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NOTE FROM THE PUBLISHER:

This edition has undergone reformatting and editing to adhere to the formatting guidelines of the newly reorganized Juris Mentem Law Review. Upon its initial release, this edition was not formatted for print; thus, non-content-based edits have been made to enhance readability. The unedited version can be accessed on our website.

This edition was written before our editorial review and development process was implemented. This edition should not be cited as independent research, and Juris Mentem does not endorse the factual accuracy of these articles.

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LETTER FROM THE EDITORS:

On behalf of the Juris Mentem Executive Board, Column Editors, and Staff Writers, we are deeply honored to present the inaugural edition of our publication. This edition is a true testament to compassion, hard work, and dedication all in such difficult times amidst a global pandemic. After meticulously planning the journal for months and over the summer, not everything has gone to plan during a socially distanced semester. Nevertheless, we are truly so proud to be at this moment where we can celebrate our achievements and reminisce at the year's end.

Juris Mentem was established to provide a creative and professional outlet to undergraduate students and features works from ambitious freshmen to seniors who are just beginning their journeys. This edition encapsulates the issues that have plagued us during COVID-19 as well as contemporary problems of race, discrimination, the criminal justice system, the continued impact of our institutions in addition to their policies and decisions, and comparative analyses of pressing issues all across the world.

We must extend some important thank you's: to our faculty advisor, SPA Professor Michelle Engert, for her continued dedication and support, particularly in the uncertain early stages of our venture; to our diligent members of the Juris Mentem Executive Board, who, through their expertise and passions, have helped shape and elevate this journal to levels we alone could not have achieved and to our Head Design Editor, Harsha Mudaliar, who was instrumental in the publication of this edition; to our skilled Column Editors, who spent countless hours honing their writers' pieces, providing needed guidance, all while enthusiastically working on their own; to our talented staff writers, the legal minds who have each produced thought-provoking and well-researched articles. We truly commend them for their hard work. This has been a year like no other, and we are endlessly grateful for each individual's time, patience, and commitment.

We send you our best wishes for the new year and look forward to many more editions to come.

Thank you,

Prerita Govil & Graham Payne-Reichert
Co-Editors-In-Chief

MASTHEAD:

JURIS MENTEM

An Evaluation of Liability and Employee Consent During COVID-19

MAX KLUGER
Staff Writer

WHO IS TO BLAME: AN EVALUATION OF LIABILITY AND EMPLOYEE CONSENT DURING COVID-19

BY MAX KLUGER

Relationships require trust. To be trustworthy, both parties must be transparent and agree upon a set of ideas so that no party is left in the dark. In the business world, transparency is commonly exhibited in the form of contractual agreements, including at-will, written, and oral employment, as well as implied oral contracts. Often, such contracts include items such as an employee's responsibilities and their capacity for promotion. By being in the know, workers have a better idea as to what to expect while on the job. And transparency promotes success. In fact, the trust formed between an employer and employee has been shown to build engagement which in turn boosts productivity.

Background:

Yet this trust has been challenged in the past few months, as the United States' economy has tanked due to COVID-19. Individuals have struggled to pay their bills, and around 175,000 businesses have closed, with 60% of them never to return. As a result, many employees chose not to return to work as CARES Act funding enabled them to stay at home and collect unemployment at a higher level than was traditionally available. In other cases, employers asked employees to work in person even when there were numerous risks involved in doing so. Increasing pressure on employers and employees prompted them

to focus increasingly on their own interests. It was only a matter of time before this friction manifested itself in our legal system, and there have been 1,411 alleged labor violation lawsuits filed to date. This essay will attempt to analyze the legal options available to both corporations and individuals as it relates to liability and just compensation during this unprecedented time.

American citizens are legally protected from financial ruin caused by injury in the workplace. This insurance comes in the form of workers' compensation. In layman's terms, workers' comp enables employees to receive medical benefits in exchange for relinquishing their ability to sue their employer for negligence. Evidence of these ideas have stemmed from as early as 2050 B.C. in what's considered modern-day Iraq, where under Arab rule, various body parts were given a monetary value. For instance, losing a thumb on the job would give you half the value of losing a finger. However, the modern system owes its founding to Prussian Chancellor Otto von Bismarck with his 1884 creation of Workers' Accident Insurance. It was initially created to be a remedy doctrine, to provide medical or monetary benefits to injured workers while protecting businesses from lawsuits. Yet today, some argue that workers' compensation is stacked against the injured party. It can be difficult to put a monetary value on illness or injury, and therefore, it can be "a system whose outcomes are often unfair to sick and injured workers". Additionally, most community illnesses are not covered by workers' compensation. After all, it is extremely difficult to pinpoint when exactly an individual first interacts with the bacteria, virus, or parasite that causes the disease. However, the coronavirus presents a unique situation as the probability of transmission is immensely higher than the flu or common cold. In these unusual circumstances, many states have taken action to better protect their workers. Currently, 17 states have taken steps to classify COVID-19 as being a work-related illness with many other states on the way.

While greater coverage is a step in the right direction, it has come at the cost of already struggling businesses. Since governors made the decisions to close down large portions of the economy, many businesses across the nation have not had the capital to stay afloat. Small companies with low liquidity quickly went out of business while larger corporations reaped the benefits, exacerbating economic inequality. In fact, the nation faced the worst economic crisis since the Great Depression. In response, CARES Act funding helped to disperse protective gear to citizens and businesses and additionally provide incremental financial support to unemployed Americans. However, this was in no way a replacement for an economy, but rather a temporary solution to ensure that hospitals were not overwhelmed with patients. In the past few months, companies have exponentially declared bankruptcy, with the entertainment, retail, and transportation sectors having been especially hard hit.

To prevent this and save jobs, companies have tried to compel their employees to return to work. Many have done so while promoting safety measures, some of which include taking daily temperature screenings, filling out questionnaires, and following CDC guidelines. To protect already struggling businesses from pending lawsuits and further financial ruin, some argue that businesses should have their employees sign COVID-19 liability waivers. Yet, according to attorney James Oh, employers would likely lose the case if they were taken to court. An employee cannot prospectively waive their rights against an employer, and every state has a workers' compensation system which is not waivable. Oh argues that a more pragmatic solution may be to sign a contract acknowledging that both employer and employee will both do the best they can to create a safe environment and follow safety protocols. Still others disagree that this "good faith" argument would similarly not hold up in a court of law. It remains yet to be seen how these arguments would be perceived by judges, as there is currently no precedent to rely on.

While lawyers are forced to speculate on how judges would rule in a liability case, there are clearly cases that litigants are more likely to bring to court and win. For instance, if an employee can show that their business operated against the wishes of government guidance resulting in their illness while on the job, their chance of receiving just compensation skyrockets. Additionally, it is important to note that employees with pre-existing health conditions do not operate under usual employment rules, but rather through the governance of the Americans with Disabilities Act (ADA). Walter Olson is a senior fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies. Olson firmly believes "the ADA is its own world" and that "employees with protected comorbidities can request accommodations, which may include work from home if that is a practicable way to do the job … where consistent with ADA rules." Therefore, if an employee has a serious illness, such as diabetes or cancer, and makes their employer aware of the situation, the employer must exercise greater caution before requiring them to return to work. In this case, the employer would be responsible for dealing with workers who have pre-existing conditions on a case-by-case basis to ensure the safety of an at-risk individual.

While legal experts are forced to speculate about how COVID-19 liability cases would be decided, a few things are without doubt. Workers' compensation, business cooperation, government guidance, and ADA rules will all play a pivotal role in determining liability precedent. Following CDC guidelines is not only ethical and responsible behavior, but may help to win a legal dispute as well. Finally, our economic output, while undoubtedly crucial to the wellbeing of a nation's citizens, must not come at the expense of worker safety. Employers have an obligation to protect their workers, and employees have a duty to be transparent with their bosses. If we can abide by these

guidelines, we may begin to restore the tainted relationship between employee and employer promulgated by this pandemic.

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JURIS MENTEM

SPAC With A Vengeance

NATHAN MASTER
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SPAC WITH A VENGEANCE: THE RETURN OF SPECIAL PURPOSE ACQUISITION COMPANIES ALONGSIDE A NEW INVESTOR GENERATION

BY NATHAN MASTER

Approximately The primary purpose of the capital markets is to aid and support entities that seek to procure precisely that: capital. While increasingly intricate securitized products have made it all the easier to get lost in jargon, procedure, and regulation, fundamental to it all is the simple question: What is the best way for a company to get the pecuniary support it needs to thrive? As of late, one of the popular—although perhaps not as new as one might think—forms of public placement that companies have turned to is the Special Purpose Acquisition Company, referred to as a SPAC. Tracing back to similar "blank-check" companies utilized at the turn of the century, SPACs have recently regained traction, with the inception of more than 150 of these companies and more than 100 Initial Public Offerings (IPO) via this method in the past year alone. While there are merits to SPAC structure, which no doubt allure investors and corporations alike, there must be more regulation of these entities, now more than ever. The newfound affinity for SPACs within the investment community has resounding impacts across international markets, the livelihood of businesses, and individual investors' pockets, and as such requires scrutiny to the nth degree to ensure the best outcomes for all parties involved.

First will come the discussion of the intricacies of what makes up a SPAC, as perhaps one of the greatest barriers to overcome in understanding their place as an investment vehicle is differentiating the actual deal structure utilized in these transactions.

Alongside this will be an attempt to provide context and history of these entities, and touch upon the subsequent banning of so called "blank check" companies from which the SPAC entity is derived. Next, by observing the expansion of this trend toward international markets, in tandem with the evolving domestic investing landscape, a proper education of the reader on the critical importance that regulation plays in these spheres can be achieved. Indeed, recent news from the SEC suggests similar understanding—while there are undoubtedly benefits that accompany and flow from SPAC deals, without proper jurisprudence there can be no assurance of investment security, which is fundamental to maintaining faith in the markets.

Special Purpose Acquisition Companies: An Overview & History

SPACs are companies that are created with the intention of raising capital in an IPO with the expectation that the funds will be used to acquire a company or set of assets to be determined. As is typical with all IPOs, the SPAC must register its intent through the SEC, seek underwriting, and gain clearance before it can be taken to market. In many instances, this scrutiny from regulators is the most important hurdle, as the company, perhaps for the first time, shares its internal financial reports for close inspection. However, in the case of SPACs, this IPO process is typically much quicker and painless, as the company was incorporated for the sole purpose of going public, and as such does not have core business units or historical financial information to provide. Indeed, while traditional IPOs for business can take months to years to fully flesh out, a SPAC

IPO can take as short as eight weeks to be greenlit. Upon successful completion of the IPO, institutional and retail investors alike can buy warrants within the company, which gives investors the opportunity to buy an equity stake in the business or asset class that the SPAC decides to invest in. Within this warrant structure belies one of the primary functional differences between a SPAC and traditional capital raise from the typical investor's perspective.

While perhaps the shortened time frame alone is not a cause for major concern, the evolutionary history of SPACs is more imperfect. Special Purpose Acquisition Companies are direct descendants of "blank check" companies that rose into prominence in the late twentieth century, which the SEC ultimately banned in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. Blank check companies are defined as "development stage companies with no specific business plan or purpose or has indicated its business plan is to engage in a merger or acquisition with an unidentified company or companies, other entity, or person." Leading up to the turn of the century, blank check companies received criticism for their dealings in particularly risky and speculative investments that were at times not fairly communicated to investors, and the Act of 1990 introduced new regulatory requirements and specifications meant to protect investors. Today, SPACs successfully tread the line of legality and within compliance with the Act while maintaining a status of being "per se… fraudulent." Leading up to the introduction of penny stock reform, blank check companies could effectively solicit investors for various transactions and ultimately underdeliver with the final transaction, where the sponsors and target companies would profit while the warrants saw dilution and a net negative return.

Trends & The Investment Landscape

Despite the stigma associated with SPACs and their subsequent transactions within the spheres of academia and, to a certain extent, those of regulatory authorities, SPACs have continued to garner popularity both domestically and internationally, with the first European SPAC dating back to 2005, only two years after the first SPAC in the United States following the 1990 SEC rules change. Additional similar activity can be observed within Asian and South American geographies as well, signaling a global trend in popularity with this process. To be clear, this trend is no surprise when considering the benefits that companies have from a streamlined capital raising process. However, it is just as important to consider the potential shortcomings. In comparison to the United States, these other international countries that are seeing SPACs enter into the vogue have considerably less stringent regulations regarding these types of investment vehicles, and many of the same trends that were seen in the United States are materializing in these countries. For example, the trend of SPACs within the United Kingdom targets small and micro-cap companies, similar to the penny stocks that drove the SEC to ban blank check companies in the nineties.

While there are some troublesome signals in international markets, there are also changes within the United States that have the potential to expand SPAC exposure. First is the reevaluation of accredited investors to include various sets of certifications and experience in addition to basic income requirements. While not directly influencing the accessible market for SPACs, this new definition will introduce a new set of investors to private equity investments, which greatly influence and oftentimes underwrite these special purpose placements. Simultaneously appearing is the influx of retail traders and investors to the marketplace over the past year. Interest in the market, compounded with both fiscal stimulus and a simple

increase in free time spurred all-time highs of new trading account sign-ups and trading volumes. While the jury is still out on the overall impact this has on the market, this directly increases the sphere of influence that SPACs have, as many traders have sought warrant purchases as an additional investment strategy to diversify portfolios and seek returns. Although not a problem in and of itself, the scope and magnitude of any below decks action within the SPAC space has the ability to shake faith in the markets, as was seen with blank check companies.

Recent Developments & A Way Forward

With the ushering in of many new potential sources of capital, the safety of investors must take forefront importance, particularly as it pertains to SPACs and their continued use. More recently the SEC has announced increased scrutiny of SPACs and their sponsors, which is a welcomed change given what is at stake. Specifically, the SEC raised questions surrounding different disclosure methods and mechanisms, as well as ownership compensation as it relates to the final acquisition. This criticism is neither unfounded nor unheard of criticisms of SPAC compensation seem warranted, with favorable terms towards sponsors ultimately dragging down the value of both the overall transaction and the investment return of shareholders' warrants. Fundamentally, the risk remains of misaligned incentives across the transaction process, and without fair and stringent guidelines, investors can become lost in obscurity. This mentality of action without proper due diligence can be observed with price-action following the recent regulatory news, as the SEC announcement promptly resulted in a market-wide selloff of frontrunning SPACs at the time. While theoretically investors would perfectly and sufficiently research all of their personal investments, the reality suggests a deviation from this hypothetical.

In summation, the future of SPACs remains unclear, with all parties involved bringing unique incentives to the table. Businesses of all sizes can derive benefits from a clearer and arguably easier capital raising process, and SPACs in this regard offer a nuanced alternative to the bureaucratic typical IPO process. The flipside is investor protection and the regulation required to uphold these principled aspects underlying faith in the capital markets. While the under informed investor may expect to surely benefit from SPAC investment, reality and history dictate the risks associated with the process, and the potential for malicious action to uproot the entire process. With the reforms of the nineties fading into the background of the new generation of investors' minds, continued examination of SPAC practices both domestically and abroad must be maintained lest history repeat itself.

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JURIS MENTEM

Racial And Gender Discrimination In The Workplace

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RACIAL AND GENDER DISCRIMINATION IN THE WORKPLACE

BY ALICIA RIDGLEY

Introduction

Racial and gender discrimination in the workplace has been occurring for many years. Racial discrimination "occurs when an individual is subjected to unequal treatment because of their actual or perceived race." Gender discrimination is "a common civil rights violation that takes many forms, including sexual harassment, pregnancy discrimination, and unequal pay for women who do the same jobs as men." Various public figures like Ruth Bader Ginsburg and Martin Luther King Jr. worked to abolish gender and racial discrimination in all aspects of life. Some bystanders that were against abolishing these discriminations worked to preserve legal precedents like Plessy v. Ferguson (1896). The discussion around racial and gender discrimination is a conversation that's been active for years, and there are two sides to the legal issue.

Historical Evolution of Diversity in the Workplace

Diversity in the workplace has been happening for centuries. In particular, we see the first major landmark of gender reform in the workplace in the late 1800s. The equal pay legislation was passed in 1872 by Attorney Belva Ann Lockwood in order to secure equal pay for female federal employees. "In 1872, pioneering female attorney Belva Ann Lockwood, a member of the American Woman Suffrage Association, persuaded the U.S. Congress to pass a law guaranteeing equal pay for women

employed as federal employees." From there, the vision of women in the workplace expanded, and women were integrated more into the working scene. When World War II began, women were participating more in manual labor because they became the manpower while the men were fighting in the war. Laws like the Equal Pay Act of 1963 and the Pregnancy Discrimination Act of 1978 were introduced, and women began to be seen more as part of the working class. These laws have been more effective as time goes on, but there's still a lot of work to be done in the workplace.

When looking back at the historical introduction of race in the workplace, it goes back as far as slave times. History shows that when white people brought African natives over to America to work as their slaves, they were degraded and looked at as property rather than as human beings. As time progressed, people of color were slowly integrated in society, and cases like Brown v. Board of Education of Topeka (1954) and Gideon v. Wainwright (1963) helped to promote and hold white people more accountable for racial inclusion in society. These landmark cases were crucial in making history and greatly affected society for the better. It made people more aware that separate wasn't equal, and that racial discrimination wasn't constitutional. It wasn't until the Civil Rights Act of 1964 that racial equality truly began to progress. The Civil Rights Act of 1964 "prohibits discrimination on the basis of race, color, religion, sex or national origin. Provisions of this civil rights act forbade discrimination on the basis of sex, as well as, race in hiring, promoting, and firing." Title VII of the Civil Rights Act of 1964 prohibits discrimination of any kind in the workplace. Each topic of discrimination has complex and long histories leading up to the present day and are important to understand how law and discrimination go hand in hand as part of the workplace experience. Discrimination still plays a role in business interactions and workplace etiquette. "Workplace bias by gender, race, and ethnicity is a reality in organizations large and small, in

executive suites and in entry-level production and service jobs, in both the private and public sectors."

Racial Discrimination and Law

Racial discrimination has been an issue for a long time, especially following the Civil Rights Act of 1964. "The Civil Rights Act of 1964, which ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex or national origin, is considered one of the crowning legislative achievements of the civil rights movement." Once segregation was deemed unconstitutional, people of color were slowly integrated more into the workplace. Title VII of the Civil Rights Act of 1964 helped to support the argument that workplace environments should be equal in all ways and made sure that these practices were being put into place on an everyday basis. That title included being hired, promoted, and/or fired.

In recent years, the U.S. Equal Employment Opportunity Commission (EEOC), founded on July 2, 1965 to enforce Title VII, has worked to ensure that different minority races are well-integrated and that employment opportunities for minority races are just as available as they would be for any white person in the workplace. Those against the EEOC and Civil Rights Act of 1964 maintain that the precedent set in Plessy v. Ferguson (1896) should still be law today. Plessy v. Ferguson (1896), a legal precedent set by the U.S. Supreme Court, stated that the phrase "separate but equal" was constitutional. It sparked a lot of racism and racist attitudes in America, like public harassment and segregational practices, that ultimately led to the Jim Crow laws in the 1960s and segregation. The Civil Rights Act of 1964 was a solution to and result of Plessy v. Ferguson and overturned the decision made by the Supreme Court at the time. Americans who support racism and segregation believe that the workplace, much like the rest of society, should be for those deserving of certain positions. Studies have shown that in past years, African

Americans have gotten low-level positions in the workplace due to discrimination against them. An African American man could go to an ivy league school and be qualified for a high level position and still be discriminated against because of the color of his skin. Lawyers and anti-racism activists have flipped the script and worked to change that narrative. "During FY 2014, EEOC staff resolved 30,429 charges of employment discrimination based on race and recovered nearly $75 million for individuals along with substantial changes to employer policies to remedy violations and prevent future discrimination-without litigation." It is within the public's interest to change the stereotype and integrate more diversity into different businesses across the nation.

Gender Discrimination and Law

Gender discrimination appears in everyday workplace environments and situations. Gender discrimination is a broad umbrella term for many kinds of discrimination l ike pregnancy discrimination, equal pay and compensation discrimination, and sexual harassment. Title VII in the Civil Rights Act of 1964 not only includes the illegality of racial discrimination, it also includes the illegality of gender discrimination of any kind. Regardless of whether someone is part of a minority race or a majority race, women have faced scrutiny in this country for centuries. The 19th Amendment, which passed in 1920, gave women the right to vote. From there, women started to integrate themselves more into society and even more into the workplace. While the men at home were off fighting WWII, women were taking their place in the factories and working jobs. "Government figures show that women's employment increased during the Second World War from about 5.1 million in 1939 (26%) to just over 7.25 million in 1943 (36% of all women of working age)." This was a great stepping stone for the future, providing work for women after the war ended as well. "After the war, women were still employed as secretaries, waitresses, or in other clerical jobs,

what we often call the "pink collar" work force. Those jobs were not as well paid, and they were not as enjoyable or challenging, but women did take those jobs because they either wanted or needed to keep working." Women were put into work and seen more in the workplace, yet at the same time they weren't being treated fairly. Women were being underpaid, doing the same jobs a man would do and being paid less because of their gender identity. There has been significant research to show that not even 30% of women are in a predominately female work environment.

Different legislation has been passed since the 19th Amendment in 1920. In the wake of the LGBTQ+ community, gender discrimination has been changed to sexual discrimination to accommodate the different sexual orientations in the workplace. The Equality Act is a bill that enforces Title VII in the Civil Rights Act. Congress is currently evaluating the bill and passing it through both the House of Representatives and the Senate for approval or denial. Nancy Pelosi, the Speaker of the House, did a lot of work researching and advocating for this new act. "The Equality Act would force employers and workers to conform to new sexual norms or else lose their businesses and jobs." This new bill would provide the necessary added protection to make sure that different sexualities are welcomed and supported in the workplace. This, as a result, could lead to more job opportunities, job security, and experiences for the LGBTQ+ community. Passing this legislation could add a sense of security and appreciation for the LGBTQ+ community. It can also help to avoid workplace stereotypes like women only working for men (secretaries and assistants) and women not having enough talent to reach higher positions within a company. Gender equality and the abolishment of gender discrimination can change the workplace stereotypes for the future.

Conclusion

Gender and racial discrimination and the law have been an American issue for a while. With today's changing legal and political climate, there are many different views on the subject. Minority races, especially black women in particular, have to work just as hard to make as much as a white man would in a single year. "This year, Black women will have to work well into the month of August to catch up to the wages that white men earned in 2018 alone. In concrete terms, this means that Black women experience a pay gap every day—and this gap adds up." In terms of gender discrimination, women continue to struggle with making the workplace equal for men and women, and even all LGBTQ+ members. Wages still continue to be unequal, and it's hard for a woman or an LGBTQ+ member to receive a top level position in a company. It's going to take a long time for gender and racial discrimination to be dealt with fully in life, especially in the workplace, but legal precedents and new laws set nationwide will change the process people of color and different minority genders go through when being in the workplace.

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JURIS MENTEM

How Korematsu Is Critical To Preserving First Amendment Rights

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FOR SAFETY AND URGENCY; HOW KOREMATSU IS CRITICAL TO PRESERVING FIRST AMENDMENT RIGHTS

BY DUNCAN CRIM

Introduction

On March 19th, 2020, the State Public Health Officer and Director of the California Department of Health issued an order preventing gatherings of most individuals not deemed "essential workers" by the state. Over the course of several months, restrictions were both added and removed by the California executive branch. On July 29th, the same Public Health Officer issued an order stating, "Places of worship must therefore discontinue indoor singing and chanting activities and limit indoor attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower." In the order, the State of California asserts, "the guidance is not intended to revoke or repeal any worker rights, either statutory, regulatory or collectively bargained, and is not exhaustive as it does not include county health orders, nor is it a substitute for any existing safety and health-related regulatory requirements such as those of Cal/OSHA." In an order that applies specifically to religious and cultural gatherings, the State of California made no mention of the rights of religious congregants or attendees, only that of workers. As of October, California Superior Court Judge Mitchell Beckloff has overturned the order, challenged in court by Grace Community Church, as having no precedent in both California and United States law. The Judge has continued to overturn a

series of attempts by the county to place a restraining order on Pastor MacArthur as they failed to meet statutory requirements. The most recent attempt by the county to significantly curb the number of congregants to Grace Church, normally in the thousands, came in the form of a termination of the parking lot lease belonging to the Church. The letter reads, ""If Grace fails to vacate the premises as required, the District may enter the premises and remove Grace's personal property in accordance with the Agreement and applicable law, and Grace will be responsible for any resultant expenses incurred by the District." Although having lost in court a total of five times, Los Angeles County is continuing to pursue the shutdown of Grace Church out of concerns for public health.

These ongoing decisions are some of the most important for the future litigation of the First Amendment. If the State has the right to shut down, or severely restrict, gatherings for the purpose of safety, the government will have seized an enormous amount of power. It is possible to see how the State was able to develop such power looking back to Schenk v United States. Judge Oliver Wendell Holmes' decision in Schenk from 1919 proclaims, "falsely shouting fire in a theater and causing a panic" is a violation of the First Amendment. Unknown to most, Schenk was about a man passing out anti-war flyers during the peak of fighting in World War I. Woodrow Wilson's government issued an executive order defining advocacy of non-violence as far too dangerous to be permissible under the First. This case was partially overturned in 1969 by Brandenburg v Ohio which states that speech cannot be restricted unless that speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." While Brandenburg establishes the "imminent lawless action" standard for preventable free speech, this standard is troublesome in the current cultural era where the phrase "silence is violence" is cited by well- regarded news organizations like The Hill and MSN. The standard for

"imminent lawless action" may have well established legal precedent, but courts tend to follow the cultural pull of America, albeit at a slow pace. It is imaginable the claim of "safety" as a justification for shutting down religious gatherings could be expanded far beyond that of churches, to include dissident political viewpoints or even ethnicities. It is still established law that the United States maintains the right to detain large groups of people solely based on ethnicity, as the widely disliked decision in Korematsu v United States in 1944 justifies the mass detention of Japanese individuals, "because the properly constituted military authorities...decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast." Urgency, derived from Korematsu, and safety, derived from Brandenburg are thus two words which L.A. County, and the government writ large can use to argue for shutting down Grace Community Church, or any other gathering.

Past interpretations of decisions in American law reveal much about the two terms "safety" and "urgency". In separate instances, safety and urgency have been evoked as both a defense and advocacy of certain legal positions. It is important to draw a dichotomy for the two words' legal meanings. When addressing free speech concerns, however, urgency and safety have somewhat different standards.

In Korematsu, the primary justification for the detainment of Japanese Americans was "military urgency". Military urgency was used to revoke due process rights, but more importantly the right to free assembly. In Korematsu Japanese Americans potentially being enemy combatants was enough of an urgent matter to warrant such a revocation, despite the lack of proof for the claim. Hindsight reveals that the mere accusation made by the dominant powers of the State created the "urgency" of the internment camps, which were not urgently needed and revealed not a single enemy. Urgency is legally dubious, as the

courts have relied on definitions outlined in cases like Korematsu in Grace Church, without overtly mentioning such.

Urgency is often invoked as a justification not for just "urgent" matters, but for matters where a potential future event may occur due to lack of action. It is entirely possible there were Japanese spies within the ranks of those interned, who could have assisted in providing intelligence to the Japanese. The result could have ended up in mass American casualties, and a victory for the Axis power in the East. In Grace Church, the unknown effect of the virus initially justified California's lockdowns. If COVID-19 had a higher lethality rate many more citizens could have perished. In the most charitable interpretation of LA County's argument, the current lack of information on the disease justified restrictions on the church, just as the lack of information on the number of Japanese spies validated the internment camps. L.A. County is effectively arguing that by pushing the interpretation of Korematsu to its fullest extent, one could claim that in matters involving potentially mass life or death situations, urgency to save lives is a legally sound justification for revocation of First Amendment rights.

Judge Beckloff has avoided the entire issue of urgency and safety by stating the restrictions were arbitrary, and arbitrarily enforced, citing "Black Lives Matters" protests which lacked adherence to required statutes. Beckloff's decisions do not hold that restrictions on assembly are illegal, only that restrictions deemed arbitrary are. Arbitrary lacks full definition regarding First Amendment restrictions, the best one can come up with is Justice Brennan's definition of obscenity in the Roth v United States decision, "I know it when I see it." Under Beckloff's decision and precedent, one can say that First Amendment rights can be restricted in circumstances where there is imminent mass casualty, as long as the restrictions are based and evolved in a non-arbitrary way.

The second word, “safety,” derived from Brandenburg can be invoked to justify First Amendment restrictions on the grounds that it is stopping speech, "directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” In comparison to the definition of “urgency” there are two important distinctions. First, the justification of safety relies on incitement to lawless action. In Korematsu the United States could have argued that the Japanese were going to convince others to rebel against the United States by using their speech rights. The imminent Japanese “lawless action” is more commonly known as treason. This justification would rely on a strong suspicion or knowledge that the Japanese Americans were going to act in a way. However, since no Japanese Americans were prosecuted for the crime during or after the war, “lawless action” could not be invoked, and therefore neither can “safety.” This, in part, explains why Korematsu highlights “urgency” as the primary motivation for the state’s actions.

