PART I

Context and Background: Health-Harming Legal Doctrines, Historical Discrimination, and Implicit Bias

Part I of this text includes two chapters aimed at introducing readers to relevant legal doctrines and to the lasting health effects of the nation's discriminatory past. By way of background, Chapter 1 describes four different health-harming legal doctrines. Chapter 2 discusses the health-related legacy of race-based discrimination and the ongoing effects of implicit bias on health and health care.

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CHAPTER 1

Health-Harming Legal Doctrines

LEARNING OBJECTIVES

By the end of this chapter you will be able to:

- Explain the meaning of the "no duty to treat" principle.
- Describe how poverty is excluded from protection under federal antidiscrimination law.
- Discuss what is meant by the term "negative Constitution."
- Explain the difference between the right to legal counsel in criminal versus civil legal matters.

Introduction

This chapter provides readers with an overview of the types of broad legal doctrines that can influence the health of tens of millions of people—even when the doctrines themselves have nothing specific to do with health or health care. We start here because it represents one of the broadest possible ways to begin a discussion about health justice: by zooming out to consider the topic through a very wide lens, so that from the outset readers understand that even arcane legal doctrines seemingly unrelated to health equity are at work to influence the nation's health in disproportionate ways. As the text progresses, the lens zooms in more and more, providing a series of images that portray health injustices in sharper relief.

We've selected four legal doctrines to serve as examples, a couple of which receive additional treatment in subsequent chapters. The selected doctrines were not chosen for their interrelatedness; indeed, in some cases, they have little to do with one another, aside from the fact that they all work in their own way to make it more difficult for many people to get and/or stay healthy. The first doctrine discussed was alluded to in the Introduction to this text, and it is the only one of the four that is specific to health care services: the "no duty to treat" principle. This long-standing principle helps explain why there is no overarching right to health

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care in the United States, and is a natural starting point for a discussion about health justice. The second doctrine has to do with the fact that federal civil rights protections have never been extended to poverty in the same way they have been extended to race, ethnicity, gender, disability, age, and other traits or distinguishing qualities. We next discuss the notion of a "negative Constitution," which refers to the fact that the federal Constitution has been interpreted by the U.S. Supreme Court as not *requiring* the government to affirmatively act to protect the public's health and welfare. Lastly, we explain the difference between the right to legal counsel in criminal matters and in civil legal matters. The lack of such a right in the latter context can have enormous health consequences for low-income individuals and families.

The "No Duty to Treat" Principle

One of the most basic tenets in U.S. health law is that generally speaking, individuals have no legal right to health care services (or to health insurance). As a result, there is no legal responsibility on the part of clinicians to provide health care upon request. This doctrine is referred to as the "no duty" or "no duty to treat" principle, which is perhaps most famously described in the case of *Hurley v. Eddingfield*. In that case, the Indiana Supreme Court was asked to pass judgment on the actions of one Dr. Eddingfield, whose lack of medical attention led to the death of a pregnant woman named Charlotte Burk. In the course of discussing whether the doctor had a legal relationship to Mrs. Burk sufficient to trigger a duty to treat, the court wrote that Indiana's medical licensing statute:

> provides for . . . standards of qualification . . . and penalties for practicing without a license. The [state licensing] act is preventive, not a compulsive, measure. In obtaining the state's license (permission) to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept.[1]

In other words, according to the court, Dr. Eddingfield's medical license did not confer upon him an *obligation* to provide health care services; rather, Indiana's licensure requirement existed in order to make sure that should a person actually decide to provide health care services, that person would have the necessary knowledge and skills to do so in an appropriate fashion. Viewed in this way, medical licenses are a form of quality control, not a mechanism for gaining access to services. The same can be said for the driver's licenses many of you have in your book bag or purse: in no way does it require that you take a vehicle out for a spin, today or ever; rather, as with a medical license, the point of your driver's license is to guarantee that should you *choose* to operate a motor vehicle, you are qualified to do so. Note too that just as Dr. Eddingfield's medical license did not grant Mrs. Burk access to his services, your driver's license does not grant you access to a car or truck.

