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DEPARTMENT OF LEGAL STUDIES
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Volume 1

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FOREWORD

Dr. Alisa Smith, J.D., Ph.D.

Department Chair, Department of Legal Studies

It is my distinct honor to welcome readers to the University of Central Florida (UCF) Department of Legal Studies inaugural undergraduate law journal. By establishing an undergraduate law journal, UCF joins a very elite group of universities that provides students this unique, unparalleled and quintessential experiential learning opportunity, which is typically reserved for law and graduate students. Writing and editing the undergraduate law journal affords students a hands-on and deep understanding of the process of writing for publication, editing the work of others, and creating a journal.

The students who participated this first-year were recommended by departmental faculty, then interviewed and selected by the undergraduate law journal advisor, Professor James Beckman. Professor Beckman, who was also the inaugural chair of the Department of Legal Studies, took on the role of law journal advisor, as he does with all projects, with the fervor and dedication of a true scholar-teacher. Under his tutelage, the students were provided a top-notch learning experience. From teaching the students the nuances of Bluebook citation to the thick-skinned approach of editing others and their own work and the exploration of writing for publication, there is no one better to engage and teach students than Professor Beckman.

As with any such endeavor, it takes a village. The undergraduate journal could not have come to fruition without the support of university and college administrators, the department's Office Manager, Katie Connolly, and the many legal studies faculty, who everyday dedicate their time and energy to preparing the next generation. Topics in this inaugural issue are truly extraordinary, in terms of the quality of the research and writing, as well as timeliness and relevancy of the articles. For example, articles in the journal range from the "social media" comments and "tweets" of the

President of the United States and what status of “law” these comments are afforded in the U.S. legal system to the legality of police officers’ usage of automatic license plate scanners and whether or not such practices violate society’s reasonable expectation of privacy. Other articles deal with such complex and timely topics such as the impact of race on the operation of the United States correctional system to an analysis of the implications of the “Me Too#” movement and its comparison with a famous 1966 short story by author Joyce Carol Oates. Enjoy the articles and marvel that these bright students, who so willingly took on more work than a normal course, engaged in critical assessment and thought-provoking conversations, and produced a journal that contributes to intellectual debates and a deeper understanding of many timely interdisciplinary topics.

INTRODUCTION

James A. Beckman, Faculty Advisor

Professor, Department of Legal Studies

This journal is an extraordinary scholarly and creative work product which was composed entirely by a group of truly amazing undergraduate students at the University of Central Florida (UCF). As the genesis of UCF's Department of Legal Studies Law Journal conceptually began to take shape over a year ago, Dr. Alisa Smith (Chair of the Legal Studies Department) and I knew that in order for a project of this nature to succeed, we had to have a class of extremely talented and dedicated students to write articles, peer review the work of others, and in essence, create the journal. Thus, the first essential step in the creation of this journal was the selection of the right group of students. In order to ensure that the best students were selected, each student on the editorial board (and as an enrolled student in the specially designed class designed to create the journal) had to be nominated by a faculty member of the Legal Studies Department. Of those nominated, as the instructor of record, I then invited those nominated students who had a clearly evidenced ability and experience in solid legal writing, research and editing to be in the class and serve on the inaugural editorial board.

During the first month of work by the students, much time was spent on discussing "best practices" of an editorial board, covering the well-established procedures of student run law school level "law reviews" and "law journals," exercises in the proper usage of the *Chicago Manual of Style* and *The Bluebook: A Uniform System of Citation (The Harvard Blue Book)*, and other such preparatory activities. Students were also required to research and write an article of their own—although there was no guarantee that their authored article would be published.

As a result of a call for papers that went out to multiple academic departments, fifty-three articles were ultimately submitted by

students for consideration by the editorial board. Each of the fifty-three articles were sent directly to me as the Faculty Advisor. In order to conduct a blind peer-review of all of these articles, I removed all identifiable author information for each submission and converted each file into a randomized PDF file labeled and given the title of a submission number ranging from one to fifty-three (*e.g.*, Submission #1, Submission #11, Submission #42, *et cetera*). To guide the editorial board in their critique and blind peer-review of the various submissions, an “Article Review Sheet” was utilized to aid in a proper review. This “Article Review Sheet” can be found at the end of this Introduction. As one may ascertain from perusing the review sheet, articles were evaluated on a plethora of different criteria, ranging from the timeliness and currency of the article, to the writing style and proper use of citations and appropriate scholarly attribution. After the first peer-review round, the pool of fifty-three articles for potential inclusion in the journal was narrowed down to twenty-one articles. At that point, every editorial board member was tasked with reading the twenty-one articles selected for the “semi-final round.” After an individual review of the semi-final round, the entire editorial board met and discussed the merits and deficiencies of each submission. At the end of this meeting, the editorial board utilized a “Final Round Voting/Review Sheet” which can also be found at the end of this Introduction. This was a blind-review and blind-vote as well. Once the final articles were selected for publication, each article was assigned a team of three reviewers/editors, who would each review and edit the articles in detail. Each editor was assigned at least three articles to review as either the first, second or third reviewer.

The amount of work that the editorial board put into the production of this journal has been nothing short of extraordinary. Their work has been amazing and on par with the editorial work of many law school law review editorial boards for which I am familiar. The quality of the articles and the quality of the editing by the editorial board was as good, if not better, than many law school level journals. The articles are all well researched, well written and timely. In perusing the following pages of this journal, I am confident that the reader will

be impressed with the journal and the many fascinating and highly engaging articles.

**PLA 4022-0002: CONTEMPORARY ISSUES IN LAW
LEGAL STUDIES UNDERGRADUATE LAW JOURNAL**

Department of Legal Studies
College of Health and Public Affairs, University of Central Florida

Article Review Sheet for the UCF Legal Studies Undergraduate Law Journal¹

Timeliness, Currency and Overall Analysis

1. Does the article deal with a topic of current relevancy? Is it timely?
1.....2.....3.....4.....5
2. Does the article offer new information or new perspectives for the readers?
1.....2.....3.....4.....5
3. Is the article coherent for the intended audience(s)?
1.....2.....3.....4.....5
4. Are the qualitative or quantitative analyses appropriate?
1.....2.....3.....4.....5
5. Does the article offer a viable solution, an alternative approach, or a transition position to the problem the research defines?
1.....2.....3.....4.....5
6. Does the evidence and reasons support the conclusions and implications made by the author(s)?
1.....2.....3.....4.....5

Facts, Issues and Conclusions in Article

7. Does article include clear legal issues and most significant facts?
1.....2.....3.....4.....5

¹ This review sheet was designed utilizing multiple resources dedicated to effective writing and designing top-notch research papers. See, for example, The University of Southern California: Research Guide: Organizing Your Social Science Research Paper: Theoretical Framework, <http://libguides.usc.edu/writingguide/theoreticalframework>. See also, Louis J. Sirico, Jr. and Nancy Schultz, *PERSUASIVE LEGAL WRITING*, 4th edition, Wolters Kluwer: 2015.

8. Does article have clear conclusion and/or answers?

1.....2.....3.....4.....5

9. Does article use and apply legal principles/rules?

1.....2.....3.....4.....5

10. Does article include all material facts?

1.....2.....3.....4.....5

11. Does article exclude extraneous facts?

1.....2.....3.....4.....5

12. Does article include unfavorable and favorable facts?

1.....2.....3.....4.....5

13. Is Article organized in a logical fashion?

1.....2.....3.....4.....5

Discussion Issues

14. Is Article organized around issues and sub-issues?

1.....2.....3.....4.....5

15. Devotes appropriate amount and depth of analysis consistent with the importance of the authority

1.....2.....3.....4.....5

16. Does Article utilize appropriate authorities? Does the article weigh or apply the authorities appropriately?

1.....2.....3.....4.....5

17. Explains why and how the legal rules applies to the topic of the article?

1.....2.....3.....4.....5

Writing Style, Organization and Proper Grammatical Usage

18. Article uses complete paragraphs and paragraphs are organized to communicate logical progression of ideas

1.....2.....3.....4.....5

19. Article uses thesis sentences to create logical progression

1.....2.....3.....4.....5

20. Article uses appropriate word choice and grammar

1.....2.....3.....4.....5

21. Article contains few excess words

1.....2.....3.....4.....5

22. Article uses complete sentences with subject and verb agreement

1.....2.....3.....4.....5

23. Article uses accurate punctuation and proper quotation marks

1.....2.....3.....4.....5

24. Article includes no contractions or slang

1.....2.....3.....4.....5

25. Article writes out numerals and abbreviates as appropriate

1.....2.....3.....4.....5

26. Article uses correct possessives and capitalizations

1.....2.....3.....4.....5

Proper Citation

27. Provides citation for every utilized quotation

1.....2.....3.....4.....5

28. All citations are substantively accurate

1.....2.....3.....4.....5

29. Names of authorities are accurate

1.....2.....3.....4.....5

30. Volumes and sources accurate

1.....2.....3.....4.....5

31. Year and court accurate

1.....2.....3.....4.....5

32. Page numbers of cases or articles correct

1.....2.....3.....4.....5

33. Pin point cites are utilized and are accurate

1.....2.....3.....4.....5

34. Typeface, spacing, italicizing, underlying, et cetera, are accurate

1.....2.....3.....4.....5

Final Round Voting/Review Sheet

Instructions: First, give a ranking number of 1-20 when we discuss or reference each article; second, after going through all 23 articles, I will ask you to go back through and rank your top 10-12 articles

Article	Initial Point Score	Final Ranking
Submission 1		
Submission 2		
Submission 11		
Submission 13		
Submission 15		
Submission 19		
Submission 21		
Submission 22		
Submission 24		
Submission 25		
Submission 29		
Submission 30		
Submission 31		
Submission 32		
Submission 33		
Submission 34		
Submission 35		
Submission 40		
Submission 43		
Submission 44		
Submission 45		

THE SOCIAL MEDIA ERA PRESIDENT

Vincent Wardynski

Recently, social media has become instrumental in the way we communicate as a society. Social media has propelled people to stardom and ruined individual's careers. Through social media, news is disseminated and funds are raised for natural disaster relief. It gives the average person a platform to voice their opinions and share funny cat videos. According to the Pew Research Center, seven out of ten Americans use some form of social media.² But what role should social media play in our government? More specifically, what effects can a government official's use of social media have on the American legal system? Enter President Donald Trump. The current President's social media use has been known to enrage his opposition and embolden his supporters. Regardless of one's political affiliations or personal feelings towards President Trump, it is hard to deny that his social media use is creating a rippling effect through the current legal system.

President Trump's tweets have arguably had significant impact on several hot-button issues and his use of Twitter has come into play in numerous court proceedings. His tweets regarding the travel ban may equate to an analysis of legislative history courts often resort to when trying to determine the true origins of a law; either legislative or through executive orders. The U.S. Court of Appeals for the Ninth Circuit footnoted President Trump's tweets in its decision to block the travel ban.³ His tweets regarding the death penalty for both U.S.

² "Social Media Fact Sheet." February 5, 2018. Accessed February 8, 2018. <http://www.pewinternet.org/fact-sheet/social-media/>. Pew Research Center is a nonpartisan fact tank that informs the public about the issues, attitudes and trends shaping the world. It conducts public opinion polling, demographic research, media content analysis and other empirical social science research.

³ Phillips, Amber. "Anything Trump tweets can be (and just was) used against him in a court of law." Washingtonpost.com. June 12, 2017. Accessed January 29, 2018. <https://www.washingtonpost.com/news/the-fix/wp/2017/06/12/anything-trump->

Army Sergeant Bowe Bergdahl and terrorist Sayfullo Saipov may constitute a breach of the due process rights afforded under the Fifth Amendment.⁴ Further, President Trump's tweets regarding the transgender military ban sparked outrage, lawsuits, and began a conversation as to what power, if any, the President's Twitter account holds.⁵

Additional legal issues spurred by President Trump's twitter usage include a lawsuit filed by Citizens for Responsibility and Ethics ("CREW") and the National Security Archive out of George Washington University. This pending case pertains to the President's habit of deleting tweets, which the plaintiffs allege is in violation of The Presidential Records Act ("PRA") of 1978.⁶ Furthermore, the Knight First Amendment Institute from Columbia University is also suing President Trump. This case was brought by several plaintiffs who argue that their First Amendment rights have been stifled by being blocked by President Trump on Twitter.⁷

Much like Franklin Delano Roosevelt's use of Fireside Chats on the radio or Ronald Reagan's use of skillful and effective television communication,⁸ President Trump appears to be pioneering an

tweets-can-be-and-just-was-used-against-him-in-a-court-of-law/?utm_term=.1429bdba3a32.

⁴ Sherman, Mark, and Sadie Gurman. "Donald Trump's Twitter: Here's how the president's tweets can affect the legal system." www.Globalnews.ca. November 3, 2017. Accessed January 29, 2018. <https://globalnews.ca/news/3841552/donald-trump-twitter-legal-system/>.

⁵ Waldman, Paul. "Policy by tweet: Trump's transgender ban moves forward." www.washingtonpost.com. August 24, 2017. Accessed January 29, 2018. https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/24/policy-by-tweet-trumps-transgender-ban-moves-forward/?utm_term=.d51dc1964f92.

⁶ Saul, Josh. "Trump Sued For Deleting Tweets and White House Use of Encrypted Messaging Apps." www.newsweek.com. June 22, 2017. Accessed January 29, 2017. <http://www.newsweek.com/trump-lawsuit-watchdog-group-records-signal-confide-twitter-destroy-628281>.

⁷ Hamilton, B. Colby. www.law.com. August 14, 2017. Accessed February 2, 2018. <https://www.law.com/newyorklawjournal/almID/1202795433126/>.

⁸ "American Government, 5d. The Media." www.ushistory.org. July 4, 1995. Accessed February 2, 2018. <http://www.ushistory.org/gov/5d.asp>.

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innovative way in which the President corresponds with the public. Through radio and television, Presidents have historically informed the public of desired policies, attempted to soothe Americans of the pains caused by war and economic hardship, and released official public statements.⁹ There appears to be some controversy surrounding the idea that President Trump's tweets are official statements. Seemingly, some confusion existed early on within the administration as to just what capacity the President's tweets held. When questioned on President Trump's social media usage, a former senior White House national security adviser, Sebastian Gorka, stated, "It's not policy. It's social media..."¹⁰ However, former White House press secretary, Sean Spicer, said, "The President is the President of the United States, so they're considered official statements by the President of the United States", in regards to the President's tweets.¹¹

Nonetheless, in November of 2017, the Department of Justice ("DOJ") assured United States District Judge, Amit Mehta, of the U.S. District Court for the District of Columbia that President Donald Trump's tweets are "official statements of the President of the United States."¹² Accordingly, President Trump's tweets are and will be treated as public record. Judge Mehta requested some clarification regarding *how* official the President's tweets are and whether they are statements of the White House and the President. DOJ attorneys filed a response stating that "...the government is treating the statements...as official statements of the President of the United

⁹ Ibid.

¹⁰ 2017. "JUNE 7, 2017 Trump, twitter, transparency and trouble." Gateway Journalism Review no. 345: 9. General Reference Center Gold, EBSCOhost (accessed February 11, 2018).

¹¹ Landers, Elizabeth. "White House: Trump's tweets are 'official statements'." www.cnn.com. June 6, 2017. Accessed February 5, 2018. <https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>.

¹² Laird, Lorelei. "DOJ says Trump's tweets are official presidential statements." <http://www.abajournal.com>. November 14, 2017. Accessed February 5, 2017. http://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements

States.”¹³ Obviously, very little case law exists pertaining to what extent of government use of social media is to be considered official or a public forum.

As mentioned previously, the U.S. Court of Appeals for the Ninth Circuit footnoted President Trump's tweets in its decision to block the travel ban or more formally, Executive Order 13780. This policy has been through a gauntlet of legal proceedings. The United States District Court for the District of Hawaii issued a temporary restraining order on the travel ban. Eventually, the Hawaii court converted the temporary restraining into an indefinite preliminary injunction.¹⁴ The United States District Court for the District of Maryland arrived at a similar conclusion.¹⁵ In time, the federal appeals court in Richmond, Virginia, cited religious discrimination in its refusal to instate the ban.¹⁶ When the issue made its way to the Ninth Circuit, the court ruled that President Trump’s attempt to block immigration from six predominantly Muslim countries “...exceeded the scope of the authority delegated to him by Congress.”¹⁷ In their ruling, the judges cited the following tweet from the President:

Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM), (“That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!”)¹⁸

¹³ Ibid.

¹⁴ Permanent Injunction

Definition from Nolo’s Plain-English Law Dictionary: A court order that a person or entity take certain actions or refrain from certain activities. A permanent injunction is typically issued once a lawsuit over the underlying activity is resolved, as distinguished from a preliminary injunction, which is issued while the lawsuit is pending.

¹⁵ Advertisement. Trump Travel Ban Blocked Nationwide By Federal Judges In Hawaii, Maryland. National Public Radio, Inc. March 15, 2017.

¹⁶ Liptak, Adam. "Appeals Court Will Not Reinstate Trump’s Revised Travel Ban." www.nytimes.com. May 25, 2017. Accessed February 2, 2018.

<https://www.nytimes.com/2017/05/25/us/politics/trump-travel-ban-blocked.html>.

¹⁷ Ingram, Matthew. "Trump's Own Tweets Help Kill His Government's Travel Ban, Again." www.fortune.com. June 12, 2017. Accessed January 29, 2018.

<http://fortune.com/2017/06/12/trump-tweets-travel-ban/>.

¹⁸ Trump, Donald. Twitter Post. June 5, 2017, 6:20 PM.

The judges reasoned that the policy sought to ban people from specific countries, however, it did not provide any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness. They summarized that the policy did not provide a rationale explaining why permitting entry of nationals from the six designated countries would be detrimental to the American people.¹⁹ The court also took into consideration that then press secretary, Sean Spicer, had confirmed that Trump views his tweets as official statements from the White House. As such, the court became further confused when President Trump continued to refer to the policy as a ban even though his administration often argued that said policy was not, in fact, a ban and that it should not be regarded as such.²⁰ Upon appealing to the U.S. Supreme Court ("SCOTUS") and adding some non-Muslim countries, SCOTUS ruled in favor of the President's administration and allowed the ban to go into effect in early December of 2017.²¹ However, it is extraordinarily interesting that the President's tweet was cited in the Ninth Circuit ruling. This move could possibly set a precedent in the way courts interpret the true origin of law. Different sentiments previously expressed on social media by lawmakers may now be subject to scrutiny when determining if a proposed law has come from a place of reason and necessity or if said law came from certain biases lawmakers may possess.

Due process rights afforded under the Fifth Amendment of The U.S. Constitution are yet another aspect of the law that President Trump's Twitter use may have impacted. This impact may specifically relate to the cases of Sergeant Bowe Bergdahl and Sayfullo Saipov. Bergdahl was a U.S. Army soldier who had walked away from his outpost in Paktika province, Afghanistan. Contradictory reports surround Bergdahl's desertion and subsequent capture. And further conflicting

<https://twitter.com/realDonaldTrump/status/871899511525961728>.

¹⁹ Ingram, Matthew. "Trump's Own Tweets Help Kill His Government's Travel Ban, Again." www.fortune.com.

²⁰ Ibid.

²¹ Ariane De Vogue. "Supreme Court lets full Trump travel ban take effect."

www.cnn.com. December 5, 2017. Accessed January 29, 2018.

<https://www.cnn.com/2017/12/04/politics/supreme-court-travel-ban/index.html>.

reports surround potentially six different service members who lost their lives in the search for Bergdahl.²² When Bergdahl was finally brought before a Court Martial, his lawyers argued that he could not receive a fair trial since the Commander-in-Chief had already decided that Bergdahl deserved the death penalty and voiced that decision via Twitter. The Colonel who presided over the Court Martial, Jeffery Nance, had expressed that he was not directly affected by President Trump's criticism of Bergdahl. However, he did state that he would consider the President's comments as a mitigating factor in the sentencing.²³ It may be open for interpretation, but President Trump's tweets may have very well provided Bergdahl with a lighter sentence.²⁴ Can a military member ultimately obtain fair due process when his boss and the boss of those presiding over the legal proceedings publicly voices that he believes the defendant should get the death penalty? The Commander-in-Chief is, after all, the boss of the military.

Similar arguments can now be made on behalf of Sayfullo Saipov. Saipov is a terrorist who plowed a rented Home Depot truck into a crowd in Manhattan, effectively killing eight people.²⁵ In November of 2017, President Trump took to Twitter to condemn Saipov and suggest that he should receive the death penalty. The Fifth Amendment of the U.S. Constitution stipulates that no person shall be deprived of life or liberty without due process of law.²⁶ The President's tweet could absolutely have a complicating effect on the federal prosecution of Saipov, in that an argument pertaining to the defendant's right to receive a fair trial can now be raised. One of

²² Thompson, Mark. "The 6 U.S. Soldiers Who Died Searching for Bowe Bergdahl." [Www.Time.com](http://www.time.com). June 2, 2014. Accessed February 1, 2018. <http://time.com/2809352/bowe-bergdahl-deserter-army-taliban/>.

²³ Sherman, Mark, and Sadie Gurman. "Donald Trump's Twitter: Here's how the president's tweets can affect the legal system." [www.Globalnews.ca](http://www.globalnews.ca).

²⁴ "Bowe Bergdahl spared prison time for US Army desertion." www.bbc.com. November 3, 2017. Accessed February 1, 2018. <http://www.bbc.com/news/world-us-canada-41860828>.

²⁵ Yan, Holly, and Dakin Andone. "Who is New York terror suspect Sayfullo Saipov?" [Www.cnn.com](http://www.cnn.com). November 2, 2017. Accessed January 29, 2018.

<https://www.cnn.com/2017/11/01/us/sayfullo-saipov-new-york-attack/index.html>.
²⁶ U.S. Const. amend. V.

Saipov's current charges carries the weight of the death penalty. The Attorney General ("AG") decides whether or not a federal prosecutor will go after a death sentence in federal cases. However, the AG normally relies on a thorough investigative process and the recommendations of the jurisdictional U.S. attorney. However, President Trump's tweets could have possibly negated that process by commenting on potential punishments before the investigations even concluded.²⁷ Should prosecutors pursue Saipov's death sentence, his defense attorneys could have an argument that AG Jeff Sessions and the Justice Department based their decision on President Trump's social media sentiments.

It also stands to reason that President Trump's tweets have directly affected his transgender military ban. In a series of tweets in July of 2017, the President announced his decision to ban transgender individuals from serving in the military in any capacity.²⁸ Shortly after the Twitter proclamation, many high ranking military leaders made it clear the armed forces did not issue policies based on the Commander-in-Chief's Twitter account.²⁹ Soon after this announcement, a number of lawsuits sprung up around the country.

Again, several judges took into account President Trump's tweets and other impulsive comments to evaluate the motivations behind this policy. U.S. District Judge for DC, Colleen Kollar-Kotelly, included pictures of the tweets in her opinion that hindered the transgender ban and even cited "the unusual circumstances surrounding the President's announcement" among her reasoning for doing so.³⁰ In

²⁷ Palazzolo, Joe. "Trump Tweets May Complicate Case Against New York Terror Suspect." www.wsj.com. November 2, 2017. Accessed January 26, 2018. <https://www.wsj.com/articles/trump-tweets-may-complicate-case-against-new-york-terror-suspect-1509644453>.

²⁸ Waldman, Paul. "Policy by tweet: Trump's transgender ban moves forward." www.washingtonpost.com.

²⁹ Hirschfeld Davis, Julie, and Helene Cooper. "Trump Says Transgender People Will Not Be Allowed in the Military." [Ww.nytimes.com](http://www.nytimes.com). July 26, 2017. Accessed January 29, 2018. <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

³⁰ Sherman, Mark, and Sadie Gurman. "Donald Trump's Twitter: Here's how the president's tweets can affect the legal system." www.Globalnews.ca.

another case, U.S. District Judge Marvin Garbis in Baltimore ruled that the ban lacked justification and "...cannot possibly constitute a legitimate governmental interest." Judge Garbris went on to express that transgender ban was not driven by genuine concerns for military efficacy. In his ruling Judge Garbis wrote, "The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest."³¹ As of January 1, 2018, openly transgender individuals were permitted to join the U.S. armed forces in compliance with federal court rulings.³² Something interesting to note here, is that President Trump's tweet, though often considered an official statement, held very little weight in this outcome. So that brings forth the question of, what legal authority does the President's social media account hold? It would appear that President Trump's Twitter account acting in a capacity to deliver official statements still draws very minimal legal authority. If anything, it could be argued that the current President's use of twitter has severely hindered his ability to enact policy or accomplish his political desires.

Not only has President Trump's actual tweets garnered legal repercussions, but also the manner in which he uses Twitter has prompted several lawsuits. CREW and the National Security Archive have brought legal action against President Trump regarding his record keeping. The groups are alleging that President Trump is violating federal law and the Constitution by destroying potential presidential records. Part of the suit alleges that the President and his administration utilize particular email programs that delete messages once they are read. The other part of the suit pertains to the President's habit of deleting certain tweets. The lawsuit alleges,

³¹ Chung, Andrew. "A second judge has blocked Trump's ban on transgender troops." www.businessinsider.com. November 21, 2017. Accessed February 2, 2018. <http://www.businessinsider.com/second-judge-blocks-trumps-transgender-troops-ban-unconstitutional-2017-11>.

³² McLaughlin, Elizabeth. "Beginning today, transgender individuals can join the US military." [www.abcnews.go.com](http://abcnews.go.com). January 1, 2018. Accessed January 29, 2018.. <http://abcnews.go.com/US/beginning-today-transgender-individuals-join-us-military/story?id=52051204>

“Presidential statements made on Twitter sent from the President’s personal Twitter account, which are subject to federal record-keeping obligations, have been destroyed.”³³ The plaintiff groups are contending that those acts are in violation of the Presidential Records Act, 44 U.S.C. §§ 2201–2207.³⁴ This case is still pending and will be interesting to see how it will be decided. Within the first five months in office President Trump deleted twenty-two tweets for various reasons including typos and misspellings such as the infamous “covfefe”.³⁵ There is no doubt that it is very important to keep an accurate record of the history of government and government officials.

Another way President Trump’s use of social media has prompted more lawsuits is through his habit of blocking American citizens on Twitter. The Knight First Amendment Institute, on behalf of several blocked citizens, has filed suit against the President for violation of their First Amendment rights. Blocked Twitter users are unable to see or interact to tweets from the accounts they are blocked from. Again, President Trump's tweets are considered official presidential statements as the President often uses tweets to convey policy statements.³⁶ The complaint states, “Because of the way the President and his aides use the @realDonaldTrump Twitter account, the account is a public forum under the First Amendment.”³⁷ The complaint goes on to allege, “It imposes an unconstitutional restriction on their participation in a designated public forum. It imposes an unconstitutional restriction on their right to access statements that Defendants are otherwise making available to the

³³ Saul, Josh. "Trump Sued for Deleting Tweets and White House Use of Encrypted Messaging Apps." www.newsweek.com.

³⁴ The Presidential Records Act, §§ 44 U.S.C.- §§ 2201-2207. (1978).

³⁵ Foley, Aris. "Here are the 22 tweets President Donald Trump has deleted since taking office." www.aol.com. June 28, 2017. Accessed February 12, 2018. <https://www.aol.com/article/news/2017/06/28/22-tweets-president-donald-trump-has-deleted-since-taking-office/23004095/>.

³⁶ Abramson, Alana. "Donald Trump Blocked These People on Twitter. Now They're Suing Him." www.time.com. July 11, 2017. Accessed February 12, 2018. <http://time.com/4853515/donald-trump-twitter-blockers-lawsuit/>.

³⁷ Knight First Amendment Institute v. Trump, 1-25 (The United States District Court for the Southern District of New York July 11, 2017) (Dist. file).

public at large.”³⁸ The outcome of this case may hold to be the most important of all the legal issues discussed in this article. The President, like all government officials, is considered a public servant. If a government official, such as President Trump, wants to utilize a platform of media to reach the public and convey political policies, that platform of media needs to be available to all voters. Senior attorney for the Knight First Amendment Institute, Katie Fallow, has cited a June 2017 U.S. Supreme Court decision, *Packingham v. North Carolina*, where Justice Anthony Kennedy designated social media as “the modern public square” and as one of the most important places for the exchange of views.³⁹

Interestingly enough, there is already a need to update this article. On February 13, 2018, President Trump’s attempt to rescind the Deferred Action for Childhood Arrivals program (“DACA”), which protects thousands of children of illegal immigrants from deportation, was prevented by a New York federal judge. U.S. District Judge Nicholas Garaufis reasoned that the administration hasn’t offered any legally adequate explanations for ending the program. Judge Garaufis stated, “The decision to end the DACA program appears to rest exclusively on a legal conclusion that the program was unconstitutional. Because that conclusion was erroneous, the decision to end the DACA program cannot stand.”⁴⁰ Judge Garaufis’ ruling questioned whether AG Jeff Sessions’ stance was aligned with that of President Trump. The judge noted that there appeared to be an inconsistency between what AG Sessions has expressed and what the President Trump expressed in a September tweet.⁴¹ The President’s tweet which Judge Garaufis cited stated the following:

³⁸ See id 35

³⁹ Wong, Julia Carrie. "Twitter users sue Donald Trump for blocking them over critical comments." *Www.theguardian.com*. July 11, 2017. Accessed February 12, 2018. <https://www.theguardian.com/us-news/2017/jul/11/twitter-lawsuit-donald-trump-blocking-knight-institute>.

⁴⁰ Hurtado, Patricia. "Trump's Move to End DACA Program Blocked by Second Judge." *www.blomberg.com*. February 13, 2018. Accessed February 14, 2018. <https://www.bloomberg.com/news/articles/2018-02-13/trump-s-move-to-end-daca-program-blocked-by-second-u-s-judge>.

⁴¹ See id. 38

Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!"

Additionally, U.S. District Judge William Alsup in San Francisco blocked the administration's attempt to phase out DACA on January 10th, 2018. Once again one of President Trump's tweets were used in the decision-making process. This particular tweet read, "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!" Judge Alsup reasoned that if President Trump himself had communicated support for DACA on Twitter in September, why should it be rescinded? ⁴²

It would appear that there are many new aspects to the American legal system as it relates to government, politicians, and official use of social media platforms. By using politicians' past social media posts, courts seem to be deciphering the true origins and intentions of the law. This was exhibited when the Ninth Circuit footnoted President Trump's tweet in the decision to block the travel ban. Fifth Amendment and due process issues are arising from politicians expressing their feelings on punishment in criminal proceedings. This issue was demonstrated in how the President's tweets potentially affected Bowe Bergdahl's Court Martial and the potential repercussions in Sayfullo Saipov's upcoming proceedings. Tweets are being regarded as official statements; yet hold very little power in regards to forming policy as we have seen in the transgender military ban matter. Furthermore, the manner in which a politician uses social media can apparently suppress first amendment rights and violate certain federal acts as we have seen in the CREW and the National Security Archive and The Knight First Amendment Institute disputes.

⁴² Hawkins, Derek. "Trump vs. Trump, again: Judge cites presidential tweets as he blocks DACA phaseout." www.washingtonpost.com. January 10, 2018. Accessed February 14, 2017. https://www.washingtonpost.com/news/morning-mix/wp/2018/01/10/trump-vs-trump-again-judge-cites-presidential-tweets-as-he-blocks-daca-phaseout/?utm_term=.78f3ddb6fa6.

It's safe to say that politicians should tread carefully as new laws and standards develop in these areas.

AUTOMATIC LICENSE PLATE READERS: THE ANSWER TO PREEMPTIVE CRIME PREVENTION

Robert Steinkraus

I. INTRODUCTION

With the recent technology boom, major advancements in tools utilized by government agencies have allowed for more effective crime prevention and investigation techniques. A new “breakthrough” technology, the Automatic License Plate Reader (“ALPR”), provides a more efficient method of community surveillance as compared to the current processes that police departments use currently in surveilling communities for protection and crime-preventative reasons. ALPR technology is an up-and-coming tool that will increase the efficiency of license plate data collection and use the license plate data to avert crimes or even anticipate national security threats before they are carried out. However, the emergence of the ALPR technology has also raised some privacy concerns regarding the methods of data collection, the location of the data storage, and how long the data is held.

The ALPR was patented by Claus Neubauer and Jenn Kwei Tyan in 2003, and it incorporated technology derived from character-reading machines that have been used to sort mail for the last fifty years or so.¹ The ALPR uses cameras that can be placed on just one or all sides of a law enforcement officer’s (“LEO”) vehicle. The cameras capture digital images of license plates, and a computer then translates the image into alphanumeric codes and subsequently stores the codes in a secured database.² This raises the question—do the probative

¹ Claus Neubauer, and Jenn-Kwei Tyan. License plate recognition with an intelligent camera. US Patent 6553131, filed September 15, 1999.

² *Id.*

benefits of averting potential crimes or national security issues achieved by using the ALPR outweigh the seemingly intrusive methods of capturing citizen's license plates and storing them for indeterminable amounts of time?

II. ADVANTAGES

The ALPR system is advantageous because it gives LEOs the opportunity to take action before there is an action. Prior to the ALPR systems, the process of inputting license plate data manually to determine a course of action was not nearly as efficient or insightful. A report by Katie Plourd regarding the incorporation of ALPR systems in Long Beach, California states: "A technically competent officer can "run" about 150 plates in a normal shift. With an ALPR system, the same officer can expect to have checked 3,000-5,000 plates in a single shift."³ This efficiency change is a demonstrably positive impact that allows departments to limit their time spent manually inputting plate information and re-allocate that time to more important LEO roles in society. This would allow LEOs to focus on more important things such as their roles as crime-fighters, law enforcers, watchmen, and providers of other social services, instead of wasting their time manually inputting license plates or having to radio the information to dispatchers.⁴ The ALPR system is not solely beneficial in its added efficiency from increased productivity as they work as a general deterrent as well. A report by Jim McKay points out that when authorities began using mobile ALPR systems "in earnest" in 2007, the number of auto thefts in the United States dropped from 53,000 in 1996 to only 28,000.⁵ As word gets out, authorities are hoping for a continued decline. This efficiency change would constitute a significant positive impact that would allow departments to limit time

³ Plourd, Katie. "Camera system aids Long Beach police." *Online Forty-Niner* 12, no. 104 (April 18, 2006). Accessed February 13, 2018.

<http://web.csulb.edu/~d49er/archives/2006/spring/news/v12n104-camera.shtml>.

⁴ *Id.*

⁵ McKay, Jim. "License Plate Recognition Systems Extend the Reach of Patrol Officers." *Government Technology*. April 08, 2008. Accessed February 13, 2018.

<http://www.govtech.com/public-safety/License-Plate-Recognition-Systems-Extend-the.html>.

spent manually inputting plate information and allow for a more efficient approach to policing and maintaining society.