The second distinction between urgency and safety lies in the importance of interpretation. Urgency demands that those creating the restrictions are acting because they believe mass casualty will happen. The thoughts and intentions of lawmakers or the executive must appear reasonable and non- arbitrary, and are therefore paramount. The facts of the matter as to why a restriction is being ordered is almost entirely irrelevant, what matters is the logic and intentions of lawmakers. However, when using “safety” as a defense of restrictions, the interpretation by the audience is what matters. This is best demonstrated by the examples in Brandenburg where imminent lawless actions are a result of immediate audience reaction to speech. Thus, despite the seeming linguistic wrongness, “urgency” is evoked to defend restrictions against potential future damage, whereas “safety” is used to defend restrictions on the basis of potential immediate damage. In combination, urgency and safety create a high bar to

meet if one wishes to state that both are the reason for First Amendment restrictions. This is exactly what L.A. County argued. The County, even if their restrictions were not arbitrary, would have to demonstrate imminent lawless action was being caused and future damage or mass casualty would occur sans restrictions.

A potential reason for L.A. County making it more difficult for themselves to prove this standard is because citing "urgency" alone appears too much like the commonly disliked Korematsu. Regardless of restrictions, imminent lawless action is unlikely to occur in a church, or anywhere where calls to violence are often repudiated. That would make the invocation of "safety" almost impossible to demonstrate. The modern toxicity of Korematsu thereby forced L.A. county to cite safety and urgency. Korematsu being deemed wrong by the majority of the public and large sections of the judiciary may be useful in forcing governments like

L.A. County to cite other reasons than "urgency" for First Amendment restrictions. Korematsu did not win his case, and thousands of Japanese Americans suffered wrongs never made right by the United States. However, Korematsu provides hope for future Americans, by making those who would seek to restrict the First Amendment wary about appearing just as morally unjustified as President Roosevelt in 1940.

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JURIS MENTEM

Reforming America's Juvenile Transfer System

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REFORMING AMERICA'S JUVENILE TRANSFER SYSTEM

BY MORGAN HARRIS

Introduction

America's tough stance on crime has resulted in the highest incarceration rate of any country. Juvenile offenders have also felt the effects of a tightening judicial system, including harsher penalties from being tried in adult court. There are 250,000 cases per year of juveniles being tried as adults in the United States, and state laws on how to qualify and handle these cases vary widely. For example, the applicable age to be tried as an adult ranges from a minimum age of 16 in Georgia to 21 in Vermont.

Although there is a range of minimum age requirements and other criteria through which a juvenile defendant can be tried as an adult, regulation on this issue is broad, leaving extensive room for discretion on the part of judges and prosecutors. In this article, I will compare Florida, which is widely considered the strictest state when it comes to trying juveniles as adults, to the most progressive state on the matter, Vermont. I will also discuss the racial disparities impacting juveniles from varying backgrounds.

When approaching the topic of juveniles in adult court, it is important to understand the legal terms used for the criteria. Some states follow Statutory Exclusion, which excludes lower classes of cases from the ability to be brought to adult court, as well as excludes certain higher-level crimes from being tried in juvenile court. This means that murder and other serious violent

offenses committed by children would automatically be sent to an adult court. A Judicially Controlled Transfer means that all cases, including violent ones, automatically begin in juvenile court, having to be transferred to adult court by a judge if deemed necessary.

Prosecutorial Discretion Transfer means that the prosecutor has full executive discretion over filing a case against a juvenile defendant in adult court. A "Once an Adult, Always an Adult" Transfer means that if a juvenile is convicted in adult court once, they will continue to be tried in adult court for any future crimes they commit.

Strict Judicial Practices

Historically, Florida has been home to some of the strictest juvenile prosecution practices in the country. At one point, 60% of cases in which juveniles were tried in adult court were non-violent crimes, and only 2.7% of cases were murder cases. This changed in 2015 when the Florida Supreme court ruled in Falcon v. State that non-violent juvenile offenders could not be tried as adults. Florida continues to convict the highest percentage of juveniles in adult court out of any state, at a rate of 164.7 juveniles per 100,000.

In Florida, prosecutors can automatically send juvenile cases to an adult court without any input from the judge or defendant. The largest contributing factor to this is the state's use of the Prosecutorial Discretion Transfer method and direct-transfer laws. In direct-transfer states like Florida, the prosecutor has "Prosecutorial Unilateral Decision", meaning youth defendants are not allowed to appeal the prosecutor's decision.

By taking all power out of the defendant's hands, a prosecutor is able to coerce a youth defendant into accepting a

plea deal despite the defendant's possible innocence. They are often told that they are likely to receive harsher sentencing in adult court. Children are also threatened with the prospect of being held in adult detention centers, which are especially dangerous for minors. Prosecutors can legally refuse to disclose the amount of evidence they have to the defendant. Therefore, the minor may become afraid of the possible consequences of adult court, leading them to falsely confess.

The adult court system was not created with juvenile defendants in mind, making it especially intimidating for minors. Florida justices are not required by law to simplify court proceedings in a way that is understandable to minors once in adult court, in contrast from the way information is handled in youth courts.

Another reason a Florida juvenile defendant may accept a plea in order to prevent an adult trial has to do with the fact that if tried as an adult, they won't have access to adequate childhood rehabilitation programs. In both adult prisons and adult detention facilities, in which individuals who are presumably innocent stay awaiting their trial, there are not proper educational programs that are age- appropriate for kids navigating the criminal justice system. This goes against the Supreme Court ruling that a child is more susceptible to rehabilitation, thus denying youth offenders their right to a fresh start.

Juveniles tried in Florida's adult courts are further denied a second chance after finishing their sentence due to the fact that the state does not expunge records of those tried as adults. Juvenile offenders placed in adult corrections systems are also denied their right to vote in the same manner adults who were formerly incarcerated are. They are prohibited from voting for 5-7 years after their release, after which they must submit a

request to be able to vote. Children are being denied suffrage before they even first obtain this right.

Even when juveniles in Florida are put into juvenile correctional facilities, their safety is still on the line. Every juvenile prison in Florida is privatized. They are owned by a variety of companies, but Youth Services International (YSI) is especially notable due to the multiple sexual abuse cases against them. Juveniles are already the victims of abuse in prison at increased levels, according to the Department of Justice Report of Sexual Victimization in Juvenile Corrections Facilities. The fact that Florida juvenile corrections facilities are run by companies with a track record of abuse without federal oversight further increases the risks for children in both juvenile and adult prison. It's important to note that juveniles in adult correctional centers are even more likely to be abused.

Racial Disparities

When looking at statistics on juveniles tried and convicted in adult courts, significant racial disparities are apparent. According to Dr. B.K Elizabeth Kim, an assistant professor at the University of Southern California's School of Social Work, children of color are, "more likely to be arrested once they come in contact with the police than white youth, they're more likely to be charged after an arrest, they're more likely to be transferred to an adult court, they're more likely to be sentenced more harshly."

Only 35 states and the District of Columbia have published data within the last five years containing numbers of juvenile transfers to adult court and juveniles convicted in adult court. 18 out of 35 of these states disaggregated data by race. One state whose data shows some of the worst disparities is New Jersey, where 90% of the kids tried as adults are Black.

Unsurprisingly, Florida is in the top four states with the most racial disparities in children's adult sentencing. Florida's African American population is only 21%, yet makes up 67.7% of the juvenile offenders transferred to adult court. Black children in this state also receive 7.8% longer sentences than White children for the same crimes.

These racial disparities can be attributed to a long history of systemic racism in the United States that ultimately leads to racial bias of judges and prosecutors. This bias is made clear by states like Oregon. Between 1844 and 1925, Oregon's racial exclusionary acts prevented African Americans from living in the state. Today, Oregon's Black population is only 2.3%, but 15.8% of Oregon's juvenile offenders who were tried as adults are Black.

Overall, the United State's history of racial stereotyping has led to Black youth being perceived as less innocent than white youth. According to the American Psychological Association, Black boys are more likely to be mistaken as older and are held more accountable for their actions. Black girls are also presumed to be less innocent and more likely to act out than their white peers.

This has led to the presumption that Black juveniles are more likely to be guilty than white juveniles. Therefore, when prosecutors or even judges are given full discretion without strict criteria, as we see in states that follow Prosecutorial Discretion Transfer or Judicially Controlled Transfer methods, Black and Latino kids are far more likely to face discrimination.

Progressive Options

California is one state that has made progressive legislation on juvenile transfer, largely in response to racial disparities. Specifically, in 2016 they passed Proposition 57, which ended direct filing. This transfers the power from prosecutors to

judges, who are statistically more likely to look at all factors, not just race.

Despite this initiative, California has only achieved partial progress toward achieving racial equality in its courts. According to a study on racial and ethnic disparities of California's Department of Juvenile Justice transfers, there was some benefit in passing Proposition 57, as their juvenile transfer rates dramatically decreased overall; however, racial disparities have continued. California's population is 71% white, 34% Hispanic, and 6.5% Black. Yet, in 2020, Hispanic youth make up 66% of juvenile transfers, while Black youth make up 19%, and white youth only 13%. This data shows that although ending direct transfer is a step toward achieving more justful practices for youth offenders in a broad manner, California's efforts still fall short in achieving racial equality.

The state which has put the most effort toward reaching fair and reasonable treatment for juvenile defendants is Vermont, which has practically eliminated its own ability to try kids as adults. In 2016, Vermont passed H.95, which incrementally raised the age at which one can be tried as an adult from 16 in 2016 to 21 in 2018. Therefore, the state essentially ended their practice of sending juveniles to adult trials. Under this bill, state attorneys in Vermont now have the ability to refer a juvenile delinquent to a restorative justice program approved by the Department of Children and Families as opposed to filing charges in court.

The Vermont Judiciary explained that their reasoning for making these changes was based on "sociology, developmental psychology, and neuroscience" that shows that for emerging adults (aged eighteen to twenty-five), it is natural to take risks, rebel, and even break the law at times. This is because the prefrontal cortex, responsible for decision-making, is not fully developed until age twenty-five.

Their research also shows that kids and emerging adults are especially malleable, and easily affected by rehabilitation. In their Juvenile Recidivism Study, the state found that sixteen and seventeen-year-olds were more likely to recommit crimes if they were placed in an adult corrections center. Because rash decision-making is a natural phenomenon that has been scientifically proven to improve as teens or emerging adults grow older, it is logical to pursue second chances for juvenile offenders.

Now, youthful offenders in Vermont would have their crimes expunged from their criminal records. This means that if a 19-year-old got charged with minor drug possession, they would be able to get help in rehabilitation programs in a juvenile correctional facility and apply for jobs and schools without a crime on their record.

Vermont's efforts have opened up similar conversations in other states. However, there is opposition to these reforms amongst Americans that prohibit new legislation from being passed. In Massachusetts, nine district attorneys signed a letter in 2017 saying they did not see new brain science development as a valid reason to raise the transfer age. They also stated their belief that the proposed legislation would fail to hold offenders accountable.

Conclusion

As more states start to consider reforming their juvenile justice practices, it is important for legislators and lawmakers to ask themselves what drives them to make these changes. Changes like ending direct-filing, which 14 states still practice, have proven to be effective for lowering overall juvenile transfer rates. However, states must take further steps when targeting racial disparities. It is necessary to limit the criteria by which justices are able to transfer youth offenders to adult court to only include

serious violent crimes in order to equalize the playing field for children of all races and backgrounds.

Studies on brain development, sociology, and Supreme Court precedents show us that youth offenders are both unable to fully understand the consequences of their actions and that they are susceptible to change with support programs. Therefore, states must consider moving from systems of punishment to systems of rehabilitation for children in their justice system.

As children who are punished without rehabilitation are more likely to become repeat offenders, America's youth deserve a chance at a better life. Helping them grow rather than preventing them from getting future jobs and higher education will ultimately benefit both the individual and the country.

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JURIS MENTEM

R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission

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ON R.G. & G.R. HARRIS FUNERAL HOMES INC. v. EEOC

BY SHREYA MURTHY

Abstract

In 2013, Aimee Stephens, a funeral director at R.G. and G.R. Harris Funeral Homes informed her employer that she identified as a transgender woman and would begin to present as female once returning from a vacation. However, before she was able to leave for her vacation, her employer terminated her employment. Ms. Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC), which later stated that there was reasonable cause to believe Harris Homes had violated Title VII of the Civil Rights Act of 1964 by "discharging Stephens because of her gender identity". Harris defended its actions by asserting that firing Ms. Stephens had been an act of religious freedom. The issue at contention was whether or not Harris Homes violated Title VII of the Civil Rights Act of 1964 by firing Ms. Stephens based solely off of her gender identity. There was also a second issue unique to Ms. Stephen's case- whether she had been fired for not conforming to gender stereotypes, which, as the Supreme Court had said previously, was a form of sex discrimination.

Background

For almost six years, Aimee Stephens had been employed as a funeral director at R.G. and G.R. Harris Funeral Homes in the state of Michigan. Ms. Stephens, who was born biologically male, presented as male during those six years. In July 2013, she told her employer, Mr. Thomas Rost, about her long struggle

with gender identity, as well as her decision to begin living and working as a woman before undergoing sex-reassignment surgery. She went on to inform Mr. Rost that when she returned from the two-week vacation she was taking, she would wear business attire appropriate for a female under the employment of the funeral home. As per the dress code, this meant wearing a skirt-suit, rather than a pant-suit with a necktie. Mr. Rost shortly after fired Ms. Stephens. Ms. Stephens took action by filing a sex-discrimination charge with the EEOC, which the EEOC backed up by stating that there was reasonable cause to believe that Ms. Stephens' firing violated Title VII of the Civil Rights Act of 1964.

District Court Ruling

In September 2014, the EEOC filed a complaint with the United States Court for the Eastern District of Michigan against Harris Homes, but the Court's decision ultimately sided with the defendant. Judge Sean F. Cox rejected the EEOC's argument that Harris Homes violated Ms. Stephen's Title VII rights because "transgender status or gender... [were] not protected classes". However, the Court did accept the precedent set by Price Waterhouse v. Hopkins, which established that sex-stereotyping was a form of sex-discrimination, interpreting the Price Waterhouse decision to mean that "gender be irrelevant". Therefore, Judge Cox rejected the defense's argument that their gender-specific dress- code did not "constitute impermissible sex stereotyping under Title VII", and sided with the plaintiff.

That being said, Judge Cox did note that Harris Homes used another successful line of defense: the Religious Freedom Restoration Act (RFRA). The Court believed Harris Homes met its burden in explaining how the application of Title VII would prevent its ability to conduct business as normal in "in accordance with its sincerely-held religious beliefs". This is based on the fact that the defense was able to prove Mr. Rost was a man

of sincerely- held religious belief, specifically, his belief in the Biblical viewpoint that "that people should not deny or attempt to change their sex". Having met their burden, Harris Homes was entitled to an RFRA exemption.

Court of Appeals for the Sixth Circuit Reversal

On appeal, the Court of Appeals for the Sixth Circuit reversed the ruling made by the District Court. They affirmed the lower court's interpretation of the Price Waterhouse precedent in that gender should be irrelevant to employment decisions. However, the Sixth Circuit stated that gender is not being treated as irrelevant "if an employee's attempt or desire to change his or her sex leads to an adverse employment decision". Therefore, the Sixth Circuit broke with the lower court by stating that discrimination due to an individual being transgender or deciding to transition does violate Title VII. The Sixth Circuit stated that "discrimination because of an individual's transgender status is always based on gender stereotypes," in this case, how one's gender relates to their dress choices as per societal norms, and therefore does amount to gender not being treated as irrelevant. Perhaps most importantly, the Sixth Circuit used a comparative method to determine if Ms. Stephens's claim of "paradigmatic sex discrimination" (which is described in Hively v. Ivy Tech Community College) was valid, meaning, if Ms. Stephens had been a cisgender woman (rather than a transgender woman) who wanted to wear women's clothes, would Mr. Rost have fired her? The answer to that is most likely no, meaning Harris Homes did engage in sex-based discrimination.

Supreme Court Ruling

The R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission case was heard in the Supreme Court along with Bostock v. Clayton County and Altitude Express, Inc. v. Zarda. All of these cases had to do with

Title VII protections based on sexual orientation and gender identity, and ultimately, the Court ruled 6-3 in favor of extending the Civil Rights Act of 1964's Title VII protections to gay and transgender individuals.

The majority opinion was written by Justice Neil Gorsuch. Justice Gorsuch began by stating that both parties agreed that when the Civil Rights Act of 1964 was written, no one would have thought Title VII rights could extend to gay or transgender people, and that the court usually interprets a statute "in accord with the ordinary public meaning". That public meaning, according to Justice Gorsuch, is that "an employer violates Title VII when it intentionally fires an individual employee based in part on sex". Justice Gorsuch used a similar comparative method to that which Sixth Circuit used when determining whether Ms. Stephens was fired on the basis of sex:

> *"…Take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision".*

This theme carried throughout the opinion for the Court: Gorsuch stated that to separate sex discrimination from discrimination based on sexual orientation or gender identity is wrong, as sex is relied upon heavily to make these decisions.

There were two dissenting opinions in this case: one by Justice Samuel Alito, with Justice Clarence Thomas joining, and a separate one by Justice Brett Kavanaugh. Though separate,

both dissenting opinions had similar complaints which Justice Alito sums up best when he stated, "There is only one word for what the Court has done today: legislation". Both dissents strongly favored

Congress taking action and passing legislation that would ensure there be no employer-based discrimination due to sexual orientation or gender identity. This would be preferable, both dissents state, to the Court setting this bold, new precedent of equating discrimination based on gender identity or sexual orientation with discrimination based on sex. In addition to this, Justice Alito rejected this notion that "sexual orientation and gender identity are inextricably bound up with sex," citing hypothetical in which an employer has the policy that they "do not hire gays, lesbians, or transgender individuals," without even knowing the potential biological sex of any of these individuals. Finally, the Price Waterhouse precedent is referenced once more when Justice Alito agrees that there may be some instances where "traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other," in the workplace, but he dismisses it as another matter.

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JURIS MENTEM

The Equal Rights Amendment: An Imminent Constitutional Crisis

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THE EQUAL RIGHTS AMENDMENT: AN IMMINENT CONSTITUTIONAL CRISIS

BY ZACHARY SWANSON

Historical Background

The Equal Rights Amendment (ERA), proposed by Martha Griffiths in the House of Representatives in 1971, states the following: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." By 1972, it was passed by both the House of Representatives and the Senate, and it was then sent off to the states for ratification. If the amendment had been ratified, it would have been the first time the Constitution explicitly ensured equality of law regardless of sex. However, Congress included a deadline of seven years for states to ratify (which was then later arguably extended to 10 years). Despite its initial widespread support, opposition began to grow among conservatives, who feared that it could expand access to abortion and require women to sign up for the draft. By 1979, the proposed amendment's initial deadline, 35 states had ratified, but five of those states claim to have since rescinded their ratifications. Congress passed a bill to extend the ERA's deadline to 1982, but no states ratified the ERA during this extension.

In recent years, a legal theory began to emerge among some ERA proponents: the "three-state strategy". This theory contended that if three more states ratified the ERA, the required three-fourths of states required to ratify the amendment would have been reached, and the ERA would be ratified.

The idea lay dormant for years until it saw a resurgence in 2017. That year, Nevada became the first state to ratify the ERA in several decades. In order to bring the three-state strategy to court, only two more states needed to ratify the amendment. The pressure for more states to ratify the ERA intensified, and in 2018, Illinois became the next state to ratify the ERA.

Anticipating Virginia's ratification, in December of 2019, five states opposed to the ERA sued David Ferriero, the National Archivist, seeking to prevent him from certifying the ERA. In response, Ferriero asked the White House's Office of Legal Counsel (OLC) for an opinion regarding the ERA's constitutionality. The OLC concluded that due to the ERA's expiration of the deadline set for ratification by Congress, the recent state ratifications were not legally valid. However, the OLC did not comment on the issue as to whether it is constitutional for a state to rescind its ratification of an amendment.

In January of 2020, Virginia became the most recent state to ratify the ERA, paving the way for the three-state strategy to prove itself in court. Following instruction from the White House's OLC, the National Archivist refused to sign off on the ERA's ratification. Thereafter, Virginia, along with Nevada and Illinois, sued the Archivist, seeking to have him recognize the ratification of the ERA. This article focuses on that case, Virginia v. Ferriero.

Arguments for Ratification of the ERA

The plaintiff states must prove three things to succeed in their lawsuit:

1. The Constitution does not require that an amendment must be ratified within a certain timeframe.

2. The ERA's proposed ratification deadline was invalid.

3. A state cannot rescind its ratification of a constitutional amendment.

The first point may be the easiest for the plaintiffs to prove. They have a clear example to point to: the 27th Amendment. More than 200 years passed between its introduction and ratification in 1992. Though it was one of the earliest amendments introduced, it was not ratified by 3/4ths of the states until a grassroots movement began in the late 1980s. This seems to indicate that unless a deadline is specifically imposed within an amendment itself, a constitutional amendment remains pending indefinitely.

This is further supported by case law. Coleman v. Miller, decided in 1939, dealt with a proposed amendment to ban child labor. In Coleman, the Supreme Court decided that Congress has the authority to set or not set a deadline for ratification of a constitutional amendment. Thus, all constitutional amendments which do not set a deadline are considered pending. The Court's reasoning in Coleman was the basis on which the 27th Amendment was ratified.

The second point may be more difficult for the plaintiffs to prove. The Coleman decision reaffirmed, albeit modified, Dillon v. Gloss, a 1921 decision regarding the validity of the 18th Amendment. In Dillon, the Court determined that Congress indeed has the power to "fix a reasonable time for ratification". However, in the plaintiffs' view, Dillon does not control the outcome of this case. They argue that the ERA ratification deadline was placed in the preamble of the amendment, and was not in the article itself as presented to the states. Because the deadline was not actually a part of the amendment itself, the plaintiffs contend that it should be considered irrelevant. The plaintiffs state "... given the Framers' concern for protecting state prerogatives against federal intrusion, any doubts about the scope

of congressional authority should be resolved in favor of the States."

The plaintiffs also argue that a state cannot rescind a constitutional amendment once they have ratified it. This argument is based on the fact that there is no mechanism set forth within Article V of the Constitution for a state to do so. They offer a strict originalist approach, heavily emphasizing the Framers' intent. The language of Article V states that an amendment "shall be valid . . . , as Part of this Constitution, when ratified by . . . three fourths of the several States' '. Plaintiffs interpret this language to mean that once a state has ratified an amendment, it has had its final say on the matter. They additionally cite a letter from James Madison to Alexander Hamilton from 1788 in which he states "'that constitutional provisions be adopted 'in toto, and forever[.]'"

Though there is no case law on the subject, they cite the historical precedent of the 14th Amendment, noting that "... the 14th Amendment was adopted despite two States' attempts to rescind their ratifications." However, looking into the history of the 14th Amendment leaves us with a much less definitive answer. Prior to certifying the 14th Amendment, Ohio and New Jersey did in fact attempt recessions. Secretary of State Seward seemed unsure as to whether the rescissions by Ohio and New Jersey were legitimate or not. His first proclamation of the 14th Amendment's ratification was conditional, noting "if the resolutions of Ohio and New Jersey ... are to be deemed as remaining in full force and effect, notwithstanding the subsequent [rescission] resolutions of the legislature of those States ... then the aforesaid Amendment has been ratified ..." Only once enough states had ratified that Ohio and New Jersey's rescissions were irrelevant did he issue a definitive, unequivocal proclamation of the 14th Amendment's ratification. There simply is not yet a clear precedent on whether a state is allowed to rescind its ratification of an amendment.

Arguments Against Ratification

The defendants have a rebuttal to each of these arguments. Their first rebuttal addresses the ERA's seven-year deadline. They point out that the Twenty-third, Twenty-fourth, Twenty-fifth, and Twenty-sixth amendments had identical seven-year ratification deadlines to the ERA. It thus seems unlikely that "no one [would have] said anything about it."

While convincing at first glance, there is an obvious difference between these amendments and the ERA: They were all ratified within their deadlines. Thus, their constitutionality was never brought into question, nor was it ever settled by a court.

Their second rebuttal deals with implied deadlines. In their motion to intervene in the case, the defendant states cite Dillon, stating "The Supreme Court has drawn the 'fair ... implication from article V' that 'the ratification' of a constitutional amendment 'must be within some reasonable time after the proposal.'" They fail to mention that Coleman, which clarified the Dillon ruling, goes directly against the point they are trying to make. In Coleman, the Court determined that it is the job of Congress to determine when an amendment has "lost its vitality", and therefore all amendments without explicit deadlines are still pending for the states to ratify.

The 27th Amendment's existence seems to directly contradict the defendants' arguments. They spend a mere one sentence to rebut this: "While Plaintiffs note that the Twenty-Seventh Amendment was ratified in 1992 (200 years after it was proposed), the legitimacy of that ratification is hotly contested, and an isolated episode from the 1990s says little about the original meaning of Article V." It seems that the defendants are making a bold claim here: that the most recent amendment to the US Constitution may not have been properly ratified.

Additionally, the plaintiffs vigorously oppose the claim that this ratification of the 27th amendment "sheds little light" on whether Article V imposes some sort of implied timeframe for ratification.

The defendants also argue that a state can rescind a constitutional amendment's ratification. They argue that the now-rescinded ratifications of the certain states, currently held by the National Archives, should not be applied to this amendment against those states' consent. They state that the Constitution "gives States the power to determine 'when' they have 'ratified' an amendment," citing Article V and the federal district court case of Idaho v. Freeman. Freeman directly dealt with the Equal Rights Amendment and Congress extending its deadline. That court believed Congress did not have authority to grant this extension.

In 1982, the Supreme Court granted the case certiorari. However, by the time they were to hear the case, the deadline had expired, and no states had ratified the ERA in the interim. They thus dismissed the case as moot. Therefore, while the defendants rely heavily on the arguments in Freeman throughout their motion, they are technically backing their argument with a moot case.

Conclusion

Virginia v. Ferriero is a case that seems all but destined to reach the Supreme Court. Though the Court tends to shy away from so-called "political questions" (the definition of which is blurry at best), a failure to reach a definitive decision would result in a constitutional crisis. Some states would argue that the ERA serves as the 28th Amendment, and some states would not. Ultimately, the Court could be forced to later answer the question anyway as plaintiffs begin to bring suit under the disputed ERA.

As a practical matter, once this case reaches the Supreme Court, the plaintiffs face a difficult challenge. With the recent

death of Ruth Bader Ginsburg, there is now a 5-3 conservative majority on the Court, with a 6-3 majority likely on its way once the Senate confirms President Trump's appointed justice. Even Ginsburg herself was not supportive of the three-state strategy, a fact pointed out multiple times in the defendants' motion to intervene.

There is another solution that has been proposed. Some activists maintain that Congress should simply pass a law removing the ERA's deadline, allowing it to take effect with less controversy. H.J. Res. 79 was passed by the House in February of 2020 intending to do exactly that.

However, the White House's OLC disputes that Congress has the authority to do so, continuing to argue that the ERA is dead. The outcome of Virginia v. Ferriero will shed some much needed light on the ratification process for constitutional amendments, clarifying what Article V means in modern times.

If the ERA is declared legally dead, the best path for its proponents may simply be a fresh start.

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JURIS MENTEM

Bostock v. Clayton County and LGBTQ+ Individuals In The Workplace

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WHAT BOSTOCK V. CLAYTON COUNTY MEANS FOR LGBTQ+ INDIVIDUALS IN THE WORKPLACE TODAY

BY GRACE WEINBERG

Introduction

On June 26, 2015, the Supreme Court of the United States of America historically ruled that same-sex couples have the right to marry across the nation. This landmark decision changed the lives of millions of LGBTQ+ (Lesbian, Gay, Bisexual, Transgender, Queer, etc.) people who now had the ability to legally marry their partners. But the fight was far from over. Americans who identify as LGBTQ+ face more workplace discrimination than cisgender, heterosexual people. Pew Research Center reports that as of 2013, 21% of LGBTQ+ adults have reported facing discrimination in the workplace, whether that be in employment, promotions, or other ways.

Case Summary

One such case of workplace discrimination is seen in the case of Bostock v. Clayton County. Here, three employees were fired from their jobs after either transitioning in their gender expression, or demonstrated that they were gay in conversation or action. Gerald Bostock was fired from his job days after participating in a gay softball league. Donald Zarda was fired from his job at Altitude Express soon after he mentioned that he was gay. And finally, Aimee Stephens was fired after letting her employer know that she was beginning her transition. All three

cases were brought before their respective courts, which handed down varying verdicts. Bostock's employers were found to have not violated Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination on the basis of "race, color, religion, sex, or national origin" [3]. Meanwhile, the claims Zarda and Stephens were allowed to proceed. By the time the collective case reached the US Supreme Court, both Mrs. Stephens and Mr. Zarda had passed away, and the cases became consolidated within Mr. Bostock's original case as they dealt with similar issues.