In order to understand the power of the "no duty" principle, you should know one other thing about Dr. Eddingfield: prior to Charlotte Burk's death, he served as her family physician. Put in more formal terms, the doctor had a preexisting relationship with the now-deceased patient. Clearly the Indiana Supreme Court was aware of this fact from the record that was produced during the doctor's trial, and surely,

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you must be thinking, this fact would establish enough of a fiduciary relationship to hold Dr. Eddingfield accountable for the death of Mrs. Burk. However, under the law, physician–patient relationships must be established (and re-established) for each specific "spell of illness," and thus past treatment alone is not enough to form a legally binding relationship in the present. Put differently, a physician–patient relationship does not exist as a general, continuous legal matter—even with one's primary care doctor—but rather it exists for a specific period of time and must be (re)established accordingly.

As noted in the Introduction to this text, the U.S. generally treats health care as a commodity subject to market forces and to one's own economic status. Indeed, during the public debate in 1993 over President William Clinton's failed attempt at national health reform—one of several times the nation has debated whether to move away from the "no duty" principle and establish a right to health care—then–U.S. Representative Dick Armey (R-TX) stated that "health care is just a commodity, just like bread, and just like housing and everything else."[2] What is instructive about Representative Armey's quote is that, far from being a legal anomaly, the lack of a right to health care services is in line with the nation's overall approach to access to basic necessities. During the 1960s and early 1970s, with the tailwinds of the Civil Rights Movement filling their sails, a determined group of public interest lawyers and social reform activists pressed the federal courts for an interpretation of the Constitution that would have created an individual right to welfare. Under this view, the government would be required to provide individuals who suffered from "brutal need" with minimally adequate levels of health care, food, housing, etc.—the types of things referred to by Representative Armey. But in a series of cases, the Supreme Court rejected this notion of a constitutional right to welfare. Underpinning these decisions were views about the nature and design of the Constitution, the nation's free market philosophies, and more.

At the same time, the scope of the "no duty to treat" principle is not all-encompassing, as there are a few laws that chip away at it and thus carve out a right to health care services where otherwise it would not exist. For example, a federal law called the *Examination and Treatment for Emergency Medical Conditions and Women in Labor Act* grants all individuals, irrespective of one's ability to pay or a hospital's willingness to provide services, the right to an "appropriate screening examination" and, if an emergency condition is uncovered, to clinical services necessary to stabilize the patient. Basically, the law prevents hospitals from turning away people with medical emergencies—at least until those emergencies have been addressed to the point that the individual's condition will not materially worsen upon leaving the facility, at which time the "no duty" principle kicks back in and the hospital is free to refuse further treatment. Additionally, both Medicaid and Medicare create legal rights to health care benefits and services for individuals who meet the programs' eligibility criteria, but then again, these services are only carried out by health care providers who choose in the first instance to participate in the programs themselves. (Recall the analogy between a medical license and a driver's license; in the case of providers who choose not to participate in Medicaid and Medicare, they are effectively choosing the types of cars they don't want to drive.) Finally, some private health insurance products obligate physicians participating in the delivery of those products to provide care to individuals who purchase those products; essentially, for purposes of this discussion, delivery of care under these private health insurance policies operates like the delivery of Medicaid and Medicare services, in the sense that physicians decide whether to become "participating providers" in private health insurance plans.

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The basic upshot of the "no duty" principle is that individuals can access health care services if (1) they have the means to pay for health care services outright; (2) they have the means to pay for private health insurance premiums, deductibles, and copayments; (3) they have been singled out for public insurance coverage on the basis of medical condition, age, or income; or (4) they are lucky enough to stumble into free services through the magnanimity of ethics-conscious health care providers. It almost goes without saying that this approach to health care results in enormous gaps: as discussed in the chapter on health disparities, the nation suffers from disparities in health care access, diagnosis, treatment, and outcomes, based on a range of factors including race, ethnicity, socioeconomic status, physical and mental disability, age, gender, sexual orientation, and immigration status. Furthermore, it is common for people to forego care altogether on the basis of cost. Recent data indicate that 55% of people without insurance coverage, 30% of people with private insurance, and 21% of people with public insurance said they had forgone needed health care because it was too expensive.[3]

