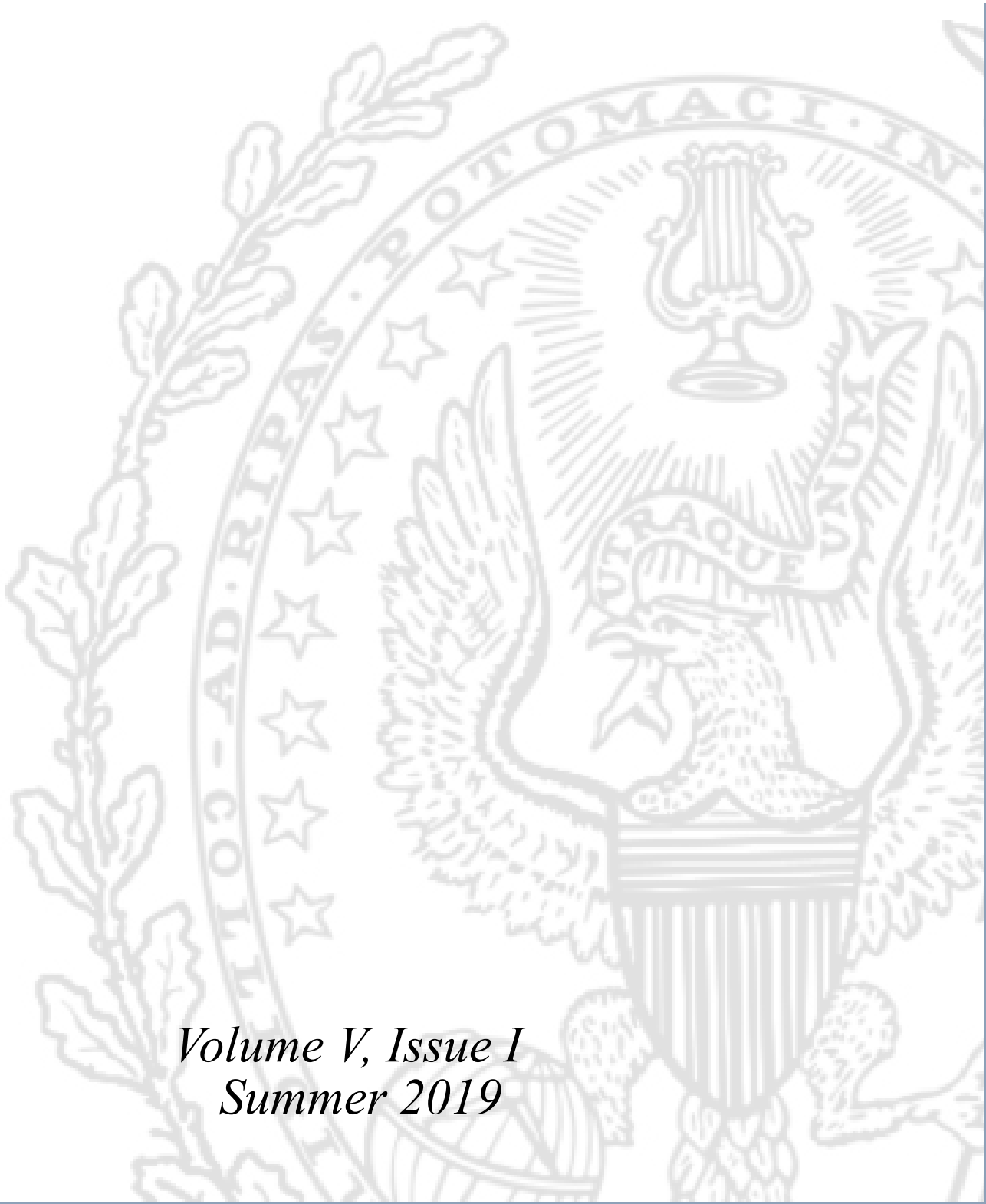
Georgetown University Undergraduate Law Review



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Letter from the Editor

August 5, 2019

Dear Reader,

It is with great pleasure that I welcome you to the fifth edition of the Georgetown University Undergraduate Law Review! For this edition, we sought to publish scholarship on various legal issues not included in previous publications. As a result, the following articles focus largely on human rights issues as they relate to the nation's most historically disenfranchised groups: the disabled, mentally ill, and indigenous communities. Additionally, this edition engages timely and controversial domestic and international issues concerning the presidential self-pardon, personal data protections on the internet, and the legality of travelling with a firearm.

It is important to mention that in our fifth year as a publication, we doubled the size of the journal. After much deliberation, we decided that publishing these ten articles would best align us with our mission to present a wide-ranging and diverse collection of salient legal issues. It is our hope that you find the subsequent works fascinating and relevant to larger legal dialogues today.

I would like to thank all of those who have made this year's publication a success. First and foremost, thank you to the authors of this year's collection of articles and their contributions to academic scholarship. Moreover, this edition would not have been possible without our dedicated staff and their countless hours of work. I owe a special thank you to my managing editors, Diana Chiang and Kaarish Maniar, both of whose continual insight and support significantly shaped the arc of our publication. Finally, thank you to our Georgetown colleagues, including our professors, advisors, and the Georgetown Pre-Law Society who supported our staff in realizing our goals for the fifth edition.

We hope you enjoy reading this publication as much as we enjoyed putting it together. As always, please do not hesitate to reach out to us at guundergraduatelawreview@gmail.com to share your comments with us. We welcome and look forward to your feedback.

Sincerely,

Cynthia Karnezis
Editor-In-Chief

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Gamble v. United States; An Erroneous Exception

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Abstract

First, the separate sovereigns exception is incompatible with the history, text, and meaning of both the Constitution and the Fifth Amendment. Second, the exception is inconsistent with jurisprudential developments since the matter was last meaningfully addressed. Third, due to changes in the factual landscape of criminal law, the doctrine is outdated and warrants revision.

Introduction

This paper will review the separate sovereigns exception to the Fifth, its place within the history, text, and meaning within the context of the Fifth Amendment, and its jurisprudential development. To understand the development of this exception, this brief will analyze relevant case law and precedent at each step of its incorporation. Furthermore, this brief will specifically consider the state-level incorporation of the Fifth Amendment into the Fourteenth Amendment and the implications of this development on the separate sovereigns exception. Finally, it will consider changes to the factual landscape and underpinnings of the American criminal justice system, particularly considering the extension of federal criminal law and the convergence of federal and state law. In conclusion, the brief will address why *Gamble* presents a feasible solution and does not pose a challenge to the pursuit of justice and civil liberty.

Part I. Background

In 2008, Terance Gamble was convicted of second degree robbery in Mobile, Alabama. As a felon, Gamble was thus banned by both federal and state law from the possession of a firearm. In November 2015, Gamble was pulled over and found in possession of a 9mm handgun. Gamble was prosecuted for violation of Alabama state law and received a one-year sentence. With ongoing state prosecution, Gamble was simultaneously charged by the federal government for felon possession of a firearm.[1] Gamble's plea, thus, is that subsequent federal prosecution violates his Fifth Amendment right that prevents being placed in jeopardy twice for the same crime.

The District Court denied Gamble's motion, with no choice but to adhere to the Court's separate sovereigns exception. The Court of Appeals agreed, stating that "unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine."[2] At each step along the way, from District to Appellate Court, and as the stated reason for certiorari, this case has relied entirely on the separate sovereigns exception.

The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The exception argues that an offense against state law is different than an offense against federal law because the two levels of government emanate their power from different "original sources," and thus are separate sovereign entities.[3] However, this exception is at odds with the history, text, and meaning of the amendment. As will be discussed in greater detail, the underlying purpose of the Fifth Amendment is to protect individuals from the excesses of the government, articulating the rights of the accused individual, not of the government. At the time of its incorporation, the Bill of Rights protected people by declaring negative rights that the Federal government could not encroach. Its purpose was to create, not restrict, individual liberty. The exception is also at odds with the text itself, which offers no room for sovereign exception. Such an exception was considered, and rejected, by the Constitutional Convention.[4] The exception is best understood through an examination of its jurisprudential development.

1 Gamble v. United States brief, 1-2 https://www.supremecourt.gov/DocketPDF/17/17-646/62536/20180904142141905_17-646%20ts.pdf

2 *Supra* 1 at 3. brief, 3

3 Puerto Rico v. Sanchez Valle, Justice Kagan, 2016, https://supreme.justia.com/cases/federal/us/579/15-108/#tab-opinion-3583250

4 Supra 1 at 10.

Legal Precedent

The separate sovereigns exception emanates from a unanimous 1922 decision, *United States v. Lanza* regarding bootleggers during Prohibition. The Eighteenth Amendment articulated the notion of separate sovereign responsibilities, stating that both Congress and the States have concurrent power to enforce Prohibition through appropriate legislation. Chief Justice Taft wrote, "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory".[5] However, *Lanza* insufficiently settles the separate sovereigns exception to the Fifth Amendment. At this point, *Barron v. Baltimore* was controlling precedent regarding incorporation and dictated that the Fifth Amendment was not applicable to the states.[6] Hence, the only restricted double jeopardy was that of a second prosecution, for the same offense and under the same authority, by the federal government. While this case allows both the state and federal governments to prosecute for the same offence, it does so when double jeopardy protections could not have applied to state courts. There is no way that *Lanza* could have set controlling precedent for this case as the protection against double jeopardy was yet to apply to to both levels of government. *Lanza* reveals a fundamental weakness of the sovereign exception applicable to *Gamble*: that it is rooted in outdated legal precedent.

The Courts would issue another landmark decision regarding separate sovereignty in 1958's *Abbate v. United States*. Abbate and Falcone were charged by the State of Illinois with conspiring to destroy property. As several of the facilities they targeted were federally held, the two were additionally charged with the federal crime of conspiring to destroy property essential to United States communication systems. In this case, Justice Brennan, writing for the majority, argued that separate prosecutions reflect the concurrent power of the state and Federal governments to enforce separate statuses. In essence, an act constitutes one offense per offended level of sovereign; breaking a state law is a different offense than breaking a federal law, even if the facts are identical. Hence dual prosecutions are not a violation of the Double Jeopardy Clause if they are for different offenses. This argument, as Justice Black argues in his dissent, relies on dicta rather than on precedent, and is wholly unsubstantiated. While the majority ignores the history, text, and meaning of the Fifth Amendment, Justice Black articulates that the premise of the amendment was to establish a "broad national policy against federal courts' trying or punishing a man a second time after acquittal or conviction in any court."[7] Black alludes to the Partridge Amendment, introduced at the Constitutional Convention by George Partridge, which would have added the phrase "by any law of the United States" following the Double Jeopardy Clause. Patridge's addition would have permitted the Federal government to prosecute those who had already faced State trial.[8] Congress, however, adopted no exception to the double jeopardy requirement. The notion that violation of state and federal law constitutes unique offenses is one that arose in dicta and is in no way based on precedent or applicable jurisprudence. Hence, Black argues that the exception has no place within the American legal tradition.

There is a third landmark case in the development of separate sovereignty. In a 2016 case, *Puerto Rico v. Sanchez Valle*, the Court decided that Puerto Rico and the U.S. feder-

5 United States v. Lanza, Chief Justice Taft, 1922, https://supreme.justia.com/cases/federal/us/260/377/

6 Barron v. Baltimore, Chief Justice Marshall, 1833, https://www.oyez.org/cases/1789-1850/32us243

7 Abbate v. United States, Justice Black, 1958, https://supreme.justia.com/cases/federal/us/359/187/#tab-opinion-1942323

8 Gamble brief, 10

al government are the "same sovereign" for purposes of the Double Jeopardy Clause, and thus may not doubly prosecute. Justice Kagan, writing for the six justice majority, argued that the definition of sovereignty rests on the "ultimate source" of the government's power. Kagan argued that while states are separate sovereigns because they draw power from "inherent sovereignty," which is unconnected to and predates the U.S. Federal government, Puerto Rico does not. Puerto Rico's history, Kagan argues, demonstrates this fact, as it was Congress that conferred upon the people the right to create the Puerto Rican Constitution, which in turn conferred Puerto Rico the right to bring about criminal charges. Thus, the U.S. Congress is Puerto Rico's original source of authority and the island does not constitute a separate sovereign from the Federal government. In her concurrence, Justice Ginsburg argued that "the [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA."[9] There are several reasons why the Court's decision in *Sanchez Valle* warrants reconsideration in *Gamble*. The opinion that separate sovereigns need to be revisited, especially following the incorporation of the Fifth Amendment, is agreed upon by many courts and commentators.[10] Ginsburg, though in concurrence with the Court's use of long prevailing doctrine, questions the fundamental nature of said doctrine. Ginsburg argues that current separate sovereigns doctrine contradicts the purpose of the Double Jeopardy Clause because States and Nation are "kindred spirits" yet "parts of ONE WHOLE," and it is inconsistent with the amendment's purpose and text to try or punish the same person twice within that whole.[11] Justice Ginsburg question the Court's fundamental holding that the States draw their power from a separate original source than the Federal government, which by the court's own rule would thus make them indistinct sovereigns. Justice Ginsburg argues that separate sovereignty warrants reconsideration because of changing jurisprudence regarding the Fifth Amendment and because of faulty definitions of sovereignty. *Gamble* is the vehicle for this reconsideration that *Sanchez Valle* was not - a clear litmus test for dual, state and federal level, prosecutions of a banal crime.

Part II. Developing Arguments

With a robust understanding of the watershed precedents that define the separate sovereigns exception, one can more clearly understand and address the three major reasons why this court should find it unconstitutional. First among these is that the exception is at odds with the text, history, and meaning of the Fifth Amendment, and that no case has meaningfully considered this rationale.

The Fifth Amendment can holistically be understood as the protector of the accused. The amendment addresses criminal procedure and outlines constitutional limitations on legal procedure. From a purposivist standpoint, the goal of the Fifth Amendment is to protect and strengthen the rights of the accused and the goal of the Double Jeopardy Clause was to prevent multiple trials for the same offense. Ergo, as the separate sovereigns doctrine makes the clause less protective of individual liberties and subjects the accused to multiple trials for the same offense, it is thus at odds with the text's purpose. The exception additionally contradicts the clause's literal text. The text

9 Puerto Rico v. Sanchez Valle, Justice Ginsburg, 2016, https://supreme.justia.com/cases/federal/us/579/15-108/#tab-opinion-3583250

10 United States v. Wilson, 413 F.3d 382, 394 (3d Cir. 2005) (Aldisert, J., dissenting) ("The time has come for the Supreme Court to revisit the issue[.]"); United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 497 (2d Cir. 1995) (arguing that the exception "is in need of serious reconsideration");

11 Puerto Rico, Ginsburg; Federalist Paper no. 82, Alexander Hamilton

contains no exception. As mentioned, Congress debated the inclusion of the Patridge Amendment into the clause, which would have added the words "by any law of the United States" into the document and would have allowed for subsequent prosecutions at the state and federal level.[12] However, Congress rejected the Amendment, and phrased the clause in absolute terms, making no exception to the right against double jeopardy. The structure of the Bill of Rights and the United States Constitution as a whole is predicated on the core principles of federalism. As Madison wrote, the system was designed to provide "double security … to the rights of the people".[13] The separate sovereign exception is inimical to this core premise of American federalism, as it restricts individual rights, rather than protects them, by enabling the two levels of government to accomplish in tandem what they are prevented from doing separately : put an accused twice in jeopardy. This rationale, that separate sovereigns is fundamentally at odds with the history, text, and purpose of the Fifth Amendment, has not been seriously considered at any step along its incorporation into American jurisprudence. As our discussion of precedent illuminated, separate sovereigns emerged from "ill considered dicta" that neglected to engage with the history, text, or meaning of the clause in question.[14]

The second core reason why this Court should find the separate sovereigns exception unconstitutional is that the exception's doctrinal underpinnings have eroded with the incorporation of the Fifth Amendment. The exception was predicated, in *Lanza*, on the fact that the double jeopardy clause was not applicable to the states. Thus, for purposes of a double jeopardy analysis, a state trial essentially did not count as jeopardy. The clause solely restricted subsequent trials at the federal level. This same truth existed in *Abbate.* The doctrinal bedrock of this argument, however, dissipated in 1969 with *Benton v. Maryland*. *Benton* stipulates that the Double Jeopardy Clause is an element of liberty as protected by the Due Process clause of the Fourteenth amendment, and is thus applicable to the states. This incorporation warrants jurisprudential revision as the Court has held, in *Elkins v. United States* and *Murphy v. Waterfront*, that following incorporation the Court should not adhere to precedent and should reconsider the case's constitutional underpinnings.[15] Now, double jeopardy applies to both state and federal level prosecution, meaning that a state level trial would count as facing "jeopardy" for an offense, while before *Benton* it had not. The separate sovereigns exception may have initially been constitutional, as there was no protection against double jeopardy that included the state level. However, the incorporation of *Benton* means that state level trials now count as facing the same "jeopardy" as federal trials. This legal development has not yet been considered, and thus the separate sovereigns exception's place within the Fifth Amendment warrants reconsideration

The third core reason why the Court should find the separate sovereigns exception unconstitutional is because of changes to the factual landscape of criminal justice. It is Court policy that changed factual underpinnings of precedent warrants their revision. *Casey* makes clear that when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, "said rule warrants revision.[16] When the separate sovereigns doctrine was first put in dicta in *Fox*, it was assumed that because of the minute overlap between state and federal criminal court the separate sovereigns exception would be restricted for "instances of

12 Gamble brief, 10
13 Federalist Paper no. 51, James Madison
14 Gamble brief, 7
15 Gamble brief, 8
16 Planned Parenthood v. Casey; Gamble brief, 35

peculiar enormity, or where the public safety demanded extraordinary rigor".[17] The Court suggested that the one-prosecution rule was, in certain extreme cases, suspendable. At the time of *Fox*, the Court was certainly imagining the intended subversion of the Fugitive Slave Act by a free state, and thus imagined this as such an extreme condition. While there were certain issues that warranted federal attention, at the time federal and state criminal justice systems operated in nearly autonomous spheres.[18] Federal law was largely reserved to protect limited and well-defined federal interests, while the states enacted and prosecuted the majority of criminal law.[19] Recent growth of the federal government's role in criminal enforcement has become so expansive that "the federal government has duplicated virtually every major state crime."[20] Now, virtually every crime can be charged in both state and federal court - thus, the factual underpinnings of the criminal justice system that motivated the *Fox* opinion have eroded. While *Fox* assumed that duplicative proceedings would happen for cases of extreme public safety or peculiar enormity, in 2016 convictions such as Gamble' involving "illegal possession of a firearm, usually by a convicted felon" accounted for more than half of the year's 7,305 federal firearms convictions.[21] This is not a matter of peculiar enormity, it is a banality; if this decision is allowed to stand then subsequent trials for any violation of the all-encompassing federal criminal code would be twice triable.

Part III. Response to Counter Arguments

There are several essential counterarguments that must be addressed in this decision. One counterargument that must be addressed revolves around the definition of "offence" within the meaning of the Double Jeopardy Clause. This argument contends that violation of a state and federal law constitutes two unique offenses, one against either sovereign. Thus, Terance Gamble actually committed two offenses, one when he broke Alabama law and another when he violated Federal law. In *Moore v. Illinois*, the Court explained that "[a] n offence, in its legal signification, means the transgression of a law."[22] Hence, when the same offense violates the laws of two separate entities, the perpetrator has, through one act, committed two separate offenses. Ergo, if the two entities are determined to be separate sovereigns they may successively prosecute the defendant. The Court's determination for sovereignty, both in *Moore* and later articulated in *Puerto Rico v. Sanchez Pale* is the notion of "original source". Thus, if the two bodies derive their power of prosecution from two unique sources they are separate sovereigns and may doubly prosecute. In *Sanchez Valle*, Justice Kagan, through historical analysis of the role of the US government in developing the island's political and legal autonomy, argued that because the US government gave Puerto Rico its political autonomy and power, it was thus the "original source". Therefore, the two are not separate sovereigns, and one cannot be prosecuted for violation of both Puerto Rican and federal law. Justice Kagan argues that while Puerto Rico finds its original source for power in the U.S. federal government, states, because of the "equal-footing" doctrine, rely on "authority originally belonging to them before admission to the Union and preserved to

17 Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 HASTINGS L.J. 1135, 1138–40 (1995). From Gamble brief

18 Gamble brief, 43-46

19 Amicus brief, Senator Orrin Hatch, https://www.supremecourt.gov/DocketPDF/17/17-646/63337/20180911145348110_17-646%20tsac%20Senator%20Orrin%20Hatch.pdf

20 Edwin Meese III, Big Brother on the Beat: The Expanding Federalization of Crime, 1 TEX. REV. L. & POL. 1, 22 (1997); from Gamble brief, 43

21 Gamble brief, 44

22 *Moore v. Illinois*, Justice Powell, 1977, https://supreme.justia.com/cases/federal/us/434/220/#tab-opinion-1952441

them by the Tenth Amendment."[23] The doctrine argues that even States that are constructed and incorporated by the US government have "inherent sovereignty" that is unconnected to and that preexists very government from which they were created. This, Kagan argues, is true because it was true for the first 13 states, which held these original powers, and that under the doctrine of equal-footing new states must possess the same liberties and legal characteristics as the original colonies. Therefore the sovereignty of all states lies unconnected to that of the US Congress.

There are several main issues with the argument that "original source" for power is the arbiter of sovereignty. The first of these is the question of the "equal-footing" doctrine. The doctrine suggests that because of the "original source" of power of the 13 colonies, which the Court's defines in *Moore* and *Sanchez Palle* as the test for sovereignty, all newly incorporated states must possess the same rights as the original 13, and must thus be separate sovereigns of their own. However, the equal-footing doctrine itself is a requirement imposed by the Constitution. Since new States would have no claim to the rights of the original 13 without the equal-footing doctrine, the Constitution itself is the ultimate source of power. Since the Constitution is the ultimate source of power for these new states, they are, by the Court's own test, not separate sovereigns from the federal government. The exception is thus unworkable by the Court's own metric.

The equal-footing doctrine is additionally unworkable in the context of the District of Columbia. The Court ruled that Puerto Rico finds its original source of power from the U.S. federal government, while US states do not. In this analysis, Justice Kagan traced the arc of Puerto Rico's history and changing autonomy. If one performs a similar analysis to Justice Kagan's one would come to the irrefutable conclusion that the ultimate source of power for the District of Columbia is, just like Puerto Rico's, the U.S. federal government. The District was formed in 1790 on land ceded by Maryland and Virginia to the federal government. The city developed over the next decade, and in 1800 became the federal capital.[24] Throughout the District's history, there have been efforts at self-rule, petitions to, and protests of the federal government for greater political autonomy. The District's current legislative body, the Council of the District of Columbia, was established by the 'District of Columbia Home Rule Act of 1973", enacted by Congress, and ratified by the District's voters.[25] The history of the District reveals a clear, unassailable truth: its ultimate source of power is the U.S. federal government. Therefore, by the *Sanchez Valle* test, the two entities are not separate sovereigns; an individual may not be tried more than once. It is an unworkable standard for a defendant in the District of Columbia to be immune from the separate sovereign exception and thus be afforded different constitutional protections than a resident of the State of Maryland. Per *Montejo v. Louisiana* "[t]he fact that a decision has proved 'unworkable" is a "tradition ground for overruling it". As demonstrated, this precedent is unworkable, and must be overturned.

Another counter argument in favor of maintaining the separate sovereigns exception is that there are, by the very premise of the federalist system, separate interests and goals of the federal and state governments. However, the "separate spheres" of interests between federal and criminal law have eroded since this court last considered the dual sovereignty doc-

23 Heath v. Alabama, from United States' brief, 9

24 William Tindall, Origin and Government of the District of Columbia, Judd & Detweiler, 1902

25 Council of the District of Columbia, "DC Home Rule", https://web.archive.org/web/20141018112528/http://www.dccouncil.washington.dc.us:80/pages/dc-home-rule

trine, due to the mass federalization of many criminal offenses previously reserved to the states.[26] Therefore, while there was a "practical protection" against double prosecution due to the minor overlap of criminal law, the expansion of federal criminal codes has accordingly expanded opportunities for double prosecution and has eroded this practical protection.[27] The opportunity for dual prosecution has expanded from what was first laid out in *Fox* as matters of "peculiar enormity" or when "public safety demands extreme rigor" to what we have here in *Gamble* - an extraordinarily banal violation of gun ownership laws.[28] The broad overlap between federal and criminal law underscores the changing factual landscape of this case, and challenges the assumption that there are vast and irreconcilable differences between the goals and interests of federal and state criminal law.

Conclusion

It is essential to work through a practical situation to understand the implications of *Gamble's* challenge to the separate sovereigns exception, and why this presents a workable solution. In the early 1990s, after the Rodney King beating, federal prosecutors charged four Los Angeles police officers with civil rights violations, after they were controversially acquitted in state trial. A serious question in this debate must be whether the elimination of the separate sovereign exception would hinder the ability of federal civil rights prosecution to ameliorate state failures of criminal justice. What this calculus forces us to consider is the delicate balance between the constitutional rights and privileges of the individual and the government's interest against the observance of such rights. Because the right in question concerns the Fifth Amendment, which is protected under its incorporation into the Due Process clause of the Fourteenth Amendment, violation of this right requires satisfying strict scrutiny and showing of a narrowly tailored compelling government interest.[29] As the Court should hold, the government would need to satisfying strict scrutiny to infringe the protections of double jeopardy. For Rodney Hood, and in every other trial concerning civil rights or police abuse, this right would certainly be compelling. American citizens have a fundamental right to their lives and the protection of their police. Rodney Hood should not sacrifice this right by his blackness. The federal government has a clear and compelling interest in the prosecution of Hood's assailants - the protection of civil liberties and a check on police brutality. There is no compelling government interest in the dual prosecution of Terance Gamble, which, as demonstrated, is a banal and victimless crime. What this distinction demonstrates is that an individual's right to protection from double jeopardy may be infringed, but only when the subject at hand confers with strict scrutiny. This presents a workable and just solution to the question of double jeopardy, and how the rule of law need not upend the mores of justice.

In conclusion, this Court should overturn the separate sovereigns exception to the Double Jeopardy Clause of the Fifth Amendment. However, the Court should recognize that strict scrutiny, when satisfied, would allow the government to forgo this protection.

26 Gamble brief, 43
27 Gamble brief, 43
28 Fox v. Ohio; from Gamble brief, 43
29 United States v. Carolene Products Company, 1944

In the Eye of the Beholder:
Art, Law, and Child Pornography in Late-Twentieth-Century America

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Abstract

In 1990, a San Francisco Grand Jury decided that something about Jock Sturges's photography of nude children set it apart from child pornography, saving him from the charges a federal prosecutor recommended. This legal and cultural history paper investigates cases like this, questioning what, if anything, distinguishes art depicting the naked bodies of children from child pornography in the eyes of American law and society. My analysis of case law dating back to the late-1950s, the photography of Jock Sturges and Sally Mann, and other popular art and obscenity debates from the 1980s and 1990s illustrate persistent social and legal ambivalence around this controversial topic. Through these examples, I argue that the law has failed to produce a sustainable framework for securing both children's safety and freedom of expression in artistic pursuits involving nude minors. The implications of this unresolved issue are amplified in our online world.

