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All Correspondence should be addressed to:

Juris Mentem Law Review
Department of Justice Law & Criminology
American University, School of Public Affairs
4400 Massachusetts Avenue NW
Washington, DC 20016-8043

jurismentem@american.edu
american.edu/spa/jlc/juris-mentem.cfm

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EDITOR'S NOTE:

On behalf of the Editorial Board, it is my honor, to introduce the Fall 2023 edition of the *Juris Mentem Law Review*.

I am immensely grateful for the opportunity to collaborate with a talented cohort of writers and editors, and extend my appreciation to all those who have helped shape this publication into what it is today. Founded through unprecedented challenges posed by a global pandemic, *Juris Mentem* has continued to grow into a thriving community of aspiring legal scholars, researchers, and professionals. At *Juris Mentem*, we promote critical thinking and legal scholarship, and proudly display this through our semesterly publication.

My deepest thanks go to the AU staff and the JM Editorial Staff for their unwavering commitment and unrelenting efforts to ensure the quality of this publication. JM's writers seek to explore not only the prominent legal questions of our time, but also issues that are often overlooked and underrepresented. This diverse collection of pieces provides readers the opportunity to learn about legal issues they may not have encountered before.

Happy reading,

Jon DiPietro,
Editor-in-Chief

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THE STORY OF OJ: A QUESTION OF BLACK CAPITALISM'S FIGHT AGAINST THE AMERICAN LEGAL SYSTEM

Charity Arrington

The Story of OJ: A Question of Black Capitalism's Fight Against the American Legal System

> When white Americans tell the Negro to 'lift himself by his own bootstraps,' they don't look over the legacy of slavery and segregation. I believe we ought to do all we can and seek to lift ourselves by our own bootstraps, but it's a cruel jest to say to a bootless man that he ought to lift himself by his own bootstraps. And many Negroes by the thousands and millions have been left bootless as a result of all of these years of Oppression.
>
> - Dr. Martin Luther King Jr.

INTRODUCTION

Conversations on Black capitalism have recently become more frequent and divisive. Prominent Black billionaires in the music industry, such as Jay Z and Rihanna, have demonstrated the power of Black wealth, raising questions about how these individuals benefit the broader Black community as a whole—beyond mere representation. While some Black celebrities have amassed substantial wealth, the Black community continues to face economic inequalities and inequitable access to resources. In historically racialized systems, the question becomes: How much Black wealth can counteract the institutional effects of racism? The justice system has long been recognized as a main contributor to racial inequality in America, particularly for Black Americans. From runaway slave laws that enabled the police to arrest Black people to President Richard Nixon's infamous War on Drugs, the odds have consistently favored white communities and white wealth, all while being stacked against Black communities. Racism, specifically against Black Americans, is at the heart of the criminal justice system: "Courts normalize, legitimize, and perpetuate the extraction of resources from poor, predominantly Black communities and support the accumulation of white wealth."[1]

[1]Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts,* Columbia Law Review (2023), https://columbialawreview.org/content/racial-capitalism-in-the-civil-courts/.

Evidently, the justice system has historically favored the rich and the white.

Today, Black people are statistically far more likely to enter the criminal justice system. Through higher arrest rates, sentencing disparities, racial profiling, and other factors, Black people continue to be disproportionately affected by the criminal justice system. For example, Black people are more likely to be stopped and searched by the police.[2] In the courtroom, research from the *Prosecutorial Performance Indicators* found that cases involving Black victims were more likely to be dismissed than cases involving Black and white victims, despite Black defendants being more likely to be prosecuted.[3] Moreover, the bail system significantly drives the criminalization of Black people's poverty. In the mere 4% of civil cases, judges set a financial bond that is nearly always a cash bond—and more often than not, this hurts poor Black people the most.[4] Cases with wealthy Black defendants demonstrate when two variables are altered: race and socioeconomic status. While the justice system is often stacked against poor and Black individuals, it's important to consider how it treats wealthy Black defendants. Statistically, because they are Black, the odds are still against them. Depending on the nature of the charges or lawsuits, these cases can raise questions about racial bias, discrimination, and access to legal representation in the justice system.

While many of the issues facing Black Americans are apparent in the criminal justice system, the civil justice system is no different. Civil courts actively contribute to, and perpetuate, racial inequality. The civil system, with its history of constructing racial hierarchies and reinforcing racial privileges, plays a crucial role in historical racial exploitation and wealth accumulation, particularly among Black communities. Even after the formal abolition of slavery, the legal system continues to support these hierarchies and legitimize racial exploitation.

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[2] National Conference of State Legislatures, *Racial and Ethnic Disparities in the Criminal Justice System* (May 2022), https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system.

[3] Prosecutorial Performance Indicators, *Racial &Ethnic Differences* (2023), https://prosecutorialperformanceindicators.org/racial-ethnic-differences/.

[4] Spurgeon Kennedy, *Freedom and Money–Bail in American*, The Pretrial Services Agency for the District of Columbia (2023), https://www.psa.gov/?q=node/97#.

In the context of debt collection, the racialized accumulation of debt and debt delinquency disproportionately affects Black communities. In *Whiteness as Property,* Cheryl Harris discusses how civil courts have a history of solidifying the power of white supremacy through the practice of resolving everyday contract and property disputes.[5] Works from Ian Haney López and Ariela Gross explore how deliberations within civil courts define the racial identity of the individuals in cases.[6] In their work, the authors documented legal proceedings that involved a thorough examination of physical attributes, as well as other indicators of social identity and what was considered "common expectations."[7] This process included extensive debates on how to establish the racial identity of the parties involved, carrying significant implications. Such practices of shaping and defining race, which reinforce ideas of racial inferiority and magnify distinctions between racial groups, play a critical role in enabling and institutionalizing societal disparities. Capitalists rely on the power of these civil courts to maintain fear and discipline and to authorize the extraction of significant sums of money. Some academics suggest "it is not simply that the courts have allowed racial categories to mark the groups of people who are exploited and those who profit, but also that the courts have actively constructed race and thereby made systemic racial exploitation appear rational."[8]

Criminal and civil courts emphasize the deep connection between racism and capitalism. They demonstrate that capitalism relies on racialized systems of exploitation and extraction, and the legal system actively supports these processes by making it more challenging for Black communities to overcome historical racial inequalities. Criminal charges and lawsuits with wealthy Black defendants can uncover the legal and financial challenges successful individuals, regardless of their race, may face within the capitalist system. Consequently,

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[5]Cheryl Harris. (June 1993). Whiteness as Property. Harvard Law Review. *106*(8)

[6]*See generally* Ian Haney López, *White By Law: The Legal Construction of Race* (1996); *see also* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 Yale L.J. 109, 112–14 (1998).

[7]Ian Haney López, *White By Law: The Legal Construction of Race* (1996).

[8]Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts,* Columbia Law Review (2023), https://columbialawreview.org/content/racial-capitalism-in-the-civil-courts/.

such cases could impact their ability to contribute to economic development and potential charitable causes within Black communities. As a case study, this paper will delve into the details of the case of former NFL player and actor, Orenthal James (O.J.) Simpson.

MURDER TRIAL OF O.J. SIMPSON

O.J. Simpson is a former American collegiate and professional football player. After retiring from football in 1985, Simpson turned to film and television acting. On June 12, 1994, Simpson's ex-wife, Nicole Brown Simpson, and her friend Ronald Goldman were stabbed to death outside Nicole's home in Los Angeles. Five days later, Simpson was arrested and charged with the two murders. Simpson's 1995 criminal trial has now been hailed as one of the most celebrated trials of the century, and also as one of the most divisive. Simpson later pleaded not guilty to the murder charges, after hiring a team of prominent lawyers to handle his defense. Simpson's defense attorneys claimed he was wrongfully accused, while the prosecution theorized that Simpson was a controlling husband whose relationships had a history of abuse. The prosecution also pointed to blood from the crime scene found in Simpson's car and home. In a pivotal moment during Simpson's trial, the prosecution asked Simpson to put on a glove that the supposed murder suspect had worn. But the glove did not appear to fit properly—thus marking the creation of the infamous phrase: "If [the glove] doesn't fit, you must acquit." Simpson's lengthy and nationally televised trial became the center of all media coverage and an unprecedented amount of public scrutiny. On October 3, 1995, after deliberating for less than four hours, a jury acquitted Simpson of the murder charges.

But Simpson's legal troubles did not end there. In 1997, Simpson dealt with a separate civil lawsuit filed by Ronald Goldman's family. Simpson was ultimately found liable—by a preponderance of the evidence, which is a lower standard of proof than his criminal trial—for the wrongful death of his ex-wife and Goldman. Simpson was ordered by a jury to pay $33.5 million in damages to the families of his ex-wife and Goldman, which is equivalent to $61 million in 2023. The jury reached its verdict in a unanimous decision that Simpson was responsible for both deaths. The physical evidence presented

during the civil trial was largely the same as the evidence in the criminal trial, however, the civil trial focused more closely on the domestic violence elements of Simpson's behavior.

Analysis:

The case of O.J. Simpson demonstrated a complex overlap of factors: race, wealth, and the legal justice system in the United States. It highlighted several aspects of racial inequality in the legal system, including the presence of racial bias in policing—particularly in the controversial actions of Detective Mark Fuhrman. This raised concerns about systemic racism within the police force and led to public outcries that Simpson was being targeted.[9] The case also shed light on the disparities in the quality of legal representation available to individuals. Simpson's wealth allowed him to access top-tier legal defense, including famous attorney Johnnie Cochran. This is a luxury privilege not afforded to most people, particularly those from marginalized communities. The capability to afford legal resources emphasizes the disparities in the quality of legal representation that people can access based on their financial means.

Additionally, the media's portrayal of the case and the racial dynamics within it, played a significant role in shaping public perception. This underscored how public opinion can be influenced by racial biases and stereotypes, ultimately affecting trial outcomes. Controversy arose when Time published, "An American Tragedy," featuring a photo of Simpson on the cover, which was noticeably darker than how the original picture appeared. Critics had claimed that Time had used photo manipulation to darken the image, implying racist editorializing.

The case also raised concerns about racial bias in jury selection, which can disproportionately affect minority defendants. Both the prosecution and the defense were accused of manipulating the racial composition of the jury to their advantage. This raised issues related to the fair and impartial selection of

[9]Lorraine Adams, *Past Paints Troubling Portrait of Simpson Case,* The Washington Post (1995), https://www.washingtonpost.com/archive/politics/1995/08/22/past-paints-troubling-portrait-of-simpson-case-detective/d7e5ee9e-d8b6-4ebc-976a-d03885e11b8b/.

jurors, often forcing minority defendants to engage in the same type of manipulation to attempt to gain the upper hand in a system pitted against them.[10] The Simpson case, with its racially divided public opinion and high-profile nature, brought attention to the complex interplay of race and wealth in the legal justice system in the United States. While many Black Americans supported Simpson, many white Americans did not—this revealed how different communities interpreted the case through the lens of their own experience and perceptions of the justice system.[11] The public perception of the case indicated that regardless of Simpson's fame and wealth, he was still prone to experiencing racism.

Even within Simpson's own defense team, racism was an issue. In an interview with Robert Shapiro, who worked with Johnnie Cochran on Simpson's defense team, Shapiro admitted that the team played the "race card . . . from the bottom of the deck," implying that he believed the team wrongfully inserted race as an issue in the case.[12] In the same interview, Shapiro, who initially led the defense team, admits that he hired Cochran, in part, because he was Black. In response, Cochran denies ever playing the race card, stating "We never played the race card. What we did was pursue the credibility card . . . I think the race card trivializes the whole issue of race in America."[13] But during Simpson's civil trial, the topic of race was not permitted. Los Angeles County Superior Court Judge Hiroshi Fujisaki instructed Simpson's defense team to limit any evidence of racial bias from the Los Angeles Police Department (LAPD), specifically regarding evidence of contamination and racism by former detective Mark Fuhrman—who, as previously discussed, the defense team alleged had previously used the n-word. According to Judge Fujisaki, "This is not a case of: Did the LAPD commit malpractice?"[14]

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[10] Christopher Spolar, *Majority-Black Jury Selected In O.J. Simpson Murder Trial*, The Washington Post 1994.

[11] Carl E. Enomoto, *Public Sympathy for O. J. Simpson: The Roles of Race, Age, Gender, Income, and Education.* The American Journal of Economics and Sociology (Jan. 1999) http://www.jstor.org/stable/3487883.

[12] Barbara Wlters Interview with Robert Shapiro, 1996.

[13] Johnnie Cochran Interview Larry King 1996.

[14] Associated Press, O.J. Judge limits defense by restricting evidence (Sep. 17, 1996), https://www.deseret.com/1996/9/17/19266221/o-j-judge-limits-defense-by-restricting-evidence.

The Simpson case serves as a stark illustration of the persisting racial disparities within the American legal justice system under capitalism. The case brought to the forefront the intricate issues surrounding race, wealth, and the legal system, emphasizing how the availability of financial resources can significantly impact an individual's access to legal representation and justice. Additionally, it demonstrated how the media's portrayals of cases and public perception can be influenced by racial biases and stereotypes, potentially affecting trial outcomes. Both Simpson's criminal and civil cases, with their racially divided verdicts, highlighted the challenges in ensuring a fair and impartial legal system, particularly regarding jury selection. The cases also raised critical questions about systemic inequalities that continue to affect marginalized communities within the justice system. Although the Simpson case took place almost thirty years ago, it remains a powerful example of the need for comprehensive reforms to address racial disparities and inequities in the legal justice system, especially when looking through a capitalistic lens. The racism Simpson experienced throughout both his career and murder trial is referenced by Jay-Z, a prominent musician and Black capitalist, in his song The Story of O.J. In this song, Simpson is featured in a line saying, "I'm not Black, I'm O.J." and Jay-Z rhetorically responds, "Okay."[15] This quip exchange in the song references a greater idea that wealth, notoriety, and fame can transcend race—something Simpson tried to do in his trials by not assuming the identity of a "Black" American, and rather saying throughout the trials he was just a normal and wrongfully accused person

THE ROLE OF THE SUPREME COURT

Shelley v. Kraemer:

Shelley v. Kraemer (1948) is a crucial case in understanding how the legal system has played a role in addressing racial disparities, particularly in the realm of property ownership and housing opportunities. In this case, a Black family, the Shelleys, purchased a property in a St. Louis, Missouri, neighborhood. But unbeknownst to the family, there was a racially

[15]Jay-Z, "The Story of O.J.," 4:44 (Roc Nation, 2017).

restrictive contractual agreement (racial "covenants") prohibiting the property's sale to non-white individuals. When the Shelleys attempted to move into their new home, they faced legal challenges from white property owners in the neighborhood who sought to enforce the racial covenant. The case revolved around the question of whether courts could enforce racially discriminatory covenants in property deeds, or if such enforcement violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of the United States ultimately held that state courts could not enforce these restrictive covenants, as doing so would constitute state action in support of racial discrimination and therefore violate the Equal Protection Clause. The decision in *Shelley* was significant in challenging housing discrimination and contributing to the broader civil rights movement that was beginning to emerge during that time period.[16]

Despite its significance, *Shelley* serves as a reminder that economic success and wealth accumulation within the Black community, which is largely represented by homeownership, cannot fully offset the deeply ingrained history of racial inequality perpetuated by the legal justice system under capitalism. In the majority opinion in *Shelley*, Chief Justice Fred M. Vinson acknowledged the necessity of legal action to challenge racially restrictive agreements and gain equal protection under the law—this shed light on the persistent need for legal remedies to address housing discrimination.[17] While the case marked a substantial victory, it underscores the limitations of legal action in fully addressing historical and ongoing racial disparities because, in the years that followed, the Fourteenth Amendment's protections were diminished, and largely deemed inapplicable and irrelevant in subsequent cases.

Shelley played a critical role in expanding housing opportunities for Black Americans and serves as a testament to the legal system's capacity for addressing specific issues of racial inequality. However, it cannot single-handedly offset the multifaceted history of racial disparities within the legal justice system under capitalism. Justice William O. Douglas, in his concurring opinion, highlighted the legal precedents set by the Court's previous decisions and the evolving perspective on

[16] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[17] *Brown v. Board of Education,* 347 U.S. 483 (1954).

racial inequality.[18] Ultimately *Shelley* is symbolic of the need for broader systemic changes and continued efforts to address racial inequalities in various dimensions, aiming for a more equitable and just society for all. It reinforces the argument that Black wealth, though crucial in the fight for economic justice, cannot entirely eradicate the pervasive historical and ongoing racial disparities within the legal justice system under the capitalist framework.

Brown v. Board of Education:

In *Brown v. Board of Education of Topeka* (1954), the long-standing issue of racial segregation in public schools was addressed.In a landmark decision in *Brown*, the Supreme Court of the United States ruled that state laws establishing racially segregated schools were unconstitutional. This decision marked a pivotal moment in the civil rights movement, declaring that the doctrine of "separate but equal" schools—which was previously deemed constitutional by *Plessy v. Ferguson* (1896)—was inherently unequal and violated the Fourteenth Amendment's Equal Protection Clause.[19] Segregation is just another glaring example of systemic racism within the legal justice system. Although not immediately enforced, the decision in *Brown* eventually led to the desegregation of public schools and had broader implications for the fight against racial segregation and discrimination in the United States.[20]

In the majority opinion, Chief Justice Earl Warren wrote, "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[21] For the first time in sixty years after the decision in *Plessy*, the Court acknowledged that racial segregation in education is unequal and violated the principles of equal protection under the law—this fundamentally challenged the entrenched racial disparities within the legal justice system, reaching other areas and not just schools.

Like *Shelley*, *Brown* also showed that there are limitations to relying on Black wealth to offset the history of racial inequality. The case recognized that even if Black individuals achieved economic success, their families, children, and even

[18] *Shelley*, 334 U.S. 1 (1948).
[19] *Brown*, 347 U.S. 483 (1954).
[20] *Id.*
[21] *Id.*

themselves could still face severe racial inequalities in access to quality education—and education is a key determinant of future economic opportunities. Chief Justice Warren's opinion emphasized that the issue of racial segregation was a legal and moral imperative that needed to be addressed, reinforcing the idea that correcting racial inequality within the legal justice system requires comprehensive legal action and was beyond the reach of individual economic success.[22]

Analysis:

What these cases demonstrate is how the legal justice system is limited in its power to achieve racial justice in the courtroom through capitalism. *Shelley* addressed housing discrimination, highlighting the need for legal remedies, but also the limits of relying solely on Black wealth. This case demonstrated legal remedies alone are insufficient to address the systemic issues of racial injustice. On the other hand, *Brown* exposed the inadequacy of economic success in overcoming racial disparities in education, emphasizing the necessity of comprehensive legal action to combat systemic racism. This case declared segregated schools unconstitutional, emphasizing separate educational facilities were inherently unequal. While this was a significant victory for the civil rights movement as a whole, it revealed the limitations of Black wealth in offsetting racial disparities. Both cases, despite their historical significance in challenging racial disparities, emphasize legal action and economic success alone are insufficient to fully address the deeply ingrained history of racial inequality within the legal justice system under capitalism. Comprehensive legal changes and systemic efforts are required to tackle the root causes of systemic racism.

BLACK CAPITALISM AND THE LAW

Black capitalism intersects uniquely with the legal justice system, particularly in the context of the criminalization of poverty. The criminalization of poverty carries a racialized dimension in the United States and this standard has been upheld for centuries. A 2019 report on the inequalities in the economic situation of Black Americans found that the typical

[22] *Id.*

Black household's wealth was $24,100, but for White households, it was $188,200. This translates into the typical Black household holding about 12 cents for every dollar of wealth held by the typical White family—a disparity that has remained largely unchanged since 1989.[23] This economic disparity has contributed to a higher likelihood of Black Americans entering the criminal justice system.[24]

With common criminal punishments, such as fines and fees for misdemeanors, and the resurgence of debtors' prisons, the imprisonment of people unable to pay debts often results in an increase in fines and fees.[25] The Institute for Policy Studies also highlights the criminalization of poverty being affected by the increase in arrests of homeless people and people feeding the homeless, and criminalizing life-sustaining activities such as sleeping in public when no shelter is available.[26] Consequently, paired with the criminalization of poverty in the justice system is also the associated theme of the racialization of the criminal justice system. In addition, some academics discuss how the racialization of poverty in the United States has made it impossible to "disentangle narratives of the 'undeserving poor'" from those of Black Americans.[27] In a capitalist society where poor people already suffer because of their inability to obtain capital, and that inability is passed down through generations and reinforced through the courts, Black Americans are unable to escape the wrath of the criminal justice system. However, the racism that Black people experience in the criminal justice

[23] Natasha Hicks, Fenaba R. Addo, and Anne E. Price, *Still Running Up the Down Escalator: How Narratives Shape our Understanding of Racial Wealth Inequality*, The Samuel DuBois Cook Center on Social Equity at Duke University and The Insight Center for Community Economic Development, (2021) https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf.

[24] National Conference of State Legislatures, *Racial and Ethnic Disparities in the Criminal Justice System* (May 2022), https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system.

[25] Karen Dolan. *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty Institute for Policy Studies,* (March 2015), https://ips-dc.org/the-poor-get-prison-the-alarming-spread-of-the-criminalization-of-poverty/.

[26] *Id.*

[27] Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts,* Columbia Law Review (2023), https://columbialawreview.org/content/racial-capitalism-in-the-civil-courts/.

system is not only because of the history of racism in courts as institutions. Racism is perpetuated and reinforced with individualized racism through discretion from judges, prosecutors, and law enforcement—the actions of these individuals can also directly enable racial prejudice and profiling. As defined by Tonya L. Brito, a Professor of Law at the University of Wisconsin Law School, racial capitalism in the law is "a system of racialized dispossession, extractions, accumulation, and exploitation for power and profit in which human elements are both commodified and devalued."[28]

BLACK CAPITALISM DEFINED

Over forty years ago, the idea of "Black capitalism" was first pushed by white Southern republican politicians in an attempt to cast themselves in a more progressive light—without actually doing any work to advance progress. The original purpose of Black capitalism was to address racial economic inequality by encouraging Black Americans to catch up with their white counterparts through entrepreneurship and private ownership. This concept found its way into governmental policies, like President Richard Nixon's Southern Strategy.[29] In an effort to improve Black ghettos in the early seventies, President Nixon proposed tax breaks and incentives. President Nixon, who promised his white southern republican supporters that he would "lay off Pro-Negro efforts," appealed to the sentiment that he should "help Negroes help themselves,"—this was an early dog whistle to Black capitalism.[30]

This idea contrasted with popular conversations about reparations and other similar messages that Black activists proposed during the Civil Rights Movement. Black activists called for economic justice in the form of federally government-funded reparations, while President Nixon merely wanted to do the bare minimum—like just taking down "whites-only" signs.[31] The white majority was not in support of these efforts to integrate or provide resources for Black communities. Rather, a lackluster effort was made to "let the government use its tax

[28] *Id.*
[29] Mehrsa Baradaran, *The Real Roots of 'Black Capitalism,'* The New York Times (March 2019) https://gooriweb.org/news/2000s/2019/nyt31mar2019b.pdf.
[30] *Id.*
[31] *Id.*

and credit policies," to power "the greatest engine of progress ever developed in the history of man: American private enterprise."[32] Black capitalism was more appealing and understandable for white voters. The strategy appealed to white capitalist sentiments because it stressed privatization of capital as the path to economic advancement and equality, instead of reliance on public services, such as welfare.[33] It took away the responsibility of the government to take accountability for the destructive effects of racism and slavery and put it onto Black individuals to make up for it themselves. The theory was that if racism has resulted in Black Americans having fewer financial resources than white Americans, then the solution is to support Black Americans in obtaining economic freedom—like assisting Black Americans in their pursuit of owning businesses in the same way that white Americans own businesses.

BLACK CAPITALISM IN THE EYES OF MARX AND DU BOIS

In most literature, capitalism is raised as an alternative to socialism and communism. These two political philosophies—socialism and communism—are advocated for by Karl Marx in *The Communist Manifesto*. As defined by Marx, capitalism is a socio-economic system reflective of class struggle, exploitation, and the relentless pursuit of profit.[34] More specifically, Marx's definition of capitalism highlights two key concepts: (1) private ownership and class division, and (2) exploitation and commodification of labor.[35] Throughout his manifesto, Marx viewed capitalism as a system that inherently perpetuates inequality, alienation, and the concentration of wealth and power in the hands of the few.[36] Marx argued that the contradictions and conflicts embedded within capitalism would eventually give rise to a revolutionary movement by the proletariat, which are collectively defined as the working-class

[32] *Id.*

[33] Andrew F. Brimmer and Henry S. Terrel, *The Economic Potential of Black Capitalism,* Statements and Speeches, Member - Board of Governors of the Federal Reserve System (1969).

[34] Karl Marx and Friedrich Engels. *The Communist Manifesto.* 1848 translated by Samuel Moore. Communist League.

[35] *Id.*

[36] Karl Marx and Friedrich Engels. *The Communist Manifesto.* 1848 translated by Samuel Moore. Communist League.

people.[37] This revolutionary movement would in turn lead to the overthrowing of the capitalist system and establishment of a classless society.[38] In this classless society the means of production would be collectively owned, and wealth would be distributed equitably.[39]

While Marx has been hailed as a voice piece of the oppressed classes, his works have been criticized for not addressing the intersectional racial elements that contribute to class division. Karl Marx rarely discussed race in his discussions of capitalism. Rather, Marx believed that racism was a temporary issue with no lasting legacy. W.E.B. Du Bois, often seen as Marx's Black counterpart, criticized Marx for not generalizing his theories for use by Black Americans in their own revolution. In Du Bois' *Marxism and the Negro Problem*, he discusses how the core of Marx's writings can be used as a solution to the problems that African Americans face in the United States.[40] Du Bois points out that the main content of what Marx writes about, "the class struggle of exploiter and exploited,"[41] is a situation that can also be used to describe the situation of African Americans. In *Black Reconstruction in America,* Du Bois defines "the Negro proletariat" as the Black working class, especially those who were former slaves and freed during the Reconstruction period.[42] Du Bois highlighted how the Negro proletariat faced various challenges, including economic exploitation, racial discrimination, and political disenfranchisement. He equated the status of the Negro proletariat with Marx's concept of the working proletariat while making the distinction that the grievances of the Negro proletariat were "more fundamental and indefensible" than those of the white proletariat.[43]

Consequently, Du Bois differs from Marx in his perspective on which group inflicts suffering upon another. According to Du Bois, it is not the capitalist who inflicts suffering on the Negro proletariat. Rather, it is the white laborer who "deprives the

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[37] Karl Marx. *Das Kapital. Translated by Ben Fowkes,* Penguin Classics, (1885).

[38] *Id.*

[39] Karl Marx and Friedrich Engels.*The Communist Manifesto.* 1848 translated by Samuel Moore. Communist League.

[40] Du Bois, W.E.B. "Marxism and the Negro Problem." *The Crisis*; v.40, n.5 (May 1933): 103-104, 118.

[41] *Id.*

[42] *Id.*

[43] Du Bois, W.E.B. "Marxism and the Negro Problem." *The Crisis*; v.40, n.5 (May 1933): 103-104, 118.

Negro of his right to vote, denies him an education, denies him affiliation with trade unions, expels him from decent houses and neighborhoods, and heaps upon him the public insults of open color discrimination."[44] Du Bois attributes Black suffering to the deliberate actions that white laborers take against Negro proletariats. Du Bois writes, "It knows exactly what it is doing and it meant to do it"—the white laborers are without excuse.

BLACK CAPITALISM AND THE MUSIC INDUSTRY

The music industry has undergone a monumental transformation with the advent of the internet and digital streaming platforms, making music more profitable than ever before. This transformation has led to the commodification of music, in which music is created and sold primarily for profit, rather than being created solely as an art form. In *Ethnomusicology*, Timothy D. Taylor, a musicology professor at the University of California, Los Angeles, describes the commodification of music as, "Music made expressly for the purpose of making money, not art, or heartfelt individual expression, or, simply, for a good groove."[45] Commodification makes it nearly impossible for professional musicians and artists to get adequately paid for their work. The music industry is widely recognized as one of the biggest culprits in exploiting workers for their skills, while at the same time taking all of the profit made from it. Many musicians and artists have cited record labels taking advantage of their skill by forcing them to overwork all the time and paying them close to nothing, leaving some of the biggest names in music scraping by with a fraction of the amount that the entirety of their product is making.[46] The issue derives in conflict between the motive of the record label and the motive of the musician. Jeremy Gilbert, a cultural and political theory professor at the University of East London, calls this distinction the difference between commerce and capital. While the musician is focused on making music to financially support themselves and their needs and lifestyle,

[44] *Id.*

[45] Timothy D. Taylor, "The Commodification of Music at the Dawn of the Era of 'Mechanical Music.'" *Ethnomusicology*, vol. 51, no. 2, 2007, pp. 281–305. *JSTOR*, http://www.jstor.org/stable/20174526. Accessed 5 Nov. 2023.

[46] Hesmondhalgh, D. (2021). Is music streaming bad for musicians? Problems of evidence and argument. *New Media & Society*, *23*(12), 3593-3615. https://doi.org/10.1177/1461444820953541.

the record label is solely focused on building cash that is being utilized for productive or investment purposes.[47]

The evolution of the music industry, with its focus on profit and commodification, highlights a stark reality for Black artists. While the industry has seen tremendous transformations due to technological advancements, Black artists still face challenges in obtaining fair compensation for their work.[48] The exploitative nature of the music industry, where record labels prioritize capital accumulation over fair compensation for musicians, underscores the broader theme that Black wealth alone cannot overcome the historical racial inequalities deeply embedded in American society—these issues surrounding Black wealth then seep into the legal justice system under capitalism.

CASE STUDY: LAWSUIT OF LIZZO

In her recent 2023 lawsuit, Black pop singer Lizzo was accused of allegations of racial harassment toward her Black former backup dancers. The lawsuit is filed against Lizzo's touring company, Big Grrrl Big Touring (BGBT) by three of her former backup dancers: Ariana Davis, Crystal Willams, and Noelle Rodriguez. Included in the lawsuit was a charge of racial harassment, with allegations that Lizzo targeted the Black dancers on her team more than others. Regardless of whether the accusations of Lizzo are correct, the situation raised two questions: Given the history of Black Americans' role in a capitalist society as subservient, what happens when they are given economic power, specifically the power and resources to assist other Black Americans out of their subservience? Additionally, how effective is this economic and financial power in liberating themselves and their Black community? An advocate of representation might argue the mere presence of Lizzo in the entertainment industry has done enough work to motivate other Black individuals to do the same. However, Lizzo as a Black person held a role in a position of power and was still

[47]Jeremy Gilbert, *Capitalism, creativity and the crisis in the music industry*, openDemocracy (September 2012), https://www.opendemocracy.net/en/opendemocracyuk/capitalism-creativity-and-crisis-in-music-industry/.

[48]Martin Guttrige-Hewitt. Majority of Black music artists and professionals have faced racism in the industry, Black Lives In Music survey finds. October 13, 2021. DJ Mag

representative of Black people. Her economic success and position of power did not prevent allegations of mistreatment of other Black individuals, highlighting the complexity of Black capitalism in addressing broader economic disparities. Does economic success by one or a few Black individuals translate to broader economic empowerment and success for the larger community?

The Lizzo lawsuit, with its allegations of weight-shaming and racial harassment among her former backup dancers, provides a case study within the broader context of Black capitalism and the legal justice system under capitalism. While Lizzo's fast rise to fame and wealth has made her a symbol of success and representation for marginalized communities, the lawsuit raises crucial questions about the true impact of Black wealth in addressing systemic racial inequalities within the legal system.

It's important to note that Lizzo, as a Black artist with significant economic power, holds a position of relative privilege compared to many Black individuals. She wields substantial influence in the entertainment industry and represents marginalized communities as a spokesperson for body positivity, Black women, and plus-size individuals. However, the lawsuit's allegations that she targeted her Black dancers and permitted racial harassment within her team cast a shadow on this image of representation. This case exemplifies the complexities of Black capitalism in the legal justice system. It underscores that economic success by one or a few Black individuals may not necessarily translate to broader economic empowerment and success for the larger Black community. The allegations against Lizzo raise questions about the potential for economic power to be used to alleviate systemic inequalities, or conversely, perpetuate individual biases and racial prejudices, even when wielded by Black individuals.

CONCLUSION

Both cases of Lizzo and O.J. Simpson demonstrate the influence of race and wealth in the legal justice system, especially in high-profile legal situations. While Lizzo and O.J. Simpson's cases have vastly different circumstances and legal issues, they share common themes surrounding race, wealth, public perception, and the justice system. Just as O.J. Simpson's wealth

provided him with access to high-quality legal defense, Lizzo's financial means may impact her ability to navigate the legal system effectively. Both cases illustrate that race and wealth continue to influence legal outcomes and public opinion in high-profile cases. The legal system's ability to address racial disparities and achieve justice is challenged in these instances, underscoring the need for systemic changes and reforms to create a more equitable and just legal justice system.

The cases of O.J. Simpson and Lizzo, though differing in their circumstances, intertwine on crucial themes of race, wealth, and the legal system. O.J. Simpson's trial exposed racial biases, disparities in legal representation, and the influence of wealth in the justice system. Similarly, Lizzo's recent lawsuit reflects the complexities of Black capitalism, questioning the true impact of economic power on systemic racial inequalities. Lizzo, as a prominent Black figure with economic influence, symbolizes success and representation. However, the lawsuit's allegations of racial harassment among her Black backup dancers challenge this narrative. It raises questions about whether individual economic success translates to broader empowerment for the Black community. The very essence of Black capitalism, rooted in the idea of economic empowerment, confronts complex challenges. It might not necessarily lead to systemic change, and Lizzo's case serves as a stark reminder of this.

The intersection of race and wealth in the legal justice system presents a fundamental challenge. Both the Lizzo and Simpson cases place a spotlight on the intricate interplay between these factors, emphasizing the imperative need for comprehensive reforms. By addressing the disparities in legal representation, challenging racial biases, and removing systemic inequalities, a more equitable and just legal system could be established. And this would not only be for high-profile cases like these, but for the community at large. The examination of the legal justice system under capitalism and its historical relationship with racial inequality highlights the complex dynamics at play. While the emergence of Black wealth and successful Black individuals in the music industry, like Jay Z and Lizzo is a noteworthy development, it is essential to recognize that the legal justice system's deeply ingrained history of racial bias and systemic racism persists.

Despite technological advances and increased profitability, Black artists continue to struggle for fair compensation. The commodification of music further exacerbates the exploitative nature of the industry, emphasizing that wealth alone cannot eradicate historical racial inequalities ingrained in American society.

The cases of *Shelley v. Kraemer* (1948) and *Brown v. Board of Education* (1954) exemplify the legal efforts to combat racial disparities in housing and education. These cases played significant roles in addressing specific issues of racial inequality within the legal system, highlighting the system's capacity for change. However, they also underscore the limitations of relying solely on Black wealth to offset systemic racism. The historical context of Black capitalism reveals its origins as a concept that, at times, places the challenge of racial economic inequality on Black individuals rather than addressing the broader systemic issues. This approach fails to account for the institutionalized discrimination within the legal justice system, which extends beyond the realm of economics.

Racial inequality within the legal justice system is not solely a result of economic disparities. It is deeply rooted in a history of racial bias, discrimination, and systemic racism that has perpetuated disparities in arrest rates, sentencing, racial profiling, and access to legal representation. While Black wealth can provide resources for economic development and charitable causes, it cannot fully eradicate these systemic issues. In light of this, it is evident that the legal justice system under capitalism continues to disproportionately affect Black communities, even when wealthy Black defendants are introduced into the system. The question of whether economic success by a few Black individuals translates to broader economic empowerment and success for the larger community remains a point of debate. As Jay Z and Lizzo demonstrate, the impact of Black wealth on the broader Black community is not straightforward, and it raises questions about the true potential for economic liberation.

While the emergence of Black wealth is a positive development and can certainly contribute to economic empowerment, it cannot single-handedly offset the deeply entrenched history of racial inequality within the legal justice system under capitalism. Comprehensive legal and systemic changes are necessary to address the root causes of racial disparities and

to ensure a more equitable and just society for all. To many Black Americans, capitalism appeals to their desire for power and domination, something that white Americans have historically always had. However, as Walter Johnson, one of our leading historians of slavery, wrote, "There was no such thing as capitalism without slavery."[49]

[49] Nicholas Lemman, *Is Capitalism Racist?* The New Yorker, (2020), https://historynewsnetwork.org/article/175606#.

UNVEILING THE FOURTH AMENDMENT'S DIGITAL COMPASS: GEO-LOCATION WARRANTS IN MODERN JURISPRUDENCE

Kuhu Badgi

Unveiling the Fourth Amendment's Digital Compass: Geo-Location Warrants in Modern Jurisprudence

ABSTRACT:
Geofence warrants are legal tools that allow law enforcement to request data from technology companies about devices within a specific geographical area during a particular time frame. These warrants conflict with the protections provided by the Fourth Amendment, which guards against unreasonable searches and seizures and typically requires law enforcement to obtain a warrant based on probable cause before conducting a search. In the context of the Fourth Amendment, this article delves into the regulatory framework surrounding geofence warrants. The article seeks to elucidate the legal intricacies, boundaries, and implications associated with geofence warrants, examining whether these modern digital tools violate the established search practices mandated by the Fourth Amendment. Through this exploration, the article provides insights into the evolving landscape of digital privacy rights and law enforcement tools in the modern era.

INTRODUCTION

During the summer of 2020, protestors filled the streets of cities across the nation, rallying in protest against the numerous cases of police violence against Americans of color. One such protest took place in Kenosha, Wisconsin, following the police shooting of Jacob Blake on August 23, 2020.[50] After a week of protests, forty buildings were destroyed and two people were shot dead by a counter-protestor before the order was eventually restored. In an attempt to identify these protestors, law enforcement used a series of geofence warrants, which allowed them to identify the individuals in the proximity of the protests and obtain their location data. Using the warrants,

[50] Russell Brandom, How police laid down a geofence dragnet for Kenosha protestors (Apr. 13, 2019), https://www.theverge.com/22644965/kenosha-protests-geofence-warrants-atf-android-data-police-jacob-blake.

law enforcement officials targeted seven different geographical zones, seeking to identify anyone located within that area during a span that stretched as long as two hours. The result was a location dragnet that was spread over some of the busiest times and locations in the first days of the protest. The data results of the warrant inevitably included individuals who were completely uninvolved with the violence and even individuals who hadn't protested that week at all.

The escalating use of geofence warrants by law enforcement nationwide, and the lack of precedent restricting their use, imperil the privacy and Fourth Amendment protections guaranteed to all Americans. In accordance with the Fourth Amendment's requirement of a warrant for the execution of searches,[51] the issuance of geofence warrants—which solicit information pertaining to individuals without any involvement in criminal activity—constitutes an infringement of said Fourth Amendment rights. Furthermore, the precedent of the courts in recent years of surpassing Fourth Amendment search warrant standards under the "good faith exception" further imperils these privacy protections.

BACKGROUND

Definition and explanation of geofence warrants:

Reverse warrants, as categorized by law enforcement, are used to identify potential suspects when there is no prior knowledge of an individual's involvement in criminal activity. Geofence warrants represent a form of reverse warrants, through which government authorities aim to determine an individual's presence within a specified physical zone during a defined time period. Through the use of geofence warrants, the government can compel technology companies to disclose what they term "location history data," which can include any relevant information about a device's data—this includes GPS information, Bluetooth beacons, cell phone location information from nearby cell towers, Internet Protocol address information, and the signal strength of nearby WiFi networks.[52]

[51] *See* U.S. Const. Amend. IV.

[52] Geofence Warrant Primer, National Association of Criminal Defense Lawyers, 1, https://www.nacdl.org/getattachment/816437c7-8943-425c-9b3b-4faf7da24bba/nacdl-geofence-primer.pdf.

This "location history data" is especially striking considering the sheer quantity of data that tech companies like Google are capable of collecting from devices. In the first half of 2021 alone, law enforcement sent Google more than 50,000 subpoenas, search warrants, and other legal requests for their data, requesting collection from Sensorvault—which is Google's immense centralized database of users' location history.[53]

There are three steps in the process of obtaining a geofence warrant, which can be completed by law enforcement through the use of single or multiple warrants.[54] First, the government identifies the specific area and window of time during which they want to identify devices. Then, the government may subpoena companies for this information—typically Google—through a geofence warrant. In this step, the government can obtain the anonymized numerical identifiers and time-stamped location coordinates for the devices that match the outlined time and location requirements. Next, law enforcement reviews the device information they have been provided and narrows the list based on relevant information that may aid their investigation. This process may involve establishing patterns of movement or pinpointing the location of specific suspects. At this point, the government may request more information about specific devices from the company through a private letter, within a longer period of time with fewer geographic limitations. Lastly, the government further narrows the list and may request identifying information, such as usernames and birthdates from the devices' users. Law enforcement is then able to connect the anonymized data to specific individuals to advance their investigation.

Data collection in geofence warrants:

Geofence warrants are dependent on the extensive pool of location information gathered by Google, which encompasses approximately 131.2 million Americans who use Android devices or access Google-affiliated applications and websites like Calendar, Chrome, Drive, Gmail, Maps, and YouTube. While other companies like Apple, Lyft, Snapchat, and Uber have

[53] Jennifer Valentino-DeVries, Google's Sensorvault Is a Boon for Law Enforcement. This Is How It Works. (Apr. 13, 2019), https://www.nytimes.com/2019/04/13/technology/google-sensorvault-location-tracking.html.

[54] *Supra* note 2.

also received such warrants, Google stands out as the most frequent recipient. Consequently, this discussion primarily focuses on Google due to its prominent role, but it serves as a representative example of any entity engaged in the collection and storage of location data.[55]

THE FOURTH AMENDMENT

History of the Fourth Amendment:

The framers of the United States Constitution adopted the Fourth Amendment to protect Americans from unreasonable government action. The amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and requires that warrants be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[56] In other words, a judge must confirm that law enforcement has sufficiently established probable cause prior to authorizing a search warrant.

In a landmark case, *Carpenter v. United States* (2018), law enforcement used the cell phone numbers of three suspects in a robbery case to obtain their transactional records under the Stored Communications Act.[57] These transactional records included the date and time of calls made by the suspects, and the location of where these calls began and ended—all of which used their cell-site location information (CSLI). Timothy Carpenter was charged based on this cell-site evidence. Carpenter moved to suppress this evidence, arguing that the Federal Bureau of Investigation (FBI) needed a warrant under the Fourth Amendment to obtain this evidence.

The Supreme Court of the United States ultimately held that the acquisition of this data was a violation of the Fourth Amendment's protection against unreasonable searches and seizures.[58] This decision set a precedent in the contentious struggle between individual privacy and the wide reach of modern surveillance tools. It further established that the Fourth

[55] *Supra.* note 2.
[56] U.S. Const. Amend. XIV, § 2.
[57] Stored Communications Act, 18 U.S.C. § 2713 (2020).
[58] *Carpenter v. United States*, 585 U.S. ___ (2018).

Amendment protects reasonable expectations of privacy and property interests. The Court held that individuals maintain a legitimate expectation of privacy in their CSLI, thus requiring law enforcement to obtain a warrant before accessing such data. The Court went on to decline the extension of the third-party doctrine, which asserts that there is no expectation of privacy in information voluntarily provided to others.[59] The Court held that location information is "not truly 'shared' as one normally understands the term" because the use of devices is "such a pervasive and insistent part of daily life," and the logging of this information occurs "without any affirmative act on the part of the user beyond powering up [a device]."[60]

THE UNCONSTITUTIONALITY OF GEOFENCE WARRANTS

Probable cause requirement:

Under the Fourth Amendment, probable cause is a flexible standard used to approve search warrants. Courts rely on a case-by-case totality of the circumstances analysis, but generally, the knowledge component of the probable cause standard requires that it "raises a 'fair probability' or a 'substantial chance' of discovering evidence of criminal activity."[61]

In the context of geofence warrants, the presence of probable cause must not only be associated with whether a database holds evidence related to the crime but also whether probable cause applies to the specific areas for which location data is being requested. Probable cause has consistently required a certain level of precision, ensuring that no more intrusion into privacy is allowed than what is necessary given the circumstances. In the case of *Wong Sun v. United States* (1963), the Supreme Court determined that there was no probable cause to search a thirty-block area in order to locate a single laundromat suspected of being involved in heroin sales.[62] The Court held that the broad and vague scope of the search would simply encourage law enforcement officers to search the entire

[59] *Id.* at 2209.
[60] *Id.* at 2210.
[61] *Supra* note 6.
[62] *Wong Sun v. United States*, 371 U.S. 471 (1963).

length of the street to find evidence, whether by chance or other means—which would run afoul of the Fourth Amendment.

The overbroad nature of the probable cause standard, especially when applied to geofence warrants, can have serious implications for law enforcement. Geofence searches result in a greater number of incorrect identifications than other forms of location-based data analysis. When such a wide range of devices is included in these searches, law enforcement can invariably discover a device that aligns with their narrative. Within the limited period in which law enforcement has employed this extensive and unrestrained search method, there are accounts of innocent individuals getting implicated in the criminal justice system, facing allegations, imprisonment, and subsequently being found not guilty. For example, in 2018, Jorge Molina, a warehouse worker in Avondale, Arizona, was arrested and incarcerated for a week as a suspect in a drive-by homicide, all based on data tracking his device to the location where the shooting occurred. Additional investigation quickly pointed to another suspect and led to Mr. Molina's exoneration, but not before he spent a week in jail, lost his job, and faced significant collateral consequences.[63]

In the context of utilizing a geofence warrant, there exists a challenge in aligning the probable cause standard with the nature of these warrants. While law enforcement seeks to identify a suspect's potential location within a general area, obtaining probable cause for the entire region becomes unfeasible. Geofence warrants inherently grant access to data within broadly defined and vague areas, posing a conflict with the established standard of probable cause. This discrepancy prompts the need for further clarification on how judges interpret and apply the probable cause standard when considering and granting geofence warrants. Whether judges deviate from the standard in issuing these warrants or if there exists a different rationale guiding their decisions warrants deeper examination to reconcile this discrepancy.

Lack of particularity:

[63] Meg O'Connors, Avondale Man Sues After Google Data Leads to Wrongful Arrest for Murder (Apr. 13, 2019), https://www.phoenixnewtimes.com/news/google-geofence-location-data-avondale-wrongful-arrest-molina-gaeta-11426374.

The problem with geofence warrants is also rooted in the requirement of particularity under the Fourth Amendment. The particularity requirement states that in order to obtain a warrant law enforcement must have "particularly describing the place to be searched and the persons or things to be seized".[64]The process of obtaining and employing geofence warrants is generally vague which betrays this requirement, This means in an average warrant issued under the Fourth Amendment, law enforcement must specifically outline exactly who they are going to search and the specific location they will be searching. The framers of the Constitution added this requirement as a safeguard to deter broad and general searches by the government, and to ensure warrants issued against individuals have a process and lawful standard.[65]

The particularity requirement, moreover, guarantees that government agents cannot rely on indiscriminate or overbroad warrants to engage in "general, exploratory rummaging in a person's belongings."[66] Despite its nomenclature, the utilization of a geofence does not confine law enforcement's search jurisdiction to a specific temporal or geographical scope. Rather, the current procedure grants law enforcement the authority to define these boundaries themselves, meaning there is no explicit limit on how large they can be. Law enforcement may then compel a service provider to meticulously sift through its records, employing a broad, dragnet-like approach to identify devices and, consequently, the individuals linked to them, that entered a designated geofence area.

Lack of court involvement:

A core provision of the Fourth Amendment is the requirement that warrants be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[67] This ensures that before a warrant can be issued, a judge must determine that a warrant application has sufficiently established probable cause, and satisfied the requirement of particularity.

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[64] *Supra.* note 6.

[65] Zachary Walker, Bale-ing from a Common Sense Reading: Warrants and the Particularity Requirement, Univ. Missouri L.R Blog (2022).

[66] *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

[67] *Supra.* note 6.

But in the context of geofence warrants, there is a lack of involvement from the judiciary. Law enforcement can act fairly on their own, removing a valuable safeguard of civil liberties as there is little impartiality and oversight from the courts. Under the Fourth Amendment, court involvement is ordinarily required so that the use of measures, such as searches, is approved by a "neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[68] Having the involvement of the courts in approving warrants acts as a check against potential abuses of power, ensuring that law enforcement actions are guided by a commitment to fairness and the law, rather than by the zealous pursuit of criminal suspects.

In the administration of general search warrants, a magistrate judge is heavily involved in the process of approving warrant requests by law enforcement. In accordance with this process, search warrants may only be granted if a judge is satisfied with the application or if there is probable cause to believe that a search will be fruitful. However, in the procedure for obtaining geofence warrants, both law enforcement and non-government companies become the sole determining body of whether revealing the location and identifying details align with the standards for conducting searches. In this process, there is no requirement that a judge evaluate the specific data being identified. Furthermore, because geofence warrants are not issued by a judicial body and because they are not the direct subjects of the warrants, individuals are not given notice and are often unaware that their CSLI information is being evaluated, despite the disclaimers typically outlined in Terms of Service agreements, like that of Google. Hence, these individuals cannot seek judicial review of the collection of their CSLI information until, and if, criminal charges are brought against them and they raise a motion to suppress the information at their trial. Within the current procedural steps of obtaining geofence warrants, law enforcement has the capacity to obtain precise identifying information. This information not only regards individuals directly implicated in criminal activity but also encompasses those entirely uninvolved. All of this collection occurs without the requisite judicial oversight or court authorization, which ultimately constitutes a serious

[68] *Johnson v. United States*, 333 U.S. 10 (1948).

infringement upon the fundamental principles outlined within the Fourth Amendment.

Moreover as delineated in the procedure for obtaining a geofence warrant, judicial oversight and involvement are explicitly mandated solely during the initial step of subpoenaing technology companies for anonymized location information. However, in the second and third steps—which entail the revelation of specific identifying information—this imperative of court involvement is conspicuously absent.

The good faith exception:

In addition to the many issues with geofence warrants, they are often rubber-stamped after the fact by courts applying the "good faith exception" to the exclusionary rule—this arguably allows infringements on the probable cause standard to run rampant. In *United States v. Leon* (1984), the Supreme Court ruled that otherwise inadmissible search evidence is admissible so long as the seizing officer acted in objectively reasonable reliance on a search warrant, even if the warrant is later ruled invalid.[69] If probable-cause support for a search warrant is clearly lacking in the view of a well-trained officer, the "good faith" exception will not apply, even if the warrant is issued and approved by a magistrate. Because geofence warrants allow for law enforcement to "work backward" through the reverse warrant process, access to individualized information through a device-based search is permitted without meeting the probable cause standard.

In 2019, when there was a bank robbery in Midlothian, Virginia, law enforcement initially had no leads However, because law enforcement assumed their suspect would have a cell phone on him, the government was able to obtain a geofence warrant that identified every phone logged into Google within a 150-meter radius of the bank, from thirty minutes before and after the robbery. The geofence warrant, signed by a state magistrate judge, informed law enforcement that there were nineteen phones that fit these conditions, and the government was provided the location patterns of all of these phones during the time window. Upon the government's request, Google delivered expanded location information of the nineteen devices for a full hour before and after the robbery. Based on this informa-

[69] *United States v. Leon*, 468 U.S. 897 (1984).

tion and the location patterns they identified, law enforcement narrowed down the list to three potential suspects—including the potential robber and co-conspirators—and requested their identities from Google. This information identified one of the suspects as Okello Chatrie, who was then charged with the robbery. When Chatrie challenged the evidence derived from the geofence warrant, his motion to suppress was denied. In *United States v. Chatrie* (2022), Judge M. Hannah Lauck of the United States District Court Eastern District of Virginia ruled that while the geofence warrants may be considered unlawful searches for their broad nature, data derived from them have been permitted under the good faith exception to the warrant requirement.[70]

The good faith exception was also applied by the California Court of Appeals in *People v. Meza* (2023).[71] In this case, Daniel Meza and Walter Meneses were identified as suspects in the murder of Adbadalla Thabet. This was after a geofence search warrant directed to Google revealed cell phones signed into Google accounts that were in several of the same locations as Thabet on the day of his murder. Law enforcement viewed the suspects on security footage and used this to file for the geofence warrant. On appeal, Meza and Meneses argued that the geofence warrant used to identify their cell phones violated their rights under the Fourth Amendment. The warrant authorized the identification of any individual within six large search areas. However, the warrant did not have any particularized probable cause as to each person or their location, and neither the search boundaries nor the times designated in the geofence warrant were as narrowly tailored as they could have been given the information available at the time. In authorizing the search of more than twenty acres total, over a cumulative period of more than five hours in residential and commercial areas, the warrant allowed a location-specific identification of thousands of individuals for whom no probable cause existed. While the Court felt that the probable standard requirement was met due to the security footage, the Court agreed that the geofence warrant lacked the particularity required by the Fourth Amendment and was impermissibly over-

[70] *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022).
[71] *People v. Meza*, 90 Cal.App.5th 520 (2023),

broad. Nevertheless, the Court affirmed Meza's and Meneses's convictions, applying the good faith exception as justification.

Geofence warrants are reliant on the good faith exception primarily because they involve the collection of digital location data from numerous individuals within a specified geographical area, often without specific suspects identified. Law enforcement agencies obtain these warrants to access data from technology companies, such as cell phone providers or social media platforms, in an attempt to gather evidence related to criminal investigations. The good faith exception allows the information obtained through these warrants to be admissible in court, even if the warrant is later found to be defective or lacking in probable cause. The admissibility of evidence obtained through the good faith exception raises significant concerns regarding its constitutionality and its compatibility with the Fourth Amendment. Due to the lack of existing jurisprudence on geofence warrants, it is difficult to determine whether these warrants can effectively be administered without relying on the good faith exception. However, if the courts believe that geofence warrants would otherwise be considered inadmissible in almost all cases and circumstances, it is certainly a worthy development to note how big of a problem the good faith exception is. Geofence warrants, which can yield a trove of sensitive location data, often lack the specificity required to satisfy the Fourth Amendment's probable cause requirement. Thus, the good faith exception effectively undermines the warrant process, as it allows law enforcement to conduct intrusive searches with limited oversight and accountability. Underlying the issue with geofence warrants is the clear unconstitutionality of the good faith exception.

GEOFENCE WARRANTS IN PRACTICE

Warrant denial:

Federal courts across the country are divided on the issue of whether geofence warrants are constitutional. One such example is *In the Matter of Search of Information that is Stored at Premises Controlled by Google, LLC* (2021). In this matter, Magistrate Judge Angel D. Mitchell of the United States District Court for the District of Kansas denied a geofence warrant on the basis that it did not adequately establish probable cause,

nor did it narrowly identify the place, time, and location of the requested search, as required under the particularity requirement of the Fourth Amendment.[72] In their warrant application, the government sought a geofence warrant directed to Google location history data covering a defined area that surrounds and includes a building where a federal crime allegedly occurred. The warrant application was initially denied because of the proposed geographic boundaries of the geofences, which encompassed two physical locations within a busy commercial and a residential area on major arterial streets in a major metropolitan area. In the first application, the court found that the geographic scope of the geofence warrant was not narrowly tailored in that "the vast majority of cellular telephones likely to be identified in this geofence will have nothing whatsoever to do with the offenses under investigation."[73] In the second application, the court pointed out that the geofence would have captured not only the pertinent business establishments but also the residential units above those business establishments and neighboring sidewalks.

This case is important because the denial of the warrant establishes the standard for probable cause in regard to geofence warrants, by distinguishing that simply having probable cause that a crime was committed at a certain location is not substantial itself. The government must also prove that the evidence of this crime being committed will exist in the place being searched—a standard that was not met by this particular warrant application. This holding also establishes the standard for the particularity requirement, asserting that a warrant application must address the anticipated number of individuals likely to be encompassed within the targeted Google location data. In this case, the magistrate noted that "the geofence boundary appears to potentially include the data for cell phone users having nothing to do with the alleged criminal activity," meaning that the warrant is likely to capture uninvolved individuals from those surrounding properties.[74] Under Judge Mitchell's holding—which is not binding on other courts but reflects the same rationale of other judges—the standard for approving a geofence warrant application that comports with the Fourth

[72] *Matter of Search of Info. that is Stored at Premises Controlled by Google, LLC*, 542 F. Supp. 3d 1153 (D. Kan. 2021).
[73] *Id.* at 1155.
[74] *Id.* at 1158.

Amendment is extremely high. However, many applications have been approved despite this established standard, reaching contrary conclusions.

Warrant approval:

A case that reached a contrary conclusion to Judge Mitchell's findings is *In the Matter of Search of Information that is Stored at Premises Controlled by Google, LLC* (2021). Although this case has the same caption, it comes from the United States District Court for the District of Columbia. Magistrate Judge G. Michael Harvey of the same issued an opinion regarding an application by the government for a geofence warrant.[75] The government sought Google's data for a federal crime allegedly committed inside a shipping center that has a building with another business located in the nearby area. The targeted area was approximately 875 square meters and included the shipping center's front half, as well as the parking lot—but it did not include the other businesses in the building and the roads. The application sought 185 minutes of data over 8 days during a period of over 5 months. This footage was based on a surveillance video obtained from inside the shipping center, showing the alleged criminal conduct. The video footage also showed a few customers in the shipping center when the targeted subjects were present engaging in the alleged criminal conduct.

The government sought the three-step protocol that it typically provides in its geofence search warrant applications. Judge Harvey had concerns regarding this protocol because it afforded the government the discretion to order Google to provide identifying information. This resulted in Judge Harvey ordering a revised application and protocol to be made. Specifically, the government had to provide the court with the devices for which it sought identifying information. As Judge Harvey explained, "In the revised protocol, the discretion as to what devices falling within the geofence to deanonymize no longer rests with the government, but with the Court."[76] This highlights the inherent concern with geofence warrants, which

[75] *Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F. Supp. 3d 62 (D.D.C. 2021).
[76] *Id.* at 74.

lies in the lack of court involvement that they require beyond their initial application.

In analyzing whether the warrant met the Fourth Amendment's particularity requirement, Judge Harvey concluded that the government satisfied this requirement because it identified a criminal offense for which there was probable cause, it described the information sought in Google's possession, and it identified both a specific time and location for this information. However, under the standards underscored in the United States District Court for the District of Kansas by Judge Mitchell, retaining a warrant for these designated areas would also include the information of the customers who may have entered the shipping center during the allotted times, as well any individuals who may have entered the parking lot.[77] This geographic area identified in the warrant is overbroad. Similar to the geofence warrant denied by Judge Mitchell, the geofence in this case would have captured not only the pertinent suspects but also the information of any individuals in the industrial area. Considering the area in question shares a building with other businesses, this warrant poses the risk of collecting information about a group of individuals not implicated in the crime in question at all. Thus, Judge Harvey erred in his opinion. The probable cause standard has not been met for any of these individuals, and while the scope of this warrant is significantly smaller, the sentiment that the particularity requirement remains unmet stands true.

The inconsistencies that clearly exist between the rulings of various district courts are also immensely concerning. The clear uncertainty surrounding how Fourth Amendment standards apply to geofence warrants has led to the inconsistent authorization of these warrants, meaning that the standard for searches can vastly differ based on jurisdiction and the individual interpretation of judges alone. Thus, clarification from higher courts is necessary to consolidate these vastly differing rulings by the lower courts.

PROPOSED LEGISLATION

Geofence warrants raise significant privacy concerns. These warrants involve the collection of extensive location data from

[77] *Supra*. note 21.

countless individuals who may have no connection to a criminal investigation. The reverse-engineering approach used in geofence warrants to identify suspects based on historical location data has the potential to infringe upon Fourth Amendment rights, which protect against unreasonable searches and seizures. One of the significant challenges in addressing geofence warrants is the inconsistency in how they are treated in different federal courts across the country. Some courts have upheld the use of geofence warrants, arguing that they are a legitimate investigative tool, while others have found them unconstitutional, citing concerns about overreach and a lack of particularity in the warrants. The lack of uniformity in these rulings creates uncertainty about the legal status of geofence warrants in different jurisdictions. So too, individuals' Fourth Amendment rights may be protected more robustly in some areas while being inadequately safeguarded in others. This inconsistency undermines the core principles of the Fourth Amendment, which should apply uniformly across the nation to protect individuals' rights, regardless of their geographical location. Furthermore, due to the nature of Geofence warrants, it is nearly impossible for the government to request a warrant that complies with the probable cause, specificity, and particularity warrant requirements.

To address these concerns and establish a consistent framework for the use of geofence warrants, Congress should consider enacting federal legislation that outright bans the use of geofence warrants under all circumstances. Such legislation would send a clear message that geofence warrants are incompatible with the Fourth Amendment and the principles of privacy. Such legislation has been proposed in states such as New York, through the Reverse Location Search Prohibition Act[78]—and it was supported by technology companies, such as Google and Microsoft.[79] Using this proposed legislation as a model, federal legislation banning the use of geofence warrants could be created and should unequivocally prohibit the use of geofence warrants by law enforcement agencies at both the federal and state levels. Such legislation is an opportunity

[78]Assembly Bill A84A, S. 296A, 117th Cong. (2021).

[79]Zack Whittaker, Google, Microsoft and Yahoo back New York ban on controversial search warrants (May 10, 2022), https://techcrunch.com/2022/05/10/google-new-york-geofence-keyword-warrant/.

for Congress to reiterate the importance of privacy rights in the digital age and emphasize the need for law enforcement agencies to obtain proper warrants based on probable cause when conducting location-based searches.

CONCLUSION

The implications of geofence warrants extend far beyond the situations highlighted in the cases examined herein. Concerns surrounding the privacy issues with geofence warrants intensified in the wake of the 2022 *Dobbs v. Jackson Women's Health Organization* decision—which overturned the constitutional right to abortion.[80] With the restriction of abortion access in several states across the country, law enforcement could employ geofence warrants to target and prosecute individuals seeking contraceptive procedures, thereby putting the privacy, security, and civil liberties of women across the nation in grave danger.

As technology continues to evolve beyond the scope of *Carpenter*, so too does the potential for more invasive surveillance techniques such as geofence warrants. These tools, while innovative, challenge the fundamental tenets of the Fourth Amendment that guard against unreasonable searches and seizures. By casting a wide net and potentially implicating innocent individuals based merely on their proximity to a crime scene, geofence warrants lack the specificity and particularity traditionally required by the Fourth Amendment. This broad approach stands in stark contrast to the Amendment's intention to protect individual privacy rights against unjustified government interference. Based on these considerations, geofence warrants do not comport with the requirements of the Fourth Amendment.

[80] *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

TREATISE ON THE IMPACT OF CHRISTIAN TOLERANCE ON SECULAR NATURAL LAW THEORIES

Robert Cadenasso

Treatise on the Impact of Christian Tolerance on Secular Natural Law Theories

INTRODUCTION

Religion has long dominated most aspects of society and nowhere is that more prominent than in religion justifying the rule of law and governance. From the divine right of kings to the codes of Justinian, jurisprudential scholars have relied upon religion for centuries. Natural law had its foundations within a religious context. Though there are many theories and definitions of natural law, it generally is the belief that laws must be made in accordance with greater, universal principles. It has historically invoked God or a deity as the justification for its righteousness and universality. However, more contemporary definitions have become more secularized. One of the earliest signs of secularization occurred in Hugo Grotius' On War and Peace, where he posited that natural law would exist even if God did not. This conclusion and the ability to express it was largely due to the presence of Christian tolerance at the time of Grotius' life. There are three main elements that must be addressed in terms of religious tolerance that indicate its necessity when Grotius published his work. First, it must be established that religious tolerance existed as a concept. Ideals of tolerance can be traced back to the Bible, with many early Christians expanding on these principles while under the threat of persecution. The extent of toleration fluctuated throughout history, yet it is undeniable that it was present during Grotius' life because he lived during the Protestant Reformation, which was a time defined by the fracturing of the Church and its subsequent loss of political power. The second element is tolerance existing in a practical sense. Even if the idea of tolerance is present, whether it was actually adhered to is an important indicator. This can and should be construed in the broadest of contexts as it can manifest itself in many different ways. For example, an author can outright discuss contemporary ideas about tolerance and dissent. Another possibility would be an author being able to freely express an idea that during other times would get them

persecuted. Lastly, the author would need to be free from persecution for the work or, at least, repercussions from the work must be separate from religion. All of these variables were present during Hugo Grotius' life and it is thanks to the confluence of these variables, which started centuries before his birth, that gave him the ability to publish his manuscript.

EARLY CHRISTIAN TOLERANCE

The foundational principles of Christian tolerance are clearly first exhibited in the Bible. The Bible is the main religious text for Christianity and consists of the Old Testament and the New Testament. The Bible preaches that:

> Ye have heard that it hath been said, Thou shalt love thy neighbor, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.[81]

The Bible calling for its followers to not simply tolerate hatred and evil, but actually show love and compassion towards evil perfectly encapsulates the highest principle of Christian tolerance. It is not defined by passivity, yet an active embrace of those who hate (though, notably, not acceptance of hatred or evil). Additionally, the Book of Matthew acknowledges that God subjects those who commit evil to the same conditions as those who do not, at least in the earthly setting. Importantly, the word "evil" for the purposes here can be conservatively construed as to be referring to those with dissenting ideas surrounding religiously tangential topics, like theories of law and governance. However, it is clear that these verses were referring to evil far stronger than digressing ideas.

The Book of Romans has multiple verses that are prevalent in any discussion of Christian tolerance. First, the Bible states that "[a]s for the one who is weak in faith, welcome him, but not to quarrel over opinions."[82] This verse calls for community with those with differing views in a non-confrontational

[81] Matthew 5:43-45 (King James).
[82] Romans 14:1 (King James).

manner. The next verse provides an analogy for how Christians should act, stating that "[o]ne person believes he may eat anything, while the weak person eats only vegetables. Let not the one who eats despise the one who abstains, and let not the one who abstains pass judgment on the one who eats, for God has welcomed him."[83] This analogy is best suitable for describing cultural differences, yet the subsequent verse can easily be universally applied. Importantly, these verses ascribe divine toleration, not only tolerance by humans. It says "...God has welcomed him," denoting that not only does God preach tolerance to humans, but also abides by tolerance in her actions as well.[84] This divine tolerance signifies that those who are not tolerant are not following God's example nor God's will. Finally, Romans poses a poignant question that strikes at the heart of the Bible's teachings on tolerance, asking "[w]ho are you to pass judgment on the servant of another? It is before his own master that he stands or falls. And he will be upheld, for the Lord is able to make him stand."[85] While the language of this verse is admittedly antiquated, a contemporary interpretation of this verse reveals it to be extremely tolerant. Historically, and traditionally, the terms servant and master meant a form of subjugation and exploitation, respectively. However, a modern interpretation of this verse reveals the possibility for the terms to be more voluntary loyalty and cultural or religious stature, respectively. For example, someone of a polytheistic religion would be a servant to their Gods while their Gods are the masters of them. When examining the verse under these pretenses, what this verse illustrates is tolerance of those who may worship different Gods, but also the verse calls for judging people on a personal level. In other words, the person should be judged on the plane or grounds that they themselves prescribe to. In a strictly literal sense, that means judging a monk by their standards as a monk, rather than judging a monk by the standards of an atheist. Furthermore, this verse can also be interpreted to simply mean that one should mind their own business and should pass no judgment on that which is not their business, which is an interpretation that preaches tolerance in its own unique way.

[83]Romans 14:2-3 (King James).
[84]Romans 14:3 (King James).
[85]Romans 14:4 (King James).

While Romans deals more directly with tolerance, the Book of Ephesians articulates aspects of Christian behavior that furthers the principles of tolerance in a more indirect manner. The Book of Ephesians states that "I therefore, the prisoner of the Lord, beseech you that ye walk worthy of the vocation wherewith ye are called, With all lowliness and meekness, with longsuffering, forbearing one another in love; Endeavoring to keep the unity of the Spirit in the bond of peace."[86] While this verse does not expressly engage with the notion of tolerance, it essentially explains how a Christian should conduct themselves and treat others. To summarize, Christians should act with humility and love, for themselves and for all others, to maintain unity and peace. Such an edict has an air of universality to its decree, meaning its applicability to the question of tolerance is abundantly relevant. The manner in which the Bible expects Christians to act is an indicator of how tolerant they should be. The principles of love, peace, and unity are conveyed clearly in these verses and tolerance only furthers such principles and does not degrade them. The Book of Ephesians articulates expected conduct even more explicitly, calling on Christians to "...be ye kind one to another, tenderhearted, forgiving one another, even as God for Christ's sake hath forgiven you."[87] While many of these principles mirror the previous verse, this verse includes a new dimension: forgiveness. Forgiveness is a necessary attribute of tolerance: The ability to forgive those one disagrees with, yet not forgive in the sense of damnation or heresy, but instead in the sense of love and tolerance for such conflict.

There are other notable verses found throughout the New Testament that lay important foundations for later Christian tolerance. For example, the First Book of Thessalonians states, "[s]ee that none render evil for evil unto any man; but ever follow that which is good, both among yourselves, and to all men."[88] In other words, if one sees evil being done, they should not deal in evil, even if such actions are done unto them. In dealing with evil, one must utilize good for themselves and all people. This verse deals directly with morality and articulates a difficult to follow rule: When someone does wrong unto you, do not do wrong unto them. This verse passively advocates

[86]Ephesians 4:1-3 (King James).
[87]Ephesians 4:32 (King James).
[88]1 Thessalonians 5:15 (King James).

for tolerance while expressly condemning intolerance. Another book, Hebrew, mandates that one "[f]ollow peace with all men, and holiness, without which no man shall see the Lord."[89] Similar to previous verses, the mandate to be at peace with one's fellow human beings has no caveat for differing ideas or even ideals. Though one may be implied, it would seem contradictory to the aforementioned verse in Thessalonians, which calls for one not to commit evil against those who perpetuate evil. Breaking peace with those who dissent would be a significant departure from committing no evil, even if evil is done unto them. Finally, Jude summarizes tolerance in a few short words, reading "[a]nd of some have compassion, making a difference."[90] It calls for compassion for those who differ. These verses are just a section of countless other verses and parables in the Bible which preach tolerance. Now, it is important to note that tolerance as written about in the Bible mostly refers to tolerance of different religious. While such notions are not precisely comparable to discussions of natural law or plainly dissenting ideas, they definitely are not antithetical to such discussions.

While the Bible laid the foundation for Christian tolerance, many theologians subsequently expanded and, unfortunately, narrowed the scope of it through further work. One such theologian was Tertullian. Tertullian was one of the Latin Apologists, who were Christians tasked with defending Christianity under the Roman Empire.[91] However, the Apologists did not believe they were fighting for any new religion, in fact, their arguments were based on an older religion: Judaism.[92] While fighting for the legitimacy of the Christian faith, Tertullian also provided early interpretation of Christian tolerance. In a letter to Scapula Tertullus, the Proconsul of Africa who was persecuting Christians, Tertullian distilled down religious tolerance to a concise and enduringly relevant few sentences. Tertullian wrote that "…it is a fundamental human right, a privilege of

[89] Hebrew 12:14 (King James).

[90] Jude 1:22 (King James).

[91] Mark Burrows, *Christianity in the Roman Forum: Tertullian and the Apologetic Use of History*, Vigiliae Christianae, 42 (1988).

[92] *Id.* at 210 ("Apologists in general did not see themselves as defenders of any "new" phenomena upon the landscape of religious cults or philosophical schools in the Roman world. Rather, they cast their defense upon the ancient foundations of the Jewish heritage, one which they held to be far superior to the novelty of Roman institutions and practices.").

nature, that every man should worship according to his own convictions: one man's religion neither harms nor helps another man. It is assuredly no part of religion to compel religion — to which free-will and not force should lead us — the sacrificial victims even being required of a willing mind."[93] This is an expansive and liberal view of religious tolerance, especially for the second century. Tertullian articulates numerous aspects of tolerance and religious observance that will endure for as long as organized religion itself endures. First, Tertullian believes an individual's own personal beliefs should lead them to religion, giving the individual a choice in what they believe and the manner in which they express that belief. He takes this belief a step further, introducing a notion that worship must inherently have a voluntary aspect to it. Compelled worship of religion is no worship at all. Second, he provides a defense for religious freedom that, albeit not original, is poignant: The religion does not harm those who do not wish to participate in it.

In his earlier work, *Apology*, Tertullian expands on his views on religious tolerance. The work itself was a sweeping defense of Christianity during a time when Christians were largely persecuted. He wrote:

> [l]et one man worship God, another Jupiter; let one lift suppliant hands to the heavens, another to the altar of Fides; let one…count in prayer the clouds, and another the ceiling panels; let one consecrate his own life to his God, and another that of a goat. For see that you do not give a further ground for the charge of irreligion, by taking away religious liberty, and forbidding free choice of deity, so that I may no longer worship according to my inclination, but am compelled to worship against it. Not even a human being would care to have unwilling homage rendered him.[94]

Tertullian emphasizes both Christian and the polytheistic religion the Romans followed. For example, the altar of Fides was a temple in Rome dedicated to the Goddess Fides.[95] Fides was the Goddess of faith, loyalty, and honesty.[96] His invoca-

[93]Letter from Tertullian to Scapula Tertullus, Proconsul of Africa (212 AD) (On file with the Library of Congress).

[94]Tertullian, *Apology* or *Defence of the Christians against the accusations of the gentiles*, (197 AD) (On file with the American University Library).

[95]The Editors of Encyclopedia Britannica, *Fides*, Britannica, (July 20, 1998).

[96]*Id.*

tion of her altar is clearly deliberate. He may also be alluding to Faunus, who was a deity commonly depicted as half-man, half-goat. Faunus was seen as a "bestower of fruitfulness."[97] The reference to a goat may simply serve to illustrate the extreme to which Tertullian takes religious freedom. Here he also iterates his staunch opposition to compelled religion or compelled worship. Yet, it is more complex than in his letter to Scapula. He discusses the view of compelled religion in two perspectives. First, as stated in his letter, he focuses on the worshippers, believing they have the right to choose who they honor. Second, and absent from his letter, is the second perspective he implies. In the last line, he states that "Not even a human being would care to have unwilling homage rendered him."[98] He, in a very indirect and passive nature, is taking the viewpoint of a God or, at the least, of the divine. While he masks his argument under the guise of a human, the power of his argument lies in the reasoning that a God would not want insincere worship. In that way, he is using the example of a human being as a reflection of God.

Though Tertullian passed away around 220 CE, his views on tolerance would outlive him, spreading eventually to Lactantius, a subsequent Christian Apologist.[99] [100] Lactantius lived during the persecution of Christians by the Roman Emperor Diocletian in the early third century. In his work, *Divine Institutes*, Lactantius reiterated Tertullian's views on religious tolerance, writing that:

> If you wish to defend religion by bloodshed, and by tortures, and by guilt, it will no longer be defended, but will be polluted and profaned. For nothing is so much a matter of free-will as religion; in which, if the mind of the worshiper is disinclined to it, religion is at once taken away, and ceases to exist.[101]

Lactantius refers to the duality of religious tolerance. A religion that can only be defended through violence is so polluted

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[97] *Id.*

[98] Tertullian, *Apology* or *Defence of the Christians against the accusations of the gentiles*, (197 AD) (On file with the American University Library).

[99] Robert L. Wilken, *Tertullian*, Britannica, (October 5, 2023).

[100] The Editors of Encyclopaedia Britannica, *Lactantius*, Britannica (January 1, 2023).

[101] Lactantius, *Divine Institutions*, (Written from 304-313 AD) (On file with the Georgetown University Library).

and intolerant that it will only remain relevant and respected for as long as the threat of violence is present. Violence in the name of preservation rarely achieves sustainable preservation. Not only would the religion fail to quell religiously-inspired dissent (i.e. no amount of violence will ever completely eradicate religious belief), but it also serves to alienate those committing the violence. This is not to even mention how the violence itself possibly erodes the values of the religion itself. The other aspect of religious tolerance is that which Tertullian wrote of before him: the requisite voluntary nature of worship. Lactantius, however, also addresses this issue from a slightly different perspective than Tertullian. Tertullian wrote of the worthlessness of compelled worship on a human being. Lactantius essentially states that religion exists within the good faith belief of the worshippers. If one in their mind does not truly believe in the God they are worshiping, then no worshiping is actually occurring. Religion is predicated on belief and absent that belief, religion ceases to exist. Both Tertullian and, later, Lactantius, provide some of the earliest examples of non-Biblical Christian tolerance. Their writings, no doubt, were heavily influenced by the religious persecution each faced in their lifetimes under the Roman Empire.