The Exclusion of Poverty from Protection Under the Constitution

In the chapter on social and structural barriers to health, you will learn about the close connection between poverty and poor health. As a backdrop to that discussion, we describe here the way in which poverty has been treated under the federal Constitution—namely, as underserving of rigorous antidiscrimination protection. Certain characteristics such as race, ethnicity, national origin, religion, and gender have been declared "suspect" or "quasi-suspect" classes by the U.S. Supreme Court, a designation that indicates that people have suffered governmental discrimination on the basis of these characteristics in the past. As a result, the Court has interpreted the federal Constitution's Equal Protection Clause in a way that grants special protection against discrimination to these classes. However, the Court has never ruled that the impoverished are a protected class. Furthermore, the Court has protected over time certain fundamental rights—including rights not explicitly set out in the Constitution—under the Constitution's Due Process Clause. Notwithstanding a series of cases the Court heard during the Civil Rights Era, the Court has yet to find that individuals have a fundamental right to even the most basic necessities.

Overview of Equal Protection Jurisprudence

Under the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, states are generally prohibited from governing in ways that single out particular groups for unequal treatment.[4] Nonetheless, a state will often pass laws that treat certain groups differently than others, such as a law that prohibits men—but not women—under a certain age from purchasing alcohol.[5] As described below, whether this law (and many others that similarly differentiate among groups of people, regardless of the context) is constitutional depends in large part upon how deeply a court scrutinizes a legislature's goals in passing the law. The important idea that there should be different levels of judicial scrutiny when undertaking equal protection analyses was born in a surprising place: a footnote in a 1938 Supreme Court

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decision considering a state law concerning milk. In discussing the Court's practice to normally defer to states about their reasons for passing laws, Justice Harlan Stone recognized that, in contrast to economic laws like the one before the Court, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[6] In other words, when legislatures pass laws that disadvantage "discrete and insular minorities," the lawmakers may have been motivated not by neutral governmental goals like safety, but rather by prejudice or animus. As a result, courts should be in the habit of carefully scrutinizing those laws that may have been corrupted by hostility towards certain minority groups.

One question the Court has had to answer several times since 1938 is: which groups are "discrete and insular minorities"? Although the Court has not ruled that any particular set of criteria must be satisfied in order to qualify a group as a "suspect class," it has generally asked at least three questions when considering this question:

1. Has the group in question historically been discriminated against or been subject to prejudice, hostility, or stigma?
2. Does the group possess an immutable or highly visible trait?
3. Is the group generally powerless to protect itself through the political process?

Only a few years after writing its famous footnote, the Supreme Court determined that laws "which curtail the civil rights of a single racial group are immediately suspect" and as a result, the Court will apply "the most rigid scrutiny" when deciding their constitutionality.[7] Under this "strict scrutiny" test, as it has come to be known, race-based classifications will be upheld only if the law has a compelling government interest and is narrowly tailored to achieving it. Strict scrutiny has proven to be a difficult standard to overcome, because it is very hard for a state legislature to show that a law favoring one race over another has a compelling governmental objective behind it. The Court now also applies strict scrutiny to laws treating U.S. citizens differently than noncitizens, laws singling out individuals based on their national origin, and laws infringing fundamental rights.

Through the process of deciding which groups are worthy of enhanced protection from discrimination, the Supreme Court determined that laws that treat men and women differently are not as plainly troubling as classifications based on race, national origin, or citizenship status. As a result, the Court deemed sex-based laws "quasi-suspect," subjecting them not to strict but to "intermediate" scrutiny. Under this standard, states must show that a law that classifies people on the basis of sex serves important governmental objectives and is substantially related to the achievement of those objectives.[8]

