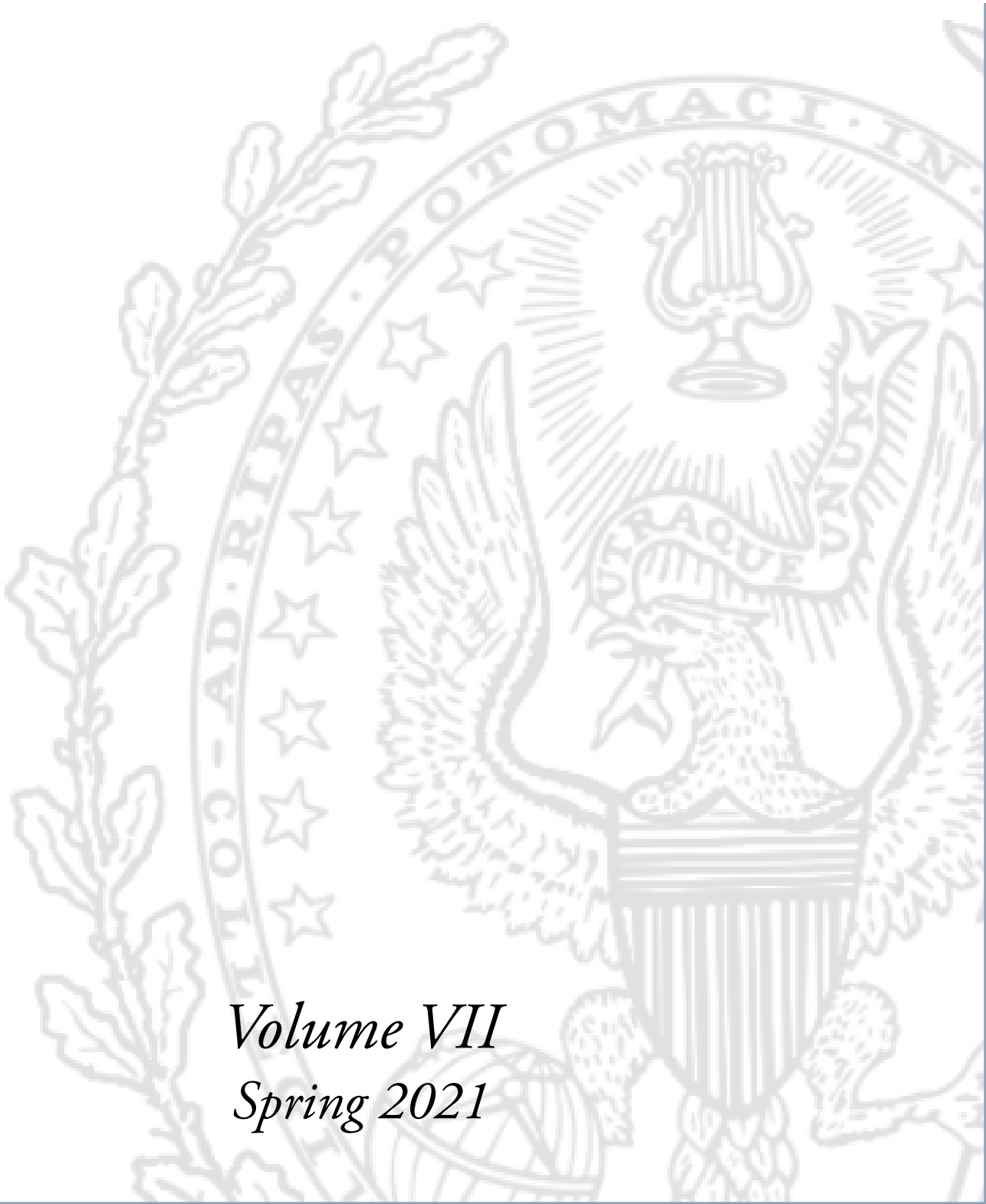
Georgetown University Undergraduate Law Review



Volume VII
Spring 2021

Georgetown University Undergraduate Law Review

Volume VII
Spring 2021

Georgetown University Undergraduate Law Review

Letter from the Editor

June 24, 2021

Dear Reader,

Our editors conducted a rigorous review of graduate and undergraduate submissions to compile Volume VII. We are happy that this edition covers a diverse set of topics ranging from judicial procedure, constitutional interpretation, and national security law in the United States to libel law issues in South Korea.

We open our edition with articles focused on judicial procedure and philosophy. Lindsay Gradowski argues that Supreme Court Justices Amy Coney Barrett and Neil Gorsuch are establishing two distinct varieties of originalism by considering precedent and political necessity to different extents. Next, Charlene Canning traces the evolution of corporate personhood in business cases and its impact on individual rights. Shauli Bar-On presents the results of an experimental study to scrutinize the utility of Federal Rule of Evidence 403, which aims to limit the impact of emotions when juries consider evidence.

The next section focuses on contemporary domestic legal issues. After analyzing a specially assembled set of local newspaper articles, Carolyn Chun contends that the practice in the State of Georgia of banishing sex offenders to other jurisdictions shows the social and expressive facets of punishment. Michelle Dubovitsky's article argues that the state secrets privilege in national security law poses a risk to the system of checks and balances and calls for reform. Cecilia Katz-Zogby critiques the internal logic of the fighting words doctrine in speech cases and calls for its abolition. Lily McGrail applies recent precedent regarding the Due Process Clause to argue that state bans on polygamous marriage can violate individual religious rights.

Shifting to a comparative and theoretical lens, Allison Rhee contrasts libel law in South Korea and the United States by discussing how former presidents Park Geun-Hye and Donald Trump used it with varying success against their opponents. Finally, Bridget Burke dissects the theory behind the American criminal justice system, arguing that its focus on retribution inhibits its rehabilitative and safety ideals.

Our management team is grateful for the contributions of our authors. We would also like to thank our editorial staff for their work on this edition. Throughout the vicissitudes of a difficult and challenging year for our society, our editorial staff and managing editors showed great dedication and perseverance during the months of rigorous editing they committed to make this edition possible and support the authors.

Finally, we hope that you enjoy this edition as a critical reader. The views expressed by the authors do not necessarily represent the views of Georgetown University, GUULR, our management, or our editors. We present these articles not as the final word on these topics, but as the beginning of a thoughtful dialogue we hope you will be spurred to engage in.

Sincerely,

Quentin MacClean Levin
Editor-in-Chief

Solveig Baylor, Arjun Ravi, Lauren Scarff, & Daniel McCooey
Managing Editors

Table of Contents

New vs. Old, Stubborn vs. Expedient:

A Critical Analysis of Neil Gorsuch, Amy Coney Barrett, and Originalism's Future on the Supreme Court

Lindsey Gradowski
Georgetown University

Abstract

This article explores originalism's past, present, and future as an American judicial philosophy and argues that a new generation of originalists are upon us, chiefly Supreme Court Justices Neil Gorsuch and Amy Coney Barrett. Justice Gorsuch's past legal decisions and writings demonstrate that he is steadfast in his convictions and committed to putting Constitutional principles over potential practical consequences when making judicial decisions. Justice Barrett's philosophy relies less on precedent and is more politicized than Justice Gorsuch's, and she has used originalist thinking to reach wildly varying conclusions, sometimes relying on different parts of her ideology to reach a desired end. From these analyses two variations of originalism emerge, labeled within the article as stubborn and expedient originalism. In terms of the future, originalism is here to stay, and Justices Gorsuch and Barrett are unpredictable enough that drawing any concrete conclusions about how they will adjudicate is impossible.

I. INTRODUCTION

The October 2020 confirmation of Amy Coney Barrett to the Supreme Court of the United States has reopened the conversation about the merits of originalism as a judicial philosophy.[1] This paper aims to analyze originalism, explore its evolution over the past 40 years, and predict its future course. These goals will be primarily achieved through examining past judicial decisions of self-described originalists Justice Neil Gorsuch (Section II) and Amy Coney Barrett (Section III).[2] Additional analysis will be explored regarding how Justice Barrett might formulate her Supreme Court opinions and how both justices compare to their mentors.

First, a foundational understanding of the history of and beliefs that underpin originalism must be achieved, which will compose the remainder of Section I. The precise meaning of the term originalism has been debated since its genesis in 1980, as legal scholars have analyzed every word in its first definition.[3] For the purposes of this paper, originalism will be defined as the belief that the Constitution is a fixed, rather than evolving, document, and that judges and justices ought to put the intentions of its Framers above all else when interpreting its provisions. As with any philosophy, originalism has evolved greatly over time and spawned several derivatives. This Introduction will first analyze competing speeches between Justice William J. Brennan and leading originalist thinker Edwin Meese and living constitution advocate, which illustrates the debate surrounding so-called original intent originalism. Next, this article discusses the evolution of public meaning originalism. Finally, an examination of a speech by Harvard Law professor Cass Sunstein will focus on its identification of the two main derivatives of originalism: hard originalism and soft originalism.

Many originalist advocates, such as Edwin Meese, stress the importance of originalism as a means to securing the rule of law.[4] In 1985, then Attorney General Meese remarked to the American Bar Association that, "[we] pride ourselves on having produced the greatest political wonder of the world — a government of laws and not of men."[5] Meese argued that any system of judicial decision-making other than originalism was bound to be fraught with justices inserting their own opinions, thereby tampering with how the Framers intended the law to be interpreted.[6] That same year, Justice Brennan rebutted Meese's speech in an address at Georgetown University, laying out many of non-originalists' largest critiques of the philosophy. Brennan called Meese arrogant for believing he could read the minds of the Framers and implored justices to use twentieth century knowledge in their decision-making.[7] In keeping with the belief that the Constitution is a living, changing document, Brennan also stressed the importance of principles that underly the document, such as "social justice, brotherhood, and human dignity,"[8] rather than relying on exact verbiage, especially because

1 The White House, *Senate Confirms Amy Coney Barrett for Supreme Court*, Whitehouse.gov (October 26, 2020), https://www.whitehouse.gov/articles/senate-confirms-amy-coney-barrett-supreme-court/.

2 During their confirmation hearings, both Gorsuch and Barrett were speculated to become "the new Scalia," the man widely viewed as the father of originalism, showing how even public perception has labeled these two justices as the clearest advocates of originalism on the bench.

3 Lawrence Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, Georgetown Law Faculty Publications and Other Works, 1353, Apr. 28, 2011 at 2. It is widely accepted that the term "originalism" was coined by legal scholar Paul Brest in 1980. His original definition read: "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters." The implications of the word "or" at the end were of particular importance to legal experts.

4 Edwin Meese, *The American Bar Association 7/9/85*, Justice.gov (2011), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf (last accessed December 12, 2020).

5 *Id.*

6 Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 Harv. J.L. & Pub. Pol'y 875, 876-7 (2008).

7 *Id.* at 878.

8 William J. Brennan, *The Great Debate: Justice William J. Brennan, Jr. – October 12, 1985 | The Federalist Society*, The Federalist Society (Nov. 1, 1986), https://fedsoc.org/commentary/publications/the-great-debate-justice-william-j-brennan-jr-october-12-1985.

"consequences flow from a justice's interpretation in a direct and immediate way."[9] In essence, while no harm comes from discussing different judicial philosophies, by their very nature, court cases deal with people who believe they have been wronged, and those persons should not be disadvantaged if a small group of men 200 years ago might not sympathize with their plight.

Meese later retorted that the founding of the country was not that long ago,[10] an argument which many critics think falls short.[11] First, even if this point stands, Meese himself must have conceded that originalism will fail with time, reframing the discussion to simply how much time must pass before originalism becomes obsolete. Further, his critics thought it preposterous to declare that 1788 was not substantially different from 1985, when Meese gave this speech.[12] Americans viewed and interacted with technology, economic issues like taxation, and social issues like racial equality in significantly different ways in the twentieth century. Nearly every facet of Americans' daily lives was different: they had no electricity, mandatory education, or vaccines for any diseases.[13] The Framers, although intelligent, could not have foreseen the United States today.

In 1986, many originalist scholars began abandoning Meese's version of their philosophy in favor of "original meaning originalism," sometimes referred to as "new originalism."[14] Justice Antonin Scalia, widely credited as being the father of new originalism, explained his position by saying, "[m]en may intend what they will; but it is only the laws that they enact which bind us."[15] Scalia advocated for an application of laws as they would have been originally understood by the public. This interpretation circumvents the issue of objectively determining the intentions of the Framers, but the question of what the phrases in the Constitution, a notoriously vague document, originally meant persists. Further, the same problem of modern standards arises (though Justice Scalia may not have seen it as one), as, for example, Americans in 1789 surely had different standards and understanding of what constituted "cruel and unusual" punishments than we do today.[16]

This paper pertains to two crucial differences between old and new originalism. First, old originalism strongly allied with one political agenda, being "primarily a critique of the Warren Court's rights jurisprudence."[17] In contrast, new originalism "is not concerned primarily with criticizing Supreme Court decisions."[18] Second, old originalists, as illustrated above with Meese, were "clause-bound,"[19] focused squarely on the rule of law, whereas new originalists cared more about the "fixed principle[s]" of the Constitution.[20]

Finally, two categories have emerged within new originalism: hard originalism and soft originalism.[21] As Sunstein describes them, hard originalists attempt to "go back in [a] time machine and ask the Framers very specific questions about how we ought to resolve very particular problems."[22] This judicial philosophy quickly falls apart under scrutiny, as it is impossible to objectively determine how the Framers would resolve legal problems of the modern era. Thus, many modern originalists identify themselves with soft originalism, the belief that the original meaning of the text should be one method, but never the only method, for judicial

9 *Id.*
10 Calabresi, *supra* note 6, at 880.
11 Brennan, *supra* note 8.
12 *Id.*
13 Rachel Hajar, *History of Medicine Timeline*, Heart views: the official journal of the Gulf Heart Association, 43-45 (2015).
14 Solum, *supra* note 3, at 15.
15 Note, *Original Meaning and Its Limits*, 120 Harv. L. Rev. 1279 (2017).
16 Brennan, *supra* note 8.
17 Keith Whittington, *The New Originalism*, 22 Geo. J.L. & Pub. Pol'y 599, 608 (2004).
18 Stephen Griffin, *Rebooting Originalism*, 2008 U. Ill. L. Rev. 1185, 1188 (2007).
19 Whittington, *supra* note 17.
20 Griffin, *supra* note 18, at 1189.
21 Cass R. Sunstein, *Five Theses on Originalism*, 19 Har. J.L. & Pub. Pol'y 312 , 311 (1996).
22 *Id.*

decision-making.[23] Soft originalists are often more liberal in areas such as free speech and racial discrimination.[24] With these distinctions in mind, we can begin our analysis of originalist justices.

II. NEIL GORSUCH

A. 10th Circuit Judge

This section will analyze three of Neil Gorsuch's opinions during his tenure as a 10th Circuit judge.[25] In each of the three cases, Gorsuch proves himself to be a thoughtful adjudicator who acts in line with the textual principles rather than the spirit of the Constitution regardless of the political or practical implications of his decisions.

In 2007, Gorsuch authored the unanimous majority opinion in the free speech and retaliation case *Casey v. West Las Vegas Independent School District*.[26] The case dealt with a school superintendent who believed that she had been improperly fired after raising concerns about the legitimacy of the school district's Head Start program and the transparency of School Board meetings.[27] Right before *Casey* was decided, the Supreme Court issued a decision in *Garcetti v. Ceballos*. The Court found that individuals acting in their capacity as an employee were not afforded the same free speech rights as a person acting as a private citizen.[28] Consequently, Gorsuch threw out the portions of Casey's suit in which he determined she had been acting solely in her capacity as a Superintendent, even though she acted appropriately and no action had been taken to address her concerns.[29] However, he upheld Casey's claim that she faced retaliation after going to the New Mexico Attorney General regarding her concerns about the School Board's conduct, since the Attorney General was not her supervisor and Casey acted only in her capacity as a concerned private citizen.[30] In his decision, Gorsuch drew a very narrow distinction that aligned with precedent but also left room for the expansion of free speech rights, illustrating his commitment to principle without attempting to please any one side.[31]

In 2012, Gorsuch joined the majority opinion in *U.S. v. Molina*, which determined that restricting felons from owning firearms did not violate the 2nd Amendment, bolstered by the precedent of *U.S. v. Valerio*.[32] Later, in 2014, Gorsuch joined the majority opinion in *U.S. v. Deiter*, reaffirming the precedent set by the Supreme Court in *Scarborough v. U.S.* that the Commerce Clause has the power to prevent felons from possessing firearms in certain cases.[33] These cases illustrate Gorsuch's commitment to upholding precedent, even on a traditionally conservative issue.[34]

Finally, in 2015, Gorsuch dissented in *U.S. v. Nichols*, a case about whether sex offenders should be required to alert authorities when they are leaving the country.[35] Gorsuch's reasoning was not that he believed sex offenders deserved less supervision, which was the practical consequence of his decision, but rather that

23 *Id.*
24 *Id.*
25 Brian Duignan, *Neil Gorsuch*, Encyclopædia Britannica, (Aug. 25, 2020), https://www.britannica.com/biography/Neil-Gorsuch. After being nominated by President George W. Bush and confirmed by the Senate, Gorsuch served as a Judge for the U.S. Court of Appeals for the Tenth Circuit from 2006-2017.
26 Casey v. West Las Vegas Independent School District, 473 F.3d 1323 (10th Cir. 2007).
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 This case is also important to note as then-Judge Barrett heard a similar case, Lett v. City of Chicago. See Section III.
32 United States v. Molina, No. 11-2128 (10th Cir. July 30, 2012).
33 United States v. Deiter, 576 F. App'x 814 (10th Cir. 2014).
34 U.S. v. Molina is particularly of note because then Seventh Circuit Judge Amy Coney Barrett dissented in a very similar case, Kanter v. Barr (see Section III).
35 United States v. Nichols, 784 F.3d 666 (10th Cir. 2015).

the issue was "a constitutional question that deserve[d] more notice."[36] Gorsuch expressed concerns with the power that the Attorney General had to determine the standards for which sex offenders convicted prior to the Sex Offender Registration and Notification Act would be required to register their faces and locations with the program.[37] Yet again, Gorsuch proved that he is willing to put principle above practicality.

In *Casey*, Gorsuch showed his dedication to principle despite the practical consequences of his decision, deferring to the *Garcetti* ruling and therefore dismissing parts of Casey's complaint despite acknowledging she acted appropriately and was punished. By upholding the other part of the complaint, Gorsuch also proved that he was committed to exploring nuance and expanding rights where precedent allows. In *Molina* and *Deiter,* Gorsuch again proved his deference to precedent, even on issues for which coming to another decision would have been politically desirable. Then, in *Nichols*, Gorsuch gave the clearest example of his willingness to value theoretical principles over the consequences of his decisions. All four of these decisions are in line with soft, new originalist thinking, which values principle and nonpartisanship, as well as being open to expanding certain basic rights, such as free speech. Further, Gorsuch's continuing deference to precedent distinguishes him from other originalists and shows that Gorsuch is a true soft originalist, using multiple methods of judicial reasoning when weighing the merits of a case.

B. U.S. Supreme Court Associate Justice

How did Justice Gorsuch's judicial philosophy translate to the highest court in the land? This section analyzes which parts of Gorsuch's decision-making methodology changed or persisted during his first three years on the bench. Further, the political and practical implications of his decisions are examined.

One of the first cases in which Gorsuch demonstrated that he was not afraid to go against the grain was *Sveen v. Melin*, a case regarding the validity of a life insurance policy, held by Sveen,[38] in which an ex-spouse, Melin, was the beneficiary.[39] The policy in question was purchased before Minnesota's so-called revocation-on-divorce law, and, thus, Melin argued that retroactively applying the law would violate the Contracts Clause. The Court reached an 8-1 decision in favor of Sveen.[40] Gorsuch was the sole dissenter, citing part of the Appellate Court decision saying, "the Contracts Clause … guarantees people the right to 'rely on the law . . . as it existed when the[ir] contracts were made'" and, thus, cannot be applied retroactively.[41] All eight other Justices found that interpretation to be too strict, including Justice Clarence Thomas, an occasional hard originalist.[42]

A year later, Gorsuch wrote the majority opinion for *U.S. v. Haymond* in which he and the four traditionally liberal Justices ruled that mandatory minimum sentencing based on probation violations violated a defendant's Fifth and Sixth Amendment rights.[43] Here, Gorsuch displayed his ambivalence to the political optics of a case, breaking ranks with conservative colleagues and even other originalists[44] to join four liberals in giving leniency to a man convicted of possessing child pornography.[45]

Another high-profile case in which Gorsuch reached across the metaphorical aisle was *McGirt v. Oklahoma*. McGirt claimed that as a member of the Muscogee (Creek) Nation, any crimes he committed on Muscogee land were prosecutable only by the federal government, not by the state of Oklahoma, because of the

36 *Id.*

37 *Id.*

38 His two children, listed as secondary beneficiaries on the policy, were the petitioners.

39 Sveen v. Melin, 138 S. Ct. 1815 (2018).

40 *Id.*

41 *Id.*

42 Sunstein, *supra* note 21.

43 United States v. Haymond, 139 S. Ct. 2369 (2019).

44 The other potential originalist justices on the bench were Justices Thomas and Kavanaugh. Whether or not Justice Kavanaugh is an originalist is highly debatable (most experts believe he falls somewhere around the line of "weak originalist"), but even staunch originalists like Justice Thomas found themselves on the other side of this case.

45 *Haymond*, 139 S. Ct. at 2369.

Indian Major Crimes Act.[46] Gorsuch authored the 5-4 majority opinion, which held that since Congress never broke its treaty to the Muscogee people, it ought to still be considered a reservation, even 154 years later.[47] Here again, Gorsuch grounded his argument in the legal text presented to him and followed the conclusion he gained from that text regardless of other external factors.

In his transition from judge to justice, little appears to have changed in Gorsuch's judicial decision-making process. Gorsuch has largely stayed true to his Circuit Court ideals of the importance of principle and precedent. Further, Gorsuch is the member of the bench who stays the least within his prescribed political leanings, and analysis has shown that (following the retirement of Justice Anthony Kennedy) he is the Justice most likely to be a swing vote.[48] Even though Justice Kavanaugh and Chief Justice Roberts are more moderate than Gorsuch on paper, according to FiveThirtyEight analyst Amelia Thomson-DeVeaux in the 2018-19 term, "Gorsuch was more of a loose cannon. He joined the liberals in more closely divided cases than any of his conservative colleagues."[49] This dedication to nonpartisanship aligns with the philosophy of new originalism.

However, it is impossible to put a legal mind so squarely into one box. Gorsuch's reliance on precedent, most often when interpreting statutes, separates him from other originalists who typically disregard precedent that they do not think accurately interprets texts.[50] On the other hand, Gorsuch's dissent in *Sveen* hints at a level of old and hard originalism that has not appeared in his other rulings examined in this paper. His willingness to ignore what others consider as common sense in favor of the letter of the law reads as more in line with the rule-oriented approach of old originalism, and his inability to use another method of judicial reasoning in that case shows a trend towards hard originalism.

Further, many have been quick to point out how Justice Gorsuch's views have fluctuated over the years. Respected attorney and author of a book about Gorsuch[51] David Dorsen notes in a Washington Post op-ed that Gorsuch "relie[d] mostly on moral and pragmatic arguments, not on originalism" in his 2006 book, *The Future of Assisted Suicide and Euthanasia*.[52] Ironically, Dorsen argues that most of Gorsuch's concerns regarding sensitive topics like euthanasia surrounded potential unintended consequences rather than having any basis in the law.[53] However, by 2016, Gorsuch's writings reflected "uncompromising originalism."[54] It is entirely possible that Gorsuch's judicial philosophy naturally evolved over 10 years as a judge, but he called himself an originalist back in 2006 while simultaneously expressing legal opinions based on consequences. Even recently, Gorsuch has proposed seemingly anti-originalist ideas, for example, suggesting that Fourth Amendment protections should be expanded.[55] Perhaps Thomson-DeVeaux put it best when she labeled Gorsuch a loose cannon:[56] he is very dedicated to his judicial philosophy, but it is anybody's guess just what comprises that philosophy.

46 McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

47 *Id.*

48 Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FiveThirtyEight (July 2, 2019), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/.

49 *Id.*

50 David A. Strauss, *Originalism and Precedent: Why Conservatives Shouldn't Be Originalists*, 31 Harv. J.L. & Pub. Pol'y 969 (2008).

51 Dorsen's book is entitled "The Unexpected Scalia: A Conservative Justice's Liberal Opinions."

52 David M. Dorsen, *Opinion | Is Gorsuch an Originalist? Not so Fast*, Wash. Po. (March 17, 2017), https://www.washingtonpost.com/opinions/is-gorsuch-an-originalist-not-so-fast/2017/03/17/88352dbe-0b21-11e7-b77c-0047d15a24e0_story.html.

53 *Id.*

54 *Id.*

55 Nicholas Kahn-Fogel, *Property, Privacy, and Justice Gorsuch's Expansive Fourth Amendment Originalism*, 43 Harv. J.L. & Pub. Pol'y 425, 428-9 (2020).

56 Thomson-DeVeaux, *supra* note 48.

C. Comparing Justice Gorsuch to His Mentors

Justice Gorsuch clerked for two Supreme Court Justices: Justice Byron White and Justice Anthony Kennedy.[57] Many similarities can be drawn between Gorsuch and Kennedy: both were important swing votes in high profile cases, and, while on the bench together, the two agreed in rulings 82 percent of the time.[58] However, Gorsuch's Martin-Quinn score[59] placed him as the second most conservative Justice on the court, compared to the much more moderate Kennedy who even ended up in the "leans liberal" category.[60]

Gorsuch distinctly differs from his other mentor, Justice White. In a 2017 speech, Gorsuch called White his first mentor.[61] White, nominated by a Democratic president, was by no means a traditional conservative, and he is best remembered as a staunch pragmatist.[62] Even in cases in which he was in a conservative minority (such as *Roe v. Wade*), White grounded his decisions in the plausible consequences he foresaw and the practicality of regulations.[63] This mode of thinking starkly contrasts with Gorsuch who, as previously discussed, often puts consequences aside in favor of principle.

The conclusion that can be drawn from these comparisons is simple: mentors are not intrinsically good indicators of the leanings of their protegees. Gorsuch has drawn far more comparisons to Justices Thomas and Scalia over the years than to either of his mentors. It is important to remember that each justice has reached their title on their own merits, not the merits of those for whom they clerked, and, as such, are their own individuals with autonomous opinions. This conclusion is not meant to suggest that analyzing mentors gives *no* insight into how that justice will view a particular issue, but simply that analysts should be careful before rushing to compare one justice to another.

III. AMY CONEY BARRETT

A. 7th Circuit Judge

This section examines several noteworthy cases heard by Amy Coney Barrett during her time as a 7th Circuit Judge.[64] While there are some discrepancies in her judicial reasoning, Barrett consistently shows a dedication to originalism and grounds each decision in her interpretation of legal texts.

In early 2019, Judge Barrett wrote the 2-1 majority decision in *Yafai v. Pompeo*.[65] Yafai, a naturalized U.S. citizen, claimed that his wife, whose last name is Ahmed, was denied a visa application based on false allegations that she had once attempted to smuggle refugee children into America.[66] Barrett ruled against

57 Duignan *supra* note 25.

58 Oliver Roeder, *Which Justices Were BFFs This Supreme Court Term*, FiveThirtyEight (June 27, 2018), https://fivethirtyeight.com/features/which-justices-were-bffs-this-scotus-term/.

59 The "Martin-Quinn" score is the most commonly used method for measuring the ideology of Justices based on their rulings. It assigns Justices a number (the range of which is theoretically unbounded) based on an average of all of their rulings, with negative numbers denoting more liberal rulings and positive numbers denoting more conservative

60 Roeder *supra* note 58.

61 Nina Totenberg, *Judge Gorsuch's Originalism Contrasts With Mentor's Pragmatism*, NPR (Feb. 6, 2017), https://www.npr.org/2017/02/06/513331261/judge-gorsuch-s-originalism-philosophy-contrasts-with-mentors-pragmatism.

62 *Byron R. White*, Oyez (last accessed December 15, 2020), https://www.oyez.org/justices/byron_r_white.

63 Totenberg, *supra* note 61.

64 115th Congress, *PN369 — Amy Coney Barrett — The Judiciary*, Congress.gov, https://www.congress.gov/nomination/115th-congress/369 (last accessed Mar. 28th, 2021) After serving as a professor at the University of Notre Dame School of Law, Barrett was nominated to the 7th Circuit by President Donald Trump in 2017.

65 Yafai v. Pompeo, 912 F.3d 1018 (7th Cir. 2019).
The dissenting panelist, Reagan appointee Judge Kenneth Ripple, wrote a passionate dissent in which he argued that the ruling, "deprives Mr. Yafai of an important constitutional right" (pg. 10).

66 *Id.*

Yafai on the grounds that "Congress has delegated the power to determine who may enter the country to the Executive Branch, and courts generally have no authority to second-guess the Executive's decisions."[67] Therefore, since the consular officer provided *some* reason to deny Ahmed's visa, regardless of the reason's legitimacy, Barrett determined that the decision must be upheld. Four months after the case was decided, it was denied a rehearing *en banc*.[68] In that decision, Barrett clarified that:

> The Supreme Court has held that, absent a showing of bad faith, a consular officer need only cite to a statute under which the application is denied. … The officer in *Yafai* did that, but our dissenting colleagues would require more. … The Court has repeatedly rejected it, however, so we are required to reject it too.[69]

In this decision, Barrett shows a commitment to maintaining the rule of law even when that requires turning a blind eye to extenuating circumstances. In this manner, Barrett shows tinges of old originalism—she favors the rule over the principle by ensuring that Yafai and Ahmed's due process rights are being protected—as well as hard originalism, as she bases her ruling only on the written text without consideration of other methods of analysis.

Later that same year, Judge Barrett heard *Kanter v. Barr*, a case in which a man claimed his Second Amendment rights were being violated as a non-violent felon unable to possess a firearm.[70] The court ruled that the government demonstrated a substantial interest in dispossessing all felons, but Barrett dissented. In her dissent, Barrett argued that "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons," contending that Kanter, convicted only of mail fraud, should not be classified as "dangerous."[71] Yet, this decision is seemingly at odds with originalism.

While Barrett's language does suggest that she analyzed the case as the Framers might have done, she ignores the actual language of the Second Amendment and dismisses the precedent set in *D.C. v. Heller,* as well as rulings in the Fourth and Eighth Circuits that only law-abiding citizens had full Second Amendment rights.[72] The majority opinion even notes that "Historical evidence is inconclusive as to whether felons were categorically excluded from the Second Amendment's scope,"[73] analyzing the case in an originalist manner and coming to a different conclusion than Barrett, a proclaimed originalist. Her dissent is also of note in light of Gorsuch's ruling in *U.S. v. Molina* in which he used originalist thinking to conclude that felon dispossession does not violate the Second Amendment.[74] Finally, Barrett's ruling is inconsistent with her own past decisions, as in *Yafai,* she refused to consider extenuating circumstances in favor of a categorical rule, whereas here, she argues that such a rule violates Kanter's rights. This contradiction suggests, though by no means proves, that Barrett was influenced by the political leanings of the cases, which dealt with immigration and gun control, two highly politicized issues. If true, this would put Barrett further in line with hard originalist thinking, which is more partisan than new originalism.[75]

In January 2020, Barrett authored the decision in *Lett v. City of Chicago*, another case that reveals similarities to Gorsuch. Lett, an investigator for a Chicago police department municipal office, was told by his supervisor to include in a report the critical fact that officers had planted a gun on the victim of a shooting. Not agreeing with his superior's conclusion, Lett omitted the finding from his report and was later disciplined. Lett argued that his First Amendment right to free speech had been violated by his supervisors, who had retaliated

67 *Id.* at 4.

68 *Yafai*, 912 F.3d at 1018.

69 *Id.* at 3.

70 *Kanter*, 919 F.3d at 437.

71 *Id.* at 27.

72 *Id.* at 10, 14, & 32.

73 *Id.* at 14.

74 *Molina,* No. 11-2128.

75 Whittington, *supra* note 17.

against him for the report.[76] In a 3-0 decision, the court found that since Lett acted solely in his role as an employee, his speech was not protected by the First Amendment. Barrett cited the precedent set by *Garcetti*, the same precedent Gorsuch used to justify his *Casey* ruling 13 years earlier.[77] In this ruling, Barrett shows a commitment to textual precedent even when it is not politically advantageous. She reaches the same conclusion as her originalist colleague Gorsuch based on a similar set of facts, showing her to be acting consistent with new originalist thinking.

Finally, in mid-2020, Barrett joined the majority opinion in *Cook County v. Wolf*. Cook County, Illinois requested a preemptive injunction in response to Department of Homeland Security guidelines that would support the deportation of immigrants deemed to be "public charges."[78] The panel found in favor of Cook County, ruling that, "On the merits, the court concluded that DHS's reinterpretation of the term [public charge] is likely impermissible" under the American Procedure Act (APA) and, therefore, a preemptive injunction could be upheld.[79] Here, Barrett again valued legal statutes over politics, grounding her reasoning in the language of the APA. However, Barrett did not author this decision, so the full extent of what factors she weighed, and the specifics of her personal opinion, cannot be known.

Barrett's judicial philosophy in *Yafai* adhered strictly to the letter of the law regardless of extenuating circumstances or uncertain facts. Then, Barrett seemingly reversed her position in *Kanter*, where she dissented due to a belief that Kanter's status as a nonviolent felon constituted an exception to the rule. In that case too, Barrett showed a disregard for nuance between competing facts, overlooking her colleagues' argument that historical evidence was too inconclusive to support any one viewpoint about the Framers' intent. In later decisions, such as *Lett* and *Cook County*, Barrett showed a commitment to nonpartisanship as well as textual analysis. Though she has at points shown leanings towards old originalism, Barrett has also proven herself to be open to the expansion of some rights in a way most old originalists would not, an idea that will be explored further later in this section.

B. U.S. Supreme Court Associate Justice

Taking into account the previous analysis of Justice Barrett's Circuit Court opinions and Justice Gorsuch's transition from judge to justice, this section will examine the newly appointed Justice's time on the Supreme Court and ideology expressed in law review articles she authored between 1998 and 2013 in an attempt to make predictions about her judicial philosophy in future rulings.

So far, Justice Barrett has been in the news more for what she has *not* done than what she has done. Barrett heard her first oral arguments in early November 2020, with some criticizing her for taking the prior week off to prepare and, therefore, not voting in two other cases.[80] Both of those cases were decided by a 7-1 majority, so it is unlikely that Barrett's voice would have changed the outcome. However, Barrett's abstention does mean no information can be gathered about her opinions on those cases, which dealt with important First and Eighth Amendment issues.[81]

In December, Justice Barrett joined the majority opinion denying a Texas lawsuit filed against four swing states in the 2020 Presidential Election.[82] Two other justices, Justices Thomas and Alito, wrote statements suggesting that they would have allowed the Texas lawsuit to move forward, meaning that Barrett would have not been an outlier if she had chosen to take the stance urged by the President—but she did not. From the

76 *Lett,* 946 F.3d at 398.

77 *Casey*, 473 F.3d at 1323.

78 Cook County v. Wolf, 962 F.3d 208 (7th Cir. 2020).

79 *Id.* at 7.

80 Nina Totenberg, *Justice Barrett Joins Supreme Court Arguments For The First Time*, NPR (Nov. 2, 2020), https://www.npr.org/2020/11/02/930443660/justice-barrett-joins-supreme-court-arguments-for-the-first-time.

81 *Id.*

82 Adam Liptak, *Supreme Court Rejects Texas Suit Seeking to Subvert Election*, N.Y. Times (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html.

outset of her nomination, Barrett's appointment to the Supreme Court has been shrouded in animosity and politics, but she has yet to take any action to confirm Democrats' fears. Her nonpartisan adjudication thus far — though she has not been on the bench long enough for court observers to draw any concrete conclusions — points towards a new, rather than old, originalist philosophy.

But what about the future? A study in the Northwestern University Law Review found that after 10 years on the bench, almost all Supreme Court Justices have substantially changed their ideological tendencies.[83] Will Justice Barrett follow that pattern? The newest justice has only been an adjudicator for three years, and, as such, it can be difficult to draw conclusions about how she might respond to any one issue. However, Barrett was a law professor for 16 years prior to becoming a judge and, as such, has written a multitude of law review articles that begin to illuminate how she might decide cases.

In an early publication, Justice Barrett took a strong, faith-based position on capital punishment in lieu of the old originalist view on the constitutionality of the death penalty. In 1998, then-Professor Barrett co-authored a journal article in which "the authors suggest that the moral impossibility of [Catholic judges] enforcing capital punishment in such cases as sentencing, enforcing jury recommendations, and affirming are in fact reasons for not participating."[84] This article suggests that Barrett would take a firm position against the death penalty, but she amended her statement during her Seventh Circuit confirmation proceedings, creating a distinction between trial judges and "appellate judges considering issues of law in the case of someone already on death row."[85] However, these past statements that attempt to draw fine legal distinctions on her rationales for life and death decisions leave critics and Catholic colleagues alike unconvinced of the sincerity of her expressed religious and moral convictions. Indeed, Barrett joined two majorities, one on the Seventh Circuit and one on the Supreme Court, each denying a stay of execution, clearing the way for the executions of two men.[86]

Barrett did not recuse herself in either case, and her justification seems to be that as an appellate judge she is not deciding whether an execution is proper, only whether all procedure has been properly followed, though that certainly reads the same as enforcing jury recommendations, which Barrett said was grounds for recusal in her journal article.[87] This reasoning is akin to saying that you are innocent because while you loaded the gun, someone else pulled the trigger. While it is important for judges to retain impartiality and not allow faith to interfere with matters of the state, Barrett's self-described faith-based justification for facilitating executions only at the appellate level requires a large logical leap. In an area literally with life and death consequences, it is critical that her reasoning be easily comprehensible. Further, Barrett's complete separation of her actions from their impacts suggests that she now puts text over practical consequences, similarly to Gorsuch, also showing an unwillingness to use any method of judicial decision-making other than originalism. Finally, Barrett's backtracking shows the limitations of using the ideologies she expressed in her law review articles as a guide to her future decisions, as, like Gorsuch, she seems to be a "loose cannon."

Barrett's more recent writings have revealed strong originalist views such as her analysis of the doctrine of *stare decisis*, especially for Circuit Court decisions. Barrett raises concerns with the emphasis placed on precedent, in line with old originalist thinking, though she also acknowledges that precedent can have expediency and stability benefits.[88] In 2003, Barrett wrote an article entitled "Stare Decisis and Due Process," in which she argued that "the preclusive effect of precedent raises due-process concerns, and, on occasion, slides

83 Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?,* 101 Nw. U. L. Rev. 127 (2007).

84 John Garvey & Amy Coney Barrett, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303 (1998).

85 Robert Barnes, *Supreme Court Continues Capital Punishment Trend with Barrett on the Bench*, Wash. Po. (November 20, 2020), https://www.washingtonpost.com/politics/courts_law/amy-coney-barrett-orlando-hall-execution/2020/11/20/ba28d3c6-2b47-11eb-9b14-ad872157ebc9_story.html.

86 *Id.*

87 Garvey & Barrett, *supra* note 84.

88 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Texas L. Rev. 1711, 1712 (2013).

into unconstitutionality."[89] Essentially, Barrett asserted that a case-by-case analysis was the only method to ensure that the circumstances of each lawsuit were given proper weight. This argument concurs with her dissent in *Kanter*, in which she worried about the categorical restriction of rights. Barrett goes so far as to say, "I propose that courts remove rules—like, for example, the rule that one appellate panel cannot overrule another—that create nearly insurmountable barriers to error-correction."[90] Such an action would endanger court legitimacy, especially if two panels passionately disagreed with each other and inevitably provide an avenue by which to stalemate legal proceedings. Yet, Barrett appears to either not recognize or not care about those consequences.

Further, it is ironic to read Justice Barrett's discussion of the individuality required to uphold due process, considering her decision in *Yafai* which completely ignored extenuating circumstances in favor of upholding the procedural rule of law. Judge Ripple even remarked in his dissent that Mr. Yafai was being denied his due process rights.[91] Here again we see that strict originalist Professor Barrett and "my hands are tied by precedent" Judge Barrett differ substantially.

In 2013, Barrett confirmed her originalist rejection of precedent in an article entitled "Precedent and Jurisprudential Disagreement," this time arguing that deference to precedent stifles the plurality of the court.[92] Her argument was again squarely in line with modern originalist thinking, though it ignored the fact that dissents are also given weight when precedent is considered.

Overall the most significant implication of Professor Barrett's articles is that Justice Barrett will not give much weight to precedent when adjudicating, relying more on her own textual discretion.[93] However, only time will tell how much she follows this principle, as she has already shown a willingness to reject it when she chooses to with serious consequences for vulnerable groups such as immigrants like Yafai and impoverished criminals such as Orlando Hall, who was executed in November 2020.[94] As she did with all the examples in this section, it is likely that Barrett will change, if not completely invert, her legal positions in the future.

What can we learn from Gorsuch's transition to the Supreme Court that may inform predictions about the evolution of Justice Barrett's views? The conclusion reached in Section II was that Justice Gorsuch was very similar to Judge Gorsuch in terms of the originalist decision-making factors he values, including a commitment to the strict construction of the meaning of texts. However, it was also concluded that Gorsuch has shown a willingness to contradict himself, such as whether to consider the consequences of his decisions and as he wanders all over the wide spectrum of originalism. These two conclusions I believe will generally hold true for Justice Barrett, although the breadth of her originalist meanderings may be more restrained than has been seen with Gorsuch. Faith-based Professor Barrett is at odds with the strict interpretations of Judge and Justice Barrett. But, as with Gorsuch, perhaps the most poignant conclusion that can be drawn is that Justice Barrett is a loose cannon. Only time will tell if she becomes another originalist swing vote, although doubtful, or attempts to restrict as many rights as possible as Democrats fear, also doubtful. As with most things in life, the truth will probably land somewhere in the middle. But there is one more important aspect of Justice Barrett to examine: her propensity to become a carbon copy of the late Justice Antonin Scalia.

C. Comparing Justice Barrett to Her Mentor

From the outset of her nomination, one name was often mentioned—that of her former mentor, Justice Antonin Scalia. Barrett clerked for Justice Scalia, known as the founder of new originalism, in 1998 and

89 Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003).

90 *Id.*

91 *Yafai,* 912 F.3d at 1018.

92 Barrett, *supra* note 89.

93 Many legal experts have warned against such an approach to reaching judicial opinions. One such critic, David Strauss, wrote that it "causes people to hide the ball, to avoid admitting, perhaps even to themselves, what is really affecting their decisions" (Strauss, *supra* note 50). Precedent in of itself represents a check on the current bench's power, helping to moderate decisions that are handed down by ensuring that a majority of justices from multiple sessions agree on the same legal conclusion.

94 United States v. Hall, F.3d 381 (5th Cir. 1998).

has often talked about the profound impact he had on her judicial views.[95] However, it is unwise to jump to the conclusion that Barrett's tenure on the court will mirror Scalia's.

Undoubtedly, Barrett and Scalia are similar justices ideologically and philosophically. A *Washington Post* analysis found that Barrett aligned most closely ideologically with Scalia, placing her as slightly more liberal and open to civil rights expansion than her mentor.[96] Philosophically, there is little question that Barrett will retain her originalist calculus when deciding cases on the Supreme Court. These two facts seem to suggest that Barrett will in fact become a new Scalia, but there is more to the story.

During her confirmation hearings, Barrett rejected the notion that she would decide cases just as Scalia would have done, promising that originalist judges could work through the same process and arrive at different conclusions.[97] However, she was reluctant to give any information about her ideology at all.[98] The finding in the aforementioned *Northwestern University Law Review* article that many justices shift their ideologies over time[99] suggests that Barrett is likely to stray further from her mentor over her tenure. Already, Barrett has shown herself to be open to expanding rights where Scalia was not. Supreme Court precedent from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* states that citizens have the right to sue government officials for Fourth Amendment violations,[100] and Barrett left open the possibility of expanding *Bivens* to include First Amendment violations in the Seventh Circuit case *Smadi v. True*.[101] In contrast, Scalia joined two majority opinions restricting the reach of *Bivens*.[102] Barrett's inclination towards rights expansion is similar to Gorsuch's and may suggest that it is a growing characteristic of modern originalists.

IV. CONCLUSION

What can be learned from these analyses of Justice Neil Gorsuch and Justice Amy Coney Barrett? Knowledge about their judicial philosophies is important because, as relatively young justices, they are likely to remain on the Court and shape American law for decades. Gorsuch and Barrett each seem to have their own brand of originalism. Gorsuch's strand can be labeled as stubborn originalism. He is generally consistent, often placing principle above practical consequences and giving more weight to precedent than the typical originalist. However, Gorsuch can also be single-minded in his application of his originalism, at times disregarding common sense rather than recommending that statutes be amended, as seen in *Sveen*. In this way, Gorsuch can also be reluctant to step into advising legislative policy, another common originalist trait. To Gorsuch, the most persuasive argument is one on the theoretical level, based in written law, though in the end it is Gorsuch's individual interpretation of the laws presented to him that will influence his ruling.

In comparison, Barrett's version, which can be classified as expedient originalism, is less fleshed out and more contradictory, likely because of her relative inexperience as an adjudicator compared to Gorsuch.

95 Lynn Sweet & John Seidel, *How Amy Coney Barrett Went from Notre Dame to Supreme Court Frontrunner*, Chicago Sun-Times (Sept. 24, 2020), https://chicago.suntimes.com/politics/2020/9/24/21454762/amy-coney-barrett-supreme-court-president-donald-trump-notre-dame.

96 Jason Windett et al., *Analysis | Amy Coney Barrett Is Conservative. New Data Shows Us How Conservative*, Wash. Po. (Oct. 22, 2020), https://www.washingtonpost.com/politics/2020/10/22/amy-coney-barrett-is-one-most-conservative-appeals-court-justices-40-years-our-new-study-finds/.

97 This notion is unsettling in of itself, as it seemingly supports the criticism of originalism that there is no way to ascertain the "one true meaning" of the founders. Whether this fact plays into Barrett's analysis of arguments or whether she said it solely in an attempt to placate Congressional Democrats cannot be known.

98 Smadi v. True, No. 19-1370 (7th Cir. November 8th, 2019).

99 Epstein et al., *supra* note 83.

100 [IFS Staff], Three Cases Show Judge Amy Coney Barrett's Willingness to Expand. Institute For Free Speech (Sept. 23, 2020), https://www.ifs.org/blog/cases-judge-coney-barrett-expand-free-speech-protections/; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 91 S. Ct. 1999 (1971).

101 Smadi v. True, No. 19-1370 (7th Cir. November 8th, 2019).

102 [IFS Staff], *supra* 89. The two cases restricting *Bivens'* reach were *Wilkie v. Robbins*, 551 U.S. 537 (2007), *and Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

Therefore, her interpretations probably will prove to be the more malleable of the two. Right now, Barrett's originalism, as seen in *Yafai* and *Kanter*, is more politically aware and less precedent-driven, aligning herself more closely with her mentor than was the case with Gorsuch and his mentors, Justices Kennedy and White. The contradictory nature of her rulings draws questions about whether Barrett applies originalism only when convenient to justify a particular conclusion, even unintentionally. Finally, Professor Barrett inserted herself into policy and procedural advocacy where Gorsuch has not, for example, suggesting radical changes to the power of Appellate Court panels and stare decisis. With these individual conclusions in mind, conclusions about originalism as a whole may be drawn as well.

With at least three staunch originalists on the Supreme Court, counting Justice Thomas, the philosophy is here to stay for the foreseeable future. Yet, originalism is sure to evolve as the most prominent players shift from Scalia and Thomas to the likes of Gorsuch and Barrett. The newer Justices have already shown tendencies to become swing votes, Gorsuch more than Barrett, siding with their liberal colleagues and expanding rights where the older generation of originalists never did. However, the exact philosophies of new originalists, especially Gorsuch and Barrett, are always changing and nearly impossible to pinpoint. Finally, Gorsuch and Barrett are inclined to contradict themselves as their reasoning evolves, as with Gorsuch's view on the importance of unintended consequences and Barrett's position on the constitutionality of categorical rules. Further, their writings subscribe to their types of originalism to fluctuating degrees, both showing occasional tendencies towards old originalism, such as Gorsuch in *Sveen* and Barrett in *Yafai*. At times, the justices have even contradicted originalism itself, as seen with Gorsuch in his book on euthanasia and Barrett in *Kanter*. As University of Chicago law professor David Strauss aptly put it, originalism "imposes only a very uncertain limit on judges and leaves them a great deal of latitude to find, in the original understandings, the outcomes they want to find."[103] In essence, many conclusions can be justified by originalism since the exact meaning of founding documents is so hard to divine; thus, there is a great deal of space for originalist adjudicators to change positions while still operating under an originalist framework. It is the opinion of this author that originalism will become less polarized in the future if the United States enters a phase of bipartisan healing and as Gorsuch and Barrett, both newer justices, establish themselves on the Court separate from older originalists. Based on the totality of this analysis, perhaps the only conclusion that can safely be drawn is that originalism will change, but the exact nature of that change is impossible to predict.

103 Strauss, *supra* note 50.

Supreme Businesses:
Impacts of Business Cases Since 1886

Charlene Canning
University of Pennsylvania

Abstract

Business law in the United States has evolved profoundly since the Industrial Revolution. This article analyzes landmark Supreme Court cases involving businesses since the case Santa Clara County v. Southern Pacific Railroad to analyze how they have impacted individual rights. Since the initial recognition of businesses as individuals, business entities accessed rights and privileges enjoyed by people. This article will analyze how businesses have accessed and, in turn, impacted the rights and privileges to speech, free exercise, and economic engagement. Through teleological argumentation and a legal realist approach, this article examines impacts that these business cases have had on individuals and their rights. The paper concludes with a discussion of how the development of corporate personhood threatens the intrinsic nature of rights.

I. INTRODUCTION

The *Declaration of Independence* popularized the idea that people ought to have certain inalienable, individual rights.[1] Often overlooked, however, is the fact that the ability to exercise one's agency is a prerequisite to exercising these rights and engaging in the pursuit of happiness. In a country with millions of other actors adjacently chasing their own versions of happiness, it is necessary to be able to advocate freely, an ability now protected by the First Amendment. Additionally, agency and autonomy are required to pursue equal access to economic activity.[2] In the years between the ratification of the Bill of Rights and where the United States currently stands, there have been numerous ways in which such conduits to autonomy have been altered to place limits on the extent to which certain groups of people can exercise those freedoms, while a wealthier class has seen a significant rise in their own agency. In this context, that class includes those who own some businesses and businesses themselves.

In order to analyze the coexistence of freedoms held by businesses and individuals,[3] it is important to first recognize the definitions of key terms. Central to this article are the concepts of business cases, corporate personhood, and judicial realism, as well as the analysis of business cases. More specifically, this article will examine cases involving businesses that have reached the Supreme Court of the United States. Most of the cases dissected will involve larger businesses that affect a considerable number of employees and shareholders in addition to any future parties involved in similar cases that will have to submit to the previously established precedent.