The added efficiency implicated by the time saved after the introduction of ALPR technology is not the only attractive outcome of ALPR utilization, as money and resources saved by using ALPRs is a lucrative idea to departments in itself. In examining labor efficiency alone and applying a cost-benefit analysis, departments would save time and resources spent to pay LEOs to drive around and manually input license data—and that’s only if the LEO has a Mobile Data Computer (“MPC”) in his or her vehicle.⁶ Without the MPC, the LEO would have to call out the license plate code over a police radio to the dispatcher and have the dispatcher manually input the code. By the time the process is over, the LEO could have potentially lost sight of the vehicle or just wasted time. According to recent reports by Homeland Security News Wire, it is clear that ALPR systems are becoming increasingly common in police departments across the country. This change is predominantly due to the fair market value price of a full ALPR system falling from roughly \$24,000 to \$17,000.⁷ Although \$17,000 may seem like quite a chunk of change, the ALPR is more cost-efficient than it seems, as most people prejudicially apply the theory of omission to the apparent ‘high prices’ when assessing the technology.

III. DISADVANTAGES

While ALPRs are a proactive approach to making the process of obtaining license plate data more efficient, there are still malfunctions which could inhibit the process and be described as a “revenge factor” of sorts. A revenge factor is a term describing the phenomenon of a technology having the exact opposite effect than that for which it is introduced.⁸ The ALPR system might

⁶ Homeland Security News Wire. "Reduced prices for license plates readers attracts more buyers." Homeland Security News Wire. January 24, 2012. Accessed February 13, 2018. <http://www.homelandsecuritynewswire.com/srlet20120124-reduced-prices-for-license-plates-readers-attracts-more-buyers>.

⁷ *Id.*

⁸ Tenner, Edward. *Why things bite back: technology and the revenge of unintended consequences*. New York: Vintage Books, 1997.

unintentionally scan foreign objects that it assumes are license plates, such as a billboard on the highway or a park bench on the street. This would not only temporarily clutter the MDC, but would in fact make license plate data collection a lengthier process by the time the error is corrected—the exact opposite of the intended effect. Although this short-term loss in scanning efficiency may not seem to be a detrimental issue, if the LEO has trouble processing the plate data, it could give time to elude the LEO or close the window of opportunity to avert a national security threat.

A. HOW MANY SCANS DOES IT TAKE TO GET TO THE CENTER OF A CIVIL RIGHTS INFRINGEMENT SUIT?

Although ALPRs seem like an ostensibly perfect technology, there are still problems, as there are with the emergence of many new technologies. These issues can be deemed important or unimportant through a subjective determination by a personal political stance on preventative measures taken to ensure national security. The American Civil Liberties Union (“ACLU”) claims that the ALPR systems are explicitly intrusive and a civil rights violation “to a T.” Jeff Gamso, legal director of the American Civil Liberties Union of Ohio, said, “The scanner’s gaze is too wide and it’s an infringement against the innocent drivers whose plates get captured... Using (ALPR) to scan all license plates is a civil rights violation and could lead to government abuse of the information... I think they should just knock it off”.⁹ The ACLU has a valid point, but should the U. S. government weigh its “atrocious” infringement of keeping metadata against the potential to anticipate and prevent national security issues or obtaining criminal evidence which could be used to push the scales of guilt beyond a reasonable doubt?

IV. RELEVANT CASE LAW

In fact, it is not an atrocious infringement at all. This is where a landmark case regarding expectation of privacy and Fourth

⁹ Associated Press. "NEWS ACLU objects to plate scanners in police cruisers." The Chronicle. July 30, 2007. Accessed February 13, 2018. <http://www.chroniclet.com/news/2007/07/30/ACLU-objects-to-plate-scanners-in-police-cruisers.html>.

Amendment¹⁰ issues comes into play. In *Katz v. United States*¹¹, the Supreme Court reasons that “the Fourth Amendment protects people from warrantless searches of places or seizures of persons or objects, in which they have a subjective expectation of privacy that is deemed reasonable in public norms.¹² The reasonableness standard is construed upon the totality of circumstances on a case-by-case basis. The person’s precautions taken to exclude others’ access are strong indicators to the expectation of privacy and might be taken into consideration by the court.¹³ The Fourth Amendment protection does not expand to governmental intrusion and information collection conducted upon open fields. Expectation of privacy in an open field¹⁴ is not considered reasonable.”¹⁵ The precedent of *Katz v. United States*, in addition to the Plain View Doctrine,¹⁶ which allows an officer to seize evidence that is in plain view without a warrant during a lawful observation, establishes that one cannot have a reasonable expectation of privacy in the public while they are driving their vehicle. The license plate data collected by the scanners is in plain view, and its collection is in no way an infringement upon the rights of the driver.

V. WHAT HAPPENS TO THE DATA?

In addition to the privacy issues regarding the methods used by LEOs in the process of collecting plate data, there are also concerns regarding the amount of time the information should be retained for, what the departments will do with the information, and who will have access. Will the storage of the collected plate data be well-protected and encrypted?

¹⁰ "The United States Bill of Rights: First 10 Amendments to the Constitution." American Civil Liberties Union. Accessed February 13, 2018. <https://www.aclu.org/united-states-bill-rights-first-10-amendments-constitution>.

¹¹ *Katz v. United States*, 389 U. S. 347 (1967).

¹² *Supra* note 10.

¹³ *Supra* note 11.

¹⁴ The Open-Field Doctrine was established in *Hester v. United States*, 265 U.S. 57 (1924).

¹⁵ *Supra* note 11.

¹⁶ The Plain View Doctrine was established in *Arizona v. Hicks*, 480 U.S. 321 (1987).

Police departments go to great lengths to protect the very sensitive, private data they gain through the ALPRs, but there is always the potential for human error or a malicious breach. For example, the Boston Police Department was under investigation in 2013 for potentially intruding upon the privacy of the citizens of Boston through questionable methods of storage and use of the collected plate data and how long it was kept.¹⁷ During the investigation, a LEO in the Boston Police Department inadvertently released the plate data of roughly 68,000 vehicles scanned in a six-month period to ‘The Globe’, a Boston newspaper.¹⁸ Although it was a simple human error, the effects were not so simple. Roughly 68,000 citizens’ plate information, the locations at which the plates were scanned, and other sensitive information was dumped into the public domain, leaving those citizens vulnerable. This could be a huge problem for citizens who wish for their habitual movements not to be discovered by someone who could maliciously use the leaked data. For example, stalking victims would have had their daily movements made available to the public—information that could be used by the stalker. Contrary to the liberal assessment of this privacy issue, it could be said that the data is not actually private because the data being logged is in public view. This invokes the Plain View Doctrine, as the data being scanned is in “open-fields”¹⁹ or “plain-view.”²⁰ Regardless of the scans happening in “plain-view”, it would be hard to monitor a citizen’s habits enough to create a map of places they frequently travel, which may cross the legal line drawn by state stalking statutes.

A. IS THE COLLECTED DATA PROTECTED?

Not only is there the possibility of whoever is placed in charge of the data inadvertently releasing it, but there is always the potential

¹⁷ Musgrave, Shawn. "Boston Police halt license scanning program." Boston Globe. December 14, 2013. Accessed February 13, 2018. <https://www.bostonglobe.com/metro/2013/12/14/boston-police-suspend-use-high-tech-licence-plate-readers-amid-privacy-concerns/B2hy9UizC7KzebnGyQQJNM/story.html>.

¹⁸ *Id.*

¹⁹ *Supra* note 14.

²⁰ *Supra* note 16.

problem of a breach. In the modern age, data protection is of the utmost importance among many government, private, and corporate institutions. One example would be in the practice of law. Many private attorneys must go through countless procedures to ensure the protection of their clients' confidential information and communications due to attorney-client privilege. These private attorneys use encrypted internet providers to view documents, usually PDFs; they have security software that can shred documents and eliminate all traces of that document on that computer and server and go through countless other measures to ensure the protection of their clients' information. Yet, there are still cases of attorneys or firms being hacked and the hacker demanding compensation or actions on behalf of the firm in exchange for the "key", their password, to their clients' and their own sensitive data and that's if the hacker even decides to uphold his end of the bargain.²¹ This example alone goes to show that even though there can be multiple preventative measures taken to protect data, where there is a will, there is a way.

Apart from the looming issues that come from the storage of the plate data being inadvertently dumped on a large scale or the potential of a breach of the data, there are potentially perceivable constitutional issues pertaining to the length of time the data can be stored for. At some point, the departments must erase the citizen's plate data, or the "legal line" drawn out in the Fourth Amendment would be crossed but so far, this has not occurred. Although a potential constitutional issue exists, there is no case law yet to define this "legal line". In *United States v. Ganius*,²² the Defendant appealed a conviction on the basis of the government storing his data for an undefined amount of time, and then having the data subsequently used against him once probable cause was developed. The Defendant raised the issue of the government infringing upon his

²¹ Simonite, Tom. "Holding Data Hostage: The Perfect Internet Crime?" Technology Review. February 04, 2015. Accessed February 13, 2018. <https://www.technologyreview.com/s/534516/holding-data-hostage-the-perfect-internet-crime/>.

²² *United States v. Ganius*, 824 F. 3d (2nd Cir., 2016).

Fourth Amendment right against an unlawful retention of his computer data, that was seized three years prior in 2003, pursuant to a valid search warrant, and then using it once probable cause was developed.²³ The Court in *United States v. Ganius*²⁴ affirmed the lower court's decision, holding that that the government relied in good faith and denying the Defendant's motion to suppress the computer data. The "legal line" has not yet been defined simply because there has not yet been a proven instance of the government retaining data and not using it in "good faith."

B. DESPITE THE ADVANTAGES – ETHICAL ISSUES REGARDING POSSESSION OF PRIVATE DATA

Aside from the involuntary occurrences of the sensitive data being accidentally dumped by the department, a weakly protected system that is breached, or potentially perceived constitutional issues, there are unethical LEOs who take advantage of situations and technologies. Such is the concern for police departments in Texas due to a recent law that was passed in 2015.²⁵ The law allows officers to install credit card and debit card readers in their patrol vehicles to take payment on the spot for unpaid court fines, also known as *capias* warrants.²⁶ When the law passed, Texas legislators argued that not only would it help local government with their budgets, it would also benefit the public and police.²⁷ Although passed with seemingly good intentions, this law has led to many problems, creating questions regarding the intention of this law and its potential misuse. The 'Warrant Redemption' program works like this:

The agency is given no-cost license plate readers as well as free access to LEARN-NVLS, the ALPR data system Vigilant says contains

²³ *Id.*

²⁴ *Id.*

²⁵ Dave Maass. "'No Cost' License Plate Readers Are Turning Texas Police into Mobile Debt Collectors and Data Miners." Electronic Frontier Foundation. January 26, 2016. Accessed February 13, 2018. <https://www EFF.ORG/deeplinks/2016/01/no-cost-license-plate-readers-are-turning-texas-police-mobile-debt-collectors-and>.

²⁶ Hirby, J. "What is a Capias Warrant?" The Law Dictionary. Accessed February 14, 2018. <https://thelawdictionary.org/article/what-is-a-capias-warrant/>.

²⁷ *Supra* note 25.

more than 2.8-billion plate scans and is growing by more than 70-million scans a month. This also includes a wide variety of analytical and predictive software tools. Also, the agency is merely licensing the technology; Vigilant can take it back at any time. The government agency in turn gives Vigilant access to information about all its outstanding court fees, which the company then turns into a hot list to feed into the free ALPR systems. As police cars patrol the city, they ping on license plates associated with the fees. The officer then pulls the driver over and offers them a devil's bargain: get arrested, or pay the original fine with an extra 25% processing fee tacked on, all of which goes to Vigilant. In other words, the driver is paying Vigilant to provide the local police with the technology used to identify and then detain the driver. If the ALPR pings on a parked car, the officer can get out and leave a note to visit Vigilant's payment website.²⁸

In addition to the agencies unnecessarily and unfairly charging citizens for outstanding court fines, departments also "sign away" the privacy of those who are scanned. There is a clause in the agencies' contract with Vigilant that allows the company to get a copy of all the license-plate data collected and use it for commercial purposes! This is an outrageous and unfair practice that unduly infringes on the rights of those citizens in Texas. Luckily, Texas is the exception, as the rest of the country's approach of using the ALPR technology is for the good of society.

VI. CONCLUSION

ALPRs are in the early stages of becoming a nationally used technology that proactively and preemptively prevents national security issues or crimes. Although there are a few occasions where the privacy of citizens' information is potentially put at risk, there are far more occurrences of the system being used as it should. With proper anticipatory regulations in place to keep unfair practices such as the situation in Texas from occurring, this technology could be a highly beneficial addition to many departments' technological arsenal. The probative benefits of averting potential national security

²⁸ *Id.*

issues outweigh the seemingly intrusive methods of capturing citizen's license plates and storing them indefinitely.

A COLLISION OF COLLUSION: HOW THE NCAA IS CONSPIRING TO FAIL THEIR “STUDENT ATHLETES”

John Tuley

1. The Creation of the Student Athlete

The National Collegiate Athletic Association, hereinafter the NCAA, dates back to two meetings held in 1905 by the President of the United States, Teddy Roosevelt, in an attempt to increase player safety within intercollegiate football. Sixty-two charter members formed the Intercollegiate Athletic Association, or the IAA, and in 1910 the IAA was renamed the National Collegiate Athletic Association, hereinafter the NCAA.¹ Today the NCAA is comprised of 1281 total member schools, conferences, and other affiliated organizations. These institutions and organizations comprise the voting force of the NCAA and are responsible for the rules and regulations of the NCAA. When the NCAA was founded they were trying to catch up to the issues that necessitated its creation, such as the commercialization of collegiate athletics. Schools took advantage of the money that could be made from having a successful athletic program. The first ever organized athletic activity, a rowing match between Harvard and Yale, featured a Harvard coxswain who was not a Harvard student.² The NCAA had a problem on their hands that was embedded in their organization before they even existed. The NCAA’s immediate reaction was to address the issue of ineligible athletes receiving impermissible benefits to make money for universities. It was also in the best interests of the participating members to keep each other from spending excessive amounts of money to get the best athletes in order to maintain competitive balance. While it

¹Gerald Sherman Gurney, Andrew S. Zimbalist, & Donna A. Lopiano, *Unwinding Madness: What Went Wrong with College Sports and How to Fix It* 10 (2017).

² Rodney K Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9 Id. at 10-11 (2000).

absolutely makes sense that players not be paid directly from Universities themselves, the NCAA overcorrected, banning players receiving any compensation at all. The most significant step in keeping student athletes from receiving benefits occurred when then Executive Director (now referred to as President) Walter Byers coined the term “student-athlete.” The issue that the NCAA tried to combat was players trying to collect on workers compensations claims for injuries that they suffered as a result of their athletic play for the universities. If the courts had ruled that the players were in fact employees of these universities, they would be entitled to workers compensation as well as other benefits, including a base salary. In an effort to combat this escalation, Director Byers defined these players as student athletes during legal proceedings. Soon after this, the NCAA implemented this term throughout the bylaws and structure of their organization. This became key in keeping these athletes under the strict control of the NCAA. An article from the *Washington Law Review Journal* states that “The NCAA’s purpose in this message is to shore up a crumbling façade, a myth in America, that these young athletes in NCAA-member sports programs are properly characterized only as ‘student-athletes.’”³ Student athletes are not permitted to make money off of their own likenesses because of NCAA bylaws passed after the “student athlete” was defined, largely due to a community of collusion from NCAA schools.

II. The NCAA in Court

With the NCAA beginning to exercise their powers and into the realm of becoming anti-trust, schools began suing the NCAA to limit their power. The NCAA’s first major legal battle occurred in 1984 in the case of *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*. The Supreme Court found that the television contract that the NCAA entered into for the 1982-1985 seasons violated the Sherman Antitrust Act. In that case, the NCAA “limits the total amount of televised intercollegiate football games and the number of games that any one college may televise, and no

³ Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as an Employee*, 81 Wash. L. Rev. 71 Id.at 74 (2006).

member of the NCAA is permitted to make any sale of television rights except in accordance with the [television] plan.”⁴ The Supreme Court held that “[t]here can be no doubt that the challenged practices of the NCAA constitute a ‘restraint of trade’ in the sense that they limit members’ freedom to negotiate and enter into their own television contracts.”⁵ The court also recognized its own precedent, that in order to determine something as violating the Sherman Antitrust Act, it must be found to be an unreasonable restriction of trade. To that extent, the court found that “By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.”⁶ However, in *Board of Regents*, the Supreme Court dealt a huge blow to the fight for player compensation stating “To preserve the character and quality of the ‘product,’ athletes must not be paid.”⁷ In light of the Supreme Court ruling in the *Board of Regents* case, the NCAA lost out on a major revenue source. While the *Board of Regents* decision helped to return power to the member institutions, the players were left uncompensated and had to shoulder a heavier burden for the NCAA, who quickly had to find a new revenue stream.

A. The NCAA’s Monetary Reaction to the Board of Regents Decision

The organization reacted by starting to promote and grow the annual men’s basketball tournament, now more commonly referred to as “March Madness”. The NCAA has a lucrative contract with Time Warner Cable for the exclusive broadcasting rights to the March Madness tournament. In 2010, the NCAA and Time Warner Cable entered into a fourteen year, 10.8-billion-dollar contract through 2024. In 2016, the parties signed an eight year 8.8-billion-dollar extension to their original contract which now goes through 2032. This signifies the first time in history that the NCAA will have a

⁴ *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

⁵ *Id.* at 98.

⁶ *Id.* at 99.

⁷ *Id.* at 102.

television contract worth over a billion dollars a year.⁸ Because the NCAA is a not-for-profit organization, the money they make from this contract is distributed to the individual member conferences. The conferences then use a disbursement formula, based on a multitude of factors, to distribute these funds to the individual institutions. A large amount of money from these lucrative television rights deals trickles its way down to NCAA member institutions. This left the players at NCAA member institutions having to put their bodies on the line while not being able to make any money for themselves. Players were used in advertisements, jersey sales, and other marketing campaigns and none of the profits came back to them. Another example of large-scale monetization in response to the *Board of Regent* decision is the NCAA's licensing deal with the video game developer Electronic Arts to publish yearly installments of video games centered around NCAA college football and men's college basketball. The football series started in 1993 with "Bill Walsh College Football" and the basketball series started in 1998 with "NCAA March Madness 98." The basketball franchise ended in 2010, but the more popular football series continued on until 2014. Players' likenesses were again being used without them receiving any compensation from it. The end of this franchise was brought about in a monumental lawsuit that began working its way through the court system.

B. The O'Bannon Decision

In 2009, a former University of California-Los Angeles player by the name of Ed O'Bannon brought suit against the NCAA. O'Bannon discovered through a friend that the 1995 National Championship team that O'Bannon was on was featured as a "Historic Team" in NCAA March Madness 2009. While the player was not named, he played O'Bannon's position, had O'Bannon's number, and had the same height and weight as O'Bannon. The player even had the same left-handed shooting motion as O'Bannon. O'Bannon's likeness was being used without his permission for the NCAA to make money.

⁸ Rodger Sherman, [The NCAA's New March Madness TV Deal Will Make Them a Billion Dollars a Year](https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner), SBNation (Apr. 12, 2016, 5:06 PM), <https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner>.

O'Bannon then filed a class action lawsuit against the NCAA, alleging that failing to compensate athletes for their performance violated the Sherman Antitrust Act. At the trial level, the class won outright against the NCAA. The amateur status of players was overturned by Judge Cynthia Wilken, who's ruling placed a requirement on the NCAA to "not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws," as well as setting aside five-thousand dollars a year for use of "name, image and likeness rights ("NIL rights")."⁹ This was an appropriate remedy to the biggest issue facing NCAA. Players deserve to make money off of the work that they put in and they deserve a portion of the money made off of their image. However, the NCAA appealed, referencing, in part, that the precedent set in *Board of Regents* about players not being paid to respect the integrity of the game. On appeals, the Ninth Circuit Court of Appeals upheld in part and overturned in part Judge Wilken's ruling. Judge Jay Bybee wrote the opinion that upheld the ruling that the NCAA violates the Sherman Antitrust Act and may have done so for years. Judge Bybee stated that NCAA member schools and conferences are in violation of the law by not "allowing NCAA members to give scholarships up to the full cost of attendance."¹⁰ He also stated that the 1984 *Board of Regents* case should not be seen as disallowing amateur rules to be questioned as a matter of law, stating that "[a]lthough we agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive, we hold that those rules are not exempt from antitrust scrutiny;"¹¹ Bybee upheld the requirement that schools must provide a full cost of attendance stipend to athletes. However, Judge Bybee managed to protect the NCAA by overturning the

⁹ O'Bannon v. National Collegiate Athletic Association; Electronic Arts INC. ; and Collegiate Licensing Company, "Finding of Facts and Conclusions of Law," No. 4:09-cv-03329-CW, Id. at 96 (D. California August 8, 2014).

¹⁰ O'Bannon v. National Collegiate Athletic Association, Case Nos. 14-16601 and 14-1708 (U.S. 9th Cir., September 30, 2015)

¹¹ Id. at 7.

injunction of the five-thousand-dollar trust for money made using the likenesses of players, or “NIL Rights”. The decision hinged on two prongs: For one, the judges had difficulty determining why it would be antitrust if institutions colluded to cap pay for athletes at zero dollars for “NIL rights”, but acceptable for institutions to collude to cap pay for athletes at an arbitrary number such as five-thousand dollars. The second prong to the court’s decision was, as Judge Bybee said, “offering [student-athletes] cash sums untethered to educational expenses”—such as \$5,000 a year for NIL rights—would transform NCAA sports into ‘minor league status.’”¹² The O’Bannon led class-action lawsuit attempted to appeal the case to the Supreme Court, but they decided not to grant *certiorari*, effectively leaving the amateur status of athletes in limbo until another landmark case comes along to break the gridlock. The players can take solace in the partial dissent written by Ninth Circuit Court of Appeals Judge Sydney Thomas whom states in her opinion, Judge Wilken’s five-thousand-dollar trust judgement is an appropriate legal remedy.¹³ It is particularly interesting to note that the decision of Judge Wilken did not arbitrarily cap the NIL Rights trust at five thousand dollars. She instead suggested that five thousand should be the floor, stating “[a]lthough the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete.”¹⁴

C. The Northwestern University Fight for Labor Rights

At the same time the NCAA was fighting the ruling in the O’Bannon case, players at Northwestern University attempted to unionize and threatened to go on strike. National College Players Association (NCPA) President Ramogi Huma, Northwestern quarterback Kain Coulter, and former University of Massachusetts basketball player Luke Bonner received help from the Steelworkers Union and filed

¹² Id. at 56, 62.

¹³ Id. at 4

¹⁴ “Finding of Fact” Id. at 96.

their petition to the National Labor Relations Board (NLRB). In comments made on the ESPN show *Outside the Lines*, Huma stated “This is about finally giving college athletes a seat at the table.”¹⁵ The NLRB dealt a massive blow to the fight for players to remove their amateur status: Five members of the NLRB panel voted unanimously to strike down the players claims that they should be treated, not as the coined term “student athletes,” but as employees of their universities. The players core belief was that they worked hours on end to generate money for their universities at the cost of their free time, and especially impacting their lives as students. The NLRB took issue with the fact that “the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.”¹⁶ To the NLRB, this decision was analogous to allowing a single team, such as the Minnesota Vikings, to create a union solely for their team, which represented only their team’s interest. Once again, the NLRB left the future ambiguous for players to potentially unionize; nowhere in the NLRB’s report did they say that athletes could not be classified as employees, and they stated that “[a]s a final note, the Board’s decision not to assert jurisdiction does not preclude a reconsideration of this issue in the future.”¹⁷ In fact, NLRB President, Wilma Lieberman stated, “There may have been some sympathy for the players’ argument... [b]ut siding with the players may have seemed like too great a leap, so this is a compromise.”¹⁸ This was yet another instance of what seems a like zero sum game for the so-called “student athletes” at NCAA member institutions. In the Washington

¹⁵ Tom Farrey, [Kain Coulter Starts Union Movement](http://www.espn.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union), Sports Illustrated (Jan. 28, 2014), http://www.espn.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

¹⁶ Case 13–RC– 121359 (2015) (not reported in Board Volumes)

¹⁷ Id. at 6.

¹⁸ Ben Strauss, [N.L.R.B. Rejects Northwestern Football Players’ Union Bid](https://www.nytimes.com/2015/08/18/sports/ncaafotball/nlrb-says-northwestern-football-players-cannot-unionize.html), New York Times (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafotball/nlrb-says-northwestern-football-players-cannot-unionize.html>.

Law Review journal article titled “The Myth of the Student Athlete: The College Athlete as Employee” authors Robert A. McCormick and Amy Christian McCormick state “Grant-in-aid athletes in revenue-generating sports at NCAA Division I institutions are employees under the common law.”¹⁹ They go on to add that “[athletes] perform services for the benefit of their universities under an agreement setting forth their responsibilities and compensation, are economically dependent upon their universities, and are subject virtually every day of the year to pervasive control by the athletic department and coaches.”²⁰ Therefore, under this test, the authors believe that athletes are indeed employees and as such, should be afforded basic rights given to employees.

III. Donald De La Haye and the New Fight for Players Rights

On June 10th, 2017, UCF kicker Donald De La Haye posted a video to his YouTube channel. At the time, the junior kickoff specialist had approximately 56,000 subscribers. Prior to this De La Haye’s channel featured videos of him committing incredible athletic feats including videos of him doing impressions of other position groups, making difficult kicks, or just “vlogs” of his life. Many of these videos revolved around De La Haye’s life as a division-one athlete at The University of Central Florida. However, the June 10th video had a whole new tone to it. The video was titled “Quit College Sports or Quit YouTube?” and in which De La Haye told his subscribers that “some people upstairs ain’t happy” about the fact that his videos portrayed his life as a Division One athlete.²¹ According to De La Haye, “I guess I can’t make any videos that make it obvious that I’m a student athlete. ‘Cause, that makes it seem like, I’m using my likeness and my image to make money, which I’m really not.”²² This drew the media’s attention, the

¹⁹ Robert A. McCormick & Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete as an Employee, 81 Wash. L. Rev. 71 Id.at 96 (2006).

²⁰ Id. at 97.

²¹ Deestroying, *Quit College Sports, or Quit Youtube?*, YouTube (Jun. 10, 2017), <https://www.youtube.com/watch?v=k3gdVzq3nm4&t=71s>

²² Deestroying, *I Lost My Full D1 Scholarship Because of my YouTube Channel*, YouTube (Jul. 23, 2017), <https://www.youtube.com/watch?v=Fh69-X6X55w&t=9s>.

Washington Post even commenting on De La Haye's video saying, "Would you mind if we put this video in our player to be featured on our site?" The NCAA found that De La Haye was in violation of bylaw 12.4.4 which "states that an athlete 'may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business.'" Over the next few months the story seemingly died down as Donald was forced to choose between his source of income and his athletic scholarship. Finally, the NCAA communicated their decision with UCF and Donald: Donald could continue to make videos on his YouTube channel, but he would have to forgo any monetization that he would receive for the videos. If Donald chose to keep the monetization he would be ruled ineligible and UCF would be forced to rescind his scholarship. Instead of backing down De La Haye took a stand for the rights of athletes under the umbrella of the NCAA and decided that he would not forgo the money he made from his YouTube channel, meaning that he would lose his scholarship to UCF. In a video posted July 31, 2017, titled "I lost my full D1 scholarship because of my YouTube channel..." De La Haye announced his decision. This video kicked off a media frenzy with media outlets both questioning, and agreeing with the NCAA's decision. A Forbes article entitled "NCAA fails kicker Donald De La Haye and all Student-Athletes," author Darren Heitner says "the spotlight should be shone [not on De La Haye but] on the NCAA's ludicrous rules that it continues to enforce against individuals it claims are students-first in order to continue an absurd allegation that it promotes a sense of amateurism." Heitner also says "the lack of support received by De La Haye has served as a disappointment and should be a real wake up call to other college athletes who believe that their interests are always a top priority."²³ A contrasting article from Sports Illustrated paints the NCAA as the accidental bad guys; they clarify that it was UCF's decision to strip De La Haye of his scholarship and remove him from the team due to their fear of him being ruled ineligible. They

²³ Darren Heitner, NCAA Fails Kicker Donald De La Haye And All Student-Athletes, Forbes (Aug. 3, 2017, 7:44 AM.), <https://www.forbes.com/sites/darrenheitner/2017/08/03/ncaa-fails-kicker-donald-de-la-haye-and-all-student-athletes/#4158ad9e3776>.

pointed to ongoing cases such as Baylor and University of Mississippi (Ole Miss) where the NCAA would likely crack down hard and be lauded for placing a more draconian punishment on teams. They also made perhaps the best point of all: “The NCAA very much wants you to know that the NCAA didn’t do this to De La Haye. It was the mean old schools—which, of course, run the NCAA.”²⁴ As has been previously stated, the schools give the NCAA power. The voting members of the NCAA develop the bylaws such as rule 12.4.4 which made Donald De La Haye ineligible. It is member institutions, such as UCF, that are the reason that the NCAA has run into the legal issues it has. The NCAA itself is nothing more than a figure head and a conduit for enforcing rules that are enacted by the very schools it governs. That is why it serves as such a strange dichotomy when schools such as UCF, University of Mississippi (Ole Miss), Baylor, University of Southern California (USC), Penn State, Southern Methodist University (SMU), or any other of the numerous schools speak out after their program or its players are punished by the NCAA. Of course the institutions know the rules because they are the ones that have enacted them. What is more, they are ultimately the ones that are enforcing them. In a 39-page description of the infractions process, the NCAA itself defines its infractions committee as being comprised of “individuals serving as volunteers from NCAA member institutions and conferences and individuals from the general public who have legal training.”²⁵ It is clear that institutions are punishing themselves for stepping out of line for the infractions that they have committed. In the process, athletes like Donald De La Haye who suffer while his university points the finger at an institution that they themselves are responsible for. It is the ultimate smoke and mirrors technique aimed at keeping the unknowing observer pointing their finger at the Great and Powerful Oz, while ignoring the man behind the curtain. As for

²⁴ Andy Staples, [Singing With Saquon? Current Stars Should Take NCAA at Its Word and Cash in Now on YouTube](https://www.si.com/college-football/2017/07/31/NCAA-statement-still-allows-stars-to-cash-in-on-YouTube), Sports Illustrated (Jul. 31, 2017), <https://www.si.com/college-football/2017/07/31/NCAA-statement-still-allows-stars-to-cash-in-on-YouTube>.

²⁵ Miller, Ted. “Mailbag: Breaking Down How USC Was Wronged.” ESPN, ESPN Internet Ventures, 30 Mar. 2015, proxy.espn.com/blog/pac12/tag?name=travis-wilson.

the suffering Donald De La Haye endured as a result of his lost scholarship, the losses have not been too terrible. As of January 24th, 2018, Donald's "Social Blade," a website responsible for tracking YouTube subscriber, viewer, and earnings numbers, says Donald has 527,437 subscribers, as well as an estimated income of anywhere from 2.9 thousand to 46.8 thousand dollars per month.

IV. Player Opinions at UCF

While conducting my research I spoke to numerous UCF football players about the issues discussed in this paper.²⁶ I was both surprised and intrigued by some of the answers I received. I spoke to both scholarship athletes, and non-scholarship athletes. I asked generally about what their feelings were with some and others got into more detail. The first athlete interviewed, Player 1, was a non-scholarship athlete. He was adamantly against the idea of players being paid. He listed the benefits given to players, including their full cost-of-attendance scholarships, and even a Publix gift card, and said that was enough to provide athletes quality of life. When asked about whether athletes should have their scholarships guaranteed for four years, he stated that they shouldn't, because some of the athletes would get complacent and not work hard enough to justify giving them the scholarship. He was also adamantly against players making money off their likenesses; in his opinion, the money that universities make off of their players likenesses are fairly earned by the university because they finance the opportunity those players have to better themselves. Player 1 did agree, however, that players should be given better options for insurance should they receive a major injury. The opinions of the scholarship athletes and non-scholarship athletes differed greatly.²⁷ I spoke to a group of four scholarship athletes, Players 2, 3, 4, and 5. These players had a completely different tone than Player 1. All four players believed that they should be compensated in some way and that making money off of their

²⁶ For purposes of confidentiality, the identity of each football player has been omitted from this article. However, the original interview comments and names of the players interviewed are retained by the author of this paper.

²⁷ Face-to-face interview with UCF Football Player 1, University of Central Florida, (February 9, 2018).

likeness would be a fair alternative to making a simple wage. These players also agreed they should have medical insurance provided to them should they get injured. The most interesting part of these interviews was that Player 3 had no idea that his scholarship was year-to-year and not guaranteed. The other three players and myself informed him that scholarships are year-to-year and largely up to the coach's discretion.²⁸ This suggested that universities do not make it clear to their athletes that they are living year-to-year and can lose their scholarship at the drop of a hat. Generally, the players were all in agreement that the current benefits they are provided are not sufficient. The final player I talked to, Player 6, is also a scholarship athlete. Player 6 had a more thoughtful response to the issues I discussed with him. He was surprisingly not for the idea of athletes getting paid. He said that the benefits athletes get from their scholarships are enough for them to live on and are sufficient compensation for their time. He was unsure on his feelings toward insurance and scholarship guarantees. He said he believes in them but does not know if it's worth it for the individual universities to shell out that money for their players. He had to thoroughly consider whether or not players should be able to use their likenesses to make money. He was opposed to the idea of players making money from their jerseys if they are sold in the bookstore because "[the University] deserves it, we wouldn't have jerseys if it wasn't for them." Then I posed him the question of whether or not he could use his likeness in the way that Donald De La Haye, his ex-teammate, did; Player 6 responded "that's a good [...] question" and seemed to genuinely ponder the query for a minute. He finally answered that in special circumstances like that, it should be taken case-by-case and that in De La Haye's case because he was capitalizing off of his position as a UCF football player, it was "a toss-up."²⁹

V. Conclusion

²⁸ Face-to-face interview with UCF football players 2, 3, 4, 5, University of Central Florida, (February 10, 2018).

²⁹ Face-to-face interview with UCF football player 6, University of Central Florida, (February 10, 2018).

It is clear that the NCAA, in their practice against allowing athletes to make sufficient compensation or to make money off of their likeness, are violating anti-trust measures. The Sherman Antitrust Act was passed to outlaw "every contract, combination, or conspiracy in restraint of trade ... [and any] monopolization, attempted monopolization, or conspiracy or combination to monopolize."³⁰ In the examples of *Board of Regents* and *O'Bannon*, the courts ruled that the NCAA was engaging in some form of antitrust practices that were limiting the ability for schools, or players, to determine how they could market themselves and make money. In both cases, the courts took massive steps to limit the power the NCAA has over its athletes and put power into the hands of the athletes themselves. In *Board of Regents*, the court took a massive power away by allowing conferences and individual schools the power to market themselves and to choose their own schedules within the realm of college football. The NCAA was able to make up the loss of that revenue stream by signing the massive TV rights deal for "March Madness." However, the student athletes who ultimately playing to earn the money for the NCAA and their respective schools, see very little benefits. Outside of their scholarships, which admittedly are a large expenditure given to athletes who would otherwise not have the opportunity to attend these often-prestigious universities, other basic rights are not being met. Thanks to the *O'Bannon* ruling, universities are finally offering full cost of attendance scholarships, instead of leaving student athletes thousands of dollars short with no way to make up the difference given their inability to work while juggling a full-time sport and full-time classes. There are certain basic rights that should be allotted to athletes.