Applying a variety of factors, with varying degrees of consistency, the Court has found that not all groups singled out for disparate treatment should be subjected to strict or even intermediate scrutiny.[9] If the Court determines that the classification is neither suspect nor quasi-suspect, it applies the lowest standard of review, termed "rational basis" review. Laws nearly always survive this type of review. For example, the Supreme Court upheld a Massachusetts law that required police officers to retire at age 50, refusing to find that age was a suspect or quasi-suspect classification, citing no history of discrimination and the fact that older people cannot be a discrete, insular minority because everyone ages. The Court scrutinized the law only to the

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extent of asking whether the law was rationally related to a legitimate state interest, and was satisfied with testimony that, because people tend to decline physically at age 50, the law serves the state's interest in public safety.[10] However, even when applying rational basis review, the Court will refuse to uphold a law if it is based upon "a bare … desire to harm a politically unpopular group."[11]

Overview of Substantive Due Process Jurisprudence

Just as the Fourteenth Amendment limits the ability of governments to single out particular groups for unequal treatment, it also protects individuals from laws that infringe too severely upon fundamental rights guaranteed by the Constitution. This is known as the guarantee to "substantive due process," because the protections stem from the Fourteenth Amendment's Due Process Clause. Some fundamental rights, like the right to vote, are explicitly included in the text of the Constitution. Others, however, are not explicitly mentioned but are so "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty" that the Supreme Court has deemed them to be fundamental (for example, rights related to marriage, contraception, procreation, and child rearing).

As with determining which suspect or quasi-suspect groups fall under the Equal Protection umbrella, the Court has grappled with determining which implicit rights are worthy of being classified as fundamental. In what is clearly the most famous example, the Court found in *Roe v. Wade* that the fundamental (but implicit) right to privacy was expansive enough to encompass a woman's right to choose to terminate a pregnancy under certain circumstances.[12]

Efforts to Apply Equal Protection and Substantive Due Process to Laws Affecting the Poor

Concurrent with other social movements of the time, the 1960s and early 1970s brought about a fight for equality for poor people, as advocates sought to publicize the harms associated with persistent poverty, poor nutrition, dangerous housing, and substandard education. And while the federal Aid to Families with Dependent Children (AFDC) program (which started in 1935 as a relatively minor expenditure but became a nearly $30 billion program by the mid-1970s) provided assistance for struggling families, the often humiliating and burdensome legal requirements imposed by states in administering it solidified the general view that recipients were second-class citizens.[13] Poverty lawyers launched challenges to these state laws on various grounds, including the argument that they infringed upon an implicit fundamental right: the right to live at a basic level of subsistence.

The first state welfare law challenge that made its way to the U.S. Supreme Court, in a case called *King v. Smith*, was successful—just not on constitutional grounds. In the *King* case, the state of Alabama terminated welfare benefits to a single mother because she occasionally cohabitated with a man who was not her husband, on the grounds that this man acted as a "substitute father" and could support the woman's children. The Supreme Court rejected this argument, finding it to be a violation of the federal AFDC statute, which only denied benefits where legal parents—but not men who cohabitate with single mothers—were able to provide support.[14] *King v. Smith* marked a victory for the welfare rights movement, but it did nothing to improve efforts to gain special status for the poor under the Constitution.

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The second welfare benefits case to be heard by the Court, *Shapiro v. Thompson*, challenged a Connecticut rule that denied welfare benefits to families that had lived in the state for less than a year. This time, the Court decided the case on constitutional grounds, holding that the rule infringed on the plaintiff's implicit fundamental right to travel and could not survive strict scrutiny.[15] Even though the Court held that the law infringed upon the right to travel, and not on a right to live, the decision resulted in a "euphoric reception from welfare lawyers," who hoped "that strict scrutiny would soon be extended to state welfare law classifications, heralding the end of geographic differences in welfare grants and moving inexorably toward a constitutional right to live."[16]

Soon after, in 1970, poverty lawyers recorded another victory in *Goldberg v. Kelly*, when the Court held that welfare benefits could not be terminated without an evidentiary hearing. Importantly, the Court considered the welfare benefits to be "statutory entitlements" rather than charity, but it did not go so far as to find that the poor have a constitutional right to receive welfare benefits.[17] Nevertheless, the Court noted that:

> …important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding, the Nation's basic commitment has been to foster the dignity and wellbeing of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty…Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community… Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.[18]

The Court's strong language—and its quotation of the Preamble to the Constitution—suggested to some that the Court was sloping toward a future ruling that those mired in poverty had a right to public assistance, thus taking another step closer to recognizing a right to live.