II. BACKGROUND AND CONTEXT

A. The Origin of Business Rights

Before businesses relied on "corporate personhood" in the courts, there was a time when they failed to seek legal standing—a prerequisite for bringing a suit to court.[4] The first case heard before the United States Supreme Court involving a business was *Bank of the United States v. Deveaux* in 1809.[5] The bank involved was ultimately successful and helped set a precedent confirming that businesses have the right to sue in federal courts.[6] This was eventually upheld in 1844 and 1853, when the Supreme Court agreed that corporations were citizens in *Louisville, Cincinnati, & Charleston Railroad v. Letson* and *Marshall v. Baltimore and Ohio Railroad*, respectively.[7] While these cases serve as proof of legal action performed by and against businesses, it was not until the 1886 case of *Santa Clara County v. Southern Pacific Railroad Company* that a business case resulted in a precedent that officially opened the door for businesses to access more notable rights that were previously held solely by individuals, known as corporate personhood.[8] It is no coincidence that the origin of corporate

1 U.S. Declaration of Independence, para. 2 (1776).

2 *See* e.g., *Committee on the judiciary,* Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, (2005) at 143. ("Chairman SPECTER. The joint opinion then goes on, after the statement as to sexual activity, to come to the core issue about women being able to plan their lives. The joint opinion says, "The ability of women to participate equally in the economic and social like of the Nation has been facilitated by their ability to control their reproductive lives.") During the confirmation process for Chief Justice Roberts, Chairman Specter references the codependence of autonomy and economic activity.

3 While employing the term "corporate person," the term "individuals" refers to individual American people and not individuals who serve representative capacities as owners of businesses.

4 *See e.g., infra* note 9.

5 Bank of the United States v. Deveaux, 9 U.S. 61 (1809).

6 *Id.*

7 Louisville, Cincinnati, & Charleston Railroad v. Letson, 43 U.S. 497 (1844); Marshall v. Baltimore and Ohio Railroad, 57 U.S. 314 (1853). While these cases uphold the precedent that businesses could sue and be sued, they were decided by the Taney court, which was known for its populist rulings and aimed to limit the rights of corporations. In these two cases, Taney sought to undermine the methods used by railroads to evade having their cases tried in federal court.

8 Santa Clara County v. Southern Pacific R. Co. 118 U.S. 394 (1886). In other accounts of the history of corporate personhood, it is popular to refer to the 1882 railroad cases concerning taxation. Specifically, San Mateo County v. Southern Pacific Railroad, 116 U.S. 138 (1885). While there was no ruling that supported the development of corporate personhood, the arguments of Roscoe Conkling, who was the influential lawyer for the railroad, set a foundation for the ruling that would come four years later.

personhood can be traced back to a formidable structure that aimed to consolidate credit in the early 1800's and then again to the economic success of railroad companies later on in the same century.[9] The timing of this success, coupled with the addition of new constitutional amendments following the Civil War, contributed to the development of corporate personhood.[10] While the Fourteenth Amendment had initially been one of the amendments passed in hopes of addressing racial injustice following the emancipation of slaves, this case is one of the many that would follow where businesses exploit reparative legal developments to advance their own interests.[11]

This practice of utilizing law that was originally intended to secure the rights of African Americans to achieve unrelated ends is prevalent throughout legal history in the United States. In addition to *Santa Clara* in 1886, another corporate case integral to the development of corporate personhood is the 1905 case of *Lochner v. New York*.[12] This case involved the New York Bakeshop Act, which limited the amount of time people could work in a week.[13] Lochner, the owner of the bakeshop involved, violated this act twice and appealed the conviction after the second time, arguing that the Fourteenth Amendment protects the freedom to establish their own contracts.[14] Accordingly, the issue at hand was whether or not the Bakeshop Act violated the liberty protected by the Due Process Clause of the Fourteenth Amendment.[15] After analyzing the facts and considering this question, the Court held that the statute was unconstitutional.[16]

West Coast Hotel Co. v. Parrish overturned *Lochner*, which further supports the idea that the economic success of large businesses incentivized the Supreme Court to grant them additional elements of legal personhood.[17] In 1937, the United States was still recovering from the Great Depression, and trust in the financial solvency of businesses in America was especially low. The interest in providing financial security for individuals is clear in the majority opinion penned by Justice Charles Evan Hughes, often considered the antithesis to *Lochner*.[18] He argues that police powers permitted the state to create and enforce minimum wage laws, superseding any interest in respecting the right to contract.[19]

Some academics have characterized the judicial action in *Lochner* as unjust because of the political bias manifested in the Court's clear preference for government inaction. [20] In response to this, Cass Sunstein,

9 *See* Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2018).

10 *Id.*

11 *Id.*

12 Lochner v. New York, 198 U.S. 45 (1905).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

18 *Lochner,* 198 U.S. 45 (1905).

19 *West Coast Hotel*, 300 U.S.

20 *See* e.g., Daniel R. Ernst, Lawyers Against Labor: From Individual Rights to Corporate Liberalism (1995) at 88. ("The 'elaborate but palpably unconvincing reasoning' of the judges notwithstanding, the true basis of decision in labor cases was the bench's 'pre-determined economic views' informed by only the most rudimentary understanding of the social context to industrial disputes.") *See also* Howard Gillman, The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993) at 1 ("According to the long-standing common wisdom about this period, toward the end of the nineteenth century many conservative American judges began to aggressively disregard the proper boundaries of their authority in order to search out and destroy "social legislation" that was inconsistent with their personal belief in laissez-faire economics and social Darwinism.") Here, the author describes the contemporary

a leading constitutional law scholar, was one among many who argued that this interpretation of *Lochner* and the period that followed was inaccurate. Critics like Sunstein maintained that the claim about the Court's preference for "government inaction" in so far as "judicial deference to legislative enactments" was ultimately dependent on the faulty premise that neutrality and inaction can be defined "in terms of the perpetuation of current practice."[21] The characterization of *stare decisis*, or adherence to precedent, as neutrality or inaction is a method of dismissing the analytical responsibility of the Court.[22] Judicial activism is often defined as the expansion of individuals' rights while the opposite entails restricted private action through government intervention. Judicial activism via police power is to *Lochner* as deliberate inaction is to *West Coast Hotel.* Business cases first experienced judicial activism through *Lochner* since it developed the notion of a right to contract and contributed to the later-affirmed individual rights to state-mandated minimum wage.

Both *Lochner* and *West Coast Hotel* show us that business law has a long history of consequential significance in the United States. In theory, judges are meant to deliver opinions that do not reflect any political biases, simply applying legal analysis and objective reasoning. While the reality of this practice has long been up for debate, Arthur Schlesinger, Jr. established the term "judicial activism" in 1947 to convey the idea that judges consider the consequences of their opinions and manufacture their legal analysis accordingly.[23] Like the binary of *Lochner* and *West Coast Hotel*, Schlesinger posited that judges could be put into one of two categories: ones that practice judicial activism and ones that exercise judicial restraint.[24] Many legal scholars have chosen to interpret the opinion delivered in *West Coast Hotel* to be the end of the *Lochner* period since fewer economic regulations were struck down and more fundamental and civil rights were protected.

Some may believe that the judiciary's role is to invent and improve upon acceptable doctrine, but this also requires judicial activism.[25] True neutrality does not exist, and the acknowledgement of this fact is an example of the legal realist perspective that this article adopts. The theory of legal realism posits that "all law derives from prevailing social interests and public policy" and it accordingly considers the fact that judges contemplate social norms and public policy in addition to abstract rules.[26] Even if one rejects the idea that judges have their own political agendas when considering cases, one must concede that those seemingly impartial judges employ doctrine originating from precedent that is politically biased. Thus, the most tangible effect of judicial activism is that judges on the Supreme Court have the capability of leaning toward an end of the political spectrum and delivering opinions that reflect this political bias based on the precedent they choose to adhere to.

No matter how convincing the argument in support of judicial activism is, the practices of the current Chief Justice are antithetical to the notion of judicial realism. In his own words during a confirmation hearing, Chief Justice John Roberts asserted that, "[j]udges have to have the humility to recognize that they operate

popularity of judicial activism occurring whenever a reversion to a conservative ruling was possible. This was often done and then described as "inaction" because of these kinds of rulings would more or less restore whatever precedent preceded the liberal one being questioned in a given case.

21 Cass R. Sunstein, Lochner's Legacy (1987).

22 *See* Dartmouth v. Woodward, 17 U.S. 518 (1819). An earlier example of this practice can be found in Chief Justice John Marshall's opinion. When the court was tasked with answering a question they had never answered before (whether or not businesses were private or public entities). Justice Marshall remarks that "It is too clear to require the support of argument that all contracts and rights respecting property, remained unchanged by the revolution." Here it is clear that the legal continuity Justice Marshall alludes to does not exist. This method of disguising new legal precedent with the facade of continuity allows Justice Marshall to escape the need to justify the apparently private nature of business.

23 Keenan D. Kmiec, the Origin and Current Meanings of "Judicial Activism" (2004).

24 It is worth noting that Schlesinger believed that "a wise judge knows that political choice is inevitable" and that judicial restraint in the form of upholding conservative or liberal precedent does not occur in the absence of political bias or action.

25 Ernst, *supra* note 20.

26 *Legal Realism,* LEGAL INFORMATION INSTITUTE (LII), https://www.law.cornell.edu/wex/legal_realism (last visited Aug 15, 2020).

within a system of precedent shaped by other judges equally striving to live up to the judicial oath."[27] Throughout his tenure on the highest bench in the country, this belief has not always been apparent. During the process of confirming judges for the Supreme Court, each party in Congress does their best to support judges that they believe will produce or support opinions that coincide with their partisan interests.[28] Evidence for this idea can be found in the blockage of President Obama's March 2016 Supreme Court nomination. His nominee Merrick Garland was meant to replace the spot left vacant by the death of the notable conservative Justice Antonin Scalia. Republican leaders in the Senate successfully deferred consideration of a nominee until the arrival of a new president. This stalling shows that there is partisanship involved in the selection process, supporting the idea that the judges that are chosen to sit on the bench at least have a history that includes upholding or overturning certain precedents and that it is this record that convinces either party that those nominees would be willing to support their partisan efforts.

While Chief Justice Roberts was nominated by a Republican president, one might say that his decisions during the summer of 2020 are anything but conservative. His decisions to join the liberal sides of three prominent rulings might suggest to the lay person that he has altered his political views. This would contradict his own words, which are that his actions only demonstrate his proclivity for the objectivity allegedly provided by *stare decisis*.[29] The first ruling where Chief Justice Roberts supposedly adopts a liberal perspective includes a set of cases being referred to as landmark rulings for queer rights.[30] Additionally, *Department of Homeland Security et al. v. Regents of the University of California,* consists of a set of facts concerning Deferred Action for Childhood Arrivals.[31] The majority opinion for *Medical Services v. Russo* is the final of the three more noteworthy ones of the summer and is a consequential callback to *Whole Woman's Health v. Hellerstedt* and *Roe v. Wade*.[32]

While Chief Justice Roberts's proclivity for *stare decisis* is a possible explanation for these progressive rulings, some of his past decisions are exceptions. In his concurring opinion for *Citizens United v. Federal Election Commission*, he says, "Austin, however, allowed the Government to prohibit these same expenditures out of concern for 'the corrosive and distorting effects of immense aggregations of wealth' in the marketplace of ideas"[33] and preempts this with a quote from *Buckley*: "restricting the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[34] Here, Chief Justice Roberts's participation in the overruling of *Austin* and *Buckley* juxtaposes his habit of sticking to precedent. (Similar to the sentiment in this concurring opinion, this article will analyze the ways in which certain cases have prioritized the interests of the few rather than the many.) This becomes important as Chief Justice Robert has increasingly acted as the swing vote.[35] Moreover, this could mark the beginning of a decrease in judicial realism. Most importantly, we must consider the degree to which judges are willing to manufacture the legal analysis necessary to support certain politically aligned outcomes. If this is the case, it would support the idea that these judges are aware of the impacts that corporate cases have on the rights of individuals and that those impacts are intentional.

27 *See supra* note 3.

28 *See supra* note 3. There is a large amount of questions dedicated to *Roe v. Wade,* many of them framed with political perspectives and aimed to see where John Roberts stood on this issue.

29 *See id.* at 142-144. John Roberts explains his respect for stare decisis and goes on to explain his rationale for its application and relevant conditions while providing answers to questions from the Committee on the Judiciary.

30 *See* Bostock v. Clayton County, 590 U.S. _ (2020); *see also* Altitude Express v. Zarda, 590 U.S. _ (2020); *see also* R.G. & G.R. Harris Funeral Homes Inc v. Equal Employment Opportunity Commission, 590 U.S. _ (2020).

31 Department of Homeland Security et al. v. Regents of the University of California, 591 U.S. _ (2020).

32 Medical Services v. Russo, 591 U.S. _ (2020); *see also* Whole Woman's Health v. Hellerstedt, 579 U.S. _ (2016); Roe v. Wade, 410 U.S. 113 (1973). Compared to his decisions for the cases that concerned the rights of queer people, Justice Robert's support was even more consequential in *Department of Homeland Security et al. v. Regents of the University of California* and *Medical Services v. Russo* because these were ultimately 5-4 decisions.

33 558 U.S. 310 (2010) at 8 (Roberts, concurring).

34 *Id.*

35 *See* Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, NY Times (June 30 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html.

So, then, is Chief Justice Roberts the ideological center of the Court?[36] Or, is his process truly dictated by his preference for precedent rather than a political perspective? Were the Taney and Chase Courts pressured by the economic success of railroad companies to rule in their favor? Was the economic recovery of individual people a political priority in the year that brought the contentious *West Coast Hotel* ruling? The answers to these questions of judicial activism, judicial realism and the origin of corporate personhood serve as a historical foundation for analysis of how corporate cases impact the rights and free agency of individuals.[37] Some may argue that it is not the intent of either the parties or judges involved in landmark cases to cause such impacts,[38] but identifying and analyzing trends that indicate otherwise not only helps us gather an understanding of why these cases were ruled the way they were; it can also help us predict future impacts.

Further discounting appellate objectivity is the contentious process of nominating and swearing in justices for the highest court. This is reflected in the rise of opposition Supreme Court nominations received during the voting process and the decrease in the overall success of federal court nominations.[39] A specific instance demonstrating the increasing political polarization of the process is when the Republican majority blocked President Obama's Supreme Court nomination in 2016.[40] This shows that the nomination process for federal judges has become a partisan process in which either party is motivated to support judges that appear to support their agendas.

Ultimately, the acknowledgement of judicial activism via the acceptance of judicial realism is necessary to fulfill the moral objective of using law to accomplish positive impacts. Judicial realism is necessary because it requires judges to first be aware that their rulings have tangible impacts in order for them to have preferred outcomes. In the context of this article, maintaining a pretense of objectivity subverts this mission and is essential to understanding the rise of business enfranchisement and the indirect impacts it has had on the rights of individuals.

B. Business Change of the First Amendment

Most cases chosen to be heard before the Supreme Court are not one-dimensional. There are usually several legal questions within a single case, but the Court has the ability to narrow their opinions down to answering the question or questions of their choice.[41] One explanation for this is that the Supreme Court may be attempting to limit the potential abuse of their rulings by limiting the legal scope of the questions being

36 *Id.* Pulitzer Prize finalist Adam Liptak is an example of someone who believes this theory. His reasoning includes the apparent loss of an ideological center left by the retirement of Justice Kennedy in 2018.

37 *See* Bank of the United States v. Deveaux, 9 U.S. 61 (1809). "A Constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles." Marshall's explicit endorsement of using the Constitution as a means of inventing law instead of being a conclusive, descriptive document demonstrates what would eventually be referred to as judicial activism. Moreover, this was the first case in which a business was successful at gaining some form of corporate personhood (the precedent established was the right to sue and be sued).

38 *See e.g.,* Cass R. Sunstein, Are Judges Political? (2006).

39 John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, Pew Research Center (March 7, 2018) https://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/.

40 Ron Elving, *What Happened with Merrick Garland in 2016 and Why it Matters Now*, NPR (July 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

41 *See, e.g.,* Winkler, *supra* note 9, at 67. "Although Marshall based a corporation's ability to sue in federal court on the citizenship of its members, the esteemed jurist never identified who exactly counted as a member of a corporation… Marshall skipped right over this key issue and declared that the Bank had the right to sue the tax collector in federal court."; *see also* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 US _ (2020) at 2 (Alito, concurring) "I understand the Court's desire to decide no more than is strictly necessary, but under the circumstances here, I would decide one additional question: whether the Court of Appeals erred in holding that the Religious Freedom Resto-ration Act... does not compel the religious exemption granted by the current rule." Here we see Justice Alito explicitly note a question unanswered by the majority opinion.

asked.[42] After all, desperate or otherwise inspired by a particular strategy, attorneys do their best to use seemingly unrelated precedents to support their own arguments or to refute the opposing case. This limitation of scope is usually indicated in a surreptitious footnote with a phrase such as "[the solicitor] presented a substantial amount of testimony and evidence at trial to prove [a conclusion related to a question that we do not wish to address] but we need not reach that issue."[43] This example, from a 1984 case in the 7th Circuit, shows that appellate courts are able to choose which legal issues or questions to address because of the perfunctory method of dismissing the issue in question. Moreover, concurring opinions can reach similar conclusions but choose to answer questions neglected in the majority opinion. Such opinions further support the idea of intentionally limiting the language of opinions in order to prevent certain applications. In this section of the article, it will become clear that the realm of corporate law related to free speech and exercise is one that includes the legal maneuvering lawyers do on behalf of businesses and the careful limitation of scope in the opinions written. Accordingly, business cases that modify the legal understanding of First Amendment rights are perhaps the most consequential, since they change the extent to which businesses are understood to be people for the purpose of legal disputes and are able to access other rights.

i. Other Stakeholders

Perhaps the most academically dissected way that corporate cases have impacted the First Amendment rights of individual Americans is through the development of corporate personhood.[44] There is particularly abundant criticism about the overall impacts on First Amendment rights of stakeholders such as shareholders and employees. A salient result of corporate personhood is the legal recognition of a company's religious beliefs. In *Burwell v. Hobby Lobby*, the Supreme Court of the United States considered facts involving Hobby Lobby, a national arts and crafts chain owned by the Greens, a Christian family.[45] The Greens refused to cover birth control in their employee health care plans because to do so would have gone against their religious beliefs.[46] The family, as representatives of Hobby Lobby Stores, sued Kathleen Sebelius, who was the secretary of the United States Department of Health and Human Services.[47] The legal argument brought forth by the representation for the Greens contended that the Patient Protections and Affordable Care Act both violated the Free Exercise clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA).[48]

Thus, the issue that concerned the Supreme Court was whether RFRA allows a for-profit company to deny its employees health coverage if doing so would violate the company's religious beliefs.[49] Ultimately, the Court held that Congress intended for RFRA to be applicable to businesses because they are composed of

42 Federal Judicial Center, Judicial Writing Manual: A Pocket Guide for Judges (2013), at 17. "Moreover, a judge may find it efficient to address issues not necessary to the decision if the judge can thereby provide useful guidance for the lower court on remand. However, judges must be careful not to decide issues that are not before them and to avoid

43 Ulane v. Eastern Airlines, 742 F.2d 1081, 1084 n.8 (7th Cir. 1984).

44 Tim Wu, Is the First Amendment Obsolete? (2018); *see also e.g.,* Jonathan Macey, Citizens United as Bad Corporate Law (2018); *see also e.g.,* John Coates, Corporate Speech & the First Amendment: History, Data, and Implications; *see also e.g.*, Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights of the

45 573 U.S. 682 (2014).

46 *Id.*

47 *See* Reem Garris, *Burwell v. Hobby Lobby*, The Embryo Project Encyclopedia (June 29, 2020, 4:40 PM), https://embryo.asu.edu/pages/burwell-v-hobby-lobby-2014#:~:text=In%20the%202014%20case%20Burwell,corporations'%20right%20to%20religious%20freedom. ("On 10 April 2014, the Secretary for the HHS, Sebelius, resigned. Appointed as the new head of the HHS, Sylvia Burwell inherited the case on behalf of the department. The case was then

48 *See* Hobby Lobby, 573 U.S.

49 *See id.*

individuals.[50] Moreover, Justice Samuel Alito wrote that the contraception requirement creates a substantial burden that is not the least restrictive method of satisfying the government's interests.[51] This case establishes legal precedent protecting only the religious beliefs of the more prominent stakeholders of a company: the owners.[52] Consequently, this holding fails to adequately represent the beliefs of all stakeholders involved. More specifically, the negative impacts are experienced by two particular groups: shareholders and employees.

ii. Shareholders

Less obvious are the effects that the religious protection of businesses has on shareholders with opposing religious beliefs. With this subset of corporate stakeholders, it is easy to make the argument that people are essentially free agents and can accordingly choose to invest or divest from companies as they wish. After all, if shareholders choose to remain investors of companies that "speak in ways that may not reflect the positions of their equity owners,"[53] they have clearly decided that the economic benefit outweighs the burden of any cognitive dissonance. Justice Alito says in the majority opinion of *Burwell v. Hobby Lobby* that RFRA was intended "to protect the rights of people associated with the business, including shareholders, officers, and employees,"[54] but the reality of only reinforcing the protection of the owners' religious beliefs proves otherwise.[55] This, then, affirms that the owners of the company are the only ones that possess the religious beliefs being exercised.

Instead of acknowledging that businesses consist of many different stakeholders at all levels that have different religious beliefs, the majority opinion only recognizes and protects the First Amendment rights of the Green family, or more specifically, the business's CEO and President.[56] Why is the Court content with giving a small number of people the ability to contradict the religious beliefs and exercise of the masses? In addition to a CEO and a President, a business consists of other stakeholders that most often outnumber these two positions. The recognition of businesses as people is frequently defended with some variation of the argument that businesses are people because they consist of people,[57] yet the *Hobby Lobby* precedent does not "reflect… the varied interests of the actual human beings who own its equity."[58] Instead, it honors the religious beliefs of a few people involved in the company's leadership. By only accepting the religious beliefs of the highest positions as the sole representations of the beliefs of a business, the religious beliefs and other First Amendment rights of stakeholders with different religious beliefs are ignored. The Court, therefore, fails to adequately recognize the rights of the people in a company. Though the motivation and reasoning in Justice Alito's opinion may differ, the impact is clear: the people with the most power involved (the *de facto* owners of businesses) have access to a greater amount of liberty in the form of rights that are not truly inalienable.

iii. Employees

Hobby Lobby also affects the healthcare that employees are provisioned.[59] Instead of reproductive healthcare benefits being provided by the employer, *Hobby Lobby* sets the precedent that such access to healthcare

50 *See id.; see also e.g., supra* note 9 at 54-55 ("[Horace Binney] sought to collapse the distinction between the corporation and its members, suggesting the courts see right through the corporation and focus instead on the people who compose it.").

51 *Id.* at 40 ("The least-restrictive-means standard is exceptionally demanding...and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.").

52 *See id.* (Ginsburg, dissenting).

53 Gregory Mark, Hobby Lobby and Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value (2016).

54 Hobby Lobby, 573 U.S. at 3 (syllabus).

55 *See* Hobby Lobby, 573 U.S. (Ginsburg, dissenting).

56 *Id.* at 12.

57 *See supra* note 50.

58 *Supra* note 48.

59 *Supra note* 48.

can be provided by the government in lieu of one's employer.[60]

While this disparate impact may seem like a reason to abolish corporate personhood, two things rebut this. First, the fact that all workers seeking the provision of healthcare that goes against the religious beliefs of an owner ultimately receive their benefits, no matter their source. Second, businesses are not democracies and do not have legal, ethical, or moral obligations to mirror the religious beliefs of the majority.[61] While it may be advantageous for a business to consider the preferences of stakeholders beyond the owners, they have no obligation to do so.

Instead, let us look at the non-uniqueness of the provision of healthcare in either scenario. The business owners viewed the action of providing financial assistance in the form of healthcare to their employees as consent to actions that violate their religious beliefs. This relies on the premise that monetary spending is indicative of expression and, in this case, religious exercise.[62] Thus, if the alternative created to solve this problem is that the business makes payments to the government so that they, as an intermediary, can provide the same services that the owners object to, one might say that this too is assent. If the monetary spending and provision of healthcare occur in either scenario, then the added bureaucracy of making payments to the government instead of the employees themselves is superfluous. One might even venture on to argue that the only impact of importance is the money saved when a business in this situation makes the substitute payments to the government are less than what would be spent on healthcare.

Some might say that the Supreme Court worked within the confines of the legal question at hand, which concerned RFRA's allowance of for-profit companies to deny employees health coverage of contraception. However, judicial realism shows us that the omission of a more nuanced discussion is purposeful. This idea is further supported by the fact that the only in-depth discussion of the consequences of this expansion of corporate personhood occurs in the dissent when Justice Ruth Bader Ginsburg says there is "no support for the notion that free exercise rights pertain to for-profit corporations."[63] While pointing out the error of maintaining that companies have First Amendment rights, Ginsburg highlights the lack of precedent. Thus, Justice Alito's dismissal of the contention that businesses cannot access First Amendment rights via the lack of supporting precedent is not mere *dictum* (non-binding language that is not core to a case's holding); it is judicial activism. While the majority opinion is focused on the argument that a business is included in the definition of "person,"[64] the dissent written by Justice Ginsburg also explains that the unique harm done to third parties in cases like this becomes a compelling state interest to protect and thus outweighs the government's interest in upholding a company's supposed religious freedom.[65]

In addition to the other insinuations made by the different aspects of the majority opinion, the Court's acceptance of Hobby Lobby's logic that directly providing contraceptive health care would be taking a stance violative of its religious beliefs suggests that the act of spending money is an act of speech or expression—a legal question confirmed by a previous case involving money in politics.

C. Money in Politics

One way of bypassing the democracy of American politics is through the possession and use of

60 *Id.*

61 *See e.g.,* Lynn Stout, Corporations Shouldn't be Democracies, (2007).

62 *See supra* note 48.

63 Burwell v. Hobby Lobby, 573 U.S. 682 (2014)(Ginsburg, dissenting).

64 *Id.* at 3 n.2.i. "And HHS's concession that a nonprofit corporation can be a "person" under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of "person" includes natural persons and non-profit corporations, but not for-profit corporations." The reduction of this interest to semantics instead of a substantive question of corporate law with tangible impacts is another example of a Court evading meaningful analysis and accountability.

65 *Id.* at 2, 7-8; see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 US _ (2020) (Ginsburg, dissenting). The harms to third parties in this case are more extreme since there is no alternative source of funding for employees to access the healthcare to which their employer objects.

abundant wealth. When wealthy actors in the form of businesses interfere in political processes, the result is political change that does not accurately reflect the will of the people and instead disproportionately reflects the wishes of a small portion of the population. In this context, this includes corporate heads with enough finances and market control to effectively control American politics. This section of the paper will discuss two ways money is used in politics and their corrupting impacts on democracy through the inaccurate representation of a politician's constituency. The first of these two ways is the *quid pro quo* funding of political campaigns, and the second is the lobbying done to get specific legislation passed.

i. Campaign Finances

Before the 2014 Supreme Court ruling of *Burwell v. Hobby Lobby*, the Court chose to recognize First Amendment rights of business to enjoy the freedom of speech in the 2010 ruling of *Citizens United v. Federal Election Commission*.[66] Previously in this section, attention has been drawn to the way that protecting the First Amendment rights of a few people in charge of a single business has negatively impacted the same rights of individuals. One dynamic present here is that the allowance of companies to affect political campaigns is undemocratic. During the oral argument made before the Supreme Court, the solicitor for Citizens United criticized the public agreement condition that was proposed in the lower courts by claiming that it is unreasonable for any court to require that businesses reflect the will of the masses in order to be politically active. This is consistent with the fact that companies are not democratically elected bodies. Therefore, their political activity via financial contributions or expenditures ought not to be accepted since their practice by these economically powerful, interested groups contradicts the democratic principles of the United States.

One example of disproportionate business influence in American politics is the lobbying done by the National Rifle Association (NRA).[67] The NRA is notorious for funding political campaigns via the organization's political action committees (PACs) and individual members rather than directly from the organization itself.[68] A combination of these two actors contributed $1,094,909 toward 2016 elections and spent $3,188,000 in lobbying efforts during that same year.[69]

Not only is this particular actor, in the opinion of this author, an example of immoral action resulting in the perversion of democracy, but it also serves as an example of a consequence of the *Citizens United* ruling: foreign interference with American elections.[70] First noted as a concern by Justice Ginsburg, Justice Alito asks the solicitor a leading question about whether foreign companies have any less access to First Amendment rights, to which the solicitor answers that there is no precedent or government concern to support the idea that foreign entities ought not have the same access to First Amendment rights.[71] After the spectacle that was the 2016 United States presidential election, the topic of foreign interference with political campaigns became a topic of national discourse. The potential for foreign influence in American politics is now acknowledged and abhorred by a majority of Americans. While the NRA is a 503(c) nonprofit organization, its multi-million

66 *Citizens United*, 558 U.S.

67 *See* Jones, *infra* note 76.

68 *See* Brennan Wiess & Syke Gould, *These are the Members of Congress with the Most NRA Donations,* Business Insider (Feb. 28, 2018), https://www.businessinsider.com/nra-political-contributions-congressional-candidates-house-senate-2018-2.

69 *National Rifle Assn Profile: Summary*, OPENSECRETS, https://www.opensecrets.org/orgs/summary?toppnumcycle=2016&toprecipcycle=2020&contribcycle=2020&lobcycle=2020&outspendcycle=2020&id=d000000082 (last visited Aug 5, 2020).

70 *Citizens United*, 558 U.S. at 47 (The issue of foreign influence is mentioned and dismissed as something the Court need not answer).

71 *See e.g., supra* note 32.

dollar private, corporate donors[72] include foreign companies like Italian-founded Beretta U.S.A and Benelli U.S.A.[73] Thus, we see how the NRA's acceptance of foreign funding casts a shadow on the façade of its mantra of protecting the all-American right to bear arms. After reputable sources confirmed that foreign efforts influenced the 2016 presidential election, most Americans responded negatively to the news.[74] On the surface level, foreign interference in a sovereign democratic nation's politics is harmful since it erodes the extent to which the people can be certain that the political process produces change that accurately reflects the people of the nation.

This issue of corrupt democracy is compounded in cases where the Supreme Court considers the amount of support certain legislation gathers when they have to decide whether or not to strike it down. For example, during the oral arguments for *Hobby Lobby*, one of the Justices makes a hypothetical argument in favor of RFRA by saying that the legislation gained much support when passed by Congress.[75] This referral to the popularity of legislation upon its passing supports the idea that heightened popularity of legislation increases the reluctance of Supreme Court justices to strike it down. Furthermore, this positive correlation also erodes democracy because the Court is meant to check the legislative branch rather than defer to it. When single corporations, such as the NRA, can leverage their donations against politicians, then legislation is not truly or enthusiastically supported by the majority of a politician's constituents but, instead, by the comparatively fewer owners of a single business. The judiciary becomes yet another branch that is unduly influenced by businesses when it mistakenly defers to perceived public support rather than *de factor* corporate manipulation.[76]

Thus, we see the reappearance of a familiar framework: businesses infringe upon the rights of individuals and defend themselves by claiming that they themselves have rights. Moreover, another effect is that politicians are motivated to represent the interests of a few people.[77] Thus, the argument against wealth corrupting the marketplace of ideas insofar as political efficacy is not given a proper response. There is little consideration of the fact that businesses directly or indirectly donating money to political campaigns in cases like this are extremely wealthy and do in fact violate the First Amendment rights of the masses by essentially skewing the political attention paid to certain issues and legislation. Ultimately, businesses are an unelected body of people that unjustly have significant political efficacy.[78] Actions by politicians whose campaigns were funded by businesses are not representative of their constituents because such politicians are motivated to pass legislation or otherwise act in ways that advance the agendas of the companies that donated to them and encourage further donations.

72 Danny Hakim, *Beyond the Grave, the N.R.A.'s $56 Million Donor Lives On*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2019/07/16/us/nra-donor-robert-petersen.html.

73 *Beretta Group Pledges $1 million to Benefit the NRA Institute for Legislative Action and Civil Rights Defense Fund*, NRA-ILA (Sept. 13, 2008), https://www.nraila.org/articles/20080903/beretta-group-pledges-1-million-to-ben. ("The National Rifle Association (NRA) announced today that the Beretta Group of companies, led by Beretta U.S.A., Benelli U.S.A., and Burris in the United States have pledged to give the NRA $1 million over the next five years.")

74 *See e.g.*, Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html.

75 Hobby Lobby, 573 U.S.

76 Jeffrey M. Jones, *Americans' Views of NRA Become Less Positive*, Gallup (Sept. 13, 2019), https://news.gallup.com/poll/266804/americans-views-nra-become-less-positive.aspx (This Gallup article includes a poll showing that the NRA has a low approval rate, which is "below 50% for only the second time in 30 years"). Corporations like the NRA are particularly odious since these companies have disguised themselves as an accurate perspective of American people; see also Domenico Montanaro, *Poll: Most Americans Want To See Congress Pass Gun Restrictions*, NPR (Sept. 10, 2019), https://www.npr.org/2019/09/10/759193047/poll-most-americans-want-to-see-congress-pass-gun-restrictions (Showing that most Americans support the idea of passing some sort of legislation that increases gun control.) This reform would include measures such as mental health screening and background checks.

77 *See e.g.,* Nicholas Confessore, Sarah Cohen & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. Times (Aug. 1, 2015), https://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html.

78 *See e.g., supra* note 61.

ii. Business Lobbyists

Businesses also interfere with accurate political representation when they spend money to promote or stifle certain legislation.[79] In 2012, Bill Gates and other affluent philanthropists supported Initiative 1240, a referendum to open public charter schools in Washington State.[80] Three times prior to this, similar referendum initiatives had failed. While these philanthropists intended to help people, other wealthy actors have less benevolent agendas. A short list of actors includes companies whose impacts range from opposing desegregation, impeding progress for the feminist movement, the rise in obesity in the United States, an increase of cancer rates caused by the use of tobacco products, and, most regrettably, the escalation of school shootings.

All lobbyists share the interest of supporting public policy that coincides with their own agendas. Groups like the American Civil Liberties Union, Public Citizens for Children and Youth, and the National Association for the Advancement of Colored People are organizations motivated by public advocacy.[81] Historically, the work done by organizations like these are on behalf of marginalized groups that lack the political efficacy to enact the change they wish to see in their communities.[82] While these businesses have used the benefits of corporate personhood to bring forth social progress, this cannot be said of all lobbyists.

Many believe that the NRA is another example of a corporation focused on advocating for citizens, but the contention that the NRA is a corporation primarily interested in reflecting the interests of American gun owners is undermined by its acceptance of significant foreign donations and lobbying efforts that contradict the wellbeing of American people.[83] The NRA Institute for Legislative Action has added many lobbying efforts to the books over the years, including efforts in favor of Congress cycle's Manchin-Toomey Amendment to S. 649, and against legislation such as the Fix Gun Checks Act of 2013.[84] All of this effort to thwart legislation is especially harmful since studies have shown that this reform could be effective at decreasing the rate of gun violence in the United States.[85] By ensuring that politicians produce legislation that reflects a distorted version of public desire, lobbyists are able to perpetuate the political inefficacy of everyday voters.

79 *Remarks of Senator Barack Obama*, N.Y. Times (June 22, 2007), https://www.nytimes.com/2007/ 06/22/us/politics/22text-obama.html («When I arrived in Washington eight years later, the need for change was equally clear. Big money and lobbyists were clearly drowning out the aspirations of the American people.").

80 Valerie Strauss, *Microsoft Gives $50,000 More to Washington Charter School Initiative*, Wash. Po. (Oct. 20, 2012), https://www.washingtonpost.com/news/answer-sheet/wp/2012/10/20/microsoft-gives-50000-more-to-washington-charter-school-initiative/.

81 *See e.g.,* National Association for the Advancement of Colored People, *About Us*, NAACP (Accessed Aug. 17, 2020, 3:52pm) https://www.naacp.org/about-us/. "The vision of the National Association for the Advancement of Colored People is to ensure a society in which all individuals have equal rights without discrimination based on race."; *see also e.g.*, American Civil Liberties Union, *History,* ACLU (Accessed Aug. 17, 2020) https://www.aclu.org/. ("The ACLU dares to create a more perfect union — beyond one person, party, or side. Our mission is to realize this promise of the United States Constitution for all and expand the reach of its guarantees.").

82 *See e.g.,* Brown v. Board of Education, 347 U.S. 483 (1954); *see also e.g.,* Trump, President of the United States, v. National Association for the Advancement of Colored People, 591 US _ (2020); *see also e.g.,* Frontiero v. Richardson, 411 US 677 (1973).

83 Jones, *supra* note 76; see also Madison Thomas, UWire (Oct. 24, 2017) ("In response to the 2012 Sandy Hook shooting, the NRA donated a record $2.7 million to its political action committee, the National Rifle Association of American Political Victory Fund, the following January and February…This year saw the deadliest single mass shooting in modern American history, as well as the largest year of spending for the NRA. From June to July of 2017, $3.2 million dollars have been spent on lobbying alone, compared to $3.1 million in the entirety of 2016. There is a clear connection between the occurrence of gun-related terrorist attacks on American soil and the NRA's attempts to continue to protect the very same weapons.").

84 Sam Musa, *The Impact of NRA on the American Policy*, 4 J. Pol. Sci. Pub. Aff. 1, 2-4 (2016).

85 Rand Corporation, The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States, (2018); *see also* David DeGrazia & Lester Hunt, Debating Gun Control, (2016).

III. DISCUSSION: ECONOMIC IMPACTS

The most direct impacts businesses have on society at large are economic ones because of the codependent nature of independent people and companies. In addition to being shareholders or the owners themselves, individual people are the consumers and employees upon which companies rely.

A. Limiting Consumer Choice

Beyond the scope of people more immediately involved with businesses are members of the general public that elect to take part in the affairs of a business by way of consumption. Monopolies limit the free agency of consumers by limiting the choices available in a given market. Two impacts of this will be discussed in this section: the inability of consumers to freely associate with businesses that support their own values and the high price increases that result from price control.

In addition to limiting the choices available for consumption, the existence of monopolies allow a limited number of companies to take advantage of an entire industry's price control.[86] The Supreme Court case *Apple Inc. v. Pepper* is an example of a corporate case that concerned this kind of price control.[87] While Apple's global market share hovers around 20%,[88] its market share in the United States is significantly higher, reported to be at 47% in the fourth quarter of 2018.[89] Apple's revenue largely consists of what it earns from the provision of products and services.[90] Alarmed by what seemed to be Apple's ability to raise app store prices without consequence, consumers sued the company.[91] Since Apple is not directly responsible for the prices of their apps, the counsel arguing on behalf of the company maintained that the class action suit ought to have been raised against the app developers that were raising the prices.[92] Initially left unsaid was the fact that Apple had been steadily increasing its contractual fees with independent app developers,[93] which in turn motivated the developers to raise the prices of their smartphone applications in order to maintain their bottom line.[94]

So, then, the ultimate question before the Court was one of responsibility: are the consumers "proper plaintiffs for this kind of antitrust suit,"[95] allowing them to bypass the developers and sue the company for harmful pricing? In the dissenting opinion, Justice Neil Gorsuch explains his frustration through something that could nominally be referred to as the pass on theory. Because developers were passing on the price of the heightened contractual fees, they ought to have been the ones held responsible.[96] On the other hand, Justice Brent Kavanaugh ultimately blamed Apple's monopoly and predisposition to optimize their profits in

86 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776) ("The monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate").

87 587 U.S. _ (2019).

88 *Team Counterpoint, Global Smartphone Market Share: By Quarter*, Counterpoint (May 18, 2020), https://www.counterpointresearch.com/global-smartphone-share/.

89 *Team Counterpoint, US Smartphone Market Share: By Quarter*, Counterpoint (May 17, 2020), https://www.counterpointresearch.com/us-market-smartphone-share/#:~:text=Apple%20is%20still%20leading%20the,39%25%20share%20in%20Q3%202018.

90 *Press Release, Apple, Apple Reports Record First Quarter Results*, Apple (Jan. 28, 2020), https://nr.apple.com/d2i8z883J5.

91 Apple, 587 U.S.

92 *Id.*

93 *Id.*

94 *Id.* at 2 (Gorsuch, dissenting); *see also, e.g.,* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481 (1968).

95 *Id.* at 4.

96 *Id.* at 5 (Gorsuch, dissenting).

his explanation for the majority opinion.[97] He specifically mentions that their contractual fees and 30% share of the profit from each app compound their interest in profit.[98] Thus, the higher prices are a direct result of Apple's behavior since the prices would not have gone up without the added fees and reduction of revenue received by application developers. In this instance, Apple dominates in the market and exploits application developers' willingness to contract, thus limiting the economic agency of the consumer by taking advantage of the limited number of options available.

Beyond the scope of price control, corporate personhood has also affected the extent to which consumers are able to impact the range of the option set available to them; in addition to causing prices in a market to increase, monopolies also limit the number and variety of suppliers.[99] As one of a limited amount of suppliers, there is limited competition and thus limited motivation for businesses to act in consideration of what is best for society; businesses with considerable control of the market are less likely to adopt programs that primarily exist for the sake of public good.

A harmful impact of limiting the convenience of a proper option set is the reduction in the power of the consumer. An example includes the existence of only one kind of coffee shop on urban college campuses: Starbucks—a common indicator of incoming gentrification.[100] In this common situation, affiliates of a university that are against gentrification have no other choice within the given option set but to support a chain that shares responsibility for uprooting communities and encouraging young white professionals to stay. Even if these people chose not to consume Starbucks products, the remaining portion of the community only has one option for access to convenient caffeine and related products. Here we see that attempted boycotts motivated by problems perpetuated by the private sector become less likely to have a big impact on sales revenue if the businesses responsible for perpetuating the issue are the only available retailers or providers in the area.[101] The result here is clear: companies that harm society are able to continue to do so when they have significant control of the market, and consumer activism becomes less effective as a result of this monopoly.[102]

B. No Right to Contract

The United States of America is a democracy and, therefore, is meant to prioritize the rights and agency of its citizens. Consistent with this is the idea that the U.S. does not place other incentives, monetary or otherwise, above this interest. Inconsistent with this is the reality of allowing private businesses to solve disputes involving the infringement of such rights.

There is a long history of unsuccessful cases in which this supposed right to contract is further limited.

97 *Id.* at 8, 11, and 14.

98 *Id.* at 2-5.

99 Smith, *supra* note 86.

100 *See Starbucks Accused of Abusing Monopoly Power in Violation of Sherman Act*, Gale Academic OneFile (Sept. 25, 2006), https://go-gale-com.proxy.library.upenn.edu/ps/i.do?p=AONE&u=upenn_main&id=GALE%7CA151859264&v=2.1&it=r&sid=summon; *see also Starbucks Sued for Trying to Sink Competition*, CNN Money (Sept. 26, 2006), https://money.cnn.com/2006/09/26/news/companies/starbucks/.; *see also* Benjamin Y. Fong, *Unfair Trade*, The Outline (Apr. 3, 2020), https://theoutline.com/post/4192/starbucks-racism- timeline?zd=1&zi=otkxrn4e.

101 Timothy J. Brennan, Refusing to Cooperate with Competitors: A Theory of Boycotts (1992) ("For a boycott to be effective, the target firm must fall victim to higher input prices or a decrease in demand for its output.").

102 *Id.; see also* Zephyr Teachout, *Boycotts Can't Be a Test of Moral Purity*, The Atlantic (August 3, 2020), https://www.theatlantic.com/ideas/archive/2020/08/boycotts-cant-be-a-test-of-moral-purity/614821/. ("The reason for this is that boycotts replace tension in the political sphere with tension in the private sphere, putting the central axis of tension between the firm and the activists.") As the quote suggests, this article adopts a critical lens while evaluating the social effects of boycotting. One of the most salient points include the fact that holding monopolistic (and otherwise problematic) businesses accountable ought to be the burden of policymakers rather than consumers. While this would probably be more efficient, this argument fails to acknowledge that policymakers are politicians that care most about being reelected. If neither wealthy donors nor everyman voters demonstrate disdain for certain businesses, then there is no motivation for a politician to pass policy that reflects such disapproval. The article is certainly correct about other things, such as the fact that ethical consumerism without complementary policy often fails to produce long-term success.

For example, the dissents in the *Slaughter-House Cases* refer to the violation of the freedom to contract via the Due Process Clause of the Fourteenth Amendment.[103] However, it was not until *Frisbie v. United States* that the idea of a right to contract is recognized at all,[104] and it was not until the 1897 case of *Allgeyer v. Louisiana* that the Supreme Court delivered a majority opinion declaring that the due process clause of the Fourteenth Amendment protects one's ability to contract.[105] This line of development is particularly remarkable since it includes a rare occasion where a right is affirmed for businesses before it is for individuals. Nevertheless, this section will explain that protecting this action has had two negative consequences for individual people: coercive employment contracts and private arbitration.

i. Employment

In addition to affecting the agency of individuals when it comes to participating in the economy, additional economic impacts of corporate cases include employment. Contracts for employment could be characterized as coercive due to common features such as incongruous scheduling, inadequate compensation, and the ultimate impact of perpetuating wealth inequality.

Some might argue that employees are capable of leaving any company if they are not satisfied with the terms of their employment, but this is not true for the many who work menial jobs or for those whose work requires skill or otherwise involves classified information because exit different barriers exist for both of these groups.[106] For low-skilled workers, the businesses they work for are easily able to replace them and thus the voice of the individual employee is not very efficient in terms of creating change through self-advocacy. This has created a reality where most menial jobs involve similar features, such as long hours, inadequate compensation, and abusive scheduling. Thus, due to the excess of people applying for each available position and the similarity of working conditions, the average low-skilled worker does not benefit from leaving one job to go to another with the same issues. Even high-skilled workers face repercussions for trying to seek better employment. Many of these highly technical jobs have non-compete clauses in their initial employment contracts which make it more difficult for those people to find employment in a short period of time after leaving another company. This can lead to their skills no longer being up-to-date and further prevents them from being ideal candidates when they seek employment after the end of their non-compete clauses. Thus, employees are motivated to stay employed at their current job since the task of finding new work elsewhere is strenuous in the short-term and does not outweigh the burden of sticking to a job that provides steady income. Similarly coercive are clauses included in employment contracts that compel employees to private arbitration. Thus, the agreement between an employee and their employer does not necessarily qualify as satisfaction with the agreement, especially when the option set is homogenous or limited.[107]

ii. Pursuing Legal Action

The Supreme Court's support of private arbitration has led to a proliferation of disputes solved outside of court. In the 2001 case of *Circuit City Stores, Inc. v. Adams*, the Supreme Court considered facts involving the employment contract between a sales counselor and his employer.[108] Saint Clair Adams, the counselor, filed

103 83 U.S. 36 (1873).

104 157 U.S. 160 (1895).

105 165 U.S. 578 (1897).

106 *See e.g.,* Vincent S. Flowers & Charles L. Hughes, Why Employees Stay, (1973) ("The exhibit shows that low-skill manufacturing employees stay primarily for maintenance or environmental reasons, many relating to the non work environment. Seven of their top ten reasons relate to the external environment—for example, "I wouldn't want to rebuild the benefits that I have now" and "I have family responsibilities." Their two outstanding reasons for staying that relate to the internal environment are fringe benefits and job security. These employees will not remain on the payroll because of job satisfaction. To them, factors outside the company are more important...Managers offer quite a different profile. They stay mainly for reasons related to their jobs themselves and community ties; the difficulty of finding another job, family responsibilities, and company loyalty exert relatively less influence on them.").

107 *See* Elizabeth Anderson, Liberty, Equality, and Private Government (2015).

108 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

a discrimination lawsuit against his employer after signing the contract, which required that all disputes be settled by arbitration.[109] Circuit City then argued that Adams must be compelled to arbitration via the Federal Arbitration Act (FAA).[110] Ultimately, the Court considered the issue of whether or not the exclusions listed in the FAA applied to employment contracts.[111] Thus, private arbitration has had negative effects on those who wish to pursue legal action. For example, employment contracts often include clauses forbidding class action suits. This is another instance of businesses infringing upon the rights of their employees and saying that they are simply exercising their own rights. In this case, the ability to contract is being used as a justification for preventing two things: the faults of a business being handled by the court system and negative publicity.[112]

Effects of the increased popularization of private arbitration include one derivative of an argument based on principle: the decrease of justice. Businesses prefer private arbitration over going to court because doing so saves them time and money, both of which companies spend more of when disputes go to court. This also benefits any employees involved in a given case. To some extent, private arbitration creates a more equitable standing ground for each side because businesses are usually able to dedicate more monetary resources to any given legal issue. This often gives them an upper hand in lengthy court battles and can discourage employees from continuing to seek redress for their grievances.[113]

Perhaps a more pragmatic argument against private arbitration is the increase of injustice. Private arbitration does not involve the same amount of public scrutiny as a case tried in court.[114] This privacy increases the likelihood that businesses will repeat the egregious behavior in the future, thus increasing the amount of injustice in the workplace. One prominent example of this is sexual harassment in the workplace and how sweeping it under the rug perpetuates a hostile workplace that results in more people experiencing sexual harassment. Additionally, forced arbitration removes employees' access to a civil suit involving a jury of their peers. Finally, the decisions in private arbitration are often final, whereas decisions involving two parties established in court can be appealed.[115]

IV. CONCLUSION

While the merit of corporate personhood remains a contentious concept constantly affected by the spectrum between judicial activism and *stare decisis*, there is no doubt that such development has greatly impacted the rights of individuals. This article has shown examples of the choices and beliefs of the few affecting the many. The most salient points supporting this include the limitations that corporate cases have introduced to the rights of individuals insofar as the First Amendment and economic agency. In the first part of this article, the Courts usually justified their rulings by explaining that the suppression of First Amendment rights was unconstitutional.[116] In spite of this concern, these decisions protected the First Amendment rights of the "owners" of businesses while simultaneously limiting the same rights of many others. In the next section , it became clear that the Court expresses multiple perspectives on the economic circumstances that can limit individuals' agency. Something the Court apparently agrees on is upholding private arbitration, often without discussion of the consequences.

109 *Id.*

110 *Id.*

111 *Id.*

112 *See e.g.,* Katherine Stone & Alexander Colvin, *Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.

113 In the end, we see once again that one motive to further develop corporate personhood is financial. Such motives are explicitly stated in an amicus curia submitted to the Supreme Court while they were deciding Circuit City Stores. Among other things, the document explains that advantages of private arbitration include saving time and financial resources.

114 Circuit City Stores, 532 U.S.

115 *Id.*

116 *See* Medical Services v. Russo, 591 U.S. _ (2020); Whole Woman's Health v. Hellerstedt, 579 U.S. _ (2016); Roe v. Wade, 410 U.S. 113 (1973); Burwell v. Hobby Lobby, 573 U.S. 682 (2014).

