THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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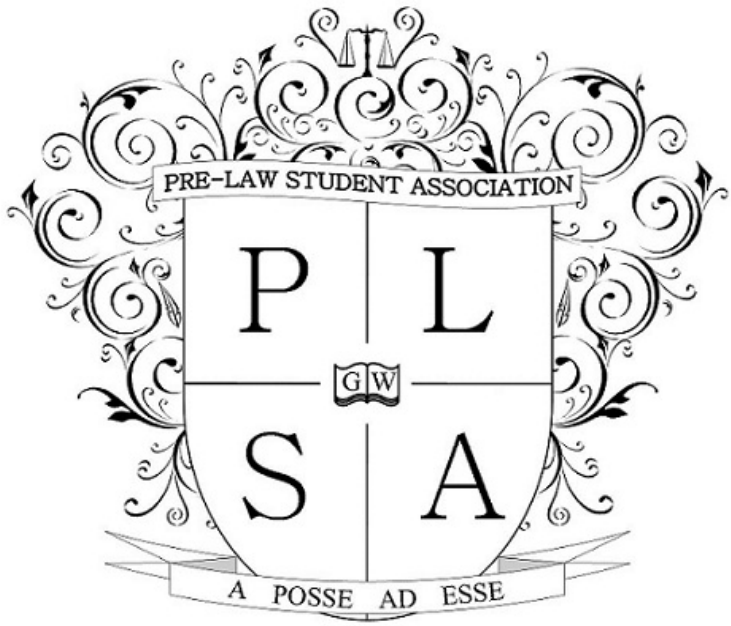

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Foreword

As the President of The George Washington University Pre-Law Student Association for 2021 and a former member of the Undergraduate Law Review, it is with absolute pride that I introduce the 2021 GW Undergraduate Law Review.

This year's publication is truly unique and impressive as it was done almost entirely based on online correspondence and coordination from our ever-growing collection of student writers, editors, and leaders passionate about the legal field. Every member of our writing staff is hands-on and deliberate about everything they contribute, something I learned firsthand as a former associate editor. I could not be more pleased with what our organization has been able to create and accomplish in this unprecedented chapter in our organization's history, and I have nothing but the highest hopes for our return to regular campus life next fall.

The goal of our organization has always been to provide undergraduate students at our university with skills and resources through exposure to legal research and writing, intensive editing, and a familiarity with the Bluebook citation system at an early stage. Additionally, the organization provides information regarding the law school admission process, LSAT test prep workshops, legal professional speaker events, and networking events to give our members a leg up wherever we can.

It is with great pleasure that I present to you the 2021 Edition of the GW Undergraduate Law Review.

Sincerely,

Andrew Almeida

Andrew Almeida
President

Introduction

Dear Reader,

For 11 years now, the George Washington University's *Undergraduate Law Review* has provided an outlet for GW's brightest minds to take part in a prestigious scholastic endeavor that spans the entire academic year, providing them with the opportunity to cultivate their most advanced piece of collegiate writing and be published as an undergraduate. Despite this academic year being fully virtual, the *ULR* drew a record number of applications from passionate students spanning a variety of academic backgrounds and grade levels, all aspiring to contribute to one of less than twenty undergraduate law journals in the nation. 14 outstanding students completed this process, and their work is now bound and stored in the Library of Congress, the GW Library, and a consortium loan community. This was no small feat, as the *ULR*'s rigorous writing process included the approval of legal proposals, two outlining and research stages, three rounds of peer editing, one round of review by legal professionals, and strict adherence to Bluebook legal citation.

Through it all, our writers and editing team demonstrated extraordinary levels of intellect, attention to detail, and devotion to their work and this organization. An editing staff that included myself, three editors-in-chief, eight student editors, and 18 professional editors, worked tirelessly to develop the writers and their articles, and maintain the high standards of the *ULR* at every stage of the process. I am so proud of the entire *ULR* staff, and astounded by how far they have come, how much they have grown, and how hard they have worked. Countless hours and sleepless nights spent writing, editing, and fine-tuning—only to do it all over again and again—has produced a work that we can all be proud of. Most importantly, our writers and editors have gone above and beyond anyone's expectations in fulfilling the *ULR*'s tradition of making each volume better than the last.

I am forever grateful for my editors-in-chief—Alyssa Greenstein, John Bennett, and Courtney Lange—without whom this publication would be nowhere near where it is today. Their consistent support, patience with a fully virtual format, and determination ensured a successful publication. The immense responsibilities entrusted to me this year were the culmination of my involvement with the *ULR*, and I know that I owe a significant part of my collegiate education and love of the law to the profound lessons I have learned during my time here, and the inspirational peers who have been with me the whole way.

Sincerely,

Emily Bauwens
Law Review Director

ARTICLES

The American Prison System: An Equal Protection Evaluation Based on the Constitutionality of Gender Segregation

Erica Brangwynne

Introduction

In the United States, incarcerated individuals are imprisoned in separate institutions on the basis of gender.[1] In most cases, state governments and the federal government operate two separate prison systems: one for men and one for women. Despite a growth of interest in the rights of prisoners and the rights of women over the past several decades, the rights of female prisoners have received relatively little attention from the public and scholars alike. Nationwide, incarcerated males have had access to a greater quantity and variety of occupational and educational programs in comparison to incarcerated females.[2] Prisons that house men tend to have greater populations than those that house women, which has led to differences in treatment and to distinct atmospheres.

Reintegration programs tend to focus on men's needs. The lack of educational and vocational programs at female facilities, along with the explicitly gendered class offerings, hamper women's prospects for successful rehabilitation once released from prison.[3] In general, inmates tend to have few financial resources, minimal education, and subpar job skill training. This problem is only compounded for female inmates who generally have fewer resources and less employment experience than male inmates.[4] The significance of this

[1] This article focuses on state and federal institutions for women. Private prisons and juvenile detention centers present other difficulties which are beyond the scope of this article.

[2] SHARON L. FABIAN, *Toward the Best Interest of Women Prisoners: Is the System Working,* 6 New Eng. Journal on Prison Law 1, 60 (1979).

[3] SOLVEIG SPJELDNES, *Gender Differences and Offender Reentry: A Review of the Literature*, Journal of Offender Rehabilitation (May, 2009).

[4] *Id.*

inequity within state and federal prisons has become increasingly relevant, as women have recently become the fastest growing group of the incarcerated population.[5] In fact, the population of women in prison has risen 646% between 1980 and 2010, which is 1.5 times the rate of male growth in incarceration over the same period.[4]

Though incarcerated individuals do not have full Constitutional rights, they only lose those rights that are fundamentally inconsistent with their status as inmates.[6]Accordingly, incarcerated individuals retain the right to the Equal Protection Clause under the Fourteenth Amendment. This article will build upon Equal Protection jurisprudence that surrounds gender, and it will argue that the segregation of inmates based on gender within the American prison system is a violation of the Equal Protection Clause of the Fourteenth Amendment.[7] The term "gender" will be used throughout this article and will include people who identify as men, women, and non-binary.[8]

The article will begin by establishing the patriarchal nature of the prison system today. It will first outline the history of female prisons and the role gender plays within prisons today, to help demonstrate that segregation based on gender is due to outdated gender stereotypes and heteronormative assumptions. The decision to segregate that created scale differences was based in part on stereotypical assumptions about the different security and rehabilitative problems posed by male and female inmates. The segregation of inmates violates the Equal Protection Clause under the Fourteenth Amendment as it prevents equality and eliminates pressure for standardized treatment. Commonly cited obstacles to enduring educational equity between males and females within prisons will be addressed and explained why these obstacles are insufficient to justify segregation based on gender. To ensure adequate and equal correctional opportunities for male and female incarcerated individuals while also ensuring inmate safety, a co-correctional remedy should be employed to establish a non-discriminatory prison system (without mixing genders in cells).

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[5] WENDY SAWYER, *The Gender Divide: Tracking Women's State Prison Growth,* Prison Policy Initiative (Mar. 25, 2018).

[6] *Fact Sheet: Incarcerated Women and Girls,* The Sentencing Project (Nov. 2015).

[7] *Hudson v. Palmer*, 468 U.S. 517 (1984).

[8] This paper will address the issues that women face, however many of these issues affect both non-binary and transgender people as well.

I. Background of and the Legal Precedent of the Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the XIV Amendment states that, "No state shall deny to any person within its jurisdiction the equal protection of the laws."[9] Equal protection forces a state to govern impartially to prevent unreasonable discrimination based on the use of classifications.

A. Establishment of Female Only Institutions

Throughout the early 1800's, the relatively low numbers of incarcerated females allowed states to house women prisoners alongside men as part of the "general population."[10] Males and females were held together and were subject to filthy conditions, overcrowding, and harsh physical punishment.[11] As the rates of female incarceration began to rise slightly, women were housed in separate wings or separate floors of the same facility.[12] The description of women's quarters in state annual reports describes the facilities as having "wretched conditions, overcrowding, lack of supervision, neglect, enforced idleness, and…sexual exploitation or abuse."[13] Women were often locked away in rooms above the guardhouse or mess hall of the prison, or anywhere else that could fit a small population of inmates.[14] Because they were typically housed in spaces out of sight, women were largely left without supervision and were especially vulnerable to violence from other inmates or guards.[15] During this period, females were generally expected to be "more pure and have higher morals than men."[16] Hence, upon incarceration, women were treated differently than men, as they were considered more morally depraved and less likely to be rehabilitated. Thus, the woman "who dared to stray or fall from her elevated pedestal was regarded as having fallen a greater distance than a male, and hence beyond any possibility of reformation."[17] Women were also heavily blamed for any disruptions their presence created within the

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[9] U.S. CONST. amend. XIV, § 1.

[10] JACK LYNCH, *Cruel and Unusual: Prisons and Prison Reform,* The Colonial Williamsburg Foundation, (2011).

[11] *Id.*

[12] *Id.*

[13] MARA DODGE, *"More Trouble than Twenty Males": Women Convicts in Illinois Prisons 1835-1896*, 32 J. Soc. Hist. 907, 908 (1999).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

masculine world of the penitentiary.[18] An Auburn Prison chaplain summarized the female experience by stating that being a male inmate at that prison would be tolerable but being a female inmate "would be worse than death."[19] Additionally, sexual abuse was flagrant around the country, and it was discovered in 2015 that the Indiana State Prison had run a prostitution service for male guards, using female prisoners.[20]

In 1869, two Quaker reformers, Rhoda Coffin and Sarah Smith, learned of allegations about sexual abuse of incarcerated females at the Indiana State Prison.[21] The two women advocated for an end to sexual assault against women prisoners and lobbied the state to fund the Indianan Reformatory Institute for Women and Girls, established in 1873 as the first adult female correctional facility.[22] Known today as the Indiana Women's Prison, the facility was founded with a focus on rehabilitation rather than punishment.[23] While Coffin and Smith have been praised for their "progressive" views on the importance of rehabilitation within the prison system, female researchers, who are also inmates at the Indiana Women's Prison today, have uncovered a darker history of the first women's prison.[24] An 1881 inquiry report found that the prison superintendent often engaged in assault, humiliation, and "dunking" of female prisoners and would "pull their hair and pound their heads against the wall."[25] Along with the utilization of abusive practices, the prison aimed to "correct" female inmates though reintegrating the women into traditional gender roles.[26]

The prison's 1876 annual report states that the incarcerated women were trained to "occupy the position assigned to them by God – as wives, mothers, and educators of children."[27] Despite the problematic nature of the first women's prison, the prison served as a model for institutions across the country. By 1940, twenty-three states had opened separate facilities for incarcerated females.[28] Until 2012, Indiana Women's Prison had one of the most successful education programs, with hundreds of professors who worked with female

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[18] *Id.*

[19] DAVID LEWIS, *From Newgate to Danneomora: The Rise of the Penitentiary in New York 1976-1848* 164 (1965).

[20] REBECCA ONION, *The Pen: Inmates at America's Oldest Women Prison are Writing a History of it - And Exploding the Myth of its Benevolent Founders,* Slate (Mar. 22, 2015).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] SAMARA FREEMARK AND LILA CHERNEFF, *Prison History Assignment Yields Surprise, Passion for Research*, APM Reports (Sept. 8, 2016).

[27] SAMARA FREEMARK AND LILA CHERNEFF, *Prison History Assignment Yields Surprise, Passion for Research*, APM Reports (Sept. 8, 2016).

[28] ESTELLE B. FREEDMAN, *Their Sisters' Keepers: Women's Prison Reform in America, 1830-1930* 15 (1981).

inmates earning their bachelor's degree.[29] This program was cut due to financial costs. The women were taught traditionally feminine skills such as sewing and cooking and were at times released on parole to work as domestic servants for families. The education that female inmates received was focused on home economics unlike the practical skills taught to male inmates such as industrial design or technical work.[30] These antiquated norms and ideals are the very basis on which contemporary female prisons function.

B. Legal Doctrine Concerning Gender Disparity in the Prison System

Although the Supreme Court has never explicitly considered the issue of the differential treatment of men and women inmates under the 14th Amendment, its decisions in other women's rights cases suggest that most of the sex-based classifications in prisons today violate constitutional standards. In *Barefield v. Leach* (1974), the district court held that a disparity of programs for female inmates, when compared to those offered to men, could not be justified because female inmates represent a smaller incarcerated population thus making it costlier to provide program parity.[31] The holding of the court stated:

> By providing [female prisoners] fewer and poorer educational and vocational programs, as well as less adequate facilities and equipment, and by denying them access to supplemental programs like work pass and incentive good time, the State has unnecessarily deprived women inmates of valuable rehabilitative experience.[32]

Though a success for women inmates, this was only an injunctive relief for women at the New Mexico State Penitentiary.[33] Court rulings regarding prisons have generally not benefited women inmates in a broader sense, as they tend to be specific in condition, policy, or location.

In the following years, the district court held in *Glover v. Johnson* (1979)[34] - a case that evaluated gender discrimination in the Michigan prison system - that those programs and opportunities available to female inmates in the state of Michigan were significantly inferior in both quality and quantity to those offered to male prisoners.[35] This ruling essentially followed the reasoning of the decision in *Barefield* (1974).

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[29] *Id.*

[30] ADAN HARRIS, *Women in Prison Take Home Economics, While Men Take Carpentry* (April 20, 2018)

[31] *Barefield v. Leach*, No. 10282 (D.N.M. 1974).

[32] *Id.*

[33] EILEEN B. LEONARD, *Judicial Decisions and Prison Reform: The Impact of Litigation on Women Prisoners*, 31 Social Problems, 45, (1983).

[34] *Glover v. Johnson,* 478 F. Supp. 1075, 1079.

[35] *Id.*

Women Prisoners v. District of Columbia (1996),[36] a case that involved women located at three different facilities, provides a clear example of differential programming opportunities. Women placed in a minimum-security facility were incarcerated at "the Annex," which was located on the grounds of the men's minimum-security prison.[37] The district court found that female inmates' vocational opportunities included those of "reception, housekeeping, and library assignments."[38] This was compared to the vocational opportunities that male inmates were provided, which included "carpentry, and electrical/mechanical work."[39] Despite the stereotypical nature of these assignments, the D.C. Circuit vacated the district court's order that required the prison authorities to provide female inmates with the same opportunities and programs as their male counterparts,[40] rejecting equal protection claims because it concluded that men and women prisoners were not similarly situated.[41]

In *Keevan v. Smith* (1996), a case that involved Missouri prisons, female inmates could work as telephone operators or telemarketers and perform data entry and office copying duties.[42] Male inmates, on the other hand, had access to a broad range of industry job related programs.[43] The dissent stated, "The jobs for men require more skills and give the men a considerable market advantage outside the prison setting."[44] Yet, the Eighth Circuit upheld the differential programming based on the idea that women and men prisoners were not similarly situated.[45] and that the plaintiffs did not prove the prison officials had acted with discriminatory intent.[46]

C. State Justification for Failing to Provide Equal Program Opportunities is Insufficient to Justify Segregation

The government has offered a few notable justifications for why it has not provided incarcerated males and females with equal program opportunities. States have utilized the institutional size to demonstrate why it is unreasonable for a state to provide incarcerated males and females with equal educational options. Others have relied on the argument of

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[36] *Women Prisoners v. District of Columbia,* 877 F Supp. 134 (D.D.C. 1994).
[37] *Id.* at 639
[38] *Id.* at 657
[39] *Id.*
[40] *Women Prisoners v. District of Columbia,* 93 F. 3rd 910 (D.C. Cir. 1996).
[41] *Id.* at 927. To make this determination, the court relied on differences between the male and female facilities.
[42] *Keevan v. Smith,* 100 F.3d 644 (8th Cir. 1996).
[43] *Id.*
[44] *Id.* at 653 (Heaney, J., dissenting)
[45] *Id.* at 650
[46] *Id.* at 651

financial concerns, and therefore, that the state is not required to provide equal correctional educational opportunities. Both the institutional size and financial concerns are insufficient to justify gender segregation

i. Institutional Size

Females make up 7% of the American incarcerated population.[47] Despite the fact that 7% is a sizable proportion of the American prison population, states have argued that it is not financially or logistically reasonable to provide males and females with equal access to programming.

In *Glover v. Johnson* (1979), incarcerated females filed a civil rights lawsuit against the Director of Michigan Department of Corrections and the State of Michigan.[48] The plaintiffs argued the state had violated the Constitutional rights of the female prisoners by offering educational and vocational rehabilitation opportunities, which were significantly inferior to those offered to male inmates.[49] The state claimed that the difference in opportunity was due to limitations caused by the size of the institutions, as the female prison was substantially smaller in terms of population than the male prison.[50] The district court found that the argument of "institutional size" of the facilities was not a justification, but rather "an excuse for the kind of treatment afforded to women prisoners."[51] The court additionally found that by "providing [females] with fewer and poorer educational and vocational programs, as well as less adequate facilities and equipment, and by denying [females] access to supplemental programs...the State was unnecessarily depriving women inmates of valuable rehabilitative experience."[52] In this ruling, the Court determined that the size of the female incarcerated population is unrelated to the prevention of female inmates from access to the same opportunities afforded to male inmates.

D. "Not Similarly Situated"

An argument that states have made in opposition to providing male and female inmates with equal educational and vocational opportunities is that men and women are not

[47] GRANT DUWE AND VALERIE CLARK, *The Effects of Prison-Based Educational Programming on Recidivism and Employment*, 94 The Prison Journal, 454 (2014).
[48] *Glover v. Johnson,* 478 F. Supp. 1075, 1076 (1979).
[49] *Id.*
[50] *Id.* at 1077
[51] *Id.* at 1078
[52] *Id.* at 1101

"similarly situated." The equal protection clause generally requires the government to treat similarly situated people alike, therefore, if two groups are not considered similarly situated, then a claim cannot be made under the equal protection clause.[53] In *Roubideaux v. North Dakota Department of Corrections & Rehabilitation* (2009), a group of female inmates filed suit, with the claim that the North Dakota Department of Corrections and Rehabilitation violated the rights of female inmates under the 14th Amendment.[54] The female inmates alleged that inferior educational programs, vocational programs, substance abuse treatment, and work preparation programs qualified as discrimination against women.[55] The Eighth Circuit Court of Appeals affirmed the district court's judgment in favor of the defendant state of North Dakota, concluding that the plaintiffs failed to prove that female inmates were "similarly situated" to male inmates as they were not held at the same institution.[56] This lower ruling is inconsistent with current legal precedent - since this case was decided, the United States Supreme Court has determined that there must be an intermediate standard of review for state gender classifications, which may open the North Dakota correction practices up for reconsideration.

E. Intermediate Standard of Review for Gender Based Discrimination

Prior to 1971, gender classifications were subject to the lowest level of review: rational basis review. However, in *Reed v. Reed* (1971), the Court determined that there were relevant similarities between the legal position of women and that of racial and ethnic minorities; thus, there should be a more stringent level of review to protect the rights of women.[57] For the first time, the Supreme Court ruled that a law that discriminates against women is unconstitutional under the 14th Amendment, holding that a state statute that requires that males be preferred to females, denies women equal protection under the law.[58]

The Court further established an intermediate standard of review for gender classification under the Equal Protection Clause of the 14th Amendment in *Craig v. Boren* (1976),[59] where it held that gender-based regulation in a discriminatory manner requires the

[53] *Klinger v. Department of Corrections,* 31 F.3d 727 (8th Cir. 1994).
[54] *Roubideaux v. N. D. Department of Corr. & Rehab.,* 570 F.3d 966 (2009).
[55] *Id.*
[56] *Id.* at 971
[57] *Reed v. Reed,* 404 U.S. 71 (1971).
[58] *Id.*
[59] *Craig v. Boren*, 429 U.S. 190 (1976).

government to demonstrate that criteria based on one's gender is necessary to achieve its objectives.

In the most recent articulation of the intermediate standard of review, *Mississippi University for Women v. Hogan* (1982),[60] the Supreme Court utilized a strict application of the *Craig* test, and emphasized the harms to women that result from facial gender classification. The *Craig* test requires a stricter application of intermediate scrutiny. Under this test, the government had to prove the law or statute served a governmental purpose and that it served an "important and appropriate purpose."[61] The Court held that the state must demonstrate that classification by gender has an important purpose and this relationship between the objective and the proposed classification is significant.[62]

United States v. Virginia (1996), considering the male only admission policy of the Virginia Military Institute, established that an "exceedingly persuasive justification" is necessary if one is seeking government action based on gender classification.[63] As the Court held, "generalizations about the way women are, estimates of what is appropriate for *most women*."[64] do not qualify as exceedingly persuasive justification. Importantly, the heightened standard of review does not forbid a categorization based on gender, but rather indicates that gender-based classification is not permissible if it is used to "perpetuate the legal, social, and economic inferiority of women."[65]

The current conditions of the prison systems, which reflect gender segregation, would not pass the intermediate standard of review if the Court were to review it. The lack of educational and vocational opportunities afforded to female inmates at women's prisons as compared to incarcerated males needs to be substantially related to an important and appropriate government interest. However, gender discrimination is not necessary to achieve the government's objective of the betterment of society. This segregation based on gender actually harms rather than advances the government's objective as it lessens the opportunities of female prisoners to programs, which can reduce recidivism and allow for more successful re-entry into the community.

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[60] *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, (1982).
[61] *Id.*
[62] *Id.*
[63] *U.S. v. Virginia,* 518 U.S. 515 (1996).
[64] *Id.* at 550 (emphasis in original).
[65] *Id.*

II. Gender Segregation in the American Prison System

A. Gender Segregation is Disadvantageous to Females

In the United States prison system, incarcerated females have less access to facilities, services, and correctional education than males. In a 1980 Congressional Report, the Government Accountability Office stated that, "women in correctional institutions are not provided comparable services, educational programs, or facilities as male prisoners."[66] Four decades later, little has changed to lessen the deep inequity within the criminal justice system. Incarcerated females have less access to mental health services, drug and addiction counseling, and healthcare than male inmates.[67] Female inmates are also more likely to be held in isolated rural locations within smaller size institutions.[68] Additionally, since there is typically only one, or at most two female institutions per state, females are unable to be placed in facilities appropriate to their specific needs.[69] In contrast, incarcerated males are often assigned to a particular institution with consideration given to their different health, educational, and vocational needs.[70]

i. Lack of Educational and Vocational Opportunities

Most egregiously, in comparison to male prisoners, females are not provided with equal educational and vocational opportunities. Across the nation, male prisoners have access to a greater quantity and variety of educational programs. A report conducted by the Texas Criminal Justice Coalition in 2018 found that the state of Texas offers 21 job certification programs for men, but only two for women.[71] While men are offered an array of programs often in the industrial field - such as construction carpentry or electrical technology - female inmates are offered courses typically gendered towards women, such as office administration and culinary arts.[72] This trend is not just limited to southern states.

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[66] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GGD-81-6, *Women in Prison: Inequitable Treatment Requires Action* (1980).

[67] RABIA AHMED, CYBELE ANGEL, REBECCA MARTEL, DIANE PYNE & LOUANNE KEENAN, *Access to Healthcare Services During Incarceration Among Female Inmates*, 12 Int. J. Prison Health 204, 212 (2016).

[68] U.S. DEPARTMENT OF JUSTICE, Sourcebook of Criminal Justice Statistics, at 393 (Table 4.2).

[69] FABIAN, *Toward the Best Interests of Women Prisoners,* 63

[70] *Id.*

[71] LINSEY LINDER, *An Unsupported Population: The Treatment of Women in Texas' Criminal Justice System,* Texas Criminal Justice Coalition, 17 (2018).

[72] *Id.*

Across the country, 68% of women, compared to 58% of men, received no education while incarcerated.[73]

Unequal access to correctional education is particularly detrimental to the rehabilitation of female inmates. Every year, almost 700,000 prisoners are released back into their communities with no greater employable skills than those which they had upon incarceration.[74] Within three years of being released, about 40% of these previously incarcerated individuals will commit new crimes, or violate their parole, and return behind bars.[75]

Correctional education is critical to ensuring the successful reentry of individuals into society after being released from incarceration. The term "correctional education" refers to a variety of educational programs available to incarcerated populations, ranging from basic skills training focusing on math, reading, and writing, to vocational training that provides inmates with the skills necessary to obtain employment after release.[76] The RAND Corporation conducted a meta-analysis, which found that individuals who received correctional education, of any kind, are 43% less likely to return to prison, and 13% more likely to obtain a job after release.[77] In a case study of Minnesota, it was found that prisoners who participated in work release programs, which allow inmates to work in the community as their release date approached, had more than double the chance to find work within the first two years of release.[78] By denying women the same opportunity to partake in correctional education, the state has effectively limited the chances females have to maintain a living wage once they are released.

ii. Poor Healthcare and Lack of Services

As men historically have higher incarceration rates compared to females, the United States prison system has been developed under a male-centric premise. Thus, the U.S. prison

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[73] U.S. DEPARTMENT OF EDUCATION, NCES 2016-040, Highlights from the U.S. PIACC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training (2014).

[74] LOIS DAVIS & ROBERT BOZICK, *Learning Behind Bars: The Effectiveness of Education in Prisons,* Vera Institute of Justice, (Sept. 16, 2013).

[75] *Id.*

[76] *Correctional Education: Adult Education and Literacy*, U.S. Department of Education (2017).

[77] LOIS M. DAVIS, ROBERT BOZICK, JENNIFER L. STEELE, JESSICA SAUNDERS & JEREMY N. V. MILES, *Evaluating the Effectiveness of Correctional Education: A Meta Analysis of Programs that Provide Education to Incarcerated Adults, RAND Corporation , 41 (2013).*

[78] GRANT DUWE, *An Outcome Evaluation of a Prison Work Release Program Estimating its Effects on Recidivism, Employment, and Cost Avoidance,* 26 Crim. Jus. Pol. Review 532, 533 (2015).

system is ill equipped to meet the biological and psychological needs of incarcerated women. When compared to male inmates, female inmates are not only presented with a lack of healthcare services while incarcerated, but also face many barriers to accessing these services. These barriers include treatment interruption, health disempowerment, and recidivism to crime and substance abuse upon release.[79] The disparity between male and female inmates can be found in the prevalence of mental health disorders and health conditions as well. Incarcerated women were found to have higher rates of psychiatric and physical health conditions than their male counterparts.[80] In addition, many of these health conditions that were reported as higher in female inmates included those that are statistically higher for men in the general population.[81] This discrepancy suggests a need for "targeted attention" towards female inmates with regard to their health.[82]

Women have specific health needs that differ from those of men, which require attention from specific kinds of medical professionals. Historically, prisons do not employ obstetricians or gynecologists with adequate training.[83] At one correctional facility, women were offered one 12-step-program led by volunteers compared to men who had access to four 12-step-programs.[84] An inmate at the Women's Huron Valley Correctional Facility - the only all women's correctional facility in Michigan - stated that the lack of healthcare is so severe and essentially nonexistent, that inmates refer to it as "death-care."[85]

The lack of social support, prenatal screenings, and other necessary health services needed for a successful birth is harmful to the 6-10% of female inmates that are pregnant.[86] Not only is this harmful to the mother, but also may be harmful to the child. Women who give birth while in prison are separated from their newborn almost immediately.[87] This event can cause a ripple effect in which those women are more likely to be diagnosed with postpartum depression, which can lead to future emotional harm, and an increased risk for

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[79] RABIA AHMED, CYBELE ANGEL, REBECCA MARTEL, DIANE PYNE & LOUANNE KEENAN, *Access to Healthcare Services During Incarceration Among Female Inmates*, 12 Int. J. Prison Health 204, 212 (2016).

[80] INGRID A. BINSWANGER, JOSEPH O. MERRILL, PATRICK M. KRUEGER, MARY C. WHITE, ROBERT E. BOOTH, AND JOANN G. ELMORE., Gender Differences in Chronic Medical, Psychiatric, and Substance-Dependence Disorders Among Jail Inmates. 100 *American Journal of Public Health*,476 (2010).

[81] *Id.*

[82] *Id.*

[83] DANYA ZIAZADEH, *Inadequate Health Care: A Significant Problem Affecting Incarcerated Women.* (2019).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

recidivism.[88] By not providing proper health services to female inmates, the prison system is essentially making an already vulnerable population more susceptible to health issues.

iii. Re-Entry Programs

When referring to inmates, the term "re-entry" indicates the period of transition in which released individuals enter into a community following incarceration.[89] Female inmates have reported a greater need for re-entry services in which the highest reported needs were for employment, education, and life related skills.[90] Establishing stable employment is a necessary component to reintegrating into society.

Re-entry can be difficult for women as mental disorders are often accompanied by behaviors that are deemed 'unacceptable' or 'dangerous' in the community, leading to recidivism.[91] This is a greater risk for women because of the lack of mental health services in female correctional facilities compared to male facilities. Those re-entry programs that have been deemed most successful include services related to education, employment, and mental health services.[92] By denying women access to these programs, this demographic is being placed at a disadvantage following release from prison.

iv. Treatment of Non-Binary/Trans Incarcerated Populations

Gender segregation is not significantly related to the safety of non-binary and transgender incarcerated populations. Within the contemporary segregated prison system, non-binary and transgender individuals are the population most vulnerable to assault. A nationwide study found incarcerated transgender individuals are ten times more likely to be sexually assaulted by fellow inmates and five times as likely to be sexually assaulted by prison staff than the general prison population.[93] Furthermore, transgender and non-binary individuals are more likely than other populations to end up in prisons. Nearly one in six transgender Americans, and one in ten black transgender Americans have been to prison.[94]

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[88] LORIE S. GOSHIN, MARY W. BYRNE, AND ALANA M. HENNINGER. *Recidivism after Release from a Prison Nursery Program.* 31 Public Health Nursing, 109 (2013).

[89] SOLVEIG SPJELDNES AND SARA GOODKIND. *Gender Differences and Offender Reentry: A Review of the Literature.* 48 Journal of Offender Rehabilitation, 314 (2009).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *LGBTQ People Behind Bars: A Guide to Understanding the Issue Facing Transgender Prisoners and Their Rights,* National Center for Transgender Equality, 13 (2018).

[94] *Id.*

In May 2018, the Trump Administration removed protections first introduced by former President Barack Obama, which had been granted to transgender prison inmates.[95] The U.S Bureau of Prisons announced that this includes using an inmate's biological sex to determine whether an individual is sent to a male or female prison, without regard to the gender that they identify with. This change creates more hardship for transgender individuals, as they are now legally required to be at the institution that does not match their gender identity. The challenges of the current system for non-binary and transgender individuals, as well as the high level of abuse these populations face while incarcerated, demonstrate that the segregation of inmates by sex is not substantially related to keeping inmates safe. By not gendering prison assignments, this would be less of an issue. Therefore, the state interest of inmate safety does not meet the intermediate scrutiny standard.

III. Suggested Solution and Counter Arguments

A. A Co-Correctional Remedy

The goal of a non-discriminatory prison system is to provide equal access and opportunities to services, programs, and facilities, without the consideration of gender. This remedy is not suggesting that women adapt to the existing structure of male prisons, but rather that desegregation of correctional facilities should prompt a reevaluation of the goals and practices of prisons and jails as well as the role of women in these systems. Institutional assignments will be made on classifications other than gender (these factors are currently used in the classification of male inmates): prior criminal history, age, psychological health and condition, and educational and vocational needs. Women should be provided with opportunities and access to the same jobs and classes, enjoy the same privileges and benefits, and operate under the same rules as men with the same status. However, this remedy would not include the assignment of males and females to the same cells, but rather would include placing males and females into the same institution. This will diminish and possibly eliminate the state justifications of financial concerns and institutional size, while also preventing gender-based violence between inmates.

Programs should also focus on rehabilitation and post release care. This should include equal opportunities for male and female inmates to health services, vocational programs,

[95] CHASE STRANGIO & AMY FETTIG, *The Trump Administration is Attacking Trans People in Federal Prison,* ACLU (May 25, 2018).

education, and other necessary programs. Effective implementation and management may lead to positive outcomes that decrease the recidivism rates of females, as well as males. By establishing prison systems that house both males and females in the same facility (in separate cells), the states no longer have a legitimate reason to provide female inmates with less than adequate services, programs, and opportunities. The financial cost will also be lowered as the resources used to establish these programs can be shared by both genders. Additionally, this will create opportunities that are both equal in quantity and quality to the inmates.

B. Counter Arguments

i. Safety of Inmates

The issue of safety while in prison is the most compelling and significant justification for the continuation of segregation of female and male inmates. The issue of safety is undoubtedly a valid concern as prisons are notorious for being sites of physical and sexual abuse. However, the reasoning behind this state interest is motivated in large part by gendered and heteronormative assumptions. Furthermore, the government interest of ensuring inmate safety is not significantly related to gender segregation and thus cannot be upheld under the intermediate standard of review.

The segregation of inmates based on gender is not significantly related to the state interest of safety of inmates, as segregation is not currently effective in ensuring the safety of inmates, either male or female. Approximately 43%-57% of females in prison and about 67%-79% of females in jail have been physically or sexually abused.[96] One in ten previously incarcerated individuals reported at least one incident of sexual victimization during their most recent period of incarceration.[97] Of the inmates reporting sexual abuse, 31% were victimized three or more times.[98] Furthermore, the notion that segregating inmates based on gender will make inmates safer assumes that inmates are more vulnerable to attacks from other inmates. Yet, current statistics demonstrate that correctional officers commit the highest rates of sexual assault on inmates.[99] This article does not argue that inmates of

[96] A FICKENSCHER, J LAPIDUS, P SILK-WALKER & T BECKER, *Women Behind Bars: Health Needs of Inmates in a County Jail,* 116 Pub. Health Rep. 191, 193 (2001).

[97] ALLEN J. BACK & CANDACE JOHNSON, *Sexual Victimization Reported by Former State Prisoners,* 2008, Bureau of Justice Statistics, 14 (2012).

[98] *Id.*

[99] *Id.*

different genders should be placed in the same cells, but rather that they should be granted the same opportunities.

Conclusion

Female inmates constitute a relatively small percentage of the total prison population in the United States. Amongst other inequities, female prisoners are offered fewer vocational and educational opportunities than are their male counterparts, despite being similarly situated. Programming opportunities that are offered to women are often inferior in quality and are stereotypically gendered in nature. When women prisoners are faced with qualitative programming differences, they are treated differently from male inmates not because of their relatively small numbers, but because they are female.

The equal protection rights of women in prisons have yet to be fully recognized. The current lack of educational equity between male and female incarcerated populations is a violation of the equal protection clause of the 14th amendment. Segregation by gender in the American prison system disadvantages female inmates as incarcerated females have less access to correctional educational opportunities which are essential to successful rehabilitation and reintegration to society. The reintegration and rehabilitative aspects of incarceration, the broader interests of the criminal justice system, and the rights of incarcerated females, require more than parity of treatment. Female inmates should not lose their right to be treated as equal to men upon conviction, and the subjugation of the gender stereotyped world of the past should no longer be a part of women prisoners' rehabilitation. Over the course of many decades and many Supreme Court cases, it has been held that the equal protection clause does not permit inferior treatment based on a person's gender, and the same standard should hold when evaluating the rights of female inmates.

Wrongful Conviction: The Legal Doctrine and Procedure that Stand Between Liberty and Injustice

Emi-Lee R. Commisso

Introduction

100 years ago, Oliver Wendell Holmes Jr.—Associate Justice of the Supreme Court of the United States—took the bench and looked into the eyes of a zealous young lawyer, only to remark: "[t]his is a court of law, young man, not a court of justice."[1] 100 years later, these words are perhaps even more salient. While courthouses around the world stand adorned with the scales of justice, there is no guarantee that this fundamental human right will be afforded to those who enter.[2] This uncomfortable truth has confronted the legal system for centuries.[3] Arguably, its most profound manifestation lies with those who have been wrongfully convicted.

Historically, the conviction and execution of innocent persons have sparked discourse by actors within and outside the world of criminal justice.[4] This can be traced as far back as seventeenth-century England; prominent public figures implored the courts to raise the standard of evidence deemed acceptable for use in capital cases.[5] Yale law professor Edwin Borchard expanded on these early discussions with his publication, *European Systems of State Indemnity for Errors of Criminal Justice*.[6] He explained that while the protection of public

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[1] *See, e.g.*, Michael Herz, "Do Justice!": Variations of a Thrice-Told Tale, 82 VA. L. REV. 111, 113 n.9 (1996); BUCKNER F. MELTON JR., CRIMINAL JUSTICE: THE LAW 26 (2010).

[2] *See* MELTON JR., *supra* note 1, at 26 (remarking that "justice is a difficult and at times an uncertain concept.").

[3] *See, e.g.*, Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1188-90, 1195 (2005).

[4] *Id.* at 1185-86, 1188.

[5] *Id.* at 1188-89.

[6] Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (May 1912 to March 1913).

safety is an inherent function of the State under *jura majestatis* (rights of sovereignty), errors in the administration of American law, leading to wrongful conviction, have not been sufficiently met with apology, redress, or reform.[7] Today, we continue to grapple with these challenges, as the pervasiveness of wrongful conviction comes to be better understood.[8]

Since 1989, there have been 2722 exonerations in the United States.[9] The most widely accepted estimates suggest that the prevalence of wrongful conviction is between 1% and 5%,[10] while other sources argue that it could be as high as 10%.[11] Given an incarcerated population of 2.3 million, these are not insignificant figures.[12] In 2019, State's Attorney Marilyn Mosby—the architect of Baltimore's enhanced Conviction Integrity Unit—stated that exonerees Chestnut, Watkins, and Stewart "must now reconcile that we live in a world that could take 36 years away from innocent men."[13] However, while these young men must reconcile with this notion, we, as a society, simply cannot accept it. In 1790, French attorney Claude-Emmanuel de Pastoret stated that wrongful conviction was "as unavoidable a misfortune in our social order for the moral existence of the citizen, as hail or lightning is for his physical existence."[14] History has taught us otherwise.

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[7] *Id.* at 684-85.

[8] *See id.* at 684; *see also* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827, 832-38, 867 (2010).

[9] *The National Registry of Exonerations*, University of Michigan Law, Michigan State University, and UCI Newkirk Center for Science and Society, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Jan. 29, 2021).

[10] *See, e.g.*, Gould & Leo, *supra* note 8, at 832-36; Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69-70 (2006); Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Error*, 53 CRIME & DELINQ. 436, 440, 460 (2007); Michael D. Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 768, 778 (2007); Marvin Zalman, Brad Smith & Amy Kiger, *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72, 83-87 (2008).

[11] John Grisham, *Why the innocent end up in prison*, Chi. Trib. (Mar. 14, 2018), https://www.chicagotribune.com/opinion/commentary/ct-perspec-innocent-prisoners-innocence-project-death-row-dna-testing-prosecutors-0315-story.html.

[12] *Id.*; Ramsay & Frank, *supra* note 10, at 440; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, The Prison Policy Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[13] Timothy Williams, *They Spent 36 Years Behind Bars for Murder. Someone Else Did It.,* N.Y. Times (Nov. 25, 2019), https://www.nytimes.com/2019/11/25/us/baltimore-men-exonerated-murder.html; *Conviction Integrity Unit,* State's Attorney Office, https://www.stattorney.org/office/bureaus-units/conviction-integrity-unit (last visited Apr. 18, 2021).

[14] Borchard, *supra* note 6, at 690; 2 CLAUDE-EMMANUEL JOSEPH PIERRE DE PASTORET, DES LOIX PÉNALES 118 (Paris, Chez Buisson 1790).

Wrongful convictions implicate the entirety of the criminal justice system—from policing and investigation, to prosecution and sentencing.[15] Whether it is the result of a negligent and incompetent performance of one's duties or intentional and unethical maleficence, the injury to innocent persons is grave.[16] I will demonstrate that existing policies, practices, precedent, and jurisprudence all contribute to a flawed exercise of justice, where the fundamental right to due process is outweighed and eclipsed by the need for efficient crime control. To limit the potential for wrongful conviction, the system must call for legislative action, engage in procedural reform, and look to reshape damaging sub-cultural norms.

This article will begin by discussing the philosophical underpinnings of the Fourteenth Amendment Due Process Clause. It will then examine the effect that dominant legal precedent and jurisprudence have on the occurrence of wrongful convictions. Next, it will evaluate the policies and practices of law enforcement, prosecutors, and indigent defense counsel, as well as address the limitations of the crime control culture of the criminal justice system. Finally, this article will emphasize the individual, collateral, and legal consequences of wrongful conviction; and draw upon legal philosophy and case law to propose new ways of tackling this victimization of innocent persons. It is the responsibility of all citizens to demand greater integrity and fairness in the legislation and administration of the law, so as to balance the scales of justice.

I. The Jurisprudence and Legal Precedent Underlying Wrongful Convictions

A. The Philosophical Foundations of the Fourteenth Amendment Due Process Clause

The Fourteenth Amendment Due Process Clause can be conceptualized through the philosophical writings of Jean-Jacques Rousseau, Emile Durkheim, Max Weber, and Montesquieu. It reads: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."[17] The "social contract," as formulated by Rousseau, touched upon these ideas—it was a solution to the loss of freedom that came with the development

[15] James M. Doyle, *Learning From Error in the Criminal Justice System: Sentinel Event Reviews*, in MENDING JUSTICE: SENTINEL EVENT REVIEWS 3, 4-5 (National Institute of Justice ed., Sept. 2014); Interview with Richard Duque, Criminology Professor (Dec. 10, 2020).

[16] *See id.* at 4-6, 8-9; Borchard, *supra* note 6, at 684; Saundra D. Westervelt & Kimberly J. Cook, *Coping with Innocence after Death Row*, 7 CONTEXTS 32, 35-37 (2008); Interview with Richard Duque, Criminology Professor (Dec. 10, 2020).

[17] U.S. CONST. amend. XIV, § 1.

of society.[18] More specifically, the social contract was an agreement in which citizens relinquished their individual rights in favor of the will of 'the people.'[19] In so doing, a state was born.[20] As part of this construction of sovereignty, the "general will" was translated into law,[21] and the State promised to defend the interests of the public, to protect their safety, and to bring about renewed liberty.[22] While Rousseau did not directly use the language of "due process," he did emphasize that the sovereign could not exist without limitations on its power.[23] His work was an early consideration of the ideals etched into the Fourteenth Amendment.

Durkheim dove deeper into the foundations of the law itself. He saw it as a reflection of our "collective conscience"—our shared "beliefs and sentiments."[24] As such a symbol of "social solidarity,"[25] the law has become a "sacred" space through which we contemplate and revise our understanding of moral issues.[26] In theory, it is fair and just and equal. However, in executing the law, moral conflicts can also unfold. Max Weber came to learn that the "formal-procedural rationality (Zweckrationalität)" that developed with modern society brought greater efficiency and regularity at the cost of "substantive-value rationality (Wertraitionalität);" he called this the "iron cage."[27] Likewise, the methodic bureaucratic processes of the criminal justice system can compromise the very values that underlie them.[28] The extensive standards, policies, and practices designed to justly implement the law can be driven by a focus on crime control goals (i.e. efficiency), which conflict with

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[18] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT: OR, THE PRINCIPLES OF POLITICAL RIGHTS 2, 20, 46-48 (Rose M. Harrington trans., London, G.P. Putnam's Sons 1893)(1762) ("Man is born free, and he is everywhere in chains.") ("'To find a form of association which shall defend and protect with the public force the person and property of each associate, and by means of which each, uniting with all, shall obey however only himself, and remain as free as before.' Such is the fundamental problem of which the *Social Contract* gives the solution.").

[19] *Id.* at 21-22, 46-47.

[20] *Id.* at 22.

[21] *Id.* at 36.

[22] *Id.* at 20, 48.

[23] *Id.* at 47.

[24] *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79-80, 84, 130 (George Simpson trans., New York, Macmillan 1933) (1893); *see also* Brett C. Burkhardt & Brian T. Connor, *Durkheim, Punishment, and Prison Privatization*, 3 SOC. CURRENTS 84, 85, 91 (2015).

[25] DURKHEIM, *supra* note 24, at 64.

[26] *Id.* at 100; JOHN R. SUTTON, LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE 6 (2001).

[27] The Metaphysics Research Lab, *Max Weber*, Stanford Encyclopedia of Philosophy (Aug. 24, 2007), https://plato.stanford.edu/entries/weber/#IroCagValFra; *see* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 123-124 (Talcott Parsons trans., Routledge 2005) (1930) (describing citizens subject to the iron cage as "[s]pecialists without spirit, sensualists without heart . . . .").

[28] *See* SUTTON, *supra* note 26, at 108, 110.

underlying substantive due process interests.[29] This can result in the abuse of inalienable individual rights, as well as threats to the presumption of innocence.[30]

As Montesquieu suggested, "constant experience shows us, that every man invested with power is apt to abuse it . . . . To prevent this abuse . . . power should be a check to power."[31] The Fourteenth Amendment Due Process Clause helps serve this role. In 1868, this amendment was ratified and made enforceable across all jurisdictions in the American federalist system.[32] As imbued in President John Adams' phrase, "a government of laws, and not of men," the Fourteenth Amendment Due Process Clause is designed to protect the rights of citizens from abuse by government actors working outside the law.[33] It is a critical legal safeguard against wrongful conviction.[34]

B. The Legal and Procedural Doctrine Relating to Due Process: The Right to Counsel

The Supreme Court in *Hebert v. Louisiana* remarked that the Fourteenth Amendment protected "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."[35] In *Powell v. Alabama* the majority contended that the Sixth Amendment right to counsel constitutes one of these "fundamental principles."[36] The defendants, a group of African American males, were convicted of rape and later sentenced to death.[37] Since the crime had the potential to carry a capital sentence, the defendants were entitled to appointed counsel.[38] However, they were left to navigate all proceedings on their own, from the arraignment onwards.[39] It wasn't until the start of trial that they had counsel, though it was superficial in nature.[40] As eloquently explained by Justice Sutherland: "[h]e [the defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not

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[29] *See id.*

[30] *See* Herbert L. Packer, *Two models of the criminal process*, 113 U. PA. L. REV. 1, 16 (1964).

[31] 1 CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 214 (Thomas Nugent trans., London, J. Nourse and P. Vaillant 2nd ed. 1752) (1748).

[32] *Fourteenth Amendment*, Cornell Law School - Legal Information Institute, https://www.law.cornell.edu/wex/fourteenth_amendment_0 (last visited Jan. 10, 2021).

[33] JOHN ADAMS, NOVANGLUS, AND MASSACHUSETTENSIS 84 (Boston, Hews & Gross 1819) (1774); *Due Process*, Cornell Law School - Legal Information Institute, https://www.law.cornell.edu/wex/due_process (last visited Apr. 19, 2021).

[34] *See*, e.g., *supra* note 17; *Procedural Due Process-Criminal*, Cornell Law School - Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/procedural-due-process-criminal (last visited Jan. 10, 2021).

[35] *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

[36] *Id.; Powell v. Alabama*, 287 U.S. 45, 67-68, 70 (1932).

[37] *Powell,* 287 U.S. at 49-50.

[38] *Id.* at 50, 59-60.

[39] *Id.* at 57.

[40] *Id.* at 57-58.

know how to establish his innocence."[41] This was particularly pertinent because the defendants were "youthful," "ignorant," "illiterate," and faced the prospect of death without the support of family or friends by their side.[42] The Court held that a denial of this fundamental right was an abuse of due process, and the conviction was reversed.[43] Given the Court's phrasing of the opinion, this holding was only made applicable to the specific facts of *Powell*.[44] Nevertheless, *Grosjean v. American Press Co., Johnson v. Zerbst, Avery v. Alabama*, and *Smith v. O'Grady*, for example, later affirmed the necessity of legal representation in protecting liberty and justice.[45]

Betts v. Brady broke from this precedent,[46] only to be overruled in the landmark case of *Gideon v. Wainwright*.[47] As an indigent defendant, Betts asked the court for counsel.[48] Given the nature of his robbery charge, this request was denied.[49] Despite his best efforts, the court handed down a guilty verdict and he was sentenced to eight years in prison.[50] Habeas corpus relief was also rejected,[51] as the judge held that Betts was "not helpless" at the time of trial, but capable of adequately defending "his own interests."[52] Based on the facts of this particular case, the Court did not find the Sixth Amendment right to counsel necessary for the trial to be fair.[53] Interestingly, the facts and circumstances of *Betts* are quite similar to those in *Gideon*.[54] Clarence Gideon appeared before the court and requested that the judge appoint him a lawyer.[55] However, he was charged with a non-capital felony offense, which, under Florida state law, meant that he was not entitled to representation.[56] So, Gideon defended himself *pro se* and was ultimately convicted and given a five year sentence.[57] He claimed that his Fourteenth Amendment rights had been violated, but upon further review,

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[41] *Id.* at 69.
[42] *Id.* at 52, 69, 71.
[43] *Id.* at 71, 73.
[44] *See id.* at 71; *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).
[45] *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938); *Avery v. Alabama*, 308 U.S. 444, 446-47 (1940); *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *Gideon*, 372 U.S. at 343-44.
[46] *Betts v. Brady*, 316 U.S. 455 (1942); *Gideon*, 372 U.S. at 343-44.
[47] *Gideon,* 372 U.S. at 345.
[48] *Betts,* 316 U.S. at 457.
[49] *Id.* at 456-57.
[50] *Id.* at 457.
[51] *Id.*
[52] *Id.* at 472.
[53] *Id.* at 473.
[54] *Gideon*, 372 U.S. at 338.
[55] *Id.* at 337.
[56] *Id.*
[57] *Id.*

relief under habeas corpus was denied.[58] It wasn't until the case reached the Supreme Court that the conviction in *Betts* was reversed.[59] The Supreme Court concluded that in an adversarial system of justice it is but "an obvious truth" that indigent defendants require counsel.[60] The Justices reasoned that if the government found it necessary to invest significantly in prosecutors, under the assumption that they are fundamental to the legal system, then defense lawyers must also be deemed "necessities, not luxuries."[61] *Gideon* highlighted the importance of fairness in legal proceedings—specifically, that all defendants were to be treated equally and impartially before the court.[62] This penchant for due process only continued to grow thereafter.

Previously, the courts had acknowledged that the Sixth Amendment right to counsel inherently afforded "effective assistance of counsel."[63] It was not until *McMann v. Richardson* that this notion was more effectively expressed in the law.[64] The Court finally articulated that this right would be ineffectual if "incompetent" attorneys represented those accused.[65] With this in mind, *Strickland v. Washington* later provided the legal system with a mechanism through which to assess the quality of counsel: the performance must not be so "deficient"[66] as to create "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[67] This standard protects the due process interests of defendants.[68]

Much of the case law discussed up to this point has focused on why assistance of counsel is necessary and how to ensure each defendant receives quality representation. However, there is also the question of when to implement these rights. The courts have determined that all citizens must be furnished with an attorney "at or after" the start of

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[58] *Id.*

[59] *Id.* at 345 ("The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested . . . . Twenty-two States, as friends of the Court, argue that Betts was 'an anachronism when handed down,' and that it should now be overruled. We agree.").

[60] *Id.* at 344.

[61] *Id.*

[62] *Id.*

[63] *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

[64] *See id.* at 771.

[65] *Id.* ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.").

[66] *Strickland v. Washington*, 466 U.S. 668, 682, 687 (1984).

[67] *Id.* at 687, 694.

[68] *Id.* at 711 (Marshall, J., dissenting).

"adversary judicial proceedings," also referred to as "critical stage[s]."[69] These critical stages include: arraignments,[70] the "period between arraignment and . . . trial,"[71] custodial interrogations,[72] preliminary hearings,[73] identification procedures occurring at the start or following the start of prosecution,[74] plea negotiations and when entering into a guilty plea,[75] trial,[76] sentencing,[77] direct appeals,[78] and in some instances, probation and parole revocation proceedings.[79] Without counsel, the defendant would be prejudiced, thus violating their "right to a fair trial."[80]

The critical stages that occur during investigatory and preparatory phases are of particular interest to this article. *Powell* emphasized the importance of these stages in building a strong defense, and as such, the need for counsel to be present.[81] The Court in *Wade* later built upon this argument. The defendant was indicted on robbery charges, but the government violated his Sixth Amendment right to counsel during a post-indictment lineup.[82] So, the conviction was vacated, and *Wade* returned to the lower courts for additional action.[83] Given the possibility for suggestiveness during lineup procedures,[84] the Court was

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[69] *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972); *see, e.g.*, *Moran v. Burbine*, 475 U.S. 412, 428 (1986); *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981); *Moore v. Illinois*, 434 U.S. 220, 226-27(1977); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Coleman v. Alabama*, 399 U.S. 1, 14-15 (1970) (Black, J., concurring) ("As a shorthand expression, we have used the words 'critical stage' to describe whether the preliminary phase of a criminal trial was part of the 'criminal prosecution.'"); 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION 43-44 (Carolina Academic Press 4th ed. 2015) (1991).

[70] *See Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *Effective Assistance at Critical Stages*, Sixth Amendment Center (2021), https://sixthamendment.org/the-right-to-counsel/effective-assistance-at-critical-stages/.

[71] *See Powell v. Alabama*, 287 U.S. 45, 57 (1932); Sixth Amendment Center, *supra* note 70.

[72] *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); Sixth Amendment Center, *supra* note 70.

[73] *Coleman*, 399 U.S. at 9-10; Sixth Amendment Center, *supra* note 70.

[74] *See, e.g.*, *Moore v. Illinois*, 434 U.S. 220 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); Sixth Amendment Center, *supra* note 70.

[75] *See, e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Iowa v. Tovar*, 541 U.S. 77 (2004); *Hill v. Lockhart*, 474 U.S. 52 (1985); *McMann v. Richardson*, 397 U.S. 759 (1970); Sixth Amendment Center, *supra* note 70.

[76] *See, e.g.*, *Alabama v. Shelton*, 535 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (U.S. 1963); Sixth Amendment Center, *supra* note 70.

[77] *See, e.g.*, *Lafler*, 132 S. Ct 1376 (2012); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Glover v. United States*, 531 U.S. 198 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967); Sixth Amendment Center, *supra* note 70.

[78] *See, e.g.*, *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963); Sixth Amendment Center, *supra* note 70.

[79] *See, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Mempa v. Rhay*, 389 U.S. 128 (1967); *but see Morrissey v. Brewer*, 408 U.S. 471 (1972); Sixth Amendment Center, *supra* note 70.

[80] *See Wade*, 388 U.S. at 226-27; *Gideon*, 372 U.S. at 344.

[81] *See Powell*, 287 U.S. at 57-59.

[82] *Wade*, 388 U.S. at 220.

[83] *Id.* at 243.

[84] *Id.* at 233-36.

greatly concerned about the fairness of the lineup, especially in the absence of counsel.[85] In fact, it was determined on cross-examination that one eyewitness was in a position to see the lineup assembly process, during which time an FBI agent's presence singled out defendant Wade.[86] The Court argued that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[87] Thus, "the post-indictment lineup was a critical stage" where counsel was required.[88]

Kirby v. Illinois and *United States v. Ash* then deviated from the more inclusive nature of these opinions by restricting the expansiveness of critical stages.[89] The U.S. Supreme Court concluded in *Kirby* that lineups conducted in advance of "adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"—would not necessitate legal representation.[90] The police stopped Kirby and his friend Bean, both of whom had been in possession of Willie Shard's wallet contents at the time.[91] After the police determined that a robbery had occurred, Mr. Shard was taken to the station and he identified the two men as the perpetrators.[92] The petitioner filed a pretrial motion to prohibit use of the identification provided by Shard, but this request was rejected and the verdict was upheld on appeal.[93] The Court argued that at the time of the identification there was no need for counsel, as it is only upon the start of "judicial criminal proceedings" that legal representation is required to protect the defendant from the "forces" of the government;[94] and the justice system must accordingly weigh the need to investigate crimes.[95] The Court in *Ash* went one step further by also finding that post-indictment photographic displays do not constitute critical stages.[96] The Justices argued that representation is not needed to help defendants meet their adversaries, as these procedures are not conducted in person.[97] Moreover, the Court did not believe that the same

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[85] *Id.* at 234, 236.
[86] *Id.* at 234.
[87] *Id.* at 224.
[88] *Id.* at 237.
[89] *See Kirby v. Illinois*, 406 U.S. 682 (1972); *United States v. Ash*, 413 U.S. 300 (1973).
[90] *Kirby*, 406 U.S. at 689-90.
[91] *Id.* at 684.
[92] *Id.*
[93] *Id.* at 685-86.
[94] *Id.* at 689-90.
[95] *Id.* at 691.
[96] *Ash*, 413 U.S. at 324-25 (Stewart, J., concurring).
[97] *Id.* at 317.

threats to due process existed with photographic displays as they do with live lineups, and so, the additional safeguard of counsel was deemed unnecessary.[98]

C. The Legal and Procedural Doctrine Relating to Due Process: The Right to Discovery

As established by "the Due Process Clauses of the Fifth and Fourteenth Amendments," the accused has the right to view particular pieces of evidence in the custody of the government.[99] In *Mooney v. Holohan*, it was alleged that the government violated these rights when the prosecutor utilized perjured testimony, and further hid evidence that could shed light on the unreliability of that testimony, in order to jail and convict the accused.[100] The Court ruled that the prosecutor's nondisclosure was an act of "deliberate deception" designed to restrict the defendant's liberty, and as such, deprive him of his due process guarantees.[101] *Pyle v. Kansas* further held that given a "proven" denial of Fifth and Fourteenth Amendment rights, the defendant would be eligible for discharge from custody.[102] Like in *Mooney*, Harry Pyle alleged that he was confined on the basis of perjured testimony and suppressed evidence.[103] The Kansas state court failed to adequately investigate the truth of these claims before rejecting his "petition for a writ of habeas corpus."[104] This led the Court in *Pyle* to reverse and remand.[105]

These decisions served as leading authorities, later informing the ruling in *United States Ex Rel. Almeida v. Baldi*.[106] Almeida was convicted on murder charges after exculpatory ballistic evidence was left out of trial.[107] The court argued that the Commonwealth violated principles of due process through "[t]he suppression of evidence favorable to Almeida [the accused] . . . . "[108] *Napue v. Illinois* expanded upon these discussions of discovery rights.[109] Henry Napue was given a 199-year sentence on the testimony of a key witness, George Hamer.[110] Hamer was "promised consideration" for his cooperation, though this was not adequately disclosed to the jury.[111] The State violated the defendant's constitutional rights

[98] *Id.* at 321, 325 (Stewart, J., concurring).
[99] DRESSLER & MICHAELS, *supra* note 69, at 143.
[100] *Mooney v. Holohan*, 294 U.S. 103, 110 (U.S. 1935).
[101] *Id.* at 112.
[102] *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)).
[103] *Id.* at 216.
[104] *Id.* at 215-16.
[105] *Id.* at 216.
[106] *United States Ex Rel. Almeida v. Baldi*, 195 F.2d 815, 820 (3d Cir. 1952).
[107] *Id.* at 816-17.
[108] *Id.* at 820.
[109] *Napue v. Illinois*, 360 U.S. 264 (1959).
[110] *Id.* at 266.
[111] *Id.* at 267-70.

when they permitted Hamer to present false testimony, even if it was unsolicited.[112] Moreover, the Court emphasized that the prosecution cannot use "false evidence," regardless of whether they perceive the effect of that evidence to be limited to questions of witness credibility, rather than innocence.[113] These determinations must be left to the jury.[114] Ultimately, this case law culminated thirty years later in *Brady v. Maryland*.[115]

Petitioner John Brady and his associate Charles Boblit were convicted of first-degree murder and given the death penalty.[116] Brady claimed that while he was guilty of participating in the robbery that resulted in murder, he did not take part in the killing.[117] Unlike in *Napue*, Brady had outwardly asked for access to Boblit's out-of-court statements.[118] It was not until well after the trial took place and the courts further upheld the conviction that new evidence came to light—the government suppressed a statement where Boblit openly confessed to the homicide.[119] A retrial was granted strictly to revisit the issue of punishment.[120] The Court drew from the language of past precedent when "hold[ing] that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[121] *Brady v. Maryland* remains a touchstone on defendants' rights to exculpatory evidence and information.[122]

These rights differ slightly in their implementation within the grand jury as compared to trial.[123] Where it is clear that evidence would be significantly valuable to the defense, the principle of fairness demands that it be shared, though there need not be a formal request to necessitate this process.[124] According to procedural standards, *Brady* material must be "promptly" given to opposing counsel, so that they have sufficient time to

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[112] *Id.* at 269.
[113] *Id.*
[114] *Id.*
[115] *Brady v. Maryland*, 373 U.S. 83 (1963).
[116] *Id.* at 84.
[117] *Id.* at 84-85.
[118] *Id.* at 84.
[119] *Id.*
[120] *Id.* at 85.
[121] *Id.* at 87.
[122] *See* Colin Starger, Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Marlyand, 46 LOY. L. A. L. REV. 77, 80, 82, 159 (2012); *see also* Bennett L. Gershman, Reflections on Brady v. Maryland, 47 S. TEX. L. REV. 685, 685-87 (2006).
[123] *See* DRESSLER & MICHAELS, *supra* note 69, at 129, 143-44.
[124] *United States v. Agurs*, 427 U.S. 97, 110 (1976).

undergo an exhaustive investigation and make strategic preparations.[125] Convictions may be overturned in instances where these Fifth Amendment rights are violated and defendants are no longer able to have a fair trial.[126] Otherwise, the government would be required to prove—"beyond a reasonable doubt"—that the result of the case would have nevertheless been the same, even if the evidence was relayed.[127] In grand jury proceedings, on the other hand, prosecutors are not obligated to present *Brady* evidence.[128] However, in practice, the U.S. Attorneys' manual has specified that when a prosecutor has knowledge of evidence that speaks to the innocence of an alleged offender, they must divulge this information to the grand jury prior to the pursuit of an indictment.[129]

D. The Legal and Procedural Doctrine Relating to Due Process: The Defendant's Rights at Trial

In addition to defense counsel, judges have a duty to protect "the rights of the accused."[130] Confrontation and self-incrimination are issues of particular note. The Sixth Amendment provides defendants with the right to face those witnesses that will be testifying on behalf of the government.[131] Indeed, cross-examination enables the jury to evaluate the credibility and truthfulness of witnesses.[132] It has been argued that this confrontation serves as the "greatest legal engine ever invented for the discovery of the truth."[133] If any prosecutor or judge were to directly interfere with this vital process, integrity and fairness would be lost.[134]

The Fifth Amendment also states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[135] In court, it is the responsibility of defense counsel to facilitate their client's interest in waving or asserting this privilege.[136]

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[125] *See* Standards for Criminal Justice: Prosecution Function § 3-5.5 (Am. Bar Ass'n 3d ed. Proposed Revisions 2010); Telephone interview with Glenn Kirschner, Assistant U.S. Att'y. (Sept. 23, 2020).

[126] *E.g.*, *Agurs*, 427 U.S. at 103; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

[127] *United States v. Bagley*, 473 U.S. 667, 684, 704, 707 (1985).

[128] *United States v. Williams*, 504 U.S. 36, 51-55 (1992); DRESSLER & MICHAELS, *supra* note 69, at 129.

[129] U.S. Attorneys' Manual § 9-11.233.

[130] Standards for Criminal Justice: Special Functions of the Trial Judge § 6-1.1 (Am. Bar Ass'n 3d ed. 2000).

[131] U.S. CONST. amend. VI.

[132] *California v. Green*, 399 U.S. 149, 158 (1970).

[133] *Id.* at 158 (U.S. 1970) (quoting 5 John Henry Wigmore, Evidence § 1367 (3d cd. 1940)).

[134] *See*, *e.g.*, *id.;* DRESSLER & MICHAELS, *supra* note 69, at 237-38; *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (referring to the Confrontation Clause as a "bedrock procedural guarantee . . . .").

[135] U.S. CONST. amend. V.

[136] *See* DRESSLER & MICHAELS, *supra* note 69, at 262; *see also* John H. Langbein, *The Historical Origins of the Privilege Against Self Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048, 1054 (1994).

Though, the trial judge must formally question the defendant to ensure that these rights are "knowingly waived."[137] This is colloquially referred to as a "Boyd Inquiry."[138] Without this safeguard, this Fifth Amendment right against self-incrimination, and its "noble" attempt to protect the liberty of defendants, would be subject to challenge.[139] Additionally, *Griffin v. California* prohibits the government from suggesting that the accused's decision to remain silent thereby demonstrates guilt.[140] Upon the defense's request, the judge must also instruct the jury not to draw such conclusions.[141] Otherwise, by "inferring guilt from a defendant's silence . . ." jurors would inappropriately "make[] testimonial use of the silence itself."[142]

In all of these instances, the judge and the prosecutor could face disciplinary action for improper behavior.[143] Misconduct could be met, for example, with reprimand, sanction, suspension, probation, or disbarment/removal from the bench.[144] Furthermore, if their errors have prejudiced the defendant and deprived them of their due process rights, any conviction thereafter could also be reversed.[145]

II. The Legal and Procedural Causes of Wrongful Conviction

A. Contributing Factors

Wrongful conviction is the product of systemic failings: "[T]he errors of many individuals ('active errors') converge and interact with system weaknesses ('latent conditions'), increasing the likelihood that individual errors will do harm."[146] As such, responsibility lies, to some extent, with all agents of the criminal justice system.[147] Not just

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[137] *Boyd v. United States*, 586 A.2d 670, 675 (D.C. 1991).

[138] Telephone interview with Glenn Kirschner, Assistant U.S. Att'y. (Sept. 23, 2020); *see also Boyd*, 586 A.2d at 675, 678.

[139] *Boyd*, 586 U.S. at 675, 678; *see Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (U.S. 1964); *see also Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quoting Erwin N. Griswold, THE FIFTH AMENDMENT TODAY 7 (1955)).

[140] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[141] *Carter v. Kentucky*, 450 U.S. 288, 300-03 (1981).

[142] DRESSLER & MICHAELS, *supra* note 69, at 281; *see also Carter*, 450 U.S. at 305.

[143] *See* Model Rules of Prof'l Conduct R. 8.1, 8.4 (Am. Bar Ass'n 2020); *see* Model Code of Judicial Conduct Canon 1-3 (Am. Bar Ass'n 2019); *see also* Neil Gordon, *Misconduct and Punishment: State disciplinary authorities investigate prosecutors accused of misconduct*, The Center for Public Integrity (Jun. 26, 2003), https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/.

[144] Model Rules for Law. Disciplinary Enf't R. 10.1 (Am. Bar Ass'n 2002); Model Rules for Judicial Disciplinary Enf't § II, R. 6.2 (Am. Bar Ass'n 1995); Gordon, *supra* note 143; *see also* Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, Reuters, https://www.reuters.com/investigates/special-report/usa-judges-misconduct/.

[145] *E.g.*, *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 7 (Tex. Crim. App. 1990); *see* DRESSLER & MICHAELS, *supra* note 69, at 73; *see also How Courts Work: Steps in a Trial*, Am. Bar Ass'n (Sept. 09, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals/.

[146] Doyle, *supra* note 15, at 4.

[147] *Id.*

with those who wield the sword of justice (i.e. police, prosecutors, defense attorneys, and judges), but importantly with those who forged it (i.e. legislators, policymakers, and politicians).[148] It is both the design of the system and the actions of individuals, as driven by law and policy, which come together to create tragedy.[149] Ultimately, an understanding of the most common factors that contribute to wrongful conviction will help illustrate weaknesses in the law and those in its administration by our actors and institutions of justice. Eyewitness misidentification, false confessions, prosecutorial misconduct, and inadequate defense representation are particularly notable sources of error.[150]

As stated by the court in *Wade*, "the annals of criminal law are rife with instances of mistaken identification."[151] Scholars have estimated that more than 75% of all "known" wrongful convictions can be somewhat attributed to eyewitness misidentification.[152] Naturally, with each witness account there is a degree of unreliability due to the stress experienced at the time of the crime.[153] Research suggests that while eyewitnesses feel as though the event is effectively "stenciled into their minds," there is but a small link between their certainty in the identification and its accuracy.[154] This is an inevitable fallibility of eyewitness identifications.[155] However, suggestive procedures and language can further impact their accuracy.[156] Consider the flawed administration of lineups and photo arrays. Marvin Anderson was a victim of this misconduct before becoming the United States' ninety-ninth exoneree to be vindicated through the use of DNA testing.[157] During his case, the police presented witnesses with a photo array that was entirely in black and white, excluding his photo, which was in color.[158] Moreover, he was the only individual to be included in "both the photo array and the lineup."[159] Grossly suggestive and unfair

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[148] *Id.* at 4-5.

[149] *Id.* at 4.

[150] Gould & Leo, *supra* note 8, at 841.

[151] *Wade*, 388 U.S. at 228.

[152] Gould & Leo, *supra* note 8, at 841.

[153] Saul M. Kassin, Phoebe C. Ellsworth, & Vicki L. Smith, *The "general acceptance" of psychological research on eyewitness testimony: A survey of the experts*, 44 AM. PSYCHOL. 1089, 1091, 1093, 1096 (1989); Sven-Ake Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCHOL. BULL. 284, 284, 286, 289-290 (1992); Gould & Leo, *supra* note 8, at 841.

[154] Gould & Leo, *supra* note 8, at 841-42.

[155] *See* Gould & Leo, *supra* note 8, at 841.

[156] *Id.* at 842.

[157] *See Marvin Anderson*, Mid-Atlantic Innocence Project, https://exonerate.org/all-project-list/marvin-anderson/(last visited Jan. 15, 2020).

[158] JON GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 84, 144 (2008).

[159] *Id.*

procedures, such as those described in Mr. Anderson's case, distort the recall provided by witnesses and their memory of the "identification experience" itself.[160]

False confessions can also result from police misconduct.[161] Law enforcement officials experience a great deal of pressure from the public, the media, and political figures to swiftly apprehend criminal perpetrators.[162] This can cause them to operate with tunnel vision.[163] Investigations can become driven by the belief that an identified suspect is guilty,[164] and any evidence that is contradictory to this presumed guilt may be concealed or disregarded.[165] Additionally, law enforcement can use "psychologically coercive . . . interrogation methods," such as threats of punishment, isolation and detention, and offers of leniency, which can induce false confessions.[166] Suspects can become emotionally, psychologically, and physically exhausted; they see no option but to confess to a crime they did not commit.[167] Then, following an admission of guilt, detectives further influence the story offered by the confessor, for example, by contributing insight into the particulars of the crime and eliciting feelings of remorse.[168] This misconduct can significantly affect rates of wrongful conviction—"in two studies, innocent false confessors whose cases went to trial were convicted 73-81% of the time."[169] It has also been reported that in cases prior to 2004, false confessions were present in roughly 65% of homicide-related wrongful convictions cleared through DNA testing.[170] While the legal principle of *nemo tenetur seipsum accusare* ("no

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[160] Gary L. Wells & Amy L. Bradfield, *"Good, you identified the suspect": Feedback to eyewitnesses distorts their reports of the witnessing experience*, 83 J. APPL. PSYCHOL. 360, 366, 372, 374 (1998).

[161] Gould & Leo, *supra* note 8, at 844-850.

[162] *See* Samuel Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 477-478, 494 (1996); *see also* Jenia Iontcheva Turner, *Regulating Interrogations and Excluding Confessions in the United States: Balancing Individual Rights and the Search for the Truth*, in DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL: A COMPARATIVE PERSPECTIVE ON EVIDENTIARY RULES 1, 94, 96 (Sabine Gless and Thoma Richter ed., 2019); *see also* Gould & Leo, *supra* note 8, at 857-58.

[163] Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WIS. L. REV. 291, 292 (2006); Gould & Leo, *supra* note 8, at 851, 857-58.

[164] Deborah Davis & Richard A. Leo, *Strategies for Preventing False Confessions and Their Consequences*, in PRACTICAL PSYCHOLOGY FOR FORENSIC INVESTIGATIONS AND PROSECUTIONS 124 (Mark Kebbell & Graham Davies eds., 2006).

[165] Findley & Scott, *supra* note 163, 292; Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

[166] Richard A. Leo, *Police Interrogation and American Justice* 155-162 (2008); Gould & Leo, *supra* note 8, at 846; *Miranda*, 384 U.S. at 448.

[167] *See* Gould & Leo, *supra* note 8, at 846-47.

[168] *Id.* at 849.

[169] *Id.* at 844 n.107; *see* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 959, 961, 992 (2004); *see also* Richard A. Leo & Richard J. Ofshe, *Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 481-83 (1998).

[170] Gould & Leo, *supra* note 8, at 844; WELSH S. WHITE, MIRANDA'S WANING

one is bound to bring forth (i.e., accuse) himself") has historically prohibited the use of coercion to acquire confessions—a doctrine now formally codified by the Constitutional protections of the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment Privilege against Self-incrimination[171]—improper police interrogation methods continue to threaten justice.[172]

With regard to prosecutors, there are a number of ways in which their actions can contribute to the possibility of wrongful conviction.[173] In some instances, they may practice witness coaching—the "dark"[174] and "dirty" secret of the American legal industry.[175] The court *In re Eldridge* explained that a lawyer's responsibility is to "extract the facts from the witness, not pour them into him; to learn what the witness does know, not to teach him what he ought to know."[176] Nevertheless, there are those who unethically coach witnesses into providing inaccurate or disingenuous testimony in the hopes of addressing discrepancies in statements, hiding evidence or information otherwise detrimental to the government's case, and securing convictions.[177] Prosecutors may also make "inappropriate" and "inflammatory" closing statements, as referenced above in *Griffin v. California*.[178] However, the most common form of misconduct is the failure of prosecutors to properly disclose exculpatory evidence to defense counsel.[179] The prosecution is obligated to turn over evidence of "substantial value," even in the absence of a formal request,[180] as withholding any such information could

PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 225 (2003).

[171] Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 74 n.50, 75-76 (1989); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 479-80 (2005).

[172] *See*, *e.g.*, Leo, *supra* note 166, at 155-162; Turner, *supra* note 162, at 99, 102; Saul Kassin, *It's Time for Police to Stop Lying to Suspects*, N.Y. Times (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/opinion/false-confessions-police-interrogation.html?referringSource=articleShare.

[173] *See* Gould & Leo, *supra* note 8, at 854-55.

[174] John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989).

[175] Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 740 (1998); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 832-34 (2002).

[176] In re *Eldridge*, 82 N.Y. 161, 171 (N.Y. 1880).

[177] Gershman, *supra* note 175, at 832-34.

[178] *Griffin*, 380 U.S. 615; Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action Is Rare After Misconduct*, N.Y. Times (Mar. 21, 2004), https://www.nytimes.com/2004/03/21/nyregion/when-prosecutors-err-others-pay-price-disciplinary-action-rare-after-misconduct.html.

[179] Gould & Leo, *supra* note 8, at 854; *see* Gershman, *supra* note 122, 686 n.8.

[180] *Agurs*, 427 U.S. at 110.

prejudice the defendant.[181] Unfortunately, this misconduct often goes undiscovered.[182] All of these actions can result in a greater likelihood of wrongful conviction.[183] The court in *Berger v. United States* eloquently describes the true role of prosecutors:

> [H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[184]

Similarly, an absence of adequate defense representation can also contribute to the occurrence of wrongful convictions.[185] This is most relevant in the case of public defenders.[186] They suffer from a significant lack of resources and funding, which can hinder their ability to retain "experts, paralegals, and investigators."[187] Moreover, with exceedingly large caseloads, public defenders may be unable to sufficiently prepare for trial, having to resort to a "dismissive, callous or hurried . . . " handling of defendants.[188] Under these circumstances, defense counsel struggle to fulfill their duty as advocates,[189] or to protect their clients from the errors of police, prosecutors, and witnesses.[190] In fact, in an examination of capital cases from 1973-1995, Liebman, Fagan, West and Lloyd found that inadequate defense representation was the most prominent issue.[191]

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[181] *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

[182] Elliott & Weiser, supra note 178 ("'Most of the time, when prosecutors withhold evidence, no one finds out about it,' said Mr. Rudin . . . .").

[183] Gould & Leo, *supra* note 8, at 854-55.

[184] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[185] Gould & Leo, *supra* note 8, at 855-56.

[186] *See*, *e.g.*, Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 678 (2011); Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?* 106 J. CRIM. L. & CRIMINOLOGY 681, 720 (2016); Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, U.S. Dep't of Justice: Bureau of Justice Statistics (Nov. 2000), https://www.bjs.gov/content/pub/ascii/dccc.txt#:~:text=Indigent%20defense%20involves%20the%20use,public%20defenders%20or%20assigned%20counsel (considering that "[o]ver 80% of felony defendants charged with a violent crime in the country's largest counties and 66% in U.S. district courts had publicly financed attorneys.").

[187] Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1291–92 (2013).

[188] *Id.*; Sheila Martin Berry, *"Bad Lawyering": How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487, 489 (2003).

[189] *See* Bazelon, *supra* note 186, at 689.

[190] Adele Bernhard, *Effective Assistance of Counsel*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 227-28 (Saundra Westervelt & John Humphrey eds., 2001).

[191] James S. Liebman, Jeffery Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000).

B. How does the law foster conditions for wrongful conviction?

Wrongful conviction stems from limitations in the scope of legal doctrine, and in the failure of police, prosecutors, and defense attorneys to effectively apply the law. These deficiencies go beyond the human error that is inevitable in the criminal justice system. Rather, they foster conditions for wrongful conviction. Eyewitness misidentification, false confessions, prosecutorial misconduct, and inadequate defense representation should be examined through a more scrupulous legal lens.

It appears that while the presence of counsel at 'critical stages' has been deemed necessary in assuring fair and just criminal prosecutions,[192] this precedent is not always executed in practice.[193] This is of particular concern during investigatory and preparatory stages. The prevailing due process standard cited in *Manson v. Braithwaite*[194] is not sufficient to protect persons throughout investigative pre-trial procedures. With respect to the "reliability" of eyewitness testimony, the Court looks to the factors listed in *Neil v. Biggers*.[195] For example, "the opportunity of the witness to view the criminal at the time of the crime…"[196] is one factor evaluated against "the corrupting effect of the suggestive identification itself."[197] However, should the goal not be to pre-emptively eliminate suggestiveness, rather than attempt to gauge its potential for harm? Moreover, due process cannot be assured, if the Supreme Court, as concluded in *Perry v. New Hampshire*, does not oblige trial judges to examine the reliability of allegedly suggestive identification procedures before permitting eyewitness evidence to be presented to the jury.[198] These limitations pose the potential to affect the fairness of criminal proceedings.

Custodial interrogation is another arena to consider when applying the right to counsel. The significance of a particular stage to the success of a police investigation is subsequently linked to the "criticalness" of legal assistance at that stage.[199] Given the zeal

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[192] *See supra* notes 69-80.