However, the Court abruptly halted this trajectory in *Dandridge v. Williams*, decided just a few weeks after *Goldberg*. The issue in *Dandridge* was whether a Maryland regulation setting a family maximum limit for welfare benefits violated the Equal Protection Clause because it unfairly disadvantaged families with more children by providing less money per child. The Court was blunt in its assessment, characterizing state welfare rules as the type of "intractable economic, social and even philosophical problems" that are "not the business of this Court." Applying the lowest level of scrutiny, the Court upheld the law as rationally related to the state's legitimate interests, including encouraging employment.[19]

In another case arguing for special legal status for poor people, called *San Antonio Independent School District v. Rodriguez*, students in a poor area of San Antonio challenged Texas' method of funding public education. The method, wherein school districts in relatively wealthy areas provided more funding per student than did

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districts with poorer residents, was challenged under the Equal Protection Clause for providing lower quality education to poor children. In response, the Supreme Court refused to find that children living in poorer school districts were entitled to a public education equal to that of children from wealthier families, noting that it had never found that wealth is a suspect class entitled to strict scrutiny.[20] The Court wrote that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." The Court contrasted this case to earlier decisions, in which wealth-based classifications completely deprived individuals of important services and were struck down as a result. As a result, the Court applied rational basis review and affirmed Texas' funding scheme.

Future Prospects for Granting Poverty Special Status

The line of welfare rights cases culminating in *Dandridge* seems to foreclose a finding that there is a fundamental right to live, a right for which many poverty lawyers had fought.[21] But the Court's language in *Goldberg* at least suggests a way forward for future arguments that a person mired in poverty has a right to a basic level of subsistence. Since public assistance, in the form of welfare, subsidized housing, subsidized nutrition, a quality education, and more, is needed to sustain even a meager existence for millions of adults and kids, perhaps society should consider whether a legally recognized, even if implicit, fundamental right to live should be "found" in the nation's Constitution.[22]

Furthermore, although the Supreme Court in *Rodriguez* was stating the obvious when it said it has never held that poverty is a suspect class, this is primarily a product of the Court's unwillingness to address the question directly.[23] Were the Court to consider the standards under which other classifications have been deemed suspect, it could certainly find that laws singling out the poor should be more closely scrutinized. As the state welfare laws above demonstrate, there is a long history of discrimination against the poor. Further, there can be no doubt that low-income individuals lack political power, given that ordinary political processes are often dominated by corporate interests and wealthy individuals.[24] At the very least, laws which discriminate against the poor and are rooted in "a bare … desire to harm a politically unpopular group" should be subjected to more searching review.[25]

The "Negative Constitution"

We turn now to a third health-harming legal doctrine, this one termed the "negative Constitution." This discussion certainly dovetails with the one immediately above, since the negative Constitution helps to explain why certain positive rights (like rights to tangible things, including food or health care services) are not often found to exist as a federal constitutional matter.

By way of background, we start with a description of what are known as "police powers." These powers represent state and local government authority to require conformance with certain standards of conduct meant to protect the public's health, safety, and welfare. Put less formally, a state's police powers allow it to control—to some extent—personal and corporate activities that may harm the public's health if left unbridled. There are many examples of police powers: health care providers must obtain licenses from state agencies before practicing medicine; health care

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facilities must meet and maintain certain accreditation standards; restaurants are heavily regulated by states and localities; employers must follow many occupational health and safety rules, and buildings have "codes" that must be followed when they are designed, built, and maintained; certain industries are constrained by pollution control measures; the marketing and sale of tobacco products is regulated by law; motorcyclists must wear helmets, passengers in cars must wear seat belts. If you stopped to think about it for a couple minutes, you would likely generate many more examples of the ways in which your daily activities are shaped by governmental police powers.