Finally, one must also consider the reverse. Without the development of corporate personhood, organizations such as the American Civil Liberties Union and the National Association for the Advancement of Colored People probably would have had a harder time fighting cases that result in undeniable social good. On the other hand, the non-uniqueness of complicity in cases such as *Hobby Lobby* show that the only real difference between the existence of corporate personhood and a lack thereof is the commodification of rights.[117] While individuals are also capable of being exploitative and primarily motivated by profit, the difference is the compounding of protection that corporate personhood provides.

This leads to a bigger discussion that simultaneously implicates the future of corporate law in the United States: are the rights and agency of people in the United States intrinsically valuable? If there is intrinsic value in the rights afforded to people by their government, then one can expect to see a Supreme Court that leans toward the disenfranchisement of businesses.[118] Judicial activism would be necessary in order for this to occur since such a trend would violate *stare decisis*. If the purpose of having rights is that they may not be infringed upon without due consequences and further deterrence of such violation, then surely granting those same protections to corporate entities that in turn use them to justify the infringement they perform upon individuals is not just. To avoid excessive negative impacts, judges must first acknowledge that their decisions are influenced by inescapable differences in perspective. Only after taking accountability will society be able to progress to one that benefits from decisions that are not only just, but also moral.

117 Winkler, *supra* note 9, at xxi-xxii.

118 Michael Sandel, What Money Can't Buy (2012) at 312 ("To corrupt a good or a social practice is to degrade it, to treat it according to a lower mode of valuation than is appropriate to it.").

Emotionally Objective:
Federal Rule of Evidence 403 and Emotions Influencing Jury Decision Making

Shauli Bar-On
University of Southern California

Abstract

The only individual right inscribed in the Declaration of Independence, Constitution, and Bill of Rights is the right to a trial by jury. By vesting fact-finding in a jury of one's peers, the American legal system ensures that the government must gain the approval of its citizens before depriving an individual of his or her liberty. However, the legal system's Framers did not relinquish all power to jurors; in fact, they expressed an inherent distrust of them. After years of Supreme Court drafting, Congress codified the Federal Rules of Evidence (FRE) in 1975. The rule that most illustrates a distrust of juries is FRE 403, which holds that relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. In other words, evidence that has a danger to unfairly inflame the passions of the jury by being overly emotional is blocked from their review. The following experiment tested whether Rule 403 is necessary: whether the average person, when exposed to evidence that would otherwise be excluded under this rule, truly would be overcome by emotion, so much so that it causes him or her to reverse his or her verdict. By comparing emotionally neutral evidence with evidence designed to induce discrete emotions, this experiment suggests that a juror's emotions play a larger role than his or her demographics or previous experiences in influencing his or her judgement. Of the emotions elicited, sympathy for the defendant played the most significant role, followed by anger, fear, and sadness.

I. INTRODUCTION

Aristotle claimed that "the law is reason free from passion."[1] However, examination of any criminal trial challenges that assertion.[2] Trial lawyers are trained to persuade not only with facts, but also with stories.

Previous experiments have made clear that juries react more to evidence that is emotional in nature. Extending that principle, experiments have illustrated that jurors are more likely to render verdicts against a side that angers or disgusts them, and they are more likely to render more punitive damages against parties that anger or disgust them. Jurors have been shown to react most extremely and frequently to anger and disgust as opposed to other emotions.[3] Comparing the results of a past experiment with Richard Lazarus' emotions theory, the relationship was clear: anger and disgust lead to the strongest reaction from individuals.[4] Sadness, by contrast, causes the reverse in individuals, and it will often cause them to close off and *not* act.[5] Fear has been explored as well. Previous experiments suggest that when individuals feel fear, they question and seek more information.[6]

In this article, I discuss the origins of Federal Rule of Evidence 403 and its intended purpose, provide background information on Lazarus' emotions theory as it relates to the jury process, compare my experiment to prior experiments that attempted to measure emotions among jurors, and, finally, detail the methodology and results of this study. By comparing emotionally neutral evidence with evidence designed to induce two discrete emotions, anger and fear, this experiment found that a juror's emotions played a larger role than his demographics or previous experiences in influencing his judgement. Of the emotions elicited, sympathy for the defendant played the most significant role, followed by anger, fear, and sadness. This experiment suggests that, everything else being equal, an average person may be overcome by emotion, so much so that emotion determines his or her verdict when exposed to evidence that would otherwise be excluded under Rule 403.

II. RELEVANT BACKGROUND

A. Federal Rule of Evidence 403

The jury process grew out of the traditions of English law. Its underlying purpose was to ensure that a defendant's fate is not decided by the government but, rather, by the community in which he or she resides. As the famed defense attorney Johnnie Cochran once put it:

> The existence of the jury is the most powerful expression of the American people's ultimate faith in the virtue of popular sovereignty. In the most critical matters—often involving life and death—we trust the interests of our community, not highly trained experts, towering intellectuals, or even elected officials. We entrust our welfare to twelve ordinary American people. We rely on their conscience, their goodwill, and the wisdom of their collective experience to dispense justice—without which liberty itself is a meaningless abstraction.[7]

Cochran, of course, acknowledges that juries sometimes render inaccurate verdicts or are persuaded

1 Aristotle, 1287a *Politics Book III* 32.
2 Aristotle may be discussing the law itself, not the application of the law in criminal trials, as Cochran discusses later, but the point still stands: passion is inherent in the law's application.
3 Neil Feigenson, *Jurors' Emotions and Judgments of Legal Responsibility and Blame: What Does the Experimental Research Tell Us?,* 8 Emotion Rev. 26, 27 (2015); Niel Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review,* 30 Law & Hum. Behav. 143, 149 (2006); Jennifer Lerner & Larissa Tiedens, *Portrait of the angry decision maker: How appraisal tendencies shape anger's influence on cognition,* 19 J. Behav. Decision Making 115, 120 (2006).
4 Feigenson, *supra* note 2 at 27; Feigenson, *supra* note 3 at 149; Lerner & Tiedens, *supra* note 4 at 120; Jessica Salerno & L, Peter-Hagene, *The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments,* 24 Psychol. Sci. 2069, 2072 (2013).
5 Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgments,* 20 Behav. Sci. & L. 423, 430 (2002).
6 *Id.*
7 Johnnie L. Cochran and Tim Rutten, *Journey to Justice* 187 (1996).

by meritless arguments. The truth, while present, is not always what is most influential or ultimately decisive in the outcome of a trial. To that he responds, "and if that justice is not always perfect—well, neither is anything else this side of the grave."[8]

Richard Restak, a neurologist and neuropsychiatrist with over a decade of experience in psychological analysis of the court system, wrote of the fiction of "reasonableness" in the context of jury instructions, claiming that "emotions are not incidental and not subsidiary to rational process. Instead, the reasonable person, even at his or her most reasonable moments, is influenced by emotional processes."[9]

Hence, the legal system consists of mechanisms to check the jury. The American system of law allows for judges to filter information and decide what the jury is officially permitted to consider. Federal Rule of Evidence 104 (a) codifies this: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."[10] The Federal Rule of Evidence that most clearly displays legislative and juridical concerns about juries is Rule 403. The rule reads, "Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice."[11] The Advisory Committee Notes to Rule 403, written when the United States Congress approved the uniform Federal Rules of Evidence, explain that "'unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[12]

Underlying Rule 403 is a model of optimal jury behavior. Ideally, the system is structured in a way for juries to use admitted items of evidence as proof of only the factual propositions the judge admits them to prove; ascribe the proper probative weight to each item of evidence; and concentrate on the issues disputed in the case.[13] Rule 403 reflects concerns about a jury's ability to reasonably weigh all evidence, and it is the quintessential juror-centric rule in that it is designed to exclude evidence otherwise admissible out of a fear over the irrational effect such evidence may have on the jury's decision making.[14]

Legal scholars have commented on Rule 403 extensively: one notes, "There is an apparent contradiction between the conception of the ideal juror as a logical reasoning machine and also as a source of community attitudes, sentiments, and moral precepts."[15] Another legal scholar opined that "the idea that justice requires emotional detachment, a kind of purity suited ultimately to angels, ideal observers, and the original founders of society, has blinded us to the fact that justice arises from and requires such feelings as resentment."[16] This paradox is the inspiration for this experiment.

B. Emotions Theory

Tracing the history of the study of emotions reveals that their discovery is ongoing. We still do not fully understand how emotions are formed, nor do we know precisely how we express them.

Richard Lazarus's Appraisal Theory was a turning point in emotions theory. Lazarus's theory built off the cognitive component in the 1962 Schachter Singer theory.[17] Lazarus's experiments suggested that the body

8 *Id.*
9 Richard Restak, *The Fiction of the Reasonable Man,* The Washington Post (1987).
10 Fed. R. Evid. 104.
11 Fed. R. Evid. 403.
12 *Id.*
13 Edward J. Imwinkelried, *The Need to Amend Federal Rule Evidence 404(b),* 30 Vill. L. Rev. 1465, 1472 (1985).
14 Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 Cath. U. L. Rev. 153, 166-67 (2008).
15 Reid Hastie, *Emotions in Jurors' Decisions,* 66 Brook. L. Rev. 991 (2001).
16 Robert C. Solomon, *A Passion for Justice Emotions and the Origins of the Social Contract*, 34 (1995).
17 Schachter and Singer were the first to suggest there is a cognitive component to emotions. They suggested that emotions consist first of a physiological arousal, followed by the mind identifying that arousal and assigning an emotion to it. This theory revolutionized Descartes's traditional understanding that emotions are rooted in the desires of the soul; *see* Stanley Schachter & Jerome Singer, *Cognitive, Social, and Physiological Determinants of Emotional State,* 69; *see Psychol.*

evaluates an external stimulus, appraises its meaning, and then registers a particular emotion based on the body's coping mechanisms.[18] However, Lazarus believed that the cognitive component comes before the emotion is felt. Lazarus gave an example of a person encountering a snake. The individual encounters the stimulus, evaluates whether he is in danger, and then undergoes a secondary appraisal to decide whether he has any available ways to cope with the danger. The combination of these two evaluations results in different emotions: it could result in fear if the person realizes he or she is pinned to a wall, or it could result in amusement, awe, or fascination if he or she is observing the snake at a zoo.[19]

What is certain, according to cognitive emotion theorists, is that in the context of watching a clip or reading a book, some comprehension or reasoning takes place in order for the emotion to take form.[20] Jurors, for example, must understand the language and the testimony, comprehend it, and register it in order to feel something because of it.

This experiment relies on Lazarus's Appraisal Theory of emotion. This cognitive theory asserts that emotions are determined by people appraising stimuli, suggesting that appraisals mediate between the stimulus and the emotional response. Lazarus' theory involves two appraisals. The first, primary appraisal, deals with establishing the significance or meaning of the stimulus. The secondary appraisal comes after the emotional response. He called this the coping appraisal, where one assesses what action to take to cope with the emotion that was aroused.

In a jury trial context, the primary appraisal comes after the stimulus, which, in this case, would be the evidence the jury is presented and exposed to. Based on the nature of the evidence, the jury appraises it, and the result is an emotional response. Following the emotional response, jurors undergo the secondary appraisal. They once again appraise what action to take based on the evoked emotion. In this context, the response is the verdict they ultimately render.

Some strong critics challenge the cognitive theory of emotions and the Appraisal Theory.[21] A number of criticisms stem from the idea that there are occasions where we experience an emotion before we think about it or process it, such as fear during a jump scare. There is a reason it is said that "smiles are contagious." At certain times it is not necessary to fully comprehend *why* someone is feeling a particular emotion for that emotion to transfer. In the context of jury trials, a witness may cry on the stand, and jurors will at the very least be more prone to feel sad while watching the witness testify. This experiment could not afford the model jurors this opportunity, and the extent to which they felt the emotions intended by the fact pattern is limited to their self-reporting.

This experiment utilizes the Appraisal Theory because of the secondary coping mechanism appraisal. Jurors have a unique opportunity not only to experience certain emotions, but to decide how to cope with them. This experiment assesses whether certain emotions lead to a different coping mechanism and whether a particular verdict is rendered to cope with emotions.

C. Literature on Emotions Affecting Jury Decisions

There is a substantial body of scholarship concerning the use of emotion in jury decision making and deliberation. Jurors describing their experience with emotions often report experiencing emotions including anxiety, irritation, anger, fear, and sympathy.[22] A team from Australia conducted an experiment and found that

Rev. 121, 122 (1962); Robert C. Solomon, *What is an Emotion? Classic Readings in Philosophical Psychology 2nd Edition*, New York: Oxford University Press, 25 (2003).
18 *Id.* at 130.
19 *Id.* at 114.
20 Solomon, *supra* note 19, at 118; Schachter & Singer, *supra* note 19, at 19; Randolph R. Cornelius, *Gregorio Marañon's Two-Factor Theory of Emotion*, 17 Personality and Social Psychology Bulletin 1, 65-69 (1991).
21 Gary D. Marshall & Phillip G. Zimbardo, *Affective Consequences of Inadequately Explained Physiological Arousal,* 37 J. Personality & Soc. Psychol. 970, 980 (1979).
22 Carole L. Hinchcliff, *Portrait of a Juror: Selected Biography,* 69 Marq. L. Rev. 495, 497 (1986); Nancy S.

jurors were more likely to convict, at almost double the rate, when presented with gruesome evidence.[23] Judges are harsher or more lenient depending on the emotions they experience too.[24]

Emotion in jury decision making has also been researched heavily in the context of the jury's observation of a defendant's behavior and demeanor.[25] Several studies have found the defendant's perceived remorse, based on in-court observations of the defendant, even in cases in which he or she never testifies, to be one of the major factors influencing the jury's emotions and, subsequently, their decision about whether to sentence him to death.[26] Scott Sundby recorded several interviews with jurors in capital cases and found that jurors became increasingly angry at what they perceived as the defendant's nonchalant, arrogant attitude as he sat in the courtroom.[27]

When jurors feel sadness, they tend to question the evidence and be more skeptical of it.[28] Several studies also indicate that jurors are most prone to base their decision upon feeling anger or rage toward one side.[29] In one experiment, outrage was concluded to be the primary motivator of jurors' decisions concerning punitive damages.[30] Another experiment found that the impact of the severity of an injury on mock jurors' judgements of liability and compensatory awards is mediated by jurors' feelings towards the parties involved in the cases.[31]

One experiment by Gross & Levenson successfully induced particular emotions in a group of participants using video clips. The experiment found that video clips successfully provide a reliable means of eliciting discrete emotions such as anger with only minimal levels of other emotions.[32] Utilizing this discovery, another team showed jurors videos meant to elicit certain emotions and determined that jurors are more likely to assign harsher punitive damages and are more likely to find liability or guilt if they are primed to feel anger from one of the videos used in the Gross & Levenson experiment.[33] The team has also demonstrated an emotional spillover effect in a legal judgement through a similar experiment.[34] There, researchers generated hostile emotions in participants by showing them a clip of bullies assaulting a young boy. Then, in a separate trial, the participants

Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465, 479 (1997).

23 David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame and Jury Decision-Making,* 30 Law & Hum. Behav. 183, 192 (2006).

24 Mary L. Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements,* 6 L., Culture & Human. 75, 103 (2010); Terry Maroney, *Angry Judges,* 65 Vand. L. Rev. 1205, 1239 (2012); Richard A. Posner, *How Judges Think,* Caambridge: Harvard University Press 110 (2008); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases,* Vanderbilt University Law School, Public Law & Legal Theory Research Paper Series 7 (2007).

25 Jessica S. Salerno & Bette L. Bottoms, *Emotional Evidence and Jurors' Judgments: The Promise of Neuroscience for Informing Psychology and Law,* 27 Behav. Sci. & L. 273, 286 (2009).

26 Susan A. Bandes, *Centennial Address: Emotion, Reason, and the Progress of Law,* 62 DePaul L. Rev. 921, 925 (1999); Demmy Chin, *Sentencing: A Role for Empathy*, 160 U. Pa. L. Rev. 1561, 1570 (2012); Leah C. Georges et al., *The Angry Juror: Sentencing Decisions in First-Degree Murder*, 27 Applied Cognitive Psychol. 156, 162 (2013).

27 Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 88
Cornell L. Rev. 1558, 1564 (1998).

28 Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgements,* 20 Behav. Sci. & L. 423, 430 (2002).

29 Feigenson, *supra* note 2, at 27; Feigenson & Jaihyun Park, *supra* note 3, at 153; Lerner & Larissa Tiedens, *supra* note 4, at 120; Salerno & Peter-Hagene, *supra* note 5, at 2072.

30 Cass R. Sunstein et al., *Predictably Incoherent Judgments,* 131 Olin Working Paper 14, 1415 (2001).

31 Bryan H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?,* 23 L. & Human Behav. 75, 81 (1999).

32 James G. Gross & Robert W. Levenson, *Emotion Elicitation Using Films,* 9 Cognition & Emotion 87, 105 (1995).

33 Jennifer Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility,* 24 Personality and Social Psychology Bulletin 563, 566 (1998).

34 *Id.* at 570.

were asked to make culpability judgements, and the participants were explicitly told that the film they had previously watched was irrelevant to the task at hand and that it had no connection to the scenarios in the cases they were deciding. Even so, participants who were exposed to the anger-inducing film judged the defendants to be more responsible and more liable, rendering higher-level damages as well.[35]

Emotional spillovers such as the one described in the aforementioned experiment are called "incidental emotions."[36] An "incidental emotion" is the "ambient mood or emotional state of the decision maker at the time of the decision."[37] A juror may experience an incidental emotion of frustration, for example, because of traffic or work-related problems. As indicated by the literature above, the incidental emotion hypothesis has been tested and proven accurate many times.[38]

III. EXPERIMENT: WHICH EMOTIONS HAVE THE GREATEST EFFECT ON JURY VERDICTS

A. Methodology

The body of research into juror emotional decision making is extensive, but little to no research has been conducted in determining whether Rule 403 is truly effective in preventing jurors from being overtaken by emotion. Based on the existing literature, this experiment tests whether emotions, particularly anger, have the ability to flip an individual juror's decision. The experiment focuses on an individual's decision-making process and does not touch on group dynamics and the complications that arise when several people have to make a unanimous decision together.

This experiment presented scenarios intended to elicit particular emotions among participants and had them rate to what extent they believed the defendant to be guilty. The surveys were designed to assess whether the results vary from the aforementioned studies and to examine whether a particular characteristic, such as race, gender, education level, etc., made jurors more susceptible to being influenced by the emotion elicited.[39]

This experiment is designed around a single case with three variations: a control, a second variation identical to the control except it includes video evidence meant to induce anger, and a third variation identical to the control with a video meant to induce fear. Both non-control variations contain evidence that would not survive a Rule 403 balancing test and would be deemed inadmissible. This experiment aims to determine whether one emotion proves to be more persuasive and emotionally swaying compared to the other in terms of the jury's ultimate verdict.

This experiment was conducted through Qualtrics and administered through Amazon Mechanical Turk. The Qualtrics survey included three different factual scenarios and was programmed to administer an even distribution of each of the three scenarios. Each participant only viewed a single scenario chosen by the program at random. Participants were instructed to act as if they were a juror in a criminal trial. The following instructions were displayed before the participant began the questionnaire: "You will be presented with a factual scenario as part of a criminal trial. You will be acting as a juror. Please read the charge, the factual scenario, and the jury instructions before deciding on a verdict and answering the questions that will follow."

After participants viewed one of three factual scenarios, they each responded to a list of identical questions. These questions asked for participants' demographic information such as gender and race, their marital status, number of children, education level, whether they have friends or family working in law enforcement, whether they have friends or family who work as lawyers, and whether they have been victims of violent crimes. These are typical questions asked of any potential juror.[40]

Participants were then asked to render a verdict of guilty or not guilty, identify the most compelling

35 Hastie, *supra* note 17, at 1001.

36 *Id.*

37 *Id.*

38 *Id.*

39 Lerner et al., *supra* note 46, at 570.

40 *United States Sample Jury Questionnaire,* Federal Judicial Center (2012).

evidence that led to their decision, and answer a variety of questions asking them what emotion they felt as they reviewed the evidence.

The following two questions were replicated from the Bright & Goodman-Delahunty study.[41] They are meant to measure whether the participant understood the concept of reasonable doubt.[42] The scale measure is regarded to be the best judgmental measure.[43] They were included after the initial rendering of the verdict.

- Please move the slider to indicate the location that shows how you feel:

  1 = I am not at all confident I rendered the correct verdict.

  7 = I am extremely confident I rendered the correct verdict.

- Please move the slider to indicate the location that shows how you feel:

  1 = I have no doubt at all that the defendant is guilty.

  7 = I have extreme doubt that the defendant is guilty.

The two questions below were meant to measure the relative feeling or intensity of particular emotions to be compared across scenarios distributed to different participants. The free response question was asked first so as not to prime individuals to certain emotions and to determine what their first-thought emotion was.[44]

- What one word best describes how you feel after reading these facts and reviewing the evidence?
- Please move the slider to indicate the location that shows how you feel after reading these facts:

  1 = I did not feel this emotion at all.

  7 = I felt this emotion extremely.

  Anger, Fear, Sadness, Disgust

The question below was asked as a check to ensure that participants were actually reading the questions and responding accurately.

- Please move the slider to position number 5.

The question below was meant to measure whether sympathy or empathy was a factor in the verdict. The formatting and scale were again inspired by what is deemed best practice in judgemental measurements.[45]

- Please move the slider to indicate the location that shows how you feel:

  1 = I feel no sympathy/empathy for _____ .

  7 = I feel extreme sympathy/empathy for _____ .

    - Amount of sympathy/empathy I feel for Robert Gill (the victim)
    - Amount of sympathy/empathy I feel for Robert Gill's family
    - Amount of sympathy/empathy I feel for Alex Richardson (the defendant)
    - Amount of sympathy/empathy I feel for Alex Richardson's family

The fact patterns were all based on the same general case. All participants were provided with the same jury instructions for murder and for the explanation of the "beyond a reasonable doubt" standard.

41 Bright & Goodman-Delahunty, *supra* note 31, at 192.
42 *Id.*
43 George E. Marcus, W. Russel Neuman & Michael B. Mackuen, *Measuring Emotional Response: Comparing Alternative Approaches to Measurement*, 5 The Eur. Pol. Sci. Ass'n 1, 741 (2017).
44 *Id.*
45 *Id.*

The control fact pattern used for this case was designed to produce a "not guilty" verdict. It contained an even number of prosecution and defense facts, which, when a reasonable jury deliberates, should find that guilt beyond a reasonable doubt has not been proven.

The second fact pattern was identical to the first and had just one addition: it contained a video that, factually, did not help either side. In other words, it should not have swayed the jury one way or another in the sense that it did not tip the factual scale. It did, however, evoke a particular emotion. The video depicted the defendant punching a bus driver in what the facts explained was an unrelated incident that did not support the prosecution nor the defense's theorized timeline. This video has been validated to primarily induce anger, among other emotions, by previous scholarship.[46]

The third factual pattern was identical to the second, but, instead of the anger-inducing video, it depicted a video of a spider attacking the camera. The facts explained that someone had placed the spider in the victim's house at one point before the murder, but they stated clearly that the prosecution had no proof regarding who put the spider there. The video used in this scenario has also been validated to primarily induce fear, among other emotions, by previous scholarship.[47]

The demographic questions were included in the survey to verify whether they have any particular role—besides the emotions reported—resulting in a guilty or not guilty verdict. As such, the following is the list of independent variables that the experiment measured to potentially explain the dependent variable, the jury's verdict:

- The emotion the juror reported feeling (anger, fear, or sadness)
- The level of sympathy the juror reported feeling for the victim
- The level of sympathy the juror reported feeling for victim's family
- The level of sympathy the juror reported feeling for defendant
- The level of sympathy the juror reported feeling for defendant's family
- Whether the juror or someone the juror knows has been a victim of a violent crime
- The juror's education level
- The juror's marital status
- Whether the juror has any children
- The juror's ethnicity
- The juror's gender
- Whether the juror or any of the juror's friends or family have worked in law enforcement
- Whether the juror or any of the juror's friends or family are lawyers

Basic Distribution

A total of 225 individuals participated in this experiment and completed the survey from start to finish. The Qualtrics survey was designed to recruit participants and distribute the three scenarios evenly. However, the software cannot account for individuals starting but not completing the survey. As such, Qualtrics distributed the survey as evenly as possible. The final distribution was as follows:

46 In a 2017 study, Cowen & Keltner tested a range of visual stimuli to determine what emotions were appraised by subjects. The visual used in this condition, elicited responses of anger in 77% of a diverse pool of 853 subjects. Forty-five percent reported feeling disgust when viewing this video (Cowen & Keltner, 2017. Video #1703).
47 The same Cowen & Keltner study utilized this video as well and measured what emotions were appraised by the same subject pool. The visual used in this condition elicited responses of fear in 69% of respondents (Cowen & Keltner, 2017. Video #564).

Which case number did you read?	%	Count
Case #1	36.89%	83
Case #2	33.33%	75
Case #3	29.78%	67
Total	100%	225

B. Manipulation Check: Comparing Fact Pattern and Emotions Reported

Figures 1-5 below measure whether the experiment was successful in eliciting the emotion intended per factual scenario. Case #1 was the control, which was not meant to elicit any emotion in particular. Case #2 included a video of the defendant punching a bus driver and was intended to elicit anger/disgust. Case #3 included a video of a venomous spider found in the victim's home; it was meant to elicit fear. Disgust and anger in the context of this experiment have similar meanings. Case #2 was intended to elicit both of these emotions. The results below indicate that the experiment was successful; the video evidence in the scenario in Case #2 angered jurors significantly more than the lack of this evidence in the other two fact patterns.

Figure 1: Comparing Scenario and Reported Feeling of Disgust

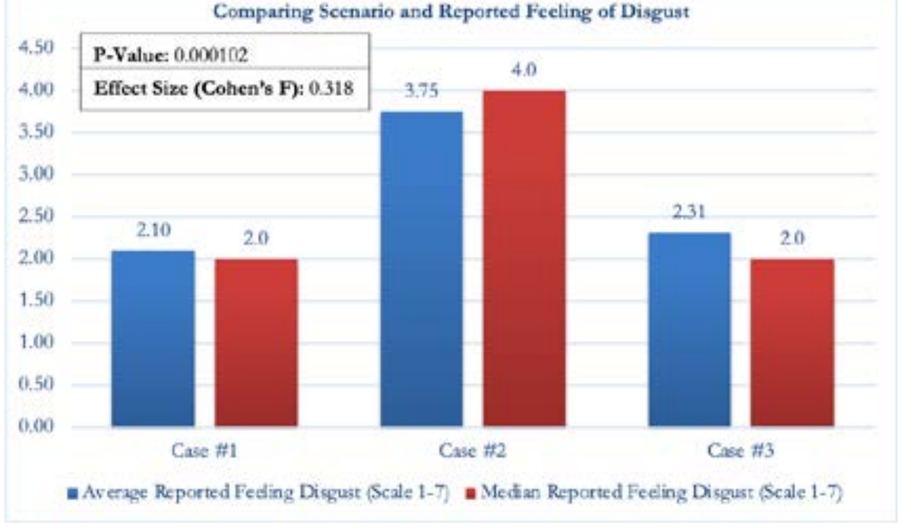


Figure 2: Comparing Scenario and Reported Feeling of Anger

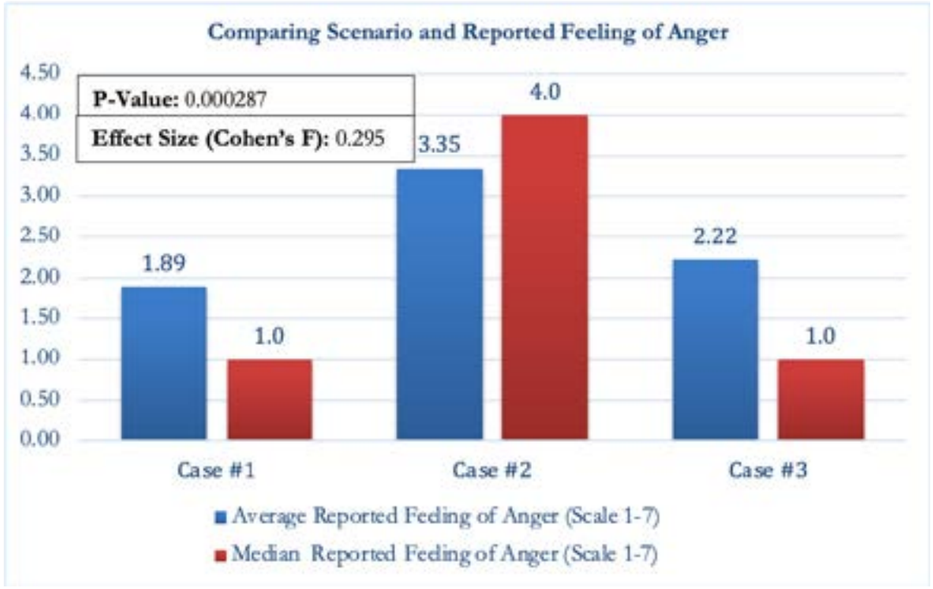


Figure 3: Comparing Scenario and Reported Feeling of Sympathy for Defendant

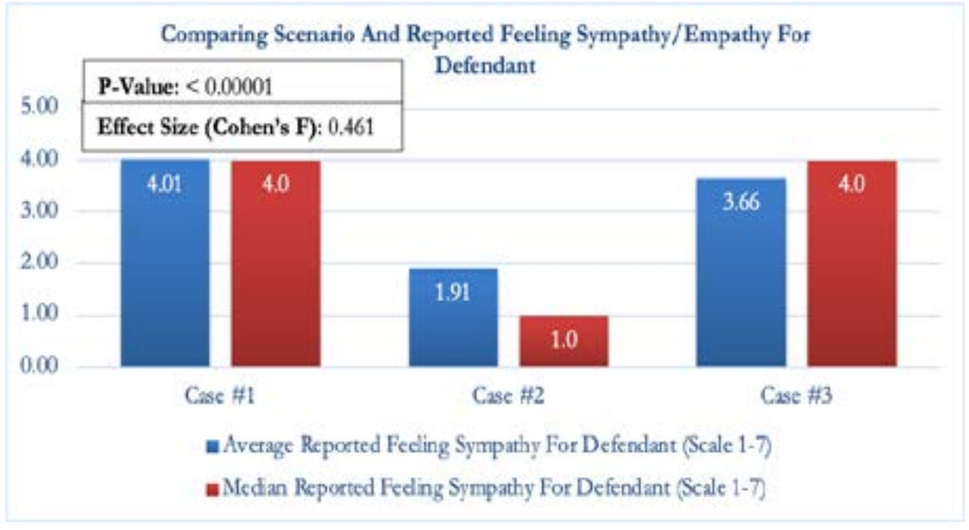


Figure 4: Comparing Scenario and Reported Feeling of Sadness

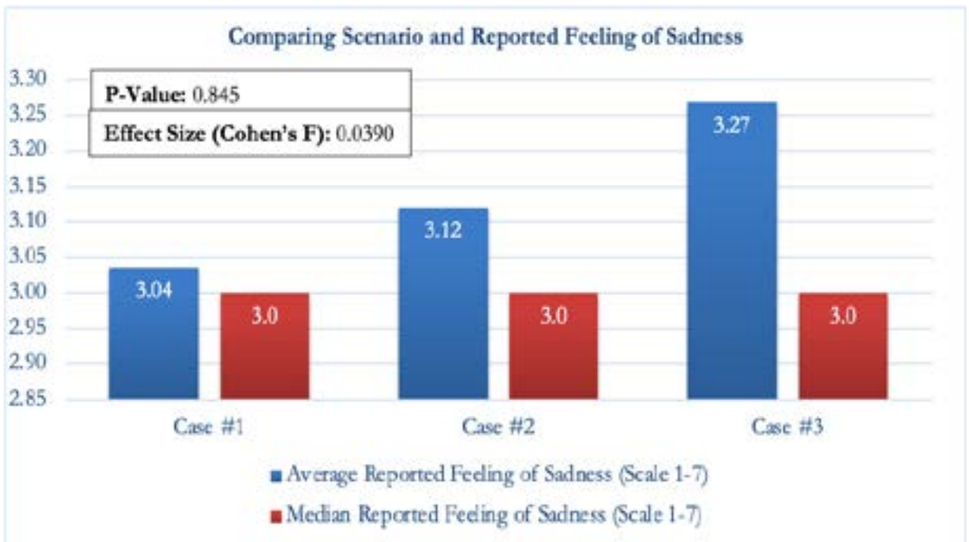
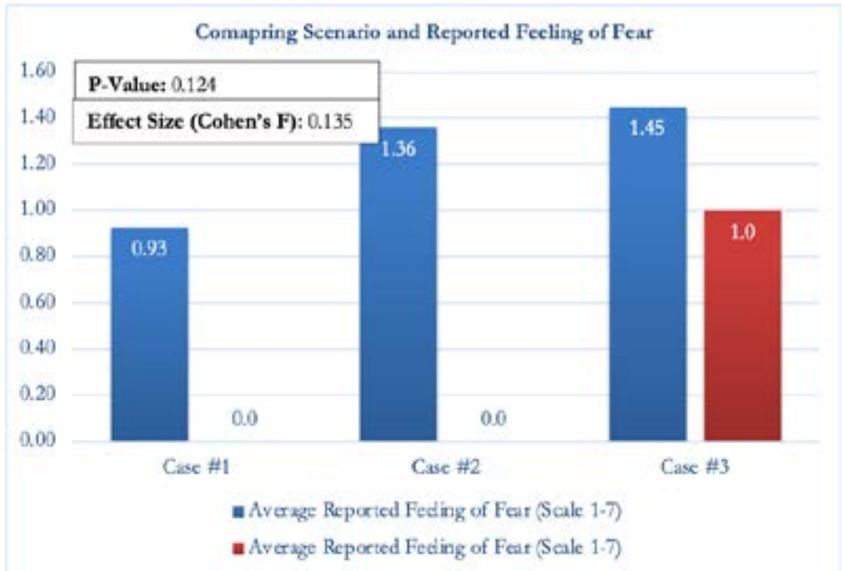


Figure 5: Comparing Scenario and Reported Feeling of Fear



These results indicate that Case #2, the case intended to elicit anger and disgust, also resulted in participants feeling less sympathy/empathy toward the defendant. The difference in reported sympathy/empathy for the defendant between Case #2 and the other two cases are drastic and statistically significant. [48]

No one particular case saw sadness being reported significantly more than other cases. There is no statistically significant difference between the means. This is consistent with what the experiment intended to accomplish.

The level of fear was only slightly higher in Case #3 compared to the other two cases. Case #3 was indeed intended to elicit fear, but the average reported level in Case #3 was only 1 on the scale from one to seven. While fear was felt more in the intended Case #3, it was not felt at a high level. This difference is not statistically significant.[49]

C. Demographic Information

Just as important as understanding the basic distribution of the survey and scenario numbers is taking into account which people were and were not represented in the sample used for this experiment. The following demographic information was collected to check whether it played a role in verdict decisions:

A relatively even number of males and females participated in the survey (54.9% male, 44.6% female, and 0.45% other). Respondents were overwhelmingly white (73.7%), and a substantial portion were Asian (17.4%). Well over half of those who participated were college educated (13.4% with some college education, 45.1% with a bachelor's degree, and 8.5% with education beyond a bachelor's degree). Less than half (46.4%) of participants were married, and just under half (49.1%) had children. The survey specifically asked about marital status and children because it was potentially relevant, given that the experimental fact pattern contained some information about the defendant and victim's relationships with their respective families before and after the crime.

The survey also asked whether participants had any association with lawyers or law enforcement. A handful (18.3%) of participants were associated with or had friends or family working in law enforcement and a nearly identical number (18.3%) had ties with lawyers or were lawyers. Finally, 19.6% of participants reported being a victim or knowing a victim of a violent crime. All of these demographic and characteristic questions are standard for jury questionnaires.[50] Jurors are typically removed from the jury panels for cause when answering in the affirmative for any of these questions. No statistically significant relationship was found between any demographic or characteristic question and the juror's ultimate verdict.

D. Limitations

The most obvious limitation of this experiment is that it does not accurately simulate trial conditions for the participant. Thus, it cannot capture the effect that actual trial settings have on jury decision making. There is something to be gained by receiving evidence in-person; jury instructions, after all, ask jurors to evaluate the credibility of witnesses by observing witness demeanor. This is why jurors must hear from witnesses physically instead of simply reading an affidavit or a fact pattern as was done in this experiment.

Additionally, lawyers would much rather speak to juries in person, especially when seeking to create sympathy or empathy. Much is lost when reading about an individual's family and struggles on paper as opposed to hearing about them in-person, noticing vocal inflections and seeing the human subject or subjects sitting in

48 A p-value determines whether the relationship between two variables is statistically significant. The lower the p-value is, the less likely the relationship is due to chance and the more likely that there is a significant relationship between the variables. A relationship is usually considered statistically significant if the p-value is less than 0.05. The Effect Size is the standard deviation of the population means divided by their common standard deviation. Whereas p-value measures whether a statistically significant relationship exists, this number measures *how significant* a statistical relationship is.

49 See *supra* note 50.

50 *United States Sample Jury Questionnaire,* Federal Judicial Center (2012).

front of you. As such, the intended emotions may not have been evoked, or they may have been evoked to a lesser degree. Based on these limitations, the experimental treatment is a conservative estimation of the possible impact of emotions in trials because the treatment does not have the visceral real-world intensity or life-and-death consequences of an actual trial. The experiment contains realistic cases, but precisely mirroring the actual circumstances of the in-person jury experience was not possible.

This experiment also relied in part on self-reporting of survey participants not only regarding what emotion they felt, but also on which scenario they encountered. The first question in the survey asked participants to list which scenario number they encountered; the number was listed in bold, highlighted, in all caps, at the bottom of each fact pattern. Qualtrics does not have a feature to verify whether participants accurately reported which facts pattern they were presented with besides a manual verification of all surveys. Therefore, there is the possibility that some participants misunderstood which number to report, and this may have skewed the data. However, this number should be negligible.

E. Hypotheses

The following were pre-experiment hypotheses:

- H1: Subjects in the second condition will report the highest levels of anger. Subjects in the third condition will report the highest levels of fear.[51]
- H2: Subjects in the control experiment will result in the smallest number of guilty verdicts, followed by subjects in scenario #3—the fear condition—and followed then by subjects in scenario #2—the anger/disgust condition.
- H3: Guilty verdicts will primarily come from participants who reported feeling anger, followed by participants who reported feeling fear.
- H4: The reported most influential factor in guilty verdicts will be the video evidence in scenarios #2 and #3, respectively.
- H5: The regression calculation will reveal that feeling anger toward the defendant is the biggest predictor of a guilty verdict.

F. Results

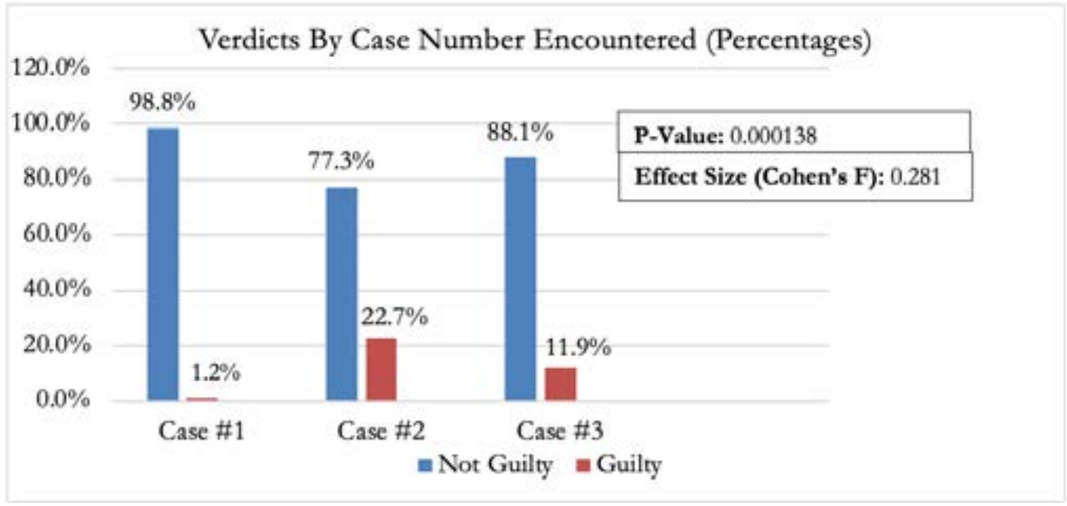
i. Comparing Fact Pattern and Guilty Verdict

This section analyzes which scenarios caused jurors to render the most "guilty" verdicts. The results were as follows:

Figure 6 reveals that the highest number aof guilty verdicts came from Case #2, the case that was intended to elicit anger and that there is a statistically significant tendency for the increase in guilty verdicts in Case #2. Thus, the results reveal that H2 was validated. The subsequent results attempt to explain why jurors convicted more often in Case #2 than in the other cases.

51 This hypothesis predicts that the Cowen & Keltner 2017 experiment results will be supported and that the videos used in this experiment will elicit the same discrete emotions as they did previously. See the manipulation check in the methodology section for the results.

Figure 6: Verdicts By Case Number Encountered



ii. Comparing "Guilty" Verdicts to Emotions Reported

The true intention of this experiment, as the methodology section points out and the hypotheses make clear, is to discern whether particular emotions may sway juror decisions. The results below indicate that jurors were more likely to convict when feeling anger, followed by fear.

Figure 7: Verdicts Compared to Reported Feeling of Anger

Anger

P-Value: 5.71936E-05 **Effect Size (Cohen's F):** 0.9947
Difference Between Averages (Guilty - Not Guilty): 2.115

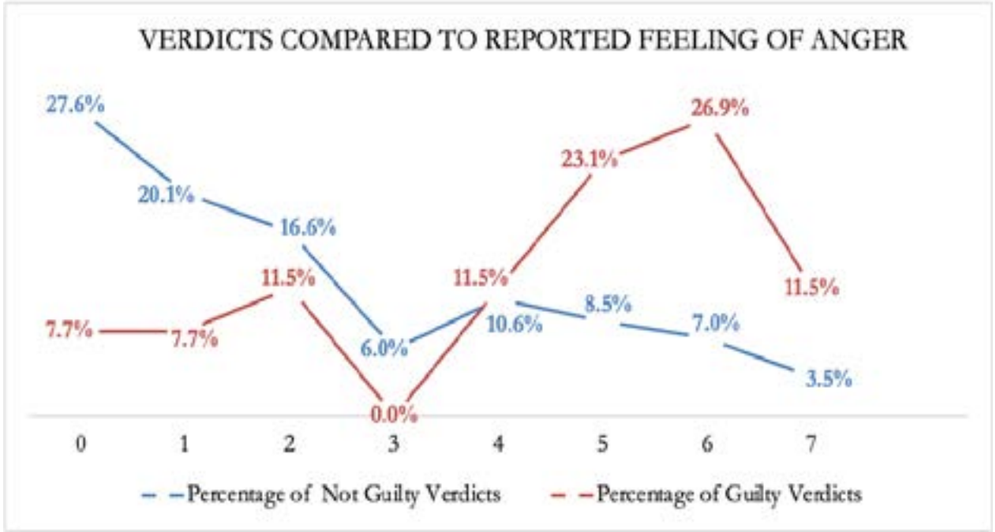


Figure 8: Mean and Median Reported Feeling of Anger by Verdict

	Sample Size	Median Anger Rating	Average Anger Rating	Standard Deviation
Guilty	26	5.0	4.35	2.19
Not guilty	199	2.0	2.23	2.13

There is a large statistical significance between feeling anger and finding the defendant guilty. Figure 7 also shows that, on average, as anger increases, guilty verdicts increase, and as reported feelings of anger decrease, not guilty verdicts increase. Additionally, it is clear from Figure 8 above that guilty verdicts saw a higher average and median level of anger reported. For context, the middle level on the reporting scale was 3.5.

Figure 9: Verdicts Compared to Reported Feeling of Fear

Fear

P-Value: 0.00411046 **Effect Size (Cohen's F):** 0.7763
Difference Between Averages (Guilty - Not Guilty): 1.3

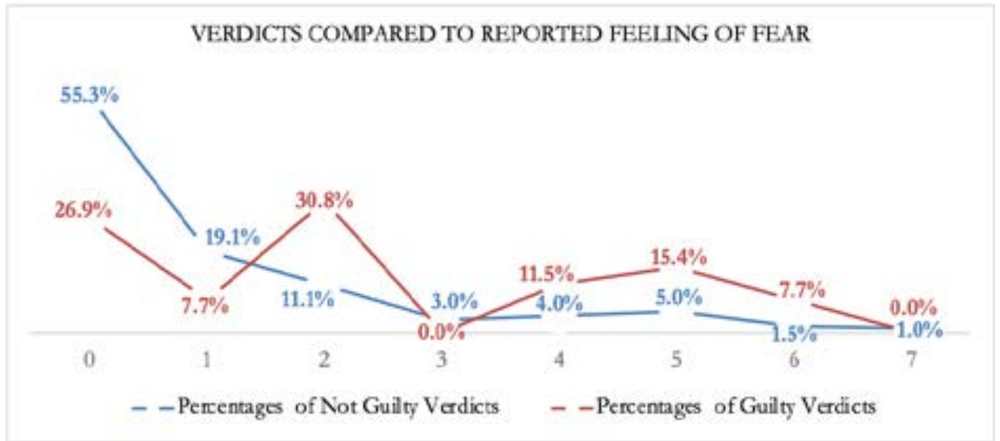


Figure 10: Mean and Median Reported Feeling of Fear by Verdict

	Sample Size	Median Fear Rating	Average Fear Rating	Standard Deviation
Guilty	26	2.0	2.38	2.06
Not guilty	199	0.0	1.08	1.64

Figure 9 reveals that fear also played a statistically significant role in the jury's verdict, although much less significantly than anger. Fear's minimal significance is also apparent in analyzing the average level of fear for guilty verdicts, shown in Figure 10. It was a mere rating of 2.38, which is well below the 3.5 middle-ground

rating available on the reporting scale. If fear had played a more prominent role, we would expect to see guilty verdicts reporting a higher average and median level of fear. The results are similar when the analysis is re-run, filtering for each respective scenario participants who reported feeling fear; a relationship between fear and guilty verdicts exist in each analysis, but its statistical significance is low.

Figure 11: Verdicts Compared to Reported Feelings of Sadness

Sadness

P-Value: 0.100519691 **Effect Size (Cohen's F):** 0.351
Difference Between Averages (Guilty - Not Guilty): 0.8494

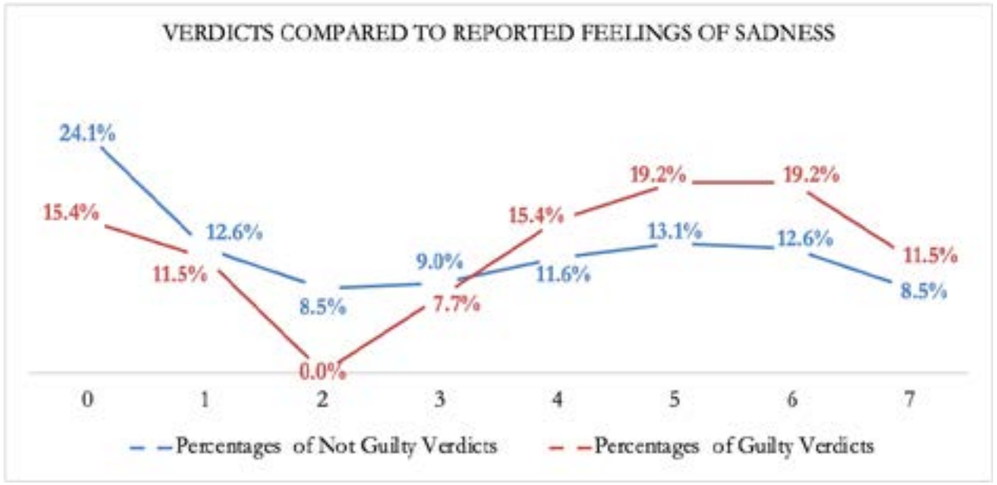


Figure 12: Mean and Median Reported Feeling of Sadness by Verdict

	Sample Size	Median Sadness Rating	Average Sadness Rating	Standard Deviation
Guilty	26	4.5	3.88	2.41
Not guilty	199	3.0	3.04	2.43

Figure 11 indicates that there was no statistically significant relationship between level of sadness reported and verdict. Figure 12 shows a similar average rating of sadness in guilty and not guilty verdicts. While there is a slight relationship showing that as sadness increases, guilty verdicts increase, this was not statistically significant. The regression model below explains this in greater detail.

Figure 13: Verdicts Compared to Reported Feelings of Disgust

Disgust **P-Value:** 0.000922779 **Effect Size (Cohen's F):** 0.7448
Difference Between Averages (Guilty - Not Guilty): 1.7617

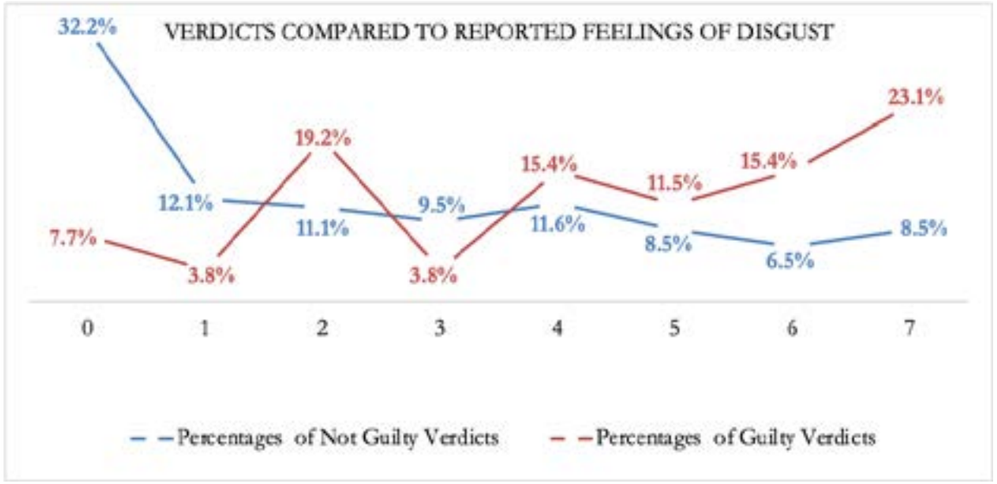


Figure 14: Mean and Median Reported Feeling of Disgust by Verdict

	Sample Size	Median Sadness Rating	Average Sadness Rating	Standard Deviation
Guilty	26	4.5	4.27	2.31
Not guilty	199	2.0	2.51	2.38

Disgust in this case's context is a similar emotion to anger, and it was found to produce similar results to the emotion of anger, as shown in Figure 13. Figure 14 indicates a dramatic increase in median and average reports of feeling disgust for guilty verdicts compared to not guilty verdicts. On average, as disgust increased, guilty verdicts increased, and as disgust decreased, not guilty verdicts increased. This relationship is statistically significant. However, the regression analysis below indicates that while there is a statistically significant relationship between participants' reported feeling of disgust and their ultimate verdict, this relationship is not significant enough to be a stand-alone predictor of a juror's verdict.