[193] *See*, *e.g.*, SARAH GERAGHTY & MIRIAM GOHARA, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (Feb. 2003), https://www.clearinghouse.net/chDocs/not_public/PD-MS-0004-0001.pdf; *Argersinger*, 407 U.S. at 35 (quoting Dean Edward Barrett: "The gap between the theory and the reality is enormous."); *see infra* note 202-03 and associated text for further discussion of instances when indigent counsel has been absent during critical stages.

[194] *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

[195] *Id.*; *Neil v. Biggers*, 409 U.S. 188 (1972).

[196] *Neil*, 409 U.S. at 199-200.

[197] *Manson*, 432 U.S.at 114.

[198] *Perry v. New Hampshire*, 565 U.S. 228, 238-43 (2012).

[199] *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

and determination of police to acquire confessions "between arrest and indictment," legal representation is required during that time.[200] "The right to counsel would indeed be hollow if it began at a period when few confessions were obtained."[201] While all accused persons may request representation, those that are indigent are often not fully afforded this privilege.[202] It's not uncommon for these individuals to spend months in jail only to have brief conversations with their attorneys, if any, in advance of trial.[203] Thus, there is a lack of procedural law to guarantee due process during this pre-trial period.

Moreover, the legal definition of 'critical stages' falls short of incorporating all consequential investigative procedures. Existing law fails to apply to pre-indictment lineups and post-indictment photographic displays.[204] These events should be seen as equally critical given their potential to elicit incriminating evidence, to impact liberty, and to secure an individual's involvement in the criminal justice system. University justice clinics, law professors, and non-profit criminal justice organizations have fought to expand this definition, as evidenced in the amici curiae petition created for the 2019 case of *Gardner v. The Superior Court of San Bernardino County*.[205] While the circumstances of this petition surround misdemeanor cases and pre-trial appeals, rather than identifications, it nevertheless highlights the need for expanded assistance of counsel in order to avoid wrongful convictions.[206] This petition demonstrates that a critical stage is simply that which could result in "significant consequences for the accused."[207] As such, there is a need for legal representation at greater stages of criminal proceedings. Without a federal or state statute dictating the right of accused persons (especially those that are indigent) to effective defense counsel during the

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[200] *Id.* (citing Edward L. Barrett Jr., *Police Practices and the Law -- From Arrest to Release or Charge*, 50 CAL. L. REV. 11, 43 (1962)); Massiah, 377 U.S. at 204.

[201] *Escobedo,* 378 U.S. at 488.

[202] *See*, *e.g.*, *Miranda*, 384 U.S. at 474; SHUBHANGI DEORAS & NORMAN LEFSTEIN, AM. Bar ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE iv-v (Dec. 2004), https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf; STEPHEN B. BRIGHT ET AL., THE SOUTHERN CENTER FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER …" : A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM 11-12 (Jan. 2003), https://files.deathpenaltyinfo.org/legacy/files/pdf/jan.%202003.%20report.pdf; Alexa Van Brunt, *Poor people rely on public defenders who are too overworked to defend them*, The Guardian (Jun. 17, 2015), https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked.

[203] BRIGHT ET AL., *supra* note 202, at 11-12; GERAGHTY & GOHARA, *supra* note 193, at 6.

[204] *Supra* notes 90, 96.

[205] Brief for the Innocence Project et al. as Amici Curiae Supporting Respondents, *Gardner v. App. Div. of the Super. Ct. of San Bernardino Cty.*, 6 Cal. 5th 998 (Cal. 2019) (No. S246214).

[206] *Id.*

[207] *Id.* at 8-9 (quoting *Bell v. Cone*, 535 U.S. 685, 695-696 (2002)).

aforementioned times, citizens could be more likely to face errors that would increase the prospect of wrongful conviction.[208]

Unfortunately, these accused persons are not only left without counsel but often without effective assistance of counsel.[209] The "sleeping lawyer" problem is a grave reality of the current system.[210] Lawyers provided to indigent defendants are under-resourced and underfunded.[211] In 2007, where state's attorneys' offices received $5.8 billion in funding and had approximately 26,000 support staff, local and state public defender services were given $2.3 billion and had roughly 10,000 support staff.[212] This has considerable effects on the processing of defendants.[213] In New Orleans, public defenders take on close to 19,000 cases respectively, per year, which gives them a mere seven minutes to allocate for each one.[214] This is significant because studies at the federal level show that as caseloads increase, the performance of public defenders worsens, and as wages diverge from the market rate, the probability of being found guilty rises.[215] This absence of "staff, time, training, and resources . . ." means that "*Gideon* [is] an unfunded mandate . . . ."[216] Furthermore, there is limited

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[208] *See id.* at 4-10 (discussing the need for effective assistance of counsel to be present at greater points throughout the judicial process—specifically, pre-trial appeals). This logic can be applied to pre-indictment lineups and post-indictment photographic displays. *See also* DEORAS & LEFSTEIN, *supra* note 202, at iv-v, 3-4, 7, *passim*; *see also* Bazelon, *supra* note 186, at 721.

[209] *Supra* note 202; *see also* ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14 (Apr. 2009), https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/misdemeanor_20090401.pdf.

[210] *E.g.*, DEORAS & LEFSTEIN, supra note 202, at 4; Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN'S, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS *REFORMED AMERICA'S PRISONS* (1998)) (stating that "the *Strickland* Standard, as it has emerged in practice, is that a lawyer with a pulse will be deemed effective."); *ACLU Praises Supreme Court Refusal of 'Sleeping Lawyer' Case as 'Acknowledgment and Reminder' of Death Penalty Problems*, ACLU (Jun. 3, 2002), https://www.aclu.org/press-releases/aclu-praises-supreme-court-refusal-sleeping-lawyer-case-acknowledgment-and-reminder.

[211] THOMAS GIOVANNI & ROOPAL PATEL, AM. BAR ASS'N, GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 1, 4 (2013), https://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

[212] Lynn Langton & Donald J. Farole, Jr., *Public Defender Offices, 2007 – Statistical Tables, Table 1,* U.S. Bureau of Justice Statistics 1-2 (Jun. 27, 2010), https://www.bjs.gov/content/pub/pdf/pdo07st.pdf; Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 Statistical Tables,* U.S. Bureau of Justice Statistics 1, 4 (Dec. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/psc07st.pdf. The funding values provided above are based on a survey of 49 states.

[213] *Martinez-Macias v. Collins*, 979 F.2d 1067, 1068 (5th Cir. 1992) ("The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got what it paid for."); GIOVANNI & PATEL, *supra* note 211, at 4-6.

[214] BORUCHOWITZ ET AL., *supra* note 209, at 21.

[215] RADHA IYENGAR, AN ANALYSIS OF THE PERFORMANCE OF FEDERAL INDIGENT DEFENSE COUNSEL 23, 28 (June 2007), https://www.nber.org/system/files/working_papers/w13187/w13187.pdf.

[216] GIOVANNI & PATEL, *supra* note 211, at 1.

oversight of public defenders, which prevents the justice system from ensuring quality representation.[217] ABA standards do not come with a mechanism for enforcement.[218] While it is the job of defense attorneys to protect their client's due process rights, they are not well positioned from an institutional standpoint to do so.[219] The possibility of wrongful conviction is heightened by these constraints.[220]

Once wrongfully convicted, it is exceedingly difficult to prove that defense counsel was ineffective.[221] To claim ineffective assistance of counsel, there must be both a "deficient performance" and "prejudice"—a reasonable probability that with otherwise competent representation the outcome of the case would have differed.[222] This *Strickland* burden is much "too high."[223] Firstly, defendants must be able to establish which actions or inactions constitute unreasonable conduct.[224] Justice Marshall argues that this is a difficult task.[225] In his dissent, he explains that "reasonably competent" has not been adequately defined by the courts and this largely leaves judges to use "their own intuitions" when making decisions about the quality of attorney performance.[226] The "ambiguity of an 'objective standard of reasonableness' . . ." is problematic,[227] as a court only needs to find fault with one element of *Strickland* to reject an ineffective assistance of counsel claim.[228] If the counsel's conduct is the product of "strategic choice," it is even less likely that the claim will succeed.[229]

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[217] DEORAS & LEFSTEIN, *supra* note 202, at 21, 39; BORUCHOWITZ ET AL., *supra* note 209, at 47.

[218] *See*, *e.g.*, NORMAN LEFSTEIN & ROBERT L. SPANGENBERG, THE CONST. PROJECT AND THE NAT'L LEGAL AID & DEFENDER ASS'N, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 8, 91 (2009), https://archive.constitutionproject.org/pdf/139.pdf; DEORAS & LEFSTEIN, *supra* note 202, at 42; MELANCA CLARK & EMILY SAVNER, BRENNAN CENTER FOR JUSTICE, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 12 (2010), https://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Community%20Oriented%20Defense-%20Stronger%20Public%20Defenders.pdf.

[219] DEORAS & LEFSTEIN, *supra* note 202, at 7-28 (discussing problems of inadequate funding, the lack of crucial resources, poor attorney compensation, the burdens of excessive caseloads, and more).

[220] Gould & Leo, *supra* note 8, at 855-56.

[221] DRESSLER & MICHAELS, *supra* note 69, at 77, 77 n.167.

[222] *Strickland*, 466 U.S. at 687, 694.

[223] DRESSLER & MICHAELS, *supra* note 69, at 77.

[224] DRESSLER & MICHAELS, *supra* note 69, at 78.

[225] *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

[226] *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

[227] *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

[228] *Id.* at 697.

[229] *Id.* at 690-691; DRESSLER & MICHAELS, *supra* note 69, at 78.

As for the second prong, "prejudice" is just as challenging to prove, because "reasonable probability" can also be difficult to interpret.[230] Justice Marshall believed that courts would have a hard time retroactively examining the record of a trial and determining if defense counsel was effective in their role for the simple reason that "evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."[231] Thus, defendants must be able to jump through a number of legal hoops to prove ineffective assistance of counsel.[232] In the end, inadequate defense representation can have devastating consequences for accused persons, and there is currently no practical legal mechanism to monitor and improve their performance.[233]

The misconduct of prosecutors is similarly of serious concern with respect to wrongful conviction, as they are "the most powerful actors in the criminal justice system."[234] A prosecutor's discretion is unparalleled.[235] They select which cases to pursue and which to dismiss; they determine what charges to bring against the accused; and they restrict the sentencing decisions of judges based upon the charges they have chosen.[236] These choices can be largely influenced by institutional and political incentives, rather than legal factors.[237] Prosecutors are often elected officials, many of whom aspire to higher offices.[238] They are driven by promotions, political endorsements, re-election campaigns, and the prospect of bolstering their reputation.[239] All of this requires that they secure convictions.[240] As it can be incredibly challenging to measure prosecutorial performance based, for example, on investigation efforts, research and writing skills, dedication, and character, conviction rates become the focus.[241] In being rewarded for successful convictions, questions of ethics and integrity can fall by the wayside.[242] In order to meet these conviction expectations,

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[230] DRESSLER & MICHAELS, *supra* note 69, at 83; *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

[231] *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

[232] DRESSLER & MICHAELS, *supra* note 69, at 77.

[233] Westervelt & Cook, *supra* note 16, at 33-37; *see supra* notes 217-20; *see also* DRESSLER & MICHAELS, *supra* note 69, at 77-83.

[234] JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 133 (2017).

[235] *See id.* at 130; Jordan A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 491 (2016).

[236] *Id.* at 133.

[237] Ethan D. Boldt. & Christina L. Boyd, *The Political Responsiveness of Violent Crime Prosecution*. 71 POL. RES. Q. 936, 936-39 (2018).

[238] *Id.*

[239] *Id.*

[240] *See* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L., 441, 444 (2009).

[241] *Id.*

[242] *Id.*

prosecutors may be enticed to commit misconduct.[243] They might suppress exculpatory evidence, prevent the testing of DNA, or pressure accused persons into guilty pleas.[244] This "conviction mindset" has become deeply embedded in prosecutorial culture, thereby compromising the role of prosecutors as "officers of the court sworn to exonerate the innocent."[245]

With all of this discretion and potential for harm, prosecutors can face limited oversight.[246] Where misconduct is most apparent and appalling, it appears that the justice system is hesitant to pursue disciplinary action or to reverse convictions.[247] Prosecutors are also afforded immunity against outside civil action.[248] *Cousin v. Small* has indicated that they cannot be held liable for even the most egregious of acts, if they were acting in their capacity as legal advocates at the time.[249] The court justifies this inaction based on the belief that there are already sufficient measures in place to prevent and manage "unconstitutional conduct," so the pursuit of private damages is considered unnecessary.[250] However, prosecutorial misconduct persists, as seen in the 2019 case of *Singleton v. Cannizzaro*.[251] The plaintiffs maintained that the Orleans Parish District Attorney's Office issued fake subpoenas and threats of imprisonment to coerce witness and victim cooperation; lied in material witness warrant applications; made claims of retaliation; compelled speech; and committed other misdeeds.[252] While the court acknowledged the office's misconduct, the prosecutors' Joint Motion to Dismiss was partly granted under immunity protections.[253] Perhaps the existing safeguards do not effectively serve to protect the rights of defendants or to ensure integrity and fairness in legal proceedings. The issue of prosecutorial immunity should be re-

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[243] *Id.;* Jeffrey W. Lucas, Corina Graif, & Michael J. Lovaglia, *Misconduct in the Prosecution of Severe Crimes: Theory and Experimental Test*, 69 SOC. PSYCHOL. Q. 97, 98 (2006).

[244] Bibas, *supra* note 240; Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. Times (Aug. 29, 2003), https://www.nytimes.com/2003/08/29/us/prosecutors-fight-dna-use-for-exoneration.html.

[245] *See* Bibas, *supra* note 240, at 444, 449-51.

[246] Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1121, 1135, 1147, 1154 (2013).

[247] Stanley Z. Fisher, *In search of the virtuous prosecutor: conceptual framework*, 15 AM. J. CRIM. L. 197, 199, 212 (1998).

[248] *E.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 420, 427-28 (1976).

[249] *Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003) (referencing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

[250] *Marrero v. City of Hialeah*, 625 F.2d 499, 509 (5th Cir. 1980) (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

[251] *Singleton v. Cannizzaro*, 372 F. Supp. 3d 389 (E.D. La. 2019).

[252] *Id.* at 401-402, 414, 424, 430.

[253] *Id.* at 401, 403.

examined, especially regarding the more frequent use of monetary damages as a possible deterrent mechanism.

C. The Consequences of Wrongful Conviction

Wrongful conviction is not merely a social justice issue, but fundamentally a legal one. In the immediate, the government violates the rights of the individual to liberty. Incarceration directly infringes upon an individual's ability to move around unreservedly; it constrains their privacy; it restricts their freedom of speech; it impedes upon their security; and it limits their opportunities for growth.[254] For those on death row, there is no greater loss. Wrongful convictions destroy the very interests protected so vigorously by the United States Constitution. Yet, the justice system has in many cases failed to rectify its errors, or to adequately compensate innocent persons injured.[255] "When . . . by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed."[256]

Even when individuals are exonerated, there are considerable "collateral consequences."[257] Wrongfully convicted persons struggle to shake off the criminal label they have lived with for years and they can find it difficult to reintegrate back into society.[258] They must overcome the fear and doubt of community members who continue to view them as "guilty criminals," despite incontrovertible proof to the contrary.[259] Among others, they face barriers in securing employment, housing, and medical care.[260] With respect to emotional and psychological effects, it can be trying to rebuild relationships with loved ones, to address feelings of outrage and frustration, and to tackle mental health and addiction challenges.[261] The adjustment can be exceedingly tough following trauma experienced in

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[254] John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property"*, 59 HASTINGS L.J. 515, 516 (2008).

[255] Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 6 PACE L. FAC. PUBL'N. 703, 704-07 (2004); Gould & Leo, *supra* note 8, at 837-38, 867.

[256] EDWIN M. BORCHARD & E. RUSSELL LUTZ, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE 392 (1932).

[257] *See* Westervelt & Cook, *supra* note 16, at 33, 35-36; *see also* Chin, *supra* note 186, at 676; *see also* Ronald F. Wright, *Prosecutor Institutions and Incentives*, 18 CRIMINOLOGY, CRIMINAL JUSTICE, LAW & SOC'Y 85, 87 (2017).

[258] *Id.* at 35-36.

[259] *Id.* at 35.

[260] *Id.* at 36.

[261] *Id.*

prison.[262] Additionally, they must continue to navigate legal processes (i.e. gubernatorial pardons, compensation claims, and record expungement).[263] However, perhaps their greatest need "is for an apology"—which rarely is forthcoming.[264]

Ultimately, the damage of wrongful conviction extends far beyond just one person.[265] The consequences are significant—not only for the individuals directly affected by an unjust revocation of liberty, but also for their loved ones and for society at large.[266] Wrongful conviction undermines the very integrity, fairness, and humanity that represent the heartbeat of the criminal justice system; it undermines the legitimacy of the system.[267] For one, the true perpetrator travels freely and continues to pose a danger to the public.[268] Through DNA exonerations, the Innocence Project has attributed "154 additional violent crimes, including 83 sexual assaults and 36 murders . . ." to criminals who walked the streets, while innocent persons remained locked up in their place.[269] Rolando Cruz and Alex Hernandez are two men who were wrongfully convicted and incarcerated, during which time Brian Dugan—the actual offender—carried out a "string of abductions, rapes, and murders."[270] Rather than utilizing resources and funding to protect the public from these offenders, U.S. taxpayers end up paying for innocent persons to be incarcerated.[271] From 1989 to 2010, $214 million was spent in Illinois alone to rectify wrongful convictions.[272] This compromises the criminal justice system and the public may struggle to believe in the ability of police, prosecutors, and judges to effectively uphold the law.[273] If meaningful change is not pursued, otherwise preventable wrongful convictions will continue to occur, striking at the heart of the American justice system.

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[262] Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 165, 168-171 (2004).

[263] Westervelt & Cook, *supra* note 16, at 36.

[264] *Id.*

[265] *See id.* at 33, 35-36; Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1044-46 (2015); Gould & Leo, *supra* note 8, at 836-37.

[266] *Id.*

[267] *See* Flowers, *supra* note 175, at 700, 732-33.

[268] Bishop & Osler, *supra* note 265, at 1044; Gould & Leo, *supra* note 8, at 836.

[269] *DNA Exonerations in the United States*, Innocence Project, https://innocenceproject.org/dna-exonerations-in-the-united-states/(last visited Dec. 30, 2020).

[270] Bishop & Osler, *supra* note 265, at 1042, 1044.

[271] *Id.* at 1045; Gould & Leo, *supra* note 8, at 836.

[272] Bishop & Osler, *supra* note 265, at 1046; *Sun Times: DNA and the High Cost of Wrongful Convictions*, Innocence Project (Jun. 21, 2011), https://innocenceproject.org/sun-times-dna-and-the-high-cost-of-wrongful-convictions-2/.

[273] Gould & Leo, *supra* note 8, at 836; Flowers, *supra* note 175, at 700, 732-33.

D. The Debate

With the occurrence of wrongful conviction comes recognition of a need for enhanced due process.[274] However, scholars and criminal justice practitioners debate the extent to which it should drive system functioning.[275] Today, crime control could be perceived as the guiding model. Crime repression, public safety, and punishment are integral concerns that mold the workings of the criminal justice system.[276] In attempting to achieve these goals, the system has come to resemble an "assembly-line conveyor belt," continuously processing a limitless number of cases.[277] Justice has become synonymous with efficiency. Law enforcement and prosecutors operate "free of legal impediments"[278] and are expected to secure convictions swiftly.[279] As such, system actors work under the assumption that a majority of "criminal defendants are, in fact, guilty."[280] Under this intellectual framework, any attempt to address the issue of wrongful conviction could potentially hinder crime control goals, in favor of due process.[281]

The due process model places autonomy, citizens' rights, and restrictions on governmental power, above the efficiency of the system.[282] It highlights the potential for error to infect investigative stages of criminal cases.[283] Under this framework, actors are acutely aware of human fallibility and function with a presumption of innocence in order to reduce the possibility of wrongful convictions.[284] While a greater weight on the due process of law could impact the efficiency of the system in the short run,[285] it can promote public safety and crime control in the long run. Order is built on a foundation of trust and respect for the institutions that execute the law.[286] Wrongful conviction, as a by-product of legal, procedural, and institutional failings, damages this trust and undermines the legitimacy of the system.[287] When repression of crime does not promote social freedom,[288] but rather

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[274] *See* DRESSLER & MICHAELS, *supra* note 69, at 19-20.
[275] *See id.* at 17-18.
[276] *See* Westervelt & Cook, *supra* note 16, at 37.
[277] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 159 (1968).
[278] DRESSLER & MICHAELS, *supra* note 69, at 18.
[279] PACKER, *supra* note 277, at 160.
[280] ALAN M. DERSHOWITZ, THE BEST DEFENSE xxi (1982).
[281] *See* DRESSLER & MICHAELS, *supra* note 69, at 19-20.
[282] *Id.* at 19-20.
[283] *Id.* at 19.
[284] *Id.* at 19-20.
[285] DRESSLER & MICHAELS, *supra* note 69, at 19-20.
[286] *See* Flowers, *supra* note 175, at 700, 732-33.
[287] *See id.*
[288] PACKER, *supra* note 277, at 158.

threatens one's very rights to liberty and justice, society's confidence in the criminal justice system wanes and public safety is endangered.[289] Exonerations reveal an inherent conflict between these models and the values they espouse.[290] However, crime control and due process should not be an either/or proposition. In the end, there must be a balance where the cost of efficiency is not so severe that innocent persons are wrongfully convicted. That is why the following legal safeguards and solutions should be implemented.

III. The Solution

A. Checks against Violations of Due Process of Law: Law Enforcement

With a stronger understanding of the factors that contribute to wrongful conviction, it is my belief that existing policies and procedures have not been entirely effective in protecting due process interests. Leading scholars, Jon Gould and Richard Leo, have stated: "[w]ith all of the information that has been amassed over the last century of inquiry, it is embarrassing to the point of shameful that criminal justicians, policymakers, and politicians do not follow the example of other professions and seek to learn from and prevent systemic error."[291] This begins with greater checks against due process violations.

Eyewitness identification is one investigative area that requires reformed practices to strengthen its reliability and accuracy.[292] It would be valuable to start by conducting assessments in all police departments to identify suggestive procedures and errors. In the 1990s, U.S. Attorney General Janet Reno oversaw this very research,[293] and we can draw from the insightful results and guidelines provided in the accompanying literature. Of note, double-blind administrations should be included with all lineups.[294] In so doing, both the witness and the police administrator will remain unaware of the identity of the suspect.[295] Importantly, this helps to ensure that neither individual will be able to seek out or provide information regarding the validity of the identification.[296] Unfortunately, one 2013 study

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[289] Bishop & Osler, *supra* note 265, at 1033, 1037; Flowers, *supra* note 175, at 700, 732-33.

[290] Westervelt & Cook, *supra* note 16, at 37.

[291] Gould & Leo, *supra* note 8, at 827.

[292] *See id.* at 843.

[293] *Id.*

[294] *Id.*; NANCY K. STEBLAY, U.S. DEP'T OF JUST., DOUBLE-BLIND SEQUENTIAL POLICE LINEUP PROCEDURES: TOWARD AN INTEGRATED LABORATORY & FIELD PRACTICE PERSPECTIVE 2, 14-15 (2007), https://www.ojp.gov/pdffiles1/nij/grants/246939.pdf; Donald P. Judge, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 270 (2000).

[295] Steblay, *supra* note 294, at 14-15; Gould & Leo, *supra* note 8, at 843.

[296] Steblay, *supra* note 294, at 14-17; Judge, *supra* note 294, at 270; Gould & Leo, *supra* note 8, at 843.

showed that in a sample of 365 agencies only 38.8% reported implementing double-blind procedures since 1999.[297] It is also recommended that investigators take confidence statements directly after any identification to avoid having future events or commentary alter the witness' perception of confidence leading up to trial.[298] Moreover, identification procedures should involve computer-generated photo arrays,[299] or when possible, sequential displays.[300] Rather than examining a group of photos or a lineup of individuals all at once, the witness should view them one after the other.[301] This ensures significantly greater correct rejection rates; in other words, those who are not the true perpetrator are more often eliminated from identification, as they should be.[302] Research across twenty-five studies has shown that sequential lineups can decrease the possibility of eyewitness misidentification by roughly 50%.[303] Finally, police departments are encouraged to video tape these identification procedures to avoid improper conduct.[304]

Similar protections should be introduced during custodial interrogations.[305] Notably, the act of video recording interrogations can prevent the use of coercive techniques by law enforcement, and consequently, reduce the potential for false confessions to result in wrongful convictions.[306] Police are more likely to refrain from making threats, engaging in acts of harm, or unduly influencing statements.[307] This video footage also allows jurors to

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[297] POLICE EXECUTIVE RESEARCH FORUM, NAT'L INST. OF JUST., A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAE ENFORCEMENT AGENCIES xii (2014), https://www.ojp.gov/pdffiles1/nij/grants/242617.pdf.

[298] Wells & Bradfield, *supra* note 160, at 361; Judge, *supra* note 294, at 264-270; Gary L. Wells et al., *Eyewitness identification procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1, 27 (1998) (emphasizing the importance of this procedure as "the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers will believe the eyewitness made an accurate identification.").

[299] Steblay, *supra* note 294, at 26; POLICE EXECUTIVE RESEARCH FORUM, *supra* note 297, at 25.

[300] Nancy Steblay, Jennfer Dysart, Solomon Fulero & R.C. L. Lindsay, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 463-64 (2001) ("Sequential lineup conditions foster significantly lower false identification of the innocent suspect compared to simultaneous lineups (9% vs. 27%) . . . .").

[301] ELLA M. BULLY ET AL., NAT'L INST. OF JUST., EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 9, 29-30 (1999), https://www.ojp.gov/pdffiles1/nij/178240.pdf; Steblay et al., *supra* note 300, at 460.

[302] Steblay et al., *supra* note 300, at 463 ("Correct rejections of the lineup are 23% higher (72% vs. 49%) in the sequential lineup condition . . . .").

[303] Gould & Leo, *supra* note 8, at 843, 843 n.102.

[304] BULLY ET AL., *supra* note 301, at 37; POLICE EXECUTIVE RESEARCH FORUM, *supra* note 297, at 26.

[305] Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127-28 (2005).

[306] Gould & Leo, *supra* note 8, at 850.

[307] *Id.*

use the events seen on tape to make their own determinations regarding the reliability and veracity of witness testimony.[308] Additionally, improved resources are required to assist officers in competently and fairly conducting interrogations; specifically, expert psychologists could write up documents highlighting the do's and don'ts of interrogation, which would aid police departments in the creation of new policy guidelines and trainings.[309] Where necessary, federal legislation or court action should be taken to help implement these changes to identification and interrogation procedures. These protections would minimize the potential for wrongful conviction to occur through eyewitness misidentification and false confession.[310]

It could be argued that these reforms might adversely impact police-community relations.[311] Perhaps this increased oversight could point to a loss of privacy or a loss of public trust in the ability of law enforcement to fairly and justly execute their duties.[312] However, with custodial interrogations, for example, the exact opposite is true—surveys have found that police "enthusiastically support" the use of videotaping.[313] Allegations of misconduct drop away when unjustified and those who would ordinarily transgress are no longer apt to do so; voluntary admissions of guilt are less in question; interrogation recordings can be used as training tools for incoming officers; and confidence in the police improves significantly, as this procedure gives the appearance that these institutions are willing to be open with the public.[314] For all those who swore to protect and serve their communities with excellence and integrity—and to respect and uphold the inalienable rights of all persons—these safeguards are devices to help law enforcement "honest[ly] and effective[ly] . . ." fulfill their duties.[315]

B. Checks against Violations of Due Process of Law: Defense Representation

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[308] *See id.*

[309] *See* Leo & Ofshe, *supra* note 169, at 433 n.10, 443-44, 443 n.30, 492.

[310] *See id.* at 842-43, 850.

[311] *See* Harry Bruinius, *Why Police are Pushing Back on Body Cameras*, The Christian Science Monitor (Aug. 30, 2016), https://www.csmonitor.com/USA/Justice/2016/0830/Why-police-are-pushing-back-on-body-cameras. This research on body worn cameras is used as a reference point for the potential police sentiment on increased accountability and transparency measures such as the video recording of identification procedures.

[312] *Id.*

[313] Sullivan, *supra* note 305, at 1128.

[314] *Id.* at 1129-1130.

[315] *See Stephan*, 711 P.2d at 1159-1161 (holding that "recording . . . is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial.") (stating that it "also protects the public's interest in honest and effective law enforcement . . . .").

Public defender services also require large-scale institutional transformation, which must be mandated by the highest levels of government.[316] In an adversarial system of justice, there is an expectation that both sides are equally matched.[317] Yet, public defenders oversee an exceptionally large number of cases while having minimal support.[318] They receive half the funding of prosecutors and are assisted by far fewer administrative staff, technical experts, and investigators.[319] The *ABA Criminal Justice Standards* highlight the need for these defense services, despite their clear lack of accessibility.[320] These standards carry Sixth Amendment "evidentiary weight,"[321] and explicitly state the legal system's requirements of defense counsel.[322] Though, as it stands, they are inadequately met due to existing institutional constraints.[323]

Ultimately, the quality of defense representation cannot improve until all defense lawyers are equipped with the resources necessary for them to be effective in their positions.[324] A 2004 study conducted by the American Bar Association's Standing Committee on Legal Aid has indicated that through improved funding, resources, and training, defense attorneys stand a better chance of preventing the conviction of innocent persons.[325] This means that in addition to government funding, the Department of Justice should promote and allocate a greater proportion of grants towards public criminal defense.[326] These agencies are in need of additional assistance, higher salaries for attorneys, an improved capacity to work with investigators and experts, and training on how to best tackle the challenges of an overburdened legal system.[327] "Taken as whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice

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316 *See* Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1411 (2011); *see also* DEORAS & LEFSTEIN, *supra* note 202, at vi; *see also* GIOVANNI & PATEL, *supra* note 211, at 2, 8-9.

317 *E.g.* Paul C. *Giannelli, Achieving Justice: Freeing the Innocent, Convicting the Guilty - Report of the ABA Criminal Justice's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 Sw. U. L. Rev. 763, 871 (2008).

318 *Supra* notes 211, 214, 216.

319 Langton & Farole, Jr., *supra* note 212; Perry & Banks, *supra* note 212.

320 Standards for Criminal Justice: Providing Defense Services § 5-1.4 (Am. Bar Ass'n 3d ed. 1992) ("The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.").

321 Chin, *supra* note 186, at 679.

322 *Id.* at 680.

323 *Id.*; *supra* notes 211-19.

324 Brown, *supra* note 316, at 1411; *see* GIOVANNI & PATEL, *supra* note 211, 1-2; *see also* DEORAS & LEFSTEIN, *supra* note 202, at vi.

325 DEORAS & LEFSTEIN, *supra* note 202, at 3, 4.

326 *Id.* at 32; GIOVANNI & PATEL, *supra* note 211, at 2, 4, 8.

327 *See id.* at 2, 4, 8-9; *see also* DEORAS & LEFSTEIN, *supra* note 202, at 10-11, 49.

system that constantly risks convicting persons who are innocent of the charges lodged against them."[328] These deficiencies must be fixed.

C. Checks against Violations of Due Process of Law: Evaluation Mechanisms

Moving forward, sentinel reviews should become a regular feature of operations within police departments, prosecutors' offices, and public defender services.[329] Sentinel events serve as beacons; they illuminate flaws within the criminal justice system and caution society of "threats to justice."[330] They force us to examine the structural, environmental, and legal conditions that provoke error,[331] and encourage us to effect positive change.[332] As long as wrongful conviction continues to take place, the system requires a mechanism, like sentinel reviews, so that it can "learn the lessons that are important to preventing future harms."[333] While the National Institute of Justice has begun research into their implementation, they have yet to become established practice.[334] The Department of Justice should begin forming an impartial body of police, prosecutors, defense attorneys, and judges to investigate cases of wrongful conviction and to demand action when needed. It is time that the criminal justice system follows in the footsteps of the medical and aviation fields, where accountability and transparency are not simply aspirations, but necessities.[335]

D. Legislative Reform

While essential, checks on violations of due process of law are not sufficient to address the grave injustice of wrongful conviction. Insofar as it is tied to shortcomings in the law, a legal solution is required. Eyewitness misidentification, false confession, prosecutorial misconduct, and inadequate defense representation are all sources of error that contribute to wrongful convictions,[336] and which can be better addressed through amendments to the law.

With regard to eyewitness identification and custodial interrogation, suggested procedural safeguards have not been wholly implemented.[337] They have only been adopted

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[328] DEORAS & LEFSTEIN, *supra* note 202, at 7.
[329] *See generally* Doyle, *supra* note 15.
[330] *Id.* at 3.
[331] *Id.* at 8.
[332] *Id.* at 3.
[333] *Id.* at 8.
[334] *Id.* at 11.
[335] *Id.* at 3.
[336] Gould & Leo, *supra* note 8, at 841.
[337] *See False Confessions & Recording of Custodial Interrogations,* Innocence Project, https://innocenceproject.org/false-confessions-recording-interrogations/(last visited Dec. 15, 2020); *See*

across law enforcement agencies in roughly 50% of all states, whether by "legislation, court action, or substantial voluntary compliance."[338] Yet, double-blind administrations, sequential displays, and video recordings have proven to prevent errors that increase the probability of wrongful convictions.[339] Thus, the value of these reforms is well established by scholars and practitioners, and as such, all states should be legally mandated to implement them in their investigative procedures. Moreover, despite the harmful effects of false confessions, there are still a number of states that have not adequately bolstered rules of evidence relating to the adversarial "search for truth."[340] In the future, the courts should legally require all confessions to be accompanied by supporting evidence,[341] and judges should be obligated to thoroughly evaluate the reliability and accuracy of confessions, in advance of any further proceedings.[342]

Furthermore, the courts should re-examine how they approach the use of eyewitness testimony in cases. For fifty years, the *Biggers* standards have been used to emphasize the "accuracy" of identifications over due process interests, such as "suggestibility" and reliability.[343] While the courts believed these standards to be effective, Wells and Bradfield have found that four of the five of them can be manipulated by the suggestive actions of investigators.[344] This puts into question the Court's holding that eyewitness identifications cannot be suppressed solely on the basis of suggestiveness, but instead on that of accuracy.[345] As is now apparent, the former affects the latter, thereby making the *Biggers* test unreliable.[346] Thus, new legal precedent, drawn on the basis of psychological evidence, should replace *Biggers*.

As for prosecutorial misconduct, a legal solution is half the battle. A significant cultural shift is necessary to change the conviction mindset that defines the performance

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Eyewitness Identification Reform, Innocence Project, https://innocenceproject.org/eyewitness-identification-reform/(last visited Dec. 15, 2020).

[338] Innocence Project, https://innocenceproject.org/eyewitness-identification-reform/(last visited Dec. 15, 2020); Innocence Project, https://innocenceproject.org/false-confessions-recording-interrogations/ (last visited Dec. 15, 2020).

[339] *Supra* notes 294-310.

[340] *See* Turner, *supra* note 162, at 99-100.

[341] *See id.*

[342] *See* Turner, *supra* note 162, at 100; *see also* Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall, & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, WIS. L. REV. 479, 508-509 (2006).

[343] Gary L. Wells & Donna M. Murray, *What Can Psychology Say about the Neil v. Biggers Criteria for Judging Eyewitness Accuracy?*, 68 J. APPL. PSYCHOL. 347, 348 (1983).

[344] Wells & Bradfield, *supra* note 160, at 374-75.

[345] *Id.*

[346] *Id.*

incentives within state and federal prosecutors' offices.[347] Beyond that, to limit the need for greater oversight and discretionary constraint, it would be prudent to remake the laws that govern discovery.[348] To avoid the withholding or destruction of critical exculpatory evidence, the criminal justice system should move closer to the days of open-file discovery.[349] In its original conception, defense counsel was given access to all information acquired by and in the possession of the government,[350] rather than being limited to evidence that was strictly "material."[351] Critics rightfully argue that this can put witnesses in life threatening positions.[352] Under new rules of evidence, discovery could become more open, while protecting the identities of witnesses until after they have testified.[353] Protective orders can also be utilized as an added safeguard.[354] Others are concerned that this change would further encumber public defenders, thereby worsening the state of indigent defense services.[355] However, with the proper structures and resources in place, this burden could be limited.[356] Expanded discovery could reduce *Brady* violations and promote the search for truth, which "is most likely to emerge when each side seeks to take the other by reason rather than by surprise."[357] It would also enable defendants to make more informed decisions about their case.[358] This could allow for a more efficient handling of cases, less appellate involvement,

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[347] *See* Bibas, *supra* note 240.

[348] ANDREA KEILEN ET AL., THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2-3 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

[349] *Id.*

[350] *Id.*; Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 429 (2013); *see also* Avis E. Buchanan, Op-Ed., *Fairer Trials, and Better Justice, for D.C.*, Wash. Post (Oct. 30, 2011), https://www.washingtonpost.com/opinions/fairer-trials-and-better-justice-in-dc/2011/10/25/gIQATkFMQM_story.html.

[351] Brady, 373 U.S. at 87.

[352] *See* Fox, *supra* note 350, at 430; *see* also Michael H. Graham, *Witness Intimidation*, 12 FLA. ST. U. L. REV. 239, 240-42 (1985) (stating that in a 1976 study "thirty-nine percent of the witnesses . . . were very much afraid of revenge by defendants and that twenty-six percent had actually been threatened at some point during the criminal process . . . .").

[353] *See* Jencks Act, 18 U.S.C. § 3500(a) (2006).

[354] Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009) ("[A] . . . rule mandating broad disclosure should contain an exception for cases in which disclosure would endanger witnesses, interfere with an ongoing investigation, or otherwise jeopardize a governmental interest. Model Rule 3.8, for example . . . enables prosecutors to seek protective orders . . . .").

[355] Fox, *supra* note 350, at 428.

[356] *See* KEILEN ET AL., *supra* note 348, at 4 ("The burden of implementing an open-file system should be minimal considering most states have a pre-existing system in place for comparable exchange during civil trials.").

[357] *Id.* at 2-3, 9; Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964).

[358] *See*, *e.g.*, Fox, *supra* note 350, at 430; Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1560 (2010); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 543-44 (2007).

and greater cost saving within the system.[359] A number of federal and state prosecutors have already implemented versions of expanded discovery, in recognition of its strengths.[360] Legislation is required to make this a reality across the nation. Greater rights to discovery would help ensure that defense attorneys are able to present the strongest case for their clients, to defend their due process rights, and to improve the fairness and effectiveness of the criminal justice system.[361] Above all else, expanded discovery would decrease the likelihood of wrongful convictions.[362]

Having said this, effective assistance of counsel must also become a fixture at an earlier stage of criminal cases. "Equal justice under law" cannot be achieved until quality defense representation[363] is made available during all stages that could considerably affect the outcome of a case.[364] This requires a broadening of the current definition of critical stages to include pre-indictment lineups and post-indictment photographic displays; greater effort should also be made to secure counsel for indigent defendants prior to custodial interrogation. If these events are shown to have a substantial impact on determinations of guilt and incarceration, representation should be present.[365] Also, in a system where plea bargains are used to close roughly 95% of all criminal cases, there is a clear need for early appointment of counsel.[366] At no point does the Constitution specify when counsel must attach, and albeit a minority, some state courts have flirted with the notion of extending this

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[359] Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1372 (2012); Buchanan, *supra* note 350; Medwed, *supra* note 358, at 1558, 1560; Fox, *supra* note 350, at 430; KEILEN ET AL., *supra* note 348, at 1.

[360] KEILEN ET AL., *supra* note 348, at 4.

[361] *See id.* at 1-3; *see also* Gershman, *supra* note 358, at 543; *see also* Moore, *supra* note 359, at 1372.

[362] KEILEN ET AL., *supra* note 348, at 2-3; Medwed, *supra* note 358, at 1559.

[363] *See* Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L.& POL'Y REV. 161, 162-63, 165 (2009); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 43, 43 n.257 (2013).

[364] *See*, *e.g.*, *supra* notes 69-80, 202, 207-08; *see infra* 365 for more information on expanding access to counsel.

[365] *See* Jeremiah Mosteller, *Is Access to Counsel the Most Important Due Process Right?*, Charles Koch Institute, https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/is-access-to-counsel-the-most-important-due-process-right/ (last visited Jan. 15, 2021).

[366] *Id.*; Turner, *supra* note 162, at 100; LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, PLEA AND CHARGE BARGAINING 3 (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf.

right.[367] It is the "master key" that unlocks the door to fair and reliable criminal procedure[368] and, because of its importance, it must adapt to the ever-changing needs of our current time.[369]

This solution is not without possible critiques: the permanency of legal doctrine and cost.[370] Some might believe that these legal reforms are much too transformational and that the law should remain consistent with the Sixth Amendment vision of the Framers.[371] However, time has demonstrated that the law is not fixed. Chief Justice Warren Burger understood that "[t]he right to counsel has historically been an evolving concept."[372] As interpreters of the Constitution have shown through decades of precedent, this right has adapted with the changing values of society.[373] Cost is perhaps the more common argument against expanding the right to counsel.[374] From an ethical perspective, it would likely cause more guilty persons to go unprosecuted, but that is a price tolerated by society in exchange for greater Sixth Amendment guarantees and the ideals that this right brings to bear.[375] Financially speaking, research indicates that this change would not be overly burdensome, given the success many states have already had with more developed assistance of counsel provisions.[376] The government should not undervalue defense representation and its importance to procedural justice.[377] Once the legal system is seen as unfair or illegitimate, it

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[367] *See, e.g.*, *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (remarking on the "possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment . . . ."); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) (quoting *United States Ex Ret Hall v. Lane,* 804 F.2d 79, 82 (7th Cir. 1986); *Perry v. Kemna*, 356 F.3d 880, 895–96 (8th Cir. 2004); Mosteller, *supra* note 365.

[368] King, *supra* note 363, at 6; Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment*, 30 U. CHI. L. REV. 1, 7 (1962); JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION xvii, 128 (2002) (explaining that "[w]ithout a lawyer's aid, it is quite unlikely that an accused will be able to enjoy the advantages of the other enumerated rights. Without counsel, there is little chance for a fair battle between equally able adversaries.").

[369] King, *supra* note 363, at 6.

[370] King, *supra* note 363, at 6, 39-40; *see*, *e.g.*, Brian Naylor, Barrett, *An Originalist, Says Meaning of Constitution 'Doesn't Change Over Time',* NPR (Oct. 13, 2020), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time; Ilan Wurman, *What is originalism? Debunking the myths*, The Conversation (Oct. 24, 2020), https://theconversation.com/what-is-originalism-debunking-the-myths-148488. The latter two sources focus on the concept of originalism. I've drawn from this information to discuss how originalists might respond to the reforms I have proposed.

[371] *See* King, *supra* note 363, at 6; *see also* Naylor, *supra* note 370; *see also* Wurman, *supra* note 370.

[372] *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring).

[373] King, *supra* note 363, at 6, 8-10.

[374] *Id.* at 39.

[375] *Id.* at 40.

[376] *Id.*

[377] *See id.* at 46.

loses its authority;[378] and it takes a direct hit every time a person is wrongfully convicted. The law should be amended to protect the innocent and the integrity of the system's pursuit of justice.

Finally, to reduce the harm done to innocent persons, states should reform existing policies and statutes on DNA testing.[379] Notably, there is a build up of "hundreds of thousands" of rape kits that have not been tested.[380] CNN investigators found that over the last decade rape kits have been thrown out in 400 cases spanning fourteen states and twenty-five police agencies.[381] In fact, this occurred before any statute of limitation elapsed, or when there was none in effect.[382] This is of particular importance because more than 95% of known exonerations come from rape and murder cases.[383] It should not only be a requirement of all jurisdictions to preserve rape kits, but also to test this evidence within a given standard of time.[384] This would enable the system to prevent the conviction and incarceration of innocent persons.[385] As Wayne County, Michigan, Prosecutor Kym Worthy explains: "[w]hat you are doing when you destroy a rape kit is destroying the chance that they [rape survivors] are ever going to see justice."[386] If evidence is available post-conviction, the current "scope and substance" of laws are negatively constrained, given considerable barriers like "sunset provisions," poor preservation and cataloging of biological evidence, and lack of funding.[387] This inhibits wrongfully convicted persons from demonstrating their innocence.[388] So, policy and law on DNA testing must be improved.[389]

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[378] *See* LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 9 (2016); *see also* Flowers, *supra* note 175, at 733.

[379] Ashley Fantz, Sergio Hernandez, & Sonam Vashi, *How the trashing of rape kits failed victims and jeopardizes public safety*, CNN (Nov. 29, 2018), https://www.cnn.com/interactive/2018/11/investigates/police-destroyed-rapekits/index.html; Erin Gordon, *Untested Rape kits: Delays, Destruction and Disregarded Victims*, Am. Bar Ass'n (May 17, 2019), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/may/untested-rape-kits-delays-destruction-and-disregarded-victims/.

[380] Fantz, Hernandez, & Vashi, *supra* note 379.

[381] *Id.*; Gordon, *supra* note 379.

[382] Fantz, Hernandez, & Vashi, *supra* note 379.

[383] Samuel R. Gross, *Convicting the Innocent*, 4 ANNU. REV. L. SOC. SCI. 173, 179 (2008).

[384] Gordon, *supra* note 379; *see also* Fantz, Hernandez, & Vashi, *supra* note 379.

[385] *See* Fantz, Hernandez, & Vashi, *supra* note 379.

[386] *Id.*

[387] *Access to Post-Conviction DNA Testing*, Innocence Project, https://innocenceproject.org/causes/access-post-conviction-dna-testing/ (last visited Dec. 27, 2020).

[388] *See id.*

[389] *See supra* notes 379, 387.

Conclusion

As Associate Justice Oliver Wendell Holmes Jr. insightfully suggested, the court system is based not on a foundation of justice, but on the law.[390] This is no more evident than in the persistent and pervasive nature of wrongful conviction.[391] Sadly, it is not an aberration but, rather, an outcome that has come to be expected in the criminal justice system.[392] While society has awoken to its presence, more decisive action must be taken to mitigate this grave victimization of innocent persons.

With a more detailed examination of its root causes, it becomes clear that wrongful conviction is deeply tied to limitations in legal doctrine and in the flawed administration of the law. In particular, existing case law has at times limited the application of Sixth and Fourteenth Amendment due process protections—assistance of counsel is not guaranteed at all "critical stages" of judicial proceedings, or otherwise potentially consequential investigatory stages.[393] Moreover, the quality of this counsel is often suboptimal, as public defender services are inadequately equipped to match their adversarial counterparts in court.[394] Finally, police and prosecutors may willfully neglect and violate procedural law designed to safeguard due process, given a lack of oversight and disciplinary mechanisms.[395] Thus, wrongful conviction is a profound legal issue.

As such, it necessitates a legal solution. The implementation of due process checks is critical, but not enough. Wrongful conviction threatens individual rights to liberty; it places physical, emotional, and psychological costs upon its victims; and it undermines the fairness, integrity, and legitimacy of the criminal justice system.[396] The consequences are much too severe not to warrant transformative change. Fundamental reform of the legal landscape is required in the shape of new legislation and revised practices and policies. While efficiency and crime control may drive the current pursuit of justice, these ideals should not and cannot endanger due process.[397] For the price is wrongful conviction—"the greatest crime of all . . . ."[398]

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[390] *Supra* note 1.
[391] *See supra* note 8.
[392] *See supra* notes 9-13.
[393] *See supra* notes 89-98, 192-93, 207-08, 365.
[394] *See supra* notes 209-220.
[395] *See supra* notes 161-82, 243-48, 313-15.
[396] *See supra* notes 254, 257-73.
[397] *See supra* notes 274-81.
[398] Elliott & Weiser, *supra* note 178 (sharing the words of Judge John P. Collins).

Impossible to Determine: Inferring *Dolus Specialis* at the Ad Hoc Tribunals

Kylie Henry

"We know that often holding those who have carried out mass atrocities accountable is at times our best tool to prevent future atrocities."

-Samantha Power, former U.S. Ambassador to the United Nations[1]

Introduction

Genocide is a crime of specific intent. The perpetrators must seek "to destroy [...] a national, ethnical, racial or religious group."[2] This attempt to deny the world an entire people—their unique members, traditions, culture, and contributions to society—is a crime conducted against all of humanity.[3] Genocide must be prevented and punished as such.

When the United Nations General Assembly (UNGA) unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") in 1948, they established genocide as a crime under international law.[4] Despite this recognition, millions of people have since been persecuted or murdered in situations that arguably amount to genocide in Cambodia, Rwanda, Bosnia, Sudan, Iraq, Burma, and

[1] Samantha Power & David Pressman, *President Obama Directs New Atrocity Prevention Measures*, Obama White House Archives (Aug. 6, 2011), https://obamawhitehouse.archives.gov/blog/2011/08/06/president-obama-directs-new-atrocity-prevention-measures.

[2] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, art. II (Dec. 9, 1948) [hereinafter Genocide Convention].

[3] Todd F. Buchwald & Adam Keith, *By Any Other Name: How, When, And Why the US Has Made Genocide Determinations*, U.S. Holocaust Mem'l Museum 15 (2019); Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress 91 (1944); Genocide Convention Implementation Act of 1987, 18 U.S. Code § 1091 (2007).

[4] Genocide Convention, supra note 2.

China.[5] Prosecution of the perpetrators of genocide remains an important international responsibility and an essential mechanism for genocide prevention. Not only does it deliver justice, but prosecution may also help to deter future atrocity crimes by affirming that perpetrators will not be treated with impunity.[6]

In 1998, fifty years after the United Nation's adoption of the Genocide Convention, the International Criminal Tribunal for Rwanda (ICTR) issued the world's first genocide conviction.[7] The tribunal found Jean-Paul Akayesu guilty of committing genocide against the Tutsis.[8] The Akayesu Trial Chamber acknowledged that "[g]enocide is distinct from other crimes [since] it embodies a special intent or *dolus specialis*."[9] The "special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial

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[5] *See generally* Press Release, Extraordinary Chambers in the Courts of Cambodia, Nuon Chea and Khieu Samphan Sentenced to Life Imprisonment in Case 002/02 (Nov. 16, 2018), https://www.eccc.gov.kh/sites/default/files/media/2018; Marcel Lemonde & You Bunleng, *Khmer Rouge Victims in Cambodia, April 1975 - January 1979: A Critical Assessment of Major Estimates*, Extraordinary Chambers in the Courts of Cambodia J.J. (Sept. 30, 2009) (discussing the number of deaths, causes of these deaths, and the national, religious and ethnic origins of the deceased in Cambodia, 1975 – 1979; includes determination of genocide against the Cham population); *see generally* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 129 (Sept. 2, 1998) (legal finding of genocide in Rwanda); Commission on Human Rights Report on the situation of human rights in Rwanda, U.N. ESCOR, 52nd Sess., UN Doc. E/CN.4/1996/68 (Jan. 29, 1996) (evidence of atrocities committed in Rwanda, Apr. 1994 - Jan. 1996); *see generally* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 539-99 (Aug. 2, 2001) (legal determination that genocide was perpetrated against Bosnian Muslims at Srebrenica in July 1995); *The Fall of Srebrenica and the Failure of UN Peacekeeping,* Human Rights Watch (Oct. 15, 1995) (report on fall of Srebrenica as part of a larger attempt by Bosnian Serb forces to commit genocide); *see generally* United States Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2004 - Sudan* (Feb. 28, 2005) (discussing information indicating the Sudanese government and Janjaweed committed genocide in 2004); United States Department of State, Bureau of Democracy, Human Rights, and Labor & Bureau of Intelligence and Research, *Documenting Atrocities in Darfur,* State Publication 11182 (Sept. 2004) (evidence of atrocities in Darfur); *see generally* United States Department of State, Bureau of Democracy, Human Rights, and Labor, *2017 Country Reports on Human Rights Practices: Iraq* 2 (2018) (examining ISIS abuses and atrocities in Iraq); "They came to destroy": ISIS Crimes Against the Yazidis, Human Rights Council, UN Doc. A/HRC/32/CRP.2 (June 15, 2016) (discussion of genocide, crimes against humanity, and war crimes committed by ISIS against the Yazidis); *see generally* Report of the Independent International Fact-Finding Mission on Myanmar, 39th Sess., UN Doc. A/HRC/42/50 (Aug. 8, 2019) (evidence of genocide in Rakhine State); Hannah Beech, Saw Nang & Marliese Simons, *'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, New York Times (Sept. 8, 2020, updated Dec. 4, 2020) (soldier testimony and photographic evidence of crimes in Rakhine State); *see generally* Austin Ramzy, *China's Oppression of Muslims in Xinjiang, Explained*, New York Times (Jan. 20, 2021) (Secretary of State Pompeo concluded China was committing genocide against the Uighurs and other ethnic minorities); Colum Lynch, *State Department Lawyers Concluded Insufficient Evidence to Prove Genocide in China,* Foreign Policy (after Secretary of State Pompeo's declaration, State Department lawyers found insufficient evidence to prove genocide).

[6] Power & Pressman, *supra* note 1; Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a media briefing in Khartoum, Sudan, October 21, 2020, https://www.icc-cpi.int/Pages/item.aspx?name=201020-otp-statement-sudan.

[7] *First Conviction for Genocide: Timeline of Events*, U.S. Holocaust Mem'l Museum https://www.ushmm.org/learn/timeline-of-events/after-1945/first-conviction-for-genocide (last visited Jan. 3, 2021).

[8] Akayesu was also charged with one count of incitement to commit genocide. See *Id.*

[9] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 498. All ICTR documents can be found at http://www.ictr.org/default.htm.

or religious group, as such.'"[10] The group target is pursued by harming individual members, which separates genocide from other crimes (homicide, war crimes, and crimes against humanity).[11] *Dolus specialis* became the standard of intent for future international cases involving charges of genocide.[12]

International courts understand the crime of genocide to consist of two distinct mental elements.[13] First, the perpetrator must possess the general intent to commit one or more acts of genocide specified by the Genocide Convention.[14] Second, the perpetrator must commit the act(s) with the "intent to destroy… [a] group."[15] While convictions for other atrocity crimes require proof of general intent, proof of the second, ulterior intent is unique to the crime of genocide.[16] This understanding of genocide was influenced by the Holocaust, during which Hitler's intent to eradicate the Jewish population of Europe was openly and publicly asserted.[17] Today few perpetrators of genocide are as vocal about their ultimate aim of group annihilation.[18] Requiring evidence of a perpetrator's specific intent sets a high burden of proof.[19] Without a confession or direct evidence, which is often difficult to obtain, it is tough to prove that a perpetrator or perpetrators committed individual acts with the intention of destroying a protected group.[20] The ad hoc tribunals encountered significant barriers when prosecuting individuals for genocide in Rwanda and the former Yugoslavia.[21]

Furthermore, it is important to note that while there is significant debate about the type of intent required by the Genocide Convention, the ICTR, International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), and the International Court of Justice (ICJ) all adopted the Genocide Convention definition

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[10] *Id.*

[11] William Schabas, Introduction to the International Criminal Court 38 (2004).

[12] *See, e.g., Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 517; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 108 (Dec. 14, 1999); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest, Introduction (July 12, 2010); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), I.C.J. Judgment ¶ 187 (2007) (dolus specialis as requisite level of intent).

[13] Kai Ambos, *What Does 'Intent to Destroy' Mean?*, 91 Int'l Rev. Red Cross 833, 834-35 (2009).

[14] *Id.*, at 834.

[15] *Id.*; Genocide Convention, *supra* note 2, art. II.

[16] International Criminal Court, Elements of Crimes, Introduction to Art. 6 (2011).

[17] Buchwald & Keith, *supra* note 3, at 14.

[18] *Id.*; Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 975 (Sept. 27, 2006).

[19] Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach,* 5 Genocide Studies & Prevention: Int'l J. 238, 242 (2010); *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523.

[20] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523; Goldsmith, *supra* note 19, at 246.

[21] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523; Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgment, ¶ 13 (Apr. 19, 2004).

verbatim and relied on the *dolus specialis* standard to satisfy the intent requirement.[22] This article will highlight the multiple, and frequently conflicting, interpretations of the *dolus specialis* standard of intent detailed in the convictions of individual perpetrators of genocide at the ad hoc tribunals. Part I will examine how international doctrines define genocidal intent. These documents informed the trial and appeal judgments made in the international criminal tribunals examined in Part II. Part II will then focus on how the evidentiary standard of *dolus specialis* evolved through the ICTR and ICTY judgments. It will analyze the inconsistent interpretations used to reach genocide convictions and acquittals. Finally, Part III will offer insight into how the ICC, future tribunals, and future fact-finding missions should interpret the evolving understanding of genocidal intent.

I. History of the Genocide Convention

A. Convention on the Prevention and Punishment of the Crime of Genocide

Confronted by the systematic, state-sponsored murder of millions of Jews in Nazi Germany, Polish jurist and international lawyer Raphael Lemkin proposed a new word to describe the atrocities: genocide.[23] He devised the term from the Greek word *genos* (race, tribe) and the Latin word *caedere* (to kill).[24] Lemkin intended genocide "to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[25] To him, "the critical elements of genocide were not the individual acts, though they may be crimes in themselves, but the broader aim to destroy entire human collectivities."[26] He argued that state sovereignty could not grant states "the right to kill millions of people."[27] On December 9th, 1948, due to Lemkin's relentless advocacy and an international desire to prevent future mass atrocities, the then fifty-five UN member states unanimously approved the Genocide

[22] *See* S.C. Res. 955, art. 2, U.N.Doc.S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N.Doc.S/RES/827 (May 25, 1993); Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90. (1998); Bosn. & Herz. v. Serb. & Montenegro, I.C.J. Judgment ¶ 143 (2007) (verbatim definition of genocide). *See Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 517; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 108 (Dec. 14, 1999); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest, Introduction (July 12, 2010); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), I.C.J. Judgment, ¶ 187 (2007) (dolus specialis as requisite level of intent).

[23] Johann Justus Vasel, *'In the Beginning There Was No Word...'*, 29 Euro. J. Int'l L. 1053 (2019).

[24] Raphael Lemkin, *supra* note 3, at 79.

[25] *Id.*

[26] *Id*; Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda,* Fac. Publications Santa Clara L. 1, 15 (2008).

[27] Raphael Lemkin, *Genocide*, 15 American Scholar 230 (1946).

Convention.[28] When it entered into force in January 1951, the Convention became the first international human rights treaty.[29] Article II defined genocide as:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[30]

Inclusion of the phrase "intent to destroy [...] a group" reflected Lemkin's emphasis that the victims of genocide are not the individuals, but the unique human groups to which they belong.[31] Still, the exclusion of social, economic, political, and other human groups from the final version meant that the Convention's definition of genocide was narrower than Lemkin's original definition.[32] In other aspects, the Genocide Convention went further. State signatories of the Convention undertook the obligation "to prevent and to punish" the crime.[33] Signatories understood that promising to inform the UN of acts of genocide (so the body could determine the appropriate prevention measures), enacting domestic legislation to outlaw genocide, and pledging to try persons accused of genocide in a competent domestic court or future international court satisfied this obligation.[34] In 2006, the ICJ further expanded the Convention's scope when it determined in *Democratic Republic of the Congo v. Rwanda* that prohibiting genocide is a peremptory norm of international law (*jus cogens*).[35] All states, not just those who have ratified the Genocide Convention, are thus prohibited from committing genocide.

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[28] *Genocide Convention*, United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/genocide-convention.shtml (last visited on Dec. 30, 2020).

[29] Genocide Convention, *supra* note 2, art. I.

[30] *Id.*, art. II.

[31] Raphael Lemkin, *supra* note 3 at 79.

[32] Genocide Convention, *supra* note 2, art. I; David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?*, 2 Notre Dame J. Int'l & Comp. L. 167, 176 (2011).

[33] Genocide Convention, *supra* note 2, art. I.

[34] Manuel J. Ventura, *The Prevention of Genocide as a Jus Cogens Norm? A Formula for Lawful Humanitarian Intervention*, Shielding Humanity: Essays in Int'l L. 289, 312-3 (2014).

[35] Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002 (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports ¶¶ 64, 125 (Feb. 3, 2006).

The Genocide Convention did not prevent states or individuals from committing genocide. It did, however, set up a framework for prosecuting states and individuals accused of genocide. All relevant international courts and tribunals adopted the legal definition of genocide provided by Article II of the Genocide Convention.[36] Since the Convention does not specify the type of intent required (e.g., *dolus specialis*, *dolus eventualis*, general, or knowledge-based),[37] international tribunals and courts were left to determine what constituted genocidal intent themselves.[38] Confusion over the type of intent and the proof required has stemmed from the Convention's incomplete definition. Though imperfect, the definition and responsibilities set out in the Genocide Convention have defined genocide prevention and punishment, and directed fact-finding missions and international tribunals regarding the crime.

B. Draft Code of Crimes against the Peace and Security of Mankind with Commentaries

The UN International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind with Commentaries provided one of the first interpretations of the Genocide Convention's "intent" requirement.[39] The Draft Code of Crimes defined "the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal" and the commentaries attached to the Draft Code elaborated on the International Law Commission's understanding of serious international crimes.[40] However, since the UNGA did not adopt the Code, its commentaries are non-binding.[41]

Article 17(5) of the 1996 Draft Code commentaries states that the "crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law."[42] The commentary details that even when the general intent

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[36] S.C. Res. 955, art. 2, U.N.Doc.S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N.Doc.S/RES/827 (May 25, 1993).

[37] In relation to genocide, the *dolus specialis* standard of intent requires that "the perpetrator commits an act [of genocide] while clearly seeking to destroy the particular group, in whole or in part." *Dolus eventualis* would require that "the perpetrator knows that his/her actions may bring about the destruction of a group, but continues to commit these acts." General intent would require "that the perpetrator intends to commit the killing, but not necessarily to destroy the group." Knowledge-based intent would require that the perpetrator "willingly commit a prohibited act with the knowledge that it would bring about the destruction of a group." For definitions, *see* Goldsmith, *supra* note 19, at 241.

[38] *Id.*, at 254.

[39] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/L.532 Introduction A, B (1996).

[40] *Id.*; Ruth Ghebrai & Biya Tesfaye, *Genocide: The Complexity of Genocidal Intent*, Örebro University School of L., Psychology and Social Work 29 (2012).

[41] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, *supra* note 39, Introduction.

[42] *Id.*, art. 17(5).

to commit one of the acts of genocide is accompanied by "a general awareness of the probable consequences of such an act," it does not satisfy the intent requirement.[43] Instead, the crime of genocide requires an ulterior intent that defines the protected group, not individual victims, as the ultimate target.[44] Still, the Draft Code commentary acknowledged the difficulty of establishing a perpetrator's specific intent.[45] For high-level perpetrators, Article 17(10) states that "the necessary degree of knowledge and intent may be *inferred* from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group."[46] This commentary makes two important clarifications. First, it states that genocidal intent may be inferred. Second, the commentary suggests that proof of knowledge may be enough for a genocide conviction.[47] The Draft Code commentaries originally provide a narrow interpretation of the "intent" requirement of the Genocide Convention, but then caveat that a "necessary degree of knowledge and intent" warrants a genocide conviction.[48] The level of intent required and how to establish such intent remains unclear in the 1996 Draft Code commentaries.

C. International Criminal Court

The Rome Statute treaty establishing the ICC was adopted in 1998 and entered into force in 2002.[49] Unlike the ICJ, which the UN founded in 1945 to hear civil disputes between states, the ICC was founded to prosecute perpetrators of the world's most serious crimes.[50] The Court's creation was an important step towards universal justice, as it signified that "no ruler, no State, no junta and no army anywhere can abuse human rights with impunity."[51] While scholars and politicians have questioned its effectiveness, and only 123 countries are currently State Parties to the Rome Statute, the ICC is the only permanent international court devoted to ending impunity for individuals who have committed severe crimes.[52]

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[43] *Id.*

[44] Nehemiah Robinson, The Genocide Convention: A Commentary 58 (1960).

[45] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, *supra* note 39, art. 17(10) (emphasis added).

[46] *Id.*

[47] Goldsmith, *supra* note 19, at 246.

[48] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, *supra* note 39, art. 17(10).

[49] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90. (1998).

[50] *About*, International Criminal Court https://www.icc-cpi.int/about (last visited Dec. 31, 2020).

[51] Kofi Annan Statement to the International Bar Association, June 12, 1997, Press Release SG/SM/6257. https://www.un.org/press/en/1997/19970612.sgsm6257.html.

[52] Claire Felter, *The Role of the International Criminal Court,* council on foreign relations, June 25, 2020, at "What are other criticisms of the ICC?" https://www.cfr.org/backgrounder/role-international-criminal-court#chapter-title-0-8; International Criminal Court, States Parties to the Rome Statute, https://asp.icccpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list

The Rome Statute grants the ICC jurisdiction over the gravest crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[53] In characterizing the crime of genocide, Article 6 of the Rome Statute adopted the definition verbatim from the Genocide Convention.[54] As such, the Statute added no clarification about the level of intent required.

Article 30 of the Rome Statute elaborated on the mental element required for all crimes under the Court's jurisdiction.[55] In accordance, the accused must perpetrate the material elements of a crime with "intent and knowledge."[56] The Court understands that "a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[57] A person has knowledge when they possess "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[58] This clarification only explains the Court's understanding of general intent. When applied to the crime of genocide, Article 30 of the Rome Statute requires that the perpetrator means to commit one or more of the acts of genocide against one of the protected groups with "intent and knowledge" in order for the Court to find him responsible for the crime.[59] The crime of genocide, however, contains a second mental element.[60] The "intent to destroy [...] a group" phrase in the definition of genocide requires that the perpetrator "actually intended to harm the group with which the individual is associated."[61] The Rome Statute does not provide any information about how to establish the second mental element of genocide.

In 2011, the ICC published the Elements of Crimes document to provide further guidance on the crimes under the ICC's jurisprudence.[62] In the introduction, the document refers to Article 30 of the Rome Statute. It elaborates on the Court's earlier understanding of "intent and knowledge" by stipulating that the "existence of intent and knowledge can be

.aspx (last visited Dec., 31, 2020); Rome Statute of the International Criminal Court, Preamble, 2187 U.N.T.S. 90 (1998).

[53] Rome Statute of the International Criminal Court, Preamble, 2187 U.N.T.S. 90. art. 5 (1998).

[54] *Id.*, art. 6.

[55] *Id.*, art. 30.

[56] *Id.*, art. 30(1).

[57] *Id.*, art. 30(2).

[58] *Id.*, art. 30(3).

[59] *Id.*, art. 30.

[60] Ambos, *supra* note 13, at 833.

[61] Goldsmith, *supra* note 19, at 238, 248.

[62] International Criminal Court, Elements of Crimes, General Introduction (1) (2011).

inferred from relevant facts and circumstances."[63] While this refers to the first mental element of genocide, general intent, it does not apply to the second mental element, specific intent. Article 6 of the ICC Elements of Crimes states:

> (c) Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding [genocide] will need to be decided by the Court on a case-by-case basis.[64]

This addition affirms that the evidence necessary to convict someone of genocide is more complicated and circumstantial than the intent required for the other crimes under the Court's jurisdiction, but does not provide any more information on the level or proof of intent required.[65] It is also important to note that the ICTY and ICTR prosecutions began before the ICC was established.[66] Still, the Rome Statute and Elements of Crimes documents will influence future genocide convictions and are therefore necessary to consider.

II. Ad Hoc Tribunals Determine Genocidal Intent

The United Nations Security Council (UNSC) established the ICTY in 1993 and the ICTR in 1994 to prosecute individuals most responsible for atrocity crimes in Croatia, Bosnia and Herzegovina, and Rwanda.[67] The ad hoc tribunals were the first international courts to deal with charges of genocide.[68] Their decisions further outlined the international community's understanding of genocidal intent.

A. International Criminal Tribunal for Rwanda

1. Prosecutor v. Akayesu

When the ICTR found Jean-Paul Akayesu guilty of genocide in 1998, it became the first international tribunal to issue a genocide conviction.[69] The Akayesu Trial Chamber's detailed interpretation of the Genocide Convention set important legal precedent and

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[63] *Id.*, Introduction to art. 6(c).

[64] *Id.*

[65] *Id.*, art. 6.

[66] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90. (1998); S.C. Res. 955, art. 2, U.N.Doc.S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N.Doc.S/RES/827 (May 25, 1993); International Criminal Court, Elements of Crimes (2011).

[67] S.C. Res. 827, U.N.Doc.S/RES/827 (May 25, 1993); S.C. Res. 955, art. 2, U.N.Doc.S/RES/955 (Nov. 8, 1994).

[68] *First Conviction for Genocide: Timeline of Events*, *supra* note 7.

[69] *Id.*

sparked considerable debate. In regards to the level of intent required for a genocide conviction, the Akayesu Trial Chamber determined that the "crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged… must have been 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'"[70] The Chamber defined *dolus specialis* as "the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."[71] However, the Akayesu Trial Chamber then stipulated that the "offender is culpable [of genocide] because he knew or should have known that the act committed would destroy, in whole or in part, a group."[72] The specific intent ("clearly seeks") standard requires a higher level of intent than the "knew or should have known" standard.[73] The Akayesu Chamber did not address this discrepancy. In determining Akayesu's genocidal intent, the Chamber disregarded the "known or should have known" test in favor of the specific intent interpretation.[74] All subsequent international trials relied on the specific intent interpretation to satisfy the level of intent necessary for the crime of genocide.[75] Before this seminal ruling, no official legal document had attached *dolus specialis* to the level of intent required by the Genocide Convention.[76]

In addition to determining the requisite level of intent, the Akayesu Trial Chamber made a formative decision when it acknowledged that "intent is a mental factor which is difficult, even impossible, to determine."[77] The prosecution is unlikely to find concrete evidence of genocidal intent, in the absence of a confession from the accused.[78] For this reason, the Chamber decided "that it is possible to deduce the genocidal intent."[79] The Chamber noted that "the general context of perpetration … the scale of atrocities committed, their general nature, in a region or a country, or … deliberately and systematically targeting victims on account of their membership of a particular group" were relevant

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[70] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 517.
[71] *Id.*, ¶ 498.
[72] *Id.*, ¶ 523.
[73] Gregory Kent, *Genocidal Intent and Transitional Justice in Bosnia: Jelisić, Foot Soldiers of Genocide, and the ICTY*, 27 E. Euro. Pol. & Societies 575 (June 2013); Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. of Int'l Criminal Justice 992 (2005).
[74] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 729-31.
[75] Ghebrai & Tesfaye, *supra* note 40 at 26. 'Ad hoc tribunals' refers to the ICTY and ICTR.
[76] Goldsmith, *supra* note 19, at 254.
[77] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523.
[78] *Id.*
[79] *Id.*

indicators of intent.[80] Allowing a chamber to infer a perpetrator's specific intent "to destroy [...] a group" from the general context and additional relevant factors broadens the standard; however, at its strictest interpretation, an inference does not satisfy the *dolus specialis* requirement as first defined by the Akayesu Chamber.[81] Still, the Chamber recognized that the difficulties associated with identifying clear, concrete evidence of specific intent favored the perpetrators of genocide.[82]

Permitting an inference of intent allowed the Chamber to determine Akayesu's specific intent and convict him of committing genocide.[83] His genocidal intent was evident in speeches he made calling for the commission of genocide against the Tutsis, the large number of Tutsis he killed or ordered to be killed, and his deliberate selection of victims.[84] Despite the Akayesu Chamber's understanding that a perpetrator's genocidal intent may be inferred from the general context, subsequent trials, particularly ICTY trials, encountered difficulties proving specific intent beyond a reasonable doubt.[85]

2. Prosecutor v. Kayishema

In the year following the Akayesu judgment, the ICTR found Clément Kayishema guilty of genocide.[86] The ruling made additional contributions to the international understanding of genocidal intent. The Kayishema Trial Chamber confirmed *dolus specialis* as the distinguishing aspect of genocide.[87] Similar to the Akayesu Chamber, the Kayishema Trial Chamber recognized that the difficulty of finding explicit manifestations of specific intent might allow perpetrators to escape conviction.[88] The Chamber therefore stipulated that "the necessary element of intent can be inferred from sufficient facts," including the number of group members affected, a pattern of purposeful action, the physical targeting of the group or their property, the use of derogatory language, the weapons employed, the extent of bodily injury, methodical planning, and the systematic manner of killing. Though comparable, the factors deemed indicators of specific intent in *Kayishema* are not identical to those listed in *Akayesu*.

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[80] *Id.*

[81] Goldsmith, *supra* note 19, at 246.

[82] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523.

[83] *Id.*, ¶¶ 729-31; Goldsmith, *supra* note 19, at 246.

[84] *Id.*, ¶¶ 729-31.

[85] *Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 105; Kent, *supra* note 73, at 564.

[86] Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, Section VIII (May 21, 1999).

[87] *Id.*, ¶ 91.

[88] *Kayishema*, Case No. ICTR-96-3-A, Appeals Judgment, ¶ 159.

The Kayishema Trial Chamber differed from the Akayesu judgment by emphasizing that the existence of a genocidal plan and the number of victims indicate specific intent.[89] The Kayishema Chamber determined that genocide would be difficult, even impossible, to carry out without a plan.[90] This emphasis helped the Chamber find Kayishema guilty because, as the Prefect of Kibuye, he implemented the national plan to commit genocide at a local level.[91] To prove a perpetrator's specific intent, the Kayishema Chamber also found "the number of victims from the group to be important."[92] Scholars and courts have also disputed this emphasis on the number of victims, arguing genocide is a crime of intent.[93] One act (or killing) committed with genocidal intent could, in theory, constitute genocide.[94] Including these additional factors expanded on the Akayesu precedent.

An Appeals Chamber upheld Kayishema's genocide conviction, satisfied that the number of Tutsis he killed or ordered to be killed, his pattern of actions and implementation of a genocidal plan, and his statements demonstrated his genocidal intent.[95] The Kayishema Trial and Appeals Chambers confirmed that intent may be inferred and expanded the number of relevant factors.

3. Subsequent ICTR Genocide Convictions

Later genocide convictions under the ICTR's jurisdiction followed the reasoning set out in *Akayesu* and *Kayishema*.[96] In the absence of direct, concrete evidence of the perpetrator's specific intent, the ICTR chambers allowed genocidal intent to be inferred from sufficient facts.[97] The chambers considered the general context of the perpetration, scale of atrocities, deliberate and systematic selection of victims, physical targeting, derogatory language, extent of injury, existence of a plan, number of victims, and pattern of purposeful acts when determining intent.[98] Later judgments that addressed the issue of intent are detailed below.

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[89] *Id.*, ¶¶ 93-94, 276, 533.
[90] *Id.*, ¶ 94.
[91] *Id.*, ¶¶ 528-30.
[92] *Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶¶ 93, 533.
[93] Buchwald & Keith, *supra* note 3, at 14.
[94] *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 685 (Aug. 1, 2001).
[95] *Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶¶ 531, 541; *Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, ¶ 155.
[96] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 63 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment & Sentence, ¶ 166 (Jan. 27, 2000).
[97] *Id.*
[98] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523; *Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶¶ 93-94.

Georges Rutaganda, the second vice-president of the Rwandan Hutu militia, appealed his genocide conviction on the grounds that the Chamber wrongfully used the "*Akayesu* test" instead of the "*Kayishema* Test" when determining genocidal intent.[99] He argued that the "*Akayesu* test" allowed the Chamber to infer his intent from the "general context" without additional facts.[100] His appeal was dismissed because the Trial Chamber had inferred Kayishema's genocidal intent from a number of factors, including the general context of the acts, his participation in massacres, his deliberate selection of Tutsi victims, and his use of his authority to encourage crimes against the Tutsis.[101] The Chamber ruled that there were not two separate tests for determining genocidal intent, but that "the standard applied in … the Trial Judgment is in keeping with the generally accepted practice of the ad hoc Tribunals."[102] In the absence of direct evidence, the *Akayesu* and *Kayishema* precedents recognized that genocidal intent may be inferred from additional facts, such as the general context and pattern of acts.[103]

In the Musema judgment, the Trial Chamber added that humiliating utterances towards Tutsis and use of anti-Tutsi slogans during attacks also constituted evidence of the perpetrator's specific intent.[104] Chants, such as "Let's exterminate them," revealed Musema's genocidal intent.[105] This addition expanded the number of factors deemed relevant to inferring intent.

Overall, the ICTR adopted a narrow definition of intent by applying the *dolus specialis* requirement to the crime of genocide. However, the ICTR chambers allowed perpetrators' specific intent to be inferred from a number of relevant facts, actions, utterances, and patterns. Evidence that the ICTR chambers determined could be used to infer specific intent expanded as the Tribunal unfolded. There are still outstanding ICTR cases (now under the jurisdiction of the International Residual Mechanisms for Criminal Tribunals) involving charges of genocide. While most of the individuals that were charged remain fugitives, Félicien Kabuga, former President of the National Defence Fund and former President of the *Comité d'Initiative of Radio Télévision Libre des Milles Collines* (RTLM), was arrested and

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[99] *Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 2; *Rutaganda*, Case No. ICTR-96-3-A, Appeals Judgment, ¶ 521 (May 26, 2003).

[100] *Rutaganda*, Case No. ICTR-96-3-A, Appeals Judgment, ¶ 522.

[101] *Rutaganda*, Case No. ICTR-96-3-A, Appeals Judgment, ¶ 529-30.

[102] *Id.,* ¶ 528.

[103] *Id.*

[104] *Musema*, Case No. ICTR-96-13-A, Judgment & Sentence, ¶¶ 932-33.

[105] *Id.*

transferred to the Mechanism's custody in 2020, where his case is in the pre-trial phase.[106] The ruling may provide further clarification on the issue of intent.

B. International Criminal Tribunal for the former Yugoslavia

1. Prosecutor v. Jelisić

Proving genocidal intent was more difficult at the ICTY trials. The Serbian perpetrators of atrocity crimes were aware that disguising their intentions would prevent outside powers from intervening.[107] Most notably, General Ratko Mladic warned the Bosnian Serb Parliament:

> We should not say, "We will destroy Sarajevo, we need Sarajevo." We are not going to say that we are going to destroy the power supply pylons or turn off the water supply, no, because that would turn America out of its seat, but . . . one day there is no water at all in Sarajevo. [Why] it is we do not know. . . . And the same with electrical power . . . we have to wisely tell the world it was they who were shooting, hit the transmission line and the power went off, they were shooting at the power supply facilities. . . . That is what diplomacy is.[108]

Officers took Mladic's warning seriously.[109] After massacring civilians, Serb forces would proclaim that the Bosnian Army was killing its civilians to spark military intervention on their behalf from the West.[110] Avoiding culpability—while committing atrocity crimes—was part of the Serbian forces' strategy.[111]

In the ICTY's first case concerning genocide, Goran Jelisić, who acted as commander of the Luka concentration camp and referred to himself as the "Serbian Adolf," was acquitted.[112] The Chamber was not satisfied he "was motivated by the *dolus specialis* of the crime of genocide."[113] His borderline personality disorder, arbitrary killings, and "foot soldier" status (Jelisić was a police officer and low-level commander) led the court to their

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[106] Félicien Kabuga, Case No. MICT-13-38, Case Information Sheet, International Residual Mechanism for Criminal Tribunals https://www.irmct.org/sites/default/files/cases/public-information/IRMCT-CIS-Kabuga-EN.pdf.

[107] *Krajisnik*, Case No. IT-00-39-T, Judgment, ¶¶ 975-77; Edina Bećirević, *The Issue of Genocidal Intent and Denial of Genocide: A Case Study of Bosnia and Herzegovina,* 24 E. Euro. Pol. & Societies 480, 484 (2010).