As the above list indicates, police powers can be rather coercive, if not downright invasive. However, these powers are not absolute, and at some point they give way to the individual freedoms and liberties we have come to cherish as Americans. Furthermore, police powers can never be used to purely punish individuals—since their purpose is the promotion of public health—they cannot be administered arbitrarily, and they cannot be used for purposes unrelated to public welfare.

After reading about police powers, many students reasonably believe that states *must* protect the public health and welfare through affirmative use of these powers. The U.S. Supreme Court has never interpreted the Constitution in this way, however. Rather, the Court has viewed the Constitution as *empowering* the government to act in the name of public health, in the event a state chooses to do so (this is reminiscent of the act of licensing—for both doctors and drivers—discussed in the previous section on the "no duty to treat" principle). This, you may have guessed, is what is meant by the "negative Constitution." This doctrine holds that the Constitution does not require government to provide any goods or services whatsoever, public health or otherwise, and derives from the fact that the Constitution is phrased mainly in negative terms—for example, the Constitution's First Amendment doesn't affirmatively state that citizens have a right to free speech, it says that Congress "shall make no law" *abridging* the freedom of speech. This view of the Constitution, to paraphrase Judge Richard Posner, maintains that the drafters of the document were more concerned with what government would do *to* people rather than what government should do *for* them. In this way, the Constitution exerts a negative force that limits governmental power to restrain us as individuals, rather than compelling government to promote public health through tangible goods and services.

The application of the negative Constitution doctrine is starkly witnessed in two Supreme Court decisions—*DeShaney v. Winnebago County Department of Social Services* and *Town of Castle Rock, Colorado v. Gonzales*[26]—which both have terribly distressing facts at their core. In the *DeShaney* case, a one-year-old named Joshua DeShaney was placed in his father's custody after his parents divorced. Over the span of the next three years, multiple people—including the father's second wife and various emergency room personnel—complained to social services workers in Wisconsin that the father had been abusing Joshua physically. While county officials opened a case file and interviewed Joshua's father on multiple occasions, each time they decided that they didn't have sufficient evidence of child abuse to remove Joshua from the house and place him in court custody. When Joshua was four years old, he suffered a horrific beating at the hands of his father. He eventually survived a life-threatening coma but was left with permanent brain damage, and he was expected to live the remainder of his life in an institution for the mentally disabled. Subsequently, Joshua's father was convicted of child abuse.

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Joshua's mother filed a civil rights lawsuit against the Wisconsin social services workers who failed to remove him from his abusive father's home. A 6–3 majority of the U.S. Supreme Court turned away the lawsuit in 1989, finding that under the Due Process Clause state officials had no affirmative constitutional duty to protect Joshua:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[27]

The Court majority then went even further, ruling that while the state knew that Joshua was in danger and expressed a willingness to protect him against that danger, those facts were not enough to establish the type of affirmative duty to rescue reserved for parties who have (for purposes of the Constitution) a "special relationship."

Three Justices dissented. They argued that the State of Wisconsin, through its establishment of a child protection program, undertook a duty to intervene in Joshua's life, and that its failure to meet this duty violated the Constitution. The dissenters complained that in effect, Wisconsin's program displaced private sources of child protection but then ignored the very harm it was meant to prevent.

Sixteen years after *DeShaney*, the Supreme Court again took up the question of whether the government has a duty to affirmatively protect its citizens. Sadly, the facts in *Castle Rock v. Gonzales* are as tragic as those in *DeShaney*. Jessica Gonzales received a restraining order protecting her and her three young daughters from her husband, who was also the girls' father. One June afternoon, all three girls disappeared from in front of her home. She suspected that her husband had taken the girls in violation of the court order, a suspicion she was able to confirm through a phone call to her husband. In two initial phone conversations with the Castle Rock (Colorado) Police Department, Mrs. Gonzalez was told there was nothing the police could do and to wait until 10:00 p.m. to see if anything changed.