Decision

In a 6-3 decision the Supreme Court ruled that the employers of Bostock did, in fact, violate Title VII of the Civil Rights Act of 1964. In doing so, they established the notion that Title VII protects not only against gender discrimination in the conventional sense, but also against discrimination on the basis of sexual orientation and gender identity or expression. The majority opinion, handed down by Justice Neil Gorusch, explains that firing someone based on their sexual orientation or gender identity is, in fact, gender discrimination as prohibited by Title VII because the homophobia is born not out of the relationship between two people in and of itself, but rather in the gender of one of the people. In other words, it is not the fact that people are in a relationship with one another, it is the fact that both of those people are men out of which the issue arises. In this lies the justification for covering sexuality and gender identity under the Civil Rights Act of 1964. Justice Gorsuch writes that, "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands."

Dissent

Justices Samuel Alito and Clarence Thomas wrote a dissenting opinion for this case, and Justice Brett Kavanaugh wrote one of his own. They argue that Congress did not protect workplace discrimination on the basis of sexuality in 1964, and to say that they did would not only be untrue, but would be an abuse of power because it is not the Court's job to decide such things. During the trial, the employers had similarly argued that the original legislators of the Civil Rights Act did not intend to protect LGBTQ+ individuals from workplace discrimination. However, the context of the creation of the legislation should not overrule the context in which it exists today. The interpretation of said law is per the Supreme Court, so to speculate as to the 'original intent' is irrelevant. Justice Alito goes so far as to equate the decision to 'legislation' in an attempt to illustrate the disregard for the separation of powers intrinsic to our democracy.

Impact

This case is a key example of textualism, a concept that emphasizes focusing on the literal text of the law itself rather than external factors such as the intent of the legislators or the context in which the law was created. Gorsuch used textualism to justify the court's ruling and received criticism for doing so, particularly by his fellow Justices who dissented. What is interesting to note is the history of textualism as a conservative policy. The fact that a typically conservative method of law interpretation was used to hand down a ruling that stood in contrast to conservative principles of family structure and religion was enormous in symbolizing what may be a change of tide in law interpretation.

LGBTQ+ individuals celebrated the decision across the country, which happened to be delivered in the middle of pride month. Advocacy groups such as GLAAD called the case a

"historic decision" and said that finally, the highest court of the land recognizes what has always been true: homophobia and transphobia of any kind cannot be tolerated or justified.

Meanwhile, President Trump offered a somewhat indifferent reaction, saying that "we live" with the decision that had been made. Justice Gorsuch himself was appointed to the Supreme Court by President Trump, and such a connection is interesting when taking into consideration the President's history, both in policy and rhetoric, of homophobia and transphobia. Prior to Bostock v. Clayton County, 28 U.S. states had no state laws protecting LGBTQ+ workers from discrimination, according to data gathered by Associated Press. Since the ruling was handed down in the midst of a global pandemic, it is difficult to gauge the impact this case has had on LGBTQ+ people in the workplace. However, there is reason to believe that the issue will persist, particularly because of arguments concerning freedom of religion. Many religious groups have expressed astonishment and disappointment at the court's ruling. They say that to hire someone whose identity is in conflict with the religion someone practices is to be intolerant of said religion. This begs the question: if both religion and sexual/gender identity discrimination are prohibited under Title VII, what happens when one causes the other?

Looking Ahead

Justices Thomas and Alito definitely took the side of religion earlier this week when writing that Obergefell v. Hodges, the case that legalized gay marriage in the United States, paved the way for "this court's cavalier treatment of religion in its Obergefell decision". Such a statement comes at a moment of utmost importance in the future of the Supreme Court as President Trump has officially nominated Amy Coney Barrett to replace Justice Ginsburg after her passing last month. With Barrett on the bench, Obergefell is in imminent danger of being

overturned. Such an occurrence would not only have severe ramifications for LGBTQ+ individuals, but it would also call into question other cases that deal with LGBTQ+ rights, such as Bostock v. Clayton County.

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JURIS MENTEM

The State Of Death Penalty Jurisprudence In The United States

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THE STATE OF DEATH PENALTY JURISPRUDENCE IN THE UNITED STATES

BY EDWARD GROOME

Introduction

The United States has a long history with capital punishment. Death by hanging was one of the earliest punishments for crimes established by the First Congress in 1790, and many states retain a system of capital punishment today. In the modern era, capital punishment has been greatly restricted by the Supreme Court, no longer applicable to juveniles or to those with mental disabilities. However, at the end of a summer marked by increases in violent crime nationwide and a deadly pandemic that has claimed the lives of hundreds of thousands, the federal government has ended its 17- year moratorium on executions and has executed eight people since July. This trend follows the implementation of a new federal protocol for carrying out executions, and it suggests that the current Supreme Court is increasingly unwilling to limit the scope of capital punishment, preferring instead to ease the process of execution. With this in mind, it is useful to examine the current state of the law as it relates to capital punishment, as well as the constitutional questions surrounding its use.

Lethal Injection and the One Drug Protocol

Before delving into the specifics of Roane et al. v. Barr—the case which allowed federal executions to resume—and its implications, some context is necessary. In 2019, the federal government developed a new uniform protocol for federal death

row inmates, following a review of its existing protocol. The government chose to use a single drug, the barbiturate pentobarbital, for lethal injections. In 2019, the Court had decided that this one-drug protocol did not violate the Eighth Amendment, when confronting a challenge to Missouri's lethal injection protocol. Of the four plaintiffs in Roane, however, two were to be executed in states which use three-drug cocktails for lethal injections.

Interestingly, the question that came before the DC Circuit Court in Roane was not one of fundamental constitutional rights, but instead one of a challenge to procedure. Taken alongside other precedents involving lethal injection as a method of execution, the concurring opinion of Judge Katsas in particular may have interesting implications on future capital cases. The plaintiffs in this case did not argue that the protocol constituted a violation of the Eighth Amendment, but instead that it was a violation of the Federal Death Penalty Act, which states that federal executions must be carried out in the "manner prescribed by the law of the state in which the sentence is imposed." The primary point of contention was the meaning of the word "manner," and whether this referred solely to the top-down method of execution, i.e., lethal injection, or whether the federal government must comply with all state procedures for executions (a one-drug protocol, compared to a three-drug cocktail, and particular methods of inserting the intravenous catheter). Both the Department of Justice and Judge Katsas of the DC Circuit argued that the word "manner" should encompass only the top-level method of execution in a general sense. This meant that state protocols for lethal injection would be irrelevant, because the federal government would be utilizing the states' chosen method of execution, which is lethal injection. The two judges in the majority, Katsas and Rao, did not reach consensus on their reasoning, but they allowed the executions to proceed, holding that the district court had erred in interpreting the FDPA

to require the federal government to comply with all state procedures set out in both statutes and regulations. While Katsas contended that the use of the word "manner" applies only to the top-level method of execution, lethal injection, Rao argued that the statute applies to regulations that have the force of law as well, but stopped short of including execution protocols under that broad umbrella. Regardless of their differences as to the plain meaning of the statute, both judges agreed that the government may proceed with its executions, as to side with the plaintiffs would have amounted to delaying a legally prescribed and constitutional punishment over a semantic issue.

However, Katsas' line of reasoning may provide an opening for future arguments challenging executions, and provide prisoners challenging their death sentences an avenue to partially overturn the Court's decision in Bucklew v. Precythe. In Bucklew, the Court refused to grant relief to a Missouri man sentenced to die, who had challenged the state's lethal injection protocol on the grounds that his medical condition would result in a situation where lethal injection would cause him constitutionally impermissible levels of pain. The opinion of the majority in this case imposed a very high burden of proof upon the condemned to satisfy the tests established by Baze v. Rees and Glossip v. Gross (known as the Baze-Glossip test) which held that lethal injection is per se constitutional, and an Eighth Amendment challenger must identify an alternative method of execution that is readily available to the state to avoid lethal injection. Mr. Bucklew's proposed alternative, nitrogen hypoxia, was rejected by the Court, and Justice Gorsuch wrote that Missouri had a compelling reason to proceed with lethal injection and avoid being the first state to experiment with a new "method" of execution. As a result, the Court held that the Eighth Amendment does not guarantee a prisoner a painless death, and required a great degree of specificity for proposed alternatives to lethal injection.

These two cases may appear to be only tangentially related, but accepting Judge Katsas' reasoning, Gorsuch's high bar for satisfying Baze-Glossip may well need to be revisited. After all, if the "manner" and "method" of execution are to be considered as synonymous and interchangeable, then to satisfy the Baze-Glossip test an alternative "method" of execution need not specify the exact protocols for administering lethal injection, lethal gas, or other methods of execution, but only a top-level "manner" of execution. Were Mr. Bucklew alive today, applying this standard to his case would mean it would be sufficient for him to argue that he be executed by lethal gas, rather than specifying nitrogen hypoxia or the protocols for administering nitrogen laid out by the states that have authorized its use in such cases, these being Alabama and Mississippi. Justice Gorsuch stated in that case that, while an alternative execution was Bucklew's right to request, "...choosing not to be the first to experiment with a new method of execution," is sufficient justification for the state to reject his request.

As Justice Breyer noted in his Bucklew dissent, the majority drew the requirement to supply an alternative execution method from Glossip v. Gross, but nowhere in that holding was it stated that a condemned prisoner must craft specific protocols for implementation. If the Court adopts Katsas' reasoning that "manner" refers to top-line methods, then an alternative execution such as the one proposed by Bucklew would not constitute "experimentation" with a new "method" since execution by lethal gas has been authorized by some states. Furthermore, Justice Gorsuch is clear in his Bucklew opinion that it is not even required that the proposed alternative be authorized by the law of the state in which the execution takes places, and, in fact, some states—Missouri included—do still authorize the use of lethal gas for executions as a matter of law, though the practice has not been used in some time. It is too late to grant Bucklew, or any of the plaintiffs in this case, any sort of

relief, but these opinions provide a roadmap for future challenges, since it has been demonstrated that lethal injection has the highest rate of botched executions of any method of execution, and as Justice Gorsuch notes in the Bucklew holding, the test for determining which methods constitute "cruel and unusual punishment" is "necessarily a comparative exercise." Therefore, while a painless death is not constitutionally required, a comparatively less painful death is—by Justice Gorsuch's own logic. While the opportunity remains for opponents of the death penalty to make these challenges, as the law stands now, execution has become an easier process to carry out, both at the state and federal level, and given the current barriers to satisfying the Baze-Glossip test as well as the unwillingness of courts to grant stays of execution at the eleventh hour, success in these cases is still unlikely for opponents of capital punishment. With the federal judiciary trending significantly more conservative in recent years, and a six justice conservative majority on the Supreme Court, the four vote threshold for granting certiorari in capital punishment cases has become all the more difficult for opponents to meet.

Information and the First Amendment

In addition to creating a high bar for the success of Eighth Amendment challenges, the Court's hesitance to grant last minute stays of execution also has allowed states to move ahead with executions under opaque protocols. The holding in Baze v. Rees declared three-drug lethal injection protocols to be constitutional, and under Bucklew the Baze-Glossip test applies in all Eighth Amendment challenges. The one-drug protocol was adopted due to the prevalence of botched executions resulting from the three-drug cocktail, and due to the difficulty states had encountered in procuring the drugs necessary for executions. Oftentimes, states turn to compounding pharmacies rather than more reputable distributors, due to pressure from advocacy groups to prevent companies from supplying lethal chemicals.

The challenges that arise as a result of this potentially dangerous process have been viewed less favorably by the Court, and in recent years courts have hesitated to grant stays of execution or preliminary injunctions in capital cases. Many states that actively employ capital punishment have adopted "secrecy laws" to avoid the common problem of pharmaceutical companies refusing to sell lethal drugs for the purpose of executing prisoners. This puts the condemned in a position where they are unable to access information relevant to their cases due to secrecy laws obscuring state execution protocols and policies regarding last rights. The action of states to obscure such information from the public not only raises concerns regarding due process, but also brings to light First Amendment concerns as well, since the withholding of such information regarding procedure may result in breaches of other constitutionally protected rights.

The clearest available example of this concern is the case of Dunn v. Ray, in which Domineque Ray, a Muslim, was informed mere days before his execution that he would not be permitted to have an imam by his side, with the state of Alabama supplying instead a Christian chaplain. Upon learning this, Mr. Ray filed for a stay of execution, which he was granted by the Eleventh Circuit on the grounds that the state of Alabama had run afoul of the Establishment Clause. The Supreme Court reversed that decision on the grounds that Ray had waited too long to seek relief, and allowed his execution to proceed. The Court has acknowledged that capital punishment i s not facially unconstitutional, but the willingness to speed up the execution process leaves these issues unaddressed for the purpose of hastening the execution process.

The Insanity Defense

The current trend can also be observed in the Court's approach to other issues related to the death penalty, specifically those dealing with the Due Process Clause of the Fourteenth

Amendment. In the Court's holding in Kahler v. Kansas, Justice Kagan writes for the majority to say that the Court will not standardize a constitutional-law framework for the insanity defense, in response to a suit alleging that Kansas had effectively eliminated this defense by excluding from the use of the insanity defense those defendants arguing they were incapable of understanding that their actions were not morally justifiable. Both the majority and the three dissenting Justices discuss the M'Naghten rule, which originates from an eighteenth century case regarding the insanity defense and which established two prongs through which to argue such a defense. The first prong of this traditional insanity defense is to argue that the defendant could not comprehend their own actions, and thus could not have acted with intent, or "mens rea" to commit their crime. The second prong of this common law rule is "moral incapacity." That is, the defendant understands their actions, but is so impaired by mental illness that they cannot comprehend that those actions are immoral. The majority argued that due to its own history of refusing to standardize the insanity defense within constitutional law, and the fact that states have traditionally relied upon a modified version of the rule, that it could not rely solely on M'Naghten to rule in Kahler's favor. As such, the Court refused to strike down a Kansas statute narrowing the state's insanity defense to only encompass the first prong of M'Naghten. The central question, in this case, was whether narrowing the scope of the insanity defense in this way amounted to a de facto abolition of the defense altogether, as both the majority and the dissenting Justices, in this case, acknowledged that the insanity defense is a fundamental right guaranteed by the Due Process Clause. Both sides, in this case, cited English common law in their respective opinions, but taken with other recent trends in capital cases, this holding amounts to a rejection of precedent surrounding Eighth Amendment jurisprudence.

Neither Justice Kagan nor Justice Breyer's opinions in Kahler stated that M'Naghten is to be the controlling standard for understanding the insanity defense under the law—quite the opposite. Kagan was quite clear that precedent precludes the idea that there exists a single standard for understanding this defense, and Breyer likewise stated that applying M'Naghten is not constitutionally required in deciding cases related to the insanity defense. Both opinions noted that states have codified their own versions of this standard into their penal codes and that Kansas is in the minority of states that have sought to limit the scope of this defense to the question of whether mental impairment precludes the possibility of a defendant developing the necessary "mens rea" for a conviction. The key here is that a majority of states have incorporated this standard, in some fashion, into their legal codes. The majority's unwillingness to rule in favor of Kahler, in this case, suggests a departure from the reasoning that governed other decisions, such as Atkins v. Virginia, where the Court struck down the use of the death penalty against the mentally disabled. In this case, Justice John Paul Stevens cited the increasing number of states that had legislatively abolished this practice and concluded that based on society's "evolving standards of decency," the practice of executing the mentally impaired had become a constitutionally impermissible policy. Kagan's opinion in Kahler, as well as Gorsuch's in Bucklew, and the holding in Roane, make no mention of this standard, relying instead on English common law and the principle of allowing governments to wield broad discretion in proceeding with executions. A prohibition against executing the mentally impaired means very little if states have broad latitude to define how a jury may view mental illness and disability.

For opponents of capital punishment, this represents an unfortunate trend away from one where the consensus of states may turn the tide in court, even as more states abandon the practice. A majority of the Supreme Court has increasingly

turned away from the "evolving standards of decency" precedent where the Eighth Amendment is concerned, and relying instead on principles of originalism and states' rights. Though these developments will not result in an end to the lengthy process of legal challenges to capital sentences, the quiet departure from the past trend towards restricted use of capital punishment means that the practice will become only deeper ingrained in constitutional law.

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JURIS MENTEM

A Case Analysis of Shelby County v. Holder

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CONGRESSIONAL AUTHORITY AND SOCIETAL NEED: A CASE ANALYSIS OF SHELBY COUNTY v. HOLDER

BY JOSEPHINE MAGNOTTI

Introduction

From Dred Scott v. Sanford to Korematsu v. United States, the Supreme Court has passed down its fair share of racially damaging, and just plain wrong, decisions. In recent years, racial discrimination has been brought to the forefront of Supreme Court rulings; the case of Shelby County v. Holder, decided in 2013, was a deeply damaging decision, as it eliminated voter suppression protections and sparked extensive repercussions. This analysis will address first the facts of Shelby County, as well as provide background on other rulings and legislation mentioned further in the essay. After the background has been provided, the original holding and its flaws will be discussed and eventually lead to the main point of this analysis: why the Court was ultimately wrong and the appropriate ruling that should have been passed down. In Shelby County, the majority failed to recognize the congressional authority given in the 14th and 15th amendments to deter voter discrimination by the states and therefore consequently decided to strike down Section 4 of the Voting Rights Act of 1965.

Background

Shelby County was brought to the Supreme Court of the United States after Shelby County, Alabama filed in 2010 in the

D.C. District Court that Sections 4 and 5 of the Voting Rights Act of 1965 were unconstitutional. Section 4 stated that there were certain "covered jurisdictions" that had a history of discriminatory tests or low minority registration, while Section 5 outlined that these jurisdictions needed to seek approval from the Attorney General or a district court before any new election or voting procedures took effect. The state of Alabama, where Shelby County is located, is a covered jurisdiction. The District Court upheld the constitutionality of the sections, as did the D.C. Circuit Court, citing congressional authority to reauthorize the Voting Rights Act in 2006 and the need for the act to combat voter discrimination. When the case reached the Supreme Court, a divided Court ultimately ruled 5-4 that Section 4 of the Voting Rights Act was unconstitutional due to the outdated nature of the coverage formula and the lack of need for the section in the modern era. Chief Justice Roberts wrote for the majority, while Justice Clarence Thomas concurred, adding that Section 5 should also be deemed unconstitutional. Justice Ruth Bader Ginsburg penned the dissent, joining Justices Breyer, Sotomayor, and Kagan.

The Voting Rights Act of 1965 will be the singular legislative piece referenced throughout this analysis, as Section 4 of the act is the main point of contention in the Shelby County decision. On August 16th, 1965, President Johnson signed the Voting Rights Act into law to combat racial discrimination that plagued the voting system in America's segregation era. In Section 4 of the Act, it specifies areas considered to be "covered jurisdictions"; these were originally classified as areas that had previously implemented discriminatory tests or devices or had less than 50% of potential voters registered. Under Section 5, it specifies that any changes to voting procedures in these jurisdictions must first be approved by the Attorney General or a court. It has been amended and reauthorized several times by Congress in 1970, 1975, 1982, and 2006.

Several major court precedents will be referenced throughout this analysis and they will be provided further background in the following sections. A major precedent that will be referred to within this analysis is South Carolina v. Katzenbach (1966). In a similar fashion to Shelby County, South Carolina filed to declare sections 4 and 5 of the act unconstitutional. In its first major decision regarding the Voting Rights Act, the Court ruled 8-1 that these sections were a "valid effectuation of the Fifteenth Amendment" ("South Carolina v. Katzenbach"). In the majority opinion written by Chief Justice Earl Warren, the Court held that the vast legislative history, congressional duty, and the need for the act in protecting the minority vote were grounds for the constitutionality under the 15th Amendment. This case set the stage for further challenges against the Voting Rights Act.

McCulloch v. Maryland, one of the Court's first landmark cases, will also appear within this analysis; in this case, the Court emphasized the power of Congress to utilize the Necessary and Proper Clause. After the creation of the Second Bank of the United States, Maryland's state legislature voted to tax all state banks that were not directly chartered by the legislature. A unanimous Court, spearheaded by Chief Justice Marshall, struck down the tax as unconstitutional. The Court rejected Maryland's argument that the Necessary and Proper Clause found in Article I, Section 8 of the United States Constitution, –which allows Congress 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…"– only applied to the carrying out of Congress's enumerated powers. Under this clause, Marshall held that Congress has broad discretion to carry out its implied constitutional powers in "appropriate and legitimate" ways.

The case of Shaw v. Reno (1993) will be briefly referenced in this analysis as well, in order to highlight the Equal Protection Clause of the 14th Amendment and the methods which states

employ to racially divide the voting system. The appellant argued that North Carolina's reapportionment scheme was unconstitutional under the Fourteenth Amendment's Equal Protection Clause and its Privileges and Immunities Clause, which states that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," because the districts were seemingly far too racially imbalanced for the scheme to be just a mistake. In a 5-4 decision, the Court voted for Shaw, holding that the districts were so confusingly drawn that there was no other option than to assume that it was done on a segregated basis.

The final case referenced in this analysis will be Northwest Austin Municipal Utility District 1 v. Holder (2009). In this case, a district fell under the covered jurisdiction label as outlined in Section 4(b) and sought to exempt itself from the provisions in Section 5; the litigants also argued that the congressional reauthorization of the Voting Rights Act in 2006 was not a valid exercise of power. The Court, in an 8-1 decision, rejected both of the claims made by the district. Northwest Austin Municipal Utility District 1 could not seek a bailout, as it did not fall under the "political subdivision" definition, and the congressional reauthorization was acting within the scope of its constitutional power due to documented, modern racial discrimination. However, the Court expressed in its opinion that "the Act now raises serious constitutional concerns."

Original Ruling and Majority Reasoning

In a controversial 5-4 opinion, the Court delivered its ruling on June 25th, 2013. In the majority opinion, penned by Chief Justice Roberts, the Justices argued that the burdens placed upon the states by Section 4 were no longer responsive to the modern-day conditions, as the amount of time between the ruling and the enactment of the Voting Rights Act allowed for significant enough change to warrant the unconstitutionality of

Section 4. Roberts claimed that, because of the Act's several reauthorizations by Congress, the coverage formula, which decides which areas are covered jurisdictions, became outdated after there was no change in the 1982 and 2006 authorizations. He cited several cases in which the Court upheld the constitutional challenges for the reauthorizations, as well as the Court's suspicions about the Act in Northwest Austin Municipal Utility District No. 1 v. Holder ("Shelby County v. Holder"). Referencing the Tenth Amendment and the Founders' intent, Roberts stated that [t]he Federal Government does not [...] have a general right to review and veto state enactments before they go into effect." The majority opinion continues to emphasize the sovereignty of the states and the Tenth Amendment's power to regulate elections, arguing that while extraordinary conditions of racial discrimination permitted the Act's constitutionality in cases such as Katzenbach and Lopez, those conditions were no longer present enough to put such a burden on the states. Ultimately, the Court decided that the Voting Rights Act departed from the principle of "equal sovereignty" by requiring only covered jurisdictions to request preclearance from the federal government, infringing on state's rights as provided in the Tenth Amendment, as well as stating that "things have changed dramatically" and that the coverage formula set in Section 4 is outdated and unconstitutional.

Misapplied Reasoning in Original Holding In deciding to strike down Section 4 of the Voting Rights Act of 1965, the Court misapplied their legal reasoning based on the ignorance of legislative intent, congressional will, and the argument that states have been provided unchallenged sovereignty and power to regulate their elections through the Tenth Amendment. In cases such as Katzenbach and Northwest Austin, the Court, despite noted doubts, has repeatedly affirmed the constitutionality of Section 4 in view of the circumstances of racialized voter suppression that have been in place for centuries. The Court was

also deeply mistaken in stating that racial discrimination, while not as evident as the 1960s, had disappeared within American society and voting laws. Beyond ignorance of racial disparities within the American voting system, Robert's legal reasoning essentially stated that, due to the success that the coverage formula has had in combating racial discrimination, then the burden that it places on states is no longer necessary —but this argument is false. In Justice Ginsburg's dissenting opinion, she utilized an excellent metaphor to clarify this argument, writing that "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."

How the Court Should Have Held

Due to the legal reasoning found in the consistent congressional reauthorizations of the coverage formula and the legislative powers implied in the 14th and 15th Amendments, the Supreme Court should have held that Section 4 of the Voting Rights Act of 1965 played a vital role in the prevention of voter discrimination and was therefore constitutional. The first legal basis on which the Court should have decided is the power of Congress to review and reauthorize the Voting Rights Act. Congress represents the people and comprises 535 members; the Supreme Court is composed of nine, unelected justices who make decisions that impact millions. In the Court's dissent, Ginsburg suggests that the reason Congress believed that this act continued to be necessary was because of "second- generation barriers." In a case such as Shaw v. Reno, it proves apparent that, despite the protections put forth in the Voting Rights Act, states will find a way to racially discriminate. In response, Congress reauthorized the act for 5 years in 1970, 7 years in 1975, 25 years in 1982, and, most recently, another 25 years in 2006. When tasked in 2006 to reinvestigate whether the act was needed, Congress found that, though the Voting Rights Act had helped directly, these

second-generation barriers still posed a threat to the voting system. Congress was not naive in making this claim either; in Northwest Austin, the Court acknowledged that Congress "amassed a sizable record" in their determination that " serious and widespread intentional discrimination persisted in covered jurisdictions."

The decision to reauthorize was supported by decades of records; it was not taken lightly. The Court ignored, however, the ways in which subtle discrimination occurs in the modern-day. The textualist ideals embodied in the majority opinion disregard the idea that violations of the Voting Rights Act in the 1960s will be inherently different from those in the 2010s. As Justice Ginsburg wrote, "Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute." In Katzenbach and Northwest Austin, the Court continued to uphold the constitutionality of the statute, and Congress adhered to the structure the Court set and reauthorized to protect the freedoms of the American citizens that it represents.

The second legal basis which the Court failed to recognize adequately was the purpose of the 14th and 15th Amendments, which includes their implied legislative powers. The 14th Amendment includes the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It also includes the Equal Protection Clause. The 15th Amendment states that "the right of citizens of the United States to vote shall not be denied or abridged by the United States" and "the Congress shall have the power to enforce this article by appropriate legislation." These amendments allowed the original Voting Rights Act to be constitutional. While the wording at contention in the statute is "appropriate legislation," any points arguing that sections of the

Voting Rights Act are "inappropriate" are invalid, as Congress has continued to carry out its duty to investigate the legitimacy and role of the act in each reauthorization and consistently deemed it necessary. In the Necessary and Proper Clause in Article 1, Section 8 of the Constitution, Congress is allowed to enact all laws it determines to be "necessary and proper." In the landmark case, McCulloch v. Maryland, Chief Justice Marshall concluded that the Necessary and Proper Clause applied to implied powers just as much as enumerated powers; the implied powers in the 15th Amendment of Congress to carry out legislation necessary to protect its citizens from discrimination are included in this precedent. States, despite this act, have continued to attempt to implement racially discriminatory voting laws: Mississippi in 1995, Georgia in 2000, South Carolina in 2003, Texas in 2006, etc. Upon reviewing various attempted cases of voter suppression, it is justifiably necessary and proper that Congress use its power to enact appropriate legislation to protect the freedoms outlined in the 14th and 15th Amendments.

Conclusion

The repercussions of Shelby County proved the dissenters' hindsight correct: across the country, states began to implement voting procedures that systematically discriminated against their minority populations. Chief Justice Roberts and the majority failed to recognize the importance of the congressional reauthorizations and the protections provided by the 14th amendment and 15th amendment and instead blindly disregarded the coverage formula as outdated and no longer needed, resulting in voter suppression laws to arise. Congress was within its right to continually reauthorize the Act according to its implied powers in the amendments and the Necessary and Proper Clause, and the Supreme Court should have ruled with the precedents set in Katzenbach, Lopez, and Northwest Austin. Whether it is the voting corruption in Georgia or strict voter ID laws in North Dakota, the Shelby County decision's disputable legal grounds

allowed racial discrimination against minority Americans and continues to face serious controversy in the modern era.

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JURIS MENTEM

Our Lady of Guadalupe v. Morrissey-Berru

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OVERBROAD OR ENTANGLED: OUR LADY OF GUADALUPE V. MORRISSEY-BERRU

BY BRENNA OLSEN

Introduction

The balance between First Amendment religious freedoms and sufficient employment protections has always been a struggle in American history. Religious freedom is one of the most important tenets of American culture and law, but giving any type of protection often threatens others' religious liberties, as seen in Justice Thomas' dissent in Obergefell v. Hodges[1]. Employment protections for private firms is often a question of government entanglement, but making a judgment about religious freedom can easily cross the line into the territory of overbroad exceptions. In Our Lady of Guadalupe v. Morrissey-Berru[2], the Supreme Court generously expanded religious freedom in employment cases.

In this analysis, I will give an overview of Our Lady of Guadalupe v. Morrissey-Berru, as well as the case that received a combined judgment, St James School v. Biel[3]. I will then discuss the holding, the majority opinion, and the dissent, including the Hosanna-Tabor judgment that influenced both sides of the Court's arguments. I will then analyze this judgment and discuss what it means for the future fight between religious liberty and employment protections in a larger context.

Facts and Combined Judgment

The case Our Lady of Guadalupe v. Morrissey- Berru was brought by a private Catholic school. The respondent was an employee of the institution, under contract as a teacher4. It was in her contract that she completed religious duties to advance the Catholic faith and the school's mission, through praying with her students and preparing them for mass and communion5. Her contract was reviewed yearly, so in 2014 she was demoted, and the next year her contract was not renewed. The respondent filed a claim with the Equal Employment Opportunity Commission, alleging that the school had fired her in favor of hiring a younger teacher6. The school maintains that they did not renew Morrissey-Berry's contract due to the results of a performance review that displayed her difficulty in administering a reading and writing curriculum. The lower court held that because Morrissey-Berru was not a "minister," even if she had faith based duties, her employment was not covered by ministerial exception under Hosanna v. Tabor7. OLG filed a petition for a writ of certiorari.