[108] Mladic served as the Commander of the Main Staff of the Army of the Bosnian-Serb Republic (VRS) May 1992 - 1995. He was charged with one count of genocide. *See* Prosecutor v. Mladic, Case No. IT-09-02, Trial Judgment Summary (Nov. 22, 2017); *Krajisnik*, Case No. IT-00-39-T, Judgment, ¶ 975.

[109] Bećirević, *supra* note 107, at 484-85.

[110] *Id.*

[111] *Id.*

[112] *Jelisić*, Case No. IT-95-10-T, Judgment, ¶¶ 102, 138. The ICTY was established before the ICTR, but the ICTR was the first to issue a genocide conviction.

[113] *Id.*, ¶¶ 108.

decision.[114] Multiple witnesses testified that Jelisić regularly proclaimed his hatred toward Muslims and his desire to kill all of them, but the Chamber decided that "[a]lthough he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group."[115] Most notably, the Chamber could not determine if the murders committed by Jelisić were motivated by his own genocidal intent or if he was acting "to please superiors."[116] Jelisić's acquittal made it evident that the ICTY would struggle to hold low-level, direct perpetrators accountable for genocide.[117]

Judge Shahabuddeen dissented from the Majority. He argued that the Trial Chamber adopted the wrong test because "it did not refer to possible inferences which a trier of fact might eventually be able reasonably to draw from those elements."[118] He argued that the Chamber did not consider all the evidence relevant to inferring specific intent, including evidence that indicated "that the bulk of people killed belonged to a particular ethnic group," that Jelisić held de facto authority over the camp, and that "he exercised that authority to implement the liquidation arrangements…to destroy people as members of an ethnic group. [119] He also argued that whether Jelisić was acting alone or part of a group did not affect his specific intent.[120] If the Chamber had considered all of the evidence presented to its full extent, Judge Shahabuddeen contented that Jelisić would not have been acquitted of genocide.[121]

Examining the same facts as the Jelisić Trial Chamber, an appeals chamber concluded that the evidence presented "could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Brčko."[122] The Jelisić Appeals Chamber agreed with Judge Shahabuddeen: a few "random" killings or displays of mercy could not negate "the plethora of other evidence recounted above as to the respondent's announced intent to kill the

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[114] *Id.*, ¶¶ 105-08.

[115] *Id.*, ¶¶ 102-08.

[116] *Id.*, ¶¶ 12, 105. Defendant (Jelisić) claimed he was operating under hierarchical duress.

[117] Janine Natalya Clark, *Elucidating The Dolus Specialis: An Analysis of ICTY Jurisprudence on Genocidal Intent*, Crim. L. Rev., 497, 508-09 (2015). *See also* Kent, *supra* note 73, at 564–87.

[118] *Jelisić*, Case No. IT-95-10-A, Appeals Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 16 (July 5, 2001).

[119] *Id.*

[120] *Id.*

[121] *Id.,* ¶¶ 17-18.

[122] *Id.*, ¶ 68. The Appeals Chamber did not re-try Jelisić for genocide, citing that the wrongful acquittal was because of the Trial Chamber and Prosecution, not the Defense.

majority of Muslims in Brčko and his quotas and arrangements for so doing."[123] That two competent chambers could examine the same evidence and reach different conclusions underscores the difficulty of determining genocidal intent and the lack of clarity around the issue.

2. Prosecutor v. Krstić

General-Major of the Drina Corps of the Army of Republika Srpska (VRS) Radislav Krstić was the first person convicted of genocide at the ICTY.[124] In the Krstić Trial Judgment, the Trial Chamber adopted the *dolus specialis* standard and made two new findings regarding its evidentiary standard.[125] First, although the Genocide Convention does not protect groups from "cultural genocide,"[126] the Krstić Trial Chamber determined that "attacks on the cultural and religious property and symbols… may legitimately be considered as evidence of an intent to physically destroy the group."[127] Previous ICTR and ICTY cases had not considered cultural attacks as evidence of genocidal intent.[128] Second, in order to convict Krstić of genocide, the Trial Chamber relied heavily on his participation in the Srebrenica joint criminal enterprise (JCE).[129] The JCE had genocidal intent, inferred from their widespread and systematic campaign to kill all Bosnian men of military age in Srebrenica.[130] The Krstić Trial Chamber determined that from the moment "[Krstić] learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the [JCE's] genocidal intent."[131] While this new finding—participation with knowledge equals shared intent—would have been crucial in holding mid and low-level perpetrators accountable, the Krstić Appeals Chamber overturned the decision.[132] The

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[123] *Id.,* ¶ 71.

[124] *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 727.

[125] *Id.*, ¶ 571.

[126] Cultural genocide is not protected by the Genocide Convention. *See* Leora Bilsky, *Return of Cultural Genocide?* 29 Euro. J. Int'l L. 373, 378-9 (July 23, 2018). The International Law Commission defines cultural genocide as "any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group." *See* Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, *supra* note 39, art. 17(12).

[127] *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580.

[128] Elisa Novic, *Physical-Biological or Socio-Cultural 'Destruction' in Genocide? Unraveling the Legal Underpinnings of Conflicting Interpretations,* 17 J. Genocide Rsch. 63, 74 (2015).

[129] *Krstić*, Case No. IT-98-33-T, Judgment, ¶¶ 633-45.

[130] *Id.,* ¶ 619.

[131] *Id.,* ¶¶ 644-45.

[132] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 98.

Appeals Chamber reversed Krstić's genocide conviction on the grounds that full awareness of others' specific intent "alone cannot support an inference of genocidal intent."[133] A strict interpretation of *dolus specialis*, where knowledge cannot be equated with intent, was upheld.[134]

In their judgment, the Krstić Appeals Chamber made an additional important clarification regarding genocidal intent. The Chamber stated that the "intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him."[135] Since the atrocities in Bosnia were not as widespread as those during the Holocaust or the Rwandan genocide, this finding demonstrated that genocide, and therefore genocidal intent, does not depend only on the number of victims or the size of territory affected.[136] In general, however, the reversal of Krstić's genocide conviction demonstrated the difficulty of applying the *dolus specialis* standard in instances with limited evidence.[137] It furthered the trail of confusing, inconsistent interpretations of the intent requirement and evidentiary standards.

3. Prosecutor v. Karadžić

In *Prosecutor v. Karadžić*, the Trial Chamber placed renewed emphasis on determining the accused's genocidal intent from a comprehensive analysis.[138] The Chamber underlined that genocidal intent can be inferred from "from all the facts and circumstances."[139] The evidence should not be considered individually, but instead taken together to demonstrate a genocidal mental state.[140] The Chamber also embraced a less restrictive specific intent

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[133] *Id.*, ¶ 134; s*ee also* Mark Drumbl, *Prosecutor v. Radislav Krstić: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, 5 MELB. J. INT'L L.. 434, 443 (2004).

[134] Drumbl, *supra* note 133; Goldsmith, *supra* note 19, at 246.

[135] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 13.

[136] *Id.,* ¶ 12-13 ("The intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group… The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him").

[137] *Id.*; Novic, *supra* note 128, at 68.

[138] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment ¶ 550 (March 24, 2016).

[139] *Id.*

[140] *Id.*

evidentiary standard. By specifying that "factors relevant to this analysis may include, but are not limited to…" the Chamber acknowledged that there are additional factors a future court may deem relevant to inferring genocidal intent.[141] This interpretation allows for a larger number of facts and circumstances to be pertinent to genocide convictions.

The Karadžić Trial Chamber also expanded the list of sufficient factors.[142] Acknowledging that the Genocide Convention did not recognize ethnic cleansing (forcible transfer) as an act of genocide, the Chamber stipulated that ethnic cleansing is "a relevant consideration as part of the Chamber's overall factual assessment."[143] Since ethnic cleansing was an important part of the VRS's explicit goals, this addition increased the evidence relevant to determining genocidal intent.[144] The Trial Chamber found Karadžić guilty of committing genocide in Srebrenica, but not in municipalities across Bosnia. He was part of the Srebrenica JCE whose goal was to destroy the Bosnian Muslims in Srebrenica[145] The Chamber was not presented with concrete evidence that Karadžić knew the killings were taking place or that he intended them to take place, only that he was part of the enterprise that conducted them.[146] Still, the Chamber accepted his participation in the Srebrenica JCE and his conversations with Srebrenica's civilian administrator about expansion of the campaign to kill Bosnian Muslim men as proof of his genocidal intent.[147] This inference of intent is very close to "knowledge and participation," which the Krstić Appeals Chamber previously deemed insufficient to determine specific intent.[148] In Karadžić's case, the fact that he knew about the plan to eliminate the Bosnian Muslims in Srebrenica and participated in the killings allowed for an inference of genocidal intent, but, in the Krstić Appeals Judgment, Krstić's awareness that his troops possessed genocidal intent and his supervision of executions did not prove his genocidal intent beyond a reasonable doubt.[149] These contradictions were not addressed by the Chamber.

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[141] *Id.*; Milena Sterio, *The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide*, 31 Emory Int'l L. Rev. 272, 291 (2017).

[142] *Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 553.

[143] *Id.*

[144] Manojlo Milovanović, Directive for Further Operation, OP. NO. 7, Ref. no: 2/2-11 (Mar. 8, 1995). Drina Corps of the Army of the Republika Srpska were instructed to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica or Žepa."

[145] *Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶¶ 2541, 2591.

[146] *Id.*, ¶¶ 5798-814.

[147] *Id.*, ¶ 5811; Sterio, *supra* note 141. Karadžić's conviction rested on the theory of JCE, and that his intent to order and implement killings at Srebrenica must have been shared with other members of the JCE.

[148] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 134.

[149] *Id.*; *Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 5814.

Karadžić was acquitted of committing genocide in the Bosnian municipalities.[150] Though presented with evidence of statements, speeches, and actions indicating the Overarching JCE's objectives of ethnic separation and forceful creation of an ethnically homogeneous state, the Trial Chamber was not satisfied that the Overarching JCE, of which Karadžić was a member, possessed the requisite genocidal intent.[151] The Karadžić Trial Chamber grappled with how to prove a JCE's genocidal intent and then how to prove a member's shared intent. The Karadžić Appeal Chamber did not reverse any of the Trial Chamber's findings in regard to Karadžić's genocide charges and therefore did not offer any further discourse on the subject.[152]

Additional clarification on the role of JCEs and specific intent may be provided by the Mladić appeal decision, whose verdict is due May 2021.[153] Like Karadžić, the Trial Chamber convicted Commander of the VRS Main Staff Ratko Mladić of committing genocide in Srebrenica because of his role in the Srebrenica JCE (which was found to possess genocidal intent).[154] Though Mladić was found to be a member of the Overarching JCE, he was similarly acquitted of committing genocide in the Bosnian municipalities because the Chamber was not satisfied of the Overarching JCE's genocidal intent.[155] The Prosecution appealed the judgment on the grounds that the "Trial Chamber erred in law… by applying a heightened standard when finding that Mladić and other [Overarching] JCE members did not possess the intent to destroy the Bosnian Muslims."[156] Mladić appealed his conviction of genocide in Srebrenica, arguing he did not share the Srebrenica JCE's intent.[157] The Chamber's decision on these two appeals may provide a clearer understanding of how to infer specific intent.

4. Subsequent ICTY Genocide Convictions

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[150] *Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 2626.

[151] The Overarching JCE refers to the joint criminal enterprise whose goal was to "permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in BiH." *Karadžić*, Case No. IT-95-5/18-T, Judgment, Introduction A(3(i)), ¶ 2605 (definition of Overarching JCE and Chamber's decision regarding the enterprise's genocidal intent).

[152] *Mladić*, Case No. MICT-13-55, Appeals Proceedings before the International Residual Mechanism for Criminal Tribunals, Case Information Sheet (June 2019).

[153] Press Release, UN Security Council, *International Residual Mechanism for Criminal Tribunals May Conclude Most Cases by May 2021, Its President Tells Security Council,* UN Doc. SC/14385 (Dec. 14, 2020) https://www.un.org/press/en/2020/sc14385.doc.htm (Mladić case expected to conclude in May 2021).

[154] *Mladić*, Case No. IT-09-92-T, Judgment, ¶¶ 5127-31 (Nov. 22, 2017).

[155] *Id.*, ¶¶ 4234, 4237.

[156] *Mladić*, Case No. MICT-13-56-A, Prosecutor's Notice of Appeal, Ground 2(A) (Mar. 22, 2018).

[157] *Mladić*, Case No. MICT-13-56-A, Notice of Appeal of Ratko Mladić, ¶¶ 29, 61-62 (Mar. 22, 2018).

Later ICTY trial and appeal judgments regarding genocide charges provided more interpretations of the *dolus specialis* requirement. The few examined below are representative of the additional interpretations, but do not consist of a comprehensive review of all the ICTY cases that dealt with the issue of intent.[158]

The Brđanin Trial Chamber stipulated that genocidal intent may be inferred when it is "*the only reasonable inference available on the evidence*."[159] This standard narrowed the Court's understanding of specific intent, making it even more difficult to secure a genocide conviction. This stipulation was particularly important when investigators and prosecutors sought to make a genocide determination in Darfur, which will be discussed in more detail in the next section.[160]

More cases dealt with inferring intent from participation in a JCE. The ICTY found Vujadin Popović, former Lieutenant Colonel and the Chief of Security of the Drina Corps of the VRS, possessed genocidal intent because he participated in the JCE to murder military-aged Bosnian Muslim men from Srebrenica.[161] The prosecution presented evidence that he planned, ordered, and directly participated in these murders.[162] This determination contrasts with the Krstić Appeals Chamber decision that knowledge and participation in the JCE was not substantial proof of intent.[163] Ljubisa Beara, Chief of Security of the Main Staff of the Army of Republika Srpska, was also convicted of genocide because he held "detailed knowledge of the killing operation itself and Beara's high-level and far-reaching participation in [the JCE to Murder]."[164] Again, the ICTY struggled with how to determine genocidal intent in situations where the hierarchy of leadership was unclear or when the Court could not presume that the direct perpetrators of genocide adopted their leaders' intent.[165] Beara's conviction signaled that the Court was more likely to convict high-level perpetrators of genocide than foot soldiers, such as Goran Jelisić.[166]

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[158] Additional cases not examined here include: Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment (Dec. 12, 2012); *Krajisnik*, Case No. IT-00-39-T, Judgment; Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgment, ¶ 1180 (June 10, 2010) (Borovčanin, Nikolić, Pandurević).

[159] Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 970 (Sept. 1, 2004).

[160] *Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, Key Finding 1 (Mar. 4, 2009).

[161] *Popović* et al., Case No. IT-05-88-T, Judgment, ¶ 1180.

[162] *Id.*, ¶¶ 1180-81.

[163] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 134.

[164] *Popović* et al., Case No. IT-05-88-T, Judgment, ¶¶ 1313, 1317.

[165] *Id.*

[166] *Id.*, ¶¶ 1312-14; *Jelisić*, Case No. IT-95-10-T, Judgment, ¶¶ 102, 138.

The Stakić judgment represented another important ICTY ruling. The Trial Chamber and Appeals Chamber agreed that the "Appellant did not seek to destroy the Bosnian Muslim group in whole or in part – the fact that more Bosnian Muslims could have been killed, but were not, indicates that the Appellant lacked *dolus specialis*."[167] They reached this conclusion because the structures in place and the camps in the Prijedor municipality could not have facilitated the destruction of the Muslim group.[168] This ruling contradicts past understandings of specific intent, particularly the Krstić Appeal Chamber's ruling that a perpetrator's intent is limited by the opportunities presented to him.[169]

Another controversy emerged when an ICTY Appeals Chamber overturned former commander of the Bratunac Brigade of the Republika Srpska Army Vidoje Blagojević's genocide conviction because "the forcible transfer operation alone or coupled with the murders and mistreatment" was not enough to infer genocidal intent.[170] Examining the same evidence as the Blagojević Trial Chamber, the Appeals Chamber reached an entirely different conclusion.[171] The Appeals decision also departed from the Karadžić Chamber's stipulation that ethnic cleansing is "a relevant consideration as part of the Chamber's overall factual assessment."[172] Blagojević's eventual acquittal further highlights the uncertainty surrounding the evidentiary standard of *dolus specialis*.

The jurisdiction of the ICTY on genocidal intent is, at best, inconsistent. The absence of concrete evidence of intent and varying decisions about hierarchical responsibility complicated the ICTY Chambers' decisions about perpetrators' specific intent. Even agreements on the evidentiary standard between chambers and the ad hoc tribunals led to different outcomes.[173] Overall, the uncertainty surrounding the definition of *dolus specialis* and the evidentiary standard it requires led to inconsistent judgments at both ad hoc tribunals.

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[167] Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment, ¶ 42 (Mar. 22, 2006).
[168] *Id.*, ¶¶ 41-42.
[169] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 13.
[170] Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Appeals Judgment ¶¶ 3, 123-24 (May 9, 2007).
[171] *Id.*, ¶ 123; Bećirević, *supra* note 107, at 483.
[172] *Id.*
[173] Kent, *supra* note 73, at 579.

III. The Future of *Dolus Specialis*

There is no uniform standard for determining genocidal intent. The 1948 Genocide Convention left the intent requirement open to interpretation.[174] The ad hoc tribunals—the first international courts to charge and convict individual perpetrators of genocide—agreed that the phrase "intent to destroy" in the Genocide Convention meant the perpetrators must have committed one or more of the individual acts listed by Article II with the ulterior intent of destroying a protected group.[175] This specific intent, or *dolus specialis*, is the distinguishing element of the crime of genocide.[176] It emphasizes its severity: the perpetrator, or perpetrators, seeks to destroy a unique human group.[177] By requiring the prosecution to prove a perpetrator's specific intent, the ad hoc tribunals set a high evidentiary standard. The *dolus specialis* standard means that without manifestations of intent to prove "that the perpetrator clearly [sought] to produce the act charged," the perpetrators of genocide cannot be held accountable for their actions.[178]

To combat the difficulty of proving specific intent, the ad hoc tribunals agreed that genocidal intent may be inferred from relevant facts and circumstances in the absence of concrete evidence.[179] The chambers' determinations of applicable "facts and circumstances" evolved over the course of the tribunals. For example, the Akayesu Trial Chamber found that the general context, the scale of atrocities, the general nature of the atrocities, and deliberate and systematic targeting of victims of a particular group demonstrated genocidal intent.[180] The Kayishema Trial Chamber added that intent may be inferred from a pattern of purposeful action, physical targeting of the group or their property, the use of derogatory language, the weapons used, the extent of bodily injury, the existence of a plan, and the number of victims.[181] The ICTY chambers referred to the *Akayesu* and *Kayishema* precedent that specific intent may be inferred, but further complications arose.[182] Unclear hierarchies,

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[174] Genocide Convention, *supra* note 2.
[175] Ambos, *supra* note 13, at 837.
[176] *Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶ 91.
[177] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 134.
[178] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 498.
[179] *Id.*, ¶ 523; *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580.
[180] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523.
[181] *Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶¶ 93-94.
[182] For reference to Akayesu and Kayishema precedent, *see, e.g., Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 61; *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 571; *Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 549. For complications regarding specific intent at the ICTY, *see, e.g., Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 105; *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 383; *Blagojević & Jokić*, Case No. IT-02-60-A, Appeals Judgment, ¶ 123.

particularly within joint criminal enterprises, led to inconsistent decisions about intent.[183] Trial and appeals chambers, presented with the same evidence, came to different conclusions regarding the accused's specific intent.[184] Their conflicting decisions reflect the difficulty of proving intent and the confusion over what meets the intent requirement.

Inconsistencies surround the evidentiary standard of *dolus specialis*. For example, the Akayesu Trial Chamber found explicit statements of intent demonstrated genocidal intent amidst the general context.[185] However, the Jelisić Trial Chamber determined Jelisić's reference to himself as the "Serbian Adolf" and his statements that only 5-10% of the detainees at the Luka camp would leave alive did not prove his specific intent.[186] The Jelisić Appeals Chamber further complicated the issue by agreeing that his statements of intent might be enough to infer genocidal intent, but declining to retry Jelisić.[187] ICTY judgments also added cultural destruction, geographic limitations, and forcible transfer to the factors relevant to determining a perpetrator's specific intent.[188] The differing judgments across and within the two ad hoc tribunals created a confusing amount of jurisprudence on the issue.

Another contradiction arose when, in determining a perpetrator's specific intent, some trial chambers relied on evidence that reflected a "knowledge and participation" requirement. The Akayesu Trial Chamber, which set the *dolus specialis* precedent, also stated "the offender is culpable [of genocide] because he knew or should have known that the act committed would destroy, in whole or in part, a group."[189] Although the Trial Chamber was satisfied Akayesu clearly sought to destroy the Tutsi ethnic group, therefore satisfying the *dolus specialis* requirement, the Chamber acknowledged this more lenient "known or should have known" test.[190] A few of the ICTY Trial Chambers, in the absence of direct evidence,

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[183] *Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 105; *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 383.

[184] *Jelisić*, Case No. IT-95-10-A, Appeals Judgment, ¶ 68; *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 134; *Blagojević & Jokić*, Case No. IT-02-60-A, Appeals Judgment, ¶ 123.

[185] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 167, 730.

[186] *Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 102; Kent, *supra* note 73, at 579.

[187] *Jelisić*, Case No. IT-95-10-A, Appeals Judgment, ¶ 68.

[188] *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580; *Karadžić*, Case No. IT-95-5/18-T, ¶ 553; *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 13.

[189] *Akayesu*, Case. No. ICTR-96-4-T, Judgment, ¶ 523.

[190] *Id.*, ¶ 730 ("Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes"); Kent, *supra* note 73, at 575; Akhavan, *supra* note 73.

inferred specific intent from the perpetrators' knowledge and then participation in a JCE.[191] While the Krstić Trial Chamber found Krstić's likely knowledge and participation in the Srebrenica JCE proved his intent, the Appeals Chamber overturned the ruling due to insufficient evidence of intent.[192] The Karadžić Trial Chamber determined that Karadžić's high-level position in the Srebrenica JCE demonstrated his intent.[193] These decisions reflect uncertainty about what constitutes enough evidence to infer intent—or they showed that some chambers embraced a more lenient, knowledge-based approach to inferring intent.[194] These decisions serve as a reminder that how to infer genocidal intent lacks coherent precedent.

The ICTR and ICTY, the first international tribunals to charge and convict individuals of genocide, will not be the last.[195] To ensure that perpetrators of genocide are held accountable for the crimes they commit, it is important to set an international standard about what constitutes genocidal intent. This will also help prosecutors substantiate genocide charges and investigators on fact-finding missions make informed determinations. The ICC or other tribunals must hold perpetrators accountable for the crimes they commit.[196]

A. A Footnote for the ICC

While the ad hoc tribunals delivered the above genocide convictions, the ICC will try at least some of the future perpetrators.[197] The UN established the ICC to try perpetrators of the most serious crimes, including genocide, whose governments are unwilling or unable

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[191] *Krstić*, Case No. IT-98-33-T, Judgment, ¶¶ 633-645; *Karadžić*, Case No. IT-95-5/18-T, Judgment ¶ 5811.

[192] *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 134.

[193] *Karadžić*, Case No. IT-95-5/18-T, Judgment ¶ 581; *Karadžić*, Case No. IT-9S-SI18-AR98bis.l, Appeals Judgment, ¶¶ 81-85 (July 11, 2013).

[194] Goldsmith, *supra* note 19, at 246.

[195] The UN has conducted investigations in Darfur and Burma. *See* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (January 25, 2005); Report of the Independent International Fact-Finding Mission on Myanmar, 39th Sess., UN Doc A/HRC/42/50 (Aug. 8, 2019). The ICC is in the pre-trial stage of former President Omar Al Bashir's trial. *See Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest. The ICJ is hearing arguments for Gambia v. Myanmar, concerning the Myanmar government's role in the genocide. *See* Gambia v. Myanmar, Press Release Summary 2020/1 (Jan. 23, 2020); *see* U.S. State Department, U.S. Bilateral Relations with Burma, https://www.state.gov/u-s-relations-with-burma/ (Jan. 21, 2020). The U.S. also stated that China is committing genocide against the Uighurs.

[196] Goldsmith, *supra* note 19, at 253.

[197] Given its mandate and international standing, the ICC will likely, and unfortunately, try future perpetrators of genocide. *See* Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 6 (1998). The trials of Jovica Stanišić & Franko Simatović, Ratko Mladić, Maximilien Turinabo et al., and Félicien Kabuga from the ICTY and ICTR are being handled by the International Residual Mechanism for Criminal Tribunals. *See Cases*, International Residual Mechanism for the Criminal Tribunals, https://www.irmct.org/en/cases (last visited Mar. 19, 2021).

to.[198] Its existence as a permanent institution also makes it more accessible and practical. Trying individuals at the ICC does not require the logistics or incur the cost that ad hoc tribunals do.[199] This solution focuses on updating the ICC's understanding of genocidal intent because individual perpetrators are most likely to be tried there or in a hybrid tribunal developed in consultation with the ICC.[200]

As mentioned in Part I, the ICC's Elements of Crimes document focuses on the conduct, consequences, circumstances, and, if necessary, particular mental state associated with the crimes under the ICC's jurisprudence.[201] As discussed in Part I, Article 6 provides the only clarification about genocidal intent: "the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis."[202] While this description recognizes that each perpetrator—and the nature of the genocide they are partaking in—is different, it does not recognize that courts may infer genocidal intent.[203] It also leaves investigators, States, and the Court without guidance on how to interpret the ad hoc tribunals' conflicting case law.[204]

For other crimes under the Court's jurisdiction, the Elements of Crimes document uses footnotes to further clarify what constitutes the crime. For example, one footnote states that the Court understands bodily or mental harm to "include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."[205]

There is no footnote that elaborates on the Court's understanding of genocidal intent, but the ICC should add one to clarify that genocidal intent may be inferred and what factors the Court may use to determine intent. The footnote attached to Article 6 Introduction (c) should detail:

> In the absence of concrete evidence, genocidal intent may be inferred from a number of facts and circumstances including, but not limited to, the general context, the scale and general nature of the atrocities, the number of victims, the extent of the injury caused, systematic and deliberate targeting of members of the group, a pattern of persecutory acts against members of the same group, the systemic nature of the attacks, the existence of a plan, utterance of derogatory language, existence of a political

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198 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 6 (1998).

199 *See* Jon Silverman, "Ten years, $900m, one verdict: Does the ICC cost too much?," BBC NEWS (Mar. 14, 2012), https://www.bbc.com/news/magazine-17351946 (discussing importance of permanent court)

200 Felter, *supra* note 52.

201 International Criminal Court, Elements of Crimes, General Introduction (2011).

202 *Id.*, Introduction to art. 6(c).

203 *Id.*

204 *Id.*

205 *Id.*, art. 6(b) footnote 3.

> doctrine consistent with genocidal intent, and attacks on cultural or religious property or symbols associated with the group.

Most importantly, this proposed footnote concretely states that courts may infer genocidal intent. It achieves three additional goals. First, it states clearly what the Court considers indicative of a perpetrator's intent. To limit confusion, the list consolidates the factors that the ad hoc tribunal chambers found relevant to genocidal intent.[206] Second, the footnote respects the "case-by-case basis" detailed in the ICC's Elements of Crimes, which gives individual chambers the ability to determine a perpetrator's specific intent.[207] Each chamber would still be able to determine which relevant factor, or combination of factors, proved a perpetrator's specific intent. Third, the explicitly non-exhaustive list also allows future courts to add to the list of relevant factors. Unlike the strict interpretation of the Genocide Convention, this footnote respects that future genocides may be committed with methods different than the previous ones.[208] Adding the above stipulation to the Elements of Crimes document formalizes the expansion for future charges and convictions.

Clarifying the evidentiary standard of genocidal intent in the Elements of Crimes would serve as a first step to sorting through the confusing jurisprudence on the issue and clarify how the ICC will try individuals charged with genocide. It does not solve all of the issues courts have encountered or will encounter. Even with the understanding that genocidal intent may be inferred from a number of different actions, facts, and circumstances, the *dolus specialis* requirement imposes a complex, elusive standard on the crime of genocide.[209]

The addition to the ICC Elements of Crimes may also benefit state governments making genocide determinations. Since states are likely to issue a public determination of genocide before the ICC, it would be useful to have a standardized list of what factors the

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[206] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523 ("the scale of atrocities committed, their general nature, in a region or a country, or … deliberately and systematically targeting victims"); *Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶¶ 93-94 ("physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing…the number of victims from the group…[also] it would appear that it is not easy to carry out a genocide without such a plan, or organization"); *Musema*, Case No. ICTR-96-13-A, Judgment & Sentence, ¶¶ 932-33 (see for humiliating utterances); *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580 ("attacks on the cultural and religious property and symbols… may legitimately be considered as evidence of an intent to physically destroy the group"); *Karadžić*, Case No. IT-95-5/18-T, Judgment ¶ 550 ("but are not limited to…").

[207] *Id.*, Introduction to art. 6(c).

[208] Goldsmith, *supra* note 19, at 246; Bettwy, *supra* note 32, at 176.

[209] Kent, *supra* note 73, at 575-76; Buchwald & Keith, *supra* note 3, at 16, 29.

ICC considers relevant to genocidal intent.[210] Adoption of the footnote described above may also make it harder for governments to shy away from issuing genocide determinations. In the past, governments have claimed that unclear evidence of genocidal intent prevented them from making a determination.[211] This footnote removes, in part, that shield.

Critics may suggest that adding such a list to the Elements of Crime departs too far from the original Genocide Convention; however, the Convention itself does not stipulate the level of intent required.[212] *Akayesu* set the *dolus specialis* standard—and then allowed the Chamber to infer such intent.[213] The trial chambers of the ad hoc tribunals recognized that without inferring special intent, it would be difficult, perhaps impossible, to convict the perpetrators of modern genocides.[214] The footnote list, which includes all of the factors used to infer specific intent in both tribunals (excluding those overturned in Appeals Chambers), does not introduce any new considerations. The explicit statement that the Court can infer intent reflects the ICC's understanding that modern genocides, where some perpetrators are less obvious about their aims, requires the Genocide Convention to adapt in order to hold perpetrators accountable.[215]

B. Future Determinations and Convictions

Inclusion of the proposed footnote about genocidal intent in the ICC Elements of Crimes will affect future trials and fact-finding missions. If the former president of Sudan, Omar Al Bashir, is tried at the ICC, this clarification may encourage a conviction of genocide. Potential fact-finding missions in Xinjiang, China, and Tigray, Ethiopia looking for possible evidence of genocide would also benefit from a better, consolidated understanding of evidence relevant to intent. The ICC's interpretation of specific intent is important to future genocide determinations and convictions.

In 2010, the ICC charged Al Bashir with three counts of genocide. This charge added to the two counts of war crimes and five counts of crimes against humanity with which he was charged in 2008.[216] The ICC found "reasonable grounds to believe that Omar

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[210] Buchwald & Keith, *supra* note 3, at 14.

[211] *Id.*, at viii, 22, 44, 50; Samantha Power, A Problem From Hell: America And The Age Of Genocide, 282-3 (2002).

[212] Goldsmith, *supra* note 19, at 250; Genocide Convention, *supra* note 2.

[213] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523.

[214] *Id.*; *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580 (Aug. 2, 2001).

[215] *Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, ¶¶ 165-93 (Mar. 4, 2009).

[216] *Id.*; *Al Bashir*, Case No. ICC-02/05-01/09-1, Second Warrant of Arrest (July 12, 2010).

Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups."[217] The prosecution presented the Government of Sudan's efforts to hinder international assistance to IDP camps, the pattern of mass atrocities allegedly committed by government forces, and Al Bashir's responsibility as President (at the time of the alleged atrocities) and his "scorched earth" tactics as evidence of genocidal intent.[218] Al Bashir has not been transferred to the ICC, but if he is, a Chamber will determine if this evidence, combined with any additional evidence submitted by the prosecution, constitutes enough to convict him of genocide.[219] The proposed footnote for the Elements of Crimes will assist in this regard. In the absence of direct evidence, proof of genocide occurring in the general context or perpetrated by leaders under Al Bashir's direction are relevant factors.[220] Similar to Yugoslavia, the perpetrators of the Darfur genocide were unclear about their intent and directed the blame onto other groups.[221] In Yugoslavia, the genocide was called "ethnic cleansing;" in Darfur, the crimes are called "tribal conflicts."[222] There are no euphemisms for genocide. These factors should not prevent a trial or appeals chamber from determining intent either.

For future fact-finding missions who may look for evidence of genocide, having the footnote in the Elements of Crimes to show what factors the ICC already recognizes as relevant regarding intent will help direct investigators. Establishing a single definition not only reduces confusion surrounding the intent requirement for international criminal tribunals concerned with the crime of genocide, but it also provides a clearer requirement for UN Commissions of Inquiry and International Fact-Finding Missions. Atrocities committed against the Uighurs in Xinjiang, China and civilians in the Tigray region of

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[217] *Id.*

[218] *Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, ¶¶ 165-93.

[219] In October 2020, the PM promised to "cooperate" with the ICC. Bashir has not been transferred to the court for trial. *See Sudan Pledges Cooperation with ICC on Former Leader Omar al-Bashir*, VOA News (Oct. 19, 2020), https://www.voanews.com/africa/sudan-pledges-cooperation-icc-former-leader-omar-al-bashir (discussing PM Hamdok's promise to work with the ICC); s*ee also Al Bashir*, International Criminal Court https://www.icc-cpi.int/darfur/albashir (last visited Mar. 19, 2021) (suspect remains at large).

[220] *Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, ¶¶ 165-93.

[221] Bećirević, *supra* note 107, at 484-85; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Executive Summary II (January 25, 2005).

[222] *Id.*, ¶ 201; Gregory Stanton, *Call It Genocide*, George Mason Univ., Dec. 15, 2017.

Ethiopia may soon warrant UN investigations.[223] These investigations would benefit from a clearer definition.

Conclusion

The horrors of the Holocaust shocked the world into codifying the prevention and punishment of genocide.[224] In 1948, the UNGA unanimously ratified the Genocide Convention; today, 152 countries have signed the Convention.[225] In signing the Convention, each state promised "to prevent and to punish" genocide.[226] Each recognized that state sovereignty does not grant persons in positions of power the right to annihilate human groups who reside in their territory.[227] Each affirmed that persons suspected of committing genocide must be tried in a competent court.[228] While genocide prevention efforts have been inconsistent in the decades following the Genocide Convention, the establishment of the ad hoc tribunals and the permanent ICC marked an effort by the UN, and its member states, to end impunity for the perpetrators of genocide.[229]

Although the Holocaust served as the catalyst for the Genocide Convention, Nazi crimes cannot be the measuring stick for future genocides.[230] Six million people do not need to die in order for governments to intervene. Explicit evidence of intent (written plans, explicit directions, confessions) is not required for courts to find perpetrators guilty of genocide.[231] In order to achieve the Convention's original goals—to prevent and punish genocide—the ICC must allow courts to infer perpetrators' specific intent.[232] The ICC's guiding document must reflect its understanding that genocidal intent may be inferred from a number of different relevant factors.[233] Preventing and punishing genocide did not start with the 1948 Genocide Convention. It will not end with an additional footnote in the ICC's

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[223] Gregory Stanton, *Genocide Alerts*, Genocide Watch, https://www.genocidewatch.com/countries-at-risk (last visited Jan. 4, 2020).

[224] United Nations Office on Genocide Prevention and the Responsibility to Protect, *supra* note 28.

[225] *Id.*

[226] Genocide Convention, *supra* note 2, art. I.

[227] *Id.*

[228] *Id.*, art. V, VI.

[229] *Id.*; S.C. Res. 955, U.N.Doc.S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N.Doc.S/RES/827 (May 25, 1993); Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90. (1998).

[230] Steven R. Ratner, *The Genocide Convention After Fifty Years: Contemporary Strategies for Combatting a Crime Against Humanity*, 92 Proceedings of the Annual Meeting (Am. Soc'y Int'l L.): The Challenge of Non-State Actors 1 (Apr. 1998).

[231] *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 523; *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580.

[232] Goldsmith, *supra* note 19, at 245-49, 254.

[233] *Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, ¶¶ 165-93.

Elements of Crimes, but this is another step in the right direction. Providing additional clarity about the complex issue that is specific intent helps ensure that the perpetrators of genocide will be held accountable for the crimes they commit.

A Prescription for the Drug-Price Crisis: A Call for Implementing ERP and IRP Systems to Regulate Prescription Drug Prices for Publicly and Privately Insured Patients

Gabriela Landolfo

Introduction

In 2019, record high prices for prescription drugs in the United States forced over two million Americans—uninsured, underinsured, and insured alike—to skip medications or delay critical medical treatments.[1] In the same year, prices for prescription drugs rose faster than inflation, launching life-saving treatments such as insulin and cancer drugs to new, unaffordable costs.[2] These drug prices thus secured for Americans first place in the race for the highest healthcare expenditures, their prize being costs four times the amount paid by European consumers for the same drugs.[3] To the benefit of pharmaceutical companies and the detriment of consumers, this phenomenon represents not an anomaly but a trend in which increasing drug prices and unaffordability have come to define the United States healthcare system.

Although high drug prices incentivize pharmaceutical companies to develop and market new treatments, their existence and persistence are fomented by the root of the drug price crisis: pharmaceutical monopolies.[4] Such monopolistic competition is achieved in the

[1] Rohan Khera et al., *Cost-Related Medication Nonadherence in Adults with Atherosclerotic Cardiovascular Disease in the United States, 2013 to 2017*, 140 Circulation. 2067-2069, (2019).

[2] Inmaculada Hernandez et al., *The Contribution of New Product Entry Versus Existing Product Inflation in the Rising Costs of Drugs*, 38 Health Affairs. [#A], [#B] (2019).

[3] Staff of H.R. Comm. on Ways & Means, 119th Cong., A Painful Pill to Swallow: U.S. vs. International Prescription Drug Prices 4, 15 (Comm. Print 2019).

[4] Rebecca S. Eisenberg, *Patents and Regulatory Exclusivity*, Univ. Mich. L. Sch. Scholarship Repository, (2012), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1126&context=book_chapters

United States by using and subsequently manipulating the intellectual property system (e.g., patents and trademarks), made possible due to the lack of drug price regulation legislation.[5] The absence of comprehensive state and federal pricing legislating and the U.S. government's laissez-faire regulatory approach to pharmaceutical companies manifest in the exorbitantly priced prescription drugs characteristic of the United States' healthcare economy, rendering select life-saving treatments unaffordable to millions of Americans.[6]

Intellectual property (IP) law, most notably the advantages its exercise affords to the pharmaceutical industry, plays a major role in both determining prescription drug prices and, consequently, fueling the drug price crisis in the United States.[7] Under IP law, pharmaceutical companies may be granted either a patent, issued by the Patent and Trademark Office (PTO), or a regulatory exclusivity, issued by the Food and Drug Administration (FDA), that allow these companies to establish limited monopolies on their drugs.[8]

Patents are "the grant of a property right to the inventor."[9] This granted property right affords pharmaceutical companies the legal authority to "exclude others from making, using, offering for sale or selling" any competing drug product covered by the patent.[10] Patent protections against competitors usually last twenty years after the date on which the application for the patent was filed.[11] Furthermore, injunctions may be imposed against competitors that make, use, sell, or offer to sell competing drug products that a court finds infringe upon a valid patent maintained by another company.[12] Pharmaceutical patents can protect *inter alia* chemical compounds used in a pharmaceutical product, a product's manufacturing method, and product usage.[13]

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[5] *Id.*

[6] *Id.*

[7] Kevin J Hickey et al., Congr. Research Serv., R45666, Drug Pricing and Intellectual Property Law: A Legal Overview for the 116th Congress 1 (2019).

[8] *Id* at 3.

[9] *Id.*

[10] *General Information Concerning Patents*, United States Patent and Trademark Office, (October 2015), https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-2

[11] *Id.*

[12] *Id.*

[13] Hickey et al., *supra* note 7, at 6, 13; *see also* 35 U.S.C. § 101.

It was known that challenging the validity of a patent, frequently through the federal court system, is "time consuming, complex, and expensive."[14] While the establishment of the Patent Trial and Appeal Board (PTAB) in 2011 provided a cheaper avenue to seeking revocation of previously issued patents, such proceedings remain "complex" and "far from cheap."[15] Therefore, IP law has traditionally provided strong rights to pharmaceutical companies, enabling the establishment of limited monopolies over treatments and medications in the pharmaceutical industry.

Regulatory exclusivities represent a secondary mechanism used by pharmaceutical companies to sustain monopolies over their drugs. Regulatory exclusivity includes the marketing and data rights granted to a pharmaceutical company.[16] The FDA requires pharmaceutical companies seeking to market a newly invented drug to obtain regulatory approval or licensure.[17] This regulatory approval affirms that the new product is both safe and effective in accordance with FDA standards and guidelines.[18] Once regulatory approval is achieved, the pharmaceutical company receives marketing exclusivity of its product.[19] The FDA will not grant regulatory approval to companies wishing to market drugs that compete with biosimilars—biologically equivalent drugs already approved by the FDA for dissemination.[20] Therefore, the FDA system of regulatory exclusivity augments the ability of the pharmaceutical industry to establish monopolies on certain prescription drugs.

In navigating the patent and regulatory exclusivity landscape, three pricing regimes emerge to meet the demand of privately and publicly insured consumers.[21] In the first regime, private insurers negotiate drug prices with pharmaceutical companies.[22] Drug prices for privately insured payments are determined via a negotiating triangle between

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[14] FTC v. Actavis, Inc., 570 U.S. 136, 153 (2013).

[15] Hickey et al.*, supra* note 7, at 12; Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB,* 91 Notre Dame L. Rev. 1, 258, 273, 285 (2015).

[16] Rin H. Ward et al., Cong. Research Serv., R46679, Drug Prices: The Role of Patents and Regulatory Exclusivities 12-13 (2021); *Exclusivity and Generic Drugs: What Does it Mean?* U.S. Food & Drug Admin., https://www.fda.gov/files/drugs/published/Exclusivity-and-Generic-Drugs--What-Does-It-Mean-.pdf

[17] Ward et al., *supra* note 16, at 7.

[18] *Id.* at 7-8.

[19] *Id.* at 12.

[20] *Id.* at 3, 12-14.

[21] James C. Robinson, *Public and Private Health Insurance Pricing for Innovative and Expensive Drugs in the U.S.,* Berkeley Ctr. for Health Tech. 5 (2014), https://bcht.berkeley.edu/sites/default/files/US%20FR%20biopharma%20120914.pdf

[22] *Id.*

pharmaceutical companies, health insurance providers, and pharmacy benefit managers (PBMs) who act as middlemen in drug price negotiations.[23] Although PBMs, in principle, serve to negotiate discounts on prescription drug prices, their relationship with pharmaceutical companies is ambiguous. Although savings are negotiated, the extent to which these benefits are afforded to consumers remains unclear.[24]

The second drug price regime includes mandated prices for public programs.[25] All public and quasi-public programs receive drugs at discounted prices; the extent of the discount, however, varies by program and is linked to drug prices negotiated in the first regime.[26] Finally, the third regime involves the pricing debate for Medicare patients.[27] One of the weaker aspects of Medicare coverage, drug prices for the elderly are often unaffordable and require additional insurance to cover the cost of their prescriptions.[28]

Ultimately, the advantageous relationship between the pharmaceutical industry and United States' intellectual property law, specifically the exercise of patent and regulatory exclusivity privileges, enables the establishment of limited monopolies on life-saving treatments and subsequently creates a market of inelastic supply in which high prices do not diminish consumer demand.[29] Moreover, the existing legislative framework and legal precedent for drug price regulations fail to comprehensively protect American consumers against price gouging and pharmaceutical monopolies. Therefore, there is a need for implementing both an external reference pricing system (ERP) and an internal reference pricing system (IRP) for prescription drugs that would decrease the influence of the patent system on drug prices, directly address the gaps in existing drug price legislation, achieve prices comparable to those in European markets, and encourage increased research and development for treatments formerly dominated by pharmaceutical monopolies.[30]

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[23] *Id.* at 5, 7.
[24] *Id.*
[25] *Id.* at 5.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Rebecca S. Eisenberg, *Patents and Regulatory Exclusivity*, Univ. of Mich. L. Sch. Scholarship Repository, (2012), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1126&context=book_chapters
[30] *See* Angela Acosta et al., *Pharmaceutical Policies: Effects of Reference Pricing, Other Pricing, and Purchasing Policies*, 10 Cochrane Database Systematic Revs. 1, 2, 10 (2014), https://pubmed.ncbi.nlm.nih.gov/25318966/

This article will begin with an investigation of existing legislation and legal precedent that endeavor to reign in pharmaceutical monopolies and the associated high costs for prescription drugs. Next, the article will evaluate the extent to which IP law, specifically patents and regulatory exclusivity, enables the creation of monopolies on critical treatments and medications. Finally, the article will argue in favor of implementing both external and internal reference pricing systems in the United States, citing their benefits as eliminating the relevancy of IP law in the regulation of pharmaceutical prices in the United States.

I. Background

Despite the continued exercise of patent privileges and regulatory exclusivity, some progress has been achieved to curb the establishment of pharmaceutical monopolies. Several federal courts have endeavored to impose limits on intellectual property privileges for pharmaceutical companies, including the affirmation of the PTAB's authority to reverse patent and monopoly rights. Furthermore, some states have successfully passed and implemented legislation regulating prices of prescription drugs, that courts have upheld in landmark decisions as consistent with the Commerce Clause.

A. Checks to the Pharmaceutical Industry's Symbiotic Relationship with the Patent System

In 1981, the U.S. Supreme Court in *Diamond v. Diehr* ruled that "abstract ideas," such as mathematical formula or scientific truths are unpatentable concepts, holding that such discoveries are "manifestations of nature, free to all men and reserved exclusively to none."[31] This ruling limits the ability of pharmaceutical companies to maintain monopolies over natural laws governing drug innovation and production. Therefore, pharmaceutical companies cannot claim the knowledge of chemical compounds or processes as intellectual property and are consequently obligated to share such concepts with competitors.

Building upon *Diamond*'s principle on the unpatentability of natural laws, the Court held in *Mayo Collaborative Services v. Prometheus Laboratories* that pharmaceutical companies seeking patent privileges must demonstrate that their discovery is not merely a law of nature, natural phenomenon, or abstract idea, but rather an innovative application of such natural laws to a product or process that renders the drug or method of treatment eligible for patent

[31] 450 U.S. 175, 185 (1981) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980)).

protection.[32] Furthermore, the Court extended its analysis to introduce the "inventive concept" requirement, obligating pharmaceutical companies to demonstrate that the drug for which they seek a patent builds upon and extends beyond the natural law.[33] Although the scope of the patentable drugs or methods of use deemed "inventive" under this definition appears dubiously large and ambiguous, the Court clarified that an innovative concept must be "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself."[34]

However, one of the most significant checks to the pharmaceutical industry's profiteering from United States' IP law can be found in the PTAB.[35] Created by Congress in 2011, the PTAB acts as an appellate body to which a patent examiner's decision to grant or reject a patent claim can be appealed.[36] In the context of post-grant review or *inter partes* review proceedings, in which a third party can ask the U.S. Patent Office to revoke an issued patent, the PTAB can affirm or reverse a patent examiner's initial decision to uphold or deny the patentability of issued patent claims.[37] Thus, the PTAB serves as a check to both the pharmaceutical industry and the U.S. Patent Office through its ability to review questions of patentability raised by third parties.

Although opposition to the PTAB's enormous regulatory power questioned its legitimacy, the landmark patent case of *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* affirmed the authority of the PTAB to reverse, through *inter partes* review, limited monopoly rights granted to the private sector.[38] The *Oil States* decision upheld the PTAB's authority to negate monopoly privileges for certain drug composition and treatment regimens, allowing competitors to produce and market biosimilar drugs—a drug with a biological and chemical twin already available in the pharmaceutical market—in the case of

[32] 566 U.S. 66, 71-73 (2012).

[33] *Id.* at 72-73.

[34] Veracode Inc v. Appthority Inc, 137 F. Supp.3d 17, 46 (2015).

[35] *General Information Concerning Patents*, United States Patent and Trademark Office, (October 2015), https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-2

[36] *Id.*

[37] *Id.*; Kevin J Hickey et al., Cong. Research Serv., R45666, Drug Pricing and Intellectual Property Law: A Legal Overview for the 116th Congress 12 (2019); Kevin T. Richards, Cong. Research Serv., R46525, Patent Law: A Handbook for Congress 24-27 (2020).

[38] 138 S. Ct. 1365, 1373, 1379 (2018).

a revocation of patent privileges.[39] Fewer invalid patents will increase competition and production of biosimilars, which in turn would decrease prices and increase both affordability and availability of certain treatments.[40] Ultimately, legal precedent regarding patent eligibility for prescription drugs has emerged to fill the gaps left by legislation. The federal court system has protected the shared and universal nature of mathematics and natural laws, and has affirmed the legitimacy of regulatory bodies as second-look arbiters of patentability. Therefore, these legal actions mark the beginning of comprehensive regulations against the pharmaceutical industry's exploitation of patent law.

B. Existing Legislation Regulating Drug Prices for the Publicly Insured

The negotiation of prescription drug prices for publicly insured patients encompasses the second and third drug pricing regimes.[41] Although numerous public and quasi-public provider programs with drug coverage exist in the U.S., this section will focus on Medicaid coverage of pharmaceutical drugs. A complex framework of both federal and state policies governs drug coverage and pricing for Medicaid patients.[42] Contrary to private insurance companies, Medicaid agencies do not buy pharmaceuticals directly from manufacturers, but rather reimburse pharmacies for both ingredient costs of producing the drug and the dispensing fee for filling the prescription. This Medicaid privilege effectively mitigates unreasonable prices and provides more affordable drug coverage for patients enrolled in the program. In *re Plavix Marketing, Sales Practice & Products Liability Litigation (No. II)*, a federal district court noted that rebate agreements obligate government insurers "to provide reimbursement for the cost of a drug on a state's formulary when the drug is prescribed by a physician for an 'on-label' indication."[43]

In addition to the privileges of the publicly insured, some states have implemented robust drug pricing legislation. Maine's 2000 Act to Establish Fairer Pricing for Prescription Drugs, for example, represented an attempt to mitigate increasing drug prices via the imposition of comprehensive guidelines for PBMs and the creation of a drug affordability

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[39] *What is a Biosimilar?* The U.S. Food & Drug Admin., https://www.fda.gov/media/108905/download

[40] *Id.*

[41] James C. Robinson, *Public and Private Health Insurance Pricing for Innovative and Expensive Drugs in the U.S.,* Berkeley Ctr. for Health Tech. 5 (2014), https://bcht.berkeley.edu/sites/default/files/US%20FR%20biopharma%20120914.pdf.

[42] *Id.*

[43] 332 F.Supp.3d 927, 934 (D.N.J. 2017).

review board.[44] The constitutionality of Maine's Act to Establish Fairer Pricing for Prescription Drugs, although confronted with numerous legal attacks from the pharmaceutical industry, was upheld in *Pharmaceutical Research & Manufacturers of America v. Concannon* as not preempted by federal law and in accordance with the Commerce Clause of the U.S. Constitution.[45] The emphasis on increased transparency for PBMs obligates these individuals to negotiate primarily on behalf of consumers.[46] This transparency fosters favorable negotiating conditions for all pricing regimes and therefore carries positive implications for both the publicly and privately insured. Ultimately, the success of this act presents a viable strategy for states seeking to regulate the costs of prescription drugs. The lack of similar legislation in other states will be analyzed in later sections of this article.

C. Existing Legislation Regulating Drug Prices for the Privately Insured

While drug prices for publicly insured Americans are protected by the strong negotiating power of their government insurers, drug prices for privately insured Americans remain at the mercy of the negotiation among pharmaceutical companies, PBMs, and insurance companies. To address this regulatory gap, legal precedent has aimed to clarify the role of pharmacy benefit managers (PBMs), key players in the first pricing regime's negotiation of prescription drug prices. Maine's Act to Establish Fairer Pricing for Prescription Drugs started the dialogue on guidelines for PBMs, a discussion that was continued by the U.S. Court of Appeals for the District of Columbia in *Pharmaceutical Care Management Ass'n v. District of Columbia*. This court further clarified the PBM role, identifying their purpose as "fiduciaries" working "to disclose the content of their contracts with pharmacies and manufacturers, and to pass on any payments or discounts they receive from pharmacies or manufacturers."[47] According to *Pharmaceutical Care Management Association*, PBMs must disclose the content of their contracts and expose competing interests contrary to their purpose of securing drug price discounts for consumers. These obligations result in greater transparency between consumers, PBMs, and insurance companies, elevating the negotiating power of private insurers on behalf of patients.

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[44] Sarah Lanford et al., *Maine Forges New Ground and Enacts Comprehensive Drug Package*, Nat'l Acad. For State Health Pol'y, (July 1, 2019), https://www.nashp.org/maine-forges-new-ground-and-enacts-comprehensive-drug-package/

[45] 249 F.3d 66, 85 (1st Cir. 2001).

[46] *Id.*

[47] 522 F.3d 443, 445 (D.C. Cir. 2008).

In conclusion, some regulatory legislation and legal precedent has been achieved to reduce the ability of pharmaceutical companies to exploit the patent system. Legal precedent affirms that inventions directed to natural laws and natural phenomena, including those directly related to the manufacture of prescription drugs and medical treatments or the natural occurrence of a pharmaceutical composition, and lacking an "inventive concept," remain free and unpatentable. Additionally, Maine's Act to Establish Fairer Pricing for Prescription Drugs represents a pioneer attempt by a state to mitigate drug costs via the regulation of PBMs. Increased transparency requirements for these individuals benefit both privately and publicly insured consumers.

II. Problem Statement

Despite legal and legislative efforts to mitigate the rising costs of prescription drugs, gaps in the effective regulation of drug prices in the United States remain. The pharmaceutical industry continues to take advantage of intellectual property rights such as patent and regulatory exclusivity privileges to establish limited monopolies on critical treatments. Moreover, the intricacy of public and private insurance drug coverage complicates the efficacy of legislation endeavoring to curb rising pharmaceutical drug prices.

A. Patent System Abuse

The pharmaceutical industry's abuse of the United States' patent system represents its most egregious and most convenient advantage. Despite the positive implications of *Oil States*'s affirmation of the PTAB's ability to regulate patent privileges for pharmaceutical companies, the ruling failed to establish both a wide regulatory scope for the PTAB and a comprehensive precedent against monopoly formation of life-saving treatments.[48] In *XY, LLC v. Trans Ova Genetics, L.C.*, Judge Newman of the U.S. Court of Appeals for the Federal Circuit wrote an opinion that recognized, "Although it is now confirmed that Congress has authority to authorize the PTAB to invalidate issued patents, it cannot be inferred that Congress also authorized the PTAB to override the judgments of Article III courts."[49] As Article III courts encompass the United States Supreme Court, courts of appeals, district

[48] *See* XY, LLC v. Trans Ova Genetics, L.C. 890 F.3d 1282, 1300 n.1 (Fed. Cir. 2018) (Newman, J., concurring-in-part and dissenting-in-part) (describing limits on the PTAB's power).

[49] *Id.*, 1302.

courts and the Court of International Trade,[50] the PTAB cannot revoke patent privileges for a pharmaceutical company whose patent was formerly affirmed by one of the aforementioned courts on the same grounds previously litigated and decided. This limitation represents a significant check on the authority of the PTAB to regulate limited monopolies on pharmaceutical products. As patents typically maintain a duration of twenty years, a ruling from an Article III court on the legitimacy of a pharmaceutical patent provides some level of security to the pharmaceutical company's limited monopoly.[51]

Despite limitations on its authority, the PTAB serves as a valuable resource for generic-brand companies inclined to enter the market for popular drugs and compete due to high product demand. The PTAB's value as a regulatory check on pharmaceutical monopolies ends, however, in the absence of competitors. The patenting of orphan drugs—drugs developed for rare conditions in which consumer demand is limited—exemplifies a regulatory failure outside of the PTAB's scope of review.[52] Given the small market, pharmaceutical companies holding patents on orphan drugs are less incentivized to manufacture such products whose revenues oftentimes fail to cover the costs of research and development.[53] Pharmaceutical companies will often choose to cease production of the drug while maintaining their patent, whose objective of precluding competition continues despite the lack of production.[54] Consequently, patents on orphan drugs often leave patients with rare conditions without treatment.[55]

Although the Orphan Drug Act, which amended the Food, Drug and Cosmetic Act, offered increased incentives for pharmaceutical companies to produce and distribute orphan drugs,[56] the patent system and the privileges it affords to the pharmaceutical industry prevailed and thus continued to prevent competition after the approval of exclusivity privileges.[57] Pursuant to this act, the Food and Drug Administration (FDA) allows generic

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[50] *Courts: A Brief Overview*, Federal Judicial Center, https://www.fjc.gov/history/courts/courts-brief-overview

[51] XY, 890 F.3d at 1300 n.1.

[52] Rebecca S. Eisenberg, *Patents and Regulatory Exclusivity*, Univ. of Mich. L. Sch. Scholarship Repository, (2012), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1126&context=book_chapters

[53] Spectrum Pharms, Inc. v. Burwell, 824 F.3d 1062, 1064 (D.C. Cir. 2016).

[54] *Id.*

[55] *Id.*

[56] Spectrum Pharms., 824 F.3d at 1064.

[57] *Id,* 1064.

pharmaceutical producers to enter the market for a specific orphan drug while protecting the patent-holder's market exclusivity over the use of the orphan drug.[58] According to the FDA, the balance of competition and monopoly presents the best solution to orphan drug pricing and scarcity.[59] This balance, however, fails to rectify pharmaceutical monopolies on orphan drugs. In *Sigma-Tau Pharmaceuticals, Inc. v. Schwetz*, the U.S. Court of Appeals for the Fourth Circuit affirmed that the language of the Orphan Drug Act was purposefully "disease-specific" rather than "drug-specific" and thus "protects uses, not drugs for any and all uses."[60] This distinction affirms that despite the FDA's regulatory authority over incentivizing competition in orphan drug markets, the patent for the orphan drug, when used for conditions it was created to combat, remains valid, subsequently excluding competition.[61] The Orphan Drug Act therefore fails to incentivize competition for the disease-specific use of the orphan drug, rendering patients with rare conditions devoid of affordable treatment.

B. Regulatory Exclusivity Abuse

Regulatory exclusivity, a facet of intellectual property law, augments the monopoly privileges of patent-holders to the benefit of the pharmaceutical industry and to the detriment of its consumers. The Drug Price Competition and Patent Term Restoration Act of 1984, colloquially known as the Hatch-Waxman Act, expanded regulatory exclusivity for pharmaceutical companies to include the power to "partially circumvent patent restrictions and accelerate FDA approval so that they would be able to bring their products to market as soon as the brand name drug companies' patents expired or were found invalid or not infringed."[62] Legislators intended this act to serve as an incentive to pharmaceutical companies to comply with and undergo FDA safety and regulatory procedures prior to its authorization for marketability.[63] However, subsequent analysis of the act and the implications of its implementation revealed that "certain loopholes within the Act create perverse incentives for brand name and generic drug companies to enter into collusive

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[58] *Id.*
[59] *Id.*
[60] 288 F.3d 141, 145 (4th Cir. 2002).
[61] *Id*, 145.
[62] Note, *The Hatch-Waxman (Im)Balancing Act*, LEDA at Harv. L. Sch., http://leda.law.harvard.edu/leda/ data/551/Paper1.html
[63] *Id.*

agreements, with possible antitrust implications, to the detriment of the public."[64] Ultimately, regulatory exclusivity as it stands does not allow such agreements in black letter; rather the absence of subsequent legislation or legal precedent prohibiting such collaborations encourages their exercise.

Moreover, the PTAB's appellate privileges do not apply in cases of contested regulatory exclusivity. Regulatory agencies, such as the FDA, do not maintain the authority to revoke regulatory exclusivity privileges after granting marketing approval to the company. In *Eagle Pharmaceuticals Inc. v. Azar*, the FDA approved a pharmaceutical company's orphan drug for marketing but denied its subsequent request for a seven-year period of regulatory and marketing exclusivity.[65] The court held, however, that the pharmaceutical company was entitled to regulatory exclusivity privileges under the statute, 21 U.S.C. § 360cc(a), which "unambiguously entitles a manufacturer to marketing exclusivity upon designation and approval."[66] The FDA argued that the pharmaceutical company failed to distinguish its product as "clinically superior" to already available biosimilars.[67] Contrarily, plaintiff invoked the Orphan Drug Act, claiming that its product designation as an orphan drug affords exclusivity privileges upon FDA approval.[68] The Court affirmed the right of Eagle to retain regulatory exclusivity of its product, despite the ambiguity of its clinical superiority to other available drugs. Therefore, certain designations of drugs automatically earn exclusivity, and thus limited monopolistic privileges regardless of whether these products are superior to already available treatments. Ultimately, this rule negates the regulatory authority of the FDA and similar agencies to mitigate adverse effects of pharmaceutical monopolies while drug companies, once approved for efficacy and safety, can automatically earn monopolistic privileges.

C. Gaps in Existing Legislation Regulating Drug Prices for the Publicly and Privately Insured

Publicly and privately insured patients, regardless of the type of insurer negotiating on their behalf, are subject to the adverse implications of pharmaceutical monopolies.

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[64] *The Hatch-Waxman (Im)Balancing Act*, Leda at Harvard Law School, https://dash.harvard.edu/bitstream/handle/1/10015297/Paper1.html?sequence=2&isAllowed=y

[65] 952 F.3d 323, 325 (D.C. Cir. 2020).

[66] *Id.*

[67] *Id.*

[68] *Id.*

Despite the success of Maine's Act to Establish Fairer Pricing for Prescription Drugs to assuage the rising cost of prescription drugs, create a more transparent drug pricing regime with direct benefits to the consumer, and inspire subsequent legislation that expands upon the aforementioned goals,[69] concurrent state efforts seeking similar legislative victories were met with and stymied by significant pharmaceutical industry pushback. For example, D.C. Code § 28-4553, which prohibits the sale of any drug at an "excessive price," was ruled facially unconstitutional on the grounds that federal patent law preempts the regulations presented by the statute.[70] In accordance with the Supremacy Clause, federal intellectual property laws—specifically patent and regulatory exclusivity—preempt the purposes of and subsequently impose an injunction against *D.C. Code § 28-4553*.[71] Furthermore, the U.S. Court of Appeals for the Federal Circuit in *Biotechnology Industry Organization v. District of Columbia* expanded its analysis of the constitutionality of the D.C. statute to evaluate the "complex balance of economic forces and regulatory exclusivity designed to encourage and reward the innovation, research, and development of new drugs," forces upon which the U.S. pharmaceutical industry is based.[72] The court subsequently affirmed that these forces, and the foundation they provide for the U.S. pharmaceutical industry, preclude regulations such as D.C. Code § 28-4553 and thus curb legislative attempts to weaken the economic influences driving the industry.

Another aspect of the Maine legislation that has yet to gain legislative or legal approval in other states includes the role of PBMs in drug price negotiations between insurers and pharmaceutical companies.[73] The absence of legislation establishing conduct and competing interest guidelines for PBMs results in a general ambiguity of their role and, consequently, an opportunity for these individuals to profit from both drug companies and consumers without the risk of conduct infractions.[74] The Court in *Pharmaceutical Care Management Association v. Rowe* affirmed the PBM's intermediary role as one with "the opportunity to engage in activities that may benefit the drug manufacturers and PBMs

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[69] *See* discussion *supra* Section I.B.

[70] D.C. Code § 28-4553; Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 1374 (Fed. Cir. 2007).

[71] Jay B. Sykes et al., Congr. Research Serv., R45825, Federal Preemption: A Legal Primer (2019).

[72] 496 F.3d at 1366.

[73] Sarah Lanford et al., *Maine Forges New Ground and Enacts Comprehensive Drug Package*, Nat'l Acad. for State Health Pol'y, (July 1, 2019), https://www.nashp.org/maine-forges-new-ground-and-enacts-comprehensive-drug-package/

[74] *Id.*

financially to the detriment of the health benefit providers."[75] To exemplify this opportune role, the court in *Pharmaceutical Care Management* cites the commonality of "therapeutic interchange[s]" in which PBMs "may substitute a more expensive brand name drug for an equally effective and cheaper generic drug."[76] This exchange benefits both the PBM, who collects a fee from the drug manufacturer, and the pharmaceutical company who ultimately receives a higher payment from the consumer and his or her insurance company. Furthermore, the PBM may receive a discount from the pharmaceutical company during the negotiation which he or she may elect to keep as personal commission while relaying the higher, non-discounted payment to the consumer and the insurer.[77] These dishonest yet lawful practices of PBMs result as a consequence of the lack of consumers' awareness of such individuals and their intended role as advocates for prescription drug consumers in drug price negotiations.[78] Additionally, the absence of both awareness and transparency carried tremendous implications for U.S. drug pricing regimes. Although drug price negotiations involving PBMs occur in the first pricing regime, the agreements of such negotiations set pricing standards for publicly insured patients and government negotiations with pharmaceutical companies.[79] Therefore, the lack of guidelines regulating PBM conduct impose significant pricing burdens on both privately and publicly insured prescription drug consumers.

Ultimately, the pharmaceutical industry's abuse of the patent system and regulatory exclusivity privileges secure its limited monopoly rights over pharmaceutical products, precipitating rising drug prices for American consumers. Similarly, the absence of state legislation advocating increased transparency in drug pricing negotiations further cements the pharmaceutical industry's constitutionally guaranteed ability to maintain limited monopolies and impose high prices on critical treatments.

III. Solution

The implementation of both external and internal reference pricing systems at the state and federal levels would adequately address the legislative and legal precedent gaps in

[75] 429 F.3d 294, 298 (Fed. Cir. 2005).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

pharmaceutical drug price regulation. The implications of an enactment of ERP and IRP systems will be examined theoretically via an analysis of the European Union, providing a case with relatively similar consumer demand, technology supply and costs associated with research and development.

A. External Reference Pricing

External reference pricing (ERP), or international price comparison, endeavors to contain costs and assure consumers that their drug payments do not exceed those in other countries with comparative development levels.[80] Governments who utilize external reference pricing systems derive a benchmark price for each pharmaceutical drug based on an aggregate calculation of prices set by other countries and reimbursement rates for drug ingredients and costs of research and development in their home countries.[81]

The implementation of such a system therefore weakens the ability of pharmaceutical companies to raise drug prices above costs of production under the protection of patents and regulatory exclusivity.[82] External reference pricing, according to analysis of health systems with advanced healthcare coverage that utilize such pricing tools, is especially effective in markets with patented pharmaceuticals.[83] In industries in which one pharmaceutical company holds a patent for an essential medication, ERP works to mitigate the ability of the firm to increase prices via the establishment of price benchmarks that allows the firm to collect a profit yet one not so far above the costs of production.[84] Ultimately, well-implemented, flexible ERP systems would transform the industry of prescription drugs, providing more transparency and affordability to healthcare consumers.

B. Internal Reference Pricing Systems

Internal Reference Pricing systems, similar to their external reference pricing counterpart, endeavor to establish a standardized, domestic drug pricing framework. Juxtaposed to ERP systems, however, IRP systems build upon aggregates of domestic costs of research and development, maximum levels of reimbursement, price controls, price

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[80] Anne-Peggy Holtorf et al., *External Reference Pricing for Pharmaceuticals—A Survey and Literature Review to Describe Best Practices for Countries With Expanding Healthcare Coverage*, 19 Value in Health Reg'l Issues, 122, 122, (September 2019).

[81] *Id.*

[82] *Id.* at 122-23.

[83] *Id.* at 124, 126, 130.

[84] *Id.* at 125, 130.

negotiations, and index pricing to set prices for prescription drugs.[85] Analyses of these systems demonstrate a significant reduction of costs to consumers in both the long and short term, indicating an overall decrease in insurance company expenditures.[86] Furthermore, IRP systems serve to both increase transparency of production costs and decrease overall costs accrued by consumers.

C. Case Analysis of ERP and IRP Systems in the European Union

Lawmakers in a post-2008 Europe experimented with numerous cost-containment strategies and initiatives implemented to curb exponentially increasing costs of prescription drugs within the European Union.[87] Among these efforts, ERP and IRP systems emerged to regulate increasingly unaffordable drug prices and provide relief to consumers.[88] Although both systems presented several challenges due to the decentralized nature of the European Union, the adoption and implementation of ERP and IRP systems afforded net benefits for prescription drug consumers in Europe.

The implementation of an ERP system within the EU successfully regulated drug prices and transformed the market for pharmaceuticals to one characterized by affordability and accessibility.[89] Pharmaceutical companies maintain limited control over the derivation of price benchmarks in an ERP system;[90] therefore, the industry is largely excluded from price negotiations except in providing comprehensive reports of production costs. Comparably, the exclusion of pharmaceutical companies in price negotiations would transform price negotiations and regimes in the United States' prescription drug market. The conduct and competing interest concerns associated with PBMs would become obsolete under such a system, providing greater levels of transparency and affordability for the consumer. One challenge experienced by the European Union in its implementation of ERP, however, includes the difficulty of conducting price comparisons between countries.[91] European nations, although united by a common international organization, present discrepancies in levels of development. These discrepancies further complicate individual

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[85] Angela Acosta et al., *Pharmaceutical Policies: Effects of Reference Pricing, Other Pricing, and Purchasing Policies*, 10 Cochrane Database Systematic Revs.; 1, 1 (2014), https://pubmed.ncbi.nlm.nih.gov/25318966/

[86] *Id.* at 23-24.

[87] Cécile Rémuzat et al., *Overview of External Reference Pricing Systems in Europe*, 3 J. Market Access and Health Policy 27675, at *1-2 (2015).

[88] *Id.* at *2.

[89] *Id.*

[90] *Id.* at *10

[91] *Id.*

governments' tasks of determining price benchmarks. On the contrary, the United States maintains a relatively homogenous level of development among its territories. Furthermore, the United States shares a similar level of development with both France and Germany, the leading members of the EU. Therefore, an ERP system in the United States would likely face fewer difficulties in determining price benchmarks.

The IRP system in the European Union experienced similar success. Contrary to the ERP system's endeavors to curb the ability of pharmaceutical companies to dictate prices via monopolistic privileges, the EU's IRP system functions to regulate prices of "out-of-patent" drugs, or pharmaceuticals who compete with similar products without the burden of patented monopolies.[92] Thus, the IRP works to compare prices of pharmaceuticals from similar chemical, pharmacological, or therapeutic groups to derive a benchmark price that is used in the domestic pharmaceutical industry and later, internationally, in the ERP system. Consequently, an internal reference price is established for all corresponding groups of products and biosimilars within the corresponding chemical, pharmacological, and therapeutic category.[93]

A setback of this IRP framework within the European Union includes the challenge of understanding the discrepancy of prices between similar products.[94] The competition between pharmaceutical companies, characteristic of IRP systems, forces producers to lower prices, sometimes below costs of production, to maintain their businesses.[95] These resulting prices distort the IRP benchmark price at the detriment of the pharmaceutical industry. In the United States, however, successful implementation of IRP is possible, but would require a transparent and honest collaboration between the federal government and pharmaceutical companies to agree upon a fair, affordable and commercially productive price. Thus, such a collaboration under an IRP would benefit both consumers and pharmaceutical companies, strengthening trust between the public and private sectors while lowering costs for consumers and maintaining profits for producers.

Ultimately, the success of ERP and IRP systems in the European Union presents a viable solution to United States' pharmaceutical industry's abuse of the patent system and

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[92] Kai Ruggeri et al., Pharmaceutical Pricing: the Use of External Reference Pricing, *Rand Europe* (2013) https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR240/RAND_RR240.pdf, 50

[93] *Id.*

[94] *Id.*

[95] *Id.*

regulatory exclusivity. Both systems strive, in principle and in practice, to benefit the consumer via the establishment of price benchmarks in domestic and international markets to provide affordable, accessible and effective treatment to patients.

Conclusion

The increasing unaffordability of prescription drugs in the United States not only presents an imminent threat to uninsured and underinsured patients, but also indicates the direction toward which our healthcare economy moves, one marked by exclusivity and unaffordability. In a post-COVID-19 world, comprehensive healthcare coverage will become a primary concern. Requirements for mandatory vaccinations and yearly physical exams will serve only as a foundation for invasive disease control measures. In a dangerous combination, our healthcare economy continues to remain market-dependent and thus thrives on rising health care expenditures. The imposition of new health requirements coupled with high costs of care will manifest as a new caste system in the United States: one in which those who can afford care are accepted and those who cannot are shunned from civilized society and the opportunities it affords.

Therefore, the regulation of the pharmaceutical industry and its symbiotic relationship with intellectual property law emerges as an issue of importance and relevancy in a time in which Americans struggle to pay not only for insulin, but for food. Ultimately, a post-pandemic United States will require legislative action and legal precedent to transform the United States' pharmaceutical industry from one of monopolistic giants into one of symbiotic consumer-producer efforts.

To Link or Not to Link: Approaches to Embedding Copyright Infringement Claims Beyond the Server Test

Deah Dushyanth

Introduction

There is no doubt that the drafters of the United States Copyright Act of 1976 would not understand the words "embed," "re-post," "tweet," and "viral" in the context of today's internet—let alone the scope and ubiquity of the internet and social media in everyday life—but these terms are now central to our content-driven internet.[1] The leaps in technological advancements that have taken place over the last several years and decades should usher in a new era of copyright law that accounts for the complexities of internet infrastructure and search engines. In fact, the Copyright Act of 1976 was enacted in response to the digitization of content and alludes to open-ended applications in order to accommodate subsequent technological changes.[2] How should this significant piece of intellectual property legislation be interpreted when it comes to social media embedding, a practice that is crucial to many businesses but remains legally unclear?

"Embedding" refers to the linking of third-party content on a webpage, allowing it to become a part of the website's own content.[3] The recent rulings by the Southern District of New York in *Goldman v. Breitbart* and this year's *Sinclair v. Ziff Davis*, challenged precedent concerning the effect of a copyright holder's exclusive public display right granted by the Copyright Act of 1976 with respect to embedding a social media post within a website. Embedded social media posts incorporate online material into a separate website or

[1] *See* Goldman v. Breitbart News Network LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).
[2] *Copyright*, Cornell Legal Information Institute, https://www.law.cornell.edu/wex/copyright.
[3] Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 Yale J.L. & Tech. 227 (2019).

document, sometimes without the permission of the copyright holder. Common examples of this practice are the embedding of Instagram and Twitter posts on sites like Buzzfeed that rely heavily on lists and commentary-style articles that provide brief insights on embedded media. For example, one post entitled "100 Celebrity Tweets From 2020 That You Might Have Missed"[4] compiles embedded Twitter posts into a single post on Buzzfeed. The "Buzzfeed Model,"[5] which focuses on aggregating lists, posts, and online memes in an effort to create highly shareable content, has depended heavily on embedding third-party content and has been a transformative force in the field of journalism[6]. In fact, traditional news sites like the New York Times and the Wall Street Journal also increasingly embed social media posts into their online stories as sources. For example, in an article titled "'Bridgerton' Star Regé-Jean Page will Not Appear in Season 2,"[7] the New York Times embeds a tweet from the official Twitter account of the Netflix show Bridgerton, announcing the departure of a main cast member in the upcoming season[8]. This type of seamless embedding, in which the content of the embedded post is a critical primary source for the article, is typical of modern digital news media. This raises concerns about an "infringement of the exclusive right of alteration, communication or reproduction enjoyed by the copyright holder," the original poster.[9]

The industry standard for assessing such potential infringement, referred to as the server rule and the server test interchangeably, posits that only users that store images directly on their server can infringe upon the copyright holder's rights. This is an outdated concept that does not accommodate interconnectivity of the internet and the speed and frequency at which images are shared globally. In *Goldman*, the court explicitly rejected the Server Test by proposing a more thorough investigation into the way liability is assigned in the terms and conditions of social media platforms and encouraging accommodation of the framework of the Copyright Act of 1976.[10] This new approach to assessing copyright infringement of

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[4] Jen Abidor, *100 Celebrity Tweets from 2020 You Might Have Missed*, Buzzfeed, https://www.buzzfeed.com/jenniferabidor/celeb-tweets-2020 (Dec. 27, 2020).

[5] Edson C Tandoc Jr & Joy Jenkins, *The Buzzfeedication of Journalism? How Traditional News Organizations Are Talking About a New Entrant to the Journalistic Field Will Surprise You!*, 18 Sage 482 (2015).

[6] *Id.*

[7] Sarah Bahr, New York Times (Apr. 2, 2021), https://www.nytimes.com/2021/04/02/arts/television/bridgerton-netflix-rege-jean-page.html.

[8] *Id.*

[9] Pessi Konkasalo, *Links and Copyright Law*, 27, Issue 3 Computer L. & Security Rev.258-66 (2011).

[10] *Id.*

images reposted or embedded online will have a significant impact on revenue of companies whose business models hinge on the ability to embed third party content on their websites. Online media companies make money by driving users to their articles, encouraging users to engage with and share content and view the advertisements on these pages.[11] User engagement relies heavily on readability and embedding posts improves the user experience, seamlessly integrating sources and commentary in one place.[12] The increased restrictions may also reduce the availability of information at the speed it is currently accessible. If users cannot access relevant social media posts and third-party content directly in an article, they have to work harder to acquire information that would otherwise be accessible to them in one place.[13]

The United States is now more than ever an information and service-based society,[14] and technology companies like Google and traditional media companies have utilized social media to provide insights for viewers and subscribers. In fact, companies like Buzzfeed have utilized the practice of embedding as the core component of their business framework.[15] Similarly, content creators are able to capitalize on the intimacy provided by direct interaction with consumers by promoting their brands on social media. In fact, customers are more likely to purchase these brands via social media promotion, rather than traditional marketing techniques[16]. This has ushered in a new era of content-based revenue, both for creators who post directly to social media and companies that embed those posts in articles.[17]

At a time when unimpeded access to information is predicated on the ability of individuals to share knowledge across online platforms, meticulous copyright regulation is necessary for the fair flow of information. Copyright laws exist to encourage the creation of content by ensuring that the copyright holder can profit off their creative work. It is therefore the courts' responsibility to ensure that every avenue of infringement is considered, including infringement on the internet.[18] However, over-regulation may present financial and

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[11] Mathias Felipe de Lima Santos & Ruiqi Zhou, *Data-Driven Business Model Innovation in Journalism: A Case Study of BuzzFeed as a Platform of Public Good*, 2018 Asian Conf. on Media Comm. & Film 2018 Official Conf. Proceedings.

[12] *Id.*

[13] *Id.*

[14] Frank Webster, Theories of the Information Society 149 (4 ed. 2014).

[15] Edson C Tandoc Jr, *Five Ways BuzzFeed Is Preserving (Or Transforming) the Journalistic Field*, 2018 Sage Pub.ations 200.

[16] Jacob Gardner & Kevin Lehnert, *What's New About New Media? How Multi-Channel Networks Work with Content Creators*, 59 Bus. Horizons 293 (2016).

[17] *Id.*

[18] *Id.*

operational problems for companies that have found success through third-party embedding and may impede the free flow of information. As a result, it is important that courts strike a balanced approach to regulation.

Although the server test establishes clear criteria for copyright liability based on the location of image storage, this distinction is arbitrary, and its failure to recognize the terms and agreements that dictate the sub-licensing of content oversimplifies a complex issue. The recent holdings in *Goldman v. Breitbart* and *Sinclair v. Ziff Davis* create a foundation for a change in legal precedent, but they are only one piece of the puzzle. Courts must find a balance between advancing the free flow of information and protecting copyright holders' rights. It is necessary to form a legislative body that would collaborate with industry professionals to legislate the standardization of the terms and conditions to accommodate changes in media that depend on embedding social media posts in articles. Furthermore, this legislative body could discuss the nuances of sub licensing and liability in order to create an industry standard that may be challenged on a case-by-case basis. This would better equip courts to rule on cases of third-party embedding and address the nuances of an issue that is relatively in its legal infancy.

