *See* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 121.

²⁷⁷ *See id.* at 26.

trafficking, prostitution and other immoral acts, terrorism, antiquities theft, arms dealing, and organized crime.”²⁷⁸ The EMLSU was established due to the cumulative pressure and concern about the threat of this phenomenon and its negative impact on Egypt’s economy.²⁷⁹

In practice, several ACAs have been proven to be effective in undertaking their role in fighting corruption.²⁸⁰ However, irrespective of the effectiveness of these institutions, they still suffer from weaknesses in terms of their lack of complete political independence; therefore, one of the primary defects of governmental ACAs is their subordination to the executive branch.²⁸¹ Accordingly, it is highly recommended to protect them from political interference by enhancing their independence and ensuring no political intervention occurs in their decisions, as shown in several past incidents.²⁸² Furthermore, the neutrality these agencies maintain adds to their credibility and impartiality; therefore, it should be preserved.²⁸³

²⁷⁸ *See id.* Further, Article 14 of this law “imposes penalties on those who commit or attempt to commit a money laundering crime a period not exceeding seven years in prison, a fine equal to twice the amount of money involved in the crime, and in all cases the seized funds shall be confiscated or an additional fine equal to the value of these funds shall be imposed if such funds cannot be seized or have been disposed to others in good faith.” *Id.*

²⁷⁹ *See id.* In addition, concerns were declared by the OECD Financial Action Task Force (FATF) regarding the absence of a comprehensive legal regime to combat money laundering crimes. *Id.* It should be noted that the Egyptian law on battling money laundering includes sufficient provisions on asset recovery, but the problem is the unsuccessful and ineffective applicability of these provisions. NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009 26 (Transparency Int’l Secretariat 2009).

²⁸⁰ *See generally id.*

²⁸¹ *See id.* at 123-25.

²⁸² *See* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 26. Moreover, enhancing the transparency of ACAs’ findings and reports by making them available to the general public after inspections, creating a vital mechanism for whistle-blowing and following up on the investigations and decisions of ACAs in a more transparent manner to the public will support their task in fighting corrupt deeds. *Id.* Article 36 of the UNCAC, which required the need for establishment of a specialist investigative anti-corruption body, provides: “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. *Id.* Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. *Id.* Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.” *Id.*

²⁸³ *See* NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 26. Besides making government services more efficient through E-Governance Strategy—accessible via SMS and online—the aim is to reduce the facilitation payments by minimizing direct contact between government officials and citizens. *Id.*

V. THE BASIC ANTI-BRIBERY FEATURES OF THE EGYPTIAN PENAL CODE

Like the Latin legal system, Islamic *Shari'a* law is based on the distinguished principle *nullum crimen nulla poena sine lege*, which reflects the idea that someone should not face criminal punishment for an act that was not criminalized at the time of the act.²⁸⁴ Accordingly, to discipline corruption, a legal framework of rules must define and prohibit it. For such rules to be suitably pragmatic, they must be transparent, applied in an impartial and consistent manner, and not subject to arbitrary change.

In modern international commerce, lawyers must identify bribery as an evil encountered and generally condemned in both Middle Eastern and Western legal systems.²⁸⁵ In fact, Middle Eastern governments have enacted legislation imposing criminal liability on those involved in bribery.²⁸⁶ These Middle Eastern anti-bribery laws, usually derived from European (Napoleonic) Penal Codes, have often been influenced by and are consistent with traditional Islamic jurisprudence prohibiting bribery.²⁸⁷

It is significant to investigate the anti-bribery (anti-corruption) provisions of the Egyptian Penal Law, enacted in 1937, and its amendments, as they are among the broadest and most detailed in the Middle East.²⁸⁸ Even before Egypt became a party to the UNCAC, it had criminalized serious forms of corruption.²⁸⁹ It should be kept in mind that the Egyptian Penal

²⁸⁴ See Khalid Al Hamrani, *Double Trouble? The Relevance of the FCPA in the Middle East*, (June 2020) <https://www.tamimi.com/law-update-articles/double-trouble-the-relevance-of-the-fcpa-in-the-middle-east/>. The Middle East has set the stage for a number of well-publicized “Corrupt Payments” debates including some which suggest enacting a statute based on the United States Foreign Corrupt Practice Act (FCPA). *Id.* In this context, some legal scholars have concluded that bribery is more ubiquitous in the Middle East than elsewhere in the world for reasons comprising culture, politics, and religion. *Id.*

²⁸⁵ Howard Stovall, *Summary of Middle Eastern Criminal Code Provisions Prohibiting Bribery*, 2 (1999), https://stovall-law.com/files/2019-07-25_12_44_25_antibribery_in_the_middle_east_cal.pdf.

²⁸⁶ See *Transparency and Integrity in Lobbying*, ORG. FOR ECON. CO-OPERATION & DEV., 2013, available at <https://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf>. The Transparency and Integrity Commission (TIC) stated the main forms of corruption in Egypt include: issuing decisions in favor of a certain group other in violation of the public interest; lack of transparency in public procurement; receipt of payments/bribes in return for facilitating access to governmental services, for example, customs and taxes, documenting and specifying fines, and misuse or waste of public funds or/and public property.

²⁸⁷ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12.

²⁸⁸ See *id.* Indeed, the Egyptian anti-bribery provisions have been criticized as excessively sophisticated and their punishments are extremely severe. A revised draft of the Penal Law in 1966 attempted to address these criticisms, but that draft was not enacted. *Id.*

²⁸⁹ See *id.* at 1, 168. Regarding the criminalization and penalization of corruption acts, Articles 103 through 132 covers the public official’s misconduct in a comprehensive way and includes laws on active and passive bribery, embezzlement of public funds, and making proceeds from public office. *Id.* For the purposes of criminal prosecution, these articles determined the prohibited acts and identified the applicable criminal sanctions. *Id.* at 96. The Egyptian statute includes further

Code, which is based on the French Napoleonic Code, and its amendments cover a wide range of corruption offenses and provide for severe penalties.²⁹⁰

A. Defining Corruption Offenses and Bribery under Egyptian Penal Law

It is essential for businesses to understand the legislative framework in which they operate without exposing themselves to undue risk. Corruption and bribery are diversely defined under many laws, but fundamental principles apply universally. Bribery covers the act of “giving, offering, or promising” bribes (active bribery) as well as “taking, requesting, and accepting” them (passive bribery).²⁹¹ This includes financial and other undue advantages of a monetary or non-monetary nature.²⁹² For instance, monies or

provisions to penalize the “acts of any employer who, even by negligence or recklessness caused severe harm to the assets or the interests of a public body.” See Law No. 58 of 1937 (Criminal Code), *al-Waqā’i’al-Misrīyah*, 1937, vol. 71, arts. 103-12 (Egypt). Additionally, Article 106 penalizes “the act of requesting bribes, for oneself or for the other, in the private sectors and business partners.” See *id.* at art. 106. Furthermore, Article 106bis of the same code “forbids the manipulation of real or presumed influence for private gain or obtaining undue advantage, whether the transgressor is a public official or not.” See *id.* Some provisions of the Penal Code also prohibit corruption-related offenses such as the abuse of official capacity to influence judicial decisions or to hinder its execution and the use of coercion on a witness to preclude him/her from testimony or to present false testimony. See *id.* at art. 300. In addition to the Penal Code, various legislations proscribe corruption-related offenses that could be done by public officials, such as illicit enrichment and the concealment or laundering the proceeds of corruption (money laundering). See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 1, 15, 146. Moreover, Egypt is a party to the United Nations Convention Against Transnational Organized Crime as well as the United Nations Convention Against Illicit Traffic in Narcotic Drugs. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197. Also, Egypt is the inaugurating member of the Middle East and North African Financial Action Task Force. This is a regional, inter-governmental co-operative body that centers on money laundering and financing of terrorism. See Mohamad Talaat, *Anti-Corruption in Egypt*, GLOB. COMPL. NEWS, <https://www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-egypt/> (last visited Nov. 30, 2023).

²⁹⁰ The TIC called for the modification of the current public office law to detail and explain other forms of corruption that might not necessitate criminal conduct, such as the abuse of authority, or making use of office. See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 79.

²⁹¹ For further discussion on the classification of bribery into active and passive in the French penal system, see generally MOHAMMAD ZAKY ABOU’AMER, KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS, AL-GOZ’E AL’AWEL: AL-GRA’MM AL-MODRAA BELMASLAHA AL-‘AMA, AL-RASHWA WA AL-GRA’MM AL-MOLHKA BEHA [THE EGYPTIAN PENAL LAW—THE SPECIAL PART, PART I: THE CRIMINAL OFFENCES AGAINST PUBLIC INTEREST, BRIBERY AND THE RELATED-CRIMINAL OFFENCES], (1983); RAMSSES BAHIENAM, AL-KSEM AL-KHAS FI KANUN AL-‘UQUBAT: “GARIMAAT AL-RASHWA” [THE SPECIAL PART OF THE EGYPTIAN PENAL LAW: BRIBERY OFFENCE], (1989). In this regard, the French criminal doctrine classifies corruption and bribery into “Active Corruption” and “Passive Corruption” despite the Egyptian criminal doctrine and jurisprudence does not explicitly adopt this classification. See R. GARRAUD, TRAITÉ THEORIQUE ET PRATIQUE DU DROIT PÉNAL [TREATISES ON THE THEORY AND PRACTICE OF THE PENAL LAW], 370 (3rd ed. 1930).

²⁹² *Id.*; see also MOHAMMAD ZAKY ABOU’AMER, KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS, AL-GOZ’E AL’AWEL: AL-GRA’MM AL-MODRAA BELMASLAHA AL-‘AMA, AL-RASHWA WA AL-GRA’MM AL-MOLHKA BEHA [THE EGYPTIAN PENAL LAW—THE SPECIAL PART, PART I: THE

loans are considered monetary advantages, whereas holidays, entertainment, and career enhancements or promotions may be regarded as non-monetary advantages.²⁹³

The Egyptian criminal doctrine defines corruption as the “misuse of public office or power for private gain or misuse of private power in relation to business outside the realm of government.”²⁹⁴ In comparison, bribery is the offering, promise, giving, demanding, or acceptance of an advantage as an inducement for an illegal or unethical action or a breach of trust.²⁹⁵

Acts of bribery are intended to influence individuals in the performance of their duties and incline them to act fraudulently and dishonestly.²⁹⁶ In the same vein, whether the beneficiary or recipient of a bribe works in the public or private sector is irrelevant.²⁹⁷

Corruption offenses are principally set out in the Egyptian Penal Code, which defines bribery in Articles 103-112 as “a grave criminal offense falling under the category of crimes against the civil service, trust, and public interest and considered as a serious crime under Egyptian law, especially when it involves a government employee, referred to as a ‘Public Official’ or simply an ‘Official.’”²⁹⁸ In some circumstances, a private sector servant who accepts a bribe is also punishable under the same law.²⁹⁹ The provisions of the Egyptian Penal Law dealing with bribery are contained in the portion of the Penal Law covering “Crimes Against the Public Interest and Duty.”³⁰⁰

The prohibition against bribery guarantees that the government will function properly and that no public worker will use their position or

CRIMINAL OFFENCES AGAINST PUBLIC INTEREST, BRIBERY AND THE RELATED-CRIMINAL OFFENCES], (1983); RAMSSES BAHENAM, AL-KSEM AL-KHAS FI KANUN AL-‘UQUBAT: “GARIMAAT AL-RASHWA” [THE SPECIAL PART OF THE EGYPTIAN PENAL LAW: BRIBERY OFFENCE], (1989).

²⁹³ *Id.*

²⁹⁴ See MOHAMMAD ZAKY ABOU‘AMER, KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS, AL-GOZ’E AL’AWEL: AL-GRA’MM AL-MODRAA BELMASLAHA AL-‘AMA, AL-RASHWA WA AL-GRA’MM AL-MOLHKA BEHA [THE EGYPTIAN PENAL LAW—THE SPECIAL PART, PART I: THE CRIMINAL OFFENCES AGAINST PUBLIC INTEREST, BRIBERY AND THE RELATED-CRIMINAL OFFENCES], 617-21 (1983) [hereinafter *ABOU‘AMER*].

²⁹⁵ *Id.* at 37-48, 129.

²⁹⁶ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 83-84.

²⁹⁷ See *id.* The Egyptian Penal Code’s provisions cover the passive and active bribery of public officials in an indirect way. *Id.* The latest amendments to these provisions focus on “passive” corruption, which reflects the Egyptian government’s concern at that time to forbid public officials from misusing their power for personal benefit. *Id.*

²⁹⁸ See Law No. 58 of 1937 (Criminal Code), *al-Waqā’i‘al-Misrīyah*, 1937, vol. 71, arts. 103-12 (Egypt).

²⁹⁹ See ABOU‘AMER, *supra* note 294 (noting that the anti-bribery provisions are primarily directed to public employees).

³⁰⁰ See Law No. 58 of 1937 (Criminal Code), *al-Waqā’i‘al-Misrīyah*, 1937, vol. 71, arts. 103-12 (Egypt). Other such crimes are the misappropriation of public funds and forgery in official documents. *Id.*

influence to achieve any personal benefit or private gain.³⁰¹ Bribery essentially involves the trading or peddling of a position.³⁰² It requires two parties: first, the recipient official who requests or accepts payment or promise in exchange for performing or refraining from performing a function of their position, and second, the briber, who makes the offer of or simply agrees to pay the bribee what they requested.³⁰³ The primary aspect of the crime of bribery is the conduct or behavior of the official; bribery is deemed to have occurred as soon as the official agrees to a payment or promise to abuse the duties of their position.³⁰⁴ In other words, there will typically be a *quid pro quo* transaction that both parties will benefit from.³⁰⁵ Thus, the primary focus in bribery under Egyptian law is on the official.³⁰⁶

B. The Bribery of Public Officials: Criminalization Requirements

Combating corruption requires a comprehensive and coherent legal framework that criminalizes bribery and related acts. Criminalization has a clear and robust impact both inside and outside the criminal law sphere.³⁰⁷ Under the Egyptian Penal Code, corruption is a serious criminal felony.³⁰⁸ While the law does not explicitly refer to any *mens rea* or mental intent

³⁰¹ See ABOU'AMER, *supra* note 294.

³⁰² See generally MAHMMOUD NAGIUB HOSNI, SHARH KANUN AL-'UQUBAT, AL-KSEM AL-KHAS, AL-GRAMM AL-MODRAA BELMASLAHA AL-'AMA [THE EXPLANATION OF EGYPTIAN PENAL LAW—THE SPECIAL PART: THE CRIMINAL OFFENCES AGAINST THE PUBLIC INTEREST], (1972); see also Amr Adly, *Mubarak (1990-2011): The State of Corruption*, ARI THEMATIC STUDIES: THE POLITICS OF CORRUPTION, ARAB REFORM INITIATIVE (2011).

³⁰³ See generally MAHMMOUD NAGIUB HOSNI, SHARH KANUN AL-'UQUBAT, AL-KSEM AL-KHAS, AL-GRAMM AL-MODRAA BELMASLAHA AL-'AMA [THE EXPLANATION OF EGYPTIAN PENAL LAW—THE SPECIAL PART: THE CRIMINAL OFFENCES AGAINST THE PUBLIC INTEREST], (1972).

³⁰⁴ See generally Adly, *supra* note 221.

³⁰⁵ *Id.*

³⁰⁶ *Id.* Nonetheless, separate provisions and crimes have been developed for punishing the briber and any intermediary. *Id.*

³⁰⁷ See generally Law No. 58 of 1937 (Criminal Code), *al-Waqā'i' al-Misrīyah*, 1937, vol. 71, arts. 103-12 (Egypt); see also NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 83-84.

³⁰⁸ See Law No. 58 of 1937 (Criminal Code), *al-Waqā'i' al-Misrīyah*, 1937, vol. 71, arts. 9-12 (Egypt). In this context, it should be noted that the tripartite classification of the criminal offenses adopted by the Egyptian Penal Code will be deducted from Article 9 of this code in which stipulates that: "Offences are of three kinds: (1) Felonies (2) Misdemeanors, and (3) Infractions." Also, Article 10 as amended the Penal Law and the Law of the Criminal Procedure by Act No. 95/2003 provides that: "A felony is an offence punishable by any of the following penalties: death, life Imprisonment, aggravated detention, and simple detention." On the other hand, Article 11 of the same code stated that: "A misdemeanor is an offence punishable by either of the following penalties: imprisonment, a fine the maximum of which exceeds five hundred Egyptian pounds." But according to Article 12 "A contravention (infraction) is an offence punishable by a fine the maximum is which does not exceed five hundred Egyptian pounds." See *id.* For further details concerning this main classification, see AHMAD 'AWAD BELAL, MABAD'E KANUN AL-'UQUBAT AL-MASRY: AL-KESM AL-'AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES], (2004).

requirement in its definition of corruption or bribery, corruption is an intentionally committed criminal offense.³⁰⁹ However, Article 104bis does refer to non-intentional corruption, *i.e.*, when a public official performs an act of corruption in the discharge of their duties “without having the intention” of doing so.³¹⁰ Bribery comprises an undue advantage (inducement), whether financial or other, according to Article 107 of the Penal Code.³¹¹

As described above, Egyptian law criminalizes both passive and active bribery of public officials.³¹² Incrimination of bribers is not unequivocally cited in the law but is implicitly covered in Article 107bis, which stipulates that “[t]he briber . . . shall be punished with the [same] penalty prescribed for the bribe-taker.”³¹³

There are three common elements to the crime of bribery under Egyptian law: (a) the status of the recipient of the bribe as a “public official;” (b) the *actus reus* (substantive element), meaning the criminal activity itself including the benefit such as a gift or promise thereof; and (c) the *mens rea* (requisite criminal intent/mental component).³¹⁴ These three elements of bribery are analyzed in further detail in the following discussion.

³⁰⁹ *Id.*; see also Law No. 58 of 1937 (Criminal Code), vol. 71, arts. 9-12 (Egypt).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See Law No. 58 of 1937 (Criminal Code), vol. 71, art. 107 (Egypt); V.E. GARCON, CODE PÉNAL ANNOTE [PENAL CODE ANNOTATION/SUPPLEMENT], art. 177, no.74; WALINE V. MARCEL, TRAITÉ ELEMENTAIRE DE DROIT ADMINISTRATIF [TREATISES OF THE BASIC ADMINISTRATIVE LAW], 201, 407 (6th ed. 1951).

³¹⁴ See, *e.g.*, Mohammad Talaat, *Anti-Corruption in Egypt*, GLOB. COMP. NEWS, <https://www.globalcompliancencnews.com/anti-corruption/handbook/anti-corruption-in-egypt/> (last visited Nov. 7, 2023). In other words, there are three fundamental elements regarding bribery under most Middle Eastern laws: the recipient of the bribe as a “public official” with “official duties,” the material element (*i.e.*, the gift or promise), and the moral element that required the existence of the criminal *corrupt* intent. See, *e.g.*, *id.*

C. The Scope of Applicability of Egyptian Law's Bribery Provisions:
Elements of Bribery as a Criminal Offense (Briber Criminality)

1. *Who Can Engage in Bribery? The Concepts of "Public Officials" and "Official Duties" in the Egyptian Penal Law*³¹⁵

From a plain etymological perspective, the law needs to define the meaning of "domestic public official" when referring to the active or passive bribery of public employees. This will evade improbability since the lack of a "clear definition may make the scope of an offense" ambiguous or vague.³¹⁶ The law should define such officials as "any person holding a legislative, administrative, or judicial office, whether appointed or elected, and any person exercising a public function, whether in a public body or a public enterprise."³¹⁷ Article 111³¹⁸ of the Penal Code provides a broad concept and description of public officials, covering

³¹⁵ See generally KHALED SULTAN, GARA'MM AL-RASHWA FI 'AKOUD AL-TJARAH AL-DAWLIYAH: DERASSH MOUKRNAH [BRIBERY CRIMES IN INTERNATIONAL COMMERCIAL CONTRACTS: A COMPARATIVE STUDY], (2009). In this respect, it should be noted that, it is obvious from the meaning of Article 222 that doctors, surgeons, and nurses are considered public officials in regard to the anti-bribery provisions because it is stipulated that: "Any doctor, surgeon, or a nurse give within a way of nepotism a falsified certificate or report concerning pregnancy, disease or death with his or her knowledge of its falsification shall be imprisoned or pay a fine of 100 EGP. And if he or she request for himself or herself or for others to do any of these illegitimate acts or upon any recommendation or mediation or by trading in influence shall be penalized by bribery's punishments." See Law No. 58 of 1937 (Criminal Code), art. 22 (Egypt). Further, according to the Principle of "Moral Multiplicity of Crimes and Punishments," Article 298 in regard to "False Testimony" states, "If anyone falsely testified before the court in a criminal or a civil action upon a recommendation or . . . shall be penalized by bribery sanctions if it is severer than the penalties of false testimony." See *id.* at art. 298. For further details on the forgoing principle, see AHMAD 'AWAD BELAL, MABAD'E KANUN AL-'UQUBAT AL-MASRY: AL-KESM AL-'AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES], (2004).

³¹⁶ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 1, 18 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>; see also MOHAMMAD ZAKY ABOU'AMER, KANOUN AL-IJRA'AT AL-JINA'IYAH [CRIMINAL PROCEDURAL LAW], (2008).

³¹⁷ *Id.*

³¹⁸ *Id.* In the same sense, Article 434/8 of the French Penal Code provides that:

The direct or indirect request or acceptance without right of offers, promises, donations, gifts or advantages, by a judge or prosecutor, a juror or any other member of court of law, an arbitrator or an expert appointed either by a court or by the parties, or by a person appointed by a judicial authority to carry out conciliation or mediation, in return for performing or abstaining from performing an act of his office, is punished by ten years' imprisonment and a fine of €150,000. Yielding to the solicitations of a person described in the previous paragraph, or to a proposal of any offer, promise, donation, gift or reward with a view to obtaining from such a person the performance or non-performance of an act pertaining to his office, is subject to the same penalties. Where the offence referred to under the first paragraph is committed by a judge or prosecutor in favor or against a person who is being criminally prosecuted, the penalty is increased to fifteen years' criminal imprisonment and a fine of €225,000.

[A]ny person performing a public service or employed in governmental agencies or placed under the control and the supervision of the government as well as members of national or local representative councils either elected or appointed, and therefore including Members of Parliament³¹⁹ subject to the lifting of their immunity.³²⁰

It also includes “members of the judiciary,³²¹ arbitrators, experts, religious representatives, liquidators, judicial administrators, board members, and employees and managers in any enterprise in which the state is a shareholder.”³²² In this respect, the Egyptian jurisprudence has also decided that some institutions, objectives, or the like are *per se* public and, subsequently, their servants are considered public officials.³²³ In addition, members of the boards of directors, managers, employees, or representatives of associations, public companies, societies, foundations, or establishments are considered public officials under Article 106/A if the state or any public organization³²⁴ contributes to its funding at any level.³²⁵ Further, Egyptian

Also, Article 435/3 of the same code provides: “For the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions . . . the unlawful proffering, at any time, of any offer . . . to a person . . . or an electoral mandate in a foreign State, or within a public international organization . . .” See C. pén. arts. 434/8, 435/3, available at https://www.napoleonseries.org/research/government/france/penalcode/c_penalcode3b.html.

³¹⁹ See Cour de cassation [Cass.] [supreme court for judicial matters] crim., March 29, 1886, Bull. Crim., No. 199, arts. 435/4 - 5 (Fr.), available at <https://www.oecd.org/france/2076560.pdf>; *Id.* at art 3 (providing the Penal Code of the Republic of France).

³²⁰ UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 26; *Id.* at 9.

³²¹ *Id.* at 8 (explaining that persons holding a judicial office are not expressly mentioned but could fall under Articles 111-115 and interpreted implicitly from the original language: “any person performing a public service . . .”). See generally ABOU‘AMER, *supra* note 294.

³²² *Id.* See also BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 15 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>.

³²³ For instance, a vessel pilot employed in the Suez Canal has been considered as a public employee, given the fact that the Suez Canal Power managed a public utility service. Similarly, the Public Authority for Agrarian Reform is a public entity, its property is public property, and its employees are public officials. The same conclusion applies to employees in public establishments for flour and rice mills, and public co-operatives. See ABOU‘AMER, *supra* note 294.

³²⁴ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>. (“Corrupt transactions generally involve a high level of confidentiality and secrecy, involving persons other than the bribers (i.e., persons, natural or legal, seeking a business advantage) and the bribe-takers (officials providing the business advantage). To ensure an arms-length distance between bribers and bribed, bribes are frequently transferred to designated third parties (spouses, children, political parties) through agents, intermediaries, consultants, etc. In order to prevent the involvement of third parties, their role in corrupt transactions should be regulated and sanctioned.”). See generally AHMAD FATHI SOROUR, AL-WASIT FI KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS [A GUIDE FOR EGYPTIAN PENAL LAW: THE SPECIAL PART], (1968).

³²⁵ See generally NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12. See ABOU‘AMER, *supra* note 294. See also the Law No. 60 of 1971 (Public Entities), 1971 (Egypt); Law No. 61 of 1971 (Public Sectors Corp.), 1971 (Egypt). Egyptian law criminalizes the use of public assets for private gain. In addition, under Article 112 “public funds extend beyond state-owned

jurisprudence defines public officials as “any person consigned to a permanent job in the service of a public utility managed by the State or a regional or utility public legal person and holding a permanent office that is part of the administrative organization of such service.”³²⁶ Third-party beneficiaries are explicitly covered in all applicable provisions and considered as bribery offenders “for himself or for a third party” in Articles 103, 103bis, 104, 104bis, 106, 106bis, and 106/A as long as they are natural individuals.³²⁷ However, it is unclear what sort of individual is subject to the

resources to include all funds cited in Article 110 of this law, such as syndicates, unions and economic companies, associations and units. Using all of these resources, in addition to public resources, for private gain or personal interest is illegal.” See Egyptian Crim. Code, arts. 110-112 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. In this respect, there is a doctrinal criminal and administrative debate concerning the doctrine of what so-called “The Theory of Actual Official: *Fonctionnaire de fait*” in which his or her appointment in the public office is null or void because of some formalistic-procedural defects have been realized during his or her appointment regarding the application of bribery provisions on his or her side. For sure, if he or she committed any corrupt behavior, both criminal and disciplinary liability shall be addressed during remaining-working in the office according to the pre-dominant opinion in both doctrine and jurisprudence. With respect to this debate, See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12. With respect to this debate, See also ABOU’AMER, *supra* note 294, at 133-34. In Jordan, Article 169 of the Penal Code defines public officer as follows: “A public official means any public servant in the administrative or judicial branch, any officer in, or member of, the civil or military authorities, and any employee or worker in the public or state’s administration.” See, e.g., THE PENAL CODE OF THE HASHEMITE KINGDOM OF JORDAN, *Al-Jarida Al-Rasmiyya*, 8 Aug. 2001, art. 169, [hereinafter Jordan Penal Code].

³²⁶ See generally ABOU’AMER, *supra* note 294. Furthermore, Law No. 47 of 1978 on State Civil Servants in its first article provides that: “employees in governmental ministries, agencies and bodies of special budgets, local government units, and public bodies should be considered as public officials.” Law No. 47 of 1978 (promulgating the Regul. for Civ. Servants), *Al-Waqaui Al-Misryia*, 1978 (Egypt).

³²⁷ *Id.* It should bear in mind, that there are some definite legal requirements that must be fulfilled in order to avoid the incidence of bribery in the procurement process. MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., BUSINESS ETHICS AND ANTI-BRIBERY POLICIES IN SELECTED MIDDLE EAST AND NORTH AFRICAN COUNTRIES 12 (OECD & OCDE 2006), available at <https://www.oecd.org/mena/competitiveness/36086689.pdf>. Intermediations are permissible under the laws of numerous countries and jurisdictions, including Algeria, Bahrain, Egypt, and Jordan. *Id.* In order to prevent the occurrence of bribery acts in the intermediation process requires: (a) intermediaries are obliged to be properly registered and recorded and (b) the incomes resulting from the intermediaries’ undertakings (“commissions”) must be disclosed by the intermediaries to the competent authorities such as audit consultants. *Id.* at 11-12. This second requirement illustrated in an express way by Egypt’s Law No. 120 of 1982 governing the Activities of Commercial Agents and Certain Activities of Commercial Intermediaries at Article 14 which provides as follows:

The Ministries and organs of the Government, the Units of local governments, the Public Institutions and the Companies and the Units of the Public Sector shall, when making contracts, include in the tender a provision concerning the amount of the commission or brokerage payable to the commercial agent or commercial intermediary when the contract is awarded, as well as the person(s) who will receive the sum, and requiring to deposit such sum for the account of the person entitled thereto in a bank operating in the Arab Republic of Egypt which is subject to the Central Bank’s supervision (control) and in the currency agreed by the parties. *Id.* at 12.

penalty under Article 106, which criminalizes passive corruption by “any employee” and, particularly, whether it may apply to private sector workers or is restricted to “employees of departments associated with the government” under Article 111.³²⁸ Bribery through intermediaries is emphasized by Articles 105bis and 108, under which intermediaries are punishable unless they acted in *good faith*.³²⁹

For decades, the Penal Code contained *no* provisions for the bribery of foreign public officials.³³⁰ But recently in 2018, after amending Article 111, it does explicitly “consider staff from public international organizations or foreign officials as public officials.”³³¹ It was difficult to agree with those who argue that corruption and bribery of foreign public officials can be addressed through Articles 2 and 3, whose nationality and extraterritoriality principles of jurisdiction apply to Egyptian criminal law.³³² In this context, it

³²⁸ See generally ABOU‘AMER, *supra* note 294.

³²⁹ *Id.* (emphasis added). In the author’s perspective, it is recommended—and for the purpose of non-impunity—that the scope of Article 106 should be reviewed with a more precise definition rather than the term “any employee” and the role of intermediaries in corruption practices in Egypt must be examined in order to assess the efficiency of current legal provisions. See Egyptian Crim. Code, art. 106 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf; *Id.* at arts. 105/b, 106 (mandating that indirect bribery is illegal “as a result of . . . intermediation.”). Under Article 109/b-2, bribery is “subject to harsher penalties imposed elsewhere” See *id.* at art. 109/b-2. For instance, when, pursuant to Article 108, “the purpose of the crime is to commit an act punished by the law with a severer penalty than the one prescribed for the briber,” intermediaries would be subject to sanctions when offering or agreeing to mediate. See *id.* at art. 108. Intermediaries acting in good faith, *i.e.* when transmitting an offer, promise, or gift to the official without knowledge of his or her intent to commit the offense, would be exempted under Article 60 concerning the offense committed in good faith. See *id.* at art. 60. This means that the Penal Code deals in several instances with “criminal justification on grounds of Islamic law,” providing that exercising a “right based on the *Sharie‘a*” does not constitute a criminal offense. See *id.*

³³⁰ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 18 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf> (emphasis added). See also ABOU‘AMER, *supra* note 294.

³³¹ See generally *id.*

³³² See generally ABOU‘AMER, *supra* note 294. See Egyptian Crim. Code, art. 2 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. Article 2 of the Egyptian Penal Code stipulates that:

The provisions of this code shall further apply to the persons mentioned hereinafter: (1) Any person who commits outside Egypt any act that renders him either a principal or an accomplice to any offence committed either wholly or in part in Egypt . . . Any person who commits abroad one of the following crimes: (i) A felony against the government security, as prescribed in Part [1] and [2] of Book (II) of the present law; (ii) A felony of forgery as prescribed in Article (206) of the present law, and (iii) A felony of counterfeit, forgery or falsification of currency note or coin as prescribed in Article 202, or a felony of bringing into or taking out of Egypt that counterfeit, forged or falsified currency note or coin, circulating it, or possessing it for the purpose of circulating or dealing with it as prescribed in Article 203, providing the currency is legally circulated in Egypt.

is essential to note that to conform with the latest international standards, Egypt has been urged to criminalize corruption vis-à-vis foreign public officials and officials of public international organizations, such as the World Bank and IMF.³³³

In other words, Article 106(bis)(b) of Law No. 5 of 2018 (*amending the Penal Code*) provides that any foreign public employees or employees of a public international organization who ask for or accept a gift or promise of one, for themselves or others, for performing or abstaining from or breaching one of their international duties is committing bribery and punishable by imprisonment for life and a fine of 500 to 1,000 Egyptian pounds (US\$28 to \$56).³³⁴ Article 111(2) defines the term “foreign public employee” as “any person who holds, by appointment or election, a legislative, executive, administrative, or judicial position in a foreign country, and any person performing a public function on behalf of a foreign country” and an “employee of an international organization” as “any international civil servant or any person acting on behalf of an international organization.”³³⁵

See Egyptian Crim. Code, art. 2 (Egypt). Accordingly, committing any one constituent element of a criminal act on the Egyptian territory could theoretically be sufficient and adequate to validate the application of Egyptian law, and consequently subject to the jurisdiction of Egyptian criminal courts. *Id.* Pursuant to Article 3 of the same code:

Any Egyptian who, while he/she is outside Egypt, commits an act considered a felony or misdemeanor under this law shall be punished according to its provisions if he/she returns to Egypt, provided that the act committed was punishable under the law of the country where the act was committed.

See id. at art. 3. Hence, corruption of foreign public servants not definitely covered. *Id.* The exercise of extra-territorial jurisdiction is sometimes subject to procedural and technical requirements that can make it problematic to apply over public officials in bribery’s complicated cases committed abroad by the country’s own nationals. *Id.* These procedural requirements may affect the success of this kind of jurisdiction as foreign authorities may be reluctant to report the conducts of their own public employees. *See id.*

³³³ *See generally* ABOU’AMER, *supra* note 294; *See* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 26. Normally, corruption and bribery acts implicate public or government officials (or their close families and business associates). *See generally* *Corruption: A Glossary of International Criminal Standards*, OECD 1, 35 (2007), <https://www.oecd.org/corruption/anti-bribery/39532693.pdf>. Thus, as a policy matter, a government official could be a public official, whether foreign or domestic, a political candidate or party official, a representative of a government-owned/majority-controlled organization, or an employee of a public international organization. *Id.* Recently, the Egyptian Criminal Code has defined the term “Foreign Official” and designate bribery of foreign officials as an offense in accordance with Article 2 of the UNCAC, as an *autonomous* definition. It should be noted that Law No. 5 of 2018 amending article 6 and article 111 of the Penal Code penalizing the act of bribery of a foreign public employee *Egypt: Ninth UN Anti-corruption Conference Held in Sharm El-Sheikh*, LIBR. CONG. (Jan. 3, 2022), <https://www.loc.gov/item/global-legal-monitor/2022-01-03/egypt-ninth-un-anti-corruption-conference-held-in-sharm-el-sheikh/> (noting that while article 103 of the Penal Code criminalizes requests for a bribe by domestic public employees, article 109 punishes the act of offering a bribe to domestic public officials).

³³⁴ *Egypt: Ninth UN Anti-corruption Conference Held in Sharm El-Sheikh*, LIBR. CONG. (Jan. 3, 2022), <https://www.loc.gov/item/global-legal-monitor/2022-01-03/egypt-ninth-un-anti-corruption-conference-held-in-sharm-el-sheikh/>.

³³⁵ *Id.*

Moreover, it is noteworthy that the Algerian Anti-Bribery Law is the broadest Arab criminal law, which is consistent with international norms and standards, in particular with the UNCAC definition of public officials.³³⁶ As part of countries' obligations to global anti-corruption instruments, most, if not all, need to conform their domestic legislation with approved standards and norms.³³⁷ As described, the UNCAC is a crucial guide for anti-corruption efforts in the Arab region.³³⁸ Egyptian authorities should consider reevaluating the scope and effectiveness of their legal provisions. The gaps between Egyptian law and the provisions of the UNCAC reveal the need to modernize and update the contemporary legal framework and take into account the latest practices regarding economic crimes. For example,

³³⁶ See MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., BUSINESS ETHICS AND ANTI-BRIBERY POLICIES IN SELECTED MIDDLE EAST AND NORTH AFRICAN COUNTRIES 21 (OECD & OCDE 2006). In this respect, Article 2/B of the Algerian Anti-Corruption Law provides that:

“Public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, and (iii) any other public official may mean any person who performs a public service or provides a public utility as defined in the domestic law of the State.

Article 2/B of the Algerian Anti-Corruption Law. For further discussion about the concept of public employee in Algerian Penal (Anti-Bribery) Law, see HANAN MOHAMMAD MALIKA, GRA'EM AL-FASAD: AL-RASHWA WA AL-AKHTELAS WA TAKSO'UB AL-MOUAZAF AL-'AMM MN WAR'A WAZIFATO FI AL-FIQH AL-ISLAMI WA KANOUN MOUKAFAHT AL-FASAD AL-GAZA'RI MOUKARNN BEBA'D AL-TESHRIA'AT AL-'ARABIYA [CORRUPTION CRIMES: BRIBERY, EMBEZZLEMENT OF PUBLIC FUNDS, AND TRADING IN INFLUENCE IN ISLAMIC JURISPRUDENCE AND THE ALGERIAN COMBATING LAW ON CORRUPTION COMPARED WITH SOME ARABIC LEGISLATIONS], 45-50 (2010). This definition is very close to the same definition of the public official stated in Article 2/a, b, and c of the UNCAC. See, e.g., ANTI-CORRUPTION LAW OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA (ALJUMHURIYAH AL JAZA'IRIYAH AD DIMUQRATIYAH ASH SHA'BIYAH) “*Kanoun Moukafaht Al-Fasad Al-Gaza'ri*”, *Al-Jarida Al-Rasmiyya*, 22 Nov. 2006, at art. 2/6 (Algeria).

³³⁷ See HANAN MOHAMMAD MALIKA, GRA'EM AL-FASAD: AL-RASHWA WA AL-AKHTELAS WA TAKSO'UB AL-MOUAZAF AL-'AMM MN WAR'A WAZIFATO FI AL-FIQH AL-ISLAMI WA KANOUN MOUKAFAHT AL-FASAD AL-GAZA'RI MOUKARNN BEBA'D AL-TESHRIA'AT AL-'ARABIYA [CORRUPTION CRIMES: BRIBERY, EMBEZZLEMENT OF PUBLIC FUNDS, AND TRADING IN INFLUENCE IN ISLAMIC JURISPRUDENCE AND THE ALGERIAN COMBATING LAW ON CORRUPTION COMPARED WITH SOME ARABIC LEGISLATIONS], 45-50 (2010). This definition is very close to the same definition of the public official stated in Article 2/a, b, and c of the UNCAC. See, e.g., ANTI-CORRUPTION LAW OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA (ALJUMHURIYAH AL JAZA'IRIYAH AD DIMUQRATIYAH ASH SHA'BIYAH) “*Kanoun Moukafaht Al-Fasad Al-Gaza'ri*”, *Al-Jarida Al-Rasmiyya*, 22 Nov. 2006, at art. 2/b (Algeria).

³³⁸ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 1, 16 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>. Furthermore, international efforts and instruments address misconduct commonly linked with such criminal activities as money laundering, transnational organized crime, and the illicit trafficking of narcotics. *Id.* The Egyptian Prosecutor General reported that “the corrupt practices of the twenty-first century are difficult to investigate and prosecute due to their interregional and international nexus, considers that the legal framework complies with Egypt's obligations under the UNCAC.” *Id.* at 17.

Articles 103-112 should be clarified and simplified, with active and passive bribery acts being addressed and rewritten in distinct, parallel articles. The nature of the benefits accumulating from bribery should also be identified in detail to establish the line between what is acceptable and what is not. Egypt must also apply for accession to other universal instruments, such as the 1997 OECD Convention on Combating Bribery in International Business Transactions.³³⁹ Finally, the bribery of foreign public officials must be made very obvious as a criminal offense in compliance with the UNCAC.³⁴⁰

2. *Legislation on the Protection of Witnesses and Reporters*

Witnesses and reporters are not public officials and sometimes are exploited in various ways.³⁴¹ The detection, investigation, and prosecution of corrupt practices can be challenging, as corruption often includes influential public officials, business leaders, and firms with several measures to disguise their fraud and corruption.³⁴² Additionally, witnesses may decline to testify in corruption cases because they fear that presenting truthful and honest testimony might threaten and endanger them.³⁴³ To successfully fight corruption, the general public and employees who become conscious of corrupt and dishonest practices are encouraged to report such actions and to act as witnesses when necessary.³⁴⁴ Article 33 of the UNCAC requires state parties to consider presenting procedures and techniques to defend individuals who report criminal offenses.³⁴⁵ Such persons must be protected and kept safe from all forms of retaliation for their collaboration.³⁴⁶

In criminal law and criminal procedure, it is notable that various countries have implemented different means for the protection of witnesses without any bias or discrimination against the rights of the defendant.³⁴⁷

³³⁹ See generally KHALED SULTAN, GARA'MM AL-RASHWA FI 'AKOUD AL-TIJARAH AL-DAWLIYAH: DERASSH MOUKRNAH [BRIBERY CRIMES IN INTERNATIONAL COMMERCIAL CONTRACTS: A COMPARATIVE STUDY], (2009).

³⁴⁰ See UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 17. In this context, Egyptian nationals charged with crimes in other countries may be prosecuted by domestic authorities under Egyptian law.

³⁴¹ See generally GERRY FERGUSON, GLOBAL CORRUPTION: ITS REGULATION UNDER INTERNATIONAL CONVENTIONS, US, UK, AND CANADIAN LAW AND PRACTICE 998-1000 (Unvi. of Victoria 4th ed. 2022).

³⁴² See generally *id.*

³⁴³ See generally *id.*

³⁴⁴ See generally *id.*

³⁴⁵ See generally *id.*

³⁴⁶ See, e.g., G.A. Res. 58/4, annex, United Nations Convention against Corruption, art. 33, at 26 (Oct. 31, 2003) ("Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.").

³⁴⁷ See generally FERGUSON, *supra* note 341, at 1005.

Examples include suspending disclosure of the identities of witnesses, excluding the general public from the courtroom, non-declaration of victim and witness identities, allowing testimony to be presented via communications technology such as video or other suitable means, testimony behind screens or outside of courtrooms, and penalizing acts of intimidation, torture, and reprisal against witnesses and informants.³⁴⁸

Unfortunately, in most Arab countries, including Egypt—for decades—there was *no* particular statute governing overall protection for witnesses as required by the UNCAC.³⁴⁹ On the other hand, the Egyptian government has recently considered it due to its necessity in protecting reporters and witnesses of corruption.³⁵⁰ However, more measures to fill technical gaps in the legislation on the protection of reporters and journalists have been recommended.³⁵¹

Moreover, under Egyptian anti-bribery law, trading on one's position is criminalized even if the requested or promised action was not within the public official's authority.³⁵² The "duties of the position" are inferred as any act within the legal scope of the official's position.³⁵³ Where the act is inside the official's duties, the law does not differentiate between whether or not the official's performing substantive action or abstention was correct, proper, and approved by internal service rules.³⁵⁴ This element of the crime is satisfied even if the official wrongly or incorrectly believes or claims that the requested or promised act is within the official's duties.³⁵⁵ Government

³⁴⁸ See G.A. Res. 58/4, annex, United Nations Convention against Corruption, art. 33, at 26 (Oct. 31, 2003). See also *id.* at art. 32. See generally U.N. OFF. ON DRUGS & CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, UNITED NATIONS OFFICE ON DRUGS AND CRIME DIVISION FOR TREATY AFFAIRS (rev. 2nd ed. 2006). It is worth noting that the U.N. Legislative Guide for the Implementation of the UNCAC advocates that such actions should not be narrowly interpreted and should apply to all persons who collaborate in the criminal investigation and prosecution of corruption cases, whether or not they truly give testimony. *Id.* However, actual protection policies can be relatively expensive, and therefore, some countries lack such measures due to the absence of financial resources. *Id.*

³⁴⁹ See generally ABOU'AMER, *supra* note 294.

³⁵⁰ Law No. 58 of 1937 (Criminal Code), art. 22.

³⁵¹ See *Egypt: The Draft Law on Witness Protection Must Respect International Law*, ALKARAMA (June 3, 2013), <https://www.alkarama.org/en/articles/egypt-draft-law-witness-protection-must-respect-international-law>.

³⁵² Law No. 58 of 1937 (Criminal Code), art. 22.

³⁵³ *Id.*

³⁵⁴ See generally Ehab Yehia, *Egypt: Bribery Under Egyptian Law*, MONDAQ (Aug. 9, 2022), <https://www.mondaq.com/corporate-crime/1219438/bribery-under-egyptian-law>. For example, although a cook at a government hostel did not have a principal duty for scrutinizing the food delivered to the hostel, the cook—by virtue of his job—was in a situation to notify the proper authorities of any distasteful food delivered to the hostel. Therefore, a payment made to the cook—to persuade him to oversee and check the delivery of spoiled food—was bribery.

³⁵⁵ See, e.g., 18 U.S.C. § 201. According to 18 U.S.C. § 201 on bribery of public officials and witnesses, the term "official act" means "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *Id.*

interest will be equally harmed by this “illusory competency.”³⁵⁶ Not only should the integrity of the government’s work be protected, but also the administration’s reputation and the public’s trust in it.³⁵⁷ Thus, this element is established even if the appropriate relevant act is only indirectly related to the official’s duties.³⁵⁸ Therefore, it is necessary that public officials have competence (even in case of mistake), which permits them to perform administrative acts effectively.³⁵⁹

3. *Legal Entities Criminal Responsibility: What about Corporate Criminal Liability?*³⁶⁰

The current Penal Code does not cover the criminal responsibility of legal persons and entities.³⁶¹ Moreover, Egyptian law does not explicitly mention corporate liability.³⁶² Only natural persons acting as intermediaries may be convicted.³⁶³

It is problematic for the decision-maker to identify who may be engaged in bribing public officials, specifically with such complicated structures of

³⁵⁶ Law No. 58 of 1937 (Criminal Code), art. 22.

³⁵⁷ *Id.*

³⁵⁸ SULTAN, *supra* note 339, at 98-103; *Casier Criminel* [Criminal Case] case no. 575, session of 21 May 1999 (Fr.); *Casier Criminel* [Criminal Case] case no. 0209, session of 12 Dec. 1988 (Fr.). Concerning the notion of “Illusory Competency” including “Indirect, Temporal, and Partial Competence,” see André Vitu, *LE DROIT PÉNAL SPECIAL [PENAL LAW: THE SPECIAL PART]*, 292 (Tome 1 1982). See also REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, available at <http://www.oecd.org/dataoecd/24/50/2076560.pdf>.

³⁵⁹ See C. pén. art. 177. Pursuant to Article 177 of French Penal Code provides “that while not arising directly from his/her duties expressly created by statute or regulation (règlements), is nonetheless derived from those duties . . .” *Id.*

³⁶⁰ To strengthen the Egyptian consultation process and stay in conformity with the modern international improvements regarding integrity and business regulations, the government should regulate multi-national corporations and international associations in order to further combat corruption in Egypt. Creating a sound and comprehensive business environment and spreading codes of ethics to the Egyptian market will intensify accountability, shrink economic risks, and decrease several businesses’ production costs. See MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *BUSINESS ETHICS AND ANTI-BRIBERY POLICIES IN SELECTED MIDDLE EAST AND NORTH AFRICAN COUNTRIES* 21 (OECD & OCDE 2006).

³⁶¹ See *id.* at 28. In contrast, liability of legal persons (i.e., corporations) exists in some countries, such as Algeria, Bahrain, and Egypt, for other types of economic offenses which fall outside the scope of the bribery criminal act. *Id.*

³⁶² JEAN PRADEL, *DROIT PENAL GENERAL [PENAL LAW: THE GENERAL PART]*, 571-72 (10th ed. 1995) ; Caroline Février, *La responsabilité pénale des personnes orales [CRIMINAL LIABILITY OF LEGAL ENTITIES]*, *COURS DE DROIT PÉNAL* (2023), available at <https://aideauxtd.com/la-responsabilite-penale-des-personnes-morales/>; *REV. DE DROIT PÉNALE ET DE CRIMINOLOGIE [PENAL LAW AND CRIMINOLOGY L. REV.]*, 2 (1954).