A. Full Cost of Attendance Scholarships and Insurance

The first thing is something that many people already assume exists. Athletes at major universities should be guaranteed their scholarships until they attain a degree. As it currently stands, athletes are given their scholarships on a year-to-year basis, making them essentially contracted by their universities. Coaches can seemingly on a whim

³⁰ 15 U.S. Code § 1 (1890).

revoke an athlete's scholarship at the end of the year, leaving athletes in limbo year-to-year as they hope to retain their scholarship to continue on their education and continue playing their sport. If the NCAA really is hoping to attain their stated mission of providing a quality education to their "student athletes" then they should guarantee the scholarships of their athletes until they can attain their degree so as to ensure that their educational needs are met as they fulfill their obligation to their university. Another basic necessity that should be met for athletes at universities is to provide them insurance. Many of these athletes put their bodies on the line day in and day out. However, if they are seriously injured they can be swept aside, forced to fend for themselves without the one thing that got them to a position they likely would not have been in otherwise. What's more, athletes often face large medical bills from their injuries that they cannot hope to pay for. Therefore, on top of guaranteeing their scholarships so these athletes can still get their degree, the universities should provide them with insurance in order to offset any medical costs they may incur as a result of any injury they sustain on behalf of their university. Universities should also provide athletes with workshops that teach them basic skills necessary to survive in the professional world; skills such as effective interviewing, resume building, and even clothing drives to allow athletes access to business attire for interviews and future jobs. The fact of the matter is the NCAA, but most importantly its member institutions, have colluded to use athletes for their resources, their bodies. These universities have failed at their stated mission of creating "student athletes." Not because the task is impossible, but because these universities have colluded against the athletes' best interests to ensure that they're part of the money-making machine that is college athletics.

B. Stopping Anti-Trust Ban on Player's Likenesses

There is no reason that athletes should be paid a wage. The reason for this is three-fold. The first being that universities would depend largely on student fees to pay these wages, putting undue burdens on non-student-athletes, who shouldn't be responsible for the financial stability of their athletic departments. The second is that compensation amongst sports would be so drastically disproportional

that it would be difficult to create fairness amongst individual sports. For instance, the revenue that college football brings in compared to men's golf would be so much greater that it would be unfair to pay them the same wage, but also unfair to minimize golf's impact. The third and final reason is that certain schools with enough revenue could corner the market on the highest quality athletes, essentially wrecking competitive balance. The Supreme Court has held that restrictions of trade in the world of sports are not unreasonable if they exist to keep competitive balance. Therefore, a wage would not be an appropriate legal remedy in this issue. The answer is simple. Not allowing athletes to make money off of their own likeness, their own being, is an unreasonable restriction of trade. There has been an organized attempt by the member institutions of the NCAA to keep athletes from being able to make money off of their likeness, such as the *O'Bannon* case and the more recent case of Donald De La Haye. While the ruling of Judge Cynthia Wilken was a step in the right direction, under the letter of the law it can be seen as still being a product of collusion to cap or floor players earnings. The answer to this issue is simply allowing athletes to organize in a manner similar to what was attempted at Northwestern and allow them to collectively bargain for the amount that can legally be placed in trust for use of their likenesses. The organizing players were correct in believing they deserve a seat at the table. For the purposes of collective bargaining, they should be seen as employees due to the time and effort they contribute to their universities. The NLRB should validate this by recognizing these athletes as employees in order to allow them to negotiate for the monetization of their own rights. There is another change that needs to be addressed and this issue is not legal in nature but societal. Members of the collegiate sports watching public should stop believing the NCAA narrative. It starts by not addressing these young men and women as "student athletes" and recognizing them as what they really are; cogs in a money-making wheel. Society needs to hold the NCAA, and the colluding member institutions accountable for the issues that they have caused. Only then will this situation begin to be appropriately rectified.

THE HIGH ROAD: AN ANALYSIS OF MARIJUANA AS AN IMPAIRING SUBSTANCE AND WHY MARIJUANA LAWS FAIL TO ADHERE TO THE FRAMEWORK OF DUI ALCOHOL LEGISLATION

Michael McWaters

The trend of legalizing marijuana for medical or recreational purposes has led to the proliferation of its consumption within the United States, and this significant increase in marijuana usage has fueled concerns nationally regarding the new public safety crisis of drugged drivers.¹ Indeed, a report on drugged driving from the Governors Highway Safety Association found that, “in Colorado, marijuana-related traffic deaths increased 48% in the three-year average (2013-2015) since Colorado legalized recreational marijuana.”² In response, several states have enacted per se driving under the influence (DUI) laws which criminalize driving with a certain amount of tetrahydrocannabinol (THC) – the psychoactive compound in marijuana – in a sample of whole blood.³ Lawmakers claim that these regulations are legitimate because they follow the same quantifiable standard as the .08 blood alcohol content (BAC) limit for DUI alcohol.

While such laws may appear valid in that they mimic the familiar .08 per se standard from DUI alcohol prosecutions, THC impairment is not analogous to alcohol impairment. If the state wishes to prosecute individuals for unlawful impairment, it bears the burden of

¹ See NHTSA, DRUG PER SE LAWS: A REVIEW OF THEIR USE IN STATES 3 (2010), “there has been a growing call, particularly from the law enforcement community, for more effective legal tools to combat drugged driving.”

² Drug Impaired Driving – A Guide for States, Governors Highway Safety Association report, 10 (2015).

³ As of 01/12/2018, five states have enacted specific per se limits for THC and nine states have enacted zero tolerance laws for THC or its metabolites. See Drug-Impaired Driving Laws - GHSA, Drug Impaired Driving (2018), <https://www.ghsa.org/state-laws/issues/drug%20impaired%20driving> (last accessed February 9, 2018).

demonstrating that the substance in question is a causal factor leading to criminally impaired driving.⁴ No scientific relationship has been demonstrated to justify any THC per se limit based on impairment,⁵ and these myopic restrictions serve only to hinder further research into the drugged driving problem while arbitrarily convicting citizens based on insignificant concentrations of THC in the bloodstream.

Along with its significance as a timely issue, the debate regarding drugged driving laws is also of great relevance to aspiring or current DUI advocates who will represent individuals charged with these crimes in the court of law. Understanding the sound jurisprudence – or lack thereof – undergirding these laws is critical to mounting a successful defense or prosecution for DUI and driving under the influence of drugs (DUID) accusations. The current DUID laws will almost certainly be refined in the near future, and this article seeks to demonstrate why this is necessary and how claims of impairment and drugged driving might be more justly settled.

Part I of this article will explore the history of DUI legislation in the United States, how lawmakers agreed upon .08 BAC as the legal limit for DUI alcohol, and the relevance of the established scientific framework of the twentieth century for determining what constitutes dangerous criminal impairment. Part II will analyze the existing scholarship which investigates the relationship between THC concentrations and crash risk, as well as highlight issues with current THC concentration measurement and per se enforcement mechanisms for DUID laws. Part III will identify the negative ramifications of continuing the existing DUID policies and propose alternative methods for future drugged driving jurisprudence.

I. An Overview of the History of DUI Laws Pertaining to Alcohol:

⁴ Commonwealth v. Connolly, 394 Mass. 169, 474 N.E.2d. 1106 (1985), holding that a link between mental or physical impairment and impaired driving must be established.

⁵ Ed Wood, Why a 5ng/ml THC limit is bad public policy - and the case for Tandem per se DUID legislation, *The Journal of Global Drug Policy and Practice* 1–20 (2016).

A. **How we arrived at .08 as the standard for criminal impairment**

When the crime of driving while impaired by alcohol was first created with the advent of the automobile, jurors were hesitant to punish offenders without clear evidence of criminal impairment.⁶ The issue of determining the level of intoxication was alleviated with the invention of the Drunk-O-Meter in 1938,⁷ but law enforcement still lacked scientific evidence which could demonstrate a clear link between high BAC and an increased crash risk. For a per se regulation, like the nation's initial .15 BAC limit, to have legitimate penal effect, the onus was on the state to prove a scientific link between the impairing substance and the criminal behavior.⁸ As one doctor remarked in a letter to the American Medical Association (AMA): "Without proof that driving with, say, a .15 percent BAC actually caused an unacceptable number of road accidents, the public was unmoved by this mechanical wonder in cases with ambiguous nonmachine evidence of morally blameworthy impairment."⁹

The efficacy of the Drunk-o-Meter and later the breathalyzer hinge upon the incredibly consistent behavior of ethyl alcohol among humans.¹⁰ Thanks to the uniformity of this substance, a measure of an individual's BAC allows law enforcement to reliably infer their level

⁶ Andrea Roth, *The Uneasy Case for Marijuana as Chemical Impairment under a Science-Based Jurisprudence of Dangerousness*, 103 Calif. L. Rev. 850 (2015).

⁷ This innovative device different from earlier testing methods in that it was non-invasive and could provide an estimate of the subject's BAC during a traffic stop. The Drunk-O-Meter required the subject to blow air into a balloon, which was subsequently introduced into a chemical solution. The solution would change color in the presence of alcohol, and the degree of color change allowed law enforcement to estimate the subject's breath alcohol concentration. From this information, police could determine blood alcohol concentration. See BARRON H. LERNER, *ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900*, at 24 (2011).

⁸ Roth, *supra* note 6, 844-845.

⁹ See LERNER, *supra* note 7, at 5.

¹⁰ Zack G Goldberg, *Potholes: DUI Law in the Budding Marijuana Industry*, 82 Brook. L. Rev. 243 (2016).

of impairment from alcohol.¹¹ Relatively small and water-soluble, alcohol dissolves quickly in the blood stream and rapidly crosses the blood-brain barrier.¹² Once ingested, equilibrium is readily achieved between the level of alcohol in the blood and in the brain. Thus, blood is an effective surrogate for determining the level of alcohol in the brain, which then allows scientists to determine the subject's level of impairment.¹³

This process of linking a certain BAC to dangerous driving was a long process throughout the nation's history, and a myriad of studies have been conducted which successfully demonstrate this relationship. Most notable among them is William Haddon, Jr.'s studies of nighttime single-car fatal accidents, and his case-control studies of drug concentrations in fatal crash victims.¹⁴ Haddon's emphasis on single-car crashes was highly effective at establishing causation; in these types of crashes, investigators could reliably assume that no other vehicles or outside factors influenced the accident – only the single driver was to blame.¹⁵ Haddon's studies paved the way for scientifically demonstrating that BAC at high levels, over 0.08, was causally linked to higher crash likelihood. Significant progress was also made in this field through the innovative research of Richard Holcomb. By randomly stopping drivers and measuring their BAC, Holcomb obtained samples of over 1,700 drivers' BAC to compare to

¹¹ Pal J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 482-483 (2015).

¹² Gary M. Reisfield, Bruce A. Goldberger, Mark S. Gold and Robert L. DuPont, *The Mirage of Impairing Drug Concentration Thresholds: A Rationale for Zero Tolerance Per Se Driving under the Influence of Drugs Laws*; *Journal of Analytical Toxicology*, 36:353-356 (2012).

¹³ *Id.*, at 353.

¹⁴ Haddon's analysis differed from previous studies in that he focused on nighttime, single-car fatal accidents, but also because he sought to identify a baseline percentage of drivers on the road who were drinking. This information was necessary to conclude that alcohol truly caused accidents. See William Haddon Jr. & Victoria A. Bradess, *Alcohol in the Single Vehicle Fatal Accident: Experience of Westchester County, New York*, 169 *JAMA* 1587 (1959).

¹⁵ Paul L. Zador, *Alcohol-Related Relative Risk of Fatal Driver Injuries in Relation to Driver Age and Sex*, 52 *J. STUD. ALCOHOL* 302, 303 (1991) ("The relative crash risk for drivers fatally injured in single-vehicle crashes provides a good measure of the true contribution of alcohol to increased risk of involvement in the serious crash.").

data from drivers involved in crashes in the same area.¹⁶ From this data, Holcomb concluded that drivers with a BAC of .15 were thirty-three times more likely to be involved in an accident than a sober driver.¹⁷ Haddon and Holcomb established through their analysis that BACs at or over .15 were causally linked to increased crash risk, but the question still remained of connecting lower BACs to increased crash risk.

That connection was finally legitimized through the work of Robert Borkenstein and his famous Grand Rapids Study.¹⁸ In his effort to link lower BACs with increased crash risk, Borkenstein analyzed data from drivers involved in car crashes in the city of Grand Rapids, Michigan for a twelve-month period in 1962–63 and compared them to a control group who had driven at the same times and locations without being involved in a crash.¹⁹ Borkenstein discovered that drivers with non-zero BACs less than .04 percent were no more likely than sober drivers to be involved in crashes.²⁰ The smoking gun for Borkenstein, however, was his conclusion that those with a BAC of .08 percent were nearly twice as likely to be in a crash as similarly situated sober drivers; those with a BAC of .10 percent were nearly six times as likely; and those at .15 percent were over ten times more likely.²¹ Lastly, Borkenstein revealed that injury from a crash increased with the driver's BAC level, starting at .08 percent.²²

While the .08 BAC level has been causally linked to impairment, this is not to suggest that some drivers below this level are not also impaired or that no individuals above .08 may be able to drive safely. Instead, the .08 level reflects a union between the state's interest in keeping impaired drivers off the road and individual's interest to drive

¹⁶ Richard L. Holcomb, Alcohol in Relation to Traffic Accidents, 111 JAMA 1076, 1077 (1938).

¹⁷ *Id.*, at 1081.

¹⁸ ROBERT F. BORKENSTEIN ET AL., THE ROLE OF THE DRINKING DRIVER IN TRAFFIC ACCIDENTS (1964).

¹⁹ *Id.*

²⁰ *Id.* at 213.

²¹ *Id.* at 213.

²² *Id.* at 176-77.

under a moderate influence of alcohol that does not translate to significantly higher crash risk.²³ Around the world, countries' BAC limits range from .00 (Hungary) to .15 (Guinea-Bissau).²⁴ BAC levels as low as .01 can impair some drivers,²⁵ but modern legal systems have chosen not to prosecute individuals below a certain threshold as it is reasonably likely that these individuals are not significantly impaired. This conclusion is based on public policy and politics, not science.

Nevertheless, the existence of some causal link between BAC levels and crash risk is still necessary. While the per se limit itself need not be a bright line above which all drivers are hopelessly impaired and below which all drivers are unaffected, there must be some scientific evidence to demonstrate a positive relationship between concentration of the impairing substance and crash risk to justify a jurisprudence of dangerousness.²⁶ Simply put, while the precise limit itself need not be evidence based, the relationship undeniably should. This is where the existing marijuana legislation falters.

B. The significance of the scientific framework of legitimate DUI laws

It is difficult to overstate the significant implications of the DUI alcohol model pioneered by Haddon and his progeny. This scientific framework clearly delineated the necessary steps to establish a legitimate relationship between impairment and dangerousness. For these scientists, that model relied on epidemiological studies of single-car crashes and case-control studies compared to sober drivers in similar environments.²⁷ Perhaps the most important lesson from

²³ Fell, J. C., Voas, R.B., The effectiveness of reducing illegal blood alcohol concentrations (BAC) limits for driving: Evidence for lowering the limit to .05 BAC. *Journal of Safety Research*, 37, 233-243 (2006).

²⁴ World Health Organization, *Global Status Report on Alcohol and Health*, 67-68 (2014).

²⁵ Moskowitz, H., Robinson, C., Driving related skills: Impairment at low blood alcohol levels. Noordzij, P., Rosbach, R., (eds). *Proceedings of the Tenth International Conference on Alcohol, Drugs, and Traffic Safety*. Elsevier, Amsterdam, pp. 79-87 (1987).

²⁶ See Roth, *supra* note 6, at 845.

²⁷ *Id.*, at 865.

the DUI alcohol era was that demonstrating the impairing effects of a substance is wholly insufficient as a justification under a jurisprudence of prohibition. While the inebriating properties of alcohol were well understood and accepted during this period, it was the epidemiological rigor of systematic case-control studies which truly legitimized the .08 limit for unlawful impairment.

In the context of marijuana and driving under the influence of drugs (DUID) laws, this venerable framework still applies today. While convenience and familiarity might encourage lawmakers to import a per se limit to regulate THC while driving, this overlooks the crucial fact that a scientific relationship between THC impairment and increased crash risk has yet to be established.²⁸ Until systematic study can verify the alleged link between THC levels and dangerous driving, any law criminalizing driving with THC in the bloodstream in a marijuana-legal state must be regarded as illegitimate. Moreover, laws relying on a per se limit are subject to additional scrutiny in that the state must demonstrate that most individuals above the per se limit are criminally impaired – a burden which is essentially impossible to satisfy for THC.²⁹ This standard represents yet another hurdle that legislators have failed to overcome in their quest to criminalize driving under the influence of THC without scientific support.

II. The Issues with Criminal DUID Laws

As more states around the country begin to permit the medical and recreational usage of marijuana, their legal systems must adapt to successfully integrate this once-prohibited substance into the legal realm. Of paramount importance is the issue of DUID laws and their enforcement. For these laws to be validly enforced, however, it must

²⁸ Compton, R. P. & Berning, A., Drug and alcohol crash risk. (Traffic Safety Facts Research Note. DOT HS 812 117). Washington, DC: National Highway Traffic Safety Administration (2015).

²⁹ See discussion *infra* Part II.C and Goldberg, *supra* note 10, at 253. “...the fact that marijuana stays in the human body for days after usage, and that dosages of THC create relatively variable levels of impairment depending on individual tolerance, make it nearly impossible to accurately determine if someone is impaired by marijuana at a given time via blood testing.”

be scientifically demonstrated that a measurable quantity of the drug in an individuals' body causes criminal impairment.

The issue with existing marijuana laws is twofold. First, unlike alcohol, marijuana has not been causally linked to an increase in crash risk.³⁰ This is a prerequisite for valid enforcement of laws that prohibit driving while high. Society agrees to punish the drunken driver, but not to punish all individuals with alcohol in their body because it is understood that a certain level of alcohol in the bloodstream is necessary to cause impairment. While no doubt our roads would be safer if any individual drinking any amount of alcohol were not permitted to drive,³¹ society prefers to prosecute only those individuals with a BAC at or above what has been scientifically demonstrated to increase the risk of crashes. While a panoply of studies attests to marijuana's impairing effects,³² evidence that the substance increases the likelihood of vehicular crashes is sorely lacking.

Second, marijuana is unlike alcohol in that its effects and duration vary heavily among users.³³ Whereas the level of alcohol in the bloodstream and how it translates to impairment is relatively uniform among humans, marijuana concentrations – measured in nanograms per milliliter (abbreviated ng/mL) – vary greatly in their impairing

³⁰ See NHTSA report, *supra* note 1, citing: Terhune et al., *The Incidence and Role of Drugs in Fatally Injured Drivers*. (Report No. DOT HS 808 065). Washington, DC: U.S. Department of Transportation (1992).; Mathijssen et al., *Use of psychoactive medicines and drugs as a cause of road trauma*. In D. R. Mayhew & C. Dussault (Eds.), *Proceedings of Alcohol, Drugs & Traffic Safety - T 2002: 16th International Conference on Alcohol, Drugs & Traffic Safety, August 4-9, 2002* (Vol. 2, pp. 451-457). Montreal, Canada: ICADTS (2002).

³¹ Henry Newman & Edwin Fletcher, *The Effect of Alcohol on Driving Skill*, 115 JAMA 1600 (1940).

³² See Harman, R. I. Huestis, M. A., *Cannabis Effects on Driving Skills*. *Clinical Chemistry*, 59(3), 478-492 (2013).; Moskowitz, H., *Marijuana and Driving*. *Accident Analysis and Prevention*, 17:323-345 (1995).; Robbe, H. W. J., & O'Hanlon, J. F., *Marijuana and Actual Driving Performance*. (Report No. DOT HS 808 078). Washington, DC: U.S. Department of Transportation (1993).

³³ Mateus M. Bergamaschi, et. al, *Impact of Prolonged Cannabinoid Excretion in Chronic Daily Cannabis Smokers' Blood on Per Se Drugged Driving Laws*, *Clinical Chemistry*, 519-526 (2013).

effects.³⁴ Chronic and medical users can maintain levels of 10 ng/mL several hours after consumption,³⁵ far above the 2 ng/mL and 5 ng/mL levels established by various states. Prosecuting these individuals as dangerous when they are not legitimately impaired represents a denial of justice and enforcing these standards that criminalize impaired as well as non-impaired drivers is irresponsible.

A. Lack of demonstrated relationship between THC concentration and crash risk

As was the case with alcohol, the ultimate linking factor between substance use and crash risk is single-car crashes. Unlike multi-vehicle crashes, culpability in single-car crashes involves far fewer variables and can be readily inferred from the involvement of the substance, either THC or alcohol.³⁶ Regrettably, no study has yet been conducted that focuses on single-car crashes with drivers tested immediately after the accident and which distinguishes between low, moderate, and high levels.³⁷ This last point is particularly important for the establishment of any per se regulations; for these standards to be considered valid, it must first be demonstrated that a substance is not impairing below the limit but does impair most people above that limit.

While they do not precisely imitate Haddon's study in all the ways identified, four recent studies comparing THC impairment and single-car crashes are available for review. The first and most comprehensive, conducted by Romano and Voas (2011), analyzed data from 44,000 single-car fatal crashes.³⁸ Interestingly, they concluded that stimulants were a greater factor in increased crash risk than cannabis, and that THC users were underrepresented in

³⁴ Mark J. Neavyn et al., *Medical Marijuana and Driving: A Review*, J. MED. TOXICOLOGY 269, 271 (2014)

³⁵ Erin L. Karschner et al., *Do Delta9-Tetrahydrocannabinol Concentrations Indicate Recent Use in Chronic Cannabis Users?* 104 ADDICTION 2041, 2046 (2009).

³⁶ See Zador, *supra* note 15.

³⁷ See Roth, *supra* note 6, at 897.

³⁸ Eduardo Romano & Robert B. Voas, *Drug and Alcohol Involvement in Four Types of Fatal Crashes*, J. STUD. ALCOHOL & DRUGS, at 567, 571 (2011).

single-car crash fatalities.³⁹ Likewise, Poulsen et al. (2014) found that only 7.6 percent of drivers had any amount of THC in their system.⁴⁰ The study's authors concluded that there was no increased risk of fatal crashes from THC blood concentrations over 5ng/mL.⁴¹ Similarly, both Gjerde et al. (2011)⁴² and Longo et al. (2000) concluded that there was no statistically significant connection between positive tests for THC and fatal or nonfatal road accidents.⁴³ These results are consistent with more recent scholarship, finding "the more carefully controlled studies, that actually measured marijuana (THC) use by drivers rather than relying on self-report, and that had more actual control of covariates that could bias the results, generally show reduced risk estimates or no risk associated with marijuana use."⁴⁴

Logan, author of *Marijuana and the Cannabinoids*, argues that the ability of users to notice the impairing effects of the substance and act accordingly may contribute to harm reduction.⁴⁵ By contrast, alcohol users typically suffer from overconfidence and fail to adequately measure their level of impairment and relative ability to perform complex cognitive tasks like driving. Robbie and O'Hanlan

³⁹ Id.

⁴⁰ Helen Poulsen et al., *The Culpability of Drivers Killed in New Zealand Road Crashes and Their Use of Alcohol and Other Drugs*, 67 ACCIDENT ANALYSIS & PREVENTION 119, 122 tbl. 1(2014).

⁴¹ Id. at 126. Roth, *supra* note 6, suggests "the Poulsen data likely overstates the crash risk of low THC blood levels because of the delay in testing blood samples for THC after fatal accidents."

⁴² Hallvard Gjerde et al., *Alcohol, Psychoactive Drugs and Fatal Road Traffic Accidents in Norway: A Case-Control Study*, 43 ACCIDENT ANALYSIS & PREVENTION 1197 (2011).

⁴³ Marie C. Longo et al., *The Prevalence of Alcohol, Cannabinoids, Benzodiazepines and Stimulants Amongst Injured Drivers and Their Role in Driver Culpability, Part II: The Relationship Between Drug Prevalence and Drug Concentration, and Driver Culpability*, 32 ACCIDENT ANALYSIS & PREVENTION 623, 626 & tbl. 2 (2000).

⁴⁴ Controlling for covariates is of exceptional importance because the group that most often consumes marijuana, young males, is also the group that is most often involved in car accidents. Controlling for this relationship dispels supposed risk in some studies. See Elvik, R., *Risk of Road Accident Associated with the Use of Drugs: A Systematic Review and Meta-analysis of Evidence from Epidemiological Studies*. *Accident Analysis & Prevention*, 60, 254–267 (2013).

⁴⁵ BARRY K. LOGAN, *MARIJUANA AND DRIVING IMPAIRMENT, MARIJUANA AND THE CANNABINOIDS*, 290-291 (2007).

suggest that subjects may overcompensate for their perceived impairment, effectively improving driving ability compared to sober driving.⁴⁶ This trend of some subjects demonstrating superior driving ability following THC consumption appeared at both low and high doses.

1. Other studies finding causality between THC and driving risk

The findings of non-single-car crash studies are less consistent, with results suggesting both increased and decreased risk from THC consumption. A case control study conducted by Li et al. using the National Highway Traffic Safety Administration's (NHTSA) Fatality Analysis Reporting System (FARS) and National Roadside Survey of Alcohol and Drug use found a heightened crash risk for drivers testing positive for THC at 1.83 times that of sober drivers.⁴⁷ A second analysis using the same datasets, conducted by Romano et al., identified no increased crash risk for drivers using marijuana.⁴⁸ Nevertheless, a subsequent investigation by Berning & Smither concluded that the limitations of the FARS dataset are not conducive to "unbiased, reliable, and valid estimates" of the risk of vehicular crash because of marijuana use.⁴⁹

A recent population-based study conducted in nine European Union countries, known as Driving under the Influence of Drugs, Alcohol and

⁴⁶ Robbe, H. W. and O'Hanlon, J. F., Marijuana and Actual Driving Performance. DOT HS 808 078. US Department of Transportation, National Highway Traffic Safety Administration (1993).

⁴⁷ Li, G., Brady, J. E., & Chen, Q., Drug Use and Fatal Motor Vehicle Crashes: A Case-Control Study. *Accident Analysis and Prevention*, 60, 205-210 (2010).

⁴⁸ Romano, et al., Drugs and Alcohol: Their Relative Crash Risk. *Journal of Studies on Alcohol and Drugs*, pp 1-9 (2014).

⁴⁹ The limitation identified in Berning and Smither's analysis is the lack of uniformity across states for both drug testing and drug reporting. Additionally, changes in testing and reporting practices over time also prevent comparisons of data across different states or years. See Berning, A., & Smither, D. D., Understanding the limitations of drug test information, reporting, and testing practices in fatal crashes. (Traffic Safety Facts Research Note. DOT HS 812 072). Washington, DC: National Highway Traffic Safety Administration 2-3 (2014).

Medicines (DRUID), is the largest epidemiological study to review drugged driving.⁵⁰ Investigators in this study sought to use odds ratios to estimate the risk of crash involvement of THC use in fatally and seriously injured motorists. The results were highly divergent, varying from .29 times to 25.38 times risk.⁵¹ The aggregate risk factor for seriously injured and fatally injured drivers was 1.39 and 1.33 times greater, but neither result was statistically significant.⁵² Unsurprisingly, a combined analysis of the DRUID data revealed the highest crash risk was for drivers with high alcohol concentrations (above .12 BAC) who were found to be 20-200 times more likely to crash.⁵³ THC-positive drivers were found to have an elevated risk at 1-3 times more likely than sober drivers, much like a BAC between .01 to .05.⁵⁴

B. Problems with measurement and generalization of THC impairment

As was articulated previously, alcohol concentrations are well-generalizable among humans because of the uniform manner by which the substance behaves in the body. Alcohol molecules' small size and water solubility allow them to quickly traverse the blood-brain barrier and establish an equilibrium concentration between the blood and the brain.⁵⁵ By contrast, THC is a relatively large and fat-soluble molecule that behaves differently than alcohol in the body, and across different human specimens.⁵⁶

⁵⁰ Hels, et al., Risk of Injury by Driving with Alcohol and Other Drugs. DRUID – Driving Under the Influence of Drugs, Alcohol, and Medicines, D2.3.5. (2011).

⁵¹ Id, at 8.

⁵² Id, at 6.

⁵³ Id, at 9.

⁵⁴ Id.

⁵⁵ Consensus report. Drug concentrations and driving impairment. Consensus Development Panel. Journal of the American Medical Association, 254, 2618–2621 (1985).

⁵⁶ Government Accountability Office, Report to Congressional Committees: Drug-Impaired Driving 15-293, 15 (2015). [hereinafter GAO Report]

Blood is an ineffective surrogate for determining the degree to which THC affects the brain for three reasons: (1) fat-soluble THC transcends the blood-brain barrier at a much slower rate than does alcohol.⁵⁷ This rate of transfer is significantly delayed, such that THC levels in blood can actually be decreasing as the concentration of THC in the brain reaches its peak.⁵⁸ (2) THC rapidly diffuses from the blood to fattier tissues like the brain, heart, and lungs.⁵⁹ The half-life for THC molecules is 96 hours, but the THC concentration in the blood typically falls by 90% only one hour after cannabis consumption.⁶⁰ (3) The abundance of fatty tissue in the brain means that THC remains present in the user's brain for much longer than it can be detected in blood samples.⁶¹ Mura et al. found that 100% of post-mortem blood samples revealed higher THC levels in the brain than in the blood.⁶²

“As the NHTSA website acknowledges, “[i]t is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects.” Indeed, researchers have found that chronic cannabis users develop a tolerance to many of the

⁵⁷ What level of THC in blood causes driving impairment?, We Save Lives (2017), <http://wesavelives.org/what-level-of-thc-in-blood-causes-driving-impairment/> (last visited Feb 8, 2018).

⁵⁸ See LOGAN, *supra* note 45, at 283 -284.

⁵⁹ Paul Armentano, Should Per Se Limits Be Imposed For Cannabis? Equating Cannabinoid Blood Concentrations with Actual Driver Impairment: Practical Limitations and Concerns, *HUMBOLDT JOURNAL OF SOCIAL RELATIONS* 49 (2013).

⁶⁰ Thus, THC remains present in the body and potentially capable of impairing the subject when a blood test would underestimate THC concentration. The rate at which THC exits the blood for fattier tissue is especially problematic for vehicle crashes because crash victim's blood is typically not analyzed until two to three hours following the accident. See Huestis MA, Henningfield JE, Cone EJ, Blood cannabinoids. 1. Absorption of THC and formation of 11-OH-THC and THCCOOH during and after smoking marijuana. *Journal of Analytical Toxicology*, 16: 276-82 (1992).; Toennes et al., Comparison of cannabinoid pharmacokinetic properties in occasional and heavy users smoking a marijuana or placebo joint. *Journal of Analytical Toxicology*, 32: 470-77 (2008).

⁶¹ See We save lives, *supra* note 57.

⁶² Mura P, et al., THC Can Be Detected in Brain While Absent in Blood. *Journal of Analytical Toxicology*, 29, 842-843 (2005).

psychomotor effects of THC, including those specifically related to driving tasks.”⁶³

Much of the current scientific research suggests that there is no reliable and effective test to determine what concentration of THC in the blood or breath equates to impairment. Indeed, studies reflect that frequent marijuana users maintain levels of THC in the blood well above the legal limits of 2 ng/mL for up to 30 days,⁶⁴ and that infrequent users may test negative for marijuana immediately after consumption or hours after when the effects of impairment are still present.⁶⁵ Existing marijuana tests both incorrectly identify sober drivers as impaired and fail to identify impaired drivers as under the influence.⁶⁶ This concern is exacerbated by the highly variable effects of marijuana among humans. “One study showed that on average, 73% of THC was cleared from blood within the first 25 minutes after smoking marijuana, but that number ranged from 3% to 90% from one subject to the next.”⁶⁷ Likewise, existing field sobriety tests are ineffective to determine impairment for marijuana.

In a study conducted by the American Automobile Association (AAA) foundation for traffic safety, researchers compared the sobriety test results from THC-positive drivers to sober volunteers.⁶⁸ The sober drivers performed far better on some sections of the exam, with 55.5 percent passing the walk-and-turn as opposed to six percent of THC-positive drivers,⁶⁹ but no link could be demonstrated between exam scores and THC level in the blood. Most surprisingly, the results of the

⁶³ See Roth, *supra* note 6, at 888.

⁶⁴ See Bergamaschi et al., *supra* note 33, at 519, noting that “four of five participants remained THC positive after 30 days.”

⁶⁵ See LOGAN, *supra* note 45, at 282-283.

⁶⁶ See discussion *infra* Part II.B and note 64, explaining that differing tolerances and the highly variable effects of the THC molecule on humans can lead to false positives and negatives in THC blood tests.

⁶⁷ Hartman, et al., Effect of Blood Collection Time on Measured Δ^9 -Tetrahydrocannabinol Concentrations: Implications for Driving Interpretation and Drug Policy. *Clinical Chemistry* 62:2 367-377 (2016); see Wood, *supra* note 5, at 5.

⁶⁸ Barry Logan et al., AAA Foundation for Traffic Safety, *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis*, (2016).

⁶⁹ *Id.*, at 1.

study revealed that while 80 percent of the failing drivers had THC levels at 1ng/mL or greater, 30 percent of the passing drivers also had THC levels above this limit.⁷⁰ Based on their results, the authors of the study concluded “a quantitative threshold for per se laws for THC following cannabis use cannot be scientifically supported.”⁷¹

C. **Problems with existing enforcement mechanisms**

Per se limits seek to mimic the familiar .08 BAC regulation for drunk driving by criminalizing a certain quantity of the impairing compound in the subject’s bloodstream. The assumption for these per se laws is that most individuals above the limit are impaired, while most below the limit are not dangerously impaired.⁷² Thus, an individual who tests above the limit is guilty of a per se violation, while an individual who tests below the limit is not guilty of such a violation.⁷³ This framework is irresponsible to import to the issue of drugged driving because it ignores whether the subject is exhibiting any symptoms of impairment.

Per se and zero-tolerance laws also falter with the prevalence of polydrug use. Numerous studies reflect that alcohol and marijuana are the most frequent combination of drugs used by drivers, and this combination is more impairing than either substance on its own.⁷⁴ This undermines the standard set by per se regulations because a person below the 2.0 ng/mL or .08 BAC limit could still be criminally impaired by the effects of the two substances together. “Hartman et al. showed that use of alcohol and marijuana together produces significantly higher blood concentrations of THC than marijuana use alone.”⁷⁵ To accommodate this issue, subjective tests should be implemented which seek to determine if a driver is exhibiting outward symptoms of impairment. The presence of these impairing

⁷⁰ Id., at 2-3.

⁷¹ Id.

⁷² See Wood, supra note 5, at 2-3.

⁷³ Id.

⁷⁴ See GAO Report, supra note 56, at 16.

⁷⁵ See Drug Impaired Driving, supra note 2, at 13.

drugs – in any quantity – should be a prerequisite for prosecution, but the subjective recognition of impairment by a qualified and trained Drug Recognition Expert (DRE) should also be relied upon in securing DUID convictions.