I. Introduction

In Jock Sturges's 1987 photo "Marine, Jeanne, Gaëlle, and Two Alexandras Standing," five girls at various stages of adolescence pose relative to each other on a beach in a naturist commune in Montalivet, France. All five are completely nude.[1] They gaze in different directions, but the pubic areas and chests of three girls directly face the camera. In 1990, FBI officials and San Francisco police officers raided Sturges's photography studio and seized his equipment and negatives. A federal prosecutor subsequently recommended that a grand jury indict him on counts of child pornography. The grand jury declined. Sturges's case is one example of what can happen when photographers choose to depict nude minors in their work. Sally Mann, another photographer who photographed naked children throughout the 1980s and 1990s, featured her own children at their home and was never subjected to legal investigation. Mann casts her own young children as the fierce and independent, yet still playful, stars of her photographs. Both Sturges's and Mann's depictions of naked children as sensuous and naturistic challenged the innocent, sheltered, and nonsexual sanctity of childhood. Especially at a time with numerous perceived threats to children, such as HIV/AIDS, the growing availability of recreational drugs, and rising divorce rates, these popular depictions of naked children further degraded the purity of the American child in society. Beyond this threat to childhood innocence, though, Mann and Sturges's photography calls into question the viewer's ethical responsibility.

In her seminal book *On Photography*, the American philosopher Susan Sontag suggests that "photography has become one of the principal devices for experiencing something, for giving an appearance of participation."[2] Unlike painting or sculpture, for example, photography can tread close to pornography because of its experiential nature. Anne Higonnet, an art historian who specializes in artistic depictions of childhood, argues, "it is commonly believed that photographs occupy a threshold between reality and representation."[3] Assuming this is true, Mann and Sturges's photos invite uncomfortable questions about voyeurism. Do viewers inherently sexualize child subjects by looking at their bodies in photos? Do photographers sexualize children by photographing their nude bodies and calling it art? How subjective can the definition of art be? These questions permeate both critical response to and public debate about Mann and Sturges's photos.

Mann faced uniquely maternal and moral criticism accompanying the accusation of sexualizing her own children. By contrast, Sturges underwent a legal investigation because of the perceived threat his photos posed to child safety outside of the family home. The state and the public viewed him as a legitimate child pornography threat due to his relationship with his subjects: pubescent girls who were not his children. Despite these compelling differences, both photographers stoked public outrage and asked viewers to question what it means to look at a child's naked body. This essay aims to situate the Mann and Sturges cases within their time by discussing other art and obscenity trials and by providing legal definitions of obscenity, child pornography, and consent. This background will detail how, from the 1970s to the 1990s, shortcomings of the law contributed to a larger cultural anxiety over dangers to American children real and imagined. Art critics could transcend this moral panic due to their belief in this type of photography as a noble artistic pursuit. The public, ultimately, could not.

1 Fig. 1. Jock Sturges, Marine, Jeanne, Gaëlle, and Two Alexandras Standing, Montalivet, France, 1987, http://www.artnet.com/artists/jock-sturges/marine-jeanne-gaelle-and-two-alexandras-standing-1V4dRLYrPiLS_fa5w3kFsw2.

2 Susan Sontag, On Photography, 7 (1997).

3 Anne Higonnet, Pictures of Innocence: The History and Crisis of Ideal Childhood, 162 (1998).

Amidst hysteria over exploitation and obscenity in the late twentieth century, most viewers were already immersed in a climate of fear. For both the public and the state, painting the photographers as irresponsible at best and pedophilic at worst posed an easier solution than contending with their own contentious viewership of the photographs. The Sally Mann and Jock Sturges controversies illustrate that child pornography laws designed in the 1970s and early 1980s failed to decisively address images that claimed to be art and never intended to be pornography yet resembled it in the eyes of the law. Today, when cases such as Mann's and Sturges's arise, the laws neither ensure children's safety in artistic ventures nor secure freedom of artistic expression. This ambiguity and desire to protect the self and the family caused Americans to react to such art by making isolated judgements about the artists instead of confronting the legal implications of the subject matter itself. This ambivalence about what distinguishes art, including images of naked children, from child pornography reflects a persistent gap in American law and ambiguity in American society.

II. Prurient, Lewd, and Lascivious: Obscenity and Pornography in American Law

The 1957 case *Roth vs. United States* is a traditional reference point for modern debates over pornography and obscenity in America. Traditionally, obscenity was banned under a common law theory of corruption.[4] *Roth* created a narrower definition of obscenity and a framework for deciding what constitutes obscene material. In *Roth,* the defendant, Samuel Roth, distributed magazines containing explicit photographs in New York. In California, David Alberts gave out publications containing images of nude women. Both were arrested for violating obscenity laws and their cases were consolidated in *Roth*. In a 6-3 decision, the Supreme Court decided that obscenity was not "within the area of constitutionally protected speech or press.[5] In his majority opinion, Justice William Brennan established a set of guidelines, coined the "Brennan Doctrine," for determining what constitutes obscenity. To differentiate restrictions on obscene material from censorship, the "Brennan Doctrine" stated that only items with "prurient interests" could be removed from the public sphere.[6] To Brennan, "prurient," which is defined as having an excessive interest in sexual matters, meant "utterly without redeeming social importance."[7]

This differentiation, however, failed to adequately reconcile American desires to both squash obscenity and to preserve free speech and civil liberties. As historian, Whitney Strub, argues that Brennan's opinion draws out the inherent paradoxes in the United States' history of obscenity and a society "both prurient and repressive, both righteous and sinning."[8,9] The 1973 case *Miller v. California* established the new, prevailing definition of obscenity in America. According to the case, something is obscene if: the "average" person would find that the work appeals to prurient interest; the work depicts sexual conduct in a "patently offensive way;" and/or if the work lacks serious literary, artistic, political or scientific value.[10] Yet, even with these added guidelines, the case law had not yet directly addressed child pornography.

4 Roth v. United States, 354 U.S. 476 (1957).

5 *Id*. at 3.

6 Whitney Strub, Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression, 1 (2013).

7 *Supra* note 5, at 3.

8 *Supra* note 6, at 4.

9 For example, in the 1964 case *Jacobellis v. Ohio*, Supreme Court Justice Potter Stewart believed the film in question was not obscene under the *Roth* standard. Explaining his beliefs in a concurrence with the 5-4 majority, he said, "I know it when I see it, and the motion picture involved in this case is not that." This now-iconic declaration exemplifies the subjective and ironic nature of policing obscenity.

10 *Miller v. California*, 412 U.S. 15 (1973).

The first attempt to legislate modern child pornography laws came with the 1977 "Protection of Children Against Sexual Exploitation Act." The Act prohibited the sexual exploitation of minors by making it illegal to film, photograph, or record a minor in any sexual act, transport any film or recording of such an act, or transport any minor in "interstate or foreign commerce for immoral purposes."[11] Among acts prohibited are intercourse, bestiality, masturbation, and sadomasochism. Some acts are less clearly exploitative, for example the "lewd exhibition of the genitals or pubic area" of minors or of adults in the presence in children.[12] In *New York vs. Ferber* in 1982, the Court questioned whether pornographic depictions of children lacked First Amendment protection if they did not explicitly fit the new obscenity standards.[13] The Court concluded that because child pornography laws are designed to protect children from exploitation and abuse, the standards are stricter than those for deciding obscenity cases.[14] Part of this decision meant declaring that, by definition, all child pornography was completely lacking in artistic value. Paul R. Abramson, Steven D. Pinkerton, and Mark Huppin summarized the decision in their book *Sexual Rights in America*, writing that after *Ferber*, "if a child is harmed by pornography, the context is immaterial."[15]

The *Ferber* standards of child pornography pose questions about the role of art that seeks to push cultural boundaries regarding childhood, sexuality, and nudity. *United States v. Dost* (1986) involved two men who photographed nude young girls. A United States District Court in Southern California considered whether the photographs depicted the minors' genitals in a "lascivious" manner and established the "Dost Test" for determining what qualifies as lascivious exhibitionism.[16] This test includes whether or not the genitals are the "focal point," whether the setting is "sexually suggestive," the child's attire (or lack thereof), the age of the minor, and whether or not the visual depiction of the child is designed to "elicit a sexual response in the viewer."[17] These criteria attempt to establish a methodology for deciding what constitutes harm to a child in pornography. The Court indicted both defendants with charges of child pornography after applying the guidelines to the photography in question. These criteria, while useful, still rely on subjective definitions of what is "suggestive," "lascivious," or sexually stimulating.

The 1992 case *United States v. Knox* illustrates the United States government's interest in appearing to be tough-on-porn – and specifically child porn – during this time period. *Knox* questioned whether the Dost Test can stand in cases where the children involved are not nude. Stephen Knox was arrested for possessing three films of young girls dancing in bathing suits, leotards, and otherwise "revealing" attire with a focus on "crotch shots."[18] The Third Circuit Court of Appeals concluded that this focus, as well as crude photograph titles, constituted a lascivious exhibition of genitals and pubic area.[19] During Knox's appeal, Pres-

11 Protection of Children Against Sexual Exploitation Act, 18 USCS §§ 2251-2259 (1977).

12 *Id*. at 3.

13 The 1984 revision to the Act replaced the use of "lewd" with "lascivious." The use of "lascivious" in place of "lewd" was in response to the 1982 case *New York v. Ferber*.

14 *New York v. Ferber*, 458 U.S. 747 (1982).

15 Paul R. Abramson, Steven D. Pinkerton, and Mark Huppin, Sexual Rights in America: The Ninth Amendment and The Pursuit of Happiness, 142 (2003).

16 Kieran Dowling, *A Call to Rewrite America's Child Pornography Test: The Dost Test*, 24 Seton Hall J. Sports & Ent. L., 5 (2014).

17 *United States v. Dost*, 636 F. Supp. 828 (SD Cal. 1986).

18 *Supra* note 15, at 138.

19 cert. granted, 113 S. Ct. 2926, vacated and remanded, 114 S. Ct. 375 (1993), aff'd, 32 F.3d 733 (3d Cir. 1994), cert. denied, 1994 WL 512613 (U.S. Jan. 17, 1995); Titles such as "Little Girl Bottoms."

ident Bill Clinton sent the Justice Department a letter, in which he unambiguously stated, "I find all forms of child pornography offensive and harmful, as I know you do, and I want the federal government to lead aggressively in the attack against the scourge of child pornography."[20] After Clinton's condemnatory note, the Justice Department reversed its brief in support of Knox and the Supreme Court declined to hear Knox's final appeal.[21] Political and cultural forces and the subjective Dost Test compounded to confirm Stephen Knox's conviction. By 1992, child subjects did not have to be nude in visual depictions in order for the material to be classified as child pornography. Between 1989 and 1992, however, artists continued to create works involving nude children. Most either escaped recourse or prevailed in legal contests. Thus, even as laws passed, they did not translate universally or seamlessly into practice.

III. Photography, Pornography, and Paranoia

This dissonance between legal and cultural action crystallized in famous art and obscenity trials of the 1980s and 1990s, most notably with the Robert Mapplethorpe case in 1989. Mapplethorpe, an American photographer, died of AIDs in March of that year. Following his death, a retrospective of his work toured American museums and the organizers received a $10,000 National Endowment for the Arts grant.[22] However, due to the fact that Mapplethorpe's photography included depictions of homoerotic sadomasochism and nude children, the director of the Cincinnati Contemporary Art Center, where the Mapplethorpe show was scheduled to appear, was charged under Ohio law with "pandering obscenity" and two counts of child pornography.[23] Mapplethorpe's work and the political controversy around its showing illustrate how law and popular culture converged around this issue.[24]

In Mapplethorpe's 1976 photo "Jessie McBride," a nude young boy stares directly at the camera while perched atop an armchair, his legs spread and his penis exposed.[25] While "Jessie McBride" is certainly less violent and seemingly innocuous compared to the homoerotic and sadomasochistic images in the collection, the equation of these two types of images demonstrates the intensity with which concerned stakeholders treated potential instances of child pornography.[26] One reason they were equated is the issue of consent; no child can give consent to sexual acts with an adult because of the decision-making capability and power imbalance inherent in the age difference. Art historian and author of *Pictures of Innocence: The History and Crisis of Ideal Childhood*, Anne Higonnet, argues that, theoretically, it is therefore possible to argue that no subject with less power, whether economic, political, or social, can ever give genuine consent to the photographer with more power.[27] However, it would follow that countless famous and uncontested photographs, not to mention every family photograph a parent takes of their child, would consequently be deemed unethical. Seeing as a jury acquitted the Cincinnati Art Director in 1990, clearly neither nudity

20 *Supra* note 15, at 139.

21 When Knox appealed, however, the Justice Department concurred. In a brief supporting Knox, Chief Supreme Court Advocate Solicitor General Drew S. Days III determined that "child pornography statutes apply only to nudity or to genitals whose contours are evident through clothing" (Days). In response to the brief, the Supreme Court sent the case back to the Third Circuit, who rejected the Solicitor General's argument.

22 *Supra* note 3, at 167.

23 *Id.*

24 The trial was decided by jury.

25 Fig. 2, Robert Mapplethorpe, *Jessie McBride*, New York, 1976, copyright Robert Mapplethorpe Foundation.

26 Examples of the homoerotic content in Mapplethorpe's "X Portfolio" include an image of a man urinating into another's open mouth, men stimulating their penises and anuses with objects and fingers, and men bound or posed with various restraints.

27 *Supra* note 3, at 169.

nor power imbalances preclude photographs of nude children like Mapplethorpe's from being deemed art-worthy.

Thus, the Mapplethorpe case introduces a basic, yet significant question: what constitutes art? *Ferber* declared that no child pornography can have artistic value.[28] Combined with cases like *Massachusetts v. Oakes,* which established "mere nudity" as grounds for child pornography in 1986, it seems feasible that every photograph of a nude child would be classified as child pornography. In response to the Mapplethorpe case, a 1989 *The New York Times* headline read, "Is Art Above the Laws of Decency?"[29] The author, art critic Hilton Kramer, sought to inhibit the propagation of Mapplethorpe's work on moral grounds, citing its "gruesome peculiarities."[30] Andrew Vachss, an attorney specializing in child and youth representation, would defend Kramer, arguing that when it comes to child pornography, "any discussion of censorship is a sham, typical of the sleight-of-hand used by organized pedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights."[31] However, fellow critic Robert Storr counterintuitively argued that viewing the work is necessary for us to contend with its meaning. He notes that we must demand the right to "look, or look away," lest what he views as censorship become law.[32] While the Mapplethorpe case is only one art and obscenity trial that occurred in the 1980s, it underlies a foundation of understanding for the Sally Mann and Jock Sturges cases and speaks to the social and political climate of the era.[33]

A surprising alliance of the early 1980s stoked the sensationalism of the obscenity cases: feminist anti-porn advocates and conservative moral crusaders. Feminists saw pornography as inevitably subjugating women (and children) to the male gaze and oppression.[34] Some viewed pornography's demise as the final goal of the women's movement.[35] Emboldened first by Ronald Reagan's 1980 election and then the Attorney General's conservative report on the dangers of pornography in 1986, Christian women of the New Right organized around the idea of driving out the scourge of pornography based on religious and moral grounds.[36] Both groups, despite appealing to vastly different audiences, gained national visibility by validating the unrest surrounding children's roles in pornography, as well as its general consumption.[37] Due to the constant need to protect children from these threats, these years also fostered a climate of parental anxiety centered around how to act lovingly and appropriately towards one's child. Sally Mann's case is an example of

28 *New York v. Ferber*, 458 U.S. 747 (1982).

29 Hilton Kramer, *Is Art Above the Laws of Decency?* The New York Times, July 2, 1989, https://www.nytimes.com/1989/07/02/arts/is-art-above-the-laws-of-decency.html.

30 *Id.* at 8.

31 Andrew Vachss, *Age of Innocence*, London Observer, April 17, 1994, at 14.

32 Robert Storr, *Art, Censorship, and the First Amendment: This is Not a Test,* 50 Art J., 13 (1991).

33 Other cases (besides Sturges's case and the controversy around Mann) include the investigation of Alice Sims, who photographed her young children and their friends playing naked in the bath. The police never pressed charges, although her children were temporarily placed in an emergency foster home; Steven C. Dubin, *Arresting Images: Impolitic Art and Uncivil Actions,* 138 (1992).

34 Amanda Cawston, *The Feminist Case Against Pornography: A Review and Re-evaluation,* Taylor and Francis Online, July 19, 2018, at 14.

35 *Id.* at 8; Catharine MacKinnon and Andrea Dworkin are two of the most famous anti-porn feminist theorists.

36 Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report,* 12 Am. B. Found. Res. J. 681 (1987).

37 A worry about children being exposed to porn at earlier and earlier ages was also central to this panic. Feminist scholar Andrea Dworkin addressed this concern in her 1979 book *Pornography: Men Possessing Women* (New York: Penguin Books).

what happens when an observer views a parent as crossing this line.

IV. Sally Mann: A Mother at Work

Much of Sally Mann's photography centers around her family's home in Lexington, Virginia. Her 1992 collection *Immediate Family* contains 65 black and white photographs of her three children, all under the age of 10. Mann captures fleeting images of Jessie, Virginia, and Emmett during the vulnerable experience of growing up. Mann's photographs are soft and jarring at the same time. The 1989 photograph "Hayhook" depicts Jessie, her oldest daughter, naked, hanging from a hook on a deck, surrounded by her siblings and other adults.[38] Writer and critic Luc Santé argues that this photo at first appears sinister, but becomes a moment of "private rapture, a moment of illumination" for Jessie upon realizing that all those around her are unaware of her.[39] Neither Jessie's nakedness nor her pose is problematic to Santé. The traditionally radical New York magazine *Artform*, however, refused to publish this photo. These divergent critiques of a single photo exemplify the polarized responses to the book writ large.

Mann herself had reservations about putting her children's bodies on display. In fact, she arranged a private meeting with a federal prosecutor in Roanoke, Virginia to assess the legality of her photos. The prosecutor warned Mann that at least eight of her photographs in *Immediate Family* could be grounds for arrest. For a time, Mann decided not to publish *Immediate Family*. Her children were furious and urged her to proceed with the book, so Mann sent her two oldest, Jessie and Emmett, to a psychologist to ensure that they understood the potential consequences.[40] After receiving support from the psychologist, Mann published the book, but not before requesting it to be withheld from Lexington bookstores and deciding they would not display copies at her family's home.[41] By all measurable standards, Mann took precautions to preserve her children's comfort and understood the legal risks associated with her work. Publishing the book paid off. Within the first year of its release, Mann's publisher received over half a million dollars worth of print orders and *Aperture,* a photography magazine, published a monograph of the series along with a traveling museum exhibition. Despite this acclaim, Mann did not expect the magnitude of personal attacks she received after publishing *Immediate Family.*

Feminist author Mary Gordon is one of the most prominent critics of Mann's ethics of motherhood at play in *Immediate Family.* Gordon argues:

> Unless we believe that it is ethically permissible for adults to have sex with children, we must question the ethics of an art which allows the adult who has the most power over these children – a parent, in this case a mother – to place them in a situation where they become the imagined sexual partner of adults, adults they don't even know, and might be horrified by.[42]

For Gordon, Mann's ethical error was not tak-

38 Figure 3. Sally Mann, *Hayhook*, 1989, in *Immediate Family* (New York: Aperture, 1992).

39 Luc Santé, *On Photography: The Nude and the Naked: Childhood and Innocence in the Photography of Sally Mann and Jock Sturges,* The New Republic, May 1, 1995, at 30-34.

40 Richard B. Woodward, *The Disturbing Photography of Sally Mann*, The New York Times, September 27, 1992, https://www.nytimes.com/1992/09/27/magazine/the-disturbing-photography-of-sally-mann.html.

41 Connie Nyhan, *Letter to the Editor 3 - no Title,* The New York Times, October 18, 1992; One *New York Times* letter-to-the-editor argues that this act of self-censorship further complicates the first amendment issues associated with Mann's work.

42 Mary Gordon, *Sexualizing Children: Thoughts on Sally Mann*, 111 Salmagundi, 144 (1996).

ing the photographs, but inviting the sexual responses some may have to her children's bodies. Gordon views Mann skeptically, noting that the "innocence" Mann must have possessed to think that viewers would not make sexual associations to the photos "passes understanding."[43] Gordon implies that Mann was kidding herself if she did not draw the conclusion that some people would use her photographs pornographically when deciding whether or not to publicize them.

Mann responded – the only criticism to which she wrote a direct response – by positing that Gordon had a flawed understanding of something "which has been a part of human life – human nature? – for tens of thousands of years and yet which even now makes Mary Gordon uneasy: art."[44] Although Mann avoided legal recourse, her photography challenges us to debate ethics of motherhood and viewership. It is no wonder that her images sparked controversy in a society already dealing with a crisis of childhood and parenthood. Mann may have been trying to redefine the limits of childhood and maternity to an audience mostly unwilling to join her.

Gordon was merely one scholarly critic. Mann recounted the mass of responses she received from the public in a 2015 *The New York Times* retrospective. She recalls sorting the letters into three piles: "for," "against," and "what the…?" One asked, "Was it really art, Ms. Mann, or was it covert incest?"[45] Others "against" fell into the "bad mother" camp. People accused Mann of being "manipulative," "sick," "twisted," and "vulgar."[46] The broadcast evangelist Vic Eliason criticized Mann on his radio show and called on the Milwaukee District Attorney to investigate one of Mann's shows.[47] Sometimes, publications interfered and decided what the public could or could not see. A critical *The Washington Post* review barred four-year-old Virginia's eyes, chest, and pubic region in their depiction of *Virginia at Four*.[48] Mann describes feeling that a "mutilation" of her daughter's body had occurred; "heartbreakingly," she recounts, "the night after seeing the picture with the black bars, [Virginia] wore her shorts and shirt into the bathtub."[49] Virginia herself wrote a letter to the author and editor, and they apologized. All stakeholders wanted to preserve the innocence of American children. However, because of the ambivalence around how to handle the topic in American law and culture, critics ended up shaming not only the mother, but the child, too.

V. Jock Sturges: An Artist and a Threat

On April 25, 1990, Jock Sturges returned to his house and found it filled with police officers and FBI officials who were there to investigate him for child pornography. The officials seized his camera, darkroom contents, studio equipment, personal diaries, hundreds of thousands of negatives and photographs, and even a copy of Nabokov's *Lolita*. Sturges, a fine arts photographer whose work has been featured at the Museum of Modern Art and the Metropolitan Museum of Art, often photographed young nude girls in beautiful, natural landscapes. Like in his photo *Marine, Jeanne, Gaëlle, and Two Alexandras Standing,* he depicts his subjects in the years directly before, during, and just after puberty. He limits his subject pool to those whose families embrace nudity, such as those who live on naturist communes or frequent nude beaches.

Santé's article in *The New Republic*

43 *Id.* at 145.

44 Sally Mann, *An Exchanging on 'Sexualizing Children*, 114/115 Salmagundi, 230 (1997).

45 Sally Mann, "*Sally Mann's Exposure*," The New York Times, April 16, 2015.

46 *Id.* at 11.

47 *Supra* note 40.

48 Figure 4. Sally Mann, "Virginia at Four," in *Immediate Family* (New York: Aperture, 1992).

49 *Supra* note 48, at 11.

describes Sturges's artistic mission as a simple devotion to the human body.[50] He writes, "[Sturges] is not 'interrogating' sexuality, or turning his subjects into metaphors, or forcing them or his viewers to confront anything difficult or weird."[51] This proposition came after the Sturges's investigation that ended in no criminal charges. In a 2013 interview, Sturges urged viewers to "understand that [his project] wasn't just pictures of pretty girls, it was a long-term relationship with a huge amount of respect as the engine, and that the project was open-ended and continuing."[52] Looking back on his work, Sturges skirts the exploitative implications associated with the belief that his photos are "just pictures of pretty girls" by instead emphasizing the duration and mutual respect of his relationships with his subjects. Santé compares Sturges and Mann directly, yet never refers to Sturges's legal case. To him, apparently, it was not worth mentioning. The closest he got was in a defense of Sturges: according to Santé, "Sturges's work has all of the gravity, meticulousness and formal polish of academic art. Far from hindering his career, social taboos are greatly to his benefit: without them his pictures might seem warmer, but also more ordinary."[53]

The lab technician who alerted law enforcement of what he perceived as concerning images of nude children would disagree. At the time of the case, the general manager of the lab told *The New York Times* that Sturges's photos were the first they had ever flagged, and that six people viewed them and agreed to report; "I wish that everybody would withhold judgement until they see the photos for themselves," he told the reporter, "society should wait until they see what the content is before they jump to conclusions."[54] Society, however, never got a chance to see the images. The FBI investigation reached a dead end and ultimately cost taxpayers over a million dollars, while the reporting lab lost $200,000 to protest pickets and boycotts. As Higonnet argues, the lab did not necessarily foresee these costs because "in a climate of fear, any image of a child's body can seem dangerous."[55] While Santé paid no mind to Sturges's controversial past, the lab technician saw his work through the context of the contemporary moral panic; less concerned with issues of art and censorship, the lab ended up going out of business the following year.[56]

VI. The Consent Framework

In their book on sexual rights, Abramson, Pinkerton, and Huppin connect Mann and Sturges to a larger conversation about autonomy and consent. They posit that, "though many Americans buy [Mann's and Sturges's] books, it also seems safe to assume that many if not most American pedophiles possess them as well."[57] This chilling thought reinserts legal and political frameworks into this argument. Are Mann's and Sturges's photographs legally classifiable as child pornography? According to many of the legal standards outlined in this argument, the answer would be a definitive yes. However, it depends on interpretations of the subjective standards the case law sets: determining lasciviousness, suggestiveness, and what elicits a sexual response in viewers. Lasciviousness and suggestiveness in the context of child photographs is extremely hard to define, and surveying sex-

50 *Supra* note 39, at 9.

51 *Supra* note 39, at 9.

52 Jonathan Blaustein, *Jock Sturges Interview,* A Photo Editor, August 21, 2013, http://aphotoeditor.com/2013/08/21/jock-sturges-interview/.

53 *Id*. at 13; Sturges acknowledges that the taboos and controversy associated with his work also increased his fame. In an interview with *The Spectator* in 2011, he admitted, "Certainly, the feds pushed my career ahead by ten years."

54 Katherine Bishop, *Photos of nude children spark obscenity debate*, The New York Times, July 23, 1990, https://www.nytimes.com/1990/07/23/us/photos-of-nude-children-spark-obscenity-debate.html.

55 *Supra* note 3, at 191.

56 *Id.* at 13.

57 *Supra* note 15, at 152.

ual response is both ethically and logistically impossible. Attempts to limit sexual responses more often than not rely on assumptions about viewers, not facts about the photographers, let alone the children involved. Both Mann and her daughter felt more violated by *The Washington Post*'s decision to censor the image of Virginia than by its unmodified original state.[58] Reactionary solutions such as the altered version of *Virginia at Four* only serve to reinforce the idea that there was something sexual about the image in the first place.