³⁶³ JEAN PRADEL, *DROIT PENAL GENERAL [PENAL LAW: THE GENERAL PART]*, 180-83 (10th ed. 1995) (“[L]es personnes moral une volonté collective proper nee certes de la rencontre de volontés dvolontes née le bon déroulement de la réunion des volontés individuelles mais pouvant differer de la volonte de chacun des membres du groupement . . .”) (quoting Gaston Stefani, Gorges Levasseur, & Bernard Bouloc).

legal entities.³⁶⁴ Rules on the liability of legal persons for crimes are not universally stable due to the progression in techniques of corporate accountability for misconduct.³⁶⁵ Even after the uprising, it is unclear whether corporate liability might be implemented and applied in Egypt, as it is not explicitly provided under criminal law.³⁶⁶

In this regard, the Egyptian government representatives articulated that corporate responsibility might apply, even if they could not determine which article(s) addressed the liability of juristic persons or which type of accountability (criminal, civil, or administrative) applied.³⁶⁷ Three significant factors may weaken the liability concerning legal persons' bribery offenses: (a) liability is restricted to the acts of high-ranking officials such as senior managers, executive officers, and directors;³⁶⁸ (b) the identification, prosecution, and conviction of a natural individual are mandatory in order to initiate criminal proceedings against a juristic person;³⁶⁹ and (c) cases where a legal person pays on behalf of a correlated legal person (*e.g.*, a subsidiary) are not enclosed.³⁷⁰ As for this type of liability, it is unclear whether the punishments of debarment from public procurement deals or postponement from any future competitive bidding are possible under the current law.³⁷¹

Laws on corporate accounting, internal controls, and auditing, which exist in various Middle Eastern countries, might play a vital harmonizing role in dissuading bribery of public employees.³⁷² In particular, the obligation that businesses undergo regular independent auditing may provide a vital precaution for the deterrence system.³⁷³ In the same attitude, many countries have fashioned accounting and recordkeeping criteria to increase the transparency of commercial transactions.³⁷⁴

³⁶⁴ OECD et. al., ANTI-CORRUPTION ETHICS AND COMPLIANCE HANDBOOK FOR BUSINESS 49 (2013).

³⁶⁵ See generally Mohamed 'Arafa, *Battling Corruption within a Corporate Social Responsibility Strategy*, 21 IND. INT'L. & COMP. L. REV. 397 (2011).

³⁶⁶ See generally C. pén. art. 121/2.

³⁶⁷ See THIERRY DALMASSO, LA RESBONSABILITE PÉNALE DES PERSONNES MORALE [THE CRIMINAL LIABILITY OF MORAL PERSONS], 61 (1995).

³⁶⁸ See generally 'Arafa, *supra* note 365, at 399 ("In this regard, corporations must see themselves as having social responsibilities to enable meaningful progress towards fighting corruption.").

³⁶⁹ See generally *id.* at 400 ("By adopting specific codes of conduct, many companies have begun to promote integrity, transparency, and benevolent corporate citizenship both internally and externally.").

³⁷⁰ See generally *id.* at 400-01 ("[T]hey must also work toward removing corruption, bribery, and unethical behavior from corporate culture. Several corporations have argued that accountability and transparency reduce corruption, with administrative integrity being crucial to achieving better governance. Yet while the world realizes the importance of eliminating corruption, the problem of how to curb this phenomenon persists.").

³⁷¹ See, *e.g.*, Law No. 159 of 1981 (Corporate Law), *Al-Jarida Al-Rasmiyya*, 1981, vol. 40 (Egypt).

³⁷² See, *e.g.*, *id.*

³⁷³ See, *e.g.*, *id.*

³⁷⁴ See, *e.g.*, Law No. 95 of 1992 (Capital Market Law), *Al-Jarida Al-Rasmiyya*, 1992 (Egypt) (explaining that such countries include Egypt, Lebanon, and Jordan. These countries have engaged in notable efforts in enhancing transparency and corporate financial reporting requirements with

In Egypt, all companies, along with commercial firms registered and listed under the Corporate Law No. 159 of 1981, have an obligation to prepare and present annual audited financial reports consistent with the accounting, disclosure, and auditing standards in the Accounting Practice Law No. 133 of 1951.³⁷⁵ In some countries, the inadequacy of bookkeeping and auditing conditions may involve severe punishment.³⁷⁶

As a result, recent assessments by Egypt's Capital Market Authority publicized that a number of Egypt's listed enterprises had not fulfilled the disclosure requirements and audit reports in compliance with the requisite reporting format.³⁷⁷ It is understood from the *IMF Report on the Observance of Standards and Codes: Accounting and Auditing in Egypt*, issued in August 2002, that due to some uncertainty in the legal provisions regarding the civil and criminal responsibilities of parties in charge of bringing misleading or improper information in audited financial reports, Egyptian accountants and auditors had effective immunity for professional wrongdoing which opens the door to escape impunity.³⁷⁸ In this context, it is highly recommended that corporations consider bribery, fraud, non-compliance with registration, disclosure requirements, and wrongful intermediation reasonable grounds for ineligibility for future competitive commercial dealings.³⁷⁹

Under some Middle Eastern jurisdictions, while workers of a corporation that bribes a public official may be sanctioned for their conduct, the company may not.³⁸⁰ Some Middle Eastern courts have delivered decisions holding that "corporate entities are *not* criminally responsible for bribery criminalities committed by their officials."³⁸¹ For instance, the Egyptian Supreme Court has long held that "the individual servants who commit the crime of bribery, *not* their corporate employer, are personally responsible."³⁸²

international accounting and audit standards. Further, in Egypt, pursuant to the Capital Market Law No. 95 of 1992 requires all registered enterprises to prepare financial declarations in compliance with IAS).

³⁷⁵ SULTAN, *supra* note 339, at 98-102.

³⁷⁶ *See generally* CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE, EGYPTIAN CITIZENS' PERCEPTIONS OF TRANSPARENCY AND CORRUPTION (2009) (stating that these measures advance the transparency values of commercial operations in order to achieve credibility only when an adequate managerial controlling mechanism is in place to implement them effectively. For instance, in Egypt, no operative devices exist for imposing sanctions on auditors and inspectors who fail to comply).

³⁷⁷ *See generally id.*

³⁷⁸ SULTAN, *supra* note 339, at 98-103.

³⁷⁹ *Id.* at 102-03.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 29 ("The Egyptian Court of Cassation has long ruled that Juridical persons are not criminally responsible for crimes committed by their representatives. The persons who commit the crime are the ones who are personally responsible . . ."). It should be noted that it could be argued that there

In Egypt, under Article 16 of Law No. 80 of 2002 on money laundering, in cases where money laundering is committed by a legal entity, this entity shall be *jointly* liable for the payment of any monetary sanctions and damages if the crime was committed by a servant on behalf of the legal entity.³⁸³ Efforts to avoid and detect money laundering in connection with the bribery of public officials can attain actual outcomes only when anti-money laundering laws explicitly list bribery as a *predicate* criminal offense.³⁸⁴

4. Codes of Conduct for Public Officials

To erect barriers against corruption, it is vital to ensure that ethical standards are well-established and familiar to public officials and employees. Public officers should be subject to definite standards and ideals, such as integrity, honesty, and the correct, impartial, honorable, and proper performance of their offices.³⁸⁵ To accomplish this, domestic statutes must

is no uniform definition of the public official in the criminal code corresponds to the agreed concept of administrative law scholars. *See id.* at 25. As the term of public official in administrative law is not general or comprehensive, to apply to the meaning of the public employee regarding the public interest's crimes stated in the penal code, as these sorts of criminal acts represents—in the eyes of law—breach, trafficking or exploitation of the employee's position, and duties of public office as set out in law. *See id.*

³⁸³ Law No. 80 of 2002 (Anti-Money Laundering Law “AMLL”), *Hosni Mubarak*, 2002, art. 16 (Egypt), as amended by Law No. 78 of 2003, *rabea al akhar*, 2003 (Egypt). Furthermore, according to Law No. 3/2005, promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, “[m]anaging persons of the legal entity are separately criminally liable under Article 25 if they had *knowledge* of the acts. The legal person is also *jointly* liable if the breach was committed by an employee acting in the name of the legal person or on its behalf.” Law No. 3 of 2005 (Protection of Competition & the Prohibition of Monopolist Practices), 2005 (Egypt), available at <https://www.gafi.gov.eg/English/StartaBusiness/Laws-and-Regulations/Publishing Images/Pages/TradeLaws/Law%20No%203%20of%202005%20Promulgating%20the%20law%20on%20Protection%20of%20Competition%20and%20Prohibition%20of%20Monopolistic%20Practices.pdf>.

³⁸⁴ *See* EXECUTIVE REGULATIONS OF THE ANTI-MONEY LAUNDERING LAW, art. 2 (Egypt), available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjrk5Pl07eCAxV8C0QIHRFCD0IQFnoECA0QAQ&url=https%3A%2F%2Fwww.antimoneylaundering.org%2Fdocument%2Fdefault.aspx%3FdocumentUId%3DA19810E2-AFC9-4185B856B5B8088BB2B1&usg=AOvVaw1J3oNTaCzhr75fxR3dMmi8&opi=89978449>. Also, this statute governs the “Know-Your Customer” policy and obliges banks to report suspicious operations to Egyptian financial institutions, especially the newly-created financial intelligence unit set up at the Central Bank. *Id.* It should be noted that in the United Kingdom, the UK Bribery Act 2010 not only makes bribery and corrupt deeds illegitimate, but also holds UK corporations liable for failing to apply suitable procedures to prevent such acts by those employed for the firm or on its behalf, no matter where in the world the performance takes place. *The UK Bribery Act 2010: principles, offences, and penalties*, PINSENT MASONS (Aug. 18, 2023), <https://www.pinsentmasons.com/out-law/guides/the-uk-bribery-act-2010-principles-offences-and-penalties>.

³⁸⁵ ‘Arafa, *supra* note 365, at 397, 410 (“Most codes contain a statement of the corporation’s major philosophical principles and values and articulate the ethical parameters in guiding employees’ actions and behaviors. . . . Codes of ethics represent an important part of corporate culture and constitute an essential CSR tool. They should provide a supportive, moral framework for employees rather than constitute a repressive, dictatorial method of control over them.”).

include guidance on how public officials should conduct themselves in relation to those rules and norms and how they may be held liable for their activities and decisions.³⁸⁶

Experience shows that it is significant that the principles and ethical values be acknowledged and accepted by public officials.³⁸⁷ Best practices include improving guidelines through open discussion, consultation, and contribution rather than a top-down approach, supplementing moral norms to employment contracts, and systematic awareness-raising creativities.³⁸⁸ Many codes of conduct have anti-bribery and anti-corruption provisions.³⁸⁹ These provisions are stated either directly or indirectly, stressing the values of honesty, trust, integrity, transparency, accountability, and through rules governing gifts and hospitality.³⁹⁰

The advantage of such codes is that they coach public employees about the behavior to embrace in their day-to-day performance and update and inform citizens about the conduct they are entitled to assume from those who occupy public office.³⁹¹ Codes of conduct with detailed guidelines and rules promote practicality, making identifying and reporting violations easier.³⁹²

Having a code of conduct is *not* mandatory under current Egyptian law.³⁹³ However, it is a requirement under the UNCAC.³⁹⁴ Some public bodies, such as schools, universities, hospitals, banks, unions, and others, have voluntarily decided to have their own ethical codes.³⁹⁵ In the absence of such a code, conduct may diverge enormously from one public institute to another.³⁹⁶ Unlike other governmental administrative bodies, local public

³⁸⁶ See generally Charlotte Durrant, *What Are the Advantages and Disadvantages of Codes of Conduct in Regulating Moral Behavior in Business?* (2008) (unpublished student paper, 2008 Institute of Business Ethics essay competition postgraduate category winner) (on file with author).

³⁸⁷ See generally *id.*

³⁸⁸ 'Arafa, *supra* note 365, at 411 ("Ethical leadership is essential if codes of conduct are to be adhered to and are to be used to successfully regulate the moral behavior of employees. If employees consider corporate leadership unethical, codes of conduct will fall into contempt. Therefore, codes are only as good as the leaders who advocate for them.").

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ See generally Durrant, *supra* note 386.

³⁹² See generally *id.* See also UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 33.

³⁹³ See generally SOFIA WICKBERG, OVERVIEW OF CORRUPTION AND ANTI-CORRUPTION IN EGYPT (Transparency Int'l 2015), available at https://knowledgehub.transparency.org/assets/uploads/helpdesk/Country_profile_Egypt_2015.pdf.

³⁹⁴ See UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 8.

³⁹⁵ See, e.g., IESBA CODE OF ETHICS PROHIBITIONS APPLICABLE TO AUDITS OF PUBLIC INTEREST ENTITIES, INT'L ETHICS STANDARDS Bd. FOR ACCT. (2009), https://www.ethicsboard.org/_flysystem/azure-private/meetings/files/6013_0.pdf.

³⁹⁶ See generally *Ethics Codes: How they can curb corruption in public service if part of a smart anti-corruption infrastructure*, ANTI-CORRUPTION EVIDENCE RSCH. PROGRAMME (Sept. 30, 2020), <https://ace.globalintegrity.org/ethics-codes-how-they-can-curb-corruption-in-public-service-if-part-of-a-smart-anti-corruption-infrastructure/>. Concerning the public officials at lower ranking, the law leaves all the sanctions imposing on them to the State Civil Servants Law that entirely states

employees do not have a law requiring local public governmental establishments to have codes of conduct.³⁹⁷ Thus, local bureaucrats have not established such codes.³⁹⁸

5. *The Actus Reus (Material Element)*

a. *Bribery Criminal Activity*

Active bribery provisions are very concise and only consider active bribery as it is related to passive offenses.³⁹⁹ For instance, Article 107/b states, “The briber and mediator shall be punished with the penalty prescribed for the bribe taker.” Articles 109/b-1 and 103-105/b take a similar approach.⁴⁰⁰ It is not apparent whether active bribery is penalized in line with the sanction incurred by the public servant or with the punishment effectively pronounced.⁴⁰¹ On the other hand, the crime of passive corruption for actions in compliance with the public employee’s ordinary duties is penalized under Article 103 of the Penal Code and Article 18 of Law No. 62 of 1975 on illegal profit-making.⁴⁰² According to this statute, any person’s wealth should reflect their legitimate sources of income, meaning that their wealth should be proportionate to their income, and a *fortiori* notion should be applied to public officials because of the power and trust delegated to them by the public.

Consequently, there should not be any discrepancy between the genuine sources of income of a public employee and the extent of assets under their control.⁴⁰³ In case of incongruity, competent authorities should thoroughly examine the discrepancy.⁴⁰⁴ The public official should also provide a

the sanctions but not the forbidden conduct. *See, e.g.*, Law No. 81 of 2016 (promulgating the Civil Service Law), 2016 (Egypt). Thus, a specific code of conduct should be launched to govern such types of relationships. *Id.*

³⁹⁷ *See generally* Law No. 62 of 1975 (Illegal Profit-Making), *Al-Jarida Al-Rasmiyya*, 1975, art. 18 (Egypt); *cf. id.* at art. 2.

³⁹⁸ *See generally* WICKBERG, *supra* note 393. In this sense, TIC underscored the importance to adjust and modernize the standing law governing State Civil Servants to guarantee the protection of the individual along with the community rights and sets obvious foundations for punishment and reward through decentralization of public administration, evolving disciplinary procedures, stimulate transparency, accountability, and fight administrative corruption. *Id.*

³⁹⁹ *See generally* MOHAMMAD Z. ABOU‘AMER, KANOUN AL-IJRA‘AT AL-JINA‘IYAH [CRIMINAL PROCEDURAL LAW], (2008).

⁴⁰⁰ *Id.*

⁴⁰¹ *See* ABOU ‘AMER, *supra* note 294. In other words, active corruption—the giving of bribes or any other undue advantage—to public officials, is equally penalized. *Id.*

⁴⁰² *See id.*; *see also* Law No. 62 of 1975 (Illegal Profit-Making), *Al-Jarida Al-Rasmiyya*, 1975, art. 18 (Egypt).

⁴⁰³ *Cf. id.* at art. 2.

⁴⁰⁴ *See id.* at arts. 5-6.

reasonable legal ground for it.⁴⁰⁵ If he cannot justify the difference, he should be convicted of illicit enrichment because the wealth he cannot prove or clarify might result from a bribe, embezzlement, or other corrupt practice.⁴⁰⁶ However, for the crime to be proven, it must be shown that it was “intentionally” committed according to the general principles of the Egyptian Penal Law.⁴⁰⁷

Therefore, the *actus reus* of a passive bribery offense entails requesting or soliciting a bribe when an official indicates to another person that the latter must pay a bribe for the official to act or refrain from acting.⁴⁰⁸ Articles 103-105/b covers such circumstances.⁴⁰⁹ The soliciting of a bribe must be in consideration of one of the following acts achieved by a public servant:

1. Performing an act that falls within the scope of their duties;⁴¹⁰
2. Performing an act that is wrongfully considered as falling within the scope of their competencies;⁴¹¹
3. Abstaining from carrying out an act falling within the scope of their duties or committing a violation of any of their duties;⁴¹²
4. Carrying out unintentionally an act that falls within the scope of their duties or which is wrongly assumed to fall within their scope of duty, pretending that it falls within their scope of work, abstaining from carrying it out, or committing a breach of their duties;⁴¹³
5. Accepting a gift from a person in return for rendering a service (benefit) that falls within the scope of their duties;⁴¹⁴ and
6. Performing or abstaining from carrying out an obligation falling within the scope of their work or committing a breach of his duties due to a request, recommendation, or intermediation.⁴¹⁵

⁴⁰⁵ See *id.* at art. 2.

⁴⁰⁶ *Id.*; see also ABOU ‘AMER, *supra* note 294.

⁴⁰⁷ ABOU ‘AMER, *supra* note 294.

⁴⁰⁸ *Id.*; see also Egyptian Penal Code Egyptian Crim. Code, arts. 103-105/b (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

⁴⁰⁹ *Id.*

⁴¹⁰ See Egyptian Penal Code Egyptian Crim. Code, arts. 103 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

⁴¹¹ See *id.* at art. 103(b). See generally AMMAL ‘OSMAN, SAHRAH KANUN AL-‘UQUBAT—AL-KSEM AL-KHAS [EXPLANATION OF THE PENAL LAW: THE SPECIAL PART], (1990) (explaining the definition of bribery and its elements).

⁴¹² See Egyptian Penal Code Egyptian Crim. Code, arts. 104 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

⁴¹³ *Id.*

⁴¹⁴ *Id.* at art. 105.

⁴¹⁵ *Id.*

In this regard, the act of soliciting a bribe is complete once a public official requests or solicits the bribe.⁴¹⁶ There need *not* be an agreement between the briber and the official or evidence of agreement of the corrupt act.⁴¹⁷ However, “receiving”⁴¹⁸ or “accepting”⁴¹⁹ a kickback can occur only when an official actually receives a bribe *after* an agreement pursuant to Articles 103-105/b, which does not create any of the differences mentioned above.⁴²⁰

Further, “offering” occurs when a briber designates that they are ready to give a payoff.⁴²¹ Under Article 109/b-1 of the Penal Code, “imprisonment and a fine . . . shall be imposed on whoever offers a bribe, even when not accepted.”⁴²² “Promising” refers to a briber who agrees with a public employee to provide a bribe (*e.g.*, where the briber enters an agreement with a public servant).⁴²³ Under Articles 107 and 107bis, an illicit promise is generated by any advantage or benefit gained or accepted by the public official.⁴²⁴ “Giving” occurs when the briber actually transfers the bribe.⁴²⁵ These acts constitute active bribery.⁴²⁶ By the same token, under Article 107bis, an illegal gift is any benefit obtained or accepted by a public official.⁴²⁷

⁴¹⁶ See NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 146.

⁴¹⁷ ‘AMMAL ‘OSMAN, SAHRAH KANUN AL-‘UQUBAT—AL-KSEM AL-KHAS [EXPLANATION OF THE PENAL LAW: THE SPECIAL PART], (1990).

⁴¹⁸ *Id.* at 278. This is an act in which the employee receives the advantage through bribery. *Id.* The subject of this promise represents the cornerstone of the material element as the most serious images of bribery are directly preceded by a promised bribe. *See id.* at 290-99.

⁴¹⁹ *Id.* In this context, the court can determine whether there was an acceptance from all the circumstances surrounding the incident, including circumstantial evidence prior to the acceptance. *Id.* The acceptance may also be made verbally or in writing, explicitly or implicitly. ‘AMMAL ‘OSMAN, SAHRAH KANUN AL-‘UQUBAT—AL-KSEM AL-KHAS [EXPLANATION OF THE PENAL LAW: THE SPECIAL PART], 290-99 (1990). According to the Egyptian jurisprudence, the *tacit* acceptance is required to be in a serious act of free will and in a full conscious. *Id.*

⁴²⁰ *See generally* ABOU‘AMER, *supra* note 294.

⁴²¹ *Id.*

⁴²² *Id.* Attempted bribery also constitutes an offense under Article 109/b-1, when a bribe is offered but not accepted and subject to imprisonment and a fine of EGP 500 to 1,000. *See generally id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ MOHAMMAD ZAKY ABOU‘AMER, KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS, AL-GOZ‘E AL‘AWEL: AL-GRA‘MM AL-MODRAA BELMASLAHA AL-‘AMA, AL-RASHWA WA AL-GRA‘MM AL-MOLHKA BEHA [THE EGYPTIAN PENAL LAW—THE SPECIAL PART, PART I: THE CRIMINAL OFFENCES AGAINST PUBLIC INTEREST, BRIBERY AND THE RELATED-CRIMINAL OFFENCES], 617-21 (1983).

⁴²⁶ *Id.*

⁴²⁷ *Id.* For instance, two high-ranking Egyptian officials were arrested on charges of taking bribes from building firms seeking contracts in a multi-million-dollar restoration project in Cairo. Both defendants were being investigated about the criminal charges against them, but no details were given on the companies or on the amounts of money that allegedly changed hands. *Id.*

Regarding criminal complicity (aiding and abetting) under Egyptian criminal law, the *mere* offer of a bribe could not be criminally punished.⁴²⁸ Thus, the first paragraph of Article 41 of the Penal Code provides that “[e]xcept in cases where the law specially provides otherwise, an accessory to an offence shall incur the penalty prescribed by law for the offence.”⁴²⁹ From this provision, the legislation appears to endorse the same sentence for both the principal and accomplice.⁴³⁰ On the other hand, an attempt to bribe a public official would not be penalized if it did not result in the official’s acceptance of the bribe.⁴³¹ In a remarkable decision regarding bribery criminalization, the Egyptian Supreme Court held:

Bribery has not been committed by the briber unless the public official seriously intends to accept it, but not when he pretends to accept the inducement, since then—as in the categorical refusal—there is not a [r]eal

⁴²⁸ Accordingly, Article 39 of the Penal Code defines “principal” as follows: “A person is concerned as a principal in the commission of an offense: (1) who [commits] such offense whether alone or in conjunction with others; or (2) who in the case of an offence consisting of two or more acts, [knowingly] participates in such offence by doing one or more such acts . . .” Egyptian Penal Code Egyptian Crim. Code, arts. 39 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. On the other hand, Article 40 of the same code defines “accomplice” as follows: “A person is concerned as an accessory in the [c]ommission of an offense: (1) who instigates to the commission of the act constituting the offense, provided that the act is the consequence of such instigation; or (2) who is a party to an arrangement having for its object the commission of the offense, provided that the offense is the consequence of such arrangement, or (3) who [knowingly] supplies weapons or other implements or means employed in the commission of the offense, or in any manner aids the principal or principals concerned in the offense in the preparation, facilitation, or commission thereof.” *Id.* at art. 40. Also, Article 42 of the same code stipulates that: “An accessory shall be liable to the penalties prescribed by law, even though the [principal] may exempt from all penalty by reason of some ground of justification or by reason of the absence of criminal intent on his part or by reason of any other circumstances personal to himself.” *Id.* at art. 42. With respect to the criminal participation of the criminal offense rules in Egyptian law, *See generally id.* at arts. 39–40, 42. *See generally* AHMAD ‘AWAD BELAL, MABAD’E KANUN AL-‘UQUBAT AL-MASRY: AL-KESM AL-‘AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES], 295–347 (2004). For further discussion on accomplice criminal liability in the Egyptian legal system, *see generally* Mohamed ‘Arafa, *Criminal Complicity, Accomplice Criminal Liability to the Criminal Offences: A Comparative Analysis between the Egyptian Criminal Law System and the Criminal Law System of the United States of America*, 67 REVISTAS JURÍDICAS SÍNTESE REVISTA DE ESTUDOS CRIMINAIS [PONTIFICAL CATHOLIC U. CRIM. STUD. L. J.] (2018).

⁴²⁹ Law No. 58 of 1937 (Criminal Code), art. 22.

⁴³⁰ *See id.* Accomplices, including third-party beneficiaries—any person who is assigned to receive the payoffs or benefit, or learns of it, and is agreed to by the bribe-taker—are sentenced to one-year in jail and a fine equal to the amount of the bribe under Article 108/b, if they are *knowingly* involved in the bribe. *Id.*

⁴³¹ *See id.*

trading or peddling by the official of his position . . . and the abuse of the official's position and trust does not exist⁴³²

b. Forms of Bribes

Bribes can take the form of both fiscal and non-fiscal advantages.⁴³³ Article 107 defines inducement as “any benefit obtained, accepted, or learned of by the bribe-taker or by the person he appoints to that end, shall be considered as a promise or donation, whatever its name or kind, or whether that benefit is physical or non-physical.”⁴³⁴

A review of anti-bribery provisions proposes a broad interpretation of what constitutes a bribe.⁴³⁵ Many such provisions apply to any benefit or advantage granted.⁴³⁶ Accordingly, it may be tangible, such as a gift in cash or loans, or intangible, such as obtaining employment or a promotion for the official's relative or entertainment of a sexual or similarly inappropriate nature.⁴³⁷ By the same token, the benefit may be inferred from the terms of a

⁴³² ‘OSMAN, *supra* note 417, at 98-100. As a result, the Egyptian Penal Law was amended to prohibit offering a bribe. George Sadek, *Egypt: Ninth UN Anti-corruption Conference held in Sharm El-Sheikh*, LIBR. OF CONG. (Jan. 3, 2022), [https://www.loc.gov/item/global-legal-monitor/2022-01-03/egypt-ninth-un-anti-corruption-conference-held-in-sharm-el-sheikh/#:~:text=Article%20107\(b\)%20prohibits%20the,the%20bribe%20is%20not%20accepted.](https://www.loc.gov/item/global-legal-monitor/2022-01-03/egypt-ninth-un-anti-corruption-conference-held-in-sharm-el-sheikh/#:~:text=Article%20107(b)%20prohibits%20the,the%20bribe%20is%20not%20accepted.) For further discussion on the criminalization of attempted offenses in Egyptian criminal law, see AHMAD ‘AWAD BELAL, MABAD’E KANUN AL-‘UQUBAT AL-MASRY: AL-KESM AL-‘AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES], 265-69 (2004). In this context, Article 45 of the Egyptian Penal Code defines attempt as being “[t]he commencement of execution of an act with the intent to commit a felony or a misdemeanor if [c]ompletion thereof has been interrupted or has failed of effect owing to [c]ircumstances [independent] of the will of the party. Further, shall constitute an attempt neither the determination to commit the offense nor the preparatory acts for its commission.” See Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973, art. 45 (Egypt). See generally Albaer Sheron, *The Objective and Subjective Perspectives in the Theory of Criminal Attempt*, 7 L. J. L. & ECON. 254 (1974); ‘Arafa, *supra* note 365, at 399.

⁴³³ See AHMAD ‘AWAD BELAL, MABAD’E KANUN AL-‘UQUBAT AL-MASRY: AL-KESM AL-‘AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES], 265-69 (2004). In other words, bribes can take on several diverse shapes and forms, but typically they entail corrupt intent. *Id.* There will usually be a *quid pro quo* transaction that both parties will benefit. *Id.* A bribe could be the direct or indirect promise, offering, or authorization, of anything of value, offer or receipt of any kickback, loan, fee, reward or other advantage, or giving of aid, donations or voting designed to exert improper influence. *Id.*

⁴³⁴ See Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973, art. 45 (Egypt); see also ABOU‘AMER, *supra* note 294, at 74-76, 110-14, 152.

⁴³⁵ ABOU‘AMER, *supra* note 294, at 82-88.

⁴³⁶ *Id.* at 85-86.

⁴³⁷ *Id.* The Egyptian Anti-Bribery laws generally do not expressly allow promotional gifts, good-will presents, or loyal courtesies. *Id.* However, in practice and sometimes in the eyes of the law, socially accepted gifts are permitted, on certain occasions (*e.g.* the feast gift, the Islamic New Year or the end of Ramadan), tokens of appreciation or gratitude, invitations to events and if such gifts or activities are of minor and nominal value and falling within reasonable bounds of value and occurrence. *Id.* In addition, the size of the gift and its value may have significance in the decision of a public prosecutor to initiate or not the criminal motion and proceedings. *Id.*

contract.⁴³⁸ Thus, any special benefit an official obtains—for example, by selling his personal property for a price higher than its actual value or by purchasing property at a price less than its actual value—is considered a “benefit.”⁴³⁹ Egyptian law also does not distinguish between a benefit that an official personally receives and a benefit obtained for another party.⁴⁴⁰ For example, Articles 103, 103bis, 104, and 104bis apply to “every public official requesting [a benefit] for himself or for another,”⁴⁴¹ and Article 107 states that “any benefit obtained by the recipient of the bribe, or by the person designated by him [to receive the bribe] or knowing and agreeing to it, shall be considered a promise or a gift.”⁴⁴²

The Egyptian anti-bribery provisions are so broadly drafted as to reach virtually any attempt to trade on a government position, trust, or its duties, regardless of the timing of the benefit.⁴⁴³ Therefore, an official may be deemed the recipient of a bribe even though he did not actually accept a payment.⁴⁴⁴ The Egyptian anti-bribery law considers an official’s *mere* request to be a completed crime, even if such request was not accepted by the other party, since an official who offers his or her position for trade is not in an inferior degree of criminality than the one who actually completes the bribery transaction.⁴⁴⁵

In summary, the recipient of the bribe obtains a sum in advance in exchange for performing or abstaining from an action.⁴⁴⁶ However, even if the recipient does not receive a benefit in advance, the crime is deemed complete when the recipient accepts the briber’s promise to pay a benefit at a later time.⁴⁴⁷ In this respect, it is worth noting that the crime of bribery is *not* “conditional” on the briber’s subsequent payment of the bribe because the official’s *mere* agreement to a later payment has already exploited their position and the public interest and trust have already been threatened by the official’s abuse of their position.⁴⁴⁸

⁴³⁸ MOHAMMAD ZAKY ABOU’AMER, *KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS, AL-GOZ’E AL’AWEL: AL-GRA’MM AL-MODRAA BELMASLAHA AL-‘AMA, AL-RASHWA WA AL-GRA’MM AL-MOLHKA BEHA* [THE EGYPTIAN PENAL LAW—THE SPECIAL PART, PART I: THE CRIMINAL OFFENCES AGAINST PUBLIC INTEREST, BRIBERY AND THE RELATED-CRIMINAL OFFENCES], 85-86 (1983).

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 82.

⁴⁴¹ *Id.*

⁴⁴² ‘OSMAN, *supra* note 417, at 300-03.

⁴⁴³ *Id.* at 304-06.

⁴⁴⁴ *Id.* at 308-10.

⁴⁴⁵ ABOU’AMER, *supra* note 394.

⁴⁴⁶ *Id.*

⁴⁴⁷ ‘OSMAN, *supra* note 417.

⁴⁴⁸ *Id.*

c. The Problem of “Facilitation Payments”

In many countries, including Egypt,⁴⁴⁹ it is a customary business practice to make gifts of small amounts to low-ranking government officials to facilitate or expedite a routine action or process.⁴⁵⁰ Egyptian penal law contains *no* provisions covering this type of payment, leaving considerable doubt.⁴⁵¹ Generally speaking, facilitation payments are “a form of bribery made for the purpose of expediting or facilitating the performance by a public official of a routine governmental action, and not to obtain or retain business or any other improper advantage.”⁴⁵² Although there are regulations governing facilitation payments to civil servants, the regulations are not effective in practice.⁴⁵³ Traditions and conventions developed over the past decades have firmly established and recognized this practice.⁴⁵⁴

⁴⁴⁹ Efforts of the European Union (EU) Member States’ self-governing national laws should not be ignored as they were committed to creating or drafting new laws, adapting these rules to fulfill the conditions and guidelines requisite under other adopted statutes. *See generally* Claudius O. Sokenu, *Bribery Act is Not Perfect but Brings UK into Line with OECD*, THE GUARDIAN (Feb. 4, 2011, 8:48 AM), <https://www.theguardian.com/law/2011/feb/04/bribery-act-delay>. A noticeable recent statute that has been gaining attention is the United Kingdom (UK) Bribery Act. *Id.* It has been described overbroad and more comprehensive than the Foreign Corrupt Practices Act (FCPA), a United States statute on corruption, because of its wide scope of application. *Id.* However, it is said to be bringing the UK in line with what is expected under the Organization for Economic Co-operation and Development (OECD) treaty. *Id.* This echoes that the UK Bribery Act is one of the most inclusive anti-corruption policies. *Id.* The UK Bribery Act 2010 makes no division between facilitation payments and complete bribery and corruption irrespective of size or domestic cultural prospects, even if that is “how business is done here.” *Id.* On the other hand, in case the facilitation payments are made under the use of force (duress, safety or security issues, or harm), the victim must contact the Group Compliance Officer and record the basic transaction within the consultant. Claudius O. Sokenu, *Bribery Act is Not Perfect but Brings UK into Line with OECD*, THE GUARDIAN (Feb. 4, 2011, 8:48 AM), <https://www.theguardian.com/law/2011/feb/04/bribery-act-delay>. For further details regarding the UK Bribery Act, *see generally* EOIN O’ SHEA, THE BRIBERY ACT 2010: A PRACTICAL GUIDE (Jordan Publ’g Ltd. 2011).

⁴⁵⁰ *See* Barry & Richard, *Doing business in Egypt? Corruption Risks Before & After the Bribery Act*, THEBRIBERYACT.COM (May 26, 2011, 2:56 AM), <https://thebriberyact.com/2011/05/26/doing-business-in-egypt-corruption-risks-before-after-the-bribery-act/#:~:text=Corporates%20and%20individuals%20involved%20directly,force%20of%20the%20Bribery%20Act.&text=Egyptian%20law%20has%20a%20wide,the%20breadth%20of%20the%20law>.

⁴⁵¹ *See* Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973 (Egypt).

⁴⁵² *Id.* Facilitation payments are prohibited by Egyptian Civil Servants Law. *Id.* Facilitation payments are normally needed by low-level and low-income bureaucrats in order to attain ranks of service to which one would formally be authorized without such payments. *Id.*

⁴⁵³ *See* Mike Koehler, *The Payments...Would Not Constitute Facilitation Payments for Routine Governmental Actions Within the Meaning of the FCPA*, FCPA PROFESSOR (Nov. 10, 2010), <https://fcpprofessor.com/the-payments-would-not-constitute-facilitation-payments-for-routine-governmental-actions-within-the-meaning-of-the-fcpa/>.

⁴⁵⁴ *See* Egypt Risk Report, GAN INTEGRITY (Sept. 30, 2020), <https://www.ganintegrity.com/country-profiles/egypt/#:~:text=EG%20Egypt%20risk%20report&text=Corruption%20is%20an%20obstacle%20for,the%20forms%20of%20corruption%20encountered>. These conventions became stronger than the laws criminalizing such corrupt practices. *Id.* This report cites that “facilitation payments

The practice of facilitation is illegal in most countries.⁴⁵⁵ To combat the practice, the Egyptian government should specify a subsection within the bribery statute to include facilitation payments that follows the United States Foreign Corrupt Practices Act of 1977.⁴⁵⁶ It must provide guidance on what is and is not permissible, emphasizing how to evaluate what is acceptable, and also specifying what is never acceptable, what is usually permissible, and under which circumstances the evaluation criteria should apply from the legal point of view.

6. *The Mens Rea (Moral Element) - Corruption and Criminal Intent—Faute Intentionnelle*⁴⁵⁷

In order to have culpability, an offender must have knowledge of all elements creating the crime and a free will directed towards their realization.⁴⁵⁸ Knowledge and free will must be present for the accused's criminal to be found guilty.⁴⁵⁹ Otherwise, the *mens rea* will fail.⁴⁶⁰

A corruption pact appears to be required.⁴⁶¹ In other words, there must be a meeting of minds between the briber and the recipient of the bribe.⁴⁶² Even though this pact is not a definite agreement, it indicates that the briber knew and recognized that the purpose of their proposal was to *bargain* for a public decision or omission and that the public official was mindful and aware that they would receive an illegal gain in return.⁴⁶³ Therefore, the *mere* offer of a bribe is prohibited explicitly and, thus, punishable under the Penal Statute.⁴⁶⁴ Accordingly, for the payor to be guilty of bribery, they must have

and gifts are an established part of 'getting things done,' despite these practices being criminalized under Egyptian law." *Id.*

⁴⁵⁵ See GLOBAL INTEGRITY REPORT 2008 (Glob. Integrity 2019), available at https://www.globalintegrity.org/wp-content/uploads/2019/08/GIRScorecard2008_Egypt_comments.pdf.

⁴⁵⁶ See generally Mike Koehler, *The Payments...Would Not Constitute Facilitation Payments for Routine Governmental Actions Within the Meaning of the FCPA*, FCPA PROFESSOR (Nov. 10, 2010), <https://fcpprofessor.com/the-payments-would-not-constitute-facilitation-payments-for-routine-governmental-actions-within-the-meaning-of-the-fcpa/>; Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929, 1003 (2012).

⁴⁵⁷ 'OSMAN, *supra* note 417, at 286 in "LES MOTIVATIONS EN DROIT PENAL" [MOTIVATIONS IN PENAL LAW], ("L'intérêt personnelle a agir de l'acteur de l'infraction de, la cause psychologique particuliere qui a détermine son acte.").

⁴⁵⁸ See BELAL, *supra* note 433, at 135.

⁴⁵⁹ *Id.* at 136-40.

⁴⁶⁰ *Id.* at 192. Consequently, gifts, promises or gratification which have been offered or taken without consideration in line with mutual practice, are not considered an illegal inducement. ABOU'AMER, *supra* note, 399, at 179; SULTAN, *supra* note 339, at 108-09.

⁴⁶¹ ABOU'AMER, *supra* note 399, at 102-07.

⁴⁶² *Id.*

⁴⁶³ *Id.* at 104-06.

⁴⁶⁴ *Id.* An official's acceptance of the bribe must be serious and correct; thus, if he pretends to accept the bribe in order to assist the authorities' apprehension of the offeror *flagrante delicto*, then the

intended to reward the employee for a previous act, induce the official to perform or abstain from performing an act, or misuse his office.⁴⁶⁵

Criminal intent may be proven in various ways, including circumstantial evidence.⁴⁶⁶ It is not necessary that intent be expressly declared by the recipient of the bribe or by the briber, orally or in writing.⁴⁶⁷ Rather, courts are guided by the circumstances surrounding the accusation.⁴⁶⁸ Of course, the burden of proving the criminal intent—as a general principle—is placed on the state’s public prosecution.⁴⁶⁹

Lastly, Egyptian laws illustrate that proof of criminal intent can be a delicate problem.⁴⁷⁰ For this reason, many Middle Eastern countries have an incentive to amend their criminal statutes to allow evidence of both the offer of bribery and the purpose behind the bribe to convict someone of a felony.⁴⁷¹ The intent of the public servant regarding the promises or offers does not need to be analyzed.⁴⁷²

VI. PRIVATE SECTOR (“BUSINESS-TO-BUSINESS”) CORRUPTION AND OTHER RELATED CORRUPTION OFFENSES

Except for the largest enterprises, business ethics still seem to be unfamiliar or uncertain for many in Egypt, even after the ousting of President Mubarak.⁴⁷³ Typically, there is no mutual concept or term used in Arabic for

correct acceptance does not exist, and the matter is merely an offer without acceptance, for which only the offeror of the bribe is penalized, under Article 109bis of the Egyptian Penal Law. *See* Egyptian Penal Code Egyptian Crim. Code, art. 109 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. In this respect, it should be noted that pursuant to Article 30 of the Egyptian Criminal Procedural Code No. 150 of 1950 “[a] crime is *flagrante delicto* during its commission or just afterwards, when the victim chases the offender or the public raises a shout and cry immediately after it, or the offender is found nearby with weapons, implements, documents, or other items that suggest he or she committed or participated in the offense; or there are other signs or indications of his guilt.” *See id.* at art. 30.

⁴⁶⁵ Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973 (Egypt).

⁴⁶⁶ ABOU’AMER, *supra* note 399, at 107.

⁴⁶⁷ *Id.* at 107-09.

⁴⁶⁸ *Id.* at 110-15.

⁴⁶⁹ *See* Ferial Aboushoka, *Nearly 20 Years of Legal Limbo: Egypt’s Illicit Gains Framework*, GLOB. ANTICORRUPTION BLOG (Feb. 20, 2023), <https://globalanticorruptionblog.com/2023/02/20/nearly-20-years-in-legal-limbo-egypts-illicit-gains-framework/>. For further discussion on the availability of specific criminal intent and general intent required by some criminal scholars, *see* ABOU’AMER, *supra* note 399, at 102, 106, 152-53.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 154-57.

⁴⁷² *Id.* at 159-60.

⁴⁷³ *See generally* Marc Michael, *Tackling Corruption in Revolutionary Egypt*, OPEN DEMOCRACY (Mar. 29, 2011), <https://www.opendemocracy.net/en/tackling-corruption-in-revolutionary-egypt/> (“Corruption is the word on every Egyptian’s lips as the misuse of public funds and office is exposed

the notion of business morals.⁴⁷⁴ The Arabic term “*akhlak el-maha’ne*” (professional morality) is an adaptation of the extensively used stance for “religious morality.”⁴⁷⁵ The current Penal Code does not explicitly cover private corruption.⁴⁷⁶ Nevertheless, it seems from the interpretation of the language of Article 109bis of the criminal code that corruption between two private individuals or entities could be penalized.⁴⁷⁷ The Penal Code states, “If the offer is made to [someone] other than a public official/civil servant, the penalty shall be detention for a period not exceeding two years or paying a fine not exceeding two hundred pounds.”⁴⁷⁸ However, this language could be interpreted by the courts and different jurisdictions as applying to two private persons.

Historically, former President Nasser’s nationalization policy of most large enterprises and commercial businesses in 1961, including various Egyptian joint stock syndicates, momentarily extended the prominence of government-owned companies.⁴⁷⁹ Accordingly, the promotion of business ethics and corporate governance would enhance the development of moral codes and other corporate measures along with their social responsibility aimed at precluding private-sector bribery.⁴⁸⁰ For instance,⁴⁸¹ a forum

from Mubarak downwards. The answer is to repeal the semi-privatization of the state bureaucracy and introduce a minimum wage.”).

⁴⁷⁴ See generally *id.*

⁴⁷⁵ See generally Areej Abdullah Algumzi, *The Impact of Islamic Culture on Business Ethics: Saudi Arabia and the Practice of Wasta* (Aug. 2017) (Ph.D. thesis, Lancaster University) (on file with Lancaster University). With robust emphasis on the public service’s integrity or from a broader corporate governance perspective, most governments appear to have a goal on the fight against bribery. See generally Marc Michael, *Tackling Corruption in Revolutionary Egypt*, OPEN DEMOCRACY (Mar. 29, 2011), <https://www.opendemocracy.net/en/tackling-corruption-in-revolutionary-egypt/>. In Egypt, the administration has fortified the development of good performs, including values of conduct among their own corporate sector along with barring corruption, bribery, and other related dishonest practices in business transactions. See generally *id.*

⁴⁷⁶ See generally Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya, 1973* (Egypt).

⁴⁷⁷ *Id.*

⁴⁷⁸ See *id.*

⁴⁷⁹ ABOU’AMER, *supra* note 399, at 157-58. As a result, the Penal Law was amended in 1962, adding Article 106bis/A to cover the acts of management and employees of joint stock companies. *Id.* The explanatory memorandum for this 1962’s amendment stated that: “[Article 106bis/A] was added to fit the development of a new society and harmonize with its requirements. Thus, it explicitly states that bribery involving shareholding companies shall be punished in the same manner as bribery involving public positions.” *Id.* Although this amendment made bribery a *felony* for employees of joint stock companies, there is some opposition among Egyptian jurists on whether the felony’s provision applies only if the joint stock company is providing services for public benefit. *Id.* The legislative history of Article 106bis/A reveals the intention of the legislator to apply that felony’s provision of the Penal Law to public officials, albeit including employees in—at least some—government-owned companies. *Id.*

⁴⁸⁰ See generally NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12.

⁴⁸¹ There was also great efforts accomplished in the region by the Centre for International Private Enterprise, a Washington-based non-profit governmental organization. See *Egypt: Socio-Economic*

discussion about good governance and integrity standards was held in ‘Amman, Jordan on October 6, 2002.⁴⁸² The forum targeted building public-private partnerships in Middle Eastern countries, including Egypt, Tunisia, and Morocco, in order to promote economic growth and social progress in the Arab region.⁴⁸³

A. Implementing New Strategies: Anti-Corruption Provisions Including Private Codes of Conduct and Compliance Programs

Corporations, business organizations, and industry partnerships may engage in the battle against corrupt conduct.⁴⁸⁴ They may fight corruption through individual strategy or collective movements, whether special sector or multi-industry, and they may combat corruption at the local, national, or global levels.⁴⁸⁵ Codes of conduct replicate the ethical values of corporations.⁴⁸⁶ Compliance plans and procedures guarantee that the moral ideals of an establishment are implemented effectively and that they indicate any threats that may arise in the course of business dealings.⁴⁸⁷ Each firm defines the measures that are most beneficial to its compliance philosophy.⁴⁸⁸ One critical component is the spreading of the norms comprised in codes of ethics and compliance policies to all employees and workers, along with a clear punitive policy for non-conformity.⁴⁸⁹

In Egypt, prevailing corporate governance principles and codes of conduct do not commonly contain anti-corruption or anti-bribery provisions.⁴⁹⁰ In light of Article 12 of the UNCAC, government organizations have recently made efforts to engage the private sector in the fight against

Development Through Inclusive Decision-Making and Private Sector Reform, CTR. FOR INT’L PRIV. ENTER., <https://www.cipe.org/projects/egypt/> (last visited Nov. 29, 2023).

⁴⁸² See MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 19.

⁴⁸³ *See id.*

⁴⁸⁴ *See id.*

⁴⁸⁵ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 144.

⁴⁸⁶ *Id.* at 157.

⁴⁸⁷ *Id.* at 149-50. *See generally* Ahmad A. Alshorbagy & Radwa S. Elsaman, *Doing Business in Egypt after the January Revolution: Capital Market and Investment Laws*, 11 RICHMOND J. OF GLOB. L. & BUS. 43, reprinted in [2011] 4 J. AFRICAN & INT’L. L. 2) (“surveys the economic activity in Egypt from a legal perspective. It evaluates Egyptian laws affecting economic activity by analyzing the effectiveness and shortcomings of relevant laws and proposing the necessary amendments to those laws in light of the Revolution’s impact.”).

⁴⁸⁸ NATIONAL INTEGRITY SYSTEM STUDY: EGYPT 2009, *supra* note 12, at 149-50.

⁴⁸⁹ *Id.* at 153-54. Further, the major Egyptian corporations have recognized codes of conduct and corporate governance guidelines. However, only transnational businesses seem motivated to design codes of conduct and compliance programs under the pressure from their chief international stakeholders. *Id.* at 149-50.

⁴⁹⁰ *See generally* Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973 (Egypt).

corruption, and there has been a growing number of private creativities to come to terms with corruption via preventive procedures.⁴⁹¹

However, the United Nations Global Compact (UNGC) was introduced in 2004.⁴⁹² This initiative asks businesses around the globe to voluntarily commit to internalizing principles⁴⁹³ in the areas of human rights, labor, environment, and anti-corruption⁴⁹⁴ and to enter into partnerships that assist in advancing United Nations (UN) goals such as the Millennium Development Goals (UNMDG).⁴⁹⁵

It is highly recommended that large Egyptian national corporations, as well as other significant government agencies and NGOs, participate in a national dialogue.⁴⁹⁶ Furthermore, they should seek to attain extensive information on international standards aimed at evolving private integrity ideologies and advancing investment opportunities.⁴⁹⁷ For instance, the OECD Guidelines for Multinational Enterprises could establish an agenda to include useful values for national corporations.⁴⁹⁸ This framework could contain anti-bribery canons linked to managing and controlling subsidiaries, joint ventures, agents, contractors, and suppliers, as well as rules overriding political contributions, charitable donations, sponsorships, facilitation payments, gifts, and hospitality.⁴⁹⁹ Such guiding principles inspiring

⁴⁹¹ UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197. For an in-depth analysis concerning private sector actions to stem corruption, see G.A. Res. 58/4, annex, United Nations Convention against Corruption, art. 12, at 349 (Oct. 31, 2003).

⁴⁹² *Our Governance*, U.N. GLOB. COMPACT, <https://unglobalcompact.org/about/governance> (last visited Nov. 29, 2023). However, enterprises have made no special efforts to advance corporate compliance programs. *Id.*

⁴⁹³ *Id.* Based on some recent research, several Egyptian companies have joined the Global Compact. *Id.* The corporations have combined on a *voluntary* basis and are working to translate the Global Compact's nine principles into positive effective actions. *Id.* The Egyptian network is currently working to launch what so-called the National Corporate Governance (NCG) and CSR foundation in Egypt. *Id.*

⁴⁹⁴ See generally *Our Governance*, U.N. GLOB. COMPACT, <https://unglobalcompact.org/about/governance> (last visited Nov. 29, 2023) (explaining that principle 10 recommends “[b]usinesses should work against corruption in all its forms, including extortion and bribery.”).