1. Zero-tolerance laws

This article does not attempt to argue that zero-tolerance laws are improper in jurisdictions where marijuana is still illegal. The State has a legitimate interest grounded in the jurisprudence of prohibition by deterring users of an illicit substance from driving.⁷⁶ If possession or use of a substance is illegal, it is rational that use of that substance while operating a vehicle can be punished as well. However, this basis of punishment is not adequate in states where cannabis is now medically or recreationally permitted. If marijuana is to be regulated in a similar fashion as alcohol, the obligation is on the state to scientifically demonstrate how and at what concentrations the substance impairs drivers to a point which is punishable by law.

III. Effective ways DUID laws can be implemented

A. Issues with continuing the current criminal regime

The problems resulting from continuing the current unjust system of prosecuting DUIDs based on illegitimate per se standards are numerous. First and most basically, marijuana users do not deserve to be punished for a morally blameworthy act of impaired driving unless they are legitimately impaired. Subjecting upstanding citizens to the stigmatizing crime of DUI for the sake of additional convictions or to punish those who might truly be impaired has no penological justification in our justice system. Second, such a myopic view hinders additional research and exploration into the question of dangerous driving from marijuana impairment. An unscientific approach which exists solely for the acquisition of more convictions hampers understanding of the link between marijuana and impairment and ensures critical research will not continue to be done on the topic.

⁷⁶ See Roth, *supra* note 6, at 844 – 845.

Third, this undermines the criminal justice system's legitimacy. When criminal law deviates from a legitimate basis of punishment and indicts more average citizens, their peers are more willing to acquit and cause the penal system to appear ineffective, illegitimate, and uninformed.

The criminal justice system has the appropriate tools to deal with this public safety issue, but more detection methods must be researched, and more data collection must be done. New technologies which allow recording of THC concentrations through breath samples,⁷⁷ as well as updated sobriety tests tailored specifically to THC impairment conducted by trained DREs have both shown great promise in effectively identifying marijuana impaired drivers.⁷⁸ Even if per se limitations for THC impairment are impossible to implement fairly, this framework potentially can be applied to other non-illegal drugs that require a jurisprudence of dangerousness to prosecute on DUI and impairment grounds.

B. Proposed enforcement policy for DUID marijuana

The solution to the nascent THC DUID issue is not to accept that some innocent, non-impaired drivers will be punished or that some criminally impaired drivers will evade detection under an arbitrary per se limit. Instead, law enforcement should abandon the illegitimate standard of THC concentrations in the blood and instead rely on a tandem analysis that demonstrates evidence of impairment and proof of the drug in the body. Irrational per se legislation only serves to exonerate drivers who show evidence of impairment

⁷⁷ *Id.*, at 913, citing Sarah K. Himes et al., Cannabinoids in Exhaled Breath Following Controlled Administration of Smoked Cannabis, 59 CLINICAL CHEMISTRY 1780 (2013). "the future holds the possibility of improving research using a breath test for THC that might have a shorter window of detection and allow quicker sampling of stopped motorists."

⁷⁸ See Goldberg, *supra* note 10, at 273, "DRE officers "have an 86 percent accuracy rate when their assessments are compared to the [actual] results of blood and urine tests.", citing Allison Manning, Going Beyond Sobriety Tests, Officers Learning to Gauge Drug Use, COLUMBUS DISPATCH (2013), <http://www.dispatch.com/content/stories/local/2013/05/24/officers-learning-to-gauge-drug-use.html> (last accessed February 12, 2018).

without reaching the per se threshold and convict non-impaired drivers who still cross this limit.

More practically, arrests and convictions should be based upon trained police officer's (DRE) testimony regarding evidence of impairment by observations or measurable quantities (blood pressure, pulse) combined with scientific evidence that the drug was present in any quantity. This avoids the issue of users who are impaired below the threshold, but also does not wrongfully convict frequent or medical users who are not impaired but still test above the per se threshold. A workable subjective-based DUID law would convict offenders through a two-part analysis; this process would necessitate (1) evidence that the individual's physical or mental state is impaired based on observation, sobriety test results, incriminating statements, or witness testimony, and (2) scientific proof of any level of the impairing substance (besides alcohol) in the individual's body at the time of arrest or within two hours after.

Opponents of using subjective DRE's testimony for DUID convictions contend that relying on the potentially biased observations of law enforcement is too inconsistent a standard to be integrated reliably into the context of DUID prosecutions. While these detractors may be correct in that the subjective observation standard is imperfect, the absence of an effective scientific test to determine THC concentration in the brain means that it is the most reliable evidence of impairment available. Additionally, the testimony of officers can be corroborated with dash-cam or body-cam footage, which is becoming increasingly available for introduction at trial.⁷⁹ These visual manifestations of impairment may be subjective and inconsistent, but they are the best tools available for determining impairment because they ensure non-impaired drivers will not be wrongfully convicted. By embracing this subjective standard reliant on observations, law enforcement may cogently address the burgeoning public safety issue of drugged

⁷⁹ See Goldberg, *supra* note 10, at 274 noting: "Increased use of police body and dashboard cameras has already gained traction among the public as a result of the recent media focus on the excessive use of force by police"

driving without haphazardly exonerating impaired drivers and convicting sober motorists.

Modern law enforcement is subject to the same scientific standards that were necessary almost a century ago to legitimize the established .08 standard for DUI alcohol. The burden of the state to provide a scientific basis for a per se regulation of an impairing substance has not been lightened, and blindly importing the alcohol model to DUID laws for THC defies the venerable scientific support which undergirds existing DUI legislation. The current per se DUID laws may seek to promote public safety and achieve justice, but in their current form – without epidemiological support – they have accomplished neither.

RACE, CRIME, AND JUSTICE: UNDERSTANDING WHY RACIAL DISPORPORTIONALITY TRANSPIRES IN UNITED STATES PRISONS

Jake Kenny

I. Abstract

This article draws on numerous data sources to evaluate and justify the racial disproportionality of U.S. prisons by reviewing studies that concentrate on single-state results and compares them to nationwide findings. Discrimination in the arrest and incarceration of minorities has emerged as a prevalent issue today regarding the study of race, crime, and justice. Statistics show that racial minorities, almost exclusively black males, face a disproportionately larger possibility of being incarcerated. The magnitude of this issue can be evaluated by comparing arrest statistics by race and crime with the prison admissions statistics by race and crime. This article reviews the original method of calculating racial disproportionality, done by Alfred Blumstein, and additional studies performed using Blumstein's method. Through the examination of several studies concentrating on the nation as a whole and additional studies focused on the statistics of specific state racial disproportionality, my findings indicate that the presence of racial disproportions varies by jurisdiction but can be perceived. Understandably, the data in this article yields important findings, however, it is necessary to understand that while there is a need for continuous concern on the possible racial discrimination occurring in the criminal justice system; this unease should not divert attention from what is arguably the more important matter: ameliorating the social environment conditions that promote disparity among minorities involved in crime, and ultimately moving the nation toward a more equitable application of its laws.

II. Introduction

The Incarceration population in America has increased significantly over the past four decades, from just over 240,000 inmates in 1975 to

nearly 2.2 million people in 2015 in the nation's jails and prisons.¹ The United States leads the world in incarceration, housing over twenty-five percent of the world's prisoners despite being home to only five percent of the world's population.² This five hundred percent incarceration increase can be seen as a result not of changes in crime rates, but from the nation's new tough-on-crime policies.³ These policies have led the Department of Justice to set aside approximately thirty percent of their annual budget in 2017 to prisons and detention.⁴ The intensification of these policies has affected people of color, which make up roughly sixty percent of the population in prison.⁵ African American men are roughly 5.3 times as likely to be incarcerated than Caucasian men and Hispanics are 2.2 times as likely.⁶ The question here is, how can African Americans and Hispanics be more likely to be incarcerated even though Caucasians make up a majority of the population in the United States at 61.3%?⁷ Comparing the incarceration rate by race/ethnicity with the population of the United States by race/ethnicity, we can see that these percentages do not correlate.

Do these large racial/ethnic disparities represent discrimination by race or policy in the criminal justice system? Or do these racial disparities represent the disproportionality of minorities involved in street crime? A possible answer is that the criminal justice system is flawed and biased against race and ethnicity. An alternative is that a larger police presence is required for low-income-high-crime neighborhoods where minorities live, leading to a higher arrest rate of minorities. According to Pew Research in 2014, African Americans and Hispanics earn the lowest annual average household income in America at about \$43,300, while Caucasians earn an average

¹ The Sentencing Project, Fact Sheet: Trends in U.S. Corrections, www.sentencingproject.org/criminal-justice-facts/ (last visited Jan. 24, 2018).

² Lorna Collier, *Incarceration Nation*, American Psychological Association, Oct. 2014, Vol 45, No. 9, at 56.

³ The Sentencing Project, *supra* note 1.

⁴ U.S. Dept. of Justice, FY 2017 Budget Summary, Aug. 29, 2016.

⁵ The Sentencing Project, *supra*.

⁶ *Id.*

⁷ *Id.*

household income of about \$71,300.⁸ These racial disparities are not a new phenomenon of this decade, but rather a disparity that has existed decades prior. A report released in 2008 by The PEW Center on the States shows this discrepancy, releasing statistics based on gender and race for those incarcerated.⁹ According to Pew Research, one in one hundred and six white men ages eighteen or older are incarcerated compared to one in fifteen black men ages eighteen or older.¹⁰ This ratio increases even further to one in nine black men incarcerated when the ages are adjusted to those twenty to thirty-four years old.¹¹ Contrary to what the public believes, policing procedures include a higher presence of officers in high-crime low income neighborhoods, not only to combat crime, but also to attempt to raise police trust and assist those who live in the neighborhood with escaping poverty.¹²

An pertinent article published in 1982 by Alfred Blumstein studied the effects of “racial bias” or “differential involvement” and whether it justifies the high levels of Hispanics and African Americans incarcerated in U.S. prisons.¹³ In his study, Blumstein compared racial differences in criminal offending and racial proportions in arrests to racial demographics of prisons.¹⁴ He recognized that the more these statistics corresponded to each other, the more evidence that African American and Hispanics consume higher incarceration rates than Caucasians. However, a divergence of statistics would clearly represent the mere presence of “racial bias.”¹⁵ After focusing on the comparison of arrests and incarceration of blacks and whites, Blumstein observed that the underlying reason that African Americans contain a higher population in prisons than Caucasians is

⁸ Pew Research Center, *On Views of Race of Inequality, Blacks and Whites are Worlds Apart*, June 27, 2016 at 8.

⁹ The Pew Center on the States, *One in 100: Behind Bars in America 2008* (2008).

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² Alfred Blumstein, *On the Racial Disproportionality of United States' Prisons*, 73 J. Crim. L. & Criminology 1259-1281, 1277 (1982).

¹³ Alfred Blumstein, *On the Racial Disproportionality of United States' Prisons*, 73 J. Crim. L. & Criminology 1259-1281 (1982).

¹⁴ *Id.* at 1265.

¹⁵ *Id.* at 1264.

because they are more likely to commit a crime that results in a prison sentence.¹⁶

Blumstein went on to discuss the disproportionality of those in prison according to sex. The sex-specific incarceration rate is at a ratio of twenty-four to one, with ninety-six percent of prisoners being male and four percent being female.¹⁷ Regardless of the disproportionality, it is uncommon for anyone to argue that this disparity results from discrimination against males.¹⁸ It is recognized that males participate in a greater amount of crime, specifically serious crime, that leads to imprisonment.¹⁹ Comparing the racial distribution of prisoners sentenced for a specific crime with those arrested is another approach to identify this issue.²⁰ If racial discrimination and differential treatment of arrestees is not present in our criminal justice system (including not only arrests but bail amount, prosecution, conviction, commitment to prison, and time served), then one would find the results from the comparison rather similar.²¹

Blumstein concluded that racial differences cannot be primarily accredited to discrimination occurring after the time of arrest. There is a possibility of a larger racial disproportionality affected by arrest vulnerability. Disparities in arrest vulnerability would produce a larger number of minorities to be sentenced to prison.²² While demographic information, such as race, can be used to easily determine the individuals who are processed and sent to prison, it is more problematic to acquire information regarding those who commit the crimes.²³ As mentioned previously in this article, it is acknowledged that there is a high police presence in poor, crime-prone communities.²⁴ This distinction in patrol presence could possibly account for some of the disproportionality of African American and

¹⁶ *Id.* at 1278.

¹⁷ *Id.* at 1262.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Id.* at 1265-66.

²¹ *Id.* at 1264.

²² *Ibid.*

²³ *Id.* at 1277.

²⁴ *Ibid.*

Hispanic populations arrested and incarcerated.²⁵ Some might argue that another factor contributing to the high value of minorities in prison could result from the criminal justice system's emphasis on crimes in which minorities tend to predominantly commit. This argument would change the way society views different crimes, possibly initiating a change in the severity of punishments for crimes. Work performed by Sellin et al.²⁶ and Rossi et al.²⁷ discuss that topic more in-depth and could help to enlighten that possibility.

The results presented by Alfred Blumstein in his *Journal of Criminal Law and Criminology* article, *On the Racial Disproportionality of United States' Prison Populations*, do not argue that such racial discrimination is nonexistent, nor do they provide an excuse for hindering any efforts to discover or eliminate racial discrimination.²⁸ However, it does suggest that solely discovering the presence of racial disproportionality in the criminal justice system does not prove the existence of racial discrimination. Further in-depth studies must be performed to form conclusions on whether discrimination is occurring.

There are two key criticisms that are used to counter the statistics used in Blumstein's research published in his 1982 article.²⁹ The first criticism is that Blumstein solely relied on arrest statistics produced by the Uniform Crime Report (UCR) as a way to quantify racial involvement in crime.³⁰ In his 1982 article, Blumstein vindicated this disapproval by citing a study Michael J. Hindelang published in 1978.³¹ Hindelang discovered a relationship concerning both the racial patterns in UCR arrest statistics and victim's statements of

²⁵ *Ibid.*

²⁶ Thorsten Sellin and Marvin E. Wolfgang, *The Measurement of Delinquency* (1964)

²⁷ Rossi, Waite, Bose and Berk, *The Seriousness of Crime: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974).

²⁸ Blumstein (1982), *supra* note 12, at 1281.

²⁹ Brett E. Garland, Cassia Spohn, Eric J. Wodahl, *Racial disproportionality in the American prison population: Using the Blumstein method to address the critical race and justice issue of the 21st century*. *Justice Policy Journal*, Vol 5, No. 2, (2008), at 18.

³⁰ *Id.* at 18.

³¹ *Ibid.*

robbery, rape, and aggravated assault.³² Although the arrest statistics generated by the UCR may be a respectable source of such data, it fails to incorporate less serious crimes such as theft and drug offenses, in which a greater amount of discretion is involved regarding arrest. Due to the factors discussed above, the accuracy of determining criminal participation from arrest rates could be called into question.³³ Using the data published by the Uniform Crime Report to indicate the racial differences in prisons may be acceptable; however, it fails to integrate the discrimination that occurs at the time of the criminal act with discrimination at the time of incarceration.³⁴ The second criticism to Blumstein's approach is that he utilized prison population statistics instead of prison admission statistics. Comparing arrest rates based on racial and ethnic background from a single year with the current prison populations can distort the results because of year-over-year changes in arrest rates.³⁵ Not only are people who were arrested that year, and admitted into prison, included in that figure, long-term inmates from years before are also incorporated, complicating the comparisons.³⁶

II. Langan's Methodology and Outcomes

Patrick A. Langan published an article in 1986, titled *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, addressing these concerns in a study investigating whether the high offending rates of blacks justify their high presence in U.S. prisons.³⁷ Unlike Blumstein's methods to identify whether racial bias or differential involvement explains the high levels of African Americans and Hispanics that are incarcerated in U.S. prisons, Langan utilized victimization statistics from the National Crime Survey (NCS) (an earlier version of the National Crime Victimization

³² *Ibid.*

³³ *Id.* at 19.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 *J. Crim. L. & Criminology* 666 (1985).

Survey).³⁸ Several criminal actions were surveyed through the NCS which include burglary, larceny, auto theft, rape, robbery, simple assault, and aggravated assault.³⁹ As an alternative to using all crime victim accounts, only victim descriptions of race for these crimes were applied in Langan's study.⁴⁰ A victim reporting the occurrence of a crime could be influenced by race, however, this is beyond the control of the criminal justice system. Langan analyzed prison admission data from the following years: 1973, 1979, and 1982.⁴¹ Inmate studies were conducted by the Bureau of Justice Statistics for both 1973 and 1979, while a state survey of prison admission populations was used for 1982.⁴² The outcomes of Langan's study, regardless of improvement of the research strategy, had similar results to Blumstein's study. Langan focused mainly on the predicted and perceived imprisonment of blacks whereas Blumstein concentrated on the black-to-white relationships of those incarcerated.⁴³ The estimated number of black offenders to be incarcerated was calculated by "multiplying the number of black offenders (represented in the NCS) by the crime-specific probability of a white offender going to prison."⁴⁴ In 1973, there was no substantial variance between the expected and observed population of blacks admitted to prison.⁴⁵ However, in 1979 and 1982, there were significant differences found. Eighty-four percent and eighty-five percent of the inconsistencies between crime victim accounts of offending race and prison admission of blacks for these years, respectively, were elucidated by the elevated immersion of blacks in crime.⁴⁶ Notably, the omission of drug crimes data, which results in a minimum amount of explained racial disproportionality, unquestionably led to an inflated aggregate amount of justified

³⁸ *Id.* at 671.

³⁹ *Id.* at 672.

⁴⁰ *Id.* at 671.

⁴¹ *Id.* at 674.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Id.* at 678.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 679.

disparity between the anticipated and observed incarceration of blacks.⁴⁷

III. Single-State Studies

Two additional studies have analyzed explained amounts of racial disproportionality in prisons within a single state. Darnell Hawkins published an article titled *Race, Crime Type, and Imprisonment* which replicating Blumstein's method in North Carolina with greater concentration on the varying racial disparity among crime types. Hawkins compared nonwhites and whites.⁴⁸ Hawkins utilized both Uniform Crime Report's arrest statistics and prison admission statistics while integrating a one-year interval period (e.g. comparing 1978 arrests with 1979 prison admission statistics).⁴⁹ Unlike Langan and Blumstein, Hawkins found a greater inexplicable amount of racial disparity in North Carolina than what Blumstein detected at the national level. Thirty percent of the racial disproportionality in 1978-1979 was left unexplained, and in 1980-1981, the number rose substantially to forty percent and then to forty-two percent in 1981-1982.⁵⁰ These significant differences in racial disproportionality highlight the significance in analyzing the incarceration disparity over numerous time periods.

Another study performed by Austin and Allen, published in 2000, analyzed the prison disproportionality in the state of Pennsylvania, observing a five-year period of both prison commitments and arrests.⁵¹ He correspondingly incorporated a lag year, like Hawkins, using the arrest statistics from 1990-1994 and comparing them to the prison admissions from 1991-1995.⁵² Austin and Allen restricted their analysis to males, comparing whites and nonwhites (which include

⁴⁷ *Ibid.*

⁴⁸ Darnell Hawkins, "Race, Crime Type, and Imprisonment," *Justice Quarterly*, Vol. 3 No. 3, (1986): 251-269.

⁴⁹ *Id.* at 253-54.

⁵⁰ *Id.* at 257.

⁵¹ Roy L. Austin and Mark D. Allen, "Racial Disparity in Arrest Rates as an Explanation of Racial Disparity in Commitment to Pennsylvania's Prisons," *Journal of Research in Crime and Delinquency*, Vol. 37 No. 2, (2000) at 206.

⁵² *Id.* at 206

Asians, American Indians, Hispanics, and Blacks).⁵³ Using Blumstein's method, Hawkins found that over the five-year period, the percentage of racial disproportionality between prison admissions and arrests in Pennsylvania was 42.39%. After removing drug offenses from the calculations, the percentage rose to a massive 70.43%. Contrary to Hawkins' findings in 1986 for North Carolina, the racial disparity for each year varied insignificantly in Pennsylvania.⁵⁴

Hawkins made crime-specific comparisons with Blumstein's original study published in 1982 and noted that "Blumstein reported that only one crime category showed a lower rate of actual, as compared to expected, black imprisonment—a small, residual 'other' category."⁵⁵ This means that this small category of blacks who committed crimes were underrepresented. Hawkins observed that blacks were extremely underrepresented for crimes like robbery and rape in the state of North Carolina in contrast to Blumstein's findings.⁵⁶ Hawkins highlighted that this inexplicable disproportionality of his measure of aggravated assault was approximately six to seven times what Blumstein discovered.⁵⁷ Differences between other crimes like auto theft, burglary, larceny, and homicide were also suggested between Hawkins and Blumstein's findings.⁵⁸

Austin and Allen also published their findings in comparison to Blumstein's study concluding that "with the exception of rape, for every offense with which our 1991 findings may be compared, his explained disproportionality dwarfs ours."⁵⁹

The unexplained disparity for drug offenses according to race in the state of North Carolina, averaging to about forty-five percent across all the years analyzed, was very similar to Blumstein's results for drug offenses at the national level which were forty-nine percent in 1979

⁵³ *Id.* at 206.

⁵⁴ *Id.* at 211.

⁵⁵ Darnell Hawkins, "Race, Crime Type, and Imprisonment," *Justice Quarterly*, Vol. 3 No. 3, (1986) at 257.

⁵⁶ *Id.* at 257.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Austin and Allen, *supra* note 51, at 213.

and fifty percent in 1991.⁶⁰ However, Austin and Allen found that the racial disparity present in Pennsylvania in 1991 was a mere twenty-six percent for drug offenses justified by arrests.⁶¹ This racial disparity in drug offenses could not be explained by the greater connection of blacks to more severe drug offenses like narcotics or cocaine related crimes.⁶² These two single-state studies were conducted to assess Blumstein's equation and hypothesis. Neither of the studies completely agrees or supports Blumstein's theory that racial disparity in prisons is due to the greater number of arrests for more serious offenses as opposed to less serious offenses. Both Austin and Allen, as well as Dawkins indicated that the racial disproportionality was explained more for crimes like murder, rape, and robbery than for burglary and theft.⁶³ Hawkins' findings do contradict Blumstein's hypothesis. Hawkins found that crimes such as murder carried a higher amount of unexplained racial disproportionality than crimes like robbery and rape in North Carolina.⁶⁴ Hawkins also discovered more unexplained racial disproportionality for crimes like assault than for larceny and burglary.⁶⁵

IV. The Missing Element

Alfred Blumstein published another article in 1993 containing the black-to-white imprisonment ratios for forty-two states across the U.S.⁶⁶ This study was valuable and was one of the first to include different parts of the country to identify whether or not there were a greater amount of unexplained racial disproportions present. There were three other studies that used Blumstein's method to assist in addressing the fundamental factor that was missed; a study across the nation and not one single state. These studies were performed by

⁶⁰ For information regarding the North Carolina study, see Hawkins, *supra* note 55, at 257. For information regarding Blumstein's results, see Blumstein (1982), *supra* note 12, at 252.

⁶¹ Austin and Allen, *supra* note 51, at 211.

⁶² *Id.* at 212.

⁶³ *Id.* at 214

⁶⁴ *Id.* at 256

⁶⁵ *Id.*

⁶⁶ Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743 (1993)

Hawkins & Hardy 1989;⁶⁷ Crutchfield, Bridges & Pitchford 1994;⁶⁸ Sorensen, Hope & Stemen 2003.⁶⁹

Darnell Hawkins and Kenneth Hardy published a study in 1989 by Social Justice/Global Options studying thirty-nine states.⁷⁰ Hawkins and Hardy excluded states that contained less than a one percent black population.⁷¹ Corresponding to Blumstein, Hawkins and Hardy used the Uniform Crime Reports arrest data from 1979 and the Department of Justice's statistics for prisoners admitted by the end of 1980.⁷² They discovered that racial disproportionality varied, citing disproportionate arrest rates in such states.⁷³ The percentages of explained racial disproportionality ranged from a maximum of ninety-six percent in Missouri to a minimum of twenty-two percent in New Mexico.⁷⁴ In performing this study, Hawkins and Hardy both uncovered that in nine states of the total thirty-nine, merely forty percent of the disproportions according to race were justified by arrests.⁷⁵ In six other states, the number of arrests justifies more than eighty percent of the black-white imprisonment ratio.⁷⁶ The following discoveries aided Hawkins and Hardy in concluding that Blumstein's figure of eighty percent would not be a reasonable approximation for the country.⁷⁷

Sorensen, Hope, and Stemen published an article in 2003 producing one of the most current studies examining the racial

⁶⁷ Darnell F. Hawkins and Kenneth A. Hardy, Black-White Imprisonment Rates: A State-by-State Analysis, *Social Justice*, Vol. 16, No. 4 (1989)

⁶⁸ Robert D. Crutchfield, George S. Bridges, and Susan R. Pitchford, Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity, *Journal of Research in Crime and Delinquency*, Vol. 31 No.2, (1994).

⁶⁹ Jon Sorensen, Robert Hope, and Don Stemen, Racial Disproportionality in State Prison Admissions: Can Regional Variation be Explained by Differential Arrest Rates? *Journal of Criminal Justice* 31 (2003)

⁷⁰ Hawkins and Hardy, *supra* note 67, at 77

⁷¹ *Id.* at 77

⁷² *Id.* at 77-78

⁷³ *Id.* at 78

⁷⁴ *Id.* at 89

⁷⁵ *Id.* at 79

⁷⁶ *Id.*

⁷⁷ *Id.*

disproportionality in prisons.⁷⁸ They used the Uniform Crime Report's arrest data from the year 1996 and the National Corrections Reporting Program's prison admittance data from 1997 to study the racial disparity in twenty-three states nationwide.⁷⁹ The UCR's arrest data included weapons, property, drug, and violent offenses. Sorensen, Hope, and Stemen combined all data and established that for all twenty-three states, the average percentage of racial disparity of imprisonment was approximately sixty-seven percent. These numbers could be explained by arrest ratios across the states whereas thirty-three percent was left unexplained.⁸⁰ However, when Sorensen, Hope, and Stemen eliminated drug offenses from the equation the percentage increased to approximately seventy-nine percent.⁸¹ They also studied the explained percentages of racial disparities in prisons longitudinally from 1985 to 1997. This examination showed a decrease in drug offenses in the late 1980s, from approximately eighty percent in 1985 to fifty-five percent in 1988.⁸² Following 1988 to 1997, the percentages of drug crimes committed flattened out and remained steady through the end of the study parameters.⁸³ Sorensen et al. also attributed the large decline in drug offenses in the mid-1980s to the drop in explained racial disparity of 80% in 1985 to approximately seventy percent in 1997.⁸⁴

Contrary to Blumstein's liberation hypothesis, Sorensen et al. found property crimes at ninety-two percent was inexplicably greater than robbery and rape offenses at eighty-eight percent and eighty-four percent.⁸⁵ Sorensen and associates wrote, "With the exception of aggravated assault, violent crimes generally had the highest percentage of disproportionality explained by arrest, with over four-fifths explained. Property crimes closely followed violent crimes with about three-fourths of racial disproportionality explained by

⁷⁸ Sorensen, Hope, and Stemen, *supra* note 69

⁷⁹ *Id.* at 76

⁸⁰ *Id.* at 78

⁸¹ *Id.* at 78

⁸² *Id.* at 79

⁸³ *Id.* at 78

⁸⁴ *Id.* at 78-79

⁸⁵ *Id.* at 78

arrests.”⁸⁶ A mere fifty-one percent of the racial disparity in drug crimes is explained by arrest records.⁸⁷ Unlike Hawkins and Hardy’s findings, Sorensen et al. found regional differences in the explained racial disparity to be reasonably insignificant from approximately 67.4% in the Midwest to 60.2% in the West.⁸⁸ When excluding drug offenses, they found the numbers to increase to 81.5% in the Midwest and 68.7% in the West explained disproportionately.⁸⁹ After adjusting the ratios to the differences in black and white arrests, the imprisonment ratios increased even higher.⁹⁰ The adjusted imprisonment ratios were calculated by multiplying the unexplained disparity with the unadjusted black-and-white incarceration proportion. This product was added to the anticipated black incarceration rate when arrests are controlled. The sum provides the adjusted black-and-white imprisonment ratio. Sorensen et al. found that the amounts of blacks and whites that live in urban areas is significantly greater in the Midwest than in any other region.⁹¹ Researchers found that a strong correlation was found between the blacks living in urban areas compared to whites.⁹² These results helped Sorensen et al. to conclude that because crime is the highest in urban areas and a majority of population in urban areas are black, the black-white imprisonment rates are understandably greater in the Midwest.⁹³

Crutchfield, Bridges, and Pitchford (1994) performed a study concentrating the statistics for violent crime offenses in forty-eight percent of states using the Uniform Crime Report’s data from 1981 and the state prison census for prison populations.⁹⁴ Crutchfield et al. concluded that 89.5% of the nation’s racial disparity was explained by

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 80

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 81

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Crutchfield, Bridges, and Pitchford, *supra* note 68, at 170-71

arrest records.⁹⁵ Crutchfield et al. stated that the difference between their findings and Blumstein's findings was due to the exclusion of drug offenses in their study. Consistent with Hawkins and Hardy's findings, Crutchfield et al. established that the percentage of racial disparity varied immensely among states.⁹⁶ They discovered that the highest amount of explained racial disparity was in the Midwest states coming in at approximately 115%.⁹⁷ Crutchfield and associates also discovered that there was a high variation of explained variation within regions as well, with 107% in Pennsylvania and fifteen percent in New Hampshire.⁹⁸ They concluded that there was a faint correlation between black and white ratios for arrest and incarceration across the forty-eight states in their study.⁹⁹

VII. Conclusion

There are a number of premises that can be identified from the studies inspired by Alfred Blumstein's initial study published in 1982: 1) It is impossible to generalize racial disproportionality on the national level due to the discrepancies across states; 2) Drug-related crimes constitute the lowest number of explained disparities according to arrest; 3) Racial disparity can vary over time; 4) The theory presented by Alfred Blumstein has received partial, but not whole, support; 5) Drug offenses have an influence on racial disparity; 6) the amount of blacks living in urban areas compared to whites can have an effect on the percentage of explained racial disproportionality; 7) An insufficient amount of theoretical justifications of racial disparity in prisons has been studied; and 8) The Midwest has the largest ratio of black to white imprisonment, even after adjusting to account for the large number of blacks living in urban areas. Discrimination in the arrest and incarceration of minorities is now a critical controversial topic that must be addressed. Research has shown that a percentage of the disparity between the black and white incarceration rates can be attributed to the variances

⁹⁵ *Id.* at 173

⁹⁶ *Id.* at 172

⁹⁷ *Id.* at 175

⁹⁸ *Id.*

⁹⁹ *Id.*

in arrest rates. Although this research supports the Blumstein's Liberation Hypothesis, it also suggests that there is a percentage of this racial disproportionality that is the product of racial inequality and discriminatory treatment. The problem of racial and ethnic disproportionality in prison populations is less about the manifestation of racial inequality in the criminal justice system and more about the societal injustices that foster higher rates of violent crime among blacks. This injustice and inequity is a disadvantage to the African American and Hispanic community because of the racial discrimination and segregation occurring today. Practitioners, policymakers, and academics must strive to continue the search for the root of racial discrimination to achieve the philosophy of our justice system: equality and justice for all.

MAKING MILLIONS OF DOLLARS OFF CONSTITUTIONAL VIOLATIONS

Samantha Forkel

I. Introduction

Prisons house those unwanted, forgotten, and cast out by society. This is a significant reason why there is a lack of discussion or reform regarding the conditions of prisons. “The degree of civilization in a society can be judged by entering its prisons”¹ and examining how it treats its prisoners. Despite the fact that these people are imprisoned for committing a crime, this does not allow for prisoners to be treated as less than human. In the United States, there has been an alarming increase of inmates compared to the 1970s and this increase comes with substantial costs.² In an attempt to offset this huge expense, some state governments now contract private corporations to run prisons. These private prisons are controversial, but governments are continually utilizing them; from 2000-2011 the number of private prisons grew by 150% and the total number of inmates housed increased to 126,300, a full 8% of the inmate population.³ Given the increasing reliance, a discussion of the privatization of prisons is especially relevant and before the dependency of private prisons increases, it must be determined if privatization is truly effective.

Even though inmates are imprisoned, they are still protected under the Constitution.⁴ This gives the corporation and staff the task of

¹ A quote by Russian philosopher, Fyodor Mikhailovich Dostoyevsky. The Yale Book of Quotations 210 (F. Shapiro ed. 2006).

² Carson, E.A. (2014). Prisoners in 2013. Washington, D.C.: Bureau of Justice Statistics.

³ Carson, E.A. (2016). Prisoners in 2015. Washington, D.C.: Bureau of Justice Statistics (16).

⁴ U.S. Const. amend. XIV, § 1. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the

ensuring constitutional infractions do not occur in these prisons. The ensuing discussion will reveal that private prisons are in fact unconstitutional because of their failure to protect the constitutional rights in the day to day treatment of their prisoners. Repeated violations of prisoner's constitutional rights will display why private prisons are not the answer to increased incarceration rates. They should be ruled unconstitutional because they're incapable of abiding to the Eighth and Fourteenth Amendments.

II. The Eighth Amendment and Private Prison Conditions

Under the Eight Amendment, those in the United States cannot be subjected to "cruel and unusual punishment".⁵ This is a constitutional right that must be upheld and protected by private prisons in regard to their inmates. Most prisoners experience some form of mental illness and the conditions in the private prisons do little to combat these issues.⁶ Inmates in private prisons face problems of overcrowding, inadequate health care, and violence that leads to serious injuries and in some instances, death. These unconstitutional conditions will display the clearly harmful effects that private prisons have.

A. Violence

Private prisons are plagued with brutality from inmates, and these abusive environments violate inmates' Eighth Amendment right from "cruel and unusual punishment."⁷ Private prisons experience more inmate-on-inmate violence; a study conducted showed that assault was experienced by 33.5% of inmates in private prisons compared to 20.2% of inmates in public prisons.⁸ This is even more startling because public prisons house a greater proportion of maximum

State wherein they reside... nor deny to any person within its jurisdiction the equal protection of the laws."

⁵ U.S. Const. amend. VIII.

⁶ Cassandre Monique Davilmar, *We Tried to Make Them Offer Rehab, But They Said, "No, No, No!": Incentivizing Private Prison Reform Through The Private Prisoner Rehabilitation Credit*, 89 N.Y.U.L. Rev. 267, 275 (2014).

⁷ See surpa note 5.

⁸ Austin, J and Conventry, G. (2001). *Emerging Issues on Private Prisons.*: Bureau of Justice Assistance (57).

security prisoners (19.8%) compared to private prisons (4.6%).⁹ The substantial amount of violence displays the inability of private prisons to protect their inmates' constitutional rights.

