Volume 5 Spring 2022 UCF Department of Legal Studies Law Journal

# UNIVERSITY OF CENTRAL FLORIDA DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

Volume 5 Spring 2022

Articles

# UNIVERSITY OF CENTRAL FLORIDA

# DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

# BOARD OF EDITORS FOR 2021-2022

# Table of Contents

# FOREWORD

Timothy M. Ravich

Chair (Interim) and Associate Professor, Department of Legal Studies

In celebrating this fifth edition of UCF's *Undergraduate Law Journal*, a broad and full-throated endorsement of undergraduate legal reviews is in order.

Only three years before the UCF Department of Legal Studies conceptualized an undergraduate law review and produced its first volume thanks to the pioneering efforts of Professor James Beckman. "*Above the Law*," in a snarky article, denounced a national trend in pre-law education: the emergence of undergraduate law journals. At its core, the article challenged the value proposition and return on investment of such an undertaking, particularly for pre-law students. "There's just nothing to be gained," the article concluded. After all, the article asserted, law schools do not necessarily weigh participation in extracurricular activities in the same ways or to the same degree that colleges might, so why bother. With more than 1,000 law- and related journals publishing multiple issues every year, the marketplace for legal research is saturated, and correlatively, the quality of publication is diluted.

However, evaluating undergraduate law reviews solely through a lens focused on outcome (the narrow outcome of law school admission) misses the point of the entire mission of undergraduate legal research and writing. Oxford University established an undergraduate law publication in 2009. Why? To provide an "opportunity for law undergraduates to publish their academic legal writing in a recognised law journal and a platform for discourse on legal developments." The objective of the *Columbia Undergraduate Law Review*: "[T]o enrich the academic and extracurricular life of [its] undergraduate community by providing a forum." The *raison d'être* of the *Penn Undergraduate Law Journal*: "The aim of an undergraduate legal publication is to 'sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes

that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.'"

Opportunity, enrichment, forum, discussion—these are the common and unifying hallmarks of undergraduate law reviews, including this one, and they animate a commitment to experiential learning. Return on investment is not the goal; investment in students is. (And for the record, the ROI is not zero in any event.)

This journal, like those of other institutions, is fundamentally about honing the ability of students to read critically, to think analytically, to present ideas coherently with evidence and logic. The importance of developing these skills in traditional print sources for a generation of "digital natives" is all the more important in an era of 140-character "tweets" and "fake news." Consider the findings in *Evaluating Information: The Cornerstone of Civil Online Reasoning*, a 2016 report by the Stanford History Education Group, which found that college students "may be able to flip between Facebook and Twitter while simultaneously uploading a selfie to Instagram and texting a friend, [b]ut when it comes to evaluating information that flows through social media channels, they are easily duped." Additionally, the report's authors further elaborate:

> [W]e would hope that middle school students could distinguish an ad from a news story. By high school, we would hope that students reading about gun laws would notice that a chart came from a gun owners' political action committee. And, in 2016, we would hope college students, who spend hours each day online, would look beyond .org URL and ask who's behind a site that presents only one side of a contentious issue. But in every case and at every level, we were taken aback by students' lack of preparation.

In this context, the undergraduate law journal experience goes a long way to undoing disturbing national (even international) trends in the critical thinking abilities of today's students.

So, yes, maybe law schools place more (or all) emphasis on LSAT scores and GPA relative to undergraduate law review experience.

But, as the Department of Legal Studies has found, the value of an undergraduate law journal experience has never been higher and students with the critical thinking and writing skills that laws schools and law-centered employers covet just so happen to be those who participate in the work on our undergraduate law journal.

In fact, the students whose work is included in this issue are vetted thoroughly. They are often recommended by faculty, then interviewed and selected by the undergraduate law journal advisor, then trained in the particulars of legal writing and editing. The works they have produced are current and compelling, ranging from socio-technological issues like treason and cybercrime to socio-political issues like homelessness, substance abuse, and China. Congratulations to all the authors in this book. Put it on your résumé or not; the lessons you have gained in preparing these works will reap a lifetime of benefits in yet-imagined ways.

Compliments, too, to all our faculty who channeled star students (and their writing) to this publication and to our staff, particularly the doyenne of our staff, Katie Connolly, for her work behind the scenes. And, alas, thanks to Professor James Beckman for recognizing the value and importance of an undergraduate law review many years ago, and for working continuously and tirelessly in nurturing students to produce high quality legal research of publishable quality.

# INTRODUCTION

James A. Beckman, Faculty Advisor

Professor, Department of Legal Studies

This year marks the fifth anniversary of the University of Central Florida (UCF) Department of Legal Studies Undergraduate Law Journal. As the faculty advisor to the Undergraduate Law Journal, every year for the last five years, I have worried about two issues: first, how to recruit top notch undergraduate students to serve on the Board of Editors for the journal; and two, how to ensure a robust and high-quality pool of potential articles for possible inclusion in the law journal.

And yet, every year for the last five years, all the worrying has been for naught. Each year, there has been a stellar group of individuals serving on the Board of Editors, and this year is no different. Serving on the Board of Editors is not an insignificant commitment of time. Many of the individuals on the Board spent *hundreds* of hours poring over papers submitted for potential inclusion in the journal. Students were asked to review, rank, and critique dozens of articles, all while also conducting their own research and writing. Then, once final articles were selected, each person edited at least one of the selected articles.

This year's Board of Editors is not only composed of a talented and dedicated group of individuals, but for the first time this year, also consists of multiple "non-traditional" students who have brought their decades of life experiences, prior careers, and wisdom to their editorial responsibilities. This alone has vastly improved the overall quality of the journal. For this and their superb work, I am grateful.

While the quality of the published articles in year one of the journal (in 2018) are just as good as the articles published this year in this issue, what has changed is the depth of quality in all the papers submitted for potential publication. Consequently, the review and selection process has become increasingly competitive with each

passing year. Unfortunately, this has meant that many good articles were turned away because of how competitive the pool of potential articles has become.

This year's journal has a host of diverse articles ranging from treason to the rise of cybercrime to the problems of homelessness and the perils of substance abuse within the legal profession. The lead article (which received the highest ranking and review in two separate blind peer review rounds) deals with the viability of the charge of treason in 2022. This year also marks the second year in a row where one of the articles selected for publication was a "revise and resubmit" from the previous year. In both last year and this year's journal, one of the student authors each year continued to work on their paper after their papers were originally not selected, made significant improvements and revisions, and resubmitted it with great results in the subsequent year! This illustrates the perseverance, dedication, and passion that these student authors bring to their chosen topic.

Finally, a few words are merited as to the review and selection process for articles published in this year's journal. Thirty-three papers were submitted for potential inclusion in the journal. This compares with thirty-seven submissions for the 2021 journal, thirty-two submissions for the 2020 journal, thirty submissions for the 2019 journal, and fifty-three submissions for the 2018 journal. Each of these thirty-three articles was randomly placed into one of three review groups, with eleven papers in each of the three groups. Each of the three review groups were assessed over the course of three separate weeks (one review group per week). The ranking/rating criteria that was utilized can be found at the end of this Introduction.

As part of the student review process, not only are students required to review and rank the articles but must also justify each of their reviews/comments in writing. On this step alone, students generated one hundred and thirty-five pages of single-spaced comments on the deficiencies or merits of the papers under consideration (forty-two pages for Submission Group A, forty-six pages for Submission Group B, and forty-seven pages for Submission Group C)! These one hundred and thirty-five pages of comments, along with class ranking

of the articles, and a discussion board debate, represented the most voluminous amount of data to consider about each article in the first five years of the journal's existence.

The top articles in each group moved on to a second round of review. After this first blind peer-review round, the pool of thirty-three articles was reduced to seventeen papers. At that point, every editorial board member was tasked with re-reviewing these seventeen papers and discussing the merits and deficiencies of each submission. A second vote was conducted to further narrow the pool. This was a blind-review and blind-vote as well. Once the final papers were selected for publication, each article was again reviewed and edited.

The amount of work that the editorial board put into the production of this journal has been exemplary. Further, the quality of the articles is as good, if not better, than is the case for many law school level journals. The articles are well researched and excellently written. In perusing the journal, the reader will be impressed with the many intriguing and highly informative articles on a host of timely issues. Regardless of the article one reads, it is easy to forget that these articles were researched, written, and edited by undergraduate students. I am confident that the reader will be impressed with the quality of research contained in each article. The various topics explored, the research conducted, and knowledge presented is both rich and diverse. The quality of this journal is a testament to not only the talented group of student authors, but also the phenomenal work of the Board of Editors in reviewing and editing the various articles contained in this volume.

**LEGAL STUDIES UNDERGRADUATE LAW JOURNAL**

Department of Legal Studies

College of Community Innovation and Education, University of Central Florida

# Article Review Sheet for the UCF Legal Studies Undergraduate Law Journal[1]

---

**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

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

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

# THE DEATH AND RESURRECTION OF TREASON

Hannah Synder

ABTRACT

Can Americans who join terrorist organizations and fight against United States troops be charged with treason? Does the January 6th riot in Washington D.C. constitute "levying war"? Despite ongoing acts of levying war, and providing aid and comfort to enemies, the United States has not had a treason case since the early 1950s. Courts and prosecutors actively avoid the charge, leading to a substantial lack of case law and legal guidance. Today, legal scholars disagree on how the Treason Clause should be applied. In this article, the disappearance of treason as a viable charge will be explored, and opposing views analyzed on how it should be utilized in the twenty-first century. This article will set forth the arguments as to why treason still holds significant constitutional importance, and should return as a viable charge in criminal law.

## INTRODUCTION

"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court."[2]

John Walker Lindh joined the Taliban and took up arms against American troops.[3] Eric Snowden leaked classified federal information.[4] Rioters led an insurrection on the capitol.[5] All have

[2] U.S. CONST. ART. III, § 3.
[3] U.S. v. Lindh, 212 F. Supp. 2d 54 (E.D. Va. 2002).
[4] United States Obtains Final Judgment and Permanent Injunction Against Edward Snowden, Justice News, The United States Department of Justice: Office of Public Affairs, Oct. 1, 2020, https://www.justice.gov/opa/pr/united-states-obtains-final-judgment-and-permanent-injunction-against-edward-snowden.
[5] Capitol Violence, FBI, Jan. 8, 2021, https://www.fbi.gov/wanted/capitol-violence.

been called “traitors” and “treasonous” by the public, but none have resulted in a treason charge, much less a conviction.[6] The Treason Clause is the only constitutional issue that has not been applied in the twenty-first century. Should treason return as a viable charge in American law? If so, how should it be applied?

Perhaps the highest and most imperative charge in criminal law is treason.[7] It holds the unique position of being the only crime defined in the constitution.[8] Yet despite its historical and constitutional importance, treason has fallen out of favor; the last true case was tried in 1948, with the Supreme Court affirming the guilty conviction in 1952.[9] This is not due to a lack of treasonous acts since 1948. Rather, courts have been actively avoiding the charge. This has led to a lack of substantial case law and legal guidance. Scholars have also largely ignored the Treason Clause. The few who dive into the subject often note the lack of attention paid to it by legal professionals. Today, courts and scholars either disregard the charge entirely, or disagree on how it should be applied in the twenty-first century.[10] In this paper I will argue why treason should return as a viable charge in criminal law and analyze how it should be applied to modern issues.

Section I will establish a fundamental understanding of the Treason Clause and how to commit treason. Section II will describe why the founders chose to define treason in the Constitution, rather than leave it to Congress. It will also study how treason has evolved over time and analyze why treason prosecutions have disappeared. Section III will discuss treason’s importance and argue why it should return as a charge in criminal law. Section IV will give proscribed changes that will enable the treason charge to return as a viable and

[6] E.g., Lois Beckett, Why Aren’t We Calling the Capitol Attack Treason?, The Guardian, Apr. 5, 2021, https://www.theguardian.com/us-news/2021/apr/05/the-capitol-attack-treason.
[7] See Cramer v. United States, 325 U.S. 1, 22 (1945).
[8] U.S. CONST. art. III, § 3.
[9] Kawakita v. U.S., 343 U.S. 717 (1952).
[10] E.g., Jennifer Malone, American Taliban Avoids Charge of Treason Claims to be Victim of Coercion, 7 PUB. INT. L. REP. 1, 17 (2002).

workable charge. Section V will apply the proscriptions to relevant cases and delineate how they should have resulted.

## I. STEP BY STEP GUIDE TO COMMITTING TREASON IN THE UNITED STATES

In the United States, there are two ways to commit treason: "levying war" and "adhering to an enemy, providing them aid and comfort."[11] Either way, three elements must be proven to sustain a treason conviction: allegiance, an "overt act", and treasonous intention.[12] The elements are characterized differently between the two forms of treason. However, both require the "overt act" be proven by the testimony of two witnesses or be confessed in open court.[13]

### a) How to Levy War

To "levy war" the participants must first owe allegiance to the United States and revolt against their own government.[14] If an individual aids a foreign enemy to overthrow the United States, then war has not been levied.[15] However, if a group of American citizens or nationals attempt to suppress the law by force or try to overthrow their own government, then war may be levied.[16]

Second, is intent.[17] In "levying war "cases, treasonous intentions are proven by a plan to overthrow the government or to suppress the law by force.[18] For example, planning to attack congress for an unwanted law proves treasonous intentions.[19] Attempting to overthrow

[11] U.S. CONST. art. III, § 3.
[12] E.g., Kawakita v. U.S., 343 U.S. 717 (1952).
[13] U.S. CONST. art. III, § 3.
[14] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863).
[15] Id.
[16] Id.
[17] E.g., Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800).
[18] Id.
[19] Cf. U.S v. Mitchell, 2 U.S. 348 (C.C.D. Pa. 1795) (finding that targeting an excise office of the United States to suppress the law is treason).

congress by force is another example.[20] However, a protest without the intent to suppress or overthrow is not treason by "levying war."[21]

Third, a treasonable design must be put into action. This is the "overt act" that must be proven by two witnesses or confessed in open court.[22] Conspiracy to overthrow the government or to suppress the law by force does not amount to "levying war."[23] War is only levied when the conspired plan is put into action.[24] This can be characterized by the assemblage of men for a treasonable design.[25] However, if men are recruited to serve an individual, or to protest, then war has not been levied.[26]

b) How to Adhere to an Enemy, Providing Aid and Comfort.

To commit treason by "adhere to an enemy, providing aid and comfort", the individual must owe allegiance to the United States. Regardless of residency or dual citizenship, American citizens and nationals owe allegiance to the United States.[27] Because treason is a breach of allegiance, those owing no loyalty to the United States cannot commit treason.[28]

Next is the "overt act." Unlike "levying war", this form of treason is not bridled by specific deeds.[29] Providing "aid and comfort" comes in many different forms. A few examples are speech, harboring, holding money, providing information, and working behind enemy lines.[30]

---

[20] Id.
[21] Fries, 9 F. Cas. at 931.
[22] U.S. CONST. art. III, § 3.
[23] E.g., Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75, 126 (1807).
[24] Id.
[25] Id. at 127.
[26] Id.
[27] Kawakita v. U.S., 343 U.S. 717, 733-35(1952).
[28] See id.
[29] Cf. Cramer v. United States, 325 U.S. 1, 58 (1945) ("Acts innocent on their face, when judged in the light of their purpose and of related events, may turn out to be acts of aid and comfort committed with treasonable purpose.").
[30] E.g., id.

Last is intention, or "adhering" to the enemy. The intention requirement protects unknowing participants.[31] For example, providing housing to an enemy, without the knowledge they are an enemy, is not treason.[32] Proving intentions also distinguishes free speech from treason in the form of speech. For example, dissenting opinions are protected.[33] However, if speech is created with the intent to betray while aiding an enemy, then treason has been committed.[34]

## II. THE RISE AND FALL OF TREASON

### a) The Inclusion of Treason in the Constitution and the Rational for It Being the Only Crime Defined in The Constitution

Treason holds the unique position of being the only crime defined in the Constitution. This phenomenon can be attributed to England's abuse of the crime.[35] In English law during the American Revolution, many deeds were considered treason: (1) encompassing the death of the King, the Queen, or their heir; (2) violating the King's companion, wife, eldest unmarried daughter, or the eldest son's wife; (3) levying war; (4) adhering to the King's enemies, providing them aid and comfort; (5) and slaying the Chancellor, Treasurer, or Judges.[36] The wide variety of treasonous acts dangerously exposed people to prosecution. Specifically, accusations of "imaging the death of the King" were used to eliminate political rivals, or to suppress resistance to the Crown.[37] If treason were left to Congress, it could be changed easily to fit the wants of the party in power and be utilized as a political weapon. However, by placing it in the Constitution, the Founder's set treason on a higher level than other laws and made it

[31] See id. at 30.
[32] See id. at 28.
[33] U.S. CONST. amend. I.
[34] Chandler v. United States, 171 F.2d 921 (1st Cir. 1948).
[35] Cf., Cramer v. United States, 325 U.S. 1, 22-23 (1945) ("The temper and attitude of the Convention toward treason prosecutions is unmistakable. It adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced.").
[36] See Treason Act 1351, 25 Edw. 3 c. 2 § 5 (Eng.).
[37] JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 5 (1971).

extremely difficult to change. Because the Treason Clause is in the Constitution, amending it requires a two-thirds majority vote, or a constitutional convention to be called with a two-thirds majority vote.[38] It is unlikely the Treason Clause will ever be amended through Congress; out of the 11,000 amendments proposed since 1789, only twenty-seven have been ratified.[39]

Also due to the abuse suffered in England, the Founders adopted a narrow definition of the crime.[40] Language such as "levying war" and "adhering to enemies, giving them aid and comfort" were borrowed from English law.[41] However, the narrow definition was not enough. They also included a difficult evidentiary requirement, the "two witness" rule.[42] Requiring the testimony of two witnesses to the same overt act would protect against flagrant accusations and ensure treason would not be used as a political weapon. Concerns were voiced at the Constitutional Convention regarding the limiting nature of the Treason Clause.[43] Some believed the limited definition combine with the two-witness rule would make treason too difficult to prove.[44] However, the majority thought it best to err on the side of caution.[45] The final Treason Clause was decided as follows: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of

---

[38] U.S. CONST. art. V.

[39] Amending the Constitution, U.S. Senate, 2019, https://www.senate.gov/reference/reference_index_subjects/Constitution_vrd.htm#:~:text=It%20has%20become%20the%20landmark,11%2C000%20amendments%20proposed%20since%201789.

[40] Cramer, 325 U.S. at 22.

[41] Compare 25 Edw. 3, Stat. 5 (". . . if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm. . .") with U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. ").

[42] MAX FERRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 346-48 (1911).

[43] Id. at 345-50.

[44] Id.

[45] Id.

two Witnesses to the same overt Act, or on Confession in open Court."[46]

b) A Brief History of Treason in The United States

The first wave of treasonous offenses addresses the issue of levying war. In 1795, John Mitchell was found guilty of treason for his participation in the Whiskey Rebellion.[47] Mitchell, along with other armed insurgents, revolted against the region's tax collector and burned his house down.[48] Because the intent of the revolt was to prevent the execution of an act of Congress through force, and the insurgents showed a substantial show of force, acting in a military manner, it was considered treason.[49] Mitchell, along with other rioters, was found guilty and sentenced to hang. A similar situation arose from Fries Rebellion in 1799-1800. Angered over taxation, John Fries lead a large group of affected people to prevent the implementation of the tax.[50] Fries was subsequently charged with treason. At trial, the court emphasized the difference between lesser crimes and treason is the intention behind the actions.[51] Fries was found guilty and sentenced to death.[52]

Two men were charged with treason for participating in Aaron Burrs military expedition to Mexico in the case of *Ex Parte Bollman*.[53] Allegedly, the true intention behind the expedition was to levy war against the Unites States in New Orleans.[54] However, the plan was never fully realized. Consequently, the evidence was insufficient and the intention behind the defendant's participation was inconclusive.[55] Chief Justice Marshall wrote: "To complete the crime of levying war

[46] U.S. CONST. art. III, § 3.
[47] U.S v. Mitchell, 2 U.S. 348, 356 (C.C.D. Pa. 1795).
[48] Id. at 348.
[49] Id. at 356.
[50] Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800).
[51] Id. at 930 ("The true criterion to determine whether acts committed are treason, or a less offence (as a riot), is the quo animo, or the intention, with which the people did assemble.")
[52] Id. at 932.
[53] Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75 (1807).
[54] Id. at 132.
[55] Id. at 136.

against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design."[56]

The second and most prominent wave occurred in light of World War II. The most notable case is *Cramer v. United States*, which reached the Supreme Court. Anthony Cramer was a German born, naturalized United States citizen.[57] In 1924, he was accused of treason by aiding German spies.[58] The spies entered the United States by submarine with plans to sabotage American industry.[59] Cramer met them multiple times and held $3,600 for them.[60] He was found guilty in the lower court, but the judge did not administer the maximum sentence stating: "I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States or planned to do that."[61] This is where the controversy began. In plain language, the Treason Clause only requires an overt act.[62] While some courts adopted this strict view, others contended mens rea (otherwise known as criminal intention), was needed to find a person guilty of treason.[63] The Supreme Court decided extreme overt acts would show guilty intentions themselves.[64] However, in uncertain situations, such as Cramer's, treasonous intent would need to be proven.[65] The ruling in this case proved to be controversial.

In contrast to *Cramer*, treason was rather obvious in *Chandler v. United States*.[66] However, this case does demonstrate how the court

---

[56] Id. at 126.
[57] Cramer v. United States, 325 U.S. 1 (1945).
[58] Id. at 3.
[59] Id.
[60] Id.
[61] Id. at 3-4.
[62] U.S. CONST. art. III, §3.
[63] Cramer v. United States, 325 U.S. 1, 4 (1945).
[64] Id. at 47.
[65] Id.
[66] Compare id. (finding the "overt act" was meeting with spies in a public space) with Chandler v. United States, 171 F.2d 921, 925 (1st Cir. 1948) (finding the defendant was on the enemies payroll and clearly understood his assignment was to create propaganda for the enemy).

treats propaganda related treason. Born and raised in America, Douglas Chandler found political kinship with Nazi Germany.[67] He moved to Europe and worked as a radio broadcaster for the German Reich.[68] The radio broadcasts were used as psychological warfare to create division and problems among allies, and to demoralize troops.[69] The aim of the broadcasts was explicit to employees, including Chandler.[70] In 1943, Chandler was apprehended in Germany and returned to the United States where he was indicted for treason, and found guilty.[71] On appeal, the court made two important distinctions to the Treason Clause. First, treason committed abroad is still within the jurisdiction of the United States.[72] Second, although mere words are not enough to constitute treason, speech produced to betray while aiding an enemy is.[73] This case demonstrates where free speech ends, and treason begins.

The last true treason case was in 1952. *Kawakita v. United States* addressed the issues of dual citizenship in relation to treason.[74] Tomoya Kawakita was born in America and left for Japan at age 17.[75] While in Japan, Kawakita received formal education, and during WWII became a translator at Oeyama, a prisoner of war camp.[76] The record shows that during his time at the POW camp, he not only participated in, but also instigated, abuse of the POW's.[77] After the war, Kawakita returned to America, where a former POW recognized him, and alerted the authorities.[78] The trial court found Kawakita guilty of treason for adhering to the enemy and giving them aid and comfort

[67] Chandler v. United States, 171 F.2d 921, 925 (1st Cir. 1948).
[68] Id.
[69] Id. at 926.
[70] Id.
[71] Id. at 927-29.
[72] Id. at 929.
[73] Id. at 944. ("Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment.").
[74] Kawakita v. U.S., 343 U.S. 717 (1952).
[75] Id.
[76] Id.
[77] Id. at 726.
[78] Id. at 721.

by mistreating prisoners of war while employed in Japan.[79] Kawakita lost the case and appealed. His primary defense was that as a dual citizen, he owed allegiance to Japan while there.[80] His defense failed in the Supreme Court and the ruling of the lower court was affirmed.[81] He was sentenced to death for his crimes.[82] However, in 1953 President Eisenhower commuted the death sentence and gave him life imprisonment.[83] Then, for political purposes, President Kennedy and the Attorney Generals' office reversed that decision, and released Kawakita on the condition he return to Japan in 1963.[84]

c) Why Treason Has Fallen Out of Favor

The United States has not pursued a treason prosecution since the 1950's. Similarly, the Treason Clause has been largely ignored by law professors and legal scholars alike. The few who delve into the clause often report the alarmingly sparse selection of relevant case law and legal scholarship.[85] But the disappearance of treason is not due to a lack of treasonous acts, nor is it merely coincidental. Rather, the lack of treason charges after the 1950s can be explained by a few factors.

The following section will cover the primary reason why treason has disappeared. First, the ruling in *Cramer v. United States* made it nearly impossible to prove treason, and the Supreme Court encouraged Congress to enact laws that would essentially usurp the Treason Clause. Second, following *Cramer*, the legislature enacted laws to replace treason, which prosecutors subsequently utilized. Third, post-9/11 policy hands enemy combatants who are American

[79] Id. at 743.
[80] Id. at 735.
[81] Id. at 745.
[82] Id.
[83] NAOKO SHIBUSAWA, TOMOYO KAWAKITA, Densho Encyclopedia https://encyclopedia.densho.org/Tomoya_Kawakita/#top.
[84] Id.
[85] See Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem, 154 U. PA. L. REV. 863, 865-66 (2006) (". . . there is virtually no scholarship engaging doctrinal issues in American treason law."); see also George P. Fletcher, Ambivalence About Treason, 82 N.C. L. REV. 1611, 1612 (2004) (observing an alarming lack of attention to treason in American law).

citizens over to military jurisdiction, thus removing such cases from the traditional civil system.

*i. The Problems with Cramer*

The majority based their decision to reverse on the intentions of the "overt acts."[86] They ruled if treasonous intent is not obvious, then it must be proven that the acts were done with treacherous intent, to further a treasonous plot.[87] Furthermore, the Court found that only evidence pertaining directly to the specific acts could aid in proving intentions.[88] For example, the following facts, admitted by Cramer at trial, were ruled impermissible to proving treasonous intentions because they did not occur during the acts at issue and were not evident to the witnesses (meeting, dining, and drinking with the spies): (a) Cramer knew one of the spies well, Thiel, years before the incident, (b) knew Thiel had left the states to fight for the Nazi party, (c) Cramer admitted he supposed Thiel and the other spy had illegally entered the country through submarine, (d) Cramer held money for them, (e) Cramer admitted Kiel told him he was here on a mission for the German government, (f) Cramer actively helped to keep Thiel's identity hidden, and attempted to throw federal agents off of the spies tracks.[89] The troublesome aspects of this ruling are best highlighted in the dissent:

> To say that we are precluded from considering those admissions in weighing the sufficiency of the evidence of the true character and significance of the overt acts is neither good sense nor good law. Such a result makes the way easy for the traitor, does violence to the Constitution, and makes justice truly blind.[90]

Dissenting Justice Douglas, with Chief Justice Stone, Justice Black and Justice Reed concurring, found the ruling to be unreasonable and unprecedented: historically, there was no record to indicate the acts

[86] Cramer v. United States, 325 U.S. 1, 35 (1945).
[87] Id.
[88] Id.
[89] Id. at 56-57.
[90] Id. at 65-66.

themselves must function as evidence for intent.[91] Furthermore, the majority contradicted standard protocol for proving intentions in criminal law.[92] Normally, people of sound mind are assumed to understand the natural consequence of their actions.[93] Therefore, intent is usually evident from their actions or from their own admissions in open court.[94] If ambiguity exists, background information may be used as evidence to prove criminal intentions.[95] Without the ability to infer intent or to utilize the defendant's admissions to prove intent in treason prosecutions, Justice Douglas believed the charge would be unduly challenging for the prosecution, and eventually lead to the release of traitors.[96]

Scholars have taken similar issue with *Cramer*. The most in-depth analysis of Treason was conducted by James Willard Hurst in 1971. Hurst believed the Court's decision to be overly narrow and unclear: ". . . The majority opinion in *Cramer v. United States* has cast such a net of ambiguous limitations about the crime of 'treason' it is doubtful whether a careful prosecutor will ever again charge an indictment under that head."[97] Hurst contends, similar to Justice Douglas, there is no policy in English or American law to support the majority adding additional requirements to prove intentions.[98] Other scholars have attributed the lack of treason cases directly to the Court's decision. ". . . . I argue that a confluence of factors—namely Cramer, Congress, and prosecutorial discretion—was responsible for

[91] Id. at 58-59 (arguing the Constitution does not require the two-witness rule be applied to all evidence proving intent and finding no historical basis for the Majorities conclusion).
[92] Id.
[93] Cf., id. at 54-55 (arguing that people understanding the consequences of their actions is an established staple in criminal law, particularly regarding treasonous intentions).
[94] Id.
[95] Id. at 60 ("The treasonable intent or purpose which it is said may be proved by a single witness or circumstantial evidence must, in the absence of a confession of guilt in open court, be inferred from all the facts and circumstances which surround and relate to the overt act.").
[96] Id. at 75.
[97] HURST, supra note 36, at 217.
[98] See id.

the lack of treason prosecutions after 1954."[99] The Court's decision has caused a lack of supply and distinction on the topic of treason, leaving future courts reliant on outdated case law with little guidance on modern issues.[100]

Unfortunately, the issues with *Cramer* do not end with shackling the Treason Clause. In Section V of the opinion, the majority notes treason is extremely restrictive, and encourages alternate forms of prosecution.[101] They indicate that Congress has the full power to create alternatives to treason, such as crimes of disloyalty or forbidding acts that could endanger national security, particularly in times of war.[102] This portion of the opinion was not addressed in the dissent. However, Hurst mentions this section briefly, warning that straying from the original intention to keep treason out of the legislature's hands could cause strain in the balance of power, and delete the safeguards embedded in the Constitution.[103]

*ii. Proxy Laws*

But while treason is always disloyalty, disloyalty is not always treason. "Proxy laws" are laws which punish disloyalty to the United States. Most actions committed in violation of these could be tried under the Treason Charge. When the Supreme Court wrote:

"The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focused upon defendant's specific intent to do those particular acts52 thus

---

[99] Paul Crane, Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance, 36 FLA. ST. U. L. REV. 635, 640 (2009).

[100]See Larson, supra note 84, at 856-66 (". . . there is virtually no scholarship engaging doctrinal issues in American treason law."); see also George P. Fletcher, Ambivalence About Treason, 82 N.C. L. REV. 1611, 1612 (2004) (observing an alarming lack of attention to treason in American law).

[101] See Cramer v. United States, 325 U.S. 1, 45 (1945) ("But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focused upon defendant's specific intent to do those particular acts.").

[102] Id. at 939 (arguing that treasonous cases too difficult to prove under their decision in Cramer should be tried under other offenses).

[103] HURST, supra note 36, at 217-18.

eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities."[104]

It gave prosecutors their blessing to try treason under lesser charges.[105] When a possible treason case arises, prosecutors have the discretion to pick which crime they will charge. Any reasonably prosecutor would choose to charge a crime under the following laws and sidestep the strenuous Treason Clause.

One such proxy law is the Espionage Act, which criminalizes acts that cause injury to the United States or provide advantage to other nations, particularly regarding matters of national security.[106] The law applies to all other nations, parties, or military forces in foreign nations, whether they are enemy or ally.[107] Acts committed to benefit enemies of the United States could fall under treason or espionage.[108] Consequently, espionage is viewed as a lesser degree of treason.[109] However, the procedural requirements for espionage are not as strenuous as those for treason.[110]

More recent proxy laws have been enacted in response to the War on Terror. 18 U.S.C. § 2 criminalizes activities that harm the interests of the United States, while 18 U.S.C. § 2339B prohibits providing material support or financial assistance to enemy terrorist organizations.[111] Similarly, 31 CFR § 595.204 prohibits Americans from providing or participating in transaction that would provide support to designated terrorist organizations.[112] Violation of these

---

[104] Cramer, 325 U.S. at 45-46.
[105] See id.
[106] 10 U.S.C.A. § 903a.
[107] Id.
[108] Compare 10 U.S.C.A. § 903a (punishing acts committed to benefit other nations, military forces, and agents of foreign governments and forces) with U.S. CONST. art. III, §3 (punishing acts committed to aid or comfort an enemy of the U.S.).
[109] See United States v. Rosenberg, 195 F.2d 583, 610 (2d Cir. 1952) (Considering the crime of espionage to be crime of the same kind as treason- but of a lesser degree.)
[110] See id. at 610-11 ("The constitutional safeguards applicable to a trial of the greater crime of this kind must be applied to the lesser. . . here there were no such safeguards, since the trial judge did not give the instructions constitutionally required in a treason trial.").
[111] See 18 U.S.C.A. § 2 and 18 U.S.C. § 2339B.
[112] See 31 CFR § 595.204.

laws is considered providing aid and comfort to enemies of the United States[113] Such actions should be subject to the Treason Clause. While other laws punish acts which jeopardize national security, they do not punish betrayal and carry lower sentences than the Treason Clause.[114] For example, terrorist organization "Al-Qaeda" declared war against the United States in 1998.[115] The organizations leader, Usama Bin Laden, publicly encouraged his follower to kill Americans, with no regard to whether they are military or civilians.[116] Since then, Al-Queda and organizations under their umbrella have orchestrated various terrorist attacks against United States civilians and military.[117] Because they are an active enemy, if an American were to join or aid these organizations, it would be a breach of allegiance. Therefore, any act they commit, whether it be providing monetary funds or fighting on the front lines, should be punished under the Treason Clause. However, like espionage, it is far easier to acquire a guilty conviction under the forementioned laws than under the Treason Clause. They do not require the testimony of two witnesses, nor do they require proof of intent. [118] Furthermore, these proxy laws do not carry the stringent precedent from *Cramer*, only allowing evidence from the overt act witnessed to prove intent.[119]

*iii. Military Jurisdiction*

Jurisdictional issues have also contributed to the decline of treason prosecutions. In 2001, Congress enacted law allowing the President to use military force against any nation or participants he

[113] U.S. v. Lindh, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002).
[114] Compare 18 U.S.C. § 2339B (requiring the defendant no more than twenty years) and 31 CFR § 595.204 (Requiring no less than twenty years imprisonment unless death results from the action) with U.S. CONST. art. III, § 3 (Requiring imprisonment no less than five year and up to capital punishment).
[115] See J. T. Caruso, Al-Qaeda International, FBI, 2001, https://archives.fbi.gov/archives/news/testimony/al-qaeda-international; see also National Commission on Terrorist Attacks, 9/11 Commission Report, 2004, https://govinfo.library.unt.edu/911/report/911Report.pdf.
[116] Caruso, supra note 114.
[117] National Commission on Terrorist Attacks, 9/11 Commission Report, 2004, https://govinfo.library.unt.edu/911/report/911Report.pdf.
[118] See 18 U.S.C. § 2; see also 18 U.S.C. § 2339B; and 31 CFR § 595.204.
[119] Cramer v. United States, 325 U.S. 1, 35 (1945).

believed to be involved in the 9/11 terrorist attack.[120] The law allowed enemy combatants, even those who are American citizens, to be charged in military jurisdiction.[121] This raises three concerns. First, the law is problematic for case law and scholarship. Although Americans joining terrorist organization to fight against their own is unpatriotic, it does give the legal system the opportunity to apply archaic laws, such as treason, to modern warfare. This would allow the Treason Clause to modernize, and provide legal guidance for the future. Unfortunately, if these cases are tried under military jurisdiction, they do not apply as precedent in non-military courts, leaving the Treason Clause to collect dust. The second issue regards the Founder's intentions. The Treason Clause was specifically written for situations where those with allegiance to the United States decide to betray their country.[122] There is no indication that the Constitution contemplates citizens who are not part of the United States military should be tried under military jurisdiction after committing acts of betrayal.[123] Lastly, despite any transgression against the country, American's still retain Constitutional protections. If tried as an "enemy combatant" those rights are relinquished.[124]

## III. WHY TREASON SHOULD RETURN AS A VIABLE CHARGE

Treason plays a unique role in American law: the Treason Clause is the only law properly equip to handle betrayal against the United States. When not utilized, betrayal goes unpunished. The "passions of men" are not quelled. Case law and legal scholarship fail to develop, and the public is left with little knowledge of what constitutes

[120] See Authorization for Use of Military Force of 2001, PL 107–40, 115 Stat. 224.
[121] See id.; see also Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004) (holding that U.S. citizens can be detained as enemy combatants when there is sound factual basis).
[122] See U.S. CONST. art. III, § 3; Cf., Cramer v. United States, 325 U.S. 1, 8 (Finding the Founders had no reluctance to punish breaches of allegiance through the crime of treason).
[123] Cf. Larson, supra note 84, at 925 (". . . there is therefore little reason to think that terrorist groups pose such a distinctive and unique threat as to warrant departure from the ordinary criminal law paradigm.").
[124] See id. at 897.

treason. This section will argue why treason should return as a viable charge in criminal law.

"As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both."[125]

a) By Any Other Name

Treason should not be charged under any lesser crime. The Founders set a high bar for treason to prevent abuse, however, they never intended it to be so stringent that prosecutors would avoid using it.[126] Legal minds often emphasize the Founders' intention to restrict treason.[127] In doing so, they omit why it was included in the Constitution at all.[128] At the time, under English law, treason was committed against the Monarchy.[129] In a country with no monarchy, whose politicians are voted in and out regularly, a treason law would not be reasonable unless allegiance is vital for a nation to thrive. Specifically, a treason law in the United States would only make sense if loyalty to the Constitution is necessary for the nation to function. This is evident from how treason is defined. To "levy war" against the United States is to forgo the Constitutional process of changing law: protest, appeal, and voting for leaders who will truly represent the

[125] Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75, 125 (1807).
[126] See Cramer v. United States, 325 U.S. 1, 8 (1945); see also FERRAND, supra note 41, at 345-50 (Establishing the Treason clause should be stringent.).
[127] See Ex parte Bollman, 8 U.S. at 126-27 (emphasizing the founder's intentions to protect citizens from abuse of treason); c.f., Cramer, 325 U.S. at 47-48 (arguing it is better to err on the founders side of condition when judging cases of treason); c.f., HURST, supra note 36, at 137 (". . . . though the most obvious emphasis in discussion was upon limiting the scope of 'treason', there can be no doubt that the restrictive policy was intended likewise to restrict judged and to curb the creation of novel treasons by construction.".
[128] C.f., Cramer, 325 U.S. at 8 (1945) ("There is no evidence that the forefathers intended to withdraw the treason offense from use as an effective instrument of the new nation's security against treachery that would aid external enemies.").
[129] 25 EDW. 3, STAT. 5.

people's will.[130] Likewise, to "adhere" and "give aid and comfort" to an enemy, is to assist an enemy who means harm to the United States. Should the enemy succeed, the liberties protected by the Constitution would be placed in jeopardy.

However, the Treason Clause does not punish action alone.[131] Courts have repeatedly emphasized that treasonous intent is necessary for a conviction.[132] Actually, it is treachery and action, rather than damage done that makes a traitor.[133] It is the intention to betray that separates treason from other crimes. To commit treason is to betray the United States, the Constitution, and every single American.[134] While other crimes punish violence or the conveyance of national secrets, the Treason Clause is the only law crafted to punish Americans who betray the United States.

b) Passions of Men

When treason arises, there is often a public outcry for justice. Considering there is ". . . no crime which can more excite and agitate the passions of men than treason. . .", prosecutors must be careful in utilizing the charge.[135] The accusation alone brings unwanted stigma to the defendant's life.[136] But, to not try treason under the proper heading may cause civil discord, and lead citizens to serve their own means of justice. For example, had the POW who first found Kawakita not been completely stunned upon seeing him in the states he "might have taken the law into my own hands--and probably Kawakita's

[130] U.S. v. Mitchell, 2 U.S. 348, 355 (C.C.D. Pa. 1795) (If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence, in legal estimation, is High Treason; it is an usurpation of the authority of government; it is High Treason by levying of war.).
[131] U.S. CONST. art. III, § 3; e.g., Cramer, 325 U.S. at 35.
[132] E.g., Bollman, 8 U.S. at 128-33.
[133] See Chandler v. United States, 171 F.2d 921, 941-42 (1st Cir. 1948) (holding it does not matter whether a treasonous action causes damage).
[134] C.f., id. (Finding that treason is not committed against politicians, but rather the United States as an entity).
[135] See Bollman, 8 U.S. at 125.
[136] Suzanne Babb, Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh, 54 HASTINGS L.J. 1721, 1734-37 (2003).

neck."[137] Furthermore, the POW's who were the victims of Kawakita's treason (and the primary witnesses in his trial) threatened to take matters into their own hands if he were released.[138] Similarly, when American Taliban fighter, John Walker Lindh, was not charged for treason, there was fury among the public.[139] Walker was kept in strict custody. Had he been available to the public, Americans may have served their own form of justice.

c) Punishments

One additional benefit of the treason charge is that, unlike the proxy laws or military tribunal being used in its stead, treason carries a very flexible sentencing range. Those found guilty can be sentenced to no less than five years, but up to capital punishment.[140] For example, John Mitchell in the Whiskey Rebellion and John Fries in Fries Rebellion, were both found guilty of levying war, and sentenced to hang.[141] Douglas Chandler, who created propaganda for the Third Reich, was given life imprisonment.[142] Kawakita, who abused POW's and was responsible for the death of some Americans, was sentenced to death.[143] On the other hand, before his Supreme Court appeal, Anthony Cramer was only sentenced to forty-five years imprisonment for aiding German saboteurs.[144] The flexibility of punishment is one of the most advantageous and overlooked aspects of the treason charge. Because Congress cannot create lesser degrees of treason, it would be unreasonable for every individual found guilty to be sentenced to life imprisonment or death. Especially because treason may be committee to varying degrees. If the treason is egregious, life

[137] David Rosenzweig, POW Camp Atrocities Led To Treason Trial, Los Angeles Times, Sep. 20, 2002, https://www.latimes.com/archives/la-xpm-2002-sep-20-me-onthelaw20-story.html.
[138] Id.
[139] See Robert Barr, John Walker: The Definition of Treason, Gwinnett Citizen, Sept. 10, 2002, http://www.gwinnettcitizen.com (on file with Hastings Law Journal).
[140] 18 U.S.C.A. § 2381.
[141] Megan Israelitt, Is treason applied as the founders intended? 9 NAT. LAW REV. 5 (2019) https://www.natlawreview.com/article/treason-applied-founders-intended.
[142] Chandler v. United States, 171 F.2d 921, 943 (1st Cir. 1948)
[143] Israelitt, supra note 139, at 8.
[144] Id.

imprisonment or the death penalty may be appropriate. However, if the treasonous act is of less impact, then fewer years can be assigned. This ensures treason does not go unpunished but allows the court to decide how severe a punishment is needed.

d) Clarity in Modern Terms

Since the last treason case in 1952, war, international relations, and American society have changed drastically.[145] Nearly every constitutional issue has been applied to modern issues, except treason.[146] If a case arose today, courts would be looking to outdated caselaw for guidance. The rise of terrorism and Americans who leave the United States to fight for the enemy has compelled scholars to revisit the Treason Clause.[147] But with little legal guidance on modern issues, scholars often disagree on what treason looks like in the twenty-first century.[148] Similarly, the public has little understanding of what treason actually is.[149] This results in flagrant accusations which are harmful to those who have not committed any form of treason.[150] The treason charge must return so that it may be established in modern terms.

Scholars have addressed the ambiguity surrounding the treason charge. First there is the question of "levying war." Should a domestic terrorist be tried under the Treason Clause?[151] If so, does it matter if they are a lone actor or part of an organization?[152] On a similar note, if an American joins ISIS and announces publicly that he is "waging

[145] John Gordon, The 50 Biggest Changes In The Last 50 Years, American Heritage, 2021, https://www.americanheritage.com/50-biggest-changes-last-50-years.
[146] George P. Fletcher, The Case for Treason, 41 MD. L. REV. 193, 194 (1982) ("the basic criminal law course focuses on homicide, sometimes on rape and burglary, but no one discusses treason.").
[147] E.g., Jameson A. Goodell, The Revival of Treason: Why Homegrown Terrorists Should Be Tried As Traitors, 4 NAT'L SEC. L.J. 311, 312 (2016).
[148] Compare id. at 313 (arguing Americans who join foreign terrorist organization should be charged with treason) with Babb, supra note 134, at 1722 (arguing Americans who join foreign terrorist organizations cannot be charged with treason).
[149] Babb, supra note 134, at 1735 (finding the public often has misplaced outcry when a possible treason case arises).
[150] Id.
[151] Goodell, supra note 146, at 311.
[152] Id.

war on America", is he guilty of levying war?[153] The United States has only addressed "levying war" in cases resulting from an increase of taxes in the 1800's.[154] While those cases may provide some guidance, there are no cases that directly address the questions above.

Then there is the issue of "adhering to, providing aid and comfort to an enemy."[155] Some argue the terrorist organizations are not an "enemy", despite the American military warring with such organizations for over two decades.[156] Others argue an "enemy" is someone engaged in hostile and militarized relations with the United States.[157] Contrastingly, some believe a congressional declaration of war is necessary for someone to be an enemy.[158] Then, there is the argument that treasonous actions motivated by religious purposes would not fulfill the "treacherous intentions" requirement.[159] Conversely, there is the opinion that religious intentions do not excuse traitorous actions. Again, most "aid and comfort" cases resulted from WWII, so the questions of enemy, declarations of war, and possible religious exemptions have not fully been addressed.