CHRISTIAN (IN)TOLERANCE IN THE MEDIEVAL AGE

As the Church expanded under the embrace of Emperor Constantine and then survived the fall of Rome, the expansive Christian tolerance of Tertullian and Lactantius was largely abandoned. In its wake, Saint Augustine, a scholar, theologian, and Bishop, developed a religious justification for persecution. His theory developed mostly due to the Church's conflict with the Donatists, who had contentious differences with the established Church.[102] Though it appears early in the conflict, Augustine sought tolerance and a nonviolent resolution, he

[102] Ronald Christenson, *The Political Theory of Persecution: Augustine and Hobbes*, Midwest Journal of Political Science, Vol. 12, No. 3, 421 (Aug., 1968) ("The Donatists, somewhat resembling an early variety of Puritanism, held a purist standard of the visible Church, arguing that the validity of the sacraments depended upon the morality of the priest, that those who compromised the Scriptures in order to avoid the Diocletian persecution had cut themselves off from Christianity, and that re-Baptism by a morally right priest was necessary for all who joined their sect.").

soon abandoned such hopes.[103] Augustine "...defended 'righteous persecution' of the Donatists in order to restore the unity of the Church. In their resistance, the Donatists became the authors of their own suffering as the emperors became agents of God."[104] Where the Romans persecuted Christians for refusing to adhere to their polytheistic religion, here Saint Augustine condones the persecution of a sect of the Church, not even an entirely separate religious entity, though even such a distinction does nothing to excuse Augustine's views. Where the Bible provides the framework for Christian tolerance, so too did it provide Augustine the framework to express a belief in what he deemed "righteous persecution."[105] According to Augustine, "Christ not merely said 'blessed are they who are persecuted' but added 'for righteousness' sake.' "[106] Augustine quotes the Beatitudes, but it is unclear if the Beatitudes included the second clause prior to Augustine. In any case, when the history of the persecution of Christians at the hands of the Romans is taken into account, it is troubling that Augustine would so readily invoke such a caveat. Furthermore, from this faulty premise, Augustine "…developed the argument that not only were Donatists who suffered false martyrs, since they did not suffer for righteousness sake, but that the Church can actively persecute in the name of righteousness. The distinguishing feature is the intention of the agents of persecution…"[107] Justifying the persecution of fellow Christians represents the complete departure from Tertullian's views of Christian tolerance and religious liberty. Where Tertullian's and Lactantius' views were clearly influenced by the persecution they faced at the hands of the Romans, Augustine actively defended the violence of the Romans against the Donatists, claiming that "...they bear not the sword in vain; they are the ministers of God to execute wrath upon those that do evil."[108] Augustine's views on toler-

[103] John A. Rohr, *Religious Toleration in St. Augustine*, Journal of Church and State, Vol. 9, No. 1, *55* (Winter 1967) ("From the time of his ordination until 398, Augustine was interested only in dialogues with the Donatists as means of winning them to the Catholic faith. c faith. On several occasions, he explicitly rejected the use of political means in his religious disputes.").

[104] Ronald Christenson, *The Political Theory of Persecution: Augustine and Hobbes*, Midwest Journal of Political Science, Vol. 12, No. 3, 419 (Aug., 1968).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 423.

[108] Epistula, 87.8.

ance, or more accurately, intolerance, reflects living in a time when the Church was not actively being persecuted. His views, not Tertullian's, would come to be widely accepted over the next few centuries.

In the 13th century, however, Thomas Aquinas proffered his own views on tolerance, which differed from Augustine's defense of persecution and his earlier, more tolerant policy towards the Donatists. Furthermore, Aquinas grounded his views on tolerance in a legal setting. Aquinas wrote:

> …[L]aw is framed as a rule or measure of human acts. Now a measure should be homogeneous with that which it measures…since different things are measured by different measures. Wherefore laws imposed on men should also be in keeping with their condition, for… law should be 'possible both according to nature, and according to the customs of the country.'[109]

By articulating such a legal framework, Aquinas expands discussions of tolerance past the traditional religious contexts that have previously been discussed. Aquinas is discussing human behavior more so than adherence to religion. If Aquinas is correct and law is a measure of human acts and that which is measuring such a phenomena must be homogenous to human acts, then it serves that, at least legally, the entity that measures human action is another human. His emphasis on the condition of humans furthers this proposition. His only invocation of a higher power or God is when he references nature. It is important to note that when Aquinas invokes nature that he himself has a robust theory of law, which includes the presence of eternal law, divine law, natural law, and human law. Laws regulating moral behavior define what behavior a jurisdiction will tolerate and most assuredly that leaves room for intellectual diversity and, therefore, a requirement for tolerance. In fact, Aquinas' definition itself includes an aspect of tolerance. He acknowledges that the local customs of a country are significant and within the condition and nature of humans in their legal framework. Such an admission is impossible without accepting, or merely tolerating, the fact that customs differ from country to country. While what measures moral behavior must be homogenous, the law itself that one utilizes to judge others must be adapted to the local customs and conditions of people

[109] Summa Theologica I-II, q. 96, a.2, ad 2.

depending on their country. However, Aquinas does not stop at societal differences when discussing law. He explains further:

> Now possibility or faculty of action is due to an interior habit or disposition: since the same thing is not possible to one who has not a virtuous habit, as is possible to one who has. Thus the same is not possible to a child as to a full-grown man: for which reason the law for children is not the same as for adults, since many things are permitted to children, which in an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man.[110]

While Aquinas is referencing the inadequacy of equating following the law with being a virtuous person, his approach is rather individualistic in nature. He acknowledges the necessity of an inherent subjectivity within the law. What is proper for one is not necessarily proper for another. Referring to his example of a child and an adult, he clearly believes that one must tolerate certain behavior from a child that they would not otherwise tolerate from an adult. Though he remains firmly within a legal setting, he is advocating for a form of subjective tolerance. This dispels the belief that morality and virtue are absolute (a sentiment echoed above when he acknowledges the importance of the customs of a country when creating law). From this analogy, one can extrapolate that, when applied to differing ideas, Aquinas would argue that the belief must be viewed in a subjective manner. He may not tolerate a possibly heretical idea, but would, under this reasoning, contextualize the idea. Subjectivity requires contextualization, which is vital for true tolerance of a foreign practice. Furthermore, Aquinas wrote:

> Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like. The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore it does not lay upon the

[110] *Id.*

> multitude of imperfect men the burdens of those who are already virtuous..that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils…[111]

While Aquinas again notes the distinction between moral goodness and legal obligations, he also espouses that the law must act as an example as much as it must act as a deterrent. His emphasis on the law leading to virtue, instead of instantaneously demanding it from imperfect beings, encapsulates principles of patience and understanding surrounding the fallibility of human beings and human behavior. Furthermore, Aquinas essentially states that the role of law is to deter only greatest evil, which inherently requires the tolerance of less evil behavior virtuous people may condemn or voluntarily abstain from already. His argument is limited to legal tolerance, though, not moral tolerance and assuredly not acceptance. However, his argument creates a spectrum of evil or a spectrum of subversive behavior where the law draws a line detailing what will be criminalized and what will be tolerated. In a certain capacity, this spectrum can be applied morally as well, though Aquinas is unwilling to do so. Subversive behavior is the manifestation of humanity's imperfection and is, at least in some capacity, an inevitable product of the human condition. However, within such a broad category, some subversive behavior will always be seen as more or less evil than other actions. A moral argument can be made that one must excuse such behavior on a moral level as being a natural human expression and not warranting judgment when compared to worse acts of subversive behavior. Aquinas may not agree.

The New Testament of the Bible lays the foundations for Christian tolerance as a necessity of conducting oneself in a Christian manner, including such principles as forgiveness, not being judgmental, loving all people, and living in peace, especially those who hold differing views. Tertullian and Lactantius provided the most expansive views on Christian tolerance, reflecting their lives under persecution. As the Church rose, their expansive view was limited by Augustine, who eventually sought to justify persecution. Aquinas' views on tolerance, though heavily skewed towards Augustine, do seek in some capacity to return to tolerance, though more in the human be-

[111] *Id.*

havioral sense than the religious sense that occupied the minds of the others. Each definition reflects the lived experiences of each scholar at different points of the Church's prevalence, power, and acceptance. However, the greatest test of Christian tolerance would not be until centuries after Aquinas' death.

THE PROTESTANT REFORMATION AND WEAKENING OF THE CHURCH

In 1517, Martin Luther nailed his 95 Theses to the door of a Church in Wittenberg, sparking the Protestant Reformation.[112] [113] Luther argued against transgressions of the Church, including indulgence-peddling, amongst a host of others.[114] The immediate significance of such a statement cannot be exaggerated because it fundamentally changed the relationship of individuals with God and with the Church.[115] This belief spurred religious tolerance, resuscitating Tertullian's original arguments surrounding voluntary worship and freedom to choose what religion to observe.[116] In fact, the Reformation did not simply resuscitate beliefs surrounding Christian tolerance,

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[112] Peter Marshall, *1517: Martin Luther and the Invention of the Reformation*, Oxford University Press (2017).

[113] There is some dispute amongst scholars as to whether Luther actually nailed it to the door or if he simply provided it in some other manner. *See* Volker Leppin And Timothy J. Wengert's *Sources for and against the Posting of the Ninety-Five Theses*, Lutheran Quarterly, Volume XXIX (2015).

[114] C. Scott Dixon, *Luther's Ninety-Five Theses and the Origins of the Reformation Narrative*, The English Historical Review, Volume 132, No. 556, Oxford University Press, 535 (2017) ("From the modern perspective it seems straightforward enough: this was the moment when Luther openly challenged the practice of indulgence-peddling, and with it the teaching and authority of the late medieval Catholic church.")

[115] Ernst Wilhelm Benz, *Symbols and Events of the Reformation*, in R. Schmidt, ed., *The Meaning of the Reformation for the World of Tomorrow*, Frankfurt am Main, 70 (1967) ("[W]estern Christianity had reached a new stage of the religious conscience, one in which, for the individual, personal experience and personal witness becomes decisive in his relationship to God and to the community.").

[116] Martin John Spalding, *The History of the Protest Reformation in Germany and Switzerland and in England, Ireland, Scotland, The Netherlands, France, and Northern Europe*, John Murphy Company, VOlumes 1-2, 316 ("Religious liberty guarantees to every man the right to worship God according to the dictates of his conscience, without thereby incurring any civil penalties or disabilities whatever…The Reformation indeed boasted much in this particular respect. It professed to free mankind from the degrading yoke of the Papacy, and thereby restore to them their Christian liberty.").

but actually emphasized religious liberty as well, to the extent that the Church was seen as hindering freedom and one's ability to develop a relationship with God.[117] Politically, the Protestant Reformation divided the Church, creating numerous denominations under the Christian faith, with Catholics and Protestants being the most recognizable.[118] Where the Reformation was supported, the political power of the Catholic Church greatly diminished.[119] Such diminishment allowed for new and diverse political groups to gain power. The fracture of the Church into denominations, coupled with the loss of political power fostered an environment of discussion and debate surrounding topics that generations prior may not have dared to question.

Amidst this upheaval, the Netherlands emerged as a center both for religious conflict and tolerance. Interestingly, Wessel Gansfort spoke against the Church's indulgence peddling thirty years before Luther did so in Germany.[120] During the first half of Grotius' life, the Netherlands faced religious division between the Calvinists, who followed the teachings of John Calvin, and the Remonstrants, who followed the teachings of Jacob Arminius. This conflict would unravel until it was partially resolved by the Synod of Dort in 1618-1619.[121] Though there was conflict between the two groups, the overwhelming atmosphere of the Netherlands was tolerance, to the point where the "...tolerant atmosphere of the Netherlands made it difficult for

[117] Ibid. ("The restraining influence of Church authority was to be spurned, as wholly incompatible with freedom, and each one was to be guided solely by his own private judgment in matters of religion.").

[118] *The Reformation: Its Roots and Its Legacy*, Edited by Pierre Berthoud & Pieter J. Lalleman, Pickwick Publications (2017).

[119] Sascha O. Becker, Steven Pfaff, and Jared Rubin, *Causes and consequences of the Protestant Reformation*, Explorations in Economic History Volume 62, 18 (2016) ("Politics was one area where the Reformation had an immediate and obvious impact. Where the Reformation took hold, the ruling elite evicted the Catholic Church from power. This fundamentally altered the makeup of city councils, parliaments, and royal councils.").

[120] Jan Van Herwaarden, *Between Saint James and Erasmus: Studies in Late-Medieval Religious Life – Devotion and Pilgrimage in the Netherlands*, Studies in Medieval and Reformation Traditions, Volume: 97, 86 (2003) ("…contrary to opinion at the time, the traffic in indulgences had also flourished in the Netherlands with many simple people being taken in by it. In the Netherlands too, however , there were also voices denouncing this appalling abuse.").

[121] *The Reformation: Its Roots and Its Legacy*, Edited by Pierre Berthoud & Pieter J. Lalleman, Pickwick Publications, 6 (2017).

the victorious Calvinists to impose any kind of unity, let alone uniformity, by suppressing them or others who dissent from the official church's theological position."[122] Furthermore, the Netherlands "...became a relative haven of religious toleration and religious dissidents of all kinds flocked there. The United Provinces of (northern) Netherlands thus became the most religiously tolerant and diverse state in Europe, a status that made it unique…".[123] A time defined by religious conflict, yet having that conflict be confined by overarching beliefs of tolerance would exert tremendous influence over anyone growing up during it.

HUGO GROTIUS, RELIGION, AND INCARCERATION

As these events unfolded, Hugo Grotius was born in 1582 in Delf, Netherlands. His father raised him with an understanding of Christian doctrine and, later in his childhood, Grotius was greatly influenced by an Arminian clergyman named Utengobard.[124] When he went to Leiden University, a Protestant school, he was mentored by Francis Junuis.[125] The Netherlands during Grotius' early life was defined by religious tolerance. Though that can be attributed to the Protestant Reformation, some scholars argue it was mostly due to the Dutch rebelling against Spain.[126] In fact, the Dutch leader, William of Orange, actively supported religious freedom.[127] The truth is that it was

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[122] Ibid.

[123] Ibid.

[124] Charles Butler, *The Life of Hugo Grotius*, Luke Hansard & Sons (1999) (On file with Project Gutenberg).

[125] *Id.*

[126] Jonathan Israel, *The Emergence of Tolerance in the Dutch Republic*, 3 (1997) ("...there can be no denying that it was, above all, the Revolt against Spain-and the experience of war, disruption or religious strife which accompanied it-which shaped the Dutch toleration debate down to the early eighteenth century. The Revolt shattered the previously prevailing religious, academic, educational and intellectual framework in the Netherlands, creating in the northern provinces the conditions for a society more flexible and tolerant with regard to religious and intellectual dissent than any other in western or central Europe at any rate down to the Glorious Revolution which, in at least some respects, forged an even more tolerant society in Britain.").

[127] *Id.* at 4 ("For William not only evinced a powerful aversion to religious persecution and preference for religious freedom, but actively sought to introduce political and legal guarantees, based in part on recent German

a combination of both that led to fostered the environment of religious tolerance that would shape Grotius' early life.

For as tolerant as the Netherlands was in his early life, however, Hugo Grotius was arrested in 1618, largely due to his opposition to a coup by the noted Calvinist Prince Maurice, who executed one of Grotius' close colleagues. While the grounds for his incarceration were political, as it occurred after Prince Maurice seized power against those Grotius supported, there definitely was religious overtones to the conflict as a whole. Grotius ultimately escaped jail and went to France, where his disdain for Calvinism understandably grew.[128] Four years after escaping incarceration, he wrote his influential work, *On the Laws of War and Peace*, in 1625. It was this work where he articulated his theory surrounding natural law. Now, one would assume that being incarcerated due to his religion would cause him to hold abandon views of religious tolerance, however, in his dedication to King Louis XIII of France, Grotius wrote that:

> …[W]hen you call back to life laws that are on the verge of burial, and with all your strength set yourself against the trend of an age which is rushing headlong to destruction; . . . when you offer no violence to souls that hold views different from your own in matter of religion; . . . when by the exercise of your authority you lighten the burden of oppressed peoples.[129]

King Louis XIII provided Grotius refuge after his daring escape and this dedication indicates that he was still committed to the ideals of religious tolerance. The actions of King Louis and Grotius' appreciation of him represents how religious tolerance allowed for greater publishing freedom. King Louis XIII was a Roman Catholic providing sanctuary to a Protestant. Grotius' words seem to indicate that the religious tolerance of the time was fleeting and trending in the wrong direction. In the short term, his warning was true. Galileo Galilei was first tried in 1616 and "was given a precept utterly to abandon

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and French precedents for freedom of religious practice at least for the main established churches, the Catholic and Lutheran, as well as the Reformed.").

[128] Charles Butler, *The Life of Hugo Grotius*, Luke Hansard & Sons (1999) (On file with Project Gutenberg).

[129] Hugo Grotius, *On the Laws of War and Peace*, Dedication to King Louis XIII, (1625).

Copernicus's principles."[130] However, that first trial also had a heresy element.[131] Grotius had good reason to believe that there was still religious animosity. However, the presence of persecution or animosity in one part of the world does not negate the advances made in more tolerant areas. It is from this basis of religious tolerance that enabled Grotius to publish his theory of natural law.

GROTIUS AND NATURAL LAW

It is from these beginnings, both as a society and as an individual, that Hugo Grotius laid the foundation for a secular definition of natural law. Importantly, Grotius' definition is not entirely secular. In fact, Grotius utilizes God as evidence of the existence of natural law. However, his theory does not require that there be a divine, intelligent creator. It does, however, require that humans be viewed as inherently rational. According to Grotius, "[t]he mature man in fact has knowledge which prompts him to similar actions under similar conditions, together with an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech."[132] This definition, rather than be predicated on God or any divine being, is predicated on the rationality of human beings. Humans are rational, they respond to situations rationally, and therefore when faced with similar situations, rational humans will act in similar manners. While the question of the inherent rationality of humans can and is disputed, the reliance on human nature and not God is significant. In fact, Grotius puts humans on the same plane as animals, with the only separation being the ability for humans to communicate. It is a natural, animalistic form of natural law that can exist in a vacuum absent a God or deity. For Grotius, that theory, broadly, is as follows:

> This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the

[130]Thomas Mayer, *The Roman Inquisition: Trying Galileo*, University of Pennsylvania Press, 3 (2015).
[131]Ibid.
[132]Stephen Neff, *Hugo Grotius on the Law of War and Peace: Student Edition*, Cambridge Press, 3 (2012).

> restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfill promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[133]

The ability to execute each of those actions requires rationality, not God. In fact, Grotius admits just that.[134] However, God may be invoked when discussing if the execution of such actions are just or fair. Traditionally, the issue is the inherent subjectivity of any natural law definition that does not rely on a power or entity greater than the author writing the theory. However, as Grotius notes, "[h]e has also been endowed with the faculty of knowing and of acting in accordance with general principles."[135] If all humans have that same faculty and generally act in accordance with the same general principles, then it serves to reason that those principles with which the collective human race subscribe to are the superior justification that God used to be. In other words, God derives power from the sincere belief of their worshipers. As Lactantius stated, "[f]or nothing is so much a matter of free-will as religion; in which, if the mind of the worshiper is disinclined to it, religion is at once taken away, and ceases to exist."[136] If those worshipers willingly turned their faith away from God, then God becomes no greater than humans. By the inverse logic, if those worshipers placed their faith not in an entity, but rather ideals or principles, then those principles would rise to the place previously only ascertained by Gods. The greatest objection to this line of thinking is that while humans can rally around ideals and principles easily, defining what they mean and how they manifest themselves will inevitably divide the people yet again. One would only need to turn towards religion itself to see such an objection manifest itself. The Christians who wrote of tolerance and the Christians who defended persecution both saw themselves as righteousness before the same God. If asked, both Augustine and the Donatists would argue that God was

[133] Ibid.

[134] *Id.* at 4 ("What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness: that there is no God, or that the affairs of men are of no concern to Him.").

[135] *Id.* at 3.

[136] Lactantius, *Divine Institutions*, (Written from 304-313 AD) (On file with the Georgetown University Library).

on their side. Martin Luther and indulgence-peddling Friars prayed to the same God. In other words, the objection of subjectivity is not mutually exclusive towards secular lines of reasoning.

Furthermore, Grotius notes that it is not simply general principles that would unite humans under natural law. According to Grotius, in addition to general principles,

> …[S]acred history, besides enjoining rules of conduct, in no slight degree reinforces man's inclination towards sociableness by teaching that all men are sprung from the same first parents. In this sense, we can rightly affirm also that . . . a blood-relationship has been established among us by nature; consequently, it is wrong for a man to set a snare for a fellow-man.[137]

Grotius' invocation of a shared history mirrors Aquinas' invocation of the unique customs of countries. This also echoes the Bible's reference to "the unity of the Spirit in the bond of peace."[138] The unity in this case is the unity of the human race as all being related to each other on a global level. Grotius utilizes the argument of a blood relationship liberally as a universal call for the connectedness of the human race. His justification for why someone should not contradict natural law is that in doing so, one contradicts their inherent humanity. Again, this does not require the presence of a God or deity. It is human based.

While Grotius' definition does not require God, it does incorporate God. For example, Grotius states that "…the law of nature of which we have spoken, comprising alike that which relates to the social life of man and that which is so called in a larger sense, proceeding as it does from the essential traits implanted in man…".[139] There are two interpretations that can be derived from this statement and while not the same, they are also not necessarily exclusive of each other. First, natural law originates from humans innately. A human is innately rational, innately adheres to the same general principles, and innately seeks community. From these ingredients, natural law innately follows. The second interpretation is that God

[137] Stephen Neff, *Hugo Grotius on the Law of War and Peace: Student Edition*, Cambridge Press, 4 (2012).
[138] Ephesians 4:3 (King James).
[139] Stephen Neff, *Hugo Grotius on the Law of War and Peace: Student Edition*, Cambridge Press, 4 (2012).

placed within humans the capacity for a natural law. The first interpretation is not predicated on the truthfulness of the second interpretation, but also does not exist in conflict with it. It is possible that a God placed within humans the capacity to be rational, the capacity to adhere to general principles, and the need for community. It is possible that God understood that from these ingredients, natural law would follow. It is also possible that humans are not rational, do not naturally submit to general principles, and seek community out of necessity and that it is the will of God only that brings forth natural law from a state of nature. Grotius' definition is sensitive to both, which may very well be a reflection of his growing up in a religious tolerant, yet admittedly fraught society.

Ultimately, it would be disingenuous to label Hugo Grotius' natural law theory as secular. That implies that the theory exists completely separate from God and does not involve God in any capacity. To the contrary, Grotius does utilize God as a justification. What is notable is that he provides definitions and justifications that can, theoretically, exist outside of the presence of God. Under a certain interpretation, his theory has a secular element described above, one that was inspired by the tolerant environment under which he grew up and his values of religious pacification.

CONCLUSION

Hugo Grotius' work would have been just as impactful if his natural law theory held no secular elements, as he laid foundations in both maritime and international law. Yet, for him to be able to have a secularized theory, a culmination of a variety of factors had to occur. First, he was born and raised during the Protestant Reformation and The Netherlands' war for independence from Spain, both of which contributed to an expansive definition and environment of religious tolerance that mirrors what Tertullian sought centuries before Grotius' death and represents a sharp departure from the persecution theory of Augustine and the behavioral tolerance legal theories of Aquinas. As strange as it sounds, if he was not imprisoned and forced to flee to France, he may never have been so compelled by King Louis XIII's tolerance of him that he does not dedicate *On the Laws of War and Peace* to the King's tolerance. Furthermore, if he lived in a less tolerant society, even Spain

during that time, he may not have been so bold as to state that natural law exists whether or not God does. It was all of these chances, both at the societal and personal level, that empowered him with the freedom to make such a claim. In some ways, he benefited from the times he lived in, yet in far more ways, he seized with courage the opportunity the current landscape provided him. Today, natural law remains as relevant as ever before, especially in the US as the country increasingly comes to terms with inequitable systems and institutions that may cause the most just of laws to operate in unjust manners. In that moment, one must wonder whether natural law survives in such an environment, with or without God.

THIRD-PARTY FUNDING IN LITIGATION: HISTORY, RECENT DEVELOPMENTS & ETHICS

Alex Holtzapffel

Third-Party Funding in Litigation: History, Recent Developments & Ethics

INTRODUCTION

In civil litigation, the two parties involved are the plaintiff and the defendant. Throughout modern history, the plaintiff would have to fund their lawsuit by themselves, which was difficult for the average person to afford, leading civil suits to be relegated to wealthier individuals. As countries have broadened the public's ability to engage local issues and disputes through the law, such as through the legalization of class action lawsuits, more people have been looking for a means to fund their suits. Since the 1990s, many countries have seen a burgeoning market to address this: litigation finance. Law firms and private companies have begun to act as a third player within the suit, financially supporting the plaintiff and paying for their legal fees. Litigation funding is not done simply out of altruism, but is a lucrative venture for its participants if the case is successful. Third-party litigation funding in civil cases has been a global phenomenon in recent years, but it is still a relatively new market in countries like the United States and China. As a result, the rules in each country are still dubious, and have seen some positive and detrimental changes following court rulings. Along with this, the global market has come under criticism for its ethics. Opponents see it as potentially harmful towards the autonomy of the plaintiff's choices in the case; the plaintiff being coerced into making decisions that are more beneficial to the funder. Supporters of litigation funding argue that it is advantageous to both the funder and the plaintiff, and that it allows indigent people to continue their case and achieve justice. Third-party funding in litigation remains controversial, but it nonetheless continues to expand and grow as a market across the world.

HISTORY OF LITIGATION FUNDING IN AUSTRALIA & THE UK

The origins of litigation finance are to be found in the United Kingdom and one of its Commonwealth realms, Australia. During the 1990s, John Major's Conservative government in the UK and Paul Keating's Labor Party in Australia pursued liberal economic reforms, which gave private companies greater involvement in state matters and policy. This included legal reforms, where private funding in civil cases became more legitimate in the eyes of legislators and the courts. Legislation was passed that allowed insolvency practitioners to finance lawsuits characterized as company property.[140] This meant that bankrupt companies could establish funding contracts to finance the company's preexisting claims.[141] As a result, the government now recognized legal claims as a corporate asset, which was unprecedented in Australia at the time.[142] The Australian litigation funder that jumped into the niche market first was Insolvency Management Fund Limited, now called Omni Bridgeway Limited.[143]

Another groundbreaking change to Australia's legal system was the legalization of class action lawsuits in 1992.[144] The courts saw class action suits as an efficient means of dealing with group claims.[145] In comparison to the United States, which adheres to an "open" structure to class action lawsuits that include anyone who meets the defined class, Australia has a "closed" system that only includes those who explicitly want to join the suit.[146] This makes identifying the plaintiffs far easier in Australia than in the United States, and makes litigation funding a more clear cut process. Some lawyers and companies embraced the change and began funding class action lawsuits, while others were hesitant due to the lack of clarity regarding

[140] Michael Legg et al., *Litigation Funding in Australia*, UNSW Law Research Paper No. 2010-12 1, 4 (2010).

[141] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[142] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[143] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[144] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[145] *Id.*

[146] Michael Legg et al., *Litigation Funding in Australia*, UNSW Law Research Paper No. 2010-12 1, 13 (2010).

which arrangements would be struck down by courts and which would not.[147]

Two legal doctrines were the primary roadblocks to third-party funding in Australia as well as a handful of other former British colonies: maintenance and champerty.[148] Originating in English common law, champerty and maintenance were structured to prevent frivolous lawsuits. Professor Victoria Shannon Sahani, a legal scholar at Arizona State University defines maintenance as "...about people who are not party to a legal case providing funding for that case, and Champerty is Maintenance for a profit."[149] Australia's federal system gave states the ability to manage maintenance and champerty regulations on their own, many of which began to eliminate them by the mid-1990s. New South Wales, for example, abolished them in the Maintenance, Champerty and Barratry Abolition Act of 1993.[150] The abolition of champerty and maintenance in NSW made litigation funding arrangements dubious, a major change in the playing field as it was formerly prohibited.[151]

Sahani describes the period of 1992 to 2006 in litigation finance to be a "wild west of Australian law," as companies were unsure of the way courts would swing on their arrangements.[152] This legal ambiguity was finally cleared up in 2006 in the case of *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.*[153] The High Court of Australia ruled that third-party litigation funding arrangements had a legitimate purpose and did not abuse the legal process.[154] In fact, the ruling even allowed funders to influence decision-making within the case itself.[155] Third-party funding was already a growing trend in Australia, but

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[147] *Id.* at 4.

[148] George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 Journal of Law, Economics & Policy 451, 458 (2012).

[149] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[150] George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 Journal of Law, Economics & Policy 451, 463 (2012).

[151] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[152] *Id.*

[153] Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd, [2006] HCA 41; 229 CLR 386; 80 ALJR 1441; 229 ALR 58

[154] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[155] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

the 2006 decision made it truly prolific. Nowadays, nearly all major Australian class action lawsuits are funded by private companies.[156]

These developments in Australia mirrored similar ones in the United Kingdom. Even though the UK embraced litigation finance during the 1990s and 2000s, its origin point can be traced back to the Criminal Law Act of 1967.[157] This act decriminalized champerty and maintenance and ended criminal/tort liability from those doctrines.[158] While the 1967 Act made litigation funding contextually suitable, there was still uncertainty as to which contexts third-party funders should contribute to.[159] Litigation funding would finally surge in prominence in the United Kingdom at the end of the century, following Australia's path.

The 1990s saw significant legislation attempting to improve access to the justice system for ordinary citizens. The Parliament of the United Kingdom passed several acts throughout the decade that sought to give middle-income and lower-income individuals greater access to conditional fee agreements.[160] The Court and Legal Services Act of 1990 allowed clients and lawyers to enter into conditional fee agreements that were previously illegal, such as "no-win, no-fee" agreements that let clients waive legal fees if they lost the case, otherwise known as "non-recourse."[161] British citizens could now sign on to affordable agreements, which made the process of filing a lawsuit and going to court far easier for the average person.[162] Since a third-party funder was responsible for the bill through the conditional fee agreement, it allowed the plaintiff far greater flexibility to go further with the case than was previously acces-

[156] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[157] George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 Journal of Law, Economics & Policy 451, 459 (2012).

[158] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[159] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[160] Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 Journal of Law, Economics & Policy 405, 409 (2012).

[161] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[162] Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 Journal of Law, Economics & Policy 405, 409 (2012).

sible.[163] Some lawyers also saw this as a lucrative venture, many of whom funded cases with their own money independently to get a decent share of a plaintiff's victory.[164]

The next landmark piece of legislation was the Access to Justice Act of 1999. This act offered alternatives to traditional third-party funding, and it did so in several different ways.[165] First, it excluded personal injury lawsuits from getting civil legal aid, with conditional fee agreements acting as alternatives to government support.[166] Second, litigants on the plaintiff's side could pass insurance premiums and success fees on to the defendants, in line with the United Kingdom's "English rule" where the losing side pays for the legal fees of the winning side.[167] Third, the Act introduced "After the Event Insurance," allowing litigants to receive insurance if they have to pay for the legal fees of their opponent under the aforementioned rule.[168]

By 2002, His Majesty's Court of Appeal in England endorsed litigation, deeming that it was no longer opposed to alternative funding sources in "public policy."[169] The only agreements that would be barred were ones that deliberately "undermine the ends of justice."[170] Yet, some restrictions on litigation funding were enacted in the following years. The Court of Appeal in 2005 found that third-party funders could not command the direction of the case and the plaintiff would have full control over decision-making.[171] Lord Phillips specifically stated in the ruling that "[s]uch funding will leave the claimant as the party

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[163] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[164] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[165] Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 Journal of Law, Economics & Policy 405, 407 (2012).

[166] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[167] *Id.*

[168] *Id.*

[169] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

[170] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[171] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

primarily interested in the result of the litigation and the party in control of the conduct of the decision."[172]

Despite certain ethical regulations, the mid-to-late 2000s saw a massive increase of activity in this market. Many of the top litigation finance firms in the United Kingdom today were founded during this period, including Burford Capital in 2009, Therium Capital Management in 2009, Vannin Capital in 2010, and Woodsford Litigation Funding Limited in 2010.[173] These four along with a plethora of others joined the Association of Litigation Funders of England and Wales, an organization founded in 2011 to help ensure ethical standards among the firms.[174] The establishment of organizations like the ALF and a code of conduct would be influential towards other firms springing up in other countries, particularly the United States.

HISTORY OF LITIGATION FUNDING IN THE U.S. & CHINA

As litigation funding grew exponentially in the 2000s and spread throughout the world, the United States became the next location to adopt the practice. Being a former colony of the British, the American legal system also contained the doctrines of maintenance and champerty.[175] Prior to the growth and legitimacy of third-party funding in civil cases, many funders were prohibited from financing plaintiffs' cases during the 1990s and beforehand.[176] Following the development and success of litigation finance in Australia, American courts adopted a similar approach. Australia, a federal constitutional monarchy, and the United States, a federal republic, left the regional governments the respective decision of whether to uphold champerty and maintenance or to discard it.[177] Between states, there is variation between how each will judge third-party

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[172] *Id.*

[173] *Id.*

[174] Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 Journal of Law, Economics & Policy 405, 444 (2012).

[175] Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 Northern Kentucky Law Review 687, 689 (2011).

[176] *Id.* at 688.

[177] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

funding arrangements.[178] Time has also factored into how state courts approach these agreements, as many have gotten more lenient over time.

During the late 1990s and early 2000s, many states were more harsh and restrictive towards them. An example of this is the Supreme Court of Ohio's judgment in the *Rancman v. Interim Settlement Funding Corp.* case in 2003, where the old champerty prohibition was used to deny the agreements between the plaintiff and the funder.[179] Courts earlier on were skeptical of funding firms who did the financing for an individual, as they saw it as unethical and possibly resulting in the client caving to pressure by the funder as to how to conduct their case.[180] Thus, courts in the early period of litigation finance in the U.S. generally opposed individual-funding firm arrangements and upheld business-funding firm arrangements. An example of this was during Anglo-Dutch Petroleum International, Inc.'s $650 million lawsuit against Ramco and Halliburton.[181] Anglo-Dutch entered a "no win, no fee" agreement with its investors. The court allowed the arrangement to pass, as it allowed contingency fee agreements and viewed that this arrangement did not "prey on financially desperate plaintiffs," considering that this was a corporation and not a person.[182]

In some states, maintenance and champerty have been completely eliminated. Several states such as Arizona and Massachusetts have all gotten rid of the doctrines, though others have preserved them, and some like New Jersey never implemented them in the first place.[183] Nonetheless, agreements have been far more likely to pass through state courts over the last decade or so than previously, showing a general trend of embracing third-party funding as a means for plaintiffs to

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[178] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[179] Rancman v. Interim Settlement Funding, C.A. No. 20523 (Ohio Ct. App. Oct. 31, 2001)

[180] Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 Northern Kentucky Law Review 687, 688 (2011).

[181] Sudan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a place in the United States Market*, 53 Villanova Law Review 83, 88 (2008).

[182] *Id.* at 90.

[183] Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 Northern Kentucky Law Review 687, 694 (2011).

support their suits. For instance, Delaware limited their application of the doctrine for funding agreements in December 2015.[184] The issue has also remained largely in the hands of the states. National bodies like Congress took an interest in how to regulate litigation finance when it sought information from certain funders, but hasn't pushed for any federal restrictions since.[185]

In Delaware specifically, new developments have seen clearer stances taken by judges as to how third-party litigation funding agreements will be administered in the state. Colm Connolly, the Chief Judge of the U.S. District Court for the District of Delaware, issued a standing order that forced plaintiffs to provide the identity, address, and place of formation of the case's funder.[186] This recent change in 2022 has led to some funders not engaging in Delaware-based cases. Connolly has held evidentiary hearings that justify his decision for greater transparency between the court and the plaintiff's funder.[187] One of his findings was that the third-party funder of IP Edge, MAVEXAR, directly controlled the litigation process—a blatant violation of the agreement's restrictions.[188]

Like that of Australia and the United Kingdom, the United States has seen the market of third-party funding in litigation grow immensely. Credit Suisse was one of the first companies to set up shop in the American litigation market, establishing a Litigation Risk Strategies group in 2006.[189] This showed the increasingly globalized international market for litigation funding, as it was no longer restricted to individual countries. To uphold business practice standards, some funding firms formed organizations like the American Legal Finance Association to prevent unethical actions when funding plaintiffs. The U.S. has become one of the principal locations for third-party litigation funding, but due to the inconsistency among states,

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[184] Lake Whillans, *The History And Evolution Of Litigation Finance*, Above the Law (2017).

[185] *Id.*

[186] Sean Keller et al., *Litigation Funding Disclosure and Patent Litigation*, 33 Federal Circuit Bar Journal 1, 27 (2023).

[187] *Id.* at 44.

[188] *Id.* at 45.

[189] *A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, The Practice (2019).

there is not complete certainty regarding how courts will view funding arrangements.[190]

Compared to the federalized government of the United States, the other economic superpower and by contrast a unitary state, China, has had a different journey on the path towards accepting litigation finance. The People's Republic of China first embraced market reforms and economic liberalization in 1978 under the leadership of Deng Xiaoping, rejecting state socialism in favor of a state-directed and state-facilitated capitalism. While China became a center for Western investment and outsourced industry after its economic restructuring, China only began to adopt legal reforms around the 1990s.

In 1991, the Civil Procedure Law was passed, which for the first time permitted class action lawsuits.[191] During this period, the Communist Party sought to implement reforms while preserving their hold on power. Recent events like the Tiananmen Square protests in 1989 made the party leadership approach increased public dissent through two means: 1.) responding with an iron fist, and 2.) placating public sentiment and allowing for greater control over local issues. The Communist Party embraced class action lawsuits as a means for its citizens to express their discontent through the judicial process rather than through protests.[192]

This period in modern Chinese history saw a great degree of experimentation within the country's legal proceedings, which drew inspiration from multiple countries such as the United States.[193] An example of this is the approach towards the previously mentioned "open" and "closed" variations of class action suits. China and the United States both have "open" systems that encompass everyone in the class, with the Chinese opposing the "opt-out"/"closed" system of Australia and the United Kingdom.[194] China's acceptance of class action lawsuits also strengthened and expanded its existing legal system.

Prior to the 1990s, most disputes were handled by administrative bodies rather than through the courts, as individuals in

[190] Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 Northern Kentucky Law Review 687, 697 (2011).

[191] *Class Action Litigation in China*, 111 Harvard Law Review 1523, 1523 (1998).

[192] *Id.* at 1533.

[193] *Id.* at 1525.

[194] John C. Coffee, *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 University of Pennsylvania Law Review 1895, 1916 (2017).

China were often too poor to pursue a case or too hesitant to antagonize powerful and influential figures or companies.[195] Through this rare openness from the Chinese government, the public was able to voice its criticisms of issues including consumer fraud, contracts, corruption, and environmental pollution through collective efforts rather than individual suits.[196] Prospective lawyers also benefited from this legal revolution. The total number of lawyers in China in 1980 was a miniscule 3,000, but by 1996 it had grown to around 100,200.[197]

Chinese lawyers have been allowed to establish their own firms independent of the government and run them as profit-driven organizations. However, many lawyers in China grew irritated by the attorney fee restrictions, a regulation that the Chinese government still maintains. They are fixed at low percentages of the amount in the case, such as only being allotted 3% in cases involving property.[198] For third-party funding, China does allow contingency fees, which has let lawyers and other funders to, in some instances, reap much of the damages from the settlement.[199] Foreign funders are frequently given less favorability by local and regional courts in China, who are generally wary of outside influence.[200] This has made China, although a growing market for litigation finance, not the ideal location for Western funders.

Another element to the moderate growth of the market is the lack of a consistent position on what agreements between funders and plaintiffs are acceptable. Litigation funding is permitted, but the lack of clarity on what specifically is permitted has prevented third-party funding from taking off in China.[201] Despite China's unitary character, how agreements are parsed out is largely in the hands of lower courts. The focal points within China for litigation finance are Beijing and Shanghai,

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[195] *Class Action Litigation in China*, 111 Harvard Law Review 1523, 1525 (1998).
[196] *Id.* at 1528.
[197] *Id.* at 1536.
[198] *Id.* at 1537.
[199] John C. Coffee, *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 University of Pennsylvania Law Review 1895, 1916 (2017).
[200] John C. Coffee, *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 University of Pennsylvania Law Review 1895, 1916 (2017).
[201] Joseph J. Stroble et al., *Third-Party Litigation Funding: A Review of Recent Industry Developments*, 87 Defense Counsel Journal 1, 9 (2020).

and both cities' intermediate courts have held diverging views on how third-party litigation should be dealt with.[202]

Compared to the ambiguity within the Chinese mainland, Hong Kong, a "special administrative region" of China, has passed legislation that clearly defines how funding will be administered. Hong Kong was a British colony from 1841 until 1997 when it was given back to China, and as a result, the city's legal structure was that of the English common law tradition, in contrast to the rest of China's civil law system.[203] In line with the other former British colonies like Australia and the United States, Hong Kong also has the champerty and maintenance doctrines, but the scope of them has been minimized.[204] Recent legislation has broadened the scope of third-party funding in the city. Third-party funding in litigation is still prohibited, with the exception of the following three occurrences: 1.) access to justice, 2.) insolvency proceedings, and 3.) a legitimate common interest with the plaintiff.[205]

On June 14, 2017, the Legislative Council of Hong Kong Special Administrative Region passed the "Arbitration and Mediation Ordinance (Third Party Funding) (Amendment) Ordinance 2017 (Amendment Ordinance)" that legalized the use of third-party funding in arbitration.[206] The legislation requires high confidentiality between a funder and a plaintiff to prevent any unethical behavior.[207] Maintenance and champerty still block litigation from being able to be accessed by third-party funders. Mainland China, lacking these doctrines in their legal system, has taken inspiration from Hong Kong when approaching agreements for arbitration funding as well as developing their own litigation funding market.[208]

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[202] Nuno Garoupa, *Globalization and deregulation of legal services*, 38 International Review of Law and Economics 77, 83 (2014).

[203] *Id.*

[204] Peng Hou, *Financing arbitration in mainland China: Hong Kong's legislation as a model*, 34 Arbitration International 593, 593 (2018).

[205] Joseph J. Stroble et al., *Third-Party Litigation Funding: A Review of Recent Industry Developments*, 87 Defense Counsel Journal 1, 9 (2020).

[206] Peng Hou, *Financing arbitration in mainland China: Hong Kong's legislation as a model*, 34 Arbitration International 593, 597 (2018).

[207] Joseph J. Stroble et al., Third-Party Litigation Funding: A Review of Recent Industry Developments, 87 Defense Counsel Journal 1, 10 (2020).

[208] Peng Hou, *Financing arbitration in mainland China: Hong Kong's legislation as a model,* 34 Arbitration International 593, 611 (2018).

In October of 2017, the National People's Congress of the People's Republic of China passed the General Provisions of Civil Law that provides new potential for third-party funders to finance disputes involving bankrupt companies.[209] Later in December 2017, the Supreme People's Court of the People's Republic of China announced that the judicial committee had developed new provisions for the regulation of cases, including the jurisdiction of arbitration.[210] China still has significant room to grow and change regarding this market, and many of the developments within Hong Kong may have a ripple effect on the rest of the country.

HOW DOES LITIGATION FUNDING WORK?

As litigation finance developed into a large and globalized market for funders, many investment firms and law firms created methodologies for how to conduct business with plaintiffs. There is no standardized strategy that firms will take when creating arrangements, but there are some key attributes that many of them share. To give an example, Oasis Legal Finance breaks down its criteria for agreements into seven factors: 1.) damages, 2.) liability, 3.) ability to pay, 4.) contingent attorney fee, 5.) sufficient margin for investment, 6.) background, and 7.) state of residence.[211] Liability is considered to be the most important factor out of the seven, as funders will only consider financing a plaintiff's case if there is strong evidence for the defendant's liability.[212] Both the plaintiff and the defendant must be considered and investigated thoroughly before most firms make the decision to commit.

Even though funders generally want to help plaintiffs in need or participate in a good cause, their primary objective is to profit from a favorable result to an extent that outweighs the costs of funding the case.[213] Often in arrangements for commercial cases, the plaintiff agrees to let the funder collect an interest rate of at least 25% in exchange for the funder covering

[209] *Id.* at 613.
[210] *Id.*
[211] Ronen Avraham, *Symposium: A Brave New World: The Changing Face of Litigation and Law Firm Finance: Nineteenth Annual Clifford Symposium on Tort Law and Social Policy*, 63 DePaul Law Review 233, 239 (2014).
[212] *Id.* at 240.
[213] Wenjing Chen, *An Economic Analysis of Third Party Litigation Funding*, 16 US-China Law Review 34, 35 (2019).

all legal fees.[214] The intricacies for the exact percentage are agreed upon through negotiations between the two sides. This frequently involves the consideration of the duration of the case, the amount of money given, the case's potential value, and the likelihood of a settlement.[215] While the investment can be costly for a firm, the gamble can also have great benefits if successful. Under conditional/contingency fee agreements, the third-party funder will have to pay for the fees whether or not the case is successful, but the chance that a case turns out favorably may be worth the investment.[216] However, different countries also have distinct approaches to payment; in the United Kingdom, the loser of the case will have to pay the victor's legal fees, which allows the funder to benefit from the rewards and not pay for the fees of their client.[217]

Due to the potential risks involved, several firms have established strategies for how to conduct finding a client and reaching an agreement. Woodsford Capital Management Limited learns about the merits of the claim, the motivation of the claimant for seeking funding, the attorney of the claimant, the size of the litigation budget, the size of the damages, and the recovery.[218] Once establishing these facts, Woodsford contacts the plaintiff to discuss the case. During this, they enter a non-disclosure agreement that will protect confidentiality between the two sides.[219] This is considered essential for transparency purposes. Following the non-disclosure agreement, the third-party funder evaluates the proposed amount by the plaintiff as well as create a term sheet, and if things go smoothly, a final due diligence questionnaire is sent to the client.[220]

The process that Woodsford lays out is reminiscent of other firms, such as Burford Capital and Omni Bridgeway Limited. Burford's criteria prior to the discussion and non-disclosure agreement are the subject matter of the case, the strength of the

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[214] Ronen Avraham, Symposium: *A Brave New World: The Changing Face of Litigation and Law Firm Finance: Nineteenth Annual Clifford Symposium on Tort Law and Social Policy*, 63 DePaul Law Review 233, 239 (2014).

[215] *Id.*

[216] Tara E. Nauful, *Third Party Litigation Funding: Do We Need It? Is It Worth the Risks?*, 35 American Bankruptcy Institute Journal 16, 16 (2016).

[217] Wenjing Chen, *An Economic Analysis of Third Party Litigation Funding*, 16 US-China Law Review 34, 36 (2019).

[218] *A Practical Guide to Litigation Funding*, Woodsford Insight 2, 5 (2022).

[219] *Id.* at 6.

[220] *Id.*

plaintiff's case, the legal counsel of the plaintiff, what jurisdiction the case is in, the required amount of capital investment, and the size of damages.[221] Afterwards, a non-disclosure agreement is reached, there is a due diligence assessment, and a deal is reached for the funder's investment.[222] Omni Bridgeway goes into further detail on how it arrives at a deal as opposed to its criteria for finding a plaintiff.

For the non-disclosure agreement, the claimant or the claimant's lawyers will provide the funder with a general overview of the lawsuit and the amount of capital needed.[223] The firm argues that it ensures attorney work-product protection and follows the decision of *Miller UK Ltd. v. Caterpillar, Inc.*, which extended this protection to materials exchanged between a funder and a plaintiff under a non-disclosure agreement.[224] Following the agreement, the term sheet should lay out the economic terms of the proposal, and while the term sheet is non-binding, many funders have exclusivity periods.[225] The sheet should describe the amount of capital to be invested and what rewards the funder will receive, which often increases the longer they stay on a case. The due diligence process then follows the term sheet in Omni Bridgeway's process.

To finalize the deal, a litigation funding agreement contractually obligates the funder to pay for legal fees as well as have a stake in the rewards of a positive settlement.[226] According to Omni Bridgeway, these agreements give the funder a limited set of rights, leading to resistance toward changes to the economic terms of the agreement by the claimant.[227] Once this has been accomplished, the arrangement is fully reached. The funding process described by these firms largely applies to commercial litigation funding for lawsuits between businesses, but there are other forms of third-party funding.

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[221] Emily Slater, *Demystifying the litigation finance diligence process*, Burford Capital (2019).
[222] *Id.*
[223] Sarah Jacobson, *Step by step: The nuts and bolts of the funding process, part one*, Omni Bridgeway (2021).
[224] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014)
[225] Sarah Jacobson, *Step by step: The nuts and bolts of the funding process, part one*, Omni Bridgeway (2021).
[226] Sarah Jacobson, *Step by step: The nuts and bolts of the funding process, part two*, Omni Bridgeway (2021).
[227] *Id.*

As previously stated, litigation funding first revolved around personal-injury cases which financed individuals rather than corporations, and thus not as lucrative as commercial litigation.[228] As litigation finance has grown, law firms have also joined in with companies in financially supporting plaintiffs. The last form is crowdfunding that receives financial support from many different groups and individuals for a case often revolving around remedying some social injustice.[229] Examples of this include ESG (Environmental, Social, and Corporate Governance) class action lawsuits that address man-made ecological disasters, such as Indonesian seaweed farmers impacted from the Australian Montara oil spill or citizens whose homes were destroyed around an iron mine in Brazil from the Mariana dam disaster. Even though these causes are not as profitable or ideal for funders, litigation finance has also allowed for increasing support for issues such as these. Funders for personal-injury litigation and crowdfunders for class action litigation usually follow a similar process that funders for commercial litigation adhere to.

RECENT LITIGATION FUNDING DEVELOPMENTS IN THE UK & CHINA

Due to the novelty of third-party litigation funding, the rules and regulations of the market are not resolute, so significant or even landmark changes may occur at a moment's notice. While some countries have largely remained the same over the years regarding their position on how governments handle litigation funding arrangements, such as the United States and Australia leaving it up to their federal subjects, others have seen tremendous alterations to the status quo. The United Kingdom, despite its status as one of the originators of litigation finance, has seen recent decisions that have rocked the boat immensely. On July 26, 2023, the Supreme Court of the United Kingdom ruled in the *PACCAR Inc and others v Competition Appeal Tribunal and others* that the majority of litigation

[228]Tara E. Nauful, *Third Party Litigation Funding: Do We Need It? Is It Worth the Risks?*, 35 American Bankruptcy Institute Journal 16, 16 (2016).
[229]*Id.* at 17.

funding agreements fall under damages-based agreements, and will be regulated accordingly.[230]

The dispute originated from an investigation by the European Commission, when the United Kingdom was still a member of the European Union on July 19, 2016, that found five truck manufacturing companies in violation of competition law.[231] The companies, such as the Dutch company DAF Trucks NV, had deliberately delayed introducing low-hydrocarbon emission technologies and passed off the cost for their implementation onto the customers.[232] Two British companies, the Road Haulage Association Limited and UK Trucks Claim Limited, brought collective proceedings orders on behalf of the consumers to the Competition Appeal Tribunal against the five companies.[233]

Both of these companies' cases were financed by third-party funders, which DAF contended were "claims management services" since the funders' compensation would be a share of the damages acquired from a successful suit.[234] DAF and the other manufacturing companies argued that the Competition Appeal Tribunal should not accept the collective proceedings order, as their funding arrangements did not comply with the Courts and Legal Services Act 1990 nor the Damages-Based Agreements Regulations 2013.[235] The Competition Appeal Tribunal ruled against the five companies, who then brought a "leapfrog" appeal to the Supreme Court of the United Kingdom, skipping past His Majesty's Court of Appeal in England.[236] The Supreme Court of the United Kingdom ruled 4-1 that litigation funding

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[230] Susanne Augenhofer et al., *The proposed regulation of Third Party Litigation Funding – much ado about nothing?*, 20 Zeitschrift für das Privatrecht der Europäischen Union 198, 207 (2023).

[231] Ana Carolina Salomão et al., *Is the Supreme Court ruling in PACCAR really clashing with the Litigation Finance industry? An overview of the PACCAR decision and its potential effects*, Litigation Finance Journal (2023).

[232] Hanh Nguyen et al., *The Supreme Court's decision in PACCAR: litigation funding stopped in its trucks?*, Charles Russell Speechlys (2023).

[233] Ana Carolina Salomão et al., *Is the Supreme Court ruling in PACCAR really clashing with the Litigation Finance industry? An overview of the PACCAR decision and its potential effects*, Litigation Finance Journal (2023).

[234] *Id.*

[235] Hanh Nguyen et al., *The Supreme Court's decision in PACCAR: litigation funding stopped in its trucks?*, Charles Russell Speechlys (2023).

[236] *Id.*

arrangements do fall under damages-based agreements and claims management services.[237]

Lord Leggat, Reed, Sales, and Stephens upheld the PACCAR appeal, with Sales stating that litigation funding arrangements would qualify under the natural definition of claims management services and were "...not tied to any concept of active management of a claim."[238] Lady Rose's dissenting statement argued that the ruling would be difficult to enforce on funders and would radically impact the current landscape.[239] She stated that "[t]his would be massively damaging both for the administration of justice in relation to the existing cases which involve funding by litigation funders, and the future access to justice of parties who would otherwise have employed litigation funding," asserting that the ruling would largely harm those in need of third-party funding to support their cases.[240]

This case, despite its upheaval of the established regulations regarding third-party litigation funding, was not necessarily unexpected. Many firms and claimants eyed the PACCAR lawsuit closely, as it could (and did) upend the status quo. As discussed earlier, common law legal systems like that of the United Kingdom have been historically hostile to litigation funding due to maintenance and champerty doctrines, so this outcome was not entirely unprecedented.[241] Lord Sales acknowledged the relaxation of the rules in recent decades and the "...valuable role in furthering access to justice" that litigation finance plays.[242] The decision to classify litigation funding agreements under claims management services was done to give statutory clarity to the market after many years of legal ambiguity, as opposed to restricting its capabilities.[243]

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[237] Susanne Augenhofer et al., *The proposed regulation of Third Party Litigation Funding – much ado about nothing?*, 20 Zeitschrift für das Privatrecht der Europäischen Union 198, 207 (2023).

[238] Ana Carolina Salomão et al., *Is the Supreme Court ruling in PACCAR really clashing with the Litigation Finance industry? An overview of the PACCAR decision and its potential effects*, Litigation Finance Journal (2023).

[239] Hanh Nguyen et al., *The Supreme Court's decision in PACCAR: litigation funding stopped in its trucks?*, Charles Russell Speechlys (2023).

[240] *Id.*

[241] Ana Carolina Salomão et al., *Is the Supreme Court ruling in PACCAR really clashing with the Litigation Finance industry? An overview of the PACCAR decision and its potential effects*, Litigation Finance Journal (2023).

[242] *Id.*

[243] *Id.*

The majority of funders will likely pause and review their existing litigation funding arrangements to see if they comply with the Damages-Based Agreements Regulations 2013.[244] Even though this is a present challenge, litigation funders will have to adapt to these new conditions to stay afloat. Many European litigation finance firms have been following the PACCAR decision and have publicized their internal regulations in order to prevent similar rulings within European Union member states.[245] The current challenges in British litigation finance clearly have ripple effects across other nations and will alter how funders negotiate their deals with plaintiffs, but third-party litigation funding is not in danger. The United Kingdom's litigation investment is estimated to be between $1.3 and $1.8 billion, showing that the market is still profitable for funders and valuable as a social service for the public good.[246]

New regulations defining the procedural rules have not only occurred in the United Kingdom but also in developing nations, such as their former colonies of India and Nigeria. The most prominent country to see developments on how third-party funding is conducted is China. These changes also provide insight as to how the Chinese judicial system varies in their approach depending on which municipality or province has jurisdiction over cases with funding arrangements. The China International Economic and Trade Arbitration Commission ruled in December 2021 in favor of a claimant who received funding from a third-party, with the respondent appealing to both the Jiangsu Province Wuxi Intermediate People's Court and the Beijing Fourth Intermediate Court.[247] Both courts ruled against the appeal, stating that the Commission's confidentiality provisions regarding arbitration weren't violated and that Chinese law does not prohibit third-party funding in arbitration cases.

While the Wuxi and Beijing courts took a positive position towards permitting third-party funding, Shanghai took the opposite view in a May 2022 case. The Shanghai Second In-

[244] Hanh Nguyen et al., *The Supreme Court's decision in PACCAR: litigation funding stopped in its trucks?*, Charles Russell Speechlys (2023).

[245] Susanne Augenhofer et al., *The proposed regulation of Third Party Litigation Funding – much ado about nothing?*, 20 Zeitschrift für das Privatrecht der Europäischen Union 198, 208 (2023).

[246] *Id.* at 201.

[247] Robert Wheal et al., *The Growth of Third-Party Funding: A Global Perspective*, White & Case (2023).

termediate Court decided that third-party litigation funding arrangements violated public policy and a funder was not allowed to receive any financial rewards from a successful case.[248] The Shanghai judiciary had four main takeaways from the case: 1.) concern over the control that funders have over their claimants' freedom of choice, 2.) concern over the lack of quality of representation for the claimant, 3.) concern over the confidentiality provisions, and 4.) concern over the competitive nature of litigation finance as an obstacle to mediation between parties.[249]

China's unitary and authoritarian government is often viewed in the West as having complete dominance over the decision-making of every institution, yet that is simply not the case. The Chinese courts are not fully subservient to the demands of the Communist Party of China and have their own distinctions on what the law will authorize. It is also noteworthy that the hub of Chinese commerce, Shanghai, is more restrictive regarding the role of private firms funding plaintiffs than the government-centric Beijing. China's attitude toward third-party funding in both litigation and arbitration is not finalized nor uniform, as these latest developments clearly indicate.

ON ETHICAL CONCERNS REGARDING LITIGATION FUNDING

Within the last section, the Shanghai Second Intermediate Court critiqued litigation funding in their ruling from an ethical standpoint, viewing it as contradictory to the public good. By contrast, Lord Sales and Lady Rose of the Supreme Court of the United Kingdom saw the practice as beneficial to plaintiffs and the law as a whole. A continuous debate over the ethics of third-party funding of litigation has led to many arguments for or against the use of the practice by a plethora of groups. Examining each of these arguments is essential to gaining a thorough understanding of the disputes over the market.

Advocates for litigation funding often argue that it is both beneficial to the profit-driven outlook of business and firms as well as to the lower-income plaintiff in need of financial support for their case. The cases can be very lucrative, as the market has grown into a multibillion dollar industry, and many

[248] *Id.*
[249] *Id.*

firms make large profits from portfolio funding, a system of supporting various cases at once.[250] The ethical side of supporting those who can't afford sustaining a case is also often highlighted. Some third-party funders join low-damages cases, so their clients don't feel that the firm is taking a disproportionate share of the rewards.[251] Financing the case alleviates the costs for their clients and the non-disclosure agreements present the funding as largely altruistic, and in many instances there is altruistic intent.[252] Proponents also argue that there is significant transparency between the client and the funder, as well as a respect for the coercion-free decisions over the case that the client retains. Lastly, supporters of third-party litigation funding argue that it is not a controversial subject outside of academia while it is widely accepted in the business and legal world.[253]

Critics as well as outright opponents of third-party litigation funding come from a variety of different backgrounds. Some in the business community believe that it harms the opportunity for fair and efficient settlements; a sentiment likely emerging from when they themselves are put on the defensive.[254] Attorneys worry about litigation finance's impact on attorney client privilege and sway over critical decisions in the lawsuit.[255] Certain local governments also oppose litigation funding, such as state governments in the United States. Minnesota still adheres to champerty and maintenance regarding litigation finance in civil cases, which came from the decision of the *Maslowski v. Prospect Funding Partners LLC* lawsuit.[256] Other American governmental bodies, such as the U.S. Chamber Institute for Legal Reform, argue that litigation funding arrangements violate the *Model Rules of Professional Conduct* of the American Bar Association, specifically Rule 1.6: Confiden-

[250] Christopher P. Bogart, *The Case for Litigation Funding*, 42 Litigation 46, 48 (2016).

[251] *Id.* at 47.

[252] Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 Widener Law Journal 229, 237 (2013).

[253] Christopher P. Bogart, *The Case for Litigation Funding*, 42 Litigation 46, 47 (2016).

[254] Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 Widener Law Journal 229, 231 (2013).

[255] *Id.*

[256] Maslowski v. Prospect Funding Partners LLC, No. A21-1338 (Minn. Aug. 23, 2023)

tiality of Information, Rule 1.7: Conflict of Interest, and Rule 5.4: Professional Independence of a Lawyer.[257] The institute also has recently reported on the threat posed to national security regarding the anonymity of some litigation funding agreements, particularly from the China Investment Corporation.[258] They argue that lawsuits against military technology companies funded by this corporation will allow them access to highly confidential information.[259]

Still, some assumptions by the opponents of litigation funding are not well substantiated. A common talking point is that funders undermine the chance of a settlement and push the plaintiff to keep pursuing the lawsuit in order to reap a decent allocation of the damages by the end. Critics argue that the non-recourse loans are the primary cause of this. However, optimal loans that maximize the payoff to the client and the funder lead to higher chances of a settlement.[260] Through optimal loans, settlement bargaining often prevails, in contrast to cases without it, which often continue on to a trial.[261] This assumption made by legal writers and some institutes does not always align with reality.[262] Absolutist claims on either side of the litigation finance debate generally overlook the nuanced and complex nature as to its ethics.

CONCLUSION

In this overview of third-party litigation funding, a variety of attributes to it as a phenomena have been explored. Its historical background, the intricacies of how it works, recent changes in legislation and major court rulings, and the ethical controversy over the practice. Regardless of the developments in courts or in governments, litigation funding is likely here to stay, as it has grown into a massive industry in the United States, the United Kingdom, and elsewhere. Many developing

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[257] Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 The Georgetown Journal of Legal Ethics 687, 693 (2020).

[258] Michael E. Leiter et al., *A New Threat: The National Security Risk of Third Party Litigation Funding*, ILR Briefly 1, 1 (2022).

[259] *Id.*

[260] Andrew F. Daughety et al., *The Effect of Third-Party Funding of Plaintiffs on Settlement*, 104 The American Economic Review 2552, 2553 (2014).

[261] *Id.*

[262] *Id.* at 2555.

countries have also seen the introduction of third-party funding. The globalized nature of the market in question allows it to remain as remunerative as it is, and the risk and reward employed by firms can result in massive victories. It is also a civic good, and allows for the average person to have access to the law and bring about accountability. Debates will continue on how this should be administered to ensure the plaintiff's rights, especially at the state level in countries like the United States and Australia. Based on current trends, more regional governments will establish legal clarity for the practice instead of continuing the current ambiguity. Ultimately, third-party funding in litigation has undeniably had a seismic impact on justice across the world and will remain a prominent force in civil law.

RESHAPING THE ADMINISTRATIVE STATE: THE MAJOR QUESTIONS DOCTRINE AND THE SUPREME COURT'S CONSOLIDATION OF POWER

Viyon Houessou-Adin

Reshaping the Administrative State: The Major Questions Doctrine and the Supreme Court's Consolidation of Power

ABSTRACT:
Over the past year, the Supreme Court of the United States has significantly reshaped the administrative state. At the core of this transformation is the major questions doctrine, which was formally contextualized in the seminal case *West Virginia v. Environmental Protection Agency* (2022). This doctrine imposes a heightened standard on agencies by requiring "clear congressional authorization" for claimed authority, but this term remains equivocal. This article explores the impact of the major questions doctrine and its departure from the longstanding *Chevron* deference, where courts traditionally deferred to agencies in interpreting ambiguous statutes. The ramifications of the major questions doctrine are illustrated in the Court's recent decision in *Biden v. Nebraska* (2023). With this decision, the Court consolidates power by appointing itself the ultimate arbiter of "major questions" and decisions of "vast economic and political significance." Against the backdrop of the current political climate that is characterized by gridlock and discord, this consolidation of power is a path the executive and legislative branches are powerless to stop. This article argues that the administrative state, which was built on broad discretionary authority, now confronts a redefined landscape where the judicial branch assumes an unprecedented role in shaping policy.

INTRODUCTION

In January 2020, the World Health Organization (WHO) declared the COVID-19 pandemic a "public health emergency of international concern"; every nation now had to grapple with a global pandemic.[263] Looking at the response in the

[263]Tedros Adhanom Ghebreyesus, WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV) (Jan. 30, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov).

United States, in March 2020 then-President Donald Trump issued a proclamation declaring the COVID-19 pandemic a national emergency.[264] In response to this proclamation, then-Secretary of Education Betsy DeVos announced that repayments and interest accrual for federally held student loans would be suspended.[265] After a change in Presidential administrations a year later, President Joseph Biden kept in place the national emergency proclamation and ensuing loan suspensions. In August 2022, President Biden took things a step further and announced a wide-sweeping student loan forgiveness program. Relying on authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), President Biden sought to directly eliminate student loan debt for millions of Americans.[266] Before the student loan forgiveness program was set to take effect, various plaintiffs filed lawsuits against it. Two of these lawsuits, *Department of Education v. Brown* (2023) and *Biden v. Nebraska* (2023), eventually reached the Supreme Court of the United States.

Although the Supreme Court dismissed *Brown* on standing grounds,[267] in *Nebraska* the Court struck down the student loan forgiveness program, holding that President Biden exceeded his authority under the HEROES Act.[268] But the Court's decision in *Nebraska* did not rely on a strict reading of the text of the statute. Instead, the Court relied on the major questions doctrine, which was formally contextualized last year in *West Virginia v. Environmental Protection Agency* (2022). Under the major questions doctrine, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast eco-

[264] Presidential Proclamation No. 9994, 85 Fed. Reg. 15337-15338 (2020).

[265] Press Release, Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency (Mar. 20, 2020), https://www.ed.gov/news/press-releases/delivering-president-trumps-promise-secretary-devos-suspends-federal-student-loan-payments-waives-interest-during-national-emergency.

[266] Notice of Debt Cancellation Legal Memorandum, 87 Fed. Reg. 52944 (2022).

[267] *Department of Education v. Brown*, 600 U.S. 551, 556, 143 S. Ct. 2343, 2348, 216 L. Ed. 2d 1116 (2023) (holding "We do not resolve respondents' procedural claim because we conclude that they lack standing to bring it").

[268] *Biden v. Nebraska*, 143 S. Ct. 2355, 2368, 216 L. Ed. 2d 1063 (2023) (holding "The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not").

nomic and political significance."[269] The doctrine serves as an implicit repudiation of *Chevron* deference, which requires courts to defer to agencies when they reasonably interpret ambiguous statutes.[270]

The Supreme Court's decision in *Nebraska* reinforces the major questions doctrine and turns the administrative state upside down. Congress, in recognition of its inability to predict the future and envision every single possible policy detail, ordinarily provides agencies with broad discretion—this is the heart of the administrative state. The major questions doctrine rebukes this view and instead places agency decisions at the whim of the Court, providing for a de facto termination of the administrative state. By appointing itself the arbiter of what constitutes a "major question" and a decision of "vast economic and political significance," the Court is consolidating power within the judicial branch. This consolidation of power is a path the executive branch is powerless to stop, and with the current political climate, Congress is incapable of reining in.

BACKGROUND

History of the administrative state:

Much of the beginning of the administrative state can be traced back to the 1930s and President Franklin D. Roosevelt's "regulation-mad New Deal."[271] Against the backdrop of severe economic turmoil following the Great Depression, President Roosevelt unveiled a series of policies and programs—known collectively as the "New Deal"—designed to revitalize the economy and prevent future crises. This led to President Roosevelt establishing numerous regulatory agencies: the new Securities Exchange Commission (created in 1934), the Federal Communications Commission (created in 1934), the National Labor Relations Board (created in 1935), and the Civil Aeronautics Authority (created in 1938). President Roosevelt also increased the

[269] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2605 (2022) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014)).

[270] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 838, 104 S. Ct. 2778, 2780, 81 L. Ed. 2d 694 (1984).

[271] David M. Kennedy, *What the New Deal Did*, 124 POL. SCI. Q. 251, 251-68 (2009).

authority of existing agencies like the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Federal Reserve Board.[272] This marked a period of the administrative state being significantly expanded. All of these agencies acted largely informally and without written procedures. This was until 1946, when the Administrative Procedure Act (APA) was enacted and now governed all agency action. The APA detailed clear procedures for agency decision-making and specified the limits of agencies' discretion.[273] The APA now incorporated the judiciary into the regulatory scheme by subjecting final agency rules and decisions to judicial review. But agencies still wielded immense power, and before the late 1960s there were almost no cases of courts second-guessing the authority of agencies.[274]

Half a century later in the 1970s, when President Richard Nixon assumed office, there was a shift in the executive branch from the "economic regulation" that served as the bedrock of the New Deal. There was now a focus on "social regulation," characterized by new safety, health, and consumer protection programs. In the context of regulatory agencies, many were also formed by President Nixon, including: the Environmental Protection Agency (created in 1970), the Occupational Safety and Health Administration (created in 1971), and the Consumer Product Safety Commission (created in 1972).[275] At this point there were a large number of agencies, demonstrating a substantial growth in the administrative state. Agencies began using their "informal rulemaking"—a process under the APA that involves issuing rules that apply broadly to many parties—more frequently to account for the shift to "social regulation."[276] This trend continued into modern times and largely reflects the current administrative state.

Chevron deference:

The Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) is the "most-cited ad-

[272] Kennedy, *supra* note 9, at 256.
[273] Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 121-190 (2016).
[274] DeMuth, *supra* note 11, at 125.
[275] *Id.*
[276] *Id.*

ministrative law case of all time"—and rightfully so.[277] This case created the doctrine of "*Chevron* deference," which requires courts to defer to agencies when they reasonably interpret ambiguous statutes.[278] When Congress passes a statute, they provide guidance and directives to agencies. But these statutes are not—and cannot be—all-encompassing. Congress cannot prescribe the unknown, so naturally there will be gaps and ambiguities in any statute. Agencies are thus required to interpret the statutes they administer, and this interpretation becomes core to an agency carrying out a prescribed course of action. By the time a court engages in judicial review and construes a statute administered by an agency, that agency will typically have already given some construction to the statute.[279] And over the nineteenth century, courts gave "respectful consideration" to agencies' constructions.[280] Then when *Chevron* was decided in 1984, this principle of consideration (and deference) was solidified.

Chevron articulates a two-step framework for reviewing an agency's interpretation of a statute: First, a court must ask whether Congress has directly spoken to the precise question at issue. If so, Congress's clear statutory instructions are binding, and the court must not give deference to the agency's interpretation. If, however, Congress is "silent or ambiguous" on the precise question at issue, a court must only determine whether the agency's interpretation is "permissible."[281] This second step is key, as a court is not asked to determine whether the agency's interpretation is the "best," only whether the interpretation is reasonable—if it is, the court must uphold the agency's interpretation.[282] *Chevron* deference has had significant implications for the administrative state because it acknowledges the expertise of agencies in interpreting and implementing complex regulatory statutes.

THE MAJOR QUESTIONS DOCTRINE

[277] Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 937-993 (2018).
[278] *See Chevron*, 467 U.S. 837, 838, 104 S. Ct. 2778, 2780, 81 L. Ed. 2d 694 (1984).
[279] Siegel, *supra* note 15, at 943.
[280] *Id.*
[281] *Chevron*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984).
[282] *Id.* at 843 n.11, 844.

Historical context:

But *Chevron* deference has been implicitly overruled by the major questions doctrine. This doctrine, which was formally contextualized in *West Virginia v. Environmental Protection Agency* (2022), has turned the administrative state upside down. Although the doctrine was formally contextualized last year, its foundational principles were not first articulated in 2022. About thirty years ago, the Supreme Court used the rationale of the major questions doctrine to strike down an agency's claim of regulatory authority. More specifically, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (1994), the Court decided not to extend *Chevron* deference to the Federal Communications Commission (FCC) as it attempted to enact a rule that waived tariff requirements for nondominant long distance telephone carriers.[283] The FCC argued that a provision of the Communications Act that authorized it to "modify any requirement" for filing tariffs gave it broad authority.[284] But the Court held that this provision "does not contemplate basic or fundamental changes" and the FCC's interpretation is "not entitled to deference, since it goes beyond the meaning that the statute can bear."[285] While the Court does not use the words "major question," the Court's rationale is that if Congress wanted the power to "modify" to extend to such major changes, it would have clearly stated so.

Six years later in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.* (2000), the Supreme Court continued to refine the principles of the major questions doctrine. In this case, the Food and Drug Administration (FDA) argued that a provision of the Food, Drug, and Cosmetic Act that authorized it to regulate "drugs" and "devices," gave it broad authority to issue rules to drastically reduce tobacco use by minors.[286] But the Court ultimately held that the statute was not clear

[283] *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994).

[284] *Id.* at 2225 (Communications Act, 47 U.S.C. § 203(a) requires communications common carriers to file tariffs with the Federal Communications Commission, and § 203(b)(2) authorizes the Commission to "modify any requirement made by or under . . . this section").

[285] *Id.* at 2226.

[286] *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1294, 146 L. Ed. 2d 121 (2000) (finding the FDA "asserted jurisdiction" under the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321(g)-(h)).

enough and "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[287] This is the first time the Court used the wording "decisions of such economic and political significance" that has become core to the modern usage of the major questions doctrine.[288] Although again the Court does not use the words "major question" throughout its analysis, it does cite a law review article written by then-Judge of the United States Court of Appeals for the First Circuit Stephen G. Breyer that uses such wording.[289] In the twenty years that followed, the Court continued to strike down agency actions relying on the loosely formed major questions doctrine.[290]

West Virginia v. EPA:

The Supreme Court then formally contextualized the major questions doctrine in *West Virginia v. Environmental Protection Agency* (2022). At issue in *West Virginia* was whether the Environmental Protection Agency (EPA) had the authority under the Clean Air Act to regulate greenhouse gas emissions across all industries of the private sector. Relying on the major questions doctrine, the Supreme Court ultimately held that it did not. In 2015, under President Barack Obama's administration, the EPA adopted the Clean Power Plan (CPP), which was de-

[287] *Id.* at 1315.

[288] *Id.*

[289] *Id.* at 1314 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration")).

[290] *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 267, 126 S. Ct. 904, 921, 163 L. Ed. 2d 748 (2006) (finding "the idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act's] registration provision is not sustainable."); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014) (striking down the Environmental Protection Agency's licensing program because "we expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"); *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration,* 595 U.S. 109, 126, 142 S. Ct. 661, 669, 211 L. Ed. 2d 448 (2022) (Gorsuch, J., concurring) (The Occupational Safety and Health Administration "claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate").

signed to reduce carbon dioxide emissions from existing power plants. Four years later, under President Donald Trump's administration, the EPA reversed course, repealed the CPP, and determined that implementing the CPP in the first place exceeded statutory authority under the Clean Air Act. The EPA then adopted the Affordable Clean Energy (ACE) rule, which had similar goals of the CPP but did not apply industry-wide. A number of States and private parties filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit, challenging the repeal of the CPP and the enactment of the replacement ACE rule.[291] After consolidating the cases, the Court of Appeals held that the ACE rule relied on a "fundamental misconstruction" of the Clean Air Act.[292] The Court of Appeals went on to set aside the rule after finding that it was "arbitrary and capricious" under the Administrative Procedure Act.[293]

Opinion of the court:

Since the Court of Appeals vacated the ACE rule and its repeal of the CPP, this brought the CPP back into legal effect. After petitions for certiorari were granted, and the cases remained consolidated, in *West Virginia v. Environmental Protection Agency* (2022), the Supreme Court held that the EPA did not have authority under the Clean Air Act to enact the CPP.[294] Chief Justice John G. Roberts, Jr., writing for a six-to-three majority, explicitly stated "this is a major questions case."[295] This was the first time the Court contextualized, and used the wording of, the major questions doctrine. Chief Justice Roberts reasoned that pursuant to the major questions doctrine, there are " 'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[296] The major questions doctrine com-

[291] *West Virginia*, 142 S. Ct. 2587, 2592-94 (2022).
[292] *American Lung Association v. Environmental Protection Agency*, 985 F.3d 914, 930 (D.C. Cir.) (citations omitted), *rev'd and remanded sub nom. West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).
[293] *Id.*
[294] *West Virginia*, 142 S. Ct. 2587 (2022).
[295] *Id.* at 2595.
[296] *Id.*

bines an inquiry of both separation of powers principles and a practical understanding of legislative intent. The doctrine essentially boils down to a single question: whether an agency can point to "clear congressional authorization" for the authority it claims.[297] In other words, the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[298]

Concurring Opinion:

Justice Neil M. Gorsuch, joined by Justice Samuel A. Alito, Jr., wrote separately in a concurring opinion. Justice Gorsuch noted, "to resolve today's case the Court invokes the major questions doctrine."[299] Justice Gorsuch argued that the doctrine is a "clear-statement rule" required by the United States Constitution because it is explicitly rooted in "Article I's Vesting Clause."[300] Based on this understanding, Justice Gorsuch said "the question becomes what qualifies as a clear congressional statement authorizing an agency's action."[301] But Justice Gorsuch does not go on to concretely detail an answer to this question.

Dissenting opinion:

Justice Elena Kagan, joined by Justices Stephen G. Breyer and Sonia Sotomayor, wrote separately to dissent from the Court's judgment. Justice Kagan asserted the "clear congressional authorization" the Court now demands can be found in "Section 111 [of the Clean Air Act]."[302] This statutory provision gives the EPA the authority to select the "best system of emission reduction" for power plants.[303] But the Court's decision, which relies on the majority questions doctrine, removes this explicit authority from the EPA. According to Justice Kagan, the Court substituted its own judgment about what the "best" system is. This is especially significant because the parties to the lawsuit do not dispute that the CPP is the "best system," or

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[297] *Id.* at 2609.
[298] *Id.* at 2605 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014)).
[299] *Id.* at 2616 (Gorsuch, J., concurring).
[300] *Id.* at 2619 (Gorsuch, J., concurring).
[301] *Id.* at 2622 (Gorsuch, J., concurring).
[302] *Id.* at 2628 (Kagan, J., dissenting).
[303] *Id.*

the "most effective and efficient way to reduce power plants' carbon dioxide emissions."[304]

Analysis:

Although the text of the Clean Air Act unambiguously authorizes the CPP and entrusts the EPA and its experts to make decisions about greenhouse gas emissions, the Court sought to make its own expert judgment. Because the Court felt that the issues raised in the CPP were "just too new" and "too big a deal for Congress to have authorized," the EPA *must have* exceeded its authority.[305] But the "core command" of the Clean Air Act, which instructs the EPA to find the "best system of emission reduction," ultimately gives broad authority to the EPA.[306] Especially when reading Section 111 of the Clean Air Act in context with the overall statutory scheme, there can be no question that Congress meant to confer such authority to the EPA.[307] If this statutory provision was not enough, Congress's intent with the Clean Air Act is similarly clear: its goal was to "speed up, expand, and intensify the war against air pollution" in all its forms.[308] As Justice Kagan noted in her dissent, the major questions doctrine ignores this congressional intent and simply creates "some tougher-to-satisfy set of rules" to obtain a preferred outcome.[309] Because if the Court had seriously considered the text of Section 111, "when read in context and with a common-sense awareness of how Congress delegates," the Court would have determined that the EPA's enactment of the CPP was authorized.[310]

CURRENT APPLICATION OF THE MAJOR QUESTIONS DOCTRINE

Student loan forgiveness program:

The Supreme Court's decision in *West Virginia* set the stage for the Court to strike down President Joseph Biden's stu-

[304] *Id.*
[305] *Id.*
[306] *Id.* at 2629 (Kagan, J., dissenting).
[307] *See* Clean Air Act, 42 U.S.C. § 7411(a)(1); *see also* § 7401 *et seq*.
[308] *West Virginia*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).
[309] *Id.* at 2634 (Kagan, J., dissenting).
[310] *Id.*

dent loan forgiveness program a year later. In August 2022, President Biden announced a wide-sweeping student loan forgiveness program. President Biden kept in place the national emergency declaration for the COVID-19 pandemic, and ensuing student loan suspensions, which were issued in the previous Presidential administration. Relying on authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), President Biden sought to directly eliminate student loan debt for millions of Americans.[311] The HEROES Act authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Higher Education Act of 1965 (Education Act) as the Secretary deems necessary in connection with a war or other military operation or national emergency."[312] Citing the "national emergency" previously declared for the COVID-19 pandemic, President Biden sought to invoke this provision of the HEROES Act for his program. In particular, the program was designed by Secretary of Education Miguel Cardona to address the financial harms caused by the COVID-19 pandemic. Under the program, President Biden would have canceled $10,000 in debt for those earning less than $125,000 a year (or households earning less than $250,000 a year) and $20,000 in debt for low-income families who previously received Pell Grants.[313] But before the program was set to take effect, various States and private parties filed lawsuits against it. Only two of these lawsuits, *Department of Education v. Brown* (2023) and *Biden v. Nebraska* (2023), made their way to the Supreme Court.