Abramson, Pinkerton, and Huppin argue that a consent-based legal framework would help clarify the distinction between these two and future cases.[59] For Mann, the ability of her subjects to consent is contingent on her motherhood. Higonnet elucidates the complexity of Mann's situation, writing, "some would argue that the only person to whom a child can give consent is a parent, while others would retort that a parent is the last person from whom a child would be able to withhold consent."[60] The question then becomes whether or not parents can provide consent for their children. The answer is undoubtedly yes in many familial, medical, and personal decisions. Perhaps the guideline of parental consent should be extended to sexual images of children, which then leaves the parents vulnerable to legal recourse if determined to have acted against the child's interest.[61] In 1992, Law Professor Edward De Grazia said, "there isn't the slightest question that what [Mann] is doing is art, so her motives and the artistic value would be unmistakable to the Supreme Court. Her work would highlight the vagueness and overbreadth of the child pornography laws."[62] However, more than 25 years later, it seems unlikely that Mann's case will be the one to set a precedent, and even if it could, the precedent it would set would be vulnerable to the specific intentions and morals of each new case.

Sturges, for example, would require a different precedent, because under a consent-based framework the question becomes whether he has the right to take photographs of children who are not his own, even if their parents provided consent. It may seem as if this consent standard could still apply; if Sturges gets his subjects' parents to sign off, it becomes the parent's problem if the child photographed grows up and decides they were exploited in the process. However, this does not address the deeper issue of what the lab manager hinted at in *The New York Times*: the public's right to decide what kind of threat Sturges's photography poses. The consent framework falls short in this instance by not fully addressing what worried the public in the 1980s and 1990s: the thought that this man, photographing innocent children naked, might be doing so for perverse reasons or enabling viewers with perverse motives.

Some may suggest that the potential for sexual exploitations of nude images of children is reason enough to strip these images of any potential artistic value. For Sturges, taking away some of his artistic agency would not negatively impact his independent subjects, and would likely take exploitative material out of the hands of pedophiles. While no one knows exactly why the San Francisco Grand Jury decided to acquit, there does not seem to be any compelling artistic connection between Sturges and his subjects, or of his artistic project at large (other than, as previously noted, to photograph "pretty" young women). Mann's recounting of her own daughter's reaction to the censorship of her young body might give these critics more nuanced reasons to reconsider their position. A child left ashamed and an artist left without the right to express her art is not a positive legal

58 *Supra* note 45.

59 *Supra* note 15, at 159.

60 *Supra* note 3, at 163.

61 This guideline was established in *Prince v. Massachusetts,* which determined that "the custody, care, and nurture of the child reside first in the parents."

62 *Supra* note 42, at 10.

outcome, even if the state could have reasonably foreseen some citizens using the material for perverse means. While the public would still be left to decide for themselves in high profile cases, Courts could potentially adopt a cost-benefit analysis procedure to decide which viewpoint prevails in the eyes of the law. When cases like Mann's or Sturges's come up in the future, they ought to consider legal definitions of child pornography in light of the role of photographer, subject, and the consent-based power dynamics at play. Ultimately, they might balance the advantages and disadvantages to decide whether freedom of expression or protection of potentially threatened or exploitable child subjects should triumph.

Mann's and Sturges's cases are useful in conversation together precisely because of their differences. They provide a natural point of contrast and reveal how the complexities of an artist's intention and relationship to his or her subject can manifest in popular culture. Gender and parenthood are particularly explosive variables in cases involving child sexuality – in this case, a mother photographing her own children is drastically different than a man photographing young girls who are not his daughters. While the potential for deciding cases involving images of naked children with the rules of consent that Abramson, Pinkerton, and Huppin propose is promising, it does not sufficiently clarify our current laws and policies regarding child pornography. We must adopt an explicit language of consent in cases of artistic intent – a precedent that could surely be abused but would introduce legal distinction at the least. If artistic intent matters, courts must consider individual artists' motivations and relationships with subjects, a standard which would have greatly distinguished Mann's and Sturges's cases in the eyes of the law.

VII. Issue Evolution for an Online World

The legal gap between protection of children and freedom of expression becomes even more concerning in a digital age, where online pornography is available in mere seconds and art proliferates relatively unmediated on social media platforms. Tumblr, an online blogging site, announced in December of 2018 that they will ban all pornographic content.[63] The decision came just weeks after Apple removed Tumblr from the App Store in response to a discovery of child pornography on the site. Although child pornography may have been the cause for the decision (Tumblr has not commented on the connection), the effects include a total ban on genitalia and female nipples as well as visual depictions (videos, photos, or GIFs) of sexual acts.[64] Some argue that this will adversely harm women and LGBTQ people who have historically cultivated safe spaces for sexual exploration on the site.[65]

In order to keep real children safe and avoid negative externalities such as the erasure of a sex-positive space for marginalized groups, the questions of what is porn, what is art, and what constitutes harm to children need to be addressed preemptively, rather than retroactively. Using Mann and Sturges as case studies helps identify a need to clarify American law regarding child pornography and artistic intent. Though the implied goal is protecting both freedom of expression and children, the actual children displayed are, ironically, largely overlooked in this analysis. By addressing the failures of child pornography law and clarifying the gray area around cases like Mann's and Sturges's, fewer resources will be drained evaluating potential threats and more can be funneled to social services for children who need it. Failure

63 *Adult Content,* Tumblr, https://tumblr.zendesk.com/hc/en-us/articles/231885248-Sensitive-content

64 Jessica Powell, *The Problem with Banning Pornography on Tumblr*, The New York Times, Dec. 6, 2018, https://www.nytimes.com/2018/12/06/opinion/tumblr-adult-content-pornography-ban.html.

65 *Id.* at 16.

to address this persistent gap will surely result in more speculative arguments about artistic subjects at the expense of children who are actually in the throes of sexually abusive or exploitative relationships.

Image Appendix

Figure 1. Jock Sturges, Marine, Jeanne, Gaëlle, and Two Alexandras Standing, Montalivet, France, 1987.

Figure 2. Robert Mapplethorpe, Jessie McBride, New York, 1976, copyright Robert Mapplethorpe Foundation.

Figure 3. Sally Mann, Hayhook, 1989, in Immediate Family (New York: Aperture, 1992).

Figure 4. Sally Mann, "Virginia at Four," in Immediate Family (New York: Aperture, 1992).

Seeking Reparations in the Face of Ableist Shame: Organizing in the Wake of California's Eugenics Programs and Forced Sterilizations

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Abstract

Fueled by the rise of the pseudo-scientific eugenics movement across the United States in the early twentieth century, California became the third state to pass a eugenic sterilization bill in 1909. This resulted in the sterilization of over 20,000 people in California, most of whom were Mexican, Chicanx, and Latinx. Following nearly a decade of organizing, advocacy, and litigation, California finally outlawed eugenic sterilization in 1979. Recently, survivors, scholars, filmmakers, and advocates have revisited the state's history of forced sterilizations to acknowledge the past and advocate for reparations for survivors. In 2018, advocates introduced a bill in the state legislature that would provide payments for survivors, create a historical exhibit about the program's history, and fund development of further resources that would teach Californians about the state's culpability in eugenics. Though California's bill is an encouraging start to the process of addressing the damage caused by the eugenics movement and forced sterilizations, it lacks important details about implementation and excludes survivors of sterilizations that took place outside the 1909-1979 time period. In order to fully confront the breadth and depth of California's history of reproductive violence, future advocacy must address these flaws and center the voices and leadership of impacted communities.

Introduction

The early twentieth century saw the heyday of eugenic science as mainstream and innovative thought in the U.S., with the rise of social hygienic societies and university sponsorship of eugenics research and scholarship. In 1909, California became the third U.S. state to pass a eugenic sterilization bill, which led to over 20,000 documented sterilizations between 1909 and 1979. California's sterilizations accounted for one-third of all documented sterilizations nationally of people deemed mentally ill, feeble-minded, epileptic, syphilitic, or otherwise unfit to reproduce and potentially transmit their undesirable "defects" to offspring.[1] Sterilizations in California largely targeted Mexican and other Latinx[2] people and Asian Americans—many of whom were actually disabled or given such labels under the guise of scientific rationale for their sterilization. Forced sterilizations continued through the 1970s in California mental institutions and prisons.[3]

Sterilizations across the U.S. are steeped in ableism, racism, and a settler-colonial logic of nationalism and white capitalist patriarchal values as normative. The language of disability to pathologize negative racialization and non-normative gender and sexuality was used to support the targeting of Black, Latinx, Asian, and Indigenous peoples (including many Puerto Ricans) in California.[4] Of particular note, Latina women faced disproportionately high rates of pathologization as "sexually delinquent" or "petty criminals," both labels deriving from the pernicious intersection of racism and misogyny demeaning them as deviant and leading to eugenic sterilization as unfit to reproduce.[5] S. e. smith describes the specific targeting of "lower-class, racialized communities" as inextricably tied to ableist justifications:

> Their lives were being policed and examined, their sexual acts, their intimate household lives, their family formations. They were placed under extreme scrutiny and pathologized. Especially in the cases of young Mexican-American women and men, they were not allowed social transgressions at all. Expressions of sexual

1 Nicole L. Novak, Kate E. O'Connor, Natalie Lira, & Alexandra Minna Stern, *Ethnic Bias in California's Eugenic Sterilization Program, 1920-1945*, *Population Studies Center Report 16-866*, at 3 (University of Michigan Institute for Social Research, June 2016), *available at* https://www.psc.isr.umich.edu/pubs/pdf/rr16-866.pdf; Jess Whatcott, "Sexual Deviance and 'Mental Defectiveness' in Eugenics Era California," *Notches*, Mar. 14, 2017, *available at* http://notchesblog.com/2017/03/14/sexual-deviance-and-mental-defectiveness-in-eugenics-era-california/; .

2 Note that use the gender-neutral suffix "x" is a U.S. Spanish-speaking usage, and many Central and South American Spanish-speakers instead use the gender-neutral suffix "e."

3 Novak et al., *supra* note 1; Tina Vasquez, "A Conversation With 'No Más Bebés' Filmmakers Virginia Espino and Renee Tajima-Peña," *Rewire*, Feb. 1, 2016, *available at* https://rewire.news/article/2016/02/01/conversation-mas-bebes-filmmakers-virginia-espino-renee-tajima-pena/; Tiesha Rashon Peal, *The Continuing Sterilization of Undesirables in America*, in 6 Rutgers Race & L. Rev. 225 (2004).

4 Nina Wallace, "Photo Essay: Japanese American Mothers During WWII," *Densho*, May 11, 2017, *available at* https://densho.org/japanese-american-mothers-wwii/ (noting Congressional proposal to sterilize Japanese women in internment camps); Ana Clarissa Rojas Durazo, *Medical Violence Against People of Color and the Medicalization of Domestic Violence*, in Color of Violence: The INCITE! Anthology, 179-188 (INCITE! Women of Color Against Violence, ed. 2016) at 185 (noting actual sterilizations of Japanese women in internment camps); Bernardine Dohrn, Billy Ayers, Jeff Jones, & Celia Sojourn, The Weather Underground Organization, Prairie Fire: The Politics of Revolutionary Anti-Imperialism: Political Statement of the Weather Underground (1974) at 88 (noting that bill proposed to sterilize all Japanese women in internment camps failed by only one vote); s.e. smith, "'When You Try to Stop It, Nothing Happens': A Q&A on the History of Coerced Sterilization in California," *Rewire*, Feb. 1, 2017, *available at* https://rewire.news/article/2017/02/01/try-stop-nothing-happens-qa-history-coerced-sterilization-california/.

5 Novak (2016), *supra* note 1, at 16.

> agency in young women, or rebellion in young men, they weren't painted as youthful mistakes. They were really read as mental deficiency and potential social threat, so they often sustained harsher punishments than white youth.[6]

Furthering the goals of the eugenics movement the U.S. Supreme Court decided in *Buck v. Bell* (1927) that involuntary sterilizations of mentally disabled people contributed to the public health of the citizenry and were performed in the public interest "to prevent those who are manifestly unfit from continuing their kind," a decision that has *not* been overturned to this day, but which spurred increased sterilizations in states with publicly-funded eugenics sterilization programs by legally entrenching sterilization as a means of achieving social control.[7]

Activism and Organizing for Legal Redress and Reparations

In California, the Comisión Femenil Mexicana Nacional, a group formed in 1970 by Mexican women organizers responding to misogyny at the National Chicano Issues Conference,[8] agreed to serve as the organizational plaintiff along with Dolores Madrigal (the named plaintiff) and nine other working-class Mexican women involuntarily sterilized in Los Angeles area hospitals during the 1960s and 1970s, in a landmark case brought by two young Latinx attorneys, Antonia Hernández, recently graduated from law school, and Charles D. Nabarrete (who is also blind).[9] Mexican women organizers, who founded the Committee to Stop Forced Sterilization, conducted independent investigations and identified 140 Mexican women who had survived forcible sterilization.[10] They also held demonstrations outside the Los Angeles hospital where most of the women were sterilized and engaged in efforts to educate communities, including publishing a pamphlet on forced sterilization.[11] Despite this work, the Committee to Stop Forced Sterilization no longer exists.

Former California State Senator Art Torres, who is openly gay and Latino, authored legislation in 1979 that finally outlawed eugenics sterilization in California after learning about the sterilizations from publicity surrounding *Madrigal v. Quilligan* (1978).[12] Around the same time, the Mexican American Legal Education and Defense Fund received funding from the Ford Foundation to create the Chicana Rights Project, staffed by two attorneys and one paralegal in both California and Texas, to pursue impact litigation on issues affecting Mexican women. Among other advocacy work, the Chicana Rights Project filed a petition with the California Department of Health demanding stronger informed consent processes for sterilization and increased access to information about birth control, possibly paving the way for the success of Torres' bill.[13] Like the

6 smith (2017), *supra* note 4.

7 *Buck v. Bell*, 274 U.S. 200, 207 (1927); Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, in 95.7 American Journal of Public Health 1128-1138, at 1130 (2005).

8 University of California, Santa Barbara, "Comisión Femenil Mexicana Nacional, Inc.," *Special Research Collections*, n.d., *available at* https://www.library.ucsb.edu/special-collections/cema/cfmn.

9 *Madrigal v. Quilligan*, No. CV-75-2057-JWC (C.D. Cal. 1978) (slip opinion), *aff'd* 639 F.2d 789 (9th Cir. 1981), (unpublished opinion).

10 Committee to Stop Forced Sterilization, Stop Forced Sterilization Now (n.d.) (pamphlet also references Spanish version and numerous articles published in 1973 and 1974).

11 *Id*.

12 Stern (2005), *supra* note 7, at 1138.

13 Lori A. Flores, *A Community of Limits and the Limits of Community: MALDEF's Chicana Rights Project, Empowering the 'Typical Chicana,' and the Question of Civil Rights*, in 27.3 Journal of American Ethnic History 81-110, at 91 (2008); Cynthia E. Orozco, "Handbook of Texas Online: Chicana Rights Project," *Texas State Historical Association*, Jun. 12,

Committee to Stop Forced Sterilization, the Chicana Rights Project no longer exists.

In 2003, California Governor Gray Davis formally apologized for the state's eugenics program, although the state did not create any reparations programs or take any other action to address the mass sterilizations.[14] Ten years later in 2013, the Center for Investigative Reporting published an in-depth piece revealing the coercive sterilizations of nearly 200 incarcerated women in California during the 1990s and from 2006 to 2010, under a law permitting state funds to cover sterilizations.[15] In 2014, organizing efforts by Justice Now, a legal and community advocacy group focused on supporting currently and formerly incarcerated women and fighting for prison abolition, led to passage of a bill banning the use of sterilization as a eugenicist form of "birth control" for incarcerated people.[16]

In 2016, filmmaker Renee Tajima-Peña and historian producer Virginia Espino, both women of color, collaborated on a new documentary, No Más Bébes (No More Babies), regarding the repeated lawsuits the ten women from *Madrigal v. Quilligan* brought against the hospitals, the local counties, and the state and federal governments over their forced sterilizations.[17] Tajima-Peña and Espino understand that their work on sterilizations implicates class, race, and gender.[18] Their documentary relies heavily on historical footage captured by Chicanx filmmakers who worked in the same neighborhoods where the targeted women lived, and features extensive interviews with five survivors—Consuelo Hermosillo, Maria Hurtado, Dolores Madrigal, Maria Figueroa, and Gloria Molina—as well as attorney Antonia Hernández.[19]

Currently, California Latinas for Reproductive Justice, Disability Rights California, and the Disability Rights Education and Defense Fund, all California-based policy, legal, and advocacy groups, have taken a leading role in pushing for a reparations bill.[20] Few survivors have spoken out, but one of the first was Charlie Follett, who is white and was committed to a state home because his parents struggled with alcohol addiction. Follett demanded reparations in letters to state lawmakers for years with no response.[21] Three weeks after CNN

2010, *available at* https://tshaonline.org/handbook/online/articles/pqc02.

14 Natalie Delgadillo, "California Sterilized More People Than Any U.S. State But Has Yet to Compensate Victims," *Governing the States and Localities*, Aug. 7, 2017, *available at* http://www.governing.com/topics/public-justice-safety/gov-sterilization-california-reparations-tennessee-eugenics.html.

15 Corey G. Johnson, "Female inmates sterilized in California prisons without approval," *Reveal: Center for Investigative Reporting*, Jul. 7, 2013, *available at* https://www.revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/.

16 Corey G. Johnson, "California bans coerced sterilization of female inmates," *Reveal: Center for Investigative Reporting*, Sep. 26, 2014, *available at* https://www.revealnews.org/article-legacy/california-bans-coerced-sterilization-of-female-inmates/; Justice Now, Abolition Starts With You, n.d., *available at* https://www.justicenow.org.

17 Mika Hernandez, "No Más Bébes – Interview with Director Renee Tajima-Peña," *Center for Asian American Media*, Jan. 25, 2016, *available at* https://caamedia.org/blog/2016/01/25/no-mas-bebes-interview-with-director-renee-tajima-pena/; Vasquez, *supra* note 3.

18 Vasquez, *supra* note 3.

19 Hernandez (2016), *supra* note 15; No Más Bébes, *About: The Film*, n.d., *available at* http://www.nomasbebesmovie.com/film/.

20 Emily Galpern, "California Plans Legislation to Compensate Sterilization Survivors," *Center for Genetics and Society*, Aug. 10, 2017, *available at* https://www.geneticsandsociety.org/biopolitical-times/california-plans-legislation-compensate-sterilization-survivors; Nicole Knight, "Thousands Were Sterilized Under California's Eugenics Law. Now Survivors Could Get Reparations.," *Rewire*, Apr. 19, 2018, *available at* https://rewire.news/article/2018/04/19/thousands-sterilized-californias-eugenics-law-now-get-reparations/.

21 Elizabeth Cohen & John Bonifield, "California's dark legacy of forced sterilizations," *CNN*, Mar. 15, 2012, *available at* https://www.cnn.com/2012/03/15/

reported on Follett's struggles, he died at 82 years old leaving his family with no money to cover burial costs.[22] Researchers Natalie Lira and Alexandra Minna Stern have noted that, unlike the push for reparations for sterilizations in North Carolina, which was largely a survivor-led effort, few survivors in California have publicly come forward.[23] Survivors' reticence to come forward is likely impacted by the stigma attached to past institutionalization and mental disability diagnoses, as well as the fact that most sterilizations outside prisons took place earlier than those in North Carolina, between the 1920s and the early 1950s, which could mean that fewer survivors remain alive today.[24] Some survivors have chosen not to disclose their sterilization even with those closest to them because of shame and stigma, which could make it harder still to identify and contact living survivors even if the reparations bill passes and the fund begins operations immediately.[25]

Legislating Reparations

In 2018, State Senator Nancy Skinner and Assembly Member Monique Limón introduced SB-1190, a bill to establish a Eugenics Sterilization Compensation Program, which would create a fund to provide monetary compensation to survivors who were sterilized between 1909 and 1979. SB-1190 also aims to partner with community organizations to identify and contact survivors about their right to tax-free compensation, collaborate with community members to create memorials that acknowledge past sterilizations, and develop a traveling historical exhibit and other educational programs to teach Californians about the state's eugenics laws.[26] Earlier, Assembly Member Cristina Garcia, one of only ten Latinx members, had expressed intent to introduce a reparations bill, but she was on voluntary unpaid leave during the 2017-2018 legislative session, which may explain why she was not involved with SB-1190.[27] On April 17, 2018, SB-1190 passed from committee and went to the Committee on Appropriations with a favorable recommendation.

Skinner's bill aims to provide between $25,000 and $50,000 to each survivor from the specified period, which covers those targeted under the state's original eugenics law, but does not include any of the incarcerated survivors who were sterilized after 1979 and as late as 2013, or descendants of survivors who would die before the law would take effect on January 1, 2019.[28] In comparison, North Carolina's sterilization compensation fund provides an initial payment of $20,000 and a second payment of $15,000 to eligible survivors who come forward, while Virginia's sterilization compensation fund provides survivors

health/california-forced-sterilizations/index.html;

22 John Bonifield, "No money to bury man sterilized by force," *CNN*, Apr. 11, 2012, *available at* http://thechart.blogs.cnn.com/2012/04/11/no-money-to-bury-man-sterilized-by-force/.

23 Smith, *supra* note 4.

24 *Id*.

25 Mike McPhate, "California Today: Wrestling With a Legacy of Eugenics," *New York Times*, Dec. 20, 2016, *available at* https://www.nytimes.com/2016/12/20/us/california-today-eugenics-sterilization.html?_r=0; Ronnie Cohen, "Historians Seek Reparations for Forcibly Sterilized Californians," *Scientific American*, Dec. 6, 2016, *available at* https://www.scientificamerican.com/article/historians-seek-reparations-for-forcibly-sterilized-californians/?wt.mc=-SA_Twitter-Share; Sarah Zhang, "A Long-Lost Data Trove Uncovers California's Sterilization Program," *The Atlantic*, Jan. 3, 2017, *available at* https://www.theatlantic.com/health/archive/2017/01/california-sterilization-records/511718/.

26 Senate Bill 1190, Eugenics Sterilization Compensation Program, California Legislature – 2017-2018 Regular Session, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1190.

27 Delgadillo (2017), *supra* note 14; Galpern (2017), *supra* note 20.

28 Senate Bill 1190, *supra* note 26; Knight (2018), *supra* note 20.

$25,000.[29]

The California bill would allow the Eugenics Sterilization Compensation Program to conduct community outreach to identify and contact qualified survivors through "various methods to conduct outreach, including, but not limited to, radio announcements, social media posts, and flyers to libraries, social service agencies, long-term care facilities, group homes, supported living organizations, and regional centers."[30] The Eugenics Sterilization Compensation Program would decide if a person is eligible using records from the state's archives, Department of State Hospitals, and Department of Developmental Services to verify their identity and that they were sterilized during the specified years.[31]

According to a January 2017 report, researchers found that as many as 831 survivors were still alive at the time of their investigation.[32] In an interview the following month with *Rewire*, a reproductive justice magazine, these researchers discussed their efforts to demand reparations from the state over many years, an effort that now requires increased urgency because fewer and fewer survivors are likely to be alive due to the sterilizations beginning over a century ago.[33]

Conclusion

Though the California reparations bill is well-intentioned, multifaceted in its approach, and contains many necessary forms of reparations for survivors and their descendants, it is not sufficient to fully address the scale and scope of the harm caused by the state's eugenics program. Survivors who struggle with ableist shame because they had disability or mental illness imputed to them – regardless of whether they might actually be disabled with cognitive or other impairments or not – will not fully benefit from the monetary compensation without privacy protections and trauma-informed practices for state employees or designees responsible for administering the fund. Furthermore, with the exclusion of survivors of forced sterilizations in state prisons, the legislature deprives justice to thousands of formerly incarcerated Latina, Native, and Black women still living with the lifelong effects of eugenic sterilization. These proposed limitations and exclusions are likely the product of political expediency and could be addressed through revised legislation under the leadership of community organizers in impacted communities. Finally, in seeking to address the harm of past sterilizations, the bill attempts to provide for public education through funding historical markers and a traveling exhibit, but does not specify in what way any curricula about the state's large-scale forced sterilization program will be made available to the public, including in public schools that are already required to teach the histories of the LGBTQ and disabled communities as part of social studies classes. Teaching youth about eugenics practice borne of nativism, racism, and ableism is all the more necessary given the dangers of intensified nationalism and increased state surveillance over social deviance in the present age.

29 Eric Mennel," Payments Start For N.C. Eugenics Victims, But Many Won't Qualify," NPR Shots: Health News, Oct. 31, 2014, *available at* https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify; Tom Carper, "Press Release: Senate Passes Bipartisan Bill To Assist Eugenics Victims Receiving Compensation Payments," *Tom Carper: U.S. Senator for Delaware*, Dec. 1, 2015, *available at* https://www.carper.senate.gov/public/index.cfm/2015/12/senate-passes-bipartisan-bill-to-assist-eugenics-victims-receiving-compensation-payments.

30 Senate Bill 1190, *supra* note 26, at § 24201(a)(1).

31 Senate Bill 1190, *supra* note 26, at § 24201(a)(2).

32 Alexandra Minna Stern, Nicole L. Novak, Natalie Lira, Kate O'Connor, Siobán Harlow, & Sharon Kardia, *California's Sterilization Survivors: An Estimate and Call for Redress*, in 107.1 American Journal of Public Health 50-41, at 50 (2017).

33 Smith (2017), *supra* note 4.

Street Safety and the Second Amendment:

The Physical and Institutional Implications of New York State Rifle & Pistol Association v. City of New York

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Abstract

The impending oral arguments and subsequent decision in New York State Rifle & Pistol Association v. City of New York portend an ideological clash between a reconstituted Supreme Court and an American public expressing a growing national desire for stricter gun laws. The case concerns a provision of the New York City firearm licensing scheme known as a "premises license." Petitioners in this case - New York City residents and premises license holders - attempted to carry their handguns to shooting ranges and second homes outside of New York City, allegedly in violation of New York City's Rule 5-23. At the district court level, New York City's cross-movement for summary judgement on the constitutional questions was granted and the complaint was dismissed. Petitioners now challenge the opinion of the Second Circuit. This paper argues that the Supreme Court should vote to uphold the Second Circuit Court of Appeals' decision and affirm New York City's premises licenses framework. The past writings of Justice Kavanaugh however, appear to indicate that he will vote to overturn the Second Circuit, while those of Justices Gorsuch and Roberts leave some uncertainty in this potentially landmark case.

Introduction

For the first time in nine years, a reconstituted Supreme Court will hear a significant Second Amendment case, from which an unprecedented expansion of national gun rights appears to be a distinct possibility. Two new Justices – Neil Gorsuch and Brett Kavanaugh – have replaced Antonin Scalia and Anthony Kennedy on the Court. These new Justices' presence may counteract the growing public condemnation of ineffective firearm regulations that has emerged in the aftermath of the attack at Marjory Stoneman Douglas High School in Parkland, Florida. The Court's latest appointments – along with its presumptive ideological center, Chief Justice John Roberts – will now have the opportunity to modify or eclipse their predecessors' Second Amendment legacies.

