



The Legal Research Club is proud to present the

CAPSTONE JOURNAL OF LAW AND PUBLIC POLICY

The mission of the Legal Research Club is to continue the tradition of excellence at The University of Alabama by **EQUIPPING** undergraduates with the skills necessary to succeed in research, **EXPANDING** perspectives of legal issues in both Alabama and the nation, and **EXCELLING** in the publication of the Capstone Journal of Law and Public Policy.

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On behalf of the Legal Research Club, we would like to extend our sincerest gratitude to the students, faculty, and professional community that have made this edition of the Capstone Journal of Law and Public Policy possible.

To Hannah Berman, director of pre-law at The University of Alabama, the LRC is able to flourish when backed by a strong pre-law community, and it is to you that we direct our thanks. Your support of the LRC has been tantamount to its success, and we look forward to furthering this relationship as the organization continues to serve as a fundamental pillar of the pre-law program.

And to the pre-law communities throughout the Southeast whose students and advisors have joined us in our mission to create the premier undergraduate law journal, thank you. We excitedly celebrate the research your students have produced, and readily welcome your continued engagement with our organization.

We offer our deepest appreciation to Dr. Lawrence Cappello, our organization advisor, for your inexhaustible support and guidance. It is with your help that we have seen an incredible growth in membership engagement and an innovation in thought which has transformed our Club.

To the editorial staff and contributors, we owe our sincerest praise. You are among the most driven pre-law students at The University of Alabama, and this edition of the Journal comes only as a result of your steadfast dedication to the operations of the LRC.

With that, we hope you enjoy this edition of the Journal. Since our founding in 2017, we have made it our mission to redefine what it means to be a pre-law student at The University of Alabama. It has been an absolute pleasure to serve alongside of such a brilliant and determined executive team that has worked to achieve this goal with an inspiring vigor.

All the best,

Claire Faivre
President, Legal Research Club
2019-2020

LETTER FROM THE EDITOR

Dear Reader,

On behalf of the 2019-2020 Editorial Board and the Legal Research Club, I am proud to introduce the first issue of the third volume of the Capstone Journal of Law and Public Policy.

This is the fifth semester that the journal and club have been active on campus and it has been highly rewarding to see how things have progressed over these two and a half years. This semester, our club has remained focused on its core objectives of publishing long-form articles in the Capstone Journal, posting shorter essays on the online Capstone Commentary, and providing a community for pre-law students interested in the research side of the law.

This semester was the first in which we have released a Fall issue of the Capstone Journal. This was made possible by the hard work and stamina of the Editorial Board of the Journal, the Executive Board of the LRC, and all of those that contributed high-quality submissions for this semester's issue. Many of this semester's editors were new to the Editorial Board, but all showed a great motivation to learn and learn quickly in order to meet this semester's aggressive deadlines.

Continuing the trend from years past, we were humbled to receive submissions from our own University of Alabama, but also from the University of South Carolina, Vanderbilt University, the University of Florida, and Samford University. We would like to thank all of those who submitted articles this semester, as well as the pre-law communities throughout the southeast for their help in obtaining the best possible submissions.

This issue of the Capstone Journal features articles on diverse topics, ranging from the intersection of environmental law and racism to abortion rights to the United States' drug enforcement policies.

I hope that you enjoy reading these articles and consider becoming involved with the Legal Research Club or the Capstone Journal in the future. We are always looking for talented undergraduates to submit papers, become editors, or join our executive board.

Happy reading,

Nick Gillan
Editor in Chief, Capstone Journal
Fall 2019

GET INVOLVED!

Submissions for the next edition of the journal will open soon! Send an email to **capstonejournal@gmail.com** to inquire about our submissions process. Submissions are open to all.

The Capstone Commentary is always accepting blog posts for the state's foremost undergraduate legal blog. Please send inquiries or pieces for publication to **LRCatUA@gmail.com**.

If you are a University of Alabama pre-law student, consider joining the Legal Research Club. We offer a variety of opportunities to engage with legal research and writing before law school, including research workshops, writing clinics, and a writing competition. Members of the LRC are also eligible to apply for positions with the LRC, Capstone Journal, or Capstone Commentary.

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***PUNISHMENT FOR MENTAL ILLNESS ALONE:
AN ARGUMENT FOR OVERTURNING JONES V.
UNITED STATES***

*Jayne Smith**

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INTRODUCTION

In September 1975, Michael Jones was arrested in Washington, D.C. and charged with petit larceny for “attempting to steal a jacket from a department store.”¹ If found guilty, he faced a maximum of one year in jail.² The court ordered that his competency to stand trial be evaluated.³

¹ Jones v. United States, 463 U.S. 354, 359 (1983).

² *Id.*

³ *Id.*

During the competency hearing process, hospital psychologists discovered that Mr. Jones suffered from paranoid schizophrenia and that his attempted theft was “the product of his mental disease.”⁴ He plead, and was found, not guilty by reason of insanity (NGRI).⁵ Pursuant to D.C. Code § 24-301(d)(1), he was committed to a mental hospital for treatment.⁶

Sadly, Mr. Jones remained in the mental hospital for longer than a year, the maximum prison sentence that he would have received had he instead plead guilty to petit larceny.⁷ According to D.C. Code § 24-301, patients have three options for release once they have been committed following a NGRI conviction. First, patients are entitled to a hearing 50 days after commitment wherein they must prove, by a preponderance of the evidence, either that they are no longer mentally ill or that they are no longer dangerous.⁸ Second, they are entitled to the same type of release hearing, with the same evidentiary burden, every six months thereafter.⁹ Third, they may be released by the court if the hospital chief of service certifies their recovery.¹⁰ Mr. Jones appealed to the Supreme Court, arguing that if he was to continue being held indefinitely, the State must go through its formal civil commitment procedures, rather than continuing to detain him on his NGRI finding.¹¹ The Supreme Court

⁴ *Id.* at 360.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 360.

⁸ D.C. Code § 24-301(d)(2).

⁹ D.C. Code § 24-301(k).

¹⁰ D.C. Code § 24-301(e).

¹¹ Jones, 463 U.S. at 362-63.

ruled against Mr. Jones, finding that “on the basis of [his] insanity judgment,” the Government may confine him “to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.”¹² Thus, in theory, a person could be detained for the rest of their life for a crime as trivial as attempting to steal a jacket.

The Court’s decision in *Jones* stemmed from precedent regarding civil commitment standards. The Court had previously found that in order to civilly commit an individual, the State must present clear and convincing evidence that he suffers from a mental illness and that he is a danger to himself or to others.¹³ In *Jones*, the same two elements were involved. However, rather than rigorously analyze the elements, as it had in previous cases, the Court quickly dispensed of them in *Jones*. The *Jones* Court found that anyone found NGRI had satisfied both elements; the insanity portion showed their mental illness and the conviction showed their dangerousness to society.¹⁴

This Note first argues that the Court incorrectly likened the theoretical danger posed by any convicted criminal to the literal danger required by civil commitment standards. It will first do so by analyzing other Supreme Court precedent from both before and after *Jones*, as well as state and federal civil commitment laws, to show that *Jones* is a significant departure from other commitment policies.

Secondly, this Note argues that the rule against absurdity prevents the *Jones* outcome.¹⁵ By the *Jones* rationale, an

¹² *Id.* at 370.

¹³ *Addington v. Texas*, 441 U.S. 418 (1979).

¹⁴ *Jones*, 463 U.S. at 363-66.

¹⁵ *Id.* at 364.

individual's status as a criminal makes him a danger to society. Thus, anyone who the State can show suffers from a mental illness and has been convicted of a crime can be civilly committed, regardless of the nature of their crime or illness. This Note argues that this premise cannot be so when analyzed in light of the rule against absurdity and the purpose of NGRI statutes.

Next, this Note will address policy concerns of the *Jones* outcome. First, it will argue that the decision is in the worst interest of the defendant. Theoretically, by pleading NGRI to a low-level crime, a defendant hopes that he will receive treatment for his mental illness and become a functioning member of society once again. However, if that defendant knows that there is a chance that by virtue of his plea alone, he could be confined forever, he is less likely to choose to plead, instead accepting a low-time jail sentence. But jails are the last place that these defendants should be. They are already overcrowded in many instances, with an elevated prevalence of mental illness from the general population.¹⁶ The defendant's mental illness is much more likely to worsen in jail than it would have in treatment, making him more likely to recidivate.

Finally, this Note will propose possible solutions to mitigate the risk of indefinite commitment for low-level

¹⁶ See Jemelka et al., *The Mentally Ill in Prisons: A Review*, HOSPITAL AND COMMUNITY PSYCHIATRY 40, 481-90 (1989); Linda A. Teplin, *The Criminalization Hypothesis: Myth, Misnomer, or Management Strategy*, LAW AND MENTAL HEALTH: MAJOR DEVELOPMENTS AND RESEARCH NEEDS, 149-83 (1991) (the study included anyone who had been diagnosed or treated by a mental health professional or displayed symptoms of mental illness as defined in the DSM-IV).

offenders. First, it will detail an alternate solution for the release of insanity acquittees that is sensitive to public concerns while eliminating indefinite confinement. Next, it will give an option that would allow defendants to make a more knowledgeable decision about whether they wish to plead NGRI.

I. THE CIVIL COMMITMENT STANDARD

A. *Historically*

The Supreme Court has long recognized the importance of protecting civilians against unjustified confinement, whether in the civil or criminal context. Indeed, the Court has specifically stated that civil confinement for any reason represents a significant deprivation of liberty.¹⁷ In one of its earliest decisions of the topic, *Specht v. Patterson*¹⁸, the Court held that civil commitment hearings were protected by both the Due Process Clause of the 5th Amendment and the Equal Protection Clause of the 14th Amendment.¹⁹

The Court further emphasized the importance of Due Process in *Jackson v. Indiana*.²⁰ There, Jackson, who was deaf and mute with a 4-year-old mental capacity, was charged with two robberies resulting in a nine-dollar gain.²¹ He was declared incompetent to stand trial and was committed to a mental institution until he could be shown to be sane.²² After

¹⁷ See *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967).

¹⁸ 386 U.S. 605 (1967).

¹⁹ *Id.* at 608.

²⁰ 406 U.S. 715 (1972).

²¹ *Id.* at 717.

²² *Id.* at 718-19.

more than three years of commitment, Jackson showed little improvement or hope of regaining sanity.²³ Thus, his confinement was tantamount to a life sentence, depriving him of due process protection.²⁴ The Court therefore held that Jackson could not be involuntarily committed solely because of his incompetency to stand trial.²⁵

The Court addressed the topic of involuntary commitment again only three years later in *O'Connor v. Donaldson*.²⁶ Donaldson was involuntarily committed for more than fifteen years at the request of his father, for the “care, maintenance, and treatment” of delusions caused by paranoid schizophrenia.²⁷ His commitment was allowed by a Florida law that was repealed pre-litigation.²⁸ Patients committed under this law could be released from hospital care upon a showing that they were not dangerous to themselves or others, regardless of whether they continued to suffer from mental illness.²⁹ Despite Donaldson’s making this showing and requesting release on several occasions, the hospital’s superintendent continued Donaldson’s confinement, arguing that he feared Donaldson would be unable to successfully adjust to life outside of the institution.³⁰ The superintendent presented no evidence to support this conclusion.³¹ In fact, there was no showing that

²³ *Id.*

²⁴ *Id.* at 738-39.

²⁵ *Id.* at 738.

²⁶ 422 U.S. 563 (1975).

²⁷ *Id.* at 565-66.

²⁸ *Id.*

²⁹ *Id.* at 567.

³⁰ *Id.* at 567-68.

³¹ *Id.* at 568.

Donaldson had ever presented a danger to himself or others and there was evidence indicating that he could have secured and held a job outside of the facility relatively easily.³² Thus, the Court held that he could not be involuntarily committed if he did not both suffer from a mental illness and pose a danger to himself or others.³³ It specifically noted that even if the initial commitment was based upon a showing of both of these elements, the commitment was no longer constitutional if one of the elements was later unsatisfied.³⁴

Shortly thereafter, the Court issued an opinion in a strikingly similar case, *Addington v. Texas*.³⁵ Addington was involuntarily committed because of several episodes wherein delusions caused by paranoid schizophrenia led to violent outbursts against his parents and substantial property damage to their home.³⁶ The Court reaffirmed its holding in *O'Connor v. Donaldson* and went on to state that the proper evidentiary standard for this showing is by clear and convincing evidence.³⁷

This same line of reasoning continued after the *Jones* opinion in *Foucha v. Louisiana*.³⁸ Foucha was charged with aggravated burglary and illegal discharge of a firearm and was later found not guilty by reason of insanity.³⁹ Psychologists were unsure what precise mental illness Foucha suffered from but hypothesized that it was some

³² *Id.*

³³ *Id.* at 576.

³⁴ *Id.* at 575-76.

³⁵ 441 U.S. 418 (1979).

³⁶ *Id.* at 420-21.

³⁷ *Id.* at 432-33.

³⁸ 504 U.S. 71 (1992).

³⁹ *Id.* at 73-74.

combination of drug-induced psychosis and antisocial personality disorder.⁴⁰ Years later, Foucha no longer suffered from any mental disorder, causing the Court to rule in favor of his release.⁴¹ It found that his lack of mental illness caused him to no longer be classified as an insanity acquittee, therefore requiring the State to undergo civil commitment hearings if it wished to continue confining him.⁴² Thus, the Court emphasized that confinement requires both mental illness and dangerousness, this time in the context of NGRI individuals.

B. Jones Rationale

The *Jones* Court made its decision in purported consideration of its precedent regarding civil commitment standards. Specifically, it reiterated the necessity of the State to show both mental illness and dangerousness by clear and convincing evidence.⁴³ The first element is easily satisfied, however. By virtue of the fact that a defendant has plead NGRI, he has admitted that he is mentally ill. Thus, all that remains is to prove that he is dangerous.

The *Jones* Court stated that “[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.”⁴⁴ The Court pointed to its decision in *Lynch v. Overholser*⁴⁵, finding that the fact that a person is found guilty of a criminal act is

⁴⁰ *Id.* at 75.

⁴¹ *Id.* at 77-78.

⁴² *Id.* at 79.

⁴³ *Jones*, 463 U.S. at 363-66.

⁴⁴ *Id.* at 364.

⁴⁵ 369 U.S. 705 (1962).

"strong evidence that his continued liberty could imperil 'the preservation of public peace.'"⁴⁶ This potential disturbance of public peace was, in the Court's eyes, enough of a threat to society to justify confinement. The mere fact that Jones was guilty of a crime was proof of his dangerousness. The Court specifically argued that it had never required a showing of violence *per se* for a finding of dangerousness and rejected Mr. Jones's argument that his minor property crime should not be considered inherently dangerous.⁴⁷

II. HISTORY OF THE INSANITY DEFENSE AND MODERN IMPLICATIONS

The insanity defense is one of the longest-standing fixtures of law, with its roots in Hebrew, Greek, and Roman legal doctrine.⁴⁸ In its earliest form, it was used to pardon those who lacked "full reasoning powers and were deprived of moral responsibility."⁴⁹ In the thirteenth century, the English common law introduced the idea of moral intent to the legal system.⁵⁰ In 1843, one of the modern tests for insanity, the M'Naghten test, was introduced to the common law.⁵¹ There are currently three main insanity tests that are used in the American legal system.⁵²

The insanity defense was historically a means of social protection for those who lacked moral culpability, invoked to

⁴⁶ *Id.* at 714.

⁴⁷ Jones, 463 U.S. at 365.

⁴⁸ Rudolph Joseph Gerber, *The Insanity Defense* 8 (1984).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ M'Naghten's Case, 8 Eng. Rep. 718 (H.L.) (1843).

⁵² See Clark v. Arizona, 548 U.S. 735, 750-51 (2006) (performing a fifty-state survey into the insanity defense).

spare the most vulnerable members of society from traditional imprisonment. However, over the last 100 years, American attitudes toward insanity acquittees have dramatically worsened. Sentiments reached an all-time low in 1984, just two years before the *Jones* decision, when John Hinckley, Jr. attempted to assassinate President Ronald Reagan, wounding him and three others.⁵³ Hinckley plead insanity and was found not guilty by reason of insanity, and was sent to a mental institution.⁵⁴ The Nation's popular opinion was that Hinckley got a "get out of jail free" card; Senator Strom Thurmond "equated [the sentence] to a free ride."⁵⁵ Following President Reagan's shooting, the insanity defense became even stricter. First, the *Jones* opinion was given two years later, in 1983. Then, the next year, Congress passed the Insanity Defense Reform Act of 1984, which heightened the standard necessary for an individual to be deemed NGRI.⁵⁶ Since then, Americans have increasingly felt that insanity acquittees escape committing crimes without serving any punishment.⁵⁷ The media has fueled this fear of insanity acquittees by reporting on them primarily in

⁵³ Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, September 27, 2017, <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html> (last accessed January 10, 2019).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ U.S. Dep't of Justice, *Insanity Defense Reform Act of 1984*, DEP'T OF JUSTICE RESOURCE MANUAL TITLE 9 NO. 634 (2019).

⁵⁷ See James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 963 (1986) (noting that public dissatisfaction with the insanity defense is based in feelings that defendants are "getting off" or "going free.")

the context of violent crime, leading the public to believe that “most insanity defendants are murderers who commit random acts of violence.”⁵⁸ Even the ABA Standards recognize that with the release of insanity acquittees, attorneys should expect public outcry.⁵⁹ Despite all of this outrage, only one-120th of one percent of felony cases end in a finding of NGRI.⁶⁰

In those rare instances, defendants are often given harsher, rather than less harsh, confinement sentences than they would have gotten had they gone to prison. According to a 2017 study, more than 10,000 mentally ill Americans who haven’t been convicted of a crime — people who have been found not guilty by reason of insanity or who have been indicted but found incompetent to stand trial — are currently involuntarily confined to psychiatric hospitals.⁶¹ No federal agency, national registry, or organization tracks these patients.⁶² A New York Times article reported that in six states- Florida, Texas, Connecticut, Georgia, New York, and Washington- and the District of Columbia have almost 1,000 NGRI patients who have been hospitalized for five to 15

⁵⁸ David B. Wexler, *Symposium on the ABA Criminal Justice Mental Health Standards: Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 543 (1985).

⁵⁹ See ABA STANDARDS FOR CRIMINAL JUSTICE § 7-7.3 commentary at 7-373 (1980) (noting that “[i]t is undisputed that the public feels threatened by the potential release of mental nonresponsibility acquittees.”

⁶⁰ McClelland, *supra* note 56.

⁶¹ National Association of State Mental Health Program Directors, *Forensic Patients in State Hospitals: 1999-2016, 2017*.

⁶² *Id.*

years.⁶³ More than 100 patients had been committed longer than 25 years.⁶⁴ Many of these NGRI patients committed only minor crimes and were unaware that they could be held indefinitely.⁶⁵

III. ARGUMENT FOR OVERTURNING *JONES*

A. *The Court's False Logic About 'Danger'*

The *Jones* Court argued that it “never has held that ‘violence,’ however that term might be defined, is a prerequisite for constitutional confinement.”⁶⁶ It pointed to a 1961 opinion that pushed back against the notion that minor crimes are non-dangerous, *Overholser v. O’Beirne*.⁶⁷ “[T]o describe the theft of watches and jewelry as ‘non-dangerous’ is to confuse danger with violence. Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both.”⁶⁸ The Court is correct in asserting both that all crimes have some inherent danger and that danger and violence are separate ideas. However, a closer look at the Court’s aforementioned opinions involving civil commitment reveals that the Court’s conclusion that it is not concerned with violence in this context constitutes little more than mincing words.

In *O’Connor v. Donaldson*, the Court granted certiorari in order to determine whether Donaldson’s continued

⁶³ McClelland, *supra* note 56.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Jones*, 463 U.S. at 365.

⁶⁷ 302 F.2d 852 (1961).

⁶⁸ *Id.* at 861.

confinement was constitutional.⁶⁹ The Court was purely analyzing the dangerousness prong of civil commitment, as the provision for release in question allowed for continuing mental illness, so long as the patient showed no “dangerousness.”⁷⁰ To show that Donaldson was not dangerous, the Court first pointed to the vague fact that Donaldson had never “committed a dangerous act.”⁷¹ This alone could support either the Court’s argument in *Jones* or this Note’s argument. The following sentence, however, sheds some light on the primary consideration for the Court. It notes that Donaldson had never “been suicidal or been thought likely to inflict injury upon himself.”⁷² When the Court’s mention of “dangerous acts” is combined with this consideration of suicidality, it seems likely that the Court’s main concern is whether an individual poses a physical danger to himself or others.

The argument that the Court has, in fact, historically been concerned with violence when it contemplates “danger” is bolstered by the Court’s discussion in *Addington v. Texas*. There, all parties stipulated to Addington’s mental illness, so the only inquiry for the Court to make was whether Addington was dangerous.⁷³ In support of the *Jones* Court’s argument, the *Addington* Court mentions that part of the reason the defendant was involuntarily committed were episodes in which he “caused substantial property damage

⁶⁹ O’Connor, 422 U.S. at 577.

⁷⁰ *Id.*

⁷¹ *Id.* at 568.