Department of Education v. Brown:

In *Department of Education v. Brown* (2023), Myra Brown and Alexander Taylor, two individuals who both have student loans, sued to enjoin the Department of Education "from enforcing, applying, or implementing the [student loan forgive-

[311] *See* 87 Fed. Reg. 52944 (2022).

[312] Title IV of the Higher Education Act of 1965, 20 U.S.C. §1098bb(a)(1).

[313] Press Release, President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

ness program]."[314] Although Brown and Taylor argued that they were injured because they were deprived of certain procedural rights,[315] the true crux of their argument was that they were injured because neither of them met the eligibility requirements to receive any debt relief. On this basis, Brown and Taylor sought vacatur of the entire program. District Judge Mark T. Pittman of the United States District Court for the Northern District of Texas granted the requested relief. Judge Pittman held that the student loan forgiveness program "is an agency action of vast economic and political significance" and that "the major-questions doctrine applies."[316] After specifically invoking the major questions doctrine, Judge Pittman declared the student loan forgiveness program unlawful and vacated it in its entirety.[317] The Department of Education promptly appealed, and while the case was pending before the United States Court of Appeals for the Fifth Circuit, the Supreme Court granted certiorari before judgment to consider it alongside *Biden v. Nebraska* (2023). In *Brown*, Justice Samuel A. Alito, Jr., writing for a unanimous court, concluded that both Brown and Taylor lacked standing to challenge the student loan forgiveness program and did not resolve their claims.[318] Accordingly, Judge Pittman's judgment was vacated, and the case was dismissed.

Biden v. Nebraska:

In *Biden v. Nebraska* (2023), the state of Missouri filed a lawsuit with five other states—Nebraska, Arkansas, Iowa, Kansas, and South Carolina—against the student loan forgiveness program. The States alleged that the program "contravened separation of powers and violated [the] Administrative Procedure

[314] *Brown v. Department of Education*, 640 F. Supp. 3d 644, 656 (N.D. Tex.), *cert. granted before judgment sub nom. Department of Education v. Brown*, 143 S. Ct. 541, 214 L. Ed. 2d 310 (2022), and *vacated and remanded sub nom. Department of Education v. Brown*, 600 U.S. 551, 143 S. Ct. 2343, 216 L. Ed. 2d 1116 (2023).

[315] *Id.* at 655 (determining that "Brown and Taylor . . . could not voice their disagreement because the [student loan forgiveness program] did not undergo notice-and-comment rulemaking procedures under the Administrative Procedure Act).

[316] *Id.* at 665.

[317] *Id.* at 652.

[318] *Brown*, 600 U.S. 551, 556, 143 S. Ct. 2343, 2348, 216 L. Ed. 2d 1116 (2023) (holding "We do not resolve respondents' procedural claim because we conclude that they lack standing to bring it").

Act."[319] District Judge Henry E. Autrey of the United States District Court for the Eastern District of Missouri held that none of the States had standing to challenge the program. And without standing, there was no "case or controversy" under Article III of the United States Constitution.[320] Accordingly, Judge Autrey dismissed the States' lawsuit and they promptly appealed.[321] The United States Court of Appeals for the Eighth Circuit issued a nationwide preliminary injunction against the program pending appeal.[322] After the Department of Education sought to vacate this injunction, the Supreme Court granted certiorari before judgment.[323]

Opinion of the court:

Turning first to the threshold question of standing, in *Biden v. Nebraska* (2023), Chief Justice John G. Roberts, Jr., writing for a six-to-three majority, held that the state of Missouri had standing to challenge the student loan forgiveness program. Unlike *Brown*, this meant that the lawsuit Missouri filed was able to be considered by the Court. More specifically, Chief Justice Roberts reasoned that Missouri had standing because the Missouri Higher Education Loan Authority (MOHELA), which is a major servicer and participator in the student loan market, is controlled by the State and would be harmed by the student loan forgiveness program. Because the program would cost MOHELA an estimated $44 million a year in fees, Chief Justice Roberts held that this constituted a direct injury to Missouri itself, and standing for the other five states did not need to be addressed.[324] With the standing requirement satisfied, Chief Justice Roberts turned to the primary question at issue: whether the Secretary of Education, and similarly President Biden, had authority under the HEROES Act to enact the student loan forgiveness program. Relying on the major

[319] *Nebraska*, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023).

[320] *See* U.S. Const. art. III, § 1 *et seq*.

[321] *Nebraska v. Biden*, 636 F. Supp. 3d 991, 1002 (E.D. Mo.), *cert. granted before judgment*, 143 S. Ct. 477, 214 L. Ed. 2d 274 (2022), and *rev'd and remanded*, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023).

[322] *Nebraska v. Biden*, 52 F.4th 1044 (8th Cir. 2022).

[323] *Nebraska*, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023).

[324] *Id.* at 2365 (holding "Because we conclude that the Secretary's plan harms MOHELA and thereby directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States").

questions doctrine, Chief Justice Roberts determined that the HEROES Act did not authorize the student loan forgiveness program. Chief Justice Roberts reasoned that the Secretary of Education's power to "modify" under the HEROES Act does not permit "basic and fundamental changes in the scheme" designed by Congress.[325] Chief Justice Roberts determined that this power, even when looking at "waive or modify" in combination with one another, does not authorize the Secretary of Education to "rewrite [the HEROES Act] to the extent of canceling $430 billion of student loan principal."[326]

Concurring opinion:

Justice Amy Coney Barrett wrote separately in a concurring opinion. Justice Barrett asserted the major questions doctrine "reinforces [the Court's] conclusion but is not necessary to it."[327] Justice Barrett then nonetheless defended the doctrine, calling it "a tool for discerning—not departing from—the text's most natural interpretation."[328] According to Justice Barrett, the Secretary of Education's interpretation of the HEROES Act goes far "beyond what Congress could reasonably be understood to have granted."[329] But to be clear, Justice Barrett believed that the Court swapping its own judgment and expertise with that of the Secretary of Education "gives Congress's words their best reading."[330]

Dissenting opinion:

Justice Elena Kagan, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, wrote a blistering dissent. Justice Kagan asserted "the plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan" and are merely filing a lawsuit against a policy they oppose.[331] According to Justice Kagan, this does not rise to the standing requirement under Article III of the United States Constitution, and by hearing this case "in every respect, the Court today

[325] *Id.* at 2368 (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225).
[326] *Id.* at 2358.
[327] *Id.* at 2376 (Barrett, J., concurring).
[328] *Id.*
[329] *Id.* at 2384 (Barrett, J., concurring).
[330] *Id.*
[331] *Id.* at 2385 (Kagan, J., dissenting).

exceeds its proper, limited role in our Nation's governance."[332] Because the Court's precedents do not allow "plaintiffs to rely on injuries suffered by others," and that is exactly what Missouri is doing with MOHELA, Justice Kagan would have dismissed the lawsuit in its entirety for a lack of standing.[333] Standing is not just a procedural requirement, it is a constitutional one. The Court went to great lengths to reconfigure the standing test under *Lujan v. Defenders of Wildlife* (1992) to confer standing upon MOHELA and have the authority to decide the case.[334] But under any ordinary analysis—one that does not rely on the newly created major questions doctrine—MOHELA does not meet the threshold to have standing. And without standing, Justice Kagan went as far as to declare "the Court, by deciding this case, exercises authority it does not have. *It violates the Constitution*."[335]

ANALYSIS

Erroneous doctrine:

Under the major questions doctrine, President Biden's student loan forgiveness program was dead on arrival at the high court, and unjustly so. The COVID-19 pandemic was an unprecedented national emergency, in both its scope and impact. President Biden, in exercise of the national emergency provision of the HEROES Act, sought to enact the student loan forgiveness program to address the economic hardships faced by millions of Americans—especially since these hardships were exacerbated due to the pandemic. The program advances the primary goal of the HEROES Act, which is to ensure that "recipients of student financial assistance . . . are not placed in

[332] *Id.* at 2384 (Kagan, J., dissenting).

[333] *Id.* at 2385 (Kagan, J., dissenting).

[334] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (creating a three-part test for standing: (1) the plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury).

[335] *Nebraska*, 143 S. Ct. 2386, 216 L. Ed. 2d 1063 (2023) (Kagan, J., dissenting) (emphasis added).

a worse position financially in relation to that financial assistance because of" a national emergency.[336] As such, the broad nature of a "national emergency" under the HEROES Act was precisely Congress's intent:

> "A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise."[337]

The administrative state is built upon broad congressional delegations because Congress relies on the expertise of agencies to make policy decisions on complex and evolving issues as and when they arise. The Supreme Court has instead appointed itself the arbiter of what constitutes a "major question" and a decision of "vast economic and political significance." But Congress has never provided the Court with a statutory mandate to assume this role. And to the contrary, Congress has its own statutory tools to override agency decisions, especially ones that they feel constitute "major rule[s]."[338]

Congress could not have predicted the COVID-19 pandemic, so its "clear congressional authorization" was already in the HEROES Act which vests the Secretary of Education with the power to "waive or modify" student loan programs "as the Secretary deems necessary in connection with a . . . national emergency."[339] Importantly, "[t]he Secretary is not required to exercise the waiver or modification authority . . . on a case-by-case basis," and the Secretary is exempt from otherwise-applicable procedural requirements that would delay the implementation of waivers and modifications.[340] The Secretary's power to waive "means eliminate," and modify means "alter . . . to the extent [the Secretary] think[s] appropriate."[341] In the context of student loan programs, the power to waive or modify "extends from minor changes all the way up to major

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[336] Higher Education Act of 1965, 20 U.S.C. § 1098bb(a)(2)(A).
[337] *West Virginia*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).
[338] *See, e.g.*, Congressional Review Act, 5 U.S.C §§ 801, 804.
[339] 20 U.S.C. § 1098bb(a)(1).
[340] *See* 20 U.S.C. § 1098bb(b)(3); *see also* § 1098bb(d).
[341] *Nebraska*, 143 S. Ct. 2355, 2372, 216 L. Ed. 2d 1063 (2023) (Kagan, J., dissenting).

ones."[342] So if the Secretary of Education deemed it necessary to cancel a substantial portion of student loans for millions of Americans, as they did with President Biden's student loan forgiveness program, that would comport with the text of the statute.

In a ruling that misconstrues this text, the Supreme Court's decision in *Nebraska* further erodes the authority of the executive branch, instills its own ideas about congressional delegations, and "overrides [a] legislative choice."[343] Under the major questions doctrine, the Court does not define what qualifies as "clear" congressional authorization. The Court simply believes President Biden's program is "a very bad idea" and uses the major questions doctrine to strike down a policy they oppose.[344] But the Court is not a policy making body and should not be making their own determinations about the validity of student loan forgiveness. Such determinations would necessarily involve evaluating a range of policy considerations. But Congress is "far more competent than the Judiciary" to make such an evaluation.[345]

The major questions doctrine was completely made up by the Supreme Court itself. With purported roots in constitutional structure and traditional principles of judicial review, the doctrine actually serves as a tool for the Court to "substitute[] itself for Congress and the Executive Branch in making national policy."[346] The doctrine goes far beyond creating a new way to conduct statutory analysis. In reality, the doctrine creates "a rule specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also micro-specifically."[347] The Court may contend that it has not appointed itself the arbiter of whether a policy of "vast economic and political significance" should stand, but the major questions doctrine does just that. When questioning who has the authority to decide the validity of such policies, "the right answer is the political branches: Congress in broadly authoriz-

[342] *Id.* at 2395 (Kagan, J., dissenting).
[343] *West Virginia*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).
[344] *Nebraska*, 143 S. Ct. 2355, 2385, 216 L. Ed. 2d 1063 (2023) (Kagan, J., dissenting).
[345] *Egbert v. Boule*, 213 L. Ed. 2d 54, 142 S. Ct. 1793, 1803 (2022).
[346] *Nebraska*, 143 S. Ct. 2355, 2385, 216 L. Ed. 2d 1063 (2023) (Kagan, J., dissenting).
[347] *Id.* at 2400 (Kagan, J., dissenting).

ing loan relief, [and] the Secretary and the President in using that authority to implement the forgiveness plan."[348]

Presidential response:

Following the Supreme Court's decision in *Nebraska*, President Biden announced that he would be creating a new student loan forgiveness program that is rooted in the "compromise and settlement authority" of the Higher Education Act.[349] But this program may face additional regulatory hurdles as it must go through negotiated rulemaking, which is a process that requires representatives from the Department of Education and affected interest groups to negotiate the terms of a new proposed student loan forgiveness program. While this regulatory process plays out, any new student loan forgiveness program is certain to face legal scrutiny, and like its predecessor is unlikely to survive an inquiry under the major questions doctrine. This ultimately leaves the executive branch powerless to stop the Supreme Court's consolidation of power with the major questions doctrine.

Congressional response:

As Justice Neil M. Gorsuch correctly noted in his concurrence in *West Virginia*—but then still missed the mark by endorsing the major questions doctrine—the Constitution vests "lawmaking power in the people's elected representatives."[350] The Constitution also ensures power is not "in the hands of 'a few, but [in] a number of hands.'"[351] But the major questions doctrine completely contravenes this view, placing power directly in the hands of the few—the nine justices of the Supreme Court—and skirts past the elected representatives in Congress.

The call for agencies to simply point to "clear congressional authorization" rings hollow—and the Supreme Court is aware of this. Even if Congress were to heed the Court's orders to be more "clear," practically this is an uphill battle. The current political climate is characterized by persistent gridlock and partisan discord,[352] and the major questions doctrine exploits

[348] *Id.*
[349] *See* Higher Education Act of 1965, 20 U.S.C. § 1082(a)(6).
[350] *West Virginia*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).
[351] *Id.*
[352] *E.g.*, German Lopez, *A Dysfunctional Congress*, N.Y. TIMES (Jan. 9, 2023), https://www.nytimes.com/2023/01/09/briefing/mccarthy-congress.html;

these flaws. The doctrine, by its very nature, presupposes a Congress that is capable of swift and decisive action—yet the reality falls short of this expectation. And without being able to meet the new stringent "explicit" standard, the doctrine just serves as a de facto termination of the administrative state. Even if Congress were to try and step up—which the Court knows it won't—any broad delegation of authority to agencies would not be amenable to the Court. The fact of the matter is:

> "Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done."[353]

Addressing every minute detail in a statute is simply not possible, as Congress cannot prescribe the unknown. Congress knows it cannot predict the future or envision every single possible policy detail, so it ordinarily provides agencies with broad discretion—this is the heart of the administrative state. The major questions doctrine directly attacks this foundation by requiring Congress to legislate "micro-specifically."[354]

Future implications:

The Supreme Court's endorsement of the major questions doctrine does not bode well for the future of the administrative state. In fact, it reflects a Court that is becoming increasingly hostile to the administrative state as a whole. There are currently three new cases pending before the Court that attack the administrative state on all fronts—one of which, *Loper Bright Enterprises v. Raimondo*, that seeks to put a permanent end to *Chevron* deference.[355] Should the Court overturn *Chevron*, the

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Jacob Bronsther & Guha Krishnamurthi, *Congress is dysfunctional. History shows it won't change anytime soon*, WASH. POST (Feb. 9, 2023), https://www.washingtonpost.com/made-by-history/2023/02/09/congress-dysfunction-polarization-gridlock/; Aaron Zitner, *U.S. Grapples With Political Gridlock as Crises Mount*, WALL ST. J. (Oct. 11, 2023) https://www.wsj.com/politics/national-security/u-s-grapples-with-political-gridlock-as-crises-mount-be179aca.

[353] *Nebraska*, 143 S. Ct. 2355, 2397, 216 L. Ed. 2d 1063 (2023) (Kagan, J., dissenting).

[354] *Id.* at 2400 (Kagan, J., dissenting).

[355] *See Consumer Financial Protection Bureau v. Community Financial Services Association*, No. 22-448 (argued Oct. 3, 2023) (a challenge under the

major questions doctrine would be etched into the jurisprudence of administrative law, serving as the only tool for courts to employ for statutory analysis of agency action. This would wreak havoc on future administrative actions, creating legal uncertainty around agencies' ability to create policies and carry out acts that are duly authorized by Congress, all if the Court simply *feels* Congress is not "clear" enough.

CONCLUSION

The Supreme Court's use of the major questions doctrine in *Nebraska* "overrides the combined judgment of the Legislative and Executive Branches"[356] The doctrine implicitly overrules *Chevron* deference and attacks the heart of the administrative state: broad delegations and discretion. Congress knows that it cannot predict the unknown, so it relies on the expert judgment of agencies. The major questions doctrine places the Court's views above those of the executive and legislative branches. The doctrine allows the Court to substitute its own judgment about how to "give[] Congress's words their best reading."[357] While it may seem logical to simply require agencies to point to "clear congressional authorization" for the authority they claim, the Court does not concretely define what is "clear." And when any reasonable reading of a statute would suggest the text is in fact clear—like the provisions of the Clean Air Act and the HEROES Act questioned by the Court in *West Virginia* and *Nebraska*—the major questions doctrine just serves as a smokescreen for the Court to strike down policies it does not like. If the Court itself cannot "speak clearly" about what constitutes congressional ambiguity, there can be no other conclusion than that using the major questions doctrine "go[es] beyond the proper role of the judiciary."[358] The Court has fundamentally reshaped the administrative state. With the major

Appropriations Clause to the funding mechanism for the Consumer Financial Protection Bureau); *Securities and Exchange Commission v. Jarkesy*, No. 22-859 (argued Nov. 29, 2023) (a three-pronged attack on the enforcement proceedings of the Securities and Exchange Commission); *Loper Bright Enterprises v. Raimondo*, *cert. granted*, No. 22-451 (oral argument scheduled for Jan. 17, 2024) (seeks to overrule *Chevron* deference).

[356] *Nebraska*, 143 S. Ct. 2355, 2400, 216 L. Ed. 2d 1063 (2023) (Kagan, J., dissenting).

[357] *Id.* at 2384 (Barrett, J., concurring).

[358] *Id.* at 2375.

questions doctrine, the Court has consolidated power by making itself the arbiter of policy. The executive branch has no means of stopping the Court, and the current political climate renders Congress incapable of doing so either.

TRUMP IN GEORGIA: THE LEGAL CASE AND THE LIMITS OF THE FIRST AMENDMENT

Benjamin Kessler

Trump in Georgia: The Legal Case and the Limits of the First Amendment

ABSTRACT:
Former President Donald Trump was charged in Georgia under the Racketeer Influenced and Corrupt Organizations Act (RICO). While many await the result of the trial with anticipation, it is imperative to acknowledge the controversial history of the act. Throughout its historical legal applications, the law has been applied somewhat selectively—often extending the definition of what qualifies as an organization or racketeering activity. While the precedence of RICO varies, one thing is clear: It has never been applied to a former U.S. President before.

HISTORY OF RICO CHARGES: ORIGINS IN NEW YORK

Though Trump is currently facing RICO charges in Georgia, the first RICO laws originated in the state of New York. During the 1960s and 1970s, organized crime was a serious problem in New York City. As desire to combat the problem mounted, the New York RICO act sought to extend the rights of the state to prosecute racketeering activities. Rudy Guiliani would take credit for the adoption of these anti-racketeering efforts, though the extent of his involvement has been contested.[359]

RICO charges in the state of New York became increasingly prevalent with the use of the law in 1979 against one of the most prominent labor unions. In the case of *United States v. Scotto*, the jury would rule against the union, stating "Scotto displayed an arrogant contempt for the law and committed crimes in the classic patterns of racketeering."[360] Successful prosecution on the part of Guiliani allowed RICO charges to accumulate legitimacy before they would be used against mob families.

[359]Jaclyn Diaz, It's time to rethink Rudy Giuliani and his claim to discover RICO (August 29, 2023, 5:01 AM ET), https://www.npr.org/2023/08/29/1195552571/rudy-giuliani-rico-origin-story.

[360]United States v. Scotto, 641 F.2d 47 (2d Cir. 1980).

Some of the first groups to face prosecution were labor unions. The International Longshoremen's association was accused of unlawful payments and income tax evasion. Subsequently, RICO applications in New York faced major successes in prosecuting crime bosses, notably the Massino crime family. These cases began to be known as the "Five Families" cases, highlighting the influence of such a select group of people over the city mob activity.[361] The extensive coverage of these cases would lead to the adoption of RICO laws in 33 states to date.[362]

HISTORY OF RICO CHARGES UNDER GEORGIA LAW

The original usage of the law in the state of Georgia was oriented toward mafia-tied organizations, most notably the Georgia-based Dixie Mafia. High profile cases of arson, drug trafficking, graft, and even murder were commonplace. Analogous to temporary usage of the RICO act, the event was a wide spectacle with authorities discreetly limiting the number of court attendees.[363] While murder charges proved difficult to assert beyond a reasonable doubt, Georgia's RICO allowed for more proactive punitive measures against the Dixie Mafia in accordance with the 1983 law stating, "(b) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity."[364] What qualifies as employment of a pattern of behavior would be subjected to interpretation by subsequent state courts.

The Georgia Supreme Court, in the case *Chancey v. State*, would later take issue with the original use of RICO. Originally, racketeering was defined as a pattern of behavior explicitly

[361] Arnold H. Lubasch, U.S. JURY CONVICTS EIGHT AS MEMBERS OF MOB COMMISSION, (Nov. 20, 1986) https://www.nytimes.com/1986/11/20/nyregion/us-jury-convicts-eight-as-members-of-mob-commission.html.

[362] State Racketeering Laws (June 20, 2016) https://www.findlaw.com/state/criminal-laws/racketeering.html.

[363] Snipers on the roof for historic 1983 trial, (Sep. 9, 2020) https://www.waltontribune.com/article_588b74ee-f21b-11ea-9f47-0bc80046e461.html

[364] Code of Georgia, Chapter 14 Racketeer Influenced and Corrupt Organizations, (Current through 2023-2024) https://casetext.com/statute/code-of-georgia/title-16-crimes-and-offenses/chapter-14-racketeer-influenced-and-corrupt-organizations

outlined as two or more instances of illegal behavior as outlined in the Official Code of Georgia Annotated (OCGA). The court stated that, "[u]pon a review of the voir-dire examination of prospective jurors in that case, the Supreme Court holds that the trial court's finding of juror impartiality does not meet constitutional standards."[365] Chancey was released after serving 19 years in federal prison. Though the first prosecution under RICO was overturned, RICO cases would soon cement themselves as a fundamental part of state law shortly after the initial ruling.

Despite its roots in 1980s anti-gang activity, the usage of RICO began to balloon during the 2010s. RICO would later come to be utilized in cases against Final Exit Network, an assisted suicide advocacy group, for allegedly engaging in the practice themselves and tampering evidence of doing so. Implicating political advocacy groups under RICO law would come to demonstrate the broadening of what constitutes a corrupt organization. *Final Exit Inc. v. State* was dismissed for lack of evidence, reading "we conclude OCGA § 16–5–5(b) restricts speech in violation of the free speech clauses of both the United States and Georgia Constitutions. The order of the trial court holding otherwise is hereby reversed."[366] A petition for the writ of certiorari in the State of Minnesota would be denied.[367]

An essential precedent for RICO cases was set in 2013 when RICO law was used to prosecute teachers who forged standardized test results. All teachers were found guilty. Teachers prosecuted under Georgia's RICO laws operated mostly at the middle school level, with most of the teachers in the eighth grade. While the level of communication between teachers has remained unclear, several actors have denied organizational communication.[368] Their qualification as an organized entity has come under much scrutiny—44 out of 56 Georgia Public Schools found some level of cheating on standardized

[365] *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717, 721 (1986)

[366] Jeffrey Scott, *Suicide Group Members in Court Friday in Cumming Asking for Dismissal* (December 9, 2010) https://www.ajc.com/news/local/suicide-group-members-court-friday-cumming-asking-for-dismissal/uC3glxAyjrNrZO5vPGuSiP/

[367] Final Exit Network, Inc. et al. v. State (February 6, 2012)

[368] Jason Koebler, "Educators Implicated in Atlanta Cheating Scandal," (July 7, 2011) https://www.usnews.com/education/blogs/high-school-notes/2011/07/07/educators-implicated-in-atlanta-cheating-scandal.

tests. The eight-month trial received widespread coverage from major media outlets. Not dissimilar from the contemporary debate, this case was seen as a microcosm of many political debates surrounding educational policy at the time.

It is important to also acknowledge the connection between RICO implementation and discussions about race in America. RICO charges were levied against artists Gunna and Young Thug for promoting street gang activity under their music label YSL. Citing lyrics as evidence for the guilty ruling led the defense attorney to call the process a "racist reach."[369] Similar critiques have also been levied against the RICO charges for the Stop Cop City movement- a left-wing movement dedicated to protest against what is argued as excess state funds allocated to Atlanta Police- for vandalism.[370] RICO still operates as originally designed, as an anti-gang measure, with the law seeing usage in states like Texas and California against drug cartels like the Sinaloa cartel.[371]

ANALYSIS

Trump's defense strategy regarding the upcoming RICO lawsuit appears lacking strong legal foundations. First, we must examine the anecdotal and circumstantial evidence against the Trump team. The circumstantial evidence as it currently stands seems to point against the Trump team in the ongoing Georgia RICO case. As such, it is imperative that the Trump team provide a convincing argument to exonerate themselves. The Trump team is likely to invoke freedom of association and freedom of speech principles into their defense.

CIRCUMSTANTIAL EVIDENCE

[369] RJ Rico, Young Thug's Lawyers Want Lyrics Removed as Evidence from RICO Trial, Motion Says (November 30, 2023)https://www.ajc.com/news/crime/young-thugs-lawyers-want-lyrics-removed-as-evidence-from-rico-trial-motion-says/FFVMTUR7IREFPDSPUELUADTOJQ/.

[370] 61 Indicted in Georgia on Racketeering Charges Connected to Stop Cop City movement (September 15, 2023) https://apnews.com/article/atlanta-cop-city-protests-rico-charges-3177a63ac1bd31a1594bed6584e9f330.

[371] Carlos A. Briano, Two Mexican Cartel Members Found Guilty of Violating RICO Statute, (Oct. 26, 2021) https://www.dea.gov/press-releases/2021/10/26/two-mexican-cartel-members-found-guilty-violating-rico-statute.

Former President Trump's alleged behavior criminally implicates him under Georgia's RICO statutes. There are numerous accusations against the Trump team for their actions in Georgia that deserve to be considered . Among these accusations are solicitation to commit election fraud, intentional interference with performance of election duties, making false statements, criminal solicitation, improperly influencing government officials, alleged bribes, cyber influence, and even forgery. With over 40 alleged violations, there is strong evidence that indicates Trump's team engaged in racketeering patterns. Given that the Georgia RICO law specifically requires two or more instances of illegal behavior to qualify for a pattern of racketeering, the prosecution cannot lay the entirety of their case on one isolated instance of criminal activity.

Perhaps the most damning piece of evidence against the Trump team is Trump's phone call with Secretary of State Bradley Raffensperger—this potentially constitutes a first instance of illegal behavior. During the call, President Trump proclaims he "won by hundreds of thousands of votes," that Rafensperger ought to "re-evaluate" vote counts, and that he wants "to find 11,780 votes."[372] Furthermore, Trump spoke to other officials in Arizona, Michigan, Wisconsin, and Pennsylvania after the call with Rafensperger, the contents of which remain unclear but nonetheless are grounds for investigation.[373] If President Trump is acquitted of the Georgia RICO charges, it is possible that other states, like those aforementioned, will open their own RICO investigations. Some have asserted that the leaking of the call was illegal for national security reasons, but these have been contested since Georgia is a state of one-party consent for phone call recordings as is Washington, D.C.[374] [375] In other words, only one person must consent to a recording of the call for it to be legal.

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[372]Allie Bice, Kyle Cheney, Anita Kumar and Zach Montellaro, Trump's Pressure on Georgia Election Officials Raises Legal Questions, (Jan. 3, 2023, 6:33 PM EST) https://www.politico.com/news/2021/01/03/trump-georgia-election-454122

[373]Tim Darnell, Full Transcript of Donald Trump's call to Brad Raffensperger (February 15, 2023) https://www.atlantanewsfirst.com/2023/02/15/read-full-transcript-donald-trumps-call-brad-raffensperger/

[374]Georgia Recording Law (September 10, 20023) https://www.dmlp.org/legal-guide/georgia-recording-law

[375]District of Columbia Recording Law (September 10, 2023) https://www.dmlp.org/legal-guide/district-columbia-recording-law

A component of the RICO charges that implicates the former president are allegations of cyber interference and alleged bribes. This may prove to be more consequential than the aforementioned phone call which has been met with a staunch freedom of speech defense by Trump's legal team. In Count 32 of 41, it is alleged that Sidney Powell, a Trump ally, contracted polling company SullivanStrickler LLC for Coffee County Georgia with the express purpose of tampering with ballot markers and tabulating machines in an act of aiding, abetting, and encouraging conspiracy. It is further alleged in Count 33 that Powell was not entrusted with any officer for ballot care. Count 35 further alleges intent to remove voter data from the Voting Systems Corporation. Count 36 alleges invasion of privacy and breach into private voter information.[376] The currently disclosed circumstantial evidence regarding false statements and cyber interference points negatively for the Trump team.

The extent of Sidney Powell's association with Trump has been a point of significant contention. Powell never officially signed an engagement agreement with former president Trump himself. Nevertheless, Trump had championed her in the past as being part of his "truly great team." Powell herself also championed herself as a great ally of Trump in the past. As the trial unfolds, the two have increasingly attempted to distance themselves from one another, though their contradictory statements are likely to raise suspicion. The extent of their involvement will likely be argued as minimal or non-existent by the Trump defense.[377] It should be noted that guilty verdicts have been made in the past without explicit proof of enterprise, as in the case of *Cobb County v. Jones Group*.[378] What Sidney Powell has already disclosed after her guilty plea points at the very least to some involvement between the two actors.

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[376]Janie Boschma, Curt Merrill and Abby Turner, Former President Donald Trump's Fourth Indictment, Annotated (August 15, 2023) https://www.cnn.com/interactive/2023/08/politics/annotated-trump-indictment-georgia-election-dg/

[377]Marshal Cohen and Kristen Holmes, After Sidney Powell pleads guilty in Georgia case, Trump claims she was 'never' his attorney, despite their past ties (Oct. 22, 2023, 11:53 AM) https://www.cnn.com/2023/10/22/politics/trump-sidney-powell/index.html

[378]*218 Ga. App. 149, 460 S.E.2d 516 (1995)*

PRECEDENT IN NEW YORK/GEORGIA

RICO charges are specifically designed to result in convictions for actions that more traditional charges may be inadequate to address. Georgia RICO law defines a pattern as "[e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods…" and enterprise as "any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities." The broadly encompassing nature of these definitions have allowed for prosecutions of varying scales.[379] [380] These new aforementioned provisions encouraged people to prosecute mafias at large rather than on a person-by-person basis.

If the Stop Cop City movement, a largely disorganized movement of protestors seeking to prevent police buildup, can be characterized as an enterprise, legal arguments that a political party cannot be qualified as such for their lack of organization are unlikely to stand legal pushback. Qualification that RICO applies to "[g]overnmental … agencies" puts a nail in the coffin on the argument that the definition of "organization" does not extend to the Republican Party.[381] Though it may seem intuitively like a stretch to some supporters of the former President—going from the dixie mafia to the leading Republican Party presidential candidate—the law was specifically written with the intent of avoiding governmental impunity.

It is important to note that RICO suits typically result in convictions, with the aforementioned New York Mafia, Dixie Mafia, Atlantic Public School Teachers, and YSL cases all resulting in guilty verdicts. Several members of the Trump team have already pleaded guilty or have been found guilty of racketeering within the Trump team. Trump's team has outlined a two-pronged constitutional defense against these charges: protections of freedom of speech and freedom of association.

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[379] GA Code § 16-14-3 (2021)
https://law.justia.com/codes/georgia/2021/title-16/chapter-14/.

[380] Id.

[381] id.

FREEDOM OF ASSOCIATION

It has been anticipated that an argument will be put forward by Trump and his legal team for freedom of association. Though freedom of association is thought of as a cornerstone of democratic thought and governance, its constitutional backing is storied and modern. Historically, freedom of association was conflated with or brought under the umbrella of rights protected under The First Amendment: freedom of assembly. Freedom of assembly has historically been interpreted as the constitutionally-protected right to gather and protest. Legal debates surrounding the constitutional protection of association would result in myriad cases on the subject matter. See *Pressner v. Illinois* (1886); See Also *De Jonge v. Oregon* (1937). [382] These cases would gradually further the precedent for freedom of association. The Red Scare notably complicated freedom of association, as the right to association was denied to Communist Party affiliates under the pretense that "the Communist Party is not an ordinary or legitimate political party."[383] See *Gibson v. Florida Legislative Investigation Committee* (1963). Freedom of association has been further solidified as a necessary component of due process (The Fourteenth Amendment) in the case of *Obergefell v. Hodges* (2015). *Brown v. Hartlage* (1982) would define modern conceptions of freedom of association, arguing that freedom of association ought to hold but not extend to agreements to "agreements to engage in illegal conduct." It is this legal reasoning that upholds the central tenets of freedom of association while preserving national security and anti-terrorist measures, see *Holder v. Humanitarian L. Project, 561 U.S. 1 (2010)*.

Trump associated with these people before the criminal acts in a non-criminal manner. Trump is not being prosecuted for instances of association before alleged crimes, but instead for committing crimes with the alleged goal of political self-interest. Committing crimes for a political purpose falls under the definition of terrorism and is therefore explicitly not protected under the freedom of association as highlighted in the aforementioned cases. This level of analysis has been

[382] Overview of Freedom of Association, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/#essay-11

[383] Id.

previously applied by legal scholars like David Cole, who interrogated freedom of association as contingent upon "expressive" versus "intimate" involvement. Expressive implies ideational in nature, while intimate involvement implies direct participation in a given crime. The prosecution will have to prove beyond a reasonable doubt that the Trump team had a unified interest to rise to Cole's criterion of intimacy. Unified interest has been historically difficult to prove. Failed and ongoing pursuits to file multi-level-marketing companies like Herbalife and AdvoCare under RICO have been met with the defense of a lack of common purpose between organization administrators, see *Ranieri v. AdvoCare Int'l* (2019)[384]. The Trump team will have a harder time employing this defense due to the smaller scale of the operation, with Trump and 18 co-defendants being the only accused.[385] Claims that association was not predicated on criminal acts will be met with skepticism.

FREEDOM OF SPEECH

The first amendment has been repeatedly invoked during the RICO charges against the Trump team. While RICO charges are predicated on criminal association, Trump's legal team has raised a constitutional challenge under the First Amendment, arguing his words—irrespective of his associations—should be protected. Harvey Silverglate, co-counsel for defendant John Eastman, claims that [t]he indictment in Georgia vs. Donald Trump and 18 others sets out activity that is political, but not criminal. It goes hand-in-glove with the recent effort to criminalize lawful political speech and legal advice, in stark violation of constitutional rights to Freedom of Speech, Right to Petition the Government for Redress of Grievances, and the Right to Counsel."[386] Yet, there is a complex historical record

[384]John Sanders and Rex Man, Successfully Fighting Plaintiffs' RICO Claims Alleging an Illegal Pyramid Scheme (Oct. 10, 2019) https://www.winston.com/en/blogs-and-podcasts/direct-sellers-update-regulation-law-and-policy/successfully-fighting-plaintiffs-rico-claims-alleging-an-illegal-pyramid-scheme

[385]By Blayne Alexander, Charlie Gile, Katherine Doyle and Dareh Gregorian Trump and 18 co-defendants charged with Racketeering in Georgia 2020 Election Probe, (August 14, 2023, 9:38 PM) https://www.nbcnews.com/politics/donald-trump/trump-indicted-georgia-racketeering-rcna74912

[386]Leinz Vales et. al, August 15, 2023 - Donald Trump indictment in the Georgia 2020 election probe news, (August 16, 2023)

of the government regulating speech, including even criminalizing it in rare instances. The right to free speech cannot extend to any and all speech, i.e incitements of violence or lying under oath.

By far the most common phrase used to express the limits of radical free speech arguments is "yelling fire in a crowded theater (*Schenck v US 249 U.S 47*)."[387] As a consequence of its ubiquity, it is often forgotten that panics in theaters were a nearly epidemic problem in both the United States and the United Kingdom. Recently, the oft repeated reference has come under scrutiny for its usage to uphold the Espionage Act. The controversial law was later repealed for its unconstitutionality. Nevertheless, yelling fire in a crowded theater was used before and outside of the Espionage Act, and its staying power in popular culture indicates that people can understand the implications of speech as a form of inspiring potentially dangerous action.[388]

Even ignoring this particular example, the extent to which freedom of speech can be employed in response to a RICO charge merits reflection. In the United States, there is tape delay on live television so as to ensure that expletives are censored. This arguably infringes on freedom of speech, though the government has deemed it more important to ensure the protection of positive freedoms, e.g the protection of children from profanities. Arguably, this is at least somewhat contentious as cases filed against the FCC and other legal debates are somewhat frequent. Given this, the government has a moral authority to regulate speech without criminalization of speech.[389].

While comedy broadcasters on television operate in a realm in which they cannot directly encourage someone to act in a certain way, in-person speech can have an empowering effect

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https://www.cnn.com/politics/live-news/trump-indictment-georgia-fulton-county-08-15-23/index.html

[387] *U. S. 52 Schenck v. United States*, 249 U.S. 47, Page 249 (1919).

[388] Carlton F.W Larson, "Shouting 'Fire' in a Theater": The Life and Times of Constitutional Law's Most Enduring Analogy (October, 2015) https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1748&context=wmborj.

[389] Chad M. Muir, Bleeping Expletives: Adequate protection of the Public or Unjustified Censorship? FCC v Unjustified Censorship? FCC v. Fox Television Stations, Inc., 129 vision Stations, Inc., 129 S. Ct. 1800 (2009), (2010) https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1336&context=jlpp

on action analogous to the aforementioned "fire in a theater" phenomenon. It has been alleged that Trump's speech crosses the line into criminality because it implicates potential action from the electors to illegally refuse to certify election results. In contrast to Trump's words, yelling fire in a crowded theater does no one harm nor implicate subsequent criminality. It can be regulated on a far less direct rationale that it could lead to a stampede that leads to someone being injured, which is a far weaker criminal link than what is alleged in Trump's case. This may have its legal roadblocks regarding whether or not Trump's speech can be generalized to the racketeering or criminal activity of an entire organization. Are false statements intrinsic to this corrupt organization? What is RICO's relationship to freedom of speech? Does generalization obscure the question of speech as an extension of intent (i.e actus reus)? It is for these reasons that the false statement allegations may be less likely to yield guilty verdicts than aforementioned allegations of cyber crimes, bribes or election interference.

While the prosecution technically holds the burden to prove the legality of the law, historical precedent and the wide acceptance of RICO laws compel Trump's team to put forward sufficient evidence that their speech falls under protected speech. Some may object to, for example, Sidney Powell or Rudy Giuliani being prosecuted under RICO as a violation of freedom of association. There is no way to prove *actus reus*, or guilty action, behind speech if one person's speech is being used to prosecute another. The counterargument to this assertion is that false statements/criminal speech was interwoven in the fabric of the Trump organization. This may be one of the more contentious aspects of the trial and sentences for false statements will likely fall in accordance with how many false statements or criminal speech acts were employed. If these are not at all in accordance, this could potentially represent a First Amendment or the eighth amendment (cruel or unusual punishment). In this context, it is clear that speech is not entirely separate from action and therefore cannot fall strictly into protected speech.

APPLICATION OF CASE LAW PRECEDENT TO THE TRUMP CASE

To understand the legal standing of the Trump case, a comparison must be drawn between RICO cases against Final Exit Network (ruled Not Guilty) and the Atlanta teachers (ruled guilty).

In the *Final Exit*, a major reason for case dismissal was simply a lack of evidence that the crimes alleged took place. This is unlikely to occur in the case of the Trump RICO charges, given the fact that several members of the Trump team have already pled guilty. But there are several other reasons why the RICO charges dismissed against Final Exit seem to have more significant differences than the ones being discussed in Georgia today. The RICO charge levied against Final Exit was the charge of OCGA§16-5-5(b), which criminalizes the advertisement of assisted suicide and the enactment of the service thereafter.[390] The law does not criminalize assisted suicide in its totality, nor did it prevent the discussion of assisted suicide as a political issue. Not only was it deemed that the appellants did not have coercive or murderous intent—the constitutionality of the law itself was called into question. It was the ruling of the Supreme Court of Georgia that restriction on the "public advertisement" of assisted suicide services was itself a violation of the first amendment, and that a state interest in protecting people from suicide could simply be performed through a ban.

This case could be written about at large as it poses several interesting questions, like the fairness of the expectation that facilities that offer assisted suicide have limited capacity to promote their business, the implications of a total state ban on assisted suicide, and whether there a coercive aspect to all advertisements that simply should not be accepted with life or death decisions. These sorts of questions, however, seem to have few parallels with the Trump case. While Trump's invocation of the first amendment is to shield himself from allegations of association, the first amendment itself is a critical part of why OCGA§16-5-5(b) was deemed unconstitutional. It is not mentioned that freedom of speech was invoked in order to shield any individual appellant from charges faced by other appellants.[391]

In the prosecution of Atlanta teachers, it was made apparent that teachers colluded with one another in order to forge test scores, thus implicating salary increases. Stories of alleged

[390] *Final Exit Network, Inc. et al. v. State* (February 6, 2012)
[391] Id.

"cheating parties" were part of an ongoing legal argument made at the time that the educators had been conspiring and colluding with one another.[392] This argument, however, received criticism and controversy. Many accused Willis and other members of the legal process of contributing to the ongoing demonization of educators. It was argued that the implementation of No Child Left Behind incentivized teachers to cheat on standardized test score results in order to maintain wages. This point has been contested by state investigations into the matter, which did not find sufficient evidence that bonuses were substantial enough to create cheating incentives. The Atlanta Cheating Scandal is no distant history, with some sentence commutations occurring as recently as June 2022.[393] Other cheating scandals have emerged since then, which could either point to the sophistication of law enforcement in tackling these problems or potentially to the structural inequalities that have remained dormant since the 2013 RICO case.[394]

Accusations of a "witch hunt" or repudiations of the tenuous definition of organization were even made during the 2013 trials, not unlike accusations made by the Trump team today. It is also noted that over 100 Atlanta educators engaged in questionable or criminal conduct. Most "acknowledge the cheating and admitted their participation. The others were given eight to ten opportunities to avoid the consequence of criminal prosecution."[395] This paints a different picture of Willis' prosecution of Atlanta teachers than the oft repeated statistic of "11 out of the 12 tried were convicted."[396] Willis' use of plea deals, sentence reduction, and jury persuasion as outlined in the 2013 case will be all the more relevant as the RICO case in Georgia progresses.[397] A guilty verdict for Trump will come with the

[392]Valerie Strauss, Remember the Atlanta schools' cheating scandal? It isn't over., (Feb. 1, 2023) https://www.washingtonpost.com/education/2022/02/01/atlanta-cheating-schools-scandal-teachers/

[393]Judge Drops Prison Time For Former Principal Convicted In The Atlanta Public Schools' Cheating Scandal, (Jun. 29, 2022) https://justiceingeorgia.com/judge-drops-prison-time-for-former-principal-convicted-in-the-atlanta-public-schools-cheating-scandal/

[394]Id.

[395]Mark Walsh, What Trump's Prosecution in Georgia Has in Common With the Atlanta Schools Cheating Case, (August 23, 2013).

[396]Id.

[397]id.

high burden of proving the top-down nature of the alleged affair, but, if history is anything to go by, it will be an uphill battle for Trump to argue lack of association.

CONCLUSION

RICO charges have recently gone under reexamination following the prosecution of former U.S. President Donald Trump under Georgia's RICO laws. First gaining traction for the purpose of prosecuting New York City mafias, RICO laws would soon come to be implemented to target the Dixie mafia in Atlanta. As implementations of RICO have evolved into prosecuting teachers, music labels and protest movements, skepticism arose surrounding the law's impact on freedom of association. This skepticism has found a reawakening in light of the prosecution against the Trump team for their actions during the 2020 election. With specific regard to the Trump case, it appears as though fears of a First Amendment crackdown are not based on legal evidence. Radical arguments in favor of free speech absolutism still do not absolve the Trump team of RICO charges, nor do they take into account the ability for speech to incur harm. There is no evidence as of right now to a major backlash against state RICO laws. As the laws remain in effect, however, it is important to remain vigilant as there are numerous troubling examples where it was invoked.. The Stop Cop City application of RICO law appears to be one such troubling case. What's more, RICO should see more usage against modern day mafias in accordance with the original meaning of the legal texts. Time can only tell how public pressures will reshape RICO, but it is important to not let it curb personal and fundamental freedoms, even if current claims of it doing as such are personally motivated.

WHAT SETS GEORGIA APART IN TRUMP'S TRIALS: THE RICO ACT AND OTHER UNIQUE ASPECTS OF THE GEORGIA JUSTICE SYSTEM

Rachel Lacoretz

What Sets Georgia Apart in Trump's Trials: The RICO Act and Other Unique Aspects of the Georgia Justice System

INTRODUCTION: UNPRECEDENTED CRIMINAL BEHAVIOR, UNPRECEDENTED LEGAL CONSEQUENCES

On Tuesday, November 3, 2020, voters across the United States, including in Georgia, cast their ballots for the next President of the United States. Georgia, a traditionally Republican state, had voted for the Republican candidate for president in the previous six elections.[398] Yet, during the 2020 election, a very tight race in Georgia ended with approximately 12,000 more votes for Democratic candidate and former Vice President Joe Biden than Republican candidate and incumbent President Donald Trump.[399] Georgia's 16 electoral votes went to Biden, which eventually tipped the scales and allowed Joe Biden to win more than 270 electoral college votes, thereby winning the overall presidential election.[400]

Donald Trump, deeply unhappy with the projected outcome of the race, refused to concede his loss of the election and accept the results nationally, and, more particularly, in several states.[401] Instead, he claimed that the election had been "rigged" and "stolen," despite having no concrete evidence to support this claim.[402] In Georgia, Trump and his Republican allies in Georgia requested two recounts of the presidential

[398] Georgia Presidential Voting History, 270towin.com, https://www.270towin.com/states/Georgia (last visited Nov. 12, 2023).

[399] November 3, 2020 General Election, Georgia Secretary of State, https://results.enr.clarityelections.com/GA/105369/web.264614/#/summary (last updated Nov. 20, 2020).

[400] Office of the Federal Register, NARA, State of Georgia Presidential Electoral College Certificate of Vote, available at https://www.archives.gov/files/electoral-college/2020/vote-georgia.pdf (last updated Dec. 14, 2020).

[401] Donald J. Trump (@realDonaldTrump), (Nov. 4, 2020, 12:45 AM), X, formerly known as Twitter, https://twitter.com/realDonaldTrump/status/1323864021167198209.

[402] Donald J. Trump (@realDonaldTrump), (Nov. 15, 2020, 9:19 AM), X, formerly known as Twitter, https://twitter.com/realDonaldTrump/status/1327979630477922304.

votes, one by hand and one machine recount.[403] [404] There were small changes in the vote tallies after the votes were recounted by hand (less than 2,000 votes total), but no changes to the overall result of the Georgia election, which declared that Joe Biden had won the state.[405] Trump then engaged in a complex and multi-layered plot to overturn the results of the election in Georgia and other states, acting upon advice from lawyers and other advisors. This scheme involved numerous alleged criminal activities, especially the engagement in a criminal enterprise. The members of the enterprise took part in acts of racketeering activity to further its goals. Those goals were to subvert the voting process of the Electoral College and keep Donald Trump in office as the President of the United States.[406]

On August 14, 2023, District Attorney Fani Willis of Fulton County, Georgia announced that her office had indicted former President Donald Trump and 18 co-defendants.[407] The indictment included 41 counts of criminal activity related to Trump's and his allies' attempts to interfere with the results of the 2020 general election in Georgia.[408] Count 1 of the indictment charges Trump and his co-conspirators under a law known as the RICO statute, the Racketeer-Influenced and Corrupt Organizations Act.[409]

By August of 2023, former President Trump had already been indicted in three other criminal cases around the country. The first case, filed April 4, 2023 in New York state court, charged Trump with falsifying business records in order to

[403] Letter from Congressman Collins and GAGOP Chairman Shafer to Georgia Secretary of State Raffensperger, Nov. 10, 2020), available at https://gagop.org/2020/11/10/congressman-collins-and-gagop-chairman-shafer-send-letter-to-georgia-secretary-of-state-raffensperger/.

[404] Richard Fausset, The Trump campaign asked for another recount in Georgia. Some counties expect to begin today., N.Y. Times, (Nov. 24, 2020), https://www.nytimes.com/2020/11/24/us/the-trump-campaign-asked-for-another-recount-in-georgia-some-counties-expect-to-begin-today.html.

[405] November 3, 2020 Presidential Recount, Georgia Secretary of State https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary (last updated Dec. 7, 2020).

[406] The State of Georgia v. Donald J. Trump, et al., No. EJ15 (Ga. Fulton County Superior Court, Filed Aug. 14, 2023) (hereinafter referred to as "Georgia Indictment" or "GA Ind.")

[407] Georgia Indictment

[408] *Id.*

[409] *Id.* at 13.

cover up payments to an adult film star named Stormy Daniels during his candidacy for president in the 2016 presidential election.[410] The second case, with charges filed in federal court in Florida on June 9, 2023, alleges that Trump criminally mishandled classified documents to which he had gained access during his time as President.[411] The third case is the case most closely related to Trump's charges in Georgia. Filed in federal court in Washington, D.C., Trump's third criminal case charged the former president for his part in the events leading up to and including the January 6, 2021 insurrection at the Capitol, including conspiracy to violate rights and conspiracy to defraud the government.[412]

The case in Georgia is the only case in state court related to Trump's criminal activity during his time in office. However, despite the state jurisdiction, Trump's charges in Georgia may eventually pose the most serious legal threat to him. Indeed, the Georgia state venue might actually be the cause of this more severe threat, or at least a major contributing factor. What follows is an evaluation of the circumstances that, combined, present a major challenge to Trump and his allies. This includes an in-depth analysis of the advantages to charging Donald Trump in the Georgia state court rather than in federal court, and an examination of salient procedural components of the Georgia criminal justice system which might impede Trump's legal defense team. Two key laws in Georgia, the Racketeer-Influenced and Corrupt Organizations (RICO) Act and the procedural rules surrounding clemency (specifically, pardons) for imprisoned individuals in Georgia pose significant hindrances to any defense Trump may assert. Both were enacted in large part due to contemporary social scandals and political challenges. The origins of both are entirely unrelated to their consideration in the case of Donald Trump.

Count 1 of 41 in the Georgia indictment charges Donald Trump and numerous co-conspirators with violating the Geor-

[410]The People of the State of New York v. Donald J. Trump, 23 Civ. 3773, *available at* https://manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf.

[411]United States v. Trump et al., Case No. 23-CR-80101 (S.D.FL Jul. 27, 2023), *available at* https://www.justice.gov/storage/US-v-Trump-Nauta-De-Oliveira-23-80101.pdf.

[412]United States v. Trump, Case No. 23-CR-00257 (D.C. Aug. 1, 2023), *available at* https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf.

gia RICO statute.[413] In order to demonstrate the significance of this particular charge and the benefits of charging Trump with it, one must first understand the history and purpose of RICO laws in the United States.

RICO AND ITS HISTORY

In the early to mid-twentieth century, organized crime posed a major threat to the functioning of legitimate businesses in the United States. Congress viewed the criminal infiltration of American businesses, first recorded in 1950, as a major economic threat to the nation.[414] Before RICO, law enforcement entities attempted to prosecute organized crime entities with little success, partly due to struggles to connect superficially unconnected petty crimes, and also due to failure of these prosecutions to take down the organizations' leaders.[415]

In response, Congress passed the Racketeer Influenced and Corrupt Organizations Act ("RICO") in October of 1970.[416] The RICO Act was Title IX of the larger Organized Crime Control Act of 1970.[417] The statute's goal was to combat corruption in the United States due to organized crime, in particular by effectively dismantling entire organized crime groups at once. Under the federal RICO statute, the government can seek both civil remedies and pursue criminal prosecutions. The statute makes it unlawful for individuals to engage in "racketeering activity" in an enterprise in order to achieve pecuniary gain. Bribery and obstruction of justice are included under the federal RICO statute's definition of racketeering.[418] In 1969, Senator John McLellan, of the Senate Judiciary Committee, shared a report on the success of the Organized Crime Control Act.[419] In prior hearings, the FBI had identified 288 high level mob

[413] Georgia Indictment at 13.

[414] Organized Crime Control Act of 1970, Congressional Statement of Findings and Purposes, Section 904(a) of Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

[415] *Id.* See also General Accounting Office, *Effectiveness of the Government's Attack on La Cosa Nostra* (April 11, 1988).

[416] *Id.* at 941, 948.

[417] *Id.* at 941, 948.

[418] 18 U.S.C. §§ 1961- 1968

[419] S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969).

leaders.[420] On average, the Mob members identified in the 1969 hearings served a prison sentence of approximately three and a half years.[421] In 1988, the United States Government Accountability Office reported to the Senate Subcommittee on Investigations within the Committee on Governmental Affairs on the successes of the implementation of the federal RICO statute.[422] This hearing included a list of more than a thousand known high level Mob leaders. On the 1988 list, Mob members served on average nearly nine and a half years in prison, and those charged with RICO violations served an average of 11 years.[423] Approximately 30% of the overall Mob members identified in 1988 were convicted for RICO charges.[424]

THE GEORGIA RICO STATUTE

Georgia's own RICO statute came into effect not long after the federal law was enacted . On March 20, 1980, House Bill 803 was approved by the General Assembly of Georgia. Georgia's law was driven by considerations similar to those that prompted the federal RICO Act.[425] According to the text of the Georgia RICO Act itself, it was intended to be used against "organized criminal elements," with prosecutors establishing an "interrelated pattern of criminal activity the motive or effect of which is to derive pecuniary gain."[426]

Georgia code states that it is unlawful for individuals to employ racketeering activities to "acquire or maintain, directly or

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[420] *Measures Relating to Organized Crime: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, 91st Cong. 124-40 (1969).

[421] *Organized Crime: 25 Years After Malachi, Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 100th Cong., 2d Sess. 72 (1988).

[422] General Accounting Office, Effectiveness of the Government's Attack on La Cosa Nostra (April 11, 1988), *available at* https://www.gao.gov/assets/t-osi-88-2.pdf. See also G. Robert Blakey, Ronald Goldstock, How We Got Here: RICO Then to Now, 15, 59, RICO, Institute of Continuing Legal Education, Printed by State Bar of Georgia, *available at* https://www.gabar.org/membership/cle/upload/Rico_LoRes.pdf.

[423] *Id.*

[424] *Id.*

[425] Georgia Laws 1980, §26-34, 405, 415 ((current version at Ga. Code § 16-14 (2015).

[426] *Id.* at 406.

indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money."[427] It is also illegal "for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity."[428] Georgia defines "racketeering activity" as "to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the laws of this state."[429] In essence, RICO statutes are intended to make it easier to prosecute those who conspire to violate the law in order to achieve a personal or professional goal, including acquiring property, or achieving control or interest in any enterprise.[430]

Under the statute, even if the individual does not engage in racketeering activities themselves, they may be found guilty of violating the RICO statute if they use funds derived from such activity.[431] The Georgia RICO statute declares that conspiracy to commit racketeering is also unlawful, meaning that even unsuccessful attempts to corrupt legitimate enterprises could still be prosecuted by the state.[432] The Georgia RICO statute includes in its definition of "racketeering activity" all conduct defined under 18 USC Section 1961, the federal RICO statute.[433] However, the Georgia RICO statute also enumerates several other offenses as falling under the definition of "racketeering activity," including any act or threat involving bribery, evidence tampering, influencing witnesses, extortion, forgery, intimidation or injury of a jury or court or trial officer, or obstruction of justice.[434]

FEDERAL VS. GEORGIA RICO: A COMPARATIVE ANALYSIS

RICO charges are regarded among Georgia prosecutors as easier to prove than other types of enterprise and organized

[427] Ga. Code § 16-14-4 (2015)
[428] *Id.*
[429] Ga. Code § 16-14-3 (2015)
[430] Ga. Code § 16-14-4 (2015)
[431] Ga. Code § 16-14-4 (2015)
[432] *Id.*
[433] Ga. Code § 16-14-3 (2015)
[434] *Id.*

crime violations, as the emphasis is on the pattern of racketeering activity, rather than on the specifics of any one criminal incident.[435]One crucial difference between the federal RICO statute and the Georgia RICO statute is in their definitions of "pattern of racketeering activity." While the federal RICO statute describes a "pattern of racketeering activity" as one that "requires" the engagement in at least two acts of racketeering activity, the Georgia statute defines a "pattern of racketeering activity" as the engagement of two or more acts of racketeering activity.[436] [437]

The federal statute only lists one of the necessary components of a "pattern of racketeering activity" but not other potential components, leaving it open to interpretation.[438] By contrast, the Georgia statute is self-contained and clearer as it specifies that the engagement in two or more racketeering activities is *all* that is necessary to meet the standard definition of a "pattern of racketeering activity."[439] This makes violations of the statute easier for prosecutors to prove.

Additionally, the Court of Appeals of Georgia has ruled that the RICO statute "does not require the state to prove all of the alleged predicate offenses."[440] Rather, a RICO conviction requires the state to prove that the defendant committed at least two "offenses of the kind included in the RICO statute." The Georgia RICO statute focuses on telling the story of an overall pattern of criminal behavior rather than detailing the specifics of each alleged violation of the RICO statute.

Another benefit to the Georgia RICO statute from a prosecutorial perspective is that a defendant merely has to "conspire" or "endeavor" to violate any of the provisions in the Georgia statute in order to be in violation of the law.[441] If an individual commits an "overt act" intended to further the goal of the endeavor, the state can attribute that act to all parties as proof of

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[435]"RICO 101", Presentation by John A. Regan, Gang Resource Prosecutor, Prosecuting Attorneys' Council of Georgia, *available at* https://pacga.org/wp-content/uploads/2021/02/RICO-101.pdf.
[436]18 U.S.C. § 1961 (5) (2022)
[437]Ga. Code § 16-14-3 (2015)
[438]18 U.S.C. § 1961 (5) (2022)
[439]Ga. Code § 16-14-3 (2015)
[440]Mosley v. State, 253 Ga. App. 710, 712 (2002)
[441]Ga. Code § 16-14-4 (2015)

their attempts to achieve the goals of the enterprise.[442] Such an act does not itself need to be illegal; rather, the state must prove that the act was committed as a means to achieve the overall goal of the enterprise.

Additionally, prosecutors do not have to be concerned about invoking the doctrine of double jeopardy if they reference a defendant's past criminal behavior in connection to the charge of racketeering activity. According to a Georgia Court of Appeals ruling, "A RICO prosecution is based upon the defendant's engagement in an *enterprise* of racketeering activity, not upon the separate or related commission of acts involving 'the same conduct.' It would destroy the purpose of the Act to prohibit a valid RICO prosecution on grounds that a defendant might at some time have been prosecuted for an individual act that was similar to the RICO predicate offenses or which might have been part of a larger enterprise."[443] This ruling determined that prosecutors would not violate the doctrine of double jeopardy by referring to past criminal conduct as potential predicate acts to establish a pattern of racketeering activity.[444]

Federal criminal RICO cases require the prosecution to "satisfy four elements of proof: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'"[445] More specifically, this means that federal prosecutors must prove, "(1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendant was associated with or employed by the enterprise; (4) that the defendant engaged in a pattern of racketeering activity; and (5) that the defendant conducted or participated in the conduct of the enterprise through that pattern of racketeering activity through the commission of at least two acts of racketeering activity as set forth in the indictment."[446]

By contrast, the Georgia RICO statute does not require prosecutors to establish proof of an enterprise, rather only that the defendant " 'through a pattern of racketeering activity or proceeds derived therefrom, . . . acquire[ed] or maintain[ed],

[442] *Pasha v. State*, 273 Ga. App. 788 (Ct. App. 2005), citing *Causey v. State,* 154 Ga.App. 76, 79(2), (1980).

[443] *Bethune v. State*, 198 Ga. App. 490, 491 (1991)

[444] *Id.*

[445] *Jones v. Childers,*18 F.3d 899, 910 (11th Cir. 1994) (quoting *Sedima, S.P.R.L. v. Imrex Co.,*473 U.S. 479, 496) (1985))

[446] *United States v. Phillips*, 664 F. 2d 971, 1011 (5th Cir. Unit B Dec. 1981), *cert. denied,* 457 U.S. 1136 (1982)

directly or indirectly, any . . ., real property or personal property of any nature, including money.'"[447] For former President Donald Trump and his plot to overturn the results of the 2020 presidential election in Georgia, this distinction is critical. If this case had been brought against Mr. Trump and his co-conspirators in federal court, Trump's attorneys could have argued that the prosecution did not have proof of an established enterprise, on the grounds of a weak association between some of the individuals in the indictment. Trump's attorneys may have also attempted to assert in federal court that the enterprise's connection to interstate commerce was weak. In Georgia state courts, such an argument would be irrelevant to substantiating the allegation of violating the RICO statute.

According to another opinion in the Georgia Circuit Courts, "[t]he Georgia RICO statute is significantly broader than its federal counterpart in that OCGA § 16-14-4 (a) makes it unlawful for any person through [a pattern of racketeering activity or] proceeds derived from a pattern of racketeering activity to acquire or maintain any real property, or personal property of any nature, including money".[448] [449] In other words, the federal RICO statute declares that a person who has received money from racketeering activity is barred from using that money for or investing the money into any enterprise that impacts or conducts interstate or foreign commerce. This is due to the Necessary and Proper clause of the Constitution, which states that Congress may enact laws that are "necessary and proper" for executing its other powers– namely, its authority to regulate interstate commerce.[450] So, in order for Congress to have the authority to legislate on RICO, the offenses must be related to interstate commerce in some way. Georgia has no such requirement, as it has jurisdiction over all violations of state law, and does not have any jurisdiction over interstate commerce.

On the other hand, Georgia's RICO statute makes it illegal to engage in racketeering activity "to acquire or maintain, directly or indirectly, any interest in or control of" any enterprise,

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[447] *Cobb County v. Jones Group*, 218 Ga. App. 149, 152-53 (1995) (*quoting Dover v. State,* 192 Ga. App. 429 431 (1989).

[448] 'Georgia Racketeer Influenced and Corrupt Organizations Act,' 20 Ga.BarJ. 34 (1983)

[449] *Dover v. State*, 192 Ga. App. 429, 430 (Ga. Ct. App. 1989)

[450] U.S. Const., Article 1, § 8, Cl. 3

real property, personal property, or money.[451] In Georgia, an individual does not have to *use* or *invest* money or other assets derived from racketeering into an enterprise, as is required in federal court, but instead merely *acquire* or *maintain* money, property, or control of an enterprise through a pattern of racketeering activity.[452]

THE LEGAL STRATEGY – WHY USE RICO?

The key aspect of RICO violations is committing two or more crimes for the advancement of some sort of criminal enterprise. Two or more acts that would otherwise have to be charged separately can prove that a defendant is seeking to accomplish some larger unlawful scheme.[453] RICO indictments also allow the prosecution to create a broader and more detailed overview of the defendant's criminal activity, enabling them to uncover the "scheme" in its entirety and painting a more complete picture of the enterprise, its members, and its purpose.

In the case of Donald Trump, his plot to overturn the results of the 2020 presidential election in Georgia was massive in scale. RICO was intended to prosecute the executors of long-term and complex criminal agendas such as Trump's election plot, making this an appropriate use of the statute. Furthermore, the law in Georgia is designed to allow prosecutors to piece together the story of enterprises to demonstrate guilt. Therefore, not only is RICO an acceptable method to charge Trump and his allies, it is a strategically beneficial one as well. This is even more apparent with regards to the RICO statute in the state of Georgia as opposed to the federal RICO Act.

HOW DID DONALD TRUMP VIOLATE RICO? – AN EVALUATION OF THE FANI WILLIS INDICTMENT

Part 1: The "Fake Electors" Scheme

According to the indictment, Trump's scheme to overturn the 2020 election results met the definition of a "conspiracy

[451] Ga. Code § 16-14-4 (2015)

[452] Compare federal requirement, 18 U.S.C. § 1962, with Georgia state, Ga. Code § 16-14-4

[453] Ga. Code § 16-14-2 (2021)

[that] contained a common plan and purpose to commit two or more acts of racketeering activity in Fulton County, Georgia, elsewhere in the State of Georgia, and in other states."[454] The indictment accused Trump and his associates of several types of "predicate acts," which by themselves may not violate any laws, but taken together, demonstrate a pattern of racketeering activity.[455]

One aspect of Donald Trump's plot to overturn the results of the 2020 election in Georgia was an attempt to take advantage of the procedural rules of the Electoral College. Trump sought to do this by influencing state legislatures to certify a slate of electors other than the ones selected by the state party convention of the candidate with the majority of votes.[456] The plan became known colloquially as the "fake electors" scheme.

One element of this sub-plot was addressed in the Georgia indictment as "False Statements to and Solicitation of State Legislatures," the first method listed of the enterprise to achieve their goal of subverting the 2020 election results.[457] Trump allies attended several hearings of the general assembly in December of 2020, and made broad and unfounded claims of voter fraud in Georgia, while urging the assembly to select a new slate of electors to verify the results of Georgia's election at the state capital building in Atlanta.[458] According to the Georgia indictment, "the purpose of these false statements was to persuade Georgia legislators to reject lawful electoral votes cast by the duly elected and qualified presidential electors from Georgia. Members of the enterprise corruptly solicited Georgia legislators instead to unlawfully appoint their own presidential electors for the purpose of casting electoral votes for Donald Trump." [459]

The Georgia indictment also alleges the "Creation and Distribution of False Electoral College Documents" as method three intended to overturn the results of the 2020 American presidential election.[460] According to the indictment, "[m]embers of the enterprise, including several of the Defen-

[454] See Georgia Indictment at 14.
[455] *Id.*
[456] See Georgia Indictment at 16.
[457] *Id.*
[458] *Id.*
[459] *Id.* at 16.
[460] *Id.* at 17.

dants, created false Electoral College documents and recruited individuals to convene and cast false Electoral College votes at the Georgia State Capitol, in Fulton County, on December 14, 2020."[461]

Part 2: "Find Me the Votes"

Trump and his allies also directly called several top officials in the state of Georgia, including Georgia Secretary of State Brad Raffensperger, and Frances Watson, who was at the time the Chief Investigator of the Investigations Division for the Georgia Secretary of State.[462] Audio recordings of some of these phone calls capture the tactics undertaken by Donald Trump and his Chief of Staff Mark Meadows to influence the counting of votes in Georgia.[463] Trump and dozens of coconspirators alleged numerous types of voter fraud in Georgia, ranging from people dropping in votes at night to thousands of "dead people" voting (i.e., people fraudulently voting under the name of a deceased individual).[464] To the latter allegation, Georgia Secretary of State Brad Raffensperger replied, in a January 2, 2021 phone call with Trump, Meadows, Raffensperger, and others, "I guess there was a person Mr. Braynard who came to these meetings and presented data and he said that there was dead people, I believe it was upward of 5,000. The actual number were [sic] two. Two. Two people that were dead that voted. So that's wrong. There were two."[465]

Another exchange later in the same phone call included the former President questioning Raffensperger, asking, "Brad, why did they put the votes in three times? You know, they put 'em in three times."[466] To this, Raffensperger responded, "Mr. President, they did not put that. We did an audit of that and we proved conclusively that they were not scanned three times."[467] In perhaps the most notable instance of Donald Trump solicit-

[461] *Id.*

[462] Read the Full Transcript and Listen to Trump's Audio Call with Georgia Secretary of State, CNN, (Jan 3., 2021), at https://www.cnn.com/2021/01/03/politics/trump-brad-raffensperger-phone-call-transcript/index.html.

[463] *Id.*

[464] *Id.*

[465] *Id.*

[466] *Id.*

[467] *Id.*

ing Georgia state officials to violate the law to secure a victory for him in Georgia, Trump demanded that the Georgia Secretary of State "find 11,780 votes," one vote more than the 11,779 vote margin by which he had lost the state.[468] Towards the end of the hour-long phone call on January 2, 2021, Trump appeared to grow frustrated with the Georgia state officials. He questioned them, "So what are we going to do here folks? I only need 11,000 votes. Fellas, I need 11,000 votes. Give me a break."[469]

These examples demonstrate that Trump knew he was spreading disinformation about the 2020 election in Georgia, and that he was asking Georgia officials to violate their oath of office in some way in order to change the Georgia election results to reflect a Trump victory in the state.

On numerous occasions, Georgia state officials from various offices firmly refuted Trump's claim of mass voter fraud, providing data to support their conclusion. As such, Donald Trump and his allies clearly knew that the statements he and others were making about the Georgia general election were false. Trump also knew that he was soliciting the Secretary of State in Georgia to undermine the election results in Georgia by "finding" enough votes to change the results to Trump's favor.[470] These phone calls, meetings, and other solicitations of corruption were addressed in the Georgia Indictment as the second method listed for furthering the goals of the enterprise, "False Statements to and Solicitation of High Ranking State Officials".[471]

Fani Willis also argued the issue of the existence of a criminal "enterprise." According to Willis, "the Defendants and other members and associates of the enterprise had connections and relationships with one another and with the enterprise."[472] The indictment elaborates on what made the association of the defendants an "enterprise," stating that "the enterprise constituted an ongoing organization whose members and associates functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise."[473]

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[468] *Id.*
[469] *Id.*
[470] See Georgia Indictment at 14.
[471] *Id.* at 16.
[472] *Id.* at 15.
[473] *Id.*

There is one aspect of the Georgia RICO statute that is stricter than the federal RICO law. With regard to a "pattern of racketeering activity," one of the key elements necessary for a RICO conviction, Georgia defines the phrase as "at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents,....'".[474] [475] By contrast, the federal RICO statute does not "on its face require any interrelatedness between the predicate crimes themselves."[476]

In many ways, the Georgia RICO statute is a broader reframing of the federal statute. The language clearly defines the unlawful acts, evidence, and goals that be present to constitute a pattern of racketeering activity, in comparison to the more vague federal requirements. In addition, the unlawful acts listed in Georgia's RICO statute encompass a variety of crimes that are not included in the federal RICO statute.[477] However, these crimes or predicate acts must be proven to be interrelated in Georgia, unlike in federal court.[478] This indicates that a repetition of predicate acts that are extremely similar in nature may produce a stronger prosecutorial case as part of a RICO charge under the Georgia statute. Such minute differences demonstrate how minor variations in language and phrasing in similar laws can have a major impact on the prosecutorial strategy and the judicial evaluation of a case.

CRITICAL PROCEDURAL RULES IN GEORGIA CRIMINAL PROCEDURE: DISCOVERY AND HARMFUL ERROR

In addition to the nature of Georgia's RICO statute, there are several aspects of criminal court procedure in Georgia that may be a boon for the prosecution in this case. First among these potential benefits for prosecutors is the application of the Harmless Error doctrine. In regards to the criminal discovery process, the Harmless Error doctrine allows the state leniency in Georgia code Section 27-1403. This code mandates that

[474] Ga. Code Ann. § 16-14-3 (2015)
[475] *Dover v. State*, 192 Ga. App. 429, 430-31 (Ga. Ct. App. 1989)
[476] *Id.*
[477] Ga. Code § 16-14-4 (2015)
[478] *Dover v. State*, 192 Ga. App. 429, 430-31 (Ga. Ct. App. 1989)

judges grant the defendant an exclusionary remedy if the prosecution fails to provide the defendant with certain information before the trial.[479]

Georgia case law states that, "without the consent of the defendant, no witness shall be permitted to testify for the State whose name does not appear upon the list of witnesses as furnished to the defendant unless the solicitor or prosecuting attorney shall state in his place that the evidence sought to be presented is newly-discovered evidence which the State was not aware of at the time of its furnishing the defendant with a list of the witnesses."[480] In other words, if the prosecution does not notify the defendant of a certain piece of evidence before the trial, that evidence must be excluded from consideration at the trial. This procedural rule, if applied as written, may disqualify many incriminating pieces of evidence, and may also help ensure that the defense team has access to all evidence that the state plans to bring at trial. However, in practice, despite the strong wording of the code, many courts do not enforce this statute. The word "shall" (rather than, for instance, "may") in the statute may imply that an exclusionary remedy is *required* in the event that the prosecution fails to provide evidence to the defense.

Yet, with the application of the harmless error doctrine, the courts have often "acknowledged that a violation had occurred, but found that no harm had resulted to the defendant."[481] Georgia case law has also established that "[h]arm as well as error must be shown to warrant reversal" of a decision.[482] Therefore, the exclusionary remedy is usually not applied in those instances. In fact, the Georgia Court of Appeals remarked in *Smith v. State*, "[e]very case relying on the Act [27-1403] so far has been found to come under an exception thereto."[483]

As remarked in one analysis of the doctrine, "[t]his result seems to indicate that the appellate courts are unwilling to resolve cases on procedural grounds rather than on the merits in

[479] Ga. Code Ann. § 27-1404

[480] Prather v. State, 223 Ga. 721, (Ga. 1967).

[481] Lynn Lassiter Irvin, The Criminal Discovery Dilemma in Georgia, 34 MERCER L. REV. 1113 (1983).

[482] Saxon v. State, 266 Ga. App. 547 (Ct. App. 2004), citing Matthews v. State, 268 Ga. 798, 803(4)(1997).

[483] Smith v. State, 123 Ga. App. 269, 272 (Ga. Ct. App. 1971).

this area."[484] In this case, the Georgia Court of Appeals demonstrated that they may allow judges to place higher importance on the facts of the case than on procedural rules using their discretion. Critics have argued that, "by permitting each judge to decide what remedy to enforce, the courts have created a situation that lacks uniformity or predictability of result in application of a remedy for violation of the statute…the defendant, therefore, is left with uncertainty about what he can do to enforce the discovery statute."[485]

PARDON ME – HOW THE GEORGIA COURT VENUE CHANGES OPTIONS FOR CLEMENCY

The History of Pardons in Georgia

If Trump were to be convicted in Georgia state court, a pardon may not be a viable option for him.

In the decades following the American Civil War, the use of pardons in Georgia as a means of granting clemency to convicted criminals was scarce. In the 1850s, there were approximately 50 people pardoned per year in the state.[486] This number did eventually rise to 150 by the 1890s, and to around 200 by the turn of the twentieth century.[487]

At this time, the State Prison Commission was tasked with making all recommendations for pardons and paroles. However, such cases were usually only considered if the prisoner's attorney filed an application.[488] This made it extremely unlikely that poor prisoners, those unable to afford attorneys, would even be considered for pardons or paroles. During this era, most Georgia residents favored a punitive, rather than rehabilitation, criminal legal system. As a result, they were incredibly skeptical that pardons were appropriate at all.[489]

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[484] Lynn Lassiter Irvin, The Criminal Discovery Dilemma in Georgia, 34 MERCER L. REV. 1113 (1983).

[485] *Id.*

[486] Stephen Garton, *Managing Mercy: African Americans, Parole and Paternalism in the Georgia Prison System 1919-1945*, 36 Journal of Social History, 675 (2003).