This article has four subsequent sections: Part I, Part II, Part III and Part IV. Part I provides background on the case currently pending before the Supreme Court, *New York State Rifle and Pistol Association v. City of New York* , No. 18-280. Part II sets forth a legal analysis of each of Petitioners' respective constitutional arguments as presented in their brief on petition for a writ of certiorari to the Supreme Court, and concludes that the Supreme Court should uphold the decision of the Second Circuit and find in favor of the City of New York. Part III consists of an examination of the past rulings and commentaries of the Supreme Court's two newest members, as well as those of Chief Justice Roberts, regarding the *Heller* and *McDonald* decisions and other Second Amendment jurisprudence. Part III posits that Justice Kavanaugh is most likely to rule at least in part to reverse the decision of the Second Circuit, while Justices Gorsuch and Roberts may attempt to advance a narrower opinion. Finally, Part IV concludes that the collision between public opinion and the Supreme Court's Second Amendment jurisprudence portends questions of institutional legitimacy and additional litigation in the months and years following a potential decision in *New York State Rifle and Pistol Association*.

I. Background

In its 2008 decision in *District of Columbia v. Heller* (2008) the Supreme Court held that the Second Amendment "protects an *individual* right to possess firearms"[1] (emphasis added). In so holding, the Court set a national precedent pushing its interpretation of the Second Amendment right to keep and bear arms into conflict with federal firearms regulations. Two years later, the Court expanded upon the *Heller* decision, incorporating the newfound individual right to keep and bear arms against the state and local governments in *McDonald v. City of Chicago*.[2] However, as the New York Times Supreme Court reporter, Adam Liptak, noted with regard to *McDonald*, "the justices left for another day just what kinds of gun control laws can be reconciled with Second Amendment protection."[3] The present case of *New York State Rifle and Pistol Association v. City of New York* provides the new Justices the opportunity to expand upon the *Heller* and *McDonald* decisions by specifying the ways in which these precedents pertain to a municipal firearms regulation.

The challenge before the Court to the ruling of the Second Circuit in *New York State Rifle and Pistol Association v. City of New York*, No. 18-280, pertains to an ostensibly innocuous provision of the New York City firearm licensing scheme known as a "premises license."[4] Under Rule 5-23 of the Rules of the

1 District of Columbia v. Heller, 554 U.S. 570 (2008).

2 McDonald v. Chicago, 561 U.S. 742 (2010).

3 Adam Liptak, *Justices Extend Firearm Rights in 5-to-4 Ruling*. THE NEW YORK TIMES, June 28, 2010. https://www.nytimes.com/2010/06/29/us/29scotus.html.

4 The New York State Rifle & Pistol Associa-

City of New York, an individual with a premises license may only possess a handgun "inside of the premises which address is specified on the license,"[5] except when transporting the firearm to or from a shooting range located in New York City. Rule 5-23 further requires that individuals transporting firearms between their homes and a shooting range do so with their handguns and ammunition locked in separate containers. This restricted premises license is one of a number of firearms permits issued by New York City. New York City also issues 'Carry Business Licenses' and 'Special Carry Licenses,' which allows business owners to carry a concealed handgun. In addition, the City issues separate rifle and shotgun permits, as well as a special permit for law enforcement retirees.[6]

The Petitioners in this case – New York City residents and premises license holders – attempted to carry their handguns to shooting ranges and second homes outside of New York City. At the district court level, New York City's cross-movement for summary judgement was granted and the initial complaint was dismissed. Petitioners now challenge the opinion and dispute the holding of the Second Circuit, that Rule 5-23 does not violate the Second Amendment, the Commerce Clause, or the fundamental right to travel.[7]

II. The Supreme Court Should Uphold the Decision of the Second Circuit

A. Rule 5-23 Stands Up to Intermediate Scrutiny; Strict Scrutiny Does Not Apply

As the Second Circuit explained in its opinion below, Rule 5-23 "does not trigger strict scrutiny and it survives intermediate scrutiny."[8] Since *Korematsu v. United States*, the Supreme Court has held that strict scrutiny should apply to government restrictions on content-based speech,[9] cases that involve suspect classifications,[10] and regulations that interfere with the exercise of fundamental rights.[11] However, as the Second Circuit recognized in its decision, the restrictions in Rule 5-23 do not substantially impair the ability of citizens of the City of New York to own and operate firearms. The Rule does not forbid Petitioners from possessing firearms in any of their multiple homes, nor does it prevent them from participating fully in membership at a firing range or shooting competition within or outside the City of New York. Furthermore, as the Second Circuit recognized, any limitations on Petitioner's ability to carry firearms in public "are not imposed by Rule 5-23, but rather are inherent in their lack of carry permits."[12] Therefore, the Supreme Court should not adopt strict scrutiny in its analysis of Rule 5-23.

Nevertheless, even if the Court were to apply intermediate scrutiny in the present case, the Respondents are capable of demonstrating that Rule 5-23 stands up to constitutional muster, as they did in the Second Circuit. In *Craig v. Boren*, the Supreme Court held that legislation subject to intermediate scrutiny must "[1] serve important governmental objectives and

tion, Inc. v. The City of New York, 883 F.3d 45 (2d Cir. 2018).

5 New York, The Rules of The City of New York Title 38, Chapter 5, §23.

6 New York Police Department License Division, New Application Instructions, https://licensing.nypdonline.org/new-app-instruction/.

7 Reply brief of petitioners New York State Rifle and Pistol Association, Inc, New York State Rifle and Pistol Association v. City of New York (No. 18-280).

8 The New York State Rifle & Pistol Association, Inc. v. The City of New York, 883 F.3d 45 (2d Cir. 2018), 14.

9 See: United States v. Alvarez, 567 U.S. 709 (2012).

10 See: *Id*. and Hirabayshi v. United States 320 U.S. 81 (1943).

11 See: San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

12 The New York State Rifle & Pistol Association, Inc. v. The City of New York, 883 F.3d 45 (2d Cir. 2018), 17.

[2] be substantially related to the achievement of those objectives"[13] in order to withstand constitutional challenge. A number of Circuit Courts, in their application of the test in *Craig* to the issue of public firearm use and ownership, have affirmed the interest of a state or municipality in public safety. For example, in *Kachalsky v. Cacace*, the Second Circuit held that "[t]here is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety."[14] Similarly, in *U.S. v. Masciandaro*, the Fourth Circuit asserted that "outside the home, firearm fights have always been more limited, because public safety interests often outweigh individual interests in self-defense."[15] Balancing these Circuit Court interpretations with the sworn testimony of New York City officials asserting the City's need to regulate the public presence of firearms,[16] the Supreme Court should find that Rule 5-23 serves an important governmental objective within the framework established in *Craig*.

New York City Police Department Officials state a similarly compelling relation between Rule 5-23 and the stated interest in regulating the public presence of firearms, which the Second Circuit found similarly convincing. In a sworn affidavit taken during the trial court proceedings, former Commander of the License Division, Andrew Lunetta, explained that "[w]hen target practice and shooting competitions are limited to locations in New York City the ability to create…a fiction[al legal purpose] is limited."[17] Therefore, Rule 5-23 enables the City to more effectively regulate the public presence of firearms by specifying for both law enforcement and for the public the time and manner in which firearms are permitted to be present on city streets. Given this substantial relation of the Rule to the City's interest in regulating the public presence of firearms, the Rule also satisfies the second prong of the *Craig* test, and stands up to any intermediate scrutiny the Supreme Court may choose to apply.

B. The Restrictions Imposed by Rule 5-23 Do Not Violate the Second Amendment

Petitioners' claims that the Second Circuit misinterpreted and intentionally diminished the burden imposed by the *Heller* and *McDonald* decisions fail to reflect a close application of those opinions to the rule in question. In fact, those two decisions, upon which Petitioners found their Second Amendment argument, demonstrate that Rule 5-23 stands up to Second Amendment scrutiny within this specific constitutional framework. Petitioners assert, in their first reference to *Heller*, that "'the right of law-abiding, responsible citizens to use arms in defense of hearth and home,' *District of Columbia v. Heller*, is not limited to just one home."[18] They therefore contend that the restriction in Rule 5-23 whereby an individual holding a premises license cannot transport a firearm to a second home violates the Second Amendment. Petitioners fail, however, to analyze the use of the word 'arms' in the *Heller* opinion. The Supreme Court's use of the phrase 'arms,' as opposed, for example, to the phrase 'a certain arm,' instructs courts' interpretations of the individual right expounded in *Heller*. While *Heller* guarantees the right of an individual to possess firearms in each and as many homes as he or she so desires, it does not ensure the right of said individual to possess *a specific* firearm in all such homes. This line

13 Craig v. Boren, 429 U.S. 190 (1976).

14 Kachalsky v. Cacace, No. 11-3642 (2d Cir. 2012).

15 United States v. Masciandaro, No. 09-4839 (4th Cir. 2011).

16 See: The New York State Rifle & Pistol Association, Inc. v. The City of New York, 883 F.3d 45 (2d Cir. 2018), 32.

17 *Id.* at 34.

18 Reply brief of petitioners New York State Rifle and Pistol Association, Inc, New York State Rifle and Pistol Association v. City of New York (No. 18-280), 6.

of logic is further reflected in *Morris v. Slappy*. There, the Supreme Court read the general Sixth Amendment right to the Assistance of Counsel not to include "the right to counsel with whom the accused has a 'meaningful relationship,' tak[ing] into account the interest" of one of the relevant parties.[19] Because the word 'arms' is not the same as the phrase 'a specific arm,' this interpretation of the Sixth Amendment right to Assistance of Counsel not to include a right to a *specific* attorney should be reflected in the Supreme Court's interpretation of the relevant text in *Heller*. Furthermore, Petitioners' argument asserting a circuit split between the Second Circuit's decision in *New York State Rifle and Pistol Association* and the Seventh Circuit's decision in *Ezell v. City of Chicago* fails to recognize the meaningful factual distinctions between the cases. Petitioners excoriate the City of New York for "preclud[ing] its residents from honing the safe and effective use of their handguns at shooting ranges *outside* city limits if it is unconstitutional for Chicago to preclude its residents from honing the safe and effective use of their handguns at shooting ranges *inside* city limits."[20] However, as the Supreme Court affirmed most recently in *Collins v. Virginia*, "our legal traditions [have long] understood th[e home] to be inviolable – a principle so well accepted as to have become embedded in a maxim still heard today: 'a man's house is his castle.'"[21] This special status afforded to the home was also foundational in the Court's decision to affirm *Heller*, and therefore implies a constitutional distinction between Second Amendment restrictions that reach within the home and those – like Rule 5-23 – that apply to travel outside of the home and around New York City. Rule 5-23 still allows citizens with a premises license to lawfully transport a handgun to an in-City firing range for practice. Therefore, the Supreme Court should reject Petitioners' argument that Rule 5-23 is analogous to the provision struck down by the Seventh Circuit in *Ezell*, as Rule 5-23 applies only up to the doorstep of a given home and, unlike the law in *Ezell*, leaves options for residents to practice safe handgun usage within the City.

C. Rule 5-23 Does Not Trigger the Commerce Clause

Petitioners' argument that the travel restriction provision of Rule 5-23 violates the Commerce Clause fails to demonstrate that the Rule should trigger the Commerce Clause in the first place. Petitioners cite *Granholm v. Heald* to assert that the travel restriction "plainly 'deprive[s] citizens of their right to have access to the markets of other States on equal terms.'"[22] Such an assertion fails to incorporate an understanding of the Supreme Court's precedent pertaining to the Commerce Clause and market access. In *Gibbons v. Ogden*, Chief Justice John Marshall expounded the range of the Court's Commerce Clause by holding that "laws for regulating the internal commerce of a State are not within the power granted to Congress."[23] Furthermore, in *United States v. Lopez*, the Supreme Court interpreted this restriction upon Congress to mean that "the proper test [whereby the Commerce Clause may be triggered] requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[24] In this same decision, the Court held that gun possession is not an economic activity directly or indirectly affecting interstate commerce.[25] Based upon this interpretation, therefore, restrictions upon

19 Morris v. Slappy, 461 U.S. 1 (1983).

20 Reply brief of petitioners New York State Rifle and Pistol Association, Inc, New York State Rifle and Pistol Association v. City of New York (No. 18-280), 9.

21 Collins v. Virginia, 584 U.S. (2018), 10.

22 Reply brief of petitioners New York State Rifle and Pistol Association, Inc, New York State Rifle and Pistol Association v. City of New York (No. 18-280), 10.

23 Gibbons v. Ogden, 22 U.S. 1 (1824).

24 United States v. Lopez, 514 U.S. 549 (1995).

25 *Id.* at 549.

New York City residents who wish to transport *specific* handguns to shooting-range facilities outside of the City do not deprive equal access to markets and neither does the law in question in *Lopez*. In fact, the restrictions in the New York City licensing scheme are even less restrictive upon gunowners than Petitioners make them out to be. The restrictions in Rule 5-23 apply exclusively to individuals with premises licenses, and do not control other licenses for which City residents may apply. In the context of the City's licensing scheme, therefore, one cannot apply the commerce clause to Rule 5-23. The Court should therefore respect its precedents and find that Rule 5-23 does not trigger the Commerce Clause.

D. The Rule is Similarly in Compliance with the Fundamental Right to Travel

Petitioners' attempt to argue that Rule 5-23 violates the fundamental right to travel stems from a misleading or, at best, misunderstood interpretation of the Rule itself. The majority in *Saenz* held that the right to travel includes three specific protections, none of which Rule 5-23 violates. First, the Court wrote that the right to travel "protects the right of a citizen of one state to enter and to leave another state."[26] Petitioners assert that the travel restrictions in Rule 5-23 are analogous to a legal quarantine upon New York City residents while they are in possession of an iPhone, golf club, or other personal affect. This hasty analogy fails to recognize the role of Rule 5-23 in the larger context of the New York City licensing scheme. In addition to the premises license, New York City provides firearms licenses to certain business owners, to designated "carry guards" such as security guards, and to law enforcement retirees, among others.[27] By comparing the Rule to a hypothetical ban on travel while in possession of ordinary personal effects, Petitioners betray not only their refusal to recognize the context in which Rule 5-23 operates, but also the fact that the right of a citizen to travel need not entail the right to travel under all circumstances. Professor Richard Sobel of Northwestern Law noted in 2014 that the *Saenz* decision aligned with the Supreme Court's holding in *Shapiro v. Thompson* that "'a classification that has an effect of imposing a penalty on the right to travel violates the Equal Protection clause 'absent a compelling government interest.'"[28] Therefore, even if the Court were to find that the restriction in Rule 5-23 creates a penalizing classification on the right to travel, New York City's well-established compelling interest in regulating the presence of firearms on city streets would avert an Equal Protection violation. In a sworn affidavit taken during the trial court proceedings, former Commander of the License Division, Andrew Lunetta, explained that, prior to the enactment of Rule 5-23, "[premises] licensees had been caught traveling with loaded firearms, transporting firearms nowhere near an authorized range or at no hour when a range in the City was open."[29] The specific provisions included in Rule 5-23 therefore directly addressed the violations that New York City police officers were noticing in the field.

The second protection established in *Saenz* – "the right to be treated as a welcome visitor rather than as an unfriendly alien"[30] – is similarly unconvincing given the facts of the present case. Petitioners assert that the alleged difficulties of being unable to train with one's own gun outside of New York City make New York City residents less prepared to use

26 Saenz v. Roe, 526 U.S. 489 (1999).

27 New York Police Department License Division, New Application Instructions, https://licensing.nypdonline.org/new-app-instruction/.

28 Richard Sobel, The Right to Travel and Privacy: Intersecting Fundamental Freedoms, 30 J. Marshall J. Info. Tech. & Privacy L. 646 (2014).

29 See: The New York State Rifle & Pistol Association, Inc. v. The City of New York, 883 F.3d 45 (2d Cir. 2018), 22.

30 Saenz v. Roe, 526 U.S. 489 (1999).

their handguns for self-defense at their in-city homes.[31] This unsubstantiated claim decrying the travel restriction, however, does not align with the second protection in *Saenz* any better than it does with the first. Petitioners' feeling of welcomeness in a different State has no bearing upon their ability to ably defend their respective homes, nor is the reverse any more logically valid. Petitioners' argument against the travel restriction in Rule 5-23, therefore, falls tellingly outside of the bounds of the first two protections established in *Saenz*.

The third and final protection does not apply to the facts of the present case. The Court also held in *Saenz* that the fundamental right to travel includes, "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[32] Petitioners in the instant case make no such claim that they were attempting to become citizens of another state, nor that any part of Rule 5-23 prohibited them from taking steps to do so. Petitioners' reliance upon *Saenz* to argue that the fundamental right to travel has been violated, therefore, reveals the legal and factual baselessness for this claim.

III. Roberts and Gorsuch's Misgivings and Kavanaugh's Second Circuit Suspicions

The deciding votes in *New York State Rifle and Pistol Association v. City of New York* appear most likely to come from the newest appointments to the Court – Justices Gorsuch and Kavanaugh – as well as the Court's presumptive ideological center, Chief Justice John Roberts. A closer examination of each of the relevant Justices' past comments on the issues at hand reveals that Justice Kavanaugh is most likely to vote at least in part to overturn the decision of the Second Circuit, and that Justices Gorsuch and Roberts, while likely to advance a similar decision, may also weigh other interests, such as the Supreme Court's institutional legitimacy.

A. Kavanaugh's Straight Line from *Heller* to the Present Case

As a Judge on the U.S. Court of Appeals for the District of Columbia Circuit, Kavanaugh wrote a dissent to the Circuit Court's application of the Supreme Court's decision in *D.C. v. Heller* ("*Heller I"*), expounding his rationale of Second Amendment interpretation in a case also named *D.C. v. Heller* ("*Heller II"*). In his dissent, Kavanaugh appeared to advance views largely irreconcilable with the level of scrutiny and Second Amendment interpretations that the Second Circuit adopted in *New York State Rifle & Pistol Association v. City of New York*. For example, Judge Kavanaugh wrote that "[i]n my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, and not by a balancing test such as strict or intermediate scrutiny."[33] He then proceeded to contend that relating the gun regulation in question to a compelling government interest, as required by intermediate scrutiny, would not accord with that framework of evaluation. It therefore appears at the outset that Justice Kavanaugh's standard of review in the present case will differ from that adopted by the Second Circuit and advocated above.

Furthermore, on the Second Amendment question, Kavanaugh's dissent in *Heller II* seems to indicate a potentially irreconcilable departure from the reasoning of the Second Circuit. In his dissent, Kavanaugh explained his interpretation of the Supreme Court's decision in *Heller I* to include an understanding that "[t]he Court said that 'dangerous and unusual weapons' are equivalent to those

31 Reply brief of petitioners New York State Rifle and Pistol Association, Inc, New York State Rifle and Pistol Association v. City of New York (No. 18-280), 6.

32 Saenz v. Roe, 526 U.S. 489 (1999).

33 District of Columbia v. Heller, No. 10-7036, (D.C. Cir. 2011) 50.

weapons not 'in common use.'"[34] The implied corollary of this statement, according to former Stanford Law Professor Amy Howe, was that weapons that have traditionally been in common use since the time of the founding were not dangerous and unusual, and therefore could not be regulated due to Second Amendment protections.[35] Professor Howe presented the example from Kavanaugh's *Heller II* dissent in which he drew "no real difference"[36] between handguns and semi-automatic rifles based upon their historical and traditional similarities. This interpretation seems to conflict with New York City's limited licensure scheme and with the premises license established in Rule 5-23 in particular. It therefore appears quite possible, on the Second Amendment issue as well, that Justice Kavanaugh may vote to overturn the decision of the Second Circuit.

B. Gorsuch's Second Amendment Aversion

As a Circuit Judge on the United States Court of Appeals for the Tenth Circuit, Justice Gorsuch repeatedly opted not to apply the Supreme Court's precedents in *Heller* or *McDonald* to constitutional questions before the Tenth Circuit, and thus left his interpretation of Second Amendment precedent the most ambiguous of the current Justices. In *United States v. Pope*, for example, Judge Gorsuch wrote the majority opinion in a case concerning defendant Pope's motion to dismiss an indictment under a federal firearms regulation. There, Pope asserted that possession of a firearm exclusively on his own property for the purposes of self-defense precluded a federal firearms conviction under the Second Amendment. Gorsuch, however, indicated an aversion to wading into such a hotly contested issue,[37] and declined to rule on Pope's constitutional argument, writing that "[a]ll the material facts on which Mr. Pope's motion to dismiss relies are outside the indictment, hotly disputed by the government, and intimately bound up in the question of Mr. Pope's guilt or innocence."[38] This refusal to address the constitutional question at hand will not be an option for Justice Gorsuch in *New York State Rifle & Pistol Association v. City of New York*. Nevertheless, Gorsuch's nod to the intensity of the government's argument in *Pope* may indicate a reticence to dismiss New York City's asserted public safety interest in regulating the presence of firearms on city streets.

In a similarly noncommittal Tenth Circuit case in which Gorsuch ultimately voted in the opposite direction however, Gorsuch revealed a proclivity for holding the government to a relatively high standard on issues of gun laws. In *United States v. Games-Perez*, Gorsuch dissented from the Tenth Circuit's decision to uphold the conviction of Miguel Games-Perez, a previously convicted felon found guilty of possessing a firearm in interstate commerce. There, Gorsuch asserted that convictions under this particular federal firearm statute required the government to prove that the defendant knew of his or her status as a previously convicted felon.[39] By not holding the government to this standard, Gorsuch wrote, "[the] court fail[ed] to hold the government to its congressionally specified burden of proof."[40] While still avoiding the broader constitutional question of the validity of the statute under which Mr. Games-Perez was prosecuted, Gorsuch revealed a tendency to demand the highest burden of proof from the government

34 District of Columbia v. Heller, No. 10-7036, (D.C. Cir. 2011) 51.

35 Amy Howe, *Kavanaugh and the Second Amendment*, SCOTUSBLOG (Jul. 27, 2018, 10:51 AM), https://www.scotusblog.com/2018/07/judge-kavanaugh-and-the-second-amendment/.

36 *Id.* at 1.

37 United States of America v. Mark R. Pope, No. 09-4150, (10th Cir. 2010).

38 *Id.* at 1.

39 United States of America v. Miguel Games-Perez, No. 11-1011, (10th Cir. 2012).

40 *Id.* at 29.

in defending its firearms regulations.[41] Given his decisions in *Games-Perez* as well as in *Pope*, it appears that Justice Gorsuch's vote in *New York State Rifle & Pistol Association v. City of New York* is less certain than that of Justice Kavanaugh or Roberts.

C. Chief Justice Roberts' Potential Institutional Reticence

Chief Justice John Roberts has had the greatest opportunity to weigh in on the Court's Second Amendment jurisprudence in his fourteen years on the Supreme Court, although he has not yet authored a significant Second Amendment opinion himself. Roberts joined the majority opinions written by Justices Scalia and Alito respectively in *Heller* and *McDonald*, and also joined in a per curiam opinion in *Caetano v. Massachusetts* in which the Court vacated a State firearms conviction.[42] While each of these votes would seem to indicate a partiality to overturning the decision of the Second Circuit in *New York State Rifle & Pistol Association v. City of New York*, perhaps the most significant of Roberts' statements have come outside of the Supreme Court's Second Amendment jurisprudence altogether.[43]

The Chief Justice's apparent concern with the preservation of the Court's institutional legitimacy may inform his decision on whether or not to potentially join the other four members of the Supreme Court who were appointed by Republican presidents.[44] In a statement to the Associated Press on November 21, 2018, Chief Justice Roberts responded to President Donald Trump's accusation of political bias in the Supreme Court by asserting that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[45] The Chief Justice's apparent concern with the Court's perceived legitimacy – expressed in this statement – was, according to a number of legal commentators, on further display in the Court's decision of February 7, 2019. There, Roberts sided with the Court's four appointments from Democratic presidents to temporarily block a restrictive abortion law. [46] Liptak explained in his analysis of the Chief Justice's decision that "Chief Justice Roberts is a product of the conservative legal movement, and his general approach is to lean right. But he is also an institutionalist and a guardian of his court's legitimacy, meaning he wants to make modest and deliberate moves."[47] An alignment of the Republican-appointed Justices in opposition to the decision of the Second Circuit in *New York State Rifle & Pistol Association v. City of New York* may well erode the Supreme Court's perceived legitimacy. As Professor Peter Irons of the University of California, San Diego explained "[a] Court seen as overly partisan and result-driven would erode that [Court's] legitimacy."[48] The best indication of the Chief Justice's impending – and perhaps deciding – vote in *New York State Rifle & Pistol Association v. City of New York* may, in fact, be his votes and statements outside of the realm of

41 *Id.* at 29.

42 Caetano v. Massachusetts, 577 U.S. (2016).

43 Associated Press. "Roberts, Trump spar in extraordinary scrap over judges." November 21, 2018. https://www.apnews.com/c4b34f9639e141069c-08cf1e3deb6b84.

44 Supreme Court of the United States. "About the Court: Current Members." https://www.supremecourt.gov/about/biographies.aspx.

45 Associated Press. "Roberts, Trump spar in extraordinary scrap over judges." November 21, 2018. https://www.apnews.com/c4b34f9639e141069c-08cf1e3deb6b84.

46 June Medical Services v. Gee, 586 U.S. (2019).

47 Adam Liptak. "In Surprise Abortion Vote, John Roberts Avoids 'Jolt to the Legal System." THE NEW YORK TIMES. February 8, 2019. https://www.nytimes.com/2019/02/08/us/politics/john-roberts-abortion.html.

48 Peter Irons. "Has the Supreme Court lost its legitimacy?" NBC NEWS. February 4, 2019.

Second Amendment jurisprudence. In the face of a growing national desire for stricter gun laws – an October, 2018 Gallup poll found that sixty-one percent of Americans favor them[49] – Roberts may not necessarily adhere to the same Second Amendment tendencies he displayed prior to infamous shootings from Orlando to Parkland to Pittsburgh.

Based upon the past comments of Justices Roberts, Gorsuch and Kavanaugh, it appears that the Court's newest appointment is the most likely to vote to overturn the decision of the Second Circuit. Chief Justice Roberts' apparent institutional concerns blur the inevitability of his vote, while Justice Gorsuch has largely refrained from addressing the constitutional questions that arise in this case.

While the Second Circuit's decision will be far from safe when the Supreme Court issues its decision in *New York State Rifle & Pistol Association v. City of New York*, the case is not necessarily headed for reversal. Respondents' ability to dissect Petitioners' constitutional challenges piece-by-piece, and to emphasize institutional concerns that may speak to Chief Justice Roberts, will ultimately determine the outcome in this case.

Conclusion

Amy Davidson Sorkin of the New Yorker Magazine has framed the impending oral arguments and subsequent decision in *New York State Rifle & Pistol Association v. City of New York* as an even more dire clash of ideological forces than Chief Justice Roberts, or indeed the President, seemed willing to acknowledge. She described the backlash to the shooting in Parkland, Florida in particular as an impetus for an institutional conflict. Sorkin wrote that "the movement to pass stricter gun laws has been gathering strength. That political will is set to collide with the ideological priorities of the Court's conservatives."[50] As this ideological debate continues to transpire in the judiciary through litigation that tests the boundaries of the decisions in *Heller* and *McDonald*, an analogous dispute seems set to transpire on the political stage, in 2020 and thereafter. In *New York State Rifle & Pistol Association v. City of New York*, therefore – which will in many ways be the first step that the Supreme Court takes into a new age of Second Amendment jurisprudence – the debate regarding the legitimacy of some of America's oldest legal and political institutions may well be redefined for a generation to come.

