



JURIS MENTEM

Undergraduate Law Journal of the American University

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VOLUME II, ISSUE I

We are proud to present the third edition of American University's Undergraduate Law Journal. This semester, including the transition from online to in-person learning, has posed many challenges for our students. However, the highly-motivated, intellectually curious individuals that make up Juris Mentem have continued to express their passion for exploring complex law-related topics.

Volume 2, Issue 1 is the product of the dedication and hard work of our writers, column editors, and executive board over the past six months. Each and every article in this publication is the result of in-depth research, high-level writing, and meticulous editing. We extend our gratitude to those column editors who, in addition to writing their own articles, edited an entire column's articles and worked with writers to provide feedback and support throughout the editing process. We would also like to thank our faculty advisor, School of Public Affairs' Professor Michelle Engert for her guidance and mentorship.

Especially since Juris Mentem is only in its second year, our journal continues to grow and change. For example, this edition includes Bluebook style citations as opposed to Modern Language Association and Chicago formats that we have used in the past. We also chose to expand our columns to include Entertainment Law and Health Law to accommodate the myriad of topics that American University's students were interested in exploring. Since this was the law journal's first in-person semester, we held workshop events to help our writers get to know one another and work in a collaborative setting.

In the coming semesters, we hope to take steps to create a more professional, esteemed journal. We would like to find new, innovative ways of elevating the voices of American University students who present unique perspectives on some of the most complex legal issues facing our world today. We welcome any constructive criticism and feedback that may help us build toward that goal.

We hope you enjoy reading Volume 2, Issue 1 of the American University Undergraduate Law Journal.

Best wishes,

Co-Editors-in-Chief
Harsha Mudaliar & Pranjal Chandra

JURIS MENTEM - BUSINESS LAW

Do Business Laws Undermine the Power of Women?

ALICIA RIDGLEY

Women are some of the most intellectual and driven people in the working world. For centuries, women have been undermined and underestimated, and they have fought immensely for equality and workplace opportunities. Their professional world has been under pressure for decades, and women haven't been afforded the same opportunities as their male counterparts because of their gender. Laws supporting women in all aspects of life started in the early 20th century when women fought for voting rights, and still continues today with lobbyists advocating for the end of gender discrimination throughout workplaces across the country. While these laws are great and supportive of the female community, one has to question whether these business laws are made to empower women or silence them. Do laws, like the Fair Standards of Labor Act of 1938, work for or against women in the everyday business setting? Some will argue that they value women in the workplace, making sure that they're well supported, and that glass-ceiling effect ultimately disappears within every working setting. Others will argue that it's made to silence the working women of America, in order to make sure that there's no conflict and unrest in the business world. This article will explore the various aspects of these new laws, and we'll look to examine their positives and negatives.

HISTORICAL ANALYSIS

For the longest time, women were only viewed as housewives, with their primary role of taking care of their household and immediate family. They were expected to merely cook, clean, and fulfill stereotypes that were outdated and sexist. As women started to challenge those beliefs, especially women outside of that norm, the public had opinions on the concept of the American housewife. Many believed a woman's place was in the home, and the workplace wasn't accommodating for women. The sexist ideas surrounding a woman's duty in life suppressed female empowerment and created more boundaries for women in this country. Once women started integrating more into the working world and it slowly started to become more common to see a working woman, laws came out to support them. One of the most important laws that was put into place was The Fair Labor Standards Act of 1938. The Fair Labor Standards Act of 1938 was signed into law by President Roosevelt. It was made as women were beginning to enter into the workplace and started advocating for equalities within their jobs. "The law,

applying to all industries engaged in interstate commerce, established a minimum wage of 25 cents per hour for the first year, to be increased to 40 cents within seven years. No worker was obliged to work, without compensation at overtime rates, more than 44 hours a week during the first year, 42 the second year, and 40 thereafter.”¹ This helped to increase wages and make more profit over time for workers. Women could no longer be denied a lower pay than men, giving them a leg up in work. However, this was only the beginning of significant change within women’s working habits.

Although this was beneficial, it wasn’t until 1963 that we started to see significant change for working women. The Equal Pay Act of 1963 was a law passed by President Kennedy, ensuring that women were paid equally. That law stated that “No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions...”² This increased equality within the workplace, as women were starting to take more jobs during wars like the Vietnam War and Cold War. Women were signing up to become nurses, working staff, and filling other important jobs within the war.

LEGISLATION

One significant piece of legislation that was passed helped to support women working in the most influential way possible. Title VII, a statute passed within the Civil Rights Act of 1964, states that not a single person should be discriminated against because of their race, sex, religion, color, or national origin. This means, in addition to those categories, that people cannot be discriminated against because of their gender and sexual identity. This, after being passed, not only benefited women but many other minorities in and outside of the workplace. It helped to support other pieces of legislation like the Fair Labor Standards Act and solidify a woman’s place at work. Although discrimination and injustices still exist, legislation like Title VII can help to control the situation and provide a solution if a discrimination case arose at work.

With the passing of several laws, like Title VII, and increasing public support over time, women have such a prominent role in the working society. 30% of women in business today are running companies, leading them as CEOs and making their mark on business history. Some employers still believe in the old school mindset that women shouldn’t be allowed to work, so they continue the mindset within the workplace. On the other hand, there are supporters who believe that these types of legislation are important to societal growth. By approaching these laws and anti-discrimination legis-

1 Fair labor standards act, Encyclopædia Britannica, <https://www.britannica.com/event/Fair-Labor-Standards-Act> (last visited Dec 6, 2021).

2 The equal pay act of 1963, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/statutes/equal-pay-act-1963> (last visited Dec 6, 2021).

lation with a progressive approach, it allows society to learn and adapt to modern day thinking and technology. We're all appreciated and considered equal so we can coexist and by applying this thinking and thought process, it will create better established relationships for future generations.

CONCLUSION

Going forward, the best way to invest in legislation for women's rights is to lift, not suppress. In order to empower women rather than demote them, it's best to look at the way women work in the world. If the question was asked as to whether or not these laws support or suppress women in the workplace, this question will most likely be answered differently by all. Some will say that these laws are in full support of women working while others may believe that there's still a lot more work to be done. Equality is still working and growing throughout our government, and advocating for fair change can create a stronger community and growth for women who continue to work. Legislation comes from the intent to change and influence the law so that it benefits the people it's intended for. Business laws don't have to demote women as long as the right idea and legislative intent is behind the foundation of business law. Legislators can create a business and federal environment that is empowering for all women for decades to come.

JURIS MENTEM - BUSINESS LAW

Distribution of Equity and Allocation of Suffrage within Original Corporations of the United States

BEN MERMEL

ABSTRACT

The concept of incorporation is older than the American economy itself, and yet, has evolved to become a stolid mainstay of the modern enterprise in the United States. This article will aim to explore the history of incorporation as it relates to the development of the fundamental tenets of equity and the right of both shareholders and the board of directors to exercise their will upon the bearing of the company they have invested in. In contemporary times, corporations have come to serve as a vehicle for private individuals to earn dividends in a joint venture, whether those individuals be workers or investors, or some combination of the two. However, the method by which participatory persons have accrued either equity or seats on a board of directors is often left undiscussed, and not widely understood. This article will aim to articulate how that process occurs, as well as how the process itself developed over time.

INTRODUCTION

Incorporation in the United States, or the act of creating and registering a corporation with the government of any of the fifty states or the federal government, is for many people, the vehicle by which they may reap the profits of a well constructed business model, whether they be founders, investors, workers, or even consumers. Along with incorporation, particularly at the undertaking of the process, the company is often divided into pieces, to be shared amongst the founders and key initial staff, most often in the absence of the ability to pay potential employees. For the purposes of this article, only original corporations will be considered, that is to say, those corporations whose formation was not with the intent to create empty vessels through which crafty law firms may render either a real enterprise or individual judgement proof - shell corporations. This process of incorporation and division of equity is often the most important in the charted course of any company, and can shape the future for an enterprise for centuries.

HISTORICAL RELEVANCE

The concept of a corporation stretches back to the Byzantine Roman Empire, as promulgated in the *Corpus Juris Civilis*¹, a unified legal code governing the corpus or bodies of the nation, including the nation itself, which was regarded as a massive corporation endowed with special powers. When the text was discovered mostly intact in the 11th century, scholars known as *glossators*² imparted the knowledge onto Europe's ruling class. This marked the beginning of a period in which all institutions seeking to possess legal rights of articulation and agency were termed "incorporated." This doctrine is known as *corporatism*³, a style of governance in which the whole of society is viewed as one large body, of which there are subsections, representing limbs and organs. For example, in such a system, the head of state would be perceived by the law, and the people, to be literally the "head" of a vast body, to be directed by the leader. Indeed, many cities during this period chose to become incorporated, which endowed them with special rights, such as the right to exist as a discrete entity, be aggrieved and petition for redress, and own and manage property. In this period, the first true corporate republics were established in the form of the Republic of Florence, which was effectively governed by large banking guilds⁴, and the Dutch East India Company, which was both *de jure* and *de facto* a financial institution that possessed temporal governing powers⁵. In England, in later times, the ability to devolve power to a private corporation was reserved for Parliament and the monarch, the powers of corporations being extensively guarded by the state out of fear that private entities would turn that power on the government.

This mercantile system fell largely out of favor in the 17th and 18th centuries, as truly privatized businesses became prevalent in commerce, particularly so in an internationally developing economy. Corporatism too, declined with the end of World War II, and is no longer practised as a sound political theory. However, the organizational structure developed both by the Florentians and the Dutch and many others persists today in the form of the modern corporation. The principles of top-down management in the form of a board of directors and executive officers have additionally lasted throughout the ages and find themselves present in many modern companies as well. Modern companies are influenced not only by ancient Roman texts and long-dead corporate republics, but also by more recent trends, such as those propagated by the contemporary business community. These trends include among other things, a tradition insofar as the division of equity within an original organization is concerned, wherein pieces of a company are distributed to investors based on both a class system and most often,

1 Justinian I, *Corpus juris civilis* (534AD).

2 Glossator, *Lexico Dictionaries* | English, <https://www.lexico.com/en/definition/glossator> (last visited Dec 6, 2021).

3 Corporatism, *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/corporatism> (last visited Dec 6, 2021).

4 Government of Florence, https://web.archive.org/web/20050507014434/http://www3.telus.net/Quattrocento_Florence/government.html (last visited Nov 6, 2021).

5 Amanda Briney, *The rise and decline of the Dutch East India Company* ThoughtCo (2019), <https://www.thoughtco.com/the-dutch-east-india-company-1434566> (last visited Nov 6, 2021).

a vesting scheme for employees. Another trend that has endured the test of time is that of suffrage within the corporation, or the right of those investors and workers who participate to determine the direction of said company. The history and evolution of the corporation is fundamental to understanding the practices of the modern company and business community and informs current laws, regulations, and economic practices.

In the United States, the modern corporation did not emerge until the late nineteenth century, and indeed, any of the companies that were decried by many were in fact structured as trusts, controlled by the founders, and monopolistic both in market share and equity. Prior to this period, in order to form what the law did and does define as a corporation, one required a legislative patent. This changed in the year 1896, when the State of New Jersey, finding a pronounced deficit in business-oriented growth, promulgated an “enabling” law, the terms of which allowed individuals, not the state, to choose and self-define what constitutes a corporation. This allowed for the first time, in the United States, an individual and individuals, to form their own enterprises and direct them at will. From here, the modern corporation develops.

STRUCTURE OF THE MODERN CORPORATION

The modern corporation is undoubtedly structured as a top-down model, with a Chief Executive Officer as the leader, and many subsidiary heads of departments and functionaries answering to them. Corporations are structured in similar fashions to other bodies, particularly those in the field of government. If one looked closely at the arrayed structure of most companies, especially those that operate on a large scale, the essential functions of a government are well represented. One finds legislative power vested within a board of directors, and executive power vested aptly in the executive suite. In most corporations, a Board of Directors is responsible for, among other things, drafting the company bylaws, overseeing the decisions of the executives, and iterating directional decisions. Conversely, the executive is responsible for executing the will of the board of directors, and is ultimately accountable. To draw an even more sharp comparison, in very large corporations, employees often accrue equity through some form of a “stock option plan,” whereby an employee is entitled to acquire a pre-determined share of the company over a defined set of time. In turn, ownership of these shares confers upon the employee the right for their voice to be heard, and with enough collectivisation, steer the direction of the company, in theory. This provides a larger body than the board of directors for the company, including the board, to ultimately make itself accountable to.

DISTRIBUTION OF EQUITY

Equity is a complex topic, but is most widely legally defined as “...ownership in a corporation, entitling the owner to share in the profits of the corporation.”⁶ There are, as of 2021, no specific legal preset requirements to the way that the founder of a startup

⁶ Stock, Legal Information Institute, <https://www.law.cornell.edu/wex/stock> (last visited Dec 6, 2021).

company is forced to distribute portions of the enterprise. Equity is often rendered as compensation by these startup firms in lieu of a salary or benefits, as many nascent companies likely do not possess the funds necessary to monetarily purchase the services of their employees. This stage is the most important to examine when discussing the distribution of equity, as it is the period in which the greatest portions of stock and the swiftest speed of transfers occur in the absence of a major acquisition or dissolution.

Additionally, when a company receives initial capital from investors, the progenitors of the corporation have an important decision to make: How much of their company would they be willing to allow potential investors to claim in exchange for much needed cash? The manner in which a founder must choose how to do this is a complex balancing act. Invariably, as a company grows in both size and success, scores of investors will seek to reap the earnings of the up and coming venture. This can pose unforeseen challenges to the vision of any founder attempting to develop the company in their chosen fashion. This issue most presently arises for a founder where the suffrage of the members of the Board of Directors is concerned.

SUFFRAGE WITHIN THE BOARD OF DIRECTORS

The Board of Directors is, as earlier discussed, effectively the legislative arm of any good company. Amongst their powers are the ability to write and edit the corporate charter, terminate the executives, and set the general direction of the corporation. In many boards initially, particularly within fields that rely on large seed investment, the board is comprised of the founders and first investors. This is the period of time in which founders possess both the greatest and most delicate amount of controlling power. The founders both make the initial decision about who is entitled to invest, and conversely be represented on the board, but additionally may find themselves vulnerable to the intentions of an investor with voting power. This is of course before corporations “go public” wherein they are almost universally within the United States governed by both the Board of Directors and the shareholders, which cease to be the same group of people the larger a venture becomes. It is worth noting that this division of power stems from the landmark English case *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*,⁷ which formed the basis for the interpretation of the right to direct as set by a company charter, stating that whilst the shareholders were indeed necessary to the direction of the company, their right to interfere with the power of the board was naught, so long as such was spelled out within a company’s charter. This doctrine has been extended to the Americas, and to the United States modernly within the Sarbanes-Oxley Act.⁸ Within large, public corporations, often the general shareholders exercise based on their class of share, a modicum of power and the right to be heard by company leadership.

However, the mode in which boards assign this prestigious membership is not oft dis-

7 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*, (1906) 2 Ch 34

8 Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. (2002)

cussed. In many corporations, it is simply by majority vote of the board whether or not to admit a new director. In others, a board may simply reserve the right to collectively appoint members. Conversely, within large public corporations, trading hubs such as NASDAQ⁹ have decreed that the selection process for new board members must be a more rigorous process, screened with independent or outside directors. The SEC, which governs the management of corporations, has articulated that accession by convention of nominating committee is preferable, and that the nominating committee be composed of independent, or outside directors. Indeed, the SEC requires that a large portion of the composition of the board of directors be independent. This system can come with differing requirements based on the jurisdiction the company is incorporated or operates in. For example, the State of California now requires that a certain amount of the board of any public corporation be women.¹⁰ In other nations, there exists a system of codetermination, in which a set segment of the board must be selected by the employees of the company. However, once a board member has acceded, that member immediately is conferred upon with the voting rights of every other member, save the chairperson¹¹, who receives the right to direct, much as the speaker of a legislative body, the course of the board.

CONCLUSION

A board such as the ones described above almost certainly makes for a stable governing authority in large public corporations, and a fluid body within startups. However, the modern corporate structure has enabled most, if not all boards of directors to exercise supreme control over the direction of a company, occasionally against the wishes of both the employees and the founders. Most prominently, public oustings have occurred, of founders from their own creations, spurred by a board who wished to move the company in a new direction. Famously, this happened to inventor and technological pioneer Steve Jobs, who was forced out of Apple¹² in the 1980's over disagreements with the board about the development of the Macintosh personal computer. Though the power of corporate boards and their selection is not often discussed, it would do young founders well to learn their history as bodies of governance first, and enterprise second, and to know that the choice of whom to include on a board could be a fatal one where the founders' vision is concerned. This rings ever more true for new and burgeoning executives and businesses, who may find themselves outmaneuvered by the votes of the board and words of their charters.

9 Nasdaq Listing Center, <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series> (last visited Dec 6, 2021).

10 2018 California code :: Corporations code:: Title 1 - Corporations :: Division 1 - General Corporation Law :: Chapter 3 - Directors and Management :: Section 301.3., Justia Law, <https://law.justia.com/codes/california/2018/code-corp/title-1/division-1/chapter-3/section-301.3/#:~:text=Section%20301.3.%20Universal%20Citation%3A%20CA%20Corp%20Code%20%20C2%A7,minimum%20of%20one%20female%20director%20on%20its%20board.> (last visited Dec 6, 2021).

11 Chair of the Board (COB), Investopedia (2021), <https://www.investopedia.com/terms/c/chair-of-the-board.asp> (last visited Dec 6, 2021).

12 Steve Jobs, ABC News, <https://abcnews.go.com/Technology/steve-jobs-fire-company/story?id=14683754> (last visited Dec 6, 2021).

JURIS MENTEM - BUSINESS LAW

Epic Games, Inc. v. Apple; Antitrust in the Twenty-First Century

MATTHEW STEFAN

INTRODUCTION

In August of 2020, Epic Games, Inc. brought a suit against Apple, Inc. in the Northern District of California for violations of Federal and California state antitrust laws. Epic Games, Inc. is a producer of video game software and other experiential three-dimensional programs.¹ Among the programs developed by Epic Games is Fortnite, an online video game where players can compete against each other.² Unlike Epic Games, Apple, Inc. is a producer and manufacturer of personal electronic devices as well as the software compatible with these electronics.³ Through the App Store, an e-commerce platform where Apple product users are able to download digital games for their devices, Apple offers a mobile version of the Fortnite game for download to their users subject to their agreement with Apple.

As practice, Apple requires developers who wish to sell, advertise, or offer their app through the App Store, require that developers enter into an at-will contract with the company. Among the provisions set forth in the contract, Apple retains 30% of the sale or revenue generated by a purchase either from the App Store or within the application subsequent to purchase as a fee for App Store use.⁴ Furthermore, Apple does not allow third party developers, like Epic Games, Inc., to accept direct payment for purchases made within the application.⁵ Functionally, this means that third-party developers are unable to create a system that allows them to collect revenue on the application, and thus not subject to the collection of Apple fees.

Epic Games, Inc. introduced a program within their software in the Fortnite App that would allow users to make purchases directly to the company, rather than through Apple's In App Purchase function. Notably, this feature was not disclosed to Apple and was included in an approved update to the app.⁶ When the feature was published, Apple

1 Epic Games, <https://www.epicgames.com/site/en-US/about> (2021).

2 What is Fortnite?, Epic Games, <https://www.epicgames.com/fortnite/en-US/news/what-is-fortnite-beginners-guide> (2021).

3 AAPL, Reuters, <https://www.reuters.com/companies/AAPL.O> (2021).

4 Epic Games, Inc. v. Apple, Inc., 493 F.Supp.3d 817, 829 (N.D. Cal. 2020).

5 *Id.*

6 *Id.* at 831.

removed Fortnite from the App Store. Subsequent to this move by Apple, Epic Games filed a temporary restraining order against Apple to which they responded, subsequent to the termination of the order, by terminating the ability for Epic Games to distribute applications through the App Store.⁷

As a result of their termination, Epic Games filed a suit against Apple under the California Unfair Competition Law which prohibits any unfairly competitive business actions that include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”⁸ Apple filed a countersuit alleging damages from breach of contract seeking damages. The trial was conducted in May of 2021.

Plaintiff, Epic Games, argued that Apple violated clauses of the Sherman Act, California Cartwright Act, and California Unfair Competition laws. In the Court’s preliminary injunction decision, the Northern District of California Court held that “novel business practices—especially in technology markets—should not be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have cause or the business excuse for their use... [b]ecause innovation involves new products and business practices, courts[‘] and economists[‘] initial understanding of these practices will skew initial likelihoods that innovation is anticompetitive and the proper subject of antitrust scrutiny.”⁹ Notably, this argument and precedent suggests that the standard for antitrust infringements ought to be higher because it may be somewhat unclear during the innovation process whether or not a corporation has violated antitrust laws.

NORTHERN DISTRICT OF CALIFORNIA DECISION

The Northern District of California, through Judge Yvonne Gonzalez Rogers, found that Apple was, in fact, in violation of several antitrust laws. Further, Judge Gonzalez Rogers found that Epic Games was in breach of contract and ordered the company to pay more than twelve million dollars for the revenue Apple lost as a result of the circumvention of the Apple In-App Purchase software.¹⁰ Not all of the decisions were decided in Apple’s favor, of the 10 decisions, only one was decided in favor of Epic Games. The Court found that Apple was, in fact, in violation of California’s Unfair Competition Law.¹¹ Practically, this means that Apple must begin to allow additional payment methods within applications. This provision is included in the decision of the Court and it serves as the basis for Apple’s appeal on the decision.

Interestingly, the Court maintained that “antitrust law protects competition and not competitors. Competition results in innovation and consumer satisfaction and is es-

7 Epic Games, Inc., 493 F.Supp.3d at 831.

8 California Unfair Competition Law, CA Bus & Prof Code § 17200 (through 2012 Leg Sess).

9 Epic Games, Inc., 493 F.Supp.3d at 833.

10 Epic Games, Inc., v. Apple, Inc., No. 4:20-cv-05640-YGR, judgement at 1 (N.D. Cal. Sep. 10, 2021).

11 *Id.*

sential to the effective operation of a free market system.”¹² This furthers the ideas set forth in the preliminary injunction decision that suggest “Antitrust law is not concerned with individual consumers or producers, like Epic Games; it is concerned with market aggregates.”¹³ Interestingly, this interpretation of antitrust law is fundamental to the Court’s ruling and places great emphasis on the need for competition in a free market economic system. Further, the Court found that Epic Games, Inc. “failed in its burden to demonstrate Apple is an illegal monopolist.”¹⁴ Interestingly, this was the only count on which Apple, Inc. prevailed. On all other alleged counts, nine of the ten, the Court found that Apple was in violation of antitrust laws and was ordered thus to adjust their practices. Functionally, the decision required that Apple allow app developers to provide alternatives to in-app purchase features through the App Store.

DISCUSSION

The decision outlined by the Court in *Epic Games, Inc. v. Apple* is extremely interesting when related to compliance with antitrust laws deeply codified into the American Legal Tradition, including the Sherman Act and both binding and persuasive precedent set by Federal and State Courts including the United States Supreme Court. While it will most certainly have lasting implications on the ability of Apple to require payment through their software, the applications of this decision are vastly impactful and potentially endless. Specifically related to the technology industry, the decision “could trigger the most consequential changes yet to the multibillion-dollar mobile economy.”¹⁵ Indeed, Apple grossed more than sixty billion dollars from App Store purchases and could be expected to see a 30% cut in this total if the decision is upheld. More broadly, it is possible that the decision could have impacts across sectors related to corporations that require payment exclusively through their own services. If affirmed on appeal, it will be remarkable to observe the shift in the business model of Apple, particularly given that they make considerable revenue from the thirty percent fee charged on in app purchases. Conclusively, the final decision has not yet been released and it is impossible at this point to completely understand the implications of the decision. Overall, it is fundamental to continue reforming the antitrust law as specifically applied to the technology industry.

12 Epic Games, Inc., v. Apple, Inc., No. 4:20-cv-05640-YGR, Rule 52 Order at 2 (N.D. Cal. Sep. 10, 2021).

13 Epic Games, Inc., 493 F.Supp.3d at 839.

14 Epic Games, Inc., No. 4:20-cv-05640-YGR, Rule 52 Order at 2.

15 Bobby Allyn, *Epic Games v. Apple: What the Ruling Means for iPhone Users*, NPR (Sep. 10, 2021) <https://www.npr.org/2021/09/10/1036043886/apple-fortnite-epic-games-ruling-explained>.

JURIS MENTEM - CIVIL RIGHTS LAW

The Ghost of the Religious Freedom Restoration Act

ZACHARY SWANSON

INTRODUCTION

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA). It stated, in part, that “[g]overnment shall not substantially burden a person’s exercise of religion.”¹ The law was a direct response to the Supreme Court’s *Employment Division v. Smith* decision in 1990. In *Smith*, the Court ruled that “neutral laws of general applicability”² could not infringe upon the freedom of religion guaranteed by the First Amendment. RFRA has gone through many changes throughout the years. It was initially meant to apply to both state and federal governments, but the Supreme Court ruled in *City of Boerne v. Flores* (1998) that it was unconstitutional as applied to the states. In 2006, the Supreme Court ruled in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* that it could constitutionally be applied against the federal government. In the years since then, RFRA has been used as a tool by the conservative legal movement to combat reproductive rights and the recent series of legal wins by the LGBTQ+ movement. This article will explore the history of RFRA, from its origins to what it has come to represent.

EMPLOYMENT DIVISION V. SMITH

In 1984, Alfred Leo Smith was fired from his job at ADAPT, a private drug rehabilitation center in Oregon.³ He was a Native American, and he had recently attended a ceremony put on by the Native American Church. This ceremony included the sacramental use of the hallucinogenic substance peyote, spiritually sacred to many Native Americans. Once the rehabilitation center found out about this, he was fired. When trying to apply for unemployment benefits, the State of Oregon denied his claim. Oregon law stated that those fired due to “misconduct” were not eligible for unemployment bene-

1 Religious Freedom Restoration Act, 42 U.S. Code § 2000bb-1(a)

2 *Employment Division v. Smith*, 494 U.S. 872 (1990) “Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”

3 Martha K. Robinson, Robinson on Long, ‘Religious Freedom and Indian Rights: The Case of Oregon v. Smith’ H-Net (2001), <https://networks.h-net.org/node/16794/reviews/16964/robinson-long-religious-freedom-and-indian-rights-case-oregon-v-smith>.

fits. Smith sued under the Free Exercise Clause of the First Amendment, arguing that his rights to freely practice his religion had been infringed upon by the State of Oregon in denying his claim.⁴ The Supreme Court, however, ruled against him. Because the law was “neutral” and “generally applicable” (i.e. did not target a specific religion), it was not a violation of the Free Exercise Clause of the First Amendment.

THE RELIGIOUS FREEDOM RESTORATION ACT

Congress was displeased with the Court’s decision in Smith. In the findings section of the Religious Freedom Restoration Act, they stated that the decision “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”⁵ and that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”⁶

As such, the law intends to impose the requirement that the government sufficiently justify any infringement upon religion with a “compelling state interest.”⁷ Additionally, even if they can justify their infringement upon religious activity, they must only infringe upon it using the “least restrictive means.”⁸

RFRA applied to both the federal government and state governments, and it provided judicial relief for claims of infringement on religious freedom under the act.

CITY OF BOERNE V. FLORES

Patrick Flores, the Archbishop of San Antonio, sought to expand the limits of his church. As such, he applied for a building permit from the city council. They denied the claim, citing a city ordinance protecting historical sites. Flores sued under RFRA, stating that the ordinance could not survive the compelling state interest test. The Supreme Court ruled against Flores, and in doing so they struck down RFRA as applied to the states.

The Court stated that Congress had overstepped its authority and infringed upon the separation of government branches. Congress has the power to enforce the Constitution against the states.⁹ However, it does not have the power to interpret the Constitution. That responsibility lies with the judiciary. The Court had made their interpretation of the Free Exercise Clause clear in Smith, and Congress did not have the authority to reverse that by passing a law.¹⁰

4 U.S. Const. amend. XIV “Congress shall make no law respecting an establishment of religion, or **prohibiting the free exercise thereof**...” (emphasis added)

5 ext - H.R.1308 - 103rd Congress (1993-1994): Religious Freedom Restoration Act of 1993, H.R.1308, 103rd Cong. (1993), <https://www.congress.gov/bill/103rd-congress/house-bill/1308/text>.