The difference in management between private and public prison management is evident with Corporations of America (CCA) purchase of Lake Erie in 2011,¹⁰ and the changes to the prison's condition are distressing. From 2010 to 2012, inmate-on-inmate violence increased by 187.5%¹¹ and 35.2 % of inmates reported being abused in some way.¹² In addition, Lake Erie substantially grew their prison population by 300 inmates in less than a year.¹³ There may be an assumption that the inmates' violent nature causes this brutality, but this assumption fails to consider the conditions that cause the prisoners to act this way. This increased violence in Lake Erie correlates with the large increase of inmates. CCA's greedy decision to house more inmates was cruel, immoral, and clearly infringes upon the Eighth Amendment.

Overcrowding and violence is not contained only to Lake Erie. A privately-owned prison in Oklahoma, North Fork Correctional Facility, contained 2,381 inmates from California because of overcrowding in California's prison system. In 2011, a massive fight broke out between prisoners which led to forty-six injuries.¹⁴ The large number of injuries reflects the incapability of staff at for-profit prisons to prevent violence from occurring. Low pay and inadequate training for staff not only increases brutality from inmates, but also from the guards themselves.¹⁵ Offenses committed by staff include "urinating and placing fecal matter in prisoners' food and drinks; sexually abusing

⁹ Id at 41.

¹⁰ Geisler, G. (2013). Lake Erie Correctional Institution.: Clinical Information Interoperability Council (3).

¹¹ Id at 4.

¹² Id. at 6.

¹³ Id. at 3.

¹⁴ Lee, H, (2011, October 12) California Convicts Brawl In Oklahoma Prison. Retrieved from <http://www.sfgate.com/crime/article/California-convicts-brawl-in-Oklahoma-prison-2327324.php> (last accessed on 12 Feb. 2018).

¹⁵ André Douglas Pond Cummings, 6 Wake Forest J. L. & Pol'y 407, 420 (2016).

prisoners; [and] violently mistreating prisoners.”¹⁶ Prison guards are supposed to keep peace and order, but instead are creating unsafe conditions for inmates. Guards receive inadequate training and are paid \$7,000 less than public prison guards,¹⁷ so they are not as incentivized to protect inmates’ constitutional rights.¹⁸ Brutality and force are used to control inmates¹⁹ and prisoners have no one securing their rights inside the walls of the jail. The conditions that the guards put inmates in are “cruel and unusual.”²⁰

With regards to violence, for a claim to be taken against a prison guard under the Eight Amendment the plaintiff must prove the defendant “maliciously and sadistically use[d] force to cause harm.”²¹ Inadequate training in private prisons that leads to excessive force can be improperly justified under this case. A court in New Mexico ruled that force cannot be viewed as a violation of the Eight Amendment if it was used to reestablish peace.²² These rulings allow for guards to claim they believed that force was used properly in their respective situations. This gives no accountability or reason for private prisons to stop the violence and better train their guards.

B. Inadequate Medical Treatment

To increase profits, budget cuts are a frequent practice among private prisons; this was discussed with staff and is also apparent with medical treatment of prisoners. The substantial intake of young and healthy prisoners exhibits the cost cutting mentality of private corporations.²³ Despite this approach of housing healthy prisoners, there are still huge medical care issues due to cost-cutting.²⁴ The

¹⁶ Ryan Miller, 37 Loy. L.A. Int'l & Comp. L. Rev. 377, 405 (2016).

¹⁷ Mumford, M., Schanzenbach, D., Nunn, Ryan. (2016) The Economics of Private Prisons. The Hamilton Project, (5).

¹⁸ See supra note 15, at 420.

¹⁹ See supra note 15, at 425.

²⁰ See supra note 5.

²¹ See Hudson v. McMillian, 503 U.S. 1 (1992).

²² See Peña v. Greffet, 108 F. Supp. 3d 1030 (2015).

²³ Alex Friedmann, 42 Fordham Urb. L.J. 503, 522 (2014).

²⁴ See supra note 15, at 420.

failure of private prisons to provide sufficient medical care to inmates is alarmingly harmful and violates the Eighth Amendment.

Responding to medical issues in a timely matter is essential, but private prisons fail to do this which is a huge reason why there are so many medical issues in private prisons. Prisoners go without necessary medication because it may take up to weeks for prescriptions to be refilled.²⁵ This is extremely troubling when prisoners have severe medical conditions and the prescriptions are not readily available.²⁶ Additionally, prisoners do not receive correct medical care and are mistreated.²⁷ This is reflected in the increased number of deaths in Arizona prisons which is attributed to the increased privatization of health care.²⁸ Another instance of an Eighth Amendment violation is a for-profit prison in Mississippi where the staff purposefully ignored medical conditions.²⁹ Lesions were left untreated, signs of cancer were disregarded, and an inmate even went blind from mistreatment.³⁰ Allowing these medical conditions to escalate to this extreme degree causes suffering and is considered cruel and unusual punishment. These prisoners depend on the staff to care for them and they are purposefully being mistreated and put into harm's way.

The failed health care system in private prisons has devastating effects that in some cases result in death. In 2008, a detainee named Jesus Manuel Galindo died from an epileptic seizure while in solitary

²⁵ (2014). Warehoused And Forgotten: Immigrants Trapped In Our Shadow Private Prison System Retrieved from American Civil Liberties Union: https://www.aclu.org/sites/default/files/field_document/060614-aclu-car-reportonline.pdf. (80) (last accessed on 12 Feb. 2018).

²⁶ Id at 81.

²⁷ Id at 80.

²⁸ "There have been 50 deaths in Arizona Department of Corrections custody in just the first eight months of 2013. That is a dramatic increase from previous years. The Arizona Republic reported 37 deaths in 2011 and 2012 combined" Isaacs, C (2013). Caroline Isaacs, Death Yards: Continuing Problems with Arizona's Correctional Health Care, (4).

²⁹ Dockery v. Epps, No. 3:13 CV 326. Southern District of Mississippi Jackson Division. 2013, May 30 (3).

³⁰ Id at 3.

confinement.³¹ Galindo informed the guards at Reeves County Detention Center (owned by GEO Corrections & Detention, a private corporation that runs prisons all over the United States) about his condition, but nothing was done to help him.³² In this case, a man's life was taken away from him because of the poor medical facilities offered at this private prison. Even after this tragedy, Reeves Country Detention Center has learned nothing from their past mistakes; understaffing, denial of medication, and inadequate care are all still prevalent.³³

For a claim of medical negligence under the Eighth Amendment, the plaintiff must prove that there was "deliberate indifference to serious medical needs" according to *Estelle v. Gamble*.³⁴ This was ruled this way so that accidents by medical professionals cannot be considered a violation of the Eighth Amendment.³⁵ This is intended to protect doctors in cases where legitimate mistakes occur, but is concerning because negligence can be argued and justified as an accident and makes it extremely difficult for inmates to prove their claim. Like violence in prisons, this case is burdensome with regards to establishing accountability of private prisons. Private prisons have the task of creating as much of a profit as possible but cutting health care has harmful effects on inmate's rights.

III. The Fourteenth Amendment and Minorities

The Fourteenth Amendment of the Constitution states "nor shall any State deprive any person of life, liberty, or property, without due process of law..."³⁶ Private prisons are ignoring this right and are unfairly targeting groups of minorities and exposing them to the harsh prison conditions. This is reflected in the fact that 1 in 36 Hispanic men and 1 in 15 African American men are behind bars

³¹ See supra 25, at 64.

³² Id. at 65.

³³ Id. at 67.

³⁴ *Estelle v. Gamble*, 429 U.S. 97 (12) (1976).

³⁵ Id.

³⁶ See supra note 4.

compared to 1 in 106 White men.³⁷ The greed of private corporations running prisons has apparent negative effects and lead to unfair targeting towards minority groups.

A. Immigration Detention

Throughout American history, there have been periods of fear towards specific groups of people who are believed to be threatening to the society. This was evident during World War II with Japanese internment camps and during the Cold War with regards to the Red Scare. The events that occurred on September 11th, 2001 has caused fear of terrorism and has led to alarm and controversy towards immigrants, which is apparent in American politics (the proposed wall along the Mexican border, et cetera). One of the main reasons private prisons even regained support from society was because of illegal immigration.³⁸ This harsh outlook towards illegal immigrants is reflected in detention rate. In 2005, less than 250,000 illegal immigrants were detained-but by 2010, that number swelled to 392,000 illegal immigrants.³⁹

Half of the illegal immigrants detained are placed into private prisons which is unconstitutional relating to the Fourteenth Amendment which states “nor shall any State deprive any person of life, liberty, or property, without due process of law.”⁴⁰ Even though illegal immigrants lack certain rights such as voting, they are still protected under the Fourteenth Amendment of the Constitution.⁴¹ Private prisons are viewed as a fix to the increasing illegal immigration problem, but detainees end up being subjected to the violent and harsh conditions expounded upon above. The story of Jesus Galindo displays the effects private prisons have on immigrants. Not only was it cruel and unusual punishment but Galindo’s life was taken from

³⁷ (2008). One in 100: Behind Bars in America 2008. Washington D.C., The Pew Charitable Trusts (6).

³⁸Mike Tartaglia, Private Prisons, Private Records, 94 B.U.L. Rev. 1689, 1693 (2014).

³⁹ (2011) The Influence of the Private Prison Industry in the Immigration Detention Business, Detention Watch Network (1).

⁴⁰ See supra note 38, at 1694. U.S. Const. amend. XIV.

⁴¹ See, *Yick Wo v. Hopkins*, 118 U.S. 356 (2001). “The Fourteenth Amendment to the Constitution is not confined to the protection of citizens” (10).

him by the private prison's negligence which ultimately violates the Fourteenth Amendment. Galindo isn't the only detainee who has suffered injustice within private prisons. Spanish speakers have issues communicating with English-speaking medical staff.⁴² Because this lack of communication exists, prisoners can be misdiagnosis or have a lack of proper treatment.

B. African Americans

Another group within the United States that is predominantly present in private prisons is African Americans. There is a race disparity in public prisons, but within private prisons it is even greater. African Americans are essentially being used to make a profit⁴³ because they have the highest incarceration rates.⁴⁴ A study conducted showed that African Americans are placed into private prisons more than any other race because of healthcare reasons;⁴⁵ for-profit prisons cut as many costs as possible, and it turns out that younger and healthier inmates are usually African American.⁴⁶ This is taken advantage of and is used to target this minority group even more.

One in nine Black men between twenty and thirty-five years old are incarcerated, and this can be attributed to lobbying.⁴⁷ Lobbying is a common tactic used by different groups for political reasons, but is especially used by private corporations who run prisons. These private corporations utilize lobbying to encourage incarceration, so that there's an increased need for more private prisons.⁴⁸ This causes police to target poor neighborhoods (while has little effect on wealthier areas) and leads to the large amount of African Americans being incarcerated.⁴⁹ In addition to increased targeting of certain neighborhoods, harsher policies are being introduced that increase

⁴² See supra note 25, at 80.

⁴³ See supra note 15, at 407.

⁴⁴ See supra note 2.

⁴⁵ Pretrella, C. (2014) *Radical Criminology*. Brooklyn New York: Punctum Books (81, 82-83).

⁴⁶ *Id.* at 83.

⁴⁷ See supra note 37, at 6.

⁴⁸ See supra note 15, at 410.

⁴⁹ See supra note 15, at 409.

time in jail. For example, in Florida, regardless of the inmate's past crimes, they must serve 85% of their imprisonment and probation officers must report any probation violation that occurs.⁵⁰ African Americans are being unfairly targeted and deprived of their lives and liberty. Money is being valued more than their constitutional rights.

IV. Constitutional Authority Over Private Prisons

State governments contract out private corporations to run prisons to ease the burden of overcrowding in the system.⁵¹ Since private prisons are not a part of the government, the question remains whether private prison inmates have the same constitutional rights as public prison inmates. 42 USCS § 1983 states that “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.” This secures that public and private prisons are obligated to protect the constitutional rights of their inmates.⁵² It would be unfair if only those in public prisons were afforded their constitutional rights but those unfortunate inmates in private prisons weren't guaranteed the same rights. Private entities are hired by the state and need to be held just as accountable as the state.

A. Accountability for Private Prison

It has been established that private prisons have to protect the constitutional rights of their inmates. This is not always the case, and many times private prisons receive few repercussions for mistakes made. Prisons are usually monitored by the media and government⁵³, but there's a lack of disclosure with regards to private prisons' data.⁵⁴ This makes it difficult for communities to be aware of constitutional infractions occurring and there is no opportunity to establish plans to improve the prisons. Organizations are set up to see if the contract between the state and the prison is being followed, but

⁵⁰ See supra note 37, at 9.

⁵¹ Peter Duitsman, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C.L. Rev. 2209, 2210.

⁵² *Id.* at 2234.

⁵³ See supra note 38, at 1692.

⁵⁴ *Id.* at 1669.

these organizations receive funding from private corporations for events that they organize.⁵⁵ It's hard to conclude that these organizations are being unbiased since there are such close connections with private prisons.

To make sure that constitutional rights are not being infringed on there needs to be an unbiased watch system that has authority over private prisons. The agencies that are currently being used have little power to force private prisons to fix their conditions⁵⁶. Other countries such as Great Britain have national agencies that enforce minimum standards on private prison conditions.⁵⁷ If the United States created an agency similar to Great Britain's, this would assist with improvements to conditions of these prisons. The current agencies are useless at protecting constitutional rights since most reforms must occur through civil action.

In general, taking action against the prison system is a difficult task because of the Prison Litigation Reform Act. The wrongdoing of the prison must be reported to the prison first, it must be physical, and it cannot be about certain aspects of the prison's environment.⁵⁸ This task is made even more difficult in private prisons because inmates cannot sue under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotic* like public inmates.⁵⁹ It was discussed earlier how difficult it is to make a claim against private prisons with regards to the Eighth Amendment. The plaintiff bears the burden of proof to establish the malign intentions of the prison and guard(s). The system fails to assist the prisoners and it is difficult for them to receive justice or change how they are being treated.

V. Greed of Private Prisons

⁵⁵ Id. at 1700.

⁵⁶ David Fhati, *The Challenge of Prison Oversight*, 47 Am. Crim. L. Rev. 1453.

⁵⁷ Id.

⁵⁸ Id. at 1453-1455.

⁵⁹ Id. 1461 "the Eleventh Circuit has recently held that private prison operators are not "public entities" under the Americans with Disabilities Act, and therefore, unlike publicly operated prisons, cannot be sued under Title II of that statute." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcoti*, 403 U.S. 388, gives people the right to sue when their constitutional rights have been infringed on.

All these claims against private prisons display that money is valued more than inmate's constitutional rights. Problems are caused by greed of corporations that make budget cuts for larger profits. Private prisons have huge profits; for example, in 2012 GEO Corporation had 208-million-dollars in earnings.⁶⁰ This is ridiculous considering all the constitutional violations that occur in private prisons because of overcrowding, understaffing, and poor training. For-profit prisons are more focused on receiving a bigger profit, which is expected considering it is a corporation making money off the imprisonment of people.

Private prisons take advantage of a lack of funding in the government. They are seen as a solution to the incarceration problem and a way to save money which is why there is a growing reliance on them. Despite this perception, there is little proof that they do so.⁶¹ GEO had 208-million-dollar profit, and the government funded 36% of that revenue.⁶² This displays the greed of these corporations because budget cuts and constitutional violations are occurring while huge profits are being made. The American government and taxpayers are funding these huge profits. Private prisons are not equipped to preserve the constitutional rights of inmates because greed overshadows liberty.

VI. Conclusion

Private prisons are unconstitutional because of the horrendous conditions that the prisoners are subjected to. The increased privatization is the easy way out in dealing with incarceration problems but this practice offers no long-term solution. It is impossible for a private prison to protect prisoner's rights when their main goal is to make as much profit as possible. Even when action is taken against these prisons for violating constitutional rights, there are few repercussions or changes to prison conditions. Controversy regarding private prisons is not limited to the United States; Israel

⁶⁰ See supra note 4, at 1694.

⁶¹ See supra note 23, at 553.

⁶² See supra note 4, at 1694.

declared them unconstitutional in 2009.⁶³ The United States needs to take the same action before there is a greater reliance on them.

There is no proven long-term financial benefit to the government using private prisons and they are being used because of the assumption that it is an easy way of dealing with the growing prison population. The money paid by the government to private prisons should be redistributed properly and used to stop recidivism. As of 2007, a majority of prisoners who finished their sentence were arrested again within three years⁶⁴. The prison system is failing to rehabilitate inmates which leads to bigger profits for corporations. Taking this approach would lead to lower incarceration rates and ultimately lower the amount of money needed to run so many prisons, so there wouldn't be a need to contract private corporations. As of 2018, money is not being used to fix the problem, instead the money made by private corporations (funded by the government) is being used to increase imprisonment rates through lobbying. Private corporations cannot protect those in their prisons, and their lobbying exposes more inmates to appalling conditions. For-profit prisons are making huge profits, at the tax payers' expense, while subjecting inmates to constitutional violations.

⁶³ See supra note 8, at 377

⁶⁴ See supra note 37, at 4

THE SECOND AMENDMENT AND THE FORGOTTEN MILITIA

Benjamin J. Green

I. Introduction

On February 14, 2018, a mass shooting occurred at Marjory Stoneman Douglas High School in Parkland, Florida. Seventeen people were killed and fourteen more were taken to hospital. This incident has sparked mass debates over gun control, as well as the viability of the Second Amendment in today's modern age. While there are several points that can be made over the necessity of gun control in America, this article does not serve to explore any of them. Instead, it serves to combat the argument that the Second Amendment is far outdated for today's modern society.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹ This is the exact text of one of the most controversial amendments to our nation's constitution. Its very nature instills rights upon American citizens that few countries have, namely the ability to lawfully possess a firearm. The politics surrounding this amendment are quite volatile, as this is one of the many house-splitting issues that our government faces today, some critics even calling it "the most embarrassing provision of the Bill of Rights."²

Much of the political debates involving the Second Amendment are surrounding the individual right, that the right to bear Arms shall not be infringed. However, the most unique right that this Amendment grants American citizens is the right to form a Militia.

Looking further back into the Constitution, we can see that Congress, "Shall have the power to [...] provide for calling for the Militia to

¹ U.S. Const. Amend. II

² Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103-130 (1987)

execute the Laws of the Union, suppress Insurrections and repel invasions.”³ This is known as the Militia Clause, which initially allowed Congress to call forth American citizens in the event of an invasion to protect their country. At first this may seem contradictory to the Army Clause, which simply allows Congress to create an Army⁴, but the Militia clause was introduced after the Army clause; the Framers wanted to instill the ability of the average American citizen to not only defend their Nation from foreign invasions, but from domestic tyranny as well.

This article’s purpose is not to explore every avenue of political debate surrounding the Second Amendment, for that would not only be exhaustive but eternal as well. My purpose in writing this document is to show what I believe to be the true intent the Founders had while drafting the Second Amendment. First by analyzing the conditions in which it was drafted, and then by detailing the several adaptations and interpretations that courts have made over the years of its existence.

II. Early History of The Second Amendment

A. Pre-Colonial

Although the Founding Fathers wanted to create a nation that was free of the tyranny they saw from the Great British Empire, they incorporated various aspects of old British practices into their new nation. An Englishmen’s obligation to serve his nation is an old concept, following the phrase: “For King and Country.”⁵ The formation of a citizen army is the first notion of a “militia,” and can be seen in the late Twelfth Century when King Henry II formalized his subjects’ duties with the Assize of Arms.⁶

³ U.S. Const. Art. I Sec. 8 Cla. 15

⁴ U.S. Const. Art. I Sec. 8 Cla. 12

⁵ Common British phrase, often used in terms of military service in which it refers to the loyalty and allegiance to the throne of England. Wording changes with whomever sits atop the throne (i.e. currently with Queen Elizabeth II it would be For Queen and Country).

⁶ Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L. J. 1855, 2079 (1985). See for exact year of enactment.

The Arms required that arms not only be possessed by the freemen of the Empire, but also prohibited the possessor from selling, pledging, or in any other way alienating the weapons.⁷ In 1253, the armed population of the citizen army was expanded to also include serfs.⁸ Another augmentation to the Assize occurred in 1297, which now required all men possessing land to a value of twenty pounds to provide themselves with horses and arms.⁹ Queen Elizabeth I formalized the citizen army process by issuing instructions for general musters in each county.¹⁰ The purpose of these musters was to give Queen Elizabeth the knowledge of the, “numbers, qualities, abilities, and sufficiency of all her subjects in that county.”¹¹ During Queen Elizabeth’s reign, the citizen army acquired the name “militia.”¹²

It is in the early Stuart period that we first see the existence of this militia as a force to combat government tyranny, specifically that of King James I and his son King Charles I. In short, James I feuded with Parliament about the bounds and powers of the Crown. Parliament took the position that it would determine who should be seated,¹³ while James espoused the divine right theory of government, that Kings held their thrones by the will of God alone, and not by the will of peoples or parliaments.¹⁴ James held that the King, as chosen by God, was the law and all rights flowed from the King.

This feud between James and Parliament extended with King Charles I, when Parliament enacted the Petition of Right in 1628. The Petition recited Charles’ violations of the rights of his subjects, including imprisonment without process, quartering of soldiers in English

⁷ Sir Frederick Pollock & Frederick W. Maitland, *The History of English Law Before the Time Of Edward I*, 421-42, 565 (1968).

⁸ David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. L. & POL. 1, 7 (1987).

⁹ Carl Stephenson & Frederick G. Marcham, *Sources of English Constitutional History*, 163 (1937). Further cited as *Sources*

¹⁰ *Id.* At 397

¹¹ *Id.* (Instructions for General Musters (1572))

¹² *Id.* At 396

¹³ *Sources*, *supra* note 9, 412-13

¹⁴ Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961-1001 (1975).

homes without the consent of the owner, and the execution of persons pursuant to martial law.¹⁵ Sounds familiar, does it not? Charles agreed to acknowledge his excesses, but thereafter dissolved Parliament and refused to call it for eleven years until he was forced to in 1640.

Soon after Parliament had reassembled, they moved to seize control of the militia.¹⁶ Charles, of course, refused to accept this demand. Lacking the King's consent, Parliament moved to circumvent Charles' authority and appointed its own officers to take control of the Militia through an Ordinance of Parliament in 1642.¹⁷ Parliament advised the militia that any units mustered under authority other than that of Parliament would be punished; the King did the same and as a result, civil war ensued.

While it may seem to the reader that this article is becoming more akin to that of an English History paper, some points must be taken from the events that transpired during this period to understand how the Founding Fathers created the Constitution and its Amendments.

After the revolution, Charles II was placed on the throne by Parliament. Because of the tradition of universal armament and the very recent Civil War, the English people were heavily armed. Charles II decided to develop his own army and began to disarm the population except for troops whom he believed would be loyal to his government.¹⁸ Charles II's policy of disarmament continued with his brother, King James II. King James was a Catholic King ruling over Protestants in a country that barred Catholics from holding appointed office.¹⁹ James' army doubled in size after defeating the rebellion lead by Charles II's illegitimate son, the Duke of Monmouth.²⁰ James then quartered his new troops in private homes, directly violating previous Parliamentary enactments.

¹⁵ *Sources, supra* note 9, at 450-52

¹⁶ *Sources, supra* note 9 at 486-87

¹⁷ *Id.*

¹⁸ *Supra* note 8

¹⁹ *Sources, supra* note 9 at 555

²⁰ *Supra* note 8

James' army then deserted him in 1688 when William of Orange landed in England with a large Dutch army. William and Mary became sovereigns in 1689, however Parliament required them to accept the Declaration of Rights.²¹ This declaration listed the abuses by James and set forth the right of Protestant subjects to have arms for their defense.²² This was not a new right, as the allowance of arms for British citizens was a long-time tradition by then. However, it is here that we first see the creation of a right meant to resist tyranny.

B. Colonial Era

With the history of abuse of power in the form of standing armies, the English views on the relationship between arms and democracy heavily influenced the views of the Founders. Both the Federalists, those who believed in a strong central government, and the Anti-Federalists, those who believed in stronger State power and favored self-government, agreed that arms and liberty were eternally linked.

These views can first be seen in the context of Article 1, section 8 of the Constitution, concerning Congress' power to raise an Army and its power over the militia. Congress would have the power to raise and support armies,²³ however, initially there was no check against standing armies in times of peace.²⁴ With the history of abuse of standing armies, there was no question that a standing army would pose a threat to the liberty of the people. The dilemma the Founders faced was that they needed some form of an army during times of war, but to wait until war to raise one could be catastrophic. Their solution was to limit the amount of money that Congress could appropriate to raise an army by no more than two years. In the Founder's mind, the people would control the House of Representatives and the Senate, and Congress would control the

²¹ *Sources, supra* note 9 at 599

²² *Id.* At 601

²³ *Supra* note 4

²⁴ Dept. of State, *Documentary History of the Constitution* 560 (1900), reprinted in 3 *Documentary History of the Constitution of the United States of America 1786-1870*, at 560 (Johnson Reprint Corp. 1965).

money; thus, the people were given an effective check against the dangers of a standing army.

The other substantial check against a dangerous standing army is the existence of a militia. The militia would satisfy the dual obligation of providing for the nation's defense, while also warding against the dangers of a standing army and potential abuse of power from the national government. George Mason spoke on the relationship between arms and liberty, contending that the most effective way to enslave a people is to disarm them.²⁵ The Antifederalists feared governmental tyranny and contested the ratification of the Constitution. They wanted to preserve individual rights against that tyranny and argued for the inclusion of a Bill of Rights that would include individual rights such as free speech and the right to bear arms.²⁶

The Federalists, too, feared government tyranny. Like the Antifederalists, they did not attempt to dispute the bond between arms and freedom. James Madison argued that even though the proposed Constitution offered sufficient protections against tyranny through its checks and balances, the real deterrent to governmental abuse was the armed population.²⁷ Another leading Federalist, Alexander Hamilton, stated that, "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government"²⁸ Hamilton asserts that if the persons whom the nation entrusts with supreme power shall abuse that power, the citizens must rush to arms.²⁹

In summary, the Federalists and Antifederalists disagreed on several issues, such as the existence of sufficient checks and balances, and the inclusion of a bill of rights. However, they agreed upon the fact

²⁵ 3 *The Papers of George Mason 1725-1792*, at 1075 (Robert A. Rutland ed., 1970)

²⁶ David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *Yale L.J.* 551 (1991).

²⁷ James Madison, *Notes of Debates in the Federal Convention of 1787*, at 600 (Ohio Univ. Press rev. ed. 1984).

²⁸ *The Federalist Papers*, No. 28 (Alexander Hamilton).

²⁹ *Id.*

that the most prominent danger to their new republic was a tyrannical government and the ultimate check on that government was an armed population. It is clear that the Founders, in their drafting of the Constitution, wanted the nation to be free of any fear of tyranny and their inclusion of the Second Amendment outlines the methods in which the people of that nation would secure that freedom.

III. Interpretation via Case Law

Until the twentieth century, the Supreme Court had few dealings with any Second Amendment claims. At this time, the federal government would not yet regulate firearms, and the Bill of Rights had yet to be applied to the state governments. However, during the Prohibition era, certain weapons (such as submachine guns and sawed-off shotguns) became associated with the organized crime of that time. In 1943, Congress passed the National Firearms Act³⁰, which prohibited the private possession of specified weapons, namely the types mentioned previously.

In *United States v. Miller*,³¹ the Supreme Court reviewed a Federal trial court's decision to dismiss an indictment wherein the defendants were indicted for transporting an unregistered double barrel 12-gauge shotgun in interstate commerce in violation of the National Firearms Act. The United States District Court for the Western District of Arkansas quashed the indictment as it violated the Second Amendment.

Notice here, the proceedings take place in Federal court because the NFA is a Federal enactment; the Second Amendment would not be incorporated against state governments until *McDonald v. Chicago* (which will be discussed further into this article).

The Supreme Court reversed the decision and remanded for further proceedings, asserting that in the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at the time had some reasonable

³⁰ 26 U.S.C.S. § 1132

³¹ 307 U.S. 174 (1939).

relationship to the preservation of efficiency of a well regulated militia, [The Court] cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.³² The Court further cited the decision of *Aymette v. State*, by stating “It is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”³³

This is the first major instance of the Supreme Court interpreting the Second Amendment. Notice how their basis for discussion was not simply whether it would be reasonable to own a sawed-off shotgun, but instead they asked if the possession of a sawed-off shotgun correlated with the preservation or efficiency of a well regulated militia; for that is the true intention of the Founders in their writing of the Second Amendment.

In *McDonald v. Chicago*³⁴, the State of Illinois enacted multiple ordinances banning handgun possession. Petitioners claimed that these ordinances violated the Second Amendment right to bear arms, and they asserted that the ownership of a firearm for self-defense was the cornerstone of the Second Amendment. The Court agreed and reversed the lower court decisions, stating that self-defense was a basic right and was the central component of the Second Amendment right.³⁵ The Court therefore found that the Second Amendment right to keep and bear arms was incorporated and made applicable to the states via the Due Process Clause of the Fourteenth Amendment.

As it was drafted, the Constitution was intended to place regulations on the Federal Government, as the Founders wanted each state to have their own governing body as well. With the decision in this case, the Court effectively applied the notion that the Founders wanted to protect the nation from a tyrannical government to that of the state. Perhaps they never anticipated such a situation to come about, but

³² *Id.*

³³ *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.

³⁴ 561 U.S. 742

³⁵ *Id.*

nevertheless, by incorporating the Second Amendment to State governments, the Supreme Court had ensured the people of every state their right to defend themselves from tyranny.

In *District of Columbia v. Heller*,³⁶ a special policeman filed action against the District of Columbia for enacting ordinances that banned the ownership of handguns as well as the requirement that firearms be kept nonfunctional, claiming that these ordinances violated the Second Amendment right to bear arms. The Court held that the D.C. ban on handgun possession in the home as well as its regulatory clause mandating that any firearm in the home be rendered inoperable was indeed in violation of the Second Amendment.³⁷ The Court held that the Second Amendment afforded the right to bear arms to citizens unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense in the home.

Here, the Court determined that the prefatory clause to the Second Amendment, “A well regulated Militia, being necessary to the security of a free State”³⁸ announced the purpose of the Amendment, but did not limit its application, nor expand the scope of the operative clause. This is the first major instance of the Court interpreting the Second Amendment in terms of modernization, that the Amendment granted not only the right to bear arms for the existence of a militia to defend against a tyrannical government, but also to defend oneself inside one’s home. Notice how the Court is very careful in this loose interpretation, as it states the Second Amendment right was not unlimited, however it expands the class of “arms” to those that were not in existence at the time of the founding.³⁹

Finally, in *Caetano v. Massachusetts*⁴⁰ a woman was convicted under a Massachusetts ordinance banning the possession of an electrical weapon (i.e. a stun gun). The Massachusetts Supreme Court had

³⁶ 554 U.S. 570

³⁷ *Id.*

³⁸ *Supra* note 1

³⁹ *Supra* note 36

⁴⁰ 136 S. Ct. 1027

upheld the conviction claiming that the ordinance was not in violation of the Second Amendment because a stun gun was not a protected class of “arms.”⁴¹ The Massachusetts Supreme Court claims that stun guns are not protected because they were not “in common use at the time” of enactment,⁴² and that they found nothing in the record to suggest that stun guns were readily adaptable to use in the military.⁴³ Upon review, the Court found that the explanation given by the Massachusetts court contradicts the precedent set by the U.S. Supreme Court in *District v. Heller*. The Supreme Court vacated the lower court’s decision and remanded for further proceedings.

With this decision, the Court held that the Second Amendment extends to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.⁴⁴ This is the moment where the Second Amendment became timeless. With the Court’s interpretation, they have set the standard that the Second Amendment is not solely about the right to bear Arms, but that right to protect oneself; they have shown that the Founders intended to instill the right of protection to the people of their nation, not simply the right of ownership.

Through the various case law, the Court has modernized and fortified the Second Amendment in a way that will continuously sustain the provision for years to come. The most popular argument against the Amendment is that the Founders could never have anticipated how advanced modern-day arms would be, and that, “The Second Amendment needs to be repealed because it is outdated.”⁴⁵ However, it is clear through the case law of the Second Amendment that the Court’s interpretation has completely refuted this argument. With each decision, the Second Amendment has been shaped to fit the current era of our nation, and it has been interpreted to not

⁴¹ *Commonwealth v. Caetano*, 470 Mass. 774 (Vacated).

⁴² *Id.* at 781

⁴³ *Id.*

⁴⁴ *Supra* note 40.

⁴⁵ David S. Cohen, *Why It’s Time to Repeal the Second Amendment*, Rolling Stone, <https://www.rollingstone.com/politics/news/why-its-time-to-repeal-the-second-amendment-right-bear-arms-20160613>, (Last accessed on 2/13/2018).

protect certain weapons or weapon augmentations that would not directly align with service in or efficiency of a militia; it has been interpreted that the Founders would also want to protect the citizens of America from tyranny of a State government as well as a Federal government; it has been interpreted to give the right to bear arms outside of service in a militia to provide for a lawfully acceptable purpose, such as self-defense; and finally it has been interpreted to encompass all categories of conceivable “arms” in its protection.

IV. Conclusion

The Second Amendment’s greatest protection is not that of the right to bear arms, but the protection against a tyrannical government through the existence of a militia. By looking at the English history revolving around citizen armies, we see that the idea of protection against tyranny was not new to the Founders. From the events of the English Revolution, we see the necessity of this protection and how Parliament instilled it through the Declaration of Rights, the first instance of government explicitly giving the right to arms to its citizens as a means of their defense. Despite the differences in views between the Federalists and Anti-Federalists regarding the Constitution, both factions shared in their fear of a tyrannical government. It is precisely for this reason that the Second Amendment was written: to protect the people via the right to bear arms. Taken from the words of James Madison, the real deterrent from governmental abuse is the armed population.⁴⁶

⁴⁶ *Supra* note 27.

ARE SANCTUARIES SAFE? A LEGAL ANALYSIS OF THE CAMPAIGN TO DEFUND SANCTUARY CITIES

Brandt Dietry

I. Introduction

While disputes over Deferred Action for Childhood Arrivals (DACA) legislation have taken center stage as Congress battles over immigration reform, another of President Donald Trump’s campaign promises has gone largely unanalyzed. President Trump has vowed to cut off funding for so-called “sanctuary jurisdictions” throughout the United States, and although details of this effort have been vague, the very idea of using Congress’s spending powers in this manner raises several constitutional questions.¹ In the past, Congress has enjoyed a broad power to quasi-regulate states and localities with threats of funding cuts, albeit with certain restrictions. However, an injunction granted by a U.S. District Judge in California blocking a Trump executive order—citing the Tenth Amendment—has kicked off what is sure to be a long and bitter legal battle likely to end up in the Supreme Court.²

The most notable landmark case on the issue of congressional spending power is the 1987 Supreme Court ruling in *South Dakota v. Dole*, a case in which the Court held that Congress was within constitutional bounds when attempting to indirectly encourage uniform drinking age laws across the nation.³ Although the Court sided with Congress and its right to attach conditions to federal funds, the majority opinion, delivered by Chief Justice Rehnquist, laid out a clear set of potential limitations on spending powers.⁴ This set of

¹ Exec. Order no. 13,768, 82 FR 8799 (2017).

² Cnty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Calif. 2017).

³ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁴ *See id.* at 207-208.

limitations provides the framework for a legal analysis of the Trump administration's proposed agenda.