I. Background of and Precedent for Internet Embedding and Infringement Law

A. Embedding on the Internet

"Embedding" refers to the linking of third-party content on a webpage, allowing it to become a part of the website's own content.[19] An internet webpage is constructed through a series of instructions coded in Hypertext Markup Language ("HTML") and stored on a server[20]. When users access this webpage, their browsers connect to the server where the coded instructions for the webpage are stored. The HTML code then feeds instructions to the browser about how to arrange the webpage on the user's computer. In the case of photographs on a webpage, the HTML code can either instruct the browser to retrieve the photograph from the webpage's own server or from a third-party server.[21] Embedding occurs when coders opt for the latter option and incorporate images stored on a third-party server onto a webpage. These images are then hyperlinked to the third-party website, meaning that clicking on the image will direct a user to the third-party website. Clicking on

[19] Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 Yale J.L. & Tech. 227 (2019).
[20] *Id.*
[21] *Id.* at 234.

a tweet embedded in a Buzzfeed article, for instance, would direct a user to the original tweet on Twitter. This benefits sites by providing a "seamlessly integrated webpage"[22] that condenses all relevant information in one convenient place for users, even though some of the images may be hosted in various locations. In fact, most popular social media sites including Facebook and YouTube provide web designers with easy access to code they can use to embed content on their own webpages.[23]

B. Regulation of Embedding Under U.S. Copyright Law

1. Embedding Liability

From its inception, the internet has maintained an "open architecture"[24] framework in which all users are welcome. In fact, the internet "operates as an opt-out system"[25] which means that users can maneuver websites freely by default, unless site owners take specific action to block access. Common actions to restrict access include requiring a password to view content and blocking individual Internet Protocol (IP) addresses.[26] Although there are other methods for restrictions, a basic tenet of internet services is that content providers will not bypass technological measures of restriction.[27] This means that users and internet companies place a heavy emphasis on internet etiquette, or "netiquette,"[28] allowing internet operations, particularly linking and embedding, to become legally ambiguous. Furthermore, this type of relationship places a great deal of agency in the hands of users; website owners are limited in their ability to restrict access to their sites. Unlike the internet, however, copyright law operates as an opt-in system.[29] This means that a greater amount of power is afforded to copyright owners; a user cannot use a copyright owner's protected work without the explicit permission of the copyright owner.[30]

Copyright law in the US has been left open-ended with the intention of continuing to protect creators and consumers in a changing digital terrain; the language is worded

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[22] *Jane C. Ginsburg & Luke A. Budiardjo, Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?, 42 Colum. J.L. & Arts417 (2019).*

[23] *Id.* at 234.

[24] Monika Isia Jasiewicz, *Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators*, 122 Yale L.J. (2012).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Daniel B. Levin, *Building Social Norms on the Internet*, 4 Yale J.L. & Tech.(2002).

[29] *Id.*

[30] 17 U.S.C. § 106, 106A.

ambiguously on purpose.[31] However, this ambiguity raises the question of whether embedding fits within the scope of the copyright law as drafted.

The Copyright Act of 1976 amended existing copyright law in response to changes in technology. Copyright law exists to protect "original works of authorships … from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[32] Such works include but are not limited to literary works, musical works, dramatic works, and motion pictures.[33] However, copyright infringement became harder to identify as content transitioned to digital platforms. While the internet and other modern technologies did not exist in their current form in 1976, the act's language reveals an intention to extend protections to new and future technologies. The 1976 Act endeavors to promote a single national copyright system in order to bolster public welfare by increasing protections on information in order to motivate copyright holders to publish their works on new platforms.[34] The 1976 amendment acknowledges that "tremendous growth in the communications media has substantially lengthened the commercial life of many works."[35] and establishes the intent of Congress to consider the benefit of the public.[36] The law states that to allow information to spread, publishers must be assured of exclusive rights.[37]

Copyright owners have the exclusive right to reproduce copies of their work.[38] The Copyright Act defines "copies" as "material objects in which a work is fixed … and from which a work can be perceived, reproduced, or otherwise communicated."[39] Embedded works are not unauthorized copies; although embedding content on a browser may display third-party works on that webpage, the process of embedding in no way makes a copy of the original content. Rather, the user is directed to the original third-party source if they click on the hyperlink.[40] As a result, court decisions in various cases throughout the 1990s established

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[31] Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. Pa. L. Rev. 856 (1978).

[32] *Id.*

[33] 7 U.S.C. § 102.

[34] *United States Copyright Office A Brief Introduction and History*, copyright.gov, https://www.copyright.gov/circs/circ1a.html.

[35] § 106, 106A.

[36] *Copyright Basics*, U.S. Copyright Office, https://www.copyright.gov/circs/circ01.pdf (last updated Dec. 2019).

[37] § 106, 106A.

[38] § 106, 106A.

[39] 17 U.S.C. § 101.

[40] Anthony R. Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over "Ram Copies"*, 2001 U. Ill. L. Rev. 83 (2001).

that embedding does not violate a copyright holder's right to reproduce copies of their work.[41]

The Copyright Act of 1976 also gives copyright holders the exclusive right to display a work publicly. This means that the copyright holder can "show a copy" of their work "either directly or by means of a film, slide, television image or any other device or process."[42] A "device, machine or process" used to publish and share content is defined as any process "known or later developed."[43] This is where legal scholars have found the most compelling support that embedding may violate a copyright holder's exclusive rights; embedding obviously displays the online works of one party publicly on the site of another party.[44] However, this issue was remedied for many years by the server test.

2. The Server Test

The server test was established in *Perfect 10 v. Google (2006)*, in which Perfect 10 sued Amazon.com and Google for unauthorized display of its copyrighted images. Perfect 10 alleged that Google,

> operated a search engine that indexed its copyrighted images, stored low-resolution 'thumbnail' versions of the images on its servers, facilitated the display of those images on users' computer screens, and provided programming instructions that informed users' web browser software how to access full size versions of the infringing images through the Internet.[45]

In 2006, the District Court for the Central District of California deliberated three key questions: "1) does the "in-linking" of images directly infringe a copyright owner's exclusive right to display their work publicly? 2) Is Google liable for creating "an audience" for infringing websites because they help users find sites that may contain infringements? 3) Does simply visiting a website that includes infringing material make you an infringer?"[46] On the first issue, the court found that embedding does not automatically infringe on a copyright owner's exclusive rights.[47] This decision was a huge victory for the early internet, because it alleviated the threat that simply clicking on a hyperlink would be considered copyright infringement. On the second issue, the court rejected Perfect 10's argument that Google

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[41] Playboy Enters., Inc. v. Frena, 839 F.Supp. 1552 (M.D.Fla. 1993), Playboy Enters., Inc. v. Russ Hardenburgh, 982 F. Supp. 503, *Id.*

[42] § 106, 106A.

[43] § 101.

[44] *Id.* at 248.

[45] Perfect 10, Inc. v. Google, Inc., 508 F.3d 1146 (9th Cir. 2007).

[46] Perfect 10 v. Google, Inc., 416 F.Supp.2d 828, 843 (C.D. Cal. 2006).

[47] *Id.*

should be held liable for infringements on particular sites displayed on its search engine. On the third issue, the district court once again rejected Perfect 10's argument and concluded that any copies made automatically by a browser likely constitute fair use[48] under Section 107 of the Copyright Act. However, the district court found that Google's display of thumbnail images of Perfect 10's content was commercial and only "partially transformative," particularly because of its use of AdSense, a program that uses data analytics to target images and advertisements at users and allows website publishers to generate revenue per-clicks.[49] As a consequence, the district court rejected Google's claim that their production of thumbnails constitutes fair use.

In 2007, the US Court of Appeals for the Ninth Circuit heard the case on appeal. While it upheld the lower court's opinion that hyperlinking does not constitute copyright infringement, the Ninth Circuit reversed the ruling that Google's thumbnails were infringing and did not constitute fair use. The court found that no infringement had taken place because the full-sized image had not been stored on Google's server, determining that "the two images actually come from two different sources: Google's server for the thumbnail, and a third-party website in the case of the full-sized image."[50] The court only considered the full-sized image to be the intellectual property of Perfect 10. Therefore, the server test was predicated on the difference between hosting, storing, and guiding information from one place to another. This was a key step in acknowledging that ownership is in the context of copyrighted images on the internet is dependent on how information is accessed, necessitating an investigation into the history of an image's presence on the internet.

3. Rejection of the Server Test: Goldman v. Breitbart and Sinclair v. Ziff Davis

Recent cases have highlighted issues with the server test reasoning and have seen courts increasingly rejecting its use in third-party embedding cases. It should be noted that no court is bound to the use of the server test; the Ninth Circuit holding that established the server test has not been adopted by the Supreme Court and therefore no court is required to use it. However, it has simply existed as settled precedent and has been popular for its binary reasoning and simplicity. In the 2018 case *Goldman v. Breitbart*, the plaintiff Justin

[48] *Fair use*: Section 107 of the U.S. Copyright Act provides provisions for "fair use," or the permitting of the unlicensed use of copyrighted works in certain situations. This will be explained at greater length at a later point in this paper.
[49] *Id.*
[50] *Id.*

Goldman took a photograph of New England Patriots quarterback Tom Brady appearing to assist the Boston Celtics General Manage Danny Ainge recruit Kevin Durant to the team.[51] The image, which was first uploaded to Goldman's personal Snapchat story, was of great interest to those within the sports realm and was shared on Twitter, Instagram, and other social media platforms. Additionally, many news outlets embedded tweets containing the photograph within articles discussing the interaction and its implications for the sports world, although none of these outlets downloaded or stored the image on their own servers.[52] If a user clicked on a tweet in an article, they would be directed to the original tweet on Twitter's platform. Goldman sued several media outlets, alleging that their embedding of images that contained his photograph constituted copyright infringement.[53] The question for the court was whether the media outlets were exempt from copyright infringement simply because they did not download or store the image on their own servers.

In *Goldman,* U.S. District Court of the Southern District of New York ruled that language in the Copyright Act of 1976 and case law do not provide sufficient reasoning to conclude that the location of a copyrighted work matters in determining whether a party infringed upon a copyright holder's exclusive right to display. On appeal, Judge Katherine Forrest emphasized the "exclusivity" provision of the display rights afforded to copyright holders under the Act. While the media companies relied heavily on *Perfect 10*, the court cited the Supreme Court decision in *American Broadcast Company v. Aereo, Inc. (2014)*, in which the Court held the location of content cannot immunize a party from liability for an infringing action. In *ABC*, users paid Aero a monthly subscription to be able to view "near-live" television broadcasts and watch and record shows on their mobile phones and tablets. ABC claimed that its exclusive rights to "publicly perform" their works were being violated by Aereo's service.[54] The Court held that transmitting a copyrighted television program to subscribers was tantamount to publicly performing the program. Citing the definitions under the Copyright Act of 1976, the Court argued "behind-the-scenes technological differences do not distinguish respondent's system from cable systems, which do perform publicly."[55] Using the principals of the *Aero* holding, which asserted that a "tech company that acts like

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[51] *Goldman v. Breitbart.*

[52] *S.D.N.Y. Ruling in Goldman v. Breitbart: An Embedded Tweet May Constitute Copyright Infringement*, 2019 Colum. J.L. & Arts.

[53] *Id.*

[54] ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

[55] ABC, Inc. v. Aereo, Inc. - 134 S. Ct. 2498 (2014), https://www.lexisnexis.com/community/casebrief/p/casebrief-abc-inc-v-aereo-inc.

a cable company should be treated like a cable company," the *Goldman* court reasoned "that a webpage publisher that acts like it is displaying a photo on its webpage should be treated as if it is … doing so"[56] It should be noted, however, that the *Goldman* ruling, which was decided by the Southern District Court of New York, did not change the applicability of the server test, which is still law in the Ninth Circuit.

Goldman is not the only case that has rejected the line of argument presented by the server test. In *Flava Works Inc. v. Gunter (2012)*, the U.S. District Court for the Northern District of Illinois rejected the notion that a website only displays a photo if it is stored on the website's server.[57] In this case, Flava Works, a site that gives users access to pornographic videos through a paid subscription service, sued myVidster, a website with a large video database. The plaintiff alleged that myVidster's proprietor, Marques Gunter, was not effectively monitoring his site by "purposefully creat[ing] a system that makes it more difficult for copyright owners to monitor the site for infringement," because users could bypass the Flava Works paywall and access its copyrighted videos via the myVidster website.[58] While the defendants argued that the server test applied because users did not save copies of infringing videos, but rather used hyperlinking to share videos, the district court disagreed. The court distinguished between the role of Google in *Perfect 10* and myVidster by asserting that Google provided a platform for a general search, whereas myVidster users "personally select[ed] and submit[ed] videos for inline linking/embedding on myVidster."[59] It should be noted, however, that the *Goldman* ruling, which was decided by the Southern District Court of New York, did not change the applicability of the server test, which is still law in the Ninth Circuit

More recently, a New York court ruling questioned the validity of the server test and highlighted the role of sublicensing in the discussion of embedding third-party content. In June 2020, the U.S. District Court for the Southern District of New York heard a motion for reconsideration in the case of Stephanie Sinclair, a photographer who had sued Mashable, a large digital media platform, for copyright infringement for embedding one of her Instagram posts on its website. Although the court initially dismissed Sinclair's complaint, it subsequently reversed its decision. The district court adhered to its original holding that

[56] *Id.*
[57] Flava Works, Inc. v. Gunter, 754 F. Supp. 3d (N.D. Ill. 2011).
[58] *Id.*
[59] *Id.*

Instagram has the broad right to sublicense the plaintiff's content to application program interfaces (APIs) users such as Mashable as laid out in Instagram's Terms of Use but overturned its ruling that there had been evidence of a sublicensing agreement between Instagram and Mashable in Instagram's Platform Policy. The court asserted that for a sublicensing agreement to exist, the 'explicit' consent of the licensor is required. Instagram's policies do not include such consent language.[60] The adoption of language concerning sublicensing rights and explicit consent in embedding liability cases strongly suggest that sublicensing and API considerations cannot be separated from any discussion about embedding and infringement.

II. Examination of Past Decisions in Embedding Cases and Their Relevance to Recent Cases

A. Problems with the Server Test

The assumption that many legal scholars made about the server test being settled law is false.[61] In fact, the server test is not rooted in the language of the Copyright Act and has only been implemented by one Circuit Court.[62] The Copyright Act protects copyright holders from infringement of their copyrighted goods through display on a device or process that is "now known or later developed."[63] The copyright holder has the exclusive right to display their work through any tangible medium that may exist now or in the future. This provision therefore suggests that practices like hyperlinking and embedding, which are tangible mediums[64] through which users can view works, may be considered in violation of the exclusive rights of the copyright holder. Furthermore, it is well within the framework of the Copyright Act to scrutinize the process of transmitting photos by determining what exactly constitutes the display or performance of a work. As technology evolves, it stands to reason that the definitions of terms like display and performance cannot remain entirely the same. Under the server test, the Ninth Circuit posited that to display or show a copy of a work requires the possession of that copy.[65] However, courts have argued that the Copyright Act does not necessitate possession of a copy for a legitimate claim of infringement.[66] In fact, the *Goldman* court opined that "[t]he plain language of the Copyright Act, the legislative

[60] Sinclair v. Ziff Davis, LLC, (S.D.N.Y. 2020).
[61] *Id.*
[62] *Id.* at 247.
[63] § 106, 106A.
[64] Allsha D. Malloy & Amrit Tiwana, *Tangible Medium*, 2003 Encyclopedia Info. Sys.
[65] *Id.*
[66] *Id.* at 247.

history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have "displayed" a work within the meaning of the Copyright Act,"[67] explicitly rejecting the Ninth Circuit's reasoning.

The Copyright Act defines transmitting a work or performance as "communicat[ing] it by any device or process whereby images or sounds are received beyond the place from which they are sent."[68] In line with this logic, embedding a work within an article via a hyperlink could constitute infringement if "the place from which they are sent" is considered to be the copyright holder's website. This definition necessitates further clarification of ambiguous terminology; the origin of a work must be identified, and its subsequent locations should be mapped out to determine how the work is shared and establish the resulting liabilities. In this same way, it is necessary to understand how liability should function as a copyrighted work is disseminated more frequently through numerous channels and moves further away from the copyright holder's website. If the origin is the copyright holder, is every subsequent user who shares the work liable for copyright infringement? Furthermore, the *Goldman* decision asserted that the process of embedding a tweet clearly falls into a process as defined by the Copyright Act that "resulted in a transmission of the photos so that they could be … shown."[69] It should be noted, again, that the decision in *Goldman,* like *Perfect 10*, is not set binding; other courts are not required to adopt the *Goldman* reasoning. If intent to show the photo is a considerable factor in determining infringement, the infrastructure of modern media companies would fall apart.[70] The current ecosystem of the internet depends heavily on the ability of users to share information freely. In fact, most digital media companies, including Buzzfeed and the Huffington Post, have built entire business models that hinge on the ability of content to be spread across the internet.[71] It can be argued that a media company's only intention when including any third-party image is for a user to view that image. With this classification of infringement, enforcement would be extremely difficult and the utility to businesses and the consumers who benefit from the information those businesses provide, would be diminish. While these challenges to the

[67] *Id.* at 17.
[68] § 101.
[69] *Id.*
[70] *Id.*
[71] *Id.*

server test quite clearly offer further protections to copyright holders and may interpret the Copyright Act more accurately, there are still significant challenges to automatically classifying embedding a work as a process of displaying it.

B. Issues with a blanket definition of "process"

If embedding an image or post on a website is infringement under the parameters of the Copyright Act, the question arises as to what the scope of the word "process" is. For example, if an Instagram post is not embedded on a website, but the hyperlink to the post is provided on the website, would this still infringe upon the copyright holder's display and performance rights?[72] The danger in setting too broad a definition of a process is that it may lead to the severe restriction of information and a complete disruption of current internet etiquette. However, if courts interpret the parameters that constitute a process too narrowly, copyright holders would not receive the full benefit of their rights as afforded by the Copyright Act, discouraging content creators from releasing new work. By making the process of linking a violation of display and performance rights or relying on over-specific definitions of embedding, courts would impede the internet's ability to function as it was intended.

C. Protected parties

The server test is a straightforward rule that interprets copyright broadly to garner straightforward results. These results, however, will not always be equitable. In *Perfect 10*, greater protection awarded to internet service providers and web pages like Google. The establishment of the server test sought to immunize these companies from liability by giving them a simple, bright-line rule that would allow them to function within the parameters of existing technologies, which perhaps served to nurture the growth of a burgeoning internet infrastructure.[73]

However, the ruling in *Goldman* challenged that dynamic, promoting protections for copyright holders and questioning the liberties that internet companies and media outlets have enjoyed for decades. The rejection of the server test in *Goldman* and other discussed cases illustrates a trend of courts questioning the server test. The *Goldman* and *Perfect 10* rulings present a tension between two liability paradigms: one that affords greater liberties

[72] *Id.* at 248-249.

[73] Jason Schultz, *P10 v. Google: Public Interest Prevails in Digital Copyright Showdown*, Electronic Frontier Foundation, https://www.eff.org/deeplinks/2007/05/p10-v-google-public-interest-prevails-digital-copyright-showdown.

to internet service providers and webpages and one that places a greater emphasis on the rights of copyright holders and content creators. The implications of both scenarios are cause for concern. Should copyright holders feel that their rights are not being protected, they might choose to stop creating work out of fear that they will not be recognized for it.[74] However, should search engines like Google and media outlets like Mashable feel that linking and embedding pose too high a legal risk, their pool of sources will decrease drastically. Furthermore, on the user end, readability of online articles and access to information instantaneously will also decrease.[75] There is therefore a need for legislation that that encourages the continued creation of work in order to protect and expand the amount of information available on the internet.

D. Sublicensing Issues

The main distinction between the rulings in *Goldman* and *Sinclair* is in the issue of sublicensing. While the *Goldman* argument primarily focused on display and performance rights, the ruling in *Sinclair* introduces a new line of argument. The *Sinclair* court introduces the idea of sublicensing in the litigation of third-party embedding cases. In view of her holding that Instagram does have the broad right to sublicense user content to APIs as laid out in its Terms of Service, Judge Forrest required a sublicensing agreement between Mashable and Instagram in which Instagram gives Mashable explicit consent to sublicense the user's content.[76] This challenges the tech industry standard, which operates under the assumption that when a user agrees to the Terms of Service conditions when making an account, the company then has permission to sublicense content to other third-party sources. Once again, this can be seen as a victory for copyright holders and a loss for media outlets and internet companies who will see restrictions in the way that the content on their platforms can be shared. While it was previously assumed that the ability for a company to sublicence was tantamount to entering into an explicit sublicensing agreement with a user, the *Sinclair* court rejected this notion and afforded users greater control over the intellectual property they post on their social media pages.

E. Support for Legal Legitimacy of Embedding

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[74] *Id.*

[75] Kit Walsh & Karen Gullo, What if You Had to Worry About a Lawsuit Every Time You Linked to an Image Online? (Oct. 24, 2017), https://www.eff.org/deeplinks/2017/10/what-if-you-had-worry-about-lawsuit-every-time-you-linked-image-online.

[76] Sinclair v. Ziff Davis, LLC, (S.D.N.Y. 2020).

Legitimate embedding is a key aspect of the modern internet and a crucial element to maintaining the quality and quantity of information available through media outlets. For example, a Buzzfeed article about a group on media platform Reddit driving up video game retailer GameStop's stock prices and angering hedge funds includes two embedded social media posts: a tweet from a user expressing her disdain for Wall Street's retaliatory restrictions on GameStop stock, and a TikTok video posted by a user who participated in the over-investing.[77] Both embedded posts play a crucial role in setting the tone of the article and delivering key information about the parties involved and their respective attitudes towards the issue. The TikTok video shows a large group of users speaking excitedly about "breaking" the GameStop stock. This serves to support the article's assertion that many of these young investors view this investment behavior as a game. Clicking on the TikTok will take the user to TikTok's site, where they will be able to access relevant comments on the post and gain further insight into the event. To counter this, the embedded tweet serves to show key criticisms of Wall Street's response and provide a rebuttal to the severe condemnation of these investors by hedge funds and financial institutions.

These are all crucial pieces of information that allow the reader to contextualize the information in the text of the article and pursue further research into the topic with the provided hyperlinks. News media etiquette has evolved to depend heavily on compounding information and deriving new insights from various existing sources. In order to pursue a protective framework for legitimate embedding, it is essential to understand the merits and flaws of relevant existing provisions.

1. DMCA Safe Harbor

Section 512 of the Digital Millennium Copyright Act (DMCA) of 1998 establishes "safe harbors"[78] that protect "qualifying online service providers"[79] from monetary damages "from copyright infringement based on the actions of their users, in exchange for cooperating with copyright owners to expeditiously remove infringing content and meeting certain conditions."[80] To qualify for safe harbor protection, service providers that "that allow users to post or store material on their systems, and search engines, directories, and other

[77] Amber Jamieson, An "Angry Mob" on Reddit Is Pushing Up GameStop's Stock Price and Pissing Off A Bunch of Wall Street Firms, Buzzfeed News (Jan. 6, 2021, 8:08 PM), https://www.buzzfeednews.com/article/amberjamieson/gamestop-reddit-stock-shares

[78] 17 U.S.C. § 512.

[79] § 512.

[80] § 512.

information location tools"[81] must designate a representative to receive copyright infringement claims. The purpose of this law is to protect platforms and monitor and regulate infringement activity, rather than eliminate the actors completely.[82] There are certain criteria that need to be met by service providers as set out in Section 512 that must be met for these providers to receive safe harbor protections. These include allowing copyright holders to easily disable access to infringing content by enacting "notice and takedown procedures."[83] On the user end, the DMCA safe harbor contains provisions that allow individual users to challenge what they believe to be improper takedowns. Without this particular provision, online service providers would be severely restricted in their ability to host and transmit user-generated content.

The DMCA represents a legislative "compromise between the copyright industry and online service providers."[84] The safe harbor statute works at the service provider or platform level to ensure accountability for content displayed on these sites. It targets sites that host users who may then use the platform to post copyright infringing material. The DMCA repeat infringer provision is therefore challenging to interpret in terms of embedding because it is unclear if this policy would also include embedding materials on the sites that have no "pre-existing relationship with third-party websites posting infringing material."[85] There is a certain level of legislative ambiguity that exists when trying to apply the notice and takedown policy in §512(g), which has a provision for replacement that does not provide clear steps for application in cases of user-embedded content.[86] Many digital rights groups, including the Electronic Frontier Foundation (EFF), have long criticized the DMCA safe harbors for providing an avenue for "risk averse service providers"[87] to remove content from their sites at their will. [88] This same problem could translate to embedded content, especially in the wake of cases like *Goldman* and *Sinclair*, where service providers may be more cautious towards the gray areas in copyright law that have benefited them in the past.

2. Fair Use

[81] *DMCA Designated Agent Directory*, Copyright.gov, https://www.copyright.gov/dmca-directory/.
[82] § 512.
[83] § 512.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

Section 107 of the U.S. Copyright Act provides provisions for "fair use," or the permitting of the unlicensed use of copyrighted works in certain situations. Common usages protected by the fair use provision are "reproduction in copies … for purposes such as criticism, comment, news reporting, teaching … scholarship, or research."[89] There are multiple measurable factors that can be applied on a case-by-case basis that determine whether or not a particular reproduction qualifies as fair use of a copyrighted work, including the purpose and financial incentives of the reproduction, the portion of the copyrighted work that has been reproduced, and the market implications of the reproduction on the value of the original copyrighted work.[90] The Copyright Act states that the fair use doctrine is first and foremost a legal tool that promotes the freedom of expression.[91] However, the application of fair use in the internet era has led to a constant struggle between maintaining intellectual property protections for copyright holders and ensuring the free flow of information for internet users.

In the case of *Goldman*, the intent of Mashable was once again an underlying concern. While the defendants argued that the copyrighted image was "transformative news reporting," [92] and therefore constituted fair use, the plaintiff "countered that the photo itself was not newsworthy" and that the defendants "profited by exploiting the news value of the photo."[93] The defense, however, argued that the photo was itself the source of speculation about Tom Brady's role in trying to recruit Kevin Durant to the Boston Celtics, and therefore newsworthy.[94] Furthermore, the resulting theories presented by fans and media companies about Tom Brady's role and the implications of Kevin Durant possibly being recruited to the Boston Celtics could qualify as transformative reporting. This example presents the main issue with the factors of fair use in a digital news era. Courts may rule differently based on the weight they give to each of the factors and ultimately create confusing case law to inform future decisions.

3. Implied License

The relationship between an internet user and an internet search engine or platform is not a new one. Therefore, it is essential to understand that paradigm for copyright licensing

[89] 17 U.S.C. § 107.
[90] § 107.
[91] § 107.
[92] *Id.*
[93] *Id.*
[94] *Id.*

within the context of internet as it has been litigated in the past. There are two types of copyright licenses: exclusive and non-exclusive. Exclusive licenses need to be in writing while non-exclusive licenses need not be in writing. An implied license is a non-exclusive license which has historically been used in copyright cases where two parties have entered into a contractual relationship with each other.[95] However, in *Field v. Google*,[96] a district court expanded the scope of the implied license doctrine to "resolve a conflict between an internet user… and an internet service engine…who had no contractual relationship with one another."[97] The court stated that the implied license doctrine is exercised "where a copyright holder knows of the use and encourages it."[98] It should be noted that while there has been significant interest in the application of the implied license doctrine as a new legal standard for such internet disputes, it is non-binding to the *Goldman* court; it is a concept that has been discussed in other cases but has not been utilized by most courts.[99] This doctrine has not been widely adopted by different courts. For the purposes of this article, the implied license doctrine will be discussed as a proposed avenue for litigating embedding cases, rather than set law. Although this provision presents a compelling defense for legitimate embedding, this language becomes significantly more ambiguous when contextualized within the social media sphere. Using the implied license doctrine within the context of social media requires a determination of whether an Instagram or Twitter user "know" of or "encourage" the licensing and sublicensing of their content to third-party sites by the social media company?

In *Goldman*, this is certainly not the case. The plaintiff did not encourage media outlets to embed and share his photo. However, the first part of the *Sinclair* ruling, which states that Instagram is well within its rights to enter into a sublicensing agreement with a third-party site or API, suggests that far more legal emphasis should be given to the Terms of Service conditions agreed to by the user when setting up a social media account.[100] In fact, given the ambiguity of applying the implied license doctrine to cases of embedding liability, courts increasingly depend on the Terms of Service agreements between users and

[95] *Id.*
[96] Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).
[97] *Id.*
[98] *Id.*
[99] *Id.* at 266
[100] *Id.*

social media companies to determine misuse of copyrighted content. If courts pursue an analysis of these agreements, they should determine whether or not the social media company entered into an explicit licensing agreement with the plaintiff. For example, the Snapchat Terms of Service conditions explain:

> When you [upload content], you retain whatever ownership rights in that content you had to begin with. But you grant us a license to use that content. How broad that license is depends on which Services you use and the Settings you have selected. We call Story[101] submissions that are set to be viewable by Everyone as well as content you submit to crowd-sourced Services, including Our Story, "Public Content." For all content you submit to the Services other than Public Content, you grant Snap Inc. and our affiliates a worldwide, royalty-free, sublicensable, and transferable license to host, store, use, display, reproduce, modify, adapt, edit, publish, and distribute that content. This license is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones.[102]

The language in the Snapchat Terms and Conditions suggests that Snapchat has a license over a user's content and reserves the right to sublicense the content and transfer the license to their 'affiliates' to alter and publish the content as they please. Furthermore, the degree to which a user grants Snapchat license over their content is determined by the user's own decision about where they want to share their content; Snapchat uses the user's privacy settings to determine the scope of their right to sublicense the user's content. Taking into consideration the language in Snapchat's Terms of Service, the *Goldman* ruling yields two essential questions: 1) what constitutes an 'affiliate' of Snapchat and 2) what privacy settings did the plaintiff in *Goldman* use when uploading the picture in question?[103] If a company does not have a pre-existing relationship with Snapchat, the logic in the *Sinclair* ruling suggests that an explicit licensing agreement is necessary in order for Snapchat to legally sublicense the use of a user's content. It is necessary that the term 'affiliate' is further defined by Snapchat in order to understand the scope at which the company can permit the publication and adaptation of user content. The Terms of Service clearly asserts that affiliates are separate from business partners and third parties, but fails to explicitly define the term.

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[101] A 'Story' is a collection of pictures and videos that are uploaded to a user's Snapchat account and are visible to either just the user's friends or the entire Snapchat community. Individual users' stories can also be uploaded to public, crowdsourced stories based on geographical locations or events.

[102] *Snap Inc. Terms of Service*, Snap Inc., https://snap.com/en-US/terms (last updated Oct. 30, 2019).

[103] *Id.*

III. Pursuing a Comprehensive Framework Using the Structure of Existing Copyright Legislation

A. Addressing Root Issues

1. *Content Creators v. Lawmakers*

According to an article in the Chicago Law Review, titled *The Creative Employee and the Copyright Act of 1976* creators have three central interests in their works:

> …first, a possessory interest, which is fulfilled by composing a work that satisfies the creator's initial vision; second, an interest in the integrity of the work, which is endangered by the process of compromising that vision with commercial demands; and third, a reputational interest, which turns on how the work is presented to the public.[104]

These interests often clash with copyright law, as legal arguments cannot always align with the level of creative liberty that content creators expect and may not always afford content creators their expected amount of control and protection over their work.

i. Impact of Unchanged Regulations on Copyright Holders

In addition to individual creator concerns, there are many benefits to society from the free flow of information and the continued creation of content. With the rise of social media, the way that content is created and classified has changed dramatically. However, it is essential for lawmakers to consider that these changes have not altered the priorities of creators as outlined above; they have simply shifted the medium through which work is created and shared. The server test is an example of a practice that does not provide enough protection of creators' interests and, instead, seeks to remedy the problem with a blanket resolution. The increased interaction between news media and social media has resulted in an interconnected system of compounding information and an overall benefit to public education and involvement in society.[105] It is therefore imperative for lawmakers to ensure that they are protecting content creators' interests enough to encourage the continued creation of work.

ii. Impact of Stricter Regulations on Internet Creators and Businesses

Conversely, the over-regulation of content can also lead to a decline in the availability of information to the public. Internet etiquette and culture has existed on a

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[104] Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. Chi. L. Rev. 590, 605 (1987).

[105] *Id.*

framework of interconnectivity; the interaction of information plays a key role in the ability of the internet to benefit users and businesses. Regulation could harm media outlets that utilize social media posts and third-party content to bolster the legitimacy, readability, accuracy, and newsworthiness of their articles. This could lead these companies to conduct a cost-benefit-analysis: should they absorb the cost of paying creators licensing fees for access to their content or cease embedding third-party content on their sites altogether? The first option presents issues for both the companies and users. The process of identifying each third-party post, contacting the copyright holder, and entering into a contractual agreement could require the existence of a department dedicated solely to this purpose. While this may be accomplished at wealthier companies like Twitter and Instagram by using an algorithm, it would still deviate enough from their regular operations to require a significant level of personnel and technological restructuring. As a result, costs to the company will increase. In addition to the increased personnel costs, providing financial compensation for each license will also drive up costs. These transactional costs will ultimately need to be passed on in part to users in the form of increased subscription fees and limited free content.[106]

If the company chooses to stop embedding content on its site, however, both the users and the company lose out. The amount of information available on any given media site will decrease, and the quality of the user experience will also decrease.[107] Where a user would previously see an article on the New York Times discussing a tweet by a private citizen that references a particular piece of legislation and be able to see both the tweet and parts of the legislation on the same webpage, they would only be able to view content that was written by New York Times journalists. This would hinder the amount of information the New York Times is able to give the user and decrease the user's ability to easily access relevant linked content on the webpage.

B. Proposed Solutions

1. Comprehensive Legislation ("Internet Copyright Modernization Act")

Internet infrastructure has expanded past the outdated provisions present in the Copyright Act of 1976 and the 1998 DMCA.[108] To address this, I propose comprehensive legislation that will modernize internet copyright law, with specific provisions for embedding

[106] *Id.* at 259.
[107] *Id.*
[108] *Id.*

liability to remove ambiguity and, above all, promote the growth and interconnectivity of the internet and media. Unlike the server test, which simply offers a binary distinction that does not account for the technological complexities of embedding, this legislation will build on the idea presented in cases like *Goldman* and *Sinclair* to establish a fair framework for litigating embedding disputes.

A new system for copyright should follow a similar framework for creation, deliberation, rulemaking, and dispute settlement as the 2018 Music Modernization Act (MMA). The MMA, which has been lauded as the most significant recent advancement in copyright legislation, updates current laws "to reflect modern consumer preferences and technological developments in the music marketplace."[109] Similarly, this new legislation, called the Internet Copyright Modernization Act (ICMA), should strive to regulate the sharing of information on the internet in a way that reflects modern consumer preferences and technological developments in digital media. This new statute must implement recent case law and traditional copyright law under one legislative umbrella in order to offer complete considerations of the concerns of all relevant stakeholders.

i. Formation

In order to understand the feasibility of such a drastic industry-wide change, it is essential to analyze the Music Modernization Act, a monumental legislative achievement that sought to renew the music industry in the age of digital streaming. The MMA cites one of its goals as providing a consistent legal process for studio professionals and artists "to receive royalties for their contributions to music that they help to create."[110] The ICMA will help internet creators and media stakeholders by "providing a consistent legal process"[111] for copyright issues related to the sharing and in-linking of content on the internet. This legal process is one that will seek to define ambiguous terminology like 'affiliate' and 'sublicensing,' by drawing from cases like *Goldman* and *Sinclair*. The ICMA will draw from the explicit license ruling in *Sinclair*, by requiring social media companies like Snapchat and Instagram to establish explicit agreement with companies that are not their direct affiliates in order to exercise their right to allow the publication and distribution of user content on third-party sites. Furthermore, social media companies must have a provision in their Terms

[109] *Summary of the Music Modernization Act (MMA)*, Copyright Alliance, 1 (), https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf.

[110] Music Modernization Act, H.R. 5447, 115th Cong. (2018.)

[111] *Id.*

of Service Agreements that prevents them from any content licensing rights for users who choose to utilize all the available privacy settings. Users who choose to keep their content private should be assured that their privacy preferences are respected by social media companies and that these companies do not include their content in any exclusive licensing agreements with other organizations. However, users should also be made aware that the more public they choose to make the content, the more power they are affording to the social media companies to sublicense that content. Therefore, the ICMA will call for a standardization of Terms of Service agreements for similarly situated media companies. This means that social companies like Instagram, Snapchat, Twitter, and TikTok will offer users near identical Terms of Service agreements that include the respective distinction between private and public content. Essentially, this would provide a skeletal blueprint for companies offering similar platforms for users to share content and would enable better clarity in the rights of both the platform and its users. Exceptions to this standard would be evaluated on an individual basis if companies want to account for content like licensed music and videos separately.

As the implications of copyright legislation on the internet are not one-sided, it is also necessary that a coalition of individuals representing different internet stakeholders be responsible for influencing the ICMA. The represented groups would include legal professionals from media conglomerates, social media companies, consumer rights groups, digital freedom coalitions, free speech coalitions, technology professionals, internet service providers, activism groups representing content creators, and any other relevant stakeholders. The early stages of the ICMA will start out with a coalition of media companies and digital rights groups calling on interested parties to nominate representatives and express why their group should be included in the list of stakeholders in the ICMA. The goal of this process will be to hear as many interested parties and ensure accurate representation of relevant stakeholders.

The groups will form a lobby that will meet over an allotted period of time, beginning with a cap of two years with the possibility for extension if the committee is able to provide evidence of substantial progress. The discussed topics will emphasize the different forms of linking and digital revenue streams, with an emphasis on clarifying embedding legislation. Technology related to linking and navigating sources (i.e. what happens when a link is clicked) will be analyzed in order to inform more comprehensive definitions of words

like "display," "perform," "transmit," and "process." Like the record industry in the early stages of the Music Modernization Act[112], this group will encourage joint lobbying efforts with the goal of passing new legislation and impelling regulatory reform. The group would present its findings to Congress, encouraging legislators to use these definitions to enact a new provision in §110 of the Copyright Act that will exempt legitimate embedding from infringing liability.[113] Congress should use elements like knowledge and intent, as laid out in the DMCA to draw a line between legitimate and illegitimate embedding. It is possible that representatives of the group could testify before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet,[114] to call for unified legislation and considerations of the grievances of all relevant stakeholders.

ii. Titles

There will be three main titles in the ICMA: copyright holder's rights, linking party's rights, and user rights. All members of the committee will deliberate on each of these titles, but parties representing the respective groups will be able to present their individual concerns to be addressed by the larger group. All findings and grievances concerning each of these three categories will be expressed to Congress.

The main agenda for policies concerning copyright holder's rights will be to protect the three central interests of creators: possessory interest, interest in integrity of the work, and a reputational interest. In protecting these interests, the committee will be pursuing a main goal of the ICMA: to encourage the continued creation of works. The main agenda for policies concerning linking party's rights will be to ensure that media outlets and internet companies are able to share newsworthy information without fear of copyright liability. In doing this, the committee will be pursuing a main goal of the ICMA: to encourage the free flow of information on the internet. The main agenda for policies concerning user rights will be to ensure minimal technological and legal restrictions for users to access content on the internet. In doing this, the committee will be pursuing a main goal of the ICMA: to encourage

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[112] *Id.*

[113] 17 U.S. Code § 110.

[114] *House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, subcommittee of the House Judiciary committee on the Judiciary in the United States House of Representatives*, This committee "has jurisdiction over the Administration of the U.S. Courts, the Federal Rules of Evidence, Civil and Appellate Procedure, judicial ethics, patent, trademark law and information technology." Courts, Intellectual Property, and the Internet (116Th Congress), https://judiciary.house.gov/subcommittees/courts-intellectual-property-and-internet-116th-congress.

the free flow of information on the internet. These actions will, in combination, support the continuation of internet infrastructure as a network of networks, a key principle that is at the heart of the internet's usefulness to society.

iii. Legislating Body ("Internet Licensing and Copyright Collective")

This legislation will also ensure accountability and effective representation of relevant interest groups by creating a regulatory body in charge of establishing best practices. The creation of this group, which will be known as the "Internet Licensing and Copyright Collective" (ILCC), will be modeled on the Mechanical Licensing Collective (MLC) in the MMA. The ILCC will be a "non-profit organization designated by the U.S. Copyright Office pursuant to the" ICMA.[115] This body will be responsible for ensuring transparency and compliance with the ICMA principles, providing services to all three groups of represented stakeholder groups as well as other groups impacted by the ICMA policies, and continuously discussing the issues covered in the ICMA with the intention of perfecting and extending protections to the maximum extent possible under U.S. copyright law. In order to ensure fairness, the members of this collective will be chosen from the same interest groups that were part of creating the ICMA. This way, every stakeholder will have a voice in legislating the ICMA and ensuring (1) the smooth transition to adopting ICMA policies and (2) the fair settlement of any disputes on a case by case basis.

2. Acknowledgment of Counterarguments

i. Disproportionate influence in rulemaking

A possible critique of such a framework, and one that has existed with the MMA as well, is the disproportionate influence this policy will give to wealthy and powerful media and internet conglomerates with nearly infinite resources compared to individual content creators or activism groups. In the MMA, concerns arose that members of the MLC were mostly record executives and business professionals from within the industry, with very little artist or creative representation.[116] The resulting fear was that the industry would fall into a system that would favor record labels over the rights of individual artists and producers. To remedy this, the MLC pursued a policy of expanding their collective members, consciously adding more artist rights advocates in order to equalize stakeholders' powers within the

[115] *About Us*, The Mechanical Licensing Collective, https://www.themlc.com/our-story.

[116] Conflict of Interest Policy, Mechanical Licensing Collective, https://themlc.com/sites/default/files/2020-05/Conflict%20of%20Interest%20Policy%20of%20The%20MLC.pdf ( )

committee.[117] In this same way, the ILCC will adopt a dynamic approach to picking committee members, constantly improving representation and ensuring the eradication of powerful blocs within the collective.

Conclusion

"The power of the web lies in its ability to link related documents."[118]

When the Copyright Act of 1976 was enacted, legislators surely did not consider the many challenges that would arise with the modern Internet. In fact, the language of the Copyright Act is difficult to apply to computers and servers, and is better suited for television, radio, and print mediums. By including that the display clause could be extended to encompass new technologies, the Copyright Act seemed to foresee the gap in legislative language that would cause future disputes like those in *Perfect 10*, *Goldman*, and *Sinclair*.

Embedding has become an integral part of an open internet infrastructure. It is essential to maintaining the free flow of information and has evolved to redefine the way that individuals consume news and media content. While the server test pursued the preservation of this architecture by absolving "the embedding party from direct liability,"[119] its alignment with the Copyright Act is weak. Furthermore, it fails to account for the intricacies of internet location mapping as well as alternate defenses for legitimate embedding including DMCA safe harbors, the fair use doctrine, the implied license doctrine, and sublicensing rights as laid out in the Terms of Service conditions of platforms.

As a result, lawmakers, industry professionals, and consumer rights activists should collaborate on a comprehensive document: The Internet Copyright Modernization Act (ICMA), which will protect legitimate embedding practices while also removing ambiguity from internet copyright law and providing a central location for stakeholders to access relevant regulations. A condition of this Act is the establishment of an Internet Licensing and Copyright Collective (ILCC), a committee of similar stakeholders will ensure the implementation of the ICMA tenets. This framework will allow courts to find a balance between pursuing the free flow of information and protecting copyright holders' rights.

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[117] *Advocacy*, The Recording Academy, https://www.grammy.com/advocacy/issues-policy/music-modernization-act.

[118] Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 Minn. L. Rev. 609 (1998).

[119] *Id.*

The Second Amendment: Overturning *District of Columbia v. Heller* (2008) and Combating America's Gun Violence Epidemic

Zoe Eberstadt-Beattie

"District of Columbia v. Heller, which recognized an individual right to possess a firearm under the Constitution, is unquestionably the most clearly incorrect decision that the Supreme Court announced during my tenure on the bench."
– Associate Justice John Paul Stevens, May 14, 2019

Introduction

In *District of Columbia v. Heller* (2008), the Supreme Court issued a 5-4 ruling affirming the right to "bear arms"[1] as a fundamentally protected right under the U.S. Constitution. The opinion of the Court, delivered by Justice Antonin Scalia, outlined three major points.[2] First, the Second Amendment protects an individual's right to bear arms, and the prefatory clause, "A well-regulated Militia, being necessary to the security of a free State," does not define the operative clause, "the right of the people to keep and bear arms, shall not be infringed."[3] Second, the Court held that the federal territory of D.C. may impose certain minor limitations on the Second Amendment as they may with any right.[4] Third, the Court held that the District of Columbia's firearm laws, handgun bans, and trigger-lock requirements were in violation of the fundamental Constitutional right to bear arms.[5] The decision has been held up by gun-ownership-activists as a victory, but the lack of clear precedent for the holding makes it seem less Constitutionally-based and more

[1] U.S. Const. amend. II.
[2] District of Columbia v. Heller, 554 U.S. 570 (2008).
[3] *Id.* at 1.
[4] *Id.* at 1-2.
[5] *Id.* at 2.

politically-motivated. Moreover, the decision neglects to consider the realities of gun ownership, gun control, and gun violence seen throughout American history. As a consequence, the Court will eventually need to overturn the *Heller* decision and allow for broader federal and state regulations on the ownership of firearms if it intends to allow state and federal legislatures to combat the spread of America's gun violence epidemic.

The Second Amendment states, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[6] In 1787, only four years after the American Revolutionary war, the words a "well-regulated Militia" must be understood in reference to the fight against an oppressive British monarch, King George III.[7] The context of this Amendment defines its intent in protecting the central principle of general personal freedoms throughout the Constitution. Additionally, *Heller's* decision assumed that 18th century muskets and pistols are comparable to the high-powered machine guns accessible in 2008 despite modern firearms being far deadlier and more accurate than those used over 200 years ago.[8]

Heller was almost unprecedented. Unlike so many other rights that have developed gradually, there was little litigation surrounding the Second Amendment prior to *Heller*. Ultimately, Justice Scalia's opinion disregarded one of the few precedents relating to this issue, *United States v. Miller* (1939).[9] The establishment process of other rights took decades of court cases to fully realize. Additionally, Justice Scalia's notable and ardent originalist tendencies is an important consideration for understanding his intentions authoring the decision for *Heller*. However, even if it was the intent of the framers to establish an individual right of ownership, the Court still neglected the somewhat common practice, despite the originalist ideologies, of acknowledging an evolving society. For example, social media has caused many to wonder about how the First Amendment can be applied to certain types of speech and advancing surveillance technologies have created challenges for the ways in which courts apply the Fourth Amendment.[10] Ultimately, it proved to be a lethal decision for the Court not to allow for the same appreciation of modern realities in

[6] U.S. Const. amend. II.

[7] William S Price, Reasons behind the Revolutionary War, NCPedia (1992), https://www.ncpedia.org/history/usrevolution/reasons (last visited Jan 13, 2021).

[8] *Heller*, 554 U.S. 570.

[9] United States v. Miller et al., 307 U.S. 174 (1939).

[10] *See, e.g.,* Riley v. California, 573 U.S. 373 (2014).

technological advancements in analyzing the Second Amendment's applicability to modern society.

Gun ownership, gun violence, and gun-related racism all contribute to a basic lack of social advancement. Historically, gun ownership has been exclusive to white Americans and has played a central role in perpetuating race-based violence.[11] In the criminal justice system, young Black men and boys are far more likely to face criminal repercussions for gun possession and are disproportionately represented in homicide statistics due to gun violence.[12] Internationally, gun deaths are lower by orders of magnitude.[13] The one critical legal difference between the U.S. and the industrialized international community: the United States is alone in guaranteeing a fundamental right to individually keep and bear arms, whereas most nations require basic training and regulations to own a gun.[14]

The current reality of how the Second Amendment has been interpreted makes the passage of common sense gun reform nearly impossible, especially when those principles are defended by powerful lobbying organizations like the National Rifle Association (NRA).[15] With a vast majority of Americans in favor of common sense gun reform, those advocating for change have yet to witness effective regulation of the firearm industry from the executive, legislature, or judicial branches.[16] Ultimately, the *Heller* decision has only helped to solidify and amplify America's gun violence epidemic and will do so for generations to come. Therefore, its key remedy is overturning the decision with a new Supreme Court case.

Like any Constitutional question, the article begins in the 18th century with an in-depth examination of the Second Amendment and its original public meaning. This will

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[11] Adam Winkler, The Secret History of Guns ,The Atlantic (2017), https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/ (last visited Jan 13, 2021).

[12] Richard V. Reeves & Sarah E. Holmes, Guns and race: The different worlds of black and white Americans Brookings (2020), https://www.brookings.edu/blog/social-mobility-memos/2015/12/15/guns-and-race-the-different-worlds-of-black-and-white-americans/ (last visited Jan 13, 2021).

[13] Joshua Gillin et al., PolitiFact - The facts on mass shootings in the United States @politifact (2017), https://www.politifact.com/article/2017/nov/08/facts-mass-shootings-united-states/ (last visited Jan 13, 2021).

[14] Ruth Levush, Firearms-Control Legislation and Policy: Comparative Analysis (2013), https://www.loc.gov/law/help/firearms-control/comparative.php#Constitutional%20Right%20to%20Bear%20Arms (last visited Apr 11, 2021).

[15] Laurence Tribe, Opinion | The Second Amendment isn't the problem The Washington Post (2018), https://www.washingtonpost.com/opinions/repealing-the-second-amendment-is-a-dangerous-idea/2018/03/28/ab194138-32af-11e8-8bdd-cdb33a5eef83_story.html (last visited Jan 13, 2021).

[16] Rachel Treisman, Poll: Number Of Americans Who Favor Stricter Gun Laws Continues To Grow NPR (2019), https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow (last visited Jan 13, 2021).

examine the sentence structure, and the controversial clause in question, "a well-regulated militia."[17] Following this, the article will examine the procession of judicial decisions, both through the federal and state courts, that lead to *District of Columbia v. Heller* and eventually *McDonald v. City of Chicago.*[18] These precedent cases include *Nunn v. State* (1846),[19] *United States v. Cruikshank* (1875),[20] and *United States v. Miller* (1939).[21] Part II will address the effect of discriminatory past gun control laws and the consequence it has had on modern reform efforts as well as the overwhelming statistics which have led to the gun violence epidemic in America today. Lastly, the conclusion of this article will address two legislative solutions and one critical judicial decision needed to create impactful change on this issue. Without the ladder, however, real lasting change may be difficult to achieve.

In *District of Columbia v. Heller* (2008), the Court concluded that the right to bear arms, regardless of the prefatory clause, is fundamental and constitutionally protected.[22] Without any significant precedent, a disregard for the basic syntax rules of the English language, and a refusal to acknowledge the meaning of a "well-regulated Militia" in the 18th century, the Court extended the 18th century definition of "arms" to 21st century armaments and established an individual right to bear modern arms based on that ancient definition.[23] This decision in turn led to *McDonald v. City of Chicago* (2010) which incorporated this right to the states.[24] Due to the extreme gun violence epidemic that the United States has faced in the past few decades,[25] and the gun laws that have been created since the *Heller* decision, there are three potential partial solutions to combat this problem: one, federally mandated universal background checks, two, a federally mandated licensing system, and three, the most critical and effective solution, overturning the *Heller* decision.

I. The Original Context of the Second Amendment & the State of Second Amendment Case Law before *Heller*

[17] U.S. Const. amend. II.
[18] McDonald v. City of Chicago, 561 US 742 (2010).
[19] Nunn v. State, 1 Ga. 243 (1846).
[20] United States v. Cruikshank et al., 92 U.S. 542 (1876).
[21] *Miller*, 307 U.S. 174.
[22] *Heller*, 554 U.S. 570.
[23] *Heller*, 554 U.S. 570.
[24] *McDonald*, 561 US 742.
[25] Gillin, *supra* note 13.

Modern debates concerning the Second Amendment have centered around the two clauses of the amendment and their relationship to one another.[26] Gun-ownership activists, like Justice Scalia, advocate for a separation of the two clauses -- the prefatory and the operative.[27] Those who advocate for sensible gun reform tend to believe the prefatory clause, "A well-regulated Militia, being necessary to the security of a free State," in fact defines the operative clause, "the right of the people to keep and bear arms, shall not be infringed."[28] This debate however, is not wholly political. The issue in question considers two central points: basic English syntax rules and the context of a "well-regulated Militia."[29]

A central feature of the former debate regards commas, and their use in official 18th century English syntax. Generally, commas were used less to divide thoughts and clauses, as they are in the 21st century, but rather to create natural pauses in speaking.[30] However, whether the Second Amendment is to be interpreted from an 18th century or a 21st century grammatical perspective, there is one commonality: a comma never designates two completely different ideas; rather, it brings them together.[31]

Understanding the comma issue is central to understanding the second aspect of the two clauses debate: "the well-regulated Militia." The framers of the Constitution were also the men who led the charge against the British Colonialists. However, the nature of the Revolutionary Army would not be at all that similar to modern U.S. standards of a military. The revolutionaries feared a standing army and emphasized the ultimate value of organized militias -- especially for the American Revolution.[32] Ultimately, smaller militias were essential to winning the war. Contextualized with every other right in the Constitution at the time, these were principles intended to protect the people -- on mass -- against oppression by government force.

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[26] Legal Information Institute, Amendment II. BEARING ARMS Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-2 (last visited Jan 13, 2021).

[27] Luis Acosta, United States: Gun Ownership and the Supreme Court (2008), https://www.loc.gov/law/help/usconlaw/second-amendment.php (last visited Apr 11, 2021).

[28] U.S. Const. amend. II.

[29] Acosta, *supra* note 27.

[30] Adam Freedman, Clause and Effect The New York Times (2007), https://www.nytimes.com/2007/12/16/opinion/16freedman.html?login=smartlock&auth=login-smartlock (last visited Jan 13, 2021).

[31] William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas*, WILLIAM & MARY LAW SCHOOL SCHOLARSHIP REPOSITORY 472 (2007), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2167&context=facpubs (last visited Mar 20, 2021).

[32] Saul Cornell, Part 5 of 17: Fear of Standing Army Youtube (2021).

Understanding the Second Amendment also requires looking at the documents written by the Founding Fathers contemporaneous to their consideration of the Bill of Rights. While deliberating, James Madison put forth a first draft of the Second Amendment which itself is very similar to the one codified in the Constitution but with instructive differences: "The right of the people to keep and bear arms shall not be infringed; a well-armed, and well-regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." (Complete Bill of Rights, supra at 169.)[33]

The additional clause essentially stated that if one's religious objections, such as the Quakers in Pennsylvania, did not allow them to keep and bear arms, then they were not required to join the "well-regulated militia." In its essence, this original Second Amendment is not intended to guarantee gun ownership, but rather to extend the First Amendment in protecting religious observance over the State's obligations.[34] The Second Amendment was shortened to accommodate many southerners at the time.[35] While intent cannot be entirely discerned from one draft to another, it should be noted that in considering an Amendment addressing this principle, there was a primary focus placed on the rights and status of the militia.[36] Additionally, adjustment from this draft to the final version most notably eliminates the focus on religious rights rather than the "well-regulated militia." The emphasis on the Second Amendment was to protect against oppression, not to protect an individual's right to bear arms.

For years, the Second Amendment did not receive the same degree of attention in the courts as other principles codified in the Bill of Rights. In *Nunn v. State (1846),*[37] the state of Georgia passed laws that limited citizens from openly carrying pistols— laws which were ultimately struck down.[38] The first instance in which the Second Amendment came into question on the federal level was in *United States v. Cruikshank* (1875).[39] In that decision, the Court found that,

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[33] Brief for the Petitioners as Amici Curiae, p. 27, District of Columbia v. Heller, 554 U.S. 570 (2008).

[34] *Id.* at 27

[35] *Id.* at 27

[36] *Id.* at 27-28

[37] *Nunn*, 1 Ga. 243.

[38] *Id.*

[39] *Cruikshank*, 92 U.S. 542.

> [The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in The City of New York v. Miln, 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.[40]

Lastly, although it was not mentioned in both the *Heller* opinion of the Court or dissenting opinions, *United States v. Miller*'s unanimous decision stands in direct contradiction to the central arguments of *Heller*. In *Miller*, the Court found that the defendant's use of a sawed-off shotgun was not protected by the Second Amendment in that the transportation of a sawed-off shotgun was not in "preservation or efficiency of a well-regulated Militia."[41]

While the original context of the framer's intent in constructing the Second Amendment provides a clear understanding of its meaning and its purpose in 1787, case law does not provide such a clear, reasoned, and comprehensive path. In the *Heller* opinion, Justice Scalia relied heavily on decisions made in state supreme courts such as *Nunn v. State* (Georgia) and *State v. Chandler* (Louisiana) from the 19th century.[42] In *Nunn v. State* (1846), the Georgia Supreme Court, ". . .construed the Second Amendment as protecting the 'natural right of self-defense' and therefore struck down a ban on carrying pistols openly.[43] According to *Heller*, the *Nunn* opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause."[44] However, Justice Scalia failed to consider Georgia Supreme Court Chief Justice Joseph Henry Lumpkin's intentions. Justice Lumpkin was a fierce advocate of "slavery and the Southern code of honor." The purpose of this decision was not to fight against oppressive laws but rather to bolster white supremacy by allowing whites to carry

[40] *Id.*
[41] *Miller*, 307 U.S. 174.
[42] *Heller*, 554 U.S. 570.
[43] *Nunn*, 1 Ga. 243.
[44] *Heller*, 554 U.S. 570.

firearms in public for intimidation purposes.[45] However, in this case, the intentions of Georgia Supreme Court Chief Justice Lumpkin should, at a very minimum, be addressed since he was not championing personal freedoms but, more importantly, advocating for a historically oppressive tool to continue oppressing Black Americans in Georgia.

In 1873, the brutal Colfax Massacre in Louisiana was organized by a large group of white supremacists. Ultimately, hundreds of newly freed African-Americans were murdered at the hands of white men attempting to prevent free and fair elections.[46] After years of court battles, *United States v. Cruikshank* (1875) was argued before the Louisiana Supreme Court.[47] Rather than being charged with murder, members of the White League were accused of violating the Enforcement Act of 1870 by depriving others of their First Amendment right to assemble and of their Second Amendment right to bear arms.[48] In an interesting turn of events, the Supreme Court ruled that the Second Amendment was only protected federally and did not apply to the states.[49] This ultimately overturned the convictions placed on the murderous white supremacists.[50]

In a unanimous 1939 decision, however, the Supreme Court changed course on the Second Amendment in *United States v. Miller.*[51] In *Miller*, the two defendants, Jack Miller and Frank Layton, violated the National Firearms Act of 1934 by transporting a sawed-off shotgun over state lines.[52] The Court held that not only was a sawed-off shotgun specifically not protected by the Second Amendment, but they also specified the intent of the Second Amendment. In the opinion of the Court delivered by Justice James C. McReynolds, the Court held that the operative intent of the Second Amendment was to protect the "militia" rather than the "arms." Additionally, "'[i]n all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain

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[45] Saul Cornell & Eric M. Ruben, The Slave-State Origins of Modern Gun Rights The Atlantic (2015), https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/ (last visited Jan 13, 2021).

[46] Danny Lewis, The 1873 Colfax Massacre Crippled the Reconstruction Era Smithsonian.com (2016), https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/ (last visited Jan 13, 2021).

[47] *Cruikshank*, 92 U.S. 542.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Nelson Lund, Heller and Second Amendment Precedent, 13 Lewis & Clark Law Review (2009), https://law.lclark.edu/live/files/771#:~:text=District of Columbia v.,Miller. (last visited Jan 13, 2021).

[52] *Miller*, 307 U.S. 174.

exceptions, to cooperate in the work of defense." In so doing, the Court held that the inclusion of the word "arms" in the Second Amendment was intended to help define the militia system it was ultimately protecting.[53] Due to the somewhat controversial application of *Nunn v. State* and *United States v. Cruikshank* as well as the disregard of *United States v. Miller* the Supreme Court should reevaluate its decision to create this individual right and reexamine the decisions made in *Heller*.

II. Guns as a Fundamental Right

Mark Twain once said that "history doesn't repeat itself, but it often rhymes."[54] American gun violence is no exception. From the beginnings of slavery in the American colonies, firearms were used as a tool of oppression. This legacy continued into Reconstruction, Jim Crow, and it still exists today.[55] Georgia Chief Justice Joseph Henry Lumpkin—the architect of the *Nunn* decision—was a fierce advocate of slavery. His intention was to promote violence against Black Americans living in Georgia.[56] In short, gun-control laws were aimed at limiting Black Americans access to firearms. Therefore, white Americans were able to perpetuate race-based violence. These discriminatory regulations included police issued licenses, public housing gun bans, gun sweeps in 'high crime neighborhoods,' and prohibitions on gun ownership by convicted felons.[57] Some states even instituted race-based firearm bans, which were eventually overturned by the 14th Amendment.[58]

This history of racist gun control policy is typically used to dissuade modern common-sense gun reform. It harps on the idea that "racially-selective" regulation is the same as "populational" regulation.[59] In the past, certain policies that were cloaked in "populational" regulation were ultimately "racially-selective" in practice. For example, in 1971, the federal government, under President Nixon's command, instituted the war on

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[53] *Id.*

[54] History Doesn't Repeat Itself, but It Often Rhymes, Ohio Wesleyan University, https://www.owu.edu/news-media/owu-magazine/fall-2018/history-doesnt-repeat-itself-but-it-often-rhymes/#:~:text="History Doesn't Repeat Itself,It Often Rhymes" – Mark Twain (last visited Jan 13, 2021).

[55] Cornell, *supra* note 45.

[56] *Id.*

[57] *Id.*

[58] Winkler, *supra* note 11.

[59] Steve Ekwall, The Racist Origins of U.S. Gun Control Sedgwick County, https://www.sedgwickcounty.org/media/29093/the-racist-origins-of-us-gun-control.pdf (last visited Jan 13, 2021).

drugs.[60] Years later, Nixon's chief domestic policy advisor, John Ehrlichman, explained their reasoning.[61] This seemingly righteous cause to regulate illegal drug consumption in the United States was really a charade intended to criminalize particular drugs more commonly associated with Black Americans.[62] In the 21st century, massive sentencing disparities in crack cocaine and powder cocaine cases plagued the American justice system.[63] The intent was again racially biased.[64] The government could have made efforts to fight the drug crisis in the United States using rehabilitative services and fighting the root of the drug influx.[65] Instead, it made racially targeted attacks.[66] The federal and state governments have made similar decisions with gun violence, exemplified by only criminalizing Black ownership rather than ownership on mass.[67] The racially-selective regulation is not an example of common-sense gun reform but rather oppression by powerful white Americans - who also happened to have guns in their hands. However, past discriminatory policies can, and should, be learned from to create overarching reform and, most importantly, an overturn of the *Heller* decision which may have contributed to the ongoing violence in communities of color especially.

Today, the gun violence epidemic plagues American streets. From 2000 until 2014, the United States faced 133 mass shootings.[68] The next nation on the list is Germany with six in the same time frame.[69] Even when population size is accounted for, America still takes the top spot.[70] From 2011 through 2014, public mass shootings have tripled—

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[60] Caroline Garske, Crack in the System: The Racially Motivated Intentions and Consequences of the Anti-Drug Abuse Act of 1986 , 2018, https://ir.uiowa.edu/cgi/viewcontent.cgi?article=1263&context=honors_theses (last visited Jan 23, 2021).

[61] *Id.*

[62] Tom LoBianco, Report: Aide says Nixon's war on drugs targeted blacks, hippies CNN (2016), https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html (last visited Jan 13, 2021).

[63] Deborah J. Vagins & Jesselyn McCurdy, Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law American Civil Liberties Union (2006), https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law (last visited Jan 13, 2021).

[64] *Id.*

[65] American Academy of Pediatrics, Addressing the Opioid Epidemic American Academy of Pediatrics (2017), https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Substance-Use-and-Prevention/Pages/addressing-the-opioid-epidemic.aspx (last visited Apr 11, 2021).

[66] Garske, *supra* note 60.

[67] Ekwall, *supra* note 59.

[68] Gillin, *supra* note 13.

[69] *Id.*

[70] *Id.*

occurring once every two months.[71] According to the Centers for Disease Control and Prevention, nearly 40,000 Americans died at the hands of a firearm in 2018,[72] 61% of which were "completed" suicide attempts.[73] 103 people die from firearms and three times that number are shot every day in the United States.[74]

While interpersonal gun violence is at the forefront of this epidemic, suicide by firearm is just as deadly. Internationally, the United States is ranked 27th in the world with a suicide rate of 15.3 out of every 100,000 Americans.[75] In 2018, suicide was one of the top ten most common causes of death in the United States.[76] For children and adults aged 10 through 34, it was the second most common cause of death. Overall, suicide ended nearly 50,000 lives in the United States.[77] Contrary to other nations, firearms were the most common tool used by suicidal people in the United States. These weapons accounted for nearly half of suicides in American. [78] A 37-year-long study, published by the American Journal of Psychiatry, found suicide by firearm to be far deadlier than methods such as suffocation and poisoning, as the ability to reverse the former is far less likely.[79] Overall, guns have killed more Americans than terrorism, the Iraq and Afghanistan Wars, illegal drug overdoses, and AIDS combined from 2001 through 2013.[80]

Racially, gun violence shares many similar characteristics with other institutionally discriminatory policies. In the media, perception of race-based violence and gun usage are

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[71] Mother Jones, Rate of mass shootings has tripled since 2011, new research from Harvard shows Mother Jones (2014), https://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research/ (last visited Jan 13, 2021).

[72] CDC, FastStats - Injuries Centers for Disease Control and Prevention (2020), https://www.cdc.gov/nchs/fastats/injury.htm (last visited Jan 13, 2021).

[73] UC Davis Health, Facts and Figures What You Can Do (2019), https://health.ucdavis.edu/what-you-can-do/facts.html#:~:text=There were 39,740 deaths from,U.S. died by firearm suicide.&text=Firearms are the means in approximately half of suicides nationwide. (last visited Jan 13, 2021).

[74] Brady United, Key Statistics Brady (2021), https://www.bradyunited.org/key-statistics (last visited Jan 13, 2021).

[75] World Population Overview, Suicide Rate by Country 2020 (2020), https://worldpopulationreview.com/country-rankings/suicide-rate-by-country (last visited Jan 13, 2021).

[76] National Institute of Mental Health, Suicide National Institute of Mental Health (2021), https://www.nimh.nih.gov/health/statistics/suicide.shtml (last visited Jan 13, 2021).

[77] *Id.*

[78] *Id.*

[79] Kirsi Suominen et al., Completed Suicide After a Suicide Attempt: A 37Year Follow-Up Study American Journal of Psychiatry (2004), https://ajp.psychiatryonline.org/doi/full/10.1176/appi.ajp.161.3.562 (last visited Jan 13, 2021).

[80] Zack Beauchamp, Guns killed more Americans in 12 years than AIDS, war, and illegal drug overdoses combined Vox (2015), https://www.vox.com/2015/10/3/9446193/gun-deaths-aids-war-terrorism (last visited Jan 13, 2021).

only beneficiary to some.[81] White shooters – especially when involved in mass shootings - are labeled "mentally-ill" while Black and Brown shooters are labeled "terrorists" and "thugs."[82] This perspective, however, is not just media bias and perception; it has grave implications on policy. These discriminatory labels contribute to the centuries of racial fear that Black and Brown people are "more dangerous" than white people, which in turn feeds into the narrative that white Americans must "protect" themselves with firearms against the "terrorists" and "thugs."[83] This perception was also on display during the 1960s, when The Black Panthers, a self-proclaimed self-defense oriented militant organization, received nothing but fear and rejection from white Americans.[84]

There are also quantitative analyses of the racial bias in gun violence and policy. The Bureau of Justice Statistics - an office within the U.S. Department of Justice - found Black men were five times more likely to be arrested and criminally prosecuted for possession of a firearm.[85] From 2011 through 2013, a study found Black men also faced the brunt of gun deaths.[86] Firearm death rates for Black and white women were both under 5 deaths per 100,000 people, while white men were between 15 and 20 per every 100,000 people.[87] Black men, however, faced a rate of nearly 35 deaths per 100,000.[88] For younger Americans, between 20 and 29 years-old, the statistics are even more staggering. White women again come in under 5-gun deaths per every 100,000 people.[89] Black women were just under 10-gun deaths per 100,000 people, and white men were around 20-gun deaths per 100,000 people. [90]From here, the statistics jump. For every 100,000 Black men between the ages of 20 and 29, 90 of them were killed by firearms.[91]

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[81] Anthea Butler, Shooters of color are called 'terrorists' and 'thugs.' Why are white shooters called 'mentally ill'? The Washington Post (2019), https://www.washingtonpost.com/posteverything/wp/2015/06/18/call-the-charleston-church-shooting-what-it-is-terrorism/ (last visited Jan 13, 2021).

[82] *Id.*

[83] Stefano DellaVigna & Ethan Kaplan, *The Political Impact of Media Bias*, 2007.

[84] National Museum of African American History and Culture, The Black Panther Party: Challenging Police and Promoting Social Change National Museum of African American History and Culture (2020), https://nmaahc.si.edu/blog-post/black-panther-party-challenging-police-and-promoting-social-change (last visited Jan 13, 2021).

[85] Justice Programs, Lawrence A Greenfeld & Marianne W Zawitz, Bureau of Justice Statistics publications catalog (1995).

[86] Reeves, *supra* note 12.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

It is true that many former gun restrictions were discriminatory in nature and cloaked under the guise of "populational regulation." However, that does not discount the possibility of modern gun reform to be enacted, with safety and public health in mind rather than bias. A study by the Center for American Progress used in a Congressional Committee on the Judiciary found that, "the 10 states with the weakest gun laws (Kansas, Mississippi, Wyoming, Arizona, Alaska, Idaho, Louisiana, Kentucky, Vermont and Missouri) had three times more gun violence than the 10 states with the toughest gun laws (California, Connecticut, New Jersey, Maryland, Massachusetts, New York, Hawaii, Illinois, Rhode Island and Delaware)."[92] Lastly, overturning *Heller*, which is crucial in the goal of eliminating gun violence in America, may not come as soon as necessary. However, if states begin to enact policies, like the ones previously stated, this may signal a change in societal norms and expectations that the Supreme Court should consider for a future decision overturning this 2008 decision. Both policy and Court ruling are going to be crucial in eliminating this public health crisis. Which comes first is entirely up to those in charge.

III. Three Legislative and Judicial Solutions

Despite the never-ending gun-violence epidemic, there has been little policy to advance common sense reform. Today, there are two commonly discussed legislative solutions and one judicial solution to the gun violence epidemic - all with varying levels of potential efficacy and probability of implementation. The first proposed solution is universal background checks.[93] With overwhelming support for this policy in public polling, the practice would hypothetically close loopholes and prevent dangerous Americans from obtaining guns.[94] The second proposed solution is a national licensing system.[95] States that have enacted this system have already experienced drastic changes to the number of gun deaths they experience and, ultimately, have protected lives while still

[92] Committee on the Judiciary, & Committee on the Judiciary, States With Weak Gun Laws Suffer From More Gun Violence (2019), https://www.judiciary.senate.gov/press/dem/releases/states-with-weak-gun-laws-suffer-from-more-gun-violence (last visited Jan 13, 2021).

[93] Bipartisan Background Checks Act, H.R. 8, 116th Cong. (2019).

[94] *Id.*

[95] Federal Firearm Licensing Act, S. 2249, 116th Cong. (2019-2020).

protecting the ownership of guns.[96] The last solution, which ultimately needs to go hand-in-hand with legislative options, is a Supreme Court overturn of *Heller* and any following case establishing an individual right to ownership.[97]

A. Universal Background Checks

Today, universal background checks are one of the most commonly referred to gun violence solutions in modern debate. Currently, there is one major loophole in federal firearm sales.[98] Sellers of guns online, at gun shows, or any location that does not have a federal dealer's license are considered unlicensed firearm sellers.[99] Being unlicensed can be incredibly beneficial to the gun owner, allowing them to sell their weapons without the use of a background check.[100] This in turn allows those with felony convictions, domestic violence convictions, mental health disorders, and any other record that might prohibit them from normally purchasing a firearm to do so.[101] Today, approximately 80% of firearms purchased for criminal purposes are purchased via an unlicensed exchange.[102] Should universal background checks be implemented, this major loophole would no longer allow for the unregulated sale of deadly firearms.

While Gallup found that 96% of Americans favored universal background checks in 2017, this will not solve the overall problem of gun violence.[103] First of all, the Federal Bureau of Investigation database, which conducts background checks, is severely outdated.[104] In 2017, a young man named Dylann Roof was sentenced to death for his part

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[96] Jayvie Canono & JH Bloomberg School of Public Health, Licensing Johns Hopkins Bloomberg School of Public Health (2020), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/research/licensing/ (last visited Jan 13, 2021).

[97] John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, The Atlantic, May 14, 2019, https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/ (last visited Apr 11, 2021).

[98] H.R. 8, *supra* note 93.

[99] *Id.*

[100] Bureau of Alcohol, Tobacco, Firearms and Explosives & U.S. Department of Justice, 5310.2 Do I Need a License to Buy and Sell Firearms? 3 (2016).

[101] Giffords Law Center, Universal Background Checks Giffords Law Center (2021), https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/ (last visited Jan 13, 2021).

[102] Katherine A Vittes, Jon S Vernick & Daniel W Webster, Legal status and source of offenders' firearms in states with the least stringent criteria for gun ownership Injury prevention : journal of the International Society for Child and Adolescent Injury Prevention (2012), https://pubmed.ncbi.nlm.nih.gov/22729164/ (last visited Jan 13, 2021).

[103] Lydia Saad, Americans Widely Support Tighter Regulations on Gun Sales Gallup (2017), https://news.gallup.com/poll/220637/americans-widely-support-tighter-regulations-gun-sales.aspx (last visited Apr 11, 2021).

[104] Ellen Nakashima, FBI: Breakdown in background check system allowed Dylann Roof to buy gun The Washington Post (2015), https://www.washingtonpost.com/world/national-security/fbi-accused-

in the 2015 mass murder of nine people at a predominantly Black church in Charleston, South Carolina.[105] Immediately after the domestic terrorist attack, FBI Director James Comey disclosed a report which examined numerous outdated flaws in the National Instant Criminal Background Check System (NICS). It was these flaws which allowed Roof to obtain a firearm "legally" despite his narcotics charge.[106] In California, a 2018 study found that the implementation of a universal background check as well as a misdemeanor violence prohibition had virtually no effect on firearm mortality rates.[107] Ultimately, the background check system does not catch those whose mental health issues or violent tendencies are not reported.

B. Universal Licensing System

Recently, several states have moved towards a more efficacious solution: a universal licensing system.[108] Also called Permit-to-Purchase laws, this practice treats firearm ownership similar to that of owning and operating a vehicle - a potentially dangerous tool that can be used safely if properly regulated.[109] Typically, licensing encompasses background checks, fingerprinting, and can require evidence of handgun safety training. One of the most successful aspects of licensing systems, however, are the wait times.[110] In most states, getting a license takes around three weeks - the general idea is that if someone needs a gun immediately, they probably shouldn't have a gun in the first place.[111] Moreover, 18th century gun regulation was most similar to a national licensing system. Registration was common, as guns were almost solely used during the state-

charleston-shooter-should-not-have-been-able-to-buy-gun/2015/07/10/0d09fda0-271f-11e5-b72c-2b7d516e1e0e_story.html (last visited Jan 13, 2021).

[105] Alan Blinder & Kevin Sack, Dylann Roof Is Sentenced to Death in Charleston Church Massacre The New York Times (2017), https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html (last visited Jan 13, 2021).

[106] Nakashima, *supra* note 104.

[107] Alvaro Castillo-Carniglia et al., California's comprehensive background check and misdemeanor violence prohibition policies and firearm mortality Annals of Epidemiology (2018), https://www.sciencedirect.com/science/article/abs/pii/S1047279718306161?via=ihub (last visited Jan 13, 2021).

[108] S. 2249, *supra* note 95.

[109] German Lopez, I looked for a state that's taking gun violence seriously. I found Massachusetts. Vox (2018), https://www.vox.com/2018/11/13/17658028/massachusetts-gun-control-laws-licenses (last visited Jan 13, 2021).

[110] *Id.*

[111] Canono, *supra* note 96.

regulated militias that kept track of militia service and the weapons used by members of the militia.[112]

Practically, national licensing systems—those that include background checks, safety training, and waiting periods have proven to be enormously effective.[113] The 22 states, as well as the District of Columbia, where PTP laws are currently in use, have seen clear benefits on gun death rates due to their regulatory policies.[114] Massachusetts is a state with one of the lowest gun violence problems in the country, in large part due to the Massachusetts Gun Transactions Portal which includes significant hurdles toward gun ownership.[115] Ultimately, most researchers, including the Harvard Injury Control Research Center, agree that fewer guns leads to fewer gun deaths.[116] This is because if a gun does not exist, a gun death cannot occur.[117] The most staggering statistics comes from a comparison of Connecticut and Missouri. In 2007, Missouri repealed its licensing law, which in turn led to their firearm suicide number rising 16.1 percent and their firearm homicide number rising 25 percent.[118] In Connecticut, the opposite was true.[119] After the implementation of a licensing system in the state, homicide numbers due to guns declined 40 percent, and suicide numbers due to guns declined 15.4 percent.[120] These studies have shown that a licensing system works, and the absence of one allows for increased gun deaths. If the U.S. Federal Government were to take steps to create a modern national licensing system, and truly regulate who gets licensed and who should not, the gun violence epidemic would dramatically decrease. Ultimately, it would be the most effective and feasible legislative solution to combat the gun violence epidemic in the United States.

C. Overturning Heller

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[112] Saul Cornell, Five types of gun laws the Founding Fathers loved The Conversation (2020), https://theconversation.com/five-types-of-gun-laws-the-founding-fathers-loved-85364 (last visited Jan 13, 2021).

[113] Joshua Aspril, Handgun Licensing More Effective at Reducing Gun Deaths Than Background Checks Alone Johns Hopkins Bloomberg School of Public Health (2019), https://www.jhsph.edu/news/news-releases/2019/handgun-licensing-more-effective-at-reducing-gun-deaths-than-background-checks-alone.html (last visited Apr 11, 2021).

[114] *Id.*

[115] Lisa Hepburn & David Hemenway, Where there are more guns there is more homicide Harvard Injury Control Research Center (2004), https://www.hsph.harvard.edu/hicrc/firearms-research/guns-and-death/ (last visited Apr 11, 2021).

[116] Lopez, *supra* note 109.

[117] Hepburn, *supra* note 115.

[118] Canono, *supra* note 96.

[119] *Id.*

[120] *Id.*

The final, and most crucial solution to allow any progress on this issue, is also the most difficult to accomplish. In 2008, *District of Columbia v. Heller* set a precedent that the Second Amendment establishes the individual right to gun ownership. This in turn led to *McDonald v. City of Chicago* (2010) which ultimately incorporated the Second Amendment to the states (since D.C. is a federal territory).[121] The only way to implement national and state policies that would have real lasting effects on the gun violence epidemic is to overturn *Heller* and *McDonald* in the same effect as *Brown v. Board of Education of Topeka* (1954)[122] overturning *Plessy v. Ferguson* (1896).[123] The United States' evolving society, technology, and standards were not considered in *Heller*. Therefore, its decision has allowed for this nation's preeminent public health crisis to persist and persevere. Policies such as universal background checks and licensing systems are critical to ending the prevalence of gun related violence. Despite both *Heller* and *McDonald* allowing for some measure of regulation, the Supreme Court's decision places major confines on the ability of states and the federal government to cure their gun-related death rates. Until the Second Amendment is repealed, the most logical and effective solution would be to overturn *Heller* and implement federal policies, like a national licensing system, to prevent this on-going public health crisis.