⁷² *Id.*

⁷³ *Addington*, 441 U.S. at 421.

both at his own apartment and at his parents' home."⁷⁴ But, this is couched within a larger discussion of dangerousness as violence. For example, Addington's last series of psychiatric episodes began with him being arrested for making threats of violence against his mother.⁷⁵ Additionally, the Court noted that Addington had been "involved in several assaultive episodes while hospitalized," which seems to indicate its fear of further violence by Addington.⁷⁶ In fact, the very law under which Addington was committed indicates that the State of Texas was concerned with dangerousness as it relates to violence, not dangerousness in a general sense. The two-part inquiry of Texas's law looks into "(1) whether the proposed patient is mentally ill, and if so (2) whether he requires hospitalization in a mental hospital for *his own welfare and protection or the protection of others*."⁷⁷ Each seems to indicate that both Texas and the Court were concerned with preventing a risk of harm, not generalized sociological danger.

While the civil commitment addressed by *O'Connor* and *Addington* and the insanity acquittal commitment in *Jones* are separate legal processes, they are undeniably related, as recognized by the *Jones* Court.⁷⁸ Additionally, as previously noted, the Court rejected Jones's "suggestion that the requisite dangerousness [for the civil commitment standard for confinement] is not established by [his committing] a non-

⁷⁴ *Id.*

⁷⁵ *Id.* at 420.

⁷⁶ *Id.* at 420-21.

⁷⁷ *Id.* at 420, citing Tex. Rev. Civ. Stat. Ann. Art. 5547-51 (Vernon 1958) (emphasis added).

⁷⁸ *Jones*, 463 U.S. at 366-67.

violent crime against property” on the grounds that “violence . . . is not a prerequisite for a constitutional commitment.”⁷⁹ The Court is *technically* correct on this notion; previous case law has only explicitly discussed “danger” and “dangerousness,” not “violence.” But the notion of “dangerousness” has two main definitions. First, it can refer to the “possibility [of] . . . harm or loss.”⁸⁰ This is the definition that the *Jones* Court relies upon in arguing that violence *per se* is not required. In this definition, any crime would certainly be able to be considered “dangerous,” as all crimes cause some variety of “harm or loss.” But, the aforementioned case history points to the alternate definition of dangerousness: “able or likely to inflict injury or harm.”⁸¹ *O’Connor* and *Addington*, the foundational cases for the constitutional protections required in civil commitment proceedings, each refer to this notion of danger. In the civil commitment context, this is the only definition that makes sense; otherwise, those with mental illness who had previously been convicted of a crime could be civilly committed without any further cause. So, while it is true that the Court has never required a finding of violence using that term specifically, the “danger” that the Court has always required is concerned with this risk of harm, rather than a vague notion of the “danger” of crime generally.

B. The Absurdity Doctrine

The Supreme Court has a long-established canon against interpretations that lead to absurd results. This rule against

⁷⁹ *Id.* at 365.

⁸⁰ <https://www.merriam-webster.com/dictionary/dangerous>

⁸¹ <https://www.merriam-webster.com/dictionary/dangerous>

absurdity requires that when “the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . the intention of the drafters, rather than the strict language, controls.”⁸² While NGRI statutes vary across the country, their purpose is almost always the same: to ensure the safety and protection of both the insanity acquittee and the community at-large. The *Jones* Court ruled that “the Constitution permits the Government, on the basis of the insanity judgment, to confine [a person] to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.”⁸³ It clarified this statement in *Foucha*, saying, “*i.e.*, the acquittee may be held as long as he is both mentally ill and dangerous, but no longer.”⁸⁴ At first pass, this rule appears to be giving some protection to insanity acquittees. But in reality, when coupled with the Court’s discussion of dangerousness in *Jones*, it leaves no real provision for the release of insanity acquittees. This lack of a road to release is against the purpose of NGRI statutes, and thus should be stricken down as an absurd result.

The first grounds for the release of an insanity acquittee is because he no longer suffers from mental illness. However, based on the high degree of mental illness required to be found NGRI, it is unlikely that most insanity acquittees will ever be determined to be entirely mentally health. Of the more than thirty states that have the option of finding a defendant not guilty by reason of insanity, the majority employ the *M’Naghten* test for insanity. The test consists of

⁸² United States v. Ron Pair Enter., Inc., 489 U.S. 235, 242 (1989).

⁸³ *Jones*, 463 U.S. at 368.

⁸⁴ *Foucha*, 501 U.S. at 77.

two main prongs: cognitive capacity and moral capacity.⁸⁵ The cognitive capacity prong examines “whether a mental [illness] leaves a defendant unable to understand what he is doing.”⁸⁶ The moral capacity prong assesses “whether a mental disease or defect leaves a defendant unable to understand that his action was wrong.”⁸⁷ This high standard, coupled with juries’ largely negative views of insanity acquittees, means that only those with fairly severe mental illness are found NGRI. Most forms of severe psychosis, other than those caused by drug or alcohol use, are chronic conditions that can be treated, but not cured. As a result, this grounds for release is precluded for insanity acquittees whose illness is chronic. This cuts directly against the goals of NGRI statutes to serve as a protective measure by basing the length of an acquittee’s confinement on the nature of his disease, rather than on the specific threat that he poses.

The second mechanism for the release of an insanity acquittee is by a showing that he is no longer dangerous. The *Jones* court specifically noted that the “relative ‘dangerousness’ of a particular individual . . . should be a consideration at the release hearings.”⁸⁸ This idea was echoed in *Foucha v. Louisiana*, in which an insanity acquittee was released because he demonstrated that he no longer posed a danger to himself or those around him.⁸⁹ But this does not make sense in light of how Mr. Jones himself became an insanity acquittee. Recall that Mr. Jones was charged with

⁸⁵ See, e.g. *Clark v. Arizona*, 584 U.S. 735, 736 (2006).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Jones*, 463 U.S. at 387, n. 14.

⁸⁹ 504 U.S. 71 (1992).

simple petty theft of a jacket, and that he appealed to the Court that his indefinite confinement was not warranted because of the low-level nature of his offense. The Court responded by stating that the specific nature of the offense Mr. Jones committed was irrelevant; he was considered a danger simply by virtue of his having committed a crime. This raises the question: how is it that all criminals can be considered dangerous *per se* in one part of the process, but differentiated based on the crime they committed in another part? Moreover, Mr. Jones himself appears to be a clear indication that there is no differentiation, as he was still being confined more than a year after being found NGRI for a petty crime.

The only remaining option for an insanity acquittee to be released is direct release by the director of the mental hospital in which they are housed.⁹⁰ This avenue for release is analogous to the idea of a pardon in the criminal context; while it is technically available, it is only employed in the rarest of cases and is not a means of release that most people can rely on. This is due to a number of factors, not least of which being the public's hugely negative perception of the release of insanity acquittees.⁹¹ As such, it should not be

⁹⁰ Jones, 463 U.S. at 357.

⁹¹ See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE § 7-7.3 commentary at 7-373 (1980) (stating “[i]t is undisputed that the public feels threatened by the potential release of mental nonresponsibility [insanity] acquittees.”). This negative perception is further fueled by media's frequent coverage of the release of insanity acquittees and any crimes they may commit post-release. See David B. Wexler, *Symposium on the ABA Criminal Justice Standards: Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528 (1985).

considered a typical avenue for release of an insanity acquittee.

The goals of NGRI statutes are the protection of those with mental illness and society and potential rehabilitation of insanity acquittees. However, the *Jones* decision cuts directly against that goal by labeling all insanity acquittees as “dangerous.” This assumption of dangerousness makes it more likely that an insanity acquittee will have to demonstrate lack of mental illness in order to be released. For the significant portion of insanity acquittees who suffer from chronic illnesses, this means a substantial likelihood of long-term confinement, even if the crime committed was minor. Since the *Jones* interpretation goes against the intent of NGRI statutes, it should be abandoned based upon the rule against absurdity.

C. Policy Implications Against Jones

Mental illness is one of the leading causes of disease in the United States. In any given year, over 40 million Americans, nearly one-fifth of the country, experience a mental illness of some kind.⁹² Of those, 9.8 million suffer from a “serious mental illness” that “substantially interferes with or limits one or more major life activities.”⁹³ These mental illnesses take a serious toll both on those who suffer from them and on society as a whole. Serious mental illnesses

⁹² *Any Mental Illness (AMI) Among Adults*, NAMI, <http://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among-adults.shtml> (last accessed January 10, 2019).

⁹³ *Serious Mental Illness (SMI) Among Adults*, NAMI, from <http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml> (last accessed January 10, 2019).

cost those who suffer from them \$193.2 billion in earnings every year, leading to an increased poverty rate along the mentally ill and depressing the economy as a whole.⁹⁴ A staggering 37% of adolescents ages 14-21 with mental illness drop out of school, the largest disability-based dropout group in the country.⁹⁵ More than 90% of children who die by suicide have a mental illness.⁹⁶ Adults with serious mental illness die an average of 25 years earlier than those without mental illness, largely due to treatable complications.⁹⁷ Mental illness occurs in every age, race, gender, and socioeconomic background and its effects can be felt throughout all of American society.

No social institution is more profoundly impacted by mental illness than the criminal justice system. Although rates vary by study, nearly all published research shows that jail detainees have a significantly higher rate of serious mental illness - such as bipolar disorder, major depression,

⁹⁴ T.R. Insel, *Assessing the Economic Costs of Serious Mental Illness*, AM. J. OF PSYCHIATRY, 2008, at 165-66 and 663-665.

⁹⁵ *35th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2013*, U.S. DEP'T OF EDUCATION, 2014, <http://www2.ed.gov/about/reports/annual/osep/2013/parts-b-c/35th-idea-arc.pdf> (last accessed January 10, 2019).

⁹⁶ *Mental Health: A Report of the Surgeon General*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., CTR. FOR MENTAL HEALTH SERVS., NAT'L INST. OF MENTAL HEALTH, 1999.

⁹⁷ *Morbidity and Mortality in People with Serious Mental Illness*, NAT'L ASSOC. OF STATE MENTAL HEALTH PROGRAM DIRECTORS COUNCIL, 2006, <https://www.nasmhpd.org/docs/publications/MDCdocs/Mortality%20and%20Morbidity%20Final%20Report%2018.08.pdf> (last accessed January 10, 2019).

schizophrenia, and other psychotic disorders - than the general population.⁹⁸ As of mid-2005, it was estimated that 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates had suffered from a diagnosis or symptoms of a mental illness in the past year.⁹⁹ Of those prisoners, about half met the criteria for mania, about a quarter showed symptoms of major depression, and about one fifth met the criteria for a psychotic disorder.¹⁰⁰ One pair of studies reported that 6% of men and 15% of women in Cook County, Illinois Jails showed symptoms of serious mental illness that would require treatment beginning upon arrival.¹⁰¹ Thus, mental

⁹⁸ See Ron Jemelka et. al, *The Mentally Ill in Prisons: A Review*, HOSPITAL AND COMMUNITY PSYCHIATRY, May 1989, at 481–490; Linda A. Teplin, *The Criminalization Hypothesis: Myth, Misnomer, or Management Strategy*, LAW AND MENTAL HEALTH: MAJOR DEVS. AND RESEARCH NEEDS, 1991, at 149–183.

⁹⁹ See Doris James and Lauren Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE, 2006, <https://bjs.gov/content/pub/pdf/mhppji.pdf> (the study included anyone who had been diagnosed or treated by a mental health professional or displayed symptoms of mental illness as defined in the DSM-IV) (last accessed January 10, 2019).

¹⁰⁰ See *id.* (finding that 43% of state prisoners and 54% of jail inmates suffer from mania, 23% of state prisoners and 30% of jail inmates suffer from major depression, and 15% of state prisoners and 24% of jail inmates suffer from a psychotic disorder).

¹⁰¹ Linda A. Teplin, *Psychiatric and Substance Abuse Disorders Among Male Urban Jail Detainees*, AM. J. OF PUBLIC HEALTH 84, February 1994, at 290–293; Linda A. Teplin et al., *Prevalence of Psychiatric Disorders Among Incarcerated Women*, ARCHIVES OF GENERAL PSYCHIATRY 53, June 1996, at 505–512.

illness poses a significant challenge for jails and prisons from the time of an inmate's arrival until his or her release.

Further, these disorders have a profound impact upon a person's experience while incarcerated. Several studies have shown that psychiatrically impaired inmates show both more frequent and more serious adjustment and disciplinary problems during incarceration than inmates who are not impaired.¹⁰² For example, inmates with mental illness are twice as likely to be involved in a physical altercation than inmates without mental illness.¹⁰³ Of those currently incarcerated, those with mental health problems are substantially more likely to be incarcerated multiple times.¹⁰⁴ Specifically, currently inmates with diagnosed bipolar disorder are more than three times more likely to have been

¹⁰² Hans Toch and Kenneth Adams, *Pathology and Disruptiveness Among Prison Inmates*, J. OF RESEARCH IN CRIME AND DELINQUENCY 23, February 1986, at 7–21; Richard C. McCorkle, *Gender, Psychopathology and Institutional Behavior: A Comparison of Male and Female Mentally Ill Prison Inmates*, J. OF CRIMINAL JUSTICE 23, January 1995, at 53–61; Christine H. Lindquist and Charles A. Lindquist, *Gender Differences in Distress: Mental Health Consequences of Environmental Stress Among Jail Inmates*, BEHAVIORAL SCIENCES AND THE LAW 15, Autumn 1997, at 503–523.

¹⁰³ See Doris James and Lauren Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE, 2006, <https://bjs.gov/content/pub/pdf/mhppji.pdf> (last accessed January 10, 2019).

¹⁰⁴ Jacques Baillargeon et al, *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, AM. J. OF PSYCHIATRY, 2009, <https://ajp.psychiatryonline.org/doi/abs/10.1176/appi.ajp.2008.08030416> (last accessed January 10, 2019).

incarcerated four or more times before.¹⁰⁵ Moreover, prisoners are less likely than other members of the population to have their mental illness treated, and the medical care that prisons provide is often woefully lacking.¹⁰⁶

Clearly, prisons are not the optimal environment for those who suffer from mental illness. Not only is that population unlikely to get meaningful treatment in prison, they are more likely to experience malingering and worsening of symptoms while there.¹⁰⁷ Their presence in prisons is also not ideal for prison officers, who tend to only have basic training in handling mental health crises and thus are less well-equipped to deal with these situations than mental health professionals. Clearly, then, any policies that promote mentally ill individuals' placement in prisons over treatment facilities should be frowned upon. But the Court's decision in *Jones* does exactly that. The goal of an NGRI finding is to be able to implement measures rooted in rehabilitation, rather than in punishment. It is precisely this chance at rehabilitation that likely makes mentally ill individuals seek an NGRI finding, rather than proceeding through the criminal justice system. But, if individuals charged with a crime were aware that by pleading NGRI, they could face indeterminate sentences, they would be less likely to elect to plead that way; most people would not choose indefinite confinement over a defined term of confinement, even if the former included a rehabilitation component. This is especially true for those

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g.* *Brown v. Plata*, 563 U.S. 493 (2011); *Braggs v. Dunn*, 257 F. Supp.3d 1171 (M.D. Ala. 2017).

¹⁰⁷ *Braggs v. Dunn*, 257 F. Supp.3d 1171, 1193 (M.D. Ala. 2017).

who commit low-to-medium level offenses who would likely receive minimal jail time. Unfortunately, it is those individuals—people who suffer from mental illness but have not yet committed a serious crime—who are most able to be helped by treatment. The *Jones* decision should be overruled in favor of more clearly defined confinement sentences in order to better promote rehabilitation and deter recidivism.

IV. PROPOSED SOLUTIONS

A. *The California Model*

California approaches the release of insanity acquittees dramatically differently than *Jones*'s permission to indefinitely commit. Insanity acquittees in California can be released through the traditionally-available routes—namely, a showing of either recovery from mental illness or lack of dangerousness or direct release by the treatment facility.¹⁰⁸ However, even if none of these routes are available, insanity acquittees are automatically eligible for release after having been committed for the maximum prison sentence possible for the crime committed.¹⁰⁹ This approach ensures that individuals like Mr. Jones, who suffer from mental illness and commit only minor crimes, are not deprived of their liberty indefinitely. Additionally, it allays public concern about “getting off too easily” by requiring that individuals spend just as much time in a mental health facility as they would have in jail.

¹⁰⁸ *Not Guilty by Reason of Insanity (NGRI) and Restoration of Sanity*, DISABILITY RIGHTS CALIFORNIA, 1995, <https://www.disabilityrightsca.org/system/files/file-attachments/517201.pdf> (last accessed March 4, 2019).

¹⁰⁹ McClelland, *supra* note 56.

California's NGRI release process is also responsive to the widely-held public concern surrounding the release of insanity acquittees. There are certain instances in which insanity acquittees may be confined beyond their would-be prison sentence. Specifically, if the acquittee was charged with a felony and remains a danger to him/herself or others, he or she may be confined for an additional two years.¹¹⁰ The court makes the final determination of whether the individual should receive this additional confinement term, and it can be renewed indefinitely.¹¹¹ This decision, although discretionary, is backed by procedural protections as well. In order for an acquittee's confinement term to be extended, the mental health facility in which the individual is housed must make a recommendation to extend the maximum confinement term.¹¹² Then, the district attorney must decide whether to petition the court to extend the term or to release the acquittee.¹¹³ If the district attorney petitions for extension, the court holds a formal adversarial hearing to determine whether it will grant the petition.¹¹⁴ Even if the petition is granted, both the insanity acquittee and the mental health facility can petition the court to order the individual to carry out the additional term in a state outpatient mental health

¹¹⁰ Disability Rights California, *supra* note 111.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ However, this protection is likely only one in theory, but not reality. As previously noted, because of the public fear and outrage surrounding an insanity acquittees' release, it is unlikely that a district attorney would override a mental health facility's recommendation to continue confinement.

¹¹⁴ *Id.*

program.¹¹⁵ The same process must occur every two years for the extension to continue to be renewed.¹¹⁶

California's model for the release of insanity acquittees is far superior to the model of indeterminate confinement set forth in *Jones*, and it should be adopted nationwide. Setting the maximum confinement term at the same length as the maximum prison sentence possible for the crime promotes fairness by ensuring that individuals are not deprived of liberty because of mental illness while acknowledging the legislature's notions of appropriate confinement terms. Additionally, the possibility of term extension ensures that individuals who remain a danger to themselves or the public continue to receive treatment regardless of their would-be prison sentence and affords them due process protections. Thus, the system achieves a best-case for all involved parties.

B. Mandatory Padilla Warnings for Insanity Acquittees

In *Padilla v. Kentucky*, Mr. Padilla, a native of Honduras, was arrested for drug-related charges.¹¹⁷ During the plea negotiation process, Padilla's attorney advised him that even with a guilty plea, he "did not have to worry about immigration status since he had been in the country so long."¹¹⁸ However, contrary to this advice, Padilla's felony conviction virtually guaranteed his deportation.¹¹⁹ Padilla appealed, arguing that he would not have plead guilty had he

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 559 U.S. 356 (2010).

¹¹⁸ *Id.* at 359.

¹¹⁹ *Id.*

known the consequences.¹²⁰ The Supreme Court found that the attorney's erroneous advice constituted constitutionally deficient counsel as defined by *Strickland v. Washington*.¹²¹ The Court further held that "counsel must inform her client whether his plea carries a risk of deportation."¹²² It based this decision largely on the necessity that defendants be fully informed of all of the consequences of any major decisions that they make in the trial process.¹²³

The *Padilla* advisory, as it has come to be known, has been expanded beyond the immigration context.¹²⁴ Indeed, counsel is expected to notify clients of the foreseeable consequences of any of their decisions during the trial process.¹²⁵ This information allows defendants to make a fully informed decision regarding how they will plead to the charges against them. This intelligent and knowing plea is not only helpful for defendants' outcomes in the criminal justice system; it is required by the Supreme Court.¹²⁶

If the *Jones* decision is not overturned or modified to reflect the California confinement model, the *Padilla*

¹²⁰ *Id.*

¹²¹ 466 U.S. 668 (1984).

¹²² *Padilla*, 559 U.S. at 374.

¹²³ *Id.* at 366-70.

¹²⁴ See, e.g., Hahn H. Le, *The "Padilla Advisory" and its Implications Beyond the Immigration Context*, 20 Wm. & Mary Bill Rts. J. 589 (2011).

¹²⁵ See, e.g., *United States v. Aguiar*, 894 F.3d 351, 359-62 (D.C. Cir. 2018) (holding that counsel was deficient in failing to notify his client of the clear and usual consequences of failing to accept a plea bargain).

¹²⁶ See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (holding that in order for a guilty plea to be valid, it must be knowing, intelligent, and voluntary).

advisory should be expanded to this context. If that were to occur, then counsel would be required to notify defendants that an NGRI plea, if successful, can result in indefinite commitment. This is critically important to protecting the due process rights of defendants, as they may not be aware that their hospital confinement can last much longer than their would-be prison confinement. When defendants have full knowledge of the process, they are able to make better decisions for their own outcomes. Just as the Court has recognized that defendants have an irrefutable right to know the full consequences of a guilty plea, it should recognize the right to knowledge about pleading not guilty by reason of insanity.