49 RJ Reinhart. "Six in 10 Americans Support Stricter Gun Laws." GALLUP. October 17, 2018. https://news.gallup.com/poll/243797/six-americans-support-stricter-gun-laws.aspx.

50 Amy Davidson Sorkin. "Will the Supreme Court Use a New York City Regulation to Strike Down Gun Laws?" THE NEW YORKER. February 4, 2019. https://www.newyorker.com/magazine/2019/02/04/will-the-supreme-court-use-a-new-york-city-regulation-to-strike-down-gun-laws.

The Complexities of The Self-Pardon:
A Legal Technicality or Rationally Unconstitutional?

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Abstract

The Constitution is mum regarding the concept of a presidential self-pardon, thus leaving it open for interpretation. Those who argue for the legality of the self-pardon often point to legal principles, case precedent, and the text of the Constitution for justification. Under close scrutiny, however, these arguments are often either not applicable or lacking appropriate context. This paper contextualizes the Constitution and analyzes it under various legal lenses to show that the Framers did not intend for the president to exercise self pardon. Although other academics, such as Philip Bobbitt, have examined the legality of the self-pardon, very few have done so using a wholistic approach. This paper adds to the debate by arguing that a right to self-pardon contradicts the Framers' intent to prevent corruption. The following discussion provides an overview of the history of the self-pardon, but also frames the concept in a new light.

"As has been stated by numerous legal scholars, I have the absolute right to PARDON myself…"

— Donald J. Trump (@realDonaldTrump) June 4, 2018[1]

Introduction

Is the President right? As stated in Article II of the Constitution, the president "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[2] But, are there limits to such a power? Since June 2018, this question has been fervently debated. Since the Supreme Court has yet to rule on this issue, the question remains open. Ultimately, the decision has the potential to become as pivotal in American history as the outcomes of *United States v. Nixon* and *Bush v. Gore*.[3]

Richard Nixon, George H.W. Bush, and Bill Clinton all considered self-pardon as a remedy to their legal difficulties during their presidencies. As Nixon's presidency was disintegrating and impeachment and potential conviction lay on the horizon, he requested a memo from his Justice Department's Office of Legal Council on the subject of the self-pardon. On August 5, 1974, Acting Assistant Attorney General, Mary C. Lawton concluded, "Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself."[4] A decade later, George H.W. Bush contemplated pardoning himself for any crimes he may have committed during the Iran-Contra scandal.[5] Subsequently, in 1998, having been credibly accused of perjury and obstructing justice while defending himself in a civil, sexual harassment lawsuit brought by Paula Jones, it was suggested that Bill Clinton could use the power of the presidency to seek the protection of self-pardon.[6] These three presidents, however, ultimately reached a similar conclusion: whether it was the belief that the incoming president would issue a pardon or their calculation that impeachment would fail, each president declined to pardon himself, thereby avoiding the political and constitutional firestorm that would have ensued.

The judgement of his predecessors notwithstanding, President Trump has revelaed that he is considering a different course. In June 2018, he remarked that "pardons are a very positive thing for a President. I think you see the way I'm using them. And yes, I do have an absolute right to pardon myself."[7] Given his varied legal difficulties, which include allegatations of obstruction of justice, conspiracy with the Russian government during the 2016 presidential campaign, campaign finance violations and an emoluments lawsuit, a scenario where President Trump deems a self-pardon necessary appears pos-

1 Donald Trump (@realDonaldTrump), Twitter (June 4, 2018, 5:35 AM), https://twitter.com/realDonaldTrump/status/1003616210922147841 (last visited Mar. 31, 2019).

2 U.S. Const. art. II, § 2, cl. 1.

3 *United States v. Nixon*, 418 U.S. 683 (1974); *Bush v. Gore*, 531 U.S. 98 (2000).

4 *Presidential or Legislative Pardon of the President*, U.S. DEPARTMENT OF JUSTICE, Aug. 5, 1974, https://www.justice.gov/file/20856/download (last visited Mar. 31, 2019).

5 Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of The Presidential Self-Pardon Power*, 52 Okla. L. Rev. 197 (1999).

6 Daniel H. Erskine, *The Trial of Queen Caroline and the Impeachment of President Clinton: Law as a Weapon for Political Reform*, 7 Wash. U. Global Stud. L. Rev. 1 (2008);
Harold Bruff et al., Can President Clinton Pardon Himself?, SLATE MAGAZINE, Dec. 30, 1998, slate.com/news-and-politics/1998/12/can-president-clinton-pardon-himself.html (last visited Mar. 31, 2019).

7 *Remarks by President Trump Before Marine One Departure*, THE WHITE HOUSE (June 8, 2018, 8:02 AM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-8/ (last visited Mar. 31, 2019).

sible.[8] As such, this discussion could not be more relevant. What follows is a non-partisan and dispassionate examination of the germane legal arguments, historical context, precedent, and rational thinking which will inform any conclusion regarding this matter.

Part I. Background

Expressio Unius

As it is both colloquially and legally known, a pardon is the ability to "forgive an error or offense."[9] Additionally, a pardon acknowledges the pardonee's guilt, but nullifies the punishment. In 1915, the Supreme Court concluded that that a pardon "carries an imputation of guilt; acceptance a confession of it."[10]

Proponents of the presidential self-pardon often reference the Founders' deafening silence on the issue as indication of their tacit approval of the power; as acknowledged, the Constitution clearly states that the president "shall have Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[11] Therefore, the Constitution states two explicit exceptions. Firstly, as is clear in the text, the president may not pardon impeachment. Secondly, the president may not pardon state crimes, as the Constitution only allows for the pardoning of federal crimes, or "offenses against the United States."[12] Defenders of the president's right to self-pardon often defer to the legal concept of *Expressio Unius Est Exclusio Alterius* , which explains that when an exception to a right has been explicitly stated, all instances not excluded are permitted.[13]

Ex Parte Garland

Despite there being no direct precedent regarding the constitutionality of a self-pardon, there is an argument to be made by extrapolating precedent from a tangential case. The president has, as the Supreme Court determined in *Ex Parte Garland*, a pardon power "unlimited, with the exception[s] stated" where his pardon power is absolute and "extends to every offence known to the law."[14] Thus, it could be argued that the president does, in fact, have the power to pardon himself. If the power of pardon is indeed unlimited with the stated exceptions, then the lack of a self-pardon exception would theoretically make it valid.

The Framers' Debate

To understand the Constitution's text, either to clarify vague language or apprehend the conditions in which it was crafted, it is

8 Barry H. Berke et al., *Trump's Real Problem Is That He Obstructed Justice, and Mueller Can Prove It. Here's How*, THE WASHINGTON POST, Aug. 22, 2018, www.washingtonpost.com/outlook/2018/08/22/trumps-real-problem-is-that-he-obstructed-justice-mueller-can-prove-it-heres-how/?utm_term=.147d4b7766af (last visited Mar. 31, 2019);
Tom McCarthy et al., Former FBI Head Robert Mueller to Oversee Trump-Russia Investigation, THE GUARDIAN, May 17, 2017, www.theguardian.com/us-news/2017/may/17/trump-russia-investigation-special-counsel-robert-mueller-fbi (last visited Mar. 31, 2019);
Philip Bump, *The Government Implicates Trump and the Trump Campaign in Federal Campaign Finance Violations*, THE WASHINGTON POST, Dec. 7, 2018, www.washingtonpost.com/politics/2018/12/07/government-implicates-trump-trump-campaign-federal-campaign-finance-law-violations/?utm_term=.511ba37242e7 (last visited Mar. 31, 2019);
Rick Newman, *Here Are All of Trump's Legal Problems*, YAHOO! FINANCE, Oct. 30, 2018, finance.yahoo.com/news/trumps-legal-problems-203620363.html (last visited Mar. 31, 2019).

9 *Pardon*, OXFORD DICTIONARIES, en.oxforddictionaries.com/definition/pardon (last visited Mar. 31, 2019).

10 *Burdick v. United States*, 236 U.S. 79 (1915).

11 U.S. Const. art. II, § 2.

12 *Id.*

13 Expressio Unius Est Exclusio Alterius, MERRIAM-WEBSTER'S DICTIONARY OF LAW, https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius (last visited Mar. 31, 2019).

14 *Ex Parte Garland*, 71 U.S. 333, 380 (1866).

often instructive to read the Framers' relevant debates. Unfortunately, the conversation surrounding the pardon power is as brief as the clause itself — a single conversation between two Framers, Edmund Randolph and James Wilson.[15] Randolph clearly opposes a near limitless pardon power while Wilson argues in favor of it.[16] Randolph suggested that treason should be an unpardonable offense, for "the President may himself be guilty. The Traytors may be his own instruments."[17] The suggestion that a president have such a clear restriction on his power, however, was evidently struck down for it failed to enter the Constitution.

In defining the role of the presidency, the Framers were explicit in their desire that the chief executive not have any of the attributes of European royalty. Unlike a European monarch, the American president is elected from the populous by attaining a majority vote in the electoral college; his salary is clearly defined and inalterable during his term; he cannot use any royal title nor may he derive any personal benefit; and he can be removed from office for any "high crime or misdemeanor."[18] Thus, the president was envisioned to be a powerful leader without kingly attributes.

Part II. Why the President Cannot Pardon Himself

Expressio Unius in Context

According to proponents of the self-pardon, because the Constitution only bars the pardoning of state crimes and impeachment, all other pardons, including a self-pardon, must be legal. However, when the U.S. Supreme Court examined this principle in *United States v. Barnes*, it concluded that "*expressio unius est exclusio alterius* is a rule of construction, and not of substantive law, and serves only as an aid in discovering legislative intent when not otherwise manifest."[19] In the case of the presidential self-pardon, *Expressio Unius* is not applicable.

There are several ways to interpret an explicit list of exclusions. First, consider the admonition, "do not drive on Tuesdays." By identifying a specific day of the week, the appropriate implication is that one can drive on all other days. Now, consider the warning, "do not drink and drive." A reasonable person cannot argue that driving after taking a narcotic must be permissible since it has not been explicitly prohibited. Accordingly, does 'no dogs allowed' mean that lions are allowed but guide dogs are excluded?[20] Thus, it appears that *Expressio Unius* is not applicable in relation to the presidential pardon, for the list of potential limitations on the president's pardon power would be far too long to enumerate.

To universalize, one can argue that *Expressio Unius* is only applicable when there is a discrete number of options. However, when the list of alternative possibilities is near-inexhaustible, identified exceptions may serve as guidance to the existence of other exceptions, but to contend that all unidentified exceptions are permissible would lead to absurd and indefensible positions.

Ex Parte Garland 1866 as Bad Precedent

An argument whose foundation is *stare decisis* is made in bad faith because the referenced case does not actually discuss the question at hand. *Ex Parte Garland* directly addresses *what crimes* the president may pardon, though it is completely silent on *whom*

15 Brian C. Kalt, *Pardon Me?: The Constitutional Case against Presidential Self-Pardons*, 106 Yale L.J. 779 (1996).

16 *Id.*

17 *Id.*

18 U.S. Const. art. II, § 1, cl. 3; U.S. Const. art. II, § 1, cl. 7; U.S. Const. art. I, § 9, cl. 8.

19 *United States v. Barnes*, 222 U.S. 513 (1912).

20 *Expressio Unius Est Exclusio Alterius*, COLLINS DICTIONARY OF LAW (3rd ed. 2006).

he may pardon. Therefore, contextually, the *Ex Parte Garland* decision should read that the president's pardon power is "unlimited in which crimes it may pardon, with the exceptions stated," not the recipient of the pardon. To claim that there is precedent supporting a self-pardon is, at best, careless with the actual judicial opinion.

Stare decisis, in referencing *Ex Parte Garland*, instructs that the president not be limited in which crimes he has the power of pardoning. Notwithstanding, consider a hypothetical where the crime committed results in the perpetrator becoming president and thus gaining the office's inherent pardon power. This is the proverbial perfect crime; if his crime is discovered then he simply pardons himself prior to his impeachment and if his crime remains undiscovered, he pardons himself at the end of his term. In either event, he would never be subject to punishment. Thus, election fraud would be a crime without consequence. This is, of course, unless the self-pardon were prohibited.

The Framers' Debate in Context

It may be argued that the Framers intended to have a broad and near-unlimited power of pardon, for if the president can pardon those who commit treason on his behalf, could he not simply pardon himself, as well? However, to come to the aforementioned conclusion is only possible if the debate between the Framers is taken out of context; when confronted with the possibility that "the President be himself a party guilty [of treason]," Wilson acknowledged that "[the President] can be impeached and [then] prosecuted."[21] This sequence of events, where impeachment precedes a pardon, is a logical impossibility; the lengthiness that naturally accompanies the process of impeachment exceeds the brevity that a pardon requires. While the former demands half of the House of Representatives and two-thirds of the Senate concurring on a judgment of guilt, the latter requires only the stroke of a pen.[22] Thus, it is highly improbable that Wilson, the creator of the presidential pardon, envisioned the president to have the ability to self-pardon, for bestowing the president with that authority is antithetical to the fail-safe he promised.

The Framers' Intent: the Rationale of the Pardon

While *The Federalist Papers* certainly do not carry the force of law, they do, however, provide some insight into the thinking of Hamilton and the Framers. Despite the American pardon's superficial resemblance to that of a European monarch, closer inspection reveals it to be quite different. While a monarch's pardon power is part and parcel of his divine rights, the president, as Hamilton explains in *Federalist* No. 74, is instead given the power of pardon for two practical reasons. Firstly, the pardon power softens justice, for the "criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[23] Secondly, the pardon is a mechanism which, used judiciously, could save the Union itself "in seasons of insurrection or rebellion," given that "there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."[24]

21 James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 571 (Gaillard Hunt & James Brown Scott eds., 1987).

22 Gregory Korte, Can Trump Really Do That? The Presidential Pardon Power, Explained, USA TODAY, June 5, 2018, eu.usatoday.com/story/news/politics/2018/06/04/presidential-pardons-explanation-executive-clemency-powers/660381002/ (last visited Mar. 31, 2019).

23 *THE FEDERALIST* NO. 74, at 475-477 (Alexander Hamilton) (Modern Library ed., 2000).

24 *Id.*

Because a monarch's authority is derived from the divine, he could certainly argue that it is within his rights to pardon whomever he wishes. Notwithstanding, the concept of divine rulers committing self-pardon has been vehemently debated in the European courts.[25] However, even the most generous reader of the Constitution would be hard-pressed to explain how an American president, an elected official fully accountable to the law, advances the objectives of justice or the maintenance of the union by pardoning himself.

Simply based upon its definition, a pardon can only be used in relation to a crime. Impeachment, however, is not a crime. Impeachment is a political process, a remedy of sorts.[26] Ergo, when the Framers stated that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," it is illogical to assume that he may pardon the process of impeachment.[27] Rather, the Constitution's meaning of "except in case of impeachment" must be more complex than it appears at face value. More precise verbiage of the Framers' intent would potentially read, "He shall have power to grant reprieves and pardons for offenses against the United States, except [for crimes] in cases of impeachment."[28] The belief that the president could pardon the process of impeachment proves just as illogical as the idea he could pardon taxes. Consequently, the Framers likely meant the president cannot pardon crimes that lead to impeachment, rather impeachment itself.

Simultaneously, if it is to be believed that the Framers intended the clause to deny the president the ability to pardon crimes relating to impeachment, then the entirety of self-pardon is de facto abnegated as well. The Constitution reads that "the President…shall be removed from Office on impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[29] If the Constitution only allowed for impeachment for the felonies of treason and bribery, the bar would be set quite high. Adding the language of "high Crimes and Misdemeanors" remedies the issue and give insight into the Framers' intent.

In a discussion of the grounds for impeachment during the Constitutional Convention, George Mason questioned, "Why is the provision restrained to treason and bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses."[30] Thus, as a corrective measure, the phrase "high crimes and misdemeanors" was added by James Madison.[31] This formulation was chosen, as explained by Alexander Hamilton in *Federalist* No. 65, because it was adequately broad and sufficiently vague to "the subject of impeachment as those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[32] Simply, the phrase "high crimes and misdemeanor" was added to impeachable offenses in order to supplement the seemingly few impeachable crimes. Therefore, it must follow that the president cannot pardon any crime he, himself, commits, regardless of perceived severity, for any and all illegal activity that is to be considered a potentially impeachable offense.

25 Robert Nida and Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of The Presidential Self-Pardon Power*, 52 Okla. L. Rev. 197 (1999).

26 What Is a 'Pardon' and Does It Get Rid of My Criminal Record?, LEGAL AID SOCIETY OF CLEVELAND, lasclev.org/pardon/ (last visited Mar. 31, 2019).

27 *Supra* note 16.

28 *Supra* note 16.

29 U.S. Const. art. II, § 4.

30 Max Farrand, *The Records of the Federal Convention* 550 (1911).

31 *Id.*

32 *THE FEDERALIST* NO. 65 at 423-24 (Alexander Hamilton) (Modern Library ed., 2000).

The Absurd Effects of the Unfettered Self-Pardon

A government's legitimacy and moral right to use state power is both justified and lawful only when there is assent of the people over which that political power is exercised, or, "consent of the governed."[33] However, what does the phrase "all men are created equal" mean if a citizen, once elected president, is free to pardon himself of any crime, committed prior to or during his presidency, regardless of the heinousness of the offense?[34] The fact that laws must uphold justice into its innermost parts is self-evident in nature, for the citizenry will not stand for a system that is *prima facie* unfair**.**

Absurdity, despite being less obvious than consent of the governed, is an equally important attribute that the law must avoid. Luckily, absurdity can be easily recognized. If a law creates an outcome that is clearly incorrect, then that law should be considered absurd. Edmond Plowden illustrates this in a scenario where "a prisoner who breaks [free of] prison shall be guilty of felony, [but it] does not extend to a prisoner who breaks out when the prison is on fire: 'for he is not to be hanged because he would not stay to be burnt."[35] Thus, it is understood that for laws to be fair, they must not lead to absurd outcomes.

While there can be very few generalizations made about the Supreme Court's interpretation of the Constitution, foundational principles have included a faithfulness to the Framers' intent, the protection of the individual from the state, the protection of individuals from each other, and the avoidance of absurdity. For example, the Fourteenth Amendment was added to create a more just society.[36] Simultaneously, the Supreme Court has not deferred to the plain language of any assertion or protection found within the Constitution, when doing so would lead to an absurd outcome. Despite the Second Amendment, no 'citizen may keep or bear' a nuclear bomb; despite the First Amendment protections, we may not yell "fire" in a crowded theater, etc.[37] It strains credulity to suggest that presidential pardon power is the only sacrosanct privilege specified in the Constitution. When contextualized, it is neither just nor sensible to grant the president unlimited pardon power.

Imagine a scenario where the president truly has an unfettered power of self-pardon, with the only exceptions being the ones explicitly stated. In that case, could he not, quite literally, shoot a person on Fifth Avenue?[38] Perhaps sell pardons for anyone who can afford the fee? In fact, with a pardon power restricted only for state crimes and the nebulous term of "impeachment," the president's ability to use his pardon power for any purpose, whatsoever, is unbounded. The aforementioned scenarios are all permissible if we accept that presidential pardon power is the one and only privilege delimited by the Constitution that cannot be subjected to judicial review, interpretation, and limitation. Thus, even if all arguments made prior (*expressio unius*, constitutional debates, context of the clause, and the history of the Constitution) were to fall on deaf ears, to allow the presidential pardon to be uncurtailed is simply poor, and absurd, policy.

33 United States Declaration of Independence

34 *Id.*

35 E. Russell Hopkins, *The Literal Canon and the Golden Rule*, 15 CAN. B. REv. 689, 695 (1937).

36 U.S. Const. amend. XIV.

37 Schenck v. United States, 249 U.S. 48, 52 (1919).

38 Trump: 'I Could Stand In the Middle Of Fifth Avenue And Shoot Somebody And I Wouldn't Lose Any Voters, REALCLEARPOLITICS, Jan. 23, 2016, www.realclearpolitics.com/video/2016/01/23/trump_i_could_stand_in_the_middle_of_fifth_avenue_and_shoot_somebody_and_i_wouldnt_lose_any_voters.html (last visited Mar. 31, 2019).

While as yet untested, to remain consistent with the ancient legal doctrine and modern jurisprudence, commodum ex injuria sua nemo habere debet (a wrongdoer should not be enabled by law to take any advantage from his actions), the Supreme Court may need to revisit this legal precedent. An exemplary case states that "to permit the murderer to retain title to the property acquired by his crime as permitted in some states is abhorrent to even the most rudimentary sense of justice." Similarly, allowing the president to pardon himself would create a circumstance where election fraud becomes a viable option for a trailing candidate, for what would he have to lose?

Part III. Conclusion

An uncritical review of this topic would allow one to conclude, solely based on a misinterpretation of expressio unius, that the president could, in fact, pardon himself. However, a more rigorous and less superficial analysis leads one to the exact opposite conclusion and establishes a solid case for the illegality of the self-pardon.

The arguments for the presidential self-pardon are often superficial and intellectually complacent. While the expressio unius argument is easy to make and understand, it is simply misapplied. Simultaneously, those who support presidential self-pardon will likely misinterpret Ex Parte Garland to bolster their case. However, this argument only passes the weakest examination; this case only addresses which crimes the president may be pardon but remains silent on whom he may pardon. Nonetheless, these anemic arguments comprise the strongest legal case for presidential self-pardon.

On the other hand, the reasons to disallow it are compelling and consistent with American jurisprudence. Clearly, the Framer who introduced the presidential pardon argued that impeachment with subsequent prosecution is the fail-safe for a corrupt president. To prosecute the president after impeachment is a logical impossibility if the self-pardon were within the president's rights. Additionally, the president may only pardon a crime, not a political process. Thus, when the Constitution states that the president may not pardon impeachment, this must be taken to mean that the president cannot pardon any crimes that could precipitate impeachment, which are undefined and innumerable. Furthermore, allowing the president to pardon himself is simply poor legal policy, for it inevitably generates absurd and indefensible results. Finally, to allow a self-pardon would not only allow general crimes to be pardoned, but could promote election fraud.

Thus far, this discussion has avoided any consideration of the elephant in the room. However, it is essential to acknowledge that the presidential self-pardon is partisan in nature. President Trump and his legal team have suggested that the presidential self-pardon precludes any legal consequence to the Special Counsel's investigation. Nonetheless, regardless of one's political ideologies, due process compels a consistent determination on the legality of the self-pardon. As this examination has shown, the Constitution of the United States demands that the argument against self-pardons must be unanimously accepted, for "wherever law ends, tyranny begins."

Like A Dog With A Bone:
How United States v. Stevens Keeps the Door Open for Animal Law

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Abstract

In the decision for United States v. Stevens, the Supreme Court struck down §48 as a violation of the First Amendment. But by focusing almost entirely on free speech, the Court failed to acknowledge animal welfare as a compelling state interest—a threat to the advancement of animal law. In addition to ethical reasons concerning animal welfare, the issue should be considered a compelling state interest due to the overwhelming data linking violence towards animals and violence towards people. Every avenue of the legal system, especially the Supreme Court, must take animal cruelty seriously to prevent future escalations of interpersonal violence.

Introduction

The United States legal system describes animal law as a "statutory and decisional law in which nature—legal, social, or biological—of nonhuman animals is an important factor."[1] Section 48 (§48), introduced by Congressman Elton Gallegly (R-CA), faced little resistance in the House of Representatives and passed the Senate unanimously in 1999. It was written after a spotlight was shone on "crush videos" in the 90's, which depicted the crushing of helpless animals, usually under a women's high heel, and often catered to a niche sexual fetish.[2] The law targeted crush videos by making illegal "any visual or auditory depiction 'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,' if that conduct violates federal or state law where 'the creation, sale, or possession takes place.'"[3] An exception clause protected content "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[4] While swearing the legislation into law, President William Clinton declared that it would be used against depictions appealing to prurient interests.[5] Nobody was prosecuted under the law until 2004 when Robert Stevens, an entrepreneur that sold footage of aggressive pit bull behavior online, was caught by law enforcement. Though dogfighting was not the content Congress originally aimed to deter with §48, Stevens's actions ultimately fell under the its jurisdiction. Stevens contended that §48 was facially invalid as it violated the First Amendment. In April 2010, the Supreme Court delivered an 8-1 decision in favor of Stevens; the majority decision featured a staunch defense of the First Amendment without touching on whether animal cruelty was a compelling state interest. *United States v. Stevens* represents an unanswered question in the American legal system: to what degree should the protection of animal rights — and the result of those rights' protection — be respected in times of controversy.

Background

Stevens's case took years to arrive to the Supreme Court. A Pennsylvania federal district court[6] initially denied Stevens's motion to dismiss his indictment, citing the depictions subject to §48 as unprotected speech under the First Amendment.[7] In May 2005, Stevens appealed to the Third Circuit Court of Appeals, which overturned his criminal conviction, declaring §48 unconstitutional on First Amendment grounds. Beyond declaring the law unconstitutional, the Third Circuit did not deem animal cruelty as worthy of recognition for a new category of unprotected speech. Furthermore, it decided the analogy that lawyers presented between *Ferber*, the Supreme Court case which determined child pornography as unprotected speech, and §48 was invalid because children and animals are not of the same standard of importance. The Third Circuit also cited *Lukumi*, the Supreme Court case which declared the prohibition of ritualistic animal sacrifices unconstitutional and deemed animal welfare as a non-state compelling interest.[8] In December 2008, the United States Solicitor General filed a petition to the Supreme Court to review the Third Circuit's decision.[9]

1 Brief for Group of American Law Professors as Amicus Curiae, *United States v. Stevens*, 599 U.S. 460 (2010), pp. 1.

2 Abigail Perdue and Randall Lockwood, Animal Cruelty and Freedom of Speech: When Worlds Collide 51 (2014).

3 United States v. Stevens, Syllabus (October Term 2009), pp.1. https://supreme.justia.com/cases/federal/us/559/08-769/index.pdf.

4 David N. Cassuto, *United States v. Stevens: Win, Loss, or Draw for Animals?,* J. Animal L. & Ethics, 12 (2012).

5 *Id.*

6 *United States v. Stevens*, Oyez, https://www.oyez.org/cases/2009/08-769 (Nov. 17, 2018).

7 *Supra* note 3, at 6.