[487] *Id.*

[488] *Id.*

[489] Jane Walker Herndon, *Eurith Dickinson Rivers: A Political Biography* 331 (1974), (published Ph.D. dissertation, University of Georgia), *available at*

Governor Talmadge, in his first two two-year terms as governor from 1933-1937, pardoned only 661 people.[490] During his four years as the governor of Georgia from 1937-1941, Ed Rivers pardoned approximately 1,900 people.[491] However, the public became suspicious of Governor Rivers.[492] The major criticisms of Rivers were due to the fact that he had criticized his predecessor, (and later successor) Governor Eugene Talmadge, for issuing an egregious number of pardons, and pledged not to do so himself.[493] Yet, Rivers did not fulfill his promise. Governor Rivers also aroused suspicion for the inconsistent timing of his pardons– in his last year of office alone, he granted over a thousand pardons, including over 700 of which were issued in his last four months as governor.[494]

Furthermore, the Rivers administration was already considered one of the most corrupt administrations Georgia had seen. This was partly due to the fact that Rivers was indicted in 1942 following a major 1940 scandal alleging that he had attempted to defraud the state through "large scale purchases of road machinery and other supplies during his administration," although the charges were eventually dismissed due to several mistrials and acquittals.[495] Interestingly, Governor Talmadge issued more pardons in his third term in office than Rivers had issued during his own two-term administration. Talmadge doled out 3,083 pardons in just two years, although this term was after Rivers had served his own terms as governor.[496]

In 1942, a Georgia grand jury indicted Governor Eurith Dickinson "Ed" Rivers and 19 others on multiple corruption charges, although the charges were eventually dropped due to a hung jury.[497] In particular, Rivers was indicted on one count

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https://www.proquest.com/dissertations-theses/eurith-dickinson-rivers-political-biography/docview/302743285/se-2?accountid=8285.

[490] *Id.* at 332.

[491] *Id.*

[492] *Id.*

[493] *Id.*

[494] *Id.* at 333.

[495] RIVERS IS INDICTED ON NEW FRAUD COUNTS; Charges Against Former Georgia Governor Are Extended, N.Y. Times, (Feb. 4, 1942). See also Ray Hill, Georgia's Little New deal: Governor Eurith D. Rivers The Knoxville Focus (2023).

[496] Jane Walker Herndon, *Eurith Dickinson Rivers: A Political Biography* 331 (1974), (published Ph.D. dissertation, University of Georgia).

[497] Randall Patton, *E. D. Rivers*, New Georgia Encyclopedia (2006).

of embezzlement.[498] The legitimacy of the pardons granted by Governor Rivers was considered quite dubious. Rivers' chauffeur, Albert Chandler, was arrested and indicted in 1941 on two felony charges of "peddling pardons."[499] According to a grand jury presentment covered by the New York Times in 1941, Chandler "frequently went to prison camps with pardons already signed and asked to see prisoners whom he did not know," supposedly on behalf of Governor Rivers.[500]

Some politicians argued that Rivers delegated his authority to grant pardons to his executive secretary, Marvin Griffin.[501] Indeed, a Fulton County Grand Jury presentment claimed that many pardons in Georgia were somehow signed by Rivers while he was not present in the state.[502] A convicted lottery operator testified to a Fulton County grand jury under oath that Pat Avery, an attorney and friend of the Rivers administration, had told her that pardons were being sold for approximately $500 to $600.[503] That amount would be equivalent to about $10,900 to approximately $13,000 in the year 2023.[504]

As a result of the major abuses of the power of the governorship, in February of 1943, the Georgia State Senate passed Senate Bill 5, creating a State Board of Pardons and Paroles.[505] The bill was ratified as part of the Georgia State Constitution in August of that year by a four-and-a-half-to-one vote by Georgia voters.[506] The bill removed the power to grant clemency from the Governor, and placed it in a board consisting of three

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[498] *Id.*

[499] *Georgia Asks Help in 'Pardon Racket, N.Y. Times (Jul. 2, 1941)*. See also *GEORGIA: Pardoner's Tale*, TIME (Jul. 14, 1941).

[500] *Id.*

[501] Jane Walker Herndon, *Eurith Dickinson Rivers: A Political Biography* 334 (1974), (published Ph.D. dissertation, University of Georgia).

[502] *Id.* at 335.

[503] *Id.*

[504] *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 13, 2023).

[505] S.B. 5, Gen. Assembly, Reg. Sess. (Ga. 1943). See also *Acts and Resolutions of the General Assembly of the State of Georgia 1943, Volume 1*, 185, 195 (1943), http://dlg.galileo.usg.edu/do:dlg_zlgl_183439209,

State Board of Pardons and Paroles of Georgia, First Biennial Report to the Governor and Members of the General Assembly of Georgia, Doc. No. 364 G296 (1944), *available at* https://hdl.handle.net/2027/uiug.30112118324281.

[506] Ga. Const., Constitution of the State of Georgia 1877 as amended through 1943, (1943), Article V, §1, ¶ XII (current version at Ga. Const. Art. 4, §2).

governor-appointed members, serving staggered seven-year terms.[507] A constitutional amendment which took effect in 1973 expanded the board to five members,which is its current size.[508] The board established new eligibility rules for prisoners regarding parole or pardon considerations, with the main goals of protecting Georgia's citizens, and attempting to rehabilitate released prisoners.[509] Such requirements included how much time a prisoner must serve of their term before being eligible for parole, depending on the nature of the crime.

In the first biennial report of the State Board of Pardons and Paroles, the board detailed its activities spanning its creation on February 10, 1943 until June 30, 1944.[510] The board members established requirements for eligibility for paroles, pardons, sentence commutations, and other rulings which they had the power to make. The report also records the number of pardons, paroles, commutations, removals of disabilities by law, and other actions regarding Georgia criminals.[511] Unsurprisingly, the number of pardons issued decreased considerably. Only one pardon was issued during this time period, although over 100 applications for pardon were investigated.[512] In the second biennial report, spanning July 1 of 1944 to June 30, 1946, no pardons were issued at all.[513]

Georgia Pardons vs. Federal Pardons

Today, a pardon in Georgia is defined by the Georgia State Board of Pardons and Paroles as, "an order of official forgiveness and may be granted to individuals who have maintained a good reputation in their community and have remained crime free for a required period of years following the completion

See also State Board of Pardons and Paroles, https://pap.georgia.gov/about-us (last visited Nov 13, 2023).

[507] *Acts and Resolutions of the General Assembly of the State of Georgia 1943, Volume 1*, 185, 195 (1943), *available at* http://dlg.galileo.usg.edu/do:dlg_zlgl_183439209. See also Ga. Const. Art. 4, §2

[508] Ga. Const. Art. 4, §2

[509] State Board of Pardons and Paroles of Georgia, First Biennial Report to the Governor and Members of the General Assembly of Georgia, Doc. No. 364 G296 (1944), *available at* https://hdl.handle.net/2027/uiug.30112118324281.

[510] *Id.*

[511] *Id.*

[512] *Id.* at 10.

[513] State Board of Pardons and Paroles of Georgia, Second Biennial Report to the Governor and Members of the General Assembly of Georgia, 5 (1946), *available at* https://hdl.handle.net/2027/hvd.hl4254.

of their sentence(s), to include parole or probation." [514] Significantly, a Georgia pardon does not, "expunge, remove, or erase crimes from a person's criminal record."[515]

Meanwhile, according to the Office of the Pardon Attorney, a federal pardon is, "an expression of the President's forgiveness and ordinarily is granted in recognition of the applicant's acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or completion of sentence."[516] The federal pardon "does not signify innocence," but it does "remove civil disabilities…imposed because of the conviction for which pardon is sought, and should lessen the stigma arising from the conviction."[517]

Both definitions stipulate that their pardons do not expunge an individual's crimes from their record, and both definitions use the phrase "forgiveness" to refer to the act of pardoning.[518] However, it is explicitly stated that federal pardons are usually contingent upon the individual's "acceptance of responsibility" for the crime in question.[519] This concept is not mentioned directly by the Georgia State Board of Pardons and Paroles, but according to their 2022 report, they may take into account a number of factors, including inmate progress and disciplinary reports.[520]

Whereas federal pardons are granted at the discretion of the executive (the President of the United States), Georgia state pardons can only be granted by the State Board of Pardons and Paroles. Federally, an individual can be pardoned of a crime before they complete their sentence, before they are convicted, or even before they are charged, although this is rare.[521] By contrast, in Georgia an individual must have "completed all sentence(s) at least five (5) years prior to applying."[522] Of course,

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[514] State Board of Pardons and Paroles, Annual Report FY 2022, at 23 (2022).
[515] *Id.*
[516] Office of the Pardon Attorney, *Frequently Asked Questions*, U.S. Dept. of Justice.
[517] *Id.*
[518] *Id.* See also State Board of Pardons and Paroles, Annual Report FY 2022, at 23 (2022).
[519] *Id.*
[520] State Board of Pardons and Paroles, Annual Report FY 2022, at 20 (2022).
[521] Office of the Pardon Attorney, *Frequently Asked Questions*, U.S. Dept. of Justice.
[522] State Board of Pardons and Paroles, P*ardons and Restoration of Rights*, Georgia State Board of Pardons and Paroles.

federal pardons are contingent upon the President's approval, but that is the only element necessary to secure one. In the year 2022, President Joseph Biden granted just 9 federal pardons.[523]

In the same year, according to their 2022 report, the Georgia State Board of Pardons and Paroles documented that there were 1,184 applications for clemency (including pardons, parole, and restoration of civil and political rights).[524] Out of these applications, 412 pardons were granted.[525] However, it is important to note that these pardons were granted only after the individuals submitted an application for consideration of clemency, after the State Board of Pardons and Paroles thoroughly examined all of the circumstances of the individual and the crime, and followed strict guidelines on eligibility for consideration.[526]

Federal pardons may also be granted if there is a compelling social or political interest in pardoning an individual for a crime. For example, President Gerald Ford pardoned his predecessor, President Richard Nixon, in 1973, of alleged election crimes in an attempt to settle the political unrest that arose after Nixon's infamous Watergate scandal.[527] These reasons are not legitimate factors for consideration of a pardon by the Georgia State Board of Pardons and Paroles.

The combination of these factors suggests that federal pardons are easier to receive than Georgia state pardons despite being rarer. This is especially true for famous or influential individuals, which Donald Trump certainly is. However, for Donald Trump, the difference in the way the Georgia government and the federal government issue pardons is detrimental to his chances of post-sentencing relief in Georgia. If Trump is convicted of violating Georgia law, he would not be able to compel, extort, coerce, bribe, or threaten the governor to issue a pardon or some other form of clemency.

CONCLUSION: THE ARENA CHANGES THE GAME

[523] Office of the Pardon Attorney, *Frequently Asked Questions*, U.S. Dept. of Justice.
[524] State Board of Pardons and Paroles, Annual Report FY 2022, at 24 (2022).
[525] *Id.*
[526] *Id.*
[527] President Gerald R. Ford, *Proclamation Granting Pardon to Richard Nixon by the President of the United States of America* (Sep. 8, 1974).

RICO law is primed to illustrate the elaborate conspiracy Trump engaged in. It was quite literally designed to target criminal plots like Trump's, related in the nature, membership structure, and methods of the conspiracies if not in the goals of the enterprises. In Georgia, the RICO statute is even harsher on defendants than the federal statute.[528] It has fewer expectations for establishing proof of a criminal enterprise, broader definitions of racketeering activity, and allows for more discretion from the prosecution in proving a pattern of such racketeering activity.[529]

Furthermore, Donald Trump still wields considerable political power in the United States and is the current frontrunner for the Republican candidate nomination. As such, there are avenues that Trump could take to interfere with the legal process in a federal court. Indeed, Trump has already attempted to do so, by claiming immunity to subpoenas on the basis that he and his advisors are not free to volunteer certain information due to their confidentiality.[530] If he were elected president in 2024, he might be able to pardon himself (although this would be unprecedented, having never happened in American history) of his federal crimes.[531] In fact, the federal judge presiding over Trump's case in Florida was a Trump appointee.[532] There are a myriad of advantages Trump might have in federal court that he won't have in Georgia, both seen and unseen by the public.

Trump's Georgia indictment might be overlooked by the media and the public in favor of the flashier federal charges against him. The media has been quite fascinated by the federal prosecutor for two of Trump's cases, Jack Smith, and the ban on cameras in federal courtrooms adds a layer of mystery to

[528] Chancey v. State, 256 Ga. 415 (1986).

[529] *Id.*

[530] Alan Feuer, *Federal Prosecutors Reject Trump's Immunity Claims in Election Case*, N.Y. Times, (Oct. 19, 2023), *available at* https://www.nytimes.com/2023/10/19/us/politics/trump-immunity-election.html.

[531] Kathryn Watson, *Can a President Pardon Himself?*, CBS News (Jun. 18, 2023), *at* https://www.cbsnews.com/news/can-a-president-pardon-himself/.

[532] Andrew Atterbury and Meredith McGraw, *Trump-Appointed Judge Assigned to Oversee the Florida Case*, Politico (Jun. 9, 2023), *at* https://www.politico.com/news/2023/06/09/trump-appointed-judge-to-oversee-initial-florida-court-appearance-00101273.

Trump's appearances in federal court.[533] [534] Yet, in time, the case currently making its way through the Georgia state court system will have an equal– if not greater– impact on Trump's future, and perhaps on the future of the United States as a whole.

[533]Attorney General Merrick B. Garland, *Appointment of John L. Smith as Special Counsel*, Office of the Attorney General, Order No. 5559-2022 (Nov. 18, 2022), *available at* https://www.justice.gov/d9/press-releases/attachments/2022/11/18/2022.11.18_order_5559-2022.pdf.

[534]Fed. R. Crim. P. 53

ALTERNATIVES TO TODAY: EXPANDING THE FEDERAL GOVERNMENTS' ROLE IN COMBATING THE SCHOOL-TO-PRISON PIPELINE

Nia McBean-Linton

Alternatives to Today: Expanding the Federal Governments' Role in Combating the School-to-Prison Pipeline

INTRODUCTION

The school-to-prison pipeline (STPP) is a disturbing pattern in which children and adolescents are funneled from public schools into the prison system.[535] Youth most at risk are from already vulnerable communities: youth of color with mental health issues and educational disabilities, and members of the LGBTQ+ community. The pipeline is present because of remnants of segregation, in-school policing, disciplinary zero-tolerance policies, and the nature of underfunded schools and overworked teachers.[536] During the COVID-19 pandemic, in-person schooling was interrupted for students all over the nation. Despite the absence of student's physical presence in classrooms during the pandemic, they were still suspended, expelled, and even sent to juvenile detention.[537] The ever-present pipeline signals a need for greater action to be taken through a top-down model, as this article will argue, the federal government's capacity to fill this need should be expanded.

Zero tolerance policies in school codes became widespread in the 1990s, and by the early 2000s, the number of students suspended annually nearly doubled. There was an increase in police presence in school buildings, and laws were created that mandated the referral of children to law enforcement authorities for school code violations.[538] These policies are applied to illicit actions without considering the severity of the behavior,

[535] American Civil Liberties Union, Issues of Juvenile Justice, *School-to-Prison Pipeline*, https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline.

[536] American Bar Association, Section on Civil Rights & Social Justice, *Shutting Down the School-to-Prison Pipeline*.

[537] Corry Collins, It Was Always About Control (2021), https://www.learningforjustice.org/magazine/spring-2021/it-was-always-about-control.

[538] Nancy Heitzeg, *Chapter One: Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline*, 453, COUNTERPOINTS, 11, 20 (2014).

mitigating circumstances, or context, with the ultimate goal of deterrence being unmet.[539] Restorative justice centered initiatives are the most common solutions put forward in opposition to zero tolerance policies. The United States Department of Justice defines restorative justice as "a process whereby parties with a stake in a specific offense resolve collectively how to deal with the aftermath of the offense and its implications for the future."[540] This is a practice that should become more prevalent in schools. Zero tolerance policies take away from teacher's discretion and were historically worsened by the No Child Left Behind Act.

The No Child Left Behind Act was signed into law in 2002 with the goal of ensuring "all children have a fair, equal, and significant opportunity to maintain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[541] Additionally, schools were sanctioned for failing to meet the defined achievement scores.[542] Zero tolerance, combined with policies stemming from the No Child Left Behind Act, led to the removal of low performing students from the standard schools and transferring them to alternative schools. Using zero tolerance to expand arrests and expel students was a way for school administrators to shield themselves from attendance scrutiny.[543] Eventually, the No Child Left Behind Act was replaced by the Every Student Succeeds Act in 2015. Education law experts believe this new law simultaneously overcorrected the No Child Left Behind Act in asking too little in terms of equity, and kept the testing pressure under the original law by requiring standardized tests for schools to receive any Title I

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[539] Christopher Mallet, *The School-to-Prison Pipeline: A Critical Review of the Paradigm Shift*, 33, CHILD AND ADOLESCENT SOCIAL WORK JOURNAL, 15 (2016).

[540] T.F Marshall, National Criminal Justice Reference Service, *Restorative Justice: An Overview* (1998) https://www.ojp.gov/ncjrs/virtual-library/abstracts/restorative-justice-overview.

[541] No Child Left Behind Act of 2001, Pub. L No. 107-110, § 1001, 115 Stat. 1425 (2002).

[542] *Id.*

[543] Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16, GEORGETOWN JOURNAL ON POVERTY LAW & POLICY, 585 (2009).

funding.[544] Title I funding is a product of the 1965 Elementary and Secondary Education Act signed by President Lyndon B. Johnson and provides supplemental federal aid to schools with a high population of low-income students.[545]

Disproportionate effects:

As of 2022, for every white individual incarcerated in the United States, there are five Black and three Hispanic individuals incarcerated.[546]Additionally, Black youth are more than four times as likely to be committed or detained in juvenile facilities than white youth.[547] For context, Black youth represent only 15% of students enrolled in public schools throughout the United States and Hispanic youth represent 28%.[548] School resource officers have a larger presence in schools with higher populations of minorities, which directly leads to racial profiling existing within the school setting.[549] Despite the end of de jure segregation and Jim Crow laws almost sixty years ago, the legacy of redlining and contemporary housing policies and practices continue to contribute to racial segregation.[550]

During the 2020-2021 school year, more than one-third of students attended a school in which 75% or more of students were of one race or ethnicity.[551] On average, white students

[544]Aaren N. Cassidy & Steven L. Nelson, *Understanding Arkansas' State Takeover of the Little Rock School District as Antiblackness: A Dialectical Relational Approach,* 22, JOURNAL OF LAW IN SOCIETY, 167 (2022).

[545]Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy,* 39 JOURNAL OF LAW & EDUCATION, 1 (2010).

[546]The Sentencing Project, U.S. Criminal Justice Data, (2023), https://www.sentencingproject.org/research/us-criminal-justice-data/.

[547]Office of Juvenile Justice and Delinquency Prevention, Easy Access to the Census of Juveniles in Residential Placement (2021), https://www.ojjdp.gov/ojstatbb/ezacjrp/.

[548]National Center for Education Statistics, Racial/Ethnic Enrollment in Public Schools (May 2023), https://nces.ed.gov/programs/coe/indicator/cge.

[549]Christen Pentek & Marla E. Eisenberg, *School Resource Officers, Safety, and Discipline: Perceptions and Experiences across Racial/Ethnic Groups in Minnesota Secondary Schools*, 88, CHILDREN AND YOUTH SERVICES REVIEW, 141 (2018).

[550]Chauncee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36, FORDHAM URBAN LAW JOURNAL, 1009 (2009).

[551]U.S Government Accountability Office, K-12 Education: Student Population Has Significantly Diversified, but Many Schools Remain

attended schools where 30% of students were poor, and Black and Hispanic students attended schools where 66% of students were poor.[552] The use of property taxes to fund school districts establishes a pattern where the quality of resources students receive coincides with the wealth of their family. Schools with higher concentrations of low-income and minority students often receive lower quality books, fewer instructional resources, larger class sizes, and less qualified teachers.[553]

In the *Brown v. Board of Education* (1954) decision, the Supreme Court of the United States reiterated the fact that the "segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law."[554] But this decision was almost seventy years ago, and while much has changed with the laws on the books, the socio-political effects of segregation still linger. What if the law took a different approach and proactively ensured the "detrimental effects" cease to continue? This could be made possible by expanding the federal government's oversight and enforcement authority over education.

FEDERAL EDUCATION POLICY

Under President Barack Obama, the Department of Education issued guidelines on "discriminatory discipline," in response to studies showing students were being harshly punished for minor offenses, and that students from minority groups were disproportionately affected.[555]For example, in Texas in 2006, Casey Harmeier was arrested and taken to juvenile detention for pulling the plastic cover off of a fire alarm.[556] At around 10:00 a.m., 10-year-old Casey was in the hallway

Divided Along Racial, Ethnic, and Economic Lines (Jun. 16, 2022), https://www.gao.gov/products/gao-22-104737

[552] Smith, *supra* note 16.

[553] Linda Darling-Hammond, National Library of Medicine, *Inequality in Teaching and Schooling: How Opportunity is Rationed to Students of Color in America*, National Academies Press, 208 (2001), https://www.ncbi.nlm.nih.gov/books/NBK223640/.

[554] Brown v. Board of Educ., 347 U.S. 483 (1954).

[555] Claudio Sanchez, *Obama Administration Has Little Love For 'Zero Tolerance'*, All Things Considered (Jan. 8, 2014), https://www.npr.org/2014/01/08/260808007/obama-administration-has-little-love-for-zero-tolerance.

[556] Texas Appleseed, *Collateral Consequences*, (Jul. 5, 2018), https://report.texasappleseed.org/collateral-consequences/.

with his friends when they dared him to pull the cover of the fire alarm down.[557] At 2:15 p.m., Casey was escorted into a police officer's car in handcuffs and taken to the Tomball Jail.[558] Prior to his mother being called, Casey was fingerprinted, photographed, and signed a police report.[559] In the State of Texas, pulling a fire alarm is normally a Class A misdemeanor. However, for Casey, the charge was elevated to a felony merely because of the fact that it occurred on school grounds. This is the same classification that would be given to the crime of making a bomb threat to a school.[560] After Casey had spent three weeks in the Tomball district's alternative center, his father, who is a teacher in the county, proved to the district that pulling the plastic cover off of a fire alarm only sets off a horn—but the actual fire alarm was never pulled until officers tried to replace the cover.[561] In other words, Casey never actually pulled the fire alarm, resulting in his charges being lowered to a misdemeanor. Initially, the district attorney's office refused to drop the charges. However, they were pressured into doing so a few days before the trial. Casey's parents sued the school district, the principal, the city of Tomball, and the police officer who made the arrest; the lawsuit ultimately resulted in a $5,000 settlement.[562] In addition, the chief of police reported that in the future, similar cases would likely be handled differently.[563]

Under President Donald Trump, the Education Secretary, Betsy Devos, officially rescinded the Obama-era school discipline guidelines, which, as discussed, were instituted to prevent cases like those of Casey Harmeier. Secretary Devos rescinded the policy under the guise of increasing school safety in the wake of a high school shooting in Parkland, Florida.[564]

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[557] Brandon Moeller, *Boy 10 Could Face Felony Charges for Messing with Fire Alarm*, (Nov. 8, 2006), https://www.chron.com/neighborhood/article/Boy-10-could-face-felony-charges-for-messing-9569073.php.

[558] As juvenile cases are sealed for privacy, the information regarding juvenile cases in this article are primarily from news sources.

[559] Moeller *supra* note 23.

[560] *Id.*

[561] Rock Casey, *Boy's fire alarm saga has happy ending in Tomball*, (Jan. 22, 2009), https://www.chron.com/news/article/boy-s-fire-alarm-saga-has-happy-ending-in-1540584.php.

[562] *Id.*

[563] *Id.*

[564] Collin Binkley, *Trump official cancel Obama-era policy on school discipline*, (Dec. 21, 2018 7:02 PM), https://apnews.com/article/07c8e7c5a69942699f7640890677c2d2.

In the case of the Parkland High School shooting, however, the school resource officer left the school rather than confronting the gunman. This suggests that school resource officers are not equipped to handle school shootings, not that the Obama-era school discipline guidelines needed to be rescinded.[565] From 2005 to 2018, the percentage of public schools that have security staff rose from 42% to 62%.[566] Moreover, schools have recorded that with the presence of school resource officers there has been a 21% increase in exclusionary discipline, which is the removal of a student from their typical educational setting, often through suspension and expulsion.[567] This is just one of the many problems that require the federal government to apply effective pressure to change school districts' policies.

EFFECTS OF THE COVID-19 PANDEMIC

Three case studies:

The COVID-19 pandemic highlighted a new problem: students were not safe from extreme school disciplinary policies, even in their own homes. The following are three prime examples of the school-to-prison pipeline in action, despite the existence of a pandemic. First, there was the case of Grace—a 15-year-old African American girl with ADHD in Michigan who was sent to juvenile detention for failing to wake up for school and submit schoolwork.[568] Grace was already on probation because of prior violence with her mom and the theft of a cell phone at school. Charisse, her mother, had told a court caseworker that "nothing significant" had occurred during the time they had been isolating at home due to the pandemic. In fact,

[565] Scott A. Johnson, *Discussion of Change Needed Following the Shooting at Marjory Stoneman Douglas High School in Parkland Florida, A Brief Response*, 7, JOURNAL OF FORENSIC SCIENCE & CRIMINAL INVESTIGATION, 1 (2018).

[566] Ke Wang et al., *Indicators of School Crime and Safety:2019* (Jul. 2020), https://nces.ed.gov/pubs2020/2020063.pdf.

[567] Anthony Petrosino et al., *Research in Brief: School-Based Law Enforcement* (2020), https://ies.ed.gov/ncee/edlabs/regions/west/relwestFiles/pdf/4-2-3-20_SRO_Brief_Approved_FINAL.pdf.

[568] Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention* (July 14, 2020), https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention.

there had been no incidents of Grace fighting with her mom since the incident that landed her probation in the first place. During remote learning, Grace failed to wake up for class and turn in her homework; consequently, her case worker filed a violation of her probation against her. A hearing occurred on May 14, 2020, and Judge Mary Ellen Brennan, the presiding judge of the Oakland County Juvenile Drug Court, ruled that Grace had violated the terms of her probation. Judge Brennan enforced "zero tolerance" and sentenced Grace to detention at the Children's Village Detention Center.[569] This ruling was made despite Governor Gretchen Whitmer's executive order that "eliminat[ed] any form of juvenile detention or residential facility placement for juveniles unless a determination is made that a juvenile is a substantial and immediate safety risk to others."[570] Although a petition calling for Grace's release began to circulate and accumulated 25,000 signatures—and received the support of state and federal officials—Judge Brennan denied Grace's attorney's request for her release.[571] After Grace appealed, the Michigan Court of Appeals ordered Grace's immediate release from the juvenile facility in Detroit, only one week after Judge Brennan denied her request.[572]

Secondly, there is the case of Isaiah Elliot from Colorado. Isaiah, who was 13 years old at the time, was attending art class virtually when his teacher noticed he was holding a toy gun.[573] Like Grace, Isaiah had been diagnosed with ADHD. The art teacher informed the vice principal that she saw Isaiah with a gun, but that she believed it appeared to be fake; nonetheless, the vice principal involved the police.[574] Two police officers were sent to Isaiah's home, without first notifying his parents, and the police officers eventually came to the conclusion that

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[569] *Id.*

[570] Mich. Exec. Order No. 2020-29 (Mar. 29, 2020), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/29/executive-order-2020-29.

[571] Beth LeBlanc & Mike Martindale, *Oakland Co. girl jailed for not doing homework gets released*, (July 31, 2020), https://www.detroitnews.com/story/news/local/oakland-county/2020/07/31/oakland-co-girl-jailed-not-doing-homework-ordered-release/5557997002/.

[572] *Id.*

[573] States News Service, *Glimpse of Toy Gun in Student's Home Prompts School Officials to Call Out the Police* (Sep. 14, 2020).

[574] *Id.*

the gun was in fact a toy. But the officers still reprimanded Isaiah by threatening him with jail time if the incident happened again.[575] Isaiah's father rushed home when he learned that the police were being sent to the house and stated that he feared his son could have ended up like Tamir Rice—Rice was shot and killed by a police officer back in 2014 for holding a toy gun when he was 12 years old, one year younger than Isaiah.[576] In response to this incident, Governor Jared Polis signed a law, named in honor of Isaiah, designed to protect students participating in online instruction. The law—titled "Isaiah's Law"—establishes that for the purposes of the crime of interference with staff or students of an educational institution, a student's home is not legally the same as school property.[577] Despite the trauma the incident caused the Elliot family, it took one year for the school district that put Isaiah's life in danger to apologize, and the only way they did that was through sending a short letter.[578] His parents felt the letter from the Widefield school district was insincere since so much time had passed.[579]

Finally, there is the case of Ka'Mauri Harrison. In September 2020, Ka'Mauri was taking a test virtually and a BB gun was visible in the background.[580] His teacher reported the presence of the BB gun in his room to the principal. The principal suspended Ka'Mauri from school and recommended him for expulsion on the basis of the school's zero tolerance policy for having weapons in the classroom.[581] Ka'Mauri's father, Nyron Harrison, promptly filed a federal lawsuit against the school district, seeking to block Ka'Mauri's expulsion. Attorney General Jeff Landry filed a motion for the state to intervene in the lawsuit, and claimed that the Jefferson Parish School Board utilized a mandatory expulsion statute on conduct that is not prohib-

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[575] *Id.*

[576] *Id.*

[577] Isaiah's Law § 22-1-131 (2021).

[578] Ryan Warner, *A Year After Sending Cops To A Kid's Home, A Colorado Springs School District Apologizes* (Sep. 10, 2021), https://www.cpr.org/2021/09/10/a-year-after-sending-cops-to-a-kids-home-a-colorado-springs-school-district-apologizes/.

[579] *Id.*

[580] States News Service, ACLU of Louisiana Condemns Suspension of 4th Grader Ka'Mauri Harrison for BB Gun (Sep. 29, 2020).

[581] *Harrison v. Jefferson Parish School Board*, 502 F. Supp. 3d 1088 (E.D La. 2020).

ited or even covered by existing school discipline statutes.[582] The case was ultimately settled in 2021, but the details of the settlement have not been released.[583] This incident occurred after the state passed a law similar to Isaiah's Law, declaring that student's homes are not school property and disciplinary policies cannot treat them as such.[584]

Post-pandemic reexamination:

These three cases are impactful in highlighting that even in the supposed safety of their own homes, students continued to be criminalized by the education system. Moreover, these cases occurred despite state governors having signed laws into effect to protect youth under the abnormal circumstances of the pandemic—these laws were clearly not enough. While only three cases are discussed above, Attorney General Landry's office released a statement saying that he had "taken a number of actions to defend Ka'Mauri and other students who were sent into a bureaucratic abyss for no reason and told there is no way out."[585] But this is just the actions being taken by one state official; it is not enough to solve the problem that our current mechanisms are failing to protect vulnerable youth across the country. State governors were not able to protect them through executive orders, signaling a need for something greater, something at the federal level.

Hopey Fink is an education justice attorney in Missouri who represented a six-year-old that was suspended in March 2023 from school for two months for an altercation with other students. Fink reported that there have been several students who are receiving minimal education alternatives while they are "long term removed" or suspended, and that the pandemic has led to a regression in how school districts properly address this problem. [586] The six-year-old was suspended for a second time shortly after returning to school, and his lawyers attribute

[582] States News Service, State of Louisiana Joins Federal Lawsuit Against Jefferson Parish School Board Over Violations of Ka'Mauri Harrison's Constitutional Rights (Feb. 8, 2021).

[583] Jennifer Crockett, *The families of Ka'Mauri Harrison and Tommy Brown reach settlement with JP school board* (Jul. 7, 2021).

[584] LA. Rev. Stat §17:416 (2020).

[585] *supra* note 49.

[586] Tony Messenger, St. Louis Post-Dispatch, *Hazelwood dad worries about school-to-prison pipeline after son, 6, is suspended (*Mar. 24, 2023), https://www.stltoday.com/news/local/education/messenger-hazelwood-

it to his first suspension and not gaining the tools and support to be successful in school.[587]

Megan Helton, a law student who specializes in juvenile justice, studied the impact that Hurricane Katrina had on the school-to-prison pipeline. She turned her studies into lessons for the post-COVID era as both Hurricane Katrina and the COVID-19 pandemic caused trauma, financial loss, and time away from school for students. More specifically, in New Orleans, 60% of students had been issued a suspension in the post-Katrina era, pushing struggling youth even further from education.[588] Zero-tolerance policies also exploded and were instituted for safety measures after Katrina; the same thing occurred after the pandemic, as seen with safety measures like mask requirements.[589]

Post-pandemic, there has been an increase in misbehavior and violence in schools. More than 8 in 10 public schools have seen stunted behavioral and socioemotional development in students directly attributable to the COVID-19 pandemic.[590] With all of these findings in mind, providing well-funded and well-developed restorative justice measures and a system to hold schools accountable is needed now more than ever.

ROLE OF THE FEDERAL GOVERNMENT

Traditionally and constitutionally, as seen with the Tenth Amendment, education policy is under the authority of state governments.[591] However, the United States Department of Education, an agency under the federal government, is bound by various laws to ensure that all educational institutions that receive federal funding do not engage in conduct that is discriminatory on the basis of race, color, national origin, sex,

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dad-worries-about-school-to-prison-pipeline-after-son-6-is-suspended/article_3904e718-5a52-51f9-a74a-55fd153f9677.html#.

[587] *Id.*

[588] Megan Helton, *A Tale of Two Crises: Assessing the Impact of Exclusionary School Policies on Students During a State of Emergency,* 50 J.L. & EDUC. 1, (Spring, 2021).

[589] *Id.*

[590] Institute of Education Sciences, School Pulse Panel (May 2022), https://ies.ed.gov/schoolsurvey/spp/#read-more.

[591] U.S Department of Education, Poliy, https://www2.ed.gov/policy/landing.jhtml?src=ft.

disability, or age.[592] Furthermore, both the Department of Education and the Department of Justice have recognized the overrepresentation of students of color in regard to suspensions and school-related arrests."[593] As previously discussed, Title I funding is a primary way for the federal government to issue money to schools, specifically schools with a high population of disadvantaged youth. It allows the federal government to implement programming toward equal education by attaching certain requirements and mandates to federal funding. The potential for the federal government to hold schools directly accountable for contributing to the school-to-prison pipeline is seen clearest in *United States v. City of Meridian* (2017).

United States v. City of Meridian:

In 2013, the United States, through the Department of Justice (DOJ), brought a claim against various entities: the City of Meridian, Lauderdale County, Judges Frank Coleman and Veldrore Young of Lauderdale County Court,, the State of Mississippi, the Mississippi Department of Human Services, and the Mississippi Division of Youth Services (collectively the "Defendants").[594] The DOJ claimed that the aim of the case was to eliminate a pattern and practice of conduct by the Defendants that violated juveniles' constitutional rights—specifically their rights under the Fourth (protection against unreasonable searches and seizures), Fifth (due process rights), and Fourteenth Amendments (equal protection under the law).[595] These rights,[596] as alleged by the DOJ, were being disregarded by the Defendants.

In December 2011, the DOJ notified the Defendants that it was beginning an investigation into their alleged unconstitutional practices. The DOJ claimed that the Defendants denied their access to youth records, proceedings, and contact with juvenile detention center personnel. In August 2021, the DOJ

[592] U.S Department of Education, Ensuring Equal Access to High-Quality Education (Apr. 3, 2023).

[593] Judith A.M. Scully, *Examining and Dismantling the School-To-Prison Pipeline: Strategies for a Better Future,* 68 ARK. L. REV. 959, (2016).

[594] *United States v. City of Meridian*, 2017 U.S. Dist. LEXIS 228677 (United States District Court for the Southern District of Mississippi, Northern Division September 30, 2017, Filed).

[595] *Id.*

[596] *See* U.S. CONST. amend. IV.; *see* U.S. CONST. amend. V.; *see* U.S. CONST. amend XIV.

notified the Defendants that they had found evidence of them violating constitutional rights and would file a lawsuit unless the Defendants engaged in negotiations—which they did not. Honing in more specifically on the DOJ's allegations in its lawsuit, the DOJ argued that juveniles were discriminatorily brought into court without counsel, without understanding the charges against them, and without an understanding of resources to defend themselves. Additionally, the DOJ argued that the consequences the youth faced were severe and disproportionate, including incarceration for minor, technical violations that should have been handled at the school level under ordinary disciplinary policies. The DOJ alleged that students were arrested and charged for being disrespectful, refusing to follow directions, or simply using profanity.[597] The DOJ asserted that the Defendants operated a school-to-prison pipeline by arresting and incarcerating children for school infractions without exercising discretion and without regard for their constitutional rights.

During separate appellate proceedings in a new case, *United States v. Lauderdale County* (2019), Lauderdale County and Judges Frank Coleman and Veldrore Young of Lauderdale County Court were removed as defendants based on a technicality.[598] The remaining parties in the case reached a settlement agreement soon after.[599] The agreement prohibited the Meridian Police Department from arresting children for misbehavior that could be addressed with school discipline, required the police department to create policies and provide training on the limited circumstances in which school-based arrests may be conducted, and mandated due process in any actions. The agreement also required the City of Meridian to seek a Memorandum of Understanding (MOU) between the Meridian Police Department and Public School District Police Department to outline authority and procedures, require officers to receive training on interacting with juveniles and bias-free policing, require the city to collect and publicize data on school-based arrests, and require the city to hold community input meet-

[597] *United States v. City of Meridian*, 2022 U.S. Dist. LEXIS 31484, 2022 WL 551261 (United States District Court for the Southern District of Mississippi, Northern DivisionFebruary 23, 2022, Filed).

[598] *United States v. Lauderdale Cty.,* 914 F.3d 960, 2019 U.S. App. LEXIS 3344 (United States Court of Appeals for the Fifth CircuitFebruary 1, 2019, Filed).

[599] *supra* note 66.

ings every six months.[600] This MOU was initially set to expire within 12 months, as agreed by all parties, but the district court used its discretion and inherent authority to prolong the terms of the agreement beyond this initial period. Instead the court granted the termination of the MOU after over three years in February 2022.[601]

Analysis:

The outcome in *United States v. City of Meridian* (2017) demonstrates that the federal government does have the ability and jurisdiction to protect students and hold schools accountable—directly combatting the school-to-prison pipeline phenomenon. The case officially ended one year ago with the termination of the MOU, and the DOJ must not stop with the City of Meridian. The Civil Rights Division of the DOJ has an Educational Opportunities Section that is responsible for enforcing statutes that require school officials to not discriminate against students on the basis of sex, national origin, color, language, or disability. But this authority is currently limited in its scope. As seen with the order in *United States v. Lauderdale County* (2019) dismissing the county judges as defendants, some officials remain out of reach of the DOJ. That is because the DOJ is currently only authorized to conduct civil actions against officials or employees of government agencies, and the courts are not considered an agency for the purposes of the civil action statutes.[602] As such, the authority of the DOJ needs to be expanded in order to hold everyone who is upholding the school-to-prison pipeline—including judges—accountable. As a practical matter, judges have immense power and control over the lives of children who are brought before them, and youth should certainly not suffer because judges cannot be held accountable.

IDEAL GOLD STANDARD

Although the dual-federalism approach to education allows for local control over education and promotes competition, it also permits substantial inequitable disparities amongst

[600] *Id.*
[601] *Id.*
[602] Cause of action, 34 USCS § 12601 (Current through Public Law 118-19, approved October 6, 2023).

the states.[603] As detailed hereinabove, the school-to-prison pipeline (STPP) is most prevalent in underprivileged areas. There are practical ways to alleviate the pipeline and the best way includes the federal government taking on a greater role and transforming some of its funding initiatives. This section will describe a gold standard structure for mitigating the STPP.

Reallocating and increasing funding:

First, a portion of the funding provided for school resource officers should be reallocated towards mediation specialists. School resource officers were initially incorporated into the school system in large amounts in the context of the real and legitimate fear surrounding school shootings.[604] However, there is now conflicting evidence on the effectiveness of school resource officers in preventing violence in general, and school shootings specifically.[605] It is clear however, that the presence of school resource officers increases the rate at which students are referred to the juvenile justice system, and receive harsher punishments for minor offenses that were previously handled by school administrators.[606] Furthermore, youth who are removed from school have increased odds of committing a crime and being arrested in the future.[607] Another concern with school resource officers is their broad authority to conduct searches. School resource officers have more freedom to search students than a police officer would if the students were on the street.[608] While probable cause or a warrant is required for police officers to search someone outside of schools,

[603] Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48, WAKE FOREST L. Rev. 287 (2013).

[604] Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84, THE CLEARING HOUSE: A JOURNAL OF EDUCATION STRATEGIES, ISSUES, AND IDEAS, 160 (2011).

[605] Congressional Research Service, School Resource Officers: Law Enforcement Officers in Schools (2013).

[606] Denise C. Gottfredson , Scott Crosse , Zhiqun Tang , Erin L. Bauer , Michele A. Harmon, Carol A. Hagen & Angela D. Greene, *Effects of School Resource Officers on School Crime and Responses to School Crime*, 19 CRIMINOLOGY & PUB. POLICY 905 (2020).

[607] Thomas Mowen & John Brent, School Discipline as a Turning Point: The Cumulative Effect of Suspension on Arrest, 53 J. Res. JOURNAL OF RESEARCH IN CRIME & DELINQUENCY 628 (2016).

[608] Matthew Theriot & Matthew Cuellar, *School Resource Officers and Student's Rights,* 19 CONTEMPORARY JUSTICE REVIEW 363 (2016)..

inside of schools, they only need reasonable suspicion.[609] Children are customarily considered a vulnerable population and consequently deserve more protection, not less.

Mediators, or restorative justice practitioners more broadly, can assist overworked school administrators in dealing with student behavioral issues without risking a child's future, and additional funding needs to be provided for these individuals. Having robust mediation and restorative justice programs will decrease the need for harmful zero-tolerance policies. And the federal government can play a role in providing this funding. For example, in 2017, the National Institute of Justice—which is under the DOJ—issued a $1.2 million grant to the Maryland Montgomery County public school district to incorporate restorative justice practices and evaluate their effectiveness.[610] With this funding, the school district reported that the number of students referred to administrative offices for misconduct decreased by 70%, and students reported feeling better about their safety and relationships in school.[611] The funding also led the school district to collaborate with the Conflict Resolution Center of Montgomery County for their mediation and restorative justice services. The mediators at the Center are all volunteers or Americorps members.[612] Unfortunately, there are not enough mediators willing to work without compensation, making it impossible to match the demand from schools seeking restorative justice services. Maryland is not the only state that shows the effectiveness of restorative justice: in Texas, a restorative justice pilot program led to a decrease in school suspension by 77%.[613] Ultimately, more funding is needed to expand these programs in each and every state—and this is a key opportunity for the federal government to step in.

When implemented effectively restorative justice can make an impactful difference, but these programs need to be funded in order to reach their potential. The DOJ offers regular funding for hiring school resource officers (SRO).[614] Yet in their

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[609] *Id.*

[610] Final Report and Collaborative Action Plan, Maryland Commission on the School-to-Prison Pipeline and Restorative Practices (Dec. 20, 2018).

[611] *Id.*

[612] CRCMC, Volunteer Training (2023), https://crcmc.org/volunteer-training/.

[613] Hani Morgan, *Restorative Justice and the School-to-Prison Pipeline: A Review of Existing Literature*, 11, EDUCATION SCIENCES, 159 (2021).

[614] Community Oriented Policing Services, U.S. Department of Justice, https://cops.usdoj.gov/supportingsafeschools.

Guiding Principles for School Resource Officer Programs, the DOJ explicitly warns that "because of the potential for negative outcomes, including the exacerbation of perceived or actual discrimination by SROs based on race, color, national origin (including English language learners), disability, and sex (including sexual orientation, intersex traits, and gender identity), communities must carefully consider for themselves whether to implement an SRO program."[615] The DOJ should specifically reallocate its funds away from the SRO program that it explicitly warns could lead to discrimination and send funds towards ensuring restorative justice measures can be implemented effectively.

Expansion of authority:

As discussed in the analysis of *United States v. City of Meridian* (2017), the authority of the DOJ in cases concerning students needs to be expanded. The DOJ's current authority is limited to cases that concern discrimination on the basis of sex, national origin, color, language, religion, or disability. While there are certainly disproportionate effects on minority populations in the school-to-prison pipeline, the cases that would be beneficial to investigate do not always exclusively fall under the definition of discrimination. Consequently, the DOJ needs to be given broad authority to intervene in cases in which students are referred to the juvenile justice system for infractions that could be handled by schools. As noted with the order in U*nited States v. Lauderdale County* (2019), the county judges were dismissed as defendants because the DOJ did not have the authority to bring a case against them.[616] But these judges were certainly not without fault. In fact, Judge Frank Coleman of Lauderdale County Court retired exactly one month after the DOJ filed its case against him.[617] What is more, the DOJ's Civil Rights Division currently acts on cases that are submitted to it in a reactionary manner. In an ideal structure, the DOJ should

[615] Community Oriented Policing Services, *Guiding Principles for School Resource Officer Programs* (2022), https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p460-pub.pdf.

[616] *United States v. Lauderdale Cty*., 914 F.3d 960, 2019 U.S. App. LEXIS 3344 (United States Court of Appeals for the Fifth CircuitFebruary 1, 2019, Filed).

[617] Judge Frank M. Coleman: Professional Background and Legal Expertise, https://trellis.law/judge/frank.m.coleman.

be granted the ability and resources to be more proactive in investigating possible practices that are contributing to the STPP.[618] In support of this goal, the DOJ should create a new position—a high-level executive—specifically for someone to have the sole responsibility of addressing and combating the STPP.

Increased court involvement:

Finally, the role of juvenile courts need to be reassessed and amplified in order to ensure that youth who are aggressively punished do not fall through the cracks and get thrust into a cycle of crime. If youth do fall through the cracks and enter the STPP, juvenile courts should have more review authority to periodically check in on all incarcerated juveniles. Because the courts often serve as the final safeguard against the STPP, they need to serve more as a check. The STPP is heavily embedded at the state level, as seen with some states that already determine the amount of prison beds they will need, in part through the percentage of children who cannot read at certain elementary grade levels.[619] The courts need to ensure that juveniles are pushed towards alternative education programs that still provide opportunities for the youth to grow.

Trauma-informed pedagogy is a useful tool to both prevent students from entering the juvenile justice system and ensuring they leave it—thus, it should be more widespread.[620] Schools often administer severe discipline to students who need the most support—these students are more likely to have learning disabilities, come from single-parent or foster care homes, live in poverty, and experience homelessness.[621] In general, investments need to be made in alternative education and diversion programs in the juvenile justice system that set students up for success when the school system is unable to. Juvenile centers were originally created to promote rehabilita-

[618] Civil Rights Division, Education Opportunities Section, https://www.justice.gov/crt/educational-opportunities-section.

[619] Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education,* 40 U.C. Davis L. Rev. 1653, (Jun. 2007), *available at* https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4P47-YJH0-00CW-C08X-00000-00&context=1516831.

[620] Letitia Basford et al., *It Can be Done: How One Charter School Combats the School-to-Prison Pipeline*, 53 THE URBAN REVIEW, 540 (2020).

[621] *Id.*

tion, yet the implementation of these programs varies greatly from state to state—this provides yet another area where the federal government's involvement could be beneficial.[622]

Practicality issues:

In reality, the greatest obstacle to increasing the role of the federal government in eliminating the STPP is the United States Constitution itself. The Tenth Amendment asserts 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."[623] Because the Constitution does not directly address education, the Tenth Amendment has been regarded as the default constitutional provision giving states control over their own education systems. Consequently, the federal government's power over education lies in guidance, regulations, and funding.[624] As detailed above, the first element of the new proposed standard concerns adjusting the programs that the federal government is funding—tying mandates to federal funding is permissible and would not run into concerns with the Tenth Amendment. However, expanding the jurisdiction of the DOJ over schools and those with authority to carry out the STPP may be an issue and raise serious federalism concerns.

The United States is a large country and every state has a different culture, and it makes sense for each state to govern its educational system differently. However, maintaining the status quo may not be the answer and historical practice cannot always be the binding principle. For example, at the time of the ratification of the Constitution, most Americans did not leave their own states and slavery was legal—we are living in a completely different world today, one in which there is an exorbitant STPP.[625] The standards of public education vary greatly from state to state, and even from county to county. Absolute

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[622] Karen Sullivan, *Education Systems in Juvenile Detention Centers,* 18 BYU Educ. & L. J. 159, (2018), *available at* https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5VDF-50Y0-00CT-V0P8-00000-00&context=1516831.

[623] U.S. Const. amend. X, § 2.

[624] William Owings et al., *How Variations in State Policies and Practices Impact Student Outcomes: What Principles and Professors Need to Know*, 101 NASSP BULLETIN 299 (2017).

[625] *Id.*

state control over education leads to children in one state not having the same opportunities as those in another—this is a big problem that led to the DOJ filing its case in *United States v. City of Meridian* (2017). Constitutionally expanding the jurisdiction of the DOJ to investigate and sue school districts and those with authority over juveniles, including judges, would not take away states' ability to govern their school districts based on their local culture, but it would help reduce harm being done to youth.

Another practical concern is the implementation of restorative justice. Restorative justice as a solution to the STPP has been around for decades, however, the pipeline remains to be a big issue, albeit with some progress at local levels. This calls into question the effectiveness of restorative justice and whether it has been, or can even be, implemented properly on a large scale. The first issue is the fact that restorative justice has largely been developed in the criminal justice setting, and some of the methods developed for the criminal context are inappropriate for the school and juvenile context.[626] The "victim" and "offender" approach does not work because oftentimes in schools the relationship is more complex, and who the victim is can switch from day to day. As a result, this approach can leave students increasingly distanced from the school and community, which is counterproductive because restorative justice practices are most effective when the participants have a desire to participate.[627] While restorative justice has become increasingly popular in theory, it is difficult to discern whether, and if so which, school districts are implementing restorative justice practices in the way that they were originally intended or if they are simply using those terms because it looks good in certain policy arenas.[628] Restorative justice needs to be carried out by trained staff and implemented in a way that is consistent with its core values and principles. Resolving conflicts effectively and non-violently is something that is not necessarily inherent, people need to learn. As a result, in addition to programming that serves as a reaction to conflicts between members of the school community, there also needs to be more education for the purpose of prevention. In funding

[626] Schiff, Mara, *Can Restorative Justice Disrupt the 'School-to-Prison Pipeline'?*, 21 CONTEMPORARY JUSTICE REVIEW 121 (2018).
[627] *Id.*
[628] *Id.*

these programs, the federal government needs to take more steps to ensure they are carried out effectively.

CONCLUSION

Through the school-to-prison pipeline (STPP), children—many of which are disproportionately minorities—are funneled out of school and into the juvenile justice system. The pipeline is caused by remnants of segregation, zero-tolerance policies, the presence of in-school police, and underfunded and overworked school staff. Cases categorized as STPP cases grew in the 1990s and coincided with the rise of zero tolerance. During the COVID-19 pandemic, students took classes virtually from their homes. But despite this, cases of students being suspended, expelled, and arrested continued, emphasizing the ever-remaining problem of the pipeline. The pandemic highlighted issues within the education system, and now with the return to in-person learning, there is a new opportunity to address them. While President Barack Obama tried to implement guidance to states to eliminate the pipeline, there are few enforcement mechanisms the federal government can use—this is largely due to the Tenth Amendment of the United States Constitution, which lays the groundwork for education to be under state control. Under President Donald Trump, the Education Secretary, Betsy Devos rescinded the Obama-era guidelines and supported an increase in school resource officers—this further exacerbated the STPP. *United States v. City of Meridian* (2017) shows that the United States Department of Justice (DOJ) has the ability to take legal action to combat the STPP, and this should be expanded by increasing the DOJ's authority. Furthermore, the DOJ should allocate funding away from school resource officers and towards ensuring restorative justice programs are implemented correctly—as the evidence suggests, if done properly these programs can be very successful. State governments have the best understanding of their local contexts, however, the federal government needs to take a greater role in holding them accountable for upholding systems that lead to children being imprisoned. The federal government can have either a positive or negative impact on youth and the education system, and it is time that it takes a more proactive position in ending the school-to-prison pipeline.

THE ETHICS OF ARTIFICIAL INTELLIGENCE IN THE CREATIVE SPACE

Rohan Naval

The Ethics of Artificial Intelligence in the Creative Space

BACKGROUND

Enacted in 1710, the Statute of Anne was the first legislative manifestation of copyright. Created to protect the works of authors, it was the foundational document in establishing intellectual property rights in the Western Legal Tradition.[629] It also established the concept of the public domain, the place in which works rest after their copyrights expire. In the United States, the idea of intellectual property has enjoyed similar protections from its inception, with creators being granted "the exclusive Right to their respective writings and discoveries" by the discretion of Congress.[630] The U.S Patent and Trademark Office, and later the Copyright Office, carry out this function today- as intellectual property has expanded to cover contents such as slogans, colors, and other such works that an individual feels has "a bona fide intention to use in commerce."[631] It is for this reason that intellectual property rights are important; and necessary for almost all work conducted in society. Similar to critiques of anarchy, a society lacking protections for original work would perpetually exist in chaos, where nobody could retain the moral rights to their creations.Such a place would be devoid of commerce, trade or artistic works- nobody would ever be able to sleep peacefully with the fruits of their labor, if it were not for intellectual property rights.

Artificial Intelligence is becoming a growing force in the "digital age," a time in which books have been replaced for screens, libraries have been replaced for PDFs, and everyone carries computational marvels in their pockets. It is not unearthly to imagine that even the mere process of thinking would be outsourced to technology. The term 'Artificial Intelligence' first arose when John McCarthy used it to question whether machines would be able to bridge the gap between executing commands and 'understanding' commands at

[629] Statute of Anne, 8 Anne c. 19 (1710) (England).
[630] U.S. Const. art. I, § 8, cl. 8.
[631] 15 U.S.C.A. § 1127 (1958).

a more fundamental level.[632] This represents a technological leap greater than the invention of the personal computer. The abilities of Artificial Intelligence range from machine learning, deep learning, and natural language processing. These processes allow AI to store data and learn from interactions-similar to the human brain. It also enables interaction through response, and these responses can be used to create sophisticated and intricate products, such as images, animations, or text responses.

The intersection of Artificial Intelligence and its outputs have immense ramifications for the creative space. One of the biggest concerns around AI is its ability to create realistic content, and in the future, create content that is virtually indistinguishable from an actual image.[633] Moreover, there are many questions about whether AI can be used as a tool, on academic and creative levels. The creative space will be impacted by the existing legal frameworks to which AI can fit into, the pathways in which creatives can protect themselves from AI-generated content, and the balance between AI's use as a tool and the threat it may pose to industries.

INTRODUCTION

In 1909, the Copyright Act expanded the legal protections to cover musical works beyond just a print format.[634] Followed by expanding protections in the following decades, other forms of art, such as architecture and paintings, are now protected by copyright. This principle has been understood to be central to protecting one's work. However, the definition of what comes under said "protected work" is a subject of increasing scrutiny. Aside from frivolous lawsuits regarding rights to common-use artworks, the nature of things being copyrighted is one that is becoming more diverse. Athletes now have contracts that negotiate image rights, and corporations may even copyright colors or phrases that they feel is central to their brand. As

[632] John McCarthy, *From here to human-level AI*, Artificial Intelligence, 171-Issue 18, 1174, 1180 (2007).

[633] Pranshu Verma, *AI can draw hands now. That's bad news for deep-fakes.*, (March 26th, 2023, 7.00 AM), https://www.washingtonpost.com/technology/2023/03/26/ai-generated-hands-midjourney/.

[634] 1909 Copyright Act: An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. (1909).

copyright evolves, it is important to understand the limitations of copyright, both in what the law applies to and what it encompasses on a given work. Section 107 of the 1976 Copyright Act, the latest general revision to Section 17 of U.S Code, clearly establishes the principle of "fair use"- the principle that a work can be used if it is transformative in nature, i.e if the purpose of the work is to comment on it and not to commercially profit off of it.[635] This is a limiting principle that shall be discussed over the course of this article when discussing creative works. Hence, it is evident how these two competing forces will dictate the answers to some questions posed.

Artificial Intelligence (AI), a concept that some believe to be the biggest leap in technology in the 21st century, has made replicability of protected works an issue for two broad reasons: similarity to original creations, and its range of abilities. Artificial Intelligence tools, such as ChatGPT and Midjourney AI, have been able to create works such as images, paintings, and cinema scripts, to name some of its capabilities. As defined by Sam N. Lehman Wilzig, AI machines must be "creative and purposive" like humans, and "exhibit curiosity."[636] This distinguishes it as a form of technology that can replace the more subjective aspects of human nature, which is much more different than previous machines that merely reduced human effort. Like most other technological advancements, there have been many detractors who claim that such inventions pose a threat to their way of living- such as the candlemakers during the advent of the lightbulb, or equestrians during the age of automobiles. To name a few contemporary examples, the *Screen Actors Guild and the American Federation of Television & Radio Artists* (SAG-AFTRA) union has gone on strike for such reasons, as they feel that the re-creation of their images and voice using AI is unethical and displaces their craft.[637] Their counterparts off-screen, the *Writers Guild Association* (WGA) also believe that their talents are being displaced and they have added that the training of these models uses their original works- something

[635] 17 U.S.C.A. § 107.

[636] Lehman Wilzig, S. N., *Frankenstein Unbound: Towards a legal definition of artificial intelligence*, 13(6), FUTURES, 442, 443 (2002).

[637] Dawn Chmielewski & Lisa Richwine, *Hollywood actors secure safeguards around AI use on screen*, (November 9th, 2023, 6:04 PM) https://www.reuters.com/business/media-telecom/hollywood-actors-secure-safeguards-around-ai-use-screen-2023-11-09/.

for which they are not compensated.[638] Furthermore, the legitimacy of AI works has been coming under scrutiny; such was the case with the song *"Heart on my Sleeve,"* a song that replicated the voice of popular artist Drake, which was removed from contention at the prestigious *Grammy* awards.[639] This represents a significant step in technology in the creative world; however, it comes with a significant challenge. Some of these challenges include how works produced may closely resemble the works of the original authors, and how this can abuse the image of creators. Furthermore, there is the larger question of whether work created by any AI tool retains any originality.

The questions to be asked all stem from the "forces" discussed before, in the context of AI. First, one must ask whether works from AI systems should be attributed to the system or the individual responsible for the input. Beyond this, there are questions regarding the training of AI tools and their outputs, and whether there are areas in which an AI model can overstep ethical bounds. Finally, there is an examination of existing laws governing AI, and methods by which concerned creatives can protect themselves.

EVOLUTION OF COPYRIGHT LAW

Principles of Intellectual Property

Intellectual property is the active ownership of 'abstract things,' such as ideas, creative works, and concepts. It represents a club good- a good which is non-rivalrous, but excludable.[640] One of the questions that arises from this is the need for intellectual property protections, or questioning whether this type of property has rights. One of the questions that comes up is that of replenishment; there is certainly an issue when property is stolen, as it cannot be replaced or duplicated,

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[638] Jake Coyle, *In Hollywood writers' battle against AI, humans win (for now)*, (September 27th, 2023, 5:35 PM) https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence-39ab72582c3a15f77510c9c30a45ffc8.

[639] Chloe Veltman, *When you realize your favorite new song was written and performed by…AI*, (March 27th, 2023, 5:00 AM) https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd.

[640] Patrick McNutt, *Public Goods and Club Goods*. ENCYCLOPEDIA OF LAW AND ECONOMICS, 0750, 927, 928 (1999).

whereas 'abstract ideas,' by definition, cannot be exhausted. Hence, is it necessary to protect these ideas? Furthermore, on what basis is ownership taken of these ideas? Finally, is there a limit to what ideas can be owned? These are some of the underpinnings of intellectual property, and its derivations- copyright, patents, trademarks, and trade secrets.[641]

"Copyright," as discussed here, is largely derivative of the theory of Intellectual Property.[642] Most theories of private property, such as that of John Locke, have a theory that centers around the product of one's labor. His famous saying, "*Man has a Property in his own Person,"* lays the foundation for this theory.[643] If believe that every human has the right to their own labor and they use this labor to create something from nature to something valuable, they can claim this as their property. The Lockean *Proviso* places limits on this, in which he says that the acquisition of property is only ethical when there is "enough and good" left for others. He argues that God has created all that exists in "the commons," and that the acquisition of private property is the transition of objects from the commons to ownership. There was also the utilitarian argument of labor, where John Locke says that since the process of adding labor to a product has a social benefit, it then follows that they are rewarded with property rights. This theory, however, does have its issues. For example, if numerous people work to build a house, do they all own the house equally, regardless of their contributions? Nevertheless, Locke's arguments could apply to intellectual property. If there is an *intellectual commons*, and someone performs intellectual labor to identify an object, they own that object by the same reasoning. This leads us to a problem- what are the limits of this process?

German philosopher George Friedrich Hegel attempted to critique this belief of property, as he saw property as being but a means to survival, and hence did not see intellectual property as falling within the same vein.[644] However, he did find property as being a means to express one's personality-

[641]Ted Hagelin, *A new method to value intellectual property*, 30, *AIPLA QUARTERLY JOURNAL*, 353, 353 (2002) .

[642]Peter Drahos, *A Philosophy of Intellectual Property*, 48, ANU PRESS TEXTBOOKS (2016).

[643]John Locke, Chapter V: Of property *in Second Treatise of Government*, 13 (Infomotions Inc. 2000).

[644]Peter Drahos, *A Philosophy of Intellectual Property*, 88, ANU PRESS TEXTBOOKS (2016).

hence giving some opening to the idea of intellectual property, even if not overtly stated. For example, some would say that artistic creations are the extension of personality, and hence qualify as property. This is a view held by Immanuel Kant and can be termed the "personality-centric" view of intellectual property. In the view of Hegel, citizens have 'subjective freedom,' of which consists of the fulfillment of individual needs and wants- hence viewing property as central to freedom. As Hegel did not intend to make an argument either for or against intellectual property, it has been pointed out that his argument of appropriation could apply to objects such as "DNA or animal life forms," which opens some questions about the limits of intellectual property.[645] This theory, produced by Hegel and adopted by Kant, elaborates on what property is, with 2 main points- property is the formal recognition of ownership, and the embodiment of individual will in a thing. Intellectual property is special in this regard, because it is not readily seen, felt, or observed, but rather conceptualized and expressed. He believes that ideas circulate all around us, and that in a civil society, the state would confer rights to these ideas to individuals; this, according to him, would pose a massive threat to society. He argues that since these ideas move all around us, across communities, areas, and borders, it logically follows that a global system would be required to govern these rights. As a result, many communities all over the world would be affected by this system. He mentions the field of science and others that produce knowledge using abstract ideas to this end. For example, if one were to claim ownership of the scientific method, would that not threaten the livelihood of every scientist? This is another reason for which he argues the economic impact of such a copyright system would hurt the poor in many cases. Hence, there is a similar problem as did Locke in the previous theory- the boundaries of what can and cannot be claimed as intellectual property is unclear.

In the context of Artificial Intelligence, this question may raise an interesting hypothetical: what if electronic systems were to gain personality? Peter Drahos raises this idea through the theory of an "electronic doppleganger," that would assume the identity, personality, and profile of a human, unbeknownst to the person it is imitating.[646] Hegel would argue that this

[645] *Id.* at 16.
[646] *Id.* at 16.

action steals the personality of an individual, and hence is an encroachment on freedom. However, there is an opposing argument that if someone performs the labor into the *intellectual commons* to create an Artificial Intelligence system that can replicate such works, they are entitled to its products as a result. Of course, this argument would entail some ethical questions, such as whether the AI used the work of the author it was attempting to imitate and whether the work that it used to develop said personality was consensual. This forms the foundational argument when considering creative works and Artificial Intelligence and will be present in every case relevant to the matter.

In summary, intellectual property can enjoy similar benefits to ownership that are already afforded to private property. The philosophies of Locke and Hegel, by different approaches, have justified the status of intellectual property. There are three parties that can claim to have a stake in any intellectual property case- authors, owners, and users. The role of authors are established as those who create their works via intellectual labor, to produce a creative work. They are also granted *de facto* ownership of this property via its production- now seen as a right afforded to all creators and inventors. The function of an owner in this system would be one who holds the intellectual property in name and receives any economic benefit or legal liability from the work. For example, if a painter were to create a painting and sell it to an art gallery, it would be clear that the painter- the author, in this case- has relinquished his or her right as an owner to the gallery, who may now receive all the consequences stated above. However, this ownership may not extend to the same extent as private property, taking the view of Hegel; assuming that intellectual property is the "manifestation of one's personality", the gallery owner may not have absolute liberty with the painting. They may not be able to change creative aspects of the painting, distort its intention, or claim authorship of the work. This relation will be relevant when it comes to AI, questions arise as to whether it is ethical for AI to "improvise" present works, or even use creative products in the machine-learning process. Furthermore, there is a third party that enters the mix here, which is the user. Anyone who uses copyrighted material may be considered a user, and they are ethically and sometimes legally obligated to state their inspiration or the copyrighted works they may use. Legal

history has found that the user has often been the source of substantial controversy, when authors claim that other authors have infringed on their copyrights- making them users that have infringed on copyrights. Moving this discussion to AI, the machine-learning process requires them to absorb large amounts of data, some of which may be copyrighted. Hence, the relevance of intellectual property to Artificial Intelligence raises numerous questions that must be clarified.

Foundations of Copyright Law

When discussing the use of copyright law, the bulk of the discussion centers around what such a system must protect. There are distinctions in applying the law, such as the categories of intellectual work that can or cannot be copyrighted; however, there is also a reasoning behind each of these decisions. These motivations are important in the context of AI, as they are necessary to understand what aspects of AI, if needed, must be regulated on either ethical or socially beneficial lines. This ranges from whether copyright laws are made to protect authors, whether they are necessary for authors to feel secure, and whether some copyright laws are necessary to allow for the freedom of expression and the progression of a society's culture.

Locke's theory of labor concluded that the labor of an author entitles them to the products of their labor, and that the logical extension to intellectual property is that this entitles the author to a copyright. This intellectual property was defined as originating from the "intellectual commons."[647] This can be seen as a justification for copyright; authors who create work via intellectual labor by extracting ideas from the commons are entitled to the products from it. However, this argument is not as straightforward as it may seem without assessing what "labor" entails.[648] Labor may represent any human effort or work done, whilst others may see it as the creation of something that is socially valuable. Granting copyrights on this basis will create problems when posed against each other. For example, if copyright protections are adjudicated based on human effort, artists with a more instinctive approach may fear the brunt of being unprotected, as an author who comes up with a literary

[647] *Id.* at 14.
[648] https://www.youtube.com/watch?v=HYJuhPf9s5k

work in his dream or by impulse may not have worked sufficiently to be entitled to protection. Furthermore, the factor of luck can also complicate labor. If someone took a picture of a centennial comet they found in the sky, they have certainly worked less than a NASA scientist who made the accurate calculations and parameters to point their telescope at the very same comet. Although proportionality may seem like a just way to define labor, this quantity can be represented within intellectual property itself. On the example of the comet, the NASA scientist will have a much clearer and intricate photo, which has come because of their work done in setting up the photo. The product of such an action must receive equal protections as the act of someone clicking a simple button on their phone. Sophistication must not be a barrier to copyright law, as even in the labor market, a minimum wage worker ideally receives the same labor protections as the executive of a Fortune 500 company. Therefore, utilizing copyright law as a tool to protect products of work plays a significant role in safeguarding authors from all walks of life.

Hegel's view created the theory of property rights that are the extension of one's personality, and that they may receive protections on such grounds. There are many possibilities when considering the "personhood" of ideas, and what happens when treating these ideas as conscious in the vein of the author.[649] When Hegel saw property rights as the manifestation of one's personality, this led to the idea that human rights were served by property rights, and that self-expression is one of these rights.[650] Hence, when authors create a work, the copyright may not only extend to the ownership of property in their name, but also to metaphysical connections they have to their work. If a sculptor makes a statue of Jesus Christ, the process of sculpting has created a bond between author and creation that does not end when the sculpture is completed. They may have had wishes for this work to be displayed in a church, or to showcase their idea of God. Hence, if this statue were to be purchased and placed in a mosque, or hidden in a basement, the author may see this act as an attack on their personality as it violates their self-expression. In other circumstances, authors may object on grounds of perversion of their identity, privacy,

[649] *Id.* at 16

[650] Peter Drahos, *A Philosophy of Intellectual Property*, 88, ANU PRESS TEXTBOOKS (2016).

autonomy, and their self-realization.[651] Laws can be created to this effect, as explored by the Romantic Author theory- that there can be grievances on works beyond the economic or possessive realm, and that there is a distinction in laws that protect publishers and laws that protect authors. The Romantic Author theory is a radical extension of moral rights, that all works are created by an independent original genius from nothing and exist beyond the reality in front of us.[652] This lays the bedrock for the theory of moral rights- an explanation of the boundaries to which this metaphysical connection can be defined and enforced to protect this intimate relationship that an author has with his work.[653] This explains the role of copyright laws to protect personality and how they may protect authors in a more holistic sense.

Finally, there is the cultural theory, which borrows from both theories listed above and is a growing force in copyright jurisprudence. Some copyright authors have long argued for a 'welfare theory'- that ensures that the creations of authors must be protected for other authors to feel empowered to continue their work. Like the welfare theory, this explanation lies on philosophy beyond property rights, and instead has its roots in political theory from the likes of Karl Marx, Plato, and Alexis de Tocqueville. This theory finds culture as creating the conditions necessary for human flourishment i.e. a form of positive law, and that the law must guide citizens towards this goal. It differs from the welfare theory, one also centered around community sentiment, as it assumes that humans are not the best judges of their demands and invokes Plato's idea of true law. As theorized by William Fisher, culture manifests itself through two main aspects: the ideal human life and distributive justice. Given that human nature flourishes under better conditions than others, and that these conditions cannot be determined by individuals themselves, social and political institutions may take on this onus of promoting human welfare.

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[651] Margaret Jane Radin, *Property and Personhood*, 34 STANFORD LAW REVIEW, no. 5: 957–1015 (1982).

[652] Jacqueline Rhodes, *COPYRIGHT, AUTHORSHIP, AND THE PROFESSIONAL WRITER: THE CASE OF WILLIAM WORDSWORTH*, Cardiff Corvey: Reading the Romantic Text, June 2002, 3.

[653] Samuel Jacobs, The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today, 23 Mich. Telecomm. & Tech. L. Rev. 169 (2016).

First, the ideal human life has creative characteristics, such as autonomy in making decisions, engagement with meaningful work and communities, and self-expression- all these characteristics are essential to human nature, and copyright must be used to establish laws to further all of these goals.[654] Distributive justice is an ideology aimed at universalizing the conditions for a good life.[655] This may find its feet when looking at patents for vaccines, or medicines, and whether these should be open to every producer to universalize health standards, and the same logic can be applied to other facets of human life. When relating both concepts to culture, broadly defined as containing art, education, political systems, and diversity, every aspect of culture leads to a more complete human life. For example, diversity offers people the opportunity to engage with communities, while art grants them autonomy and self-expression. On subjects governing these fields, copyright laws can be used to advance virtue in society. For example, the protections afforded to artists in their work allows them to preserve and showcase their works, which develops the ideal human life. Similarly, placing ideas into the public domain, such as calendars, facts, and ideas, allows for education on new matters and helps preserve objects that are used everyday. Although the cultural view of copyright rests on a rather controversial political theory and seems to put the state in a position of moral authority, it has a meticulous answer for the scope and function of copyright law from many perspectives.

Tenants of Copyright

Copyright law jurisprudence has found three main principles in applying the law and granting copyrights and trademarks to individuals. These issues relate to the strength of claims, the scope of the law and fixation.[656] When organizing the functions of copyright along these lines, it is found that theories of welfare and culture relate more to the scope of the law as they determine what can and cannot be copyrighted,

[654]William Fischer, "CopyrightX: Lecture 10.1, Cultural Theory: Premises" (lecture taught at Harvard Law School in Winter 2013).

[655]Lamont, Julian and Christi Favor, *Distributive Justice*, The Stanford Encyclopedia of Philosophy (September 26th, 2017) https://plato.stanford.edu/entries/justice-distributive/#Aca.

[656]Lydia Pallas Loren, *Fixation as notice in copyright*, 96:369 BOSTON UNIVERSITY LAW REVIEW, 939, 940 (2016).

whereas, the theory of fairness and moral rights address the strength of claims for authorship (moral rights in specific will be addressed later in this article). Both ideas have a long history in the American court system and have generally bent towards a much freer copyright system- one that places less onus on the authors, making copyright claims easier.[657] There is another issue related to what can be copyrighted, bringing up the concept of ideas and expression. The third important principle is fixation i.e. the registration of a work in a particular medium.[658] In practice, this means authors must have proof that their created work existed in the physical realm, and not just in the metaphysical one. This clarifies copyright law in 2 main aspects- it helps identify whether a work meets the threshold for copyright protection, and if infringing copies of the work are distributed by a defendant in a copyright claim; fixation helps settle any dispute.[659] These legal principles help form the bedrock of copyright; however, they may change based on subject matter such as musical works, literary works, and architecture. These three aspects of copyright are essential to understand the nature of content created by Artificial Intelligence, and what kind of content can have its own copyright protections or may be subject to copyright infringements.

The first aspect of a copyrighted work is originality. Under this umbrella, a work must be considered an independent creation, and must have a "modest amount of creativity." [660] Under the philosophy of intellectual property, a work that is not an independent creation may be considered the theft of intellectual labor or the appropriation of one's personality. This has been the subject of federal law, and upheld by inferior courts in which they have determined that "paraphrasing or copying with invasion" to be in violation of 17 U.S.C.A. § 101.[661] [662] These laws and decisions reiterate that a one-to-one copy

[657] *Id.* at 28.

[658] Douglas Lichtman, Copyright as a Rule of Evidence, 52 DUKE L.J. 683, 687 (2003).; See also Yoav Mazeh, Modifying Fixation: Why Fixed Works Need to Be Archived to Justify the Fixation Requirement, 8 LOY. L. & TECH. ANN. 109, 137 (2008).

[659] *Id.* at 28.

[660] William Fischer, "CopyrightX: Lecture 1.2, The Foundations of Copyright Law: Originality" (lecture taught at Harvard Law School in Winter 2013).

[661] 17 U.S.C.A. § 101.

[662] *Addison-Wesley Pub. Co. v. Brown,* 223 F. Supp. 219, 227 (E.D.N.Y. 1963) ("Copying is not confined to a literary repetition, but includes various

is not needed for a work to infringe copyright- rather that the intent to take work and transform it to make it appear otherwise is what could infringe on originality.[663] It logically follows that even appropriating a substantial part of work infringes on copyright. The second component of originality is that a work must have a "modicum of creativity." Courts have long held the "sweat of the brow" theory, meaning that copyright claims may only hold water such that the author has demonstrated a large amount of labor into the process.[664] Until the *Feist* decision, this had a grip over American jurisprudence on the subject; proponents argued that this allowed authors to receive full benefit for their works of compilation, and eliminating this doctrine would decrease the amount of authors who would be willing to compile works- stemming from an argument grounded in fairness.[665][666] However, *Feist* established the "modicum of creativity" doctrine- yielding that so long as authors could prove that their work had even a small amount of creativity, it passed the test for originality.[667] In this regard, *Feist* was instrumental as it dramatically lowered the threshold of proof needed by an author to demonstrate originality. One of the most popular examples for how this theory has evolved was in *Sarony*, which was long used by photographers and artists alike to control the dissemination of their work.[668] Napoleon Sarony's case rested on the fact that he had taken a lot of care to set up the photo and produce it, showing the labor

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modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration.").

[663] *Alfred Bell Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951)("A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it.").

[664] *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.* 281 F. 83, 88 (2d Cir. 1922) ("He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.").

[665] *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 111 S. Ct. 1282, 1285, 113 L. Ed. 2d 358 (1991)

[666] Tracy L. Meade, Ex-Post Feist: Application of a Landmark Copyright Decision, 2 J. INTELL. PROP. L. 245 (1994).

[667] *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 111 S. Ct. 1282, 1285, 113 L. Ed. 2d 358 (1991) ("The constitutional requirement necessitates independent creation plus a modicum of creativity.").

[668] *Burrow-Giles Lithographic Co. v. Sarony* 111 U.S. 53, 57, 4 S. Ct. 279, 280, 28 L. Ed. 349 (1884).

he put into the process. However, *Feist* was decisive in saying that there is no need to invest an amount of work to prove a copyright claim- meaning that even clicking a picture on an iPhone represents a "modicum of creativity" that makes a work original. This was the case with *Apple*, which was adjudicated in 1994.[669] When numerous computer manufacturers sued each other for infringement of copyright on a Graphical User Interface (GUI), the court held that works needed "virtual identity" in order to violate copyright- and that "substantial similarity" passed the test as laid out in *Feist*. This showed that the second threshold for originality, a modest amount of creativity, was necessary- albeit rather easy to demonstrate.

The next aspect of copyrighted work relates to the idea-expression dichotomy. Earlier under the *Principles of Intellectual Property*, the consequences of opening the abstract to copyright claims and named the scientific method was one amongst many ideas that, if claimed, could pose an obstacle to anyone in a given field. The idea-expression dichotomy is created to clarify this issue, and avoid such hindrances. This contention was established in *Baker vs. Selden* and gave rise to 2 doctrines.[670] The dichotomy, as laid out by Justice Bradley, came in this case where there was an appeal for copyright infringement over one author being accused of copying the illustrations of bookkeeping of another author:

> The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.[671]

This decision found that expression may represent something more intimate and original, and hence under the guise of fairness, does have an apparent need to be protected It also

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[669] *Apple Computer, Inc. v. Microsoft Corp.,* 35 F.3d 1435 (9th Cir. 1994) ("In determining whether manufacturer's GUI was infringed, district court properly compared works for virtual identity, rather than substantial similarity.").

[670] *Baker v. Selden,* 101 U.S. 99, 103, 25 L. Ed. 841 (1879) ("The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before.").