CONCLUSION

Involuntary confinement imposed by the government, no matter the context, represents a significant deprivation of liberty. As such, considerations surrounding it should be viewed with caution. The Court's decision in *Jones* ignores this basic principle by allowing indeterminate confinement of individuals with mental illness without providing them adequate protection under the law. What's more, the Court relied on faulty reasoning by ignoring its previous rulings' spirit and instead simply looking to their precise verbiage. In doing so, the Court came to the conclusion that commission of crime causes an individual to be so dangerous as to warrant his indefinite confinement. However, this conclusion cuts directly against the intent of the insanity defense: a long-held understanding that mental illnesses can lead their sufferers to lack the moral understanding required for conviction. Moreover, the *Jones* outcome incentivizes defendants to

accept finite prison sentences, rather than taking a chance on an undefined term of treatment. This places an additional strain on the criminal justice system, which is required to provide at least basic-level treatment to individuals with mental illness. Unfortunately, that additional strain usually doesn't lead to positive outcomes, and most individual's mental illness worsens with imprisonment. The first solution proposed here protects those individuals' liberty interests by tailoring confinement terms to the needs of the individual and the crime committed. If that type of plan is not adopted by the judicial system, then counsel should be required to notify clients of the possibility of indefinite confinement, allowing them to make a fully informed decision about how to plead. No matter the solution, one thing is clear: individuals like Mr. Jones, whose mental illness leads them to commit petty, nonviolent crime, deserve to have a viable path to receiving treatment and rehabilitation, rather than being locked away indefinitely.

**THE NEW LIFE OF ALABAMA’S HB 56:
CRIMMIGRATION AND RACIAL PROFILING IN U.S.
TRAFFIC STOPS**

*Sumona Gupta**

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INTRODUCTION

The Beason-Hammon Alabama Taxpayer and Citizen Protection Act is the decidedly euphemistic official title of HB 56, an Alabama immigration law deemed the “harshest” in the country. Its name is fitting, however, as it represents the law’s nativist and racist underpinnings that existed under the guise of economic anxiety. It specifically targeted Alabama’s small Hispanic immigrant population and was intended at the outset to strike fear in their communities – to “attack every aspect of an illegal alien’s life,” according to

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Micky Hammon, the Alabama state representative who co-sponsored the bill.¹

Signed into law in June 2011, HB 56 faced court challenges almost immediately. Its provisions included prohibition of financial transactions between undocumented people and agencies or individuals, criminalization of people sheltering or transporting undocumented immigrants, and required verification of the immigration status of schoolchildren.² Exact figures for the number of people who left the state because of these extreme measures is not available, but it is clear that they resulted in great loss in the forms of both revenue for the state and members of communities across Alabama.³

After the Supreme Court overturned almost every section of Arizona's SB 1070 (the blueprint law for HB 56) in June 2012 and the 11th U.S. Circuit Court of Appeals blocked almost all provisions of HB 56 the following month, it seemed that immigrant defenders had been victorious in their efforts to dismantle the law. A settlement was reached between the state of Alabama and advocacy groups in 2013, seemingly marking the law's true end.⁴ However, both the Supreme Court and the 11th Circuit Court agreed that one

¹ See Raymond Mohl, *The Politics of Expulsion: A Short History of Alabama's Anti-Immigrant Law, HB 56*, 35 J. AM. ETHNIC HISTORY 47 (2016).

² *Id.* at 47.

³ Samuel Addy, CTR. FOR BUS. & ECON. RESEARCH, UNIV. OF ALA., A COST-BENEFIT ANALYSIS OF THE NEW ALABAMA IMMIGRATION LAW (2012), available at <http://cber.cba.ua.edu/New%20AL%20Immigration%20Law%20-%20Costs%20and%20Benefits.pdf>.

⁴ See Mohl, *supra* note 1, at 55.

portion of Arizona’s and Alabama’s laws could remain intact, provisions allowing law enforcement officers to make a “reasonable attempt... to determine the immigration status” of any person they have stopped or detained if they have a “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”⁵

This comment will argue that this key provision, (section 12), which has yet to be officially enjoined, is inherently prejudicial. It allows for continued and unchecked racial profiling by police officers. As a review article, it will combine historical, legal, sociological, and analytical scholarship with journalistic articles and “grey literature” (e.g. fact sheets, issue papers, and research reports). It uses the background and traffic stop provision of HB 56 as a lens to further examine issues of racial profiling and prejudice in immigration policing and legislation.

Section I of this paper will outline the history of HB 56 and how racial tensions caused by a relatively small influx of Latino immigrants to Alabama crystallized to form a law based on xenophobic sentiments. This section will also detail the legal challenges the law faced almost immediately after its passage and the “new life” it has taken in the present.

Section II will delve into the legal basis of racial profiling by police in immigration-related traffic stops, including the 1975 Supreme Court ruling in *United States v. Brignoni-Ponce*. It will discuss the history of ICE agreements with state and local police and how they have heightened both

⁵ See Benjamin D. Galloway, *The Beginning of the End: United States v. Alabama and the Doctrine of Self-Deportation*, 64 MERCER L. REV. 1100 (2013)

“crimmigration” and “shadow” immigration enforcement. It draws on sociological research tying legal and social stereotypes of immigrants as “illegals” with these policing measures. This section also incorporates new data from Stanford University researchers who have analyzed over one hundred million police stops. They have proven conclusively that racial profiling by law enforcement is prevalent throughout the United States in traffic stops and that its targets are disproportionately black or Hispanic drivers.

Finally, Section III will consider the possible remedies available to prevent racial profiling in traffic stops. This includes small steps on the state level like passage of Alabama state Senator Rodger Smitherman’s racial profiling data collection bill or a similar national law. It would be extremely unlikely that any one measure could stop the practice outright, however, unless deeper sociological and legal criminalization of immigration status is adequately addressed.

I. BACKGROUND

A. *HB 56’s Journey to Passage*

Kris Kobach, an attorney from Kansas and former member of the George W. Bush Justice Department, had long been a proponent for hardline, uncompromising crackdowns on illegal immigration when he came to speak to lawmakers at a 2007 conservative conference in Birmingham, Alabama. Since the 1990s, he had worked with the Federation for American Immigration Reform (FAIR), a group that works to curtail not only illegal immigration to the United States, but

legal immigration as well.⁶ By the mid 2000s, Kobach had begun to seek more direct influence with lawmakers for his anti-immigration agenda. He worked his way around the country as a “traveling salesman” to local or state politicians who shared his goals.

Starting in small towns like Valley Park, Missouri and Hazelton, Pennsylvania, he wrote bills with the intent of creating a living environment so hostile, it would result in “self-deportation.” This included random ID check requirements or prohibiting landlords from renting to immigrants, among other things. In each of these localities, his laws were found unconstitutional, costing towns hundreds of thousands or even millions of dollars from lawsuits while Kobach left with profits from his legal fees.⁷

During President Obama’s tenure, Kobach set his sights higher, working on immigration legislation for the entire state of Arizona. In 2010, Randal Archibold and Jennifer Steinhauer of the *New York Times* wrote that the influx of Latino immigrants to the state combined with “an embattled state economy” to create an environment receptive to harsher policies toward illegal immigration.⁸ Historian and journalist

⁶ See Mohl, *supra* note 1, at 45; *About FAIR*, FEDERATION FOR AMERICAN IMMIGRATION REFORM, *available at* <https://www.fairus.org/about-fair>.

⁷ Zachary Mueller, *Immigration 101: Who is Kris Kobach*, AMERICA’S VOICE, *available at* <https://americasvoice.org/blog/kris-kobach/>.

⁸ Randal C. Archibold and Jennifer Steinhauer, *Welcome to Arizona, Outpost of Contradictions*, THE NEW YORK TIMES, April 28, 2010, *available at* <https://www.nytimes.com/2010/04/29/us/29arizona.html?mtrref=undefined>.

Mike Davis wrote that the “racist component” of Far Right anti-immigrant sentiments “interlocks neatly with the more acceptable economic alarmism,”⁹ and Kobach capitalized on both when authoring his Arizona immigration bill SB 1070.

The bill, which was passed in 2010, was among the first to rely on the concept of “attrition through enforcement.”¹⁰ Outlined in 2005 by Mark Krikorian of the conservative Center for Immigration Studies, this idea sets out to accomplish the same goal as mass deportations in a more “realistic” way. It combines increased “conventional enforcement” (like arrests and deportations) with increased requirements for verification of legal immigration status to “make it as difficult and unpleasant as possible to live [in the United States] illegally.”¹¹ Kobach set out to encourage “self-deportation” with such measures as requiring police to check the immigration status of anyone they have stopped, allowing officers to arrest someone if they suspect they are undocumented, criminalized holding or applying for a job as an undocumented immigrant, and stopped public services for undocumented people.¹²

Alabama, like Arizona, had seen an increased number of Latino immigrants arrive since the late 1980s, though it was a much more modest number. Census data from 2010 showed

⁹ See Mohl, *supra* note 1, at 42.

¹⁰ *Id.* at 45.

¹¹ Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, CENTER FOR IMMIGRATION ENFORCEMENT, May 1, 2005, available at <https://cis.org/Downsizing-Illegal-Immigration>.

¹² Az. S. Bill 1070, 2nd Reg. Sess. See also Mohl, *supra* note 1, at 44-45.

that only 186,000 self-identified Hispanic people lived in Alabama, about 4 percent of the state’s total population. Working mostly in the agricultural, landscaping, or service industries, small towns saw the largest increases in Latino immigrants. In Albertville, Collinsville, and Russellville, the population was 30% or more Latino. However, state politicians seized on the dramatic 145% increase of immigrants to stoke fears of a “majority-minority” state (while ignoring the fact that this number was only because of the very small initial number of immigrants).¹³

Racial tensions were again conflated with concerns of illegal immigration and job loss. Lawmakers and residents alike considered all who had a Latino appearance or spoke Spanish as their first language to have immigrated to the country illegally, wrote Tuscaloosa Unitarian minister Fred Hammond in an open letter. By 2007, when Kobach visited the state, town halls across Alabama drew large crowds of people clamoring for harsher penalties for illegal immigrants. Republican lawmakers began pushing for an English-only driver’s license exam and increased penalties for unlicensed drivers. State senator Scott Beason had led the charge in these efforts.¹⁴ He enthusiastically formed a collaborative

¹³ See Mohl, *supra* note 1, at 43.

¹⁴ *Id.* at 43-44. This practice (requiring an English-only drivers’ license exam) in Alabama was challenged in in 2001. The Supreme Court found that only the federal government may sue government agencies for violating Title VI of the Civil Rights Act, not private actors, so the plaintiffs could not file a civil rights lawsuit against the state’s Department of Public Safety. See *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001). However, the Alabama Supreme Court reaffirmed that the exam should be given in multiple languages in 2011. See The Associated Press, *English-only challenge to Alabama*

relationship with Kobach after speaking with him at the 2007 conference. They worked together to author what would become HB 56. Making final revisions to the bill on his laptop during a hunting trip, Kobach claimed that, this time, the bill would be “airtight” to challenges.¹⁵

Though HB 56 borrowed heavily from its sister law, Arizona’s SB 1070, it went a step further in its discriminatory intent. Along with the provisions set forth in the Arizona law, it prohibited financial transactions between undocumented immigrants and agencies or individuals, criminalized sheltering or transporting undocumented immigrants to school, medical facilities, or other destinations, required that public schools verify the immigration status of students, and made it a crime for undocumented people to even live in the state.¹⁶ It therefore won the title of the nation’s “toughest” immigration law when it was signed into law as the Beason-Hammon Alabama Taxpayer and Citizen Protection Act by Governor Robert Bentley in June 2011.¹⁷ Many immigrant advocates likened the law to the state-sanctioned racism of Alabama’s infamous past – “Juan Crow” instead of Jim

driver's license test knocked down by state Supreme Court, AL.COM, March 4, 2011, available at http://blog.al.com/wire/2011/03/english-only_challenge_to_alab.html.

¹⁵ See George Talbot, *Kris Kobach, the Kansas lawyer behind Alabama's immigration law*, AL.COM, October 16, 2011, available at http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html.

¹⁶ See *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236 (11th Cir. 2012).

¹⁷ See Peggy Gargis, *Alabama sets nation's toughest immigration law*, REUTERS, June 9, 2011, available at <https://www.reuters.com/article/us-immigration-alabama/alabama-sets-nations-toughest-immigration-law-idUSTRE7584C920110609>.

Crow.¹⁸

B. Aftermath and Legal Challenges

Almost immediately after the law went into effect, immigrant rights groups and advocates like the American Civil Liberties Union, and the Hispanic Interest Coalition of Alabama filed lawsuits challenging it in federal district court. They challenged it on the grounds that it was a violation of the supremacy clause of the Constitution, as it made matters of immigration a federal, not state or local responsibility.¹⁹ The U.S. Justice Department also challenged it for this reason.²⁰ Another argument the Justice Department and advocacy groups made was that HB 56 violated the Fourth and Fourteenth Amendments to the Constitution which guarantee protections against unreasonable searches and seizures and the Equal Protection Clause, respectively.²¹ Critics of the law said that it would violate the civil rights of immigrants or citizens based on their perceived nationality or race. The ability of police officers to use a “reasonable suspicion” that a person is undocumented to warrant a stop or search was called into question, as it could lead to an

¹⁸ See AFL-CIO, CRISIS IN ALABAMA: INVESTIGATING THE DEVASTATING EFFECTS OF H.B. 56 11 (2011); Jennifer E. Brooks, “No Juan Crow!” Documenting the Immigration Debate in Alabama Today, SOUTHERN CULTURES (2012).

¹⁹ See Mohl, *supra* note 1, at 51.

²⁰ See United States v. Alabama, 813 F. Supp. 2d 1282, 1292 (N.D. Ala. 2011).

²¹ See Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti- “Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011)

environment rife with racial profiling.²²

A helpline for people who would be affected by the law was established by the National Immigration Law Center and the SPLC the day after HB 56 went into effect. They recorded information from thousands of callers who described how almost every aspect of their lives had been targeted by the law. From that information, the National Immigration Law Center created a report describing three key findings – that the provisions of HB 56 were legalized discrimination tactics aimed at people believed to be “foreign,” that the provision requiring public schools to verify the immigration status of students and their parents discouraged children of color from attending school and heightened bullying, and finally that the “damaging and unconstitutional” practice of racial profiling by police officers was reported much more often than it had been prior to the law’s enactment. Reports of profiling by police came not only from undocumented people, but from a mix of U.S. citizens, immigrants with lawful immigration status, and immigrants without lawful immigration status. Their main shared characteristic was their ethnic appearance.

One caller named Roberto said he was stopped when walking home from work by police officers who asked for his immigration “papers” and gave no other reason for his stop. When Roberto provided his license, the officers said they believed it to be fraudulent, and the next time they saw him, they would arrest him and “send him back to Mexico.” Another caller named Ana reported being pulled over repeatedly by law enforcement with little justification. One night, after being followed by an officer in a police car for

²²*Id.* at 388

one mile, he claimed it was because she had her high beams on and that she was “hurrying.” He asked her pointed questions about her immigration status, and when she said she did not understand one of his questions, he became visibly agitated and insisted she was not being truthful to him. Roberto and Ana as well as other callers like them believed that it was their perceived race or ethnicities that made police stop them, not a valid, articulable purpose.²³

In August of 2011, two months after HB 56 was passed, U.S. District Court Judge for the Northern District of Alabama, Sharon Blackburn, reviewed the law and upheld several key provisions. This included section 12, which required law enforcement officers to check the immigration status of any person they stopped or who was in their custody if the officer had “reasonable suspicion” that a person was in the country illegally, section 18, which required that police officers to hold people for driving without a license and verify their immigration status, and section 28, which required public schools to verify the immigration status of all students enrolled.²⁴ After increased national scrutiny and mobilization against the law, however, the 11th U.S. Circuit Court of Appeals granted injunctions against sections 10, 27, 28, and 30, making sections 12 and 18 the only provisions still active.²⁵

In June 2012, the Supreme Court heard *Arizona v. United*

²³ National Immigration Law Center, STORIES FROM THE ALABAMA HOTLINE: RACIAL PROFILING AFTER HB 56 2-4 (2012).

²⁴ See *United States v. Alabama*, 813 F. Supp. 2d 1282, 1292 (N.D. Ala. 2011).

²⁵ See Galloway *supra* note 5, at 1096.

States, concerning Arizona’s SB 1070. In a 6-2 vote, the Court overturned almost every section of the Arizona law, which had clear implications for the law modeled after it, HB 56. It affirmed federal authority over state authority in most matters of immigration, overturning sections that made it illegal to be in the state or apply for a job without legal immigration status, as that was within federal purview. However, section 2(B), requiring police to make a “reasonable attempt...to determine the immigration status” of any person that they have arrested, detained, or stopped if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” The Court left this section open to challenges in lower courts, as Arizona had adopted some self-imposed limitations to the law and there was uncertainty about how it would be enforced.²⁶

Historian Raymond Mohl, a professor at the University of Alabama at Birmingham, wrote that after the Supreme Court’s decision, “both sides claimed a victory of sorts.” Immigrant advocates continued to demonstrate against HB 56, as thousands of protestors marched through the state capital, Montgomery multiple times in 2012 and hundreds of church leaders rallied outside the Statehouse to denounce the law’s “xenophobic and racist” nature in April of that year.²⁷ Amid the tensions of the year, Dr. Samuel Addy, an economist at the University of Alabama in Tuscaloosa, released his estimate of the revenue the state lost and would continue to lose without its Hispanic immigrant population.

²⁶ See *Arizona v. United States*, 132 S. Ct. 2492, 2947–98 (2012).

²⁷ See Mohl, *supra* note 1, at 55.

He wrote that between forty and eighty thousand immigrants could leave, reducing Alabama’s GDP by \$2.3 billion to \$10.8 billion for each year the law was in effect. Addy came to this number by combining estimated costs of enforcement and litigation, “inconveniences” for citizens and businesses, lessened economic development, and reduced demand (as immigrants would no longer earn or spend incomes in the state if they left).²⁸ Addy admitted his findings were not precise, as they were solely based on estimates, but they still garnered significant media attention. Even the notably conservative Fox News ran an opinion piece calling the law a “train wreck” for these economic repercussions.²⁹ Some Republican state lawmakers, however, dismissed the findings as “baloney,” touting the purported “job creation” aspect of HB 56.³⁰

In August 2012, a three-judge panel for the 11th U.S.

²⁸ See Addy, *supra* note 3, at 1.

²⁹ Alex Nowrasteh, *Alabama's Immigration Law Is a Train Wreck*, FOX NEWS, September 2, 2011, available at <https://www.foxnews.com/opinion/alabamas-immigration-law-is-a-train-wreck>.

³⁰ See Mohl, *supra* note 1, at 50. Many of the jobs vacated by undocumented immigrants who left the state were not taken by native-born Alabamians. These jobs, like picking produce, have high physical labor requirements and low pay. Many farmers reported labor shortages after HB 56, resulting in unpicked produce rotting in fields. Governor Robert Bentley announced a program in 2011 to connect unemployed Alabamians seeking work with farmers who lacked laborers, but the few hundred people who were hired through the program “barely lasted a single day.” See also Pioneer Press, *Few Americans taking immigrants’ jobs in Alabama*, PIONEER PRESS, October 19, 2011, available at <https://www.twincities.com/2011/10/19/few-americans-taking-immigrants-jobs-in-alabama/>.

Circuit Court of Appeals decided on whether to permanently enjoin certain provisions of HB 56 following the *Arizona v. United States* decision. The panel echoed much of the Court's decisions, enjoining the sections of HB 56 that matched those overturned in *Arizona*. Judge Charles Wilson analyzed sections 10, 11(a), 12(a), and 27 individually in the court's opinion. The first two (making a lack of holding immigration papers a state crime and making it a crime to apply for work without proper authorization) were found to be preempted by federal law. Section 27, which prohibited recognition of contracts in which one party "had direct or constructive knowledge" that the other party was undocumented, was also preempted. This provision, which the ACLU claimed would prevent any "foreign"-seeming person from accessing necessities like electricity or water without proof of citizenship³¹, was decried by Judge Wilson. To say it was "extraordinary and unprecedented would be an understatement...Essentially, the ability to maintain even a minimal existence is no longer an option for unlawfully present aliens in Alabama," he wrote.³²

However, Section 12(a) (which required law enforcement officers to verify the immigration status of any person they had stopped and had "reasonable suspicion" was undocumented) was not found to be preempted by federal law. The Supreme Court's upholding of a similar provision in

³¹ Cecillia Wang, *Victory! Appeals Court Blocks Additional Provisions of H.B. 56, Alabama's Anti-Immigrant Law*, AMERICAN CIVIL LIBERTIES UNION, March 9, 2012, available at <https://www.aclu.org/blog/immigrants-rights/state-and-local-immigration-laws/victory-appeals-court-blocks-additional>.

³² *Alabama*, 691 F.3d at 1293

the Arizona law was followed. In *Arizona*, they concluded that “[c]onsultation between federal and state officials is an important feature of the immigration system,” and thus, state law enforcement officers could work with federal ones in matters of immigration. However, as in *Arizona*, the provision was left open to challenges.³³

C. “New Lifeë”

One month after the ruling, Police chief Brian Stillwell of Clanton, Alabama declared he would not enforce section 12 of HB 56. He came to his decision after realizing that it usually took hours for federal authorities to verify the immigration status of people police had stopped. He believed that these prolonged stops done without an arrest would amount to a constitutional rights violation. Some other jurisdictions in the state (like Birmingham) did the same, waiting for court battles to cease before they acted. Montgomery and Tuscaloosa police did not, however, leading to uneven application of what remained of the law across the state.³⁴

The Hispanic Interest Coalition of Alabama (HICA) along with the ACLU, SPLC, National Immigration Law Center (NILC) and other advocacy groups continued with their lawsuit to permanently enjoin provisions of the law that had been temporarily enjoined by courts. In October 2013, a

³³ *Alabama*, 691 F.3d at 1285.