6 *Id.*

7 *Id.*

8 *Id.*

9 U.S. Const. amend. XIV, § 5.

10 *City of Boerne v. Flores*, 521 U.S. 507 (1997)

GONZALE V. O CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL

In 1999, the federal government seized a shipment of hoasca tea by União do Vegetal. União do Vegetal is a church that uses hoasca tea, which contains a hallucinogenic substance, in some of their rituals. The substance itself, dimethyltryptamine, is outlawed by the Controlled Substances Act. The church sued under RFRA, claiming that the seizing of their shipment was an infringement upon their religious beliefs and could not be justified by a compelling state interest. The Supreme Court sided with the church, and in doing so, they affirmed that RFRA is constitutional as applied to the federal government.¹¹

HOBBY LOBBY V. BURWELL

The Affordable Care Act, passed in 2010, prescribed that employers must provide health insurance for their employees, and this included access to contraception. The owners of Hobby Lobby refused to provide contraception, claiming that it infringed upon their religious beliefs. The Department of Health and Human Services under the Obama administration sued Hobby Lobby for failing to abide by the ACA. Hobby Lobby, in turn, argued that the federal government was infringing upon their religious rights without providing a sufficient justification as required by RFRA, and they also stated that they were not doing so with the least restrictive means. Despite 19 Congresspeople who originally signed onto RFRA objecting to this interpretation¹², the Supreme Court ultimately sided with Hobby Lobby. Though they stated that the HHS had in fact provided a compelling state interest, they had not enforced that interest using the least restrictive means.¹³

BOSTOCK V. CLAYTON COUNTY

Bostock v. Clayton County, decided in 2020, was a win for the LGBTQ+ legal movement. Written by Neil Gorsuch, the decision clarified that Title VII, the provision of the Civil Rights Act that applies to employment, protects both gay and transgender employees because it bars discrimination based on “sex”. However, the decision includes a possible exception at the very end: RFRA. “Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.”¹⁴ A RFRA case as described here has not yet been brought, but it is certainly not out of the question.

11 *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006)

12 *HOBBY LOBBY: Murray Leads Senate Democrats Amicus Brief in SCOTUS Case*, United States Senator Patty Murray (Jan. 28, 2014), <https://web.archive.org/web/20210523042916/https://www.murray.senate.gov/public/index.cfm/2014/1/hobby-lobby-murray-leads-senate-democrats-amicus-brief-in-scotus-case>.

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

14 *Bostock v. Clayton County*, 590 U. S. ____ (2020)

CONCLUSION

RFRA has seen various changes in its meaning and application since its passage. Originally a response to the State of Oregon infringing upon the practices of the Native American Church, the Supreme Court soon found that it could not be applied to the states at all. This brought the constitutionality of the law as a whole into question, but the Court later clarified that RFRA can indeed be applied against the federal government. This brought up the possibility of various challenges to federal laws. It was soon used to weaken the Affordable Care Act, and it has recently been considered as a possible challenge to laws protecting LGBTQ+ rights. The future of RFRA is unknown, but it is certainly worth keeping an eye on.

JURIS MENTEM - CIVIL RIGHTS LAW

Wealth Proportionate Fines: Addressing Inequality in the Federal Fines System

MORGAN HARRIS

INTRODUCTION

Wealth inequality is worsening in the United States. According to a survey conducted by the Pew Research Center in 2020, the wealth gap between upper- and lower-class Americans' average annual family income increased by \$73,400 from 1970 to 2018.¹ In this timeframe, lower-class American families' annual incomes grew by \$8,000 while upper-class families' incomes grew by \$80,900.² The United States code regarding fines for criminal acts underscores the exponential growth of the wealth gap between rich and poor. U.S. criminal code sets, in dollar values, the maximum amount that both citizens and organizations can be fined for federal felonies, misdemeanors, and infractions. The United States' imposition of fines in dollar amounts impacts upper- and lower-class Americans very differently, trapping the poor in a cycle of debt and poverty that can lead to imprisonment while harming public safety by failing to incentivize wealthy citizens to abide by laws.³ To promote economic equality and public safety, the United States can modify its criminal code to impose fines that are proportional to one's wealth so that all people are impacted equally rather than capping fines at a fixed amount.

Federal law includes detailed sentencing guidelines. U.S. Code § 3571 of Title 18 Federal Crimes and Criminal Procedure specifies the maximum fines for both individuals and organizations for federal offenses. Specifically, an individual can be charged no more than \$250,000 for a felony or a misdemeanor resulting in death, \$100,000 for a Class A misdemeanor not resulting in death, and \$5,000 for an infraction or a Class B or C misdemeanor not resulting in death.⁴ Organizations can be charged no more than \$500,000 for a felony or a misdemeanor resulting in death, \$250,000 for a Class

1 Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, Trends in U.S. income and wealth inequality Pew Research Center's Social & Demographic Trends Project (2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/>.

2 Horowitz, supra note 1

3 Stacy Barrett, Paying Criminal Fines: What If I Cannot Afford to Pay My Fine? Lawyers.com (2019), Paying Criminal Fines: What If I Cannot Afford to Pay My Fine?

4 Sentence of a Fine, 18 U.S.C. § 3571 (b), (2008).

A misdemeanor not resulting in death, and \$10,000 for an infraction or Class B or C misdemeanor not resulting in death.⁵ A misdemeanor is a lesser criminal offense, such as simple assault. An infraction is a petty offense, such as a speeding ticket.⁶ A felony is the most serious of these three classifications and results in the highest maximum fine.⁷ Some examples of felonies are shoplifting over a specified value of merchandise or committing a violent assault.

CONSTITUTIONALITY OF DAY FINES

While repercussions are necessary when federal felonies, misdemeanors, or infractions are committed, 18 U.S. Code § 3571 disproportionately punishes lower- and working-class Americans. The Code aims to limit excessive fines by capping maximum amounts, thus upholding the Excessive Fines Clause of the Eighth Amendment of the Constitution, which states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁸ However, the current code violates this clause by imposing excessive fines on the poor. Deputy State Solicitor of the New Jersey Attorney General’s Office, Alec Schierenbeck, explains, “while a \$250 speeding ticket means little to a millionaire, it is roughly a week’s pay for someone earning minimum wage.”⁹ Even if federal judges were to consider wealth, unfair advantages for upper-class citizens would persist as they could easily afford to pay the maximum amount for a fine. Removing upper limits and implementing wealth-proportionate fines could resolve this inequity.

A CYCLE OF POVERTY

Fixed-sum fines can push the poor even deeper into poverty. The United States recognizes that some people will be unable to easily pay their fines, so they offer federal offenders payment plans in which they slowly pay off their debts over time. However, these payment plans charge interest, meaning that the amount of money someone already struggles to pay increases.¹⁰ In the long run, this means that the poor are not only charged a higher percentage of their earnings; they pay more money altogether than the rich do for the same crimes. This reality is worsened if a payment on the payment plan is missed. A missed payment can result in additional fines and even seizure of property for home or business owners.¹¹ This government action destabilizes already impoverished people by putting them in even more debt, removing their shelter, and potentially even their source of income if, for instance, they owned a small business.¹²

5 Sentence of a Fine, 18 U.S.C. § 3571 (b), (2008).

6 *Id.*

7 *Id.*

8 U.S. Const. amend VI

9 Alec Schierenbeck, The Constitutionality of Income-Based Fines The University of Chicago Law Review, https://lawreview.uchicago.edu/publication/constitutionality-income-based-fines#footnoteref284_gn4dg6k (last visited 2021).

10 Barrett, *supra* note 3

11 *Id.*

12 *Id.*

While it is important to ensure that people are not frivolously skipping payments, people who struggle to pay fines are punished with the assumption that they have ill intentions. By fining people for crimes driven by hunger and deprivation, the government drives citizens further into poverty, hindering their ability to provide for their families. Fines under current code could even lead people to commit more theft in their state of desperation. An April 2000 Northwestern University study on Urban Poverty and Juvenile Crime found that the financial desperation and high stress levels brought on by poverty make struggling individuals more likely to commit robbery, theft, and violent acts.¹³ Thus federal punishment can increase the crime it is intended to deter, by worsening conditions of poverty and desperation. Altering U.S. Code § 3571 to fine Americans based on a percentage of their wealth could deter crime without destabilizing people and reduce the need for payment plans that place a burden on lower-class Americans.

The current system can also directly imprison those who fail to pay. Staff attorney at Columbia Legal Services, Nick Allen, explained one of the many situations he has seen in which government fines push people into the prison industrial complex. “\$500 or \$600 for someone who has no ability to pay may as well be \$1 million.”¹⁴ In Arkansas, when a child, whom Allen refers to as E.B., got a \$500 fine for his juvenile offense, he felt hopeless, stating, “Just forget it, I might as well just go ahead and do the time because I ain’t got no money and I know the [financial] situation my mom is in.”¹⁵ E.B. then served three months in jail for his family’s inability to pay his fine.¹⁶ Fines can impose the threat of a prison sentence for those experiencing poverty, while wealthier individuals can pay the fine without the loss of their rights ever occurring to them.

PUBLIC SAFETY RISKS

The fixed-sum fines with limits defined by U.S.C. § 3571 impact society by placing people’s safety at risk. For the rich, a fine of a few hundred dollars does not carry as much weight, meaning U.S. Code § 3571 does not motivate wealthy Americans to follow the law as much as the poor. A March 2012 study on the relation between social class and unethical behavior by the U.S. National Library of Medicine found that upper-class individuals were more likely to break the law while driving, take valued goods from others, lie in negotiations, endorse unethical behavior at work, and exhibit more unethical decision-making tendencies than lower-class individuals.¹⁷ When the wealthy do not feel the intended effect of the punishment they are served, public safety is at risk. While fines imposed by U.S. Code § 3571 may derail a poor person’s finan-

13 Jens Ludwig, Greg Duncan & Paul Hirschfield, *Urban Poverty And Juvenile Crime: Evidence From A Randomized Housing-Mobility Experiment*, *Quarterly Journal of Economics* (2001).

14 Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs* Americanbar.org (2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/> (last visited Dec 4, 2021).

15 Llorente, *supra* note 13

16 *Id.*

17 Paul K. Kiff et al., *Higher social class predicts increased unethical behavior*, 109 *Proceedings of the National Academy of Sciences of the United States* (2012).

cial security, the wealthy have little risk.

Like wealthy individuals, large businesses and organizations are lightly punished for felonies, misdemeanors, and infractions included under U.S. Code § 3571. In an article by Schierenbeck for the University of Chicago Law Journal, the Deputy State Solicitor explains that businesses see some criminal acts as “wealth-maximizing.”¹⁸ Some companies view fines for criminal offenses as trivial in comparison to the profit they will receive in the long run by committing the offense, heightening external costs and public safety risks.

PROGRESSIVE SOLUTIONS

To improve public safety and reduce the impact and existence of wealth inequality, the United States government can alter U.S.C. § 3571. As opposed to capping fines at a certain level and defining fines at an absolute value, the code could remove its limits on how much individuals and organizations can be charged and impose fines that are proportional to one’s wealth. This way, fines will impact everyone equally regardless of wealth.

The dollar value of fines posed under a wealth-based fine system garners criticism from the wealthy. In Finland, which assesses its fines based on wealth for some traffic, shoplifting, and other violations, a wealthy businessman received a fine of €54,000 (equivalent to \$65,253.87) for driving at 65 miles per hour in a 50 miles per hour speed zone.¹⁹

Finland uses a ‘day fine’ system in which the courts first estimate the amount of spending money the offender has for one day. This number divided in half is considered a reasonable amount to charge the offender. The court then has rules, depending on the crime’s severity, about how many days the offender must go without this money. In practice, “going about 15 mph over the speed limit gets you a multiplier of 12 days, and going 25 mph over carries a 22-day multiplier,” Atlantic staff writer Joe Pinsker explains.²⁰

The day fine system has been successfully implemented in the U.S. as well as Europe. In 1998, Staten Island was the first area of the country to introduce day fines in a one-year experiment partnered with the Vera Institute of Justice. According to a study by the Vera Institute, there were more equitable impacts of fines under the day fine system, meaning more people were able to pay their fines.²¹

Considering the legality of implementing day fines in U.S. courts, it is important to

18 Schierenbeck, *supra* note 9

19 Joe Pinsker, Finland, home of the \$103,000 speeding ticket The Atlantic (2015), <https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/> (last visited Dec 4, 2021).

20 *Id.*

21 Judith Greene, The Staten Island Day Fines Experiment Vera Institute of Justice, <https://www.vera.org/publications/the-staten-island-day-fines-experiment> (last visited 2021).

note in any comparisons to Europe that in many countries that use day fines, such as Finland, Sweden, and Germany, courts have full access to their citizens' income and wealth information.²² In the U.S., courts must request offenders' means information from the Internal Revenue Service, so this is a potential barrier to the day fine system.²³The Vera Institute's Staten Island experiment required that offenders fill out detailed self-assessments of their means to expedite this process.²⁴

CONCLUSION

U.S. Code § 3571 allows the wealthy to commit federal offenses without feeling the severity of punishment that low-income offenders face. It defies the Eighth Amendment by punishing the poor disproportionately, pushing them deeper into poverty and sometimes prison. This benefits the rich while creating more hardship for future Americans who will be impacted by generational poverty if the wealth gap continues at its current rate. One option to reduce inequality is to modify U.S. Code § 3571 to assess fine amounts based on wealth and remove upper fine limits. Still, there are many ways in which our judicial system oppresses the poor, such as fining people who miss court dates because they cannot afford to get childcare or time off work.²⁵ While the modification of U.S. Code § 3571 is not a cure-all for inequality in America, it can serve as a first step in addressing it.

22 Greene, *supra* note 21

23 Disclosure Laws IRC 6103(i)(1), (2021).

24 Greene, *supra* note 20

25 US: Criminal Justice System Fuels Poverty cycle, Human Rights Watch (2018), <https://www.hrw.org/news/2018/06/21/us-criminal-justice-system-fuels-poverty-cycle> (last visited Dec 4, 2021).

JURIS MENTEM - CIVIL RIGHTS LAW

Black Blood in the Water: The EPA's Rocky History with Environmental Justice

ALYSSA BASCH

INTRODUCTION

On June 14, 2018, the Environmental Protection Agency (EPA) finally settled its oldest pending civil rights complaint, 26 years after it was originally filed. The United States District Court for the Northern District of California ruled that the EPA was guilty of environmental racism through its refusal to address pollution concerns of a largely Black community in Flint, Michigan.

The EPA's actions directly violated Executive Order 12898 in accordance with Title VI of the Civil Rights Act, which states that each federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions."¹

HISTORICAL BACKGROUND

In more recent years, the United States has increased its efforts to combat environmental racism and provide security for marginalized communities. Environmental racism refers to the disproportionate exposure of communities of color to unsafe environments, including polluted air, water, and soil. The environmental justice (EJ) movement--created to prevent such disparities--emerged in 1987 after the United Church of Christ Racial Justice Commission published a report titled *Toxic Wastes and Race in the United States*.² The report determined that hazardous waste sites were more likely to be located near minority communities, who ultimately faced a far greater burden of environmental degradation and pollution than their white counterparts.³ As an attempt to prevent further environmental racism, President George H. W. Bush founded the

1 Executive Order 12898 of February 11, 1994

2 Sierra Club, History of Environmental Justice, Sierra Club (February 17, 2001), <https://www.sierraclub.org/environmental-justice/history-environmental-justice>.

3 *Id.*

Office of Environmental Equity in 1992, later renamed the Office of Environmental Justice.⁴ In 1994, President Bill Clinton signed Executive Order 12898, which requires federal agencies to “make achieving environmental justice part of [their] mission.”⁵

Until the 1990s, the environmental justice movement relied on traditional environmental laws to address disparities.⁶ Eventually, activists turned to Title VI of the Civil Rights Act of 1964 to combat the environmental racism minorities faced.⁷ Title VI serves as one of the nation’s landmark civil rights laws. Section 601 of Title VI generally prohibits discrimination based on race, color, or national origin by any entity or program that receives federal funds.⁸ Furthermore, Section 602 of Title VI allows for federal departments and agencies to issue their own rules, regulations, or orders to effectuate section 601’s discriminatory prohibition.⁹

However, environmental justice leaders face several barriers when prosecuting Title VI cases in federal courts, including the U.S. Supreme Court’s decisions in *Guardians Ass’n v. Civil Service Commission*, 463 U.S. 582 (1983) and *Alexander v. Sandoval*, 532 U.S. 275 (2001).¹⁰ In *Guardians Ass’n v. Civil Service*, the Court found that Section 601 of Title VI requires proof of intentional discrimination, which requires prolific evidence.¹¹ In *Alexander v. Sandoval*, the Court ruled that there is no private right of action to enforce disparate-impact regulations promoted under Title VI.¹² As Justice Scalia wrote, “Title VI itself directly reaches only instances of intentional discrimination... [n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under [Section 602].”¹³

Furthermore, Executive Order 12898 remains judicially unenforceable.¹⁴ Without any law that directly combats environmental justice, the environmental activists must rely solely on Title VI of the Civil Rights Act of 1964 to battle discrimination.

THE CASE AT HAND

In 1992, Father Phil Schmitter, a Catholic priest from the St Francis Prayer Center, filed

4 Sierra Club, *supra* 2.

5 *Id.*

6 Albert Huang, Environmental justice and Title VI of the Civil Rights Act: A critical crossroads, American Bar Association (March 1, 2012), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Alexander v. Sandoval*, 532 U.S. 275 (2001).

13 *Id.*

14 Hannah Perls, EPA Undermines its Own Environmental Justice Programs, Environmental & Energy Law Program (November 12, 2020), <https://eelp.law.harvard.edu/2020/11/epa-undermines-its-own-environmental-justice-programs/>.

a complaint with the EPA alleging that Michigan’s state environmental department racially discriminated against the Black community by approving a permit for the Genesee Power Station in an area of Flint Michigan that already had more than 200 polluting facilities.¹⁵ Without emission-control technology in-place, the community worried that the Genesee Power Station would emit lead, mercury, arsenic, and other pollutants.

Beyond the decision to place the incinerator in the neighborhood, the permitting process was rife with instances of discrimination.¹⁶ The hearings were initially held in Lansing, 65 miles away from the community in question, making it difficult for poor residents to attend.¹⁷ During the hearings, white attendees were prioritized over Black attendees to testify.¹⁸ When a hearing was finally held at a venue within the community, the Michigan Department of Environmental Quality installed armed guards, contrary to their usual practice.¹⁹

As Father Phil Schmitter later declared, “It became apparent they must have perceived African Americans as violent, bad people. And it’s very intimidating to have people standing around with weapons.”²⁰

For years, residents filed complaints to the EPA, citing the discriminatory and environmentally unjust practices taken against them. Despite requirements that all civil rights complaints must be investigated within 180 days, the EPA failed to look into any accounts.²¹ The EPA continued to stall until 2015, when CALifornians for Renewable Energy, Ashurst/Bar Smith Community Organization, Citizens for Alternatives to Radioactive Dumping, Maurice and Jane Sugar Law Center for Economic and Social Justice, Sierra Club, and Michael Boyd filed a lawsuit against them for negligence and refusal to comply by their own rules.²² A report from NBC and Center for Public Integrity later uncovered that more than 90% of civil rights complaints to the EPA were rejected or dismissed.²³ Furthermore, the EPA’s External Civil Rights Compliance Office had only once formally found that anyone’s civil rights were violated when the lawsuit was filed in 2015.²⁴

Over the next couple of years, the EPA continued to litigate the case, even challenging

15 Sierra Club, *Federal Court Still Requires EPA to Enforce Civil Rights*, Sierra Club, (October 8, 2020), <https://www.sierraclub.org/texas/blog/2020/10/federal-court-still-requires-epa-enforce-civil-rights>.

16 Sophie Yeo, *Environmental Racism in Flint is Much Older Than the Water Crisis*, Pacific Standard (June 18, 2018), <https://psmag.com/environment/flints-other-lead-crisis>.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 Sierra Club, *supra* 15.

22 Californians for Renewable Energy, Ashurst Bar/Smith Community Organization, Citizens for Alternatives to Radioactive Dumping, Saint Francis Prayer Center, Sierra Club, and Michael Boyd v. United States Environmental Protection Agency and Michael Boyd v. United States Environmental Protection Agency and Scott Pruitt, Case 4:15-cv-03292-SBA Document 114 (2018).

23 Sierra Club, *supra* 15.

24 *Id.*

a court mandate that demanded for the agency to follow the law. Finally, on June 14, 2018, the United States District Court for the Northern District of California ruled that the EPA was guilty of environmental racism due to its neglect of complaints.

CONCLUSION

While the California District Court's finding aided the environmental justice movement, it did little to remedy more than two decades of environmental racism in Flint. In 2016, the Governor's Flint Water Advisory Task Force concluded that Black and impoverished residents "did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities."²⁵ Many activists argue that if the EPA entered a resolution with the Michigan state agency decades ago, many of the problems that precipitated the Flint water crisis could have been prevented.²⁶ By continuously extending the case, the EPA disregarded the livelihood of the Flint, Michigan's Black community and generated permanent socioeconomic damage.

Two years later, the EPA motioned for The United States District Court for the Northern District of California to remove their order that required the EPA to follow the law for civil rights complaints, but was denied by District Court Judge Sandra Brown Armstrong.²⁷ Still, the EPA's reluctance to examine all civil rights claims demonstrates the continued inequalities in America. In order to truly diminish disparities between races, both federal and non-federal agencies will need to address and combat environmental injustices.

Today, the Black community faces the lasting effects of the EPA's environmental racism. A 2013 study conducted by the Centers for Disease Control and Prevention found that although blood lead levels among U.S. children drastically dropped since the late 1990s, average blood lead levels among Black children (1 to 5 years old) between 2007 and 2010 were still roughly 38 percent higher than their white counterparts.²⁸ In November 2021, Judge Judith Levy of the United States District Court Eastern District of Michigan approved a settlement of \$626 million to compensate the residents exposed to the lead.²⁹ While these reparations serve as a measure of justice, they cannot reverse the extreme physical and neurological damages caused by involuntary lead consumption.

25 Sophie Yeo, *Environmental Racism in Flint is Much Older Than the Water Crisis*, Pacific Standard (June 18, 2018), <https://psmag.com/environment/flints-other-lead-crisis>.

26 *Id.*

27 Sierra Club, *supra* 215.

28 German Lopez, *Lead exposure is a race issue*. The crisis in Flint, Michigan, shows why., Vox, (January 6, 2016), <https://www.vox.com/2016/1/6/10724536/flint-michigan-lead-exposure-race>.

29 Laura Ly, *Judge gives final approval of \$626 million settlement for people affected by Flint water crisis*, CNN, (November 10, 2021), <https://www.cnn.com/2021/11/10/us/flint-michigan-water-crisis-judge-approves-settlement/index.html>.

JURIS MENTEM - CONSTITUTIONAL LAW

The Future of Voting Rights After *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*

MARIANA ESPINOZA

Throughout the history of the American voting system, there have been repressive tactics to ensure that certain voting groups could not vote. Such tactics consisted of poll taxes, reading tests, and even religious exams. In the wake of the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendment, Southern states resorted to other ways at preventing African Americans from voting. Today, considering two Supreme Court cases, *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*, it is argued that many states are enacting repressive voter laws as a consequence of both rulings.

The Voting Rights Act of 1965

In 1965 President Lyndon B. Johnson passed the Voting Rights Act (VRA) of 1965. The VRA outlaws the various forms of discriminatory voting laws. Such laws were formed in the aftermath of the Civil War when African Americans were emancipated, given citizenship, and the right to vote. The Voting Rights Act of 1965 prohibited literacy tests and sent federal examiners to multiple Southern state to ensure black people could register to vote. The Act was initially supposed to expire after ten years. However, in 1982 Congress reauthorized it for seven years, then for 15 years in 1992, and then for 25 years in 2006.

Shelby County v. Holder (2013)

In 2013, the Supreme Court ruled on *Shelby County v. Holder*. The case surrounds a suit filed by Shelby County, Alabama seeking an injunction on the enforcement of Section 5 and Section 4 of the VRA. Section 5 of the Voting Rights Act of 1965 is meant to protect people's right to vote in states that have historically disenfranchised its non-white citizens. It does this by prohibiting districts from changing their election procedures without obtaining permission to do so. The other section, Section 4 is intended to provide a "coverage formula" which defines the specific jurisdictions that require permission to change their voter laws. This "formula" identifies "States or political subdivisions that maintained tests or devices as prerequisites to voting and had a low

voter registration or turnout in the 1960s and the early 1970s.”¹

In a 5-4 decision, the Supreme Court decided that Section 4 is unconstitutional, and they reasoned that it imposed a burden that is no longer applicable to the current conditions of the districts in question. They write that the “Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years.”²

This begs the question, in states that have had historically repressive voter laws, is it possible that they still have such repressive laws? While there may not be literacy tests and poll taxes, it doesn’t mean that there aren’t other methods of making it difficult for people to vote. However, with this ruling in *Shelby*, the Court’s decision appears to allude that there is no type of voter suppression or restrictions, which as we saw in the 2020 election are not true.

Brnovich v. Democratic National Committee (2021)

The first section of *Brnovich v. Democratic National Committee*, pertains to the Arizona law-- H.B. 2023, regarding their voting system. This law provides two types of locations for individuals to vote at. The first is a vote center that allows voters to vote at any of the polling locations within the county. The second option is the precinct-based voting which means voters may only vote at the designated polling place within their precinct. Most of the state’s population lives in counties using the precinct-based system. The Democratic National Committee (DMC) challenged the policy by stating that the law violated Section 2 of the Voting Rights Act because if ballots were cast at the wrong precinct they would not be counted. The DMC claimed that this would “adversely and disparately affect Arizona’s American Indian, Hispanic, and African American citizens.”³

The second section of this case deals with vote-by-mail, which for the previous 25 years was used in Arizona. Within the state they allowed voters to drop off their ballots at various drop box locations or voters could return their early ballots through the mail, dropping it off at a polling place, vote center, or an authorized government official’s office. It should be noted that the Democratic National Committee called witnesses who “testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged.”⁴ In 2016, Arizona legislators passed H.B. 2023 which criminalized the collection of ballots and its delivery, making such an action a felony. Many people, including the plaintiffs in this case, believed that because there was no evidence of early ballot fraud in the state, that this law should not have been created. The Democratic National Committee further argued in this case that H.B. 2023

1 Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

2 *Shelby County v. Holder*, 570 U.S. 529 (2013).

3 *Brnovich v. Democratic National Committee*, 948 F. 3d 989.

4 *Id.*

violated Section 2 of the Voting Rights Act and that its creation was done with discriminatory intent, therefore violating the Fifteenth Amendment.

The Supreme Court in a 6-3 decision ruled that neither portion of H.B. 2023 violated the Voting Rights Act. In the majority opinion, the Court said that the options provided to voters “entail the ‘usual burdens of voting,’ and assistance from a statutorily authorized proxy is also available.”⁵ Additionally, the Court also said that even if the Democratic National Committee were able to show that there was a disparate burden caused by H.B. 2023, “the State’s ‘compelling interest in preserving the integrity of its election procedures’ would suffice to avoid §2 liability.”⁶

The Impact of Shelby and Brnovich on the 2020 Election

The 2020 election occurred during a pandemic where government officials had to provide solutions for conducting the 2020 election in a safe manner. As a result, we saw many states adopt vote-by-mail systems to limit the transmission of COVID-19. Two specific states that are alleged to have been able to impose restrictive voter laws because of the *Shelby County v. Holder* decision are Georgia and Arizona.

In 2020 Georgia used dropboxes for the first time. Many argue that Georgia’s voter laws are draconian because it limits the number of dropboxes that each county can have, the hours and days the drop boxes will be open, and even where they can be located.⁷ Additionally, the law establishes that voting has to take place during “normal business hours,” which further leads to the imposition of a vote by mail methods.⁸ Such restrictions on a vote by mail create an environment that may inhibit both voters of lower-income as well as minorities from voting. The limitation of absentee-ballot drop boxes appears to be targeted at Atlanta, likely to reduce the number of drop boxes from 94 to less than 25.⁹ Additionally, the legislation says that “each county can’t have more than one dropbox per early voting site or 100,000 active registered voters, whichever number is smaller.”¹⁰

The 2020 Arizona law, H.B. 2023 which prohibited the collection of ballots by anyone except a caregiver greatly impacts people of color. The Ninth Circuit Court noted that Black, Hispanic, and Native Americans were more likely than white voters to rely on ballot collection, especially for reasons that are specific to the state of Arizona. One such reason is that Native Americans live on reservations that are far from polling places, and they do not have traditional addresses which therefore limits their access

5 *Brnovich v. Democratic National Committee*, 948 F. 3d 989, p. 5

6 *Id.*

7 Daniel Dale and Dianne Gallagher, Fact Check: What the New Georgia Elections Law Actually Does, CNN, Cable News Network, (Mar. 31 2021) www.cnn.com/2021/03/31/politics/fact-check-georgia-voting-bill-law-elections-explained/index.html.

8 *Id.*

9 David Leonhardt, The Georgia Voting Fight, *The New York Times*, (Apr. 7 2021), www.nytimes.com/2021/04/07/briefing/the-georgia-voting-fight.html.