The public is also in need of clarification. Hillary Clinton, Donald Trump, Eric Snowden, and the rioters at the January 6th insurrection have each been, at some point, accused of treason.[160] While these are among the more notably accused, the terms "treason" and

---

[153] Id.
[154] Israelitt, supra note 139, at 8.
[155] U.S. CONST. art. III, § 3.
[156] Babb, supra note 134, at 1728.
[157] Henry Mark Holzer, Why Not Call It Treason?: From Korea to Afghanistan, 29 S.U. L. REV. 181, 221-22 (2002).
[158] Babb, supra note 134, at 1731.
[159] Id. at 1735.
[160] Gorka says Hillary Clinton is guilty of treason, could 'get the chair', The Daily Beast, Oct. 27, 2017. https://www.thedailybeast.com/gorka-says-hillary-clinton-is-guilty-of-treason-could-get-the-chair; Daniel Hannan, Donald Trump is guilty of treason. Gazette, Oct. 21, 2021.https://www.post-gazette.com/opinion/Op-Ed/2021/01/21/Donald-Trump-is-guilty-of-treason/stories/202101210036; Zackary Keck, Yes, Edward Snowden is a traitor, The Diplomat, Dec. 21, 2013. ://thediplomat.com/2013/12/yes-edward-snowden-is-a-traitor/; Lois Beckett, Why aren't we calling the Capitol Attack an act of treason? The Guardian, Apr. 5, 2021. ://www.theguardian.com/us-news/2021/apr/05/the-capitol-attack-treason.

"traitor" are thrown around brazenly.[161] The problem with someone being deemed a "traitor" without an indictment or trial, is that it severely impacts people's lives and how Americans view public figures. Treason carries a stigma that once adopted, cannot be undone.[162] Unfortunately, if legal scholars cannot agree on what treason is, how can the public begin to truly understand it? The treason charge must be brought back so that when treason occurs, everyone can recognize it. And, when baseless accusations arise, people will not automatically assume the accused is guilty.

## IV. REESTABLISH THE TREASON CLAUSE AS A MEANINGFUL AND WORKABLE CHARGE IN THE LEGAL SYSTEM.

To reestablish the Treason Clause as a meaningful and workable charge in the legal system, three things must occur. First, *Cramer v. United States* must be restrained. Second, foreign terrorist organizations must be considered "enemies" as it applies to treason.

### a) Restricting *Cramer*

To modernize the Treason Clause, the evidentiary requirements created in *Cramer v. United States* must be curtailed. In its original form, the Treason Clause is stringent, requiring the testimony of two witnesses to the same of overt act, and requiring intent or "adhering to the enemy" be proven.[163] Even some of the Founder's believed it to be overly strict because "Treason may sometimes be practiced in such a manner, as to render proof extremely difficult- as in a traitorous correspondence with an enemy"[164] The decision in *Cramer* took proof from "extremely difficult" to nearly impossible, except for when treasonous intent is obvious, such as when an individual is on the enemy's payroll.[165] Today, *Cramer* would be the largest hurdle in

[161] Babb, supra note 134, at 1722 (explaining how the media and politicians will call someone a "traitor" and find them guilty before a trial takes place).
[162] United States v. Rahman, 189 F.3d 88, 112 (2d Cir. 1999) (warning that treason has a dangerous stigma attached to it).

[163] U.S. CONST. art. III, §3.
[164] See FERRAND, supra note 41, at 348.
[165] See HURST, supra note 36, at 218 ("The majority opinion in Cramer v. United States has cast such a net of ambiguous limitations about the crime of 'treason' that

securing a treason conviction.[166] For example, consider an American is caught meeting with an enemy by two witnesses. The American is indicted for treason. During investigation, the authorities find text messages, social media posts, and videos of the American, showing clear support of the enemy. They also find a Cashapp transfer from the American to the Enemy with the caption "for the materials", followed by a bomb emoji. They also discover the enemy purchased explosives and planned to bomb Congress. Under *Cramer*, none of the above evidence would be permissible to prove treasonous intent because they were not observed by either witness during the "overt act" of meeting with the enemy.[167] The intention requirement of the Treason Clause would not be fulfilled, and the American would be set free. If *Cramer* is overruled, prosecutors would be able to use evidence beyond the "overt act" to prove intentions.

b) Expanding the Definition of "Enemies" to Include Modern Organizations and Non-Traditional Enemies That Were Not Prevalent at the Inception of the Treason Clause

The definition of enemies should be expanded to include modern organizations and non-traditional enemies that were not prevalent at the inception of the Constitution. To commit treason by providing "aid and comfort", the act must be done with adherence to an enemy.[168] When Congress declares war, the enemy is obvious. However, the United States has only been congressionally at war eleven times, the last time being in WWII.[169] Most wars, or conflicts which resulted in the death of American troops, were not conducted while being congressionally at war. When war is not declared by Congress, who is the enemy? Is there an enemy? This is arguably the

---

it is doubtful whether a careful prosecutor will ever again chance an indictment under that head.").

[166] Id. at 218.

[167] Cramer v. United States, 325 U.S. 1, 34–35 (1945) ("Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses.").

[168] U.S. CONST. art. III, §3.

[169] About Declarations of War, United States Senate, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm.

most crucial point in bringing the charge of treason into the twenty-first century.

*U.S. v. Frick* held treason by "providing aid and comfort" only occurs when there is war.[170] However, it does not specify whether Congress must declare war for there to be a war or an enemy. Indeed, it does not define what an enemy is in quasi-wars or conflicts (every "aid and comfort" case has arisen out of formal wars).[171] However, at the inception of the Treason Clause, England, Spain, and France were all considered enemies, and Native Americans were "potential enemies", despite the United States not being congressionally "at war" with Spain, France, or the Native Americans. [172] Likewise, in 1798 treason was applied to French citizens purchasing supplies for their military bases.[173] Further support is found in definitions. *Black's Law Dictionary* defines enemies as "An opposing military force." and "A foreign state in open hostility to another whose position is being considered."[174] 10 U.S.C.A. § 948a defines "hostilities" as "any conflict subject to the laws of war."[175] Neither definition requires a Congressional declaration of war.

Foreign terrorist organizations should be considered "enemies" as it applies to the Treason Clause. First, organizations which pose a threat to the United States are enemies as defined by technical and realistic application.[176] Spain and France were considered "nation security risks" and "enemies" for simply having land adjacent to the original

[170] United States v. Fricke, 259 F. 673, 677 (S.D.N.Y. 1919).
[171] About Declarations of War, supra note 168.
[172]C.f., Cramer v. United States, 325 U.S. 1, 8 (1945) ("England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France had but lately been dispossessed in the Ohio Valley; Spain claimed the Mississippi Valley; and, except for the seaboard, the settlements were surrounded by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes.").
[173] Loane, supra note 125, at 62.
[174] Enemy, BLACK'S LAW DICTIONARY (11th ed. 2009).
[175] 10 U.S.C.A. § 948a.
[176] C.f., Cramer v. United States, 325 U.S. 1, 8 (1945) (Labelling every country and Native American with interest near the colonies to be "enemies"). See also supra note 75, at Enemy.

thirteen states and wanting to expand their reach from Europe.[177] Under such reasoning, foreign militant groups that have attacked, threatened, and killed Americans, would be considered enemies. Furthermore, no congressional declaration of war is needed: only a foreign, opposing military force, that aims to threaten or harm the United States.[178] While the charge of treason would be viable for any foreign group that poses a national security threat, it is especially applicable when those organization become firmly established and are actively fighting American troops. For example, Al-Qaeda has been at war with the United States for years.[179] They are responsible for various attacks on military and civilian Americans, including the attacks of September 11, 2001.[180] Then came the Islamic State (ISIS). ISIS has held various territories in the Middle East but has a global reach.[181] They recruit, train, and bring terror to the world, aiming to destroy western civilization, and calling for "death to America."[182] Likewise, the Taliban are known for their violent, gruesome, and inhumane behavior.[183] They also are responsible for the death of Americans and have threatened the United States.[184]

Susan Babb contends that groups such as ISIS, Al-Qaeda, and the Taliban are not enemies under the Treason Clause because they are

[177] Id.
[178] Id.
[179] Al Qaeda, History.com, Dec. 4, 2018, https://www.history.com/topics/21st-century/al-qaeda.
[180] Id.
[181]Timeline: The rise, spread, and fall of the islamic state, Wilson Center (Oct. 28, 2019), https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state.
[182] Id.
[183]Mark A. Drumbl, The Taliban's 'Other' Crimes, 23 Third World Quarterly 1121, 1121-22, 2002, https://www.jstor.org/stable/pdf/3993566.pdf.
[184] Oliver Browning, CNN reporter describes Taliban chanting 'death to America' on streets as 'friendly'. The Independent, Aug. 16, 2021, https://www.independent.co.uk/tv/news/taliban-chanting-death-america-friendly-v83e72cc6.

groups rebelling against their own governments.[185] Her reasoning originates in *U.S. v. Greathouse*:

> The term 'enemies,' as used in the second clause, according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.[186]

The ruling appears damaging to contrary arguments. However, Babb misses the most relevant part of *Greathouse*: context. *Greathouse* is a Civil War case from 1863.[187] The defendants provided "aid and comfort" to other Americans under the guidance of Jefferson Davis.[188] The court ruled the defendant could not be charged with "aiding the enemy" because the aid was provided to Americans in insurrection against their own government.[189] To clarify, before *Greathouse*, Confederates could be considered enemies.[190] Post *Greathouse*, they were no longer considered enemies, and could only be charged with "levying war."[191] However, "subjects of a foreign power in open hostility with us" would apply to modern terrorist organizations.[192] Under 10 U.S.C.A. § 948a, "enemy combatants" or "unprivileged enemy belligerents" are any individual who: "(a) has engaged in hostilities against the United States or its coalition partners; (b) has purposefully and materially supported hostilities against the United States or its coalition partners; or (c) was a part of al Qaeda at the time of the alleged offense under this chapter."[193]

---

[185]Babb, supra note 134, at 1730-31.
[186] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863)
[187] Id.
[188] Id.
[189] Id.
[190]See Capt. Jabez W. Loane, Iv, Treason and Aiding the Enemy, 30 MILITARY LAW REVIEW 1, 61-62 (1965).
[191] Id. at 61.
[192] 10 U.S.C.A. § 948a (defining any person who engages in hostilities with the United States as an "enemy").
[193] Id.

Therefore, under *Greathouse* and U.S.C. Title 10, the term "enemy" would apply to all members of foreign terrorist organizations, such as ISIS, Al Qaeda, and the Taliban.[194]

## V. APPLYING TREASON CHARGE

This section will give tangible examples of how the Treason Clause should be applied, given the prescriptions made in the prior section. First, it will discuss how the Treason Clause should apply to January 6th insurrection at the United States Capitol was an act of "levying war." Second, it will argue that John Walker Lindh should have been charged with treason.

### a) January 6th Insurrection at the United States Capitol

If the evidentiary requirements in *Cramer* are restricted, the United States would be able to prosecute some participants of the January 6th insurrection at the United States Capital for treason by "levying war."[195] On January 6, 2021, Americans gathered at the United States Capitol to protest the transfer of power to the newly elected President.[196] Among the protesters were extremists.[197] Attempting to impose their will upon the government by force, they stormed Capitol Hill, fought police officers, and brought violence to the Capitol.[198] After the insurrection, the FBI discovered some of the extremists had previously conspired online to storm the Capitol.[199] Under early

---

[194] See id. (defining any person engaged in hostilities with the United States, or who is a member of al Qaeda as an enemy); see also United States v. Greathouse, 26 F. Cas. 18, 22 (holding that "enemies" as is applies to the Treason Clause are individuals subject to a foreign power, who are in open hostilities with the United States).

[195] C.f., U.S. v. Mitchell, 2 U.S. 348 (holding the act of attacking a public official place pf residence was an act of war).

[196] Lindsey Wise Et Al., 'The Protesters Are in the Building.' Inside the Capitol Stormed by a Pro-Trump Mob, Wall St. J., Jan. 6, 2021, https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654?mod=article_inline.

[197] Id.

[198] Id.

[199] Ian Talley & Rachael Levy, Extremists Posted Plans of Capitol Attack Online, Wall St. J., Jan. 7, 2021, https://www.wsj.com/livecoverage/biden-trump-electoral-college-certification-congress/card/x1dwwPqnJM1XfQh5LaUj.

precedent, the insurrection would have been considered treason by "levying war". [200] The extremists conspired a treasonous plot and held an assemblage of men for the purpose of carrying out a treasonous design. [201] The conspired plan would be utilized to prove treasonous intentions and distinguish traitors from protesters who simply got caught in the riot. [202] Under *Cramer*, the previously conspired plan would be impermissible to prove intentions because they did not occur during the "overt act" that was witnessed. [203] However, if the evidentiary requirement of *Cramer* is curtailed, the conspired plot would be utilized to prove intentions, and treason could be proven.

b) John Walker Lindh

The case of John Walker Lindh (Walker) illustrates why treason must return as a viable and workable charge. Born and raised American, Walker turned on his homeland and became a Taliban fighter. [204] He trained and fought with Al Qaeda and the Taliban against United States and allied forces. [205] He even met with Usama Bin Laden. [206] Walker was found by American and allied forces after a ground fight with the Taliban. [207] Walker was brought back to the United States, and charged with ten crimes. [208] Among his charges were conspiracy to kill United States nationals, providing material support and resources to foreign terrorist organization, contributing services to al Qaeda, supplying services to the Taliban, and using and carrying firearms and destructive devices during crimes of violence. [209] Yet, he

[200] See U.S. v. Mitchell, 2 U.S. 348, 349 (C.C.D. Pa. 1795) ("an insurrection with an avowed design to suppress public offices, is an act of levying war").
[201] C.f., id. at 118 (holding evidence showing the leader's treasonous intent does not establish treasonous intent for every person involved).
[202] Id.
[203] Cramer v. United States, 325 U.S. 1, 34–35 (1945) ("Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses.").
[204] U.S. v. Lindh, 212 F. Supp. 2d 541 (2002).
[205] Id.
[206] Id. at 547.
[207] Id.
[208] Id.
[209] U.S. v. Lindh, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002).

was not charged with treason. Walker received twenty years but was let out early, serving only seventeen.[210] He was released in 2019 and is living freely in the United States; he is now in his early forties.[211]

If organizations like al Qaeda and the Taliban are not considered enemies as it applies to the Treason Clause, people like Walker cannot be tried for treason.[212] Likewise, if the evidentiary requirements in *Cramer* are not restrained, proving intentions would be very difficult. CIET. However, if foreign terrorist organizations were considered the enemy as it applies to the treason clause, and the evidentiary requirements in *Cramer* were restrained, Walker would have been charged with treason by "adhering to an enemy, providing aid and comfort." Furthermore, he would have been found guilty.

The outcome of Walker's case is problematic. First, it does not punish his betrayal. Walker's actions were tried, but his traitorous intentions were not. His treason began when he left the United States to join al Qaeda. His treason was only furthered by him taking up arms with al Queada and the Taliban to kill Americans. Walker's betrayal should be tried and punished under the rightful charge of Treason. Second, Walker likely would have received harsher punishment had he been tried under the Treason Clause. For creating propaganda, Chalder received life imprisonment.[213] Kawakita's actions in the POW camp led to him receiving the death penalty.[214] Walker's actions were comparable, if not worse than any other individual convicted of treason. Yet, the Government allowed him to evade the possibility of life imprisonment or capital punishment. Last, the United States missed the opportunity to provide current case law and legal guidance to the Treason Clause. This would have aided in future

[210] Justin Huggler, American Taliban flies back, but not to the cages of Guantanamo Bay, The Independent London, January 23, 2002.
[211] Greg Myer, John Walker Lindh, The 'American Taliban,' Is Released From Prison, National Public Radio, May 23, 2019.
[212] U.S. CONST. art. III, § 3.
[213] Chandler v. United States, 171 F.2d 921, 925 (1st Cir. 1948).
[214] Kawakita v. U.S., 343 U.S. 717 (1952).

treason cases, and furthered scholars and the public's understanding of the Treason Clause.

## CONCLUSION

The Founders placed the most important and foundational laws in the Constitution. Simply by its placement, the Treason Clause could be viewed as more imperative than other laws. It is uniquely equipped to handle betrayal against the United States because it places emphasis on the intent to betray and includes safeguards which prohibit it from being used as a political weapon. In eliminating the treason charge, the courts, legislature, and prosecutors have done a great disservice. As lesser crimes takes its place, the Treason Clause collects further ambiguity. Prosecutors and courts do not utilize it. Legal scholars struggle to define exactly what treason is. The public misunderstands what "treason" or a "traitor" is, leaving the media and everything other than legal guidance to tell them what it is.

As the Walker case shows, treason itself is still alive and relevant. If *Cramer* is restricted, and the definition of "enemies" is broadened as it applies to treason, the Treason Clause will once again be able to serve its proper function. The United States will be able to punish traitors accordingly, and call treason by its rightful name. Doing so quells the passions of men and allows the jury to decide a fitting punishment. While the actions, enemies, and specifics may differ from century to century, treason will always be treason. It cannot, nor should not be tried under any lesser crime. It is time for legal minds to bring treason into twenty-first century. The treason charge must be resurrected.

# I'M A SLAVE 4 U; BRITNEY SPEARS'S CONSERVATORSHIP DISPUTE THE EMBODIMENT OF ELDERLY CONSERVATORSHIP ABUSE

Erika L. Dávila Santana

"The most luxurious possession, the richest treasure anybody has, is his personal dignity" (Robinson).[1] Britney Jean Spears epitomizes the American dream, starting as a little girl from rural Louisiana in a working-class family. With her talents and ambition, she scaled up the social ladder to become one of the wealthiest superstars, netting a $350 million fortune.[2] As an inspiration to many, the Princess of Pop was expected to remain a pop culture icon with an ever-growing platform. Unfortunately, Britney Spears's rags-to-riches story transposed into riches-to-rags, all because of her conservatorship.[3]

Paradigmatic to her personality and brand in the 2000s, spontaneity, dynamism, and bold were the touchstones of Britney Spears.[4] She reveled in her ability to express herself through her music, performances, and relationships.[5] Britney Spears's autonomy was self-evident, showcasing her drive and ambition for success.[6] For her, wealth was not limited to her material riches; her affluence in autonomy and dignity, portrayed through her songwriting, performances, and more, were trademark to the name Britney

[1] Robinson, Jackie, "The most luxurious possession, the richest treasure anybody has, is his personal dignity".
[2] See WHAT HAPPENED TO BRITNEY SPEARS' $350 MILLION FORTUNE?, *infra* note 30.
[3] See DAROS, *infra* note 28.
[4] *Id*.
[5] *Id*.
[6] *Id*.

Spears.[7] Unbeknownst to her, Britney's world would collapse on Friday, February 1, 2008.[8]

After a series of public displays of disordered behavior, peddled by inordinate media coverage, Britney Spears would be placed in a conservatorship under the rule of her father, James P. Spears.[9] Becoming a conservatee, Britney Spears lost the right to handle all her personal, financial, and estate affairs. Her decision-making capabilities were effectively quelled by the court system of California.[10] Britney Spears, multi-millionaire princess of pop, came second to a child in terms of legal rights pertaining to autonomy; she had little to none.[11] Under the conservatorship, Britney Spears lost access to her money, platforms, and properties.[12] The management of her resources was assigned to her father, who swindled them and is now avoiding punitive legal action.[13] Considering her social acclaim and opulence, how is it that Britney Spears was legally relegated by the court as "incompetent"? As will be discussed further on, Britney Spears fell prey to financial exploitation, emotional abuse, and medical abuse.[14] These were not stand-alone acts. Instead, all constitute what Britney Spears suffered: conservatorship abuse.[15] Despite her case being unique in the celebrity world, she is one of the millions of Americans abused through this legal arrangement.[16]

Conservatorships may be considered both the problem and the solution for vulnerable communities suffering abuse. However, the improper application of conservatorships upon these communities plays a large role in the exacerbation of abuse crises and mental health issues in the nation. Those who may be deemed one of the most susceptible populations to abuse and exploitation, the elderly,

---

[7] *Id*.
[8] See PET., *infra* note 32.
[9] See DAROS, *infra* note 28.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] See SEIELSTAD, *infra* note 19.
[14] See ASWAD, *infra* note 36.
[15] *Id*.
[16] See MILLER, *infra note 63.*

often fall prey to abuse at the hands of those appointed to protect them. To create awareness of this growing legal issue, a comparative analysis of these elderly issues and top-news Britney Spears conservatorship dispute will be effected. Furthermore, this project functions to contribute to the creation of a collective societal bourn to modify existing and create just and effective conservatorship and guardianship laws for the protection of these vulnerable communities.

## HISTORY OF CONSERVATORSHIPS AND THEIR APPLICATIONS

### A. *The Inception of Conservatorships and their foundation in Society*

Conservatorships as a legal concept host convoluted, and mostly covert, historical origins. The legal process that transfers decision-making authority over an individual (a conservatee) deemed incapable of managing their personal or financial affairs to another person (a conservator), a conservatorship, can be traced to medieval and early modern England.[17] History shows the biological and psychosocial need for mentally ill individuals deemed incompetent by law to have structures set in place to protect their best interests. As societal attention to charitable causes from the populace increased during the seventeenth century, social welfare programs involving legal incompetency jurisdictions were created.[18] The common practice in these programs was for private guardians to arrange housing and care of their elected wards in private homes. With the bourne to protect vulnerable populations from physical, emotional, and financial harm and exploitation, the concept of conservatorships was begotten.

[17] Neugebauer R, "Medieval and Early Modern Theories of Mental Illness," Archives of general psychiatry (U.S. National Library of Medicine, n.d.), https://pubmed.ncbi.nlm.nih.gov/371576/.

[18] Neugebauer R, "Diagnosis, Guardianship, and Residential Care of the Mentally Ill in Medieval and Early Modern England," The American journal of psychiatry (U.S. National Library of Medicine, n.d.), https://pubmed.ncbi.nlm.nih.gov/2686477/.

B. *Early Evidence of Conservatorship Mis-execution in United States History*

Despite the seemingly benevolent beginnings of conservatorships, misexecution occurrences soon became apparent. A prime example of the improper application of conservatorships, or guardianships, in the United States is the Native American plight in the early 1900s.[19] In the name of justice for and preservation of Native communities, the early American government introduced policies that regulated both local and federal management of Native land.[20] The policies claimed to support Native communities through their relocation of housing and assets.[21] While these laws masqueraded as efforts for the beneficent project, they were effectively shifting ownership of the lands to white settlers.[22] Notwithstanding those Native lands hosted oil and gas, profitable to the resident communities, the government deemed them "surplus to Indian needs" and transferred the land rights to themselves, to later sell the land ownership to white project developers.[23] Because of governmental guardianship programs such as this one, Native Americans went from being amongst the richest people per capita in the world due to the natural resources in their lands to one of the most vulnerable populations in the United States, with only 48 million acres of their initial 138 million.[24]

The Act of May 27, 1908, set the legal precedent for what today are known as conservatorships.[25] This Act transferred "minor and

[19] Andrea Seielstad, "The Disturbing History of How Conservatorships Were Used to Exploit, Swindle Native Americans," The Conversation, August 16, 2021, https://theconversation.com/the-disturbing-history-of-how-conservatorships-were-used-to-exploit-swindle-native-americans-165140.
[20] Oklahoma Historical Society, "Removal of Tribal Nations to Oklahoma," Removal of Tribal Nations to Oklahoma | Oklahoma Historical Society, n.d., https://www.okhistory.org/research/airemoval.
[21] General Allotment Act, Act of Feb. 8, 1887 (24 Stat. 388, ch. 119, 25 USCA 331)
[22] Indian Land Tenure Foundation, "Land Tenure History," ILTF, n.d., https://iltf.org/land-issues/history/.
[23] U.S. National Park Service, "The Dawes Act," National Parks Service (U.S. Department of the Interior, n.d.), https://www.nps.gov/articles/000/dawes-act.htm.
[24] See LAND TENURE HISTORY, *supra* note 22.
[25] The Act of May 27, 1908 (35 Stat. 312)

incompetent" Indian's land, persons, and property to local courts. To secure more Native land to profit from, these county courts would declare Native American parties as incompetent, mentally incapacitated without the ability to handle their financial affairs.[26] Native American activist Zitkála-Šá described in 1924 how Native communities would be determined conservatees under the court's conservator power, "When oil is 'struck' on an Indian's property, it is usually considered prima facie evidence that he is incompetent, and in the appointment of a guardian for him, his wishes in the matter are rarely considered."[27] Despite the legal settings for the manifestation of conservatorships have ameliorated, the same cannot be said of the phenomena of power-hungry individuals that seek to exploit the vulnerable.

## CONTEMPORARY MISEXECUTION OF CONSERVATORSHIPS

### A. *Britney Spears's Trajectory and Critical Acclaim*

In contemporary times, pop-star Britney Spears's life story highlights this phenomenon. Britney Spears plaudits her origins as a rural girl from a working-class family in Louisiana and her transition into an acclaimed worldwide superstar; a story meriting discussion.[28] As a vibrant young girl excited to jump into stardom, Britney Spears was surrounded by family members and industry professionals driven to aid her achieve success. From "The Mickey Mouse Club" to the MTV Video Music Awards, Britney Spears started to acquaint herself with the spotlight. Behind her, her overbearing teams of agents, managers, and parents, pushed her to climb up the ladder of celebrity fame.[29] Britney Spears's transition from child star to American pop icon raked

[26] See LAND TENURE HISTORY, *supra* note 22.
[27] Zitkála-Šá, "Summary," in *Administration of Indian Affairs in ... Oklahoma. Hearing before the Comm ... on H.J. Res. 181* (U.S. Government Printing Office, 1924), p. 8.
[28] Daros, Otávio. "Deconstructing Britney Spears: Stardom, Meltdown and Conservatorship." *Journal for Cultural Research*, 2022, 1–16. https://doi.org/10.1080/14797585.2021.2018663.
[29] *Id*.

in a $350 million fortune, which her aforementioned team relished.[30] The pressure to maintain a perfect image became too much to handle for Britney Spears, and amidst the life-changing experiences of two divorces, the birth of her two children, losing custody of them, and flagrant media scandals, she suffered from public mental breakdowns, which would be the start to her presence in the courts.[31]

B. *Britney Spears is Declared Unfit by the courts*

Britney Spears's downward spiral as she became acquainted with the law can be traced to the instatement of her conservatorship. After Britney made headlines for her offbeat behavior and mental health crises, she admitted herself into a psychiatric facility. Meanwhile Britney was in the UCLA Medical Center trying to regain her composure and overcome her personal troubles, her father, James P. Spears, or Jamie Spears, filed for conservatorship on February 1, 2008, at the Superior Court of California, County of Los Angeles.[32] He petitioned to be his daughter's probate conservator, claiming she was incompetent and suffered from dementia. The courts granted the petition. Under California law, Jamie Spears was granted authority to make medical and health care decisions for Britney, restrict and limit visitors, and retain caretakers and security guards for her on a twenty-four seven basis.[33] He had ultimate control over her personal, medical, and financial decisions.[34]

Conservatorships are a necessary evil, but the ideal should be for their power to be temporary. California Judge Reva Goetz believed so too, as she granted Jamie Spears temporary conservator power over

[30] Brokeist, "What Happened to Britney Spears' $350 Million Fortune?," Brokeist, July 31, 2021, https://brokeist.com/britney-spears-net-worth-low/.
[31] Rachel Tannenbaum, "Timeline: Britney Spears' Life of Ups and Downs," The Florida Times-Union (Florida Times-Union, July 21, 2011), https://www.jacksonville.com/story/entertainment/music/2011/07/21/timeline-britney-spears-life-ups-and-downs/987240007/.
[32] Pet. for Appointment of Probate Conservator of the Person C.D. Cal., GC-310 (BP108870), February 1, 2008.
[33] *Id*.
[34] *Id*.

Britney Spears.[35] When the Petition was granted, Britney exhibited signs of bipolar disorder and suffered a mental health crisis, followed by an involuntary psychiatric evaluation and temporary institutionalization.[36] The courts reasoned that Britney could not manage her affairs due to this and placed her under a general conservatorship, which was intended to only be temporary.[37] California law indicates that a conservatorship, such as the one Britney Spears was imposed, may be terminated if the conservatee becomes able to handle their own affairs.[38] Unlike typical conservatees, who may suffer from poor health or cognitive limitations, Britney Spears continued to host massive earning power and results through record deals, performances, and product deals, despite the courts declaring her unfit to handle her affairs.[39] Regardless she being fit enough to work on international entertainment projects and earn millions, her conservator claimed she was not competent.[40] This brings forth one main postulation: Britney Spears had become competent after some time in the conservatorship, but Jamie Spears denied her the opportunity to terminate said conservatorship.

C. *Conservatorship Abuse*

When abusive conservators believe a conservatee is regaining competency, they work to avoid termination of the conservatorship. It is possible that Jamie Spears profusely opposed the termination of

---

[35] *Id*.

[36] Jem Aswad, "Read Britney Spears' Full Statement against Conservatorship: 'I Am Traumatized'," Variety (Variety, June 24, 2021), https://variety.com/2021/music/news/britney-spears-full-statement-conservatorship-1235003940/.

[37] See PET., *supra* note 32.

[38] California Probate Code § 1860(b)

[39] Laurel Wamsley, "Britney Spears Is under Conservatorship. Here's How That's Supposed to Work," NPR (NPR, June 24, 2021), https://www.npr.org/2021/06/24/1009726455/britney-spears-conservatorship-how-thats-supposed-to-work.

[40] Elizabeth Wagmeister, "Britney Spears' Personal Conservator Fights Back after Jamie Spears Alleges Singer Is 'Mentally Sick' and Needs Psychiatric Hold," Variety (Variety, August 6, 2021), https://variety.com/2021/music/news/britney-spears-mentally-sick-jamie-spears-jodi-montgomery-1235036368/.

the conservatorship because he was acting outside of the scope of his assigned duties.[41] To keep her from speaking out about her conservatorship experiences, Jamie Spears is claimed to have imposed forced medication upon Britney Spears.[42] Medical records show she was administrated the high-risk drug lithium to treat her bipolar disorder but was not properly monitored to prevent common side effects of long-term consumption such as depression, mental imparity, and thyroid and kidney problems.[43] Britney Spears testified in a court hearing to feeling, "drunk. I really couldn't even take up for myself. I couldn't even have a conversation… I was scared… and my dad was all for it".[44] Britney Spears also testified that she, "worked seven days a week, no days off, which in California, the only similar thing to this is called sex trafficking. Making anyone work against their will, taking all their possessions away — credit card, cash, phone, passport — and placing them in a home where they work with the people who live with them."[45] This directly implicates Jamie Spears of abusing his power as a conservator. While California law duly permits conservators to be compensated for the work performed on behalf of the conservatee[46], they cannot self-deal, or take advantage of their position by acting in their own interest instead of the conservatee's.[47] A conservator's duty is to protect conservatee's persons and assets, yet Jamie Spears is reported to have depleted Britney Spears's $350 million fortune into $56 million, all while earning millions of dollars through Britney's career

[41] "Britney Spears' Dad Retains Control of Her Affairs," Reuters (Thomson Reuters, October 28, 2008), https://www.reuters.com/article/us-spears-idUSTRE49R8R420081028.
[42] Kerry Wolfe, "Britney Spears – Rights Restored and Taking No Prisoners.," Weinberg Elder Law, November 18, 2021, https://weinbergelderlaw.com/2021/11/18/britney-spears-rights-restored-and-taking-no-prisoners/.
[43] Brian Shine et al., "Long-Term Effects of Lithium on Renal, Thyroid, and Parathyroid Function: A Retrospective Analysis of Laboratory Data," *The Lancet* 386, no. 9992 (2015): pp. 461-468, https://doi.org/10.1016/s0140-6736(14)61842-0.
[44] See ASWAD, *supra* note 36.
[45] *Id*.
[46] California Probate Code § 2640-2647
[47] Overview of Conservatorships, in *Handbook for Conservators* (San Francisco, CA: Judicial Council of California, 2016), pp. 5-74.

throughout the conservatorship.[48] Because the conservatorship was serving his interests, Jamie Spears rejected terminating the legal arrangement, directly going against the court investigator's recommendations to forge "a pathway to independence" that would allow Britney Spears to no longer be in conservatorship.[49]

D. *Media Pays Attention to Britney Spears's Legal Battles*

In spite of the troubles, she underwent during her conservatorship, her ease of garnering awareness of her cause is a privilege endowed to her by her status. Her superstardom nor public appeal subsided during her conservatorship; instead, they fueled society's support for Britney Spears throughout the legal ordeal.[50] Said social acclaim may be considered the central reason Britney Spears achieved her bourn of terminating her conservatorship. The unanimous social movement #FreeBritney gave impulse to the revealing of Britney Spears's conservatorship abuse to international news, being the catalyst of the court proceedings that would get Britney Spears to be able to tell her perspective of the events without restriction from her conservator.[51]

The media served as both the poison and antidote to Britney Spears's conservatorship. Albeit the social power Britney Spears holds, the media has not always been in her favor. In efforts to be the biggest tabloid among many, the press took Britney's life as its pet project, exacerbating Britney's demise when she was in an already fragile physical and mental state.[52] Instead of viewing Britney as a child star who had grown up under the spotlight and was burnt out from being overworked and exploited, all while experiencing marital ruptures and mental health issues, the media exploited her, capitalizing on her

[48] See WHAT HAPPENED TO BRITNEY SPEARS' $350 MILLION FORTUNE?, *supra* note 30.

[49] Liz Day, Samantha Stark, and Joe Coscarelli, "Britney Spears Quietly Pushed for Years to End Her Conservatorship," The New York Times (The New York Times, June 22, 2021), https://www.nytimes.com/2021/06/22/arts/music/britney-spears-conservatorship.html.

[50] See DAROS, *supra* note 28.

[51] See ASWAD, *supra* note 36.

[52] Us Weekly Staff, "Britney Spears' Us Weekly Covers through the Years," Us Weekly, April 4, 2019, https://www.usmagazine.com/celebrity-news/pictures/britney-spears-us-weekly-covers-through-the-years-20142111/.

downfall. Tabloid covers and story lines “also helped contribute to the image of her as a cheater ("Britney & Justin: Did She Betray Him?"), a slut ("Britney's Wild Nights"), a bad mother ("Brit Puts Baby In Danger Again"), unstable ("SICK!"), and outright crazy ("TIME BOMB")”.[53] The media turned contretemps into calamities, effectively setting the scene for Britney Spears’s mental breakdowns and conservatorship placement.

E. *Britney Spears is Free from Conservatorship*

Britney Spears’s legal team, along with the #FreeBritney movement, achieved on Friday, November 12, 2021, what had been past due for more than a decade: the termination of Britney Spears’s conservatorship.[54] After almost fourteen years, Britney Spears was deemed fit to handle her personal, financial, and legal affairs. The public speculates that former conservator Jamie Spears filed to end the conservatorship to avoid legal discovery and deposition under oath regarding his earnings and financial management of Britney Spears’s estate.[55] Once the court granted the petition to terminate the conservatorship, varied reactions surged. Media response was mostly favorable; the press was glad that their advocacy had contributed to the pop star’s liberation. In the aftermath, Britney Spears had the opportunity to express herself, bearing testimony of the physical, emotional, financial, and legal hardships she overcame, “The #FreeBritney movement — you guys rock. Honestly, my voice was muted and threatened for so long, and I wasn't able to speak up or say anything... I honestly think you guys saved my life… I've been in the conservatorship for 13 years. That's a really long time to be in a situation you don't want to be in…”. In her statement, Britney Spears

[53] Jeva Lange, “The Britney Spears Media Paradox,” The Week (The Week, June 26, 2021), https://theweek.com/britney-spears/1001969/the-media-doomed-britney-spears-it-might-save-her-too.
[54] Joe Coscarelli and Julia Jacobs, “Judge Ends Conservatorship Overseeing Britney Spears's Life and Finances,” The New York Times (The New York Times, November 13, 2021), https://www.nytimes.com/2021/11/12/arts/music/britney-spears-conservatorship-ends.html.
[55] *Id*.

urged for her story to "make an impact and make some changes in the corrupt system."[56]

F. *Hidden from the Spotlight, Elders*

Vulnerable populations, such as the elderly, who do not host Britney Spears's social acclaim often fall victims to said corrupt system. Despite aging being a natural process of life, elders suffer disconnection from their younger peers due to their age differences and nonconcurrent life experiences.[57] This disconnection has driven a wedge between these two major generations, further precipitated by generational differences in opinions of societal values, finances, and politics. Younger generations categorize the elderly and their views as antiquated, outdated, and irrelevant.[58] Without proper education on the multigenerational dynamic and attitudes, younger populations misattribute the older generations' views to them being incompetent, unfit to handle themselves.[59] These societal attitudes have spawned discrimination against the elderly, contributing to their susceptibility to exploitation.[60]

G. *Ageism and Abuse*

Exploitation naturally occurs from the improper establishment of conservatorships over the elderly. Common law institutes that conservatorships are to transfer the handling of affairs, whether personal and/or financial, of a conservator to a conservatee because the latter is unable to handle them due to their mental capacity,

---

[56] Jeevan Ravindran, "Britney Spears Tells #FreeBritney Movement: 'You Guys Saved My Life'," CNN (Cable News Network, November 18, 2021), https://www.cnn.com/2021/11/17/entertainment/britney-spears-conservatorship-freebritney-instagram-scli-intl/index.html.

[57] "Why Do Younger People Dislike Older People?," Psychology Today (Sussex Publishers, n.d.), https://www.psychologytoday.com/us/blog/boomers-30/201901/why-do-younger-people-dislike-older-people.

[58] Anna Rosa Donizzetti, "Ageism in an Aging Society: The Role of Knowledge, Anxiety about Aging, and Stereotypes in Young People and Adults," *International Journal of Environmental Research and Public Health* 16, no. 8 (2019): p. 1329, https://doi.org/10.3390/ijerph16081329.

[59] *Id*.

[60] "Elder Abuse," World Health Organization (World Health Organization, n.d.), https://www.who.int/news-room/fact-sheets/detail/elder-abuse.

physical disability, or age.[61] Because of this legal condition, misconceptions occur, equivalenting old age with incompetency.[62] In the United States, an estimated 1.3 million adults are under guardianships or conservatorships, about 85 percent of them over the age of 65.[63] With the most common type of conservatorship over the elderly being general probate conservatorships, this vulnerable population is left with little to no say over their affairs.[64] The loss of autonomy that elder conservatees experience serves as the breeding ground for elder conservatorship abuse, characterized by higher rates of guardianship or conservatorship abuse within older populations compared to younger populations.[65]

The higher likelihood for conservatorship abuse to occur in elder populations is rooted in their perceived societal value. Because of the generational differences and views, the younger generations, who compose approximately 37 percent of the United States population, tend to spurn elders, who comprise approximately 13 percent of the United States population, from society.[66] Considering that younger populations have control over technology and the polls, the sociopsychological stigmatization of older adults rebuffs most apparent advocacy for their causes. Unlike the case of young superstar Britney Spears, the misexecution of conservatorships over the elderly is more likely to remain.[67] The financial and legal

---

[61] "Elderly Guardianship Basics," Findlaw, May 17, 2021, https://www.findlaw.com/elder/elder-care-law/elderly-guardianship-basics.html.
[62] Sarah J. Barber, "An Examination of Age-Based Stereotype Threat about Cognitive Decline," *Perspectives on Psychological Science* 12, no. 1 (2017): pp. 62-90, https://doi.org/10.1177/1745691616656345.
[63] Kenneth Miller, "How Senior Guardianship Trend Leaves Some Isolated," AARP, October 4, 2018, https://www.aarp.org/caregiving/financial-legal/info-2018/court-ordered-guardianship-separates-family.html.
[64] "Conservatorship," Legal Information Institute (Legal Information Institute, n.d.), https://www.law.cornell.edu/wex/conservatorship.
[65] BEDSON, Lois, John Chesterman, and Michael Woods. "The Prevalence of Elder Abuse among Adult Guardianship Clients." Macquarie Law Journal 18, no. 2018 (2018): 15–33. https://search.informit.org/doi/10.3316/agispt.20190319007818.
[66] "2010 Census Briefs," U.S. Census Bureau (U.S. Department of Commerce Economics and Statistics Administration U.S. CENSUS BUREAU, n.d.), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.
[67] See MILLER, *supra* note 63.

incentives to serve as conservator are tempting to many, and disadvantageous to lose, which leads to conservatees who have become *sui juris*, or having full rights or (mental) capacity, from having regained their capacity to handle their affairs but are unable to terminate their conservatorships.

H. *No coverage of Elder Issues*

The depreciative public opinion of elders plays a significant role in the lack of advocacy against elder conservatorship abuse.[68] Media is designed to cater to societal trends and interest metrics, thus appealing to its biggest audience, younger populations.[69] Assimilating younger populations' interests into their coverage, mainstream media outlets seldom report on issues affecting the elderly, such as elder conservatorship abuse. Without media attention, the majority of the population, who belong to younger generations, are unaware of the struggles their older counterparts face and thus do not advocate for the former's recovery of autonomy from conservatorships. They cannot advocate against an issue they do not know is occurring.

I. *Elder Conservatorship Abuse*

Besides the natural mental processes and hardships that age brings, improper conservatorships provoke further grief in the elderly. Conservatorships strip conservatees of their right to handle their affairs, shifting jurisdiction to the conservator.[70] The sudden legal loss of autonomy that conservatorships are characterized by create

[68] Richeson JA, Shelton JN. A Social Psychological Perspective on the Stigmatization of Older Adults. In: National Research Council (US) Committee on Aging Frontiers in Social Psychology, Personality, and Adult Developmental Psychology; Carstensen LL, Hartel CR, editors. When I'm 64. Washington (DC): National Academies Press (US); 2006. Available from: https://www.ncbi.nlm.nih.gov/books/NBK83758

[69] Erick Elejalde, Leo Ferres, and Rossano Schifanella, "Understanding News Outlets' Audience-Targeting Patterns - EPJ Data Science," SpringerOpen (Springer Berlin Heidelberg, May 14, 2019), https://epjdatascience.springeropen.com/articles/10.1140/epjds/s13688-019-0194-8.

[70] See CONSERVATORSHIP, *supra* note 64.

penury to conservatees.[71] Depression, anxiety, and anger issues are some of the most pervasive emotional ailments arising from loss of independence.[72] The effects of diminished independence are not solely emotional. These disordered behaviors create and exacerbate physiological and medical problems such as heart disease, diabetes, and stroke.[73] Conservatorships produce unjustifiable hardship for elderly populations.

The disjunction between the sociopolitical belief that elders should maintain self-determination and autonomy and the baring of independence as a result of conservatorships promotes the financial exploitation of the elderly.[74] This often occurs through the undue influence conservators manifest over conservatees.[75] Conservatorships, as the root of diminished independence for elders, serve as intimidation for them, using their fear of the power the conservator has over them as leverage to conduct the conservatee's financial affairs in the conservator's best interests.[76] As the law conditions the placement of conservatorships to be for those the courts deem incapable of handling their own affairs, the elderly fall victim to the undue categorization.[77] This legal arrangement functions on the basis that the conservatee is unfit, and the finding of financial exploitation functions on the same basis, showing that the elder conservatee is more vulnerable and susceptible to the power and control asserted against them by their conservator, and are thus

[71] Amy Fiske, Julie Loebach Wetherell, and Margaret Gatz, "Depression in Older Adults," *Annual Review of Clinical Psychology* 5, no. 1 (January 2009): pp. 363-389, https://doi.org/10.1146/annurev.clinpsy.032408.153621.
[72] Elizabeth Arden, "How Diminished Independence Can Impact the Health & Well-Being of Older Adults," True Link, n.d., https://www.truelinkfinancial.com/blog/diminished-independence-can-impact-health-well-older-adults.
[73] "CDC Promotes Public Health Approach to Address Depression ...," n.d., https://www.cdc.gov/aging/pdf/cib_mental_health.pdf.
[74] Hall, Ryan & Hall, Richard & Chapman, Marcia. (2005). Exploitation of the Elderly: Undue Influence as a Form of Elder Abuse. Clinical Geriatrics. 13.
[75] *Id*.
[76] *Id*.
[77] See BARBER, *supra* note 62.

more easily exploited.[78] Through conservatorships, the elderly are swindled out of their health, mental sanity, and money.

J. *Universal Damaging Effects of Conservatorship Abuse*

Notwithstanding the harmful universal effects of conservatorships on conservatees, there exists quantitative inequity in the societal perception of the generations and the consequent impact on conservatorship arrangements.[79] The disparate value that society attributes between younger and older generations and their respective social statuses is evident through the present advocacy against conservatorship abuse in these populace groups. Younger generations and their towering social acclaim, embodied by Britney Spears, have the privilege of creating and maintaining social awareness of the causes, amassing social movements that advocate for the values they espouse.[80] This is demonstrated through the #FreeBritney social movement, which worked to grant Britney Spears her freedom through the termination of her conservatorship.[81] Britney Spears, with the help of her legal team, funded by her multimillion-dollar fortune, and the #FreeBritney movement, became free of the legal arrangement, albeit with considerable effort and time dedicated to the feat. However, elders do not enjoy such privileges. Over 15 million older adults ages 65 and older are economically insecure and are living at or below 200 percent of the federal poverty line.[82] Most elders, under typical circumstances, cannot afford the costly aid from attorneys to help terminate their conservatorships.[83] Even if they manage to obtain *pro bono* legal counsel, their cases do not garner enough societal or media attention

[78] See HALL, HALL, CHAPMAN, *supra* note 74.
[79] Wood, Erica F. "The Paradox of Adult Guardianship: A Solution to—and a Source for—Elder Abuse." *Generations: Journal of the American Society on Aging* 36, no. 3 (2012): 79–82. https://www.jstor.org/stable/26555943.
[80] Marissa Cohen, "#Freebritney: Why Indefinite Conservatorships Are Unconstitutional," SSRN, July 8, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873321.
[81] See RAVINDRAN, *supra* note 56.
[82] "Get the Facts on Economic Security for Seniors," The National Council on Aging, n.d., https://www.ncoa.org/article/get-the-facts-on-economic-security-for-seniors.
[83] *Id*.

to push for legal remedies, as Britney Spears's case did. Because of these occurrences, elders are often left to indefinitely suffer conservatorship abuse.[84]

Disproportionate conservatorship abuse unto the elderly showcases the dangers of conservatorship misexecution across populations.[85] The loss of autonomy brings forth varied negative consequences, both emotional and medical, for conservatees independent of generation and social status.[86] Disordered behaviors are one of the most prevalent indicators of the presence of stressors.[87] Both young and old populations battle with depression as a response to a stressful life event such as being stripped of personal autonomy.[88] The curtailment of the right for an individual to engage in daily activities, handling their own affairs, leads said individuals, specifically conservatees, to suffer negative health consequences such as hopelessness, anger, and depression, irrespective of age, social status, and financial capability.[89] Conservatorship abuse is a universal experience among conservatees under improper conservatorships.