³⁴ Jeremy Redmon, *Alabama’s show-me-your-papers law: A cautionary tale for Georgia*, ATL JOURNAL-CONSTITUTION, September 16, 2012, available at <https://www.ajc.com/news/alabama-show-your-papers-law-cautionary-tale-for-georgia/SkUdHyOVGgM85yUTqGN27O/>.

settlement was reached in the lawsuit. The state agreed to block sections 10, 28, 13, 11(a), 11(f) and (g), and 27 and to pay \$350,000 in legal fees to the coalition lawyers. In a press release, the NILC wrote that the agreement also “significantly limits racial profiling under sections 12 and 18.” This was because the state agreed that police could not hold someone in a traffic stop just to check their immigration status. “This is a significant victory because many departments across the state have interpreted the ‘show me your papers’ provisions to authorize detaining people just to check their immigration status,” the press release read.³⁵

The settlement was a significant victory for the advocacy groups who had rallied against HB 56 and similar laws since the day it was signed. Hammon, who was House Majority Leader at the time of the settlement (but was later jailed for felony mail fraud), still insisted that the “meat of the bill” was intact.³⁶ However, the national news media generally came to

³⁵ See Press Release, National Immigration Law Center, Civil Rights Coalition Victorious in Suit Against Alabama’s Anti-Immigrant Law: Agreement Permanently Blocks Most of the Law’s Worst Provisions, Strictly Limits Racial Profiling Provision (October 29, 2013), available at <https://www.nilc.org/2013/10/29/nr102913/>. One year later, the state agreed to pay another \$230,000 to coalition members in the settlement for a lawsuit against another anti-immigrant provision, making the total amount owed to coalition lawyers \$580,000. See Press Release, American Civil Liberties Union, Alabama to Pay \$580,000 in Legal Bills because of Unconstitutional Anti-Immigrant Laws (May 6, 2014), available at <https://www.aclu.org/news/alabama-pay-580000-legal-bills-because-unconstitutional-anti-immigrant-laws>.

³⁶ See Mike Cason, *HB 56 two years later: Settlement takes bite out of Alabama’s immigration law*, AL.COM, November 3, 2013, available at

the consensus that the law was officially dead. MSNBC ran a HB 56 story titled “How America’s harshest immigration law failed.”³⁷

Two years later and six years after the law’s signing, the stream of national attention HB 56 brought Alabama had mostly dissipated, as the law seemed “dead.” However, Connor Sheets, a reporter for Alabama-centric news website AL.com, wrote an article claiming the law was very much alive – it was “still on the books” and had “[gotten] new life under Trump.” Hammon was, perhaps, correct. After the 2013 settlement, Sheets wrote, legislators had not formally repealed the remnants of HB 56 not blocked by courts. “Adding to the confusion is the fact that even immigration lawyers and advocates find it difficult to determine exactly which provisions of the law have been blocked and to what degree, as well as how strictly they are being enforced,” he added.³⁸

http://blog.al.com/wire/2013/11/hb56_two_years_later_constitut.htm
l. Brian Lyman, *Former Alabama House majority leader gets 3 months for mail fraud*, MONTGOMERY ADVERTISER, February 15, 2018, available at

<https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2018/02/15/former-alabama-house-majority-leader-gets-3-months-mail-fraud/341127002/>.

³⁷ Benjy Sarlin, *How America’s harshest immigration law failed*, MSNBC, December 16, 2013, available at <http://www.msnbc.com/msnbc/undocumented-workers-immigration-alabama>.

³⁸ Connor Sheets, *Alabama’s 2011 anti-immigrant law H.B. 56 still on books, gets new life under Trump*, AL.COM, March 24, 2017, available at

https://www.al.com/news/birmingham/2017/03/hb_56_alabamas_2011_anti-immig.html.

An undocumented Mexican immigrant named Arturo who was interviewed for the article claimed that he and many other undocumented residents of his trailer park in Irondale had been pulled over. Though they were not asked about their immigration status, Arturo noted that the fear of arrests and being turned over to ICE was heightened. ICE raids and “collateral arrests” had increased dramatically since 2017 in the state.³⁹ Though police officers are not allowed to stop people just to verify their immigration status, Alabama police are not required to record information like the race of a person stopped or reason for a stop, so it is unknown whether the practice has truly ceased.⁴⁰ These actions are indicative of a larger trend. Courts and laws alike have gradually converged criminal and immigration enforcement, with the inevitable conclusion being discriminatory laws like HB 56 and police profiling.

II. LEGAL BASIS FOR RACIAL PROFILING BY POLICE

A. *Supreme Court Precedent and United States v. Brignoni-Ponce*

Racial profiling, according to the ACLU, “is the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the

³⁹ Connor Sheets, *ICE raids have 'blown up' in Alabama since Trump immigration orders went into effect*, AL.COM, March 1, 2017, available at https://www.talk.com/news/2017/03/ice_raids_have_blow_up_in_ala.html.

⁴⁰ John Sharp, *Police fought Alabama lawmakers over racial profiling stats, but bill to surface again next year*, AL.COM, May 27, 2018, available at https://www.al.com/news/2018/05/post_169.html.

individual's race, ethnicity, religion or national origin.”⁴¹ Under the Fifth Amendment’s Due Process Clause and the Fourteenth Amendment’s Equal Protection Clause, police are barred from using race or ethnicity as the sole justification for a stop.⁴² However, it is widely known that racial profiling is a widespread systemic issue. One common example is the increased likelihood of police officers across the country to stop African-American drivers for minor traffic violations,⁴³ as described by the phrase “driving while black” (a play on “driving while intoxicated”).⁴⁴

The Supreme Court has played an instrumental role in how racial profiling occurs today, namely through establishing and upholding the “reasonable suspicion” exception. It is used by law enforcement to justify stops or temporary detentions in the absence of probable cause.⁴⁵ The reasonable suspicion exception was established in the landmark 1968 case *Terry v. Ohio*. After hearing the case, the Supreme Court ruled that although the plainclothes officer

⁴¹ See ACLU, *RACIAL PROFILING: DEFINITION*, ACLU.org, available at <https://www.aclu.org/other/racial-profiling-definition>.

⁴² See Lupe Salinas and Fernando Colon-Navarro, *Racial Profiling as a Means of Thwarting the Alleged Latino Security Threat*, 37 THURGOOD MARSHALL L. REV. 9 (2011).

⁴³ Emma Pierson et al., *A LARGE-SCALE ANALYSIS OF RACIAL DISPARITIES IN POLICE STOPS ACROSS THE UNITED STATES* (2019), available at <https://5harad.com/papers/100M-stops.pdf>.

⁴⁴ David Harris, *DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS: AN AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT*, ACLU.ORG, , available at <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> (1999).

⁴⁵ See Salinas and Colon-Navarro, *supra* note 43, at 17.

that arrested Terry had no probable cause to arrest him, his search was permissible under the Fourth Amendment. If a police officer “observes unreasonable conduct which leads him reasonably to conclude... that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous,” they can conduct a “carefully limited search” of the suspect’s outer clothes to remove those weapons, their opinion read.⁴⁶

The “stop and frisk” and reasonable suspicion precedents set by Terry are marred with racial prejudice. Until a federal judge declared the practice unconstitutional in 2013,⁴⁷ New York City police carried out millions of stop and frisks. A comprehensive study carried out by Stanford University, New York University, and Microsoft researchers analyzed three million of these stops. They found that black and Hispanic people were disproportionately stopped. This was because police carried out stop and frisks more often in “high-crime, predominately minority areas, particularly public housing,” and that there were still “lower thresholds for stopping minorities relative to similarly situated whites.”⁴⁸ The reasonable suspicion exception (and its potential for racial profiling) was extended to immigration-related stops in *United States v. Brignoni-Ponce*.

⁴⁶ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴⁷ Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, THE NEW YORK TIMES, August 12, 2013, available at <https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>.

⁴⁸ See Sharad Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 THE ANNALS OF APPLIED STATISTICS 365 (2016).

In the 1970s and 1980s, concerns began to swell about undocumented immigration, primarily from Mexico. In 1984, Reagan-appointee and former Attorney General William French Smith proclaimed that “[the United States] has lost control of its borders.” In 1986, Congress passed the Immigration Reform & Control Act. It was among the first laws to sanction or prohibit employers from hiring undocumented immigrants.⁴⁹ Kevin R. Johnson, Dean of the University of California Davis School of Law, wrote that the Supreme Court took a similar stance on immigration issues, as reflected in opinions issued at the time. In *INS v. Delgado*, for example, Justice Powell claimed that the “immigration problem” could justify the finding that an immigration sweep in a factory was not a seizure in violation of the Fourth Amendment.⁵⁰

In the opinion for another case involving the Immigration and Naturalization Service (*INS v. Lopez-Mendoza*) the Court set a higher bar for proving that immigration officers violated immigrant defendants’ rights. Allowing motions to suppress in deportation cases would allow immigrants to “immediately resume their commission of a crime through their continuing, unlawful presence in this country,” it read. This reading of undocumented immigrants – as people who are inherently criminal regardless of how they are arrested – has permeated the mindset immigration enforcement officers today. This has opened the door to “extra latitude” when it comes to racial profiling or not obtaining proper consent. “Even if [an ICE

⁴⁹ See Kevin R. Johnson, *How Racial Profiling in America Became the “Law of the Land,”* 98 GEO. L.J. 6 (2011).

⁵⁰ *Id.* at 6-7.

agent] were to suppress the evidence because [they] didn't have proper consent...that doesn't matter. The fact remains that the person is here illegally," Claude Arnold, a former ICE special agent, said.⁵¹

Decided in 1975, *United States v. Brignoni-Ponce* also had wide-ranging implications for the future of immigration enforcement. The case involved Felix Humberto Brignoni-Ponce, who had been arrested for knowingly transporting illegal immigrants after being pulled over by police on March 11, 1973. It was an unusually rainy night in San Clemente, California, so the Border Patrol checkpoint on Interstate Highway 5 was closed. However, two officers were parked perpendicular to the road, using their patrol car's headlights to see the passing cars. It was then that they saw Brignoni-Ponce along with his two passengers, Elsa Marina Hernandez-Serabia and Jose Nunez-Ayala. The officers pursued and questioned them about their citizenship, eventually learning that Hernandez-Serabia and Nuñez-Ayala had immigrated to the country illegally. All three were arrested and the two passengers were set to be deported.⁵²

At trial, Brignoni-Ponce moved to suppress the evidence the officers obtained during the stop, claiming it was a violation of the Fourth Amendment's unreasonable search and seizure clause. This is because the officers had pulled Brignoni-Ponce over solely because of his and his

⁵¹ Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA, June 8, 2018, available at <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania>.

⁵² See *United States v. Brignoni-Ponce*, Criminal Indictment No. 14805, Nov. 1972 Grand Jury (S.D. Cal.).

passengers’ ethnic appearance. One of the officers, Agent Terrance Brady confirmed this on cross-examination.⁵³ However, after a one-day trial, a jury found Brignoni-Ponce guilty on both counts of knowingly transporting an alien into the United States in violation of 8 U.S.C. § 1324(a)(2). District Court Judge Howard B. Turrentine, Jr. sentenced him to four years in prison.⁵⁴

Brignoni-Ponce appealed to the U.S. Court of Appeals for the Ninth Circuit. As his appeal was pending, the Supreme Court decided in *Almeida-Sanchez v. United States* that using roving patrols to search a vehicle without a warrant or probable cause near the U.S.-Mexico border violated the Fourth Amendment.⁵⁵ Applying this ruling to Brignoni-Ponce’s case, the Ninth Circuit held that the appearances of Brignoni-Ponce and his passengers were “not enough” to warrant a stop. “As we said in *United States v. Mallides*: ‘there is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious because the skins of the occupants are nonwhite,’” their opinion read.⁵⁶

Upon this ruling, Solicitor General Robert Bork filed a petition for a writ of *certiorari* because the case involved “a law enforcement method that has a significant role in the Border Patrol’s program of deterring and detecting the

⁵³ See Petition for Writ of Certiorari, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), at 9.

⁵⁴ *Id.* at 11-12.

⁵⁵ *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

⁵⁶ See *Brignoni-Ponce*, 499 F.2d at 1110.

unlawful entry and transportation of aliens in this country.”⁵⁷ The Supreme Court granted *certiorari*.

According to Johnson, *Brignoni-Ponce* was important because it involved immigration enforcement operations that are away from a port of entry into the U.S. “The government in *Brignoni-Ponce* in effect was arguing for expanding the broad power to stop, seize, and search that it had at the *border* to the *entire border region*,” he wrote.⁵⁸

On June 30, 1975, the Court issued its opinion on the case. The decision was unanimous, ruling on the side of *Brignoni-Ponce*. Using the reasonable suspicion standard outlined in *Terry v. Ohio*, they wrote that Border Patrol officers in roving patrols may only stop vehicles “if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”⁵⁹ Because the officers who stopped *Brignoni-Ponce* relied only on his and his passengers’ perceived nationality or race, they had violated the Fourth Amendment. “Mexican appearance” alone did not meet the reasonable suspicion standard.

On its face, this ruling would appear to be a victory for immigrant and civil rights defenders. It could seem like a repudiation of discriminatory profiling tactics by the nation’s highest court. However, this is not the case. In the final sentence of their opinion, Justice Lewis Powell wrote that the “likelihood that any given person of Mexican ancestry is an

⁵⁷ See Petition for a Writ of Certiorari to the United States Court of Appeals in the Ninth Circuit in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), at 7.

⁵⁸ See Johnson, *supra* note 50, at 11-12.3

⁵⁹ See *Brignoni-Ponce*, 422 U.S. at 884.

alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”⁶⁰ While race or nationality *alone* could not meet the reasonable suspicion standard, “[a]ny number of factors” could be combined with it to justify a stop in the broader border area. The Court offered several examples of these factors:

- the “characteristics of the area in which they encounter the vehicle,”
- the “proximity to the border”;
- the “usual patterns of traffic on the particular road”;
- information about recent illegal border crossings in the area”;
- the “driver’s behavior” and “erratic driving”;
- “obvious attempts to evade officers”;
- “aspects of the vehicle.” such as “certain station wagons, with large compartments for fold-down seats or spare tires” or appearing “heavily loaded”;
- the “characteristic appearance of persons who live in Mexico, relying on such factors as mode of dress and haircut”;
- “an extraordinary number of passengers, or the officers may observe persons trying to hide”;
- and the “facts in light of [the officer’s] experience in detecting illegal entry and smuggling.”⁶¹

⁶⁰ *Id.* at 886-87.

⁶¹ *Id.* at 884-86 (citations omitted).

Though the Court ruled in favor of *Brignoni-Ponce*, its opinion made its stance on immigration enforcement quite clear. Though Border Patrol officers did violate the Fourth Amendment in this instance, they should be given some leeway to apprehend undocumented immigrants who only “create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.”⁶²

In 1976, the Supreme Court built on the *Brignoni-Ponce* decision. With *United States v. Martinez-Fuerte*, they ruled that border patrol officers may direct people who are of apparent Mexican ancestry to secondary inspection based on appearance alone. In his dissent, Justice Brennan wrote that this would allow Border Patrol to “target motorists of Mexican appearance.”⁶³ *United States v. Cortez* in 1981 further broadened the scope of Border Patrol’s abilities to stop and question motorists.⁶⁴

Though *Brignoni-Ponce* seemed to end racial profiling in immigration stops, it could be argued that it enabled it to continue. There is nothing preventing Border Patrol or ICE officers from using race as their only justification for stopping an individual. They can satisfy the reasonable suspicion requirement so long as they combine race with such factors as a haircut or fold-down seats after the fact. This practice even has a name – “canned p.c. (probable cause).”⁶⁵ Simon Sandoval-Moshenberg, an immigration attorney, said this is

⁶² *Id.* at 879-880.

⁶³ *Martinez-Fuerte*, 428 U.S. at 572 (Brennan, J., dissenting).

⁶⁴ *United States v. Cortez*, 449 U.S. 411 (1981).

⁶⁵ *See* Johnson, *supra* note 50, at 23.

why it is so difficult to prove racial profiling has occurred without explicit evidence. “[Without it], it’s very difficult to prove racial profiling. The officer always has some other reason on why he stopped your client and no one else,” he said.⁶⁶

B. “Crimmigration”

In April of 2017, Antonio Sanchez was pulled over after a landscaping job in Pelham, Alabama, for having a large pile of tree branches in the back of his truck. The officer who pulled him over did not issue a ticket, but ran a check on him. Sanchez’s license had been suspended and he had missed a court date for a public intoxication charge. He was arrested and brought to the Jefferson county jail. However, days later, Sanchez was transferred two states away to Jena, Louisiana. Booked into LaSalle Detention Facility, he was set for deportation. After a public petition by Birmingham immigrant rights’ group Adelante Alabama, he was let out on bond after one month. However, his immigration case was still pending as of early 2019.

The morning following his arrest, Sanchez’s wife, Leticia, had attempted to pay her husband’s bond. However, ICE had issued a detainer request.⁶⁷ This meant that ICE requested the sheriff’s office keep him jailed for at most 48 hours so they could take him into federal custody for removal purposes. Immigration detainers have been challenged in

⁶⁶ See Surana, *supra* note 52.

⁶⁷ Connor Sheets, ‘A whole nightmare’: Alabama father of 7 out on bond after detention by ICE, AL.COM, June 17, 2017, available at https://www.al.com/news/2017/06/a_whole_nightmare_alabama_fath.html.

several recent court battles, as they bring significant concerns of Fourth Amendment violations (requesting the “seizure” of a person without probable cause of a crime).⁶⁸ However, they remain “very common,” said Thomas Byrd, a spokesperson for ICE’s New Orleans field office.⁶⁹

ICE detainees are only one form of the linkage between local law enforcement and federal immigration enforcement. Over past three decades, the federal government has extended some responsibilities of immigration enforcement to local and state police.⁷⁰ In a few jurisdictions, police officers can undergo training to act as immigration agents themselves, through the 287(g) program.⁷¹ It is more commonplace, however, for officers to assist immigration authorities through programs like Secure Communities or its replacement, the Priority Enforcement Program (PEP). Police officers in all states are required to submit arrestees’

⁶⁸ Laurence Benenson, *The Trouble with Immigration Detainers*, NATIONAL IMMIGRATION FORUM, May 24, 2016, available at https://immigrationforum.org/article/trouble-immigration-detainers/#_edn18. See generally *Cisneros v. Elder*, No. 18CV30549 (D. Colo., El Paso Cty. Mar. 19, 2018), *Roy v. City of L.A.*, No. CV 12-09012-AB (C.D. Cal. Feb. 7, 2018).

⁶⁹ See Sheets, *supra* note 68.

⁷⁰ See Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 229 (2014).

⁷¹ See Benenson, *supra* note 69. The 287(g) program has been largely phased out, as it was both costly and concerning to civil and immigrant rights advocates. It was replaced by Secure Communities and the Priority Enforcement Program. See Leslie Rojas, *A phase-out for 287(g) immigration enforcement partnerships*, SOUTHERN CALIFORNIA PUBLIC RADIO, December 27, 2012, available at <https://www.scpr.org/blogs/multiamerican/2012/12/27/11741/gradual-phase-out-287g-immigration-enforcement-pro/>.

fingerprints to an immigration database, giving ICE a “technological presence” in local jurisdictions.⁷² Communication or cooperation of this kind (between federal and state officials) was explicitly sanctioned in the Supreme Court case challenging Arizona’s SB 1070, meaning it is unlikely to end in the near future.⁷³

This increasing convergence of local criminal enforcement and federal immigration enforcement has been described by the term “crimmigration.”⁷⁴ Illegal entry to the United States was considered a labor infraction until the 1940s, as the Immigration Naturalization Service was contained within the Labor Department.⁷⁵ However, undocumented immigrants have become increasingly criminalized over the successive decades. Before the 1980s, deportations of permanent residents were relatively rare and usually occurred because of crimes of “moral turpitude” (like drug trafficking or major weapons offenses). Detention of undocumented immigrants was also much less commonplace, and circumstantial considerations were given to prevent it. However, in 1988, Congress shifted their stance.

⁷² Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, AMERICAN IMMIGRATION COUNCIL IMMIGRATION POLICY CENTER, November 2011, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/SCComm_Exec_Summary_112911.pdf.

⁷³ See Sweeney, *supra* note 71, at 229.

⁷⁴ See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

⁷⁵ See Rene D. Flores and Ariela Schachter, *Who Are the “Illegals”?* SEP *The Social Construction of Illegality in the United States*, 83 AM. SOCIOLOGICAL REV. 844 (2018).

“Aggravated felonies” became reason enough for deportation.⁷⁶ In 2009, this was furthered, as most minor misdemeanor offenses were deemed “gateway crimes” deserving of deportation proceedings. Criminal sanctions have been leveraged on almost all people convicted of an immigration offense, including tourists or businesspeople overstaying visas.⁷⁷

Immigration infractions are considered civil offenses, not criminal offenses. However, with the rise of crimmigration, immigration enforcement has increasingly mirrored criminal enforcement. For example, Border Patrol officers were formerly a collection of a few hundred ranchers, local marshals, and sheriffs. They are now a trained law enforcement body authorized to make stops and arrests and conduct surveillance, much like police. DHS immigration enforcement officers are the largest armed federal law enforcement body, and immigration prosecutions now outnumber all other types of criminal prosecutions.⁷⁸ Federal control of immigration matters is also eroding, as state and local actors have entered DHS agreements like Secure Communities or PEP.⁷⁹ Immigration law enforcement can detain suspects (including permanent residents and children) in detention centers, mirroring incarceration in the criminal system. Though immigration trials are similar to criminal ones (requiring hearings in which evidence and witnesses can

⁷⁶ See Stumpf, *supra* note 75, at 383.