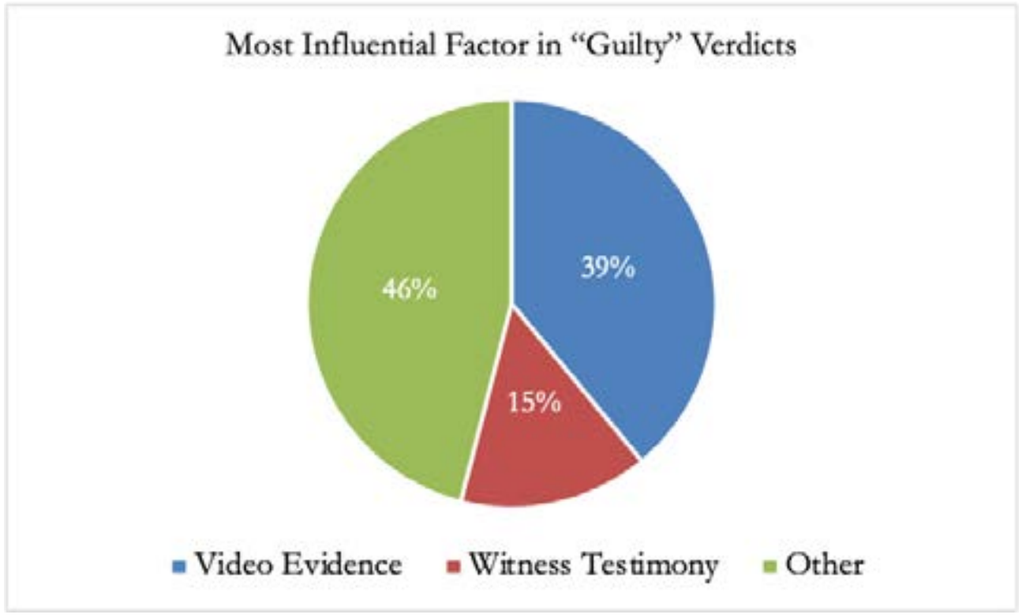
iii. Reports of Most Influential Factor

It is not enough to gather a relationship between emotions reported and the ultimate verdict the jurors decided. This experiment also intended to measure whether the emotion was the primary factor in causing the verdict that they decided on. Each survey contained an open-ended question for participants to record what piece of evidence they found the most or least convincing in deciding their verdict. Each of the 225 open-ended responses were coded and assigned to categorie.[52] For not guilty verdicts, there are four categories: (1) lack of

52 For example, one open-ended response was, "punching the bus driver for no reason." This was coded to "Video Evidence" Another response was, "the witness' statements." This was coded as "Witness Testimony." Another was,

evidence and/or alibi, (2) video evidence, (3) witness testimony, and (4) other. For guilty verdicts, there are three categories: (1) video evidence, (2) witness testimony, and (3) other. Figure 15 below presents the data for all guilty verdicts broken down by the most influential piece of evidence leading to them.

Figure 15: Most Influential Factor in "Guilty" Verdicts



These results indicate that nearly half of guilty verdicts were caused directly by the video evidence. Open-ended responses from survey participants illustrate that the driving factor in a statistically significant number of respondents was the video of the defendant punching the bus driver, the video intended to elicit anger. Here are some select answers:

- "The video of him punching the bus driver in the face, showing that he is in a violent mind set."
- "punching the bus driver for no reason"
- "Mr. Richardson was at the place of the murder when it happened. He also punched a bus driver for apparently no reason which shows his personality."
- "The guy punched the bus driver for no apparent reason which makes me think he's a violent guy who would kill with no remorse."

Over half of guilty verdicts attributed their reasoning to something *besides* the video evidence. These results do not rule out indirect causation between emotions produced as a result of viewing the videos and guilty subsequent verdicts. In other words, participants may have also been unaware that viewing a particular video

"deliberate, malicious, and premeditated killing." This was For example, one open-ended response was, "punching the bus driver for no reason." This was coded to "Video Evidence" Another response was, "the witness' statements." This was coded as "Witness Testimony." Another was, "deliberate, malicious, and premeditated killing." This was coded as "other."

caused them to vote a certain way.

iv. Sympathy as a Factor

While sympathy may also be considered a reported emotion and can be placed in the same category as anger and fear, it was placed in a separate category because the fact patterns were not designed to elicit this emotion in particular. Nonetheless, it ended up being the most influential and decisive factor in predicting whether a juror would vote to convict or acquit.

Figure 16: Verdicts Compared to Reported Feeling of Sympathy for Victim

Sympathy for Victim **P-Value:** 0.212910112 **Effect Size (Cohen's F):** 0.2434
Difference Between Averages (Guilty - Not Guilty): 0.4447

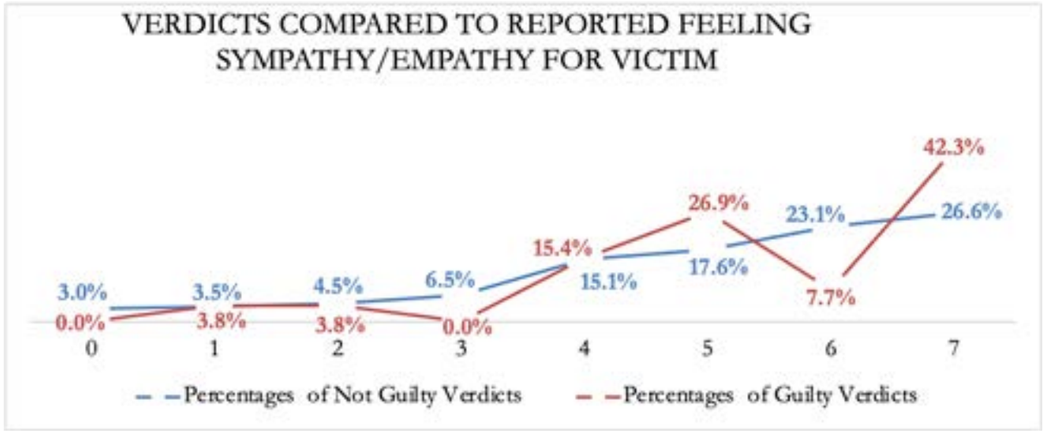


Figure 17: Mean and Median Reported Feeling of Sympathy for Victim

	Sample Size	Median Sympathy Reported	Average Sympathy Reported	Standard Deviation
Guilty	26	5.5	5.50	1.66
Not guilty	199	5.0	5.06	1.86

Figure 16 reveals no statically significant relationship between feeling sympathy for the victim and finding either verdict for the defendant. Indeed, the average and median reports of sympathy felt are similar. Figure 17 shows a similar relationship between guilty and not guilty verdicts rises as well.

Figure 18: Verdicts Compared To Reported Feeling Of Sympathy For Defendant

Sympathy for Defendant [53] **P-Value:** 1.99004E-09 **Effect Size (Cohen's F):** 1.1564
Difference Between Averages (Guilty - Not Guilty): -2.4055

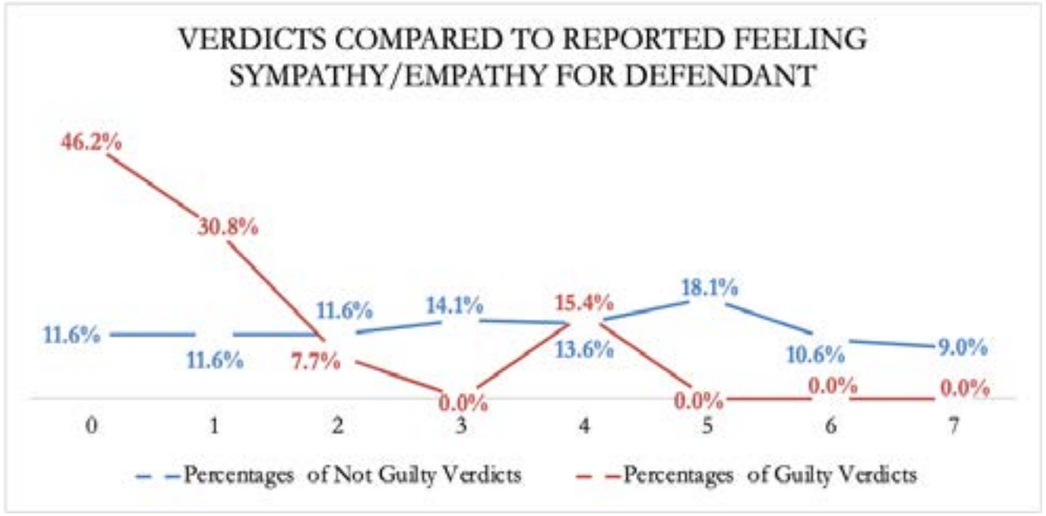


Figure 19: Mean and Median Reported Feeling Of Sympathy For Defendant

	Sample Size	Median Sympathy Reported	Average Sympathy Reported	Standard Deviation
Guilty	26	1.0	1.08	1.41
Not guilty	199	4.0	3.48	2.16

Figure 18 suggests a strong relationship between verdict and reports of feeling sympathy/empathy for the defendant. Figure 19 also shows that the average and median levels of sympathy differ dramatically between guilty and not guilty verdicts. Both figures illustrate the general trend that as sympathy/empathy for the defendant increases, guilty verdicts drop dramatically.

v. Regression Calculation

I first ran a regression equation with all the potential explanatory variables (listed in the methodology section). The equation revealed that there were only three statistically significant variables for predicting the underlying reason for the jury's verdict. Ranked in order of significance, they were the following: (1) level of sympathy reported for the defendant, (2) reported feeling of anger, and (3) reported feeling of fear. Notably, each of these variables are emotions, not the individual's past experiences, characteristics or demographics. These results indicate that emotions felt are a greater predictor of ultimate verdict compared to past encounters with law enforcement, experience with crime, familiarity with lawyers, or any of the other variables used.

53 The results for the reported level of sympathy for the defendant and the reported level of sympathy for the defendant's family are highly similar, so the latter's results are omitted from this section to avoid redundancy.

After finding the three most statistically significant variables, I then ran the regression equation again using only these variables to generate the results below.[54]

Reports of Feeling Sympathy/Empathy for the Defendant

- Jurors were 2.97 times **less** likely to find the defendant **guilty** for every 1 point increase in the level of sympathy/empathy they felt for the defendant.

Reports of Feeling Anger for the Defendant

- Jurors were 1.68 times **more** likely to find the defendant **guilty** for every 1 point increase in the amount of anger they reported feeling.

Reports of Feeling Fear for the Defendant

- Jurors were 1.61 times **more** likely to find the defendant **guilty** for every 1 point increase in the amount of fear they reported feeling.

The following variables were found to have no statistical significance and are **not** accurate predictors for the underlying reason a juror would vote to convict a defendant:

Reports of Feeling Sadness for the Defendant

- Jurors were merely 1.35 times more likely to find the defendant guilty for every 1 point increase in the level of sadness they reported feeling.

Reports of Feeling Disgust for the Defendant

- Jurors were merely 1.11 times more likely to find the defendant guilty for every 1 point increase in the level of disgust they felt toward the defendant.

Reports of Feeling Sympathy/Empathy for Victim's Family

- Jurors were merely 1.12 times less likely to find the defendant guilty for every 1 point increase in the level of sympathy/empathy they reported feeling for the victim's family.

Reports of Feeling Sympathy/Empathy for Victim

- Jurors were merely 1.09 times more likely to find the defendant guilty for every 1 point increase in the level of sympathy/empathy they reported feeling for the victim.

G. Discussion

Before delving into a discussion of how emotions impact the ultimate verdict, it is worthwhile to first review whether the experiment's fact patterns in the three scenarios were successful in eliciting the emotions they intended to. Anger and disgust inducements were significantly more prevalent in Case #2, and fear, although not by much, was felt more by jurors involved in Case #3. No one case saw more jurors feeling sadder than others, as intended. Sympathy for the victim and the victim's family remained consistent throughout the three cases, but sympathy for the defendant dramatically decreased for jurors in Case #2. This is understandable; after all, if jurors feel more anger toward the defendant, they are less likely to feel sympathetic toward him.

The results of this experiment support the hypotheses and support prior research. By repeating the methodology used by Gross & Levenson to elicit discrete emotions, this experiment has validated which emotions the Cowen & Keltner videos are prone to elicit (see methodology section).[55] As such, H1, which predicted that subjects in the second and third conditions would report the highest levels of anger and fear, respectively, was supported. The results also support H2: indeed, scenario #2 produced the highest number of

54 The original regression equation included all 16 explanatory variables. However, the long equation is not necessary because it contains too many variables for the size of this sample. and all but three of the variables have no impact.

55 Gross & Levenson, *supra* note 51, at 105.

guilty verdicts, followed by scenario #3, and then the control scenario. The results here are almost identical to the Bright and Goodman study, finding that the rate of conviction nearly doubled when jurors reported feeling anger.[56] Indeed, the results substantiate the theory of emotional spillover and are consistent with the findings by Bornstein, Bandes, and Sunstein, finding that jurors act more punitively when they feel anger, regardless of whether the anger is caused by either side or by a third party completely unrelated to the case before them.[57] This also supports H3, which predicted that guilty verdicts would primarily come from participants who reported feeling anger.

The most influential factor in the guilty verdicts was reported as being the video but by low margins. Less than half of guilty-voting jurors reported the video as being their most influential factor. H5, which predicted that anger toward the defendant would be the biggest predictor of a guilty verdict, was not supported. The regression calculation revealed that anger toward the defendant was indeed a major factor in causing guilty verdicts, but it was second to the level of sympathy jurors felt for the defendant. As such, the best predictor of securing a guilty verdict is not minimal anger toward the defendant, rather maximal sympathy toward him.

IV. CONCLUSION

The results support most of the hypotheses and previous experiments: the highest number of guilty verdicts came from the scenario with the anger video, followed by the scenario with the fear video, and lastly by the control video, which was not meant to elicit any particular emotion.

The data also indicates that a driving factor in a juror's ultimate verdict is the juror's attitude toward the defendant, not necessarily their attitude toward the victim or the victim's family. The biggest predictor in a guilty verdict is anger toward the defendant and the most reliable predictor of a not guilty verdict is sympathy or empathy toward the defendant. As such, a criminal trial lawyer ought to focus their efforts not only on the facts of the case, but also on doing as much as possible to get the jury to either like or dislike the defendant.

Regarding Rule 403, it is almost certain that both videos would have been excluded from the jury's viewing if an objection was raised by the defense. Since the defendant was not charged with an assault associated with his punching the bus driver in video #2, the probative value of the evidence is low. Also, as is clearly seen by the results of this experiment, the evidence is far more prejudicial to the defendant.

As such, the most apparent implication of this study is that it supports the necessity of Rule 403. Even though factually the video did not support the prosecution's timeline any more than it did the defense's, its emotional nature caused the jury to convict the defendant over one and a half times more often.

The results suggest the need for juries and judges to determine what evidence is admissible. Perhaps it is necessary to reconsider bench trials, or trials with no juries. Various factual issues are already decided by judges and judges only. For example, juvenile delinquency cases are never heard by a jury. These cases often involve inflammatory pieces of evidence such as the child's disciplinary record, potential past conduct, or other evidence that may very well be excluded from the jury's viewing. Judges, however, are trusted because they are supposedly more experienced and intelligent and have the capability of making just decisions without being too heavily influenced by emotional evidence. It is unclear whether this is truly the case. Even so, the nuances of the justification for Rule 403 should be recognized in further research and practice.

56 Bright and Goodman-Delahunty, *supra* note 57, at 81.

57 Bornstein, Bandes, and Sustein, *supra* note 36, at 570.

Banished:
Sex Offenders, Exile, and Social Norms in Georgia

Carolyn Chun
Stanford University

Abstract

Georgia remains one of the few states in the nation that still employs banishment as a tool of criminal sentencing. It remains difficult to explain the persistence of this form of punishment in Georgia, which defies legal trends in other states and the lack of evidence supporting its effectiveness against recidivism. This article analyzes the practical usage and popular perception of banishment in Georgia primarily through newspaper articles from the past two decades, which reveal a disproportionate application of banishment to sex offenders. This article argues that banishment in the state exemplifies the social and expressive facets of punishment, in which a sentence can serve no instrumental purpose of crime control but instead underscores a hostile legal and political environment for those convicted of certain transgressions, in particular those of a sexual nature.

I. INTRODUCTION

"Man with foot fetish gets plea deal, must leave area."[1] This headline ran in an October 2015 issue of *The Augusta Chronicle*, a local Georgia newspaper covering Richmond and the surrounding area. The individual in question had found himself in court for strong-arm robbery after he stole cash from a female victim and then, to the wolfish amusement of the *Chronicle*, asked to smell her feet. The man had a previous conviction for lewd conduct after sucking on the toes of an eleven-year-old, as well as a separate accusation of attempting the same with a twelve-year-old in a Richmond, Georgia, Walmart.[2] The second half of the headline reflected the fact that, as part of his sentence, the man would serve fifteen years of probation, during which time he would have no contact with minors, receive psychological treatment for his foot fetish, and be banished from the Augusta Judicial Circuit, including Burke, Columbia, and Richmond Counties. Georgia is one of 16 states in the nation whose constitution prohibits banishment in explicit terms,[3] but the constitutional restrictions apply only to exile outside of the state; banishment within its borders remains an active tool of criminal sentencing. Banished Georgians have ranged from mundane criminals to a man whose pet chimpanzee rampaged across Atlanta in 1982, biting five people and attempting to board a public bus in the process.[4]

Absent from the literature is a clear explanation of why banishment persists in Georgia. Its continued usage in the state stands against the national trend, and there are no sentencing guidelines recommending its implementation. In the absence of centralized and digitized records on banishment sentencing in Georgia, this article analyzes two decades of media coverage of the practice to assess its popular understandings and engagement with the public sphere, utilizing a sample of 376 cases culled from over forty different local Georgian newspapers. For the purpose of this work, the sample was restricted to banishment imposed as part of a criminal sentence, not as a condition of bond, as well as to cases of banishment that were at the county level or greater.[5]

Through an examination of the distribution of charges leading to banishment within reported cases, which reveals a disproportionate emphasis on sex crimes, this article argues that public depictions of Georgian banishment have no clear bearing on reducing recidivism nor reducing crime more generally. Rather, banishment remains, as an extension of historical practices and modern analyses of penal logic, almost exclusively a performative ritual of social rejection and judgement through which Georgia reifies a hostile legal and political environment for those who have committed crimes of a sexual nature.

This article will proceed in three parts. First, it will discuss punishment as a vehicle for social and cultural expression, often at odds with or complicating its instrumental rationale for crime control. Second, it will discuss the findings within the collected reporting, which suggest disproportionate attention paid statewide to banishment for sexual offenses relative to other crimes. Third, it will contextualize banishment for sex offenders within current Georgia law, arguing that the present legal restrictions on sex offenders render banishment practically redundant. Instead, banishment is indicative of a more abstract and emotional social reprimand on sexual crimes, an interpretation supported by the rhetoric of Georgian courtrooms and the press.

II. RELEVANT BACKGROUND

Until a constitutional amendment in 2006 instituted a requirement that an individual be banished to an area no smaller than a judicial circuit, Georgian courts ruled that banishment could extend to all but one of the counties in the state.[6] The usual destination of choice manifested in places like Echols, a rural county in the south of Georgia which lacked a bank, hotel, or incorporated town, had a single traffic light and one post

1 *Man with Foot Fetish Gets Plea Deal, Must Leave Area*, The Augusta Chronicle, (October 26, 2015).
2 *Id.*
3 Peter D. Edgerton, *Banishment and the Right to Live Where You Want,* 74 U. Chi. L. Rev. 1023, 1030 (2007).
4 *Apes Gone Bad: Before Gorilla, There Was Atlanta's Chimp*, The Atlanta J.-Const. (June 8, 2016).
5 Within these parameters, the sample of cases reflects all reported incidents of banishment since 2000 containing the words "banish," "banished," "banishing," or "banishment" and available online through the newspaper database Access World News, as of the state of its collections on May 25, 2020.
6 Terry v. Hamrick, 284 Ga. 24, 663 __ (2008).

office, and, over the years, became the paper home of hundreds of criminals. In 2003, the chief assistant district attorney of DeKalb County estimated that he had prosecuted over 200 cases banishing the defendant to Echols.[7] Most of those sentenced to rural exile made out like Darrin Beamon, whose nine-year banishment to Echols came after he pled guilty to shoplifting in DeKalb. "I've never been to Echols County," he said later, "I asked for a ticket straight to New Jersey."[8]

Even in the wake of the 2006 constitutional amendment, banishment has continued in Georgia, most often from the county or the judicial circuit, but also *de facto* at the state level.[9] Criminals whom courts wish to leave the state now find themselves banished instead to the Southern Judicial Circuit, including Echols, or else to the one-county Clayton Judicial Circuit, which hosts the Atlanta airport.[10] The phenomenon is at odds with national judicial precedent, built on decades of lower-court jurisprudence from across the United States, which generally rejects the governmental power to impose banishment as part of a criminal sentence. In 1953, the Supreme Court of North Carolina wrote, "[i]n North Carolina, a court has no power to pass a sentence of banishment; and if it does so, the sentence is void. This is the general rule in American Courts."[11] Notably, judicial rulings have never invalidated banishment on the grounds of cruel and unusual punishment, citing the lack of affirmative legislation granting the courts such power.[12] As a result, these decisions do not extend to banishment as a condition of executive pardons, of which there is more recent nationwide evidence.[13]

With that said, modern penology focuses on rehabilitation as a means of reducing recidivism and overall crime. These goals tend not to be furthered "by removing the individual to be rehabilitated from the control of the authorities who should be [rehabilitating] him."[14] In one 1999 case, a New Mexico pharmacist who admitted to child molestation accepted banishment to Alaska over prison. The man went on to drug and molest numerous Alaskan children for more than a decade.[15] Banishment might be a useful tool to protect victims in cases of domestic violence, where there is an intimate relationship between the crime and proximity to a particular person.[16] Mostly, however, banishment grants reprieve by unloading problem citizens from one locale onto another.[17] In Georgia, retaliation negates even this benefit. When individuals banished from DeKalb began trickling into Cherokee, its district attorney stated, "[w]e'll return the favor"—presumably by sending criminals from Cherokee to DeKalb in exchange.[18]

III. BANISHMENT AS PUNISHMENT

A. Rituals of Punishment as Performance

7 *Hard to Believe, But Banishment Is Legal*, The Atlanta J.-Const., (October 23, 2003).

8 *Metro's Banished Vanish to Avoid Exile in Rural Echols—Restricted to Life Far from City Glitz, Most Flee Georgia*, The Atlanta J.-Const., (September 30, 2001).

9 As might come as no surprise, it was the state representative from Echols, Ellis Black (R-Valdosta) who introduced the bill responsible for the amendment, HB 692. He cited counties like Fulton as ones who took the greatest advantage of Echols as the place of exile; the sole vote against HB 692 in its initial pass before the state House of Representatives came from Joe Heckstall (D-East Point), who represented Fulton. *Exiled to Echols: Why There's Not Much Support for Judicial Banishment Loophole*, The Valdosta Daily Times, (July 17, 2011).

10 *Judge: Guilty Plea 'Wise Decision'*, The Rockdale Citizen, February 21, 2008; *Feds File Motion to Drop Case Against York's 'Main Wife,'* The Macon Telegraph, (April 15, 2004).

11 State v. Doughtie, 74 S.E.2d 922 (N.C. 1953).

12 Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. Pa. L. Rev. 758, 765 (1963).

13 Kavalin v. White, 44 F.2d 49 (10th Cr. 1930); *Ex parte* Snyder 159 P.2d 752 (Okla. Crim. App. 1945); Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953).

14 Armstrong, *supra* note 11, at 761.

15 Krack v. State 973 P.2d 100 (Alaska 1999).

16 Cameron Carpino, *Banishment in Georgia: A New Approach to Domestic Violence*, 27 Ga. St. U. L. Rev. 803, 820 (2011).

17 *Id.*, at 812.

18 *Id.*, at 803.

The penal system and practices of punishment are far more complicated than mere expressions of state dominance and attempts at crime reduction. In the seventies, philosopher Michel Foucault opined that penal practice was an exclusively utilitarian tool of social control or a blunt extension of state power.[19] However, such an explanation fails to account for the persistence of high-cost prison systems that fail to tamp down recidivism rates.[20] Nearly a century prior, sociologist Émile Durkheim presented an alternative depiction of punishment—one of pure and unthinking passion.[21] Durkheim's punishment is a means of social expression in response to violated norms. While Foucault restricts the agents involved in punishment to "the controllers and the controlled … Durkheim insists upon a crucial third element, the onlookers, whose sentiments are first outraged and then reassured."[22] Yet, Durkheim still asserts that punishment is useful, or purposive, in that its emotive nature strengthens the bond of society through affirmation of common beliefs and connections. This insistence on utility again stumbles when contrasted with cases where punishment has incited social unrest.[23] Punishment does not always result in a clear net good.

Ultimately, punishment is both control and expression, with non-instrumental qualities that reflect its place within the broader, ongoing social dialogue. Punishing criminals is about more than the immediate transgression, intertwined with "wider problems of authority, the nature of social membership, questions of inclusion and exclusion in the social group."[24] Punishment defines accepted behaviors and, therefore, the social order. This makes it an especially resonant space for symbolic expression, both rational and not, which "helps explain why penality is caught up in all sorts of cultural and moral cross-currents which rob it of any singular purposiveness or direction."[25] Reductive and functional explanations of penal logic fail because the motivations behind punishing criminals are often not aligned; it reflects the muddled state of the social consciousness as much as it seeks to control it. One can make sense of punishment only through a framework that allows for a greater degree of multi-level and multi-directional motivation, without the expectation of a singular explanation.

If all punishments are heavy with symbolic meaning, then banishment is even more so. In early colonial America, Puritan settlements often leveraged the performative and public aspect of punishment. This was the purpose of the stocks in the Puritan town square, which pushed criminals into public view.[26] Humiliation was the punishment and the penance—a potent source of shame in small towns, but also the sole recourse for hard-pressed settler communities unable to deal with the loss of large numbers of able-bodied workers to exile or imprisonment.[27] When the Puritans did banish people, the transgressions were severe. Several cases involved sexual offenses, including William Collins, whose banishment from Massachusetts in 1642 came after he "sought sexual favors under a false promise of marriage."[28] New Haven banished William Harding in the same year for his "filthy dalliances with divers young girls."[29] Suffolk County banished Elinor May for prostitution in 1678.[30]

Yet, the banished were most often religious dissidents, as was the case with Anne Hutchinson, Roger Williams, and religious groups like the Anabaptists, the Jesuits, and the Quakers.[31] Having crossed an ocean "to

19 Michel Foucault, Discipline And Punish: The Birth of the Prison, Trans. Alan Sheridan (1979).

20 David Garland, *Frameworks of Inquiry in the Sociology of Punishment*, 41 Brit J. Soc. 1, 6 (1990).

21 Émile Durkheim, The Division of Labor in Society 90 (1964).

22 Garland, *supra* note 18, at 8.

23 *Id.*, at 9.

24 *Id.*

25 *Id.* at p. 11.

26 Lawrence Freedman, History of American Law 6-71 (3d ed. 2019).

27 *Id.*

28 Edgar J. McManus, Law and Liberty in Early New England: Criminal Justice and Due Process, 1620–1692 55 (1993).

29 *Id.*

30 *Id.*, at 168.

31 In addition to cases related to sex or heresy, Goodman also describes criminals banished for contempt for authority. This last category includes such colorful examples as the banishment of Captain Stone for calling a magistrate

find a haven for… liked-minded individuals," heresy and its legal implications were perhaps the most dangerous possible threat to the Puritan mission.[32] Early American history, therefore, wielded banishment as one of the gravest punishments, through which "the excluded were sent beyond the typical or traditional limits involved in ostracism or shaming."[33] It defined behaviors well beyond the pale. While heresy did not survive as a punishable offense past independence, sexual deviance did. In 1914, a man in Oregon accused of inducing two women into prostitution received a pardon, provided that he leave the United States and never return.[34]

B. Two Decades of Banishment in Georgia

The survey of Georgian newspapers offers insight into how the public has understood and the media has reported on banishment in Georgia over the past twenty years. It also helps establish a sense of the minimum geographic scope within which banishment has occurred in Georgia. If reported incidents were restricted to a few counties or just to urban or rural sections, one would need to attribute much of the practice to complicating county-level factors. Instead, the cases, which span January 2000 to March 2020, represent sixty-seven of the 159 counties in Georgia, or almost half. The counties speckle across Georgia, without a noticeable geographic split or pattern. That is not to say that the distribution of reported banishments is uniform. Houston County, whose website declares it "Georgia's Most Progressive County," accounts for the largest number of reported cases, at sixty.[35] The second most prolific banisher in media reports is Richmond County with thirty-four.

While some of this unevenness can be ascribed to biases within newspaper reporting and the rate at which cases of banishment feature in the local media of an area—*The Augusta Chronicle*, which covers Richmond, has a regular column called "For the Record" to report on court cases—additional sources support the preeminence of Houston County as a place of banishment, in large part due to the tenure of Kelly Burke as district attorney. "I do it all the time. I love it," said Burke in an interview in 2001, while mentioning that a full list of individuals banished from Houston existed online at his website, available to the public.[36] The said list no longer exists, and the county appears far fewer times in more recent reports of banishment after his time in office. Nonetheless, there has been no notable overall decline in the practice since the end of Houston as a banishment hub. Banishment is a broad social and cultural phenomenon occurring within the general vicinity of most or all Georgians, rather than one exclusive to a single county.

The distribution of reported crimes for which the perpetrator was banished exhibits vast discrepancies from official crime statistics, as reported by the Georgia Bureau of Investigation.[37] By far the greatest number of crimes in the state involve stealing, including burglary, larceny, and auto theft, which together made up 290,049 cases or 88% of all reported crimes in Georgia in 2018. Aggravated assault accounted for 24,801 cases, or 7.5% of crimes. Rape constituted 2,684 cases, or about 1%. The report lists incidents of sexual abuse, noted under "Family Violence," as numbering 433 that year.[38] Meanwhile, reported banishments for sexual offenses in the dataset number 71, making up 19% of the collected incidents. That is just eight cases behind burglary or theft, the category used in the dataset for all crimes of stealing and the most frequently reported reason for banishment, at 79. Since state reporting of overall crime rates references offenses as determined in the courts, while the articles can only give a general description of the crime, official statistics and categorizations within the

"not a justice but a 'just-ass.'" Nan Goodman, Banished: Common Law and the Rhetoric of Social Exclusion in Early New England 11 (2012).

32 Nan Goodman, *Banishment, Jurisdiction, and Identity in Seventeenth-Century New England*, 7 Early Am. Stud. 109, 114 (2009).

33 Goodman, *supra* note 30, at 16.

34 Kavalin v. White, 44 F.2d 49 (10th Cr. 1930).

35 *District Attorney*, Houston County, https://www.houstoncountyga.org/government/district-attorney.cms (last visited April 25, 2021).

36 *Get Out of Town, Stay Out of Jail—Banishment a Substitute for Prison,* Savannah Morning News, (October 22, 2001).

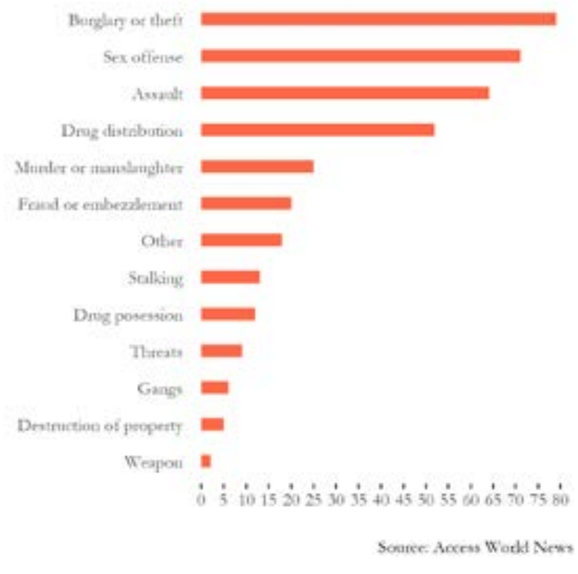
37 *2018 Summary Report Uniform Crime Reporting (UCR) Program*, Ga Crime Information Center (2018).

38 *Id.*

dataset are not directly comparable. Cases where sexual motivation or context was present but did not result in rape or family abuse are also not identified within official Georgia reporting. Still, the share of sexual offenses in reporting of banishment is 2.5 times that of all aggravated assault in overall Georgian crime statistics.

Figure 1: Reported Banishment Cases, by County in Georgia (2000-2020)

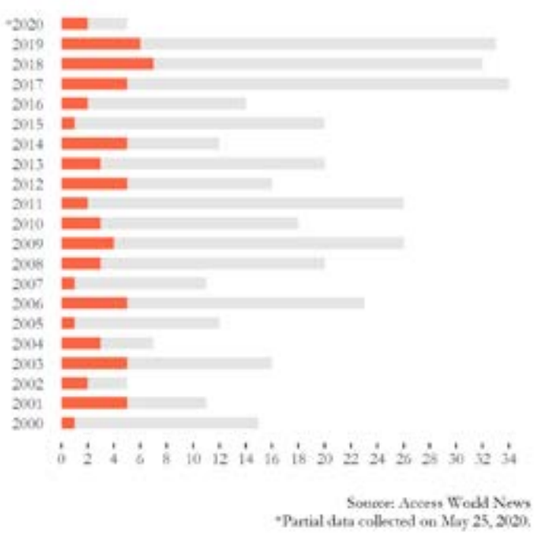
Figure 2: Reported Banishment Cases, by Crime in Georgia (2000-2020)



It is unsurprising that the distribution of reported banishments should differ slightly from overall crime rates in Georgia. At the sentencing level, the courts may find certain crimes more worthy of banishment than others. Then there is the additional impact of how the media chooses to report on cases of banishment—understanding that media reporting is not an exhaustive list of all banishments conducted within the state. Media coverage of general crime is often unrelated to the relative frequencies and nature of different crimes depicted in official figures. Crime statistics indicate that most crime is nonviolent, but aggregated media reports suggest the contrary.[39] Criminal incidents where the victims are female, very young, or elderly receive more coverage than comparable cases concerning victims who are male or middle-aged.[40] By that logic, one would expect inflated reporting on sex offenders and banishment sentencing of such criminals, particularly when the crimes include the victimization of children. The overwhelming majority of sex offense cases in this dataset involve minors—child pornography, child molestation, and statutory rape.

The extent of mismatch between reported banishments and actual crime rates is nonetheless important. Through a combination of selection in application of banishment and in reporting, the picture that arrives to consumers of Georgian local media is one that paints an explicit link between banishment and sex offenses. This centers publicity about banishment on a form of crime which is uncommon in relative terms. Moreover, such coverage directs most public attention towards an example of banishment which is ineffective from an instrumental penal standpoint, failing to support the goal of overall crime reduction. Burke, of Houston County, did argue that banishment could help keep convicted drug dealers out of the business. He believed that keeping them off their home turf and away from regular contacts and customers would encourage them to seek a fresh start.[41] The need for networks and accomplices is less true of sex offenders. The case for banishment as useful in domestic violence, where there is a relationship between the offender and the victim, is more applicable to sex offenders.[42] That said, not all sexual offenses fall under that category.

Figure 3: Sex Offense Banishments as a Share of Total Reported Banishments in Georgia (2000-2020)



39 Vincent F. Sacco, *Media Constructions of Crime*, 539 Annals Am. Acad. Pol. & Soc. Sci. 141 (1995).

40 Valerie Wright and Heather M. Washington, *Read between the Lines: What Determines Media Coverage of Youth Homicide?* in Deadly Injustice: Trayvon Martin, Race, and the Criminal Justice System (Devon Johnson et al. eds. 2015).

41 Becky Purser, *More Than 500 People Have Been Banished from Houston County*, The Macon Telegraph, (May 3, 2009).

42 Carpino, *supr*a note 14, at 820.

Indeed, situations where the offender had a relationship with the victim make up only a fraction of overall sexual offenses in the dataset. In addition to the groups labeled in the above graph, the data collection process tagged incidents of assault, murder or manslaughter, and sexual offenses which occurred in a case of intimate violence where the victim was a current or former partner or relative. Intimate violence played a role in only 20% of assault cases, 8% of murder or manslaughter cases, and 4% of sexual offense cases. Meanwhile, drug distribution constitutes a large portion of the sampled cases of banishment but, nonetheless, lags behind burglary and theft and is on par with cases of assault not involving domestic violence. These are two kinds of crime which face no limitations based on a particular geographic space. That burglary or theft is the most common crime to receive a banishment sentence at first seems linked to how often it occurs in Georgia; however, if banishment is an ill-fitted tool to reduce recidivism for burglars and decrease overall stealing in the future, no rate of burglaries would alter this fact. That the state applies banishment at all to these crimes, much less at the high rates suggested in media reporting, is a notable deviation from given explanations about the practical usage of banishment as an effective penal mechanism. Aside from the moderate usage of banishment for drug dealers, a one-track, goal-oriented narrative explaining banishment appears to fall apart when it comes to its media and public perception.

As mentioned, Georgian banishment can still serve a use other than that of reforming criminals by allowing a county to wash its hands of a person. If the burglar can no longer return to the county, he might continue to burglarize elsewhere, but he is now the problem of someone else, somewhere else.[43] The benefit is diminished by the widespread use of banishment in Georgia, which leads to counties effectively swapping criminals. Yet, if one person poses a particular nuisance or threat, the courts may still see banishment as a net good. The comments of at least one judge featured in a Georgian news article support this alternative narrative as an explanation for banishment. "Other names come up, and Judge Daniel said he's about given up on them. One man, he said, will be burglarizing the minute he's released from jail."[44] The judge expresses doubt that another will ever be substance-free. The public defender asks, "Can we banish him from the county?" The judge responds, "That's what I was thinking."[45] Georgian understandings of banishment in the public arena can, thus, still cohere with a purposive element, albeit a selfish one, even for crimes where it might be useless as an obstacle to future lawbreaking. When recidivism appears inevitable, banishment is the answer. Cut the rotting limb; push the nuisance next door. Nonetheless, even this fails to square with the real impact of banishment on sex offenders relative to existing restrictions.

The media focus on cases of sexual banishment related to child abuse is rhetorically important for multiple reasons. First, it distinguishes the current discourse from the historical trend. In early Puritan communities, sexual offenses that merited banishment covered a broad range of behaviors now considered legally acceptable, from adultery to sodomy.[46] Not so long ago, interracial marriage could also prompt banishment. The initial decision that led to the 1967 Supreme Court case *Loving v. Virginia* offered the Lovings escape from imprisonment for miscegenation conditioned on their departure from the state for twenty-five years.[47] There are a few instances of prostitution in the past two decades of reporting on Georgian banishment and mentions of details like foot fetishes still indicate a broad discomfort with perceived sexual deviance, but the articles largely deal with nonconsensual sexual interactions. Second, the media focus on child abuse frames the dialogue on sexual offenses as largely threatening children. A handful of cases are about sexual assault against an adult victim. However, most of the cases involving banishment—or most of the cases being reported as receiving banishment—are those affecting children, featuring both the horror of minor abuse and the deep stigma of pedophilia. Not all headlines are as salacious as the one that ran in *The Augusta Chronicle* in 2015,

43 *Id.*, at 803.

44 *Judge Helps Alcoholics Recover*, The Augusta Chronicle, (October 30, 2006).

45 *Id.*

46 McManus, *supra* note 27, at 55; Kris Franklin, *The Rhetorics of Legal Authority Constructing Authoritativeness, the "Ellen Effect," and the Example of Sodomy Law*, 33 Rutgers L. J. 49, 64 (2001) .

47 Briana McGinnis, *This Is Why Some U.S. Judges Banish Convicts from Their Home Communities*, Wash. Post, (March 16, 2017).

broadcasting the deviant sexual appetite of a man who sucked the toes of young girls, but the articles on child sex offenders are nonetheless meticulous in underscoring the youth of the victim, often detailing specific ages. "W.R. MAN RECEIVES 35 YEARS IN PRISON FOR FONDLING BOYS," announces *The Macon Telegraph*, from 2006.[48] "Woman who married teenager gets nine-month jail sentence," reads *The LaGrange Daily News*, in the same year.[49] An article from 2004 describes how a former teacher molested two students, while one from 2006 reports on a teen babysitter who violated her underage charge, and another from 2011 details abuse from a former Bible studies teacher.[50] Such cases, contrary to the relatively rare nature of sexual crimes in Georgia, underscore a close and real risk of predatory pedophiles, cloaked in the innocent professions and corners of social life which best give them access to vulnerable children. In Georgia, the resonant space of banishment has become a platform for these lurking horror stories, these shadows beneath the bed, and a deep and ingrained sense of moral repugnance.

C. Banishing the Banished: Sex Offender Law in Georgia

The complicating factor for an instrumental rationale regarding the banishment of sex offenders is that, outside of banishment, Georgia also has one of the strictest sets of sex offender laws in the nation. A stricter law than is now on the books failed before a judge in 2006; that iteration would have prohibited sex offenders from living, working, or loitering within 1,000 feet of any location where children frequent, such as schools, churches, parks, gyms, swimming pools, and school bus stops. The mandatory minimum for a violation would have been ten years. As one article from that year pointed out, all 292 registered sex offenders then living in Gwinnett were within 1,000 feet of a school bus stop.[51] The bill that eventually passed in 2008 included the same restrictions, with an exception for those sex offenders who already owned their homes or held their jobs prior to the law; those in rental housing still needed to move. Moving forward, their residences would need to be in compliant areas.[52]

With sufficient legislative support for such expansive restrictions, it comes as no surprise that Georgians have also maintained an attack on sex offenders via banishment, maintaining a two-front war against the presence of sexual criminals. At the same time, the presence of this sex offender law also appears to have completed the work of banishment already, as well as on a much larger scale. The case of Gwinnett is true of counties across Georgia. One researcher testified in 2008 that, in Columbia County, less than 2% of the land parcels complied with the new living restrictions imposed on sex offenders nor was there a guarantee that those properties had available rental housing.[53] Without information on the rate of homeownership among the 14,500 individuals on Georgia's sex offender list in 2008, it is not possible to ascertain the consequences of this law on sex offender presence within Georgia.[54] Nonetheless, it is a severe restriction on sex offenders unmatched for other classes of criminals, one which ensures that, even if a sex offender can live in a community, their range of social freedom and participation is greatly diminished. Their expulsion from the social realm in Georgia is more or less complete, even in the absence of banishment. The additional sentence of banishment thus offers no instrumental value. The risk of in-county recidivism in violation of banishment would appear to be about the same as in-county recidivism in violation of statewide sex offender restrictions. Either way, the offender would be violating a legal restriction meant in part to keep them away and from reoffending.

48 *WR Man Receives 35 Years In Prison For Fondling Boys*, The Macon Telegraph, (June 2, 2006).

49 *Woman Who Married Teenager Gets Nine-Month Jail Sentence*, LaGrange Daily News, (March 16, 2006).

50 *Ex-Houston Teacher Pleads Guilty to Molestation—Jordan Enters Guilty Plea on Charges of Molesting Two Students; Other Charges Dropped*, The Macon Telegraph, (January 18, 2004); *Teen Babysitter Convicted of Molesting Boy*, The Macon Telegraph, (November 2, 2006;) *Ex-Bible Studies Teacher Banished*, Athens Banner-Herald, (February 1, 2011).

51 *Judge Blocks Sex Offender Law*, Gwinnett Daily Post, (June 30, 2006).

52 Maureen Downey, *OUR OPINION: Sex Offender Bill Flawed—Limits on Where Targeted People Can Live, Work Are Too Severe and Too General—and Ineffective*, The Atlanta J.-Const., (February 28, 2008).

53 *Sex Offender Law Flawed*, Waycross J.-Herald, (November 26, 2008).

54 Downey, *supra* note 51.

Even after 2008, reporting of the banishment of sex offenders in Georgian newspapers has continued at significant rates. There is some evidence that the sex offender registry in Georgia is less robust than it might be, hindering standard efforts to enforce the severe restrictions of its current law.[55] As of 2018, 4,000 of the 22,345 names on the registry had yet to receive a risk classification, which determines how closely they are monitored.[56] The Georgia registry also does not make public the criminal histories, dates of birth, or employment information of sex offenders.[57] Banishment might, therefore, be a way to shore up gaps in government monitoring of sex offenders. By casting them out and marking them with an unusual punishment, which in turn might make it into the press, banishment more prominently identifies criminals to the public, increasing the chance that the wider Georgian community will monitor and notice future transgressions. However, vigilantism and communal criminal enforcement are no longer recognized with sufficient approval, tacit or explicit, for this to be acceptable as the sole or even a significant factor in the continued practice of banishment. Although it would be remiss to ignore the fact that citizen arrests remain a part of the penal landscape, often fraught with significant moral and social tension, there is no evidence within the collected media reports of banished sex offenders being driven out or prevented from returning through such citizen action.

Instead, the banishment of sex offenders within Georgia appears to underscore the expressive, multifaceted, and social aspects of punishment. The number of articles on the practice of banishment in Georgia, in particular on sexual banishment, establishes that expulsion is a public and emotive process. Reporting is part of the punishment process, rather than distinct from it. Through these media reports, the Georgian public becomes a participant in the act of criminal reprimand. In this case, through their continued readership of the banishment sentences of Georgian sex offenders, residents of Georgia receive and reaffirm the social rejection of Georgian sex offenders. Whether or not the association is conscious, Georgian newspaper subscribers must now understand a connection between the practice of banishment and sexual crimes. Sex offenders are not welcome; they will be cast out.

This becomes a form of potent social dialogue logically distinct from the mere existence of sex offender laws through two routes. The first is through leveraging the rhetorical and symbolic power of banishment itself, which in early Puritan communities was a tool to purge those seen as obstacles to a God-fearing community.[58] For centuries, banishment has highlighted the deviant and the distasteful, and its history remains a core part of how Georgians perceive it today. Despite the frequent usage of banishment within the state, Georgian articles on the topic still often feature a line explicitly explaining that banishment is still permissible as part of a criminal sentence. Banishment has retained the awe and shock value of a vestige of the past, with all the associated social concerns. Through the application of banishment to sex offenders, the cumulative statement of repudiation towards their actions becomes one with a far more demonstrative, passionate, and telling rhetorical consequence than the mere fact of technical restrictions.

The second impact of banishment is that it creates a continuous reminder of the state disapproval of sexual transgressions. Even if the press reports on a case where the sentence includes a requirement to register as a sex offender, it might not reiterate the extent of the general restrictions placed on sex offenders within Georgia. The banishment-like consequences of Georgian sex offender law are obscured in the tangle of its various provisions. A sentence of banishment is simple and straightforward in its message, as well as easy to amplify in a headline. It further transforms understood disapproval into legal punishment, a penalty given in response to a specific sexual transgression, with a causal link to the action of the offender. It affirms the guilt of the sex offender and the extent to which the offender merits expulsion. The 71 articles reporting on the banishment of a sex offender in the past two decades in Georgia thus became 71 distinct reminders that the state deemed sex offenders to be deviants and moral sores hampering the public interest. The power of repetition is significant, as is the power of individual stories. Outside of its initial implementation, the blanket effect of a sex

55 Rhonda Cook, *Ga. Sex Offender Registry Problems Cost the State Federal Funds*, The Atlanta J.-Const., (May 28, 2018).

56 *Id.*

57 *Id.*

58 Goodman, *supra* note 30, at 114.

offender law lacks comparable rhetorical impact.

That banishment figures as part of an active dialogue around criminal justice and social mores within Georgia is clear from those instances when judges and attorneys have been more vocal about the motivations behind a sentence of expulsion—most often in cases of drugs or racism. Banishment can serve to identify what is perceived as a broader societal ill, one which the county must uproot both metaphorically and literally. "Cocaine and methamphetamine are poison that infiltrate our community and breed drug addiction and crime," said the district attorney in Spalding County in 2017, while commenting on the combined 145 years of banishment that a group of drug dealers then faced.[59] Banishment can also indicate a lack of forgiveness, even after time is served. One of the most well-publicized cases in the dataset relates to an incident in 2017, where members of a group called "Respect the Flag" interrupted a Black child's birthday party, waving the Confederate flag, yelling racial epithets, and threatening to kill the attendees.[60] The judge ruling in the case was unequivocal: "We don't need this in Douglas County. We don't need it anywhere."[61] Such statements indicate a moralizing message embedded in the decision to banish particular criminals, one which remains unattached to the practical consequences of the sentence. The perpetrators were sentenced to banishment only from the boundaries of Douglas County, yet the sentiment behind it extended even further that no community should welcome them, although the banishment sentence would not prohibit their settling elsewhere. Indeed, when racism and sex offenses combine, the tone of the banishment increases even further: "Klansman pleads guilty to sex charge," reads the *Times-Georgian* article detailing his banishment from all of Georgia but Clayton, presumably in the hopes that the man would board the next flight out of the state.[62]

IV. CONCLUSION

The use of banishment in Georgia is often discussed as an anachronism, a vestige of colonial punitive practices. However, Georgian banishment is a vigorous, living institution with deep roots in modern social problems. Communities remain predicated on social and cultural norms, and banishment is representative of this fact, both as a punitive and a rhetorical instrument. The institution of banishment amplifies and shapes the distinction between those at the center of the social order and those at the fringe, identifying transgressors whose very presence threatens the community. In Georgia, public discourse has identified sex offenders as falling into the latter category. There is no significant evidence that the disproportionate banishment of sex offenders helps to counter recidivism or increases restrictions beyond those already in place under broader sex offender law. As a result, the banishing of sex offenders in Georgia demonstrates how punishment can lack a clear judicial objective for the state. Rather, banishment in Georgia shows that a punitive practice can persist because it gives voice to sentiments that remain fervent within the community. It is an opportunity for judges and newspapers to reiterate their condemnation of sexual offenses, as part of a larger social discourse that extends outside of banishment.

Recognizing banishment as a social practice as well as a penal one introduces both opportunities and risks. With the flexible nature of banishment comes a lack of safeguards to ensure its consistent and just application. Alongside the banishments of recidivist sex offenders, drug dealers, and violent abusers were those of first-time offenders, including one whose sole crime was a speeding ticket.[63] Nor are societal norms, enforced through banishment, guaranteed to be morally acceptable. Within the past half-century, much has changed about how Americans view right and wrong. Presently, Georgia is reckoning with moral and ethical issues around policing, racism, and the just application of the law. Here, an understanding of the social and expressive nature of punishment may prove to be revealing. In February 2020, white vigilantes shot and killed Ahmaud Arbery, a Black man, in Glynn County, Georgia, and almost three months passed between his death and the

59 *Reported Drug Dealers Enter Guilty Pleas*, The Griffin Daily News, (June 22, 2017).

60 *Two in Confederate Flag Incident Sentenced to Prison,* Douglas County Sentinel, (March 1, 2017).

61 *Id.*

62 *Klansman Pleads Guilty to Sex Charge*, Times-Georgian, (November 27, 2012).