⁴⁹⁵ See generally *Global partnership key to achieving Millenium Development Goals by 2015 – UN report* (2012), U.N. (July 12, 2012), <https://news.un.org/en/story/2012/07/414572>. See also *Anti-Corruption*, U.N. GLOB. COMPACT, <https://unglobalcompact.org/about/governance> (last visited Nov. 29, 2023) (discussing the processes and the reasons that led to the addition of the anti-corruption principle).

⁴⁹⁶ See generally *Principle Ten: Anti-Corruption*, U.N. GLOB. COMPACT, <https://unglobalcompact.org/what-is-gc/mission/principles/principle-10> (last visited Nov. 29, 2023).

⁴⁹⁷ See generally *id.*

⁴⁹⁸ See generally *2023 update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD, <https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm> (last visited Nov. 29, 2023) (outlining the OECD Guidelines and eleven particular policies behind them).

⁴⁹⁹ For instance, Orange (previously known as Mobinil), the country's leading cell phone operator designed a code of conduct for employees in 2005. It stated:

The first objective of these guidelines is to ensure that our employees do not participate in corrupt acts such as offering bribes with the aim of circumventing or breaking

employee awareness and disseminating business policies against bribery have not yet been fulfilled.⁵⁰⁰

Furthermore, corporate social responsibility (CSR)⁵⁰¹ is becoming pervasive in the business sector, as many companies are beginning to recognize that practicing CSR is vital for their public image.⁵⁰² This is imperative if they want to conduct business in Egypt or elsewhere with foreign corporations.⁵⁰³ Within the current Egyptian corporate culture, two non-binding strategies have formalized the exposure of non-financial

Egyptian laws, regulations, and ethical standards. The second objective is to ensure that our employees do not receive gifts in return for illegal or illegitimate favors.

YVES GAUTHIER, CODE OF CONDUCT: OUR COMPANY VALUES AND COMMITMENTS 17 (MOBINIL 2005), available at <https://www.orange.eg/en/about/company-overview/Documents/CodeofConductEn-2012.pdf#:~:text=The%20Code%20of%20Conduct%20outlines%20the%20shared%20set,teams%2C%20departments%2C%20and%20the%20company%20as%20a%20whole>. Some of the most nationally advanced provisions include rules relating to gifts, hospitality or advantages, conflicts of interest, and specific provisions regarding the whistle-blowing channels through an internal audit control, recordkeeping, and fraud department. As a result, the non-compliance may end in disciplinary action. *See generally id.* *See also* Ahmad A. Alshorbagy, *Orascom Telecom Versus France Telecom: A Case Study on Egyptian Takeover Law*, 20 INFO. AND COMM. TECH. L. (2011).

⁵⁰⁰ *See generally* ‘Arafa, *supra* note 365.

⁵⁰¹ *Id.* at 399.

⁵⁰² *Id.* at 398-99. *See also* Mohamed ‘Arafa, *Corporate Social Responsibility and the Fight against Corruption: Towards the Concept of CSR in Egypt after the January Revolution*, 9 CORP. SOC. RESP. IN COMPAR. PERSP. 222, 199 (2014) (“CSR is slowly becoming a prominent theme in Egypt because of the country’s aggregate openness to the global and free-market economic system along with the boosted role of the private sector. As a result, the promotion of local business will play an imperative role in helping Egyptian corporations adapt to global markets. Moreover, the essential rationale is to use CSR as a means of building upon traditional values in order to balance and mediate between philanthropic traditions and modern economic structures.”).

⁵⁰³ ‘Arafa, *supra* note 365, at 398-99. *See also* Ahmad A. Alshorbagy, *CSR and the Arab Spring Revolutions: How is CSR Not Applied in Egypt?*, 34 WIS. INT’L L. J. 1 (2016) (explaining the CSR principles’ relationship to the Arab Spring uprisings, providing several examples on corporations’ ineffective social role in Egypt and their failure to mitigate the Revolution’s causes, describing CSR legal framework in Egypt, and analyzing CSR legal framework in order to demonstrate how corporations misuse CSR principles to promote private interests over social interests, which defeats CSR declared goals) (“[T]he importance of the CSR legal framework evolution and suggests broader perceptive of development; one that exceeds mere reasonable GDP rates and includes other social, cultural, and political aspects.”) (“Not only did corporations ignore CSR notions, but they also harnessed all of their abilities to exploit the fragile legal framework in all possible ways that extend to all aspects of CSR . . .”).

information.⁵⁰⁴ Both reports and booklets were published by the Egyptian Institute for Directors, chaired by the Ministry of Investment.⁵⁰⁵

The Guide to Corporate Governance Principles in Egypt (2005) counsels businesses in Egypt to comply for the benefit of the whole business climate.⁵⁰⁶ This document contains a contribution from the International Finance Corporation (World Bank Group) concerning the disclosure of social plans on transparency, integrity, credibility, and common interest dealings with the community.⁵⁰⁷ Anti-corruption policies are not directly incorporated into the corporate governance program in the private sector, but most corporate governance doctrines are anticipated to combat corrupt and fraudulent acts through rules regarding disclosure, transparency, internal auditing, supervising controls, protecting shareholders' rights, and conflicts of interest.⁵⁰⁸ In this context, "[g]ood corporate governance is a counterbalance to corrupt practices in the private business. Sound corporate governance practices attack the supply side of corrupt relationships by increasing transparency, reducing discretionary power, and holding decision-

⁵⁰⁴ 'Arafa, *supra* note 365, at 200-01 ("The motivation for CSR in Egypt differs from that of businesses operating internationally, as CSR is powerfully influenced by Egypt's religious beliefs. As such, Egypt has a powerful culture of giving, practiced in both its Islamic tradition of *zakâh* . . . CSR in Egypt is still observed as a non-institutionalized phenomenon and is understood mainly as a philanthropic concept. Egyptian businesses operate in an atmosphere where CSR compliance is mostly voluntary and many lacks the indispensable consistency and significance of purpose in their social responsibilities. After the revolution, several marketing campaigns focused on CSR to support ongoing societal development and sustainable economic improvement. The National Anti-Corruption Commission combats corruption, deals with conflicts of interest, promotes and defines the standards of integrity and transparency, develops the national strategy concerned with such matters, ensures the implementation of said strategy in coordination with other independent bodies, and supervises the concerned agencies specified by law. The Central Auditing Organization has control over state funds and any other body specified by law. . ."). *Id.* at 207.

⁵⁰⁵ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 37. The Egyptian Institute of Directors designs and delivers a wide variety of training courses and certificate programs covering all areas of corporate governance and integrity values. *Id.* These courses and programs are targeted not only at directors; board members and managers, but also at other interested parties. Generally, training is designed and delivered to specifically meet the practical needs of contributors from companies, smaller owned enterprises and State-owned enterprises. *Id.*

⁵⁰⁶ ZEYAD BAHAA EL DIN ET AL., GUIDE TO CORPORATE GOVERNANCE PRINCIPLES IN EGYPT 4 (OECD), available at https://www.ecgi.global/sites/default/files/codes/documents/egyptiancodeofcorporategovernance_en.pdf.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* Regarding the shareholders protection, see AHMAD A. ALSHORBAGY, PROTECTING MINORITY SHAREHOLDER RIGHTS IN EGYPTIAN PUBLIC CORPORATIONS: A COMPARATIVE STUDY IN CORPORATE GOVERNANCE AND SECURITIES REGULATION (LAP LAMBERT Acad. Publ'g 2012).

makers accountable.”⁵⁰⁹ Moreover, the Code of Corporate Governance⁵¹⁰ for the Public Enterprise Sector (2006) encompasses provisions from the OECD Guidelines on State-Owned Enterprises, even though it does not suggest any practical proposals concerning fraud and corruption.⁵¹¹ On the other hand, small and medium-sized enterprises (SMEs) suffer from corrupt practices as they encumber their businesses.⁵¹² As a result, entrepreneurs face countless difficulties, including bribes, kickbacks, and other time and asset-consuming conflicts.⁵¹³

B. Other Related-Corruption Offenses

Other corruption-related offenses include obstruction of justice,⁵¹⁴ which needs to be criminalized in Egypt as it is in the United States.⁵¹⁵ Furthermore, embezzlement, misappropriation, and diversion of property are criminalized in Article 112 *et seq* of the Penal Code.⁵¹⁶ Penalties are life

⁵⁰⁹ Todor Yalomov and Boyan Belev, *Examples/lessons learned in Bulgaria and transition countries*, in 1 CORPORATE GOVERNANCE: AN ANTIDOTE TO CORRUPTION (Shkolnikoy ed. 2002), available at http://pdc.ceu.hu/archive/00001434/01/Corporate_Governance.pdf.

According to the UNGC website:

The rapid development of rules of corporate governance is also prompting companies to focus on anti-corruption measures as part of their mechanisms to protect their reputation and the interests of their shareholders. Their internal controls are increasingly being extended to a range of ethics and integrity issues, and a growing number of investment managers are looking to these controls as evidence that companies undertake good business practices and are well managed.

Principle Ten: Anti-Corruption, U.N. GLOB. COMPACT, <https://unglobalcompact.org/what-is-gc/mission/principles/principle-10> (last visited Nov. 29, 2023).

⁵¹⁰ See generally Khaled Dahawy, *Developing Nations and Corporate Governance: The Story of Egypt*, RESEARCHGATE, Jan. 2007 (examining the importance of corporate governance in its required economic restructure, measuring the implementation and/or defiance of corporate government disclosures, and asking for an urgent need to educate and train Egyptian stakeholders about corporate governance focusing mainly on the benefits of corporate governance).

⁵¹¹ See generally *id.*

⁵¹² PETER WILKINSON, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY COMMENTARY 1 (Susan Côté-Freeman 2008).

⁵¹³ See generally ‘Arafa, *supra* note 365, at 399.

⁵¹⁴ *Obstruction of Justice*, CORNELL L. SCH., https://www.law.cornell.edu/wex/obstruction_of_justice (last visited Nov. 9, 2023). Obstruction of justice by definition is an attempt to intervene with the administration of the courts, the judicial system or law enforcement executives. *Id.* It may comprise intimidating, hiding evidence or interfering with an arrest. *Id.* It is something a person does to hinder the administration of a court process or proper discharge of a legal duty. *Id.* In general, this crime is committed in order to delay a proper achievement of the rule of law. *Id.*

⁵¹⁵ See, e.g., U.S. Att’y Off. N. Dist. of Ohio, *Egyptian Nationals Found Guilty of Obstruction of Justice*, THE FBI (Oct. 5, 2009), <https://archives.fbi.gov/archives/cleveland/press-releases/2009/cl100509.htm#:~:text=Steven%20M.%20Dettelbach%2C%20United%20States%20Attorney%20for%20the,Court%20Judge%20Solomon%20Oliver%2C%20Jr.%20in%20Cleveland%2C%20Ohio>.

⁵¹⁶ MOHAMMAD ZAKY ABOU‘AMER, KANUN AL-‘UQUBAT, AL-KSEM AL-KHAS, AL-GOZ‘E AL‘AWEL: AL-GRA‘MM AL-MODRAA BELMASLAHA AL-‘AMA, AL-RASHWA WA AL-GRA‘MM AL-MOLHKA BEHA [THE EGYPTIAN PENAL LAW—THE SPECIAL PART, PART I: THE CRIMINAL

imprisonment and detention, which can be either for a limited duration or the duration of the prison term.⁵¹⁷ The most significant of these crimes is the crime of trading in influence.

1. *Trading or Peddling in Influence*⁵¹⁸

One scholar stated, “[t]he extent of corruption at the local level led a top official in the former President’s office to say: ‘Corruption in local government has reached our knees.’ The disagreement built upon this statement to develop one of its own: ‘Corruption at local government has reached our throats.’”⁵¹⁹ There is an immense difference between these two phrases. While both acknowledge that there is corruption at the lower level among junior officials, the former outlook on resolving corruption is easier than the latter, but the latter is more accurate.

In the same vein, Article 106/b criminalizes the use of real or fake authority to obtain, or attempt to obtain, any official order, decision, emblem, delivery order, construction contract, employment, favor, or advantage of any kind.⁵²⁰ Strictly speaking, the offense specifically targets the act of influencing public officials through a triangular linkage between the bribee,

OFFENCES AGAINST THE PUBLIC INTEREST, BRIBERY AND THE RELATED-CRIMINAL OFFENCES], 165-244 (1983).

⁵¹⁷ *Id.* at 163-244.

⁵¹⁸ In other words, the action of receiving or giving rewards to public officials for the purpose of influencing the official’s decision-making in the discharge of his or her public function usually called “influence peddling,” “trading in influence,” or “influence-trafficking.” Yet some countries restrict this criminal offense to civil servants. Such is the case in Bahrain under Articles 202 and 203 of the Penal Code. *See* PENAL CODE OF THE KINGDOM OF BAHRAIN, *Al-Jarida Al-Rasmiyya*, 1976, at arts. 202-03 (Bahrain), available at https://sherloc.unodc.org/cld/uploads/res/document/bhr/1976/penalcode_html/Bahrain_Penal_Code_Decree_No_15_of_1976_EN_translation_-_non_official.pdf.

⁵¹⁹ *See, e.g.*, Al-Masry Al-Youm, *Court sentences former presidential chief of staff to 7 years in prison*, EGYPT INDEP. (May, 27, 2012), <https://www.egyptindependent.com/ex-chief-presidential-staff-sentenced-7-years-imprisonmentn1/> (“Cairo Criminal Court sentenced former presidential Chief of Staff [the late] Zakariya ‘Azmy to seven years in prison and fined him L.E. 36 million for abusing power to generate illicit gains of more than L.E. 42.6 million during his time in office.”). In this sense, ‘Azmi charged with implant and political influence for the unjust enrichment based on gaining money, gifts, and obtaining donations by foreign heads of state as well as by senior foreign business officials, and property to abuse his position (peddling in office) resulted in the non-suitability with the financial disclosure statements provided. *See, e.g.*, Law No. 62 of 1975 (Illicit Enrichment Apparatus “IEA”), *Al-Jarida Al-Rasmiyya*, 7 July 1975, art. 2 (Egypt). For further details on this crime, *see also*, ‘Arafa, *supra* note 6, at 13-15. (“[A] few years ago, a law concerning illegal profit-making was challenged before the Supreme Court, which held it was suspected of being *unconstitutional* because it reverses the presumption of innocence which is protected by the 1971 abrogated constitution [and the 2012 Constitution] and by the United Nations ICCPR. . . . [H]owever, a retrial would not be possible as it contradicts the general rule of the criminal procedure, which embodies the presumption of innocence and places the initial burden of proof on the public prosecution and then shifting it to the *accused*.”).

⁵²⁰ ABOU‘AMER, *supra* note 516, at 148-56.

the trader in influence—who actually receives the bribe in order to obtain a favorable public decision—and the public official who grants an advantage to the briber.⁵²¹ This may include intermediation, where an agent indicates to the company that they are willing to give valuable advantages in order to exercise influence on a public official to obtain a decision favorable to the corporation.⁵²²

On the other hand, the punishment for influence trafficking is imprisonment for up to two years for the briber or a fine as a pecuniary sanction of EGP 200 and up to EGP 500 or one of both sanctions.⁵²³ The same penalties apply to bribe-takers acting in ways outlined in Article 104, *i.e.*, refraining from performing their work or defaulting on their duties.⁵²⁴

2. *Tax and Customs Administration as an Example of Trafficking in Influence*

The tax and customs sector represents one of the significant portions of the Egyptian economy and is subject to many acts of corruption.⁵²⁵ Both the tax authorities and customs administration play a fundamental role in the security and the public welfare of the citizens and are one of the primary sources of the state's national income.⁵²⁶ Bribery opportunities are widely prevalent as officers may be interested in misusing their public trust and exploiting their positions for personal benefits and private interests, while

⁵²¹ *Id.*

⁵²² *Id.* at 150-54.

⁵²³ *Id.* at 155.

⁵²⁴ *Id.* at 153-54.

⁵²⁵ *See, e.g., Egypt arrests tax authority chief on charges of receiving bribes*, REUTERS (Jan. 4, 2020), <https://www.reuters.com/article/us-egypt-corruption-idUSKBN1Z3085> (“The head of Egypt’s tax authority . . . has been arrested on charges of receiving bribes . . . ‘[I]t was proved through recorded phone calls and meetings that he received money and gifts as bribes’ . . . ‘[T]he (finance) minister affirmed that there is no one above law, and that there can be no covering up of any corruption’ . . . [E]gyptian authorities have made notable efforts [recently] to improve tax collection and curb tax evasion, tightening laws and launching public campaigns to encourage people to settle their tax affairs.”).

⁵²⁶ *See generally* GILLES MONTAGNAT-RENTIER, THE MULTIFACETED ROLE OF CUSTOMS AND ITS IMPORTANCE FOR THE ECONOMIC SOCIETY (IMF eLibrary), available at <https://www.elibrary.imf.org/display/book/9798400200120/CH001.xml>. On February 28, 2002, the biggest bribery scandal of 2002 in Egypt is an example. The Supreme State Security Court imprisoned the former Finance Minister Mohi El-din El-Gharib for nine years. El-Gharib, three customs officials, and three businessmen tycoons were found guilty of profiteering and receiving bribes from three tycoon importers, in return for permitting them to avoid the payment of the required customs fees. *See generally* Gamal Essam El-Din, *The Business of Bribery*, ALAHRAM WEEKLY (June 13/19, 2002), <https://english.ahram.org.eg/WriterArticles/Gamal-Essam-ElDin/289/0.aspx> (“In the second harshest verdict handed down to an official charged with corruption . . . Maher El-Guindi, a former governor, was sentenced to seven years.”).

businesses or customers may search for an illicit way to avoid paying taxes or expediting customs measures through the payment of bribes.⁵²⁷

In this event, various aspects contribute to the rampant corrupt acts in tax and customs administration, such as the complexity of laws, rules, and procedures, as well as the level of control and discretionary power granted to public servants in the decision-making process.⁵²⁸ Thus, accountability and reliability within the tax and customs system require enhancement through more clarification and simplification of the tax and customs systems. This may be accomplished by reducing personal contact between public officials and taxpayers and implementing a method for assessing potential risk. Further, the administration should consider creating integrity measures, staff norms, reporting procedures (including self-assessment, direct submission, and reducing bureaucracy), and punishment instruments, which are suggested to enhance accountability and reliability in the tax system.

The Egyptian government, NGOs, and civil society have attempted to address corruption and bribery as a rampant cultural phenomenon.⁵²⁹ The following section sheds light on the defects of certain criminal provisions regarding the criminal sanctioning policy of corruption and proposes reforms in the criminal justice policy based on the UNCAC.

VII. THE PUNISHMENT, SENTENCING GUIDELINES AND THE PROSECUTORIAL JURISDICTION

A. Criminal Punishments of Corruption: Bribery Watchdogs Bite Selectively

Corruption and bribery are fraught matters, and several individuals are restrained from joining the war against them unless stimulated to do so by a

⁵²⁷ See generally Gamal Essam El-Din, *The Business of Bribery*, ALAHRAM WEEKLY (June 13/19, 2002), <https://english.ahram.org.eg/WriterArticles/Gamal-Essam-ElDin/289/0.aspx>; see also *Egypt Sentences Ex-minister Youssef Boutros Ghali*, BBC NEWS (June 4, 2011), <https://www.bbc.com/news/world-middle-east-13654926> (“Egypt’s former Finance Minister Youssef Boutros Ghali has been given a 30-year jail sentence over corruption charges and to pay back 60 million L.E.”); see also *id.* (“The court found him guilty of having used 102 cars waiting in customs—including six luxury cars for personal benefit—in an action which ‘greatly harmed the financial interests, violated bidding procedures laws, and cost the state treasury,’ court said.”). Additionally, he was found guilty of having exploited the Ministry of Finance’s assets for his personal electoral campaign, and printing materials at the expense of the ministry. *Id.* Right now, Ghali is on the Interpol’s wanted list based on a red-warrant issued against him. *Id.*

⁵²⁸ See generally RITA RAMAHLI, EGYPT: ADDING A MILLION TAXPAYERS (Celebrating Reforms 2007).

⁵²⁹ See generally *Egypt risk report*, GAN INTEGRITY (Sept. 30, 2020), <https://www.ganintegrity.com/country-profiles/egypt/#:~:text=Bribery%2C%20embezzlement%2C%20tampering%20with%20official,part%20of%20Egyptians%27%20everyday%20life>.

central government.⁵³⁰ The corruption expert Ahmad Shaker ‘Ashour wrote, “[t]he state investigates corruption but usually only after officials are out of office, and only with the green light from above. We need to prosecute these officials while they are in office and abusing power.”⁵³¹

On the surface, Egypt appears to be making progress in confronting corruption.⁵³² In recent years, especially after the resignation of President Hosni Mubarak, state investigations have caught corrupt government officials and leading businesspeople, including prominent members of the former ruling NDP.⁵³³

In order to fight corruption, the law must create effective, proportionate, dissuasive, and adequate penalties for bribery. Sentences should be severe and equivalent to those applicable for other grave criminal acts.⁵³⁴ Criminal sanctions should be similar for both active and passive corruption and applicable to all persons engaged in the crime. In this respect, agents and their corporations should be held responsible for active corruption. Some jurisdictions hold companies liable to complementary civil and disciplinary penalties instead of criminal punishments.⁵³⁵ The majority trend, however, is to make such companies subject to corporate criminal liability.⁵³⁶

⁵³⁰ See generally Global Programme against Corruption et al., U.N. Manual on Anti-Corruption Policy 1, 5 (2001) (unpublished manual) (on file with author), available at <https://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>. A cultural factor is that Egyptians are individualistic *per se* and prefer to work alone rather than in groups or teams. See generally Tarek Radwan, *Individualism versus Community in the Egyptian Psyche*, ATL. COUNCIL (Sept. 19, 2012), <https://www.atlanticcouncil.org/blogs/menasource/individualism-versus-community-in-the-egyptian-psyche/>.

⁵³¹ Cam McGrath, *Egypt: Corruption Watchdogs Bite Selectively*, GLOB. ISSUES (July 8, 2010), <https://www.globalissues.org/news/2010/07/08/6232>.

⁵³² See generally BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338.

⁵³³ Cam McGrath, *Egypt: Corruption Watchdogs Bite Selectively*, GLOB. ISSUES (July 8, 2010), <https://www.globalissues.org/news/2010/07/08/6232>. The latest big catch is Ibrahim Suleiman, a former housing minister and Ex-NDP ex-parliamentary representative, found of profiteering and misappropriating public funds during time in office. See, e.g., Reuters Staff, *Egypt ex-housing minister gets 8 years jail for graft*, REUTERS (March 29, 2001, 7:16 AM), <https://www.reuters.com/article/egypt-verdict/egypt-ex-housing-minister-gets-8-yrs-jail-for-graft-idUKL6E8ET5GC20120329>.

⁵³⁴ Penal sanctions are always linked with the provisions regulating the giving or receiving of bribes. MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 25. Punishments primarily include custodial terms along with fines in countries such as Bahrain and Egypt, in addition to the confiscation of the bribe. *Id.* The level of sanctions applicable to the offenders diverges greatly among countries, so it might be an extremely harsh or severe sanction, such as a prison term of up to twenty-five years as in Egypt. *Id.*

⁵³⁵ Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J., 126, 130 (2008).

⁵³⁶ See *Corporate Criminal Liability*, FRESHFIELDS, <https://www.freshfields.us/insights/campaigns/global-enforcement-outlook/corporate-criminal-liability/> (last visited Nov. 29, 2023). Further, the tender, bids, and auction laws of many countries like Egypt—as stated before—provide for the disqualification of bidders who have been guilty of bribery crimes. See, e.g., Law No. 89 of 1998 (Tenders and Auctions Law), *monakasat* [debates], 1998 (Egypt).

Furthermore, statutes need intermediate measures to identify, trace, recover, freeze, and seize the proceeds and instruments of corruption.⁵³⁷ Remarkably, due to the communal historical and ethical concerns shared by various nations who anticipated taking a strong stand against corrupt practices in public services, the Egyptian bribery law penalizes recipient public officials more often than their bribers.⁵³⁸ Even though many criminal jurists have critiqued this, it is still ubiquitous in Egypt.⁵³⁹

B. Penalties for Bribed Public Officials and Third-Party Beneficiaries

Under Articles 103 and 103bis of the Penal Law, sanctions in the form of life imprisonment and fines of at least EGP 1,000 and not exceeding the donation or the promise given⁵⁴⁰ may apply to a civil servant having acted within the duties of their office.⁵⁴¹ In contrast, if the bribe was anticipated to

⁵³⁷ In other words, bribes and any profit therefrom must be confiscated. Confiscated proceeds may be monies, physical objects (possibly purchased with the proceeds of a bribe), or intangible assets (e.g. shares in a company).

⁵³⁸ ABOU'AMER, *supra* note 516, at 107-11.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 108-10. In practice, bribery charges do not entail more than three years' imprisonment. Article 14 of Law No. 80 of 2002 on money laundering provides for imprisonment of up to seven years and a fine twice the value of the property involved in the offense. Fiscal sanctions for subsequent offenses range between EGP 100 and 500. *See* Egyptian Crim. Code, art. 44 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. *See also* C. pén. arts. 132/17, 131/26 (following a similar approach). The French Penal Code states: "No penalty may be enforced where the court has not expressly imposed it. The court may decide to impose only one of the penalties applicable to the offense before it." Article 231/26 reads:

Forfeiture of civic, and family rights covers: (1) the right to vote; (2) the right to be elected; (3) the right to hold a judicial office, or to give an expert opinion before a court, or to represent or assist a party before a court of law; (4) the right to make a witness statement in court other than a simple declaration; (5) the right to be tutor or curator. . . . [F]or forfeitures of civic, civil, and family rights may not exceed a maximum period of ten years in the case of a sentence imposed for a felony and a maximum period of five years in the case of a sentence inflicted for a misdemeanor. The court may impose forfeiture of all or part of these rights. The forfeiture of the right to vote or to be elected imposed pursuant to the present Article also entails prohibition or in capacity to hold public office.

Further, Article 131/27 of the same code reads:

Where it is incurred as an additional penalty for a felony or a misdemeanor, the prohibition to exercise a public office or a professional or social activity is either permanent or temporary. In the latter case, the prohibition may not exceed a term of five years

Article 121/7 of the same statute provides:

The accomplice to a felony or a misdemeanor is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice. *See id.* at arts. 131/27, 121/7.

⁵⁴¹ ABOU'AMER, *supra* note 516, at 107-11.

make the official refrain from a function of their position or to act “outside the scope of his/her duty or competence,” then Articles 104 and 104bis provide that, in addition to the prison sentence, the public official will be penalized by a doubled fine.⁵⁴²

The law also contains a set of particularly deterrent ancillary penalties,⁵⁴³ such as the stripping of rights and privileges relating to official duties, dismissal from office for up to ten years under Article 24, disbarment from any public position or any public procurement opportunity, hindering of any decorations and medals, banning from eligibility under Article 25,⁵⁴⁴ and disbarment from holding a government position under Article 26.⁵⁴⁵

Thus, bribes that induce an official act within their responsibilities are punished less severely than bribes that infringe on their duties.⁵⁴⁶ This is because the latter offense is considered to involve not only the reception of an unjustified reward by a public official but also to be intended to cause such an official to breach the duties of the office and public trust.⁵⁴⁷ It may be considered as an aggravating circumstance.⁵⁴⁸ Under Article 108, if the purpose of a bribe is to commit an act that the law punishes more severely,

⁵⁴² *Id.* at 112.

⁵⁴³ *Id.* In any event, a public official who commits bribery is also subject to disciplinary penalties, essentially a matter of administrative law rather than criminal law. *Id.* at 114-15.

⁵⁴⁴ Egyptian Penal Code Egyptian Crim. Code, art. 25 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. If the judge imposes the felony punishment on the official receiving the bribe, the official must be deprived of his rights and privileges as provided in Article 25 of the Penal Law. *Id.* Thus, if the official is dismissed from membership in public or local legislative bodies, the official may be shown leniency and convicted to a misdemeanor jail sentence in lieu of the felony penalty, in which case, under Article 27, he/she is banned from membership in legislative bodies for a period of not less than twice the period of the applicable misdemeanor jail term. *See id.* at arts. 25, 27.

⁵⁴⁵ *Id.* at arts. 24, 26. Accomplices, including third-party beneficiaries—an agent who is assigned or hired to take the donation or benefit and is agreed to by the bribee—are criminally liable and subject to a one-year imprisonment and a fine equal to the amount of the bribe under Article 108bis, if they are knowingly or purposely engaged in the bribe. *Id.*

⁵⁴⁶ ABOU'AMER, *supra* note 516, at 108.

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* On the other hand, some Arabic statutes make a distinction depending on whether or not the public servant who takes the payoff holds and exercises judicial duties. In those countries, the offense in regard to a judge or any member of the judicial authority is punished more severely than bribery of other public employees. MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 26.

such as treason,⁵⁴⁹ then the recipient of the bribe shall receive that punishment in addition to a fine for bribery.⁵⁵⁰

C. Penalties for Bribers and Intermediaries

Under Article 107bis of the Egyptian Penal Code, the briber and the intermediary are considered accomplices in the crime of bribery and shall receive the same punishment as the bribee.⁵⁵¹ Except for ancillary punishments, penalties for bribers and intermediaries are identical to sentences passed and inflicted on public officials.⁵⁵² However, the financial sanctions seem extremely low when measured against the amount of money that may be earned in winning a contract, for instance.⁵⁵³

D. Seizure and Confiscation and the Exemption from Criminal Liability

Because confiscation divests bribers of the proceeds of bribery transactions, it is one of the most effective measures for thwarting and sanctioning the bribery of government officials.⁵⁵⁴ Egyptian law provides for the seizure and confiscation of bribes, proceeds, and all advantages resulting from bribery.⁵⁵⁵ However, Article 107 provides that “[t]he briber or the

⁵⁴⁹ See, e.g., Egyptian Penal Code Egyptian Crim. Code, art. 80 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. More significant punishments will occur if the purpose of the gift or the promise received by the bribe-taker is to commit a serious or grave felony related to the national security of the state, such as treason or spying as these criminal acts incriminated by death penalty. *Id.*

⁵⁵⁰ *Id.* at art. 17. Further, Article 17 of the Egyptian Penal Code gives judges the authority to reduce punishment sentences if they decide that a condition of the accused—such as age, personality, health status, or a crime coupled with extenuating circumstances—requires such reduction, without needing to provide justification. *Id.*

⁵⁵¹ *Id.*; see also ABOU'AMER, *supra* note 516.

⁵⁵² Egyptian Penal Code Egyptian Crim. Code, art. 107 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

⁵⁵³ SULTAN, *supra* note 339, at 150-56.

⁵⁵⁴ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 15.

⁵⁵⁵ See Egyptian Penal Code Egyptian Crim. Code, art. 110, 30/1 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf. Article 110 of the EPC requires judges to order the confiscation of bribes as it provides that “[i]n all cases, confiscation will be ordered for what the briber or the intermediary paid as a bribe, in accordance with the preceding articles.” *Id.* Thus, confiscation is a “supplementary” punishment, and a “mandatory” one at the same time. *Id.* In all other cases, the confiscation is subject to the general rule of Article 30/1 of the same law which provides for the seizure and confiscation of all proceeds and equipment used in the act of corruption. See *id.* at art. 30/1. Thus, the rights of an innocent third party will be safeguarded. *Id.* (“In this respect, an innocent third party is an individual who does not participate in the bribery and who had an in-kind claim to the gift presented.”).

intermediary shall be exempted from punishment . . . if he/she reports the crime to the authorities or confesses [to the crime].”⁵⁵⁶ From the philosophical and moral perspective, the goal of this clause is to protect the public interest, enhance public trust, and assist the government in proving acts of corruption, as bribery represents a crime of dark numbers⁵⁵⁷ by improving the efficiency of criminal prosecution.⁵⁵⁸ Although this provision applies only to the active briber, it creates some grounds for concern because it may lead to serious law enforcement gaps in cases of grand corruption.⁵⁵⁹

Egyptian law provides two methods for obtaining an exemption from punishment and prosecution of bribery: one may either report bribery or confess to it.⁵⁶⁰ Reporting bribery to the administrative and judicial authorities occurs before the discovery of the offense, whereas confessing to bribery occurs after the discovery, the apprehension of the defendants, and the initiation of criminal proceedings.⁵⁶¹ The exemption is reserved for the briber or the intermediary.⁵⁶² The recipient of the bribe may not utilize this exemption.⁵⁶³ Egyptian Penal Law does not establish any formal or specific conditions relating to a confession of a bribe; there are no restrictions in terms of time, place, or manner.⁵⁶⁴ Hence, the judge should not place any restrictions on it but simply examine the confession to confirm its meaning and verify that the admission⁵⁶⁵ is authentic, clear, unambiguous, detailed, and from a mature individual before a judicial authority.⁵⁶⁶ However, it is still

⁵⁵⁶ See *id.* at art. 107.

⁵⁵⁷ The dark number or figure of a crime is a term used by criminologists and sociologists to describe the amount of unreported and undiscovered crimes, which calls into question the reliability of official crimes statistics. For further explanation on the dark number of the crime, see generally SUE TUS REID, *CRIME AND CRIMINOLOGY* (McGraw-Hill Humanities/Soc. Sci./Language 9th ed. 1999).

⁵⁵⁸ SULTAN, *supra* note 339, at 171-75.

⁵⁵⁹ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 20; see also GEORGE MOODY-STUART, *THE COSTS OF GRAND CORRUPTION* (Inst. of Econ. Aff. 1996).

⁵⁶⁰ ABOU'AMER, *supra* note 516, at 128-32.

⁵⁶¹ *Id.*

⁵⁶² *Id.* In other words, such exemption from punishment goes beyond the general defenses in penal codes and can be used to circumvent liability by a defendant. *Id.* For further discussion concerning the general and specific defenses in penal law, see generally BELAL, *supra* note 433, at 265-69.

⁵⁶³ *Id.* at 267-68.

⁵⁶⁴ ABOU'AMER, *supra* note 516, at 129-30.

⁵⁶⁵ *Id.* The government should verify the confession by presenting precise evidence of proof, correct documents, and essential information about the crime and the perpetrators which lead to their conviction. See Egyptian Penal Code Egyptian Crim. Code, art. 84 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

⁵⁶⁶ *Id.* In addition, the confession must not to be under coercion. Noor Mahdy, *Invalidity of A Confession*, ANDERSON (March 7, 2023), <https://eg.andersen.com/invalidity-of-a-confession/#:~:text=Despite%20this%2C%20a%20confession%20given,cannot%20legally%20be%20relied%20upon>. For further discussion on the legal requirements for confessions in criminal cases, see YASSER FAROUK, AL'ITRAF AL-MA'FY MN 'UQUBAT AL-RASHWA: FALSAFATOH,

debatable whether perpetrators frequently use this provision for their own benefit.⁵⁶⁷ If they do, it may explain the relatively small number of individuals who are criminally prosecuted for active corruption and bribery.⁵⁶⁸ When investigations are initiated, corporate employees or representatives accused of bribing seem to succeed in negotiating immunities in return for their collaboration, while corrupt public officials are convicted.⁵⁶⁹

Overall, the deterrent value of criminal sanctions has been questionable.⁵⁷⁰ In addition, there are some uncertainties over the implementation of corporate liability.⁵⁷¹ Therefore, it is highly recommended that the Egyptian government assess, review, and amend its provisions concerning criminal liability and punishment involving corruption, specifically, the provision allowing exemption from bribery.⁵⁷² The criminal sentence should fit the crime in cases of natural and legal persons engaged in active and passive bribery.⁵⁷³ The legislation needs to consider both petty and grand corruption.⁵⁷⁴ The majority of criminal bribery offenses in Egypt are petty and involve low-ranking officials, but after the revolution, it seems that the rule of law will be respected, but it still needs to be revised.⁵⁷⁵ Such crimes need not be penalized by severe fines.⁵⁷⁶ Grand corruption, however, should be sanctioned by heavy financial penalties that reflect the seriousness of the offense (*e.g.*, breach of competition provisions or money laundering).⁵⁷⁷ Moreover, because arguments for the defense offer much room for debate, the general lines of defense should be permitted, and any fraud, corruption, or bribery-specific defense should be obliterated.⁵⁷⁸

E. Immunity, Privileges, and Statute of Limitations

Several gaps persist in Egypt's legal framework that undermines the anti-corruption fight.⁵⁷⁹ One significant gap in the law relates to conflicts of

MAHIYATOH, DAWABTOH, ATHAROH [THE IMPUNITY FROM BRIBERY OFFENCE BY CONFESSION: LEGISLATIVE HISTORY, DEFINITION, REQUIREMENTS, AND EFFECTS], 232-56 (2011).

⁵⁶⁷ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 27.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.* at 6.

⁵⁷¹ *Id.* at 20.

⁵⁷² *Id.* at 21.

⁵⁷³ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 21 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

⁵⁷⁹ ABOU'AMER, *supra* note 516, at 251-53.

interest faced by public officials and public figures in the business community.⁵⁸⁰ Some high-ranking officials enjoy absolute immunity from criminal investigation, prosecution, and trial based on their positions as cabinet ministers or parliamentarians and, consequently, escape criminal culpability.⁵⁸¹ This leads to extensive public suspicion concerning state bodies.⁵⁸² Moreover, when leaders and elites engage in criminal practices in the private and public spheres, it destabilizes government legitimacy and weakens the rule of law.⁵⁸³ Because of the hidden and secret nature of corruption crimes, particularly bribery, and the obstacles that often arise from investigating corrupt acts, it is crucial that criminal laws provide public anti-corruption actors with a better understanding of who is subject to criminal liability.⁵⁸⁴

There may be exemptions, at least temporarily, through immunities or privileges.⁵⁸⁵ Pursuant to the Egyptian Constitution, immunities apply to several public officials, including the President, members of Parliament, judges, provincial governors, cabinet ministers, and their deputies.⁵⁸⁶ However, the President's immunity may be lifted if one-third of Parliament votes in favor.⁵⁸⁷ As for ministers and members of Parliament, two-thirds of

⁵⁸⁰ *Id.* at 256.

⁵⁸¹ *Id.* at 254.

⁵⁸² *Id.*

⁵⁸³ *Id.* at 256.

⁵⁸⁴ MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 18, 19.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 19.

⁵⁸⁷ *Id.* See also ABROGATED EGYPT CONSTITUTION, art. 85 (Egypt). Article 85 of the Abrogated Egypt Constitution states, "Any charge against the President of high treason or of committing a criminal act shall be made upon a proposal by at least one third of the members of the People's Assembly. No impeachment shall be issued except upon the approval of a majority of two-thirds of the Assembly members." On the other hand, the new text states,

A charge of violating the provisions of the Constitution, high treason or any other felony against the President of the Republic is to be based on a motion signed by at least a majority of the members of the House of Representatives. An impeachment is to be issued only by a two-thirds majority of the members of the House of Representatives and after an investigation to be carried out by the Prosecutor General. If there is an impediment, he is to be replaced by one of his assistants. As soon as an impeachment decision has been issued, the President of the Republic ceases all work; this is treated as a temporary impediment preventing the President from carrying out presidential duties until a verdict is reached in the case. The President of the Republic is tried before a special court headed by the president of the Supreme Judicial Council, and with the membership of the most senior deputy of the president of the Supreme Constitutional Court, the most senior deputy of the president of the State Council, and the two most senior presidents of the Court of Appeals; the prosecution to be carried out before such court by the Prosecutor General. If an impediment exists for any of the foregoing individuals, they are replaced by order of seniority. The court verdicts are irrevocable and not subject to challenge. The law organizes the investigation and the trial procedures. In the case of conviction, the President of the Republic is relieved of his

Parliament must approve the lifting of their immunity in order to be subjected to criminal investigation and trial.⁵⁸⁸ In the same vein, members of the judiciary are immune under Article 65 of the *de facto* 1971 Constitution and enjoy the same invulnerability under the 2012 constitutional document.⁵⁸⁹ Although they may be subject to punitive or disciplinary actions, Article 168 states that they may not be removed or impeached.⁵⁹⁰

It is necessary for there to be explicit provisions regarding the circumstances in which immunity applies and the conditions under which it may be lifted.⁵⁹¹ This would be particularly useful in evaluating the degree to which bribery prosecutions may be abused as a political tool against opponents.⁵⁹² It is also crucial that the periods of limitation do not expire during the term of office of a high-ranking official, which may require reform of the immunity provisions.⁵⁹³ Otherwise, the statute of limitations may make criminal prosecution impossible.⁵⁹⁴ Egyptian law has statutes of limitations of three years for misdemeanors and ten years for felonies.⁵⁹⁵ Accordingly, many officials enjoy immunity due to their terms of office.⁵⁹⁶ However, rules are vague and unclear regarding statutes of limitation and investigation standards beyond the immunity period.⁵⁹⁷

post, without prejudice to other penalties. *See id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 159 (providing on the prosecution).

⁵⁸⁸ *See* ABROGATED EGYPT CONSTITUTION, art. 96 (Egypt). Article 96 of the *de facto* Constitution provides that “[n]o membership in the People’s Assembly shall be revoked except on the grounds of loss of confidence or status or loss of one of the conditions of membership” Moreover Article 159 states, “The President of the Republic and the People’s Assembly shall have the right to bring a Minister to trial for crimes committed by him in the performance of his duties or due to them. . . . [N]o indictment shall be issued except by a majority of two-thirds of the members of the Assembly.” *See id.* at art. 159.

⁵⁸⁹ *Compare* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 65, available at <https://constitutionnet.org/sites/default/files/Egypt%20Constitution.pdf> (stating that “[t]he State shall be subject to law. The independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties.”), *with* TEMPORAL CONSTITUTIONAL DECLARATION, 30 March 2011, art. 47 (Egypt), available at https://constitutionnet.org/sites/default/files/egypt_provisional_constitution_of_the_arab_republic_of_egypt_or_constitutional_declaration_of_2011_2011-12_0.pdf. (“Judges are independent and not subject to removal. The law regulates disciplinary actions against them. There is no authority over them except that of the law, and it is not permissible for any authority to interfere in their issues or matters of justice.”).

⁵⁹⁰ *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 168, available at <https://constitutionnet.org/sites/default/files/Egypt%20Constitution.pdf>.

⁵⁹¹ MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 19. This will be the situation in which the crime is in the case of *flagrante delicto*. *See generally* ABOU’AMER, *supra* note 294.

⁵⁹² MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 19.

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* There has been no actual or accurate studies conducted to determine whether immunity privileges have permitted any public officials to escape investigation or prosecution. MENA TASK

It is highly encouraged that the Egyptian government establish clear, unambiguous rules on when immunity applies and create clearly defined provisions for lifting such immunity.⁵⁹⁸ The government should also ensure criminal misconduct may be investigated and prosecuted upon lifting immunity.⁵⁹⁹ This means that periods of limitation should be sufficiently long to allow for proper investigations and should be suspended during the immunity period.⁶⁰⁰

F. Prosecuting Bribery of Public Officials

The late Hafez AbouSe'eda, an expert on human rights, corruption, and white-collar crimes, reported, “[w]e’re fighting ghosts. It is clear that there’s corruption. You can smell it, touch it, and feel it. Everything indicates that there are big fat cats, but [citizens] have no power to catch them or bring them to court.”⁶⁰¹ This is mainly because, in Egypt, the Public Prosecution is the sole body responsible for investigating crimes, indicting individuals, and referring cases to trial.⁶⁰²

As a general rule, it is considered mandatory for the prosecution to investigate criminal complaints within the Egyptian justice system.⁶⁰³ The principle of “mandatory prosecution” means all criminal offenses that come to the consideration of the prosecuting authorities should be automatically prosecuted.⁶⁰⁴ However, there is an exception to this rule, which is allowed

FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., BUSINESS ETHICS AND ANTI-BRIBERY POLICIES IN SELECTED MIDDLE EAST AND NORTH AFRICAN COUNTRIES 19 (OECD & OCDE 2006), available at <https://www.oecd.org/mena/competitiveness/36086689.pdf>. Secret remunerations, the use of false or forged documents, statements, or reports, and multiple intermediaries may make it very difficult to unmask this sort of sensibly obscured criminal behavior.
Id.

⁵⁹⁸ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 19.

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* Cam McGrath, *EGYPT: Corruption Watchdogs Bite Selectively*, GLOB. ISSUES (July 8, 2010), <https://www.globalissues.org/news/2010/07/08/6232> (quoting Hafez AbouSe'eda, the former Chairman of the Egyptian Organization for Human Rights).

⁶⁰² Nourhan Fahmy, *The Egyptian Prosecution: A Fact Sheet*, TAHRIR INST. (May 4, 2020), <https://timep.org/2020/05/04/the-egyptian-prosecution-a-fact-sheet/>. The Egyptian Criminal Procedural Law and its recent amendments states, “The Public Prosecutor is the only [competent] authority and [n]o other power initiates the criminal procedural action except [by the virtue of law] or within the circumstances prescribed by law.” See Law No. 150 of 1950 (promulgating the Law of Legal Proceedings), *al-Waqā’i al-Misriyah*, 1950, art. 1 (Egypt).

⁶⁰³ *Public Prosecution Office*, EGYPT JUST., <https://egyptjustice.com/public-prosecution-office> (last visited Nov. 29, 2023); see also ABOU’AMER, *supra* note 399.

⁶⁰⁴ ABOU’AMER, *supra* note 399. Frankly, some Arab Criminal Procedural legislations do not contain any provisions relating to the principle of either discretionary prosecution or mandatory prosecution. *Id.*

under the principle of “discretionary prosecution.”⁶⁰⁵ Under this principle, the prosecuting authorities decide whether to bring a charge against the individual or pause proceedings.⁶⁰⁶ However, prosecutorial discretion must be exercised independently and be free from any political interference.⁶⁰⁷

Concerning investigative methods and support mechanisms, Egyptian Criminal Procedural Law provides numerous procedures for criminal investigation and prosecution.⁶⁰⁸ These procedures include methods intended to obtain information from individuals, including interrogatories, questioning and reporting,⁶⁰⁹ direct interviews, hearing of witnesses, the use of experts to make technical findings and provide testimonies, and cross-examination.⁶¹⁰ In addition to measures designed to safeguard evidence that has been gathered and preserved, procedures such as preventive detention, release on bail, and police supervision are also used.⁶¹¹ However, there is no specific reporting obligation outside the general rule of Articles 25 and 26 of the Egyptian Code of Criminal Procedure allowing or requiring public officials to report information on a criminal offense.⁶¹²

⁶⁰⁵ *Id.* Under this principle, the prosecuting authorities decide whether to bring a prosecution or pause proceedings. *Id.* Prosecution means “initiating public proceedings and referring the case to an investigating magistrate where they exist, or to a court.” *Id.* On the other hand, it means “placing a termination to the procedure that might have been started and results in no public proceedings.” *Id.* Also, the absence of a direct victim, the nonexistence of serious and reliable evidence, and the irrelevance of the harm done in addition to other discretionary concerns surrounding the case itself may result in a decision to postpone a case. *Id.*

⁶⁰⁶ MOHAMMAD ZAKY ABOU'AMER, KANOUN AL-IRRA'AT AL-JINA'YAH [CRIMINAL PROCEDURAL LAW], (2008).

⁶⁰⁷ *Public Prosecution Office*, EGYPT JUST., <https://egyptjustice.com/public-prosecution-office> (last visited Nov. 9, 2023).

⁶⁰⁸ ABOU'AMER, *supra* note 399. With strong political leadership, it should be possible to move the agenda further in order to achieve concrete results. *Id.*

⁶⁰⁹ *Id.* The effectiveness of reporting system in the criminal justice policy usually depends on reporters and informers feeling secure that they will benefit from adequate and suitable protection from acts of reprisals or any threats of retaliations. *See generally* RESOURCE GUIDE ON GOOD PRACTICE IN THE PROTECTION OF REPORTING PERSONS, U.N. NATIONS CONVENTION AGAINST CORRUPTION 59-61 (U.N. Off. of Drugs & Crime 2015).

⁶¹⁰ ABOU'AMER, *supra* note 399. Collaboration among policy makers and scholars contributes not only to better institutional values but also to better understanding of anticorruption dynamics.

⁶¹¹ *Id.*

⁶¹² *See* BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 25. Article 25 of this law established reporting as a right: “Whoever has information about the occurrence of a crime of which the public prosecution may file a lawsuit without a complaint or a request may report such information to the public prosecution or any of the judicial officers.” *Id.* at 51. Further, Article 26 mandates public officials to report “any public official or person assigned a public service who knows during or due to the work thereof of a crime that the public prosecution may pursue without a complaint, or a request shall report such crime immediately to the public prosecution of the nearest judicial officer.” *Id.* *See also* Law No. 150 of 1950 (promulgating the Law of Legal Proceedings), *al-Waqā'i' al-Misriyah*, 1950, arts. 25-6 (Egypt).