Nothing changed by 10:00, so Jessica again called the police, at which time she was again told to wait, this time until midnight. After this process played out yet another time, she went to her husband's apartment. Finding it empty, she went to the police station in person. Rather than attempt to locate the missing girls, the police officer who wrote up Jessica's report went to dinner. A couple hours later, Jessica's husband pulled his truck up to, and began shooting at, the Castle Rock Police Department. The police returned fire, killing him. Jessica's three daughters were found dead in the back of her husband's truck, having been murdered by their father some hours earlier.

Jessica sued the police department, claiming that its inaction violated the Constitution. Specifically, she argued that the restraining order she received was "property," and that the police effectively "took" this property in violation of the Due Process Clause's requirement that no state "deprive any person of life, liberty, or property, without due process of law." By a 7–2 margin, however, the Supreme Court

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ruled in favor of the town of Castle Rock, ruling that Jessica did not have an individual entitlement to enforcement of a Colorado law that requires police officers to use all reasonable means to execute restraining orders. The Court then said that even *if* it had found such an entitlement, there was uncertainty as to whether the entitlement would rise to the level of a protected "property" interest that triggers constitutional protections. According to the Court, the Due Process Clause does not protect all government "benefits," including things that government officials have discretion to grant or deny (for example, because police departments have finite resources, officers have discretion to consider whether a violation of a restraining order is too minor to justify enforcement).

Taken as a whole, the negative Constitution doctrine and the cases that apply it raise a couple important questions in the broad context of health, welfare, and safety. First, given our deep reliance on government to organize social and economic life in a way that creates conditions for us to be healthy, what do you think about a legal doctrine that holds that government has no affirmative obligation to provide services or to shield even the most vulnerable among us from another person's violence? Second, if we can't rely on the courts to check even the worst instances of government workers' failure to act, what's to prevent those same workers from "using" their inaction to harm certain people or groups (e.g., withholding important benefits from certain groups, or withholding necessary services from certain neighborhoods)?

No Right to Counsel in Civil Legal Matters

The fourth and final legal doctrine discussed as a background matter concerns the ability of individuals to afford and access help when trying to enforce complex civil legal rights. This ability is, in many ways, as important as the right itself: for what good are rights to, say, food stamps and a mold-free apartment and Medicaid benefits if the holder of the rights can't actually get those things? Because the enforcement of legal rights is so important—particularly for low-income and other vulnerable populations whose reliance on social programs and services is often a quality-of-life, or life-and-death, matter—it makes sense to ask what rules and systems are in place to help people enforce their legal rights. To answer this somewhat complicated question in a succinct way, it is instructive to consider the difference between rights that attach in the area of criminal legal representation versus those that exist in the realm of civil legal assistance. It is worth noting at the outset that the U.S. is one of the only countries that completely separates access to criminal and civil legal services.

Criminal Legal Representation

Per the Sixth Amendment to the U.S. Constitution, the government is required to provide legal counsel to all federal defendants who are unable to afford their own attorneys. The right to counsel in state criminal prosecutions was established (though only for serious offences) by the U.S. Supreme Court in the well-known case of *Gideon v. Wainwright*.[28] The case started after Clarence Gideon was arrested for burglary. Indigent and unable to secure the services of private legal counsel, he asked the trial court to assign him a lawyer. Denied by the court, Gideon represented himself. He was found guilty and sentenced to five years in state prison.

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Gideon appealed his conviction to the U.S. Supreme Court, claiming that the state court's refusal to grant him legal assistance violated his constitutional rights. The Supreme Court agreed to hear Gideon's case (and assigned him a highly respected lawyer). The Court eventually ruled in Gideon's favor, holding that the assistance of counsel, if desired by an indigent defendant, was a guaranteed right under the U.S. Constitution when states prosecuted people for serious crimes. Along with a new trial, Gideon received government-financed legal services, and he was cleared of all charges just a few months after the Supreme Court's landmark ruling.

Gideon v. Wainwright led to many changes in how the indigent are represented in criminal cases. For example, the decision effectively created the need for criminal lawyers employed at public expense—what are known today as public defenders—and its importance extends not only to subsequent cases concerning legal representation at trial and on appeal, but also to cases dealing with police interrogation and the well-known right to remain silent.