## REMEDIES TO A SOCIAL ILL

### A. *Proper Execution of Conservatorships*

Divergent to commonplace elder conservatorship abuse, the proper application of conservatorships is an effective legal arrangement to protect vulnerable communities from harm.[90] Adults who are deemed by the courts as unable to take care of their personal and financial affairs are more likely to get taken advantage of without the

[84] 25 U. Tol. L. Rev. 189 (1994)
[85] Joan K. Monin et al., "The Personal Importance of Being Independent: Associations with Changes in Disability and Depressive Symptoms.," *Rehabilitation Psychology* 59, no. 1 (2014): pp. 35-41, https://doi.org/10.1037/a0034438.
[86] See ARDEN, *supra* note 72.
[87] *Id*.
[88] See MONIN, *supra* note 85.
[89] See ARDEN, *supra* note 72.
[90] H. Richard Lamb and Linda E. Weinberger, "Therapeutic Use of Conservatorship in the Treatment of Gravely Disabled Psychiatric Patients," *Psychiatric Services* 44, no. 2 (1993): pp. 147-150, https://doi.org/10.1176/ps.44.2.147.

installment of protective programs.[91] Conservatorships function as a systematic safeguard to protect an individual's personal affairs, finances, and estate.[92] The person approved by the court to remove the responsibility of managing the affairs by handling it themselves, or a conservator, may excel in their assigned duty: to take care of the conservatee's affairs, managing the affairs in the best interest of the conservatee.[93] However likely that the conservatee is interested or becomes capable of managing their own affairs, resources conducive to regaining independence should be accessible to this population.

B. *Solutions Proposal*

Conservatees who are interested in or are capable of fitness recovery should have the proper resources accessible to them to embark on such a process as conservatorship termination. Similar to the conventional therapies made available to individuals following a stressful life event, help groups supported by trained mental health professionals may be a positive way of helping individuals transition from conservatorship to freedom.[94] Furthermore, allowing conservatees seeking conservatorship termination the opportunity to attend governmentally-provided financial literacy classes or conferences may aid in the building of the necessary skills and knowledge that individuals will need once conservatorship is terminated.[95] Another manner in which to allow for conservatees to show the courts their competency is to create a "road to independence program" where conservatees are tasked with managing a number of their personal and financial affairs throughout a set period of time to demonstrate that they can handle the

[91] See DAROS, *supra* note 28.
[92] See CONSERVATORSHIP, *supra* note 64.
[93] *Id*.
[94] Vanessa Pupavac, "Therapeutic Governance: Psycho-Social Intervention and Trauma Risk Management," *Disasters* 25, no. 4 (2001): pp. 358-372, https://doi.org/10.1111/1467-7717.00184.
[95] Catherine M. Reich and Jeffrey S. Berman, "Do Financial Literacy Classes Help? an Experimental Assessment in a Low-Income Population," *Journal of Social Service Research* 41, no. 2 (September 2014): pp. 193-203, https://doi.org/10.1080/01488376.2014.977986.

responsibilities of their daily lives.[96] This trial-style program may serve as a conservatee's précis of competency and possible applicability after reinstitution.

Less-restrictive alternatives still better serve vulnerable communities compared to conservatorships as a first response.[97] To care for adults who can understand and communicate, assigning them social service agencies with a case manager who supports them along the way should be the initial selection of care.[98] If the adult needs to manage solely their medical affairs, such as designating what type of health care they would elect given grave illness, a legal professional may aid them in formulating advance health care directives unique to their case and needs.[99] To manage their affairs should they become incapacitated, adult individuals should designate a trusted individual to be their power of attorney.[100] If the affairs are solely financial, daily money management programs are of assistance to individuals needing help with simple, financial tasks like paying bills, making bank deposits, and filing taxes[101]. These are just some of the vast resources currently available to support vulnerable communities without the need to subject them to the last resort of conservatorships absent due exigency.

In order to make these safeguards against conservatorship abuse sustainable, there must be multigenerational education on these issues.[102] Through the inculcated awareness of this legal arrangement

[96] Jerry G. Alston, "Preparation for Life after Incarceration.," ERIC, March 31, 1981, https://eric.ed.gov/?id=ED202559.
[97] "Alternatives to Guardianship: Conservator: Alternative Guardianship," The American College of Trust and Estate Counsel, n.d., https://www.actec.org/estate-planning/alternatives-to-guardianship-conservator/.
[98] San Francisco Superior Court, "Alternatives to Conservatorship - California Courts," San Francisco Superior Court, July 2006, https://www.courts.ca.gov/partners/documents/alternatives.pdf.
[99] *Id*.
[100] See ALTERNATIVES TO GUARDIANSHIP: CONSERVATOR: ALTERNATIVE GUARDIANSHIP, *supra* note 97.
[101] See ALTERNATIVES TO CONSERVATORSHIP - CALIFORNIA COURTS, *supra* note 98.
[102] Roma Stovall Hanks et al., "A Multigenerational Strategy to Transform Health Education into Community Action," *Progress in Community Health Partnerships:*

and the misexecution effects upon the elderly, the rising generations may foster a stronger bond with the older generations.[103] This human connection may serve as the balancing effect needed to create public awareness of improper conservatorships. The American population already showed that, given proper motivations, it is a force not to be reckoned with in the fight for justice and freedom.[104] #FreeBritney was only the beginning of political uproar, and other vulnerable communities such as the elderly will have their day in court.[105]

## CONCLUSION

The legal system that governs people's day-to-day lives and affairs in the United States has exponentially grown and developed since its inception. While the government has modified, eliminated, and created policies that protect the People's best interests, changing to accommodate the passing of time and changes in society and its values, there are still lengths to go in properly protecting America's most vulnerable populations. Abuse must not be tolerated amongst the People, much less purported by the Institutions set to prevent such acts from occurring. What is lonelier and sadder than being betrayed by the one Institution meant to protect you? The protector must not become the abuser. Instead of allowing for conservatorship abuse to prevail, laws must be put in place to prevent these occurrences, and manage the already-existing cases. Improper conservatorships need not be the end for vulnerable communities. Instead, there are tangible, evidence-supported solutions to help these communities overcome these challenges and positively contribute to society. In a nation that values freedom, justice, and democracy above all else, citizens deserve to concurrently experience

---

*Research, Education, and Action* 12, no. 1S (2018): pp. 121-128, https://doi.org/10.1353/cpr.2018.0027.

[103] *Id*.

[104] Roundtable on Population Health Improvement; Roundtable on the Promotion of Health Equity and the Elimination of Health Disparities; Board on Population Health and Public Health Practice; Institute of Medicine. Supporting a Movement for Health and Health Equity: Lessons from Social Movements: Workshop Summary. Washington (DC): National Academies Press (US); 2014 Dec 3. 2, Lessons from Social Movements. Available from: https://www.ncbi.nlm.nih.gov/books/NBK268722/

[105] Charlie Crist and Eric Swalwell (Washington, D.C., n.d.).

these through their personal autonomy and dignity. Restoration and restitution are achievable bourns, but they will only be fulfilled with the proper systematic, sociopolitical, and cultural changes.

# A FALL FROM GRACE: THE RISING RATE OF ATTORNEYS WITH SUBSTANCE ABUSE DISORDERS, CHEMICAL DEPENDENCIES, AND ADDICTIONS

Amy M. Yost

## INTRODUCTION

Transcending the decades, the Murdaugh family dynasty was known for wealth, power, law and order. Their notoriety began over a century ago when Randolph Murdaugh, Sr. ascended to the position of the Fourteenth Circuit Solicitor in 1920. In the South Carolina Lowcountry, the Circuit Solicitor is the chief prosecutor across five separate counties,[1] similar to the district attorney in other jurisdictions. Randolph Murdaugh, Jr. took the throne in 1940 and served until his retirement in 1986. The following year, the crown was passed down to Randolph Murdaugh, III, which he wore proudly until 2005 when he entered private practice.[2]

Son of Randolph Murdaugh, III, attorney Richard "Alex" Murdaugh quickly dismantled that legacy a few years later. He recently came under fire with multiple charges and is the subject of several lawsuits. The charges relate to unsolved homicides, missing client funds, and a scheme to defraud an insurance company with his own murder-for-hire/suicide attempt.[3] More than seventy pending criminal charges and civil suits are at the core of these malfeasants, including fraud,

[1] Fourteenth Circuit Solicitor's Office, https://scsolicitor14.org (last visited January 26, 2022).
[2] History of the Fourteenth Circuit Solicitor's office, Fourteenth Circuit Solicitor's Office, https://scsolicitor14.org/solicitor-duffie-stone/history/ (last visited Apr 14, 2022).
[3] Katie Shepherd and Jessica Lipscomb, Alex Murdaugh Surrenders in Alleged Suicide-for-Hire Plot as Police Launch New Probe into Housekeeper's Death. The Washington Post (September 16, 2021 at 7:36 AM) https://www.washingtonpost.com/nation/2021/09/15/alex-murdaugh-hitman-shooting/ (last visited December 29, 2021).

negligence, misappropriation of funds, breach of trust and obtaining property by false pretense. [4]

The collapse of the Murdaugh legacy is bolstered by Alex Murdaugh's fall from grace: a self-admitted addiction to opioids spanning more than two decades.[5] Overcome with anxiety, depression and the intense stress of the profession, many lawyers often struggle with problematic alcohol and substance abuse.[6] Further, the culture of the legal community, in both public service and in private practice, condone the idea of "work hard, play hard" by utilizing alcohol for entertaining clients, celebrating victories and as a coping mechanism for the various forms of defeat.

The rising rate of attorneys with a self-reported substance abuse disorder, chemical or alcohol dependency, as the data reveals, is reportedly at its highest in our country's history. [7] The notion of attorney addiction and dependency may come as a surprise to those outside of the legal community, but these issues are not breaking news. Rather, new data has been slowly accumulating due to the increasing number of law students utilizing performance-enhancing substances and attorneys' outcries for addiction assistance.

But where does the foundation for dependency lie? How did it begin and what fuels that continuum? Are addicted attorneys merely victims of circumstance? Are the consequences faced by addicted

---

[4] Ana Kaplan, Alex Murdaugh Facing Over 70 Financial Crimes Charges After Indictments Allege He Defrauded Victims Out Of Nearly $9 Million. Forbes (January 21, 2022). https://www.forbes.com/sites/annakaplan/2022/01/21/alex-murdaugh-facing-over-70-financial-crimes-charges-after-indictments-allege-he-defrauded-victims-out-of-nearly-9-million/?sh=51f4d84a7007 (last visited February 1, 2022).
[5] Riley Bean, Murdaugh's Lawyers Release Statement on Alleged Insurance Fraud Conspiracy. WMFB News (September 15, 2021 at 7:57 AM) https://www.wmbfnews.com/2021/09/15/murdaughs-lawyers-blame-opioid-addiction-suicide-insurance-fraud-conspiracy/ (last visited March 19, 2022).
[6] Patrick R. Krill, JD, LLM, Ryan Johnson, MA, et.al., The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys, J. of Addiction Med., Volume 10 (1), pp. 46-52 (2016).
[7] Aaron H Wallace, Esq., The Relationship Between Alcohol Abuse, Legal Malpractice, and COVID-19, Fla. Mut. Ins. Co. https://flmic.com/2020/06/05/the-relationship-between-alcohol-abuse-legal-malpractice-and-covid-19-florida/ (last visited April 19, 2022); See Krill supra note 6 at 46 - 48.

attorneys more or less severe than civilians? Are the current resources available to attorneys and law students adequate to provide assistance for those in need? The cornerstone here is access to proper support and rehabilitative resources prior to making precarious decisions of deceit and wrongdoing.

This article will explore addiction and dependency issues of law students and lawyers alike by providing an analysis of the triggers, aggravating factors and consequences whilst contemporaneously evaluating currently available resources. Perhaps, a current analysis of this data will result in the expansion of the existing Lawyer Assistance Programs (LAP) to include therapy, specialized group sessions, monitored sponsorships and Continuing Legal Education (CLE) courses. Or alternatively, a reimaging of the protocols surrounding publicized disciplinary actions against lawyers engulfed in addiction or dependency.

## I. PARAMETERS AND METHODOLOGY

Substance abuse in the legal community is a dangerously serious issue that is nearly twice as likely to occur as compared to any other profession.[8] Albeit well-known throughout the members of the legal profession, issues of substance abuse and chemical dependency amongst American attorneys and law students have gone virtually unexamined for decades.[9] The limited data available focusing on these issues covers a variety of substances and mitigating circumstances. The research included herein explores utilization of stimulant drugs, both licit and illicit in nature, alcohol consumption and chemical dependency of law students and attorneys in the United States.

From Adderall to cocaine and Valium to Xanax; certainly practicing physicians are not the only people with the knowledge that either a prescription or a street drug exists for nearly every letter of the alphabet. Probing into every drug in today's pharmaceutical and

[8] Alana E. Toabe, A Stimulating Education: The Ethical Implications of Prescription Stimulant Abuse by Law Students, The Geo. J. of Legal Ethics. Vol. 30 (4), pp. 1037 – 1056 (2017).
[9] See Krill supra note 6 at 46.

street markets would result in exhaustive material that would be a disservice to the intended purposes herein. Therefore, this portion will define the most commonly utilized substances within the parameters of the legal community as explored in the limited data currently available.

First and foremost: Adderall, commonly prescribed as Adderall IR (immediate-release). Adderall is the "performance-enhancing" stimulant drug of choice for many law students, which often carries over into their professional careers. Lest we not omit the closely related Adderall XR, an extended-release form of the original amphetamine. Research and sales show that Adderall is the most widely prescribed stimulant to assist with treating Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD) or to merely combat exhaustion and narcolepsy.[10] It is prescribed to approximately 11% of school-aged children in an effort to assist with focus and attention issues while decreasing impulsivities.[11] However, when applied to college students, 20-30% have taken Adderall, Ritalin or similar stimulants merely to increase their studying and test-taking capabilities.[12] For purposes of this article, performance-enhancing prescription stimulants will be reduced singularly with the main focus on Adderall.

Next, we turn our attention to opioids, which are often entangled and confused with opiates. Rest assured, these substances are similar in nature in that both produce sedating and euphoric effects.[13] However, a clear distinction exists between these two types of pain-relievers. Opioids are defined as lab-created, synthetic-based substances that relieve pain by targeting the body's sensory and nervous systems.[14] The most commonly known opioid is Fentanyl, a

[10] See Toabe, supra note 7 at 1037-38.
[11] Id. at 1038.
[12] Id.
[13] Jennifer Darulo, Opiates v. Opioids: What's the Difference? WebMD Connect to Care® https://www.webmd.com/connect-to-care/addiction-treatment-recovery/prescription/opiates-versus-opioids (last visited January 31, 2022).
[14] Id.

drug that is plaguing the black market as a cutting agent for cocaine.[15] According to the Center for Disease Control (CDC), opiates are defined as "natural opioids" as they are harvested from the poppy seed plant.[16] This translates to heroin, morphine, and codeine. Outside of the medical field, these substances are collectively referred to as opioids. This article will refer to opioids and opiates collectively as opioids, specifically excluding heroin, as there is less-than-minimal data currently available that pertains to heroin use by members of the legal community.

Directing ourselves to another significant area of concern is a subject simply referred to by various sources as "chemical dependency." Within somewhat recent history, the Florida Bar expanded its original, and very narrow, rules governing the state's Lawyer Assistance Program (FLA) to include chemical dependency.[17] As a result, the Florida Bar found a way to subtly include illicit street drugs such as cocaine under the umbrella of chemical dependency. As it relates to these analyses, substances such as cocaine and crack cocaine will collectively fall under the category of chemical dependency.

The last may be the most commonly known and most widely accepted substance of all: alcohol. A central nervous system depressant,[18] alcohol is utilized by many as a relaxation tool following a long day or during socially entertaining settings. As discussed in further detail later, the data suggests that law students and lawyers both regularly consume alcohol at above-average rates. Whether to celebrate the small victories, commiserate a tough loss, entertain clients or as a sedative to escape the stress of a demanding

[15] Nathan Yerby, Drug Traffickers are Increasingly Mixing Fentanyl into Cocaine, Addiction Center (July 10, 2019) https://www.addictioncenter.com/community/traffickers-mixing-fentanyl-cocaine/ (last visited February 6, 2022).
[16] Id.
[17] Scott M. Weinstein, Florida Lawyers Assistance: Saving Lives and Legal Careers. The Fla. Bar J. Vol. 92 (1), p. 20 (2018).
[18] Jena Hilliard, Is Alcohol a Depressant?, Addiction Center (October 20, 2021) https://www.addictioncenter.com/alcohol/is-alcohol-a-depressant/ (last visited February 7, 2022).

profession, alcohol is not far away. Approximately 36% of attorneys struggle with alcohol dependency while 21% are considered problem drinkers.[19] More significantly, many of these same lawyers identified that their drinking issues began during law school. Notably, younger lawyers under the age of thirty consume the most alcohol.[20] Considering these self-reported revelations extracted from a prominent and relatively recent study, alcohol, without question, is often seen as the silver lining. As such, it is one of the principal parameters of this article.

## II. THE PRACTICUM

The legal education system is cutthroat and not for the faint of heart. Aside from its competitive nature, law school requires a commitment of three to four years to a tremendous amount of work that culminates into a handful of fate-determining exams. No matter the institution, all law students undergo an intense and rigorous curriculum that involves a plethora of case analyses, written briefs[21] and intense argument conditioning patterned after the Socratic Method.[22] It sounds exhaustive because it is exhaustive.

To successfully endure that environment, many law students have a pervasive secret that is not so secretive anymore. Adderall is the performance-enhancing study drug of choice amongst law students nationwide. [23] According to a recent survey of approximately eleven thousand students across fifteen law schools, 14% of students illegally took a prescription medication within the last year.[24] Of the students

[19] See Krill supra note 6 at 49-50.
[20] Id. at 47-49.
[21] Ashley Heidemann, What is the First Year of Law School Like?, The Nat'l Jurist (March 6, 2104 at 11:35 AM) https://nationaljurist.com/prelaw/what-first-year-law-school (last visited April 21, 2022).
[22] Elizabeth Garrett, The Socratic Method, The University of Chicago Law School (1998) https://www.law.uchicago.edu/socratic-method (last visited April 21, 2022).
[23] Paul L. Caron, Law Schools' Dirty Little Secret: Adderall, TaxProf Blog, Pepp. Caruso Sch. of L.: TaxProf Blog (November 6, 2016) https://taxprof.typepad.com/taxprof_blog/2016/11/law-schools-dirty-little-secret-adderall.html (last visited January 6, 2022).
[24] Jerome M. Organ, David B. Jaffe, Katherine Bender, (2017). Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek

who admitted to taking a controlled substance without a prescription, 79% disclosed that the drug consumed was Adderall, with another 39% reported taking Adderall XR.[25] Moreover, students perceive Adderall as a harmless study drug that provides advantages including intense focus, increased productivity, performance and stamina.[26] This translates to students using Adderall both licitly and illicitly in order to keep up with the exhaustive demands of law school to congruently submit above-average quality work.

The same survey found that 37% of law students had anxiety while 17% showed signs of depression, females more than males, in both categories.[27] However, more than 10% of the survey respondents who admitted to using Adderall also reported suffering from problematic behaviors, including abusing other illicit drugs.[28] The silent factor is that the abuse of Adderall can lead to separate or commingled and dangerous habits of abusing other substances including alcohol and chemical dependency. Interestingly, 49% of all respondents indicated that their chances of being admitted to the bar would be higher if their problematic behavior was never disclosed.[29]

According to the American Bar Association (ABA), the United States had 112,882 actively enrolled law students in the Fall semester of 2019, with another 19,819 pursuing an LLM, master's degree or specialized program certificate.[30] Analysis of this data can be reduced to a simple mathematical equation. As applied to the number of enrolled law students, the statistics obtained from the aforementioned survey reveal that nearly 15,000 students enrolled in

---

Help for Substance and Mental Health Concerns. J. of Legal Studies. Am. U. Wash. C. of L. J. L. Edu., Research Paper No. 2017-02, Vol. 66 (1) pp.115-158 (2016).

[25] Id. at 134-135.

[26] Id. at 135.

[27] Id. at 136 – 137.

[28] Id.

[29] Id. at 142.

[30] ABA Reports Law School Enrollment for 2019 Remains Stable, Amer. Bar Ass'n, https://www.americanbar.org/news/abanews/aba-news-archives/2019/12/aba-reports-law-school-enrollment/ (last visited February 6, 2022).

America's law schools have illegally used Adderall for an academic advantage.

Notwithstanding, some law school educators are in total denial, while others are suspicious that the number of students consuming Adderall is much higher than what is reported. Specifically, the Associate Academic Dean for Student Life at Texas Tech University College of Law believes that students conceal their illicit use of Adderall in fear of jeopardizing graduation or admission to the bar.[31] Reflecting collectively on these suspicions, considering the results of the single, and somewhat narrow survey mentioned above, coupled with the students' fear to disclose, the true number of American law students abusing Adderall could be nearly infinite.

Although Adderall has useful medicinal purposes when taken as prescribed, its dark side is a frighteningly high potential for addiction, physical dependence, misuse, and evolution to other substances.[32] In contrast, alcohol acts as a depressant, the consequences of which, when mixed with Adderall, are somewhat unpredictable. However, what is known is that in combination, these substances form a potentially deadly cocktail capable of causing seizures and overdose[33]. Since Adderall is classified as a stimulant and alcohol a depressant, the actual effects of this combination mistakenly appear to counteract each other.[34] Nevertheless, the chemical makeup of Adderall has not been altered, and thus, the common misperception of their lack of commingled effectiveness makes overdose a very real possibility.[35] This relates to law students on a significant level because Adderall abuse has the potential to expand into misuse of alcohol and

[31] Kathryn Rubino, Law Students: We Know Your Little Secret, Above the Law (November 4, 2016) https://abovethelaw.com/2016/law-students-we-know-your-little-secret/?rf=1 (last visited February 5, 2022).
[32] Scot Thomas, MD, The Dangers of Mixing Adderall and Alcohol. American Addiction Centers (January 20, 2022) https://americanaddictioncenters.org/adderall/mixing-with-alcohol (last visited February 6, 2022).
[33] Id.
[34] Id.
[35] Id.

other substances that often travel with the pupil into the practice of law.

As the research shows, the intensity of the law school curriculum and the dire requirement to produce exceptional quality work may lead to anxiety, depression, and exhaustion. Although an overhaul of the law school curriculum is not being suggested here, certainly an investigation would not be cause for concern. Additionally, providing prospective law students with transparent and current information pertaining to the potential for dependency issues, abuse statistics, and typical expectations in practice would, at the very least, afford students an opportunity to make an informed decision.

## III. THE CONTINUUM

As an officer of the Court, lawyers are tasked with an unceasing responsibility for the quality of justice and to zealously represent their clients.[36] Attorneys must be competent, prompt, diligent throughout all professional functions, act in such manners during non-professional engagements and have a duty to uphold legal process.[37] Without question, the responsibilities of attorneys, both in and out of practice, are interminable.

Attorneys are often plagued by typical career stressors including litigation, trial and court-mandated deadlines. These three critical aspects of the practice of law, which many lawyers regularly endure, contribute to notoriously long hours at the office. From the initial consultation to the discovery process, and continuing through to final judgment and appeals, every phase of a litigated case is engulfed in research, pleadings, briefs and Rules of Procedure that are governed by court-mandated deadlines. However, trials are in a league of their own as the preparation for a single trial can consume many daunting months brimming with pre-trial motions, disclosures, depositions,

[36] Model R. of Prof. Resp.: Preamble & Scope (Am. Bar Ass'n 2020).
[37] Id.

preparing lines of questioning, along with opening and closing arguments.[38]

A prime supporting factor, the Covid-19 pandemic resulted in a rapid increase of trials. The recent Administrative Order issued by the Florida Supreme Court implemented a new case management process governing pre-trial deadlines in all civil cases.[39] This affects the practice of law in a detrimental fashion because the Order essentially sets all cases for trial in an effort to maintain the judiciary process. As an example, Broward County Administrative Order 2021-19-Civ (Amendment 2), issued on May 19, 2021, delineated a fast-tracking system for Streamlined, General and Complex cases.[40] As a result, the average General case is to be disposed within eighteen months of the initial filing.[41] Florida's Ninth Circuit Court followed suit by issuing an Administrative Order to "ensure prompt resolution of disputes."[42] Similarly, California Supreme Court Chief Justice Tani G. Cantil-Sakauye issued a statewide court update that described her personal execution of 353 emergency orders since March, 2020. All of which were intended to assist the trial courts with their case management systems in the wake of Covid-19.[43]

A somewhat recent survey from 2016, backed by the Hazelden Betty Ford Foundation, anonymously polled 12,825 actively employed, licensed, practicing attorneys regarding their alcohol and drug abuse. The results of this survey are more than alarming. More than 22% of respondents admitted to problematic alcohol or other substance

[38] A Day in the Life of a Trial Lawyer, The Princeton Rev. https://www.princetonreview.com/careers/173/trial-lawyer (last visited February 8, 2022).
[39] In re: Comprehensive Covid-19 Emergency Measures for Florida Trial Courts, Fla. Sup. Ct. Admin. Order AOSC20-23, Amend. 10, § III(G) (March 26, 2021).
[40] Establishment and Implementation of Case Management Plan, Seventeenth Jud. Cir. Admin. Order 2021-19-Civ, Amend. 2 (May 19, 2021).
[41] Id.
[42] Order Governing Civil Case Management and Resolution, Ninth Jud. Cir. Admin. Order 2021-04 (April 29, 2021).
[43] Chief Justice Tani G. Cantil-Sakauye, Court Updates: Statewide, California Lawyer's Association (December 7, 2020) https://calawyers.org/court-updates/ (last visited February 8, 2022).

abuse, with 14% reporting that the issues began during law school.[44] Weekly stimulus abuse had the highest self-reported rate of 74%, including nearly 22% abusing opioids.[45]

Considering that the respondents admitted to weekly stimulant use and issues beginning in law school, perhaps a closer look at the legal community empirically would benefit future law students, as well as practicing attorneys, judges, and other legal professionals. Administrative Orders like those described above were intended to serve the benefit of the public by ensuring speedy resolutions. However, the Orders are proving burdensome because they have created increased workloads for attorneys who are already struggling to stay afloat with the pre-existing deadlines set forth by the various Rules of Procedure. Ideally, a peaceful medium exists; however, locating it strikes as cumbersome, intoxicating, and challenging.

## IV. THE INFAMY

Although lawyers are bound by codes of professional conduct, recent cases like those surrounding Alex Murdaugh are evidence that addictions often demand priority over codes of conduct and professional ethics. For example, Martin Louis Stanley, a California attorney, was disbarred after a few short years in practice due to his alcohol and drug-fueled addictions leading him to commit more than thirty acts of misconduct against his clients.[46] Stanley's misconduct, all of which he blamed on alcoholism and drug addictions, included fraudulent misrepresentations, misappropriating upwards of thirty thousand dollars in client funds, forgery, writing bad checks and abandoning clients to support his addictions.[47]

In 2001, a case with similar circumstances was presented to the New York Supreme Court which affirmed the suspension of attorney Salvatore J. Piemonte, after he was found to have committed a felony under New York Judicial Law §90(4)(d).[48] In the matter of *Piemonte,*

[44] *See* Krill *supra* note 8 at 50.
[45] *See* Krill *supra* note 8 at 49.
[46] *Stanley v. State Bar*, 50 Cal. 3d 555 (Cal. 1990).
[47] *Id.* at 558.
[48] *In re Piemonte,* 287 A.D. 2d 117 (N.Y. App. Div. 2001).

the Respondent's judgment was negatively affected because of his addictions to alcohol and cocaine. Specifically, Piemonte committed professional misconduct by filing a false document and tampering with a witness.[49] This is yet another instance where the addiction had a proverbial chokehold on the already suffocating practitioner.

James Eugene Ackermann, an Illinois attorney, was suspended with conditional probation stayed after a pattern of misconduct and negligent management of legal matters emerged following the death of his practicing partner.[50] Proceeding at least a six-year stint of alcohol abuse, Ackermann admitted to misconduct, neglect and misrepresenting clients.[51] The opinion of the Court noted that Ackermann admitted to virtually all of the nine counts, all of which could be traced to repeated intoxication and alcohol dependency.[52] The saving grace here is that the Respondent voluntarily admitted himself to an alcohol treatment program prior to the commencement of the aforementioned disciplinary proceedings. However, many attorneys are not so privy to that prodigious situation.

Another notable case is that of an attorney from Charleston, West Virginia, who began abusing drugs as a teenager. He was sober prior to entering law school and remained sober until 2004. However, in 2005, Attorney Louis Dante DiTrapano began to succumb to his cocaine addiction, which led to misappropriation of client funds, multiple arrests, confinement, and total disbarment.[53] On March 14, 2006, and April 24, 2006, DiTrapano was arrested for possession of cocaine. During that six-week period, a federal search warrant for his residence was executed on April 6, 2006, where crack cocaine was seized.[54] On June 14, 2006, DiTrapano was indicted on two felony counts and was remanded to the custody of the United States

[49] Id. at 118.
[50] In re Ackermann, 99 Ill. 2d 56 (Ill. 1983).
[51] Id. at 58.
[52] Id.
[53] At a June 1, 2012, reinstatement hearing, DiTrapano revealed that he misappropriated "a large amount" from a client brokerage account during his 2005 relapse. In re DiTrapano, 233 W. Va. 754, 761 (W. Va. 2014).
[54] Id. at 758

Marshal.[55] DiTrapano was imprisoned for a term of six months with supervised release for three years immediately thereafter. Unfortunately, after his release, DiTrapano relapsed. He was arrested on April 1, 2007, for possession of amphetamines and tested positive for cocaine.[56] As if it were not enough to disbar DiTrapano entirely, the State Bar of West Virginia successfully sought to have his law licenses annulled from West Virginia and Georgia on May 10, 2007, and November 3, 2008, respectively.[57]

Similarly, Richard Twohy, a California attorney, became the subject of a public disciplinary action that resulted in total disbarment as a result of his chemical dependency. Twohy was admitted to the California Bar in 1973 and was twice disciplined for misconduct in 1984 and in 1987, defined as moral turpitude, willful misrepresentations to the Court, misappropriation and unlawful practice of law.[58] At his disciplinary hearing, Twohy admitted that he had been addicted to cocaine since 1980 and was under the influence at the time of his misconduct.[59] In fact, his addiction lasted until 1987, when he voluntarily enrolled in a drug rehab program, including attending Cocaine Anonymous meetings.[60] However, his efforts at rehabilitation ultimately failed. In conjunction with his disbarment, Twohy was ordered to pay restitution to clients. Unique to the California Supreme Court's opinion rendered in *Twohy* was the Court's position that eighteen months of sobriety defined a "meaningful and sustained period of successful rehabilitation."[61] At his disciplinary hearing, Twohy provided the Court with a letter of recommendation from his substance abuse counselor, indicating that the Respondent had successfully completed a treatment program two months prior. However, the Court found that the correspondence did

[55] Id. at 759.
[56] Id.
[57] Id.
[58] Twohy v. State Bar, 48 Cal. 3d 502 (Cal. 1989).
[59] Id. at 511.
[60] Id. at 509.
[61] Id. at 515.

not fit the mold of reliable evidence that a "long-standing addiction" was permanently under control.[62]

As in the aforesaid case of *Ackermann,* the opinion of the Illinois Supreme Court noted that, "The purpose of a disciplinary proceeding is to safeguard the public and maintain the integrity of the legal profession."[63] No matter the misconduct or malfeasant, these acts are considered egregious and severely contravenes the lawyer's professional ethics and code of conduct. In accompaniment are sufficiently dire consequences imposed by State Bars and State Supreme Courts, which are almost always a matter of public record.

## V. THE PENANCE AND THE DRUBBING

Insofar as this article has explored the foundational and professional triggers of addiction, chemical and alcohol abuse, the embarrassment of self-defamation that attorneys face in this light far outweighs the retributions for those behaviors. For the self-aware, admitting to an addiction, chemical or alcohol dependency brings forth a plethora of guilt, shame, and a proverbial blacklisting label of untrustworthiness. By asking for help with these issues, an attorney's reputation is publicly tarnished as many State Bar Associations identify disciplinary actions on the lawyer's online registration information page.

Historically, disciplinary actions were not so transparent and were addressed on a local level in a secretive fashion.[64] This changed following a groundbreaking 1970 report issued by the ABA's Special Committee on Evaluation of Disciplinary Enforcement.[65] The

---

[62] Id.

[63] Ackermann, 99 Ill. 2d at 68, citing In re Levin, 77 Ill. 2d 205, 211 (Ill. 1979) (majority opinion).

[64] Raymond R. Trombadore, Robert B. McKay, et.al., Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement, ABA Commission on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n (2018). https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ (last visited February 14, 2022).

[65] Mark J. Fucile, Public Discipline is More "Public" than Ever: The Impact of Web-Based Lawyer Rating Services on Discipline, (2016). The Professional Lawyer, Am. Bar Ass'n., Volume 24 (1) https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-

Committee, chaired by former United States Supreme Court Justice Tom C. Clark (hereinafter referred to as the Clark Report), described a "scandalous" and major flaw in the system of lawyer disciplinary actions that lacked transparency.[66] Candidly, Justice Clark's report degraded disciplinary agencies that concealed information related to disciplinary actions, indicating that such concealment damaged the profession beyond the misconduct of the attorney.[67]

Interestingly, the Clark Report has been previously hailed as a moral reshaping of the American legal disciplinary system.[68] It was the first of its kind to conduct a nationwide examination of the legal disciplinary process, strongly recommending that all disciplinary actions become a matter of public record.[69] Nearly twenty years later, in 1989, the ABA conducted a subsequent nationwide evaluation of the legal community's disciplinary regulations.[70] Throughout the more current study, the ABA found that many states offered substance abuse counseling services; however, supportive rehabilitation services were not mandated in conjunction with the disciplinary process.[71] The same study suggested that criticism of the judicial system was generated by secretive disciplinary proceedings, which the public would never accept.[72] The 1989 survey adopted the recommendations of the Clark Report, the majority of which has been adopted in most states.[73] Arguably, the public would have nothing to criticize if the disciplinary process was not a matter of public record.

---

1/public_discipline_more_public_ever_impact_webbased_lawyer_rating_services_discipline/ (last visited February 13, 2022).

[66] Id.

[67] Id.

[68] Raymond R. Trombadore, Robert B. McKay, et.al., Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement, ABA Commission on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n (2018). https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ (last visited February 14, 2022).

[69] Id.

[70] Id.

[71] Id.

[72] Id.

[73] Id.

Expanding from the aforementioned studies, the ABA has followed the recommendations of the Clark Report. For example, Model Rule 16 of the Rules for Lawyer Disciplinary Enforcement encourages public release of the disciplinary proceedings with the exception of disability proceedings.[74] Continuing, this same Rule states that public disclosure is "necessary" when a lawyer's license has been in any way limited. [75] However, the disciplinary action is not made public until a finding of probable cause has been made. In plain language, the investigating disciplinary agency takes on the role of a law enforcement officer by privatizing an investigation which is then materially publicized before ever reaching a judge. Another Rule, Model Rule 17, directs that all notices of lawyer suspension, disbarment, and reinstatements are to be published in the State Bar's journal, as well as in a newspaper of each district where the lawyer maintained an office.[76] Interestingly, the ABA notes that the disciplinary agency involved is precluded from admitting to any ongoing investigations in the interest of privacy. In an effort to maintain neutrality amidst allegations of misconduct, the investigating agency must receive the allegations whilst protecting the reputation of the accused prior to making any findings of probable cause.[77]

However, another thirty years have elapsed since this study was performed, and times have changed. Therein lies the issue of public humiliation for American lawyers. This is not the childhood story of "the boy who cried wolf." Notwithstanding the lawyer's guilt over the shameful behavior exhibited, one could ponder whether the chastising and disgrace that follows publication of the disciplinary action would negatively encourage further misuse of drugs or alcohol. Regulations and circumstances like these make up a downtrodden environment instead of the encouraging support system seen within other similarly intense and high-stress fields of work, such as the medical field.

[74] Model Code of Pro. Resp. DR 16 (Am. Bar Ass'n 2020).
[75] Id.
[76] Model Code of Pro. Resp. DR 17 (Amer. Bar Ass'n 2020).
[77] Id.

## VI. A DOUBLE STANDARD

In contrast to the legal profession, addictions within the area of medicine are reported anonymously with the caveat that the individual voluntarily participates in a treatment program.[78] Interestingly, the most common form of physician impairment results from addiction and substance abuse disorders, which will be experienced by 10-15% of medical professionals throughout their lifetime.[79] This includes surgeons, as well as medical technicians, physician assistants and nurses.

Many states allow for licensed healthcare professionals to enter treatment anonymously. In fact, confidential programs are offered to medical practitioners in most states, accompanied by detailed treatment plans supported by Alcoholics Anonymous and Narcotics Anonymous, which do not require disclosure of one's identity to the National Practitioner Databank.[80] Generally, these treatment plans encompass approximately five years' time and boast an impressive 74-90% rehabilitation success rate.[81] These protocols of a five-year treatment plan on an anonymous basis often facilitate a healthy return to the practice of medicine without the black cloud of a tarnished reputation.

Consider, for a moment, these regulations of the medical community relative to the anonymous addiction reporting standards. In contrast to the legal field, attorneys are subjected to the taint of moral turpitude and must face their dependency issues in a public forum, as required by the ABA Model Rules. Moreover, as noted above, the idea of mandatory reporting was designed for the benefit and protection of the public. However, the missing link in generating that forethought was consideration for the protection of the attorney.

---

[78] Unique Challenges for Professionals in Addiction Diagnosis and Treatment, Butler Center for Research, Hazelden Betty Ford Foundation (June 1, 2015) https://www.hazeldenbettyford.org/education/bcr/addiction-research/health-care-professionals-substance-abuse-ru-615 (last visited February 9, 2022).
[79] Sonia Tagliareni, Doctors and Addiction, Drug Rehab Centers (February 26, 2020) https://www.drugrehab.com/addiction/doctors/ (last visited February 15, 2022).
[80] Id.
[81] Id.

Keep in mind that those same suffering members of the legal profession are also members of the general public in some capacity.

## VII. FINAL OBSERVATIONS

The livelihood of the judicial system only thrives because of its members and their constant pursuit of justice. Agreeably, lawyers are held to the highest of standards, but so, too, are doctors and surgeons. If the medical community can develop and navigate a successful anonymous addiction protocol, perhaps the judiciary should take a step back to reassess and reimagine the regulatory guidelines to include anonymity for struggling legal professionals.

As outlined above, a State Supreme Court opinion noted that eighteen months of sobriety did not sufficiently prove rehabilitative sobriety and resulted in total disbarment of an attorney who willingly submitted himself to rehab. Yet and still, the medical field prescribes a five-year treatment plan for its members who exemplify a nearly complete success rate. When it comes to the American lawyer, rehabilitation evaluation assessments are created on a case-by-case basis but are not at all what one would consider a solid treatment plan like those seen within medicine.

Many of the attorneys identified in the disciplinary actions described herein were jailed, suspended from practice or disbarred entirely. They were ordered to repay client funds that were misappropriated as a result of their addictions. In addition to restitution, some of the respondents were also ordered to pay court fees and fines. Payment of restitution and court fees is a morally sound reprimand. However, consider from where, and how those funds will be generated whilst the attorney is jailed, suspended, or disbarred. It seems plausible that a savings account did not exist or was depleted in the wake of the addiction. If finances were available from another outlet, misappropriation of client funds likely would not have occurred.

By no means is it being suggested that lawyers should only receive a slap on the wrist. Nevertheless, the current climate of the disciplinary process punishes lawyers with no clear assistive objective other than reprimanding the lawyer and protecting the public's interest in the

justice system. Throughout these proceedings, many LAPs, which are subsidiaries of each State Bar Association, offer optional, minimal support whilst lawyers are contemporaneously subjected to public disconcertion and the harshest of sanctions, which is many times the equivalent of a dishonorable discharge.

There are many solutions that may be considered to assist this issue. Perhaps LAPs could employ more medical professionals that specialize in alcohol abuse and addiction treatment to assist with these issues. Mandate the development of a specified anonymous treatment plan for the addicted lawyer in connection with confidential disciplinary actions; not only for the benefit of the lawyer's health and well-being, but as an encouraging caveat to return to practice upon successful completion. Furthermore, each State Bar should increase the amount of CLE courses surrounding substance abuse, chemical and alcohol dependency to five annual credit hours. With respect to students, law schools should employ a mandatory substance abuse course into each year's curriculum. Offering support and treatment options in anonymity may also prove beneficial to many struggling students and could prevent a chemical dependency from expanding into abuse of other substances. For those entering practice, each State Bar should incorporate a mandatory substance abuse training protocol in connection with taking the bar exam or prior to being sworn in.

## VIII. CONCLUSION

In summary, attorneys with alcohol, addiction or dependency issues are subjected to debilitating ridicule and ignominy. However, in contrast, we must compare the disciplinary regulations of the ABA and resulting reputational detriment to those of the medical field; a profession which is just as complicated, stressful and intense. If a choice arose between a surgeon who was surfing a narcotic-induced high that is seconds from cutting open a patient versus an inebriated attorney arguing a motion, the instantaneous and preferred choice of many, if not most, would be the attorney. If surgeons, doctors, physician assistants and nurses are encouraged and supported

through their community to anonymously address their addictions, attorneys should receive the same treatment.

The addicted or dependent attorney in recovery is rarely seen as the underdog and should undoubtedly be celebrated when success stories emerge from those journeys. The conflict lies in the areas where the support, encouragement and ample resources should be offered without the caveat of mortifying embarrassment, public humiliation and disbarment. Moreover, the support should be encouraging and present, prior to hitting rock bottom, and travel with the lawyer throughout the recovery journey; not merely a technical compliance within the ABA's Model Rules.

The fall from grace of the dependent lawyer is not merely a character flaw, a matter of circumstance or as a result of the stressors surrounding the profession. It is a combination of the addiction-fueled misconduct and inherent demands of the profession, coupled with the lack of regulated, professional support resources, inconsistent addiction treatment procedures and unfair reporting practices. As Bill Courtney once said, "The true measure of a person's character is how one handles one's failures, not successes."[82] Perhaps if this notion was applied in a broader spectrum, the empirical handling of the failures could be a measurable success within the legal community.

The overall mindset behind this research was to present the data in a manner that would insight support to fellow legal professionals, essentially to encourage lawyers to take better care of their colleagues and themselves. Cataclysmic change across all branches of the legal community certainly will not occur overnight, but change has to start somewhere. To quote Ruth Bader Ginsberg, "Fight for the things that you care about, but do it in a way that leads others to join you."[83] Conceivably, the information and data contained herein will

[82] Bill Courtney, Against the Grain: A Coach's Wisdom on Character, Faith, Family and Love 1 (2014).
[83] Justice Ruth Bader Ginsberg, Radcliffe Award Recipient Address, 364th Commencement Ceremony, Radcliffe Institute for Advanced Study, Harvard University (May 28, 2015).

act as a stepping-stone for those in positions of power to affect positive change concerning alcohol use, addictions and chemical dependency of law students and for struggling legal professionals alike.

# QUALIFIED IMMUNITY: IS IT A LICENSE TO KILL?

Sierra Bracewell

*Abstract*

From the rise of the "say [their] name" movement and widespread recognition of the occurrence of police brutality, qualified immunity has received a substantial amount of media attention in the past few years. What is qualified immunity and how does it effect our justice system? This article analyzes the origins of qualified immunity and discusses the case history surrounding the evolution of this judicially established doctrine. While identifying both the support and opposition for qualified immunity, this article will contend that there is a path forward without qualified immunity as it stands. Qualified immunity undermines the justice system by allowing police officers and government officials to circumvent accountability for their conduct.

## Introduction

In the years that followed the Civil War, Congress passed the Enforcement Acts. Passed as three separate laws between 1870 and 1871; these laws were created specifically to protect the newly awarded rights to African Americans.[1] While prohibiting groups of people from banding together with the intention of violating a citizens' constitutional rights, empowering judges and marshals to supervise local polling place, and allowing the President to use the armed forces to combat those who wanted to deny equal protection of the law[2] were all vital; perhaps the most important development

[1] Wright, Kianna. "The Enforcement Act of 1870." Blackpast.org, 12 Dec. 2019.
[2] "The Enforcement Acts of 1870 and 1871." *U.S. Senate: The Enforcement Acts of 1870 and 1871*, 5 June 2020, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.

was 42 U.S.C. § 1983[3] becoming enacted by the 42nd Congress. This Section was enacted not only to ensure Fourteenth Amendment rights, but to effectively create a way to receive damages for a deprivation of those rights.[4] Passing these laws was vital due to the uprising of a domestic terrorist group, the Ku Klux Klan (KKK). Composed of a group of white ex-confederate soldiers, the KKK spent their time terrorizing Black communities. Due to the KKK attempting to suppress the Black community from voting, running for office, and attending jury duty, the Senate passed the final two acts known as the Ku Klux Klan Acts to ensure everyone their civil rights and equal protection of the law.[5] Having these laws in place meant that for the first time in the United States history, Black people would have the same rights as anyone else. However, this act was not commonly used in litigation until a significant case that was decided in 1961. *Monroe v. Pope*, 365 U.S. 167 (1961) was a case dealing with thirteen Chicago police officers who unlawfully searched the home of a Black family. During this unlawful home invasion, the police officers had the two parents stand naked in the living room with their six children.[6] While the family was standing in the living room, the police officers ripped apart sheets, dumped out their drawers, and essentially destroyed their home. After this unlawful search, the police officers also illegally detained the father of this family. The reasoning for this detention was because they wanted to question this man about a murder that happened two days prior. While detaining him, they also denied him access to call his lawyer.[7] Monroe eventually brought suit

[3] People seeking damages from misconduct of police officers or government officials will bring forth a suit under 42 U.S.C. § 1983, also referred to as section 1983 or a 1983 action, on the state level. On the federal level, "Bivens lawsuits" exist to allow people to sue federal agents for clear violations of constitutional law as established in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).
[4] Nahmod, S. "A Section 1983 Primer (1): History, Purposes and Scope." *Nahmod Law*, 7 Nov. 2009, https://nahmodlaw.com/2009/10/29/a-section-1983-primer-1-history-purposes-and-scope/.
[5] "The Enforcement Acts of 1870 and 1871." *U.S. Senate: The Enforcement Acts of 1870 and 1871*, United States Senate, 5 June 2020, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.
[6] *Monroe v. Pope*, 365 U.S. 167, 203 (1961).
[7] *Id*. at 169.

against each of the officers individually, as well as the City of Chicago under Section 1983. The City of Chicago and the police officers wanted to dismiss the complaint on the grounds that municipalities cannot be held liable under the Civil Rights Act, and the district court ruled in favor of the dismissal.[8] Monroe did attempt to appeal this decision, but the United States Court of Appeals for the Seventh Circuit affirmed the lower court's decision. Monroe then brought the case to the United States Supreme Court where the Court's opinion was that each of the police officers may be held individually liable since they were acting under the color of law, however municipalities are not liable under this act.[9] Shortly after this case, we find the birth of qualified immunity.