Furthermore, collecting and distributing statistics on corruption and bribery is imperative for several reasons.⁶¹³ Statistics allow a country to demonstrate its commitment to fighting bribery and corruption, while also enabling effective assessment of the application and execution of domestic anti-corruption provisions.⁶¹⁴ Furthermore, accurate facts, data, and information about the number of cases that evolve beyond preliminary investigation to the phase of formal charges offer specifically valuable information about enforcement.⁶¹⁵ As a signatory to the UNCAC, accurate and comprehensive statistical data collection would assist Egypt to live up to its international obligations.⁶¹⁶

It should be noted that banks are prohibited from providing—directly or indirectly—any information concerning their client’s accounts, deposits, trusts, and safe deposit boxes, except upon an order of a competent judicial authority.⁶¹⁷ In some countries, legal provisions have been modified with respect to access to bank accounts because bank confidentiality⁶¹⁸ regulations can seriously hinder criminal investigation and prosecution.⁶¹⁹

⁶¹³ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 26.

⁶¹⁴ See *id.*

⁶¹⁵ See *id.* In order to develop this sort of investigating mechanism, the Egyptian authorities are asked to gather data that (i) distinguishes between economic and corruption crimes in order to accurately define what sorts of criminal acts are committed; (ii) separated into economic division and civil service groups; and (iii) contains implementation decisions and sanctions policy. *Id.*

⁶¹⁶ See *id.* at 27. The UNCAC advocates that the worsening of the corruption *status quo* in Egypt is intensified by the non-enforcement or inadequate application of the law. *Id.* In case of deficiency of any data on law implementation—corruption offenses that are indicted or penalized—it is problematic to evaluate or measure the level to which anti-bribery and anti-corruption laws are actually executed in Egypt. BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT 27 (MENA-OECD Initiative 2009), available at <https://www.oecd.org/global-relations/46341460.pdf>.

⁶¹⁷ See Merna G. Saad, *Banking Laws in Egypt*, YOUSSEY SALEH & PARTNERS (July 10, 2016), <https://yousseysaleh.com/Investment-in-Egypt/banking-laws-egypt/>.

⁶¹⁸ See BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22. Bank secrecy is lifted only in cases related to money laundering. *Id.* The law on money laundering also explicitly provides for mutual legal assistance and international cooperation, pursuant to Article 13 of the United Nations Convention Against Transnational Organized Crime. *Id.* See also G.A. Res. 55/25, annex, United Nations Convention Against Transnational Organized Crime, art. 12&13. (Dec. 2000).

⁶¹⁹ In these countries, professional secrecy is no longer an obstacle to legal proceedings. See generally, Law Number 28 of 2000 (Banking Law of The Hashemite Kingdom of Jordan), *Al-Jarida Al-Rasmiyya*, 2000, as amended Law No. 46 of 2003 (Temporary Law), *Al-Jarida Al-Rasmiyya*, 2003 (Jordan), available at <https://www.cbj.gov.jo/EchoBusV3.0/SystemAssets/2f75d7af-5465-4e1f-90dd-8b825037edbd.pdf>; See also Law No. 3 of 1956 (Bank Secrecy), 1956 (Lebanon), available at https://www.bdl.gov.lb/CB%20Com/Laws%20And%20Regulations/Laws/Law_3956_EN%20%A72_3.pdf. In support of this, Article 40 of the UNCAC states, “Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of [bank secrecy] laws.” See UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 40.

Enforcement of corruption is inadequate due to insufficient investigation and prosecution of economic crimes, such as bribery of public officials.⁶²⁰ In Egypt, the effective administration of legal systems needs to develop anti-corruption standards comparable to international practices and obtain additional experience with economic crimes to achieve desirable levels of professionalism at the judicial level.⁶²¹ Egyptian authorities should be more transparent and accountable in order to present a clear image of the effectiveness of laws on bribery and corruption.⁶²² Entities responsible for curbing bribery and corruption should also conduct regular analyses of corruption offenses that are prosecuted, the sanctions imposed, and the efficiency of their enforcement.⁶²³ Further, they should also communicate the outcomes of their assessments.⁶²⁴

G. International Judicial Cooperation: Extradition and Mutual Legal Assistance⁶²⁵

International cooperation frequently plays an essential role in securing evidence of bribery with respect to government officials.⁶²⁶ In particular, tracing funds and assets abroad is often an indispensable means for investigating and prosecuting numerous cases of bribery in business operations.⁶²⁷ By the same token, courts and judges may be asked by foreign

⁶²⁰ Arafa, *supra* note 142, at 197 n.78.

⁶²¹ See generally BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22. For example, in many Arab countries, the determination of judicial police training still needs to improve its aggressive model of policing. MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 36. Training necessities are often concerned with the achievement of political stability and internal security rather than towards professional law application and economic crime deterrence. *Id.* Another feature of police and judicial training is that it tends to rely on classical techniques of instruction, focusing on theory and acquiring information rather than practice and advanced professional skills. *Id.*

⁶²² BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 27.

⁶²³ *Id.*

⁶²⁴ *Id.*

⁶²⁵ *Id.* at 22. It is essential for national authorities in the State to coordinate together to eliminate corruption. *Id.* Also, Article 38 of the UNCAC reassures cooperation between its public authorities, as well as its public officials, and, on the other hand, its powers in charge of investigating and prosecuting criminal offenses. Numerous corruption circumstances are very complicated and hidden; early notice to appropriate public bodies along with early support at the request of investigative agencies is a good standard for good practice. See UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at arts. 38-39 (explaining the co-operation between the national authorities together and the private sector).

⁶²⁶ MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 36.

⁶²⁷ *Id.* See generally Mahmoud C. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition: A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969).

authorities to investigate bribery offenses that have ties to their countries.⁶²⁸ However, systematic barriers often prevent the effective sharing and exchange of information with third countries.⁶²⁹ Except when an agreement provides for direct exchange of documents between judicial authorities, many countries' legal systems do not permit enforcement authorities to share information directly with law enforcement authorities in other countries.⁶³⁰

Under the Code of Egyptian Criminal Procedure, executive authorities must send their requests for mutual and technical assistance via diplomatic channels; reports from third countries follow a similar route.⁶³¹ Requiring documents or requests to be transmitted through diplomatic channels may cause delays in assisting other countries with their investigation and prosecution of corruption offenses and hinder international cooperation.⁶³²

International instruments and customary practices on the process of information exchange have launched a set of general norms that must be present to achieve an inclusive awareness of the circumstances within a country and its institutions.⁶³³ The most central of these are the complete and

⁶²⁸ See generally UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197.

⁶²⁹ MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 36; *Breaking down Barriers: International Cooperation in Combatting Foreign Bribery*, OECD, <https://www.oecd.org/daf/anti-bribery/Anti-Bribery-Ministerial-International-Cooperation-Discussion-Paper.pdf> (last visited Nov. 30, 2023). According to Article 10 of the UNCAC, the public should have actual access to the decision-making process and decision-makers through simplified administrative measures and the right to request public information. Moreover, the last paragraph of the Article 10 requires states to distribute public information, which may comprise periodic reports on the threats of corruption in its public administration. See UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at art. 10.

⁶³⁰ See generally *id.*

⁶³¹ MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 36. Also, it is important to note that information exchange with third countries is subject to the condition of reciprocity, which "means to give and take mutually; to return in kind or even in another kind or degree." See, e.g., CRIMINAL PROCEDURAL LAW OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA (AL JUMHURIYAH AL JAZA'IRIYAH AD DIMUQRATIYAH ASH SHA'BIYAH) [KANUN AL-IJRA'AT AL-JINA'IYAH AL-GAZA'RI], *Al-Jarida Al-Rasmiyya*, 6 Aug.1966, art. 725 (Algeria). Some countries may reject to execute or issue a request for assistance from a foreign country on the basis of national economic interest and security, the probable effect upon connections with another State, the identity of the natural or legal individuals engaged, or of "any other consideration" as under Article 723 of Algeria's Criminal Procedural Code and Article 333 of Tunisia's Criminal Procedural Code. See generally *id.* at arts. 723, 725; see also CRIMINAL PROCEDURAL LAW OF THE REPUBLIC OF TUNISIA [KANUN AL-IJRA'AT AL-JINA'IYAH AL-TOUNSY], *Al-Jarida Al-Rasmiyya*, 24 July1968, art. 333 (Tunisia).

⁶³² MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 36. See also Mahmoud C. Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CAL. W. INT'L. L.J. 1, 2 (1974) ("It is universally recognized that every state has the power to regulate conduct within its territory and, beyond it, such other conduct which affects its legitimate interests. The power of a state to proscribe conduct within its territory and such other conduct which affects its interests is a concomitant to the principle of sovereignty.").

⁶³³ See generally Mahmoud C. Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CAL. W. INT'L. L.J. 1, 10 (1974) ("However, the Supreme Court of the United States, noted that '[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws

unconditional disclosure and automatic posting of information, the smooth attainment of data, regulated costs, and restricted exceptions.⁶³⁴ Over and over again, large-scale corruption has transnational aspects, perhaps because the briber or bribee is domiciled abroad, the offense is planned or committed wholly or partially in one or more foreign countries,⁶³⁵ the proceeds of the criminal act have been transferred, or the offender has escaped the country.⁶³⁶ International collaboration and mutual legal assistance are increasingly necessary to detect global corruption channels and secure evidence.⁶³⁷ Judges may need to make representations or delegations to foreign nations in cases of bribery involving foreign countries.⁶³⁸ Parties should use well-suited

committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction”).

⁶³⁴ See generally *id.* (report translated in to Arabic by the author). See also Isabel Esterman, *An Opening*, AM. CHAMBER OF COM. IN EGYPT (2012), <https://www.amcham.org.eg/publications/business-monthly/issues/196/April-2012/2819/an-opening> (explaining that if the People’s Assembly passes a new draft bill on freedom of information, it could end decades of government secrecy in Egypt. But advocates for greater transparency would still have a long road ahead of them).

⁶³⁵ See generally Mahmoud C. Bassiouni, *Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT’L. L. 27, 29 (1983) (“Under such a scheme, international crimes established by conventional or customary international law must be enforced by the national criminal laws of the states. The concomitant duty to prosecute or extradite and to cooperate with other states in the prevention and suppression of such conduct is imposed upon the signatory states.”).

⁶³⁶ See generally *id.*

⁶³⁷ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22. For further explanation on the international co-operation to fight transnational criminality, see generally Mahmoud C. Bassiouni, *Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality*, 15 NOVA L. REV. 353 (1991).

⁶³⁸ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22; see generally Bassiouni, *supra* note 635, at 30 (“A textual analysis of some relevant treaty provisions in the twenty categories of international crimes reveals that the objectives of an international criminal law convention are: (1) to explicitly or implicitly declare certain conduct a crime under international law; (2) to criminalize the conduct under national law; (3) to provide for the prosecution or extradition of the alleged perpetrator; (4) to punish the person found guilty; (5) to cooperate through the various modalities of judicial assistance in the enforcement of the convention; (6) to establish a priority in theories of jurisdiction and perhaps recognize the applicability of universal jurisdiction; (7) to refer to an international criminal jurisdiction; and (8) to exclude the defense of superior orders.”).

international standards, extradition,⁶³⁹ and mutual legal assistance (MLA) provisions.⁶⁴⁰

In this respect, the former Egyptian Prosecutor General stated,

Egypt had a weak legal basis on which to engage in international co-operation [sic], as it is party to only a very few bilateral agreements allowing it to do so. . . . [C]o-operation [sic] is refused if the requesting state investigates an offense that doesn't exist in the state to which it makes its request. . . . [A]ll requests have to follow the formal co-operation procedure. . . . [C]omity—deferral out of courtesy or goodwill and outside any international obligation—had been used once in an important Egyptian case where assistance had been sought from an OECD country that had provided information on money flows.⁶⁴¹

⁶³⁹ Countries may provide extradition policy and MLA in corruption cases through various sorts of arrangements, such as bilateral and multilateral treaties and conventions. *See* UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at arts. 43-50 on extradition; transfer of sentenced persons; mutual legal assistance; transfer of criminal proceedings; law enforcement co-operation; joint investigations; and special investigative techniques. *Id.* at arts. 51-59, 60-62. For further discussion on extradition, *see generally* MAHMOUD C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (5th ed. 2007); Mahmoud C. Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733 (1968); Mahmoud C. Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 2 (1968) (“The history of international extradition in the western world has in no sense of the word paralleled that found in the eastern world. . . . [I]n *United States v. Rauscher*, the Supreme Court of the United States stated, ‘It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties. . . . Prior to these treaties, and apart from them there was no well-defined obligation on one country to deliver up such fugitives to another; and, though such delivery was often made, it was upon the principle of comity; . . . and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.’”).

⁶⁴⁰ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22. M. CHERIF BASSIOUNI & KHALED MOHY EL-DIN, AL-WASA'EK AL-DAWLIYAH WA AL-EKLYIMIA AL-MA'ANIYA BEL AL-'ADALAH AL-JINAA'YAH: AL-GOZ'E AL-THANY: AL-GRA'MM AL-JINAA'YAH WA AL-TA'AWN FI AL-MAS'AEAL AL-JINAA'YAH [INTERNATIONAL AND REGIONAL INSTRUMENTS ON CRIMINAL JUSTICE, PART II: INTERNATIONAL CRIMES AND CO-OPERATION IN CRIMINAL MATTERS], (2006).

⁶⁴¹ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22. According to a recent study, the Egyptian Attorney General has a special office for international cooperation. *Id.* As Egypt does not have enough experience concerning the area of freezing assets from corruption acts; it is highly recommended to assign an inter-agency task force containing experts from the Ministry of Justice, the Ministry of Interior, the Central Bank, the Ministry of Finance, the Prosecutor's General Office, the private banking sector, and others as well as to request external and foreign consultants and investigators to track assets abroad, as Egypt lacks enough experts to address this question. *See, e.g., Attorney General proposes anti-corruption committee*, EGYPT INDEP. (Oct. 9, 2010), <https://www.egyptindependent.com/attorney-general-proposes-anti-corruption-committee/> (“the committee will work on implementing the United Nations Convention against Corruption, conduct studies, carry out awareness raising campaigns, and bolster cooperation with NGOs that fight corruption.”).

Furthermore, the Legislative Committee of the National Council for Human Rights (NCHR) concluded that Egyptian law was ineffective in matters relating to international cooperation, access to information, and recovery of funds.⁶⁴² The Prosecutor General's report on international cooperation with other countries regarding anti-corruption issues found that the Egyptian government has not yet placed the UNCAC provisions on international coordination and extradition of criminals into domestic law⁶⁴³ and that Egypt's current provisions are unable to address grand corruption with any kind of foreign component adequately.⁶⁴⁴ Accordingly, Egypt does not have an adequate legal foundation on which it can cooperate globally to fight international fiscal crimes.⁶⁴⁵

It is recommended that Egypt publicize mandatory international agreements regulating mutual legal assistance and extradition and conduct a statistical study based on accurate data with the Ministry of Justice on their implementation.⁶⁴⁶ The finding of such a study could incentivize the Egyptian government to amend and adjust its existing provisions to live up to Egypt's international commitment to battling corruption and fraud.⁶⁴⁷

VIII. CONCLUSION

This article underscored several cases of corruption and cronyism under Mubarak and the current administration. The corruption cases were used to renovate the networks that linked power with wealth and the state with business. The main argument is that Egypt faced a prolonged case of weak state institutions combined with deregulation and liberalization. The strong, well-positioned actors, whether within the state circles or their business associates, exploited and maximized their gains by grabbing public assets and occupying beneficial market positions.⁶⁴⁸ These initial conditions were replicated, transforming the economy into a cronyistic, non-market-based

⁶⁴² BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22. See *Third Annual Report Human Rights Situation in Egypt 2006/2007*, THE NAT'L COUNCIL FOR HUM. RTS. (Jan. 18, 2007), <https://nchr.eg/Uploads/publication/en/annualreport3E1672581881.pdf>; see also Hesham Nasr et. al., *Criminal Justice and Prosecution in the Arab World*, (Oct. 2004), <http://www.pogar.org/publications/judiciary/criminaljustice-brown-e.pdf>; see generally Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, 1973 (Egypt).

⁶⁴³ See *id.*

⁶⁴⁴ See *id.*

⁶⁴⁵ *UNODC and Egypt sign agreement to strengthen cooperation against crime*, U.N. OFF. DRUGS & CRIME, <https://www.unodc.org/unodc/en/frontpage/2018/October/unodc-and-egypt-sign-agreement-to-strengthen-cooperation-against-crime.html> (last visited Nov. 30, 2023).

⁶⁴⁶ BUSINESS CLIMATE DEVELOPMENT STRATEGY PHASE 1 POLICY ASSESSMENT EGYPT, *supra* note 338, at 22.

⁶⁴⁷ *Id.*

⁶⁴⁸ See generally Adly, *supra* note 39.

political economy.⁶⁴⁹ This situation persisted for many decades because of the dictatorial nature of the current military regime, together with the weak status of civil society.⁶⁵⁰ The challenge that faces Egyptians after the expulsion of Mubarak is to redefine and modernize the institutional relations between the state and the economy with more robust regulatory and market-upholding foundations.

Corruption and bribery have been recognized as serious issues for business processes in Egypt.⁶⁵¹ Thus, a comprehensive legal system will not eliminate corruption, but the proper, fair management of such a legal framework is required to overthrow corruption. This should be done by implementing practical legal foundations that are capable of imposing the laws and regulations that are the pillars of the framework. Also, the Egyptian legal agenda must include accountability devices that can avert and overwhelm corruption if effectively operated.⁶⁵² However, this framework needs to be rationalized and updated to be consistent with modern international goals, especially in the UNCAC, by enacting new laws on the protection of witnesses and informants in grave criminal cases.

In adopting the essential legal framework for combating corruption, consideration should be given to deterrent procedures concerning public office and the better handling of public finances, *e.g.*, in the area of employment, appointment, retention, promotion, and retirement of public officials.⁶⁵³ Further, this article has illustrated that the presence of codes of conduct for public employees and other executives, efficient laws, effective reporting appliances, and actual investigation and prosecution, as well as harmonization among national authorities, are essential components of a sound legal framework capable of curbing corruption. Such measures increase detection rates, enrich transparency, ensure accountability and integrity, and maintain public confidence in implementing general anti-corruption philosophies.

⁶⁴⁹ See generally Sufyan Alissa, *The Political Economy of Reform in Egypt*, CARNEGIE ENDOWMENT FOR INT'L PEACE, Oct. 2007, at 5.

⁶⁵⁰ See, *e.g.*, STIFTUNG, *supra* note 15.

⁶⁵¹ See generally Law No. 62 of 1975 (Illicit Enrichment Apparatus "IEA"), *Al-Jarida Al-Rasmiyya*, 7 July 1975, art. 2 (Egypt); see generally Mahmoud C. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition: A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969). See also TINA SOEIDE, DRIVERS OF CORRUPTION: A BRIEF REVIEW (World Bank 2014) ("Political corruption, weak state legitimacy, and fragile state structures impede efficient reform; efficient solutions must therefore often involve international players. Lack of political will is not only a developing country's concern, however. In all categories of countries, anticorruption progress is being pushed by international collaboration, and the ability to control the most entrenched corruption depends on the willingness of governments in the most developed economies to participate with developing countries in anticorruption campaigns.").

⁶⁵² See Egyptian Penal Code Egyptian Crim. Code, arts. 103-11 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

⁶⁵³ See, *e.g.*, UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 197, at 41, art. 7.

Moreover, anti-corruption laws must enjoy common support and address the idiosyncrasies of the environments to which they apply. A fruitful legal framework must comply with the most recent international norms, adopt an inclusive and multi-disciplinary attitude, and allow Interpol and judicial international assistance in inhibiting and eliminating corruption.⁶⁵⁴

Finally, it is crucial to focus on threats to the financial system, particularly financial institutions that engage in self-dealing, corrupt practices, and fraud. Such threats, however, are complex and manifest themselves at many levels.⁶⁵⁵ For instance, considerable emphasis is placed on the problems that confront those who operate in the financial world, primarily because regulatory and enforcement actions are designed to address specific criminal issues, such as the disruption of highly profitable crimes or terrorism.⁶⁵⁶ Therefore, programs should be developed by those working in enforcement, compliance, and the financial sector to focus on practical issues and provide, on a truly international scale, better approaches and greater cooperation to fight global corruption.⁶⁵⁷

Consequently, if a new regulatory framework is established, both domestically and internationally, it will inevitably place much greater emphasis on ensuring integrity and sanctioning those who abuse positions of trust. There are also deep concerns by governments and financial institutions as to the extent corruption impacts the stability and security of the nation, specifically the impact of money laundering and organized crime.⁶⁵⁸ Therefore, it is essential to get a better understanding of the fundamental issues involved in preventing and controlling economic crime.⁶⁵⁹ Designing compliance programs will also be useful in gaining global insights and an in-depth understanding of matters pertaining to corporate regulations and enforcement in cases where organizations fall victim to massive fraud, reckless input of funds, failure to manage risk, over-zealous trading on corporate debt products, and rogue trading.⁶⁶⁰

⁶⁵⁴ See, e.g., Timothy M. Phelps, *Revolution might not be a cure for Egypt's extreme poverty*, L.A. TIMES (Feb. 20, 2011), <https://www.latimes.com/archives/la-xpm-2011-feb-20-la-fg-egypt-return-20110220-story.html>; *Egypt: A Nation in Waiting*, DOCUMENTARY STORM, <http://documentarystorm.com/politics/a-nation-in-waiting/> (last visited Nov. 30, 2023); *Hosni Mubarak*, N.Y. TIMES, <https://www.nytimes.com/topic/person/hosni-mubarak> (last visited Nov. 30, 2023); Alia Allana, *History's crossroads*, THE INDIAN EXPRESS (Feb. 10, 2011), <http://www.indianexpress.com/news/History-s-crossroads/748326>.

⁶⁵⁵ See, e.g., *id.*

⁶⁵⁶ See, e.g., *id.*

⁶⁵⁷ See, e.g., *id.*

⁶⁵⁸ See, e.g., *id.*

⁶⁵⁹ See, e.g., *id.*

⁶⁶⁰ See, e.g., Timothy M. Phelps, *Revolution might not be a cure for Egypt's extreme poverty*, L.A. TIMES (Feb. 20, 2011), <https://www.latimes.com/archives/la-xpm-2011-feb-20-la-fg-egypt-return-20110220-story.html>; *Egypt: A Nation in Waiting*, DOCUMENTARY STORM, <http://documentarystorm.com/politics/a-nation-in-waiting/> (last visited Nov. 30, 2023); *Hosni Mubarak*, N.Y. TIMES, <https://www.nytimes.com/topic/person/hosni-mubarak> (last visited Nov. 30,

This article attempts to go beyond the classical bounds of the study of unethical behavior in business and describe the link between corruption and economic development. Understanding this relationship is vital because when economic policies reflect the desires of public officials and their partners, the economically trained bureaucracy's role in modeling economic strategy is eclipsed. The recent events in Egypt after the 2011 Revolution slowly revealed the extent of the corruption of former President Hosni Mubarak.⁶⁶¹ Moreover, following the more recent victories of Islamist parties, it has become increasingly important for Egypt to focus on financial and economic crimes, including corruption.⁶⁶² This is especially relevant in light of the current corruption trials of the previous regime.⁶⁶³

Widespread corruption may have roots in culture and history, but it is, nevertheless, an economic and political problem.⁶⁶⁴ Corruption causes inefficiency and inequity.⁶⁶⁵ Corruption indicates that the political system is operating with little concern for the broader public interest.⁶⁶⁶ An efficient anti-bribery legal system is an essential basis for attracting investors and for a functioning economy at the national and international levels.⁶⁶⁷ This effective system depends on the quality and consistency of the laws and regulations,⁶⁶⁸ the means of enforcement, and, of course, a genuine political

2023); Alia Allana, *History's crossroads*, THE INDIAN EXPRESS (Feb. 10, 2011), <http://www.indianexpress.com/news/History-s-crossroads/748326>.

⁶⁶¹ See Khalil Al-Anani, *Ten Years Later: Reflections on Egypt's 2011 Uprising*, ARAB CTR. WASH. D.C. (Feb. 19, 2021), <https://arabcenterdc.org/resource/ten-years-later-reflections-on-egypts-2011-uprising>; see generally Mahmoud C. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition: A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969).

⁶⁶² See *id.*

⁶⁶³ See Khalil Al-Anani, *Ten Years Later: Reflections on Egypt's 2011 Uprising*, ARAB CTR. WASH. D.C. (Feb. 19, 2021), <https://arabcenterdc.org/resource/ten-years-later-reflections-on-egypts-2011-uprising>.

⁶⁶⁴ See *Corruption*, U.N. NATIONS, <https://www.unodc.org/romena/en/corruption.html#:~:text=Corruption%20is%20a%20complex%20social,and%20contributes%20to%20governmental%20in%20stability> (last visited Nov. 30, 2023).

⁶⁶⁵ See generally *id.*

⁶⁶⁶ See generally *What Is Corruption?*, TRANSPARENCY INT'L, <https://www.transparency.org/en/what-is-corruption> (last visited Nov. 30, 2023).

⁶⁶⁷ See, e.g., Timothy M. Phelps, *Revolution might not be a cure for Egypt's extreme poverty*, L.A. TIMES (Feb. 20, 2011), <https://www.latimes.com/archives/la-xpm-2011-feb-20-la-fg-egypt-return-20110220-story.html>; *Egypt: A Nation in Waiting*, DOCUMENTARY STORM, <http://documentarystorm.com/politics/a-nation-in-waiting/> (last visited Nov. 30, 2023); *Hosni Mubarak*, N.Y. TIMES, <https://www.nytimes.com/topic/person/hosni-mubarak> (last visited Nov. 30, 2023); Alia Allana, *History's crossroads*, THE INDIAN EXPRESS (Feb. 10, 2011), <http://www.indianexpress.com/news/History-s-crossroads/748326>. MENA TASK FORCE ON BUS. INTEGRITY & COMBATING BRIBERY OF PUB. OFFS., *supra* note 360, at 36. Governments should actively encourage and support business efforts in promoting business ethics. *Id.*

⁶⁶⁸ See, e.g., Timothy M. Phelps, *Revolution might not be a cure for Egypt's extreme poverty*, L.A. TIMES (Feb. 20, 2011), <https://www.latimes.com/archives/la-xpm-2011-feb-20-la-fg-egypt-return-20110220-story.html>; *Egypt: A Nation in Waiting*, DOCUMENTARY STORM, <http://documentarystorm.com/politics/a-nation-in-waiting/> (last visited Nov. 10, 2023); *Hosni*

will.⁶⁶⁹ Developing efficient policy mechanisms and problem control, if the international community recognizes the dilemma, will help battle this phenomenon. Corruption erodes political legitimacy and the protection of rights.⁶⁷⁰ Decades into the global fight against corruption, there has been progress in both policy research and legal efforts, but much remains to be done. Widespread corruption may have roots in culture and history, but it is a symptom that the political system is operating with little concern for the broader public interest.⁶⁷¹

Mubarak, N.Y. TIMES, <https://www.nytimes.com/topic/person/hosni-mubarak> (last visited Nov. 10, 2023); Alia Allana, *History's crossroads*, THE INDIAN EXPRESS (Feb. 10, 2011), <http://www.indianexpress.com/news/History-s-crossroads/748326>.

⁶⁶⁹ See, e.g., *id.* Apart from that, a growing number of countries are engaged in a reform process to improve and adjust the prevailing laws on corruption.

⁶⁷⁰ See generally *What Is Corruption?*, TRANSPARENCY INT'L, <https://www.transparency.org/en/what-is-corruption> (last visited Nov. 10, 2023).

⁶⁷¹ See generally *id.*

A COMPARATIVE ANALYSIS OF MENTAL HEALTH PROFESSIONALS' DUTY TO WARN ACROSS THE UNITED STATES: THE NEED FOR CLEARLY DEFINED LAWS IN LIGHT OF RECENT MASS SHOOTINGS

Alexis Hulfachor*

I. INTRODUCTION

The increased public attention on acts of mass violence has created substantial concern over the ability to prevent such violence.¹ Numerous political officials in recent years have attributed mental illness as the root cause of mass shootings, thus causing stigma to surround those with such conditions.² However, researchers suggest that while mental illness is undeniably a key risk factor in committing acts of mass violence, it is not the only factor involved.³ In a recent study conducted in 2020, it was estimated that approximately two-thirds of public mass shooters who attacked from 1966 to 2019 displayed signs of mental illness.⁴ Other recent studies suggest that roughly 25% of mass murderers have exhibited a mental illness.⁵ Even still, politicians and media commentators often label mass shooters as mentally ill and turn to mental health professionals as a way to prevent these terrifying acts of violence.⁶ Given the immeasurable impact of mass shootings, introducing laws that clearly define when a mental health professional is responsible for warning others of potential harm to the public could interrupt the process of violence and increase the mental health communities' effectiveness at managing those threats.⁷

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¹ *Mental Health Professionals' Duty to Warn*, NAT'L CONF. STATE. LEG. (Mar. 6, 2022), <https://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx>.

² Jonathan M. Metzl et al., *Mental Illness, Mass Shootings, and the Future of Psychiatric Research into American Gun Violence*, 29 HARV. REV. PSYCHIATRY 81, 81 (2021).

³ Monir Ghaedi, *Mass shootings and mental illness: It's complicated*, DW (July 7, 2022), <https://www.dw.com/en/mass-shootings-and-mental-illness-its-complicated/a-6238811>.

⁴ Adam Lankford & Rebecca G. Cowan, *Has the Role of Mental Health Problems in Mass Shootings Been Significantly Underestimated?*, 7 J. THREAT ASSESSMENT AND MGMT. 135, 135 (2020).

⁵ Metzl et al., *supra* note 2, at 83.

⁶ *Id.* at 82.

⁷ *See generally* Mark A. Rothstein, *Tarasoff Duties After Newtown*, 42 J.L. MED. & ETHICS 104, 104 (2014).

Another study on mass shootings revealed the critical role mental health providers played with many of the perpetrators of mass violence.⁸ The study examined public mass shootings in America from 1966 to 2019, finding that 67.7% of the mass shooters had a history of mental health concerns.⁹ Moreover, 19% of mass shooters were hospitalized for psychiatric reasons, 25% participated in counseling, and 20% were prescribed psychotropic drugs.¹⁰ This does not suggest that mental illnesses are the exclusive cause of mass shootings, as the vast majority of people with mental disorders are never violent.¹¹ Rather, these findings demonstrate the important role mental health providers play in preventing acts of mass violence and highlight the urgent need for state legislators to clearly define when a provider has the duty to warn others.¹²

In the aftermath of the reoccurring mass shootings in the United States, many public and elected officials have understandably tried to prevent such tragedies in the future.¹³ Policymakers have focused on whether it is possible for mental health professionals to identify serious threats and intervene with mentally unstable individuals to prevent mass violence in the future.¹⁴ This Note attempts to address this issue, specifically focusing on whether clearly defined duty-to-warn laws could help mental health professionals identify serious threats and intervene with mentally unstable individuals in time to prevent future tragedies.

This Note contributes to this discussion by assessing the varied jurisdictional approaches to duty-to-warn laws within the United States. Part I examines *Tarasoff v. Regents of University of California*, highlighting the California Supreme Court's reasoning and the conflicting duties imposed on therapists. Part II traces the judicial and legislative responses in the aftermath of *Tarasoff*, highlighting the shortcomings of the trends within *Tarasoff* laws. Part III critically assesses practical problems inherent in the implementation of the various duty-to-warn laws, arguing that ambiguity can arise because of the lack of clarity of the laws, the conflicting duties of confidentiality and protection of the public, and the inexact science of predicting violence. After reviewing the inconsistent and confusing laws on mental health professionals' duty to warn, Part IV proposes a clearly defined statute that

⁸ See Jilian K. Peterson & James A. Densley, *The Violence Project: Database of Mass Shootings in the United States, 1966-2019* at 20-21 (2019), <https://www.theviolenceproject.org/wp-content/uploads/2019/11/TVP-Mass-Shooter-Database-Report-Final-compressed.pdf>.

⁹ *Id.* at 20.

¹⁰ *Id.* at 21.

¹¹ *Id.* at 11-12.

¹² Daniel C. Holland et al., *Tarasoff vs Threat: Considerations for Mental Health Providers Navigating Legal, Ethical and Practical Variables Associated with Preventing Mass Acts of Violence*, 23 INT'L J. EMERGENCY MENTAL HEALTH & HUM. RESILIENCE 86, 87 (2021).

¹³ Rothstein, *supra* note 7, at 104.

¹⁴ *Id.*

addresses the concerns of both the public and mental health professionals who legislators require to warn and protect third parties from patient violence. This solution seeks to clarify therapists' duties regarding the treatment of potentially violent patients while also serving the goal of preventing tragedies from occurring in the future.

II. *TARASOFF*: THE MENTAL HEALTH PROFESSIONAL'S DUTY TO WARN THIRD PERSONS OF PATIENT VIOLENCE

Mental health providers, in some situations, have been thought to dissuade violence and protect the public from harm through two distinct but related courses of action within the treatment setting.¹⁵ First, successful treatment of a patient could address and treat underlying frustration, anxiety, and rage that could potentially erupt into violence.¹⁶ Second, in situations where patient violence is imminent, mental health professionals are in a unique position to assess a patient's dangerousness to others and disclose any threats before any future harm occurs.¹⁷ The second pathway was created in the landmark case of *Tarasoff v. Regents of University of California*, which was the "first case to find that a mental health professional may have a duty to protect others from possible harm by their patients."¹⁸ The 1976 California Supreme Court decision fundamentally influenced modern principles relating to the duty-to-protect doctrine and the ethics of patient confidentiality within a therapeutic relationship.¹⁹ While it has been more than forty years since the decision, the case remains relevant in many jurisdictions across the United States, with numerous courts relying on its reasoning as a basis for their decisions.²⁰

A. *Tarasoff's* Creation of the Duty to Warn or Protect

Tarasoff arose from a tragic situation between two students at the University of California-Berkeley.²¹ On October 27, 1969, Prosenjit Poddar, a 22-year-old male graduate student, killed Tatiana Tarasoff, an 18-year-old female undergraduate student.²² Poddar and Tatiana met at a folk dance

¹⁵ J. Thomas Sullivan, *Mass Shootings, Mental "Illness," and Tarasoff*, 82 U. PITT. L. REV. 685, 708 (2021).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Mary I. Wood, *Protective Privilege Versus Public Peril: How Illinois Has Failed to Balance Patient Confidentiality with the Mental Health Professional's Duty to Protect the Public*, 29 N. ILL. UNIV. L. REV. 571, 574 (2009).

¹⁹ *Id.* at 573-74.

²⁰ *Id.* at 574.

²¹ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 339 (Cal. 1976).

²² *Id.*

hosted by the University of California-Berkeley International House.²³ After a brief and casual relationship, Tatiana broke off the relationship.²⁴ Subsequently, Poddar became depressed and sought treatment from a psychologist, Dr. Lawrence Moore, at Cowell Memorial Hospital.²⁵ Dr. Moore diagnosed Poddar with “paranoid schizophrenia, acute and severe.”²⁶ During one of their sessions, Poddar informed Dr. Moore that he planned to kill an unnamed girl, readily identifiable as Tatiana, when she returned from summer vacation in Brazil.²⁷

With the concurrence of two other doctors at Cowell Memorial Hospital, Dr. Moore decided that Poddar should be committed for observation at a psychiatric hospital.²⁸ Dr. Moore contacted campus police requesting assistance in securing Poddar’s confinement.²⁹ The officers took Poddar into custody but ultimately determined he was rational and released him on his promise to stay away from Tatiana.³⁰ Subsequently, Dr. Powelson, director of the Department of Psychiatry at Cowell Memorial Hospital, requested the police to return Moore’s letter for involuntary commitment.³¹ Powelson then ordered that all of Dr. Moore’s notes on Poddar be destroyed, and no action be taken to secure Poddar’s involuntary commitment.³² Shortly after Tatiana returned from Brazil, Poddar went to her brother’s residence armed with a pellet gun and a kitchen knife.³³ When Tatiana refused to speak with him, Poddar repeatedly shot her with a pellet gun and fatally stabbed her in the front lawn.³⁴

Tatiana’s parents filed a wrongful death action against the university regents, the psychologist, supervising psychiatrists, and the police.³⁵ The plaintiffs asserted liability on two grounds: (1) the defendants’ failure to warn plaintiffs of the impending danger and (2) their failure to bring about Poddar’s confinement pursuant to the Lanterman-Petris-Short Act.³⁶ The California Supreme Court held that plaintiffs stated a cause of action against

²³ People v. Poddar, 518 P.2d 342, 344 (Cal. 1974).

²⁴ *Id.*

²⁵ *See id.*; *Tarasoff*, 551 P.2d at 341.

²⁶ People v. Poddar, 518 P.2d 342, 345 (Cal. 1974).

²⁷ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ People v. Poddar, 518 P.2d 342, 345 (Cal. 1974).

³⁴ *Id.*

³⁵ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 339-40 (Cal. 1976).

³⁶ *Id.* The Lanterman-Petris-Short Act allows for mental health professionals to take a person into custody for involuntary treatment if, because of mental illness, he or she is likely to cause harm to self or others. *Understanding the Lanterman-Petris-Short (LPS) Act*, DISABILITY RTS. CAL. (Jan. 8, 2018), <https://www.disabilityrightsca.org/publications/understanding-the-lanterman-petris-short-lps-act>.

the psychiatrists at Cowell Memorial Hospital for failure to protect Tatiana from Poddar's foreseeable violence.³⁷ Although the court recognized that a person traditionally owed no duty to control the conduct of another in the absence of some "special relationship," the court found that a special relationship existed between a therapist and their patient.³⁸ The existence of a special relationship requires a therapist to take reasonable precautions to warn potential victims of danger after learning of a patient's intent to harm a third party.³⁹ The court further stated, "although plaintiffs' pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist."⁴⁰ It reasoned that the doctor-patient relationship was sufficient to support liability for failure to warn third persons of a patient's dangerousness because "by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient."⁴¹

The court highlighted the difficulties mental health professionals may experience when attempting to predict whether a patient would resort to violence.⁴² It reconciled this concern by finding that a therapist need not "render a perfect performance."⁴³ Instead, a therapist need only exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances."⁴⁴

The court also recognized that a therapist must be able to foresee from the patient's manifestations that the patient was likely to commit violent acts against a readily identifiable victim.⁴⁵ In applying its reasoning to the current case, Tatiana was a readily identifiable victim, which heightened the likelihood that she would suffer future harm, and warning Tatiana or her family could have prevented her murder.⁴⁶ The court concluded, "when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another,

³⁷ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976).

³⁸ *Id.* at 343.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 344.

⁴² *Id.*

⁴³ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

⁴⁴ *Id.*

⁴⁵ Sullivan, *supra* note 15, at 714.

⁴⁶ *Id.*

he incurs an obligation to use reasonable care to protect the intended victim against such danger.”⁴⁷

While *Tarasoff* is recognized as creating the duty to warn, the decision’s impact has proliferated widely decades later.⁴⁸ The court established that once a duty arises to warn or protect a potential victim, a therapist may be required to take reasonable and necessary action to protect the threatened individual.⁴⁹ Such steps that would satisfy this standard may include having the patient confined, notifying law enforcement, warning the intended victim, or taking other measures to protect the intended victim.⁵⁰ The court’s broad language provides mental health practitioners the option of warning potential victims of a patient’s threat.⁵¹ It also allows them to seek other protections, such as involuntary hospitalization, which avoids breaking patient confidentiality.⁵² However, requiring therapists to determine the meaning of “foreseeability” could distract from patient care and interfere with the critical decision-making of mental health providers.⁵³

B. Conflicting Duties: Confidentiality and the Duty to Warn

Confidentiality is the basis of therapeutic trust in a medical and psychiatric relationship.⁵⁴ In *Tarasoff*, the California Supreme Court considered the difficulty in balancing patient trust in the therapeutic relationship with public protection.⁵⁵ The American Psychiatric Association (APA), in its amicus curiae brief, argued that a patient’s trust in the psychotherapist is crucial in neutralizing violent-prone persons.⁵⁶ Moreover, the APA argued that the imposition of a duty to warn on psychotherapists undermines the therapeutic relationship and harms therapeutic effectiveness because it impairs the patient’s ability to communicate freely.⁵⁷ According to the APA, the imposition of a duty to warn would result in overprediction of violence, numerous breaches of confidentiality, and premature termination

⁴⁷ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

⁴⁸ Rothstein, *supra* note 7, at 106.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Tarasoff*, 551 P.2d at 346.

⁵² Sullivan, *supra* note 15, at 716.

⁵³ Robert I. Simon, *The Myth of “Imminent” Violence in Psychiatry and The Law*, 75 U. CIN. L. REV. 632, 643 (2006) (stating “‘Foreseeability’ and ‘near future’ are legal fictions as applied to clinical assessment of violence toward one-self or others, [which] is indicative of the imperfect fit between psychiatry and the law.”).

⁵⁴ Wood, *supra* note 18, at 577.

⁵⁵ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 346 (Cal. 1976).

⁵⁶ Brief for American Psychiatric Association et al. as Amici Curiae Supporting Respondents, *Tarasoff v. Regents of Univ. of Cal.*, 551 P. 2d 334 (Cal. 1976) (No. 23042), at 26-27.

⁵⁷ *Id.* at 26.

of therapy, which would increase the patient's danger to society.⁵⁸ When weighing the public interest in supporting effective treatment of mental illness and protecting patients' rights to privacy against the public interest in safety from violent assault, the California Supreme Court found that the uncertain and conjectural character of the alleged damage to the patient did not overcome the possible peril to the victim's life.⁵⁹ Moreover, the court held that "professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim."⁶⁰ The court justified its holding by stating, "[t]he risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved."⁶¹

Free and open communication between patient and provider was one of the main concerns set forth by the *Tarasoff* defendants regarding the patient's potential damage from a breach of confidentiality.⁶² However, the court rejected the defendants' argument that the possibility of issuing warnings based on information disclosed in psychotherapy would undermine the free and open communications essential to effective therapy.⁶³ Instead, the court found that "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others."⁶⁴ In other words, patient-confidentiality must be overcome when disclosure is necessary to avoid harm to another.⁶⁵ The court famously concluded, "the protective privilege ends where the public peril begins."⁶⁶

Conversely, in his dissent, Justice Clark took the opposite approach to the issue of confidentiality.⁶⁷ He asserted that confidentiality was the cornerstone of effective treatment of mentally ill patients and that if confidentiality were undermined, the therapeutic relationship would be irreparably destroyed.⁶⁸ Justice Clark offered a threefold explanation against imposing a duty on mental health professionals to disclose patient threats to potential victims.⁶⁹ First, people will avoid seeking mental health treatment if they believe their medical information will be shared with outsiders.⁷⁰ Second, confidentiality promotes full disclosure and allows patients to

⁵⁸ *Id.* at 11.

⁵⁹ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 346 (Cal. 1976).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 347.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

⁶⁶ *Id.*

⁶⁷ *See id.* at 354-62 (Clark, J., dissenting) (arguing that patient confidentiality is of utmost importance and that the duty to warn would irreparably destroy the therapeutic relationship).

⁶⁸ *Id.* at 354-55 (Clark, J., dissenting).

⁶⁹ *See id.* at 354-62 (Clark, J., dissenting).

⁷⁰ *Id.* at 359 (Cal. 1976) (Clark, J., dissenting).

provide complete and accurate information, which is essential to treatment.⁷¹ Finally, confidentiality builds trust by providing assurances that patient communications are confidential.⁷² Justice Clark's concern about the majority's encroachment on patient-confidentiality has remained consistent with professional apprehensions over the decision's imposition of a duty to warn or protect third persons from dangerous patients.⁷³

Justice Clark's concerns about *Tarasoff's* effect on mental health treatment are shared by many.⁷⁴ One major concern is grounded in the idea that psychiatric care still carries a great deal of social stigma.⁷⁵ Because a sense of shame is associated with a psychiatric disorder, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."⁷⁶ Without the assurance of confidentiality, individuals who need mental health treatment may be deterred from seeking necessary care.⁷⁷ Unnecessary warnings and fruitless breaches of trust in the therapeutic setting could have potentially harmful consequences, such as suppressing disclosure completely.⁷⁸

Additionally, the duty to protect society from violent patients has seemingly complicated the treatment of mentally ill patients and possibly impaired therapeutic effectiveness because of the therapist's fear of legal repercussions that could result from failure to disclose a patient's threat.⁷⁹ According to Mary I. Wood, the confusion surrounding a mental health practitioner's duty to warn "can impair a therapist's ability to effectively treat a patient when the focus shifts from the patient's problems to the therapist's duty and potential liability."⁸⁰ Given that public protection is one of the few instances that a provider's obligation of confidentiality may be overridden,⁸¹ clarifying mental health providers' duty to warn could offer unique prospects for preventing violent behavior in the future while still protecting trust within the therapeutic relationship. This concern is shared not only by the mental health community but also by courts across the United States.⁸²

⁷¹ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 359 (Cal. 1976) (Clark, J., dissenting).

⁷² *Id.* at 359-60 (Clark, J., dissenting).

⁷³ Sullivan, *supra* note 15, at 717.

⁷⁴ See e.g., Wood, *supra* note 18, at 579.

⁷⁵ *Id.* at 578.

⁷⁶ *Id.*

⁷⁷ *Id.* at 579.

⁷⁸ *Id.*

⁷⁹ See generally Anna Whites & Matthew W. Wolfe, *The Provider's Duty to Protect Patients and Third Parties*, 12 J. HEALTH & LIFE SCI. L. 1, 5 (2019).

⁸⁰ Wood, *supra* note 18, at 580.

⁸¹ Whites & Wolfe, *supra* note 79, at 5.

⁸² Sullivan, *supra* note 15, at 717.

III. THE CONFUSING AFTERMATH: LEGISLATIVE AND JUDICIAL RESPONSES TO *TARASOFF*

Since the *Tarasoff* decision, most states have enacted statutes that address the circumstances in which a practitioner has a duty to warn third parties of potentially violent patients.⁸³ As the notion of a duty to warn crept across the United States, it created critical variations among the states.⁸⁴ In Professor Mark Rothstein's examination of the differing legislative responses to *Tarasoff*, he notes that there is no single duty to warn, but rather fifty-one jurisdiction-specific duties.⁸⁵ According to Rothstein, as of 2014, twenty-nine states have imposed a mandatory duty to report serious threats, sixteen states and the District of Columbia implemented permissive duty-to-warn laws, four states had yet to impose any duty to report, and Georgia stood alone with its own unique law.⁸⁶ Since 2014, two states that previously had no duty to report, Nevada and Maine, adopted mandatory duty-to-warn statutes.⁸⁷

There are several other variations among state statutes.⁸⁸ For example, some state laws differ on the circumstances when warnings or other protective measures are appropriate.⁸⁹ Others vary on the individuals or entities that must be protected.⁹⁰ Additionally, some states grant immunity from liability if the mental health professional complies with certain statutory requirements.⁹¹

While many scholars categorize jurisdictional responses to *Tarasoff* differently, it is clear that various positions have emerged as each state has wrestled with the implications of the duty to warn.⁹² In a review of *Tarasoff*

⁸³ Wood, *supra* note 18, at 584.

⁸⁴ See Paul B. Herbert & Kathryn A. Young, *Tarasoff at Twenty-Five*, 30 J. AM. ACAD. PSYCHIATRY L. 275, 276-80 (2002).

⁸⁵ Rothstein, *supra* note 7, at 106.

⁸⁶ *Id.* Since 2014, two states that previously had no duty to report, Nevada and Maine, have adopted mandatory duty to warn statutes. See ME. REV. STAT. ANN. tit. 32 § 7007 (2022); see also NEV. REV. STAT. ANN. § 629.550 (2021).

⁸⁷ See ME. REV. STAT. ANN. tit. 32 § 7007 (2022); see also NEV. REV. STAT. ANN. § 629.550 (2021).

⁸⁸ Rothstein, *supra* note 7, at 106; see e.g., NEB. REV. STAT. ANN. § 38-2137; LA. STAT. ANN. § 9:2800.2; COLO. REV. STATE. ANN. § 13-21-117; CAL. CIV. CODE. ANN. § 43.92; IND. CODE § 34-30-16-1.

⁸⁹ Rothstein, *supra* note 7, at 106; see e.g., DEL. CODE ANN. TIT. 16, § 5402; LA. STAT. ANN. § 9:2800.2 (providing that Delaware requires there to be an explicit and imminent threat to kill or seriously injure a clearly identified victim for the duty to warn to arise. Whereas Louisiana's duty to warn law requires there to be a threat of physical violence, deemed significant by the treating provider, against a clearly identified victim, and there to be apparent intent and ability to carry out such threat).

⁹⁰ Rothstein, *supra* note 7, at 106; see e.g., DEL. CODE ANN. TIT. 16, § 540; 405 ILL. COMP. STAT. ANN. 5/6-1003; FLA. STAT. ANN. § 456.059.

⁹¹ Rothstein, *supra* note 7, at 106.