Conclusion

The question of gun ownership rights in America becoming a political issue is far more recent than other aspects of the Bill of Rights. Speech has always meant being able to speak, assembly has always meant being able to gather peacefully, and press has always meant being able to write and distribute information without fear of persecution. While these rights have been reconsidered, expanded, and interpreted many times, ultimately, they've always existed in American society in one form or another. The Second Amendment, however, is different. If it is to be a question of firearm ownership, then a massive problem presents itself. Firearms weren't the same societal issue in 1789 that they are now. Today, guns are one of the nation's most prominent epidemics - taking tens of thousands of lives every year.[124]

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[121] *McDonald*, 561 US 742.
[122] Brown v. Board of Education of Topeka, 347 US 483 (1954).
[123] Plessy v. Furguson, 163 US 537 (1896).
[124] CDC, *supra* note 72.

There is an additional lasting truth which itself tends to negate the possibilities of change. Part II details the overwhelming number of fatalities associated with guns. With more than 390 million firearms in the United States, there are more guns than people. Indeed, Americans own nearly half of all firearms in the world.[125] The existence of a gun allows for gun-perpetrated violence to occur. If the gun didn't exist, neither would the gun death. Each solution, the background check, the national licensing system, and the overturning of *Heller*, fails to deal with this basic and fatal issue. There are, first and foremost, too many guns in America.

However, while gun culture is still very prevalent and American society across all fifty states, the start of reform is still possible—even if it takes additional time to evolve into real change. A national licensing system would prevent future problematic owners from gaining a gun. That, in turn, would prevent them from selling that gun without a background check in a private sale or giving it as a gift. In years to come, technologically advanced weapons, which are more "effective" than previous models, would become more difficult to attain. These policies are for the future—and with time comes acceptance. Every social movement has its own varieties of backlash. As policy is made, however, and time moves on, so do societal standards. If the United States makes the decision to enact common sense gun reform and overturn *Heller* now, Americans years in the future will not only support the decision but reap the lasting effects of real change.

Data shows time and time again that more firearms lead to more firearm-based violence. Gun deaths are unique to the United States only because of the Second Amendment and its interpretation by the U.S. Supreme Court. Legislative and judicial change is possible and necessary to ending the gun violence epidemic in America.

[125] Kara Fox, How US gun culture compares with the world CNN World (2019), How US gun culture compares with the worldHow US gun culture compares with the world, https://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html (last visited Jan 23, 2021).

The Innovative Design Protection Act: Creative Integrity and its Place in Law

Yasmin Maleki

Introduction

In 2016, independent fashion designer Tuesday Bassen took legal action against Zara SA ("Zara"), an international fast fashion brand.[1] Bassen had found a series of her designs sold by the fashion giant without credit to her, giving consumers the impression that they had been purchasing the original work of in-house Zara designers.[2] It was only after Bassen spent over $2,000 in legal fees, that Zara responded.[3] However, this response contained neither an apology nor an indication that Zara would discuss the matter any further. Instead, Zara's legal team responded by saying, "The lack of distinctiveness of your client's purported designs makes it very hard to see how a significant part of the population anywhere in the world would associate the signs with Tuesday Bassen."[4] This statement indicated that Zara believed that, because Bassen did not have a large following or a recognizable brand, they had not plagiarized her designs. Although the comparisons of each of their designs are remarkably similar, under the Copyright Act of 1976,[5] Zara had not committed plagiarism.

Plagiarism is a prevalent issue throughout the arts. Copyright laws have enabled artists to protect and maintain ownership of their original works. These laws ensure the artists' rights over their own works and provide legal recourse should these rights be

[1] Dayna Evans, *Talking With Tuesday Bassen About Her David Vs. Goliath Battle Against Zara,* The Cut (Jul. 29, 2016, 8:00 PM), https://www.thecut.com/2016/07/tuesday-bassen-on-her-work-being-copied-by-zara.html.

[2] *Id.*

[3] Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And it's Completely Legal*, Vox (Apr 27, 2018, 7:30 AM), https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m.

[4] Evans, *supra.*

[5] Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

violated.[6] Artistic works such as film, music, and literature are all protected under the copyright laws presented in the Copyright Act of 1976.[7] Although fashion serves as a form of artistic expression similar to these media, fashion design is not protected under the Copyright Act of 1976.[8] This makes it nearly impossible for independent and freelance designers, such as Tuesday Bassen, to compete with corporate giants like Zara.[9]

The Innovative Design Protection Act ("IDPA") proposes the extension of copyright protection to fashion designs.[10] The adoption of the IDPA would extend the umbrella of copyright protection to fashion designs to protect the integrity of the arts as well as provide the opportunity for small designers like Bassen to ensure that their creations are protected under the law. Given the alarming number of lawsuits and amount of public upheaval resulting from the lack of protection against plagiarism in fashion design, the adoption of the IDPA is a necessary step in ensuring that all forms of artistic intellectual property are protected. Intellectual property protections were developed to enable artists, inventors, and creators to publicly advertise and share their works without the concern that their ideas will be copied.[11] In this sense, they were created to protect creative integrity while fostering the development of new ideas.[12] In accordance with this public policy rationale, fashion design should be covered under copyright law. Right now, big corporations have the resources to rule over the industry by silencing independent and freelance designers. Fast fashion, the ability to manufacture and replicate products within days of their release, has plagued the industry by dismissing the creatives and true artists that had once been revered in the past.[13] To save creative integrity, the IDPA must be adopted and applied to ensure legal protections against plagiarism in the fashion industry.

Part I of this article will present background information on the IDPA to provide a foundation for arguments presented in the following sections. Part II aims to highlight key issues resulting from the absence of copyright protection as it pertains to fashion design.

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[6] Copyright Act of 1976, 17 U.S.C. § 102(a) (2012).
[7] *Id.*
[8] *Id.*
[9] Lieber, *supra* note 3.
[10] Innovative Design Protection Act (IDPA), S. 3523, 112th Cong. (2012).
[11] Copyright Act of 1976, 17 U.S.C. § 102 (2012).
[12] Casey Callahan, *Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, But Not Quite Enough*, 7 Brook. J. Corp. Fin. & Com. L. 207 (2012).
[13] Lieber, *supra* note 3.

Part III will provide a comprehensive analysis of the proposed solution: the adoption of the IDPA as a means of protecting fashion designs.

I. Background Information, Legal Precedent, and History

A. Copyright

Article I, Section 8 of the United States Constitution provides the basis for copyright protections by stating that within Congress's scope of power is the ability "[t]o promote the Progress of Science and useful Arts" by enacting protections over the writings and discoveries of authors and inventors.[14] Along with patents, copyright provisions were passed as a means to reward creatives for their efforts while encouraging them to continue developing new ideas.[15] These creations are viewed as societal contributions which facilitate the spread of information and cultural development.[16] Granting creators exclusive rights to the exploitation and marketing of their works enables them to maintain control of their creations while having their efforts be recognized as valuable.

Copyright laws under the Copyright Act of 1976 address the ownership and rights to "original works of authorship" that have been "fixed in a tangible medium of expression."[17] This includes literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recording; and architectural works.[18] In accordance with Section 102(a) of the Copyright Act of 1976, a work is safeguarded from the moment it has been created and fixed in a tangible form that is either directly perceptible or made perceptible through the aid of a machine or device.[19] However, it is clearly stated in Section 102(b) that copyright protection may not be applied to "any idea, procedure, process, system, method of operation, concept, principle, or discovery regardless of the form" in which it is expressed.[20] While Section 102(a) alludes to the protection of fashion designs on the authority that they are original ideas that can be expressed as graphic or pictorial works fixed in a tangible medium of expression, Section 102(b) dismisses this on the basis that fashion designs are not listed as original works of authorship under Section 102(a).

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[14] U.S. CONST. art. I, § 8, cl. 8.
[15] Robert Gorman, *Copyright Law* 5 (2nd ed. 2006).
[16] *Id.*
[17] Copyright Act of 1976, 17 U.S.C. § 102(a) (2012).
[18] *Id.*
[19] *Id.*
[20] Copyright Act of 1976, 17 U.S.C. § 102(b) (2012).

While there are several categories of covered arts that are addressed in the Copyright Act of 1976, the most difficult category to distinguish is arguably that of useful articles.[21] A useful article falls under the categories of "pictorial, graphic and sculptural" (PGS) works.[22] This broad definition has caused many cases to arise and challenge the boundaries of what could be defined as a PGS work. In the 1954 case of *Mazer v. Stein*[23], Stein, a manufacturer of ornamental lamp bases, accused Mazer, a competitor manufacturer, of copying their designs. Stein argued that the lamp bases were artistic and unique because they were sculpted to look like the dancing bodies of men and women.[24] This case presented the question of whether "works of art" could also be intended for use, as with the bases of the lamps. In their opinion, the Supreme Court referred to the Copyright Act of 1976 which stated that that a "useful article" was be defined as a:

> "[T]wo-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsman-ship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[25]

The Court used this definition to hold that the use of a work of art as an element in a manufactured article was not a misuse of the copyright.[26] Ultimately, the Court affirmed the decision of the lower court and declared that the copyright was valid, granting Stein the rights and ownership over the lamp design.[27] Additionally, Section 113(a) of the Copyright Act was amended to include "the right to reproduce the work in or on any kind of article, whether useful or otherwise,"[28] in reference to the copyright of PGS works. *Mazer v. Stein* set a precedent for later cases, many of which upheld copyrights over ornamentally shaped, useful articles.

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[21] Copyright Act of 1976, 17 U.S.C. § 101 (2012).
[22] *Id.*
[23] *Mazer v. Stein*, 347 U.S. 201 (1954).
[24] *Id.*
[25] Copyright Act of 1976, 17 U.S.C. § 101 (2012).
[26] *Mazer*, 347 U.S., at 201.
[27] *Id.*
[28] Copyright Act of 1976, 17 U.S.C. § 113(a) (2012).

Following the case of *Mazer v. Stein,* many questions arose regarding specific instances of PGS works and whether they could be covered under copyright protection.[29] In an attempt to provide clarification between "works of applied art protectable under the bill and industrial designs not subject to copyright protection," a House Report states that,

> Although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.[30]

The application of this definition can be noted in *Kieselstein–Cord v. Accessories by Pearl, Inc.*[31] In 1980, the Court of Appeals for the Second Circuit Court considered the issue of whether functional pieces could be classified as useful articles presented by Kieselstein-Cord, a manufacturer of fine and crafted accessories.[32] The appellant had filed a copyright infringement claim against a competitor manufacturer under the notion that the competitor had copied, produced, and sold an inexpensive version of an original belt buckle design.[33] The Second Circuit found that the replicas were nearly identical to the authentic pieces created by Kieselstein-Cord.[34] In addition, the Second Circuit referenced the aforementioned House Report and held that elements that "physically or conceptually, can be identified as separable from the utilitarian aspects of" a useful article are protectable by copyright law.[35] Accordingly, the court ruled that the plaintiff's belt buckles observed "conceptually separable sculptural elements, as apparently have the buckles' wearers who have used them as ornamentation for parts of the body other than the waist,"[36] and that the "primary ornamental aspect of the . . .buckles is conceptually separable from their subsidiary utilitarian function."[37] As a result of these rulings, it was concluded that Kieselstein-Cord was entitled to copyright protection of their belt buckle design.[38] However, the remainder of the belt

[29] Gorman, *supra* note 15, at 44.
[30] Copyright Act of 1976, 17 U.S.C. §§ 1301–1332.
[31] *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* (citing H.R. REP. NO. 1476, at 54-55 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5668).
[36] *Id.* at 991.
[37] *Id.*
[38] *Id.*

design was not protected as it served a clear purpose and utilitarian function.[39] Similar to the lamp base in *Mazer v. Stein*, the buckle was considered to be a sculptural work with no intended purpose when isolated from the rest of the piece.[40] For this reason, Kieselstein-Cord's belt buckle qualified for copyright protection.[41] The findings of these two cases issue a narrow coverage of fashion designs under copyright law,[42] provided the work or particular aspect of such can be distinguished as an original creation which does not serve a practical function or can be separated from that function.

B. Trademark

A trademark is defined as: "a word, symbol, or phrase, used to identify a particular manufacturer or seller's products and distinguish them from the products of another."[43] One classic example of a trademark is the Nike swoosh, which instantly distinguishes a Nike-brand item from that of Nike's competitors such as Adidas or Reebok. Under certain circumstances, trademark laws can extend beyond words, symbols, and phrases to include other aspects of a product, such as its color or packaging.[44] Unlike copyright protections, which aim to promote the progress of useful arts, trademark laws were passed in an effort to alleviate consumer confusion in the commercial marketplace by ensuring the advancement of accurate information and quality of products and services.[45]

According to state law, a person or corporate entity has committed the tort of unfair competition when they have employed deceptive words, pictures, or marks to distinguish their product, service, or brand in a capacity that would mislead the purchasing public.[46] To obtain trademark protections, a plaintiff must prove that their mark is distinctive enough that the defendants use of that same mark would mislead a "significant segment of the purchasing public."[47] In the 2012 case of *Christian Louboutin v. Yves Saint Laurant*,[48] the French design house Louboutin sought a preliminary injunction against the defendant, Yves Saint Laurant ("YSL"), a different French design house, for their appropriation of Louboutin's distinguished "red sole" mark. This mark referred to the lacquered red soles found on

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Julie Zerbo, *Protecting Fashion Designs: Not Only What, but Who*, 6:3. U. Bus. L. REV. 595 (2017).
[43] Commerce and Trade, 15 U.S.C. § 1127 (2012).
[44] *Id.*
[45] Gorman, *supra* note 15, at 5.
[46] *Id.* at 7.
[47] *Id.*
[48] *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.,* 696 F.3d 206 (2d Cir. 2012).

Louboutin shoes.[49] The court ultimately ruled that Louboutin's "red sole" mark was entitled to trademark protection because it served as a discernible element of the brand's identity.[50] Because it could be observed in a significant amount of the brand's goods, the primary significance of the mark was used "to identify the source of the product rather than the product itself."[51] Therefore, the mark had adopted a secondary meaning, redefining its function as a marketing ploy rather than a nonfunctional and decorative addition to the shoe. This acted as a potential source of confusion for consumers, which is why the court was prompted to safeguard Louboutin's mark under trademark protections.

When a party is in possession of the rights to a trademark, they can sue other parties for trademark infringement. Again, in this instance, the court must consider whether the use of that trademark by another party could mislead the consumer. To assess the likelihood of consumer confusion, the court takes into consideration a number of factors including the strength of the mark, the proximity of the goods, the similarity of the marks, evidence of actual confusion, the similarity of marketing channels used, the degree of caution exercised by the typical purchaser, and the defendant's intent.[52] The criteria considered and argued throughout these cases become unclear as each party attempts to further their legal interests through multiple claims. For example, in the 2016 case *Forever 21 v. Gucci*,[53] a dispute arose when Gucci, a luxury design house, demanded a cease and desist of the sale of four products being sold by Forever 21, a fast fashion giant. The products in question used Gucci's trademarked blue-red-blue ("BRB") pattern. Forever 21 argued that the BRB pattern was too generic and was used by several other third parties such as Louis Vuitton, Balenciaga, and Urban Outfitters.[54] In addition to challenging Gucci's standing trademarks, Forever 21 asked that the court deny any pending trademark applications Gucci had filed.[55] The legal battle continued for two years and ultimately ended in a settlement after the court had determined Forever 21 had standing to challenge the BRB trademarks.[56] This case exemplifies how trademark infringement as a legal argument can lead to unnecessary lawsuits when used in the context of the fashion industry. These lawsuits are a consequence of the

[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979).
[53] *Forever 21 v. Gucci Am.,* 2018 U.S. Dist. LEXIS 238201 (C.D. Cal. Feb 9, 2018).
[54] *Id.*
[55] *Id.*
[56] *Id.*

lack of legal clarity and concrete regulation of fashion designs as a subject of trademark protection.

To promote the growth of the fashion industry through the protection of articles of apparel, three notable acts have been proposed: the Design Piracy Prohibition Act, the Innovation Design Protection and Piracy Prevention Act, and the Innovative Design Protection Act.

C. Design Piracy Prohibition Act

The first of these acts meant to clarify protections for articles of apparel is the Design Piracy Prohibition Act ("DPPA").[57] This bill, first introduced to Congress in 2006, offered a solution to the shortcomings of current intellectual property legislation in reference to its lack of protections over fashion designs.[58] The bill proposed to amend Section 1301 of Title 17 of the United States code[59] to add "fashion design" as a subsequent protection under this chapter.[60] Under this bill, "fashion design" is defined as: "the appearance of as a whole of an article of apparel, including its ornamentation."[61] The bill, if enacted, would protect articles of "apparel" under the condition that they could be proven to be "original,"[62] meaning that it was a new or novel design. The term "apparel" covers not only traditional clothing garments, but also footwear, headgear, bags, belts, and eyeglass frames.[63] Under this bill, articles registered through the Copyright Office would be entitled to a period of protection lasting three years provided they had been registered within three months of being made public.[64] During the duration of its protection, the designs would be catalogued in an electronic database open for public viewing.[65] Supporters of the bill included New York's Council of Fashion Designers in American ("CFDA"), while opponents included the American Apparel and Footwear Association ("AAFA").[66] Arguments presented by the AAFA against the bill included the Copyrights Office's alleged inability to process each

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[57] H.R. 2196, 111th Cong. (2009).

[58] Sara R. Ellis, *Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and IDPPPA are a Step Towards the Solution to Counterfeit Chic*, 78 TENN. L. REV. 163, 175 n.129 (2010).

[59] 17 U.S.C. § 1301 (2006).

[60] H.R. 2196, 111th Cong. (2009).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] H.R. 2196, § 2(d).

[65] H.R. 2196, § 2(j).

[66] Louis Ederer & Maxwell Preston, *The Innovative Design Protection and Piracy Prevention Act - Fashion Industry Friend or Faux?*, LexisNexis (Jan. 31, 2011), https://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/posts/the-innovative-design-protection-and-piracy-prevention-act-fashion-industry-friend-or-faux.

application and criticisms regarding the vague language of the proposed protection and infringement standards, which they believed would force courts to waste time attempting to define the proposed standards rather than enforce them.[67] The CFDA and AAFA dedicated the next few years to refining the language of the DDPA, and the bill was reintroduced in both 2007 and 2009 with the backing of major political figures such as Senator Charles Schumer (D-NY), Orrin Hatch (R-UT), Lindsey Graham (R-SC), and Hillary Clinton (D-NY), and Representatives William Delahunt (D-MA), Jerrold Nadler (D-NY), and Charles Rangel (D-NY).[68] Although the reintroduction of the bill ultimately fell short, Senator Schumer was able to reconcile debates involving the CFDA and the AAFA, resulting in a newly proposed bill: the Innovation Design Protection and Piracy Prevention Act.[69]

D. Innovation Design Protection and Piracy Prevention Act

The Innovation Design Protection and Piracy Prevention Act (IDPPPA) was introduced to the Senate in 2010 by Senator Schumer along with 10 other cosponsors.[70] Similar to the DPPA, the IDPPPA proposed amendments the Copyright Act of 1976[71] to extend copyright protection to fashion design by revising the definition of "useful articles" to include articles of "apparel."[72] Additional elements of the DPPA applied to the IDPPPA include the three-year protection term, the "originality plus novelty" standard required for registration, and independent creation precludes liability.[73] Although the IDPPPA retained the aforementioned elements of the DPPA, the new changes helped distinguish the bill as a valuable addition to the considerations of copyright protections over apparel.[74] Along with simple emendations, such as an exemption that would allow an individual to replicate a protected design for personal and non-commercial use, there were several significant modifications.[75] The first notable revision provided clarity to previously vague standards by redefining protected designs as those with "a unique, distinguishable, non-trivial and non-

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Copyright Act of 1976, 17 U.S.C. §1301 (2012).
[72] S. 3728, 111th Cong. (2010).
[73] *Id.*
[74] Janet Lin & Sunita Koneru & Erica Krikorian, *Alterations to the Design Piracy Prohibition Act: Innovative Design Protection and Piracy Prevention Act ("IDPPPA"),* LexisNexis (Aug. 26 2010), https://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/posts/alterations-to-the-design-piracy-prohibition-act-innovative-design-protection-and-piracy-prevention-act-quot-idpppa-quot.
[75] *Id.*

utilitarian variation over prior designs."[76] This simplified the infringement standards by prohibiting the protection of "substantially identical" designs rather than those that were "substantially similar" as prescribed by the DPPA.[77] Under the newly proposed bill, the term "substantially identical" was defined as an article "of apparel which is so similar in appearance as to be likely mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."[78] The IDPPPA also eliminated the registration requirement previously proposed by the DPPA. Under these conditions, the Copyright Office would no longer be responsible for evaluating each application.[79] Instead, designers would be able to protect their designs by marking them as set forth under Section 1306 of the Copyright Act, which entails using the words "protected design," listing the year in which protection is to commence, and stating the name of the owner.[80] Another key revision made to the IDPPPA was the heightened pleading standard which requires that in the case of design infringement: (1) concrete evidence must be provided to verify that the design of the claimant is protected and thereby original and entitled to protection, (2) the design of the defendant infringes upon the protected design in that it is substantially identical, and (3) that the defendant had knowledge of the protected design.[81] These heightened pleading standards would discourage frivolous litigation.

In comparison to the DPPA, the IDPPPA ultimately narrowed the scope of its application by refining the language used to determine originality and by providing new measures to identify infringement of protections. Through these necessary emendations, the IDPPPA was able to obtain the support of both the CFDA, the AAFA, and numerous other parties and organizations within the fashion industry.[82] However despite being voted to proceed to the Senate floor, introduced to the House of Representatives, endorsed by the U.S. Chamber of Commerce, and receiving approval from the Chamber's executive vice president of government affairs, the bill was disregarded after it had been sent to the Subcommittee on Intellectual Property, Competition, and the Internet for consideration.[83]

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[76] S. 3728, 111th Cong. (2010).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Copyright Act of 1976, 17 U.S.C §1306 (2012).
[81] Lin & Koneru & Krikorian, *supra* note 74.
[82] *Id.*
[83] Callahan, *supra* note 12, at 207.

With the demise of the IDPPPA came the creation of the most recent design protection act: the Innovative Design Protection Act.

E. Innovative Design Protection Act

In 2012, Senator Schumer introduced the Innovative Design Protection Act ("IDPA").[84] While the IDPA is extremely similar to its predecessor, it includes two key provisions that distinguish it from the IDPPPA. First, the IDPA requires that the owner of the design provide written notice to the defendant alerting them of their potential infringement.[85] The plaintiff is prohibited from filing an infringement lawsuit against the defendant until twenty-one days have passed since the notice has been provided.[86] The second addition addresses the damages a claimant is entitled to following an infringement suit.[87] It states that the defendant can only be held liable for damages and profits accrued after the date in which the lawsuit against them had been filed.[88] This provides an incentive for the defendant to cease production and sales of the allegedly pirated design within twenty-one days of receiving a notice.[89] The addition of these two mandates provides an opportunity for the matter to be settled more efficiently, without having to advance the proceedings into the consideration of the court.

II. Problems and Why They Must be Addressed

A. The Rise of Fast Fashion

Luxury fashion brand, Proenza Schouler, released their iconic PS1 bag in 2009.[90] Due to the high demand for what became a coveted "it" bag, the PS1 bag quickly became a target for plagiarism.[91] In that same year, Target released a "Mossimo messenger" bag that was eerily similar to the PS1.[92] While the original PS1 bag retails between $1,695 and $9,250, the Target look-alike was sold for just $34.99.[93] Jack McCullough, one of two head designers

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[84] S.3523. 112th Cong. (2012).

[85] Matthew Seror, *The Innovative Design Protection Act: Bound for Success or Doomed to Fail?*, Buchalter Nemer, https://www.buchalter.com/wp-content/uploads/2013/09/The-Innovative-Design-Protection-Act.Seror_.pdf.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] PROENZA SCHOULER, https://www.proenzaschouler.com/sets/proenza-schouler-harmony-korine-ps1-anniversary, (last visited Jan. 3, 2021).

[91] Callahan, *supra* note 12, at 195.

[92] *Proenza Schouler Disappointed That Target Copied Their PS1 Bag,* Refinery29 (Mar. 25, 2011, 5:00 PM), https://www.refinery29.com/en-us/proenza-schouler-target-mossimo-ps-1-copy

[93] Callahan, *supra* note 12, at 195.

for Proenza Schouler, voiced his frustrations about the matter in a public interview: "[W]hy save up and buy ours when you can buy theirs right away?" Target representatives responded to this by releasing a statement that read: "It always has been and continues to be the policy of Target to respect the intellectual property rights of others."[94] While this response clearly dismisses any alleged allegations and fails to acknowledge the unethical behavior present, it is technically correct in terms of legality. As previously established, fashion designs do not fall under the category of intellectual property, meaning that, although evidently fraudulent, Target's actions are permissible under present law.[95] These laws are enabling the growth of fast fashion brands while smaller brands, like Proenza Schouler, are repeatedly harmed. If consumers are presented a significantly cheaper option, many will opt for it. Designer Allen Schwartz, the owner of a brand recognized for their knockoff pieces asked, "If [you] can put a well-made, great-looking suspender pant in a store for $190 and it's sitting 20 feet away from a similar suspender pant by Donna Karan that retails for $450, which do you think the average consumer is going to want?"[96] Consumers are often willing to purchase the imitation piece rather than the original, often at the expense of craftsmanship, quality, and longevity. With no real legal backing, designers must idly stand by as their creations are repeatedly knocked off and their originality goes unrecognized. Some may decide to sue for copyright or trademark infringement, but this is a lengthy and unpromising process that few unestablished designers can afford. Even so, this is undermined by the ability of fast fashion retailers to produce and distribute their imitation items within days. In the absence of legal obstacles, current law is making it easier for corporations to do this.

B. Distorting Innovation

In an effort to protect their designs from being plagiarized, many brands have opted to integrate their trademarked logo as a visible aspect of their pieces. For example, Fendi's iconic brown and beige double "F" logo saturates a wide range of their products from their bags, to their clothing, and even to niche luxury items such as their skis.[97] The use of branding, especially in surplus, allows well known corporations to claim trademark rights over their designs, making it increasingly difficult for copyists to create and distribute

[94] *Id.*
[95] *Id.*
[96] *Id.* at 199.
[97] FENDI, https://www.fendi.com/us/, (last visited Jan. 20, 2021).

replicas.[98] While this is able to successfully deter the production of many imitation pieces, being forced to immerse one's designs in branding, distorts innovation.[99] Creators may prefer to distinguish their designs through structural complexities or through the use of unique fabrics and trimmings. However, they may feel obligated to employ their trademarked logo as a means of distinguishing their piece and protecting it under the law.[100] Although this may help to protect the economic interests of a brand, it may come at the expense of innovation and design aesthetics. By forcing designers to compromise these key features, the creative process is undermined, and the novelty of clothing is forgotten.

C. Disadvantages of Independent Designers

Small and independent designers are not afforded the opportunity to protect their designs under trademark law. As discussed with the case of Tuesday Bassen, it was found that under current law, the piracy of her designs was legal as a result of her status as a new independent designer lacking a substantial following within the industry.[101] Without any avenues to protect their work, designers are silenced and eventually discouraged from creating new pieces. This halts innovation in the fashion industry and creates many obstacles for rising designers. Copyright protections are intended to serve as a reward for creatives that motivates them to continue developing new ideas.[102] In order to facilitate the growth of the fashion industry, copyright protection must be adopted to reward visionary talent that facilitates the evolution of culture in our society.

In addition to being unable to protect themselves from plagiarism, unestablished designers often lack the resources larger corporations have at their disposal.[103] Established brands are more likely to have the funds to use more expensive and distinctive materials, making it increasingly difficult for copyists to plagiarize.[104] Copyists may also opt to create imitation pieces from smaller brands because when creating a replica of a high end good, it is difficult to distinguish whether the success of the product is from its design or exclusively from the name of the brand.[105] The culmination of these obstacles hinder the rise of

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[98] Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1176 (2009).

[99] *Id.*

[100] *Id.*

[101] Lieber, *supra* note 3.

[102] U.S. CONST. art. I, § 8, cl. 8.

[103] Hemphill & Suk, *supra* note 98, at 1178.

[104] *Id.*

[105] *Id.*

independent designers and innovative ideas, thereby immobilizing cultural progression facilitated through the arts.

D. The Branding Crisis

Much of the fashion industry is heavily reliant on brand identity and image to build rapport and credibility with their consumers by differentiating themselves from the masses.[106] There is a direct correlation between a company's ability to foster their identity through brand recognition and their success.[107] This is undermined when plagiarized works are advertised as either the original work itself or as an alternative to such. This allows the distortion of brand identity and ultimately harms the company image and decreases revenues.[108] In *Kimsaprincess Inc. v. Missguided*,[109] Kim Kardashian sued online retailer Missguided for trademark infringement. According to Kardashian's lawyers, "Missguided systematically uses the names and images of Kardashian and other celebrities to advertise and spark interest in its website and clothing."[110] Without the consent of Kardashian, Missguided had turned her into a spokesperson by leveraging her status as an influencer with the intention of leading consumers to believe she is an affiliate of the brand.[111] Kardashian argued she was subject to monetary damages as a result of her unauthorized affiliation with Missguided.[112] Missguided is an inexpensive online retailer recognized for their knockoff products. Therefore, Missguided's misappropriation of the Kardashian name had caused it to be devalued and cheapened. Kardashian ultimately won the suit and was rewarded 2.7 million dollars in damages.[113] The victory for Kardashian exemplifies the court's acknowledgement of the harmful effects of unprecedented and unwilling brand affiliation. However, the court's recognition of the importance of brand identity must be applied to the entire fashion industry to effectively protect additional sectors of intellectual property.

E. Fashion as an Extension of Culture

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[106] Jill Ross & Rod Harradine, *Fashion Value Brands: The Relationship Between Identity and Image,* 15 J. Fash. Mark. Manag. 306 (2011).

[107] *Id.*

[108] *Id.*

[109] Manatt, Phelps Phillips, LLP, *Kim Kardashian Sues Knockoff Site,* JD Supra, (Mar. 7, 2019), https://advance-lexis-com.proxygw.wrlc.org/api/document?collection=news&id=urn:contentItem: 5V KG-RGV1-F03R-N27B-00000-00&context=1516831.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Kim Kardashian Will Pocket Nearly $3 Million From Lawsuit Against Missguided,* The Fashion Law (Jul. 3 2019), https://www.thefashionlaw.com/kim-kardashian-will-pocket-nearly-3-million-from-lawsuit-against-missguided/.

Cultural theorists have noted the important role that fashion plays in the development of culture as it acts as a form of expression through its ability to convey representative characteristics of social and individual ideals.[114] In accordance, fashion is prevalent throughout all sectors of society including but not limited to business, sciences, and politics[115] As ideas continue emerging within each of these realms, they become visibly manifested in apparel.[116] An example of this is increased female authority in the workplace as it relates to the rising popularity of women's workwear such as blazers and shoulder pads. While the United States law may not recognize this importance, the influential nature of fashion is recognized and protected under the law in Europe.[117] Under the law of the European Union, fashion designs are entitled to an unregistered right which protects original works for up to three years from the date the design was first released.[118] In *Yves Saint Laurent (YSL) v. Ralph Lauren (RL)* before the Paris Tribunal de Commerce,[119] YSL sued RL for copyright infringement, design infringement, and unfair competition over their black tuxedo dress design. Because this case took place in a European court of law, YSL was able to successfully claim the rights to their design as a form of intellectual property.[120] If this case were to have taken place in the United States under current law, the outcome would have likely left YSL and their designs unprotected from the plagiarism of RL. Europe is able to uphold integrity in the fashion industry because they acknowledge the important role it plays in cultural growth. The French Intellectual Property Code[121] goes as far as to express that any original work expressed in any medium may be entitled to copyright protections.[122] This means in addition to the protection of garment design, fashion shows and editorial pieces are also granted legal safeguards.[123] The broader application of these protections in Europe is derived from the history of textile design as an esteemed and preserved art form dating back to the 15th century when the French King granted exclusive rights over the fabrication

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[114] Hemphill & Suk, *supra* note 98, at 1149.

[115] *Id.*

[116] *Id.* at 1150.

[117] Fridolin Fischer, *Design Law in the European Fashion Sector,* WIPO (Feb. 2018), https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html.

[118] *Id.*

[119] Amy Spinder, *A Ruling by French Court Finds Copyright in a Design*, N.Y. Times (May 19, 1994), https://www.nytimes.com/1994/05/19/business/company-news-a-ruling-by-french-court-finds-copyright-in-a-design.html.

[120] *Id.*

[121] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [IPC.] [FRENCH INTELLECTUAL PROPERTY CODE]

[122] Fischer, *supra* note 117.

[123] *Id.*

of distinguished textiles.[124] In Europe, this gave rise to the creation of major brands such as Chanel, Balenciaga, Prada, and Gucci, which were founded in the early 20th century, as well as Burberry and Lanvin, which date back even further to the 1800s.[125] As a result of the economic prosperity and cultural influence brought about through the growth of these brands, Europe has substantiated fashion as a driving force of cultural development that is deserving of legal validation. While American brands grow, they too should be entitled to legal protections as granted by the European Union. Designers such as Tommy Hilfiger, Kate Spade, Ralph Lauren have become internationally recognized, yet their works remain unprotected under domestic law.[126] The current law of the United States does not reflect the same values as its European counterparts largely because apparel is viewed as a utility rather than an art.

The fashion industry has grown beyond utilitarian needs. The law claims that because apparel serves a function, it cannot be considered an art in the sense that film, music, and literature.[127] However, this should not be a standard of protection as the purpose of apparel has evolved beyond function. Across almost all divisions of socioeconomic class within the United States, consumers purchase clothing on the basis of personal style rather than on the functionality of the piece.[128] Clothing can often withstand years of wear, however consumers continue to purchase new clothes every season, not because it is no longer functional, but because the style is considered to be outdated.[129] The power of apparel aesthetics over functionality can be exhibited through the production of a single garment in multiple colors. In most cases, color is not an indicator of the functional significance of a garment. Yet, this aesthetic principle has the capacity to govern buyer decisions. While each garment design is not a work of multiplexity, simplicity does not merit the dismissal of the piece as an art form. The painted, minimalistic, geometric shapes of Mark Rothko and Piet Modrian are elementary in design, yet they are accepted as modern and priceless pieces of art.[130] If paintings and sculptures are considered works of art despite their simplicity, fashion is entitled to the same classification. Designers must account for ever changing aesthetics and trends in order to evolve and adapt as quickly as society does so as to reflect the needs

[124] *Id.*
[125] Lieber, *supra* note 3.
[126] *Id.*
[127] Hemphill & Suk, *supra* note 98, at 1162.
[128] *Id.* at 1155.
[129] *Id.*
[130] Callahan, *supra* note 12, at 202.

and wants of consumers. Apparel has evolved to become an outlet for creativity and self-expression[131] through its ability to serve as a visual manifestation of one's culture, values, and faith. Museums have come to recognize the artistic essence of fashion by showcasing visionary pieces of apparel.[132] The exhibition of The Costume Institute of the Metropolitan Museum of Art (MET) became recognized as a curatorial department of the museum and has displayed a range of couture pieces.[133] Each year, this exhibit inspires the theme of the MET Gala,[134] a fundraiser that attracts acclaimed guests from the worlds of film, society, sports, business, and music who showcase innovative apparel designs.[135] This exhibition makes it clear that contemporary attitudes towards fashion deem it an art, no longer a mere utility. If society has come to recognize the artistic value of fashion, the law is compelled to address it as well.

III. Solution

A. Adopt the Innovative Design Protection Act

As previously discussed, widespread plagiarism that has plagued the fashion industry must be addressed if creative integrity is to be restored and cultural development is to continue to advance. The solution is the adoption of the previously proposed IDPA. By extending copyright protections over fashion as a form of intellectual property, the IDPA will adequately reward designers for their innovative works.[136] While the protections of other forms of intellectual property such as film, music, and literature are already in effect, the adoption of the IDPA will allow fashion designs to be granted the safeguards they should be entitled to.

B. Questioning the Effects of Piracy

A series of arguments have circulated in opposition to the extension of copyright protections over fashion designs. Legal scholars Kal Raustiala and Chris Sprigman have

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[131] Lynsey Blackmon, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV 107, 147 (2007).

[132] *Id.*

[133] THE COSTUME INSTITUTE, The Met 150, https://www.metmuseum.org/about-the-met/curatorial-departments/the-costume-institute, (last visited Jan. 3, 2021).

[134] Majorie Elven, *Must See Fashion Exhibitions of 2019,* Fashion United (Jan. 18, 2019), https://fashionunited.com/news/culture/must-see-fashion-exhibitions-of-2019/2019011825682.

[135] Nancy Chilton, The Met Gala: From Midnight Suppers to Superheroes and Rihanna, The Met 150 (Apr. 30, 2020), https://www.metmuseum.org/blogs/now-at-the-met/2020/met-gala-costume-institute-benefit-brief-history.

[136] Innovative Design Protection Act (IDPA), S. 3523, 112th Cong. (2012).

adamantly vocalized their resistance to protections over fashion designs claiming that[137] "piracy paradoxically benefits designers."[138] In this section, a series of those claims will be addressed to substantiate previous assertions that piracy is a detriment to the fashion industry.

The potential economic implications of protecting fashion designs have increasingly been contested. It is argued that the United States' current GDP for fashion is nearly $350 billion, and if the IDPA were to be enacted, that growth would be restricted and potentially even stunted.[139] This is believed to be the case because if fast fashion corporations are restricted in production, they will be unable to fuel the economy to the degree that they have thus far. However, these critics are flawed in their assertion that copyright protections over fashion designs will inevitably hurt the economy because plagiarism is not a requisite of fast fashion.[140] Retailers who sell knockoff pieces, such as Zara and H&M, do not exclusively focus on copies.[141] If the IDPA were to be adopted, these retailers would be compelled to hire additional in-house designers in order to compete with other brands and remain relevant in an ever changing industry.[142] This would create more job opportunities for smaller designers looking into breaking into the industry, thereby spurring innovation. In an effort to expand the market of affordable clothing, brands may choose to partake in collaborations with other retailers as an outcome of the IDPA. In the past, Alexander Wang x H&M[143] and Yeezy x Gap[144] have released collaborative collections that have enabled consumers to purchase high end goods at a lower price. The merging of the luxury goods industry and affordable clothing will fuel the economy through the release of additional collaborative collections that reach a larger consumer base. Protecting fashion designs will also fuel the industry by allowing brands to make more informed decisions regarding which designs they release. Because the IDPA has a three-year term on protected goods,[145] companies would be able to use the work of specific designers as case studies and if successful, bring back and

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[137] Hemphill & Suk, *supra* note 98, at 1180.

[138] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design,* 92 VA. L. REV. 1687 (2006).

[139] Lieber, *supra* note 3.

[140] Hemphill & Suk, *supra* note 98, at 1172.

[141] *Id.*

[142] Callahan, *supra* note 12, at 212.

[143] Alessandra Codinha, *The Alexander Wang x H&M Lookbook*, VOGUE (Oct. 16, 2014), https://www.vogue.com/article/alexander-wang-hm-collaboration.

[144] Isabelle Hore-Thornburn, *Kanye West's Gap Collab Takes Yeezy in a Colorful New Direction*, HIGH SNOBIETY (July, 2020), https://www.highsnobiety.com/p/kanye-west-yeezy-gap-collab-teaser/.

[145] Innovative Design Protection Act (IDPA), S. 3523, 112th Cong. (2012).

incorporate those designs after the legal protections have expired. This would fuel the industry and economy while simultaneously protecting creative integrity that may have otherwise been threatened.

Raustiala and Sprigman propose the theory of piracy paradox which asserts that the production of replicas leads to the development of new ideas because trends are afforded a shorter life span, thereby resulting in an increase in industry wide sales.[146] However, they fail to address the discouraging effects of plagiarism on independent designers in the industry.[147] Having one's designs plagiarized with the knowledge that they do not have the legal capacity to defend themselves deters designers from continuing to create. After being presented an award for her designs, creator Alexis Bittar is quoted to have said "When I won the award, I thought great, this is like I'm declaring I'm someone to knock off."[148] This demonstrates the harmful impact plagiarism has, even within an ever changing and increasingly innovative industry such as fashion. In their theory of the piracy paradox, Raustiala and Sprigman attribute the innovative nature of the fashion industry to piracy without acknowledging the fact that it is an inherently inventive industry.[149] Every season, designers are expected to release new collections, each one more innovative and competitive than the last.[150] The competitive nature of design and aesthetics are drivers of innovation in the industry; plagiarism merely subdues this,[151] allowing retailers to steal the ideas of others giving them no need to generate their own. In the world of fine art, there has been no shortage of innovation despite the piracy protections in place.[152] The classifications and varieties of art continue to evolve as 21st century movements such as neo-dadaism, absurdist, and visual art emerge.[153] If art has remained rich in innovation and development, an inherently dynamic industry such as fashion can expect the same effects even with the adoption of the IDPA.

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[146] Judyta Kasperkiewicz, *Fashion Design Protection in European Union: Unregistered Community Design*, Fordham Intell. Prop. Media & Ent. L.J. (2017).

[147] Raustiala & Sprigman, *supra* note 138.

[148] Callahan, *supra* note 12, at 200.

[149] Raustiala & Sprigman, *supra* note 138, at 1722.

[150] Callahan, *supra* note 12, at 210.

[151] Hemphill & Suk, *supra* note 98, at 1160.

[152] Callahan, *supra* note 12, at 202.

[153] Art Acacia, *The 21st Century Art Movement — What is it?,* Medium (Nov. 28, 2017), https://medium.com/predict/the-21st-century-art-movement-what-is-it-a5db9dcc1d97.

Conclusion

At the heart of the fashion industry is a desire to create and inspire.[154] Designer Ralph Lauren reflects this value in his statement: "I don't design clothes. I design dreams."[155] The fashion industry has a unique and remarkable ability to adapt to its region, social climate, and individual values. Miuccia Prada refers to fashion as an "instant language,"[156] illustrating its ability to act as a vehicle for self-expression. This essential reality presupposes the need for legal protections that would be brought about by the adoption of the IDPA. The law must recognize the profound influence of fashion and protect the innovative nature of the industry and those who fuel it. The adoption of the IDPA will ensure the safeguarding and re-establishment of ethics and morality as a vital component of the fashion industry in the United States.

[154] Blackmon, *supra* note 131, at 158.

[155] Asad Meah, *30 Inspirational Ralph Lauren Quotes On Elegance & Success,* Awaken the Greatness Within (Mar. 9, 2017) https://www.awakenthegreatnesswithin.com/30-inspirational-ralph-lauren-quotes-on-elegance-success/.

[156] Alessandra Galloni, *Interview: Fashion Is How You Present Yourself to the World,* The Wall Street Journal (Jan. 18, 2007, 12:01 AM), https://www.wsj.com/articles/SB116907065754279376.

The Criminalization of Poverty: A Legal Review of Cash Bail for Indigent Defendants

Fatmah Noredin

"Washing one's hands of the conflict between the powerful and the powerless means to side with the powerful, not to be neutral."
— Paulo Freire, 1958

Introduction

Azairian Cartman was a 24-year-old college student and a member of the Army Reserve when he was accused of stealing from, threatening, and abusing his previous sexual partners. He was arrested and tried in 2017 by the Michigan District Court. Although Cartman's accuser was unable to provide any evidence to support her abuse and harassment allegations during the preliminary hearing, the presiding judge still increased the bond to $225,000.[1] While awaiting trial, Cartman was held in detention because he was unable to afford the bond.[2] Due to this, he spent 6 months in jail and consequently suffered major harm including the loss of his apartment, employment, and ability to afford schooling.[3]

As his situation worsened, Cartman took a plea deal for felony larceny charges because he was losing everything.[4] Subsequently, he was unhoused and unable to pursue his dream of working in law enforcement. The judge and prosecutor agreed to expunge Cartman's felony conviction after he completed a year of probation. Cartman's story

[1] *Stories from a Broken Bail System,* (April 14, 2019), https://www.aclumich.org/en/stories-broken-bail-System.
[2] *Id.*
[3] *Id.*
[4] *Id.*

illustrates the irreparable harm that befalls the indigent as a result of their inability to afford bail.

According to the Legal Information Institute, an indigent defendant is "impoverished, or unable to afford the necessities of life."[5] Cash bail allows defendants awaiting court hearings to be released from jail after making a payment to the court to ensure they attend their future hearings.[6] The payment amount is determined by the judge and is based on the severity of the crime, the likelihood of fleeing, and the danger posed to the community.[7] There are various forms of pretrial release used across jurisdictions and each jurisdiction has different requirements. While aspects of the cash bail system are constitutional, given the government's interest in protecting public safety and incentivizing defendants to attend their hearings and trials, cash bail disproportionately impacts poor individuals.[8] Consequently, requiring a defendant to pay an exorbitant amount of cash bail before release is unconstitutional. It violates the accused's rights to due process, equal protection under the law, and protection from excessive bail granted by the Constitution. These violations of indigent defendants' rights require that we abandon cash bail to avoid discriminatory policy. Therefore, Congress should pass federal legislation that details the impact of cash bail and its infringement on the rights of the accused and encourage states to abolish and replace this practice.

I. The Legal Precedent and Constitutionality of the Money-Bail System

A. The History of the Cash Bail System

There are various forms of pretrial release used today in the United States. For instance, a surety bond is a promise that a third party will pay the defendant's bail on their behalf, in exchange for the defendant paying a fee of the bail.[9] Unlike direct payment to the court, this fee is non-refundable. An unsecured appearance bond is an agreement for pretrial release that will fine the defendant if they fail to appear for hearings.[10] A secured bond, the

[5] LII / Legal Information Institute. 2021. Indigent. [online] Available at: <https://www.law.cornell.edu/wex/indigent> [Accessed 16 April 2021].

[6] Shima Baughman, The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System, 2017 Utah L. Digital Commons (2017).

[7] Criminal Justice Policy Program, HARVARD LAW SCH., Moving Beyond Money: A Primer on Bail Reform, 4–6 (2016).

[8] *Id.* at 2-5 n.6

[9] George J. Alexander, John W. Roberts & James S. Palermo, A Study of the Administration of Bail in New York City, 651 Santa Clara L. Digital Commons 693, 703-05 (1958).

[10] Bail: An ancient practice reexamined (1961) Yale Law J 70:966–977.

most commonly used form of release, is a financial payment or collateral that is in exchange for pretrial freedom.[11] Lastly, personal recognizance is a pretrial release agreement that does not require money but is contingent on the defendant's appearance in court.[12]

The Constitution didn't mention bail originally, but bail was established on the federal level in the Judiciary Act of 1789. The Act distinguished capital and non-capital offenses by establishing pretrial release for all non-capital federal cases.[13] Also, the 1789 Act asserted that the bail eligibility for capital offenses was left to the discretion of a judge.[14] The Eighth Amendment was established in 1791, two years after the Judiciary Act of 1789. These two laws were interpreted as granting a right to bail in non-capital cases and a protection from excessive bail.

B. Bail Reform Act of 1966

The Bail Reform Act of 1966 focused on expanding the release conditions and allowing a judge to consider factors such as community ties and employment.[15] The purpose of the expanded conditions of release was to provide options that assure the appearance of the defendant without requiring pretrial detainment.[16] These include, but are not limited to, placing a defendant under supervised release, restricting their travel, and imposing a curfew. Furthermore, the Act established pretrial release as a norm influenced by the defendant's potential flight risk and mitigating factors.[17] The Act also recommended release on recognizance in all non-capital cases but authorized the use of other release conditions to ensure the appearance of the accused at hearings.[18]

1. Act of 1966: Eighth Amendment Challenge

The Eighth Amendment requires that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," commonly referred to as the Excessive Bail Clause.[19] This clause is ambiguous; it does not define excessive bail or explicitly state whether or not bail is a constitutional right. In 1951, *Stack v. Boyle* raised

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[11] Amanda Russell, Returning to Court: A Multi-Paper Dissertation on Failure to Appear and Commercial Bail Bonds. ProQuest Dissertations Publishing, 2016. Print. (pg. 22).

[12] *Id.*

[13] Muhammad B. Sardar, Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration, 84 Brook. L. Rev, 1427-32 (2019).

[14] *Id.* at 1431 n.10

[15] Public Law 89-465, National Archives and Records Administration (1966), https://catalog.archives.gov/id/299929 (last visited Apr 1, 2021).

[16] *Id.* at 214 n.12

[17] *Id.* at 214-215 n.12

[18] *Id.* at 214 n.12

[19] U.S. Const. amend. VII, § 1.

the issue of what constitutes excessive bail. This case was brought by members of the Communist Party who were charged with conspiracy to violate the 1940 Smith Act, a federal law that prohibited advocating for overthrowing the government or participating in any group that supported overthrowing the government.[20] The defendants were held pretrial and each given a $50,000 bail at the judge's discretion.[21] However, the defendants filed a motion to reduce bail on the grounds that the set bail was significantly greater than the typical amount set for similar crimes and the standard process of scheduling bail was not followed.[22] The process of assessing bail required the judge to consider individual circumstances, look at mitigating factors, and examine the evidence of flight risk. However, the court denied the motion to reduce bail, even though the defendants presented evidence of financial hardship, community ties, and clean criminal records.[23] As a result, the defendants filed a habeas petition to the Ninth Circuit Court and were denied before successfully petitioning the Supreme Court.[24] The Court, responding to the petitioners' Eighth Amendment challenge, held that the bail amount was excessive because the individual circumstances of each defendant were not considered and the government failed to prove that the defendants intended to flee.[25] This case established limitations when setting bail, and classified bail as excessive when set higher than the typical bail amounts approved by the jurisdictional schedule without justification.

C. Bail Reform Act of 1984

The Bail Reform Act of 1984 attempted to address the likelihood of repeat offenses by violent defendants released on bail and to reform the 1966 Act.[26] In addition to a judge having the discretion to consider the seriousness of a crime, the 1984 Act added the likelihood that a defendant would repeat the offense when determining pretrial release as a preventative measure with a limited burden of proof.[27] This is significant because it was a reactionary response to the progressive 1966 Act because it allowed judges to make decisions based on fear.

1. Act of 1984: Fifth Amendment Challenge

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[20] Stack v. Boyle, 342 U.S. 1, 4 (1951).
[21] *Id.* at 3 n.17
[22] *Id.* at 13 n.17
[23] *Id.* at 3-4 n.17
[24] *Id.* at 4 n.17
[25] *Id.* at 9-10 n.17
[26] Lay, Donald P. and De La Hunt, Jill (1985) "The Bail Reform Act of 1984: A Discussion," William Mitchell Law Review: Vol. 11: Iss. 4, Article 2.
[27] *Id.* at 931 n.23

In 1987, the 1984 Act was challenged in *United States v. Salerno*. Anthony Salerno was arrested and indicted for violating the Racketeer Influenced and Corrupt Organizations (RICO) Act through committing extortion, labor racketeering, and murder. Prosecutors alleged that Salerno was dangerous to the community because of his status in a crime family and the court agreed.[28] As a result, Salerno was not offered bail and was held awaiting trial under the Bail Reform Act of 1984.[29] Consequently, he challenged the Act before the Second Circuit Court of Appeals by arguing that denial of bail violated the Due Process Clause of the Fifth Amendment because it punishes defendants for a presumed threat that is based on speculation.[30] Salerno also argued that it violated his protections from excessive bail as established by the Eighth Amendment because the possibility of accurately predicting criminal conduct is low. Consequently, bail should be assessed based on a defendant's likelihood to flee rather than their potential threat to the community.[31] The appellate court found in favor of Salerno; however, the government appealed the decision to the Supreme Court and the Court reversed it.[32]

In response to the Fifth Amendment challenge, the Court held that the goal of the Bail Reform Act of 1984 is not punitive but, rather, ensures the safety of the community which is in the interest of the government.[33] Therefore, they found, the Act does not prevent defendants from receiving a speedy trial because the burden of proving danger is the responsibility of the government.[34] Moreover, when responding to the Eighth Amendment challenge, the Court held that the language of the Amendment does not exclude considering other factors when assessing bail.[35] The holding in Salerno affirmed the constitutionality of the 1984 Bail Reform Act and set a precedent for the ability to detain defendants pretrial based on danger to the community.

2. Act of 1984: Equal Protection Challenge

The Fourteenth Amendment's Equal Protection Clause protects citizens from states infringing on their rights and "denying them the equal protection of the law."[36] While this clause does not explicitly include protection from financial discrimination, it established that

[28] United States v. Salerno, 481 U.S. 739 (1987).
[29] *Id.* at 744 n.25
[30] *Id.* at 761 n.25
[31] *Id.* at 752 n.25
[32] *Id.* at 741 n.25
[33] *Id.* at 747-745 n.25
[34] *Id.* at 747 n.25
[35] *Id.* at 753-754 n.25
[36] U.S. Const. amend. XIV, § 1.

state governments cannot treat similarly situated people differently without sufficient justification. For instance, in *Bearden v. Georgia*, Bearden was ordered to pay fines and restitution because of his conviction in burglary and theft charges.[37] He started to make the initial payments but was unable to continue after losing his job, so the state of Georgia revoked his probation and arrested him.[38] Bearden sued, claiming his imprisonment violated his rights under the Fourteenth Amendment.[39] The Eleventh Circuit Court held that Bearden's fundamental rights were not violated, so he appealed to the Supreme Court.[40]

The Court found in favor of Bearden and held that revoking probation and imprisoning him due to his inability to pay violated the Equal Protection Clause.[41] In the majority opinion, Justice O'Connor stated that because Bearden demonstrated that he made bona fide efforts to collect the funds, the state may not use poverty to justify his imprisonment.[42] Moreover, in response to Bearden's Fourteenth Amendment challenge, the majority opinion highlighted that:

> To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

The Court also added that the government must examine the reasons for the failure to pay and consider alternatives to detention when assessing possibly revoking an individual's probation.[43]

D. Equal Protection: Walker v. Calhoun

In 2015, the Eleventh Circuit Court reviewed the detainment of Maurice Walker. He was arrested by the Calhoun Police Department and charged with a misdemeanor for public intoxication and being a pedestrian under influence.[44] Subsequently, Walker's bail was set at $160, which Walker was unable to afford and he was held awaiting trial.[45] Under Georgia's bail schedule, indigent arrestees are held for 48-hours to determine their eligibility for release on recognizance and verify their indigence.[46]

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[37] Bearden v. Georgia, 461 U.S. 661, 663 (1983).
[38] *Id.* at 664 n.34
[39] *Id.* at 664 n.34
[40] *Id.* at 673 n.34
[41] *Id.* at 673 n.34
[42] *Id.* at 674 n.34
[43] *Id.* at 675 n.34
[44] Walker v. Calhoun, 17-13139 U.S. App. D.C. 203, 2-4 (D.C. 2018). (11th Circuit Court)
[45] *Id.* at 2 n.41
[46] *Id.* at 4 n.41

Walker filed a suit claiming that the City of Calhoun violated the Fourteenth Amendment's Due Process and Equal Protection Clauses by making pretrial release contingent upon the ability to afford it.[47] The Eleventh Circuit Court reversed the lower court's decision and held that Walker was not deprived of his rights because he was unable to prove that indigent defendants were being treated differently overall based on wealth.[48] Thus, Walker did not make a sufficient Fourteenth Amendment challenge. Instead, his argument falls under the Eighth Amendment.[49] Walker's main concern was the procedures used to set bail in the City of Calhoun, not the amount of bail. However, the Circuit Court found that the Standing order is constitutional because it provides an option for individualized examination of circumstances.[50] Walker appealed to the Supreme Court, but the Court denied certiorari arguing that "[the] Standing Bail Order is facially constitutional because it properly addresses the competing interests—the rights of individuals and the realities of law enforcement—and adopts a presumptively 'prompt' constitutional time frame."[51]

II. Issues Caused by the Money Bail System

A. Issues with the money bail system

As evidenced by the Bail Act of 1984, the goal of a secured bond is to ensure community safety and incentivize defendants to appear at their court hearings.[52] However, the current practice and implementation of the cash bail system overreaches to the intended goal and disproportionately impacts defendants from low-income backgrounds.[53] These unintended outcomes are burdensome and can manifest in a variety of ways such as incentivizing pleading guilty to avoid additional jail time, the inability to prepare an adequate defense if held pretrial, and potential loss of employment and housing.

When an indigent defendant is unable to afford the set bail, they are required to remain in detention while awaiting hearings. According to a study on guilty pleas and pretrial

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[47] *Id.* at 6 n.41
[48] *Id.* at 51 n.41
[49] *Id.* at 16 n.41
[50] *Id.* at 38 n.41
[51] Walker v. Calhoun, 18-814 S. Ct. 1, 3-7 (U.S. 2015). (U.S Supreme Court, denial of Certiorari)
[52] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in various sections of 18 U.S.C. and 28 U.S.C.).
[53] Hills, D., & Laird, L. (2016). Bail's Failings: Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor and Leads to Long-term Incarceration. N. ABA Journal, 102(4), 54-61. http://www.jstor.org/stable/24806960

detention, detainees are often faced with concerns of building a defense and being in a stressful environment.[54] However, when a defendant is poor, they are faced with additional concerns of loss of employment, housing, and even custody of their children.[55] Therefore, this period of pretrial detention plays a significant role in influencing defendants, despite innocence or reasonable defense, to plead guilty to avoid additional jail time.[56] This is because the likelihood of pleading guilty is exacerbated by the defendant's financial circumstances.[57] Accordingly, pretrial detainees are 2.86 times more likely to plead guilty if they are poor and the acceptance of a plea bargain is more likely if credit for time served is offered in exchange for a guilty plea.[58] Therefore, both pretrial incarceration and the bail system disproportionately disadvantage poor defendants because it plays a role in influencing them to plead guilty.[59]

As established in the Confrontation Clause of the Sixth Amendment, the Constitution guarantees citizens the right to effective assistance of counsel and the right to a defense when facing criminal charges. The Confrontation Clause of the Sixth Amendment states:

> In all criminal prosecutions, the accused shall….be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

This is interpreted as an individual's right to present witnesses that support their defense and right to legal representation.[60] When a defendant is in custody pretrial, there are barriers that can prevent the accused from preparing a sufficient defense, such as limited access to an attorney. Access to legal representation is critical in mounting a defense and helping the defendant understand the judicial process.[61] When in custody, the client-attorney privilege is

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[54] Petersen, Nick. (2019). Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas. Criminal Justice Policy Review. 31. https://www.researchgate.net/publication/332174820_Do_Detainees_Plead_Guilty_Faster_A_Survival_Analysis_of_Pretrial_Detention_and_the_Timing_of_Guilty_Pleas.

[55] Hills, D., & Laird, L. (2016). Bail's Failings: Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor and Leads to Long-term Incarceration. N. ABA Journal, 102(4), 54-61. http://www.jstor.org/stable/24806960

[56] *Id.* at 5-7,25 n.51

[57] *Id.* at 19 n.51

[58] *Id.* at 18 n.41

[59] Bibas, Stephanos, "Plea Bargaining Outside the Shadow of Trial" (2004). Faculty Scholarship at Penn Law. 924. https://scholarship.law.upenn.edu/faculty_scholarship/924

[60] U.S. Const. amend. IV, § 1.

[61] Bibas, Stephanos, "Plea Bargaining Outside the Shadow of Trial" (2004). Faculty Scholarship at Penn Law. 924. https://scholarship.law.upenn.edu/faculty_scholarship/924

often dependent on the level of privacy offered by the prison facility.[62] Some jail facilities may offer private spaces for professional visits, however, there are facilities that only offer visits in a shared space or with a correctional officer present.[63]

Additionally, the deterioration of the defendant's mental health as a result of incarceration may render them incapable of assisting with their defense.[64] For instance, if the accused is under immense stress and he or she might be unable to recall important details that can assist the attorney.[65] Therefore, the defendant's constitutional right to counsel and to gather witnesses is impeded by the impacts of pretrial incarceration.

B. Additional Unintended Consequences

Pretrial incarceration has a variety of additional consequences that disproportionately impact indigent defendants. The inability to maintain employment could result in termination of employment and loss of housing, both of which can perpetuate a cycle of poverty.[66] Furthermore, these factors contribute to destabilizing the defendant's ties with family and the community.[67] These consequences are illustrated in Cartman's experience; he was unable to afford bail and lost his housing, job, and future education prospects.[68] These oftentimes overlooked consequences are detrimental to potential rehabilitation prospects therefore the government has the responsibility to account for these implications and work to counteract them.[69]

Moreover, when comparing wealthier defendants and indigent defendants charged with similar crimes, it is evident that wealthier defendants are less likely to face these consequences because they can afford pretrial freedom.[70] For instance, in *Walker v. Calhoun*, wealthier defendants were able to pay the set bail for their freedom, while poor defendants were held for a minimum of 48 hours to verify their indigence.[71] Therefore, pretrial incarceration has implications that are more likely to be experienced by poor people.

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[62] Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement, Cardozo Pub. L. Pol'y & Ethics J. 1 (2015)

[63] *Id.* at 9-10 n.58

[64] *Id.* at 4 n.58

[65] *Id.* at 9 n.58

[66] Hills, D., & Laird, L. (2016). Bail's Failings: Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor and Leads to Long-term Incarceration. N. ABA Journal, 102(4), 54-61. http://www.jstor.org/stable/24806960

[67] *Id.* at 56-57 n.62

[68] *Stories from a Broken Bail System,* (April 14, 2019), https://www.aclumich.org/en/stories-broken-bail-system

[69] *Id.* n.64

[70] *Id.* n.64

[71] *Id.* n.64

Considering all burdens posed to indigent defendants who are unable to pay for freedom, it is reasonable to argue that the money bail system is unconstitutional for indigent defendants.

C. Constitutional Violations: Eighth Amendment

The Eighth Amendment's Excessive Bail Clause explicitly states that "excessive bail shall not be required."[72] While there is no specific definition of 'excessive', Supreme Court decisions are the clearest indication of how the Eighth Amendment should be implemented and interpreted. In *Stack v. Boyle*, the Supreme Court held that bail is excessive when it is a high amount without justification and does not consider the individual circumstances of the defendant.[73] Furthermore, when the bail amount is unreasonably higher than the typical amount set for similar offenses, it can be classified as excessive.[74] This holding can be applied and is important to the discussion of the constitutionality of secured bail by presenting a conceptual limitation to what constitutes excessive and burdensome bail. Additionally, as demonstrated in *Walker v. Calhoun*, a defendant can be stuck in pretrial detention because they are unable to afford bail.[75] Therefore, it is necessary to recognize that secured bail, at any amount for an indigent defendant, is excessive because it does not consider that they will be unable to afford any amount of cash bail.

D. Constitutional Violations: Fourteenth Amendment

The Fourteenth Amendment's Equal Protection Clause establishes the fundamental right to fair treatment from state governments.[76] In *Bearden v. Georgia*, the Court held that "the State may not use as the sole justification for imprisonment the poverty or inability of the probationer to pay the fine and to make restitution if he has demonstrated sufficient bona fide efforts to do so."[77] Although *Bearden v. Georgia* does not concern bail, the same principle that prohibits imprisonment as a result of poverty is applicable to bail practices. This is because pretrial detention due to poverty can be equated to unjustified imprisonment as a result of an inability to pay fines and make restitution.

In *Bearden*, the majority opinion emphasizes the importance of considering individual circumstances and examining if the individual, at no fault of their own, is unable to afford fees.[78] If the *Bearden* holding was applied to bail proceedings, pretrial detention that

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[72] U.S. Const. amend. VII, § 1.
[73] Stack v. Boyle, 342 U.S. 1, 4 (1951)
[74] *Id.* at 342 n.69
[75] Walker v. Calhoun, 17-13139 U.S. App. D.C. 203, 2-4 (D.C. 2018). (11th Circuit Court)
[76] U.S. Const. amend. VII, § 1.
[77] Bearden v. Georgia, 461 U.S. 66, (1983)
[78] *Id.* at 461 n.73

is a direct result of an inability to afford bail is deprivation of conditional freedom and therefore unconstitutional. According to the *Bearden* decision, courts should find adequate alternatives to guarantee appearance that does not require imprisonment such as conditional release with supervision.[79] The Equal Protection Clause asserts that states cannot deny individuals equal treatment and protection without justification. Both converting inability to pay into imprisonment and the improper use of cash bail deprives individuals of their liberty.

E. Analyzing bail reform in differing jurisdictions

1. Washington, D.C.

The District of Columbia was the first jurisdiction to move from cash bail in 1992. The 1992 expansion of the Code of the District of Columbia highlighted that courts are "prohibited…from setting a financial bail that resulted in the defendant remaining in jail".[80] The 1992 addition to the Code of the District of Columbia specifically states the following:

> A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person.

The language of the 1992 act explicitly asserts that bail must be reasonable and should not result in "preventive detention."[81] Since 95% of D.C. defendants are indigent the Act resulted in only five percent of pretrial defendants being given cash bail.[82] Instead, courts adopted other methods that effectively guaranteed future court appearances without resulting in unnecessary detention. Moreover, the work of the Pretrial Services Agency (PSA) in Washington played a central role in sustaining an effective pretrial system that does not rely on financial bail. The PSA created a risk assessment framework that interviews defendants and verifies their individual circumstance.[83] The purpose of the assessment is to analyze factors within a defendant's life to provide the court with critical information that they must be aware of when making bail determinations. Additionally, PSA also handles a

[79] *Id.* at 461 n.73
[80] D.C. Code § 23-1321
[81] *Id* at 3 n.79
[82] The Pretrial Justice Institute, The D.C. Pretrial Services agency: Lessons from Five Decades of Innovation and Growth, https://www.courts.ca.gov/partners/documents/pdr-nat-dc-pji-dcpsa-case_study.pdf (last visited Apr 5, 2021).
[83] *Id.* at 4 n.77

variety of divisions for pretrial release, including a drug treatment program, mental health program, and supervision programs.[84]

Following the elimination of cash bail and implementation of PSA, the District of Columbia released ninety-four percent of all defendants, and ninety percent of the defendants released appeared for their upcoming court hearings.[85] Furthermore, only ten percent of the released defendants either reoffended or violated the condition of their release.[86] In terms of cost, the District saves $398 million dollars yearly due to the decrease in the jail population and the elimination of the reliance on cash bail.[87]

2. New York

In early 2020, New York implemented major reforms to the state's bail and pretrial release system. The newly established law emphasized the importance of using the least restrictive conditions for pretrial release to maintain an individual's rights while ensuring community safety and appearance for court hearings.[88] The law details that for those charged with misdemeanors or nonviolent offenses, release on recognizance is required, but additional conditions to ensure the defendant returns to hearings are available.[89] As detailed in section 500.10 of the 8 Criminal Procedure Law, additional conditions to release can be restrictions on travel, inability to possess firearms, and electronic monitoring.[90] Judges have the discretion to require cash bail when presiding over the bail hearing of defendants who are charged with violent felonies and serious offenses.[91] The overall goal of this major bail reform is to assure defendants are not being held pretrial because of their inability to pay bail, replacing it with the release on recognizance and conditional releases.

The progressive bail reform in the state of New York was negatively received by law enforcement.[92] The media and law enforcement anticipated a rise in crime, some

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[84] *Id.* at 5 n.77

[85] Sara Dorn, How D.C. court reforms save $398 million: Impact 2016 Cleveland (2016), http://www.cleveland.com/metro/index.ssf/2016/05/how_dc_court_reforms_save_398.html (last visited Apr 5, 2021).

[86] *Id.* n.80

[87] *Id.* n.80

[88] N.Y. Comp. Codes R. & Regs. tit. 1509, § 2009 (2019). at 111-112

[89] *Id.* at 113 n.83

[90] *Id.* at 114 n.83

[91] *Id.* at 114 n.83

[92] Rafael A. Mangual, "De Blasio's Bail Reform Bid for 'Woke' Cred Puts You at Risk," *New York Post*, May 30, 2019.

characterized the reform as 'the end to proactive policing.'[93] The bail reform was expected to allow more than 400 nonviolent offenders to be released on recognizance. Additionally, after the reform was enacted on January 1, 2019, reports of three defendants reoffending in violent ways were publicized.[94] This added to the negative reception of the reform and raised additional concerns of safety for the public. According to a report by the New York Police Department, crime increased by twenty percent within the first two months.[95] Furthermore, NYPD reported a thirty-two percent increase in robbery and a variety of other crimes.[96] Although there were positive aspects, the reactionary fear and pressure on politicians resulted in the repealing of the New York bail reform.

F. *Elimination of Commercial Bondsmen*

One of the various forms of pretrial release is a surety bond which allows others to pay the defendant's bail on their behalf in exchange for a non-refundable 10% fee.[97] Surety bonds and commercial bondsmen operate in an industry that profits solely from poor defendants.[98] Therefore, it is in the best interest of the commercial bondsmen industry that states do not implement bail reform. Many arguments in favor of maintaining the cash bail system highlight that defendants can use a commercial bondsman and will only have to pay a significantly low amount of the bail for release. Thus, they claim, defendants are no longer burdened by unaffordable bail amounts and held pretrial. This approach is flawed because it does not consider that most indigent defendants cannot afford the fee.[99] In a 2016 study that examines the effects of pretrial detention on case outcomes, the authors affirm that many defendants cannot afford bail, despite how "low" it is.

> Even when the bail amount is set at a relatively low level, the majority of defendants cannot afford to post bail. For example, in Philadelphia and Miami-Dade, the setting of our study, only about 50 percent of defendants were able to post bail when it was set at $5,000 or less.

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[93] Tina Moore, "NYPD stats show notable jump in crime so far this year," New York Post, March 2, 2020.

[94] Insha Rahman, "New York, New York: Highlights of the 2019 Bail Reform Law," Vera Institute of Justice, July 2019.

[95] "Supervised Release Quarterly Scorecard," New York City Mayor's Office of Criminal Justice, March 2019.

[96] *Id.* n.90

[97] George J. Alexander, John W. Roberts & James S. Palermo, A Study of the Administration of Bail in New York City, 651 Santa Clara L. Digital Commons 693, 703-05 (1958)

[98] Thanithia Billings, Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System, 57 B.C.L. Rev. 1337 (2016), http://lawdigitalcommons.bc.edu/bclr/vol57/iss4/7

[99] Walker v. Calhoun, 17-13139 U.S. App. D.C. 203, 2-4 (D.C. 2018). (11th Circuit Court)

This conveys that lower or 'more affordable' bail is not the appropriate solution because there is still a significant number of individuals who are not able to afford what is considered low bail amounts.[100] It is undeniable that many people still use the services of a commercial bondsman; therefore, it is imperative to recognize that in order to eliminate the commercial bondsmen industry, cash bail must also be replaced. Otherwise, defendants who do rely on the affordability of a surety bond will have no choice but to remain detained pretrial. As seen in Washington, D.C., the issue of the reliance on commercial bondsmen has decreased when the reliance on cash bail was eliminated. Overall, it is necessary to recognize that the commercial bonds industry thrives on high bail amounts and the low financial capability of defendants.[101]

III. Response to Issues Raised by the Cash Bail System

A. Approach and General Solution

Abandoning the practice of cash bail in the pretrial release system would be a step towards a more just legal system. An ideal approach would be Judicial intervention, which would consist of the Supreme Court issuing a decision that recognizes the inequity that is perpetuated by the cash bail system and deeming it unconstitutional. This is not an unprecedented resolution and has occurred in many other cases where the Court has reviewed lower court decisions such as *Obergefell v. Hodges*, the case that required states to recognize same-sex marriage.[102] Nonetheless, it is clear that a review of the wealth-based discrimination argument is unlikely to occur because the Court did not take the opportunity to examine this question in the *Walker v. Calhoun* case, instead concluding that the use of secured bail and bail schedules are constitutional.

Another approach to addressing the inequities established by the cash bail system is a constitutional amendment. For instance, the Eighth Amendment could be revised to include an explicit right to bail and release on recognizance with strict eligibility guidelines or including protection from wealth-based discrimination under the Equal Protection Clause. This would eliminate the debate that attempts to question a defendant's right to

[100] Dobbie, Will, et al. "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges.", 201-202 Aug. 2016, doi:10.3386/w22511.

[101] Thanithia Billings, Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System, 57 B.C.L. Rev. 1337 (2016), http://lawdigitalcommons.bc.edu/bclr/vol57/iss4/7

[102] Obergefell v. Hodges, 576 U.S. 644, 135

pretrial freedom and right to equal protection. Along the same lines, this would protect incarcerated individuals from pretrial detainment solely because of their inability to afford freedom. However, a constitutional amendment is not necessary to achieve equitable bail practices; instead, the proposed solutions are within the scope of the Constitution.

Legislative intervention is the most fitting course of action to accomplish the abandonment of the cash bail system because it can implement a system that can be replicated at the state level. This must be initiated by Congress through passing federal legislation that addresses the inequities perpetuated by the current implementation of cash bail. Then the federal government can use incentives to urge states to follow the example set by the federal legislature and aim to eliminate cash bail by adopting the new federal pretrial system.

Article one of the Spending Clause permits the government to use federal funding to incentivize states.[103] For instance, in 1984, the federal government wanted states to raise the minimum drinking age to 21, and in order to encourage states to do so, the government reduced federal transportation grants for any state that did not comply.[104] When reviewing the Spending Clause, in *South Dakota v. Dole*, the Supreme Court affirmed the constitutionality of withholding federal funds from states pending a conditional agreement that is in the best interest of public welfare.[105] Therefore, this applies to the case examining the constitutionality of cash bail. If a state is hesitant to abandon the practice of cash bail, then Congress can incentivize the state through grants that will support the transition to a new just bail system. The congressional power of the Spending Clause has been affirmed by the *Dole* decision, and it establishes a specific legal avenue that can assist with eliminating the use of cash bail.[106]

The newly established pretrial release system should be modeled after the successful aspects of the District of Columbia and New York's release practices. For example, the federal cash bail legislation should emphasize the standardization of release on recognizance for all misdemeanors and nonviolent felony charges. If further assurance is needed to require a defendant to return, then the federal legislation should follow the lead of the amended New York Criminal Procedure Law and establish conditions that can be applied at the

[103] USCS Const. Amend. VI
[104] S.D. v. Dole, 483 U.S. 203, 107 S.
[105] *Id.* at 218 n.98
[106] *Id.* at 207 n.98

discretion of the judge. The conditional release includes restrictions on travel, supervision programs, and electronic monitoring. Pretrial detention is unconstitutional because it disproportionately impacts poor individuals, while conditional requirements allow individuals to maintain their freedom pretrial and ensure community safety and court appearances.

Conclusion

Pretrial detention when disproportionately impacting indigent defendants is a violation of the Equal Protection Clause, the Excessive Bail Clause, and the Due Process protections. The Equal Protection violation is best demonstrated by the *Walker* case, displaying that the wealthy are not subject to the same burdens, even if they commit the same crime. This unequal ramification is emphasized by President Johnson when signing the Bail Reform Act of 1966:

> The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only- he stays in jail because he is poor.

President Johnson highlights the role class plays in pretrial freedom.[107] Another unconstitutional aspect is the violation of the excessive bail clause which highlights that when it comes to people who are impoverished, an unreasonably high bail amount is excessive.[108] Therefore, the need to replace the current cash bail practices is evident and requires a comprehensive replacement that promotes and normalizes pretrial release in eligible cases.

As seen in the District of Columbia, it is possible to establish a successful and just pretrial practice without cash bail. This federally established system considers individual circumstances and requires appropriate conditions to pretrial release that assure the appearance of defendants without being unreasonable. Moreover, this system normalizes the standard of release on recognizance and takes the necessary measures to ensure that there aren't any burdens that can prevent an individual from following court orders. This can be carried out with the help of establishing a Pretrial Service Agency (PSA) in every state that focuses on alleviating these burdens and ensuring the rights of defendants are not violated. When such a system is adopted on a national scale, the need for commercial bondsmen will

[107] "Remarks at the Signing of the Bail Reform Act of 1966." The American Presidency Project, 22 June 1966, www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966.

dramatically decrease and defendants will no longer be penalized because they cannot afford bail.

Cartman's experience would have drastically differed if the proposed solutions of prioritizing release on recognizance were implemented. He would have been able to continue working and pay for his housing. Additionally, he most likely would have not been under pressure to accept the offered plea deal, and instead, he would have had the opportunity to negotiate a better deal or even take it to trial considering the lack of evidence. Although his felony conviction was later expunged, the serious consequences Cartman faced because of his inability to afford pretrial freedom should not be overlooked.

Plus Quam Tolerabile: Imbalanced Presidential and Congressional Authority in Regulating National Security and Foreign Direct Investment

Eric Martin

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

- Charles de Montesquieu, The Spirit of the Laws, 1748

Introduction

In August 2020, the United States Department of Commerce blocked Oracle's acquisition of TikTok.[1] America's new favorite social media application allegedly violated its privacy standards and shared citizens' private information with the Chinese government.[2] This violation prompted the Defense Department to recommend its personnel remove TikTok from their phones.[3] Moreover, China's ownership of half of the top ten most popular social media channels suggests TikTok could have empowered its tech and

[1] Wilbur Ross, *Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States*, United States Department of Commerce (Sep 18, 2020), https://www.commerce.gov/news/press-releases/2020/09/commerce-department-prohibits-wechat-and-tiktok-transactions-protect

[2] Jack Nicas et al., *TikTok Said to Be Under National Security Review*, N.Y. Times (Aug. 7, 2020), https://www.nytimes.com/2019/11/01/technology/tiktok-national-security-review.html

[3] Matthew Cox, *Army Follows Pentagon Guidance, Bans Chinese-Owned TikTok App*, Military.com (Dec. 30, 2019), https://www.military.com/daily-news/2019/12/30/army-follows-pentagon-guidance-bans-chinese-owned-tiktok-app.html

communications-driven economy as well as its political prowess.[4] The application's success threatened the United States' global leadership, prompting Executive Order 13942, which pressured TikTok to divest or cease its United States operations by September 20 of 2020 due to national security concerns.[5, 6] This demonstrates the danger of the shifting scope of national security in trade policy, specifically regarding foreign direct investment (FDI). Due to significant ambiguity concerning congressional and executive authority in regulating FDI and national security, such capabilities defer to the President. Ultimately, national security resembles a common rationalization for this imbalance of powers and potential economic protectionism. Congress has begun reforming this issue.[7] Yet, asymmetrical power between the branches persists due to a legislative failure to distinguish congressional and executive responsibilities concerning the national security and commercial facets of FDI.

The congressional committee responsible for regulating FDI is the Committee on Foreign Investment in the United States (CFIUS). The committee works alongside the President to prevent external economic security threats[8] and ensures beneficial commercial outcomes for the United States during controlling and non-controlling FDI transactions.[9] However, such security threats may overlap with presidential duties. For example, the Commerce Clause of the Constitution grants Congress regulatory power over foreign commerce.[10] Yet, the President and Congress must jointly maintain national security.[11] Thus, while both branches should work together, current and planned legislation realistically expects their responsibilities to clash and ultimately defers trade decisions to the Executive branch. These decisions include which companies can invest in, merge with, or acquire U.S.