63 *News of the Weird*, Athens Banner-Herald, (June 6, 2014).

arrest of the men involved.[64] In June 2020, during the protests against police violence and racism sparked by the deaths of two other Black individuals at the hands of law enforcement, Fulton County arrested six Atlanta officers for pulling two college students from their car and tasing them during the enforcement of a curfew designed to help quiet the protests.[65] In March 2021, a white shooter killed six Asian women at spas in Cherokee County and Atlanta; he claimed a "sexual addiction" motivated him to kill the women in order to remove "temptation."[66] Glynn County has sentenced at least 14 individuals to banishment in the past two decades; Fulton has banished at least seven, with at least one incident, from 2003, related to a hate crime against a Black victim. The presence or absence of banishment in the sentencing of the former cases might, thus, be a telling indicator of the current social atmosphere in Georgia and the extent to which the public and the courts see such assaults not as law enforcement, but as racial attacks, as well as if such violence can strike as deep a chord of fear and repugnance as do instances of sexual deviance and abuse. Meanwhile, what happens in the case of the spa shooter may indicate whether courts understand racial fetishization as predominantly an issue of racism or of abnormal sexual behavior and how this may impact the social reprimand against perceived sexual deviance.

64 Richard Fausset, *Judge Finds Probable Cause for Murder Charges in Arbery Case*, N. Y. Times, (June 4, 2020).

65 Asia Simone Burns, *6 Atlanta Officers Charged after Confrontation with College Students*, The Atlanta J.-Const., (June 2, 2020).

66 Richard Fausset, Nicholas Bogel-Burroughs, & Marie Fazio, *The Suspect in the Spa Attacks Has Been Charged with Eight Counts of Murder*, N. Y. Times, (March 26, 2021).

Examining the State Secrets Privilege:
Exploitation and Entrenchment of Secrecy in the National Security Law Domain

Michelle Dubovitsky
Georgetown University

Abstract

The state secrets privilege is an evidentiary legal tool that was intended to serve as a shield against court-ordered disclosure of information that would legitimately harm the national security interests of the United States. However, the privilege is being exploited by the executive branch to undermine the judiciary's capacity to review the constitutionality of national security practices. Remarkably, the courts have done little to prevent this exploitation. By and large, courts defer to the government when state secrets privileges are invoked. This is largely because they diverge from typical procedure in order to allow the government to have maximum flexibility such that they can ensure that cases challenging its practices are dismissed. This disturbing trend has the potential to weaken the system of checks and balances that is a fundamental part of U.S. liberal democracy. Legislators and the judiciary must, therefore, enact reforms that arm the courts with stronger inv estigative powers to ensure that executive claims of privilege are meaningfully policed and that procedural normality is maintained.

I. INTRODUCTION

National security concerns justifiably mandate a certain level of secrecy in litigation. If evidence related to sensitive matters such as military technologies, espionage tactics, or the identities of undercover, overseas government spies were to be divulged during discovery and subsequently exposed to the public realm, the consequences for national security could very well be disastrous.[1] To protect against this dangerous possibility, the Supreme Court formally established the state secrets privilege in the 1953 landmark case *United States v. Reynolds*.[2] The state secrets privilege is an evidentiary legal tool that was intended to serve as a shield against court-ordered disclosure of information during civil litigation that would legitimately harm the national security interests of the United States.[3]

However, since the September 11, 2001, terrorist attacks ("9/11"), the privilege has been exploited by presidential administrations to effectively quash judicial review of questionable government practices.[4] It is remarkable that the judiciary has done so little to prevent this usage of the privilege. By and large, courts display a pronounced deference to the government when the state secrets privilege is invoked, as they often diverge from typical procedure in order to allow the government maximum flexibility such that cases against the government are dismissed.[5] In doing so, courts fail to hold the executive accountable for practices that deserve the highest level of scrutiny.[6] This has disturbing implications for the United States as a healthy liberal democracy with a functioning checks and balances system.[7] In order to curtail exploitation of the state secrets privilege, the courts must be armed with stronger powers to thoroughly investigate the legitimacy of state secrets claims. Legislators and the judiciary must implement mechanisms to mandate *in camera* review of allegedly secret evidence, prevent the dismissal of litigation during inappropriately early stages of civil procedure, and institute the use of special advocates within classified proceedings. By doing so, the judiciary can maintain procedural normality while meaningfully policing executive claims of privilege.

II. EXAMINING THE CASES

The scope of the state secrets privilege was intended to be relatively limited in *Reynolds*.[8] Even so, a thorough analysis of the *Reynolds* decision reveals the gaps that have allowed the precedent to be more liberally applied in modern circumstances.[9] The *Reynolds* case was set in motion when a B-29 bomber crashed during a test flight in 1948 and killed three civilian contractors who were on board.[10] The widows of the three contractors filed wrongful death suits against the government and requested that the Air Force's accident investigation report be divulged under Rule 34 of the Federal Rules of Civil Procedure.[11] This states that any party has the right to request other parties to produce documents relevant to trial that are in their ownership or control.[12] The government protested the discovery motion, alleging that disclosure of the report would compromise military secrets and undermine the technical advantage of U.S. air power.[13] The Court ultimately decided that the

1 Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 Boston Univ. L. Rev. 103, 105-106 (2017).
2 United States v. Reynolds, 345 U.S. 1, (1953).
3 Daniel R. Cassman, *Keep it Secret, Keep it Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stanford L. Rev. 1173 (2015).
4 *Id.*, at 1184.
5 Kwoka, *supra* note 1, at 107.
6 Cassman, *supra* note 3, at 1174-1176.
7 *Id.*, at 1184.
8 Reynolds, 345 U.S. 1 at 7.
9 Reynolds, 345 U.S. 1.
10 *Id.*, at 1.
11 Fed. R. Civ. P. 34.
12 *Id.*, at 3.
13 Reynolds, 345 U.S. 1 at 1.

government's privilege claim was appropriate and denied the plaintiffs' discovery motion.[14] Nevertheless, it foresaw the dangers of abdicating judicial control "to the caprice of executive officers" and warned that the state secrets privilege "is not to be lightly invoked."[15]

This sentiment has been echoed in modern reflections on *Reynolds*.[16] A recent example was in the 2011 government breach of contract case *General Dynamics Corp. v. United States*.[17] The plaintiff General Dynamics had been under a $4.8 billion fixed-price contract with the U.S. Navy to develop a stealth military aircraft.[18] However, a Navy contracting officer had terminated the contract after General Dynamics fell behind schedule.[19] General Dynamics filed suit challenging the contract termination, alleging that the delay in schedule should be excused because the U.S. government had failed to share its superior knowledge about how to develop military aircraft.[20] The U.S. government responded by filing a privilege claim, arguing that any information about the aircraft was considered to represent a state secret, which meant that it could not be discussed in court.[21] The Court followed in the footsteps of the majority in *Reynolds* by ruling in favor of the government.[22] Justice Antonin Scalia wrote in his majority opinion that "neither party can obtain judicial relief" because determining whether there was indeed a breach of contract as claimed by the plaintiff would require "full litigation" that "would inevitably lead to the disclosure of state secrets."[23]

In other words, the Court never reached a verdict on the central issues of the *General Dynamics Corp.* case. This was because proceeding with the first steps of the judicial process—being interrogated and evaluated through the adversarial tradition—would expose classified national security matters. In a nod that acknowledged the frustrating nature of the Court's refusal to engage, Justice Scalia admitted in his majority opinion that "neither side will be entirely happy" with the decision to dismiss on the basis of the Court's inability to proceed.[24] He also described that the invocation of the state secrets privilege should be an "option of last resort, available in a very narrow set of circumstances."[25]

To justify the dismissal, Justice Scalia referenced precedent in *Totten v. United States*,[26] an 1876 invocation of the state secrets privilege that resulted in the dismissal of the government's alleged breach of contract.[27] In *Totten*, a former spy sued the government for failure to pay his salary; the case was dismissed outright because the Court ruled that any trial would "inevitably lead to the disclosure of matters which the law itself regards as confidential."[28] Scalia, by referencing *Totten*, correspondingly writes: "judicial refusal to enforce promises ... is not unknown to the common law, and the traditional course is to leave the parties where they stood when they knocked on the courthouse door."[29]

14 Reynolds, 345 U.S. 1 at 1.
15 *Id.*, at 7, 9-10.
16 *Id.*
17 General Dynamics Corp. v. United States, 563 U.S. 478, (2011).
18 *Id.,* at 1.
19 *Id.,* at 1.
20 *Id.,* at 1.
21 *Id.,* at 1.
22 Reynolds, 345 U.S. 1.; General Dynamics, 563 U.S. 478.
23 *Id.,* at 2, 7-8.
24 *Id.,* at 10.
25 *Id.,* at 13.
26 Totten v. United States, 92 U.S. 105, (1875).
27 General Dynamics, 563 U.S. 478 at 7.
28 Totten v. United States, 92 U.S. 105 at 92.
29 General Dynamics, 563 U.S. 478 at 9.

In order to avoid the kind of dismissals that occurred in both the *Totten*[30] and *General Dynamics*[31] cases, the *Reynolds* decision did attempt to regulate the circumstances in which the state secrets privilege could be invoked: *Reynolds* established precedent regarding the specific kind of secrets that were to be considered as worthy of protection from disclosure.[32] During oral arguments for *Reynolds*, the government asserted that the accident investigation report contained "highly technical and secret" information about the "equipment" of the B-29 bomber.[33] The Court accepted the government's arguments because it was able to articulate a clear cause-and-effect relationship between the exposure of the bomber's technical design and its decreased effectiveness as an important military aviation technology.[34]

Thus, the precedent was set that secrets worthy of protection from disclosure were those of a military nature, meaning that the information classified within this category would be tied to areas such as national defense or foreign policy. In addition, to further regulate the circumstances in which state secrets privilege claims could be brought, the Court established a two-part test to evaluate these types of claims.[35] The first element of the test is largely procedural, mandating that the government make "a formal claim of privilege, lodged by the head of the department which has control over the matter."[36] However, the second raises more significant difficulties: it requires that "the court itself ... determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[37]

No case better illustrates the implications of these difficulties raised by the second element than *Reynolds* itself.[38] As already mentioned, the Court held that the accident investigation report did fall under the privilege umbrella because it posed a substantial risk of exposing critical military secrets.[39] The Court reached this conclusion without ever actually examining the contents of the report.[40] When the document was declassified decades later in 2000, it was found that the document contained no details that discussed any secret electronic equipment within the B-29 bomber nor any detailed information about the bomber's technical design.[41] In fact, the information that the document did contain was that the bomber was brought down by a fire in the engine: this is evidence that would have been instrumental to the widows' claims that government negligence had caused the deaths of their husbands.[42]

These revelations triggered new litigation in the form of *Herring v. United States.*[43] In *Herring*, the widows' descendants sought monetary damages as a remedy to what they alleged were fraudulent claims by the government in the original *Reynolds* case,[44] which had stated that the crash report did in fact contain state secrets.[45] Here, the case was decided again in favor of the government.[46] The Court of Appeals for the Third

30 Totten, 92 U.S. 105.
31 General Dynamics, 563 U.S. 478.
32 Reynolds, 345 U.S. 1 at 2.
33 *Id.,* at 5.
34 *Id.,* at 10.
35 *Id.,* at 8.
36 *Id.,* at 8.
37 *Id.,* at 8.
38 *Id.*
39 *Id.,* at 10.
40 *Id.,* at 11.
41 Patricia J. Herring v. United States, 424 F.3d 384, (3d Cir. 2005).
42 *Id.*
43 *Id.*
44 Herring, 424 F.3d 384., at 388.
45 Reynolds, 345 U.S. 1.
46 *Id.*, at 392.

Circuit issued another ruling that was characterized by deference to the executive.[47] This ruling found it possible that the document's inclusion of highly general phrases about the aircraft—such as statements that it was "capable of dropping bombs" and "of operating at altitudes of 20,000 feet and above"—could have been pieces of information that would have been "of keen interest to a Soviet spy fifty years ago."[48] The *Herring* decision proved controversial, which was highlighted when then-Senator Pat Leahy (D-VT) remarked that the Court's reasoning was "a little mystifying."[49]

The Court's generous reading of the 1948 bomber crash report in *Herring* speaks to another aspect of the judiciary's willingness to appease the executive branch when it comes to national security-related invocations of privilege.[50] A Senate Judiciary Hearing on the state secrets privilege in 2008 featured testimony from Michael A. Vatis who stated that "too often, information deemed classified by the Executive Branch merely echoes what was in last week's newspapers."[51] A similar note was expressed by the *New York Times* executive editor Dean Baquet when he was pressed by an interviewer to explain the paper's decision to publish the name of a Central Intelligence Agency ("C.I.A.") operative.[52] When asked to respond to the accusation that the paper's decision put lives in jeopardy, Baquet lamented, "I wish the C.I.A. did not say that about everybody and everything. They hurt their case."[53] Baquet's and Vatis's words ring particularly true in the context of the bomber crash report. There is no denying that the executive branch exaggerated the level of technical detail that was contained in the report. Yet, even when the U.S. Court of Appeals for the Third Circuit was given the chance to review the report decades later in *Herring*, it still sided with the government and ruled that the representations of its content were not fraudulent.[54] If the executive branch tends to indiscriminately label evidence as secret, then the judiciary seems to have a tendency to let them get away with it.

This tendency is supported by data. A study published in the Stanford Law Review found that "in general, when courts decide the application of state secrets claims to individual cases, they uphold the privilege 67% of the time, deny it 18% of the time, and uphold it in part 15% of the time."[55] Furthermore, in "21% of the cases in which the privilege is raised, courts never rule on the issue."[56] The fact that *Reynolds* did not create a particularly combative path for courts to take when confronted with state secrets privilege claims tends to explain the presence of an alarming 82% of cases in which the claims are either fully or partially upheld.[57] Yet, even for those judges within the 18% minority that may skew towards employing less deference to the executive, excessive government use of the state secrets privilege poses serious risks to their ability to discriminate between legitimate and frivolous invocations.[58] The possibility of courts being buried in an avalanche of executive frivolity became evident in the decades following 9/11. The same study found that after September 2001, instances of state secrets privilege invocations skyrocketed during both the Bush and the Obama administrations.[59] Prior to

47 *Id.*

48 *Id.,* at 392 n.3.

49 *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability: Hearing Before the Comm. on the Judiciary*, 110th Cong. 4 (2008) [hereinafter *Hearings*] (statement of Senator Patrick Leahy).

50 Herring, 424 F.3d 384.

51 *Hearings*, *supra* note 49, at 192 (statement of Michael A. Vatis, Partner, Steptoe & Johnson LLP).

52 Jack Goldsmith, *Interview with Dean Baquet, Executive Editor of New York Times, on Publication Decisions About Intelligence Secrets, and More,* Lawfare (Apr. 29, 2015), https://www.lawfareblog.com/interview-dean-baquet-executive-editor-new-york-times-publication-decisions-about-intelligence.

53 *Id.*

54 Herring, 424 F.3d 384., at 392.

55 Cassman, *supra* note 3, at 1188.

56 *Id.,* at 1188.

57 Reynolds, 345 U.S. 1.

58 Cassman, *supra* note 3, at 1188.

59 *Id.*

9/11, the privilege was asserted in 2.4 cases per year on average.[60] Afterwards, however, the average jumped to 11.4 cases per year, highlighting a 375% increase.[61]

Several of these post-9/11 cases require examination in greater detail. In the 2010 case *Mohamed v. Jeppesen Dataplan, Inc.*, Ethiopian citizen Binyam Mohamed brought a suit against Jeppesen, an American company that provided the C.I.A. with logistical services supporting its rendition program, known as the illegal detainment, interrogation, and torture of individuals abroad.[62] Mohamed, suspected of training with al Qaeda or the Taliban, had been apprehended in Pakistan and transported to secret C.I.A. detention facilities in Morocco and Afghanistan where he was detained and viciously tortured for months.[63] Afterwards, he was again transported and detained, only this time in the C.I.A.'s infamous black site prison in Guantanamo Bay.[64] Nearly seven years after his initial arrest, Mohamed was ultimately released by the U.S. government without ever having been tried for any crime.[65] Mohamed, once freed from detention, sought a legal remedy against Jeppesen, who he claimed was liable for his injuries because they had provided the C.I.A. with the flight plans for Mohamed's transport between detention sites.[66]

Mohamed was denied any chance at a legal remedy, however, because the U.S. government invoked the state secrets privilege on behalf of Jeppesen.[67] The government broadly claimed that anything related to the C.I.A.'s rendition program or its interrogation practices as well as "any other information...that would tend to reveal intelligence activities, sources, or methods," was too sensitive to discuss in court.[68] As a result, they moved to dismiss Mohamed's complaint.[69] The District Court for the Northern District of California agreed with the government and barred the entirety of the litigation from proceeding.[70] When Mohamed appealed, an *en banc* review by the Ninth Circuit Court of Appeals upheld the District Court's ruling, as it stated: "there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets."[71] Incredibly, the Court cited this reasoning, despite the fact that Mohamed had indicated that he could rely on evidence that was *publicly available* to litigate his case.[72]

The courts that handled post-9/11 cases that challenged the National Security Agency's ("N.S.A.") wiretapping practices similarly failed to subject government claims of privilege to scrutiny and to provide litigants with remedies. After a *New York Times* article reported in 2005 that President George W. Bush had authorized the N.S.A. to surveil American citizens for terrorist activity without the required warrants,[73] a group of journalists and lawyers sued the N.S.A. for violating the Foreign Intelligence Surveillance Act ("F.I.S.A.") and the U.S. Constitution in the case *American Civil Liberties Union v. National Security Agency*.[74] This case was dismissed for having a lack of standing by the Court of Appeals for the Sixth Circuit because it held

60 *Id.*

61 *Id.*

62 Binyam Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1075-1076 (9th Cir. 2010).

63 *Id.,* at 1074.

64 *Id.,* at 1074.

65 *Id.,* at 1074.

66 *Id.,* at 1075-1076.

67 *Id.,* at 1077.

68 *Id.,* at 1086.

69 *Id.,* at 1077.

70 *Id.,* at 1087.

71 *Id.,* at 1087.

72 *Id.,* at 1075.

73 James Risen & Eric Lichtlau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. Times (Dec. 16, 2005), https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html.

74 American Civil Liberties Union v. National Security Agency, 493 F.3d 644, (6th Cir. 2007).

that "the plaintiffs do not—and because of the state secrets doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the N.S.A. ... without warrants."[75] The Court could have allowed the litigants to motion for discovery of the classified documents that proved whether their communications had been targeted. After doing so, it then could have applied dual, adversarial interrogation for an impartial arbiter, as is tradition within the U.S. system of law, to investigate the government's inevitable attempts to prevent that discovery. Instead, it did neither, dismissing the case in its entirety thus failing to reach the merits of its underlying claims.[76]

The Supreme Court demonstrated a similar course of action in a N.S.A. surveillance case that followed *American Civil Liberties Union*.[77] After an amendment to F.I.S.A. in 2008 that authorized an expansion of the government's surveillance powers,[78] a group of human rights activists and lawyers challenged the added amendment in *Clapper v. Amnesty International USA*.[79] In order to satisfy the standing requirements such that they could bring the challenge forward, the litigants claimed that the F.I.S.A. amendment would likely cause them injury in the future when their communications were inevitably acquired under the to-be-expanded surveillance authority.[80] The claims did not reference any secret information: first, because the litigants had not yet made any request for discovery and, second, because the language of the F.I.S.A. amendment that they were challenging was completely public.[81] Nevertheless, the Supreme Court dismissed *Clapper* because it found the claim of future injury to be too "speculative."[82] In other words, the judiciary ruled that the plaintiffs had not established a sufficient connection between any action by the government and the harm that the plaintiffs allegedly suffered and that, therefore, any allegations that suggested that the government had caused their harm were speculative. Of course, the only reason why the claims were considered to be speculative to begin with is because the government tends to cloak its wiretapping practices in secrecy for national security reasons. It does this with the help of the state secrets privilege, which it would likely have invoked not long after in this case, had the Court not, in effect, preemptively sided with them.

The case of *Jewel v. NSA* continued the pattern.[83] In *Jewel*, the plaintiffs alleged that, by virtue of being AT&T customers, their data was being unlawfully collected and stored by the N.S.A.[84] The case was filed after significant revelations about secret government surveillance were made public by former AT&T technician Mark Klein,[85] former N.S.A. agent William Binney,[86] and, of course, Edward Snowden.[87] Despite the wealth of available *public* information that buttressed the plaintiff's arguments, the Court still dismissed the case because it reasoned that the public information offered by the plaintiffs still lacked the particularity that would be necessary to establish standing in the case.[88] Thus, it never ruled on the constitutionality of the particular data

75 *Id.,* at 6.
76 *Id.,* at 40.
77 *Id.*
78 FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended at 50 U.S.C. §§ 1801-1885c).
79 Clapper v. Amnesty Int'l USA, 568 U.S. 398, (2013).
80 *Id.* § II.
81 *Id.* § III(B).
82 *Id.* § IV(B).
83 Jewel v. NSA, 673 F.3d 902, (9th Cir. 2011).
84 *Id.,* at 5-6.
85 Government Accountability Office, *2006: Mark Klein* (Jul. 9th, 2006), https://whistleblower.org/timeline/2006-mark-klein/.
86 Government Accountability Office, Biography of NSA Whistleblowers William (Bill) Binney and J. Kirk Wiebe, https://whistleblower.org/bio-william-binney-and-j-kirk-wiebe/, (last visited Dec. 18, 2020).
87 Lawfare, *Snowden Revelations*, https://www.lawfareblog.com/snowden-revelations/, (last visited Apr. 13, 2021).
88 Jewell, 673 F.3d 902 at 17.

collection program.

III: EXAMINING THE IMPLICATIONS

In order to understand how the courts in each of these post-9/11 cases reached the drastic decision to dismiss without addressing the underlying merits, it is necessary to revisit the foundational *Reynolds* precedent. The extraordinary *Reynolds* mandate greatly restricts the courts' maneuverability around government privilege claims. In essence, it asks that the judicial branch somehow must determine the validity of claims that evidence contains national security secrets and that its exposure would pose a real risk, all without accessing the very evidence that would prove or disprove that validity.[89] Though *Reynolds* does not prohibit a judge reviewing secret evidence alone in their private chambers—a process termed *in camera* review—it explicitly discourages that the court jeopardize "the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[90]

Holding the courts to such a standard is the equivalent of demanding that a doctor must diagnose the size of a patient's tumor without being allowed to see their CAT scan. Without access to the very documents upon which they must base their decision-making, both doctor and judge run the risk of making highly erroneous estimates. In practice, then, the precision necessary for judicial oversight—in other words, the need for judges to review the actual evidence carefully and thoroughly upon which they form the basis of their ruling—is replaced with guesses, assumptions, and approximations as to what information that evidence might possibly contain. This would be unacceptable for making recommendations in the medical field, and it should be similarly frowned upon in passing legal verdicts. Ultimately, the second element of the *Reynolds* test creates a gap in the court's oversight mechanisms that risks turning the exercise of its oversight duty into an exercise in futility.[91]

The rest of the *Reynolds* decision fails to offer much relief for this dilemma.[92] Other than the two-part test, the only other concept it established was the "necessity for...compulsion," which refers to the private party's mandate to demonstrate a need for the information that the government claims is privileged.[93] Justice Fred M. Vinson wrote for the majority opinion that "the showing of necessity ... will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[94] In other words, the court need not look as closely at whether the government's demands are legitimate if the opposing party fails to demonstrate an overriding need for the evidence.[95] The Court can avoid holding the government's claims of privilege to the same level of scrutiny as the plaintiff's claims. Of course, this was the entire point. It makes sense that the Court is more willing to investigate the plaintiff's claims than the government's claims, as the former does not possess secrets vital to national security, while the latter does. The larger theme, then, is that the presence of national security secrets will always tip the scale in favor of a government-friendly litigation outcome and stack the odds against ordinary citizens. This group of citizens includes those who may have legitimate injuries that deserve redress and for which the government is liable.

Reynolds ostensibly prevents any judiciary takeover by the caprice of executive officials, but, upon closer analysis, *Reynolds* seems quite deferential to and trustworthy of government representations of the contents of privileged documents.[96] Of course, the ruling is not always interpreted this way, and it has not meant that all government state secrets privilege invocations have been honored. Indeed, the contradictory tones that the ruling strikes between resistance and deference to the executive combined with the lack of any clearer guidelines

89 Reynolds, 345 U.S. 1.
90 *Id.,* at 10.
91 *Id.*
92 *Id.*
93 *Id.,* at 2.
94 *Id.,* at 11.
95 *Id.,* at 11.
96 *Id.*

on how exactly to investigate the validity of privilege claims have led to a disparity in the ways in which courts across the country handle these claims. While some judges allow trials to proceed with privileged information excluded, others show extreme deference to the executive by responding to privilege claims with the unilateral barring of any litigation from proceeding. In both cases, however, the courts usually protect privileged evidence from the adversarial testing that is tradition within the U.S. system of law.[97]

This trend has problematic implications for a society that values democracy, transparency, and the protection of constitutional rights. The government's tendency to generously label secret various national security-related matters undermines its credibility before the judiciary and the public.[98] If too much of the government's activity is shielded not only from public view, but also from the lens of the judicial microscope, the possibility rises that abuse and misconduct will fester unchecked.[99] One government accountability watchdog has even gone so far as to say that what was meant to be a "narrow, evidentiary scalpel" is instead being used as a "chainsaw" to mangle the muscle of judicial review into what amounts to be ineffectual, flabby oversight.[100] Though the chainsaw metaphor may amount to hyperbole, the essence of the argument remains true. During cases in which courts recognize the government's state secrets privilege, it becomes much more likely that that case will be dismissed without reaching the merits of the case's underlying claims, either for inability to proceed or for lack of standing.[101]

This is significant for two reasons. First, it significantly weakens the judiciary's role in the system of checks and balances because it undermines opportunities for the courts to meaningfully examine the conduct of the legislative and executive branches of government. Second, it strips away the constitutional right of private citizens to seek remedy for injury through the very institutions, the courts themselves, that are designed to lawfully mediate their grievances and disputes. The judiciary's dual role as an arbiter of constitutionality and as a provider of legal remedies for injury is an indispensable feature of the U.S. constitutional system that was enshrined in one of the most important cases in legal history, *Marbury v. Madison*.[102] Chief Justice John Marshall, in the case's seminal majority opinion, explained, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[103] Marshall further forewarns that "if the laws furnish no remedy for the violation of a vested legal right," the government of the United States cannot be "termed a government of laws."[104] When the courts dismiss litigation in its entirety after the state secrets privilege is invoked, the courts are effectively preventing private litigants whose vested legal rights have been violated from receiving the otherwise owed remedies to which Justice Marshall refers.

One could argue that the consequences of dismissing litigation without reaching the underlying merits of the case may not be so harmful in certain instances. For example, a silver lining existed in the *General Dynamics Corp.* and *Totten* cases that, notwithstanding their impact on future rulings, the consequences of abandoning the plaintiffs at the courthouse door were not so dire.[105] In terms of the immediate impact on the plaintiffs in question, the dismissals only meant that they failed to receive the contract or the salary that the plaintiffs felt they were owed.[106] However, in the post-9/11 space, the privilege invocations that deserve a heightened degree of scrutiny are not those that arise in simple breach of contract cases, but the ones that are filed to obscure

97 Kwoka, *supra* note 1, at 110.
98 Cassman, *supra* note 3, at 1184.
99 *Id.,* at 1184.
100 Electronic Frontier Foundation, *State Secrets Privilege*, Issues, https://www.eff.org/nsa-spying/state-secrets-privilege/, (last visited Dec. 18, 2020).
101 Kwoka, *supra* note 1, at 107-108.
102 Marbury, 5 U.S. 137, (1803).
103 *Id.,* at 163.
104 *Id.,* at 163.
105 General Dynamics, 563 U.S. 478.; Totten, 92 U.S. 105.
106 General Dynamics, 563 U.S. 478.; Totten, 92 U.S. 105.

government activities with the greatest potential for abuse.[107] Specifically, the state secrets privilege has played a starring role in civil litigation concerning two of the most controversial national security practices in recent memory, the C.I.A.'s extraordinary rendition program and the N.S.A.'s warrantless wiretapping program.[108] Invocation of the privilege in cases—such as *Mohamed*,[109] *ACLU*,[110] *Clapper*,[111] and *Jewel*[112]—that have challenged these programs has led to unacceptable procedural exceptionalism on the part of the judiciary.[113] The resulting dismissals denied non-governmental litigants their right to legal redress and allowed intolerable government abuse to remain unchecked.[114]

The dismissal of the *Mohamed* case is a particularly egregious example of the state secrets privilege that was used to quash judicial review of questionable government practices. The Court's majority even admitted as much, writing that "terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors."[115] It grows even more appalling, however, upon closer examination of the Court's divergence from the typical procedure in order to give the government maximum flexibility to block Mohamed's complaint. Instead of requiring the executive branch to file a claim of privilege after Mohamed motioned for discovery, the judiciary allowed the government to do so at the pleadings stage.[116] The District Court for the Northern District of California offered no explanation for this procedural abnormality.[117] In fact, it even claimed that "the motion by the United States is timely."[118]

Although the decision to bar the litigation from proceeding during the pleadings stage may have passed without commentary in the District Court, the Ninth Circuit Court of Appeals that reviewed the decision made evident that it would comment on the abnormality.[119] In the majority opinion that upheld the District Court's decision, Judge Fisher wrote, "dismissal at the pleading stage under *Reynolds* is a drastic result and should not be readily granted."[120] Judge Hawkins, dissenting, went even further in his criticism of both the District Court's procedural exceptionalism and his appellate court colleagues who allowed the exceptionalism to stand.[121] In his dissent, he wrote that the decision ignored "well-established principles of civil procedure which, at this stage of the litigation, do not permit the prospective evaluation of hypothetical claims of privilege that the government has yet to raise and that the district court has yet to consider."[122]

As Judge Hawkins notes, the "prospective" and "hypothetical" nature of the claims and evidence in question *at this stage* of the litigation represents precisely the reason why this procedural decision should not have been made during pleadings.[123] The decision deprived Mohamed of the chance to identify the evidence that he needed to compel, setting him up to fail to meet the very burden of demonstrating the necessity of

107 Cassman, *supra* note 3, at 1215-1216.
108 Kwoka, *supra* note 1, at 119-125.
109 Binyam Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1075-1076 (9th Cir. 2010).
110 American Civil Liberties Union v. National Security Agency, 493 F.3d 644, (6th Cir. 2007).
111 Clapper v. Amnesty Int'l USA, 568 U.S. 398, (2013).
112 Jewel, 673 F.3d 902.
113 Kwoka, *supra* note 1, at 107.
114 *Id.,* at 118.
115 Mohamed, 614 F.3d 1070 at 1091.
116 *Id.,* at 1093.
117 *Id.*
118 *Id.,* at 1133.
119 *Id.,* at 1089.
120 *Id.,* at 1089.
121 *Id.,* at 1099.
122 *Id.,* at 1099.
123 *Id.,* at 1099.

compulsion that he was required to by *Reynolds.*[124] Further, the decision denied Mohamed the possibility to suggest redactions to satisfy the government's fears of state secrets exposure, as, at that point, there were no documents in question to redact. Finally, the decision prevented the Court itself from reviewing the government's claims via any adversarial testing or inquisitorial procedure. Given that the litigation had not even reached the discovery phase, there was no hard evidence identified for the Court to consider *in camera* in an investigation of the legitimacy of government claims. Ultimately, no court ever ruled on the merits that underlined Mohamed's challenge to the C.I.A.'s extraordinary rendition program.

The dismissal of the cases challenging the N.S.A.'s warrantless surveillance program similarly demonstrates procedural exceptionalism on the part of the judiciary, albeit for different reasons. All three of these cases—*Jewel,*[125] *Clapper,*[126] and *American Civil Liberties Union*[127]—were dismissed for lack of standing. In other words, the judiciary believed that no sufficient connection had been established between any action by the government and the harm that the plaintiffs allegedly suffered. A decision to dismiss for lack of standing on its own does not demonstrate procedural exceptionalism, but the logic behind the judiciary's decision to dismiss for lack of standing *only* in the context of these specific cases does.

The plaintiffs in these three cases attempted to circumvent any triggering of the state secrets privilege by signaling to the judiciary that they could solely rely on publicly available information to prove that they had been harmed by the government's warrantless surveillance program.[128] Indeed, one would expect that leaks like the Snowden revelations would provide plaintiffs with an abundance of detailed, publicly available, and non-privileged evidence with which to trump any assertions that injury claims would otherwise be considered as speculative.[129] In theory, publicly available information should allow litigants to both establish standing and move forward with litigation without provoking the government's use of the state secrets privilege.

This is because, by definition, publicly available information and secret information are not the same. Information that has never been shared or divulged publicly falls into the category of being considered as a secret. But if "secret" information has been divulged by leakers and whistleblowers, acknowledged in Congressional testimony, and reported by major news agency investigations, how secret is it really? To put it more directly, why should information that has already been shared on TV channels, newspaper columns, and internet forums be barred from entering into the courtroom? In the words of the American Civil Liberties Union's Ben Wizner, claiming privilege for such widely known information is effectively saying that "the only place in the world where" it "can't be discussed is in this courtroom."[130]

Yet, despite the availability of public information supporting the claims of the plaintiffs in *Jewel,*[131] *American Civil Liberties Union,*[132] and *Clapper*,[133] the courts still ruled that it was not enough to establish standing. The decisions display a profoundly circular logic. The evidence needed for the plaintiffs to establish standing that their data was collected by the government and that this data collection caused them harm is the very evidence that they did not have access to because of the government's invocation of the state secrets

124 Reynolds, 345 U.S. 1.
125 Jewel, 673 F.3d 902.
126 Clapper, 568 U.S. 398.
127 American Civil Liberties Union, 493 F.3d 644.
128 Jewel, 673 F.3d 902 at 7; Clapper, 568 U.S. 398 at § III(B); American Civil Liberties Union, 493 F.3d 644 at 3.
129 Lawfare, *supra* note 106.
130 John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. Times (Feb. 9, 2009), https://www.nytimes.com/2009/02/10/us/10torture.html.
131 Jewell, 673 F.3d 902 at 7.
132 American Civil Liberties Union, 493 F.3d 644 at 3.
133 Clapper, 568 U.S. 398 § III(B).

privilege. Yet, when they abandoned attempts to use secret evidence and informed the court that the only evidence they intended to use to prove standing was public, the courts still refused to allow them to do so. This landed the plaintiffs right back at the beginning, where they were unable to use or access the only evidence that the court would accept to establish standing. As the Court in *Jewel* put it, "even if the public evidence proffered by Plaintiffs were sufficiently probative on the question of standing, adjudication of the standing issue could not proceed without risking exceptionally grave damage to national security."[134] As a result, the Court never ruled on the constitutionality of the N.S.A. data collection in question.[135]

IV. CONCLUSION

It seems that any way that the current version of the cake is cut, the plaintiffs still go home hungry. It is difficult neither to imagine nor to empathize with the frustration likely felt by Mohamed,[136] the *Clapper* plaintiffs,[137] and countless others who search for remedies in the constitutional system in good faith, only to have that same system claim it is incapable of providing what they seek. The lamentable impact of these cases, however, extends far beyond the individuals who are directly involved. The biggest implication of state secrets privilege invocations is that the government becomes shielded from genuine judicial oversight and is protected from liability claims. This represents an effect that has been demonstrated time and time again as early as 1876, when the *Totten* case that addressed government breach of contract was dismissed for lack of ability to proceed,[138] to most recently in 2010, when the *American Civil Liberties Union* case that challenged the N.S.A. surveillance program was dismissed for lack of standing.[139]

The protection of national security interests must be balanced with the maintenance of individual rights and the system of checks and balances. The bottom line is that the pendulum has swung too far in favor of the former with little effective intervention from the judiciary throughout this process. On one hand, the deference and procedural exceptionalism that have been demonstrated by the judiciary to the executive are rooted within the gaps that were identified in the foundational *Reynolds* decision.[140] On the other, the variety with which *Reynolds* is interpreted also speaks to a problem in the way that the precedent, and the state secrets privilege itself, is applied in modern contexts.[141] Judicial oversight has been colored by the shadow of 9/11 for too long. It is time for the courts to stop tiptoeing on metaphorical eggshells around government privilege claims and begin wrestling with the underlying merits of important, landmark litigation brought to courts to hold the government accountable to the American people. The courts must avoid at all costs turning to dismissal for inability to proceed and lack of standing as a response to privilege invocations so that the judicial branch can preserve constitutional rights that are integral to U.S. democracy.

The problem is that the U.S. government will likely continue to invoke the state secrets privilege when it believes that it is in its best interest to do so, regardless of whether the invocation is appropriate or not. Therefore, the responsibility of policing these claims and preventing the procedural exceptionalism that so often have led to the dismissal of litigation falls largely on the shoulders of judges. However, the contradictory tensions of the *Reynolds* precedent that form the basis of almost all rulings in the context of the state secrets privilege mean that interpretations of the ruling will likely never be fully resolved.[142] As such, approaches to reform the judicial response to privilege claims should look elsewhere for inspiration. Instead, these approaches

134 Jewell, 673 F.3d 902 at 8.
135 *Id.,* at 17.
136 Mohamed, 614 F.3d 1070.
137 Clapper, 568 U.S. 398.
138 Totten, 92 U.S. 105.
139 American Civil Liberties Union, 493 F.3d 644.
140 Reynolds, 345 U.S. 1.
141 *Id.*
142 *Id.*

should focus on the lack of protections against procedural exceptionalism and the meager investigative powers of the judiciary.

Legislators should institute three protective measures to address these coexisting issues. First, judges should be required in every single instance in which the state secrets privilege is invoked to review the allegedly secret evidence *in camera*. When a judge has the chance to review the actual contents of evidence that are alleged to be secret when alone in private chambers, he or she would be able to make an informed decision as to whether that evidence deserves to be protected by this privilege. This would eliminate the excessive dismissals that may stem from judges having to guess blindly at the merits of government privilege claims.

Second, judges should be banned from dismissing litigation based on state secrets privilege during the pleadings stage. At that stage, no evidence has been collected or logged, meaning that the evidence is not yet available for the judge to review *in camera* as would be mandated by the first proposed reform measure.[143] Dismissal for inability to proceed or lack of standing should therefore only be appropriate during or after discovery to allow judges to privately consider the contents of the allegedly secret evidence as it is logged and to maintain procedural normality.

Third and finally, the U.S. judicial system should begin to implement special advocates in classified proceedings. Special advocates are "judicially appointed, government-cleared lawyers whose assigned task is to take the adversarial position in an *ex parte* proceeding" involving the government's privilege claim.[144] In other words, when the private litigant and their counsel cannot take part in a court proceeding that discusses secret evidence that neither have the authorization to view, they would be represented in that proceeding by a special advocate that would represent the litigant's interests and assist the court "to test the strength of the State's case."[145] Currently, private litigants are at a significant disadvantage when it comes to arguing against a government privilege claim. Given that these litigants are unable to view the actual contents of secret evidence, they cannot convincingly argue that government claims of privilege are not well-founded. The special advocate would solve this problem by having unfettered access to any secret evidence, which this person can leverage to represent private litigant interests more effectively.[146] Thus, special advocates would level the playing field between the government and private litigants by improving the persuasiveness of the private litigation's arguments against the state claims of privilege.

Of course, these three protective mechanisms are not perfect solutions to the complex problems that the state secrets privilege has posed for the judiciary for over a century. However, it is clear that whatever shape reform takes, legislators and the judiciary must take urgent action. National security practices adapt to reflect changes in technological advances and the modern threat landscape. This inevitably triggers waves of national security-related civil litigation filed to challenge new practices and adjudicate the issues of liability and constitutionality they raise. This happened in the early 21st century when cases like *Mohamed,*[147] *Jewel,*[148] *American Civil Liberties Union*,[149] and *Clapper*[150] arose when the U.S. government changed its national security strategies and tactics in response to emerging threats, such as Al-Qaeda.[151] Although it is impossible to predict when the next change in strategy will be, it is inevitable that another wave of litigation will arrive in the future

143 Kwoka, *supra* note 1, at 160.
144 *Id.,* at 160.
145 *Id.,* at 160.
146 *Id.*
147 Mohamed, 614 F.3d 1070.
148 Jewell, 673 F.3d 902.
149 American Civil Liberties Union, 493 F.3d 644.
150 Clapper, 568 U.S. 398.
151 Susan E. Rice, *U.S. National Security Policy Post-9/11: Perils and Prospects*, The Fletcher Forum of World Affairs, 133 (2004).

as U.S. national security strategies continue to evolve to meet new threats and challenges. Rather than wait for the next tsunami of litigation to hit, the judiciary must act preemptively to arm themselves with stronger powers and protections so that it can withstand this next wave. Otherwise, government exploitation of the state secrets privilege will only cause secrecy to continue to be entrenched as the status quo.

Sticks and Stones:
A Call for the Abolition of the Fighting Words Doctrine

Cecilia Katz-Zogby
Georgetown University

Abstract

The fighting words doctrine, intended to allow regulation of speech that is inherently likely to provoke violence, was formally established by the Supreme Court of the United States in the 1942 case of *Chaplinsky v. New Hampshire*. This paper argues that this doctrine is inherently contradictory and serves no useful purpose in First Amendment law today. It analyzes the jurisprudential history of the fighting words doctrine from its creation to its present applications (or lack thereof) and considers proposed solutions to the doctrine's problems. Ultimately, the fighting words doctrine must be abolished because of its fundamental flaw in assuming that speech that inflicts injury or incites violence is of little value.

I. INTRODUCTION

An old and commonly known children's rhyme tells us that sticks and stones may break our bones, but words shall never hurt us.[1] However, as a matter of legal rights, there is much debate over the extent to which individuals have a right to insult or to be insulted by others. In 1942, the Supreme Court created an exception to the First Amendment's guarantee of free speech in what has been referred to as the fighting words doctrine.[2] The creation of special categories of speech entitled to little or no First Amendment protection is an action that the Court rarely takes and has only done so a handful of times to regulate speech like obscenities, libel, and commercial speech.[3]

The existence and history of the fighting words doctrine has long been criticized and debated by constitutional scholars. In order to understand the problems with the fighting words doctrine as it exists today, it is necessary to understand the doctrine's history and key components. The first section of this paper will summarize the jurisprudential history of the fighting words doctrine from its creation to the present day. The second section will analyze the evolution of fighting words, revealing how contradictory the doctrine has become. The third and final section will scrutinize proposed solutions to the problems with the fighting words doctrine and ultimately conclude that the doctrine should be abolished because it is inherently contradictory and serves no useful purpose in First Amendment law.

II. JURISPRUDENTIAL HISTORY

The fighting words doctrine was created in the 1942 Supreme Court case of *Chaplinsky v. New Hampshire*, a case in which a Jehovah's witness, Walter Chaplinksy, was proselytizing in the street which upset the crowd that gathered around him.[4] After being warned by the marshal that the crowd was becoming "restless,"[5] Chaplinsky called the city marshal a "fascist" and declared that "the whole government of Rochester are fascists or agents of fascists," and was subsequently arrested.[6] The Court held that Chaplinsky's speech was not protected by the First Amendment by creating a new category of speech outside of First Amendment protection: fighting words. The fighting words doctrine was famously defined by Justice Frank Murphy in the majority opinion of *Chaplinsky*:

> There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[7]

This original definition in *Chaplinsky* is best known for having two components: words that "inflict

1 Deborah Levine, *Sticks and Stones May Break my Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws*, 41 Fordham Int'l L.J. 1293 (2018).

2 Thomas F. Shea, *Don't Bother to Smile When You Call Me That--Fighting Words and the First Amendment*, 63 Ky. L.J. 1, 11 (1975).

3 *Id.*

4 Chaplinsky v. New Hampshire, 315 U.S. 568, 568-570 (1942).

5 *Id.* at 570.

6 *Id.* at 569; Chaplinsky was convicted under a New Hampshire statute which read: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." The appellant (Chaplinsky) claimed that the statute was invalid under the Fourteenth Amendment because it "placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite." *Id.*

7 *Id.* at 572.

injury" and words that "tend to incite an immediate breach of the peace."[8] The first component seeks to protect the listener from psychic injury and the second prong seeks to protect the speaker from a potentially violent retaliation. It is important to note that the last sentence of the doctrine describes the balancing test that the Court used to justify excluding fighting words from constitutional protection. The Court claims that fighting words are "no essential part of any exposition of ideas" and are of very "slight social value as a step to truth," and, thus, "any benefit that may be derived from [them] is clearly outweighed by the social interest in order and morality."[9] The two pronged definition laid out in *Chaplinsky,* and the balancing test that justified it, set the standard for fighting words cases—a standard that would become increasingly narrow as it evolved.

It took twenty years after *Chaplinsky* for the Court to hear another major fighting words case.[10] In *Cohen v. California*, the Court redefined and further narrowed the *Chaplinsky* definition.[11] In 1971, Paul Robert Cohen walked into a Los Angeles courthouse wearing a jacket that said "Fuck the Draft" in an attempt to express his feelings about the draft and the Vietnam War. Cohen was convicted under a California statute which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person" by "offensive conduct."[12] The opinion of the Court, written by Justice John Harlan, begins by establishing that Cohen's speech does *not* qualify as any of the possible exceptions to freedom of speech.[13] First, Harlan clarifies that Cohen's jacket is speech and not conduct. Second, Harlan explains that Cohen's jacket is not obscene. Third, the Court holds that Cohen's jacket is not fighting words. In explaining why Cohen's expression is not fighting words, the Court established what constitutional scholar Thomas Shea calls the "actual addressee test."[14] Harlan writes, "No individual actually or likely to be present could reasonably have regarded the words on appellants jacket as a direct personal insult."[15] The actual addressee test significantly narrows the fighting words doctrine by adding an additional test speech must pass in order to be considered fighting words. Michael Mannheimer of Northern Kentucky University Law School describes the fighting words doctrine (after the addition of the actual addressee test) as being:

> made up of two independent components—one objective and one subjective. It is objective to the extent that it requires that speech meet some objective standard of violence-creating *potential* before that speech can be deemed fighting words; it is subjective to the extent that it further requires an *actual* likelihood of violence to exist. The objective element concerns itself with the content of the words. The subjective element is concerned with the context in which the speech is used.[16]

8 *Id.*

9 *Id.*

10 There were two less significant cases between *Chaplinsky* and *Cohen*: *Terminiello v. City of Chicago* (1949) and *Feiner v. New York* (1951). In *Terminello*, the Court established the 'clear and present danger' test, under which words which produce a clear and present danger are not protected but other speech, even if it causes unrest or dispute, is protected by the First Amendment (and not considered fighting words). In *Feiner* the Court held that incitement to riot created a clear and present danger and is therefore not protected. *Terminello* and *Feiner* are considered hostile audience cases—related to fighting words but subject to the clear and present danger test instead of the fighting words doctrine (although speech that poses a clear and present danger is considered fighting words). The cases are not considered major fighting words cases in this paper because the Court applied the clear and present danger test instead of the fighting words doctrine as defined by *Chaplinsky.* However, *Terminello* and *Feiner* are relevant to the trajectory of fighting words jurisprudence in that the creation of the clear and present danger test narrowed the scope of what is considered fighting words. Terminiello v. Chicago, 337 U.S. 1 (1948); Feiner v. New York, 340 U.S. 315 (1951); *See also* Fran-Linda Kobel, *The Fighting Words Doctrine - Is There a Clear and Present Danger to the Standard?* 84 Dickinson L. R. 75, 75-96 (1979-1980); Michael J. Mannheimer, *The Fighting Words Doctrine,* 93 Colum. L. Rev. 1527, 1527-1571 (1993).

11 Cohen v. California, 403 U.S. 15, 28 (1971).

12 *Id.* at 15.

13 *Id.* at 18.

14 Shea, *supra* note 2, at 22; This was further clarified the next year in *Gooding v. Wilson* in which the Court held that a Georgia statute was overbroad because the statute was not limited to fighting words likely to cause acts of violence by the *actual addressee*. Gooding v. Wilson, 405 U.S. 518, 519 (1972).

15 *Cohen,* 403 U.S. at 20.

Mannheimer's analysis draws two important contrasts. First, he contrasts the second prong of the fighting words doctrine's emphasis on the speech's *potential* to cause violence with the actual addressee test's emphasis on the *actual* likelihood of violence. Essentially, Mannheimer argues that with the addition of the actual addressee test, an objective analysis must find that speech has the potential to provoke a violent retaliation and a subjective analysis must find that, based on context, the speech is likely to provoke a violent reaction from the actual addressee. The second contrast, directly related to the first, is between the fighting word doctrine's evaluation of *content* and the actual addressee test's evaluation of *context*. Thus, the actual addressee test can be understood as the addition of a context-based evaluation of speech in order for the speech to qualify as fighting words.

The Court's decision in *Cohen* not only narrowed the fighting words doctrine by adding the actual addressee test; it also ignored the first prong of the *Chaplinsky* definition. Harlan defines fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[17] This reformulation of the fighting words doctrine notably ignores the first prong of the *Chaplinsky* definition which defines fighting words as words that "inflict injury."[18] It is possible that the Court simply believed it was obvious that the first prong was inapplicable in this case and, therefore, did not need to be mentioned. In fact, Harlan only devotes one paragraph of the Court's opinion to explaining why Cohen's expression is not fighting words. While it does seem obvious that the "Fuck the Draft" jacket did not inflict injury, incite an immediate breach of the peace, or directly insult and provoke a violent reaction from any individual in Cohen's presence, Harlan's explanation as to why the speech is not fighting words appears incomplete. In a Texas Law Review article praising the Court's opinion in *Cohen*, Ronald J. Krotoszynski Jr. argues that the decision "speaks eloquently to values that transcend its facts, and does so in a way that vindicates core civil liberties."[19] However, even Krotoszynski admits that Harlan fails to fully explain why he believes the jacket is not fighting words and notes that a good dissent could have been written but was not.[20] Given that Harlan only mentioned the second prong and that there lacked a dissenting opinion challenging the Court's explanation of why Cohen's speech was not fighting words, the *Cohen* decision left an unclear precedent as to the significance of the first prong of the doctrine.

The fighting words doctrine was further complicated in *R.A.V. v. City of St. Paul* (1992).[21] The petitioner (a minor at the time) burned a cross in the lawn of a young black family that moved in across the street from him.[22] He was convicted under an ordinance called the Bias-Motivated Crime Ordinance that specifically prohibited burning a cross "on the basis of race, color, creed, religion, or gender."[23] The Court overturned the ordinance on the basis that it constituted viewpoint discrimination.[24] The Court held that St. Paul could not

16 Mannheimer, *supra* note 10, at 1544.

17 *Cohen*, 403 U.S. at 20.

18 *Chaplinsky*, 315 U.S. at 572.

19 Ronald J. Krotoszynski Jr., *Cohen v. California: Inconsequential Cases and Larger Principles*, 74 Tex. L. Rev. 1251, (1996).

20 *Id.* at 1254.

21 R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).

22 *Id.* at 379.