⁹² See generally Taylor Gamm, *Beyond the Symptoms: Finding the Root Cause of the Chaotic Tarasoff Laws*, 86 U. CIN. L. REV. 823, 835 (2018); Wood, *supra* note 18, at 585 (categorizing jurisdictional

statutes, which tracked the variations of duty-to-warn laws in the United States, Paul Herbert and Kathryn Young found that “the variety of duty-to-warn laws across the nation—with no two states agreeing precisely on a common approach—is virtually unprecedented for any pervasive legal doctrine.”⁹³ Moreover, Herbert and Young concluded that “confusion is an inevitable product, and confusing law is inefficient at best, and often harmful.”⁹⁴ Despite the *Tarasoff* court’s attempt to clearly define the duty to warn and protect, the court’s guidance did not assist other states in writing clear and understandable statutes and did not define the duty in a way that was intelligible and useful to mental health professionals.⁹⁵

To obtain a better understanding of the trends that have developed across the nation since *Tarasoff*, Part II of this Note intends to subdivide the differing jurisdictional approaches into five broad categories: (1) clear affirmative duty to warn, (2) permissive duty to warn, (3) immunity for failure to warn except for in limited circumstances, (4) the hybrid approach, and (5) no-duty-to-warn jurisdictions.

A. Clear Affirmative Duty-to-Warn Statutes

In states that impose a clear affirmative duty to warn, also known as a mandatory duty to warn, mental health professionals are mandated by state law to disclose patients’ threats to third parties.⁹⁶ However, these providers are protected from legal action by patients whose confidentiality is breached.⁹⁷ In states that establish a clear affirmative duty to warn, there is minimal uncertainty about the presence of a duty.⁹⁸ For example, Idaho’s statute imposes a clear affirmative duty on mental health professionals to warn third persons of a patient’s threat.⁹⁹ The statute uses clear, unambiguous language, such as “a mental health professional has a duty to warn,” which leaves little room to doubt the existence of a duty.¹⁰⁰ The Idaho statute provides that a mental health professional has a duty to warn a third person if “a patient has communicated to the mental health professional an explicit

variation in four general categories: “those that explicitly establish a duty, those that prohibit liability except under particular circumstances, those that seem to permit but not require disclosure, and those that take other approaches.”); Sullivan, *supra* note 15, at 752 (analyzing variations of state law by diving approaches into mandatory duty to warn or protect, permissive approach to the duty to warn or protect, a hybrid approach to warning, and the Arkansas immunity model).

⁹³ Herbert & Young, *supra* note 84, at 280.

⁹⁴ *Id.*

⁹⁵ Wood, at *supra* note 18, at 584.

⁹⁶ Chinh, *Understanding Duty to Warn*, SW TO SW (July 30, 2017), <https://swtosw.com/2017/07/30/understanding-duty-to-warn/>.

⁹⁷ *Id.*

⁹⁸ Wood, at *supra* note 18, at 584.

⁹⁹ IDAHO CODE ANN. §6-1902 (1991).

¹⁰⁰ *Id.*

threat of imminent serious physical harm or death to a clearly identified or identifiable victim or victims, and the patient has the apparent intent and ability to carry out such a threat.”¹⁰¹

Although Idaho’s statute clearly establishes a duty to warn, it fails to provide the protection necessary to prevent future acts of violence.¹⁰² This is primarily because of its requirement for “imminent” physical harm or death.¹⁰³ The imminence requirement is an extremely high bar to meet for disclosures.¹⁰⁴ For example, in *Garner v. Stone*,¹⁰⁵ a police officer disclosed to his psychologist that he had a vision of killing his captain and thought about killing eight to ten others, including the police chief and county commissioner.¹⁰⁶ The psychologist decided these threats were serious and reported them to the police officer’s superiors.¹⁰⁷ The psychologist indicated that he “did not believe the threats to be imminent but considered them to be very serious.”¹⁰⁸ The police officer sued the psychologist for violating the physician-patient privilege after the psychologist warned his superiors.¹⁰⁹ Ultimately, a six-person jury in a Georgia Superior Court found in favor of the former police officer.¹¹⁰ As seen in this case, imminence implies immediacy, and often fails to take into account that a patient may make credible threats or indicate dangerousness without expressly stating that they intend to take immediate action to carry out those threats.¹¹¹ Although the requirement for imminent physical harm or death is likely intended to limit

¹⁰¹ *Id.*

¹⁰² See Rothstein, *supra* note 7, at 107 (stating the imminence standard sets the bar too high by limiting disclosures to threats that indicates immediacy and fails to consider that a patient may make credible threats and indicate dangerousness without expressly stating that he or she intends to take immediate action to carry out those threats).

¹⁰³ See Rothstein, *supra* note 7, at 107 (showing many states use “imminent” or “immediate.”); see also *Emerich v. Phila. Ctr. for Human Dev., Inc.*, 720 A.2d 1032, 1039-40 (Pa. 1998) (“immediate, known and serious risk”); COLO. REV. STAT. § 13-21-117 (2008) (“imminent”); DEL. CODE ANN. tit. 16, § 5402(a)(1) (2003) (“imminent”); IDAHO CODE ANN. § 6-1902 (2004) (“imminent”); IND. CODE § 34-30-16-1 (1999) (“imminent”); N.J. STAT. ANN. § 2A:62A-16 (2000) (“imminent”); OHIO REV. CODE ANN. § 2305.51(B) (2018) (“imminent”).

¹⁰⁴ Rothstein, *supra* note 7, at 107.

¹⁰⁵ *Garner v. Stone*, No. 97A-320250-1 (Ga., DeKalb County Super. Ct. Dec. 16, 1999).

¹⁰⁶ William F. Doverspike, *The So-Called Duty to Warn: Protecting the Public versus Protecting the Patient*, 61 GA. PSYCH. 20, 26 (2007), available at http://drwilliamdoverspike.com/files/how_to_manage_the_duty_to_protect.pdf.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 27.

¹⁰⁹ *Id.* at 26.

¹¹⁰ *Id.*

¹¹¹ Rothstein, *supra* note 7, at 107.

the obligations of mental health professionals,¹¹² “it is equally likely to result in confusion and a reluctance to take action to prevent harms.”¹¹³

A general commonality among these jurisdictions is that a therapist must warn “either the victim or law enforcement after a patient makes an explicit and specific threat of physical harm.”¹¹⁴ However, some jurisdictions, such as Indiana, Maryland, Massachusetts, and New Jersey, require a psychotherapist not only to warn of explicit threats by the patient but also require a warning if an assessment of the patient’s actions or the circumstances evidences a threat to a third party.¹¹⁵

B. Immunity for Failure to Warn or Protect Except For In Limited Circumstances

Within the mandatory duty-to-warn category is a subcategory in which jurisdictions provide immunity for failure to warn or protect except in limited circumstances.¹¹⁶ In these jurisdictions, a mandatory duty is imposed on mental health practitioners only when narrow and specified events occur within the therapeutic setting.¹¹⁷ In the absence of such circumstances, the statutes provide immunity to the therapist for failure to disclose a patient’s potential threat.¹¹⁸ For example, laws within this category generally state, “[a] mental health practitioner . . . is not liable for failing to warn of a patient’s threatened violent behavior unless . . .”¹¹⁹ or “no cause of action shall arise against . . . a psychotherapist . . . for failing to protect . . . except . . .”¹²⁰

However, laws that provide immunity to psychotherapists for failure to warn, except in limited circumstances, often require clarification.¹²¹ For example, Colorado’s statute provides that a mental health professional is not liable for failure to warn or protect unless a specific set of circumstances are

¹¹² See, e.g., *McCarty v. Kaiser-Hill Co., L.L.C.*, 15 P.3d 1122, 1124 (Colo. App. 2000); *Fredericks v. Jonsson*, 609 F.3d 1096, 1099 (10th Cir. 2010) (discussing that a mental health provider only has a duty to warn when a patient communicates a serious threat of imminent violence. If there is no evidence of a serious threat of imminent violence, then a provider will not be held liable for failure to warn).

¹¹³ Rothstein, *supra* note 7, at 107.

¹¹⁴ Taylor Gamm, *Beyond the Symptoms: Finding the Root Cause of the Chaotic Tarasoff Laws*, 86 U. CIN. L. REV. 823, 836 (2018).

¹¹⁵ Herbert & Young, *supra* note 84, at 278.

¹¹⁶ Wood, *supra* note 18, at 571.

¹¹⁷ See, e.g., NEB. REV. STAT. § 38-2137 (2022); LA. STAT. ANN. § 9:2800.2 (2022); DEL. CODE ANN. tit. 16, § 5402 (2018); COLO. REV. STAT. § 13-21-117 (2022); ARK. CODE ANN. § 20-45-202 (2013); CAL. CIV. CODE § 43.92 (2013); IND. CODE. § 34-30-16-1 (1998).

¹¹⁸ See, e.g., *id.*

¹¹⁹ NEB. REV. STAT. § 38-2137 (2022).

¹²⁰ CAL. CIV. CODE § 43.92 (2013).

¹²¹ See, e.g., COLO. REV. STAT. § 13-21-117 (2022).

met.¹²² While Colorado's attempt to shield therapists from liability is admirable, its lack of clarity makes it difficult for mental health providers to appreciate when such a duty arises.¹²³ Colorado statute provides in part:

A mental health provider is not liable for damages in any civil action for failure to warn or protect a specific person or persons, including those identifiable by their association with a specific location or entity, against the violent behavior of a person receiving treatment from the mental health provider, and any such mental health provider must not be held civilly liable for failure to predict such violent behavior except where the patient has communicated to the mental health provider a serious threat of imminent physical violence against a specific person or persons, including those identifiable by their association with a specific location or entity.¹²⁴

The Colorado statute is chaotic and even incoherent at times.¹²⁵ The statute seemingly protects mental health providers from "failure to warn or protect a specific person or persons," while also imposing a duty on those mental health professionals for failure to disclose "a serious threat of imminent physical violence against a specific person or persons."¹²⁶ With the difficulties involving imminence and practical issues of applying the imminence standard within the treatment setting, therapists are unlikely to recognize when liability begins and immunity ends.¹²⁷ However, one notable aspect of Colorado's statute is its extension of the duty to warn to cover persons that are "identifiable by their association with a specific location or entity."¹²⁸ Since mass shootings have increasingly targeted different venues in recent years, such as churches, synagogues, grocery stores, and movie theaters, including language that encompasses specific locations within duty-to-warn statutes could help prevent future acts of mass violence.¹²⁹

Another distinguishing factor of this type of duty-to-warn statute is the communication of a serious threat of imminent physical violence.¹³⁰ Under Colorado law, a patient must communicate a serious threat of physical violence to a mental health professional in order for the duty to warn to be

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ COLO. REV. STAT. § 13-21-117 (2022).

¹²⁸ *Id.*

¹²⁹ Faith Karimi, *Mass shooters are increasingly attacking 'soft targets' such as supermarkets. Experts say securing them will be difficult*, CNN (May 20, 2022, 7:10 AM), <https://www.cnn.com/2022/05/20/us/mass-shooters-soft-targets-challenges-cec/index.html>.

¹³⁰ *See Duty to Protect: Roles and Responsibilities for Psychologists*, APA PRAC. ORG. 1, 2 (2013), <https://www.apaservices.org/practice/good-practice/duty-to-protect.pdf>.

triggered.¹³¹ In *Fredericks v. Jonsson*, a patient previously expressed to a psychologist that he used to have “frequent violent fantasies” involving members of the plaintiff’s family, but that he no longer experienced those violent thoughts.¹³² The psychologist did not convey any warnings to the patient’s probation officer or the plaintiffs.¹³³ Two weeks after the examination, the patient drove to the plaintiffs’ home and broke a window in an attempt to break in.¹³⁴ The plaintiffs brought an action against the psychologist for negligent failure to warn, arguing that the psychologist had a duty to warn them because any reasonable psychologist in her position would have known from the patient’s history that he posed a serious risk of violence to the plaintiffs.¹³⁵ The court rejected this argument because Colorado’s duty-to-warn statute requires that the threat be “communicated” to the mental health provider.¹³⁶ The court interpreted this to mean that a mental health provider has a duty to warn only when the patient himself predicts his violent behavior by communicating or expressing his threat to the mental health provider.¹³⁷ Although the court found that the patient’s actions may have led a reasonable psychologist to believe that the patient was a threat to the plaintiffs, it was unwilling to hold the psychologist liable because there was no evidence that the patient communicated “a serious threat of imminent physical violence against a specific person or persons.”¹³⁸

The requirement of a communication of a specific threat of imminent physical violence is underinclusive and brings to light issues with “specificity.”¹³⁹ For example, in *Riley v. United Health Care of Hardin, Inc.*, a male patient with a propensity towards violence never communicated a specific threat toward anyone in his family.¹⁴⁰ However, his hospital records indicated that “he has certainly thought about . . .” hitting his mother, and that “problems related to increased irritability and anger have become more and more evident with his mother.”¹⁴¹ Moreover, the patient told hospital staff that if he was forced to return to his mother’s home, “he might do something he would regret later.”¹⁴² Five days after the patient’s release, he

¹³¹ *Fredericks v. Jonsson*, 609 F.3d 1096, 1097 (10th Cir. 2010).

¹³² *Id.* at 1098.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1105.

¹³⁶ *Id.*

¹³⁷ *Fredericks v. Jonsson*, 609 F.3d 1096, 1105 (10th Cir. 2010).

¹³⁸ *Id.* at 1106.

¹³⁹ See A.G. Harmon, *Back from Wonderland: A Linguistic Approach to Duties Arising from Threats of Physical Violence*, 37 CAP. U. L. REV. 27, 61 (2008) (“A good portion of duty to warn cases . . . [require] specificity of the intended victim. If the threat/pledge is not against either a clearly or reasonably identifiable victim, the duty does not arise.”).

¹⁴⁰ *Riley v. United Health Care of Hardin, Inc.*, No. 97-5860, 1998 WL 5d8733, at *2 (6th Cir. 1998).

¹⁴¹ *Id.*

¹⁴² *Id.*

killed his mother.¹⁴³ The hospital was not liable for failure to warn because the patient never communicated any threat of a specific act of violence to the hospital staff, nor did he articulate a direct threat of physical harm against his mother.¹⁴⁴ The court held that the statement that he “might do something he might regret later” was not sufficient to impose a duty to warn on the hospital because the statement did not specify the intended victim or a violent act.¹⁴⁵ In states requiring a communication of a specific threat of imminent physical violence, many potential victims are left without warning of a patient’s propensity towards violence.¹⁴⁶ While a patient’s prediction of their own violence is a clear sign that another person is in danger, many patients are unlikely to specifically state “I am going to kill X,” which exposes many potential victims to probable violence without warning.¹⁴⁷

However, Indiana takes a different approach to the duty to warn.¹⁴⁸ Under Indiana law, a mental health provider has no duty to “predict” or “warn or take precautions to protect from” a patient’s violent behavior unless the patient “has communicated to the provider of mental health services an actual threat of physical violence or other means of harm against a reasonably identifiable victim or victims” or the patient “evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence or other means to cause serious personal injury or death to others.”¹⁴⁹ Indiana courts have interpreted this to mean that a mental health provider’s duty to warn arises when a patient makes an actual threat of physical violence or the totality of the circumstances indicate that the patient is an imminent danger to others.¹⁵⁰

The Indiana Court of Appeals, in *Coplan v. Miller*, held that determining whether a patient posed “imminent danger” required a consideration of the entire treatment period, rather than a consideration of each treatment separately.¹⁵¹ In *Coplan v. Miller*, a patient, Zachary Miller, killed his grandfather after a month of erratic behavior and six trips to the emergency room at Community Howard Regional Health in Kokomo, Indiana for mental health issues.¹⁵² Miller was taken to the hospital on multiple occasions because of threats made to his mother and grandfather.¹⁵³

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *4.

¹⁴⁵ *Id.*

¹⁴⁶ *See e.g.*, *Riley v. United Health Care of Hardin, Inc.*, No. 97-5860, 1998 WL 5d8733, at *4 (6th Cir. 1998).

¹⁴⁷ *See e.g.*, *Coplan v. Miller*, 179 N.E.3d 1006 (Ind. Ct. App. 2021).

¹⁴⁸ *See* IND. CODE ANN. § 34-30-16-1 (1998).

¹⁴⁹ IND. CODE ANN. § 34-30-16-1 (1998).

¹⁵⁰ *See e.g.*, *Coplan*, 179 N.E.3d at 1012-13.

¹⁵¹ *Id.* at 1013.

¹⁵² *Id.* at 1008-09.

¹⁵³ *Coplan v. Miller*, 179 N.E.3d 1006, 1008-09 (Ind. Ct. App. 2021).

On one of the occasions, Miller was brought to the hospital by the police after his grandfather reported that Miller had kicked him and threatened to kill him.¹⁵⁴ The hospital subsequently determined that Miller presented a “psychiatric problem” and a “homicide risk.”¹⁵⁵ On another occasion, Miller was brought to the hospital by police officers after he threatened to kill his mother, kicked his grandfather a second time, and killed the family dog.¹⁵⁶ Each time Miller went to the hospital, he was discharged with instructions to follow up with behavior health.¹⁵⁷ On his final trip to the emergency room, Miller was acting “anxious,” “paranoid,” and “agitated” and asked to be admitted to the hospital.¹⁵⁸ The doctors determined that “inpatient treatment was not medically necessary” and ordered the patient to be discharged.¹⁵⁹ Within hours of his release, the patient went to his grandfather’s home and brutally attacked him.¹⁶⁰ The patient hit his grandfather with a frying pan, stomped on his head, choked him, and cut his wrist with a steak knife.¹⁶¹ His grandfather succumbed to his injuries two days later.¹⁶²

The defendants argued that the patient’s actions during the month before the attack were insufficient to trigger the duty to warn because he never communicated an actual threat against his grandfather, and the patient did not manifest conduct indicating that he was seriously going harm another person.¹⁶³ The court agreed that the actual threat prong was not met because although the patient acknowledged making earlier threats against his grandfather, this was not the same as saying “Doctor, I’m going to kill [my grandfather].”¹⁶⁴ However, the court found that when determining the imminent-danger prong, a patient’s conduct should be considered as a whole, including consideration of a patient’s “historical” or “prior” conduct.¹⁶⁵ The court concluded that the patient’s conduct on the day of the murder should not be considered in a vacuum, and that the court could not ignore “all the disturbing things he said and did over the previous thirty days.”¹⁶⁶ Viewing the totality of the patient’s statements and conduct, the court held that the hospital visits were sufficient to support a finding of “imminent danger.”¹⁶⁷

¹⁵⁴ *Id.* at 1009.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1010.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Coplan v. Miller, 179 N.E.3d 1006, 1010 (Ind. Ct. App. 2021).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1011-12.

¹⁶⁴ *Id.* at 1013.

¹⁶⁵ Coplan v. Miller, 179 N.E.3d 1006, 1013 (Ind. App. 2021).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Indiana does not stand alone in requiring mental health professionals to consider the actions or circumstances of the patient's threat of violence.¹⁶⁸ Maryland, Massachusetts, and New Jersey require a therapist not only to warn of explicit threats but also to determine whether a patient's actions or the circumstances of a threat indicate imminent danger.¹⁶⁹ Indiana, Maryland, and Massachusetts specifically mandate that a therapist take into account the patient's past actions and propensity for violence.¹⁷⁰ Requiring a provider to look beyond actual threats of physical violence and take into consideration the full extent of the patient's conduct is likely to provide additional protection to potential victims.¹⁷¹ However, expanding the duty to warn to the entirety of a patient's past actions could lead to confusion and uncertainty for many mental health providers when the patient's conduct does not demonstrate a strong propensity towards violence.

C. Permissive Duty-to-Warn Statutes

Permissive duty-to-warn states do not require a therapist to warn third parties of imminent threats.¹⁷² Instead, these jurisdictions allow the breach of confidentiality to disclose such threats to authorities or potential victims.¹⁷³ Sixteen states fall within this category.¹⁷⁴ Permissive duty-to-warn statutes leave disclosure to the therapist's discretion, allowing them to break confidentiality to warn a third party of a patient's threat of violence without subjecting the therapist to civil liability for failure to warn.¹⁷⁵ For example, Oregon's statute provides that in "the professional's judgment" when a patient "indicates a clear and immediate danger to others or to society" during the course of treatment, the mental health provider "may [report] to the appropriate authority."¹⁷⁶ However, the statute explicitly states, "[a] decision not to disclose information . . . does not subject the provider to any civil liability."¹⁷⁷ The Oregon Supreme Court interpreted this statute to mean that there is "no duty to report, under Oregon law, but public health care providers have the discretion to do so."¹⁷⁸ Moreover, because permissive laws do not

¹⁶⁸ See Herbert & Young, *supra* note 84, at 278.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *e.g.*, Coplan v. Miller, 179 N.E.3d 1006, 1013 (Ind. App. 2021).

¹⁷² Gamm, *supra* note 114, at 837.

¹⁷³ *Id.*

¹⁷⁴ Rothstein, *supra* note 7, at 106.

¹⁷⁵ Herbert & Young, *supra* note 84, at 278-79.

¹⁷⁶ OR. REV. STAT. ANN. § 179.505(12) (2022) (emphasis added).

¹⁷⁷ *Id.*

¹⁷⁸ State v. Miller, 709 P.2d 225, 236 n.8 (1985), *superseded by statute*, OR. REV. STAT. ANN. § 40.045 (2022), *as recognized in* Powers v. City of Salem, 771 P.2d 622, 628 n.13 (1989) (stating the Court's interpretation of Oregon's Permissive Duty to Warn statute is still good law, as it was superseded for its presumption that prejudice always resulted from a mistake in admitting evidence).

impose liability on the provider, they often have a lower threshold for the level of risk that triggers a therapist's ability to warn and may apply to a wider range of victims.¹⁷⁹ One significant difference between mandatory and permissive law is the type of potential victims that trigger the duty or ability to warn.¹⁸⁰ Mandatory duty-to-warn laws generally require an identified or identifiable victim, whereas permissive laws apply to a wider range of potential victims when there is potential harm to a person or the public.¹⁸¹ This expansion is clearly noticed in the Oregon statute, which allows a provider to disclose when a patient is a "danger to others or to society."¹⁸²

An essential variation among permissive states is the amount of discretion a statute affords to psychotherapists.¹⁸³ In states such as Texas and Oregon, therapists have true and complete discretion on whether to disclose patient communications.¹⁸⁴ For example, in Oregon, confidential patient information and patient communications may be reported to the appropriate authority if "in the professional judgment of the health care services provider" the patient is considered a "clear and immediate danger to others or to society."¹⁸⁵

Texas's permissive *Tarasoff* statute has been interpreted by the Texas Supreme Court as an exception to confidentiality that provides for disclosure in certain circumstances.¹⁸⁶ In *Thapar v. Zezulka*, the court flatly rejected any *Tarasoff* duty in Texas.¹⁸⁷ The court concluded that Texas's statute *permits* mental health professionals to disclose patient threats to medical or law enforcement personnel but does not *require* disclosure of patient threats to prospective victims.¹⁸⁸ The problem posed by the Texas Supreme Court's permissive warning approach is that it provides little direction or protection to mental health professionals in addressing the potential consequences of a patient's threat of violence.¹⁸⁹

¹⁷⁹ *Duty to Protect: Roles and Responsibilities for Psychologists*, APA PRAC. ORG. 1, 2 (2013), <https://www.apaservices.org/practice/good-practice/duty-to-protect.pdf>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² OR. REV. STAT. ANN. § 179.505(12) (2022).

¹⁸³ Gamm, *supra* note 114, at 837.

¹⁸⁴ Herbert & Young, *supra* note 84, at 279.

¹⁸⁵ OR. REV. STAT. ANN. § 179.505(12) (2022).

¹⁸⁶ *Thapar v. Zezulka*, 994 S.W.2d 635, 639 (Tex. 1999); *see* Current Tex. Health & Safety Code § 611.004(a)(2) (emphasis added), which adopts the same standard:

(a) A professional *may* disclose confidential information only: . . .

(2) to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others or there is a probability of immediate mental or emotional injury to the patient . . .

¹⁸⁷ *Thapar*, 994 S.W.2d at 639.

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ Sullivan, *supra* note 15, at 740.

The statute does not include warnings to an identified victim, thereby limiting disclosure of threats to “medical or law enforcement.”¹⁹⁰ This provides significant protection for therapists because victims or their family members cannot bring actions against mental health professionals when threats are actualized and result in injury or death.¹⁹¹ However, the therapist would be exposed to potential liability for any warning or other protective action if the therapist incorrectly assesses the seriousness of the patient’s threat.¹⁹² The Texas Supreme Court explained that the statute “does not shield mental-health professionals from civil liability for disclosing threats in good faith.”¹⁹³ Rather, mental health professionals “make disclosures at their peril.”¹⁹⁴

This permissive approach, which fails to impose a statutory duty to warn and fails to provide immunity when warnings are given in good faith, subjects therapists to potential liability for acting in accordance with a moral duty to prevent violence or injury to a patient’s intended victim.¹⁹⁵ This result can potentially place therapists in a position to decline action when confronted with uncertainty and instead favor inaction.¹⁹⁶ Although a provider may conclude that a patient is likely to engage in violence, the therapist may decline to act because of the risk of civil liability.¹⁹⁷ Statutes of this nature are likely to result in under-inclusion because a therapist may be unwilling to incur liability for disclosure of confidential patient information, even when the therapist believes the patient has the intent and ability to carry out such a threat.¹⁹⁸ However, Texas’s position remains the minority view with respect to the duty to warn.¹⁹⁹

Another problem posed by permissive duty-to-warn laws stems from a heightened risk of ethical violation.²⁰⁰ For example, implicit bias may lead a therapist to be more suspicious of someone who acts, appears, or speaks in a particular manner.²⁰¹ When therapists have the ability to determine which individuals they should report, they may be more inclined to report members of one sex, socioeconomic group, culture, or religion over another.²⁰² This

¹⁹⁰ *Thapar*, 994 S.W.2d at 639.

¹⁹¹ Sullivan, *supra* note 15, at 741.

¹⁹² *Id.*

¹⁹³ *Thapar v. Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999).

¹⁹⁴ *Id.*

¹⁹⁵ Sullivan, *supra* note 15, at 741.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *See generally id.*

¹⁹⁹ *Id.*

²⁰⁰ Joel M. Geiderman & Catherine A. Marco, *Mandatory and permissive reporting laws: obligations, challenges, moral dilemmas, and opportunities*, 1 JACEP OPEN 38, 39 (2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/emp2.12011>.

²⁰¹ *Id.*

²⁰² *Id.*

can lead to over-reporting because a mental health provider may be more inclined to make unnecessary warnings in states that both permit disclosures and provide immunity for such disclosures.²⁰³

Accordingly, the permissive approach can be both underinclusive and overinclusive.²⁰⁴ A situation may be underinclusive in that therapists may fail to provide warnings, even when there is a serious threat of violence against a readily identifiable victim.²⁰⁵ The potential consequence of these statutes suggests that therapists are not obligated to provide such warning or could incur liability to the patient for breach of confidentiality.²⁰⁶ On the other hand, an overinclusive result may occur when a therapist provides unnecessary warnings, thereby damaging the therapist-patient relationship and hindering the effectiveness of treatment.²⁰⁷ While this approach does not subject a therapist to liability for failure to warn a potential victim, therapists arguably face more difficulty in determining when to warn victims and, therefore, must rely on their sense of moral obligation to either protect the potential victim or preserve confidentiality with the patient.²⁰⁸

D. The Hybrid Approach

There are two states that take a hybrid approach to duty-to-warn laws: Florida and Illinois.²⁰⁹ These states combine mandatory aspects with permissive aspects of the duty to warn; however, both laws achieve this goal in vastly different ways.²¹⁰ Florida's approach is simultaneously permissive and mandatory: a psychiatrist may report threats to a potential victim *and* has an affirmative duty to report threats to a law enforcement agency.²¹¹ In contrast, Illinois' approach draws a distinction between the type of mental health professional.²¹²

The Illinois Mental Health Code imposes a mandatory duty to warn by requiring psychologists and psychiatrists to report when a patient "has communicated to the person a serious threat of physical violence against a reasonably identifiable victim or victims."²¹³ In contrast, under the Illinois

²⁰³ *See id.*

²⁰⁴ *See e.g., id.* at 38.

²⁰⁵ *See generally* Sullivan, *supra* note 15, at 741.

²⁰⁶ *See generally* Geiderman & Marco, *supra* note 200, at 39.

²⁰⁷ *See generally* Sullivan, *supra* note 15, at 741.

²⁰⁸ Rebecca Johnson et al., *The Tarasoff Rule: The Implications of Interstate Variation and Gaps in Professional Training*, 17 J. AM. ACAD. PSYCHIATRY L. 435, 437 (2014).

²⁰⁹ *See* FLA. STAT. ANN. §456.059 (2018); 405 ILL. COMP. STAT. ANN. 5/6-103 (2000); 740 ILL. COMP. STAT. ANN. 110/11 (2015).

²¹⁰ *Id.*

²¹¹ FLA. STAT. ANN. § 456.059 (2018); Sullivan, *supra* note 15, at 762.

²¹² *See Duty to Warn and Reporting Threats of Harm: What You Need to Know*, JACKSON LLP (Nov. 11, 2021), <https://jacksonllp.com/duty-to-warn-in-healthcare/>.

²¹³ 405 ILL. COMP. STAT. ANN. 5/6-103 (2000).

Confidentiality Act, a therapist may disclose patient communications at the “therapist’s sole discretion” when disclosure is “necessary to warn or protect a specific individual against whom a recipient has made a specific threat of violence.”²¹⁴ This imposes solely a permissive requirement with no liability imposed on a therapist for failure to warn or to protect a potential victim if threats made by a patient are actualized.²¹⁵ Illinois courts have interpreted the Confidentiality Act as an “exception to the general rule against disclosures,” which allows the therapist to disclose confidential information “when the therapist feels there is a threat of imminent risk to anyone, including the therapist,” as long as the disclosure is made for the “purpose of preventing or avoiding the injury.”²¹⁶

On the other hand, Florida’s approach varies depending on the person or agency the mental health professional intends to disclose the threat.²¹⁷ Traditionally, Florida took a permissive approach to *Tarasoff*²¹⁸ laws, allowing therapists to notify victims and law enforcement when “the patient has the apparent capability to commit such an act, and that it is more likely than not that in the near future, the patient will carry out that threat.”²¹⁹ However, in the wake of the 2018 Parkland school shooting,²²⁰ Florida implemented new legislation requiring mental health professionals to contact law enforcement while still maintaining a permissive element for contacting the potential victim directly.²²¹ The current Florida statute provides that when a psychiatrist learns of a “specific threat to cause serious bodily injury or death to an identified or a readily available person,” they *may* disclose patient communications to the extent necessary to warn any potential victim and *must* disclose patient communications to the extent necessary to communicate the threat to a law enforcement agency.²²² This hybrid approach allows the psychiatrist discretion to disclose the patient’s threat to

²¹⁴ 740 ILL. COMP. STAT. ANN. 110/11 (2015).

²¹⁵ *See Duty to Warn and Reporting Threats of Harm: What You Need to Know*, JACKSON LLP (Nov. 11, 2021), <https://jacksonllp.com/duty-to-warn-in-healthcare/>.

²¹⁶ *McNally v. Bredemann*, 30 N.E.3d 557, 564 (2015).

²¹⁷ *See* FLA. STAT. ANN. § 456.059 (2000).

²¹⁸ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (1976).

²¹⁹ FLA. STAT. ANN. § 456.059 (2019).

²²⁰ On February 14, 2018, Nicholas Cruz, a former student at Douglas High School in Parkland, Florida, killed seventeen students and teachers and wounded seventeen others. Cruz was treated for multiple mental health disorders by a therapist but discontinued therapy sessions a year before the shootings. *See* Terry Spencer, *School shooter’s brain exams to be subject of court*, AP NEWS (Aug. 14, 2022), <https://apnews.com/article/health-florida-fort-lauderdale-parkland-school-shooting-nikolas-cruz-3e95e3f24bff436544d8e3ab1e24efbb>; *Pollack v. Cruz*, 296 So. 3d 453, 456 (Fla. Dist. Ct. App. 2020).

²²¹ Ryan C. W. Hall & Irina Tardif, *Florida Law Enforcement Policies for and Experience With Tarasoff-Like Reporting*, 49 J. AM. ACAD. PSYCH. AND L. 1, 3 (2021).

²²² FLA. STAT. ANN. § 456.059 (2019) (emphasis added).

the intended victim while simultaneously mandating the psychiatrist to report any threat to a law enforcement agency.²²³

The mandatory aspect of Florida's law provides an important level of protection for potential victims of a patient's violence by bringing law enforcement into the situation.²²⁴ Requiring mental health professionals to report to law enforcement shifts the duty to warn or protect potential victims from the treating therapist to the agency charged with preventing violence.²²⁵ This is likely more effective than a direct warning from the mental health professional in terms of preventing a potentially violent situation.²²⁶ Since law enforcement agencies have more resources than mental health providers and an increased capacity to identify possible victims, it is seemingly appropriate to delegate notification to law enforcement.²²⁷ A 2021 study suggested that 89.0% of Florida law enforcement agencies had policies in place for notifying potential victims and 91.4% had policies regarding notification of specific locations.²²⁸ Moreover, the study concluded that 80.6% of the responding law enforcement departments had policies about monitoring a suspected victim or location, which indicated that notifying law enforcement had positive value for the safety of the potential victim or location beyond simply notifying the threatened person.²²⁹

Florida's statutory scheme also attempts to protect the therapist by providing that disclosure is only required when the therapist determines that the patient has both the intent and ability to carry out such a threat.²³⁰ In other words, the statute requires a "clinical judgment that the patient has the apparent intent and ability to imminently or immediately carry out such threat."²³¹ The Florida approach defers to the mental health professional's assessment of the credibility of the patient's threat, the perceived seriousness of the patient's intent to commit the violent act, and the patient's ability to act on the threat.²³² Moreover, the statute protects the therapist issuing the required warning from civil liability.²³³ The statute provides that a mental health provider's "disclosure of confidential communication when communicating a threat . . . may not be the basis of any legal action . . . or civil liability."²³⁴ The statutory immunity provided by Florida's duty-to-warn law promotes the public policy of protecting third parties from violence,

²²³ Sullivan, *supra* note 15, at 762.

²²⁴ *Id.* at 763.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Hall & Tardif, *supra* note 221, at 7.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Sullivan, *supra* note 15, at 763.

²³¹ FLA. STAT. ANN. §456.059 (2018).

²³² *Id.*; Sullivan, *supra* note 15, at 764.

²³³ *Id.*

²³⁴ FLA. STAT. ANN. §456.059 (2018).

while also protecting the therapist from civil liability for disclosing patient communications.²³⁵

The Florida statutory scheme attempts to strike a balance between the need for confidentiality and the protection of third persons.²³⁶ However, it favors the latter interest by requiring mandatory reports to law enforcement while attempting to ensure that the breach of patient-therapist confidentiality is not functionally ignored by only requiring disclosures when the therapist makes the determination that the patient has both the intent and ability to carry out such threat.²³⁷ This approach is preferable because it provides heightened protection to the public by requiring communication with a collaborating agency, which is of significant importance when public violence is threatened.²³⁸ Also, this approach provides some protection to the confidential relationship between provider and patient because the therapist is not obligated to disclose confidential information to potential victims.²³⁹

IV. THE IMPRACTICAL APPLICATION OF CHAOTIC DUTY-TO-WARN LAWS AND THE NEED FOR CLARITY

In the years following the *Tarasoff* ruling, the practical problems inherent in the implementation of the current duty-to-warn laws became a major concern within the mental health community.²⁴⁰ Ambiguity concerning the application of the duty to warn can arise because of the lack of clarity in the laws, the conflicting duties of confidentiality and protection of the public, and the inexact science of predicting violence.²⁴¹

The myriad of ambiguous laws, regulations, and legal rulings have created confusion for mental health providers regarding what is confidential, when confidentiality should be breached, and what specific actions mental health providers must take in these situations.²⁴² Challenges involving the implementation of the duty to warn may also be linked to the lack of clear, effective guidelines defining the terms of their duty to third persons.²⁴³

²³⁵ Sullivan, *supra* note 15, at 764.

²³⁶ *Id.* at 765.

²³⁷ FLA. STAT. ANN. §456.059 (2018); *id.*

²³⁸ See generally Hall & Tardif, *supra* note 221, at 1.

²³⁹ See generally FLA. STAT. ANN. §456.059 (2018); Sullivan, *supra* note 15, at 765.

²⁴⁰ See generally Karen Tapp & Darrell Payne, *Guidelines for Practitioners: A Social Work Prospective on Discharging the Duty to Protect*, 8 J. SOC. WORK VALUES & ETHICS 1, 5-6 (2011).

²⁴¹ G. Andrew H Benjamin and Connie J. Beck, *Major Legal Cases That Have Influenced Mental Health Ethics*, in THE CAMBRIDGE HANDBOOK OF APPLIED PSYCHOLOGICAL ETHICS 429, 438 (Mark M. Leach & Elizabeth Reynolds Welfel ed., 2018).

²⁴² Jeffrey E. Barnett & Caroline Coffman, *Confidentiality and its Exceptions: The Case of Duty to Warn*, SOC'Y FOR ADVANCEMENT PSYCHOTHERAPY, <https://societyforpsychotherapy.org/confidentiality-and-its-exceptions-the-case-of-duty-to-warn/> (last visited Sep. 4, 2023).

²⁴³ Ginger Mayer McClarren, Comment, *The Psychiatric Duty to Warn: Walking A Tightrope of Uncertainty*, 56 U. CIN. L. REV. 269, 286 (1987).

Mental health providers are frequently held liable for failing to adequately warn a potential victim, even though the law has not made clear what constitutes an "adequate" warning.²⁴⁴

A 2009 study of 300 psychologists in four states with varying legal obligations concerning the duty to warn found that 76.4% of psychologists had misunderstandings about their respective state's laws.²⁴⁵ Some of the psychologists believed that a legal duty to warn arose when it did not, while others believed that a warning was their only legal recourse when other protective options were available.²⁴⁶ Moreover, 89% of the participating psychologists were confident that they understood the duty to warn/protect in their own jurisdiction.²⁴⁷ The uncertainty faced by mental health providers regarding their legal obligations is often attributed to the highly complex and contradictory laws and regulations, as well as the unclear definition of "dangerousness."²⁴⁸ Additionally, the lack of clear guidance concerning a therapist's professional obligations makes it challenging for mental health professionals to know when the duty to warn arises and how to implement the duty to warn into their clinical practice.²⁴⁹

Implementing the duty to warn and protect doctrine can often present complex and challenging ethical dilemmas that require intricate clinical judgments for mental health professionals.²⁵⁰ Therapists must balance immediate client welfare with the best interest of society and, at the same time, protect themselves from legal ramifications that may result from a failure to warn or breach of confidentiality.²⁵¹ For example, a provider may feel strongly that a particular circumstance justifies a breach of therapist-patient confidentiality but is ultimately mistaken.²⁵² That provider could then be held liable to the patient for the breach of confidentiality, regardless of whether the provider was acting in good faith.²⁵³ Conversely, a provider who favors confidentiality over the issuance of a warning could be subject to civil liability for the failure to warn a threatened third party.²⁵⁴

²⁴⁴ *Id.*

²⁴⁵ Yvona L. Pabian et al., *Psychologists' knowledge of their states' laws pertaining to Tarasoff-type situations*, 40 PRO. PSYCH. RSCH. PRAC. 8, 8 (2009).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Jeffrey E. Barnett & Caroline Coffman, *Confidentiality and its Exceptions: The Case of Duty to Warn*, <https://societyforpsychotherapy.org/confidentiality-and-its-exceptions-the-case-of-duty-to-warn/> (last visited Sep. 4, 2023).

²⁴⁹ *Id.*

²⁵⁰ Luann Costa & Michael Atekruse, *Duty-to-warn guidelines for mental health counselors*, 72 J. COUNSELING DEV. 346, 346 (1994).

²⁵¹ *Id.*

²⁵² Ahmad Adi & Mohammad Mathbout, *The Duty to Protect: Four Decades After Tarasoff*, AM. J. PSYCHIATRY (2018), <https://psychiatryonline.org/doi/10.1176/appi.ajp-rj.2018.130402>.

²⁵³ *Id.*

²⁵⁴ *Id.*

Challenges involving the implementation of the duty to warn may be attributed to how United States jurisdictions define “dangerousness” and the requirement of imminence.²⁵⁵ While “imminent” violence towards self or others is a term firmly embedded in the language of psychiatry and the law, there is no evidence-based research that supports the proposition that clinicians can accurately predict when, or even if, an individual will commit an act of violence.²⁵⁶ Nevertheless, eighteen states and the District of Columbia require that to establish a duty to warn or protect, a threat made against a potential victim be “imminent” or “immediate.”²⁵⁷ In the states that explicitly require that the violence be “imminent” to give rise to a duty to warn, clinical commentators often provide different definitions of how the law ought to be interpreted, ranging from a few days to a few weeks to several months.²⁵⁸ For example, one commentator defined “imminent” violence as occurring “within three days” of the prediction of violent behavior towards another.²⁵⁹ Another researcher found that the measure of “imminent” violence was whether a patient would or would not engage in violent conduct within one week following a psychological risk assessment.²⁶⁰ Others define imminence more vaguely. For example, the California Department of Health Care Services defined “imminent” as “about to happen or ready to take place.”²⁶¹

Moreover, imminence sets the bar too high for disclosure and leaves mental health professionals attempting to apply an impractical standard.²⁶² Although the imminence requirement is generally intended to limit the duties of mental health professionals,²⁶³ it leaves the therapist with the impossible task of divining the meaning of “imminent” danger.²⁶⁴ For example, a mental health professional may believe that a patient with a history of violence who has made credible threats did not indicate that they were planning to take imminent action to carry out those threats, which could leave the therapist uncertain as to whether they are under a legal duty to warn the potential

²⁵⁵ *Id.*

²⁵⁶ Simon, *supra* note 53, at 637.

²⁵⁷ Rothstein, *supra* note 7, at 107.

²⁵⁸ Johnson et al., *supra* note 208, at 471.

²⁵⁹ See JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 134 (1981).

²⁶⁰ Paul D. Werner et al., *Aspects of Consensus in Clinical Predictions of Imminent Violence*, 46 J. CLINICAL PSYCH. 534, 535 (1990).

²⁶¹ *Rights for Individuals in Mental Health Facilities Admitted Under the Lanterman-Petris-Short Act*, CAL. DEPT. HEALTH CARE SERV. 1, 29, https://www.dhcs.ca.gov/services/Documents/DHCS_Handbook_English.pdf.

²⁶² Rothstein, *supra* note 7, at 107.

²⁶³ See *id.*; Simon, *supra* note 53, at 637.

²⁶⁴ Simon, *supra* note 53, at 638.

victim and, thereby expose the therapist to liability if the therapist is ultimately mistaken.²⁶⁵

The American Psychiatric Association (APA) abandoned the imminence standard in its medical code of ethics.²⁶⁶ Specifically, The APA's *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* ("The Principles of Medical Ethics") banished the word "imminent" in its 2006 edition.²⁶⁷ Currently, *The Principles of Medical Ethics* states, "[w]hen, in the clinical judgment of the treating psychiatrist, the risk of danger is deemed to be *significant*, the psychiatrist may reveal confidential information disclosed by the patient."²⁶⁸ Replacing "imminent" with "significant" shifts the focus from the time in which the patient may commit the violent act to whether the patient has demonstrated capacity to carry out such a threat.²⁶⁹ This allows the therapist to focus on the patient's history of violence, the situational triggers that have exacerbated violence in the past, and what can be done to intervene.²⁷⁰

The confusion surrounding the imminence standard shows that legislatures should focus less on the immediacy of the threat and more on the patient's demonstrated capacity to carry out the threat.²⁷¹ Focusing on the patient's capacity to commit the future act may increase the effectiveness of the duty to warn and provide further protection to potential victims because it is consistent with the role of a mental health professional.²⁷² Psychologists and other mental health practitioners often conduct risk assessments to predict the likelihood that an individual might act violently in the future.²⁷³ The information relevant to conducting risk assessments includes childhood experiences, previous violent history, personality structure, degree of mental health, relationship status, and use of alcohol.²⁷⁴ Moreover, the context, opportunity, frequency, and severity of past dangerous behavior and the identification of circumstances that trigger dangerous behavior are essential

²⁶⁵ Rothstein, *supra* note 7, at 107.

²⁶⁶ *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, AM. PSYCHIATRIC ASS'N, 1, 7 (2013), <https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/Ethics/principles-medical-ethics.pdf>.

²⁶⁷ Simon, *supra* note 53, at 638.

²⁶⁸ *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, *supra* note 266, at 7.

²⁶⁹ See Johnson et al., *supra* note 208, at 471.

²⁷⁰ See *id.*

²⁷¹ *Id.*

²⁷² See generally Jan Chaiken, et al., *Predicting Violent Behavior and Classifying Violent Offenders*, in UNDERSTANDING AND PREVENTING VIOLENCE, VOLUME 4: CONSEQUENCES AND CONTROL 217, 245 (Nat'l Acad. Press, 1994).

²⁷³ Stephen Rochefort, *Risk Assessment: Predicting Future Violence*, VIE PSYCH., <https://www.viepsychology.com/2016/11/04/risk-assessment-predicting-future-violence/> (last visited Aug 27, 2023).

²⁷⁴ *Id.*

to a competent and reliable risk assessment of future dangerousness.²⁷⁵ According to a recent study, a person's past conduct, antisocial or self-destructive behavior, may be indicative of the frequency and seriousness of future violent behavior.²⁷⁶ Specifically, the frequency and seriousness of the other forms of socially undesirable and self-destructive behaviors are indicative of the frequency and seriousness of future violent behavior.²⁷⁷ Aligning legal requirements for the duty to warn with the current research and methodology used by mental health professionals when making predictions of future violence could likely increase the effectiveness of the mental health community and provide additional protection to the public.²⁷⁸

Interestingly, *Tarasoff* never imposed an "imminence" or "immediacy" requirement.²⁷⁹ This requirement likely would not have been satisfied because Poddar did not kill Tatiana until ten weeks after disclosing to Dr. Moore that he intended to harm Tatiana.²⁸⁰ Perhaps this is what led the California Supreme Court to focus on the foreseeability of the harm over the immediacy of Poddar's dangerous actions.²⁸¹ However, foreseeability has been described as "a cliché" and a "legal fiction as applied to the clinical assessment of violence."²⁸² Moreover, requiring therapists to determine the meaning of imminence and foreseeability could distract from patient care and interfere with the critical decision-making of mental health providers.²⁸³

Accordingly, to interrupt acts of violence and increase the mental health communities' effectiveness at managing potential threats, the duty to warn should focus on the risk of danger that is deemed to be significant by the mental health professional, the patient's intention to carry out such harm, and the patient's demonstrated capacity to carry out such harm. Moreover, the duty to warn should be focused on the obligation to assess violence according to a standard of reasonable care, which therapists may achieve in their clinical practice, and not a duty to predict violence accurately.²⁸⁴

²⁷⁵ Robert T. M. Phillips, *Predicting the Risk of Future Dangerousness*, 14 VIRTUAL MENTOR 472, 474 (2012).

²⁷⁶ Chaiken et al., *supra* note 272, at 245.

²⁷⁷ *Id.*

²⁷⁸ *See generally id.*

²⁷⁹ *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

²⁸⁰ *Id.* at 341.

²⁸¹ *See id.* at 346; Rothstein, *supra* note 7, at 107.

²⁸² Simon, *supra* note 53, at 636.

²⁸³ *Id.* at 643.

²⁸⁴ James C. Beck, *The Psychotherapist's Duty to Protect Third Parties from Harm*, 11 MENTAL AND PHYSICAL DISABILITY L. REP. 141, 147 (1987); *Emerich v. Phila. for Human Development, Inc.*, 720 A.2d 1032, 1040 (Pa. 1998).

V. A PROPOSAL FOR A MODEL STATUTE THAT IS CLEARLY
DEFINED AND PRAGMATICALLY EFFECTIVE IN THE
TREATMENT SETTING

The jurisdictional variance of this legal doctrine is abundant, and the variety of the duty-to-warn laws across the nation produces an element of unpredictability and confusion for mental health providers and the community therein.²⁸⁵ This unwanted result contributes to a reluctance to act because of “the conundrum a mental health care professional faces regarding the competing concerns of productive therapy, confidentiality, and other aspects of the patient’s well-being . . . [and] public safety.”²⁸⁶ This Note does not seek to strike a complete balance between provider-patient confidentiality and the protection of public safety, nor does it provide a conclusive answer on how to prevent acts of mass violence in the future. Rather, this Note proposes a model statute that seeks to clarify therapists’ duties regarding the treatment of potentially violent patients. While the need for effective and confidential mental health treatment must be balanced with the interest of protecting society from violent acts, legislatures must be cognizant of the difficulty of accurately predicting future dangerousness and afford protection to therapists implementing the duty to warn.²⁸⁷

In addition, state legislatures should define the scope of when a therapist’s duty to warn arises, to whom the duty is owed, and what preventive actions must be taken to discharge such duty. They should also afford immunity to therapists for disclosures of confidential information and failure to predict a patient’s dangerousness accurately. Moreover, state legislatures should provide effective statutes, which eliminate “imminent” from providers’ duty to warn. The therapeutic relationship and protection of the public will arguably benefit if legislatures pass clearly defined laws and ensure that therapists are able to efficiently integrate such duties within their practice.