⁷⁷ *Id.* at 371.

⁷⁸ *Id.* at 388.

⁷⁹ Charis Kubrin, *Secure or Insecure Communities - Seven Reasons to Abandon the Secure Communities Program*, 13 AM. CRIMINOLOGY & PUB. POLICY 323 (2014).

be presented), the government is not compelled to offer counsel for indigent defendants. The Eighth Amendment protection against cruel and unusual punishment is not extended to noncitizens.⁸⁰ Immigration law enforcement has therefore come to closely resemble criminal law enforcement, though far fewer legal protections are extended.

With the criminalization of undocumented immigrants comes concerns of racial profiling, a widely-documented issue in law enforcement (especially in traffic stops). Maureen Sweeney of the University of Maryland School of Law has coined the term “shadow immigration enforcement” to describe how immigration responsibilities can distort the work of local or state law enforcement officers:

Shadow enforcement occurs at the margins of regular police work, external to the enforcement mandate of state troopers, local police, and sheriffs’ deputies. In the vast majority of cases, these officers have no training, mandate, or authority to enforce federal immigration law. Their involvement in the routine communication of immigration information to federal authorities, however, can create strong and sometimes perverse incentives that distort the ways in which they carry out their mandated policing duties. The lure of possible immigration checks, for example, can influence the officers’ choice of targets for traffic enforcement or whether to merely cite people for offenses or to arrest them (and thus bring them into the station for fingerprint checks that can reveal immigration status). This dynamic generally goes

⁸⁰ See Stumpf, *supra* note 75, at 390-393.

unacknowledged and unregulated within regular police structures. It operates under the table, in the shadows.⁸¹

PEP and Secure Communities' original stated purpose was to primarily remove "Level 1" offenders – those who have committed murder, sexual assault, kidnapping, or major drug offenses. However, in 2009, ICE data showed that only 10% of the 111,000 people detained through the program were Level 1 offenders. The other 90% committed Level 2 or Level 3 offenses ranging from burglary and fraud to minor traffic violations like running a stop sign.⁸² Arrests of non-criminal or Level 3 aliens has also increased during President Trump's tenure. TRAC, an ongoing project by Syracuse University, has compiled data on immigration enforcement. Comparing detainments and deportations from 2016 to 2017, they found that the types of offenses that that led to them that had grown the fastest were "generally misdemeanors or petty offenses." The category that grew the most was traffic offenses.⁸³

The U.S. Department of Justice and Government Accountability Office have conducted multiple investigations into racially biased policing in the past several years. This

⁸¹ See Sweeney, *supra* note 71, at 230.

⁸² See Rachel Zoghlin, *Insecure Communities: How Increased Localization of Immigration Enforcement under President Obama through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution*, 6 THE MODERN AMERICAN 22 (2011).^[1]_{SEP}

⁸³ *Deportations Under ICE's Secure Communities Program*, TRAC IMMIGRATION-SYRACUSE UNIVERSITY, April 25, 2018, available at <https://trac.syr.edu/immigration/reports/509/>.

included an investigation into Transportation Security Administration officers in multiple airports. Almost 40% of SPOT (Screening of Passengers by Observation Techniques) arrests, meant to spot possible terrorists, were for immigration violations.⁸⁴ TSA officers, pressured to appear productive, targeted black or Latino passengers in the hopes they would be arrested for drug or immigration offenses. In some airports, staff estimated as much as 80% of passengers searched were people of color.⁸⁵ At Newark Liberty International Airport (one of the nation’s busiest), profiling was so rampant that a group of screeners had been nicknamed “the Great Mexican Hunters.”⁸⁶

A comprehensive two-year investigation of police in Alamance, North Carolina, involving over 125 interviews, reviews of training materials and policies, and a statistics and records review, found that they had systematically targeted Latino residents. They were four to 10 times more likely to be targeted for traffic enforcement than non-Latino drivers. These stops were often meant to serve as pretext for an immigration status check.⁸⁷

Though Alabama has a relatively small undocumented immigrant population,⁸⁸ TRAC ranked the state 22nd out of the

⁸⁴ Steve Strunsky, *Concern over racial profiling against Hispanic passengers at Newark airport continues in wake of report*, NJ.COM, August 5, 2011, available at https://www.nj.com/news/2011/08/concerns_of_discrimination_aga.html.

⁸⁵ See Sweeney, *supra* note 71, at 231.

⁸⁶ See Strunsky, *supra* note 85.

⁸⁷ See Sweeney, *supra* note 71, at 231.

⁸⁸ *U.S. unauthorized immigrant population estimates by state, 2016*, PEW RESEARCH CENTER, February 9, 2019, available at

55 states and territories for ICE arrests and 18th for Secure Communities removals in 2018.⁸⁹ Whether section 12 of HB 56 is officially overturned or not, its intent has lived on. It matters little what the original purpose of an arrest is – through PEP and Secure Communities, if police officers can find any pretext to arrest an undocumented immigrant, they can alert immigration authorities to detain and deport them as well.⁹⁰ “Just from a traffic stop a whole nightmare can start,” said Cesar Mata, a member of Adelante Alabama, about Sanchez and many like him.⁹¹

C. Sociological Research and Stanford Racial Profiling Data

Racial profiling has roots in the societal perception of undocumented immigrants and their criminality. A 2018 sociological study from University of Chicago and Washington University in St. Louis researchers contended that the status of being “illegal” is not a fixed condition dependent on a strict legal definition. Instead, scholars have come to define illegal status as a fluid social construct. Shared stereotypes based on traits like national origin, occupation (“blue-collar” jobs), or perceived ethnicity is used to “assign illegality” to certain people, regardless of their immigration

<https://www.pewhispanic.org/interactives/u-s-unauthorized-immigrants-by-state/>.

⁸⁹ *Where ICE Secure Communities Removals Now Occur*, TRAC IMMIGRATION -SYRACUSE UNIVERSITY, November 13, 2018, available at <https://trac.syr.edu/immigration/reports/537/>.

⁹⁰ See Zoghlin, *supra* note 83, at 5.

⁹¹ See Sheets, *supra* note 68.

status. The researchers referred to this with the term “social illegality.”⁹²

Using a survey of over 1,000 non-Hispanic white U.S. residents, the researchers determined which traits drove stereotypes of undocumented status. Mexican immigrants were most commonly considered “illegal,” though immigrants from other Latin American countries, Africa, and the Middle East were also very likely to be deemed undocumented. This contrasts with immigrants from Asia or Europe, who were 5 to 8 percentage points less likely to be suspected of illegality.⁹³ This aligns with findings from past qualitative reports. Undocumented Hispanic immigrants in Dallas, Texas, widely claimed that their perceived ethnicity drew disproportionate attention from law enforcement. In Southern California, reports from Asian and African-Americans show that they are very rarely confronted about their immigration status.

The report also puts forth that negative stereotypes of illegality are fed into by both political discourse and immigration law itself. For example, a large influx of Mexican immigrants came to the U.S. through an agreement between the two countries in 1942. The Bracero program, as it was called, allowed 450,000 temporary visas for Mexican laborers per year. However, a cap was set at 20,000 visas in 1976 (though the demand for work persisted). The flow of immigrants came as usual, though they were now termed “illegal aliens” and considered an “invasion” that had to be stopped. Terms like these have only grown in usage over the

⁹² See Flores and Schachter, *supra* note 76, at 839.

⁹³ *Id.* at 848.

past several decades, driving social illegality based on racial, ethnic, and occupational stereotypes. The researchers pointed to the anti-immigrant sentiments in Hazelton, Pennsylvania, before they attempted a self-deportation law in 2006. Local lawmakers began to blame undocumented immigrants for gang activity, drug dealing, and increased violent crimes. This energized anti-immigrant attitudes, as residents increasingly suspected all Hispanic members of the population (regardless of their immigration status) were “illegals” deserving of deportation. This was mirrored years later in the lead-up to Alabama’s HB 56, as both laws came to target all those perceived to be “illegal” instead of just those with undocumented status.⁹⁴

The researchers claimed that perceived illegality could explain some wide-ranging socioeconomic inequalities. Latinos receive lower call-back rates from landlords than Asian or non-Hispanic whites, possibly due to fear of being prosecuted for unlawful business dealings or simply prejudice. Social illegality could also play a role in hiring decisions, worse healthcare treatment, more precarious workplace conditions, or even the lack of attention from teachers some groups face. Police and immigration officers are not immune to the effects of pervasive stereotypes, either. “[G]iven that immigration authorities are likely to share the same social stereotypes as the rest of the population, they might target specific groups for closer inspection,” the researchers wrote. “This could contribute to the significant

⁹⁴ *Id.* at 841-843.

nationality-based disparities of police officer stops and deportations...which future researchers could investigate.”⁹⁵

Stanford University’s Computational Policy Lab and Computational Journalism Lab have joined in a collaborative effort to fill this aforementioned information gap. Approximately 50,000 people are stopped by police in traffic stops per day, which amounts to 20 million people per year and makes traffic stops the most common interaction between the public and police. However, racial data in traffic stops is not always readily available, if it is available at all. Previously, the most widely sourced national statistics were from the Police-Public Contact Survey. It only includes information from about 50,000 people who have reported being stopped by police, and it is not always trustworthy, as survey data often has a selection bias. In a few jurisdictions, police have released reports on their traffic stop data, but this data is also limited. Neither can be used by researchers to reliably study racial profiling in traffic stops.⁹⁶

Their project, called the Stanford Open Policing Project, has compiled and analyzed almost 100 million traffic stops across 21 states and 29 municipalities over the past decade. They used public records requests to collect the data, using multiple tests to determine potential racial bias in policing (the veil of darkness test, threshold test, and an analysis of the effect of marijuana legalization in traffic stops). Using this information, the largest data set to date, they concluded that

⁹⁵ *Id.* at 864.

⁹⁶ *See* Pierson et al., *supra* note 44, at 1.

there is evidence of systemic racial profiling by police throughout the United States.⁹⁷

One test, the veil of darkness test, is based on a simple assumption. During nighttime, police are not as able to see the race of the person they are stopping before the stop. Therefore, the racial distribution of people stopped during the daytime would differ from those stopped at night if racial profiling exists. With this test, the Stanford researchers only analyzed stops involving black and white drivers, as “the ethnicity of Hispanic drivers is not always apparent, even during daylight hours.” After adjusting for the time of day, data from across the country showed that black drivers comprised a smaller amount of stopped drivers after dark, which suggests racial profiling. However, the report adds that there are some caveats to this test. This includes changing driving patterns in different parts of the year, and streetlights affecting perception of race during nighttime.⁹⁸ The researchers used other tests to analyze the data before they made definitive conclusions.

The researchers developed the threshold test by using the framework of another statistical test, the outcome test. It was developed in the 1950s by Nobel Prize winning economist Gary Becker. Becker said that if police officers do not discriminate, then they should find contraband in searches of minorities at the same rate as whites. If searches of minorities yielded less contraband than searches of whites, it could be concluded that there is a double standard. From this test, they

⁹⁷ *Findings*, Stanford Open Policing Project, *available at* <https://openpolicing.stanford.edu/findings/>.

⁹⁸ *See* Pierson et al., *supra* note 44, at 4-5.

determined that “the bar for searching black and Hispanic drivers is generally lower than for searching white drivers across the locations [they considered].”⁹⁹ This meant that, though contraband was equally or less likely to be found in searches of black or Hispanic drivers, the threshold for searching them was lower than for whites.

Overall, their data confirms what has widely been believed for decades – racial profiling in traffic stops is pervasive in police jurisdictions throughout the country. HB 56 and its provision regarding immigration-based traffic stops is merely an explicit sanctioning of the practice. In their conclusion, the researchers noted that the data they have compiled – which is freely available to download on the Open Policing Project website – should be used by police departments to reexamine their guidelines, encouraging “more consistent, efficient, and equitable decisions.”¹⁰⁰ Making this information widely and freely accessible, (or bringing it out of the shadows, so to speak) is therefore the first of many steps in bringing about change.

III. FUTURE STEPS TO LIMIT RACIAL PROFILING

It should be noted that of the states analyzed by the Stanford researchers, Alabama was not one. Police are only required to record the race of people they have stopped in 31 states. Two of the researchers noted that 15 states either did not respond to their records requests or did not say how or if data was collected. Louisiana was one of four states to say

⁹⁹ See Pierson et al., *supra* note 44, at 6.

¹⁰⁰ See Pierson et al., *supra* note 44, at 10.

outright that they did not track racial data at all because they simply “have a written policy against racial profiling.”

Of the 31 states that did provide information, many did not share protocols for collecting racial data. In Nevada, for example, police officers only record the race of the driver if they have been ticketed or arrested. In South Carolina, it is the opposite, as race is only recorded if neither has occurred. Three states, including Maine, collect information but do not compile or analyze it. The Montana Highway Patrol has required officers to record the race of every driver stopped since 2003, but they did not analyze this data until 2012. One year later, they were sued, accused of detaining Latinos for minor traffic violations to check their immigration status.¹⁰¹

Traffic stops are a very large component of police work. They can also show instances of racial bias in police interactions more concretely than other forms. However, this lack of uniformity in collecting and analyzing data prevents true nationwide analysis of the issue. The Stanford researchers were forced to piece together the information themselves, as some states such as Alabama outright ignored their requests for data.¹⁰²

Fifteen years ago, in 2004, Alabama state Senator Roger Smitherman first attempted to introduce a bill that would

¹⁰¹ Vignesh Ramachandran and Katie Kramon, *Are Traffic Stops Prone to Racial Bias?*, THE MARSHALL PROJECT, June 21, 2016, available at <https://www.themarshallproject.org/2016/06/21/are-traffic-stops-prone-to-racial-bias>.

¹⁰² See Emma Pierson et al., A LARGE-SCALE ANALYSIS OF RACIAL DISPARITIES IN POLICE STOPS ACROSS THE UNITED STATES, STANFORD OPEN POLICING PROJECT (2017), available <https://arxiv.org/pdf/1706.10567v1.pdf>, pg. 21.

outlaw racial profiling by police. It would also require police departments to create written policies defining and prohibiting the practice. Smitherman was spurred by media reports from that year that said only 18% of police jurisdictions in the state recorded the races or ethnicities of people stopped. However, the bill has failed to pass the House vote multiple times since. In 2018, the bill was modified. It would require all state law enforcement agencies to record and report traffic stop statistics, including race, gender, age of drivers and reason for the stop.¹⁰³ However, powerful law enforcement groups like the Alabama Sheriff’s Association and the Alabama Peace Officers Association opposed the measure, saying it would “burden” officers with paperwork.¹⁰⁴ It passed the Senate vote 27-0 but died in the House of Representatives. Smitherman introduced the bill again before the state’s 2019 legislative session.¹⁰⁵

Before critical analysis of racial profiling can begin, a measure like this must pass. Though Section 12 of HB 56 was meant to be struck down after the 2013 settlement, whether police are following this ruling is unknown. Statistics

¹⁰³ John Sharp, *Police fought Alabama lawmakers over racial profiling stats, but bill to surface again next year*, AL.COM, May 27, 2018, available at https://www.al.com/news/2018/05/post_169.html.

¹⁰⁴ Howard Koplowitz, *Law enforcement officials cite too much paperwork for opposing anti-racial profiling bill*, AL.COM, March 7, 2018, available at https://www.al.com/news/2018/03/law_enforcement_officials_cite.html.

¹⁰⁵ Mike Cason, *Alabama senator wants to identify, stop racial profiling*, AL.COM, February 5, 2019, available at <https://www.al.com/news/2019/02/alabama-senator-wants-to-identify-stop-racial-profiling.html>.

regarding the race of those stopped by police is not uniformly recorded in Alabama, if at all.

Smitherman's bill is a step in the right direction to curtail racial profiling. It follows the lead of Connecticut and California, which have recently passed laws requiring records of racial statistics in traffic stops statewide.¹⁰⁶ However, it could perhaps go further in outlining what constitutes racial profiling. When it is defined as using race as the "sole factor" in an officer's decision to stop someone, it opens the door to pretextual stops (using "canned p.c."). In crafting anti-profiling legislation, lawmakers should consider limiting the use of pretextual stops. Any possible minor violation should not be reason enough to conduct an immigration check, for example. Though the Supreme Court allowed such factors as clothing or a haircut to justify a stop, state lawmakers and police departments can take it upon themselves to end this practice with a more explicit definition.

The End Racial Profiling Act of 2017 would require all federal law enforcement agencies and state agencies receiving federal grants to comply with measures meant to record and limit racial profiling. It also would authorize grants to analyze and research the "best practice devices and systems to eliminate racial profiling." It was introduced in March 2017, and has yet to be enacted.¹⁰⁷ If it is passed, the act could bring uniformity to data collection and analysis nationwide, though whether it can tackle the systemic nature of the issue is not known.

¹⁰⁶ Ramachandran and Kramon, *supra* note 102.

¹⁰⁷ End Racial Profiling Act of 2017, H.R. 1498, 115th Cong. (2017).

CONCLUSION

In July 2011, one month after HB 56 was signed into law, Alabama Congressman Mo Brooks spoke at a town hall. On the subject of illegal immigrants, Brooks claimed he would “do anything short of shooting them” to drive them out of the state.¹⁰⁸ Brooks received condemnation from the national media and has since been embroiled in other controversies, but he was reelected by a wide margin in the 2018 midterm elections.¹⁰⁹ Though Brooks’ statement was extreme in its anti-immigrant stance, it is somewhat reflective of the underlying issue of HB 56 and the decades-long rise of “crimmigraton.”

Though legislation entwining criminal and immigration enforcement had been noticed since the 1980s, the term crimmigration was not coined until 2006 by Juliet Stumpf.¹¹⁰ In the concluding paragraphs of her paper, *The Crimmigration Crisis*, Stumpf made several prescient observations about the dangers of increased criminalization of immigrants.

As criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals...When noncitizens are classified as

¹⁰⁸ See Mohl, *supra* note 1, at 56.

¹⁰⁹ Noel Geiger, *Congressman Mo Brooks wins re-election*, WHNT NEWS, November 6, 2018, available at <https://whnt.com/2018/11/06/congressman-mo-brooks-wins-re-election/>.

¹¹⁰ Tanvi Misra, *The Rise of 'Crimmigration'*, CITYLAB, September 16, 2016, available at <https://www.citylab.com/equity/2016/09/the-rise-of-crimmigration/499712/>.

criminals, expulsion presents itself as a natural solution. The state treats the individual – literally or figuratively – as an alien, shorn of the rights and privileges of membership [to American society]... The result is a society... in which nonmembers are cast out of the community by means of borders, walls, rules, and public condemnation.¹¹¹

These statements are reflective not only of the immigration atmosphere throughout Alabama, but increasingly throughout the country. They mirror the case of Sanchez, who had lived in the U.S. for more than half his life, and ICE acting director Thomas Homan, who said that though “ICE agents and officers have been given clear direction to focus on threats to public safety and national security... when we encounter others who are in the country unlawfully, we will execute our sworn duty and enforce the law.”¹¹² HB 56 and its policy regarding traffic stops was therefore the end result of the larger crimmigration mentality, not an anomaly.

¹¹¹ See Stumpf, *supra* note 75, at 419.

¹¹² Sheets, *supra* note 68.

THE NECESSITY FOR A PARADIGM SHIFT IN THE WAR AGAINST DRUGS

Paige Brinkley

The United States considers itself an example to the world of democratic values such as freedom and equality. Yet despite only making up 5% of the world's population, America holds nearly 25% of the global prison population.¹ A major portion of the incarcerated citizens in the U.S. are those in prison on drug charges. Drug arrests account for a quarter of the population that is locked up.² Over 1.6 million people are arrested, prosecuted, incarcerated, placed under criminal justice supervision and/or deported each year on a drug law violation, 80% of which are for possession alone.³ This concerted, strict effort to prohibit and penalize drug use and possession in the past 50 years has cost the federal government an estimated 1 trillion dollars.⁴ It would be assumed that incarceration and strict penalization would be effective in reducing drug use in the United States and minimizing their negative effects due to the length of time these policies have been enacted and their astronomical cost. It would also be assumed that, because the United States incarcerates the most people for drug crimes in the world, that we would have among the lowest drug use rates and health

¹ *Mass Incarceration*, ACLU.ORG,
<https://www.aclu.org/issues/smart-justice/mass-incarceration>

² *Id.*

³ *Id.*

⁴ Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM),
<https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

issues associated with drug use.⁵ This, however, is not the case. The United States holds the highest share of the world's population with drug use disorders among countries at 3.31%, and the second highest death rate from drug use disorders.⁶ These dismal statistics indicate the ineffectiveness of the United States federal government and the criminal justice system's strict criminalization and penalization of drug use in mitigating harmful health effects of drugs and reducing the consumption and availability of them. The current laws and policies have only succeeded in imprisoning millions of citizens, which has disproportionately affected certain populations and made them susceptible to the collateral consequences that stem from incarceration. A change toward decriminalization of small-scale possession for personal use is imperative in order to achieve a rational drug policy that puts science and health before incarceration.