The case of St James School v. Biel received a combined judgment with Morrissey-Berru due to the nearly identical circumstances, aside from the alleged discrimination. Similarly to Morrissey- Beru, Biel was a teacher in a Catholic school and gave religious teachings to her students. She was a long-term substitute for part of the academic year, and then spent one year as a fifth-grade teacher. St. James School's contract with Biel was nearly identical to that of OLG's. She was expected to advance the faith and community of the Catholic school, including going to religious conferences and leading prayers with her students. St. James declined to renew Biel's contract after one year, and so she filed a claim with the EEOC, alleging that the school had not renewed her contract because she requested a leave of absence in order to obtain treatment for breast cancer. St. James disagreed, citing the teacher's inability to observe the planned curriculum

and inability to keep an orderly classroom. The school received a summary judgment under ministerial exception, but the Ninth Circuit was divided due to Biel's lack of credentials, training, and ministerial background. Due to the disagreement amongst lower courts, the Supreme Court granted review and combined the case with Morrissey-Berru.

Holding, Opinion, and Concurrences

The Supreme Court decided 7-2 in favor of the petitioner9. Justice Alito delivered the opinion, joined by Chief Justice Roberts, and Associate Justices Breyer, Kavanaugh, Gorsuch, Kagan, and Thomas. Justices Thomas filed a concurring opinion joined by Gorsuch as well10.

The legal basis for this decision relies on precedent, with the case Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission11. To give a brief summary, a Lutheran school teacher named Cheryl Perich needed to go on disability leave for part of the year. The church offered to pay part of her insurance premiums in exchange for her resignation, and she refused. Upon return she discovered that her position had been filled with a newly contracted teacher for the remainder of the school year. Perich returned to the school and refused to leave until she obtained a written record that she reported to work that day. She also threatened to take legal action unless she retained her job, and was fired for insubordination. She then filed under the EEOC, alleging that the church had violated the Americans with Disabilities Act12. The lower courts argued that the First Amendment barred them from interfering with employment issues between a church and a minister, but the Sixth Circuit vacated and remanded because they did not believe Perich qualified as a minister for the ministerial exception13. The Court unanimously ruled on the side of Hosanna-Tabor, and decided (1) that the ministerial exception is a valid concept under the First Amendment; and (2) it was applicable to Perich's case.

But they elected not to create a formula or test for the ministerial exception, even though they evaluated Hosanna-Tabor on four circumstances that they deemed appropriate to use a ministerial exception.

Justices Gorsuch and Thomas concurred in full, but in addition wrote to remind lower courts that they should always defer to a Church's good faith judgment for whether or not an employee should be considered for ministerial exception14. They say this is necessary because the Court cannot possibly know every religious role and their duties in each diverse religion of the United States. Therefore, the defense be used by the Church in good faith, due to each religion's different definitions. The Court cannot create a test because it would most likely leave out minority faiths that have differing definitions of "ministerial.15" This is an attempt to avoid excessive government entanglement, as set by Lemon v. Kurtzman16. Therefore, the claims that OLG and St. James made under ministerial exception should be good enough for the Court to avoid future entanglements.

Dissent

Justice Sotomayor wrote the dissenting opinion, joined by Justice Ginsburg17. She argued that the First Amendment already provides caveats to religious freedom, and that the concept of ministerial exception is judge made, not legislatively made18. She wrote that the good faith argument lacks legal grounding, thus effectively stripping thousands of teachers of employment protections, so she must dissent. Sotomayor comes to this conclusion by approaching the subject very much within the specific context of Hosanna- Tabor, and argues that all cases should be this way. She says that the reasoning that decided Perich was considered applicable for ministerial exception was fourfold: title, training, duties, and having a leadership role in the faith community. The Justice concludes that the majority opinion

allows religious institutions to discriminate, and only the employer may decide if a case of discrimination is actionable19.

For the case of St. James v. Biel, the dissent claims that Biel was not required to be Catholic, did not "lead" or "teach" her students in prayer, but had student prayer leaders. During mass, she was not required to lead it, only to keep the class orderly. Then, when Biel discovered she would need to take time off for cancer treatment, her contract was not renewed. Sotomayor says that because the reason for termination was non-religious, Biel's case should not be covered under ministerial exception20.

In OLG's case, the dissent argues that Morrissey- Berru was simply a teacher, had no religious background, and was not teaching with ministerial intent, but as a substitute teacher21. There was also a factual dispute for whether or not the teachers were actually required to be Catholic22. But in any case, when the teacher was in her 60s, she was let go, as earlier stated. The school did not cite a religious reason not renewing Morrissey-Berry's contract, and therefore, the dissent concludes, they should not be applicable for the religious exception23.

Analysis

So why did the Justices depart from the unanimous judgment of Hosanna-Tabor? It seems that the majority opinion is thinking more about religious liberty and keeping government entanglement to an absolute minimum, following the separation of church and state. The entanglement doctrine was developed in Lemon v Kurtzman, to stop the government from needing to comb through each individual case of religious private school funding to ensure tax dollars were not being used religiously24. Being overly involved in church affairs is encroaching on First Amendment rights, as well as too time consuming. The Court's majority opinion expressed that the separation between church and state must remain strong, and that both the Establishment

Clause and Free Exercise Clause must be upheld in these situations25. The dissenting opinion, on the other hand, sought to address future impacts on employees. Justice Sotomayor said that she would like to balance "First Amendment concerns of state- church entanglement while avoiding an overbroad carveout from employment protections.26" While the overbreadth doctrine is typically used in the context of free speech,27 the dissent uses this in the other direction. This carve out would leave so little regulated protection for employees that it would go against their freedoms. The dissent argues that the opinion of the Court making such sweeping decisions cannot provide justice for everyone in this situation, so perhaps a little more regulation is needed in this area2.

The split makes sense, ideologically. The more conservative and moderate judges sided with keeping the government out of religious institutions, while the most 'liberal' judges sided with employee protections. This could be seen in a larger cultural context, as well. As workplaces change, and more people are offered protection in the workplace, how will religious employers adjust? Churches could come under fire for not adjusting to new equal protections due to their religious beliefs. For example, many churches do not allow women, or members of the LGBTQ+ community, to lead a congregation. Cases like this could certainly be protected under the ministerial exception. But how far down the line should this go? According to the majority of the Court, teachers with any religious duties can be included29. This could possibly set the stage for future cases with even less religious duties, due to Justice Thomas' good-faith argument30.

Some may discount the importance of religious liberty when only thinking about the majority faiths. Religious liberty is not only granted to the most popular American faiths; minority faiths should be allowed to choose their own missions and rules, as stated in the opinion31. For example, should an Indigenous

religious institution be punished for not hiring white members or teachers? Should the Amish community be punished for not hiring someone outside of their community? Religious liberty is important for all religions, and it is one component of American culture. This culture of importance that America has built around religious liberty is good, when enforced equally, but makes it difficult when balancing these rights with other freedoms— such as freedom from employment discrimination.

Looking Forward

The question, with the opinions now discussed, is how will this affect the future? The majority opinion has given a sweeping win to religious employers, and even suggested that religious institutions' employment decisions should be accepted in good faith. In an attempt to reduce government entanglement, the majority opinion has made a very broad decision that gives religious employers the final word in cases like this.

While this case does not rule on employment-based healthcare, it has the potential to be used as precedent for further religious-liberty employment cases dealing with sexual orientation or gender identity. This has been a notoriously contentious topic since the Hobby Lobby decision in 2014,32 and, more recently, Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania of 202033. In these cases, the employers refused to include contraception in their health coverage, which clashed with the ACA. Abortion and healthcare have been two of the biggest battles, both legally and culturally, especially with a majority-conservative court. While America becomes extremely polarized on both of these fronts,34 the Court takes generations to make changes to any of these issues. This could be potentially dangerous if polarization continues in this direction.

Conclusion

What was once a unanimous decision is now split. While the Court had a clear majority, the dissent showed that another win for religious liberty may lead to problems for workers later, and evaluating at a case-by-case level may have been worth it. But as the Court's majority leans more and more conservative, this could be very telling for the next iteration of constitutional law. Avoiding entanglement at the expense of being overbroad towards religious institutions and employers may very well be the road that the United States has chosen with its next generation of justices. Paying attention to the fight between religious freedom and worker protection in the next 20-30 years will be an interesting period for legal history and development, and their effects on American culture and unity.

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JURIS MENTEM

Black Lives Matter, Trump, Barr, and Protest At Washington, D.C.

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BLACK LIVES MATTER, TRUMP, BARR, AND PROTEST AT WASHINGTON, D.C.: IS THERE A BIVENS CLAIM?

BY JAMES PHELAN

Background

Since Bivens v. Six Unknown Named Agents was decided in 1971, the Supreme Court has generally declined to recognize new implied damages remedies for violations of constitutional rights by federal defendants. Despite this, Black Lives Matter has initiated a suit against the President and Attorney General in their personal capacities for violating their First Amendment right to protest peacefully during the Summer 2020 protests on behalf of George Floyd. Considering the Supreme Court's recent disapproval of Bivens claims altogether, this Note argues that the plaintiffs have no implied cause of action and that the suit, as it pertains to its Bivens claims, will fail.

Introduction

On May 25, 2020, after having been arrested for the use of a $20-dollar counterfeit bill, George Floyd was tragically killed by Minneapolis police officers, who pinned him down to unconsciousness and, ultimately, death. Unable to breathe, Floyd pleaded with the officers—but he was ignored, even as "onlookers called out for help." In response to Floyd's murder, Americans in Minneapolis committed to the streets to march in solidarity with Floyd and against police brutality. After police employed tear gas to disperse demonstrators, what was initially limited to

Minneapolis spread across the nation, and by May 27, protests had erupted from Memphis, Tennessee, to Los Angeles, California.3 Though the protests were by and large peaceful, agitators used them as an opportunity to loot and commit violence, to which mayors– including Muriel Bowser of Washington, D.C.– responded by instating night time curfews.

In Washington, D.C., Bowser's curfew was set to begin at 7 p.m., and twenty minutes prior to the curfew on June 1, authorities—under the command of the Justice Department, and acting on Attorney General Barr's orders—used tear gas and other types of force to remove a crowd of demonstrators in Lafayette Park, across from the White House. The slated justification for this treatment was the movement of the President of the United States, as President Trump walked from the White House to the "historic" St. John's Episcopal Church, which had suffered fire damages in the protests.

Days after the events at Lafayette Park, members of Black Lives Matter D.C., the principal plaintiffs, sued in a District Court for various claims of relief, alleging that the Federal Government deprived them of their First Amendment rights to speech, assembly, and petition; and their Fourth Amendment right to be free from unreasonable seizure.6 These claims are pursued under the argument that the defendants, in their personal capacities, violated Bivens v. Six Unknown Named Agents, a Supreme Court case that created a cause of action against federal agents acting in their individual capacities to deprive an individual of his or her constitutional rights under the Fourth Amendment.

Bivens and its Progeny

Before Bivens was decided, there was no process by which plaintiffs could recover damages from federal officials for violations of their constitutional rights. Although Congress in 1871 had allowed for the vindication of rights violations by

state, the door to further applications of this doctrine was opened.

For the next decade, in two other contexts, the Court expanded Bivens. The first case, Davis v. Passman, concerned sex discrimination against a federal employee by her Congressman. There, Congressman Passman terminated Davis, who had been an administrative assistant, under the belief that men were better suited for the job. The Court found that the discrimination violated the Equal Protection component of the Fifth Amendment. A year later, in Carlson v. Green, after a prisoner died despite requesting medical treatment for several hours, the Court held that federal officials had violated the prisoner's Eighth Amendment rights.

In both Davis and Carlson, the Court qualified its officials,9 it was not until Bivens that an holdings by expressing that Bivens relief would "analogous" federal damages remedy was created. The Supreme Court counseled that "power, once granted, does not disappear like a magic gift when it is wrongfully used," and that, "where federally protected rights have been invaded…courts will be alert to adjust their remedies so as to grant the necessary relief." Under "general principles of federal jurisdiction," a remedy was provided for federal violations of the Fourth Amendment, and have been inappropriate had there been (1) "special factors counseling hesitation in the absence of affirmative action by Congress," and (2) an already provided "alternative remedy which [had been] explicitly declared to be a substitute for recovery directly under the Constitution." Together, Bivens, Davis, and Carlson are the sole cases in which the Supreme Court has approved an "implied cause of action" concerning federal officers.

Read alone, the language tailored by Justice Brennan in Bivens suggested that "the Court would keep expanding [the decision] until it became the substantial equivalent of 42 U.S.C. §

1983.19" But the Court began to decline implied causes of action and "adopted a far more cautious course.20" In Court's "consisten[t] refus[al] to extend Bivens to any new context or new category of defendants27" suggests that the Bivens doctrine, barring a major redirection in the Court's approach, will remain limited to the facts of the original case, as well as those in Davis and Carlson.

Courts therefore must cautiously decide whether to Cannon v. University of Chicago,21 although an extend Bivens to new contexts—and if there are implied cause of action was approved, it was qualified that if Congress intends for a private litigant to enjoy a cause of action, it is preferred that Congress tailor its remedy "in explicit terms.22" Until this view was firmly adopted, "as a routine matter with respect to statutes, the Court would approve implied causes of action not explicit in the statutory text itself.23" After Bivens applied this approach to claims based on the Constitution, the Court proceeded to cabin its scope, highlighting the "tension between [the approach in Bivens] and the "special factors counseling hesitation,28" they will not proceed. Although a precise definition for special factors has not been provided, Ziglar v. Abbasi, decided in 2017, counseled that any inquiry ought to focus on "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.29" In Hernandez v. Mesa, decided this year, the Court endorsed its Abbasi approach. Observing that Bivens may not have been decided as it was had it Constitution's separation of legislative and judicial been taken up today,30 the Hernandez majority power.24" Since the short-lived expansion of Bivens, finding new implied causes of action has become "disfavored," as the Court has only rejected cases requesting new implied damages remedies under the Constitution. Indeed, after nearly 40 years since the decision was released, Bivens has yet to be again extended. All in all, the wrote

that, in recognizing implied damages claims in order to "furthe[r] the 'purpose' of the law, [a] court risks arrogating legislative power."

Distinguishing Plaintiffs' Case from Bivens

Based on precedent, whether the plaintiffs in the lawsuit are likely to succeed turns on two successive inquiries: first, whether the alleged facts of their complaint arise in a new context, and second—assuming that the answer is yes—whether special factors counsel hesitation to create a new implied cause of action.

Concerning new-context analysis, the facts of this case are demonstrably new, and they suggest a context not yet considered by the Supreme Court that Bivens extends to First Amendment claims." The Abbasi majority had the final word, writing that Bivens, Davis, and Carlson "represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself" The plaintiffs' First Amendment action therefore represents, under the Abbasi framework, a new context due for consideration.

The meaning of "new context" is broad, and it Like with the First Amendment, the plaintiffs' also embraces whether there is a "new category of Fourth Amendment claim brings to light new defendants" involved. In Bivens, the alleged circumstances, too. Although Bivens concerned rights violation involved the Fourth Amendment; in Davis, it involved the Fifth Amendment; and, finally, in Carlson, it involved the Eighth questions surrounding the Fourth Amendment— that case dealt with the question whether federal narcotics agents had violated the search-and-seizure Amendment. Here, the rights violations put provisions of the Fourth Amendment—this case "is forward involve the First Amendment and the Fourth Amendment: each

presents a context that is sufficient to be considered new under the Court's precedents.

Regarding the First Amendment claim, the Court has never extended its Bivens holding to any First Amendment context. It is true that in the past it has been assumed that implied claims apply to the First Amendment, but in actuality, it has yet to "h[old] different in a meaningful way."

First, Bivens's facts dealt with routine officers conducting routine law-enforcement work; here, the claims are against not only regular police officers but also high-ranking officials in their personal capacities. This is a departure from the facts of Bivens, Davis, and Carlson—the first dealing with narcotics officers, the second with a Congressman, and the third with correctional officers.

New-context analyses may consider only cases decided by the Supreme Court. See Ziglar, supra, note 9, at 1859 ("The proper test for determining whether a case presents a new Bivens context is as follows. If the case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new." (emphasis added)).

Second, there is no question that the core of the Fourth Amendment represents the right of one to be free of undue intrusion in one's home by the government,42 which is why courts have dealt with this issue many times over,43 including in Bivens itself. But plaintiffs' case concerns whether the Attorney General may remove large groups of demonstrators in front of the White House in preparation for presidential travel. Though the Court dealt with presidential movement and the removal of protestors in Wood v. Moss—a case involving presidential security and the First Amendment rights of demonstrators—it expressly declined to affirmatively decide whether Bivens extended; and that case's facts can be distinguished, as they involved a

last-minute change in motorcade plans by the President and the Secret Service, which occurred far from the White House grounds.

These two factors, together, make it clear that this litigation is markedly different from that in Bivens and similar cases. Since the plaintiffs' claims "aris[e] in a new context," it would be appropriate to consider, as Abbasi and Hernandez suggest, whether any special factors exist that counsel hesitation before extending Bivens.

Special Factors

The central question in considering special factors in Bivens claims are "separation-of-powers principles,45" including (1) the risk of interference with the coordinate branches of government, (2) whether a reasonable inquiry suggests that Congress would "doubt the efficacy or necessity of a damages remedy," and (3) whether courts are the appropriate venue to "consider and weigh the costs and benefits of allowing a damages action to proceed.46"

In Abbasi, Justice Alito included that, even if a damages remedy is necessary in the absence of sufficient equitable relief, granting it "requires an assessment of its impact on governmental operations." It can hardly be gainsaid that the protection of the President is a core function of national security, and the Court has remarked as much. In Moss, the Court instructed that crowds of 200–300 alone present a threat to the President if they are "within weapons range" and have a "largely unobstructed view." Combined with the need for a city-wide curfew in Washington, D.C., the decision to remove demonstrators in advance of President Trump's movement is likely to be accorded deference by the District Court, which is why plaintiffs' Bivens claim will likely be denied. Furthermore, if Congress has remained silent, i.e., declined to provide damages remedies, in high-profile

situations, courts are expected to defer to the status quo.51 Congress has increased the protection authority of the Secret Service, including with measures such as making it a crime to issue threats against, assassinate, or kidnap the President.52 It has not, however, created a statutory cause of action to protest peacefully is one that is fundamental to the United States' scheme of ordered liberty. This piece does not touch upon the ethical concerns surrounding the tactics used by the police to disperse demonstrators at Lafayette Park, though, against agents and officers accused of violating, there are plenty.

Rather, the core questions constitutional rights in the course of their protection duty in this context, nor has it erected a liability scheme. Moreover, the D.C. District Court recently affirmed this view: "If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under Bivens, respect for the separation of powers demands that courts hesitate to imply a remedy."

There is another factor worth discussing. "Bivens suits are not the appropriate mechanism to litigate objections to general government policies." In the plaintiff 's complaint, the alleged conduct underneath the claims is neither "personal," "direct," nor "particularized" with a plaintiff– necessary conditions to trigger Bivens relief. By contrast, these plaintiffs are seeking relief "against individuals who have applied a general policy that affected [them] and others in similar ways.56" In order to right alleged constitutional wrongs, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally", not Bivens remedies. Together, these factors counsel hesitation along the lines discussed in Abbasi and Hernandez.

Conclusion

George Floyd's story shocks the vast majority of Americans to their core, and the right of Americans addressed here about plaintiffs' lawsuit is whether there are Bivens claims to be found and granted. On that question, the answer is a very likely no.

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13. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

14. Correctional Services Corp. v. Malesko, 534 U.S. 61, 68 (2001).

15. Wood v. Moss, 134 S. Ct. 2056, 2066 (2014); supra, note 25; Hartman v. Moore, 547 U.S. 250, 254, n. 2 (2006); Bush v. Lucas, 462 U.S.

16. 367, 372 (1983).

17. Reichle v. Howards, 132 S. Ct. 2088, 2093, n. 4 (2012).

18. Abbasi, supra, note 9, at 1859. Abbasi offers courts seven possible inquiries for new-context analysis: "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider." Ibid.

19. Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

20. Illinois v. Rodriguez, 497 U.S. 177 (1990); Payton v. New York, 445 U.S. 573 (1980).

21. Hernandez, supra, note 24, at 743 (quoting Abbasi, supra, note 9, at 1858).

22. Watts v. United States, 394 U.S. 705, 707 (1969) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive").

23. This is not to suggest that the invocation of national-security concerns represents the end of the line for any plaintiff engaged in litigation against the Executive Branch. Abbasi was careful to invoke precedents such as Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion), and Boumediene v. Bush, 553 U.S. 723 (2008), as examples of where deference was denied: "national-security concerns [cannot] become a talisman used to ward off inconvenient claims."

24. 18 U.S.C. § 871; 18 U.S.C. § 1751.

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JURIS MENTEM

Use of The Third Amendment In Disaster Response and Cybersecurity

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THE LITTLE AMENDMENT THAT STILL COULD: MODERN APPLICATIONS OF THE THIRD AMENDMENT IN DISASTER RESPONSE AND CYBERSECURITY

BY CASSIDY STONEBACK

Introduction

Despite clearly being a top concern for the founding ignored. Even the Eleventh Amendment, usually not emphasized when teaching about the amendments, has had multiple Supreme Court cases in which the extent of its application was debated.

Currently, the Third Amendment has a relatively narrow interpretation, making it difficult to use as a basis for any arguments; but interpretations change, and once archaic amendments are dusted off and put to use. As privacy becomes more important in our modern world, and as the definition of private property becomes more encompassing, the chances increase that the Third Amendment will be used in fathers, the Third Amendment[1] has almost never innovative ways. Our modern world has two main methods used to stop a government action. The Supreme Court has never used the amendment as its primary justification for a ruling and there are only contexts in which the Third Amendment could apply: the use of federal troops in national disasters and to prevent insurrections, and cyberattacks in one case, Engblom v. Carey, in which plaintiffs organized by the federal government have successfully argued that they were protected by the Third Amendment. While other

amendments in the Bill of Rights crowd court dockets—as well as being debated, researched, and scrutinized by courts and scholars—the Third Amendment remains.

The History of the Third Amendment

In the time leading up to the American Revolution, it was very common for British soldiers to quarter in colonists' homes, and the Quartering Act of 1765 required "colonial authorities to provide food, drink, quarters, fuel, and transportation to British forces stationed in their towns or villages.7" The colonists were outraged at this treatment—they even felt it necessary to mention it in the Declaration of Independence, including "[q]quartering large bodies of armed troops among us" in their list of grievances against the King8.

The history of a right against quartering goes even further back than the founding of the colonies, with foundations in 14th century England. Protections against forced billeting can be traced back to 1131 in the charter Henry I granted to London9. Over the next few centuries, protections against the quartering of soldiers increased throughout England, culminating in the Mutiny Act in 1689, which forbade the quartering of soldiers in private homes without owner consent10. This act did not protect private businesses, however, because it did not allocate funding for barracks. It often forced troops to quarter in inns, stables, etc., and it did not apply to the colonies, but it did set the precedent for quartering laws in England and the colonies11.

Leading up to and after the passage of the Quartering Act in 1765, many colonies passed laws prohibiting the quartering of soldiers during times of peace. Although most English laws banning quartering did not allow for exceptions during times of war, many of the laws passed by the colonies did, most likely because the colonies feared the threats of the New World and wanted more protections in place12. The importance of

protections from quartering was once again emphasized in the Bill of Rights, for which 5 of 8 states submitted proposals containing provisions against quartering, solidifying their place as the Third Amendment to the Constitution13.

The Third Amendment in Action

Despite the colonists' long fight for freedom from the quartering of British soldiers and the clear support for an amendment banning quartering in times of peace, the Third Amendment is almost never used in judicial arguments. The first time that the protections of the Third Amendment were challenged was during the War of 1812 and then again during the Civil War. Even though Congress did not pass any legislation describing how quartering of soldiers in homes could occur during these two wars, quartering did occur14. Still, there were not any cases brought to the Supreme Court to challenge this action.

The Third Amendment has been used as the primary justification for a court decision once, in Engblom v. Carey15. In this case, the plaintiffs, two correctional officers at Mid-Orange Correctional Facility argued that their Third Amendment protections against the quartering of soldiers had been violated when National Guardsmen were housed in their rooms during a correctional officer strike16. Although the building in which the plaintiffs lived was regulated by the Department of Corrections, they still rented their units "in accordance with normal 'landlord-tenant' responsibilities and practices.17" The court ruled that the plaintiffs were protected by the Third Amendment, which set three important precedents: National Guardsmen are considered soldiers with respect to the Third Amendment; the Third Amendment applies to the states; and the "Third Amendment was designed to assure a fundamental right to privacy," so it protects residences and not just homes. This decision expanded the reach of the Third Amendment, setting a

precedent that its uses can be expanded in the future. Beyond Engblom v. Carey, there have been a few cases that referenced the Third Amendment which outlined its scope and how it could be used in the future.

The Third Amendment Here and Now

Since there has not been a war on American soil in many years, chances are that the Third Amendment will not be used during wartime any time soon, but this does not mean that it does not have any other applications. The National Guard is often dispatched during natural disasters, as it was during Hurricane Katrina,[20] and it is often used to control insurrections, which is happening a lot now in response to recent protests[21]. There is also some evidence that the Third Amendment could be used to protect American citizens from government cyber attacks[22]. Of these possible applications, it is much more likely that the former will ever become a judicial precedent, but they both warrant analysis[23].

During the federal response to Hurricane Katrina, the government dispensed thousands of National Guard personnel to Louisiana and the Gulf Coast to respond to the situation; unfortunately, the lack of military housing forced the responders to stay in "schools, convention centers, hospitals, hotels, churches, and tents," and sometimes homes. In some of these cases, the National Guardsmen responded harshly when they encountered resistance, and there were reports of property damage and destruction[24]. Natural disasters are not the only situations during which the Third Amendment could be applied; more recently, President Trump activated the National Guard in response to protests in D.C. over George Floyd's killing. Some of these guardsmen were housed in hotels in D.C., leading many to claim that the action could be in violation of the Third Amendment[25].

In order to determine if these actions are considered unconstitutional based on the Third Amendment, one must look at four aspects: (1) whether the country is at war; (2) whether the National Guardsmen and other federal actors involved count as soldiers; (3) whether quartering occurred; and (4) what is considered a "house" and who its owner is26. The first three questions are easily answered. Congress did not declare war during either of these times, so quartering of soldiers in homes without permission from the owner was unconstitutional27. Furthermore, in Engblom v. Carey the court determined that National Guardsmen are considered soldiers28. Finally, based on the Framers' intentions to protect citizens from occupation by a national government, the presence and occupation of the National Guard in these properties would constitute quartering29.

The last question presents more of a debate, as the buildings in question are clearly not considered "houses" under the traditional definition. In Engblom v. Carey, the court ruled that the Third Amendment protects residential privacy and not just an owner's property rights—and that consent from an owner does not override a lack of consent from the resident30. This decision may then protect residents in apartments and possibly those staying in hospitals and hotels if they can prove that their right to privacy was infringed upon. The other class of buildings being looked at here, privately-owned buildings that do not traditionally house people (churches, schools, convention centers, etc.), might also be protected under the Third Amendment, based on the fact that the Founding Fathers specifically rejected "a proposal to create a provision allowing billeting of soldiers in public houses or inns without consent.31" This fact implies that the intent of the Third Amendment is to protect both the privacy rights of residents and the property rights of owners. Essentially, both residents and owners should be protected from the quartering of soldiers on their property under the Third

Amendment. But without more precedent, it is hard to tell for certain whether this will come true.

Another possible application of the Third Amendment is in cybersecurity policies. As cyber- attacks on America become more frequent,32 so do cyber-counterattacks, which are still the best option the government has for responding to these attacks33. These counterattacks can very easily affect Americans, causing the U.S. military to interfere with the privacy of citizens, a possible violation of the Third Amendment34. While this may seem like a gross manipulation of the meaning of the Third Amendment,35 one must remember that the intent of the amendment is to indicate "a preference for the civilian over the military," which implies that it should protect civilians from intrusive military action 36. When one considers this intention, it seems likely that the Third Amendment protects against cyber-counterattacks. There are then two questions that must be answered to determine whether this protection exists or not:

(1) is the computer or network device property protected as part of 'any house,' and (2) does the military intrusion constitute 'quartering' by a 'Soldier'?37"

The first question can be answered by, once again, examining the purpose of the Third Amendment. The Framers rejected a much more specific version of the amendment that would have allowed for quartering in places like inns, opting for the much broader Third Amendment language in the Constitution today38. The decision in Engblom v. Carey supports this broad reading of the amendment, emphasizing that it protects the privacy of American citizens39. Other amendments have also been interpreted this broadly—for example, in Katz v. United States, the Supreme Court ruled that "the Fourth Amendment protects people, rather than places.40" If this same interpretation can be applied to the Third Amendment, then it

follows that the Third Amendment's protection against quartering can apply to computers.