23 *Id.* at 391; The Bias-Motivated Crime Ordinance prohibited "the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" The ordinance was found to be overbroad and "impermissibly content based" by the trial court which dismissed the case. The Minnesota Supreme Court reversed, holding that the ordinance was not overbroad as there was precedent that the phrase "arouses anger, alarm or resentment in others" indicates a prohibition only of fighting words. *Id.* at 377.

24 *Id.* at 378; The Court accepted the Minnesota Supreme Court's understanding of the ordinance as limited to fighting words, thereby dismissing overbreadth claims. Therefore, the Court only considered arguments regarding content-based discrimination. *Id.* at 381.

regulate a group of fighting words (cross burning) based on their content (i.e. motivated by racism, sexism, or religious intolerance).[25] Justice Antonin Scalia went on to pontificate:

> [T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression-it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility alone would be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.[26]

Scalia argued that St. Paul could not specifically prohibit fighting words that communicated racist ideas because racist beliefs should be left to be debated in the marketplace of ideas.[27] This argument implies that racist speech cannot be regulated because it has value and is therefore protected by the First Amendment.

Just a year later, the Court made clear in *Wisconsin v. Mitchell* that hate speech laws are unconstitutional. The decision invalidated the entire first prong of the *Chaplinsky* definition.[28] Unlike *R.A.V.,* the statute in question in *Wisconsin v. Mitchell* punished conduct as opposed to speech. The Wisconsin statute in question permitted enhanced penalties for racially motivated crimes.[29] The Court held that the statute was constitutional, clarifying that while hate speech cannot be specifically proscribed, hate crimes can.[30] While *R.A.V.* also invalidated the first prong of the fighting words doctrine, *Wisconsin v. Mitchell* confirmed this. The argument made against the Wisconsin statute was that it had a chilling effect on speech.[31] The Court found this unlikely and affirmed that hate crime laws are permissible because they have no effect on speech whereas expressive conduct statutes that target hate speech (like the one in *R.A.V.*) are unconstitutional.[32]

In *Virginia v. Black* (2003), also building upon the legacy of *R.A.V.*, the Court held that *R.A.V.* did not make it unconstitutional for a state to prohibit cross burning with an intent to intimidate.[33] Scalia specifically mentioned this is in his opinion in *R.A.V.*[34] The Court declared, "As a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities… The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages."[35] In effect, *Virginia v. Black* allowed states to regulate certain types of fighting words, in this case, cross burning, so long as they did not target hate speech.

It is clear from the creation of the fighting words doctrine in 1942 to the last major fighting words case in 2003 that the doctrine was substantially narrowed to the extent that the first prong of the *Chaplinsky*

25 *Id.* at 393-394.
26 *Id.*
27 *Id.* at 387.
28 Wisconsin v. Mitchell, 508 U.S. 476 (1993).
29 *Id.* at 476.
30 *Id.*
31 *Id.; See The Chilling Effect in Constitutional Law,* 69 Colum. L. Rev. 808 (1969) and Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633 (2013).
32 *Id.*
33 Virginia v. Black et al., 538 U.S. 343, 343 (2003).
34 *R.A.V.,* 505 U.S. at 393.
35 *Black*, 538 U.S. at 344.

definition was essentially invalidated. Moreover, the Court's definitions of fighting words varied significantly from case to case. In fact, the fighting words doctrine proved to be so unclear that at no time since its creation in 1942 has the Court upheld a conviction based upon it.[36] The jurisprudential history of fighting words makes obvious that while the doctrine has narrowed over time, it has simultaneously become more ambiguous.

III. THE FUNDAMENTAL PROBLEM

From its inception, the fighting words doctrine was inherently contradictory and unclear. As outlined in the balancing test in *Chaplinsky,* which defines fighting words as "no essential part of any exposition of ideas" and of very "slight social value as a step to truth,[37] the exclusion of fighting words from First Amendment protection is premised on their having little to no value. In the same vein, the Court has often stated or implied that protecting political speech was the primary purpose of the First Amendment and as such should be constrained as little as possible.[38] However, the jurisprudential history of fighting words reveals that the Court had repeatedly ignored this logic.

The contradictory nature of the fighting words doctrine was first evidenced in *Chaplinsky,* the very case in which the doctrine was created. The speech in *Chaplinsky* was obviously political and today would almost certainly be protected by the First Amendment. Yet, it was Chaplinsky's statement to a city marshal, who was an agent of the government, arguably making Chaplinsky's comments to him inherently political,[39] calling him a fascist and calling the government of Rochester fascists, that motivated the Court to create a special category of speech not protected by the First Amendment because of the speech's inherent lack of value. Moreover, Chaplinsky was a Jehovah's witness, a religious sect that was (and continues to be to a lesser extent) subject to a great deal of prejudice.[40] It appears likely that prejudice played some role in the Court's decision to criminalize religious proselytizing and government criticism, which are among the fundamental rights guaranteed by the First Amendment.[41] The fact that Chaplinsky's speech was deemed fighting words while a white man burning a cross on the lawn of a black family in *R.A.V.* was considered expressing an opinion by the Court reveals just how subjective the fighting words doctrine is and has always been.

The fighting words doctrine was further undermined in *Cohen*. As previously mentioned, Constitutional Scholar Ronald J. Krotoszynski Jr. wrote an article in the Texas Law Review in which he praises the *Cohen* decision because he believes that by finding the statute unconstitutional, the Court was intentionally protecting Cohen's right to political speech.[42] While Harlan's language at the end of the majority opinion is deserving of Krotoszynski's praise (most notably his claim that "[The] constitutional right of free expression is a powerful medicine in a society as diverse and populous as ours,"[43] and the famous phrase: "one man's vulgarity is another man's lyric"[44]), Harlan fails to mention that the most obvious reason Cohen's jacket is not fighting words is because the jacket was obviously a political statement. Had Harlan pointed out that the speech in *Cohen* fails the balancing test laid out in *Chaplinsky* it would have significantly simplified the Court's application of the fighting words doctrine. Unfortunately, Harlan instead further narrowed the doctrine by adding the actual addressee

36 Burton Caine, *The Trouble with Fighting Words: Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 Marq. L. Rev. 441, 444 (2004).
37 *Chaplinsky*, 315 U.S. at 572.
38 *See* Citizens United v. Federal Election Commission, 558 U.S. __ (2010).
39 *See* Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 Harv. C.R.-C.L. L. Rev. 1, 1-28 (1974).
40 Zoe Knox, *Jehovah's Witnesses as Un-Americans? Scriptural Injunctions, Civil Liberties, and Patriotism*, 47 J. Am. Stud. 1081–1108 (2013); Nathan T. Elliff, *Jehovah's Witnesses and the Selective Service Act*, 31 Va. L. Rev. 811-834 (1945).
41 Caine, *supra* note 36.
42 Krotoszynski., *supra* note 19, at 1251-1252.
43 *Cohen*, 403 U.S. at 24.
44 *Id.* at 25.

test, set a complicated precedent by excluding the first prong, and failed to apply the most objective part of the fighting words doctrine—the balancing test.

In *R.A.V.,* the balancing test was, again, ignored, a fact that was pointed out in a dissenting opinion.[45] There are several negative consequences of the *R.A.V.* decision, the most important of which is that it legitimizes hate speech. Unlike in *Cohen*, the speech in *R.A.V.* is clearly not political, it is directed at a specific person (the black family whose lawn the cross was burned on), and it was intended to inflict injury and, arguably, incite a breach of the peace. Justice Byron White's dissent refers to the balancing test from *Chaplinsky* in explaining the fundamental problem with the majority opinion:

> Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment. Indeed, by characterizing fighting words as a form of "debate" the majority legitimizes hate speech as a form of public discussion.[46]

White's dissent draws upon the language of *Chaplinsky* that fighting words must be of "sufficient value to outweigh the social interest in order and morality."[47] Most importantly, however, White accurately predicts that the *R.A.V.* decision will legitimize "hate speech as a form of public discussion."[48] This raises the larger question: if hate speech specifically designed to intimidate, injure, or provoke cannot be regulated as fighting words, what purpose does the fighting words doctrine serve? Any elementary understanding of American history teaches that hate speech causes *more* harm than other types of fighting words, especially racist hate speech. In fact, it is likely that no category of speech poses a greater threat to our "social interest in order and morality" than hate speech.

White also points out another, although less significant, problem with the majority opinion in *R.A.V.* The Court states that fighting words are "a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey."[49] This is incongruous with every previous description of fighting words since their creation in *Chaplinsky*. Fighting words are not, as White points out, a mode of communication but, rather, "a content-based category" that falls outside of First Amendment protection.[50] As such, the entire category of fighting words is subject to regulation under the First and Fourteenth Amendments. White clarifies: "A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence…"[51] The majority's fundamental misunderstanding of fighting words in *R.A.V.,* both as a class of speech regulated because of its content and as a method of preserving "the social interest in order and morality,"[52] set a dangerous precedent and reveals just how little the Court understood the very doctrine they believed they were upholding.

The *Black* decision reveals just how contradictory and confusing fighting words jurisprudence has become. The basis of fighting words exclusion from First Amendment protection as explained in *Chaplinsky* is based on the fact that the Court defines fighting words as having little value. However, *R.A.V. v. City of St. Paul*, *Wisconsin v. Mitchell,* and *Virginia v. Black* represent a dangerous and confusing departure from this logic. Fighting words generally can be regulated because of, as Scalia refers to it, their "constitutionally proscribable

45 *R.A.V.,* 505 U.S. at 391.

46 *Id.*

47 *Chaplinsky*, 315 U.S. at 572.

48 *R.A.V.,* 505 U.S. at 391.

49 *Id.* at 393.

50 *Id.* at 408.

51 *Id.*

52 *Id.* at 391.

content"[53] which is of little value, while some subset of fighting words—hate speech—is protected because the Court deems it valuable. Some fighting words cannot be considered valuable and deserving of First Amendment protection if the entire justification of regulating fighting words is based upon them having little value in the marketplace of ideas.

The Court's contradictory decisions suggesting that fighting words simultaneously are of little value and of great value began before *R.A.V.* and can, in fact, be traced back to *Chaplinsky*, in which the Court created the doctrine to prosecute obviously political speech. The fighting words doctrine was ill-conceived from the start because of the doctrine's fundamental contradiction that a category of speech is simultaneously too provocative to be protected by the First Amendment and too meaningless to be worthy of First Amendment protection.[54] This fundamental flaw has gradually become clear through the Court's increasingly contradictory and confusing application of the doctrine.

Many First Amendment scholars have proposed alterations to the fighting words doctrine in order to make the doctrine less discriminatory and more equitable.[55] Different critiques of the fighting words doctrine focus on different problems and, thus, lead to different proposed solutions. However, in general, there are four possible ways to rectify the fighting words doctrine, each of which I will now examine

The first option is for the Court to begin enforcing the first prong, which defines fighting words as words that "inflict injury."[56] While the Court has not explicitly overruled the first prong of the standard, it was essentially abolished in *R.A.V.* and finished off in *Wisconsin v. Mitchell*.[57] Toni M. Marrasso explains in an article titled "The Hate Speech Dilemma" that some civil rights activists argue that hate speech could be regulated by the fighting words doctrine "on the theory that such speech likewise inflicts injury and threatens the social peace and the mental peace of the members of the target group."[58] The idea of prohibiting hate speech through

53 *Id*. at 377.

54 With regard to the latter point consider *Texas v. Johnson* in which the opinion of the Court responded to dissents that flag burning should be illegal because the flag is a unique symbol and there are other ways of expressing disagreement with the government. The Court said that these arguments "sit uneasily" next to each other—if the flag is a unique symbol, then there is no other method of expressing hatred or disagreement with this country than to desecrate the flag). *Texas v. Johnson*, 491 U.S. 397 (1989). The Court has recognized on several occasions the emotive value of speech but has refused to recognize this contradiction in the fighting words doctrine. In fact, in *Cohen* the Court noted that "words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen*, 403 U.S. at 26.

55 *See* Wendy B. Reilly, *Fighting the Fighting Words Standard: A Call for Its Destruction,* 52 Rutgers L. Rev. 947, 980 (2000); Clay Clavert, P*ersonalizing First Amendment Jurisprudence: Shifting Audiences & Imagined Communities to Determine Message Protection in Obscenity, Fighting Words, and Defamation*, 20 U. Fla. L. Rev. 439, 439-478 (2009); Charles R. Lawrence II., *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 (1990); For approaches that specifically target hate speech s*ee also* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 Harv. C. R.-C. L. L. Rev. 133 (1982) (calling for a new tort for racial insults); Marjorie Heins, *Banning Words: A Comment on Words That Wound* , 18 Harv. C. R.-C. L. L. Rev. 585 (1983) (a response to Delgado, criticizing him for not understanding the First Amendment constraints on his approach); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma,* 32 Wm. & Mary L. Rev. 23 (1991) (discussing Delgado, Lawrence and others' proposals regarding banning hate speech as it relates to fighting words and arguing instead for the Stanford policy).

56 *Chaplinsky*, 315 U.S. at 572.

57 *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 Harv. L. Rev. 114 (1993).

58 Massaro, *supra* note 55. (Attributing this theory to Stetson Kennedy, The Klan Unmasked, (1990) and Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2320-2381 (1989).

the revival of the first prong of the fighting words doctrine, while tempting, would likely be ineffective. This dramatic broadening of the fighting words doctrine would require enforcing the entire first prong not just against hate speech, but against any speech that "inflicts injury" in the eyes of the fictional reasonable person. Constitutional scholar Wendy Reilly, whose argument against the fighting words doctrine is that it does not protect marginalized groups, dismisses this opinion as infeasible because "the courts have shown… that the fighting words doctrine will almost only be used to address potential violence."[59] Therefore, the immediate injury inflicted upon victims of hate speech will be ignored unless they respond violently, in which case the Court is unlikely to be sympathetic to them. Even scholars that propose the incorporation of hate speech into the larger category of fighting words acknowledge that "The fighting words doctrine is a paradigm based on a white male point of view."[60] I contend that the larger problem with revitalizing the first prong of the fighting words standard is that inherent to every iteration of the Court's definition of fighting words is the reasonable person standard.[61] The idea of the Supreme Court determining what "inflicts injury"[62] upon marginalized groups seems infeasible and overbroad

The second option for altering the fighting words doctrine is to, essentially, make the fighting words doctrine the same as the clear and present danger test. In proposing this approach, Mannheimer writes, "Therefore, in order to more fully protect the value of insulting language, the Court ought to modify the fighting words doctrine by including a requirement that the speaker intend for his or her words to result in violence before the words are deemed unprotected. Only then would the Court bring such language fully within the coverage of the First Amendment."[63] While this is theoretically promising, it also fails to account for the problem of the reasonable person standard. As the jurisprudential history of the doctrine demonstrates, the Court is not capable of accounting for its own bias—*Chaplinsky* is a good example of this. Moreover, this approach is thoroughly impractical. Proving intent is difficult enough in criminal cases, thus as a standard applied to First Amendment law it seems almost impossible.

This third approach to correcting the discriminatory nature of the fighting words doctrine was proposed by constitutional scholar Kathleen Sullivan. Sullivan proposes adding to the second prong, which defines fighting words as words that "tend to incite an immediate breach of the peace,"[64] to correct the prong's inherent bias against individuals with a perceived lack of propensity for violence.[65] Sullivan argues, "If we have to live with such an exception [for words that cause a 'breach of the peace'], shouldn't it at least be extended to words that cause flight or fright as well as fights?"[66] Sullivan assumes that the fighting words doctrine cannot be fully abolished and opposes reviving the first prong. Theoretically, adding a flight or fright response to the second

59 Reilly, *supra* note 55, at 980.

60 Lawrence, *supra* note 55, at 454.

61 The *Chaplinsky* court made clear: "The word "offensive" is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight ...." *Chaplinsky*, 315 U.S. at 568. This is further clarified in *Cohen*, in which the Court redefined fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen,* 403 U.S. at 20.

62 *Id*. at 572.

63 Mannheimer, *supra* note 10, at 1571.

64 *Chaplinsky*, 315 U.S. at 572.

65 Kathleen M. Sullivan, *The First Amendment Wars*, The New Republic (Sept. 28, 1992), at 35; Reilly writes, "Paradoxically, then, the current fighting words doctrine might actually encourage women to react violently because that is the only way for them to gain its protection." Reilly, *supra* note 55, at 962. The fighting words doctrine is also biased against minorities with a perceived propensity *for* violence, including LGBTQ+ individuals. In *State v. Phipps*, the Ohio Supreme Court stated that same-sex solicitations are "as a matter of common knowledge, often likely to provoke violent reaction." S. Adele Shank, *Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine*, 41 Ohio St. L.J. 553 (1980).

66 *Id.* at 40.

prong could help women and other groups with a lower actual or perceived propensity for physical violence gain the doctrine's protection. However, Sullivan's proposal ignores what Reilly refers to as the "the debilitating harm that immobilizes… vulnerable groups."[67] The reality is that the reasonable person standard is sufficient reason to assume that courts are incapable of understanding psychic harm or involuntary responses to psychic harm. The *Harvard Law Review* responded to Sullivan's argument as such:

> Although Professor Sullivan suggests that she would not revive the "inflict injury" prong of *Chaplinsky* in order to respond to the problem of hate speech, she fails to consider the other logical alternative: namely, to conclude that we do not "have to live with such an exception" after all. Overruling *Chaplinsky* would eliminate a doctrine that accommodates the undesirable "male" tendency to come to blows. More importantly, eliminating the "fighting words" doctrine would eradicate a tool that governmental officials may use and have used to harass minority groups and to suppress dissident speech.[68]

The Harvard article's rejection of Sullivan's argument offers the fourth option instead: abolishing the fighting words doctrine altogether.

V. CONCLUSION

Abolishing the fighting words doctrine entirely is the only viable option. As the jurisprudential history of the doctrine makes clear, the very premise of the doctrine is contradictory. The justification for the creation of the fighting words doctrine was that fighting words "are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[69] The first part of this justification is contradictory both in theory and as evidenced by case law. Words cannot simultaneously have so much emotive power that they provoke violence and be "no essential part of any position of ideas."[70] The emotive power of fighting words *is* an idea.[71] Justice Oliver Wendell Holmes wrote in *Gitlow v. New York*, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[72] I believe that the reverse is also true. Every incitement is an idea. If fighting words were meaningless they would have no effect on the addressee.

Case law further demonstrates that the first part of this justification is contradictory. The political statements made in *Chaplinsky* inspired the creation of the doctrine—statements that were undoubtedly an essential part of Chaplinsky's "exposition of ideas."[73] The fact that the Court described Chaplinsky's statements as being "of slight social value as a step to truth,"[74] reveals how subjective fighting words are as a concept. Moreover, the fact that the Court upheld racist cross burning in *R.A.V.* on the justification that it was an idea worthy of First Amendment protection speaks to just how nonsensical this justification is. The second part of the justification for the creation of the fighting words doctrine, which I have referred to throughout this paper as the 'balancing test,' also no longer holds true. If the fighting words doctrine were truly intended to preserve "the social interest in order and morality," the Court would use the doctrine to punish hate speech.

If this reason for the abolition of the fighting words doctrine is accepted, it raises the question of what the implications of abolishing the doctrine would be. As mentioned earlier, the Court has never upheld a

67 Reilly, *supra* note 55, at 980.

68 *The Demise of the Chaplinsky Fighting Words Doctrine*, *supra* note 57, at 1141.

69 *Chaplinsky,* 315 U.S. at 572.

70 *Id.*

71 Caine, *supra* note 36.

72 Gitlow v. People of New York, 268 U.S. 652, 673 (1925).

73 *Chaplinsky*, 315 U.S. at 572.

74 *Id.*

conviction based on the fighting words doctrine.[75] The fighting words doctrine has only ever been an important part of First Amendment law in that it has been hotly debated and seen as a possible way to punish hate speech. The potential of the doctrine to punish hate speech has never been realized. As a result, the doctrine serves no practical purpose. Given that the fighting words doctrine is inherently biased by the reasonable person standard, irreparably contradictory based upon its very justification, and serves no practical purpose as an exception to the First Amendment, abolishing the fighting words doctrine is the only logical path forward.

75 Krotoszynski, *supra* note 19.

A Marriage of Two Rights:
The Constitutionality of Plural Marriage for the FLDS Community in a Post-Obergefell Court

Lily McGrail
Georgetown University

Abstract

Members of the Fundamentalist Church for the Latter-day Saints ("FLDS") have long contested Supreme Court decisions that dispute the claim that the Free Exercise Clause does not protect the FLDS's spiritual practice of plural marriage. In 2015, the Court ruled in *Obergefell v. Hodges* that same-sex marriage is protected under the Due Process and Equal Protection Clauses of the 14th Amendment. Although seemingly unrelated to the issue of plural marriage, Justice Anthony Kennedy's language in *Obergefell* specifies that a person's right to choose a partner is embodied in the right to privacy. This paper will argue that the right to religious plural marriage is in fact constitutionally protected. I will argue that the Court's interpretation of the Due Process Clause in *Obergefell* grants individuals the fundamental right to choose their spouse(s), as marriage is one of the core building blocks of family life. The bulk of my argument will stem from the hybrid situation created by the Free Exercise and Due Process Clauses, requiring the Court to employ strict scrutiny to determine the constitutionality of plural marriage for FLDS members. Since there is no readily identifiable compelling state interests or narrowly tailored laws that could prohibit religiously mandated plural marriage, plural marriage for FLDS adherents is constitutionally protected.

I. INTRODUCTION

In March 1830, Joseph Smith published *The Book of Mormon: An Account Written by the Hand of Mormon upon Plates Taken from the Plates of Nephi*. According to Smith, the revelations in the book were delivered from God to indigenous American prophets between the years 2200 BCE and 421 CE and were later found by Smith on a series of golden plates. Smith and his followers then established the Church of Christ, later renamed the Church of Jesus Christ of Latter-day Saints (LDS).[1] One of the most central—and controversial—teachings the early church espoused was that of plural marriage.[2] The importance of plural marriage is posited in John Taylor's 1886 Revelation in which God commands that man "must do the works of Abraham."[3] Abraham, as well as many other prominent biblical figures, had multiple wives simultaneously.[4]

Soon after 1886, however, internal disagreement over this interpretation of the revelation fractured the Church. The LDS leadership published the 1890 Manifesto advising against plural marriage, and, in 1904, it published another manifesto officially excommunicating practitioners of plural marriage.[5] Those who held tightly to the original interpretation of the 1886 Revelation founded the Fundamentalist Church of the Latter-day Saints (FLDS), and, to this day, its members view plural marriage as central to living a spiritually sound life.[6]

Plural marriage was profoundly repugnant to the predominantly mainline Protestant populace of 19th century America, and members of the LDS church faced rampant social and governmental discrimination. The United States has seen a total of three so-called Mormon Wars. The first was fought in 1838 when LDS adherents were forced to leave Missouri.[7] The second was the 1844 Mormon War in Illinois where a band of armed Illinois citizens forced the LDS community to flee to Utah, resulting in the mob-style execution of LDS founder Joseph Smith.[8] The third was in 1857 when Mormons went to battle against the U.S. Army in the Utah territory.[9]

In addition to social and military violence, practitioners of plural marriages were forced to go to court to fight for legal recognition of their marriages. The 1879 U.S. Supreme Court case of *Reynolds v. United States* held that plural marriage was not protected by the Free Exercise Clause of the First Amendment.[10] *Davis v. Beason* later upheld the 1882 Edmunds Act, which imprisoned over 1,300 LDS members for polygamy-based crimes.[11] In 1946, *Cleveland v. United States* upheld the Mann Act, which prohibited the transport of women across state lines to participate in polygamy and equated polygamy to prostitution and debauchery.[12]

Recently, however the American public has taken a stronger interest in polygamy in light of popular television shows like HBO's *Big Love*[13] and TLC's *Sister Wives*.[14] Not only have these shows piqued America's interest in polygamy, but they have also decreased the stigma surrounding plural marriage. The UK's Channel 4 even ran a short documentary series examining the lives of polygamous families living in societal exile in the Utah desert.[15]

To this day, polygamy remains illegal in the United States under *Reynolds*.[16] One of the most monumental revolutions in U.S. marriage law occurred in 2015 when the Supreme Court handed down its decision in *Obergefell v. Hodges* to legalize gay marriage.[17] Justice Anthony Kennedy's opinion brought the choice of one's marriage partner under the umbrella of the right to privacy protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause states, "...nor shall any State deprive any person of life, liberty, or property, without due process of law," with the focus of the clause on interaction between the word "liberty" and the phrase "due process of law."[18] The Due Process Clause has been the basis for the Supreme Court identifying Constitutionally protected fundamental rights, such as the right to privacy in *Griswold v. Connecticut*, which overturned laws aimed at restricting married couples' access to contraception.[19] Moreover, Kennedy's language highlighted the importance of decriminalizing certain forms of marriage to allow a person to "achieve the full promise of liberty."[20]

This paper will argue that the reasoning of the *Obergefell* decision justifies the legality of plural marriage as a due process right, while retaining its free exercise character as well. The due process and free exercise claims together form a hybrid situation that requires courts apply strict scrutiny to laws that infringe upon this right. In other words, courts should require the state to prove a compelling interest in banning polygamy using the least restrictive means. I will demonstrate that there is no compelling state interest in banning polygamy and that such laws are not narrowly tailored. Thus, when confronted with the issue, the Court must grant legal status to polygamous marriages and strike down laws that deny this status.

II. HISTORICAL AND LEGAL CONTEXT

This section will elaborate the relevant factual background for the ensuing analysis. First, the history of the free exercise clause and its relationship with polygamy will be elaborated. Next, the meaning of the Due Process Clause as well as its application in the landmark marriage rights case *Obergefell v. Hodges* of 2015. Finally, the "hybrid situation" will be discussed as defined by Justice Antonin Scalia to later argue that polygamy bans would not pass the resultant level of strict Supreme Court scrutiny.

A. The History of the Free Exercise Clause and Polygamy

The Free Exercise Clause of the First Amendment states: "Congress shall make no law… prohibiting the free exercise [of religion]," which today applies similarly to both federal and state governments.[21] At the core of the Free Exercise Clause is the principle that laws cannot be designed to prevent the exercise of religious duties, obligations, or practices, unless they interfere with the health or safety of others. Since the 1990 case of

1 *Golden Plates to Book of Mormon*, The Church of Jesus Christ of Latter-Day Saints, https://www.churchofjesuschrist.org/study/friend/2017/02/golden-plates-to-book-of-mormon?lang=eng (last visited May 9, 2021).

2 "Plural marriage" is a commonly accepted term for what most people call "polygamous marriage." Polygamy, however, refers to a marriage with more than two participants of any gender. What this paper refers to is more accurately called polygyny, when a man has multiple wives simultaneously. But for the purpose of simplicity, I will refer to polygynous marriage as "plural marriage" throughout this paper.

3 Joseph White Musser, The Four Hidden Revelations (Truth Publishing ed., 1948).

4 *Id*.

5 *The Manifesto and the End of Plural Marriage*, The Church of Jesus Christ of Latter-Day Saints, https://www.churchofjesuschrist.org/study/manual/gospel-topics/the-manifesto-and-the-end-of-plural-marriage?lang=eng, (last visited May 9, 2021).

6 *Plural Marriage and Families in Early Utah,* The Church of Jesus Christ of Latter-Day Saints, https://www.churchofjesuschrist.org/study/manual/gospel-topics/plural-marriage-and-families-in-early-utah?lang=eng, (last visited March 25, 2021).

7 Alexander L. Baugh, A Call to Arms: The 1838 Mormon Defense of Northern Missouri (2000).

8 John E. Hallwas and Roger D. Launius, Cultures In Conflict: A Documentary History of the Mormon War in Illinois (1995).

9 David Roberts, *The Brink of War*, Smithsonian Magazine, (Jun. 2008), https://www.smithsonianmag.com/history/the-brink-of-war-48447228/.

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

11 Davis v. Beason, 133 U.S. 333 (1890).

12 Cleveland v. United States, 329 U.S. 14 (1946).

13 *Big Love* (HBO 2006).

14 *Sister Wives* (TLC 2010).

15 *Three Wives, One Husband* (BBC 2017).

16 Reynolds v. United States, 98 U.S. 145, 161 (1879).

17 Obergefell v. Hodges, 576 U.S. 1 (2015).

18 U.S. Const. amend. XIV, § 1.

19 Griswold v. Connecticut, 381 U.S. 479 (1965).

20 *Id.* at 14.

21 U.S. Const. amend. I.

Employment Division v. Smith, the Court has held that the Free Exercise clause permits laws that hinder religious practices if they are "facially neutral" and "generally applicable."[22] Since then, it has, generally, reserved the application of strict scrutiny to hybrid cases that involve both religious exercise and other fundamental rights or cases in which religious freedom statutes require the application of strict scrutiny.[23]

Despite its evolving views of the Free Exercise Clause overall, the Court has held a consistent, if not problematic, view of the Free Exercise Clause regarding practicing polygamy. In the Court's first major case concerning polygamous marriage in *Reynolds v. United States*, Chief Justice Morrison Waite acknowledged that "it [is] an accepted doctrine of [the LDS] church that 'it [is] the duty of male members of said church, circumstances permitting, to practise polygamy'" and "the failing or refusing to practise polygamy by such male members… would be punished, and that the penalty for such failure and refusal would be damnation in the life to come."[24] Needless to say, the Court's understanding of the then-LDS doctrine stresses the necessity for a member of the Church to practice polygamy according to his or her conscience and religious conviction.[25] The Court did, however, distinguish a belief in polygamy from practicing polygamy: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[26] The Court failed to recognize that belief and exercise are indivisible in the FLDS Church. For FLDS adherents, practicing polygamy is central to one's membership in the Church and community. Moreover, *Lawrence v. Texas* bridges beliefs and actions when it states, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[27] This reading of liberty allows FLDS adherents to express their belief in plural marriage through the act of polygamy. *Lawrence* generally views domestic life and intimate conduct as areas in which government interference is impermissible.[28]

Much of the Court's rationale for upholding polygamy bans relates to the supposed immorality of polygamy. *Davis v. Beason* claims that polygamy constitutes an "[act] inimical to the peace, good order and morals of society."[29] This argument begs the question of who defines morality in society. In *Cleveland v. United States*, the Court answers, "Whether an act is immoral within the meaning of the statute is not determined by the accused's concepts of morality. Congress has provided the standard."[30] The notion that Congress, or any legislature, has the institutional capacity to define morality is ludicrous. Morality is too central to a person's soul to withstand interference from a governmental body. Moreover, an individual's morality is largely shaped by the religious community they are raised in, among other factors. Therefore, Congress alone cannot dictate or coerce an individual's moral leanings.

The Court finally abandons its adherence to legislatively defined morality in *Lawrence v. Texas*, a case concerning the legality of anti-sodomy laws.[31] While anti-sodomy laws in the United States had a historically antagonistic nature toward the LGBTQ community, the Court finally acknowledges that "for centuries there have been powerful voices to condemn homosexual conduct as immoral"[32] and references *Planned Parenthood*

22 Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 882 (1990).
23 *Id.*
24 Reynolds v. United States, 98 U.S. 145, 161 (1879).
25 At the time of the *Reynolds* decision, the mainline LDS church still practiced polygamy. Now this doctrine is exclusive to the FLDS church.
26 *Reynolds*, 98 U.S. at 167.
27 Lawrence v. Texas, 539 U.S. 558, 562 (2003).
28 *Id.*
29 Davis v. Beason, 133 U.S. 333, 333 (1890).
30 Cleveland v. United States, 329 U.S. 14, 20 (1946).
31 *Lawrence*, 539 U.S. at 558.
32 *Id.* at 571.

v. Casey to admit that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[33] Here, there are clear parallels between the Court's distaste for homosexuality and its discrimination against polygamists. *Lawrence* is significant because it broadens the Court's concept of morality and allows it to evolve as new liberties are realized and morals discovered.[34] Polygamy in the FLDS Church is "built upon a set of social and moral principles" that may conflict with the traditional Protestant concept of morality, but this is not an adequate reason for legislation to continue to brand polygamy as immoral.[35]

In *Cleveland*, the Court notes its worry that allowing the practice of polygamy under the Free Exercise Clause will open up the floodgates to requiring the legalization of any act that is found in a religious doctrine.[36] The Court is concerned that protecting plural marriage as free exercise "would place beyond the law any act done under the claim of religious sanction."[37] The Court foresees that "any tenets, however destructive to society, may be upheld and advocated, if asserted to be a part of religious doctrines."[38] In contemplating the decriminalization of plural marriage, the Court questions in *Reynolds*, "Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government… could not interfere to prevent a sacrifice?"[39] The Court's prediction, however, is unfounded because the Court has already asserted its right to overrule civil rights and liberties claims when an act would endanger public health or safety. Even if the Court were to allow polygamy, it would not make religious practices of human sacrifice suddenly constitutional.[40] Hence, the Court could retain its freedom to condemn truly physically harmful religious freedom claims while allowing the FLDS community to live in accordance with their religious duties.

B. Marriage in *Obergefell* and the Due Process Clause

Obergefell fundamentally alters the institution of marriage in the law while also reinforcing the notion of a living Constitution that continues to test the boundaries of liberty. Kennedy argues that "new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic in a Nation where new dimensions of freedom become apparent to new generations."[41] Such phrasing is meant to combat the historically based arguments against gay marriage, citing hundreds of years of laws banning acts of homosexuality.

The Court in *Reynolds* similarly bases its decision on a lengthy history of anti-polygamy laws: "polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church … from the earliest history of England, polygamy has been treated as an offence."[42] This version of history was first challenged in Justice Frank Murphy's dissent in *Cleveland* when he brings up that "[polygyny] was quite common among ancient civilizations, and was referred to many times by writers of the Old Testament… [polygyny] is basically a cultural institution deeply rooted in the religious beliefs and social mores of those societies."[43] Kennedy's reframed historical argument in *Obergefell* is a further challenge to the validity of using a historical ban on polygamy to justify a continuance of the ban. Not only was polygamy

33 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).
34 *Lawrence,* 539 U.S. at 571.
35 *Cleveland,* 329 U.S. at 26.
36 *Id.* at 14.
37 *Id.* at 20.
38 Davis v. Beason, 133 U.S. 333, 345 (1890).
39 Reynolds v. United States, 98 U.S. 145, 166 (1879).
40 Juan Zamorano, *Cult 'anointed by God' kills 7 in Panama Jungle*, ABC News (Jan. 19, 2020, 9:30 AM), https://abcnews.go.com/International/wireStory/cult-anointed-god-kills-panama-jungle-68378252.
41 Obergefell v. Hodges, 576 U.S. 1, 2 (2015).
42 *Reynolds,* 98 U.S. at 164.
43 Cleveland v. United States, 329 U.S. 14, 26 (1946).

widespread in ancient history, as evidenced by the patriarch Jacob (later renamed Israel) in the Old Testament, but recent centuries of discrimination against polygamous families should be reexamined to determine whether these bans infringe on the evolving understanding of liberty.[44]

While the subject of *Obergefell* mainly concerned the secular aspect of marriage, the case also stresses the centrality of marriage to one's religious and personal beliefs.[45] Justice Kennedy recognizes that "marriage is sacred to those who live by their religion" and "the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."[46] Unfortunately, Kennedy did not extend this principle to members of the FLDS community. Plural marriage is sacred and central to FLDS beliefs and culture, but legislation like the Edmunds Act forbids them from legally establishing polygamous families. Murphy in *Cleveland* points out that "polygyny is a form of marriage built upon a set of social and moral principles" derived from FLDS doctrine.[47] The Court's historical refusal to recognize an FLDS man's religious obligation to marry multiple times contradicts the reasoning in Kennedy's recent opinion in *Obergefell* and evokes a free exercise claim.

Kennedy eloquently emphasizes the importance of marital choice to an individual's autonomy and liberty, effectively placing marital choice under the right to privacy guaranteed in the Fourteenth Amendment's Due Process Clause.[48] He asserts:

> Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.[49]

From this, Kennedy defines marriage as an institution "rising from the most basic human needs… essential to our most profound hopes and aspirations" and that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[50] Bringing the right to choose whom one marries under the protection of the Due Process Clause presents a new challenge to bans on polygamy. As part of the FLDS doctrine, plural marriage is clearly essential to members' "personal identity and beliefs."[51] The logic follows that if government were to infringe on this identity of belief, it would violate the constitutional principles of dignity, autonomy, and liberty laid out in *Obergefell*. This presents a due process claim to a person's right to participate in plural marriage.

C. Hybrid Situation

In *Employment Division v. Smith*, Justice Antonin Scalia argues, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated

44 Polygamy is ubiquitous throughout the Old Testament. The prophet Abraham had two wives, Sarah and Hagar, who were fundamental to the development of Judaism, Christianity, and Islam. Jacob, who is later renamed Israel and gives his name to the modern nation-state and religious ideal, famously had two wives simultaneously plus two concubines who are sometimes called wives. The New Testament steps back from polygamy, especially in the writings of St, Paul the Apostle, but FLDS maintain that the examples in the Old Testament takes precedent.

45 *Obergefell*, 576 U.S. at 1.

46 *Id.* at 27.

47 *Cleveland,* 329 U.S. at 26.

48 The right to privacy originates in *Griswold v. Connecticut* and is reaffirmed in landmark cases like *Roe v. Wade*, *Lawrence v. Texas* and *Planned Parenthood v. Casey*.

49 *Obergefell*, 576 U.S. at 2.

50 *Id.* at 3.

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

action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections…. The present case does not present such a hybrid situation."[52] While *Smith* is judged according to the question of whether a law is neutral and generally applicable, Scalia defines a hybrid situation as a constitutional issue that involves the Free Exercise Clause and another constitutional right that elevates the Court's standard of review to strict scrutiny.[53] This means that such a statute must prove a compelling state interest and use measures that are narrowly tailored in order to remain constitutional.

The most famous case to employ a hybrid right is *Wisconsin v. Yoder*. In *Yoder*, members of the Amish community argued that legally "compulsory attendance [of Amish children to school] violated their rights under the First and Fourteenth Amendments."[54] In a recent polygamy case *State of Utah v. Green*, "amici argue that Utah's bigamy statute should nonetheless be strictly scrutinized for a compelling interest because the statute violates not only Green's free exercise of religion, but also Green's constitutional rights of privacy and free association, thus presenting a 'hybrid situation.'"[55]

To pass strict scrutiny, bans on polygamy would need to serve a compelling state interest with the least restrictive means. A polygamy case has yet to make it to the Supreme Court with this claim, and the next two sections will discuss how anti-polygamy laws would fail under strict scrutiny.

III. LACK OF COMPELLING INTEREST AND FAILING STRICT SCRUTINY

A. Compelling State Interest

With strict scrutiny, the Court's standard of review requires that the state show a compelling interest in banning polygamy. Compelling interests include protecting public health and safety, national security, and/or fundamental rights.[56] Thus far, opponents of polygamy have argued for the existence of three state interests in banning polygamy, none of which qualify as compelling interests under existing precedent.

Firstly, the Court asserts that only beliefs are protected under the Free Exercise Clause and that Congress has the power to regulate religiously motivated actions.[57] Yet, this negates the opinion in *Lawrence* that connects the liberty of belief to "the protected right of… adults to engage in intimate, consensual conduct."[58] Secondly, the Court cites interests in maintaining "good order" and "morality" in society, but *Lawrence v. Texas* debunks this when it demonstrates "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives" and discounts external judgments on the morality of their lifestyles.[59] Lastly, the Court fears that allowing polygamy might lead to further free exercise claims that would dilute the effect of laws.[60] If polygamy is allowed, then the Court might have to permit a plethora of other acts that are mentioned in religious doctrines. However, the Court should not worry about such claims because the Court can justify a compelling interest in public health and safety to prohibit harmful religiously motivated behavior.

The Court has not identified a sufficiently compelling interest for banning polygamy because it has not been directly confronted with the issue since it began applying the strict scrutiny test in the mide-20th century.[61]

52 Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 882 (1990).

53 *Id.*

54 Wisconsin v. Yoder, 406 U.S. 205, 209 (1972).

55 State of Utah v. Green, 76 P.3d 24 (Utah 2004).

56 Ronald Steiner, *Compelling State Interest*, The First Amendment Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest, (last accessed May 5, 2021).

57 Reynolds v. United States, 98 U.S. 145, 166 (1879).

58 Lawrence v. Texas, 539 U.S. 558, 576 (2003).

59 *Id.* at 572.

60 Cleveland v. United States, 329 U.S. 14, 14 (1946).

61 *See also* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

This section will posit possible compelling interests the Court might have in banning polygamy. One interest the Court could have is limiting tax fraud. Another is that legalizing polygamous marriages could put a massive burden on fiscal institutions like Social Security and healthcare, while requiring the federal government to put inordinate effort into rewriting U.S. tax and administrative law. Prevention of spousal and child abuse is also a potential Court interest. Polygamous families tend to have higher rates of domestic abuse than conventional monogamous families.[62] This section will address each of these points and show how they all fail to justify any compelling state interest.

i. Fiscal Compelling Interests

The state's fiscal interest in prohibiting polygamy stems from the disproportionally higher rates of tax evasion in polygamist communities and the burden the government would have to bear in order to rewrite the U.S. tax code to suit these families. Permitting the spread of polygamy is highly controversial since "critics of polygamy… cite tax evasion as one of the litany of evils perpetrated by polygamists."[63] In 2008, Senator Harry Reid at a Senate Judiciary Committee hearing on polygamy said witnesses "describe[d] a web of criminal conduct that included welfare fraud, tax evasion, massive corruption and strong-arm tactics to maintain the status quo."[64] Though tax evasion is a common accusation against the FLDS community, much of their tax evasive behavior is due to the fact that they "are more likely to work in agricultural and construction jobs," which are occupations that "tend to underreport their income in general."[65] FLDS members take jobs with limited government oversight because they tend to live in more desolate parts of the United States where their lifestyle suffers minimal governmental and societal condemnation.[66] The illegality of their lifestyle forces them to live in fear of what might happen to their families if they are arrested for the crime of polygamy. In fact, the tax evasive behavior of polygamists is largely due to the United States' criminalization of polygamy and its lack of recognition of plural marriages.[67]

The Court could also argue that rewriting U.S. laws to accommodate polygamous couples would put an undue strain on many fiscal institutions. Legalizing polygamy would require U.S. law to confer marital benefits to all spouses. This would mean that every spouse in the marriage would be "entitled to Social Security benefits, health insurance, and their partner's assets if the relationship ends through death or divorce."[68] Critics may believe that Social Security is already underfunded, and it would be a nightmare for health insurers to figure out how to provide for a man's four wives and sixteen children. While polygamous families would undoubtedly stretch these systems, it is estimated that there are only "between 20,000 and 100,000 fundamentalist Mormons living in the Western United States belong[ing] to polygamous households."[69] That number is much less than the 67.9 million Americans currently receiving Social Security benefits.[70] Even if religiously based polygamy was legalized, the actual number of FLDS adherents is insignificant compared to the U.S. population, and allowing them the same financial benefits as monogamous married couples would not burden the government.

Furthermore, the law's refusal to grant legal status to polygamous families confuses the benefits process for plural wives and discriminates against them for their religious beliefs. U.S. law is written exclusively for

62 The Advocates for Human Rights, *Polygamy*, Stop Violence Against Women (last updated September 2020), https://www.stopvaw.org/harmful_practices_polygamy.

63 Samuel D. Brunson, *Taxing Polygamy: Married Filing Jointly (and Severally?)*, 6 Social Justice (2014).

64 *Id.* at 31.

65 *Id.* at 33.

66 *Id.* at 38.

67 *Id.* at 3.

68 A.S., *The Polygamy Tax*, The Economist (July 25, 2011), https://www.economist.com/free-exchange/2011/07/25/the-polygamy-tax.

69 Brunson, *supra* note 57.

70 Office of Retirement and Disability Pol'y, *Fast Facts & Figures About Social Security, 2019,* Social Security, https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2019/fast_facts19.html.

people who are single or in monogamous marriages.[71] Nonlegal plural spouses are unsure how to request marital and unemployment benefits, especially when shared children and assets are involved. This raises the question of whether U.S. laws are discriminatory against members of the FLDS community. According to the Court's argument in *Sherbert v. Verner*, if a plural spouse is unable to file for benefits because of her belief that she is a legitimate plural wife in the eyes of God, then her "ineligibility for benefits derives solely from the practice of her religion… [and] forces her to choose between following the precepts of her religion and forfeiting benefits."[72] *Sherbert* asserts that "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[73] A law that confers benefits to religious and secular dyadic couples while ignoring members of religious sects that mandate polygamy would contradict "the governmental obligation of neutrality in the face of religious differences."[74]

A further potential compelling interest in upholding polygamy bans is the immense burden on the federal government to rewrite U.S. laws to accommodate plural marriages. In regard to tax law, "Congress could create alternate brackets, applicable to polygamous taxpayers. But creating such individualized tax brackets would create administrative burdens as Congress and the Treasury Department tried to determine how to design those brackets."[75] Rewriting U.S. laws would prove excessively onerous since they were written under the assumption that marriage is limited to two people. Even so, an administrative burden does not constitute a compelling interest to limit a fundamental right under strict scrutiny. Instead, the federal government might actually have a compelling interest in writing polygamy into tax law, for "the harms to [disenfranchised] taxpayers include psychic harms of feeling excluded, devalued or even discriminated against by the larger society… [and] an unfair tax system may cause taxpayers to lose faith in the tax law."[76] It is essential that tax laws remain relevant and legitimate in the eyes of all corners of society, including the FLDS community. During a peak of frustration, the FLDS Church instructed members to stop paying taxes and apply to receive every public service in order to drain the government out of spite over their lack of legal recognition.[77] As more of the American public learns and accepts the existence of polygamous communities, the legitimacy of tax law will suffer.

ii. Social Compelling Interests

The Court has never shied away from harsh criticisms about the social implications of plural marriage, often alluding to female and child subjugation in polygamous families, opening them up to domestic abuse. The Court may employ these past arguments to assert a compelling interest claim of preventing the subjugation of women to cult-like male dominance. In *Reynolds*, lower courts "told the jury to 'consider what are to be the consequences to the innocent victims of this delusion [the doctrine of the FLDS Church and polygamy]. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children… these are to be the sufferers.'"[78] This statement problematically equates the doctrine of the FLDS Church to a delusion, a clear affront to FLDS beliefs. Additionally, most women enter into plural marriage freely and are assumed to share the same beliefs. Polygamist wife and FLDS adherent Lillian Foster talks of her desire to join a plural marriage: "I love the principle of plural marriage because it's a feeling. It is so beautiful to reach past yourself and to love somebody deeper than just what I want and what I'm getting out of it."[79] The Court's depiction of corrupted women led like sheep to the slaughter minimizes a woman's agency to participate in polygamy according to her own deeply held beliefs. The Mann Act of 1910, a white-slave act which prohibited

71 Brunson, *supra* note 57.

72 Sherbert v. Verner, 374 U.S. 398, 404 (1963).

73 *Id.*

74 *Id.* at 409.

75 Brunson, *supra* note 57.

76 *Id.* at 26.

77 *Id.* at 4.

78 Reynolds v. United States, 98 U.S. 145, 168 (1879).

79 *Three Wives, One Husband: Episode 1* (Channel 4 television broadcast 2017).

the transport of women across state lines to participate in polygamy, put polygamy "in the same genus as prostitution and debauchery," despite the fact that "such reasoning ignores reality."[80] Comparing polygamy to slavery and prostitution is similarly questionable, as it ignores women's roles in growing their family in the image of their religion.

The Court might also suggest that once in a polygamous marriage, the potential for spousal and child abuse increases dramatically. Statistics would back up the Court's claim since incidences of spousal and child abuse are often correlated with polygamy.[81] Yet, in actuality, any spousal or child abuse may instead "be ancillary effects of polygamy when practiced within isolated society, removed from governmental oversight or mainstream societal influence."[82] For the most part, FLDS communities live in extremely rural parts of the United States since they feel it is the only way they can practice their religion without governmental interference.[83] Legalizing polygamy would allow FLDS families to reintegrate into society and strengthen the law's ability to identify and punish domestic crimes. While social stigma might continue to ostracize them in mainstream society, polygamous families would still be able to live openly in the eyes of law enforcement. It is also important to point out that "monogamous marriages are not free from crimes such as spousal abuse, incest, and child abuse, but monogamous marriages remain legal despite the long and historical presence of… unthinkable abuses committed against women and children."[84] "These alleged harms are not *caused* by polygamy, much like they are not *caused* by monogamy," hence voiding the Court's argument that legalizing polygamy would lead to an uptick in abuse.[85] If anything, legal recognition would deter abuse. Victims of familial abuse in polygamous families would not fear prosecution for calling the police for protection from their abuser, and, in turn, that abuser will be more hesitant to engage in risky violent behavior.

Extending the Court's compelling interest argument of limiting further crimes, it is true that polygamous communities have "significantly higher levels of rape, kidnapping, murder, assault, robbery and fraud."[86] The source of these abuses is typically the surplus of unmarried men who are unable to find wives. There is a general theory that "if some men are able to have more than one wife, other men, like low-status and undesirable ones, will be unable to find wives and will be unable to produce a family."[87] Single men in all communities are the main perpetrators of crimes, and polygamous societies merely increase the number of single men.[88] However, in a world in which polygamy is legal, "monogamous couples would still exist; some couples might be homosexual or have bisexual triads; some group relationships of four or five adults might form."[89] In short, there would not be as large of a surplus of unmarried men as there are in current polygamous societies. Also, bringing polygamy into mainstream society would allow polygamous communities to integrate with people living more conventional lifestyles. Instead of having a small community of FLDS families and single men living in extremely rural parts of the country, FLDS families would live next door to dyadic couples and single men would have a wider pool of potential partners. This suggests that the Court's argument is statistically flawed.

80 Cleveland v. United States, 329 U.S. 14, 25 (1946).

81 The Advocates for Human Rights, *supra* note 53.

82 Casey E. Faucon, *Decriminalizaing Polygamy*, 5 Utah L. Rev. 709, (2016).

83 *Three Wives, One Husband* (BBC 2017).

84 Faucon, *supra* note 73, at 728.

85 *Id.* at 725.

86 Am. Ass'n for the Advacement of Sci., *Monogamy Reduces Major Social Problems of Polygamist Cultures,* EurekAlert! (Jan. 23, 2012), https://www.eurekalert.org/pub_releases/2012-01/uobc-mrm012312.php#:~:text=Monogamy%20reduces%20major%20social%20problems%20of%20polygamist%20cultures,-University%20of%20British&text=In%20cultures%20that%20permit%20men,institutionalize%20and%20practice%20monogamous%20marriage.

87 Faucon, *supra* note 73, at 731.

88 Am. Ass'n for the Advacement of Sci., *supra* note 80, at 1.

89 Faucon, *supra* note 73, at 732.

Kennedy's opinion in *Obergefell* reinforces the argument that the legalization of plural marriage would increase overall social stability. Kennedy claims that "the right to marry… safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[90] Polygamist families would not have to dwell on custodial confusions regarding children and could educate their children in public schools without the children facing as much stigma. Kennedy further argues that "without [the] recognition, stability, and predictability which marriage offers, their children suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[91] In a polygamous family, children from different mothers should feel equal to their siblings. The current law favors children from the legal marriage over other children from additional spiritual marriages. Recognition under the law would allow the law to treat all children in a polygamous family equally and mitigate any material or psychic harms that currently plague children of nonlegal spiritual marriages.