In order to understand the scope and complexity of this issue, it is vital to look back at the history of the United States' current drug policy and examine its ineffectiveness and ramifications. In 1971, President Richard Nixon called for a "War on Drugs" that set in motion a tough-on-crime policy agenda that was advanced by Ronald Reagan in the 1980s and his wife, Nancy Reagan, who spearheaded a "Just Say No" campaign. Because Nixon and Reagan both saw fighting the supply side of the drug war as a losing proposition, they enacted and endorsed a zero-tolerance policy that emphasized punitive measures against users and

⁵ *War on Drugs*, HISTORY.COM,

https://www.history.com/topics/crime/the-war-on-drugs#section_8

⁶ Hannah Ritchie & Max Roser, *Drug Use*, OUR WORLD IN DATA (April 2018), <https://ourworldindata.org/drug-use>.

shouldered them with full responsibility. Rather than place the blame on the drugs themselves, the moralist view blamed users, characterizing them as sinful and morally defective. Policymakers at all levels of government passed harsher sentencing laws and increased enforcement actions, especially for low-level drug offenses, such as mandatory minimums. In the 1970s, the Drug Enforcement Administration (DEA) was formed to monitor and control drug smuggling and use within the country. The DEA was allocated a budget of less than 75 million dollars in 1973. Today, their budget is \$2.03 billion.⁷ These laws that sought to prevent the use of certain drugs—particularly through coercion and punishment—hoped to accomplish the goal of a drug-free world.

It would seem logical that an indicator of a satisfactory policy agenda would be its effectiveness and efficiency in achieving its goals. The United States' strict criminalization and penalization of drugs since the 1970s has proven to be utterly ineffective in accomplishing its goal of ending drug use in America, rendering it unjustifiable. For instance, the number of people in U.S. prisons on drug-related charges almost doubled from the 1980s to present day, yet the use of illicit drugs increased and the prices of street drugs plummeted.⁸ In light of the resources it consumes and the damage it does to people's lives, mass incarceration of drug users must be justified by preventing criminal wrongdoing.

⁷ *War on Drugs*, HISTORY.COM, https://www.history.com/topics/crime/the-war-on-drugs#section_8

⁸ Why We Need Drug Policy Reform, OPEN SOCIETY FOUND. (April 2019), www.opensocietyfoundations.org/explainers/why-we-need-drug-policy-reform

Yet, incarcerating people has shown to have little effect on substance misuse rates.⁹ Instead, it has been proven to be linked with increased mortality from overdose. Within the first two weeks of being released from prison, an individual is 13 times more likely to die than the general population and their leading cause of death is overdose.¹⁰ The United States has the highest drug use disorder rate and second highest drug use death rate in the world. Despite the surge of incarceration of drug users since the 1970s, drug use has risen, along with the number of overdoses and rate of drug use disorders in the United States. This failure to prevent illicit substance abuse makes these drug policies ineffective and unjustifiable.

Furthermore, the legitimacy of incarcerating people due to drug use and possession alone must be questioned if there is no prevention in wrongdoing or increase in public safety. Punishing individual drug users cannot be justified by grievance satisfaction because the voluntary consumption of a drug does not pose a threat to society in itself. If an individual uses a drug and does not participate in an activity that could harm others and does not sell or distribute to others, a victim is not created. Furthermore, the user assumes the risk by voluntarily consuming the drug. If one agrees with the harm principle articulated by John Stuart Mill, then we have the liberty to do anything which does not harm anyone else.

⁹ Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

¹⁰ *Id.*

After establishing the historical failure of the strict drug policy and laws in the United States since the 1970s and its lack of justification, it is now imperative to examine the scope and magnitude of negative effects this agenda has had on our society. The imprisonment of its citizens can never be taken lightly by a federal government. Without success in curbing drug-related problems, strict criminalization and penalization of drugs has imprisoned millions of Americans, who would otherwise be law-abiding citizens, and created a system that hinders equality and opportunity.

Mass incarceration, specifically on drug-related offenses, has significantly affected those of lower socioeconomic status and minorities, creating a deeply unfair and discriminatory system. People of color experience discrimination within our criminal justice system and are more likely to be stopped, searched, arrested and convicted, particularly for drug law violations.¹¹ African-Americans account for nearly 40% of those incarcerated for drug-related crimes, despite the fact that they only account for 13% of the U.S. population and use drugs at similar rates to other races. Similarly, Latinos make up 18% of the population, yet make up 38% of those in prison on drug offenses.¹² African-Americans are six times more likely to be incarcerated for drug use than white Americans.¹³

¹¹ *It's Time for the U.S. to Decriminalize Drug Use and Possession*, DRUG POL'Y ALLIANCE (July 2017), <http://www.drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession>.

¹² *Id.*

¹³ Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM),

Perhaps the most enlightening example of discrimination in the implementation of drug laws in our country is the dichotomy between the criminalization of crack cocaine compared to the criminalization of powder cocaine. The conviction for crack possession and distribution—more commonly sold and used by people of color—is 100 times more severe than possessing and distributing the same amount of powder cocaine, which is more commonly sold and used by white people.¹⁴ It is evident that systemic racism pervades our criminal justice system and strict criminalization negatively effects minorities in our country at an alarming rate. Because of harsh laws against possession and use of illicit drugs, the poor and people of color are imprisoned far more than white Americans, despite similar usage rates. This discriminatory system propagates and widens the gap of economic opportunities and inequality in our country and further oppresses historically marginalized groups of people. Any system or policy that is discriminatory and oppressive enacted by a government cannot be just and merit reevaluation.

Furthermore, the post-incarceration plight for drug users create serious impediments to reintegration, economic security and freedom. Research has clearly shown that the likelihood of unemployment increases as a result of

<https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

¹⁴ Robert Crutchfield & Gregory Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUE IN SCI. & TECH. 1 (Fall 2015), <https://issues.org/the-effects-of-mass-incarceration-on-communities-of-color/>.

incarceration.¹⁵ Changes in public policy since the Reagan administration has exacerbated the problem as dozens of laws that restricted the kind of jobs ex-prisoners could have, disqualified them from many job training programs, and eased the requirements for parental rights to be terminated.¹⁶ This shows that punishment for a drug-related offense does not end at incarceration but is also accompanied by the denial of child custody, voting rights, business loans, licensing, student aid and public assistance. For example, one in thirteen African-Americans of voting age are denied the right to vote due to laws that disenfranchise people with felony convictions.¹⁷ Criminal records often result in the deportation of legal residents and the denial of entry in the United States for noncitizens. These punitive measures were inflicted with the belief that those who violate laws are undeserving of benefitting from participating in democracy. Yet, not having access to these services increases the likelihood of recently released felons becoming involved in criminal behavior because they are severely inhibited from taking the legitimate path to economic security and reintegrating into society. The exclusions that come with being imprisoned for drug offenses in the United States relegate millions of Americans to second-class citizenship after they serve their time in prison.

¹⁵ Eric L. Jensen et al., *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL'Y REV. 1, 100, 106-107 (2004).

¹⁶ *Id.*

¹⁷ *It's Time for the U.S. to Decriminalize Drug Use and Possession*, DRUG POL'Y ALLIANCE (July 2017), <http://www.drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession>.

Our current drug policy also continues a cycle of poverty and can contribute to increased drug use in poor communities as the families of those convicted on inflated drug charges are severely affected. An estimated 2.7 million Americans have an incarcerated parent.¹⁸ There is an extraordinary racial disparity in this data, particularly with drug offenses, showing 3.9% of African-American children in the U.S. having a parent in prison due to non-violent drug crimes, 1.1% of Hispanic children and 0.6% of white children.¹⁹ The effects of incarceration on families and communities are broad and extreme. Pew Research Data indicates that more than two-thirds of incarcerated men had been employed prior to their convictions and nearly half had lived with their children. (Pew, 2018) When a wage-earning parent is removed from the home and sent to prison, the burden falls on the remaining parent to provide for the family and the economic freedom and living conditions of the children are compromised. The areas of concentrated incarceration in the United States are in predominantly minority areas, and these places are among the most socioeconomically disadvantaged communities nationwide.²⁰ The dramatic increase of the incarceration of the poor and minorities due to the “War on Drugs” has completely transformed communities in the

¹⁸ Families and the Effects of Mass Incarceration, B.U. SCH. OF PUB. HEALTH (June 26, 2016), <http://www.bu.edu/sph/2016/06/26/families-and-the-effects-of-mass-incarceration/>.

¹⁹ *Id.*

²⁰ Robert Crutchfield & Gregory Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUE IN SCI. & TECH. 1 (Fall 2015), <https://issues.org/the-effects-of-mass-incarceration-on-communities-of-color/>.

United States, destabilizing family units, limiting economic opportunities, and trapping those imprisoned and their families in cycles of poverty. It can be inferred that having a stable family life and economic stability lowers the probability of becoming involved in crime such as distributing illicit drugs and experimenting with such substances. Furthermore, strict regulation by the government has caused street drug prices to plummet and an increase in drug-related violence in poor communities with high incarceration rates. According to some estimates, hundreds of thousands of murders in the United States can be attributed to violence between criminal organizations fighting for power made possible by the drug trade.²¹

The collateral consequences of mass incarceration that socially and economically cripple American citizens and their families, coupled with its disproportionate effect on minority communities, reveal that the harm that has been done by harsh penalization of drug use is heavily disproportionate to the harm that has been prevented. When the punishment is so disproportionate to the crime, it does nothing to help society or promote rehabilitation—it is a distortion of justice. Furthermore, it is prudent and necessary to reject policies that contribute to inequality in our country and damage the health and economic well-being of the population.

It is clear that a different approach and shift in goals related to drug use in the United States is vital. The ideology

²¹ Why We Need Drug Policy Reform, OPEN SOC'Y FOUND. (April 2019), www.opensocietyfoundations.org/explainers/why-we-need-drug-policy-reform

that labels drug users as morally defective is harmful and ineffective in dealing with the health issues associated with drug use. An abstinence-only approach like “Just Say No” and the vision of a drug-free America is unrealistic. The federal government’s attempts to achieve this dream have been counterproductive and actually increased harmful drug use in the United States. Drug abuse is a problem of public health in our country, not of criminal law and must be treated as such. In order to achieve a drug policy that prioritizes science and health over punishment and incarceration, it is imperative to shift our goals to reducing the likelihood drug users will become drug abusers, minimizing the harmful effects of drug use on the population and reducing stigmas associated with drug addiction.

The failure of the current drug policy and the war on drugs has led to a consideration of many alternative methods. For example, some argue for depenalization: the retention of drug use as a crime but with enforcement based on practical considerations and community needs. Some argue for regulated access, or government control of illegal drugs in order to create a market for substances, and tightly controlled availability for more drugs that pose a greater risk. Still others argue for decriminalization. Ideally, drug decriminalization involves the elimination of all punitive, abstinence-based, coercive approaches to drug use. However, for the purposes of this paper, this encompasses a range of efforts to eliminate criminal penalties, even if such efforts do not eliminate all forms of coercion entirely. With any proposed policy approach, it is imperative to judge the proposal on a set of predetermined criteria that can evaluate its ability to be effective in both implementation and projected outcomes. For

this paper and particular policy proposal, it seems appropriate to judge the policy choice on the (1) the efficiency of reaching its goals (lessening harmful effects of drugs on users and the whole population), (2) fairness in outcome and implementation, (3) legality of the plan and (4) political acceptability of the proposal.

With this criterion in mind, I propose enacting a drug policy similar to that of Portugal's addressing low-level drug possession through our public health system instead of criminal justice system. This would entail decriminalizing drug use, small-scale possession for personal use and possession of drug paraphernalia on a federal level. Instead, the actions would be considered a civil offense. Even in this decriminalization framework, drug use and possession would remain prohibited and subject to police intervention. But, infractions would be completely removed from the framework of the criminal justice system, and instead processed in noncriminal proceedings as administrative violations. Offenders would be subject to a fine, or referral to a drug treatment program, based on the number or repeat offenses and the seriousness of the act. Furthermore, I propose expanding drug treatment and harm reduction services. This shift in policy away from punishment and coercion would prioritize public health and focus on mitigating the harmful effects illicit drug use can have on individuals and our society. Furthermore, it would drastically reduce the number of people arrested and incarcerated in our country, allowing them to avoid the social and economic consequences of being swept up in our criminal justice system.

In order to judge the efficiency of this policy, we must look at the effects of decriminalizing drug use and possession in a country where such policies have been enacted. In 2001, Portugal opted to decriminalize possession of all drugs. They eliminated criminal penalties for low-level possession and consumption of all drugs and reclassified them as administrative offences. They also unilaterally expanded their public health services to offer more drug treatment centers and harm reduction services.

The catalyst for this dramatic shift in policy was the political consensus, at the time, that drug abuse was becoming an uncontrollable social problem and that a major barrier to effective treatment was strict criminalization. In other words, decriminalization was not driven by the view that drug abuse was an insignificant problem in Portugal, but rather that the perception that it was a massive social issue, and criminalization was exacerbating the problem.²² In fact, decriminalization was only enacted after an extensive study performed by the Commission for a National Anti-Drug Strategy who recommended decriminalization as the best strategy for combating Portugal's growing abuse and addiction problems. In their 1998 report, the commission states its recommendation was intended to, "redirect the focus to primary prevention, extend and improve the quality of health care for addicts and provide the necessary mechanisms for enforcement by voluntary treatment programs as an

²² Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*, CATO INSTITUTE (Apr. 2, 2009), https://www.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf.

alternative to prison sentences.”²³ Another rationale for this policy choice was the view that criminalization was creating a stigma and keeping addicts from seeking treatment due to fear of prosecution and incarceration. Furthermore, decriminalization would free up resources that could be allocated into treatment and harm reduction programs.

Since Portugal enacted this drug policy in 2001, the lifetime prevalence rate of drug use in the country has dropped far lower than the United States and other European Union countries, social problems and harms related to drug use have substantially decreased, and none of the atrocities that opponents to decriminalization predicted have come to pass. Despite the commonly held belief that a decriminalization policy would increase the number of drug users in a country, the lifetime prevalence rate in the pre-decriminalization era of the 1990s in Portugal were higher than the post-decriminalization rates in almost every category of drug.²⁴ Portugal’s drug use rates remain below the European average and far lower than rates of drug use in the U.S.²⁵ Indeed, most EU states have double, triple or even quadruple the rates than Portugal in usage rates of cocaine, including those countries with the harshest criminalization policies. Furthermore, in comparison to other European countries, since 2001, Portugal has the absolute lowest

²³ *Id.*

²⁴ *Id.*

²⁵ *It’s Time for the U.S. to Decriminalize Drug Use and Possession*, DRUG POL’Y ALLIANCE (July 2017), <http://www.drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession>.

lifetime prevalence rate for cannabis—the most used drug in the EU.²⁶

The harms and issues to public health that addiction and drug abuse can cause have also been substantially mitigated in Portugal since 2001. By shifting focus to drug abuse as a public health problem rather than criminal justice problem, the Portuguese government was able to allocate more funds towards treatment centers and harm reduction programs. This made it easier for a broad range of services to work together to serve their communities more efficiently. It also reduced the stigma associated with drug abuse and seeking help. Those who had been referred to as *drugados* or *junkies* became known more sympathetically and more accurately as “people who use drugs” and “people with addiction disorders.”²⁷ Between 1998 and 2011, the number of people in drug treatment increased by 60%. (DPA, 2018) While those in favor of criminalization use the increase of people seeking drug treatment as an indicator of worsening drug problems, quite the opposite is true. Addicts freely seek treatment in a decriminalized society because they do not fear criminal penalties which decreases the amount of addiction and enables the management of drug-related harms. Because of this, as treatment enrollment rose in Portugal, drug-related

²⁶ Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies*, CATO INSTITUTE (Apr. 2, 2009), https://www.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf.

²⁷ Susana Ferreira, *Portugal's Radical Drugs Policy Is Working. Why Hasn't the World Copied It?*, (Dec.7, 2017), <https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it>

issues substantially decreased. The number of HIV diagnoses dropped from 1,575 cases in 2001 to 78 in 2013.²⁸ Moreover, there was an average of one overdose death per day in Portugal before 2001. In 2016, there were 30.²⁹ This evidence is conclusive in proving that a decriminalization policy removes barriers and stigmas associated with people receiving drug abuse treatment which substantially mitigates the harmful effects of drug use.

Looking at the example of Portugal, it is clear that implementing a similar policy of decriminalizing small-scale possession and use of drugs in an effort to manage drug use through a public health lens in the United States would be far more efficient in achieving its goal than our current policy. It would create an environment in which people who use drugs problematically would have an incentive to seek treatment. It would also remove barriers to those receiving help for drug addiction and improve the cost-effectiveness of limited public health resources. Around the world, it is clear that strict criminalization policies do not produce lower drug usage rates and lessen its harmful effects on society. If anything, contrasting the high drug problems and usage rates in the highly criminalized United States with the low and ~~manageable rates of decriminalized~~ Portugal show that the

²⁸ *It's Time for the U.S. to Decriminalize Drug Use and Possession*, DRUG POL'Y ALLIANCE (July 2017), <http://www.drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession>.

²⁹ Ethan Nadelmann, *The U.S. Needs to Decriminalize Drug Possession Now*, (Nov 26, 2018), www.rollingstone.com/politics/politics-features/united-states-decriminalize-drug-possession-nadelmann-760001/.

opposite trend can be true. A public policy of decriminalization is more efficient in mitigating the harmful effects of drug use on a population.

Now that we have established that this particular drug policy would be efficient in reaching its' goals, we must examine whether a policy of decriminalization would be fair in both implementation and outcomes. I believe it would be much fairer and more equal than our current policy. The collateral consequences and detrimental effects of mass incarceration on low-income and minority communities are vast and well-documented. There is an obvious and straightforward answer to the policy question of how to confront the negative effects of mass incarceration that has been exacerbated by the "War on Drugs"- and that is to reduce it. A significant benefit of this particular drug policy over the current one in the United States is that decriminalizing possession would remarkably diminish the number of people arrested, incarcerated, or otherwise swept into the criminal justice system, thereby allowing people, their families and communities to avoid the many harms that flow from drug arrests, incarceration, and the lifelong burden of a criminal record. Reducing mass incarceration through decriminalizing low-level drug possession would have profound effects on these communities, because they have disproportionately suffered the most. This would be a positive step towards alleviating racial and income-based disparities in our criminal justice system, creating a far more equal and just society for all. Furthermore, there is no evidence to suggest that a move away from a high level of imprisonment of non-violent drug crimes, which characterizes the United States more than any other nation in the world, will result in

a substantial increase in crime. (effects on mass incarceration)

We can see a clear correlation between policies of drug decriminalization and a decrease in minority arrests in certain jurisdictions in the United States that have decriminalized marijuana use and possession. In Alaska, marijuana was legalized in 2014 and African-American marijuana arrest rates fell by 93%. In Washington D.C., marijuana was decriminalized in 2014 and possession and growing was legalized by a voter-approved ballot initiative. For possession, arrests between 2010 and 2016 dropped by more than 99% for African-Americans.³⁰ Decriminalization would reduce the number of people arrested and incarcerated in our country, particularly those in low-income and minority communities, which would keep families intact, boost economic opportunities and create a system of more equality within our criminal justice system. It is clear that discrimination within our criminal justice system has exacerbated existing inequalities and fostered severe social and economic disadvantage. Decriminalizing drug possession and use would reduce the disparity between minority and majority crime rates and would help eliminate society's over use of prisons to solve social problems. Additionally, another benefit would be that it would improve relationships between law enforcement agencies and the communities they have sworn to protect and serve.

³⁰ *It's Time for the U.S. to Decriminalize Drug Use and Possession*, DRUG POL'Y ALLIANCE (July 2017), <http://www.drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession>.

Furthermore, the money saved from ending strict incarceration for drug charges could be allocated for preventing more serious and dangerous crimes, to public health resources and services for returning prisoners. In 2015, the federal government spent an estimated \$9.2 million every day to incarcerate people charged with drug-related offenses—that's more than \$3.3 billion annually. (Pearl, 2018) Through the implementation of my policy proposal, that money could then be used to fund an expansion of drug treatment and harm reduction services. This further emphasizes a shift from viewing drug use in the United States as a public health problem rather than a criminal justice system. Also, funds could be allocated to fund services for returning felons who were incarcerated on drug charges that would help them gain employment and reintegrate into society. Using federal funds that were formally used to incarcerate citizens to fund public services that would aid addicts and ex-felons would significantly help communities that have struggled with high incarceration rates and drug addiction issues. Also, law enforcement agencies could shift their focus to serious, violent crimes which would make communities safer for all.

As you can see, decriminalizing drug use and possession would be a far more fair and equal policy than the current United States policy because it would help keep American citizens out of prison. It could significantly reduce incarceration rates in our country and would benefit low-income and minority communities that have had the most negative repercussions from a strict policy on drug use. Furthermore, funds that are saved from reducing incarceration rates could be allocated to public services that

would increase public health, equality and safety within communities.