The second question requires more analysis of the definition of quartering, but first it must be established that, based on the ruling in Engblom v. Carey, members of the U.S. Cyber Command can be considered soldiers, because they serve as part of the Department of Defense41. Traditional and current definitions of quartering establish that it does not have to be permanent, and many quartering provisions are specifically meant to prevent damage, so if these cyber-attacks cause damage, which they very easily can, they may fall into the definition of quartering. Furthermore, in English common law, the quartering of horses was forbidden because they were considered instruments of war, so actions taken by soldiers for the purpose of defense could be argued to be covered by the Third Amendment42. This is obviously a very loose interpretation of the Third Amendment, but there are some precedents and evidence to support this view.

Conclusion

Although determining whether the founding fathers would want the Third Amendment to be read broadly enough to protect property on computers is difficult, it could almost definitely be applied during disasters and insurrections to protect both residential and property-owner rights. Either way, the Third Amendment is not obsolete: it can, with some difficulty, be applied to common, modern situations. The Third Amendment is meant to protect civilians from the overreach of the military, and it will continue to do that, so long as people take initiative and stand up for their rights in the courts.

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4. See, e.g., Hans v. Louisiana, 134 U.S. 1 (1890), which determined that the Eleventh Amendment prohibits a citizen of a U.S. state to sue that state in a federal court. And, in Frew v. Hawkins, 540 U.S. 431 (2004) the Court held that enforcement of a consent decree does not violate the 11th Amendment.

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11. See, e.g.,Youngstown Co. v. Sawyer, 343 U.S. 579, 644 (1952), where the Court ruled that the Third Amendment makes it clear that "even in war time, [the President's] seizure of needed military housing must be authorized by Congress." In Griswold v. Connecticut, 381 U.S. 479 (1965) the Supreme Court found that there is a constitutional right to privacy that can be found within many amendments, including the Third Amendment. Finally, when a plaintiff claimed in Custer County Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001) that the Federal Aviation Administration violated his Third Amendment rights by designating the airspace above his house for military use, the court found that this is not a correct reading of the amendment.

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20. See "The Third Artifact: Beyond the Fear of Standing Armies and Military Occupations, Does the Third Amendment Have Relevance in Modern American Law," in which John Gamble details how the Third Amendment can be applied in cases concerning cybersecurity, but promptly announces that it is incredibly unlikely to be interpreted this way. He is right: using the Third Amendment in this way would require a fairly liberal interpretation, but when one considers that the purpose of the amendment is to ensure that the military cannot infringe on a civilian's privacy, it does not seem far fetched that the Third Amendment protects citizens from cyberattacks by the government, too.

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JURIS MENTEM

The Place For The Insanity Defense In The United States Criminal System

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THE PLACE FOR THE INSANITY DEFENSE IN THE UNITED STATES CRIMINAL SYSTEM

BY GRACE GOLD

Purpose

The purpose of this article is to understand the transformation of the insanity defense in American criminal law, and to connect the changes in the law to changes in public perception and public outcry.

History

The insanity defense has existed in some form since the beginning of formal legal systems. Old Roman law included a statute of non compos mentis, meaning 'not sound in one's mind.' However, the first true documented case law with the verdict of insanity was the M'Naghten Case. The case created the M'Naghten Rule, which assesses whether a defendant was inflicted by mental illness and unable to discern the nature, quality or wrongfulness of the act that they committed. This rule was used as the precedential foundation for many cases in the United States involving mental illness up until Durham v United States in 1953. Durham v. United States was a broad new precedent set by the American Law Institute (ALI) that read:

> *"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law".*

Many jurisdictions were quick to criticize this wide-sweeping new rule, pointing out that it could be used in a liberal manner to easily find defendants not guilty simply by reason of insanity and did not appropriately capture the 'unsound mind' aspect of the previous precedents. Thus, states split on the issue and began to implement only one of the two approaches based on whether they preferred a more conservative definition-the M'Naghten Rule-or a more liberal approach-the ALI Rule.

The reality of the insanity defense prior to 1982 was that the majority of state and federal courts allowed the defense of 'not guilty by reason of insanity.' In these cases, the prosecution bore the burden of proof, which was 'beyond a reasonable doubt.' This high burden of proof made it easier for defendants to avoid conviction, and afterwards, they would receive psychiatric treatment rather than be streamlined into the general prison population.

This all drastically changed on March 30,1981, when John Hinckley Jr. attempted to assassinate then-president Ronald Reagan. Hinckley, Jr. captivated the public's attention, claiming that his desire to kill the president stemmed from wanting to impress young actress Jodi Foster. After a very public trial, John Hinckley Jr. was found not guilty by reason of insanity. He was sent to a psychiatric hospital and remained there until 2016 when a judge deemed that he was no longer a danger to himself or the public.

Public Perception

The public was absolutely outraged; in polls taken the day after Hinckley's verdict, 83% of Americans believed that justice had not been served. Public perception was that the insanity defense was used far too frequently. It is essential to note that the insanity defense was not, in fact, a commonly used defense. It is

used in less than 1% of all felony cases and is only successful—that is, results in acquittal—15-20% of the time. The public commonly perceives that the insanity defense is utilized mostly in murder cases, leading to the stronger feeling that justice is not properly served for victims when the insanity defense is invoked. In actuality, less than one-third of cases that use the insanity defense are murder cases. It is also important to note that when a defendant receives a verdict of 'not guilty by reason of insanity,' that does not mean that they walk free. In many states, this means that instead of entering the traditional prison system , the defendant is sent to a psychiatric treatment center. In many cases, the duration of stay in these treatment centers equals or outweighs the time that would have been spent in prison.

Legislative Changes

Within three years, the United States Congress and many state legislatures passed sweeping legislation reform that constricted the use of the insanity defense and made it harder for the jury to find someone not guilty. In most states, the defense 'not guilty by reason of insanity' becomes an affirmative defense, meaning that it places the burden of proof on the defendant. Essentially, throughout the trial, the defendant would need to prove the presence of his or her mental impairment that prevented them from understanding their actions at the time of the crime.

Another important change that many states adopted was a verdict option of 'guilty but mentally ill,' which solely acknowledges that one may have been suffering from a mental illness but does not lessen the blame or sentence. In two states, the 'guilty but mentally ill' verdict completely replaced the insanity defense. New restrictions were also placed on what expert witnesses were allowed to testify to, constraining the knowledge and information jurors were allowed to obtain. In large part, these changes were the result of public

misconceptions. In fact, five states have altogether abolished the insanity defense. In Kahler v Kansas, United States Supreme Court ruled that Kansas's abolition of the insanity defense did not violate neither the Eighth nor the Fourteenth Amendment. This paves the way for more states to completely abolish the insanity defense.

Effect

Despite the fact that many public notions about the insanity defense are the result of misunderstandings, lack of knowledge, or misconceptions, popular opinion has grown increasingly more opposed to the insanity defense. It is certainly important to acknowledge retribution for the victims; however, this can be balanced with concerns about mental health for the defendants. This is more feasible than ever in 2020, as mental health awareness has become less stigmatized and mental health amongst the prison population has become a more prominent topic. It is important to amend and protect the insanity defense in an effort to keep those out of the general prison population who do not belong there. Further research on specific ways to amend these laws is necessary. Clearly, public perception and pressure works. It is time for it to finally be used to help protect and rehabilitate those who need it.

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JURIS MENTEM

Jury Nullification As A Tool For Abolition

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JURY NULLIFICATION AS A TOOL FOR ABOLITION

BY ABBY GRIFNO

Introduction

As I logged on to watch a virtual superior court hearing, I briefly read through the public records of the defendant whose case I would be watching. He had been tried—and convicted—of a homicide but was now attempting to gain a retrial on the basis of his counsel not bringing potential witnesses to testimony. His retrial was denied and it was agreed that his case wouldn't have changed if those witnesses were brought forward. Even worse, the prosecution had argued that if there were more witnesses it would have potentially confused the jury. While their points were valid, the issues presented made me wonder if the verdict could have been different if there was a retrial. The answer is yes: a new jury or new evidence could easily change everything. In fact, jury perception of a case matters far more than the validity or strength of any of the evidence presented. Bias affects everyone and jurors are no exception; it is impossible for jurors to just look at the facts.

In this paper, I argue that jurors have far more power than many realize, and this power can be used for abolitionist goals. I will first dive into the history of jury nullification and abolitionist principles before exploring how the two can be connected to create transformational change from within the criminal justice system.

Understanding Jury Nullification and Abolitionism

Jury nullification is a power that has been used for centuries, albeit by many different names, and it dates as far back as 17th-century England. When a case goes to trial, the verdict lies almost entirely with the jury, who not only gets to determine the guilt or innocence of a defendant, but also the validity of the law. As such, juries have tended to nullify in one of two scenarios: when they believe the law itself is unfair or when jurors feel empathy for a specific defendant. Jury nullification has been considered a potential tool for social justice for many years. Its power as a tool of societal influence was notably discussed in 1995 by Paul Butler as a way for African Americans to provide pushback against the traditionally racist criminal justice processes that have unduly targeted people in the Black community.

Butler radically described this as a way of dismantling the "master's house with the master's tools," but could not have necessarily foreseen the biggest problem with his strategy: Black people have continually and increasingly been excluded from juries, making it difficult for them to use jury nullification to their advantage as intended. An NPR report released in 2010 noted that the prosecution is given significant latitude when determining which jurors to strike, and their reasoning is rarely questioned. A more recent NPR study was even more grim, discussing in detail that Black people may also not serve in juries because they themselves are or were incarcerated (as felony charges can exclude an individual from ever serving on jury) or because the individual cannot afford missing work to attend the trial. Furthermore, while defendants are entitled to a jury of their peers, they are not entitled to a jury containing members of their own race (or any other specific identity category). While Butler certainly laid the groundwork for how jury nullification could be used to reclaim justice, and many scholars have continued to build upon it, the changing nature surrounding criminal justice

reform movements necessitates revisiting how the process can be utilized by current activists.

Actively encouraging jury nullification has been considered a double-edged sword in the past, and fear persists about the jury having too much power. For instance, many stand by the argument that judges are the ultimate experts on law and that a jury's only obligation is to confirm whether or not the law should be applied. A controversial instance of potential jury nullification (because jury nullification can rarely be confirmed) is the O.J. Simpson case, where many were shocked the jury found reasonable doubt in convicting Simpson and he was thus acquitted. Another oppositional argument to jury nullification is that it has the potential to be used for discriminatory acquittal, allowing racial or gender-based violence to go unpunished. This was particularly prevalent after emancipation, when violence against Black communities was common and obvious but many of the responsible perpetrators were never arrested, prosecuted, or convicted. A more recent instance of potential jury nullification was the acquittal of the police officers charged with beating Rodney King. Despite each of these instances in which jury nullification has not worked or has been hotly contested, it still remains true that it can be utilized as a tool for social justice initiatives when employed properly.

The final important scholarship to discuss is the relationship between jury nullification and criminal justice initiatives. Many scholars have discussed in great detail the problems within the United States' Criminal Justice System and mass incarceration, but I will focus on one particular scholar who has both outlined the history of mass incarceration and the principles of abolitionism that are widely supported today by those seeking large-scale change. Ruth Wilson Gilmore stated in The Golden Gulag, the United State's is heavily focused on the idea of incapacitation—instead of finding ways of supporting individuals who have committed crimes, our current criminal

justice system is focused almost entirely on separating criminals from the rest of society, often indefinitely. She discusses how prisons came to be a defining feature of the United States as a catch-all solution to economic and social issues and finally the necessity of abolitionist movements. She explains that as abolitionists, activists must have an end goal of completely uprooting the current prison industrial complex, as reforms that function within the system inevitably get swallowed up within the bureaucracy. In the next section, I will dive into how jury nullification can be an abolitionist tool that is particularly useful as movements like Black Lives Matter continue to gain traction on a country-wide scale.

Aiding the Abolitionist Movement Using Jury Nullification

The concept of jury nullification is foreign to many jurors and suppressed in many courts, but the actual legality is clear. According to the ACLU, discussion of jury nullification is protected under free speech so long as the motive isn't to influence a specific case. Furthermore, jurors cannot get in trouble for whatever verdict they reach and defendants found not guilty cannot get retried. Despite the clear legality of jury nullification and the lack of consequences for jurors who decide to nullify, the U.S. Supreme Court ruled that state courts and prosecutors do not need to inform jurors of the option. As noted earlier, jurors can be struck from the jury for any reason and at any point before the verdict is officially rendered. In courthouses where jury nullification is particularly frowned upon, knowledge of a juror open to the possibility of nullification can result in their removal from the jury; some organizations even advise jurors to not discuss the idea of nullification during deliberations.

Even before recent movements such as Black Lives Matter gained major traction, most Americans were strongly in favor of significant criminal justice reform. In the most recent study released by the ACLU, 91% of Americans believe the criminal

justice system needs reform and 71% say it is important to decrease the number of people in prison. Furthermore, in many states, laws regarding drug use are continually challenged by both organizations and individuals . If the laws won't change and evolve alongside the views of citizens, then jury nullification can fill this ever-growing gap between the courts and the people. Jury nullification is a perfect component of abolitionism; it transforms the court from the inside out and puts power directly into the people's hands.

Now, thanks to various movements against mass incarceration, society may finally be in a position to utilize jury nullification in significant ways. Knowledge surrounding the legality and possibility of using jury nullification should be continually pushed forward and supported in major movements so that more jurors can make informed decisions on not only the guilt or innocence of an individual but also the validity of the law. Drug abuse and sex work, for example, are two broad categories of crime whose defendants would be positively affected by jury nullification.

Drug Abuse

Drug laws are an obvious place for jurors to begin using their powers of nullification, and the use of this power could have a significant effect on mass incarceration. The number of people in prison for drug-related offenses has increased tenfold since the 1980s, according to The Sentencing Project. Furthermore, many drug laws are racially coded so that convictions for non-Caucasian defendants result in more severe sentencing. An example of this racial coding is the Drug Abuse Act of 1986, which created a higher penalty for crack cocaine (more popular among Black people) than powdered cocaine (more popular among white people). The overcriminalization of drug use also has devastating effects outside of increasing incarceration; it excludes people from job opportunities, separates families, and

rarely improves the conditions that led an individual to abusing or selling drugs in the first place. With studies proving time and time again that there is no relationship between increased prison time and reducing recidivism, it is simply illogical for so many states to continue to impose cruel and lengthy sentences for these charges. If lawmakers refuse to enact the dramatic changes necessary to improve the situation, jurors can rightfully step in. Utilizing jury nullification in every possible instance for non-violent drug offenses could allow defendants to seek treatment options, provide these defendants with tools to seek other forms of employment, and allow them to reap other community-wide benefits.

Sex Work

Despite the fact that the majority of those involved in sex work were trafficked into their position, prostitutes are consistently placed into prison with few other options,. Furthermore, many sex workers are immigrants with few connections and small or nonexistent support systems; once they are released from prison, they often return to their pimps, who are usually involved in large rings with significant protection and rarely, if ever, face legal repercussions for sex trafficking. If jury nullification were to be utilized in cases of sex work, it could prevent individuals for serving time for crimes that they were either forced to commit or turned to because they felt they had no alternatives. Furthermore, studies prove that legalizing sex work would protect the health and safety of workers and prevent trafficking. As with the case of drug laws, sex work laws are slow to change, but the use of jury nullification can send a message to the courts and help the community.

Conclusion

Jury nullification as a strategy has long held the attention of scholars across the country, but it has yet to gather mainstream

attention. Nevertheless, as movements for criminal justice reform gain traction, it is valuable to consider how everyday citizens can directly impact the livelihood of those on the stand. To encourage the use of jury nullification, movements should begin educating and promoting it as an abolitionist strategy. If it were to succeed, laws regarding sex work and drug use that fail to serve the community would become functionally obsolete, taking power back from the prison system and into the people's hands.

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JURIS MENTEM

Influence of The Media In The Modern Courtroom

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PUBLIC LIKES AND DISLIKES: INFLUENCE OF THE MEDIA IN THE MODERN COURTROOM

BY GAIA LETIZIA LODOVICI

Introduction

In a day and age where social media is a fundamental part of everybody's lives, it would be naive to overlook the impact of media on systems of justice. The criminal justice system seeks to provide fair proceedings, but that goal is becoming increasingly difficult to achieve when such proceedings are displayed and are subject of extensive commentary by the media. In the following paragraphs, I will analyze the effect of the media on courtroom decisions in the United States by scrutinizing three select cases in which public opinion and social media platforms played a significant role.

The media can exert undue influence on public opinion of high-profile trials, sometimes crafting narratives without having the full story, the facts of the crime, or insight into the inner workings of law enforcement.

History of Media Involvement

Predictably, the media first capitalized on the exciting, high-profile cases. The first televised criminal trial was that of Ted Bundy in 1979. Bundy's trial was particularly appealing to the media because Bundy was labeled a 'psychopath,' a diagnosis that only further fueled public interest. Furthermore, the media coverage of his trial gave him the opportunity to take his defense outside the courtroom and influence public perception, which, in

return, has a proven effect on jury outcome. Ted Bundy, and his "charming" way of co-counseling his defense, was able to influence public perception to the point of developing a "fandom" of young women all over the country. Despite his conviction, Bundy's case was revolutionary for criminal courts all over the United States, as television coverage of criminal trials started to become ordinary for high-coverage cases.

The streaming of criminal proceedings after Bundy's trial, however, was still not as widespread as we know it to be today. Public interest began to spike again with the famous case of O.J. Simpson. Because cameras were allowed in the courtroom, yet again, a certain narrative was spread through the media. Contrary to Bundy's case, Simpson's trial media coverage was shaped around racial issues, as Los Angeles in 1992 was experiencing protests and riots advocating for racial equality. Due to the media coverage, which resulted in the confluence of Simpson's alleged wrongdoings with those of the LAPD, as well as Simpson's status as a former star athlete, the trial resulted in an acquittal and is now one of the prime examples of the power of public opinion in the courtroom.

The Impact of Imaging

Differing portrayals of defendants by the media can also cause vastly different outcomes. One example of a skilled portrayal of the defendant is the case of Brock Turner, a white Stanford University swimmer who was sentenced to six months in jail for sexually assaulting an unconscious woman. During the same month, African-American Vanderbilt University football player Cory Batey was convicted of aggravated rape and sentenced to 15 years in federal prison Brock Turner's photograph on various news outlets showed him in a suit, accompanied by his family; Cory Batey's image, on the other hand, showed him in a prison suit and handcuffs. It is clear that these two images portray two different "types" of men, with one meant to appear

considerably more dangerous than the other. These two cases are not an isolated incidents, as the media has always consistently reported criminals of different races in different ways and continues to do so today.

Implications

The cases of Bundy, Simpson, and others are famous examples of how the media has shaped a narrative that resulted in a consequent reaction in court. It is important to note, however, that this behavior has evolved throughout the years and can be a hidden cause of injustice, even in cases we don't frequently hear about or that have not dominated the headlines for decades. Much of the effect of social media on public perception is achieved through "framing," which can be defined as "the packaging of criminal events in the media into tidy representations that make the sharing of information easy". Another method of packaging stories is the infotainment model, or "the marketing of a highly edited and distorted combination of entertainment and information pupated to be truthful and comprehensive".The infotainment phenomenon becomes dangerous when considering that much (if not most) of what the public knows about crimes is derived straight from the media, which gives reporters and journalists the opportunity to carefully craft stories in order to sway public opinion.

Repercussions of media influence on trials and other public forums have been examined in a 2010 study entitled "Measuring Media Influences on U.S. State Courts," which surveyed more than 1,000 judicial districts in the nation and collected data from newspaper coverage of 10,000 state trial court judges. The authors found that "presence of active press coverage magnifies the influence of voters' penal preferences on criminal sentencing decisions", and that this is especially true when talking about violent crimes. In other words, media coverage of trials extends beyond the courtroom and onto the ballots; voters

tend to vote more harshly after witnessing extensive coverage of criminal trials.

Conclusion

The Bundy's and O.J. 's trials are a perfect example of how much media in the courtroom actually shapes the narrative around the trial and, more specifically, the defendant. It is possible, if not probable at least for the O.J. trial, that if media coverage was absent, trial results would have been much different. How ethical is it to let the media govern public perception of defendants? We see how dangerous it can be when class and racial bias shape the conversation around a defendant, such as with Turner and Batey. One could consequently assume that framing and infotainment now present a threat to many defendants' Sixth Amendment rights to a fair trial and their Fourth Amendment rights to privacy. At the same time, however, removing media presence from the courtroom has not been considered constitutional violation since 1980 with Chandler v. Florida, a Supreme Court decision. On the other hand, it is important to note that at the time of the Chandler v. Florida decision, regulations for cameras in the courtroom were much stricter and the negative potential of this decision was probably unknown, as no one could have predicted the evolution of media as we know it today.

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JURIS MENTEM

Clarifying Mens Rea In The U.S. Criminal Justice System

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CLARIFYING MENS REA IN THE U.S. CRIMINAL JUSTICE SYSTEM: WHAT TACTICS HAVE BEEN EFFECTIVE IN PROVING THE PRESENCE OF MENS REA AND WHAT TACTICS HAVE FAILED?

BY SHANNON MULREED

Introduction

Mens rea, the Latin term for "guilty mind," is a staple in the United States criminal justice system that must be proven in order to obtain a conviction. Its presence in the system has raised many questions due to the ambiguity of when it is necessary and how it is dictated. Its purpose is to prove that the defendant has intentionally committed the criminal act with which they are charged, but it can be difficult to prove whether or not a person knowingly committed a criminal act; sometimes, there is no concrete evidence to prove the presence of the so-called 'guilty mind.' Mens rea is countered by strict liability offenses, which apply when a defendant is considered liable for a criminal act without regard to their mental state or awareness. Because of these contradicting arguments, the question of whether or not mens rea is necessary in certain convictions becomes unclear.

Key Supreme Court Cases Regarding Mens Rea In 2004, Christopher Dean was convicted in federal district court for a bank robbery. During the robbery, Dean took money from the teller drawer with one hand while the other hand seemed to

accidentally fire the pistol. No one was harmed by the shot. Four years later, the Supreme Court case Dean v. The United States debated the question of whether a 10-year minimum sentence under federal law applies to a defendant who accidentally fires a gun during a violent crime. In other words, the question is whether prosecutors have to prove that the shot fired during a violent crime was not accidental in order for the 10-year minimum to apply. In this case, the United States argued that this minimum is an enhancement statute and therefore criminal intent does not need to be proven. Ultimately, the Supreme Court sided with the United States in the decision that proof of mens rea was not necessary in order for the enhancement statute of the 10-year minimum sentence to apply if a firearm is discharged during a violent crime.

In the 2009 case Flores-Figueroa v. United States, the Petitioner was an illegal immigrant who used a fake Social Security Number in order to obtain employment. The Supreme Court decided that using a Social Security Number belonging to another person, which Flores-Figueroa did, is not sufficient enough to prove that the Petitioner knew that the Social Security Number they used belonged to someone else. Therefore, in this decision, the Supreme Court confirmed the requirement of mens rea for the enhancement statute to apply.

The 2013 case Rosemond v. United States dealt with petitioner Rosemond, who was involved in a drug trafficking offense where he and another man, Ronald Joseph, met Ricardo Gonzalez. Gonzalez fled the scene without paying for the drugs and Joseph fired a gun at Gonzalez. The Supreme Court scrutinized whether Rosemond had knowledge that Joseph would discharge the firearm, and whether this knowledge, especially in a drug trafficking offense, is required in order for Rosemond to be convicted. The Supreme Court decided that a conviction requires proof that the defendant, while aiding or abetting another, has

prior knowledge or mutual intent that the person they are aiding planned on using a gun.

Finally, Elonis v. United States in 2015 focused on whether the intent to threaten is necessary for a conviction, because in this case, the petitioner argued that he did not intend to threaten the petitioner in a literal sense. The defendant in this case had made several social media posts in which he threatened to kill his ex-wife, but the posts were accompanied by a disclaimer that the statement was not a threat in a literal sense. The Supreme Court decided that mens rea was required in order to be convicted.

Clearing the Ambiguity Surrounding Mens Rea

As one can see, the requirement of mens rea and its application in the criminal justice system is inconsistent and unclear. Due to this sense of ambiguity, Senator Orin Hatch introduced the Mens Rea Reform Act of 2015; later that year, Representative James Sensenbrenner introduced the Criminal Code Improvement Act of 2015. Both introduced legislation that aimed to clarify and create a federally uniform mens rea standard, making it a default required element in convictions. A clearer outline for the applicability of mens rea would seemingly make for a more just system. However, critics argue that this approach of reform would provide a greater opportunity for elite corporate actors to avoid prosecution in white- collar crimes by invoking mens rea as a defense. Both of the previously mentioned pieces of legislation were rejected due to their proposed requirement of willfulness to be proven, which means that the actor specifically knew that their actions were unlawful; this requirement has also earned public criticism from the United States Department of Justice.

Due to the ambiguity of mens rea, and the difficulty that legislators have faced when attempting to rectify this ambiguity, it is difficult to know what the future of mens rea looks like. The

question is whether reform in legislation to form a federal mens rea standard will actually create a more just system, or whether this creation will merely protect elite corporate actors from deserved prosecution.

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JURIS MENTEM

Reicherttimbs v. Indiana: A Step Towards Ending Unjust Forfeitures

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TIMBS V. INDIANA: A STEP TOWARDS ENDING UNJUST FORFEITURES

BY GRAHAM PAYNE-REICHERT

The United States Constitution guarantees certain inalienable rights that many Americans may take for granted. However, state courts often have very different interpretations of what some of these rights truly mean, allowing some of them to go by the wayside until fully incorporated to all the states by the United States Supreme Court. Last year, the Supreme Court gave a breath of life to the Eighth Amendment, specifically its clause forbidding "excessive fines." This case, Timbs v. Indiana, establishes a precedent that controls a practice that has been ramping up in recent decades: civil forfeiture.

In order to understand the importance of the Timbs case, it is crucial to know exactly what is meant by civil forfeiture. In general, it is when law enforcement officers take assets from persons suspected of involvement with criminal activity without necessarily charging the owner with a crime. This is different from criminal forfeiture, in which an individual must be charged with a crime, or the property was obtained through illegal means. Criminal forfeiture has a higher standard for proving the connection to criminal activity than civil forfeiture, which, until this Supreme Court decision, was very scantily regulated. But what legal reason is there for these two seizures to be so different?

The key difference is that when the government seizes property through civil forfeiture, it does so by filing an action "in rem" or "against a thing." This means that the government is actually filing a civil lawsuit against the object being seized. This lends itself to almost comical case names, such as 62 Cases of Jam v. United States. Because of the civil nature of these cases, the owners often do not enjoy the same rights as a criminal case, and the burden of proof is far lower, allowing the government to seize whatever they want, so long as a tenuous connection to crime can be made.

Civil forfeiture has been a legal action since the Revolutionary War, but it saw a huge expansion under the War on Drugs. One law in particular was responsible for a tremendous increase in this practice. The Comprehensive Crime Control Act of 1984 granted the government the right to seize property, instead of being limited to just seizing money. However, the bigger issue with this law was the establishment of the Asset Forfeiture Fund. Prior to this fund, assets seized had to be given to the federal government. After this law, however, the law enforcement agency that seized the property has the right to keep the funds for "certain general investigative purposes." This allows law enforcement agencies to seize property from innocent people, sell it, and keep the funds for themselves, which is what happens in virtually all civil forfeiture cases following the establishment of this Fund. Overall, this law establishes a direct incentive for police to seize as much as they can. During the first year the Asset Forfeiture Fund was in place, law enforcement agencies seized $93.7 million in assets and property. By 2014, that number was up to $4.5 billion, clearly showing an incentive being capitalized on by law enforcement agencies across the nation.

There are far too many cases of this power being abused. Take Terry Rolin, for example. In 2019, Terry's daughter, Rebecca Brown, visited him in his home in Pittsburgh. During the visit he gave her $80,000 from his life savings. She was to take

this money back to her home in Boston, where she would set up a bank account for him, allowing her to help manage his retirement funds. However, the money never got to Boston. At the airport, the money was seized by a DEA agent, and the Rolin's later discovered that they were keeping the money through civil forfeiture. Neither Terry nor Rebecca committed a crime. It is perfectly legal to fly with any amount of money. Furthermore, the money itself was not involved in crime in any way, yet the government seized it.

Tyson Timbs, similarly, faced an abuse of civil forfeiture that he eventually took all the way to the Supreme Court. After his grandfather died, Timbs came into a large sum of money. With that money, he bought a $42,000 Land Rover, and spent the rest of the money on heroin and opioids that he was addicted to. Strapped for cash, Timbs, at the advice of a police informant, sold drugs twice. Both times were to undercover officers, leading to his arrest. However, the police also seized his Land Rover. After Indiana's Supreme Court refused to reverse the action, Timbs' case was granted certiorari to the United States Supreme Court, where a decision was made in 2019.

First, however, the legal history of the Excessive Fines Clause must be understood. One case in particular paved the way for this decision: Austin v United States (1993). In a unanimous decision, the Supreme Court ruled that civil forfeiture does fall under the Eighth Amendment because the forfeitures serve as punishment for the crime. This is a very important legal precedent that is used in the Timbs case.