Put simply, qualified immunity is created to protect police officers and government officials from having to undergo litigation in situations where the courts feel they should not have to. Qualified immunity is not one specific statute or piece of legislation, it is actually a judicially established doctrine designed to protect police officers and government officials from liability.[10] In 1967, there was another significant case that impacted the protection of police officers and government officials. *Pierson v. Ray*, 386 U.S. 547 (1967) was a case that was brought against city officers and a municipal police justice for false imprisonment and deprivation of civil rights. This case eventually made its way to the Supreme Court where Chief Justice Warren held that the Civil Rights Act did not allow a judge to be held liable for an unconstitutional conviction, and that defense of good faith and probable cause that are available to police officers, are also available to judges.[11]

Eventually, courts eliminated the "in good faith" section, claiming that there is no way for a police officer or government official to know what they are doing is inappropriate if there is no previous case

[8] *Id*. at 170.
[9] *Id*. at 192.
[10] "Qualified Immunity." *National Association of Attorneys General*, 19 Nov. 2020, https://www.naag.org/issues/civil-law/qualified-immunity/.
[11] *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

that states that exact thing. This was a decision made in yet another vital case regarding qualified immunity, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The monumental opinion in this decision was the Court stating that "government officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known*."[12] This is the case where we begin to find the issue with qualified immunity. Because of the high standard imposed by the Court in *Harlow v. Fitzgerald*, the level of specificity required for a victim of an injustice by the hands of a government official to receive a ruling in their favor is next to impossible. These become issues because victims are often left feeling as though they have not received the same rights entitled to everyone else.

An example to further illustrate this point is a case involving Alexander Baxter. In Baxter's case, a neighbor saw him break into a home, so they decided to call the police.[13] Becoming startled after hearing the sirens come closer, Baxter fled the scene and hid in the basement of another house that was close by. The police officers had a helicopter and a canine unit so Baxter's hope of remaining undetected was definitely short-lived. There were two officers that were actively searching for Baxter and one of them had a canine. The canine led them to find Baxter's trace that eventually led them to the basement.[14] The police officers warned that they will release the canine to apprehend him, to which Baxter responded by lifting both of his hands up.[15] The officer released the canine, and the canine ended up biting Baxter in order for the police to arrest him. In Baxter's argument, his legal team raised awareness of the *Campbell*[16] case. In this case, there were two different men involved, however, Baxter thought it would be advantageous to compare his story to Campbell's since they were both in similar situations. Campbell had

[12] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (italics/emphasis added).
[13] *Baxter v. Bracey*, 751 Fed.Appx. 869, 870 (2018).
[14] *Id*. at 870.
[15] *Id*. at 870.
[16] *Campbell v. City of Springboro, Ohio*, 700 F.3d 779 (6th Cir. 2012).

someone call the police on him for a suspected burglary and it is possible that he fled the scene when he heard the sirens approaching as well. In the *Campbell* case, the police officer was using a canine to apprehend the suspect just as the Baxter case. The canine apprehended Campbell while he was lying face down in the grass, making it difficult for Campbell to surrender, speak, or defend himself.[17] The court ruled in favor of Campbell, holding that "At no point was Campbell actively resisting arrest. Thus, Campbell has made out a colorable argument for excessive force based upon improper handling by Clark"[18] and that "factual issues existed as to whether the officer acted contrary to clearly established law, precluding summary judgement for officer on excessive force claims based on qualified immunity."[19]

Although these cases may seem very similar, the aforementioned issue with qualified immunity is the level of specificity required for a victim to receive a ruling on their behalf. When Baxter attempted to use the *Campbell* case to aid in his argument, the court disagreed as to whether that case was the best one to apply to the situation at hand. The court claimed that the *Robinette*[20] case would be a better case to cultivate a more convincing argument.[21] The *Robinette* case was another case regarding an armed burglary. The suspect presumably heard the sirens approaching and attempted to hide. When the police officers arrived on the scene, they saw the broken glass and determined that a burglary had occurred.[22] The police went inside the building and warned that they had a canine present with them. However, when the suspect did not come out, they let the canine go.[23] The canine ran ahead of the officers and found the suspect hiding underneath a car. After the canine located the suspect,

[17] *Id*. at 785.
[18] *Id*. at 787.
[19] *Id*. at 779.
[20] *Robinette v. Barnes*, 854 F.2d. 909 (6th Cir. 1988).
[21] *Baxter v. Bracey*, 751 Fed.Appx. 869, 872 (2018).
[22] *Robinette v. Barnes*, 854 F.2d. 909, 911 (6th Cir. 1988).
[23] *Id*. at 911.

the canine apprehended suspect by the neck.[24] By the time the police officers arrived at the suspect, he was surrounded by blood. Upon witnessing that, the officer leashed his canine and called for an ambulance. When the suspect got to the hospital, he was pronounced dead on arrival. In this case, the suspect was lying under a car, and it is unclear from the evidence whether he attempted to surrender. The court draws the comparison due to the fact that in the *Robinette* case, the suspect was in a dark and unfamiliar place which is similar to the situation Baxter was facing.

Recall that in the *Campbell* case that was decided in 2012, the suspect was lying face down in the grass and was then apprehended by the canine, the court ruled in favor of Campbell. In the *Robinette* case that was decided in 1988, the suspect was hiding under a car and apprehended and unfortunately killed by the canine, the Court ruled in favor of the police. Drawing attention to these cases aids in understanding the meticulous information that can win or lose the case with regards to qualified immunity. All three of the cases involved the police being called due to a burglary, they all had the suspects hiding in the dark, and they all involved a canine apprehending the suspect. However, that is not enough to gain a ruling in the victim's favor. In order to prevail against a qualified immunity claim, the plaintiff must establish that the conduct violated clearly established statutory or constitutional rights. The small details of these cases are where we will consistently witness police officers use their qualified immunity defense because the exact situation may not have happened before.

## I. Case History

In exploring the history of qualified immunity deeper, there will be a pattern beginning to reveal itself showing both how it formed and how it has evolved to where it is today. *Monroe v. Pape*[25] was significant in holding that individuals can be held liable, but

[24] *Id*. at 911.
[25] *Monroe v. Pape*, 365 U.S. 167 (1961).

municipalities cannot. However, in practice, this liability is very rarely seen. *Pierson v. Ray*, 386 U.S. 547 (1967) was a case involving fifteen white and Black Episcopal clergymen who used segregated facilities in Jackson, Mississippi.[26] After refusing to leave when the police officers ordered them to do so, they were arrested. Eventually, they brought suit against the city police officers and a municipal police justice for deprivation of rights, where the case eventually made its way to the United States Supreme Court. The Supreme Court held that the police justice was immune from liability as there was no specific allegation that he had any role in the arrests,[27] the Court further held that the defense of good faith and probable cause that is available to police officers for false arrest and imprisonment, is also available to them in the action under Section 1983.[28] This case is significant in that the liability against police officers can now be circumvented if they were acting "in good faith" or had "probable cause" for acting the way they did.

As alluded to at the onset of this article, qualified immunity evolves again in the case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This was a case involving an alleged wrongful termination from the United States Air Force. Fitzgerald was a management analyst and had previously testified about two billion dollars in unexpected costs associated with a transport plane and technical difficulties. Two years after his testimony, he was discharged and believed it to be retaliation because of his testimony.[29] He brought suit for damages and the case made its way to the United States Supreme Court where one of the most significant developments in qualified immunity occurred. Amongst other things, writing for the majority, Justice Powell held that "government officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have*

[26] *Pierson v. Ray*, 386 U.S. 547 (1967).
[27] *Id*. at 553.
[28] *Id*. at 557.
[29] *Harlow v. Fitzgerald*, 457 U.S. 800, 803 (1982).

*known*."[30] It is necessary to re-emphasize a portion of that quote which is "clearly established." This eliminated the "in good faith" or "probable cause" defense and allows for any actions by government officials so long as it has not been clearly established that those actions are a violation of rights.

In *Mitchell v. Forsyth*, 472 U.S. 511, (1985), a former Attorney General was granted qualified immunity for a warrantless wiretap on a phone of a radical group that was threatening national security.[31] Even though his actions violated the Fourth Amendment, the Supreme Court held that he was entitled to qualified immunity because when the wiretap took place, it was not clearly established that such a wiretap was unconstitutional.[32] A few years later, in *Anderson v. Creighton*, 483 U.S. 635 (1987), Federal Bureau of Investigation (FBI) agents conducted a warrantless search of the Creighton's family home because they believed that a man suspected of robbery might be found there.[33] The Creighton's filed suit against Anderson, one of the agents, asserting a claim for money damages under the Fourth Amendment.[34] Writing for the majority, Justice Scalia stated that the question surrounding whether Anderson was entitled to qualified immunity was whether a reasonable officer could have believed the search to be lawful in light of the clearly established law and information the officer possessed.[35] The Court held that Anderson was entitled to qualified immunity since he could have reasonably believed that his search was lawful.[36] To further expand upon alleged violations of Fourth Amendment rights, *Wilson v. Layne*, 526 U.S. 603 (1999) was a case where police officers invited the media to "ride-along" with them while they executed a search warrant.[37] A sweep of the home revealed the person of interest not to be there, but the

[30] *Id*. at 818 (italics/emphasis added).
[31] *Mitchell v. Forsyth*, 472 U.S. 511, 513 (1985).
[32] *Id*. at 530.
[33] *Anderson v. Creighton*, 483 U.S. 635, 637 (1987).
[34] *Id*. at 637.
[35] *Id.* at 641.
[36] *Id*. at 646.
[37] *Wilson v. Layne*, 526 U.S. 603, 606 (1999).

media observed and took photographs of the search anyway, however, they were never involved.[38] The Wilson family sued the law enforcement officials. Chief Justice Rehnquist, writing for the majority, explained how it was necessary to determine if a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.[39] The Court held that it was not unreasonable for him to believe that it was lawful to bring the media with him, and since it was not clearly established at the time of the search, he was entitled to qualified immunity.[40] All of these cases involved Fourth Amendment violations with regards to warrantless searches, but since none of them were factually similar to the other, each of the government officials were entitled to qualified immunity.

Qualified immunity expands again in *Saucier v. Katz*, 533 U.S. 194 (2001). Katz was protesting during the vice president's speech, and Saucier, a military policeman, allegedly used excessive force to arrest Katz.[41] The United States Court of Appeals for the Ninth Circuit made a two-part qualified immunity inquiry; first is whether the law was clearly established, the second is, if the law was clearly established, whether a reasonable officer could have believed the conduct was lawful.[42] The case went to the Supreme Court, where they held that Saucier was entitled to qualified immunity since there was no clearly established rule prohibiting him from acting as he did.[43] The two-part inquiry was then used until *Pearson v. Callahan*, 555 U.S. 223 (2009). This case was about an undercover police officer who entered the home of Callahan with a marked bill to purchase methamphetamine.[44] After the purchase of the drugs, officers entered the home and conducted a prospective sweep. During the

[38] *Id*. at 608.
[39] *Id*. at 615.
[40] *Id.* at 618.
[41] *Saucier v. Katz*, 533 U.S. 194, 198 (2001).
[42] *Id*. at 209.
[43] *Id*. at 209.
[44] *Pearson v. Callahan*, 555 U.S. 223, 228 (2009).

sweep, the officers found the marked bill along with syringes and methamphetamine.[45] Callahan was subsequently charged with unlawful possession and distribution of methamphetamine. However, the evidence obtained from the search were inadmissible and Callahan's charges were reversed.[46] Callahan then filed a Section 1983 action in federal court alleging the officer's violated his civil rights under the Fourth Amendment.[47] The Supreme Court overruled their decision in *Saucier* that implemented the two-part inquiry for qualified immunity. It reasoned that substantial judicial resources were often expended in determining difficult constitutional claims that ultimately had little to do with the outcome of the case.[48] The Court also held that the officer was entitled to qualified immunity because the unlawfulness of the officers' conduct in this case was not clearly established.[49]

The evolution of the case history surrounding qualified immunity sounds complicated because it is. It is something that is determined on a case-by-case basis, and as long as that exact thing has not happened before or it was not clearly established, then the government officials will receive qualified immunity. In *Stanton v. Sims*, 571 U.S. 3 (2013), a police officer responded to a disturbance involving a person with a baseball bat.[50] When the officers arrived on the scene, they saw three men walking on the street. Two of the men walk into a nearby apartment, and the third crossed the street in front of the police vehicle. The officers did not see a baseball bat, but they considered the man's behavior to be suspicious and ordered him to stop.[51] The man continued walking into the residence and closed the gate behind him, the officer forcibly opened the gate and injured the residence's owner.[52] Sims, the

[45] *Id*. at 228.
[46] *Id*. at 228.
[47] *Id*. at 229.
[48] *Id*. at 236.
[49] *Id*. at 245.
[50] *Stanton v. Sims*, 571 U.S. 3, 4 (2013)
[51] *Id*. at 4.
[52] *Id*. at 5.

residence's owner, sued in action under Section 1983 in federal court arguing a violation of her Fourth Amendment rights.[53] When the case arrived at the Supreme Court, the Court expressed no opinion on whether the entry into Sim's yard was constitutional.[54] Because Stanton could have believed that his actions were justified, he was entitled to qualified immunity.[55]

In practice, the scope of qualified immunity is beginning to expand further than it was intended. To further illustrate, comparing *Plumhoff v. Rickard*, 572 U.S. 765 (2014) and *Mullenix v. Luna*, 577 U.S. 7 (2015) will be of interest to the reader. In *Plumhoff*, a police officer pulled over Rickard for an inoperable headlight. After the officer noticed damage on the vehicle, he asked Rickard to step out and Rickard sped away.[56] The officer called for backup and continued the pursuit until surrounding him in a parking lot. When Rickard attempted to flee, the police officers fired shots into the vehicle killing both Rickard and a woman who was a passenger in the vehicle.[57] Surviving members of their families sued under federal and state law claims under Section 1983 arguing that the police violated the Fourth Amendment rights of the victims.[58] After the case arrived at the Supreme Court, the Court held that Plumhoff's conduct did not violate the Fourth Amendment, but even if that were not the case, Plumhoff would still be entitled to summary judgment based on qualified immunity[59] because he violated no clearly established law. In *Mullenix v. Luna*, 577 U.S. 7 (2015), a police officer approached Leija with a warrant for his arrest.[60] Leija lead the police officers on a high-speed chase while also telling the police dispatcher that he will shoot the officers that are following him.[61] Spikes were then set up in hopes of catching him, but one trooper wanted to take an alternative

[53] *Id*. at 5.
[54] *Id*. at 10.
[55] *Id*. at 10.
[56] *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014).
[57] *Id*. at 770.
[58] *Id*. at 770.
[59] *Id*. at 778.
[60] *Mullenix v. Luna*, 577 U.S. 7, 8 (2015).
[61] *Id*. at 8.

route.[62] Mullenix, the trooper, fired six shots at the car in order to stop it. Later it was determined that Leija died as a result of the shots, four of which hit his upper body, and none hit his car.[63] Respondents sued Mullenix under Section 1983 arguing a violation of Fourth Amendment rights.[64] The Supreme Court held that it was not clearly established that using deadly force in pursuit of a fleeing suspect who posed a threat to others violated the Fourth Amendment. The Court further explained that since none of the precedents "squarely govern"[65] the facts of this case, Mullenix is entitled to qualified immunity. These two cases are factually similar in that police officers were in pursuit of a fleeing suspect, they believed that suspect to pose a threat to others, and they used deadly force to subdue the suspect. However, since the facts of *Plumhoff* do not squarely govern the facts of this case, Mullenix was granted qualified immunity for his actions. Qualified immunity can be repeatedly found providing a path for police officers and government officials to circumvent accountability for their actions. However, support for qualified immunity comes with slight justification.

## II. Support for Qualified Immunity

The support for qualified immunity comes from a few different ideas. One of the most widely used arguments is that government officials should not have to undergo frivolous litigation while performing their discretionary duties.[66] Since it is qualified immunity and not absolute immunity, government officials can still be held liable for their actions. The immunity is simply put in place to ensure that private citizens do not sue people who were acting within the scope of their authority. Since it is not uncommon to see government employees

[62] *Id*. at 9.
[63] *Id*. at 9.
[64] *Id*. at 10.
[65] *Id*. at 15, as established in *Brosseau v. Haugen*, 543 U.S. 194 (2004) holding that issues that fall in a "hazy border" (similar to a grey area) are not clearly established.
[66] Rumberger, Kirk. "Qualified Immunity: The Commonly Misunderstood Defense and Opponents' Efforts to Expose Law Enforcement Officers to Financial Ruin." *JD Supra*, 5 Mar. 2021, https://www.jdsupra.com/legalnews/qualified-immunity-the-commonly-8441176/.

have some form of shield from personal lawsuits, it stands to reason that people who have to make split-second decisions should also have a shield.[67] Lawsuits can be tedious and expensive, when someone is performing their job diligently, they do not want to have to fear a lawsuit for doing what they thought was within their authority. It is indisputable that there are times when police officers have to make life changing decisions, therefore, ending qualified immunity could lead police officers to being hesitant in performing their duties.[68] If someone's actions violate a clearly established law, then they can be held liable. However, if the law is not clearly established, only then will the police officer/ government official be granted qualified immunity.

If judges debate about the application of the law even in their own chambers, then police officers should not be expected to perfectly analyze the complex constitutional issue at hand.[69] That is where we find the premise of support for the "clearly established" aspect of qualified immunity, which is another vital area of support. Police officers are not lawyers or judges, they are not trained in understanding and interpreting the evolving legal world. If a police officer or government official conducts an action that violates someone's Fourth Amendment right, but it has never been established that it is in fact a violation, then the officer or official should be shielded from liability. As previously stated, there are times in which police officers are forced to make life changing decisions, and in those moments, they should not be expected to think like legal scholars.[70] When police officers are taking actions to keep the public safe, even if those actions violate existing laws, they should not be

[67] Cotton, Tom. "In Defense of Qualified Immunity." *National Review*, National Review, 27 Oct. 2021, https://www.nationalreview.com/2021/10/in-defense-of-qualified-immunity/.
[68] "Pros vs Cons of Qualified Immunity: Both Sides of Debate." *Findlaw*, 21 Sept. 2021, https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html.
[69] Rumberger. "Qualified Immunity."
[70] FindLaw. "Both Sides of the Debate."

held liable.[71] Recall the case *Pierson v. Ray*, 386 U.S. 547, (1967) where the men were arrested for using segregated facilities. Although we have now come to point in our society where we agree that segregation is reprehensible, it was not illegal at the time these men were arrested. Therefore, when the police made the arrest, the did so because they believed they were not violating existing law. The Court held in that case that police officers cannot be expected to predict future laws.[72] Although the Court did agree that there was a violation of constitutional rights, since their actions were supported by the law at the time, they were granted qualified immunity.

Overall, most of the support for qualified immunity comes from the idea that the police and government protect us, therefore, we should protect them from frivolous litigation. Supporters of qualified immunity argue that ending it, or even curtailing it, could be catastrophic for law enforcement agencies. Since police officers and government officials who knowingly violate the law can already be held liable under Section 1983,[73] supporters argue that qualified immunity should remain in place to protect those who do not knowingly violate any clearly established law. If we took away qualified immunity, police officers may have to look elsewhere for private insurance against personal lawsuits which potentially could raise the cost of policing in general.[74] In an attempt to gain insurance elsewhere, this could inadvertently give control to insurance companies over police agencies, which would give people less democratic control over the police. Since qualified immunity is not absolute immunity, supporters feel as though this is necessary to ensure that our police officers and government officials can perform all of their tasks without fear of prosecution. If they do violate a

---

[71] "Why We Need Qualified Immunity." *National Police Support Fund*, 12 Apr. 2021, https://nationalpolicesupportfund.com/why-we-need-qualified-immunity/.
[72] *Pierson v. Ray*, 386 U.S. 547, (1967).
[73] "42 U.S. Code § 1983 - Civil Action for Deprivation of Rights." *Legal Information Institute*, Legal Information Institute, https://www.law.cornell.edu/uscode/text/42/1983.
[74] Cotton, Tom. "In Defense of Qualified Immunity." *National Review*, National Review, 27 Oct. 2021, https://www.nationalreview.com/2021/10/in-defense-of-qualified-immunity/.

clearly established law, then there is a system in place for the victim of the alleged violation to receive damages. Ending qualified immunity could put government officials and police officers in a position where they do not want to do their job anymore which could lead to less police and substantially impact our communities. Most supporters do not argue for absolute immunity, only qualified. People simply believe that police officers and government officials should not have to worry about financial ruin for carrying out their duties.[75] Unfortunately, all of this support does not negate the issues that arise from qualified immunity.

## III. Issues with Qualified Immunity

Opponents of qualified immunity argue that it undermines the public trust in that it creates a system where police officers and government officials can escape accountability simply because the exact facts have not happened before. It is important to remember that qualified immunity is not a "good faith" defense. Recall that in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) where an employee of the department of the Air Force believed to be wrongfully terminated, the Court held that as long as the conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known, then they are entitled to qualified immunity.[76] This ruling effectively eliminated the necessity of a "good faith" defense in that even if the action was not done "in good faith," as long as it did not violate any clearly established law, then the person who conducted that action would be granted qualified immunity. This is important because even if the police officer or government official had malicious intent or did something morally reprehensible, they could still be granted qualified immunity as long as there was no violation of a clearly established law.[77]

---

[75] *Id* at Cotton. "In Defense."

[76] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[77] Deerson, David. "The Case against Qualified Immunity." *National Review*, National Review, 18 Dec. 2021, https://www.nationalreview.com/bench-memos/the-case-against-qualified-immunity/.

This can be illustrated in the case of *Jessop v. City of Fresno*, 936 F.3d 937, (9th Cir. 2019). In this case, the police officers had a warrant to search illegal gambling machines at three properties. The warrant also contained the authorization to seize all monies in connection to the illegal gambling.[78] After the search, the officers submitted an inventory sheet that stated they seized approximately fifty thousand dollars from the properties. However, Jessop argues that over two hundred and seventy-five thousand dollars was missing.[79] While the court held that if the officers did commit those alleged actions, then it was morally wrong. However, the court further explains that not all conduct that is improper or morally wrong violates the constitution.[80] Since the right to be free from theft of property seized during the pursuit of a warrant was not clearly established, the officers were entitled to qualified immunity.[81]

Another case to expand on this point is *Corbitt v. Vickers*, 929 F.3d 1304 (Ga. Ct. App. 11, 2019). In this case, a police officer was attempting to apprehend a criminal suspect when the chase led into an unexpecting family's backyard.[82] When the police officer entered the backyard, he demanded that everyone get down on the ground, including the minor children that were present.[83] The family dog came out, and even though it was making no threat, the officer discharged his firearm twice. Neither shot hit the dog, but the second shot hit one of the minor children in the back of the knee.[84] The child's mother brought a suit for damages under Section 1983 where the case eventually made it to the state appellate court. The court held that the police officer was entitled to qualified immunity since there was no clearly established law making it apparent to any other officer in his shoes that his actions would have violated the Fourth

[78] *Jessop v. City of Fresno*, 936 F.3d 937, 939 (9th Cir. 2019).
[79] *Id*. at 940.
[80] *Id*. at 943.
[81] *Id*. at 943.
[82] *Corbitt v. Vickers*, 929 F.3d 1304, 1308 (Ga. Ct. App. 11, 2019).
[83] *Id*. at 1308.
[84] *Id*. at 1308.

Amendment.[85] In this case, since a person's right to not be accidentally shot in the leg was not clearly established, qualified immunity was granted. The lack of good faith in the actions of these police officers and government officials is often a point of contention for opponents of qualified immunity because it appears as though police officers are able to circumvent accountability for their conduct. Another area of concern for opponents of qualified immunity is that the level of specificity required for a victim to receive compensation is almost impossible with this as a defense. Unless the facts of a case squarely govern the facts of the case in question, nothing has been clearly established, therefore a victim of an injustice will not receive compensation. In illustrating this point further, it is important to recall the facts in *Baxter v. Bracey*, 751 Fed.Appx. 869 (2018), *Campbell v. City of Springboro, Ohio*, 700 F.3d 779 (6th Cir. 2012), and *Robinette v. Barnes*, 854 F.2d. 909 (6th Cir. 1988). These were all cases that involved a suspected burglary, they all involved a suspect hiding in a dark place, and they all involved the use of a canine in apprehending the suspect. However, since none of the facts of these cases squarely governed each other, the officers were granted qualified immunity in two of them. One judge was even quoted saying that "a court can almost always manufacture a factual distinction" when determining whether an officer should be granted qualified immunity.[86]

The issue opponents have with the requirement of the cases having to match on every fact is that since there will almost always be some difference, even if it is small, the police officers and government officials will likely be granted qualified immunity. This immunity shields them from liability, and in turn, accountability.
Another pressing issue for opponents of qualified immunity is that police brutality is a significant concern and qualified immunity may shield police officers from liability when their conduct is excessive. Opponents bring up an example of Gabriel Olivas who had poured

[85] *Id*. at 1322.
[86] "Pros vs Cons of Qualified Immunity: Both Sides of Debate." *Findlaw*, 21 Sept. 2021, https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html.

gasoline on his body and threatened to kill himself.[87] His son called 911, and after the police department acknowledged that tasering him would set him on fire, they did so anyway.[88] The house burned down, and Olivas passed away. The family brought suit under Section 1983 against the police officers for damages, but they were ultimately granted qualified immunity.[89] The police officers were called to help a man in distress and ultimately contributed to the end of his life.[90] Recall that in *Corbitt v. Vickers*, 929 F.3d 1304 (Ga. Ct. App. 11, 2019) the police officer shot a minor child in the leg and was also granted qualified immunity. This level of brutality and lack of accountability causes opponents to feel a severe distrust in a system put in place to protect the communities. Opponents tend to believe that "if the rule of law means anything, it means that those sworn to enforce it should not be above it."[91]

Opponents of qualified immunity do not necessarily need an end to it, because they do not disagree with the concept that there should be some form of immunity for police officers and government officials. Opponents simply argue that the current form of qualified immunity has shielded government officials and law enforcement officers in a way where there is now a public distrust in the system.[92] As Chief Justice Marshall stated in the landmark case of *Marbury v. Madison*, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the

[87] *Marie Ramirez v. Guadarrama*, 844 F. App'x 710, 711 (5th Cir. 2021).
[88] *Id*. at 712.
[89] *Id*. at 717.
[90] Guzman, John. "How Police Use Qualified Immunity to Get Away with Misconduct and Violence." *NAACP Legal Defense and Educational Fund*, NAACP, 21 Dec. 2021, https://www.naacpldf.org/qi-police-misconduct/.
[91] The Editorial Board. "End the Court Doctrine That Enables Police Brutality." *The New York Times*, The New York Times, 22 May 2021, https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html.
[92] Schweikert, Jay. "Qualified Immunity: A Legal, Practical, and Moral Failure." *Cato.org*, Cato Institute, 14 Sept. 2020, https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure#exacerbates-crisis-accountability-law.

violation of a vested legal right."[93] Opponents of qualified immunity just want to see that their government will be held accountable for a violation of a legal right.

## IV. How to Move Forward

The quickest solution to answer the needs of the people who oppose qualified immunity would be to fully abolish it. While supporters would oppose this at first, the abolition of it will allow space for the birth of something new. Supporters of qualified immunity may argue that the abolition of it would bankrupt police officers and government officials alike. Police officers are also often covered by insurance policies that protect them against financial judgements. The local police in the aforementioned case had insurance and were even represented by an insurance company lawyer at trial. However, a study that was published in 2014[94] showed that governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations. Put differently, taxpayers typically foot the bill when police officers violate a person's rights. Individuals hardly ever contribute to settlements or judgements.

Therefore, allowing for the litigation will statistically not bankrupt the police officers or government officials. In a more recent Supreme Court case, Justice Sotomayor stated that qualified immunity "sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[95] It stands to reason that one of the easiest ways to satisfy people would be to abolish qualified immunity altogether.

However, if it is not feasible to simply end qualified immunity, it is very clear that there needs to be some type of reform in the policy.

---

[93] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).
[94] Schwartz, Joanna C. "Police Indemnification." *NYU Law Review*, 23 Sept. 2018, https://www.nyulawreview.org/issues/volume-89-number-3/police-indemnification/.
[95] *Kisela v. Hughes*, 138 S.Ct. 1148, 1162 (2018).

The first suggestion, and perhaps the easiest to obtain, would be amending Section 1983 to include statements that prohibit a defense that immediately dismisses the case. The aforementioned cases repeatedly show an attempt to receive damages under Section 1983, but qualified immunity has consistently protected police officers and government officials from that liability due to the defense of qualified immunity.[96] By amending Section 1983 to include that a defense of qualified immunity cannot be used for these types of lawsuits, opponents could feel as if their needs of accountability are being met. This amending could also be good for supporters of qualified immunity in that the defense still exists, just not for alleged Section 1983 violations. This allows police officers and government officials to still have some qualified immunity for their conduct, it is just necessary to specify when that immunity can apply. A similar option could be allowing for a type of "good faith" defense so long as there has not been a law passed that made that type of conduct illegal at the time the incident occurred. This would mean that as long as the person was acting "in good faith" at the time, then they may have access to the defense. The biggest shift in using the defense would have to be how it is introduced into the court. It cannot be interpreted into something that is determined on a case-by-case basis, there has to be a set standard that is created in order to create a system of accountability.

Another option, and possibly the most complex, would be restructuring certain aspects of policing. There have been a substantial number of current events, from the death of Eric Garner to the death of George Floyd, that have sparked massive protests in the United States. The brutality at the hands of police officers with the existence of qualified immunity creates a public distrust. Incidents of police violence have hurt the relationship between police and community, and the loss of public trust comes from a widespread perception that bad officers are not held accountable when things go

[96] Schweikert. "A Legal, Practical, and Moral Failure."

wrong.[97] One of the suggestions for this change would be to ensure that police officers who were either terminated due to misconduct or have had a substantial amount of misconduct cases, should not be allowed to work in law enforcement again. Derek Chauvin, the police officer who killed George Floyd, was involved in eighteen police misconduct cases.[98] Had there been a policy in place that barred people from continuing law enforcement if they have been involved in a set number of misconduct cases, there would be a lot less police brutality and subsequently there would be a higher level of trust in the policing system. Another thing that would be equally as important in the reform of policing would be mandating de-escalation training for all police officers. As it stands, more than twenty states do not require their police officers to undergo de-escalation training. Experts agree that de-escalation training can be particularly effective, a Nevada Assembly Speaker stated that "giving officers the tools to de-escalate a situation can often be the difference between life and death."[99]

## Conclusion

Qualified immunity may sound very complicated and confusing and that is because it is. The case history has been substantial and intricate. The developments started with who could be held liable.[100] It then transforms into requiring that police officers or government officials have to act "in good faith" or have "probable cause" to raise such a defense.[101] The doctrine evolves again with the removal of the

[97] Craven, James, et al. "How Qualified Immunity Hurts Law Enforcement." *Cato.org*, 15 Feb. 2022. https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement.
[98] Ray, Rashawn. "How Can We Enhance Police Accountability in the United States?" *Brookings*, 11 Nov. 2020, https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/.
[99] Stockton, Gracie. "21 States Still Don't Require De-Escalation Training for Police." *APM Reports*, APM Reports, 6 Jan. 2022, https://www.apmreports.org/story/2021/06/24/21-states-still-dont-require-deescalation-training-for-police.
[100] *Monroe v. Pope*, 365 U.S. 167 (1961).
[101] *Pierson v. Ray*, 386 U.S. 547 (1967).

"in good faith" portion and emphasizing that it must have been a "clearly established" law that was violated.[102] Eventually, a two-prong test gets developed for using qualified immunity,[103] but a few years later that test is overruled.[104] In theory, qualified immunity protects police officers and government officials from frivolous litigation. In practice, qualified immunity protects all police officers and government officials unless they violate a law that has been established by a case that is factually similar. The initial justification for qualified immunity was to prevent police officers and government officials from having to undergo litigation that is a waste of resources.[105] Since employees of the government are typically shielded from liability to an extent, it is argued that police officers and government officials should be granted a form of shield from liability as well. Support is also given to qualified immunity because people argue that police officers should not be expected to think like legal scholars while performing their duties.[106] Issues rise when people feel as though there is a complete lack of accountability for actions that violate constitutional rights.[107] While opponents agree that ending qualified immunity will not be a solution to fix everything, it is a step in the right direction. There is also an issue in the level of specificity required in order for a victim of an injustice to receive damages. Opponents often feel as though it is impossible to receive a ruling in favor of the victim.[108]

While the path forward is not clear, there is still a path forward. The key to moving forward is understanding that there are valid concerns

---

[102] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
[103] *Saucier v. Katz*, 533 U.S. 194 (2001).
[104] *Pearson v. Callahan*, 555 U.S. 223 (2009).
[105] Rumberger, Kirk. "Qualified Immunity: The Commonly Misunderstood Defense and Opponents' Efforts to Expose Law Enforcement Officers to Financial Ruin." *JD Supra*, 5 Mar. 2021.
[106] *Id*. at Rumberger. "Qualified Immunity."
[107] Schweikert, Jay. "Qualified Immunity: A Legal, Practical, and Moral Failure." *Cato.org*, Cato Institute, 14 Sept. 2020, https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure#exacerbates-crisis-accountability-law.
[108] Craven, James, et al. "How Qualified Immunity Hurts Law Enforcement." *Cato.org*, 15 Feb. 2022.

on both sides of the argument. Progression requires collaboration. Complete abolition of qualified immunity could set us into unprecedented times, however, the doctrine as it stands leaves a plethora of people feeling invalidated. Reform, rather than abolition, could be the best path forward to meet the needs of people on all sides of this highly controversial topic. A research fellow from the Institute for American Police Reform stated that "[reform] will improve police accountability and restore public faith that officers are not above the law, without demonizing officers [who make] tough decisions while serving their communities."[109] Since qualified immunity has critics across the ideological spectrum including conservative Justice Clarence Thomas and liberal Justice Sonia Sotomayor,[110] finding mutual grounds for reform is not a farfetched idea. When creating the reform, it is vital that both sides are properly and adequately represented in order to best serve the needs of our society. There are instances when qualified immunity is necessary, but there have also been times when it has been unfair to the victims. Reform in qualified immunity does not have the ability to fix an entire system, but as the notorious Ruth Bader Ginsburg stated, "Real change, enduring change, happens one step at a time."[111]

[109] Herscowitz, Eva, et al. "Don't Abolish Qualified Immunity, Reform It: Policing Expert." *The Crime Report*, 11 Nov. 2021, https://thecrimereport.org/2021/11/10/dont-abolish-qualified-immunity-reform-it-policing-expert/.

[110] Jagannathan, Meera. "'They Get a Get-out-of-Jail-Free Card': How Qualified Immunity Protects Police and Other Government Officials from Civil Lawsuits." *MarketWatch*, MarketWatch, 29 June 2020, https://www.marketwatch.com/story/they-get-a-get-out-of-jail-free-card-why-law-enforcement-and-other-government-officials-are-protected-from-civil-lawsuits-2020-06-24.

[111] Ryan, Kevin J. "How 2 Boyhood Friends Brought the Netflix Model to Baseball Bats." *Inc.com*, Inc., 2 Feb. 2022, https://www.inc.com/kevin-j-ryan/bat-club-florida-baseball-equipment-subscription-service.html.

# HIDING THE HOMELESS

Caitlin Capozzi

Are policy makers legally permitted to implement laws that violate a homeless individual's right to travel, sit, or find shelter? The homeless face scrutiny from the law everyday through ordinances which violate their constitutional rights. The right to be free from cruel and unusual punishment,[1] and the right to be secure in one's personal effects[2] are their most commonly violated rights. Although some courts have stated the unconstitutionality of such ordinances, they are still found throughout the country.[3] Why would policy makers want to implement policies that have drastic effects on an already vulnerable group of people?

This article draws attention to laws that criminalize the homeless and attempts to ward off the unsheltered through means of architecture and camp sweeps. The disparity in race among the homeless,[4] solutions to ending homelessness,[5] and the cost of criminalizing the homeless are important aspects that will be explored in this article.

[1] U.S. CONST. amend. XIII.

[2] U.S. CONST. amend. IX.

[3] See Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019) (discussing the violation of the eighth amendment through unconstitutional ordinances such as the anti-camping and anti-sleeping ordinances found in Boise, Idaho).

[4] See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (examining the mass incarceration of African American men in America to show the unjust treatment that black men face through means of incarceration. This provides insight to try and understand the large disparity of white men incarcerated to that of a black man. There is a domino effect in which black men are punished more often for crimes, making it harder to find a job, and in turn ending up homeless or as a repeat offender).

[5] See Aimee Majoue, A Practical Look at Ending Homelessness, 16 SEATTLE J. FOR SOC. JUST. 913 (2018) (providing an in-depth look at the pros and cons regarding resources currently in place and resources that may offer a better solution in ending the cycle of poverty and reducing homelessness).

## Introduction

Why has the government continued to criminalize and violate the constitutional rights of the homeless, rather than implement housing programs to better assist homeless individuals? Laws and ordinances are put in place that criminalize behavior necessary for their survival.[6] The issue of homelessness has become increasingly relevant given the nowadays economic climate, and the recent impact of Coronavirus on the community.[7] It is appalling for such a persistent problem, that has overtaken cities,[8] to receive little attention. Many people believe that the homeless population is made up of criminals with a poor work ethic, which led them to become unsheltered.[9] However, the reality is the opposite of this stigma. The law has enabled and criminalized homelessness.[10]

Rather than funding programs to help end homelessness, laws are established with the scope of hiding the homeless from the rest of

---

[6] E.g., Vancouver Mun. Code § 8.22.040 (2002) ("It shall be unlawful It shall be unlawful for any person to camp, occupy camp facilities for purposes of habitation, or use camp paraphernalia in the following areas: (1) any park; (2) any street; or (3) any publicly owned or maintained parking lot or other publicly owned or maintained area.").

[7] See Alicia Adamczyk, Millions of Americans Could Face Eviction in July-- and It Could Destabilize Communities for Years to Come, CNBC (Jan. 12, 2021, 9:26 AM), https://www.cnbc.com/2020/07/01/nearly-7-million-households-could-face-eviction-without-assistance.html [https://perma.cc/CES6-K9NK]. (discusses how millions of Americans are struggling to pay their bills in the middle of a pandemic which closed the door on so many businesses).

[8] See Sarah McCammon, Millions Face Housing Crisis After Federal Moratorium on Evictions Expires, NPR (July 26, 2020, 7:45 AM), https://www.npr.org/2020/07/26/895480905/millions-face-housing-crisis-after-federal-moratorium-on-evictions-expires [https://perma.cc/23QQ-AHUJ]. (discussing the expiration of the Federal Moratorium and how devastating its effects can be).

[9] See Erin Blakemore, Poorhouses Were Designed to Punish People for Their Poverty, History (Aug. 29, 2018), https://www.history.com/news/in-the-19th-century-the-last-place-you-wanted-to-go-was-the-poorhouse [https://perma.cc/GBC4-UJY2]. (explaining the stigma that has been given to the poor throughout history. The goal was to make the poor suffer so greatly that they would work as hard as they could to rid themselves of this status).

[10] E.g., Durango, Colo., Code Of Ordinances § 17-60(c) (2019) (outlawing activities such as sitting, lying, and kneeling in downtown business areas).

society.[11] These laws shed light on how homelessness became such a prominent issue in the United States. While programs have been created to help meet some of the needs of the homeless community,[12] the issue of getting them into permanent housing has not fully been addressed. This article addresses the people experience homelessness, the history of homelessness, and the laws that are set in place to criminalize this community. It is crucial to understand that an individual's socio-economic status should not determine whether they are afforded the same rights as those who can afford housing. The unsheltered should be treated with as much dignity as we would want to be shown. It is not surprising that this nation struggles with a rising number of people being unsheltered. However, there is an attainable solution: government-funded housing.

A. The Main Cause of Homeless

Homelessness is caused by several factors, often beyond the individual's control. It is easy to see a homeless individual and wonder why they would not get a job, yet it is much harder to consider and understand how many challenges they must overcome in order to be employed.[13] One's mental health or physical disability, one's age or criminal background, and often one's inability to bathe and wash their clothes can automatically disqualify them from a position.[14] Despite this stereotype, it has been statistically proven that almost one-third

[11] E.g., Las Vegas, Nev., Mun. Code §13.36.055(a)(6) (2006) (prohibiting individuals from feeding the "indigent").

[12] See 42 U.S.C. § 11431 (2002) (providing homeless youth an equal opportunity to pursue an education as their peers).

[13] Sarah Golabek-Goldman, Note, Ban the Address: Combating Employment Discrimination Against the Homeless, 126 YALE L.J. 1788 (2017) (focusing on the obstacles a homeless individual must face when trying to obtain employment. She mentions how people often yell at individuals on the street to "get a job" but those people do not understand how difficult that can be).

[14] Id. (Many people do not consider the fact that when filling out a job application there is a section to provide your phone number and address, both which would be left blank when filling out the application. In addition, employers typically want to know that their employees have a reliable source of transportation. When applicants cannot provide any of these things for themselves, it is unlikely that employers will consider them as candidates for the job.)

of the homeless population is employed.[15] However, they cannot afford the price of housing and must remain in shelters.

The Department of Housing and Urban Development (HUD) requires most non-profit organizations that serve the homeless to participate in the Homeless Management Information Systems (HMIS).[16] This system was developed to determine the services each organization is providing, how many individuals are benefiting, and the success rate of their interventions. This data is then used to inform policy makers about circumstances surrounding local areas, and to push policies such as the Hearth Act[17] to be implemented. This provides the most insightful data to present to lawmakers and Congress, thus addressing the severity of the problem, and the growing number of clients in need of services.[18]

While many stereotype the homeless by portraying them as lazy and looking for a government handout,[19] the statistics available through HUD imply a different perspective. In 2020, there were an estimate of

---

[15] Homelessness and Hiring: Employer Perspectives, U.S. DEP'T HOUSING & URB. DEV. 3 (2013), http://www.hudexchange.info/resources/documents/AudioLecture6_Pamphlet.pdf [http://perma.cc/B3WY-TZSN].

[16] HUD 2017 Continuum of Care Homeless Assistance Programs Housing Inventory Count Report, U.S. DEP'T OF HOUS. & URBAN DEV. EXCH. 1 (2017), https://www.hudexchange.info/resource/reportmanagement/published/CoC_HIC_CoC_CA-602-2017_CA_2017.pdf [https://perma.cc/923D-VXKV]. Central Florida Continuum of Care FL-507 (CoC).

[17] See generally 42 U.S.C. § 11360 (1987) (Reauthorizing the importance of permanent housing for those who are experiencing homelessness).

[18] U.S. Dep't of Hous. and Urban Dev., The 2009 Annual Homelessness Assessment Report to Congress, § iii (2010), available at http://www.huduser.org/publications/pdf/5thHomelessAssessmentReport.pdf [hereinafter U.S. Dep't of Hous. And Urban Dev., 2009 Report]. ("The HMIS Lead agency will properly set up each project in HMIS to ensure accuracy of data collection and abide by Federal and local funding requirements.").

[19] Overcoming Employment Barriers for Populations Experiencing Homelessness, Nat'l Alliance To End Homelessness (Aug. 21, 2013) [hereinafter Overcoming Employment Barriers], http://www.endhomelessness.org/page/-/files/Overcoming%20Employment%C20Barriers%C20for%C20Populations%C20Experiencing%20Homelessness.pdf [http://perma.cc/UTX9-4YW8] (describing how difficult it is to get employers to see past the stereotype surrounding homeless individuals and hire qualified candidates for the job).