Legality and political acceptability are vital components in evaluating a particular policy proposal. In the context of decriminalizing drug use, it seems daunting to enact such a policy within the United States due to our political history and ambivalent relationship with drug use and substance abuse. However, other countries have successfully decriminalized drugs-and the U.S. is moving in the right direction. Most drug laws exist on a spectrum between criminalization and decriminalization and many U.S. jurisdictions have taken steps in the direction of decriminalization. This includes the legalization of marijuana, establishing pre-arrest diversion programs, and enacting 911 Good Samaritan Laws, which allow for limited decriminalization of drug use and possession at the scene of an overdose for those who are witnesses and call for emergency medical assistance.³¹ Additionally, polls of presidential primary voters last year found that substantial majorities support ending arrests for drug use and possession in Maine (64%), New Hampshire (66%) and South Carolina (59%). In 2016, the first state-level decriminalization bill was introduced in Maryland and a similar bill was re-introduced in 2017. Meanwhile, in Hawaii, the legislature approved a bill last year to create a commission to study decriminalization.³²

A policy of decriminalization is becoming the preferred policy choice for reputable organizations all over the world. The United Nations and World Health Organization released

³¹ *Id.*

³² *Id.*

a joint statement calling for repeal of laws that criminalize drug use and possession. They join an impressive group of national and international organizations who have endorsed drug decriminalization that includes the International Red Cross, Organization of American States, Movement for Black Lives, NAACP, and American Public Health Association, among many others.³³

It must be understood that a transition from the current United States' drug policy to decriminalizing small-scale possession and use would require a complete change in goals towards drug use in our country but, while daunting, could have great implications for the reduction of substance abuse and future of our criminal justice system. The "War on Drugs" was not successful in curtailing drug use in our country and only succeeded in exponentially increasing our incarcerated population, creating greater inequalities within our criminal justice system and extraordinarily harming low-income and minority populations. It was a distortion of justice- creating much more harm for American citizens than preventing it. A shift in goals towards minimizing the harmful effects of drug use on the population- rather than ending all drug use in our country through coercion and punishment- is vital in creating a more equal criminal justice system and a drug policy that prioritizes science and health. Through the example of Portugal, it is clear that decriminalization has a positive effect on public health and is a better alternative in mitigating the harmful effects of drug use on a population. Additionally, making small-scale drug possession and use administrative offenses would be

³³ *Id.*

beneficial for low-income and minority communities who have suffered the most from the coercive drug laws of the past fifty years, a fairer alternative in both implementation and outcomes. The stances of reputable international organizations and legislation passed in American jurisdictions show that this policy is possible and public support is growing. Drug decriminalization is not simply a policy change, but rather a paradigm shift towards science and health that is needed to increase public health, begin to achieve equality within our country and fix our broken criminal justice system.

THE RIGHTS OF CHILD IMMIGRANTS AT THE UNITED STATES-MEXICO BORDER

Anna Katherine Sherman

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INTRODUCTION

The rights of immigrants at the southern border of the United States have been a widely-discussed topic throughout the current presidential administration.¹ The U.S.-Mexico border is the location where the highest number of immigrants, documented and undocumented, first cross into the country.² However, the growing concern regarding this issue relates to the treatment of these people once they reach our country. More specifically, the number of underage

¹ *Administration Actions Against Immigrant Families Harming Children Through Increased Fear, Loss of Needed Assistance*, TARGETED NEWS SERVICE.; David A. Graham, *Has Trump Kept His Campaign Promises?*, THE ATLANTIC (Apr. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trump-promises-cheat-sheet/507347/>.

² The US-Mexico Border, MIGRATION POL'Y INST. (June 1, 2006), <http://www.migrationpolicy.org/article/us-mexico-border/> [<https://perma.cc/2Q8P-F7NJ>].

migrants is rapidly increasing.³ While children are only one-third of the global population, almost half of all refugees are under the age of 18.⁴ Due to the consistent mistreatment of these children, human rights efforts have been going on for the past decade in attempts to remedy the abuse of child immigrants at the border.⁵ It is evident that the children immigrating into this country are not endowed the same rights as those born here. In fact, restrictive immigration policies limit the human rights that all children are entitled to, regardless of citizenship status.⁶ In Part I, this paper will analyze the differences between foreign-born and U.S. native children with regards to their rights per the Constitution. In order to analyze the rights of child immigrants, it is essential to compare how their rights relate to those of minor citizens. Part II will discuss the human rights perspective on the rights of child immigrants. Specifically, it aims to explain how this fits into the judicial precedent that exists concerning the rights of American children and the “best interests of the child” standard.⁷ Part III will provide a comparison to immigration policies of Canada in order to consider how their approaches may be applied in the case of the U.S.-Mexico border. This

³ *Uprooted: The Growing Crisis For Refugee And Migrant Children*, U.N. CHILDREN'S FUND (UNICEF), (Sept. 2016), <https://www.unicef.org/videoaudio/PDFs/Uprooted.pdf>.

⁴ *Id.*

⁵ *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, NO MORE DEATHS 5, 25 (2011), <http://forms.nomoredeaths.org/wp-content/uploads/2014/10/CultureOfCruelty-full.compressed.pdf>.

⁶ *Id.*

⁷ Gary A. Debele (1998). *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*. 15, 75.

part will include an examination of the United Nations' stance on immigration and children's rights at large, using the Convention on the Rights of the Child as a guide.⁸ Finally, this paper will conclude with an argument for a re-examination of the immigration policies of the United States, particularly with regards to our government's treatment of children. The existing approach to immigration law does not adequately consider children's human rights and should be revised to include the same protections for child immigrants as those guaranteed to children who are U.S. citizens.

I. A COMPARISON OF CHILDREN'S RIGHTS

The rights of minor citizens of the United States differ from those of adult citizens as well as those of immigrant minors. Historically, children in our country have been treated as having a different set of legal rights compared to adults.⁹

The 1944 decision of *Prince v. Massachusetts* was one of the first instances that children are entitled to rights, particularly regarding the welfare of the child.¹⁰ Justice Rutledge states in the opinion of the Court that the state's authority over children is broader than it is over adults because it is essential to the well-being of the country to encourage "the healthy, well-rounded growth of young

⁸ Douglas E. Abrams et al., West (2014). "*An International-Law Basis For Children's Rights?*" CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE. pp. 103–111.

⁹ *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645, 1944 U.S. LEXIS 1328, 7 Lab. Cas. (CCH) P51,172 (Supreme Court of the United States January 31, 1944, Decided).

¹⁰ *Id.*

people into full maturity as citizens, with all that implies.”¹¹ Others have claimed that because of the inherent diminished capacity of minors, they should be awarded certain protections under the law in order to better their development.¹²

In the decisive opinion of *Bellotti v. Baird*, Justice Powell states that children have always been treated differently than adults under the law.¹³ Alluding to the Court’s decision in *Kent v. United States*, he references the distinction between juvenile court systems and adult criminal justice as proof that a disparity exists.¹⁴ He also cites *In re Gault*, which established that neither the Fourteenth Amendment nor the Bill of Rights are for adults alone, and that minority does not prohibit them from the protections of the Constitution.¹⁵ Most importantly, the *Bellotti v. Baird* decision indicates that the rights of children must be considered differently than the Constitution as applied to adults. Justice Powell identifies three reasons for this conclusion: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental

¹¹ *Id.*

¹² Bruce C. Hafén, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their ‘Rights’*, 1976 B.Y.U. L. REV. 605, pp. 644-51.

¹³ *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797, 1979 U.S. LEXIS 17 (Supreme Court of the United States July 2, 1979, Decided).

¹⁴ *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84, 1966 U.S. LEXIS 2015, 11 Ohio Misc. 53, 40 Ohio Op. 2d 270 (Supreme Court of the United States March 21, 1966, Decided).

¹⁵ *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, 1967 U.S. LEXIS 1478, 40 Ohio Op. 2d 378 (Supreme Court of the United States May 15, 1967, Decided).

role in child rearing.”¹⁶ This case is significant because it serves as an important benchmark for the additional rights and protections of children within the judicial system. Further, the implications of this judicial precedent are relevant when considering the rights of child immigrants, due to the basic set of human rights and protections that all minors inherently possess.

The definition of an alien according to the Immigration and Nationality Act is any person who is not a citizen or national of the United States.¹⁷ Conversely, the Constitution’s Citizenship Clause defines a citizen as any person born or naturalized in the United States.¹⁸ While these pieces of legislation provide straight-forward definitions of these legal statuses, the set of rights assigned to both groups is not as explicit, particularly with regards to those of minors. Much like the laws for U.S. citizens, immigration legislation was never written with intent to govern children.¹⁹ Rather, it was supposed to be used as a deterrent for migrant adults, so adult and minor immigrants are largely treated the same under the law.²⁰ Furthermore, because family law and child protection matters are under the jurisdiction of the states, child

¹⁶ *Supra* note 13.

¹⁷ § 1101. Definitions, 8 USCS § 1101 (Current through PL 116-8, approved 3/8/19).

¹⁸ Sec. 1. [Citizens of the United States.], USCS Const. Amend. 14, , USCS Const. Amend. 14, § 1 (Current through PL 116-8, approved 3/8/19).

¹⁹ Erin B. Corcoran (Spring, 2015). *Deconstructing and Reconstructing Rights For Immigrant Children*. HARVARD LATINO LAW REVIEW, 18, 53.

²⁰ *Id.*

immigration protections become even more difficult to implement federally.²¹

The situation becomes even more nuanced when a child immigrant enters U.S. territory without a parent. An unaccompanied minor is the term used for any child under the age of 18 who does not have a parent or guardian in the United States to provide care for them and arrives to the country without legal status.²² Upon entering the country, unaccompanied minors have the right to a hearing before an immigration judge.²³ However, after 72 hours, these children then become the responsibility of the Office of Refugee Resettlement under the Department of Health and Human Services.²⁴ Minor immigrants cannot be held for longer than 20 days in detention and have the right to be in the least restrictive setting possible.²⁵ The criticism of this system, however, is that due to the high increase of unaccompanied minors in the country, the dockets have become overwhelmed

²¹ Olga Byrne (Fall, 2017). *Promoting A Child Rights-Based Approach To Immigration In The United States*. GEORGETOWN IMMIGRATION L. J., 32, 59.

²² § 279. Children's affairs, 6 USCS § 279 (Current through PL 116-8, approved 3/8/19).

²³ Richard F. Storrow (Fall, 2018). *Unaccompanied Minors At The U.S.-Mexico Border: The Shifting Sands Of Special Immigrant Juvenile Status*. GEORGETOWN IMMIGRATION L. J., 33, 1.

²⁴ § 1232. Enhancing efforts to combat the trafficking of children, 8 USCS § 1232 (Current through PL 116-8, approved 3/8/19).

²⁵ *Id.*

and the case backlog has prevented a number of children from benefiting from these rights.²⁶

Additional legislative measures have been taken to secure the rights of child immigrants and facilitate eventual naturalization, such as the Immigration Act of 1990. This act was instituted as a means of providing relief to unaccompanied minors by instituting a new legal status known as Special Immigrant Juvenile Status, which would protect these children by providing them legal permanent residency.²⁷ After maintaining this status for five years, the law permits those with Special Immigrant Juvenile Status to naturalize and become U.S. citizens, like the majority of legal permanent residents.²⁸

The Obama administration also instituted protections for child immigrants through an executive memorandum that created Deferred Action for Childhood Arrivals (DACA), providing another resource for undocumented minors. However, the Trump administration has since threatened the

²⁶ *Children: Amid A Growing Court Backlog Many Still Unrepresented* (2017), TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/immigration/reports/482>.

²⁷ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1101(a)(27)(J) (2018) *see* H.R. 7068, 115th Cong. § 103 (2018)). From this status people are permitted, after a time and if meeting other qualifications, to naturalize. 8 U.S.C. § 1421-59.; *Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles*, 40 CARDOZO L. REV. 579, 582.

²⁸ § 1427. Requirements of naturalization, 8 USCS § 1427 (Current through PL 116-8, approved 3/8/19); § 1429. Prerequisite to naturalization; burden of proof, 8 USCS § 1429 (Current through PL 116-8, approved 3/8/19).

program.²⁹ The DACA program was originally intended to defer removal of children from the country and grant them temporary legality in the United States.³⁰ If the program were to be eliminated, nearly one million immigrants would be deemed illegal residents of the country and be subject to removal.³¹ This would also impact their families, as many of the DACA recipients are working in the U.S. to provide for them.³² The elimination of DACA would also harm citizen children whose parents or other family members are removed.³³

Therefore, in order to maintain the safety and well-being of all children, we must reconsider our approach to immigration law. It is instances like these in which it is clear that some reform must be made to protect the intrinsic human rights of all children, regardless of their citizenship status.

²⁹ Attorney General Sessions Delivers Remarks on DACA. (2017, September 05). <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

³⁰ Consideration of Deferred Action for Childhood Arrivals (DACA). (2017, September 05). <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines>.

³¹ Krogstad, J.M., & Krogstad, J.M. (2017, September 01). *DACA 'Dreamers' face uncertain future under Trump*. <https://www.pewresearch.org/fact-tank/2017/09/01/authorized-immigrants-covered-by-daca-face-uncertain-future/>.

³² *DACA revoked, what should the U.S. do for young undocumented immigrants?*, NEWS HOUR, PBS. (2017, September 05). <https://www.pbs.org/newshour/show/daca-revoked-u-s- young-undocumented-immigrants>.

³³ *Supra* note 21.

II. THE HUMAN RIGHTS PERSPECTIVE

The idea of human rights stems from the fact that everyone has an innate set of privileges earned by existing. The law of the United States does not explicitly define human rights, but these fundamental privileges are alluded to in the U.S. Constitution, treaties, federal and state law, or any other piece of legislation.³⁴ The absence of a certain fundamental right from the Constitution does not mean that it is nonexistent. In fact, the Ninth Amendment clarifies that not all rights are enumerated in the Constitution, implying that some rights will be left to interpretation.³⁵ However, it remains clear that certain human rights are indisputable in U.S. law. For example, the Declaration of Independence enunciates that “life, liberty, and the pursuit of happiness,” are “self-evident,” “unalienable rights.”³⁶ Thus, there exists, in the very basis of our country, a respect and consideration for certain innate human rights that cannot be denied.

The “best interests of the child” approach is a clear implication of human rights applied in domestic U.S. law. Currently, all 50 states recognize this standard when making a decision that may directly affect the well-being of a child.³⁷ The “best interests of the child” approach is derived from the *parens patriae* duty of the State to protect those who cannot

³⁴ Merle H. Weiner (Fall, 2004). SYMPOSIUM ON INTERNATIONAL LAW. *Family Law Quarterly*, 38, 583.

³⁵ U.S. CONST. amend. IX; *Supra* note 34.

³⁶ *Webster v. Ryan*, 189 Misc. 2d 86, 729 N.Y.S.2d 315, 2001 N.Y. Misc. LEXIS 264 (Family Court of New York, Albany County June 21, 2001, Decided); *Supra* note 34.

³⁷ *Supra* note 19. (See note 42).

protect themselves.³⁸ Simply put, *parens patriae* is the basis for State interference in the rights of children. As referenced in *Meyer v. Nebraska*, this doctrine originates from Plato's Commonwealth State.³⁹ Under *parens patriae*, it is for the betterment of the State to act in the best interests of the child so that they can develop into productive members of society.⁴⁰ In the case of *Matthew v. Yoder*, it is the dissenting opinion that provides another allusion to the "best interests of the child" standard.⁴¹ Justice Douglas explains in his partial dissent that children should be allowed a voice when deciding matters that affect them, interpreting the Bill of Rights to allow children to make decisions about their own lives.⁴² These sentiments are evident in today's application of the *parens patriae* doctrine as the "best interests of the child" standard. The American Bar Association Standards for representing children establish that the "best interests" approach, when applied substantively, prioritizes the child's safety, permanence, and well-being.⁴³ Procedurally, it

³⁸ Douglas E. Abrams et al., West (2014). "*A Very Special Place In Life: The History Of Juvenile Justice In Missouri*", CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE. pp. 19-20.

³⁹ *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 1923 U.S. LEXIS 2655, 29 A.L.R. 1446 (Supreme Court of the United States June 4, 1923, Decided).

⁴⁰ *Id.*

⁴¹ *Wis. v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15, 1972 U.S. LEXIS 144 (Supreme Court of the United States May 15, 1972, Decided).

⁴² *Id.*

⁴³ See ABA Standards for Lawyers Who Represent Children in Abuse and Neglect Cases, A-2 (1996).

prioritizes allowing the child to have a voice in the matter at hand.⁴⁴

However, this standard is not universally applied in immigration law.⁴⁵ The protocol for American children starkly contradicts the privileges given to foreign born children, despite the fact that immigration proceedings directly affect where these children will be placed and have a significant impact on their quality of life.⁴⁶ There is no right for child immigrants in the United States that requires the best interests of the child be considered.⁴⁷ The only aspect of immigration law that references this standard is the Special Immigrant Juvenile Status.⁴⁸ In addition, the William Wilberforce Trafficking Victims Reauthorization Act of 2008 established that child advocates should be appointed for “trafficking victims and other vulnerable unaccompanied alien children,” and that they should “advocate for the best interest of the child.”⁴⁹ However, these limited protections are only available to a specific subset of children, which is largely determined by the state’s interpretation of this federal law.⁵⁰

⁴⁴ Peter Margulies (March, 1996). *The Lawyer As Caregiver: Child Client's Competence In Context*. FORDHAM L. REV., 64, 1473.

⁴⁵ David B. Thronson (2002). *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*. OHIO STATE L. J., 63, 979.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Supra* note 27.

⁴⁹ § 1232. Enhancing efforts to combat the trafficking of children, 8 USCS § 1232 (Current through PL 116-8, approved 3/8/19).; *Supra* note 21.

⁵⁰ Randi Mandelbaum and Elissa Steglich (October, 2012). *Special Issue: Immigration And The Family Court: Special Issue*

The fact that U.S. legislation treats its own children so much differently than children of another country is indicative of a human rights issue. The basic human right to life is not protected for child immigrants in the United States.⁵¹ The misconception that child immigrants are only coming into the country as “economic migrants” has promoted the false idea that these children are different from those seeking asylum.⁵² This is dangerous because a common sentiment is that those coming with their parents for economic reasons are undeserving and unworthy of trust, while immigrants seeking asylum are genuine children in need of legal action on their behalf.⁵³ Another one of the hesitations regarding applying this standard to immigration is that it will result in excess numbers of immigrants in the country or that it will condone fraud within the system.⁵⁴ However, these concerns are not directly related to the incorporation of the “best interests” standard.⁵⁵ Immigration courts are already confronting the issue of adjudication of what constitutes sufficient documentation, so this worry is not a sufficient reason to excuse the use of a “best interests standard” in U.S. immigration law.⁵⁶ Rather, it is essential

Article: Disparate Outcomes: The Quest For Uniform Treatment Of Immigrant Children. FAMILY COURT REV., 50, 606.

⁵¹ *Supra* note 21.

⁵² Urban Jonsson, *Human Rights Approach To Development Programming* (UNICEF 2003); *Supra* note 21.

⁵³ *Id.*

⁵⁴ Bridgette A. Carr (2009). *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure.* YALE HUMAN RIGHTS & DEVELOPMENT L. J., 12, 120.

⁵⁵ *Supra* note 7.

⁵⁶ *Id.*

that our country adopt this standard in order to recognize the human rights of children, regardless of birthplace or nationality, to ensure that the safety and well-being of all children are protected by our country.

As seen in American judicial history, the establishment of human rights for citizen children has frequently been disputed.⁵⁷ Historically, the United States has looked at immigrant children as even less likely to be rights-holders because the country's priority is immigration enforcement.⁵⁸ Because the national sentiment towards immigrants is often one of pity, they are not viewed as individuals with rights.⁵⁹ Their need for resources is viewed as an economic burden, so these children are less likely to get the protection that they need.⁶⁰ The charity model that often develops in situations like these is only a temporary fix to a bigger social problem.⁶¹ A rights-based approach, however, promotes a systematic change that addresses the inequalities and root causes of these rights violations.⁶² The following section will demonstrate how these types of approaches have been instituted elsewhere to explain how a rights-based approach is possible in the United States.

⁵⁷ *Supra* note 13.

⁵⁸ Jacqueline Bhabha (2000). *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*. THE UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE, 7, 269.

⁵⁹ Jonathan Todres (2011). *A Child Rights-Based Approach to Reconstruction In Haiti*. INTERCULTURAL HUMAN RIGHTS L. REV., 6, 43.

⁶⁰ *Supra* note 21.

⁶¹ *Id.*

⁶² *Id.*

III. INTERNATIONAL PERSPECTIVES

The human rights perspective extends further than the United States, and it is worth noting the international stance on immigration rights since this is an issue that requires the involvement of more than one country. In 1989, the United Nations' Convention on the Rights of the Child (CRC) established a set of rights for all children to be recognized internationally.⁶³ At the crux of this list is the "best interests of the child" perspective, which is included in Article 3.⁶⁴ The United States and Somalia are the only two countries in the world that have not ratified the CRC.⁶⁵ It is worth noting that the CRC has no mechanisms to enforce compliance with its terms or impose any sanctions for noncompliance.⁶⁶ However, it serves as a set of values that almost every country has agreed upon as a basis for how children should be treated and the responsibilities that the State has for them.⁶⁷ This shared value is primarily that the state make decisions based on the best interests of the child.⁶⁸

The four main principles of the CRC are non-discrimination, the best interests of the child, the right to participation, and the right to life, survival, and

⁶³ *Supra* note 8.

⁶⁴ *Id.*

⁶⁵ Office of the United Nations High Commissioner for Human Rights; Status of Ratifications of the Principal International Human Rights Treaties.