10 Dale and Gallagher, *supra* 7.

to mail.¹¹

One of the biggest fears with voting by mail has been the idea that there would be higher levels of voter fraud. The Brennan Center for Justice distinguishes between impersonation fraud and other kinds of “fraud.” The other type of “fraud” is typically accidental or rather, identified as human error. In the wake of this past election, there were many fears about impersonation fraud and that there were not enough safeguards against it, according to the Brennan Center for Justice. However, as early as 2007 it was found that incident rates were between 0.0003 and 0.0025 percent.¹² Today, the mail-in voter fraud rate is 0.00006% meaning it is five times less likely than being hit by lightning.¹³ In a review of the 2016 election, there were only four documented cases of voter fraud.¹⁴

The Aftermath of Shelby County v. Holder

There is no denying that in the wake of the Shelby County decision, which ultimately struck down the protections that were provided in Section 2 of the Voting Rights Act, it is inevitable that there will be legislation that is repressive in nature. The latest example of this is Georgia’s S.B. 202 which was passed in March of 2021. One of the key aspects of this law relates to election management, such as who decides on disqualifying ballots and who is eligible to vote. Such decisions under this law are made by county boards of election as well as providing more power to the General Assembly. In doing so, the state board would be picked and therefore controlled by the legislative Republican majority.¹⁵

In an attempt to curb such restrictive voter laws, the Department of Justice, led by Attorney General Merrick Garland, is seeking to ensure that restrictive voter laws are struck down. In a speech, Attorney General Garland defended voting rights and promised to ensure that it would remain one of the Department’s top priorities. In doing so he vowed to double the number of staff in the Civil Rights Division who are working on enforcing voting rights protections in various states. Additionally, he said that the Department will scrutinize current laws and practices to determine if they are discriminatory toward non-white voters. Additionally, he said that the Department will scrutinize current laws and practices to determine if they are discriminatory toward non-white voters and monitor the use of “unorthodox postelection audits.”¹⁶

11 Sean Morales- Doyle, The Supreme Court Case Challenging Voting Restrictions in Arizona, Explained, Brennan Center for Justice, (Feb. 25, 2021), www.brennancenter.org/our-work/research-reports/supreme-court-case-challenging-voting-restrictions-arizona-explained.

12 Justin Levitt, The Truth About Voter Fraud, (Nov. 9, 2007), <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud>.

13 Robin Young and Allison Hagan, Why Mail-In Voting Works And How To Solve Real Concerns, (Aug. 17, 2020), <https://www.wbur.org/hereandnow/2020/08/17/vote-by-mail-absentee>.

14 Phillip Bump, There have been just four documented cases of voter fraud in the 2016 election. The Washington Post. (Apr. 29, 2019), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/>.

15 S.B. 202

16 NEEDS SOURCE

The second biggest strategy toward curbing restrictive voter laws is the John Lewis Voting Rights Advancement Act and the For the People Act. The John Lewis Voting Rights Advancement Act, otherwise known as H.R. 4, served to create a new “formula” to substitute the one in the Voting Rights Act of 1965 that was struck down in the *Shelby County v. Holder* ruling. This was done by creating a new “formula” that would determine which state has a pattern of discrimination within voting procedure. This would guarantee that any voting changes do not affect voters by ensuring that officials publicly announce all voting changes at least 180 days before an election. As well as expanding the government’s authority to send federal observers to the polls on election day and during the early voting period.¹⁷ Unfortunately, in early November of 2021, Senate Republicans blocked the Act from advancing further.

The For the People Act (H.R. 1) is a bill meant to improve access to a ballot box, prohibit voter poll purges, end partisan gerrymandering, and promote voting system security by increasing poll watchers and nationalizing a security strategy.¹⁸ Earlier this year, polls showed that there was public support for this bill. One survey from Data for Progress showed that sixty-seven percent of Americans were in favor of the bill. Out of this percentage, fifty-six percent were Republicans and sixty-eight percent were independents.¹⁹ While this bill was passed initially in the House, it was blocked in the Senate, and in 2021 it was reintroduced by the Democrats in the House.

In the years following the rulings in *Shelby County* and *Brnovich*, the Voting Rights Act of 1965 has been greatly impacted, with large portions being struck down. As a result of declaring Section 4 unconstitutional, many voters in various states may be at risk of restrictive voter laws. As America approaches the 2022 election, *Shelby* and *Brnovich* may provide a path for more restrictive voter laws in the years to come. In the years to come considering *Shelby* and *Brnovich*, many activists and politicians are looking to various methods in order to provide some form of safeguard despite the loss of Section 4.

17 H.R. 4

18 H.R. 1

19 Data For Progress, 67 Percent of Americans Support H.R.1 For The People Act (January 22, 2021), <https://www.dataforprogress.org/blog/2021/1/22/majority-support-hr1-democracy-reforms>.

JURIS MENTEM - CONSTITUTIONAL LAW

The Future of the Electoral College in the United States

ADELAIDE SPITZ

INTRODUCTION

The Electoral College plays a principal role in the U.S. political system. While it has certain advantages, some of which can be argued are no longer relevant, there are damaging downsides over which many people have voiced concerns. Namely, the Electoral College does not accurately reflect the opinion of the majority of people. An issue relating to the Electoral College – specifically, faithless electors – has gone all the way to the U.S. Supreme Court and resulted in a win for the people. The decision stated that states have the right to enforce an elector’s oath. Many have argued for the complete abolition of the Electoral College, for which cooperation between states and politicians seems the only viable route.

HISTORICAL DEVELOPMENT

Since the establishment of the United States Constitution, people have debated the necessity of the Electoral College as a means of electing the President and Vice President. The method in which the executive was to be elected came under scrutiny during the Constitutional Convention in 1787. Framers proposed many different means of appointment, such as election by the legislature, through appointed delegates, and directly by the people. On September 6th, 1787, it was ultimately decided that the President would be selected via state legislature-appointed electors and a majority of the total vote. Each state would be given a handful of electors depending on the size of its population. The people of America would vote in each state, and depending on the state election result, the electors would be chosen. The Electoral College was thought to be beneficial for multiple reasons. Compared to a direct popular vote, the “ignorance of the people” would be far enough removed in the College so as to not adversely affect the competence of the executive. The people’s voices would be heard, albeit filtered through the vote of state-appointed electors. The Electoral College also has the advantage of reducing the disproportionate influence of states with larger populations over states with smaller populations.¹

¹ Feerick, J. D. (1968). The Electoral College: Why It Was Created. ABAJ, 54, 249. Accessed from: <https://heinonline.org/HOL/P?h=hein.journals/abaj54&i=251>.

ELECTORAL COLLEGE AT THE SUPREME COURT

The question of whether to keep or abolish the electoral college remains a hotly debated issue today. Many believe that the system is outdated and should be replaced by a national popular vote so as to reflect “one person, one vote.” A common complaint is that the Electoral College does not truly reflect the will of the people since a candidate can win the popular vote yet lose the election. This has happened a handful of times throughout history, most recently in 2016 with the election of Donald Trump. In addition, there is the issue of “faithless electors,” in which electors may vote in a way that is contrary to what the people of the state want. In 2020, the issue of faithless electors made it all the way up to the Supreme Court of the United States in the case *Chiafalo v. Washington* (2020). The question that the Court was considering was whether or not a state could legally bind electors to vote in the way that the population they represent has voted. The case stemmed out of a scenario in 2016 in which a group of faithless electors sought to alter the outcome of the presidential election by failing to uphold their oath to vote for Hillary Clinton. A Washington state trial court ruled against the electors and the Washington Supreme Court affirmed, rejecting the claim that the Constitution granted the electors discretion to exercise their own judgement. The U.S. Supreme Court unanimously affirmed the Washington Supreme Court’s decision, arguing that the Constitution – specifically Article II – gives states the power to enforce an elector’s pledge to support their party’s nominee.² This decision restores a bit of power back to the people because states can now make sure that electors are working for the people of their state rather than for their self interest.

THE FUTURE OF THE ELECTORAL COLLEGE

Thus the ability of the Electoral College to misrepresent the will of the people has been severely limited by the Supreme Court’s decision in *Chiafalo v. Washington*. But, is it time to abolish the Electoral College altogether, and is that even practical? Since the Electoral College was established in the Twelfth Amendment to the U.S. Constitution, abolishing it would require a new Constitutional amendment, meaning at least two thirds of the members of the House of Representatives, two thirds of the members in the Senate, and three fourths of states would need to vote in favor of such a drastic change.³ This level of support is unlikely to exist for something as important as the way we elect our executive branch. Even so, a majority of the U.S. population – over sixty percent – supports the abolition of the Electoral College.⁴ Some extreme measures have been proposed to get the electoral college abolished: David Litt writing for *Time* in 2020 proposed that since the Electoral College only advantages ten states, the remaining states could team up to support an amendment to abolish it. However,

² *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020).

³ Parks, Miles. “Abolishing the Electoral College Would Be More Complicated Than It May Seem.” NPR. March 22, 2019. Accessed from <https://www.npr.org/2019/03/22/705627996/abolishing-the-electoral-college-would-be-more-complicated-than-it-may-seem?t=1636142574914>.

⁴ Brenan, Megan. “61% of Americans Support Abolishing Electoral College.” Gallup. September 24, 2020. Accessed from <https://news.gallup.com/poll/320744/americans-support-abolishing-electoral-college.aspx>.

because of the myths that surround the Electoral College, many politicians are likely to vote against it.⁵ While the Supreme Court's decision in *Chiafalo* was a win for the people, the makeup of the nation's high court is subject to change at any point and decisions can be quite unpredictable. Thus going through the courts to make advances away from the outdated system will be inconsistent and unreliable. The most effective way is therefore through cooperation among states and politicians. Only then will the country be in a position to vote away the Electoral College through a Constitutional Amendment.

Conclusion

Clearly the Electoral College remains a contested issue in U.S. politics, some debates ending up before the Supreme Court. *Chiafalo* reinvigorated the debate over the outdated system and ultimately became a step in the direction toward preserving the voice of the people. But the possibility of getting rid of the Electoral College altogether remains open, albeit with severe obstacles. Any means taken to do so will be arduous and will result in far-reaching effects, as it would essentially dissolve a custom which has been present since the early days of U.S. democracy.

⁵ Litt, David. "The Supreme Court Just Pointed Out the Absurdity of the Electoral College. It's Up to Us to End It." *Time*. July 7, 2020. Accessed from <https://time.com/5863481/supreme-court-faithless-electors-electoral-college/>.

JURIS MENTEM - CONSTITUTIONAL LAW

How the First Amendment has Shaped the Media

SOPHIE BIONELLI

INTRODUCTION

The First Amendment includes two very important freedoms: the freedom of speech and freedom of press. These freedoms have been a hot topic among court cases and have shown how the media isn't as free to show or say what they want as most Americans may think. While the First Amendment gives the press the freedom to publish anything they desire, they can be punished for some of the things they say. The First Amendment has limitations, including obscenity, fighting words, defamation, and more. Although most people may think that saying "I have a right to free speech!" will allow them to get away with whatever they are saying, this often isn't the case.

The Supreme Court has faced many cases involving the media and free speech. Most of the cases that have to do with a publishing company are cases regarding First Amendment rights. Americans rely on the media for the truth, but as seen in recent years, they have not always supplied people with the truth. People affected by news stories that contain false information about them can sue media companies. This shows how the First Amendment, while allowing people to have the freedom to say what they want, also can be a way of controlling the media. The media is supposed to be truthful, so the First Amendment allows them to say what they would like, but it also punishes them if they do not regard the truth in their publications.

HISTORICAL BACKGROUND

The media has always had a complex relationship with the First Amendment. The First Amendment to the U.S. Constitution protects five important freedoms: freedom of press, freedom of speech, freedom of religion, freedom to peaceably assemble, and freedom to petition the government for a redress of grievances. Freedom of press and freedom of speech are closely related. These are the two freedoms that are most often the topic of popular news and court cases. Free speech and free press allow the free creation of new majorities. Freedom of speech is important as a guarantor of freedom for a properly functioning democracy. Free speech has so many definitions, but basically it allows the citizens to speak freely without government constraint. However, there are limitations to this freedom, including the use of defamatory speech. Defamation

is a social tort in terms of law, and it is a statement that injures a person's reputation as perceived by right-thinking, rational people. Libel and slander are two forms of defamation. Libel is written defamation published in a permanent or semi-permanent media like a movie, photo, video, etc. Slander is any kind of spoken defamation. There is no aspect of truth in the definitions of defamation, libel, or slander. Journalists and the media are not reporting the truth in these cases involving defamation because the truth is not known. Journalists have to defame people in order to do their job sometimes. For example, journalists have conditional privilege that protects most speech made in "good faith" and in the public interest.¹ "Good faith" refers to the way that the journalist must believe that his or her comment is true. Since the First Amendment was created surrounding the fundamental principle that public discussion is a political duty, journalists are basically protected from defamation claims when their work discusses matters of public concern. But if the media publishes false information recklessly or knowingly, then the conditional privilege is lost, and they can be punished.

IMPACT ON SUPREME COURT DECISION

The First Amendment has a grip on the media. The media is free to publish any information they would like unless restricted by a valid prior restraint. A prior restraint is a government effort to stop the publication of something. This freedom is also a liability because they can be punished for some things that they publish if it is false or defamatory. For example, a newspaper that publishes false information about a person can be sued for libel. A landmark case in this area is *New York Times Co. v. Sullivan* (1964), which states that a public official has to prove that defamatory language was "published with knowing falsity or reckless disregard for the truth."²

During the Civil Rights Movement, the media covered protests and other demonstrations. The *New York Times* published an advertorial about Martin Luther King, Jr. An advertorial is an advertisement even though it is not selling something because it is addressing a public issue. The advertorial was paid for by community leaders, celebrities, and politicians, and it laid out a number of things done to MLK and his non-violent supporters. The police commissioner in Montgomery County, Alabama, L.B. Sullivan, sued the *New York Times* because he believed the advertorial defamed him. The reason is because the advertorial stated that MLK was arrested 11 times, but the real number was only seven. L.B. Sullivan sued and won the case, but the *New York Times* appealed it all the way to the Alabama Supreme Court, but then proceeded to lose. The *New York Times* then appealed to the U.S. Supreme Court, where they said that the statements were in fact defamatory. But, the *New York Times* won the case. Sullivan correctly pointed out that when the *New York Times* reported on the events, they had written the amount of arrests correctly but then changed the number with "actual malice." Actual malice means publishing something knowing that it is not true or with a reckless disregard for the truth. The Supreme Court decided that even though

1 Leah Easterby, *Defamation, Public Officials, and the Media*, Nolo (June 4, 2019), <https://www.nolo.com/legal-encyclopedia/defamation-public-officials-and-the-media.html>.

2 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ("The target of the statement must show that it was made with knowledge of or reckless disregard for its falsity...").

the journalists knew the truth, the people in the advertising department did not. This case added substantial truth as a defense to libel, but threw logic and rational reasoning out the window. *New York Times v. Sullivan* is one of the most important decisions regarding free press and free speech because it shows how the First Amendment limits the ability of American public officials to sue for defamation.

A case that is extremely important to journalists that also involves the *New York Times* is *New York Times Co. v. United States*. This 1971 case involves the Pentagon Papers and how the government asked the *New York Times* not to publish these documents, but they did anyway.³ The U.S. government requested that these papers not be published because this would endanger national security. But the *Times* appealed this, saying that prior restraint, which is preventing publication, violated the First Amendment. The Supreme Court ruled in favor of the *Times* and recognized that there needs to be a balance between the protection of national security by the government and right to a free press granted in the First Amendment. This case shows that journalists really have to use their freedoms in a wise way while they play out their role of disseminators of information to the public.

Another important case regarding what journalists have the freedom to publish versus what they do not is the case of *Miami Herald Publishing Company v. Tornillo*. The case of *Miami Herald v. Tornillo* shows that the First Amendment gives publishing companies and the media protection against being forced to say what they don't want to say and that the government cannot require anyone to publish what they do not want.⁴ A Florida law and FCC act sought to make journalists more ethical by requiring them to be fair. So in broadcast media, if you criticize a politician, you must give them a chance to respond. When Tornillo, the Executive Director of the Classroom Teachers Association and a candidate for the Florida House of Representatives, asked the *Miami Herald* if they could publish his response to their editorials criticizing him and his candidacy, they said no. The *Miami Herald* refused Tornillo's request and said that the First Amendment protected them from not having to publish his side. The First Amendment gives a person or publishing company protection from being forced to say what they do not want to say, meaning the government cannot require anyone to publish what they don't want to.

CONCLUSION

The media and the First Amendment have always had an interesting and complex relationship, especially regarding the freedoms to speech and press. Journalists and the media mostly have the freedom to say what they want, but there are consequences for this freedom. If something defamatory is published, then the publishing company or journalist can be sued. This is often the basis of many Supreme Court cases regarding defamation. Overall, the First Amendment is crucial in order to protect the American

3 *New York Times Co. v. United States*, 403 U.S. 713 (1971) (“The government did not overcome the “heavy presumption against” prior restraint of the press...”).

4 *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (“Press responsibility is not mandated by the Constitution and...cannot be legislated...”).

people as well as the press, but it also is essential in protecting citizens from the press. beneficial for multiple reasons. Compared to a direct popular vote, the “ignorance of the people” would be far enough removed in the College so as to not adversely affect the competence of the executive. The people’s voices would be heard, albeit filtered through the vote of state-appointed electors. The Electoral College also has the advantage of reducing the disproportionate influence of states with larger populations over states with smaller populations.

JURIS MENTEM - CONSTITUTIONAL LAW

Political Gerrymandering: Non-Justiciable or Conservative Activism?

BEN PARSONS

INTRODUCTION

In 2019, Common Cause, a DC-based watchdog organization, filed suit against the North Carolina Republican Party, led by Robert Rucho, over a heavily gerrymandered congressional map for the state that would favor Republicans. After winning in lower courts, Rucho filed an appeal to the Supreme Court of the United States where the five conservative Justices of the Supreme Court, led by Chief Justice John Roberts, effectively overturned years of legal precedent established in *Baker v. Carr* and *Reynolds v. Sims* by ruling that political gerrymandering was neither a justiciable issue nor an issue involving the Fourteenth Amendment's Equal Protection Clause. In establishing that political considerations for the redistricting process do not in and of themselves disqualify a map as discriminatory, the Supreme Court has reinvigorated the debate over the founders' intent regarding representation of the people within our democracy.

A DECIDEDLY JUSTICIABLE QUESTION: THE SUPREME COURT ON LEGAL JURISDICTION

Gerrymandering, a term named after Elbridge Gerry,¹ is colloquially defined as the practice of drawing political or electoral districts during the constitutionally mandated reapportionment process every ten years in a way that provides one group with a political advantage over the other.² The Supreme Court, though never offering a legal definition of the process, has further delineated the process into two distinct categories, “political gerrymandering”³ and “racial gerrymandering.”⁴ Racial gerrymandering, by their definition, is when electoral districts are redrawn in a way in which racial minorities are intentionally grouped or split up to reduce their impact on the political system. Political gerrymandering, alternatively, is when people, based on their political persuasions, are separated or grouped into different electoral districts to reduce their impact on the political system.

1 Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (2002).

2 *Gerrymander*, Legal Information Institute: Cornell Law School (Nov. 05, 2021, 3:13 PM), <https://www.law.cornell.edu/wex/gerrymander>.

3 *Miller v. Johnson*, 515 US 900 (1995).

4 *Shaw v. Reno*, 509 US 630 (1993).

The Court, despite only beginning to consider these questions significantly since 1961, has had a storied history of upholding individuals' rights to challenge the redistricting process as discriminatory. In 1962, Charles Baker challenged Tennessee's redistricting process in *Baker v. Carr*, arguing that a Tennessee state statute that regulated the redistricting process was intentionally ignored. After hearing the case, the Supreme Court found that under the Equal Protection Clause of the Fourteenth Amendment, challenges to the reapportionment challenge writ large were justiciable issues.⁵

Following this case in 1964, the Court reaffirmed their decision in *Wesberry v. Sanders*. The Court, after hearing a challenge to Georgia's congressional districts as unconstitutional, found once again that the constitutionality of a state's redistricting map was challengeable, and that the issue was justiciable.⁶

DECISIVE ACTION: SUPREME COURT ACTIONS TO CORRECT GERRYMANDERING

In the same year, a separate, better-known case, represented the first time in which the Court decided that not only could they hear questions of the constitutionality of electoral districts, but that if electoral districts were indeed unconstitutional, the Court had the imperative to correct the issue. In *Reynolds v. Sims*, M. O. Sims argued that Alabama's reapportionment process violated the fourteenth amendment because, after redrawing new electoral districts, there were massive population disparities. This made it so that because fewer voters contributed to electing an official in one district than another, voters in the smaller population district had a stronger impact on the political process than others. This fact, a violation of the founder's principle of "one person, one vote", made the reapportionment map unconditional. The Court also went as far as to say that once the violation was apparent, a court could take action to correct it.⁷

In 1986, the Supreme Court acted upon this imperative in *Thornburg v. Gingles*. Gingles sued Thornburg, the Attorney General of North Carolina, saying that the state's map intentionally split African Americans into separate districts to dilute their voting power. The Court agreed and set out a standard for which electoral restrictors had to follow to ensure that those electoral district maps were not in violation of the Voting Rights Act, Equal Protection Clause, or Fifteenth Amendment.⁸

In short, this heavily litigated issue, until 2019, consistently held that the question of gerrymandering was both a justiciable question, and that the courts must act when gerrymandered districts violated the Constitution.

ONE PERSON, ONE VOTE: SOMETIMES, BUT NOT ALWAYS

5 *Baker v. Carr*, 369 US 186 (1962).

6 *Wesberry v. Sanders*, 376 U.S. 1 (1964).

7 *Reynolds v. Sims*, 377 U.S. 533 (1964).

8 *Thornburgh v. Gingles*, 478 US 30 (1986).

Despite this general legal precedent established in the fifty years before it, *Rucho v. Common Cause* seems to disregard this understanding, and construe the beliefs of America's founders. The majority opinion cited arguments such as the fact that the founders had known of partisan gerrymandering, but still left much of the election law-making powers to Congress. They argued that the concept that the Court has found in the past that it can only intervene on questions of gerrymandering to uphold the "one person, one vote" principle and to prevent racially discriminatory gerrymandering. This interpretation, however, ultimately seems to say that the question of political gerrymandering is just too difficult for them to address.

These arguments, conveniently, fail to address the fact that the founders also thought it acceptable for the courts to address the issue of political gerrymandering and that political gerrymandering is, in its very nature, a challenge to the principle of one person one vote.

Beginning with the idea that the founders had not intended for the courts to intervene on the issue of partisan gerrymandering, this standard is simply the attempt of the majority to create an "authoritative excuse" to skirt their responsibility to intercede on issues of gerrymandering back to Congress. The Court is correct in their argument that the founders "addressed the election of Representatives to Congress in the Elections Clause, Art. I, §4, cl. 1, assigning to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations."⁹ Yet, in saying that there was "no suggestion that the federal courts had a role to play,"¹⁰ the majority ignores that the founders did not expressly prohibit this. When applying this standard evenly, the founders did not suggest that it was the role of the courts to help create and uphold a right for people of color to be treated equally under the law, nor did they suggest that it was the role of the courts to allow a place for women to seek legal recourse. If the majority truly believed that they could act only in a way that founders expressly suggested, then many of the liberties granted to individuals across society would need to be revoked. Despite my disagreements with this majority, I doubt that they would ever recommend this drastic action, meaning that by including this rationale, they are simply trying to identify an authoritative source that would allow them to defer upon their duty.

Additionally, in arguing that the question of political gerrymandering is a separate one from questions regarding the principle of "one person, one vote," the majority simply ignores the realities at present. If the Court were to look honestly at present conditions, it would be impossible to say that this principle is truly being upheld. If we were to hold consistent with this principle then generally, with some exceptions, the views of the majority of voters in an electoral district should be represented by their elected official.

9 *Rucho v. Common Cause*, 588 US __ (2019).

10 *Id.*

This means that in a state like Texas, for example, where about 47% of the vote leans Democratic and 52% leans Republican, of the 38 districts, about 17, depending on the election cycle, would likely lean in favor of Democrats.¹¹ Instead, after the new redistricting cycle, only about 13 districts will lean in favor of Democrats, while 24 will lean in favor of Republicans.¹² In a state like Maryland, where about 60% of the vote leans in favor of Democrats and 36% lean in favor of Republicans, about 3 districts should lean toward Republicans.¹³ Instead, only 2 districts lean toward Republicans, and the other 6 lean toward Democrats.¹⁴

In each of these instances, people, be it Democrats in Texas or Republicans in Maryland, ultimately lose their equal say in the political system. In reality, the majority, in this case, has simply refused to uphold the principle of “one person, one vote.”

CONCLUSION

In ignoring the reality that gerrymandering violates the principle of “one person, one vote” and by saying that the question of political gerrymandering is simply not justiciable, Chief Justice John Roberts and the conservative majority on the Supreme Court, in essence, throw their hands in the air saying “this question is too hard!” The majority in their opinion ignore the principle of stare decisis and twist the vision of our founders to provide authority for an opinion grounded not in law, but in conservative activism. Though arguing that the Court is not equipped to handle this issue, in reality, the Court is no less equipped than any legislative body and is perhaps the body most equipped to set aside political preferences and handle this issue in a way grounded in law, not in subjectivism.

11 *Texas Partisan Lean*, Daves Redistricting (Nov. 05, 2021, 3:25 PM), <https://davesredistricting.org/maps#stats::5095c824-cee0-4e00-80d5-507614320045>.

12 *Plan C Map*, Texas State Legislature (Nov. 05, 2021, 3:25 PM), <https://data.capitol.texas.gov/dataset/planc2193>.

13 *Maryland Partisan Lean*, Daves Redistricting (Nov. 05, 2021, 3:25 PM), <https://davesredistricting.org/maps#stats::b623b503-7bfe-4bd3-8a5b-f85680208e10>.

14 *Maryland Draft Congressional Plan*, Maryland Citizen Redistricting Commission (Nov. 05, 2021, 3:25 PM), <https://redistricting.maryland.gov/Documents/Final-proposed-drafts/MCRC-Final-Proposed-Draft-Congressional-Plan.pdf>

JURIS MENTEM - CRIMINAL LAW

Party In the Courtroom: Media and Due Process in Celebrated Cases

JULIA BROSNAN

INTRODUCTION

As of 2016, the Washington Post publishes, on average, 500 staff produced articles daily.¹ With topics ranging from politics and global affairs to sports and entertainment, the news is a wealth of information. As access to the news has increased with access to the internet and social media, this has become even more true. People are constantly surrounded by the media. Anyone with a smartphone has instant access to hundreds of news sources along with blogs and social media.

People get information from the news whether it be on social media, online or television, so any bias in the news consequently affects the public's perception. News outlets report on what they believe matters to their audience, so even if people do not realize it, they have power over the matters on which media outlets report. This is not only the case in terms of entertainment news, but also news related to criminal trials and investigations. As a result certain criminal cases, celebrated cases, receive more attention from the media and the public. The amount of attention a case receives can have implications on a person's criminal trial and may affect the court's ability to give a defendant a due process trial.

CELEBRATED CASES

A celebrated case in criminal justice is a case which receives an exorbitant amount of public and media attention as compared with the average case.² Celebrated cases make up the top layer of Samuel Walker's "wedding cake" model of criminal justice.³ Often these cases involve a person with celebrity status, but they may also be cases that the public finds particularly shocking or disturbing for one reason or another. Examples of celebrated cases over the past several decades include the trial in which OJ Simpson was prosecuted for murder; the trials of Korey Wise, Kevin Richardson, Raymond

1 Robinson Meyer, How many stories do newspapers publish per day? The Atlantic (2016), <https://www.theatlantic.com/technology/archive/2016/05/how-many-stories-do-newspapers-publish-per-day/483845/> (last visited Nov 29, 2021).

2 Samuel Walker, Exploring the roots of our Criminal Justice Systems, 81 Michigan Law Review 946 (1983), <https://www.jstor.org/stable/1288419> (last visited Nov 3, 2021).

3 *Id.*

Santana, Antron McCray and Yusef Salaam, the teenagers prosecuted in the case colloquially known as the Central Park jogger case; and the trial of Derek Chauvin for the murder of George Floyd. All of these cases were high profile during both investigation and trial.