37,000 veterans and 171,575 homeless families with children without shelter on a single night.[20] There has been an increase in the number of homeless college students, as seen with the implementation of the McKinney Vento Act.[21] The McKinney Vento Act is designed to ensure that students have an equal opportunity to pursue a post-secondary education as their peers while experiencing homelessness. This is implemented in several ways and allows parents to request transportation to and from school, enroll their child in school without proof of residence and allows the child to participate in any school program or service for which they qualify.[22]

Although the problem seems to be clear (one's lack of motivation to get a job or live a stable life), there are greater factors at play. The demand for affordable housing is much greater than the supply.[23] Those who find homelessness to be a product of laziness fail to consider that children who cannot be employed, college students who are in school full-time, and veterans who fought for our country also experience homelessness.

a. Lack of Affordable Housing

The overarching cause of homelessness in America is the lack of affordable permanent housing on the market.[24] There are plenty of homes available to rent or buy, however, gentrification[25] and overpopulation has led to a competitive housing market that many

[20] U.S. Dep't of Hous. and Urban Dev., 2009 Report, supra note 11, at ii.
[21] See 42 U.S.C. § 11431 (2002).
[22] Id.
[23] See Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (discussing a municipality's right to impose fees on developers in an attempt to improve the lack of affordable housing).
[24] See generally Michelle DaRosa, Comment, When Are Affordable Housing Exactions an Unconstitutional Taking?, 43 Willamette L. Rev. 453, 453 (2007) ("This nomenclature also addresses the problems shared by many communities whose necessary workforce cannot afford to live near where they work and the increasing concerns about the effects of commuting on workers' families, their ability to make a living, and even the environment.").
[25] See Hannah Weinstein, Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification, 62 UCLA L. REV. 794, 805 (2015) (discussing how 'gentrification displaces lower-income residents').

cannot afford.[26] HUD found that homelessness was most prominent in larger cities such as Los Angeles.[27] Individuals and families in need of money, housing, food, and employment, seek out cities where there is a wealth of opportunities. However, the increasing amount of residents in an urban area leads to higher prices and even those with established jobs find it challenging to afford housing. This is even more difficult for those who are in dire need of affordable housing because they cannot afford anything else. There are a ridiculous number of barriers for those struggling to make ends meet to locate an area where affordable housing is attainable. A press release by HUD explains their goal to remove barriers preventing the public from accessing affordable housing.[28] They acknowledge that current regulations have prevented housing supply to match the increased demand.[29] As neighborhoods experience gentrification, the property value rises, accordingly rent in the surrounding area increases and individuals who have resided in these neighborhoods are forced to relocate.[30] Given our current economy, it is grueling for someone to relocate after losing their home due to the surge in rent across cities.[31] There was affordable housing on the market, but with the

[26] See Zoe Loftus-Farren, Tent Cities: An Interim Solution to Homelessness and Affordable Housing Shortages in the United States, 99 CALIF. L. REV. 1037 (2011).
[27] See U.S. Dep't of Hous. & Urb. Dev., HUD 2019 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS (2019) [hereinafter HUD 2019 REPORT], https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2019.pdf [https://perma.cc/6EFE-84SR].
[28] HUD 2019 REPORT, supra note 27.
[29] See Thomas E. Walls, Note, Affordable Housing: Plenty of Demand, But No Supply to Be Found, 24 N.C. BANKING INST. 417 (2020) (describing the economic crisis causing a disproportionate supply and demand for housing. Demand is significantly increasing and the supply of affordable housing is very limited).
[30] See e.g., Richard T. LeGates & Chester Hartman, Gentrification-Caused Displacement, 14 URB. LAW. 31 (1982);
Audrey G. McFarlane, The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power, 8 U. PA J, CONST. L. 1, 5 (2002).
[31] See generally John A. Powell and Marguerite L. Spencer, Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color, 46 HOW. L.J. 433 (2003) (Explaining the negative effects of gentrification on low-income individuals and the gentrifiers).

rise in technology, big companies began to build in cities, pushing out those who could no longer afford to be in the area.[32]

b. Employment Does Not End Homelessness

People will often tell the homeless individuals to "get a job."[33] However, they fail to acknowledge how many of the homeless are employed or lost their job. Homeless individuals who do not work often suffer from a physical or mental disability which prevents them from working.[34] However, employment does not equal housing. Employment does not guarantee that an individual will earn enough to afford the cost of housing. In addition, the Coronavirus resulted in the shutdown of thousands of non-essential businesses which made it even more difficult for those already struggling to pay bills.[35] The stigma[36] equating homelessness to criminality does not apply to those who became homeless due to becoming unemployed, fell ill, or faced another unexpected expense. Furthermore, children do not choose to become homeless. [37] Instead they fall victim to homelessness since they cannot financially support themselves due to their age. Those who are living paycheck to paycheck could be at risk of becoming homeless every month, if unexpected expenses were to arise. While the focus of this paper is not on economics, it is important to consider how the economic status of our country is the driving cause of homelessness.[38] Without understanding the

[32] Id.

[33] Sarah Golabek-Goldman, Note, Ban the Address: Combating Employment Discrimination Against the Homeless, 126 YALE L.J. 1788 (2017).

[34] HUD 2019 REPORT, supra note 27.

[35] See United Nations, Policy Brief: COVID-19 and the Need for Action on Mental Health 2 (2020), https://unsdg.un.org/sites/default/files/2020-05/UN-Policy-Brief-COVID-19-and-mental-health.pdf (Discussing how the economic stress surrounding the pandemic is likely to increase severe mental health risks among homeless and low-income individuals).

[36] Overcoming Employment Barriers for Populations Experiencing Homelessness, supra note 19.

[37] See 42 U.S.C. § 11434a (2) (2002) (Defining a homeless child as an individual who lacks a fixed, regular, and adequate nighttime residence for purposes of qualifying for the McKinney Vento Assistance Act).

[38] See generally Harry Simon, Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities, 66 TUL. L. REV. 631 (1992).

increased cost of living, especially in big cities, one cannot reason why so many people experience homelessness. The inability to pay first and last months rent in addition to a security deposit makes it difficult to rent an apartment. The inability to make a down payment on a car, creates additional expenses getting to and from a job, as when one is forced to opt for unreliable public transportation . Without a house and a car, securing a job has become increasingly difficult and thus these individuals are stuck in a vicious cycle of homelessness and poverty.

B. History of Homelessness

The Homestead Act, implemented in 1862 was the reason many United States citizens were given a free plot of land.[39] However, until the abolition of slavery with the ratification of the Thirteenth Amendment[40] and the subsequent ratification of the Fourteenth Amendment in 1868,[41] most African Americans were not legally allowed to own property. Provided that only white men were allowed to own land at the time, the state legislature limited an entire race and gender from being able to secure land on their own. Slave codes, which had been enacted as early as the early 1600s, prevented those of African American descent from owning land, regardless of their status as free or enslaved.[42] Based upon a 2019 HUD report, African Americans are classified as constituting largest percentage of the homeless, even though only a fraction of the population as a whole.[43] The scope of this paper is not to focus on the disparities between races or how these laws led us to where we are today, but they should be taken into account.[44] Black people composed an

[39] Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. § 175) (repealed 1976).
[40] U.S. CONST. amend. XIII.
[41] U.S. CONST. amend. XIV.
[42] See David F. Forte, Spiritual Equality; the Black Codes and the Americanization of the Freedmen, 43 LOY. L. REV. 569 (1998) ("Slaves had no right of contract or property." David discusses the laws that were in place to keep slaves and free men inferior to that of the white man).
[43] HUD 2019 report, supra note 17.
[44] See, e.g., Dorothy E. Roberts, The Social and Moral Cost of Mass Incarceration in African American Communities, 56 STAN. L. REV. 1271, 1274 (examining the effect

overwhelming 40 percent of the homeless population in 2019,[45] despite only making up 13 percent of the population.[46] Having such a stark disparity between races requires more awareness.[47]

C. Laws Made to Criminalize the Behavior of the Homeless

While the government has made attempts to lend the homeless a hand, there were more initiatives to strip them of their rights and criminalize behavior necessary to their survival. Each city and state has its own laws and ordinances established to deal with the homeless crisis; however, the general undertone of these laws seem to be the same.[48] One can surmise these ordinances' goal is removing the homeless from plain sight and preventing them from polluting the streets in any way possible.[49] Laws prohibiting the homeless from camping, sleeping, or sitting on public property, panhandling, and food sharing were implemented in states across the country such as

---

of incarceration on African Americans); Corinne A. Carey, No Second Chance: People with Criminal Records Denied Access to Public Housing, 36 U. TOL. L. REV. 545, 552 (2005) (focusing on the need of those leaving prison to obtain housing).

[45] Nat'l L. Ctr. On Homelessness & Poverty, Racism, Homelessness, and the Criminal And Juvenile Legal Systems 1 (2020) [hereinafter Homelessness and Poverty], https://Nlchp.Org/Wp-Content/Uploads/2020/08/Racism-Homelessness-And-Criminal-Legal-Systems.pdf.

[46] Id.

[47] See generally Cheryl Nelson Butler, Blackness as Delinquency, 90 WASH. U. L. REV. 1335, 1336 (2013) ("the juvenile court perpetuated existing racial stereotypes about blackness and delinquency and enforced societal notions of race, gender and class stratification.").

[48] See, e.g., Vancouver Mun. Code § 8.22.040 (2002).

[49] See Jessica A. York, Federal Judge Rules, Homeless Camp Residents Given 72 Hours Notice to Vacate, Santa Cruz Sentinel (Apr. 30, 2019), https://www.santacruzsentinel.com/2019/04/29/homeless-camp-follow-proceedings-from-todays-hearing-in-federal-court/ [https://perma.cc/TN3A-QSQ5] (discussing the three day notice homeless individuals who were camping outside in Santa Cruz were given to vacate or have their belongings confiscated and trashed during an official camp sweep).

Florida[50] and California.[51] While we may enjoy many rights, the right to affordable housing is not one.

a) Anti-Camping

Imagine a world where you are fined for sitting on a public street when you had nowhere else to go. This is the harsh reality for thousands of homeless people across the country. Texas is in the process of enacting a ban on camping in unapproved public areas.[52] Some other ordinances include banning public parks from being used as encampment grounds.[53] It appears that banning the homeless from camping in these areas will encourage them to use local resources such as shelters. The camps will be removed, and police officers will be asked to relocate those living in the unapproved areas. It is not uncommon for cities to do camp sweeps where they enter an unapproved area and begin confiscating the tents, blankets and belongings of the homeless.[54] The CDC advised against the sweeps of camps across the country, as they said it would lead to those living there to spread throughout the city, spreading the Coronavirus (COVID-19) along with them.[55] These sweeps will make the homeless finding an area that is not restricted public property or private property even more difficult. Courts have found that the confiscation and destruction of camps to be a violation of their constitutional

[50] See Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D. Fla. 1992) (discussing the unconstitutional way in which the city was arresting homeless individuals for acts of sleeping or standing in public areas).
[51] See Tobe v. City of Santa Ana, 892 P.2d 1145,1152 (Cal. 1995) (determining that it was unconstitutional to enact such a broad statute banning the act of camping or storing personal belongings in a public area).
[52] Tex. H.B. No. 1925 (2021).
[53] See New Proposal Would Restrict Homeless People from Sleeping Within 500 Feet of Parks, Homeless Shelters, CBS L.A. (Aug. 23, 2019), https://losangeles.cbslocal.com/2019/08/23/homeless-sleeping-ban/ [https://perma.cc/Z4Y8-569J].
[54] See Tobe, 892 P.2d at 1152 (mentioning a previous settlement against the city where they agreed to refrain from conducting camp sweeps).
[55] The Centers for Disease Control and Prevention (CDC, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html ("Clearing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.").

rights.[56] Not only are the areas where unsheltered individuals reside being diminished, but the few belongings they have left are confiscated, often leaving individuals with nothing to their name.

Now, imagine a world in which you own a car, and have just been evicted from your home. The only place for you to sleep is in your car. Yet, several cities with anti-homeless laws include a ban on camping, which not only applies to sleeping on the streets but also in your vehicle.[57] In many states, it is illegal to sleep in a "temporary shelter out-of-doors," which refers to a car, tent, or other shelter providing means.[58] Many of the homeless people who have a car are forced to park in lots that are open twenty-four hours a day, such as Walmart, to avoid fines, or possibly have their car impounded.[59]

b) Homeless Are Not a Protected Class

Our system of government has again let down this entire class of people is by failing to acknowledge the homeless population as a protected class. Race, age, gender, and religion all fall under a protected class, however, the homeless do not.[60] A protected class consists of a group of individuals who are legally protected, because they have experienced extreme discrimination and hardship due to circumstances out of their control. The status of "protected class" means that these individuals are free from any employment discrimination, public funding discrimination, and public accommodation discrimination. While history has shown the need to protect minority groups from being discriminated, the homeless require protection as well. There are numerous stories that detail the

[56] See Lavan v. City of Los Angeles, 693 F.3d 1022, 1030 (9th Cir. 2012) ("The City does not—and almost certainly could not—argue that its summary destruction of Appellees' family photographs, identification papers, portable electronics, and other property was reasonable under the Fourth Amendment").
[57] Orlando Mun. Code § 43.52 (2021).
[58] Id.
[59] See TRISTIA BAUMAN ET AL., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 24 (2016), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf (providing information regarding how many states have laws against sleeping in public and the penalties and punishments for such conduct).
[60] Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).

abuse homeless individuals face while living on the streets.[61] A YouTube search for "bum-fighting" loads thousands of videos where individuals are instigating fights with homeless men for entertainment.[62] The National Coalition for the homeless kept track of the violence that occurred against the homeless and found that during a ten year period nearly 250 homeless individuals were beaten to death.[63] These individuals are often attacked on the street, while sleeping by someone looking for a laugh, or are simply chosen as someone weak to pick on.[64] However, as previously stated, the federal government does not acknowledge the homeless as a protected class.[65] There is not one set group of people who make up the homeless population, and to punish them as if they are criminals due to them being unsheltered must be a violation of their constitutional rights. Some states have recognized the homeless as a protected class,[66] but many have not. Most of the hate crimes against the homeless go unreported because many homeless individuals fear the police.[67]

---

[61] See, e.g., Jeff McDonald, Should "Bum-Bashing" Be a Hate Crime?, 15 PUB. INT. L. REP. 115, 116-17 (2010) (discussing the heinous crimes that homeless individuals face while living on the streets and the legislation being passed to eliminate it).

[62] Id.

[63] Nat'l Coalition for the Homeless, Hate, Violence, & Death on Main Street USA 2008, 28 (2009) [hereinafter Nat'l Coalition].

[64] See e.g., Sarah Finnane Hanafin, Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny, 40 Stetson L. Rev. 435, 453-54 (2011) (mentioning several cases in which homeless individuals have been attacked. She describes an incident where two boys beat a homeless man with a bat while he was asleep on a park bench. This man later died in the hospital before being able to identify his attackers).

[65] 28 U.S.C. § 994 (2010) (addressing the matter of violent crime but does not include the homeless as a protected class).

[66] See e.g., Me. Rev. Stat. Ann. tit. 17, § 1151(8)(B) (2009) (empowering judges to issue harsher sentences for hate crimes committed against the homeless); Md. Code Ann., [Crim. Law] § 10-304 (2009) (Adding homelessness to its list of protected classes).

[67] See, e.g., Jeff McDonald, Should "Bum-Bashing" Be a Hate Crime?, 15 PUB. INT. L. REP. 115, 116-17 (2010).

c) Don't Share Food with Homeless

Imagine spending the entire day in the Florida Sun without any food or water because the city has enacted an ordinance that prohibits organizations from sharing food. Non-profit organizations often try to provide the less fortunate with hot meals, however some cities have tried to limit these services by preventing them from sharing food in public spaces.

In 2014 the city of Fort Lauderdale enacted an ordinance which prohibited organizations from providing food for the homeless in outdoor public locations.[68] The ordinance provides that parks are not to be used for social services, but for the public to relax and enjoy themselves.[69] If the homeless cannot afford to purchase food for themselves, nor legally allowed to panhandle, nor allowed to receive food, how would they survive? This feels strikingly familiar to signs warning visitors not to feed the alligators, because they will keep coming back looking for more. Even though there are food pantries throughout cities and organizations that can aid in meeting their needs, the homeless typically do not have a means of transportation.[70] Furthermore, accessing these places may not be an easy task.

d) Sitting/Loitering

In addition to the prohibition on camping, many cities also prohibit loitering or prowling.[71] These ordinances often prohibit loitering if it is done in a manner that is "not usual for law-abiding citizens."[72] However, differentiating the homeless between criminals should not be a hard task. Identifying an individual who may be casing a store versus an individual remaining outside because they have no other

[68] Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).
[69] Id.
[70] See Victoria Vantol, Lack of Reliable Transportation Keeps People in Homelessness (May 9, 2019), https://invisiblepeople.tv/lack-of-reliable-transportation-keeps-people-in-homelessness/ (looking at a 2015 Harvard study that determined reliable transportation as the biggest obstacle for someone trying to overcome homelessness).
[71] Orlando Mun. Code § 43.62 (2021).
[72] Id.

place to stay is easy to spot. It should not be considered criminal activity for an individual to remain in one location for an extended period unless suspicious activity is noticed. Courts have discussed the violation of constitutional rights regarding the inability to travel freely, sit, or camp in public areas.[73]

e) Unlawful Use of Right of Way

Individuals are prohibited from the unlawful use of right of way. Using the median or right of way to panhandle or to solicit rides through hitch-hiking is illegal in many cities.[74] This is also mentioned in the 2012 Florida statute and anyone found guilty could face a second degree misdemeanor.[75] The statute makes it unlawful for an individual to give solicitors a ride.[76] To the contrary, rideshare systems such as Uber and Lyft are used daily and they are considered an exception to this rule.[77] If a homeless individual cannot afford a bus pass or an uber, their only option may be to hitch-hike. If there is another individual willing and able to take them where they need to go, it makes little sense why they should be prevented from doing so. However, it is not only illegal for individuals to use the right of way to solicit money or services, but it is illegal for an individual to give the solicitor a ride.[78]

D. Attempts Made to Hide the Homeless

a) Language of the Ordinances

The language included in several laws and ordinances state they are in place as a matter of "public safety".[79] Homeless individuals are people entitled to the same rights as others and they should be able to sit on a public sidewalk. Claiming that these laws are focused on ensuring public safety, lawmakers are neglecting to acknowledge that

[73] See Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).
[74] Orlando Mun. Code § 43.61 (2021).
[75] FLA. STAT. § 2045 (2012).
[76] FLA. STAT. § 316.130(5) (2020).
[77] FLA. STAT. § 341.031 (2021).
[78] Orlando Mun. Code § 43.61(2) (2021).
[79] Randall Amster, Patterns of exclusion: sanitizing space, criminalizing homelessness, Soc. Justice Vol. 30, No. 1 (91) 195 (2003).

the homeless are a part of the public. They deserve to be protected and kept out of harm's way just as much as individuals who have a stable place to live. It is extremely unsafe for individuals to live on the street[80] and cruel to allow them to starve. Yet, these laws have banned many activities which are necessary to a homeless individual's survival.[81]

In *Food Not Bombs v. City of Fort Lauderdale,* the court stated that the area in which the food was being shared "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness."[82] There is little difference between this group handing out free meals, and a food truck legally allowed to sell in the area. The only difference is Food Not Bombs is giving out free food to a community which mainly consists of the homeless. The crowd that is drawn to a food truck in the park from an organization feeding the less fortunate is vastly different. As with the introduction of hostile architecture, the goal is to keep the homeless from residing in areas where working citizens are often located.[83]

b) Hostile Architecture

In addition to criminalizing behaviors of the homeless, thousands of dollars are spent on "hostile architecture" that ensures they have no place to sleep, sit, or loiter.[84] City planners are responsible for

[80] See Katherine B. O'Keefe, Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws, 52 WM. & MARY L. REV. 301, 315 (2010) (focusing on hate crimes that homeless individuals face from the public).

[81] See e.g., Santa Ana, Cal., Ord. § 10-550(d) (2019).

[82]Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

[83] See Eric Jaffee, The Hidden Ways Urban Design Segregates the Poor, Fast Code Design Company (Aug. 12, 2014, 8:00 AM), www.fastcodesign/3034206/slicker-city/the-hiddenwaysurban-design-segregates-the-poor (showing the ways in which seemingly normal architecture has been designed to push the homeless out of the city). See also Sara Schindler, Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment, 124 Yale L.J. 1934 (2015).

[84] See Sara K. Rankin, The Influence of Exile, 76 MD. L. REV. 4, 47 (2016) ("Some urban design techniques have been described as "weapons" that are used by "architects, planners, policy-makers, developers, real estate brokers, community activists, neighborhood associations, and individuals to wage the ongoing war

designing architecture that makes it impossible to comfortably remain on the grounds for an extended period.[85] A New York bookstore installed sprinklers which would spray individuals attempting to seek shelter.[86] Santa Cruz spent thousands on high pitch signaling boxes to deter loitering.[87] Spikes on furniture or in front of a store, and benches that have arm rest down the entire bench or that are curved to prevent one from sitting on the bench for an extended period of time. Seattle placed bike racks in areas that were full of homeless camps and where a very limited number of people use bikes as transportation.[88] In addition, spikes were added to the ground in front of stores to prevent the homeless from lying down.[89] This architecture is often found in the downtown area where the number of homeless people is usually high.[90]

c) Making the Homeless Invisible

The government has shown that the goal is not to end homelessness but to hide it from those who are not experiencing homelessness. This is done through camp sweeps, anti-camping and anti-sitting ordinances, and architecture made to deter the homeless from

---

between integration and segregation. Such techniques are commonly dubbed as the practice of "hostile" or "disciplinary" architecture, which uses design as a mechanism to reduce the presence of homeless people in urban centers.).

[85] Id.

[86] Gregorett Roberts, Natalie O'Neill, Strand Bookstore 'uses sprinklers to evict homeless', N.Y Post (Nov. 14, 2013, 2:10PM) https://nypost.com/2013/11/14/strand-bookstore-uses-sprinklers-to-evict-sleeping-homeless/.

[87] Phil Gomez, Santa Cruz installs anti-loitering noise boxes along San Lorenzo River levee, (Sept. 9, 2014, 6:42PM) https://www.ksbw.com/article/santa-cruz-installs-anti-loitering-noise-boxes-along--san-lorenzo-river-levee/1329455.

[88] Josh Cohen, New anti-homeless architecture: Seattle uses bike racks to block rough sleepers, The Guardian (Jan. 24, 2018, 2;30PM), https://www.theguardian.com/cities/2018/jan/24/anti-homeless-architecture-seattle-bike-racks-block-rough-sleepers.

[89] Id.

[90] See generally Robert C. Coates, Ending Chronic Homelessness in America's Major Cities--The Justice Systems' Duty, 42 U.S.F. L. REV. 427 (2007) (discussing the role of the government to solve the problem of homelessness in America, prominently in large cities).

remaining in one area for an extended period. They want to ensure that revenue continues to come in through cities that are riddled with homelessness.[91] Big events such as festivals like EDC take place in big cities, which result in camp sweeps in the festival's surrounding areas.[92] The same is also true for areas such as Miami when huge football games occur. In many cities like Orlando, the homeless are shuffled out of the areas they call home, often through camp sweeps where most of their belongings that they cannot travel with are confiscated.[93] It would reflect poorly if we held events in areas where the only visible street art is a tent city created by a homeless camp. Therefore, in cities like Portland, the homeless are removed from the area in order to keep appearances up and keep money flowing through the community.[94] This additional revenue stream is not being used to redirect or improve the homeless situation but to increase property values by drawing in upper class citizens.[95] The problem is, local political leaders often ignore the homeless residing in these areas and choose not to enforce certain ordinances until the time has come for a big event, where all of those individuals are then pushed out of the camps where they reside. It is not uncommon for homeless

[91] Jesse Van Tol, Yes, you can gentrify a neighborhood without pushing out poor people, The Wash. Post (April 8, 2019) ("But for many neighborhoods, gentrification represents much-needed investment. Local residents welcome the resurrection and revival of neglected and disinvested areas. Community leaders desire capital investments, leading to better services, jobs, thriving businesses and other components of a healthy, vibrant neighborhood.").

[92] See Civil Rights, The Five Pillars of NCH's Civil Work Right, Nat'l Coalition for Homeless, http://nationalhomeless.org/issues/civil-rights/ [https://perma.cc/L5SM-R3UE] (last visited Nov. 29, 2021).

[93] Complaint, Orange Cty. Catholic Worker v. Orange County, No. 8:18-cv-00155 (C.D. Cal. Jan. 29, 2018) (regarding police sweeps in Orlando).

[94] Angelica Thornton, Portland prioritizes homeless camp cleanups ahead of high-profile events, Katu (Sept. 21, 2021) https://katu.com/news/homeless-crisis/portland-prioritizes-homeless-camp-cleanups-ahead-of-high-profile-events.

[95] See John A. Powell & Marguerite L. Spencer, Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color, 46 HOW. L.J. 433 (2003).

individuals to camp out in the woods to avoid run-ins with law enforcement.[96]

E. Court Opinion on Criminalization Practices

This criminalization of the homeless has been most recently addressed in *Martin v Boise* where the United States Supreme Court upheld a United States Circuit Court of Appeals for the Ninth Circuit decision, striking down the ordinance which criminalizes the homeless for sleeping outside.[97] In this case, each of the six plaintiffs had been cited for violating one of two Boise City ordinances.[98] These ordinances included the camping ordinance and the disorderly conduct ordinance.[99] The Court concluded that as long as a criminal penalty was imposed, these ordinances violated the Eighth Amendment's protection against cruel and unusual punishment.[100] If an individual is homeless and no alternative shelter is available then it is cruel and unusual to cite such an individual. Their constitutional right to travel has been violated.[101]

---

[96] See Sarah Harris, After Months Of Homelessness, A Teen Leaves The Woods Behind, NPR (May 24, 2014, 3:12pm) https://www.npr.org/2014/05/24/311112125/after-months-of-homelessness-a-teen-leaves-the-woods-behind (interviewing a young girl sharing her experience about having to live in the woods after becoming homeless).

[97] Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019); City of Boise v. Martin, 140 S. Ct. 674 (2019).

[98] Id. at 603 ("Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances.").

[99] Id. at 604 ( "The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof.").

[100] Id. at 589 ( "On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in all public spaces, when no alternative sleeping space is available, violate the Eighth Amendment. ...local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions.")

[101] See Tobe v. City of Santa Ana, 892 P.2d 1145,1083 (Cal. 1995) ("The Court of Appeal majority, relying in part on this evidence, concluded that the purpose of the

In *Food Not Bombs*, the Court declined to address whether or not the city ordinance banning food sharing was a violation of the First Amendment or was unconstitutionally vague.[102] Instead, they ruled that food sharing was not considered expressive conduct under the First Amendment.[103] However, they reversed the district court's ruling, which granted a summary motion to the city.[104] Based on this ruling, it would make sense for the district court to review the vagueness and unconstitutionality, if any, of the ordinance. Food not Bombs is a non-profit organization that provides hot meals for those in need and are typically found in public areas that are hotspots for the homeless. The organization believes "that food is a human right, not a privilege, which society has a responsibility to provide for all."[105] Prior to summer 2020, the City of Fort Lauderdale enacted a park rule which read, "Parks shall be used for recreation and relaxation, ornament, light, and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs."[106] To limit the ability of organizations such as the one described above from being able to serve those in need while failing to advise organizations on how to provide these services without violating any rule or ordinance is unacceptable.[107] The United States Court of

---

ordinance—to displace the homeless—was apparent. On that basis, it held that the ordinance infringed on the right to travel, authorized cruel and unusual punishment by criminalizing status, and was vague and overbroad.").

[102] Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1238 (11th Cir. 2018).

[103] Id. at 1238 ("The district court granted summary judgment in favor of the City. It held that FLFNB's outdoor food sharing was not expressive conduct protected by the First Amendment and that the ordinance and park rule were not vague.")

[104] Id.

[105] Id. at 1272

[106] Id. at 1272

[107] Id. at 1273 ("The Park Rule commits the regulation of FLFNB's protected expression to the standardless discretion of the City's permitting officials. The Park Rule bans social service food sharing in Stranahan Park unless authorized pursuant to a written agreement with Fort Lauderdale (the "City"). That's all the rule says. It provides no guidance and in no way explains when, how, or why the City will agree in writing.").

Appeals for the Eleventh Circuit found that the park rules violated the First Amendment and remanded the case back to the district court for further proceedings.[108]

Although it is an older case, *Pottinger v City of Miami* emphasizes the criminalization and fear mongering tactics that have been placed on the homeless for decades.[109] In this case, the United States District Court for the Southern District of Florida found that the Fourth and Eighth Amendments had been violated, and the ordinances used to arrest the homeless were overbroad.[110] The court found that imposing criminal penalties on those with no available shelter was cruel and unusual punishment under the Eighth Amendment.[111] The court also found that seizing the property of the homeless on public property was a violation of the Fourth Amendment's protection against unlawful search and seizure.[112] These practices have become standard because most of the time, those falling victim to them cannot afford to legally defend themselves.[113] This ruling is consistent

---

[108] Id. at 1297 ("The long and short of it is that the Park Rule as applied to the Plaintiffs' expressive food sharing activities violates the First Amendment. Accordingly, we REVERSE the district court's summary judgment order and REMAND for further proceedings consistent with this opinion.").

[109] See Pottinger v. City of Miami, 810 F.Supp. 1551, 1583 (S.D. Fla. 1992) ("The court concludes that the City's practice of arresting homeless individuals for performing inoffensive conduct in public when they have no place to go is cruel and unusual in violation of the eighth amendment, is overbroad to the extent that it reaches innocent acts in violation of the due process clause of the fourteenth amendment and infringes on the fundamental right to travel in violation of the equal protection clause of the fourteenth amendment. The court further concludes that the City's seizure of plaintiffs' personal property violates their fourth amendment rights.").

[110] Id. at 1583

[111] Id. at 1577

[112] Id. at 1573

[113] Luis Almodovar & Stacy McNally, Are You Worried About Going to Jail? The Public Defender's Office Homeless Outreach Program, 36 STETSON L. REV. 183, 183-84 (2006) ("The majority of criminal cases are resolved through plea bargains. This holds true for homeless defendants as well. Some plead guilty or no contest because they are guilty; however, others enter pleas simply to resolve the court process quickly. A homeless defendant who receives a plea offer of ten days in jail on an ordinance violation will usually take the offer, because he or she will most likely remain in jail for more than ten days while awaiting another court hearing or trial. Furthermore, homeless and transient individuals do not usually meet the

with the views from Tobe v. Santa Ana, which stated that "[i]t may not, however, penalize individuals who have committed only the offense of being without shelter. Sleeping outdoors under a blanket is neither dangerous nor unhealthful to anyone other than the homeless persons who do so as a matter of necessity."[114]

According to the Eleventh Circuit Court of Appeals, if there is a legitimate government purpose and a fundamental right is not infringed upon then the ordinance is constitutional.[115] Although, when you take a closer look at some of these laws, it is hard to see a legitimate purpose. The Eleventh Circuit found that sleeping outside is not a fundamental right and the homeless are an unprotected class.[116] The court did not find the right to housing an essential right, rather a means to enlarge the gap between the upper and lower class.[117] Restricting all of these activities leaves the homeless with little to no way of improving their situation. We are now seeing a significant rise in the homeless population, following the devastating economic effects of COVID-19, as these ordinances continue to haunt the homeless.

F. Improving the Situation

As the issue of homelessness has grown, the government has provided individuals with some solutions to their problems. To aid the homeless, the federal government has provided funding for affordable housing programs, forlow-income individuals, a guaranteed education to those experiencing homelessness, and transitional housing. While these programs have been helpful to many individuals, more funding for these programs is necessary to

---

criteria for release on their own recognizance because they do not have permanent addresses.").

[114] See Tobe v. City of Santa Ana, 892 P.2d 1145,1152 (Cal. 1995).

[115] Bannum, Inc., v. City of Fort Lauderdale157 F.3d 819, 822 (11th Cir.1998) ("If an ordinance does not infringe upon a fundamental right or target a protected class, equal protection claims relating to it are judged under the rational basis test; specifically, the ordinance must be rationally related to the achievement of a legitimate government purpose.").

[116] Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000).

[117] Id.

meet the demand for housing.[118] The only way to end homelessness is to have affordable housing for individuals experiencing it. We can offer temporary shelter, access to education, job assistance but without a permanent home, the main problem will stay unsolved.

a) Equal Opportunity to Pursue an Education

The McKinney Vento Act of 1987 was established to ensure homeless children an equal opportunity to pursue the same education as their peers.[119] This guaranteed that homeless children would be able to enroll and attend public school.[120] In addition, the Florida statutes require tuition and fee waivers for homeless students enrolled in or applying to a Florida College.[121] Federal tuition waivers are provided to students who are experiencing homelessness, but again this does not provide them permanent housing. Students struggling with homelessness must constantly worry about their safety, their next meal, and remain in good academic standing to stay enrolled at university. While it is important to ensure that students are receiving a proper education, providing them free tuition while they are living on the streets seems to be counterproductive. Children and adults need stability and the comfort of knowing they are safe when they go to sleep rather than just a seat in the classroom. Therefore, the idea that providing a free education to students who do not have a bed to sleep in at night is providing them an "equal education" as their peers is misconceiving. The ability of a student to perform well after a good night's rest and waking up to a hot meal, versus a student who has

[118] See Rental Burdens: Rethinking Affordability Measures, U.S. DEP'T HOUSING & URBAN DEV., https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html [https://perma.cc/DAG2-TA8D] (last visited Nov. 29, 2021). HUD defines rent-burdened families as those "who pay more than 30 percent of their income for housing" and who may, as a result, "have difficulty affording necessities such as food, clothing, transportation, and medical care."

[119] 42 US Code §11431 ("Each State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths.").

[120] Id.

[121] FLA. STAT. § 1009 (2021).

slept outside or in their car and must search for change to find breakfast, does not equate to equal opportunity.

b) Affordable Housing Programs

The best attempt made by the government to aid low-income families was the implementation of affordable housing programs. The Department of Housing and Urban Development is responsible for overseeing all operations of the public housing programs. The Section 8[122] Housing Program is the most used form of housing assistance. This program provides vouchers to low-income individuals to pay for privately owned housing.[123] HUD provides federal funding to Public Housing agencies who pay the landlord a direct subsidy on behalf of the tenant.[124] There are other options such as subsidized housing and public housing which provide affordable housing or reduced rent.[125]

c) Transitional Housing

Transitional housing is typically run by state or non-profit organizations to provide temporary housing and case managers to individuals experiencing homelessness. Case managers are assigned to individuals to find them services for which they qualify and may be in need of. Transitional housing can vary in the time they allot everyone to stay, some being overnight shelters and others allowing some to stay for weeks at a time. Transitional housing is not meant to be an end point but a steppingstone in getting you to that end point, which would be permanent housing. Temporary housing, while helpful, is still not a solution to the problem. While we may be able to find a shelter to house these individuals temporarily, most shelters

[122] 42 U.S.C § 1437 (2016).
[123] Id.
[124] 24 C.F.R. § 982.1 (2015) (Section 8 assistance may be "tenant-based" or "project-based". In project-based programs, rental assistance is paid for families who live in specific housing developments or units. With tenant-based assistance, the assisted unit is selected by the family. The family may rent a unit anywhere in the United States in the jurisdiction of a PHA that runs a voucher program.).
[125] Id.

place a limitation on how long someone can remain.[126] If an individual stays for the allotted time and if forced to leave, they may end up right back on the streets. Even when homeless shelters have space, it takes a lot of time to get into one and some shelters will not allow individuals who have exhausted their allowed time to remain.[127] This time constraint also leaves the homeless with no options but to live on the streets.

G. Failure to Properly Manage the Problem

Criminalizing inevitable acts committed by the homeless[128] leads to a vicious cycle: homelessness cannot end due to the barriers created by their economic status and lack of shelter. Homeless individuals cannot afford to pay fines for attempting to find a safe place to sleep, but if the fines are not paid they could end up incarcerated or have their license suspended which would add to the endless list of challenges they must overcome prior to not even receiving but applying for a job. Furthermore, to have their license reinstated unless they pay the fine, then they are left with limited options. Without a license, individuals are unable to obtain employment which would allow them to pay their bills, however, individuals cannot afford to obtain a license without a job , therefore leaving them in a never ending cycle of trying to escape their situation. In addition to the difficulty of getting a job without a license, if an individual was arrested due to an ordinance that has criminalized them while experiencing homelessness, an employer has access to these records and is less likely to consider them as a suitable candidate This makes

[126] Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019) (discussing the inability of some homeless individuals to be admitted into a homeless shelter and being forced to sleep on the street).

[127] Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006) ("so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public.").

[128] Las Vegas, Nev., Code §§ 10.86.010-.040 (2019) (prohibiting the act of sitting, sleeping, or camping on any public right-of-way).

it even more difficult for these individuals to find permanent housing and escape the cycle.

The purpose of establishing new laws is to protect our citizens from harm. However, as seen in San Francisco, decriminalizing the behavior of the homeless still does not solve the problem: they continue to face the worst homeless epidemic, even after decriminalizing certain ordinances.[129] The city of San Francisco removed many ordinances that would criminalize the homeless and camps began appearing all over the city. Certainly, cities should not be decriminalizing acts of prostitution or public drug use, regardless of which individuals commit those infractions. These are acts which should not be initiated and established, especially on the public streets.[130] However, camping or sleeping in public should not be criminalized. There are behaviors that are necessary to the survival of a homeless individual. On the other hand, the commission of vice crimes should remain illegal as they are not crucial to an individual's survival.

H. Government Funded Housing Programs

The government found ways to assist the homeless to some extent, but with the increasing rate of both rent and homeless individuals, shows more needs to be done. Programs such as providing emergency housing for people in crisis, permanent supportive housing, and public housing have been in place to assist individuals in

[129] Chris Herring, Dilara Yarborough, Tony Sparks, Criminalization Fails to End Homelessness in San Francisco, Hous. Matters an Urb. Inst. (July 29, 2020), https://housingmatters.urban.org/research-summary/criminalization-fails-end-homelessness-san-francisco

[130] See Tobe v. City of Santa Ana, 892 P.2d 1145,1131 (Cal. 1995) ("The City is not required, of course, to open all its public spaces at all hours to the homeless or to tolerate dangerous or unhealthful conduct. For example, it may enforce existing ordinances against such "camping" behavior as the erection of semi-permanent structures, outdoor cooking, and public defecation and urination. It may also enforce existing laws against public drunkenness, drug use, vandalism, assault, theft, and similar misconduct. It may not, however, penalize individuals who have committed only the offense of being without shelter. Sleeping outdoors under a blanket is neither dangerous nor unhealthful to anyone other than the homeless persons who do so as a matter of necessity. Similarly, if the City does not choose to provide storage places for the personal property of the homeless, it may not criminalize their discreet "storage" of personal belongings in public areas.").

finding an affordable home.[131] While programs such as shelters and temporary housing assistance have been implemented, it does not solve their permanent housing needs.[132] Shelters are meant to be transitional places until the individual can get settled, whereas public housing programs provide a permanent solution in which individuals can remain in one unit for an extended period.

Public housing is managed by HUD to provide safe rental housing at a discounted rate to low-income individuals. HUD can be funded through two separate means: the public housing operating fund, and the public housing capital fund. While many argue that there should not be taxpayer funded housing, it was found that Spokane spent 3.7 million enforcing laws which criminalize the homeless.[133] The cost of incarcerating the homeless for criminalization ordinances was close to 2 million.[134] Had this money been allocated to increase funding for permanent housing and criminalization ordinances were removed, we would see a significant decrease in the homeless population. Taxpayer money is being used to enforce ordinances that aggravate rather than solve the problem. It is less financially reasonable to keep the homeless incarcerated or hospitalized than it would cost to provide a case manager who could assist them with job applications and finding permanent housing. A study found that taxpayers saved 4 million dollars after their city housed only ninety-five residents through the Housing First movement.[135] If there was more focus on solving homelessness and less on criminalizing it, taxpayer money

[131]See Salley Kim, Note, Preventing Shelternization: Alleviating the Struggles of Homeless Individuals and Families in New York City, 42 FORDHAM URB. L.J. 1019, 1034 (2015) (examining the various government funded housing programs).
[132] Id. at 1034 ("these housing initiatives are limited and fail to meet the high demand of low-income individuals and families.")
[133] See Howard, Joshua; Tran, David; and Rankin, Sara, At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle and Spokane (2015) Homeless Rights Advocacy Project. 10. https://digitalcommons.law.seattleu.edu/hrap/10.
[134] Id.
[135] Mary E. Larimer et al., Health Care and Public Service Use and Costs Before and After Provision of Housing for Chronically Homeless Persons With Severe Alcohol Problems, 301 JAMA 13 (2009), http://jama.jamanetwork.com/article.aspx?articleid=183666.

could be used effectively, and law enforcement could allocate more resources to actual crimes.

## Conclusion

While many people believe homelessness is a choice, many individuals struggling with homelessness were unexpectedly placed into this life and struggle every day to survive. There are several laws and ordinances in place that make it next to impossible for unsheltered individuals to prevent being thrown in jail or faces fines. Laws made to prevent people from “choosing” this lifestyle are ineffective. Most homeless individuals did not choose to become homeless and therefore criminalizing behavior necessary to their survival is cruel and ineffective. States which enforce criminalization ordinances are wasting money and resources by failing to allocate more funding for permanent housing programs. Many courts have decided that it is unconstitutional to punish individuals for behavior in which they are forced to due to a lack of resources available to them. Even after considering the amount of discrimination the unsheltered class may face, the courts have yet to recognize them as a protected class, leaving them extremely vulnerable. To meet the demand for affordable housing, the supply of affordable housing needs to be addressed.

# THE EXPONENTIAL RISE OF CYBERCRIME

Tyler Jackson Ruposky

## Introduction

It is undeniable that cyberspace and, more recently, cybercrime have dominated our lives over the last few decades. It has been a common theme in entertainment, with books such as George Orwell's *1984* and movies like *The Matrix*, both of which are iconic in the science fiction world. The cyber tendencies of our world are continually discussed in the news cycle: cryptocurrency trends, Meta and the Metaverse[1]—a completely digital world presented through virtual-reality—and there is seemingly always a data breach from some company. The rapid advancement in technology and the increasing availability of it have allowed for a boom in technological accessibility and capability. A natural byproduct of this accessibility, though, is a massive increase in cybercrime. Cybercrime complaints are exponentially increasing,[2] yet cybercrime prevention and mitigation has only recently garnered attention. Ultimately, cybercrime has been rising because of the general legal and technical difficulties involved in enforcing it, the perception of cyberspace may not be entirely developed yet, and cybercrime can be very lucrative given the tactics employed by cybercriminals.

## The Rising Frequency and Cost of Cybercrime

The rise of cybercrime is made clear by the annual Internet Crimes Report, which is produced by the Internet Crimes Report Center, who reports to the Federal Bureau of Investigation (FBI).[3] As cybercrime

[1] See Brooks Canavesi, What Is the Metaverse: Where We Are and Where We're Headed, Association for Talent Development (Jan. 5, 2022), https://www.td.org/atd-blog/what-is-the-metaverse-where-we-are-and-where-were-headed (Last Accessed Feb. 16, 2022).

[2] U.S. FBI & Internet Crime Complaint Center, Internet Crime Report, (2020), https://www.ic3.gov/Media/PDF/AnnualReport/2020_IC3Report.pdf (Last Accessed Feb. 15, 2022).

[3] See FBI Internet Crime Complaint Center, About Us, available at https://www.ic3.gov/Home/About.

complaints rise, the resulting monetary damages will naturally rise alongside it. The most recent Internet Crime Report contains data for 2020 and details the increasing frequency and cost of cybercrime.[4] According to the 2020 report, since 2016, there has been a total of 2,211,396 complaints.[5] There has been a steep upward trend in cybercrime complaints since 2016, too. In 2016 alone, there were 298,728 complaints.[6] In those complaints, damages were estimated at 1.5 billion dollars.[7] Four years later, in 2020, there were 791,790 complaints, which is more than double the number of complaints in 2016.[8] The monetary damages for cybercrime in 2020 were estimated to be 4.2 billion dollars.[9] Previous publications of this report show a similar upward curve.[10] In the 2016 Internet Crime Complaint Center (IC3) report, another snapshot of yearly statistics tell a similar story. In the four-year span from 2012 to 2016, there were about 11.4 million complaints with $4.63 billion in losses.[11]

The hardware and software necessary to combat cybercrime, on a large scale, can host exorbitant prices.[12] Simply having the best components for cyber defense, however, does not inherently mean a network is secure. A diverse team of computer scientists and cybersecurity experts must utilize that equipment to create a safe network. Additionally, as technological advancements occur or new computer viruses appear, the network and its security must be maintained and updated. As new software for computers releases, the hardware will have to be upgraded to effectively combat

[4] FBI, supra note 2.
[5] Id. at 5.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] U.S. FBI & Internet Crime Complaint Center, Internet Crime Report, (2016), https://www.ic3.gov/Media/PDF/AnnualReport/2016_IC3Report.pdf (Last Accessed Feb. 15, 2022).
[11] Id. at 2.
[12] See Praveen Yeleswarapu, More than just numbers- calculating the real ROI of a good cyber defense system, BLUSPAPHIRE Intelligent Cyber Defense (Nov. 12, 2021), https://www.blusapphire.com/blog/calculating-the-real-roi-of-a-good-cyber-defense-system, (Last Accessed Feb. 15 2022).

cybercriminals. As a result, between acquiring the equipment, assembling a skilled team, and performing necessary upkeep, the costs of cybersecurity drastically skyrocket.

The costs of cyber defense will vary for every business or individual depending on various factors, such as a business' size and the type of data being stored. However, even though massive corporations have started investing tremendous amounts into cybersecurity, there has been a major phenomenon emerging. Eric Rosenbaum, a senior editor for the Consumer News and Business Channel (CNBC), describes this anomaly by stating "in many cases, increased spending on cybersecurity in recent years hasn't resulted in better protection against hackers."[13] Two days later, Aleksandr Yampolskiy, the co-founder and CEO of Security Scorecard,[14] explained cybersecurity spending to *Cybercrime Magazine*.[15] In a video interview, he describes a tale of two companies: one that does not spend enough on cyber defense, and another that puts money into cyber defense, but does not spend it wisely.[16] Yampolskiy then suggests that companies are not approaching cybercrime in the correct way.[17] He explains that companies wish to become an "impenetrable fortress" but scolds that mentality, claiming it is "a futile effort, you're always gonna get hacked."[18] He suggests that companies prepare in a

[13] Eric Rosenbaum, Microsoft's $20 billion plan for cybersecurity's big spending problem, CNBC (Sep. 8, 2021, 10:04 AM EDT), https://www.cnbc.com/2021/09/08/microsofts-20-billion-and-cybersecuritys-big-spending-problem.html (Last Accessed Feb. 15, 2022).
[14] SecurityScorecard, see also Customers at https://securityscorecard.com/customers (It is also worth noting that SecurityScorecard rates the cybersecurity of multiple large companies, such as Liberty Mutual Insurance and Nokia).
[15] Cybercrime Magazine, see also About Us at https://cybersecurityventures.com/our-company/ (The Magazine is published by Cybersecurity Ventures, a leading firm in cyber research. Cybercrime Magazine is their media outlet).
[16] Cybercrime Magazine, Cybersecurity Budgets & Spending: Aleksandr Yampolskiy, CEO at SecurityScorecard, YouTube (Sep. 10, 2021), https://www.youtube.com/watch?v=kO6wpXnU7e0 (Last Accessed Feb. 15, 2022).
[17] Id. (relevant comment beings at 0:21s mark).
[18] Id.

manner that a hacker will inevitably get in,[19] and to focus on "build[ing] the right capabilities to recover from that."[20] This spending, though, is not limited to just businesses.