While the Court has not explicitly stated that fiscal and social stability are compelling interests, this paper aims to preempt these foreseeable arguments against the legalization of polygamy. So, even if these interests are considered compelling, this paper proves that anti-polygamy laws do not achieve the goal of mitigating these issues, and in some cases can exacerbate them.

B. Narrowly Tailored Laws

If the Court were to prove that the state has a compelling interest in banning polygamy, which this paper has argued is highly unlikely, then any anti-polygamy law would have to use the least restrictive means to outlaw the practice in order to pass the Court's strict scrutiny test. One way in which a law could ban polygamy is to prohibit it to the general population and only allow FLDS members to participate in plural marriage. This, however, presents two constitutional issues, one of the Court's ability to question the sincerity of an FLDS individual's belief, and the other concerning official recognition of the FLDS Church.

In the Court's history of weighing free exercise claims, the judicial branch has consistently avoided probing the sincerity of an individual's religious belief. In *Burwell v. Hobby Lobby Stores, Inc.*, Justice Ginsburg's dissent stresses, "The courts [should be kept] 'out of the business of evaluating'… the sincerity with which an asserted religious belief is held."[92] The furthest the Court has gone in testing an individual's religious sincerity is if an individual claims an exemption from a law under the Free Exercise Clause, despite continued actions that directly contradict his or her claim. For example, "someone [might claim] a religious objection to eating broccoli, but that same person knowingly eats broccoli each week."[93] However, a factual record is less applicable to polygamy. It might prove easier for a polygamous family that has practiced the FLDS faith for decades to justify a religious exemption from an anti-polygamy law, but recent converts to the faith could also obtain religious exemption without the Court questioning the sincerity of the conversion. The only other time where the Court investigates sincerity is "where there is a financial or otherwise self-interested motive to lie about a religious belief."[94] A person might enter into a plural marriage with insincere motives like obtaining Social Security or health care benefits, but the law already has measures to test marital fraud that could rectify this situation through irreligious means. Otherwise, a narrowly tailored law for FLDS members would prove ineffective in truly relegating the practice of that religion.

A more significant problem that arises from a narrowly tailored law for FLDS families is the discriminatory nature of such a law. While the FLDS Church is the most famous religion in the United States to advocate for polygamy, other religious sects also hold plural marriage as central to their doctrines. In addition to the thousands of FLDS members, there are "an estimated 50,000 polygamous Muslims… and several thousand

90 Obergefell v. Hodges, 576 U.S. 1, 3 (2015).

91 *Id.*

92 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

93 Ben Adams and Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 Stan. L. Rev. 59, (2014).

94 *Id.*

polygamous Hmong" that live in the United States.[95] A law that only exempts the FLDS Church from a polygamy ban would unfairly discriminate against these other polygamy-practicing religious groups. To add all polygamous religions to the list would never encompass the spectrum of faiths that practice polygamy. The law would have to be sufficiently vague to include newer and more obscure religions. This goes back to the question of sincerity, for a group of people could found a new religion for the sole purpose of obtaining a religious exemption from polygamy bans. A law that generally exempts religious groups from polygamy bans would never prove effective. A narrowly tailored law that only exempts certain religious groups would still place significant restrictions on less popular or emerging polygamist religions.

While polygamy is generally illegal in all states, the legality of spiritual cohabitation, when a legally married couple lives with additional spiritually married spouses, is murky. The question of whether or not to allow spiritual cohabitation was the central concern of *The State of Utah v. Green*.[96] The Utah Supreme Court argues that "the word 'cohabit' does not have religious origins or connotations," meaning that practitioners of nonlegal polygamy cannot receive a free exercise exemption for simply living together. [97] A narrowly tailored law may permit spiritual cohabitation, but it would not ensure the liberties laid out in *Obergefell*.[98] For example, spiritual cohabitation would still discriminate against the children of spiritual marriages and make them unequal to their siblings from the legal marriage. The law would have to grant full legal status to spiritual plural marriages for it to prove least restrictive in its effect.

C. The Future of Anti-Polygamy Laws

The State cannot justify a compelling interest in banning polygamy and no law could effectively use the least restrictive means to allow for religious plural marriage. When applying strict scrutiny to hybrid rights claims, the Court must strike down anti-polygamy laws that are brought before it in the future. The state's fiscal interests in preventing tax fraud, abstaining from rewriting tax codes, and alleviating the strain on institutions like Social Security and healthcare are not sufficient to block a fundamental, spiritual, and constitutional right. Social interests also fall short of the requirements of compelling interests since elevated crime rates in polygamous communities stem more from the illegality of polygamy rather than the institution of polygamy itself. Any law that would try to regulate polygamy using the least restrictive means would still encroach on an individual's liberties, as they would bring into question religious sincerity and discrimination against non-FLDS polygamists. Laws that could allow spiritual cohabitation between nonlegal spiritual spouses still deprive the participants of liberties outlined in *Obergefell*.[99] Absent a compelling state interest to ban polygamy or a reasonable way to narrowly tailor anti-polygamy laws, no anti-polygamy law would survive the heightened scrutiny afforded to hybrid situations.

The argument that polygamy must be constitutional rests on the hybrid situation presented through joint claims under the Free Exercise and Due Process Clauses. Accordingly, nonreligious polygamous couples might not enjoy the same legal status since they have no free exercise claim. The purpose of this paper is to examine religiously based claims to legalize polygamy, but the result of legalizing polygamy for religious marriages might allow nonreligious marriages to enjoy the same liberties. The *Obergefell* arguments for legalizing plural marriages on the grounds of liberty and autonomy, coupled with the governmental oversight available through legalization, are generally good justifications for legalizing all forms of polygamy.[100] While it would prove extremely difficult for a nonreligious plural marriage to obtain legal status through the courts, religious plural marriages might pave the way for legalization of all types of plural marriages.

95 Brunson, *supra* note 57.
96 State of Utah v. Green, 76 P.3d 24, 24 (Utah 2004).
97 *Id.* at 25.
98 Obergefell v. Hodges, 576 U.S. 1, (2015).
99 *Id.*
100 *Id.*

IV. CONCLUSION

Affirming the constitutionality of religiously motivated polygamy as a hybrid situation under the Free Exercise and Due Process Clauses is the natural next step in the evolution of marriage law after *Obergefell*.[101] The broadening understanding of liberty should extend to the FLDS community and other polygamy-practicing religions. Granting religiously polygamous families full legal status would allow FLDS adherents to enjoy participation in mainstream society without fear of arrest or losing their children. Even more importantly, these religiously devout people can live in unity with their religion and their nation's laws, not having to choose between the two any longer. Members of the FLDS Church, through their legal ability to practice polygamy, can obtain the full promise of liberty, autonomy, and dignity ensured in *Obergefell*.[102] The law would no longer promote social stigma against practitioners of plural marriage and their children. In striking down polygamy bans, the Court would allow the FLDS community a brighter future.

101 *Id.*
102 *Id.*

Media, Defamation, and Presidents:
U.S. and South Korea Compared

Allison Rhee
Northwestern University

Abstract

Defamation law — and libel law, in particular — powerfully shapes media coverage of events, people, and places. It often pits freedom of speech against opposing interests in society such as reputation, privacy, and personal damages. The comparative importance of these competing values can often be reflected in a country's libel law. In the United States and South Korea, this difference is prominent. Libel is a civil offense in the U.S. and a criminal offense in Korea. Interestingly, defamation law influences the way the media interacts with presidents, specifically Korean president Park Geun-Hye and former American president Donald Trump. Park and Trump both have leveraged lawsuits to produce a chilling effect among journalists and individuals to deter them from publishing negative coverage. They have also been continuously at odds with the mainstream media, especially when it comes to national disasters. In Korea, this was the Sewol Ferry tragedy and, in the United States the coronavirus pandemic. The media also played a critical role in Park's impeachment and eventual removal from office. This article compares the effects of the differing defamation law traditions in South Korea and the United States in these contexts during these two presidencies.

I. INTRODUCTION

The right to free speech, while considered an essential constituent of the American identity, is one of the most widely litigated topics around the world. An issue both ethically challenging and difficult to balance, freedom of speech, specifically in regard to defamation, is constantly pitted against opposing interests in society such as reputation, privacy, and personal damages.[1] The comparative importance of these competing values can often be reflected in a country's libel law, as countries that value reputation more highly enforce stricter consequences of defamation compared to those who do not prioritize reputation as much.[2] Thus, defamation, particularly libel, is a complex area of law, and the balance between free speech and the reputations and rights of individuals can vary by country and culture.

Specifically, in the United States and South Korea, suing for defamation can have vastly different effects because of fundamental differences in their libel law, such as A) civil versus criminal law, B) the role of culture in determining the value of reputation, and C) the importance of money in each respective society. The presidencies of Donald Trump and Park Geun-Hye have revealed how similar approaches to defamation can result in vastly polarizing effects due to these differences. National disasters such as the coronavirus pandemic in the United States, the sinking of the Sewol ferry in South Korea, and presidential scandals in both countries have led to power struggles between the media and these presidents.

II. COMPARISON OF THE U.S. AND SOUTH KOREA

A. Defamation Law in the U.S. and South Korea

The U.S. libel law is arguably one of the most tolerant in the world largely due to the First Amendment, which provides direct protection of freedom of speech and the press, and the lack of a constitutional stipulation on the protection of reputation. Additionally, because plaintiffs bear the burden of proof in libel cases to prove that the statement in question was defamatory and false and that the journalist was at fault, it is much more difficult for the plaintiff to sue for defamation and, in turn, easier for the media entity to defend itself.[3] Further, the landmark case *New York Times v. Sullivan* established an even higher standard of fault for plaintiffs who are public officials or figures, requiring them to prove that a journalist acted out of "actual malice," or when a journalist publishes a statement with knowledge of its falsity or "reckless disregard" as to its truth or falsity.[4] *Sullivan* revolutionized U.S. libel law and freedom of the press by allowing journalists a margin of honest error protected by law, or, what the Court deemed, "breathing space" to allow the free press to survive.[5]

Statutes written into state law define what constitutes a libelous statement. Although they differ slightly from state to state, the meaning remains essentially the same. For example, in Illinois, a statement is libelous if it "tends to harm the plaintiff's reputation and diminish the respect, goodwill, confidence, or esteem to which the plaintiff is held by members in the community."[6] In California, libel is defined as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."[7] Even then, however, due to the American common law system, state libel laws are "subject to the First Amendment limitations imposed by the Supreme Court."[8]

---

1 Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 Pac. Basin L.J. 231, 231 (1995).

2 *Id.*

3 Digit. Media Law Project, *Defamation*, Berkman Klein Ctr. for Internet & Soc'y (Jan. 22, 2021), https://www.dmlp.org/legal-guide/defamation.

4 Legal Info. Inst., *Defamation*, Cornell Univ., https://www.law.cornell.edu/wex/defamation.

5 David L. Hudson Jr., *First Amendment Freedoms Need "Breathing Space,"* Freedom F. Inst. (Dec. 22, 2016), https://www.freedomforuminstitute.org/2016/12/22/first-amendment-freedoms-need-breathing-space/.

6 W. Page Keeton et al., Prosser and Keeton on the Law of Torts (5th ed. 1984).

7 Cal. Civ. Code § 45 (1872), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=45.&lawCode=CIV.

8 First Amendment Watch, *Libel: Protecting Vital Political Speech*, New York Univ. (Jan. 6, 2018), https://

In South Korea, on the other hand, libel law is significantly stricter on the defendant. The protection of reputation is written directly into its Constitution. Although it declares that all citizens shall "enjoy freedom of speech and the press," its Constitution also states that "the honor or rights of other persons" may not be violated by the press, and, if they are, "claims may be made for the damage resulting therefrom."[9] It does not expressly indicate which value — freedom or honor — should be held in higher regard by a court. However, the burden of proof in defamation cases lies upon the defendant rather than the plaintiff, which makes it more difficult for journalists and news organizations to defend themselves in court. Unlike in the United States where a statement has to be false to be defamatory, in Korea, a true statement can qualify as defamation if it is found to have been made with the "intent to commit defamation" and not out of "public interest," with the burden of defining "public interest" lying on the defendant.[10] In fact, the burden of proof on the defendant to prove the statement was "made *solely* for public interest" is "not so easy to sustain."[11]

In South Korea, the sentiment behind *Sullivan* remains relevant as the press struggles to defend freedom of speech. Although the government has properly absorbed the indication that public officials and figures are of different stature than private individuals, the "underlying political rationale of [the case] has been poorly understood," as evidenced by the constitutional definition of libel.[12]

Nevertheless, quantifying the value of reputation is tricky, and the act of suing for damages or trying to weigh the public interest against the plaintiff's reputation involves comparing elements whose objective values are difficult to assess. If one attempts to assess damages according to the Illinois definition of libel, he or she is forced to quantify the extent to which the plaintiff's "respect, goodwill, confidence, or esteem" has been affected, yet those characteristics are not inherently enumerable.[13] Reputation, therefore, is a reflection of "the social apprehension that we have of each other."[14] As this reflection changes based on the value society places on social image and public perception, the implications of libel laws change as well.

III. HOW DEFAMATION AND PRESIDENCY PLAYS A ROLE IN FREEDOM OF SPEECH IN THE U.S. AND SOUTH KOREA

A. Reputation as a Cultural Construct

Inevitably, culture plays an important role in how a society values reputation. The American legal system mainly seeks to protect reputation as it is perceived as a good or private property with a quantifiable value in the marketplace. Defamatory statements for which the resulting injury amounts to the plaintiff taking mere personal offense or incurring emotional distress are typically not strong enough grounds for a libel suit. Rather, when seeking damages, the plaintiff must show that the defamatory statement decreased his reputation's market value or negatively affected his business or work significantly.[15] Thus, in the United States, charges of libel or slander are "civil matters for which someone can be sued to recover financial damages."[16]

firstamendmentwatch.org/libel-new-york-times-v-sullivan-sets-standard/.

9 Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 14 (S. Kor.).

10 Manyan Lai, *South Korea's Defamation Law: A Dangerous Tool*, PEN Am. (Dec. 28, 2016), https://pen.org/south-koreas-defamation-law-a-dangerous-tool/.

11 Kyung Sin Park, *Crisis of Seditious Libel in Korea*, Open Net Korea, http://opennetkorea.org/en/wp/main-free-speech/crisis-seditious-libel-korea?ckattempt=1.

12 *Id.*

13 Keeton et al., *supra* note 6.

14 Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 692 (1986).

15 *Id.* at 695.

16 Michelle Estlund, *South Korea's Defamation Laws and INTERPOL- an Example of Cultural Differences between INTERPOL Member Countries*, JD Supra (Nov. 5 2019), https://www.jdsupra.com/legalnews/south-korea-s-defamation-laws-and-45482/.

An example of this can be seen in *Gibson's Bakery v. Oberlin College*, a 2019 case involving a family-owned bakery near Oberlin College that sued on the grounds that the school defamed the owner of Gibson's Bakery by using its support to "'aid and abet' the libelous material that [claimed] the small business was racist."[17] The case started when Black students who were allegedly attempting to steal alcohol from Gibson's were arrested and charged, which prompted their peers to claim this was a racially charged incident and to accuse Gibson's of racial profiling. The suit argued that the school used its resources to help students protest and boycott the bakery even though claims that it was a racist establishment were false. The bakery was awarded millions in punitive damages, but, although Gibson's was suing for libel, the case was not focused on freedom of speech. Rather, the judge kept the focus on how the school's support of the students' libelous claims cost the business hundreds of thousands of dollars in projected damages.[18]

In the United States, even non-quantifiable damages are calculated in terms of dollars and cents, as losses such as "shame" or "mortification" can be roughly compensated with money.[19] If a judge rules that punitive damages are necessary, those, too, are monetary,[20] which further demonstrates that American culture holds money in the highest regard, and the civil courts control conduct by giving or taking it away. Barring extreme circumstances, the actual depreciated *social* value of the plaintiff's reputation is disregarded.

Contrastingly, in Korea, defamation is written into both the Criminal Code and the Civil Code. Pursuant to Article 307 of the South Korean Criminal Act, different punishments are established for defamation via true or false facts with punishment for persons convicted of the latter amounting to imprisonment for a maximum of five years and a fine not exceeding ten million won (approximately $9,000).[21]

This holding of reputation in high regard and subsequently harshly punishing those who sully it may be due to the nature of Korean society, which is what Professor Robert C. Post of Yale Law School refers to as a "deference society," as opposed to the American "market society."[22] In a deference society, "dishonor is a fall from grace in the most comprehensive sense," which is an idea that closely aligns with the concept of "losing face" that is prevalent in Asian societies.[23] In a deference society, an individual who has been defamed or slandered does not find "pecuniary admeasurement" to be sufficient as the honor of a "good name" is invaluable and cannot be wholly compensated through "pecuniary damages."[24]

The nature of the punishment laid out in Korean law for a person convicted of defamation via false facts, which is most closely aligned to American law where a statement can only be defamatory if it is false, shows that Korean society does not place the same importance on money that American society does. The maximum fine a convicted person in Korea can incur is one million won, or around $9,000.[25] In *Gibson's Bakery v. Oberlin College*, the Gibson family was awarded $11 million in actual damages and $33 million in punitive damages.[26] In Korea, however, the threat of incarceration looms over defendants' heads, demonstrating that

17 Daniel McGraw, *Oberlin College Ordered to Pay $44.4 Million Damages in Libel Case Brought by Small Business*, ABA J. (June 17, 2019, 7:30 AM), https://www.abajournal.com/web/article/oberlin-college-ordered-to-pay-44.4-million-damages-in-libel-case-brought-by-small-business.

18 *Id.*

19 Amir Tikriti, *Calculating Damages in a Defamation Case*, AllLaw, https://www.alllaw.com/articles/nolo/civil-litigation/calculating-damages-defamation-case.html.

20 *Id.*

21 KLawGuru, *Crimes Against Reputation (in South Korea)*, K Law Guru (June 30, 2013), https://klawguru.com/2013/06/30/crimes-against-reputation-in-south-korea/.

22 Post, *supra* note 14, at 695.

23 *Id.* at 701.

24 *Id.* at 703.

25 Kyung Sin Park & Jong-Sung You, *Criminal Prosecutions for Defamation and Insult in South Korea with a Leflarian Study in Election Contexts*, 12 U. Pa. Asian L. Rev. 1 (2017).

26 McGraw, *supra* note 17.

those suing for defamation in Korea care not about the monetary market value of their reputation but the social value. From the plaintiff's point of view, this is a wrong that can only be made right by reclaiming their honor and punishing the defendant, even if that punishment is not directly beneficial to them. American defamation law is designed to compensate the defamed while Korean law punishes the defamer.

Regardless of differences in statutes or culture, however, it is indisputable that the right to publish information critical of others without fear of persecution is considered an essential component of a working democracy. This is especially true when the subject in question is a high-ranking public official, namely the president. As President Theodore Roosevelt said, "To announce that there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public."[27] Yet, in many countries, the threat of litigation is often used by governments and political authority to induce a "chilling effect" among critics and the public, effectively silencing dissent and discouraging the publication of negative remarks or reviews.[28]

Especially in South Korea, libel prosecutions oftentimes can be leveled against individuals or organizations for the "ostensible purpose of protecting the reputations of high public officials, sometimes that of the President."[29] One example of this is the *MBC PD Diary* case in which staff members of one of the leading television and radio network companies, MBC, were indicted for "defaming government officials in two episodes of [the investigative show] *PD Notebook* that were critical of the [presidential] administration's decision to resume importing U.S. beef" despite the risk of mad cow disease.[30] Prosecutors argued the implication that U.S. beef was unsafe was direct defamation of the agricultural minister, who oversees importations and determines if products are safe to enter Korea.[31]

Although the judge ruled in favor of the defendant, Kyung-Sin Park, a law professor at Korea University's School of Law, notes that this suit was "definitely the low point on how abusive [defamation law in Korea] can be" and an example of how just the threat of prosecution alone "chilled all other broadcasters and television producers into silence."[32] Now, he says, South Korea rarely sees television programs that "healthily [critique] government policies."[33]

The United States and South Korea are two countries that experienced an effective decline in freedom of the press and attempted silencing of dissenters who criticized the president. In the United States, this was under President Donald Trump's administration and, in South Korea, Park Geun Hye's.

B. Park and Trump: Approaching Defamation Lawsuits During the Presidency

Both Park and Trump are notorious for rejecting opposition and using litigation to chill public criticism. In a 2018 cabinet meeting, Trump denounced the current U.S. libel laws as "a shame and a disgrace and [not representative of] American values or American fairness" and vowed to reassess them.[34] This came after his personal lawyer Michael Cohen filed a defamation lawsuit against *Buzzfeed* for publishing an intelligence dossier that contained "reports of connections between Donald J. Trump's presidential campaign and the Russian government" and after the publication of *Fire and Fury: Inside the Trump White House*, a book by journalist

27 Theodore Roosevelt, Roosevelt in the Kansas City Star; war-time editorials (1918).

28 Nuno Garoupa, *Dishonesty and Libel Law: The Economics of the "Chilling" Effect*, 155 JITE 284, 284-300 (1999).

29 Park, *supra* note 11.

30 Si-soo Park, *Court Declares MBC Not Guilty on Mad Cow Report in 2008*, Kor. Times (Jan. 20, 2010, 5:41 AM), https://www.koreatimes.co.kr/www/news/nation/2010/03/117_59384.html.

31 *Id.*

32 Interview with Kyung Sin Park, Professor, Korea Univ. Law School (Nov. 30 2020).

33 Park, *supra* note 11.

34 Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. Times (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html

Michael Wolff that detailed Trump's chaotic and dysfunctional administration.[35]

Throughout his presidency, Trump threatened to personally sue journalists and organizations for reporting information critical of him countless times. A few examples include threatening to sue the *New York Times* for publishing his tax records and reporting claims that he sexually assaulted women, the *Daily Beast* for reporting on his divorce with his first wife Ivana, and the *Washington Post* for reporting on his Taj Mahal casino.[36] Moreover, Trump's reelection campaign filed three separate libel suits against the *Washington Post*, the *New York Times*, and CNN in March 2020 over claims made in opinion pieces that "referenced the [re-election campaign] and Russia."[37] So far, his lawsuit against CNN has been dismissed (as the others are also likely to be).[38]

The South Korean government under President Park was no different. Libel lawsuits were commonly weaponized by the government against individuals or organizations who propagated unsavory things about her or her administration. In 2013, in an eerily similar situation regarding interference in the presidential election, journalists published evidence that the National Intelligence Service, an intelligence agency closely aligned with President Park, acted in favor of Park's presidential campaign "by disbanding a rival political party and launching a cyber campaign against her opponents."[39] The National Intelligence Service sued them for defamation, but the cases were quickly dismissed.[40]

While at first glance the dismissals of these cases may seem to indicate the triumph of freedom of speech over censorship, a closer look at the social implications of even just filing these lawsuits reveals they have a much more significant and ominous impact on journalism. The lawsuits filed by Trump clearly lacked a strong legal basis. He sued over opinion pieces, not just facts alone, that contained information supported by several documents and reports, including the *Buzzfeed* intelligence dossier. Clearly, they were very carefully compiled and researched, causing the pieces to fail to meet the standard of actual malice needed for Trump to win the lawsuit.[41] Nevertheless, the act of filing these lawsuits meant to tell journalists, 'If you plan on writing something that reflects poorly upon me, I'll take you to court.' Regardless of the defendant's likelihood of winning, preparing a defense takes great time and resources difficult to amass when countering any presidential force. The aggressive defenses from the "behemoth of the Trump campaign," are especially threatening, having been characterized as "prohibitively intimidating".[42] The sheer thought of a potential lawsuit can be enough to convince editors or journalists to self-censor, a dangerous restriction on freedom of speech caused by the threat of potential litigation.

As Justice William Brennan said about his decision in *New York Times v. Sullivan*, the standard of actual malice and the protection of journalists comes from a "profound national commitment to the principle that debate on public issues should be uninhibited…and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[43] The ruling on that landmark case

35 Jaclyn Peiser, *BuzzFeed Wins Defamation Lawsuit Filed by Executive Named in Trump Dossier*, N.Y. Times (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/business/media/buzzfeed-dossier-lawsuit-trump-steele-russia.html.

36 @jonathanwpeters, Twitter (Jan. 4, 2018, 3:20 PM), https://twitter.com/jonathanwpeters/status/949012718933200897.

37 Catherine Lucey, *Trump Campaign Files Libel Suit Against Washington Post*, Wall St. J. (Mar. 3, 2020, 5:39 PM), https://www.wsj.com/articles/trump-campaign-files-libel-suit-against-washington-post-11583270876.

38 Oliver Darcey, *Judge Dismisses Trump Campaign's Lawsuit Against CNN*, CNN (Nov. 12, 2020, 3:18 PM), https://www.cnn.com/2020/11/12/media/trump-campaign-cnn-lawsuit-dismissed/index.html.

39 Lai, *supra* note 10.

40 *Id.*

41 Peiser, *supra* note 34.

42 Joshua A. Geltzer & Neal K. Katyal, *The True Danger of the Trump Campaign's Defamation Lawsuits*, Atlantic (Mar. 11, 2020), https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753/.

43 David L. Hudson Jr., *'A Profound National Commitment' to 'Robust' Debate*, Freedom F. Inst. (Dec. 16, 2019),

set the precedent for public figures seeking to sue for defamation, giving media organizations and individuals the breathing space they need to freely engage in public debate without fear of undue libel lawsuits. But the approach the Trump administration has chosen to take to chill freedom of speech cuts corners on proper legal proceedings and intimidates this important check on government.

That Park and Trump would go so far to silence criticism is no surprise considering both presidents also have a violent history with political demonstrations and protests criticizing their administrations. In 2015, up to 80,000 people protested against President Park's policies and demanded her resignation in one of the largest anti-government protests that Seoul had seen in over seven years, where crowds were dispersed by police spraying tear gas and water cannons.[44] Over 30 were injured, and one rice farmer, who trekked to Seoul from the rural south to protest the president's economic policies, had died.[45] Similarly, many Americans called upon President Trump and the U.S. government to reform or abolish the police in the wake of nationwide protests for the Black Lives Matter movement following the death of George Floyd.[46] In response, President Trump deployed federal law enforcement personnel that summer of 2020 to cities that arrested protestors and spread fear among some civilians.[47]

C. Media and National Disasters

The media also plays a crucial role in holding presidents and administrations accountable during national emergencies and disasters, as it did with both Park and Trump.

On April 16th, 2014, the Sewol, a ferry carrying hundreds of people, many of whom were high school students, capsized and killed 304 people.[48] For days, rescue efforts coordinated by the Ministry of Security and Public Administration continued while maritime police questioned the captain and other surviving crew members. Appallingly, President Park took no action for seven hours following the disaster. Reports claimed she was in her bedroom the morning it happened, but her office refused to explain why it took her so long to show up at the disaster control center and why she was not "briefed in person on the accident."[49]

The Sewol Ferry disaster and the loss of so many young lives culminated in an intense sense of loss and tragedy felt around the entire nation. Some grieving families blamed Park for not taking action during the most crucial hours following the accident, which they believe resulted in more deaths that could have been avoided, and have called for her to apologize.[50] The media and independent individuals soon began to wonder what Park had been doing that rendered her unable to respond to the disaster in a timely manner. [51]

https://www.freedomforuminstitute.org/2019/12/16/a-profound-national-commitment-to-robust-debate/.

44 Al Jazeera, *Dozens Injured at South Korea Anti-Government Protest*, Al Jazeera (Nov. 14, 2015), https://www.aljazeera.com/news/2015/11/14/dozens-injured-at-south-korea-anti-government-protest.

45 Steven Borowiec, *Why the Death of One Rice Farmer Has Captivated South Korea*, Bus. Insider (Oct. 1, 2016, 12:09 PM), https://www.businessinsider.com/rice-farmer-death-in-south-korea-becomes-central-to-protest-movement-2016-10.

46 Ashley Westerman et al., *In 2020, Protests Spread Across The Globe With A Similar Message: Black Lives Matter*, NPR (Dec. 30, 2020, 5:04 AM), https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt.

47 BBC, *Portland Protests: Trump Threatens to Send Officers to More US Cities*, BBC (July 21, 2020), https://www.bbc.com/news/world-us-canada-53481383.

48 Su-Hyun Lee & Sang-Hun Choe *Students Among Hundreds Missing After South Korean Ferry Sinks*, N.Y. Times (Apr. 16, 2014), https://www.nytimes.com/2014/04/17/world/asia/south-korean-ferry-accident.html.

49 Claire Lee, *Was Park Geun-Hye Asleep While Sewol Ferry Was Sinking?,* Kor. Herald (Mar. 29, 2018, 6:42 PM), http://www.koreaherald.com/view.php?ud=20180329000933.

50 *Id.*

51 Jason Strother, *Sewol families: 'The fundamental fault lies with the government,'* DW (Feb. 7, 2014), https://www.dw.com/en/sewol-families-the-fundamental-fault-lies-with-the-government/a-17753498.

One anti-government campaigner, Park Sung-Su, distributed a leaflet with a rumor that the president had "failed to respond swiftly to the disaster that day because she was having a romantic encounter with a former aide."[52] Japanese journalist Tatsuya Kato, the former Seoul bureau chief for a right-wing newspaper in Japan, published an online article suggesting the same rumor.[53] Park's administration sued both of them for criminal defamation. Another critic, an artist who painted a caricature of the president as a scarecrow facing the devastated families of Sewol victims, was not sued, but his art was pulled from a prestigious art festival in "a type of censorship usually reserved for those accused of supporting communist North Korea."[54]

The Seoul Central District Court acquitted Kato, opining that his statement was "written with the public interest in mind" and, thus, "falls within the area where the freedom of the press should be protected in a democratic society."[55] The Court also stated it was difficult to conclude his intent was to "defame the president or libel her as a public figure."[56] However, despite the victory for press freedom, it did not set any precedent for future criminal defamation laws as it was a trial court decision. Rather, political analyst Lee Cheol-hee surmised the South Korean administration was "sending a message to the press not to write adverse reports about the government."[57] Park Sung-Su was sentenced to one year in prison but was freed after eight months.[58]

It was revealed later that one of the reasons why the Sewol sank was because it was overloaded by "twice the legal limit of cargo," which was improperly secured. Regulators who had been paid off approved dangerous renovations, and these factors contributed to creating a "perfect storm" that resulted in the Sewol tragedy.[59] In January 2014, however, a former employee of the operator of the Sewol reported the overloading of the ferry to the President's Office, which took no action.[60] Even if the Office did not acknowledge his report, if the employee felt the matter was important, he could have publicly exposed the corrupt regulators and ensured the safety of the Sewol.

Why didn't he? Professor Park believes the defamation laws in Korea are to blame, which could have very easily come back to bite the employee if he had chosen to publicly criticize his former employer.[61] Defamation laws in Korea not only chilled public response and criticism of the government's response to the tragedy but could have very well played a crucial role in the sinking itself.

President Trump's time in office has not been without national disasters of its own, namely the coronavirus pandemic. With the brunt of the pandemic hitting the United States in February 2020 and

52 Sang-Hun Choe, *South Korea Government Accused of Using Defamation Laws to Silence Critics*, N.Y. Times (Mar. 5, 2016), https://www.nytimes.com/2016/03/06/world/asia/defamation-laws-south-korea-critics-press-freedom.html.

53 Glob. Freedom of Expression, *State v. Kato*, Columbia Univ., https://globalfreedomofexpression.columbia.edu/cases/state-v-kato/.

54 Sang-Hun Choe, *An Artist Is Rebuked for Casting South Korea's Leader in an Unflattering Light*, N.Y. Times (Aug. 30, 2014), https://www.nytimes.com/2014/08/31/world/asia/an-artist-is-rebuked-for-casting-south-koreas-leader-in-an-unflattering-light.html.

55 Glob. Freedom of Expression, *supra* note 51.

56 *Id.*

57 Anna Fifield, *In South Korea, Journalists Fear a Government Clampdown on the Press*, Wash. Post (Dec. 11, 2014), https://www.washingtonpost.com/world/asia_pacific/in-south-korea-journalists-fear-a-government-clampdown-on-the-press/2014/12/09/ff13603e-7a2f-11e4-8241-8cc0a3670239_story.html.

58 Choe, *supra* note 50.

59 Sang-Hun Choe, *An Overloaded Ferry Flipped and Drowned Hundreds of Schoolchildren. Could It Happen Again?*, N.Y. Times (June 10, 2019), https://www.nytimes.com/2019/06/10/world/asia/sewol-ferry-accident.html.

60 AP, *South Korea ferry captain says he warned of boat's stability problems*, Tel. (Apr. 30, 2014), https://www.telegraph.co.uk/news/worldnews/asia/southkorea/10798399/South-Korean-ferry-captain-says-he-warned-of-boats-stability-problems.html.

61 Kyung Sin Park, *"Stay Still": Sewol, a Tale of Fatal Censorship and Paternalism*, in Challenges of Modernization and Governance in South Korea 121-142 (Suh JJ. & Kim M. eds., 2017).

continuing to rage since, Trump's response to COVID-19 has been widely rebuked by individuals and media outlets for being dangerous.[62] He often made statements or suggestions that were not scientifically supported or that went directly against the advice of public health officials, lied that coronavirus numbers were going down when they were actually increasing or plateauing, and disagreed with the results of scientific studies—specifically one that tested if hydroxychloroquine would effectively treat COVID-19, claiming the study was run by people who didn't like him.[63] As Jon Sternfeld, author of the book *Unprepared*, which follows the first six months of the pandemic in the United States, notes, the reason why the country was "decimated" by the virus was that President Trump and his supporters changed the narrative of the pandemic response from one of science to one of politics, as it was "easier for them to battle governors of Democratic states than for them to battle science."[64]

This era of misinformation led some social media platforms to establish COVID-19 misinformation policies to prevent its spread. One such platform is YouTube, which banned One America News Network from posting videos for a week after discovering that one of their videos violated their policy by "claiming there's a guaranteed cure" for the virus.[65] Some media sources are also holding Trump accountable for his actions as president, while others are criticizing his failure to lead America out of the crisis. White House reporter Stephen Collinson accused the president of "ignoring the worsening tragedy" in light of the worsening pandemic, calling his actions a "stunning abdication of leadership."[66]

The coronavirus pandemic also stirred a few defamation lawsuits against the president. In April, his reelection campaign filed a suit against an NBC affiliate in Wisconsin for running an ad that claimed Trump said, "The coronavirus, this is their new hoax," without providing proper context. The campaign referred to it as a "deceitful alteration of [audio]" and sued for defamation. After the Trump campaign's failure to win the 2020 presidential election, the defendant argued that the campaign "[lacked] standing to maintain [the] suit" and requested it be dismissed.[67] The campaign agreed to drop the case a week later.[68]

Although both parties were severely criticized for failing to lead their respective countries through national disasters, the existence of defamation as a criminal offense in Korean law made President Park's efforts to silence critics much more dangerous and oppressive than those of President Trump. His suits included no criminal charges, held him to a much higher standard thanks to the First Amendment's protection of free speech, and often had no factual basis. In President Park's case, although the majority of her suits were similarly dismissed, journalists in Korea were constantly faced with the threat of litigation whether their statements were true or false, making it more dangerous to publicly condemn the president.

Especially as the pandemic continues into 2021, the ability of the media to fact-check and criticize

62 David Holtgrave, *12 ways the Trump administration botched America's response to Covid-19*, CNN (Oct. 29, 2020, 7:21 AM), https://www.cnn.com/2020/10/29/opinions/ways-trump-botched-covid-response-holtgrave/index.html.

63 Christian Paz, *All the President's Lies About the Coronavirus*, Atlantic (Nov. 2, 2020), https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/.

64 Mark Joyella, *Author Says Trump Shifted Covid-19 Response From Science To Politics, And 'That's Why We Got Decimated,'* Forbes (Nov. 25, 2020, 5:12 PM), https://www.forbes.com/sites/markjoyella/2020/11/25/author-says-trump-shifted-covid-19-response-from-science-to-politics-and-thats-why-we-got-decimated/?sh=4cd99bbea889.

65 Kelly Bourdet, *Misinformation Watch on the 2020 Election*, CNN (Nov. 2, 2020), https://edition.cnn.com/business/live-news/election-2020-misinformation/index.html.

66 Stephen Collinson, *Trump's Stunning Abdication of Leadership Comes as Pandemic Worsens*, CNN (Nov. 12, 2020, 6:38 AM), https://www.cnn.com/2020/11/12/politics/donald-trump-coronavirus-leadership/index.html.

67 Eriq Gardner, *NBC Affiliate Wants Judge to Rule on Trump's Election Loss*, Hollywood Rep. (Nov. 9, 2020, 4:09 PM), https://www.hollywoodreporter.com/thr-esq/nbc-affiliate-wants-judge-to-rule-on-trumps-election-loss.

68 Christopher Cole, *Trump Camp Drops Defamation Suit Over Virus 'Hoax' Ad*, Law360 (Nov. 16, 2020, 3:45 PM), https://www.law360.com/articles/1328961/corrected-trump-camp-drops-defamation-suit-over-virus-hoax-ad.

officials remains necessary to holding the government accountable. The freedom of the press to cover significant events and allow for public discourse on how leaders can better protect their people is a crucial cog in an essential system of checks and balances, and government restriction of such discourse in times of crisis can have serious implications for the state of the country's democracy. If a president spreads misinformation, journalists must be allowed to write freely about the leader's shortcomings without fear of retaliation. As American philosopher and activist Noam Chomsky says, "Goebbels was in favor of free speech for views he liked. So was Stalin. If you're really in favor of free speech, then you're in favor of freedom of speech for precisely the views you despise. Otherwise, you're not in favor of free speech."[69]

D. Media and Presidential Scandal in South Korea

It is also important to consider how presidents and the media interact with one another in South Korea when it comes to scandal and impeachment. Both Park and Trump were impeached during their time in office, but each impeachment had drastically different outcomes.

Park's impeachment was centered around an influence-peddling and bribery scandal that was exposed in 2016 by the media.[70] The relationship in question was a close friendship between Park and Choi Soon-sil, her confidante, who abused presidential connections to "pressure conglomerates" for "millions of dollars in donations to two non-profit foundations she controlled," as well as soliciting favors such as college admissions for her daughter.[71] Considering Park's tense relationship with the media and its similar distaste for her, it was not surprising that media outlets provided most of the damning information and fodder for the ensuing candlelight protests that demanded she be removed from office.[72] Journalism professor Soomin Seo names the *Hankyoreh* and JTBC, a Korean TV network, as two specific entities that played a particularly large role in covering and "sensationalizing" the scandal.[73]

The *Hankyoreh* was involved from the beginning of the scandal before even they themselves knew what it would become. They began by reporting on the imprisonment of two men, Lim Hyun-gyu and Kim Hae-ho, who were convicted of defaming Park when she first ran for president in 2007 by accusing her of "receiving a house in compensation for preferentially awarding a lucrative construction contract" when she was the chairperson of Yeongnam University.[74] Stories were then unraveled regarding illegal overseas gambling, fraud, and bribery that revealed that the Prosecution Service and the courts were both neglecting to investigate high-profile cases implicating the Blue House despite "publicized money trails." When the press "forged ahead with its spotlight" on the Blue House, journalists uncovered the two non-profit foundations that Choi Soon-sil controlled, which would go on to be key pieces of evidence in Park's influence-peddling scandal.[75] Unsettled by the attention the investigation was generating, Park's administration directly attacked the media and released a statement which, roughly translated, accused "some media and other corrupt vested interests and left-wing forces" of trying to "attack [the Blue House] based on public sentiment that powerful and wealthy people must

69 Noam Chomsky, Goodreads, https://www.goodreads.com/quotes/688824-goebbels-was-in-favor-of-free-speech-for-views-he.

70 BBC, *Park Geun-hye impeached: Did a puppy bring down South Korea's president?,* BBC (Dec. 9, 2016), https://www.bbc.com/news/world-asia-38259068.

71 BBC, *South Korea's Presidential Scandal*, BBC (Apr. 6, 2018), https://www.bbc.com/news/world-asia-37971085.

72 Soomin Seo, Abstract, *South Korea's Watergate Moment: How a Media Coalition Brought Down the Park Geun-hye Government*, Journalism Prac. (2020).

73 *Id.*

74 Ji-eun Kim, *'Bakkkeunhye bibang' imyongbakkaempeu jon ganbu silhyong ['Park Geun-hye Slander' Former Lee Myung-bak Executive Jailed]*, Hankyoreh (Sept. 18, 2007, 8:45 PM), http://www.hani.co.kr/arti/society/society_general/237296.html.

75 Justin Fendos, *The History of a Scandal: How South Korea's President Was Impeached*, Diplomat (Jan. 24, 2017), https://thediplomat.com/2017/01/the-history-of-a-scandal-how-south-koreas-president-was-impeached/.

have broken laws, evaded laws, or have black marks against them."[76]

The Blue House continued to strike back at the media by "unveiling evidence of a possible corruption relationship" between a "high-ranking journalist" in *Chosun Ilbo* and the ex-CEO of a company who had just "come under investigation for bribery."[77] When the newspaper continued to publish stories about the scandal, a supporter of President Park publicly revealed that the journalist in question was the editor-in-chief of *Chosun Ilbo.*[78] This was an attempt to cause the same chilling effect mentioned earlier to silence the press, and it worked. For a month, reports on the nonprofit foundations and individuals involved ceased in all media outlets except *Hankyoreh* and JTBC.

In September of 2016, *Hankyoreh* published an article on the two nonprofits, questioning who was behind them and implicating Choi Soon-sil in the process. JTBC assembled a team to investigate the two foundations in greater depth and eventually came across a tablet that belonged to Choi Soon-sil.[79] They slowly revealed the contents of the tablet, which contained edited versions of President Park's speeches and evidence that it did indeed belong to Choi. Even with all the evidence in favor of a conviction, the Prosecution Service was negligent; they possessed information on Choi's whereabouts after claiming they knew nothing and took absurdly long to finally raid the offices of the two nonprofits.[80] Eventually, Choi was convicted of corruption, influence-peddling, and abuse of power related to the Park Geun-Hye scandal and was sentenced to 20 years in prison.[81]

Many Koreans attribute the indictment, eventual impeachment, and removal of Park from office to the "honest, brave" media that "did what the Prosecution Service was reluctant to do."[82] Professor Justin Fendos indicates that the presidential scandal was not an "isolated incident," but rather a result of a "deeply embedded tradition of backdoor dealings on an epidemic scale affecting all levels of government, especially the very bureaus that should be overseeing justice" that extend to "strong-arm tactics to suppress the truth by manipulating the press," which could clearly be seen throughout Park's administration.[83]

Unlike in South Korea, the media did not play as consequential of a role in President Trump's impeachment. President Trump's first impeachment similarly dealt with a scandal regarding influence and power. In late 2019, he faced two articles of impeachment: one for abuse of power for seeking help from the Ukrainian government for his reelection campaign, and one for obstructing Congress.[84] He was accused of soliciting the Ukrainian government to "publicly announce investigations" against Joseph Biden by dangling $391 million in taxpayer funds for military aid to Ukraine.[85] In a condemnation eerily similar to that of President Park, Trump deemed reports of the scandal as "atrocious lies by the radical left" and an "assault on America" in a tweet.[86]

76 Yoon-seop Jung, *Ubyongu jugigi bonjireun singmuljongbu mandeulgetttaneun got [The essence of killing Woo Byung-woo is to create a vegetative government],* Yeonhap News (Aug. 21, 2016, 3:40 PM), https://www.yna.co.kr/view/AKR20160821036600001.

77 Fendos, *supra* note 73.

78 *Id.*

79 Eui-gyeom Kim et al., *Keiseupocheu isajangeun chwesunsil dangol masaji sentojang [Chairman Lee of Ksports is the head of a massage center that Choi Soon-sil frequents]*, Hankyoreh (Sept. 20, 2016, 2:18 PM), http://www.hani.co.kr/arti/politics/politics_general/761796.html.

80 *Id.*

81 BBC, *South Korea jails Choi Soon-sil, friend to Park Geun-hye, for corruption*, BBC (Feb. 13, 2018), https://www.bbc.com/news/world-asia-43042862.

82 Fendos, *supra* note 73.

83 *Id.*

84 Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019).

85 *Id.*

86 Courtney Subramanian & David Jackson, *Donald Trump calls impeachment accusations 'atrocious lies' as House vote looms*, USA Today (Dec. 18, 2019, 2:20 PM), https://www.usatoday.com/story/news/politics/2019/12/18/trump-impeachment-president-tweets-democrats-assaulting-america/2687961001/.

At the beginning of the scandal, *Washington Post* columnist Margaret Sullivan called for national media to not fall for the usual traps of "false equivalence," "pointless punditry," speculation, and distraction when covering the impeachment. She cited Trump's frequent "attention-grabbing performance art" as strategies to distract the press and "hijack" coverage and urged the media not to fall for it.[87] She also criticized the media's effort to seem "neutral" as resulting in a false equivalence between facts and lies. Although the facts underlying the impeachment trial were present in the news media, those interested had to "cut through a lot of brush" before finding proper information.[88] President Trump was indeed impeached, but, unlike Park, he was not removed from office where he remained until the end of his term.[89]

E. Potential Action in South Korea

The similarities between the Park and Trump administrations are shocking. Stephen Costello penned an article for *Korea Times* calling Trump the "new Park Geun-Hye" in terms of the intense public backlash and desire to remove him from power.[90] Both leaders were impeached during their terms, with Park successfully being ousted and Trump, although technically impeached, not removed from office. However, while their moves to chill criticism and punish political opponents may remain similar, the effects are vastly different.

Professor Kyung-sin Park argues that South Korea should abolish the criminal defamation law. Not only is reputation difficult to quantify, but it is ambitious to say that it even necessarily *belongs* to the individual it is attached to. Because reputation is the collective image or idea that other people have of an individual, the individual "cannot control or assume what other people think of [them] before the supposedly defamatory remark [was] made," thus making it impossible to even justify the existence of an injury.[91] This definition of reputation begs the question: Does reputation belong to the individual, or does it belong to the society that creates and enforces it? If the latter is true, then the very basis of the Korean criminal defamation law crumbles as there is no personal value associated with reputation to dispute.

Additionally, the fact that Korean defamation law also considers true statements to be eligible as libel places the blame on those who are brave enough to criticize actions that warrant criticism rather than on those who committed the actions. Long before her influence-peddling scandal arose, the media questioned Park's ability to run the government effectively. *Hankyoreh* published an opinion piece responding to Park's anger at a document leak implicating her former chief of staff, Choi Soon-sil's husband and the very man who rumors claimed Park was with at the time of the Sewol ferry disaster, in interfering with state affairs. The piece argued that the president's quick dismissal of a document that clearly implicated a member of her close inner circle in a crime was "abnormal," asking, "What kind of shameless president gets angry at the newspapers instead of blaming herself for leaving her country in this abnormal state?"[92] This is yet another example of the "chilling" effect of criminal defamation law that interferes with the media's responsibility to hold public officials

87 Margaret Sullivan, *Media beware: Impeachment Hearings Will Be the Trickiest Test of Covering Trump*, Wash. Post (Nov. 10, 2019, 4:00 PM), https://www.washingtonpost.com/lifestyle/style/media-beware-impeachment-hearings-will-be-the-trickiest-test-of-covering-trump/2019/11/08/1f2b0aac-0239-11ea-8501-2a7123a38c58_story.html.

88 Margaret Sullivan, *The two big flaws of the media's impeachment coverage—and what went right*, Wash. Post (Dec. 20, 2019), https://www.washingtonpost.com/lifestyle/style/the-two-big-flaws-of-the-medias-impeachment-coverage--and-what-went-right/2019/12/20/22c42e9c-2349-11ea-86f3-3b5019d451db_story.html.

89 Bruce Ledewitz, *No, Donald Trump wasn't convicted and removed from office. But here's why impeachment worked*, Pa. Cap. Star (Feb. 13, 2020), https://www.penncapital-star.com/commentary/no-donald-trump-wasnt-convicted-and-removed-from-office-but-heres-why-impeachment-worked-bruce-ledewitz/.

90 Stephen Costello, *Donald Trump Is New Park Geun-hye*, Kor. Times (Aug. 27, 2017, 5:46 PM), http://www.koreatimes.co.kr/www/opinion/2017/08/637_235467.html.

91 Park, *supra* note 11.

92 Hankyoreh, *Instead of the Media, Pres. Park Should Be Angry at Herself*, Hankyoreh (Dec. 2, 2014, 11:16 PM), http://english.hani.co.kr/arti/english_edition/english_editorials/667105.html.

accountable for actions that the public may otherwise be blind to.

If abolition is not possible, Professor Park suggests adding a "provision that officials cannot claim [criminal libel]" for statements that criticize their work.[93] This would hold an effect similar to that of *New York Times v. Sullivan* and protect individuals who choose to publicly air disagreements or grievances against public officials, which will, in turn, force officials to operate at a higher standard to avoid said grievances. Although this would not completely eliminate the corruption and silencing enabled by South Korea's criminal defamation law, it would alleviate the burden on the press and lessen the extent to which an increasingly litigious presidential cabinet can crack down on freedom of speech in South Korea.

F. The Future of Free Speech in South Korea and the U.S.

In the past few years, as Park Geun-Hye fell into disgrace due to a peddling and bribery scandal and more liberal President Moon Jae-In took over, the Korean media underwent a positive transformation. This can be seen in the #MeToo movement, which encouraged victims of sexual violence and abuse to stand up for themselves when it swept South Korea in 2018. It forced Korean citizens to realize their criminal defamation laws are "one of the biggest challenges that sexual violence victims [in Korea] face."[94] Because even a true statement can be considered defamatory if the intent behind it was not purely out of public interest, sexual violence victims can be punished severely for speaking up if the subject of their accusations decides to sue. Oftentimes, these allegations are against public figures, like director Kim Ki-duk who was accused of sexual and physical abuse by an actress and then sued the women's rights group that campaigned on her behalf for pecuniary damages he suffered as a result of his tarnished reputation. He was also accused by several other actresses, who used MBC's *PD Notebook*, the same platform that was sued in the mad cow disease case, to tell their stories. He lost the suit.[95]

When he took office, President Moon vowed to reassess libel law, expressed his support for the #MeToo movement, encouraged prosecutors to investigate cases thoroughly, and asked the public to reflect on how "deeply the structure of sexual discrimination is entrenched in [Korean] society."[96] Considering the implications of the #MeToo movement on the reputations of individuals, especially high-ranking and public individuals, Moon's commitment to making South Korea a safer place for people to criticize others and speak up for themselves starkly contrasts Park's administration.

Unfortunately, in America, as President Joseph Biden entered the White House in January 2021, the public continues to have concerns about free speech. Although President Biden is considerably more liberal than Trump, he and members of his team have made statements in the past that may indicate that his assumption of office will not be the saving grace of press freedom. An official for the Biden transition team, Richard Stengel, penned an op-ed last year arguing that "freedom of speech was too unfettered and that changes must be considered," especially concerning hate speech and misinformation.[97] Biden also indicated he was willing to rewrite Section 230 of the Communications Decency Act, which would hold platforms like Facebook and Twitter accountable for the statements that users publish or promote.[98] Whether the freedom of the press

93 Park, *supra* note 11.

94 Claire Lee, *How #MeToo Movement Is Pushing for Revision of South Korea's Defamation Law*, Kor. Herald (Mar. 1, 2018, 7:52 PM), http://www.koreaherald.com/view.php?ud=20180301000196.