First, it must be noted that Congress, not the President, must take action in order for federal funds to be withheld from states and localities. As District Judge William Orrick pointed out in his California opinion, "Where Congress has failed to give the President discretion in allocating funds, the President has no constitutional authority to withhold such funds and violates his obligation to faithfully execute the laws duly enacted by Congress if he does so."⁵ Therefore, while President Trump's executive order gave some shape to the effort to eradicate sanctuary cities, this Article does not address the executive order. Instead, it focuses on the possibility of Congress passing a law to the same or similar effect, which the House has already approved. This bill, H.R. 3003, focuses on Department of Justice and Department of Homeland Security grants, and threatens their revocation if states and localities do not comply with federal immigration procedures.⁶

II. The Requirements of *South Dakota v. Dole*

If Congress does pass such a law, it will be subject to the same review that the Court performed in *South Dakota v. Dole*.⁷ The points to be reviewed are as follows: [1] ". . . the exercise of the spending power must be in pursuit of "the general welfare,"⁸ [2] ". . . if Congress desires to condition the States' receipt of federal funds, it must 'do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation,'"⁹ [3]

⁵ Santa Clara, *supra* note 2, at 43.

⁶ No Sanctuary for Criminals Act. H.R. 3003, 115th Cong. (1st Sess. 2017). One of the grants named in the bill as a target for revocation was the Edward Byrne Memorial Justice Assistance grant, named for New York police officer Edward R. Byrne, who, tragically yet ironically, was killed in the line of duty in 1988 while protecting an immigrant who had agreed to testify against gang members. Bill de Blasio, *Mayor de Blasio to Trump & Sessions: Don't tell NYC police how to do their job*, USA Today, Feb. 12, 2018, <https://www.usatoday.com/story/opinion/2018/02/12/mayor-de-blasio-trump-sessions-dont-tell-nyc-police-how-do-their-job/321741002/>

⁷ See *Dole*, *supra* note 3.

⁸ *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 641 (1937)).

⁹ *Id.* at 207 (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 17, 17 (1981)).

“ . . . conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs,’”¹⁰ [4] “ . . . in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion,’”¹¹ and [5] “ . . . other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”¹²

III. The General Welfare

The first restriction on congressional spending power harks back to the Constitution itself, which declares that Congress may use funds “. . . to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹³ It so follows that spending which does not advance the “general Welfare” is unconstitutional; however, despite any perceptions about the good or evil of immigration, the courts have very little authority on the subject of societal welfare. In *Dole*, the Supreme Court stated, “In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.”¹⁴ Even an inquiry into the legal meaning of “general” as it pertains to general welfare is met with a laissez-faire approach in the history of the Court. In *Helvering v. Davis*, the Supreme Court said, “The conception of spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground, or certainly a penumbra, in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar

¹⁰ *Id.* at 207 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

¹¹ *Id.* at 211 (citing *Steward Machine Co. v. Collector*, 301 U.S. 548, 590 (1937)).

¹² *Id.* at 208.

¹³ U.S. Const. art. I, § 8, cl. 1.

¹⁴ *Dole*, *supra* note 3, at 207.

law.”¹⁵ Thus, the court has taken the power to act on this spending power restriction almost wholly out of its own hands—unless faced with some dystopian “display of arbitrary power,” the Court cannot use the General Welfare clause to defeat the use of spending power against sanctuary cities.

IV. Ambiguity

The second restriction, which requires conditions attached to federal funds to be “unambiguous,” may provide a glimmer of hope to sanctuary jurisdictions, but in the long run, Congress could certainly find a way to clarify its conditions so as to satisfy this requirement.¹⁶ The judge in the *Santa Clara* case laments the ambiguity of the defunding effort by the President and the Attorney General, citing the fact that the Executive Order implies that “all federal grants”¹⁷ will be withheld, while a memorandum from the Attorney General’s office names only three grants that are targeted.¹⁸ Additionally, the judge points out that the Executive Order fails to even define what a “sanctuary jurisdiction” is.¹⁹ That said, while the House’s original bill leaves much to the imagination, an act of Congress in the future would likely be far more explicit in its conditioning of the funds, eliminating concern over this requirement. Even so, this caveat should prohibit the Trump administration from “claw[ing] back” previously awarded funds, as the Attorney General’s memorandum has promised to do.²⁰ Because states must be allowed “. . . to exercise their choice knowingly, cognizant of the consequences of

¹⁵ *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

¹⁶ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁷ *Santa Clara*, *supra* note 2, at 47.

¹⁸ See Memorandum from the Attorney General on Implementation of Executive Order 13768, “Enhancing Public Safety in the Interior of the United States” to All Department Grant-Making Components (May 22, 2017) (on file with author).

¹⁹ *Santa Clara*, *supra* note 2, at 18.

²⁰ *Id.* at 15. Of note is a significant delay in the disbursement of 2017’s Edward Byrne Memorial Justice Assistance Grant, which is thought to be related to the battle over sanctuary cities. In November of 2017, the co-chairs of the House Law Enforcement Caucus sent a bipartisan letter to Attorney General Jeff Sessions asking that the funds be released, as they were six months late as of that time. Letter from Congressmen Bill Pascrell, Jr. and Dave Reichert, to Jeff Sessions, Attorney General, U.S. Department of Justice (Nov. 14, 2017) (on file with author).

their participation,” funds previously awarded should not be subject to these conditions, because the states could not have possibly been cognizant of this consequence at the time the funds were awarded.²¹ However, an act of Congress would likely take this into account and would be wise to avoid such language. As long as Congress can craft a coherent, unambiguous, and non-retroactive set of conditions for the grants, it should have little trouble with this requirement.

V. Relationship Between Funds and Conditions

The third restriction, which requires the conditions to be germane to federal purposes, should present little resistance to the Trump administration’s agenda. *Dole* states that by conditioning the use of highway funds by requiring that states raise their drinking ages, “Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.”²² While the Edward Byrne Memorial Justice Assistance Grant (JAG), one of the grants named in the House bill, covers many programs not related to immigration,²³ conditions attached to it need only be “reasonably calculated” to be germane to its use.²⁴ The mere fact that it funds law enforcement activities should be enough to pass this test. The House bill also threatens revocation of “. . . any other grant administered by the Department of Justice or the Department of Homeland Security that is substantially related to law enforcement, terrorism, national security, immigration, or naturalization.”²⁵ While this description is fairly vague, it certainly seems as though the House is making an

²¹ Pennhurst, *supra* note 16, at 17.

²² *Dole*, *supra* note 3, at 209.

²³ 34 U.S.C. § 10152 (2018). This “Descriptions” section of the statute authorizing the JAG lists the following program types which the JAG may fund: (A) Law enforcement programs, (B) Prosecution and court programs, (C) Prevention and education programs, (D) Corrections and community corrections programs, (E) Drug treatment and enforcement programs, (F) Planning, evaluation, and technology improvement programs (G) Crime victim and witness programs (other than compensation), (H) Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.

²⁴ *Dole*, *supra* note 3, at 209.

²⁵ No Sanctuary for Criminals Act, *supra* note 6, at 4.

effort to ensure that the funds in question are related to the condition. History indicates that such a relationship need not be too closely examined. In fact, in *Dole*, the Court accepted a Presidential Commission on Drunk Driving report as reason enough to conclude that drinking ages affected highway use, suggesting that the bar for determining germaneness is quite low and is even open to a certain amount of political bias.²⁶

VI. Pressure vs. Coercion

Fourth, Congress's use of the spending power invokes the spirit of the "anti-commandeering" doctrine, which stems from the Tenth Amendment.²⁷ This doctrine was born in the 1842 decision in *Prigg v. Pennsylvania*, in which Justice Joseph Story wrote, ". . . it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution."²⁸ This doctrine was furthered by the 1992 decision in *New York v. United States*, which declared that "Congress may not commandeer the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."²⁹ While these decisions dictate that the federal government may not *directly* force states to carry out its directives, cases like *Dole* have shown that it can constitutionally influence states' decisions through its use of the spending power. However, the Court does "recogniz[e] that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"³⁰ Although this potential scenario was only described in a theoretical capacity at first,³¹ the 2012 Supreme Court decision in *National Federation of Independent Business v. Sebelius* drew a

²⁶ See *Dole*, *Supra* note 3, at 209.

²⁷ U.S. Const. amend. X.

²⁸ *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842).

²⁹ *New York v. United States*, 505 U.S. 144, 145 (1992).

³⁰ *Dole*, *supra* note 3, at 211 (citing *Steward Machine Co. v. Collector*, 301 U.S. 548, 590 (1937)).

³¹ See *Steward Machine Co. v. Collector*, 301 U.S. 548, (1937).

contrast between the small threat made in *Dole* and the weightier threat made in its present case: “It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a ‘prerogative’ to reject Congress’s desired policy, ‘not merely in theory but in fact.’ The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”³² The small revocation of highway funds in *Dole* was “relatively mild encouragement,”³³ which was constitutional in the Court’s eyes, but the revocation of all Medicaid funds in *NFIB* was a “gun to the head.”³⁴ This came to be the standard for judging whether a use of spending power was within constitutional limits. Although the Court refrained from declaring some specific threshold over which Congress must cross in order to constitute “economic dragooning,” it shows that “over 10 percent” is coercion while “less than half of one percent” is not.

How this requirement pertains to the fate of sanctuary cities depends on what form the final legislation takes. The current House bill is fairly vague on what grants are in question—while it names two specific grants it plans to revoke, it also includes a “catch-all” statement, declaring that nonconforming jurisdictions will be deprived of “. . . any other grant administered by the Department of Justice or the Department of Homeland Security that is substantially related to law enforcement, terrorism, national security, immigration, or naturalization.”³⁵ Even a cursory examination of the explicitly named grants³⁶ and their award amounts suggests that their revocation will not rise to the level of coercion, but should Congress pursue the revocation of other grants—following the President’s executive order, which calls for the Attorney General to “ensure that . . . [sanctuary

³² *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 581 (2012) (citing *South Dakota v. Dole*, *supra* note 3, at 211-212).

³³ *Dole*, *supra* note 3, at 211.

³⁴ *NFIB*, *supra* note 32, at 581.

³⁵ No Sanctuary for Criminals Act, *supra* note 6, at 4.

³⁶ The grants explicitly named in the bill are the “Cops on the Beat” program and the Edward Byrne Memorial Justice Assistance Grant program.

jurisdictions] are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary”³⁷—this scorched-earth approach would almost certainly rise to the level of coercion. Time will tell whether Congress will offer a “relatively mild encouragement” or a “gun to the head,” but early indications are that the House and the President are willing to pursue the revocation of any grants possible. Should Congress prove too headstrong in its spending-power threat, sanctuary jurisdictions may have recourse in the courts under this requirement.

VII. The Independent Constitutional Bar

Finally, conditions on federal funds may be prohibited due to an independent constitutional bar, as evidenced by the ruling in *Lawrence County v. Lead-Deadwood*: “It is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar.”³⁸ This idea is expounded in the 1819 decision in *McCulloch v. Maryland*, which explains, “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.”³⁹ In many cases (and certainly in *Dole*) the constitutional bar provision is addressed as an afterthought—certainly, nobody’s constitutional rights were affected by the decision to raise the drinking age to 21.⁴⁰ However, a close examination of the Edward R. Byrne Memorial Justice Assistance Grant reveals that one of its approved uses does have constitutional ramifications. The Office of Justice Programs’ description of the JAG is as follows: “The JAG Program, authorized under 42 U.S.C. §3751(a), is the leading source of federal justice funding to state and local jurisdictions. The JAG Program provides states, tribes, and local governments with critical funding necessary

³⁷ Executive Order No. 13,768, *supra* note 1, at 8801.

³⁸ *Lawrence County v. Lead-Deadwood S.D.*, 469 U.S. 256, 270 (1985).

³⁹ *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

⁴⁰ *See Dole*, *supra* note 3, at 204.

to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.”⁴¹ Given that indigent defense is an approved use of the Justice Assistance Grant, this threat of revocation of funds that can support public defenders may raise a constitutional eyebrow. In reality, the proportion of JAG funds that are used for public defense is nominal—one report by the National Criminal Justice Association found that 0.27% of all JAG funds are allocated to indigent defense.⁴² However, this varies by state: Minnesota, for example, employs seven and a half public defenders using JAG funds to offset the layoff of fifty- three public defenders after a cut in state funding.⁴³ Thus, if a court finds that the states are *not* coerced into complying with federal immigration procedures—that is, if the condition is one “which the state is free at pleasure to disregard or fulfill”⁴⁴—it may follow that one of those choices involves infringing upon its citizens’ right to an attorney as guaranteed by the Sixth Amendment.⁴⁵ This is new territory for the courts, but there is an argument to be made that the threat to chill a constitutional right through spending power is its own form of coercion. To rule otherwise would be to set a dangerous precedent—one which dictates that Congress can target the constitutional rights of states’ citizens when it wants to impose policy on those states. Currently, the pressure-to-coercion test is limited in its scope, having

⁴¹ Edward Byrne Memorial Justice Assistance Grant Program, <https://www.bja.gov/jag/> (last visited Feb. 12, 2018).

⁴² Byrne JAG Spending By States Across the Criminal Justice System, http://www.nlada.net/sites/default/files/na_ncjasurveyresultsJAGspendingbystates2009.pdf (last visited Feb. 13, 2018).

⁴³ Byrne JAG Improves Public Safety and Prevents Crime: How States Use the Byrne JAG Formula Grant Program to Support Indigent Defense, http://www.nlada.net/sites/default/files/na_ncjasurveyresultsJAGspendingonindigdef2009.pdf (last visited Feb. 13, 2017).

⁴⁴ Steward Machine Co., *supra* note 31, at 595.

⁴⁵ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

only been found to fail under pressure of “economic dragooning.”⁴⁶ The pressure to provide citizens with the means to protect their Sixth Amendment rights is a wholly different kind of coercion—one that is more social than economic. The courts may be faced with an opportunity to set this precedent should such an argument be raised. Because the JAG was not a subject of the executive order at issue in *Santa Clara*, the courts have not yet been tested with a challenge that highlights the JAG. If the current House bill should become law, perhaps such a battle will play out in the courts.

VIII. Conclusion

While *Santa Clara* plays out along the old and familiar narratives of *Dole*, questions still swirl about whether Congress will wield its spending power in an attempt to stamp out sanctuary cities. If it does, the grants it targets may be the key in determining whether the defunding threat is constitutional, or whether it becomes coercion on either an economic or social front. If a mere blandishment is presented, allowing the states to decide their own course, fortune will likely favor Congress. If Congress attempts to drive its point home with excessive grant-cutting, it may be accused of putting a “gun to the head” of sanctuary jurisdictions. Furthermore, if it targets programs that carry out essential functions of the Constitution, an entirely new area of coercion jurisprudence could emerge—one which has only been historically hinted at.

⁴⁶ NFIB, *supra* note 32, at 582.

A FALSE SENSE OF SECURITY: AN ANALYSIS OF VICTIMS OF SEXUAL ASSAULT AND THE PROGRESS WE HAVE MADE COMPARED TO JOYCE CAROL OATES' "WHERE ARE YOU GOING, WHERE HAVE YOU BEEN?"

Samantha R. Conover

I: WHERE HAVE WE BEEN?

Sexual assault has recently gained national and international coverage due to allegations against high-profile celebrities, politicians, powerful businessmen, and others in power, and dominating court cases that have taken the media by storm. While sexual assault is not a new issue affecting society, given that one in five women are sexually assaulted¹, the rise in victims coming forward has created a greater platform for them to speak out and seek justice for the wrongs they suffered. Individuals from all walks of life have come forward and spoken about the abuse and harassment that they have endured — this includes well-known actresses, actors, and athletes who have been repeatedly abused by people in a position of power. This article will discuss and compare the history of sexual assault and recent cases and allegations to Joyce Carol Oates' "Where are you going, where have you been?"² Oates' short story, which was written in the 1960s, captures the essence of a young, teenage girl flirting with her own aspirations who is met with a cruel fate. Through the use of contextual analysis, this article will utilize

¹ Michele Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (National Center for Injury Prevention and Control Centers for Disease Control and Prevention) (2011)

² A fictional story loosely based upon real events concerning serial killer Charles Schmid and his victims.

Joyce Carol Oates, *Where Are You Going, Where Have You Been?*, in *Literature: a portable anthology*, 312–326 (Janet E. Gardner).

Oates' literature to illustrate the situations faced by the victims and the psychology behind their actions — while also posing two questions:

Where have we been and where are we going?

“Her name was Connie. She was fifteen...”³ A young, bright, and lively girl who wanted so much more than to be simply fifteen. She wanted love and adventure. She worried about her looks the way that many young girls do. She found herself drawn to drive-in restaurants and riding around in fast cars. She liked the attention of a different boy on every night out. It made her feel something. But that was just her life outside of home. At home she was just a girl, a girl who “knew she was pretty and that was everything.”⁴ Her mother compared her to her older sister, complained about her room being disorderly, and her father was so deeply buried in work that he wasn't home even when he was sitting right there in front of her.

Her name is Mechelle Vinson. She was nineteen. A bold, young, African American woman who was starting her career as a bank teller at Meritor Savings Bank.⁵ The year was 1974. A gallon of gas was .42 cents. President Richard Nixon resigned that year. However, for Vinson, that year marked the beginning of something sinister. Something that would not only affect Mechelle but the United States legal system as we know it.

Her name is McKayla Maroney. She was thirteen. A daring, motivated, soon-to-be Olympic gold medalist. The year was 2009. President Barack Obama became the first African-American President of the United States of America. She competed in August of that year at the Visa Championships and performed one of the hardest vault styles

³ Oates, *supra* note 2, at 312.

⁴ Oates, *supra* note 2, at 312.

⁵ She said her boss raped her in a bank vault. Her sexual harassment case would make legal history. The Washington Post, https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/?utm_term=.54fc8c98e00d (last visited Feb 13, 2018)

that a gymnast can perform, a Amânar⁶. When asked years later about this magnificent feat, Maroney said, "...I was just thirteen years old. I was just really little and I didn't really know what was going on. But I just did it, and I was just very happy that I landed on my feet."⁷ McKayla was, by her own definition, "really little" and "just thirteen years old" in 2009 — a year that holds great significance in her life.

Where has Connie been? Where has Mechelle been? Where has McKayla been? Surely, you can name places they may have visited. Drive-in restaurants, the bank they were employed at, the gym they trained at — but where else have they been? If you look deeper, this question asks much more than it simply seems to at first glance.

Where have you been? In a producer's hotel room? In a comedian's dressing room unconscious? In a bank vault forced onto the floor by your boss? In a doctor's care being "treated"? At a party being groped by your agent?

Unfortunately for many men and women, they have been there. Connie has been there, Mechelle has been there, and McKayla has been there. Eighty-two women have allegedly been sexually assaulted by big-time producer in Hollywood, Harvey Weinstein.⁸ Fifty women have come forward about sexual assault allegations against comedian and actor, Bill Cosby.⁹ More than 265 women and girls have allegedly been sexually assaulted by Dr. Larry Nassar under the pretense that they were being "treated."¹⁰ Fifteen men — once

⁶ A maneuver that consists of a roundoff on and then 2.5 twists in a laid out back salto off the vault platform. Amanar Wikipedia, <https://en.wikipedia.org/wiki/Amanar> (last visited Feb 13, 2018)

⁷ 10 Questions with McKayla Maroney – Gymnastics News, NBCOlympics.com (last visited Feb 11, 2018) Archived from the original on July 14, 2012.

⁸ Harvey Weinstein's victims release list of 82 women who say they were sexually abused Vox, <https://www.vox.com/culture/2017/10/28/16564486/harvey-weinstein-sexual-abuse-list-twitter> (last visited Feb 13, 2018)

⁹ Who are Cosbys accusers? CNN, <https://www.cnn.com/2014/12/13/showbiz/gallery/cosby-accusers/index.html> (last visited Feb 09, 2018)

¹⁰ Larry Nassar Has Been Accused of Abuse by 265 People Time, <http://time.com/5127119/larry-nassar-how-many-victims/> (last visited Feb 13, 2018)

young boys — have spoken out after allegedly being sexually harassed or assaulted by Kevin Spacey, an Actor in Hollywood.¹¹ Terry Crews alleged that he was sexually assaulted by his agent, Adam Venit, a “high-level executive” for William Morris Endeavor (WME.)¹² Many questions are posed with such high numbers of victims. How was Harvey Weinstein continuously allowed to roam about and suffer no repercussions for his actions? How did Dr. Larry Nassar allegedly assault 265 women and girls before being noticed?

1: DON'T GET YOURSELF RAPED¹³

Connie's aggressor is brought to her in “broad daylight.”¹⁴ Like Connie, these victims were not walking down darkened alleyways in high crime areas, nor were they abducted by someone unfamiliar or unknown. Their abusers were known and trusted. Most of these victims worked side by side with their abusers — in broad daylight. The abusers were not wearing masks — at least not physically — or lurking in the shadows. They walked proudly about, did as they pleased, and most of them did not hide what they did. They would not suffer any repercussions for their actions and they knew it.

Connie's abduction happened beneath a “sky [that] was perfectly blue and still.”¹⁵ Connie knew her future rapist and/or murderer. Arnold Friend was his name, but he was far from her friend. He acted as her friend and spoke as if they knew each other. He spoke as if they had stayed up late talking on the phone about her parents and how much she wanted her freedom, but they had never done that and Connie knew that. She knew but she went along with the charade anyway, thinking maybe he would go away if she did.

¹¹ Kevin Spacey scandal: A complete list of the 15 accusers USA Today, <https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/> (last visited Feb 2, 2018)

¹² Terry Crews Details Alleged Sexual Assault On 'Good Morning America' Deadline, <http://deadline.com/2017/11/terry-crews-alleged-sexual-assault-good-morning-america-adam-venit-1202208712/> (last visited Feb 8, 2018)

¹³ Alex Comfort, *Joy of Sex* (Futaba Sha) (1974)

¹⁴ Tom Quirk, A Source For 'Where Are You Going, Where Have You Been?' in *Studies in Short Fiction* 18.4 (Fall 1981): 413.

¹⁵ Oates, *supra* note 2, at 315.

"Bobby King?" she said.

"I listen to him all the time. I think he's great."

"He's kind of great," Connie said reluctantly. ¹⁶

But their casual conversation began to turn into much more and even young Connie could perceive how unsettling it had become. Arnold Friend had her cornered and at first he tried to sell the idea to her; securing a worm onto his hook and dropping it into the awaiting waters hoping that she'd bite. He stood before her in his "greasy leather boots"¹⁷ with his broad, white smile, and nonchalantly spoke, "Yes, I'm your lover... I'll hold you so tight you won't think you have to try to get away or pretend anything because you'll know you can't. And I'll come inside you where it's all secret and you'll give in to me and you'll love me."¹⁸ Connie knew what this meant as she tried to distance herself from the door — the door that Arnold Friend was just on the other side of. Her heart was pumping, her body covered in sweat and "[s]he put her hands up against her ears as if she'd heard something terrible, something not meant for her."¹⁹ But it was meant for her and she knew that. Connie thought about calling for help, the phone was just right there in reach, but Arnold warned her as she placed the phone up to her ear "...I promise it won't last long and you'll like me the way you get to like people you're close to. You will...you don't want your people in any trouble, do you?"²⁰ Connie had just been given an option. She was to go with Friend against her own will and be raped and potentially murdered or he would harm her family — he had made that clear now and Connie knew she had but two outcomes. So, she sat there on the floor, her screams and cries echoing throughout the house. Her "breath start[ed] jerking back and forth in her lungs as if it were something Arnold Friend was stabbing her with again and again with no tenderness"²¹ and suddenly a calm washed over young Connie as she accepted what was

¹⁶ Oates, supra note 2, at 317.

¹⁷ Oates, supra note 2, at 319.

¹⁸ Oates, supra note 2, at 321.

¹⁹ Oates, supra note 2, at 321.

²⁰ Oates, supra note 2, at 25.

²¹ Oates, supra note 2, at 25.

to become of her. “She was hollow with what had been fear but what was now just an emptiness.”²²

Much like Connie, victims like Vinson and Maroney, faced a similar dilemma. They were given an option and while some may not have even recognized it, it was there and their abusers knew they held this power. These actresses, actors, and athletes had but two outcomes before this recent outcry in the media. They could refuse to go along with their abuser. Connie could run from Friend and try to get away, she could use that phone to call for help. But this would leave them without a career, without the Olympics, and without their dream — Connie’s family would be harmed and what if no one believed her? If they did remain silent and either accept or not even acknowledge their abuse, they would be jeopardizing their own sense of self, their mental state, their emotional state, and their overall wellbeing. Connie would be raped and possibly murdered to save her family from the same fate. While these victims may not have all faced the threat of actually being murdered, their careers did and so did their sense of self. They would not allow their abusers to take their dreams too.

2: VIRTUOUS GIRLS ARE SELDOM ACCOSTED ²³

In many ways, the victims of these attacks were living the ultimate dream or at least it had seemed so. Whether they were on their way to stardom, had already established a career in film or modeling, or competed in the Olympics — they all appeared to be successfully reaching their dreams. At what cost though? It seems that not many people surrounding these individuals stopped to consider what these celebrities, aspiring actresses and actors, or even Olympic athletes had been subjected to just to reach their goal. Perhaps, they had no knowledge of these attacks — perhaps, they didn’t want to face the

²² Oates, *supra* note 2, at 26.

²³ Phyllis Schlafly, known anti-feminist, testified that, “...virtuous women are seldom accosted.”

A Brief History of Sexual Harassment in America Before Anita Hill, <http://time.com/4286575/sexual-harassment-before-anita-hill/> (last visited Feb 8, 2018)

truth. Either way, these young men and women have paid the ultimate price for their dreams to come true.

For each of the victims that have made headlines, their dreams to become who they wanted to be exceeded the voice inside of them that may have said to stop. The voice that might have wanted them to stay home, to stay in bed, and to give up on what it was they were trying to achieve because of the abuse they endured. However, many of them continued to pursue their dream and continued to endure many more years of sexual assault at the hands of their abuser because of it. Connie would lay in the sun, eyes closed, accurately capturing the actions of the many survivors.²⁴ They could see the spotlight ahead. They could hear the cheers of fans; they could recognize the flash of distant cameras encasing them in that moment. And they could do all of this with their eyes closed. They did not dare open them — not fully and they were unable to in many cases. For if they were to open them, those lights could dim and the once mere silhouette of their abuser could become much more real. McKayla Maroney began being groomed by Dr. Nassar at just 13 years old.²⁵ She was manipulated and taught that what he was doing was right and she believed him. She even doubted herself because as she grew, she felt uncomfortable and knew something was not right. At fifteen, McKayla flew to Japan with her team to compete, she was given a sleeping pill by Dr. Larry Nassar and awoke disorientated, only to find herself in his hotel room receiving a “treatment.”²⁶ McKayla thought she was going to die that night but, like Connie, this outstanding, brave, young woman stood tall and carried on to win two gold medals in Japan. Even through these continuous years of abuse, McKayla — in her own words — “landed on [her] feet.”²⁷

²⁴ Oates, *supra* note 2, at 314.

²⁵ Olympic gold medalist McKayla Maroney says she was victim of sexual abuse USA Today, <https://www.usatoday.com/story/sports/olympics/2017/10/18/olympic-gold-medalist-mckayla-maroney-says-she-victim-sexual-abuse/774970001/> (last visited Feb 6, 2018)

²⁶ Read McKayla Maroney's Statement in the Larry Nassar Trial Time, <http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement/> (last visited Feb 9, 2018)

²⁷ Referring to completing the most difficult vault style in 2009.

The day Mechelle Vinson began working, she was unaware that she would soon be told, “Just like I hired you, I’ll fire you. Just like I made you, I’ll break you, and if you don’t do what I say then I’ll have you killed...” when she refused to have sex with Sidney L. Taylor, her boss.²⁸ Nor did she realize it would mark the beginning of a long list of approximately 50 sexual assaults at the hands of Taylor at her workplace including being raped in the bank vault and basement.

These women — among many others — have endured horrific abuse and yet some members of the public are hesitant to join their side. Many questions arose after each allegation against a prominent figure was made and this is acceptable. A fair trial should be given to those accused to protect against false claims and uphold the standard of “innocent until proven guilty.” However, the amount of false reports of rape is incredibly small — making up from two to eight percent of all reported rapes.²⁹ We have begun to see a trend develop and it isn't progressive. It is as if once an abuser reaches a certain level of notoriety or an overwhelming number of victims, it isn't significant anymore. When allegations against Bill Cosby began to build and victims continued to come forward, people began disbelieving the stories. When Harvey Weinstein's victims were on every news outlet speaking out for the first time, the public questioned why they had been in Harvey's room at 3 a.m. or why did they not report the assault sooner. It was suddenly the victim's fault that they had been sexually assaulted. They didn't react soon enough. They shouldn't have been in a hotel room with their producer. They are probably just doing this for attention. They probably just want money. Victim blaming is not a newly founded aspect of rape culture. It's deeply rooted in the legal system and can even be seen as far

²⁸ She said her boss raped her in a bank vault. Her sexual harassment case would make legal history. The Washington Post, https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/?utm_term=.54fc8c98e00d (last visited Feb 10, 2018)

²⁹ False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, in *Violence Against Women* (David Lisak et al.).

back as the Code of Hammurabi.³⁰ Somehow, in this twisted reality we currently live in, we cannot fully escape the need to victim blame and we protect the abusers. If every allegation that hits the media receives this same type of behavior and the public forum becomes one that blames the victims and discredits their statements, is a victim going to feel secure to step out of the darkness and seek help? Will they risk their dreams and career by standing in front of an audience that doesn't believe them? Would you?

II: WHERE ARE WE GOING?

1. AN IMPENETRABLE WALL OF SILENCE³¹

Mechelle Vinson sued Meritor Savings Bank after being fired in 1978. She had been sexually assaulted for four years by her boss.³² Her case gained an immense amount of attention and was referred to as an “allegation of sexual slavery” by her attorney.³³ Two years later, a District judge ruled in favor of Meritor Savings Bank and declared that sexual harassment could only be pursued if the company had been aware of the abuse and did not intervene. Vinson continued to pursue her case and after reaching the U.S. Court of Appeals for the District of Columbia Circuit, the decision was reversed. The bank did not agree with this outcome and appealed the decision once again. In 1986, the Supreme Court unanimously ruled “...that sexual harassment violated federal laws against discrimination and that companies could be held liable for sexual harassment committed by supervisors — even if the company was unaware of the harassment.”³⁴ This defining moment is not one that is easily

³⁰ Which resorted to sentencing the rapist and victim to death. Code of Hammurabi Wikipedia, https://en.wikipedia.org/wiki/Code_of_Hammurabi (last visited Feb 9, 2018)

³¹ Reese Witherspoon visits Parliament to campaign on domestic violence The Telegraph, <http://www.telegraph.co.uk/news/celebritynews/6709714/Reese-Witherspoon-visits-Parliament-to-campaign-on-domestic-violence.html> (last visited Feb 10, 2018)

³² Available at note 28.

³³ John Marshall Meisburg Jr., Vinson’s attorney. Available at note 28.

³⁴ Available at note 28.

forgotten. Mechelle Vinson's bravery and need for justice garnered a huge milestone in the anti-rape movement, which allowed many women to seek justice themselves for sexual assault and/or harassment in their workplace.

McKayla Maroney broke her silence about her years of abuse from Dr. Larry Nassar on October 18, 2017. After the creation of the hashtag, #MeToo, many women were speaking out about sexual assaults and harassments they had been victims of.³⁵ Maroney was one of the many women to use the hashtag.³⁶ The United States Olympic Committee and USA Gymnastics approached Maroney and had her sign a non-disclosure agreement for the sum of \$1.25 million dollars in the effort of keeping her silent. But Maroney was not going to be silenced, not anymore. She had remained silent long enough. In return, she filed a lawsuit against Dr. Larry Nassar, Michigan State University, the United States Olympic Committee and USA Gymnastics.³⁷ On January 24, 2018 in a Michigan courtroom, Dr. Larry Nassar was sentenced to forty to 170 years in prison for the assaults he committed. More than 150 women courageously testified at his trial about the abuse they suffered throughout nearly two decades. Judge Rosemarie Aquilina boldly addressed Dr. Nassar and stated, "I've just signed your death warrant."³⁸ Nassar's future in prison will not erase the fact that these survivors were abused, and it may not even lessen the pain. Some may find solace by breaking the silence that they were once imprisoned by and taking a brave step forward to heal.

One glance at Actor Terry Crews and it is easy to notice that he is far different in comparison to other victims of sexual assault. McKayla

³⁵ A comprehensive timeline of the Larry Nassar scandal SBNation.com, <https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state> (last visited Feb 9, 2018)

³⁶ #METOOPIC.TWITTER.COM/LYXADTUOSS TWITTER, <https://twitter.com/mckaylamaroney/status/920548528870400001>

³⁷ Available at note 35.

³⁸ Larry Nassar sentenced to up to 175 years in prison for decades of sexual abuse CNN, <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html> (last visited Feb 4, 2018)

Maroney is 5'3.³⁹ Even though Terry Crews stands at 6'3 and weighs 245 pounds,⁴⁰ this did not prevent him from allegedly being a victim of sexual assault. His agent Adam Venit, who may not have been as strong as Terry or had as much power physically, must have thought he had more power professionally if he believed he could sexually assault Terry Crews and suffer zero consequences. This speaks volumes. In December 2017, Terry Crews filed a lawsuit against WME "seeking monetary and punitive damages" and alleging "assault, battery, sexual battery, sexual harassment, gender violence and intentional infliction of emotional distress."⁴¹ On February 3, 2018, Terry tweeted out:

*"Management got a call last week from Avi Lerner producer of EXPENDABLES 4 saying I could avoid any "problems" on the sequel if I dropped my case against @WME. Guess who's Sly's agent? ADAM VENIT."*⁴²

The act of sweeping things under the rug and trying to cover up these atrocities seems to be prevalent in society today. If you are a victim of sexual assault and reach out to get help, seek justice, or to simply not remain silent, your opportunities in your profession may be severely limited. These abusers and their enablers must believe that the answer to this problem is to ensure the victim remains silent and act as if nothing occurred. McKayla Maroney decided that was not the answer and spoke out in violation of her non-disclosure agreement. With the potentiality of having to pay a fine for releasing her victim-impact statement, many celebrities came to her side. Chrissy Teigen,

³⁹ McKayla Maroney Wikipedia, https://en.wikipedia.org/wiki/McKayla_Maroney (last visited Feb 13, 2018)

⁴⁰ Terry Crews Wikipedia, https://en.wikipedia.org/wiki/Terry_Crews (last visited Feb 13, 2018)

⁴¹ Adam Venit files response to Terry Crews sexual harassment suit NY Daily News, <http://www.nydailynews.com/entertainment/gossip/adam-venit-files-response-terry-crews-sexual-harassment-suit-article-1.3796906> (last visited Feb 9, 2018)

⁴² "Sly" refers to Sylvester Stallone, one of the actors in Expendables 4.

a model, cook, writer, and wife of John Legend, even offered to pay the \$100,000.00 fine entirely.⁴³

2. THE SHAME IS ON THE AGGRESSOR⁴⁴

Since Joyce Carol Oates' novel was written, it has been fifty-two years⁴⁵ and we still are all searching desperately for the direction forward because it seems that even with so much time in between these issues, we are back at the beginning. If equality is something we are actually striving for, then these issues should be faced with such diligence because we not only need this change, but we must change. Why wait another fifty-two years only to once again discuss that we are still facing the same issues and being silenced worldwide?