The federal government has also been increasing its investments into cybersecurity. The recent $1.2 trillion Infrastructure Investment and Jobs Act allocates funding to a wide range of areas.[21] Over the course of four years, $1 billion will be for cybersecurity.[22] In 2022, there will be $200 million authorized for cybersecurity under Section 70612, or the 'State and Local Cybersecurity Improvement Act.'[23] The amount fluctuates in the years after, but it ultimately equals $1 billon in cybersecurity spending for this Act. Indeed, Mark Weatherford, an experienced cybersecurity strategist in both the private and public sector, noted in "Making the Most of the New Federal Cybersecurity Money"[24] that the $1 billion in grants is "…the biggest federal investment in state and local cybersecurity to date."[25] Despite increases in spending on combatting cybercrime, prosecution remains difficult and data on it is extremely limited.

Prosecuting Cybercrime

Recent IC3 reports make it clear that cybercrime is becoming prevalent and costly.[26] Despite this increase in frequency and cost, it has been onerous to prosecute cybercrime. A combination of jurisdictional and technological issues can make cybercrime elusive for prosecutors. The difficulties in prosecuting cybercrime are evident

[19] Id. (relevant comment occurs at 0:48s mark).
[20] Id. (relevant comment occurs at 0:54s mark).
[21] Text - H.R.3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act, H.R.3684 (enacted), 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3684/text. (Last Accessed Feb. 15, 2022).
[22] Id. at Sec. 70612, STATE AND LOCAL CYBERSECURITY GRANT PROGRAM.
[23] Id.
[24] Mark Weatherford, Making the Most of the New Federal Cybersecurity Money, Governing (Feb. 8, 2022), https://www.governing.com/security/making-the-most-of-the-new-federal-cybersecurity-money (Last Accessed Feb. 15, 2022).
[25] Id.
[26] FBI Crime Complaint Center, supra note 2.

through the statistics included in the 2010 Internet Crime Report.[27] The 2010 report shows IC3 analysts compiling 1,420 cases representing 42,808 complaints.[28] While prepared cases do not necessarily equal prosecutions, the Internet Crime Center was only able to prepare about 3.3 percent of complaints as cases. In the same report, law enforcement only put together 698 cases of 4,015 complaints and requested FBI assistance on 598 cybercrime matters.[29] On those prepared by the FBI analysts, there were thirty-one arrests and six convictions.[30] Subsequent IC3 reports do not disclose the number of convictions or prosecutions, only complaints.[31] The 2010 IC3 report is limited to the fifty States and the District of Colombia.[32] Contrastingly, the 2020 IC3 report includes fifty-seven localities, including Puerto Rico, Virgin Islands, Guam, and other territories.[33]

This lack of data is not limited to any single jurisdiction, though. In February 2013, the United Nations Office on Drugs and Crime (UNODC) published a global report of cybercrime.[34] With over two decades of cybersecurity experience combined, Allison Peters and Amy Jordan explain that "UNODC's 2013 draft Comprehensive Cybercrime Study found that most of the nearly seventy United Nation Member States surveyed were not able to provide cybercrime

[27] U.S. FBI & Internet Crime Complaint Center, Internet Crime Report, (2010), https://www.ic3.gov/Media/PDF/AnnualReport/2010_IC3Report.pdf (Last Accessed Feb. 15 2022).
[28] Id. at 20.
[29] Id. at 3.
[30] Id. at 5.
[31] FBI Complaint Center, see also supra note 2. (This report does not mention the actual number of statistics. Prosecution statistics are also absent from the 2016 report).
[32] FBI Complaint Center, supra note 27, at 23.
[33] FBI Complaint Center, supra note 2, at 26.
[34] United Nations Office on Drugs and Crime, Comprehensive Study on Cybercrime Draft, UNODC (Feb. 2013), https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf (Last Accessed Feb. 15, 2022).

enforcement statistics."[35] In Section 1.3, the UNODC report notes that cybercrime is not easily defined or identified and that leads to statistics being much rarer when compared with other crime types.[36] While the statistics for cybercrime are limited, they do show an alarming and exponential rise in cybercrime and the difficulties in prosecuting it.

Cybercrime has abundant legislation surrounding it for prosecution in many jurisdictions across the globe. In the United States, the federal statutory law for prosecuting cybercrime exists in a number of statutes, but the primary statute is the Computer Fraud and Abuse Act (CFAA).[37] This act was passed in 1984 and has been the go-to statute for cybercrimes. However, there are other statutes that have cybercrime enforcement provisions built into them, such as the Electronic Communications Privacy Act.[38] The Public Broadcasting Service (PBS) notes that this statute was "amended by Congress in 1994 when the Communications Assistance for Law Enforcement Act (CALEA) was passed."[39] Moreover, "The amended [Electronic Communications Privacy Act] required telecommunications carriers to modernize their equipment so that they comply with authorized electronic surveillance."[40]

Furthermore, in addition to federal laws, the National Conference of State Legislatures (NCLS) explains that "All 50 states have computer crime laws…"[41] These statutes lay out computer crimes, but certain

[35] Allison Peters & Amy Jordan Countering The Cyber Enforcement Gap: Strengthening Global Capacity on Cybercrime 10 J. Nat'l Security L. & Pol'y 487 (2020).
[36] United Nations Office on Drugs and Crime, supra note 34, at 6.
[37] Fraud and related activity in connection with computers, 18 U.S.C.A. §1030 (2020).
[38] Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C.A. §§ 2510-2523 (2002).
[39] PBS, Computer Crime Laws, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/hackers/blame/crimelaws.html (Last Accessed Feb. 16, 2022).
[40] Id.
[41] NCSL, Computer Crime Statutes, Nat'l Conference of State Legislatures (Sept. 9, 2021), https://www.ncsl.org/research/telecommunications-and-information-

statutes omit a jurisdictional comment. Some statutes, like Florida's computer crime statute, have a provision that clearly establishes jurisdiction.[42] According to Florida law, someone who accesses a computer in one jurisdiction, but is physically located in another, has committed a crime in both jurisdictions.[43]

The Issue of Venue

*U.S. v. Auernheimer* demonstrates the complications in establishing venue for cybercrime that crosses numerous state boundaries.[44] Andrew Auernheimer was charged with conspiracy to commit crimes under the Computer Fraud and Abuse Act after he discovered a flaw in the AT&T systems.[45] He had a co-conspirator, Daniel Splitter, that he never met in person, and their interactions occurred only through chat rooms online.[46] Daniel Splitter lived in California at the time and Auernheimer was in Arkansas.[47] The servers they accessed were physically located in Dallas, Texas and Atlanta, Georgia.[48] Auernheimer made this flaw public after the program began to collect email addresses, and it was quickly fixed.[49] A reporter from the *Gawker* named Ryan Tate, who was not in New Jersey, wanted to publish this story. Auernheimer agreed and thus shared the list of email addresses with Tate in hopes of validating the publication.[50]

The article contains photos of screenshots of numbers and email handles with black lines covering them, but it still identifies the owner of the email addresses.[51] For example, a photo has a black line

technology/computer-hacking-and-unauthorized-access-laws.aspx (Last Accessed Feb. 16, 2022).

[42] Fla. Stat. § 815.06 (2019).

[43] Id. at § 815.06(8).

[44] U.S. v. Auernheimer, 748 F.3d 525 (3d Cir. 2014).

[45] Id. at 530.

[46] Id. at 531.

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Ryan Tate, Apple's Worst Security Breach: 114,000 iPad Owners Exposed, Insider (June 9, 2010, 5:04 PM), https://www.businessinsider.com/apples-worst-security-breach-114000-ipad-owners-exposed-2010-6 (Last Accessed Feb. 20, 2022).

censoring an email address, and the only visible parts are some numbers from an Integrated Circuit Card Identifier (ICC-ID) and the handle of an email address.[52] To the right, a red arrow indicates who the email address belongs to, along with their title.[53] The article, posted on *Business Insider*, claims that "affected accounts included…staffers in the Senate, House of Representatives, Department of Justice, NASA…"[54] and other high-profile individuals. The article from the official Gawker site returns a 404 error, indicating that the article has been removed.

Despite Auernheimer, Splitter, and Tate not residing in New Jersey, and the servers not being located in New Jersey, the government insisted that the proper venue was New Jersey because customers impacted were located in New Jersey.[55] In this case**,** the district court ultimately disagreed with the lower court and held that New Jersey was not the proper venue.[56] The court explained that "Auernheimer was hauled over a thousand miles from Fayetteville, Arkansas to New Jersey"[57] and his frustrations with being uprooted are valid because the venue was improper. The court also explained the importance of venue and the ties it has in the founding of our nation, and explained that the Supreme Court has never held improper venue as a harmless error.[58] The court wrote that improper venue is a structural error because of the Constitutional implications.[59] Quoting the United States Court of Appeals for the Tenth Circuit, the court explained "'if venue is improper no constitutionally valid verdict could be reached regardless of the [potentially] overwhelming evidence against the defendant."[60] The court then determined that Auernheimer's substantial rights were "clearly affected."[61] Along with substantial

[52] Id.
[53] Id.
[54] Id.
[55] U.S. v. Auernheimer, 748 F.3d 525 (3d Cir. 2014).
[56] Id. at 541.
[57] Id. at 540.
[58] Id. at 539.
[59] Id. at 538.
[60] Id. at 538 (quoting United States v. Miller, 111 F.3d 747, 757 (10th Cir.1997)).
[61] Id. at 538.

rights being violated, the court also noted that the "essential conduct elements"[62] did not occur in New Jersey, and there is no evidence to suggest that they did. In the conclusion, the court acknowledges the complications of technology, and states that "we must remain mindful that cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits on venue."[63] Ultimately, Auernheimer's conviction was vacated because of the improper venue.[64]

Data Breaches Have Changed How Society Views Cybercrime

The increased spending on combatting cybercrime has been a result in a change of perception in cybercrime, and cyber defense spending will only increase as damages have an upward trend of severity and become more publicized. Companies have shown interest in defending the digital data they keep, especially after notable data breach settlements. One the most notable data breaches is the Equifax Data Breach, which occurred in 2017.[65] In this event, the credit bureau Equifax suffered a data breach that resulted in 147 million people's personal information being exposed.[66] The data breach was ultimately the result of Equifax not applying a patch to a vulnerability found in Apache Struts.[67] The Apache Software Foundation makes Apache Struts, which is a "free, open-source, MVC framework for creating elegant, modern Java web applications."[68] On September 14, 2017, the Apache Software Foundation released a

[62] Id. at 540.
[63] Id. at 541.
[64] Id. at 541.
[65] FTC, Equifax Data Breach Settlement, Federal Trade Commission (Feb. 2022), https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement (Last Accessed Feb. 16, 2022).
[66] Id.
[67] Josh Fruhlinger, Equifax data breach FAQ: What happened, who was affected, what was the impact? CSO (Feb. 12, 2020 5:09AM PST), https://www.csoonline.com/article/3444488/equifax-data-breach-faq-what-happened-who-was-affected-what-was-the-impact.html (Last Accessed Feb. 16, 2022).
[68] The Apache Software Foundation, Apache Struts, Struts, https://struts.apache.org/ (Last Accessed Feb. 16, 2022).

media alert on their blog.[69] They explained that there was "CVE-2017-9805, an exploit in Apache Struts that was disclosed on 4 September 2017,"[70] and Equifax confirmed on September 13, 2017 that the data breach was because of this vulnerability.[71] However, the Apache Foundation released a patch on March 7, 2017, long before the Equifax breach occurred.[72] Apache concluded that Equifax failed to install the security updates that Apache published, and the failure to install the patch caused the massive breach.[73]

The Equifax data breach showed the importance of maintaining the software necessary to protect personal data. Albeit breaches on that scale are not common, each occurring event opens the door for distrust in maintaining sensitive data digitally. And once a company has experienced a data breach, their reputation may take years to recover. However, the consequences of data breaches, on any scale, may still be too speculative for some courts.

*Blahous v. Sarrell Regional Dental Center for Public Health, Inc* illustrated three injuries related to a data breach.[74] Blahous, on behalf of her children and all others similarly situated, claimed that the first injury is "an increased risk of their identities being stolen in the future"[75] and the second injury are the costs that are involved in mitigating that risk.[76] The third injury that Blahous claimed related to the dentist failing to protect sensitive data when Blahous theorized

[69] The Apache Software Foundation Blog, MEDIA ALERT: The Apache Software Foundation Confirms Equifax Data Breach Due to Failure to Install Patches Provided for Apache® Struts™ Exploit, The Apache Software Foundation (Sept. 14, 2017), https://blogs.apache.org/foundation/entry/media-alert-the-apache-software (Last Accessed Feb. 16, 2022).
[70] Id.
[71] Equifax, A Progress Update for Consumers, Equifax (Sept. 13, 2017), https://www.equifaxsecurity2017.com/updates//-/announcements/a-progress-update-for-consume-1 (Last Accessed Feb. 16, 2022).
[72] The Apache Software Foundation, supra note 69.
[73] Id.
[74] Blahous v. Sarrell Regional Dental Center for Public Health, Inc, No. 2:19-cv-798-RAH-SMD, 2020 WL 4016246 (M.D. Ala 2020).
[75] Id. at 3.
[76] Id. at 3.

that a portion of their payment was for data security.[77] Finally, Blahous alleged that their personal identifiable information value is "diminished" because it may have been exposed by the cyberattack.[78]

The court quoted *Clapper v. Amnesty International USA* by stating "the Court declared that a plaintiff alleging that it will suffer future injuries from a defendant's allegedly improper conduct must show that such injuries are 'certainly impending.'"[79] Because of this logic from *Clapper*, if the plaintiff in a data breach trial fails to show "*actual* misuse or fraud,"[80] then their case is dismissed with lack of standing. The court followed this logic and held that just because the dental center was breached, that alone does not grant standing to Blahous.[81] Furthermore, the court nodded to the Middle District Court of Florida, by stating "data breach mitigation costs do not create an Article III injury for plaintiffs who allege speculative harms resulting from the poaching of their personal data."[82] The court ultimately dismissed Blahous' complaint due to lack of standing.[83]

While cybercrime may be a speculative act before an attack occurs, individuals and businesses must consider the risks an attack may carry.[84] A breach alone may not be enough for standing in some jurisdictions, but it is rare that a breach occurs and data remains entirely secure or intact. After all, successful cyberattacks or massive data breaches, as happened to Equifax, receive much more coverage than unsuccessful cyberattacks. While viruses have been shut down successfully and cybercriminal rings have been dismantled,[85] both can present lasting damages for individuals or business' long after the end

[77] Id. at 3.
[78] Id. at 3.
[79] Id. at 5 (quoting Clapper).
[80] Id. at 5.
[81] Id. at 6 ("Here, the fact that the Breach occurred cannot in and of itself be enough, in the absence of any imminent or likely misuse of protected data, to provide Plaintiffs with standing to sue.").
[82] Id. at 8.
[83] Id. at 8.
[84] See Cybercrime Magazine, supra note 16.
[85] FBI, Major Cases, FBI https://www.fbi.gov/investigate/cyber/major-cases (Last Accessed Feb. 16, 2022).

of the cyberattack. A business' finances may return to normal, but their reputation will never be the same. After such a large breach, companies like Equifax must navigate through the turmoil afterwards to rebuild their trust with consumers. Even then, while trust may be restored, the companies will always have a significant data breach associated with them.

The Sony Data Breaches

Equifax is not the only company to suffer a large-scale data breach, though. Six years before the Equifax breach, Sony, specifically their gaming division, suffered a major cyberattack that took their systems down for weeks on end.[86] At one point, Sony could not estimate when their network would be back up.[87] In the open apology letter that then Chief Executive Officer (CEO) Howard Stringer wrote, he explained that no personal or credit card information was misused.[88] This cyberattack is especially notable because, up until that point in 2011, there had never been such a major attack in the gaming industry. 77 million Sony Online Entertainment accounts were impacted by this breach, and the services were down from April 21, 2011 to May 14, 2011.[89] Sony compensated customers and was named as a defendant in fifty-five class action lawsuits.[90] Sony committed to security and defense against these kinds of attacks in

[86] Tom Phillips, Five years ago today, Sony admitted the great PSN hack, Eurogamer (April 26, 2016), https://www.eurogamer.net/articles/2016-04-26-sony-admitted-the-great-psn-hack-five-years-ago-today (Last Accessed Feb. 16, 2022).
[87] See Rip Empson, A Disaster In The Making? Sony's PlayStation Network Suffers Prolonged Global Outage, TechCrunch (April 22, 2011 6:33 AM EDT), https://techcrunch.com/2011/04/22/a-disaster-in-the-making-sonys-playstation-network-suffers-prolonged-global-outage/ (Last Accessed Feb. 16, 2022).
[88] Howard Stringer, A Letter From Howard Stringer, The PlayStation Blog & Head of Communications, Nick Caplin (May 6, 2011), https://blog.playstation.com/archive/2011/05/06/a-letter-from-howard-stringer/ (Last Accessed Feb. 16 2022).
[89] Will Ripley, Why Sony hasn't learned lessons of 2011 Playstation hack, CNN (December 18, 2014 11:44 AM EST), https://www.cnn.com/2014/12/18/world/asia/sony-hack-lab-ripley/index.html (Last Accessed Feb. 16, 2022).
[90] Robert Purchese, PSN: Sony US faces 55 class-action suits, Eurogamer (July 22, 2011), https://www.eurogamer.net/articles/2011-07-22-psn-sony-us-faces-55-class-action-suits (Last Accessed Feb. 16, 2022).

the future.[91] Only three years later, though, Sony would be compromised again.[92]

On November 24, 2014, Sony Pictures Entertainment was the victim of another massive cyberattack.[93] The following twenty-two days consisted of embarrassing exposure for Sony.[94] Leaks such as Spider-Man joining the Marvel Cinematic Universe emerged and email threads that contained embarrassing or scandalous information came into light.[95] In December, the FBI accused North Korea of the Sony hack.[96] The FBI bases this allegation on the type of coding used to execute the attack. The style of the coding, such as "encryption algorithms," mirrored North Korean programs used to carry out previous cyberattacks.[97] However, it appears the investigation is still ongoing, so the commentary on it is extremely limited.[98]

The Importance of Awareness in Combatting Cybercrime

With cybercrime becoming more frequent and costly, it is imperative—now more so than ever—that society evaluates its own cybersecurity in its entirety. Cybersecurity is not exclusive to large corporations, and society must take the first step in combating

---

[91] See Wesley Yin-Poole, PSN: Sony outlines "Welcome Back" gifts, Eurogamer (May 1, 2011), https://www.eurogamer.net/articles/2011-05-01-psn-sony-outlines-welcome-back-gifts (Last Accessed Feb. 16, 2022).
[92] Andrea Peterson, The Sony Pictures hack, explained, The Washington Post (Dec. 18, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/18/the-sony-pictures-hack-explained/ (Last Accessed Feb. 16, 2022).
[93] Id.
[94] Tatiana Siegel, Five Years Later, Who Really Hacked Sony? The Hollywood Reporter (Nov. 25, 2019), https://www.hollywoodreporter.com/movies/movie-features/five-years-who-hacked-sony-1257591/ (Last Accessed Feb. 16, 2022).
[95] Id.
[96] Id. (There is speculation that it was North Korea because of The Interview, which was scheduled for release around the time of the 2014 Sony data breach. The Interview is a satirical movie about North Korea that was distributed by Sony. There is speculation that the 2014 Sony cyberattack was a retaliatory act by North Korea against Sony for distributing the movie).
[97] Alex Altman & Zeke J Miller, FBI Accuses North Korea in Sony Hack, Time (Dec. 19, 2014 2:06 PM ET) https://time.com/3642161/sony-hack-north-korea-the-interview-fbi/ (Last Accessed Feb. 16, 2022).
[98] Id.

cybercrime: becoming computer literate. A common, and easily avoidable, method of cybercrime is phishing.[99] A familiar phishing method involves a cybercriminal sending a text or email to a potential victim which contains a link that looks identical to a log in page or reset password page.[100] When someone clicks these types of links to open them, that can be enough for a talented hacker to get identifiable information from just a click. If the link downloads a program, or the user downloads a malicious file, a hacker may get much more than just identifiable information, like passwords or access to sensitive information. Even though phishing is one of the most common ways cybercriminals get access to people's personal information, there is a lack of awareness surrounding phishing scams.[101]

Phishing is not the only method that is employed by cybercriminals, and hackers target as many users as possible. On Discord, a popular messaging application used by millions every day, there was a malicious file circulating through users.[102] The message contained an installer for Windows 11, the newest version of Windows that only some computers can run due to hardware limitations.[103] Some users may look to get around these limitations, so hackers took advantage

[99] See Phishing, What is Phishing? https://www.phishing.org/what-is-phishing (This site defines phishing as a cybercrime where a target is contacted by a seemingly legitimate organization. Often, the target is familiar with the organization, or the services offered. Cybercriminals use this mask of an organization to obtain personally identifiable information (PII)). (Last Accessed Feb. 16, 2022).

[100] Id.

[101] See Alkhalil et al., Phishing Attacks: A Recent Comprehensive Study and a New Anatomy, Frontiers in Computer Science (March 9, 2021), https://www.frontiersin.org/articles/10.3389/fcomp.2021.563060/full (The journal paraphrases a study on student susceptibility, "The study observed that student susceptibility was affected by a range of factors such as phishing awareness, time spent on the computer, cyber training, age, academic year, and college affiliation.") (Last Accessed Feb. 16, 2022).

[102] See David Curry, Discord Revenue and Usage Statistics (2022), BusinessofApps (Jan. 11, 2022), https://www.businessofapps.com/data/discord-statistics/ (Last Accessed Feb. 16, 2022).

[103] See Jacob Ridley, Devious malware hosted on Discord pretends to be Windows 11 installer, PCGamer (Feb. 14, 2022), https://www.pcgamer.com/devious-malware-hosted-on-discord-pretends-to-be-windows-11-installer/ (Last Accessed Feb. 16, 2022).

of this wish by creating an installer designed to sap personal information from the user.[104] The program is called "RedLine Stealer" and it is malware that does exactly what it sounds like. The photos show there is an uncanny similarity between the official Windows 11 website and the malicious one.[105]

Attempting to deceive users with a new software upgrade is not the only method that hackers put into practice.[106] Most of their tactics rely on deception, albeit that deception can be packaged in various and creative ways. It may be through an email urging you to reset your password or surrender personal data, or through a false installer that is actually leeching personal data rather than actually upgrading the operating system.[107] The Florida Bar recognizes the growing threat of cybercrime and attacks, noting that law firms are becoming a primary target of hackers.[108] Mark D. Killian, an editor for the Florida Bar News & Journal, emphasizes that phishing emails are no longer easily identifiable as scams and that the scams are becoming increasingly sophisticated and elaborate.[109] The Florida Bar highly recommends encryption on every device to protect data and to get rid of data that is not necessary.[110] Ultimately, combating cybercrime starts with being aware of the common forms of cybercrime. Shady

---

[104] Patrick Schläpfer, Attackers Disguise RedLine Stealer as a Windows 11 Upgrade, HP (Feb. 8, 2022), https://threatresearch.ext.hp.com/redline-stealer-disguised-as-a-windows-11-upgrade/?source=aw&subacctid=103504&subacctname=Future+Publishing.&adcampaigngroup=91539&awc=7168_1644945965_c01a7c125066f5e2a591c4e66d4aeeda&jumpid=af_gen_nc_ns&utm_medium=af&utm_source=aw&utm_campaign=Future+Publishing. (Last Accessed Feb. 16, 2022).

[105] Id.

[106] See Mark D. Killian, SOPHISTICATED SCAM TARGETS LAWYERS AND WIRE TRANSFERS, The Florida Bar (Nov. 01, 2016), https://www.floridabar.org/the-florida-bar-news/sophisticated-scam-targets-lawyers-and-wire-transfers/ (Last Accessed Feb. 16, 2022).

[107] Patrick Schläpfer, supra note 104.

[108] See Gary Blankenship, HACKERS ARE INCREASINGLY TARGETING LAWYERS' COMPUTERS, The Florida Bar (May 1, 2017), https://www.floridabar.org/the-florida-bar-news/hackers-are-increasingly-targeting-lawyers-computers/ (Last Accessed Feb. 16, 2022).

[109] Mark D. Killian, supra note 106.

[110] Gary Blankenship, supra note 108.

emails that are pushy, too good to be true offers, and a plethora of other common methods must be known of. Awareness is arguably the second-best protection, behind only technology itself, such as encryption and virtual private networks.

## Conclusion

Companies and governments are dedicating more resources to combating cybercrime. Companies are beginning to consistently raise awareness about phishing for both their employees and consumers. A cyberattack may occur at any moment and may vary greatly in terms of severity. Simple precautions, such as not duplicating passwords and complying with password change recommendations, can combat cybercrime on an individual level. The more advanced a computer network is, though, the more advanced its cybersecurity, defense, and response protocols will be. Regardless of these implemented protections, failure to install updates, perform necessary upkeep, or falling for common scams can cripple a secure network. If a hacker wants the data enough, then he or she will do anything in their power to obtain it. Businesses and individuals must be prepared for a data breach, even if the threat of one is not high or the data is not sensitive. Ultimately, as we progress forward and entrust our data to cyberspace, the emphasis on cybersecurity and cyber defense must become greater.

# ASTROWORLD TRAGEDY: ANALYZING PREVIOUS CROWD CRUSH CASE

Nefertari Elshiekh

## I. INTRODUCTION

On November 5, 2021, nearly 50,000 people attended Travis Scott's Astroworld music festival in Houston, Texas (hereinafter referred to as "Astroworld" or "the festival").[1] However, the festival soon took a turn for the worse when a crowd surge occurred, which resulted in the death of ten people and injuring of hundreds of others. As more information was released, it was revealed that Travis Scott continued performing during the crowd surge. Nearly 300 lawsuits have been filed against Travis Scott as well as Drake (another concert performer), Apple Music, which streamed the concert, Live Nation, the festival organizer, and many other defendants.[2] It is easy to want to blame someone for these tragedies. However, the question is legally who, if anyone, is responsible and what can be done to prevent such a tragedy from happening again?

Since these lawsuits were only recently filed, it is unclear as to what the outcome will be. However, this is not the first crowd crush incident, nor is it the first time an incident of this nature has occurred at a Travis Scott concert. As such, there are prior cases and legal precedent to explore. Moreover, it is critical to understand the definition of legal negligence as many of the current lawsuits have accused Travis Scott and others of gross negligence and inciting a

[1] McKenzie Sadeghi, Fact Check: Post falsely claims Astroworld venue had maximum capacity limit of 20,000 people, USA Today (Nov. 11, 2021), https://www.usatoday.com/story/news/factcheck/2021/11/11/fact-check-travis-scotts-astroworld-maximum-capacity-not-20-000/6357478001/.

[2] Anna Kaplan, Live Nation's Role in Astroworld Festival Under Investigation From House Oversight Committee, Forbes (Dec. 22, 2021), https://www.forbes.com/sites/annakaplan/2021/12/22/live-nations-role-in-astroworld-festival-under-investigation-from-house-oversight-committee/?sh=1db8265efa61.

riot.[3] In 2017, Travis Scott was charged with inciting a riot at a concert in Arkansas after encouraging fans to rush to the stage.[4] Likewise, Live Nation also has a history of violating safety protocols. Since 2006, Live Nation has been linked to nearly 200 deaths and 750 injuries.[5] Whether the previous history of Travis Scott or Live Nation will impact the outcome of the lawsuits is yet to be determined, but Travis Scott has been removed from performing at the 2022 Coachella Valley Music and Arts Festival. In addition, the House Oversight Committee has opened an investigation into Live Nation's role in this tragedy.[6] Committee members stated that as the concert promoter, Live Nation was responsible for the "planning, staffing, putting up money, [and] securing permits" for Astroworld.[7] However, the Committee believes that "recent reports raise serious concerns about whether [Live Nation] took adequate steps to ensure the safety of the 50,000 concertgoers who attended Astroworld."[8] In addition, the Committee noted that "reports indicate that security and medical staff were inexperienced or ill-equipped to deal with mass injuries."[9]

## II. NEGLIGENCE

While the definition of negligence, in common parlance, is similar to the legal definition, specific criteria must be met in order to demonstrate negligence under the law. The main elements of

[3] William Cole, Grieving family of boy, 14, killed in Astroworld tragedy files $1 million lawsuit against Travis Scott, Daily Mail (Nov. 26, 2021), https://www.dailymail.co.uk/news/article-10245561/Family-boy-14-killed-Astroworld-tragedy-files-1million-lawsuit-against-Travis-Scott.html.
[4] Emma Nolan, Travis Scott Has a Long History of Inciting Chaos at Concerts, Newsweek (Nov. 8, 2021), https://www.newsweek.com/travis-scott-history-inciting-chaos-concerts-arrested-1647004.
[5] Anastasia Tsioulcas, Live Nation, a company behind Astroworld, has a long history of safety violations, NPR (Nov. 8, 2021), https://www.npr.org/2021/11/08/1053548075/live-nation-a-company-behind-astroworld-has-a-long-history-of-safety-violations.
[6] Ivana Saric, House oversight committee launches probe into Live Nation's role in Astroworld tragedy, Yahoo (Dec. 22, 2021), https://www.yahoo.com/now/house-oversight-committee-launches-probe-194833183.html?guccounter=1.
[7] Id.
[8] Id.
[9] Id.

negligence are: 1) duty, 2) breach of duty, 3) cause, and 4) damage.[10] Duty is defined as the defendant's legal obligation to uphold a certain standard of conduct toward the plaintiff, such as the duty that exists between a doctor and a patient, wherein, the doctor must conduct himself appropriately and professionally.[11] Breach of duty occurs when someone fails to uphold their duty to another. Plainly, they have failed to meet the standard level of care required.[12]

Before a defendant can be held legally responsible for the plaintiff's harm, a "cause-and-effect relationship between the negligence and the harm" must be established.[13] In other words, the defendant's negligence must be the cause of the harm to the plaintiff. Therefore, before the plaintiff is compensated for that harm, it must be proven that the defendant is at least partially responsible for causing the incident to occur (as opposed to bad luck or an unpreventable circumstance).[14] The uniqueness of this causational element is that the plaintiff cannot just demonstrate that the defendant's conduct resulted in the incident. Rather, the plaintiff must prove that the defendant's negligent aspect (the specific "conduct that breached a duty to the plaintiff") resulted in the occurrence itself.[15] In his law review article, David G. Owen offers a helpful example to further explain this notion.[16] Suppose a pedestrian walks into the street and is struck by a speeding car. If the pedestrian were to file a negligence claim against the driver, the individual that was hit must be able to demonstrate more than that it was the person's car that hit them.[17] The individual suing must also show that it was in fact the fast speed

[10] Owen, David G. (2007) "The Five Elements of Negligence," Hofstra Law Review: Vol. 35: Iss. 4, Article 1, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2282&context=hlr.
[11] Christopherson, Nick (2021) "The Legal Implications of Travis Scott's Astroworld," Wake Forest Law Review, http://www.wakeforestlawreview.com/2021/11/the-legal-implications-of-travis-scotts-astroworld/.
[12] Id.
[13] Supra note 10, at 1680.
[14] Id.
[15] Id.
[16] Id.
[17] Id.

of the driver "that amounted to the negligence that actually caused the harm."[18] On the contrary, if it is likely that the pedestrian would have been stricken, regardless of the driver's speed, then it is the conduct of the driver that caused the accident and not the "negligent aspect of the conduct."[19] This is where the "but-for" test arises, in that it must be proven that the incident *and* the harm would not have occurred had it not been for the negligence of the driver. This is known as "cause in fact."[20] There is another type of cause, known as "proximate cause," which is defined as the defendant's wrong being sufficiently related to the harm sustained, such that it is determined by the Courts to be the cause of the plaintiff's harm.[21] Proximate cause takes into consideration the fairness and justice behind finding a person negligently responsible for the injuries sustained.[22] The final element of negligence is harm. Harm occurs when an individual suffers an injury or damages as a result of the breach of duty of another.

## III. ASTROWORLD TRAGEDY

When analyzing the specific incident that occurred at Astroworld in comparison to the elements of negligence, duty is easily established. According to tort law, "The venue owner and operator have a duty…to use ordinary care to keep the premises safe, a duty to discover and correct or warn of any dangerous conditions and a duty to protect attendees from negligent activities."[23] Consequently, there is a clear duty to attendees of a concert or sporting event to protect them from danger. As a result, the question of whether a duty exists is not central to the recent lawsuits that have been filed. The venue and the operators had a distinct duty to the attendees. Additionally, the attendees would not have been injured from the stampede had the festival not occurred. As such, the cause in fact element is

[18] Id.
[19] Id.
[20] Id.
[21] Id.
[22] Id.
[23] Robert Lind, et al., Entertainment Law 3d: Legal Concepts and Business Practices § 10:36, Westlaw

satisfied. The main contentious elements that are critical to the current lawsuits are proximate causation and whether the defendants failed to protect the plaintiffs from negligent activities, thus resulting in a breach of duty.

As aforementioned, the venue owner and operator have a duty to protect attendees from danger and negligent activities, but it is not clear whether those duties were upheld at Astroworld. Historically, when determining whether a duty has been breached, a jury considers whether the actions of the defendant align with how a reasonable person would act in the same or similar situation.[24] After problems arose concerning crowd control at the 2019 Astroworld Festival, the evidence suggests that the defendants acted reasonably by making changes, which included an increased amount of security and stronger barricades.[25] However, there is additional evidence suggesting that the organizers did not act reasonably when they failed to make changes such as cancelling the festival after fans broke through the entrance before the start of the concert.[26] Further, even though a fifty-six page emergency plan was in place, the plan did not include preparations for a crowd surge, despite one occurring at the previous Astroworld Festival in 2019.[27] These different actions, coupled with lack of action, will make it difficult for the courts to determine whether the defendants breached their duty of care to the attendees.

Moreover, the other component of negligence that is heavily examined here is proximate causation, which is typically determined based on whether the injury was foreseeable.[28] In fact, this is where Travis Scott and Live Nation's combined histories are significant.

---

[24] Supra note 11.

[25] Vanessa Romo, "Astroworld's safety plan called for deceased to be referred to as 'smurfs,'" NPR (Nov. 10, 2021), https://www.npr.org/2021/11/10/1054543388/astroworlds-safety-plan-failed-to-say-what-to-do-in-case-of-a-crowd-surge.

[26] Spencer Kornhaber, The Bleak Lessons of the Astroworld Nightmare, The Atlantic (Nov. 10, 2021), https://www.theatlantic.com/culture/archive/2021/11/astroworld-travis-scott-crowds/620658/.

[27] Supra note 25.

[28] Supra note 11.

Scott's historical behavior of inciting riots and chaos at prior concerts makes it difficult for the defendants to refute the unforeseeability of Astroworld because similar injuries have occurred, but to a lesser degree of severity. Prior to his arrest in 2017 for inciting a riot, Scott was first arrested in 2015 for inciting a riot at a different music festival, Lollapalooza.[29] Furthermore, at a Travis Scott concert in 2017, Scott encouraged the concertgoers to push to the front of the stage. This resulted in concertgoer Kyle Green being pushed off the balcony, leaving him paralyzed.[30] These previous incidents increase the likelihood that the injuries sustained at Astroworld in 2021 were foreseeable. In order for performers such as Travis Scott and Drake to be held liable, the determining fact will be the role they each took in inciting the crowd surge.[31]

With regards to Live Nation, because the company is connected to hundreds of deaths, it should have anticipated injuries to attendees. Specifically, from 1999 to 2015, forty-four separate incidents have occurred with Live Nation, which all involved crowds where at least ten people died.[32] Going back even further, in 1979, a crowd surge incident occurred, similar to that of Astroworld, which killed eleven people.[33] It was later determined that the 1979 incident was as a result of improper seating at the festival, which the organizer, Live Nation, controlled.[34] Moreover, Live Nation stated in one of its annual reports that "unintentional mass casualty incidents" were among the

[29] Jake Woolf, Travis Scott on the Show that's So Crazy, It Caused a Riot, GQ (May 15, 2017), https://www.gq.com/story/travis-scott-interview.

[30] Stephanie Nolasco, Travis Scott Astroworld tragedy: Man paralyzed at 2017 show feels 'tremendous sadness,' attorney says, Fox News (Nov. 11, 2021), https://www.foxnews.com/entertainment/travis-scott-astroworld-tragedy-kyle-green-paralyzed.

[31] Bryan Sullivan, Astroworld's Legal Fallout: What's At Risk For Travis Scott and Live Nation, Forbes (November 9, 2021), https://www.forbes.com/sites/legalentertainment/2021/11/09/astroworld-update-travis-scott-drake-live-nation-and-organizers-sued-for-negligence-following-deadly-incident/?sh=6ddb8ec92bbd.

[32] Palmer Haasch, Crowd surges like the one at Travis Scott's Astroworld concert have a long history, Insider (Nov. 11, 2021), https://www.insider.com/crowd-astroworld-crush-surge-travis-scott-concert-festival-disaster-history-2021-11.

[33] Id.

[34] Id.

company's main concerns.[35] After seeing the videos from Astroworld, Paul Wertheimer, a concert safety consultant and owner of Crowd Management Strategies, said, "This was preventable. The crowd was allowed to get too dense and was not managed properly. The fans were victims of an environment in which they could not control."[36]

## IV. PAST CROWD SURGE CASES

### *A. Rotz v. City of New York*

Previous crowd surge cases have resulted in conflicting decisions in the courts. As a result, there is a lack of clear guidelines regarding handling such personal injury cases and negligence claims. In 1983, Diana Ross decided to give a free concert in Central Park and a large crowd formed.[37] However, at some point during the concert, someone began to yell that a lion was present, which caused many people to flee chaotically.[38] During the stampede, the plaintiff, David Rotz, was trampled and sustained injuries.[39] As a result, Rotz sued the broadcasting company, Paramount Pictures Corporation as well as the event producer and the City of New York.[40] As previously mentioned, proximate cause is typically determined based on foreseeability. In *Rotz,* the defendants successfully argued that the cause of the crowd rush, which was yelling that there was a lion, was not foreseeable, and as a result, "precluded liability."[41] The lower court ruled in favor of the defendants, stating, "The danger here was not foreseeable and that, as a matter of law, the injuries to the plaintiff were caused by an unforeseeable, intervening event."[42] However, on appeal, the Supreme Court of New York, found that the exact manner under which the stampede occurred (yelling of a lion)

---

[35] Supra note 11.
[36] Randall Roberts, Concert Safety Expert: Deaths at Travis Scott's Astroworld Festival were 'Preventable,' LA Times (November 6, 2021), https://www.latimes.com/entertainment-arts/music/story/2021-11-06/travis-scott-astroworld-festival-seating.
[37] Rotz v. New York, 143 A.D.2d 301, 301-302 (N.Y. App. Div. 1988).
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Id.

does not have to be foreseeable.[43] The Court stated, "In the absence of adequate supervision and control of that crowd, it was reasonably foreseeable that disorder…could erupt…and that defendant city failed to exercise the reasonable care necessary under the circumstances to avoid that foreseeable risk."[44] In other words, the Court found that, where general risk is foreseeable, even if the exact manner under which the injury occurred could not have been predicted, this "does not preclude liability."[45]

### *B. Cunningham v. D.C. Sports & Entertainment Commission*

In May of 2002, a stampede occurred at an Eminem concert resulting in more than thirty people suffering injuries because concertgoers were rushing to the stage.[46] While most of the injuries were minor, five attendees were taken to the hospital, with one of them in critical condition after going into cardiac arrest.[47] Concertgoers said they asked Eminem to stop performing so that the injured could receive help.[48] Eminem eventually stopped performing before continuing after 30 minutes.[49] Justin Cunningham, who attended the Eminem concert in question, later sued Eminem and his touring company.[50] The defendants argued that they did not have a duty to the plaintiff because Eminem "did nothing more than take the stage to perform" and because his "touring company was not involved with crowd control or management."[51] However, the Court found that the time it took Eminem to stop performing, which was more than five minutes after the stampede was apparent, resulted in an "unreasonable risk of harm," which was enough "to establish a duty between a

---

[43] Id.
[44] Id.
[45] Id.
[46] Clarence Williams and Martin Weil, 30 Injured, 1 Critically, in Concert Stampede, Washington Post (May 26, 2002), https://www.washingtonpost.com/archive/local/2002/05/26/30-injured-1-critically-in-concert-stampede/7c9d9aa5-0272-4046-b259-f76ce3984752/
[47] Id.
[48] Id.
[49] Id.
[50] Cunningham v. D.C. Sports & Entm't Comm'n, No. Civ. A. 03-839 RWRJMF, 2005 WL 3276306 at 1-3 (D.D.C. Nov. 30, 2005).
[51] Id.

performer or touring company and concertgoer."[52] As established by tort law and previously mentioned, when an injury occurs at a concert, the venue operator has a clear duty to the injured concertgoer. Consequently, duty is not typically questioned when the primary defendant is the venue operator. However, in this instance, the primary defendant was not the venue operator, and so, it wasn't as clear if duty existed. Nevertheless, the Court found that a duty existed between the performer and the touring company and the concertgoers.[53]

### *C. Klish v. Alaskan Amusement Co.*

Assumption of risk is an important concept in negligence cases. Generally, it is recognized that if an individual "voluntarily assumes the risk of injury from a known danger," that person is precluded from seeking recovery for any injuries sustained.[54] For this reason, assumption of risk is a common defense that is raised by many defendants in negligence cases. But, in order to prevail, the defendant must prove one of two things. First, the defendant must show that the plaintiff expressly assumed the risk, which could be done by signing a waiver.[55] The second option is through implied assumption of risk, wherein, the defendant would have to show that the plaintiff was aware of the present risk and "appreciate[d] its unreasonable character."[56]

The defense of expressed assumption of risk tends to be unsuccessful in crowd crush cases because, even if language about the risks associated with the event are on the ticket, the Court believes that the organizers and venue operators should take additional precautions to prevent these types of incidents from occurring.[57] As a

---

[52] Id.

[53] Pearl, Tracy Hresko (2015) "Crowd Crush: How the Law Leaves American Crowds Unprotected," Kentucky Law Journal: Vol. 104: Iss. 1, Article 4, https://uknowledge.uky.edu/klj/vol104/iss1/4/.

[54] C.T. Drechsler, Annotation, Liability of Proprietor for Injury to Customer or Patron Caused by Pushing, Crowding, etc. of Other Patrons, 20 A.L.R.2d 8, 86 (1952).

[55] Supra note 53, at 33.

[56] RESTATEMENT (SECOND) OF TORTS § 496D (AM. LAW INST. 1965).

[57] Supra note 53, at 34.

result, the Court can invalidate the expressed assumption of risk especially when the Court believes the precautions would have been "simple and inexpensive."[58] Therefore, implied assumption of risk is critical to defendants in a crowd crush lawsuit. Given that many crowd crush incidents have occurred throughout modern history, people who attend a concert or similar event with a large crowd "automatically assume the risk of any hazard that joining the crowd produces" because the previous incidents provide awareness of the possible risks associated with attending such an event. [59]

In *Klish,* the plaintiff attended a hockey game at Alaskan Ice Palace and was seated in an area that was overcrowded with people unable to locate their seats.[60] A nearby food vendor ended up being pushed by the crowd, causing him to fall and injure the plaintiff.[61] However, the Court agreed with the defendant and found that "crowds are common at … places of amusement. That there may be some jostling in such crowds is inevitable. That someone may fall and sustain injury, or cause injury to others, always is a possibility. These conditions are so common that those who attend such places are presumed to know of them."[62] This directly addresses the idea of implied assumption of risk; because the plaintiff is "presumed to know" of such a risk, the plaintiff cannot prevail. However, crowd crush incidents do not occur every time a large crowd gathers so it seems other factors can affect whether such an event occurs. One example is the venue layout, which venue operators and organizers control, and so, an attendee may not know in advance if the venue has a higher likelihood of a crowd crush incident occurring. As a result, the attendee may not be fully informed about the potential risks they are assuming. Moreover, the presence of a crowd alone does not necessarily imply a risk of being trampled "to the point of asphyxiation."[63]

[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] Klish v. Alaskan Amusement Co., 109 P.2d 75 (Kan. 1941).
[63] Supra note 53, at 36.