Although each case had different circumstances, their similarities can help provide a look into what contributed to their high amounts of media attention. O.J. Simpson was famous for his career in football and sports commentary so this is a clear reason for the attention his case received. However, this is not the case of the Central Park jogger case nor the murder of George Floyd. Neither party in either case was well known to the public before the investigations and trials of these cases. While timing and location played a role in these two cases becoming celebrated, what all three of them have in common is the racial aspect. O.J. Simpson is a Black man who stood trial for the murder of his wife Nicole Brown Simpson, who was white. All of those tried for the attack of Trisha Meili, the white Central Park Jogger, were young men of color. George Floyd was a Black man killed by Derek Chauvin, a white police officer. Other factors contributed to the fame of these cases, but it would be unreasonable to say the racial difference between the people tried in these cases and the victims in these cases did not effectuate, at least in some way, the media's focus on these cases.

FACTORS THAT CREATE CELEBRATED CASES

If a celebrity is involved in a case, it will most likely become high profile. People are interested in the lives of celebrities even when they are not on trial for or the victim of a crime, so when they are, the public's interest is piqued exponentially. Whether or not a celebrity is generally liked by the public, people want to know what happened; people care. Take Elizabeth Holmes for example. Along with Ramesh "Sunny" Balwani, Holmes was charged with "two counts of conspiracy to commit wire fraud and nine counts of wire fraud."⁴ Since her indictment in 2018, Elizabeth Holmes' case has received constant media attention. Prior to her indictment, which came four years after her creation of Theranos, "Holmes was the world's youngest female self-made billionaire, and Theranos was one of Silicon Valley's unicorn startups, valued at an estimated \$9 billion."⁵ Although not as well known and loved as a movie star, her success garnered her public recognition and respect. Following her indictment, her fall was quick. People no longer saw her as the next Steve Jobs, but as a deceitful and "captivating villain" which "catapulted her into infamy."⁶ Despite this less than positive view held by much of the public, people still follow her case and want to see news outlets report

4 U.S. v. Elizabeth Holmes, et al., The United States Department of Justice (2021), <https://www.justice.gov/usao-ndca/us-v-elizabeth-holmes-et-al> (last visited Dec 10, 2021).

5 Avery Hartmans, Paige Leskin & Sarah Jackson, The rise and fall of Elizabeth Holmes, the Theranos founder who is now on trial for fraud Business Insider (2021), <https://www.businessinsider.com/theranos-founder-ceo-elizabeth-holmes-life-story-bio-2018-4> (last visited Dec 2, 2021).

6 Lauren Dundes, Madeline Streiff Buitelaar & Zachary Streiff, Bad witches: Gender and the downfall of Elizabeth Holmes of theranos and Disney's maleficent, 8 Social Sciences 175 (2019), https://mdpi-res.com/socsci/socsci-08-00175/article_deploy/socsci-08-00175-v2.pdf (last visited Dec 3, 2021).

about Elizabeth Holmes' case.

Aside from celebrity involvement, there are several factors that influence which cases become celebrated cases. Demographics of both the victim and the person tried for a crime, for example, affect media attention; particularly race, gender and class.⁷ Missing White Woman Syndrome is a term initially coined by news anchor Gwen Ifill which refers to “the media’s fascination with missing women who are white, young, pretty, and often from middle- or upper-class backgrounds, and media’s simultaneous apparent lack of regard for those who do not fit this description.”⁸

Although Missing White Woman Syndrome refers directly to media attention immediately surrounding investigations of missing persons, it demonstrates a reality that is present in the attention other types of criminal investigations receive and the attention criminal trials receive: If the victim of a crime is a young, white, attractive woman who is middle or upper class, the investigation and trial of their case will likely receive more regard. There is also evidence suggesting that cases in which the perpetrator is Black and the victim is the model “missing white woman”⁹ receive even more attention than cases in which there is not this difference in race.

The term “Missing White Woman Syndrome” has resurfaced in the news more recently as a result of Gabby Petito’s death. Since her disappearance and the recovery of her remains in Wyoming, countless articles about her have been published and countless social media posts about her have been posted. Gabby Petito was a white, 22 year old social media influencer who was driving across the country with her fiancé Brian Laundrie. She went missing and her body was recovered in Wyoming.¹⁰ The University of Wyoming published a report which said that between the years of 2011 and 2020 there were 710 Indigenous people reported missing in Wyoming. The amount of news coverage Gabby Petito’s disappearance and death received, especially compared to those mentioned in the report, sparked discussion about Missing White Woman Syndrome. Many people saw for the first time the discrepancy and bias in news coverage.

RIGHTS OF THE ACCUSED IN CELEBRATED CASES

The nature of celebrated cases has the potential to jeopardize due process. In the United States, defendants in criminal proceedings are guaranteed the right to an “impartial

7 Carol M. Liebler, *Me(Di)a culpa?: The “missing white woman syndrome” and media self-critique*, 3 *Communication, Culture & Critique* 549–565 (2010), <https://academic.oup.com/ccc/article/3/4/549/4067455> (last visited Nov 3, 2021).

8 *Id.*

9 Zach Sommers, *MISSING WHITE WOMAN SYNDROME: AN EMPIRICAL ANALYSIS OF RACE AND GENDER DISPARITIES IN ONLINE NEWS COVERAGE OF MISSING PERSONS*, 106 *The Journal of Criminal Law and Criminology* 275–314 (2016), <https://www.jstor.org/stable/45163263> (last visited Nov 5, 2021).

10 *Missing and Murdered Indigenous People*- University of Wyoming, *Missing and Murdered Indigenous People* (2020), <https://wysac.uwyo.edu/wysac/reports/View/7713> (last visited Dec 3, 2021).

jury of the state and district wherein the crime shall have been committed”¹¹ by the Sixth Amendment of the U.S. Constitution. In celebrated, highly publicized cases these rights are more difficult to ensure. Putting together an impartial jury is much more difficult when a case is well known and has had extensive media coverage prior to the trial. In the 1983 case *U.S. v. DeLorean* a pretrial discussion between counsel concluded that “the intense media coverage” of the case “would deny DeLorean a trial before an impartial jury.”¹² Often, when people hear about a criminal case they form opinions, theories and come to their own conclusions. If a juror comes into a trial with preconceived notions about the guilt of the accused, the defendant has lost their constitutional right to an impartial jury. This can also risk the defendant’s right to the presumption of innocence as given to U.S. citizens through the right to due process ensured by the Fifth Amendment¹³ and the Fourteenth Amendment.¹⁴

In cases that are well known to a specific area, a change of venue could help in remedying this issue, but with the digitization of media much of the news has a wider, national reach. It is also generally known that it is difficult to obtain a change of venue.¹⁵ Although it stands to reason that a defendant would be willing to do so if it is to their benefit, a change of venue also requires the accused to relinquish their right to a “jury of the state and district wherein the crime shall have been committed.”¹⁶ Other solutions to decrease the impact of media on juries include ordering a continuance/delay, increased voir dire and judicial admonitions, but all are considered less effective than changing venues.¹⁷ Ultimately, having a jury that is completely unbiased is not possible as all people come into a trial with beliefs and histories that affect how they view a case, but the increased media attention of celebrated cases create conditions that threaten the rights of the defendant.

CONCLUSION

Celebrated, or high profile, criminal cases receive more attention than the average case, so they are the cases to which the general public is most likely to pay attention. Because of this, it is important to look at the race, gender, and socioeconomic status of the victim and the defendant as well as how differences in these demographics be-

11 U.S. Const. amend. VI

12 Robert M. Takasugi, *Jury Selection in a High-Profile Case: United States v. DeLorean*, 40 AM. U. L. REV. 837 (1991). <https://heinonline.org/HOL/P?h=hein.journals/aulr40&i=856> (last visited Nov 3, 2021).

13 U.S. Const. amend. V, cl. 5

14 U.S. Const. amend. XIV, § 1, cl. 4

15 Shirin Bakhshay and Craig Haney, University of California, Santa Cruz, *The Media’s Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 Psych. Pub. Pol. and L. 326, (2018), available at <https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5T08-SF50-00CV-K2HG-00000-00&context=1516831>.

16 U.S. Const. amend. VI

17 Shirin Bakhshay and Craig Haney, University of California, Santa Cruz, *The Media’s Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 Psych. Pub. Pol. and L. 326, (2018), available at <https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5T08-SF50-00CV-K2HG-00000-00&context=1516831>.

tween the victim and the defendant play a role in whether or not a case becomes celebrated. Similar biases are present at all levels of the criminal justice system, and like celebrated cases, can threaten a defendant's constitutionally ensured rights. However, when it comes to what news sources report on, the public has power; news outlets are beholden to their readers. With knowledge and realization of "Missing White Woman Syndrome," people can put pressure on news sources to report about missing women of color. Overall, the United States criminal justice system is a balance. A balance between crime control and due process, between freedom of the press and the rights of the accused, between the right to an impartial jury and the right to a jury of one's peers. As the presence of the media grows, these aspects get more intertwined and this balance becomes more difficult to find, but it is a balance that is vital for the United States to work to find.

JURIS MENTEM - CRIMINAL LAW

The Effectiveness of Juvenile Waivers in the U.S. Criminal Justice System

SHREYA DIWAN

INTRODUCTION

Every year in the United States, it is estimated that 250,000 youth are tried, sentenced, or incarcerated as adults. This is accomplished through something called a “juvenile waiver”, which is used whenever a judge decides to transfer a case from juvenile court to an adult court. The juvenile will be tried as an adult and will be denied whatever protections may exist in juvenile proceedings. Juvenile waivers are allowed in nearly all states. When America’s most punitive criminal justice policies were developed in the 1990s, 49 states changed their laws to increase the number of minors being tried as adults. On any given day, there can be 10,000 youth detained or incarcerated in adult jails and prisons. The U.S. criminal justice system has put many young people at a disadvantage with the use of juvenile waivers. The racial inequality seen in the adult criminal justice system is also present in the juvenile justice system. There is a disproportionate number of young people of color that are referred to adult court. Research shows that transferring youth to the adult criminal justice system does not protect our communities and that it increases the likelihood that youth will re-offend or recidivate. Youth transferred to adult incarceration facilities are more likely to struggle with mental health issues and to be physically abused. The negative impact of adult prisons on our youth and the effectiveness of juvenile waivers that make this transfer possible need to be addressed.

HISTORY

Before discussing whether or not juvenile waivers are effective, it is important to give a brief history of the juvenile court system and the creation of the juvenile waiver policy. The first juvenile court in the U.S. was established in Illinois in 1899.¹ Prior to this, children that were 7 years old and older were seen as people capable of criminal intent and they were punished as adults. This was largely ineffective and as such, juvenile courts that focused on rehabilitating the youth were created. The creation of these courts is attributed to the growing belief that children do not have fully developed morals and cognitive skills.

1 J. Lawrence Schultz, The cycle of juvenile court history, *Crime & Delinquency*, 19 (1973).

Unfortunately, a turning point in the trying and sentencing of juvenile offenders occurred in *Kent v. United States*.² In 1961, in Washington DC, a woman was robbed and raped in her apartment. The fingerprints that were discovered were a match for Morris Kent. Kent was a 16-year-old kid with a juvenile record for purse-snatchings and burglaries. Since he already had a record and the crime he was being accused of was so heinous, the juvenile court judge thought justice would better be served if Morris was tried as an adult in criminal court. Instead of resisting, the Juvenile Court waived its jurisdiction without holding a hearing for Kent. Kent was tried and convicted as an adult before the court fully investigated his waiver eligibility making this one of the first cases where due process for juveniles was entirely ignored.

In addition to Kent, there were many other cases during the 1970s that pushed states to try and sentence juveniles in criminal court and to deprioritize due process. The 1975 Supreme Court case of *Breed v. Jones*³ established that minors could only be tried in juvenile court or adult criminal court for the same offense in order to prevent double jeopardy. Also, the 1977 case of *Schall v. Martin*⁴, the Supreme Court decided that the pretrial detention of juveniles was lawful and was not a violation of due process. When the number of violent juvenile offenses increased significantly in the 1980s and 1990s, even more juveniles were transferred from juvenile court to criminal court for their crimes. The punishments were also far more severe. For instance, in the case of *Stanford v. Kentucky* (1989)⁵, the Supreme Court declared that it was permissible to sentence youth of 16 or 17 years of age to death. All of these rulings by the Supreme Court have made the juvenile justice system much more punitive.

Making the juvenile justice system punitive has not shown to be effective in deterring crime committed by youth. There is a considerable difference in cognitive and moral capabilities of juveniles and adults. During the time in which many punitive justice policies were adopted for youth, those who supported abolishing juvenile court argued that prosecuting juveniles in criminal court protected society and held juveniles more accountable for their crimes. However, current research indicates the opposite effect. There are many things society needs to understand before deciding that adult courts are acceptable for youth. Juvenile court decisions take into consideration a defendant's psychosocial factors, the severity of the offense, and the youth's offense history. In adult court, the severity of the offense and criminal history hold the most weight in determining one's sentence. After their release from incarceration, juveniles receive parole-like surveillance and access to reintegration programs. These policies allow juveniles a chance to change their behavior and to become positively contributing members of society again.⁶ With the use of juvenile waivers, a lot of youth are denied the chance to correct their behavior because they are placed into the adult system and denied the

2 *Kent v. United States*, 383 U.S. 541 (1966)

3 *U.S. Supreme Court Breed v. Jones*, 421 U.S. 519 (1975)

4 *Schall v. Martin*, 467 U.S. 253 (1984)

5 *Stanford v. Kentucky*, 492 U.S. 361 (1989)

6 Shay Bilchik, 1999 National Report Series: Juvenile Justice Bulletin, The Office of Juvenile Justice and Delinquency Prevention, https://www.ncjrs.gov/html/ojjdp/9912_2/contents.html.

protections of the juvenile courts. Transfers to criminal court are used whenever a juvenile's crime deems them incapable of being helped by juvenile courts. These transfers mean juveniles have lost their chance to be rehabilitated because adults in the system have less opportunities than children to correct their behavior. These waivers are also ineffective because historically, they have a tendency to be used more frequently in cases involving Black youth and Youth of Color. They are mechanisms that produce racial inequality within the justice system.

All of these issues show that the juvenile justice system's efforts to rehabilitate youth are being diminished by the use of juvenile waivers to transfer youth to adult court.

ARE JUVENILE WAIVERS EFFECTIVE?

As discussed previously, judicial waivers occur when a juvenile court judge transfers a case from juvenile to adult court. This denies the juvenile protections that juvenile jurisdictions provide such as court hearings that are closed to members of the public. By keeping these hearings confidential, juveniles are protected from the stigma they would face if their criminal records were exposed to the outside world. However, being transferred to adult court means that the alleged juvenile offender's crime is especially heinous or that they have a long prior criminal history.

There are those who suggest these waivers are necessary because certain youth commit very gruesome crimes and the juvenile waiver policy was adopted to deter youth from committing these serious crimes. However, rather than deterring all juvenile crimes, these waivers seem to be used at a higher rate to deter crime committed by youth of color. Youth of color are more likely to be tried as adults than white youth which perpetuates racism within the criminal justice system. A study was conducted by the Northwestern Juvenile Project to investigate how waivers affect youth of different races and genders. In the random sample of 1829 youths (from the ages of 10 to 18 years old) that were arrested and detained in Chicago, IL., it was found that "females, non-Hispanic whites, and younger juveniles were less likely to be tried in criminal court than males, African Americans, Hispanics, and older youths."⁷ Race plays a huge factor into the possibility that juveniles are tried as adults. As evidenced by the study, one is more likely to be transferred to adult court if they are male and/or a person of color. The waiver policy allows for racial discrimination. In order to better deter crime, our criminal justice system needs to be more fair by treating people of all races equally under the law. The waivers should show significant statistical evidence that they are not discriminatory and also that youth will not recidivate after being released from adult incarceration facilities.

Despite the waiver policy being introduced to deter crime, it seems that many juveniles have a tendency to re-offend after their release and their criminal behavior remains unchanged. A study examined 494 violent youths arrested in Pennsylvania in 1994.

⁷ Jason Washburn, Linda Teplin, Laurie Voss, Clarissa Simon, Karen Abram, & Gary McClelland, *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59, *Psychiatric Services* (2008).

Out of the 494, 79 were waived to adult court and 415 were retained in juvenile court. The findings showed a heightened recidivism among the youth that were transferred to adult court.⁸ Along with many other studies and research, it is suggested that transferring youth to adult courts does not significantly deter crime or reduce recidivism. In fact, in some cases their recidivism rates are increased.

The juvenile waiver policy is not effective in deterring crime, it allows for racial discrimination, and it also discriminates against those who struggle with mental health issues. Youth that have mental health issues are more likely to be transferred to adult court than youth who do not. The random sample of 1829 arrested juveniles in Chicago from the Northwestern Juvenile Project Study showed that out of all the juvenile transfers, “68% had one psychiatric disorder and 43% had two or more psychiatric disorders.” Juveniles who were sentenced in criminal court also were more likely to have a “disruptive behavior disorder, a substance abuse disorder, or affective and anxiety disorders.”⁹ The transfer to adult court occurs more often for the youth of color and youth with mental health issues than for youth who do not. The system of waivers appears biased and there is not enough evidence to convincingly demonstrate that it deters crime or recidivism rates among juvenile offenders. Sending youth with psychiatric disorders and other health issues to adult court interferes with their access to treatment. Upon release from incarceration, those who have these issues continue to struggle with them. Juvenile waivers must better account for youth with histories of mental illness so that they can get the treatment they need on time and are not suffering for the rest of their lives after already having been punished for their crimes through incarceration.

The outcomes of the juvenile waiver policy to date seem to indicate that there are significant detriments to continuing it. There are very few positive outcomes on record for the policy to be justified as a way to protect society. Furthermore, if one looks at recidivism rates of juveniles waived to adult courts, there is no indication that punishing juveniles more severely through adult forums leads to less crime.

CONCLUSION

Taking into consideration all of the issues with juvenile waivers, we must ask ourselves if they are truly effective in the deterrence of crime. We must ask if a juvenile is still considered to be a child although they have been waived into the adult court. If we think that they should be seen as children, we need to figure out how this will be recognized in court proceedings. If we think they should be seen as adults that are fully capable of criminal intent, we must assume that we have given up on rehabilitating them and that they are unable to change their behavior. We also have to determine the limits of their punishment even though they are in adult courts without the restrictions that govern the protection of children.

⁸ David L. Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court: A Consideration of Selection Bias*, 1, Youth Violence and Juvenile Justice (2003).

⁹ Jason Washburn, Linda Templin, et. al, *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59, Psychiatric Services (2008).

JURIS MENTEM - CRIMINAL LAW

Gideon's Broken Promise: For Indigent Clients, Fees for Legal Services Undermine the Right to Counsel

LAUREN GREENBERG

INTRODUCTION

Under United States law, a defendant facing jail time must be provided an attorney by the government if they cannot pay for one. The Supreme Court has proclaimed the importance of this right by asserting, “lawyers in criminal courts are necessities, not luxuries.”¹ Many Americans facing a life-altering charge against them actually do pay for this right through the justice system’s substantial reliance on application and recoupment fees. The Sixth and Fourteenth amendments insist on the right of impoverished defendants to be provided an attorney, but the Constitution leaves up to states exactly how to execute their systems for legal services. For this reason, there’s a wide variation in how states choose to fund indigent defense with many utilizing the practice of application and/or recoupment fees. These systems are a product of the Supreme Court decision *Gideon v. Wainwright* in which the right to counsel for indigent defendants was first reinforced more than fifty years ago. But this proclaimed right is undermined by application and recoupment fees for those defendants who must utilize public defenders. Subsequently, both fees should be abandoned and the costs absorbed by the government. They disincentivize the use of an attorney, penalizing poor defendants and rendering the right to counsel a fallacy. The danger here? It is a great disadvantage to face the legal system without the expertise of an attorney, leaving poor individuals more vulnerable to wrongful conviction and a lengthier sentence.

HISTORY: RECOUPMENT, APPLICATION FEES, AND THE RIGHT TO COUNSEL

A. Gideon v. Wainwright: The Right to Counsel

The United States first broached the question of counsel for indigent defendants in

¹ *Gideon v. Wainwright* 372 U.S. 335 (1963).

Gideon v. Wainwright. The Court declared that with serious felony charges the right to counsel is “fundamental... [and] essential to a fair trial” even for someone who is indigent.² The Court later clarified that this right also applies to misdemeanor cases facing prison time. Before *Gideon*, defendants who could not afford counsel were not always provided one by the state. The Court argued that without this necessary assistance the Fourteenth Amendment is violated, making it substantially harder for poor defendants to prevail in their criminal cases. Despite this decision, poor individuals are not yet classified as a protected class unlike race, gender, and religion. This failure is likely due to the antiquated belief that poverty is a product of individual choice rather than of oppression, racism, and an expensive legal system which entrenches poverty. If the Court were to categorize poverty as a suspect class privy to constitutional protection, indigent clients would fare better were they to sue their state governments for discrimination resulting from court fees. Still, these holdings provided most essential for indigent individuals in their access to government subsidized legal services and helped level the playing field of disparate outcomes of justice for those who could or could not afford a lawyer.

B. Recoupment and Application Fees

Recoupment of money from clients using indigent defense services occurs on the back end of criminal procedure. At the close of proceedings, defendants are required to pay a modest amount for legal services usually, but not always, with consideration for their income. Conventional recoupment statutes have required considerable effort from judicial actors to sort the genuinely indigent from defendants with greater resources.³ Application fees, however, are imposed on the front end of criminal proceedings. Before a defendant accepts indigent defense services they are charged an automatic fee to obtain government subsidized legal counsel. This typically ranges from \$25 to \$100 despite an indication of poverty and with no regard for the result of a case.⁴ Since the early 1990s, states began to rely on application fees in tandem with or to replace recoupment procedures because recoupment alone produced insufficient revenue. Application fees were less troublesome, creating a smaller administrative burden, but they are ultimately less considerate of an individual’s income because they fail to sort out those who can and cannot pay.

C. The Discretion to Enforce

Trial judges are actors that most determine how application and recoupment statutes play out. With immense discretion in the courtroom, they can craft limits on the reach of the statute and can choose to do next to nothing or a whole lot to enforce collection. Their power decides the real impact of these rules. This discretion makes for more harm in some jurisdictions where unempathetic judges attempt to bleed dry already

2 *Gideon v. Wainwright* 372 U.S. 335 (1963).

3 Logan, Wayne A., and Ronald F. Wright. “The Political Economy of Application Fees for Indigent Criminal Defense.” *William & Mary Law Review*, 5th ser., 47, no. 6 (2006). <https://ir.law.fsu.edu/articles/185>.

4 Logan and Wright. “The Political Economy of Application Fees” (2006).

poor defendants, and it demonstrates why the issue must be addressed federally to stay true to principles established in *Gideon v. Wainwright*. Some judges might argue these fees aid public defenders and court appointed defense counsel who are often overworked, underpaid, and severely financially stressed. Although they are correct that application fees have somewhat lessened the burden, the responsibility should not fall on indigent defendants to pay; the government must take on that duty.

CURRENT PRACTICE

Presently, many states rely on recoupment and application fees to support their already underfunded defender services. As of 2017, twenty-two states and the District of Columbia “charged indigent clients application fees, recoupment, or both”; eight states and D.C. require both.⁵ Louisiana, for example, is the only state which funds the majority of its court appointed defense through fines and fees.⁶ Additionally, Texas counties “recouped more than \$11 million from poor defendants in 2016.”⁷ This practice occurs not just in Texas but across the country. The Constitution says those who cannot afford a lawyer will be given one paid for by taxpayers, but defendants often take on the burden of what should be subsidized by the government. This was the case for Kelly Unterburger who was told he’d be appointed a lawyer but years later received a bill holding him liable for “thousands of dollars in attorney fees.”⁸ Across jurisdictions, this is an overused and unreliable source of funding, but in many cases indigent defense counsel relies these kinds of fees to pay often overburdened attorneys and keep their offices running. Usually it is required that defendants are told they might be responsible for costs of indigent defense, but at their discretion many jurisdictions do not follow this procedure- the reality is that the promise of a free lawyer is often rescinded. Even if defendants obtain one of the most zealous public defenders available, these lawyers are often more overworked, overburdened, and underpaid than an average private defender with less time to dedicate to each case.

A. Florida

Florida is another one of the many jurisdictions that does not waive application fees for public defenders. Rosemary McCoy, disenfranchised for having been convicted of a felony, was subject to the many fines of the justice system including an application fee for a court appointed attorney. Her conviction included a \$50 application fee on top of her already steep \$616 in case fees and \$7,000 in restitution from the court.⁹ For someone like Ms. McCoy, the almost eight thousand dollars alone was an insurmountable

5 Strong, “State-Administered Indigent Defense Systems” (2017).

6 Sunne, Samantha. “Why Your Right To A Public Defender May Come With A Fee.” May 29, 2014. <https://www.npr.org/2014/05/29/316735545/why-your-right-to-a-public-defender-may-come-with-a-fee>.

7 Najmabadi, Shannon. “He Thought He Had a Free Court-appointed Lawyer. Then He Got a Bill for \$10,000.” November 14, 2017. <https://www.texastribune.org/2017/11/14/texas-court-appointed-lawyers-arent-always-free/>.

8 Najmabadi, “He Thought He Had a Free Court-appointed Lawyer.” (2017).

9 Goforth, Claire. “In Florida, Fees, Fines From Felonies Means Disenfranchised.” September 26, 2019. <https://jjie.org/2019/08/28/in-florida-fees-fines-from-felonies-means-disenfranchised/>.

debt, but adding an unwaivable fifty dollar fee for her supposedly free lawyer laughs in the face of her indigent status and imposes an even greater burden on what might take a lifetime to pay off.

B. South Dakota

To an even greater detriment, South Dakota adheres to some of the strictest, and unconstitutional, recoupment laws in the country. Fees are “made a condition of the sentence”, so if a defendant cannot pay, an arrest warrant is issued.¹⁰ They are then held for that warrant at the expense of the taxpayer, appointed a second lawyer for the violation and will leave the court with a bill for the second attorney. Not only does this undermine the incentive to accept a government funded lawyer but also makes it difficult for poor people in the justice system to break the cycle of poverty, leading to worse outcomes down the line. As I will assess later, South Dakota’s policy is also contrary to the Supreme Court’s holding in *Fuller v. Oregon*.

C. New Jersey Mirrors a National Trend

In 2015, New Jersey raised application fees from \$50 to \$200 mirroring a national trend in offender-funded justice to finance struggling courts. Both the American Bar Association and the Brennan Center for Justice criticized this quadrupling of fees, noting they deter defendants from seeking counsel. A New Jersey Public defender added that “It’s been said it’s a revenue-generator, but you’re charging people who absolutely can’t afford it. They’re homeless, they’re mentally ill, they’re in shelters.”¹¹ Quite a few states have pursued the strategy of offender-funded justice in recent years as well. Alabama, California, Mississippi, Missouri and Texas have increased fees, fines and interest rates, and have even hired private companies to collect debts and have utilized jail time when defendants cannot pay. And the result of these procedures in New Jersey and across the country? “Jailed defendants routinely appear without counsel” sacrificing the right that spares them from harsher sentences and potentially wrongful convictions.¹²

D. National Survey Results, the Juvenile Law Center

In 2018, the Juvenile Law Center published a report on application fees in juvenile court, but this information translates perfectly to the adult system as well. In all but ten states, youth and their families are required to pay for legal assistance even if they are declared indigent.¹³ Any fines and fees associated with the justice system cause

10 Carroll, David. “The Criminalization of Poverty: A Spotlight on South Dakota.” May 30, 2013. <https://sixthamendment.org/the-criminalization-of-poverty-a-spotlight-on-south-dakota/>.

11 Kim, Tammy. “Poor Clients Pay Just to Apply for a Public Defender.” January 9, 2015. <http://america.aljazeera.com/articles/2015/1/9/poor-defendants-payfeesjusttoapplyforapublicdefender.html>.

12 Kim, Tammy. “Poor Clients Pay Just to Apply for a Public Defender.” January 9, 2015.

13 Miller, Julie. “Even Indigent Families Must Pay for Their Child’s Attorney in Most States, Report Says.” Juvenile Justice Information Exchange. January 14, 2019. <https://jjie.org/2018/08/14/even-indigent-families-must-pay-for-their-childs-attorney-in-most-states-report-says/>.

financial hardship, especially for those living in poverty, but as the Juvenile Law Center argues attaching these costs to legal representation produces “unique threats to the constitutionality” and impedes the ability to have a fair trial.¹⁴ Their study asserts that over a third of respondents said the worry of paying fees for representation led young defendants to waive their right to counsel. One expert sees these chilling survey findings as a detriment to not only the right to counsel but to the right to trial if someone decides the cost of pleading guilty is less than the cost they will face going to trial and paying for counsel.

DO INDIGENT DEFENSE FEES UNDERMINE THE RIGHT TO COUNSEL?