8 *Id.*

9 Interview by Sarah Montgomery with Brynn Smernoff, College Campaigns Assistant for the People

Majority Opinion

Chief Justice John Roberts delivered the majority opinion which discussed the moral, political, and economic consequences of §48. Morally, the Court echoed the thoughts of the Third Circuit by also rejecting the analogous political thinking between *Ferber* and *Stevens:* child abuse and animal abuse do not share the same degree of urgency. Justice Ginsburg said in her concurrence, "the very taking of the [pornographic] picture is the offense—that's the abuse of the child," and added that, "the abuse of the dog and the promotion of the fight is separate from the filming of it."[10] Economically, the Court determined the "lucrative" market for crush videos and other animal cruelty depictions was undoubtedly minute in comparison to the market for otherwise legal markets, such as hunting videos.[11]

The Court's application of the overbreadth doctrine dissipated the validity of this bill. Chief Justice Roberts acknowledged that maiming and killing do not necessarily require cruelty and but still may infringe on otherwise legal behavior on which §48 did not intend to infringe. The government's promise that the law would only be applied as intended has already been broken, as this case regards dogfighting rather than crush videos. A law ought not to be upheld only because the government claims it will use it responsibly. This overbreadth of legal writing leads to a direct contradiction of the First Amendment, even considering the exception clause of §48. Beyond finding that most depictions (such as non-instructional hunting videos) will have difficulty falling under the exception clause because of its inclusion of the ambiguous word "serious," the government cannot be sure this language will answer any and every free speech issue. The Court acknowledged that the exception clause – which was integrated to protect valuable speech, is directly borrowed from *Miller v. California,* which made obscenity unprotected speech.[12] Roberts responds that, though depictions of dogfighting and crush videos may be "value-less," the writing of §48 does not just pertain to these types of depictions and, more importantly, this kind of characterization does not set the test for what speech is and is not protected.[13] The First Amendment was created to prevent such governmental judgements which selectively declare some speech as unworthy of protection. Acknowledging that the Supreme Court has historically described certain categories of speech[14] as unprotected due to low social value, Chief Justice Roberts affirms that they are just descriptions for those specific instances, not a means of setting a test for the speech of "an ad hoc calculus of costs and benefits." The bottom line of the decision is that §48 was "substantially overbroad and therefore invalid under the First Amendment."[15]

Dissenting Opinion

Justice Samuel Alito alone delivered a dissenting opinion. He cited crush videos as "a form of depraved entertainment that has no social value," thus making them morally imperative to eradicate.[16] He argued that the First Amendment protects freedom of speech, not freedom of conduct. He also feared the economic effect of overturning §48, worrying that the Court's majority decision would create a resurgence in the market for crush videos. He agreed with the Humane Society's amicus brief: that the only way to prevent the underlying criminality of these videos is to prohibit their commercial benefits. Indeed, a loss of economic incentive

for the Ethical Treatment of Animals, email. (Nov. 16, 2018).

10 Adam Liptak, *The Court Hears Free-Speech Case on Dogfight Videos*, The New York Times, October 6, 2009. https://www.nytimes.com/2009/10/07/us/07scotus.html.

11 *Supra* note 3.

12 *Id.*

13 *Id.*

14 *Supra* note 3, at 3.

15 *Supra* note 3, at 7-11.

16 *Id.*

will deter crime.

In terms of political and legal impact, Justice Alito disagreed with his fellow justices over the use of the overbreadth doctrine. He found that the law was not overbroad because the exception clause would let legal activities, like hunting, off the hook because they have "serious" value as a part of America's heritage. The intention of §48 is to prevent animal cruelty, not to curb free speech. Justice Alito argued that there are few depictions that the law would unconstitutionally impact. In concordance with the majority, Alito also acknowledges that the motivation to deter the torture of animals is less important than preventing child abuse, thus rejecting the relationship between *Ferber* and *Stevens*. Though he sees a compelling state interest involved in the case, he does not reference animal welfare as a compelling state interest. Rather, the state interest lies in "preventing the torture depicted in crush videos."[17]

Impact on Policy

Immediately following the Supreme Court's decision, Congress enacted H.R. 5566, the Animal Crush Video Prohibition Act of 2010, otherwise known as the Crush Act. This time, members of Congress focused specifically on crush videos and reframed the issue as a matter of obscenity, an already unprotected category of speech.[18] However, this new law features much narrower language— applying only to visual (and not auditory, as previously written) depictions of burning, crushing, suffocation, drowning, impaling, and otherwise serious bodily injury of live non-human mammals.[19] The justification for passing the new law was to demonstrate that animal cruelty is indeed a compelling state interest, amongst other justifications.[20] The Crush Act – used sparsely since its enactment[21] – can be summarized as a backdoor means of achieving Congress's original goal.[22]

Economic Impact

Considering that the crush video market operates within the black market, it is difficult to conclusively determine *United States v. Stevens*'s economic impact. In 2009, journalist David Savage wrote that "society has seen a resurgence of horrific 'crush videos' for sale on the internet in the past year, ever since a United States Appeals Court, on free-speech grounds, struck down a federal law that banned the selling of videos of animals being maimed and tortured."[23] Crush videos were sold for about $300 per video. Dogfighting, another lucrative industry related to animal cruelty, creates a market for canines worth thousands of dollars and, because of its underground nature, makes footage necessary in order to showcase the dogs' combat abilities.[24]

Deciphering the economic impact of the hunting industry is also difficult because, though §48 never appeared to formally impact the hunting community, the public exposure of *Stevens* or the efforts of animal advocacy groups may have changed how Americans define the acceptable and ethical treatment of animals. Regardless, as of 2010, "hunting in the United States injects over $66 billion into the national economy through hunting-related expenditures, taxes, and licensing fees, and the creation of

17 *Id*, at 13-19.

18 *Supra* note 4, at 13.

19 *Id.*

20 *Supra* note 2, at 220, 222.

21 *Supra* note 2, at 223: As of January 2013, the Crush Act was used in prosecution only once. In that case, the District Court granted the Respondents' motion to dismiss because the depictions were found to neither be obscene nor to be integral to criminal conduct.

22 Interview by Sarah Montgomery with Nicole Saharsky, phone call, (Nov. 16, 2018).

23 David G. Savage, First Amendment, cruelty videos collide High court studies the reach of free speech *Houston Chronicle,* October 7 2009, p. 6.

24 *Supra* note 2, at 176.

593,000 jobs."[25] With numbers that large, it can be understood that the preservation of the hunting industry is economically beneficial.

With the enactment of the Crush Act, these markets have been pushed deeper underground, making it harder to collect empirical data on these markets. As Abigail Cromwell, the attorney responsible for the Northwest Animal Rights Network amicus brief submitted to the Supreme Court, points out: the Court's hard-and-fast ruling on child pornography, while certainly not entirely eliminating the entire market for such content, has curbed its production thanks to such strict regulations and serious punishment.[26] Even without the legitimacy of a favorable Supreme Court decision behind it, the fear of a felony conviction, thanks to the Crush Act, is logically a deterrent to the creation of videos depicting blatant animal cruelty.

Public Impact

Though there was not much public outcry in the mainstream media, a positive impact of the case is that it raised public awareness of the legal obstacles that animal rights advocates face. This public attention encouraged the creation of stronger state laws in regard to animal protection— in particular, provisions for some acts of animal cruelty to be seen as criminal. This increased public awareness now means that animal abuse cases often become "hot" cases, unleashing an onslaught of public opinion on local task forces and engendering the involvement of community-oriented policing.[27] Also, as raised by David Horowitz, the current Executive Director of the Media Coalition, the striking down of §48 is beneficial not only to free speech advocates but also to animal advocates.[28] For instance, animal rights groups post videos of obscene content, like videos of dogfighting, to garner sympathy. Under this law, the ability for both journalists and advocates to create an exposé utilizing depictions of such cruelty would be protected only on a basis of viewpoint-based discrimination.[29]

Argument

Though the provision at the center of the *United States v. Stevens* controversy, §48, was flawed and worthy of repeal, the case's legacy plays an important role in the necessary elevation of the status of animal law. The requirement that the action in the depiction be deemed illegal is irrelevant to animal cruelty because multiple laws regarding animals are not necessarily applicable to animal cruelty. These include laws regarding hunting seasons and fishing quotas. Additionally, the statute's condition of depicting illegal action is unclear because all 50 states have different laws regarding animal cruelty, and thus these videos could be illegal in one state but legal in another. As a result, it is challenging to apply a federal law when there is conflict between state jurisprudence and the definition of the law itself.

The Supreme Court erred in their deciding not to set a legal precedent to determine animal welfare as a compelling state interest, because it failed to recognize the social, economic, and political consequences of animal abuse and instead focused solely on the First Amendment's implications. In terms of political legacy, *Stevens* is an important case as it, along with others, establishes the Supreme Court as a pro-First Amendment group.[30] Recently, the Court as a collective has strongly favored free speech, regardless of individual Justices' ideologies.[31] Robert Barnes of *The Washington Post*

25 Amicus Curiae: Brief for the National Shooting Sports Foundation, Inc. as Amicus Curiae, *United States v. Stevens*, 559 U.S. 460 (2010), at 5.

26 Interview by Sarah Montgomery with Abigail Cromwell, phone call. (Nov. 15, 2018).

27 *Supra* note 2, at 228.

28 Interview by Sarah Montgomery with David Horowitz, Executive Director of the Media Coalition, phone call. (Nov. 15, 2018).

29 *Id.*

30 *Supra* note 16.

31 *Supra* note 22.

states that the ruling "was a ringing endorsement of the First Amendment's protection of even distasteful expression."[32] Additionally, by making its decision in *Stevens,* the Court "held that individuals cannot be held criminally liable for distributing speech depicting illegal acts, so long as the individuals did not perpetrate the underlying act."[33] This kind of judgment sets a precarious precedent not only for the possessions of unprotected speech but also for legally obtained, legally possessable speech to also not be criminalized – which affects growing legal issues, such as revenge porn.[34]

More significantly than its pro-First Amendment stance, the Supreme Court made a statement by not sending a different message. By avoiding the question of whether or not animals are a state compelling interest for the second time (the first being *Lukumi*) the Court has pushed off the animal rights dilemma for another case in the future.[35] It seems as though calls for re-considering the issue have fallen on deaf ears, considering the Court's refusal of two opportunities to do so. One can ignore that animals, like children, can neither speak nor defend themselves against adult human exploitation. One can ignore that animals are innocent victims in ways similar to children – sexually, physically, emotionally – and deserve the same protections.[36] One can ignore the fact that the reasons set forward by *Ferber* for banning speech also apply to deterring animal abuse. However, one cannot ignore that the manner in which humans relate with animals directly translates to how animals relate with people. Pamela Frasch and Megan Senatori, two lawyers who worked on *Stevens*, state that "when animal and human interests come into conflict, human interests, quickly and unsurprisingly, trump the ethical and moral arguments favoring animal protection."[37]

Animal abusers are five times more likely to commit violent crimes, four times more likely to commit property crimes, and three times more likely to be arrested for drug-related arrests.[38] If this is not terrifying enough, David "Son of Sam" Berkowitz, Jeffrey Dahmer, Edmund Emil Kemper III, and many other serial killers all share a history of animal abuse.[39] The Supreme Court must address animal cruelty seriously because there is well-established scientific evidence showing the human-on-human violence that often escalates from violence towards animals.[40]

Response

In response, one may argue that, as demonstrated by the majority and dissenting opinions, animal abuse is simply not as devastating as child abuse to the moral, political, and economic safety of America. Considering that the Constitution says nothing about animals,[41] the issue of animal abuse is not a matter for the Supreme Court to rule on. Those who object to making animals a compelling state interest could factually claim there is, constitutionally, no explicit equal protection for humans as there is for nonhumans.

32 Robert Barnes, *Supreme Court overturns anti-animal cruelty law in First Amendment case* The Washington Post, April 21, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042001980.html.

33 Erica Goldberg, *Free Speech Consequentialism*, 116 Colum. L. Rev. 746 (2016).

34 *Id.*

35 *Supra* note 4, at 13.

36 *Supra* note 20.

37 Megan A. Senatori and Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 J. Legal Educ., 216 (2010).

38 *Supra* note 1, at 23.

39 *Supra* note 1, at 29-30.

40 *Supra* note 1, at 34.

41 Helena Silverstein, Unleashing Rights: Law, Meaning, And The Animal Rights Movement, 124 (1996)

Defense of Argument

Animal abuse escalates

The critics' belief that animal cruelty is not a compelling state interest is unfounded, because the violence that escalates from initial acts of animal abuse is a threat to the safety of the American people. In 1966, the American Journal of Psychiatry found that out of 84 prison inmates surveyed, 75% of those charged with violent crimes had prior records of cruelty to animals.[42] In a different study, researchers studied 37 violent juveniles. Among them, "90% reported to have abused animals with 37% reporting sexual abuse of animals."[43] Moreover, animal abuse is a tool which abusers of people can use for control, shame, and further acts of aggression. For instance, "a 1984 study by Lenore Walker found that 41% of the battered women she interviewed had been forced by their partners to engage in sex acts with their pets."[44] Not only does animal abuse damage the direct participants, but it also damages viewers. Not only is it potentially traumatic to witness acts of violence, but it also runs the risk of desensitizing viewers to suffering, and thus triggering a loss in the ability to empathize.[45] The welfare of animals in this country is a matter of high priority because more people will continue to be hurt if the American legal system does not take animal cruelty seriously.

The possibility to create a legal foundation for animal rights

The argument that animals are not present in the Constitution, and thus are not worthy of equal protection, is irrelevant because it treats the Constitution, as a legal positivist would, as a document set in stone. First, the Constitution is changeable, and the potential always exists for new categories of unprotected speech to be added to the First Amendment. The opposing side is correct that there is weak foundation for constitutional law in relationship with animal law; however, animal rights advocates may change that with litigation. Litigation is an important resource for advancing social causes because it directly influences the definitions of legal ideas.[46] Consequently, this control over definitions will frame animal rights as a legitimate legal issue and make the definition of "animal cruelty" clearer. Furthermore, litigation of animal law issues maintains public awareness of legal controversies (as seen with the result of the *Stevens* litigation) such as animal cruelty, directly galvanizes the public, and pressures the legal system to reflect current American values.

Conclusion

Section 48 was ultimately an inadequate law, regardless of the legislation's good intentions. It proved ambiguous and the overreach of its writing disastrously pitted the noble cause of animal advocacy against freedom of speech. The law was rightly struck down. However, it is beneficial that §48 made it to the Supreme Court because it gave the opportunity for the Court to consider animal law in and of itself. The only way to advance animal law as a field is to make a restriction on animal cruelty a compelling state interest.[47] Congress and the American people have decided that the welfare of animals is of state interest; but the Supreme Court is not yet on the same page. Americans who care about the safety of this country can continute to advocate for animals by shedding light on the collective benefits derived from eradicating violence inflicted on animals. By not deciding on whether animals are a compelling state interest in *United States v. Stevens*, the door remains open for animal advocates and the people of this country to bring animals the justice they deserve.

42 *Supra* note 1, at 18.

43 *Supra* note 2, at 8.

44 *Supra* note 1, at 22.

45 *Supra* note 2, at 177.

46 *Supra* note 34, at 125.

47 *Supra* note 4, at 14.

Navigating Free Speech and Social Order:
An International Case Study on Protecting the Internet

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Abstract

In an increasingly digital world, free speech and privacy laws in any given country have a growing impact on the lives of people across the globe, especially with regard to personal data protections. Unfortunately, there has yet to be any global and effective legally binding agreements to set a base level of protection for digital information on individuals. On one side of the debate, some countries argue that some level of censorship its necessary to prevent cyberterrorism and maintain social order. On the other, other counties and human rights organizations warn that censorship violates the human rights to freedom of speech, expression and privacy, making it easier for governments to quiet dissidents and spread false information. After analyzing the legal position of data protection, I recommend the ratification of legal protections for personal data, even if it is not as extensive as one could hope. In order to be effective, any treaty would have to create a supervising body and court for resolving disputes and offering advisory opinions. Hopefully, private corporations will take the lead, valuing employee and local input rather than profits alone.

I. INTRODUCTION

For millennia, it was a ruler's unquestioned prerogative to invade the privacy of their subjects to understand their beliefs and opinions, and thereby manipulate them. The ancient Athenians were a rare exception who understood free expression to be the apotheosis of civilized society. Unfortunately, these values were lost until the Enlightenment. It wasn't until John Locke put forward the idea of universal individual freedoms, that discourse began on creating limited governments that followed the rule of law and resisted violating free expression and privacy, at least in the West. Today, it is simpler to list those states which have failed to enshrine guarantees for free expression and protection of privacy in their constitutions than those who have. However, the practical implementation of protecting these idealistic freedoms is extremely challenging, and regardless of how carefully legislatures write new laws and courts interpret them, someone will always be displeased.

As difficult as finding the right level of protection for free speech and privacy was in the analog age, the invention of the internet has made the task infinitely more complex. In addition to the majority of judges, lawmakers, and laypeople not understanding the nuances of the internet and how companies and states can manipulate it, the question of policing it must now be addressed by the international community, as the policies of one country have a direct global impact. For the first time in human history, an agent of ISIS located in a cave in Syria can talk to a suburban teenager in Montana; the manifesto of a white nationalist can be read by a thousand people in its first hour. In response, governments have improved surveillance techniques and learned new ways to manipulate opinions. This article proposes the creation of an international legally binding document, supervisory body, and court to provide oversight on trans-border issues relating to digital censorship and misinformation. The next section contains a review of the existing international agreements, jus cogens, and scholarly commentary. Then, I make the argument for moderate protections for free speech, tempered by minimal censorship. Third, I investigate the legal precedents in the European Union, China, and the United States. Finally, I offer my recommendations for giving individuals the most clearly defined data protection rights possible.

II. CRITIQUE OF EXISTING LITERATURE

As has been briefly discussed above, the tensions between speech, privacy rights, and social control have a long and complex history. It is important to note that the belief in the importance of the individual and their universal freedoms is traditionally a Western value. Most Asian countries value collectivism over individualism.[1] This description of Asian societies applies primarily to the values of the ruling parties, as it is impossible to characterize such a large and heterogeneous group of nations and peoples so simply. However, the divide between the good of the individual and the good of the community is the origin of much of the conflict surrounding digital censorship, especially as China gains international political capital and is able to offer an alternative to the Western values, which have traditionally dominated the international legal framework. However, any discussion of free speech, privacy, and censorship must begin with the rediscovery of Greek Philosophy and John Locke.

Free speech originated in the Ancient Athenian institution of citizenship before it

1 Adam B. Cohen, Michael Shengtao Wu, & Jacob Miller, *Religion and Culture: Individualism and Collectivism in the East and West*, 47 Journal o□ Cro□□-Cultural P□ychology. 1236. (September 1, 2016). https://journals.sagepub.com/doi/pdf/10.1177/0022022116667895

was rediscovered by the Europeans during the Enlightenment and exported around the world during colonialism and imperialism.[2] It was accepted by the Athenians that free speech was "considered the lifeblood of public life".[3] However, the modern conception of free speech begins with John Locke. Locke proposed a series of individual rights, including a right to free speech and equal respect, that would create a tolerant society.[4]Immediately, conflict arose depending on whether toleration was defined "in terms of a maximum of liberty for each individual, consistent with social order overall" or "in terms of a right to equal respect".[5] The first protects free speech as long as it does not compromise the social order, while the second protects free speech as long as it does not impede on the rights of others. When James Madison wrote the American Bill of Rights, he gave greater weight to free speech without qualification, than to the right of equal respect or protection of the social order.[6] In the cases that have come before the US Supreme Court in which the government has attempted to limit free speech to protect the social order, the Supreme Court has repeatedly protected free speech, declaring that in the marketplace of ideas, the truth will always win.[7] Many other liberal democracies fall on the other side of the debate, placing greater weight on social order rather than free speech. A great example is contemporary Germany, which, to avoid repeating the atrocities it committed against Jews and other minorities during World War II, has consecrated protections against hate speech in its criminal code.[8] Section 130 of the German Criminal Code prohibits speech inciting hatred against a group for reasons of nationality, ethnicity, race, and religion, as well as bans Nazism and Holocaust denial.[9] The criminal code is careful to note that political dissent is not a form of hate speech.[10] Despite differences in the level of protection for free speech, there appears to be a Jus Cogens in the developed world that free speech is an important human right, a consensus that is reflected in international agreements dictated by these wealthy Western countries.

By its very nature, international human rights laws and agreements reflect the Jus Cogens of the Western World and its veneration of the individual. Article 19 of the seminal human rights agreement, The Universal Declaration of Human Rights (UDHR), states "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[11] The language of this article suggests that the international community would adopt a definition of tolerance similar to the United States. However, Article 1 states that "all human beings are born free and equal in dignity and rights... and should act towards one another in a spirit of brotherhood."[12] The language

2 Christian Reus-Smith, *Struggles for Individual Rights and the Expansion of the International System,* 65 International Organization. 228. (April 2011).

3 John Durham Peters, Courting the Aby□□: Free Speech and the Liberal Tradition. 1. (2010).

4 John William Tate, *Free Speech or Equal Respect?: Liberalism's Competing Values*, 34 Philo□ophy and Social Critici□m. 989. (November 2008).

5 Id.

6 Id. at 990

7 W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 Journali□m & Ma□□ Communication Quarterly. 40. (Spring 1996).

8 Germany, Free Speech and Free Pre□□ Around the World (April 22, 2015) https://freespeech-freepress.wordpress.com/germany/

9 German Criminal Code, Bunde□mini□terium der Ju□tiz und □ür Verbraucher□chutz http://www.gesetze-im-internet.de /englisch_stgb/englisch_stgb.html.

10 Id.

11 *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) http://www.un.org/en/universal- declaration-human-rights/index.html.

12 Id.

of this article suggests a definition of toleration favoring the right to equal respect and social order over free speech. Yet, the use of the verb 'should' leaves it up to the reader to determine which standard of toleration they prefer. The International Covenant on Civil and Political Rights (ICCPR) offers more clarity on this issue, stating in Article 19 § 2 that "everyone shall have the right to freedom of expression," but qualifies this with SS 3 by acknowledging that the protection of free expression carries with it special responsibilities, and is therefore subject to certain restrictions when provided by law and necessary, such as protecting the rights and reputation of others, national security, social order, and public health.[13] In the time between the drafting of the UDHR and ICCPR, consensus seems to have formed for a standard of tolerance favoring right to equal respect and the maintenance of the social order. While it had yet to be invented when the UDHR and ICCPR were drafted, because it is a marketplace of ideas, the same human rights and protections apply.

The internet is a place of commerce, a marketplace where ideas and information are bought and sold. The regulation of the exchange of these ideas is crucial in order to understand how human rights are protected on the internet. Every time a byte of data passes from one company's server to another, a piece of intellectual property has been sold. Good states; states which internalize the human rights of its citizens and resist their predatory nature require good institutions that promote innovation and investment through protection of property.[14][15] Since the increase of manufacturing and imperialism during industrialization, states have signed multinational agreements to safeguard their citizens' property and created bodies to enforce them. Intellectual property became a focus of international property law in the late 19th Century, as wealthier countries moved into the later stages of industrialization and began exporting factories and jobs overseas. Rather than creating physical goods, developed countries shifted to producing ideas and inventions that were physically built in developing countries that had yet to make the transition. As a result of this economic evolution, developed countries needed new legal protections for intellectual property.

The Paris Convention for the Protection of International Property, signed in 1883, was the first attempt to protect intellectual property.[16] The Paris Convention created the World Intellectual Property Organization (WIPO) to administer the various provisions of the agreement.[17] It is worth noting that there were only eight original signatories.[18] The convention underwent numerous revisions in 1900, 1911, 1925, 1934, 1958, and finally 1967 in Stockholm. By the final revision, there were 79 signatories, marking the graduation of an increasing number of states from developing

13 *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

14 Makau W. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 Harv. Int'l L.J. 201. (2001) https://papers.ssrn.com /abstract=1525547.

15 1 Daron Acemoglu, Simon Johnson, & James A. Robinson, Handbook o Economic Growth. 689. (2005).

16 G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm in 1967*, United International Bureaux or the Protection o Intellectual Property. 8. (1969)

17 WIPO-Administered Treaties, World International Property Organization. http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2.

18 *Supra* note 13

to developed.[19] Throughout these revisions, the language remained vague, perhaps intentionally.[20] Monetizing ideas by protecting them as property can easily become a limit on freedom of expression. By using permissive language, the Paris Convention allows states to enact exemptions to trademark agreements to protect free speech.

To date, "the most comprehensive multilateral agreement on intellectual property"[21] is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which came into force in 1995. A binding agreement that allows for an adjustment period adjusted for a country's level of development, provides protections for trademarks, copyright, and industrial property rights.[22] Articles 13 and 17 of the agreement state exemptions to the enforcement of copyright and trademark law, "provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties."[23] States face a lot of pressure to protect private property in order to encourage investment. Yet, the exemption articles prove that the international community recognizes the protection of these rights, for some may encroach upon others' freedom of expression. Descriptive trademarks, or trademarks that describe general characteristics of a good or service, are a common example of intellectual property exempted from protections to avoid undue limitations on free speech.

In the age of cloud computing, most people have given up the right to their own data by agreeing to the Terms and Conditions of hundreds of programs and websites.. Organizing and analyzing this meta data for the sake of targeting advertisements and search results has grown into a multi-billion-dollar industry capable of creating disturbingly accurate models of an individual's future internet use.[24] Fortunately, there is international consensus on the importance of the right to privacy: Article 12 of the UDHR and Article 17 of the International Covenant on Civil and Political Rights (ICCPR) "provide the fundamental international obligations when it comes to privacy."[25] Of course, these rights can be restricted for reasons laid out in the 2011 report of the Special Rapporteur on Key Trends and Challenges to the Right of All Individuals to Seek, Receive and Impart Information and Ideas of All Kinds through the Internet, and closely resemble exemptions to the protections for freedom of expression. The Special Report declares that all exemptions must satisfy a three-part cumulative test; 1) to follow principles of predictability and transparency, 2) to protect the rights of others, national security, or the social order, and 3) must be necessary and the least restrictive means of accomplishing the desired outcome.[26]

III. ARGUMENT

More than any other type of invention, new technologies that improve communication and the dissemination of information have always had a profound and disruptive effect on

19 Margaret Dowie-Whybrow, *Core Statutes on Intellectual Property*, 7. (2013) https://doi.org/10.1007/978-1-137-35471-6_5.

20 Lisa P. Ramsey, *Free Speech and International Obligations To Protect Trademarks*, 35 Yale J. Int'l L. 459. (2010)

21 Background Material Chapter 24: Trade-Related Aspects of Intellectual Property Rights. World Trade Organization, 4. (2004)

22 *Id. at 3*

23 "WTO | Intellectual Property (TRIPS) - Agreement Text - Standards." World Trade Organization. https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm.

24 "Forecast of Big Data market size, based on revenue, from 2011 to 2027 (in billion U.S. dollars)", *Statista, https://www.statista.com/statistics/254266/global-big-data-market-forecast/*

25 James D. Fry, Privacy, *Predictability and Internet Surveillance in the U.S. and China: Better the Devil You Know*, 37 U. PA J. Int'l Law. 438. (2015)

26 *Id. at 440*

societies, cultures, and political systems. When Johannes Gutenberg invented his namesake printing press in the mid 15th Century, he was instrumental in dragging Europe out of an age of backwardness and ignorance stretching back to the fall of Rome.[27] Within thirty years of its invention, the Gutenberg Printing press was in widespread use throughout Europe, printing the Bible in the vernacular of the masses, and bringing with it the gradual demise of the Catholic Church's monopoly on God's word.[28] Of course, no monopoly surrenders peacefully, and the Catholic Church tried furiously to destroy heretics and the dangerous ideas they espoused. Famously, Galileo was put on house arrest for suggesting that the earth was not the center of the universe. Since Gutenberg, there have been continuous cycles of revolutionary, paradigm-shifting ideas and inventions, then states finding new ways to clamp down on them, followed by the invention of all new forms of communication that lower the barrier of entry, such as the telegram, radio, and television. The internet is no different. Despite people originally believing that the internet was the final step in the evolution of increasingly unhindered communication and information, countries and companies have proven the old cycle more difficult to break than expected.