A model statute should provide:

A mental health provider has a duty to warn the appropriate law enforcement agency and the potential victim or victims when a patient has communicated an actual threat of physical violence deemed to be significant by the provider, or evidences conduct indicating significant risk that the patient will use physical violence or other means to cause serious personal injury or death to a reasonably identifiable victim or victims, including those that are identifiable by their association with a specific location or entity. A mental health provider shall discharge the legal duty to

²⁸⁵ Gamm, *supra* note 114, at 839.

²⁸⁶ Rothstein, *supra* note 7, at 108.

²⁸⁷ *See generally id.*

warn or protect by notifying the appropriate law enforcement agency and the potential victim or victims, arranging for the patient's voluntary hospitalization, or petitioning for involuntary hospitalization. A law enforcement agency that receives notification from a mental health provider of a threat must take appropriate action to prevent the risk of harm, including, but not limited to, notifying the intended victim of such threat or initiating a risk protection order.

No civil liability or cause of action may arise against a mental health professional for failure to predict, warn, or take precautions to protect from a patient's violent behavior if a provider has, in good faith, made reasonable efforts to assess the patient's violent behavior, and their reasonable efforts fail to reveal an actual threat or evidence of violent conduct against a reasonably identifiable victim or victims, including those that are identifiable by their association with a specific location or entity. No civil liability or cause of action shall arise against a mental health provider based on an invasion of privacy or breach of confidentiality for any confidence disclosed to law enforcement or potential victims in an effort to discharge the duty arising under this section.

A model statute, such as the one above, provides public redress when a patient engages in foreseeable violence. However, it holds mental health professionals to a practical standard of conduct and encourages providers to improve their efforts in assessing potentially violent patients. Moreover, it protects mental health providers, which would substantially decrease the fear of liability felt by many practitioners in the mental health community and accounts for the difficulties of predicting future violence.

By including the language "a mental health professional has a duty to warn" there is little doubt as to the existence of an affirmative duty to act in the specified circumstances. This helps clarify the ambiguity mental health providers face when determining whether they have a duty to warn a potential victim or law enforcement. Also, the model statute clearly specifies the circumstances that give rise to the duty to warn, which will likely minimize unnecessary breaches of confidentiality.²⁸⁸ Although imposing a duty to warn on mental health professionals when a patient's actions or conduct indicate the potential for violence will likely create additional liability for mental health professionals, it encourages mental health professionals to conduct reasonable risk assessments for future violence.²⁸⁹ Moreover, limiting the duty to warn to specific threats of imminent violence is underinclusive, thereby exposing foreseeable victims to preventable violence.²⁹⁰ Thus, the

²⁸⁸ See Wood, *supra* note 18, at 598-99.

²⁸⁹ See James C. Beck, *The Psychotherapist's Duty to Protect Third Parties from Harm*, 11 MENTAL AND PHYSICAL DISABILITY L. REP. 141, 147 (1987).

²⁹⁰ See Rothstein, *supra* note 7, at 107.

expansive language of the model statute is needed to protect the public from “dangerous” patients.²⁹¹

Requiring mental health professionals to warn appropriate law enforcement agencies could also afford greater protection to the public because notifying law enforcement and promptly warning the potential victims provides a safer and simpler course of action.²⁹² Reporting threats to police officers will likely have a large impact when threats are made about public places or locations because of police officers’ ability to monitor locations or suspected victims.²⁹³ Moreover, studies have shown that notifying law enforcement has increased social benefits for the safety of the threatened person or location beyond simply notifying the potential victims.²⁹⁴ Thus, communication with a collaborating agency is of significant importance when public violence is threatened.²⁹⁵

While many psychotherapists have proposed that liability should not be triggered until the patient has made a threat directly to the therapist concerning a named victim, issues arise with this standard because it permits a clinician to avoid liability by failing to conduct an adequate assessment of potential violence.²⁹⁶ Rather, clinicians should be held to a professional standard for determining whether they have conducted an adequate evaluation of potential violence.²⁹⁷ As stated in *Tarasoff*, “when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.”²⁹⁸ This holds mental health professionals to a practical standard of conduct and encourages providers to improve their efforts in assessing potentially violent patients.²⁹⁹ It also ensures mental health professionals are held accountable when there are credible threats of violence or the patient presents clear conduct that they intend to engage in violent behavior towards an identifiable person or specific location.³⁰⁰

Scholars have rejected the expansion of the duty to warn to include threats made against a specific location.³⁰¹ Specifically, it has been argued that expanding a therapist’s duty to warn to encompass threats against persons who are “identifiable by their association with a specific location or

²⁹¹ See *id.*

²⁹² Herbert & Young, *supra* note 84, at 278.

²⁹³ Hall & Tardif, *supra* note 221, at 7.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See Beck, *supra* note 289, at 147.

²⁹⁷ See *id.*

²⁹⁸ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 339 (Cal. 1976).

²⁹⁹ See *e.g.*, Beck, *supra* note 289, at 147.

³⁰⁰ See *e.g.*, *id.*

³⁰¹ See Gamm, *supra* note 114, at 845.

entity” exposes therapists to additional liability and exacerbates practical issues within the mental health profession.³⁰² However, the extension of the potential victims to include threats made to a specific location may provide additional protection to the community and allow mental health professionals to intervene and prevent violence before it occurs.³⁰³ Moreover, since mass shootings have increasingly targeted different venues in recent years, such as churches, schools, synagogues, grocery stores, and movie theaters, including language that encompasses specific locations within duty-to-warn statutes could help prevent future acts of mass violence.³⁰⁴

In light of recent mass shootings against supposedly random victims, requiring a warning based on a specific “location or entity” seeks to prevent acts of violence against both readily identifiable and random victims,³⁰⁵ thus affording greater protection to the public. Moreover, expanding the duty to warn to encompass specific locations does not expose therapists to additional liability when legislatures combine a mandatory duty to warn with immunity for reporting.³⁰⁶ In that instance, psychotherapists are protected from civil actions that may arise from the disclosure of patient information or failure to adequately predict future violence.³⁰⁷

Scholars also contend that mandatory reporting laws often raise important ethical questions because they prioritize public and patient welfare and set aside the provider's duty to protect confidentiality.³⁰⁸ Reporting that overrides patient confidentiality is often believed to result in patients losing trust in providers or avoiding treatment altogether, which would be detrimental to the patient-therapist relationship.³⁰⁹ However, as stated in *Tarasoff*, when a therapist’s disclosure is necessary to avoid physical harm or death to others, it is “not a breach of trust or a violation of professional ethics”³¹⁰ This is because “public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others.”³¹¹

³⁰² Gamm, *supra* note 114, at 845 (quoting COLO. REV. STAT. § 13-21-117(2023)).

³⁰³ The Associated Press, *House proposal would expand duty to report threats*, THE DENVER PRESS (Mar. 5, 2014), <https://www.denverpost.com/2014/03/05/house-proposal-would-expand-duty-to-report-threats/> (explaining that when Colorado changed its law to include “specific location or entity,” Colorado Democratic Rep. Jovan Melton said, “[s]o therefore if a threat is made toward one of our schools, or a theater, or some other public place, the therapist will then be able to have the tools to work with law enforcement and really protect our public interests and public safety.”).

³⁰⁴ Faith Karimi, *Mass shooters are increasing attacking ‘soft targets’ such as supermarkets. Experts say securing them will be difficult*, CNN (May 20, 2022, 7:10 AM), <https://www.cnn.com/2022/05/20/us/mass-shooters-soft-targets-challenges-cec/index.html>.

³⁰⁵ Sullivan, *supra* note 15, at 755.

³⁰⁶ See e.g., COLO. REV. STAT. ANN. § 13-21-11 (2022).

³⁰⁷ See e.g., *id.*

³⁰⁸ Geiderman & Marco, *supra* note 200, at 39.

³⁰⁹ *Id.*

³¹⁰ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

³¹¹ *Id.*

Mandatory duty-to-warn laws are also believed to have a large economic and professional impact on mental health providers.³¹² However, courts have rejected this argument because “the execution of the duty to warn only requires a simple telephone call to the victim or other appropriate authorities.”³¹³ Thus, “[t]he burden imposed on the individual in fulfilling this duty is greatly outweighed by the potential or actual harm suffered as a result of failure to fulfill this duty.”³¹⁴

This Note is only concerned with one small part of the *Tarasoff* doctrine.³¹⁵ The duty to warn is far more complex than presented here, and various issues still remain, including possible deterrence of patients seeking psychiatric help and lack of trust in a provider. While this proposal does not fix all issues concerning duty-to-warn laws, it attempts to provide clarity to therapists, and provide heightened protection to the public. Admittedly, this proposed statute does not strike a perfect balance between provider-patient confidentiality and public protection. However, it does afford greater protection to the public, less exposure to liability on the part of the therapist, and clarifies the duty to warn in order to decrease the risk of unnecessary warnings.

VI. CONCLUSION

In the United States, state variations of legal doctrines are anticipated and often preferred.³¹⁶ However, the significant variation of duty-to-warn laws, with few states agreeing on a common approach, is nearly unprecedented for any prevalent legal doctrine.³¹⁷ Confusion is an unavoidable consequence of the chaotic *Tarasoff* laws currently in effect, which are inefficient and possibly even detrimental to the mental health community and the therapeutic relationship.³¹⁸ To mitigate the ambiguity surrounding *Tarasoff* laws, state legislatures should adopt an unambiguous approach to the duty to warn by clearly defining the scope of when a therapist’s duty to warn arises, whom the duty is owed, what preventive actions must be taken to discharge such duty, and afford immunity to therapists for disclosures of confidential information and failure to accurately predict a patient’s dangerousness.

Moreover, given the potential harm to the public from mass shootings, the introduction of a clearly defined duty to warn could interrupt future

³¹² *Bradley v. Ray*, 904 S.W.2d 302, 310 (Mo. Ct. App. 1995).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *See generally Tarasoff*, 551 P.2d at 334.

³¹⁶ *See Herbert & Young, supra* note 84, at 274.

³¹⁷ *Id.* at 278.

³¹⁸ *Id.*

instances of violence and increase the mental health communities' effectiveness at managing potential threats. Although perpetrators of mass violence are rarely driven by psychotic symptoms, mental health providers are commonly involved when persons make overt threats against others or evidence conduct that raise such concerns.³¹⁹ For the small number of persons who have mental illness that constitute a threat to themselves or others, it is necessary for there to be unambiguous and well-understood legal standards regarding the duty to warn.³²⁰ Thus, mental health professionals must be able to determine when such duty arises to efficiently protect the public from persons that threaten mass violence.³²¹ When such potential violence is at stake, it is of utmost importance that the mental health community communicate with local law enforcement agencies to prevent acts of mass violence before they occur.³²²

Admittedly, duty-to-warn laws are unlikely to avert all acts of mass violence, especially when there is no indication of violent tendencies or the perpetrator does not seek psychiatric treatment prior to committing a mass attack.³²³ However, given the critical role mental health providers play in preventing acts of mass violence,³²⁴ implementing effective and clearly defined statutes could mitigate the risk of violent persons committing mass murder because the mental health community would be better equipped to prevent acts of violence by acting on their duty to warn.

³¹⁹ Amy Barnhorst & John S. Rozel, *Evaluating threats of mass shooting in the psychiatric setting*, 33 INT'L REV. PSYCHIATRY 607, 613 (2021).

³²⁰ *See id.*

³²¹ *See id.*

³²² *See id.*

³²³ *See* Shaila Dewan, *What Are the Real Warning Signs of a Mass Shooting?*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/2022/08/22/us/mass-shootings-mental-illness.html>.

³²⁴ *See* Peterson & Densley, *supra* note 8, at 20-21.

ELIMINATION OF CASH BAIL IN ILLINOIS: ACCESSING RISK OF DEFENDANTS USING RISK ASSESSMENT TOOLS

Zachary Vancil*

I. INTRODUCTION

A fundamental concept within the United States comes from the Eighth Amendment, which commands that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹ While many aspects of the Bill of Rights have been challenged and reviewed by the Supreme Court, the Excessive Bail Clause has limited application.² The Supreme Court in *United States v. Salerno* has held that the Eighth Amendment does not always require bail, but the Court did not go further to address the minimum requirements for the Eighth Amendment.³ Therefore, like many Amendments under the Bill of Rights, the Eighth Amendment is a fundamental right, but what that exactly means so far is that someone can be denied bail to ensure their presence at trial and to protect society from further harm.⁴ In application, “innocent until proven guilty” has been in a struggle with the public’s concern about maintaining a presence at trial and protecting community safety.⁵ Due to a history of discrimination within the United States, the focus has transitioned from prioritizing safety and trial attendance to emphasizing an individual’s financial capacity.⁶ This shift frequently results in a disproportionate impact on minority groups.⁷

Cash bail is a system where defendants are detained pretrial unless they can pay cash to get out before their trial.⁸ The idea behind cash bail is that by paying in cash, a defendant is making a promise to show back up to court

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¹ U.S. CONST. amend. VIII.

² Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1039-40 (2015).

³ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

⁴ *See id.*; *see also* *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (holding that the Eighth Amendment permits bail to assure presence at trial).

⁵ Alexa Van Brunt & Locke E. Bowman, *Toward A Just Model of Pretrial Release: A History of Bail Reform and A Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 771 (2018).

⁶ *Id.*

⁷ *Id.* at 737.

⁸ Chloé G. Pedersen & Jessica Schneider, *Let's Get Real About the Safe-T Act*, 110 ILL. BAR J. 46, 47 (2022).

instead of remaining detained prior to trial.⁹ In theory, the ability of a person to pay in cash is significant because many are motivated by money, and there are plenty of examples where cash bail has worked; however, there are also many examples where it has been proven unsuccessful.¹⁰ For example, evidence shows that cash bail is often unsuccessful when wealthy individuals commit serious crimes and can be released.¹¹ In contrast, an indigent defendant who commits a less serious offense faces more significant barriers to being released simply because they cannot meet the cash bail requirements.¹²

It has been argued and empirically validated that the cash bail system of many states often discriminates based on wealth.¹³ These arguments suggest that the focus of cash bail places the burden on the defendant's ability to pay and overshadows its objective of increasing the likelihood they will show back up to court proceedings or preventing their release if they pose a real threat to the community.¹⁴ Cash bail releases individuals based on wealth rather than based on whether or not they will show back up to court or even if they are a harm to others in society.¹⁵ In comparison, some states may not require cash bail and might release a defendant on their own recognizance, which allows a defendant to return on his or her own accord to court without any further conditions.¹⁶ Other systems require a set of conditions that a defendant must abide by to remain released pretrial, but which conditions do not have any correlation to money.¹⁷ Defense lawyers and scholars have suggested that many pretrial detainees in cash bail systems are often unnecessarily detained and/or given excessive bail, thus furthering the systematic discrimination that many argue encompasses our criminal justice system.¹⁸

This Note proceeds in the following parts. Part II introduces the current pretrial system that mainly involves cash bail at the state level. Part III looks at the pretrial systems in New York, New Jersey, and Illinois and highlights

⁹ See, e.g., *How Courts Work*, AM. BAR ASS'N (Sep. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/.

¹⁰ See Josefa Velasquez & Rachel Holliday Smith, *Why is New York's Bail Reform So Controversial?* THE CITY (Feb. 21, 2022, 6:03 PM), <https://www.thecity.nyc/2022/2/21/22944871/new-york-bail-reform-controversy-eric-adams>.

¹¹ See Van Brunt & Bowman, *supra* note 5, at 716-17.

¹² See *id.*

¹³ *Id.*

¹⁴ Pedersen & Schneider, *supra* note 8, at 47.

¹⁵ See Lorelei Laird, *Court systems rethink the use of financial bail, which some say penalizes the poor*, AM. BAR ASS'N J. (Apr. 1, 2016, 4:40 AM), http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/ABA_Courts_Rethink-Featuring_Shannan_Wise.pdf.

¹⁶ *Own recognizance*, CORNELL L. SCHOOL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/own_recognizance_\(or\)](https://www.law.cornell.edu/wex/own_recognizance_(or)) (last updated July 2020).

¹⁷ See 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); see also N.J. STAT. ANN. § 2A:162-25(c)(2) (2021) (providing that both statutes give the option to set pretrial release conditions).

¹⁸ Howe, *supra* note 2, at 1039.

the differences in the cash bail systems. It also addresses the risk assessments used in each state, even if not adopted statewide. Part IV makes recommendations to the current Illinois statutory framework by changing statute wording to impose a mandatory risk assessment tool. Along with the statutory change, Part IV proposes a risk assessment tool based on factors that the other systems use.

II. A LOOK INTO THE CURRENT BAIL SYSTEMS ACROSS THE UNITED STATES

This Section introduces the current bail systems in a few jurisdictions and analyzes the pretrial statutes in Illinois, New York, and New Jersey. The reason for comparing cases among the three states is to highlight that New Jersey stands apart by moving away from cash bail and instead adopting risk assessment tools. In contrast, New York and Illinois have not yet introduced such tools.¹⁹ However, these two states have adopted differing approaches in their bail provisions,²⁰ which will be elaborated upon in this Note.

It has been suggested that the United States is in a transitional phase of criminal justice.²¹ Scholars and criminal justice experts argue that a more general consensus about mass incarceration and disproportionate effects on minorities has led legislators and grassroots efforts to petition for a change in pretrial detention.²² Many changes have been spurred by recent killings of racial minorities and a renewed backlash against the criminal justice system as it disproportionately affects people of color.²³ Among the changes currently happening to the criminal justice system are bail reform and reforming the pretrial process.²⁴ Only a few states have moved away from cash bail.²⁵ Despite being in the minority, many more states have implemented risk assessment tools and reforms to their bail structure.²⁶ Many commentators have placed the current movement under the “third wave” of bail reform.²⁷ In petitioning for bail reform, many groups, such as the Illinois

¹⁹ Christopher Porrino and Elie Honig, *Commentary: Illinois bail reformers: New Jersey’s model works, plain and simple.*, CHICAGO TRIBUNE, (Feb 14, 2020, 5:52 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-bail-reform-new-jersey-model-porrino-honig-20200214-yrho7khot5glvn3mv4u4qxihu-story.html>.

²⁰ *Id.*

²¹ See Van Brunt & Bowman, *supra* note 5, at 742.

²² *Id.* at 742-43.

²³ See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

²⁴ Van Brunt & Bowman, *supra* note 5, at 743.

²⁵ See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

²⁶ JENS DAVID OHLIN, CRIMINAL PROCEDURE: DOCTRINE, APPLICATION, AND PRACTICE 850 (Rachel E. Barkow et al. eds., 2019).

²⁷ See Van Brunt & Bowman, *supra* note 5, at 742-43.

Black Caucus, have emphasized the need for a non-monetary basis for pretrial release.²⁸ Part of the issue among critics is that a significant number of individuals are needlessly detained pending trial simply because they cannot afford bail.²⁹ They also argue that wealthy individuals who may have committed the same or even worse crimes can get out of jail pending trial simply because they can afford it.³⁰

Early into this new movement, several states made legislative movements to change their current systems.³¹ For example, Illinois has moved to eliminate cash bail under the Pre-Trial Fairness Act (PFA).³² Although Illinois is one of the few states that has moved away from cash bail, other states have yet to make such substantial changes.³³ Nationwide, states are moving away from a presumption of cash bail towards what is being considered a more fair system that does not discriminate based on wealth.³⁴ However, one major criticism regarding the current system and the newly adopted systems is that New York's new bail system only looks at whether the accused will appear in court without any consideration of likelihood to commit a new offense or potential harm to the community.³⁵ Another criticism is that some newly fashioned pretrial systems, like New Jersey, use algorithms to determine if an individual poses a flight risk or danger to the community.³⁶ However, this method poses bias concerns because the algorithms use data from historically biased cash bail systems.³⁷ Even with the concern of bias, the movement across the Nation is moving away from

²⁸ Insha Rahman et al., *Black and Grassroots Advocates Help Illinois Make History with Bill to End Money Bail*, VERA (Jan. 29, 2021), <https://www.vera.org/news/black-and-grassroots-advocates-help-illinois-make-history-with-bill-to-end-money-bail>.

²⁹ *U.S. Commission on Civil Rights Releases Report: The Civil Rights Implications of Cash Bail*, U.S. COMM'N ON C.R. (Jan. 20, 2022), <https://www.usccr.gov/news/2022/us-commission-civil-rights-releases-report-civil-rights-implications-cash-bail>.

³⁰ See Liza Batkin, *Wealth-Based Equal Process and Cash Bail*, 96 N.Y.U. L. REV. 1549, 1571-73 (2021).

³¹ See 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

³² See Bail Reform Act of 2017, Pub. Act 100-1, 2017 Ill. Laws 1.

³³ See N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023) (stating New York statute that can still have cash bail "authorized"); see also N.J. STAT. ANN. § 2A:162-25(c)(2) (2021) (providing that New Jersey statute allows for a defendant to be "released on monetary bail").

³⁴ See Stuart Rabner, Opinion, *Chief justice: Bail reform puts N.J. at the forefront of fairness*, STAR-LEDGER GUEST COLUMNIST (Jan. 9, 2017, 9:33 AM), https://www.nj.com/opinion/2017/01/nj_chief_justice_bail_reform_puts_nj_at_the_forefr.html.

³⁵ See Sonia M. Gipson Rankin, *Technological Tethereds: Potential Impact of Untrustworthy Artificial Intelligence in Criminal Justice Risk Assessment Instruments*, 78 WASH. & LEE L. REV. 647, 685 (2021); see also Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G. REP. 237, 237 (2015) (arguing that risk is based on prior criminal history and that criminal history has been often based on race).

³⁶ N.J. STAT. ANN. § 2A:162-16 (2017).

³⁷ See Sonia M. Gipson Rankin, *Technological Tethereds: Potential Impact of Untrustworthy Artificial Intelligence in Criminal Justice Risk Assessment Instruments*, 78 WASH. & LEE L. REV. 647, 685 (2021).

cash bail, and many states are testing out different systems to try and find out what works best.³⁸

A. Illinois

Prior to January 1, 2023, Illinois traditionally implemented a cash bail system.³⁹ The reconfiguration of bail and pretrial release in Illinois came in a series of bills and legislation titled the Illinois Safety, Accountability, Fairness and Equity-Today, otherwise known as the “SAFE-T Act,”⁴⁰ which was enacted to improve Illinois’ current criminal justice system by lessening the effects on racial minorities.⁴¹ Encompassed within the SAFE-T Act is a Section called the “Pretrial Fairness Act,” which is devoted entirely to pretrial procedures.⁴² In an attempt to make sweeping changes, Illinois reconfigured its bail system by moving away from a focus on a person’s wealth and ability to pay to a system that instead evaluates pretrial release based on the defendant’s threat to public safety or risk of failure to appear at future proceedings.⁴³ However, with recent amendments to the bail and pretrial release statutes, the original SAFE-T Act was incomplete.⁴⁴ The 2017 Act was incomplete because it only allowed for a presumption against setting money bail based on an individual’s ability to pay instead of eliminating cash bail.⁴⁵ Following the enactment of the 2017 Act, the Illinois Legislative Black Caucus pushed for further reform, which many contributed to the Black Lives Matter Movement following the recent line of killings and discriminatory practices against minorities.⁴⁶ The Illinois legislature subsequently contributed its decision to act, in a grand attempt to address the deeply-rooted problems in Illinois’ criminal justice system, to the pretrial phase, which disproportionately affected the poor and persons of color.⁴⁷

³⁸ See Lorelei Laird, *Court systems rethink the use of financial bail, which some say penalizes the poor*, AM. BAR ASS’N J. (Apr. 1, 2016, 4:40 AM), http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/ABA_Courts_Rethink-Featuring_Shannan_Wise.pdf.

³⁹ 725 ILL. COMP. STAT. ANN. 5/110-5 (2023).

⁴⁰ Jessica Reichert et al., *The 2021 SAFE-T Act: ICJIA Roles and Responsibilities*, ILL. CRIM. JUST. INFO. AUTH. (July 15, 2021), <https://icjia.illinois.gov/researchhub/articles/the-2021-safe-t-act-icjia-roles-and-responsibilities>.

⁴¹ See Bail Reform Act of 2017, Pub. Act 100-1, 2017 Ill. Laws 1.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See Safety, Accountability, Fairness and Equity-Today Act, Pub. Act 101-652, § 10-255, 2019 Ill. Laws 652.

⁴⁵ “There shall be a presumption that any conditions of release imposed shall be non-monetary in nature and the court shall impose the least restrictive conditions...” Bail Reform Act of 2017, Pub. Act 100-1, ch. 5, sec. 110-5, 2017 Ill. Laws 1.

⁴⁶ Raymon Troncoso, *Lame Duck Look Back: How the Black Caucus passed criminal justice reform*, CAPITOL.NEWS ILL. (Jan. 21, 2021), <https://www.capitolnewsillinois.com/NEWS/lame-duck-look-back-how-the-black-caucus-passed-criminal-justice-reform>.

⁴⁷ See Van Brunt & Bowman, *supra* note 5, at 709.

During a “lame duck” session,⁴⁸ the Illinois Legislative Black Caucus, aided by member and State Representative Justin Slaughter, pushed the current pretrial release program through the Illinois General Assembly (IGA).⁴⁹ In 2021, the IGA signed the “SAFE-T Act” into law.⁵⁰ With a focus on racial equity in the criminal justice system, the Supreme Court Commission on Pretrial Practices analyzed many methods across the United States to create a report that would guide legislators in creating reform.⁵¹

Although enacted in 2021, the Illinois Democrats and bill sponsor, Representative Justin Slaughter, allowed for a two-year period before the law became operational.⁵² However, on January 1, 2023, the execution of abolishing the option for cash bail was put on hold.⁵³ During the two-year waiting period before the Act went into effect, sixty-three counties filed suit against the State, arguing that the legislation was unconstitutional as it allegedly violated the Separation of Powers Clause found in Article II of the Constitution of the State of Illinois.⁵⁴ On December 28, 2022, the Kankakee County Court ruled, finding that the Act was unconstitutional because setting bail is within the power of the courts and, thus, violates the Separation of powers and the Illinois Constitution.⁵⁵ Because of this ruling, the provisions of the SAFE-T Act dealing with pretrial release would not go into effect in those counties that filed suit.⁵⁶ Fearing chaos and differing treatment across the state, the Illinois Supreme Court issued a stay in implementing the Act.⁵⁷ The Illinois Supreme Court heard arguments on the SAFE-T Act on March 14, 2023.⁵⁸ On July 18, 2023, the Illinois Supreme Court released its decision

⁴⁸ A lame duck session is the time period after an election and before the newly elected take office. *Lame Duck Session*, POL. DICTIONARY, <https://politicaldictionary.com/words/lame-duck-session/> (last visited Sep. 4, 2023).

⁴⁹ Grace Kinnicutt, *What's in the SAFE-T Act? A look at the 2021 criminal justice reform and how it has evolved*, CAPITOL NEWS. ILL. (May 18, 2022), <https://www.capitolnewsillinois.com/NEWS/whats-in-the-safe-t-act-a-look-at-the-2021-criminal-justice-reform-and-how-it-has-evolved>.

⁵⁰ See Safety, Accountability, Fairness and Equity-Today Act, Pub. Act 101-652, 2019 Ill. Laws 652.

⁵¹ Pedersen & Schneider, *supra* note 8, at 46.

⁵² Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9, <https://www.ilga.gov/house/transcripts/htrans101/10100104.pdf>.

⁵³ See Safety, Accountability, Fairness and Equity-Today Act, Pub. Act 101-652, 2019 Ill. Laws 652 (providing the act reforms a variety of aspects of the criminal justice system, with the major source of contention coming to the section specifically on bail reform).

⁵⁴ Clarissa Cowley & Ryan Henson, *Illinois Supreme Court puts SAFE-T Act on hold, cash bail still in effect: The Illinois Supreme Court announced that the new SAFE-T act would not go into effect on Jan. 1.*, 5 ON YOUR SIDE (Dec. 31, 2022, 7:02 PM), <https://www.ksdk.com/article/news/politics/illinois-safe-t-act-ruled-unconstitutional-headed-to-illinois-supreme-court/63-f33fa8ed-ff30-4f25-b00c-7613f5a307a6>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Order at 1, *In re People ex rel. Berlin v. Raoul*, 2022 IL 129249.

⁵⁸ Patrick Keck, *Illinois Supreme Court justices hear debate over the constitutionality of SAFE-T Act*, STATE J. REG. (March 15, 2023, 12:33 PM), <https://www.sj-r.com/story/news/politics/state/2023/03/14/illinois-supreme-court-hears-arguments-for-and-against-end-of-cash-bail/70004376007/>.

upholding the Statute with a finding that it did not facially violate any part of the State Constitution.⁵⁹ The Act would then go into effect on September 18, 2023, after the Supreme Court granted sixty additional days before its implementation.⁶⁰

Because the new law is early into its implementation, what it means for pretrial detention has yet to be determined.⁶¹ The General Assembly proposed one option where the Illinois Supreme Court could adopt a risk-assessment tool to determine bail for a defendant by considering the likelihood of appearance in court and if the defendant poses a threat to persons.⁶² However, as of September 2023, the Supreme Court has not yet created such a tool.⁶³ Alternatively, it is argued that the judge is the fact-finder and ultimately decides whether an individual should be detained.⁶⁴ This likely leaves some of the same problems as highlighted in the previous bail system because the bias of an individual judge can still be a factor; however, now, individuals will be detained without the option of money bail.⁶⁵ Without the money bail option,⁶⁶ it might be necessary for the State to alter its approach by adopting a tool or set of resources that can help evaluate and decide these risks that have traditionally been decided on a monetary basis.⁶⁷

B. New York

Like many states, New York changed its bail laws in light of movements to end racial and wealth disparities of those released on cash bail.⁶⁸ In large metropolitan areas, like New York City, the movement gained popularity due to the concentrated minority groups that bail laws primarily affect.⁶⁹ In 2019, the New York legislature passed a bill that eliminated cash bail for certain crimes.⁷⁰ One example that impacted those pushing for bail

⁵⁹ Rowe v. Raoul, 2023 IL 129248.

⁶⁰ *Id.* at ¶ 52.

⁶¹ Grace Kinnicutt, *What's in the SAFE-T Act? A look at the 2021 criminal justice reform and how it has evolved*, CAPITOL NEWS ILL. (May 18, 2022), <https://www.capitolnewsillinois.com/NEWS/whats-in-the-safe-t-act-a-look-at-the-2021-criminal-justice-reform-and-how-it-has-evolved>.

⁶² 725 ILL. COMP. STAT. ANN. 5/110-6.4 (2023).

⁶³ *Id.* (authorizing statute); see also *Supreme Court*, ILL. CTS., <https://www.illinoiscourts.gov/courts/supreme-court/> (last visited Sep. 9, 2023) (showing Illinois Supreme Court website has no guidance on pretrial risk assessment tools).

⁶⁴ 725 ILL. COMP. STAT. ANN. 5/110-6.4 (2023).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Josefa Velasquez & Rachel Holliday Smith, *Why is New York's Bail Reform So Controversial?* THE CITY (Feb. 21, 2022, 6:03 PM), <https://www.thecity.nyc/2022/2/21/22944871/new-york-bail-reform-controversy-eric-adams>.

⁶⁹ *Id.*

⁷⁰ N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

reform in New York was the detainment of Kalief Browder, a young Black man who was arrested for stealing a backpack and later charged with robbery, grand larceny, and assault.⁷¹ The significance of Browder's case in New York pertains to the location where Browder was held.⁷² Browder was detained at Riker's Island, known for being one of America's most notorious and brutal jails.⁷³ For example, from 2000 to 2022, 445 detainees died in New York City Jails, with many coming from Rikers.⁷⁴ Browder, who came from a low-income family, did not have the funds to pay for his release pending trial and spent three years at Rikers until his case was dismissed.⁷⁵ A few years later, Browder committed suicide due to the lasting effects from his experience with the criminal justice system.⁷⁶

Unlike Illinois, the legislature has taken a different approach to bail reform in New York.⁷⁷ Instead of eliminating cash bail, New York has eliminated cash bail for only "non-qualifying offenses."⁷⁸ However, in every case, the court starts with a presumption that all defendants are to be released on their own recognizance unless the court finds that the defendant poses a flight risk that would cause a non-appearance at the court proceedings.⁷⁹ Release on a defendant's own recognizance allows one to be released without any formal conditions or posting of a bond in exchange for a written promise that the defendant will show up to future court proceedings.⁸⁰ Besides the apparent benefit to the defendant by not having to pay to be released or pay for some other form of supervision, a release on one's own recognizance saves government resources and taxpayer dollars.⁸¹ However, absent from

⁷¹ Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html>.

⁷² *Id.*

⁷³ John J. Lennon, *The Brutal Reality of Life in America's Most Notorious Jail*, ATL. (Jan. 23, 2023), <https://www.theatlantic.com/books/archive/2023/01/rikers-island-oral-history-book-review/672795/>.

⁷⁴ Daphne Ho, *Death Rates on Rikers Island Raises Concerns about Incarcerated Prisoners, Particularly Black and Brown*, THE DAVIS VANGUARD (Mar. 5, 2023), <https://www.davisvanguard.org/2023/03/death-rates-on-rikers-island-raises-concerns-about-incarcerated-prisoners-particularly-black-and-brown/>.

⁷⁵ Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html>.

⁷⁶ *Id.*

⁷⁷ N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

⁷⁸ N.Y. CRIM. PROC. LAW § 510.10(3) (McKinney 2023) (citing "In cases other than described in subdivision four... the court shall release the principle pending trial on the principal's own recognizance... [or] the court shall release the principal under non-monetary conditions."); *see also* N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2023) (citing "a qualifying offense is a felony.").

⁷⁹ N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

⁸⁰ *Own recognizance*, CORNELL L. SCHOOL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/own_recognizance_\(or\)](https://www.law.cornell.edu/wex/own_recognizance_(or)) (last updated July 2020).

⁸¹ Kerrie Webb, *Chapter 520: Limiting Release on Own Recognizance*, 30 MCGEORGE L. REV. 579, 582 (1999).

the New York pretrial release law is the ability for a court to detain an individual for the threat of physical harm to a person or persons in the community.⁸²

Under New York law, the pretrial service agencies may use an “instrument or tool” to determine pretrial release.⁸³ However, the authorizing statute does not mandate that courts use such a tool to guide their decision-making in pretrial release.⁸⁴ Because the statute does not mandate or even strongly suggest using a tool, New York courts have not adopted a statewide tool, nor is there likely to be funding to do so.⁸⁵ Like other states, the statute limits the risk assessment tool from discriminating based on “race, national origin, sex, or any other protected class.”⁸⁶ Moreover, the statute emphasizes the empirical validation and revalidation of a risk assessment tool or instrument.⁸⁷ This indicates that the legislature recognized the potential benefits of incorporating such a tool, even though they lacked a clear understanding of the process for its adoption and its essential components.⁸⁸ Although the state has not yet adopted a risk assessment tool for the entire state to use,⁸⁹ New York City, through its Criminal Justice Agency (CJA), has adopted a risk assessment tool that CJA employees utilize to interview detainees and provide the information to the judge at the next court date.⁹⁰

C. New Jersey

New Jersey’s Statute provides that a defendant can be detained with a “complaint-warrant” by standards governing crimes that the Attorney General sets forth.⁹¹ Once an eligible defendant is detained with a complaint-warrant, the defendant is held for a brief period, not longer than 48 hours, to allow pretrial services to evaluate the defendant’s risk using a risk-assessment tool and for a court to make a decision.⁹² The trial court then can set monetary bond, nonmonetary conditions of release, release on the

⁸² N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023) (stating Sub section (1) of lists a series of factors to hold an individual and future threat of harm to an individual is not listed).

⁸³ *Id.* at § 510.45.

⁸⁴ *Id.* (providing that the absence of language such as “shall” or “must” lends an inference that it gives courts broad discretion in choosing whether they implement such a tool).

⁸⁵ *Pretrial Release: Risk Assessment Tools*, NAT’L CONF. STATE LEG. (June 30, 2022), <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-risk-assessment-tools#:~:text=Idaho%20and%20New%20York%20are,any%20jurisdiction%20that%20uses%20one>.

⁸⁶ N.Y. CRIM. PROC. LAW § 510.45 (McKinney 2023).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 543 (2021).

⁹⁰ *Release Assessment Forms*, N.Y.C. CRIM. JUST. AGENCY, <https://www.nycja.org/ra-court-forms> (last visited Aug. 22, 2023).

⁹¹ N.J. STAT. ANN. § 2A:162-16 (2017).

⁹² *Id.*

defendant's own recognizance, or if the court does not find any of the above means compelling, the court can order the defendant detained pending trial.⁹³ The key distinction between New Jersey and other states is that New Jersey requires a risk assessment tool and that it be used for each defendant.⁹⁴

Although many states have some risk assessment tools, a few have utilized risk assessments more than others in assessing pre-trial release under new bail reform legislation.⁹⁵ For example, under New Jersey law, "the Administrative Director of the Courts shall establish and maintain a Statewide Pretrial Services Program which shall provide pretrial services to effectuate the purposes [of pretrial release]."⁹⁶ The risk assessment is to be completed "in no case later than 48 hours" after arrest.⁹⁷ New Jersey requires that the risk assessment be "objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release."⁹⁸

Currently, these tools are fairly new in across-the-board implementation; therefore, there needs to be more data to know whether these tools are truly objective.⁹⁹ However, research continues to evaluate and improve these measures as time progresses.¹⁰⁰ Along with the Administrative Director of the Court's decision on how the risk assessment tool is structured, New Jersey also requires that the risk assessment include demographic data "including, but not limited to, race, ethnicity, gender, financial resources, and socio-economic status."¹⁰¹ Although demographic information is to be included, discrimination based on such information is prohibited.¹⁰²

Since adopting the new law in 2017, New Jersey adopted a risk assessment tool to enforce it.¹⁰³ To accomplish the objectives of the law, the state enacted the Public Safety Assessment (PSA),¹⁰⁴ developed by Arnold

⁹³ *Id.*

⁹⁴ *Id.* at § 2A:162-25.

⁹⁵ *Id.*

⁹⁶ *Id.* at § 2A:162-25(a).

⁹⁷ N.J. STAT. ANN. § 2A:162-25(b) (2021).

⁹⁸ *Id.* at § 2A:162-25 (stating the statute does not define what empirical data is, but the suggestion is that it is based on experience and research of factors and other risk assessments, specifically by Arnold Ventures).

⁹⁹ *Strengthening data-driven pretrial release in New Jersey* NAT'L INST. OF JUST. (Oct. 21, 2021), <https://nij.ojp.gov/funding/awards/15pnij-21-gg-02806-ress>.

¹⁰⁰ *Id.*

¹⁰¹ N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

¹⁰² *Id.*

¹⁰³ Laura & John Arnold Found., *Public Safety Assessment New Jersey Risk Factor Definitions - December 2018*, N.J. CTS., Dec. 2018, at 1.

¹⁰⁴ The PSA is a "actuarial assessment that estimates failure to appear in court pretrial, new criminal arrest while on pretrial release, and new violent criminal arrest while on pretrial release." *About the Public Safety Assessment*, ADVANCING PRETRIAL POL'Y & RSCH, <https://advancingpretrial.org/psa/about/> (last visited Aug. 22, 2023).

Ventures.¹⁰⁵ Although developed by an outside source, the PSA has been modified to reflect the requirements of New Jersey law.¹⁰⁶ The PSA looks at three categories: new criminal activity, new violent criminal activity, and failure to appear.¹⁰⁷ Of these three categories, the Assessment uses nine risk factors, including (1) age at current arrest; (2) current violent offense; (3) pending charge at the time of offense; (4) prior disorderly persons conviction; (5) prior indictable conviction; (6) prior violent conviction; (7) prior failure to appear pretrial in past two years; (8) prior failure to appear pretrial older than two years; and (9) prior sentence to incarceration.¹⁰⁸ Once the information is gathered on an individual, the PSA weights each factor and assigns different point values to the specific defendant and circumstance.¹⁰⁹ These calculations are, then, arranged on a scale of one to six in the three separate categories, a lower score signaling that a defendant is less likely to re-offend and should be released pending trial.¹¹⁰

III. A CASE COMPARISON BETWEEN NEW JERSEY, NEW YORK, AND ILLINOIS.

This Section will take a closer look at the impacts of bail reform in certain jurisdictions, including New Jersey, New York, and Illinois, while also considering risk assessment tools and factors. This Note aims to determine the empirical risk assessment factors and tools that have been successful in other jurisdictions that could guide Illinois in adopting a risk assessment and works to create a more fair and just pretrial procedure. To determine the success of these tools and factors, this Note evaluates the impacts on specific states' jails and criminal justice systems. While Illinois eliminated cash bail and New York has partially eliminated cash bail for qualifying offenses, New Jersey has not yet implemented such measures; instead, it modified its bail system to offer a more "just" pretrial detention service.¹¹¹

Risk assessment tools are state-adopted algorithms that determine a defendant's risk.¹¹² The idea behind these assessments is that instead of

¹⁰⁵ *Pretrial Risk Assessment Now Available to All Interested Jurisdictions; Research Advisory Board Announced* ARNOLD VENTURES (July 11, 2018), <https://www.arnoldventures.org/newsroom/laura-and-john-arnold-foundation-makes-pretrial-risk-assessment-available-to-all-jurisdictions-announces-expert-panel-to-serve-as-pretrial-research-advisory-board>.

¹⁰⁶ Laura & John Arnold Found., *supra* note 103, at 1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *About the Public Safety Assessment*, ADVANCING PRETRIAL POL'Y & RSCH, <https://advancingpretrial.org/psa/factors/> (last visited Aug. 22, 2023).

¹¹⁰ *Id.*

¹¹¹ N.J. STAT. ANN. § 2A:162-16 (2017).

¹¹² Rankin, *supra* note 37, at 685.

having a judge decide whether to allow release, which is likely subject to bias, these objective algorithms can provide a more equitable outcome across all individuals regardless of their subjective attributes, such as the ability to pay.¹¹³ Therefore, along with determining whether someone will appear in court, these risk assessment tools can help determine whether or not someone is likely to recommit a crime.¹¹⁴

Although it seems good on its face, opponents argue that the algorithm used to create these assessments might contain implicit bias that affects society without recognizing such bias.¹¹⁵ The idea of this bias is quite simple in that the creators of the algorithms need to start somewhere and create a baseline for their new tool.¹¹⁶ In doing so, the algorithms' creators use the information they already have.¹¹⁷ This information is rooted in historical data and reflects the typical behavior of offenders and society's desire to maintain control.¹¹⁸ This issue, as it is being argued, is that the criminal justice system disproportionately affects people of color and those of lower socio-economic class.¹¹⁹ With many criticizing the tool's use, the focus on the prevention of crime has shifted to how the creation of these risk-assessment tools has resulted in a discriminatory impact on society's social and implicit bias.¹²⁰ Although there is potential for a discriminatory effect, it is also possible that the creation of risk-assessment tools in Illinois would not be burdened with implicit bias.¹²¹ This is because the legislature and courts already recognize these biases by eliminating cash bail.¹²²

A. New Jersey and the Arnold Tool

While not perfect, the PSA used in New Jersey can decrease pretrial detention for individuals who may not pose a serious or dangerous threat to the community.¹²³ Before New Jersey adopted the PSA, a study found that 17.6% of individuals in jails were held pretrial for drug-related offenses, the

¹¹³ *Id.*

¹¹⁴ Pamela Cravez, *Pretrial Risk Assessment Tool Developed for Alaska*, 34 ALASKA JUST. F. 1, 1 (2018).

¹¹⁵ Kia Rahnama, *Science and Ethics of Algorithms in the Courtroom*, 2019 J.L. TECH. & POL'Y 169, 175 (2019).

¹¹⁶ *Id.* at 176.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 177.

¹²⁰ See generally N.J. STAT. ANN. § 2A:162-25(c)(2) (2017) (stating New Jersey Statute recognizing that there may be bias and accounting for it).

¹²¹ Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter).

¹²² *Id.*

¹²³ Andrea Coppola, *RE: The Pretrial Risk Assessment—How New Jersey's Bail Overhaul is Shaping Bail Reform Across the Country*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 87, 99 (2020).

highest category of offenses individuals were held for.¹²⁴ The same study found that 38.5% of New Jersey's jail population had the option to post bail but could not due to financial circumstances.¹²⁵ Thus, prior to the adoption of bail reform in New Jersey in 2012, the jail population was around 15,000 persons.¹²⁶

After the adoption of the Act in 2017, the jail population continued to decrease to around 8,500 persons.¹²⁷ The jail population continued to decline until the COVID-19 pandemic began and caused the progress on the implementation of bail reform in New Jersey to slow.¹²⁸ However, as the pandemic becomes less problematic, the jail population has continued to decrease, and in late 2021, the population was around 8,600 persons.¹²⁹ While the bail reform and implementation of the PSA in New Jersey have undoubtedly reduced the jail populations, the majority of those who are still detained are charged with what is deemed the most significant of charges, including crimes that involve murder and firearms.¹³⁰

Along with the decrease in jail populations that helped alleviate New Jersey's costs, including housing and resources, court appearance rates have not decreased.¹³¹ According to the annual report, at the start of implementing the new bail system and the PSA, New Jersey saw around 90% of court appearance rates.¹³² In 2020, however, part of the 97% increase may be attributed to COVID-19 and the adoption of many virtual sessions, defeating many fears that defendants would not appear in court if they did not pay bail.¹³³

Moreover, nationwide concerns about new bail reform laws are rooted in lack of access to funding and the inability to "process"¹³⁴ defendants in the typical timeframe mandated by statutes.¹³⁵ The concern about inability to

¹²⁴ MARIE VANNOSTRAND, *NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION* 12 (U.S. Dep't of Just. Off. of Just. Programs ed., 2013).

¹²⁵ *Id.* at 13.

¹²⁶ *Id.* at 2.

¹²⁷ GLENN A. GRANT, *ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE* 25 (N.J. Courts ed., Crim. Just. Reform ed. 2021).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 51.

¹³¹ *Id.* at 18.

¹³² *Id.*

¹³³ GLENN A. GRANT, *ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE* 3 (N.J. Courts ed., Crim. Just. Reform ed. 2021).

¹³⁴ Sarah Williams, *Police Booking Procedure*, FINDLAW, <https://www.findlaw.com/criminal/criminal-procedure/booking.html> (last visited Aug. 18, 2023) (stating a person arrested is processed to obtain "vital information" which includes the "suspect's name, contact information, the nature of the alleged crime (including the code section), and other vital statistics.").

¹³⁵ *What Does the Elimination of Cash Bail Mean for Illinois Jurisdictions?*, THE CIVIC FED'N., (Oct. 21, 2022), <https://www.civiced.org/civic-federation/blog/what-does-elimination-cash-bail-mean->

meet the “processing” deadlines is mostly unfounded as New Jersey’s findings suggest that 98.8% of defendants had their first appearance within the mandated forty-eight-hour period.¹³⁶ Even if a statute were to require the stricter twenty-four-hour period, which Illinois imposes in a very limited amount of offenses, New Jersey shows that it successfully processed 76.8% of defendants through the initial hearing within twenty-four hours.¹³⁷ The idea behind a stricter time period is to ensure that the person arrested keeps as much personal freedom intact while upholding the rule of law.¹³⁸ Thus, it is apparent from the reports and data that the PSA New Jersey has implemented decreased jail populations while maintaining court appearance rates, which is the goal of many of these bail reform and risk assessment agendas.¹³⁹

Lastly, New Jersey has not eliminated cash bail but has instead created a presumption against it.¹⁴⁰ The legislatively created presumption encourages a judge to release a defendant unless the prosecutor can show that the case involves a defendant who may threaten the community or pose a flight risk.¹⁴¹ While having a presumption against cash bail, New Jersey courts have ordered cash bail in twenty-three cases, thus showing that the presumption against using cash bail is powerful.¹⁴² Even within the cases where cash bail was used, nineteen were ordered after a defendant violated his or her pretrial release based on one of the other release conditions.¹⁴³ Thus, while many states, including New Jersey, intentionally move away from cash bail, the better option may be to create a strong presumption as evidenced in New Jersey because it maintains the option for those rare cases in which cash bail may achieve the results of getting defendants back into court and preventing them from being a threat to the community.¹⁴⁴

Notwithstanding all the data and statistics showing the PSA’s benefit in New Jersey, the PSA is admittedly imperfect in some cases.¹⁴⁵ Early in 2017, a New Jersey judge released a defendant charged with gun crimes who killed

Illinois-jurisdictions (stating in Illinois, courts are statutory allowed to keep 10% of fees, but usually the rest (90%) goes to fines and fees, accounting for nearly \$83 million per year).