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[4] Kenneth Rapoza, *Here's How Huge China's TikTok Has Become*, Forbes (Dec. 17, 2019) https://www.forbes.com/sites/kenrapoza/2019/12/17/heres-how-huge-chinas-tiktok-has-become/?sh=3180bd456299; *see also* Appendix Table 4.

[5] Robert McMillan et al., *TikTok User Data: What Does the App Collect and Why Are U.S. Authorities Concerned?*, Wall St. J. (Jul 7, 2020), https://www.wsj.com/articles/tiktok-user-data-what-does-the-app-collect-and-why-are-u-s-authorities-concerned-11594157084; *see also* Knowledge @ Wharton, *What's Pushing China's Tech Sector So Far Ahead?* (Oct. 9, 2019), https://knowledge.wharton.upenn.edu/article/whats-pushing-chinas-tech-sector-so-far-ahead/

[6] Exec. Order No.13942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

[7] Michael Leiter et al., *Broadcom's Blocked Acquisition of Qualcomm*, Harv. L. School Forum on Corp Governance (Apr. 3, 2018), https://corpgov.law.harvard.edu/2018/04/03/broadcoms-blocked-acquisition-of-qualcomm/

[8] James K. Jackson, Cong. Rsch. Serv., RL33388, The Committee on Foreign Investment in the United States (CFIUS) (2020).

[9] Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3112 (Jan. 17, 2020) (codified at 31 C.F.R. Part 800).

[10] U.S. Const. art. 1, § 8.

[11] Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

firms.[12] To that end, foreign corporations seeking to invest in, merge with, or acquire United States companies have taken legal action against the constitutionality of this power structure.[13]

The Supreme Court case *Ralls Corporation v. The Committee on Foreign Investment in the United States* considers whether the President's decisions to suspend incoming investment is subject to judicial review.[14] The Court found that the President's decisions were only subject to review if doing so would not jeopardize national security.[15] However, since national security only has an implicit definition, the President has great discretion in regulating FDI. In fact, national security's lack of an explicit definition creates a vagueness in legislative interpretation that leads to a vast subjectivity in how it is protected. Such discretion may be dangerous if a President abuses this power without other branches checking their actions, potentially preventing economic growth and technological advancement domestically and, on a larger scale, harming trade relationships.[16]

In 2018, the Broadcom and Qualcomm merger set a bolder precedent for presidential authority: executive powers would include blocking a foreign transaction before each company signed an acquisition agreement.[17] Executive Order 13942 exemplified the President's unbridled authority over FDI during today's era marked by a growing fear of technological decline and an intent to control the global economy through overseas trade regulations.[18] While only five Executive Orders have prohibited foreign mergers or acquisitions of domestic corporations, these lawsuits demonstrate the need for a standardized review process to more effectively balance congressional power to regulate foreign commerce and protect national security with that of the Oval Office.[19] Thus, to prevent over-powered presidential authority in this realm, Congress has made amendments

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[12] Jackson, *supra* note 9, at 11.

[13] 50 U.S.C. app. § 2170(e) (1950).

[14] *Id.*

[15] *Id.*

[16] Joshua P. Meltzer & Neena Shenai, *The US-China economic relationship: A comprehensive approach*, Brookings (Feb. 28, 2019), https://www.brookings.edu/research/the-us-china-economic-relationship-a-comprehensive-approach

[17] Leiter, *supra* note 7.

[18] Michael E. Leiter, Joe Molosky, *Analysis of Executive Order Prohibiting Broadcom's Acquisition of Qualcomm*, Skadden, Arps, Slate, Meagher & Flom LLP (Mar. 19, 2018), https://www.skadden.com/insights/publications/2018/03/analysis-of-executive-order-prohibiting

[19] *Id.*

to previous legislation in an attempt to define such congressional and presidential boundaries more clearly.

These boundaries have expanded for CFIUS under the Foreign Investment Risk Review Modernization Act (FIRRMA), which includes CFIUS' oversight of deals that grant foreign companies, people, or countries access to private domestic information as well as other deals structured to evade investigatory reviews.[20] However, a legislative failure to specify congressional powers in the Foreign Investment and National Security Act (FINSA), the Trade Expansion Act of 1962 (TEA), the Exon-Florio Amendment FIRRMA defers regulatory authority to the President, allowing them to dominate incoming commerce.[21]

This paper will demonstrate the expanding scope of the United States' national security policy from the National Security Act of 1950 to bills and amendments such as FIRRMA and FINSA. Moreover, it will showcase how despite CFIUS' advice to the President on regulating FDI, a significant imbalance of powers between the two enables an overwhelmingly broad presidential authority in this realm. In turn, I call for congressional review and statutory amendments to current regulations to resolve this imbalance of powers through a standardized rubric for CFIUS reviews. These actions would allow transaction parties to recognize and address potential national security concerns before investigations and in advance of transactions being announced or signed. It would also provide companies greater clarity in facilitating the CFIUS' review process, thus encouraging more intentionally structured deals to comply with relevant laws for intercontinental transactions.[22] Additionally, I implore Congress to consider one general or various statutory amendments to current legislation such as FIRRMA to differentiate presidential and congressional responsibilities in regulating FDI. These two changes would strengthen and promote American ideals of equal justice, transparency, and free trade while empowering international development opportunities.

[20] 50 U.S.C. § 4565 (2017).

[21] Antonia Tzinova, *New CFIUS Regulations Finally Take Effect*, Holland & Knight (Feb. 13, 2020), https://www.hklaw.com/en/insights/publications/2020/02/new-cfius-regulations-finally-take-effect

[22] Michael Leiter, *Reform Proposes Sweeping Changes to CFIUS Reviews*, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates (Jan. 23, 2018), https://www.skadden.com/insights/publications/2018/01/2018-insights/reform-proposes-sweeping-changes

I. National Security Ab Initio

The National Security Act of 1947 prioritized military intelligence, restructuring federal oversight of national security through divisions including the Departments of State and Defense.[23] It also suggested that national security threats endangered the United States' homeland security, citizens, resources, and objectives.[24] However, parallel to past national security legislation, this act only referred to components of national security and failed to define it.[25] In 1950, the Defense Production Act (DPA) expanded the country's "assumed" definition of national security past that of the National Security Act to include "domestic preparedness, response, and recovery from natural hazards, terrorist attacks, and other national emergencies."[26] As such, the DPA began shifting the country's national security concerns away from just military strategy.

In 2007, House Resolution 556 (HR 556) revised the DPA's empowerment of presidential authority in regulating FDI through mergers, acquisitions, and takeovers.[27] One clause allowed the President to investigate and control FDI after any associated party submits a required written notice of the transaction to CFIUS.[28] This notice permitted CFIUS to investigate said transactions to ensure they do not contain "false or misleading material information" or violate the transaction's "mitigation agreement."[29] Before investigations, CFIUS would submit a written notification to the President detailing how these covered transactions affect national security.[30] Once the President received this notification, they essentially held all decision-making power over whether to block or suspend these transactions. This power changed in 2008 when Congress unanimously replaced HR 556 with the Foreign Investment and National Security Act (FINSA).[31]

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[23] Office of the Historian at the Department of State, *National Security Act of 1947*, https://history.state.gov/milestones/1945-1952/national-security-act

[24] *Id.*

[25] National Security Act of 1947, Pub. L. No. 235 §61.

[26] Michael H. Cecire & Heidi M. Peters, Cong. Rsch. Serv., R43767, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress (Mar. 2, 2020).

[27] James K. Jackson, *supra* note 8, at 7.

[28] 50 U.S.C § 4565 (2015).

[29] H.R. Rep. No. 110-24, pt. 1, at 3 (2007).

[30] *Id.*

[31] James K. Jackson, Cong. Rsch. Serv., RL33312, U.S. Congressional Research Service, The Exon-Florio National Security Test for Foreign Investment (Mar. 29, 2013).

Congress passed FINSA to rebalance congressional and presidential powers in regulating commerce.[32] By pinpointing national security concerns within foreign companies' mergers with, acquisitions of, or takeovers of domestic companies, CFIUS more effectively mitigates commercial threats.[33] It monitors and enforces foreign corporations' compliance with FINSA rules and regulations[34], and if foreign corporations fail to meet these measures, CFIUS imposes civil penalties on the liable parties.[35] This power to impose penalties seeks to rebalance power between the Legislature and Oval Office.[36] However, FINSA continues prioritizing the Executive Branch's power, only requiring the President to disclose investigation-sensitive information if it benefits their foreign affairs agenda.[37] Moreover, they may "withhold information that would impair the foreign relations, the national security," and "the executive's constitutional duties…to supervise the unitary executive branch."[38] Consequently, while FINSA strides toward equalizing the two branches, it fails to bolster transparency between them and the United States and other foreign companies. FINSA still grants the President vast flexibility, freedom, and efficiency in restricting overseas transactions without judicial or congressional review. In particular, the Obama and Trump administrations emphasized these abilities.

In 2015 and 2016, Obama used FINSA to block two foreign acquisitions of domestic companies. First, he blocked Ralls Corporation, a Chinese national-owned company, from acquiring a United States wind farm near a Department of Defense facility.[39] In his second Executive Order, he blocked a Chinese company from taking over Aixtron, a German semiconductor firm with United States assets.[40] Not only did the Obama administration begin focusing heavily on regulating foreign technological advancements through these orders, but it also emphasized cybersecurity as a threat to national security. Obama labeled the "Cyber threat. . .one of the most serious economic and national security

[32] Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565 (Supp. III 2016)).
[33] Dep't of the Treasury, CFIUS Reform: The Foreign Investment & National Security Act of 2007 (FINSA) (Nov. 14, 2008).
[34] James K. Jackson, *supra* note 8, at 38.
[35] Tzinova, *supra* note 21.
[36] Dep't of the Treasury, *supra* note 33.
[37] James K. Jackson, *supra* note 8, at 5.
[38] *Id.*
[39] James K. Jackson, *supra* note 8, at Summary.
[40] *Id.*

challenges" America faces.[41] This statement solidified a precedent for how the United States manages FDI and views technological and economic advancement as a threat to national security.

Mirroring this belief, the Trump presidency also heavily blocked tech-related Chinese FDI. In 2017, President Trump blocked Chinese investment firm Canyon Bridge Capital Partners from acquiring Lattice Semiconductor Corporation, a semiconductor programming manufacturer.[42] Later, in 2018, he prevented Broadcom, a semiconductor and software infrastructure developer, from incorporating Qualcomm, another wireless technology creator.[43] President Trump's 2018 decision was the fifth time an Executive Order blocked a foreign company from merging with a U.S. company.[44] Though this reveals how rare these executive decisions are, President Trump also justified his decision on the grounds of the Defense Production Act of 1950, which Congress had unanimously determined eliminated the need for checks and balances.[45] By premising the trade suspension in that act, the President displayed his ability to exploit current legislation's deferral of regulatory power to the Executive branch. As such, President Trump's Executive Orders highlighted the President's ability to bypass, and disregard, congressional approval and set a precedent for intervening in foreign to domestic controlling and non-controlling mergers and acquisitions.

II. Contradictio in Adjecto: Overlapping Congressional and Presidential Authority

One of the most significant challenges in balancing Executive and Legislative powers is their overlapping responsibilities concerning national security and overseas commerce.[46] In the Commerce Clause of the Constitution, only Congress can regulate

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[41] The White House, *Remarks by the President on Securing our Nation's Cyber Infrastructure*, National Archives and Records Administration (May 29, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-securing-our-nations-cyber-infrastructure

[42] Ana Swanson, *Trump Blocks China-Backed Bid to Buy U.S. Chip Maker*, NY Times (Sep. 13, 2017), https://www.nytimes.com/2017/09/13/business/trump-lattice-semiconductor-china.html

[43] Farhad Jalinous et al., *Foreign Direct Investment Reviews 2020: A Global Perspective*, White & Case (Oct. 30, 2020), https://www.whitecase.com/publications/insight/foreign-direct-investment-reviews-2020-united-states

[44] James K. Jackson, *supra* note 8, at 21.

[45] Michael H. Cecire & Heidi M. Peters, supra note 26, at 18.

[46] Eric Rosenbach et al., *Congressional Oversight of the Intelligence Community*, Harvard Kennedy School Belfer Center (July 2009), https://www.belfercenter.org/publication/congressional-oversight-intelligence-community

commerce, including FDI through mergers and acquisitions.[47] However, the executive branch can access more information on trade and national security and make faster decisions than Congress.[48] As such, the President can more effectively determine how external companies may influence national security related to "domestic products. . .unemployment, decreases in public revenue" and "loss of investment."[49] Despite an ability to act faster on CFIUS investigations, it may be unconstitutional for provisions of TEA, the Exon-Florio Amendment, and FIRRMA to cede much of Congress' power to the Executive Office as a result of CFIUS' imprecise definition for national security and lack of a standard review process for FDI.[50]

For instance, section 232 of the Trade Expansion Act (TEA) enables any party to the foreign investment to request an investigation into specific imports' impact on United States national security.[51] This investigation was supposed to help Congress and the President arrive at a joint decision. Yet, in 2019, the Court of International Trade ruled on *Transpacific Steel LLC v. U.S.* and found that the executive branch retains the power to define national security and address any threats to it following CFIUS' investigation.[52] This decision overturned *Federal Energy Administration v. Algonquin* (1935) and displayed the potential for Section 232 to improperly delegate powers between Congress and the President.[53] Both court decisions ruled that the intelligible principle, a determinant of properly delegated congressional authority, was satisfied according to current legislation but reinforced that the Trade Expansion Act creates a dangerous capacity for this section to establish imbalanced powers.[54]

Another critical section of the TEA is Section 721, which allows the President to block a covered transaction without consulting Congress if the President determines that it

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[47] U.S. Const. Art. 1, §8

[48] Richard Lempert, *All the President's Privileges,* Brookings (Dec. 19, 2019), https://www.brookings.edu/research/all-the-presidents-privileges/

[49] Rachel F. Fefer, Cong. Rsch. Ser., IF10667, *Section 232 of the Trade Expansion Act of 1962* at 1 (2020)

[50] Tzinova, *supra* note 21.

[51] Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. §1862.

[52] Scott Diamond, *U.S. Supreme Court Declines to Hear Appeal of Section 232 Case on National Security Tariffs on Steel Imports*, Thompson Hine (Jun. 23, 2020), https://www.thompsonhinesmartrade.com/2020/06/u-s-supreme-court-declines-to-hear-appeal-of-section-232-case-on-national-security-tariffs-on-steel-imports/#page=1

[53] *Id.*

[54] John Veroneau et al., *Section 232 Tariffs Survive Constitutional Challenge, But Reforms Remain Possible*, Covington & Burlington (Mar. 28, 2019), at 1. https://www.cov.com/-/media/files/corporate/publications/2019/03/section_232_tariffs_survive_constitutional_challenge_but_reforms_remain_possible.pdf

threatens national security.[55] This rule contradicted FINSA's efforts to rebalance powers and reestablished the President's ability to regulate commerce without first conferring with Congress.[56] Thus, not only could the President determine what a national security threat is without explanation, but it could also subtract congressional power over the same investment.[57] The TEA attempted to fuse Executive and Legislative responsibilities over FDI, but the Executive Branch remains dominant over such transactions. The Exon-Florio Amendment made this difference in powers explicit.

The Exon-Florio Amendment to the DPA allowed the President "to block proposed or pending foreign acquisitions…that threaten…national security."[58] This amendment enabled President Bush to block Dubai Ports World's acquisition of six major United States ports and that of Unocal by the China National Offshore Oil Corporation.[59] One critical flaw in this amendment is the power of express intent given to the President to block or suspend any transaction he sees fit before Congress addresses and investigates it. In turn, it contradicts the United States' tradition of seeking "to actively promote internationally the national treatment of foreign firms" and upholding its system of checks and balances.[60]

The third act that regulates FDI is FIRRMA, a 2020 amendment to the DPA.[61] It amplifies the definition of "covered transaction," increasing the scope of "national security" to include mergers and acquisitions that allow foreign companies to govern domestic enterprises, especially in real estate, technology, infrastructure, and intellectual property, that would endanger national security.[62] It also included oversight of "any other…arrangement designed to evade or circumvent…CFIUS," such as foreign companies seeking non-controlling interest in United States counterparts.[63] Beyond a newfound ability to investigate these firms, FIRRMA gave CFIUS oversight into controlling and non-controlling foreign

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[55] 50 U.S.C. § 4565 (2016).
[56] *Id.*
[57] *Id.*
[58] James K. Jackson, *supra* note 31, at 3.
[59] *Id.*
[60] *Id.*
[61] Dep't of the Treasury, *supra* note 33.
[62] Jason M. Waite, *International Trade & Regulatory Advisory: CFIUS Finalizes Rules for Reviewing Foreign Investment in U.S. Businesses*, Alston & Bird (Jan. 23, 2020). https://www.alston.com/en/insights/publications/2020/01/cfius-finalizes-rules.
[63] *Id.*

transactions in the United States.[64] In effect, FIRRMA broadened the United States' influence over domestic national security-related resources.

The executive and legislative branches also gained power over resources and transactions as CFIUS' scope broadened from "individual investment transactions to…the impact of a combination of transactions."[65] By combining the impact of multiple transactions, CFIUS can more easily argue that such a combination is dangerous, even if the individual transaction is not.[66] The United States uses this regulatory loophole to maintain dominance over global economies.[67] Yet, in doing so, flaws fester inside this legislation and contribute to FDI's politicization.[68] For example, in *Ralls Corp. v. Comm. on Foreign Investment in the United States*, the court determined that "The actions of the President. . .and the findings of the President. . .shall not be subject to judicial review."[69] A lack of judicial review allows CFIUS to continue driving future negotiations "waiving around the threat of an order if parties balk at [its] mitigation terms."[70] CFIUS enjoys ambiguous investigative processes that enable its flexibility in reacting to different foreign mergers and acquisitions, but this flexibility may detract from the nation's potential economic and industrial advancements.[71]

Moreover, CFIUS' overly-broad definition of national security leads foreign investors to take unnecessary, inefficient measures to succeed in the review process.[72] In response, foreign countries may place similar restrictions on the United States' foreign investment, harming international trade relationships and reducing collaboration and innovation opportunities to enter the United States.[73] To salvage trade relationships and

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[64] Patrick Griffin, *CFIUS in the Age of Chinese Investment,* 85 Fordham L. Rev. 1757, 1761 (2017).

[65] James K. Jackson, *supra* note 8, at 39.

[66] Robert S. LaRussa and Lisa S. Raisner, *Getting the Deal Through: Foreign Investment Review*, Sherman & Sterling LLP (2017), https://www.shearman.com/perspectives/2017/08/larussa-raisner-coauthor-foreign-investment-review

[67] Raymond J. Ahearn, Cong. Rsch. Serv., R41969, *Rising Economic Powers and the Global Economy: Trends and Issues for Congress* (2011).

[68] Larry Diamond, *The Rise of Digital Authoritarianism: China, AI and Human Rights*, Hoover Institute (Oct. 1, 2020), https://engineering.stanford.edu/events/rise-digital-authoritarianism-china-ai-and-human-rights-0

[69] 50 U.S.C. app. § 2170(e)

[70] *Ralls and U.S. Government Settle Only CFIUS Suit in* History, Steptoe & Johnson LLP (Oct. 14, 2015), https://www.steptoeinternationalcomplianceblog.com/2015/10/ralls-and-u-s-government-settle-only-cfius-suit-in-history/

[71] Latham & Watkins LLP, *Overview of the CFIUS* (2017) at 8. https://www.lw.com/thoughtLeadership/overview-CFIUS-process

[72] *Id.*

[73] Laura Fraedrich et al., *Common Misconceptions Regarding CFIUS and the CFIUS Process*, Jones Day (Apr. 2015) https://www.jonesday.com/en/insights/2015/04/common-misconceptions-regarding-cfius-and-the-cfius-process

continue its economic and technological prosperity, the United States must safeguard national security while enabling foreign investment.[74] Achieving these tasks simultaneously is critical but challenging due to the constant fluctuation of foreign investment activity stemming from broad economic fundamentals, including merger and acquisition activity and the transaction's valuations.[75] This complicates Congress' evaluations of CFIUS' activities and provides opportunities for the President to steer these investigations.[76] Despite functioning in the short run, deferring power to the President is not beneficial to the United States for the reasons listed above. As such, the Treasury Department determined 28 critical activities for CFIUS and the President to consider together in blocking or suspending foreign investment.[77] Nonetheless, CFIUS still lacks a standardized review process that could balance presidential and congressional powers.[78]

III. Ratio Decidendi to Rebalance Powers

Since 1947's National Security Act, CFIUS' lack of a standardized review process has transformed the economy into a geopolitical machine.[79] To preserve and promote American prosperity and global influence, it is critical to remember and reevaluate congressional and presidential roles in national security and overseas trade.[80] Furthermore, statutes should provide a stricter and more robust standard for CFIUS reviews to reduce the increasing use of Executive Orders to regulate international commerce through FDI.

A. Create Clearer Investigation Guidelines

Congress should review and amend FIRRMA to include more effective, explicit guidelines on the presidential-congressional responsibilities in investigating and regulating FDI. The United States has discussed internationally how to best balance national security objectives with providing space for foreign investment. Ultimately, the United States

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[74] James K. Jackson, *supra* note 8, at at 27.

[75] Adam Hayes, *Guide to Mergers and Acquisitions*, Investopedia (Aug. 21, 2020), https://www.investopedia.com/terms/m/mergersandacquisitions.asp

[76] James K. Jackson, *supra* note 8, at 27.

[77] *Id* at 16.

[78] *Id.*

[79] Dexter Fergie, *Geopolitics Turned Inwards: The Princeton Military Studies Group and the National Security Imagination*, 43 Diplomatic History 644, 649 (2019).

[80] *Brookings Experts on Trump's National Security Strategy*, Brookings (Dec. 21, 2017), https://www.brookings.edu/research/brookings-experts-on-trumps-national-security-strategy/.

concurred with its allies: measures to address this political and economic issue should prioritize inclusivity, predictability, and transparency.[81] All companies and institutions seeking to merge with or acquire United States counterparts should have advance notice of what constitutes a national security threat to proactively address potentially lengthy CFIUS investigations into cross-border investments and commercial opportunities. This notice will promote international trade relationships and ensure countries and corporations face equivalent scrutiny.[82]

Furthermore, Congress should consider amending FIRRMA to set clear boundaries on presidential and congressional roles in reviewing FDI. For the last fifteen years, the United States has acknowledged the need for "transparent, predictable, and non-discriminatory" policies and tried to establish fair regulations on foreign investment related to national security concerns.[83] Yet, between 2015-2017, China experienced 143 CFIUS reviews, while Canada has had less than half as many.[84] Through more precise protocols for congressional and presidential authority over FDI, companies and institutions seeking to merge with or acquire United States counterparts may better understand potential national security issues when having their cross-border investments investigated. Also, publicly releasing this information will promote international trade relationships and equalize scrutiny of countries and corporations' mergers and acquisitions.[85]

CFIUS' new rubric should provide investors who did not pass investigations with specific feedback to address national security concerns so both the United States and the foreign company may realize economic growth. By shifting much of this responsibility on CFIUS' written review process but still allowing the President to block or suspend transactions for national security reasons, both branches' powers should rebalance, streamlining the review process.[86]

B. Counter Arguments

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[81] James K. Jackson, *supra* note 8, at 25.

[82] Kelly M. Gorton et al., *Mandatory CFIUS Filing Requirements for Certain Foreign Investments Takes Effect; Exceptions for Canadian, Australian, and U.K. Investors*, Davis Wright Tremaine LLP (Feb. 14, 2020), https://www.dwt.com/insights/2020/02/cfius-foreign-investment-filing-requirement.

[83] James K. Jackson, Cong. Rsch. Serv., RL34561, Foreign Investment and National Security: Economic Considerations (Apr. 4, 2013).

[84] James K. Jackson, *supra* note 8, at 36-37.

[85] *Id.*

[86] Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, U.S. SEC. & Exchange Commission (July 14, 2016), https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.html

In the last eight years, CFIUS investigated over 1,000 cases, but Presidents enacted an Executive Order on only five of them.[87] Though 0.5% of all CFIUS-investigated transactions seem insignificant, these trade deals were central to the U.S.'s manufacturing, finance, information, and services sectors.[88] These blockages may have sacrificed advancements in these fields, such as in the Broadcom-Qualcomm acquisition, for economic hegemony. Indeed, when the United States blocks incoming investment, it may be sacrificing long-term societal improvements for a short-sighted desire to maintain its international financial status. As the link between the global economy and national security tightens, greater governmental transparency must preserve trade relationships and global transactions. Congressional review should elevate this transparency and efficiency, particularly in statutes centered around due process.[89]

C. Failure of Judicial Review

Historically, judicial review has failed because courts claim existing acts overextend the President's oversight of national security concerns in foreign mergers and acquisitions.[90] For example, the Foreign Intelligence Surveillance Court (FISC) reviews warrants concerning domestic surveillance in federal security investigations[91] and rules on executive branch abuses of power.[92] Regarding the TEA, FISC has debated how the legislation should promote checks and balances between the branches of government[93] and ruled that it unconstitutionally enables the President to restrict domestic goods monetarily or quantitatively.[94] While Congress later amended the Act with Section 232, explicitly allowing this presidential authority, courts insisted this also deferred too much power to the President.[95] At the same time, the President's inability to explain their decision to prohibit or suspend a transaction due to national security reasons may hinder judicial enforcement of current legislation.

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[87] *Id. See also* Appendix Table 3 for more information.

[88] *Id* at 40.

[89] Amy S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached its Purpose*, 21 Geo. Mason L. Rev. 1347, 1369 (2014).

[90] Christopher M. Fitzpatrick, *Where Ralls Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, 101 Cornell L. Rev. 1087, 1098 (2016).

[91] 50 U.S.C. §§ 1801-1885c (2014).

[92] *Id.*

[93] S. Rep. No. 100-71, at 135–36 (1987)

[94] Indep. Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 620–21 (D.D.C. 1980).

[95] Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 548 (1976).

Similarly, the state secrets privilege and Freedom of Information Act grant the federal government and President the ability to decline disclosing sensitive materials in court cases if it threatens national security.[96, 97] There is a precedent for the President to act without explaining his actions, and while that legislation concerns information and data security, such a sentiment of allowed secrecy also applies to trade. Moreover, Congress has placed "an affirmative obligation on the Director of the CIA to protect intelligence sources" and give the President this freedom.[98] Since judicial review seldom discounts a President's claim that disclosing sensitive information poses a risk to national security, rebalancing power between Congress and the President should occur through legislative means.[99]

D. Checks and Balances in Presidential and Congressional Authority

Weak government checks and balances stem from multiple factors, including broad statutory interpretation that authorizes vast presidential power and prevents Congress from correcting Executive Orders without a supermajority override.[100] A growing divide in political parties inhibits the supermajority agreement Congress needs for an amendment, collaterally deepening this power structure. Nonetheless, the United States' national security policy remains within the congressional and presidential domain.[101] As such, Congress should consider two resolutions to this imbalance in international commerce. First, it should eliminate the Legislative and Executive branches' implicit approach to trade and national security legislation that defers power to the President when facing regulatory ambiguity. Second, Congress should check presidential decision-making and promote the President's "accountability and transparency" through substantive and procedural constraints to existing legislative boundaries.[102]

The Congressional Review Act (CRA) currently allows Congress to reverse the President's commercial regulations through a joint resolution within the following sixty days,[103] demonstrating congressional intent to check the executive branch. However,

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[96] Faaris Akremi, *Does Justice "Need to Know"?: Judging Classified State Secrets in the Face of Executive Obstruction*, 70 Stan. L. Rev. 973, 976 (2018).

[97] Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 Vill. L. Rev. 67, 67 (1992)

[98] 50 U.S.C. § 401 (2010)

[99] 5 U.S.C. § 552 (1970)

[100] Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2321 (2006)

[101] 137 S. Ct. 1843 (2017).

[102] Amy L. Stein, *A Statutory National Security President*, 70 Florida Law Review 1183, 1190 (2019).

[103] 5 U.S.C. §§ 801–08 (1996).

Congress rarely enforces it.[104] To promote transparency and trust in the executive branch, Congress must create clear limits on the President's ability to regulate international commerce.[105] As such, three tiers of due process requirements should hone their regulatory power: significant, moderate, and minimal constraints.

Significant constraints would require the President to meet with and share written explanations for their regulation. Past legislation that has imposed significant constraints required the Attorney General and the Secretary of State to work alongside the Secretary of the Treasury to seek congressional approval for biometric identification technology.[106] In addition, under United States Code 16, the Secretary of the Interior must approve any federal agency taking any action that may "jeopardize…endangered species or threatened species."[107] Moderate constraints would require specific findings before the President can act. Previous legislation that used moderate constraints includes United States Code 42, which mandates an impact analysis report for every proposed piece of legislation before actions that significantly influence the human environment may occur.[108] Finally, minimal constraints would only require the President to notify Congress before acting. One example of a minimal constraint is U.S. Code 20, which requires the Secretary of Education to let Congress know about any proposed legislative changes fifteen days before the proposal's release.[109] These limits will facilitate a rebalancing of power supported by the D.C. Circuit Courts due to their ability to delegate precise authority to the President function far better than judicial review of statutes that barely limit the President's ability to act.[110] Similar constraints have succeeded, such as with the Trade Expansion Act and the Defense Production Act.

Congress has made significant strides imposing constraints on presidential power but should consider adding further general or individual statutory amendments to refine

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[104] Stuart Shapiro, *The Congressional Review Act, rarely used and (almost always) unsuccessful,* The Hill (Apr. 17, 2015), https://thehill.com/blogs/pundits-blog/lawmaker-news/239189-the-congressional-review-act-rarely-used-and-almost-always.

[105] Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (citing Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1331 (D.C. Cir. 1996)).

[106] 8 U.S.C. § 1379(4) (2012).

[107] 16 U.S.C. § 1536(a)(2) (2012).

[108] 42 U.S.C. § 4332(C) (2012).

[109] 20 U.S.C. § 6571(c)(1) (2012).

[110] Mountain States, 306 F.3d at 1136 (quoting Dalton v. Specter, 511 U.S. 462, 476 (1994)).

current legislation on the President's oversight of foreign transactions.[111] For example, prior to FINSA, the President could regulate any import they believed could harm the United States' national security.[112] While the Secretary of Commerce could assess the transaction's national security implications and recommend adjusting the imports,[113] Commerce could not stop the President's actions.[114] Courts have challenged presidential actions and in *Fed. Energy Admin. v. Algonquin SNG Inc.*, the court ruled that Section 232 contradicted the President's actions who "had no power to impose monetary exactions under § 232(b)."[115] This case demonstrated the need for a statutory amendment to the TEA, which Congress passed to specify what the President and Commerce must examine before regulating incoming commerce.[116] Congress has also amended the DPA through FINSA, setting limits on the President's broad authority to control and block incoming investment for national security purposes.[117] Specifically, the transaction must be a foreign takeover of a domestic company and not adequately addressed by other laws.[118] These amendments impose moderate constraints on the President's actions because they require specific findings before they can act. For instance, no other regulatory legislation may address the President's national security concerns on that particular matter. As Congress continues refining presidential power, its amendments should promote fairness and transparency throughout the CFIUS review processes, contributing to a more balanced regulatory framework between the President and Congress.

Conclusion: Uno Flatu

From 2012 to 2020, United States Presidents blocked or suspended five multimillion-dollar deals, such as Ralls Corporation's acquisition of a United States wind farm, Broadcom's acquisition of Qualcomm, and Oracle's acquisition of TikTok, for national security reasons. These prohibitions exemplify how easily current, non-specific legislation creates an imbalance of power in the legislative and executive branches' regulation of FDI. as the President reigns over unspecified powers of such legislation. With geopolitical and

111 Franklin v. Massachusetts, 505 U.S. 788, 801 (1992).
112 19 U.S.C. § 1862(c) (2012).
113 *Id.* § 1862(b).
114 *Id.*
115 Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 569–70 (1976).
116 19 U.S.C. § 1862(d) (2015).
117 Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565 (Supp. III 2016)).
118 50 U.S.C. § 4565(d)(4) (2015).

financial tensions rising internationally, Congress should consider adding constraints to existing legislation to rebalance presidential and congressional power.

Modern ambiguity in regulatory legislation on the national security of FDI drives a sentiment of economic colonialism as the United States competes for the alpha position in the global economy, restricting and punishing other countries doing the same. Amending existing regulations or scripting new, general legislation with strict, moderate, and minimal constraints will facilitate international cooperation in CFIUS reviews and strengthen United States trade relationships by welcoming economic productivity in sectors such as technology and communications. Consistent with this stance, President Joseph Biden recently acknowledged that, "We're going to have to regain the trust and confidence of a world that has begun to find ways to work around us or without us."[119] While Biden's comment referred to the United States' response to COVID-19, it highlighted the distrust that stems from the growing divide between countries' commercial restrictions.

Historically, the legislative branch has engaged less in global politics, whereas the executive branch has reigned over foreign policy creation. However, if Congress fails to create a more standardized review process, the increasingly politicized nature of CFIUS investigations and competition for international economic dominance may irrevocably strain trade relationships with other nations, enabling other countries to usurp the United States' role as a global provider. Ultimately, Congress must consider creating a more effective, expressive, and standardized CFIUS review process to regain international commercial trust and opportunities, balance congressional and presidential power, and promote FDI while protecting national security as well as American values.

[119] Emma Kinery and Gregory Korte, *Biden Decries 'Obstruction' in National Security Transition*, Bloomberg (Dec. 28, 2020), https://www.bloomberg.com/news/articles/2020-12-28/biden-vows-to-repair-u-s-foreign-policy-after-trump-years

Appendix

Table 4. Country of Foreign Investor and Industry Reviewed by CFIUS, 2015-2017

Country	Manufacturing	Finance, Information, and Services	Mining, Utilities, and Construction	Wholesale Trade and Retail Trade	Total
China	71	50	9	13	143
Canada	17	22	22	5	66
Japan	20	20	4	2	46
United Kingdom	15	22	0	8	44
France	13	11	3	3	30
Cayman Islands	9	8	1	2	20
Netherlands	8	4	3	0	15
Germany	3	10	0	1	14
Australia	6	2	3	2	13
South Korea	5	4	2	2	13
Br. Vir. Islands	5	2	3	0	10
Israel	4	6	0	0	10
Sweden	8	1	0	1	10
Luxembourg	5	3	1	0	9
Switzerland	2	4	3	0	9
Total	**217**	**218**	**67**	**50**	**552**

Source: *Annual Report to Congress*, Committee on Foreign Investment in the United States, CY 2016 and CY 2017, December 2019.

Table 2. Foreign Investment Transactions Reviewed by CFIUS, 2009-2017

Year	Number of Notices	Notices Withdrawn During Review	Number of Investigations	Notices Withdrawn During Investigation	Presidential Decisions
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
2012	114	2	45	20	1
2013	97	3	48	5	0
2014	147	3	51	9	0
2015	143	3	66	10	0
2016	172	6	79	21	1
2017	237	7	172	67	1
Total	**1,179**	**36**	**561**	**145**	**3**

Source: *Annual Report to Congress*, Committee on Foreign Investment in the United States, CY 2016 and CY 2017, December 2019.

Note: Two additional foreign investment transactions have been blocked by presidential order.

Federalism and the Coronavirus

Julia O'Connell

Introduction

Since its first reported incident in December 2019, coronavirus (COVID-19) has rapidly spread across the globe, infecting tens of millions of people and claiming millions of lives.[1] Its impact on the United States has been far from insignificant. As of November 2020, the United States had sustained about 20% of both global cases and deaths from the disease, despite making up only about 4% of the world population.[2] This public health emergency has been met with a confused and uncoordinated national response, with the burden of government action falling on governors, mayors, and local health departments. In fact, the COVID-19 response in the United States is divided among more than 2,000 state, local, and tribunal health departments,[3] which have all been individually tasked with the daunting responsibility of protecting the health of their citizens with limited information, resources, and control over neighboring jurisdictions.

Although the global pandemic is not confined by geographic boundaries, federalist public health infrastructure of the United States has not provided a comprehensive response across zip codes. Federalism, or the division of powers between the national and state authorities, is a fundamental feature of the United States' Constitution and restricts nearly every governmental objective, with few exceptions.[4] Proponents of federalism cite benefits that include the flexibility to customize responses to the unique characteristics of a local

[1] World Health Organization, *Rolling updates on coronavirus disease*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (last updated Jul. 31, 2020).

[2] *Id.*

[3] Polly J. Prince, A Coronavirus Quarantine in America Could Be a Giant Legal Mess, THE ATLANTIC (February 16, 2020), https://www.theatlantic.com/ideas/archive/2020/02/coronavirus-quarantine-america-could-be-giant-legal-mess/606595/.

[4] James G. Hodge Jr., *The Role of New Federalism and Public Health Law,* 21 J.L. & HEALTH 309 (1997).

population, the freedom to test experimental policies, and the ability to properly manage the in-state budget.[5] The severity of the coronavirus pandemic, however, has candidly exposed the many shortcomings of our current system in the vein of public health.

The federalist framework of the United States Constitution prescribes only specific powers to the federal government. With respect to police powers, the Tenth Amendment grants state governments the exclusive ability to create and enforce the laws necessary in the protection of public health, safety, and welfare.[6] This deeply weakens the federal government's ability to mandate a centralized course of action during the coronavirus pandemic. While federalism has undoubtedly handicapped the national response, the United States' failure to curb the virus might be more appropriately attributed to lack of initiative from the Trump Administration. Although legal scholars disagree over the constitutional legitimacy of the national government grasping powers which the Framers likely intended be left to the states, many have argued that the federal government could potentially implement public health interventions via the Commerce Clause.[7] During an emergency such as the coronavirus pandemic, the health of a nation requires acting with coordination and foresight, thus necessitating an exception to strict federalist principles. The United States' failed national response has resulted in negative health outcomes for citizens, increased partisanship, and accountability issues at all levels of government.[8]

The following review will analyze the intersection of federalism and public health governance through the lens of the COVID-19 pandemic. Part I will provide a thorough background on the role of federalism within public health policy by first, identifying the constitutional powers that grant governmental action in public health; second, outlining key Supreme Court cases which have shaped both the state and federal role in public health; and, finally, recounting the United States' pandemic planning legislation which set the scene for how the nation was prepared to deal with the current virus. Part II will provide a succinct overview of state and federal action during the COVID-19 pandemic and the statutes that make such actions possible; explain the major criticisms of the Trump administration's

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[5] *Id.*

[6] U.S. Const. amend. X, § 1.

[7] Nicole Huberfeld, Sarah H. Gordon, & David K. Jones, *Federalism Complicates the Response to the COVID-19 Health and Economic Crisis: What Can Be Done?,* 45(6), Journal of Health Politics, Policy and Law. 951 (December 2020).

[8] Jennifer Selin, *How the Constitution's federalist framework is being tested by COVID-19*, BROOKINGS, *https://www.brookings.edu/blog/fixgov/2020/06/08/how-the-constitutions-federalist-framework-is-being-tested-by-covid-19/* (last updated: June 8, 2020).

response to the pandemic; and describe the major failures that are due, at least in part, to the constrained ability of the federal government to enact public health initiatives. Part III will propose some solutions to this problem, both within the federalist framework and outside of it.

I. State and Federal Public Health Powers

From its inception, the United States was organized as a confederation of states with independent power overseen by a federal government that ensured unity and protection. The Constitution granted states a broad range of political powers, in alignment with the philosophy that decisions made closer to home are inherently better and more democratic.[9] As James Madison explained in *Federalist 45:*

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite… The powers reserved to several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[10]

Because a person's health is a fundamental aspect of their life, public health legislation naturally falls under the jurisdiction of state governments.[11] However, over time, the federal government has managed to expand their reach in certain areas of public health; actions which have been legitimized by the Commerce Clause of the Constitution.[12]

A.The State Role in Public Health

The Tenth Amendment of the U.S. Constitution sets forth state powers in public health by arming states with the ability to establish and enforce laws aimed at protecting the health, safety, and general welfare of their residents.[13] Further, the Tenth Amendment more concretely limits the capacity of the federal government to impose policy on the states by stipulating that the states are accorded all powers not explicitly reserved for the federal government.[14] The ratification of this amendment in 1791 solidified that state powers,

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[9] *The Federalist No. 45* (James Madison) (Clinton Rossiter ed., 1999).

[10] *Id.*

[11] U.S. Const. amend. X, §1.

[12] Gary Lawson & Robert Schapiro, *Common Interpretation: The Tenth Amendment,* THE CONSTITUTION CENTER, *available at: https://constitutioncenter.org/interactive-constitution/interpretation/amendment-x/interps/129* (last accessed: Jan. 25, 2021).

[13] U.S. Const. amend. X, §1.

[14] *Id.*

especially in the realm of public health, would largely override those of the federal government.[15]

Since ratification, the Supreme Court has consistently held that the power to legislate in the interest of public health lies primarily with state governments,[16] while simultaneously carving out more distinct capacities of the federal government via the Commerce Clause. The 1824 Supreme Court decision in *Gibbons v. Odgen* is a prime example of this phenomenon.[17] The case involved a dispute between Aaron Odgen and Thomas Gibbons over a business partnership.[18] Aaron Odgen was operating his steamboat in New York in compliance with a monopoly that the state had assigned him, while Thomas Odgen was conducting his interstate business as permitted by a federal license.[19] New York state courts issued a permanent injunction to Thomas Odgen on the grounds that his business was violating New York's monopoly.[20] Once the case reached the Supreme Court, however, the Justices overturned the state court decision. Writing for the majority, Chief Justice Marshall opined that the regulation of interstate commerce was indeed a power reserved exclusively for the federal government; thus, New York acted outside of its authority by granting monopolies to certain parties.[21]

On the surface, this case has little to do with public health, but it served two distinct purposes applicable to our understanding of the division between state and federal powers in the area of health. First, the clear recognition of the Commerce Clause paved the way for future interpretations of this Clause to widen the federal government's power.[22] This was the first case that the Supreme Court heard regarding the Commerce Clause. Thus, their interpretation of the clause and its implications for federalism would be heavily relied upon in the coming years whenever a new case arose concerning this power.[23] Second, Justice Marshall's opinion included language that specifically granted states the ability to quarantine its citizens. Marshall wrote that "the pilot laws, health laws [and] quarantine"[24] have been

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[15] Lawson & Schapiro, *supra.*

[16] *Gibbons v. Ogden,* 22 U.S. 1, (1824).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Gibbons v. Odgen,* 22 U.S. 1, (1824), ¶ 41.

[22] American Bar Association, *Two centuries of law guide legal approach to modern pandemic, available at: https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/legal-pandemic-approach/* (last updated: March 29, 2020).

[23] *Id.*

[24] *Gibbons v. Odgen,* 22 U.S. 1, (1824), ¶ 47.

repeatedly recognized by Congress as lying within the purview of state governance. Further, the term "police powers" first appeared in this decision.[25] Chief Justice Marshall stated:

> They form a portion of that immense mess of legislation which embraces everything within the territory of the state, not surrendered to the General Government; all of which can advantageously be exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description… are components of this mass.[26]

Not only was this language central to future Supreme Court cases regarding state powers, but it also explicitly designated inspection and quarantine to be valid exercises of state power in regard to public health.[27]

The Supreme Court later reemphasized the ability of state governments to impose quarantine on citizens and non-citizens alike in *Compagnie Française de Navigation á Vapeur v. Louisiana Board of Health.*[28] Following an 1845 outbreak of yellow fever in New Orleans, Louisiana created a Board of Health to improve and coordinate public health operations. The Board began requiring citizens to quarantine during later outbreaks.[29] This was challenged in 1897 when the Louisiana State Legislature authorized the Board to forbid entry of even uninfected persons into the state.[30] The French corporation Compagnie Française de Navigation á Vapeur were quarantined at a port in New Orleans and subsequently sued over alleged infringement on their rights.[31] The Supreme Court decision in *Compagnie Française de Navigation á Vapeur* more directly implicated public health, as the majority opinion provides that quarantine is a legitimate exercise of the police powers delegated to states in the Constitution.[32] Furthermore, the Court's majority declared that state quarantine laws do not affect interstate commerce in an inappropriate manner, which would implicate the federal government.[33]

Several years later, in 1905, the Supreme Court once again affirmed the states' right to make reasonable restrictions on people's lives to protect public health and safety. The case of *Jacobson v. Massachusetts*[34] concerned the constitutionality of an ordinance in Cambridge,

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[25] *Id.*
[26] *Id.* at ¶ 257.
[27] American Bar Association, *supra.*
[28] *Compagnie Française de Navigation à Vapeur v. State Board of Health*, 25 So. 591 (La. 1899).
[29] American Bar Association, *supra* note 22.
[30] *Compagnie Francaise de Navigation à Vapeur v. State Board of Health*, 25 So. 591 (La. 1899).
[31] *Id.*
[32] *Id.* at ¶18
[33] *Id.* at ¶19
[34] *Jacobson v. Massachusetts,* 197 U.S. 11, (1905)

Massachusetts, that required all residents to be vaccinated against smallpox.[35] Henning Jacobson refused to comply with the ordinance and was fined.[36] While state law permitted this action by the Board of Health, Jacobson sued on the grounds that his Fourteenth Amendment right to liberty under the U.S. Constitution had been violated.[37] After both the Cambridge Trial Court and the Massachusetts Supreme Court ruled in favor of the city, the case reached the U.S. Supreme Court where the Justices upheld the state court's decision.[38] The Supreme Court held that compulsory vaccinations were a legitimate exercise of the state's police powers and that they were a reasonable method of preserving the public health, since those who did not get vaccines posed a direct threat to the lives of others.[39] The Court conceded, however, that while punitive actions such as fines can be imposed on those who do not comply with a vaccination mandate, a citizen cannot be physically forced to accept a vaccination.[40]

B. The Federal Role in Public Health

Because of the police powers interpreted from the Tenth Amendment by Chief Justice John Marshall, the state governments' capacity to legislate health matters is both vast and undefined. Although limited in scope, the federal government does retain certain powers related to public health. These powers derive from the Commerce Clause of Article I of the U.S. Constitution, which gives Congress the power to "regulate commerce with foreign nations, among several states."[41] From the 1950s onward, this clause has been interpreted to give broad authority to the federal government to quarantine and impose health measures to prevent the spread of disease from other countries and between states.[42]

The federal government first became involved in public health interventions under the Eisenhower Administration with the creation of the Department of Health and Human Services (HHS).[43] The first major work of the Department was the licensure of the Salk polio vaccine in 1955 to combat the polio epidemic.[44] Since this time, the HHS has continued to

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at ¶8
[40] *Id.* at ¶17
[41] U.S. Const. art, § 8, cl. 3.
[42] Hodge, *supra* note 4.
[43] Department of Health and Human Services, *About HHS*, https://www.hhs.gov/about/index.html (last visited Jan. 4, 2021).
[44] *Id.*

serve as the public health arm of the federal government with the mission of "protecting the health of all Americans and providing essential human services."[45] To promote more specific public health objectives, the Department began overseeing a number of smaller, more narrowly focused agencies such as the Center for Medicare and Medicaid Services (CMS), the Food and Drug Administration (FDA), and the Centers for Disease Control and Prevention (CDC).[46] These agencies have a variety of responsibilities under the broader umbrella of protecting public health.

The most significant of the smaller agencies in mitigating the effects of the pandemic is the CDC, which is the principal provider of research and information for both infectious and noninfectious diseases.[47] Pursuant to federal law, the CDC is authorized to detain, medically examine, and release persons arriving in the United States and travelling between states who are suspected of carrying specific communicable diseases, which makes its position in the federal government instrumental in the response to the coronavirus pandemic.[48] This power was affirmed in the 1963 federal case of *United States ex rel. Sigel v. Shinnick.*[49] The case, decided in the Eastern District of New York, upheld the federal government's decision to isolate a woman who arrived in the United States from a region where smallpox was prominent.[50] District Judge John Francis Dooling Jr. wrote that the CDC's decision to quarantine the woman for two weeks, the entire incubation period of the disease, was admissible because it was determined through "forthright, reasonable and circumstantially reassuring" consideration.[51] This decision has never been overruled and remains in effect today.

As mentioned earlier, the Commerce Clause allows for this federal power, which was assigned to the CDC through an amendment to the Public Health Service Act (PHSA).[52] The PHSA was originally enacted in 1944 and has been amended over a dozen times since.[53] It serves as the foundation of the Department of Health and Human Services' legal authority

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[45] *Id.*

[46] Federal Register, *Health and Human Services Department, https://www.federalregister.gov/agencies/health-and-human-services-department* (last visited Jan. 25, 2021).

[47] Centers for Disease Control and Prevention, *Mission, Role, and Pledge*, https://www.cdc.gov/about/organization/mission.htm (last visited Jan. 25, 2021).

[48] 42 U.S.C. § 70-71

[49] *United States ex rel. Siegel v. Shinnick,* 219 F. Supp. 789 (E.D.N.Y. 1963)

[50] *Id.*

[51] *Id.* at ¶5

[52] Public Health Service Act, Pub. L No. 104-321; Codified at 42 U.S.C. § 247d.

[53] Department of Health and Human Services, *Public Health Emergency: Legal Authority, https://www.phe.gov/Preparedness/planning/authority/Pages/default.aspx,* (last accessed: Jan. 25, 2021).

for responding to public health emergencies.[54] The powers outlined in the law include allowing the Secretary of the HHS to lead all federal public health and medical response to public health emergencies, declaring a public health emergency, controlling communicable diseases within the United States, maintaining the Strategic National Stockpile, providing for the operation of the National Disaster Medical System, and providing targeted immunity for covered countermeasures to manufacturers and distributors.[55]

Contrary to the Framers' vision,[56] modern times have witnessed a consolidation of power into the federal government, and, as exemplified by the cases and organizations previously described, this trend has not escaped public health. Despite the lasting preeminence of the states' supremacy in public health and safety matters, the federal government has successfully carved out a greater role in the protection of public health.

II. Public Health Interventions During Coronavirus

Despite the federal government's growing influence in the legal realm of public health, many of their efforts (or lack thereof) during the coronavirus have fallen flat. Few countries have been as severely impacted by COVID-19 as the United States, which, as mentioned earlier, only makes up 4% of the global population and yet suffered 20% of cases and deaths from the virus before November 2020.[57] The United States' failure to curb the devastating effects of the pandemic have been blamed on an assortment of factors—including chronic underfunding of public health, the lack of universal healthcare which has left its healthcare system overpriced and inefficient, and the continuous defunding of the social safety net that forces low-wage workers to risk their health and safety for their livelihood.[58] These are nuanced issues which have all contributed to the catastrophic consequences that the disease has wreaked on the American population.

Specifically, this section will focus on the Trump administration's strict adherence to federalist principles and his overreliance on state and local municipalities as the primary

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[54] *Id.*

[55] Public Health Service Act, Pub. L No. 104-321; Codified at 42 U.S.C. § 247d.

[56] *The Federalist No. 45* (James Madison) (Clinton Rossiter ed., 1999).

[57] Anurag Maan, Shaina Ahluwalia, & Kavya B. *Global coronavirus cases exceed 50 million after 30-day spike,* REUTERS (Nov. 8, 2020), https://www.reuters.com/article/health-coronavirus-global-cases/global-coronavirus-cases-exceed-50-million-after-30-day-spike-idUSKBN27O0IO.

[58] Ed Yong. *How the Pandemic Defeated America,* THE ATLANTIC, https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/ (last updated: Aug. 4, 2020).

cause. While a coalition of federal agencies including the Department of Health and Human Services, the Federal Emergency Management Agency, and the Centers for Disease Control and Prevention have provided guidance throughout the pandemic, they have limited authority to direct local officials. Therefore, the onus of responsibility to manage and control the spread of COVID-19 fell principally on state and local actors.[59]

A. Overview of State and Federal Action During the Coronavirus Pandemic

On January 9, 2020, the World Health Organization (WHO) announced the existence of a pneumonia-like mystery disease in Wuhan, China later identified as a coronavirus.[60] Initially, the Trump Administration treated the virus as a minor threat that posed low risk to the health and safety of Americans. By the time airports in the United States started screening passengers from Wuhan, China, the disease had already spread to a number of countries, including Iran and Italy.[61]

On January 21, the CDC confirmed the first case of coronavirus in the United States.[62] Several days later, on January 27, the White House created the Coronavirus Task Force and began to set in motion an executive, legal, and regulatory response to the disease. [63] In accordance with the Public Health and Safety Act, Secretary of Health and Human Services, Alex Azar, declared a public health emergency on January 31, giving state, tribal, and local health departments that are funded in part or whole by the PHSA the flexibility to reassign personnel to assist with pandemic response activities.[64] The CDC switched gears to focus mainly on disease surveillance, contact tracing, and communicating with clinicians on emerging information regarding the identification and treatment of COVID-19 infections.[65] Additionally, the White House issued a nationwide travel ban from China.[66]

At this point it became clear to disease experts and the general public that an effective early response would require widespread and reliable testing.[67] Despite the fact that the WHO had developed and was already widely disseminating their own test, the Trump

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[59] *Id.*

[60] Ryan Goodman & Danielle Schulkin. *Timeline of the Coronavirus Pandemic and U.S. Response,* JUST SECURITY (Nov. 3, 2020), *https://www.justsecurity.org/69650/timeline-of-the-coronavirus-pandemic-and-u-s-response/*.

[61] *Id.*

[62] Derrick Bryson Taylor. *A Timeline of the Coronavirus Pandemic,* N.Y. Times, *https://www.nytimes.com/article/coronavirus-timeline.html* (last updated: January 10, 2021).

[63] Goodman & Schulkin, *supra.*

[64] *Id.*

[65] Centers for Disease Control and Prevention, *CDC's COVID-19 Response*, available at: https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html (last updated: December 31, 2020).

[66] *Id.*

[67] Taylor, *supra* note 62.

administration chose to rely exclusively on domestically produced tests, many of which turned out to be faulty and unusable.[68] Although the declaration of a public health emergency was meant to facilitate the rapid expansion of testing, required procedures and regulations were significantly slowing the effort. Throughout February, as China and other countries took extreme measures, like complete lockdowns, to contain the disease, social and economic activities in the United States continued uninterrupted.[69] As cases continued to rise in the U.S., there was increased urgency within the federal government at the end of February to control the spread. The FDA began to allow the use of unapproved tests, President Trump extended the travel ban to additional high-risk countries, and Congress passed HR 6074, the Coronavirus Preparedness and Response Supplemental Appropriations Act, which devoted $8.6 billion to the promotion of vaccine and treatment research.[70] As mentioned earlier, the Commerce Clause allows for this federal power, which was assigned to the CDC through an amendment to the Public Health Service Act (PHSA).

Finally, on March 13, the Trump Administration declared COVID-19 a national emergency,[71] pursuant to sections 201 and 301 of the National Emergencies Act.[72] Alongside this declaration, Trump instituted a travel ban that prevented non-Americans who visited European countries in the past two weeks from entering the United States.[73] Since the United States gained sovereignty, customs and border control agents have retained the right to legally refuse entry to non-residents and place conditions like quarantine on even returning American citizens. The federal government derived its authority for isolation and quarantine from section 361 of the PHSA,[74] which was legitimized via the Commerce Clause of the Constitution.[75] The law states that the federal government can impose measures to prevent the entry and spread of communicable diseases from foreign countries into the United States, which includes measures like the travel ban.[76]

The national emergency declaration immediately freed billions of dollars in federal spending to slow the spread of disease and mitigate health risks.[77] This money was used to

[68] Goodman & Schulkin, *supra* note 60.
[69] Taylor, *supra* note 62.
[70] H.R.6074, *Coronavirus Preparedness and Response Supplemental Appropriations Act*, No: 116-123(2020)
[71] Taylor, *supra* note 62.
[72] 50 U.S.C. § 201-301
[73] Goodman & Schulkin, *supra* note 60.
[74] 42 U.S.C. § 361
[75] U.S. Const. art, § 8, cl. 3.
[76] 42 U.S.C. § 361
[77] Goodman & Schulkin, *supra* note 60.

accelerate the acquisition of personal protective equipment (PPE) and streamline diagnostic procedures in laboratories.[78] In his announcement speech, President Trump emphasized his intention to partner with the private sector, including for coronavirus test approval.[79] Additionally, mass testing finally became a reality, because the Trump Administration deployed the emergency powers designated in the Defense Production Act.[80] However, in April, the Trump Administration switched gears to provide more uninvolved leadership in the pandemic, with Trump announcing that states would have the primary responsibility for containing the virus, and the federal government would fulfil a "back-up" role.[81] While the states' role in public health is traditional, this marked the first time that a sitting United States President sought to decentralize power during a national emergency.[82]

The Trump Administration's response to the pandemic has been criticized by a variety of actors, both within the media and other areas of government. In September 2020, a scandal rocked the White House when journalist Bob Woodward revealed that Trump had intentionally downplayed the potential danger of the pandemic to avoid a "frenzy."[83] While many considered it an act of betrayal, then-President Trump defended his actions by saying it was driven by the intentional desire to keep people calm and avoid a panic.[84] This prompted an interim report from the U.S. House of Representatives in October, which included scathing denunciation of the Trump Administration's efforts.[85] The report reads: "President Trump's decision to mislead the public about the severity of the crisis, his failure to listen to scientists about how to keep Americans healthy, and his refusal to implement a coordinated national plan to stop the coronavirus have all contributed to devastating results."[86] More specific criticisms of the Administration include uneven assistance to states, funding and supply delays for necessities such as PPE, and insufficient testing.[87]

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[78] *Id.*

[79] *Id.*

[80] Defense Production Act, Pub. L. 81-774.

[81] Goodman & Schulkin, *supra* note 60.

[82] *Id.*

[83] Quint Forgey & Matthew Choi, *'This is deadly stuff': Tapes show Trump acknowledging virus threat in February*, POLITCO (Sep. 9, 2020), https://www.politico.com/news/2020/09/09/trump-coronavirus-deadly-downplayed-risk-410796

[84] *Id.*

[85] Lori Aratani, *Oversight report calls Trump administration response to the pandemic a 'failure',* THE WASHINGTON POST (Oct. 30, 2020), https://www.washingtonpost.com/trafficandcommuting/trump-coronavirus-response-failure/2020/10/29/cb58e066-1a15-11eb-82db-60b15c874105_story.html.

[86] *Id.*

[87] *Id.*

President Trump also appeared to have a confused and contradictory understanding of his role. Despite never taking any clear steps to intervene with state policy related to the pandemic, he once claimed he had total authority over coronavirus restrictions, saying:

> When somebody is the President of the United States, the authority is total, and that's the way it's got to be… The authority of the President of the United States having to do with the subject we're talking about is total… [States] can't do anything without the approval of the President of the United States.[88]

In the same interview, the President claimed that there were "numerous provisions"[89] which would have granted him the ability to compel a state to reopen their economy on command, a claim which he and the White House failed to back up with statutes.[90] In a striking example of mixed messages from the executive branch, the President backtracked merely twenty-four hours after his initial statement and said that it was not his Administration's intention to put pressure on any state or locality to reopen. He emphasized, as he had done repeatedly over the course of the crisis, that "the governors are responsible"[91] and "have to take charge."[92] Again shifting back to his message of decentralization, Trump simultaneously attempted to promote himself as the central authority while refusing to maneuver federal protocols in the interest of creating a national plan of action.

As Trump iterated above, the majority of action past February to control the spread of the virus was delegated to state officials and local health departments, whose approaches differed greatly across jurisdictions and regions of the United States. Because of the highly contagious nature of COVID-19 alongside the complete lack of interstate travel restrictions by the federal government, inaction by one area of the United States often resulted in an uptick of cases and deaths in other parts of the country.[93] Predictably, the piecemeal pandemic response was ineffective in curbing the spread of the virus.[94] New York was disproportionately affected by the disease in the early months and thus was able to receive a large portion of national resources during their time of need.[95] Subsequently, when a new

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[88] Daniel Dale, *Fact check: Trump falsely claims the president has 'total' authority over coronavirus restrictions,* CNN POLITICS, https://www.cnn.com/2020/04/14/politics/fact-check-trump-president-total-authority-coronavirus-states/index.html (last updated: April 14, 2020).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Yong, *supra* note 50.

[94] *Id.*

[95] *Id.*

wave of states were badly hit by the virus, they were forced to fight over the meager remaining reserves.[96]

States like Iowa, Kansas, and South Dakota sustained minimal restrictions, with Governor Laura Kelly of Kansas even stating that she expects the individual counties to act on their own accord.[97] Sparring between state and local officials was common, such as in Georgia where the Republican governor, Brian Kemp, and the Democratic mayor of Atlanta, Keisha Lance Bottoms, failed to agree upon the appropriate level of intervention.[98] Similar tensions between local and state officials arose in other states, including Texas and Florida.[99] Ultimately, the state and local response can be best described as a patchwork of different philosophies divided sharply along partisan lines. Although the CDC produced uniform guidelines intended for the states to follow, many governors and local officials did not heed these guidelines and, instead, reopened at their own rates, as encouraged by the White House.

The vacuum of federal leadership was a conscious choice by the Trump Administration; however, the White House is not solely responsible for the lack of a comprehensive plan. The federal government is undoubtedly constrained by the Police Powers of the Constitution,[100] which assign principal rule in public health matters to the smaller governments like state and local jurisdictions. However, some recommended interventions such as a national stay-at-home order, the implementation of robust surveillance testing, uniform quarantine/isolation requirements, public alert mechanisms, restrictions on mass transit, guidelines for the use of face masks, and benchmarks for when restrictions can be lifted incentivized by federal funding would all likely have been accepted by the Supreme Court as constitutionally permissible under the Commerce Clause.[101] Because the clause does not explicitly mention the word "health," the Supreme Court has played a role in promoting the growth of federal public health powers. Congress has relied on the Commerce Clause as the constitutional justification for enacting legislation regarding drug labelling, environmental child labor, minimum wage, working conditions, and gendered violence—all subjects that fall under the penumbra of public health governance.[102]

A. Consequences to Federalism During COVID-19

[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] U.S. Const. amend. X, §1.
[101] U.S. Const. art, § 8, cl. 3.
[102] American Bar Association, *supra* note 22.

It is certain that the lack of federal intervention has resulted in negative health outcomes for Americans.[103] As noted earlier, lax policies in one area may negatively impact neighboring geographic regions, even if those jurisdictions have implemented much stricter COVID regulations. For example, in Salt Lake City, Utah, mayor Erin Mendenhall issued a stay-at-home order weeks before the Utah governor Gary Hebert issued a much milder statewide decree, which severely delayed the prevention efforts in the state's largest city.[104] Further, because not all communities are equipped with the same resources, major disparities have been exposed. While these problems are entrenched in our systems of governance, they are expedited during a public health emergency such as the coronavirus pandemic. Namely, this virus has killed a disproportionate number of Black Americans—likely because their communities have underfunded health departments which could not adequately control the spread. [105] This is a historical problem; state flexibility in public health policymaking and spending has often resulted in the disenfranchisement of people such as minorities by denying them adequate resources.[106] Low-income and racial minority populations have been more likely to be exposed to the virus because they serve as essential workers in much higher rates, they are more likely to have chronic conditions that contribute to the risk of becoming severely ill or dying from COVID-19, and they have borne the brunt of the financial losses caused due to pandemic.[107] The suffering of communities with the deepest needs has been aggravated by inadequate public infrastructure, most likely a result of low taxes and a culture of governmental distrust.[108]

Unlike the federal government, which can choose to increase the deficit at times of crisis, some state governments are required to keep a balanced budget.[109] Due to the legal framework which places the burden of public health interventions on the states, they have become the primary payer for the majority of the response essentials.[110] The highest costs came from purchasing of personal protective equipment (PPE) and other healthcare items,

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[103] Sarah H. Gordon, Nicole Huberfeld, & David K. Jones, *What Federalism Means for the U.S. Response to Coronavirus Disease 2019,* available at: https://jamanetwork.com/channels/health-forum/fullarticle/2766033 (last updated: May 8, 2020).

[104] *Id.*

[105] Andrea Collier, *Why is COVID-19 Killing So Many Black Americans?* available at: https://greatergood.berkeley.edu/article/item/why_covid_19_killing_black_americans (last updated: June 30, 2020).

[106] *Id.*

[107] Huberfeld et al., *supra* note 7.

[108] *Id.*

[109] Gordon et al., *supra.*

[110] *Id.*

establishing quarantine and testing sites, and engaging in statewide contact tracing efforts to reduce the spread.[111] Federalism doesn't prevent the federal government from assisting the states with money and coordinating efforts, but the federal government never developed a comprehensive plan. The uneven funding assigned to states left many governors scrambling to fix problems they could not have properly budgeted for and resulted in a slew of unstable state budgets.[112] Some economists estimate that the long-term implications of this economic downturn could cost states an additional $360 billion dollars and rising unemployment hurts state tax revenue, further exacerbating this issue.[113] If a national plan had been in place which designated a comprehensive funding plan and a universal set of rules, some of these consequences could have likely been avoided, and the cost of economic stability and human lives could have been mitigated.

Additionally, President Trump's choice to downplay the virus and at times discredit the experts and epidemiologists who are meant to be informing the public of emerging disease-related information has left Americans incredibly divided. One group of states had taken a pointedly anti-science approach, ignoring evidence and focusing on the economic aspect of the virus without taking aggressive measures to tackle the disease itself, while another group of states has let science drive policy. In the science-focused states, earnest attempts to keep their residents healthy were often dampened by the lack of disease control from neighboring states.[114]

Partisanship both inside and outside of the federal government has grown substantially during this period.[115] National political figures routinely blame the other side of the aisle for the perceived failure in implementing the "right" policies.[116] President Trump himself has fingered Democratic governors as the sole cause of their states' rise in cases,[117] despite their comparatively aggressive public health approach. This partisanship has, unsurprisingly, bled out into the general population, resulting in accountability problems

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[111] *Id.*

[112] *Id.*

[113] Elizabeth McNichol, Michael Leachman, & Joshuah Marshall, *States Need Significantly More Fiscal Relief to Slow the Emerging Deep Recession,* CENTER ON BUDGET AND POLICY PRIORITIES (Apr. 14, 2020), https://www.cbpp.org/research/state-budget-and-tax/states-need-significantly-more-fiscal-relief-to-slow-the-emerging.

[114] Manny Fernandez & Jack Healy, *1 America, 1 Pandemic, 2 Realities,* THE NEW YORK TIMES (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/us/coronavirus-south-dakota-new-mexico.html.

[115] Gordon et al., *supra* note 103.

[116] Selin, *supra* note 8.

[117] *Id.*

when voters were evaluating their representatives during the 2020 elections.[118] Solidarity often emerges in times of national strife, but the over-politicization of the disease has left the American people more divided than ever.

III. Solutions

With the emergence of three vaccines with high efficacy rates and the upcoming broad distribution of them, many Americans are ready for life to return back to normal post-pandemic. Unfortunately, putting it in the past and leaving it there might not be a possibility.

Many scientists of infectious disease are suggesting that our next pandemic may not be that far off in the future.[119] Additionally, climate scientists warn that, if the United States' response to COVID-19 is any indication, the nation is ill-prepared to appropriately mitigate climate emergencies that are almost certainly upcoming.[120] Luckily, there are solutions both within the federalist framework and outside of it that can help improve the United States' response to the next pandemic or national emergency.

A major faltering of the federal government's communication with state and local governments during this time was the refusal to rely on the National Strategy for Pandemic Influenza,[121] a document which was produced by the federal government at the turn of the 21st Century in preparation for the arrival of the avian flu, also known as H1N1.[122] Similarly to COVID-19, this was a zoonotic disease spread from animals to humans.[123] It was first detected in people during the late 1990s.[124] By 2005, the United States Department of Health and Human Services developed the "Pandemic Influenza Plan"[125] in order to create a foundation on which efforts to prevent and control the impending virus could be made. The policy was anchored in our understanding of influenza as an infectious disease and was the

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[118] *Id.*

[119] Jan Dyer, *Ready for the Next Pandemic?,* INFECTION CONTROL TODAY (Mar 1, 2021), https://www.infectioncontroltoday.com/view/ready-for-the-next-pandemic-spoiler-alert-it-s-coming-.

[120] *The Epidemic Provides a Good Change to do Good by the Climate,* THE ECONOMIST, (Mar. 28, 2020), https://www.economist.com/science-and-technology/2020/03/26/the-epidemic-provides-a-chance-to-do-good-by-the-climate.

[121] Centers for Disease Control and Prevention, *National Pandemic Influenza Plans,* https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/national-strategy-planning.html (last updated: June 15, 2017).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] Homeland Security Council, *National Strategy for Pandemic Influenza,* (Nov. 2005) https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf.

result of a combined effort from prominent legal and public health experts.[126] Epidemics like HIV/AIDS, while infectious, are different enough from influenza that they are addressed in an entirely separate division of the CDC.[127]

Coronavirus and influenza share a lot of similarities. Patients often report similar symptoms; the diseases have many of the same at-risk groups, such as the elderly and the immunocompromised; both diseases share the case fatality rate of about .2%; and they spread mostly through the transmission of droplets from an infected person, such as when they sneeze or cough.[128] The most striking difference between COVID-19 and influenza is the level of infectiousness.[129] COVID-19 is much more easily spread and contracted, resulting in faster and more widespread peaks.[130]

However, some pandemic doctors feel as though the Pandemic Influenza Plan could have easily been applied to the current pandemic with minor adjustments. Unlike the response that Americans witnessed, the Pandemic Influenza Plan intended federal agencies, especially the CDC, to be the primary actors of prevention.[131] The President was suggested to assist in the communications and financial appropriations aspects of the pandemic, but defer to the scientists and experts at the HHS for major public health decision-making.[132] Most interestingly, the role of governors, mayors, or any state of local elected officials are not advanced within the plan.[133] They are granted limited discretion in vaccine rollout, but that is the extent of their responsibilities.[134] The omission of complex duties for elected officials is a striking feature of this plan because it presumes that it is more rational to have expert judgements guide responses, controlled through the federal government but not administered by any singular political party or actor.

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[126] John Kirlin *COVID-19 Upends Pandemic Plan* (2020), THE AMERICAN REVIEW OF PUBLIC ADMINISTRATION.

[127] *Id.*

[128] Centers for Disease Control, *What is the difference between Influenza (Flu) and COVID-19?,* https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last updated: Jan. 27, 2021).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

on the relationship between the United States' COVID-19 response and the tenets of federalism and recommended a body of solutions to ensure that the foundation of federalism remain intact while better addressing the urgent needs presented by a pandemic. Nicole Huberfeld, JD, a professor of health law, ethics, and human rights at the Boston University School of Public Health, assisted Professor Gordon and her research and believes that the following recommendations are easily in the purview of the Commerce Clause: (1) applying federal standards for local stay-at-home orders, based on case numbers, transmission rates, and emerging scientific information; (2) the systematic distribution of medical supplies and equipment, ideally via a portal run by the Federal Emergency Management Agency where states and local municipalities can request supplies and funds; (3) standardize data collection focusing on health outcomes and identify potential disparities in regard to race, ethnicity, and geographic area; (4) continuously support under-resourced hospitals with funding; and (5) expand Medicaid eligibility under the Affordable Care Act.[135] These changes would help centralize a course of action, which would ultimately reduce deaths and other negative consequences which result from an ongoing pandemic.

Even with the implementation of the recommendations listed, states retain the ultimate flexibility in caring for the health and safety of their residents, as the Constitution stipulates in the police powers clause outlined in the Tenth Amendment.[136] These policies would instead set a federally established minimum standard for how states should be responding to the crisis, as the federal government has done in other public health and public health-adjacent areas, such as with working and labor conditions.[137] States would be free to command the rest of their public health operations as they please.[138] Moreover, most of these interventions do not require congressional action but instead can be authorized via federal agencies dedicated to infectious disease and public health, like the CDC and the FDA.[139] While these steps themselves were not explicitly outlined in the National Pandemic Influenza Plan,[140] the spirit of the plan, which places the onus of policy writing on the experts of infectious disease at federal agencies, remains intact.

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[135] Gordon et al., *supra* note 103.
[136] Lawson & Schapiro, *supra* note 12.
[137] Gordon et al., *supra* note 103.
[138] *Id.*
[139] *Id.*
[140] Homeland Security Council, *National Strategy for Pandemic Influenza,* available at: https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf

Other public health experts have explored the idea of distancing from strict federalism as it pertains to public health.[141] In the long term, in order to ease the entrenched health disparities which have for so long disproportionately hurt low-income and minority communities,[142] the federal government should prioritize public health legislation which would make access to healthcare and health insurance equitable and universal. The Affordable Care Act (ACA), a federal statute signed into law by President Obama in 2010, represents the federal government's most ambitious segue into public health legislation.[143] It reflects the structure of federalism whereby it provides the majority of financing for its subsidized health insurance coverage plan and sets a federal minimum of standards for health insurance, but ultimately gives the states the flexibility in implementation.[144] Through executive actions, the Obama Administration gave the states choice in defining the essential health benefit package along federal perimeters and allowing them to renew old plans that are not in compliance with the APA insurance reforms.[145] However, this backfired when twelve states, including Mississippi, Florida, and Alabama, where inequities in COVID-19 cases are death are especially evident, did not expand Medicaid under the ACA and left a vacuum of government-subsidized health insurance.[146] Some law experts argue that removing the federalist aspects of public health legislation would help prevent these inequities from continuing due to lack of effective collaboration between states and the federal government.[147] This problem could be mitigated through a permanent move towards universal health care, an option which has been championed by progressives like Senator Bernie Sanders from Vermont. His plan, called Medicare for All, would abolish private health insurance and switch the country to a federally-run program which would provide equal health care to all citizens. While this would certainly diminish some of the major problems a federalist public health infrastructure creates, it would likely require leniency from federal

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[141] Sara R. Collins & Jeanne M. Lambrew, *Federalism, the Affordable Care Act, and Health Reform in the 2020 Election,* THE COMMONWEALTH FUND (July 29, 2019), https://www.commonwealthfund.org/publications/fund-reports/2019/jul/federalism-affordable-care-act-health-reform-2020-election.

[142] *Id.*

[143] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010)

[144] Collins & Lambrew, *supra* note 141.

[145] *Id.*

[146] *Id.*

[147] *Id.*

courts because it may be considered an overstep from the federal government into an area of state-domain.[148]

Conclusion

The devastating effects of the COVID-19 pandemic on the United States have been evidenced through its high rates of both infection and death. As of April 2021, the total number reached over 30 million and the total number of deaths over 555 thousand, making the case fatality rate in the United States about 1.8%.[149] While there are a number of contributing factors, one of the most pervasive barriers in curbing the consequences of the pandemic is the role of federalism in the United States' public health infrastructure and the overreliance on state governance by the Trump Administration. In the future, the Commerce Clause can be used to expand the federal government's capacities during public health emergencies like pandemics, which know no geographic barriers, so that the country can respond effectively and appropriately in the interest of saving American lives. Some legal scholars have recommended policy strategies which would keep the central tenets of federalism intact, while others suggest that the country make a permanent move away from federalism in order to phase out prominent inequities between communities. Whatever path our policymakers choose to make, it is imperative to the health and safety of a nation that we are better prepared for the next national public health emergency, which scientists warn may not be too far in the future.

[148] *Id.*

[149] N.Y. Times, *Tracking Coronavirus,* N.Y. Times (April 1, 2021) https://www.nytimes.com/interactive/2021/us/washington-district-of-columbia-covid-cases.html.

Assessing Landfill Regulation Through the Lens of Civil Rights Protections and The Environmental Justice Movement

Tena-Lesly Reid

Introduction

In the United States Constitution, the 14th Amendment's Due Process Clause stipulates that "No state shall……. deprive any person of life, liberty, or property, without due process of the law…"[1] One of the essential aspects of one's right to life, and its quality, concerns the conditions of their environment. Some of these environmental standards include access to clean water, air, and proper waste disposal--which all impact public health.[2] However, these standards are not always guaranteed. In 2016, the Flint Water Crisis, in Flint, Michigan was a devastating representation of the fact that accessibility to safe clean water is not always guaranteed.[3] Michigan's egregiously poor water management caused the outbreak of Legionnaires' disease and disproportionately affected low-income and communities of color from 2014-2015.[4] Another recent example of reckless environmental regulation concerned landfill management in a predominantly minority community in Uniontown, Alabama in 2016. Residents of the community reported experiencing nosebleeds, irritation of their throats, and nausea due to the transfer of toxic coal ash from Emory River to Arrowhead Landfill.[5] This was caused by the technicality that Arrowhead Landfill is still regulated as a "non-hazardous" landfill despite the fact that the recent transfer of coal ash

[1] U.S. Const. Amend. XIV, Section 1.

[2] Marianne Engelman-Lado et al., *Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It's Time For Action*, AMERICAN BAR ASSOCIATION, (April 2020).

[3] *Carthan v. Snyder (In re Flint Water Cases)*, 384 F. Supp. 3d 802, 2019 U.S. Dist. LEXIS 55607, 2019 WL 1442743 (United States District Court for the Eastern District of Michigan, Southern Division April 1, 2019, Filed).

[4] *Id.*

[5] Engelman-Lado et al., *supra* note 2.

originated from a hazardous site.[6] Therefore, as a non-hazardous landfill it faced less public health related checks than a landfill that is regulated as hazardous.[7] Clearly, these environmental travesties are demonstrations that the "right to life," without due process of the law, is not all-encompassing. Furthermore, it highlights that the state in fact has the capacity to infringe upon the quality of one's life through inadequate public health standards. For minority and low-income communities, there is a higher likelihood that their residences will face such environmental harms. The heightened environmental risk that disproportionately impact minorities has given rise to the environmental justice movement.[8]

Environmental justice (EJ) is a movement that works toward advancing greater legal protections for vulnerable minority and low-income populations from environmental harm, known as EJ communities. EJ focuses on eliminating the discriminatory and/or disparate effects of insufficient environmental regulations that harm the health of these populations.[9] Consequently, advocates of the environmental justice campaign for the passage of legislation and constitutional provisions that promote the right to a healthy environment.[10] While the environmental justice movement advocates for a broad range of causes, this article will focus on the dangers of poor landfill management.

Landfills are managed and engineered disposal facilities for solid waste. They are operated and monitored to abide by federal and state regulations. Landfills are placed according to on-site environmental monitoring systems, which account for signs of groundwater contamination, landfill gas, and additional safeguards. Inadequate regulation of landfills significantly impact public health by restricting access to clear water and air.[11] The predominant causes of such negative consequences can be attributed to the treatment processes of landfills that may produce environmentally harmful byproducts in the form of leachate—a thick liquid that forms during the decomposition of waste—and gas emissions.[12] If negligently managed, this substance can inject harmful materials into groundwater, which

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[6] *Id.*

[7] Engelman-Lado et al., *supra* note 2.

[8] *Id.*

[9] Tsuey-Ping Lee, *Pursuing Justice in a Community Experiencing Environmental Injustice: The Practice of Community Revitalization*, 23 CONTEMP. JUST. REV. 337 (2020).

[10] Exec. Order No. 12948, 59 FR 7629 (1994).

[11] Alexandru Andrada et al., *The Environmental Impact Assessment of a Municipal Landfill - A Study on the Leachate*, 41 UNIV. GALANTI, (September 2018).