The Supreme Court upheld the trial court's decision that, because "Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessed against him for his drug conviction. . . the vehicle forfeiture. . . would be grossly disproportionate to the gravity of Timb's offense, and therefore unconstitutional under the Eighth Amendment's

Excessive Fines Clause." This clearly builds off the precedent established in Austin that civil forfeitures are seen as punishments, and thus must fit the crime. Additionally, this case is very important because it finally incorporates the Excessive Fines Clause to all of the states under the Fourteenth Amendment's Due Process requirement.

Overall, this is a huge blow to the practice of civil forfeiture, and potentially a step towards its end. However, more precedent is needed to fully end this practice. Regardless, Timbs incorporated the Eighth Amendment to all the States, and now law enforcement agencies must consider the fines associated with the crime before seizing property.

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JURIS MENTEM

Ideological Indoctrination Through Sexual Frustration

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IDEOLOGICAL INDOCTRINATION THROUGH SEXUAL FRUSTRATION: SHOULD INVOLUNTARY CELIBATES BE CHARGED WITH DOMESTIC TERRORISM?

BY RACHEL RUBIN

Introduction

The unparalleled ability of the Internet to gather like-minded people has led to the rise of the Men's Rights Movement (MRM) in recent years, a counterculture to the feminist groups that have awarded women progress, agency, and opportunity in strides. This online subculture is a fractured amalgamation of Reddit threads, Facebook groups, and other forums, all of which cater towards heterosexual adult males who have gone prolonged periods of time without female romantic partners.1 Many of these men express anger and frustration towards women, whom they believe are direct antagonists to their ultimate pursuit of sexual relations; hence, these men label themselves Constitution unless clear intent to commit an unlawful act is expressed repeatedly, and even then, the ease of anonymous communication in the Internet shields many of these offenders from identification.3

Incel ideology has seeped into public view through a series of perpetrated attacks on women in recent years, carried out proudly by self-declared incels. Canada has chosen to charge

several of these violent attackers with domestic terrorism, rather than mere Murder in the First Degree (which includes acts carried out in furtherance of terrorism).4 By exploring differing perceptions and legal nuances of two distinct incel-motivated attacks—one in which prosecutors opted for the charge of domestic terrorism and one in which they did not—this paper seeks to answer the essential question of whether we can truly apply traditional counterterrorism frameworks to the national security threat of incel attacks—and whether we should.

The Toronto Machete Attack

In 2018, the defendant, whose name is protected involuntary celibates, or incels.2 While the incel under the Youth Criminal Justice Act, killed one movement largely exists on the fringes of mainstream Internet activity, its discourse runs deep and dangerous. Many of the discussion threads contain violent, vulgar, or profoundly misogynistic content; however, these discussion threads, by themselves, are not considered criminal. However demeaning or offensive, Internet speech is protected under the First Amendment of the United States woman and injured another at a Toronto massage parlor.5 Originally charged with first degree murder and attempted murder, federal and provincial Attorneys General later agreed to prosecute the crime as an act of terrorism.6 The decision marks the first time Canada has chosen to levy the charge of terrorism against a crime not related to Islamic extremism, sparking a global discussion about whether radicalized and misogynistic violence is truly a national security threat.7

The incel movement draws obvious parallels to traditional extremist organizations: targeting vulnerable young men on the outer edges of social circles, enticing them with promises of glory and immortal fame among the incel community for committing violent attacks, and encouraging mentally unstable members to commit suicide—but not before taking others out with them.8

Jagger (2005) determined that acts of violence can be rendered terrorism in the instances where personal prejudices about particular groups are used to fuel violence against those groups. Based on the work of Jagger and others, Canada has agreed that this hatred and prejudice does indeed function as a critical premise for acts of mass violence, redefining terrorism in Section 83.01 of their Criminal Code as follows:

> *"…an act committed in whole or in part for a political, religious, or ideological cause, with the intention of intimidating the public…"*

In addition to utilizing the domestic terrorism charge, Canadian law enforcement has also invoked the Canadian Anti-Terrorism Act in this particular case, stating that this crime "constitutes a substantial threat to domestic security.9" The invocation of these two pieces of legislation would suggest that a new precedent has been set for incel- related charges, proving to the public that legal authorities, at least in Canada, consider the incel community and its violent, hateful subsidiaries a serious safety concern.

The New Sudbury Knife Attack

Despite this aforementioned precedent, later incel-motivated attackers have only been charged with murder or attempted murder. In 2019, after the Toronto parlor attack, Alexander Stavropoulos stabbed a random woman and her child in a public parking lot in New Sudbury, Ontario, to demonstrate his anger and frustration from many years of sexual and romantic rejection.10 Stavropoulos openly admitted to authorities that he belonged to the incel movement and that his attack was motivated by his hatred for women, but Canadian authorities opted to charge him only with two counts of attempted murder, although they did discuss the potential of invoking Canada's anti-terrorism legislation.11 This raises the question of why prosecutors did not follow suit from the previous case; the only

clear difference is that in the Toronto parlor attack, the victim passed away, whereas the mother and her child in New Sudbury were able to be saved at a local hospital. This difference—whether or not the defendant actually succeeds in murder—has sparked decades of contentious debate about whether legal punishments should differ for the two crimes if the intent remains the same; nevertheless, Stavropoulos' charge implies that domestic terrorism is typically easier to prove if murder is involved, emulating the traditional image of 'terrorist attacks' that a jury might imagine, whereas the charge of terrorism feels outsized, at least to a jury, for a singular failed murder attempt.

Implications

The following questions still remain unanswered: what potential cultural impact, if any, does the label of domestic terrorism have on the incel movement and the public, as opposed to the charge of Murder in the First Degree? Does the United States stand to benefit from following Canada's lead? However unfortunate, it remains an undeniable truth that hateful, insular groups on the Internet are here to stay and will only proliferate in the future. Thus, Canadian law enforcement has chosen to get ahead of the issue by setting a strong, no-nonsense precedent, conveying to all of these groups that incel-motivated attacks are approached with grave seriousness. However, the trial for the unnamed Torontonian defendant has not yet commenced, so it will be critical to observe whether the alleged 'glory' and elevated status from 'convicted murderer' to 'convicted terrorist' further motivates violent incels to carry out more attacks in the future. Ultimately, no law or legislation can prevent the rapid multiplication of bigoted, angry Internet users or the rapid coalescence of these users into powerful underground groups, but Canada has demonstrated that not terrorism is not necessarily only synonymous with fervent religiosity; any threat to a targeted group within the country— women, in this case—is a threat to the security of the entire country.

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JURIS MENTEM

Indigent Defense and The Case of Luis v. United States

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INDIGENT DEFENSE AND THE CASE OF LUIS v. UNITED STATES

BY JAMIE TELL

Introduction

The Sixth Amendment of the Constitution provided Americans with the right to legal counsel; prior to this, legal representation was only available to those who could afford to pay for it. However, this right slowly became reality throughout the 20th century and was not fully realized until the Supreme Court issued rulings regarding due process rights. Even after the first indigent defense office was established in 1913 in Los Angeles County, issues with the system have persisted that have left politicians and the public questioning its effectiveness and whether Americans who utilize the system are truly represented fairly in court. By examining the recent Supreme Court case of Luis v. United States, the issues of the modern indigent defense system can be explored.

In Luis v. United States, the petitioner, Sila Luis, had been allegedly involved in propagating Medicaid fraud in which patients in her home healthcare company received kickbacks in return for their enrollment. The federal government has the ability to file a pretrial motion to restrict the assets of defendants who have allegedly committed fraud, and they exercised this ability in Luis's case. Luis opposed the motion, as she believed she should be able to access her assets to pay for the legal representation of her choice. In essence, her argument was that the motion would violate her Sixth Amendment right to legal counsel.

While this case does not directly relate to the public defender system in the United States, the opinions of the Justices on the Supreme Court give insight into the current state of this system and whether it is truly fulfilling its purpose of giving defendants, who are deemed indigent, access to quality legal representation. The case will be used as a lens for exploring the indigent defense system and the issues that have plagued its operation for years.

Purpose of Indigent Defense

The public defender system was created and expanded throughout the twentieth century to benefit indigent defendants who otherwise would not be able to afford legal services. The qualifications for a defendant to be deemed indigent are different in each state. However, generally, indigent defendants have "few assets and no funds to pay for a lawyer," according to the American Bar Association. When this situation occurs, there are several ways that the justice system deals with providing legal services. One option, previously referenced above as the "public defender system" or "indigent defense system," is to allocate a public defender from the county to handle the case. These lawyers represent a wide range of indigent defendants in their court proceedings. Another option is to assign the defendant a private attorney appointed by the court. The substantial difference between these two groups is that public defenders are salaried government employees who represent indigent defendants full time, whereas "assigned counsel are typically private attorneys who, subject to standards set within their county, can select onto a panel of attorneys available to represent indigent defendants." Overall, indigent defendants have few options for legal representation, and they have no say when it comes to which specific attorney from the system ultimately represents them.

Especially in recent years, discussion has been more prominent, and more publicized, about the failures of the indigent defense system and issues that public defenders in the United States face constantly. The United States, despite constituting less than 5 percent of the global population, accounts for about 25 percent of the prison population worldwide. The existing structural and resource-related problems faced by public defense offices across the country are only made more drastic by the fact that, according to estimates by the Justice Department, "60 to 90 percent of criminal defendants nationwide cannot afford their own attorneys and that in 2007, U.S. public defender offices received more than 5.5 million cases." These statistics demonstrate the troubling reality that public defenders are representing the majority of defendants in the United States while facing underfunding and increased caseloads.

Examining Luis v. United States

In Justice Breyer's majority opinion, he ruled that the Sixth Amendment of the Constitution prohibits the withholding of assets that are considered untainted by the alleged criminal activity in this case. Furthermore, given that a defendant is considered innocent until found guilty, any of the assets and funds available to a defendant could, in reality, be untainted if they are eventually found not guilty of the crime. Along with this holding, Justice Breyer also expressed the importance of the availability of these funds because they allow defendants to pay for the representation of their choice and avoid being deemed indigent. In fact, Breyer stated that, if the funds were not available, these defendants "would fall back upon publicly paid counsel, including overworked and underpaid public defenders." Moreover, Breyer reminds the court that the Department of Justice has found that only approximately "27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards" and adding to this caseload by denying defendants the ability to access

untainted funds in these specific fraud cases would result in an even greater caseload. Thus, Justice Breyer concluded that this result would "render less effective the basic right the Sixth Amendment seeks to protect." In effect, the opinion of the Court seems to come close to suggesting that the system of public defender offices are in a state where they are no longer able to fulfill their role in protecting the rights of indigent defendants.

Failings of the Current System

Upon first glance at the state of public defenders in the United States, there are several ideas propagated by legal scholars that could lessen the caseload for these offices and ensure that all Americans have access to effective legal counsel. One potential solution is decriminalization of a variety of misdemeanors, as "public defender caseloads are currently over-inflated with low-level, non-violent crimes." Ideal crimes for this potential change would be offenses relating to marijuana use and traffic laws. Drug-related offenses, in particular, are frequent and tend to plague communities that utilize the services of public defenders; they are more common for public defenders than any other type of case. Once an individual is involved in the criminal justice system and stripped of their freedom and the ability to work while they are incarcerated, there is a higher likelihood that they will remain in, or re-enter, the system in the future.

Another potential solution is increased budgets for public defender offices. This solution has substantial barriers because it relies on politicians and public officials deciding to redirect these funds from other areas. Usually, elected officials seem to prefer to direct money towards the well-funded District Attorney offices and to law enforcement in an effort to show their constituents the importance of law and order. The indigent defense system seems to take a secondary place to these other roles. However, a way to positively impact the overload of cases given to public defenders, and a third potential solution, is the redirection of funds to social

services that would prevent individuals from offending in the first place. Many in the criminal justice system struggle with homelessness, mental health issues and poverty, which all contribute to the likelihood of an individual becoming involved with the system.

The challenges that public defender offices across the United States face are immense. High turnover rates of attorneys, low salaries and overwhelming caseloads all contribute to a sentiment of many Americans and seemingly some Supreme Court justices that public defenders are not able to effectively represent all of their clients and guarantee the rights affirmed in the Constitution. In the case of Luis v. United States, Justice Breyer walks a thin line of suggesting that the current system of indigent defense is insufficient to guarantee the right to due process for all Americans. Therefore, a variety of reforms can be considered to remedy the current situation of the indigent defense system. These reforms would allow all Americans access to effective legal counsel, as well as allow for a more just and equitable criminal justice system.

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JURIS MENTEM

Madison v. Alabama and Its Implications For The Death Penalty

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IN SICKNESS AND IN HEALTH: MADISON v. ALABAMA AND ITS IMPLICATIONS FOR THE DEATH PENALTY

BY LAUREN WINKLEBACK

Introduction

The death penalty is one of the most contested issues in American legal culture, and it has a long and sordid history in the courtroom. The Supreme Court's ruling in Madison v. Alabama held that while the Eighth Amendment to the U.S. Constitution does not prohibit the execution of a prisoner who cannot recall committing his crime, it is unconstitutional to execute a prisoner who does not understand the rationale behind his execution, whether that be due to psychosis or dementia. The majority opinion, issued by Justice Kagan, stated that the defendant would have to understand why exactly he was being executed. This paper examines how Madison v. Alabama has influenced death penalty case law in the United States and how it serves as precedent for future cases regarding defendants who, due to psychosis or dementia, may not understand why they are to be executed. I will also analyze the reasoning behind the Madison v. Alabama decision and the possible implications for future legislation.

Discussion of Prior Law

Prior death penalty cases dealing in dementia that have reached the U.S. The Supreme Court has laid the foundation for Madison v. Alabama case, and it is essential to understand these

prior cases in order to fully examine the Madison v. Alabama decision. First, in Ford v. Wainwright, the Court held that the Eighth Amendment prohibits the execution of a defendant who has lost his sanity after being sentenced to death. In other words, the conclusion was that execution of the criminal in question is inhumane if they do not fully remember their actions or understand the consequences. The Court also noted that there is little to no retributive value in executing someone who does not understand why they are being killed, which brings little peace to relatives and is not truly establishing justice.

Next, in Panetti v. Quarterman, the Court determined more specific criteria used to identify inmates who are not eligible for execution. This was also the first time that the Court raised the critical question of whether the inmate should understand the reason behind his own imminent execution.

Madison v. Alabama: The Facts

Vernon Madison suffered vascular dementia as a result of multiple strokes that left him legally blind, incontinent, struggling to walk, experiencing slurred speech and, most importantly, with no recollection of his crime that landed him on death row. Madison was charged with murdering a Mobile, Alabama police officer in 1985, but his first trial was overturned after a review of the case discovered racial discrimination in the jury process that intentionally excluded Black individuals. His second trial resulted in a conviction and a death row sentence, although this decision was also eventually overturned in light of racial discrimination in the jury selection process. His third trial ended in yet another conviction, but jurors sentenced Madison to life without parole in lieu of the death penalty. However, an elected trial judge overrode the decision and imposed a death sentence.

Madison had experienced mental illness throughout his life, but grew increasingly confused and disoriented, eventually informing his lawyers he no longer remembered his crime, thereby raising concerns regarding his competency and mental fitness. Medical experts concluded that his vascular dementia resulted from several strokes that occurred in 2015 after he had been held in solitary confinement on death row for upwards of 30 years. As Madison was being scheduled for his execution in 2016, a federal appeals court held that he was incompetent and thus could not be executed due to his lack of a rational understanding regarding his crime.The Eleventh Circuit had held that executing a defendant suffering from dementia would be considered cruel and unusual punishment, violating the Eighth Amendment. But the Supreme Court overturned this decision in 2017, concluding that a federal court is not, during a habeas corpus proceeding, allowed to make a decision regarding the unsolved issue about whether executing a person with dementia violates the Eighth Amendment. Furthermore, the expert who determined that Madison was mentally competent and fit for execution was discovered to have been abusing narcotics during his evaluation and was arrested on felony drug charges shortly after Madison's competency hearing; his medical license was revoked and the validity of his determination was called into question.

Madison v. Alabama: Holding

The court held that defendants with dementia, or defendants, do not understand the rationale behind their death sentence, are barred from execution under the Eighth Amendment. The court argued that under Ford and Panetti, the Eighth Amendment does permit the court to execute a defendant, even if he does not remember physically committing the crime. Ford and Panetti only regard a defendant's comprehension of the reasoning behind his punishment, not the actual memory of committing the crime, and one may certainly exist without the other. However, the court argued that the memory loss

experienced by the defendant can still factor into the analysis demanded by the Panetti standard, which requires that the memory loss is combined with other mental challenges or shortcomings that deprive the defendant of the ability to understand why the court has sentenced them to death. Ford and Panetti, in other words, focuses on the defendant's lack of comprehension regarding why he has been sentenced to death and determines whether this lack of comprehension is actually present, regardless of the disease that is causing it. Thus, judges must look beyond a clinical diagnosis when evaluating competency and determining a proper sentence. The Supreme Court was uncertain as to whether Alabama's holding was legally errored and the case was remanded to the court for another test of Madison's competency. Alabama's initial ruling simply stated that he did not demonstrate reaching the threshold of insanity, but this ruling does not necessarily ensure the court knew that a person with dementia, but without psychosis, could receive a stay of execution.The primary question in this case, and what determines Madison's competency, was whether he could reach a rational conclusion and understanding of why Alabama intended to execute him, and the Court argued that Alabama could not have relied on arguments and evidence tainted by legal error to reach their decision. Thus, the judgment of the Alabama court was ultimately vacated.

Madison v. Alabama: Reasoning and Analysis

Madison's case differs from prior cases that have overturned execution on the grounds of mental illness or lack of understanding of one's own execution. The petitioners in Ford and Panetti suffered from extensive and significant psychotic delusions, whereas Madison suffered from dementia, but lacked psychosis and delusions. In Panetti, the defendant experienced significant delusions, but Madison did not suffer from these, and the Alabama state court argued that since he was not psychotic or delusional, his memory impairment and dementia diagnosis

could satisfy the standards implemented in Ford and Panetti without an expansion of those decisions.

However, in February of 2019, the Court determined that it is possible for a person to be too mentally incapacitated for execution, even if they do not experience psychotic delusions. The analysis lies not in the mental illness suffered by the inmate, but rather in their ability to rationally understand why they are being executed. It is a violation of the Eighth Amendment, this determination says, and is cruel and unusual punishment to execute someone who cannot rationally understand their punishment and does not serve a retributive purpose.

Implications

Madison v. Alabama is particularly noteworthy because of the composition of justices who joined in on the majority opinion. Four Supreme Court justices who typically vote liberally were in favor of Madison, but Chief Justice Roberts, a notorious swing vote who votes more conservatively, also sided in favor of Madison.

Death row itself is aging and our standards and requirements for execution are unworkable. According to the Death Penalty Information Center, 1,200 of the 2,800 prisoners on death row are over the age of 50. While age itself is not enough to arouse constitutional concerns, the illnesses that accompany aging certainly warrant consideration. Common health issues and mental disorders such as dementia should absolutely be the concern of the courts. Justice Breyer noted once that "[T]here are many, many, many prisoners on death row under threat of execution who are in their 40s, 50s, 60s, 70s, possibly 80s, who have been there for 20, 30, 40 years perhaps. So this will become a more common problem." Our current standard of competency requires that the prisoner must have a rational understanding of what crime he committed and what the punishment is. But the

court has specified that the standard for execution is not entirely precise and has argued that a rational understanding extends beyond simply an awareness and an amoral character. These specifications still lack concreteness and are highly vague, especially when applied to cases that do not choose to invoke the insanity defense. While this standard of competency is certainly progress in terms of reducing the number of prisoners eligible for the death penalty, it is still highly unclear. There are better and more precise measures used to determine competency, such as the one established by the ABA in 2006. This measure uses a three-part test, the third part of which addresses the development of mental disorders and disabilities after sentencing. The test also provides more much-needed description and context regarding competency. This was an excellent opportunity for the court to expand the test to conditions such as dementia, but it failed to do so and cases like Madison's will only become increasingly prevalent as those on death row continue to age.

Conclusion

Madison v. Alabama has solidified unclear definitions regarding what it means for an inmate to be competent and have a rational understanding of their crime and their designated punishment. The case also answers critical questions that have previously remained unanswered, such as whether it is constitutional to execute a prisoner who does not remember committing his or her crime. With Justice Ginsburg's passing and the possibility of her seat on the court being filled before the election by a conservative judge, the Supreme Court could begin to rule against the defendants more frequently. Madison v. Alabama sparks important conversations regarding the mental decline and limitations on cognition, especially as death row inmates age. This issue will only become more and more prevalent and we must establish a clear standard and legal precedent to provide a basis for future death penalty cases.

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JURIS MENTEM

Education Law: Individuals With Disabilities Act

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EDUCATION LAW: INDIVIDUALS WITH DISABILITIES ACT

BY PRANJAL CHANDRA

Introduction

Approximately 61 million Americans have a physical disability and another 6.5 million have an intellectual disability in this country.1 Every single day those with intellectual and physical disabilities face difficulties and challenges that the common man may find more routine or simple. A lot of these common tasks that individuals do every day are not necessarily easy for these individuals to accomplish, but they are resilient and have had to adapt over time. However, not everyone has been with or had to deal with on a day to day level the challenges of having a physical or intellectual disability. This includes our policymakers at the highest level as well. There have however historically been some major policy initiatives regarding those with physical and intellectual disabilities. The Individuals with Disabilities Education Act (IDEA) is a four-part piece of American legislation that ensures students with a disability are provided with Free Appropriate Public Education that is tailored to their individual needs.

The main function of this act is that, according to the website, "provide early intervention, special education, and related services to more than 6.5 million eligible infants, toddlers, children, and youth with disabilities." In 2018-19, the number of students ages 3-21 who received special education services under the Individuals with Disabilities Education Act (IDEA) was 7.1 million, or 14 percent of all public school students.2

Legal and Political History of Passing IDEA

Going all the way back to May of 1954, Brown v. Board of Education decided that it was unconstitutional for educational institutions to segregate children by race. This legal ruling would have far-reaching implications for the special education arena. Eleven years later, The Elementary and Secondary Education Act (ESEA) was signed by Lyndon B. Johnson as part of the "War on Poverty.3" ESEA not only called for equal access to education for all students, but also federal funding for both primary and secondary education for students disadvantaged by poverty. Six years later, there was a case called Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania in which students with disabilities were to be placed in publicly funded school settings. This was a win for the disability movement as it furthered the notion to treat students with disabilities the same and put them in public schools with other students. However, because of this ruling, congress set out to find out how many students were being underserved even though they were supposed to be treated equally.

According to the Bureau of Education for the Handicapped, only 3.9/8 million were receiving their adequate educational needs and 1.75 million were not in school.4 This was a massive problem that Gerald Ford took under his command. He signed the Education for All Handicapped Children Act. This allowed for states to receive federal funding for children with disabilities. The key legal issue here was that states had the responsibility to ensure compliance under the law within all of their public school systems. Eleven months later, there was an amendment to the All Handicapped Children Act in which it was mandated that individual states provided services to families with children with disabilities when they are born. The key difference is that previously these services were not available until a child reached age three, which is extremely problematic as it could hinder the growth and development of certain babies. President

Reagan signed the Handicapped Children's Protection Act which allowed for parents of children with disabilities more say in the development of their child's Individual Education Plan.

In 1990, a law was created that added traumatic brain injury and autism as new disability categories and then mandated that as a part of a student's IEP, an individual transition plan must be developed to help the student transition to post-secondary life. This was important, as while it did not always create success for these individuals, it allowed and set them up as an opportunity to grow after they received education K-12. In 1997, President Clinton reauthorized IDEA and the key this time around was to allow for states to be given the authority to expand the "developmental delay" definition from birth through five years of age to also include students between the ages of six and nine. The final amendment to IDEA was in December of 2004 when congress passed a law that stated that local school districts shift up to 15 percent of their special education funds toward general education if it were determined that a disproportionate number of students from minority groups were placed in special education for reasons other than disability.5 This was a huge win for the disabled community because there was increased funding which allowed for better quality access and funding of certain programs as well.

Legal Challenges to Disability and Education

One of the legal challenges to implementing policies for those with disabilities has been getting the services that are stated under the law of IDEA. Before children can receive special education services, they must undergo certain evaluations. Some of these assessments include diagnostic play sessions, behavioral analysis, speech-language testing, developmental evaluation, and more. There will be eligibility disputes sometimes and then meetings usually take place between administration and the parents/student. This can allow for tough cases and situations to

arise which brings in lawyers and lawsuits. There are certain times when lawyers are needed for certain situations. This includes when the case is too complicated regarding issues of service for those with disabilities. Additionally, lawyers may be needed to represent the school district and this refers to having someone who can handle the legal challenges of the disability departments at schools and colleges across the country as well as advise and go through briefing documents.

IDEA's Impact on Education

Amendments and the IDEA Act itself have positively changed the delivery of special education services nationwide. In the 2013-14 academic year, there were 6.5 million students with disabilities served under IDEA.6 The most common disabilities were specific learning disabilities, speech or language impairment, other health impairments, and autism. Today, students with disabilities make up about 13 percent of today's public school enrollments. Ninety five percent of students with disabilities are educated in local public schools.7

If the IDEA Act was not enacted, the majority of these children may still have been barred from having adequate funding and support from public schools. The Individuals With Disabilities Education Act allows students with disabilities to receive high-quality education that maximize their learning potential and assist with the transition into life post- secondary. Close to 95% of those with physical disabilities are in public schools. Since more funding has been put into place, the average scaled reading scores for students with disabilities increased by 20 points from 2000 to 2009. However, there are still challenges today. Those with disabilities graduate at 62 percent the rate of their peers. IDEA has helped implement plans for post-secondary schooling as since 2005, graduates with disabilities enrolled in colleges rose to 31.9 percent in 2005 and high schools are required

to plan for transitions into adulthood within each student's individualized education program.8

Conclusion

Through massive supreme court cases including Mills vs Board of Education, Commonwealth of PA vs P.A.R.C, and more, there have absolutely been some scrupulous legal challenges at the highest level all the way down to more arbitrary discussions within the education system. Education Law is so important as oftentimes who we are and what we learn and engulf ourselves in at a young age sets the foundation for who we are as individuals for our lives. Investing in education is so important and even though there are always political, legal, and economic challenges, it should always be a priority. Additionally, for the 66 million in this country who are physically or intellectually disabled, providing them with the correct resources while overcoming obstacles along the way is of utmost importance.

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JURIS MENTEM

Optional Standardized Testing For Students With Disabilities

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NORMATIVITY OF OPTIONAL STANDARDIZED TESTING SUBMISSIONS FOR STUDENTS WITH DISABILITIES

BY FELICITY HECTOR-BRUDER

Introduction

For over a century, standardized testing has become a commonplace appendage to the college admission system, that gate keeps access to the world of higher education. Over 8 million students took the SAT between 2018-20191. The rationale for standardized testing is that it provides a means to cross-compare students across disparate backgrounds, regions, and ability levels, to better understand their academic propensity. Admissions tests, like the ACT and SAT, as well other parts of the application process, are normative and thus raise questions of efficacy and equity.

The role of standardized testing in undergraduate institutions has been decreasing with some schools becoming either test optional or eliminating the usage of standardized tests2. Traditionally, test optional policies have been a middle ground between those who favor standardized testing, and those who dismiss it3. However, the transition to optional testing has raised a debate over the efficacy and effect on students with learning disabilities. The Superior Court of California issued a temporary injunction that prohibits the University of California (UC) schools from using standardized testing in the admissions process after the move to a test optional framework because it could discriminate against students with learning disabilities.

This injunction raises questions about the future of standardized testing within the scope of COVID-19 and beyond. When considering the advantages and discrimination of standardized testing, standardized testing in college admissions is not equally accessible and beneficial. In an optional submission framework, standardized testing disproportionately harms students with disabilities, and therefore should be changed under the framework of the ADA and IDEA.

Background

To understand how standardized testing must be accessible, it is important to understand the Individuals with Disabilities Education Act (IDEA), which ensures every student with disabilities is able to attain free public education and have services necessary to be successful. Learning disability is defined as "a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." This definition provides scope for students who can be considered to have learning disabilities. In relation to assessments, this means "All children with disabilities are included in all general state and district wide assessment programs, with appropriate accommodations and alternate assessments where necessary.5" Because this definition is broad and actual implementation is left up to states and districts, there is no clear framework for providing testing accommodations. Furthermore, there are multiple forms of accommodations and accessibility needs of students.

This lack of uniformity is a problem because it leads to sporadic implementation of learning disability-related accommodations. The Americans with Disabilities Act (ADA), ensures that "individuals with disabilities have the opportunity to fairly compete for and pursue such opportunities by requiring

testing entities to offer exams in a manner accessible to persons with disabilities.6" However when looking at the implementation, they receive many questions and complaints about onerous documentation requirements, failure to provide accommodations, and lack of responsiveness to requests7. Thus, without uniformity there is ambiguity in the process which leaves it mystified and hard to navigate for students.