[671] *Id.* at 42.

explained the idea-expression dichotomy, as the opinion delivered found that Charles Selden's diagram of bookkeeping was not subject to copyright, as it was an object of "use." Under the functions of the law, this comes under the arguments of public welfare- as it may be difficult for institutions to operate with an extraordinary amount of copyrighted works that they are barred from using. This conflict was later enshrined into law in the 1976 Copyright Act.[672] As previously stated, there are 2 main doctrines that come from this theory- the Merger Doctrine and the Scenes a Faire Doctrine. There is another evolved doctrine, Copyright Estoppel, that also applies to the idea-expression dichotomy. The *Merger Doctrine* is often considered a defense to claims of copyright infringement and contends that there is often only one set of words that can explain a certain idea.[673] An example of this could be how something such as the Second Law of Thermodynamics can only be expressed through a certain set of words for a definition; as a result, anyone may use a definition of this law found in any physics textbooks, as there is no ability to deviate from it without changing its meaning. In a similar vein, the *Scenes a Faire* Doctrine refers to "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."[674] This prevents things that are essential to a genre, for example the idea of knights wearing shining armor when describing jousts in Medieval England. This Doctrine can promote the culture function of copyright, as it allows works to develop with a shared identity. Finally, the Copyright Estoppel, also known as the "Asserted Truths Doctrine," states that statements held out as facts and advertised as such are not subject to copyright.[675] This doctrine was used in 1988 in the *Nash* case, where Jay Robert Nash was accused of copyright infringement over speculation over the death of John Dillinger.[676] However, since this speculation was presented as fact, CBS News, the aggrieved party, could not stake a claim

[672]17 U.S.C.A. § 102.

[673]Lewis R. Clayton, *The Merger Doctrine*, The National Law Journal 27, no. 39, 1 (2005).

[674]Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 616 (7th Cir. 1982).

[675]Yiwei Jiang, Case Note, *Ninth Circuit Renames Copyright Estoppel the Asserted Truths Doctrine. U. Chi. L. Rev. Online* (2021).

[676]*Nash v. CBS, INC.*, 899 F.2d 1537 (7th Cir. 1990).

to copyright. Even if presented as mere speculation, it would be categorized as an idea and not subject to copyright. This doctrine largely explains why historians and other historical works do not enjoy much copyright protection.

The final aspect of copyrighted works is fixation. This is one aspect that helps greatly in adjudicating disputes and asserting primary ownership over identical works. Fixation relates to the need for a work to be fixed in a tangible medium for it to be copyrightable. In practice, this means that one cannot register an idea for copyright until it is in digital or written form that is presentable to the public. Fixation was first seen as an administrative requirement, as it was necessary for works to be registered with a patent office. However, since the 1976 Copyright Act, there has been no necessity for fixation by government ordinance- instead copyright protection expanded to all "fixed" works, and state laws would govern protections for "unfixed works."[677] Although considered outdated by few, it now serves the function of notice- it establishes at what point works have gained copyright protections. This will be helpful once in examining questions of infringement.

Fair Use and Reproduction

The earlier discussion of intellectual property entertained the idea of preventing all works from being copyrights, and that there must be a statement of the powers that a copyright entails. In this regard, Fair Use can be considered a limiting principle to copyright- it is the one tool that allows even copyrighted works to be used in a productive capacity. The "Fair Use" of a copyrighted work refers to its use for purposes such as criticism, commentary, reporting, education, or research.[678] The "culture" justification best suits such a law, as it allows works to be used for virtuous purposes whilst also respecting authorship. Fair Use makes up a large amount of the middle ground on copyright law, and has had 4 main principles since it was first introduced as a doctrine in American jurisprudence in 1841 in *Folsom vs. Marsh.*[679] Judge Joseph Story, the author of the opinion in *Folsom vs. Marsh*, was very influential in matters of copyright- he was one of the first judges to acknowledge

[677] 7 U.S.C.A. § 101.
[678] 17 U.S.C.A. § 106.
[679] *Folsom v. Marsh,* 9 F. Cas. 342, 347 (C.C.D. Mass. 1841).

copyright as being something of metaphysics- underscoring that copyright infringement was different from outright piracy. *Folsom v. Marsh* outlined 4 aspects of fair use- the purpose and character of the use, the nature of the copyrighted use, the amount of the work used in the derivative work, and the effect of the derivative work on the market, the purpose and character of the use is answered by whether a given work is "transformative," i.e it adds a value that addresses either a welfare or cultural justification of copyright. The amount of the work copied is informative when assessing whether the work copied is central to the derivative work, and the percentage of the work lifted- primarily addressing the idea of a labor theory of rights, and fair compensation for product. This is also an underlying factor for the final factor, as a derivative work that may be a market substitute negatively affects fair compensation for labor of the original author. These factors are very helpful in allowing works that provide substantive value to be promulgated, whilst protecting the author's intellectual labor. Some of the consequences of this include that an author may enjoy a larger following upon the spread of his work- it may also prevent the author from silencing critics, if they meet guidelines on transformation and the level of content used. Fair Use becomes especially relevant when looking at the machine learning process of AI, and whether all works that are used to train an AI model can be taken under Fair Use.

On the other side of Fair Use lies the issue of reproduction and piracy. Piracy is defined as duplicating and distributing copyrighted material without permission from the copyright owner, and is expressly prohibited by law.[680] It is considered the most explicit infringement on a copyright, as it consists of lifting an entire work. This varies largely from reproduction, which is a consensual act and generally requires a distributor to compensate authors for each reproduction or the right to reproduce. Reproduction does not have much of a foothold in AI, as it would be rather easy for models to employ small tricks to avoid claims of piracy; however, there may be an issue in when AI models access copyrighted work, and the use of piracy to acquire materials used in the machine learning process.

Moral Rights and Authorship

[680]17 U.S.C.A § 506 (a).

Stemming from the personality theory of intellectual property, moral rights are rights afforded to authors that exist beyond the reproduction of their work. They are considered the right to object to derogatory treatment of one's work and recognition of the author as the creator of a work.[681] This may seem to contradict the idea of Fair Use, which protects criticism of a work. However, contention over moral rights generally arises when an author has alienated ownership of their work- they retain moral rights in perpetuity, and they pertain to how the work is presented. They were first introduced in the Berne Convention, which gave authors a provision to "object to distortion, mutilation or other modification" of work that "would be prejudicial to his/her honor."[682] Moral rights are considered important for a variety of reasons. First, it helps protect the original meaning and identity of a work. This allows the author to choose the ideas with which their work is associated. Furthermore, it also allows for fair compensation of an author, to increase the association of an author with their work. This becomes valuable when, as explained above, there is a connection of an artist to their work as moving to the metaphysical realm. Moral rights allow this connection to continue even after works are under a different owner. Artificial Intelligence can be used to misappropriate works very easily, and moral rights are a counterweight to such actions. Moreover, there are also questions about whether work created by AI should retain moral rights. Although subject to circumstances, some may argue that there is not as much connection between the author of an AI works and other such means, since the "connection" that is the foundation of moral rights largely comes through the process of creating the work. Given that this is abridged with AI, laws must address this question after deciding the question of authorship and protection of AI works.

COPYRIGHT LAW IN THE UNITED STATES

Article 1 Section 8 of the United States Constitution mandates that Congress afford authors the "exclusive right" to independent writings and discoveries.[683] The largest manifestation of this mandate has come in the form of The Copyright Act

[681] 828 U.N.T.S. 221.
[682] *Id.* at 53.
[683] U.S. Const. Art. I, § 8, cl. 8.

and its subsequent amendment, enshrined in Section 17 of the U.S Code. Before the establishment of the first Copyright Act in 1790, inventors individually petitioned Congress for authorial recognition under the Constitutional clause.[684] The successive copyright and patent claims required the establishment of a general statute so as to not overwhelm Congress, which resulted in the creation of The Copyright Act of 1790. Composed of 7 Sections, this act was important for many reasons- its recognition of authors as the creators of intellectual property, the introduction of compensation for infringements on copyright, and guidelines for notice.[685] The Statute of Anne in England, previously stated as the inspiration for American copyright, originally gave copyright to printing establishments, and avoided any special provisions for authors.[686] The Copyright Act of 1790 was revolutionary in the fact that it set the foundation for universal rights and placed the rights of publishers as derivative from the author.[687] Despite that, the idea of "owning an abstract concept" such as a work of music or art was still not born. The law only covered printed copies of a text that were to be distributed, published, or sold- it only developed the idea that authors were entitled to their work, but did not yet outline what constituted an author. This act was significantly updated in 1831, with the introduction of musical works as another subject matter which was entitled to copyright.[688] Hence, the first development in American copyright law was the recognition of the author as the creator of a work.

Nevertheless, there were still issues with placing authorship as central to a copyright claim. Hypothetically, one person could copy portions of a book and still maintain copyright over a book. Given that apparatuses such as xeroxes or photocopies did not exist at the time, the labor associated with the work was sufficient for copyright; in effect, this negated most of the intellectual grounds of copyright, with the Lockean labor theory partly used here. However, several legal challenges arose from these events.[689] This laid the judicial foundation

[684] Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909*, Cambridge University Press 54 (2016).
[685] Copyright Act of 1790, 1 Stat. 124, 125 (1790).
[686] Statute of Anne, 8 Anne c. 19 (1710) (England).
[687] *Id.* at 57.
[688] 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, § 1, 4 Stat. 436, 436.
[689] *Gray v. Russell,* 10 F. Cas. 1035 (C.C.D. Mass. 1839).

for originality. Such was the finding in *Gray vs. Russell*, where Justice Joseph Story took the interpretation that an author has no extreme need for originality, but merely that they must not serve as a copier.[690] Although most of copyright law rests on this principle today, this was not the case for the imminent future, as seen in *Jollie vs. Jaques*, where the Supreme Court introduced the requirement of "substantial novelty" in copyright.[691] This was a view that slowly declined, and in *Feist*, as mentioned before, the modern view of copyright originality came to fruition, with the statement that works only require "a modicum of creativity" to be defined as original.[692]

The Copyright Act of 1976 is one of the most influential acts governing the subject till date.[693] It was the largest general revision of Title 17 of U.S Code, and incorporated most doctrines seen commonly in copyright today. First, there was the expansion of subject matter to include works such as computer programs. This was further followed by the Digital Millennium Copyright Act, which expanded most copyright mechanisms to the internet. The Copyright Act of 1976 was also integral for codifying *Fair Use* and declining formalities for copyright; works could now merit copyright protection from the moment that they are fixed in a tangible medium.[694] [695] In tandem with Artificial Intelligence, this act will be very important in deciding the extent to which different components of AI programs, such as prompts, creative inputs, and AI-created products.

ARTIFICIAL INTELLIGENCE AND AUTHORSHIP

Artificial Intelligence and Software Law

As stated above, Artificial Intelligence has 2 main features that distinguish it from previous technology- first, that they are "creative and purposive" and second that they "exhibit curiosity."[696] This distinguishes them from other computer pro-

[690] *Id.* at 61.
[691] *Jollie v. Jaques,* 13 F. Cas. 910 (C.C.S.D.N.Y. 1850).
[692] *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 111 S. Ct. 1282, 1285, 113 L. Ed. 2d 358 (1991).
[693] The Copyright Act of 1976, Public Law 94-553 (90 Stat. 2541).
[694] 17 U.S.C.A. § 107.
[695] 17 U.S.C.A. § 102.
[696] Lehman Wilzig, S. N., *Frankenstein Unbound: Towards a legal definition of artificial intelligence*, 13(6), FUTURES, 442, 443 (2002).

grams, as there is a degree of autonomy over the output. As the National Commission on New Technological Copyright Uses (CONTU) explored questions of software and copyright, there came several insights on how technology fitted into the copyright framework. Relevant to Artificial Intelligence, there was the introduction of the computer programs as subject matter of copyright, and that works complying with the standard of original authorship of the Copyright Act of 1976 were given copyright protections. This lays down the foundation of the first argument- that Artificial Intelligence prompts can legally be considered computer programs, and that the law must clarify the scope of originality needed to merit copyright protections. Upon this explanation, there is the question of the level of sophistication needed by a prompt to warrant protection. Finally, there are the legal steps necessary to clarify the current gray spots in the law relating to Artificial Intelligence.

Computer programs are defined as a set of statements or instructions to be used directly or indirectly in a computer in order to bring out a certain result.[697] In the context of a program like ChatGPT, the "prompt" function fits this exact definition- it is a set of instructions provided to Artificial Intelligence (computer) that give out a certain result. When making this connection, it may seem an open and shut case- that any prompt receives copyright protection, just as any book or any image does. However, as is the case with much of source code and other computer codes, there is a narrow definition of what can be protected by copyright. Some of these limitations come from the idea-expression dichotomy, the Merger Doctrine, and Fair Use- given that some have argued for protection of computer programs as literary works, applying these doctrines to AI prompts will be more straightforward than it has been to computer programs. Reverting to the definition of a computer program, one key aspect will be the "certain result" produced by AI. In taking these assumptions, a program will only receive copyright of a work if the author of the prompt has reasonable certainty of its output. One distinguishing feature of AI programs and conventional computer programs is replicability. Given that they are "exhibiting curiosity," an AI program will not always give the same product in response to a prompt- unlike a computer program which will run each program to the

[697]17 U.S.C.A. § 101.

exact same output infinitesimally. Hence, a prompt that has only vague connections to its final output should not receive protections of copyright. If a user inputs a generalized command, one that may be in contradiction of the "scenes-a-faire" doctrine because of its broad nature, it is fair to say that the user expects the AI to do the actual creative labor needed for this work. This is not a judgment on artistic value (i.e those that cannot paint should not get protections for prompts of AI images) but that prompts that have little creative input themselves should not receive copyright protections. However, under the idea-expression dichotomy, elaborate wording can be used to get around this issue. Federal courts have ruled on this matter, such as in *Continental Casualty Co.* v. *Beardsley*, that the underlying idea of a work may be copied, but its expression may be reserved.[698] This case also outlined the scenes-a-faire doctrine explained above. Hence, from a legal perspective, adopting AI prompts as a computer program will afford them copyright protections. Although the barrier of entry may be lower in that computer programs require a language and AI prompts do not, the details needed will be as vigorous as coding languages in reaching a sophisticated output- and it is for this output that AI prompts must be protected.

From the framework of computer programs, there are a few suggestions that can be offered to formulating prompts to receive copyright protections. The primary issues concern proving originality, copyright infringement, and doctrines of copyright. On the issue of originality, the standard of *Feist* in requiring "a modicum of creativity" does not provide a sophisticated answer. However, the dicta elaborating on how originality is determined by creativity, and not effort, does give credence to the idea of AI-generated works being protected by copyright law under the owner.[699] This shall invalidate most arguments against AI-generated works being denied copyright on the basis of being "low effort". It also means that simply rewording a

[698] *Cont'l Cas. Co. v. Beardsley,* 151 F. Supp. 28, 45 (S.D.N.Y. 1957), modified, 253 F.2d 702 (2d Cir. 1958) ("The same result also follows from the fact that a copyright never extends to the 'idea' of the 'work,' but only to its 'expression,' and that no one infringes, unless he descends so far into what is concrete as to invade that 'expression.' ").

[699] *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 111 S. Ct. 1282, 1290, 113 L. Ed. 2d 358 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' ").

prompt is sufficient to prove creativity. However, in the vein of computer programs, looking at applying copyright to the prompt will entail the Abstraction-Filtration-Comparison test, which looks at the idea of non-literal copying, established in *Altai*.[700] This three-part test was first created to identify whether code frameworks had been copied by employees moving between software companies, and consists of examining code on different levels. The *Abstraction* part looks at code on different levels, such as whether the "structure, sequence, and organization" of code are similar. Then, *Filtration* excludes areas of code that cannot be protected owing to doctrines such as those explained above, and *Comparison* examines the remaining ideas to determine non-literal copying. To move this framework to AI prompts, it would mean that competing prompts would not be very hard to be differentiated. For example, if two prompts were given to write a horror novel, elements such as haunted houses and deaths appearing in the prompts would not be sufficient to warrant infringement. However, if two prompts both have 5-part plot summaries, with marginally varying language, and similar conclusions, copyright infringements will be easier to justify, if it could be proved that the infringing party had access to the original prompt- although even changing one small element of the plot will display a "modicum of creativity." *Google vs. Oracle*, a recent case on the issue of Fair Use and the AFC test where Google was accused of copying "declaring" code, expanded Fair Use by ruling on Google's side.[701] The Court, surprisingly, gave more consideration to Google's use of the Sun API Java code, and the nature of the copyrighted work. Although the Court ruled in Google's favor on all other aspects, it justified Google's actions as Fair Use for how it would help other programmers. In a more developed AI world, where there are textbooks, courses, and tricks of the trade on how to best utilize AI, it appears that many prompts will be appropriated for different reasons- establishing them in the public domain and declaring them Fair Use. These programs and systems will also become the modus operandi of AI prompts,

[700] *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992) ("As a general matter, and to varying degrees, copyright protection extends beyond a literary work's strictly textual form to its non-literal components.").

[701] 141 S. Ct. 1183 (2021).

moving into the territory of the *Merger Doctrine*, and set up to gain protection over time.

Hence, interpreting AI prompts as code is an avenue that can be opened in the future. Like a computer program, the outcome of a work may not be protected in every case, but the source code may be protected as an expression of commands. The sophistication of prompts that will arise once AI is widely used as a tool like coding languages means that these prompts need to be protected to allow for AI works to flourish and launch a new class of works that embody human excellence.

Originality of AI works

However, there are issues that arise with the author of these artificially generated works. Computer programs require a "certain" output, and as stated before, AI models do not have such a capacity. The appeal of Artificial Intelligence comes in the end product; that one just needs a few words in mind- not a vision- to create something as complex as a painting, and so on for every subject matter. Another aspect of the output is variability: AI models can give numerous outputs for a single result, cutting against the "certain" output required. The counterpoint to this argument is that no painter can make the exact same painting 2 times, nor can a musician perform a piece identically. Hence, there is an argument that says that the computer program argument previously examined may be helpful for the prompt, but not so much for the output. Nonetheless, the two are not independent. When individual copyrights derive from a theory of personality, there are no restrictions on the expression of that personality. Such is the case with Artificial Intelligence, and it can be seen as a tool for expressing one's personality, just as it could be with computer programs, literary works, or any artistic material. One of the reasons Artificial Intelligence may seem suspicious in this regard is because it adds elements of its own, when it "exhibits curiosity." It goes without saying that if one relies on such elements when expressing personality, then their "personality" may not seem as strong or as appealing in front of the law. The challenge the law faces is exactly this- protecting the work of authors who use Artificial Intelligence to express themselves, whilst rejecting the work of individuals who use Artificial Intelligence to claim authorships.

This is a growing question in the law. Look no further than *Thaler vs. Perlmutter*, a case from this year that tackled the issue of AI-generated images.[702] Stephen Thaler was the owner of a machine called the "Creativity Machine," which possessed Artificial Intelligence. This machine, of Thaler's admission, "autonomously produced" this work, and he claimed the work to be his own in a "work-for-hire" scenario. Thaler's argument does not fit into theories of protection established before because he dissociates himself from the art entirely. His work with AI consists of proving that his models are sentient and act independently.[703] Hence, this ruling has not touched the questions of whether prompts themselves are indicative of originality. Thaler may have had a stronger case if he were able to prove his level of involvement in the work, then the court may have ruled in his favor. Much of the court's opinion discusses that "absence any guiding human hand," a work may not be protected under copyright. Although Thaler claimed that the AI "only acts at his discretion," this question was not addressed as he failed to inform the Copyright Register of this, and hence this question of this. In sum, this ruling is not as consequential for copyright as claimed. Given that many of the arguments, such as those forwarded in this article, are yet to be addressed by courts, the law is still ambiguous on the questions of Artificial Intelligence.

Hypothetically, Thaler would have had an argument had he made his contribution to the work clear. If he stated that the machine acted at his discretion, he may have had a stronger case- and there is precedent to support such an argument. Out of the 9th Circuit in 1997, *Urantia Foundation v. Maaherra* was a case that talked about works that came from celestial beings- relevant when discussing the question of authorship.[704] In this case, both parties agreed that the book in question was a celestial creation, but the court found that such a work may have never been created without human involvement and creativity. This argument can be applied to Artificial Intelligence, and

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[702] *Thaler v. Perlmutter,* No. CV 22-1564 (BAH), 2023 WL 5333236 (D.D.C. Aug. 18, 2023).

[703] Will Bedingfield, *The Inventor Behind a Rush of AI Copyright Suits is Trying to Show His Bot is Sentient*, (August 31st, 2023, 7:00 PM) https://www.wired.com/story/the-inventor-behind-a-rush-of-ai-copyright-suits-is-trying-to-show-his-bot-is-sentient/.

[704] *Urantia Found. v. Maaherra,* 114 F.3d 955, 957 (9th Cir. 1997).

with a combination of proving human involvement in prompts and final work, there may be a legal avenue to protecting AI as a helping tool in creative works.

CREATIVE ABILITIES OF ARTIFICIAL INTELLIGENCE

Artificial Intelligence and Reproduction

Artificially-generated content does run the risk of appropriating works to an extent that it violates Fair Use and becomes a form of reproduction. The "machine learning" process of AI requires other works and materials to be processed by the AI to develop intelligence.[705] The main point of contention comes when seen that some of these works may be copyrighted, or improperly credited. On principle, it does not seem necessary for these works to be illegitimate- after all, everyone has numerous books that influence each work they write. Nevertheless, this issue varies across subject matters, and using different legal theories under Fair Use, there are arguments that AI-generated works may not infringe on copyright. To resolve this, there must be additional mechanisms to ensure that original authors are protected in their works.

Artificial Intelligence Image Generators have their own distinct style and features, at least in their current iteration. Consequently, one could argue that works created by Artificial Intelligence could constitute a "parody" of works, as they have their own distinct style. *Campbell* defines parody as "the use of some elements of a prior author's composition to create a new one that composes an author's original work."[706] Take the example of Mickey Mouse, a character that has been widely parodied and has many mutilated copies for various purposes. If one were to feed his image to an AI image generator and create a new version of Mickey Mouse that comments on something in a substantive manner, then this work can be considered original and receive copyright protection, absent of previous questions regarding whether one can claim AI works under their own authorship. Hence, there is a path for protection of

[705] Jafar Alzubi, Anand Nayyar, & Akshi Kumar, *Machine Learning from Theory to Algorithms: An Overview*, 1142 JOURNAL OF PHYSICS: CONFERENCE SERIES (2018).

[706] *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 570, 114 S. Ct. 1164, 1166, 127 L. Ed. 2d 500 (1994).

AI generated images to be protected, even if they incorporate the work of other authors. The parody doctrine does sufficiently cover incorporating copyrighted works into Artificial Intelligence, and prompts must indicate the sources/influences of their work. Although this comes over the first concerns of the tedious nature of crediting each influence in the machine learning process, this can be broken down across subject matter. Such as the major body/object of critique of a parody, or multiple bodies which are fused to create one work, the development of AI should allow for such works to be listed within the metadata behind a given work.

However, there are regions where parody does not extend to. The first set of arguments relate to the development of AI. AI image generator models are becoming increasingly realistic, and although it was not initially generating lifelike images, it is approaching said point.[707] This may cross the line of parody for such images, as when they are posing as real images, they may enter the line of defamation. The other set of conflicts relate to subject matter. There are differences when appropriating different creations for use in matters such as images, voice, or anything relating to likeness is vastly different from that relating to other subject matters, such as music or software, which bring in the concept of non-literal copying. As a result, the best position for the law is to clearly identify works of Artificial Intelligence. The definition of parody has allowed for works to clearly be identified as either a parody or not parody, which helps in litigation. Consequently, there must be identifying characteristics of artificially generated works when they are displayed, sold/traded, or reproduced. Such measures would prevent bureaucratizing the creation and spread of AI works, similar to how copyright protections have evolved over the years. Laws should be constructed in a manner that makes sure both parties are aware of the nature of any artificially generated material, to understand how creativity has altered the "reproduction" of a given work.

Adopting Likeness using Artificial Intelligence

Since the advent of celebrity marketing, personality rights have grown in use, partly due to the economic benefits and also

[707] Matt O'Brien, *Tech companies try to take AI image generators mainstream with better protections against misuse*, (September 21st, 2023 at 5:17 PM).

due to the exclusive nature that some celebrities seek to guard with their public image. Personality rights are rights ordained mostly to public figures and celebrities to control commercial value and exploitation of one's name, picture, or likeness to prevent others from appropriating such value.[708] They are generally divided into 2 parts- the right of privacy, and the right of publicity, both around somewhat similar principles, but interpreted for inward/private protection and outward/public protections.[709] These rights of publicity include rights to control performance, adaptation, personality products, endorsements, and reputation. With the advent of deepfakes, technology allows AI to realistically recreate the image, voice and likeness of someone.[710] There are obvious issues that will arise from this technology- some of which are the misappropriation of likeness and defamation. The misappropriation of likeness extends to how images can be appropriated to give unapproved endorsements, performances, and violations of other publicity rights mentioned above.

This distinction of personality rights from other subject matter is important because of how personality rights attach the brand of an individual to them. Even many famous creative works are centered around the author of the work, and they gain most of the notoriety from any work. The 'parody' defense may be applied to individuals, but the idea of non-literal copying may not persist for obvious reasons, such as that one needs to be aware of likeness in order to copy it. Legal protections for moral rights exist in the Lanham Act and allow authors and likeness holders to object to "misleading descriptions of fact" and other aspects of work, such as the origin/authorship of works. The *Dastar* case clarified aspects of the Lanham Act, leading with the theory that the act only covers aspects of a work that are of consequence to consumers.[711] When applying this law to personality rights, it could be said that any person is the author of their image, and that they

[708] *Presley's Est. v. Russen,* 513 F. Supp. 1339 (D.N.J. 1981).

[709] Robert C. Post & Jennifer Rothman, *The First Amendment and the Right(s) of Publicity*, 130:86 THE YALE LAW JOURNAL, 89, 92 (2020).

[710] William Brangham, Harry Zahn, Michael Boulter, *How artificial intelligence is being used to create 'deepfakes' online*, (April 23, 2023) https://www.pbs.org/newshour/show/how-artificial-intelligence-is-being-used-to-create-deepfakes-online.

[711] *Dastar Corp. v. Twentieth Century Fox Film Corp.,* 539 U.S. 23, 24, 123 S. Ct. 2041, 2042, 156 L. Ed. 2d 18 (2003).

may object to mutilation under such laws and court decisions. These objections, however, are limited to the "nature, characteristics, and qualities" of a good, or element of likeness in this case, and have been read very narrowly by courts.[712] One of these cases from the Ninth Circuit came in the case of *Sybersound*, where the court rejected a claim of misrepresentation of authorship and copyright status.[713] Hence, in the absence of laws, authors might be able to make AI-generated content without infringing on existing copyright laws based on these arguments.

When expanded across subject matter, however, this issue becomes more complicated. Voice, especially for creatives in the music industry, is an integral part of likeness. This has become a point of contention as AI models have been able to realistically generate voice samples similar to their real-life counterparts.[714] The most famous case on this subject is the case of *Bette Midler vs. Ford*, and it gives a clearer idea of how likeness can be appropriated.[715] The Ninth Circuit ruled that "voices are not copyrightable," establishing that elements of likeness are not owned by their progenitors. However, the court's decision statedthat when likeness is "deliberately imitated," a copier "has appropriated what is not theirs' ' and hence infringes on copyright. This clarifies the question of likeness much beyond the Lanham Act- that authors may use elements of likeness, but not in service of endorsements or representation of messages on behalf of the person whose likeness they are using. Moving to Artificial Intelligence, it would come that nobody would be prohibited from making AI-generated images of people, or even deepfake videos. However, authors may not connect such creations to other implications common with likeness, such as endorsements and actions that impact the 'nature, characteristics, and qualities' of the original person.

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[712] United States Copyright Office, *Authors, Attribution and Integrity: Examining Moral Rights in the United States*, (April 2019).

[713] *Sybersound Recs., Inc. v. UAV Corp.,* 517 F.3d 1137 (9th Cir. 2008).

[714] Chloe Veltman, *When you realize your favorite new song was written and performed by.…AI*, (March 27th, 2023, 5:00 AM) https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd.

[715] *Midler v. Ford Motor Co.,* 849 F.2d 460 (9th Cir. 1988).

The *Midler* case has implications with the reproduction of work.[716] As mentioned before, the SAG-AFTRA strike arose in part because of the concerns that arose because of likeness and Artificial Intelligence; many actors were concerned that contracts they signed to alienate control over their image would result in the use of their likeness without consent, compensation, or control over its final output. However, the decision in *Midler* makes it very clear that parties that seek to recreate the likeness of an individual see immense value in their likeness, and that the reproduction is an attempt to subvert the market value, or compensation for the owner of the images.[717] Hence, it is clear that AI-recreated likeness may not have standing as independent creations, nor ethical under any "work-product" arguments. One of the reasons that likeness is much more powerful as an argument is because likeness confers notoriety and indicates economic value. Authors may parody work that has no economic value, but the same would never occur for likeness, due to an adverse reaction from consumers. Furthermore, the similarities involved in parodies of voices and likeness are much greater than that of other works such as visual art- constituting a market substitute and violating the Fair Use doctrine. Although this may work in principle, the Visual Artists Rights Act specifically does not afford protection to works such as motion pictures, literary works, or videos.[718] As a result, the SAG-AFTRA members may have to argue that the precedent set in *Midler* would apply to other areas of work- although they may be within jurisdiction of the Ninth Circuit, they would need stronger precedent to protect work that is filmed outside of the region. The SAG-AFTRA strike is an example of how a delayed engagement of the law with the concept of Artificial Intelligence may create rifts between different parties in the creative world. As such, there should be express legislation to confirm that any new rights granted by Congress to protect creatives may not apply to contracts that were negotiated before the advent of such protections. Also noted within *Thaler* was the principle that recognitions or rejections of copyright claims are not statements that they existed from the point of judgment, but merely that they existed all along, and that statements by the Copyright Office are mere confirmation of

[716] *Id.* at 87.
[717] *Id.* at 87.
[718] 17 U.S. Code § 106(A).

such.[719] A similar line should be taken along AI- that when new rights are recognized, they apply retroactively to all works, and that owners would need to negotiate any use of these works with their rightful authors.

These arguments against the reproduction of likeness also extend against deepfake videos and have implications for defamation claims. There is much that differs from a poster that accuses someone of racism and a video of someone saying a racial slur. Some of these include a stronger public perception, potential admissibility in court under false pretenses, and wider spread of such media. Moral rights, and the right of publicity, also play a big role in defamation lawsuits in the context of AI and likeness. As seen with the rights that actors have in regard to controlling the reproduction of their likeness, any individual may object to the context in which their likeness is portrayed- and there are cases in which this is tantamount to libel. Certain states, such as California, have laws that prohibit the distribution of "materially deceptive media" created by AI.[720] The Supreme Court has ruled that cases must meet the standard of "actual malice" when concerning matters of libel for public actors, as ruled in *New York Times vs. Sullivan*.[721] In cases where an author can be considered a public figure, as is the case with actors, singers, and many other creatives, few are often considered all-purpose public figures but many are considered limited-purpose public figures- especially if they have not attained significant notoriety.[722] Regardless, AI has the potential to portray these figures in a manner that violates the "actual malice" standard found in *New York Times vs. Sullivan*.[723] Deepfakes, especially those that can portray people in pornographic or criminal acts, do act with the knowledge that their portrayals are false, and as a result, be a foundation for lawsuits against the creators of such material.

Economic Impact of Artificial Intelligence

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[719] *Thaler v. Perlmutter,* No. CV 22-1564 (BAH), 2023 WL 5333236 (D.D.C. Aug. 18, 2023).

[720] Cal. Gov. Code § 11547.5.

[721] *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[722] *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

[723] *Id.* at 93.

An initial reform could mandate parties to disclose the nature of content across various contexts. Fair Use, one of the foundational principles mentioned above, explicitly does not cover work that is considered a "market substitute". As explained earlier with deepfakes, their potency enables such actions. Whilst there are deepfakes that are more deceptive in nature, i.e. that they attempt to pose as the author, there may be another category of works that are open in their status as an AI-generated creation, but nevertheless exist. Such is the question that recently arose with George R.R Martin's *The Winds of Winter*, a book that has been in the works for 10 years.[724] When a disgruntled fan used ChatGPT to complete this work, George R.R Martin brought a lawsuit to court, alleging "mass-scale copyright infringement". Although there is the question of whether one can copyright a writing style, there is a relevant question of how such a work could act as a market substitute. On a larger scale, this is currently happening in the music industry and the film industry. [725] Therefore, analyzing artificial intelligence must encompass its impact on creative work markets and its economic implications.

First, there is the conflict between AI content and Fair Use. Similar to the arguments forwarded in *Midler*, the adoption of likeness is a confirmation that one values the voice in question but is avoiding paying market value for likeness. This, in fact, does pose some Fair Use issues. First, this work poses as a market substitute- given that they wish to appropriate this image to create content that they would otherwise need the permission of the image holder for, they are taking away from the exclusivity of the image holder's authentic work. This also has ramifications in the market, where original creatives may suffer from lower exclusivity. Hence, the precedent set out in *Bette Midler vs. Ford* can be used to argue against this appropriation of images. Another notable ruling, *White vs. Samsung*, also discusses this theory that copying/imitation can be used to rely on the popularity of source materials, and

[724]Adam Bentz, *Game of Thrones AI Completed Books Removed After Being Noted In George R.R Martin Lawsuit*, (October 9th, 2023) https://screenrant.com/game-thrones-books-ai-completed-removed-lawsuit/.

[725]Jenni Reid, *A new Beatles song is let for release after 45 years- with the help of AI*, (November 2nd, 2023 at 9:37 AM) https://www.cnbc.com/2023/11/02/a-new-beatles-song-is-set-for-release-after-45-years-with-help-from-ai.html.

hence its appropriation constitutes some form of copyright infringement.[726] The main obstacle to this goal is that these decisions are resigned to the 9th circuit; such protections must be codified in federal law to ensure broader recognition of these rights into law, similar to the precedent set in *Zacchini*.[727]

Similar large-scale lawsuits have raised questions about whether generative AI poses a threat to entire creative industries, like the ongoing class-action lawsuit *Andersen et al vs. Stability AI*.[728] Coming out of the Northern District of California, Judge William H. Orrick found that the plaintiff, Sarah. H Andersen, was successful in alleging that there is unpermitted copying and reproduction undertaken by these AI models to train themselves; further underlining the financial incentives that such programs have when opened to public subscription programs. However, the case avoided claims of right to publicity questions, and instead streamlined to questions of "substantial similarity." This could be a point to not make a broad, over encompassing decision, or may come from a belief that since these works are not point-for-point copies, these arguments of right to publicity do not have standing in this case. However, the case does confront questions of how AI generated content can pose a threat to artists and creatives- it raises a query in the vein of the Candlemakers, and whether laws should be implemented to protect these artists against what some would call 'technological development.' This case is part of a collection of cases that stem from creatives seeking to prevent third parties from using AI from profiting off their works. Courts will have to deal with the question of whether AI is merely a tool, in line with how Google is a tool for research, or if it constitutes a new form of technology that poses a significant threat to creatives.

AI content also has ramifications for ethical disclosure and work credit. The Federal Trade Commission (FTC) has come out with a statement to "protect consumers," where they have identified that "a consumer may think a work has been created by a particular musician or other artist when it is created by an

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[726] *White v. Samsung Elecs. Am., Inc.,* 971 F.2d 1395 (9th Cir. 1992), as amended (Aug. 19, 1992).

[727] *Zacchini v. Scripps-Howard Broad. Co.,* 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).

[728] *Andersen v. Stability AI Ltd.,* No. 23-CV-00201-WHO, 2023 WL 7132064 (N.D. Cal. Oct. 30, 2023).

AI-product".[729] Given the common practice of trading creative work between record labels and film studios, this disclosure may be necessary to prevent a violation of Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[730] This is the economic argument against what was discussed under the intersection of Artificial Intelligence and defamation. The law has come around to the same issue, that there is a need for disclosure of the real nature of AI products, and this must be resolved by legislation. The FTC has also raised the question of whether AI models should disclose any copyrighted materials that it drew upon as source material; this was previously elaborated on when reproduction was discussed, and the law must contain provisions for creatives to have their original works credited. This will help original artists enjoy the benefits of AI whilst maintaining the novelty of their work.

LIMITATIONS OF ARTIFICIAL INTELLIGENCE

All the extracts above expand on how Artificial Intelligence, although has sufficient scope for protection in its use as a tool, does have significant ramifications for copyright. These explanations often came back to the need for the law to update itself to address the fundamental questions that AI poses. Whether it was the question of authorship, protection of creative works, or its relevance as a tool, reliance on precedent may not always give the best answer- they may guide the judiciary in how to act, but there will always remain certain questions that are unanswered by reaching to other laws. However, in this pursuit, legislatures must not be overbearing- with the advent of AI, it is inevitable that it will have a long-lasting effect on the creative process, and as a result, legislatures must not attempt to create all-encompassing statutes- merely addendums to resolutions already found in interpretations of the law, such as the ones in this article.

An initial reform could mandate parties to disclose the nature of content across various contexts. This most strongly

[729] Press Release, Federal Trade Commission, *In Comment Submitted to U.S. Copyright Office, FTC Raises AI-related Competition and Consumer Protection Issues, Stressing That It Will Use Its Authority to Protect Competition and Consumers in AI Markets* (November 7th, 2023) (located on ftc.gov).

[730] 15 U.S.C. Sec. 45(a).

applies to contractual exchanges and the presentation of works but may raise some questions in other contexts. In circumstances where record labels are trading songs, a failure to disclose audio as a deepfake is a misrepresentation of product as outlined by the FTC.[731] This could also present issues in the presentation of creative work, where moviegoers might feel misled by deepfake performances rather than the authentic performances of actors in movies. In such circumstances, it is necessary that an audience be informed through a disclaimer of the nature of the deepfake, even if the actor/actress has consented to the act. This idea comes from the same statute the FTC highlighted, in addition to it not being a proper representation of labor for an output i.e the work is a recreation/derivative work as opposed to an original work. There may be more overreaching measures, such as California's law against deepfakes, that some may argue are necessary to prevent the spread of misinformation or push false narratives.[732] Whilst the status of 'Big Tech Regulation' is still in the air, social media platforms themselves could institute policies on their platforms, or AI platforms could embed watermarks or indicators to help identify AI-generated content. Signaling is imperative in ensuring that creative works are recognized apart from AI works and receive different treatment.

One reform that could resolve conflicts over accreditation and similarity is the use of prompts as source code and the addition of tags to AI-generated work. This could also incorporate the use of the Abstraction-Filtration-Comparison (AFC) test to AI prompts.[733] This resolution could solve many questions before the law, such as the question of originality and authorship, and influences on a work. Essentially, such a system would require "tags", such as the original source/works fed to an AI to be attached to a work. This tag would explain the data pool from which the AI developed a final product, and the extent to which it did so. This will vary for subject matter but has many practical applications. For example, the tag for an AI picture for the prompt "Make a face mash of all the candidates running for president" would have a tag listing

[731] *Id.* at 101.

[732] Caroline Quirk, *The High Stakes of Deepfakes: The Growing Necessity of Federal Legislation to Regulate This Rapidly Evolving Technology*, PRINCETON LAW REVIEW JOURNAL (2023).

[733] *Computer Assocs. Int'l, Inc. v. Altai, Inc.,* 982 F.2d 693, 701 (2d Cir. 1992).

each face that was mashed. The tag may also show its sources for understanding the word 'facemash' and list any sources or references it used in that word. This will help list sources and help identify any copyrighted works used in the process. In such a case where a work has many sources, there can be multistage tags to help list these sources. Such an example would come within voice prompts, where the songs fed to imitate a voice could come under one set of tags and the sources to create lyrics would come under another category. This system would also give more insight to creatives, and they may be able to decide which of their works can be given to machine-learning processes for development. AI programs would be able to set qualitative guidelines and thresholds for the level of influence a work must have to be listed as a tag. Although this proposal is not a full-fledged, detailed system, this does solve the issues of influence and copyright infringement. Moreover, the interpretation of prompts as source code will allow for proof of originality beyond the visual point. This would require Congress to formally recognize AI prompts either as source code, or as literary works in their own right. This plan would be much more comprehensive in recognizing AI as a tool and prevent overbearing regulation from stifling progress.

Finally, another point that can bolster creatives' right is express legislation to underscore the rights already evident in judicial precedent. This legislation, at a federal level, is needed for 3 reasons: to universally protect creative works in the United States, to expand laws that cover different subject matters to incorporate AI, and to establish Fair Use guidelines in relation to AI. On the first point, this legislation should universally enshrine moral rights over the image, likeness, and voice of a creative's work. In practice, this means that film studios and record labels would need the express consent of an artist in order to use their likeness to recreate creative works to be published. This may also have implications for AI models, as users will only be able to create works that clearly present themselves as parodies. This will allow for Fair Use principles to be respected as AI gains popularity. This can be avoided through merging voices, provided there is no "substantial similarity" between both voices.[734] This is similarly easy for visual

[734] Clark D. Asay, An Empirical Study of Copyright's Substantial Similarity Test, 13 U.C. IRVINE L. REV. 35 (2022).

art, as this standard is low for this field. See *Bell.*[735] As discussed numerous times in this article, there is a need for the law to "update" itself- this refers to how numerous other areas of the law should incorporate the subjects of Artificial Intelligence. Aside from copyright, which has been the subject of this article, it has in the digital media space, or even the privacy implications of gathering materials for the machine learning process. Finally, formally incorporating copyright laws into AI will be the largest update of the law since the Digital Millennium Copyright Act.[736] Additionally, this reform must establish the recognition of artificial intelligence as a tool, allowing AI-generated content with a 'modicum of creativity' to be eligible for copyright. These developments maximize the creative potential and innovation of AI, whilst minimizing the harm it can do in infringing on copyrighted works.

STEPS FORWARD FOR ARTIFICIAL INTELLIGENCE

To summarize, the extent to which AI poses a threat to existing creative work gives considerable pause, especially when looking at the inability of the law to have even addressed the question. All the sections above discussed three different engagements of Artificial Intelligence with the law: that the law expressly covers the subject matter, that there are arguments that the law could cover a certain subject matter, or that it fails to do so entirely. It is obvious that the law should move away entirely from the latter, but it is not necessary that the law needs to dictate every minute aspect of AI. This is very similar to the debate of whether Artificial Intelligence itself is a radical development in technology, or merely an extension of technology that already exists. The answer to these questions should be reflected with changes in the law. The example used in this article is the use of prompts- they are not radically different from computer programs and source code, except for the change from coding languages to a written language. Such reforms ensure fairness and prevent an overcomplication of the law. There are many parallels with software law, such as the claims of threats to industries, the similar dichotomy of emerging and established technologies, and the role of courts in setting

[735] *Alfred Bell & Co. v. Catalda Fine Arts,* 191 F.2d 99, 105 (2d Cir. 1951).

[736] Byron Anderson, *A Primer on Copyright Law and the DMCA*, The Reference librarian 45, no. 93 (2006).

future policy.[737] Hence, these similarities should influence how the law progresses and adapts to this new technology.

A comprehensive understanding of copyright is needed to understand complaints that creatives may have regarding Artificial Intelligence using their content and likeness. It is evident that the principles established by philosophers such as George Friedrich Hegel are necessary for broader copyright protections; given the ability of AI to appropriate likeness, this is necessary to protect both all-purpose and limited-purpose public figures from deepfakes and other possible defamatory AI creations. Moreover, it also explains the justification for whether artists and other creatives can object to their works being used by AI in the machine and deep learning processes. This will have obvious implications for both the *Andersen* case and the rights of actors and writers in the *WGA* and *SAG-AFTRA* strikes.[738] [739] When including the "Romantic Author" theory into this context, it is evident why these creatives or studios could possess copyright over their creations, and AI tools would require the express consent of the designated party before incorporating such data into an output. Tenants of copyright such as the culture theory and the Fair Use doctrine will also allow for the appropriate development of AI itself, as it would allow for incorporating such materials. The analysis and measures presented so far all come out of the "emerging and established" facets of both the law and technology. Where AI may be new in its ability to adopt likeness, the law must also introduce provisions to protect creative work. The inverse is true for the role of prompts and software law. Hence, regulators must apply discretion to where regulation is needed on this basis.

Copyright will be one of the major controversies coming out of the development of AI, as is evident with the events listed previously and its forthcoming developments. There will first be issues regarding the legitimacy of AI-generated content, and then its originality. There will also be contestation over

[737] Sepehr Shahshahani, *The Role of Courts in Technology Policy*, 61 Journal of Law and Economics 37 (2018).

[738] Jake Coyle, *In Hollywood writers' battle against AI, humans win (for now)*, (September 27th, 2023, 5:35 PM) https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence-39ab72582c3a15f77510c9c30a45ffc8.

[739] Dawn Chmielewski & Lisa Richwine, *Hollywood actors secure safeguards around AI use on screen*, (November 9th, 2023, 6:04 PM) https://www.reuters.com/business/media-telecom/hollywood-actors-secure-safeguards-around-ai-use-screen-2023-11-09/.

the ethics of the AI process and its outputs. These questions will also seep into other parts of the law, as discussed with defamation and privacy. Amongst all of this, policymakers and the judiciary would do well to understand the ways in which AI could affect these different fields. As it pertains to the creative space, lawmakers must act quickly to protect authors where applicable. Furthermore, the proposed solutions would allow for the recognition of original creative work to prevent the need for an onslaught of regulation against AI. Courts, as seen with the lawsuits discussed above, will have a role to play in this emergence. As seen in the *Andersen* case, judges may be resistant in creating broad measures in the manner that Joseph Story did for copyright, and rightfully so, given that the force of law and complexity required to deal with AI must come from the legislature. To summarize, AI poses a series of daunting questions for the law, and beckons policymakers to be up for the challenge of the future.

A TOOL OR TOY: HAVE POLITICS RUINED IMPEACHMENT?

Owen Oppenheimer

A Tool or Toy: Have politics ruined impeachment?

ABSTRACT:
The popular legitimacy of impeachment in the United States is facing a crisis. States with varying impeachment procedures and partisan divides are struggling to hold officials accountable. If this continues, impeachment could become nothing more than a political tool to draw headlines and media attention. Impeachment must be reformed and used as the accountability tool it was intended to be, in order to guarantee its effectiveness for the future. This article examines the history of federal impeachment, outlines state procedures, and discusses the way an effective process was dismantled. It then synthesizes this information into what an effective modern procedure could look like. It is clear impeachment needs to change, and this article seeks to answer what those changes can be.

INTRODUCTION

From the inception of American impeachment at the Constitutional Convention of 1787, up until former President Bill Clinton's impeachment in 1998, Congress only deployed what Thomas Jefferson called "the most formidable weapon" in our political process twice against a sitting president.[740] Once for former President Andrew Johnson (for violating the Tenure of Office Act and fighting congressional reconstruction policy in the American South)[741] and once for the aforementioned President Bill Clinton (for perjury and obstruction of justice related charges).[742] However, as of recently, the once scarcely used tool of impeachment is being used at an alarming frequency. Looking at the federal level, in just the last seven years, impeachment has been used twice against former President Donald Trump, and could be used again against current

[740] Letter from Thomas Jefferson, the principal author of the Declaration of Independence (Feb. 15 1798) (on file with the United States National Archives).

[741] United States Senate, Impeachment Trial of President Andrew Johnson, 1868, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm

[742] H.R. REP. No. 105-611, at 1 (1998).

President Joseph Biden. Turning to the state level, the use of impeachment is also becoming more prevalent. In the last calendar year alone, various states have invoked their own articles of impeachment four times.[743] Incidents of impeachment have even been moving into uncharted territory, with all justices of the Supreme Court of Appeals of West Virginia, the state's highest court, being impeached for the first time in 2018. This high number can not only be attributed to increasing political polarization in our contemporary political climate, but can also serve as a symptom of a much larger problem: an uncoordinated and disorganized patchwork of impeachment processes. These differences can, at best, offer speedy trials, and, at worst, sabotage essential checks and balances in government.

While most states follow—nearly to the letter—the bifurcated and distinctly political model laid out in the United States Constitution of 1787, a number of states do not. The most notable outliers are the States of Oregon, New York, Missouri, and Nebraska. Impeachment is an extremely powerful tool, and with it being used more frequently in our new political reality, it is of paramount importance that the process remains fair, free from partisanship, and is used as the tool it was originally designed to be. This raises novel questions like whether the federal impeachment process should serve as the goal standard for the states. Or is there something to learn from the varying processes amongst the states? Or should there be a completely new standard that pulls elements from all of the processes? This article seeks to explore these very questions.

BACKGROUND

History of federal impeachment:

[743] *See* Acacia Coronado, GOP-controlled Texas House impeaches Republican Attorney General Ken Paxton, triggering suspension, (May 27, 2023), https://apnews.com/article/texas-attorney-general-paxton-impeachment-d0fa9114868adca63d55a21a53765c45; *see* Jacey Fontin, Pennsylvania House Votes to Impeach Philadelphia's Progressive D.A., (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/us/krasner-impeached-pennsylvania.html; *see* Stephen Groves, South Dakota attorney general impeached over fatal crash, (Apr. 12, 2022), https://apnews.com/article/pierre-south-dakota-impeachments-accidents-b82ddf729c15e95a80e83e88e4a44722; *see* Emmanuel Erediano, House votes 15 to 4 to impeach governor, (Jan. 13, 2022), https://www.mvariety.com/news/house-votes-15-to-4-to-impeach-governor/article_0996139c-73a4-11ec-bf05-df62799dbefc.html.

Impeachment is an English invention that dates back to ancient constitutional conventions, records of which are not codified. The first recorded instance of an impeachment occurred in 1376. This impeachment was brought against Lord William Latamir, the fourth Baron of Latimer for "acting falsely in order to have advantages for their own use."[744] Lord Latamir was impeached in his capacity as a royal advisor, and upon conviction he was removed from this post. Although a royal advisor was able to be impeached, during this time period, the scope of impeachment was severely limited and left the monarch immune from parliamentary accountability. This is a stark contrast from the idea of impeachment that developed later on, in which even the head of state and government are not immune. It was not until the 1700 Act of Settlement that, as a matter of law, someone facing impeachment could no longer be pardoned by the monarch exercising their royal prerogative of mercy.[745] It was from this system, where the head executive was still not held accountable, that the American idea of impeachment originated.

When drafting the United States Constitution, the framers looked at the English monarch as a model to avoid. Because the monarch had absolute power, the framers were warrying of an abusive executive seeping into the new nation. During the 1787 United States Constitutional Convention, a central issue for the framers was making a strong impeachment process that could act as an effective check and balance. It was from this idea of government accountability that impeachment in the United States, as it is seen today, was born. From this anti-monarchist mindset, the framers drafted Article II, Section 4 of the United States Constitution, which specifies who and what is considered impeachable: "The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[746]

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[744] *See* Library of the House of Commons: Parliament and Constitution Centre, Report, SN/PC/02666, HC 1, (UK); *see* Mary Volcansek, *British Antecedents for U.S. Impeachment Practices: Continuity and Change*, 14 The Justice System Journal. 42 (1990); *see* Frank O. Bowman III, British Impeachments (1376-1787) and the Preservation of the American Constitutional Order, 46 Hastings Constitutional Law Quarterly 755 (2019).

[745] Settlement Act (1700), (Eng.).

[746] U.S. CONST. art. II, § 4.

Under this constitutional provision, the President and Vice President are plainly identified as officials subject to impeachment. However, who qualifies as "civil officers of the United States" is not further defined, leaving a core aspect of who is subject to impeachment ambiguous. As such, in modern times historical practice informs eligibility for impeachment. Currently, as demonstrated by past impeachments going back to 1798, federal judges and cabinet-level executive officials have been regarded as "civil officers," and subject to impeachment proceedings.[747] Nonetheless, it is still unclear how far the definition of "civil officers" flows down, leaving much of the impeachment clause's applicability unclear. What is clear is that, in its current state, impeachment functions as an effective check and balance from the legislative branch on the executive and judicial branches of government.

Federal impeachment process:

When it came to deciding the actual procedure for impeachment, the framers once again looked to England's process for inspiration. In England, the House of Commons, which is the lower legislative chamber, has the power of initiating impeachments. The framers incorporated this into Article I, Section 3, Clause 6 of the United States Constitution, which says: "The House of Representatives . . . shall have the sole Power of Impeachment."[748] When creating the trial process, the framers again took inspiration from England. The House of Lords, the upper legislative chamber in England, tries all impeachments. And again, the framers implemented this in Article I, Section 3, Clause 6: "The Senate shall have the sole power to try all impeachments."[749]

Fundamentally, the impeachment procedure in the United States closely mirrors the procedure outlined in *Erskine May,* a parliamentary practice guide written by the Clerk of the House of Commons, Thomas Erskine May. May's writing, which is considered authoritative on parliamentary procedure, details the impeachment process:

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[747] List of Individuals Impeached by the House of Representatives, https://history.house.gov/Institution/Impeachment/Impeachment-List/.
[748] U.S. CONST. art. I, § 3, cl. 6.
[749] *Id.*

> "Ihe Commons, as a great representative inquest of the nation, first find the crime and then, as prosecutors, support their charge before the lords; while the lords exercising at once the functions of a high court of justice and of a jury, try and also adjudicate upon the charge preferred"[750]

Practically, the impeachment process in the United States functions in three steps. First, the House of Representatives initiates an impeachment inquiry to investigate and determine whether an impeachable offense has occurred. Second, the House must pass articles of impeachment, which include a list of formal allegations, by a simple majority vote. After this vote, the impeachment moves to the Senate for a trial, where conviction requires the concurrence of two-thirds of the senators present. In the event the president is impeached, the Constitution specifies that the Chief Justice of the Supreme Court of the United States will preside over the impeachment trial. However, the Constitution does not specify who will preside over the impeachment of other officials; so that responsibility ordinarily falls upon the presiding officer of the Senate, which is the vice president.

A unique feature of the process is what happens after conviction, as outlined in Article I, Section 3, Clause 7: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."[751] This clause ensures that in the traditional sense, impeachment is not a criminal or civil trial. This concept was reinforced by the Supreme Court of the United States in *Nixon v. United States* (1993), in which the Court held that impeachment is solely a political process and is nonjusticiable—which means it is not an issue capable of being decided by the courts. Since the Supreme Court deemed impeachments a political process, it did not set a standard of proof required for conviction, or otherwise require the incorporation of evidentiary rules into impeachment proceedings. This again highlights the impeachment process' distinction from traditional judicial proceedings. Despite some states adopting the criminal standard of "beyond a reasonable doubt," to secure a conviction, on the federal level

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[750]Thomas Erskine May, A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament, 56 (1844).

[751]U.S. CONST. art. I, § 3, cl. 7.

the standard, and any subsequent procedures, are left up to the determination of Congress.[752]

Importantly the framers originally designed what they believed to be an impeachment system that would protect the integrity of government and the decency of the people. As such, this system regarded impeachment as a non-partisan tool to be used to root out corruption in government. In fact, in Federalist No. 65, Alexander Hamilton cautioned against impeachment becoming a partisan tool:

> "The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."[753]

STATE IMPEACHMENT PROCESSES

The Beaver State:

The State of Oregon arguably has the most unusual impeachment process out of the fifty states. This peculiarity comes from the fundamental lack of any process at all. Originally, the Oregon State Constitution contained no provisions for impeachment or even the removal of public officials from office. That was until 1910, when through a constitutional amendment, Article VII, Section 6 was adopted. Although this new constitutional provision did not authorize "impeachment" per se, it allowed certain crimes by public officials to be prosecuted in the same manner as criminal trials.[754] But, the framers of the Oregon State Constitution did not wish to leave

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[752] Griffin Connoly, Impeachment comes with its own rules—-or lack thereof—- on standard of proof, (Jan. 21, 2020), https://rollcall.com/2020/01/21/impeachment-comes-with-its-own-rules-or-lack-thereof-on-standard-of-proof/.

[753] Letter from Alexander Hamilton, delegate to 1787 Constitutional Convention (Mar. 7 1788) (on file with Yale Law School Library).

[754] O.R. CONST. art. VII, § 6.

corruption to run rampant. Their chosen method of accountability was through initiating a recall election, as outlined in Article II, Section 18, Clause 1: "Every public officer in Oregon is subject, as herein provided, to recall by the electors of the state or of the electoral district from which the public officer is elected." To begin this process, 15% of citizens who voted in the last election must sign a recall petition. After this, the public officer has five days to submit either a statement of justification for the recall election ballot or resign.[755]

This method of government accountability is fundamentally different from that of the federal government. A recall election is a way for popular accountability, but it removes the ability to hold judges and civil officers accountable, as well as any other figures who are not elected. As of now, this recall process is slated to potentially change as a proposed constitutional amendment is considered. This proposal would add Section 34 to Article IV of the Oregon State Constitution, and it would create a process similar—if not identical—to the current federal impeachment procedure: "The House of Representatives shall have the power of impeachment of statewide elected officials of the Executive Branch for malfeasance or corrupt conduct in office, willful neglect of statutory or constitutional duty or other felony or high crime." In addition it would prescribe that: "The Senate shall have the power to try any impeachment received from the House of Representatives."[756]

THE EMPIRE STATE:

Looking to the State of New York, it also has an unusual impeachment process. The process begins in the lower house of the state legislature, the New York State Assembly. Although no sort of impeachment inquiry is constitutionally mandated under the New York State Constitution, the Assembly Judiciary Committee normally conducts an investigation prior to drafting articles of impeachment. Interestingly, the state constitution does not specify what sort of conduct may constitute an impeachable offense. Thus, the Assembly is afforded wide latitude to draft articles of impeachment and identify grounds.

[755] LaVonne Griffin-Valade, Recall an Elected Official, https://sos.oregon.gov/elections/Pages/recall.aspx#.
[756] H.J.R. 16, 82nd L.A., Reg. Sess. (Or. 2020).

These articles then only need to be approved by a simple majority vote, which would currently be seventy-six votes of the one-hundred and fifty member chamber. The articles are then transmitted to the High Court of Impeachment for a trial. The majority of this court consists of all sitting members of the New York State Senate, with the exception of the Senate majority leader. What makes this court's composition unique is that all seven members of the New York Court of Appeals, which is the highest court in the state, also serve on the High Court of Impeachment. If convicted, the impeached individual would be barred for life from public service in the state.

Analyzing this method for carrying out impeachment reveals that New York closely mirrors the federal procedure at the beginning of the process, by having impeachments originate in the lower house of the legislature. However, New York's process begins to deviate from its federal counterpart when it comes to not having a list of impeachable offenses outlined directly in the constitution. In addition, New York involves the judiciary directly in the process. This highlights two key issues: First, impeachment is necessarily removed as an effective check and balance against the judicial branch if they are fully integrated into the process. Second, it brings the judicial branch, which is theoretically supposed to be a non-political entity, into the impeachment process, which is exclusively a political act.

THE SHOW-ME STATE:

The State of Missouri also has an abnormal process of impeachment. The Missouri State Constitution requires all impeachments to begin in the Missouri House of Representatives.[757] The reason for impeachment, while not unlimited, can be exceptionally broad. These reasons can include: crimes and misdemeanors, misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, or any offense involving moral turpitude or oppression in office. The House puts articles of impeachment for a vote and if they achieve a simple majority out of the one-hundred and sixty-three state representatives, the impeachment proceedings progress. A trial will be held before the Missouri Supreme Court, unless

[757]M.O. CONST. art. VII, § 2.

the official being impeached is the governor or a member of the supreme court; in this case, the trial would proceed before a special commission, which is composed of seven eminent jurists elected from the Missouri State Senate.[758] The state constitution also specifies that conviction can not take place without five-sevenths of the state supreme court or special commission voting in favor of it.

This method of impeachment strays further from the federal proceedings. First, it expands the reasons for impeachment to an exceptionally broad definition. For example, the constitutional provision specifying "moral turpitude" as an impeachable offense opens up the floodgates for the potential weaponization of impeachment should the legislature have personal grievances with an official's actions; this is especially concerning in a state that is rife with hyper partisanship. Second, it turns impeachments into judicial proceedings by having the state supreme court preside over trials. Just like in New York, the use of the judicial branch in the impeachment process reduces the strength of impeachment serving as an effective check and balance.

THE CORNHUSKER STATE:

The State of Nebraska—different from Oregon, New York, and Missouri—has an entirely unique impeachment process due to the unusual way the state government is structured. Unlike the other forty-nine states, Nebraska has a unicameral legislature. This means that there is only one legislative chamber: the Nebraska Legislature. Given this structure, it is impossible to apply the existing federal impeachment process to Nebraska, as the initiation and trial of impeachments cannot be divided between two legislative chambers. However, Nebraska's governmental structure was not always this way. Although Nebraska originally had a bicameral legislature, it still had a deviant version of impeachment. The original 1875 Nebraska State Constitution provided for two legislative chambers: the House of Representatives and the Senate. The constitution also allowed for the authority of impeachment to originate in either chamber:

> "The Senate and the House of Representatives in joint convention shall have the sole power of impeachment . .

[758] S.J.R. 33, 100th G.A.., Reg. Sess. (Mo. 2020).

> . Upon the adoption of a resolution to impeach by either house the other house shall at once be notified thereof and the two houses shall meet in joint convention for the purpose of acting on such a resolution."[759]

After this meeting of the chambers, articles of impeachment would be delivered to the Chief Justice of the Nebraska Supreme Court, and a session of the court would be called within ten days.[760] After the Senate was disbanded in 1934, the impeachment process had to fundamentally change. However, given the rarity of the process, amendments relating to the authority of the now unicameral legislature, changing the powers delineated to the former bicameral chambers, were not officially made until 1971.[761] Besides some wordsmithing, the "new" impeachment process remained largely the same. Impeachment would not fundamentally change until 1986, when the time frame of the supreme court meeting to hold a trial for impeachment changed from the original ten days to trying impeachment in an "expeditious fashion."[762] This 1986 constitutional amendment also significantly changed the way the trial proceeded—instead of a unique political process it shifted to function as a civil trial: "The trial shall be conducted in the manner of a civil proceeding and the impeached civil officer shall not be allowed to invoke a privilege against self-incrimination. Except as otherwise applicable in a general civil case."[763] With this civil proceeding status comes a written standard of proof. As specified by the state constitution, a conviction requires a two-thirds majority of the state supreme court voting in favor and "that clear and convincing evidence exists indicating that such person is guilty of one or more impeachable offenses."[764] The results of conviction have essentially remained the same since the inception of the process: disqualification from public service and the subjection to prosecution.

Currently the process, which reflects the change to a unicameral legislature, functions as follows. First, a simple majority of members of the Nebraska Legislature must agree to adopt articles of impeachment against a civil officer. This may happen

[759]N.E. CONST. art. III, § 17. (1875).
[760]*Id.*
[761]L.R. 318, 89th Leg., Reg. Sess. (Ne. 1986).
[762]L.R. 318, 89th Leg., Reg. Sess. (Ne. 1986), art. III, § 1.
[763]*Id.*
[764]N.E. CONST. art. III, § 17.

in either a regular or special session. After articles are adopted, they are delivered by the Clerk of the Legislature to the Chief Justice of the State Supreme Court. In case of the impeachment of any members of the State Supreme Court, the Clerk of the Legislature will deliver the articles to the clerk of the capitol judicial district. The clerk of the capitol judicial district will then choose seven random judges, also from the capitol judicial district, to try the impeachment. When it is brought against a civil official, following the normal transmission to the Chief Justice, the trial will be managed by two members of the legislature as impeachment managers.

Reflecting on this process, Nebraska has continually made due with the resources it has provided to its unicameral legislature. The original process, when Nebraska had both a House of Representatives and a Senate, reflects a desire for consensus from two chambers. It also reflects a desire for impartiality, with the final judgment being held in front of the court. When the size of the legislative branch was reduced to one chamber, the flexibility and timeliness of impeachment was drastically affected. Ultimately, Nebraska's impeachment process is fundamentally a product of its one chamber legislature, and while it is rarely used, it seems to be an effective tool.

ANALYSIS

Original purpose of impeachment:

Impeachment was initially designed by the English as a tool for the protection of parliamentary democracy. The English saw impeachment as a way to ensure the integrity of their elected government through a sort of collective responsibility, where ensuring the "good behavior" of members is the responsibility of all.[765] This way of looking at impeachment has led to obsolescence, in favor of things like collective cabinet responsibility.[766] However, in the United States, our view of impeachment as a way of checking the executive and judicial branches has survived. But recently the effectiveness of impeachment as a tool is under threat.

[765] Raoul Berger, Impeachment: The Constitutional Problems, 132 (1974).
[766] Jack Caird, Impeachment, Research Briefing (Jun. 6, 2016), https://commonslibrary.parliament.uk/research-briefings/cbp-7612/.

Originally, impeachment was never designed to be a civil or criminal trial, but that is what it is beginning to be treated as. Much like the refreshing tree of liberty described by Thomas Jefferson, our democracy must be refreshed by the effective impeachments of tyrants. This is being challenged by pressure from executives who argue stricter standards of proofs need to be adopted for convictions for impeachment. A perfect example of a place where impeachment has been mutilated to beyond effectiveness in the State of Texas.

Texas as a case study:

The first Texas State Constitution was drafted during the Reconstruction Era of the 1860s, a period in which there was an autocratic and centralized government under Governor Edmund J. Davis. It was from living under this experience and influence that the current governing document, the 1876 Texas Constitution, was drafted. At its core, this constitution was an anti-corruption document that was designed to ensure the state was protected from autocracy—directly rebuking leaders like Governor Davis. It included things like shorter terms in office and lower salaries, local control of schools, severe limits on powers for both the legislature and the governor, low taxation and state expenditures, strict control over corporations, and land subsidies for railroads.[767]

One of these anti-corruption measures was a robust impeachment procedure. It functioned as follows: The Texas House of Representatives has the sole power to begin the impeachment process, without the need for an investigation or inquiry. The new constitution specified exactly who can be impeached: "[the] governor, lieutenant governor, attorney general, treasurer, commissioner of the general land office, comptroller, and the judges of the Supreme Court, Court of Appeals and District Court."[768] There is also a specified range of what punishment can be imposed upon conviction: "Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust, or profit, under this State."[769] These strict definitions un-

[767]Joe Ericson, Ernest Wallace, Constitution of 1876, https://www.tshaonline.org/handbook/entries/constitution-of-1876.
[768]T.X. CONST. art. XV, § 2 (1876).
[769]T.X. CONST. art. XV, § 4 (1876).

der the state constitution provide for a process that is specific enough to clarify who is subject to impeachment. It also leaves a very loose interpretation of what is impeachable, not specificing any certain charges, so that any government official can be held accountable and removed if they violate the public trust in any way. This, combined with Texas' initial two year term limits for executive officers, helped hold a state notorious for corruption in check.[770] All in all, the framers of the Texas constitution were intent on ensuring rampant corruption did not control the state government.[771]

However, over the last nearly one hundred and fifty years, Texas' impeachment process has slowly been eroded from a sharp sword designed to cut out corruption into an ineffective dull butterknife. To truly understand what happened, one must look back to Proposition 8. This was a ballot measure to amend the 1972 Constitution and it led to state executives serving four year terms.[772] This removed the first constitutional check and balance against the executive branch in Texas: the will of the people. Now if an executive does something to violate his office during his four year term, the only way to remove him is through impeachment. When this amendment was passed before the gubernatorial election of 1974, a governor was elected for the first four year term in state history.

Against the backdrop of extended term limits, impeachments served as the only tool to keep government officials in check. But this soon began to erode and strain the impeachment process, as first seen with the impeachment of a district judge in West Texas. In 1975, the legislature launched an investigation into O.P. Carrillo, a Judge of the 229th Judicial District. On August 5, 1975, the House of Representatives adopted articles of impeachment against Judge Carrillo. A month later on September 3, 1975, the Senate convened as a High Court of Impeachment to consider the Articles of Impeachment. On January 23, 1976, the Senate sustained Article VII of the Articles of Impeachment, which was for conspiracy related charges. This resulted in the removal of Judge Carrillo from office and he was also barred from holding any office of honor, trust or

[770] T.X. CONST. art. IV, § 5 (1876).

[771] John Cornyn, *The Roots of the Texas Constitution:Settlement to Statehood*, 26 TX. T. L. REV. 1089-1218 (1995).

[772] S.J.R. 1, 62nd Leg., Reg. Sess. (Tx. 1971).

profit under the state.[773] But during Judge Carrillo's impeachment trial, things took a turn for the worse: when lending his services pro-bono to the Senate, Leon Jaworski, who notoriously served as the second special prosecutor during the Watergate Scandal, pushed to change impeachment rules in Texas and adopt the standard of proof normally used in criminal trials:

> "Standard of Proof: If, after decision on pleas and motions under Rule 15, there remain any issues to be tried, the trial proceeds. The standard of proof is beyond a reasonable doubt, and is put upon the managers of the House of Representatives who are entitled to open and conclude the presentation of evidence and argument in the case."[774]

This new standard of proof based on the criminal standard was the straw that broke the camel's back for the effectiveness of impeachment in the state of Texas. Looking forty years later in 2022, during the impeachment of Attorney General Ken Paxton, the impeachment managers for the House of Representatives had to grapple with this. The impeachment managers produced over four thousand documents of evidence to support their articles of impeachment. However, because there was now such a high standard of proof, Attorney General Paxton—who is arguably one of the most corrupt officials in state history—was acquitted and allowed to remain in office. This is a perfect example of how a once effective impeachment system can be eroded to fail in the most obvious of cases.

Proposed new standard:

The impeachment process in Texas—as also discussed with the processes in Oregon, New York, Missouri, and Nebraska—has deficiencies. These five processes all represent a unique way to handle this important accountability tool but also highlight how chaotic non-standardized impeachment can be. Because perceptions of corruption and malfeasance are rising across the country, to restore trust and accountability a new impeachment process must be adopted—and this process should be

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[773] T.X. S.REP. RECORD OF PROCEEDINGS of the HIGH COURT OF IMPEACHMENT, On the Trial of O.P. Carrillo Judge, 229th District Court, 1572 (1976).

[774] *Id.*

standardized at both the federal and state level.[775] The definitions under the federal impeachment process are the gold standard for what an impeachment should look like. While not as well defined and pointed, as seen under the Texas State Constitution, it is the vagueness under the federal impeachment process that gives it one of its biggest advantages: flexibility. While states like Texas list in their constitutions specific officials that can be impeached, the federal definition of "civil officers" being sweeping across layers of government allows for more officials to be held accountable. States like Missouri stipulate in their constitutions specific crimes that can be prosecuted, but the federal "high crimes and misdemeanors'" standard allows impeachment to apply broadly. It can apply to anything from sexual immorality, like seen in the impeachment of President Bill Clinton in 1998, or the violation of the law, like seen in the impeachments of President Donald Trump in 2019 and 2021.

While federal impeachment has been an effective tool, even without convictions, steps must be taken to ensure its place as a tool in our own arsenal of democracy at the state level. First, a standard of proof based on the criminal standard should not be codified in any state constitutions. Impeachment was never intended to be effectuated as a criminal trial, it was designed merely as a tool to investigate and remove potentially corrupt officials. Second, impeachment must remain strictly separate from the judicial branch. States that involve the judiciary in the impeachment process are removing a vital check and balance against their judicial branch. Finally, legislatures must feel free to exercise the tool of impeachment whenever they deem necessary. In theory, if an official is not corrupt, they will surely survive an impeachment—a contrary result is certainly a risk, but the benefits of this broad power in the impeachment system outweigh the risks. Corrupt officials can only be swiftly removed from office if the impeachment process is open ended and flexible—this is the ideal.

Looking more specifically at how this ideal impeachment process would work in practice, first, initial investigations and inquiries to initiate impeachments should be optional. Should

[775] Dress, Brad, Nearly one in three Americans say it may soon be necessary to take up arms against the government, (Jul. 24, 2022), https://thehill.com/homenews/3572278-nearly-one-in-three-americans-say-it-may-soon-be-necessary-to-take-up-arms-against-the-government/

there be enough support by a simple majority in the House of Representatives (or the state equivalent lower chamber), articles of impeachment shall be transmitted to the Senate (or the state equivalent upper chamber). A trial shall be scheduled within one month to ensure a speedy trial and shall take place in the Senate. This time frame shall allow for enough time for evidence of wrongdoing to be collected, while also preventing opportunities for the process to drag on and potentially get bogged down by backroom political dealing. During this investigative period executive privilege will be waived, the charged official no matter what office they hold shall be required to comply with all subpoenas issued by the Senate for fact-finding purposes. The charged official shall also be immediately suspended from their office during the pendency of the levied charges. When it comes to the suspension of a judge all business of their court will be halted. After all of this evidence is collected, the House shall appoint impeachment managers who will present all of their evidence in a trial before the Senate. Importantly, under this new proposed standard, members of both chambers shall be prohibited from releasing information to the public to intentionally taint the process—evidence against the charged official shall be released publicly at the conclusion of the trial. More importantly, all donations to members of both chambers—in any form: to their campaigns, charities, trusts, or any other financial account—shall be frozen. As seen in Texas with the impeachment of Attorney General Paxton, there was a lot of outside influence in the process, and this was a big detriment.[776] While this has the opportunity to potentially upset campaign rhythms officials should focus on the quality of the job at hand and not on being reelected. The danger of influential founding is too great.

Just like the procedural rules for federal trials, when a trial is held before the Senate, a gag order would be issued to those involved no media shall be permitted—again attempting to provide a safeguard against outside influence or impeachment being decided by a court of public opinion or falling victim to political gaming. However, this shall be where the similarities with a criminal or civil trial end: in particular, there shall be

[776]Jasper Scherer, Lt. Gov. Patrick raises $3 million from pro-Paxton group ahead of impeachment trial, (Jul. 18 2023), https://www.houstonchronicle.com/politics/texas/article/dan-patrick-paxton-impeachment-18206505.php.

no established standard of proof. The only thing that shall be required for a conviction is agreement of two-thirds majority of the Senate. This is greater than the simple majority in the House needed to transmit articles of impeachment, and shall serve as a final safeguard to theoretically prevent a frivolous use of the process by requiring such a large threshold of senators to agree. There would have to be near consensus in the Senate that the evidence was enough to convict and remove from office.

Upon conviction, the charged official shall be immediately removed from office and prohibited from serving in public office again. At this point in the process, there shall be no bar on judgment extending beyond removal from office. In fact, a criminal referral of the charged official to a law enforcement body shall be permitted. This body shall then be allowed to make its own determination about whether criminal charges should be filed against the official for the conduct that resulted in their impeachment and subsequent conviction. On the flip side, if the two-thirds threshold is not met in the Senate, the charged official shall be acquitted. If acquital occurs, the official shall be restored to their office and compensated with a salary for the months they were suspended while facing impeachment.

At the conclusion of trial—when the official is convicted or acquitted—all transcripts, records, and pieces of evidence will be released to the public, except for the record of votes. This exclusion from the voting record becoming public record is crucial to preventing outside influence in the impeachment process—knowing the votes will become public can often determine the outcome of an impeachment proceeding before it even begins. Looking back at Texas with the impeachment of Attorney General Paxton, it has been shown that the senators favored their reelection prospects more than voting for what was right.[777] But this exclusion will not be indefinite and will expire after fifteen years, allowing the voting records to later be released to the public—at this point, with any term limits in place, turnover with elected officials will reduce the threat outside influence poses.

[777] Patrick Svitek, GOP senators, open to Paxton conviction, flipped when they realized they were still short the votes (Sep. 20, 2023), https://www.texastribune.org/2023/09/20/ken-paxton-senators-dan-patrick-vote-impeachment/.

Practical implications:

This new proposed standards should be standardized not only on the federal level, but should be adopted by all states. However, no matter how good a standard is, it will only be as good as those acting upon it. With this in mind, it is worth noting that impeachment cannot exist in a vacuum. There will always be the opinions of constituents, existing personal relationships with officials being impeached, and quid pro quos. Politicians are more likely to do something to guarantee their reelection, rather than doing something because it is the right thing in the long term. On the flipside, as previously noted, the reasons for impeachment can also be frivolous—it is possible to have an abusive legislature. But because the legislature, at least in theory, is more directly accountable to the people, this is an inevitable risk and should not prevent the proposed reforms to the impeachment process.

Turning back to Texas, one can see where the impeachment process was intense and influenced by questionable motives. The charges were initiated by House Speaker Dade Phelan after Attorney General Paxton had been criticizing his conduct as speaker. With this in mind, it is entirely possible to view Speaker Phelan's actions as a purely political response to get back at Paxton. There is also the question of the result of the impeachment, in which Paxton was cleared of all charges, despite an ample amount of evidence that he did commit the alleged crimes. There were even more political implications: many populists were supporting Paxton, and as discussed, many of the senators were swayed by their fear of losing their primary election coming in the next year, as opposed to voting based on the evidence.

Just as a practical matter, impeachment will always exist in a political space with potential bad actors everywhere; improper influence and bias can never fully be removed. And realistically, it will be extremely difficult to implement a standardized impeachment process for every single state because there are a swath of considerations that would need to be made—whether they be cultural, economical, or purely political, there are many things to consider. Albeit pessimistic, impeachment will likely remain fractured for years to come. Even if the new proposed standard above cannot be implemented in its entirety, it can

certainly serve as a model for smaller reforms to implement incrementally.

CONCLUSION

Ultimately, impeachment is a messy process. It varies from state to state, has flexible definitions, and is subject to the ugly forces of politics, both personal and public. While impeachment was originally designed to root out corruption, it is slowly being changed into a sort of circus process where political corruption is laid out on the floor in front of the public, but nothing is done. In its current state, the different impeachment processes on the state level can not satisfy America's urgent need for accountability. This certainly does not mean that impeachment is a useless process. Improvements, like the reforms listed above in the new proposed standard, can certainly be made, even if they are just implemented incrementally. While the proposed standard is fitting for the current needs of our democracy, new evaluations will need to be made as time progresses and our political climate continues to evolve. Such problems—which is that issues quickly evolve—are the nature of democracy, and such problems have slowly been resolved over time. Much like how we developed our original impeachment process by looking at the past, today we can look at other states and draw together the best impeachment process we can as a nation.