Civil Legal Assistance

Unlike the case for serious or high-risk criminal cases, there is no generalized right to the assistance of a lawyer in civil matters—even for the indigent and even when the most basic human needs are at stake. While states have created rights to counsel in situations dealing with the termination of parental rights, paternity, juvenile abuse, and involuntary commitment to mental health facilities, it is rare for individuals to have rights to legal assistance in very common and critical areas of civil law, including health care, immigration status, domestic violence, veterans benefits, disability needs, child custody, housing, public benefits, employment disputes, special education needs, and more. In all of these types of disputes—which can be incredibly complex and which can have life-altering consequences—individuals and families can harbor no expectation that an attorney will be on hand to help them. Instead, because they cannot afford legal fees, it is commonplace for the indigent, a growing portion of the middle class, and many small businesses to simply give up or go it alone when it comes to important civil legal needs. (Contrast this with the approach of the countries in the European Union, all of which have had a right to civil legal assistance for decades.)

Importantly, there is a legal safety net for the poorest segment of our population, who can at least try to access what are known as civil legal aid services. These services are provided by a network of publicly funded legal aid agencies, private lawyers and law firms offering free or near-free legal assistance, and law school clinics run by faculty and staffed by students. Unfortunately, however, there is far more need than there is capacity to handle that need. In the end, usually only those individuals with the lowest incomes receive assistance: some 80% of low-income individuals and 40 to 60% of middle-class individuals suffer from legal needs that go unmet. This equates to tens of millions of people who cannot access the legal assistance they need to save their homes, their jobs, their rightful public benefits, and the like.[29]

As a matter of pure funding, the U.S. Congress is most to blame for the enormous gap that exists between civil legal needs and resources. Congress holds the purse strings of the Legal Services Corporation (LSC), a not-for-profit corporation established by federal law in 1974 as the single largest funder of civil legal aid

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for low-income Americans. In today's dollars, LSC's congressional appropriation in 1976 was about $479,000,000; in 2015, that number was $375,000,000. But this $100,000,000 reduction does not even tell the whole story, for over the 40-year-period just referred to, need has soared—meaning that LSC's budget should be much higher than even its inflation-adjusted 1976 budget just to keep pace with increased need over time.

The link between civil legal problems and health is underlined by the Community Needs and Services Study, an examination of the civil justice experiences of the American public.[30] According to the study, two-thirds of adults in a middle-sized American city experienced at least 1 of 12 different categories of civil justice situations in the previous 18 months. Notably, the average number of situations reported rested at 3.3, and poor people, blacks, and Hispanics were more likely to report civil justice situations than were middle- or high-income earners and whites. The most commonly reported situations concerned employment issues, government benefits, health insurance, and housing. The study uncovered significant connections between civil justice situations and health: respondents indicated that nearly half of the situations resulted in feelings of fear, a loss of confidence, damage to physical or mental health, or verbal or physical violence or threats of violence. In fact, adverse impacts on health were the most common negative consequence, reported for 27% of situations. Also important is the fact many of those who responded indicated that they didn't even know that the problems they were experiencing were rightly considered "legal" in nature. The link between civil legal needs and health will be more fully explored in the chapter on existing safety net programs and legal protections.

Conclusion

As evidenced by the legal doctrines described in this chapter, the nation's health has much more than just social support deficiencies and luck working against it; it has long-standing, deeply rooted legal doctrines to account for, as well. Creating universal health insurance coverage? That could easily be done by way of a federal statute, assuming the political will was present. A shift in national spending priorities away from downstream medical procedures in favor of more upstream social care? In other nations similar to our own, this is the norm, so it can't be that difficult. And universal health insurance and social determinants of health are, at least, relatively common discussion topics among policymakers. But realigning bedrock legal principles that in some cases don't even conjure up the notion of "health consequences" for most people? That is a true challenge. One of the aims of this text is simply to help lay people to understand that things like "suspect classifications" and the "negative Constitution" are important legal principles that pertain to the nation's health. After you've read the text in its entirety, it is our hope that it will become one of your aims, as well.

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