Regardless of whether the development of international law has caused the increase in the percentage of the global population with access to unrestricted investment opportunities and free and fair elections, more people today enjoy life, liberty, and the protection of property than ever in human history. The internet has undoubtedly played a pivotal role in the progression of human rights protections by allowing victims of abuses to instantly share evidence of their molestation with millions of people outside the reach of the offending regime. However, as old patterns repeat themselves, states and other powerful entities are developing methods and tools to block or redirect this vital flow of information in the interest of social control. As has been laid out in the review of literature above, the UDHR and ICESCR reflect the Jus Cogens for a strong protection of free speech. The Paris Convention and TRIPS are important qualifiers for the protection of free expression on the internet because this data is protected by intellectual property rights.

It is imperative that new international bodies be formed, which give a seat to both states and multinational corporations focusing on digital information and data, to set effective international standards. To further this goal, all member states must observe a policy of monism in all relevant cases.

IV. CASE STUDIES

European Union: The Europe Court for Human Rights is the global leader in data rights protections. In 1981, it ratified Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, the first legally binding international agreement adopted in the field of data protection.[29] Convention 108 brought the data protection laws of all members of the European Union into congruity, "taking account of the increasing flow across frontiers of personal data undergoing automatic processing."[30] While the language of the agreement was not overly protective, it was an important, early step for signaling European commitment to data protection.

In 2016, the European Union signed a new agreement, the General Data Protection

27 Micheal W. Giles, "From Gutenberg to Gigabytes: Scholarly Communication in the Age of Cyberspace," 58 Journal o□ Politic□. 613. (1996) https://doi.org/10.2307/2960435.

28 *Id.*

29 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, adopted Jan. 10, 1985, E.T.S. 108. https://www.coe.int/en/web/conventions/full-list.

30 *Id.*

Regulation, to address the many new developments in data protection literature since they ratified Convention 108 over two decades earlier. The General Data Protection Regulation guarantees citizens five primary rights with respect to their data. First, citizens have the right to give clear and affirmative assent before their data could be processed.[31] Second, citizens have the right to receive clear and understandable information about data processing.[32] Third, citizens have the right to be "forgotten;" a citizen can ask for his/her data to be deleted.[33] Fourth, citizens have the right to transfer data to another service provider, for example when switching from one social network to another.[34] And fifth, citizens have the right to know when their data has been hacked.[35] The General Data Protection Regulation applies to all companies operating in the EU, regardless of where they are based, and is regulated by the European Data Protection Supervisor (EDPS).[36] Furthermore, it offers the opportunity to resolve grievances through the European Data Protection Board (EDPB), which operates similar mediation in resolving disputes between countries and offering advisory opinions.[37] By writing binding language with implementation overseen by a specific regulatory body, and creating a regional court in which to resolve disputes, the European Union is setting an example on liberal data protection.

China: At the other end of the spectrum is China, the worst offender among developed nations. One of the Chinese government's biggest undertakings has been the construction of the Golden Wall in association with a number of bordering countries, which prevents unwanted data and information from crossing China's borders.[38] For individuals,, the Wall contributes to growing inequality, as people with means are able to purchase Virtual Private Networks (VPN's) that allow people to penetrate the Wall.[39] VPN's are thought to be most commonly used by foreigners and those living closer to the coast, all though there is no data available on VPN usage in China.

At the macro level, China forces international companies to modify their services to comply with Chinese regulations in order to operate in the country. Examples of these regulations including providing the government with a backdoor into a company's network, or blacklisting certain keywords like 'student protests,' that are considered dangerous to the social order.[40] In order to remain competitive in a capitalist global system, companies have to comply, or they will miss out on the largest emerging market in the world. Unfortunately, compliance costs money, again contributing to inequality, but this time in technology companies, as only the largest will be able to afford the cost of modifying their system. Apple is already in compliance, making sacrifices like removing iTunes movies to gain permission to operate.[41] Google is currently working on a

31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*

38 Simon Denyer, *The Walls Are Closing in: China Finds New Ways to Tighten Internet Controls*, Wa□h. Po□t. (September 27, 2017) https://www.washingtonpost.com/world/asia_pacific/the-walls-are-closing-in-chinafinds-new-ways- to-tighten-internet-controls/2017/09/26/2e0d3562-9ee6-11e7-b2a7-bc70b6f98089_story.html.

39 *Id.*

40 *Id.*

41 Ivana Kottasová, *Google CEO to Employees: We're 'not Close' to Launching Search in China*., CNNMoney. (August 17, 2018) https://money.cnn.com/2018/08/17/technology/google-in-china/index.html.
Paul Mozur, Daisuke Wakabayashi, and *Nick Wingfield, Apple Opening Data Center in China to Comply With Cybersecurity Law*, N. Y. Time□. (August 7, 2018) https://www.nytimes.com/2017/07/12/business/apple-china-data-center-cybersecurity.html.

multi-billion-dollar project to modify its service in order to penetrate the Chinese market.[42] By offering two versions of their products, technology companies are setting a dangerous precedent, making it easier for smaller countries to demand less liberal internet services.

United States: The United States of America falls somewhere between China and the European Union. Since the Clinton administration, US legal policy has been to allow private companies to lead the way in data protection. The limited binding language that does exist is split up among a wide range of legal concentrations including the "United States Privacy Act, the Safe Harbor Act and the Health Insurance Portability and Accountability Act."[43] This is partially due to privacy not being explicitly protected by the US Constitution.

The government's policy of leading from behind industry, has created a Wild West of data protection, with no one – not congress, tech companies, and certainly not the masses – entirely understanding data rights. At times, Silicon Valley has proved it cares about the well-being of society rather than simply its bottom line. In June, Google cancelled a multi-billion-dollar project to integrate its data collection software with the Pentagon's, after thousands of its employees signed an open letter against it.[44] However, companies do not often behave with such altruism, and there is no doubt that another company will gladly complete the contract. As the Edward Snowden leaks and Mark Zuckerberg congressional hearing highlight, most companies are either complicit in violating data protection rights on behalf of the NSA, or simply subject to extremely loose restrictions.

V. RECOMMENDATION

The international community is in desperate need of a binding agreement expressly for the protection of data rights. As I have argued, data regulation inherently has cross-border effects which necessitates the creation of international consensus, not only amongst traditional allies like the US and EU, but also with countries of different values, like China. Ideally, the UN could ratify an agreement like the General Data Protection Regulation. However, China would never agree to comply with an agreement that flies in the face of its longtime policies on privacy and free speech. By creating very loose data protection regulations that can be agreed on, international human rights will have set a floor that can more easily be raised as international opinions evolve overtime. However, in order to make a real impact, the agreement has to include the creation of a supervisory board and international court to track compliance and punish transgressors. Without these two bodies, any agreement would simply be window dressing.

As the international community awaits the creation of new legal framework to protect free speech and privacy online, private entities have the opportunity to make structural changes to protect international free speech and privacy. The current norm of shareholder-owned corporations incentivizes profit at the expense of all else, including human rights. Restructuring corporations into cooperatives would be a creative, private sector-led improvement that would give local communities and employees the ability to dictate company values, rather than a private equity manager in another city or country. Private sector-driven change will have the largest de facto impact on international data protection laws, and will hopefully one day ensure that the free speech and privacy rights

42 *Id.*

43 Data Protection Law. HG.org Legal Re□ource□. https://www.hg.org/data-protection.html.

44 Drew Harwell, *Google to Drop Pentagon AI Contract after Employee Objections to the 'Business of War*,' Wash. Post. (June 1, 2018) https://www.washingtonpost.com/news/the-switch/wp/2018/06/01/google-to-drop-pentagon- ai-contract-after-employees-called-it-the-business-of-war/.

In Defense of the Insanity Plea

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Abstract

I argue that the insanity plea conforms with fundamental theories of criminal justice, and, generally, benefits acquittees and society by enhancing rehabilitative treatment. Furthermore, I reject increasing calls for abolishing the insanity defense and replacing it with a purely mens rea system or a verdict of guilty but mentally ill. Instead, I propose reforming one current iteration of the insanity defense—the American Law Institute model—to reduce any chance of exploitation and increase public respect for the insanity plea.

I. Introduction

Growing up the son of a war hero in Boise, Idaho, should have been an idyllic childhood for John Delling, but John's family paid twice for his father's service.[1] His father, "Crazy Ray," developed post-traumatic stress disorder after saving three comrades in Vietnam. Children mocked John for his father's mental wounds. Mental illness seemed to run in the family. By high school, John developed his own schizophrenic delusions, beating himself mercilessly. Yet one friend always stayed true: David Boss—the bright-eyed boy from California whom John first met in kindergarten.[2] David defended his pal from the bullies, the prank phone calls, and the threats at school. He remained one of John's best friends. How happy David—now a young man making a life for himself in the small town of Moscow, Idaho—must have felt when John appeared at his door for an unplanned reunion. It would be their last visit. John fired his gun at point-blank range, killing David. David was the last of seven victims John planned to shoot. John believed they were "taking his 'energy' in a way that would kill him."[3]

While the trial judge admitted John was "motivated solely by paranoid schizophrenia," Idaho is one of four states that formally abolished the insanity defense.[4] John pleaded guilty, and the judge sentenced him to life in prison as his intent to kill met normal criminal standards and threatened society.[5] John appealed his sentence to the United States Supreme Court.[6] His unsuccessful attempt to obtain a *writ of certiorari* from the Court further fueled the ongoing debate over whether mental illness absolves guilt, and if the insanity plea endangers society.

Historically, the United States accepted an insanity defense for defendants who could not understand the wrongness of their actions due to mental illness.[7] This concept was later expanded to encompass those who cannot control their actions due to mental illness. While only one percent of criminal defendants plead the insanity defense, its existence is paramount for the mentally ill Americans who employ it.[8] Debate about the insanity defense is crucial for all Americans because it involves the criminal justice system's aspirational interests: accountability for one's actions, societal protection, and sympathy for the mentally ill. This debate has returned to the fore as abolition is further debated. Indeed, in 2019, the Supreme Court voted to hear a case that hinges on the question of whether the abolition of the insanity defense in Kansas was unconstitutional.[9]

1 Rebecca Boone, *Delling Sentenced to Life in Idaho Road-trip Murders,* THE SPOKESMAN-REVIEW, August 19, 2009, http://www.spokesman.com/stories/2009/aug/19/delling-sentenced-to-life-in-idaho-road-trip/#/0.

2 *Id.*

3 Emily Bazelon, *Crazy Making,* SLATE, November 28, 2018, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/the_supreme_court_shouldn_t_allow_idaho_to_have_no_insanity_defense.html.

4 *Supra* note 1, at 1; Natalie Jacewicz, *With No Insanity Defense, Seriously Ill People End Up In Prison*, NATIONAL PUBLIC RADIO, August 5, 2016, https://www.npr.org/sections/health-shots/2016/08/05/487909967/with-no-insanity-defense-seriously-ill-people-end-up-in-prison.

5 *Id.*

6 Robert Barnes, *Justices decline to consider whether Constitution requires insanity defense*, THE WASHINGTON POST, November 26, 2012, https://www.washingtonpost.com/politics/justices-decline-to-consider-whether-constitution-requires-insanity-defense/2012/11/26/d7a3cc 62-3816-11e2-8a97-363b0f9a0ab3_story.html?utm_term=.34b180652224; Delling v. Idaho, 133 S.Ct. 504 (2012), cert. denied.

7 Delling v. Idaho, 133 S.Ct. 504 (2012), cert. denied.

8 Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, THE NEW YORK TIMES, September 27, 2017, https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html

9 Chris Haxel, *U.S. Supreme Court Mulls Kansas Inmate's Appeal Regarding Insanity Defense,* KCUR, January 23, 2019, https://www.kcur.org/post/us-supreme-court-mulls-kansas-inmates-appeal-regard-

Based upon long standing concepts of guilt and analysis of three key purposes of justice (Section III.), retaining a reformed insanity defense would best balance the criminal justice system's interests of deterrence, retribution, and rehabilitation. In addition to requiring a conditional release treatment program and informing jurors of dispositional consequences, the courts should retain the insanity defense under a modified American Law Institute (ALI) model. This standard should require the defense to prove by clear and convincing evidence that the defendant's actions would not have occurred but for a severe mental illness inhibiting their self-control and understanding of criminality. This reformed insanity defense will prevent the unjust punishments of a guilty but mentally ill system and the dangerous dismissals of charges created by a purely mens rea system, while enabling rehabilitation.

II. Theory of Guilt Mandates an Insanity Defense

The theoretical underpinning of American criminal justice is that society may hold criminals responsible for their actions because they possess the free will to choose whether to disobey laws.[10] Prosecutors typically must prove that a defendant committed the crime, the actus reus, and that they intended to commit the crime, the mens rea. This reveals that society assigns guilt to those who choose to disobey the law.[11] This presumption that free will creates criminal responsibility requires an insanity defense. Indeed, some severe mental illnesses, like schizophrenia, can reduce a defendant's cognitive and volitional abilities "to such an extent that their will is compromised."[12] Assigning criminal guilt to those whose mental illness prohibits them from choosing their own actions remains inconsistent with the notion that guilt is only assigned to those who knowingly and voluntarily choose to break the law. Thus, the insanity defense protects the mentally ill from unjust punishment and safeguards the underpinnings of the criminal justice system for all of society.

III. How to Reform the Insanity Defense

Currently, 46 states maintain an insanity defense, with most either using the M'Naghten rule or the ALI model, which should be reformed.[13] M'Naghten focuses on whether a mental disease prevents the defendant from appreciating the moral wrongfulness of their actions.[14] In contrast, the ALI model excuses those whose mental illness substantially diminishes their ability to comprehend the criminality of their actions or to conform their conduct to the law.[15] ALI specifically excludes sociopaths.[16] The major distinctions between the two are that ALI deals with understanding legal wrongfulness and is broader because it excuses defendants who lack control over their actions—despite knowing their wrongfulness.[17] The ALI standard is superior as it includes those whose

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10 Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy,* 23 LAW AND HUMAN BEHAVIOR 377 (1999); Ellsworth Fersch, THINKING ABOUT THE INSANITY DEFENSE: ANSWERS TO FREQUENTLY ASKED QUESTION, 23 (2005).

11 *Id*. at 3.

12 *Id*. at 3.

13 Julie E. Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1485 (2006); Some news outlets often say that five states have abolished it because Alaska has so narrowed the conditions for its use that "that for all practical purposes, it has been eliminated" (Andrew P. March, *Insanity in Alaska,* 98 GEO L.J, 1514 (2010)).

14 Gerben Meynen, LEGAL INSANITY: EXPLORATION IN PSYCHIATRY, LAW, AND ETHICS, 15 (2016).

15 *Id.* at 26.

16 Brian Caplan, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR., 36 (1987).

17 *Supra* note 16, at 4.

mental illness inhibits their self-control. Finding those who cannot control their actions as guilty, as M'Naghten requires, contradicts the theoretical basis of guilt as those whose mental illness limit their self-control cannot wittingly choose whether or not to commit a criminal act.

To ensure the insanity defense is available only to those who truly warrant it, the ALI standard must be modified to only excuse defendants who would not have committed the criminal act but for their severe mental illness. The addition of "severe" and the replacement of substantial capacity with "but for" emphasizes that the act would not have been committed in the absence of an extreme illness. Theoretically, not clearly limiting the defense might invite jurors to acquit those whose mental illness merely contributed to or worsened their actions. Using Bureau of Justice Statistics data, a 2015 Urban Institute study found that around one-half of all federal, state, and local inmates suffer from mental illness.[18] If only a fraction of would-be inmates proved their mental illness contributed to their act and were acquitted under a broader standard, this would excuse vast amounts of criminal activity and undermine the criminal justice system's legitimacy. With scarce mental health resources, a proliferation of insanity acquittals under a broader standard might also overwhelm treatment centers by (often) remanding additional acquittees to treatment institutions—reducing the quality of treatment acquittees receive. In a nation where half of mentally ill, non-criminal Americans have zero access to treatment, the justice system must prioritize treatment for severely ill defendants.[19]

The defense should bear the burden of proof to show by clear and convincing evidence that the defendant meets this reformed ALI standard. A 2015 survey revealed approximately fifty-one percent of Americans eligible to serve on juries believe the insanity defense allows sane criminals to evade justice.[20] Such distrust of the insanity defense risks voters forcing its complete abolition, as Marc Rosen argued happened in Kansas in 1995.[21] Burdening the defense to prove it is "substantially more likely than not" that the defendant meets the revised ALI standard would further deter sane criminals from attempting to use the insanity defense to escape justice or drain the prosecution's resources.[22] Fears of abuse are unfounded due to highly reliable medical tests that can screen out frivolous claims of mental illness and the dearth of proven cases of fraud.[23] Yet, this reform could further tame fears of fraud and increase the perception of legitimacy in insanity cases. Even if this burden hinders some genuine insanity pleas, it is paramount to mitigate the public distrust that underpins the desire to abolish the defense for all mentally ill defendants.

Some critics counter that burdening the defense with proving insanity defies the long standing belief that the prosecution must disprove the assumption that the defendant is in-

18 KiDeuk Kim, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System,* URBAN INSTITUTE, March 2015, at 9, http://webarchive.urban.org/UploadedPDF/200 0173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf.

19 Amy E. Nutt, *Report: More Than Half of Mentally Ill U.S. Adults Get No Treatment*, THE WASHINGTON POST, October 19, 2016, https://www.washingtonpost.com/news/to-your-h ealth/wp/2016/10/19/report-more-than-half-of-mentally-ill-u-s-adults-get-no-treatment/?utm_term=.e1e7ccaa0903.

20 Scott K. Elmore, THE INSANITY DEFENSE: PUBLIC OPINION AND THE PUBLIC'S TENDENCY TO IMPLICATE MENTAL ILLNESS IN HIGH-PROFILE CRIMES, 61 (2015).

21 Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y, 255 (1999).

22 *Evidentiary Standards and Burdens of Proof,* JUSTICIA, https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/.

23 Julie E. Grachek, The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System, 81 IND. L.J. 1488 (2006).

nocent.[24] Opponents further contend that since the prosecution must prove the criminal act, and sanity is a component of that criminality, the prosecution should bear this burden.[25] However, there is vast precedent for burdening the defense with proving an affirmative defense it chooses to raise.[26] Moreover, there exists a long standing assumption that the defendant is sane, and it would not be feasible for the prosecution to prove a negative—that every defendant it prosecutes is not insane.[27] Therefore, the prosecution should not be burdened with proving an assumption that is fundamental to the functioning of the justice system itself. Given that there is no certain medical test for affirmatively proving a defendant's lack of understanding of the wrongfulness of her actions, the "beyond a reasonable doubt" standard is also unreasonable for the prosecution to satisfy,[28] and it should be the burden of the defense to prove qualification for an insanity defense.

In the minority of insanity cases reaching the trial stage, jurors should be informed of the dispositional consequences of a not guilty by reason of insanity (NGRI) verdict.[29] Theoretically, jurors ought not consider the consequences of the verdict during deliberations as its consequences should not bear on whether the defendant is guilty or not (instances of jury nullification excepted). Yet, jurors consider their assumptions about these implications in practice. A 2012 study revealed that 64.2 percent of 269 mock jurors wrongly assumed those found guilty would receive mental health treatment, and 15.9 percent of mock jurors believed those found NGRI would be released.[30] When these misconceptions were corrected, over twenty-two percent of jurors altered their verdict.[31] Of course, the emotion of dealing with a real defendant is not captured in this study, yet this might exacerbate this effect since these same false assumptions might hinder their intense desire to either help or punish the defendant. Jurors should be informed of the true consequences of their verdict because it is a greater injustice to consider incorrect implications when reaching a verdict.

Finally, although all jurisdictions enable insanity acquittees to be committed to secure mental facilities, requiring a conditional release program for all discharged insanity acquittees would ensure their continued treatment after release.[32] Several states already have conditional release programs requiring insanity acquittees to either follow specific treatment plans after release or be re-hospitalized, depending on the act they committed.[33] In fact, a 2014 study that followed 365 insanity acquittees in Maryland

24 Ellsworth Fersch, THINKING ABOUT THE INSANITY DEFENSE: ANSWERS TO FREQUENTLY ASKED QUESTION, 8 (2005).

25 *Burden of Proof of Insanity in Criminal Cases - Thomas v. State*, 15 MD. L. REV., 168 (1955).

26 Legal Information Institute, *Proof, Burden of Proof, and Presumptions,* CORNELL LAW SCHOOL, https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/proof-burden-of-proof-and-presumptions.

27 *6.1 The Insanity Defense,* UNIVERSITY OF MINNESOTA LIBRARIES, http://open.lib.umn.edu/criminallaw/chapter/6-1-the-insanity-defense/.

28 Steven Smith, *Neuroscience, Ethics and Legal Responsibility: The Problem of the Insanity Defense*, 18 SCIENCE AND ENGINEERING ETHICS 479 (2012); *Supra* note 24, at 5.

29 Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy,* 23 LAW AND HUMAN BEHAVIOR, 380 (1999).

30 M. Peters and Len Lecci, *Predicting verdicts, adherence to judge's instructions, and assumptions about the disposition of the defendant in a case involving the insanity defense*, 18 PSYCHOLOGY, CRIME, AND LAW, 825 (2012).

31 *Supra* note 31, at 825

32 Richard Bonnie and Stephen Morse, *Abolition of the Insanity Defense Violates Due Process,* 41 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 494 (2013).

33 Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW AND HUMAN BEHAVIOR, 387 (1999).

over three years found these programs effectively reduce recidivism rates.[34] For conditionally released insanity acquittees, this recidivism rate was around one-third of the general population's. As recidivism rates fell below one percent for those who were allowed to voluntarily return for medical treatment, the system should allow for voluntary re-admission. Treatment protects acquittees from self-harm and reduced recidivism rates keeps society safe.

IV. The Reformed Insanity Defense Enhances Core Tenets of Justice

One major tenet of justice aims to protect society by stopping a defendant's harmful actions. Rehabilitative justice and incapacitation are two examples of this type of justice. Rehabilitative justice, which the insanity defense supports, is most useful when dealing with mental health issues, as it seeks to reform the defendant's behavior to stop their harmful action.[35] By mandating treatment for their mental illness once acquitted, the insanity defense uniquely provides rehabilitation for the mentally ill in a non-prison setting.[36] Since mental illness can lead to self-harm, rehabilitation addresses the cause of criminality, helps the afflicted individual, and best handles mentally ill criminals and protects society.

This treatment of a defendant's mental illness is inherently rehabilitative because, under the proposed changes, only those who would not have committed the crime in the absence of their severe mental illness may be acquitted. While imperfect, committing those found NGRI to treatment facilities seeks to "in theory, improve the irrational thought process that led the acquittee to commit criminal acts that resulted in her initial commitment."[37] This attempted rehabilitation is crucial as mentally ill criminals who do not receive rehabilitative treatment have higher recidivism rates.[38] Additionally, this rehabilitation would continue after release with a conditional release program and would make it a long-term solution to the cause of the defendant's criminality.

Conversely, incapacitation holds that confining the defendant through incarceration immediately protects society from the defendant's harmful actions.[39] Incapacitation does not require any rehabilitative treatment. Absent a life sentence, a mentally ill defendant would eventually be released without receiving treatment for their mental illness—the cause of their criminality in the first place. As the *Scientific American's* Robert Byron observes, most inmates—no matter how severe their mental illness—do not receive treatment in prison and tend to have higher recidivism rates than those treated in forensic hospitals.[40] Even worse, the stress and threat of exploitation while in prison can exacerbate their mental illness.[41] By contrast, the rehabilitative justice guaranteed through the insanity defense remands acquit-

34 DJ Marshall et al., *Predicting voluntary and involuntary readmissions to forensic hospitals by insanity acquittees in Maryland*, 32 BEHAVIORAL SCIENCE LAW JOURNAL 367 (2014).

35 *1.5 The Purposes of Punishment,* UNIVERSITY OF MINNESOTA LIBRARIES, http://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/.

36 *Supra* note 31, at 6.

37 Maura Caffrey, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists*, 154 U. PA. L. REV., 404 (2005)

38 Jessica Harrison, *Idaho's Abolition of the Insanity Defense - An Ineffective, Costly, and Unconstitutional Eradication*, IDAHO L. REV. 595 (2015); Robert Byron, *Criminals Need Mental Health Care,* SCIENTIFIC AMERICAN, March 1, 2014, https://www.scientificamerican.com/article/criminals-need-mental-health-care/.

39 *Supra* note 34, at 7.

40 *Supra* note 38

41 KiDeuk Kim, The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System, URBAN INSTITUTE, March 2015, at 10, http://webarchive.urban.org/UploadedPDF/200 0173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf.

tees to treatment in secure forensic hospitals, which immediately protects society. In fighting the root of criminal actions, continuing this treatment through a conditional release program better protects society in the long-term.

A second tenet of justice aims to prevent future criminality in general. Most notably, deterrence uses shows of force by making an example of the punished defendant to dissuade potential future criminals from committing the same harmful act. The insanity defense does not undercut this goal. As previously argued, it does not lead truly sane criminals to commit crimes believing they can intentionally falsely plead insanity and escape justice. That only three-tenths of the one percent of defendants who raise the insanity defense are found NGRI belies claims of a hypothetical wave of criminals escaping justice through the insanity defense.[42] Defendants who plead insanity are also subject to medical testing to verify that they are mentally ill.[43] The status of the insanity defense as an affirmative defense requiring acknowledging one committed the act, the actus reus, helps deter such false pleadings. Assuming criminals are aware of the nuances of criminal defenses (as this counter argument assumes), it would be unwise for a sane criminal to admit their guilt on the hope that a psychologist would give false sworn testimony about their mental state and the jury, which rarely acquits based on the insanity defense, would believe them. In fact, the risk is even higher as judges often set harsher than average sentences for those whose insanity pleas fail.[44] In placing the burden of proof on the defendant with the higher standard of clear and convincing evidence, one forces the defense to provide substantial evidence about a severe mental illness that a faker would invariably lack, further detering false claims. This theory contrasts with the other component of deterrence: discouraging future misconduct by the defendant.[45] This deterrence is irrelevant to insanity cases. The severely mentally ill cannot be deterred, as their illness inhibits their self-control and moral understanding of criminality.[46] Even if they could be deterred, the years they may spend committed would suffice for most crimes.

A third component of justice is punishment for actions to reduce crime and legitimize the justice system. The theory of retributive justice therefore aims to punish defendants so victims do not seek vigilante justice.[47] Punishing the severely mentally ill, however, does not achieve moral justice. Instead, it unjustly penalizes those who lack the free will to choose to break the law. As Justice Powell wrote in *Jones v. United States* (1983), "[d]ifferent considerations underlie commitment of an insanity acquittee . . . he may not be [retributively] punished" as he was not convicted.[48] Insanity acquittees still pay for their actions. They are committed for an average of five to seven years, and some may spend longer confined in a hospital than they would in prison, so the insanity defense preempts cries for vigilante justice.[49]

V. Alternative Reforms Fail

One proposal is to abolish the insanity

42 Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue*, 26 REVIEW OF LAW AND SOCIAL JUSTICE, 252 (2017).

43 *Supra* note 30, at 6.

44 Louis Kachulis, Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue, 26 REVIEW OF LAW AND SOCIAL JUSTICE, 253 (2017).

45 *Supra* note 33, at 7.