A DEFENSE OF THE EXPANSION OF FEE-OFFSETTING STATUTES TO PROTECT INDIGENT DEFENDANTS IN CIVIL CASES

Meera Sehgal

A defense of the expansion of fee-offsetting statutes to protect indigent defendants in civil cases

INTRODUCTION

Equal justice constitutes the core aspiration of American jurisprudence. The Constitution serves as the functional cornerstone of a legal system concerned with honoring the sanctity of individual rights.[778] It is through each deliberate clause that the document articulates the broader vision of justice held by its Framers. In the Bill of Rights, the Founders held that access to representation is requisite to a fair and impartial trial. Yet, the subsequent limitation of that right to solely criminal matters does a disservice to the prevailing principles the Framers were seeking to articulate. Civil courts serve as an arena for dispute resolution not just between individuals, but between citizens and the state as well. Decades of case law and opinions conferred by the court illustrate that the government's ability to bring litigation against private individuals can potentially endanger civil and fundamental liberties. Thus, indigent defendants must be constitutionally guaranteed the right to counsel in all civil suits initiated by the government. The state's ability to yield the power of injunction and deportation, preside over family matters, and exercise eminent domain assisted by its authority and legal might against society's most vulnerable, presents a deleterious asymmetry. The only other legal avenue that allows the state to inflict equivalent harm is that of incarceration: the punishment used by the court to justify providing counsel to criminal defendants. Citizens must be given equal opportunity to defend their interests regardless of status or class. This necessary expansion of the Sixth Amendment protections moves the legal system closer to the vision of justice the Founders conceived.

CONSTITUTIONAL ORIGINS

The Fourth Amendment contains two clauses, one which guarantees protection against unreasonable searches and seizures,

[778] U.S. Const.

and a second concerning the issuance of warrants.[779] This semantic structure has laid fertile ground for varying textual interpretations. One interpretation holds that the clauses should be read interdependently so that the presence of a warrant determines the "reasonableness" of a search or seizure.[780] The opposing viewpoint argues each clause be treated as distinct, and independent from the other. The Supreme Court conferred the legitimacy of the latter interpretation in *Wyoming v. Houghton*, separating the amendment into the "Reasonableness Clause" and the "Warrant Clause," which operate separately and posit two distinct protections.[781]

The amendment's primary purpose is to sanctify citizens' right to privacy by preventing government intrusion into places where citizens have a "reasonable expectation of privacy."[782] While the Fourth Amendment is applied in the status quo to regulate police conduct, the Constitution's Framers did not intend for it to apply solely to criminal law. One's "right to be secure in their persons" is a privilege that extends beyond situations of criminal apprehension and investigation.[783] The Fourth Amendment is robustly relevant to matters of civil litigation instigated by the state. Property owners may invoke the Fourth Amendment to legally challenge exercises of eminent domain.[784] The right to privacy extends to individuals involved in cases of civil forfeiture. Civil family law cases may offer the opportunity for an individual's privacy to be compromised during investigation. The guarantee to remain secure in one's "persons, places, and effects" in the face of government interference stands as a powerful affirmation of personal sovereignty.[785]

The Fifth Amendment, which outlines the rights of the accused, serves as the Bill of Rights' conceptual linchpin, providing a check on the government's authority to deprive citizens of liberty. Through five clauses, the amendment aims to ensure that individuals are not "…deprived of life, liberty, or property,

[779] U.S. Const. Amend. IV.
[780] Id.
[781] Wyoming v. Houghton, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)
[782] U.S. Const. amend. IV.
[783] Id.
[784] https://www.law.cornell.edu/wex/eminent_domain
[785] Id.

without due process of law."[786] The amendment guarantees the right to a fair trial and a jury trial, as well as protection against self-incrimination, double jeopardy, and the uncompensated taking of private property by the government.[787]

The precedent set by the accepted textual interpretation of the Fourth Amendment can apply to the Fifth. Application of a semantic framework that dissects the Fourth Amendment to the Fifth Amendment would produce a reading more reflective of the Founders' intent. The Founders drafted this amendment with the deliberate intent to secure citizens's rights in legal proceedings more broadly. Preventing the deprivation of values as tantamount as "life, liberty, or property" stands as the fundamental aim of the Constitution itself.[788] It would be false to conceive of this amendment as simply a set of procedural guidelines. Rather, it functions as an implicit expression that all legal proceedings can endanger liberty absent due process. Within the amendment, the Framers combined civil and criminal protections without meaningful distinctions. Such a structure lends credence to the argument that it is to be interpreted holistically, not individually. Their semantic distinction invalidates the assumption that each protection individually applies to the criminally accused. The amendment enumerates fair trial rights more broadly. Any interaction between citizens and the law, even beyond the realm of criminal proceedings, is only legitimate insofar as it conforms to due process requirements.

The Sixth Amendment outlines that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to 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."[789] The Sixth Amendment stands as a unique inclusion in the Bill of Rights, representing an "affirmative right" rather than the defensive safeguards outlined in other amendments, which primarily require the government to ab-

[786] U.S. Const. amend. V.
[787] Id.
[788] Id.
[789] U.S. Const. amend. VI.

stain from specific actions. The specific manner in which the right to counsel is articulated provides valuable insight into the Founders' intentions regarding this provision. The underlying principle is that legal representation must be provided when the state's interests potentially jeopardize an individual's rights in a courtroom. This clause aims to strengthen due process during legal proceedings initiated by the state. Typically, state-initiated litigation is associated with criminal proceedings, but this is not always the case.

The division of this amendment into separate clauses with each right independently enumerated illustrates that the right to counsel is not conditioned on a trial being criminal. The right to counsel is structurally framed alongside the right to compulsory process.[790] Both state and federal statutes accord parties in civil suits the ability to invoke compulsory process to compel the production of evidence. Rule 45 of the Federal Rules of Civil Procedure outlines that civil parties may do so through subpoena.[791] This signals jurisprudential recognition that the expansion of Sixth Amendment privileges to the civil realm does not run contrary to the Constitution or its intention. Rather, the application of these rights may assist in the adjudication of justice. The amendment also boldly draws a fundamental equivalence in importance between the right to counsel and that of a fair trial itself.[792] A trial is only fair insofar as parties are given the opportunity to secure legal representation.

The Seventh Amendment accords citizens the right to a trial by jury in all civil proceedings, stating that"[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[793] The inclusion of a clause regarding civil matters in the Bill of Rights—a document concerned with safeguarding liberty—illustrates the Founders' belief that unjust civil trials may stand as an avenue for inalienable rights to be breached. Certain due process requirements still hold in civil proceedings,

[790] Id.
[791] Fed. R. Civ. P. 45
[792] Id.
[793] U.S. Const. amend. VII.

underscoring the recognition that actions within non-criminal trials are integral to the maintenance of a just society and legal system. The Seventh Amendment reaffirms the principles articulated by the Fifth and Sixth Amendments. These rights collectively embody the fundamental goal of the Bill of Rights.

Central to the Fourteenth Amendment is the rhetoric of "the equal protection of the laws."[794] The word "equal" in the Fourteenth Amendment must not be limited to a consideration of equity between individual parties- rather, it must also be interpreted to imply that like cases be treated as like within jurisprudential purview.[795] Due process protections are only legitimate if they are applied uniformly. The amendment prohibits the state from denying individuals access to legal protections in an unequal manner. Individuals in similar circumstances should be accorded the same legal rights.

The value of these amendments far exceeds the procedural rules they establish. Their greatest worth is in the conceptual principles they articulate.

CASE LAW HISTORY OF RIGHT TO COUNSEL

It was through the landmark case *Powell v. Alabama* (1932) that the court first proffered an interpretation of the Sixth Amendment's assurance of the right to defense counsel for the criminally-accused.[796] In Paint Rock, Alabama, two white girls claimed that a group of Black youth, aged 13-19, had raped them, accusing them of a capital offense.[797] Each of the defendants, who were young, illiterate, and uneducated in matters of the law, pleaded not guilty. The judge appointed two attorneys to defend the entire group of nine boys. The first was a Tennessee real-estate lawyer with no license to practice in Alabama nor any knowledge of the state's criminal procedure. The second was a retired attorney who had not practiced in decades. The trials commenced immediately within mere hours upon the appointment of counsel, leaving the defense no time to prepare arguments or sufficiently hear the experiences of the accused. The trial resulted in the expedient and unanimous

[794] U.S. Const. amend. XIV.
[795] Id.
[796] Powell v. State of Ala., 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)
[797] Id.

conviction of all the defendants by an all-white jury. The defense filed a petition for a writ of certiorari that was granted by the Supreme Court. The defense argued that the state's failure to allow the defendants' attorneys adequate time to prepare violated the boys' Sixth Amendment right to counsel and Fourteenth Amendment assurance of due process.[798] Though the court itself had not articulated a federate mandate of a right to counsel, every state absent Virginia had established its own iteration of the right based on the Sixth Amendment.[799] The court, through a 7-1 decision, found the trial a violation of the defendant's Sixth Amendment rights.[800] In delivering the majority opinion, Justice Sutherland articulated that, "[t]he right of the accused, at least in a capital case, to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment."[801]

Powell established the precedent of viewing the right to representation as contingent on the magnitude of the trial's consequence. The Courts have interpreted counsel as a means to achieve the most equitable possible adversarial proceeding between the state and individual.

In 1941, Smith Betts was charged with robbery in a Maryland state court.[802] He requested counsel, citing his inability to afford defense. His request was denied on the grounds that the county only had the duty to appoint counsel for indigent defendants in rape and murder cases.[803] Forced to defend himself, he was indicted and sentenced to 8 years in prison.[804] Betts then filed a petition for a writ of habeas corpus that was initially granted but subsequently denied by the Court of Appeals of Maryland.[805] The case was then brought to the United State Supreme Court. The core controversy surrounded whether the right to counsel should be afforded to defendants in all

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[798] Id.
[799] Id.
[800] Id.
[801] Id.
[802] Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), overruled by Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)
[803] Id.
[804] Id.
[805] Id.

criminal cases, or only to those in which the punishments are severe enough to represent a threat to liberty. The Court's 6-3 decision found in favor of Brady, holding that the state is not bound by a blanket obligation to provide indigent defendants with counsel under all circumstances.[806] Justice Robert Owens' majority opinion argued that the Fourteenth Amendment does not "embody an inexorable command."[807] The court however failed to definitely outline what circumstances should justify counsel being afforded.

Griffin v. Illinois raised the question of whether poverty should be recognized as a protected status by the Fourteenth Amendment's Equal Protection clause.[808] Judson Griffin and James Crenshaw were indicted together for armed robbery in Cook County, Illinois. Illinois state law mandated that defendants could not file for appeal without a stenographic transcript of their trial. In preparation to file, Griffin and Crenshaw requested the transcript be furnished to them without a fee on account of their indigent status.[809] The court refused, holding that Illinois state law requires defendants in criminal proceedings that do not carry the death penalty to "themselves buy it."[810] This economic barrier prevented them from appealing their conviction. They appealed to the Supreme Court, claiming that the lower courts had violated their rights under the Fourteenth Amendment's Equal Protection Clause.[811]

Griffin and Crenshaw appealed to the Supreme Court, citing a violation of their Sixth Amendment rights. The Court found 5-4 in their favor.[812] Justice Black wrote in the plurality opinion, stating that "[i]n criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color," and that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[813] This case applies the concept of the constitutional requirement of "equal protection" to the treatment of indigent defendants. The Supreme Court's decision stands as a for-

[806] Id.
[807] Id.
[808] Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956)(plurality)
[809] Id.
[810] Id.
[811] Id.
[812] Id.
[813] Id.

mal recognition of an economic dimension to the Fourteenth Amendment. The imposition of any economic barrier no matter how financially menial to access liberty has been recognized as profoundly unequal. The 24th Amendment, ratified in 1964, abolished and forbade state and federal governments from imposing taxes on voters in federal elections. Underpinning this amendment was the principle that individuals must not be required to pay to exercise a right.

The court once again concurred with this opinion in *Douglas v. California* (1963).[814] This case extended the concept of equal protection to the right to counsel. Two indigent men, Bennie Will Meyes and William Douglas, were arrested and charged together in a California court with 13 felonies, including assault with the intent to commit murder.[815] A single public defender was assigned to both men. The complexity of the case and the volume of the charges ushered the public defender to request a continuance. He claimed that a conflict of interest between Douglas and Meyes justified each being appointed independent counsel.[816] The court denied these requests. The judge then granted Meyes' and Douglas' own petition to dismiss their public defender, but refused to furnish each man with a new independent counsel. Their individual requests for continuances to prepare their own defense were also denied. Both men appeared *pro se* in court and were convicted on all 13 counts. Meyes and Douglas were once again denied counsel when they tried to appeal their conviction in the California Second District Court of Appeal.[817] California law at the time granted state appellate courts the individual authority to determine whether counsel should be afforded to defendants.[818] The California District Court of Appeals had determined that "no good whatever could be served by appointment of counsel."[819]Thus, they could not have their appeal heard in court. Meyes and Douglas filed a writ of certiorari to the Supreme

[814]Douglas v. Superior Ct. of California, Cnty. of Los Angeles, No. 20-56105, 2021 WL 830953 (9th Cir. Jan. 14, 2021), cert. denied sub nom. Douglas v. Superior Ct. of California, Los Angeles Cnty., 141 S. Ct. 2608, 209 L. Ed. 2d 739 (2021), reh'g denied sub nom. Douglas v. Superior Ct. of California, 141 S. Ct. 2751, 210 L. Ed. 2d 901 (2021)

[815]Id.

[816]Id.

[817]Id.

[818]Id.

[819]Id.

Court. The petitioners claimed that they had been denied the equal protections outlined by the Fourteenth Amendment.[820] Through a 6-3 decision, the court determined that California's denial of appellate counsel had prevented them from providing the merits of their claim in court on account of their poverty.[821] The permeation of their socioeconomic status into their ability to seek legal resources constituted a violation of their due process rights. In voicing the majority, Justice Douglas stated "[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."[822]

It is with unmistakable and strong conviction that the Justice reaffirmed the vitality of mitigating the effects of socioeconomic disadvantage on a trial.

The Fourteenth Amendment as it was originally written failed to extend equal protections to Black citizens, women, and indigenous individuals. In contemporary use, it is now evoked to shield these very groups from inequality. It was only through subsequent decisions throughout the mid to late 20th century, such as the landmark case *Brown v. Board of Education* (1955) that the Court expanded these protections to become what they are today.[823] The question of "equal protection" can be thought of as ever-evolving, and malleable to fit society's changing needs.[824] Wealth has not been consistently recognized by the court as a suspect classification under the Equal Protection Clause despite significant dissension. *Griffin* and *Douglas* provide clear justification for further expanding the scope of its protections.[825] [826]

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[820] Id.
[821] Id.
[822] Id.
[823] Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955)
[824] U.S. Const. amend. XIV.
[825] Id.
[826] Id.

Poverty rates are higher among people of color than they are for white people in the United States.[827] The social relationship between poverty and race has caused the majority of indigent defendants to be people of color.[828] A reading of the Fourteenth Amendment through the conventional lens of racial inequality still supports an expansion of the right to counsel as a means through which to achieve equal justice.

The arrest of electrician Clarence Earl Gideon at the Pool Room Bar in Panama City, Florida on June 3rd, 1961 sparked the process through which the right to counsel for all criminal defendants became sacrosanct.[829] Gideon was charged with a felony in state court for breaking and entering with the intent to commit a misdemeanor. Lacking the means to hire an attorney, the 51-year-old electrician requested the state provide him legal counsel, a request denied on the ground the state was only required to provide an attorney to defendants charged with a capital offense.[830] At trial, Gideon, who had an eighth-grade education, represented himself, cross-examining witnesses and delivering a short argument in his defense. The jury found him guilty, and his conviction subjected him to 5 years in prison, the maximum sentence for his offenses.[831] While incarcerated, Gideon remained determined to seek recourse for his perceived denial of inalienable rights. Gideon urged the United States Supreme Court to hear his case through a writ of certiorari based on a five-page letter penned from his cell.[832] The court granted his petition and assigned prominent D.C. attorney Abe Fortas as his advocate.[833]

The tenuous nature of the precedent set by *Betts* laid fertile ground for controversy in *Gideon*.[834] [835] Fortas built his case on the argument that the lack of education citizens possess regarding legal proceedings justifies their right to assistance. Through a unanimous decision, the Court found in Gideon's

[827]https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html#:~:text=In%202019%2C%20the%20share%20of,share%20in%20the%20general%20

[828]https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1570&context=hastings_constitu

[829]Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)

[830]Id.

[831]Id.

[832]Id.

[833]Id.

[834]Id.

[835]Id.

favor and overturned *Betts*.[836] Where *Betts* found that failure to provide counsel to indigent defendants charged with a felony in a state court did not violate the Fourteenth Amendment's Due Process Clause, the court now ruled in favor of the selective incorporation of the Sixth Amendment right to an attorney in all criminal matters, whether in a federal or a state court. Justice Hugo Black, a dissenting voice in *Brady*, stated in the majority opinion of *Gideon* that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[837] After the court ruled in Gideon's favor, he was re-tried for his original charges and unanimously acquitted, illustrating the likelihood that Gideon's predictably rudimentary legal acumen contributed to his original conviction.

The Supreme Court was presented with the question of whether counsel in civil cases should be mandated in *Lassiter v. Department of Social Svcs*., 452 U.S. 18 (1981).[838] Abby Gail Lassiter was an indigent defendant, with very little education, in a child custody case—she had her first child at fourteen. Her second-youngest son, William, was transferred to the custody of the Durham County Department of Social Services. One year later, Lassiter was convicted of second-degree murder and sentenced to twenty-five to forty years in prison.[839] While incarcerated, Lassiter declined a social worker's request to abdicate her parental rights.[840] She wanted William to be placed under the care of her mother Lucille and remain with his four siblings, but the state refused. In jail, she asked the state to provide her assistance with her case but was denied. Lassiter attended the hearing regarding the termination of her parental rights in August 1978, unprepared and alone. The judge held that her incarceration did not justify her inability to find counsel, and refused to postpone the proceedings to afford her time to find defense.[841] Her hearing was rife with procedural inequities which can be attributed to her lack of competent

[836] Id.
[837] Id.
[838] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)
[839] Id.
[840] Id.
[841] Id.

defense- these contributed to her loss. The court allowed the Department to use hearsay evidence, ignoring key pieces of Lassiter's evidence, and thus dismissed her motions.[842]

The case was appealed to the Supreme Court, which faced the question of whether the Fourteenth Amendment's Due Process Clause need apply to child custody cases. Through a 5-4 decision, the court held that the Sixth Amendment does not mandate the state provide counsel to defendants in civil suits that do not carry the potential for the defendant to "lose their physical liberty if they do not prevail."[843] The court instead held that the need for state-appointed counsel should be determined on a case-by-case basis using a "balancing test" that weights state interests against the potential for disadvantage caused by a lack of counsel.[844] In this case, the court did not classify the consequences of Lassiter's loss as of great enough magnitude to warrant defense. The court, however, did not definitively disregard the importance nor constitutional legitimacy of state-provided counsel in civil suits more generally. Instead, they ambiguously left it to each individual state to determine whether the right to counsel applies in particular circumstances.[845]

Lassiter is significant because it represents a judicial recognition of the importance of access to counsel in civil proceedings. The court's finding did not discount the legitimacy of state-appointed defense in all child custody cases generally. Justices Blackmun, Brennan, Marshall, and Stevens filed dissenting opinions premised on their conviction that a parent's custody of their child was significant enough to warrant the assistance of counsel.[846] Their dissent offers more logical legitimacy from the majority finding. The loss of access to a member of one's kin at the hands of the state constitutes a loss of liberty and the fundamental freedom of association, making this majority decision conceptually consistent with the proposal of a limited civil right to counsel.

THE STATE OF CIVIL DEFENSE

[842] Id.
[843] Id.
[844] Id.
[845] Id.
[846] Id.

The state does not provide indigent defendants with representation in matters of civil litigation. The ruling found in *Gideon* overturned the precedent that the Sixth Amendment right to counsel be treated as conditional.[847] Yet, the court's finding that defense counsel is "fundamental and essential" to a fair trial is not imbued with a justification for its limited applicability to criminal cases.[848] The central principle of Fortas' argument in *Gideon* robustly applies to civil matters, where competent representation becomes that much more necessary to render justice. The procedural and substantive dimensions of the myriad of statutes, codes, laws, and ordinances that govern civil matters lend them complexity great enough that indigent defendants risk losing legitimate cases due to lack of legal knowledge and skill. This threatens the ability of citizens to access legal redress for being wronged, compromising the adjudication of justice.

Inalienability and consistency are necessary preconditions to any constitutional right—that is, it should not be applied conditionally. Conditioning access to a core constitutional protection on a possible outcome of conviction— fine or incarceration— does not meet what must be required of a constitutional right. The Court's failure to establish a consistent standard in the decision *Lassiter* brings to light to a glaring omission in the current state of civil defense. A right as integral as that of counsel cannot be distributed based on the subjective determinations of weakly supported individual balancing tests. Such discretionary application of rights is deeply at odds with the intention behind constitutional protections.

The current perceived inapplicability of *Gideon* to civil matters is based on the faulty premise that civil damages carry less severity. This view stems from the argument that civil penalties cannot result in incarceration. Yet, if it can be proven that freedom can be deprived by the hands of the state as a result of a punishment at common law, it follows that the requirements of due process rights afforded by the Fourteenth Amendment must hold. Matters of common law intimately affect the safety, security, and capacity of citizens to pursue freedom. Civil court cases are not limited to the realm of minor monetary disputes.

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[847]Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)
[848]Id.

A LIMITED CIVIL GIDEON AGAINST GOVERNMENT LITIGATION

The injustice perpetuated by this persistent procedural inequity makes it exigent that the state provide counsel to indigent defendants in civil suits instigated by the government. The government's failure to provide what the court has repeatedly held to be the cornerstone of a fair trial stands as an alarming omission. By rightfully broadening the scope of due process protections, this reform would represent a basic fulfillment of the state's responsibility to safeguard individual liberty.

The Sixth Amendment has been applied without exception to criminal matters because those cases stand as apparent manifestations of the state's ability to threaten individual interest. Yet, expanding this right to a civil realm would be more consistent with the Founder's original intention for the clause.

Where *Lassiter* posited the right to civil counsel as conditional, the Court held that any exercise of state power that may result in a defendant losing their physical liberty provides sufficient justification for state-appointed assistance.[849] Given that the status quo "subjects innocent men to increased dangers of conviction merely because of their poverty," it cannot be, as Justice Black referred to, as "reconciled with 'common and fundamental ideas of fairness and right.'"[850] The current state of civil defense is constitutionally unjustifiable and morally unconscionable. *Douglas* and *Griffin* illustrate the legitimacy of the expansion of the Fourteenth Amendment to protect those with socioeconomically indigent statuses.[851] [852] This categorization can serve as a barrier to the adjudication of equal justice, which posits the state the responsibility to mitigate this effect.

PRIVATE GOVERNMENT LITIGATION

[849] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)

[850] Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), overruled by Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)

[851] Douglas v. Superior Ct. of California, Cnty. of Los Angeles, No. 20-56105, 2021 WL 830953 (9th Cir. Jan. 14, 2021), cert. denied sub nom. Douglas v. Superior Ct. of California, Los Angeles Cnty., 141 S. Ct. 2608, 209 L. Ed. 2d 739 (2021), reh'g denied sub nom. Douglas v. Superior Ct. of California, 141 S. Ct. 2751, 210 L. Ed. 2d 901 (2021)

[852] Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956)

Through the Judiciary Act of 1789, Congress vested the federal district courts the jurisdiction to hear civil cases and those related to matters of equity in which the United States is the plaintiff. The state retains the ability to bring civil suits against private citizens. The Supreme Court held in 1818 that the United States could "sue in its own name" for all contract cases, and does not require congressional approval to do so. The state must bring such suits against individuals or corporations to the lower federal courts.

The state's ability to bring litigation against private individuals within a legal framework of its own creation inherently places citizens on fundamentally unequal footing with their adversary. As the court held in *Gideon*, "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[853]

The state can wield significant power over private citizens through injunction. A government command to refrain from a particular action can amount to a loss or limitation of constitutionally guaranteed liberty. It is only through injunction that the state may directly legally compel an individual to act—or not act—in a way the state sees fit. This represents the greatest abridgment of natural autonomy at the hands of the law save for incarceration. Due process rights exist to protect individuals from being falsely deprived of their liberty by the state. Despite the potential for civil defendants to lose similar inalienable rights, due process requirements are only selectively extended in civil cases. Yet, the Founders' rationale behind the indispensability of representation applies dually.

The acquisition of private property through exercise of eminent domain represents the most coercive expression of the state's ability to legally subordinate individual interests. The Takings Clause of the Fifth Amendment grants the state authority to seize private property for public use in exchange for "just compensation."[854] This power can be exercised by governments on the federal, state, and local levels, with the intention of undertaking projects that benefit the community as a whole.

Legal proceedings accompany the exercise of eminent domain. The government agency interested in acquisition sends the property owner an initial notice. The government may

[853]Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)
[854]U.S. Const. amend. V.

then begin a process of negotiations with the property owner, the aim being to find a mutually agreeable price and prevent a lengthy legal process.[855] An independent appraiser is typically tasked with determining "just compensation."[856] If an agreement cannot be reached, the government may initiate legal action by filing a complaint in court. This complaint outlines the government's intent to use eminent domain and seeks a court order allowing the acquisition. The property owner is then served with a summons and given the opportunity to present their case in court. At trial, both parties are expected to deliver arguments and present evidence to determine the lawfulness of the taking. Property owners retain a right to appeal the court's finding. The Takings Clause of the Fifth Amendment grants the state the privilege to seize private property for "public use" on the condition it provides the owner with "just compensation."[857]

Courts have derived varied definitions of "public use." *Poletown Neighborhood Council v. City of Detroit* is a testament to the consequences of the state's ability to apply great discretion in determining what constitutes a lawful seizure.[858]

General Motors sought to open a plant in Poletown, a working-class Detroit neighborhood with a rising unemployment rate. The company pitched the idea to the City of Detroit, successfully convincing them that the project could economically revive the struggling community. Supported by the Michigan State Court, the city exercised eminent domain to condemn entire homes and neighborhoods.[859] The community of generationally-owned small businesses and working-class families was razed, and the land was transferred to a private entity.

Residents and business owners in Poletown challenged the decision. The case reached the Supreme Court of Michigan, which found 4-3 in the city's favor.[860] The Court held that the public gain, resulting from the condemnation of private

[855]https://www.law.cornell.edu/wex/eminent_domain
[856]Id.
[857]Id.
[858]Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), overruled by Cnty. of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004)
[859]Id.
[860]Id.

property, deemed the taking constitutional.[861] The state interpreted "public use" based on a subjective balancing test that found the perceived economic benefit to the community great enough to justify the losses incurred by individuals. Despite the crucial fact that the taking had been initially proposed by a private corporation, the Court ruled that it had only produced "incidental private gain."[862]

Poletown illustrates how the nebulous terms of eminent domain can result in a harmful and discretionary system that strays far from the Founders' concept of "public use."[863] The vast majority of those who lost their livelihood, property, and security in their homes in Poletown were indigent. The damage caused to the public in Poletown stands as one instance of a broader problem with unchecked legal exercises of private state litigation.

The state's ability to serve as party to civil litigation underscores the need to protect a defendant's due process rights, especially when they are indigent. Cases where indigent private citizens legally oppose the state present a fundamental asymmetry. The resource discrepancy between parties inherently undermines the court's ability to reach an objectively fair conclusion. Justice Black had argued in his dissent to Brady that the denial of counsel subjects those in poverty to an increased chance of conviction, violating the Fourteenth Amendment's Equal Protection Clause. In his subsequent opinion to Gideon, he wrote, "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented."

An unequal adversarial legal proceeding between two parties in a case where the consequences endanger liberty should warrant state-appointed defense. Justice Douglas captured this dynamic in the decision to *Gideon*, emphasizing that "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of

[861]Id.
[862]Id.
[863]Id.

crime."[864] Trials at which one party has an unreasonable procedural advantage over the other meet the threshold of being "offensive to the common and fundamental ideas of fairness and right" as per Justice Roberts.[865]

As established by the decision in *Lassiter*, the imminent potential for liberty to be lost necessitates the right to defense.[866] The need to secure one's private property against state seizure is a strong justification for the right to counsel with the potential to determine an individual's access to home and livelihood.

Appearing *pro se* disadvantages a defendant both procedurally and substantively. The average citizen's unfamiliarity with the intricacies of the American legal process disrupts the trial process, causes avoidable delays, and ultimately manifests in unjust legal outcomes. The majority of citizens are not intimately familiar with rules of evidence or civil procedure, which makes it impossible for these hearings to render a just, objective outcome. This effect is compounded by the fact that indigent defendants are more likely to have lower levels of education. Over 7 in 10 defendants without a high school diploma request state-appointed counsel.[867] Failure to comply with technicalities may obviate their legitimate claims in the eyes of the law—judges must rule against any issue improperly presented despite its merits. Class, access to education, and financial means supersede the interests of justice, and the consideration of fact-finding becomes all but an afterthought. The highest legal authorities have vocalized the pivotal function that counsel plays in unambiguous terms. As Justice Sutherland articulated in *Powell*, "Even the intelligent and educated layman has small and sometimes no skill in the science of law … Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence … He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. … Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[868]

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[864] Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)
[865] Id.
[866] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)
[867] https://bjs.ojp.gov/content/pub/pdf/dccc.pdf
[868] Powell v. State of Ala., 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)

CONCLUSION

For the last two centuries, the courts have grappled with how to effectively translate the ideals set forth by the nation's Founders into practical guidelines and procedures that protect rights. The Constitution was envisioned as a doctrine of procedural safeguards against government interference. While *Gideon* provided the court with the opportunity to pragmatically sanctify these principles, the extent of its application remains incomplete.

The right to counsel as originally stipulated has been subjected to a false and limited interpretation. The conditional nature with which this right is afforded runs contrary to the very principle that underlies it. The present moment provides an opportunity for the Courts to clarify the extent of this protection. State-instigated civil litigation provides the government the unique opportunity to leverage sizable resources against society's most vulnerable. This drastic adversarial imbalance makes the undue loss of liberty inevitable. Access to freedom should not be conditioned on status—such would be antithetical to the core principles upon which the legal system is founded. The expansion of the right to state-appointed counsel in civil suits instigated by the state will reaffirm the intent of the nation's Founders to protect the rights articulated in the Constitution.

This reform will render a more sound interpretation of the Bill of Rights. This adjusted lens will bring pragmatic benefits to society. A reclarification of the Fourteenth Amendment will further advance its duty as a legal safeguard. In an era where socioeconomic inequalities are reaching unprecedented heights, the expanded application of this right to protect society's most vulnerable is both constitutionally justified and socially necessary.

Clarence Earl Gideon passed away peacefully in 1972 in a sleepy Florida community. On his unmarked grave, the American Civil Liberties Union posted a headstone. Its simple inscription reads, "Each era finds an improvement in law for the benefit of mankind."[869]

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[869] https://www.nacdl.org/Article/June2012-ClarenceEarlGideonUnlikelyWorl

WHAT DOES GENDER-BASED ASYLUM MEAN IN AN UNJUST LEGAL SYSTEM?

Julia Squitteri

What does gender-based asylum mean in an unjust legal system?

ABSTRACT:

The United States lacks a codified right to gender-based asylum. Instead, the United States has a legal system that is riddled with misogyny that has produced unjust and often inconsistent rulings in asylum proceedings—leaving many women who are fleeing dangerous circumstances of gender-based persecution in potentially life-threatening situations. For immigrant women—irrespective of their asylum-seeking status—the legal system in the United States only perpetuates historical injustice and human rights abuses. In recent years alone, immigrant women have been denied abortion access, been forcibly sterilized, and exposed to sexual violence upon entering the United States.

This article will first provide a background on the history of exclusionary immigration law. The process of seeking asylum and key developments in U.S. asylum law will also be discussed, in addition to the dynamics of gender-based asylum and relevant case history. Immigrant women are especially vulnerable to gender-based violence, including sex trafficking, domestic violence, sexual assault, and other types of sexual violence. This article outlines this epidemic of violence through the lens of the U.S. government's complicity, in order to argue that gender-based asylum is an empty promise that is not the reality for far too many women who are fleeing gender-based persecution.

Please note that this article discusses potentially triggering subjects, such as sex trafficking, forced sterilization, inhumane holding conditions, sexual assault, and family separation.

INTRODUCTION

The right to seek asylum was first created in 1948 under the Universal Declaration of Human Rights, and expanded

in 1951 through the Refugee Convention.[870] Yet, it wouldn't be until 1996 that the United States Board of Immigration Appeals (BIA)[871] allowed gender-based persecution as a compelling reason for granting asylum in its decision in the *Matter of Kasinga*.[872] Since then, the BIA's decisions have created legal inconsistency as the fight for the right to gender-based asylum continues.[873] In 1999, Rody Alvaro, a survivor[874] of domestic violence who had initially been granted asylum, had her case reversed by immigration officials. This initiated legal battles until 2009, when Alvaro finally won the right to asylum.[875] Today, the right to gender-based asylum remains fastidiously challenged as courts determine the extent of the right to gender-based asylum—determinations that have notably been inconsistent in the last few decades.[876] The right to gender-based asylum is not currently enshrined in U.S. law.

But what does gender-based asylum really amount to in a country that has gaping holes in its gender-based violence protections? An immigrant woman coming into the United States likely faces a heightened risk of human trafficking,[877] sexual assault,[878] poverty, and the denial of reproductive healthcare,

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[870] Tahirih Justice Center, Tahirih Explains: Gender-Based Asylum (June 2020), Tahirh Justice Center, https://www.tahirih.org/wp-content/uploads/2020/06/Tahirih-Explains-Gender-Based-Asylum.pdf.

[871] Karen Musalo, A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims, 29(2) Refugee Survey Quarterly, 46-47 (2010).

[872] Matter of KASINGA, 21 I&N Dec. 357 (BIA 1996).

[873] Tahirih Justice Center, at 3.

[874] The term "survivor" is used in this article in place of the term "victim" to refer to individuals who have experienced gender-based violence. This may include individuals who have experienced sexual assault, human trafficking, domestic violence, or other forms of gender-based violence.

[875] Cynthia S. Gorman, Feminist legal archeology, domestic violence and the raced-gendered juridical boundaries of U.S. asylum law. Environment and Planning A: Economy and Space, 51(5), 1050–1067, 1051 (2019).

[876] Tahirih Justice Center, at 3.

[877] Elzbieta Gozdziak, Micah N. Bump, *Victims No Longer: Research on Child Survivors of Trafficking for Sexual and Labor Exploitation in the United States*, Institute for the Study of International Migration 1, 74 (2008).

[878] Hada Soria-Escalante, Alejandra Alday-Santiago, Erika Alday-Santiago, Natalia Limón-Rodríguez, Pamela Manzanares-Melendres, & Adriana Tena-Castro,"We All Get Raped": Sexual Violence Against Latin American Women in Migratory Transit in Mexico, 28(5) *Violence Against Women*, 1259-1281, 1260 (2021).

for instance. This article seeks to explain the incongruencies with regard to the right to gender-based asylum and the reality that immigrant women often face when entering the United States.

This article recognizes that the inaccessibility to gender-based asylum impacts more than cis-women. As such, when the word "woman" is used, it is used with inclusive intent to mean any individual who identifies as, or may be viewed in the legal system as, a woman. This article employs a loose conceptualization of the word "woman." Many feminine individuals face the threat of gender-based violence both in the U.S. and prior to immigrating, regardless of whether this includes seeking asylum.

Federal immigration statutes from the late nineteenth century to the present:

Fundamentally, immigration policies are a choice that countries make in determining who is allowed to enter a state and pursue citizenship, and under what circumstances people may legally immigrate to a country. At its core, then, immigration policies are often inherently exclusionary, and the United States is no exception. Beginning in the 1880s, as the United States shifted from agricultural expansion to industrialization, exclusionary immigration law took root as illiberal nationalism and xenophobia grew in popularity.[879] This nationalism resulted in a durable legal system of "classical immigration law," in which the state exercised its power more freely in terms of mandating whether people could stay in the United States on the "basis of arbitrary criteria and summary procedures that often transgressed liberal principles."[880]

In 1875, the United States adopted its first federal immigration law: the Page Law. This law actively sought to exclude "undesirable" groups via the judgments of immigration officials.[881] Armed with scientific racism and socially xenophobic views, immigration officials pursued exclusionary policies, specifi-

[879] Peter H. Schuck, The Transformation of Immigration Law. Columbia Law Rev. 84(1), 1–90, 3 (1984).

[880] *Id.* at 3.

[881] Christina Gerken, Exclusionary Acts: A Brief History of U.S. Immigration Laws. In *Model Immigrants and Undesirable Aliens: The Cost of Immigration Reform in the 1990s*, 19–72, 26. University of Minnesota Press (2013).

cally towards Asian prostitutes and convicted criminals.[882] Yet, Asian women were branded as prostitutes with no basis for the accusation other than that of racism and sexism propagated by the media and government officials.[883] Asian American immigrants, in particular, would face some of the most restrictive exclusionary policies in early immigration law. In 1882, the Chinese Exclusion Act was passed, prohibiting Chinese immigrants from entering the U.S. or pursuing citizenship—an exclusion that did not end until 1965.[884]

In 1921, Congress passed its first immigration quota limit, followed by the Johnson-Reed Act of 1924, which explicitly gave preference to immigrants from Northwest Europe.[885] In 1952, the McCarran-Walter Act took effect. This law retained the quota system, reinforced the exclusionary criteria for denying the right to citizenship, and maintained the preference for European immigrants.[886] This law also removed the mention of race or gender as barriers to citizenship and ended the ban on immigration from Asia.[887] For over half a century, the McCarran-Walter Act formed the backbone of U.S. immigration law.

In 1939, World War II brought about a major gender role shift, as women entered the workforce at higher rates in jobs typically filled by men. Since many men enlisted in the military, traditionally "male" jobs were available to women.[888] By creating a break in the stereotypical "hetero-patriarchal" household with the expansion of female employment, more women were able to move to cities for employment—which in turn created more freedom for sexual identity expression.[889] As a result, sexual identity expression evolved, and cities gave way to a "vibrant gay subculture."[890] This evolution, however, led to homophobic panic that government officials capitalized on, linking homosexuality to communism, in what would later

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[882] *Id.* at 26.
[883] *Id.* at 27.
[884] Liz Tracey, The Chinese Exclusion Act: Annotated, JSTOR Daily (2022), https://daily.jstor.org/the-chinese-exclusion-act-annotated/.
[885] Gerken, at 29.
[886] Gerken, at 32.
[887] Gerken, at 32.
[888] Gerken, at 34.
[889] Gerken, at 34.
[890] Gerken, at 34.

be deemed the Red Scare and Lavender Scare.[891] Capitalizing on existing immigration law, Congress declared a ban on immigration by gay men or lesbian women, arguing that they were "mentally defective"—a status under which, at the time, the United States could deny citizenship status.[892] The Immigration and Nationality Act (INA), originally passed in 1952 and expanded in 1965, explicitly created a medical exclusion for gay or lesbian citizenship applicants.[893] Starting in 1965, the vast majority of visas were given to family members of U.S. citizens or permanent residents.[894] Following the 1965 INA, illegal immigration rates increased because of the lack of legal pathways for lower-income or unskilled laborers to enter the United States.[895]

The Refugee Act of 1980 allocated presidential power to set refugee quotas, and created a formal admission process for refugees that would process nearly 100,000 refugees a year on average between 1980 and 2000.[896] This bill also amended the 1965 INA to act in accordance with the UN's protocol on the characteristics of refugees that was adopted in 1967.[897] The Immigration Reform and Control Act, passed in 1986, provided amnesty to undocumented immigrants who had lived in the U.S. since 1982 and created penalties for employers who knowingly hired undocumented immigrants.[898] The penalties imposed on employers who hire undocumented immigrants, unfortunately, can raise the barriers to securing a safe, regulated job for undocumented immigrants—which may increase the likelihood of exploitative industries that can result in human rights violations, such as labor or sex trafficking.

The 1990s ushered in a new wave of immigration law transformations. Illegal immigration rates continued to increase as the media propagated ideas of chaos along the U.S.-Mexico

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[891] Matthew Willis, The Lavender Scare, JSTOR Daily (2019), https://daily.jstor.org/the-lavender-scare/.

[892] Gerken, at 34.

[893] Gerken, at 34.

[894] Gerken, at 34.

[895] Andrew M. Baxter & Alex Nowrasteh, A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day, Cato Institute Policy Analysis 919, 17 (2021).

[896] *Id.* at 16.

[897] *Id.* at 16.

[898] *Id.* at 17.

border.[899] The Illegal Immigration Reform and Immigrant Responsibility Act, passed in 1996, criminalized illegal immigration by limiting pathways for legal citizenship applications and creating strict penalties for leaving the United States. It also limited judicial review of deportation cases.[900] The Personal Responsibility and Work Opportunity Reconciliation Act, also passed in 1996, made noncitizens ineligible for crucial services such as Medicaid and welfare.[901]

In 2000, Congress passed the Trafficking Victims Protection Act (TVPA), a broad human trafficking law that, instead of protecting survivors, focused on prosecution—although few traffickers were ever prosecuted under the TVPA.[902] Given that many survivors of human trafficking are immigrant women, due to linguistic barriers and economic needs that increase vulnerability, the TVPA's requirement that survivors fully cooperate with prosecutors to receive immigration status services, shelter, and other services is concerning.[903] For some survivors of trafficking, it may be the choice between deportation or re-living (often) extremely traumatic trafficking events to aid prosecutors.[904]

During the last twenty years, undocumented immigration reached its peak, and as such, it has become a major policy issue during high-stakes elections. Under President Barack Obama, deportations reached their highest point.[905] When former President Donald Trump assumed office, he went on to greatly reduce the number of green cards issued and imposed strict restrictions on immigration, limiting asylum.[906] The exclusionary politics described in the aforementioned legal history are extremely significant to understanding the basis of anti-immigrant rhetoric that spiked under President Trump in recent years. To expand asylum definitions and reform immigration centers to treat immigrants humanely, there is a critical need for political support for these measures. Under-

[899] *Id.* at 18.
[900] *Id.* at 19.
[901] *Id.* at 19.
[902] Julia Squitteri, Reimagining Human Trafficking Law: How Can We Use Legislation To Comprehensively Aid Survivors? *5 Juris Mentem Law Review*, 206-225, 220 (2022).
[903] *Id.* at 217.
[904] *Id.* at 217.
[905] Baxter & Nowrasteh, 20.
[906] Baxter & Nowrasteh, 22.

standing the discriminatory history of U.S. immigration law is only one piece of building such support to protect and respect immigrant women in the United States.

State polarization, however, threatens to only further erode support for humane immigration reform. In recent years, states have increasingly exercised power over immigration policy enforcement.[907] For instance, the State of Texas is pushing the bounds of how much states can interfere in federal immigration policy with new bills designed to criminalize border crossings and increase state trooper presence along their border with Mexico.[908] Under the United States Constitution, authority over immigration law is given to the federal government,[909] but it wasn't until the late nineteenth century that the Supreme Court of the United States seriously began limiting state power over immigration law. The Supreme Court generally held that federal power was limited to regulating migration and travel over U.S. borders,[910] while states could only indirectly impact immigration through actions that were within the limits of accepted state power[911]—as long as such indirect action did not conflict with federal immigration law.[912] Under the Plenary Power Doctrine in the U.S. Constitution, the U.S. Supreme Court also typically defers immigration law

[907]Jennifer M. Chaćon, Overcriminalizing Immigration, 102(3) *The Journal of Criminal Law and Criminology*, 613-652, 617 (2012).

[908]J. David Goodman, Texas Patrols Its Own Border, Pushing Legal Limits, *The New York Times* (May 9. 2023), https://www.nytimes.com/2023/05/09/us/texas-border-enforcement-abbott.html.

[909]U.S. Const. art. 1§8, cl. 4 ("The Congress shall have Power … To establish a uniform Rule of Naturalization").

[910]*See Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (holding that the United States has the power to restrict immigration: "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are … one power. … If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects").

[911]*See Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (holding "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government").

[912]Chaćon, 619.

to Congress.[913] As such, the following analysis and recommendations focus on the federal level, although states can take the initiative to support programs and laws that better protect immigrants.

SEEKING ASYLUM

The right to asylum "predates liberal democracies by millennia, and the exploitation [of this right] has usually been carried out by states, including liberal democracies, whose asylum practice has always reflected state interest and only incidentally benefited individuals."[914] Refugee migration can be traced back to the Roman Empire[915]—and yet, even today, the concept of asylum is evolving. This right is contingent upon whom a regime chooses to open its borders to, which is more often than not a politically motivated choice that typically results in some extent of exclusion.

Following the Holocaust, the right to seek asylum was first recognized internationally in the 1948 UN Declaration of Human Rights and the 1951 Refugee Convention. It wasn't until the United States passed the Refugee Act of 1980, thirty years later, that the right to asylum was federally protected in this country.[916] The Refugee Act of 1980 did not recognize gender as a reason for fleeing a country but rather recognized persecution based on other factors, including nationality, race, religion, political identity, or group membership.[917]

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[913] U.S. Const. art. 1§8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[914] Liz Schuster, Asylum and the Lesson of History, 44 *Race & Class* 2, 40-56, 40 (2002).

[915] *Id.* at 40.

[916] Jonathan Blazer & Katie Hoeppner, Five Things to Know About the Right to Seek Asylum, *American Civil Liberties Union* (2022), https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum.

[917] Refugee Act of 1980, 8 U.S.C. § 110 (1980) ("(42) The term 'refugee' means (A) any person who is outside any country of such person nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

When people do come to the many ports of entry in the United States to seek refuge, they are received by border security and screened after declaring their intent to seek asylum.[918] While immigration policies, especially those under recent presidents, have attempted to restrict the right to seek asylum, people currently can still attempt to receive protection. In March 2020, President Trump's administration enacted Title 42, which allowed the United States to turn away asylum seekers, a policy that ended in May 2023.[919] President Trump derived his authority from a 1944 public health law that allows curbs on migration in the name of protecting public health, and he used the COVID-19 pandemic as a "pretext" for public health concerns.[920] Many of the asylum seekers who were turned away were, and still are, stranded in Mexico,[921] where they experienced violence, including rape and torture.[922] The Trump Administration also implemented the Migrant Protection Protocol (MPP), which led to the creation of refugee camps for tens of thousands of asylum seekers in Mexico under dangerous and squalid conditions.[923]

Once immigrants declare their intent to seek asylum, they must partake in an interview with an asylum officer and/or an immigration judge with the U.S. Department of Justice (DOJ). This process requires officials to determine whether the asylum-seeker has a credible fear of persecution or torture that

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particular social group, or political opinion, or (B) ... in the case of a person having no nationality, within the country in which such person is habitually residing, £md who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refuge" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion").

[918] Blazer & Hoeppner

[919] Blazer & Hoeppner

[920] Blazer & Hoeppner

[921] Ashoka Mukpo, Asylum-Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence, *American Civil Liberties Union*, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face.

[922] Blazer & Hoeppner

[923] Ashoka Mukpo, An Indigenous Woman Made it to Safety in the U.S. DHS Won't Let it Go, *American Civil Liberties Union* (2020), https://www.aclu.org/news/immigrants-rights/this-indigenous-woman-reached-safety-in-the-us-and-dhs-is-furious.

is driving them to seek refugee status in the United States.[924] During the credible fear interview process, asylum-seekers may be detained by the U.S. Department of Homeland Security (DHS) in Immigration and Customs Enforcement (ICE) detention centers.[925] It may take weeks for the interview to take place, and if an applicant is denied asylum status, deportation proceedings may begin immediately.[926] If an applicant is deemed not to have a credible fear by an asylum officer, they can appeal with an immigration judge—but the vast majority of asylum-seekers never enter a courtroom. In some cases, asylum seekers present clear evidence that they have a credible fear of persecution or torture and are still deported by immigration officials. After the credible fear interview, asylum-seekers participate in the Asylum Merits Interview, in which an asylum officer determines whether the applicant is eligible for asylum. Applicants can appeal a negative decision with an immigration judge; in most cases, however, if applicants are found ineligible for asylum, they are deported.

Usually, the process of awaiting asylum status takes years. In 2022, the DOJ and DHS implemented a new rule: "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers."[927] This rule was designed to grant protection sooner for those who qualify for asylum, and to remove those who did not qualify from the country promptly—instead of keeping such applicants in the country for years while awaiting a decision from an immigration judge.[928] While this new rule would certainly speed up the process of accessing protection for individuals who qualify for asylum, there are unfortunate implications for those who are deemed to not qualify for asylum in their interviews. There have been a number of cases

[924] U.S. Citizenship and Immigration Services, Questions and Answers: Credible Fear Screening (2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening.

[925] *Id.*

[926] *Id.*

[927] U.S. Citizenship and Immigration Services, FACT SHEET: Implementation of the Credible Fear and Asylum Processing Interim Final Rule (2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule.

[928] *Id.*

in which women fleeing rape, murder, and other forms of violence have been deported or detained instead of beginning asylum proceedings. In one of these many cases, a transgender woman was deported twice by border patrol, even after they heard her evidence of being violently attacked multiple times.[929] As a result of being sent back to Mexico, she was repeatedly attacked, raped, and sex trafficked.[930] She wrote after finally receiving permanent residence status: "They had known all the reasons I was trying to come back to the U.S., and even knowing them, they sent me back."[931] Too many women face this reality when seeking asylum, and for those who are deported, severe violence often follows.

GENDER-BASED ASYLUM

In 1996, the United States Immigration Board of Appeals (BIA) allowed gender-based persecution as a legitimate reason to grant asylum in its decision in the *Matter of Kastinga.* In the decision, the BIA argued that female genital mutilation (FGM) "poses a risk of serious, potentially life-threatening complications [and] can be the basis for a claim of persecution."[932] Notably, the BIA classified FGM as a serious threat to Kastinga because of her membership in the Tchamba-Kunsuntu Tribe of northern Togo.[933] This gave the BIA grounds to argue that Kastinga could be granted asylum based on her membership in a "particular social group," which is one of the factors for asylum listed under the Refugee Act of 1980.[934] While the *Matter of Kastinga* was the first case to establish forms of persecution that target women as valid reasons for asylum approval, the cases to follow would not consistently grant asylum for women fleeing persecution based on their gender.

In 1999, the BIA's decision in *Matter of R-A* was a reversal of it's decision in *Matter of Kastinga.* The BIA denied asylum to a Guatemalan woman, Rody Alvarado, who was fleeing severe

[929] American Civil Liberties Union (ACLU), American Exile, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/american-exile.
[930] *Id.*
[931] *Id.*
[932] Matter of KASINGA, 21 I&N Dec. 357 (BIA 1996).
[933] *Id.*
[934] *Id.*

domestic violence.[935] In denying her asylum, the BIA argued that:

> "[w]here a victim of domestic violence fails to introduce meaningful evidence that her husband's behavior was influenced by his perception of her opinion, she has not demonstrated harm on account of political opinion or imputed political opinion … The existence of shared descriptive characteristics is not necessarily sufficient to qualify those possessing the common characteristics as members of a 'particular social group' for the purposes of the refugee definition."[936]

In other words, since Alvarado's domestic violence was not the result of a group membership target, she failed to meet the requirements for refugee status. This decision only points to the necessity of asylum statute reform, as gender should be a protected status—just as race and religion are under current law. It wasn't until 2009 that a judge finally approved Alvarado's request for asylum—a conclusion after ten years of legal battles.[937] Alvarado's case is a key example of how courts can rule on asylum in the case of a female applicant while focusing on legal justifications that do not include gender—which only contributes to the inconsistencies in BIA cases regarding asylum applicants fleeing gender-based violence. Women should not have to prove that their experiences of persecution and violence are the result of a particular social group being targeted to receive refugee status, as in the cases of the *Matter of Kastinga* and the *Matter of R-A*. Rather, the severity of gender-based violence based on *gender* should be enough.

Both Alvarado and Kastinga's cases were extremely significant to advocacy work in the 1990s that was focused on international feminism.[938] In 1996, as a response to Kastinga's case and the media attention that FGM had garnered during that time, Congress passed a bill banning FGM in the United States.[939] During this time, international refugee law also started to more broadly recognize gender-based asylum, particularly in cases

[935] Musalo, 47.
[936] Matter of R-A-, 22 I&N Dec. 906 (A.G.2001; BIA 1999).
[937] Musalo, 47.
[938] Sara L. McKinnon, Positioned in/by the State: Incorporation, Exclusion, and Appropriation of Women's Gender-Based Claims to Political Asylum in the United States, 97 Quarterly Journal of Speech 2, 178-200, 179 (2011).
[939] *Id.* at 179.

of rape, FGM, and domestic violence.[940] Yet, these initial cases cannot be held up as hallmarks of progress for feminism; instead, as other scholars also argue, the choice of granting asylum is often extremely biased and based on stereotypes of womanhood, the country from which people are fleeing, and gendered violence. Legal scholars Carrie Crenshaw and Sara McKinnon argue that there is "an unarticulated normative bias privileging male subjects and masculinity in US courtrooms," based on an institutional history of gender discrimination.[941] McKinnon goes on to elaborate: "The normative bias of the legal system functions through 'gender neutral' definitions/standards that assume a neutral person, but because that neutrality is figured through normativity, it perpetuates the privileging of white upper-middle-class male subjects in criminal, civil, and immigration courtrooms."[942] Coupled with the lack of an Equal Rights Amendment (ERA) or codified recognition of the right to asylum based on *gender*-based persecution, such bias exhibited in courtrooms only makes it more complex for women to claim refugee status. Taking into account gender stereotypes, women are scrutinized for how they look, how they talk—are they too quiet or too "loud"—how they act, and have their experiences or fears of gender-based violence questioned and prodded. When examining the inadequate reality of gender-based asylum in the United States, the institutional sexism of the U.S. court system must also be brought to account. For how can the United States truly fulfill the promise of asylum if it is so skewed against women before they even enter the country—not to mention the realities on the other side of the border once people *do* get refugee status?

The challenge of receiving refugee status as a result of gender-based violence has only been compounded by the increasing rhetoric of U.S. officials warning of the so-called dangers of allowing domestic violence (and other forms of violence) to guarantee asylum application approval.[943] Such racist and xenophobic rhetoric by immigration officials often incites images of "floods" of immigrants overrunning the border—and

[940] Avinash Govindjee & Elijah Adewale Taiwo, The protection of women refugees under the international refugee convention, In *An Introduction to International Refugee Law*, 379–399, 379 (2013).

[941] Mckinnon, 181.

[942] Mckinnon, 181.

[943] Mckinnon, 191.

implies that gender-based violence is normal and, if treated as exceptional, would allegedly lead to "too many" immigrants.[944] From such viewpoints being expressed in the 1990s during Alavaro's case,[945] to the Trump Administration's xenophobic fear-mongering of immigration, the United States has not ceased to profess anti-immigrant views—which reinforces the idea that only "ideal" applicants should be accepted into the country. In the early 2000s, changes in the law prompted an increased emphasis on perceived applicant "credibility" by immigration judges in deciding asylum cases.[946]

For women from the Global South,[947] stereotypes perpetrated by government officials often portrayed them as "needy and desiring access to the United States," implying false assumptions about resources and motivation for women who do immigrate to the United States.[948] Faced with inaccurate perceptions of "credibility," these female applicants may face additional barriers to receiving refugee status. And given the increasing severity of climate change,[949] women from the Global South are likely to face higher rates of displacement—and thus migration—in the years to come. Climate change disasters, which occur more frequently and with greater severity in the Global South, disproportionately displace women.[950] As such,

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[944] Mckinnon, 191.

[945] Mckinnon, 191.

[946] Sara L. McKinnon, Citizenship and the Performance of Credibility: Audiencing Gender-based Asylum Seekers in U.S. Immigration Courts, 29 *Text and Performance Quarterly* 3, 205-221, 206 (2009).

[947] The Global South includes countries predominantly in the southern hemisphere, which includes Latin America, Africa, parts of the Middle East, and Southern Asia.

[948] Mckinnon, 191.

[949] Due to geographic and environmental factors, countries in the Global South face heightened risks of climate disasters and other impacts of climate change and global warming. Many parts of the Global South are already prone to severe heat—areas that also often rely heavily on agricultural production—or might be low-lying tropical islands prone to severe flooding. Significantly, countries in the Global South are some of the smallest contributors to climate change yet are facing the disproportionate impact of climate change caused by emissions by wealthier countries. *See* United Nations, On the Frontline of Climate Crisis, Worlds Most Vulnerable Nations Suffer Disproportionately, https://www.un.org/ohrlls/news/frontline-climate-crisis-worlds-most-vulnerable-nations-suffer-disproportionately.

[950] OHCHR, Climate change exacerbates violence against women and girls, *United Nations OHCHR* (2022),

the need for stronger protections of the right to gender-based asylum is only more urgent, as more women will continue to face heightened levels of violence and displacement in the future.

While gender-based asylum is most often discussed in the context of gender-based violence, gender-based asylum should also pertain to women fleeing their home country because of other forms of discrimination or persecution on the basis of *gender*. The reality of gender injustice globally is vast and, as such, conceptions of gender-based asylum cannot only include gender-based violence cases.

GENDER-BASED VIOLENCE, REPRODUCTIVE INJUSTICE, AND CHILD SEPARATION AT THE BORDER

Immigrant women are especially vulnerable to violence during the process of immigration, as well as while seeking asylum—vulnerability that only continues for those who are granted the right to asylum. Sexual violence and other forms of gender-based violence—including sexual assault, sexual harassment, human trafficking, kidnapping, FGM, and domestic violence—are an epidemic that is only compounded by weak, often inept, laws and judicial proceedings to confront the consequences of sexual violence.

This section does not distinguish between asylum-seekers and non-asylum-seekers. Instead, it more broadly discusses injustice and violence faced by immigrant women, a classification that includes asylum-seekers. As mentioned previously, the guarantee of gender-based asylum remains inconsistent, as the right to asylum explicitly based on gender is still not codified into U.S. law. While recommendations for this issue will be discussed later, this section is intended to comment on the extent of violence that all immigrants—especially women—face, as to expand the right to gender-based asylum is to guarantee many such women a safer pathway to citizenship in the United States. When legitimate—in the eyes of the law—safer avenues to citizenship exist for women, these avenues decrease vulnerability for many of the crimes discussed in this section, including sex trafficking, domestic violence, and child marriage.

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https://www.ohchr.org/en/stories/2022/07/climate-change-exacerbates-violence-against-women-and-girls# (80% of people displaced by climate change are women and girls. Women who are displaced are at higher risks for sexual violence).

Gender-based violence at and beyond the border:

There are several specific reasons immigrant women face a heightened risk of gender-based violence. Research has demonstrated that immigrants face increased vulnerability to human trafficking,[951] which is "due to linguistic barriers, child smuggling, bribery of immigration officials, and insufficiently trained border patrols."[952] Extreme generational poverty is another factor that increases vulnerability to human trafficking for survivors.[953] An individual may find themself lured into human trafficking by deceptive promises of economic opportunity, unknowing that such a promise will result in human trafficking.[954] Women unable to obtain protected status in the United States, via asylum or other citizenship processes, will likely struggle to obtain higher-paying jobs and may find the only opportunities available are unregulated work that can quickly become exploitative. Additionally, employers or traffickers who are aware of undocumented status can hold this over the heads of immigrant women who attempt to escape or report exploitative practices to authorities.

Research that has focused on minors who are human trafficked also found prior sexual assault, sexual victimization, and early sexual activity to increase the risk for sex trafficking.[955] Considering that many women who do attempt to seek asylum on the basis of gender are fleeing sexual violence—such as FGM, honor killings, forced marriage, or other forms of violence—have likely experienced sexual violence prior to or during migration, the vulnerability of sex trafficking becomes even more pronounced.

Outside of sex trafficking, gender-based violence remains pervasive. Domestic violence is yet another type of violence that immigrant women experience—and when they do, the barriers to safety, justice, and support are much greater than

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[951] Gozdziak & Bump, 74.

[952] Squitteri, 222.

[953] Jennifer Sheldon-Sherman, The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act, 117 Penn State Law Review 443, 445 (2012).

[954] Squitteri, 221.

[955] Hannabeth Franchino-Olsen, Vulnerabilities Relevant for Commercial Sexual Exploitation of Children/Domestic Minor Sex Tracking: A Systematic Review of Risk Factors, 22 *Trauma, Violence, & Abuse* 1, 9-10 (2019).

for U.S. citizens. Marriage law finds its roots in coverture—the practice of ignoring women in the law and assigning them as mere property of their husbands—which has resulted in antiquated laws today. For women who obtain immigration status via marriage, they are reliant on their spouses to complete visa applications, as well as for a variety of other reasons—giving spouses the ability to intimidate, threaten, control, and abuse their wives.[956] Despite the Violence Against Women Act[957] (VAWA)'s attempt to equalize such marriages by extending more rights to immigrant women married to U.S. citizens, complex legal qualifications still hinder women—including requirements of battery or extreme cruelty. [958] Many immigrant women in married relationships recorded being relegated to traditional household roles of labor, in addition to extreme levels of violence—some of which occurred while pregnant.[959] For couples that immigrated together to the United States, study data found that violence increased for half of the women following their arrival to the United States.[960] Other studies found that rates of lifetime intimate partner violence ranged between 13.9% and 93% for immigrant women[961]—extremely high rates that only reinforce the need for domestic violence to qualify as a compelling reason to grant asylum.

Pregnancy, abortion, and injustice:

Violence against immigrant women isn't just perpetrated by criminals; much of this injustice has also been committed against women by immigration officials in detention centers. From withholding of abortion access to forced sterilization, to

[956]Edna Erez, Madelaine Adelman, & Carol Gregory, Intersections of Immigration and Domestic Violence, *Feminist Criminology* 4(1), 32-56, 44 (2009).

[957]The Violence Against Women's Act (VAWA) was originally passed in 1994 in response to domestic violence. Since then, VAWA has been reauthorized several times and remains a key federal law in providing services to women and children impacted by domestic violence, or other recognized forms of gender-based violence, including sexual assault and dating violence. (*See*: National Network to End Domestic Violence, Violence Against Women Act, https://nnedv.org/content/violence-against-women-act/).

[958]*Id.* at 37.

[959]*Id.* at 44.

[960]*Id.* at 44.

[961]Abigail M. Morrison, Julia K. Campbell, Laurel Sharpless, & Sandra L. Martin, Intimate Partner Violence and Immigration in the United States: A Systematic Review, *Trauma, Violence, & Abuse* (2023), 1-16, 1.

other forms of reproductive injustice, the reality for women immigrating to the United States is far from just.

Unaccompanied minors held in detention centers have been previously refused the right to abortion, even when it was legally permissible for them to have an abortion procedure. This denial of the right to termination of a pregnancy to minors has occurred in a variety of immigration detention centers, including centers under the authority of the Office of Refugee Resettlement (ORR).[962] The government defended itself from such action in *J.D. v. Azar* (2019) by arguing that they had only merely failed to fund or "facilitate" abortion access for unaccompanied minors under the ORR.[963] In response after the district court agreed, the United States Court of Appeals for the District of Columbia Circuit ruled against accepting "the government's effort to reconceive of ORR's no-exceptions ban on access to abortion as a mere refusal to 'facilitate' abortion," thus holding that ORR's actions created an undue burden on the right to access abortion.[964] The Court also held that "[t]he undue-burden framework has never been thought to tolerate any burden on abortion the government imposes simply because women can leave the jurisdiction," in response to the ORR's stance that people seeking an abortion could simply leave the country to access such a procedure.[965] The ORR's policy of denying unaccompanied minors abortions was a direct result of the Trump Administration's decision to grant discretion to the ORR director in deciding who should, or should not, receive an abortion.[966] Previously, under the Obama Administration, abortions were permitted for minors in ORR custody—yet federal funds could only be used for abortions in cases of medical emergencies or rape.[967]

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[962]The ORR specifically concerns unaccompanied minors immigrating to the United States. (*See:* Kalifa J. Wright, Lydia E. Pace, C. Nicholas Cuneo, & Deborah Bartz, Reproductive Injustice at the Southern Border and Beyond: An Analysis of Current Events and Hope for the Future. 31(4) Women's Health Issues, 306-309 (2021)).

[963]*J.D. v. Azar*, 925 F.3d 1291, 1330 (2019).

[964]*Id.* at 1328.

[965]*Id.* at 1331.

[966]Kalifa J. Wright, Lydia E. Pace, C. Nicholas Cuneo, & Deborah Bartz, Reproductive Injustice at the Southern Border and Beyond: An Analysis of Current Events and Hope for the Future. 31(4) Women's Health Issues, 306-309, 309 (2021).

[967]*Id.*

The right to access abortion *should* be a right for everyone, irrespective of their citizenship status or position as an unaccompanied minor; yet, the legal reality is far from such a statement. In *Dobbs v. Jackson Women's Health Center* (2022), the U.S. Supreme Court overruled *Roe v. Wade* (1973), allowing states autonomy over their own abortion laws.[968] According to 2021 data, Texas and Florida have some of the largest immigrant populations, just behind California at 5.1 and 4.6 million, respectively.[969] Significantly, Texas has some of the strictest abortion laws in the United States, and Florida is in the process of further restricting abortion from the fifteen-week mark with a recently signed into-law six-week ban. Thus, immigrants—irrespective of their age—may have a higher likelihood of coming to states with severe abortion bans or restrictions. Such transgressions on access to crucial reproductive care are made all the more concerning by the fact that sexual assault, among other forms of sexual violence, occurs far more for immigrant women in the process of migration—over half of immigrant women are sexually assaulted while migrating.[970] Many migrants have reported being raped as they await entry to the United States.[971] Given these reports, denied access to abortion also implies that sexual assault survivors who are pregnant as a result of rape may have no way to terminate their pregnancies. While ICE released a memo after the *Dobbs* decision clarifying that they would still provide abortion access,[972] the often inhumane conditions in immigration detention centers still pose extreme concern.

Yet for women who are either denied an abortion or choose to carry their pregnancies to term, the reality remains grim.

[968] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

[969] Nicole Ward & Jeanne Batalova, Frequently Requested Statistics on Immigrants and Immigration in the United States, Migration Policy Institute (2023), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#immigrant-destinations.

[970] Soria-Escalante, Alday-Santiago, Alday-Santiago, Limón-Rodríguez, Manzanares-Melendres, & Tena-Castro, 1280-1281.

[971] Laura Gottesdiener, Ted Hesson, Mica Rosenberg, & Daina Beth Solomon, Migrants are being raped at Mexico border as they await entry to US, Reuters (2023), https://www.reuters.com/world/migrants-are-being-raped-mexico-border-they-await-entry-us-2023-09-29/.

[972] Stef W. Kight, Detained migrants can still access abortions, ICE says, Axios (2022), https://www.axios.com/2022/07/12/abortion-access-detained-migrants-ice.

Between 2018 and 2020, several incidents were documented in which pregnant immigrant women were forced to give birth over trash cans or in undignified conditions, suffered miscarriages as the result of no access to crucial healthcare services, were interrogated while in the hospital postpartum, and were separated from their families—all in addition to being deported after giving birth.[973] Pregnant women faced dangerous and cruel conditions in which they were not given proper medical attention, blankets, food, or critical medications.[974]

The genocide continuum: forced sterilization & family separation:

Forced sterilization is another piece of the egregious state of reproductive injustice and human rights violations in the United States. In 2020, a whistleblower report revealed that women in an immigration detention center in Georgia had received hysterectomies against their will[975]—building on a history of forced sterilization against non-white people in the United States. According to scholars Dr. Paul Fleming and Dr. Alana LeBron, "between 1919 and 1952 … Latina women were sterilized at a rate that was 59% higher than non-Latina women for being feebleminded or insane. The laws that allowed nonconsensual sterilization in California were in place between 1909 and 1979 and resulted in the sterilization of more than 20,000 individuals."[976] Given this history, policymakers should take decisive action to prevent forced sterilization and monitor immigration detention centers with independent monitors to prevent continued forced sterilization of immigrant women.

Forced sterilization is motivated by a myriad of prejudices and racism that assert who is "unfit to reproduce."[977] Often, immigrant women who are sterilized at the highest rates are from Central and South America—trends which are made possible by anti-immigrant sentiment that allows authorities to "get

[973]Amanda Heffernan, Pregnancy in United States immigration detention: the gendered necropolitics of reproductive oppression, 25(1) International Feminist Journal of Politics, 30-53, 31 (2022).

[974]*Id.* at 32.

[975]Wright, Pace, Cuneo, & Bartz, at 306.

[976]Paul J. Fleming & Alana M. W. LeBrón, Historical and Contemporary Reproductive Injustices at the Border and Beyond, *Am J Public Health* 110(3), 273-274, 273 (2020).

[977]Lisette Karina Gomez, Forced Sterilization of Latinas: An Issue of Reproductive Justice in the United States, *The Mellon Mays Undergraduate Fellowship Journal*, 37-41, 38 (2022).

away" with human rights violations more easily.[978] Scholars and medical professionals urge the prioritization of medical consent as one key policy solution,[979] as many forced sterilizations are given with no consent, or use consent forms with confusing terms in languages not spoken by the patients. While consent should always be given to provide any medical procedure, the law also offers several routes for ending forced sterilization. But first, the United States must acknowledge its actions; deliberately sterilizing women of marginalized groups without their consent is a major human rights abuse that impacts real people who will bear the result of a forced hysterectomy for their entire lives. Specific policy recommendations will be discussed later in this article, yet it is important to note that policy alone cannot be seen as a form of justice for forced sterilization. Such solutions will indeed protect the women to follow, but reparations are equally important—and should be seen as such. The women who have suffered as a result of forced sterilization are more than mere numbers; they represent a break in generations of families, the unjust denial of reproductive choice, and individual lives that will never be the same.

Family separation is yet another human rights abuse that has been committed against immigrant families in the United States. Trump's "zero-tolerance" immigration policies that separated thousands of children from their families at the border built upon centuries of family separation of Indigenous, Black, and Mexican children by the U.S.[980] Reproductive injustice is rife in immigration detention facilities, ranging between child sexual abuse, deportation of parents, mistreatment of pregnant detainees, child pharmaceutical abuse, traumatization of migrant children, and transfer of separated children into the foster system.[981] There aren't reparations in place to respond to the trauma that children who are taken from their families experience.[982] In 2018, the federal government re-

[978] *Id.* at 38.

[979] Elizabeth C. Ghandakly & Rachel Fabi, Sterilization in US Immigration and Customs Enforcement's (ICE's) Detention: Ethical Failures and Systemic Injustice, *AJPH Opinions, Ideas, & Practice*, 111(5), 832-834, 833 (2021).

[980] Leandra Hinojosa Hernández, Feminist Approaches to Border Studies and Gender Violence: Family Separation as Reproductive Injustice, Women's Studies in Communication 42(2), 130-134, 132 (2019).

[981] *Id.* at 132.

[982] *Id.* at 132.

leased a court-ordered report that estimated 2,654 children were separated from their families at the border.[983]

The United Nations recognizes sterilization of a particular group, as well as family separation tactics, as two factors in their definition of genocide.[984] While *intent* to destroy a particular group is a critical part of qualifying genocide, which this article does not discuss, it is still incredibly significant that two of the factors recognized as genocide tactics by the UN are employed against immigrants in the United States. This article draws on the theories of Dr. Graham Kinloch to best situate such an understanding. He defines genocide as a continuum that any society can fall along, given ethnocentrism, dehumanizing stereotypes, and particular external and internal factors that increase the likelihood of genocide.[985] Thus, genocide exists on a continuum—which can occur before mass killing ever begins, if a country does escalate to that level of violence—in which group demographic control through exploitation and discrimination occurs.[986] It is critical to situate the forced sterilization of immigrants (and other people of color historically) and family separation tactics at the border within an understanding of the continuum of genocide because these two tactics used by the United States government are likely intentional and strategic. It is not an accident that immigrant families were separated at the border, nor is the forced sterilization of immigrant women an accident. Both occurred, in recent years, under government officials appointed by President Trump, who himself reinforced hateful stereotypes about immigrants—

[983] American Civil Liberties Union, Family Separation By the Numbers, (2018), https://www.aclu.org/issues/family-separation.

[984] Genocide, *United Nations*, https://www.un.org/en/genocideprevention/genocide.shtml. ("In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group.").

[985] Graham C. Kinloch, Chapter 1: The Possible Causes and Reduction of Genocide: An Explanation, from *Genocide: Approaches, Case Studies, and Responses*, Algora Publishing (2005), 15-33, 17, 29.

[986] *Id.* at 17.

rhetoric that only reinforced ethnocentrism, which is the core of genocide, according to Kinloch.

In discussions of gender-based asylum or immigration driven by gender-based persecution (regardless of whether someone actually obtains asylum status), it is critical that legal scholars recognize the extent of violence against immigrant women perpetrated by the United States itself. In a country that does not have a codified right to gender-based asylum and has committed horrible acts of injustice against immigrants, does gender-based asylum really exist in the realities for immigrant women? This article points not only to the law but how the law manifests in the lives of real people fighting for safety and security. Immigrant women should not have to trade the fear of gender-based violence in their home country for the same fears in the United States, no matter if these fears manifest or look different in the United States.

RECOMMENDATIONS

The "American Dream" has long been founded on the idea that the United States is a land of promise where anyone can come from anything and excel. It is an ideal that is often intertwined with the infamous phrase that America is a land of immigrants—but often, the people who repeat such a saying omit the fact that those immigrants are people who, often on the basis of gender, religion, appearance, race, and ethnicity, are deemed to be "desirable." Xenophobic, racist, and sexist rhetoric forms the backbone of the legal and political realities for immigration in the United States.

How tenable is the American Dream to an impoverished Latin American woman who has been sexually assaulted during her traumatizing journey to the United States border, only to be left in a dangerous refugee camp for months and denied asylum because she didn't qualify as a member of a "particular social group" faced with persecution? How tenable is the American Dream for a woman who, after years of fighting for asylum status, is faced with the lack of socioeconomic mobility for an immigrant woman who does not have a high school diploma—a woman who can easily fall into human trafficking or other abusive situations and struggle to survive as a result? How tenable is the American Dream to an undocumented mother whose children are taken from her at the border and

who has yet to be reunited with her children? How tenable is the American Dream to a woman who wakes up in an immigration detention center only to find out that she was forcibly sterilized, separated from her only children, and is being denied asylum status?

The reality is that, for many individuals attempting to immigrate to the United States, the American Dream is but a mirage. Even for the lucky migrants who make it into the United States, this "dream" is all too often accessible only for immigrants of more "desirable" (i.e., less provoking to racists) nationalities, figures who are often men. This isn't to argue that we shouldn't invest or believe in the concept of equal opportunity that the American Dream (supposedly) implies; rather, it is to expose the false reality of this concept for marginalized communities for the sake of creating better legal and political frameworks that can finally make such a promise even slightly more real. Immigrant women exist in the identity intersections of societies; they are "outsiders," often at a gender, racial, socioeconomic, and linguistic disadvantage. This intersectionality *should* prompt additional programs, investments, and legal reforms to respond to the epidemic of gender-based violence that immigrant women overwhelmingly experience, and finally make the "American Dream" less of a rhetorical smokescreen for immigrants and their families.

Legislative action:

First, Congress should amend the Refugee Act of 1980 to include gender as a legitimate reason for granting asylum status. It is essential that the United States codify gender-based asylum, explicitly to prevent the inconsistent response by the BIA that relies on women to meet the requirement of a "particular social group" being persecuted instead of recognizing that gender-based persecution is real, expansive, and extremely dangerous. Given that both race and religion are included in the definition provided by the Refugee Act of 1980, there is no compelling reason for gender not to be included as well. Expanding this definition would also help insulate gender-based asylum from political polarization to some extent; without a codified right to asylum on the basis of gender, it is easier for political appointees to sway whether women receive asylum status based on the leaning of the political party in the White House.

Second, immigrant women—especially those of color—should have explicit, diligently enforced expansions of protections and rights. Congress should clearly identify what conditions are permissible for detainees and increase protections and guidance for vulnerable populations. Such vulnerable populations should include young children, women (especially pregnant women), and elderly populations.[987] Under no circumstances should pregnant women be sitting in freezing holding cells or denied prenatal care, for example. Passing sweeping immigration reforms that first emphasize human rights is critical to reckoning with the United States's all-too-recent past of committing egregious human rights violations. This immigrant bill of rights should, more specifically, include the following:

a. Children under the age of 18 should be kept with their families at all times. On-site psychologists should have the right to provide care to patients and conduct facility inspections at ICE detention centers to avoid adverse childhood experiences (ACEs) at all costs. Children have the right to attend permitted schooling sessions, eat nutritious meals, and access healthcare, including reproductive healthcare, that is permitted under state law.

b. Pregnant women in detention centers should have the right to regular prenatal care, as recommended by federal guidelines, as well as other healthcare services. They should have the right to regular, nutritious meals and safe living conditions.

c. All individuals in immigration detention centers must provide written consent twice, 24 hours apart, for any medical procedures. These consent forms must be in the spoken language of the patient and cannot use unnecessarily confusing language. Immigration officials also may not restrict or unduly burden an individual from accessing medical care, such as, but not limited to, abortion procedures (when legally permissible under state law).

d. Individuals seeking asylum should have the right to access mental health providers. Especially considering that gender-based violence applicants are likely

[987] Please note that this is not an expansive nor specific list.

> fleeing traumatic violence, the state has a responsibility to provide such care while individuals are in their facilities.

While this list of suggested protections for an immigrant bill of rights is likely far from complete, the above suggestions respond to the experiences of immigrants in the United States who have experienced family separation, forced sterilization, inhumane holding conditions, denial of healthcare, and other injustices. Congressional action to respond to these well-documented instances is critical. So, what is the first step? Public pressure and education. While anti-immigrant sentiment is ripe across the United States, advocacy organizations have—and should continue to—share the stories of immigrants in an effort to fuel public outrage. Funding remains a large barrier to immigration reform, as detention centers are expensive to maintain. This only fuels the necessity of a more efficient system in which people are not held in detention centers for extended periods of time. The barriers to congressional action are high for a variety of reasons, but amending the Refugee Act of 1980 is a strong start to finally codify the right to gender-based asylum. Given that public pressure around BIA cases in recent years has created a strong public support base in advocacy circles, amending the Refugee Act of 1980 is feasible.