The assumption of risk associated with a crowd crush in a large venue is different than the assumption of risk associated with being injured by a ball in a sporting event, for example. In fact, the law typically disallows someone hit by a baseball to recover damages because "the risk of being hit by a ball is a customary part of the sport."[64] This is especially because there is little to no control over the direction in which the baseball travels, and whether it travels into the stadium near fans.[65] Nevertheless, a crowd crush incident does not happen nearly as frequently as injury from a foul ball, and it does not occur with the same warning, making it less likely to be foreseeable by the attendee and harder to predict.[66]

In the early days of attending live sporting events, there was much less protection for fans injured by a foul ball, for instance. However, as injuries occurred and litigation ensued, over time, this resulted in increases to the minimum standards of care, depending on the sport, to prevent future injuries. Prior to these protections, though, the Court did not use the assumption of risk defense as a principle to preclude the plaintiff from recovering because the events were seen as "inherently dangerous without the reasonable protections."[67] Similarly, crowd crush incidents are relatively new and likewise, should be viewed in the same manner as sporting events when they were relatively new; more legal guidelines are needed, along with an increase in minimum standards in an effort to prevent these incidents from occurring. Accordingly, the venue owners need to modify design plans and make changes to seating layouts to reduce the probability of a crowd crush incident happening. In fact, based on an analysis of over a dozen crowd incidents, it was found that in every incident "management strategies…could have averted or significantly reduced crowd effects."[68] Simply put, many of these incidents could have

[64] Steve A. Adelman, Won't Get Fooled Again, TRIAL, June 2004, at 18
[65] Id.
[66] Supra note 53, at 36.
[67] Luke Ellis, Note, Talking About My Generation: Assumption of Risk and the Rights of Injured Concert Fans in the Twenty-First Century, 80 TEX. L. REV. 607, 608 (2002).
[68] John J. Fruin, Crowd Dynamics and Auditorium Management, Crowd Safety & Risk Analysis (March 1, 2015), https://www.gkstill.com/Support/crowd-flow/fruin/Fruin3.html.

been prevented if venue operators had made the proper changes. Statutory law could offer the legal incentive to, and encourage, the operators to make these necessary changes for the future.

### *D. Hillsborough Tragedy*

In 1989, ninety-six people attending a soccer game in Hillsborough were killed, with more than 700 people injured after a stampede occurred.[69] Although this tragedy occurred in England, it is interesting to examine the ways in which another nation handles crowd crush incidents. Prior to this incident, it was customary in England to sell hundreds of "standing-room only" tickets and the fans that obtained those tickets would be crowded together behind the goals.[70] This tradition, along with the police's decision to allow hundreds of attendees to push through the gates instead of individually proceeding through turnstiles contributed to the 1989 stampede. For these reasons, the jury found that the deceased were "unlawfully killed" and that the chief officer in command was "in breach of duty" as a result of gross negligence.[71] This case offers an example of an instance in which security personnel were held liable for a stampede.

Interestingly, several security guards have launched their own respective lawsuits in relation to the most recent Astroworld incident. Two security guards who sustained injuries during the stampede named Travis Scott, Live Nation, NRG Park (the venue), and AJ Melino & Associates (the company that hired the security guards) (hereinafter referred to as "AJM") as defendants in their lawsuits.[72] The plaintiffs claim that AJM did not take the proper precautions to prepare the security guards for the stampede.[73] In addition, the

---

[69] Anthony Fisher, British Police Forces Sued for "Abuse on an Industrial Scale" Over 96 Soccer Fans' Deaths, Reason (April 28, 2016), https://reason.com/2016/04/28/soccer-stampede-victims-families-sue-pol/.
[70] Id.
[71] Id.
[72] Ethan Millman, "There Was No Training: Two Injured Astroworld Security Guards Sue After Tragedy," Rolling Stone (November 22, 2021), https://www.rollingstone.com/music/music-news/security-guards-sue-astroworld-festival-travis-scott-live-nation-aj-melino-1261479/.
[73] Id.

plaintiffs allege that AJM failed to provide any training and failed to perform background checks on the employees to ensure the employees were qualified for the job.[74] The only instruction the plaintiffs were given was to arrive in all black clothing.[75] Moreover, the security guards were not issued walkie-talkies so they were unable to communicate with each other when the stampede occurred.[76] It should be noted that a security guard left the festival before Travis Scott began performing because he was afraid for his own safety, felt he was not qualified for the position and did not receive any training from AJM.[77]

## V. CROWD MANAGEMENT

Despite crowd crush related injuries occurring more frequently, there has been very little, if any, statutory law passed regarding crowd management to prevent such tragedies from happening. Consequently, when such an incident results in physical injuries, the plaintiff must turn to common law (typically torts and the law of negligence) to recover damages. However, the courts, which handle these actions on a case-by-case basis, have shown to have inconsistent rulings regarding these particular type of incidents, assumption of risk and whether the incident was foreseeable. This increases the need for statutory regulations on crowd control and management.

In fact, currently only one state has statutory law regarding crowd management and control.[78] While warning signs describing capacity restrictions may be posted at a venue, the maximum capacity number alone is not a good indicator of whether a crowd crush incident will occur. For example, if 50,000 people attend an event and are properly spaced out, there will likely be a lower probability of a crowd crush incident ensuing than if less people are closer together. Crowd crush incidents are more likely to occur in areas of high crowd density,

[74] Id.
[75] Id.
[76] Id.
[77] Id.
[78] Supra note 53, at 16.

regardless of the amount of people in the area. Festival seating, similar to what was seen at Astroworld, has a significantly higher risk of crowd-related injuries occurring. In fact, the National Fire Protection Administration said that an event with festival seating should be expected to have "overcrowding and high audience density that may compromise public safety."[79] Moreover, numerous experts on crowd science have opined that festival seating is "the principal culprit in most crowd crush cases."[80] However, the way the law handles this information is unclear. On the one hand, the known risks associated with festival seating could fall under assumption of risk, in that the plaintiff is assuming the risk by attending an event with such seating. On the other hand, it could also translate to the liability of venue operators for breach of duty if they fail to take extra precautions to prevent such an incident from happening when festival-style seating is allowed. In light of Astroworld and to prevent another tragedy like this from happening again, a body of legal standards is desperately need. This will not only incentivize venue operators and others involved to ensure a safer environment but will also create a more standardized approach for determining liability when a crowd crush event occurs.

## VI. CONCLUSION

Overall, since the Astroworld tragedy just recently occurred, the outcome of the hundreds of current lawsuits stemming from this incident are currently unknown. However, this is not the first time a crowd crush incident has happened, and previous cases show how courts have handled and assigned liability in the past. Central to these previous cases and the current lawsuits are negligence and the elements of negligence which, as discussed earlier, include (1) duty (2) breach of duty (3) cause and (4) damage. Another key concept that the courts debate when determining liability in crowd crush cases is the assumption of risk factor and whether the plaintiff assumed the risk of a crowd crush. Nevertheless, despite the previous

[79] NAT'L FIRE PROTECTION ASS'N, LIFE SAFETY CODE HANDBOOK 2003 § A.3.3.188.1 (9th Ed. 2003).
[80] Supra note 53, at 12.

litigation, courts continue to handle these actions on a case-by-case basis, which makes it difficult for those who are injured to pursue recovery for damages. The Astroworld tragedy has shown that not only is statutory law regarding crowd control and management necessary to have more consistency in crowd crush liability claims, but it will also serve as a legal incentive that can potentially prevent any further tragedies of this nature from happening again.

# THE NEED FOR CULTURAL AWARENESS IN THE APPLICATION OF MEDIATION TECHNIQUES WITH A FOCUS ON CHINA AND THE UNITED STATES

Manna Alexander

Abstract

Mediation, a dispute resolution method used worldwide, is not a rigid process and allows room for flexibility. To utilize all of the benefits that mediation possesses, there is a need for a greater understanding of how to use it. One step toward understanding mediation is to recognize the importance of culture within the mediation process. Culture affects every part of an individual's life, and will also affect the mediation they participate in. This article asserts that mediation techniques cannot be shared cross-culturally, specifically comparing the mediation techniques found in China and the United States.

## Introduction

Imagine a mediator is mediating a dispute between a Chinese party and an American party. The American party begins the mediation by calling the Chinese party by their name, setting an informal tone to the meeting. The American party then shares the issues they see, the solutions they have in mind, and suggests that one of the solutions is the right answer. The mediator, also American, unknowingly supports the American party by encouraging the informal environment, speeding through the mediation, and allowing the disputants to reach their own resolution. The mediator finds no fault in their techniques as they are typical and successful in American mediations. However, the Chinese party was expecting the mediator to take control of the meeting and make solutions for the parties. The Chinese party was not prepared to think of possible solutions for both parties and did not want to oversee resolving the conflict. During this entire process the Chinese party felt uncomfortable and no longer wanted to continue the mediation.

The mediator did not consider the Chinese party's culture and how it affects the way they resolve conflict. The American mediator assumed that the popular and successful techniques used in American mediations could work with any person, in any culture. However, generalized mediation techniques cannot always be used cross-culturally for effective mediation. Instead, these techniques often must often have to be tailored towards each specific culture.

Part I of this paper will introduce mediation and what constitutes an effective mediation. Part II will share the views that scholars have on the practice of mediation. Part III will outline how mediation is used within China and the United States and state the different mediation techniques present. Part IV will analyze China and the United States by categorizing them and explaining why certain mediation techniques are used over others. Part IV will give examples showcasing how "sharing" mediation techniques is ineffective.

## I. Mediation

### A. What is Mediation?

The United Nations defines mediations as "a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them develop mutually acceptable agreements."[1] Mediation is more flexible than litigation and arbitration, and generally includes room for creativity regarding techniques and solutions that are otherwise not seen in other conflict resolution processes.[2] A core aspect of mediation is that it is voluntary, meaning that the disputants have a choice to go to mediation or not. In some legal systems of the world, mediation can

[1] United Nations, *United Nations Guidance for Effective Mediation,* PEACEMAKER (July 2012), http://repository.un.org/bitstream/handle/11176/400960/8%20November%202019%20%28Mediation%20and%20Negotiation%29%20GuidanceEffectiveMediation_UNDPA2012%28english%29.pdf?sequence=47#:~:text=An%20effective%20mediation%20process%20responds,the%20regional%20and%20international%20environments.

[2] *Mediation,* BLACK'S LAW DICTIONARY (9th ed. 2009).

be court-ordered.[3] The court can make mediation mandatory before taking the case to trial, but the disputants are not required to settle in the mandatory mediation. During mediation, no one can force a party to stay, and no one can force a party to believe or agree to something. Self-determination, the ability to makes one's own decision, is a key aspect of mediation, and an appealing feature as well.

B. Effective Mediation

There are key fundamentals of mediation that make the process effective. These fundamentals include preparedness, consent, impartiality, inclusivity, national ownership, international law and normative frameworks, coherence, coordination and complementarity of the mediation effort, and quality peace agreements.[4]

Preparation is necessary for a responsible mediation.[5] A mediator uses their preparation as a guide to help disputants navigate through a conflict. This guide includes information related to a specific case and (flexible) strategies a mediator can use when managing a mediation.[6]

A "cornerstone of mediation" is impartiality.[7] If a party believes that the process may be biased toward or against them, the entire balance and outcome of the mediation is disrupted. A mediator "should not have a material interest in the outcome" and must balance in between both parties.[8] Also, because mediation is a voluntary process, consent is required from both parties.[9] A party cannot be forced to do anything they do not wish to do. If a court orders

[3] Rafal Morek, *To Compel or Not to Compel: Is Mandatory Mediation Becoming "Popular"?*, Kluwer Mediation Blog (November 19, 2018), http://mediationblog.kluwerarbitration.com/2018/11/19/to-compel-or-not-to-compel-is-mandatory-mediation-becoming-popular/.
[4] United Nations, *supra* note 1.
[5] *Id.* at 6.
[6] *Id*.
[7] *Id.* at 10.
[8] *Id.*
[9] *Id.* at 8.

mediation for a party and the party does not wish to participate in a mediation, they may leave after the mediator's opening statement; this would still fulfill the requirement for the court-ordered mediation.[10]

The disputants should feel that their views and needs are valued, represented, and integrated into the mediation and the outcome.[11] This is important because "an inclusive process is more likely to identify and address the root causes of conflict," which will help the parties understand one another, and lead them to settle their dispute.[12] In addition, national ownership is the idea that society must be open and committed to mediation.[13] This is because the communities that went through the conflict are also the ones that "make the decision to stop fighting" and "work towards a peaceful future" together.[14]

These fundamentals make up the foundations of techniques used in many countries.[15] Later, we will look at the mediation techniques used by China and the United States and see why some techniques can be more effective than others.

## II. Views on Mediation

Generally, mediation is viewed in a positive light by judicial systems and participants. It is a beneficial process that is used worldwide to help disputants quickly and inexpensively resolve conflict, while also clearing up the court docket. Since mediation is used in countries that are the exact opposite from each other, scholars view this as evidence to show how mediation is important and valued.[16] A popular belief

[10] FLA. STAT. §44.404 (2021).
[11] United Nations, *supra* note 1, at 11.
[12] *Id.*
[13] *Id.* at 14.
[14] *Id*.
[15] *Id.* at 2.

[16] Xiaobing Xu, *DIFFERENT MEDIATION TRADITIONS: A COMPARISON BETWEEN CHINA AND THE U.S.,* 16 AM. REV. INT'L ARB. 515, 519 (2005) ("Indeed, the very fact that mediation is widely used in societies as diverse as the U.S. (a modern capitalist and industrial society) and China (formerly a feudal society, then a communist society, and now a society in transition) is itself strong evidence that the core value

among scholars is that mediation "should have a place in every balanced and effective modern dispute resolution system."[17]

The conversation changes when looking at mediation in developing countries. Some scholars still favor mediation, stating it is a "cross-cultural, neutral, and apolitical practice of dispute resolution integral to the development of third world countries."[18] They view mediation as a neutral process that can be effective and worthwhile to introduce and implement in developing countries.[19] However, others might argue that "mediation in various ways serves the interests of legal and social elites, diminishing opportunities for social change in [developing] countries."[20] They view mediation as a way to continue oppression, and state that it needs to be kept away from those countries.[21] When looking at the structure of mediation, these scholars claim that the public's attention will no longer focus on social justice and values, causing the "status quo distributions of resources and power" to continue.[22]

Mediation is normally studied and shared from Western practices and perspectives, indicating the idea that the practice of mediation in the West is considered the norm, and universal.[23] This led other scholars to continue the study of mediation by researching mediation practices in the other regions, particularly in the East. They assert that mediation in the East is extremely different from the "norm," and

---

of mediation as a dispute resolution method is suited to modern societies, and mediation should have a place in every balanced and effective modern dispute resolution system.").

[17] *Id*.

[18] Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 295-6 (2006).

[19] *Id*. at 296 (stating that some scholars view mediation as "neutral and hence effective and worthwhile" for developing countries).

[20] *Id*. at 295.

[21] *Id*. at 296 (stating that mediation is "political and hence oppressive and worth resisting" as one of the arguments from scholars).

[22] *Id*. at 300-1 (explaining the structure of mediation to be "private, conversational modes of dispute resolution steeped in a language of interests rather than rights", and in this case referring "rights" to social justice).

[23] James A. Wall, *Community Mediation in the People's Republic of China,* 35 J. OF CONFLICT RESOL. 3, 9 (1991).

therefore there is a need to further study its mediation techniques and operations.[24]

Among scholars, there are two schools of thought regarding culture and its role in mediation. The "Universalists" believe that all humans are more alike than different.[25] They believe that humans have patterns of thought and action that are universal, and the way to approach conflict resolution is by recognizing and catering to the "universal human needs."[26] The "Culturalists" believe the opposite, arguing that people are more different than they are similar, and conflict resolution needs to cater to individual cultures.[27] They conclude that generalizations are best used as a guide to resolving conflict.[28]

The notion that culture has to be recognized when conducting and studying mediation and other conflict resolution processes is prevalent when studying mediation.[29] Mediation is different within each culture, and the expectations of what mediation is and what it accomplishes also vary around the world.[30] Some proclaim mediation will only be effective if the mediator is aware of the disputants and understands their "value orientations," which are the values or ideas given more weight in a certain culture.[31] The mediator can only

---

[24] *Id*. at 3 ("As mediation has been elaborated and applied to a variety of disputes, it has come to be viewed from a Western Perspective; that is, we consider the Western mediation process to be universal. For example, we typically think of mediation as a process in which a neutral third party uses logic and emotional appeasement to help disputants reach a mutually acceptable resolution. However … mediation in Eastern cultures differs significantly from that in our society. And given our increased reliance on mediation and our empirical scrutiny of the process, it seems appropriate at this time to examine mediation in these societies.").

[25] Joel Lee, *Culture and its Importance in Mediation*, 16 PEPP. DISP. RESOL. L.J. 317, 323 (2016).

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] Cynthia A. Savage, *Culture and Mediation: A Red Herring,* 5 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 269, 271-83 (1996).

[31] *Id*. at 292.

acquire additional information from the disputants and work with them to get to a settlement when these differences are recognized.[32]

How mediation is used and the ways in which it is needed in a particular country depends on the situation within that country. Mediation and other alternative dispute resolution processes were developed in the United States "in response to a particular perceptions of failings within the legal system."[33] However, in developing countries like Nepal, mediation is used in response to the legal system's failure towards the rural villages of Nepal, and the inability for certain conflict to be addressed in the "informal" manner that is used in Western countries.[34] This is just one example of the arguments made for the need to be aware and adapt to the culture and circumstances when using mediation. It is fair to say that the majority of individuals believe that mediation is necessary and that acknowledging culture in mediation is important to the effectiveness of the process.

## III. Mediation Techniques

The United States and China both have successful mediation programs that have been studied by scholars. China can be viewed as "number one" when it comes to the "total number of mediators, mediation institutions and reported mediated cases."[35] The United States is "viewed as a preeminent player in modern mediation study and practice," with special recognition towards its work in furthering experimentation of mediation techniques and influence in "international mediation efforts."[36] In the United States in 2017, voluntary mediations had a resolved rate of 75 percent, and court-ordered mediations 55 percent.[37] In China, mediation is used to

---

[32] *Id*. at 285.
[33] Cohen, *supra* note 18, at 320.
[34] *Id*.
[35] Xu, *supra* note 16, at 517-8.
[36] *Id*.
[37] U.S. Department of Justice, *Alternative Dispute Resolution at the Department of Justice*, JUSTICE.GOV (July 24, 2020), https://www.justice.gov/archives/olp/alternative-dispute-resolution-department-justice.

resolve over seven million disputes every year, and the estimated percent of civil disputes resolved through mediation in China is upwards to 90 percent.[38]The execution of mediation in China and the United States is different. It is important to know how mediation and mediators are viewed and used in both countries.

A. Mediation Techniques in China

In China, mediation is "a common, matter-of-fact routine."[39] Mediation is seen as a "citizen's right and the state's responsibility."[40] Mediation is common in China and is seen as a "go-to" method for dispute resolution.[41] Therefore, China's mediation set up is different. Mediation takes four forms in China: (1) by an informal family meeting, (2) by a meeting with government officials, (3) by a court mandated mediation, and (4) by a non-judicial mediation by People's Mediation Committees.[42] Within the communities of China, the [People's] mediation committees are comprised of three to nine members.[43]

Mediations can be done informally by family without any issue in China. That is because mediators in China do not have the same role as mediators in the United States. Mediators in China do not have to be neutral, and to them, knowing the disputants is helpful when trying to determine who was wrong in the dispute.[44] These mediators are like an extension of the law, trying to bring the group harmony back into place even through assertive actions.[45] The mediators feel that it is their responsibility to intervene in disputes and settle them,

[38] Eric J. Glassman, *The Function of Mediation in China, Examining the Impact of Regulations Governing the People's Mediation Committees,* 10 UCLA PAC. BASIN L. J. 2, 460-1 (1992).

[39] Wall, *supra* note 23, at 9.
[40] *Id.*
[41] Xu, *supra* note 16, at 533.
[42] Glassman, *supra* note 38, at 468-9.
[43] *Id.* at 489.
[44] Wall, *supra* note 23, at 9.
[45] *Id.*

as it becomes a personal responsibility for them.[46] They also will lose respect if the dispute is not settled at mediation.[47]

Mediation techniques found in China include: educating the disputants using logic (reasoning), criticizing the disputant's attitude or behavior, threatening the disputants, stating the other disputant's point of view, getting an apology from one disputant to another, citing the similarities of the goals and needs between the disputants, controlling the agenda for the mediation, arguing for compromise, praising the disputants (when they, or their behavior, is seen as good), quoting the law, citing moral principles, calling for empathy to a disputant (asking for respect and understanding), drafting a written agreement, and using third parties (such as family members or members of society) to educate, assist, and criticize the disputants.[48]

Now, recall the hypothetical situation from the introduction. In this situation, the Chinese party would have expected the mediator to exhibit certain Chinese techniques in the mediation he attended. His expectation was that the mediator would take control of the mediation (and the agenda), not the parties. Chinese mediators often have a significant amount of power within the community being the "second or third in command within the community governing unit."[49] This allows them to take charge without being questioned.

The Chinese party also expected for the mediator to input their own ideas, to propose (and argue for) a compromise, and to ask him to share his point of view. The Chinese party did not expect to come up with solutions himself but expected the mediator to do so while quoting the law or moral principles as support. Morals are important in Chinese culture and have a heavy influence in the behaviors of that society.[50] Citing to moral principles was effective in Chinese history and is another way to merge ideologies and traditions within

---

[46] *Id*.
[47] *Id*.
[48] James A. Wall, *Mediation in the USA, China, Japan, and Korea,* 29 SECURITY DIALOGUE 235, 240-2 (1998).
[49] *Id*. at 241.
[50] RICHARD D. LEWIS, WHEN CULTURES COLLIDE: LEADING ACROSS CULTURES 486 (4th ed. 2006).

mediation to preserve order.[51] The Chinese party expected the mediator to cite some moral principles with the intention that the disputants would recheck their behavior and attitude.

The Chinese party was also expecting to be rebuked during the mediation. Mediators in China like to educate the disputants on their actions and if such actions were "right" or "wrong." The mediators often use third parties, such as family or community members, to help educate the disputants on how to act and think.[52] Criticism is also prevalent in China as a mediation technique. In one study, Chinese mediators used criticism 38 percent of the time in comparison to Japanese and Korean mediators.[53] The Chinese party expected the mediator to call his family to intervene in the dispute. He also thought he would be criticized for being in or prolonging a dispute. However, to his bewilderment, the entire process was confidential. The Chinese party was not familiar with confidentiality, as mediations in China did not operate that way, and he kept expecting to be educated on how to act and think. He did not understand why the American party wanted a stranger as a mediator; he felt uncomfortable with the lack of personal relationship and discernment the mediator had with both disputants.

B. Mediation Techniques in the United States

In the United States it is common, and preferred, when the mediator does not know the parties.[54] When a stranger is conducting the mediation, American disputants feel better because they trust that the mediator does not participate with a certain bias or "side." Mediations in the United States focus on making sure that the parties are "trusting, listening, and responsive" with one another.[55]

One type of mediation used in the United States is transformative mediation. This mediation is focused on the idea of "conflict

[51] Xu, *supra* note 16, at 529.
[52] Wall, *supra* note 48, at 241-2.
[53] *Id.* at 244.
[54] Wall, *supra* note 23, at 9.
[55] Xu, *supra* note 16, at 537-8.

transformation, not conflict resolution."[56] The goal is not only to settle the issue, but to "understand conflict as a crisis in human interaction" and focus on the interaction between the parties.[57] This changes the way the conflict is viewed, and how the parties interact with each other, resulting in a "shift in each person's sense of their ability to deal with the situation."[58] Mediations held in the United States are not focused on the law, rather, they are focused on the relationship between the parties, and a settlement that meets both of their interests.

Mediation techniques in the United States include finding the interests (the reason why a disputant wants something), conveying positions (sharing the stances of each disputant), exercising caucus, timing proposals, having an aggressive attitude, functioning passively, maintaining procedures, facilitating communication, improving relationships, leveraging between parties restructuring the negotiation, creating an informal environment, reducing tension, summarizing the agreement, and striking a power balance.[59]

Think back to the way the American party and the American mediator acted in the hypothetical situation from the introduction. The American mediator kept up an informal environment, worked though the mediation quickly, and allowed the disputants to devise and reach their own settlement.

Mediation in America focuses more on reaching a mutual settlement without destroying the relationship between the parties.[60] The American mediator did everything they thought would accomplish this goal. Techniques such as striking a power balance and reducing tension are important for American mediators and are commonly

[56] Judith A. Saul, *The Legal and Cultural Roots of Mediation in the United States,* 1 OP. J. 1, 7 (2012).
[57] *Id.*
[58] *Id.* at 7-8.
[59] Francisco A. Perez, *Evaluation of Mediation Techniques*, 10 LAB. L. J. 716, 719 (1959).
[60] Xu, *supra* note 16, at 537.

used to restore the relationship between parties.[61] When they create that environment in the room, it is easier to help the parties communicate with one another.[62] The American mediator believed that allowing the disputants to reach their own resolution would create a less formal, and therefore less tense, atmosphere. Furthermore, the American mediator believed that an informal setting would help the conversation flow between the parties and aid in their compromising.

The American mediator also thought reframing the statements made by the disputants would be helpful in listening to and understanding all viewpoints. By doing so, the mediator thought that the disputants would feel valued and listened to, which would aid in restoring the relationship while gearing the discussion towards resolution.

Finally, the American mediator thought to also use caucus to time proposals, facilitate communication, and convey positions. Caucus is an important technique of American mediations. Caucus is when the parties are put into separate rooms, and the mediator meets with each party one-on-one. The mediator meets with both parties an equal amount of time, and uses caucus to help facilitate communication, leverage between parties, and reduce tension.[63] The American mediator believed that caucus would help the parties reach a resolution sooner, thinking the parties would feel more comfortable sharing information privately.

## IV. Discussion

### A. Categorizing China and the United States

To understand why certain techniques work better in certain countries as opposed to others, we first have to understand culture and the cultural dimensions.

According to psychologist Geert Hofstede, "culture is the collective programming of the mind that distinguishes the members of one

[61] James A. Wall, *Mediation: An Analysis, Review, and Proposed Research,* 25 J. CONFLICT RESOL. 157, 175 (1981).
[62] Saul, *supra* note 56, at 8.
[63] Perez, *supra* note 59, at 718.

group or category of people from others."[64] Culture refers to the aspects of life that makes one group different from another including language, food, history, and values. Hofstede also created the cultural dimension that describes the major differences between countries, pointing out why people within a certain culture act and react in certain ways. The cultural dimensions are power distance, uncertainty avoidance, individualism vs. collectivism, masculinity vs. femininity, and short-term orientation vs. long-term orientation.[65]

The extent to which less powerful people in a society expect and accept the distribution of power to be unequal is power distance.[66] For example, a country with high power distance is China, and a country with low power distance is the United States. Uncertainty Avoidance deals with the extent to which people in a society can handle "ambiguity" and "unstructured situations."[67] Therefore, the United States and China would have low uncertainty avoidance.[68] Individualism vs. Collectivism studies the degree to which the members of a society are within a group.[69] Individualism, seen in the United States, expresses a "one side versus its opposite," whereas collectivism, seen in China, shows "strong, cohesive in-groups" vs. out-groups.[70] Masculinity vs. femininity "refers to the distribution of values between the genders," where masculinity focuses on success and competition, while femininity focuses on the group and caring for the society.[71] Both the United States and China rest on the masculinity end of this dimension.[72] Long-term orientation vs. short-term orientation relate to "the choice of focus for people's efforts," either focusing on the future, or focusing on the past and present.[73]

---

[64] Geert Hofstede, *Dimensionalizing Cultures: The Hofstede Model in Context,* 2 ONLINE READINGS IN PSYCHOL. AND CULTURE 3 (2011).
[65] *Id.* at 3.
[66] *Id.* at 9.
[67] *Id.* at 10.
[68] Audra I. Mockaitis, *The National Cultural Dimensions of Lithuania*, 59 EKONOMIKA 67, 74 (2002).
[69] Hofstede, *supra* note 64, at 11.
[70] *Id.*
[71] *Id.* at 12.
[72] Mockaitis, *supra* note 68, at 75.
[73] Hofstede, *supra* note 64, at 8.

The United States is short-term oriented whereas China is long-term oriented.[74]

B. Relation to Mediation Techniques

Categorizing China and the United States helps us understand why certain techniques are more useful in one country over the other. For example, mediators in China have a lot of power and use criticism and threats as techniques in mediation.[75] China ranks higher on the power distance dimension in comparison to the United States.[76] The mediators are the ones with the power, and the disputants understand that their role is "under" the mediators, therefore techniques like criticism can be used without reproof. Hierarchy was, and still is, an important aspect of Chinese culture and the way individuals operate in China.[77] If a mediator were to use criticism as a mediation technique in the United States, the disputants would end the mediation because that behavior would not be accepted and would be seen as disrespectful or "out of bounds" from the mediator's role.[78]

American disputants want to have mediators that do not know them, whereas mediators in China want to have personal relationships with the disputants.[79] This is a characteristic that is explained by the Individualism vs. Collectivism dimension. China is a collectivist culture that has strong in-groups.[80] Within the communities in China, there are mediation committees that mediate disputes between members of their in-group.[81] Knowing the disputants is not a violation of neutrality because it is part of their culture to operate within their in-group. In the United States, in-groups do not have a strong presence,

[74] Geert Hofstede & Michael Minkov, *Long- versus Short-Term Orientation: New Perspectives*, 16 ASIA PAC. BUS. REV. 493, 496 (2010).
[75] Wall, *supra* note 48, at 241.
[76] Mockaitis, *supra* note 68, at 73.
[77] LEWIS, *supra* note 50, at 486.
[78] Wall, *supra* note 48, at 246.
[79] Glassman, *supra* note 38, at 485.
[80] Mockaitis, *supra* note 68, at 74.
[81] Glassman, *supra* note 38, at 469.

especially in conflict where it is viewed as one against the other.[82] Therefore, the American disputants would want a mediator that does not have any personal links to the disputants. If there is a personal relationship, then it can be viewed as the mediator being biased towards a certain party, which is not acceptable.

Aggressive attitudes are more common in American mediations than in Chinese mediations. In Chinese culture, maintaining group harmony is important and individual aggressive behavior would not promote that goal. Referencing the Individualism vs. Collectivism dimension, it makes sense why aggressive attitudes are seen in American mediations. Americans value competition and conflict.[83] Also, Americans are individualist and are fighting for themselves in conflict. Aggressive behaviors are used to compete with the other party in the dispute, and it is normal because it is part of American culture.[84] However, if aggressive behaviors were used as a tactic in China, then the mediation would not be effective because it goes against their main goal of achieving group harmony. This is also why American mediators only used the technique of "call for empathy" 5 percent of the time, while the Chinese mediators used it 20 percent of the time.[85] A "call for empathy" helps the disputants understand each other and go back to the established equilibrium.

Chinese parties will not be able to effectively work in a mediation that disregards the formality of mediation, the restoration of harmony, the acknowledgement of morals, and saving face. American parties, who operate informally, without regard to harmony, morals, or face, will not be able to effectively work in a mediation that disregards the value of time, the importance and necessity of neutrality, and self-determination. With these differences in mind, it is fair to say that both countries stay "fundamentally true to their traditional origins" and they are different in the mediation techniques used.[86]

---

[82] JOSEPH P. FOLGER & ROBERT B. BUSH, NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 13 (Joseph P. Folger et al. eds., 1994).
[83] Wall, *supra* note 48, at 236.
[84] Perez, *supra* note 59, at 718.
[85] Wall*, supra* note 48, at 244.
[86] Xu, *supra* note 16, at 544-5.

C. Applicability Beyond China and the United States

This argument is not restricted to just China and the United States. Using the cultural dimensions as a foundation, it is plausible to come to conclusions regarding which mediation techniques described above can be used elsewhere.

Although the morals may differ and the structure of how mediation is set up may be different, the cultural dimensions support the idea that techniques used in China can be used in similar cultures without major problems. For example, due to the collectivist nature of China, mediation techniques are heavily influenced by the necessity of group harmony. Other countries that are collectivist, such as South Korea and Japan can use techniques such as calling for empathy. In fact, Japanese mediators used the "call for empathy" technique 17 percent of the time, and Korean mediators used it 33 percent of the time.[87] As China has high power distance, other countries that have high power distance, such as Russia and Malaysia, can use techniques similar to Chinese techniques.[88] Techniques that can be adopted by those cultures include criticizing the disputants and controlling the agenda of the mediation. The disputants in these cultures may feel a divide between the mediator and themselves, enabling them to listen to criticism and follow along with the mediator's plan.

The same can be applied to the other end of the spectrum. Other individualistic cultures may use some American mediation techniques in their own practices. Australia and Canada are good examples for individualistic cultures.[89] These countries may use techniques such as exercising caucus and having the mediator present mainly to facilitate the communication between the parties. Since the members of individualistic cultures are isolated from their community (compared to collectivist cultures), these techniques will be helping the disputants feel more comfortable. Allowing the disputants to privately share information and allowing them to reach their own decisions will create the environment that they prefer. In addition to

[87] Wall, *supra* note 48, at 244.
[88] Mockaitis, *supra* note 68, at 73.
[89] Mockaitis, *supra* note 68, at 72.

individualistic cultures, those that have low power distance may use techniques such as creating an informal environment and striking a power balance between the disputants. These techniques will allow the disputants to know they are on equal ground, and no one is pressuring one party to act, think, or feel in a certain way. For example, countries like Germany and Switzerland could be in this category.[90]

These concepts can be applied to any country and any culture; the United States and China are just two examples. When determining what mediation techniques would best apply to a specific country, it is key to understand the culture and how people within that culture approach and deal with conflict.

## Conclusion

Mediation is an important process used around the world. Many legal systems have found its value worldwide and there has been an increase in the use of mediation.[91] However, specific mediation techniques cannot be shared around the world. Culture plays too important of a role in the way individuals perceive, process, and react to conflict, that disregarding cultural influence in conflict would set up ineffective mediations. Culture needs to be acknowledged, and mediation techniques need to be tailored to the culture the dispute is occurring in. Without awareness of culture, all the work would be done in vain. There are times when we can learn from one another, but we need to first understand that only some techniques will be useful before discerning what techniques can be shared between countries and what cannot.

[90] Mockaitis, *supra* note 68, at 73.
[91] Glassman, *supra* note 38, at 486-8.

# TECHNOLOGY IN THE LAW: HELPFUL ADVANCEMENT OR DETRIMENTAL COMPLICATION?

Elizabeth Agranovsky

## I. Introduction

The approach and entrance into the twenty-first century were marked by a number of substantial world changes from economics to politics to ideologies. However, one of the most influential changes has been in the realm of technology. Many times, people evaluate the changes in technology with reference to industries such as software engineering and scientific studies. Often one does not consider the effects of technology on other industries, such as the legal world. How has the growth of technology impacted day-to-day proceedings in the last twenty years? This paper seeks to evaluate both the positive and negative impacts that technology has had in the legal realm as of late as well as analyze what this may mean for the future and what considerations must be made.

This paper will start with a detailed discussion regarding the use of police body camera footage as an example of a relatively new innovative technology, and how the law is continuously attempting to change in accordance with the use of such cameras. This discussion will include information regarding the general failures of the law to appropriately respond to technological advancements. Secondly, this article will continue with an analysis of how technology has impacted the discovery and evidence components of litigation. To continue, the paper will discuss how technology affects the day-to-day proceedings, and how the recent COVID-19 pandemic impacted these usages. The paper concludes by identifying some lingering questions caused by technology and proposing some possible remedies that can help the law and its professionals stay as current as possible.

## II. Police and Camera Footage

Many changes in the world do not have isolated effects. As such, when technology grows, it can have varying effects on different industries. One less thought of industry that is affected by technology changes is that of the law. As time has passed in the last two decades, society has seen many advents including, but not limited to, new and developing methods of evidence presentation, preservation and discovery methods; included within this is the use of police body cameras. While this specific method of evidence preservation and presentation has become a controversial [1] and disputed topic of conversation,[2] some of its potential benefits may be irrefutable, if certain issues are addressed.[3] Additionally, the use of this form of technology shifted the perspective that many held on the responsibility of duty for those in law enforcement.[4]

The beneficial effects of police wearing some form of a camera, in its simplest form, can be described by the basic psychological effects it has on all involved. After all, as stated by William A. Farrar, a chief of police in Rialto, California, the presence of a camera in many situations results in the police officer "follow[ing] the rules a little better" and the involved citizen most likely "behav[ing] a little better" as well.[5] While this is a rather simplistic analysis of a typical interaction, it provides an overview of the perspective of many that are directly involved in law enforcement.

---

[1] Police Use Body Worn Video, AMERICAN POLICE OFFCIERS ALLIANCE, INC., https://americanpoliceofficersalliance.com/police-use-body-worn-video-brief-history/, (last visited on April 22, 2022).

[2] Considering Police Body Cameras, 128 Harv. L. Rev. 1794 (2015).
This source discusses some of the controversy and concerns that surrounded the use of police-worn body cameras at the start of their rise in use. The author showcases how the consequences of the usage of police body cameras are pervasive and as such, there is no hard consensus on whether or not implementation is the true "right answer."

[3] The first main appearance in the United States of studies regarding these police-worn body cameras and their findings as well as relevance are discussed starting around footnote twenty-two.

[4] Michael D. White & Aili Malm, Cops, Cameras, and Crisis: The Potential and the Perils of Police Body Worn Cameras 2 (2020).

[5] Id. at 1.

Camera footage helps to solidify the validity of procedures carried out during an engagement to help avoid certain evidentiary issues that could emerge. With documented proof that an officer conducted themselves in a certain manner, there is no longer room for speculation as to whether an officer may have done something, procedurally or otherwise, that would negate the legal interaction at hand or simply be inappropriate. One such example was in *United States v. Butler*,[6] which resulted in the arrest of the defendant stemming from an interaction that was initially meant to be a wellness check. In *Butler*, the defendant was asked to provide identification. While shifting to do so the officers involved viewed a firearm.[7] Upon checking into the "legality of the firearm"[8] it was found that the defendant was a felon and could not lawfully have a firearm; as such, he was subsequently arrested.[9] The defendant sought to suppress the evidence against him, however this motion was denied.[10] As one of many justifications, the court ruled that this entire interaction did not qualify as being an unlawful stop or seizure.[11] In this case, one of the primary factors that led to this reasoning was the review of body camera footage, which proved the legality of all the officer's actions. This is one of many examples that shows how body cameras, or theoretically other camera footage, can provide verification for what truly transpired during a police engagement.

However, despite the seemingly positive impacts that body cameras offer, currently, there is no widespread federal law requiring this type of technology to be used in every police encounter.[12] With any attempted piece of legislation, there are always critics bringing concerns to the table; the implementation of consistent body camera

[6] United States v. Butler, No. 2:20CR044 (DJN), 2020 U.S. Dist. WL 7777476 (E.D. Virginia. Dec. 30, 2020).
[7] Id. at 2.
[8] Id.
[9] Per the Gun Control Act of 1968, 18 U.S.C. § 921 – 925 (2022), it is illegal for a felon to possess a firearm.
[10] Butler, 2020 U.S. Dist. WL 7777476 at 2.
[11] Id. at 4.
[12] See White, supra note 4, at 16.

footage and documentation was no different. For example, in 2019, a bill was introduced in the state of Maine which required "all police officers to wear body cameras."[13] There was much opposition citing reasons ranging from cost to necessity.[14] In response to this attempted legislation, the American Civil Liberties Union (ACLU) issued a statement in which it stated, "body cameras are only tools" and furthermore discussed the importance of the policies behind their usage.[15] However, this previously proposed bill is no longer in discussion in the state of Maine; the bill died in the Senate at the end of the 129th Legislature in 2020.[16]

One of the many purposes of body cameras is to promote trust between the police force and society, and proper usage of any technology or footage, including these body cameras, is an important component in achieving this goal. The ACLU in this particular situation advocated for the necessity implementing policies in which there are "rules for accountability" as well as "rules to protect

[13] Lindsey Van Ness, Body Cameras May Not Be the Easy Answer Everyone Was Looking For, PEWTRUSTS (Jan. 14, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/14/body-cameras-may-not-be-the-easy-answer-everyone-was-looking-for.
[14] Id.
[15] Oamshri Amarasingham, LD 636 – Ought Not To Pass: An Act to Require Law Enforcement Officers to Wear Body Cameras, 1, ACLU, (Feb. 6, 2019), https://legislature.maine.gov/legis/bills/getTestimonyDoc.asp?id=129913.
[16] Summary of LD 636, STATE OF MAINE LEGISLATURE, https://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280071581 (last visited on Feb. 18, 2022).

privacy[17,18] and create transparency."[19] The significance of protecting civil liberties, such as privacy, is evident in this testimony; this is shown through the ACLU's resistance to wholly accept or deny the use of body cameras within law enforcement. Rather, as exemplified above, they advocate for the use in particular circumstances, but wholly condemn it in others. The ACLU does not believe that body cameras should always be worn or never be worn. To the contrary, the "ACLU of Maine support[ed] body cameras if they are used according to policies" however strongly opposed their usage in schools for many reasons including the necessity to protect the privacy of minors and avoid promoting a pervading type of academic environment.[20]

Therefore, it seems like body camera usage has some support if used conditionally. If not used appropriately the initial intention of the technology can get lost. Even with conditional support, there is still a constant debate as to whether bills such as the one in Maine are beneficial or even necessary. Had there been guaranteed benefits associated with the bill and the widespread use of body cameras, the proposed legislation most likely would have passed through the Senate and been implemented; if the proposal was automatically

[17] While the Constitution does not provide for an express right to privacy, it has been determined by the Supreme Court of the United States that it an implied constitution right that is implicit in the penumbra of other rights contained in the Bill of Rights. Per Roe v. Wade, 93 S. Ct. 705, 152 (1973), it has been recognized by the court that the right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, as is exemplified by a long line of court decisions reaching back to 1891.

[18] Additionally, it was stated in Griswold v. Connecticut, 381 S. Ct. 488, 504 (1965), that a fundamental right is not able to be encroached upon unless the Government is able to prove a compelling state interest. Justice Douglas wrote in his opinion that the "language and history of the Ninth Amendment reveals that the Framers of the Constitution believed that there are additional fundamental rights protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. As such, the right to privacy, which is not expressly stated in the Constitution, seems to currently be falling into this category of rights that are not necessarily considered fundamental but are nonetheless important.

[19] Amarasingham, supra note 15.

[20] Id. at 2.

deemed as harmful, it likely would not have caused such a large debate. Incidences such as this one in Maine highlight the idea that the implementation of technology is not something that should be taken lightly, nor is it as simplistic as being solely helpful or harmful.

One overlying theme that emerges is that which implies that the psychology of people and people's actions matter just as much as the presentation of technology. Arguably, technology is neither positive nor negative; it is merely a resource that can be used for good or for bad. Misuse can range from theft of software to data breaches in which the personal information of individuals is obtained and possibly publicized.[21] Additionally, another negative impact that technology could have includes contributing to poor attention spans in children growing up with this technology to anxiety, isolation, and others.[22] In instances such as these, the use of technology is leading to these negative effects. Through these vastly differing examples, it can be extrapolated that in the new and emerging presence of body camera footage, very careful considerations need to be made to leave little room for bad usages. While the usages would not exactly mimic those which were mentioned above, different pieces of technology can be used in different negative fashions. For example, there are some fears regarding officers recording and releasing the contents of this footage.[23] From victims to bystanders to even the offenders, sensitive information is often recorded in this footage and if not strictly regulated, the release of this footage can easily occur which can have unintended consequences such as the public's reduced willingness to even speak to law enforcement.[24]

[21] Alice Hutchings and Penny Jorna, Misuse of information and communications technology within the public sector, AUSTRALIAN INSTITUTE OF CRIMINOLGY, (July 31, 2015), https://www.aic.gov.au/publications/tandi/tandi470.
[22] Janna Anderson and Lee Rainie, Concerns about the future of people's well-being, PEW RESEARCH CENTER, (April 17, 2018), https://www.pewresearch.org/internet/2018/04/17/concerns-about-the-future-of-peoples-well-being/.
[23] White, supra note 4, at 51.
[24] Id.

A. Lead Up to the Growing Use of Police Body Cameras

To say whether a technological growth is positive or negative, one must evaluate its effects in relation to history. It is important to conceptualize what led to a specific change, how it is being used and implemented and what this may mean for the future. Like anything else[25] that is new, body-worn cameras started slowly with careful testing and pilot studies.[26] The first three studies of this technology in the United States occurred in rather close concurrence, at different locations. These studies occurred in Rialto, California (beginning February 2012), Meza, Arizona (beginning October 2012), and Phoenix, Arizona (beginning April 2013).[27] Each of the studies were designed to test something different including, but not limited to, citizen complaints (Rialto), reduction of civil liability (Meza), and officer perceptions of the technology (Phoenix).[28] Through these studies, a number of perceived benefits were viewed (from the

[25] While not a central issue discussed here, it could be argued that the path of police body camera usage followed similarly to that of dashboard footage used amongst law enforcement. Dashboard footage was introduced earlier in history and faced many of the same critiques at the start of its use. Currently, it is widely accepted as beneficial. As such, there is a predictable path of implementation that police body camera usage may follow. This shows that the issues currently being identified here are not unique, but rather with a technology expansion, past issues can revive as easily as new issues can be formed. The following portrays some of the many similarities between the two pieces of technology:
The Impact of Video Evidence on Modern Policing: Research and Best Practices from the IACP Study on In-Car Cameras, BUREAU OF JUSTICE ASSISTANCE U.S. DEPARTMENT OF JUSTICE,
https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/iacpin-carcamerareport.pdf, (last visited April 23, 2022).

[26] White, supra note 4, at 83.

[27] Michael D. White, Police Officer Body-Worn Cameras: Assessing The Evidence, 17-18, (2014), US DEPARTMENT OF JUSTICE,
https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/diagnosticcenter_policeofficerbody-worncameras.pdf.