46 Richard Bonnie and Stephen Morse, *Abolition of the Insanity Defense Violates Due Process,* 41 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 489 (2013).

47 *Supra* note 33, at 7.

48 Jones v. United States 463 U.S. 354 (1981).

49 *Supra* note 9, at 2; Lawrence W. Fitch, *Forensic Mental Health Services in the United States: 2014*, NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS, 19 (2014); Stephen Lally, *Drawing a Clear Line Between Criminals and the Criminally Insane,* THE WASHINGTON POST, November 23, 1997, https://www.washingtonpost.com/wp-srv/local /longterm/aron/expert1123.htm.

defense in favor of a purely mens rea system. Insanity would be raised to disprove the defendant possessed the mental capacity to intend to commit the criminal act.[50] Mental illness could be a mitigating factor at sentencing.[51] Then Attorney General William French Smith argued in 1982 that abolishing the insanity defense would stop defendants from pleading insanity and "escaping justice".[52] He also believed eliminating special defenses for the mentally ill would create a "widespread perception of our system of justice as rational and fair," while protecting the public from dangerous acquittees.[53] Four states have adopted this proposal thus far.

However, the experiences with abolition in Idaho and Montana evince a mens rea system undermines both justice and security. First, mens rea forces the jury to ignore whether the defendant would have committed the crime absent their mental illness, leading to unjust convictions. It is immoral to hold responsible anyone who cannot freely choose their actions, but that is the result of a mens rea system.[54] In his dissent to the Court's denial of certiorari in *Delling v. Idaho* (2012), Justice Breyer explains this flaw: mens rea "permits the conviction of an individual who knew *what* he was doing, but had no capacity to understand that it was wrong."[55]

Second, considering severe mental illness as a factor at sentencing could further harm the defendant and society. To prevent them from endangering society, some judges may give harsher prison sentences to mentally ill defendants.[56] As Stephen Le Blanc, then editor-in-chief of the *American University Law Review*, explained in 2007, prisons are the most likely destination for would-be insanity acquittees. However, most prisons are inherently stressful environments that lack the resources and expertise to address individuals' varied and severe illnesses.[57] Indeed, many would-be insanity acquittees were sent to prisons in Idaho after abolition, despite the prisons having an "atmosphere that makes [treatment] progress difficult."[58] Meanwhile, further investments in mental health were funneled into prisons, instead of public facilities that would also serve the general population.[59] It seems unlikely for a state that marginalizes the interests of the mentally ill by ending the insanity defense to buck the national trend and improve prison mental health services. Any diminution in rehabilitative treatment fails to address the cause of the defendant's criminality and threatens society in the long-term. Unlike insanity acquittees, these defendants will be released once their sentence ends—not necessarily once they no longer endanger society.[60]

Third, a mens rea system will not ensure those who would be acquitted with the insanity defense are convicted. Juries may still acquit mentally ill defendants if they believe a mental illness prevented the defendant from forming a clear criminal intent. Indeed, such acquittals are hypothetically more likely under mens rea. Unlike with this insanity defense proposal, mens

50 William F. Smith, *Limiting the Insanity Defense: A Rational Approach to the Irrational Crimes,* 47 MO. L. REV., 615 (1982).

51 *Id*. at 10.

52 William F. Smith, *Limiting the Insanity Defense: A Rational Approach to the Irrational Crimes,* 47 MO. L. REV., 617 (1982).

53 *Supra* note 46, at 10.

54 Richard Bonnie and Stephen Morse, *Abolition of the Insanity Defense Violates Due Process*, 41 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 493 (2013).

55 *Supra* note 8, at 2.

56 *Supra* note 52, at 10.

57 Stephen M. Le Blanc, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV., 1319-1320 (2007).

58 *Supra* note 5, at 1.

59 *Id*. at 11.

60 Maura Caffrey, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists,* 154 U. PA. L. REV., 423 (2005).

rea enables defendants with even a minor mental illness to present evidence of insanity and burden the prosecution to prove beyond a reasonable doubt that the defendant was sane and capable of forming mens rea.[61] Some opponents of the insanity defense regard this very standard as unreasonably difficult to meet.[62] Any acquittals under mens rea would undermine public safety as acquittees would be entitled to immediate release pending civil commitment—a flawed process discussed below.[63]

Fourth, a mens rea system may reducing the number of mentally ill defendants who are tried and severely undermine justice and public safety. A 1995 *Physiatrist Quarterly* study from 1979-1985 in Montana confirmed the number of individuals found incompetent to stand trial (IST) with their charges dismissed increased in proportion to the decline of those found NGRI.[64] These were individuals who likely would have qualified for the insanity defense and raised mental illness as a defense. One-third of those found IST were immediately released "rather than being hospitalized," irrespective of the seriousness of their crime.[65] As Montana courts are legally required to dismiss charges for those found IST and unlikely to regain competency after 90 days, these defendants were not even tried, much less convicted and imprisoned.[66] Even if this requirement could be waived, the defendant would not be tried or convicted while they remain IST.

61 Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW AND HUMAN BEHAVIOR, 386 (1999).

62 *Supra* note 24, at 5.

63 *Supra* note 52, at 10.

64 Lisa Callahan et. al, *The Hidden Effects of Montana's 'Abolition' of the Insanity Defense*, 66 PSYCHIATRIC QUARTERLY, 116 (1995).

65 *Id*. at 12; Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW AND HUMAN BEHAVIOR, 388 (1999).

66 *Id.*

Of course, Montana law permits those found IST and not released to be subject to involuntary civil commitment procedures.[67] However, individuals found IST and civilly committed are not subject to the same stringent commitment and treatment procedures as those found NGRI. Regrettably, a 2014 national survey revealed the civilly committed spend a mere seven to ten days committed in most states, while insanity acquittees are committed for around five to seven years.[68] Ultimately, abolishing the insanity defense creates a real risk of undertreating or releasing the "dangerous" defendants the Attorney General feared.[69]

Reform will not remedy the failed civil commitment procedures of Montana. As the *Jones* Court held, "insanity 'acquittees' may be subject to involuntary commitment by procedures substantially different from those applicable to ordinary civil commitment" because the acceptance of their affirmative defense establishes sufficient cause to detain them for treatment until they are cured or no longer dangerous.[70] Being found IST usually involves no such cause, so eliminating the insanity plea would eliminate the special commitment procedures employed in at least thirty-seven states that commit insanity acquittees until they are treated.[71] Abolition achieves the opposite of its goal: it releases the severely mentally ill into society sooner, often before they have been successfully treated.

The guilty but mentally ill (GBMI) verdict also leads to unjust convictions and does not provide treatment to severely mentally ill

67 Lisa Callahan et. al, *The Hidden Effects of Montana's 'Abolition' of the Insanity Defense*, 66 PSYCHIATRIC QUARTERLY, 104 (1995).

68 *Supra* note 9, at 2; Lawrence W. Fitch, *Forensic Mental Health Services in the United States: 2014*, NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS, 18 (2014).

69 *Supra* note 48, at 10.

70 *Supra* note 46, at 10.

71 *Supra* note 65, at 13.

defendants. GBMI coexists with the insanity defense in all but two of the thirteen states offering it.[72] Many state statutes provide only vague distinctions between the illnesses qualifying for NGRI versus GBMI, and GBMI tends to be so overly broad that someone qualifying for the insanity defense may simultaneously qualify for GBMI.[73] As the South Dakota Supreme Court held in *State v. Calin* (2005), the jury was justified in finding GBMI a defendant whom they indubitably could have acquitted by reason of insanity.[74] It is unjust to find anyone guilty who, by meeting the definition of insanity, lacks the free will to determine their actions. GBMI's hypocrisy is clear: it explicitly acknowledges the defendant's mental illness, yet holds them criminally responsible anyway.

Finally, GBMI falls short as it does not guarantee treatment for their illness once they are sentenced to prison. While some do receive the subpar treatments offered in prisons, studies since the 1990s in Georgia, Pennsylvania, and Illinois all report that less than twenty-five percent of GBMI inmates had access to inpatient psychiatric treatment, despite judges and lawyers expecting access at trial.[75] The fact that the majority of GBMI inmates receive zero treatment post-verdict only endangers society upon their release.[76]

VI. Conclusion

The insanity defense is imperfect, but it preserves the criminal justice system's fundamental values. It remains indispensable to upholding fair justice for the mentally ill and protecting society through rehabilitation. The insanity defense pursues the fundamental American promise the Supreme Court observed in *Berger v. U.S.* (1935): "justice shall be done" when "guilt shall not escape or innocence suffer."[77] However, there remains an immense opportunity for reform. Such reform can further deter frivolous claims, improve the insanity defense, and refine its use. Its alternatives, abolition or GBMI, are simply cures worse than the disease.

VII. Appendix: Jury Instructions

The defendant is charged with [criminal charge] and has pleaded not guilty by reason of insanity (NGRI). This is an affirmative defense, and the defendant acknowledges she committed the act in question. The rule applicable in this case provides that any person who was under the effect of a severe mental illness at the time of the act may so plead. The rule requires the defense to prove by clear and convincing evidence that the defendant would not have committed the criminal act but for a severe mental illness that prevented them from understanding the criminality of their act or from controlling their actions. If the defense proves all the elements of this affirmative defense by clear and convincing evidence, the defendant shall be found NGRI. Therefore, the questions before you are as follows:

> **(a)** Has the defense convinced you by clear and convincing evidence—meaning that it is highly probable—that the defendant suffered from a mental illness at the time of the act?
>
> **(b)** Has the defense proven by this same standard that this was

72 Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy,* 23 LAW AND HUMAN BEHAVIOR, 382 (1999).

73 Amy D. Gundlach-Evans, *State v. Calin: The Paradox of the Insanity Defense and Guilty but Mentally Ill Statute, Recognizing Impairment without Affording Treatment*, 51 S.D. L. REV., 147 (2006).

74 Calin v. State of South Dakota, 51 N.W.2d 122 (S.D 2005).

75 Randy Borum & Solomon Fulero, *Errata: Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW AND HUMAN BEHAVIOR, 384 (1999).

76 *Id*. at 14.

77 Berger v. United States, 295 U.S. 78 (1935).

> a mental illness severe enough to significantly impair one's judgment?
>
> **(c)** Has the defense convinced you by this same standard that the defendant would not have committed the crime absent their severe mental illness as it either impaired their understanding of the criminality of their actions OR, even if they understood that their actions were criminal, to control their actions?

If you answered no to any of questions (a), (b), or (c), and the prosecution has proved the elements of the crime beyond a reasonable doubt, you shall find the defendant guilty. If you answered yes to all of questions (a) and (b) and (c), you shall find the defendant NGRI. In this case, the defendant will be sent to a secure medical facility for mental health evaluation and treatment. Their release will be subject to medical evidence that they no longer threaten society. After release, they will be bound to a conditional treatment program, which predicates their release on adherence to a treatment plan.

Facing Your Accuser:

Confronting the Confrontation Clause

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Abstract

The Confrontation Clause, a collection of eighteen words contained within the Sixth Amendment, protects the right of the criminally accused to "be confronted with the witnesses against" him or her. A cornerstone of the American legal system, the right of confrontation has existed in one form or another across thousands of years, giving modern legal scholars and judges a wealth of history to draw upon when interpreting the Clause. This paper seeks to examine the early roots and subsequent development of the Confrontation Clause, from ancient Egypt to the steps of the Supreme Court of the United States.

Introduction

On December 15, 1791, along with many of the most important rights and protections afforded to American citizens, the Confrontation Clause became enshrined in American jurisprudence as part of the Sixth Amendment to the newly-ratified Constitution of the United States. The Confrontation Clause, eighteen simple words, single handedly created the adversarial legal process emblematic of the American criminal court.[1]

However, the ideas behind the Confrontation Clause were by no means novel. By the time the United States was drafting its Constitution, the essence of the Confrontation Clause had existed in legal practice and on paper for nearly 1,700 years.[2] The protections of the Confrontation Clause even affected the Framers of the Constitution personally through their prevalence in 18th century English law.[3] To understand what "confrontation" is and why its inclusion in the Bill of Rights was necessary, one must examine how confrontation has developed over thousands of years of common law and hundreds of years of Supreme Court interpretation. Only by confronting the text and history of the Confrontation Clause can one find its meaning and importance to the American legal system.

Background

Behind all the discussion and interpretation of the Sixth Amendment Confrontation Clause lies the actual words of the Clause. In June of 1789, James Madison rose to address the newly assembled House of Representatives, trying to introduce his list of changes to the Constitution that would guarantee civil liberties for all. Among them, Madison proposed adding in Article I, section 9, between clauses 3 and 4, the language that later became the Confrontation Clause. By the time of its ratification, Madison's proposal underwent minor edits, resulting in the official version added to the Constitution on December 15th, 1791 reading (not in Article I, but rather as an addendum to the text of the document), "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[4] Considering just the text of the amendment, one protection clearly emerges: when a citizen is accused of a crime, there must be some witness who actually confronts him or her with that accusation. In practice, "confrontation" has also come to encompass protections such as a compulsion of witnesses to testify and protection from hearsay. These protections have a rich history of revision and reform, adding up today to the Confrontation Clause that the Supreme Court holds the First Congress envisioned.

Physical Confrontation: An Ancient Custom

Physical confrontation is the oldest and simplest definition of the concept of "confrontation." Quite literally, according to the Sixth Amendment, the accused in a criminal prosecution has the right to look his or her accuser(s) in the face. The notion of physical confrontation guarantees that a criminal defendant will have the opportunity to watch those accusing him or her of wrongdoing. Physical confrontation is deeply ingrained into American society because of its historical roots, stretching all the way back to the Roman Empire of the 1st century AD.[5] In ancient Rome, a form of confrontation existed in practice, as noted in the Biblical Book of Acts. According to an anecdote told in the text about the apostle Paul's arrest and subsequent trial, the judge presiding over Paul's trial, a man

1 John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination and the Right to Confront Hearsay*, George Washington Law Review 67, no. 191 (1999): 191-193.

2 Richard C. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, Cato Supreme Court Case Review 3 (2004): 443.

3 Todd E. Pettys, *Counsel and Confrontation*, Minnesota Law Review 94, no. 201 (2009): 218.

4 U.S. Const. amd. VI.

5 *Supra* note 2.

named Festus, had occasion to discuss customs of Roman law with a visiting king. While describing to the king the events surrounding Paul's upcoming trial, he notes in Chapter 25, verse 16, "I told [the elders accusing Paul] that it is not the Roman custom to hand over anyone before they have faced their accusers and have had an opportunity to defend themselves against the charges."[6] As early as the 1st century, physical confrontation was an established custom in one of the cultural progenitors of American civilization.

Certainly, there are noticeable differences between the account of Festus from Acts and the Confrontation Clause of the United States Constitution. Namely, the anecdote in Acts does not have the weight of being the supreme law over a political territory. The Constitution has legal force in the US, while the musings of Festus from Acts may well have been posturing before a guest. In addition, the context of the passage in Acts regarding Paul's arrest and trial does note plenty of opportunity for corruption of judicial officers, with a different Roman officer waiting for Paul to bribe his way out of prison. Consequently, there are grounds to question whether Paul in this anecdote really did benefit from physical confrontation in his case. Even so, this is of little regard to the development of the protection of confrontation. Instead, the significance of the passage from Acts demonstrates that the concept of physical confrontation dates back at least 2,000 years from the present day.

Further back than Rome, however, historical evidence suggests a compulsion of witnesses to testify to meet the demands of one form of confrontation. A manuscript examined and compiled by the University College of London details an inheritance dispute in the Sixth Dynasty of Egypt, roughly 2,000 years before the Roman customs influencing Paul. The manuscript addresses concerns over the availability of a witness in the inheritance case and proclaims that, "if [the claimant] does not produce the witnesses in whose presence this utterance was voiced," the claimant shall not be able to rely upon that statement to prove his case.[7] While these ancient protections of confrontation are simplistic, they demonstrate the lasting impact of confrontation on legal systems.

Compulsion to Testify and Pretrial Depositions

Closer to the actual creation of the Confrontation Clause, common law in England had developed a second form of "confrontation," one that likely influenced the Framers as they considered the Sixth Amendment years later. Prior to a landmark decision by the House of Lords, justices of the peace had the power to interrogate witnesses and consider documentary evidence produced against the accused before trial.[8] Prosecutors argued that testimony in pretrial depositions given by witnesses could be considered for two reasons: first, the witness had confronted the accused by providing testimony about his or her actions before the justice of the peace in a pretrial hearing, and second, the witness again confronted the defendant at trial through their pretrial deposition. The House of Lords, meeting as the appellate authority for the nation, rejected this logic. In 1666, the House of Lords declared such pretrial depositions would only be admissible in cases where the witness who made them were dead, unable to travel and attend court, or could not be brought into court by the "means or procurement of the prisoner."[9] Further, if a prosecutor was simply unable to find a witness, a pretrial deposition could not satisfy physical confrontation.

With this position in mind, the creation of the Confrontation Clause seems to be a rejection of English common law regarding the ad-

6 Acts 25:16 NIV.

7 "Law in Ancient Egypt," University College of London (2003), https://www.ucl.ac.uk/museums-static/digitalegypt/administration/law.html.

8 *Supra* note 3 at 209.

9 *Id.* at 210.

missibility of pretrial depositions. The common law standard laid out by the House of Lords was less strict even than the claims of physical confrontation from the book of Acts and from early Roman custom. The permitted use of pretrial declarations when the witness has died, is unable to travel, or is unable to be procured by the defendant carved out a sizeable exception to the rule of physical confrontation. Certainly, a prosecutor must prove that the witness in question truly is dead, unable to travel, or cannot be found. By meeting this lesser burden, however, the Roman custom of face-to-face confrontation could be abandoned and the protections against hearsay the Egyptians noted could be relaxed. It is with this background, a major exception to physical confrontation, that the Framers and their ancestors travelled to North America and eventually wrote a new, higher standard of protection into law.

Confrontation in Early America: First Interpretations

By the time Madison rose to introduce the Bill of Rights in 1789, the concept of the right to confrontation had existed in states around the Union for years. In fact, Madison's home state of Virginia included the right of a citizen entangled in a criminal prosecution "to be confronted with the accusers and witnesses" in its 1776 Declaration of Rights.[10] Similarly, the Declaration of Rights for the state of Pennsylvania provided for the protections of confrontation. The state declared in 1776 that, "in all prosecutions for criminal offenses, a man hath a right . . . to be confronted with the witnesses."[11] As individual states transformed their colonial charters into state constitutions, seven of the original thirteen opted to include language protecting the right to confront witnesses in criminal trials.[12] A majority of the states made clear their intention to protect the right to confrontation under the new confederation of states. Further, these states reached consensus that confrontation was not only face-to-face in the Roman style, but also entailed compulsion on witnesses to testify and a degree of protection from hearsay. The First Congress preserved the right to be "confronted with the witnesses" against the accused in all criminal prosecutions in the Sixth Amendment. Nevertheless, while the language of the Sixth Amendment itself may be clear and powerful, the initial interpretations of the amendment by the nascent Supreme Court began to chip away at the strong right to confrontation that Madison's First Congress may have intended to create.

The first Supreme Court case to hear arguments over a violation of the Confrontation Clause was *Reynolds v. United States*, a case originating in the Utah territory involving a bigamous Mormon marriage between George Reynolds and Amelia Schofield.[13] During the trial, the prosecutor used testimony of Reynolds' second wife, Schofield, from a previous trial about the same alleged crime against Reynolds. According to the Supreme Court, Reynolds himself hid Schofield away so that she could not testify in-person against him in his second trial. Accordingly, because Schofield was "absent by [Reynolds'] own wrongful procurement," Reynolds could not insist on his "privilege" of confrontation as a reason to overturn his conviction, and his appeal was rejected.[14]

As the very first interpretation of the

10 "Virginia Declaration of Rights," The Colonial Williamsburg Foundation (2017), https://www.history.org/almanack/life/politics/varights.cfm.

11 Francis Newton Thorpe, ed. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*. 7 vols. Washington, D.C.: Government Printing Office, 1909.

12 George Lloyd, "State and Continental Origins of the U.S. Bill of Rights," The Ashbrook Center (2017), http://teachingamericanhistory.org/bor/origins-chart/.

13 Reynolds v. United States, 98 U.S. 145 (1879).

14 *Id.*

Confrontation Clause by the Supreme Court, one made binding on the federal government, *Reynolds* did not present a strong, absolute right to confrontation. In fact, the Court's holding in *Reynolds* reframed the protections of the Confrontation Clause as a privilege rather than a Constitutional right. On top of diminishing the right of confrontation, the Court also affirmed the English common law exception of unavailability, choosing to punish the defendant for hiding witnesses away from the court while simultaneously allowing prosecutors to blame the defendant for their failure to procure witnesses at trial. When viewed collectively, the first reading of the Sixth Amendment's Confrontation Clause did not bode well for the future of confrontation in America. Fortunately, the 20th century saw a course correction in terms of protecting the right to confrontation.

Confrontation at its Best

In 1965, the Supreme Court handed down its decision in *Pointer v. Texas,* declaring that the right to confrontation encompasses the right to cross-examine witnesses testifying against the defendant, which is central to the ability of attorneys and defendants to "expose falsehoods and bring out the truth in the trial of a criminal case."[15] In doing so, the Court also incorporated the Sixth Amendment Confrontation Clause onto the states, finding that the Fourteenth Amendment binds states to respect the same set of rights that the federal government is bound to respect by various provisions of the Bill of Rights. Just three years later, the Supreme Court decided the case of *Bruton v. United States,* another landmark interpretation of the Confrontation Clause. Therein, the prosecution tried Bruton jointly with a co-defendant named Evans for an armed robbery. The jury convicted both on the testimony of a witness who used Mr. Evans' confession to the crime both as direct evidence against Mr. Evans and as evidence that implicated Mr. Bruton in the robbery. As Mr. Evans did not testify in trial himself (asserting his Fifth Amendment right against self-incrimination), the testimony about Mr. Evans' confession was brought against Mr. Bruton without Mr. Bruton's attorney being able to cross-examine his co-defendant. Seeing this potential violation of confrontation emerging, the trial judge ordered the jury to consider only the testimony of Mr. Evans' confession against Mr. Evans, asking the jurors to ignore the statements from Mr. Evans' confession when considering Mr. Bruton's guilt. Upon his conviction and appeal, Bruton argued to the Supreme Court that this instruction to the jury was not enough and that his inability to cross-examine his co-defendant on this confession violated his Confrontation Clause rights.[16]

The Court agreed with Bruton, holding that the instruction required the jury to do a "mental gymnastic which is beyond, not only their powers, but anybody else's."[17] They found that it is not enough for a trial judge to instruct the jury to ignore the overwhelmingly prejudicial evidence of guilt when a violation of Constitutional right has occurred because a juror's mind cannot simply be reset when the judge so commands. Once the testimony influenced the jurors, it was too late for a simple remedy like an instruction. The Court ruled that the prior statements of a co-defendant that does not himself take the stand to testify in trial are inadmissible as evidence of guilt against another co-defendant. Unless the accused has their Sixth Amendment right to confront and cross-examine their co-defendant on the veracity of those statements, the prosecution cannot use a confession from one non-testifying party against a second party.[18]

Through *Pointer* and *Bruton*, the stron-

15 Pointer v. Texas, 380 U.S. 400 (1965).

16 Joshua Dressler and Alan C. Michaels, *Understanding Criminal Procedure.* 4th ed., Carolina Academic Press, LLC (2015): 248-249.

17 Bruton v. United States, 391 U.S. 123 (1968).

18 *Id.*

gest protections of Sixth Amendment Confrontation Clause rights emerged across the United States. No jury could convict a defendant on the confession of another without the opportunity to cross-examine his or her confessing accuser. However, as more cases presented confrontation claims before the Court, the protections of the Confrontation Clause began to fray once again.

Confrontation Today

Only twelve years after handing down its decision in *Bruton*, the Supreme Court began turning away from a strict interpretation of the Confrontation Clause that required physical confrontation and cross-examination. In deciding *Ohio v. Roberts* in 1980, the Court rejected Roberts's argument that his Confrontation Clause rights had been violated by the admission of a pretrial deposition from his daughter as evidence against him. Much like the prosecutors of 16th century England, the prosecutors in the *Roberts* case were unable to compel the daughter to testify by subpoena, prompting them to use her unavailability as an excuse to admit the pretrial deposition. The Supreme Court ruled that this satisfied the demands of the Confrontation Clause as the pretrial deposition had an "indicia of reliability" beyond those hearsay exceptions prescribed by Congress in the rules of evidence.[19] This standard lowered the bar for admission of hearsay evidence. If the statement had evidence of being trustworthy, a judge could excuse the defendant's Confrontation Clause rights and permit hearsay not subject to cross-examination. This case drew the definition of "confrontation" back to the 16th century common law practices of England.[20]

Today, the *Roberts* standard of the "indicia of reliability" is no longer the rule regarding the admission of hearsay. In the 2004 case of *Crawford v. Washington,* the Court divided the types of hearsay that had previously conflicted with the Confrontation Clause into testimonial and nontestimonial hearsay, with only testimonial hearsay (those statements made to agents of the state with the purpose of being used in trial) facing a blanket prohibition under the Clause.[21] Thus, if one made statements to law enforcement for the purpose of, as the Court noted, addressing an ongoing emergency and not for the purpose of use at a later trial, the statements would not automatically be excluded by the Clause.[22] The Court further divided testimonial hearsay into those statements which the defendant had an opportunity to cross-examine prior to trial, admissible in the face of the Sixth Amendment, and those statements for which no cross-examination had been afforded, excluded by the Sixth Amendment.[23] Thus, the *Crawford* test fell between the rule under *Roberts* and the old English common law system, both of which allowed for admission without cross examination, and the *Bruton* and *Pointer* rules, which barred admission unless the witness were subject to cross examination.

Conclusion

The concept of the right to confront the witnesses against someone has taken shape gradually over the course of nearly 2,000 years. As early as 1st century Rome confrontation has meant the ability to look an accuser in the eye. This definition expanded in 16th century England to to mean the ability to cross-examine witnesses, although it also encompassed an exception allowing for the use of pretrial depositions in cases of unavailability. The Framers of the Constitution then enshrined this protection in the Sixth Amendment. As the Supreme Court then ruled on cases of confrontation, the right was lessened to a privilege, sometimes afforded and other times denied. As the protection of confrontation rose to a crescendo in the 1960s,

19 Ohio v. Roberts, 448 U.S. 56 (1980).

20 *Supra* note 3 at 210.

21 Crawford v. Washington, 541 U.S. 36 (2004).

22 *Supra* note 17 at 241-245.

23 *Id.*

however, so too did evidentiary rules to allow more intricate ways around confrontation.[24]

At present, the protections of the Confrontation Clause are a kind of middle ground, one that Justice Antonin Scalia argued in his majority opinion for *Crawford* focuses on the climate of confrontation protections that existed during the founding of the United States. The new rule for admission of hearsay is certainly not the strongest protection of Confrontation Clause rights the country has ever enjoyed. Nevertheless, it is certainly more robust than the simplistic confrontation of 16th century England or 1st century Rome. As new legal scholars examine the intent behind the eighteen words of the Confrontation Clause, they continue to recreate the Clause, bringing new experience to the process of facing one's accusers.

24 *Supra* note 1 at 196.

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