Recoupment and application fees undermine indigent defendants’ right to counsel, imposing a disparate burden on the poor. This practice is inappropriate and unforeseen for defendants- the government claims it will afford them the constitutional right to counsel but are going to charge them for it. Advocates argue that, with recoupment, the court determines if a defendant can afford to pay, so it should be constitutionally permissible. But this calculation is not always formal and raises the concern that defendants might forgo their right to counsel if they know they’ll be charged for representation. This is an even greater worry in reference to application fees where a determination of indigency is not required.

On an anecdotal level, the deterrent to accept a state lawyer is observed by attorneys and judges who witness more waivers of the right to counsel after laws imposing application fees have taken effect. The ideals of *Gideon v. Wainwright* do not align with the practice of recoupment and application fees. From an institutional vantage point the money saved narrative is appealing to some, but a defendant’s perspective exhibits more harm than good. For this reason, the money can and must come from an alternative source. These policies make it exponentially harder for poor defendants to prevail in their criminal cases when compared with those who are financially stable. And as do many functions of the legal system, this detriment exacerbates disparities based on class and race.

A. State v. Tennin: Determinations of Indigency

Advocates of application fees theorize limited effects of these fees on the waiver of an attorney and claim they impose a sense of responsibility upon defendants. While this may sometimes be true, the negative ramifications for the constitutional right to counsel outweigh any potential benefits. The Minnesota Supreme Court has also recognized the importance of protecting the right to counsel by rendering similar laws invalid on constitutional grounds. In 2003, a state statute contained no requirement to excuse defendants from paying if they faced excessive financial hardship.¹⁵ In *State v. Tennin*, the

¹⁴ Miller, “Even Indigent Families Must Pay for Their Child’s Attorney in Most States, Report Says.” (2019).

¹⁵ *State v. Tennin* 437 N.W.2d 82 (2004).

state Supreme Court invalidated the statute's provision requiring non-waivable fees. They concluded that in order to uphold the right to counsel there must be a judicial determination of the ability to pay, and the court must be able to waive that requirement. As the Minnesota Court made clear, an application fee without individualized calculations of indigency is contrary to the Constitution. To uphold justice under the law and to make sure poor defendants are not disincentivized to use their right to counsel, the U.S. The Supreme Court must make the same determination.

B. Fuller v. Oregon: Limitations in Practice

In *Fuller v. Oregon*, the Supreme Court imposed limitations on recoupment fees. They found that recoupment without a consideration of financial status violated the right to counsel. They clarified that an individual who is truly indigent must not be required to pay recoupment fees, but if someone previously indigent acquires the financial means to pay they must do so. This clarification is important because it distinguishes the ability to pay as something to be considered in recoupment procedures. True, the guidelines established by the Supreme Court are more limited than previously, but in practice many systems do not operate within these guidelines imposing unreasonable and mandatory fees and fines “on people incapable of paying them.”¹⁶ South Dakota is just one example of the states which disregard the fundamental *Fuller* decision. Although *Fuller* placed limitations on recoupment, it only skimmed the surface of necessary protections. In the *Fuller v. Oregon* dissent Justice Thurgood Marshall notes that it is not “consistent with the Equal Protection Clause [to] imprison an indigent defendant for... failure to pay the costs of his appointed counsel.”¹⁷ But this is exactly where current South Dakota laws currently lead. At the heart of Marshall's dissent lies the principle that to consider an indigent defendant equally protected under the Fourteenth Amendment there must be a consideration of indigency in all circumstances. Through mandatory application fees and unenforced indigency consideration during recoupment procedures, Marshall's dissent is discounted and the right to counsel is undermined affording well-off defendants greater protection under the law.

CONCLUSION: ALTERNATIVE PROCEDURES AND SOLUTIONS

Indigent defendants should not have to pay for justice to be served. Many are in poverty due to the long history of racism and oppression- indigent defendants are disparately Black and brown because of this history. To promote equal justice, no truly indigent defendant should be forced to pay an application fee to obtain a public defender nor should they pay recoupment fees after the fact. The government must absorb these costs to stay true to the right to counsel and halt unjust discrimination against indigent individuals. A potential source of funding to replace these fees could be drawn from the excess in funding for prosecutors offices when compared with public defense; across the country, “prosecutors’ offices receive \$3.5 billion more in funding than public de-

16 Fuller v. Oregon 417 U.S. 40 (1974).

17 *Id.*

fense budgets.”¹⁸ This money could be put to good use as both a substitute for indigent defendants’ fees and as a means to revitalize under-resourced public defense.

Furthermore, there is no reliable empirical data on the effects of recoupment and application fees on the waiver of counsel. The United States needs a central database of information on attorney waivers to fully examine the detriment these statutes are causing to indigent defendants. Despite the lack of comprehensive data on waivers, the individuals who matter most in this situation—the defendants—cannot be adequately heard through statistics. Survey techniques might better capture this first hand account. In the meantime, if fees are in place, precautions must be taken to ensure that these procedures are not a punishment for those who cannot pay. Trial judges must use their power to waive application fees or refuse to collect them from indigent defendants. Even without formal legal authority, judges have the discretion to temporarily resolve this injustice until the law itself does so.

Poor defendants should not have to prioritize paying the government for representation over the most basic necessities like food and housing. This reality makes it all too likely that indigent individuals will refuse government counsel—especially if they know they will be forced to hand over money that does not exist or will make their life considerably more strenuous. The current system pretends indigent defendants have money when they really don’t, and it is unlikely that these fees fail to matter to individuals who are impoverished.

The promise of *Gideon v. Wainwright* has already been broken, America’s indigent defense services remain underfunded, overburdened and in a state of crisis, resulting in a justice system that lacks rudimentary fairness.¹⁹ Application and recoupment fees only entrench this injustice: poor defendants are subjected to a disparate risk of worse outcomes including longer sentences and wrongful convictions. The compounding fees and fines from courts, jails, and prisons only worsen the injustice poor defendants face within the legal system, so in every state there must be a consideration of indigency when imposing any and all fees and fines. Without this consideration, the criminalization of poverty is all too likely. To achieve Equal Protection and uphold the right to counsel, state governments must find a way to absorb the cost of indigent defense services without imposing those costs on defendants.

18 Buckwalter-Poza. “Making Justice Equal.” (2016).

19 *Id.*

JURIS MENTEM - EDUCATION LAW

The Right to Learn: Can States Ban Critical Race Theory from the Classroom?

CASSIDY STONEBACK

INTRODUCTION

In the past year, critical race theory has become a political issue talked about on the national stage. Although there is no evidence that critical race theory (CRT) is taught in K-12 schools, many politicians have campaigned on promises to ban CRT from schools and eight states have already passed laws meant to ban the teaching of CRT.¹ These laws do not explicitly refer to critical race theory, they are designed to ban any teachings of the systemic racism of the U.S. or of unconscious bias. Many of these laws have only recently gone into effect and have not yet been challenged in court, but will likely be challenged soon. There is little precedent about critical race theory that makes it easy to predict how a court will rule in this case, but looking at past cases on education can shed light as to how a court may interpret these laws. Specifically the cases of *Meyer v. Nebraska*² and *Gonzalez v. Douglas*³ may provide a precedent for any challenges brought against laws banning CRT.

UNDERSTANDING CRITICAL RACE THEORY

Critical race theory is “a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship.”⁴ Despite what many politicians say, CRT is not designed to be taught to young children. CRT is a method of criticizing complex systems of injustice for graduate students and beyond. The core principle of CRT is to move beyond viewing racism as individual actions and instead view it as a systemic problem that is present in many of the mainstream policies and principles of American society.

1 Rashawn Ray and Alexandra Gibbons, “Why are states banning critical race theory?,” Brookings, August 2021, <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>.

2 262 U.S. 390 (1923).

3 269 F. Supp. 3d 948 (D. Ariz. 2017).

4 Engy Abdelkader, “Are government bans on the teaching of critical race theory unconstitutional?,” ABAJournal, October 7, 2021, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

The reason that CRT has become a flashpoint for politicians, educators, and parents across the nation is a misunderstanding of what CRT is and how it is taught. Although CRT is not meant to target individuals that exist within the system of racism, many feel like it still singles out individuals. This is because many people “are not able to separate their individual identity as an American from the social institutions that govern us—these people perceive themselves as the system.”⁵ Because of this misconception, the movement to ban CRT has taken off across the country since many see it as an “effort to rewrite American history and convince white people that they are inherently racist and should feel guilty because of their advantages.”⁶ While this is not the goal of CRT, it does not change the fact that there are real laws being passed that will have a massive impact on how students across the country are taught about race.

THE ROLE OF THE STATE IN THE CLASSROOM

Since CRT is not taught in K-12 schools and is a relatively new curriculum even in graduate studies, there are almost no court cases that directly address CRT. There are, however, a multitude of cases addressing education and what can be taught in public schools. While the Supreme Court has set a clear precedent concerning the rights of students to freedom of speech,⁷ cases surrounding the rights of teachers to teach certain subjects is less clear.

Courts have made it incredibly clear that when acting in their official capacity as an educator, teachers do not have the right to freedom of speech. In 1968, in the case of *Pickering v. Board of Education*, the Supreme Court ruled that although teachers have the right to comment on matters of public importance as private citizens, the “teacher’s interest as a citizen in making public comment must be balanced against the State’s interest in promoting the efficiency of its employees’ public services.”⁸ This case set the precedent that schools have the right to limit the free speech of teachers if they believe it will impact the teachers’ ability to educate children.

In *Webster v. New Lenox School Dist. No. 122*,⁹ a school teacher argued that the New Lenox School District had violated his First Amendment rights by prohibiting him from teaching creationism. The Sixth Circuit Court of Appeals rejected this claim, arguing that 1) the school board had the right to establish a curriculum, and 2) that “the

5 Rashawn Ray and Alexandra Gibbons, “Why are states banning critical race theory?”

6 Bryan Anderson, “Critical race theory is a flashpoint for conservatives, but what does it mean?,” PBS NewsHour, November 4, 2021, <https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory>.

7 *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969), set the precedent that students do not shed their First Amendment rights at the door and are allowed freedom of speech as long as it does not interfere with education. In later cases, like *Bethel School District v. Fraser*, 478 US 675 (1986), *Hazelwood School District v. Kuhlmeier*, 484 US 260 (1988), and *Morse v. Frederick*, 551 US 393 (2007), the Court affirmed the core principle of *Tinker* while establishing certain scenarios during which schools could limit student speech.

8 391 US 563 (1968) at 563.

9 917 F.2d 1004 (7th Cir. 1990).

school board had the authority and the responsibility to ensure that Mr. Webster did not stray from the established curriculum.”¹⁰ Later in 2007, the idea that teachers are acting on behalf of the school board was affirmed again in *Mayer v. Monroe County Community School Corporation*.¹¹ In this case the Seventh Circuit Court of Appeals went so far as to say “[e]xpression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary,” effectively establishing that in the classroom a teacher has no First Amendment right to freedom of speech.¹²

The Supreme Court has made it clear that while states and school boards have the right to set the curriculum for public schools, there are limits to what they can ban in schools. In 1919 Nebraska passed a law prohibiting educators from teaching students any language other than English. The court ruled that this law was unconstitutional in *Meyer v. Nebraska*, determining that the state did not provide a valid reason to “interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”¹³ This set the precedent that if states want to ban the teaching of a certain subject, they must be prepared to justify this decision. This case also made it clear the primary purpose of schools is to educate and any law that diminishes that goal will be examined with strict scrutiny.

In *Board of Education v. Pico*¹⁴ the Supreme Court addressed the issue of banning books in schools, ruling that the First Amendment limits the rights of school boards to ban books from school libraries. Although not distinctly about curriculum, in this case The Supreme Court once again affirmed that school boards have power over curriculum, it reaffirmed a principle established in a past case, that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”¹⁵

When the Court was asked to determine if states could ban the teaching of evolution in *Epperson v. Arkansas*,¹⁶ they ruled that this was unconstitutional. It is important to note that this case was decided based on the establishment clause of the First Amendment, so its relevance to CRT is limited. Despite this limited application, the Court again stressed that if a state is attempting to infringe on the freedom of teachers to teach and of students to learn,” it must present a valid pedagogical reason for this ban.¹⁷ Furthermore, in his opinion in this case Justice Hugo Black argued that this statute was unconstitutional and vague, which could set a precedent for cases concerning CRT.

The most relevant case to the discussion of CRT was not decided by the Supreme

10 *Webster v. New Lenox School Dist. No. 122* at 1007.

11 474 F.3d 477 (6th Cir. 2007).

12 *Mayer v. Monroe County Community School Corporation* at 478.

13 262 U.S. 390 (1923) at 401.

14 457 U.S. 853 (1982).

15 *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) at 250.

16 393 U.S. 97 (1968).

17 *Epperson v. Arkansas* at 105.

Court, but could still set a valuable precedent for any future cases. *González v. Douglas*¹⁸ was decided by the Arizona District court in 2017 concerned the Tucson Unified School District's (TUSD) decision to end a Mexican–American Studies (MAS) after the Arizona Senate passed A.R.S. §15-112 which banned ethnic studies.¹⁹ The court ruled that this statute was unconstitutional and violated the First and Fourteenth Amendment rights of the students and the parents of the district. Although a lot of the court's decision in this case was based on details that were specific to this case²⁰, it laid out the court's method for determining if a law banning ethnic studies is constitutional. In this case the court first examined whether or not the law in question was passed with a purpose to discriminate and if not, was the enactment and enforcement of the bill discriminatory. The court then examined the history of discrimination in Arizona to determine if there was intent to discriminate. In this case specifically, the court also looked at how effective the ethnic studies program was, since it was already in place.

CONCLUSION

While not specifically concerning CRT, all of these rulings set an important precedent for any states attempting to ban the teaching of CRT. The most important commonality between all of these cases is the establishment that “[s]tudents have a First Amendment right to receive information and ideas.”²¹ This means that any CRT bans will have to undergo strict scrutiny by the courts. If states want these bills to withstand the scrutiny of the courts, they must take care to ensure that the bills do not lead to discrimination and have a genuine pedagogical purpose.

It seems likely, that based on past court decisions that allow school boards and states to both set a curriculum and prohibit teachers from discussing certain subjects in the classroom, court's will find the goal of bills banning CRT constitutional. The ultimate deciding factor will be the content and execution of these bills. States must ensure that these bills do not affect a school's ability to properly educate students, as this is the ultimate responsibility of schools. If banning CRT affects the education that a school provides or results in discrimination, the court's will almost certainly rule these bills unconstitutional.

18 269 F. Supp. 3d 948 (D. Ariz. 2017).

19 A.R.S. § 15-112 (2) 15-112.

20 The passage of the law was very unusual as it seemed to target the MAS program of one specific school and on multiple occasions the writers of the statute indicated that their motivation for passing this law was discriminatory.

21 *González v. Douglas* at 972.

JURIS MENTEM - EDUCATION LAW

Legal Action Taken Against the Biden Administration's Executive Order Protecting Transgender Rights

ALEXIS SALDANA

INTRODUCTION

The Biden Administration is being sued for the interpretations of the federal anti-discrimination law in which the plaintiffs claim that the interpretations go far beyond the regulatory requirement, statutory text, judicial precedent, and constitution permit.¹ According to the plaintiffs, the Department of Education and Equal Opportunity Commission provided guidance on the matters of trans-student rights in public schools on issues such as sex-separated showers and locker rooms, whether individuals may be compelled to use another person's pronouns, and whether schools must allow biological males to compete on female athletic teams.² The 20 states who are suing the administration claim that these interpretations have no authority to resolve such issues and do so through executive orders which prevents public participation on these serious and controversial matters.³

BACKGROUND

Biden, in one of his first official acts as president, declared that Bostock's analysis prohibit discrimination on the basis of gender identity or sexual orientation.⁴ The Bostock analysis refers to the case *Bostock v. Clayton County* where the court ruled that the basis of sexual orientation or gender identity falls under the jurisdiction of Title IX and is therefore protected.⁵ The Department of Education on June 22, 2021, published in

1 "DCPD-202100057 - Executive Order 13988-Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation". Government. Office of the Federal Register, National Archives and Records Administration, January 19, 2021.

2 "Supporting Intersex Students" Department of Education. Office for Civil Rights. October 2021. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>.

3 *Plaintiffs v. United States Department of Education*. United States District Court for the Eastern District of Tennessee Knoxville Division. Case No. 3: 21-cv-00308.

4 "DCPD-202100057 - Executive Order 13988-Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation". Government. Office of the Federal Register, National Archives and Records Administration, January 19, 2021.

5 *Bostock v. Clayton County*, Georgia. (United States Court of Appeals 11th Circuit Dec. June

the Federal Register the “Enforcement of Title IX” in respect to discrimination based on gender identity and sexual orientation based on *Bostock v. Clayton County*.⁶ Prior to the executive order, the Department of Education applied the Bostock interpretation to Title IX on the basis of discrimination based on gender identity and sexual orientation.⁷ The Civil Rights division of the Department of Justice issued a fact sheet regarding the Executive Order which, according to the plaintiffs of the lawsuit, contained inconsistencies to the *Bostock* decision.⁸ The fact sheet stated that the prevention of a high school girl from using the girl’s restroom would be considered discrimination, however, Bostock declined to resolve any matters regarding bathrooms or locker rooms. Bostock also did not mention athletes, however, the fact sheet provided guidance on allowing transgender students to compete in sports . Because of all these inconsistencies within the Executive Order and the fact sheet that do not align with the decision and facts presented in Bostock, the 20 Republican majority states sue the Biden administration as the Department of Education guidance “irreparably harms” the plaintiffs in this case.⁹

STANDING FOR THE LAWSUIT

The plaintiffs claim that the Department of Education interpretation is in violation of the Tenth Amendment of the Constitution since the interpretation constitutes Title IX in a matter that disrupts the States’ historic authority to provide their own interpretations regarding safety in educational settings. All plaintiffs maintain that because the interpretations of Bostock do not align with the fact sheet presented by the Department of Education or the Executive order issued by President Biden, the order should not be instilled in the public school system. Due to the conflicting nature of the issue, the plaintiffs believe that there should be a consensus within the fact sheet and the Executive order that match the Bostock decision which did not address many of the issues mentioned in the fact sheet. The plaintiffs cite their Tenth Amendment right to address the safety concerns on high school campuses as education is handled at the state level rather than the national government.

RAMIFICATIONS OF THIS LAWSUIT

The plaintiffs maintain that they are not bound by the Department of Education’s interpretation and fact sheet of which they claim should both be deemed unlawful. The plaintiffs also hold that Title IX does not require employees or students to use a transgender’s individual’s preferred pronouns. Should this lawsuit be won by the states, public high schools would be able to set their own standards within their states of how to address transgender rights regarding pronouns, bathrooms and locker rooms,

15, 2020).

6 “Supporting Intersex Students” Department of Education. Office for Civil Rights. October 2021. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>.

7 Education Amendments Act of 1972, 20 U.S.C. §§1681 - 1688 (2018) .

8 “Supporting Intersex Students” Department of Education. Office for Civil Rights. October 2021. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>.

9 *Plaintiffs v. United States Department of Education*. United States District Court for the Eastern District of Tennessee Knoxville Division. Case No. 3: 21-cv-00308.

and sports teams. This could have immense ramifications on the rights of transgender students to participate equally in school related extracurriculars. This would give the states and public school administrators a large amount of discretion in dealing with transgender rights and deciding whether or not to respect some of these rights such as referring to students with their chosen pronouns. If the Bostock case continues to hold precedent over the Biden administration's executive order the rights of transgender students will still be protected, however not to the extent that the fact sheet stipulated. If the inconsistencies between the Bostock decision and the fact sheet are resolved in this case, the possible ramifications could set back the rights of transgender students significantly.

JURIS MENTEM - ENTERTAINMENT LAW

Britney Spears' Conservatorship

CAMERON CRAWFORD

INTRODUCTION

One of the most iconic pop stars of all time, Britney Spears, has been subjected to a conservatorship under her father, Jamie Spears, since 2008, when the star had a public mental health crisis.¹ A conservatorship is a court outcome where a judge appoints someone to care for another adult, essentially becoming in charge of the adult and controlling many aspects of his or her life, such as one's estate.² This is justified when one is unable to care for themselves, due to severe mental illness, allowing the conservator to make life decisions for the conservatee, including medical, financial, and legal choices. Conservatorships are appointed with the intention of ensuring that one who is mentally ill or developmentally disabled has an opportunity to live somewhat independently, with guidance from a trusted conservator. However, in Britney's case, the conservatorship in place was abusive and put the pop star in horrible living conditions.

Following a divorce from her husband in 2007, Britney expressed some unconventional behavior, such as shaving her head and smashing a photographer's car with an umbrella³. In 2008, she was submitted to a psychiatric institution twice, with the conservatorship beginning shortly after this.⁴ The conservatorship was in place from then until November, 2021, a span of roughly 13 years.⁵ Throughout this period, Britney released 3 studio albums and took up a Las Vegas residency, where she performed. While she was silent about the conservatorship for nearly its entire length, she began to speak out about it publicly in 2021. This inspired the #FreeBritney movement and mobilized people throughout the entire nation to advocate on behalf of Britney and her freedom.

HISTORICAL BACKGROUND

The process of instituting a conservatorship begins when a petition is filed in the given jurisdiction. This is typically done by a relative of the potential conservatee, advocat-

1 *Britney Spears: Singer's conservatorship case explained*, BBC News, (Sep. 29, 2021) <https://www.bbc.com/news/world-us-canada-53494405>.

2 *Conservatorship*, California Courts the Judicial Branch of California, <https://www.courts.ca.gov/selfhelp-conservatorship.htm?rdeLocaleAttr=en>.

3 *Britney Spears: Singer's conservatorship case explained*, Sep. 29, 2021.

4 *Id.*

5 *Id.*

ing for a conservatorship with documentation of why one is necessary.⁶ Following this appeal, there is an investigation, wherein a person, appointed by the court, meets with the disabled person, informs them of their legal rights and the petition, and reports back to the court with detailed information.⁷ The report back to the court often entails an evaluation regarding the person's situation, mental capacity, health and medical status, financial decisions, and wishes related to a potential conservatorship.⁸ Following the investigation, there are proceedings in court, where one of three things can happen. Either the disabled person consents and the conservatorship is implemented, they contest the petition and a trial is scheduled, or the person is unable to respond and witnesses must provide testimony.⁹ If the petition is disputed, and thus taken to trial, the petitioner must provide evidence and testimony, proving that legal interjection is necessary. In this case, the petition for conservatorship will either be denied, granted with very few boundaries, or granted narrowly with limitations.¹⁰

A conservator must provide proper care for the conservatee's assets, while under court supervision. In order to end the conservatorship, the conservatee must show that they no longer require the care of a conservator and have recovered from whatever incapacitation led to the conservatorship implementation.¹¹ The death of a conservator also ends the conservatorship. In Britney's instance, her father controlled an enormous portion of her life, including her estate, finances, career, and body.¹²

IMPACT

In June, 2021, Britney appeared in front of Los Angeles probate judge, Brenda J. Penny, giving a shocking testimony in regards to what she has undergone through the duration of her conservatorship. Britney explained that she has been under strict rule of her father and management. She was forced to tour and refusal to do so would be met with a lawsuit, despite the conservatorship not allowing her access to an attorney of her choice.¹³ Because of this, Britney was forced to work and rehearse endlessly, against her will. When she finally declined a Las Vegas show, her therapist put her on lithium, an extremely heavy and behavior-altering substance.¹⁴ In her testimony, Britney said "It's embarrassing and demoralizing what I've been through."¹⁵

Furthermore, she was abused by having to attend rehabilitation at a house where she

6 Aaron Larson, *What is a Conservatorship*, ExpertLaw (May 7, 2018) https://www.expertlaw.com/library/estate_planning/conservatorship.html.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Britney Spears: Singer's conservatorship case explained.*

12 Jem Aswad, *Read Britney Spears' Full Statement Against Conservatorship: 'I Am Traumatized'*, Variety (Jun. 23, 2021, 3:59 PM), <https://variety.com/2021/music/news/britney-spears-full-statement-conservatorship-1235003940/>.

13 *Id.*

14 *Id.*

15 *Id.*

lived with nurses and guards at all hours of the day; she had zero privacy, even when she was changing or asleep; and was forced to work from 8:00 AM - 6:00 PM every day.¹⁶ Failure to comply with the work schedule would lead to not being allowed to see her boyfriend or children. She was not allowed autonomy to her body and was forced onto birth control.¹⁷ Britney endured a great deal of abuse under her conservatorship, which allowed her father and management to profit off of her misery. In her 2020 trial, Britney described the effect the conservatorship had on her, claiming “I’ve been so angry and I cry every day.”¹⁸

Despite, the judge initially denying the removal of Jamie Spears as Britney’s conservator in June, Judge Penny suspended him as her conservator in September, temporarily instituting John Zabel, a public accountant, as her conservator.¹⁹ ²⁰ Zabel was only the conservator of Britney’s estate temporarily, until the following court hearing on November 12th. On this date, Judge Penny ended Britney’s conservatorship permanently, finally granting freedom to Britney after 13 years.²¹

CONCLUSION

Spears’ case has gained a great deal of attention from the public eye and has shaken the pop culture world. A Netflix documentary, *Britney Vs. Spears*, outlines Britney’s story and the abuse she faced throughout her conservatorship. The publicity of her case and the heightened public awareness from the documentary has inspired a generation of advocates. #FreeBritney is a movement inspired in support of Britney and her freedom. This has not only aided in helping raise public awareness for Britney’s justice, but has also brought attention to conservatorships in general and their potential for abuse.

In a nation built upon values of individual freedoms and civil liberties, conservatorships are able to easily suppress these principles. While in some cases conservatorships are necessary and justified, there are many instances of conservatorship abuse throughout the nation, just like Britney’s. Due to Britney’s story and the attention that it has received, conservatorship reform will likely be a positive change in the legal field moving forward.

16 *Id.*

17 *Id.*

18 *Id.*

19 Anastasia Tsioulcas, *Judge Denies Britney Spears’ Request To Have Her Father Removed From Conservatorship*, NPR (Jun. 30, 2021, 9:59 PM), <https://www.npr.org/2021/06/30/1012027100/judge-denies-britney-spears-request-father-removed-conservator>.

20 Anastasia Tsioulcas and Mandalit Del Barco, *A Judge Suspends Britney Spears’ Dad From Her Conservatorship*, NPR (Sep. 29, 2021, 9:06 PM), <https://www.npr.org/2021/09/29/1041473650/britney-spears-conservatorship-dad-jamie-spears-suspended>.

21 Doha Madani, *Bianca Seward, and Morgan Sung, Britney Spears free from conservatorship, judge rules*, NBC News (Nov. 12, 2021, 6:00 AM), <https://www.nbcnews.com/pop-culture/pop-culture-news/prewrite-britney-spears-conservatorship-termination-hearing-rcna4481>

JURIS MENTEM - ENTERTAINMENT LAW

Disney's Monopolistic Disputes

ERIC O'DRISCOLL

INTRODUCTION: DISNEY'S RISE TO POWER

Disney has long been known for its cartoon characters, and themed amusement parks deemed “the happiest place on earth.” While these roots remain a significant part of Disney’s image, the company has exponentially grown its influence, becoming one of the most powerful conglomerates in the entertainment industry today. Disney’s sphere of influence has expanded into countless markets, such as the sports television and mainstream news industries through their ownership of ESPN and ABC. However, their most significant expansion has been into the film industry. Over the past two decades, Disney has purchased many of the largest film developers in the world such as Lucasfilm, Pixar, and most notably, Marvel. These acquisitions have given Disney the rights to some of the most popular movie franchises of all time. As a result, over half of the 20 highest grossing movies of all time are owned by Disney.¹ Despite their lack of critical acclaim, movies contained within the Marvel Cinematic Universe (MCU) – a series of interconnected superhero films based on characters developed within the Marvel comics – are the undisputed champions at the box office. While Marvel has retained its independent identity, the legal obligations associated with Disney’s ownership are certainly present, many of which demonstrate their exploitative and monopolistic behavior.

SCARLETT JOHANSSON'S CONTRACT DISPUTE

The MCU began as a connected series of films about individual superheroes who would assemble to form the Avengers superhero team, which initially consisted of Marvel superheroes Iron Man, the Incredible Hulk, Thor, Captain America, Hawkeye, and Black Widow, played by Ms. Johansson. Over time, the MCU grew in scope, introducing other superheroes and teams from Marvel Comics and culminating in two crossover films: “Avengers: Infinity War” and “Avengers: Endgame” which brought all of these characters together. Additionally, the MCU has had many spinoff movies focusing on singular Avenger’s stories. That is where the legal battle of Ms. Johansson began.