State legislation can also be a critical step towards improving the conditions for immigrants, especially socioeconomically. Research is clear that poverty fuels crime and increases the likelihood of exploitative and dangerous work, which immigrant women are already at a higher risk of facing. States can take the initiative to promote programs that help immigrants access jobs, housing, and education. There is also an imperative for advocacy against current state laws in places such as Florida, which have recently criminalized undocumented immigrants in extreme ways, such as prohibiting industries from hiring undocumented immigrants. Labor exploitation is a major issue facing marginalized communities, and states have an imperative to prevent such human rights abuses. State legislation is also likely much easier to pass than federal legislation—although this may depend on the state in question.

Litigation:

Using litigation as a tool to expose and challenge human rights abuses that immigrant women face may prove an incredibly effective method to usher in legal reform, especially given the heightened polarization around legislative immigration issues that makes passing reform bills extremely challenging. And even when gender-based violence laws are passed by Congress, they are very often riddled with inaccurate pictures of what women actually go through, and may be misinformed in their approach to responding to violence. The TVPA, for example, is a travesty of a bill to "protect" survivors of human trafficking; it instead completely misses the mark in helping actual survivors—it is the product of a bill by a politician with a track record of conflicting interests.[988] The case of the TVPA serves as a warning sign to those who exclusively rely on Congress for legal reform—and an indication that the best approaches to reform may lie with a variety of tactics, including litigation.

The American Civil Liberties Union (ACLU) has demonstrated the power of litigation on behalf of immigrants who are abused, mistreated, or neglected—lessons that the academic community can indeed learn from. In *J.D. v. Azar* (2019), for instance, ACLU lawyers fought for an unaccompanied minor to receive an abortion that she had been denied by the ORR.[989] Similarly, in *Garza v. Hargan* (2018), the ACLU filed a class action suit on behalf of unaccompanied pregnant minors who had been denied transportation to receive abortions, requesting class certification and a preliminary injunction—both of which were granted by the district court.[990]

In *Oldaker v. Johnson* (2021), thirteen individuals filed a lawsuit for "habeas relief, including release from detention and stays of removal, and … monetary, declaratory, and injunctive relief" in response to forced sterilizations they experienced at Irwin County, GA's immigrant detention center.[991] When the defendants complained publicly about their forced hysterectomies, Irwin County Detention Center staff punished them, and ICE attempted to hasten their deportations to silence their complaints.[992] The district court ordered ICE to cease retaliatory actions against the petitioners and halted deportations.

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[988] Squitteri, 212, 216.
[989] *J.D. v. Azar*, 925 F.3d 1291, 1330 (2019).
[990] *Garza v. Hargan*, 304 F.Supp.3d 145 (2018).
[991] *Oldaker v. Johnson*, 2021 WL 4254864 (2021).
[992] *Id.*

Despite being ruled moot on appeal, *Oldaker* is still a key example of how litigation can be a tool to respond to injustices, such as forced sterilization.

Litigation can be especially impactful in immigration cases, given the need for immediate and direct action in specific circumstances, including deportation, family separation, or the need for an urgent medical procedure (such as an abortion). In *Ms. L et al. v. Immigration and Customs Enforcement* (2018), ACLU lawyers attempted to reunite a mother with her child who had been forcibly taken from her by ICE. Within a month of filing their lawsuit, ACLU lawyers were able to reunite Ms. L with her daughter[993]—which demonstrates the impact of litigation as a tool for direct action. The ACLU argued that family separation policies violated the U.S. Constitution and other federal laws.[994] While the court dismissed some of the lawsuit's claims under the Administrative Procedure Act and the Asylum Statute, they held that family separation did violate Ms. L's right to due process.[995] *Ms. L* is a critical case in challenging family separation at the border and winning reparations, including family reunification processes, for immigrant families impacted by this draconian policy.[996]

These few cases, among many others, have been met with varying levels of success—but litigation has still been a strategic tactic to respond to injustices committed against immigrant women. Even if legislation reform partially misses the mark, some change could expand avenues for litigation to expand immigrant protections. While this strategy lacks the potential for prevention of unjust government action to the extent that legislation has, valuable precedents can hold much weight in legally protecting the rights of immigrants in the United States.

The case for the Equal Rights Amendment:

While the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects against government action discriminating on the basis of sex, there is a strong

[993] American Civil Liberties Union, Ms. L v. ICE, https://www.aclu.org/cases/ms-l-v-ice.

[994] *Ms. L. v. U.S Immigration and Customs Enforcement*, 302 F.Supp.3d 1149 (2018).

[995] *Id.*

[996] American Civil Liberties Union, Ms. L v. ICE Executed Settlement (2023), https://www.aclu.org/documents/ms-l-v-ice-executed-settlement.

imperative for an overarching constitutional amendment that guards explicitly against gender discrimination. How long has the Fourteenth Amendment been in place while women have been denied so many rights? Gender discrimination in educational institutions was not even banned until 1972 with Title IX, and until the decision in *United States v. Virginia* (1996). Prior to this decision, universities could still deny admission to women on the basis of their gender. Those who argue that the Equal Protection Clause is enough are blind to the lengthy history of gender discrimination institutionalized in our laws.[997] And while the Equal Protection Clause has played a key role in strategic litigation to expand women's rights, the imperative remains for constitutional protections against *gender* discrimination.

The Equal Rights Amendment (ERA), originally introduced in the 1970s, has met all of the constitutional requirements for ratification. But currently, the ERA hangs in limbo, awaiting a critical Senate vote to remove the original 1986 ratification deadline. Pending positive Senate action that would remove this barrier for the ERA to become law, the ERA could have major implications for gender-based asylum and gender justice at large. While, if finally implemented as part of the U.S. Constitution, the ERA likely would not guarantee the right to asylum on the basis of gender, it could protect against discrimination and injustice that far too many immigrant women face. Given that forced sterilization and the denial of abortion rights to teenagers in detention centers, among other injustices, have occurred in just the past few years, ERA protection is vital. Litigation as a strategy to protect the rights of immigrant women would only be bolstered by the ERA.

Until the ERA is implemented, it is challenging to predict how litigation will usher in new precedents in response, but this article maintains that codified gender discrimination protections in the U.S. Constitution are a critical step towards justice for women everywhere—but especially in the context of the extreme discrimination immigrant women experience.

Putting survivors first:

[997] Ruth Bader Ginsburg, The Need for the Equal Rights Amendment from *My Own Words*, by Ruth Bader Ginsburg, Mary Hartnett, & Wendy W. Williams. Simon & Schuster (2016).

Extensive research points to the high numbers of immigrant women who have experienced gender-based violence after entering the United States. While asylum protections are incredibly important in reducing the vulnerability of immigrant women and guaranteeing them secure status in the United States, additional action must be taken on behalf of the many women who don't receive asylum status. Until Congress reforms the Refugee Act of 1980, this will likely make up a large portion of women who immigrate to the United States.

In terms of human trafficking, the Trafficking Victims Protection Act (TVPA), as discussed earlier, has major gaps in how the so-called "protection" of victims operates in reality. The TVPA's stringent requirements for any services will continue to exclude and harm immigrant women until they are reformed, as many scholars, including this author, have called for in a litany of publications. The TVPA should offer services to anyone who claims to be human trafficked *before* any investigations proceed. Federal authorities should not conjecture who "looks" like a survivor as a requirement for believing them. Lastly, the requirement to fully cooperate with prosecutors in providing information must be removed from the TVPA; it ignores the realities of post-traumatic stress disorder (PTSD) and creates a large barrier for survivors to access supportive services. Yet, the TVPA should not be seen as the answer—prosecution should not be the sole focus of legislative reform. If the TVPA will not amend its requirements to actually protect survivors, as it claims to do, additional legislation is warranted that allocates services to survivors of gender-based violence, including human trafficking and other crimes as well.

The Violence Against Women's Act (VAWA) likewise warrants reform to expand equal rights to married couples of whom one is an immigrant. A spouse should not have any control over someone's immigration status, especially in domestic violence situations. Scholars specifically suggest improving "resource allocation to [Intimate Partner Violence (IPV)] prevention in immigrant populations, [and] broaden[ing] definitions of IPV to include immigration-related IPV."[998] Generally, legislation that concerns any form of gender-based violence has an imperative to recognize the application to immigrants and consider specialized provisions to address the intersectional

[998] Morrison, Campbell, Sharpless, & Martin, 13.

violence that immigrant women have a higher likelihood of experiencing.

Above all, laws that focus on prosecution are not the answer. This is unfortunately the case with many gender-based violence laws that overbearingly focus on prosecution and not prevention of the actual crimes in question. Action must be taken to reduce vulnerability in immigrant communities before the violence occurs, which includes investing in education, offering job pathways for undocumented individuals, and investing in anti-poverty programs geared towards immigrant communities.

CONCLUSION

Gender-based asylum is *not* a reality for most women or individuals fleeing gender-based persecution. Although several cases since the 1990s have set the standard for gender-based asylum, the level of variability between cases hinders the consistent recognition of gender-based asylum. Even in the cases that have approved asylum for women fleeing gender-based violence, they were only approved under the legal grounds of a "particular social group"—which is a direct result of the lack of a codified right to gender-based asylum in the United States.

This article discussed the reality of immigrant women experiencing real violence and fleeing often dangerous places and situations. As such, this discussion cannot be limited just to the imperative for gender-based asylum as a legal right. Many women who do not have asylum have entered the United States as undocumented individuals and experienced high levels of violence, both in immigration holding facilities and in their communities. The level of inaction by lawmakers is egregious—yet unsurprising given a history of exclusionary politics in the United States. This inaction is resulting in major human rights violations that range from rape to sex trafficking, to having one's children taken from them, to forced sterilization, and to domestic violence. Until such violence begins to be seriously addressed, the promise of rhetoric like the "American Dream" or "gender-based asylum" will continue to ring hollow.

THE STANDARDIZATION OF ARTIFICIAL INTELLIGENCE AND SUSPECT IDENTIFICATION

Ariana Taborga Sierra

The Standardization of Artificial Intelligence and Suspect Identification

ABSTRACT:
In the context of rapid technological advancements in investigative technologies, fostering more extensive and substantive public participation in policy formulation becomes imperative. This article underscores the significance of public input in the procurement and deployment of facial recognition technology (FRT) by law enforcement agencies as a pivotal example that can impact trust in law enforcement. The incorporation of public engagement in policy decisions related to the acquisition, utilization, and assessment of FRT effectiveness is advocated, employing an oversight framework inclusive of citizen stakeholders. Authentic public engagement necessitates the transparent availability of sufficient and accurate information from the outset, facilitating public dialogue and discussion of perspectives and ideas.[999] The approach outlined herein serves as a potential model for surmounting policy development obstacles commonly encountered in the context of privacy-invasive technologies employed by law enforcement.

INTRODUCTION

Artificial intelligence (AI) holds substantial promise for various applications in law enforcement, encompassing predictive policing, automated monitoring, processing extensive data (such as image recognition from confiscated digital devices, police reports, or digitized cold cases), extracting case-relevant information to aid investigations and prosecutions, and enhancing overall productivity in police operations. FRT exhibits inherent racial biases.[1000] Consequently, to enhance

[999] Dallis Hill, Christopher D. O'Connor, and Andrea Slane, Police Use of Facial Recognition Technology: The Potential for Engaging the Public through Co-Constructed Policy-Making, 24 SAGE. JOUR., REV.235, 228 (2022).

[1000] Dr. Francien Dechesne, Lexo Zardiashvili, LLM, Dr. Virginia Dignum, and Jordi Bieger, MSc, AI & Ethics at the Police: Towards Responsible Use of Artificial Intelligence in the Dutch Police, LEI. LAW., March. 2019, at 16.

and furnish law enforcement with ethical guidelines and policies about AI, it is imperative to address these biases.[1001] For law enforcement to maintain trust in their effectiveness, continuous innovation is essential to keep pace with evolving criminal strategies and capabilities, utilizing new methods and technology for task fulfillment. Demonstrating goodwill and respect for civilian rights is indispensable for law enforcement to be deemed trustworthy in exercising their power.

CURRENT METHODS OF SUSPECT IDENTIFICATION

AI holds considerable promise for law enforcement across various applications, encompassing predictive policing, automated monitoring, and efficient processing of substantial data volumes, including image recognition from confiscated digital devices, police reports, and digitized cold cases. Its potential extends to the identification of case-relevant information to support investigations and prosecutions, ultimately contributing to enhanced productivity in police operations. Nevertheless, the question arises: is the risk commensurate with the reward? Notably, AI has been effectively employed in specific tools such as PredPol, a predictive policing software leveraging machine learning algorithms to analyze historical crime data and forecast potential future crime locations. Additionally, technologies like ShotSpotter, an AI-based gunshot detection system utilizing acoustic sensors for real-time detection and localization of gunfire sources, offer crucial information to law enforcement, facilitating swift response and crime investigation. Speechify, recognized as a "must-have AI tool" for police departments, is a valuable text-to-speech tool that converts written documents, such as incident reports or legal documents, into natural-sounding audio, enabling officers to expediently access critical information.[1002] Despite these advancements, a critical evaluation is warranted to assess the balance between the associated risks and rewards of integrating AI tools within law enforcement practices.

RACIAL BIAS SUSPECT IDENTIFICATION

[1001] Dechesne, *supra* note 2, at 18.

[1002] John L.M. McDaniel and Ken G. Pease, Predictive Policing and Artificial Intelligence., Routledge (Feb. 25, 2021).

Recognizing or recalling human faces poses a formidable challenge, particularly in scenarios where face recognition garners substantial attention, such as the identification of criminal suspects in photographic or live lineups. This task is compounded by various factors that exacerbate the difficulty of accurate recognition. These factors encompass elements like heightened stress during the original incident, inadequate lighting conditions, a brief timeframe for observation, and distractions such as the presence of a weapon, escape opportunities, or the focus on the victim's plight (when not the observer).[1003] The convergence of these factors contributes to the contentious nature of eyewitness identifications as a class of evidence. Judge Nathan Sobel, a Brooklyn lawyer, judge, and adviser to several state political leaders, proposed that inaccurate eyewitness identifications have been responsible for more miscarriages of justice within the U.S. criminal justice system than all other factors combined.[1004]

Despite the widespread acceptance of the idea of an own-race bias, there had been little research on its existence until the past 30 years. In a review of relevant studies, Lindsay & Wells (1983) identified 13 samples in which both own- and other-race identification accuracy was studied. Eleven of the 13 samples yielded significant interactions between the race of the perceiver and the race of the target. Six of the 11 significant interactions were "full crossover interactions" where, for both races, own-race identification was better than other-race identification.[1005] The study criticized what they saw as oversimplified interpretations of this research literature. Lindsay & Wells argued that (1) the research results were more inconsistent than previous observers had realized; (2) the race-related differences might be of small magnitude and little importance; (3) research has been based on no firm theoretical understanding of the processes involved; and (4) the researchers often failed to ask "forensically relevant" questions.[1006]

With these elements in mind, it is imperative to acknowledge the salient influence of race in the process of suspect

[1003]J. C. Brigham, The Influence of Race on Face Recognition, Volume 28, Aspects of Face Processing in 170-177.

[1004]*Id.*

[1005]Wells, G. L., & Turtle, J. W. (1986). Eyewitness identification: The importance of lineup models. *Psychological Bulletin, 99*(3), 320–329.

[1006]*Id.*

identification, particularly within the context of contemporary technological advancements employed by law enforcement agencies. The intersection of race and technology necessitates meticulous consideration to elucidate how racial dynamics may impact the precision of suspect identification. An excessive reliance on emergent technologies and artificial intelligence (AI) within this paradigm introduces a precarious dimension, where the potential for engendering injustices and inaccuracies within our justice system becomes palpable. This predicament poses a formidable challenge, impeding the efficacy of law enforcement endeavors and the pursuit of justice. As we navigate the intricate landscape of technological integration in law enforcement practices, a nuanced understanding of the nuanced interplay between race, suspect identification methodologies, and evolving technologies is indispensable to fostering an equitable and effective criminal justice system.

EXISTING STANDARDS AND REGULATIONS IN ARTIFICIAL INTELLIGENCE

Current standards and regulations governing the use of artificial intelligence (AI) in law enforcement highlight the evolution and impact of predictive policing systems. These systems leverage AI algorithms and machine learning to meticulously analyze historical crime data, identify patterns, and predict future crime hotspots. The speed and precision with which AI processes vast amounts of data have significantly elevated the accuracy and efficiency of suspect identification. Facial recognition technology (FRT), surpassing human capabilities, particularly stands out in enhancing investigations by swiftly pinpointing potential matches within extensive databases.

In the context of regional regulations, California has emerged as a trailblazer in privacy legislation. The California Consumer Privacy Act (CCPA), enacted in 2020, bestows specific privacy rights upon California residents, potentially influencing the application of AI in law enforcement.[1007] Additionally, the California State Legislature has deliberated on bills directly addressing the utilization of facial recognition technology by law enforcement.

[1007]Cal. Civ. Code § 1798.100 (2022).

Illinois, through the Biometric Information Privacy Act (BIPA),[1008] regulates the collection and use of biometric information, including facial recognition data, thereby impacting the use of such technology in law enforcement. Similarly, Oregon, specifically the city of Portland, has instituted ordinances restricting facial recognition technology's usage by both governmental and private entities.[1009]

In Massachusetts, ongoing discussions center on the need for safeguards concerning the use of facial recognition technology by law enforcement, even if specific statewide regulations may not have been enacted. In Michigan, local jurisdictions, notably Detroit, have contemplated or implemented regulations about the use of facial recognition technology by law enforcement.[1010]

New York City has taken legislative steps concerning the use of automated decision systems, which encompass AI applications, by city agencies.[1011] This legislation emphasizes transparency requirements in the deployment of these systems, contributing to the responsible utilization of AI in law enforcement.

Acknowledging the advantages of AI in policing is crucial while reiterating its irreplaceability in certain aspects. AI's ability to augment human capabilities, enhance efficiency, and facilitate data-driven decision-making underscores its advantages. However, the acknowledgment that AI cannot replace police is pivotal, as it lacks human judgment, empathy, and the ability to navigate complex social interactions. Instead, AI should be viewed as a complementary tool that enhances law enforcement capabilities across various facets while recognizing the enduring importance of human involvement in policing.

THE NEED FOR FURTHER STANDARDIZATION

[1008] Ill. Rev. Stat. ch. 740, § 14/1 et seq. (2022)

[1009] Simone R.D. Francis & Zachary V. Zagger, New York City Releases New Guidance on Law Regulating Use of Automated Employment Decision-Making Tools, OgleTree Deakins (July 3, 2023), https://ogletree.com/insights-resources/blog-posts/new-york-city-releases-new-guidance-on-law-regulating-use-of-automated-employment-decision-making-tools/#.

[1010] *Id.*

[1011] *Id.*

Standardizing the use of artificial intelligence (AI) in law enforcement is imperative for shaping fair and best practices within these agencies. The establishment of standardized guidelines plays a crucial role in addressing bias and discrimination inherent in AI algorithms. By implementing best practices focused on fairness and inclusivity, law enforcement agencies can mitigate the risk of biased outcomes, particularly in suspect identification and other AI applications. This proactive approach to reducing bias contributes to the overall fairness of AI systems, fostering equal treatment across diverse demographic groups.

The necessity for standardization becomes particularly pronounced when considering the impact on black and brown communities, which often bear the brunt of the misuse and inaccuracies associated with facial recognition AI. These communities are disproportionately affected, making the need for fair and accurate AI applications especially vital.[1012] Standardized guidelines ensure that the development and deployment of AI technologies consider these disparities, striving to eliminate discriminatory outcomes.

Interoperability and information sharing represent additional compelling reasons for standardization in AI use by law enforcement. Standardized guidelines facilitate interoperability among different AI systems employed by various agencies.[1013] This interoperability, in turn, enhances the seamless sharing of information and collaboration on investigations.[1014] The improved flow of information leads to more effective and coordinated responses to criminal activities. Standardized formats and protocols enable better communication and integration of AI tools, ultimately enhancing the overall capabilities of law enforcement.

Transparency and public trust are critical aspects that are positively impacted by standardization. Law enforcement agencies are better equipped to communicate their processes and decision-making to the public when they adhere to estab-

[1012] Nila Bala and Caleb Watney, What are the proper limits on police use of facial recognition?, Brookings (June 20, 2019), https://www.brookings.edu/articles/what-are-the-proper-limits-on-police-use-of-facial-recognition/.

[1013] *Id.*

[1014] Daniel Wong, How Can AI Help Law Enforcement Identify Suspects Faster, Veritone (Aug. 22, 2023), https://www.veritone.com/blog/ai-public-safety-suspect-identification/.

lished guidelines. This transparency is essential in demystifying the use of AI, providing insight into how technology is employed in law enforcement. As a result, the public gains an understanding of the safeguards in place, fostering a sense of accountability and legitimacy in law enforcement practices.

Furthermore, standardization allows law enforcement agencies to adapt to evolving AI technologies more efficiently. Guidelines can be updated to incorporate new developments and address emerging challenges, ensuring agencies stay current with the latest advancements while maintaining ethical standards. This adaptability is crucial for law enforcement to effectively leverage evolving AI technologies for public safety while upholding principles of fairness and accountability. In conclusion, the need for standardizing AI use in law enforcement extends beyond technical considerations; it encompasses ethical, social, and legal dimensions, ultimately contributing to a more just and trustworthy application of AI in public safety efforts.

RISKS OF ERRORS OR ABUSE OF FACIAL RECOGNITION TECHNOLOGY

The challenges and limitations inherent in current AI suspect identification display the delicate balance between the potential benefits of technology in enhancing public services and the substantial authority of the government, fraught with the potential for harm. Even when AI technology demonstrates an aptitude for accurately identifying individuals, concerns arise among advocates regarding its potential role in fostering a surveillance state, potentially leading to an increase in arrests for minor offenses without a commensurate enhancement in public safety. The utilization of facial recognition by the Chinese government to apprehend jaywalkers and monitor specific minority groups exemplifies the apprehensions surrounding potential misuse.[1015]

Inappropriately applied, facial recognition technology (FRT) poses a tangible threat to the foundations of a free, democratic society, instigating a chilling effect that adversely impacts fundamental rights such as assembly, protest, voting, and unrestricted movement in public spaces. While law enforcement

[1015] Bala, *supra* note 14.

acknowledges the technology's efficacy in improving investigations, a veil of secrecy often shrouds their methods. Instances, such as the New York Police Department resisting disclosure of its facial recognition system's workings[1016] and Jacksonville authorities withholding details from an individual contesting a conviction,[1017] highlight the opacity and potential lack of accountability in the application of this technology. Additionally, individuals apprehended with the aid of facial recognition may remain uninformed about its utilization against them, emphasizing transparency and accountability challenges within its implementation.

The risks associated with errors or abuse of FRT are multifaceted, emphasizing the pivotal role of data quality in the efficacy of these systems. Amazon's recognition software, utilized by law enforcement in Oregon and Orlando, has faced criticism for its disproportionate misidentification rates, particularly with people of color being misidentified at higher rates than whites. Amazon contends that using its recommended 99% confidence thresholds mitigates these disparities, but the absence of a requirement for police departments to adhere to such high standards raises significant concerns.

Recent research scrutinizing commercial facial analysis technology has intensified apprehensions about the accuracy and responsible use of emerging face recognition systems. A study by Inioluwa Deborah Raji and Joy Buolamwini, published in the journal "Artificial Intelligence, Ethics, and Society," discovered substantial error rates in Amazon's Rekognition, especially in gender classification for darker-skinned women compared to lighter-skinned men (31% versus 0%).[1018]

The study unveiled several critical issues:

1. A direct or indirect relationship exists between modern facial analysis and face recognition technologies.

2. The research conducted by Raji and Buolamwini is contextualized within Rekognition's utilization.

[1016] Jon Schupe, How Facial Recognition Became aRoutine Policing Tool in America, NBC News (May 11, 2019), https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251.

[1017] *Id.*

[1018] Inioluwa Deborah Raji and Joy Buolamwini, Saving Face: Investigating the Ethical Concerns of Facial Recognition Auditing. AIES. NYC., February 7-8, 2020, at 149.

3. The absence of laws or required standards to ensure Rekognition's usage aligns with civil liberties raises ethical concerns, prompting calls for Amazon to cease selling the technology to law enforcement.

The racial disparities within the criminal justice system further exacerbate concerns, as racial minorities are already disproportionately involved in the system. A San Francisco study revealed that, despite constituting 6% of the city's population, black individuals comprised 41% of arrests between 2007 and 2014.[1019] The overreliance on flawed technology or its poor implementation not only heightens the risk of wrongful convictions but also amplifies existing racial disparities within the criminal justice system. These issues underscore the urgent need for comprehensive regulation, accountability measures, and ethical considerations in the deployment of facial recognition technology to mitigate potential abuses and safeguard civil liberties.

AI-Related Failures in Suspect Identification:

Incidents involving individuals like Robert Williams, Michael Oliver, and Nijeer Parks underscore a disconcerting pattern where six cases of Black men and women experienced unwarranted days of incarceration due to flawed facial recognition matches linking them falsely to felony-level crimes.[1020] These situations unfolded as facial recognition technology was employed to scrutinize surveillance footage of criminal incidents, generating suspect identifications or lists by comparing facial features against criminal databases or identification registries. Subsequently, investigators relied on the outcomes of this analysis and sought witness corroboration to validate the identified individuals.

In all six cases, the facial recognition analyses, as well as the subsequent witness corroboration, proved inaccurate, resulting in the wrongful arrests of these individuals.[1021] Such

[1019] Dr. Matt Wood, Thoughts on Recent Research Paper and Associated Article on Amazon Rekognition, AWS Machine Learning (Jan. 26, 2019), https://aws.amazon.com/blogs/machine-learning/thoughts-on-recent-research-paper-and-associated-article-on-amazon-rekognition/.

[1020] James Andrew Lewis and William Crumpler, Questions about Facial Recognition. Center for Strategic and International Studies (February 3, 2021), https://www.csis.org/analysis/questions-about-facial-recognition.

[1021] *Id.*

occurrences are undeniably lamentable, shedding light on the urgent need for enhanced measures to prevent the recurrence of similar errors in the future.

These unfortunate instances highlight the potential pitfalls of relying solely on facial recognition technology in criminal investigations. The discrepancies between the technology's outputs and witness testimony emphasize the importance of comprehensive scrutiny and validation processes. As we navigate the evolving landscape of law enforcement technologies, it becomes imperative to implement safeguards and refine protocols to ensure the accuracy and reliability of facial recognition outcomes. Addressing these challenges will not only protect individuals from unwarranted arrests but also contribute to the cultivation of a fair and equitable criminal justice system. Consequently, further research, development, and rigorous testing of facial recognition systems are warranted to rectify these issues and prevent their recurrence in the interest of justice and individual rights.

THE IMPERATIVE NECESSITY OF DATA PRIVACY WITHIN COMMUNITIES OF COLOR

In addressing privacy and ethical concerns and following the 2020 protests sparked by the murder of George Floyd, certain technology companies such as Amazon, Microsoft, and IBM made commitments to either temporarily or permanently cease the sale of facial recognition technologies to law enforcement agencies. However, these voluntary and highly selective corporate moratoriums prove inadequate in safeguarding privacy, as they do not preclude government entities from obtaining facial recognition software from alternative private sources. Additionally, several notable companies have refrained from making such pledges or persist in either facilitating or permitting the inclusion of their photos in third-party facial recognition databases.

The efficacy of these voluntary measures is diminished by the fact that government agencies can access industry-held data with varying degrees of due process. For instance, while a warrant with probable cause might be necessary to compel precise geolocation data from first-party service providers in many instances, these agencies may still acquire a person's movement history without such probable cause, employing

alternative means such as purchasing it from a data broker. Consequently, the limitations of voluntary corporate actions and the persistence of data-sharing practices underscore the need for comprehensive regulatory frameworks to address the broader privacy implications associated with facial recognition technologies in law enforcement.

The proliferation of technological advancements has significantly expanded the scope of government surveillance in traditionally considered "public" spaces, prompting legal inquiries into the delineation between permissible and non-permissible data collection practices. For example, estimates from the Electronic Frontier Foundation and the University of Nevada indicate that over 1,000 local police departments employ drones for aerial surveillance in their communities. As of March 2021, the Chula Vista Police Department had deployed drones for more than 5,000 civilian calls, capturing images of individuals in public areas such as sidewalks and parking lots.

Systemic Inaccuracy and Bias:

The integration of body-worn cameras, a ubiquitous tool among law enforcement agencies, functions as both a mechanism for accountability, notably in response to the advocacy of the Black Lives Matter (BLM) movement, and a generator of privacy apprehensions.[1022] These concerns manifest when recordings depicting individuals in delicate scenarios are preserved for prolonged durations, employed for facial recognition endeavors, disseminated on public platforms, or inadvertently captured by uninvolved individuals in public spaces.

The widespread utilization of commercially available devices or applications by residents complicates endeavors to mitigate undue surveillance. Applications offered by private entities, including Neighbors (an Amazon subsidiary integrated with Amazon's Ring video doorbell), NextDoor, and Citizen, empower users with the capability for real-time live streaming, viewing, and exchange of opinions concerning potential

[1022] Nicol Turner Lee and Caitlin Chin-Rothmann, Police Surveillance and Facial Recognition, Brookings (Apr. 12, 2022), https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/.

crimes,[1023] thereby raising concerns regarding unconscious bias and privacy implications. Surveillance cameras are progressively becoming omnipresent in private residences, dining establishments, entertainment venues, and retail establishments, with an estimated global deployment of hundreds of millions of smart security devices. Notably, certain devices such as Google Nest's Doorbell and the Arlo Essential Wired Video Doorbell are equipped with built-in facial recognition capabilities.[1024] Concurrently, Amazon's Ring has forged partnerships with nearly 2,000 local law enforcement agencies, streamlining a process for officers to request Ring users to voluntarily share their video recordings without the explicit requirement for a warrant.[1025]

Several companies have publicly declared unilateral initiatives aimed at enhancing the accuracy of their facial recognition algorithms and diversifying the training datasets they employ. However, the efficacy and extent of such endeavors vary significantly given the vast quantity and diverse array of facial recognition vendors in existence. The issue of accuracy becomes more pronounced when considering the overall lack of transparency prevalent in the industry. Companies are not legally obligated to permit third-party audits of their algorithms, and many either refrain from doing so or selectively disclose their processes and outcomes.[1026]

Illustratively, Amazon decided against submitting its Rekognition algorithm for testing in the National Institute of Standards and Technology's (NIST) 2018 report, despite the algorithm being under license for use by law enforcement agencies and in other highly sensitive contexts at that time.[1027] This exemplifies the broader industry trend where companies exercise discretion in divulging information about their algorithms.

Another case in point is Clearview AI, which has not publicly disclosed its rates of false positives or negatives.[1028] Similarly, the company has not proactively submitted its algorithm

[1023] Hope Reese, What Happens When Police Use AI to Predict and Prevent Crime?, JSTOR. February 23, 2022.
[1024] *Id.*
[1025] *Id.*
[1026] *Id.*
[1027] Kate Crawford and Jason Schultz, AI Systems as State Actors., CLR. Columbia Law Review, Vol. 119:1941.
[1028] *Id.* at 1929.

for testing by NIST or any other third party.[1029] This lack of transparency and voluntary testing raises concerns about the reliability and accountability of facial recognition technologies across various vendors within the industry.

Absence of Human Supervision in Automated Procedures:

Automated systems devoid of human oversight have become integral to law enforcement operations, creating a scenario where the authority of these deep learning tools remains unchecked, and their predictions are seldom questioned. This phenomenon, identified by Kate Crawford and Jason Schultz as an "accountability gap" in their report titled "AI Systems as State Actors," is characterized by diminished knowledge and direct involvement of both state and private human employees in the specific decisions that result in harm.[1030]

The origin of these automated tools varies, ranging from in-house development by government agencies to creation by contractors or even donation, as highlighted by Crawford and Schultz. However, the diverse sources of these tools contribute to a lack of clarity regarding accountability when these systems fail.

Recognizing the urgency to address this issue, a collaborative project initiated by Columbia University, in partnership with the AI Now Institute, New York University School of Law's Center on Race, Inequality, and the Law, and the Electronic Frontier Foundation, aims to scrutinize ongoing courtroom litigation in the United States where government use of algorithms is pivotal to the rights and liberties at stake. Focusing on AI utilization in law enforcement contexts such as Medicaid and disability benefits, public teacher evaluations, and criminal risk assessments, the researchers assessed how these AI systems were employed by humans. Their findings underscored the implementation of these AI systems without substantial training, support, or oversight, lacking specific protections for recipients. The adoption of these systems under a monolithic technology-procurement model, driven by cost savings and standardization, disregarded constitutional liability concerns.

Moreover, the algorithms exhibited biases, targeting individuals more likely to require support due to budget con-

[1029] *Id.* at 1954.
[1030] *Id.* at 1972.

straints, thus introducing core constitutional problems. The authors likened these automated tools to "traveling sales representatives," transferring information from one context to another, heightening the risk of bias-skewing outcomes. As AI systems increasingly rely on deep learning, potentially evolving into more autonomous and inscrutable entities, the widening accountability gap for constitutional violations poses a significant concern. This prompts the pivotal question: Should software companies bear responsibility for the utilization of their products when human oversight becomes obsolete? The legal landscape on this matter remains ambiguous.

State governments, when confronted with challenges, often disclaim knowledge or the ability to understand, explain, or rectify issues arising from AI systems procured from third parties. This avoidance of responsibility means that algorithmic systems contribute to government decision-making without mechanisms of accountability or liability.

The failure to address this accountability gap should necessitate a cessation in the use of these tools, prompting a critical reevaluation of the ethical and legal dimensions surrounding their deployment.

PRIVACY CONCERNS WITH FACIAL RECOGNITION AND BODY-WORN CAMERAS

Concerns about data security and the potential misuse of facial recognition data are pivotal in the discourse on privacy. The vulnerability of personal data collected through BWCs and the associated facial recognition technologies, emphasizes the necessity of robust privacy protection mechanisms.

Some jurisdictions do regulate the use of facial recognition technologies in conjunction with Body-Worn Cameras (BWCs). However, there is currently no federal legislative consensus on this matter. For instance, in 2015, Oregon enacted a law prohibiting facial-recognition searches of recordings from BWCs,[1031] specifically addressing recordings without extending to the regulation of real-time footage. New Hampshire has recently passed a similar law,[1032] and on a local level, the

[1031] Relating to law enforcement officer recordings, Senate Bill 614. ORS 133.741 and 181A.250 (2023).

[1032] Relative to the use of face recognition technology, House Bill 499. NH HB499 (2021).

City of Cincinnati and six police departments have adopted comparable regulations.[1033] Despite these isolated advances, the need for a federal consensus is crucial to effectively balance technology adoption with considerations of privacy, free speech, and security.

The Supreme Court has emphasized that "innocent citizens should not suffer the shock, fright, or embarrassment attendant upon an unannounced police intrusion."[1034] In response to this principle, the Wiretap Act was enacted in 1968 following landmark cases such as *Katz v. United States* (1967) and *Berger v. New York* (1967). The Wiretap Act has primarily constrained law enforcement's ability to wiretap a suspect's phone or electronic device through statutory measures rather than constitutional case law.[1035]

However, case law is not without its limitations. *Carpenter v. United States* (2018) introduced a legal loophole allowing law enforcement to retain personally identifiable information until it becomes historical, making it usable without a warrant.[1036] The duration of this period remains undecided. While individuals may currently claim a reasonable expectation of privacy in their images captured by facial-recognition technology using the Wiretap Act and *Katz* concurrence as a potential framework, the ubiquity of law enforcement's use of this technology may erode such arguments over time.

Regulating law enforcement surveillance through statute provides a comprehensive approach. Legislatures are better equipped than courts to examine the intricate effects of new technology and draft legislation accordingly, drawing on model legislation and existing biometrics laws governing commercial entities. In the absence of federal laws or decisions, the public relies on courts to safeguard civil liberties, but judges may struggle to identify future risks associated with technological innovation.[1037]

[1033] Katelyn Ringrose, Law Enforcement's Pairing of Facial Recognition Technology with Body-Worn Cameras Escalates Privacy Concerns, 105 Va. L. Rev. Online 57.

[1034] *Id.*

[1035] 18 U.S.C. §§ 2510-2522 (2022).

[1036] *Carpenter v. United States*, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

[1037] Nicol Turner Lee and Caitlin Chin-Rothmann, Police Surveillance and Facial Recognition, Brookings (Apr. 12, 2022), https://www.brookings.edu/articles/police-surveillance-and-facial-

In addition to the Wiretap Act, legislators could consider the Video Privacy Protection Act (VPPA) and the Family Educational Rights and Privacy Act (FERPA) to develop model legislation. Although dated, these acts offer research-backed definitions of personally identifiable information and regulate its handling. For instance, FERPA mandates sharing personal information only under specified circumstances, suggesting a similar approach for biometric information and facial recognition technology.[1038]

Rather than creating new legislation, model legislation on facial-recognition technology from the Georgetown Law School's Privacy and Technology Center can be expanded to include provisions related to law enforcement's use of body cameras. While addressing access to facial recognition technology (FRT) data, data retention, and training for law enforcement officers, it falls short in contemplating the depth of information gathered through BWCs. It neglects the issue of nonconsensual facial recognition technology. Regulations must address concerns about data retention, aggregation, and the technology's current margin of error when identifying individuals of color. Proposed legislation should rectify technical issues, improve the technology, and establish efficacy requirements for law enforcement.

TRANSPARENCY AND ACCOUNTABILITY MECHANISMS

Although the manifestation of artificial intelligence is not characterized by the doomsday apocalyptic scenarios that have garnered extensive media coverage, its presence is undeniably pervasive. AI, through intricate algorithms, subtly and fundamentally governs our lives while orchestrating transformative changes in our societies. The omnipresence of AI algorithms in shaping both technological and human interactions is a consequence of remarkable technological progress fueled by data, computational prowess, and the increasing potency of machine pattern recognition. This reliance on methodologies commonly denoted as "deep learning" or "neural networks" underscores the intricate nature of AI's impact.[1039]

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recognition-why-data-privacy-is-an-imperative-for-communities-of-color/.

[1038] 20 U.S.C. § 1232g (2022).

[1039] Madalina Busuioc, Accountable Artificial Intelligence: Holding Algorithms to Account. PAR. LEIDEN. UNI., August 15, 2020, at 828.

Concomitantly, AI algorithms exhibit a propensity to become entangled in negative feedback loops that are challenging to discern, extricate from, or self-correct. For instance, if an algorithm erroneously designates a specific area as "high crime," the ensuing heightened police presence results in an increased number of arrests in that location.[1040] These arrests, in turn, become the algorithm's new training data, thereby perpetuating and reinforcing its initial flawed predictions. This issue becomes particularly concerning if the algorithm's initial predictions are biased, potentially stemming from human bias in the training data, such as a historically overpoliced neighborhood.[1041] In such instances, the algorithm's predictions transform into "self-fulfilling prophecies."[1042]

Simultaneously, diagnosing and challenging algorithmic biases and malfunctions pose formidable challenges. The reputed black-box operation of these systems, coupled with their inherent complexity, complicates efforts to scrutinize and rectify discrepancies. The intricate interplay between AI, biases embedded in its predictions, and the opacity of its operational mechanisms underscores the urgency of addressing these issues to ensure responsible and equitable deployment of artificial intelligence in our evolving technological landscape.

ACHIEVING A BALANCED DISCOURSE ON FACIAL RECOGNITION

Our government agencies must prioritize innovation and the integration of cutting-edge tools to enhance their capacity to effectively serve the public. This commitment to technological advancement is underscored by the case of Jarrod Ramos, where facial recognition played a pivotal role in aiding law enforcement. Ramos, facing five charges of first-degree murder, obstinately refused to identify himself following his apprehension.[1043] In such scenarios, the deployment of facial recognition technology becomes not only a powerful investigative tool but also a crucial means of ensuring public safety.

Beyond its conventional application in law enforcement, facial recognition technology (FRT) holds immense potential

[1040] *Id.* at 833
[1041] *Id.* at 829
[1042] *Id.* at 829
[1043] Busuioc, *supra* note 41, at 832.

for addressing various societal challenges. Notably, it can be instrumental in combatting child sex trafficking and locating missing persons. The adaptability of FRT to diverse contexts highlights its versatility and underscores its value in safeguarding vulnerable populations.

The Jarrod Ramos case serves as a compelling illustration of how facial recognition can bridge critical gaps in law enforcement, facilitating the identification of individuals who might otherwise evade detection. This underscores the importance of staying at the forefront of technological advancements to bolster the effectiveness of government agencies in fulfilling their public service mandate. The broader application of FRT in addressing issues such as child sex trafficking and locating missing persons exemplifies its potential to contribute significantly to public welfare beyond the realm of criminal investigations. The ability to swiftly and accurately match facial features against databases aids in expediting investigations, leading to more timely and effective interventions.

The integration of FRT into the operational toolkit of government agencies is a commendable pursuit. The Jarrod Ramos case exemplifies its concrete utility in apprehending suspects in serious criminal cases. Furthermore, its potential to address societal challenges, such as child sex trafficking and locating missing persons, underscores the broader positive impact that strategic technological adoption can have on public welfare and safety.

POLICY AND REGULATIONS

Over the past ten years, legislative bodies at the national, state, and local levels have introduced and implemented laws aimed at mitigating or tackling the risks and negative consequences linked to the utilization of facial recognition technology within the public sector. Concurrently, civil society and the research community have put forth legislative and regulatory proposals designed to address issues such as privacy, bias, and various human and civil rights concerns associated with the government's adoption of this technology. The breadth and impact of these measures exhibit significant variation. Some initiatives focus on assessing the risks, benefits, and trade-offs of facial recognition to establish an appropriate regulatory framework, while others aim to establish specific limitations or

usage requirements to prevent or, at the very least, minimize adverse outcomes.

European Parliament on Use of AI by Police:

To counteract discrimination and uphold the right to privacy, Members of the European Parliament (MEPs) have advocated for robust safeguards in the utilization of artificial intelligence (AI) tools within law enforcement. A resolution in 2021, approved by 377 votes in favor, 248 against, and 62 abstentions, underscores the potential for algorithmic bias in AI applications.[1044] It stresses the imperative of human oversight and the necessity for substantial legal mechanisms to prevent AI-induced discrimination, particularly in the realms of law enforcement and border control. MEPs assert that ultimate decision-making authority should rest with human operators, and individuals under the surveillance of AI-powered systems must be granted access to redress.

To safeguard privacy and human dignity, MEPs have called for a permanent prohibition on the automated recognition of individuals in public spaces. They contend that citizens should only be subject to monitoring when there is reasonable suspicion of criminal activity. The Parliament is advocating for the proscription of private facial recognition databases, such as the Clearview AI system currently in operation, and predictive policing based on behavioral data.

Furthermore, MEPs are pushing for the prohibition of social scoring systems that attempt to assess the trustworthiness of citizens based on their behavior or personality traits.[1045] The Parliament expresses apprehension about the utilization of biometric data for remote identification, calling for the discontinuation of practices such as border control gates utilizing automated recognition and the iBorderCtrl project, characterized as a "smart lie-detection system" for entry into the EU. MEPs are urging the European Commission to initiate

[1044] European Parliament., Statement on the Use of artificial intelligence by the police: MEPs oppose mass surveillance (June 10, 2021), https://www.europarl.europa.eu/news/en/press-room/20210930IPR13925/use-of-artificial-intelligence-by-the-police-meps-oppose-mass-surveillance.

[1045] *Id.*

infringement procedures against member states if deemed necessary.[1046]

PROPOSED STANDARDIZATION OF FRAMEWORK

The U.S. Department of Homeland Security (DHS) administers the Child Exploitation Image Analytics (CHEXIA) program, designed to assess and implement facial recognition algorithms specifically geared toward identifying children depicted in instances of child pornography. The National Center for Missing and Exploited Children grapples with an escalating volume of tips annually,[1047] accompanied by an exponential growth in the quantity of exploitative imagery involving children. Swift identification and location of victims are paramount for ensuring their safety. However, the intricate task of tracking and analyzing such imagery is exacerbated by the presence of over 300 deep web boards, boasting more than 500,000 members who actively engage in the creation, manipulation, and exchange of this illicit material at any given time.

Facial recognition algorithms play a pivotal role in expediting the identification process for analysts, allowing them to swiftly detect all occurrences of a particular individual's face within seized imagery. This capability significantly enhances the efficiency of investigations. The DHS is in the process of integrating facial recognition algorithms developed through CHEXIA into pre-existing forensic software, making it readily accessible to law enforcement agencies globally at no cost.[1048]

In the case of finding missing persons using FRT, the software can be used to help identify missing children in India. In the metropolis of New Delhi, law enforcement authorities have successfully identified nearly 3,000 missing children within a mere four days of initiating a trial of an innovative facial recognition system.[1049] The implementation of this technology commenced on April 6, following a directive from the High Court, which mandated a trial run of the software, as detailed in

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[1046] *Id.*

[1047] Ching Yiu Jessica Lui, Facial Identification from Online Images for Use in the Prevention of Child Trafficking and Exploitation, PRO. QUEST.

[1048] *Id.*

[1049] Anthony Cuthbertson, Indian police trace 3,000 missing children in just four days using facial recognition technology, Independent. UK. (Apr 24, 2018).

an affidavit by the Ministry of Women and Child Development. The facial recognition system underwent testing on approximately 45,000 children across the city, ultimately resulting in the identification of 2,930 individuals who were reported as missing.[1050]

Employing facial recognition technology for locating missing persons is undeniably significant; however, it necessitates the establishment of standardized protocols for several reasons. Firstly, to enhance the overall security of this approach, it is prudent to mandate an additional layer of scrutiny in the form of an external audit, stipulated through the initial procurement contract. This ensures that the implementation of facial recognition technology adheres to predetermined standards, minimizing the risk of unauthorized access, misuse, or potential vulnerabilities.

CONCLUSION

Instituting a standardized framework becomes imperative as a crucial safeguard against potential government misuse and inadvertent algorithmic bias. To address this concern effectively, civil society organizations should be empowered to conduct independent testing of these facial recognition systems. This external validation serves as a pivotal mechanism to verify the technology's accuracy, ensuring its efficacy in identifying missing persons without unjustly targeting minority populations. By establishing such standardized procedures and enabling external oversight, the use of facial recognition technology for locating missing individuals can not only be optimized for its intended purpose but also uphold principles of fairness, transparency, and ethical implementation.

The pervasive racial biases exposed within facial recognition technologies underscore the critical need for robust policies and ethical guidelines in the standardization of AI for law enforcement purposes. While acknowledging the evident shortcomings, it is imperative to recognize the potential of artificial intelligence as a catalyst for expediting the identification process within the realms of suspect identification. The evolution of technological advancements should be perceived as tools augmenting rather than supplanting human judgment,

[1050] *Id.*

particularly in law enforcement where a nuanced and humanistic perspective is indispensable. With both domestic and international frameworks taking shape, there is a burgeoning opportunity to standardize this potent tool, thereby enhancing the efficiency of the justice system and ensuring public welfare. However, it is essential to remain vigilant regarding the inherent flaws associated with sole reliance on AI and facial recognition technology for suspect identification. Thus, transparency and accountability mechanisms must remain integral throughout the ongoing standardization process, serving as safeguards to mitigate potential pitfalls and uphold the ethical underpinnings of this transformative technology.

THE WOMEN'S RIGHTS MOVEMENT: THE POTENTIAL THAT EQUAL RIGHTS AMENDMENTS CURRENTLY HAVE IN AMERICA'S POLITICAL SYSTEM

Rachel Zelicof

The Women's Rights Movement: The Potential That Equal Rights Amendments Currently Have In America's Political System

ABSTRACT:
The progress of the Women's Rights Movement continues to positively impact American society. In New York State, the hub of the commencement of the Women's Rights Movement, lawmakers are seeking to enact an Equal Rights Amendment into New York State's Constitution. Currently, the New York Constitution does not explicitly prohibit discrimination by the government based on ethnicity, national origin, disability, age, sexual orientation, and gender. Hence, if New Yorkers vote for the enactment of this amendment, they will be extended more protections against discrimination from the government. If this proposed constitutional amendment is enacted, it will serve as the foundation to help the New York State Legislature articulate policies that will act to curtail discrimination against current unprotected classes.

INTRODUCTION

Seneca Falls, New York, has been deemed by historians as the site of the beginning of the Women's Rights Movement. The Seneca Falls Convention was one of the most influential events to contribute to women's equality. At this event, prominent advocate for women's rights, Elizabeth Cady Stanton delivered her remarkable speech, the "Declaration of Sentiments." This speech served as a catalyst for the Women's Rights Movement, declaring the basic rights that women have been deprived of in the United States for years. Many years after the start of the Women's Rights Movement, New York State is seeking to enact an Equal Rights Amendment that would prevent discrimination against people based on pregnancy outcome or sex. Pregnancy outcomes should be recognized as a protected class, since it is not currently recognized under the New York State Constitution. Courts often do not rule in the favor of a person if they were discriminated against as a result of their pregnancy. Although New York State has been the hub

for progress during the Women's Rights Movement, New York currently does not protect against sex discrimination. Under Article I, Section 11 of the State Constitution, "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."[1051] This section limits protections to people based on race, creed, and religion, and does not provide protections to people on the basis of pregnancy outcome or sex. In recent years, New York attempted to enact a variety of amendments to prohibit discrimination against people in the forms of religion, race, and even weight. In November 2024, an Equal Rights Amendment will be on the ballot for ratification in which voters will be able to voice their opinions. An Equal Rights Amendment is a good idea, but New York should focus on reforms that can be efficiently implemented on the local level. This will require the Equal Rights Amendment to serve as the building blocks for powerful legislation which will mitigate discrimination against women.

HISTORICAL DEVELOPMENTS IN GENDER EQUALITY

In 1848, three hundred men and women joined together at the Seneca Falls Convention to mollify the lack of women's equality in American society. Prominent Women's Rights Movement leaders such as Elizabeth Cady Stanton, Ida B. Wells, and Lucretia Mott attended this convention. Remarkably, Stanton's delivery of her "Declaration of Sentiments," bolstered women's voices in front of a large audience of men. In her speech, Stanton critically attacked the government for taking a nonchalant stance on women's rights. There were rampant injustices in American society, such as excluding women from being represented in legislative decisions, denying women the right to own property, and rejecting women from collegiate educational institutions.[1052] Yet, the government remained indifferent to the intentions of the Women's Rights Movement and perpetuated a male-dominated political environment in the United States.

[1051] N.Y. CONST. art. I, § 11.

[1052] Allison M. Parker, The Seneca Falls Convention of 1848: A Pivotal Moment in Nineteenth-Century America, 36 JOHNS HOPKINS UNIVERSITY PRESS, 341-348 (2008) (book review).

In her "Declaration of Sentiments," Stanton's principal argument advocated for the United States Government to acknowledge the injustices faced by women, and explicitly grant liberties to women such as voting rights so that they are better represented in legislative decisions.[1053] This principle is especially important for Stanton, since men were often in charge of passing legislation. According to Stanton, if women are not represented in the legislative process, then the state of the government is unjust.[1054] The government's attitude towards women's rights in New York stayed consistent since 1848. Today, it still has not been made clear that women deserve rights in the form of a constitutional amendment. Stanton further explained, "[h]e has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns."[1055] This powerful statement demonstrates Stanton's determination and exceptional advocacy, which propelled the Women's Rights Movement onto the national stage. Women were being forced to live in a world where they had no say in policy decisions that would affect them. Men also deprived women of the rights to earn money, and to own property, which are basic necessities to the right of life. It is astonishing that the government of New York did not take any action to mitigate these injustices that women were facing on a daily basis.

Not only did women have to deal with these injustices in the 1840s leading up to the beginning of the Women's Rights Movement, but women still dealt with inequality in the early 1900s. Working conditions were deplorable for women, and wages were not sufficient in any capacity. Two of the most hazardous working conditions that women experienced were at the Triangle Shirtwaist Factory and the United States Radium Company. Women were forced to work long hours and were not fairly compensated for their work. The conditions in which they worked were extremely dangerous. On March 25, 1911

[1053] Elizabeth Cady Stanton & Frederick Douglass, Declaration of Sentiments 20-23 (1848).
[1054] *Id.* at 21.
[1055] *Id.*

there was a fire in the Triangle Shirtwaist factory which resulted in the deaths of 146 girls who were working for the factory.[1056]

Another example of the horrible working conditions that women had to face was the case of the Radium Girls. In Orange, New Jersey, young girls were forced to make watches for the U.S. military which contained radium. Young girls and women suffered detrimental effects of radium positioning as a result of poor working conditions. They were "breathing in dusty air saturated with radium and placing paint brushes between their lips led to severe radium poisoning."[1057] Women experienced health problems such as "breast cancer, foot tumors, and facial disfigurement."[1058] Even after the Women's Rights Movement had been initiated, there were still cases of discrimination against women throughout the 1900s in the workplace. Thus, it is imperative that a constitutional amendment is enacted to serve as the groundwork for positive legislative outcomes that will prevent discrimination against women in the future.

The "Declaration of Sentiments" speech made by Stanton, gleaned her commitment to women's rights in American society. Stanton used specific language that emphasized the rights in which women should be entitled to as citizens of the United States of America. Stanton drew upon the foundations of the Declaration of Independence and stated, "[w]e hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."[1059] Stanton carefully articulated in her speech for the government to restore rights to women which were established in foundational documents of the United States, such as the Declaration of Independence. Stanton's careful use of articulate language is especially significant because it demonstrates the lack of accountability exercised by states in upholding gender equality.

Later in her speech, Stanton clarified the injustices that women experienced in American society will be resolved in

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[1056] Peter Dreier and Donald Cohen, The Fire Last Time: Worker Safety Laws after the Triangle Shirtwaist Fire, Race Poverty, & the Environment, 30-33, 2011.

[1057] William Graebner, Radium Girls, Corporate Boys, 26 REVIEWS IN AMERICAN HISTORY, 587-592 (1998) (book review).

[1058] *Id.* at 587.

[1059] *Id.* at 20.

the future. Stanton explicitly stated, "[r]esolved, That all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority."[1060] Stanton makes it abundantly clear in her speech that women are capable of determining their own choices in society and they will no longer be perceived as inferior to men. This statement made by Stanton was heavily packed with power and force to show men that women would no longer stand for a lack of representation in American society.

Stanton further resolved that, "it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise."[1061] This statement served to rally women together and create a national fight towards equality. The weight of this statement empowered other groups of women to start movements of their own. For example, a group of Quaker women from Rochester, New York, held their own Women's Rights Movement just two weeks after Stanton delivered her "Declaration of Sentiments" speech.[1062]

Stanton's most powerful resolution of gender injustice was "...[t]hat woman is man's equal—was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such."[1063] This statement was impactful and striking to her listeners. She asserts in this statement that women were meant to have rights, women were meant to be recognized, and above all women were meant to exercise their natural, god-given rights. Thus, it is evident that Stanton's "Declaration of Sentiments" was a catalyst for the national Women's Rights Movement across the United States. Stanton's deliberate use of firm language in her speech proved to be an effective impetus for the call to action to unite women together.

LEADERS OF THE WOMEN'S RIGHTS MOVEMENT

It is also worth acknowledging other influential political figures that played a key role in the Women's Rights Movement.

[1060] *Id.* at 22.
[1061] *Id.* at 23.
[1062] *Id.* at 345.
[1063] *Id.* at 22.

For example, Frederick Douglass effectively contributed to the Women's Rights movement by supporting Elizabeth Cady Stanton at the Seneca Falls Convention. Douglass was also a part of the American Equal Rights Association (AERA), which was a prominent organization that worked to promote Women's Suffrage.[1064] At the Seneca Falls Convention, Douglass pulverized any objections towards the inclusiveness of Women's Rights in American society. Douglass conveyed that "regardless of sex or race, every American is entitled to equal suffrage."[1065] In the AERA, Douglass worked closely among other influential leaders such as Lucretia Mott, Susan B. Anthony, Lucy Stone, and Sojourner Truth.

Lucretia Mott, another monumental leader of the Women's Rights Movement, was credited by Stanton for inspiring her to hold the Seneca Falls Convention.[1066] Mott was a staunch advocate for abolition and women's rights. She founded the Philadelphia Female Anti-Slavery Society (PFAS), which was the longest-lasting interracial abolitionist organization. Mott consistently advocated for the abolition of slavery and equality for Black Women. Gender and racial equality were the two most prominent goals for Mott to achieve. Her progressive views launched her into the light of America's political landscape. The political spotlight displayed on Mott allowed her to represent a variety of voices from Black men, white women, and Black women. Mott also heavily influenced Stanton's motivations for women's equality and she assisted Stanton with the development of the "Declaration of Sentiments" speech. Mott's employment of "individual freedom and participatory political power" lay at the heart of her argument for gender and racial equality.[1067] Mott was an incredibly important political leader who was integral to the start of the Women's Rights Movement and the Abolitionist Movement.

Susan B. Anthony, another key leader in the Women's Rights Movement, further propelled the movement to new milestones. In 1867, at the fourth Constitutional Convention of New York State, Anthony advocated to the delegates in a letter that New York State's Constitution should employ the

[1064] Lisa Pace Vetter, The Most Belligerent Non-Resistant: Lucretia Mott on Women's Rights, Journal of Political Theory, 600-630, 2015.
[1065] *Id.* at 344.
[1066] *Id.* at 603.
[1067] *Id.* at 603.

use of neutral language. Anthony stated in her letter that the delegates should discard particular language such as "man" and insert "person" in order to be inclusive of rights that should be offered to women and Black people.[1068] In her letter to the New York State Delegates, Anthony critically attacks men in positions of political power for their ignorance towards Women's Suffrage. She explains that the women of New York have an important stake in the issue of universal suffrage. Additionally, Anthony formed the Women's National Loyal League with Stanton, which was an organization focused on organizing a campaign to ban slavery.[1069]

Lucy Stone was an outstanding advocate for womens' rights. She traveled across the country to give speeches at the Women's Rights Convention. In fact, she was the first woman ever to be paid to lecture at a national convention.[1070] Stone was witty in her delivery of speeches and convinced thousands of men and women to join the Women's Rights Movement. Stone was also a fierce leader for the Women's Rights Movement when lobbying state legislatures. Stone was incredibly motivated to regenerate the New York State Constitution to be inclusive of Women's Rights.[1071] Stone argued that the country needed to adopt a new set of constitutional principles that "favored righteousness that knows no sex, color, or condition."[1072] Similarly to Anthony and Mott's ideas, Stone favored universal suffrage for all in America. Stone's contributions to the Women's Rights Movement spread awareness about universal suffrage on a national scale which was highly effective at gaining support for the Women's Rights Movement.

An additional leader during the Women's Rights Movement was Sojourner Truth, a Black abolitionist and feminist during the twentieth century. She is attributed for social reform involving women's rights and racial equality. Similar to Stone, Truth was a lecturer and traveled nationally to make speeches at a variety of women's rights conventions. Truth's most out-

[1068] Libby Garland, *Irrespective of Race, Color or Sex: Susan B. Anthony and the New York State Constitutional Convention of 1867*, OAH Magazine of History, 61-64, 2005.

[1069] *Id.* at 346.

[1070] Louise W. Knight, Woman's Voice, Woman's Place: Lucy Stone and the Birth of the Woman's Rights Movement by Joelle Million, 21 THE WOMEN'S REVIEW OF BOOKS, 16, (2003) (book review).

[1071] *Id.* at 16.

[1072] *Id.* at 62.

standing accomplishment was her ability to leverage the voices of women and Black Americans. Truth often traveled to states where slavery was highly supported and held strong ground when speaking to political officials. She worked with Anthony among other feminists to attend suffragist rallies in New York. She also lobbied organizations around the country in order to introduce universal suffrage. Truth had been accredited by Douglass and received prestigious notoriety from the conventions and meetings she attended across the country.[1073]

Each of these political leaders—Stanton, Douglass, Mott, Anthony, Stone, and Truth—all made significant contributions to the Women's Rights Movement. Their successes in the Women's Rights Movement were due to action taken on the local and state levels by holding conventions in different cities and traveling across the country. Perhaps action taken today on the local level would be much more effective in mitigating discrimination based on pregnancy outcome or sex. These leaders took effective and efficient action to fight for women's equality and the furtherance of the Women's Rights Movement. Although these leaders made considerable progress towards the fight for women's rights, a tougher political mechanism is needed to prevent discrimination against women in the future. Therefore, the New York State Equal Rights Amendment can set the foundation for effective legislation to be enforced on the local and state level.

THE FIFTEENTH AMENDMENT

The introduction of the Fifteenth Amendment tested the previous progress of the Women's Rights Movement across the United States.The Fifteenth Amendment states, "[T]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude"[1074] When the Fifteenth Amendment was originally proposed, it motioned for termination of voter discrimination based on a person's race.[1075] There was clearly a lack of consideration given to women and their right to vote when the Fifteenth Amendment

[1073] Neil A. Patten, The Nineteenth Century Black Woman As Social Reformer: The New Speeches of Sojourner Truth, *Negro History Bulletin* 49, 2-5, 1986.
[1074] U.S. CONST. amend. XV
[1075] *Id.*

was implemented. Douglass argued for the passing of the Fifteenth Amendment when President Ulysses S. Grant showed his support for the amendment. However, other leaders in the AERA, such as Stanton and Anthony, disagreed with Douglass and claimed that suffrage for a woman's right to vote was much more important than racial suffrage. Both of these challenges were hoped to be overcome by activists, but the order in which they constituted priority caused some controversy. As a result of this split over support for the Fifteenth Amendment, the AERA started to combust and ceased being effective.[1076]

THE NINETEENTH AMENDMENT

The ratification of the Nineteenth Amendment in 1920 represented a turning point in the Women's Rights Movement. The efforts of prominent leaders such as Stanton, Anthony, and Mott were finally paying off. Prior to the passage of the Nineteenth Amendment in 1869, some states including Wyoming, Utah, Colorado, and Idaho allowed women to vote and started the spread for tolerance among states for Women's Suffrage.[1077] The Nineteenth Amendment states "[t]he right of citizens of the United States shall not be denied or abridged by the United States or any state on account of sex."[1078] The Nineteenth Amendment was the pinnacle of the Women's Rights Movement. More importantly, all the work of the Women's Rights Movement leaders had come to fruition. What they once thought was impossible was now a reality for all women across the country, to be represented in government after years of being treated as inferior to men.

After the Nineteenth Amendment was ratified, women started to obtain prominent careers in society. They became more involved in the medical field by serving as nurses during World War Two. Nurses were recognized for their efforts on the frontlines during World War Two.[1079] There was a staunch

[1076] National Park Service, Why the Women's Rights Movement Split Over the 15th Amendment (2023), https://www.nps.gov/articles/000/why-the-women-s-rights-movement-split-over-the-15th-amendment.htm#.

[1077] Steven Mintz, The Passage of the Nineteenth Amendment, *OAH Magazine of History* 21, 47-50, 2007.

[1078] U.S. Const. amend. XIX, § 1.

[1079] U.S. Army Center of Military History, The Army Nurse Corps, 1993, 4-31, https://history.army.mil/books/wwii/72-14/72-14.htm.

demand for Army Corps Nurses at the beginning of World War Two. The Army Nurse Corps only had approximately 1,000 nurses enlisted to serve when Pearl Harbor was attacked. This increased demand for nurses, allowing many more women to achieve positions on the frontlines during World War Two. In order to expand their program, the Army Nurse Corps offered free nursing education to women. A remarkable number of women served as nurses in World War Two. "More than 59,000 women served on the frontlines of the war."[1080] They worked on hospital ships, hospital trains, field hospitals, and medical transport aircrafts. After working as nurses during World War Two, women gained the respect of doctors and military command.

BRADWELL V. ILLINOIS

A historical court ruling that is relevant to the history of the Women's Rights Movement in the United States is *Bradwell v. Illinois* (1873).[1081] In this Supreme Court case, Myra Bradwell applied to the state of Illinois for a license to practice law. She was denied a law license because the Court questioned her relationship with her husband. The Court questioned whether her relationship would affect her moral position as a lawyer. The heart of the Court's reasoning was within the idea of a woman being in a prominent position in American society. Interestingly, the Illinois statute that the Court considered in its opinion used language stating "he," strictly implying that only a male could hold the position of a lawyer.[1082] Bradwell argued that she was discriminated against on the basis of her sex and that she had a protected right under the Constitution to be recognized as a lawyer in the state of Illinois.

The holding of this case was that Bradwell's claim was not legitimate and there was no evidence of discrimination. The Court opinion, delivered by Justice Miller, highlighted that the right to practice law in a state is not a protected right for citizens under the United States Constitution. The Court noted that states are "[f]orbidden to abridge"[1083] constitutionally protected rights, but they are allowed to abridge a citizen's right

[1080] *Id.* at 3.
[1081] *Bradwell v. Illinois*, 83 U.S. 130 (1872).
[1082] *Id.*
[1083] *Id.*

to practice law. Justice Miller wrote in his opinion, "[b]ut the right to admission to practice in the courts of a State is not one of them."[1084] Justice Miller's delivery lacks the justification for the Court's claims. The underlying reasoning as to why Bradwell's claim was dismissed, was because she was a woman. Although it is not explicitly stated by Justice Miller, the male justices were uncomfortable with a woman obtaining such a high social status as a lawyer.

Justice Bradley concurred in his opinion, writing "[b]ut I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities."[1085] It is clear from Justice Miller's opinion, and Justice Bradley's concurrence, that women's rights were not viable in the eyes of the Illinois law. Bradwell brought a clear claim of a equal protection violation under the FourteenthAmendment, yet the Court chose not to recognize blatant sex discrimination against Bradwell. At the time, this court case acted as a major setback for the Women's Rights Movement across the United States.

CURRENT CASE OUTCOMES

In contemporary democracy within the United States, there is a greater amount of support for Women's Suffrage than there once was in the past. However, it is necessary to acknowledge that there are still numerous injustices faced by women in contemporary American society. For example, in New York, women have failed to be promoted to executive positions by male bosses. They have also been discriminated against because of their sex and pregnancy outcome, which has been brought to the New York State Supreme Court. Three crucial cases to examine how the New York State courts treat sex discrimination are *Crawford v. American Broadcasting Company Inc.* (2023) and *Handelman v. Siegelman* (2005). The outcomes of these cases are especially important to consider when looking at how the potential adoption of the Equal Rights Amendment in 2024 can potentially change the outcome of future cases. These cases will build a consensus of where New York State

[1084] *Id.*

[1085] *Id.* at 140 (Bradley, J., concurring).

courts draw the line when it comes to sex and pregnancy discrimination.

In *Crawford v. American Broadcasting Company Inc.*(2023), the plaintiff alleged that her employer was responsible for sex discrimination against her and quid pro quo harassment claims.[1086] American Broadcasting Company Inc. (ABC), is a media television company that covers worldwide news and is under a division of the Disney Company. The plaintiff alleged that in 2015, her employer made inappropriate gestures such as lurking by her desk, making flirtatious comments towards her, disclosed intimate information about his marriage, and pressured her to go out drinking with him. The New York Supreme Court held that the employer engaged in unlawful conduct since they discriminated against the plaintiff because of her sex. The Court stated that there were "[a]llegations supporting employee's hostile work environment and sex discrimination claims were part of single continuing pattern of unlawful conduct."[1087] The Court also stated, "[a]llegations were sufficient to demonstrate that employee was subjected to inferior terms, conditions, or privileges of employment on basis of her gender."[1088]

However, according to the Court, there was not enough evidence to sustain the employee's quid pro quo harassment claims. The Court stated, "[p]laintiff's vague allegation that she 'attempted' to speak to defendant 'over the next few years' is insufficient to support her claim."[1089] Interestingly, the Court supported the other complaints the plaintiff brought against the defendant, although she provided evidence that she was in a hostile work environment. Perhaps, if there was a piece of specific legislation that protected women in the workplace based on the Equal Rights Amendment, the plaintiff's quid pro quo claim could have been affirmed by the Court. Thus, it is necessary that the Equal Rights Amendment is enacted in New York State in order to

In *Handelman v. Siegelman*, (2005) the plaintiff alleged that her employer discriminated against her on the basis of sex and and pregnancy outcome.[1090] The plaintiff worked at a den-

[1086] *Crawford v. American Broadcasting Company Inc.*, 189 N.Y.S.3d 184 (2023).
[1087] *Id.*
[1088] *Id.*
[1089] *Id.*
[1090] *Handelman v. Siegelman*, 801 N.Y.S.2d 234 (2005).

tist office and filed for a period of maternity leave, which was granted by her employer. The plaintiff noted that when she was medically cleared to return back to the office, her employer announced that the office was going on vacation and that her pregnancy was a disruption to the office. The plaintiff then filed a complaint that the employer unlawfully discriminated against her because of her sex and pregnancy outcome. The Court, however, did not seem to find a sufficient basis to acknowledge the plaintiff's claim. The Court ordered that "[t]he plaintiff's cause of action for loss of consortium . . . even if undisputed, does not give rise to a claim of sexual discrimination."[1091]

Interestingly, even though there was compelling evidence present, the Court did not affirm the plaintiff's claims. The plaintiff provided clear proof of the discrimination that she faced in the workplace, but it clearly was not convincing enough for the Court. The decision made in this case was a miscarriage of justice because the Court found her claims to be superfluous. She sought the Court to hold her employer accountable for his actions, and the Court failed her. The court's decision was an obstruction of justice since the plaintiff felt harmed, targeted, and disrespected by her employer's discriminatory actions.

This discrepancy in outcomes of cases seems to depend on who is bringing the action to the court. Perhaps, it is necessary for an Equal Rights Amendment to be enacted. It is not guaranteed that the Equal Rights Amendment proposed by New York State will even be ratified by the citizens. Also, the implementation of an Equal Rights Amendment will not fully guarantee that the outcome of various New York State Supreme Court cases would change. In order to change the outcome of sex or pregnancy discrimination cases for women, a constitutional amendment can serve as a foundation for groundbreaking legislation that will make progress for women.

RATIONALE FOR SUPPORTING THE EQUAL RIGHTS AMENDMENT

The recent uptick in discrimination cases not only in the workplace but also in public spaces has sounded the alarm for new anti-discrimination reforms in New York. Political

[1091] *Id.*

organizations, such as the Planned Parenthood and the New York Civil Liberties Union, have expressed their support for the Equal Rights Amendment They are also encouraging voters to support this amendment when they receive their ballot in November 2024.

NEW YORK STATE'S EQUAL RIGHTS AMENDMENT

New York State's Equal Rights Amendment is planned to protect constituents against discrimination based on age, national origin, disability, sexual orientation, and pregnancy outcome.[1092] These aspects of social identity have previously not been protected under the New York State Constitution. However, it seems that this amendment is very broad in terms of what it claims that it will protect, and there is no clear line to be drawn by the New York State Legislature as to what will constitute discrimination of the following categories. In fact, it seems that the proposed New York State Equal Rights Amendment is missing key points that would make it successful, if it were to be implemented.

The language of New York State's Equal Rights Amendment states, that discrimination will be prohibited based on an individual's " '[e]thnicity, national origin, age, [and] disability,' as well as their 'sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.' "[1093] This constitutional amendment has the potential to mitigate discrimination against women. The Equal Rights Amendment must be enacted since it attacks discrimination at its source. This amendment can serve as the building blocks for legislation that will change the outcome of court cases in which women experience unlawful discrimination based on their sex or pregnancy outcome.

FUTURE IMPLICATIONS

It doesn't seem that the enactment of the Equal Rights Amendment in New York State would resolve discrimination

[1092] Planned Parenthood, The New York Equal Rights Amendment (2023), https://www.plannedparenthoodaction.org/empire-state-acts/ny-era.

[1093] Ballotpedia, New York Equal Protection of Law Amendment (2024), https://ballotpedia.org/New_York_Equal_Protection_of_Law_Amendment_(2024)

cases completely. The amendment only states bans against certain forms of discrimination which have been designed to protect the rights of women, people with disabilities, and people with pregnancy outcomes. The amendment provides no grounds as to how people will be held accountable for their actions if they engage in discrimination against people on the basis of disability or pregnancy outcome. It is imperative to recognize that this amendment does not outline the consequences or punishments for people who violate the provisions that were outlined. Thus, it may be more effective for New York State to enact a piece of legislation that would serve as a stronger barrier towards discrimination. A piece of legislation can outline the consequences of the violations of the Equal Rights Amendment, which could be developed based on the contents of the Equal Rights Amendment.

EQUAL RIGHTS AMENDMENTS IN OTHER STATES

A handful of states have adopted versions of the Equal Rights Amendment across the country. The latest Supreme Court Justice Ruth Bader Ginsburg supported the enactment of this amendment because it would serve as a political mechanism that would be strong enough to prevent the denial of women's rights in the United States. Justice Ginsburg stated that "[t]he notion that men and women stand as equals before the law was not the original understanding, nor was it the understanding of the Congress that framed the Civil War amendments."[1094] For Equal Rights Amendment activists the enactment of this amendment was especially important because there had been no prior official declaration in the United States Constitution that expressed that men and women were to be viewed as equals. Justice Ginsburg also noted, "[t]hey propose extension of desirable protection to both sexes; for example, state minimum wage laws would be extended to men; in no case do they propose depriving either sex of a genuine benefit now enjoyed."[1095]

COMPARATIVE ANALYSIS

[1094] Ruth Bader Ginsburg, The Need for the Equal Rights Amendment, *American Bar Association Journal* 1013-1019, 1973.
[1095] *Id.* at 1014.

Other states have taken action into their own hands to adopt a version of Equal Rights Amendments. Nevada, for example, has adopted an Equal Rights Amendment that prohibits discrimination against a person based on their "race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin."[1096] Interestingly, New York's proposed amendment bans discrimination on a person's pregnancy outcome. Equal Rights Amendments are not meant to be uniform across all states. Hence, this may create some ambiguity in the protection of women's rights nationwide. Thus, it may be effective if states adopt uniform legislation instead of a variety of Equal Rights Amendments. If legislation is uniform across all states, it will be strongly guaranteed that women's rights are protected in their entirety, and it will allow for a much more expeditious process.

CONSTITUTIONAL AMENDMENT PROCESS IN NEW YORK STATE

It is crucial to consider the amendment process of New York State when thinking about the implementation of the Equal Rights Amendment in 2024. The process to ratify an amendment of the New York State Constitution is extremely lengthy and requires approval by multiple state actors including the Assembly, constituents, and the Governor. The New York State Legislature is bicameral, composed of the Senate and the Assembly. The Senate consists of 63 members while the Assembly consists of 150 members.[1097] The members are chosen through direct election based on New York's districts and they serve two year terms. The primary function of these two institutions under the New York State Legislature is to propose bills that will eventually be enacted as laws.[1098] The Legislature is allowed to propose laws in the areas of crime, appropriating funds to state entities, and public welfare. These proposed laws must pass in both the Senate and the Assembly, before it can be signed or vetoed by the Governor. The Senate

[1096] Feminist Majority Foundation, State Level ERA's, 2023. https://feminist.org/our-work/equal-rights-amendment/state-level-eras/.

[1097] N.Y. CONST. art III, § 4.

[1098] *Id.*

and Assembly reserve the right under the New York State Constitution to reject the Governor's veto if a two-thirds majority support is met in both legislative chambers.[1099]

The process by which New York State amends its Constitution is quite extensive, as it will take at least one year for the amendment to be placed on the ballot to gain citizen input. Also, before it even reaches a ballot, it must be passed through New York State's Legislative Institutions. First, the amendment must be passed through the Senate or Assembly. Next, the Attorney General of New York State has up to twenty days to provide a written opinion to these institutions expressing their approval or dismay for the adoption of the amendment. The Attorney General must also clarify how this amendment would affect other constitutional provisions. If the Attorney General demonstrates their support for the amendment, it must fare a majority approval by both the Assembly and Senate to be ratified. But, before the amendment is enacted it must pass through the next legislative session after the next general election of the Assembly members. [1100]

FUTURE UNCERTAINTY

It is very unclear how future cases of discrimination would be treated after the implementation of the Equal Rights Amendment. New York State has not stated a clear execution of the principles and regulations surrounding the Equal Rights Amendment. The only material constituents have access to is that this amendment will give them more protections from being discriminated against by the government. The lack of clarity within this amendment is especially alarming because it is not clear how the state plans to hold people accountable for their actions if they discriminate against constituents. There could potentially be different consequences for private or public entities. Based on the outcomes of previous court cases, it is unclear if this constitutional amendment would change a judge's decision. Perhaps, a piece of legislation would be more effective in order to create the ability for better outcomes of trials.

CONCLUSION

[1099] *Id.*

[1100] N.Y. CONST. art. XIX, § 1.

Overall, the Women's Rights Movement would not have been possible without the strength, determination, and perseverance of political leaders such as Elizabeth Cady Stanton, Lucretia Mott, Lucy Stone, Frederick Douglass, and Sojourner Truth. The progress that was triggered as a result of the efforts made by these political leaders has been reversed by the decisions made by Court justices in the state of New York. Hence, women's rights advocates have expressed interest in solving this problem by enacting the Equal Rights Amendment under the New York State Constitution. If the proposed constitutional amendment passes ratification among the public, then it has the potential to serve as the building blocks for effective legislation which will mitigate the discrimination faced by women in the future.