[28] Id. It is important to note that the way in which each of these studies were conducted did differ and while the ultimate goal was to study the same technology, the intricacies differed from study to study. Despite the slight differences, the findings in the studies were very similar. It is also important to note that at the time of this publication, these studies were extremely new and as such, the analysis of the findings were somewhat limited in terms of being able to see long terms effects.

perspectives of citizens and officers) such as improved officer and citizen behavior as well as increased transparency and legitimacy.[29] In terms of concerns, some perceived issues were with regard to the privacy of citizen and officer alike as well as the logistical issues surrounding implementation, such as resource availability.[30]

However, even with the increase in usage of body cameras, "there was a low and slow burning interest in the technology through early 2014, which as a result changed the rate of growth and implementation this technology saw."[31] The shift in interest with respect to police wearing body cameras stemmed from, at least in part, highly publicized police incidents.[32] Specifically, following the summer and later portions of 2014, much changed with the deaths of Tamir Rice (November 2014),[33] Eric Garner (July 2014),[34] Michael Brown (August 2014),[35] and a number of others. As such, a large amount of scrutiny was placed on police departments and much debate ensued.[36] This instigated more rapid growth in the inclusion of body-worn cameras. These body-worn cameras were brought into the picture as a plausible way to address the situation with much support at the time, including a seventy-five-million-dollar pledge from President Obama.[37] However, despite the theoretical positive impacts that could ensue, this situation represents a cautionary tale in itself. This is due to the fact that a large financial pledge was being placed in a piece of technology that only had a "handful of evaluations" at the time.[38]

---

[29] Id at 18.
[30] Id at 18.
[31] White, supra note 4, at 83.
[32] Id.
[33] Twelve-Year-Old Tamir Rice Dies of Injuries After Being Shot by Police, (Nov, 2020), https://calendar.eji.org/racial-injustice/nov/23.
[34] Eric Garner dies in NYPD chokehold, A&E TELEVISION NETWORKS, (July 15, 2020), https://www.history.com/this-day-in-history/eric-garner-dies-nypd-chokehold.
[35] Michael Brown is killed by a police officer in Ferguson, Missouri, A&E TELEVISION NETWORKS, (Aug. 6, 2020), https://www.history.com/this-day-in-history/michael-brown-killed-by-police-ferguson-mo.
[36] White, supra note 4, at 83.
[37] Id.
[38] Id.

In fact, there were less than five thorough evaluations that had been done to investigate all issues surrounding this technology. A statistical representation of police use of body-worn cameras (based on a 2020 publication) shows that "just under half" of law enforcement have deployed this practice, based on a 2016 study.[39] Although this statistic does not represent the majority, it is substantial given that just a few years prior, the usage of police-worn body cameras was minimal if not bordering on nonexistent. Despite the seeming lack of data to support this developing action, departments began to exponentially engage in the implementation of police-worn body cameras as an attempt to rectify the situation at the time. However, this elicits further questions as to why this decision was made despite the lack of evidence to support it.

B. Discussion of Rapid Adoption Causes

In less than a decade, why was this technology so rapidly adopted despite the unknowns? Was this because of the belief that all technology growth is positive? Was this because society has an inherent trust in new technologies without considering all the effects it may have? Was this because it was the normal reaction to the adoption of a new technology? Was this due to heightened emotions that occurred at the time? The simple, yet complex, commentary to be made on the matter is that there is not one simple reason that society seemingly so readily accepted this piece of technology. Arguably, many times people actually are resistant to changes in technology versus exhibiting a willingness to accept them. Although "new technology appeals to some, the majority of Americans still prefer the familiar."[40] This resistance tends to stem from multiple factors such as humans instinctive desire to protect oneself from technologies effects on future employment.[41] So, despite a historical

[39] Id. at 84.
[40] Joanna Howarth, Here's Why People Resist New Technologies, BENTLEY UNIVERSITY (Nov. 20, 2017), https://www.bentley.edu/news/heres-why-people-resist-new-technologies.
[41] Id.

resistance to change, what made the technological development of police-worn body cameras different?

Some credit a notion known as adoption theory as having an imperative role. This concept describes the way in which technology is spread and adopted throughout a society, and which factors influence this process.[42] While there admittedly is not one singularly recognized theory of adoption when referencing technology, one constant is that these theories are focused not on the adoption of the technology itself, but rather on the "pieces that make up" this adoption process.[43] In the development of police-worn body cameras, one of the most influential factors that contributed to their increasing use was geographic setting combined with the overarching political climate of the time.[44] While these are not the sole factors to consider, one needs to note that a fundamental principle of adoption theory is the notion that the environment matters.[45]

As discussed previously, following the summer of 2014, much national attention was drawn to the crisis that loomed over the police community, and as such, the interest in police body cameras boomed at an exponentially higher rate than it had previously.[46] This technological diffusion was "inextricably linked to the crisis in policing."[47] State and federal government legislation also impacted the growth of body cameras and with the granting of a large amount of funds toward this technology, the distribution became easier and the relative usage started to increase.[48]

---

[42] Even T. Straub, Understanding Technology Adoption: Theory and Future Directions for Informal Learning, REVIEW OF EDUCATIONAL RESEARCH, 626, (June 2009), https://www.jstor.org/stable/pdf/40469051.pdf?casa_token=L1o_gIUGzqUAAAAA:xTULf2Gi0QfIGiKKmv369SdvEgKGdAnpxhHnjkfHphVoin5qGPvP8o_kmiE_juyTqXjHIBk6cQFx-IqIlu0Zv2Z3VGm0l3GdxhunmSjctpNWJyFmqK8.

[43] Id.

[44] White, supra note 4, at 95.

[45] Id.

[46] Id. at 95-96.

[47] Id. at 96.

[48] Id.

Overall, the general concurrence amongst experts, regarding the value of implementing widespread usage of police body camera footage, seemed to state that this piece of technology will be useful if used appropriately with proper controls in place.[49] As such, the more established the regulations are, the more likely it will have a positive summative effect on society.

While police body footage is an exemplification of a controversial piece of technology that has emerged in recent history, it is not nearly the only one. Additionally, this piece of technology does not just affect the daily actions of law enforcement officers. Due to the pervasive nature of technology in the world as well as the law, we can see police-worn body cameras having an impact on legislation and as such on attorneys. Attorneys are forced to continually adapt to the changing aspects of this technology. However, this is not the only example of when a piece of technology has a prevalent effect in the legal field. Many changes are also becoming visible within fields such as discovery and evidence.

## III. Discovery and Evidence

Discovery and evidence are intertwined concepts; without the discovery process, one cannot obtain evidence, and without evidence, there would be nothing to discover. The American Bar Association defines discovery as the process that both sides use to begin preparing for trial.[50] This process is the formal exchanging of information that will be used at trial; this "enables the parties to know before the trial begins what evidence may be presented."[51] This process of discovery is imperative to the law and has changed with the growth of technology. Without evidence, trials could not proceed, information would not be found, and knowledge would be limited to simply word of mouth. The process of discovery "continues from the time the case begins to the time of trial," assuming a trial

[49] Id. at 96, 102.
[50] How Courts Work, AMERICAN BAR ASSOCIATION (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/#:~:text=This%20is%20the%20formal%20process,what%20evidence%20may%20be%20presented.
[51] Id.

takes place.[52] Evidence is defined as "an item which a litigant proffers to make the existence of a fact more or less probable."[53] This can take a range of forms from testimony to recordings to a metadata of documents.

A. Changes to the Definition of Evidence

As technology developed entering the twenty-first century, the definition of evidence had to expand to be more inclusive. As time passed, more could be recorded in video or digital format and other technological developments ensued. Courts were forced to reconsider their somewhat antiquated definitions of what was considered permissible as evidence. Many questions came to fruition regarding things such as social media and cell phone records.[54] Even with the changes that seemingly occurred throughout the recent past and continue today, the law seemingly cannot keep up with technology and is consistently behind the development curve by a number of years.[55] As such, this is a constant consideration that the court system must face as of late.

In recent years, social media has become a new and emerging source of evidence in legal proceedings.[56] The introduction of growing forms

---

[52] Discovery, OFFICE OF THE US ATTORNEYS, https://www.justice.gov/usao/justice-101/discovery, (last visited on April 22, 2022).
[53] Evidence, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/evidence, (last visited on April 22, 2022).
[54] Many cases addressed this matter over the last 10 years. Some examples include: Riley v. California, 134 St. Ct. 2473 (2014)., United States v. Wurie, 728 F. 3d 1 (1st Cir. 2013)., United States v. Jackson, No. 21-cr-51 (DWF/TNL), 2021 U.S. Dist. WL 5819929 (D. Minnesota. August 25, 2021)., Thompson v. Autoliv ASP, Inc., et al., No. 2:09-cv-01375-PMP-VCP, 2012 U.S. Dist. WL 2342928 (D. Nevada. June 20, 2012).
[55] Julia Griffith, A Losing Game: The Law Is Struggling To Keep Up With Technology, SUFFOLK UNIVERSITY LAW SCHOOL (April 12th, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology//#:~:text= Technology%20seems%20to%20be% 20advancing, years%20behind%20developing%20a%20technology.
[56] Christina M. Jordan, Discovery of Social Media Evidence in Legal Proceedings, AMERICAN BAR ASSOCIATION, (Jan. 30, 2020), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/january-2020/discovery-social-media-evidence-legal-proceedings/#:~:text=Information%20documented%20on%20social%20media%20is

of technology led to this unique and novel consideration and the debates that followed on the matter. For example, in the civil case of *Tompkins v. Detroit Metropolitan Airport*,[57] following a slip and fall accident, the defendant requested that the plaintiff (Tompkins) provide "records from her social networking website accounts." This was done to verify the validity of the plaintiff's injury claims; ultimately, the defendant's request was denied. In *Romano v. Steelcase Inc and Educational & Institutional Cooperative Services Inc,*[58] a personal injury action was brought against a defendant at which point the defendant sought to have access to the plaintiff's social media accounts, for similar intentions as in *Tompkins*.[59] However, in *Romano*, the defendant was awarded access to the plaintiff's records.[60] Despite similar facts, why was a motion for access granted in one case and not in the other? How was privacy related to this matter?[61] The main difference in the matters of these cases was related to the rule that states that traditional discovery principles dictate that "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" and for purposes of discovery, this evidence does not necessarily need to be admissible for trial.[62] In *Tompkins*, it was established that in order to avoid a "proverbial fishing expedition,"[63] there must be a threshold showing that the requested information is "reasonably calculated to lead to the discovery of admissible evidence."[64] One

%20often%20spontaneous%2C%20relatively%20permanent,important%20evidence%20in%20legal%20proceedings.

[57] Tompkins v. Detroit Metropolitan Airport d/b/a Wayne County Airport, 278 F.R.D. 387, (E.D. Michigan, 2012).

[58] Romano v. Steelcase Inc. and Educational & Institutional Cooperative Services Inc., 30 Misc. 3d 426 (N.Y. 2010).

[59] Id. at 426.

[60] Id.

[61] With regard to the previously discussed cases of Tompkins and Romano, it is important to note that they are not from the same jurisdiction and as such, Romano would serve as persuasive versus as binding precedent. However, it is important to note that both cases were interpreting a similar rule to come to their decision. Despite interpreting extremely similar information, the two courts came to entirely different decisions.

[62] Fed. R. Civ. P. 26(b).

[63] Tompkins, 278 F.R.D. at 388.

[64] Id.

major factual difference between the two cases was that in *Romano*, the plaintiff had made public images that countered her respective injury claims, and as such, the defendant had grounds to request further access to the private information.[65] Comparatively, in *Tompkins*, a situation like this did not occur, and as such, the Judge Steven Whalen, writing for the majority states that the defendant failed to "establish a factual precedent with respect to the relevancy of the evidence."[66] As such, the aforementioned threshold was not met in *Tompkins,* but was in *Romano*.

As shown by the differences in the treatments of social media in the above cases there are numerous concerns that must be considered and technology in these cases has been a source of complexity and debate. Social media as evidence, while theoretically useful to verify particular types of claims, can be problematic as the understanding of its allowed usage is still growing and changing. Additionally, any slight variation in the facts may cause a different outcome, and while this is true in any case, admissibility of evidence for trial or other purposes is a fundamental component of legal proceedings, and as such, at least some clarity is needed.

B. Privacy in the Online World

As the definition of evidence expands to include aspects of the online world, a whole new consideration regarding one's rights to privacy in the online world is needed. The question of whether people have a reasonable expectation of privacy in regard to online activity does not have a definite answer. Progress is starting to be made regarding this matter; however, it is being discussed as issues appears. Case law on the matter is still growing and has yet to address every possible matter regarding the reasonable expectation of privacy in the online world. Beyond people's personal beliefs, at times users' expectation of privacy stems from the agreements that they sign when using certain platforms. However, many do not read the fine print and do not realize that there is not really privacy protection for everything

[65] Id.
[66] Id.

such as voluntary posts.[67] As such, currently it is safe to say that people expect their privacy to be protected and extend into the online world; however, the law is still growing to accommodate changes and address these matters.

A well-known opinion is that "strong privacy is a civil right" but also concedes the fact that "strong privacy protects criminals."[68] As technology continues to become more advanced, and the law struggles to keep up, people continue to grow more concerned with their privacy. As recently as 2019, "majorities think that their personal data is less secure now than it had been previously."[69] This expands to data collection as well as any form of online usage. The idea that one cannot proceed through one's day without being tracked is becoming of greater concern to citizens.[70] The ACLU is in concurrence with the idea that "technological innovation has outpaced our privacy protections" and, as a result, citizens can now be tracked in more ways than was once possible.[71]

There are a variety of ways, both passively and actively, that a user can end up being tracked through their own devices. User searches are tracked and logged via embedded software such a cookies and HTTP logging.[72] This occurs to people more often than they think; one such example would be when an advertisement of a product

---

[67] Mark Sableman, Do you have privacy rights on social media?, THOMPSON COBURN LLP, (July 12, 2016), https://www.thompsoncoburn.com/insights/blogs/internet-law-twists-turns/post/2016-07-12/do-you-have-privacy-rights-on-social-media-#:~:text=Your%20voluntary%20posting%20of%20personal,posts%20private%20information%20about%20you.

[68] Lance Rose, NetLaw: Your Rights in the Online World 165 (1995).

[69] Brooke Auxier, et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information, PEW RESEARCH CENTER, (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/.

[70] Id.

[71] What's at Stake, ACLU, https://www.aclu.org/issues/privacy-technology, (last visited on April 22, 2022).

[72] Data Collection: Defining the Customer, MIT, http://web.mit.edu/ecom/www/Project98/G2/data.htm, (last visited April 22, 2022).

appears on sites such as Facebook, Google, or Instagram, right after a user mentions or discusses this product near their electronic device. Another such example of tracking can occur via the Global Positioning System (GPS) feature of a cell phone. With this feature, not only does the user know where they are, others can know where they are as well.[73] This poses many risks to individuals such as judges, attorneys, and federal employees in agencies such as the Central Intelligence Agency (CIA), due to the fact that the ability of their profession to be effective relies on privacy and anonymity.[74] Tracking people like this could have negative effects including threats being posed to their places of work or embarrassing information being released publicly to undermine the public confidence.[75]

While this example is very niche, location tracking is not limited to these groups of people and as such, the average citizen is also concerned about the matter. Unfortunately, citizens cannot simply turn off their location and solve this issue. The ability to track is so embedded within phones and apps that it is very difficult to entirely rectify the issue.[76] Occurrences such as these are just a few examples of how people are tracked in their daily lives causing concerns regarding privacy protections for many.

As such, the usage of evidence obtained in these new fashions becomes a point of contention due to its controversial nature. Protections are limited for those that willingly provide information, as actions such as posting on a private profile commonly equated with consent.[77] However, because many features are running in the

[73] Herbert B. Dixon Jr., Your Cell Phone Is a Spy!, AMERICAN BAR ASSOCIATION, (July 29, 2020), https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/summer/your-cell-phone-a-spy/.
[74] Id.
[75] Id.
[76] Id.
[77] How Much Privacy Do You Have Online, UNIVERSITY OF DAYTON SCHOOL OF LAW, (Jan. 17, 2019), https://onlinelaw.udayton.edu/resources/how-much-privacy-do-you-have-online/#:~:text=In%20general%2C%20people%20enjoy%20a,still%20have%20the%20same%20protections.

background on devices, at times information becomes public without explicit consent. It has been found that even after permission had been revoked by users to share data, certain apps were still sharing.[78] As people attempt to have control over which pieces of their information are known, they are not even able to do so in some situations. The entire nature of evidence obtained via these methods becomes a contentious point among citizens because at times, they did not even divulge certain information, and yet, it became public somehow.

Even at the start of technological development with regards to computers, forty years ago, people were able to identify that privacy was to become a big concern.[79] By the time a law is proposed and put into action, technology can already grow and surpass the original issue at hand in the most recent legislation[80]; this is one of the major issues that faces legislature as it is difficult to enact a law when there is minimal information about its future value in society. If the laws properly kept up with the issue at hand, there would be substantially fewer unknowns and questions regarding how to handle some of the previously mentioned situations. This is yet another example of laws and policies attempting to keep up with technology and failing to do so. While the concern with regards to technology, privacy, and the law has grown considerably in the last twenty years, the key foundational forces that drive this concern have not changed much.[81] Some of the forces range from "illicit access to personal information with a malicious intent" to "use of information for purposes other than that for which it was collected" to the sanctity of the information being stored to begin with.[82] All of the above debates begs the question: has the growth of technology at this point been purely negative? Many would argue yes simply due to excessive unknowns. However, it would be incorrect to say that the technology does not have the capacity to aid society. Rarely does an innovation

[78] Dixon, supra note 73.
[79] John T. Soma, Computer technology and the law 222 (McGraw-Hill, Inc 1983).
[80] See Griffith, supra note 55.
[81] See Soma, supra note 79.
[82] Id.

that has purely negative consequences continue to be funded for usage. Rather, this showcases that the technology just needs to be implemented appropriately.

C: Technology as Evidence: Case Analyses

The presence of cell phones and their growth in complexity have resulted in their ability to be used as a plausible form of evidence. Just as video surveillance can be considered evidence, so can different aspects of cell phones, including message history and locations. The Fourth Amendment guarantees United States citizens the right to secure their "persons, houses, papers, and effects, against unreasonable searches and seizures."[83]

This decision was quite recently extended to cell phones in the case of *Carpenter v. U.S*.[84] In *Carpenter*, the defendant was arrested on twelve different counts, six for robbery, and six for carrying a firearm during the commission of a federal crime of violence.[85] Carpenter was indicated as being involved by a suspect who was arrested in 2011 after a series of robberies.[86] With this information, the prosecution used the Stored Communication Act to apply for court orders in order to obtain the cell phone records of Carpenter and others.[87] The statute used in this case had most recently been amended in 1994 and allows the government to obtain certain telecommunication records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records are "relevant and material to ongoing criminal investigation."[88] In accordance with this regulation, Carpenter's phone records were obtained and part of his conviction laid in his location at the time of a number of the robberies.[89] Prior to the trial in this case, the defendant (Carpenter), attempted to have these cellular records suppressed. This motion was denied by the District

[83] U.S. Const. amend. IV.
[84] Carpenter v. U.S., 138 S. Ct. 2206, 2209 (2018).
[85] Id. at 2212.
[86] Id.
[87] Id. at 2209.
[88] 18 U.S.C. §2703(d).
[89] Carpenter v. U.S., 138 S. Ct. 2206, 2213 (2018).

Court, and this decision was affirmed by the Sixth Circuit United States Court of Appeals.[90]

When assessed by the United States Supreme Court, this matter was ultimately reversed and remanded on the basis that the way in which the records were obtained were not valid, as some were a product of a "search" and the government obtained the records from the wireless carrier without a "search warrant supported by probable cause."[91] Additionally, Chief Justice Roberts, writing for the majority, stated that for the purpose of the Fourth Amendment, an "individual maintains a legitimate expectation of privacy…in the record of his physical movement as is captured" by a wireless provider.[92] Even though the appellate court decision was ultimately reversed and remanded, there were still some disagreements, and Justices Kennedy, Thomas, Alito, and Gorsuch all filed dissenting opinions, which serves to show that decisions surrounding these issues are rather complex.[93]

However, despite the decision in *Carpenter*, the holding in *United States v. Monroe*[94] differed. In *Monroe*, the defendant had been charged with crimes related to child pornography and had moved to have evidence obtained as a result of the use of his IP address suppressed.[95] The defendant claimed that this evidence had been obtained without a search warrant and as such obtained in a way that was counter to his Fourth Amendment rights.[96] However, in this case, the motion to suppress the evidence was ultimately denied even though *Carpenter*[97] was used as a stronghold for the defendant's reasoning.[98] In *Monroe*, counter to the cell phone discussion in *Carpenter*, the Court stated that the revealing of an IP address "does not, in it of itself, reveal a particular user's identity or

[90] Id. at 2206, 2012.
[91] Id. at 2206.
[92] Id.
[93] Id.
[94] United States v. Jordan Monroe, 350 F. Supp. 3d 43 (D. R.I., 2018).
[95] Id. at 44.
[96] Id. at 43.
[97] Carpenter v. U.S., 138 S. Ct. 2206 (2018).
[98] Monroe, 350 F. Supp. 3d at 48.

the content of the user's communication."[99] Essentially, unlike a phone, an IP address did not provide identifying information regarding a particular person, as theoretically any individual can be using a particular IP address.[100] While the facts of these cases were not the same, one of the main issues that both holdings discussed was: to what extent does the Fourth Amendment protect communications and actions via technological means? The lack of consistency with similar facts shows the complexity that this type of issue has in today's legal system and the current lack of capacity to provide a clear definition of what is protected with regard to technology under the Fourth Amendment and what is not.

In *Smallwood v. State of Florida*,[101] the court held that the evidence obtained from the defendant's phone was obtained by officers in a lawful fashion. In the facts of this case, the defendant was arrested on suspicion of being the perpetrator in a robbery.[102] The officer did not witness the event; however, based on the evidence that was present at the time, an arrest warrant was issued.[103] In the process of the arrest, a search was conducted to check for weapons on the defendant's person and, in doing so, the officers found a cell phone.[104] This cell phone was searched pursuant to the search incident to arrest clause.[105] In the proceedings of this case, the defendant's attorney had attempted to suppress this evidence due to it being obtained without a warrant.[106] However, this motion was denied on the basis that this cell phone was essentially similar to "a wallet or close container found on an arrestee's person," [107] which could be lawfully searched.

Cases such as these show that the usage of cell phone data is becoming more and more present as evidence in court proceedings,

[99] Id. at 48-49.
[100] Id. at 49.
[101] Smallwood v. State of Florida, 113 So. 3d 724, 725 (Fla. 2013).
[102] Id. at 726.
[103] Id.
[104] Id at 727.
[105] Id.
[106] Id.
[107] Id. at 724, 727.

and depending on the situation, a warrant will not even be needed to search the device if it is found on the suspect's person. This is another illustration of why many Americans feel as if privacy is decreasing within their day-to day lives. With many people essentially having their entire lives on their electronic devices, the idea that they could be subject to search and seizure without a warrant makes many wary, especially because the definition of probable cause when it comes to electronic devices is not fully defined and is still being developed.

What positive impacts could this growth of evidence usage and availability have? Despite the controversy surrounding this issue, it is irrefutable that technological growth at times aids the process of obtaining evidence. Resources such as video surveillance allows for one to be more certain that the person accused of a crime is the individual who committed the crime without relying on word of mouth, witness statements, or even confessions. Even controversial pieces of technology such as the previously discussed police-worn body cameras can have a positive impact. For example, the police-worn body cameras can be used to hold an officer accountable, as well as the citizen, if used properly. However, while the evidence itself seems to have its benefits, the process of obtaining it must be regulated appropriately.

D. Discovery Process

Beyond the evidence itself, the discovery process has rapidly changed in the last two decades. When viewed from the perspective of civil litigation, some consider the "exponential growth in the volume of electronic documents created by modern computer systems" as having the potential to jeopardize the ability of the court to "handle even routine matters."[108] When too much information is presented it becomes very difficult to determine what is pertinent

[108] John H. Beisner, The Centre Cannot Hold – The Need for Effective Reform of the U.S. Civil Discovery Process, 2, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, (2010), https://www.uscourts.gov/sites/default/files/john_beisner_the_centre_cannot_hold.pdf.

versus superfluous. Additionally, this information provided by means such as cell phones and other electronic documents may draw further questions due to the difficulty in determining the authenticity. With the growth of technology, extra steps are needed to authenticate electronic evidence through methods such as witness and experts.[109] However, this begins to impede routine matters with excess costs and more steps than may have been necessary in the past. While helpful in the sense that it can produce information that may have been inaccessible before, one must consider that too much information is also an obstructive force. While the information obtained via discovery may be helpful, with the increase in use of e-discovery, many other associated issues begin to emerge.

Some believe that the fundamental issue that becomes evident with electronic discovery in the civil litigation process is related to the American rule relating to the allocation and responsibility of legal expenses.[110] Under this concept, parties are generally obligated to be responsible for their own litigation costs.[111] As will be explained in more detail below, those with more financial resources may end up gaining an advantage and using it to abuse the system. While this is not a novel concept in society, it can at times prove particularly problematic in the legal realm. The essential goal of this abuse is to gain a competitive advantage and force a particular settlement outcome.[112] However, on the other side, even those that do not gain the competitive advantage end up feeling the need to engage in extensive discovery, at times overly extensive, out of fear of malpractice suits.[113]

Overly expansive and expensive pre-trial discovery is not a novel occurrence and has been a point of debate with experiments in

---

[109] Michaela Battista Sozio, Authenticating Digital Evidence at Trial, AMERICAN BAR ASSOCITATION, (April 27, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/04/03_sozio/#:~:text=Text%20messages%20can%20be%20authenticated,facts%20that%20are%20specific%20to.

[110] Beisner, supra note 108, at 3.

[111] Id.

[112] Id.

[113] Id.

"discovery reform as early at the late 1970s."[114] The reforms that were instituted at the time were essentially ineffective at curbing the issues and with the rise of technology and electronic means, the problem has been exacerbated.[115] The Federal Rules of Civil Procedure state that "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense."[116] The overbreadth of this regulation allows an excessive number of documents to be requested as a part of the discovery process due to one party somehow qualifying this documentation as "relevant". Computer systems in many cases now can retain documentation for infinite amounts of time and as such, there is more information accessible now for discovery purposes than there would have been during the twentieth century.[117] Additionally, many would assume that the costs associated with electronic documents would be less than that of paper documentation; however, the opposite is true. This is due to the fact that "electronic data must be heavily processed and loaded into a special database" to be reviewed for the relevancy.[118] The costs of required information retention on the part of legal professionals may end up being excessive and overbearing as well.[119]

While the theoretical benefits that electronic discovery can pose are immense, the way this process is currently handled leads to substantial negative effects. For the benefits of electronic and growing discovery to come to fruition, the way in which the discovery process and system is used will need to be developed or possibly even overhauled. This is another situation in which the technology presents the chances of positive effects on society, but its implementation must be guided by strict guidelines and rules for the benefits to be visible. The need for stringent regulations stems from

[114] Id. at 12.
[115] Id. at 2-3.
[116] Fed. R. Civ. P. 4(b)(1).
[117] Beisner, supra note 108, at 13.
[118] Id. at 13-14.
[119] Id. at 17.

the fact that "conflicts are a part of human nature."[120] The more room is left for conflict to ensue, the more likely it is to occur. As such, the more regulated something is, the less likely it is for one party to be able to gain an overly advantageous position. However, even this will end up changing once one part of the equation shifts. Rules and regulations must constantly develop with the technology that they oversee.

IV. Day-to-Day Proceedings

With regard to the day-to-day proceedings of a legal professional, growing technology has had some overwhelmingly positive effects. For example, in Florida, the E-Filing Portal only became "mandatory on April 1, 2013," with its first filing occurring in 2011.[121] This development allows for documents to be provided to the necessary parties at a significantly faster rate as well as at a cheaper cost. While some judges' procedures may still require documents to be sent in other fashions to their chambers, such as United States mail, e-filing at the very least provides the parties with the primary documentation within minutes. Due to this increase in filing speed, proceedings can happen at faster rates. In criminal proceedings, this aids in the adherence to the Sixth Amendment, which states that the "accused shall enjoy the right to a speedy and public trial."[122] Because the documentation can be processed at significantly faster rates, trials are able to occur sooner than they may have been able to fifteen to twenty years ago.

Varying estimates have been made regarding what percentage of mail is lost to the United States Postal Service (USPS) every year, yet none

[120] Sonja Kopcic, Conflicts Are a Part of Our Lives, DOBA KNOWLEDGE, (Nov. 21, 2017), https://www.dobabusiness-school.eu/doba-knowledge/conflicts-are-a-part-of-our-lives#:~:text=Conflicts%20are%20part%20of%20human,arise%20in%20relationships%20with%20others.&text=The%20main%20reasons%20for%20conflicts,characteristics%20of%20the%20parties%20involved.

[121] About E-Filing Portal, FLORIDA SUPREME COURT, https://www.floridasupremecourt.org/Practice-Procedures/About-E-Filing-Portal, (last visited April 22, 2022).

[122] U.S. Const. amend. VI.

of these evaluations are able to agree with each other given that it is a difficult quantity to valuate. However, using an online e-filing portal allows for the chances of something getting lost to essentially drop to almost zero. When e-filing, one ends up uploading documentation to relevant cases and as such, it would be impractical to believe that documentation filed this way is lost, barring a computer glitch or a system-wide breach of some kind. While it is plausible that something like this may occur, the overall net risk of losing documents to the postal system decreases, which is definitely an important benefit to consider. In order to dictate whether a document is more at risk to being lost to the postal system or to the e-filing portal, a lengthy analysis would need to be completed. But based on the growing use of the e-filing portal, it could be argued that many perceive the benefits of its use as overwhelmingly positive, despite the possible negative event of data loss that could theoretically occur.

A. Additional Considerations to Note

One caution to note is the possibility of an attorney being "left behind" if said attorney is averse to the change of technology.[123] There are several reasons that attorneys in general may be averse to any type of change, technology included. The legal profession is marked by a "focus on precedent" and an education system "which has not evolved in decades."[124] Given the focus on precedent, the older the attorney is, the more ingrained these ideas and ideals would be simply by virtue of continuous use. Research conducted by the University College London found that the median amount of time it takes to create a new habit in sixty-six days.[125] Admittedly, there is a variety of different statistics on how long it takes to create or break a habit. However, to do either, one has to have the desire to do so. Thus, despite the lack of consistency in the length of time it takes to

[123] Overcoming lawyers' resistance to change, THOMSON REUTERS, https://legal.thomsonreuters.com/en/insights/articles/overcoming-lawyers-resistance-to-change, (last visited April 22, 2022).
[124] Id.
[125] Rita Hitching, How Long Does It Actually Take to Build a Habit, (Jan. 11, 2021), https://www.humnutrition.com/blog/how-long-does-it-take-to-build-a-habit/.

form or break habits, there is at least a correlation between how ingrained a habit is and the length of time one has been doing it.

That being said, older attorneys who have been practicing for many years have by virtue been committed to this "focus on precedent" for a significantly longer amount of time; thus, they are more averse to changing to account for the growth in technology as it occurs. Law schools continue to focus more on the Socratic method and litigation than they do on technology and as such they tend to produce attorneys who are more technologically uneducated.[126] Granted, the younger generations may have their own personal knowledge but that does not tend to promote very much technology advancement within the law. This education system creates a culture of technology aversion that is evident in the law at times. Some technologies within firms that are indicative of this fact include but are not limited to outdated billing and case management systems.

The process of legal research that a student or legal professional engages in is constantly changing as well. Platforms such as Westlaw and LexisNexis were both founded in the 1970s; however, their use continues to rapidly grow even today despite the notion by some that their days are numbered.[127] This change in legal research allows for legal information to be more accessible, especially for those who cannot access a hardcover legal library. Additionally, these platforms are more user friendly than previous options and are written in more plain English over "computerese."[128] However, even with the seemingly positive impacts that online databases hold, it is extremely important that researchers use these platforms in an efficient and cost-effective way.[129] While this is not a particularly recent technological development, with the improvements to computer programing and the increasing access to resources, the legal world is

[126] Overcoming lawyers' resistance to change, supra note 123.
[127] Robert Ambrogi, Westlaw's Days Are Numbered, LAWSITES, (May 26, 2015), https://www.lawnext.com/2015/05/westlaws-days-are-numbered.html.
[128] Ann L. McDonald, et al., Communicating with legal databases 2 (1987).
[129] Id. at 1.

now better informed with regard to the differing issues with technology than they had been previously.

B. Changes in Day-to-Day Proceedings since 2020

In 2020, at the start of the COVID-19 pandemic, many industries were faced with difficulties and forced to adapt in whichever way they could. One of the biggest, and most visible changes within businesses is the amount of the labor force who currently works remotely.[130] Additionally, many law firms had to downsize their personnel and are only now starting to begin their recovery process in this regard.[131] As such, the day-to-day processes that once dictated a law firm are now changing. In-person meetings are now changing to being more virtual, even as the peak of the pandemic appears to have passed in some regions. Paralegals and legal assistants who used to work alongside the attorney now work remotely, and some firms are even hiring individuals to work remotely permanently, even following the peak of the COVID-19 pandemic.[132] With regards to litigation, because many trials were pushed or even temporarily cancelled, "mediation is becoming increasingly common."[133] These mediations, that used to be in person, can now be done virtually, causing an even lesser strain on the necessary financial resources of the firm and the court system.[134]

Unsurprisingly, COVID-19 has impacted the discovery process as well as hearings and trials. With everything occurring virtually, one must take into considerations aspects that had not been thought of previously. For example, in depositions, there is now the concern of whether the court reporter is able to record everything (even more so then previously). In an in-person deposition, there are some concerns with counsel and witnesses talking over each other;

[130] How COVID-19 Is Impacting the Legal Industry, FIRST LEGAL, (Sep. 22, 2021), https://www.firstlegal.com/how-covid-19-is-impacting-the-legal-industry/.
[131] Susan Lund, et al., The Future of work after COVID-19, MCKINSEY GLOBAL INSTITUTE, (Feb. 18, 2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19.
[132] How COVID-19 Is Impacting the Legal Industry, supra note 130.
[133] Lund, supra note 131.
[134] Id.

however, in a remote setting, this issue can be compounded.[135] When this occurs, the court reporter is forced to ask the participants to repeat what they said or carry out some other form of corrective measure. Additionally, further concerns emerge with virtual depositions in regard to whether the witness is alone in the room.[136] Because counsel is unable to see the entire room that the witness is in, there is a concern that someone may be "coaching the witness" behind the scenes.[137] In order to help with these issues, the witness can be asked to verify the points of concern, such as asking them to confirm that they are alone in the room; however, even this yields issues, as the witness may lie and no one can prove otherwise. However, the convenience factor associated with depositions is definitely evident when one needs to depose an individual in another state or location. Instead of the witness or attorney traveling, they are now able to conduct these proceedings in a remote setting. Attorneys need to take great care in these remote settings to guarantee that "any privileged or work product communications are not disclosed."[138]

During the pandemic, hearings also moved into a virtual setting and, as a result, judges had to adjust their procedures. While there was a learning curve associated with this process, it also posed a significant benefit to many.[139] In a study that was conducted, it was shown that the majority of courts (eighty-six percent) have stated that they plan to use a combination of virtual and in person hearing formats for court hearings going forward.[140] This showcases that despite the

---

[135] Aron U. Raskas, Taking Effective Remote Depositions, THE FLORIDA BAR, (June 12, 2020), https://www.floridabar.org/the-florida-bar-news/taking-effective-remote-depositions/.

[136] Id.

[137] Id.

[138] Id.

[139] Gina Jurva, The Impacts of the COVID-19 Pandemic on State and Local Courts Study 2021: A Look at Remote Hearings, Legal Technology, Case Backlogs, and Access to Justice, THOMSON REUTERS (2021), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf.

[140] Id.

initial pains that were faced, the long-term impacts are perceived as seemingly positive. The ability of hearings to move virtual during the time of the pandemic was aided by the advanced technology that much of America had on hand or could access. In less developed countries and regions, this type of shift is not necessarily as plausible.

While some issues are posed by remote depositions, without new technologies being developed over time, this would have been impossible in the face of COVID-19. Had this ability not been present when the pandemic began, many legal proceedings would have been entirely halted instead of being slowed. When engaging in remote proceedings such as virtual depositions, all parties are aware and in agreement with proceedings this way; as such, the risks and problems are acknowledged. Even as in-person depositions are an option again, many choose to continue with remote depositions due to the convenience factor it allows for. The same could be said about hearings; while there is some "tunnel vision" in the sense that one can only see what can be seen in the view of the camara, no party is oblivious to this fact.

Possibly the most problematic virtual proceedings would be that of actual trial. When conducting a trial remotely, the jury is no longer able to see all body language that they would have in person. However, if the trial were to proceed in person today, with many places still having a mask requirement of some sort, the jury would not be able to see the facial expressions of the individual testifying. This leads to the discussion as to which, if either, of these factors is more pertinent to acknowledge and rectify. Very few studies have been done on this matter in the context of the courtroom.[141] Therefore, it is difficult to determine which, if either option is better or if there is some unthought of idea that has yet to be proposed. It is commonly acknowledged that nonverbal communication is imperative to "effective human interaction."[142] It is known that these nonverbal cues subtly affect any courtroom proceeding, but the exact

[141] Martin S. Remland, The Importance of Nonverbal Communication in the Courtroom, 3 (1993), https://files.eric.ed.gov/fulltext/ED378612.pdf.
[142] Id. at 4.

way that they do so is still up for debate.[143] It can be said that at times, a witness reveals more through nonverbal cues, such as fidgeting and shifting, than they do through the actual testimony that they provide.[144] As such, in a virtual setting where many times, one can only see a witness from the shoulders up, one loses the ability to notice these nonverbal cues. Many individuals in the court room communicate a lot through facial expressions, including the judge.[145] In pre-pandemic times, the jury was able to analyze the facial expression of a witness in order to determine whether the witness's facial expression contradicts their words.[146] With the current era of mask wearing, this ability is drastically reduced, if not eliminated for some individuals.

Given that there is little to no analysis on which of these nonverbal communication factors is more pertinent than the other, it is hard to say whether there is a right or a wrong answer to the virtual hearing situation, until more study and analysis is completed. However, while the growth of technology in this situation lead to a new issue to be considered, the technology itself did not cause the issue. It merely gave rise to the conditions necessary to evoke these questions and considerations.

V. Final Comments, Considerations, and Conclusion

When discussing the role of technology in the legal realm, it is virtually impossible to label the development as solely positive or solely negative. There are too many factors and considerations to be made which limit a "bright line" distinction like this. While there are many positives and benefits that growing technology currently pose and can continue to present, if not used properly, the technology will have the opposite effect of that which is desired. In today's current health climate, the ability to access technology to promote movement within legal proceedings is imperative. However, once the pandemic passes, or at the very least significantly improves, much

[143] Id.
[144] Id. at 5.
[145] Id.
[146] Id. at 7.

study needs to be made in order to determine whether the changes that have occurred should continue as implemented or be adjusted in some way. Due to the current lack of studies regarding many types of technology, many individuals are uninformed as to what benefits as well as what consequences truly exist. There also must be some forward thinking when identifying which technologies need to be analyzed. This is because people need to realize that just because something is not being used now, this does not mean it may not be used in the near future.

Another consideration that needs to be made going forward is the usage of every form of technology as a type of evidence. In a generation that increasingly seems to value its privacy, lessening the appearance of privacy in society, even if this is not the intention or what is actually happening, will likely lead to dissent among people in society. How can this be avoided? Only further research will be able to show the best and most effective way to go about this.

Looking to the future, society needs to take a more cautionary stance and evaluate a number of questions before diving headfirst into every new piece of technology or usage that prevails. Will technology continue to develop at the rate that it has for the last twenty years? How quickly will current technologies and developments be pushed out by the new ones? Will society see a plateau in the speed of development, and if so, when? These are some of the most fundamental questions that could be evaluated for any piece of technology, even before conducting explicit pilot studies.

What are some remedies that may begin to rectify some of the issues discussed in this paper? First, legislation needs to begin to adapt faster and when new legislation is created it needs to be done so with the understanding that it will and should rapidly change in the future. However, swift and adaptive legislation does not necessarily mean it should be unstrict or poorly structured. Structure in these situations is just as pertinent as adaptability. Additionally, better education for numerous individuals is imperative to understanding. Common citizens need to be better educated about what is going on both in the technology realm and the legislature and understand how these

factors are interrelated. This could possibly be achieved by instituting free education programs within the country. Legal professionals, especially attorneys, also need to be educated to better handle the constantly changing world. To achieve this, some remedies could include an overhaul of the law school education process with a more required focus on new and emerging legal fields such as technology in the law. However, simply doing this would not be enough because by the time the law school students have graduated and practiced for a few years, there would be changes in the world yet again. As such, they need to engage in constant professional development to be well informed. This would not be the only field that requires professionals to do so; as an example, accounting and auditing have a similar process that requires developing growth and education throughout one's professional career. The final recommendation to address with regards to this paper has to do with how new technologies are implemented. It is important to not rapidly introduce a new technology simply because it seems interesting, or at first glance, extremely beneficial. Thorough studies and tests need to be conducted to begin to address any negative consequences that may not be immediately evident when the technology first is presented.

As such, technology ultimately is currently serving in detriment to the legal world in many ways. However, there are methods that can begin to be implemented to rectify this and allow the benefits to start outweighing the harmful effects. Technology holds many secrets and plausible benefits that can be extremely important. As such, it is important not to ignore the emerging issues and address them as rapidly as possible.

# ABOUT THE AUTHORS

**Elizabeth Agranovsky:** Elizabeth Agranovsky is an Accounting and Legal Studies double major planning to pursue her JD/MBA in Fall 2023. Elizabeth has plans on attending law school and finding a way to intertwine her passion for business as well as the law. While at UCF she has been involved in several activities in leadership roles, including UCF's newly founded chapter of Global Legal Empowerment Brigades as Vice President and UCF's Phi Delta Phi Chapter and the Social Chair as well as the upcoming academic year's Secretary. She is looking forward to continuing her legal academic involvement, employment, and education.

**Manna Alexander:** Manna Alexander is a recent UCF graduate who majored in Legal Studies along with a certificate in Conflict Resolution and Analysis. During her time at UCF, she had wonderful opportunities including being an editor of the Undergraduate Law Journal as well as interning at the Orlando City Attorney's office. She plans to attend law school in the coming year and is looking forward to further learning about conflict resolution, and how to effectively help others resolve their disputes. Aside from her academic goals, Manna loves giving back to her community, especially through volunteer work at her church.

**Sierra Bracewell:** Sierra Bracewell is a senior and Legal Studies major at the University of Central Florida who will be graduating in Spring 2022. Returning to school after taking 6 years off to raise her 3 children, she grew a passion for social justice on a systemic level and decided to pursue a legal career. During her time at the University of Central Florida, she was offered multiple opportunities for growth and improvement, beginning with an internship through Phi Alpha Delta at the Moore Justice Center in Brevard County. She then served as a research assistant to UCF Professor and Attorney Dr. Marc Consalo for wrongful conviction compensation and was also offered employment as a Legal Secretary at the Office of the Public Defender in Orange County. She has developed a passion for legal research and

writing and hopes to continue her education in law school upon graduating with her bachelor's degree.

**Caitlin Capozzi:** Caitlin Capozzi is a first-generation student with a desire to pursue a career in the criminal and juvenile law field with a focus on non-profit work. She is pursuing a human services minor and legal studies major with the hopes of attending law school in Florida after graduation. Caitlin served as treasurer of Phi Delta Phi, and serves as Director of Social Outreach. She loves being involved on and off campus and spending time outdoors in nature. In her free time, Caitlin loves to make art and kickbox.

**Nefertari Elshiekh:** Nefertari Elshiekh is a junior majoring in economics and international and global studies. Nefertari is a member of the Burnett Honors College and has been an editor for the UCF Undergraduate Law Journal since 2020. She has been involved in empirical legal studies research particularly in misdemeanor courts since the fall of 2019. This motivated her to conduct her own research on the impact of type of defense counsel on initial bail decisions and case outcomes. She successfully defended her Honors Undergraduate Thesis on this topic. Nefertari plans to attend law school after graduating from UCF.

**Tyler Ruposky:** Tyler J. Ruposky graduated from Seminole State College with honors in August 2021 and is now majoring in Legal Studies and minoring in Literature at the University of Central Florida. Tyler found a love for reading and writing early on at Seminole State, especially reading philosophical articles and books. After taking a Fundamental Law course there, he took four more law-related courses in the summer with an economics course on top. At UCF, Tyler looks forward to exploring various areas of the law through coursework and research.

**Erika Dávila Santana:** Erika L. Dávila Santana is a senior at the University of Central Florida, graduating in the Summer of 2022 with a Bachelor of Arts in Legal Studies. Finishing her degree in a short two years, Erika is working hard to enter law school following her undergraduate education. She became inspired to have a passion for

advocacy as she gave back to her community and helped others through her work in her local church, Ministerio Casa de Dios Un Nuevo Comienzo, in Puerto Rico. Born and raised in Puerto Rico, Erika seeks to honor her family and faith above all else, manifested in how she actively strives for excellence in all areas of her life. Erika finds inspiration and motivation in the following Biblical verse in Colossians 3: 23-24: "Whatever you do, do it from the heart, as something done for the Lord and not for people, knowing that you will receive the reward of an inheritance from the Lord. You serve the Lord Christ."

**Hannah Synder:** Hannah Snyder is a UCF graduate who majored in Legal Studies and Minored in Economics. She graduated Cum Laude and earned Honors in the Major. While at UCF, she enjoyed many activities such as writing an honors undergraduate thesis through the Burnette Honors College, Honors Moot Court, and researching veteran retention in colleges and universities through the LEAD Scholars Academy. Hannah is utilizing her gap year to gain experience in criminal law through an internship and plans on attending law school in 2023. She intends on becoming a State or Federal Prosecutor and hopes to one day work on a treason case.

**Amy Yost:** Amy M. Yost is a senior Legal Studies major and a Florida Bar Registered Paralegal. In line with this article, she is also authoring an honors thesis that follows similar research disciplines. Amy will graduate from the University of Central Florida Burnett Honors College in December, is a member of Tau Sigma Zeta Honor Society, and is an editor for the UCF Undergraduate Law Journal. Having first obtained an AAS in Chicago in 2003, Amy is excited to further her legal career by pursuing a J.D. after graduation. She intends to continue focusing on her long-standing passions for legal research, civil law and trial advocacy.