[12] *Id.*

leads to dangerous water contamination.[13] In an effort to combat this, some landfills have synthetic liners on top of a layer of clay soil in order to prevent water contamination.[14] If these hazardous materials aren't managed properly, it can have serious public health risks.[15]

Depending on their classification, it determines whether the state or federal government primarily regulates them. Landfills are defined and regulated as three types: solid waste, hazardous waste, or by the Toxic Substances Control Act (TSCA). Solid waste regulation falls under Subtitle D of the Resource Conservation and Recovery Act (RCRA). Subtitle D concerns state and local governments as primarily responsible for regulating and managing nonhazardous solid waste such as household garbage and nonhazardous industrial solid waste. The landfills that fall into this category are: municipal solid waste landfills, bioreactor landfills, industrial waste landfills, construction and demolition debris landfills (C&D), and coal combustion residual landfills (CCR). Subtitle C creates a federal program that manages hazardous waste to protect against harming public health and the environment. These regulations control the generation, storage, disposal, transportation, and treatment of hazardous waste. This includes hazardous waste landfills and polychlorinated biphenyl (PCB) landfills. Therefore, the design, location, and type of landfill influences their categorization under the law at the federal and state levels.[16] Although there are existing state laws and federal regulations intended to mitigate the health risks associated with landfills, the effectiveness of enforcing such laws face several challenges.[17]

This article will argue that the status quo of landfill regulation and protection from environmental risk is incomplete in appropriately addressing public health crises and preventing them. Given the fact that EJ communities disproportionately face environmental harm, a more comprehensive and intentional approach is necessary to shield them against adverse health effects. In order to employ the most optimal solutions to mitigate the hazardous environmental exposure that affect EJ communities, it is imperative to understand the current scope of landfill regulation and environmental policies. This article will be split into three parts to cover these issues. Part I of this article discusses the legal landscape for

[13] Andrada et al., *supra* note 11.
[14] *Id.*
[15] Lee, *supra* note *9*.
[16] *Id.*
[17] Lee, *supra* note *9*.

environmental justice efforts regarding states and federal regulations of landfills. It will also provide context as to why non-hazardous landfills that qualify as Subtitle D still pose risk to public health. Moreover, it will analyze environmental suits, state disparities, Environmental Protection Agency (EPA) administrative EJ duties, Title VI cases, and EJ policies. Then in Part II, this article highlights the barriers in the accountability of the EPA, and state practices' duty regarding health initiatives. This includes the state's right to asserting sovereign immunity and the implications of the negative Constitution. It will also address why the current regulations fall short and how the affected communities experience these consequences. Lastly, Part III offers solutions to foster improved landfill standards by encouraging stronger Congressional oversight over states and the EPA. Additionally, Part III proposes that revising the Title VI of the Civil Rights Act itself to include disparate impact claims and revising regulation standards can have stronger protections for EJ populations and the country at large.

I. The Legal Landscape of Landfills and EJ Efforts

A. The Hazards of State Regulated Subtitle D Landfills and EJ Communities

Improper landfill management poses significant risks to the community through water contamination and air pollution.[18] There are also notable barriers that prevent improvements in current regulations that don't completely address these dangers to public health caused by inadequate landfill regulation.[19] The water contaminants may include lead, mercury, cadmium compounds, nickel, toluene, and other harmful substances.[20] This contamination can lead to a range of detrimental health outcomes such as seizures, blood disorders, lung problems, and other lethal public health impacts depending on the longevity of exposure as well as the severity of exposure.[21]

Gas emissions are another aspect of landfill management that can cause serious public health effects.[22] The equipment used for landfill construction, such as oil and fuel, pollute the air.[23] High levels of these harmful emissions and air pollutants can have lasting

[18] Andrada et al., *supra* note 11.
[19] *Id.*
[20] Andrada et al., *supra* note 11.
[21] *Id.*
[22] Andrada et al., *supra* note 11.
[23] *Id.*

impacts on reproductive health, such as increased miscarriages and decreased fertility.[24] Another consequence may include severe asthma. Therefore, landfills pose extreme risk to public health if improperly managed through environmental regulation.[25]

However, the extent to which a community experiences exposure of these substances is dependent on the siting of the landfills and existing state and federal regulation on landfills.[26] The proximity of landfills to residential areas is defined by siting practices and they impact the exposure to these health hazards.[27] Research has shown that poorly designed siting practices are more likely to disproportionately affect low-income and communities of color than any other population.[28] Studies have found two theses to explain this finding.[29] One explanation is that environmental hazards are likely located in minority neighborhoods due to racial discrimination in housing, which restrains residential choices for these populations.[30] Direct factors that influence residential exposure include locations of public housing and evidence that reveals racial-based real estate steering.[31] These factors create environmental inequality.

Not every factor related to environmental injustice is caused by intentional racial discrimination.[32] Another explanation is that low-income and minority communities are more likely affected by adverse environmental outcomes because they are the least politically resistant subpopulation.[33] This concept is the idea that these communities lack the resources to influence decisions such as siting laws.[34] Ultimately, these two theses have given rise to the efforts made in civil litigation to attain environmental justice.[35]

The current pitfalls in poor landfill regulation can be attributed to the states' classifications of landfills under Subtitle D. For example, municipal construction and demolition (C&D) landfills fall mostly within the purview of the state. Municipal C&D landfills do not face the same levels of federal regulation in comparison to hazardous

[24] Andrada et al., *supra* note 11.
[25] *Id.*
[26] Andrada et al., *supra* note 11.
[27] *Id.*
[28] Lee, *supra note* 9.
[29] *Id.*
[30] Lee, *supra note* 9.
[31] *Id.*
[32]Lee, *supra note* 9.
[33] *Id.*
[34] Lee, *supra note* 9.
[35] *Id.*

landfills.[36] Therefore, there are differing corrective measures that have been instituted across the country such as protective liners, controlling leachate, location restrictions, and collecting runoff that vary from state to state.[37]

Regulations to prevent leachate, monitor groundwater and properly site landfills at the state level do not properly address the threats posed by contaminants. A study on state regulations of landfills across the United States found there was little consistency in specific requirements for leachate collection, groundwater monitoring, and location restrictions among states.[38] Only 23 states require liners to prevent leachate contamination and 27 states require groundwater monitoring.[39] 26 states include specified personnel requirements for the management and safety of landfills. Additionally, 21 states require operator training for their facilities. Even though most states stipulate a preemptive plan to safeguard against hazardous waste disposal at a non-hazardous facility, only 11 states mandate a spotter to identify unauthorized wastes.[40] These differences also apply to location restrictions. There are only 31 states that specify location restrictions for C&D landfills that go as far as to restrict siting from areas that are in proximity to "areas susceptible to flooding; in wetlands (except under certain conditions); near potable water supplies; near airports; near fault areas, seismic impact zones, or in any other unstable locations; and near tidal wave zones."[41] However, within these 31 states, only 11 states place siting restrictions that specifically dictate the distance necessary between the landfill and a public area. Even within the distance requirements of the 11 states, they vary in the distances and public areas they specify.[42] The distance requirements between landfills can range from 100 feet to 1 mile from the public area. The public areas those states emphasize differ as well from some states specifying the distance between a C&D landfill and a public school, highway, public road, city or town, while other states only specify the distances between waterways.[43] The remaining 29 states do not delineate location restrictions in their state regulations and instead leave siting decisions up

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[36] Lee, *supra note* 9.

[37] Corrie Clark et al., *A Review of Construction and Demolition Debris Regulations in the United States, CRITICAL REVIEWS IN ENVRIONMENTAL SCIENCE AND TECHNOLOGY, 36:2, 141-186,* (Jan *2010).*

[38] *Id.*

[39] Clark et al., *supra* note 37.

[40] *Id.*

[41] Clark et al., *supra* note 37.

[42] *Id.*

[43] Clark et al., *supra* note 37.

to local boards and agencies to specify on a case-by-case basis.[44] These gaps in monitoring, liners, siting, and specification leave room for C&D debris hazards such as asbestos, lead-based paint, mercury, chromated copper arsenate-treated wood to go untreated and harm human health.[45] Also, the differing location restrictions state by state means there are varying types of exposure to residential areas when it comes to C&D landfill sites.[46] Nevertheless, 93% of all landfills in the United States are classified as non-hazardous C&D waste, despite the health hazard they can pose.[47]

Consequently, individual states decide whether or not C&D landfill sites are in closer proximity to vulnerable minority and low-income populations.[48] If members of these communities believe that their health was threatened due to poor landfill management, they may seek remedies through Title VI claims toward the EPA's OCR or file an environmental lawsuit against the municipal landfill company.[49]

B. Federal Legislation, The Status of Environmental Justice and Landfill Regulations

The environmental justice movement was catalyzed by one of the first public outcries against a hazardous waste landfill in Warren County, North Carolina, by a predominantly black community in the 1980s.[50] The landfill had 31,000 tons of polychlorinated biphenyl (PCB), a highly toxic chemical that was banned from the United States in 1979. Prolonged exposure to PCBs can cause skin conditions, ocular lesions, compromise immune responses and cancer, which some residents endured at the time. Outraged over the sickness of their community caused by the toxic landfill, Warren County launched protests within the community and around the nation.[51] Despite the passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980, used to authorize the federal government to clear up toxic sites, protestors believed there were not enough protections for low-income and minority populations from detrimental environmental practices.[52]

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[44] Clark et al., *supra* note 37.

[45] *Id.*

[46] Clark et al., *supra* note 37.

[47] *Id.*

[48] Clark et al., *supra* note 37.

[49] Andria Vachon, *Economic and Environmental Considerations for Construction and Demolition (C&D) Debris Management and Policy,* UNIV. N.H. SCHOL. RESPOSITORY. (2008).

[50] Department of Energy, *Environmental Justice History,* OFF. LEGACY MGMT. https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history (2017).

[51] *Id.*

[52] Department of Energy, *supra* note 18.

However, a decade later their demands were acknowledged in Executive Order 12948 of 1994.[53] Executive Order 12948 in conjunction with CERCLA addressed some of the pitfalls in environmental regulations that fall upon EJ communities.[54] CERCLA is also informally known as the "Superfund law," which is a program that is overseen by the EPA to clear toxic contaminated sites.[55] Additionally, this act compels those responsible for contamination to carry out cleanups or to reimburse the federal government for the EPA cleanup.[56] This law aims to protect public health while simultaneously intending to restore the productive use of these sites.[57] CERCLA's program is responsible for clearing up toxic and hazardous landfill sites to restore them to healthy conditions.[58]

President Clinton issued Executive Order 12948 (Exec. Order 12948), which directed federal agencies to develop environmentally conscious plans to ensure safeguards against discrimination in federal programs that impact public health and provide the public information about environmental risks.[59] Also Exec. Order 12948 urged agencies to strategize policies that allow vulnerable communities a platform to participate in environmental decisions.[60] Section 3-302 of Exec. Order 12948 stipulates that federal agencies must collect and assess data whether programs have "… a disproportionately high and adverse health impact on minority and low-income communities."[61] Therefore, this Order requires these federal agencies to collect aggregate data on adverse environmental outcomes, organizing it by populations identified by race, national origin, and income.[62] In order to carry out its aims, this Order created the Interagency Working Group (IWG) led by the EPA Administrator and the heads of 17 departments or agencies.[63] The duties of the IWG include advancing environmental justice principles within the IWG and to import them

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[53] *Testimony of Robert D. Bullard Ph.D, Written Statement Delivered to the US Commission on Civil Rights* (2002) (statement of Robert D. Bullard, Director Envtl. Just. Resource Center).

[54] Exec. Order No. 12948, *supra* note 10.

[55] Comprehensive Environmental Response, Compensation, and Liability Act of 1980., 96 P.L. 510, 94 Stat. 2767 (December 11, 1980), *available at* https://advance-lexis-com.proxygw.wrlc.org/api/document?collection=statutes-legislation&id=urn:contentItem:5CD7-HSM0-01XN-S27V-00000-00&context=1516831.

[56] *Id.*

[57] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *supra* note 52.

[58] *Id.*

[59] Exec. Order No. 12948, *supra* note 10.

[60] Jeanne Zokovitch Paben, *Plan EJ 2014: Fact or Fiction? A Critique of The Obama Administration's Efforts on Environmental Justice,* 41 WM & MARY ENVTL. L. & POL'Y REV. 1, (2016).

[61] Exec. Order No. 12948, *supra* note 10.

[62] *Id.*

[63] Exec. Order No. 12948, *supra* note 10.

into their respective agencies.[64] One of the focus areas among the dissemination of information and regional engagement, is Title VI of the Civil Rights Act of 1964.[65]

Title VI claims are frequently used for environmental justice causes, including instances of harmful landfill siting and operation.[66] Title VI of the Civil Rights Act states that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[67] However, the Supreme Court ruling *Alexander v. Sandoval (2001)* narrowed the interpretation of what qualifies as a Title VI violation.[68] In *Alexander,* Martha Sandoval brought a class action suit against the Alabama Department of Public Safety, a recipient of federal financial assistance. Sandoval claimed that the department administering driver's license exams only in English violated Title VI.[69] Although the facts of this case did not relate to landfill issues, the Court's ruling is still relevant to how Title VI violations are interpreted in courts today. The Court held that, "Title VI itself directly reaches only instances of intentional discrimination…..[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under [section 602]."[70] Therefore, unless the facts of the case explicitly indicate that a program or activity receiving federal assistance intentionally discriminated on the basis of race, it does not satisfy a Title VI violation. This applies to harmful landfill siting and operations that can disproportionately affect minority and low-income populations. Unless there is evidence that a state's poor landfill practices *intentionally* harmed vulnerable communities, plaintiffs cannot successfully make a Title VI claim in court. The lengths of success at making a Title VI claim in federal court can be narrowed by the intentional harm requirement of *Sandoval.* Moreover, since it would be an environmental lawsuit, it is bound by the legal precedent set by *Lujan v. Defenders of Wildlife (1992).* EJ policies set by the EPA

[64] *Id.*

[65] Exec. Order No. 12948, *supra* note 10.

[66] Paben, *supra* note 56.

[67] § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin, 42 USCS § 2000d.

[68] *Alexander v. Sandoval,* 531 U.S. 1049, 121 S. Ct. 652, 148 L. Ed. 2d 556, 2000 U.S. LEXIS 8305, 69 U.S.L.W. 3397 (Supreme Court of the United States December 11, 2000, Decided).

[69] *Id.*

[70] *Alexander v. Sandoval, supra* note 68.

are intended to further address potential harms to communities, but there is also an extent at which states are obliged to follow them.

C. Title VI Litigation, EJ Policies, and Environmental Justice Lawsuits

When it comes to Title VI cases, EJ policies, and environmental justice lawsuits, they tend to face various respective hindrances. When a suit pertaining to adverse environmental outcomes is filed, the plaintiff has the burden of proving that they were harmed due to a violation of an environmental statute.[71]*Lujan v. Defenders of Wildlife (1992)* set the three elements that must be satisfied in order to have standing to sue, which has since been applied to other environmental cases. It also rejected the claim that any person using a "contiguous ecosystem" was negatively impacted by a funded activity and had standing to sue.[72] The parties must first demonstrate an "injury-in-fact," a "causal connection between the injury and the conduct complained of" and the redressability of the injury.[73] The "injury-in-fact" must be "concrete and particularized" as well as "actual or imminent."[74]

Therefore, it cannot be hypothetical and must affect the plaintiffs personally.[75] A causal connection must be "fairly traceable" to the defendant's actions.[76] Finally, the injury incurred by the plaintiff must be redressed by a decision in the plaintiffs favor.[77] Redressability is dependent on whether or not a court finds a causal connection is satisfied, since the lack thereof would find no need for redressability.[78] The *Lujan* ruling set the precedent for environmental suits including environmental justice landfill cases.[79] However, this precedent is limited in its application when it comes to landfill siting decisions and their potential health risks.[80] This is because at the stage of upcoming landfill siting decisions, there is no demonstrated 'injury-in-fact' yet and the potential health risk can be viewed as 'hypothetical' rather than "actual or imminent." Additionally, the discrepancy in location restrictions and its specification, or lack thereof, indicates that states view non-hazardous landfills at differing levels of harm. As a way to address state disparities, there are regional

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[71] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 1992 U.S. LEXIS 3543, 60 U.S.L.W. 4495, (Supreme Court of the United States June 12, 1992, Decided).

[72] *Id.*

[73] *Lujan v. Defenders of Wildlife, supra* note 71.

[74] *Id.*

[75] *Lujan v. Defenders of Wildlife, supra* note 71.

[76] *Id.*

[77] *Lujan v. Defenders of Wildlife, supra* note 71.

[78] *Id.*

[79] *Lujan v. Defenders of Wildlife, supra* note 71.

[80] *Id.*

EJ policies. The threshold for landfill siting decisions under the Executive Order 12498 and the Interagency Working Group, is that states allow public participation from vulnerable affected communities as part of all their regional EJ policies.[81] EJ policies are separated by ten regional approaches. Based on the region that a state presides, they are encouraged to comply with differing EJ policies they have agreed to. These EJ policies aim toward incorporating environmental justice considerations in their landfill siting decisions and other environmentally related projects. One way to make environmental justice considerations is through EJSCREEN assessments.[82] The EJSCREEN assessment collects information on whether or not minority and low-income populations are at risk of being disproportionately exposed to harmful landfill exposure among other environmental factors. This tool is used in six out of the ten regions.[83] However, these assessments are only guiding policies and are not uniformly required in the form of legislation in each of these regions.[84] Therefore, despite the fact that EJ policies exist to protect minority and low-income populations, some of the regions lack EJSCREEN assessments as a part of their regional policy. Moreover, the states within each region are not legally bound to abide by these policies but are encouraged to abide by them. Additionally, landfill siting plans differentiate themselves within each state.[85] Thus, when it comes to landfill siting decisions that are preemptive in exposing vulnerable populations, the most consistent policy guidance is that these populations can publicly participate through their state's board hearings before the landfill site is approved.[86]

An example of the public participation requirement is the court case regarding landfill siting that was decided post-EO 12948 was *In re Envtl. Servs.* 138 N.M. 133 (2005).[87] This dispute involved the approval by the New Mexico Environment Department of a permit to create a landfill bordering a community composed of low-income minority residents.[88] The court found that the Department Secretary abused his discretion when he limited the scope of a landfill public hearing to cover only the technical requirements of New

[81] EPA, *Environmental Justice in Your Community,* https://www.epa.gov/environmentaljustice/environmental-justice-your-community (December 2020).

[82] *Id.*

[83] EPA, *supra* note 81.

[84] Lee, *supra* note 9.

[85] *Id.*

[86] EPA, *supra* note 81.

[87] *In re Rhino Envtl. Servs.,* 138 N.M. 133, 2005-NMSC-024, 117 P.3d 939, 2005 N.M. LEXIS 366 (Supreme Court of New Mexico July 18, 2005, Filed).

[88] *Id.*

Mexico's Solid Waste Act.[89] They also concluded that compliance of the Solid Waste Act requires assessments on the public health and welfare of siting practices.[90] In essence, the court advised the Department to open up their siting decision to public participation.[91] The court stated that they were, "...not suggesting that the Secretary must reach a different result, but we do require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making."[92] Therefore, the court gave the state ultimate discretion in their public health related landfill siting decisions in regards to minority populations.[93] The same policy expectation also applies to other states besides New Mexico, if the court decides that public participation in landfill siting decisions is a priority. However, once the opportunity for public participation is satisfied the state has fulfilled its voluntary EJ policy consideration and can still ultimately go forward with their landfill project as they intended.

D. Title VI Landfill and EPA EJ Cases

As *Alexander v. Sandoval (2001)* set the precedent that Title VI complaints "reaches only instances of intentional discrimination," courts have often denied complaints where vulnerable populations are exposed to poor landfill management on the basis that there is not sufficient evidence of "intentional discrimination."[94] *Franks v. Ross (2003)* was a federal court decision in the U.S. District Court for the Eastern District of North Carolina that expressly addressed landfills in the context of Title VI and continued to uphold this standard concerning Title VI.[95] The North Carolina residents claimed that the construction of a landfill site in a predominantly black community violated Title VI of the Civil Rights Act among other federal statutes.[96] The plaintiffs were a part of a housing association who claimed they have negative, disproportionate environmental effects due to the landfill site.[97] The outcome partly relied on the decision in *Alexander*. The district court stated that *Alexander's* decision stipulated three aspects of Title VI to consider in their ruling:

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[89] *In re Rhino Envtl. Servs., supra* note 87.
[90] *Id.*
[91] *In re Rhino Envtl. Servs., supra* note 87.
[92] *Id.*
[93] *In re Rhino Envtl. Servs., supra* note 87.
[94] *Alexander v. Sandoval (2000), supra* note 68.
[95] *Franks v. Ross*, 293 F. Supp. 2d 599, 2003 U.S. Dist. LEXIS 21928 (United States District Court for the Eastern District of North Carolina, Western Division November 19, 2003, Filed).
[96] *Id.*
[97] *Franks v. Ross (2003), supra* note 95.

> (1) private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages (2) § 601 prohibits only intentional discrimination (3) regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.[98]

The court continued by stating that the Supreme Court decided that "Title VI [does not] display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602." Therefore, the Court held that no such right of action exists.[99] The *Franks* decision concluded by the court stating "it is clear that Congress did not intend to create a private cause of action under this section of Title VI. This Court will not allow plaintiffs to use § 1983 to enforce a statute that does not alone create a private cause of action"[100] Therefore, the court aligned with the precedent set by *Sandoval*, and reaffirmed that since there was not sufficient evidence of "intentional discrimination" and that "no such right of action exists" under Title VI.[101] Therefore, the United States District Court of North Carolina dismissed their Title VI claim.

Another notable court case that used Title VI violations as part of harmful landfill exposure was *Holt-Orstedt v. City of Dickinson (2009).*[102] This case detailed that the city's landfill site from 2003 contaminated the water of a predominantly African-American community with TCE, a hazardous chemical, resulting in the wrongful death of a resident due to long term exposure.[103] Additionally, it was attributed as the cause behind a multitude of terminal health effects such as cancers and skin disorders.[104] After a series of additional legal disputes and consolidations of other environmental claims, the end of the legal dispute culminated in the case *Natural Resources Defense Council (NDRC) v. County of Dickinson (2012),* which ruled in the favor of the plaintiffs as a violation of the RCRA.[105] The court found that each element of *Lujan* was satisfied and the defendants were compelled to settle in 2012.[106] Therefore, the initial Title VI claim originally present in *Holt-Orstedt* was absent in the ultimate conclusion

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[98] *Id.*

[99] *Franks v. Ross (2003), supra* note 95.

[100] *Id.*

[101] *Franks v. Ross (2003), supra* note 95.

[102] *Holt-Orstedt v. City of Dickson*, 2009 U.S. Dist. LEXIS 152517 (United States District Court for the Middle District of Tennessee, Nashville Division March 25, 2009, Filed).

[103] *Id.*

[104] *Holt-Orstedt v. City of Dickson*, (2009), *supra* note 102.

[105] *Natural Resources Defense Council v. County of Dickson*, No. 3:08-0229 (M.D. Tenn. Jan. 3, 2011).

[106] *Id.*

of the case in *NDRC*. Instead, the decision was driven by RCRA violations rather than asserting a private action under Title VI. These cases portray the limits of Title VI claims in federal court due to *Alexander's* precedent of intentional discrimination and rights to private action. Additionally, it represents that the classification of the landfill can be a determining factor for whether or not a landfill site is bound to Subtitle C RCRA requirements or Subtitle D state regulation. However, this means that instances where poor state regulations classified as Subtitle D nonhazardous landfills and disparately harm EJ communities, Title VI claims are not applicable in federal court unless there is substantial evidence of intentional discrimination. As previously discussed, one of the theses that supports the differential harm to EJ communities is attributed to indirect factors such as being the least politically resistant subpopulation and lacking the resources to effectively influence landfill siting decisions[107]. Therefore, *Alexander* can become less applicable to protect EJ communities. Other protections that are irrespective of EJ communities fall within the RCRA.

E. Shared Federal and State Landfill Responsibility

Another source of legislation that impacts the regulations of landfills is the Resource Conservation and Recovery Act (RCRA).[108] The RCRA gave the federal government the responsibility of regulating hazardous waste such as chemical products and agricultural insecticides that overtly pose health dangers.[109] This Act grants the EPA the authority to control the "generation, transportation, treatment, storage, and disposal of hazardous waste and the management of non-hazardous solid waste."[110] Section A, part IV of the RCRA outlines the federal responsibility of waste management.[111]

> ..that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvage-able materials and to provide for proper and economical solid waste disposal practices[112]

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[107] Lee, *supra* note 9.
[108] Resource Conservation and Recovery Act of 1976., 94 P.L. 580, 90 Stat. 2795 (October 21, 1976).
[109] *Id.*
[110] Resource Conservation and Recovery Act of 1976, *supra* note 108.
[111] *Id.*
[112] § 6901. Congressional findings, 42 USC § 6901 (Current through Public Law 116-252, approved December 22, 2020).

This Congressional finding concerning the RCRA clarified that although hazardous waste is federally regulated, individual states determine how to categorize other landfills.[113] Essentially, when it comes to non-hazardous landfills, states hold discretionary power setting their own environmental standards in regards to landfill operations.[114] This includes states deciphering if a landfill is hazardous or non- hazardous, siting, and construction.[115] If not managed properly due to state siting laws, which dictate the locations of landfills, landfills can have harmful effects on public health, leading to lung cancer and respiratory diseases.[116] Ergo, the way that a landfill is categorized ultimately dictates the level of federal regulation it may face, which is comparatively more regulated than a state's non-hazardous landfill.[117] This is partly the reason why some state regulated landfills can still harm EJ communities. If this does occur, other legal protections to advance environmental safety also include filing EPA Title VI administrative complaints.

F. EPA Title VI Administrative Complaints

Even as these legal protections are being chipped away, the internal procedures at EPA are also failing. While EPA OCR has significant procedures that are intended to protect vulnerable communities, in practice these procedures are not met. This in turn leads to significant adverse impacts on vulnerable communities.

As previously mentioned, the EPA OCR must adhere to the following administrative process for Title VI complaints.[118] A part of their process is to base their determination on disparate impact and overtly discriminatory regulations according to Title VI. Once a Title VI complaint is filed, the OCR must acknowledge the complaint within five days.[119] Afterward, the OCR must initiate the processing of the complaint procedure and within twenty days it must review, accept, reject, or refer it to the most relevant federal agency. If the complaint is accepted, the OCR needs to notify the complainant and recipient agency of their findings as well as recommend voluntary compliance.[120]

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[113] Lee, *supra* note *9*.
[114] § 6901. Congressional findings, *supra* note 112.
[115] *Id.*
[116] Andrada et al., *supra* note 11.
[117] *Id.*
[118] EPA, *supra* note 81.
[119] *Id.*
[120] EPA, *supra* note 81.

One of the most recent landfill siting administrative dispute was about the landfill practices of the Alabama Department of Environmental Management (ADEM).[121] The predominantly African-American and low-income residents who lived in close proximity to the landfill complained of air pollution, nausea, nosebleeds, and irritation of their throat due to coal ash waste transfer from Arrowhead Landfill.[122] Since 2013, residents continued to file complaints until the EPA investigated the Title VI complaint in 2018.[123] After reviewing the site and inspecting health hazards, the EPA found there was "insufficient evidence" for a Title VI violation and the EPA's nondiscrimination regulations.[124] The EPA ECRCO relied on air quality data that was taken miles away from the immediate landfill.[125] They stated that they had, "substantial discretion to determine the types of harms, on a case by case basis, that warrant investigatory resources."[126] The EPA stated that according to their monitoring, testing systems, and expert evaluation there was no indication that there was a prima facie violation of federal regulation. Based on facts of this case and finding no federal regulation violation under RCRA Subtitle D, they limited the scope of harms to assess.[127] Instead, their decision was premised on reliance of environmental law standards and limited scope of harms caused by ADEM's landfill. Since their evaluation took place miles away from the affected landfill site, the reliance of their investigation and ultimate decision could be at question. Furthermore, this also portrays that the methods of investigation to make their determination may not always be adequate in willing to assess the full range of environmental harms for every case.

The ADEM administrative complaint was first filed in 2003 and settled in 2017. This is not the only occurrence where the EPA's OCR did not meet its Title VI timeliness requirements in environmental justice complaints.[128] There was a similar complaint against the EPA involving landfill management in *Californians v. United States EPA (2018).*[129] Between 1992 and 2003, plaintiffs filed five administrative Title VI complaints with the

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[121] Engelman-Lado et al., *supra* note 2.

[122] *Id.*

[123] Engelman-Lado et al., *supra* note 2.

[124] EPA, *Closure of Administrative Complaint,* External Civil Rights Compliance Office, *EPA File No. 12R-13-R4, (*March 1, 2018).

[125] *Id.*

[126] EPA, *Closure of Administrative Complaint, supra* note 124.

[127] *Id.*

[128] Engelman-Lado et al., *supra* note 2.

[129] *Californians v. United States EPA,* 2018 U.S. Dist. LEXIS 56105 (United States District Court for the Northern District of California, Oakland Division March 30, 2018, Filed).

EPA.[130] The complaints alleged that state and local agencies' permitting hazardous landfill in minority communities had disproportionately affected their communities.[131] The United States District Court for the Northern District of California held that EPA failed to comply with the administrative guidelines and had the following holding:[132]

> [1]-The gravamen of plaintiffs' claims was that the Environmental Protection Agency (EPA) failed to issue mandatory preliminary findings within 180 days of accepting their respective complaints for investigation, as required by 40 C.F.R. § 7.115; plaintiffs alleged facts necessary to establish a procedural injury; [2]-Plaintiffs averred that the underlying permits had not properly been evaluated for compliance with Title VI and been allowed to remain in effect, to the detriment of plaintiffs and their constituents;..... [3]-The EPA had a mandatory duty to issue preliminary findings within 180 days after accepting a complaint for investigation, and the EPA failed to comply with that duty.[133]

Therefore, the administrative complaint process of the EPA OCR has lagged behind its timeline in other environmental justice cases even outside the scope of landfill management.[134] This presents a barrier to appropriately addressing instances of landfill public health harm and has been proven to be a patterned shortcoming of the administration among other state limitations.

II. The Barriers to Landfill Regulation Efficacy

A. The EPA OCR Administration

The other recourse for EJ populations and harmful landfill exposure is through the Title VI complaint process. As demonstrated in previous cases, the timeliness of these administrative hearings has been a hurdle to environmental justice and settling the harms of landfills.[135] A 2015 study found that the EPA's OCR has frequently failed to address Title VI complaints in a timely manner, deferring redress.[136] Over the course of 17 years, it has been found that cases have violated their timely standards.[137] The study found that

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[130] *Id.*
[131] *Californians v. United States EPA (*2018), *supra* note 129.
[132] *Id.*
[133] *Californians v. United States EPA (*2018), *supra* note 129.
[134] *Id.*
[135] Lee, *supra note* 9.
[136] *Id.*
[137] Lee, *supra note* 9.

out of 265 cases over that time period the OCR has "rejected 162 complaints without investigation, dismissed 52 upon investigation, referred 14 to other agencies, resolved 12 with voluntary or informal agreements, and accepted 13 for investigations."[138] The most prevalent reason a complaint was rejected (95 cases) was because the EPA states that the targets do not receive funding from the agency, which is required by law. Other complaints (62 cases) were too late for action since it fell outside the 180-day time limit, which the agency has the authority to waive. While others (52 cases) were disregarded because their claims were "insufficient", which meant that their description of alleged discriminatory acts was inadequate. Additionally, the study found that the Agency's 20-day regulation was consistently violated, taking the EPA an average of 254 days to take initial action on Title VI complaints, which by then 4% of the cases a part of the study were determined to be "moot" because of their own inaction.[139] In response, the EPA has since responded with proposing policy guidance that plans to provide better oversight over its administrative procedures and funding in September 2020.[140]

Until these procedure adherences improve, these administrative violations pose a barrier to landfill siting and public health hazards since it allows the possibility that the circumstances of state waste facilities could change, even though the public health harm is ongoing and worsens with longer exposures.[141] In the case that state waste facilities change, there is a chance the complaint is no longer redressable but have already harmed the public before the EPA could intervene. Therefore, the health hazard has a greater propensity to worsen with longer wait times to respond to Title VI claims. This is a barrier to correcting poor siting decisions before prolonged exposure causes irreversible harm.[142] In conclusion, the success of having a Title VI complaint addressed and resolved for EJ populations in regard to landfills and other environmental harms are limited by the patterned administrative violations of the EPA's OCR.[143] The limitations in landfill efficacy is also reflected at the state-level in terms of sustaining rights to sovereign immunity and the doctrine of the negative Constitution.

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[138] *Id.*

[139] Lee, *supra note* 9.

[140] EPA, *Improved EPA Oversight of Funding Recipients' Title VI Programs Could Prevent Discrimination,* Report No 20-E-0333, (2020).

[141] *Id.*

[142] Engelman-Lado et al., *supra* note 2.

[143] *Id.*

B. State-Level Limitations: Negative Constitution Doctrine, Sovereign Immunity and the State's Public Health Liability

State regulation of their own waste management as well as health initiatives is a right illuminated in the 10th Amendment of the United States Constitution, which contends that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[144] This constitutes the state's "police powers."[145] The state's police has encompassed "(1) promotion of public health, morals, or safety and well-being of the community, (2) enforce laws for general welfare, (3) balance private rights and public interest."[146] These powers were further realized in *Jacobson v. Massachusetts (1905).*[147] It held that the public health and safety of a state's citizens falls within their police power as long as the public health measure is of public health necessity, reasonable means, proportionate to the health risk, and has no harm to the individual.[148] Therefore, states hold a substantial amount of discretion in regard to their public health measures in addition to landfill management.

Despite the fact that federal regulations such as the RCRA exists, non-hazardous C&D municipal landfills that pose public health concerns are the state's responsibility in the hands of the state.[149] This represents part of the reason why there is unequal groundwater and leachate monitoring requirements, and location restrictions state by state.[150] Additionally, this also relates to why there are differential EJ policies that need not require EJ assessments as a part of their regional landfill siting decisions. Essentially, the disparities in landfill regulations in their siting processes across states can be attributed to the individual state's right to safeguarding their public health and safety.[151]

Nonetheless, at the state-level the duty to its citizen's "right to life" under the 14th Amendment of the Constitution is not absolute according to *Deshaney v. Winnebago County of*

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144 USCS Const. Amend. 10.

145 *Id.*

146 *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 1905 U.S. LEXIS 1232 (Supreme Court of the United States February 20, 1905).

147 *Id.*

148 *Jacobson v. Massachusetts (1905), supra* note 146.

149 § 6901. Congressional findings, *supra* note 112.

150 Clark et al., *supra* note 37.

151 EPA, *Environmental Justice in Your Community,* https://www.epa.gov/environmentaljustice/environmental-justice-your-community (December 2020).

Social Services (1989).[152] The Court ruled that, "Our cases have recognized that the Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[153] Therefore, this means that the 14th Amendment only provides for non-discrimination and does not create a new affirmative right to life that the state then has to provide for. The only exception to this holding is that "the government must provide humane confinement conditions for prisoners and it must protect a person if the states creates danger."[154] This ruling enforced the doctrine of the "negative Constitution" meaning that as long as states are not actively depriving the rights illustrated under the 14th Amendment, they have not violated their constitutional duty to protect the life of its citizens.[155] This relates to landfill siting and other potential environmental claims against the state, as in those instances plaintiffs seek remedies at the state-level oftentimes for their "inaction" to properly regulate public health concerns.[156] Therefore, when it typically comes to issues of poor landfill management and a constitutional "right to life" for environmental justice concerns, there would be a higher burden in proving the state's active and intended efforts in inadequate environmental protections. In this regard, the 'negative' duties to public health also translate in how much states are inclined to comprehensively approach landfill regulation.[157] An extension of the negative Constitution that poses a barrier to landfill protections for EJ populations is the doctrine of sovereign immunity.[158]

Sovereign immunity is the legal doctrine that the government cannot be sued without its consent and is attributed to the Eleventh Amendment of the Constitution.[159] Governments usually give consent through statute to certain types of claims. States can be sued in federal court for violations of federal law, specifically civil rights laws (§1983 claims) and perhaps other areas. Each state has a law that creates exceptions to sovereign immunity in the state's courts. Sovereign immunity exists at the state and federal level. Since suing the

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[152] *Deshaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, 1989 U.S. LEXIS 1039, 57 U.S.L.W. 4218 (Supreme Court of the United States February 22, 1989, Decided).

[153] *Id.*

[154] *Deshaney v. Winnebago County Dep't of Social Services (1998), supra* note 152.

[155] *Id.*

[156] *Deshaney v. Winnebago County Dep't of Social Services (1998), supra* note 152.

[157] David P. Currie, *Positive and Negative Constitutional Rights,* " 53 UNIV. OF CHIC. L. REV. 864 (1986).

[158] Vicki C. Jackson, *Suing The Federal Government: Sovereignty, Immunity And Judicial Independence,* 35 GEO. WASH. INT'L L. REV. 521-609 (2003).

[159] *Id.*

state for poor landfill management would fall within the jurisdiction of federal courts, the role of civil rights federal law is the most influential in the outcome in an environmental case. There are four exceptions to sovereign immunity that allow citizens to sue their own state: whether the actor was functioning in a proprietary fashion, operational action, the harm was due to the government's implementation, and if the action was justiciable under tort principles.[160] States hold sovereign immunity protections in order to limit the occurrences that citizens may choose to sue their own state.[161] However, Congress's passage of §1003 created an exception.[162]

> A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[163]

This makes for environmental justice claims under federal civil rights law as an exception to sovereign immunity. Therefore, this could hold a higher accountability by states to place proper health safeguards for a variety of environmental claims including landfill management, specifically for EJ communities. At the same time, the scope of this is limited by the "intentional discrimination" requirement of Title VI in *Sandoval*.[164] This is why alternative civil rights approaches can be better suited so that states have greater obligations to comply with and improve their state regulations to protect EJ populations.[165] Also, alternative approaches to landfill existence under the Landfill Outreach program has the viability to decrease the prevalence of landfills in the first place.

III. Solutions

A. Shifting to the Disparate Impact Burden, Revising Regulation, and The Landfill Methane Outreach Program

Since *Alexander's* ruling Title VI claims have only applied to proven practices of "intentional discrimination", it has not been as operable in resolving EJ issues through the court systems if the facts of the case do not sufficiently satisfy "intentional discrimination"

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[160] Jackson *supra* note 158.
[161] *Id.*
[162] Jackson, *supra* note 158.
[163] 42 U.S. Code § 2000d–7. Civil rights remedies equalization, WEST LAW.
[164] Jackson *supra* note 158.
[165] *Alexander v. Sandoval, supra* note 68.

requirements.[166] However, a solution to this would be to revise Title VI itself to specify that it encompasses disparate impact claims in addition to intentional discrimination claims. To protect EJ communities even more substantively, implementing Congressional comprehensive legislation such as the Environmental Justice Act of 2019 will expand EJ protections. This Act was introduced on July 23, 2019 by Cory Booker, but has not been progressed since. If this legislation was implemented, it would accomplish the following:

> (1) to require Federal agencies to address and eliminate the disproportionate environmental and human health impacts on populations of color, communities of color, indigenous communities, and low-income communities; (2) to ensure that all Federal agencies develop and enforce rules, regulations, guidance, standards, policies, plans, and practices that promote environmental justice; (3) to increase cooperation and require coordination among Federal agencies in achieving environmental justice; (4) to provide to communities of color, indigenous communities, and low-income communities meaningful access to public information and opportunities for participation in decision making affecting human health and the environment; (5) to mitigate the inequitable distribution of the burdens and benefits of Federal programs having significant impacts on human health and the environment; (6) to require consideration of cumulative impacts in permitting decisions (7) to clarify congressional intent to afford rights of action pursuant to certain statutes and common law claims; and (8) to allow a private right of action under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) to challenge discriminatory practices[167]

This Act would address all the pitfalls of current Congressional oversight, Title VI litigation, the accountability of federal agencies like the EPA, encourage more meaningful public participation and other concerns around human health for EJ populations. Moreover, the Biden administration's July 2020 plan toward environmental justice is also in line with similar objectives of the proposed 2019 Act. The plan includes placing EJ advocates in positions that reshape the goals of the EPA and other federal agencies.[168]

Another solution to account for the varying location restrictions of landfills to disadvantaged communities would be requiring a new third party landfill operator to pay for

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[166] *Alexander v. Sandoval, supra* note 68.

[167] Environmental Justice Act of 2019, S.2236, 116th Congress (2019-2020).

[168] John Cruden, Julius Redd, Stacey Halliday, *A Biden-Harris Take on Environmental Justice: What to Expect,* BEVERIDGE & DIAMOND PC, https://www.bdlaw.com/environmental-justice/publications/a-biden-harris-take-on-environmental-justice-what-to-expect/,(2020).

a science engineer to give the community advice when evaluating a new landfill site. This can also be done through federal legislation. Developing a new operator would ensure that there is an external expert to objectively assess the full range of potential landfill harms before any final landfill decisions are made. This would also address the fact that only 11 states currently mandate designated personnel to safeguard the potential of hazardous materials infiltrating non-hazardous facilities.[169] Therefore, an external operator would be able to assess potential harms holistically and objectively.

Some may argue that implementing this legislation may overwhelm the justice system and increase the lawsuits against the state and federal government for landfill mismanagement. In regard to amending Title VI to include disparate impact claims, some may also argue that it is an overreach of what Congress initially intended. Some of these sentiments can be found in Justice Alito's dissent in *Texas Dept of Housing and Community Affairs.*[170] The dissent was also joined by Thomas, Roberts, and Scalia. The dissent states their disagreement with the majority opinion that held that Title VII of the Civil Rights Act encompassed disparate impact claims as it applies to the Fair Housing Act. Alito stated in the dissent that the Court's precedents do not encompass disparate impact liability:

> The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.[171]

Alito's dissent also alludes to the concern that local governments and other private entities would bear more of a burden in ensuring that their housing practices do not have a disproportionate and disadvantageous unintentional impact on minority populations.[172] The same counterargument relates to states' landfill management, who would have a higher accountability toward their constituents with new federal legislation. Therefore, those against this solution would believe that it goes beyond the intentions of Title VI and its textual

[169] Clark et al., *supra* note 37

[170] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 135 S. Ct. 2507, 192 L. Ed. 2d 514, 2015 U.S. LEXIS 4249, 83 U.S.L.W. 4555, 25 Fla. L. Weekly Fed. S 441 (Supreme Court of the United States June 25, 2015, Decided).

[171] *Id.*

[172] T*ex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., supra* note 172.

meaning. However, since the EPA administrative complaint process has a history of ineffectiveness and it is remarkably difficult to completely overturn a Supreme Court precedent like *Alexander*, other legislative efforts should be considered. These efforts may include revising Title VI requirements or enacting new federal legislation as a feasible civil rights approach to a healthy living environment for EJ populations and the broader community. Also, interpreting landfill regulation in a civil rights lens defends against state or federal governments that may claim sovereign immunity from civil action.

Another possible solution would be to encourage greater Congressional oversight over the EPA and its failure to meet its administrative duties. The most influential mechanism Congress can shift the trajectory of abiding by their administrative rules is through funding.[173] Congress under the Administrative Procedure Act has the authority to set procedural law and limit the funding of federal agencies.[174] Therefore, Congress can use this power to draft legislation that would mandate 20-day decisions for the EPA and require monthly reporting on the EPA's progress. This would incentivize the EPA's OCR to respond to Title VI claims within their appropriate time constraints. Congress's funding powers also extend to states.[175] Through setting conditional grants, Congress can decide to make their funding to states reliant on adhering to safe landfill siting and management.[176] Therefore, conditional grants are another way to incentivize uniform state laws concerning proper landfill management and siting.

Some may argue that this would be an infringement of state's rights.[177] Opponents may say that individual states have different environmental climates and landscapes which is why landfill regulation should stay largely within their duties as a state. Some may go further to say that states and the federal government would have to incur higher fiscal costs to guarantee that even non-hazardous landfill sites are completely safe from the public in order to shield them from civil action. These higher costs may come in the form of implementing leachate protection at every landfill facility even if it is non-hazardous, paying for another expert operator, and limiting landfill locations so there is no risk to residential areas. Some

[173] Administrative Procedure Act (5 U.S.C. Subchapter II).
[174] *Id.*
[175] Administrative Procedure Act *supra* note 173.
[176] USCS Const. Art. I, § 9, Cl 7.
[177] USCS Const. Amend. X.

may also say that such regulations could hinder businesses in the state and the state's capacity to develop its infrastructure since C&D landfills are the most common type of landfill.[178]

However, there are incentives in improved landfill siting and operation standards that provide a benefit to the state as well in the form of social benefits. Improvements in landfill regulation mean less premature death, serious illnesses, and pollution.[179] Landfills can also be used as a renewable energy source, so decreasing the number of landfills around states to readily transform into an energy source is another way to lessen their environmental risk and benefit the community.[180] The EPA launched the voluntary Landfill Methane Outreach Program (LMOP) to encourage industries and waste officials to create renewable fuel for electricity, industrial heat, and vehicles out of municipal solid waste.[181] In addition to endorsers as partners, their other partners come from industry, energy, community, and the state. Currently, there are over 1,000 total partners across different states. Expanding the amount of these projects within states will lower the prevalence and harms of improper landfill management.[182] It would also in the long run be more cost effective than using fossil fuels.[183] This would also mean that it should not be as costly to standardize landfill regulations if states expanded their energy projects under the Landfill Methane Outreach Program. This program has been an option for states since 2000 and there are currently 550 operational projects across 48 states. However, each state varies in the number of projects in each state. There are also 480 candidates as projects. In its most recent report in 2018, it reduced methane emissions for hundreds of landfills while avoiding carbon emissions.[184] It has also assisted in 682 renewable energy projects over the course of 18 years and gained 6 more LMOP partners.[185] Therefore, refocusing landfill construction into this program will prove to not only be socially fruitful but cost effective. Despite opponents to the LMOP, revisions to Title VI, and enacting the Environmental Justice Act, these adjustments would improve health standards for EJ communities and the larger population.

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[178] Clark et al., *supra* note 37.

[179] Environmental Protection Agency, *Landfill Methane Outreach Program, https://www.epa.gov/lmop/benefits-landfill-gas-energy-projects* (last visited January 2020).

[180] *Id.*

[181] Environmental Protection Agency, *supra* note 179.

[182] *Id.*

[183] Environmental Protection Agency, *supra* note 179.

[184] *Id.*

[185] Environmental Protection Agency, *supra* note 179.

Conclusion

EJ communities have had a history of a higher likelihood of adverse public health exposure due to landfill management and siting. These communities face several barriers on the administrative level, state-level, and court precedents. However, revising Title VI and enacting legislation for EJ communities will warrant the protections that are needed. Also considering expanding programs such as the LMOP will lessen the public harm that landfills present. These approaches would decrease the prominent harms to the community and empower the right to a healthy living environment through complete legal protections. Essentially, these improvements have the capacity of bringing the United States closer to validating that the quality of one's life and environment is just as integral as the right to life and liberty itself.

Police Brutality, Liability, and The Rule of Law: How the Qualified Immunity Doctrine Undermines Constitutional Protections in the United States

Victoria H. Robertson

Introduction

On May 25th, 2020, Officer Derek Chauvin murdered George Perry Floyd Jr. Officer Chauvin, a police officer at the Minneapolis Police Department, knelt on Floyd's neck for 8 minutes and 46 seconds while Floyd lay face down, handcuffed.[1] Floyd expressed fear he was going to die, repeatedly stating "I can't breathe," and after several minutes was silent and motionless.[2] When Chauvin finally lifted his knee from Floyd's neck at the request of medics at 8:28pm, Floyd was dead.[3]

The death of George Floyd sparked worldwide protests against police brutality and against the lack of accountability for violent officers. Many of these protests called for police reform, particularly the abolition of qualified immunity.[4] Qualified immunity is a legal doctrine that grants government officials, operating within their role, immunity from civil lawsuits unless the plaintiff proves that they violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[5] The concerns that the officers involved in Floyd's murder, especially Officer Chauvin, will not face liability for their actions are not unfounded. Qualified immunity has been used as a shield to absolve police officers of personal liability in instances of brutality before--for example, in the 2013 death of Wayne Jones.[6]

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[1] *George Floyd: What happened in the final moments of his life,* BBC News (July 16, 2020). https://www.bbc.com/news/world-us-canada-52861726.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[6] *Estate of Wayne A. Jones v. City of Martinsburg,* WV, No. 18-2142, (4th Cir. 2020).

Wayne Jones was a 50-year-old man who, while walking at night in Martinsville, West Virginia, was approached by police officers Paul Lehman, Daniel North, William Staubs, Eric Neely, and Erik Herb.[7] After an altercation, Jones was shot in the back 22 times in two seconds.[8] When the civil rights lawsuit representing Jones' murder reached the 4th Circuit in 2018, District Judge Gina Groh found that the officers involved were entitled to protection under the doctrine qualified immunity.[9] The question before the court was "whether the officers would have understood at the time that their actions leading to Jones's death constituted an illegal use of excessive force."[10] Judge Groh held that:

> . . . it was not clearly established that an officer would violate an individual's Fourth Amendment right to be free from excessive force by shooting a person who: (1) committed a non-violent misdemeanor; (2) resisted arrest and fled from officers; (3) was armed with a knife and attempted to stab an officer;[11] and (4) was lying on the ground motionless at the time the shots were fired. Therefore, the officers are entitled to qualified immunity and summary judgment must be granted.[12]

This judgment is one of the countless examples of qualified immunity preventing government employees from facing personal liability for violating a person's federal and constitutional rights. In light of the recent deaths of men like George Floyd and Wayne Jones, and the disturbing legacy of the qualified immunity doctrine being used to shield police officers from personal liability, there exists an ethical and legal obligation to eliminate this doctrine as a method of defense for police officers. The federal government should eliminate qualified immunity for police officers in legislation modelled after Colorado's 2020 Enhance Law Enforcement Integrity Act. No citizen is above the law, including police officers. In order to ensure that the rule of law is upheld, this change must be achieved.

This article argues that federal legislation should require personal liability for police officers who commit Constitutional violations, and that the abolition of qualified immunity is required to achieve this. This article will examine the historical context of the qualified immunity doctrine, its use in modern jurisprudence, and its impact on the rule of law in the United States.

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[7] *Id.*

[8] Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests,* N.Y. Times, https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html (last updated July 20, 2020).

[9] *City of Martinsburg,* WV, No. 18-2142.

[10] Jordan Smith, "This Has to Stop": Court Rejects Qualified Immunity for Officers Who Shot Wayne Jones The Intercept (June 12, 2020), https://theintercept.com/2020/06/12/qualified-immunity-police-wayne-jones/.

[11] It should be noted that one officer sustained a superficial wound from Jones' knife, though it is unclear whether it was before or after Jones became unresponsive.

[12] *City of Martinsburg,* WV, No. 18-2142.

Moreover, it will outline the model for the abolition of qualified immunity on the federal level and draw from Coloradan state reforms to provide a detailed example of what actions should be taken by the federal government in order to rectify the detrimental effects of qualified immunity.

I. How Original Legislative Protection of Constitutional Rights Did Not Envision Qualified Immunity

In the United States, a citizen has the ability to file a civil lawsuit against government officials if the citizen has been deprived of their constitutional rights. This was first established in the Enforcement Act of 1871, also known as the "Klu Klux Klan Act."[13] Signed into law by President Ulysses S Grant, the law aimed to protect Black Americans from violence in the South and allowed for those deprived of their constitutional rights by state officials acting "under color of law" to sue in federal court.[14] Necessary to the Enforcement Act is the assumption that state officials acting under color of law are in fact personally liable for these deprivations, without undue immunities or protections.[15] The Act's original intent was to address KKK members and other white supremacists who attacked Fifteenth Amendment suffrage rights afforded to Black Americans.[16] Several of the Act's provisions continue to exist in contemporary law, the most important of which is Title 42 of the United States Code Section 1983 (42 U.S.C. § 1983): civil action for the deprivation of rights.[17] 42 U.S.C. § 1983 now reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States [...] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injure. . .[18]

According to the United States legal code, any person who causes a citizen to be deprived of their constitutional rights is liable for that deprivation, and may face civil litigation for that liability.[19] The application of this law now faces challenges, however, when considering

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[13] 7 Stat. 13.

[14] United States Senate Historical Office, *The Enforcement Acts of 1871,* https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (Accessed April 12, 2021).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] 42 U.S.C. §1983.

[19] *Id.*

the 1967 doctrine of qualified immunity, a doctrinal protection that did not exist when the Enforcement Act, the basis for § 1983 lawsuits, was written.[20]

Qualified immunity, which "[excuses federal officers] from liability for acting under a statue that he reasonably believed to be valid but was later held unconstitutional, on its face or applied,"[21] is antithetical to the legislative protections envisioned by President Grant in the Enforcement Act. Not only is it antithetical to these protections, but it actively undermines them.

A. The Establishment of Qualified Immunity

On September 13th, 1961, 15 Episcopal priests were arrested in a coffee shop in Jackson, Mississippi.[22] The priests were part of the Episcopal Society for Cultural and Racial Unity and had taken part in the Mississippi Freedom Rides, a movement that challenged illegal segregation in the American South by riding segregated interstate buses as a racially mixed group.[23] When members of the group attempted to use a white-only washroom in the coffee shop, they were stopped and asked to leave by Officers David Allison Nichols and Joseph David Griffith.[24] The priests refused to leave, and as a result, Captain JL Ray arrested all 15 for breach of peace.[25] The priests were brought to trial, and all 15 were found guilty.[26]

After their four-month sentence, the priests sought damages in the Jackson District Court and alleged that the police and the local judge had violated 42 U.S.C. § 1983 by arresting and imprisoning them for exercising their civil rights.[27] When the priests lost that lawsuit, the case went to the Fifth Circuit Court of Appeals. Once the case, *Pierson v. Ray*, reached the Supreme Court, the Court held that although police officers are not granted absolute immunity from personal liability while acting as government officials,[28] they may be "excused from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."[29]

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[20] United States Senate Historical Office, *supra* note 13.
[21] *Pearson v. Ray*, 386 U.S. 547, 555 (1967).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Ray*, 386 U.S. 547 at 555.
[29] *Id.*

Recalling the language of § 1983, that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects [...] any citizen of the United States [...] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured …"[30], it is evident that qualified immunity directly opposes the intent of this statute. If every person who subjects any United States citizen to the deprivation of any rights secured by the Constitution shall be liable to the party injured, Captain JL Ray should have been held personally liable for the deprivation of Pearson's civil rights. However, due to the court's ruling, § 1983 is rendered irrelevant in this case. Here lay the roots of the justification that police ignorance of the Constitution is excused so long as their actions are under a statue that is garnered "reasonably valid."

B. How Qualified Immunity Impacts the Effectiveness of §1983 Civil Lawsuits

The qualified immunity doctrine undermines the effectiveness of § 1983 lawsuits and makes it unreasonably difficult to prove that a person's constitutional rights were clearly established at the time of the incident. § 1983 lawsuits exist to protect U.S. citizens from deprivation and violation of their constitutional rights, and qualified immunity allows police officers to be easily absolved of any liability. This renders the existence of § 1983 useless when it comes to justice in incidents of police brutality and misconduct.

The technical definition of qualified immunity was cemented in 1982, with the case of *Harlow v. Fitzgerald*. Arthur Fitzgerald, an employee of the Office of the Secretary of the Air Force, filed a lawsuit against government officials claiming that he lost his job because of whistleblower testimony he made before Congress in 1969.[31] The Supreme Court ruled that although White House aides were not entitled to absolute immunity like Nixon, government officials such as Bryce Harlow are generally "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[32] According to the Court, a government officer can only be held liable if an appeals court has already ruled that another officer has violated the same right by engaging in the same conduct.[33] This conduct must also have been executed under the

[30] 42 U.S.C. §1983.
[31] *Fitzgerald*, 457 U.S. 731.
[32] *Fitzgerald*, 457 U.S. 800 at 818.
[33] *Id.*

same circumstances.[34] Only by meeting those difficult criteria is the right that was violated then considered "clearly established," and these criteria would prove to undermine the protection of United States citizens' constitutional rights as outlined in § 1983.[35] The technical definition of qualified immunity has therefore proved, over time, to present an unreasonably difficult criteria to fulfill.

One instance of such unreasonably burdensome criteria undermining constitutional protections is the case of *McCoy* v. *Alamu* (2020). Prince McCoy, a Texas Department of Criminal Justice (TDCJ) prisoner, filed a 42 U.S.C. § 1983 federal civil rights lawsuit against Alamu, a guard, and alleged that "Alamu pepper-sprayed him in the face without provocation," because Alamu had become aggravated by a separate inmate throwing water on him.[36] Alamu alleged that McCoy, who was unarmed, threw an "unknown weapon" at Alamu (documents indicated this was a piece of rolled toilet paper), and that Alamu acted in self-defense and used the pepper spray out of fear that "his life was in danger."[37]

When the case reached the Fifth Circuit Court of Appeals in 2020, the court held that although a jury could find that excessive force was used, they nevertheless granted Alamu qualified immunity.[38] Judge Costa best explained the overarching issue in his dissent that read, "Despite recognizing that an unprovoked assault violates the Constitution, the majority grants the guard immunity because we have not decided a similar case involving pepper spray."[39] Despite Fifth Circuit precedent that a prison guard may not strike an inmate without justified reasoning[40] or taze a nonthreatening arrestee at a traffic stop[41], because a case with pepper spray had yet to be heard, Alamu was not held liable for violating Prince McCoy's right against unprovoked assault. The horrors of qualified immunity become all too clear upon individual examination of the doctrine's application. This doctrine effectively undermines the existence of § 1983 lawsuits and bodes poorly for the protection of constitutional rights that § 1983 was intended to represent.

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[34] *Id.*

[35] 42 U.S.C. §1983.

[36] Fifth Circuit Upholds Qualified Immunity for Guard Pepper-Spraying Prisoner Without Provocation, Prison Legal News (April 2, 2020), https://www.prisonlegalnews.org/news/2020/apr/2/fifth-circuit-upholds-qualified-immunity-guard-pepper-spraying-prisoner-without-provocation/.

[37] *McCoy v. Alamu*, 950 F.3d 226, 235 (5th Cir. 2020).

[38] *Id.*

[39] *Id.*

[40] *Cowart v. Erwin*, 837 F.3d 444 (5th Cir. 2016).

[41] *Newman v. Guedry*, et al, No. 11-41192 (5th Cir. 2012).

C. Precedent for the Personal Liability of Government Officials

There is precedent in which police officers and government officials have been held liable for their actions, and the federal government should extend such precedent in order to mandate personal liability for police officers that violate constitutional rights. In *Monroe v. Pape* (1961), 13 Chicago police officers entered the Monroe family residence without a warrant and searched the Monroe home.[42] When Mr. Monroe was taken to the local police station and interrogated about a recent murder case,[43] he was deprived of his Sixth amendment right to request council[44] during his interrogation, though he was not ultimately charged.[45] The police had not acted under the authority of a search warrant or an arrest warrant when they carried out the raid.[46] When the case reached the Supreme Court, it held that, "Every person who […] deprives someone of the rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…"[47] In this ruling, police officers were to be held personally liable for the deprivation of Mr. Monroe's Constitutional rights because they were acting "under the color of law" (i.e., acting in official capacity for the municipal government).[48]

Police officers have been held liable for violating the constitutionally protected rights of their fellow citizens, yet qualified immunity is a doctrine that disrupts police accountability, and it disrupts the universal application of the rule of law in the United States by providing an undue shield to those officers. The federal government must, in order to ensure that all citizens' constitutional rights are protected equitably under the law, extend this precedent in legislation that abolishes the use of qualified immunity.

D. The Intended Benefits of Qualified Immunity

One may wonder why the qualified immunity doctrine is still in use and what benefits are present in this unjust practice.

The first intended benefit of qualified immunity is that it protects police officers from facing liability when making "life or death" decisions and prevents fearful hesitation when

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[42] *Monroe v. Pape*, 365 U.S. 167 (1961).
[43] *Id.*
[44] U.S. Const. amend. VI, § 2.
[45] *Pape*, 365 U.S. 167.
[46] *Id.*
[47] *Id.*
[48] *Id.*

making a split-second decision that would later prove to be unconstitutional.[49] On its face, this benefit seems logical: in high pressure situations, where a moment's action can be the difference between life and death, it would seem unwise to provide a cause for hesitation on the part of officers, especially regarding the fear of litigation. However, this concern is not addressed in the qualified immunity doctrine, as the "reasonableness test" established protection against this concern in 1989 in the case of *Graham v. Connor*.[50] Officer M.S. Connor pulled Dethorne Graham over in his car for an investigative stop and during the encounter, Graham resisted arrest and subsequently suffered a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.[51] Graham filed a 42 U.S.C. § 1983 lawsuit against Officer Connor, and alleged that the officer's use of force was excessive and violated Graham's Fourth Amendment right to protection against unreasonable searches.[52] In the opinion of the court, the majority held that:

> As in other Fourth Amendment contexts [...] the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. [...] The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[53]

The Supreme Court's ruling in *Graham v. Connor* case sets an "objective reasonableness" standard for claims of excessive force, establishing the precedent that courts cannot second guess decisions made by police officers on-the-spot.

This standard is a protection that exists for police officers outside the bounds of the qualified immunity doctrine and would continue to exist beyond the abolition of qualified immunity as a protection for police officers and decisions they might make while on duty.

An additional intended benefit of the qualified immunity doctrine is that it supposedly protects police officers from the time and expense of litigation by dismissing so-called frivolous lawsuits before they reach trial, saving taxpayer dollars.[54] However, qualified immunity does not implement this supposed fiscal efficiency. Advocates of qualified immunity purport that as government employees, police officers' salaries are paid with tax dollars that must not be wasted

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[49] *Fitzgerald*, 457 U.S. 800 at 818.
[50] *Graham v. Connor,* 490 U.S. 386 (1989).
[51] *Id.*
[52] *Id.*
[53] *Id* at 490.
[54] Joanna C. Schwartz, *How Qualified Immunity Fails,* 127, Yale L.J. , 1, (2018), https://www.yalelawjournal.org/article/how-qualified-immunity-fails

on frivolous lawsuits and time-intensive litigation. However, qualified immunity does not deliver this benefit.[55] Even when defendants successfully have a claim dismissed on the basis of qualified immunity, in the vast majority of cases, this only occurs after the discovery of evidence, the longest and most costly stage of litigation.[56] In a 2018 Yale Law Journal study by Joanna Schwartz, "Defendants raised qualified immunity in motions to dismiss (motions made before the discovery stage) in 13.9% of the cases in which they could raise the defense."[57] These motions were less frequently granted: courts "granted motions to dismiss in whole or part on qualified immunity grounds only 13.6% of the time."[58] Moreover, when Alexander Reinert of the Stanford Law Review studied the dockets in *Bivens* actions (constitutional cases brought against government officials) he found that grants of qualified immunity "led to just 2% of case dismissals over a three-year period."[59] It is clear that qualified immunity is not an effective tool to ensure that money is not wasted on "frivolous" litigation. While finding ways to efficiently save taxpayer money is important, qualified immunity does not present the fiscal efficiency that supporters of the doctrine assert it does. Therefore, the argument that qualified immunity provides a significant benefit by preventing the wastage of taxpayer funds on frivolous lawsuits is proven false by the data presented above.

II. The Contemporary Effects of Qualified Immunity

A. How Qualified Immunity Jeopardizes Liberal Democratic Principles

Qualified immunity threatens the rule of law in the United States. The democratic principle that *no person* is above the law in a free and democratic society is jeopardized when certain individuals are absolved of their personal liability after violating the constitutionally protected rights of an American. Private citizens are subject to the legal aphorism that "ignorance of the law is no excuse."[60] One should expect law enforcement, agents of an institution charged with knowing and enforcing the law, to be held to a higher standard of

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev.809, 845 (2010).
[60] *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015).

knowledge and behavior than private citizens. However, they are held to a far lower standard.[61] Ignorance of the law should not be an excuse to dodge liability, especially for police officers. This inequality of standard has tragically been shown in the cases previously presented in this article: When officers Paul Lehman, Daniel North, William Staubs, Eric Neely, and Erik Herb killed Wayne Jones, they were granted immunity from the law not afforded to any private citizens.[62] When Mr. Alamu assaulted Prince McCoy with pepper spray, he was granted immunity from the law not afforded to any private citizen.[63] When Officer Brad Bracey ordered a K-9 police dog to attack an already surrendering Alexander Baxter, he was granted immunity from the law not afforded to any private citizen.[64] When Trooper Chadrin Mullenix killed Israel Lejia Jr., he was granted immunity from the law not afforded to any private citizen.[65] When Officer Andrew Kisela shot Amy Hughes, he was granted immunity from the law not afforded to any private citizen.[66]

Every American must act in accordance with the Constitution of the United States, especially those who have sworn an oath to protect and serve American citizens. The United States prides itself on as a free and democratic society, and steps must be taken to ensure that no citizen is above the law. Qualified immunity is a flagrant violation of the rule of law in the United States, and is diametrically opposed to the principles of the founding of the United States. Moreover, the perception of fair accountability when it comes to the actions of police is essential to building a more productive society. Considering the voice of citizens and maintaining an awareness that citizens' judgements about fairness and accountability can "reduce citizen disrespect and citizen noncompliance,"[67] making improved accountability for police officers' wrongdoings an incentive for the government, as it would actually benefit the interactions of government officials and citizens. In fact, "procedural justice is an important component of individuals' judgements about whether to comply with legal rules and authorities,"[68] therefore, it is essential that the rule of law has a stronger presence when it comes

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[61] Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Institute, https://www.cato.org/publications/policy-analysis/qualified-immunity-legal-practical-moral-failure#null (last visited Jan 4, 2021).

[62] *City of Martinsburg*, WV, No. 18-2142.

[63] *Alamu*, 950 F.3d 226 at 235.

[64] *Alexander Baxter v. Brad Bracey*, No. 18-5102 (6th Cir. 2018).

[65] *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 205 (2015).

[66] *Id.*

[67] Ramona-Gabriela Paraschiv, *The Importance of Procedural Justice in Shaping Individuals' Perceptions of the Legal System*, 4 Geopolitics, History, and International Relations 162–167 (2012).

[68] *Id.*

to police liability, because improving the perception of justice in the legal system may improve the citizenry's likelihood of abiding by the law as a whole.

B. How Qualified Immunity Imposes Unreasonable Criteria and Unduly Absolves Officers of Personal Liability

Under the qualified immunity doctrine, a right can be proved to be violated if the right meets the criteria of being "clearly established." The criteria that the right violated by an officer must have been "clearly established" at the time of the incident has a narrow and rigid scope. A court will find that a right was clearly established only if there was a prior case that found that the same constitutional right was violated, by specifically engaging in the same conduct, under the same circumstances.[69] This prevents individuals from receiving compensation for damages incurred from unconstitutional actions by police officers, and ultimately allows for the offending officer to avoid liability for those actions. As previously referenced, this lack of accountability not only negatively impacts the democratic principle of the rule of law, but could very well impact the American citizenry's behavior and attitude regarding the policing and justice system.[70] In a 42 U.S.C. § 1983 case, the plaintiff must show that not only were their rights violated, but that the right was "clearly established."[71]

In *Baxter v. Bracey* (2018), the Sixth Circuit Court of Appeals granted qualified immunity to officers Brad Bracey and Spencer Harris who released a police dog on burglary suspect Alexander Baxter, who sat on the ground and surrendered with his hands in the air.[72] The court held that police had unknowingly violated Baxter's right to protection from excessive force, and although an earlier case had established that the use of an attack dog against a suspect who was not fleeing was an excessive use of force, the court distinguished that case because the dog in Baxter's case had more training and police had warned Baxter they might use the dog before Baxter surrendered.[73] Additionally, in the opinion of the court, Circuit Judge John Nalbandian wrote that "[Because] Baxter does not point us to any case law suggesting that raising his hands [...] is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances [, the canine apprehension has not been clearly established as an unlawful search

[69] *Alamu*, 950 F.3d 226 at 235.
[70] Ramona-Gabriela Paraschiv, *supra* note 66.
[71] *District of Columbia v. Wesby,* 138 S. Ct. 577,589 (2018).
[72] *Brad Bracey*, No. 18-5102.
[73] *Id.*

and seizure]."[74] Furthermore, Judge Nalbandian wrote that "If it is not clearly established that Harris used excessive force in apprehending Baxter, it cannot be that Bracey observed or had reason to know that excessive force would be used."[75] Essentially, Judge Nalbandian's justification for granting qualified immunity was since there was no previous case law that established the directing of a dog to attack a surrendering suspect who specifically had their hands up, Baxter's Fourth Amendment right to the protection against unreasonable searches and seizures had not been clearly established.[76] This is an illuminating example that a court will generally be able to find a minute differentiation in case law to grant qualified immunity, even when it is clear that the incident that transpired caused an American damage in the violation of their constitutional rights.

C. The Real Consequences of Qualified Immunity

By condoning the liberal usage of deadly force without the risk of personal liability, the qualified immunity doctrine essentially encourages the use of deadly force by police officers by providing substantial protection in the aftermath of violent altercations that end in the death of a civilian. In *Mullenix v. Luna* (2015), officers in the Tulia, Texas Police Department engaged Israel Leija Jr. in a high-speed car pursuit.[77] Leija made two phone calls to the police dispatcher stating that he had a gun, and that he would shoot officers if they did not stop.[78] The dispatcher relayed these calls to pursuing officers, as well as a report that Leija may have been intoxicated.[79] Texas Department of Public Safety Trooper Chadrin Mullenix stopped on an overpass above the freeway on which Leija was driving. Mullenix fired six shots in the direction of Leija's vehicle.[80] Four of those shots struck and killed Leija.[81] The Supreme Court found that Mullenix was entitled to qualified immunity because there wasn't a clearly established right that prohibited his conduct, and that his actions were "in the interest of public safety."[82] In the opinion of the court written by Justice Antonin Scalia, because Mullenix intended only to stop Leija's car by

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Luna*, 577 U.S. 7.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

destroying its engine, the gunshots were not "deadly force" because they were not "applied with the object of harming the body of the felon."[83]

However, one must remember that those shots did harm and ultimately kill Leija. In Justice Sonya Sotomayor's dissent, she contended that Mullenix should not be subjected to qualified immunity and wrote that "by sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."[84] Justice Sotomayor is correct in her dissenting opinion. By granting Mullenix qualified immunity, the justice system has effectively greenlit a "shoot first, think later" approach, which in this case resulted in the use of deadly force against an individual.

In *Kisela v. Hughes* (2018), Tucson, Arizona police officer Andrew Kisela shot Amy Hughes after responding to a call of a woman who was acting erratically with a knife.[85] Hughes filed a 42 U.S.C. § 1983 lawsuit, and claimed excessive force was used in violation of her Fourth Amendment protections.[86] Even though there was a chain link fence, Hughes held a knife and approached police officers. Because she didn't immediately drop the knife, the Supreme Court held that a police officer could not have foreseen shooting her as an excessive use of force.[87] The Court added that Hughes' Fourth amendment rights were not clearly defined in this situation, and went on to state that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[88] Due to the qualified immunity doctrine and its consequential burden of precedent specificity, Officer Kisela was absolved of any personal liability when he/she violated Amy Hughes' constitutional right to protection from the use of unreasonable force.[89]

In Justice Sotomayor's dissent -- joined by Justice Ruth Bader Ginsburg -- she wrote that "it is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[90] Justice Sotomayor reached a telling conclusion in her dissent: this is not just the second example of qualified immunity as an

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[83] Mullenix, slip op. at 1-2 (Scalia, J., concurring in judgment).
[84] *Id* at 7 (Sotomayor, J., dissenting).
[85] *Kisela v. Hughes,* 584 U. S. (2018).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

instrument of encouragement for the use of excessive and deadly force, but it is evidence of a pattern in the policing and justice systems that must be stopped.

III. A Way Forward

A. Federal Police Reform & The Coloradan Model

The federal government must abolish qualified immunity for police officers through the passing of legislation modelled on Colorado's 2020 Enhance Law Enforcement Integrity Act, which will eliminate qualified immunity as a defense from liability in lawsuits for deprivation of rights (42 U.S.C. § 1983 lawsuits).[91]

The Colorado reform, passed in the 2020 Enhance Law Enforcement Integrity Act (SB20-217), affirms that starting on September 1, 2020, police officers will be able to be sued, they can no longer claim "qualified immunity" from civil damages if they knowingly violate the law, and they could personally be liable in penalties stemming from a lawsuit.[92] SB20-217 applies to all local law enforcement officers, sheriff's deputies, and Colorado State Patrol officers. This bill creates a new "civil action for deprivation of rights," which will allow Coloradans to sue officers for damages in state court, if those officers violate the Colorado Constitution's Bill of Rights or "fail to intervene" when those rights are violated.[93]

Historically, there have been two ways a victim of excessive force could pursue claims in court: a "tort claim under Colorado law alleging negligence, assault, battery, etc.; and a federal civil rights claim pursuant to 42 U.S.C. § 1983 alleging excessive force in violation of the Fourth Amendment."[94] Until the passing of SB20-217, cases against officers were often defended on the basis of qualified immunity.[95] Upon the installment of SB20-217, a claimant can now bring a claim and allege that their rights were violated under the Colorado Bill of Rights, which closely mimics the protections afforded by the Fourth Amendment of the U.S. Constitution.[96] Most significantly, SB20-217 provides that qualified immunity is not a defense to state tort claims.[97] The predicted effect of SB20-217 on Colorado state officers regarding financial liability is "not

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[91] Enhance Law Enforcement Integrity Act, CO State Senate. §3, 2b (2020).

[92] *Id.*

[93] *Id.*

[94] CIRSA General Counsel's Office, *Law Enforcement Liability Alert,* CIRSA, 2, https://www.cirsa.org/wp-content/uploads/2020/06/Liability-Alert_Law-Enforcement.pdf

[95] *Id.*

[96] *Id.*

[97] *Id.*

a dramatic change in most circumstances."[98] SB20-217 eliminates any limitations on a plaintiff's ability to recover damages and attorney fees.[99] Cities and towns will be required to indemnify an officer for any settlement or judgment, unless the officer was criminally convicted for the conduct giving rise to the claim, or unless the employer determines that the officer did not "act upon good faith and reasonable belief that the action was lawful."[100] Under the latter scenario, the officer will be responsible to pay a portion of the settlement or judgment themselves, but if the officer is unable to do so, the city or town will be required to pay the full amount.[101]

The abolition of qualified immunity via SB20-217 will not change the standard of review applied by courts when reviewing claims made in civil suits. Claims alleging excessive force will continue to be assessed under the "objective reasonableness" standard set out by *Graham* v. *Connor* (1989).[102] Given the similarities between Article II of the Colorado Constitution and the Fourth Amendment, it is "anticipated that the courts will apply this same standard of review, but no one will know for sure until the courts start to interpret the new law."[103] They have not faced a case as of the publication of this article.[104] These are not only appropriate but highly necessary reforms that the federal government must make nationwide.

B. Counter Arguments

There are counterarguments to the abolition of qualified immunity. The first argument is that qualified immunity is necessary so police will not hesitate when they must make split-second, life-or-death decisions. As stated in Part II of this article, this is a non-issue that is not threatened by the abolition of the qualified immunity doctrine. Our underlying legal standards for determining whether a constitutional violation occurred in the first place are already "highly deferential" to on-the-spot police decision-making,[105] because of the existence of the Supreme Court's *Graham v. Connor* (1989) ruling establishing an "objective reasonableness" standard for excessive force claims, which makes clear that courts cannot second guess on-the-spot policing decisions.[106] This is clearly stated in the Chief Justice

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Jay Schweikert, *supra* note 60.
[106] *Graham v. Connor* 490 U.S. 386 (1989).

William Rehnquist's opinion for the case: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation."[107]

The second argument against abolition of qualified immunity is that eliminating qualified immunity would "negatively impact the recruitment and retention of police officers,"[108] because they would fear being sued. To begin with, it is not easy to demonstrate that a police officer violated one's constitutional rights. The history of United States Fourth Amendment jurisprudence incorporates "a great deal of deference to police decision-making,"[109] and officers who genuinely make reasonable decisions about arrests and use of force are already protected from being sued. Police officers are "nearly always indemnified for any settlements or judgments against them, meaning that their municipal employers, not the officers themselves, actually end up paying."[110] Joanna Schwartz, a UCLA law professor, found in her 2014 article Police Indemnification that, in the 5-year period from 2006 to 2011, "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement."[111]

Conclusion

The notion that qualified immunity is an undue shield given to police officers who violate the Constitution is not solely held by the author of this article. On March 25th, 2021, the New York City Council passed legislation with the intention of "reining in police misconduct by making it far easier to sue officers for conducting illegal searches or using excessive force."[112] The legislation introduces a local right to the "protection against unreasonable searches and use of excessive force," and mandates that police officers are unable to use qualified immunity as a defense against these claims.[113] The reason this legislation was introduced in the first place, according to bill sponsor and Councilman Stephen Levin, was so that "the police can't walk into

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[107] *Id.*
[108] Jay Schweikert, *supra* note 60.
[109] *Id.*
[110] *Id.*
[111] Joanna C Schwartz, *supra* note 53.
[112] Jeffery C Mays and Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct,* The New York Times, https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html (last visited April 2, 2021)
[113] *Id.*

the courtroom and say, 'The plaintiff has no right to bring me here because I am immune.'"[114] Councilman Levin understands the need for the abolition of qualified immunity so as to ensure that the rule of law continues to be upheld and that police officers face liability when violating a citizen's constitutional rights, rather than being given problematic and nonsensical immunity. Moreover, the Montana Supreme Court rejected the idea of adopting qualified immunity, declaring in a 2002 opinion in the case of *Dorwart v. Caraway* that it would be "inconsistent with the constitutional requirement that courts of justice afford a speedy remedy for those claims recognized by law for injury of person, property or character."[115] This notion must be reflected at the federal level, in order to demonstrate that the United States is a nation that values not only the law, but democratic principles like the rule of law that are the basis of the existence of the republic. Moreover, the qualified immunity doctrine undermines the statute created to protect the Constitutional rights of American citizens. Its history must not be lost on us: the history of 42 U.S.C. § 1983 comes from legislation that was created to protect Black Americans from the deprivation of their Constitutionally guaranteed suffrage rights at the hands of the Klu Klux Klan, a domestic terrorist group.[116] Qualified immunity is not only the antithesis of the spirit of 42 U.S.C. § 1983 lawsuits, but it is a real and present danger to any person who will in the future bring a 42 U.S.C. § 1983 lawsuit against a police officer, seeking justice for the deprivation of their constitutional rights.

The purported benefits of qualified immunity are demonstrably nonexistent. Qualified immunity is not the reason that police officers are not prosecuted for split-second decisions made in good faith to ensure the safety of others. The "reasonableness test" established decades ago in the 1989 *Graham v. Connor*[117] case establishes that, and its separation from the qualified immunity doctrine ensures it will outlast the abolition of qualified immunity. Moreover, the preservation of qualified immunity does not prevent so-called frivolous lawsuits from reaching the courts and racking up expenses for police officers as a result of litigation. Cases in which qualified immunity is the basis for dismissal are largely dismissed after the discovery of evidence, the longest and most expensive stage of litigation, rendering this purported benefit factually inaccurate. Additionally, previously cited research by Joanna Schwartz indicates that nearly

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[114] *Id.*
[115] *Dorwart v. Caraway*, 312 Mont. 1, 2002 MT 240, 58 P.3d 128 (Mont. 2002)
[116] United States Senate Historical Office, *supra* note 13.
[117] *Connor,* 490 U.S. 386.

100% of all financial rewards given to plaintiffs were paid by governments, whether municipal, state, or federal.[118]

Qualified immunity must be abolished for police officers, following the model of the state of Colorado's SB20-217 where police officers and state troopers cannot use qualified immunity to absolve themselves of personal liability. Because the Colorado state courts have not been presented with an overwhelming number of civil lawsuits regarding police brutality or misconduct, it is impossible to determine the practical effect of SB20-217.[119] However, expanding police officers' vulnerability to liability for enshrined rights that they violate is a step in the right direction to combat further acts of brutality by police officers against American citizens.