¹³⁶ Grant, *supra* note 127, at 35.

¹³⁷ *Id.*

¹³⁸ *Urging the Recognition of Right to Counsel at Initial Appearance*, NAT’L ASS’N OF CRIM. DEF. LAWYERS, (Feb. 19, 2012), <https://www.nacdl.org/Content/Urging-the-Recognition-of-Right-to-Counsel-at-Init>.

¹³⁹ Grant, *supra* note 127, at 37.

¹⁴⁰ N.J. STAT. ANN. § 2A:162-25 (2021).

¹⁴¹ *Id.*

¹⁴² Grant, *supra* note 127, at 37.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Joseph P. Smith, *Case advances against Vineland man in drive-by shooting*, DAILY J. (Dec. 21, 2017, 2:33 PM), <https://www.thedailyjournal.com/story/news/2017/12/21/case-advances-against-vineland-man-drive-shooting/971777001/>.

an individual the following day.¹⁴⁶ In *Rodgers v. Laura & John Arnold Found.*, the mother of the victim sued the Arnold Foundation under product liability, suggesting that the Public Safety Assessment that the Foundation created was a product that failed to meet the safety standard of preventing those who threaten the community out on release under New Jersey law.¹⁴⁷ The court dismissed the lawsuit as the PSA “constitutes information, guidance, ideas, and recommendations.”¹⁴⁸ After *Rogers*, the PSA and pretrial services received criticism that the risk assessment tools interfere with the judge’s role in the courtroom.¹⁴⁹

B. New York and the Abolishment of Bail for Certain Crimes

Since adopting the Bail Reform Act of 2019, New York has seen increased crime.¹⁵⁰ Some argue that the state’s new bail reform, suggesting that releasing individuals and not allowing the judge to evaluate the defendant’s risk to the community, has allowed defendants the opportunity to commit additional crimes while waiting for trial.¹⁵¹ However, a recent study conducted and provided by the State of New York has not found any correlation between the increased crime rates and the new law.¹⁵² In another study by Jim Quinn, it was found that crime increased in the time frame before the enactment of the new law and when the pandemic started, roughly in the spring of 2020.¹⁵³ Crime has also increased in New York since the new law’s passage by more than 20% for all crimes, and other crimes have increased significantly more, such as burglary at a 26.5% increase and car theft at a 68% increase.¹⁵⁴ Although not necessarily correlated to the new law, the bail reform has not successfully decreased crime.¹⁵⁵ On the other hand, it has also been found that crime was decreasing before adopting bail reform in New York.¹⁵⁶ Even after the decline of the COVID-19 pandemic, crime was still on the rise and jumped higher than the crime rates during the

¹⁴⁶ *Id.*

¹⁴⁷ *Rodgers v. Laura & John Arnold Found.*, Civil Action No. 17-5556, WL at 1 (D.N.J. June 11, 2019).

¹⁴⁸ *Id.* at 7.

¹⁴⁹ Rankin, *supra* note 37, at 705.

¹⁵⁰ Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNEN CTR. FOR JUST. (May 9, 2023), <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state>.

¹⁵¹ *Id.*

¹⁵² Joshua Solomon, *GOP questions state’s bail data; updated data show 2% of bail offenses led to rearrests on violent felonies*, TIMES UNION (Jan.12, 2022), <https://www.timesunion.com/state/article/GOP-calls-into-question-state-s-actions-on-bail-16768206.php>.

¹⁵³ Jim Quinn, *More Criminals, More Crime: Measuring the Public Safety Impact of New York’s 2019 Bail Law*, THE MANHATTAN INST., July 2022, at 1, 7.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1, 10.

pandemic.¹⁵⁷ Because of the increased crime and a lack of decrease in jail populations, it suggests that the way New York went about bail reform was not a success.¹⁵⁸

Due to the increases in crime and the cash bail reform failure to address the more significant issues, New York has implemented several amendments to the original 2019 bill to address the bill's failures.¹⁵⁹ These changes primarily include adding more qualifying offenses.¹⁶⁰ Compared to other states, New York is unique in that its judges must not consider the potential effect of a detainee's release on public safety, nor should they consider the defendant's risk of re-offending.¹⁶¹ It is still too early to tell if these amendments will succeed, but creating more qualifying offenses will likely increase the jail population, an outcome that bail reform was trying to prevent.¹⁶²

The Division of Criminal Justice Services data finds that New York's bail system is not achieving the results of appearance and decreased jail populations compared to New Jersey.¹⁶³ In the past few years, New York's failure to appear percentage has been 9% in New York City and 18% across the rest of the state.¹⁶⁴ However, policymakers should be careful in relying heavily on this data, considering New York officials prepare it.¹⁶⁵ This might be deceptive, as the overall percentage of defendants who were rearrested while their cases were pending stands at 20%, and this particular figure is not factored into the calculation of the reported 9% and 18%.¹⁶⁶ Since one in five defendants will be rearrested pending trial, there could likely be a connection between that high percentage and the bail statute since it excludes consideration of the likelihood of committing more offenses and public safety.¹⁶⁷ It is apparent from these numbers, commentary, and new legislative enactments that New York's bail reform has not achieved its desired goals.¹⁶⁸ The crime rate is up, the jail populations have not decreased significantly, and the failure to appear is between 9-18% or higher if those who are

¹⁵⁷ *Id.* at 1, 7.

¹⁵⁸ *Id.* at 1, 10.

¹⁵⁹ Jim Quinn, *More Criminals, More Crime: Measuring the Public Safety Impact of New York's 2019 Bail Law*, THE MANHATTAN INST., July 2022, at 1, 11.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ N.Y. STATE DIV. OF CRIM. JUST. SERVS., SUPPLEMENTAL PRETRIAL RELEASE SUMMARY TABLES 2019-2021 16 (Off. of Just. Rsch. And Performance ed., 2022).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Quinn, *supra* note 153, at 1, 15; DIV. OF CRIM. JUST. SERVS., SUPPLEMENTAL PRETRIAL RELEASE SUMMARY TABLES 2019-2021 16 (N.Y. State, 2022).

¹⁶⁷ Quinn, *supra* note 153, at 1, 15-17.

¹⁶⁸ *Id.* at 1, 7-15.

rearrested are concluded in the data.¹⁶⁹ All this suggests that New York’s bail reform is not successful, and it might be due to a lack of focus on other aspects, such as the risk of future crime and evaluating the defendant for more than just the likelihood of appearing.¹⁷⁰

C. Illinois and Various Risk Assessment Tools

Currently, Illinois does not have a universal risk assessment tool.¹⁷¹ Illinois counties have adopted different risk assessment tools (explained briefly below), but only four counties, like New Jersey, use the PSA.¹⁷² Only twelve other counties in the state have a listed risk assessment tool that courts currently use.¹⁷³ The twelve counties that use a risk assessment tool use a form of the Virginia Risk Assessment Tool, including the original or a variance of that tool.¹⁷⁴

The Virginia Pretrial Risk Assessment Instrument (VPRAI), derived from the State of Virginia, requires the Virginia Department of Criminal Justice to “develop risk assessment and other instruments to be used by pretrial services agencies in assisting judicial officers” in accessing bond and pretrial release.¹⁷⁵ The VPRAI utilizes eight risk factors, including (1) active Community Criminal Justice Supervision, which looks to see if the individual is under official supervision such as parole or supervision; (2) if the current charge is a felony drug, theft or fraud; (3) if the defendant has any pending charges; (4) convictions of prior criminal history; (5) if the defendant has two or more failure to appear for a court date in prior proceedings; (6) if the defendant has two or more violent convictions which are described as an act that “causes or is intended to cause physical injury to another person”; (7) if the defendant is employed at the time of arrest; and (8) history of drug abuse.¹⁷⁶ Although the factors are generally similar to other risk assessments, the VPRAI does not look at the age of the individual involved, history of prior convictions, the likelihood of increased sentences, all failures to appear in recent years compared to older years, and the specifics of the convictions.¹⁷⁷

¹⁶⁹ *Id.*

¹⁷⁰ N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

¹⁷¹ *Illinois*, RISK ASSESSMENT TOOL DATABASE AT BERKMAN KLEIN CTR., <https://criminaljustice.tooltrack.org/state/IL> (last visited Aug. 21, 2023).

¹⁷² *About the Public Safety Assessment*, ADVANCING PRETRIAL POL’Y AND RSCH. <https://advancingpretrial.org/psa/psa-map/> (last visited Aug. 21, 2023).

¹⁷³ *Illinois*, RISK ASSESSMENT TOOL DATABASE AT BERKMAN KLEIN CTR., <https://criminaljustice.tooltrack.org/state/IL> (last visited Aug. 21, 2023).

¹⁷⁴ *Id.*

¹⁷⁵ VA. CODE ANN. § 19.2-152.3 (2007).

¹⁷⁶ VA. DEP’T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 9-11 (2018).

¹⁷⁷ *See, e.g.*, Laura & John Arnold Found., *supra* note 103, at 1.

Once the points are entered based on the factors, the defendant is scored based on a risk level of one to six, with one being the lowest risk.¹⁷⁸ The VPRAI weights the factors according to what they have determined to have a higher risk of pretrial failure.¹⁷⁹ The lowest risk factors are two or more failures to appear, two or more violent convictions, and if the defendant is unemployed at the time of arrest.¹⁸⁰ In contrast, the VPRAI places a high risk on if the charge is a felony drug, felony theft, or felony fraud case.¹⁸¹ Based on these risk factors, it appears that the VPRAI emphasizes safety to the community and preventing future crime over ensuring the defendant returns to court, as that factor is weighted the lowest.¹⁸² This is also apparent in the conditions of release given to the defendant.¹⁸³ There are no conditions that maintain contact with the courts or any pretrial services except for drug and alcohol testing.¹⁸⁴

D. Takeaways from Different Risk Assessment Tools

In comparing Illinois, New York and New Jersey and the difference in their pretrial detention systems, it is essential to remember that New York has a vastly different legislative intent than that of New Jersey and Illinois.¹⁸⁵ New York's pretrial detention system primarily focuses on detaining those who are a flight risk or likely not to appear in court, besides the statutory exceptions for the most serious crimes.¹⁸⁶ Whereas both New Jersey and Illinois focus on the risk of failure to appear and the risk of danger to the community and/or public safety.¹⁸⁷ However, it is likely that there is also a focus on reducing crimes, particularly with individuals recommitting crime

¹⁷⁸ VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 12-13 (2018).

¹⁷⁹ *Id.* at 12.

¹⁸⁰ *Id.* at 13.

¹⁸¹ *Id.* at 12.

¹⁸² *Id.* at 6-13.

¹⁸³ (1) refrain from excessive use of alcohol or drugs; (2) submit to alcohol and drug testing; (3) refrain from possessing dangerous weapons; (4) refraining from contact with the victims and witnesses; (5) maintain and seek employment; (6) maintain or seek education; and (7) comply with curfew. *Id.* at 16.

¹⁸⁴ VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 16 (2018).

¹⁸⁵ See generally N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

¹⁸⁶ N.Y. CRIM. PROC. LAW § 510.10 (McKinney, 2023).

¹⁸⁷ Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

while on release.¹⁸⁸ Thus, in comparing the risk assessment tools between the states, there are different objectives and factors to achieve the state's goal.¹⁸⁹

Based on the factors that New York City uses (not the entire state), the focus is clearly on flight risk.¹⁹⁰ Particularly, factors seven and eight focus on the reachability of the defendant and if there is a steady means to reach the defendant.¹⁹¹ This is compared to the first six factors that look to the defendant's recent prior convictions and warrants, possibly to determine if a defendant is likely to be a flight risk for avoiding severe punishment based on enhanced sentencing structures, particularly with persons who re-offend.¹⁹²

While the New Jersey and Illinois legislative objectives include the focus on flight risk, they also consider community safety and the threat the defendant poses to the community.¹⁹³ The Virginia tool, which several Illinois counties use, evaluates the current charge and if the defendant has violent convictions, including injury to other persons.¹⁹⁴ The PSA from New Jersey takes into account the current offense, including if it is violent and if there are prior disorderly conducts, to determine if the defendant has a history of being disorderly in the community.¹⁹⁵ The two tools differ in language and factors when looking at the factors directed toward flight risk.¹⁹⁶ In addition to considering prior and current charges and sentences, the VPRAI evaluates whether the defendant is employed and if they have a history of drug use.¹⁹⁷ This endeavor suggests stability likely for a defendant to stay out of trouble and appear in court.¹⁹⁸ However, the PSA does not include any separate factors concerning possible stability in the defendant's home life but instead looks to prior failure to appear history.¹⁹⁹

¹⁸⁸ *Id.*

¹⁸⁹ N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

¹⁹⁰ *Release Assessment*, N.Y.C. CRIM. JUST. AGENCY, <https://www.nycja.org/release-assessment/3704> (last visited Sept. 12, 2023).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

¹⁹⁴ VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 7-8 (2018).

¹⁹⁵ Laura & John Arnold Found., *supra* note 103, at 1-2.

¹⁹⁶ *Id.*; VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – *passim* (VPRAI) (2018).

¹⁹⁷ VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 1 (2018).

¹⁹⁸ *Id.*

¹⁹⁹ Laura & John Arnold Found., *supra* note 103, at 3-4.

Lastly, there is no history or research on the different tools in Illinois or New York, mainly due to a lack of a uniform risk assessment.²⁰⁰ There are research and certified results of the PSA and results in New Jersey.²⁰¹ While this is still an early movement and perhaps the “third wave” of bail reform, there is likely to be more research and data that will develop in the coming years.²⁰² However, as of now, the PSA in New Jersey is achieving the goals of the legislature and proponents of bail reform while also satisfying the needs of justice.²⁰³ The bail reform with the PSA has reduced the number of detainees prior to trial and has maintained court appearance rates into the high nineties.²⁰⁴ However, in New York, the crime rate is higher than before adopting bail reform, and the goal of decreasing jail populations and pre-trial incarceration has not been achieved.²⁰⁵ Therefore, New Jersey has proved to be a successful testing ground for risk assessments, specifically the PSA, which the State has adopted as its tool.²⁰⁶

IV. RECOMMENDATIONS TO THE ILLINOIS BAIL STATUTES

Based on the pretrial release systems implemented in other states and the successes and failures of these systems based on the data shown above, this Note recommends several changes to the Illinois scheme. First, this Section will address the need for a statutory change in the risk-assessment subsection. In light of the legislative modification, this Section suggests that Illinois consider implementing a risk assessment tool akin to the PSA utilized in New Jersey. The rationale behind this proposal stems from the data indicating its efficacy, coupled with the fact that Illinois and New Jersey share comparable legislative objectives in contrast to those of New York.

A. Change in Language of Statute

Section II mentions that the current Illinois pretrial release statute does not mandate nor specify a risk assessment tool.²⁰⁷ This is a problem because the Illinois Supreme Court does not have to create one or provide funding to do so.²⁰⁸ To address that issue, a simple change in the statutory language

²⁰⁰ See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); see also N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

²⁰¹ Grant, *supra* note 127, at 37.

²⁰² Brunt & Bowman, *supra* note 5, at 743.

²⁰³ Grant, *supra* note 127, at 37.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ 725 ILL. COMP. STAT. ANN. 5/110-6.4 (2023) (citing “The Supreme Court may establish a statewide risk-assessment tool”).

²⁰⁸ *Id.*

would allow for a better objective test to assess pretrial release by requiring a risk assessment tool to be created and used.²⁰⁹ Similar to the New Jersey statute,²¹⁰ the objective would include statutory language that specifies that a risk-assessment tool must be utilized and set out the basic parameters. For example, effective statutory language could read:

(a) The Supreme Court shall establish a statewide risk-assessment tool to be used in proceedings to assist the court in establishing conditions of pretrial release for a defendant.

(b) The risk-assessment tool shall be objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear in court when required and the risk of real and present threat to the physical safety of any person or persons.

(c) The risk-assessment tool shall gather demographic information about the defendant, including but not limited to race, ethnicity, gender, financial resources, and socio-economic status. Recommendations shall be made that do not discriminate based on race, gender, educational level, socio-economic status, or neighborhood.

This statutory framework is not substantially different from the legislative intent when enacting the Pretrial Fairness Act.²¹¹ When adopting the Pretrial Fairness Act, the legislators recognized the need for risk assessment tools.²¹² Importantly, State Representative Justin Slaughter mentioned that the elimination of cash bonds moves the system to one that “relies on verified risk assessment tools to determine if an individual is a threat to the community or a concern to not return for their hearing.”²¹³ The legislature, in adopting the Pretrial Fairness Act, previously used the two-year window as a safety valve²¹⁴ to fix all the flaws the Act might have.²¹⁵ It

²⁰⁹ *Id.*

²¹⁰ N.J. STAT. ANN. § 2A:162-25 (2021).

²¹¹ Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter) (depending on the Supreme Court’s ruling, it would likely be Constitutional if the current statute is upheld).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ The “safety valve” is the time period the legislature allotted before implementation of the SAFE-T Act to receive criticism and further refine the Act to make it in conformance with their intended goals.

²¹⁵ Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter).

was further suggested that the Illinois Supreme Court could adopt and implement a risk assessment tool in the two-year window.²¹⁶

Further, based upon the above analysis of different statutory schemes on bail and other tools, New Jersey's bail reform has been the most successful by decreasing the amount and time individuals spend in pretrial confinement and having high court appearance rates.²¹⁷ A probable criticism of this proposition is that Illinois and New Jersey exhibit geographic and cultural distinctions. New Jersey is located on the East Coast, whereas Illinois occupies the central United States, with Chicago as its sole major city and the remainder of the state predominately rural.²¹⁸

Another reason for the proposed change to the statute is funding.²¹⁹ As the statute currently allows for a risk assessment, like that in New York, it is not mandated.²²⁰ By mandating that a risk assessment be required, it is likely that the State will have to allocate funds for such a program.²²¹ Whereas, if the statute remains the same and only allows the Illinois Supreme Court to create a risk assessment tool, it will likely come from funding already allocated for other court uses.²²² This is problematic because court resources are likely limited, and if the Supreme Court has to direct resources to the creation and continuing implementation and evaluation of a program, other court services could decline, such as technology in the courtroom which was brought to the Illinois Supreme Court's attention during the pandemic and the years following.²²³ However, if the statute is changed, it will mandate and further require the funding to be provided to maintain compliance with the law.²²⁴

B. The Proposed Test

Next, this Note addresses the type of risk assessment tool Illinois should adopt. Based on the data provided by the State of New Jersey, it would be

²¹⁶ *Id.* (stating when answering a question Representative Slaughter suggests that the risk assessment tool will be developed before January 1, 2023) (providing that as of the implementation date (January 1, 2023), the Illinois Supreme Court has not yet adopted a risk assessment tool).

²¹⁷ Grant, *supra* note 127, at 37.

²¹⁸ *Pretrial Reform Efforts in Illinois and Outcomes from Other States*, THE CIVIC FED'N (Feb. 22, 2021), <https://www.civiced.org/iifs/blog/pretrial-reform-efforts-illinois-and-outcomes-other-states>.

²¹⁹ *What Does the Elimination of Cash Bail Mean for Illinois Jurisdictions?*, THE CIVIC FED'N (Oct. 21, 2022), <https://www.civiced.org/civic-federation/blog/what-does-elimination-cash-bail-mean-illinois-jurisdictions>.

²²⁰ N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

²²¹ *Id.*

²²² Although this Note does not attempt to address the issues with funding surrounding bail and the court system, there have been suggestions that removing cash bail will decrease funds at the local courts and implementing a system will be costly. *Id.*

²²³ *Id.*

²²⁴ *Id.*

best to follow its pretrial risk assessment system.²²⁵ Although, as stated above, there is likely to be criticism as New Jersey and Illinois are not the same and that Illinois should adopt a completely different tool. Regardless, the PSA in New Jersey shows its success.²²⁶ Until proven otherwise, it is likely to be the best option and fix the flaws after research into the factors following the implementation in Illinois.²²⁷ Studies have further suggested that almost all risk assessment tools are close in evaluating the focused risks, and therefore, not one is better.²²⁸ The research was conducted in 2020, during which the researchers examined and compiled a comprehensive overview of various studies and research on risk assessment tools.²²⁹ In conclusion, the group found that the particular risk assessment tool does not significantly matter as the predictability between the different tools is shown to be similar.²³⁰ Because of this, the focus and extent of this Note are not simply on what risk factors and tools work but what has worked in practical application by combining the risk assessments with a form of bail reform. By examining three separate bail systems in the United States, including Illinois, New York, and New Jersey, one stood out as achieving what pretrial bail is meant to achieve.²³¹ New Jersey is a national testing ground for this new movement.²³² New Jersey has achieved high court appearance rates while decreasing jail populations, which will positively impact defendants' lives while maintaining the presumption of innocence.²³³

Since the New Jersey model has proven to be successful, it is the recommendation of this Note that Illinois, in changing its bail system, also adopt a risk assessment that has proven to achieve goals that are very similar to that of Illinois: specifically decrease jail populations to maintain the lives of those arrested, protect the community by assessing the risk of defendants, and maintain court appearance rates.²³⁴ Although the PSA and risk assessment may be adapted to fit future needs and empirical data as required by statute, this would allow for quick and easy adoption of a risk assessment tool that would be less burdensome than starting from scratch.²³⁵ This would also help fulfill the promise and legislative intent of adopting the SAFE-T

²²⁵ N.J. STAT. ANN. § 2A:162-25 (2021).

²²⁶ Grant, *supra* note 127, at 37.

²²⁷ N.J. STAT. ANN. § 2A:162-25 (2021).

²²⁸ Sarah L. Desmarais et al., *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, 48 CRIM. JUST. & BEHAV. 398, 415 (2020).

²²⁹ *Id.* at 402.

²³⁰ *Id.* at 416.

²³¹ See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); see also N.J. Stat. Ann. § 2A:162-25(c)(2) (2021).

²³² Grant, *supra* note 127, at 37.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

Act as adopted.²³⁶ As mentioned above in statements by Representative Slaughter, the view looking forward is that a risk assessment tool be adopted.²³⁷ Although the two-year window has closed in which a risk assessment tool was intended to be created, it is of utmost importance now to get one adopted and change as necessary in the future.²³⁸ The following tool and risk assessment factors are derived from the PSA and New Jersey's system and are repeated here for clarification.

Risk Factors:

1. Age at Current Arrest
 - a. If the individual is twenty-two years old or younger, the weight given to the score should be two. If the individual is twenty-three or older, the score does not matter and should be given zero. This is due to research that shows an “age-crime curve,” which holds that individuals in their mid-teens to early twenties to mid-twenties are more likely to commit violent crimes.²³⁹
2. Current Violent Offense or Forcible Felony
 - a. A violent offense causes or is intended to cause physical harm to another person.
 - b. Forcible Felonies include first-degree murder, second-degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated robbery, robbery, burglary where there is the use of force against another person, residential burglary, home invasion, vehicular invasion, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement or any other felony which involves the threat of or infliction of great bodily harm or permanent disability or disfigurement.²⁴⁰
3. Pending Charge at the Time of the Offense
 - a. A pending charge is a charge that has a future pre-disposition-related court date or is pending presentation to the grand jury.
 - b. A pending charge includes indictable or disorderly conduct offenses.
 - i. A pending charge shall not include any traffic violations unless otherwise set forth by law.

²³⁶ See generally Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter).

²³⁷ *Id.*

²³⁸ See generally *id.*

²³⁹ Michael Rocque et al., *Age and Crime*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT 2* (Wesley G. Jennings ed., 2015).

²⁴⁰ 725 ILL. COMP. STAT. ANN. 5/110-6.1 (2023) (stating the legislature in enacting the bail reform act decided what they thought were dangerous crimes by naming them “forcible felonies.” This is different than the New Jersey Statute that just uses the violent offense definition as provided above in the proposed risk assessment tool.).

4. Prior Disorderly Persons Conviction²⁴¹
 - a. Prior Disorderly Persons Convictions are defined by Illinois Statutes defining criminal offenses and disorderly person offenses.
5. Prior Violent Conviction²⁴²
 - a. Violent Conviction is determined by the Illinois Statutes defining criminal offenses.
6. Prior Failure to Appear in the Last 2 Years²⁴³
 - a. A failure to appear pretrial includes any pre-disposition court appearance for which the defendant failed to appear, and the Court took action, such as issuing an FTA notice or a bench warrant for arrest. A pre-disposition court appearance is any court appearance after arrest and prior to and including sentencing. The court appearance must have been for a pending (pre-disposition) Indictable or Disorderly Persons offense. Post-disposition court appearances are not counted, such as hearings for nonpayment/failure to pay, violations of supervision, and violations of other court-ordered obligations. A failure to appear for a single court appearance is counted once, regardless of the number of charges or FTA notices/bench warrants issued related to the single court appearance.
 - b. A failure to appear pretrial is not counted if there is confirmation that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is not counted if the FTA notice/bench warrant was issued and vacated the same day. The two-year time frame includes the two years prior to the date of the current arrest. The number of failures to appear pretrial in the past two years determines if the defendant had none, one, or two or more prior failures to appear.
7. Prior Failure to Appear in Cases Older Than Two Years²⁴⁴
 - a. A failure to appear pretrial includes any pre-disposition court appearance for which the defendant failed to appear, and the Court took action, such as issuing an FTA notice or a bench warrant for arrest. A pre-disposition court appearance is any court appearance after arrest and prior to and including sentencing. The court appearance must have been for a pending (pre-disposition) Indictable or Disorderly Persons offense. Post-disposition court appearances, such as hearings for nonpayment/failure to pay, supervision violations, and violations of other court-ordered obligations, are not counted. A failure to

²⁴¹ Prior disorderly persons convictions like that of New Jersey would be in line with the legislative intent to focus on the threat to public safety.

²⁴² Prior violent convictions will depend on what the legislature and courts determine to be violent. This Note does not attempt to go through the entire Illinois bail system or criminal justice system and determine what is to be considered violent. However, for purposes here, violent convictions would often include aggravated batteries and gun crimes.

²⁴³ This risk factor focuses on the defendant's risk of failure to appear.

²⁴⁴ This risk factor focuses on the defendant's risk of failure to appear.

appear for a single court appearance is counted once, regardless of the number of charges or FTA notices/bench warrants issued related to the single court appearance.

- b. A failure to appear pretrial is not counted if there is confirmation that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is not counted if the FTA notice/bench warrant was issued and vacated on the same day. If the defendant failed to appear for a court pretrial and an FTA notice/bench warrant for arrest was issued more than two years from the date of the current arrest, the answer to this risk factor is yes. Otherwise, the answer is no.

8. Prior Sentence to Incarceration

- a. A sentence to incarceration includes any sentence to jail or prison of 14 days or more for an Indictable or Disorderly Persons offense imposed by a judge at the time of sentencing or re-sentencing (e.g., supervision violation hearing, revocation of suspended sentence). A sentence of 14 days or more that is “credit for time served” is counted. A sentence of fourteen days or more is included only if imposed as a single sentence, not a combination of multiple lesser sentences. If the Court suspends the imposition of the sentence, it is not considered a sentence to incarceration. Incarceration in lieu of payment of fines or costs and a sanction imposed by non-judges (e.g., probation officers) are also not considered incarceration sentences. If the defendant previously received a sentence of incarceration to jail or prison of fourteen days or more as a single sentence imposed by a judge, the answer to this risk factor is yes. Otherwise, the answer is no.²⁴⁵

V. CONCLUSION

As the Nation progresses in the third wave of criminal justice reform, the ending of cash bail is a topic all across the Country.²⁴⁶ Although not the first state to move away from cash bail, Illinois is one of the leaders in eliminating cash bail with other criminal justice reforms.²⁴⁷ While Illinois legislators succeeded in eliminating cash bail, they did not act to thoroughly implement a functioning system, which has resulted in criticism and even challenges in the courts.²⁴⁸ In the near future, the legislators and the Illinois

²⁴⁵ This risk factor focuses on the defendant’s risk based on previous incarceration.

²⁴⁶ Brunt & Bowman, *supra* note 5, at 743.

²⁴⁷ Claire Savage and Corey Williams, *Cash bail disproportionately impacts communities of color. Illinois is the first state to abolish it*, THE ASSOC. PRESS (Sept. 12, 2023, 9:23 AM), <https://apnews.com/article/illinois-criminal-justice-cash-bail-reform-b8aac667b7d3016e12ea64a70964bf55>.

²⁴⁸ Michael Friedrich, *Illinois Prepares for Historic Abolition of Cash Bail*, ARNOLD VENTURES (Oct. 3, 2022), <https://www.arnoldventures.org/stories/illinois-prepares-for-historic-abolition-of-cash-bail>.

Supreme Court should develop a risk assessment tool to help create a better criminal justice system in Illinois.



A PROPOSAL TO REFORM THE INSTITUTION OF MARRIAGE IN THE POST-DOBBS ERA THROUGH THE TWENTY-EIGHTH AMENDMENT

Allison J. Cozart*

I. INTRODUCTION¹

“Embarrassed. Ashamed. Confused. Scared for the future of everyone that isn’t a straight white male in this country. Between [R]oe v. [W]ade and then the comments on same sex marriage from Thomas, we are going backwards decades and its horrifying.”²

“The fact that my wife and I have to consider getting a power of attorney [in] 2022 in case in the future someone tries to reverse same sex marriage is absolutely heartbreaking . . .”³

“ . . . [A]ctivists who oppose same sex marriage have every incentive to use an opinion like the draft in Dobbs to push arguments to overrule Obergefell. Lower courts will likely split, and the Supreme Court will feel the need to resolve. And they’ll rely on Dobbs.”⁴

“As the great Harvey Milk once said: ‘Rights are won only by those who make their voices heard.’ Because the American people made their voices heard, marriages are now more secure through the Respect for Marriage Act.”⁵

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¹ It is important to make the distinction now between consenting adults and child marriages. Thus, this Note will not address any need to expand marriage rights to encompass children, because the states have valid reasons to limit those types of marriages.

² Mike Ziemer (@MikeZiemer), TWITTER (June 24, 2022, 9:45 AM), <https://twitter.com/MikeZiemer/status/1540345446945677315> (discussing Mike Ziemer is a Dallas based entrepreneur and digital marketing specialist who shares his perspectives on Twitter as someone not in the political arena but affected by the decisions made in our government).

³ Emory LaCroix (@emory_lacroix), TWITTER (May 4, 2022, 1:42 PM), https://twitter.com/emory_lacroix/status/1521923321532715010.

⁴ Rick Hasen (@rickhasen), TWITTER (May 4, 2022, 6:26 PM), <https://twitter.com/rickhasen/status/1521994689645215744> (providing Rick Hasen is an internationally recognized expert in election law, a professor of law and political science at UCLA, and named one of the top 100 most influential lawyers in America by the National Law Journal in 2013).

⁵ Kamala Harris (@kamalaharris), TWITTER (Dec. 16, 2022, 6:18 PM), <https://twitter.com/KamalaHarris/status/1603907326993436672> (stating Kamala Harris is the Vice President of the United States and served as the attorney general for California where she started her fight for marriage equality).

“Joe Biden signing the Respect [f]or Marriage Act is not the end. It’s just the beginning. They have to keep pushing until all traditional morality has been destroyed. And even then, they won’t be satisfied.”⁶

Through their concerned language, these tweets illustrate how June 24, 2022, impacted the general public and left many feeling uncertain about the future of individual rights as American citizens once thought would be protected indefinitely.⁷

The latter tweets from Vice President Kamala Harris and conservative political pundit Ben Shapiro depict the differing views from both sides of the political spectrum in response to the Respect for Marriage Act (RFMA), a newly enacted law that recognizes the validity of same-sex and interracial marriages in the United States. However, the question remains, even in light of the new Act, of whether marriage will survive the polarization of this country for a seemingly simple question of who one will choose to marry.⁸

The Supreme Court acknowledged that “[n]o union is more profound than marriage” because it encompasses the “highest ideals of love . . . devotion, sacrifice, and family.”⁹ The Court has also suggested that it is a right no one should have to question.¹⁰ From the line of cases establishing interracial marriage in *Loving v. Virginia*, through privacy rights for consensual adult non-procreative sexual activity in *Lawrence v. Texas*, and safeguarding protection for same-sex marriage in *Obergefell v. Hodges*, marriage, regardless of the parties’ sex or gender, seemed like a fundamental right increasingly few questioned.¹¹ But for Justice Thomas, those cases’ mere reliance on longstanding substantive due process analysis raised more questions about their viability than it resolved.¹²

⁶ Ben Shapiro (@benshapiro), TWITTER (Dec. 15, 2022, 9:46 AM), <https://twitter.com/benshapiro/status/1603416283126571008> (explaining Ben Shapiro is a renowned conservative political pundit, syndicated columnist, lawyer, and New York bestselling author who weighs in on the current state of marriage rights in the United States).

⁷ Jake Epstein, *Hillary Clinton says Supreme Court decision to overturn Roe v Wade will ‘live in infamy’ and is a ‘step backward’ for women’s rights*, BUSINESS INSIDER (June 24, 2022, 22:22 IST), <https://www.businessinsider.in/politics/world/news/hillary-clinton-says-supreme-court-decision-to-overturn-roe-will-live-in-infamy-and-is-a-step-backward-for-womens-rights/articleshow/92441871.cms>.

⁸ *Section 3: Political Polarization and Personal Life Liberals Want Walkable Communities, Conservatives Prefer More Room*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/section-3-political-polarization-and-personal-life/>.

⁹ *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

¹⁰ *Remarks by President Biden on the Continued Battle for the Soul of the Nation*, THE WHITE HOUSE (Sep. 1, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/01/remarks-by-president-biden-on-the-continued-battle-for-the-soul-of-the-nation/>.

¹¹ See *Loving v. Virginia*, 388 U.S. 1, 5 (1967); *Obergefell*, 576 U.S. at 671; *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring).

¹² See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

This concern was only exacerbated when the Court famously decided to weigh in on one of the most hot-buttoned issues of the last century.¹³ In *Dobbs v. Jackson Women's Health Organization*, the recent Supreme Court case to overrule *Roe v. Wade*,¹⁴ Justice Thomas articulated in his concurring opinion:

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents.¹⁵

Though the *Dobbs* majority opinion expressly limits the decision's reach to abortion, *Roe* was a foundational opinion in many key Substantive Due Process cases.¹⁶ Writing for the majority, Justice Alito declared, "[O]ur decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."¹⁷ Even Supreme Court Justice Brett Kavanaugh, in his Senate confirmation hearing, when questioned about *Roe*, repeatedly emphasized that *Roe* was "precedent on precedent," and shortly thereafter, voted for the overturning of *Roe*.¹⁸ These statements from future Supreme Court Justices in their Senate Confirmation Hearings seemingly suggest the law is never fully settled despite what the Justices say before stepping on the bench.¹⁹ These rulings are always subjected to a new composition of the Supreme Court with differing articulations of the Constitution and how it relates to certain "fundamental" rights.²⁰

Marriage traditionally functioned as a state's right; however, since *Obergefell*, the federal government will not permit states to deny marriage licenses solely on the basis of sexual preference.²¹ It is arguably clear from the current members of the Supreme Court that *Loving v. Virginia* will not

¹³ *See id.*

¹⁴ *See Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵ *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

¹⁶ *Id.* at 2277-78 (quoting J. Alito, The Court "emphasizes that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

¹⁷ *Id.*

¹⁸ Tierney Sneed, *Brett Kavanaugh, who touted importance of precedent during confirmation fight, downplays it as he considers reversing Roe*, CNN (Dec. 2, 2021, 11:30 AM), <https://www.cnn.com/2021/12/01/politics/kavanaugh-abortion-precedent-roe-mississippi>.

¹⁹ *See id.*

²⁰ *See id.*

²¹ Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, STATELINE (July 7, 2022, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans>.

be overturned, but the same cannot be said about *Obergefell v. Hodges*.²² Although *Obergefell* provided same-sex marriages the same protections afforded to heterosexual marriages, it is not settled law.²³ Any given case handed down by the Supreme Court has the potential to be overturned years later from when it was originally decided upon.²⁴ Although prior Courts have emphasized the importance of *stare decisis*, it is clear that the Supreme Court will not always adhere to precedent.²⁵ For this reason, same-sex marriage must be thoroughly analyzed to determine the plausibility of it becoming overturned, impacting millions of married couples across the country.²⁶

This Note argues that it is counterintuitive to constitutionalize marriage for one group of people but strip another marriage of rights simply because those individuals are not a “traditional” couple.²⁷ Throughout the history of the Supreme Court, some justices vary in what definition of marriage would constitute protection.²⁸ However, this Note argues for the right to marry regardless of a definition attached to it because of its critical role in a functioning society.²⁹ Consider the Court’s recent decision in *Dobbs*; the only marriage seemingly free from government intrusion is one compromising of one white male and one white female.³⁰ This is not every single person’s definition or composition of marriage.³¹ The United States is a country where everyone should be free to choose who they marry.³² It is a country that embraces differences and embraces the culture of the many, not just the few.³³

²² See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Thomas, J., concurring).

²³ *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Roberts, C.J., dissenting).

²⁴ See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁵ Devin Dwyer, *After Roe ruling, is ‘stare decisis’ dead? How the Supreme Court’s view of precedent is evolving*, ABC NEWS (June 24, 2022, 11:20 AM), <https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047>.

²⁶ Zachary Scherer, *Key Demographic and Economic Characteristics of Same-Sex and Opposite-Sex Couples Differed*, U.S. CENSUS BUREAU (Nov. 22, 2022), <https://www.census.gov/library/stories/2022/11/same-sex-couple-households-exceeded-one-million.html> (stating there are 1.2 million same-sex couple households in the United States in 2021).

²⁷ See R. Kelly Raley et al., *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, FUTURE OF CHILD., Fall 2015, at 89.

²⁸ *Obergefell*, 576 U.S. at 734 (Roberts, C.J., dissenting).

²⁹ See Ryan Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, BACKGROUND, Mar. 11, 2013, at 1.

³⁰ See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

³¹ *Obergefell v. Hodges*, 576 U.S. 644, 651 (2015); *Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

³² See Ilya Shapiro, *The Equal Protection Clause Guarantees the Right to Marry*, CATO INST. (March 4, 2013), <https://www.cato.org/commentary/equal-protection-clause-guarantees-right-marry>.

³³ See *id.*

The purpose of this Note is to highlight the volatile nature of the right to marry.³⁴ Proposing a constitutional amendment could eliminate fear that the protection of certain categories of marriage is subject to change based on the ever-changing political composition of the Supreme Court.³⁵ Constitutionalizing marriage would allow every single daughter, son, parent, and grandparent to no longer worry about their future loved ones being able to fully express their love for someone else, even if their definition of marriage does not fit the “traditional” form.³⁶

This Note will also consider the impact *Dobbs* may have on Substantive Due Process precedents the Court has relied on since *Roe* was decided. Part I of this Note addresses how the Court’s jurisprudence came to rely upon the doctrine of Substantive Due Process and examines the pitfalls that a Substantive Due Process analysis has upon these impacted rights. Part II of this Note discusses the history of same-sex marriage and interracial marriage through cases that discuss privacy and same-sex marriage bans. Part III addresses the relationship between *Roe v. Wade* and *Obergefell v. Hodges* while analyzing the similarities in the criteria for overturning a Supreme Court precedent and how that same logic could be applied in *Obergefell*. Part IV considers the Respect for Marriage Act, an attempt by Congress to protect same-sex and interracial marriage by passing a federal statute that replaces all federal definitions of marriage to eliminate “between one man and one woman.”³⁷ Following this analysis, Part IV explains why a constitutional amendment is still pertinent in this area of the law. Finally, Part V concludes with a rationale in support of a constitutional amendment because the Respect for Marriage Act fails to protect marriage sufficiently.

II. SUBSTANTIVE DUE PROCESS

The majority in *Obergefell* rested its decision upon the fundamental right to marry.³⁸ The Court identified several reasons why it is fundamental that the right to marry applies equally to same-sex marriages, including: (1) individual autonomy to decide who one will marry, (2) the unique relationship of support and recognition marriage provides, (3) safeguarding children within a marriage, and (4) marriage provides social order regardless of the distinction of what type of marriage it is.³⁹

³⁴ Reuters Staff, *Factbox: Major Supreme Court decisions on gay rights*, REUTERS (June 26, 2013), <https://www.reuters.com/article/us-usa-court-gaymarriage-decisions-factb/factbox-major-supreme-court-decisions-on-gay-rights-idUSBRE95P19D20130626>.

³⁵ See, e.g., Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

³⁶ See *Obergefell*, 576 U.S. at 681.

³⁷ Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

³⁸ LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., R44143, *OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED* 3-4 (2015).

³⁹ *Id.*

Substantive Due Process protects unwritten rights from unwarranted government intrusion.⁴⁰ As the Supreme Court expressed in *Fletcher v. Peck*, “certain great principles of justice, whose authority is universally acknowledged,” but which are not expressly written into the text of the U.S. Constitution, should be judicially protected against government invasion.⁴¹

There are two questions to consider when the Court analyzes a potential fundamental right under Substantive Due Process.⁴² The first question is whether there is a fundamental liberty interest being infringed.⁴³ A fundamental liberty interest is one that is deeply rooted in history and tradition and implicit in the concept of ordered liberty.⁴⁴ This test was employed in both *Loving v. Virginia* and *Obergefell v. Hodges*.⁴⁵ However, this might be the crutch of *Obergefell*, and it could lead to its demise.⁴⁶ This test suggests only rights deeply rooted in history are protected.⁴⁷ Since same-sex marriage was criminalized in all states until 2015, it cannot reasonably be said to be deeply rooted in history.⁴⁸ The Court acknowledges this departure but states that “rights come not from ancient sources alone.”⁴⁹ The entire premise *Obergefell* rests on is a deeply flawed and convoluted notion that same-sex marriage is deeply rooted when it was banned across the world until 2000.⁵⁰ *Loving* is not under attack in the Court’s analysis under both Substantive Due Process and Equal Protection.⁵¹ There is an argument that *Obergefell* should have been ruled under Equal Protection and this debate might be unfounded.⁵² However, because it was not ruled under both Substantive Due Process and Equal Protection the analysis is exceptionally weak.⁵³

In *Obergefell*, the Court glanced over the history and tradition of same-sex marriage.⁵⁴ The case is premised on same-sex marriages and not marriages as a whole.⁵⁵ The Court wrote very little about the history of same-sex marriage besides assuming the laws against same-sex marriage are rooted

⁴⁰ CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW 461 (Wolters Kluwer, 6th ed. 2019).

⁴¹ *Fletcher v. Peck*, 10 U.S. 87, 133 (1810).

⁴² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2235-36 (2022).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *U.S. v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

⁴⁹ *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).

⁵⁰ *Windsor*, 570 U.S. at 808 (Alito, J., dissenting) (“No country allowed same-sex couples to marry until the Netherlands did so in 2000.”).

⁵¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2235-36 (2022).

⁵² *Id.*

⁵³ See *Obergefell*, 576 U.S. at 713 (Roberts, C.J., dissenting).

⁵⁴ *Id.* at 656-58.

⁵⁵ *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).

on religious and philosophical grounds.⁵⁶ As for ordered liberty, the Court articulated that the Fourteenth Amendment did not cover every single fundamental right.⁵⁷ The drafters of the Fourteenth Amendment did not presume to know the values of future generations and what liberty interests would deserve protection.⁵⁸ However, after reflecting, the Court announced that the Constitution's central protections would encompass same-sex marriage.⁵⁹ The right to marry is deeply rooted in our nation's history while same-sex marriage is not.⁶⁰ Specifically, there is no point in history when the Fourteenth Amendment was curated to have envisioned same-sex marriage.⁶¹ Therefore, it cannot be assumed that same-sex marriage would pass that part of the Substantive Due Process analysis.⁶²

However, if Due Process encompasses practically any marriage, it is not in our concept of ordered liberty.⁶³ The concept of ordered liberty, for example in *Lawrence v. Texas*, was preventing the states from coming into the most private parts of our lives: the bedroom.⁶⁴ However, *Lawrence* can be distinguished from *Obergefell*.⁶⁵ While many commentators have contended that *Lawrence*, which outlawed all statutes against sodomy, was a stepping stone for same-sex marriage advocates,⁶⁶ this cannot be the case. *Lawrence* is an example of telling the states they cannot do something.⁶⁷ *Obergefell* requires an affirmative act by the states to recognize a marriage license.⁶⁸ One case is affirmative action while the other case is inaction.⁶⁹

This distinct difference makes the point that instead of the Supreme Court playing a judicial role, they were legislating from the bench.⁷⁰ *Obergefell* would have been better suited being ruled under the Equal Protection Clause.⁷¹ The Equal Protection Clause would provide far greater protection than the Due Process Clause.⁷² A state's refusal to recognize a marriage that was validly acquired in one state and denied in a neighboring

⁵⁶ *Id.* at 672-73.

⁵⁷ *Id.* at 672.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 690 (Roberts, C.J., dissenting).

⁶¹ *Obergefell v. Hodges*, 576 U.S. 644, 690 (2015) (Roberts, C.J., dissenting).

⁶² *Id.*

⁶³ *Id.* at 701.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

⁶⁸ *Obergefell v. Hodges*, 576 U.S. 644, 701 (2015) (Roberts, C.J., dissenting).

⁶⁹ *Id.*

⁷⁰ *Id.* at 712.

⁷¹ HELEN M. ALVARE ET AL., WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX DECISION 112 (Yale Univ. Press 2020).

⁷² *Obergefell v. Hodges*, ALCU OHIO (Jan. 16, 2014), <https://www.acluohio.org/en/cases/obergefell-v-hodges>.

state runs afoul of the Equal Protection Clause.⁷³ The inconsistent treatment between the states would not be justified for the unequal treatment by any rational or legitimate basis.⁷⁴ Applying the Equal Protection analysis would allow the Court to acknowledge that the applicable level of scrutiny for laws regulating sexual orientation would be held to the highest level of scrutiny.⁷⁵ This analysis would allow the Court to determine the classification of sexual orientation as a suspect class.⁷⁶ Given the increased level of scrutiny, it is less likely that a court would find government action constitutional.⁷⁷ However, *Obergefell* left courts with ambiguity and did not resolve the broader impact on the rights of the LGBTQIA+ community because the court neglected classifying sexual orientation as a suspect class.⁷⁸

III. THE EVOLUTION OF MARRIAGE RIGHTS IN THE SUPREME COURT'S JURISPRUDENCE

“If marriage has any meaning at all, it is that when you collapse from a stroke, there will be another person whose “job” is to drop everything and come to your aid To be married is to know there is someone out there for whom you are always first in line.”⁷⁹

The controversy over defining marriage illuminates the absence of a clear boundary of what constitutes and defines a marriage.⁸⁰ Same-sex couples plead their case in courts to assert their right to marry with arguments rooted in equality and liberty.⁸¹ This shows a strong desire for their relationship to be given the same respect and dignity as any heterosexual couple receives without having to fight.⁸²

The Supreme Court's decision in *Loving* which invalidated anti-miscegenation laws, or those which enforce racial segmentation at the level of marriage and intimate relationships,⁸³ was the starting point of the change

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., R44143, *OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED 1-2* (2015).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 22* (Holt Paperbacks, 2005).

⁸⁰ See *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Obergefell v. Hodges*, 576 U.S. 644, 658 (2015).

⁸¹ See Brief for Respondents at 1, *Hollingsworth v. Perry*, No. 12-144 (9th Cir. Feb. 28, 2013) (“This case is about marriage... [T]his case is also about equality.”).

⁸² Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, The Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275, 278 (2014).

⁸³ *Anti-miscegenation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/anti-miscegenation> (last visited Sept. 14, 2023) (“opposing or prohibiting miscegenation”);

in how marriage is defined.⁸⁴ In 2015, same-sex couples were given the same protection with the Supreme Court recognizing their right to marry.⁸⁵ Only seven years later, some of the Supreme Court Justices, including Justice Alito, Thomas, and Barrett, have already taken a stance by questioning the very ruling that establishes same-sex couples' right to marry.⁸⁶

Throughout a long-heated battle for Civil Rights, it was not until 1967 in *Loving v. Virginia* that the right to interracial marriage was finally accepted.⁸⁷ Throughout American history, interracial marriage in the United States has endured a challenging history.⁸⁸ Beginning with the adoption of slavery laws in Maryland in 1661, Virginia enacted laws prohibiting interracial marriage.⁸⁹ These anti-miscegenation laws were prominent throughout the South, with thirty-eight states passing laws prohibiting interracial marriages.⁹⁰ However, these laws did not prevent unions between Whites and Black people.⁹¹

As societal norms and expectations of love changed, the Supreme Court's involvement finally put an end to this type of discrimination.⁹² Thus, the *Loving* Court affirmed that the right to interracially marry was constitutionally protected and found that states could no longer discriminate on the basis of race when determining whether a marriage license would be granted.⁹³

A. The Right to Same-Sex Marriage

For most of the Nation's history, states enacted statutes defining marriage to encompass only a union of one man and one woman.⁹⁴ In 1942, the Supreme Court ruled in *Skinner v. Oklahoma* that the Constitution guarantees a fundamental right to marry.⁹⁵ The Court held that "[m]arriage and procreation are fundamental to the very existence and survival of the

Miscegenation, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/miscegenation> (last visited Sept. 14, 2023) ("mixture of races").