It is incredibly disheartening to believe that even after so many years, women and men can be subjected to the same types of behaviors and the same pattern of dealing with these behaviors. Your gender, sexuality, ethnicity, race, or status should not impact your right to equality. An individual in 2018 should not be shamed for any of these factors, nor should these factors be held above you or used against you. One should be able to aspire to be anything they want. Without that drive and motivation, the many professionals across all industries would not exist.

Just like a torch, these individuals are burning flames and with every victim that we see silenced, shut out, blamed, and unsupported by the majority, that flame dims and it continues to dim. Before you know it, that light is out. That person is gone. Whether they leave the profession they once shone so brightly in or they choose another route, we have lost a great light. And with every light lost, it gets

⁴³ Chrissy Teigen Offers To Pay Possible Fine For McKayla Maroney's Truth-Telling The Huffington Post, https://www.huffingtonpost.com/entry/chrissy-teigen-mckayla-maroney-larry-nassar_us_5a5e2688e4b04f3c55a64ce8 (last visited Feb 8, 2018)

⁴⁴ Angelina Jolie on rape: The shame is on the aggressor, not the victim Raw Story, <https://www.rawstory.com/2014/06/angelina-jolie-on-rape-the-shame-is-on-the-aggressor-not-the-victim/> (last visited Feb 2, 2018)

⁴⁵ Where Are You Going, Where Have You Been? Wikipedia, https://en.wikipedia.org/wiki/Where_Are_You_Going,_Where_Have_You_Been%3F (last visited Feb 3, 2018)

darker and darker. The shadows move in closer and closer and these professions whether acting, athletics, or mere day to day business, become shadowed — no matter how great they are or once were — by the monsters that lurk within them. They are there, they are seeking their next victim, and unfortunately, they are not just a figment of your imagination, but a nightmare that is not as easy to wake up from.

And so, the question arises and we all beg to know:

Where are we going?

Because we surely know where we have been. #TimesUp. ⁴⁶

⁴⁶ #TimesUp Times Up Now, <https://www.timesupnow.com/> (last visited Feb 13, 2018)

WOMEN IN COMBAT: FIGHTING FOR EQUAL SKIES

Reina Chehayeb

The classic tale about a young, Chinese woman disguising herself as a man to take her injured father's place in the war against the Huns is not as much of a tale as one may think. Like Mulan, many women throughout history disguised themselves as men to serve in combat roles within wars, however, only a few are known. The attempts and successes of these women to join battles dates back to 1776 where Margaret Corbin disguised herself as a man to fight next to her wounded husband in the battle of Fort Washington.¹ Even though women have gradually gained more acceptance in a combat role within the military realm and no longer need to disguise themselves, more advances are still needed. With rare advocacy for women abroad to fly the skies in a combat role, countries need to adopt a universal policy to guarantee women the same rights as their male counterparts.

The First to Take the Skies

Women have always participated in wars in one aspect or another. They birthed the sons that fought in the wars, supplied medical care for the wounded, strongly and patiently waited for their husbands, sons, brothers and fathers to return home, or they were the fighters themselves. Documentation shows the first female fighter pilot was born in 1914 in a small town in Turkey which was much like Mulan's ordinary village.² Sabiha Gokcen, the girl from the small village, became a symbol of women's revolutionary involvement under the era of Kemal Ataturk, the Turkish leader at the time.³ Orphaned when

¹ Oelek, M & Vogt, R (1998). Women in Combat Roles: Past and Future. Air War College Research Report , (44-45).

² Musil, Janet and Phyllis Levy Mandell. "The Legendary Girl of the Skies: Sabiha Gokcen." School Library Journal, vol. 51, no. 10, Oct. 2005. (76)

³ Id.

she was young, Ataturk took her in as his own and adopted her. "Equal rights for women, [was] something which Ataturk endorsed well ahead of the times."⁴ Empowered by the encouragement from her adoptive father, Gokcen became a symbol of feminism and equality during World War II. She did not have to hide herself away like Mulan and Corbin did. Unfortunately, the rest of the world was, and in some areas today still is, playing catch-up.

During the same era, the United States military began to allow women to take the skies. However, the intentions were not the same in America as they were in Turkey. While Turkey intended to bring women on board for equal rights, the United States introduced a program in order to release more men to combat overseas. While Gokcen was in Turkey fighting, "Women Airforce Service Pilots," or WASP for short, was established.⁵ Approximately one thousand women civilians trained and took to the skies to transport new planes from the manufacturer's factory to the military bases. "They tested overhauled planes. And towed targets to give ground and air gunners training shooting."⁶ After the implementation of the program, many women expected WASP to become a permanent segment of the military. However, two years after its establishment in 1942, the program was disbanded.⁷ Although WASP was shortly lived, women successfully proved they were professional and capable to handle an aircraft. As Henry "Hap" Arnold, Commanding General of the U.S. Army Air Forces, stated at the last graduation ceremony of WASP trainees, "Now in 1944, it is on record that women can fly as well as men."⁸ More than three decades later in 1977, after lobbying efforts the women of WASP were finally given military recognition and later honored with Congressional Gold Medals. The efforts by WASP prove that equality for woman does not come easily or without a fight.

⁴ Id.

⁵ Stamberg, Susan. "Female WWII Pilots: The Original Fly Girls." NPR, NPR, 9 Mar. 2010, www.npr.org/2010/03/09/123773525/female-wwii-pilots-the-original-fly-girls. Last Accessed: February 14, 2018

⁶ Id.

⁷ Id.

⁸ Id.

Since the early 1900's, women have repeatedly proven they are capable to train just as well as men and to fly just as efficiently. Recently, several of these women received recognition for their accomplishments and their ability to move up the ranks, such as Julie Gibson.⁹ Approximately twenty-six years ago, Flight Lieutenant Gibson became the "first full-time RAF [Royal Air Force] operational woman pilot."¹⁰ Another example of women proving they are capable are the six fearless women to "earn their 'Wings of Gold' becoming the first women naval aviators to be designated full-fledged military pilots" in 1973.¹¹ More than thirty years later, in 2016, they were finally recognized and honored for their sacrifice and accomplishments through the Women in Aviation organization.

Organizations

The society that Mulan lived in lacked support for women in military, this has greatly changed with the creation of different organizations that recognize and assist women. International organizations, such as the Women in Aviation (WAI), support women to fight the stigmas and bias against them. WAI makes it their mission to seek out and to recognize women for their contributions to their country. Most importantly, WAI aims to identify those pioneering women for the cracks they made to the proverbial glass ceiling for women aviators. "Women in Aviation publishes books and magazines, hosts conferences and workshops, and provides scholarships, educational resources, mentoring and networking to grow careers in aviation."¹² Another organization, known as Women Military Aviators, Inc., was created by a small group of WASPs to "engage in strictly educational, charitable and benevolent purposes, for the prosecution of historical, literary and educational purposes of the corporation and to promote and preserve for historical, educational and literary purposes the role

⁹ "FLIGHTY WOMEN." Birmingham Post. (March 12, 1999, Friday)

¹⁰ Id.

¹¹ "Pioneering Women Pilots To Be Honored." US Official News. (December 22, 2016 Thursday): 469 words. LexisNexis Academic. Web.

¹² "Giving women a flying start." News-Journal (Daytona Beach, Florida). (August 30, 2004 Monday): 926 words. LexisNexis Academic. Web.

of women pilots and navigators in the service of the country during times of war and peace.”¹³ Both organizations need to be utilized to bolster and push for an international policy guaranteeing women the right to fly to protect their country.

Legislation and Cases

With the rise of women involvement in the military, new provisions and exclusion policies were created to prohibit women from serving in combat roles. Congress passed the “Women’s Armed Service Integration Act” in 1948, which accomplished positive and negative results.¹⁴ The Act gave women permanent military status, stated that women could account for two percent “of all enlisted personnel,” regulated the number of female officers to ten percent of the female enlistment, and excluded women from anything combat-related, such as “combat duties, combat units, and combat ships.”¹⁵ This Act also allowed the Armed Forces flexibility to construct their own definitions of combat, so that each branch could add women as they wished. “In an effort to facilitate the Armed Services’ occupational classifications, which are used to exclude women from noncombat positions,” and which are classified as high risk, the Department of Defense created the Risk Rule in 1988.¹⁶ This rule was a “balancing test” of the risks involved in specific assignments.¹⁷ The Risk Rule expressed, “[r]isks of direct combat, exposure to hostile fire, or capture are proper criteria for closing non-combat positions or units to women, when the type, degree, and duration of such risks are equal to or greater than the combat units.”¹⁸

¹³ Garwood, Barbara. History of the Women Military Aviators, Inc. Women Military Aviators, www.womenmilitaryaviators.org/history-of-wma.html (last accessed on 22, Mar. 2018).

¹⁴ Pamela R. Jones, 78 Cornell L. Rev. 252 (1993).

¹⁵ *Id.* at 252-254.

¹⁶ *Id.* at 255.

¹⁷ *Id.*

¹⁸ *Id.*

These exclusions were also codified in the United States Code Title 10, later to be retracted in the early 1990's.¹⁹

To increase women's involvement in combat-related actions, Senator William Proxmire introduced Senate Bill 581.²⁰ However, the Committee on Armed Services killed the bill during their review. The Air Force section of Senate Bill 581 is stated below:

SEC.3. AIRCRAFT TO WHICH WOMEN MAY BE ASSIGNED.

The text of Section 8549 of Title 10, United States Code, is amended to read as follows:

(a) Female members of the Air Force may not be assigned to duty in aircraft engaged in combat missions.

(b) The prohibition in subsection (a) does not apply to female members of the Air Force designated under section 8067 of this title (or appointed with a view to designation under that section) or to female members assigned to duty in reconnaissance, training, or transport aircraft (emphasis added).²¹

Luckily, in the United States, many of these exclusions have been repealed and are no longer the law.

Today in America, women are encouraged to serve their country in any way they wish. However, there continues to be only a handful of women pilots defying gravity, much less rising in the ranks. From the 1960's through the 1980's, there was a steady increase in women pilots in the United States; however, the number has leveled off.²² This is shown in charts and statistics provided by the Women on Aviation Worldwide Week as chronicled in the article, "Five Decades of Female Pilots Statistics in the United States. How Did We Do?" by

¹⁹ Marilyn A. Gordon and Mary Jo Ludvigson, *The Combat Exclusion for Women Aviators: A Constitutional Analysis*, 1 USAFA J. Leg. Stud. 51, 64 (1990).

²⁰ *Id.*

²¹ *Id.*

²² Maksel, Rebecca. "Why Are There So Few Female Pilots?" *Air & Space Magazine*, (6 Feb. 2015), www.airspacemag.com/daily-planet/why-are-there-so-few-female-pilots-180954115/ (Last accessed: February 14, 2018).

the founder of Women on Aviation Worldwide Week, Mireille Goyer.²³ According to Goyer, meeting a female pilot is extremely rare considering only one out of 5,623 women are pilots.²⁴ With the question as to why women are not attracted to the aviation industry and why the numbers are not increasing, Maksel referred to a study conducted by Deanne Gibson.²⁵ This study indicated that young girls viewed it “more of a man’s job...A number of participants expressed a belief that they would not suit flying because they lacked the typical pilot traits of arrogance, overt confidence and a lifelong obsession with aviation.”²⁶

However, internationally there continues to be provisions to discredit and/or squash a woman’s aspirations of becoming a fighter pilot. For instance, in Israel, Alice Miller filed suit against the Minister of Defense, Chief of Staff of the Israeli Defense Force (IDF), Head of Manpower Department of the IDF, and the Chief Officer of Women’s Corps of the IDF because she was denied the ability to move into the aviation section of the IDF.²⁷ The IDF classified aviation as a combat assignment, and women could not serve in a combat-related assignment.²⁸

The Minister of Defense and IDF argued that her denial was because of “the huge investment involved in training a pilot could not be justified for women, and planning for the deployment of pilots in the air force units would be complicated by the integration of women pilots who could be expected to be absent for significant periods of time because of pregnancy and childbirth.”²⁹

²³ Goyer, Mireille. “Five Decades of Female Pilots Statistics in the United States. How...” Women of Aviation Worldwide Week | Powered by IWOAW, www.womenofaviationweek.org/five-decades-of-women-pilots-in-the-united-states-how-did-we-do/. (Last accessed: February 14, 2018).

²⁴ Id.

²⁵ Maksel, supra note 22

²⁶ Id.

²⁷ HCJ 4541/94 Miller v. Minister of Def. 49(4) PD 9 [1995], [1995–6] IsrLR 178. (Isr.).

²⁸ Id.

²⁹ Id.

Justice E. Mazza, the majority opinion writer, stated “At the heart of this petition lies the question whether the policy adopted by the IDF, not to recruit women soldiers to the profession of aviation, should not be disqualified because it is tainted by improper discrimination on the basis of the sex of the candidates”.³⁰ His disapproval on the matter comes through his identification of the issue. The majority opinion declared that denying a woman based on “budgetary and planning considerations” is not valid.³¹ On the other hand, the minority argued that this matter was not for the High Court of Justice to determine.³²

Travelling geographically further east to India and to this past summer, women are leaving their mark like Mulan left hers, and the first female fighter pilots took to the skies. For decades, Indian women have flown but only in non-combat roles.³³ In February 2016, the President of India, Pranab Mukherjee stated, “In the future, my government will induct women in all the fighter streams of our Armed Forces.”³⁴ With this movement towards equality, the approximately 637 million Indian women will feel empowered to do anything, especially joining the armed forces and will be confident that they are capable to participate at their full capacity.³⁵

Many countries have reached cruising altitude on their flight towards more equality. Instead, countries like Saudi Arabia are beginning their departure towards the equal rights runway. As of September 2017, by royal decree, women living in Saudi Arabia are just now allowed to drive on their own which is one victory in the long fight

³⁰ Id.

³¹ Id.

³² Id.

³³ Malhotra, Aditi. “India’s First Female Fighter Pilots to Take to the Skies in the Summer.” The Wall Street Journal, Dow Jones & Company, 10 Mar. 2016, blogs.wsj.com/indiarealtime/2016/03/09/indias-first-female-fighter-pilots-to-take-to-the-skies-in-the-summer/.

³⁴ Id.

³⁵ World Bank Data, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN> Last accessed: February 14, 2018

ahead for equality in the sky.³⁶ King Salman, with the support of his sons Prince Mohammed bin Salman and Prince Khaled bin Salman, struck down the archaic notion that men were better suited to drive.³⁷ While countries like Saudi Arabia are pulling back from the gate or moving towards takeoff, the rest of the countries of the world need to band together and collectively support each other in their missions towards equal opportunities in the skies.

While these international cases demonstrate the need for a policy change globally, there are still issues in how the public view female military aviators domestically. "Deep down there's this feeling that women who join the military are asking for [the attention]. There's still this feeling that this is a man's Army. I don't think that's going to go away for a long time," Major General Jeanne Holm of the United States Airforce stated.³⁸ During a time of heated debate on women's involvement in combat roles, this quote is given context in the case of Lieutenant Carey Lohrenz. Despite the known resistance to the idea of a woman in the pilot's seat, the Navy assigned the first two female pilots, Lieutenant Lohrenz and Lieutenant Hultgreen, to fly combat aircrafts.³⁹ The Navy allowed the Lieutenants the right to choose the combat aircraft of their choice, and Lieutenant Lohrenz chose to fly the F-14 conscious of the debate occurring in the community about women in combat positions.⁴⁰

After the unfortunate, deadly accident of Lieutenant Hultgreen during a training exercise, the discussion about women military aviators heated to a new level.⁴¹ Elaine Donnelly, who was known for her opposition on women combatants, incorporated the Center for Military Readiness (CMR), which published several articles

³⁶ Stancati, Margherita, and Summer Said. "Saudi Arabia Lifts Ban on Women Driving." *The Wall Street Journal*, Dow Jones & Company, 26 Sept. 2017, www.wsj.com/articles/saudi-arabia-lifts-ban-on-women-driving-1506455054. Last accessed: February 14, 2018

³⁷ *Id.*

³⁸ Oelek, M & Vogt, R, *supra* note 1, at 45

³⁹ *Lohrenz v. Center for Military Readiness*, 350 F.3d 1274 (D.C. Cir. 2003).

⁴⁰ *Id.*

⁴¹ *Id.* at 1276

enumerating their disapproval of women in combat roles.⁴² Donnelly bashed women, specifically Lieutenant Lohrenz, for being “an incompetent combat pilot.”⁴³ She also sent letters to Senator Strom Thurmond, the Chairman of the Senate Armed Services Committee at the time, to warn him of “certain practices designed to assure that women will not fail...now [have] been extended to the demanding and dangerous field of carrier aviation in the F-14 community.”⁴⁴ Subsequently, after four articles mentioning Lieutenant Lohrenz, Lohrenz filed a lawsuit seeking damages for defamation against CMR and Donnelly.⁴⁵

Upon review of the case, the District Court entered into a summary judgement in favor of CMR and Donnelly, which dismissed the case.⁴⁶ The court ruled that Lt. Lohrenz had become a limited-purpose public figure...because of her past conduct, including taking on a role as one of the first two women combat pilots, her numerous appearances in the media before and after Lt. Hultgreen's crash, and the fact that ‘she was a forerunner in the military's attempt to integrate women into combat positions.’⁴⁷

Lohrenz appealed to the United States Court of Appeals for the District of Columbia Circuit; however, they upheld the District Court’s decision.⁴⁸ Donnelly and the Court insinuated that the Lieutenant brought this upon herself by being in the forefront of the controversy.⁴⁹ Yet, she was merely fighting for an equal opportunity based upon her abilities not her gender.

When women begin to gain equal rights, some men begin to act as though they are being discriminated against. This is clearly illustrated in a case brought by a Navy Lieutenant against the Secretary of

⁴² Id.

⁴³ Id. at 1277

⁴⁴ Id. at 1276

⁴⁵ Id. at 1277

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id. at 1274

Defense.⁵⁰ The Lieutenant served his country for nine years and failed for a second time to be selected for a promotion and consequently was mandatorily discharged subject to 10 U.S.C. §6382(a).⁵¹ While men were subject to this statute, which stipulates that men have 9 years before being honorably discharged, women were subject to 10 U.S.C. §6401 which gives women up to 13 years as an active service member to be honorably discharged.⁵² The court held that the statutory difference was constitutional because of women's exclusion from combat duty and, therefore, had fewer opportunities than their fellow male counterparts had to rise in the ranks.⁵³ With new international policies that create an equal playing field for women and men aviators to take to the skies, statutes such as 10 U.S.C. §6382(a) and 10 U.S.C. §6401 will become obsolete.

Where We Are Today

On an international scale, both women and men pilots need to work together to form an international coalition for equal opportunities for women in aviation worldwide. By having such a movement, young girls and women would be encouraged to take on a unique role in the military. Their career in aviation will be determined by their qualifications needed for the job and not by the males who occupy the majority within the industry. If countries vow to hold each other accountable for treating women with an equal opportunity as men to become respected aviators, women will be more empowered to rise in the ranks. They would be the pilots navigating their country towards equal rights in other arenas.

Through time, it is evident that women have advanced in the public eye and within the law as fighter pilots. Mulan would no longer have to disguise herself as a man, however, she still must fight for the equality for growth opportunity and for recognition she and other women deserve, especially in high-ranking military roles. Women

⁵⁰ Schlesinger v. Ballard, 419 U.S. 498 (1975).

⁵¹ Id. at 499

⁵² Id. at 500

⁵³ Id. at 508

combatants in aviation, both in the United States and abroad, must continue working through advocacy to overcome the stigma and stereotypes that imply they cannot conduct or execute their duties as a combatant. Forming an international coalition, similar to Women in Aviation International and Women Military Aviators, Inc., would encourage females of any ethnic background to enter into the military arena of aviation. The ripple effect will be boundless.

JUSTICE FOR KALIEF BROWDER: CORRECTING CROOKED CORRECTIONS AND CRIMINAL JUSTICE SYSTEMS

Davona Johnson

Introduction

It is nearly impossible today to live in the United States and not be aware of the issues that plague the criminal justice and corrections systems. With the highly publicized cases of those individuals like Freddie Gray in Baltimore, Michael Brown in Ferguson, and Philando Castile in Minnesota, the potential for a life to be taken in an instant on the streets at the hands of police officers is in the forefront of the media. With horror stories from prisons of individuals like Terrill Thomas in Milwaukee dying in jails and prisons under the care of corrections officers, the climate of prisons and their potential death toll are well known. What about those individuals who do not lose their lives while in custody? What about those people who are tormented by the criminal justice system and the corrections system so that the mental and physical anguish inflicted on them is too much for them to bear when they are released? The stories of individuals who are unjustly treated by the system and fail to acclimate to life on the streets are just as prevalent and important as those of people who lose their lives to police officers and corrections officers, but are typically not explored and publicized. The story of Kalief Browder is a lesser known case that illustrates widespread and endemic problems in the system and in society.

On July 14th, 2015, Barack Obama delivered a speech at the NAACP Annual Convention where he spoke frankly about the issues the country faces within the criminal justice and corrections systems.¹ He called for an examination of inhuman prison practices including

¹ Barack Obama, *Remarks by the President at the NAACP Conference* (July 14, 2015).

assault, rape, and the overuse of solitary confinement.² This call for reform came thirty-eight days after Bronx, New York native Kalief Browder committed suicide following a three-year stay in one of America's toughest prisons—Rikers Island.³ Much of his time at Rikers was spent in solitary confinement and his prison stay altered his life and the lives of everyone who knew him. For two years after his release, Browder struggled to return to a normal life and leave the mental suffering of Rikers behind before he took his own life. The most notable piece of the story is that Browder spent three years in Rikers for pretrial detainment. He had not been convicted of a crime, and in fact was innocent.⁴ Although he had more than thirty hearings regarding the case, it never went to trial and all charges against him were dropped. This story is not unique to Browder, but is a poignant example of the injustices in the criminal justice and corrections systems. In 2016, the jails of New York held about 3,931 prisoners a day who were incarcerated because they could not afford bail.⁵ These numbers were reflected by a majority of black and brown individuals from low-income areas. Upon his release from prison, Kalief Browder filed a civil law suit which named numerous defendants including more than twenty corrections officers, the city of New York, the presiding district attorney, the New York Police Department, and The New York City Department of Corrections among others.⁶ Kalief's untimely death preceded any administration of justice for him or his family. This article examines three of the nine claims that were asserted in Browder's lawsuit and provides evidential support for their legitimacy using court cases and statutes.

² Id.

³ Jennifer Gonnerman, *Kalief Browder, 1993-2015* (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

⁴ Complaint, *Kalief Browder v. The City of New York, Et Al*, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

⁵ Yoav Gonen, *Thousands are locked up in NYC jails because they can't afford bail* (May 18, 2017), <https://nypost.com/2017/05/18/thousands-are-locked-up-in-nyc-jails-because-they-cant-afford-bail/>.

⁶ Complaint, *Kalief Browder v. The City of New York, Et Al*, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

First Claim: False Arrest under Federal Law

A false arrest is one that is made without a warrant or without probable cause.⁷ On the federal level, false arrest is constituted by the violation of someone's Fourth Amendment rights.⁸ Kalief Browder, age sixteen, and a friend were stopped by police on May 15, 2010, on their way home from a party.⁹ The police suspected the two of stealing a backpack containing electronics, cash, and a credit card.¹⁰ Roberto Bautista, who was the victim of the theft, was in the backseat of the police car at the time. Bautista identified Kalief and his friend as the two individuals who stole his backpack.¹¹ Bautista's story changed several times in his interview. He initially claimed that the backpack was stolen that day but changed his account claiming that Browder and his friend had taken the backpack two weeks prior.¹²

This brings up the initial flaw in Kalief's case which was the false eyewitness identification. As of 2011, there were 261 cases in which innocent people were convicted of a crime and later exonerated due to DNA evidence. Of the 261 wrongfully convicted individuals, 75% of the convictions were gained partially or wholly due to mistaken eyewitness identifications.¹³ With this large margin of error connected to eyewitness accounts, the victim in Kalief's case should have been asked to identify Kalief and his friend through a proper police lineup instead of "show-up" identification especially if the victim claimed that the crime took place two weeks prior.¹⁴ The presentation of Kalief and his friend in the field was highly suggestive, as there was no evidence to connect the two to the crime. The arrest

⁷ *False Arrest*, in West's Encyclopedia of American Law, edition 2. (2008).

⁸ *Id.*

⁹ Complaint, *Kalief Browder v. The City of New York, Et Al*, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.*

¹³ Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 *Alb. L. Rev.* 1105, at 1106 (2010/2011).

¹⁴ Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identification*, *Journal of Criminal Law and Criminology*, 100 (2010).

of Kalief Browder lacked both probable cause and reasonable suspicion that he had committed any crime.

During Kalief's interrogation, he vehemently proclaimed his innocence but was arraigned on the charge of second-degree robbery.¹⁵ In the state of New York, robbery constitutes forcibly taking someone's property either through the use of physical force or the threat of physical force.¹⁶ The second degree distinction which is a class C felony has a number of qualifying elements, one of which is the aid of another individual, whether the individual is charged with the crime or not.¹⁷ Kalief's friend was released pending trial; However, Kalief could not be released because he was on probation for joyriding, and his bail was set at \$10,000.¹⁸ Raising the necessary bail amount was nearly impossible for Kalief's mother who was a single foster mother living in the Bronx, New York's most impoverished borough.

Kalief's claim of false arrest, if proven, would constitute a violation of 42 U.S.C. § 1983 which states that "Every person who...subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law..."¹⁹ In other words, anyone who's constitutional rights are violated or taken away has the legal right to sue the individual or individuals responsible. Another New York case that examined false arrest under 42 U.S.C. § 1983 is the case of *Micalizzi v. Ciamarra*.²⁰ In this case, the court found that when there is a factual dispute about the claim of a citizen, and when there is question as to whether the complaint establishes probable cause, an individual has the right to bring about a claim for false

¹⁵ Complaint, Kalief Browder v. The City of New York, Et Al, at 7, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

¹⁶ N.Y. Penal Code § 160.00 (2018).

¹⁷ N.Y. Penal Code § 160.10 (2018).

¹⁸ Complaint, Kalief Browder v. The City of New York, Et Al, at 7, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

¹⁹ 42 U.S.C. § 1983 (2018).

²⁰ *Micalizzi v. Ciamarra*, 206 F. Supp. 2d 564 (2002).

arrest.²¹ This would apply to Kalief's case because there was a factual dispute about when the crime took place, and there is question about the account the victim told police. There should also be an examination into whether the account the victim told police constituted probable cause. If counsel for Kalief Browder can prove that there was no probable cause, this would verify the legitimacy of the false arrest claim.

Second Claim: Excessive Force- Corrections Officers

"Prison officials have a legal duty to refrain from using excessive force and to protect prisoners from assault by other prisoners."²² Kalief Browder asserted that during his incarceration at Rikers Island he was beaten by corrections officers, subjected to over a thousand strip searches, starved by corrections officers, and was denied adequate protection from other inmates.²³ Six minutes of surveillance videos depicting some of Kalief's ordeals have been released to the public. One of the videos shows Kalief, both handcuffed and compliant, being tackled by two officers, and slammed to the ground.²⁴ These allegations of excessive force are violations of the Eighth Amendment's protections pertaining to the right to be free of cruel or unusual punishment as it relates to the amount of force inflicted by corrections officers.

The decision in *Wilkins v. Gaddy* would be beneficial in bolstering Kalief's claim for relief as it relates to excessive force.²⁵ The court in *Wilkins* stated that "The core judicial inquiry, we held, was not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."²⁶ In

²¹ Id. at 13.

²² *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

²³ Complaint, *Kalief Browder v. The City of New York, Et Al*, 8-9, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

²⁴ *The New Yorker*, *Violence Inside Rikers* (2015), https://www.youtube.com/watch?v=xYgP2s_TZzg.

²⁵ *Wilkins v. Gaddy*, 559 U.S. 34 (2010).

²⁶ Id. at 37.

this case the plaintiff was found to have a reasonable claim against corrections officers who physically assaulted him without grave injury. With that standard being applied to the Browder case it would simply be necessary to prove that the force inflicted by corrections officers was malicious rather than necessary to ensure the safety of the prison and those in it. Counsel for Browder could introduce the surveillance videos and testimony about the force used to investigate the claims which are issues of material fact. The surveillance video shows that Browder was not posing a threat to others or himself as the officer slammed him to the ground. This would likely be true in other incidents of excessive force used against Browder including his claim of being beaten by four corrections officers on December 17, 2011.²⁷

Another video shows Browder being beaten by more than eight inmates while corrections officers fail to secure the scene and end the fight. It took more than five minutes for a special response team to arrive in response to the incident.²⁸ *Martin v. White* stated that “...prison officials may be liable where they are deliberately indifferent to [a prisoner’s] constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.”²⁹ Kalief’s Eighth Amendment right was violated by the failure of officers to secure the safety of inmates while in their custody. Counsel for Kalief Browder had the necessary evidence to show that the corrections officers acted with reckless disregard in breaking up the physical altercations between Browder and other inmates.

Another portion of the second claim states that Kalief was subjected to over one thousand strip searches during his three-year stay at

²⁷ Complaint, *Kalief Browder v. The City of New York, Et Al*, at 7, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

²⁸ *The New Yorker*, *Violence Inside Rikers* (2015), https://www.youtube.com/watch?v=xYgP2s_TZzg.

²⁹ *Martin v. White*, 742 F. 2d 469, at 474 (1984).

Rikers.³⁰ This amounts to a strip search every single day while incarcerated. In *Michenfelder v. Sumner* the court recognized that “...not all strip search procedures will be reasonable; some could be excessive, vindictive, harassing, or unrelated to any legitimate penological interest.”³¹ In order for Kalief to have a reasonable claim, it must be proven that these strip searches served a malicious purpose rather than to ensure the safety of the facility and those individuals within the facility. In *Bell v. Wolfish*, the court said that “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application... Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”³² This grievance will certainly be more difficult to prove following the untimely death of Kalief Browder because he cannot testify to the circumstances surrounding the unreasonable searches he was subjected to at Rikers. It may be more useful to examine the strip search policies and patterns at Rikers overall. If a pattern of unreasonable and spiteful search practices at Rikers can be established this could be applied to Kalief’s claim. The state of New York has a long history of settling cases involving illegal strip searches on Rikers Island. In 2010, New York City paid \$33 million to victims who were illegally strip searched while they were detained at Rikers for misdemeanor charges.³³ The damages paid were set to cover about 100,000 cases of illegal strip searches.³⁴ At least forty-five women have also filed lawsuits against New York Department of Corrections since November 2017 claiming they were illegally strip searched while visiting inmates in New York prisons, specifically

³⁰ Complaint, *Kalief Browder v. The City of New York, Et Al*, at 9, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

³¹ *Michenfelder v. Sumner*, 860 F. 2d 328, at 332 (1988).

³² *Bell v. Wolfish* 441 U.S. 520 at 551 (1979).

³³ Michael S. Schmidt, *City to pay \$33 million to inmates who were illegally strip-searched* (2010), <https://cityroom.blogs.nytimes.com/2010/03/22/city-to-pay-33-million-to-inmates-who-were-illegally-strip-searched/>.

³⁴ *Id.*

Rikers.³⁵ This pattern of illegal strip searches on Rikers Island would at the very least support an in-depth examination into the practices conducted by the Department of Corrections and prison officials at Rikers.

In his claim, Kalief Browder asserted that he was starved while detained in Rikers and specifically spoke to an incident in April 2011 where he was deprived of five consecutive meals while housed in solitary confinement.³⁶ In *Williams v. Coughlin* the court stated that “...several correctional guidelines and standards indicate that contemporary standards require prison authorities to provide regular, daily meals to all prisoners, and they disapprove the use of food deprivation as a disciplinary measure.”³⁷ The court in *Williams* found that there is sufficient evidence for an Eighth Amendment claim where an inmate has been deprived of food for about two days.³⁸ Under this standard, Kalief would certainly have an Eighth Amendment claim since he was deprived of meals for two days without a documented reason, which could have led to health complications.

Third Claim: Deliberate Indifference to Serious Medical Needs

“The Eighth Amendment is supposed to protect people in the United States against cruel and unusual punishment but when it comes to the solitary confinement issue it is often pushed under the rug for one reason or another.”³⁹ The previous excerpt comes from an essay Kalief Browder wrote for a college English class he took after his release from prison. The most publicized and investigated part of the ordeal was the mental and emotional implications his time at Rikers

³⁵ Megan Hadley, *Visitors to NYC’s Rikers Jail Strip-Searched, Sexually Assaulted: Report* (January 10, 2018), <https://thecrimereport.org/2018/01/10/visitors-to-nycs-rikers-jail-strip-searched-sexually-assaulted-report/>.

³⁶ Complaint, *Kalief Browder v. The City of New York, Et Al*, at 8, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

³⁷ *Williams v. Coughlin*, 875 F. Supp. 1004, at 1013 (1995).

³⁸ *Id.*

³⁹ Kalief Browder, *A Closer Look at Solitary Confinement in the United States*, at 5 (2015).

had on Kalief, especially with regard to his time spent in solitary confinement. The history and effects of solitary confinement were all examined in Kalief's essay.⁴⁰ Since it was first introduced as a form of punishment for inmates, solitary confinement has long been found to lead to insanity and mental illness, particularly if implemented for extended periods of time.⁴¹ Solitary confinement has also been found to do the opposite of its intended purpose, causing increased violence and aggression from inmates rather than controlling and subduing them. Prisoners who have never previously suffered from mental illness who are placed in solitary confinement often obtain serious mental illnesses while in solitary confinement. Incarceration in solitary is also much more likely to lead to suicide.⁴² "In the United States, nearly half of prison suicides occur in solitary confinement, even though estimates of the percentages of those in solitary confinement range between 2-8%."⁴³

In his complaint, Browder alleges that he spent more than 400 days of his three-year stay in solitary confinement.⁴⁴ He also claims that he attempted to commit suicide five or six times during his incarceration and that these suicide attempts were not handled properly by correctional staff.⁴⁵ Rather than placing Kalief in the facility's psychiatric ward, corrections officers chose to handle the suicide attempts in their own manner. Kalief had his reading material and sheets taken from him and was subjected to mental abuse by the prison staff as punishment for his suicide attempts.⁴⁶ Prior to entering prison, Kalief Browder had no documented mental illness. However, upon his return home he was described as paranoid, angry, and

⁴⁰ Id.

⁴¹ Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, *Journal of the American Academy of Psychiatry and the Law*, 38 (1) 104-108 (2010).

⁴² Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Unusual Punishment*, 90 *Ind. L.J.* 741 (2015).

⁴³ Id. at 757.