In 2010, Johansson made her debut in the MCU in “Iron Man 2.” She would then go on to star in six additional MCU films between 2012 and 2019, becoming one of

1 Jackson, Josh. “The Top 20 Highest-Grossing Movies of All Time Worldwide.” Paste Magazine, August 11, 2021. <https://www.pastemagazine.com/movies/highest-grossing-movies/the-highest-grossing-movies-of-all-time/>.

the most beloved figures in the franchise. Over the past decade, Scarlett Johansson's work has generated billions of dollars for Marvel Studios, and by extension, Disney. In 2019, Marvel officially announced that Johansson would return as Black Widow, this time in her own film. The movie "Black Widow" would see Johansson return in her distinguished role of Natasha Romanoff, a super spy who manages to keep up with her counterparts despite her lack of any apparent superpowers. This would be Johansson's first film in the MCU in the lead role, making it highly anticipated by viewers who had long waited for a film dedicated exclusively to Johansson's character.

Prior to this announcement, representatives for Marvel and Johansson had finalized an agreement that she would star in this film. As a part of this agreement, Johansson obtained from Marvel a contractual promise that the release of the film would be a "wide theatrical release." This was defined as the following:

"The Picture would initially be released exclusively in movie theatres, and that it would remain exclusively in movie theatres for a period of between approximately 90 and 120 days. This roughly 90-120 day theatrical 'window' was not only industry-standard at the time the Agreement was finalized but also standard practice for prior Marvel movies distributed by Disney, including those starring Ms. Johansson."²

In November 2019, about six months after the contract between Marvel and Johansson was signed, Disney launched Disney+, an independently owned subscription service, similar in format to other popular streaming services such as Netflix, Hulu, or Amazon Prime Video. Disney announced that the offerings on Disney+ would include Disney's entire library of films, television series, and original content. Most importantly, Disney+ would eventually be the most convenient way to stream the MCU. In light of these announcements, Johansson and her representatives sought to reaffirm that Marvel would adhere to their contract with respect to the theatrical release of the film. However, in late March of 2021 Disney announced that Black Widow would be simultaneously released on Disney+ and in theatres, directly violating these promises and her agreement with Marvel. In the following months, Disney's marketing team highlighted the upcoming availability of "Black Widow" on Disney+. By forcing Marvel to breach their agreement, and launching a large-scale advertising campaign, Disney pulled millions of fans away from the theatres and toward its Disney+ streaming service. According to Disney's own press releases, Black Widow grossed more than \$60 million on Disney+ in its first weekend alone. This strategy dramatically hampered the film's performance at the box office. As a result, "Johansson sued Disney over its release strategy for the film, claiming that a simultaneous release in theaters and streaming cut into her overall earnings."³ While this lawsuit was settled within a short period of time, the actions of Disney to override Marvel's contract with Johansson clearly demonstrate monopolistic and exploitative behavior.

² *Periwinkle Entertainment, Inc., F/S/O Scarlett Johansson v. The Walt Disney Company*, 21STCV27831, 3 (Superior Court for the State of California County of Los Angeles, 2021).

³ Rakesh Sharma, "Disney (DIS) Files Lawsuits against Marvel Creators," Investopedia (Investopedia, September 28, 2021).

MARVEL CHARACTER COPYRIGHT DISPUTES

This dispute involving Scarlett Johansson demonstrates Disney's disregard for the autonomy of Marvel. Through instructing Marvel to disobey the laws of their own contract, Disney actually caused a lawsuit against themselves. Despite this, Disney, as the parent company of Marvel, are currently overseeing a litigation effort to retain copyright rights to some of Marvel's biggest characters. In one case, Marvel is suing the estate of Steven Ditko, the creator of some of the MCU's most prominent heroes, including Spiderman and Doctor Strange. This came after Ditko and other creators filed copyright termination notices, which would have granted them the exclusive rights to these characters. In many cases, including this one, the owner of a work's copyright rights is not always the original creator. Marvel, despite not being the original independent creator of Ditko's characters, is technically the owner of the rights to these characters. However, the Copyright Act of 1976 allows original creators to reclaim their work after 35 years, by giving two years of advance notice for the current owner to yield their rights. In this case, the estate of Ditko has filed a termination notice on Marvel, demanding that they return the rights of Ditko's original characters. However, Marvel has sued the estate of Ditko for filing an invalid termination notice.

Marvel's legal argument relies heavily on Ditko's work qualifying as a "work made for hire." A work made for hire is any piece of work that was created by an employee as part of their job. In such a case, the employer—not the employee—is considered the legal author and copyright holder. Unless there was an agreement signed ahead of time stating otherwise, any works made for an employer qualify as works made for hire. This is important because works made for hire are not subject to copyright termination provisions according to the Copyright Act. Therefore, if Marvel could prove that these works qualified as works made for hire, they would retain the rights to the characters in contention.

In order to prove that these works qualify as having been made for hire, Marvel outlined three primary points in their complaint against Ditko's estate:

"Marvel had the right to exercise creative control over Steve Ditko's contributions and paid him a per-page rate for his work. As with the artists in those cases, when Steve Ditko worked for Marvel, he did so with the expectation that Marvel would pay him. And as with the artists in those cases, Steve Ditko never held the copyright in the famous Marvel characters and comics on which he worked"⁴

First, Disney notes that Marvel paid Steve Ditko a per-page rate for his contributions. Therefore, Ditko was an official employee of Marvel. Second, a superior of Ditko, in this case the editorial staff, had the right to exercise creative control over Steve Ditko's

⁴ *Marvel Characters, Inc. v. Patrick S. Ditko*, 1:21-cv-07957, 2 (US District Court for the Southern District of New York, 2021).

contributions. In other words, other Marvel employees were actively involved in the creative process. Third, Disney argues that Steve Ditko did not gain any ownership of his works, nor did he attempt to gain independent ownership of his works. These three details aim to qualify Ditko's work as having been made for hire, which would preclude his estate from terminating Marvel's ownership. Additionally, Marvel cites their well-known "Marvel Method" which involves a loose collaborative atmosphere in which initial creative ideas are discussed in groups, before artists then take care of the details. Marvel claims that this method constitutes an employer-employee relationship, which would also denote the subsequent works as being made for hire. Marvel mirrored this argument in multiple separate cases against Lawrence Lieber, and other former creators. These arguments are ongoing, but once again demonstrate a top-down effort from Disney and their subsidiary companies to override the personal interests of their contributors.

CONCLUSION: THE FUTURE OF FILM LAW

Disney is the single most impactful entity in the film industry today. Their influence and practices naturally will set trends for other large corporations to follow. Therefore, it is important to examine how they treat their contributors. From actors to creatives, Disney has shown a consistent trend over the past few years of contract breaching and exploiting copyright law. In the case of Scarlett Johansson, they demonstrated a clear desire to override the independent business desires of a subsidiary company. Additionally, they are actively pursuing the rights to characters created long before Disney had any ownership of Marvel.

These issues pose significant threats to the future of the film industry. While there are no current conglomerates that will soon rival the monopolistic power and market control of Disney, there are other large players competing. This drastically threatens smaller companies, as the larger conglomerates are demonstrating an almost invincible presence. Without serious regulation being enacted moving forward, these monopolistic trends will likely persist, leaving creators and actors constantly threatened by the self interest of massive media conglomerates.

JURIS MENTEM - ENTERTAINMENT LAW

This is Why We Can't Have Nice Things: a Discussion of Taylor Swift's Rerecording Legal Battle

SOPHIA OLSON

Recently Copywrite and the impacts of music ownership have emerged in popular discourse because of Taylor Swift. After a long legal battle with her old record label, Taylor Swift has moved to rerecord her first six albums. Citing master and publishing ownership copywrites laws, and financial impact of legal decisions, the Swift masters discussion is a complex legal discussion.

MASTER AND PUBLISHING OWNERSHIP

Before one can understand the legal battle over Taylor Swift's master, it's important to understand the key elements of the arguments, master versus publishing ownership. A master is the version of an audio recording, from which copies for sales and distribution are made. The importance of this is that the owner of the master, the original copy, owns any copy that is produced. These versions could be digital downloads, streams, CDs, vinyl, and more. Because the person who owns the master effectively owns any copy of the piece, anyone who wants to use the copy has to ask the owner of the master for permission to use it. In practice, this means that before it is put on a streaming service, a CD for sale, or a movie soundtrack, the owner of the masters has to approve it. Publishing is the ownership of the compositions and lyrics of the song. In other words, publishing is the actual component of what makes the master. For example, a song you hear on the radio is the master. However, the things that make up the song, lyrics, melodies, etc. are the publishing aspects.

The Taylor Swift case is a battle over ownership of the masters of Swift's first six albums. Currently, Swift owns the publishing rights to her music but does not own the masters. Scooter Braun is the one who owned the masters up until 12 months ago when he sold them to Shamrock Capital.

BACKGROUND

When Taylor Swift published her first six albums, she did so under a contract she had signed with Sony/ATV. In she signed that Sony would own the masters of these first

six albums. While she would own the publishing rights. Swift found after publishing all these albums that she wanted to gain the master to them. This is where the disagreements began. After she completed these six albums, Big Machine, Swift's label at the time, claims they offered to let Swift buy all of her masters for the six albums back. However, Swift claims that she was offered the ability to purchase one master, and she could earn back each one as time went on.

Another key player in this disagreement was Scooter Braun. Braun bought Big Machine record label for \$300 million in 2016. Once he bought the label he gained had the ownership of Swift's masters because the label owned her masters. It was because of this that he was at the heart of Swift's battle to try to buy back her masters. However, most of this battle did not become public until 2019 when Swift revealed the extent to which Braun was refusing to sell her the masters. In 2019 she was slated to be awarded the "Artist of the Decade Award" at the American Music Awards. However, Braun refused to let her perform songs from her first six albums citing American copyright law. Copyright protection "gives the owner of copyright in a musical composition the exclusive right to make copies, prepare derivative works, sell or distribute copies and perform or display the work publicly."¹ Because Braun owned the masters he can use copyright protections and not give Swift the ability to perform the songs.

LEGALITY OF RECORDINGS

After he refused to sell her masters back to her and refused to let her perform the songs at an awards show, Swift moved to the rerecording option. The contract Swift had signed for the first six albums stated that she could rerecord the albums starting in 2020. Because this rerecord clause of her contract expired in 2020 she can rerecord the songs, without penalty from her label. Furthermore, she has both master and publishing ownership of these rerecorded albums. While this does not mean she has master's control over the original six-album, she does have master and publishing control over her rerecorded ones. This means that she can perform songs from her first six albums as long as she has released rerecordings of them. This solves the issue of her being able to perform songs from her first six albums without Copywrite lawsuits being filed against her.

The way that Swift can rerecord her album with the same lyrics and melodies and not violate Copywrite law is because she owns the substance Copywrite, and Braun owns the transferability Copywrite. In other words, because Swift wrote the songs herself she can reproduce them without Copywrite infringement. However, she has to make a new Master of It before she can perform or distribute it.

FINANCIAL IMPACT OF RECORDINGS

Another aspect of this rerecording is the financial impact it will have on her original masters. When Taylor Swift announced that she was going to rerecord her albums,

1 Title 17,U.S.C.§14 2020.

Braun sold his ownership of the original masters to Shamrock Capital for \$300 million. The reason for this is because Braun knew that the original recording masters were going to depreciate once rerecords came out. Once there were masters' rerecords the financial values were lower.

This could be positive news for Swift. If the masters of her original songs depreciate so low because of the success of her rerecords, Shamrock Capital would be more willing to sell her the ownership of the original masters. This would mean that Swift would have masters and publishing ownership of all of her albums.

CONCLUSION

Fans of Taylor Swift are deeply excited about the possibility of six album releases from Swift. While this is great for the fans, it also gives some financial and creative license back to Swift. After weaving through legal battles Swift can make a complex legal loophole to gain back her creative spirit.

JURIS MENTEM - ENTERTAINMENT LAW

When Policy Fumbles: Professional Athletes and Violence Off the Field

KARSON TAYLOR

INTRODUCTION AND BACKGROUND

In a 2014 hearing on the issue of professional sports and violence against women, Senator Claire McCaskill said, “With great power and influence comes great responsibility.”¹ In recent years, instances of domestic violence among professional athletes in Major League Baseball (“MLB”), the National Football League (the “NFL”), and the National Basketball Association (the “NBA”) continue to rise at an exponentially concerning rate. Most notably in the 1990s, the murders of Nicole Brown Simpson and Ron Goldman shed a spotlight on former running back O.J. Simpson—as well as the myriad 911 domestic violence calls and anecdotes from Nicole Brown Simpson’s friends and acquaintances about repeated incidents of domestic violence. Due to the prominence of professional athletes and teams, one would assume these groups possess immense responsibility to take accountability for their conduct both on and off the field. Unfortunately, this has not been the case. In a Westlaw search of newspapers across the United States from January 1, 2010 through March 31, 2015, “there were 64 reported incidents of domestic violence or sexual assault allegedly committed by athletes in MLB, the NFL and the NBA. [However,] the results show that only one of the 64 reported allegations resulted in conviction for the alleged crime (though four players pleaded guilty to lesser charges and five pleaded no contest), only seven players were punished by their league, and only two players were punished by their team.”² Statistically, the likelihood of a professional athlete facing consequences—by the criminal justice system, leagues, and teams—is incredibly low. Even more so when recognizing that many victims of domestic violence and sexual assault do not report to the police, let alone the alleged abuser’s league or team. Throughout the past three decades, court decisions, policies, and procedures surrounding professional athletes and domestic violence have ebbed and flowed but ultimately represent an area in which further litigation and precedent will continue to arise.

1 Steve Kraske, *TheChat: Claire McCaskill Goes after Domestic Abuse in Pro Sports*, *Kansas City Star*, Dec. 3, 2014, archived at <http://perma.cc/DV9Y-AY7M>.

2 Bethany P. Withers, *Without Consequence: When Professional Athletes Are Violent Off the Field*, *Harvard Law School Journal of Sports & Entertainment Law* (July 12, 2015) <https://harvardjssel.com/wp-content/uploads/sites/9/2015/07/Bethany-Withers-Without-Consequence.pdf>.

HISTORICAL BACKGROUND

Looking at the NFL's leadership specifically, the Executive Committee, which includes "one representative — an owner or top officer — from each of the league's 32 clubs" and the commissioner Roger Goodell.^{3 4} The "commissioner's office works with more than two dozen committees that comprehensively research and examine possible rule or policy changes before making recommendations."⁵ An obvious focus area and concern for the committee is game rules and issues that arise during play, but the NFL's leadership also holds responsibility for creating policies that affect players off the field, such as injury-prevention. Additionally, there are numerous policies and agreements emerging from the NFL every year. In 2020, the NFL entered an agreement on March 15, 2020 with the National Football League Management Council, which is "recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League ("NFL" or "League") and the National Football League Players Association ("NFLPA")."⁶ The NFLPA includes all professional football players employed by the NFL currently or in the past, rookie players as soon as they are selected for the current year's NFL College Draft, and undrafted rookie players who start negotiation with an NFL Club regarding employment as a professional football player.⁷

In the March 2020 agreement, Article 46 explains "conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner."⁸ In other words, it is within the NFL's power to take action when players act in a way detrimental to the integrity of the game of professional football, which certainly can include domestic violence allegations. Although the O.J. Simpson case from the 1990s occurred prior to Article 46, it is important to note that "the NFL Commissioner has had the authority to punish players for 'conduct detrimental to the integrity of, or public confidence in, the game of football' since 1960."⁹ And again, despite the O.J. Simpson case's ability to usher in a greater spotlight and attention to professional athletes' conduct off the field, leagues continuously push players' conduct off the field under the rug even in recent years.

3 NFL Operations, Integrity of the Game, <https://operations.nfl.com/inside-football-ops/nfl-operations/integrity-of-the-game/>.

4 Goodell, R 2021, Twitter, viewed 2 December 2021, <https://twitter.com/nflcommish>.

5 *Id.*

6 NFLPA, Collective Bargaining Agreement, (March 15, 2020) <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>.

7 *Id.*

8 *Id.*

9 Jeremy Cole, Dropping the Ball: How the Commissioner's Exercise of His "Best Interests" Authority is Failing the NFL and What Can Be Done About It, Texas Review of Entertainment & Sports Law (Fall 2015) https://www.flastergreenberg.com/media/article/489_Jeremy%20Cole%20Texas%20Rev%20Article_Final.pdf.

For instance, prominent attorney Gloria Allred delivered a letter to Roger Goodell in 2014 regarding “a young woman who made a police report last Saturday, September 20, 2014, alleging that an NFL player on an NFL team had raped her that morning.”¹⁰ The accused player then played the following day, despite a representative of the accused player’s NFL team accompanying him to the police station on September 20, 2014. As the situation occurred, Allred explained, “the NFL appeared to do nothing and never informed me that they would take any action or impose any discipline at all against [Dallas Cowboys defensive back] Mr. Spillman.”¹¹ While the criminal justice system took action and prosecuted Spillman, the NFL pointed to the fact that Spillman had not been charged, and he finished the season.¹² Later in 2016, Spillman was sentenced to five years in prison for the same sexual assault charge Allred wrote about in her letter.¹³ Though the NFL and NFLPA continue to release new policies and reforms, the common thread of failing to take action—even and especially when the criminal justice system is involved—is embedded in the tradition of professional sports.

CONCLUSION

Violence and harassment towards women is not going away any time soon. This fall, news broke that “lawyers representing the Washington Football Team offered a financial settlement this year in exchange for the silence of female former team employees who allege they endured sexual harassment while working there.”¹⁴ Even beyond domestic violence off the field, professional leagues and teams face a myriad of conflicts and decisions in terms of how to deal with harassment and abuse complaints. To no surprise, these groups often try to quietly settle these issues, and the former employees accused Roger Goodell of “deliberately burying the findings of the investigation.”¹⁵ Despite increased media attention, policy reforms, and years of complaints and reports, the issue of professional sports and violence against women off the field remains a pervasive obstacle.

10 Allred, Gloria, Statement Regarding NFL Commissioner Roger Goodell, (September 26, 2014)

<https://www.gloriaallred.com/wp-content/uploads/sites/1200518/2021/01/Roger-Goodell-Ms-Allred-statement-regarding-personal-delivery-of-letter-to-Commissioner-Roger-Goodell-09-26-14.pdf>.

11 Florio, Mike, Gloria Allred slams NFL for letting C.J. Spillman play in 2014 (Jul. 1, 2015, 3:45 PM), <https://profootballtalk.nbcsports.com/2015/07/01/gloria-allred-slams-nfl-for-letting-c-j-spillman-play-in-2014/>.

12 *Id.*

13 ESPN, Ex-Cowboy C.J. Spillman gets 5-year prison term for sex assault (Jul. 1, 2015), https://www.espn.com/nfl/story/_/id/16684624/former-dallas-cowboys-cj-spillman-gets-5-year-prison-term-sex-assault.

14 Hobson, Will, WFT offered money in exchange for public silence about workplace, former employees say <https://www.washingtonpost.com/sports/2021/10/13/wft-ndas-women-employees-workplace/> (October 13, 2021, 5:02 PM).

15 *Id.*

JURIS MENTEM - ENVIRONMENTAL LAW

Hawaii's SB2571: How We Can Advance Sunscreen Technology While Protecting Coral Reefs

JULIANNA BOYSON

BACKGROUND

In May of 2018, citing environmental concerns, Hawaii's state legislature passed bill SB2571 which banned two chemicals common in sunscreens. The chemicals -- oxybenzone and octinoxate -- were said to "have significant harmful impacts on Hawaii's marine environment and residing ecosystems, including coral reefs that protect Hawaii's shoreline."¹ According to the bill, scientific studies revealed that the chemicals were said to "increase [the] probability of endocrine disruption" and "induce feminization in adult male fish and increase reproductive diseases in marine invertebrate species (e.g., sea urchins), vertebrate species (e.g., fish such as wrasses, eels, and parrotfish), and mammals (in species similar to Hawaiian monk seal)."² SB2571 then goes on to state that both these chemicals can create deformations in various sea creatures and can change neurological behavior in fish, potentially affecting the future of these populations.³ The bill's introduction concludes by stating that these chemicals were found at elevated levels around the state's waters, including locations with coral reefs.⁴

The bill bans any sale of sunscreen that contains these two chemicals, except in the use of a prescription, and goes on to define the chemicals and sunscreens that would be affected by the passing of it.⁵ SB2571 passed unanimously in the Hawaii state-senate and passed with only four votes against it in the House, being signed into law by Governor David Ige on July 7th of 2018.⁶ The bill recently went into effect in January of 2021.⁷ Since Hawaii's ban in 2018, other jurisdictions such as the U.S Virgin Islands,

1 SB2571; Section 1; 2018.

2 *Id.*

3 *Id.*

4 *Id.*

5 SB2571; Section 2; 2018.

6 SB2571 SD2 HD2 CD1, Hawaii State Legislature, https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=2571&year=2018.

7 Lindsey Bever, Hawaii Just Banned your Favorite Sunscreen to Protect Its Coral Reefs, Washington Post (7/6/18), <https://www.washingtonpost.com/news/energy-environment/wp/2018/07/02/hawaii-is-about-to-ban-your-favorite-sunscreen-to-protect-its-coral-reefs/>.

the Florida Keys and the Micronesian island of Palau have voted to enact similar bans.⁸ Brands have also started making steps towards removing these chemicals to become more environmentally friendly; CVS's brand sunscreen completely removed oxybenzone and octinoxate from their formula and brands like Coppertone, Banana Boat and Neutrogena created what they call "reef safe" options without these chemicals, in addition to their regular brand sunscreens.⁹

POTENTIAL PROBLEMS

Hawaii's ban on these two chemicals was celebrated by environmental activist groups both in the state and out and have inspired other state's such as California to consider similar bans. Despite these celebrations, there have been some setbacks and calls for further action. The law laid out no guidelines to enforce the ban of these chemicals; state Senator Gabbard who introduced it said that state agencies expressly said that they had no interest in enforcing these bans. Additionally, SB2571 did not lay out any funding to create a new sub-agency targeted at specifically enforcing these bans.¹⁰

In addition to this potential problem, further research has shown that the ban of these chemicals may not be enough, with research coming out that chemicals like avobenzone, octocrylene, homosalate and octisalate show signs of having similar effects on coral reefs.¹¹ Sunscreens that use these chemicals, typically referred to as "chemical sunscreens," could be substituted with ones that use ingredients such as Zinc oxide and Titanium oxide. Both Zinc and Titanium oxide are commonly used in what are colloquially referred to as "mineral sunscreens" and they are the only ingredients approved by the FDA that are said to be both safe and effective against UV rays.¹² Despite these benefits, these types of sunscreens are not used as widely because they create what is commonly referred to as a "white-cast", or a white tint to the skin. For vanity reasons, many choose not to use these types of sunscreens, and many people with darker skin-tones opt to use chemical sunscreens that do not create this effect.

Another problem with this law would be that even if it was enforced in Hawaii, it is unclear how much of an effect it would have. A record 10 million tourists visited Hawaii in 2019: a number that has since gone down because of COVID-19, but is likely to go on the rise again.¹³ With all of these incoming tourists, it is likely that they will

8 Shannon McMahon, *These Seven Destinations are Banning Certain Sunscreens*; Condé Nast Traveler (5/11/21), <https://www.cntraveler.com/story/these-destinations-are-banning-certain-sun-screens>.

9 Lindsey Bever, *Hawaii Just Banned your Favorite Sunscreen to Protect Its Coral Reefs*, Washington Post (7/6/18), <https://www.washingtonpost.com/news/energy-environment/wp/2018/07/02/hawaii-is-about-to-ban-your-favorite-sunscreen-to-protect-its-coral-reefs/>.

10 *Id.*

11 Claire Caulfield, *Hawaii Has A Ban on Sunscreen Chemicals But No One's Sure Who Should Enforce It*, Honolulu Civil Beat (8/3/21), <https://www.civilbeat.org/2021/08/hawaii-has-a-ban-on-sunscreen-chemicals-but-no-ones-sure-who-should-enforce-it/>.

12 *Id.*

13 *Hawai'i Visitor Statistics Released for 2019*, Hawai'i Tourism Authority (1/29/20), <https://www.hawaiitourismauthority.org/news/news-releases/2020/hawai-i-visitor-statistics-re>

bring their own sun protection, including ones containing chemicals that are potentially harmful towards coral reef life. This potential issue has caused some community leaders, environmental groups and elected officials to call for a federal-wide ban on these chemicals.¹⁴

Lastly, it is unclear whether the study most of these laws cite is entirely accurate. The study commonly cited showed that the equivalent of three drops of oxybenzone in 660,000 gallons of water - the equivalent of an Olympic sized swimming pool - could have an adverse effect on coral larvae. While this statistic seems monumental, it is of note that the ocean contains 352 quintillion gallons of water, or the equivalent of 5.3 hundred trillion Olympic sized swimming pools.¹⁵ Hawaii's law banning oxybenzone and octinoxate claim there was a high concentration of these chemicals found on the shore of the ocean, but it is unclear how diluted these chemicals are before getting to and potentially damaging coral reefs.¹⁶

POSSIBLE SOLUTIONS

First and foremost the FDA - which regulates sunscreen as an over the counter drug rather than a cosmetic product- should take further action.¹⁷ Either the designation of sunscreen as an over the counter drug should be changed, or the federal government should invest more money in studying chemicals and sunscreen filters available in different parts of the world such as Korea and Europe. There is an entire new market of suncare that could be accessed in the United States if the FDA's sunscreen categorization was changed, or if more research would be done on these new filters. Additionally, many of these new filters are claimed to be both coral safe and don't create a "white-cast" on the skin meaning they would be both good for the environment and more appealing for customers.

Additionally, more research should be done into the effects of oxybenzone and octinoxate on the damage of coral reefs. The lack of research into this phenomenon has led to skepticism among critics, and countries like Australia, known for its Great Barrier Reef, hesitate in implementing these bans.¹⁸ Lastly, if research concludes that certain chemicals common in sunscreens need to be banned, then there should be federal action taken to ensure that these bans are across the nation, and the United States should

leased-for-2019/.

14 *Push for Nationwide Ban Follows Hawai'i Law Outlawing Toxic Sunscreens*, Center for Biological Diversity (9/9/21), https://www.biologicaldiversity.org/news/press_releases/2018/corals-05-23-2018.php.

15 *How Much Water is in the Ocean? And 20 More Must-Know Sea Stats*, Ocean Exploration Trust, <https://nautiluslive.org/blog/2020/12/04/how-much-water-ocean>.

16 SB2571; Section 1; 2018.

17 Marc S Reisch.; *After More than A Decade, FDA Still Won't Allow New Sunscreens*, Chemical and Engineering News (5/18/15), <https://cen.acs.org/articles/93/i20/Decade-FDA-Still-Wont-Allow.html>.

18 Katherine Gregory, *Hawaii Bans Sunscreens with Chemicals that Damage Coral Reefs*, but Australia Reluctant to Follow, ABC News (5/4/18), <https://www.abc.net.au/news/2018-05-04/hawaii-bans-sunscreen-coral-bleaching/9728322>.

make it an effort in their global activism on climate change to address the harmful effects that these sunscreens have on coral reefs.

The United States has the ability to be a leader on sunscreen technology which could be addressed if changes in the FDA are made, and if more money would be allocated to these important studies. Any dermatologist will tell you that it is vital to apply sunscreen every day to prevent skin cancer, and with both climate change and skin-cancer rates rapidly accelerating in the past 30 years, now seems like the time for the United States to step up and take action on both issues.¹⁹

¹⁹ *Skin Cancer*, American Academy of Dermatology Association, <https://www.aad.org/media/stats-skin-cancer>.

JURIS MENTEM - ENVIRONMENTAL LAW

Guam v. U.S: An Analysis of the Ordot Landfill Disaster

ABBY BENDER

BACKGROUND

Spanish control of the Mariana Islands terminated at the conclusion of the Spanish-American War in 1898 when Guam was ceded as a territory to the United States. Subsequent Supreme Court cases, known collectively as the Insular Cases, sought to determine the status of newly acquired territory and respond to the question of citizenship.¹ Ultimately, territories such as Guam were designated as “unincorporated territories” of the U.S. which implied that only certain parts of the U.S. Constitution applied to its citizens. From the start of the 20th century, the U.S. maintained military rule over Guam for almost half a decade until the passage of the Guam Organic Act in 1950 which enabled the Guam civilian government to exercise self-governance. Nevertheless, the legacy of U.S. militarization and imperialism left an indelible imprint on the territory’s ecological health, namely through the creation of the Ordot Dump: a landfill operated by the U.S. Navy for industrial, municipal and military waste.

During the 1940s, the Navy constructed and operated the landfill and continued to use it for several decades during the Korean and Vietnam Wars to dispose of waste. Over the course of many years, contaminants flowed into the nearby Lonfit River which empties into the Pacific Ocean. Data reveals that the dump contained seventeen toxic chemicals including DDT and Agent Orange.² Additionally, studies of the leachate water revealed a number of hazardous contaminants expected to be contaminants of potential concern (COPCS) including heavy metals, cyanide, PCBs, and pesticides among others.³ Due to the lack of “environmental safeguards” and regulations, the EPA added the dump to the National Priorities List in 1983.