BEYOND INSANITY: A DEEPER EXAMINATION OF THE INSANITY PLEA FOR SEX OFFENDERS

Haniyyah Zia

Beyond Insanity: A Deeper Examination of the Insanity Plea for Sex Offenders

ABSTRACT:
In the legal system, the insanity plea is a highly contentious affirmative defense intended to be instituted for mentally ill defendants. Historically, there are tests established to evaluate whether a defendant is criminally insane, surrounding the concepts of *actus reus* and *mens rea*. These tests, however, have incurred respective criticisms for both their creation and applications. The result of such a wide variety of tests, varying between states, is a lack of precedent necessary to define the ambiguous terms in each test as well as leaving mentally ill defendants at the mercy of the rules in the state they allegedly committed crimes in. In particular, its use by sex offenders must be re-evaluated, following the establishment that most sex offenders suffer from serious mental illness that causes them to commit sex offenses. As such, the legal system must shift its focus from an extreme dichotomy of a maximum sentence for mentally ill sex offenders or being found completely mentally insane to a middle ground that permits defendants charged with sex offenses to have their mental health needs met. This should be applied simultaneously with serving time for the crimes they committed, in a delicate balance between the criminal justice due process and crime control models. Ultimately, the "not guilty by reason of insanity" plea must be re-evaluated for its implications on a defendant's rights and shift the legal system's priorities from punitive to rehabilitative.

INTRODUCTION

In criminal trials, there are a number of affirmative defenses that a defendant can offer to counter the prosecution's evidence. One type of defense is where a condition or circumstance keeps the defendant from being held criminally responsible for the crimes they committed. Of the affirmative defenses, the insanity plea is one of the most commonly used.

The insanity plea is often referred to as an insanity defense because of the high burden necessary to prove criminal in-

sanity: clear and convincing evidence. Though not the highest burden in the justice system, the "clear and convincing evidence" standard is still comparatively high to a usual defense case that has no burden.[1101] It can be referred to as the "medium" burden because it is higher than the preponderance of evidence burden typical with a civil case, but not as high and certain as the reasonable doubt burden associated with a criminal trial. To prove something with "clear and convincing evidence" means to prove that a fact is highly probable.[1102]

There are two categories of an insanity defense: insanity and diminished capacity. While similar, insanity and diminished capacity differ in their purposeful use by a defense team. Pleading not guilty by reason of criminal insanity is a defense to the entire crime, while proving diminished capacity allows the defendant to be held not guilty to a particular element of the crime.[1103] For example, a hypothetical defendant can plead not guilty to the charge of first-degree murder by reason of diminished capacity and seek to prove their diminished capacity to negate the "intent" element necessary to commit a first-degree murder. Though not identical, diminished capacity and insanity work in the same manner by forcing the defense to take on the burden of an affirmative defense. An affirmative defense, however, calls into question the idea of presenting a legal test for insanity, often requiring proof through the use of a combination of scientific and psychiatric evidence. The issue arises when the test and legal precedent for insanity are initiated by actors of the legal system (lawyers and judges), rather than in collaboration with medical professionals. Instead, mental illnesses are combined with an intention to commit crime (*mens rea*) and resulting insanity tests are, in varying respects, largely ignorant of the intricacies of mental health in the eyes of medical professionals.

HISTORY OF INSANITY DEFENSE

The conception of insanity in law is not a uniquely modern idea. The concept was first proposed by the infamous ancient Greek philosopher Aristotle, who proposed that criminal misconduct could be excused in some circumstances, when there

[1101] *United States v. Amos*, 803 F.2d 419, 420 (8th Cir. 1986).
[1102] *Id.*
[1103] Wex Definitions Team, *Insanity Defense* (Jun. 2023)

is a mistake of fact (though a modern legal term, Aristotle explains the essence of this idea).[1104] However, he makes the particular distinction that ignorance of the law and enjoyment of cruelty should not be excused in any circumstance. Though proposed by Aristotle, the idea of insanity as an excuse for criminal actions was first implemented by the Romans following their establishment of the Laws of the Twelve Tables that stand as the earliest distinctions between civil and criminal law.[1105] Ancient Rome is also where due process was first guaranteed, resulting in the creation of early stages of the insanity defense. In Rome, there has only been one recorded instance of a defendant having pleaded not guilty by reason of insanity, with the earliest standard being that the defendant must be of sound mind or "*non compos mentis.*"[1106]

The first recorded official legal test for insanity was nearly two thousand years later in England in 1843, following the trial of *Queen v. Daniel M'Naghten*, who was charged with the murder of Edward Drummond, the secretary to the Prime Minister.[1107] When he arrived in London, he intended to shoot and kill Sir Robert Peel, the Prime Minister, because Mr. M'Naghten believed he was being persecuted by members of the Conservative Party, later mistakenly shooting Drummond, thinking he was Prime Minister Robert Peel. The defense presented this evidence in order to establish that at the time of the crime, Mr. M'Naghten had no perception of right and wrong, satisfying the standard for insanity to be proven as "show[ing] a state of mind incapable of distinguishing between right and wrong."[1108] Following the defense's expert testimony, the judge found Mr. M'Naghten not guilty by reason of insanity.

This landmark case was central for the key reason that it posed a legal question of whether it was legally proper to convict a defendant if they had no *mens rea*, or "guilty mind." Since it is necessary for the prosecution to prove that the defendant had a *mens rea* in concurrence of *actus reus* ("guilty act") in order

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[1104] ARISTOTLE & TRANSLATED BY W.D. ROSS, NICOMACHEAN ETHICS 85 (1999).

[1105] *Law of the Twelve Tables* (29 Mar. 2018), https://www.britannica.com/topic/Law-of-the-Twelve-Tables

[1106] Nigel Walker, *The Insanity Defense before 1800*, 477 ANNALS AAPSS. 25, 26 (1985).

[1107] The Queen v. Daniel McNaughton 8 Eng. Rep. 718 (1843)

[1108] *Id.*

for a crime to have been committed, the insanity defense stems from the concept that a defendant with a mental illness or incapacitation does not have a *mens rea*, and therefore cannot be considered guilty of the crime they are being charged with.[1109]

Mr. M'Naghten's case was not only monumental in that it was the first of its sort, but it also established the legal principle of the *M'Naghten* Rule, still utilized in about half of the U.S. states to prove legal insanity in courts today.[1110] Under the *M'Naghten* Rule, all defendants are presumed sane unless proven to either (1) not be mentally aware of their actions as they committed them or (2) not have been aware what they were doing was wrong.[1111] The other half of the U.S. states use the *Durham* Rule, Irresistible Impulse test, the Model Penal Code Ruleor a combination thereof.[1112] [1113] [1114] [1115] However, Kansas, Montana, Idaho, and Utah do not permit the use of an insanity defense, instead yielding to the diminished capacity defense, forcing defendants to argue for lesser sentences.[1116]

In 1887, *Parsons v. The State of Alabama* (henceforth referred to as *Parsons v. State*) presented the case of a defendant, Nancy J. Parsons, who murdered her husband, Bennett Parsons, by shooting him with a gun. She was originally convicted, but appealed to the Alabama Supreme Court, which overturned her conviction on the grounds that she was so deeply under "…'duress of… mental disease…' that she was no longer able to '…tell right from wrong'…" highlighting a flaw of the *M'Naghten* Rule's ambiguity.[1117] In turn, this established the Irresistible Impulse Test, which is used in tandem with the *M'Naghten* Rule in some states and on its own in others.[1118] This new addition to

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[1109] Seth Feurstein et. al, *The Insanity Defense*, 24, 25 (Sept. 2005).

[1110] Wex Definitions Team, *M'Naghten Rule* (Jun. 2020).

[1111] *Id.*

[1112] *Id.*

[1113] See N.H. Rev. Stat. § 628.2 (2014); See Also FindLaw, *The Insanity Defense Among the States* (Jan. 23, 2019). ("New Hampshire: The state uses the Durham standard. The burden of proof is on the defendant.")

[1114] *Id.* (Colorado, New Mexico, Texas, and Virginia use the Irresistible Impulse Test with the M'Naghten Rule or with a modified version of the M'Naghten Rule.)

[1115] *Id.* (Twenty-one states use the Model Penal Code Rule or a modification of it)

[1116] FindLaw, *The Insanity Defense Among the States* (Jan. 23, 2019).

[1117] *Parsons v. State,* 81 Ala. 577, 603, 2 So. 854, 871 (1887).

[1118] *Id.* at 863.

the *M'Naghten* Rule requires that if a defendant was so mentally ill at the time of the crime that it caused them to be entirely unable to resist the temptation to commit the crime, they cannot be found guilty. This falls in accordance with the *mens rea* necessary to convict a defendant: if the defendant could not resist committing the aforementioned crime because their mental state forced them to do so, they cannot be punished for what they could not resist.

The *Durham* Rule was also established through case law, as the *M'Naghten* Rule was, but presented a narrative of legal insanity contradictory to the one accepted in *M'Naghten* and the Irresistible Impulse Test. Monte Durham, a resident of Washington D.C. in the mid-1900s, was a mentally ill patient who, from 1940 to 1950, committed a string of minor offenses and was in and out of psychiatric treatment, where he was diagnosed with psychopathic personality disorder. However, after being released from psychiatric care for a third time in July of 1951, Monte Durham was charged with housebreaking. At the time, he pleaded not guilty by reason of insanity. During the trial proceedings, Mr. Durham's defense attorney called a psychiatric expert to testify and provide an expert opinion on Mr. Durham's mental illness in order to prove the insanity defense. When asked on stand if the defendant could discern right from wrong, the psychiatric expert responded that those with mental illnesses could typically tell right from wrong, but this fact didn't help prove that Mr. Durham's mental state affected his actions. Because of this, the judge found Mr. Durham guilty, using the *M'Naghten* Rule and Irresistible Impulse Test. Later, Mr. Durham filed for an appeal to the U.S. Court of Appeals of the District of Columbia Circuit in *Durham v. United States* where Mr. Durham's conviction was overturned when the court acknowledged the Irresistible Impulse test and *M'Naghten* test were ignorant of scientific understandings of mental illness, instead establishing a broader test (now referred to as the *Durham* Rule): a defendant could not be held responsible if their actions were the result of a mental illness or disease.[1119]

At the same time legal insanity tests were expanding, so too was the field of medical psychiatry. In the 1950s, numerous studies resulted in a broadened understanding of mental illness. Despite the attempt to broaden the scope of the *Durham* Rule ,

[1119] *Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954), abrogated by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)

the law was still vehemently opposed to its intersection with science. *Durham v. The United States* resulted in the concept that a defendant could not be held responsible if their criminal actions were the result of a "mental disease or defect," but with varying opinions from psychiatrists on what level of mental illness necessary to provide insanity, the courts were forced to establish a definition through *McDonald v. U.S.* that detailed a mental disease or defect as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[1120] [1121] Yet again, this standard was not set by a medical board with extensive psychiatric experience, but rather a team of experts in law that had little to no understanding of the manifestation of mental illness in patients. Many modern criticisms of the *Durham* Rule draw from this very aspect of the test.

Twenty years later, in 1972, the Model Penal Code Rule was established by the American Law Institute in an attempt to modernize legal insanity standards. Most of the standards used at the time had been established in the late 1800s or mid-1900s, when legal understanding of mental illness or disease were far less advanced than they became in the 1970s. Though not technically a binding legal code, under §4.01 of the Model Penal Code, defendants cannot be held responsible for their criminal conduct if, at the time of the conduct, they "lack the substantial capacity to appreciate the criminality" of their conduct due to mental disease or defect.[1122] Under §4.01 (2), the code further states that this defense cannot be used by those whose mental insanity manifests itself through repetitive criminal and antisocial behavior.[1123] This was intended to prevent the use of the insanity defense by habitual criminals or psychopaths, but coincidentally, this is where most of the insanity defense's criticisms are drawn from today.

Following the establishment of the Model Penal Code in the 1980s, a novel problem arose: a new and intense crime wave. Before 1980, the homicide rate more than doubled from

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[1120] *Id.*

[1121] *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962)

[1122] Model Penal Code, Section 4.01, 1985

[1123] Model Penal Code, Section 4.01, 1985

4.6 per 100,000 residents to 9.7 in 1979.[1124] In 1980, the homicide rate peaked and the United States saw the highest intentional homicide rate in the twentieth century with a rate of 10.2 homicides per 100,000 residents.[1125] To combat this new and unprecedented wave of crime, the Reagan Administration passed the Comprehensive Crime Control Act in 1984 which subsequently brought the intentional homicide rate from 10.2 to 7.9 per 100,000 U.S. residents.[1126] [1127] This Act also initiated the federal insanity defense to implement the standard that to prove insanity, the defendant would need to prove that at the time of the crime, they were "unable to appreciate the nature and quality or the wrongfulness" of their acts due to "severe mental disease or defect."[1128] Though a federal standard, it was left up to each individual state's discretion to adopt the new standard.

In rejection of the federal standard, six separate states adopted a version of the guilty but mentally ill or guilty but mentally insane plea.[1129] The guilty but mentally ill plea (GBMI) was built on the idea that a jury should be permitted to return a verdict somewhere between "total inculpation of guilt" and "complete exoneration" of not guilty by mental insanity.[1130] The premise of this plea is to allow the legal system to adopt a comfortable medium between complete insanity that constitutes a lack of free will and a defendant having been aware enough to recognize the difference between right and wrong. Thus, if a jury finds that a defendant committed the crimes they are charged with, yet was not so severely impaired by

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[1124] Report from Bureau of Justice Statistics by statisticians Alexia Cooper and Erica L. Smith, *Homicide Trends in the United States, 1980-2008,* 2 (Nov. 2011) (on file with the U.S. Department of Justice).

[1125] *Id.*

[1126] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984).

[1127] Report from Bureau of Justice Statistics by statisticians Alexia Cooper and Erica L. Smith, *Homicide Trends in the United States, 1980-2008,* 2 (Nov. 2011) (on file with the U.S. Department of Justice).

[1128] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984).

[1129] Alaska, Georgia, and Utah permit a guilty but mentally ill plea. Arizona, Idaho, and Montana permit a guilty but mentally insane plea. All six of these states do not permit a defendant to be found not guilty by reason of mental insanity.

[1130] Ira Mickenberg, Law Review, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict has Both Succeeded in its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense, 55* U. CIN. L. REV. 953 (1987)

mental illness that they were still aware, at some level, of the crime committed, the jury can reach a verdict of GBMI.

With this verdict, the standard is the defendant to be found guilty, but sentenced to a psychiatric or mental health facility, intended to cure the defendant of the ailments that caused them to commit crime. This sentencing principle takes into account that most mental health services offered to incarcerated individuals while in the corrections system are often subpar and intended to eliminate the need for a psychiatric professional, rather than provide the adequate support necessary. In an attempt to address this issue, the GBMI verdict permits juries to send defendants found guilty to state-sponsored psychiatric facilities, rather than sentencing them to complete their sentences in a prison facility. Though relatively new and one of the least prevalent standards present for insanity in legal proceedings, the GBMI plea is the only modern standard that permits juries to find a defendant guilty while still weighing the defendant's mental illness or defects.

CRITICISMS OF THE INSANITY DEFENSE AND ITS TESTS

The vast variation among states' respective legal insanity standards are not immune to criticism. For example, on March 30, 1981, John Hinckley Jr. shot six rounds at President Ronald Reagan in an assassination attempt "in an effort to impress the actress Jodie Foster," whom he had an obsession with.[1131] His trial culminated in him being found not guilty on all counts by reason of insanity. He was then sent to a government psychiatric hospital, St. Elizabeth's Hospital in Washington D.C., from which he was released after forty-one years in 2022.[1132] He has since publicly apologized for his 1981 assassination attempt. The public's perception, however, told a different story. An ABC News poll from the day after Hinckley's verdict showed that over three-quarters of Americans felt justice had not been served.[1133]

This perception was not unique to just the Hinckley case. A majority of Americans believe the insanity defense is a loop-

[1131] *United States v. Hinckley*, 493 F. Supp. 2d 65, 75 (D.D.C. 2007)

[1132] Vanessa Romo, *John Hinckley Jr., Who Tried To Assassinate President Reagan, is Granted Full Release* (June 15, 2022, 9:02 PM).

[1133] Valerie P. Hans, *John Hinckley Jr. and the Insanity Defense: the Public's Verdict*, 47 THE PUBLIC OPINION QUARTERLY NO. 2, 202 (1983)

hole that permits criminals to avoid incarceration.[1134] This is perhaps the reason why so many jurors are hesitant to rule in favor of the defendant for a not guilty by reason of insanity verdict. This ultimately results in even more mentally ill individuals ending up in a corrections system that refuses to accommodate them.

Specifically, all of the respective insanity defense tests have incurred their own criticisms. The Irresistible Impulse test was actually a result of widespread criticisms of the *M'Naghten* Rule and an attempt to rectify the fact that the *M'Naghten* Rule did not account for those who could distinguish right from wrong but were unable to control their actions by way of an irresistible impulse. This test, later known as the "policeman at the elbow test" was meant to shore up any potential shortcomings of the *M'Naghten* Rule, but despite its best efforts, many still find it inadequate today.[1135] It is largely criticized for being too narrow in its application since it requires the defendant to be proven as not being able to tell right from wrong, a nearly insurmountable feat.[1136] Legal analysts have also criticized the *M'Naghten* Rule for restricting expert testimony to strictly what the *M'Naghten* Rule requires an expert to testify to.[1137] For example, if a psychiatrist is brought into court to testify as an expert witness, the defendant's defense counsel will most likely choose to only elicit testimony from the expert witness regarding the defendant's ability to tell right from wrong, as the test requires, foregoing any other important testimony regarding the state of mind of the defendant or their possible history of mental illness (factors that may go to greatly influence a jury's verdict). Essentially, the *M'Naghten* Rule was labeled as antiquated in not allowing modern psychiatric medicine to factor into legal decisions.

In 1954, to rectify these shortcomings, the *Durham* Rule was established, but with its establishment came its respective criticisms. The test was meant to hold a broader standard for mental insanity in allowing more neutral, scientific evidence to be presented in courts, in the stead of moral debates over what

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[1134] *Id.*

[1135] *From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*.

[1136] Robert F. Scopp, *Returning to* M'Naghten *to Avoid Moral Mistakes: One Step Forward, or Two Steps Backward for the Insanity Defense*, 30. 135, 136 (1988)

[1137] *Id.* at 139.

is right and wrong, as presented with the *M'Naghten* Rule.[1138] Following the main criticism of the *M'Naghten* Rule as having placed too much power in the hands of lawyers and judges, rather than medical professionals, *Durham* seeked to rectify that. Yet, in its aim to be as inclusive of all possibilities, the *Durham* Rule also incurs many of its criticisms. Much of the confusion stemmed from the application of a "mental disease or defect" applying to only psychosis or any other mental disorder. It was also criticized for allowing psychiatric experts to have too much influence over the courtroom. Many were concerned over whether defendants would begin to abuse the *Durham* Rule by classifying addictions (alcoholism, drug abuse, etc,) as mental diseases. In contrast to the *M'Naghten* Rule, the *Durham* Rule placed too much influence over court proceedings in medical professionals; in other words, it tipped the balance in favor of psychiatrists and took too much power away from lawyers, judges, and juries.

Following the Durham Rule, the Model Penal Code Rule was established, but just like its preceding mental insanity tests, it too incurred much criticism. Most of its criticisms were levied against its vague language surrounding exactly what would qualify as "mental disease or defect" under the Model Penal Code standard.[1139] Just like previous standards, there was no list of symptoms necessary to prove to find one guilty by insanity, nor was there a list of mental illnesses that could incur possible insanity. This new standard meant to establish an even ground for the insanity plea, instead, blurred the lines even more by instituting vague language and leaving the ruling entirely up to the discretion of the judge or jury, depending on whether the defendant elected a bench trial or jury trial. Once again, with the Model Penal Code Rule, the court is forced to rely entirely on the testimony of conflicting expert witnesses that have varying degrees of expertise in insanity and psychiatric diagnoses. Ultimately, the Model Penal Code Rule incurred much of its criticism from the lack of its specificity.

Oppositely, the GBMI plea's criticism stems from the fact that though its intentions may be sincere, in application, it is largely ineffective. In particular, it immorally punishes de-

[1138] *From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*.

[1139] *Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954), abrogated by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)

fendants who truly did not have the agency to commit their crimes because in the states where GBMI is instituted, there is no option for mentally ill defendants to be found not guilty. They are only provided the option to plead guilty and as such, mentally ill defendants who are unable to control their conception of right and wrong are thereby punished from crimes they did not commit, in accordance with the *mens rea* principle.

As evident in the varying modern tests utilized for insanity defenses and their respective criticisms, there is no federal principle for what it means to find someone not guilty by reason of mental insanity. This is a principle that largely falls on the shoulders of the judge, jury, and state, forcing them to pit a defendant's right to due process against the state's responsibility to protect its citizens from crime.

THE CRIMINOLOGY BEHIND IT ALL

In criminal court, there are four key actors: the presiding judge, the prosecutor, the defendant, and the defense attorney who advocates for their client. In the context of mental insanity, advocacy—literally meaning "speaking for another"—takes on a different meaning… from other, more traditional legal advocacy.[1140] Here, the defense attorney is the last line of defense between a defendant and a possibly lengthy prison sentence. It becomes the burden of the defense to advocate for the mentally ill defendant, who is typically advised not to speak for themselves.

In 1841, Dorothea Dix, an early American reformer for the rights of the mentally ill, volunteered as a teacher in East Cambridge Jail where she was exposed to inmates with mental illnesses treated "inhumanely and neglectfully." [1141] [1142] Even in the mid-1800s, the connection between crime and mental illness was evident. Yet, nearly two hundred years later, the concept of mental illness is nearly nonexistent in the prison system, replaced with lengthy sentences punishing those with mental illness for what they oftentimes cannot control. In

[1140] *What is Advocacy,* https://mffh.org/wp-content/uploads/2016/04/AFJ_what-is-advocacy.pdf

[1141] Manon Parry, *"I Tell What I Have Seen" -- The Reports of Asylum Reformer Dorothea Dix,* 94, 622, 624 (2006).

[1142] Excerpted from Dorothea Dix, *Memorial to the Legislature of Massachusetts* (1843) (located in American Journal of Public Health).

2011, the U.S. Department of Justice reported 16.6% of prison inmates incarcerated for violent offenses and 29.2% of jail inmates incarcerated for violent offenses experience "serious psychological distress," yet only 60% of those inmates have received "mental health treatment since admission."[1143] Simply looking at the numbers reveals an institutional issue with prisoners and mental health. However, the connection between the two is not only correlational, but may even be causal.

In a clinical study published in 2011, there was a link discovered between mentally ill patients and a number of symptoms grouped into "threat control override," found in patients having "thoughts put in [one's] head" and "people who wish [one] harm."[1144] However, coupled with a patient's schizophrenia, it was also found that the use of "alcohol and illicit drugs" greatly exacerbated the risk for aggressive behavior.[1145] The combination of the two cannot solely be used to predict the risk for criminal and aggressive behavior because of other confounding factors like clinical and contextual factors (family history, substance and/or drug abuse, past violence, etc.). While there is no clear answer regarding how mental illness *alone* can predict behavior, it is undoubtable that it is a highly motivating factor in an offender's choice to commit a crime.

Conversely, a criminological theory that directly supports the connection between criminality and mental illness is known as the labeling theory, developed in 1938 by Frank Tannenbaum, who wrote "the young delinquent becomes bad because he is defined as bad and because he is not believed if he is good."[1146] In this theory, Tannenbaum explains that one becomes a criminal because they are expected to or consistently labeled as such. This, coupled with the fact that the American public's perception of those with mental illnesses is that they are more "prone to commit acts of violence and aggression,"

[1143] Special Report from Bureau of Justice Statistics by Statistician Jennifer Bronson and Doctor Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12* (June 2017) (on file with the U.S. Department of Justice).

[1144] B. J. Link, A. Stueve, & J. Phelan, Original Paper, *Psychotic Symptoms and Violent Behaviors: Probing the Components of "Threat/Control-Override Systems,"* 33, Social Psychiatry and Psychiatric Epidemiology, S57 (1998).

[1145] Jan Volavka & Leslie Citrome, *Pathways to Aggression in Schizophrenia Affect Results of Treatment*, 37, insert periodical name, 921, 924 (2011).

[1146] FRANK J. SCHMALLEGER, CRIMINAL JUSTICE TODAY: AN INTRODUCTORY TEXT FOR THE 21ST CENTURY 111 (2014).

results in the concept of psychiatric patients tending to commit more crimes than others because they are labeled to a criminal tendency through public perception.[1147] Although this concept isn't highly studied, the general consensus among sociologists is that untreated mental illness in psychiatric patients can lead to higher levels of tendency to commit criminal acts.

Some certain criminal acts are committed at higher rates by mentally ill patients than others, however. In the case of sex offenders, a study conducted on the Austrian corrections system found 92.9% of incarcerated sex offenders suffered from serious mental disorders.[1148] Upon further inspection, this study found that sex offenders were four times as likely to suffer from Axis I disorders (disorders commonly found among the public, particularly anxiety disorders) and nearly half of the sex offenders incarcerated under the Austrian corrections system suffered from Axis II disorders (namely personality disorders and intellectual development disorders).[1149] [1150] Interestingly, this study also found that 40% of sex offenders suffering from Axis I disorders had mental illnesses intrinsically connected with substance use disorders, namely alcohol.[1151] Despite widespread public mistrust of addiction and substance use disorders as related to mental health, the two are intimately connected.

As defined by the National Institute of Mental Health, Substance Use Disorder (SUD) involves the inability to control one's use of a specific substance. Addiction is a severe form of SUD.[1152] However, there is an important distinction that must be made between Axis I and Axis II disorders and SUD. The treatment for SUD is far more particular to the substance being abused and often cannot be treated with general mental health resources that are applicable to most Axis I and Axis II disorders. The issue arises when psychiatrists attempt to diagnose

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[1147] Noman Ghiasi, Yusra Azhar, & Jasbir Singh, Psychiatric Illness and Criminality, StatPearls, 2 (March 30, 2023).

[1148] R. Eher, M. Rettenberger, & D. Turner, *The Prevalence of Mental Disorders in Incarcerated Contact Sexual Offenders,* 139, 572, 572 (2019).

[1149] *Id.*

[1150] Nancy Schimelpfening, Reviewed by Steven Gans MD, *What Is the DSM-IV Multi-Axial System?* (Sep. 1, 2022), https://www.verywellmind.com/five-axes-of-the-dsm-iv-multi-axial-system-1067053

[1151] *Id.*

[1152] *Substance Use and Co-Occurring Mental Disorders* (Mar. 2023), https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health

those who abuse substances with mental illnesses, confusing the symptoms of one for the other.

For example, in the case of cocaine usage, signs of cocaine intoxication mirror symptoms of schizophrenia psychosis, making it increasingly difficult for psychological professionals to distinguish between the two.[1153] In some emergent settings, recent cocaine abuse has been mistaken for schizophrenia, resulting in incorrect diagnoses, stemming from the alteration of brain functions that result from prolonged cocaine addiction or abuse.[1154] It is widely accepted in the medical community that those with SUD also have mental illnesses, and that the two diagnoses are closely related.[1155] However, it is necessary to distinguish that although the two are related, they are not the same. The symptoms that are similar and in some cases, nearly identical, must be separated and correctly diagnosed when utilized to prove whether a defendant was so inundated by "mental disease or defect" that they were unable to understand the magnitude of their actions.[1156] Opposingly, those under the influence of substances with SUD are often well aware of their actions and cannot be found not guilty by mental insanity if they were under the influence of a substance at the time of the crime they are charged with. This presents the question of whether the defendant genuinely suffers from a mental illness or is simply under the influence of a substance.

Along the same vein of addiction, it is necessary for juries, mental health professionals, and legal theorists alike to distinguish between the classification of sex addiction as a mental health disorder and the mental illnesses that can constitute criminality.[1157] Sex addiction, referring to excessive sexual thoughts or behaviors that "can't be controlled," is known to be similar to other addictions, particularly the overwhelming

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[1153] Mark R. Serper et. al., *Symptomatic Overlap of Cocaine Intoxication and Acute Schizophrenia at Emergency Presentation*, 25 SCH. BULL., 1999 at 387,394

[1154] *Id.*

[1155] *Common Comorbidities with Substance Use Disorders Research Report* (Sep. 27, 2022), https://nida.nih.gov/publications/research-reports/common-comorbidities-substance-use-disorders/part-1-connection-between-substance-use-disorders-mental-illness

[1156] *Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954), abrogated by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)

[1157] *Sex Addiction, Hypersexuality and Compulsive Sexual Behavior* (Apr. 5, 2022), https://my.clevelandclinic.org/health/diseases/22690-sex-addiction-hypersexuality-and-compulsive-sexual-behavior

temptation to succumb to the addiction.[1158] While nearly 90% of those suffering from sex addiction suffer from other mental illnesses, again, there is a necessary distinction that must be made.[1159] Sex addiction is not the same as suffering from psychosis or schizophrenia, common illnesses that lead to insanity. Though the two are both illnesses in their own right, they do not equate and thus cannot be used interchangeably in discussions of the insanity plea.

Additionally, in the modern criminal justice community, there is much debate regarding whether certain offenders' childhoods affect their tendency to commit crimes later in life. As will be demonstrated by the cases of Harrison Frank Graham and Billy Milligan, the severity of neglect in one's childhood has been proven to result in a tendency to gravitate towards criminal actions in adulthood. Research from the National Institute of Justice has recently identified a direct correlation between severe abuse in one's childhood and their gravitation towards criminality.[1160] Results showed the more severely a child was neglected or abused in their early years, the higher the risk of adulthood crime, particularly violent crimes, evident in the "cycle of violence" identified in adult offenders with histories of child maltreatment.[1161] The researchers from the NIJ recommended that the antisocial behavior that results from child abuse or neglect later transforms into a tendency to commit crimes and should be targeted early on in order to intervene in the cycle of criminality.[1162]

The caveat to this recommendation is the conception of Antisocial Personality Disorder (ASPD), commonly referred to as "sociopathy."[1163] A sizable portion of defendants that plead not guilty by reason of insanity (NGRI) elicit testimony from expert witnesses that identify the respective defendant as diagnosed with Antisocial Personality Disorder, characterized by a

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[1158] *Id.*

[1159] *Id.*

[1160] *Pathways Between Child Maltreatment and Adult Criminal Involvement* (Oct. 11, 2017), https://nij.ojp.gov/topics/articles/pathways-between-child-maltreatment-and-adult-criminal-involvement

[1161] *Id.*

[1162] *Id.*

[1163] *Antisocial Personality Disorder* (Feb. 24, 2023), https://www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/symptoms-causes/syc-20353928

lack of regard for right and wrong.[1164] The cyclical nature of this diagnosis arises in one of its symptoms: those with ASPD are known to repeatedly "disregard or violate the rights of others."[1165] In other words, those with ASPD commit crimes as a result of their mental illness. However, as explored by multiple commentators on the intersection of behavior science and law, APD diagnosis does not always indicate "criminal, much less incorrigible criminal behavior."[1166] In essence, just because a defendant may have been diagnosed with ASPD, it does not mean they are automatically insane and must be found not guilty, but rather that those with ASPD must be weighed on the same scale as all other mentally ill defendants. If those with ASPD are found to have been aware of their actions while committing the crimes they are charged with, they must be found guilty in accordance with the *mens rea* principle. While defendants suffering from ASPD need adequate treatment, they must be diagnosed following the psychological diagnosis, rather than in reaction to a particular court trial or criminal charge.

It is true that sex offenders are more likely than not to suffer from mental illness and as such, the insanity plea must be adjusted, regardless of the histories of the defendants with child abuse or neglect or their respective histories of substance abuse. Each defendant's mental state must be evaluated fairly and on its own merit, in reference to the insanity plea.

USE OF THE INSANITY PLEA

Throughout history, many defendants have used the insanity plea, to varying degrees of success. Many have used it as a last resort and an alternative to a plea deal detailing a lesser sentence and many have genuinely suffered from serious illnesses that caused them to become unaware of their actions at the time of committing the crimes in question. In order to detail a remedy to the issues with the insanity plea, one must

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[1164] *Id.*

[1165] *Antisocial Personality Disorder: Often Overlooked and Untreated* (Dec 29. 2022), https://www.psychiatry.org/news-room/apa-blogs/antisocial-personality-disorder-often-overlooked

[1166] Mark D. Cunningham and Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations,* 16 BEHAV. SCI. LAW., 333, 333 (1998)

first understand how it has historically been used by mentally ill defendants.

On August 9, 1987, Harrison "Cookie Monster" Graham was evicted from his apartment in South Philadelphia.[1167] The landlord sent his son and nephew to investigate the reason for his eviction: a strange odor emanating from the apartment. Their findings led them to call for the police almost immediately.[1168] When law enforcement arrived, they stepped inside his apartment to the sight of trash piled up nearly four feet high across the floor of the apartment, a fact key to Graham's later diagnosis.[1169] On the walls were scrawlings of "aggressive expletives," a drawing of a nude woman, and two finger markings of blood.[1170] Across the hall, a door was nailed shut with "Marty" etched into the wood and, when a police officer peered through the keyhole, he discovered a woman lying unmoving inside the room.[1171] Upon forcing the door open, officers discovered the remains of six bodies, all appearing to have been deceased for an extended period of time.[1172] Inside each room of the apartment, law enforcement also discovered stacks of old mattresses, piles of dog feces, rotting food, and trash heaps piled several feet high.[1173] It later became evident that Graham had been living in the apartment for years in the same condition the officers found it in.

During his trial for the murder of these six women, Harrison Graham was evaluated by three psychiatric professionals. Dr. Robert Stanton, a psychiatrist, indicated that Graham had an IQ of below 63, which is below the level of mental incompetency. He also found that Graham suffered from frequent auditory hallucinations, blackouts, and was "psychotic, with

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[1167] Harrison Graham was nicknamed by the media the Cookie Monster killer because of his later diagnosis of multiple personality disorder, in which one of his personalities was characterized as a two-year old that loved Cookie Monster and had a beloved Cookie Monster doll.

Katherine Ramsland, *Cookie Monster and the Serial Killer* (Sep. 15, 2013), https://www.psychologytoday.com/us/blog/shadow-boxing/201309/cookie-monster-and-the-serial-killer

[1168] *Id.*

[1169] *Id.*

[1170] *Id.*

[1171] *Id.*

[1172] *Id.*

[1173] *Id.*

chronic paranoid features."[1174] Another expert, psychologist Albert Levitt, reported the defendant as "unable to read, write, or even tell time."[1175] However, the state's psychiatric expert, Dr. Robert Sardoff, testified he believed Graham was mentally competent on the grounds that he was able to answer his questions and provide a police statement, despite later evidence proving that Graham had the "mental age" of a "9-year old."[1176] On these grounds, a judge ruled Graham as competent enough to stand trial.

Graham pleaded not guilty by reason of insanity in accordance with his multiple personality disorder. This disorder manifested in Graham in three distinct personalities: Frank, "a drug addict and murderer," Junior, a young boy who adored Cookie Monster, and Marty, a neighborhood handyman who tended to his mother's every need. During the defense's case-in-chief, Graham's mother testified she never saw Graham able to grasp "the difference between right and wrong," and that he never seemed to learn anything.[1177] During the trial proceedings, Graham brought in four furry monkey puppets and played with them as the case was argued in the courtroom.[1178]

Harrison Graham was found guilty of all counts of first-degree murder and abuse of a corpse. He was sentenced to "six consecutive sentences of seven to fourteen years, six death sentences and one life term."[1179] However, Graham was not to serve the death sentence until after his life term, an unusual move at the time and, when asked about it, the judge cited his reasons as the severe neglect Graham was subject to in childhood. When this was announced in court, his attorney later told reporters he "wasn't sure" that Graham even knew he had been found guilty.

Six years after the sentencing, in 1994, the Pennsylvania Supreme Court submitted that Harrison Graham's death sentence was to be carried out immediately. The original judge of Graham's case managed to stay the execution and delay it continuously until the year 2002 when the Supreme Court

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[1174] Katherine Ramsland, *Harrison Graham: The Corpse Collector*, https://www.crimelibrary.org/serial_killers/predators/harrison_graham/14.html

[1175] *Id.*

[1176] *Id.*

[1177] *Id.*

[1178] *Id.*

[1179] *Id.*

ruled in *Atkins v. Virginia* that "mentally retarded" were not permitted to be executed in any state. Finally, on December 20, 2003, Harrison Frank "Marty" Graham, known to the public as the "Cookie Monster Killer," was deemed incompetent to be executed and his death sentence was vacated.[1180]

In Graham's case, despite severe neglect in his childhood, more than six psychiatric experts testifying that Graham suffered from severe mental illnesses over the course of his criminal trial, and Graham's unusual behavior during the court proceedings, he was not afforded any mercy from the legal system, barring the vacating of his death sentence. This is evidence of the extremities the legal insanity plea takes to prove. Even after all the evidence presented during pretrial hearings, the defense's case-in-chief, and the sentencing hearings, the defense was still unable to prove mental insanity and meet their affirmative burden. As a result, Graham was awarded the death penalty and was not explicitly offered any mental health services while serving his life sentence. In accordance with the law, Graham was found not competent enough to have his life taken away by form of the death penalty, but on the same note, was found competent enough to serve a life sentence with no chance for parole.

Similarly, the case of Billy Milligan presents the same extremes one must go to prove insanity. Born on February 14, 1955 in Miami, Florida as William Stanley Morrison, Milligan suffered intense trauma and neglect at a young age.[1181] His father, John Morrison, attempted suicide twice and ultimately died by suicide when Milligan was three years old.[1182] His mother then remarried a man named Chalmer Milligan in 1963 when Milligan was eight years old.[1183] Milligan later claimed his stepfather constantly physically abused his mother

[1180] Lee Lofland, *Cookie Monster and the Serial Killer* (Sep. 16, 2013), https://leelofland.com/cookie-monster-and-the-serial-killer/

[1181] Austin Harvey, *Billy Milligan, the Serial Rapist who Claimed that his 'Other Personalities' Committed His Crimes* (Jun. 5, 2023), https://allthatsinteresting.com/billy-milligan

[1182] Jeb Philliips, *Multiple-Personality Case of Billy Milligan Still Fascinates* (Oct. 28, 2007, 12:01 AM, updated Jun. 6, 2022, 11:07 AM), https://www.dispatch.com/story/news/2007/10/28/multiple-personality-case-billy-milligan/984983007/

[1183] *Id.*

and repeatedly sodomized Milligan.[1184] His stepfather even threatened to "bury him alive" if he told anyone about the abuse he suffered at home and, in some instances, Chalmer Milligan did bury Milligan alive for short periods of time, even going so far as to hang him "by his toes and fingers." [1185] [1186]

In Milligan's teenage years, there were several indications that he suffered from severe mental illness, notably that he was observed to wander the streets "in a daze" after falling "into trances."[1187] As a result of these trances, he was suspended from junior high (later expelled in 1972) and was unable to keep a job for an extended period of time.[1188] [1189] His parents committed him to a state mental hospital in Columbus, Ohio, where he was diagnosed with hysterical neurosis, but he was kicked out after three months for disruptive behavior. After his expulsion, he joined the Navy, but was then discharged a month after joining due to his inability to adapt to Navy life.

At this time in his life, Milligan began having adverse interactions with the law. As an adult, Milligan was incarcerated twice: once for rape and once for robbery, but was released on parole in 1977, which allowed him leeway to commit the crimes for which he is most known for today.[1190] [1191] From October 14th to the 27th of 1977, Billy Milligan raped four separate

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[1184] *Behavior: The Man with Ten Personalities* (Oct. 23, 1978), https://content.time.com/time/subscriber/article/0,33009,946128-1,00.html

[1185] *Id.*

[1186] Jeb Philliips, *Multiple-Personality Case of Billy Milligan Still Fascinates* (Oct. 28, 2007, 12:01 AM, updated Jun. 6, 2022, 11:07 AM), https://www.dispatch.com/story/news/2007/10/28/multiple-personality-case-billy-milligan/984983007/

[1187] *Behavior: The Man with Ten Personalities* (Oct. 23, 1978), https://content.time.com/time/subscriber/article/0,33009,946128-1,00.html

[1188] Jeb Philliips, *Multiple-Personality Case of Billy Milligan Still Fascinates* (Oct. 28, 2007, 12:01 AM, updated Jun. 6, 2022, 11:07 AM), https://www.dispatch.com/story/news/2007/10/28/multiple-personality-case-billy-milligan/984983007/

[1189] *Behavior: The Man with Ten Personalities* (Oct. 23, 1978), https://content.time.com/time/subscriber/article/0,33009,946128-1,00.html

[1190] *Id.*

[1191] Jeb Philliips, *Multiple-Personality Case of Billy Milligan Still Fascinates* (Oct. 28, 2007, 12:01 AM, updated Jun. 6, 2022, 11:07 AM), https://www.dispatch.com/story/news/2007/10/28/multiple-personality-case-billy-milligan/984983007/

women from the Ohio State University campus and forced three of them to write and cash checks for him at gunpoint.

After Milligan was captured, he rode to the station with Ohio State University police investigations supervisor Elliot Boxerbaum who reported feeling like he was "talking to different people at different times," one of the first indications of the severity of Billy Milligan's mental illnesses.[1192] Subsequently, his public defenders decided to have Milligan plead not guilty by reason of insanity in accordance with Milligan's multiple personality disorder, today known as dissociative identity disorder.

After psychiatrists spent months examining and diagnosing Milligan, they determined he had twenty-four distinctive personalities, most notably British intellectual Arthur, a Czechican native Regan, teenage lesbian Adalana, a three year old girl named Christene, and Billy, among others.[1193] [1194] Billy, the core personality that Milligan spent most of his time as, was largely suicidal and claimed by psychiatrists to have been "asleep" for the past seven years. When psychoanalyst Cornelia Wilbur spoke to Milligan, she was met with the Billy personality that told her everytime he "comes to" he finds he is in some kind of trouble and wishes he "were dead."[1195] Milligan's defenders argued it was the Adalana personality that committed the rapes and the Regan personality that committed the subsequent robberies, evident in how one of the rape victims told investigators the rapist was someone with a German accent, despite Milligan never having even been to Europe in his life.[1196] [1197]

On December 4, 1978, Billy Milligan was found not guilty of nine criminal charges (rape of four women, kidnapping of

[1192] *Id.*

[1193] Nick Schager, *The Serial Rapist Who Was Acquitted After Claiming to Have 24 Personalities* (Sep. 20, 2021, 4:59 AM), https://www.thedailybeast.com/the-dark-saga-of-billy-milligan-a-serial-rapist-who-was-acquitted-after-claiming-to-have-24-personalities

[1194] Austin Harvey, *Billy Milligan, the Serial Rapist who Claimed that his 'Other Personalities' Committed His Crimes* (Jun. 5, 2023), https://allthatsinteresting.com/billy-milligan

[1195] *Id.*

[1196] *Id.*

[1197] Jeb Philliips, *Multiple-Personality Case of Billy Milligan Still Fascinates* (Oct. 28, 2007, 12:01 AM, updated Jun. 6, 2022, 11:07 AM), https://www.dispatch.com/story/news/2007/10/28/multiple-personality-case-billy-milligan/984983007/

three) by reason of mental insanity on the basis of his multiple personality disorder.[1198] Judge Jay C. Flowers of Franklin County Common Pleas Court reported that it was impossible to find Milligan guilty because it wasn't the Billy personality that committed the crimes, but rather the Adalana and Regan personalities.[1199] This was also the first instance of a defendant being found not guilty by reason of insanity due to the diagnosis of multiple personality disorder, but Milligan was still committed to the Athens Mental Health Center. He resided there until 1980 when he was transferred to Lima State Hospital for the Criminally Insane, which he described as a "chamber of horrors."[1200]

Billy Milligan's case, in comparison with Harrison Graham's case, shows the extremes one must go to be found completely not guilty of a crime. In Milligan's case, it took showing the court evidence of twenty-four distinct personalities to be found not guilty, but in Graham's case, he was still found guilty despite offering evidence of three personalities. Both defendants were diagnosed with multiple personality disorder, but it took the legal system being presented with nearly twenty-four personalities in order to relieve a defendant of punishment obligation.

However, despite some cases where overwhelming evidence of mental illness hindering one's judgment may be offered, some defendants are still found guilty and sentenced to an extreme punishment.

Taylor Schabusiness, born Taylor Denise Coronado, was born in 1997 to parents Marla and Arturo Coronado in Chicago. Her mother passed away in 2009, due to cirrhosis and alcoholism. Shortly after, she moved to Wisconsin, but was sent by her father to live with her paternal grandparents in Texas at the age of eleven. There, she was diagnosed with bipolar disorder and spent a sizable amount of her childhood in mental institutions before she was expelled from high school in her senior

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[1198] Lauren Kranc, *The True Story of Billy Milligan, the First Ever Defendant Found Not Guilty Due to Multiple Personalities* (Jun. 9, 2023), https://www.esquire.com/entertainment/tv/a37693537/billy-milligan-true-story-netflix-24-faces/

[1199] Reginald Stuart, *Defendant in Rapes Found Insane* (Dec. 5, 1978), https://www.nytimes.com/1978/12/05/archives/defendant-in-rapes-found-insane-10-intelligence-quotients.html

[1200] Austin Harvey, *Billy Milligan, the Serial Rapist who Claimed that his 'Other Personalities' Committed His Crimes* (Jun. 5, 2023), https://allthatsinteresting.com/billy-milligan

year for fighting with another student. During Schabusiness' trial, her father testified that her mother's death took a large toll on his daughter's mental health and spurred her spiral into self-destructive behaviors like drug abuse.

Particular to Taylor Schabusiness, methamphetamine usage played a key role in her life and, in 2020, she married Warren Schabow, a habitual methamphetamine drug user and dealer.[1201] After marrying, she changed her last name to "Schabusiness," but her son, Mateo Coronado, took her maiden name.[1202] Soon after the birth of Schabusiness' son, her husband, Warren Schabow, was arrested on a "Possession with Intent to Deliver" methamphetamine charge, causing Taylor to send her son to live with her grandparents in Texas while she moved back to Wisconsin.[1203] There, she routinely met up with an old high school friend by the name of Shad Thyrion for methamphetamine usage and sexual intercourse.

On February 21st, 2022, at around 9:30 p.m., Schabusiness, Thyrion, and Schabusiness' roommate arrived at Schabusiness' Eastman Avenue apartment and smoked marijuana.[1204] Schabusiness and Thyrion smoked methamphetamine and, after Schabusiness' roommate left, she injected both herself and Thyrion with trazodone.[1205] At some point, Schabusiness and Thyrion went back to Thyrion's mother's home, where Thyrion lived in the basement. There, the two spent most of February 22nd. During their time in the basement, the two were engaging in intercourse when Schabusiness strangled Thyrion using chains and did not stop, despite his face "turning purple" and Thyrion "coughing up blood."[1206] She then proceeded to go upstairs to find a bread knife from the Thyrion

[1201] Anushree Madappa, *Why Was Taylor Schabusiness Arrested? Wisconsin Woman Attacks Attorney in Wild Courtroom Scene* (Mar. 7, 2023, 3:46 PM), https://www.sportskeeda.com/pop-culture/news-who-taylor-schabusiness-wisconsin-woman-attacks-attorney-wild-courtroom-scene

[1202] Jessica McBride, *Taylor Schabusiness' Family: Wisconsin Murder Suspect's Husband is Warren Schabow* (Jul. 28, 2023, 11:47 AM), https://heavy.com/news/taylor-schabusiness-husband-warren-family/

[1203] *Id.*

[1204] *What We Know and What We Don't Know About the Green Bay Dismemberment of Shad Thyrion, 'A Kind and Compassionate Person'* (Mar. 4, 2022, 5:30 PM), https://www.greenbaypressgazette.com/story/news/2022/03/04/what-we-know-green-bay-decapitation-taylor-schabusiness-shad-thyrion/9363885002/

[1205] *Id.*

[1206] *Id.*

home kitchen and used it to dismember Shad Thyrion's body parts, most notably decapitating his head and placing it in a bucket near the basement doorway.[1207] Later, in her confession, she confessed she meant to take all the body parts with her home, but "got lazy." [1208] Body parts were discovered in the basement, in containers near the bed, in containers inside Schabusiness' vehicle, and placed in several plastic shopping bags.[1209] Upon being arrested and interrogated by Green Bay officers, Schabusiness explained she "blacked out" while choking Thyrion and was under the influence of methamphetamine for the entire murder.[1210]

In Taylor Schabusiness' criminal trial, her attorney chose to plead not guilty by reason of mental disease or defect—a form of the insanity plea. However, even during the court proceedings, Schabusiness showed signs of mental instability. In a pre-trial hearing meant to allow Schabusiness' attorney to introduce the expert who was intended to testify that Schabusiness was unfit to stand trial due to her mental state, Schabusiness attacked her previous attorney, Quinn Jolly.[1211] Neither her, nor her attorney, offered any explanation of why she chose to attack Jolly.

Despite evidence presented by the defense's psychiatric expert that Taylor Schabusiness had undiagnosed bipolar disorder and was "psychotic," Schabusiness was deemed competent to stand trial.[1212] During the trial, Schabusiness' father testified about his daughter's mental state following her mother's death, citing that "she was in bad shape."[1213] He further testified that his

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[1207] *Id.*

[1208] *Id.*

[1209] *Id.*

[1210] *Id.*

[1211] Anushree Madappa, *Why Was Taylor Schabusiness Arrested? Wisconsin Woman Attacks Attorney in Wild Courtroom Scene* (Mar. 7, 2023, 3:46 PM), https://www.sportskeeda.com/pop-culture/news-who-taylor-schabusiness-wisconsin-woman-attacks-attorney-wild-courtroom-scene

[1212] Scott Hurley and Emily Matesic, *Jury: Schabusiness Did Not have Mental Disease or Defect When She Killed Man* (Jul. 27, 2023, 9:44 AM), https://fox11online.com/news/crime/taylor-schabusiness-trial-insanity-plea-ngi-shad-thyrion-homicide-dismemberment-second-phase-expert-testimony

[1213] *'F**king Loser': Taylor Schabusiness' Dad Says Drugs, Her Husband Sent Her Into a Spiral* (Jul. 27, 2023), https://www.youtube.com/watch?v=g9xwnS4nXUw&t=764s (Unofficial Transcript)

daughter seemed to be doing fine "until the drugs," in reference to her methamphetamine use that increased substantially after marrying her husband.[1214] The jury found Taylor Schabusiness guilty of first-degree homicide, third-degree sexual assault, and mutilation of a corpse, rejecting her plea of not guilty by reason of mental disease or defect.[1215] Her attorney explained in the sentencing hearing that Schabusiness had an extensive history of using "mind-altering substances" and would benefit from time in an addiction facility and mental health institution, rather than the maximum security prison.[1216] Ultimately, the judge rejected these arguments, electing to sentence Schabusiness to life in prison without parole and no chance of release with extended supervision.[1217] His main reasoning was that sentencing Schabusiness to life in prison was an action intended to "protect the public," displaying a clear battle between the criminal justice due process and crime control models.[1218]

The crimes Taylor Schabusiness committed are undoubtedly gruesome, cruel, and beyond humane. However, one must also consider that these crimes were committed under the influence of a substance, coupled with an offender who had an extensive history of mental health issues.[1219] These factors were rejected both in her sentencing and criminal trial. While there is no evidence of the fact, it may be inferred that when presented with serious substance abuse, the jury in Schabusiness' trial were unable to distinguish between the symptoms of methamphetamine addiction and genuine mental illness of bipolar disorder since the distinction was never made clear throughout the criminal trial by either the defense attorneys or prosecutors. While it is true that substance abuse symptoms often mirror those of some serious mental illnesses, they do not constitute insanity and those under the influence of certain

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[1214] *Id.*

[1215] *Wisconsin Woman Sentenced for Killing and Dismembering for Ex-Boyfriend, Scattering Body Parts: 'There Aren't Really Words For It'* (Sep. 27, 2023, 6:20 AM), https://www.cbsnews.com/news/taylor-schabusiness-sentenced-life-killing-dismembering-shad-thyrion-green-bay-wisconsin/

[1216] Doug Schneider, *Taylor Schabusiness Sentenced to Life in Prison for Killing, Decapitating Shad Thyrion of Green Bay* (Sep. 26, 2023, 6:51 PM).

[1217] *Id.*

[1218] *Id.*

[1219] Anushree Madappa, *Why Was Taylor Schabusiness Arrested? Wisconsin Woman Attacks Attorney in Wild Courtroom Scene* (Mar. 7, 2023, 3:46 PM).

substances, in Schabusiness' case methamphetamine, are often aware of their actions.

However, in acknowledging this fact, it is also necessary to acknowledge that those with Substance Abuse Disorder also need proper treatment for substance abuse or addiction, but that treatment cannot and should not be attained through the insanity plea. In this case, it is possible to find a defendant guilty of crimes, but not condemn them to a lifetime in the prison community; instead, opt for necessary rehabilitation options like mental health treatment. It is possible to "protect the public" and also consider the health of the defendant equally, while acknowledging the role substances may have played in their crimes.[1220]

Despite this fact, the insanity plea is not used only for addiction, but in some cases, as a last resort. Both John Wayne Gacy and Jeffrey Dahmer, two of the most prolific serial killers and sex offenders of all time, pleaded not guilty by reason of insanity (John Wayne Gacy) or guilty but mentally ill (Jeffrey Dahmer), to no avail.

John Wayne Gacy, born March 17, 1942, was brought up in an upper-middle-class household.[1221] His father, John Stanley Gacy, a blue-collar worker, worked as an auto-repair machinist and reportedly brought up Gacy with values surrounding the importance of masculinity, a concept Gacy struggled with as a young gay man.[1222] Gacy reports his father having a habit of drinking heavily and often demeaning him, calling him a "sissy," and at times even beating Gacy and his mother.[1223] Gacy was also a victim of sexual abuse at a young age, once at the age of five and multiple times by the same offender at the age of eight.[1224] Despite the horrific abuse Gacy suffered at the hands of others, he was never diagnosed with any mental illness in childhood or in his young adult years.

[1220] *Id.*

[1221] Adam Janos, *John Wayne Gacy's Childhood: 'Killer Clown' Serial Killer Was Victim of Abuse* (Sep. 15, 2020, updated May 12, 2023), https://www.aetv.com/real-crime/john-wayne-gacys-childhood

[1222] *Id.*

[1223] *Id.*

[1224] (At the age of five, a young girl forcibly fondled Gacy and at the age of eight, he was repeatedly molested by one of his father's friends)

Alec Wilkinson, *Conversations with a Killer* (Apr. 10, 1994), https://www.newyorker.com/magazine/1994/04/18/conversations-with-a-killer

From 1972 to 1978, Gacy worked as a building contractor and as "Pogo the Clown" at children's parties, a ruse that he used to lure young boys back to his home to sexually assault them and subsequently murder them.[1225] Over the course of the six years, John Wayne Gacy murdered thirty-three boys and young men, burying most of them in the crawl space beneath his home.[1226] He buried one body in the garage floor of the Chicago home and two other bodies in other areas of his property.[1227] He dumped four bodies into the Des Plaines river, as he confessed to later.[1228] Only twenty-nine of the bodies were ever recovered, but Gacy verbally confessed to murdering thirty-two separate times.[1229]

Despite Gacy's own confession, his attorneys decided to plead not guilty by means of mental insanity during Gacy's trial, arguing that he should not be held criminally responsible for the thirty-three murders committed and, instead, be institutionalized. In proving this affirmative defense, there were several psychiatric experts brought forward by the defense that all testified Gacy suffered from psychosis at the time of the murders and was "unable to control his behavior" during the episodes.[1230] However, in rebuttal, the prosecution offered their own psychiatric expert witness who testified that Gacy did not experience temporary insanity at any moment during the murders, but instead carefully planned and methodically carried out the brutal killings of the young boys and men.[1231] The prosecution experts also testified that Gacy suffered from Antisocial Personality Disorder, articulating that his personality disorder did not affect whether or not he suffered from mental delusions or psychosis during the murders.[1232]

[1225] *Timeline of Serial Killer John Wayne Gacy's Life, Case* (Oct. 26, 2021, 6:20 PM), https://apnews.com/article/chicago-2a5842ef8ee46f8d43799bc50f390ad8

[1226] Lauren Kranc, *Questions About the John Wayne Gacy Murders Remain Unanswered* (Apr. 22, 2022), https://www.esquire.com/entertainment/tv/a35923784/peacock-john-wayne-gacy-documentary-true-story-timeline/

[1227] *Id.*

[1228] *Id.*

[1229] *Id.*

[1230] Sara Kettler, *What Was John Wayne Gacy's Murder Trial Like?* (Dec. 20, 2022), https://www.aetv.com/real-crime/gacys-trial

[1231] *Id.*

[1232] *Id.*

In 1980, John Wayne Gacy was found guilty of thirty-three counts of first-degree murder, one count of "deviate sexual assault," and one count of indecent liberties with a child.[1233] He was then sentenced to twenty-one life sentences and the death penalty by lethal injection for twelve of the murders. On May 10, 1994, John Wayne Gacy was executed by lethal injection.

Throughout Gacy's life and even in his final years on death row, Gacy never admitted to the idea that he may have been insane, having cited his insanity plea in court as a decision made by his attorneys, rather than his decision. Gacy had never shown any signs of mental illness until the defense miraculously declared him mentally insane during his trial in 1980, signifying Gacy's defense counsel's use of the insanity plea as an exploitation of its purpose. Gacy may have suffered from abuse in his early years, but there is a general consensus among psychologists and investigators alike that Gacy was mentally sound at the time of his killings.

Joined by Gacy as one of the most prolific serial killers in American history is Jeffrey Dahmer. Born May 21, 1960, Dahmer experienced a childhood that wasn't entirely unusual, but also wasn't completely normal.[1234] His mother, Joyce Dahmer, suffered from depression and his father was a doctor who remained largely absent.[1235] Despite his parents' shortcomings, it is widely agreed by criminal justice experts today that Dahmer had "loving parents," and his serial killer streak was not caused by any of his childhood experiences.[1236] There were, however, warning signs, namely animal cruelty. In one instance, he brought a tadpole to his teacher at school who gave that tadpole off to another student in class.[1237] Angered by this action, Dahmer followed his classmate home and found the tadpole in a small aquarium, from which he extracted the tadpole to pour gasoline on it and set it on fire.[1238] He also reportedly

[1233] People v. Gacy, 125 Ill. 2d 117, 122, 530 N.E.2d 1340, 1341 (1988)
[1234] Colin McEvoy, *Jeffrey Dahmer* (Sep. 15, 2023), https://www.biography.com/crime/jeffrey-dahmer
[1235] *Id.*
[1236] Adam Janos, *Jeffrey Dahmer's Childhood: A Pail of Animal Bones Was His Toy Rattle* (Jan. 2, 2019, updated Oct. 4, 2022), https://www.aetv.com/real-crime/jeffrey-dahmer-childhood-serial-killer-cannibal-bones
[1237] *Id.*
[1238] *Id.*

impaled a dog's head with a stick near the woods surrounding his house.[1239]

In June of 1978, Dahmer picked up an eighteen-year old hitchhiker, whom he took back to his parents house to strangle and beat to death before dismembering the body.[1240] When later questioned about the first killing, Dahmer reported that he "always knew it was wrong," later dispelling his own use of the insanity plea by admitting to having been conscious and aware while committing the murders.[1241] After 1978, Dahmer wouldn't kill again until 1987. He joined the army and was stationed in Germany for some time before being released from his post due to excessive drinking.[1242] Again, when later questioned regarding the nine-year period between his first and subsequent murders, Dahmer reported that "the urge was always there," but lacked the resources and circumstances to carry out a murder.[1243]

In September of 1981, Dahmer moved back in with his parents in Ohio, but was shortly thereafter arrested for drunk and disorderly conduct, prompting his parents to send him to live with his grandparents in Wisconsin for a short while.[1244] In August of 1982, Dahmer was again arrested, this time for indecent exposure, and fined $50.[1245] In August 1986, Dahmer was arrested a last time before his next killing spree, for disorderly conduct.[1246] He was reportedly sentenced to a year of probation and counseling.[1247] The counseling seemingly had no effect on Dahmer, however, because his next murder occurred in September 1987, a month after the culmination of his probationary period.

Dahmer took his second victim to a hotel room, where he later confessed he "only planned on drugging him" but awoke to his dead body.[1248] He reported he "had no recollection" of

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[1239] *Id.*

[1240] Colin Bertram, *Jeffrey Dahmer: A Timeline of His Murders, Arrests and Death* (Aug. 11, 2021), https://www.biography.com/crime/jeffrey-dahmer-timeline-murders

[1241] *Id.*

[1242] *Id.*

[1243] *Id.*

[1244] *Id.*

[1245] *Id.*

[1246] *Id.*

[1247] *Id.*

[1248] *Id.*

beating him to death, but after waking to his dead body, Dahmer transported the body to his grandmother's house, where he dismembered the body and threw away all the body parts, with the exception of the head of the victim, which he later bleached and pulverized.[1249] From September 1987 to March 1988, Dahmer murdered and dismembered two more victims in a similar fashion to his second victim. In September 1988, he was arrested for sexual assault after luring a thirteen-year old boy to his apartment, drugging him, and molesting him.[1250] Dahmer was charged with second-degree sexual assault and enticement of a minor for immoral purposes, but spent only a week in jail before being released on bail.[1251]

From 1988 to 1991, Dahmer drugged, murdered, and dismembered the corpses of thirteen more young boys and men.[1252] One of his victims managed to escape at some point and speak to the police after Dahmer drilled a hole in the side of his head and poured hydrochloric acid, but Dahmer managed to claim the fourteen-year old victim as his nineteen-year old boyfriend, prompting law enforcement to categorize the incident as a domestic dispute.[1253]

On July 22, 1991, Dahmer attempted to drug an eighteenth victim, but the victim managed to escape and lead the police back to Dahmer's apartment, where he invited them inside.[1254] There, the police discovered a drawer filled with polaroid photos of bodies in different stages of dismemberment.[1255] Upon opening the refrigerator, they discovered the severed head of one of Dahmer's victims on the bottom shelf.[1256] In various states of disarray around the kitchen, the police also discovered four other severed heads, two human hearts, seven skulls, a largely intact human torso, several preserved male sexual organs, two skeletons, severed hands, and three more torsos submerged in acid.[1257] The sheer volume of body parts discovered was unlike anything law enforcement in Milwaukee,

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[1249] *Id.*
[1250] *Id.*
[1251] *Id.*
[1252] *Id.*
[1253] *Id.*
[1254] *Id.*
[1255] *Id.*
[1256] *Id.*
[1257] *Id.*

Wisconsin had ever encountered before. When later interrogated regarding the murders, Dahmer confessed he found his lifestyle "exciting and thrilling" and wished for it to have continued.[1258]

On September 10, 1991, Jeffrey Dahmer pleaded not guilty, but in January of the subsequent year, changed his plea to guilty but insane by the standards of where the defendant, due to an underlying disease or mental defect, (1) "lacked substantial capacity to appreciate the wrongfulness of their conduct," or (2) "lacked substantial capacity to conform their conduct to the requirements of the law."[1259] Earlier, Dahmer had admitted he knew his actions were wrong, so the question the trial attempted to answer was whether he was able to control himself.[1260] The defense offered four separate psychiatric expert testimonies, all of whom testified that Dahmer had a mental disease.[1261] The first testified he was a necrophiliac, the second saw Dahmer as potentially psychotic, and the third explained that Dahmer's actions had to have been the result of mental illness.[1262] The fourth, Dr. George Palerma, a court-appointed psychiatrist, testified that Dahmer suffered from antisocial personality disorders, but there was no evidence that he was legally insane.[1263] The prosecution offered their own psychiatric experts in rebuttal, all of whom described Dahmer's murders as methodically planned and premeditated, including Dahmer's own testimony from the trial where he stated he "had choices to make" but "made the wrong choices."[1264]

[1258] *Id.*

[1259] Sara Kettler, *What Was Jeffrey Dahmer's Murder Trial Like?* (Oct. 28, 2021, updated Oct. 12, 2022), https://www.aetv.com/real-crime/dahmer-trial

[1260] Wisconsin's trials are bifurcated, regardless of whether a defendant pleads guilty by insanity.

Id.

[1261] *Id.*

[1262] *Id.*

[1263] *Dr. George Palermo, Jeffrey Dahmer's Court-Appointed Psychiatrist, Takes the Stand* (1992), https://www.courttv.com/title/24-wi-v-dahmer-dr-george-palermo/

[1264] *Psychiatrist Dr. Frederick Fosdal, Who Evaluated Jeffrey Dahmer, Takes the Stand* (1992), https://www.courttv.com/title/34-wi-v-dahmer-dr-frederick-fosdal/

On February 17th, 1992, Jeffrey Dahmer was sentenced to fifteen consecutive life terms.[1265] Two years later, a fellow inmate beat him to death in response to Dahmer constantly taunting the inmates with cannibalistic actions.[1266]

Dahmer's case was unusual in the sense that he didn't show any clearly diagnosable symptoms of mental illness throughout his childhood or teenage years, but rather an evident step towards criminality much later in his adult years. Much of the discussion in court surrounding whether Dahmer was criminally insane did not agree on a singular aspect of his mental health, but pointed to his actions as symptoms of a mental illness, mirroring the cyclical argument surrounding Antisocial Personality Disorder. Though similar, the two are not identical. It is possible for one to exhibit the symptoms of a mental illness without having the official diagnosis of that mental illness since most symptoms overlap with other diagnoses.

In comparing both Jeffrey Dahmer and John Wayne Gacy, both committed a string of grisly murders that displayed clear disregard for the sanctity of human life. Both murderers did not show signs of serious mental illness in their childhoods, but during their court trials, psychiatrists attempted to identify the criminality of the two as symptoms of a mental illness. Psychiatric experts were unable to agree on a singular diagnosis for both of these offenders, pointing to a clear failing of the insanity plea to consider variable diagnostic methods. Here, the insanity plea was used as a last resort for cases where prosecutors had overwhelming evidence and refused to offer a plea deal in exchange for a lesser sentence.

In the case of serial killers like Jeffrey Dahmer and John Wayne Gacy, it is difficult to separate the mind of the killer from the horrific reality of the murders they committed and the families of the victims that are still grieving over the loss of their loved ones at the hands of the serial killer. However, it is the task of the legal system to carefully and impartially consider the mental health of the offender, in separation from the reality of the crimes they may have committed. In both Dahmer's and Gacy's case, it was difficult to do so since the prosecution's case in both trials focused heavily on the gore of

[1265] Colin Bertram, *Jeffrey Dahmer: A Timeline of His Murders, Arrests and Death* (Aug. 11, 2021), https://www.biography.com/crime/jeffrey-dahmer-timeline-murders

[1266] *Id.*

the crimes and pointing to the interaction with the corpses of victims as evidence of premeditation.

In both cases, the sentences provided were the maximum sentences possible, yet the possibility of mental health services provided were not considered. It is possible to sentence someone to death at the same time as considering their mental capacity and the services they will receive while under the corrections system. It is also possible to sentence someone to several consecutive life terms and understand that, though the crimes they committed are terrible and the defendant should be punished for their partaking in the crimes, the defendant also has an equal right to be provided with adequate healthcare, including mental health services. In both Dahmer's and Gacy's time in jail, neither received adequate mental health treatment in comparison with the magnitude of their illnesses. Both were considered by the system as criminals first and foremost, and mental health patients with respective needs second.

THE MORAL QUESTION

In consideration of the mental health of sex offenders, one must also consider the moral dilemma that arises. It is not often that anyone takes a stance on the side of the sex offenders and for good reason. Sex offenses are hardly victimless crimes. In fact, 96% cases of sex abuse will result in intense trauma on the part of the victim.[1267] Oftentimes, victims are called survivors simply because they were able to survive the experience, implying that living with the experience is something that many cannot cope with. Therefore, it is of utmost importance that in order to curb the numbers of sex offenses (in the United States, every 68 seconds, an American is sexually assaulted), the link between sex offenders and mental illness must be closely examined.[1268]

This presents both an ethical concern and a moral question: should sex offenders' mental health be prioritized over corrective measures? In order to answer this question, one must first consider the victims in the equation. Victims of sex offenses

[1267] DEAN G. KILPATRICK, CHRISTINE N. EDMUNDS, & ANNE SEYMOUR, RAPE IN AMERICA: REPORT TO THE NATION 7 (1992).

[1268] Report by statisticians Rachel E. Morgan and Alexandra Thompson, *National Crime Victimization Survey,* 2 (Oct. 2021) (located on file with the Bureau of Justice Statistics)

often suffer from serious mental health issues following the crimes, with 33% of women who are raped contemplating suicide and 13% attempting suicide.[1269] When victims of a violent crime are so intricately woven into the question of mental illness, one must seriously consider the implications of any legal actions, especially when only 5% of sex abusers spend more than a year in prison.[1270] While offenders of sexual offenses are most likely going to be suffering from a mental condition, their victims will also most likely suffer from a mental condition as a result of the perpetrator's actions.

The opposing face of this ethical question, however, falls on the shoulders of the government and their past treatment of incarcerated individuals. When one is placed in a corrections facility, the right to free will is temporarily abstained and the government takes on a responsibility for the life and health of that individual, in accordance with the implied social contract between a citizen and their government. However, it is widely accepted that the state-sponsored facilities provide inadequate mental health care, thus breaking the obligation of the government to provide for incarcerated individuals when under the care of the corrections system. While there is an ethical dilemma in allowing sex offenders to be treated with the same respect as any other individual in spite of their crimes, there is also a moral argument of whether offenders under the care of the government should continue to be left in corrections facilities that hold little to no regard for their mental health.

It is difficult for the human brain to grapple with the concept of remorse for a sex offender, arguably justified in its difficulty. The crimes of these offenders are some of the most heinous ones to exist and their victims will almost never fully recover from the trauma incurred as a result of their actions. However, sex offenders, despite how horrific their past actions may have been, are still people. This view directly correlates to the criminal justice due process model which holds the rights guaranteed to a defendant above the public good, guaranteed by the criminal justice crime control model. By providing resources to sex offenders, the ultimate goal is not to allow criminals to have lesser or weaker punishments, as many oppo-

[1269] *Id.*

[1270] Newsletter from Rape, Abuse, and Incest National Network, RAINNews (March 2012) (located in Rape, Abuse, and Incest National Network archives).

nents of the due process model argue, but to begin to decrease the alarmingly high rates of sexual violence. Ultimately, this cannot be done with the same corrections system we have been using for years, but it requires a rehabilitation system aimed at providing mental health care with the purpose of preventing offenders from committing sexual offenses in the future.

ANALYSIS

As such, in order to curb the intense cycle of mental illness and sex crimes, it is necessary to institute a non-punitive measure for sex offenders that provides them the necessary support so that rather than punishing a sex offender for their crime, they are treated for what *caused* them to commit that crime and prevents them from committing it again since most sex offenders finish serving their sentences within a year.[1271]

While it is still imperative that sex offenders are treated like criminal offenders, those with mental illness must also be treated as mental illness patients. Despite what options are presently available, the intersection of the two *can* exist without relying heavily on one or the other. It is definitively possible to allow incarcerated individuals ready access to mental health services because, particularly for sex offenders, mental illnesses must be incorporated into their rehabilitation process. Simply forcing an offender to sit in jail and learn from their mistakes has been shown to be widely ineffective. Adult sex offender recidivism is at a rate of nearly 5% for an incarceration of three years and a rate of 24% for a corrections period of up to fifteen years, meaning that for every one hundred adult sex offenders who spend fifteen years in jail, almost one-fourth of them will commit sex offenses again.[1272] Here, it can be inferred that with more time spent in the corrections system, the higher an adult sex offender's recidivism rate corresponds. Despite popular belief, sex offenders do not have the highest rates of recidivism, but the purpose of the American corrections system is to ensure offenders are punished and keep them from committing the same crime again. With sex offenses, the

[1271] Research Brief by Roger Przybylski, *Sex Offender Management Assessment and Planning Initiative* (July 2015) (on file with U.S. Department of Justice)
[1272] *Id.*

fact that the recidivism rate for an incarceration above fifteen years is over even 10% is, frankly, appalling and alarming.[1273]

Here, the issue arises when sex offenders are not given the opportunity to seek mental care if incarcerated. Instead, there is an extreme dichotomy of either being found guilty and sentenced to the maximum sentence in a punitive system that can hardly grapple with the mental illness of every individual offender or the mental insanity defense in which a defendant must be proven completely incapacitated of sane mind at the time of the offense. At the present moment, there is no compromise between the two or middle ground, but rather two unattainable options that are equally dehumanizing to the offender. For the creation of this middle ground, there are three necessary parts.

REMEDIES

First, there must be a federal standard for what constitutes criminally insane, rather than insanity tests that differ from state to state. Under the current system, left to the mercy of states, a defendant is largely at the discretion of whichever state they committed crimes in. Under a new federal statute that details the standard for criminal insanity, there would be no more estimation of what the language of the affirmative defense requires, but rather an abundance of precedence in state courts. However, a defendant would be permitted under the new federal statute to appeal to a federal court, establishing a federal issue.

In this newly constructed federal standard, the language of the affirmative defense and the elements of proving one to be criminally insane must be crafted in partnership with psychiatric professionals, in place of vague wording that allows any expert witness either the defense or prosecution brings to testify to non-psychiatric opinions, as was the ailment of the *Durham* Rule and Model Penal Code Rule. In doing so, there must be an additional section that details which mental illnesses constitute as mental insanity, detailing the symptoms and intensity of each symptom necessary for one to be found criminally insane, so as to not allow the jury to be confused by symptoms of addiction or symptoms of other substance

[1273] *Id.*

abuses with genuine mental illness. As part of this procedure, a malingering test must be administered, in which a psychologist or other psychiatric professional administers a test to identify whether or not a defendant is simply claiming they are mentally ill or are truly suffering from a genuine mental illness. This malingering test would ensure that all those who are mentally ill patients are treated as such and guaranteed proper care. This procedure also eliminates the exploitation of the insanity defense by substance abusers who, in their own respect, should also be treated with mental health services, but separate from those services necessitated by someone who is criminally insane, as was evident in the case of Taylor Schabusiness.

Second, to address the ever-expanding public mistrust of sex offenders and balance out the biases a jury may develop when presented with the crimes offenders commit, there must be a guilty but criminally insane defense that is permitted in all states, instead of the six states that permit its use today.[1274] The guilty but criminally insane plea would eliminate the substance of a criminal trial that necessitates proving the defendant's guilt and, instead, constitutes a trial tasked with weighing whether or not the defendant was mentally insane. The creation of a standardized guilty but mentally ill, or GBMI, plea preserves the moral sanctity of a defendant's right to be treated and seen as human, despite their crimes, while at the same time weighing the defendant's state of mind or *mens rea* of the crime. Therefore, the GBMI creates a bifurcated trial, as there was in Dahmer's case, where one portion of the trial determines the *actus reus* and the other half focuses on the question of whether the defendant was so inundated with mental disease or defect that they were unable to have a *mens rea*.

However, even with the creation and implementation of a GBMI plea, the NGRI (not guilty by reason of insanity) plea must not be abolished, in an attempt to rectify the criticisms the GBMI plea originally incurred. Thereby, with the option for both an NGRI and GBMI plea, mentally ill defendants and their legal teams are provided the support necessary to carefully evaluate the magnitude of their mental illnesses and the level of care necessitated. This creation also rids the legal system of the extreme binary between guilt and innocence present in the modern standards.

[1274] FindLaw, *The Insanity Defense Among the States* (Jan. 23, 2019),

Third and finally, the culmination of the treatment of sex offenders must focus on a system-wide shift from punitive measures to rehabilitation. It is indeed necessary to hold one accountable for breaking laws, but the form of accountability is where the issue lies. If the purpose of a prison is to punish one for their crimes, then it can equally be expected that if offenders are released from prison at any time, they cannot be expected to not commit the same crime if they were never taught that they should not commit the same crime. In focusing on rehabilitation, the root source of why sex offenders commit sex offenses must be the sole focus of their rehabilitation. What caused the offender to act this way and how can the system prevent the offender from acting in this manner again? Instead of effectively placing a death sentence on offenders, regardless of how many years they are incarcerated, that makes it increasingly difficult for convicted sex offenders to reinstate themselves into normal life after being released, the justice system must shift its focus to preventing crime instead of taking rights from individuals.

As previously discussed, most sex offenders suffer from serious mental diseases that cause them to commit sex offenses.[1275] In the process of rehabilitation, adequate mental health care that specifically targets incarcerated individuals' mental health is necessary. It is a widely known fact that the prison system is overcrowded with individuals who are largely in need of care for their mental health. In providing mental health services that specifically target the cause of one committing crimes, repeat offenders will be less motivated to commit crimes, thus eliminating the problem of overcrowding. With a minor initial investment in proper mental health care, sex offenders will be treated like patients and not criminals, as is their right in accordance with the social contract theory.

CONCLUSION

In the legal system, the mental insanity plea is a highly contentionable affirmative defense, surrounding public apprehension pertaining to which defendants are permitted to use the defense and whether they truly suffer from mental illness. From the first creation of due process to the varied insanity

[1275] R. Eher, M. Rettenberger, & D. Turner, *The Prevalence of Mental Disorders in Incarcerated Contact Sexual Offenders,* 139, 572, 572 (2019).

tests of the modern day, it is evident that mental health among criminal offenders is a glaring concern that must be remedied. Despite various opposing criminological theories pertaining to how one develops mental illness and the intersection of biological science and criminality, one thing is agreed upon: sex offenders overwhelmingly suffer from mental illness and the solution to their criminality lies in the root of their actions. With the establishment of a three-part remedy to the misgivings of the current standard for the insanity plea, the legal system can begin to shift from its focus on punishment to rehabilitation, re-awarding offenders with the rights they deserve, and providing sex offenders in particular the care that is necessary. Now, it lies in the hands of the state to recognize their misgivings and adjudicate mentally ill sex offenders, not by their actions and crimes, but by their need for care and rights and first and foremost, as human beings.