Every American is subject to the laws that govern the United States; that is a fundamental principle of the American republic. To grant individuals immunity from being held accountable when they violate the constitutional rights of citizens is to unduly place those individuals above the law. This is especially disturbing when those who are granted immunity are police officers, officials who are expected to not only understand but enforce the law. In light of the deaths of black men like Wayne Jones and George Floyd, many Americans have come to the realization that federally mandated police reform is desperately needed in the United States. That reform must begin with the abolition of the qualified immunity doctrine.

[118] Joanna C Schwartz, *supra* note 53.
[119] *Connor,* 490 U.S. 386.

Reexamining the Enforcement of Antitrust Law: Alternatives to Parens Patriae

Arthi Thiruppathi

"Competition whose motive is merely to compete, to drive some other fellow out, never carries very far. The competitor to be feared is one who never bothers about you at all but goes on making his own business better all the time."

-Henry Ford

Introduction

Reconsidering the nature of the competition which today's markets desire is an increasingly impactful question of global efficiency in a world purportedly built upon the ideals of a perfectly free market. With the unmistakable interdependence of industries and supply chains across today's globalized world, the effects of a single business merger or acquisition are manifold. Felt around the world by competitors, consumers, and political actors, the rising number of markets across the United States calls for a thorough reexamination of antitrust laws, their enforcement, and the costs associated with ambiguous legislation. With the White House and institutions like the Federal Trade Commission (FTC) shifting stances on the legality of mergers and acquisitions during every transition of administration, there are growing calls to adopt a more uniform approach to enforcement. One stance that will be explored in this article is the expansion of the scope of self-regulation, an approach that could replace the current alternative of *parens patriae*, which grants the state the ability to intervene on behalf of those who legally cannot act by themselves. This doctrine involves enormous costs in antitrust legislation because it often involves both a federal and a private investigation into the potential unlawful restriction of trade, which shifts the brunt of the costs to the consumer, either through increased prices of goods and services, increased tax, or a combination of both. In addition, it has been criticized for its potential to limit international trade with the Trade Act of 1974, due to its potential to exclude foreign

competitors and deprive American consumers of cheap goods produced by foreign monopolies.[1]

On the other hand, self-regulation has received much attention largely due to the low costs associated with it, along with its ability to better preserve the free market and promote economic efficiency.[2] It has improved industry profitability; the increase in consumer demand from the self-regulatory efforts caused firms to produce goods or services that were safer, more reliable, or more useful.[3] If each industry adopted a uniform set of guidelines, product familiarity would increase, which creates an environment that is conducive to the emergence of new markets, enabling competition and innovation. A comprehensive implementation of this policy would allow the government to divert resources to more relevant and better-suited regulation.

Antitrust laws were created with the motive of encouraging competition and protecting consumers that would be negatively affected by monopolies' ability to set prices. However, antitrust acts never specifically prohibited the existence of a monopoly.[4] The Sherman Antitrust Act notes that while any kind of contract or agreement will restrict trade to some extent, only that which unreasonably does so is illegal.[5] While the ambiguity of this wording allows the legislation to remain relevant after over a century, it also requires enforcers of antitrust laws to interpret the criteria for which firms should be prosecuted for anti-competitive actions. Moreover, 'socially desirable outcomes' differ depending on the stakeholder's perspective: should the enforcer of antitrust laws look at outcomes desirable to the immediate interests of the consumer or a long-term socially desirable outcome to society? Broad philosophical frameworks like utilitarianism may be used to question how to approach this intangible, abstract state of market forces. For example, enforcers of antitrust laws can solely consider the number of people gaining compared to the number of people losing through the occurrence of a merger or acquisition to decipher the overall greatest good for all stakeholders. This approach is most likely to align with the original goals of the

[1] Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation 15 (2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf

[2] Fed. Trade Comm'n, *Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship, https://www.ftc.gov/public-statements/1998/05/industry-self-regulation-and-antitrust-enforcement-evolving-relationship*

[3] *Id.*

[4] Sherman Antitrust Act, ch. 647, §3, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-38)

[5] Fed. Trade Comm'n, The Antitrust Laws, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

FTC, which is to protect consumer interests.[6] Additionally, courts across the country are increasingly reliant on the Areeda-Hovenkamp Treatise, a piece of academic literature about antitrust law, rather than legal precedent to settle disputes.[7] This has often been cited as another reason to create institutional reform in order to fill the void of antitrust authority and better adapt the FTC to the changing demands of a complex market.[8] This article will shed light on the historical context of antitrust laws and the circumstances under which original legislation was passed, while highlighting the contradictory nature of subsequently passed security laws and the absence of the application of stare decisis in this area of law. Given the ambiguous nature of these laws, this article will also note the consequences of political bias in the enforcement process in the United States and compare its efficiency with the enforcement of competition law in Europe. This section aims to answer the question of the ethicality of the prosecutor having close ties with those that seek to gain much from the anti-competitive practices that are under investigation. In an inequitable system where all cannot gain and where the gains of some must come from the loss of others, I seek to establish the grounds under which antitrust trials can take place fairly. Finally, the article will look into the future of procompetitive market adjustments and the scope of replacing *parens patriae* with a self-regulatory approach.

I. Historical Legacies of Antitrust Laws

A. Original legislation

Enacted in 1890, the Sherman Antitrust Act was the first federal legislation intended to limit the power of monopolies and curb activity that restricted trade and reduced economic competition.[9] The act, which is still in effect, was designed to be applicable to both formal and informal cartels that limit industrial output or share markets. Cartels are a group of independent corporations or other entities that join together to fix prices, rig bids, allocate markets, or conduct other similar illegal activities.[10] These provisions were enforced by the U.S. Department of Justice, and later by the Federal Trade Commission through litigation in

[6] *Id.*

[7] Hillary Greene, *Reflections on Judicial Treatment of the Antitrust Treatise*, The CLS Blue Sky Blog (Aug. 18, 2015), https://clsbluesky.law.columbia.edu/2015/08/18/reflections-on-judicial-treatment-of-the-antitrust-treatise/

[8] Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust,* 100 Iowa L. Rev 1919, 1938-40 (2015) (reform at the FTC)

[9] Sherman Antitrust Act, ch. 647, §3, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-38)

[10] Legal Information Institute, https://www.law.cornell.edu/wex/cartel (last visited Feb 25, 2020).

federal courts.[11] The Sherman Act was the first attempt by Congress to address the use of trusts to enable a limited number of individuals to control key industries. It is important to note that while the act outlawed groups of businesses colluding or merging to form monopolies, it did not explicitly forbid the existence of monopolies as an entity in the market, as seen in Section 1, which states, "Every contract, combination or conspiracy in restraint of trade or commerce [...] is declared to be illegal."[12] Another critical aspect of this wording is that it only refers to the restraint of "trade or commerce" and does not apply to any attempt to monopolize an industry in the manufacturing sector. This difference was explored in *United States v. E.C. Knight Company* (1895), when The American Sugar Refining Company, a corporation in control of a large majority of the manufacturers of refined sugar in the United States, acquired this control through purchasing stock in various refineries. [13]While the Court noted that the defendant had displayed anticompetitive behavior, it concluded that the Sherman Act did not reach the monopolization of manufacturing.[14]

A case that examines the definition of the restraint of trade is *United States v. Colgate* (1919), where the Supreme Court recognized the unfettered "right" of a private vendor "to exercise his own independent discretion as to parties with whom he will deal."[15] Colgate refused to do business with retailers who sold below suggested retail price, which *prima facie* appeared to be an attempt to restrain trade.[16] This landmark case is important because it establishes the precedent of courts first examining whether the intention to create or maintain a monopoly exists.[17] In the absence of such an intent, the Court deemed it legal for manufacturers to create their own price floor, which is the minimum value at which goods purchased from the manufacturer could be sold at, for retailers. It also allowed manufacturers to restrict their sales from vendors who do not abide by this price floor.[18] This was a significant shift away from the decision made in *United States v. Trans-Missouri Freight Association* (1897), when the Supreme Court ruled that the Sherman Act prohibited all

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[11] *Id.*

[12] Sherman Antitrust Act, ch. 647, §3, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-38)

[13] United States v. E.C. Knight Co, 156 U.S. 1 (1895)

[14] *Id.*

[15] Janice E. Rubin, *The Distinction Between Monopoly and Monopolization in Antitrust Law*, Congressional Research Service, (Oct. 23, 2006), https://www.everycrsreport.com/files/20061023_RL33708_bd841668b7cc0d1ce1a33cf16082662fd6257ae6.pdf.

[16] United States v. Colgate & Co., 250 U.S. 300 (1919)

[17] *Id.*

[18] *Id.*

agreements between firms, regardless of the purpose of the agreement. In this case, railroad companies formed an organization to regulate prices for transportation and the Court concluded that the behavior was a "contract between [the companies] to promote an unlawful restraint of commerce."[19] The reason cited by the Court was that competition must decide the reasonable rate, not agreements between companies.[20] An interesting difference between the two cases is that Colgate & Co. wished to set a price floor, while the Trans-Missouri Freight Association wished to set a price ceiling. Although the latter case would be beneficial to consumers and the former would not, Colgate was the only party that won its lawsuit.

The Sherman Antitrust Act was created in response to the creation of trusts that had the potential to bend an entire market to its favor, driving out competitors. This was specifically intended to combat the domination of markets by the Standard Oil Corporation, US Steel, The American Tobacco Company, and the International Mercantile Marine Company.[21] A trust was an arrangement by which stockholders in several companies transferred their shares to a single set of trustees.[22] In exchange, the stockholders received a certificate entitling them to a specified share of the consolidated earnings of the jointly managed companies, destroying competition. On January 2, 1882, the Standard Oil Trust was formed, quickly gaining a large market share in many different industries including the various stages involved in oil production and distribution and railroads.[23] This prompted the creation of the U.S. Industrial Commission, which began the "trust-busting era" along with the enactment of the three-sectioned Sherman Act. The purpose of the Act, as noted by the Supreme Court in *Spectrum Sports Inc. v. McQuillan* (1993), was "not to protect businesses from the working of the market, [but] to protect the public from the failure of the market."[24] It was made explicit by Senator Hoar, one of the authors of the Sherman Act, that market gains made through honest means that benefited consumers would not be prosecuted through the act.[25] One of the greatest shortcomings, however, was that the Sherman Act was loosely worded and failed to define such critical economic terms as "trust," "combination," "conspiracy," and "monopoly," creating the legal quagmire that has since existed.

[19] *Id.*
[20] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
[21] Barak Orbach, *The Antitrust Curse of Bigness*, 85 Southern California Law Review 605, 606-07 (2012).
[22] *Id.*
[23] *Id.*
[24] Spectrum Sports v. McQuillan, 506 U.S. 447 (1993).
[25] United States Congress, Bills and Debates in Congress 279-80 (1902).

Furthermore, the act does not clearly define the conduct that it prohibits, but rather adopts a description of an effect or harm that must be prevented by the act.[26] Because the Court did not include specific criteria for prosecution, including a definition for the word "unreasonable" in *Standard Oil Company of New Jersey et al v. United States* (1911), the 'Rule of Reason' was created to alleviate incertitude surrounding cases.[27] Because every economic transaction restricts trade in some form, the Rule of Reason was adopted to discern which transactions *unreasonably* restrict trade.[28] This shifted the responsibility of determining the meaning of the aforementioned terms to individual courts, creating discrepancies seen in cases throughout the twentieth century with stare decisis rarely applying in this context.[29] The idea of the Rule of Reason was to allow courts to use more abstract concepts such as motive and intent to determine anticompetitive practices when a firm does not explicitly violate the terms of the Sherman Act. This was seen in the case of *California Dental Assn. v. Federal Trade Commission* (1999), where it was established by the Court that "any anti-competitive effects of given restraints are far from intuitively obvious, the Rule of Reason demands a more thorough inquiry into the consequences of those restraints."[30] This is evidence that a large scope for unfair practices exists. This problem is exacerbated by the Supreme Court's ruling on *United States v. United States Gypsum Co.* (1978), wherein it held "[any] action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability."[31] This set the precedent for *mens rea* becoming an integral part of antitrust investigation.

Passed in 1914 as an amendment to the existing Sherman Antitrust Act, the Clayton Antitrust Act sought to clarify and strengthen the previous legislation. It created a more precise definition of the business practices that allowed the creation or expansion of a monopoly of a trade. For example, specific forms of holding companies, like those that attempt to control an entire industry through owning stock in a number of leading firms, and interlocking directorates, the practice of one company's board members serving in the

[26] Jan Loughlin, *Mens Rea and Felony Violations Under the Sherman Act*, 11 Loyola University Chicago Law Review 161, 162 (1979) (Sherman Act prior to Gypsum).

[27] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[28] Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 85-86 (2018) (unreasonable restraints of trade).

[29] *Id* at 95

[30] California Dental Ass'n. v. FTC, 526 U.S. 756 (1999).

[31] United States v. United States Gypsum Co., 438 U.S. 422 (1978).

same position at another company, were forbidden, as were discriminatory freight agreements.[32] It should be noted that the Sherman Act was initially conceived to limit the formation of cartels and reduce the number of oligopolies in the market because it would undermine the free market because the natural forces of demand are not setting the price.[33] One of the unforeseen consequences of the Sherman Act, however, was that it triggered the largest wave of mergers in American history.[34] Firms realized that they could join to become a single corporation and maintain all the benefits that a cartel previously allowed them, without violating the Sherman Act. One of the primary purposes of the Clayton Act was to amend these guidelines and prohibit mergers that would have the same effect as the illegal cartels.[35] However, this act prohibited individuals from "acquir[ing], directly or indirectly, the whole or any part of the stock [...] when the effect of such acquisition may substantially lessen competition." and did not include any mention of the acquisition of assets.[36] This resulted in nearly 4,800 acquisitions of companies between 1926 and 1930, with this period also seeing the largest yearly rate of acquisitions.[37] An amendment was added in 1950 to Section 7 of the Clayton Act, which allows authorities to have a greater degree of regulation of any merger, subjecting it to the Herfindahl-Hirschman Index (HHI) test to determine the market concentration of the proposed merged entity.[38] The HHI takes into account the relative size distribution of firms in a market while calculating the market share of each firm.[39] This has often been criticized as a lengthy and costly process.[40] Another criticism of this clause is the absence of a definition of the word "substantially."[41] Acquisitions could somewhat lessen competition and still be legal, and if substantial competition between two companies does not currently exist, an acquisition would not lessen this competition substantially.[42] In other words, the lack of a quantitative definition of competition makes the

[32] Clayton Act, ch. 323, §1, 38 Stat. 730 (1914).

[33] Legal Information Institute, https://www.law.cornell.edu/wex/cartel (last visited Feb 25, 2020).

[34] George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?,* 28 The Journal of Law & Economics 77, 86-89 (1985) (Evolution of antitrust policy).

[35] *Id.*

[36] Sherman Antitrust Act, ch. 323, §7, 38 Stat. 731 (1914) (codified at 15 U.S.C. §§ 1-38).

[37] Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harvard Law Review 226, 230-31 (1960) (Mergers and the Clayton Act).

[38] *Id.* at 264

[39] U.S. Department of Justice, Herfindahl-Hirschman Index (2018) https://www.justice.gov/atr/herfindahl-hirschman-index.

[40] Tony Roberts, *When Bigger Is Better: A Critique of the Herfindahl-Hirschman Index's Use to Evaluate Mergers in Network Industries*, 34 Pace Law Review 894, 932-34 (2014) (accounting for residual value).

[41] Yale Law Journal, *Judicial Interpretation of Section 7 of the Clayton Act*, 39 The Yale Law Journal 1042, 1049-50 (1930) (Supreme Court and the interpretation of reasonable).

[42] *Id.* at 1043.

Clayton Act inefficient and provides an ambiguous basis for rulings. This ambiguity manifested in the case of *Federal Trade Commission v. International Shoe Co.* where the Federal Trade Commission had concluded that substantial competition existed.[43] However, when presented with the same facts, the Supreme Court decided that because there was a great difference in the nature of products manufactured between the two shoe companies in question, there was, in fact, no competition that existed prior to the acquisition.[44] This case reveals that the lack of specificity in legislation can cause inconsistencies and shows that because much is open to interpretation, the verdict can depend entirely on one's personal view towards antitrust laws.

The Clayton Act also prohibits any person from being a director of two or more competing companies if those companies would violate the antitrust criteria by merging and does not allow price discrimination, the practice of selling the same good or service at different prices to different consumers.[45] This prevents the possibility of collusion between firms in the same industry and promotes fairer competition. It is similarly illegal to provide disparate discounts for different people, with a violation of any of these provisions amounting to a fine of $5,000 or imprisonment for up to one year.[46] These sections of the Clayton Act have a far greater degree of specificity than the Sherman Act, with the former elaborating on what acts comprise of collusion, exceptions to the law, and the types of commerce that is prohibited.

The Hart-Scott-Rodino Antitrust Improvements Act (HSR) was passed in 1976 as an amendment to the Clayton Act. This act also set a mandatory filing fee between $45,000 and $280,000 depending on the size of the merger, reducing the attractiveness of merging.[47] More importantly, however, it established the concept of *parens patriae* in antitrust law; previously, there was no effective way for individuals injured by mergers to seek compensation.[48] The adoption of the HSR allowed state attorneys general to sue companies in federal court for monetary damages as *parens patriae*.[49] It also allowed states to keep for

[43] International Shoe Co. v. FTC, 280 U.S. 291 (1930).
[44] *Id.*
[45] Clayton Act, ch. 323, §1, 38 Stat. 730 (1914).
[46] Sherman Antitrust Act, ch. 592, §3, 49 Stat. 1528 (1936).
[47] *Id.*
[48] Fed. Trade Comm'n, Filing Fee Information (2020) https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information.
[49] Sherman Antitrust Act, ch. 323, §4C, 90 Stat. 1394 (1914).

their own use any unclaimed damages that could be recovered on behalf of the consumers.[50] The Department of Justice (DOJ) and the Federal Trade Commission (FTC) are federal departments that conduct antitrust investigations as *parens patriae.* Similar federal departments that act through *parens patriae* include the Department of Human Services, which is responsible for intervening in situations of child abuse or neglect through child protective services.[51] In such cases, *parens patriae* is necessary to uphold the well-being of those that cannot defend themselves from the household authority, such as children who require protection from parents.[52] It must be noted that, however, apart from antitrust law, the only two legal contexts in which *parens patriae* is a common practice are for family law, where the plaintiffs are children and are therefore legally incompetent, and for environmental law, where the state is intervening to protect a non-human entity.[53] One commentator suggested that the citizens for whom the government is responsible for protecting are traditionally "infants, idiots, and lunatics" and further notes that governmental action based on *parens patriae* results not only in protection but also in increased limitations and hardships for both those protected and those involved with those being protected.[54] While such hardships may be inevitable for those truly incapable of caring for themselves, like the aforementioned subjects, natural persons injured by antitrust laws do not fall under the same category, as was the case in *Apple Inc. v. Pepper* (2007).[55] Additionally, when the state is prosecuting on behalf of its citizens, there is no longer a need to prove individual injury to each consumer for whose sake the case was brought upon.[56]

The doctrine of *parens patriae* as envisioned by the HSR Act was, however, was significantly weakened by the Supreme Court's decision in *Illinois Brick Co. v. Illinois* (1977), where it was decided that "only those who purchase goods or services directly from an

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[50] Milton Handler, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 The Yale Law Journal 626, 629-31 (1976) (class action).

[51] Ranjan Bal, *The Perils of "Parens Patriae"*, Georgetown Journal on Poverty Law & Policy (2017) https://www.law.georgetown.edu/poverty-journal/blog/the-perils-of-parens-patriae/

[52] Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance,* 57 Ohio State Law Journal 519, 521-22 (1996) (parens patriae and the wellbeing of children).

[53] Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Environmental Law & Policy Forum 57, 107-08 (2005) (quasi-sovereign interest in natural resources).

[54] Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 Michigan Journal of Gender and Law, 381, 382-83 (2000) (role of government).

[55] *Id.*

[56] See *supra* Milton Handler, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 630.

alleged violator of the antitrust laws can maintain a Clayton Act claim for damages," meaning that the state could not use a Clayton Act claim to settle injuries of the people through *parens patriae*.[57] In this case, the state government of Illinois sued eleven concrete block manufacturing companies for alleged conspiratorial price-fixing and a violation of the Sherman Act. The state asserted that because the bricks were meant to be used for government construction, they were injured by the anti-competitive behavior.[58] However, the defendants had the case dismissed on the count that the companies only sold bricks to masonry contractors, who in turn undertook projects for the government. The district court ruled that if an indirect purchaser of goods could sue, it would "open the door to multiple recovery," or the recovery of treble damages by multiple actors in the distribution chain.[59]

This case reveals that the prosecution should have been done by the citizen or the "natural person." In the case of *Illinois*, the natural person would have been the masonry contractors who were the direct consumers of the defendants.[60] This stance was reaffirmed in *Apple Inc. v. Pepper* (2007) when four Apple iPhone owners were injured due to the "closed system" of the iPhone, which restricts the apps that can be loaded on an Apple phone.[61] Four plaintiffs claimed that they were forced to purchase apps solely from the App Store at a higher price, due to their inability to access other markets, such as the Google Play Store, from an iPhone.[62] The Ninth Circuit Court ruled 5-4 in favor of Pepper, overturning a previous dismissal by the district court, signifying the power of the natural person to take direct action against larger monopolistic companies, such as Apple. This case shows that the natural person can take legal action against larger corporations and have the ruling in their favor. The case also suggests that *parens patriae* is not always required for citizens to prosecute and that affected parties are capable of intervening in the market without the backing of the state.

B. Overlap of Legislation with Security Law: Ambiguity of Per Se Precedence

One of the most troubling aspects of antitrust enforcement as it exists today is the ambiguity that arises from overlapping legislation. The consequences of having multiple

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[57] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Apple, Inc. v. Pepper, 587 U.S. ____ (2019).
[62] American Bar Association, Supreme Court Rejects "Who Sets the Price" Alternative to Illinois Brick (2019) https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2019/illinois-brick-v-illinois/

entities responsible for controlling the market and the associated acts that give them this authority pose a financial burden to the consumer.[63] Additionally, this creates confusion regarding which rule or guideline takes precedence. This can be seen most prominently with the Securities and Exchange Commission, created in 1934, which has the primary responsibility of regulating security law including the prosecution of accounting fraud, insider trading, and the dissemination of false or misleading information.[64] Largely governed by the 1934 Maloney Act Amendment, the security industry enjoys the privilege of self-regulation and some forms of antitrust immunity.[65] However, the problem arises when considering the fact that not all NASD dealings are granted protection from antitrust charges.

The question of whether participants in anticompetitive acts in an initial public offering (IPO) were immune from antitrust liability was examined in *Credit Suisse v. Billing* (2007). Investors, including Billing, filed a class action lawsuit against Wall Street investment firms, such as Credit Suisse, for conspiring to drive up the price of IPO securities.[66] The defendant, Credit Suisse, argued that if the plaintiffs were able to bring antitrust suits against investment firms for securities violations, they would be subverting security laws put in place by Congress.[67] Thus, the Court held that the underwriters were entitled to implied antitrust immunity because antitrust laws and securities laws are "clearly incompatible."[68] Supreme Court Justice Clarence Thomas, however, held up a lone dissent to this when he argued that the savings clause of the Securities Act of 1933, which explicitly mentioned that "any and all other rights and remedies that may exist in law" would not provide immunity.[69] This inconsistency was present in several other cases including *Gordon v. New York Stock Exchange* (1975)[70] and *Silver v. New York Stock Exchange* (1963).[71] These cases present another reason to examine existing antitrust law and revise it to account for newer overlapping legislation.

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[63] Tony Roberts, When Bigger Is Better: A Critique of the Herfindahl-Hirschman Index's Use to Evaluate Mergers in Network Industries, 34 Pace Law Review 894, 942-43 (2014) (government policy).

[64] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harvard Law Review 1197, 1227-30 (1999) (legislative history of the Securities Act).

[65] Jane M. Jozefek, *Antitrust Immunity of the National Association of Securities Dealers Under the Maloney Act*, 14 Boston College Law Review 111, 113-14 (1972) (NASD under the Maloney Act).

[66] Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007).

[67] *Id.*

[68] *Id.*

[69] Stacey Sheely Chubbuck, *Securities Law and Antitrust Law: Two Legal Titans Clash Before the United States Supreme Court in Credit Suisse Securities v. Billing*, 62 Oklahoma Law Review 145, 145-46 (2009).

[70] Gordon v. New York Stock Exchange, 422 U.S. 659 (1975).

[71] Silver v. New York Stock Exchange, 196 F. Supp. 209, S.D.N.Y. (1961).

In the case of *Silver*, the Court noted that "regulated industries are not *per se* exempted from the Sherman Act" and suggested that in the case of a "clear repugnancy between the old law and the new, the former would *pro tanto* give way."[72] This means that although neither the Sherman Act nor the Securities Act have outright precedence over another, in the case of a clear discrepancy between the two, the Securities Act would be considered first.

C. Monopolies and Socially Desirable Outcomes

Despite restraints of trade being unlawful according to the Sherman Act, the occurrence of this in the two-sided market can reduce transaction costs, thus facilitating mutually beneficial exchanges. This is seen in *Ohio v. American Express* (2018), where maintaining a monopoly increases ease of access for both merchants and cardholders.[73] The two-sided market exists in the credit card industry because cardholders benefit from holding a card only if that card is accepted by a wide range of merchants, and merchants benefit from accepting a card only if a sufficient number of cardholders use it. Four main credit card companies dominate the market in the United States, including Visa, American Express, MasterCard, and Discover. The United States sued American Express in this landmark case on anti-steering allegations that violate Section 1 of the Sherman Act, which prohibits restraint of trade.[74] Because of the higher prices charged by AmEx to merchants, some merchants choose to 'steer' customers away from using this credit card. Steering is the practice of offering consumers discounts or in other ways influencing them to use an alternate method of payment. In response to this, AmEx placed provisions in its contracts with merchants to ensure that this practice was stopped. The District Court agreed with the plaintiffs because they ruled that the credit card industry should be treated as two separate markets, one for merchants and one for cardholders, and that Amex's anti-steering provisions are anti-competitive because they had resulted in higher merchant fees. [75]However, the Supreme Court overruled this by stating, "Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power."[76] The result of this case was that American Express was able to hold on to its monopoly and thereby have greater ease of access for consumers who bear no transaction costs while using this card.

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[72] *Id.*
[73] Ohio v. American Express Co., 585 U.S. ___ (2018).
[74] *Id.*
[75] *Id.*
[76] *Id.*

One question that has arisen from the *Ohio v. American Express* is: what constitutes the ideal economic definition of a socially desirable outcome? While many wealthier consumers who possess AmEx cards have lauded the decision of the case, it can be noted that the remainder of society takes the toll for the advantages reaped by this minority.[77] However, AmEx's pricing strategy was not only economically efficient, but also popular enough to hold a 26.4% share in the credit card market.[78] In such a context, should the state, represented by the Department of Justice and the Federal Trade Commission, take up a utilitarian stance and solely look at the number of citizens who would gain from a certain practice in the present time? Alternatively, does the state have a responsibility to look at the number of citizens who would gain from a merger or acquisition in the long run, even if its effects were not evident immediately. Applying this to the case of American Express, in the long run, if more consumers were able to use its card, and therefore its expansive list of benefits, not prohibiting their pricing strategy would generally serve in the interests of the majority. Given that a state cannot take up a discriminatory approach, there is a dilemma posed here as to how federal priorities will be decided and the interests of different actors involved in this decision-making process. The following section will examine in further detail the specific considerations that can corrupt the process of deciding a state's priorities while prosecuting market misconduct.

II. Market Control and Consequences

The Federal Trade Commission (FTC) was established in order to investigate and prevent unfair methods of competition, with its primary goal of protecting consumers and competition. The FTC makes legislative recommendations to Congress about economic issues and acts on the behalf of the United States government to pursue action for individuals injured by antitrust claims through anticompetitive actions.[79] The Department of Justice (DOJ), however, has exclusive jurisdiction over all American criminal antitrust

[77] Aaron Klein, *Why the Supreme Court's decision in Ohio v. AmEx will fatten the wealthy's wallet*, Brookings, https://www.brookings.edu/research/ohio-v-amex/

[78] Ohio v. American Express Co., 585 U.S. ___ (2018).

[79] Fed. Trade Comm'n, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority (Oct. 2019) https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

prosecutions.[80] Jurisdictions for civil antitrust cases, such as prosecution against injuries outlined in the Clayton Act, are generally under the FTC.[81]

A. Consequences of Political Bias on Enforcement

The political interests of the White House administration often define the approach of the Department of Justice towards antitrust laws; Republicans are generally pro-mergers, and Democrats are the opposite.[82] While some amount of bias in the enforcement of antitrust laws is natural, an example of antitrust ruling influenced by White House politics can be seen in *AT&T-Time Warner v. United States* (2019).[83] President Donald Trump, a Republican who faced a lawsuit against Cable News Network (CNN), a Time Warner owned and operated company, encouraged the DOJ to investigate the merger.[84] The AT&T and Time Warner merger was a case of vertical integration, a process that takes place when two firms who produce goods at different stages of production merge to save costs in purchases within the supply chain. This process has been generally accepted by antitrust enforcement agencies, because the result does not substantially lessen competition through unfair means, but rather reduces the price of goods and services available to consumers.[85] Thus, the DOJ's appeal was strange and uncharacteristic of a Republican administration. Indeed, as stated by Judge Judith Rogers, "The government's objections that the District Court misunderstood and misapplied economic principles were unpersuasive," in reference to the nature of the vertical integration showed that the basis for the state appeal lacked merit.[86] The DOJ's stance in this case also signaled to the public that the government's priority in tackling antitrust cases was not solely for the benefit of the consumer or for the competitor. One condition stipulated by the DOJ for the merger to proceed was that Time Warner was to sell one of its assets, Turner Broadcasting, which includes cable news channel CNN.[87] While some may argue that the sale of Turner Broadcasting would reduce the size of the company,

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[80] U.S. Dep't of Justice, Antitrust Division Manual I-2, https://www.justice.gov/atr/file/761166/download

[81] *Id.* at II-24.

[82] B. Dan Wood, *The Politics of U.S. Antitrust Regulation*, 37 American Journal of Political Science 1, 2-11 (1993) (partisanship variables).

[83] United States v. AT&T, Inc., No. 18-5214 (D.C. Cir. 2019).

[84] Cable News Network v. Donald J. Trump, https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2018cv02610/201611.

[85] Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 Journal of Political Economy 347, 348-49 (1950) (price conditions for profit).

[86] United States v. AT&T, 310 F. Supp. 3d, 161 (D.C. Cir. 2018).

[87] Herbert Hovenkamp & Hemant Bhargava, *Why Has the AT&T-Time Warner Merger Gotten Tangled?*, Knowledge@Wharton (Nov. 2017) https://knowledge.wharton.upenn.edu/article/will-the-time-warner-att-merger-succeed/

thereby reducing its potential monopoly power, Time Warner owned hundreds of large assets, including Warner Bros. Entertainment Inc. and Home Box Office (HBO) Inc. However, the sole asset the DOJ was concerned with was the one that operated CNN. The condition, however, was not met by the company, and the Court ruled in its favor, allowing the acquisition to take place.

Furthermore, this case can be compared to Disney's recent acquisition of Rupert Murdoch's entertainment empire, 20th Century Fox. Despite the similar size and nature of the acquisition, Disney's transaction was completed within six months and without antitrust investigation by the government, which may indicate that a company's relationship with the White House can influence its antitrust decisions.[88] Additionally, failed appeals by the DOJ can undermine the power of the government in terms of antitrust regulation and create lasting challenges for future administrations trying to pursue appeals in such cases. Other firms in this sector will hesitate less before pursuing mergers, but the government will be less likely to intervene, despite the potentially anti-competitive nature of the merger because of the lasting failure in the AT&T appeal, as with Fox and Disney.[89] These inconsistencies found in the enforcement of these laws during the last administration are important to note when examining the effectiveness of *parens patriae* as the main method of antitrust investigation and prosecution. It draws the question of whether the state can be trusted to operate as an unbiased entity to regulate markets solely in order to preserve competition and protect consumer interests. The DOJ, the department that headed the antitrust investigation against AT&T-Time Warner, is a federal agency that is heavily influenced by the office of the president.[90]

This is dissimilar to its European counterparts, such as the German *Bundeskartellamt* or the Federal Cartel Office (FCO) and the French *Autorité de la Concurrence*, which act as independent competition authorities.[91] These agencies are insulated from executive control,

[88] Matthew S. Schwartz, *Disney Officially Owns 21st Century Fox*, National Public Radio (Mar. 2019) https://www.npr.org/2019/03/20/705009029/disney-officially-owns-21st-century-fox.

[89] Herbert Hovenkamp, Erik Gordon, & Hemant Bhargava, *Is the AT&T-Time Warner Decision a Blow Against Antitrust?*, Knowledge@Wharton (Jun. 2018) https://knowledge.wharton.upenn.edu/article/impact-att-time-warner-decision/

[90] Marshall J. Breger & Gary J. Edles, Independent Agencies in the United States: Law, Structure, and Politics 67-68 (2015).

[91] Bundeskartellamt, *The Bundeskartellamt*, https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html

allowing them greater jurisdiction and less bias while pursuing cases as *parens patriae*.[92] The application of competition law in Germany takes place in a strictly legalistic manner and the FCO is not viewed as a political entity. Decisions made by the FCO can be appealed to the Berlin *Kammergericht*, the highest state court in the city, where the *Senat*, an additional chamber that is set up to solely handle appeals to rulings on competition law, exists.[93] The result of such an extensive review process is both the application of greater expertise and a more thorough investigation into the matter.[94] Allowing an array of perspectives also has the effect of being able to better apply the utilitarian principle, because the different authorities involved in the process may have differing views on what action or ruling constitutes the 'best' consequences. To ensure that rulings made by these bodies are un-swayed by industry interests, the directors of the FCO sub-bodies cannot be members of any company boards, trade or industry associations, or any other professional organizations.[95] Additionally, Germany has a Monopoly Commission, which consists of competition law experts who cannot be members of a state or federal government or legislation, thus ensuring the Commission is entirely free of government influence.[96] These criteria for appointment ensure that the overall body regulating commerce in Germany is insulated from both industry and political interests and rulings are solely based on the interests of the people, unlike the current system in the United States. While the Commission does not make substantial decisions, they are required to assess the current state of market concentration and advise on general FCO rulings.[97]

In the United States, stare decisis is an inconsistent doctrine in the context of antitrust law, with significant repeals of precedent throughout courts, making antitrust rulings unpredictable and subject to few guidelines other than a specific court's individual interpretation of the law.[98] This issue is countered in Germany through the use of the Fundamental Policy Division, whose sole function is to ensure *Rechtssicherheit*, or legal uniformity.[99] Stare decisis is also given far more weightage in FCO rulings than in the United

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[92] Andre R. Fiebig, *The German Federal Cartel Office and the Application of Competition Law in Reunified Germany*, 14 U. Pa. J. Int'l Bus. L. 373, 373-74 (2014) (structure of the FCO).

[93] *Id.* at 375.

[94] *Id* at 376.

[95] *Id* at 380.

[96] *Id* at 381.

[97] *Id* at 378.

[98] Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 91-92 (2018) (stare decisis in antitrust).

[99] See *supra* Andre R. Fiebig, *The German Federal Cartel Office and the Application of Competition Law in Reunified Germany* at 382.

States. Furthermore, FCO officials remain in their position even after a transition of political power at either the state or federal power, ensuring that partisan politics play little role in deciding rulings related to competition law. In France, should the government wish to pursue investigation into an antitrust case, they are required to ask the opinion of the *Autorité de la Concurrence* to mitigate partisan decisions.[100] Such a third-party authority could be adopted in the United States as well.

B. Ambiguity of Market Efficiency

The concept of vertical integration, the process which took place in the Time Warner-AT&T merger, is a key component for achieving economies of scale. Vertical Integration can be defined as the cost advantages reaped by companies when increasing production and lowering costs, often by specialization of labor, increased access to capital, and bulk production volumes. These factors are often intrinsic to vertical integration and have been argued as reasons to pursue acquisitions.[101] The reduced cost of production is reflected in the market when consumers have access to competitively priced goods and competing companies are forced to adopt more efficient production methods to stay in the market, thus providing further choice to the consumer. In a perfectly competitive market, where goods, and the method for production of said goods, are identical, there is no reason to achieve economies of scale because the same amount of profit would ultimately be made.[102] Additionally, the state intervening with fears of a single firm taking up a growing market share can often prevent the competition derived from the existence of economies of scale.[103] A merged company that has achieved economies of scale also has the capability to invest in creating a better product. For example, the mobile service companies T-Mobile and Sprint merged in 2020 to invest in 5G technology for consumers, something that would have been unlikely individually.[104]

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[100] Autorité de la Concurrence, *Advisory Competence*, https://www.autoritedelaconcurrence.fr/fr/competence-consultative

[101] George J. Stigler, *The Economies of Scale*, 1 The Journal of Law and Economics 54, 55-56 (1958).

[102] Manuela Mosca, *On the origins of the concept of natural monopoly: Economies of scale and competition*, 15 The European Journal of the History of Economic Thought 317, 319-20 (economies of scale in natural monopolies).

[103] Greg Roumeliotis, *Sprint-T-Mobile merger talks back on, control key: sources*, Thomson Reuters, https://www.reuters.com/article/us-sprint-m-a-t-mobile/sprint-t-mobile-merger-talks-back-on-control-key-sources-idUSKBN1HH2RR (2018).

[104] Brent Kendall & Gautham Nagesh, *Sprint's Pursuit of T-Mobile US Faced Grim Prospects from Start,* The Wall Street Journal, https://www.wsj.com/articles/fcc-chairman-welcomes-end-to-sprint-t-mobile-deal-efforts-1407333787 (2014).

Sometimes the decision is based on an administration's preferences or powerful lobbies that sway the government away from a utilitarian outcome, as was seen in the AT&T-Time Warner and Fox-Disney mergers and acquisitions.[105] While the personal interests of justices are always a factor in deciding cases in every field of law, it is rare that state-led investigation into potentially illegal activity has manifold effects on the administration in power that is pushing for investigation through *parens patriae.* This can undermine the goals of efficiency and protecting consumer interests through the enforcement of antitrust laws.[106]

Furthermore, if the state was less involved in the enforcement of antitrust laws, the benefits of vertical integration have a greater chance of being preserved. By transferring the power of prosecution to the consumers, only the truly anti-competitive monopolies that unreasonably set prices will be penalized. Shifting the power of prosecution away from the state is a form of self-regulation of the market,[107] a transferable concept that is more popular with security law.[108] This allows the reexamination of the Court's priorities. The state will no longer play a dominant role in the investigation of antitrust violations, which will instead be left up to consumers whom the FTC initially intended to protect. In an "Open Letter to President Clinton from 240 Economists on Antitrust Protectionism," it was revealed that "consumers often did not ask for these antitrust actions - rival business firms did."[109] The FTC notes the main objectives of antitrust laws to be protecting competition for consumers, incentives for businesses to operate efficiently, keeping prices down and quality up.[110] The letter further went on to explain that while consumers of high technology have enjoyed falling prices and increasing innovation, many firms have increasingly started relying on the government for protection, specifically by handicapping more successful rivals.[111] While the FTC has a responsibility to ensure that any firm has the ability to enter a market, it is not their job to create a level playing field. Curbing the existence of successful companies in an

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[105] Nathan Hakman, Lobbying the Supreme Court— An Appraisal of "Political Science Folklore" 35 Fordham Law Review 15, 18-21 (1966) (A Theory of the Judicial Lobby).

[106] Lee Fang, *Corporate Front Groups Lobby to Confirm Brett Kavanaugh on the Supreme Court*, The Intercept (2018) https://theintercept.com/2018/10/04/brett-kavanaugh-supreme-court-confirmation-corporate-regulations/

[107] *See* Section III, *The Future of Procompetitive Justifications*, for further discussion on self-regulation in Securities Law and its potential transferability to antitrust law.

[108] Tamar Hed-Hofmann, *The Maloney Act Experiment*, 6 Boston College Law Review 187, 192-93 (1965) (Control for the Exchange and NASD).

[109] *An Open Letter to President Clinton from 240 Economists*, https://www.independent.org/pdf/open_letters/antitrust.pdf

[110] See *supra* Fed. Trade Comm'n, *The Antitrust Laws.*

[111] See *supra* An Open Letter to President Clinton from 240 Economists.

industry would be inherently anti-competitive.[112] Shutting down or harming firms whose success is derived from competitive acts can increase inefficient firms' reliance on the government.

Pivoting back to the text of the original antitrust laws, Section 1 of the Sherman Act prohibits the "making [of] any contract or engaging in any combination or conspiracy," rather than the *existence* of monopolies at all.[113] In other words, it is not illegal to simply have a large market share similar to that of a monopoly as long as this market share was gained through lawful, competitive means.[114] This was again reinforced by the Clayton Act, which only protected against "unlawful restraints and monopolies," implying that lawful monopolies are not explicitly illegal.[115] However, legal precedent does not always follow these conclusions. In the case of *United States v. Alcoa* (1964), the aluminum manufacturer, Alcoa, was charged with illegal monopolization and was required to be dissolved.[116] The DOJ argued that despite the company having acquired monopoly status through legal means, its possession of the power to control prices made it an illegal monopoly *per se.* While the case was dropped because of the entry of two new aluminum companies to the market, the court retained jurisdiction over the case to ensure there was no re-monopolization. However, the truly problematic part of this case rests with Judge Learned Hand's comments about Alcoa. The text reads:

> It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.[117]

This indicated that it did not matter how Alcoa became a monopoly, since its offense was simply to become one. The idea that this should not have been illegal was backed by former Federal Reserve Chairman, Alan Greenspan, who commented that Alcoa was being

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[112] U.S. Dep't of Justice, *Antitrust Enforcement and the Consumer*, https://www.justice.gov/atr/file/800691/download

[113] Sherman Antitrust Act, ch. 647, §1, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-38).

[114] *Id.*

[115] Clayton Act, ch. 323, §1, 38 Stat. 730 (1914).

[116] United States v. Aluminum Co. of America, 148 F.2d 416, 431-33 (2nd Cir. 1945).

[117] *Id.*

condemned for being "too successful, too efficient, and too good a competitor" and that the ruling of this case had led to the "condemnation of the productive and efficient members of our society" simply for being so.[118]

The existence of these caveats for successful firms provide much to contemplate whilst charting a more comprehensive and relevant idea of competition in contemporary markets. Part III will look at possible amendments to the current practices of enforcement to correct market inefficiencies, along with changes to legislation that could promote freer markets.

III. The Future of Procompetitive Justification

While much work is needed to improve the legislation governing antitrust laws, a more pressing legal concern is discerning what its exact priorities are and defining who these laws are meant to protect. Some oversight must exist to ensure that political gain is not the sole or main reason for the state to be acting as *parens patriae.* As they exist today, antitrust laws cannot protect consumers, all competitive firms, and the free market all at once. Some legal scholars have attempted to narrow down the criteria for prosecution, including specific issues such as firms whose existence causes a 'barrier to entry' of the market or those who pursue predatory pricing.[119] However, this is not a complete solution. Indeed, some argue that barriers to entry are not inherently anti-competitive or unlawful according to original antitrust legislation. One method to counteract firms who create barriers to entry with the intent of illegal monopolization, is to ensure there are ways to remedy the situation. For example, rather than breaking up a large conglomerate or suing firms whose actions are harming one set of actors, such as fellow competitors, the firm could offer compensation to the victims of a merger or acquisition. Any reasonable decision made by courts with regards to antitrust laws will be subject to the economic problem of pareto efficiency, wherein no individual can be made better off without making at least one individual worse off.

Here, the Kaldor-Hicks model presents itself to be both feasible and an effective measure to address the problem that a single approach cannot appease all stakeholders. The model's authors, who rely heavily on utilitarian philosophy, state "it is quite sufficient for [the economist] to show that even if all those who suffer as a result [of a policy decision] are

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[118] Alan Greenspan, Antitrust (1962).

[119] Oliver E. Williamson, *Delimiting Antitrust,* 76 The Georgetown Law Review 271, 274-77 (1987) (entry barriers).

fully compensated for their loss, the rest of the community will still be better off than before."[120] This means that even after those that gain from an antitrust-related ruling give up some of their "utility" for those who the ruling was against, all parties involved will see themselves better off compared to prior to the ruling. With compensation that will become an economic re-allocation of resources to those that have been made worse off, a strict enforcement of antitrust laws does not necessarily require the sacrifice of either market efficiency or competition.[121]

It is possible that without the state acting as *parens patriae*, it is possible that an inability to regulate barriers to entry will arise. However, one of the most common strategies of creating barriers to entry - predatory pricing - is unfeasible in the long run. In other words, it is rare that this will exist as a method of blocking other firms for an extended period of time. However, while examining predatory pricing, it is important to note what consists of anti-competitive behavior. For example, firms selling at prices far below the industry average, will have the ability to drive out competition and dominate the market. Despite this supposedly anti-competitive behavior, consumers are benefiting from the low prices and can force competitors to maximize their own efficiency. This problem is best illustrated by the case of *Utah Pie Co. v. Continental Baking Co.* (1967), which has often been cited as the most 'anti competitive antitrust case.'[122] The large pie manufacturing firm, Continental Baking Co, had violated Sections one and two of the Sherman Act by conspiring to restrain trade through discriminatory pricing. Specifically, in Salt Lake City, the only city where the smaller Utah Pie Co was active, the larger competitor charged its consumers below-cost prices.[123] While the behavior may have been both unethical and illegal, the low costs only hurt the competitors and the consumers were benefited both in the short and long run.[124] In such a case, if Utah Pie Co. was provided compensatory measures, no party would have been harmed while the consumers enjoyed lower prices. The compensatory measures could have even enabled Utah Pie Co. to take up a more efficient production strategy.

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[120] Peter Newman, *Kaldor-Hicks Compensation,* Brown University's New Palgrave Dictionary of Economics and the Law.

[121] Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility,* 49 The Economic Journal 549, 550-51 (1939) (comparability of individual satisfaction).

[122] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[123] *Id.*

[124] *Competition and Monopoly: Single Firm Conduct Under Section 2*, Dept. of Justice, https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter4.pdf

Additionally, very few companies are able to withstand the low-cost sales that are required to drive competition out, thus proving it to be a largely unpopular strategy. The Areeda-Turner test for exclusionary pricing can be seen to be a measure to also help alleviate threats from barriers to entry.[125] "A price at or above reasonably anticipated average variable cost should be conclusively presumed lawful," and a price below that cost "should be conclusively presumed unlawful."[126] The average variable cost is the cost that varies with output (labor or materials) per unit good produced. Prices at or above average variable cost exclude less efficient firms while minimizing the likelihood of excluding equally efficient firms, thus maximizing market efficiency. Countering recoupment, the idea that sacrificing profits in the short-run in order to make more money after competitors have been driven out, can also make predatory pricing obsolete.[127] However, if the firm expected its long-run profit enhancement to be insufficient in comparison to the sacrifice made, then it would not have engaged in predation. Thus, this potential problem arising from reducing the prevalence of *parens patriae* can be countered.

One promising alternative to *parens patriae* is the idea of self-regulation, a concept more popularly associated with security law, wherein firms within an industry tacitly agree upon a certain code of conduct with regards to pricing, safety standards, supply chain ethics, and quality. Drawing from the Maloney Act, industry self-regulation holds innumerable benefits for all actors in the market, including both consumers and competing firms in the industry. For example, aside from industry profitability, self-regulation also offers consumers safer, more useful, or more reliable goods as a result of higher standards. Following certain guidelines about competitive behavior could help a firm achieve either certification or a better reputation with competitors, vertically related industries, and consumers. In an increasingly connected world, close relationships between vertically related firms can improve efficiency and the benefits of vertical integration will always be preserved.[128] Historically, periods of strong government intervention through regulation have seen fewer prosecutions for violations of antitrust law and vice versa.[129] If the idea of regulation could

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[125] Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal*, 46 Rev Ind Organ 209, 210-11 (2015) (recoupment requirements).

[126] *Id.*

[127] Louis Kaplow, *Recoupment, Market Power, and Predatory Pricing,* 82 Harvard Antitrust Law Journal 1, 03-05 (2018) (predation inferences in antitrust law).

[128] See *supra.* Fed. Trade Comm'n, *Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship.*

[129] Howard Shelanksi, *Antitrust and Deregulation*, 127 The Yale Law Journal 1922, 1924-26 (Deregulation and gaps in competition enforcement).

be duplicated as a private sector establishment, it logically follows that the results would be similar with regards to antitrust violations. There is great unpopularity with the idea of government regulation because of its high associated costs and degree of state intervention in the market, which often leads to a more restricted economy.[130] Because original legislation like the Sherman Act is open to much interpretation about changing markets, it may serve well to have a non-governmental body to understand the context of old laws for each individual industry. As experts in an industry are more likely to understand decisions that will result in greater economic efficiency, private associations that oversee specific industries' may be able to better assess what can consist of antitrust damage. This is also similar to what exists in many European countries, such as the French and German independent competition authorities discussed earlier.

There will be an additional guarantee that such an actor will not be as swayed by political power as an agency like the DOJ and biased prosecutions or investigations are less likely to occur. This is also a measure to ensure greater consistency: the party of the president in power will not affect the number of mergers and acquisitions taking place in the country.[131] Consistency is also currently lacking between government agencies, with different authorities holding differing views on how antitrust law should apply to certain types of conduct or mergers.[132] Because the mandate of the DOJ's antitrust division, the FTC, and other state-level agencies are so broad, this overlap is almost inevitable. This may, however, force companies to be subject to a range of different legal obligations or require them to take a variety of measures to remedy the situation, ultimately resulting in great inefficiencies and additional costs. These costs, which arose from an intention of protecting consumers, can sequentially be borne from the same consumers, making the entire process nearly redundant. Therefore, while the approach of *parens patriae* has some merits and certainly has scope for much improvement, it cannot and should not be the quintessential mode of antitrust enforcement.

Instead, supplementing it with one of the options presented earlier in this paper including self-regulation, shifting the burden of investigation over to a separate agency that is less affiliated with the Executive Branch or a combination of the two may prove to both

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[130] *Id.* at 1939.

[131] Institute for Mergers, Acquisitions, and Alliances, *United States - M&A Statistics*, https://imaa-institute.org/m-and-a-us-united-states/

[132] Antitrust Modernization Commission, *Enforcement Institutions and Processes*, https://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf

cut costs in the long run and promise greater equity to the market. This in turn promises fairer standards to consumers and producers alike, to whom the government should ultimately be responsible for protecting. Indeed, although ironically so, alleviating the extent to which *parens patriae* is applicable to antitrust law enforcement, may result in greater protection of free markets and preserve competition.

Mask Transit: A Constitutional Blurred Line

TJ Boland

Introduction

With the advent of the COVID-19 pandemic, there have been many hasty legal precedents set in place by lower courts; most of them relying on the seminal 1905 ruling of *Jacobson v. Massachusetts,*[1] which held that states have the right to have compulsory vaccination laws. However, there is ambivalence around the issue of whether a mask is a medical device or clothing under the law. Additionally, there are currently questions surrounding the constitutionality of mask mandates, not just in public spaces, but also on public utilities, such as mass transit. Public transit is an essential service normally, but in the context of the pandemic, the safety of those who ride is of the utmost importance. Unsafe transit disproportionately affects the Black Indigenous and People of Color (BIPOC) population of the United States.[2] Additionally, those that can afford alternatives to transit are simply avoiding it for fear of being profiled while wearing a mask,[3] leaving our society's most vulnerable in a position where they must expose themselves to a virus whose long-term impacts

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[1] Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. LAW REV. ONLINE, 117 (2020), https://www.bu.edu/bulawreview/files/2020/07/PARMET.pdf; See *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

[2] Howard Silver & Larry Pham, A PROFILE OF PUBLIC TRANSPORTATION PASSENGER DEMOGRAPHICS AND TRAVEL CHARACTERISTICS REPORTED IN ON-BOARD SURVEYS AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, 3 (2007), http://filecenter.santaclarita.com/transit/APTA%20Passenger%20Characteristics.pdf.

[3] Caroline V. Lawrence et al., *Masking Up: A COVID-19 Face-off between Anti-Mask Laws and Mandatory Mask Orders for Black Americans,* 11 CALIF. LAW REV. ONLINE 479, 480 (Oct. 2020), https://www.californialawreview.org/covid-19-mask-orders-black-americans/.

are largely unknown.[4] In *Lehman v. Shaker Heights,*[5] the Court held that mass transit can be regulated to an extent that does not interfere with convenience, comfort, and safety on a public utility.[6] Despite this, ambiguity remains on whether possession of a mask is too large a barrier to entry on public transit, or if the public safety implications should allow for law to protect other users of this public service.

While there is currently no legal definition of what a mask is, and there is also no legal consensus on whether public transit is a fundamental right, there is sufficient scientific and legal evidence to suggest that the United States should establish a standard for mask mandates on public transit. Despite arguments that a mask hinders public convenience and comfort on transit to an unacceptable extent, the benefits of preventing the spread of COVID-19 far outweigh the potential violations of freedom of speech protections. States should define masks as clothing, which would allow them to mandate masks the same way that they mandate clothing in public.[7] This article will argue that the rulings, when contextualized with public transit, would indicate there is a case for compulsory mask wearing, despite the discomfort it may cause due to the ultimate safety benefits mask wearing provides. The Supreme Court should explicitly expand authority to allow local governments to enforce a mask mandate on public transit. Part I will seek to outline the current legal precedents present surrounding the issues of public health, public transit, and mandated masking. In Part II, the gaps in current public health and public transit law will be thoroughly explored, namely arguments for a more robust legal definition of what a mask is, along with a defined right to safety on transit. Part III will propose potential solutions and seek to define a mask legally with a SCOTUS ruling.

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[4] Anthony L. Komaroff, *What are the Long Lasting Effects of COVID-19?* HARVARD HEALTH PUBLISHING, 2 (JAN. 2021), https://www.health.harvard.edu/diseases-and-conditions/what-are-the-long-lasting-effects-of-covid-19.

[5] *Lehman v. Shaker Heights*, 418 U.S. 298, 300 (1974).

[6] *Id.*

[7] *Cohen v. California,* 403 U.S. 15, 19 (1971).

I. Public Health Law and Transit Rights in the Present

The history of public health law and transit rights in the pre-COVID-19 era is important when considering the authority that the government has to make a public mask mandate. In *Jacobson v. Massachusetts*, the Supreme Court held that mandatory vaccinations were constitutional in the context of the 1904 smallpox epidemic.[8] The Court held that despite any oppression the defendant may have felt due to mandatory vaccination, the program ultimately provided for benefits to public health that could not be ignored and far outweighed the defendant's objections.[9] Therefore, the case established the principle that so long as a public health measure is considered real and substantive, it is in fact constitutional.[10] In the subsequent century since this original ruling on compulsory public health measures in *Jacobson*, there has been a drastic reduction in the government's ability to enforce any compulsory vaccination, with slashes in its ability to enforce any mandatory public health measures, including face masks during the COVID-19 pandemic.[11] Today, states have no redress for forcible medical procedures, even in the event of a public health emergency with a rapidly spreading disease like COVID-19.[12] Even in a non-procedural context, there is no law that allows for mandatory public health measures at the federal level, but the federal law instead largely allows for a wealth of exemptions, religious or otherwise.[13] This is due to the idea that public health and safety laws are enforced and therefore fall under the jurisdiction of a state's police power.[14]

To further contextualize measures in a modern context it is useful to analyze a more recent ruling on public health measures in 2020, *Roman Catholic Diocese v.*

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[8] *Jacobson v. Massachusetts*, 197 U.S. 11, 13 (1905).

[9] Katherine Drabiak, *Disentangling Dicta: Prince v. Massachusetts, Police Power and Childhood Vaccine Policy*, 29 LOY. ANNALS HEALTH L. 177, 178 (2020), https://lawecommons.luc.edu/annals/vol29/iss1/6.

[10] *Id.* at 177.

[11] Wendy K Mariner et al., *Jacobson v Massachusetts: it's not your great-great-grandfather's public health law*, 95(4) AMERICAN J. PUB. HEALTH 581, 582 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449224/.

[12] *Id.* at 95.

[13] Hope Lu, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination,* 63 CASE WESTERN RES. L. REV. 869, 875 (Spring 2013), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1216&context=caselrev.

[14] *Id.*

Cuomo,[15] which is specific to the current COVID-19 pandemic. In the ruling, the Court held that places of worship should have the same legal status as "essential businesses" in the context of assembly rules.[16] The *per curium* opinion argued that the right to free assembly and freedom of religion is inhibited if places of worship are subject to the same restrictions on indoor capacity as nonessential business.[17]

More legal clarity can be found when considering law pertaining to citizen rights on public transit. The first foray into public transit rights was made by the Court in *Lehman v. Shaker Heights.*[18] Lehman argued that he had the right to hang any political advertisement he wanted to inside of a public streetcar.[19] The Court affirmed that the state had the right to limit speech inside of a public streetcar, print or otherwise.[20] This is because despite streetcars being a public utility, and on the surface, a public space, the cars still operated as government-controlled businesses, allowing for the state to have the same rights to limit speech as a private business would.[21] This clarification allows for states to argue that citizens cannot interfere with convenience, comfort, and safety on a public utility despite it still being a public space.[22] Although it nominally seems like a public good, the legal definition renders public transit to be anything but, allowing for the same regulations as private enterprise, despite transit being owned by the taxpayer.

Ensuring a safe means of public transportation also becomes important when examining the context of rights to movement, both in terms of inter and intra-state travel. In *Saenz v. Roe,*[23] the Court reaffirmed an individual's 14th Amendment right to move freely between states once that person is a United States citizen.[24] The case affirms that all citizens should be seen equally under the eyes of the law and that they

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15 *Roman Catholic Diocese v. Cuomo,* 208 U.S. 206, 206 (2020)
16 *Id.* at 208.
17 *Id.*
18 *Lehman v. Shaker Heights,* 418 U.S. 298, 300 (1974).
19 *Id.* at 301.
20 *Id.* at 302.
21 *Id.* at 306.
22 *Id.* at 304.
23 *Saenz v. Roe,* 526 U.S. 489, 489 (1999).
24 *Id.* at 504.

also should all be subject to the same laws on a statewide basis.[25] *Saenz* is an important ruling because it also adds that there cannot be residency requirements before a citizen can benefit from programs run by the states, and that there is no residency requirement before one is subjected to the same laws as everyone else in that state.[26] This is significant in the context of movement on transit because interstate public transit, such as Amtrak, is a widely used service, even in the context of the COVID-19 pandemic.[27] Because of the ruling in *Saenz*, if citizens were to cross state lines while riding public transit, from a state with a mask mandate to one without, there would be nothing preventing a citizen from then being able to take their masks off even though they are still on the same public transit with the exact same people.[28] This ambiguity further points to a need for a comprehensive ruling on mask mandates on public transit due to the unique nature of this issue.

This issue becomes murkier when looking at current interpretations of what protection means in the context of interstate travel. While current legal protections allow for limits on interstate travel, they are very limited in scope because of the right to interstate travel.[29] Some even argue that programs like the Transportation Security Administration (TSA) are too restrictive,[30] and that the government should not allow any form of regulation of interstate movement. However, part of protecting the right to interstate travel is keeping it safe. In *Bonacci v. Transp. Sec. Admin*, the DC circuit court held that the TSA has the right to randomly select both passengers and crew for searches before air travel.[31] Despite the TSA being a massive barrier to interstate travel by requiring licenses and body searches to move from state to state,[32] the agency is still constitutional as its protections are key to protecting the right to move

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[25] *Id.*

[26] *Id.*

[27] Luz Lazo, *Amtrak touts record ridership, revenue for fiscal 2019*, WASH. POST, Nov. 28, 2019, at 1–2.

[28] *Saenz v. Roe,* 526 U.S. at 143.

[29] Wafa Al-Otaiby. States' Responses to the Real ID Act: The Impact of State Resources, Ideology, and Administrative Preferences on the Implementation of a Federal Mandate (2010), (unpublished Ph.D. dissertation, University of Arkansas) (available at: https://www.proquest.com/dissertations-theses/states-responses-real-id-act-impact-state/docview/1018361681)

[30] Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms,* 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 639, 641 (Summer 2014), https://repository.law.uic.edu/jitpl/vol30/iss4/1/.

[31] *Bonacci v. Transp. Sec. Admin.,* 909, F.3d, 439, 443 (D.C. Cir. 2018).

[32] *Id.* at 439.

for all.[33] With this same line of reasoning, a mask mandate on public transit could be seen as constitutional. Even if a mask poses a small barrier to entry for riders of mass transit, masks also provide a level of safety to riders in the midst of the COVID-19 pandemic. The safety that masks can provide outweigh the hurdle that they pose to ridership of transit.[34]

While mass public transit is something that still allows for interstate movement, the majority of frequent riders use mass transit locally in an intrastate context. This presents a problem, because while a right to interstate movement is well defined, there is currently still much debate on the right to intrastate travel.[35] Some lower courts have argued for a limitless right to intrastate movement as seen in the 1972 ruling *Papachristou v. City of Jacksonville,*[36] which held that the city of Jacksonville, Florida did not have the right to enact a vagrancy law that prohibited strolling from place to place.[37] This fundamental right to movement is challenged by the 1975 ruling in *Wright v. Jackson,*[38] which argued that there is no constitutional right to commute to work. This ruling implied that there are limits to protected intrastate movement, and that such movement is not universal.[39] Contradictory in nature, these two rulings should indicate a need for the Court to issue an affirmative position on intrastate travel, one which extends the interstate travel rights already in place. The distinction is important in the context of mass transit as it can be both, interstate and intrastate; current ambiguity would indicate that any universal regulation on mass transit would face bountiful hurdles. Only with an affirmative right to move intrastate can the Court issue a position on mandatory masking on public transit.

The issue of masking also presents a unique challenge in legal contexts, as there is currently no legal definition of what a mask is.[40] If the government can hold

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[33] *Id.*

[34] Massimo Marchiori, *COVID-19 and the Social Distancing Paradox: dangers and solutions,* ARXIVLABS (May 26, 2020), https://arxiv.org/abs/2005.12446.

[35] Andrew C. Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel,* 86 Nw. U.L. Rev. 820, 821 (1992), https://heinonline.org/HOL/P?h=hein.journals/illlr86&i=840.

[36] *Papachristou v. City of Jacksonville,* 405, U.S. 156, 158 (1972).

[37] *Id.* at 158.

[38] *Wright v. Jackson,* 506 F.2d 900, 902 (5th Cir. 1975).

[39] *Id.*

[40] Lawrence et al., *supra* note 3, at 484.

that one must wear certain articles of clothing, and a mask is defined as an article of clothing, then masks can be mandated on transit.[41] But if a mask is considered to be a medical device, there can be no mask mandate as there is no way to force anyone to receive involuntary medical treatments.[42] However, there is significant evidence that a mask is, in fact, clothing rather than a medical device.[43] The most recent definition of what constitutes an article of clothing comes from the Court in 2014 where in *Sandifer vs. US Steel Corp,*[44] the Court made the distinction between special equipment, such as ear plugs, and clothing, such as fire-retardant jackets. In a majority opinion, the late Justice Scalia wrote that clothing was defined as, "items that are both designed and used to cover the body and are commonly regarded as articles of dress."[45] Upon further analysis in the context of the *US Steel Corp*, the Court defined that a balaclava or ski mask is considered an article of clothing.[46] Given that a ski mask can be considered a nonmedical face mask, this would point to a strong likelihood that a mask could be considered to be clothing legally despite its medical purpose. Once this definitional hurdle is cleared, the path towards universal masking on transit becomes much clearer.

Currently, the Court has no right to ban articles of clothing in the event of them causing a significant disruption inside of a public space per *Cohen v. California.*[47] The ruling came as a response to the defendant, *Cohen*, wearing a jacket emblazoned with "FUCK THE DRAFT, STOP THE WAR," which the state of California arrested him for.[48] The Court held that despite the slogan on the jacket being a

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[41] Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*. 23 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 817*,* 892 (Spring 2013), https://ir.lawnet.fordham.edu/iplj/vol23/iss3/2/.

[42] Dora W. Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment,* 46 SAN DIEGO L. REV. 161, 166 (Winter 2009), https://digital.sandiego.edu/sdlr/vol46/iss1/7/.

[43] U.S. FOOD AND DRUG ADMINISTRATION, FACE MASKS, INCLUDING SURGICAL MASKS, AND RESPIRATORS FOR COVID-19, https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/face-masks-including-surgical-masks-and-respirators-covid-19 (last updated Apr. 9, 2021).

[44] *Sandifer v. U.S. Steel Corp.,* 571 U.S. 220, 221 (2014).

[45] Tammy McCutchen & William F. Allen, *Supreme Court Finds Middle Ground On Definition Of "Clothes" Under The FLSA,* MONDAQ.COM, Jan. 29, 2014, https://www.mondaq.com/unitedstates/employee-rights-labour-relations/289386/supreme-court-finds-middle-ground-on-definition-of-clothes-under-the-flsa.

[46] *Sandifer v. U.S. Steel Corp.,* 571 U.S. 220, 224 (2014).

[47] *Cohen v. Cal.,* 403 U.S. 15, 19 (1971).

[48] *Id.*

disruption, the state had no right to ban the jacket or the phrase.[49] This proves important in the context of masking in public spaces, as it can be argued that the lack of a mask also proves to be a public disturbance; if the government cannot ban articles that cause disruptions, then it cannot currently mandate articles to avoid further disruptions.[50]

This idea of clothing enforcement inevitably leads into a discussion of public nudity law, namely if clothing is required in a public space.[51] If a mask is an article of clothing, then one could theoretically mandate masks, despite their potential inconvenience and barrier. This idea is expanded on in *Barnes v. Glen Theatre, Inc,*[52] where the Court was asked to evaluate if the state of Indiana was legally allowed to ban nudity in public spaces.[53] They held that despite nudity being considered a form of expression,[54] public indecency laws could still mandate the presence of clothing in public spaces.[55] While public indecency may not seem at surface level to be at all related to wearing masks in public, if regulations allow for the mandatory wearing of clothing in public and on mass transit, then there is a much stronger argument to be made for a federal mask mandate on transit. Strong masking law therefore should anchor masks as articles of clothing, not as medical devices, to enforce a mask mandate most effectively.

Law surrounding the COVID-19 pandemic is rapidly evolving as the scope and magnitude of the outbreak continues to expand at breakneck pace. One of the first COVID-19 specific cases to go to the Supreme Court, *South Bay United Pentecostal Church v. Newsom,*[56] held that there could be no religious exemptions to COVID-19

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[49] *Id.*

[50] *Id.*

[51] Jeffrey C. Narvil, *Revealing the Bare Uncertainties of Indecent Exposure,* 29 COLUM. J.L. & SOC. PROBS. 85, 91 (Fall 1995), https://heinonline.org/HOL/P?h=hein.journals/collsp29&i=95.

[52] *Barnes v. Glen Theatre,* 501 U.S. 560, 565 (1991).

[53] Teno A. West, *First Amendment Protections Stripped Bare: Barnes v. Glen Theatre, Inc.,* 27 NEW ENG. L. REV. 475, 478 (Winter 1992), https://heinonline.org/HOL/P?h=hein.journals/newlr27&i=485.

[54] Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment,* 67 TUL. L. REV. 1231, 1233 (Mar. 1993), https://advance.lexis.com/document/index?crid=b959e4ed-e952-42d1-8ef4-e6af1b62057a&pdpermalink=7ed4454a-8ea6-4e32-bdc6-1c16400ef19c&pdmfid=1516831&pdisurlapi=true

[55] *Id.*

[56] *S. Bay United Pentecostal Church v. Newsom,* 140 U.S. 154, 156 (2020).

capacity guidelines despite arguments for infringement on religious freedom. The church argued that capacity guidelines should not apply to places of religious worship due to the First Amendment freedom of expression protections offered to churches.[57] However, it was indicated by the Court that overall public health trumps any freedom of expression violations that a capacity guideline could create, and that any claims of religious liberty infringement were moot.[58] This fares well for a mandatory mask mandate, as the case could be applied to prevent people from violating such a mandate using arguments of religious freedom.

This ruling however was recently overturned on November 30th, 2020, with the Court's ruling on *Roman Catholic Diocese v. Cuomo,*[59] which argued that the ruling in *Newsom* should be moot due to the impact that prolonged bans on religious gatherings could have on religious expression.[60] In a concurring opinion, Justice Gorsuch wrote, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[61] This ruling is not only greatly damaging to public health guidelines, but also throws the entire possibility of a constitutional mask mandate of any form into jeopardy. If religious spaces are exempt from public health law during the pandemic, it is not a stretch to imagine people denying a mask mandate on a pseudo-private space such as mass transit on the grounds of religious freedom. While gathering and masking have fundamental differences, their overall effect of collective action to stop the spread of disease means that the ruling in *Cuomo* broadly diminishes the states' right to enforce new public health measures to curb the current COVID-19 crisis.

II. Ambiguity in Current Public Health Law: What's a crisis?

This section will outline the arguments in favor of more narrowly defining the legal definitions for a mask, including the places in which a mask can be publicly

[57] Zalman Rothschild, *Free Exercise's Lingering Ambiguity,* 11 CALIF. L. REV. ONLINE 280, 288 (July 2020), californialawreview.org/free-exercises-lingering-ambiguity/.

[58] *Id.* at 289.

[59] *Roman Catholic Diocese v. Cuomo,* 141 U.S., 206, 208 (2020).

[60] *Id.*

[61] *Id.*

mandated in a time of unprecedented crisis. It will also define what constitutes a barrier to public transit ridership.

A. Arguments for a more robust legal basis for mask mandates

In the status quo, there is still no precedent for what constitutes a crisis large enough to enforce any emergency public health law.[62] One of the most fundamental cases on the subject of mandatory vaccinations, *Jacobsen vs. Massachusetts*, still indicates that compulsory measures against pandemics can only be mandated when they are "necessary for public health or safety."[63] This language leaves much ambiguity for what type of crisis is large enough to trigger enforcement of public health law. Without a concrete definition for what exactly constitutes a necessary response to a public health crisis, any future regulation pertaining to public health measures has the potential to be struck down simply because it does not do enough to be considered necessary or vice versa. Additionally, issues could arise from the lack of a definition for a public health crisis, as one could simply argue that the crisis future legislation was attempting to respond was not large enough to warrant an infringement on civil liberties. A legal litmus test is needed to determine what the threshold is to declare a disease breakout a public health crisis.

In a 2016 ruling in the New York Appellate court, *Shah v. Spence* held that nurses in a dental office may be compelled to wear a surgical mask during flu season when customers were present.[64] This indicates that mask mandates can be enforced inside of private spaces; it is not an unreasonable jump to go from mandatory masks for employees, as seen in *Shah,* to mandatory masks for customers.[65] The theory seems to be proving itself correct in recent rulings. Mandates for masking in private spaces have quickly become commonplace, and despite numerous legal challenges, they have so far held up in circuit courts, most recently seen in *Parker v. Wolf* on

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[62] Mariner et al., *supra* note 11, at 581–590.

[63] *Id.* at 95.

[64] *Spence v. Shah* (*In re.* Spence), 136 A.D.3d 1242, 1246 (N.Y. App. Div. 2016).

[65] Andrew D. Cotlar & Joshua H. Cotlar, *Liability Unmasked: Pennsylvania Tort Law Applied to COVID Anti-Maskers,* 92 PA. BAR ASS'N Q. 14 (Jan. 2021), https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:61TB-W771-JWJ0-G0NH-00000-00&context=1516831.

December 11, 2020.[66] These mandates in private spaces, such as restaurants and hospitals, are not too far off from public transit, and one could reasonably infer that compulsory masking could be mandated under this precedent.

Enforcement of compulsory mask wearing proves challenging when one considers how such enforcement will inevitably harm BIPOC more than the average citizen.[67] If enforcement consisted of jail time, it would increase the concentration of individuals inside of prisons and could end up increasing the spread of COVID-19.[68] The risk of contracting COVID-19 multiplies by five inside of prisons when compared to the general population.[69] Keeping citizens outside of the inherently confined spaces inside of prisons is key to slowing the spread of disease. Using fines as an enforcement tactic is also not ideal, as lower income citizens would be disproportionately affected by financial ramifications.[70]

B. Arguments for safe transit as a right

The role of the state takes on a unique role in the context of the COVID-19 pandemic as it pertains to public transit. Equitable access to movement has been established under the ruling of *Saenz v. Roe,*[71] which indicates that all citizens should have the right to move from state to state, and also move intrastate, safely. However, current law surrounding the right to safe public transit is ambiguous at best, and current law had inherent discrimination against disabled people and minorities.[72] In a 2001 article, Michael Lewyn wrote, "If inaccessible transportation keeps the disabled unemployed, it logically follows that the decay of public transit in recent decades has had something to do with the growth of poverty and unemployment

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[66] *Parker v. Wolf,* 2020 U.S. Dist. LEXIS 233348, at *48 (M.D.Pa 2020).

[67] Naomi Seiler et al., *The Risk of Criminalizing COVID-19 Exposure: Lessons from HIV,* 24 HUM. RTS. BRIEF 5, 9 (Summer 2020), https://advance.lexis.com/api/permalink/f4590831-6648-4c3f-b849-2a37d4a02636/?context=1516831.

[68] *Id.*

[69] Eleanor Bird, *COVID-19 cases 5 times higher in prisons than general population,* MEDICAL NEWS TODAY, July 15, 2020, https://www.medicalnewstoday.com/articles/covid-19-cases-5-times-higher-in-prisons-than-general-population.

[70] Seiler et al., *supra*, at 24.

[71] *Saenz v. Roe,* 526 U.S. at 143.

[72] Michael Lewyn, *Thou Shalt Not Put a Stumbling Block Before the Blind: The Americans with Disabilities Act and Public Transit for the Disabled,* 52 HASTINGS L.J. 1037, 1096 (July 2001), https://advance.lexis.com/api/permalink/d6f7bbc8-cca5-40eb-8f55-15bc54b541b9/?context=1516831.

among the disabled."[73] It is this sort of inequality on transit that is currently being ever worsened by the relentless charge of COVID-19: a defined right to safe public transit for all people is needed to ensure that public safety measures, such as compulsory masking, can be implemented on transit.

Regulation of transit in the status quo exists somewhat in a grey space, as transit entities in the United States largely operate as government corporations- run by the government but financially independent.[74] This is best exemplified when referencing *Department of Transportation v. Association of American Railroads*, where Justice Scalia's majority opinion argued that for all legal intents, Amtrak is a government entity, despite it being a financially independent institution.[75] Proper guidance is needed to indicate how mass transit should be regulated in the context of public health. Despite being government entities, transit still does not qualify as wholly public space, making the enforcement of masking inside of it unique.[76]

III. The Solution

A. Masks and Mass Transit

While guidance on the enforcement of mask mandates is growing by the day, clearer legal precedent, both in the context of public health and public transit, is still needed to ensure mask mandates can be effectively enforced. Using a challenge to one of the many state mask mandates, the Supreme Court should move to establish precedent allowing for non-medical mask mandates on public transit. Masks can already be seen as clothing under current precedent based on the ruling in *Sandifer v. U.S. Steel Corp.*[77] Additionally, clothing as speech and regulation of speech on mass transit is already well defined in *Lehman v. Shaker Heights*.[78] Such a movement also has a depth of historical context, dating back to the seminal *Jacobson* ruling establishing

[73] *Id.*
[74] *Department of Transportation v. Association of American Railroads,* 575 U.S. 43, 44 (2015).
[75] *Id.* at 83.
[76] *Lehman v. Shaker Heights,* 418 U.S. at 770.
[77] *Sandifer v. U.S. Steel Corp.,* 571 U.S. at 221.
[78] *Lehman v. Shaker Heights,* 418 U.S. at 770.

that public health measures can be compelled during pandemics.[79] Despite not being a medical device, masks can still be scientifically proven to aid in the battle against COVID-19, and compelling citizens to wear them should not be seen as an overreach on personal rights and freedom. Furthermore, *Lehman v. Shaker Heights* indicates that there is indeed a true right to safe equitable transit; safety of riders in the context of COVID-19 can only be ensured with the implementation of mask wearing on transit.

While Congress can withhold funding to states who do not incentivize mask wearing, it cannot enforce a mandatory mask mandate,[80] per an August 2020 Congressional Research Service report:

> This principle thus prevents Congress from requiring states or localities to mandate masks. It does not, however, impede Congress from using its Spending Clause authority to incentivize states to do so, as long as the amount offered is not so significant as to effectively coerce, or functionally commandeer, states into enacting the mandate.[81]

A non-financial reason is needed to ensure a nationwide mask mandate. It becomes especially prudent in the context of mass transit, where their independent financial nature makes congressional power of the purse largely ineffective at influencing them.

B. Counterarguments

Perhaps the most practical of arguments against mask mandates is rooted in the financial burden that masks place on riders of mass transit. By mandating masks on public transportation, municipalities would force riders to purchase a mask, which could be a barrier to ridership on transit for the poor.[82] However, when looking at the previously established rulings such as *Jacobson v. Massachusetts* and *Lehman v. Shaker Heights*, we can see that the safety of the general public should come before the convenience and comfort of passengers on mass transit. Furthermore, if a safe right to transit is enacted, the financial hurdle is one that must be overcome in order to

[79] *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

[80] Wen W. Shen, *Could the President or Congress Enact a Nationwide Mask Mandate?*, CONG. RES. SERV., Aug. 6, 2020, https://crsreports.congress.gov/product/pdf/LSB/LSB10530 .

[81] *Id.*

[82] Lawrence et al., *supra* note 3, at 481.

ensure the safety of all riders of transit. Perhaps a line item in the next round of economic stimulus could include funding for disposable masks to be provided to transit riders.

Another argument against a mask mandate on transit argues that such a policy would not do enough to address the root causes of inequity on transit. Masks on transit, while adding a layer of protection against COVID-19, also increase the likelihood for racial profiling to occur against BIPOC.[83] There are significant racial concerns for mandatory masks, both with the issues of access and the issues of enforcement being racially skewed. This issue of racial disparity is one that cannot be ignored, as safe ridership on transit should be a right that extends to all. While a ruling on the safety for all on mass transit would not end structural racism in the United States, safe transit would be a step in the right direction towards a justice system that sees all as equal.

There are also those that believe that a mask should be considered to be a medical device and not a mask. However as seen in the cases that have set precedent such as *Sandifer v. U.S. Steel Corp*, both historically from the Court and more recent circuit court rulings, we can see that a mask, or rather a nonmedical face covering, has become more well defined as clothing. While a medical mask would do more to stop the spread of COVID-19, the differences between nonmedical and medical masks make the implementation of nonmedical masks for all citizens within the realm of legal possibilities.

Conclusion

Despite the multiple barriers to action on both the legalities of regulation of public utilities, and compulsory mask mandates, action is still needed to ensure the safety of the millions of people who ride public transit every day. Current rulings simply are not enough. Not only is there ambiguity regarding the regulation of public utilities, but there is also the question of what a mask is in a legal context. A ruling

[83] *Id.*

on the issue of what a mask is and whether it can be mandated for transit riders would have a litany of spillover effects. Such a ruling could allow for legally mandated masks in other spaces, both public and private. This move is essential not just in the context of the COVID-19 pandemic, but also as a measure of future proofing against unforeseen public health crises.