SUBSEQUENT LITIGATION

1 Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, Yale Law & Policy Review (2013), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17212/04_32YaleL_PolyRev57_2013_2014_.pdf?sequence=2&isAllowed=y.

2 *Environmental Data Summary Report: Ordot Dump, Ordot-Chalan Pago, Guam* (Mar. 2015), <http://guamsolidwastereceiver.org/pdf/RFP%20SWD001-11%20-%201b%20-%20Environmental%20Data%20Summary%20Report.pdf>.

3 *Id.*

In 2002, the EPA sued Guam over pollution of the dump claiming it violated the Clean Water Act (CWA) by “discharging pollutants . . . into waters of the United States without obtaining a permit.”⁴ The parties ultimately entered into a consent decree in 2004 which required Guam to pay a civil penalty, close the site, and create a cover system for the landfill; the site was eventually closed in 2011 and the total cost for remediating the affected area was estimated at \$160 million.

In 2017, Guam sued the U.S. under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), claiming the United States’ use of the dump exposed it to liability on two provisions. The first was a cost-recovery action under §107(a), which allows a territory to recover “all costs of [a] removal or remedial action” from “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” The second was a mutually exclusive §113(f) “contribution” action. Under that provision, a “person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement.”⁵ The D.C. Circuit reasoned that if Guam could assert a contribution claim, it could not assert a cost-recovery claim. The district court concluded that Guam did at one point possess a contribution claim, but because Section 113 has a 3-year statute of limitations, the claim expired in 2007 three years after the 2004 consent decree. Therefore, Guam was granted no remedy at all under sections 113 and 107.

SCOTUS RULING

The Supreme Court reversed and remanded the lower court’s ruling. In its oral arguments, Guam retreated and argued that it never had a viable contribution claim under §113(f) and was therefore able to pursue a cost-recovery claim under §107(a). Guam argued that their CWA agreement with the EPA did not trigger §113(f) which only resolves liability under CERCLA claims. Guam also contended that the consent decree “did not adequately ‘resolve’ any sort of liability because Guam did not formally admit responsibility and because the agreement left Guam STATES open to future enforcement action.”⁶ In a unanimous decision, the court ruled that the agreement between the EPA and Guam did not trigger the statute of limitations under §113(f) because a party may only seek contribution under CERCLA claims only after resolving a CERCLA-specific liability; settlement of environmental liabilities under other laws (including the CWA) do not apply. Guam was therefore able to pursue its lawsuit and sue the Navy under CERCLA section 113 over the costs of cleaning the Ordot Dump. In his opinion, Justice Clarence Thomas argued that the statutory language of the provision supports the conclusion that section 113 only refers to CERCLA-specific liability.

BIGGER PICTURE: A LEGACY OF U.S. IMPERIALISM

4 *Territory of Guam v. United States*, 593 U.S. 2 (2021).

5 *Id.*

6 *Id.*

In analyzing the passage of the Insular Cases as well as the U.S.'s continued treatment and disregard for the ecological health of the land, the Ordot Landfill case serves as a prime example of the indelible effects of the United States' problematic desires for colonial expansion as well as provides an argument for the repatriation of native land to indigenous settlers. In his analysis of the Chamorran creation story and Guam land struggles, Craig Santos Perez argues that U.S. militarization and imperialism essentially destroyed land that originally belonged to the indigenous Chamorro population who inhabited the land prior to Spanish colonization in the late 17th century. After the Spanish-Chamorro Wars (1668-95), Spanish authorities sought to convert, conquer, and depopulate the indigenous population through policies such as *reduccion* which destroyed 180 Chamorro settlements and relocated the surviving population.⁷ The legacy of missionization, militarization and eventual ecological imperialism as exemplified by the treatment of the Ordot Landfill speak to the ways in which "American imperialism has militarized, desecrated, and contaminated the land, asserting that it is simply territory for American military basing, betraying the belief that land is sacred and should be treated with reverence and respect," as Perez asserts in his piece.⁸

IMPACT AND CONCLUSION

The *Guam v U.S.* case not only challenges the effects of U.S. colonization but also potentially revives CERCLA claims that may have been deemed untimely. The implications of the decision also extend to a number of parties who may be seeking reimbursement for cleanup costs.⁹ For example, Michael Kettler argues that the decision made in *Guam v U.S.* could affect a number of cases argued in New Jersey such as *Cranbury Brick Yard, LLC v. United States* in which the plaintiff "lost a \$56 million claim for contamination allegedly caused by the military because the claim was held to be a CERCLA contribution claim and, thus, untimely."¹⁰ While the ramifications of the SCOTUS ruling are undeniably specific, the case nevertheless may enable plaintiffs caught within environmental-based lawsuits to move their lawsuits forward if they were deemed to be time-barred. The case also seeks to unpack and define the complex statutory language of Section 113 which Justice Samuel Alito once described as "a puzzle with pieces that are exceedingly difficult, if not impossible, to fit together" in his opinion of the *Atlantic Richfield* case.¹¹

7 Craig Santos Perez, "The Chamorro Creation Story, Guam Land Struggles, and Contemporary Poetry" (Apr. 2020).

8 *Id.*

9 Michael S. Kettler, *Cost Recovery or Contribution? Impacts of Guam on the Timeliness of CERCLA Claims in the Third Circuit and New Jersey* (July 30, 2021), <https://www.mondaq.com/unitedstates/environmental-law/1097058/guam-v-us-and-cercla-claims-in-new-jersey>.

10 *Id.*

11 Robert Percival, "Is it too late for Guam to sue the Navy to pay for the cleanup of its dumpsite?" (Apr. 23, 2023: 11:43AM), <https://www.scotusblog.com/2021/04/is-it-too-late-for-guam-to-sue-the-navy-to-pay-for-the-cleanup-of-its-dumpsite/>.

JURIS MENTEM - INTERNATIONAL LAW

International Legal Issues of Self-Determination and Secession

KALINA MESROBIAN

HISTORICAL CONTEXT AND DEFINITIONS

International law deems that any group of people have the right to govern themselves and establish a framework for national self-determination. Whether it be because of oppression or mere irreconcilable ethnocultural differences, there have been historical instances where particular ethnic groups want independence from the mother state in which they exist. International law, most of which is established by the United Nations and other international institutions, does address self-determination, very vaguely deeming that it is a right.¹ However, the reality of pursuing this right is one in which the legal field largely fails to outline because of haphazard specificity. For this reason, any group that has attempted to separate from their mother country is characterized by an endless struggle for independence. One of the key ambiguities lies in that self-determination is a right while secession—which is fundamental to self-determination and subsequent independence—is not explicitly addressed or instructed under international laws. Under the *sui generis* legal principle it relies on other states' recognition; formal recognition is rare to unique circumstantial situations.² The theory of remedial secession has theoretical foundations that are “rather weak” and concludes that secession is not an entitlement.³ The moral basis has reached a global consensus; but its legal backing makes it an issue of situational uniqueness. There are many questions and aspects left unanswered, including the obligation of states to respect and acknowledge new territorial boundaries even though, as a concept, secession was not officially recognized under the United Nations Declaration of Human Rights.⁴ Through the cases of Kosovo and Nagorno-Karabakh, the inconsistencies of international law throughout time and the need for dire improvement become evident if this is truly a right all people hold and deserve to exercise.

1 Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 553 (2010).

2 Jure Vidmar, Remedial secession in international law: Theory and (lack ...), <https://www.jstor.org/stable/pdf/26227069.pdf> (last visited Dec 5, 2021).

3 *Id.*

4 350. *Is Kosovo a precedent? secession, self-determination and conflict resolution*, Wilson Center, <https://www.wilsoncenter.org/publication/350-kosovo-precedent-secession-self-determination-and-conflict-resolution> (last visited Dec 5, 2021).

The right of any group to self-determination is not in question. However the legality over who can invoke it and in what situation is what remains contested. This being the legality regarding if secession from a mother country is actually ‘legal’. Do secession and territorial integrity go hand in hand with self-determination? The discussion of its origin is necessary to understand where self-determination can be upheld. What does it mean in different contexts according to different groups of people? Article I of the International Covenant on Civil and Political Rights “equates their [a people’s] right of self-determination with the existence within the state of a continuing system of democratic government based on public participation.” But there is a need for specific instruction on how democratic institutions can ensure self-determination for all individuals and groups within larger democracies. First, there is the concept of internal self-determination, which is when a minority group is allowed to practice their language and actively participate in their respective cultural and political sphere within a larger nation. The diplomats and legislators within the United Nations, however, deem external self-determination as something else. To them, self-determination does not equal secession.⁵ As a legal doctrine, secession is qualified as “neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.”⁶ Further, remedial secession, even under the most oppressive regimes, is the absolute last resort to ending oppression of a group. Because of sui generis, secession is a very special circumstance dependent phenomena--and can only happen through the rare global recognition and acknowledgement of secession and state creation.⁷ This does not bar them from existing, but restricts them from ever being a legally established state with territorial integrity in the eyes of the international community. As the UN is meant to uphold the territorial integrity of all states, secession is in clear opposition to this element. It means a group would be violating these terms if they desired secession, but this means it is more a violation of principles and not inherently against international law.⁸

In its initial context, self-determination was constructed for colonized groups to establish independence from their colonizers “without external interference.” However, in the contemporary world it is less a matter of the colonized and the colonizer but marginalized groups targeted by the oppressive regimes they live under on the basis of their identity. This contrast reflects the legal failure to adapt to the modern circumstances of secession and self-determination, leaving much room for debate. While self-determination is proclaimed as a right by the UN, the focus of inalienable human rights has been shifted primarily to individuals rather than groups. Furthermore, at present the global community is rather abrasive toward the efforts of groups to truly separate themselves from oppressive mother states. There has been a failure on the part

5 Tamara Jaber, *A case for Kosovo? self-determination and secession in the 21st Century*, 15 *The International Journal of Human Rights* 926–947 (2011).

6 Nerses Kopalyan, *Resolving the problem of Nagorno-Karabagh’s sovereignty EVN Report*, <https://www.evnreport.com/politics/resolving-the-problem-of-nagorno-karabagh-s-sovereignty> (last visited Dec 5, 2021).

7 Jure Vidmar, *Explaining the legal effects of recognition*, 61 *International and Comparative Law Quarterly* 361–387 (2012).

8 Allen Buchanan, *Self-determination and the Right to Secede - JSTOR*, <https://www.jstor.org/stable/24357361> (last visited Dec 5, 2021).

of international laws and liberalism to specify the legal right of secession.⁹ Although this concept was a “catalyst of decolonization”, it is not an option that minorities can rely on unless they are “extreme cases” where there are no other effective measures to combat human rights violations.

KOSOVO

Analyzing the secession of Kosovo is a helpful example in determining the different factors at play in self-determination and secession. Firstly, what constitutes a group as a “people”? The Kosovars were all of shared ethnicity and lived in Kosovo for centuries with their own infrastructures. The circumstances they were subject to also remains contested by their mother state; there was a continuous atmosphere of human rights abuses being committed by Serbia. It can be argued that this was met by violent resistance from the Kosovar Albanians as well; nonetheless, according to the existing laws, ongoing gross violations of human rights should be grounds for secession.¹⁰ The issue this group faced—a struggle of all ethnic minorities—is whether it is the only solution to the problem. If it is their right to pursue self-determination, and UN interventions did not halt the ongoing historic abuses, this should legally be enough grounds for secession. However, because of the legal ambiguity of secession and self-determination, the Kosovars had to overcome numerous obstacles in order to finally gain independence in 2008 after nearly two decades of struggle. If secession has only been accepted when separating from colonizers, their secession is not only legally ambiguous but would not be technically recognized.¹¹ Kosovo, compared to many states, has garnered more state recognition and therefore is a more successful example of a secessionist state. Yet still, on some maps Kosovo remains a part of Serbia; in this regard it becomes a geopolitical matter. Even though they hold territory and have existed this way for decades, Kosovo exists as a “political pariah.”¹²

NAGORNO-KARABAKH

A grey area remains because of a lack of clear definition even with cases like Kosovo. Due to their minimal success, is Kosovo now a precedent for other groups fighting to secede? Rhetoric around legal steps for secession has developed since, but seldom has it produced tangible results. A more recent case involves the ethnic Armenian population of Nagorno-Karabakh. Thanks to the unclear legal principle of self-determination, this population has endured multiple periods of war and violence as recently as 2020 in their struggle for statehood since their initial secession movement from Azerbaijan began in the late 1980s and early 1990s. Historically, it is home to an ethnic Armenian majority but the regional status of which country it lies in has been contested between Armenia and Azerbaijan because of Stalin and post-Soviet construction of former republics. Both countries have used historical and political evidence from the end of the Soviet era to claim Nagorno-Karabakh as its own, however the fact remains that this is

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

an autonomous territory that has been trying to gain proper self-determination for over three decades. While it was placed under Azerbaijan, its people have always voted for autonomy and independence from the state. Being a Christian minority but technically having been placed under a Muslim majority country resulted in human rights issues and many instances of violence towards its citizens.¹³ Their independence and de facto separation from Azerbaijan is evident, but the legality of Nagorno-Karabakh's secession remains largely ignored—explaining the ongoing conflict between its habitants and neighboring warring states.

So, in this case, in the eyes of the international community are the human rights abuses and discriminatory acts against ethnic Armenians not “extreme” enough as they were in Kosovo? Again, while their self-determination is acknowledged, its people remain in an impossible situation as the legal recognition of secession by the mother country would be a necessary stipulation; Azerbaijan will never give this formal recognition.¹⁴ While the international community could recognize their struggle and right to be autonomous, they are in a position which makes true independence unattainable. But under the doctrine and right of unilateral secession, it can only be legally recognized when “all other tools of conflict resolution have been exhausted.”¹⁵ Its nature is extremely conditional and requires criteria to be met—but these criteria are so broad that if the international community does not concur, human rights abuses and ethnic cleansing may not guarantee recognized secession and territorial integrity.¹⁶ On the other hand, Armenia has also desired territorial claims over Karabakh under the guise of self-determination. This was originally instated to be a claim over one region of the territory that possessed a majority Armenian population so how it got to this everlasting clash is legally murky waters. Part of what makes this more legally perplexing is that Nagorno-Karabakh technically seceded from Azerbaijan in the early 1990s—under “*lex lata* (established law)” they are demanding true self-determination and to be recognized as autonomous instead of being a disputed territory in this conflict between two warring nations. However, the most important factor is that there has not been lasting peace in the region ever since the territories were divided after the collapse of the Soviet Union. The security of its people have been at stake, and this should be considered by the international community to aid them in their fight to gain true autonomy and have their secession be recognized to gain independence.

A stronger distinction within international legal criteria for when secession can and should be recognized would greatly appease ongoing struggles of so many groups around the world under oppressive regimes. The unclear legal processes makes the right to self-determination technically attainable but true and independent autonomy

13 *Territorial integrity v. self-determination over the Nagorno-Karabakh region*, politicon.co, <https://politicon.co/en/essays/80/territorial-integrity-v-self-determination-over-the-nagorno-karabakh-region> (last visited Dec 5, 2021).

14 *Id.*

15 Nerses Kopalyan, Resolving the problem of Nagorno-Karabagh's sovereignty EVN Report, <https://www.evnreport.com/politics/resolving-the-problem-of-nagorno-karabagh-s-sovereignty> (last visited Dec 5, 2021).

16 *Id.*

for groups very difficult if secession is a situationally based case with no concrete terms as to who can pursue it and how. If international laws were to be solidified in this realm, marginalized groups would have a more fair chance to legitimately govern themselves freely without having to rely on the recognition of the whole international community.

JURIS MENTEM - INTERNATIONAL LAW

War Crimes in Libya: What Is the UN Doing About It?

EMMA MILOGLAV

INTRODUCTION

An independent fact-finding mission by the United Nations Human Rights Council has begun its investigation in Libya. So far, the investigation has found war crimes and crimes against humanity including murder, torture, enslavement, extrajudicial killings, and rape, particularly against migrants and detainees since 2016, connected to the Civil War.

This article aims to break down and understand the United Nations' definitions of war crimes and crimes against humanity; it will particularly look at how the actions in Libya by third states, foreign fighters, and mercenaries qualify as violations of international law and what that means for these parties as well as the victims. Furthermore, this analysis will examine the subsequent steps post-investigation, if The United Nations will pursue further legal action and how the parties will be held accountable.

BACKGROUND

In order to understand the violence that has taken place in Libya, it is important to understand the context of that violence: the Libyan Civil War. In 2011, the leader, Muammar al-Qaddafi, died, leading to the institution of a transitional government led by the General National Congress (GNC). In 2012, Islamic militant group, Libya Dawn, began committing acts of violence and were faced with opposition from the newly formed Operation Dignity, causing the emergence of a civil war. Since 2014, Libya has been split with Libya Dawn, supported by Turkey in the west, and Operation Dignity, backed by Russian mercenaries in the east.¹ The fighting has persisted for years leading to government fragmentation, numerous terrorist attacks, 217,000 internally displaced peoples, and approximately 1.3 million people in need of humanitarian assistance in Libya.²

1 Guardian News and Media. (2021, October 4). *War crimes and crimes against humanity committed in Libya since 2016, says the UN*. The Guardian. Retrieved November 3, 2021, from <https://www.theguardian.com/world/2021/oct/04/war-crimes-and-crimes-against-humanity-committed-in-libya-since-2016-says-un>.

2 Council on Foreign Relations. (n.d.). *Civil War in Libya | global conflict tracker*. Council on Foreign Relations. Retrieved November 3, 2021, from <https://www.cfr.org/global-conflict-tracker/con>

INVESTIGATION

Both sides have committed countless atrocious crimes through the war. For the purposes of this article, it will focus mainly on a few key actions that are particularly important to the United Nations' investigation of war crimes and crimes against humanity. The violence that the United Nations does not constitute as war crimes is abundant and devastating nonetheless.

In the east, a private Russian military company, the Wagner Group, committed murder when firing gunshots directly at innocent people who were posing no threat nor participating in any violence.³ In Libyan prisons, the prisoners of war who were arbitrarily detained and kept in secret prisons were tortured, raped, and severely neglected on a daily basis.⁴ The Libyan coast guard participated in the mistreatment and detention of migrants, refugees, war criminals, and civilians.

In the west, Islamic militant groups targeted hospitals and other health-related facilities which severely impacted access to health care in war torn areas desperate for medical assistance.⁵ Anti-personnel mines and airstrikes in residential areas have injured and killed countless civilians. The groups have recruited children to participate in the hostilities directly and have enforced extrajudicial killings of women. Targeting of the country's weakest groups, has been particularly brutal and terrorizing as they have virtually no connection to the root of the conflict.

UNITED NATIONS DEFINITIONS

The United Nations defines crimes against humanity using article 7 of the Rome Statute of the International Criminal Court.⁶ Any of the following acts may constitute a crime against humanity:

1. Murder;
2. Deportation or forcible transfer of population;
3. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
4. Torture;
5. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

flict/civil-war-libya.

3 Guardian News and Media. (2021, October 4). *War crimes and crimes against humanity committed in Libya since 2016, says the UN*. The Guardian. Retrieved November 3, 2021, from <https://www.theguardian.com/world/2021/oct/04/war-crimes-and-crimes-against-humanity-committed-in-libya-since-2016-says-un>.

4 Westfall, S. (2021, October 5). *War crimes and crimes against humanity committed in Libya, U.N. finds*. The Washington Post. Retrieved November 3, 2021, from <https://www.washingtonpost.com/world/2021/10/05/war-crimes-crimes-against-humanity-committed-libya-un-finds/>.

5 *Id.*

6 *Rome Statute International Criminal*. (n.d.). Retrieved November 3, 2021, from <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>.

6. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender;
7. Enforced disappearance of persons;
8. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In order for these acts to be found as a crime against humanity it must demonstrate three crucial elements:

1. A physical element as listed above
2. A contextual element- it must be “committed as part of a widespread or systematic attack directed against any civilian population”
3. A mental element- “knowledge of the attack”

War crimes are defined by The United Nations using article 8 of the Rome Statute of the International Criminal Court as “grave breaches of the Geneva Conventions of 12 August 1949” including:⁷

1. Willful killing;
2. Torture or inhuman treatment;
3. Wilfully causing great suffering, or serious injury to body or health;
4. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
5. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
6. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
7. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
8. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
9. Intentionally directing attacks against buildings dedicated to hospitals and places where the sick and wounded are collected, provided they are not military objectives;
10. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
11. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Similarly to crimes against humanity, war crimes contain two main elements:

1. A contextual element- “the conduct took place in the context of and was associated with an international/non-international armed conflict”
2. A mental element- “intent and knowledge both with regards to the individual act and the contextual element”

⁷ *Id.*

While both very similar, crimes against humanity and war crimes have minute details that differentiate the two. The biggest difference is that crimes against humanity must be targeted against civilian populations and war crimes must occur during armed conflict, both which apply to the actions in Libya.

The specific actions in Libya clearly do constitute crimes under these definitions. The hostile and violent acts by Islamic militant groups towards civilians, such as the anti-personnel mines left in residential areas and civilian airstrikes, constitute crimes against humanity. These actions count as crimes against humanity according to the UN because they meet all three elements. First, they meet the physical aspect through their murderous actions. Second, they meet the contextual element because it was committed as part of a widespread attack directed against the civilian population. Finally, Islamic militant groups did have knowledge of the attacks and their harm.

As for the war crimes, the violent acts such as torture, rape, and murder in the Libyan prisons or targeting the hospitals and medical centers that occurred after 2011 fit the two elements. First, they took place during a time of armed conflict, and second, both eastern and western groups had intent and knowledge of their acts.

WHY DOES THE UN MONITOR ARMED CONFLICT?

The United Nations was founded after World War II with the intent to “maintain international peace and security, develop friendly relations among nations and promote social progress, better living standards and human rights.”⁸ While the UN can not fully prevent nor put an end to war, they do ensure that certain human rights are not violated in the process or that certain egregious acts of violence are not committed.

Typically, the UN monitors civilians, women, and children in times of war to ensure the conflict does not go outside the bounds of what the UN deems appropriate behavior during armed conflict. Genocide, crimes against humanity, and war crimes are referred to as atrocity crimes because they are substantially more malicious and brutish than other war-time actions.⁹ The UN plays a key role in overseeing the protection of innocent groups in times of war and using the distinction of atrocity crimes helps to truly ensure justice for victims of these war crimes or crimes against humanity.

WHAT NOW?

Now that the crimes in Libya have been identified by the United Nations, how are these groups punished? While the UN’s responsibility is to investigate and identify these crimes, it is not their responsibility to prosecute them. According to the UN’s Charter, “nothing contained in the present Charter shall authorize the United Nations to inter-

8 United Nations. (n.d.). *History of the UN seventieth anniversary*. United Nations. Retrieved November 3, 2021, from <https://www.un.org/un70/en/content/history/index.html>.

9 United Nations. (n.d.). *United Nations Office on Genocide Prevention and the responsibility to protect*. United Nations. Retrieved November 3, 2021, from <https://www.un.org/en/genocideprevention/faq.shtml>.

vene in matters which are essentially within the domestic jurisdiction of any state.”¹⁰ In most cases, the UN leaves intervention up to the country in which the crimes were committed, simply notifying them and drawing attention to the issue.

However, in certain circumstances, the UN will cooperate with the International Criminal Court (ICC). The ICC is independent of the UN; however, the two organizations have an agreement that sets out the “legal framework for cooperation between the two institutions on matters of mutual interest” such as genocide, war crimes, and crimes against humanity.¹¹ In this case, Special Advisors may recommend that the UN Security Council refer cases to the ICC when atrocity crimes are suspected in order to render justice to victims of the crimes and hold violations accountable.

The ICC has been involved in the arrest of Saif al-Islam Gaddafi, son of Muammar Gaddafi, a Libyan revolutionary, and Al-Tuhamy Khaled, former head of the Internal Security Agency under Muammar Gaddafi, for war crimes and crimes against humanity.¹² Furthermore, in September 2020 “two families filed lawsuits in the United States against Khalifa Hiftar, accusing his forces of atrocities during the months-long siege of Ganfouda in Benghazi in 2017 in which their relatives were killed.”¹³ Small actions such as these are the result of the UN’s fact-finding mission, proving the importance of identifying atrocity crimes in conflicts.

The investigation in Libya is still in its early stages, and legal action will not be taken for the foreseeable future. It is also not clear if the UN will recommend this case to the ICC or leave intervention up to the government of Libya. Due to its divided and conflicting state it is unlikely that the Libyan government will be in any place to intervene; however, nothing at this point is certain.

10 *When should countries intervene in others’ affairs?* HistoryExtra. (2021, August 26). Retrieved November 3, 2021, from <https://www.historyextra.com/period/20th-century/when-should-countries-intervene-in-others-affairs/>.

11 United Nations. (n.d.). *United Nations Office on Genocide Prevention and the responsibility to protect*. United Nations. Retrieved November 3, 2021, from <https://www.un.org/en/genocideprevention/faq.shtml>.

12 *World Report 2021: Rights trends in Libya*. Human Rights Watch. (2021, January 13). Retrieved November 3, 2021, from <https://www.hrw.org/world-report/2021/country-chapters/libya#>.

13 *Id.*

JURIS MENTEM - LEGAL THEORY

Bastions of Natural Law? An Evaluation of Justices Clarence Thomas and Neil Gorsuch Early Days on the Supreme Court

PAUL RELYEA

NATURAL LAW

Natural law in legal theory and philosophy is a group of inalterable principles that some Judges and Justices believe ought to inform the law. It is a body of ideas to be consulted in part above the law, in part if the law is entirely silent, and in part if the standing precedent is thought to be egregiously wrong. Natural law can vary depending on the particular theorist or Judge, leading to differing outcomes. Some of the work of the Founders, such as the Declaration of Independence is heavily influenced by the natural law doctrine of the Enlightenment, which was firm in its position that “all men are created equal,” and “endowed” with certain “inalienable rights.”

BEFORE THE COURT

The historic nomination of Clarence Thomas to the Supreme Court reintroduced the concept of natural law to the Senate Judiciary Committee and potentially the Supreme Court. Then Senator Joe Biden infamously addressed Judge Thomas proclaiming “You and I know here at least what we’re talking about here. There’s a fervent and aggressive school of thought that wishes to see natural law further inform the Constitution than it does now, argued against by the positivists led by Judge Bork. Now again that may be lost on all the people. You know and I know what we’re talking about.” In the hearing, Senator Biden was using natural law as a topic of conversation to ask Judge Thomas about his jurisprudence, and to try to get an indication of where he may stand on controversial judicial issues such as abortion or reproductive rights, as he referred to them.

The conversation regarding natural law and the Supreme Court remains a lively one today. On the conservative side of the court Justice Thomas and Justice Gorsuch have gained attention for their alleged affinity for it. In the hearing, Thomas asserted his

deference to the Constitution as the “positive law,” and also reiterated that the “natural law beliefs of the Founders as a background to our Constitution” also ought to be considered. In *Created Equal*, Justice Thomas’ 2020 documentary, the Justice displays a particular affection for the language of the Declaration of Independence, which he believes to be the greatest statement of fundamental equality by the Founders. In reflecting on the life of Justice Scalia, Gorsuch appeared very deferential to the written statute, but his history as a student of Philosophy and John Finnis suggest a familiarity with the jurisprudence of natural law. Further in his doctoral thesis *The Future of Assisted Suicide and Euthanasia*, Gorsuch ties his views on the issue of the end of life to ideology and moral values. He references an “inviolability-of-human life” standard and a “moral imperative.” At his hearing discussing *Roe v. Wade*, Judge Gorsuch emphasized the importance of precedent, aligning more closely with the jurisprudential originalism he espoused in his remembrance of the late Justice Scalia.

JUSTICE THOMAS

Though it was alleged that Clarence Thomas would be a Scalia duplicate, his time on the Supreme Court has proven the opposite to be true.¹ In fact, his reverence for the founding, like an originalists’, is both authentic and intense, but varies in that he provides great consideration to “higher law” principles behind the Constitution and Declaration of Independence.² Although his commitment to natural law became murky during his confirmation hearings, and contrary to previous statements regarding his judicial philosophy, Thomas’ opinions are entirely consistent with the theory of natural law.³

In *McIntyre vs. Ohio Elections Committee*, the Supreme Court struck down an Ohio statute that banned the distribution of anonymous campaign literature.⁴ In his concurring opinion, Justice Thomas wrote that Justice Stevens’ opinion “superimpose[d] modern theories concerning expression upon the constitutional text.”⁵ In his own analysis, Thomas, fitting with natural law, analyzed the case in the context of what the Framers understood to be at the time of the drafting of the First Amendment.⁶ He relied not solely on what was the understood meaning of the text of the time, but also on the Framers’ conception of natural rights.