95 Hyo-won Lee, *Kim Ki-Duk Case Seen as Win for #MeToo in South Korea*, Hollywood Rep. (Jan. 11, 2019, 8:01 AM), https://www.hollywoodreporter.com/news/kim-ki-duk-case-seen-as-win-metoo-south-korea-1175383.

96 Yonhap, *President Moon Reiterates Support for #MeToo Movement*, Kor. Herald (Mar. 4, 2018, 5:46 PM), http://www.koreaherald.com/view.php?ud=20180304000261.

97 Steven Nelson, *Joe Biden Transition Official Wrote Op-Ed Advocating Free Speech Restrictions*, N.Y. Post (Nov. 13, 2020, 5:15 PM), https://nypost.com/2020/11/13/joe-biden-transition-official-wrote-op-ed-against-free-speech/.

98 Eric Boehm, *Joe Biden Has Officially Joined the Misguided Crusade Against Online Free Speech*, Reason (Nov. 13, 2019, 3:35 PM), https://reason.com/2019/11/13/joe-biden-has-officially-joined-the-misguided-crusade-against-online-free-speech/.

will flourish or wither under President Biden's administration, only time can tell. But if South Korea is any indication, cracking down on free speech may drive the country further from democracy.

IV. CONCLUSION

Although both Trump and Park abused litigation and used fear tactics to control the media's coverage of their presidencies, the glaring differences in their respective countries' defamation laws led to drastically different outcomes. This is due not only to the nature of the laws, but also the differing cultural values each society holds. Additionally, the United States' First Amendment and landmark case *New York Times vs. Sullivan* protect journalists who report on public officials, a level of security not afforded to Korean journalists. The implications of Korea's defamation laws and the lack of protection offered to Korean journalists have manifested themselves particularly in Park Geun-Hye's presidency.

During national disasters such as the coronavirus pandemic in the United States and the sinking of the Sewol ferry in South Korea, the respective media coverage in both countries held the presidents accountable for playing a part in the damage and grief these events caused. The media also played significant roles in holding the presidents accountable during their respective scandals: Trump's Ukrainian affiliations and Park's influence-peddling. Although both presidents pursued legal action against the media with lawsuits that were often frivolous and meant to threaten the press, in the United States, the media was often protected by libel law and *New York Times vs. Sullivan,* whereas, in South Korea, there were serious potential legal consequences for the "defamation" of public officials, even with true statements.

In more recent years, with current presidents Joseph Biden in the United States and Moon Jae-In in South Korea, the freedom of the press is not as threatened as it was with presidents Trump and Park. However, South Korea's defamation laws still do not adequately protect the media and its coverage of public officials, and, unless they provide that security to the press, a true democracy where the public, the press, and the presidency are allowed to engage in free discourse and criticism of the government will be difficult to achieve.

Lost in Translation:
The Counterproductive Divergence of Retributivist Theory & Practice in the U.S.

Bridget Burke
University of San Diego

Abstract

American criminal justice ostensibly desires to both punish criminals and protect public safety. Yet, it has pursued a punitive conceptualization of retributive justice that fails to capture this dual understanding of justice as both retribution and safety. This article will first examine America's evolved retributive approach, echoing existing observations in the literature on how the disillusionment with the rehabilitative ideal led to an increasingly punitive justification for imprisonment and a plague of cyclical crime. Then, the American criminal justice approach will be foiled to that of Sweden to examine why a rehabilitative model like Sweden's achieves public safety more effectively in the long run. These observations will then be used to construct a theoretical model that illustrates how trying to integrate the goal of safety into the punishment-focused and rehabilitation-averse model causes the model to become overly punitive. In doing so, this approach fails to produce the outcomes Americans expect it to accomplish. This article focuses on defining the theoretical and practical problems of this issue before specific solutions can be proposed.

I. INTRODUCTION

American criminal justice has developed a highly punitive concept of prisons and justice, minimizing structural rehabilitation of the convicted.[1] This observation is frequently discussed in the relevant literature and suggests the United States uses a model of justice that does not wholly conform to the principles of retributive justice. In what follows, I intend to fill a gap in the criminal justice literature by identifying how the American practice of justice diverged—and why it remains separated—from pure retributivist theory.[2] More specifically, this paper aims to give a theoretical answer to why the practice of American criminal justice is more disproportionately punitive than retributivist theory prescribes. I argue that American criminal justice becomes overly punitive by allowing a cultural fear of criminality to make punishment, rather than rehabilitation, the mechanism by which the criminal justice systems seeks, unsuccessfully, to achieve safety.

First, I will preface my argument by defining the theory of retributivism and its counterpart, consequentialism.[3] I will also specify what each model is designed to accomplish. The American approach to criminal justice most closely aligns with the punishment-based retributive justice model ("retributivism"), in which a justice system punishes an offender proportional to the wrongfulness of their actions.[4] There is also, however, an implied cultural expectation that justice means communities will be safer from criminal activity.[5] The cultural expectation of the American criminal justice system, I argue, is twofold: it is to simultaneously achieve retribution and safety. As I will demonstrate in the following sections, this dual expectation proves to be problematic for the American model.

With these expectations in mind, I will examine both how the American model became highly punitive and the consequences of this development. As established by the relevant literature, the disillusionment with the rehabilitative ideal in the United States led to an increasingly punitive justification for imprisonment.[6] The result, however, was a "war on prisoners" and extraordinarily high rates of recidivism that denoted a plague of cyclical crime.[7] Heightened focus on "giving offenders what they deserve" tended to inflate the public's negative characterizations of anyone merely associated with crime.[8] This contributed to a cultural fear of criminality that has driven a desire to punish offenders and an aversion to rehabilitating them.[9] This fear was politicized, which exacerbated Americans' inflated misconceptions on the real prevalence of criminal activity.[10]

Lastly, I will use these observations to construct a model to illustrate how the American model diverges

1 Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners"*, 114 W. Va. L. Rev. 373, 375 (2012).

2 *Id.*, at 375.

3 S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 10-12 (2009).

4 Neil Vidmar, *Retributive Justice: Its Social Context*, *in* The Justice Motive in Everyday Life, 291 (Michael Ross and Dale T. Miller eds., 2002); *see also* Neil Vidmar, *Retribution and Revenge*, *in* Handbook of Justice Research in Law, 31, 43 (Joseph Sanders and V. Lee Hamilton eds., 2001); *see also* Mitchell, *supra* note 3.

5 James Q. Wilson, Thinking About Crime 260 (Vintage Books rev. ed. 1985) (1975).

6 Haney, *supra* note 1, at 382.

7 Craig Haney, *Counting Casualties in the War on Prisoners*, 43 Univ. S.F. L.Rev. 87 (2008); Bureau Just. Stat., 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) (May 2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

8 Lisa Moore and Amy Elkavich, *Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 Am. J. Pub. Health 782 (June 2008); *see also* Milton Heumann, Brian K. Pinaire, and Thomas Clark, *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41 Crim. L. Bull. 24, 41 (2005); s Invisible Punishment: The Collateral Consequences of Mass Imprisonment (Marc Maurer and Meda Chesney-Lind, eds. 2002).

9 Haney, *supra* note 1, at 394.

10 Moore and Elkavich, *supra* note 8.

from pure retributivism and why this disconnect exists. As seen in the outcomes outlined in the previous section, the public aversion to rehabilitation demanded that American criminal justice meet a necessary threshold of punishment.[11] This is because rehabilitation undercuts the primary goal of retribution; prioritizing punishment means offenders should receive at least as much punishment as they deserve, and the justice model mutates to ensure that they do.[12] Because the U.S. justice system does not structurally rehabilitate offenders to ensure greater safety, the tough on crime approach instead becomes the mechanism by which it attempts to do so.[13] In the punishment-based, rehabilitation-averse model of the United States, the safety brought about by incapacitation of offenders becomes the dominant conceptualization of safety; I call this retributive safety. Merely incapacitating offenders, however, does not reliably translate to preventing future criminal activity.[14] Doing so requires robust structural rehabilitation; thus, I call this concept rehabilitative safety.[15] This section will use the Swedish rehabilitative approach as a foil to that of the United States. This will demonstrate how the United States has tried to maintain a punishment-based model of justice while demanding an outcome—safer communities—whose long-term success depends on undermining punishment.[16]

The parameters of the discussion exclude prescribing concrete solutions. What follows, instead, serves as a diagnostic. Building a more robust understanding of why this disconnect exists will illuminate cracks in the foundational concepts of justice upon and through which the American criminal justice system operates.

A. Defining a Model of Justice: Approaches and Expectations

The American criminal justice system derives its justifications for punishment from the retributivist school of thought.[17] Under retributivism, punishment is not only a means toward achieving justice, but the end of justice itself. Justice in this conceptualization requires those to give what is due and to pay what he or she owe according to the severity of the harm he or she inflicted. The American approach generally deems punishment as having innate usefulness, and, as such, self-imposes a lower burden (if any) on the state to prove that punishment will produce net-positive consequences upon an offender's release. In the 1970s and 1980s, "just deserts theory" emerged as a scholarly framework asserting that imprisonment is just, so long as the offender deserves the punishment.[18] In theory, desert-based punishment requires determining how culpable offenders truly are to calculate how much suffering they deserve.[19]

Retributivism seeks to impose on the offender what they deserve for the harm they created and restore a sense of fairness and healing for the victim.[20] When one feels they have been wronged, they seek to resolve the cognitive dissonance created by having experienced injustice.[21] A retributivist model uses retribution—or "seeing the offender suffer loss of status and power," in the words of social psychologist Neil Vidmar—to recover

11 Haney, *supra* note 1, at 390.

12 *Id.*, at 376.

13 *Id.*

14 Bureau Just. Stat., *supra* note 7*; see also* Moore and Elkavich, *supra* note 8, at 782; *see also* Marc Mauer, Race to Incarcerate (2006); *see also* Jenni Gainsborough and Marc Mauer, Diminishing Returns: Crime and Incarceration in the 1990s (Sept. 2000) https://www.prisonpolicy.org/scans/sp/DimRet.pdf.

15 Moore and Elkavich, *supra* note 8, at 782; *see also* Betsy Pearl, Ending the War on Drugs: By the Numbers, Center for American Progress 1 (Jun. 27, 2018) https://cdn.americanprogress.org/content/uploads/2018/06/26090511/EndingTheWarOnDurgs-factsheet.pdf?_ga=2.82119766.1300358010.1604987794-347677261.1604987794.

16 Moore and Elkavich, *supra* note 8, at 782.

17 Haney, *supra* note 1.

18 *Id.*, at 382.

19 Andrew von Hirsch, *"Neoclassicism," Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate*, 29 Crime & Delinq. 52, 59, 60 (1983).

20 Vidmar, *supra* note 4, at 291.

21 *Id.*

a feeling of vindication.[22] Within retributivism, vindication is synonymous with justice, so the model's primary goal is to provide that sense of validation.[23]

While retributive justice looks towards the individual's punishment, rehabilitative justice seeks outcomes that better the community.[24] A rehabilitative model, unlike a punishment-based retributive model, is consequentialist because it highlights the burden of punishment on the state and demands its consequences serve a utilitarian purpose.[25] Punishment, therefore, is just only if the resulting benefits outweigh its costs.[26]

A rehabilitative justice model, unlike a retributive model, rigorously seeks to achieve the consequentialist goal of increasing safety in communities.[27] Punishment is one way to further this goal in the long run, but it is not necessarily the primary mechanism by which safety must be achieved. In short, the goals are constant while the mechanism may change. Imposing punishment must generally ensure the offender will be likely to reject criminal activity upon re-entry into society.[28] Sweden and other Nordic countries are famous for embodying this principle in their criminal justice systems, which stress robust structural rehabilitation that reconditions offenders.[29] Their record-low recidivism rates suggest their rehabilitative models are effective in furthering the consequentialist goal of safety.[30]

Unlike a purely retributive model, however, retribution is not the sole expectation of the American model.[31] There is also a cultural expectation that justice means communities will be safer from criminal activity—a goal typically understood to be accomplished by a rehabilitative model.[32] The cultural expectation of American criminal justice, I argue, is twofold: its goals are to simultaneously achieve retribution and safety. The following section traces how this dual expectation evolved and how it becomes problematic for the overall model.

II. THE DEVELOPMENT AND CONSEQUENCES OF THE AMERICAN JUSTICE MODEL

The direction of American criminal justice toward a highly punitive repurposing of prisons gradually crowded out a systematic presence of rehabilitation.[33] In the words of social psychologist and Stanford Prison Experiment researcher Craig Haney, a "vacuum that was created by the abandonment of the rehabilitative ideal was filled with a new justification for imprisonment."[34] Leading up to the 1960s and early 1970s, imprisonment was often the prescription for heinous, violent crimes.[35] From these years onward, America's approach to

22 Neil Vidmar, *Retribution and Revenge*, *in* Handbook of Justice Research in Law, 31, 43 (Joseph Sanders and V. Lee Hamilton eds., 2001).

23 *Id.*, at 43.

24 Mitchell, *supra* note 3, at 10-12.

25 *Id.*

26 *Id.*; *see also* Richard S. Frase, Criminal Punishments, Oxford Companion Am. L. 197, 197 (Kermit L. Hall, et al. eds., 2002).

27 Carolyn W. Deady, Incarceration and Recidivism: Lessons from Abroad 3 (2014), https://salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf.

28 Mitchell, *supra* note 3, at 10.

29 Erwin James, *Prison is not for punishment in Sweden*, Guardian, (Nov. 26, 2014), https://www.theguardian.com/society/2014/nov/26/prison-sweden-not-punishment-nils-oberg.

30 Deady, *supra* note 27, at 1.

31 Haney, *supra* note 1, at 375.

32 *Id.*

33 *Id.*, at 377.

34 *Id.*

35 Moore and Elkavich, *supra* note 8, at 782; *see also* Pearl, *supra* note 15; Mumia Abu-Jamal and Johanna Fernández, *Locking Up Black Dissidents and Punishing the Poor: The Roots of Mass Incarceration in the US*, 28 Socialism & Democracy 1, 1-14 (2014).

retributive justice witnessed three problematic developments outlined in Craig Haney's framework.[36] The first two developments discussed here tackle the evolving American conceptualization of retribution that gives more deference and justification to punishment.

The first development that contributes to the overly punitive criminal justice system is the shift in what qualifies as retribution. In the American model, retribution became a "philosophical justification for using prisons to inflict pain and little else."[37] Because the attention and treatments required to truly aid offenders' complex problems were beyond the capacity of the traditional prison system, Americans grew disillusioned with the systematic attempt to rehabilitate offenders on a macro scale.[38] This abandonment of the rehabilitative pillar in penal philosophy "left a temporary void" in Americans' justification for punishment.[39] Scholarship sought to fill this void with just deserts theory, and imprisonment would now be justified simply if the state felt the alleged offender deserved it.[40]

Because the shift in penal philosophy did not require carefully applied rehabilitation, scrutiny on prison conditions now seemed nonsensical and unnecessary.[41] The rapid increase in the number of convictions contributed to overcrowding in public prisons, leading to the outsourcing of overflow inmates to private, for-profit prisons that only temporarily eased the burden.[42] Worsening living conditions in prisons and the lack of meaningful work or treatment opportunities led to worse adverse behavioral reactions in prisoners. [43] In turn, prison administrations responded to this adverse behavior with a harsher punishment, which led to a newfound reliance on solitary confinement practices.[44] The abandonment of the rehabilitative pillar of penal philosophy led to excessive punishment that harmed offenders in a way that would pose a significant barrier to their successful re-entry into society upon release.

The second development that contributes to the overly punitive criminal justice system is what Haney calls the "legal decontextualizing of the nature of crime itself."[45] This describes how the process by which courts decide terms of imprisonment required them to ignore meaningful mitigating factors of each case.[46] These are the same mitigating factors whose consideration gives further definition to interpretations of what is deserved under just deserts theory.

In the absence of these critical mitigating factors, the legal decontextualization of crime led to a massive influx in the number of those imprisoned.[47] The major example of this is the overly punitive sentencing guidelines fashioned in the context of the War on Drugs.[48] The administrations of President Richard Nixon and President Ronald Reagan advocated for a War on Drugs that entailed policymakers endorsing draconian sentencing

36 Haney, *supra* note 1.

37 *Id.*, at 410.

38 James Austin and Garry Coventry, Emerging Issues on Privatized Prisons, Bureau of Justice Assistance, iii. (Feb. 2001), https://www.ncjrs.gov/pdffiles1/bja/181249.pdf.

39 Haney, *supra* note 1, at 381.

40 *Id.*, at 410.

41 *Id.*, at 383.

42 Austin and Coventry, *supra* note 38; Craig Haney and Philip Zimbardo, *The Past and Future of U.S. Prison Policy*, 53 Am. Psych. 709, 713 (1998).

43 Haney and Zimbardo, *supra* note 42, at 716.

44 *Id.*

45 Haney, *supra* note 1, at 410.

46 *Id.*

47 Bureau Just. Stat., *supra* note 7.

48 Haney, *supra* note 7.

requirements.[49] This was especially true for low-level drug offenses.[50] Between 1980 and 2015, the number of those arrested for possession tripled.[51] Today, one-fifth of those incarcerated are in prison for drug charges.[52] Although the U.S. constitutes roughly 5% of the world's population, its prison system accounts for nearly one quarter of the world's prison population.[53] As it stands, the U.S. has the highest incarceration rate in the world.[54]

In the past twenty years, incarceration rates have remained high even as crime overall has declined. This has been attributed to factors such as harsher sentencing minimums, the War on Drugs, high rates of violent crime, and a lack of social safety nets for released prisoners.[55] This suggests the system-wide punitive response is, in general, not proportional to the aggregate harm done to society.

Together, these two developments begin to outline the cycle of crime that developed in the American justice model: more people face prison sentences, so more people experience harsher punishments. A disproportionate focus on punitive justice increases the chance that offenders will fail to successfully reenter society upon release.[56]

Communities initially affected by crime continue to fall victim to recidivism despite harsh prison sentences imposed on offenders.[57] According to a report for the Bureau of Justice Statistics that surveyed thirty states, over two-thirds of released prisoners were arrested for a new crime within three years, and within five years, that number jumped to just over three-quarters.[58] One-sixth of previously released prisoners constituted nearly *half* of the roughly 1.2 million arrests within five years of their initial release.[59] Additionally, recidivism is disproportionately higher among men, people of color, and young adults.[60] Those who are arrested tend to be younger, thus imprisonment poses an even farther-reaching impact on those people's lives and the communities they will likely continue to affect.[61] Furthermore, having a criminal record often signals to employers and other community members that this individual is likely to re-offend, making re-entry more difficult even outside of the formal criminal justice system.[62] This aspect of cyclical crime will be discussed more in later sections.

Recidivism rates in the United States suggest that its highly punitive approach does not promote greater safety in the long run. Why, then, has the American criminal justice system not adapted its method to a more rehabilitative approach? I argue there are two factors that contribute to an aversion to the notion of rehabilitating offenders: (1) how the American public tends to characterize those associated with crime, and (2) how the politicization of these characterizations exacerbates a cultural fear of criminality.

49 *Id.* at 1; Georgetown Law Library, A Brief History of Civil Rights in the United States: The War on Drugs and Mass Incarceration (Nov. 2020) https://guides.ll.georgetown.edu/c.php?g=592919andp=4172706.

50 Pearl, *supra* note 15, at 1; *see also* Haney and Zimbardo, *supra* note 42, at 713.

51 Pearl, *supra* note 15, at 1; *see also* Wendy Sawyer and Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Policy Initiative, https://www.prisonpolicy.org/reports/pie2020.html.

52 *Id.*

53 Deady, *supra* note 27.

54 Sawyer and Wagner, *supra* note 51.

55 *Id.*

56 Bureau Just. Stat., *supra* note 7.

57 *Id.*

58 *Id.* (67.8% and 76.6% respectively).

59 *Id.* ("(16.1%) of released prisoners were responsible for almost half (48.4%) of the nearly 1.2 million arrests that occurred in the 5-year follow-up period.")

60 Press Release, Bureau Just. Stat., *5 Out of 6 Prisoners Were Arrested within 9 Years of Their Release* (May 23, 2018).

61 Bureau Just. Stat., *supra* note 7. ("84.1% of inmates who were age 24 or younger at release were arrested, compared to 78.6% of inmates ages 25 to 39 and 69.2% of those age 40 or older.")

62 Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 National Inst. Just. J. 42, 46 (June 2012), https://fairshake.net/pdf/NIJ%20_Reentry-Employment.pdf._("The majority of employers indicate that they would "probably" or "definitely" not be willing to hire an applicant with a criminal record.")

A. Characterizing Those Associated with Crime

Another development in the American model is how the public perceives those even minimally associated with crime, and how this perception influences convictions.

Recalling that the desire for justice is first and foremost a psychological experience, it follows that the reactions to crime, embedded in this desire for justice, inform community members' perceptions of offenders.[63] There are innumerable supporting instances of communities—through their justice system, news media, or community gossip—inflating the criminal character of the accused, even when the accused is wrongfully convicted.[64] Such instances call into question how impactful the public's perception of criminality is on the accused's experience. To analyze the implications that heightened negative perceptions have on the accused, it is useful to consider cases where those accused were wrongly convicted. In these cases, the primary force driving their conviction was speculation by others, fueled by the overwhelming desire to bring a sense of retribution to a victimized community.[65]

In 1986, Walter McMillian was charged with murdering eighteen-year-old Ronda Morrison, a young white woman working a shift at a dry-cleaning store in Monroeville, Alabama.[66] The violent crime was shocking and vile to the small community; the pressure to find the killer only worsened when police could not find a reasonable suspect after six months.[67] Numerous testimonies affirmed McMillian's alibi of attending a fish fry eleven miles from the crime scene.[68] The state's key witness was renowned prison snitch Ralph Meyers, who later confessed his testimony was "bogus and…coerced out of him by the police."[69] McMillian was placed on death row upon arrest where he remained as he awaited trial.[70] The jury sentenced McMillian to life imprisonment without parole, but following a tough-on-crime movement in the Alabama judiciary, the judge overrode this life sentence and instead sentenced McMillian to death by electrocution.[71]

The circumstances of the McMillian case are indeed extraordinary, and his case cannot reasonably be used on its own to judge the integrity of the entire American criminal justice system. However, it is the social pressures at work that are of interest. The people of Monroeville were distraught and eager to avenge the brutal murder of eighteen-year-old Ronda Morrison, and the drawn-out, unsuccessful investigation added to the community's desire for justice. Local news media indicated the climate of public unrest and, in turn, fanned the flames, dehumanizing Walter McMillian.[72] While public perceptions inflated the criminal characterization of McMillian, Monroe County was made no safer, as the real offender got away with murder.[73]

The effects of local news coverage on the experience of the accused have been seen elsewhere besides this extraordinary case.[74] Philosophy professor Hugo Adam Bedau, whose late scholarly work specializes in capital

63 Vidmar, *supra* note 22, at 43.

64 Equal Justice Initiative, Walter McMillian (2020) https://eji.org/cases/walter-mcmillian/; Neil Vidmar and Julius Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, 22 Osgoode Hall L.J. 487, 495 (1984).

65 Hugo Adam Bedau, The Death Penalty in America (1998), 320.

66 CBS News, From the 60 Minutes archives: The true story behind "Just Mercy" (Jan. 9, 2020), https://www.cbs.com/shows/60_minutes/video/u9_Eti34rzNEJK_vvCNrX6fuatDLuwW_/from-the-60-minutes-archives-the-true-story-behind-just-mercy-/.

67 Equal Justice Initiative, *supra* note 64.

68 *Id.*

69 CBS News, *supra* note 66.

70 Bedau, *supra* note 65, at 351.

71 Equal Justice Initiative, The Death Penalty in Alabama: Judge Override, 4 (July 2011) https://eji.org/wp-content/uploads/2019/10/death-penalty-in-alabama-judge-override.pdf ; Equal Justice Initiative, *supra* note 64.

72 *Id.*

73 CBS News, *supra* note 66.

74 Haney, *supra* note 1, at 404.

punishment, provides analysis of media involvement in high-emotion criminal cases that is applicable here:

> Dramatizations of murders and capital trials are very effective in feeding people's desire for revenge. The prospect of an impending execution…gives the media an opportunity to focus again and again upon the repellent and horrifying details of a murder. The public response is one of outrage and frustration, and this sense of rage is fueled by the daily repetition of details of brutality as the execution draws closer. The murder occurred once, but the public is presented with it again and again to justify the execution.[75]

The same nonprofit organization that took on McMillian's post-conviction case later represented a woman named Marsha Colbey.[76] In 2007, Colbey was convicted of capital murder upon giving birth to what she insisted was a stillborn baby, and sentenced to life imprisonment without parole.[77] At age 43, Colbey had a high-risk pregnancy and could not afford proper prenatal care; she went into labor prematurely, giving birth at home alone, and her efforts to resuscitate her newborn child were unsuccessful.[78] A suspicious neighbor called the police upon seeing a marked grave, and "a state forensic pathologist with a history of preparing faulty and unreliable reports" unfoundedly concluded this could not have been a stillbirth.[79]

Marsha Colbey's story is not the only instance where mere speculation of infanticide sufficed as grounds for a greater impulse towards retribution.[80] A survey was conducted in a rural Canadian community regarding charges of second-degree murder against two parents whose two-year-old child was found dead from traumatic head injuries.[81] In this survey, researchers found that at least half of community members surveyed said they would not set aside preconceived biases against the defendants if selected to serve on the jury.[82] These community biases were also gendered, disproportionately assigning more culpability to the mother.[83] Many respondents argued that "a mother was absolutely responsible for the welfare of her child and she must be considered responsible even if she did not actually kill the child."[84] Heightened indignation replaces the mitigating evidence required for the calculus of what is truly deserved, and proportionality in punishment is greatly undermined.

The examples of McMillian and Colbey reflect a characterization of the accused that replaces the innocent-until-proven-guilty standard. There is an implied higher standard of criminal-until-proven-otherwise placed on the accused, which requires little more than the immediate, internalized reactions to alleged injustice.[85] Because of this, pervasive stereotypes influence the community's evaluation of how culpable these individuals are.[86] The story constructed by these perceptions overwhelmingly communicates a visceral message: "someone who is *worthless* killed someone who was of *value*."[87] Juxtaposing the relative worth or humanity of the victim and the accused perpetuates over-criminalized characterizations of the accused, let alone those truly guilty of the crime with which they are charged.[88]

In the context of legislative efforts to create a more uniform criminal justice approach, the underlying criminal-until-proven-otherwise standard present in sentencing minimums disproportionately harms people of

75 Bedau, *supra* note 65, at 320.

76 Equal Justice Initiative, Marsha Colbey (2020), https://eji.org/cases/marsha-colbey/.

77 *Id.*

78 *Id.*

79 *Id.*

80 Vidmar, *supra* note 22, at 41-42; *see also* Vidmar, *supra* note 4, at 293.

81 Vidmar & Melnitzer, *supra* note 64, at 494.

82 *Id.*, at 495-496.

83 *Id.*, at 496.

84 *Id.*

85 Vidmar & Melnitzer, *supra* note 64, at 494.

86 Abu-Jamal & Fernández, *supra* note 35.

87 Bedau, *supra* note 65, at 321 (emphasis added).

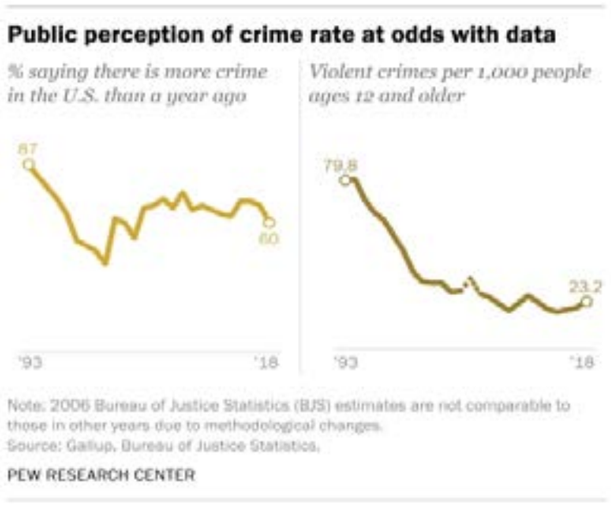
88 *Id.*, at 332.

color, and, especially, black people. [89] As such, "crime [becomes] the new code word for black people, Latinos, and increasingly, for immigrants," perpetuating stereotype-based associations with notions of criminality.[90] Thus, even the mere association with potential criminal activity can trigger inclinations toward vengeance-based retribution.[91] Ultimately, this undercuts the weighting required to punish proportionally to what an offender truly deserves according to the crime they committed.

B. The Politicization of Criminality

The American public's tendency to inflate criminal characterizations of those even minimally associated with crime leads it to mistakenly believe there is more criminal activity nationwide than there actually is.[92] Crucially, this disconnect between perceived crime rates and reality is growing over time, as shown in the Pew Research Center figure below.

Figure 1: Crime Rate and Public Perception[93]



Crime and arrest rates have generally decreased in recent decades, except for limited increases in violent crime between 2014 and 2016 that occurred primarily in urban areas.[94] The magnification of law-and-order

89 Georgetown Law Library, *supra* note 49; Marc Mauer and Ryan S. King, Sentencing Project, A 25-Year Quagmire: The War on Drugs and Its Impact on American Society 19-24 (2007), https://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf; Bureau Just. Stat., Compendium of Federal Justice Statistics at 49 (2003) https://www.bjs.gov/content/pub/pdf/cfjs03.pdf. *See also* Drug Policy Alliance, Race and the Drug War (2020), https://www.drugpolicy.org/issues/race-and-drug-war.

90 Abu-Jamal & Fernández, *supra* note 35, at 9.

91 *Id.*

92 John Gramlich, Fact Tank, *Voters' Perceptions of Crime Continue to Conflict With Reality*, Pew Research Center, Nov. 16, 2016 https://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/.

93 *Id.*

94 John Gramlich, Fact Tank, *America's Incarceration Rate Is at a Two-Decade Low*, Pew Research Center, May 2, 2018 https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low.

rhetoric in the political sphere has not eased these fears; instead, it has likely inflated them.[95] This dynamic represents the politicization of crime in the American model.[96] The public's inflated perception of the prevalence of crime impacts the criminal justice system as its operation becomes more politicized.[97] Public views—even if factually erroneous—signal what concerns, values, and perceptions the public wishes their democracy to represent and enact.

This dynamic leads to the third and final development Haney observes in American criminal justice: the democratization of the punishment process, and a subsequent "penal populism."[98] This development examines the relationship between sociopolitical attitudes towards criminality and the implementation of a retributivist philosophy.[99] In the democratic system, popularly elected officials assume and magnify the collective desires of their partisan constituents for political momentum.[100] In the 2016 Presidential election, for example, 57% of voters believed crime had increased since 2008.[101] While concern for crime was not confined to one party, former President Donald Trump gained momentum in that race in part by focusing his campaign on the increase in violent crime.[102] At the 2016 Republican National Convention, Trump asserted that "decades of progress made in bringing down crime [were] being reversed by [President Barack Obama's] Administration's rollback of criminal enforcement."[103]

Politicizing legally decontextualized crime has undermined the operation of criminal justice by encroaching on the judicial discretion needed to consider mitigating factors on a case-by-case basis. Legislative attempts to promote uniformity in sentencing—less arbitrary, and supposedly more just—yielded overbroad sentencing minimums and often unintuitive judgments that judges could not reasonably override.[104] This legislative involvement necessarily brought the issue of sentencing into a context "where populist input was encouraged, pandered to, and easily manipulated."[105]

These two factors—harsh characterizations of those potentially associated with crime and the politicization of these characterizations—build on each other. Together, they constitute a cultural fear of criminality that makes the United States averse to the idea of rehabilitating offenders.[106] This makes for an approach to criminal justice that is unforgivingly binary, as expressed by author James Q. Wilson: "Wicked people exist. Nothing avails except to set them apart from innocent people."[107] In the context of this binary mindset, prisons are meant to keep said wicked people out-of-sight and out-of-mind.[108]

95 Moore and Elkavich, *supra* note 8, at 782; *see also* Joel Dyer, The Perpetual Prisoner Machine: How America Profits From Crime (2000).

96 Haney, *supra* note 1, at 390.

97 Haney, *supra* note 1, at 400.

98 *Id.*

99 *Id.*

100 Bedau, *supra* note 65.

101 Gramlich, *supra* note 92.

102 *Id.*

103 President Donald Trump, *Address Accepting the Presidential Nomination at the Republican National Convention in Cleveland, Ohio* (July 21, 2016) https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-republican-national-convention-cleveland.

104 Haney, *supra* note 1, at 384; Equal Justice Initiative, *supra* note 71.

105 Haney, *supra* note 1, at 410.

106 *Id.*, at 394.

107 Wilson, *supra* note 5, at 260.

108 Moore and Elkavich, *supra* note 8, at 78; *see also* Ryan S. King, Marc Mauer, and Tracy Huling, Big Prisons, Small Towns: Prison Economics in Rural America, Sent'g Proj. (Feb. 2003), https://www.sentencingproject.org/wp-content/uploads/2016/01/Big-Prisons-Small-Towns-Prison-Economics-in-Rural-America.pdf.

This cultural fear of criminality creates the ultimate problem in the American model: successful re-entry of ex-offenders is highly unlikely, and, thus, its goal of safety is not accomplished in the long run.[109] Having a criminal record poses a significant barrier to employment opportunities as a majority of employers are not willing to hire someone with a criminal record.[110] Even without a conviction, an arrest still appears on background checks and is sufficient to invoke this barrier.[111] Moreover, the impact of having a criminal background extends beyond exclusionary employment opportunities. The American Bar Association's Criminal Justice Section catalogs nearly 40,000 statutes that result in employment, housing, and voting barriers.[112]

Even if an ex-offender tries to reassimilate into society, there is a deeply embedded assumption that any sort of criminal record signals to employers—and society at large—that they are more likely to offend again.[113] This builds on the previously explained notion that individuals even minimally associated with crime appear exponentially more criminal in character. This is the American model's failure to promote long-term safety: an alleged association with criminality is likely to paint that individual as someone who is ultimately untrustworthy or irredeemable and make reoffending appear to be the only viable option.

III. LOST IN TRANSLATION: THE DIVERGENCE BETWEEN THEORY AND PRACTICE

As showcased by the developments of American criminal justice, the cultural expectation of what it would accomplish is twofold. First, it is expected to provide a feeling of retribution. The increasingly popular idea that punishment could be its own end sparked scholarship on its justifications in the 1970s, rubber-stamping the notion that the state should punish offenders simply because criminals deserve punishment. Considering the renewed justification that prisons are for "pain and little else," the exponentially swelling prison population became an inevitable—yet, relatively minor—price to pay for justice.[114] Inflated public fear that criminality lurks in communities, however, suggests that communities ought to be protected from said criminals.[115] Justice, then, is also safety—not just punishment. As demonstrated by the consequences of the American model, however, its highly punitive, rehabilitation-averse approach does not reliably achieve safety in the long run.

A. Juxtaposing a Different Theory and Practice

What, then, might a safety-focused approach look like? Consider the radically different but internationally renowned approach of the Swedish criminal justice system. In an interview with *The Guardian* in 2014, Nils Öberg, director-general of the Swedish prison and probation service, asserts the role of prisons in administering justice is "not to punish" beyond being deprived of one's freedom.[116] The experience of the imprisoned aims to mimic normal life as much as possible.[117] Norway likewise follows this philosophy; Hans Henrik Hoilund, a Norwegian architect of a newer maximum-security prison in the region, notes how an abundance of natural light and shared kitchens and living spaces with flat-screen televisions promote "a sense of family" among inmates.[118] Imprisonment must, like any other remedy, work to accomplish the goal of successful re-entry.[119] Prison conditions in a rehabilitative justice model, then, do not stop at medical programs targeting drug addiction. This theory of rehabilitative justice expands into a practice of resocialization, a practice which—

109 Bureau Just. Stat., *supra* note 7.
110 Solomon, *supra* note 62, at 44.
111 *Id.*, at 43.
112 *Id.*, at 44.
113 *Id.*, at 46.
114 Haney, *supra* note 1, at 410.
115 Wilson, *supra* note 5, at 260.
116 James, *supra* note 29.
117 Deady, *supra* note 27, at 3.
118 William Lee Adams, *Sentenced to Serving the Good Life in Norway*, Time, (Jul. 12, 2010), http://content.time.com/time/magazine/article/0,9171,2000920,00.html.
119 *Id.*

as seen in the United States—can crowd out structurally sanctioned retribution.[120] There is foresight in this penal philosophy; Sweden intends to make its prisoners better citizens, and, in turn, improve public safety.[121]

The contrasting rates of recidivism between Sweden and the United States shine a spotlight on the results of their respective imprisonment philosophies. If the goal of Swedish prisons is to send the imprisoned back into society less inclined towards criminal activity, their substantially lower recidivism rate of 40% suggests they are effective in doing so.[122] Likewise, Norway's recidivism rate of just 20% suggests rehabilitative prison practices directly affect behavior once released.[123] Government-sponsored social safety nets for those released in these countries target common barriers to successful re-entry, such as employment and addiction treatment.[124] In contrast, the time offenders spend in the American prison system—as suggested by the high probability of being rearrested—does not provide them with the re-socializing tools necessary to be the more equipped citizens that the Swedish model seeks to create.

To be clear, the approaches of the United States and Sweden are fundamentally different; using the Swedish model to foil that of the United States is not meant to prescribe exactly what the United States should become. Rather, this comparison exposes how relatively drastic rehabilitative measures have shown to be effective in improving public safety.[125] The consequentialist nature of making safety a priority proves to be a key characteristic that becomes problematic when punishment substitutes for rehabilitation as the mechanism by which we achieve it.

B. The Problem of Punishment

Using lengths of sentences and harshness of imprisonment conditions as the metrics for punishment, Table 2 examines the extent to which punishment achieves retribution and safety in two parts. First, "retributive safety" occurs when the model prioritizes punishment and the short-term safety resulting from incapacitation and deterrence. Second, "rehabilitative safety" prioritizes long-term safety over retribution. In this context, safety is a consequentialist goal where punishment is justified insofar as it promotes enduring safety.

	Punishment less than deserved (Irrational)	*Punishment equal to deserved (Proportional)*	*Punishment greater than deserved (Vengeful)*
Retribution	—	✓	—
Retributive Safety	—	—	✓
Rehabilitative Safety	✓	—	—

i. Rehabilitative Safety: The Irrational Scenario

Using rehabilitation as the mechanism to achieve safety more reliably results in greater safety in the long run, as shown in the example of Sweden. However, a purely rehabilitative approach poses problems for the American model. Rehabilitation may counteract the harshness of sentence conditions by offering help.

120 Deady, *supra* note 27, at 3.
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 Bureau Just. Stat., *supra* note 7; *see also* Don Stemen, The Prison Paradox: More Incarceration Will Not Make Us Safer, Vera Inst. Just. (July 2017), https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer.
126 *See generally*, Mitchell, *supra* note 3; *see also* Stemen, *supra* note 125.

Likewise, a shorter sentence may inadvertently condone unjust actions that deserve greater punishment. Because rehabilitation undercuts the retributive potential of punishment, it does not achieve retribution. As illustrated in previous sections, however, American criminal justice is primarily interested in achieving retribution. In the eyes of the United States, therefore, pursuing that which requires extensive rehabilitation would be irrational because it is counterproductive to its own primary interest. As such, I call pursuing rehabilitative safety an "Irrational Scenario" for the United States.

Sweden contrasts the United States in this regard: they do not tick the box for retribution, but because their system is intentionally consequentialist and not retributivist, they do not aim to meet the proportional punitive standard. Sweden does, however, tick the box for safety in this first scenario due to their famously robust welfare system that both prioritizes rehabilitation in prisons and continues to offer rehabilitative resources to released prisoners. The burden on their state is so high that imprisonment is only justified when it yields a net benefit to society, regardless of what retributive value it may or may not hold.[127] In the Swedish model, therefore, this scenario is not irrational in the same way as in the United States. Their consequentialist approach is such that it largely does not value punishment for the sake of itself. Thus, it is rational (and necessary) for them to choose safety at the minimal cost of retribution.[128]

Since it is irrational in the U.S. to purposefully undermine the retributive potential of punishment, aversion to the Irrational Scenario pushes the American approach further to the right end of the spectrum. Our attention then shifts rightward to the middle scenario called "Proportional."

ii. Retribution: The Proportional Scenario

A retributive model justifies punishment (or achieves retribution by definition) when punishment is precisely equal to what the offender deserves. As discussed in previous sections, however, American criminal justice routinely misses the mark on true, proportional retribution. Since most sentences do not permanently incapacitate the convicted—either by life or by death sentence—most offenders will reenter society. As shown by the record-high recidivism rates of the United States, most of these offenders under this model leave prisons no healthier or more socially or professionally equipped than they came. Thus, while the Proportional Scenario may check the box for retribution by definition, it does not reliably achieve safety. Our attention, then, shifts rightward again to the "Vengeful Scenario."

iii. Retributive Safety: The Vengeful Scenario

When punishment is greater than what the offender deserves, the sentence does not achieve retribution and instead turns partly into revenge.[129] For overly long sentences, the Vengeful Scenario highlights life sentences and capital punishment for their permanent incapacitation.[130] The chart, however, speaks to overall patterns, not merely to a small portion of specific crimes.

Retributive safety, then, incorporates the aspiration of deterring crime by threatening long sentences and the harsh conditions associated with the abandonment of rehabilitation.[131] The assumption that harsh sentencing could effectively deter crime underscored the War on Drugs, beginning in 1971 and exploding in the 1980s.[132] The results, however, are mixed.[133] Current research suggests that incarceration has "little impact

127 Mitchell, *supra* note 3, at 10.

128 James, *supra* note 29.

129 Haney, *supra* note 1, at 388.

130 Bedau, *supra* note 65, at 353.

131 Haney, *supra* note 1, at 377.

132 Pearl, *supra* note 15, at 1-2. *See also* Chris Mai and Ram Subramanian, The Price of Prisons: Examining State Spending Trends, 2010–2015, Vera Inst. Just. (May 2017), https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends.

133 Moore and Elkavich, *supra* note 8, at 782; *see also* Marc Mauer, Race to Incarcerate (2006); *see also* Jenni Gainsborough and Marc Mauer, Diminishing Returns: Crime and Incarceration in the 1990s (Sept. 2000),

on substance misuse rates" in drug-related convictions and a "*negligible* effect on public safety," since 75% to 100% of the overall downward trend of criminal activity is attributed to other factors.[134] Even many just deserts theorists from the original wave of scholarship that sought to justify a non-rehabilitative purpose to punishment now acknowledge that these measures have had "little deterrent value."[135] Thus, in contrast to rehabilitative safety under a consequentialist model, retributive safety only achieves safety unreliably in the long run.[136]

iv. Integrating Retribution and Safety

Where, then, does the United States fall in this spectrum? Because rehabilitative safety is irrational in the primarily retributive model to which the United States aspires, American criminal justice avoids it by instead shifting towards the right end of the punishment spectrum. In other words, the American model mutates to ensure offenders are punished at least as much as they deserve. Given both the real and perceived increase in violent crime, the desire for safety is increasingly tied to the fear of criminality. As such, there is a desire for a version of safety that uses imprisonment to put criminals out-of-sight and out-of-mind. Pursuing this punishment-based version of safety causes the American model to shift even beyond the true retribution of the Proportional Scenario and towards the Vengeful Scenario.

This version of safety is only effective in the short run, as demonstrated by America's exceptionally high recidivism rate. Likewise, the exceptionally low recidivism of Sweden and Norway demonstrates how safety in the long run requires pursuing its subgoal of rehabilitation. To avoid disposing of retribution, however, the United States reduces long-term, rehabilitative safety to short-term, retributive safety. It attempts to integrate retribution and a version of safety that is most compatible with retribution into one, rehabilitation-averse framework of justice.

In other words, the United States has tried to maintain a punishment-based model of justice while demanding an outcome—safer communities—whose long-term success depends on undermining punishment. The result is a new era of disillusionment where Americans are both averted to rehabilitating offenders and bound to experience the continued harm of said offenders upon release.[137] Lost in translation, then, is a clear picture of justice.

IV. CONCLUSION

A more robust picture of the disconnect between retributivist theory and American practice suggests the observed flaws and injustice are pervasive. They are cracks in the very foundation upon and through which American criminal justice operates. Despite retributivist theory's inability to capture the American desire for both retribution and long-term safety, the American practice of what it sees as retributive justice shows it expects outcomes that are largely incompatible with this type of system.

Using the social psychology-grounded merits of the American preference for retributive justice as the starting point, I first examined the development and consequences of the American justice model, echoing existing observations in the literature on how the disillusionment with the rehabilitative ideal led to an increasingly punitive justification for imprisonment. This pursuit, however, moved beyond seeking what is fair for the victim and into a "war on prisoners" that yielded extraordinarily high rates of recidivism and perpetuated the following two observations: (1) a focus on giving offenders what they deserve, which enabled over-criminalized characterizations of anyone merely associated with crime, and (2) the politicization of this fear, which only

https://www.prisonpolicy.org/scans/sp/DimRet.pdf.

134 Pearl, *supra* note 15, at 1; *see also* Vera Institute of Justice, The State of Opioids (2017) https://www.vera.org/state-of-justice-reform/2017/the-state-of-opioids*; see also* Stemen, *supra* note 125.

135 Haney, *supra* note 1, at 382.

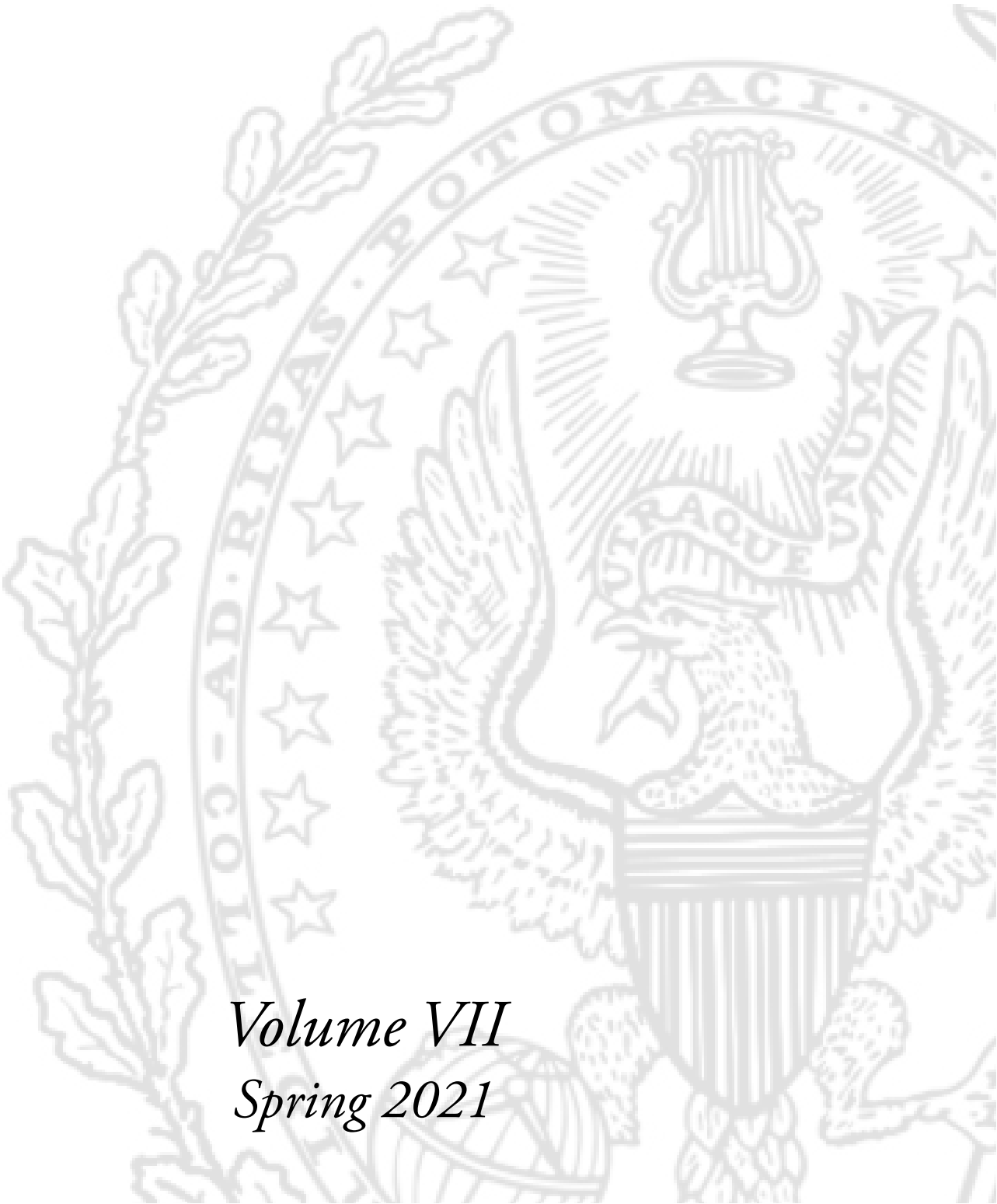
136 *Less Support for Death Penalty, Especially Among Democrats*, Pew Research Center, Apr. 16, 2015, https://www.pewresearch.org/politics/2015/04/16/less-support-for-death-penalty-especially-among-democrats/.

137 Open Secrets, Private Prisons: Public Safety v. Profit Motive (Sept. 2016) https://www.opensecrets.org/news/issues/prisons/; Haney and Zimbardo, *supra* note 42, at 719.

exacerbated Americans' inflated misconceptions on the real prevalence of criminal activity. Responding to this fear, the "tough on crime" approach ultimately failed to deliver the safety it promised, and, instead, made way for a plague of cyclical crime that suggested something must be wrong in the very foundations—the theory—of this approach.

Using Sweden's rehabilitative model as a foil, I constructed a theoretical model to illustrate why the disconnect between retributive theory and American practice exists and how it puts the values of retribution and safety at odds with each other. This illustration demonstrates how attempting to incorporate safety into a punishment-focused model, as the United States has done, causes the entire model to shift into a more vengeful practice than what retributive justice prescribes. In the translation between retributive justice theory and American practice, the United States overlooks that its dual desire for retribution and true safety are ultimately incompatible with each other. Its mutated model, therefore, fails to reliably produce outcomes that are intuitively just.

If safety is a priority in the U.S. conceptualization of criminal justice, the question becomes whether we are willing to include rehabilitation in our definition of (proportionally applied) retribution. We must ask whether we are willing to sacrifice retribution itself for a rehabilitation- and resocialization-heavy Swedish approach, if that is what safety requires.



Volume VII

Spring 2021