However, access regardless of ability level is a protected right. When looking at legal precedent, in the case Alexander v. Choate, the Supreme Court ruled in a case over federal funding for agencies that provide health services, they cannot provide handicapped people with services less effective as the ones provided to others. Further, the criteria and methods of administering programs must also be equitable so as to not impair recipients with disabilities9. Within the extended context of education, this translates to the necessity for equitable services for students with learning disabilities so that they can be equally successful. As outlined, accommodations that students receive across different tests are hard to assess because they vary so widely, but scores generally improve with accommodations like extra time10. Thus, not only are testing accommodations a protected right, but they are effective in increasing performance for students with learning disabilities.

Current Issue in California

The specific issue in the state of California is not that they eliminated standardized testing, but rather that they made it optional11. What the plaintiffs in the case contend, and what the University admits, is that not submitting standardized testing cannot hurt students, but submitting it can help12. This is compounded by the fact that during the COVID-19 pandemic, standardized testing centers are failing to provide students with learning disabilities adequate accommodations. Therefore, because they cannot get access to test scores, they do not submit

them, which can give them less of a chance in the admission process over students who do submit them. The temporary injunction bars them from using standardized test scores until an official ruling is made.

Beyond the context of the injunction and the COVID-19 pandemic, there is still a question of the accessibility of standardized testing. Because standardized testing is normative, it inherently cannot be accessible to every single student. The issue in California is that they cannot presently provide students with disabilities adequate similar accommodations. This translates to a lowered ability to be successful, and thus a disadvantage in the admissions process. Should the preliminary injunction be upheld, this could open a pathway for new cases on the fairness and efficacy of standardized testing. Specifically, that test optional policies harm students with less access and those with learning disabilities.

Conclusion

Ultimately, standardized testing under an optional framework harms students with learning disabilities because they do not always have access to resources to excel under the normative standards. This highlights that there are other ways to predict student performance. Specifically, GPA can be more indicative of performance in college than test scores13. The implications of narrow standardized testing are the valuation of specific skills that do not necessarily correlate with academic success, which is what these tests are trying to predict. When optional test policies are put in place, they hurt students with learning disabilities who have less access to necessary testing resources and can have lower scores, and thus cannot have the same application edge. Therefore, schools should eliminate standardized testing. Importantly, schools that have lowered or eliminated the emphasis on standardized testing have not harmed their academic standing or rigor14. The case in California, while

specific to the context of the COVID-19 pandemic, highlights the problem of normative testing for students with learning disabilities. Therefore, under the specific condition of test optional policies students with disabilities are disadvantaged, and thus standardized testing should be minimized and eliminated.

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JURIS MENTEM

The Legal Constitutionality of Charter Schools

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THE LEGAL CONSTITUTIONALITY OF CHARTER SCHOOLS

BY SOPHIA OLSON

Introduction

The legality of charter schools is one that is deeply rooted in state constitution challenges. Over the past 30 years, education law has been under the spotlight as it has been studied and applied in state constitutional challenges in the fight for charter school allowances. This fight for constitutional changes is filled with arguments on the interpretation of state control within the state's legal rules.

The Legal Reasoning

Legally the lines of allowances of charter schools within a state are at the mercy of a state-level legal challenge. This is because there is no federal education clause in the United State constitution. This has led to no federal-level mandate or change in our country's allowance of charter schools within our nation's constitution. This has led to each state having to challenge their state constitutions to make legal allowances for charter schools. The overwhelming argument in these state charter school cases has been looking at control language. This means looking at how charter schools are regulated by the state and how these regulations fit into constitutional clauses. These legal challenges on constitutions and control can be studied through two cases, Michigan's Council of Organizations and Others for Education about Parochiaid v Engler and California's, Wilson v. State Board of Education.

Michigan's allowance for charter schools happened in the Council of Organizations and Others for Education about the Parochiaid v Engler case. The Plaintiff argued that charter schools violated Article VIII Section 2 of Michigan's constitution. This section reads "No public monies or property shall be appropriated or paid to any public credit utilized... to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary or secondary school.1" The plaintiff's argument of this violation was overturned by the Supreme Court by saying they did not think that the state needed exclusive control over the charter schools. They decided that charter schools were controlled enough by the state because "they are under ultimate and immediate control of the state and its agents.2" In other words, because charter schools functioned under a larger state context, they met the state control criteria for public funding.

Constitutional arguments continued when the plaintiff argued that private boards ran charter schools. These boards were privately selected, unlike public school boards in which members are democratically elected by state taxpayers. The plaintiff argued that this selection of charter school boards was too privatized to allow federal funding. The Michigan supreme court did not accept this statement, citing that the state elected officials had vetted charter schools, and therefore any members of charter school boards were by association, vetted and approved by state official jurisdictions.

Legal challenges to state constitutions and state control are highlighted in California's Wilson v. State Board of Education case. This case focused on article IX, section 8 of California's state constitution. This section reads as "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools.3" Similar to Michigan the California court of appeals ruled that because the legislature

had approved charter schools, charter schools met the necessary exclusive control clause. Regarding state control, the court ruled that the state board of education had the ability to shut down a charter school if "financial, fiduciary or education4" regulations were broken. This further emphasized the charter school's state regulation and thus legality.

While the current nature of differing state allowances of charter schools shows localized state control, charter schools do have some federal policies they have to adhere to. One example of this is Title IX. Currently, Title IX states that Title IX regulations must be posted clearly in both public, charter, and private schools. This means that despite the highly concentrated state control of charter schools, highlighted in the above cases, the charter schools still have to adhere to federal guidelines. This playing out of federalism allows for charter schools to occupy a gray space in the legal world. The intersecting state charter schools' rights and federal guidelines create a federalist system of state and federal powers weaving together to create a gray area of operational control of charter schools.

Currently, there are still seven states that do not have charter school allowances. There are numerous battles within these states to bring cases to courts to change these charter school allowances. As these cases unfold it is important to understand what legal precedence has been stated in cases such as Wilson v. State Board of Education and Council of Organizations and Others for Education about Parochiaid v Engler. By understanding the dynamics of state constitutions in Charter school cases one can anticipate future legal arguments in localized and federal education law.

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JURIS MENTEM

Monsanto and the Federal Government

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MONSANTO AND THE FEDERAL GOVERNMENT: AN UNORTHODOX RELATIONSHIP

BY HARSHA MUDALIAR

Background

In the 1800s, the United States saw trusts and monopolies as a threat to economic prosperity. In response to the rise of trusts, Congress passed the Sherman Act of 1890, which outlawed price fixing as a method to cut down competition. The Clayton Act, passed in 1914, imposed even more stringent regulations, preventing companies from mergers or acquisitions with the intention to stifle competition. America's antitrust revolution in the late 19th and early 20th centuries provided a sense of false security against the authority of corporate monopolies. Yet, over a century later, large corporations, such as Monsanto, continue to assert itself as a pseudo monopoly, specifically in the genetically modified seed and crop business. Monsanto's greatest advantages have come from favorable legislation as a result of its overly- friendly relationship with the Federal Government.

Aside from its upper hand in government regulations of genetically modified foods, it has also enjoyed a near monopoly over seeds by instituting a highly restrictive policy requiring farmers to purchase seeds from Monsanto at the beginning of each season rather than collecting and reusing their own seeds. There are many episodes throughout American history that help us understand how Monsanto has been set free from the framework of laws our nation claims to be the "Supreme Law of the Land."

The Unorthodox Relationship

When Monsanto first developed their genetic modification technology back in the 1980s, they went to former Vice President George H. W. Bush with an unorthodox request and presented the idea of having the White House regulate genetically modified foods. This was particularly out of character, considering that the Reagan Administration had been known for its deregulation policies across the board. However, Monsanto hoped that these executive initiatives would increase confidence in the safety of genetically modified foods, a relatively new product yet to gain popularity with the American public. The White House fulfilled Monsanto's requests as they have continued to do for decades since their original partnership in 1986. The administration speculated that genetically modified products would cause great skepticism among the American public, and it would be best to get ahead of future conflict by regulating from the start, prior to the launch of Monsanto's genetically modified products.

More surprisingly, the executive branch was willing to turn back its own regulations when Monsanto requested the deregulation of genetically modified food companies. Instead of maintaining the existing doctrine, they turned to an era of self-policing that continues in the present day, allowing Monsanto to develop its own standards for product safety.

In the mid 1990s, Monsanto offered to purchase Mars Hill Baptist Church, located next to one of its Polychlorinated Biphenyl (PCB) factories. Suspicious of the offer, the owner of the church began investigating what he believed Monsanto was hiding, and looked into the possibility of a class action lawsuit against the corporation. For the court case that later came to be known as Abernathy v. Monsanto, the main lawyer, Donald Stewart, began to search for any Monsanto records indicating the health or environmental risks related to PCBs. During his search,

he found that Monsanto was keeping nearly half a million pages of documents in the defense's law firm to avoid arming the plaintiff with incriminating evidence about the scientific properties of PCBs. After the court ordered in Abernathy v. Monsanto that these documents be made public, it was evident that Monsanto had been knowingly covering up pollution posing direct risks to both their customers and the environment. In fact, in one document titled "Pollution Letter," a staff member in St. Louis advised members of Monsanto's marketing team on question-answering tactics regarding the pollution, citing that "[Monsanto] can't afford to lose one dollar of business."

Although the plaintiff's concerns were affirmed, Abernathy v. Monsanto ended in a settlement paid by Monsanto. While the case certainly brought some attention to the issue of environmental harm caused by Monsanto, resolving the case with a settlement absolved the corporation from real legal recourse, meaning that Monsanto was allowed to continue its unsafe business practices as long as it paid off the agreed amount. On a larger scale, however, this case brought into question how a company could care more about profit than the well being of its customers, employees, and civilians in the areas surrounding Monsanto production facilities. Additionally, immoral conspiracies such as this one made it even clearer that the Federal Government has no business enabling Monsanto's control over safety regulations.

It is important to note that the original actions of the Reagan Administration simply set the stage for further executive involvement in supporting Monsanto's political agenda. In the 1990s, the Clinton Administration intervened to back Monsanto in opposing Europe's threat to restrict genetically modified crops. This role was later transferred to the Bush Administration. In 2003, Europe had placed a moratorium on genetically modified products, ripping off a large portion of Monsanto's business. To protest the ban, Monsanto filed a formal complaint with the

World Trade Organization (WTO). In this case, the President directly backed Monsanto's action, claiming that Europe's moratorium would be detrimental to third world countries experiencing hunger.

Aside from direct action by the executive branch to uphold Monsanto's legal requests, the interwoven nature of Monsanto executives and government employees has only served to benefit the corporation by increasing its leverage over the Federal Government. Several executives at Monsanto have worked for the EPA, the Department of Agriculture, and the Advisory Committee for Trade Policy and Negotiations. Additionally, on the Hill, Monsanto has received support from Senators on issues including taxes and patents. The revolving door was another tool utilized to bring former government officials into lobbying positions at Monsanto, with the promise of political connections and the ability to call on former colleagues for political favors. One example is Michael Taylor.

In 2010, under the Obama Administration, the former Monsanto executive was appointed FDA Deputy Commissioner for Foods, giving him authority over food safety issues and providing Monsanto with yet another "in" with the federal government. In some circumstances the perverse nature of the Monsanto-Federal Government relationship is more clear. For example, the former Secretary of Agriculture (1995) pointed out that genetically modified crops in America often received a free pass, and that he faced great pressure to greenlight genetically modified products without proper safety testing. This shows the clear distortion in government decision-making based on the power of corporations such as Monsanto that serve as a leader in their industry by far.

Monsanto has managed to take over the regulator's role without even waiting for a greenlight from the Federal Government, exemplified by when the company sought FDA

approval for its new crop, genetically modified omega-3-producing soybeans in 2011. The standard approval process requires the FDA to mark new substances as "Generally Recognized as Safe" or GRAS. In this case, Monsanto provided their own information regarding the safety of their product, claiming that it was compliant with FDA standards. The GRAS verification process allows people to voluntarily provide a report on their own product rather than requiring the FDA to conduct official research. Since Monsanto tests its own products, it essentially receives automatic, no-questions-asked approval, a clear illustration of the type of back door politics that allow Monsanto to act autonomously.

Perhaps the most explicit of the favors that the American Federal Government has done for Monsanto was through the passage of Congress' 2013 Agricultural Appropriations Bill, H.R. 933, which has been dubbed the "Monsanto Protection Act." In essence, the legislation restricts Federal courts from regulating biotech companies on the production, sale, and distribution of GE seeds and crops. H.R. 933 was a reminder that the relationship between Monsanto and the Federal government is not partisan. Both Democrats and Republicans in government have been responsible for bolstering Monsanto's unchecked power. This bill was signed by President Obama and severely criticized by environmentalists. Writing a blank check for GE seed and crop companies to self-regulate sets a dangerous precedent, especially considering the unknown ramifications of widespread production and use of genetically modified foods. Aside from health risks and danger to food security, H.R. 933 poses a significant threat to the checks and balances necessary for functional governing in the United States, eliminating the role of the courts in regulating GE foods.

More recently, Monsanto has benefitted from legislation so drastic that it brings into question the system of Federalism that our nation is built on. Former Representative Mike Pompeo

introduced a H.R. 1599 in 2015, referred to as the "Denying Americans the Right to Know" or "DARK Act." The purpose of the proposed legislation was to ensure that only Federal law would have jurisdiction over topics such as genetic engineering of crops, seed and food labeling, pesticide restrictions, and certain agricultural practices. If enacted, the bill would nullify over 100 existing state and local laws on these issues spread across 43 states. Although we have seen many examples of the Federal Government attempting to masquerade diverse issues under its jurisdiction via the Commerce Clause, this piece of legislation is particularly jarring because of the direct benefit it would serve to Monsanto, the leader in genetically modified crops, seed production, and many agricultural fields.

Conclusion

The history of America's dealings with Monsanto illustrates that when Monsanto finds itself among legal challenges, it can simply find a way around, change, or interpret the rules to its own benefit, with no questions asked by the Federal Government. There have been three key ways in which Monsanto has managed to gain the upper hand as a pseudo monopoly. First, they have received special treatment from several presidential administrations, including having their products rubber-stamped by the FDA without independent testing. Second, using revolving door political tactics, they have managed to put former Federal Government employees into executive positions at Monsanto. Third, they have successfully lobbied Congress into constructing legislation that writes a blank check for Monsanto to function as they please, unregulated. The lack of accountability that has allowed Monsanto to continue its unhealthy and environmentally-risky operations across the nation serves as an embarrassment to the Federal Government and injustice to Americans.

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JURIS MENTEM

The Case of Coastal Protection and Coral

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THE COST OF LOOPHOLES IN ENVIRONMENTAL LAW: THE CASE OF COASTAL PROTECTION AND CORAL

BY MEGHAN PETERS

Introduction

When thinking of the coastline of Hawai'i, thoughts of picturesque beaches and tropical plants, and wildlife reservations may come to mind. However, beneath the surface lie bleached lifeless coral reefs and beaches with the wastewater pollutants in the waters and sand. The increasing awareness and political activity of the issues of climate change and environmental law has motivated people to protect the extensive coastline and waters of the United States. Hawai'i is increasingly becoming vulnerable to the irreversible effects of climate change, sea- level rise, coral bleaching, rising air temperatures, the loss of freshwater sources, and other ramifications of environmental degradation occurring now on the islands of Hawai'i and many other coastlines. Alongside the environmental changes, tourism, which is a leading economic industry of Hawai'i is also facing the negative effects of climate change. These environmental harms also threaten the tourism industry, which supports 216,000 jobs and generates 17.75 Billion USD in 2019.

County of Maui v. Hawai'i Wildlife Fund

In the 2019 Supreme Court case, County of Maui v. Hawai'i Wildlife Fund, the case debated the issue of Maui County's sewage treatment plant release of unsafe levels of

dangerous chemicals, including nitrogen, into the waters of the Pacific Ocean. This treatment plant, the County of Maui's Lahaina Wastewater Reclamation Facility, treats local wastewater through injecting the substances into the ground. However, in reports starting in the 1970s, the Hawaii Department of Health knew that the substances would flow into the ocean and did not enact a change in policy. In a 2010 report completed by the U.S. Geological Survey, a test of the waters in West Maui, which is a predominant park and tourism location, found traces of drugs, including sulfamethoxazole and carbamazepine, which are laundry products, high levels of nitrogen, and disinfectants in the water. When sampling the coastal waters further from the shore, chemicals present in the treatment plant, including similar drug substances and fire resistant chemicals, were found. Nitrogen, which was found at high levels along the beachfront and surrounding area of the plant, is identified by the Environmental Protection Agency (EPA) as a threat to coral reefs and leads to the increased growth of algae that reduces that ability of sunlight and oxygen to be received by the corals. Additionally, this threatens the loss of large scale clusters of coral reef habitats. Furthermore, this is identified as a local threat, as the source originates not from global polluters but instead from community spread sources. Although large global corporations are known perpetrators of environmental harm, change can be enacted at the local level, which is exemplified by this case.

These substances, which are believed to have originated in 1982 when the plant opened, have exhibited damaging effects to the surrounding reefs. The sewage treatment plant collects wastewater, and on a daily basis releases through the ground around 4 million gallons of partially treated water. The treatment plant did not apply for the required federal wastewater discharge permit, leading to 4 local groups in Hawaii to sue for the damages to the coastal waters. This occurred because of a loophole in the existing environmental policy. The Clean Water

Act, which largely formed in 1972, makes it "unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained." However, local courts twice rejected the case even with overwhelming support from local residences to address the issue, the case continued to move forward to the supreme court. Under review during the Trump Administration in 2019, the source of the dangerous chemical into the ocean was being released into the groundwater, not a direct dumping. This loophole in the Act, which has been followed for years, made it possible to continue releasing the waste into the ecosystem of Hawaii. In April 2020, the outcome of the case ruled that groundwater, when it is "functionally one into navigable water" and ultimately "a discharge that is equal to a direct discharge in these respects."

Conclusion

This ruling, with the Supreme Court in a 6 to 3 majority, addresses the pressing topic of environmental protection under the law. How can there be further protections for the environment under the law? How can this be done without loopholes like the one that brought the County of Maui v. Hawai'i Wildlife Fund to the Supreme Court? Such loopholes in preexisting laws allow for instances such as the one in Hawaii to occur and undermine environmental policy on all levels. The cost and threat of these loopholes is unprecedented, with climate change effects looming over all aspects of the environmental conversation and damages that have already occurred to coastal waterfronts. This case is a step to recognize not only the need for environmental protection in law but the loopholes that allow the misuse to exist in the first place.

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JURIS MENTEM

An Analysis of the Ways That International Law Fails Climate Refugees

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AN ANALYSIS OF THE WAYS THAT INTERNATIONAL LAW FAILS CLIMATE REFUGEES

BY COURTNEY MARTHENS

Introduction

The existence of climate migrants is an increasingly pressing issue for many countries. In 2017 alone an estimated 23 million people were displaced by sudden onset catastrophic weather events, and the World Bank estimates that by 2050 there will be as many as 143 million more climate refugees, displaced by catastrophic weather and resource scarcity caused by the long-term effects of the climate crisis. It is undeniable that these individuals without safety or resources, or a home to return to even if their country still exists, will require shelter and support from the international community as the world begins to feel the long-term impacts of climate change; however, as climate refugees have begun to make their cases for asylum across the globe, it has become clear that current refugee and asylum laws fail to provide protection for these homeless peoples.

Refugee Status and Asylum Status in International Law

Much of what creates the foundations of international law is enshrined in and codified by the United Nations, including the rules governing which peoples have refugee status and how those people should be treated. The current language regarding refugees who seek asylum or residency within another state narrowly defines refugees according to the standards of the United Nations Refugee Conference in 1951 as any individual or family who: "owing to well founded fear of being persecuted for

reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This is the dominant legal definition of what it means to qualify for refugee status in international law, and understanding the break down of this definition in the context of existing case law is critical to understanding exactly how this definition fails to encompass or protect climate refugees, who are not stateless on account of persecution based on their identity, but rather because climate change has rendered them so.

Teitiota v. New Zealand

The most pressing landmark case that has been indicative of the failure on the part of immigration case law to acknowledge the urgency of the circumstances of climate refugees is the case of Teitiota v New Zealand. The plaintiff, Ioane Teitiota, argued that he and his family were entitled to protected persons status on the basis of the fact that their home of Kiribati was facing steadily rising sea levels caused by climate change that may potentially, over time, lead to severe resource scarcity and environmental degradation that would make the island uninhabitable. The court found that Teitiota and his family had engaged in

"voluntary adaptive migration – that is, to adapt to changes in the environment in South Tarawa detailed in the 2007 NAPA, by migrating to avoid the worst effects of those environmental changes. While there is some degree of compulsion in his decision to migrate, his migration cannot be

considered 'forced' and was to another country, New Zealand, and not to another place in Kiribati."

According to the court, based on the language and definition used in UN agreements regarding the definition of those who qualify for refugee status, Mr. Teitiota and his family failed to qualify for refugee status on the basis of the fact that, although they no longer had a home or land in Kiribati, and although there is a large degree of environmental degradation occurring in the region, since it would technically be possible for Mr. Teitiota and his family to relocate to another region within the Kiribati island chain, the family could not claim that they were "forced" to emigrate from their homelands to another country. The court determined that Mr. Teitiota and his family chose to leave their home to avoid severe famine and disease, and that in choosing to do so they forfeit the right to claim that they were forced from their home; however, it could be argued that the choice to leave one's ancestral home to escape unsurvivable living conditions is not a voluntary one. As a low-lying country in which the atolls on which most people reside situated just above sea level, the rise in oceans has led to significant reductions in soil arability, as well as the reduction of already limited water supplies, which have become contaminated by sea water. Unless significant steps are taken to mitigate or reduce the impacts of the climate crisis, these circumstances will only worsen, putting the lives of every member of the community at risk. In the face of such dire and potentially inevitable conditions, can flight from the area to protect the lives of oneself and one's family really be called a choice? Additionally, to argue that the plaintiff and his family could have internally relocated to escape the environmental degradation of their homes is to ignore that the impacts of climate change do not affect only the area of the islands in which the Teitiota family had resided, but rather impact the chain as a whole, meaning that to relocate internally would not resolve the truth of the matter that Kiribati as a whole

is experiencing climate change-induced disasters and resource shortages that make the islands as a whole inhospitable to human survival.

The court also held that the legal definition of what it means to be a refugee is the one that should be upheld in a court of law rather than the sociological, and that by definition to be considered legally a refugee, the plaintiff must be escaping from a fear of "being persecuted," which is defined in New Zealand law as having experienced "the sustained or systemic violation of core human rights, demonstrative of a failure of state protection." The United Nations has previously determined that among all universal human rights are the rights to "a standard of living adequate for the health and well-being of himself and of his family, including food," as well as clean and sanitary drinking water. Arguably the conditions that the citizens of Kiribati currently exist under, with significantly reduced access to potable water and severe food shortages induced by the climate crisis induced rise in ocean water levels, are definitionally violations of these guaranteed rights. If this is true, then it must be evaluated as to whether there has been a failure on the part of the state to protect its people from these violations. Many residents of Kiribati have begun to migrate internally to the population center of Tarawa, where the government has attempted to create the infrastructure to accommodate a rapidly growing population even as sea water deteriorates the structural foundation of the land on which the people of Kiribati reside. While the government of Kiribati has purchased land in Fiji, as well as Australia and New Zealand, in an attempt to provide food supplies and refuge to a growing population of people without safe places to live or fertile land on which to grow crops, they simply to not have enough resources to accommodate their whole population as the situation worsens. Despite the best efforts of the government, it is apparent that the state is wholly unable to provide enough resources for an increasingly desperate and

growing population, indicating a failure on the part of the state to protect its people from a violation of their human rights to food and clean water induced by climate change. Given that all of these conditions are met, by definition, the people of Kiribati should then fit within New Zealand, and the international community's definition of a "refugee," and receive asylum status for their position as climate refugees; however, in this case the court determined that this was not so.

There are certainly points to be made about whether the definitions used in the case of Mr. Teitiota and Kiribati were correctly established or applied to the context of the case by the court. However, even if the definitions were correctly applied to the case of this specific plaintiff in an analysis of his specific circumstances if he were to return to Kiribati, if the argument can be made by the court that the people of Kiribati, who have left unsurvivable conditions in an attempt to protect their lives and those of their families, are not refugees on the grounds that their migration was not involuntary or caused by "persecution," it must then be because the statutes in place, both domestically within New Zealand, and internationally enshrined within the treaties created by the United Nations fail to protect people like them, who are forced from their homes not because of who they are or what they believe, but simply because they physically have no home to return to or resources on which to survive if they did return.

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JURIS MENTEM

Uighur Sterilization

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UIGHUR STERILIZATION

BY MEESHA REIISIEH

Introduction

Gulnar Omirzakh, a Chinese-born Kazakh, was in her home with her three children when she was given a government-ordered mandate to get an Intrauterine Device (IUD) inserted after the birth of her third child, who was still a newborn at the time. Two years later, four government officials came knocking at her door with a notice to pay a $2,685 fine for having more than two children. With her husband detained in a Uighur camp and not a penny to pay the fine, Gulnar and her children feared that she would be sent to join her husband and a million other ethnic minorities in an internment camp solely for having too many children. Omirzakh managed to scrape together enough money from relatives and high-interest loans to pay the fines, leaving her in extreme debt. After her husband was released from the internment camp, they managed to flee to Kazakhstan.

Zumret Dawut was not as lucky. In 2018, the mother of three was held captive in an internment camp, where she was forced to get gynecology exams every month. She and 200 other Uighur women in her compound that had more than two children were ordered to get sterilized. The women's fallopian tubes were tied— a permanent operation that made them incapable of having more children.

Gulnar and Zumret were not alone. Dozens of former Uighur detainees have disclosed to the Associated Press that they, too, were subjected to forced IUDs, birth control pills, and sometimes even abortions.1 The recent media coverage of these occurrences has led to a debate within the international law

community as to whether or not these heinous acts can be categorized as a form of genocide. In examining both the precedent set through numerous tribunals and the legality of Chinese statutes, this article will refer to international legal precedent and current standards in an attempt to further discussion and reach an answer.

The Development of the Law Concerning Genocide

Proving that a genocidal act has been committed has historically been a difficult feat. Throughout world history, there have only been three cases of genocidal intent that have been recognized in international law: Cambodia in the 1970's, Rwanda in 1994, and Bosnia in 1995. This is due to the high bar set within international law to prove genocidal intent: showing that the genocidal acts were carried out with the specific intent to eliminate a group of individuals on the basis of their ethnicity.2

Geneva

When the United Nations held the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, the signatories of General Assembly resolution 260 A (III) agreed that genocide is a crime under international law.

Article II: 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.3

Additionally, signatories agreed to punish any sort of conspiracy to commit or direct involvement in genocide, and to

prevent any acts of genocide in accordance with the official definition in the future. China is still a signatory of this resolution.

Rwanda

In 1994, the International Criminal Tribunal for Rwanda handed down the first conviction for the use of sexual violence as a weapon of war. Because these acts were used in conjunction with the intent of using sexual violence against women and children to destroy a particular ethnic group, it was decided that these acts were an act of genocidal rape.4

Bosnia/Former Yugoslavia

Since 1995, the International Criminal Tribunal for Yugoslavia has taken strides in the categorization of sexual violence as an act of war. The Tribunal enabled the prosecution of sexual violence as a war crime, a crime against humanity, and genocide, and set the precedent of rape being classified as a tool of war that can intimidate, persecute, and terrorise individuals. Following the ruling set by the ICTR's Akayesu case in 1998, the ICTY found numerous military officials guilty of rape as a crime against humanity. As justification, the tribunal deemed that in the context of a systematic attack on a group of individuals, rape was used in coordinance with a strategy of "expulsion through terror.5"

The Current Standards

Because of the legal precedents set through the ICTR and ICTY, there are now standards that can be applied to test whether or not an act can be deemed genocidal. According to the Legal Information Institute of Cornell Law School, "Genocidal intent requires that acts must be committed against members of a group specifically because they belong to that group, but it does not require that the acts be perpetrated solely because they belong to

that group. Genocidal intent can, "in the absence of direct explicit evidence, be inferred from" circumstantial evidence. When proving genocidal intent based on an inference, "that inference must be the only reasonable inference available on the evidence.6" Given this, one can reasonably infer that the acts of sterilization committed against Uighur women can not only be classified as an act of sexual violence that falls in accordance with war crimes, but can also be classified as genocidal if used as a strategy for "expulsion through terror."

Additionally, the International Conference on Population and Development in 1994 and the Fourth World Conference on Women in 1995 brought a significant shift towards a rights-based approach to population policies. Signatories agreed to support the principle of voluntary choice in family planning, and to move away from targeted approaches to practices such as sterilization and towards empowerment of individuals, especially women, to enable them to make autonomous, informed decisions about their reproduction.

Recent Developments

After the media began to report on the acts of sterilization and gender-based violence being committed against Uighur women in China, the United States Secretary of State Mike Pompeo denounced the acts. He stated, "We call on the Chinese Communist Party to immediately end these horrific practices and ask all nations to join the United States in demanding an end to these dehumanizing abuses.8" Three months after this statement, a whistleblower who was a nurse at an ICE detention facility reported that since the fall of 2019, a doctor at a U.S. Immigration and Customs Enforcement detention center in Georgia has performed a high rate of hysterectomies on Spanish-speaking immigrants without their consent.9 The whistleblower claims that many of the patients did not understand what procedure they were undergoing or why it was being performed.