In *Rosenberger vs. Rector & Visitors of the University of Virginia*, the Supreme Court held that The University of Virginia had violated the first amendment by denying funding for a student-run Christian newspaper solely based on the fact that it contained religious content.⁷ Thomas agreed with Kennedy’s majority opinion in the case but wrote

1 Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 34 (1997).

2 *Id.* at 34.

3 *Id.* at 36.

4 *Id.* at 69.

5 *Id.* at 69.

6 *Id.* at 69.

7 *Id.* at 71.

a concurrence in direct response to Justice Souter’s dissent, which purported that the Establishment Clause required separation from religion. Justice Thomas demonstrated that the Framers had no intent to “disable religious entities from participating on neutral terms in evenhanded government programs.”⁸ Further, he referenced the government’s clear support of religion dating back to the Northwest Ordinance of 1787.⁹ The Ordinance did not remain silent or neutral on the issue, but rather positively affirmed its status as a protected right throughout the United States. On this issue, the text, and the framer’s natural law beliefs remain in conflict, but the issue of the Establishment Clause remains an important battleground for natural law.¹⁰

Justice Thomas’ joining of Chief Justice Rehnquist and Justice Scalia’s dissenting opinions in *Planned Parenthood vs. Casey* further elucidates his commitment not just to the text, but to the natural law that informs them.¹¹ In *Casey*, several Pennsylvania abortion restrictions were upheld, as the commonwealth altered significantly a woman’s access to abortion. When dissenting, Thomas agrees that the text does not anywhere protect the right of a woman to abort her unborn child.¹² In the absence of a positive source of law, Thomas has deferred to his own interpretation of the intentionally ambiguous founding documents. Though the dissents come short of fully applying the natural law doctrine by failing to condemn abortion outright as a threat to human life, Justice Thomas’ position in calling for the nullification of *Roe vs. Wade* remains more in alignment with natural law than the remainder of the Supreme Court of the late 1990s.¹³

In *U.S. Term Limits, Inc. vs. Thornton*, Justice Thomas espouses the natural law philosophy behind the concept of deference to varying authorities and federalism that the Framers so painstakingly designed.¹⁴ He noted importantly that “[o]ur system of government rests on one overriding principle: *all power stems from the consent of the people.*”¹⁵ In accordance with the Tenth Amendment then, Thomas argued, the power to impose term limits upon national representatives rested at the state, not federal level.¹⁶ This focus on the people and state as the sovereign before the federal government importantly reflects natural law.¹⁷

Regarding civil rights issues, Justice Thomas’ conviction to his conception of what the Founders concept of natural rights are remains ardent.¹⁸ He wrote that the attempt to impose equality of outcome through the instrument of government was “paternalism” that “is at war with the principle of inherent equality that underlies and infuses

8 *Id.* at 72.

9 *Id.* at 72.

10 *Id.* at 73.

11 *Id.* at 73.

12 *Id.* at 74.

13 *Id.* at 74.

14 *Id.* at 78.

15 *Id.* at 79.

16 *Id.* at 79.

17 *Id.* at 79.

18 *Id.* at 82.

our Constitution.”¹⁹ It remains evident that the Framers’ conception of natural rights remains at the core of Justice Thomas jurisprudence on the Supreme Court even if supplementary to the positivist sources of law.

JUSTICE GORSUCH

Despite insinuation that Justice Gorsuch would be inclined to deploy natural law due to his personal beliefs, espoused in his doctoral work, that has not come to fruition. As the successor to Justice Scalia, and first appointment of President Trump, Justice Gorsuch has proven himself to be more aligned to Justice Scalia’s brand of originalism and deferential to text.

In his first dissent in *Perry v. Merit Systems Protection Board*, Justice Gorsuch made his commitment to the democratic elements of government clear. Simply, to him “if a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation,” and that the “business of enacting statutory fixes belongs to Congress and not this Court.”²⁰ He has further sought to be a bastion of process, objecting to the use of summary judgement in *Pavan vs. Smith* as it followed *Obergefell vs. Hodges*, but rested on no issue directly settled by that decision.²¹ In *Maslenjak vs. United States*, he cautioned against Justice Kagan’s creation of causation tests, emphasizing that the Supreme Court “often speaks most wisely when it speaks last.”²² He was additionally eager to qualify in a concurring opinion the sentiments of the Chief Justice in *Trinity Lutheran Church of Columbia, Inc. vs. Comer*, further cementing his emphasis on formality and text.²³ In referencing the First Amendment, he emphasizes the guarantee of “the free exercise of religion, not just the right to inward belief (or status.)” This a shot at the choice presented by that case, and analysis as describing public benefit was “closed to Lutherans (status) or closed to people who do Lutheran things (use).”²⁴

So, while Justice Gorsuch’s tenure is for the time being brief compared to Justice Thomas’, his writing thus far aligns him more with his predecessor, than to Justice Thomas, in that he is inclined to defer to the other branches, and text itself, rather than the natural law justifications posed by the Framers in the founding.

CONCLUSION

Both Justice Gorsuch and Justice Thomas were lambasted in the press throughout their respective confirmations to the Supreme Court for being bastions of natural law. While Justice Thomas evidently considers the natural law views of the founders, he does so through their written word. Though his affection for the Declaration of Independence

19 *Id.* at 83.

20 Diane S. Sykes, 2018 Sumner Canary Memorial Lecture: Our Newest Justice: Some Thoughts on Justice Gorsuch’s Debut Opinions, 69 Case W. Res. L. REV. 1, 10 (2018).

21 *Id.* at 12.

22 *Id.* at 12.

23 *Id.* at 14.

24 *Id.* at 15.

may lead to differences in tone, his jurisprudence remains, Originalist at heart through the lens of natural law. Justice Gorsuch's jurisprudence varies in that he has been more like his direct predecessor, Justice Scalia. Like Scalia he has invoked the importance of the democratic process and the legislator doing its work, rather than the Court, and has been an adamant advocate for formality regarding process issues.

JURIS MENTEM - LEGAL THEORY

An Examination of Judicial Abstraction in the Supreme Court

JONATHAN SCHNEIDER

INTRODUCTION

What does it mean for judges to be impartial? Objectivity, neutrality, unbiased, whichever adjacent term one reaches, conveys a desire for fairness. But what does fairness entail in practice? Would it be fair to decide a case based on one's emotional response to the subjective elements in a defendant's life? Individuals on each side of the broad ideological spectrum are apt to argue for or against the inclusion of subjectivity and personal persuasion in the judiciary, particularly in a rancorous political climate that elevates the significance of judicial decisions. The debate surrounding so-called "judicial activism," for example, is one of the most common exhibitions of a complicated question: To what extent, if any, should judges decide cases according to their beliefs? This article will demonstrate how allowing or disallowing one's beliefs to influence judicial decisions can prove deleterious or ameliorating, revealing how the inclusion of nuance must itself be nuanced.

THE MERITS OF DETRIMENTS OF ABSTRACTION AND NON-ABSTRACTION

The most beneficial element of formalism, or abstraction, and legal realism, or non-abstraction, also form the basis for their most significant drawback. Formalism disallows elements like social pressure to precipitate inimical decisions by viewing non-legal factors as irrelevant. However, it also generally prevents the desirable revocation of injurious precedent and mandates adherence to one's textual interpretation by the same means. Legal realism's emphasis on non-legal factors such as social pressure, meanwhile, can lead to enormously beneficial decisions by countering deleterious precedent. But the consequence of that mobility, in allowing the bypassing of precedent, is that a misinterpretation of social pressure could lead to a harmful decision motivated by a snapshot of societal demand.

This section will explore both sides through select cases that evince apt and erroneous instances of abstraction or a lack thereof by the Supreme Court.

Brown v. Board of Education (1954), in which the Court overruled *Plessy v. Ferguson*

(1896) and deemed the racial segregation of public schools unconstitutional, found that “[separation of Black students based on their race] generates a feeling of inferiority... that may affect their hearts and minds in a way unlikely ever to be undone.”¹ It was not the only instance where unquantifiable “intangible considerations” were used to lessen the grip of segregation.² The Court utilized “qualities which are incapable of objective measurement” in determining *Sweatt v. Painter* (1950), which found the denial of law school applicants based on race unconstitutional, exhibiting instances in which the inclusion of “non-objective” factors allayed racial injustice.³

Consideration of subjective factors also contributed to the establishment of the right to privacy, contributing significantly to the realization of abortion as a constitutional right by *Roe v. Wade* (1973).

The Court first recognized the right to privacy in *Griswold v. Connecticut* (1965), forbidding state interference in the purchase of contraceptives by married couples, finding that “the right of marital privacy... is within the penumbra of specific guarantees of the Bill of Rights.”⁴ The Court did not reduce the appellants to a party attempting to achieve recognition of a right that is not enshrined in the Constitution. Instead, it utilized a measure of subjectivity in determining the coverage of the “penumbra” and established the marital right to privacy.⁵ The Court’s subsequent *Eisenstadt v. Baird* (1972) decision extended the right to privacy, and therefore the right to own contraceptives, to unmarried individuals, acknowledging the finding of a “zone of privacy created by several fundamental constitutional guarantees” under *Griswold*.⁶ The Court recognized that such a right cannot be limited to marital couples, as “the rights [of an individual to access contraceptives] must be the same for the unmarried and the married alike.”^{7 8}

Both *Griswold* and *Eisenstadt* were used to support the Court’s finding in *Roe v. Wade* (1973). Justice Harry Blackmun, writing the opinion of the Court, acknowledged that the “Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution,” citing, inter alia, *Griswold*’s recognition of such a right under “penumbras of the Bill of Rights.”^{9 10} Additionally, Justice Blackmun referred to the Court’s finding in *Eisenstadt* that “If the right of pri-

1 *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

2 *Id.* at 483, 493

3 *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

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

5 *Id.*

6 *Eisenstadt v. Baird*, 405 U.S. 438, 461 (1972).

7 *Id.*

8 The Court noted that the decision was reached by determining that the Massachusetts law prohibiting unmarried individuals from owning contraceptives failed the rational basis test, which is used to ascertain if a law that restricts liberty is connected with “legitimate state interests,” and thus violated the Fourteenth Amendment’s Equal Protection Clause (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

However, the Court’s decision also rested on *Griswold*, citing the case repeatedly, therefore building on the “creation” of the constitutional right to privacy (*Id.* at 439; 443; 454).

9 *Roe v. Wade*, 410 U.S. 113, 152 (1973).

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

vacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹ “That right,” wrote Justice Blackmun, “necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.”¹²

Brown, *Griswold*, *Eisenstadt*, and *Roe* demonstrate that the utilization of subjective elements in reaching a decision, by what detractors may pejoratively label judicial activism, can lead to favorable decisions. Each represents instances in which the Court did not reduce the appellants (or appellee, for *Eisenstadt*) to formless parties with arguments lacking context or implicit exhibition of contemporary social persuasions. Instead, the consideration of “intangible considerations” in *Brown* and acknowledgment of a “penumbra of specific guarantees [under] the Bill of Rights” in *Griswold*, subsequently supporting *Eisenstadt* and *Roe*, provided the Court’s basis for deviating from what could be argued were objective yet unacceptable decisions, particularly in *Brown* and *Griswold*.^{13 14}

But the allowance of an emphasis on subjectivity can also permit injurious decisions, one of the most reviled in the Court’s history among them: *Korematsu v. United States* (1944).

Korematsu, in which the Court upheld the constitutionality of excluding Japanese Americans from the West Coast Military Area (WCMA), declining to address their forced relocation to internment camps, exhibits how non-abstraction can produce an unjust decision. “Military necessity” supposedly warranted excluding Japanese American individuals from the entirety of seven states, Washington, Oregon, Idaho, Montana, Nevada, California, and Utah, and part of another, Arizona. Internment began in 1942 and would continue until 1946, eventually entailing the loss of homes, businesses, and personal property due to “failure to pay taxes.”¹⁵ There are two primary issues with the Court’s reasoning, moral egregiousness aside, each demonstrating the possible harm of non-abstraction.

The first problem with the *Korematsu* decision’s justification is that ignoring the internment of Japanese Americans provided tacit approval of additional objectionable government action without consideration of its constitutionality. That is, the Court attempted to justify the exclusion of Japanese Americans from the WCMA but did not meaningfully address their subsequent internment, which had been occurring for approximately two years by 1944.¹⁶ The justification was attempted by utilization of the strict scrutiny doctrine, which the Court created for *Korematsu*, and refers to Justice

11 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

12 *Roe v. Wade*, 410 U.S. 113, 170 (1973).

13 *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

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

15 Harry S. Truman Library & Museum (n.d.). *Japanese-American Internment*. From <https://www.trumanlibrary.gov/education/presidential-inquiries/japanese-american-internment>.

16 *Id.*

Black's writing that "legal restrictions which curtail the civil rights of a single racial group" should be subjected to the "most rigid scrutiny."¹⁷ In effect, the Court argued that targeting Japanese Americans was justified because it supposedly examined the order with "rigid scrutiny," yet the known result of the exclusion received no such examination.¹⁸ In fact, it received none whatsoever by the majority opinion. Therefore, the Court failed in its application of strict scrutiny by omitting the known consequences of the exclusion order from consideration.

The second problem is that the Court utterly lacked the basis to justify any perceived threat posed by Japanese Americans as a population, demonstrated implicitly by Justice Hugo Black citing the "presence of an unascertained number of disloyal members of [Japanese Americans]" as ostensible support for the Court's decision.¹⁹ Absence of evidence does not constitute evidence of absence, but it certainly does not meet the standard for the notion of strict scrutiny established by the Court, unless the "most rigid scrutiny" refers to reasoning based on the "unascertained" quantity of disloyal individuals.²⁰

Furthermore, the Court observed that "Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan," implying each action was demonstrative of disloyalty by the given Japanese Americans.²¹ In making that observation, the Court ignored the somewhat obvious objections that one, those harboring a secret loyalty to Japan would most likely not announce it, and two, that the specified Japanese Americans may have justifiably preferred repatriation to spending the duration of the war in an internment camp. The Court also failed to recognize that conflating a swearing of allegiance to the United States and renouncing one to the "Japanese Emperor" presupposed the lack of a preexisting allegiance to the former and the presence of one to the latter simultaneously.²² Analogously, one has to imagine that the average German American during World War II would not enthusiastically renounce loyalty to Adolf Hitler without feeling insulted at the implication that such loyalty existed in the first place.

Both the creation of a Japanese American threat when none was present and the subjectively narrow view with which the Court applied strict scrutiny display how the Court's finding in *Korematsu* was subject to social pressure and lacked an abstract view of the parties and constitutional questions at hand. Whether the Court would have, in a vacuum, acquiesced to the military unilaterally excluding members of a particular race during wartime with zero substantive evidence to support the decision, tacitly allowing a further restriction of liberty by way of that race's internment, is ultimately unknowable. However, there is little doubt that the public perception of Japan and Japanese

17 *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

18 *Id.*

19 *Id.*

20 *Id.* at 214, 216, 218.

21 *Id.* at 214, 219.

22 *Id.*

Americans, perhaps even personal biases from the Justices, whether overt or implicit, contributed to the Court permitting the imprisonment of approximately 120,000 American citizens solely based on race.²³

The Court's failing in *Korematsu*, though contemptible, features only one extreme of the utilization of abstraction. At the opposing end, in complete subservience to a perception of the text, lies what is likely the most detested decision in the Court's history: *Dred Scott v. Sandford* (1857).

The Court's finding in *Dred Scott*, that Black individuals were not citizens of the United States "within the meaning of the Constitution," demonstrates how prioritizing what one believes the text dictates over personal beliefs can lead to an unjust conclusion.²⁴ The state of Black people according to the Constitution, wrote Chief Justice Roger Taney in writing the opinion of the Court, was that they could "claim none of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States."²⁵ Although the personal biases of individual Justices likely supported the basis for the 7-2 decision, Chief Justice Taney's argument for why the given interpretation of the Constitution held such emphasis proves illustrative of how over-abstraction can be disastrous. Chief Justice Taney, describing the necessity of the Court heeding a direct interpretation of the Constitution, wrote that it was not the "province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws."²⁶

Instead, Chief Justice Taney wrote, "the decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution."²⁷ The Court expressly relied on Article I § 9 and Article IV § 2 to submit that the Constitution did not see Black individuals as citizens.^{28 29} Each, Chief Justice Taney wrote, "point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed."³⁰ Therefore, regardless of the role of personal biases, the Court justified the *Dred Scott* finding with an originalist, abstract perspective of the Constitution.

CONCLUSION

The influence of abstraction or lack thereof on a given decision has demonstrable positives and negatives. The positives, exhibited by cases such as *Brown v. Board of Education* (1954), *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and *Roe v. Wade* (1973), are the inclusion of relevant sociopolitical factors that lead to the

23 *Id.*

24 *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

25 *Id.*

26 *Id.*

27 *Id.*

28 U.S. Const. art. I, § 9.

29 U.S. Const. art. IV, § 2.

30 *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

expulsion of a purely clinical judicial approach and cognizance of a decision's likely impact on society. The Court rightfully declined to treat the parties in each as complete abstracts. Instead, it recognized the context of the cases and the results of a decision one way or the other. The primary negative, illustrated by *Korematsu v. United States* (1944), is that considering these factors can lead to misidentifying social pressure, whether real or perceived, as justification for an injurious decision. Especially for cases concerning an issue so immediately objectionable as the detention of every member of a racial group, such an allowance is entirely unacceptable. Nonetheless, cases like *Dred Scott v. Sandford* (1857) demonstrate that a measure of subjectivity and understanding of political consequence is necessary to avoid a glaring miscarriage of justice by restricting oneself entirely to a textual interpretation.

JURIS MENTEM - LEGAL THEORY

Originalism Versus Living Constitutionalism Within the Lens of the Second Amendment Right to Bear Arms

ABBIE KITARIEV

Within Constitutional Law, many different methods have been used to interpret that which the founding documents mean. What has kept the oldest living democracy together is in part the very careful distribution of power within the three branches of government and the manual left by the founding fathers as to how democracy should be operationalized. But with time the interpretation has led to some issues as language becomes outdated and concepts like regulation of technology and its impact on society that the founding fathers could never have thought of begin to challenge the documents. Technology such as the internet and social media strain the reach of the first amendment, desegregation, and gay people wanting the right to marry have no literal wording written into the Constitution but have been given a place by judicial interpretation.

The current methodology of Constitutional Interpretation lays out three different approaches:

Originalism coined in the 1980s describes the judicial philosophy of interpreting the Constitution in the lens of the intentions of the founding fathers and the understanding of a commoner at the time. Legislation is seen as the root of social change rather than new interpretations.¹

Textualism similar to Originalism popularized by Justice Scalia describes an approach where the literal meaning of the Constitution should be interpreted via the language used rather than speaker meaning.²

1 Ilan Wurman, *What is originalism? debunking the myths AP NEWS* (2020), <https://apnews.com/article/samuel-alito-legislation-stephen-breyer-barack-obama-constitutions-bd1e3ae6613ab5a8dd-a12bf78dffc789> (last visited Nov 17, 2021).

2 *Textualism definition & meaning*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/textualism> (last visited Nov 17, 2021).

Living Constitution first used in 1927 is used to describe legal philosophy where the Constitution does and should evolve to fit the needs of changing circumstances and cultural values.³

But one specific issue only just recently beginning to be challenged is the place of guns as violence and mass shootings increase nationally and technology changes allow for greater harm in a matter of minutes. The United States has historically ignored the place of guns in the public and has been seen in only two cases being *District of Columbia v Heller* (2008) and *McDonald v Chicago* (2010) with a new case having been heard this year on November 3.

HISTORY

There used to not be many questions regarding gun ownership. It was up to state discretion, but during the rise of the civil rights movement, the founders of the Black Panther Party began to realize that not only did they have a right to survey the police from a distance but that the Second Amendment guarantees their right to carry guns on these missions. When they organized a movement to protest the passing of a gun regulation bill in Sacramento in response to their scouting, they entered the capital with guns sparking national outrage and fear. Across the country, states began to file laws controlling the public's right to bear arms.

In response the National Rifle Association which used to be a members hunting group began to see how these laws may threaten the freedoms of hobbyist hunters next and began to advocate for gun owners' rights, building up a massive national organization and following.⁴

D.C. V. HELLER CASE BRIEF

In 1975 the District of Columbia made it illegal to have an unregistered handgun and banned the registration of such handguns unless with prior approval from the chief of police for a one-year license. If there was approval for such handguns then the gun needed to be unloaded, disassembled, or bound by a trigger lock.

The issue arose when a resident of D.C. Dick Anthony Heller, a special police officer who was allowed to have a handgun on the job applied for a one-year license from the Chief of Police to keep a gun at home, and his application was denied.⁵ Heller decided to sue the District of Columbia under the grounds that his Second Amendment rights were being violated due to his inability to keep a functional firearm in his home without a license for self-defense. This case went up to the Supreme Court with the question:

³ *Legal Theory Lexicon: Living constitutionalism*, Legal Theory Blog (2020), <https://lsolum.typepad.com/legaltheory/2020/09/legal-theory-lexicon-living-constitutionalism.html> (last visited Nov 17, 2021).

⁴ Jad Abumrad, *The gun show: More perfect WNYC Studios* (2017), <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/gun-show> (last visited Oct 20, 2021).

⁵ *Id.*

Does the D.C. law restricting the licensing of handguns and keeping them nonfunctional in the home violate the Second Amendment right to keep and bear arms?

In a 5-4 decision, the Supreme Court stated, “that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”⁶ This case had the capacity to set a very heavy future precedent for Second Amendment cases due to the nature of it being the first of its kind to be litigated. However it has to be noted that within the majority decision of this case, Justice Scalia notes that the freedom to own firearms is not without limit in cases such as people with prior felonies or people with mental illness. Or from being carried in places like schools and government buildings.⁷

THE ORIGINALIST INTERPRETATION

The justices on the bench had the power to choose the future that gun laws in the U.S. would take on through the type of judicial interpretation they gave the case. In the majority opinion written by Justice Antonin Scalia, what he described was a classic view of originalism. First answering the question of who has the right to bear arms in which the majority decided that it is the right of the individual rather than the right of a collective or military personal as was described by the dissenters.⁸ Their defense being that at the time of the founders it was a very common practice for people to own guns for self-defense and in the case of war because the established military was small and relied on local forces. Justice Scalia adds that the right to keep guns for personal use was existent long before the Bill of Rights and was hence written to enforce said right.⁹

The confusing aspect of the judicial interpretation is that Justice Scalia is widely critiqued for his selective evidence in proving the originalist lens. For example, in his defense of the existence of private gun ownership he only partially cites Pennsylvania and Vermont’s Constitution where they define the right of the individual then skipping the next part about the militia.¹⁰

Because of this while the precedent he set is a strong one because of the case itself, it is commonly critiqued for being riddled with errors but while the court’s makeup stays as it is with more conservative justices, it likely will not be challenged for a while.

MCDONALD V. CHICAGO SELECTIVE INCORPORATION

6 *District of Columbia v. Heller*, 64 (D.C. 2007).

7 *Id.* at 2.

8 Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, George Mason University Law and Economics Research Paper Series 1–48.

9 *Id.*

10 Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 *Cardozo Law Review* 623–662 (2015).

The second case involving the rights of the people is, *McDonald v. Chicago* heard in 2010 it was decided along the same lines as *DC v. Heller* the difference being that while *Heller* outlawed federal regulation of handguns *McDonald* outlawed it in the states via the Due Process Clause of the Fourteenth Amendment.¹¹

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. BRUEN

While the previous two cases addressed the right of the people to keep guns in the home, this will be the first case addressing how they are to be held and restricted in public. Within New York and many other states, there is an application for concealed carry where people are only allowed guns if there is a serious need for self-defense. The plaintiffs are making the argument that “keep and bear arms” applies to keeping them in the home and bearing them in public, effectively making the case that the Second Amendment intends to protect both private ownership and public use.¹² Whatever the court may decide it is clear it will likely be within the originalist scope as that is the precedent that has been set and will likely be in favor of restricting policy that inhibits a person’s right to concealed carry due to the makeup of the court itself.

EVOLUTION OF GUNS AND VIOLENCE

It is obvious that guns have changed a lot since the founding of the Constitution. With that has come increased gun violence. Back when the Constitution was founded the average musket held one round, with three rounds shot a minute and a max accuracy range of fifty meters.¹³ Obviously, this has changed a lot, handguns which are owned by 72% of gun owners with multiple guns and 62% of those with one gun can shoot up to seventeen rounds with the max accuracy of a trained shooter being 100 yards.^{14 15} A rifle owned by 62% of gun owners who have more than one gun and 22% of those owning one gun can shoot between 20 and 30 rounds with up to 300 yards of accuracy.^{16 17}¹⁸ Lastly, Shotgun owners make up 54% of those with multiple guns and 16% of those

11 *McDonald Et Al. V. City Of Chicago*, Illinois, Et Al. No 08-1521 slip op. (D. Mass. June 28, 2010).

12 Amy Howe, *In major second amendment case, court will review limits on carrying a concealed gun in public*, SCOTUSblog (2021), <https://www.scotusblog.com/2021/10/in-major-second-amendment-case-court-will-review-limits-on-carrying-a-concealed-gun-in-public/> (last visited Nov 17, 2021).

13 Christopher Ingraham, *Analysis | what ‘arms’ looked like when the 2nd amendment was written*, The Washington Post (2021), <https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/> (last visited Nov 17, 2021).

14 Travis Pike, *Effective range of pistols, rifles, & shotguns* Pew Pew Tactical (2021), <https://www.pewpewtactical.com/effective-range-pistols-rifles-shotguns/#:~:text=50%20yards%20is%20about%20as,to%20balance%20their%20guns%20on.> (last visited Nov 17, 2021).

15 John Gramlich, *What the data says about gun deaths in the U.S.* Pew Research Center (2021), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/> (last visited Nov 17, 2021).

16 *Id.*

17 *Basic rifle accuracy and Ballistics*, Terminal Ballistics Research, <https://www.ballisticstudies.com/Knowledgebase/Basic+Rifle+Accuracy+and+Ballistics.html> (last visited Nov 17, 2021).

18 David B. Kopel, *The Costs and Consequences of Gun Control*, Cato Institute (2015), <https://>

owning one gun have up to 20 shells with a range of up to 50 yards.¹⁹ ²⁰ This doesn't even include accessories made for guns such as silencers or additional magazines for increased bullet capacity. It is impossible to say how much gun violence there was in 1776 but it easily produced less death just by the time it took to shoot and how many shots could be fired. Yearly 40,000 Americans die at the hands of guns with 14,000 being homicide cases and 23,000 being suicide.²¹ As of 2000 active shooter incidents have been increasingly more common with one incident in 2000 and most recently 27 incidents in 2018.²²

AN ARGUMENT FOR LIVING CONSTITUTIONALIST INTERPRETATION

Many places have researched the interaction between gun legislation and violence and have found that states with more stringent laws have significantly less gun violence.²³ Whether one believes the intentions of the framers and widespread ownership of guns in the past, the statistics speak for themselves, gun death is on the rise and as a high-income country, America has some of the most violence of any other. Living Constitutionalism is the only solution when the decision-making is put in the hands of the judicial branch. The conservative justices on the court themselves support an originalist lens in which part of the intention is the importance of legislation to bring about change rather than the judicial branch. The law in New York for concealed carry in the most recent Supreme Court case, as well as those discussed in *D.C. v. Heller* and *McDonald v. Chicago*, was exactly the legislative action that originalists aim to support. At this point, this represents clashing interests of social change vs stringent definition of the Constitution within the judicial branch at some point, one of these interests will have to give and as more people become victims of horrific deaths and “thoughts and prayers” will not be enough to stop the violence as we see now, the hands will rest on the justices themselves as lawsuits will not stop coming whether they set the precedent of the evolution of the Constitution and the safety of American Citizens, or if we continue sticking to outdated protections at a time when mass violence from one person could be better done through a sword than a gun.

www.cato.org/policy-analysis/costs-consequences-gun-control (last visited Dec 6, 2021).

19 John Gramlich, *What the data says about gun deaths in the U.S.* Pew Research Center (2021), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/> (last visited Nov 17, 2021).

20 Richard Rattenbury, *Shotgun*, Encyclopædia Britannica, <https://www.britannica.com/technology/shotgun> (last visited Nov 17, 2021).

21 *Gun violence in the United States*, The Educational Fund to Stop Gun Violence (2021), <https://efsgv.org/learn/type-of-gun-violence/gun-violence-in-the-united-states/> (last visited Nov 17, 2021).

22 John Gramlich, *What the data says about gun deaths in the U.S.*, Pew Research Center (2021), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/> (last visited Nov 17, 2021).

23 *Id.*