⁴⁴ Complaint, *Kalief Browder v. The City of New York, Et Al*, at 8, (N.Y. Sup. Ct. 2013) (No. 23969-2013).

⁴⁵ Id.

⁴⁶ Id.

restless.⁴⁷ Kalief attributed his change in behavior to his experience in Rikers and solitary confinement.

A case that deals with the issue of solitary confinement and the violation of Eighth Amendment rights is *Rosario v. Williams*.⁴⁸ The court stated that “The duration of an inmate’s confinement, while not itself a controlling factor in Eighth Amendment analysis, nonetheless helps to gauge the cumulative burden of the deprivation that the inmate has endured.”⁴⁹ Although there is not a set amount of time that makes the stay in solitary confinement a violation of rights, there is the assumption that a longer stint in solitary, would suggest a greater chance of Eighth Amendment violations.⁵⁰ Along with the length of time spent, the severity of the conditions in solitary are also considered when investigating Eighth Amendment violations. Kalief spent over a third of his time in solitary confinement which opens the door for his claim. In addition to showing that Kalief spent an excessive amount of time in solitary confinement, it must be proved that he was denied his basic necessities, that conditions were significantly severe, or that staff showed deliberate indifference to protecting health or safety. Kalief’s claim that his sheets and books were taken from him speaks to the severity of the conditions. In *Owens-El v. Robinson*, the court found that withholding mattresses, sheets, and other toiletry items does not serve a useful purpose in solitary confinement.⁵¹ If the claims of the correctional officers are that Kalief’s sheets were taken from him to prevent suicide, he should have been placed in the mental health unit where proper suicide watch measures would be in place to keep him safe. This directly connects to the indifference to health and safety the corrections officers displayed by not providing Kalief with the proper medical care in response to his suicide attempts. The components for proving deliberate indifference are set out in *McElligott v. Foley*, “(1) subjective knowledge of a risk of serious harm; (2) disregard of that

⁴⁷ Part 2, *Time: The Kalief Browder Story*, (2017).

⁴⁸ *Rosario v. Williams*, 2014 U.S. Dist. LEXIS 11340 (2014).

⁴⁹ *Id.* at 26.

⁵⁰ *Id.*

⁵¹ *Owens-El v. Robinson*, 442 F. Supp. 1368, at 1384 (1978).

risk; (3) by conduct that is more than mere negligence.”⁵² Subjective knowledge of the risk is evident by the sheer number of suicide attempts Kalief made in such a short time frame. After the third time it should have been clear that Kalief was content on taking his own life and needed psychiatric monitoring and examination. Disregard of that risk was shown by Kalief’s own words. During his deposition, Kalief claimed that Rikers’ officers encouraged him to commit suicide.⁵³ Kalief described a suicide attempt of his in detail that took place in the beginning of 2011 when he was locked in solitary confinement.⁵⁴ He claimed that while getting ready to hang himself, corrections officers stood outside the cell and said “Go ahead and jump, you got it ready, right, go ahead and jump... If you don’t jump, we’re going to go in there anyway, so you might as well go ahead and jump, go ahead and jump.”⁵⁵ The aforementioned clearly shows that corrections officers knew of Kalief’s plan to commit suicide, and that they disregarded this risk in a way that far exceeded negligence. The officers acted as active participants in the suicide attempt rather than deterring agents. Collectively, these accounts strongly indicate that serious and life-threatening medical needs of Kalief’s were ignored.

What now?

Kalief Browder’s harrowing ordeal has not been lost on deaf ears, but it is important to remember that this story, although tragic, is not unique. Several people before and after Kalief Browder have been subjected to miscarriages of justices that either changed their lives or even ended them like Kalief’s. In March of 2017, Mayor Bill de Blasio announced a ten-year plan to permanently close down Rikers Island.⁵⁶ The plan would involve moving inmates to small jails spread

⁵² *McElligott v. Foley*, 182 F.3d 1248, at 1255 (1999).

⁵³ Jennifer Gonnerman, *Kalief Browder learned how to commit suicide on Rikers* (June 2, 2016), <https://www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers>

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Sebastian Murdock, *First Rikers Island Jail Facility Set To Close This Summer* (January 2, 2018), https://www.huffingtonpost.com/entry/first-rikers-island-jail-facility-set-to-close-this-summer_us_5a4bc802e4b025f99e1e05cc.

out through the boroughs of New York.⁵⁷ This plan would be a step towards forgetting the despair and violence that hangs over Rikers and makes it one of the most infamous detention centers in the United States. The closing of Rikers Island will be little more than a publicity stunt if reform is not brought about to ensure that the failures of Rikers do not carry over into the new detention centers. This reform has to start with police departments around the country adhering to the rules set in place to ensure that innocent people do not spend time locked up for crimes for which their guilt cannot be proven.. It is necessary to ensure each inmate is treated like a human and still awarded the basic rights and liberties granted to them by the Constitution and the Bill of Rights. In 1723, Sir William Blackstone said “It is better that ten guilty persons escape, than that one innocent suffer.”⁵⁸ This quote holds true today particularly when the suffering of that individual may lead to their untimely and preventable demise. At the time of his death, Kalief Browder was a liberal arts major with a 3.5 grade point average.⁵⁹ It should be the duty of everyone to ensure that such potential never again goes to waste at the hands of the criminal justice and corrections systems.

⁵⁷ Id.

⁵⁸ Words of Justice, *Roof Garden Wall- Right Panel*, <http://library.law.harvard.edu/justicequotes/explore-the-room/south-4/>.

⁵⁹ Eduardo J. Marti, *Kalief Browder, Student* (June 18, 2015), <https://www.insidehighered.com/views/2015/06/18/essay-death-kalief-browder-student-bronx-community-college>

CONTEMPORARY TERRORISM'S MOST ESSENTIAL YET UNDETECTED SUPPLIERS: WOMEN

Aleeza Mahak Shah

Introduction

Terrorism has been part of society since humans have been willing to use force and violence for political means.¹ In the book *Terrorism and Counterterrorism*, terrorism is defined as “political violence or the threat of violence by groups or individuals who deliberately target civilians or noncombatants in order to influence the behavior and actions of targeted publics and governments.”² An attack carried out by the Sicarii, a Jewish group who used force and murder in their operation to expel Roman leaders from Judea, dates back to the first century.³ However, even though there are a plethora of examples to be cited from the beginning of recorded history to contemporary attacks, terrorism is best thought of as a modern phenomenon and it is linked almost exclusively to men.⁴ Given the extensive and nuanced history of terrorism, it should not be a surprise that many women—around half of the world’s population—also engage in terrorism, yet many people are still baffled to learn the extent to which women are involved in terrorism. Women are viewed through a dichotomous lens as domestic creatures who are nurturing, loving, and tender, qualities that are not normally associated with deadly and vicious attacks—or men, who are seen as the perpetrators of violence.⁵

¹ This article recognizes that the term “terrorism” itself is contested widely by differing organizations and countries, but for the purposes of this article, this specific definition suffices to properly relay the facts asserted in this article.

² Brigitte Nacos, *Terrorism and Counterterrorism* 37 (5th ed. 2016).

³ Amy Zalman, *The History of Terrorism*, THOUGHTCO, (Mar. 23, 2017), <https://www.thoughtco.com/the-history-of-terrorism-3209374>.

⁴ Brigitte Nacos, *Terrorism and Counterterrorism* 52 (5th ed. 2016).

⁵ Mia Bloom, *Contentious Politics and Political Violence*, OXFORD, (Jan. 2017), <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-124>.

Women are often underestimated and left out of the discussion completely when it comes to terrorism, yet women have been a part of terrorism's history for centuries.⁶ Women have played such a key role, in fact, that the first person in history who was tried in a court of law for the offense of terrorism was a woman. In 1878, Vera Zasulich, an anarchist for Narodnaya Volya, the "People's Will", in Russia, was tried for the attempted assassination of Governor Trepov in St. Petersburg.⁷ During her trial, she vehemently denied the title of murderer and proudly proclaimed, "I am a terrorist."⁸ Zasulich was found not guilty and was carried away on the shoulders of the crowd, creating a legacy for women afterward who went on to be arrested due to terrorist plots they carried out.⁹

Though there is a reluctance to believe that women are able to commit horrifying atrocities, that grudging disbelief is finally coming to an end. This is evident through the arrest rates of members of the ETA,¹⁰ which proves that "over the past 30 years, women increasingly [are being] charged alongside men with fatal actions."¹¹

Why Women Get Involved in Terrorism

There are five main reasons women get involved in terrorism. These reasons, also referred to as the "5 Rs" are revenge, redemption, relationship, respect, and rape.¹² While women have always been part of terrorist organizations, many, (mostly male dominated organizations) are just now beginning to realize how useful it is to tap into the untouched resource (women) who encompass the other fifty percent of the world.¹³ In this way, a mutually beneficial agreement is able to transpire. Women often enjoy more freedoms by joining the ranks of terrorist groups, especially if they live under oppressive patriarchal control in rigid societies, while

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ The ETA is the Basque Separatist Party that formed in the later 1950s.

¹¹ *Id.*

¹² TedxTalks, *TEDxPSU - Mia Bloom - Seeing the New Face of Terrorism*, YOUTUBE, (Dec. 5, 2011), <https://www.youtube.com/watch?v=KOTyVBhpTEM>.

¹³ See Bloom, *supra* note 5.

terrorist groups are able to gain new members who are devoted to the cause—if only for their own personal gains.¹⁴

The 5 Rs

Although it is recognized that each terrorist group has its own specific methods of recruiting women, the “5 Rs” are seen universally throughout all groups. Redemption is explained as the motivation for women to become pure through involvement in terrorist groups through sanctioned forgiveness and/or dismissal of premarital or extramarital affairs.¹⁵ Revenge is most often cited as the reason why women become suicide bombers—they want to avenge the murders or unjustified cruelty of family members or those they love.¹⁶ Respect is another major motivator for women because they believe they can get the respect from martyrdom and in death that they would never be able to achieve otherwise.¹⁷ The single biggest predictor of a woman’s involvement in a terrorist organization is her having a male family member/relation in a terrorist organization. Women’s involvement often turns into a family affair and also ensures that the women are properly vetted and not informers due to their close familial relationships. Finally, rape is factored into motivation because some women are told that they will be killed, regardless, because they have dishonored their families by no longer being virginal and “pure”.¹⁸ This way, they are told, they can do something productive with their deaths by taking out enemies, all while reaping the benefits of martyrdom; in other terrorist organizations, women are told their rapes can be absolved if they enter into the ranks of terrorism.¹⁹

How Joining the Ranks of Terrorists Benefits Women

The Liberation Tigers of Tamil Eelam (LTTE) went beyond what society considered shameful and recruited women even if—and especially if—they would have otherwise been ostracized by the patriarchal structure of in their society. A member “reported that in normal Tamil society women are

¹⁴ *Id.*

¹⁵ TedxTalks, *supra* note 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

usually blamed for their own rape.²⁰ She claimed that the LTTE does not do this and instead views sexual violence as an ‘accident’, meaning that it was not the victim’s fault.”²¹

The Black Widows in Chechnya lost everything they had in a lengthy civil war; it consumed their lands, their homes were pillaged, and their male family members were killed off.²² In most Chechen towns, “the Russians had completely destroyed all infrastructure, including the systems for water, electricity, and gas, making it impossible for people to live a normal existence.”²³ Since they received no help from the government, these women decided to storm a theater and hold ordinary citizens hostage to force the Russian government to comply with their request to be treated better.²⁴ Hurting a woman or her family was seen as an attack on Chechen honor. Since women are living representatives of honor, “when an injustice is done to [a Chechen woman], it can often be washed off only by spilling blood.”²⁵ Because many of the men in these families had been murdered at the hands of the Russian military, the women took it upon themselves to clear their family name for the sake of reclaiming their most valued possession: their honor.

Another major way women benefit from becoming members of terrorist organizations is by acclaiming fame even after their deaths.²⁶ An example of this is Hanadi Jaradat. According to various reported accounts, Jaradat was beautiful, an educated lawyer, and from a well-to-do family.²⁷ Jaradat’s father was suffering from cancer and she supported him and her sisters.²⁸ Her brother and her fiancé had both been previously murdered by the Israeli Defense Force (IDF).²⁹ After she detonated a bomb strapped to her body in a Maxim restaurant in the city of Haifa—occupied by Israeli forces in

²⁰ Miranda Alison, *Cogs in the Wheel? Women in the Liberation Tigers of Tamil Eelam*, 43 (2003).

²¹ *Id.*

²² Mia Bloom, *Bombshell*, 52 (2011).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 62.

²⁶ See Bloom, *supra* note 5.

²⁷ Anat Berko, *The Smarter Bomb: Women and Children as Suicide Bombers*, 118 (2012).

²⁸ *Id.*

²⁹ *Id.*

1948—in 2003 and killed 19 people, Jaradat became a national heroine and symbol of hope.³⁰ In this way, women who felt their lives meant nothing always had the option to become important and famous, fulfilling their dreams of becoming martyrs by having their names known as they inspired others even after their deaths.³¹ Jaradat was given many recognitions after her death including an art show in Sweden that glorified her by making her a fixture and displaying her picture around red lamps; “in 2005, the Palestinian Authority’s Ministry of Culture published a poetry collection in Jaradat’s honor, distributing it with a daily newspaper”, and finally, the Arab Lawyers’ Union gave Jaradat’s family a plaque honoring her in recognition of what they saw as her commitment to Palestine—this was the highest honor any person was able to receive in the realm of law in Palestinian society.³²

Usefulness of Women in Terrorist Organizations

Women are generally viewed as weaker, more amiable, and more peaceful members of society.³³ Being overlooked because of specific “feminine” qualities, such as tenderness and frailty, aid women terrorists in attacks that would not have been able to be pulled off by their male counterparts.

Pregnant bombings first began with a woman named Siobhan, in 1990, who was part of the Provisional Irish Republican Army (PIRA).³⁴ This was the first time the police had ever seen a woman disguise herself as pregnant, only to be carrying a bomb.³⁵ Even though Siobhan was not successful, her idea was picked up by another terrorist group the following year. A woman from the Tamil Tigers recreated Siobhan’s attack and successfully killed Indian Prime Minister Rajiv Gandhi as she pretended to present him with a garland.³⁶

³⁰ *Id.*

³¹ *Id.*

³² P. David Hornik, *Blood-Drenched Palestinian Heroine*, FRONTPAGEMAG (Oct. 21, 2012), <https://www.frontpagemag.com/fpm/149269/blood-drenched-palestinian-heroine-p-david-hornik>.

³³ Ken Sofer & Jennifer Addison, *The Unaddressed Threat of Female Suicide Bombers*, CENTER FOR AMERICAN PROGRESS, (Jan. 5, 2012, 9:00 AM), <https://www.americanprogress.org/issues/security/news/2012/01/05/10992/the-unaddressed-threat-of-female-suicide-bombers/>.

³⁴ Mia Bloom, *Bombshell*, 69 (2011).

³⁵ *Id.*

³⁶ *Id.* at 70.

Attacks carried out by women are generally more traumatizing because the world has to confront their biases regarding women as benign and harmless; it adds suspicion and creates an air of fear which can be used as a form of psychological warfare.³⁷ Women are also given more media coverage during attacks which fulfills the need that terrorists have to spread their message. The more shocking an attack is, the better it is for terrorists because that means it can have more of an impact on the general population and can even help with recruitment.³⁸ Perhaps because of the way women are able to get closer to their attack subjects without arousing suspicion, they “are responsible for 65 percent of all assassinations among groups that use female suicide terrorists, even though they only make up 15 percent of total suicide bombers in these same groups.”³⁹

Female terrorists take full advantage of their femaleness and leverage it to their benefit in any way they can. Suspects are known to flirt their way through interrogations with male officers which can help them get extra benefits in jail.⁴⁰ Women take advantage of the fact that men are not allowed to pat them down as intimately as they would if they were dealing with another man, which only exacerbates safety issues when traditional or religious clothing is involved that can help disguise bombs, knives, or guns.⁴¹ In 2010, British intelligence found out women were being fitted with breast implants that were bombs and they were almost impossible to detect at security checkpoints.⁴² Women are able to get away with many more attacks because of their perception in every society as docile, compassionate, and tender (qualities usually reserved for mothers and wives). Through this flawed security lapse, they are able to launch vicious, successful terrorist attacks.⁴³

³⁷ Ken Sofer & Jennifer Addison, *The Unaddressed Threat of Female Suicide Bombers*, CENTER FOR AMERICAN PROGRESS, (Jan. 5, 2012, 9:00 AM), <https://www.americanprogress.org/issues/security/news/2012/01/05/10992/the-unaddressed-threat-of-female-suicide-bombers/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Domestic Laws Pertaining to Women and Terrorism in the United States, and How to Ensure Targeting of Female Terrorists with These Laws

Now that the reasons for women joining terrorist organizations have been highlighted, it is crucial to understand how the United States is currently dealing with these women, and if these methods are, indeed, effective at curbing terrorism. It should also serve as a reminder that the women discussed above were Irish, Chechen, Palestinian, and Tamil. Unlike the way terrorism is so often branded by the media with the vehement declarations that “all Muslims may not be terrorists, but all terrorists are Muslims,”⁴⁴ it is imperative to analyze laws the United States currently enacts in order to ensure that all terrorists are equally pursued, regardless of race, religion, or gender.⁴⁵

Understanding Executive Order 13769: Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States

Executive Order 13769, otherwise referred to as the “Muslim Ban” was signed by Donald Trump on January 27, 2017, mere weeks after his inauguration as President of the United States.⁴⁶ While a presidential candidate, and as president, he frequently airs his disdain and contempt for Muslims, infamously calling for “a total and complete shutdown of Muslims entering the United States.”⁴⁷ This Muslim Ban was rejected by courts

⁴⁴ Arwa Mahdawi, *The 712-Page Google Doc That Proves Muslims Do Condemn Terrorism*, THE GUARDIAN, (Mar. 26, 2017 5:00 PM), <https://www.theguardian.com/world/shortcuts/2017/mar/26/muslims-condemn-terrorism-stats>.

⁴⁵ It is a clear understanding in this article that gender is a social construct and does not equate to biological “sex” or the term “woman”; however, for the purposes of this article, “gender” and “women” will be used interchangeably in order to not bog the reader down with excess definitions and continuous clarification when referring to upcoming “gender” initiatives, which are merely initiatives aimed at women.

⁴⁶ *Executive Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States*, DAILY COMP. PRES. DOCS., 2017 DCPD No. 00076 (Jan. 27, 2017).

⁴⁷ Jenna Johnson, *Trump calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST, (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.298fd2d2f644.

multiple times, until it was ruled constitutional almost a full year later.⁴⁸ Trump claimed that “the vast majority of individuals convicted of terrorism and terrorism-related offenses since 9/11 came here from outside of our country,” yet none of the terrorist attacks carried out in the name of Islam in the past fifteen years have been from the countries he banned.⁴⁹ In fact, two major studies done independently⁵⁰ both concluded that “between 2001 and 2015, more Americans were killed by homegrown right-wing extremists than by Islamist terrorists.”⁵¹ This data suggests that the United States is focusing its valuable counterterrorism efforts and resources toward terrorists that do not exist.⁵² Additionally, the focus on Muslim-majority countries communicates prejudice, which should not exist, especially when it does not effectively combat terrorism.⁵³ Although almost all of the data that exists about terrorism, especially in terms of specific numbers, relates to men, this is critically relevant to women terrorists as well. As the Trump Administration churns resources toward keeping Muslims from six Muslim-majority countries out of the United States,⁵⁴ it seems clear that more needs to be done to revamp efforts to increase security within our borders, as most terrorist attacks (even those committed in the name of radical

⁴⁸ Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, NEW YORK TIMES, (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html>.

⁴⁹ Jennifer Williams, *White American Men Are a Bigger Domestic Terrorist Threat Than Muslim Foreigners*, VOX, (Oct. 2, 2017), <https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² This data involves men, but almost all data on terrorism is done on men; we can extrapolate these same results to female terrorists because many of their decisions to become terrorists tend to overlap while giving an actual idea of the burden the United States faces from international terrorism verses that of domestic terrorism.

⁵³ Jennifer Williams, *White American Men Are a Bigger Domestic Terrorist Threat Than Muslim Foreigners*, VOX, (Oct. 2, 2017), <https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam>.

⁵⁴ *Executive Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States*, DAILY COMP. PRES. DOCS., 2017 DCPD No. 00076 (Jan. 27, 2017).

Islam) in the United States are committed by American-born or raised citizens.⁵⁵

Analyzing the USA PATRIOT Act: Preserving Life and Liberty

(Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)

The USA PATRIOT Act was passed nearly unanimously in the Senate with 99-1 votes, and was passed in the House of Representatives with an overwhelming majority of 357-66 votes shortly after the September 11, 2001 attacks.⁵⁶ One of the major reasons for the Patriot Act's passage was so that governmental authorities, many of which worked individually and independently of one another, would be able to share information they learned about terrorist activities.⁵⁷ These governmental agencies included the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), National Security Agency (NSA), and the Department of Justice (DOJ).⁵⁸ The Patriot Act also expanded the government's surveillance authority by allowing them to give delayed notification to those they were wiretapping after they secured a warrant.⁵⁹

Though this seemed like an expeditious and warranted new law, especially following the horrifying September 11, 2001 attacks, the Patriot Act, just like Trump's Executive Order 13769, began to heavily impact Muslims who had nothing to do with terrorism. During this time, the United States Government also imposed visa restrictions that barred many prominent Muslim Scholars from being able to enter the country, as well as creating great barriers and difficulties for international students.⁶⁰ Just like Executive

⁵⁵ Jennifer Williams, *White American Men Are a Bigger Domestic Terrorist Threat Than Muslim Foreigners*, VOX, (Oct. 2, 2017), <https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam>

⁵⁶ *The USA PATRIOT Act: Preserving Life and Liberty (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)*, H.R.3162 (2001), <https://www.congress.gov/bill/107th-congress/house-bill/3162>.

⁵⁷ *Id.*

⁵⁸ Shafiqah Ahmadi, *The Erosion of Civil Rights: Exploring the Effects of the Patriot Act on Muslims in American Higher Education*, 12 Rutgers Race & L. Rev. 1 (2011).

⁵⁹ *Id.*

⁶⁰ *Id.*

Order 13769, the Patriot Act mainly burdened a subset of civilians—Muslims—and focused its resources on combating terrorism where it did not exist.⁶¹ Additionally, though the expressed purpose of both these laws was to keep the United States safe from terrorism, both these laws mainly focus on men as the culprits, when these funds should have been—and should be—disbursed in order to combat the ever-increasing threat of female terrorists, which neither of these laws mention. Once the Patriot Act was enacted, women were questioned, but only in regard to their relationship with males, thus ignoring their agency to join terrorist causes.⁶² This also causes a major issue, since Muslim men are heavily profiled for being terrorists, because it leads investigators to question the Muslim women in their lives. Thus, women like Jihad Jane and Jihad Janie evade scrupulous inquisition because they do not fit the description of “accessories” that Muslim women without blonde hair and blue eyes seem to the investigators.⁶³ Even though women in terrorism have been a growing force for decades, oftentimes even leading factions of terrorists, they are still being ignored and questioned as mere accessories. This only leads to more interest in recruiting women from a terrorist’s perspective, because women still continue to go undetected and unquestioned.

How International Law and the United Nations Can Help Curb the Involvement of Women in Terrorism

The United Nations was formed in 1945 in the wake of the wreckage left by World War II. It started off with fifty-one member states and has now grown to one hundred and ninety-three member states.⁶⁴ The purpose of the United Nations is to maintain international peacekeeping, protect human rights, and uphold international law.⁶⁵ Since the United Nations is able to oversee and impose international law, it would be useful to employ its resources in order to undermine the magnetic charm terrorism entices women with.⁶⁶ Through its efforts, the United Nations has taken several

⁶¹ *Id.*

⁶² Rachael Lavina, *Women in Terrorism: How the Rise of Female Terrorists Impacts International Law*, 30 ConnecticutJIntlL 243 (2015).

⁶³ See Bloom, *supra* note 5.

⁶⁴ UNITED NATIONS, <http://www.un.org/en/index.html> (last visited Feb. 12, 2018).

⁶⁵ *Id.*

⁶⁶ *Id.*

steps to incorporate gender and specific gender-related policies in regard to counterterrorism which is a welcome change from the gender-neutral language that is used in domestic laws in the United States.

Implementing Mandatory Education for Law Enforcement and Utilizing Proper Interrogation Tactics

Women play a plethora of roles in the terrorism and counterterrorism movements.⁶⁷ As mothers, wives, and sisters, women are in a unique position to either enforce the societal attitudes of glorifying martyrdom, or they can dispel the notion that such acts of violence are necessary, or even moral.⁶⁸ Even in largely patriarchal societies in which women do not have power in the external sphere, they still have a voice within their communities and among other women, and they play an influential role in raising their children.⁶⁹ When counterterrorism efforts are brought to women through interrogation, the limited capacity for law enforcement to deal with gendered issues provides a challenge.⁷⁰ Superiors often apply pressure to law enforcement officials by forcing them to extract confessions expediently.⁷¹ Without a proper grasp on gender differences, law enforcement officials are sometimes unsure of how to proceed within the guidelines of applying human rights to their detainees.⁷² The need for female law enforcement officials is drastically increasing as efforts to curb female terrorism is rising. Female officers are prone to understand gender sensitivities in ways that men cannot, and are better able to elicit testimony and confessions from detainees.⁷³ The male method is sometimes proven to be too harsh which can result in false confessions as well as human rights abuses, an issue the United Nations is fervently opposed to.⁷⁴ The United

⁶⁷ Naureen Chowdhury Fink et. al., *The Roles of Women in Terrorism, Conflict, and Violent Extremism Lessons for the United Nations and International Actors*, CENTER ON GLOBAL COUNTERTERRORISM COOPERATION, (2013), http://www.globalcenter.org/wp-content/uploads/2013/04/NCF_RB_LS_policybrief_1320.pdf.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Nation's Resolution 1325⁷⁵, adopted on October 31, 2000, specifically deals with women, peace, and security, and officially recognizes that women are vital in "in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction".⁷⁶ This resolution also stresses the importance of incorporating gender perspectives "into all United Nations peacekeeping efforts" as well as the responsibility to take special measures to protect women, especially in zones of armed conflict, from rape and sexual abuse.⁷⁷

Identifying the Difference Between Providing Material Support to Terrorists and Aiding Women Victims

The Supreme Court, in *Holder v. Humanitarian Law Project*⁷⁸, ruled that providing "material support or resources" to anyone engaging in foreign terrorist activities was considered illegal. This lawsuit was ongoing for twelve years, in which it was repeatedly appealed. The appellants in question wanted to provide support to the LTTE and Kurdistan Worker's Party, but only in legal avenues that involved providing support for their humanitarian efforts and political activities.⁷⁹ The Supreme Court held that any kind of support that was offered, even monetary funds for humanitarian actions, was considered illegal because any organizations that are deemed foreign terrorist threats "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."⁸⁰ This ruling is problematic, especially involving women, because although many women join terrorist organizations on their own, a large number are also forced or coerced into becoming terrorists.⁸¹ This ruling is at the same time too broad and too stringent because it provides an all-encompassing definition of "material support" that includes "training, legal advice, or advocacy, even by private individuals, and even if the support is

⁷⁵ *Landmark Resolution on Women, Peace, and Security*, OFF. OF THE SPEC. ADVISOR ON GENDER ISSUES AND ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/osagi/wps/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ TedxTalks, *supra* note 11.

directed at persuading violent groups to adopt nonviolent means or appeal to the United Nations.”⁸²

Since counterterrorism strategies can be interpreted as counterproductive and even criminal, the gap of understanding between United Nations counterterrorism practitioners and gender specialists continually increases. This causes counterterrorism efforts to be inadvertently excluded from addressing women, peace, and security issues. *Holder* has created many unintended consequences that disproportionately affect women, especially in developing countries. Non-governmental organizations (NGOs) are often “squeezed between counterterrorism and terrorism, especially where counterterrorism efforts have resulted in cuts to their resources or operating space.” Women are also wary of governments co-opting their issues and heading them up counterterrorism efforts under the guise of championing their rights. This makes them uncomfortable to receive or ask for support because these counterterrorism efforts, now being carried out under their names, will make them targets for terrorist groups.⁸³

Conclusion

Since such little scholarship currently exists on female terrorism, there are many misconceptions related to the subject. Women get drawn into terrorism through many motivating factors and are invaluable resources since they are often overlooked. Current laws, such as the Muslim Ban and the Patriot Act, fail American citizens because they do not consider the very palpable and growing threat of female terrorists. International laws, as examined through protocols and procedures of the United Nations, try to address this gender disparity between women and counterterrorism efforts. Current resolutions attempt to bridge this gap to make all citizens of this world safer. The “5 Rs” (revenge, redemption, relationship, respect, and rape)⁸⁴ are crucial in understanding the motivators for women to become terrorists. Their stories illustrate that many of these women would not willingly enlist in terrorism as their chosen vocation if they had other options to positively enhance their futures or correct their pasts. It has been

⁸² See Fink, *supra* note 67.

⁸³ See Fink, *supra* note 67.

⁸⁴ TedxTalks, *supra* note 11.

shown that these women can be—and often are—brilliant,⁸⁵ compassionate,⁸⁶ and almost all are freedom fighters in their own right as they fight for their families, countries, and selves.⁸⁷ Women work differently than men with regard to terrorism and international laws should work primarily on providing aid to women who may be at risk of becoming involved in terrorist organizations. Funding should be allowed, especially in the form of education and aid to women, which can help to eliminate a major population of women terrorists. Existing laws have failed Americans by unfairly discriminating against Muslims and targeting Muslim countries, while simultaneously failing to realize that the major terrorist threats posed to America are from American-born and raised citizens themselves. The United States must repeal these laws in exchange for laws without biased language against any specific minority, ethnic, racial, or marginalized groups. This language, however, should specifically include women because the “gender-neutral” language in past laws has been futile in recognizing and preventing attacks from female terrorists.

⁸⁵ See Berko, *supra* note 27.

⁸⁶ See Bloom, *supra* note 22.

⁸⁷ See Alison, *supra* note 20.

BOOK REVIEW: *THE ROOSTER BAR*
Grisham, J. *The Rooster Bar* (2017), Doubleday Books
ISBN: 978-0385541176, pp. 352

Sean Casey

For-profit colleges have become a modern staple in American higher education. While these institutions have existed for decades, their prominence has become more pronounced in the last few years due to investments from Wall Street banks and hedge funds allowing for expansion of these “diploma mills.”¹ With the emergence of this new social impropriety, it was only a matter of time until John Grisham took a tone-deaf and hyperbolic stab at explaining the dangers of for-profit colleges in his newest novel, *The Rooster Bar*.

Grisham’s new legal thriller divides itself neatly into three definable sections. The first of which involves introducing the three protagonists, Mark, Todd, and Zola, and setting up their general disdain for their law school, Foggy Bottom. The second section of the novel involves the three protagonists dropping out of law school and illegally practicing law in order to repay their student loans. The third section ends the novel with the three ex-students running an illegal racket against Hinds Rackley, the major investor of their for-profit educator. Of the law students, Zola is depicted as the only likeable character of the three due to the fact that Grisham forces every horrible event possible to happen to her (for example, the deportation of her family from the United States) rather than developing her as a character. On the other hand, Mark and Todd, are so one-dimensional and interchangeable that even other characters in the novel

¹ A “diploma mill” typically connotes an “educational” institution focused primarily on making profits by enrolling and graduating a high number of students based upon tuition paid rather than true academic merit wherein the institution is primarily concerned with preparing students to become respectful, intellectual, and positive contributors to society. It is an institution which gives out a large number of diplomas based on inadequate standards such as an inferior education or poor and non-rigorous assessment measures.

seem to forget they are two different people, as they wind up having an affair with the same prosecutor.

The majority of the novel succeeds in addressing an important social issue, namely whether or not Wall Street controlled colleges are legitimate institutions, or if they are selling a dream that they are incapable of fulfilling. In reality, there is evidence of law schools of for-profit law schools in having more relaxed standards for admissions than the average school. Law School Admissions Test (LSAT) scores and the grade point averages (GPA) of students accepted to these schools tend to be lower.² The for-profit law schools counter this by having an extremely high law school pass rate, and a much lower bar pass rates than the average law school.³ The novel addresses how this could affect students—using the character of Gordy and a dramatized hyperbolic depiction of Gordy’s life and how it ended in order to illustrate the perils of for-profit schools. Unfortunately, in attempting to make this point, Grisham writes Gordy to be immediately unlikable as an alcohol-addled adulterer who appears to think only of himself and not of his friends or his family. This hinders Grisham’s attempt to convey the effects a for-profit education can have on a student, as it leaves Gordy’s suicide seeming more contrived than as the emotional gut-punch Grisham seems to have intended.

Although the focus of the novel is for-profit colleges run by Wall Street investment, it also broaches an important legal topic in its second act. Within the second act, the three protagonists spend their days milling through the Washington, D.C. criminal and the traffic court system. Through this time, Grisham exposes the true victims of the current legal climate. The three protagonists manage to hustle many forgotten small-time criminals scared of losing their jobs, families, and freedom over minor infractions. While small-time criminals generally do not garner much sympathy, it is the depiction of the court system as a gaping maw swallowing these people up and spitting them out which finally allows Grisham to elicit legitimate emotion in his novel. Grisham also explores the predatory nature of personal injury attorneys by depicting the treatment of

² See Paul F. Campos, *The Law School Scam*, THE ATLANTIC, Sept. 2014, <https://www.theatlantic.com/magazine/archive/2014/09/the-law-school-scam/375069/>

³ *Id.*

victims and defendants in the book as products for attorneys and courts to consume rather than as people to be protected by the legal system.

The novel manages to succeed in its most basic goals. The novel educates the reader about the predatory nature of for-profit law schools. However, this is mainly done through hyperbole. Most for-profit law schools are much more relaxed in their standards for GPA entrance as well as their standards for LSAT scores. Because of this, these law schools tend to have lower bar exam pass rates. The novel, however, portrays the pass rate for for-profit law schools to be around the fifty percent range which is very inaccurate. In reality, many of these schools hover much closer to seventy percent.⁴

The novel is also especially appropriate for its target audience—namely the general reader interested in a page-turning legal thriller. Younger generations of pre-law students may very well have their opinions relating to for-profit law schools changed by this novel. It may convince them to weigh their other options and consider whether the immense amount of debt for-profit law schools generate is worth the high graduation rate and low bar pass rates. The novel also serves to highlight some of the more predatory practices in criminal and personal injury law as a warning to a more general audience. Overall, the novel succeeds in getting its point across and enticing its core audience, but it would have not garnered the accolades of a “New York Times Best Seller” if it did not have John Grisham’s name on the front of it.

⁴ Internet Legal Research Group, *Law School Rankings 2017: Bar Exam Pass Rates (High to Low)*, <https://www.ilrg.com/rankings/law/1/desc/Bar>; see also, Jack Stripling, *John Grisham’s Latest Villain? For Profit Colleges*, CHRONICLE OF HIGHER EDUCATION, Oct. 30, 2017, <https://www.chronicle.com/article/John-Grisham-s-Latest/241613>