⁸⁴ *Loving*, 388 U.S. at 2.

⁸⁵ *Obergefell*, 576 U.S. at 681-82.

⁸⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

⁸⁷ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁸⁸ *Interracial Relationships and Marriage in the USA*, STUDYCORG (Nov. 5, 2021), <https://studycorgi.com/interracial-relationships-and-marriage-in-the-usa/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁹⁴ Jessica Pfisterer & Tiffany V. Wynn, *Legal Recognition of Same-Sex Relationships*, 11 GEO. J. GENDER & L. 1, 2 (2010).

⁹⁵ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); see also *Loving*, 388 U.S. at 12.

race.”⁹⁶ Then, in *Loving v. Virginia*, the Court stated, “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁹⁷ In *Loving*, the Court also continued to impress that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”⁹⁸

This issue of same-sex marriage did not come into the state court system until *Baker v. Nelson*.⁹⁹ In *Baker*, the Minnesota courts denied a marriage license to a couple solely because they were of the same sex.¹⁰⁰ The Minnesota Supreme Court upheld the denial, explaining that their case was distinguishable from *Loving v. Virginia* because “there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”¹⁰¹ For twenty years after *Baker*, nobody challenged the court’s stance on same-sex marriage.¹⁰²

Following the twenty-year period, three same-sex couples filed suit in *Baehr v. Lewin*.¹⁰³ There, a Hawaii statute prohibited all same-sex marriages.¹⁰⁴ The state argued that their interest was legitimate because the protection of children and other people is crucial to fostering procreation in the marital framework.¹⁰⁵ However, the Hawaii Supreme Court failed to rule on the case and, instead, remanded it to allow the state to prove it had such a compelling interest.¹⁰⁶ These compelling interests included the right to privacy, freedom to marry, and freedom of equal treatment.¹⁰⁷ In response to this ruling, the voters of Hawaii amended the legislative power to encompass same-sex marriage in their definition of marriage.¹⁰⁸ This inevitably made the case moot, and the court never expressly ruled on marriage protection for same-sex couples.¹⁰⁹ This case prompted other states to pass constitutional amendments in their states to strictly define marriage to encompass only a man and a woman.¹¹⁰

⁹⁶ *Skinner*, 316 U.S. at 541.

⁹⁷ *Loving*, 388 U.S. at 12.

⁹⁸ *Id.* (quoting, in part, the Court in *Skinner*).

⁹⁹ *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971).

¹⁰⁰ *Id.* at 185-86.

¹⁰¹ *Id.* at 187.

¹⁰² Pfisterer & Wynn, *supra* note 94, at 3.

¹⁰³ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹⁰⁴ HAW. REV. STAT. ANN. § 572-1 (holding that “marriage . . . shall be only between a man and a woman . . .”).

¹⁰⁵ *See Baehr*, 852 P.2d at 60-61.

¹⁰⁶ *Id.* at 67.

¹⁰⁷ *Id.* at 52, 60.

¹⁰⁸ *See* HAW. CONST. art. 1, § 23.

¹⁰⁹ *Id.*

¹¹⁰ Haeyoun Park, *Gay Marriage State by State: From a Few States to the Whole Nation*, THE N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/interactive/2015/03/04/us/gay-marriage-state-by-state.html>; *see also* Pfisterer & Wynn, *supra* note 94, at 4.

In 1996, President Clinton signed into law the Defense of Marriage Act (DOMA).¹¹¹ DOMA solidified Congress's priorities of defining marriage in the most traditional manner.¹¹² Congress had two primary objectives in DOMA: (1) defending heterosexual marriage for federal purposes and (2) protecting states that deny same-sex couples marriage licenses under the Constitution's Full Faith and Credit Clause.¹¹³

The Supreme Court reached a landmark decision when deciding *Lawrence v. Texas*.¹¹⁴ There, the Court decided, among other issues, whether the Due Process Clause protected governmental intrusion into a couple's private affairs.¹¹⁵ The Supreme Court struck down a Texas sodomy statute,¹¹⁶ explaining that the LGBTQIA+ community is "entitled to respect for their private lives."¹¹⁷ They also explained that the State could not "demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime."¹¹⁸ They went on to further explain, "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."¹¹⁹

In *Lawrence*, Justices Scalia and Thomas both stated,

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.¹²⁰

Justice Thomas joined Justice Scalia in the dissent because of their similar stances on sodomy and the way the Court's precedent depicted Substantive Due Process, in limited circumstances, to expand the scope of who is guaranteed this fundamental right.¹²¹ This joint dissent was made in part because their view is there is not a fundamental right under the Due Process Clause that establishes the right to sodomy.¹²² One explanation behind the dissent could be that Justice Thomas and Scalia engaged in a strict reading of the Constitution, which adhered to an originalist judicial

¹¹¹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹¹² H.R. REP. NO. 104-664, at 2 (1996).

¹¹³ *Id.*

¹¹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹⁵ *Id.* at 564.

¹¹⁶ Specifically, the Court struck down TEX. PENAL CODE ANN. § 21.06(a) (2007 Reg. Sess. of 80th legislature).

¹¹⁷ *Lawrence*, 539 U.S. at 578.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

¹²¹ *Id.* at 586.

¹²² *See id.* at 593-98.

philosophy.¹²³ If the right is not deeply rooted in history, it is a right, according to Justices Scalia and Thomas, that would not be entitled to constitutional protection from the federal government, but is instead reserved to the states to regulate.¹²⁴ Further, sodomy was a criminal offense at the time the Bill of Rights was ratified.¹²⁵ However, this line of reasoning seems contradictory when it can be assumed interracial marriage would be looked down upon at that time as well.¹²⁶ It is contradictory because both interracial marriage and sodomy were looked down upon when looking to history and tradition; however, the Court has seemingly decided to favor one issue over the other.

In addition, the Justices compared sodomy with criminal laws against fornication, bigamy, adultery, adult incest, and bestiality and further claimed these sexual behaviors were “immoral and unacceptable.”¹²⁷ The dissenting Justices advocated that same-sex couples should use the traditional method of the democratic process by convincing others to repeal laws when it is deemed socially acceptable to change old laws to reflect the views of modern society.¹²⁸ One may argue this is a well-intended option for anyone but it is not a quick or effective process for every issue.¹²⁹ Although the case was not expressly directed at same-sex marriages, Justice Scalia warned Americans that “[t]oday’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”¹³⁰

In 2003, several years after the decision in *Baehr*, seven same-sex couples in Massachusetts filed suit again when the state failed to issue those couples marriage licenses.¹³¹ In a close vote, the Massachusetts Supreme Court ruled that the Department of Health’s practice of denying marriage licenses was “incompatible with the constitutional principles of respect for individual autonomy and equality.”¹³² The court solidified the right to marriage as “the voluntary union of two persons as spouses, to the exclusion of all others” which sustained the right to marry the same sex.¹³³

The State made three arguments in support of the ban.¹³⁴ First, the goal of marriage is to provide a “favorable setting for procreation,” however, the

¹²³ See *id.* at 588.

¹²⁴ See *id.* at 593.

¹²⁵ See *id.* at 594 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

¹²⁶ See, e.g., *Naim v. Naim*, 87 S.E.2d 749, 755-56 (1955).

¹²⁷ *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

¹²⁸ *Id.* at 603-04.

¹²⁹ *How long does it take to pass and enact Bills?*, PARLIAMENTARY MONITORING GRP., <https://pmg.org.za/page/How%20long> (last visited Jan. 11, 2023).

¹³⁰ *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

¹³¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949-50 (Mass. 2003).

¹³² *Id.* at 949.

¹³³ *Id.* at 969.

¹³⁴ See MASS. GEN. LAWS ANN. ch. 207. §§ 19-20.

court stated this was inconsistent according to the statute when the state legislature granted marriage rights between infertile and terminally ill individuals.¹³⁵ Second, the State argued that heterosexual marriages ensured “the optimal setting for child rearing,” and again, the court found single-parent and non-traditional families raised children in conformity with the court’s requirements and that there is no evidence same-sex couples would not do the same or be capable of the same.¹³⁶ Finally, the State argued it had scarce resources, which it must preserve and extending the right to marriage to same-sex couples would depreciate those resources.¹³⁷ Again, the court did not find this reasoning persuasive because it was an over-generalization about the financial abilities of same-sex and heterosexual couples.¹³⁸

A decade later in *Obergefell*, Michigan, Kentucky, Ohio, and Tennessee all defined marriage as a union between one man and one woman.¹³⁹ Fourteen same-sex couples, along with two men whose same-sex partners had since deceased, came forward claiming that these statutes violated their Fourteenth Amendment Due Process right by denying them the right for their marriage to be recognized in those states.¹⁴⁰ The Court provided a history of the evolution of marriage, explaining that marriage used to be viewed as an arrangement by an individual’s parents based on a variety of factors, including but not limited to political, religious, or financial reasons.¹⁴¹ Then, marriage deemed a woman as property owned and controlled by her husband.¹⁴² The Court stated a wife’s existence merged with her husband such that she was no longer a separate individual.¹⁴³ The majority concluded that the right to same-sex marriage is fundamental under the Constitution because the Court’s past precedents, such as *Loving*, are based upon the fundamental principle of individual autonomy, which guarantees the right to marry whomever one chooses.¹⁴⁴ Views on marriage evolve over time; while same-sex marriage might have once been frowned upon, today, those feelings are not prevalent nationwide and the laws in the United States should reflect the people.¹⁴⁵

¹³⁵ *Goodridge*, 798 N.E.2d at 961.

¹³⁶ *Id.* at 961-64.

¹³⁷ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003).

¹³⁸ *Id.* (explaining that the state argued that since same-sex couples are on average less financially dependent on each other than opposite-sex couples, they are less in need of the various financial benefits attendant to marriage).

¹³⁹ *Obergefell v. Hodges*, 576 U.S. 644, 653 (2015).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 657-59.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 665.

¹⁴⁵ *Overview – Rule of Law*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> (last visited Apr. 8, 2023).

In Justice Thomas' dissent, he stated, "[t]hey ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation."¹⁴⁶ It is critical to notice a difference that over thirty states still opted for the traditional definition of marriage of one man and one woman.¹⁴⁷ Thus, this is a stronger overreach than in *Loving*.¹⁴⁸ According to Justice Thomas, *Loving* is distinct from *Obergefell*, partly due to this judicial overreach.¹⁴⁹

In addition, *Loving* removed racial barriers to marriage, which did not inherently change the definition of marriage.¹⁵⁰ Justice Thomas joined Justice Roberts by focusing his reasoning on the belief that fundamental rights announced by the Supreme Court must be rooted in history and tradition.¹⁵¹ History would dictate a plural marriage would be more accepted by the dissenters than a same-sex marriage would.¹⁵² Plural marriage is also known as polygamy, which is the practice of having more than one spouse at one time.¹⁵³ The reasoning being because plural marriages are more established in cultures and religions around the world.¹⁵⁴

The experience of growing up profoundly different, whether that be emotionally or psychologically, inevitably alters a person's self-perception, tends to make them more wary and distant, more attuned to appearance and its foibles, more self-conscious and perhaps more reflective of things that are foreign to one's own life experiences.¹⁵⁵ The presence of the LGBTQIA+ community in the arts, literature, architecture, design, and fashion could be understood, as some have, as a simple response to oppression.¹⁵⁶ Therefore, because the state's arguments against same-sex marriages reflect religious and moral doctrines, those arguments cannot have a place in our form of government.¹⁵⁷ Biblical scripture is not recognized in the United States as legally binding law and cannot be a source of resolution to this controversy.¹⁵⁸

¹⁴⁶ *Obergefell v. Hodges*, 576 U.S. 644, 722 (2015) (Thomas, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 732.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 733.

¹⁵¹ *Id.* at 686.

¹⁵² *Obergefell v. Hodges*, 576 U.S. 644, 704 (2015) (Roberts, C.J., dissenting).

¹⁵³ *Polygamy*, DICTIONARY.COM, <https://www.dictionary.com/browse/polygamy> (last visited Apr. 8, 2023).

¹⁵⁴ *Obergefell*, 576 U.S. at 704 (Roberts, C.J., dissenting).

¹⁵⁵ ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 179, 197 (photo. reprinted 1996) (1996).

¹⁵⁶ *Id.*

¹⁵⁷ JOHN RAWLS, POLITICAL LIBERALISM 22 (Columbia Univ. Press expanded ed., 2005).

¹⁵⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

B. The Right to Interracial Marriage

The right to interracial marriage was first examined in *Naim v. Naim*, where an interracial couple married in North Carolina and then returned home to Virginia to live as husband and wife.¹⁵⁹ Virginia would not recognize their marriage and further wanted to incarcerate this couple for leaving the state solely for the purpose of getting married.¹⁶⁰ The Virginia statute read as follows, “[i]t shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.”¹⁶¹

The Virginia court further articulated, “it is for the peace and happiness of the colored race, as well as of the white, that laws prohibiting intermarriage of the races should exist”¹⁶² This case serves as a prime example of this Nation’s antiquated attitudes toward interracial marriage.¹⁶³

However, since *Naim* came before *Loving*, it displays the strong aversion for interracial marriage that has since been disfavored.¹⁶⁴ It further provides an example of how far society changed from this case in 1955 to *Loving* in 1967.¹⁶⁵ Moreover, it reveals that at one point in history, marriage was viewed as a state’s right, which the Supreme Court later overruled.¹⁶⁶ The *Loving* Court recognized there are no legitimate reasons for states to deny the recognition of marriages between and among the races.¹⁶⁷

In addition, *Perez v. Sharp* is a case that arose in Los Angeles when a county clerk denied a marriage license to a Latina woman, Andrea Perez, who was classified as white under the California state law, and Sylvester Davis, who was an African American man.¹⁶⁸ The California statute voided all interracial marriages, but did not induce criminal penalties as seen in other states.¹⁶⁹ The California Supreme Court quickly dismissed the case, but noted the statute violated the Equal Protection Clause by setting up the doctrinal

¹⁵⁹ *Naim v. Naim*, 87 S.E.2d 749, 755-56 (1955) (providing this case was decided a decade before *Loving v. Virginia*).

¹⁶⁰ *Id.* at 755.

¹⁶¹ *Id.* at 756.

¹⁶² *Id.* at 759.

¹⁶³ *Id.* at 756.

¹⁶⁴ *See Loving v. Virginia*, 388 U.S. 1, 5 (1967).

¹⁶⁵ *See id.* at 12.

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Perez v. Sharp*, 198 P.2d 17, 17-18 (Cal. 1948) (explaining to avoid possible confusion, the decision in *Perez v. Sharp* was reported in the unofficial regional reporter as *Perez v. Lippold* 32 Cal.2d 711, 198 P.2d 17 (1948), and judicial decisions in other states sometimes have referred to the decision by that title. In this note it shall be referred to the decision under its correct official title of *Perez v. Sharp*).

¹⁶⁹ *Id.*

approach later restated in the Supreme Court's opinion of *Loving*.¹⁷⁰ Judge Traynor stated,

Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry. It must therefore be determined whether the state can restrict that right on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.¹⁷¹

The State's arguments, each being arguably more racist than the next, were "the prohibition of intermarriage between Caucasians [sic] and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians," that statistics prove "physical inferiority of certain races," and "persons wishing to marry in contravention of race barriers come from the 'dregs of society.'"¹⁷² Unsurprisingly, the State did not legitimately fit between the means and the ends for this arbitrary racial restriction on marriage licenses.¹⁷³

Finally, the groundbreaking case came up to the Supreme Court in *Loving*, when a white man and a black woman were married in the District of Columbia and returned to their home state of Virginia.¹⁷⁴ Virginia had a statute in place that banned interracial marriage.¹⁷⁵ This statute provided:

If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished . . . and the marriage shall be governed by the same law as if it had been solemnized in this State.¹⁷⁶

The trial judge went on to say,

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his

¹⁷⁰ *Id.* at 17-19; *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

¹⁷¹ *Perez*, 198 P.2d at 19.

¹⁷² *Id.* at 23-25.

¹⁷³ Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1164 (2009).

¹⁷⁴ *Id.* at 1153-54.

¹⁷⁵ *Id.* at 1158.

¹⁷⁶ *Loving v. Virginia*, 388 U.S. 1, 4 (1967).

arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹⁷⁷

Mildred Delores Jeter and Richard Perry Loving excited the entire country once this case was accepted and decided.¹⁷⁸ This case ended 300-year-long anti-miscegenation laws that made interracial marriages a crime across the country.¹⁷⁹ To Mildred and Richard, this case was more than a stance on politics or laws, it was about love.¹⁸⁰ On the anniversary of the Supreme Court's decision, Mildred stated, “[w]e were in love, and we wanted to be married.”¹⁸¹ *Loving* shows exactly how far marriage jurisprudence has come in America.¹⁸² However, the Lovings would not enjoy this right themselves.¹⁸³ While the Lovings admired their marriage license on the dresser in their bedroom, the police barged into the couple's bedroom and revealed to them their marriage was invalid.¹⁸⁴ The Lovings fought legal battles the majority of their lives, facing jail and banishment from their homes.¹⁸⁵ The sheriff viewed their marriage as “no good here.”¹⁸⁶ The Virginia legislature saw their marriage as “sociological, psychological, evil[.]”¹⁸⁷

Marriage is a personal right every free person should be able to enjoy.¹⁸⁸ Notably, only sixteen states had anti-interracial marriage statutes on their books when *Loving* was decided.¹⁸⁹ It seems as though since *Loving*, more American people have accepted and embraced marrying other races.¹⁹⁰ Chief Justice Earl Warren simply declared to the country the law violated the

¹⁷⁷ *Id.* at 3.

¹⁷⁸ Leah Ward Sears & Sasha N. Greenberg, *The Love in Loving: Overcoming Artificial Racial Barriers*, 94 NOTRE DAME L. REV. 28, 29 (2018).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; Mildred Loving, *40 Years Later*, ATLANTIC (June 18, 2007), <https://www.theatlantic.com/daily-dish/archive/2007/06/mildred-loving-40-years-later/227582/>.

¹⁸² See *Naim v. Naim*, 197 Va. 80, 81 (1955); see also *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁸³ Sears & Greenberg, *supra* note 178, at 30.

¹⁸⁴ Arica L. Coleman, *What You Didn't Know About Loving v. Virginia*, TIME (June 10, 2016), <http://time.com/4362508/loving-v-virginia-personas/>.

¹⁸⁵ Sears & Greenberg, *supra* note 178, at 30.

¹⁸⁶ David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES (June 12, 1992), <http://www.nytimes.com/1992/06/12/news/a-mixed-marriage-s-25th-anniversary-of-legality.html?pagewanted=all>.

¹⁸⁷ Marisa Penalzoza, *'Illicit Cohabitation': Listen to 6 Stunning Moments from Loving v. Virginia*, NPR (June 12, 2017), <http://www.npr.org/2017/06/12/532123349/illicit-cohabitation-listen-to-6-stunning-moments-from-loving-v-virginia>.

¹⁸⁸ *Id.*

¹⁸⁹ *Loving v. Virginia*, 388 U.S. 1, 6 (1967). *But see* *Obergefell v. Hodges*, 576 U.S. 644, 732-33 (2015) (Thomas, J., dissenting) (stating 32 of 50 States still retain a traditional form of marriage undermining the political process).

¹⁹⁰ *But see id.*

central meaning of the Equal Protection Clause and the Due Process Clause because the statute deprived the Lovings of their liberty.¹⁹¹

The removal of racial barriers to marriage is apparent in today's society.¹⁹² People in America have integrated, and more than two million people turn to ancestry websites to identify their ancestry, making those websites billion-dollar companies.¹⁹³ Although the Judge in *Loving* could inexcusably dilute the races into five different colors, racial divides are deteriorating and that is not the world we live in today.¹⁹⁴

IV. *OBERGEFELL* AND *LOVING* IN THE ABSENCE OF *ROE*

In *Dobbs*, it is clear from the majority opinion that the decision focused narrowly on abortion rights.¹⁹⁵ However, upon closer examination of how the majority overruled a fifty-year precedent, concerns arise that other individual rights may be overturned as easily as abortion was.¹⁹⁶

It is axiomatic that the United States Supreme Court rarely overturns one of its own decisions.¹⁹⁷ The Supreme Court has passed down over 25,500 decisions since the Court was created in 1789.¹⁹⁸ Of those decisions, the Court has only reversed its precedent 146 times, accounting for less than half of one percent of all its decisions.¹⁹⁹ This striking number is due to the Court's adherence to *stare decisis*.²⁰⁰

David Schultz stated, “[p]recedent says that like cases should be decided alike. It appeals to our notions of justice and fairness.”²⁰¹ Judges resort to precedent because it encourages uniformity, consistency, and

¹⁹¹ Sears & Greenberg, *supra* note 178, at 28.

¹⁹² See U.S. CONST. amend. XII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

¹⁹³ Sandra Feder, *Genetic ancestry results shape race self-identification, Stanford researchers find*, STANFORD NEWS (May 17, 2021), <https://news.stanford.edu/2021/05/17/ancestry-tests-affect-race-self-identification/>.

¹⁹⁴ *Loving*, 388 U.S. at 3; *id.* (providing taking Genetic Ancestry Tests (GAT) makes people more likely to identify as multi-racial as they discover more about their ancestry. This along with new births is causing the multiracial population in this U.S. to increase).

¹⁹⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2280 (2022).

¹⁹⁶ *Id.* (Breyer, J., dissenting) (“To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception.”).

¹⁹⁷ David Schultz, *The Supreme Court rarely overturns constitutional precedent – But Roe v. Wade may be different*, THOMAS REUTERS (March 21, 2022), [https://today.westlaw.com/Document/Iaa0d501ca91111ec9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://today.westlaw.com/Document/Iaa0d501ca91111ec9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true).

¹⁹⁸ *Views about same-sex marriage by state*, PEW RSCH. CTR. (May 30, 2014), <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

predictability in the court system.²⁰² Historically, the Supreme Court would not overturn a case unless the decision proved to be unworkable in practice or the conditions of the nation changed dramatically.²⁰³ The historical deference to precedent has decreased significantly over time, specifically in the past century.²⁰⁴ The noteworthy cases include *Plessy v. Ferguson*, *Bowers v. Hardwick*, *Baker v. Nelson*, *Roe v. Wade*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁰⁵

Justice Alito explained the criteria the Supreme Court considers when overruling one of its previous decisions.²⁰⁶ The criteria mentioned in *Dobbs* include the nature of the Court's error, the quality of the reasoning, workability, effect on other areas of the law, and reliance interests.²⁰⁷ Furthermore, Justice Alito first mentioned that the nature of the Court's error will be met if there is an erroneous interpretation of the Constitution.²⁰⁸ Second, the quality of reasoning is determined by looking to prior case law and if the grounds offered by the Court are sufficiently weak.²⁰⁹ Third, workability is satisfied if the reasoning can lead to predictable results through the justice system.²¹⁰ Fourth, the effect on other areas of law is created when there is a distortion of many unrelated legal doctrines.²¹¹ Lastly, the Court assesses whether overruling the decision would upend substantial reliance interests.²¹² In considering the factors displayed by the Supreme Court, it poses the question of whether *Obergefell* will fit and tilt the balance for the Supreme Court to overturn its precedent regarding same-sex marriage.²¹³

West Coast Hotel v. Parrish further illustrates the Court's power to overrule decisions which removes an issue from the people and the democratic process.²¹⁴ Justice White explained, "decisions that find in the Constitution principles or values that cannot fairly read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation."²¹⁵ Therefore, *Obergefell* can precisely fall into the first factor,

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Views about same-sex marriage by state*, PEW RSCH. CTR. (May 30, 2014), <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/>.

²⁰⁵ *Id.*

²⁰⁶ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

²⁰⁷ *Id.* at 2265-75.

²⁰⁸ *Id.* at 2265.

²⁰⁹ *Id.* at 2265-66.

²¹⁰ *Id.* at 2272.

²¹¹ *Id.* at 2275.

²¹² *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022).

²¹³ *See, e.g., id.* at 2265-75.

²¹⁴ *Id.* at 2265.

²¹⁵ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 384 (1937).

erroneous interpretation of the Constitution.²¹⁶ In his dissent, Justice Thomas aggressively urged that erroneous interpretation is present in *Obergefell* because the democratic process is undermined in the case.²¹⁷

The second factor may also be weighed in the Court's favor to overturn a decision.²¹⁸ This factor is defeated if there is text, history, and precedent to support its ruling.²¹⁹ The majority in *Obergefell* acknowledges that marriage has existed for millennia and across the world.²²⁰ Throughout that time in history, "marriage" referred to only one relationship: the union of a man and a woman.²²¹ The Constitution does not mention marriage, and the Framers arguably entrusted the states with the entire area of domestic relations.²²² In prior case law, marriage has been consistently defined within the traditional marriage definition.²²³ In *Murphy v. Ramsey*, the Court referred to marriage as "the union for life of one man and one woman"²²⁴ Years later, the Court continued to redefine marriage, stating it is "fundamental to our very existence and survival," which could imply a presumption that there is a procreative component.²²⁵ Recently, the Court explicitly made the connection between marriage and the "right to procreate."²²⁶ Again, this factor has sufficient evidence to tilt toward overruling.

The third factor is whether the decision is still workable and creates predictability among future cases.²²⁷ Society has long recognized the bond of marriage.²²⁸ A marriage creates a respected status and benefits enjoyed by married couples.²²⁹ These benefits encourage people to enter into a marriage.²³⁰ However, the original constitutional proposition is that courts do not substitute their personal beliefs for the judgment of legislative bodies.²³¹ Rather, the people elect legislatures to pass those very laws, which are reflective of their own personal beliefs.²³² The Court is repeating *Lochner's*²³³ error of converting personal beliefs into constitutional

²¹⁶ *Obergefell v. Hodges*, 576 U.S. 644, 722 (2015) (Thomas, J., dissenting).

²¹⁷ *Id.*

²¹⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265-75 (2022).

²¹⁹ *Id.* at 2266.

²²⁰ *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting).

²²¹ *Id.*

²²² *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

²²³ *Id.*

²²⁴ *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

²²⁵ *Loving v. Virginia*, 388 U.S. 1, 12, (1967).

²²⁶ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

²²⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265-75 (2022).

²²⁸ *Obergefell v. Hodges*, 576 U.S. 644, 705 (2015) (Roberts, C.J., dissenting).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *See id.*

²³² *See id.*

²³³ *Lochner v. New York*, 198 U.S. 45 (1905). David A. Strauss provides a criticism of the Court in *Lochner*, arguing that the Court was ". . . enforcing a right not found in the Constitution. Freedom

mandates.²³⁴ The Substantive Due Process in modern days stresses judicial restraint.²³⁵ The dissenting justices in *Obergefell* convey how easily it can be argued that *Obergefell* is unworkable in light of respecting other branches and upholding federalism principles.²³⁶

Fourth, the Court considers the effects on other areas of law.²³⁷ The Constitution places restraint on self-rule by allowing the people of the United States to adopt amendments to the Constitution.²³⁸ There are limitations like denying the Full Faith and Credit Clause, abridging the freedom of speech, and infringing on the right to bear arms, but aside from those powers, everything else is left up to the states respectively.²³⁹ *Obergefell* decided that a limitation that requires states to license and recognize same-sex marriages is embedded in the Fourteenth Amendment.²⁴⁰ At the time of ratification, the Fourteenth Amendment limited the definition of marriage.²⁴¹ The debate over same-sex marriage continued, and because there is no doubt the people of the United States have never decided to prohibit the limitation of marriage, the public debate should continue to be fostered until legislatures of each state decide to change their laws.²⁴² The dissenters' opinions in *Obergefell* depict this factor can again tilt towards overruling.²⁴³

Lastly, the Court weighs reliance on the decision established in the case.²⁴⁴ The Petitioners in *Obergefell* relied on liberty to carry into the discussion of past precedents by the Court.²⁴⁵ The fundamental right of liberty includes identifying the right to marry, however, not one of those cases expanded the established concept of liberty.²⁴⁶ The precedents were absolute bans on private actions that touched upon marriage.²⁴⁷

In *Loving*, a couple was criminally prosecuted for marrying.²⁴⁸ In *Zablocki v. Redhail*, a man was prohibited from marrying in Wisconsin or

of contract, unlike freedom of speech, for example, is not mentioned in the text of the Constitution. Its textual basis was the oxymoronic notion of "substantive due process." There is no problem, on this account, when courts enforce rights that are in the Constitution; the problem arises when they enforce rights that they have just made up themselves." David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 378-79 (2003).

²³⁴ See *Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting).

²³⁵ *Id.* at 706.

²³⁶ See *id.* at 687.

²³⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

²³⁸ *Obergefell*, 576 U.S. at 714-17 (Scalia, J., dissenting).

²³⁹ *Id.*

²⁴⁰ *Obergefell v. Hodges*, 576 U.S. 644, 714-17 (2015) (Scalia, J., dissenting).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See *id.*

²⁴⁴ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

²⁴⁵ *Obergefell*, 576 U.S. at 722-24 (Thomas, J., dissenting).

²⁴⁶ *Obergefell v. Hodges*, 576 U.S. 644, 722-24 (2015) (Thomas, J., dissenting).

²⁴⁷ *Id.*

²⁴⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

elsewhere because of outstanding child support payments.²⁴⁹ In *Turner*, state inmates were prohibited from entering marriages without permission, which could be denied for any compelling reason.²⁵⁰ These cases did not deny individuals solely on governmental recognition and benefits associated with marriages.²⁵¹ Again, by the dissenters' explanation, the last and final factor may tilt the scale to overturning *Obergefell*.²⁵²

Now, it is interestingly enough *Obergefell* can fit that same bill.²⁵³ This meticulous depiction explains the volatile nature of this particular area of law.²⁵⁴ While the Supreme Court, the House, and the Senate have recognized the importance both interracial marriage and same-sex marriage, this does not mean it is as solidified as one might think.²⁵⁵ After seeing how, arguably, either case could be overturned, a constitutional amendment is needed even more.²⁵⁶

A federal act, while it carries significant weight, is not as strong as some suggest.²⁵⁷ If a newly elected Congress shifts in the party alignment, the new Congress could easily repeal the act and marriage would not be any more protected than before the act.²⁵⁸ This is why it is necessary to protect marriage at the highest level through the United States Constitution.²⁵⁹

V. THE RESPECT FOR MARRIAGE ACT AND A NEED FOR A CONSTITUTIONAL AMENDMENT

This Part discusses the need for a new amendment. Only then will the right to marriage be solidified. The Court is on a devastating path," argues

²⁴⁹ *Zablocki v. Redhail*, 434 U.S. 374, 375 (1978).

²⁵⁰ *Turner v. Safley*, 482 U.S. 78, 82 (1987).

²⁵¹ *Obergefell*, 576 U.S. at 722-24 (Thomas, J., dissenting).

²⁵² See *Obergefell v. Hodges*, 576 U.S. 644, 722-24 (2015) (Thomas, J., dissenting).

²⁵³ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

²⁵⁴ *Id.* at 2265-75.

²⁵⁵ *Obergefell*, 576 U.S. at 681; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

²⁵⁶ Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Sep. 4, 2023), <https://time.com/6240497/same-sex-marriage-rights-us-obergefell/>.

²⁵⁷ See Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause: Common Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-vi/clauses/31> (last visited Sep. 4, 2023).

²⁵⁸ See Jordan M. Ragusa & Nathaniel A. Birkhead, *Understanding when and why Congress repeals laws is as important as looking at how it makes them*, LONDON SCH. OF ECON. & POL. SCI., <https://blogs.lse.ac.uk/usappblog/2015/10/16/understanding-when-and-why-congress-repeals-laws-is-as-important-as-looking-at-how-it-makes-them/> (last visited Sep. 4, 2023).

²⁵⁹ See Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause: Common Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-vi/clauses/31> (last visited Sep. 4, 2023).

Professor of Constitutional Law at Harvard Laurence Tribe.²⁶⁰ He further contends the *Dobbs* opinion “is likely to jeopardize literally all of the basic bodily integrity rights that people have come to rely on.”²⁶¹ The right to choose who one marries is a right that needs the utmost constitutional protection.²⁶²

While the states traditionally have the power to regulate marriage, this tradition must be dissipated.²⁶³ Since the beginning of the founding of America, the states have given up rights to ensure every American is protected across the fifty states.²⁶⁴ The rights reserved to the federal government should include the right of marriage.²⁶⁵ A constitutional amendment would solidify this right and give it the strongest authority out of the reach of activist politicians.²⁶⁶ However, constitutional amendments are not as easy to pass.²⁶⁷

The proposed constitutional amendment will ensure no American will ever face the day *Obergefell* or *Loving* get overturned on the same premise as *Roe v. Wade* did.²⁶⁸ The states have no legitimate interest in regulating two consenting adults choosing to get married.²⁶⁹ Our obligation is to define the liberty of all, not to mandate our own moral code.²⁷⁰ Justice O’Connor’s concurrence in *Lawrence* rejected the state’s argument that Texas had a legitimate governmental interest in the “promotion of morality,” stating that “the Court has never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of people.”²⁷¹

²⁶⁰ Madeleine Carlisle & Julia Zorthian, *Clarence Thomas Signals Same-Sex Marriage and Contraception Rights at Risk After Overturing Roe v. Wade*, TIME (June 24, 2022), <https://time.com/6191044/clarence-thomas-same-sex-marriage-contraception-abortion/>.

²⁶¹ *Id.*

²⁶² *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

²⁶³ *Williams v. State of N.C.*, 317 U.S. 287, 300 (1942) (“most perplexing and distressing complication in the domestic relations of many citizens in the different states.”).

²⁶⁴ See *The Constitution*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (last visited Jan. 7, 2023).

²⁶⁵ *Contra* Richard Kelsey, *There is No Constitutional Right to Marriage . . . Of Any Kind*, JURIST (Oct. 28, 2014), <https://www.jurist.org/commentary/2014/10/richard-kelsey-samesex-marriage/>.

²⁶⁶ Stephanie Jurkowski, *Supremacy Clause*, CORNELL L. SCH. (June 2017), https://www.law.cornell.edu/wex/supremacy_clause.

²⁶⁷ *The Amendment Process: Adding a New Amendment to the Constitution Not an Easy Task!*, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.gov/education/three-branches/amendment-process> (last visited Sept. 3, 2023).

²⁶⁸ Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Dec. 14, 2022, 10:26 AM), <https://time.com/6240497/same-sex-marriage-rights-us-obergefell/>.

²⁶⁹ *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015).

²⁷⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

²⁷¹ *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring).

A constitutional amendment is seen by many as unthinkable.²⁷² It is extremely difficult for one to be agreed upon.²⁷³ The last constitutional amendment to be ratified was in 1992.²⁷⁴ However, the heightened political pressure and the encouragement from across the nation might not be as unthinkable anymore.²⁷⁵

As rallies are seen on the news and marches are being conducted, marriage rights might be the issue that could make it as an amendment to the Constitution.²⁷⁶ While it must be admitted that constitutional amendments are gravely difficult to execute, it is not inconceivable.²⁷⁷ Clearly, by looking at the amendments already passed, there have only been 27 in our nation's history.²⁷⁸ The last amendment to the Constitution was passed in 1992.²⁷⁹ To prevent arbitrary changes in the United States Constitution, the process of making amendments is quite strenuous.²⁸⁰

An amendment may first be proposed by a two-thirds vote from both Houses of Congress or, if two-thirds of the states request one, by a convention called to amend the Constitution.²⁸¹ The amendment, in addition, must be ratified by three-fourths of the state legislatures or three-fourths of conventions called in each state for ratification.²⁸² However, in modern times, amendments have traditionally specified a time frame in which they must be accomplished through the process of several years.²⁸³

The Constitution specifies no amendment can essentially deny a state equal representation in the Senate without the state's consent.²⁸⁴ It is worth

²⁷² Daniel R. Williams, *After the Gold Rush-Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere*, 113 PENN. ST. L. REV. 55, 103 (2008).

²⁷³ *Id.*

²⁷⁴ *Congressional Compensation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xxvii> (last visited Sept. 3, 2023).

²⁷⁵ Laura W. Murphy & Robert A. Levy, *A Constitutional Amendment on Marriage: No restrictions should be imposed on marital freedom*, CATO INST. (Nov. 20, 2014), <https://www.cato.org/commentary/constitutional-amendment-marriage>.

²⁷⁶ *The Journey to Marriage Equality in the United States*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/our-work/stories/the-journey-to-marriage-equality-in-the-united-states> (last visited Sept. 3, 2023).

²⁷⁷ Drew Desilver, *Proposed amendments to the U.S. Constitution seldom go anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/>.

²⁷⁸ *All Amendments to the United States Constitution*, UNIV. OF MINN., http://hrlibrary.umn.edu/education/all_amendments_usconst.htm (last visited Sept. 3, 2023).

²⁷⁹ *27th Amendment: Congressional Compensation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xxvii> (last visited Sept. 3, 2023).

²⁸⁰ Sarah Isgur, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022, 7:00 AM), <https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780>.

²⁸¹ *The Constitution*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (last visited Sept. 3, 2023).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

noting that none of the constitutional amendments already ratified have gone through the convention process.²⁸⁵ Therefore, it is more practical that the amendment process would follow that two-thirds vote from both Houses of Congress would be needed to ensure the amendment would be ratified.²⁸⁶

The United States Congress proposes an amendment as a joint resolution.²⁸⁷ The President does not partake in this process, so this joint resolution does not have to be produced before the President for signature or approval.²⁸⁸ The original document is then forwarded to the NARA's Office of the Federal Register for processing and publication.²⁸⁹ This group will add any legislative history notes and publish them as a slip law.²⁹⁰ This process is followed in accordance with 1 U.S.C. 106(b).²⁹¹

The Archivist then submits the proposed amendment to the states for their consideration by sending a notification letter to each state governor.²⁹² Upon receipt of the notifications, the Governors will formally submit the amendment to the state legislatures, or the state will call for a convention.²⁹³ Of course, as previously stated, the convention is an unlikely result.²⁹⁴ When a state decides to ratify the proposed amendment, it will send the Archivist an original or certified copy of the state action, which will be immediately sent to the Director of the Federal Register.²⁹⁵ The Federal Register will retain these documents from each state until the amendment is adopted or fails.²⁹⁶

A proposed amendment automatically becomes part of the United States Constitution when three-fourths of the states (thirty-eight of fifty states) ratify it.²⁹⁷ The certification is published in the Federal Register and the U.S. Statutes at Large, which will serve as official notice to Congress and to the Nation that the amendment process has been completed.²⁹⁸

While thirty-eight states may seem like a grave task for any proposed amendment to be ratified,²⁹⁹ this is the only guarantee for a right to be completely protected from the polarization of the political climate in a given

²⁸⁵ Off. of the Fed. Reg. (OFR), *Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Off. of the Fed. Reg. (OFR), *Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution>.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *See id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Off. of the Fed. Reg. (OFR), *Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution>.

²⁹⁸ *Id.*

²⁹⁹ *See id.*

time period.³⁰⁰ One might believe the Respect for Marriage Act is enough to further the protection of marriage rights in this country.³⁰¹ However, with a right that deserves the utmost protection, one can never take for granted a right that can quickly be changed.³⁰²

For instance, the next Congress could immediately repeal the Respect for Marriage Act, leaving marriage rights in this country up in the air as if the Respect for Marriage Act never existed.³⁰³ This is why a constitutional amendment is the only “bulletproof” protection that can be afforded to Americans.³⁰⁴

The Respect for Marriage Act redefines marriage as between two individuals for purposes of federal law.³⁰⁵ The Act allows the Department of Justice to bring civil actions and establishes a private right of action for violations of states not recognizing same-sex marriages or interracial marriages.³⁰⁶ Any state that attempts to deny these rights, denies the full faith and credit on the basis of sex, race, ethnicity, and national origin.³⁰⁷

In sum, this Act establishes, under federal law, that a marriage constitutes any union between two individuals.³⁰⁸ The two individuals are not defined as a man and woman or as a certain race amongst the two individuals, but two individuals regardless of race, sex, national origin, ethnicity, or any other distinguishing factors.³⁰⁹ The Respect for Marriage Act, in essence by its supporters, enshrines marriage equality into federal law.³¹⁰ The Respect for Marriage Act creates a “backstop” to ensure that even if *Obergefell* was overturned, same-sex couples could retain protections if their own state nullified their marriage.³¹¹ In effect, the RFMA repeals DOMA’s bar against federal recognition of same-sex marriage, replacing it with a federal mandate

³⁰⁰ Andrew Harnik, *It’s Time to Amend the Constitution*, POLITICO (Jan. 8, 2022), <https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780>.

³⁰¹ Caroline Anders, *The Respect for Marriage Act is progress, but LGBTQ advocates say it’s no Obergefell*, THE WASH. POST (Dec. 7, 2022), <https://www.washingtonpost.com/politics/2022/12/07/respect-marriage-act-is-progress-lgbtq-advocates-say-its-no-obergefell/>.

³⁰² See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

³⁰³ Caroline Anders, *The Respect for Marriage Act is progress, but LGBTQ advocates say it’s no Obergefell*, THE WASH. POST (Dec. 7, 2022), <https://www.washingtonpost.com/politics/2022/12/07/respect-marriage-act-is-progress-lgbtq-advocates-say-its-no-obergefell/>.

³⁰⁴ *Judicial Independence*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/judicial-independence/> (last visited Aug. 23, 2023).

³⁰⁵ Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

³⁰⁶ *Id.*

³⁰⁷ Mark Joseph Stern, *The New Marriage Equality Bill Doesn’t Just Repeal DOMA. It Does Something Better.*, SLATE (July 21, 2022, 1:51 PM), <https://slate.com/news-and-politics/2022/07/respect-for-marriage-act-congress-doma-explainer.html>.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

that the federal government recognizes any marriage that is valid under state law when entered into.³¹²

This Act may be relied upon if the Supreme Court overturns *Obergefell*.³¹³ Currently, thirty-five states still have laws on their books that would outlaw same-sex marriage unions, which would automatically take effect in the event *Obergefell* falls.³¹⁴ The Act compels every state to recognize a marriage license without discriminating on the basis of those individuals' sexuality.³¹⁵

The legislation further protects interracial marriage; however, no state is seeking to outlaw those unions.³¹⁶ The RFMA relies on the Full Faith and Credit Clause in the Constitution, which gives Congress the power to require states to grant full faith and credit to the public acts, records, and judicial proceedings of other states.³¹⁷ While this clause has been read to allow states to deny full faith and credit when it contradicts the specific state's public policy,³¹⁸ this exception does not apply when Congress exercises its constitutional authority in a way that commands nationwide uniformity.³¹⁹ In other words, Congress essentially commanded that states are required to give full effect to any legal relationship created under another state's law³²⁰ and are not permitted to invalidate a marriage license due to a person's race or sex.³²¹ It cannot be forgotten that if *Obergefell* is later overturned, states may resume denying marriage licenses to same-sex couples.³²² If this occurs, it would be possible for a state to nullify same-sex marriage licenses that were otherwise permitted under *Obergefell*.³²³ However, couples facing discrimination in their home state may travel to another state, obtain a new license, and compel their home state to recognize it along with any privileges that come along with it.³²⁴ Therefore, if the Supreme Court overturns

³¹² *Id.*

³¹³ Mark Joseph Stern, *The New Marriage Equality Bill Doesn't Just Repeal DOMA. It Does Something Better.*, SLATE (July 21, 2022, 1:51 PM), <https://slate.com/news-and-politics/2022/07/respect-for-marriage-act-congress-doma-explainer.html>.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Mark Joseph Stern, *The New Marriage Equality Bill Doesn't Just Repeal DOMA. It Does Something Better.*, SLATE (July 21, 2022, 1:51 PM), <https://slate.com/news-and-politics/2022/07/respect-for-marriage-act-congress-doma-explainer.html>.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

Obergefell or *Loving*, there will be no barrier in place to prevent states from continuing to discriminate against those seeking a marriage license.³²⁵

In a survey conducted by Pew research regarding the support of same-sex marriage by state, in thirty-two states the majority of people (over 50%) strongly approved of same-sex marriage.³²⁶ There are six states close behind in which 48-49% of respondents strongly approved of same-sex marriage.³²⁷ Combining those states together would meet the thirty-eight threshold number needed to propose a constitutional amendment.³²⁸ Understandably, these are citizens of the states and not the state legislatures who are in the position to propose a constitutional amendment.³²⁹ However, the point being it is plausible.³³⁰ There is an uphill showing of support that the past centuries have shown towards same-sex marriage.³³¹

While a constitutional amendment poses many challenges, this would be the best path forward.³³² Currently, there are many strides to afford the same protections to other marriages besides the traditional marriage of a man and woman.³³³ This just might be the time the next constitutional amendment proposed may prevail.³³⁴ The continued support across the nation may spark a change in the Constitution.³³⁵ This can only be done if the public knows a constitutional amendment is needed and lobbies their state representatives to create this monumental change for the future generations of America.³³⁶ This might be amendment number twenty-eight.³³⁷

³²⁵ Kate Sosin & Candice Norwood, *What Will Happen if Obergefell Is Overturned? Queer Legal Experts are Scrambling: 35 states have marriage bans, and experts doubt that Congress could codify marriage equality*, THEM (July 12, 2022), <https://www.them.us/story/obergefell-legal-experts-lgbtq-marriage-protection>.

³²⁶ *Views about same-sex marriage by state*, PEW RSCH. CTR. (May 30, 2014), <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/>.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See, e.g., Seth Lewis, *Proposed Constitutional amendment seeks to define traditional marriage*, BAPTIST PRESS (July 13, 2001), <https://www.baptistpress.com/resource-library/news/proposed-constitutional-amendment-seeks-to-define-traditional-marriage/>.

³³¹ Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), <https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx>.

³³² See *The Right to Marry*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/righttomarry.htm> (last visited Sept. 10, 2023).

³³³ See Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), <https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx>.

³³⁴ See M. Isabel Medina, *Of Constitutional Amendments, Human Rights, and Same-Sex Marriages*, 64 LA. L. REV. 459, 463-64 (2004).

³³⁵ *Contra id.* at 471.

³³⁶ *See id.* at 464-65.

³³⁷ See, e.g., Stephanie Lai, *House Moves to Protect Same-Sex Marriage From Supreme Court Reversal*, N.Y. TIMES (July 19, 2022), <https://www.nytimes.com/2022/07/19/us/politics/house-gay-marriage-bill.html>.

VI. CONCLUSION

The heightened tension around marriage rights, combined with the Supreme Court's willingness to increase states' rights, creates the need for a constitutional amendment to protect marriage beyond the reach of states' right to regulate marriage.³³⁸ Discussing the urgency of this issue and stressing the uncertainty of same-sex marriage rights will ensure that marriage will be protected at the federal and state levels; through these actions, a vast number of Americans will surely benefit from this protection.³³⁹

While maintaining a strong desire for federalism in our nation, the priority of establishing families in our society cannot be forgotten.³⁴⁰ The rights of individuals to make choices for themselves and protecting them constitutionally could be construed as over-reaching and infringing on states' rights.³⁴¹ However, these rights are of utmost importance in our society.³⁴² This should be a right the states give up for the betterment of their own constituents.³⁴³ The consequences of marriages being stripped away creates an enormous determinant to families who rely on the economic benefits marriages provide, amongst many others.³⁴⁴

An all-encompassing marriage definition will avoid the destruction of millions of families.³⁴⁵ It will enable more families to be bonded together, move more children out of the foster care system, and promote Americans who are proud of a country that remains inclusive of all walks of life.³⁴⁶ The protection a traditional marriage receives should be the same protection all other marriages should receive as well.³⁴⁷

³³⁸ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

³³⁹ See Lina Guillen, *Marriage Rights and Benefits*, NOLO, <https://www.nolo.com/legal-encyclopedia/marriage-rights-benefits-30190.html> (last visited Sept. 10, 2023).

³⁴⁰ See ELLIOT BULMER, *FEDERALISM 3* (Int'l Institute for Democracy and Electoral Assistance 2nd ed. 2017).

³⁴¹ Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/701> (last visited Sept. 10, 2022).

³⁴² *Id.*

³⁴³ *Contra* David Davenport, *The Supreme Court Should Leave How We Marry To The States*, FORBES (March 25, 2013), <https://www.forbes.com/sites/daviddavenport/2013/03/25/the-supreme-court-should-leave-how-we-marry-to-the-states/?sh=2453c09d4a79>.

³⁴⁴ See Carrie Schwab-Pomerantz, *Does Marriage Bring Financial Benefits?*, CHARLES SCHWAB (Aug. 2, 2020), <https://www.schwab.com/learn/story/does-marriage-bring-financial-benefits>.

³⁴⁵ See Patty Funaro, *Legislative Guide to Marriage Law*, IOWA LEGIS. SERV. AGENCY, Dec. 2005, at 1-3.

³⁴⁶ *See id.*

³⁴⁷ *See generally* *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