Buck v. Bell

When evaluating the ethics of the sterilization of women in ICE detention facilities, the national debate centers around the immorality of the act. Similar to what Uighur women are facing, individuals cannot understand how depriving a woman of the right to bear children and have control over her own body could be acceptable, whether it be in terms of morality or legality. Unfortunately, however, this act is completely legal in the United States, and that is primarily due to the Supreme Court's decision in Buck v. Bell in 1927. Carrie Buck was committed to a state mental institution for being "feebleminded," a condition that had been present in her family for the last three generations. A Virginia law allowed for the sexual sterilization of inmates of institutions to promote the "health of the patient and the welfare of society." Before the procedure could be performed, however, a hearing was required to determine whether or not the operation was a wise thing to do. Thus, the Supreme Court was tasked with answering whether or not the Virginia statute which authorized sterilization denied Buck the right to due process of the law and the equal protection of the laws as protected by the Fourteenth Amendment. The Court ruled against Ms. Buck, upholding the Virginia law. Justice Holmes made clear that Buck's challenge was not upon the medical procedure involved but on the process of the substantive law itself. Since the procedure could not occur until a proper hearing had occurred and after the Circuit Court of the County and the Supreme Court of Appeals had reviewed the case, and only after "months of observation," that was enough to convince the Court that there was no Constitutional violation. Citing the best interests of the state, Justice Holmes affirmed the value of a law like Virginia's in order to prevent the nation from "being swamped with incompetence . . . Three generations of imbeciles are enough.10" To this day, Buck v. Bell is regarded as one of the greatest mistakes of the Supreme Court–yet the ruling

still stands, and 70,000 Americans have been sterilized as a result of it.

Conclusion

As dehumanizing and callous as one may consider the sterilization of ethnic minorities to be, it is an act of terror that is occurring both currently and in our own country. Though the legality of sterilization under international law has yet to be determined by a criminal tribunal, it is clear that these acts are committed in conjunction with clear genocidal intent.

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JURIS MENTEM

Europe's Last Dictator: A Legal Point of View

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EUROPE'S LAST DICTATOR: A LEGAL POINT OF VIEW

BY VANESSA SMITH-BOYLE

Introduction

This past summer Belarus erupted in protest after incumbent president Aleksandr Lukashenko, nicknamed "Europe's last dictator," claimed victory in the 2020 presidential election. People all over Belarus and the world have rightfully questioned the validity of this election, especially because Lukashenko has won every election since his rise to the presidency in 1994 and the large amount of evidence pointing to government intimidation of the opposition and electoral fraud. However, if this is true, the question remains whether or not these acts can be considered legal and, if it is not, what precedents the Belarusian government broke, which will be our focus. It is important to investigate this question because the more people know about the basic guarantees of democracy, the more likely they will be able to spot violations of international electoral law in their own country. This is especially pertinent today, as more people in the US worry about the legitimacy of the presidential election. Using evidence of electoral interference and the international election standards set by the International Covenant on Civil and Political Rights, this article finds that the Belarusian government violated international election standards set by article 25(b) through government intimidation of the opposition and falsifying the results of the election. Due to the violation of these international election standards, the 2020 Belarusian election cannot be considered legal under international electoral law. The following sections will investigate how the government did this by presenting evidence of limitation

of opposition and electoral fraud respectively as well as the portions of Article 25(b) that they violated.

Pre-Election

In the months leading up to the 2020 election, opposition leaders were met with hostility and intimidation. Three of the most favored challengers were Sergei Tsikhanousky (whose campaign was taken over by his wife, Sviatlana Tsikhanouskaya, after his arrest), Viktar Babaryka, and Valeryy Tsapkala. All three were unable to officially register as a candidate with the Central Election Commission. Instead, they were met with intimidation, arrest, and illegal holding. Tsikhanousky, a YouTube blogger who focused on the concerns of the people, was arrested for "allegedly violating public order and using force against the police." While he was being held in a pre-trial detention center, the deadline to register his candidacy passed. This is similar to the case of Babaryka, a former banker who was arrested on charges of tax evasion and money laundering about a month after he announced his candidacy, the timing of which coincided with the day before official applications for candidacy could be submitted. Consequently, Babaryka was unable to submit his application and has yet to stand trial. Lastly, Tsapkala fled the country in fear of arrest after the Central Election Commission invalidated a large partition of his collected signatures needed to submit a candidacy application. After seeing the other prominent opposition leaders' arrests, Tsapkala feared for his freedom and his family's freedom, a clear case of government intimidation. By reducing the opposition against Lukashenko by refusing to validate the campaigns of challengers, the Belarusian government violated Article 25(b) of the International Covenant on Civil and Political Rights (1966) that the Belarusian government had ratified. Article 25(b) states that "every citizen shall have the right and the opportunity...to vote and be elected at genuine periodic elections." This means that the Belarusian government cannot prevent citizens from running for electoral office. Although it

could be argued as circumstantial, the fact that the Belarusian government detained two popular candidates during the period to submit applications to get ballot access and denied another's application, points to a violation of Article 25(b). This claim is further supported by the fact that one candidate, Tsapkala, feared detainment after his application was denied, and by the fact that both Babaryka and Tsikhanouskaya were held in jail for many months after the election; Babaryka only being released in October and Tsikhanouskaya who remains in jail after facing new charges in November. If the Belarusian election had adhered to this international election standard, these three popular candidates, all of whom had over the required number of signatures needed for a candidacy application, would have had a fair chance to get on the ballot, rather than being denied the opportunity to do so. Furthermore, limiting electoral opposition is not the only way that the Belarusian government violated Article 25(b).

During the Election

During the election, the Belarusian government violated Article 25(b) again by not conducting an election that "[guaranteed] the free expression of the will of the electors." For example, the 2020 election was the first time when Belarus did not invite observers from the OSCE Office for Democratic Institutions and Human Rights, an international institution created to ensure member states stay in line with their international electoral commitments, "in a timely manner." Other attempts to stifle the vote included rejecting applicants for the vote-counting commissions, holding electoral commissions in private, and arrest or threat of arrest in response to complaints of election violations. Moreover, there are push backs against the portion of the vote won by Lukashenko as claimed by Belarus' Central Election Commission. Lukashenko was reported to have won 80.23 percent of the vote whereas the opposition favorite, Tsikhanouskaya, won a mere 9.9 percent. However, these

numbers clearly seem falsified. Before the election, Tsikhanouskaya worked hard to unite the fractured opposition and had rallied with tens of thousands of citizens in attendance. Furthermore, after the election, thousands have continued for months to protest the election results, demonstrating that many citizens do not believe these reported numbers. Tsikhanouskaya described the discrepancy between the number of protesters and the reported electoral results simply: "I see that the majority is with us," further emphasizing that it is unlikely Lukashenko won over 80 percent of the vote. Finally, for direct evidence of electoral fraud, many poll workers have come forward, admitting to helping falsify the results of the election due to pressure from the Central Election Commission. One worker admitted to submitting results without the vote totals, another to signing a document with overinflated numbers for Lukashenko. There is even an audio recording in which election officials are heard pressuring poll workers to falsify results in favor of Lukashenko. In total, there have been reports of "violations, irregularities, and instances of some form of vote-rigging from at least 24% of the country's 5,767 precincts." These are clear indicators and direct evidence of electoral fraud, meaning that the election was not a "free expression of the will of the electors" as Article 25(b) stipulates.

Conclusion

Because the Belarusian government failed to adhere to Article 25(b) of the International Covenant on Civil and Political Rights in regards to the 2020 election, the Belarusian election cannot be considered legal or valid under international electoral law, that the Belarusian government has previously consented to. Through intimidation and arrests of the opposition challengers and falsifying the results, the Central Electoral Commission did not provide citizens with the right "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free

expression of the will of the electors." These international election standards provide a framework to ensure a free and fair election. By failing to adhere to this framework, the Belarusian government has proven to its citizens that they are not living in a free democracy as their government boasts, earning Lukashenko the title of "Europe's last dictator." As the US presidential election draws closer and more and more people are worried about domestic electoral fraud, it will be important to keep an eye on these international election standards and whether or not they are adhered to.

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JURIS MENTEM

Effects of Mcgirt v. Oklahoma On American Sovereignty

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DUAL SOVEREIGNTY: EFFECTS OF MCGIRT V. OKLAHOMA ON AMERICAN SOVEREIGNTY

BY DAVID LEIBOWITZ

Introduction

McGirt v. Oklahoma is a recent landmark Supreme Court case which ruled that a large portion of the state of Oklahoma is under the sovereignty of multiple Native American tribes (Rubin 2020). In a 5-4 majority led by Justice Neil Gorsuch, the court established that, as pertaining to the Major Crimes Act of 1885, much of Oklahoma's prior reservation land was never disestablished and is subject to tribal sovereignty (McGirt v. Oklahoma, No. 18-9526, 591 U.S. (2020)). In this article, I will establish the historical grounds for this case. I will then proceed to frame this case within a political theory framework, and, in doing so, will analyze how theoretical positions of sovereignty interact with this case. I will conclude with remarks on the nature of this case, as well as potential future implications of its decision.

Background

Before attaining statehood in 1907, the majority of the eastern half of Oklahoma was reservation land, belonging to members of the Five Civilized Tribes, a collection of Native American tribes seen as "civilized" by Europeans. In 1906, Congress passed the Oklahoma Enabling Act, paving the way for the then-territory to attain the status of statehood. However, though the Oklahoma Enabling Act seemed to implicitly deconstruct the sovereignty of the reservations, there was never any official legal deconstruction of the reservations spanning a

large portion of the state. Instead, there was an arrangement in which native tribes had a form of self-government, but, ultimately, had to acquiesce to the authority of the United States government.

Prior to McGirt v. Oklahoma, in 2017, the United States Court of Appeals for the Tenth Circuit found in Murphy v. Royal (later renamed Carpenter v. Murphy and, eventually, Sharp v. Murphy) that at least one tribal nation, the Muscogee (Creek) Nation, had never formally been disestablished and that their tribal land still constituted as "Indian Country." This helped set the stage for the landmark McGirt v. Oklahoma. The plaintiff, Jimcy McGirt, had a similar case to Murphy in that he was a Native American man who had been previously convicted of sex crimes against a child in 1994 and was serving a life sentence. McGirt's counsel had argued that, because the crimes were committed on former reservation territory, they were not under the jurisdiction of the United States court system, but were in fact under the suzerainty of tribal administration. In a 5-4 majority, the Supreme Court, led by Justice Neil Gorsuch, found that the United States government had not adequately dismantled the Oklahoma reservations and were therefore not under the purview of federal legislation, such as the Major Crimes Act. The Supreme Court also decided Sharp v. Royal in conjunction with McGirt v. Oklahoma, in a perceived enhancement of Native American tribal rights (through the legal enforcement of previously unenforced treaties).

Discussion

With the decision found in McGirt v. Oklahoma, the Supreme Court has left open many questions regarding the status of tribal governments and the power and jurisdiction status of the United States government over these lands. However, while much is being said of the potential practical issues this case has levied, less is being discussed regarding the theoretical applications of

the case and its potential implications regarding national sovereignty. In this section, I will frame the case within a political theory framework, and, in doing so, will analyze how theoretical positions of sovereignty interact with this case. It must be stated that, while this case presents potentially large implications for both American sovereignty and the future status of governance for a large portion of Oklahoma, these implications are yet to be clearly fleshed out and will likely take time before they are elucidated to a fuller extent. Therefore, the legal theory debate regarding this issue is primarily speculative in nature.

In political theory, sovereignty is, defined simply, the "supreme authority within a territory." The theoretical conception of sovereignty has, since its inception, been inherently tied to governmental systems and systems of rulership. The first clear notions of sovereignty can be seen in the medieval French philosopher Jean Bodin's writings on the French Wars of Religion. He conceptualized sovereignty as a means to transition France from a feudal system to an absolute monarchy. Accordingly, Thomas Hobbes' Leviathan provides a similar, all-encompassing view of sovereignty; it is inherently linked to the state, which is tied to the efficient monarch. During the age of Enlightenment, liberal philosophers took to the idea of sovereignty as a means of establishing their respective political thought. In The Social Contract and his other works, Jean-Jacque Rousseau articulated the concept of popular sovereignty through the "general will," conventionally understood as being a system of government in which the people as a whole, rather than a specific ruler, are sovereign. The concept of sovereignty eventually developed, through other events such as the Peace of Westphalia and the establishment of a post-World War II international liberal order, into the current Western-influenced understanding presently seen throughout the world, in which nation-states with democratically-elected rulers reign over a legally-defined border.

Due to the changing conception of sovereignty, along with the transient nature of the American electoral system, it is, perhaps, unsurprising that once-minor details such as the oversight of not formally disestablishing Native American reservations in Oklahoma can, after more than 100 years, come back into the judicial and political forefront. During the early 1900s, the American conception of sovereignty was heavily influenced by expansionist and racial factors, most notably culminating in the overarching theme of Manifest Destiny. This conception led to the United States making- and ultimately breaking- numerous agreements with Native American tribes across North America.

From this there arises a theoretical question that is crucial to the theoretical understanding of sovereignty as it relates to McGirt v. Oklahoma: does a sovereign nation have the moral and political right to not uphold treaties, and if not, is that nation actually sovereign? This, which I will call the "sovereignty paradox," which is a formulation of the omnipotence paradox, also calls into question the harm principle, as formulated by liberal philosopher John Stuart Mill. The harm principle, which states that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others," can be applied in this case to question the actions and motives of sovereign nations. In the case of sovereign nations, one must assume that if a state actor is committing themselves to a treaty in good faith, they constitute themselves and their deal-making partners as both belonging to the same "civilized community," that is, the international community. In doing so, a nation has an obligation, as the principle states, only to exercise power in the prevention of harm to others. However, if this obligation is met and the principle is followed to the letter, one once again runs into the issue of the sovereignty paradox and the inability to exercise the definition of sovereignty, that being the "supreme authority within a territory."

This is doubly the case when one looks at the issues presented in McGirt v. Oklahoma; multiple nations (the United States and the Native American tribes given suzerainty over the land) claim to have the ultimate authority (i.e., sovereignty) over the land. In this case, there is theoretical grounding for both the American and Native American claims to this land. However, it is clear, by virtue of the definition of state sovereignty, that only one polity can legitimately claim sovereignty and absolute authority over the land.

In seeking to establish an answer to the question of sovereignty over the eastern portion of Oklahoma (as well as other potential future similar cases), one must appeal to the Supreme Court's reasoning when deciding McGirt v. Oklahoma. In the majority decision, delivered by Justice Neil Gorsuch, it is argued that, because there was never a formal dissolution of the Creek reservation and that Congress, in ratified treaties, had promised a "permanent home to the whole Creek Nation of Indians," there were sufficient grounds to invoke the Major Crimes Act. The invocation of the Major Crimes Act meant that the case's defendant, Jimcy McGirt, was subject to federal, rather than state, jurisdiction, and should have been tried in federal court. However, regardless of the outcome of the case, Mr. McGirt is still subject to United States federal law. This would imply that his Native American tribal nation, the Seminole tribe, is not sovereign, nor is the Creek land on which he committed his crimes. However, the Supreme Court also held that the aforementioned treaties signed some 187 years ago were still valid, and that the previously agreed-upon rights of the Creek tribal reservation land were still valid, even after years of nonenforcement.

The outcome of the case would seem to imply that, when framed from the lens of viewing the United States and the Creek nation as members of Mill's "civilized community" (which, given the Creek status as one of the "Five Civilized Tribes," would seem

to benefit them), neither the United States government nor the Creek nation has complete sovereignty over the land. Does this imply that there is a form of "pooled sovereignty," akin to the European Union and its member states? The answer to this question is complicated. While the United States and Creek tribe do share aspects of governance over this territory, as proven by the Supreme Court's decision in McGirt v. Oklahoma, there is no concrete power-sharing or delegation agreement from these two parties. In the case of the United States and Creek nations, due to the asymmetrical nature of power imbalances between the two parties, it is hard for one to make an argument that both nations have sovereignty over this land. In fact, one would be hard pressed to argue that the suzerainty of the Creek land is anything but a formality, the power of the United States military and legal system has all-but- complete control over the territory; only the local administration of the Creek land, along with other Native American tribal reservations, is administered by the tribe itself; all other responsibilities de facto fall upon the United States government. In this sense, it is not the Supreme Court that can decide on the sovereign status of the Creek tribe, but the United States Congress. Within the Supreme Court's decision, the majority held that it was Congress's prerogative to nullify treaties, and that it was due to the lack of action taken by Congress that the Creek reservation was never disestablished. This would, therefore, imply that the Creek nation is not sovereign at all, but is actually subject to the jurisdiction of the United States while holding certain levels of autonomy.

Implications and Conclusion

The implications of McGirt v. Oklahoma are yet to be fully seen. While the Supreme Court may have definitively shown that the United States never formally abrogated the treaties it signed with the Five Civilized Nations, in doing so it opened up significant new legal questions. Perhaps the biggest question revolves around the status of crimes committed by some 1,900

tribally-affiliated Native Americans in this territory who are still in the Oklahoma Department of Corrections system. It also raises questions regarding future crimes committed on this territory, as well as property rights. It would be unsurprising to see future litigatory action be taken by Native Americans due to precedent set by McGirt v. Oklahoma. It is also crucial to note that, with future possible additions to the Supreme Court, the precedent set in McGirt v. Oklahoma could be short-lived. Justice Ruth Bader Ginsburg was one of the members of the slim 5-4 majority in this case, and relevant cases brought to the Supreme Court could very well have different outcomes in the near future; the addition of Amy Coney Barrett to the Supreme Court could have wide-ranging implications for Native American rights as related to McGirt v. Oklahoma.

The question of American and tribal sovereignty is also complicated by the results of McGirt v. Oklahoma. Though the Supreme Court did acquiesce some power to the tribe by virtue of acknowledging the treaties signed with the Creek and other native tribes, there is little doubt that the Supreme Court did not truly cede half of a state to Native Americans. Instead, the decision held by the majority of justices will complicate relations between Native Americans, the government of the State of Oklahoma, and the federal government. It seems likely, perhaps, that, within Oklahoma, there will be different levels of regulation and governance for different people; those with tribal affiliation living in the territory will have to face new questions regarding taxation and property rights. McGirt v. Oklahoma, though potentially complicating intrastate interaction between tribes and the government, also answers the question of sovereignty in this territory. The United States Congress, rather than the tribal governments or the Supreme Court, has the "supreme authority" within this territory; they have the power to disband tribal reservations and abrogate treaties. In affirming this, it proves that the United States Congress is sovereign over this land, regardless

of the outcome of McGirt v. Oklahoma. Though questions of suzerainty are raised due to the outcome of McGirt v. Oklahoma, questions of sovereignty in the hands of the United States Congress are partially reaffirmed due to the outcome of the case.

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JURIS MENTEM

An Analysis of the Past, Present, and Future of the Political Questions Doctrine

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AN ANALYSIS OF THE PAST, PRESENT, AND FUTURE OF THE POLITICAL QUESTIONS DOCTRINE

BY KYRA THORDSEN

I.

While the judiciary operates off a set of written rules and procedures in its proceedings, the court system contrasts the legislative and executive branches in that it has a set of unwritten guidelines followed to establish topics which justices will or will not rule on. The judicial system's rules, specifically the political questions doctrine, which is used in choosing to abstain from, or decide on, a case, will be the focus of this article. The doctrine is a powerful and historically-frequent rule called upon by the court. We have seen the court invoke the political questions doctrine in four main areas: redistricting and apportionment, foreign policy, institutional power, and the regulation of elections.

In this article, I will first describe the history of the political question doctrine and its interactions with the court. I will then analyze how different issues have been considered through the lens of the doctrine, and argue that the influence of the political question doctrine has detracted from the overall integrity of the Supreme Court.

II.

As defined by the guidelines set by the court in Article III Section 2 of the United States Constitution, judicial power is extended to all cases and controversies that impact the United States, its governing bodies, and its citizens.1 Additional and less ambiguous rules of the court are set by court-set codes and past precedent, and are used by the justices to determine which cases are the most relevant and critical for them to hear. The rules of standing, ripeness, and mootness, in addition to the political questions doctrine, allow justices to exclude cases that they believe can be resolved by other means, have become irrelevant because of time, or have no case to be ruled on.

A "political question" is defined by a case in which the doctrine was invoked. Baker v. Carr 369 US 186 (1962) posed a question to the Supreme Court about its jurisdiction over questions of legislative apportionment, and when the court decided they had none, established a six-prong test to describe instances of political questions.2

These six prongs of the test are as follows: 1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) A lack of judicially discoverable and manageable standards for resolving it; or 3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or 4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or 5) An unusual need for unquestioning adherence to a political decision already made; or 6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The implication of the doctrine suggests that the question in consideration is beyond judicial competence regardless of who

raises it, how immediately the interests it affects, or how critical the controversy. It is rooted in the principle of separation of powers, aiming to maintain the three separate branches of the federal government, and justifying the notion that some issues are best resolved through the democratic process and are therefore beyond judicial capabilities.

III.

The most commonly invoked prongs of the Baker definition of a political question in the four fields defined as the focus of this article are the first and second. Shifting to the doctrine in relation to foreign policy disagreements, the first arises quite clearly. Article II Section 3 of the Constitution gives the role of Chief Diplomat to the President of the United States, implying that any cases regarding foreign affairs could be contested under the first prong of the Baker definition: "A textually demonstrable constitutional commitment of the issue to a coordinated political department."

This issue arose in the Zivotofsky cases of 2012 and 2015, in which a young man's (Zivotofsky) mother filed for his passport in the United States and listed his place of birth as "Jerusalem, Israel.3" The State Department recorded "Jerusalem" as Zivotofsky's place of birth. In response, a suit was filed against the State Department and the case rose to the Supreme Court. The State Department argued that by listing his birthplace as requested, the United States would be taking a precarious position in the Israel-Palestine conflict, and would compromise its ability to help further the peace process in the Middle East. Both the district and appeals courts dismissed the case on the grounds of it being a political question, as it coincides directly with foreign policy.

However, the Supreme Court ruled 8-1 in Zivotofsky's favor and the case was remanded to the trial court for further

consideration.4 Justice Sotomayor filed a concurring opinion saying that she did not define the Zivotofsky cases by the political questions doctrine since the definition of the doctrine was much more demanding than what was presented. Justice Breyer dissent the majority by saying that this issue touched on very sensitive political matters and clearly fell under the Baker definition of the political question.

Looking at this case demonstrates an instance in which the majority of the court required that a case be more seriously related to the Baker definition to be dismissed by the doctrine. In Goldwater v. Carter, 444 U.S. 996 (1979) it was established that the presidential authority to terminate treaties is a political question, reinforcing the idea that foreign policy powers belong to the president, i.e., a "coordinate political department" as defined in the first prong of the Baker definition. These two cases demonstrate a contrast that exists in decisions taken by courts that dismissed cases by the same definition without more seriousness. This demonstrates the ability for justices' personal bias to change how a case is treated in this way- a gap of integrity for the court as a whole.

For instance, the court's use of the political questions doctrine has limited its use to limit itself from checking legislative power by the same standard it used to excuse itself from checking the executive's power. In Luther v. Borden 28 US 1 (1849), the Supreme Court reinforced the legislature's power in the Guarantee Clause of Article IV Section IV of the Constitution to recognize the legitimacy of a government and invoked the doctrine instead of issuing its own ruling on the case.56 This ruling differs drastically from the Zivotofsky cases- while the court was dealing with different branches of government, it must check them both equally and not favor one over the other. Additionally, both cases were dealing with the legitimacy of a political body, and through the political questions doctrine should both fall under the first Baker prong. However, both cases did not

do this, exemplifying a key issue with the doctrine: different courts will interpret the rule differently, which prevents them from maintaining consistent enforcement based on precedent.

The court's controversies regarding cases of political and racial gerrymandering have come into public discussion in recent years, as they did when the same issues were brought to the courts years ago. This broad issue can be separated into a few different categories.

This issue of the court not protecting states against partisan gerrymandering grew extremely contentious because of the contrasting opinions of the different justices. In cases such as Gomillion v. Lightfoot 364 US 339 (1960), the court ruled to protect states from racial gerrymandering with its power since it was a violation of the Fifteenth Amendment. In cases of partisan gerrymandering, plaintiffs argued that their Fourteenth and Fifteenth Amendment rights were also being violated, and that because of this, the courts should have to intervene. Specifically in Davis v. Bandemer 478 US 109 (1986), the court ruled that there was no judicially manageable standard that existed for this issue.9

This issue was brought up once again in First, under the issue of redistricting and the apportionment of representatives to different regions and states. Under Baker v. Carr 369 US 186 (1962), legislative apportionment is a justiciable question, overturning the original decision of Colegrove v. Green, 328 U.S. 549 (1946).7

Secondly, the issue of gerrymandering has come under fire in the courts, especially when making the distinction between racial and partisan gerrymandering. In Rucho v. Common Cause 588 US (2019) (consolidated with Lamone v. Benisek, 18 US 726) partisan gerrymandering was ruled a political question, since questions of a political nature are "nonjusticiable." Justices Kagan, Ginsburg, Breyer, and Sotomayor voted against the

categorization of this issue as a political question, saying that this decision sidestepped "the most fundamental of… constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives.8" Justice Kagan argued that the lack of intervention by the Court encouraged dysfunctional politics that she believes "may irreparably damage our system of government."

Vieth v. Jubelirer 541 US 267 (2004) when Justice Scalia wrote for the plurality saying that political gerrymandering cases should be declared nonjusticiable since no court had been able to find an appropriate remedy to political gerrymandering claims in the years since 1986 when Davis v. Bandemer was decided. While this opinion was slightly contrasted by Justice Kennedy advocating for the continuing search for a solution, Justice Scalia's opinion carried for the plurality and the court did not intervene to protect voters.

Finally, one of the most famous court cases in American history, Bush v. Gore 531 US 98 (2000) influences our view of the Supreme Court's influence on our election system and the validity of its outcomes. This famously contested election came down to a few thousand ballots in a county in Florida that had problems when initially cast. The Supreme Court knew that its decision to recount or recuse themselves from a decision would ultimately have an impact on the outcome of the election. Regulation of elections falls under the responsibility of the states according to Article I Section 4 of the Constitution. Because of this, many experts believed that the Supreme Court should have allowed the decision of the lower court to stand, as it aligned with the idea of state control over election practices.

However, the Supreme Court went against what the Florida Supreme Court had ruled and ordered that no recount take place, making it possible for President Bush to take the

election. In this way, the court interfered with a political process run by a separate political institution, violating the definition of a political question in the first prong of Baker, demonstrating once again the inconsistencies of the doctrine's execution and inability for the court to truly check the other branches of the federal government.

IV.

By design, the United States government is centered around self-regulation. The Supreme Court is no different- its rules about the cases it chooses to accept limits the scope of its power, and for good reason. The political questions doctrine is invoked for the same reasons- to ensure that the Supreme Court is only doing its job when absolutely necessary, and to prevent violations of separation of powers.

The standards set for a political question established in Baker v. Carr are clear-cut and arguably more understandable than the rules of ripeness and mootness, which have been argued to be ambiguous. A common misconception of the doctrine is that it takes away the ability of the court to have any political influence, and while the court does try to maintain an apolitical nature to ensure complete fairness, it does judge on issues involving politics when it deems necessary. This, typically, is where the conflict regarding the political questions doctrine arises. Courts attempt to resolve different controversies with political ramifications regularly. For instance, the Supreme Court has dealt with racial gerrymandering as an issue on multiple occasions, and has distinctly held that certain electoral processes deny citizens the right to vote based on their skin color. On occasions such as Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 57910 the Supreme Court has restricted the powers and autonomy of the president, obviously having political consequences. Both decisions necessarily had inherently political consequences. Instead, the political question doctrine applies to

issues that courts determine are best resolved within the politically accountable branches of government– Congress or the executive branch.

Reducing the situations where courts may decline to accept or rule on a case on the grounds of the political question doctrine has important implications on the idea of separation of powers, especially between Congress and the executive branch. These two branches operate largely by checking one another through budget allocation, vetoes, and compromise, so finding a political question in a case where no disagreement exists between the political branches can be understood as an exercise of judicial minimalism, rather than upholding an important and unambiguous Supreme Court rule. These decisions also can be perceived as without important consequences for the relationship between Congress and the executive branch. In other cases, the reluctance of the judiciary to enforce a statute on the grounds of the political questions doctrine, one might argue, leaves the resolution of such questions to the political branches, and allows some constitutional questions to be resolved via a struggle between the political branches, rather than by the courts.

A different argument, however, is that the practice of allowing resolution of conflict through non-judicial avenues can often favor the executive branch at the expense of Congress and congressional power overall. Instead of determining a statute's constitutionality, the argument goes, courts effectively decline to force the executive branch to comply with congressional will—essentially expanding executive branch power. Whether the practice functioned to allow the political branches to determine separations of powers disputes between themselves, or effectively sanctioned executive branch practices, the ambiguity lies within this power. This may entail more judicial resolution of separation of powers conflicts, ultimately demonstrating the judiciary's true role to "say what the law is" in the American legal system.

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