<http://cjei.org/publications/IAWJ%20Conference/NB%20List%20of%20ountries%20and%20treaties%20ratified%20Ratification%20repor.pdf>.

⁶⁶ *Supra* note 8.

⁶⁷ *Supra* note 67.

⁶⁸ *Supra* note 8.

development.⁶⁹ The best interests of the child and the right to life, survival, and development have been discussed in the previous section with regards to human rights. The aspect of non-discrimination ensures that all children, regardless of immigrant, refugee, or citizenship status, are entitled to the rights outlined in the convention.⁷⁰ The idea is that these children are children first and foremost, not just asylum seekers.⁷¹ The United States is in clear conflict with this first principle by not applying the same standard to immigrant children as it does to citizen children.⁷² Additionally, some states bar undocumented children from public healthcare coverage, unlike citizen children who can receive benefits from the government to ensure their health and well-being.⁷³ The right to participate is the fourth main principle established by the CRC.⁷⁴ The main idea with the right to participate is that it establishes the capacity that children possess to have a voice in these decisions that so greatly affect their lives.⁷⁵ The United States does not adopt the same

⁶⁹ Comm. on the Rights of the Child, Rep. of the 2012 Day of General Discussion: The Rights All Children in the Context of International Migration (2012), http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012_CRC_DGD-Childrens_Rights_InternationalMigration.pdf

⁷⁰ *Supra* note 21.

⁷¹ *Id.*

⁷² *Supra* note 45.

⁷³ *Health Care Coverage Maps*, NAT'L IMMIGRANT LAW CENTER, <https://www.nilc.org/issues/health-care/healthcoveragemaps/>.

⁷⁴ *Supra* note 71.

⁷⁵ *Supra* note 21.

outlook with this principle either.⁷⁶ Despite this prevailing international standard, as well as adamant support from researchers and advocates that the voice of children should be incorporated into these decisions, the U.S. remains stagnant.⁷⁷

The problem with the fact that the United States has not ratified the CRC lies in its refusal to wholly commit to a “best interests of the child” standard. This is further solidified by our country’s unwillingness to adopt the policies of the CRC. For example, the CRC has clearly established that detaining immigrants is never in the child’s best interest, but the U.S. directly violates this standard.⁷⁸ Therefore, its noncompliance with the CRC is more than symbolic. The actions authorized by the U.S. government are contradicting the shared values that almost every other country in the world has adopted.⁷⁹ Furthermore, the actions taken by other countries regarding immigration legislation clearly reflect the ideals of the CRC.

⁷⁶ Jacqueline Bhabha (Spring, 2002). *Boundaries In The Field Of Human Rights: Internationalist Gatekeepers?: The Tension Between Asylum Advocacy And Human Rights*. THE HARVARD HUMAN RIGHTS JOURNAL, 15, 155.

⁷⁷ Andrew I. Schoenholtz (Summer, 2012). *Symposium: Children And Immigration: A Lost Generation?: Developing The Substantive Best Interests Of Child Migrants: A Call For Action* VALPARAISO UNIVERSITY L. REV., 46, 991.

⁷⁸ Office of the U.N. High Comm'r for Human Rights (OHCHR) & Comm. on the Rights of the Child, *Rep. of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration* (2012), <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>, *Supra* note 21.

⁷⁹ *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1, 1993 U.S. LEXIS 2399, 61 U.S.L.W. 4237, 93 Cal. Daily Op. Service 2028, 93 Daily Journal DAR 3628, 7 Fla. L. Weekly Fed. S 73 (Supreme Court of the United States March 23, 1993, Decided).

Thus, it is again evident that the ratification of the CRC is not only symbolic.

Canada provides an example of how human rights and a consideration for the “best interests of the child” can be successfully implemented into immigration law.⁸⁰ Canada’s laws implement the “best interests of the child” as the focus of immigration decisions.⁸¹ Immigration proceedings in Canada focus on how the child will be affected by the decisions made by the Court by analyzing the situation on a case-by-case basis.⁸² For example, the decision-makers must consider the benefit to the child if the parent is not removed, the detriment that parental removal could cause, and the possible repercussions should the child voluntarily wish to leave the country with the parent.⁸³ Canada has been recognized for its extraordinary treatment of immigrants and refugees, including by the U.N. when awarded the Nansen Refugee Award for outstanding service to refugees or stateless peoples.⁸⁴ Thus, it is a country that has been internationally acknowledged as having successful immigration policies.

⁸⁰ *Supra* note 54.

⁸¹ IRPA § 25(1) (Can.). In addition, § 67(1)(c) of the IRPA empowers the Immigration Appeal Division to grant an appeal if, “taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief...”; *Supra* note 54.

⁸² *Supra* note 54.

⁸³ *Id.*

⁸⁴ See United Nations High Commissioner for Refugees, *Archive of Past Nansen Winners*, online: <<http://www.unhcr.org/pages/49c3646c467-page5.html>>.

Furthermore, Canada serves as a good illustration of how these policies may be implemented into the U.S. because the immigration systems of the U.S. and Canada are quite comparable.⁸⁵ In fact, Canada has a greater proportion of immigrants that come to North America than the United States.⁸⁶ Most importantly, though, is the fact that the U.S. and Canada have both agreed that the two countries provide equally effective protection for immigrants seeking asylum.⁸⁷ This implies, therefore, that because Canada employs the “best interests of the child” approach in these situations, the U.S. should provide at least that level of protection for immigrant children.⁸⁸ However, this is clearly not the case given the increased restrictions on children’s rights in immigration law.⁸⁹ Though it is clearly possible for a “best interests of the child” standard for immigration policy in the U.S. based on its successful implementation in Canada, our country still refuses to adopt this approach for migrant children. This further solidifies that the United States is choosing to contradict the international standards for protecting children and elects instead to place further restrictions on the policies regarding non-citizen minors.

CONCLUSION

Restrictive immigration policies are not a new issue in American politics, though President Trump has garnered

⁸⁵ *Supra* note 54.

⁸⁶ *Id.*

⁸⁷ Safe Third Country Agreement, U.S. - Canada, pmbi., Dec. 5, 2002, <http://www.cic.gc.ca/english/departament/laws-policy/safe-third.asp>; *Supra* note 54.

⁸⁸ *Supra* note 54.

⁸⁹ *Supra* note 29.

considerable media attention on the topic.⁹⁰ Given the facts outlined in this paper, the restrictions that his administration has placed on migrant minors fall within his constitutional powers as the executive, but no interpretation of these actions complies with the basic human rights to which every individual is entitled. Legislative limitations have been implemented for decades⁹¹ based on the country's priorities on economic security, in combination with misguided concerns about what the negative impacts of immigration may be.⁹²

The arguments cited in Part 2 demonstrate the violation of human rights that is occurring at the U.S.-Mexico border. By failing to adopt any form of the "best interests of the child" approach, our country is indicating that it is not prioritizing protecting children.⁹³ Because our immigration system has failed to incorporate the "best interests of the child standard," we leave the children of our neighbors at risk.⁹⁴ In order to adopt a human rights approach, we must first acknowledge that child immigrants are rights-holders, with the right to have a voice in their own proceedings.⁹⁵ It is essential that the U.S. government look at minor immigrants as children first and foremost, regardless of their citizenship status.⁹⁶

The human rights arguments are further solidified by the apparent conflict with the United Nations' standards for treatment of children. The fact that America is one of only

⁹⁰ *Supra* note 1.

⁹¹ *Supra* note 21.

⁹² *Supra* note 54.

⁹³ *Supra* note 7.

⁹⁴ *Id.*

⁹⁵ *Supra* note 21.

⁹⁶ *Id.*

two countries in the world that has not agreed to treat children with a certain standard of human rights is alarming.⁹⁷ We can clearly see other countries, like Canada, that do not treat their child immigrants with such severity, and the country is not suffering as a result.⁹⁸ The U.N.'s policies on children's rights provide another compelling illustration for how we are not providing them with the care that all children deserve. It is unsettling that a country as developed as the United States can be so regressed in its policies on foreign-born children. At the very least, the U.S. government lacks compassion, but in the worst cases, it is undoubtedly treating children inhumanely. This is demonstrated by President Trump's proposed repeal of the Deferred Action for Childhood Arrivals (DACA) instituted by the Obama administration.⁹⁹ Based on his support of the Reforming American Immigration for a Strong Economy Act (or "RAISE"), it is clear that President Trump wants to limit legal immigration as well, as the act intends to cut immigration in half within a decade.¹⁰⁰ The security and well-being that our country ensures for its own children are being intentionally barred from those not born or naturalized in the United States,

⁹⁷ *Supra* note 67.

⁹⁸ *Supra* note 54.

⁹⁹ *Supra* note 30.

¹⁰⁰ Reforming American Immigration for a Strong Economy Act, S. 1720, 115th Cong. (2017); David Nakamura, Trump, *GOP Senators Introduce Bill to Slash Legal Immigration Levels*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/08/02/trump-gop-senators-to-introduce-bill-to-slash-legal-immigration-levels/?utm_term=.903007a09063.; *Symposium : - Immigration Law & Resistance: Ensuring A Nation Of Immigrants: The Economics Of Immigration Reform*, 52 U.C. DAVIS L. REV. 113, 113.

violating the human rights protections to which all children are entitled.

Our country's treatment of immigrant children has become a humanitarian crisis. Our nation is increasingly supportive of restrictive immigration policies, which makes the need to promote a rights-based approach even more urgent.¹⁰¹ Justice Rutledge's note in the *Prince* opinion should apply in the case of immigrant minors as well.¹⁰² He states that it is essential to raise healthy, well-rounded children for the continuance of a healthy democratic state.¹⁰³ If we can apply the "best interests" standard to protect the human rights of our own children, there should be no difference in the application of the law to foreign-born minors.¹⁰⁴ Furthermore, the CRC, with the support of almost every single other country in the world, prioritizes the holistic development of the child, much like priorities of Justice Rutledge.¹⁰⁵ Therefore, both the Supreme Court and the U.N. promote a "best interests of the child" approach that is consistent with domestic legislation regarding U.S. minor citizens. It is essential to apply this same standard to non-citizen children.

With consideration of these facts, it would be feasible for the United States to incorporate a more human rights-based approach to immigration law, founded in the "best interests of the child" standard.¹⁰⁶ It seems as though, given the

¹⁰¹ *Supra* note 21.

¹⁰² *Supra* note 9.

¹⁰³ *Id.*

¹⁰⁴ *Supra* note 7.

¹⁰⁵ *Supra* note 9.

¹⁰⁶ *Supra* note 7.

consistent growth of restrictive policies, the priorities of the country remain on immigration enforcement rather than acting in the best interests of human rights.¹⁰⁷ While the U.S. public may be divided on how to go about handling this issue, there is hope that the best interests of human rights will prevail.¹⁰⁸ If the underlying systematic issues are not changed, current immigration problems will not be solved.¹⁰⁹

The United States government has the opportunity to intervene to help the children at our southern border, and this can be done by protecting them with the “best interests of the child” standard.¹¹⁰ By using the rights and priorities established in the CRC, the U.S. can begin to develop an internationally-accepted approach that will prioritize children, while establishing their “best interests,” right to life, and equal treatment for child immigrants and child citizens.¹¹¹

¹⁰⁷ *Supra* note 21.

¹⁰⁸ *Supra* note 29.

¹⁰⁹ *Supra* note 21.

¹¹⁰ *Supra* note 7.

¹¹¹ *Supra* note 21.

ROE V. WADE:
THE LIFE-CHANGING DECISION THAT DIVIDED
AMERICA

Natalie Justus

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INTRODUCTION

Jane is pregnant, poor, and alone. She struggles to find employment as her due date looms closer and closer, and she cannot afford the cost of supporting a newborn baby. Without anyone to turn to, fear encompasses the young woman; she is all out of options. The year is 1970, and abortion is illegal in almost every state. Those who cannot afford to travel thousands of miles to obtain a legal abortion, or who are unable to pay the hefty price for a physician to perform the procedure illegally, subject themselves to dangerous practices as a last resort.¹ The story of Jane Roe is not unique. Countless women still face the same situation, but thanks to the 1973 landmark U.S Supreme Court decision *Roe v. Wade*, a woman now has the option to choose whether or not to carry a pregnancy to term. It has been forty-five years since *Roe v.*

¹ Harrison, Maureen, and Steve Gilbert, editors. *Abortion Decisions of the United States Supreme Court: the 1970s*. Excellent Books, 1993. Print.

Wade first constitutionally protected abortion, but there is still unsettled conflict regarding reproductive freedom.

In the United States, an uproar of voices has taken over today's political climate due to the recent retirement of Supreme Court Justice Kennedy and the nomination of Brett Kavanaugh. In a CQ Researcher article titled "Abortion," author Bara Vaida labels Justice Kennedy as a "swing vote on a court divided 4-4."² He helped reaffirm the constitutionality of *Roe v. Wade* by supporting the liberal agenda in *Planned Parenthood v. Casey* in 1992. After President Trump's conservative nominee was sworn in as Kennedy's replacement following a whirlwind of sexual assault allegations and testimonies, fear has swept over the nation. If *Roe v. Wade* were to be overturned by the Supreme Court, trigger laws that have been adopted in several states such as Louisiana, Mississippi, and the Dakotas would instantly prohibit abortion under any circumstance.³ Abortion has always been a highly contended issue in American politics, yet a large portion of the U.S population does not accurately know about the 1973 Supreme Court case *Roe v. Wade*. The Court's compelling interpretation of the 14th Amendment in *Roe v. Wade*, coupled with legal precedent established in privacy cases like *Griswold v. Connecticut*, evidences that its verdict is good law and should not be overturned.

Modern news outlets have warped the public's perception of abortion and further divided the country's political parties

² Bara Vaida, *Abortion*, CQ RESEARCHER (July 13, 2018), library.cqpress.com/cqresearcher/cqr_ht_abortion_2018.

³ *Id.*

into either pro-life or pro-choice supporters. But abortion is not just a two-sided argument. Justice Harry Blackmun, one of the seven concurring Court Justices of *Roe v. Wade*, wrote in his majority opinion:

One's philosophy, one's experiences, one's exposure, to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.⁴

In order to form a sensible opinion on the topic, one must stray away from conflicting reports and instead focus on the impartial facts of the Supreme Court's decision. This essay seeks to dispel common misconceptions surrounding *Roe v. Wade* through an analysis of the legal history of abortion.

I. EARLY HISTORY OF ABORTION

Abortion is a rudimentary part of human history that is often neglected. It has been around for as long as women have been getting pregnant. Katie Klabusich, a freelance writer, mentions in her Truthout article that "the earliest written record of abortion is more than 4,000 years old."⁵ Even excerpts from the Bible dealing with miscarriage refer to it

⁴ Harrison and Gilbert, *supra* note 1.

⁵ Katie Klabusich, *Abortion Is as Old as Pregnancy: 4,000 Years of Reproductive Rights History*, TRUTHOUT.ORG (Jan. 22 2016), truthout.org/articles/abortion-is-as-old-as-pregnancy-4-000-years-of-reproductive-rights-history/.

“in terms of loss of property and not sanctity of life.”⁶ For example, Numbers 5:11-31 describes the custom of a priest giving an unfaithful wife a “bitter water” to induce miscarriage before the Lord. In ancient Egyptian, Greek, and Roman civilizations, abortion techniques and toxic herbs were used frequently and rejected only when the father desired the child.⁷ These archaic practices were passed down over generations and dispersed all over the world.

Despite popular belief, abortion had a long history in America long before *Roe v. Wade* declared it constitutional. During the slave trade, African women would try to end pregnancies by using the cottonwood plant after being raped by their owners.⁸ The 1997 book *When Abortion Was a Crime* provides a detailed account of abortion culture during the nineteenth and twentieth centuries. The author Leslie J. Reagan, a professor at the University of Illinois specializing in law, history, and women’s studies, examines the criminality of abortion before *Roe v. Wade*. Reagan notes that “abortion was not always a crime.”⁹ As long as an abortion was performed before the pregnant women felt any movement—a point commonly referred to as “quickening” which occurred around the fourth month of pregnancy—the procedure was protected “under common law” up until the

⁶ *Ethics - Abortion: Historical Attitudes to Abortion*, BBC.CO.UK, www.bbc.co.uk/ethics/abortion/legal/history_1.shtml (last visited Oct. 12, 2019).

⁷ Klabusich, *supra* note 3.

⁸ *Id.*

⁹ Leslie J. Reagan, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973* 8 (1997).

mid-nineteenth century.¹⁰ This notion derived from old English Common Law that had been in place since the Middle Ages. Following 1880, after every state had established laws that criminalized abortion, there were “exceptions for therapeutic abortions performed in order to save a woman’s life.”¹¹ This “legal loophole” made policing and punishing women who terminated their pregnancies difficult because of the loose definition of “therapeutic.”¹²

Surprisingly, abortion was once accepted even by the Catholic Church. Before the mid-1800s, most religions viewed a “woman’s life as primary” and typically approved of early-stage abortion. Originally, no one believed that human life existed before “quickening,” not even the Catholic Church.¹³ Reagan points out that “[n]ot until 1869, at about the same time that abortion became politicized in this country, did the church condemn abortion; in 1895, it condemned therapeutic abortion” to expose the drastic shift in religious opinion.¹⁴ This change marked the beginning of a powerful religious opposition to abortion that still exists today. However, the Church’s historical acceptance of the practice demonstrates that it was not always the highly politicized, moral issue debated in modern society.

¹⁰ *Id.*

¹¹ *Id.*, at 5.

¹² *Id.*, at 61.

¹³ *Id.*, at 8.

¹⁴ *Id.*, at 7.

II. THE POLITICS OF ABORTION

Legislation adopted by the states to criminalize abortion by 1880 remained until the 1970s, when the feminist movement fought for reproductive rights in *Roe v. Wade* as well as other lesser-known Supreme Court cases.¹⁵ In the years between, women went to great lengths to end unwanted pregnancies. Because contraception was not yet easily accessible, illegal abortions were sought after as women joined the workforce, but due to “unsanitary and primitive conditions, these women risked death and serious injury.”¹⁶ In the first half of the twentieth century, many distressed women would “[employ] a wide array of instruments found within their own homes to induce miscarriages, including knitting needles, crochet hooks, hairpins, scissors, and buttons hooks.”¹⁷ In some cases, doctors would try to help out young women by terminating their pregnancies and labeling it as a therapeutic abortion. For example, if a woman threatened she would commit suicide, a doctor could defend that action was necessary to protect the health of the women.¹⁸

In *Abortion, Politics, and the Courts: Roe V. Wade and Its Aftermath*, author Eva R. Rubin illustrates how “specific events focused public opinion on the need for change, dramatized the issue, and aggregated support for new policies.”¹⁹ For example, a massive outbreak of German

¹⁵ *Id.*, at 227.

¹⁶ Eva R Rubin, ABORTION, POLITICS, AND THE COURTS: ROE V. WADE AND ITS AFTERMATH 15 (1982).

¹⁷ Reagan, *supra* note 6, at 43.

¹⁸ REVERSING ROE (Netflix 2018).

¹⁹ Rubin, *supra* note 12, at 20.

measles hit the United States, from 1962 to 1965, affecting nearly 82,000 pregnant women. This very dangerous disease can result in disastrous effects for unborn babies, yet women were still not permitted to terminate their doomed pregnancies, and “an estimated 15,000 defective babies were born.”²⁰ In 1962, a female children’s TV actress and mother of four named Sherri Finkbine became pregnant after taking Thalidomide, a drug which was known to cause terrible birth defects. Her doctor recommended an abortion, but after her case became highly publicized, all the American hospitals refused her care. Finkbine’s only option was to travel to Sweden for the procedure.²¹ All of these “activating incidents,” as Rubin calls them, caught the public’s attention and sympathy, which paved the way to the Supreme Court’s ultimate decision on abortion.

In the years before *Roe*, women were hesitant to file abortion suits due to the conservative majority of the justices, the lack of legal precedent, and the extremely slow judicial process that generally takes longer than a nine-month pregnancy. Until *Griswold v. Connecticut* was decided in 1965, “[a]bortion was an explosive issue on which there was no consensus. It involved a variety of religious and moral issues of the kind that courts are eager to avoid, and very little established doctrine or precedent was available to guide decision.”²² *Griswold v. Connecticut*, a case regarding the right to access contraception, was a major win for the

²⁰ *Id.*, at 21.

²¹ REVERSING ROE (Netflix 2018).

²² Rubin, *supra* note 12, at 35.

women's rights movement because the Court "establish[ed] a new constitutional concept," known as the right to privacy, that became the bedrock for abortion legislation.²³ Inspired by the Civil Rights Movement and the *Griswold* ruling, activist women's groups focused their efforts on court cases that promoted the women's liberation movement in order to change the law for good.

The Court's use of the Fourteenth Amendment to defend women's rights was established in *Reed v. Reed*,²⁴ laying the groundwork for its logical application in the *Roe* decision. Empowered by a unanimous Court, Chief Justice Burger asserted that an Idaho probate code giving men priority over women in the administration of a family member's estate violated the Equal Protection Clause of the Fourteenth Amendment.²⁵ While this decision had little effect on privacy rights, the women's liberation movement recognized the potential of arguments made under the Fourteenth Amendment and transferred this idea to cases like *Roe v. Wade*. Therefore, the *Roe* verdict's strong foundation in the protections of the Fourteenth Amendment comes from established legal precedent, reaffirming its validity against modern politicized misconceptions.

III. THE MONUMENTAL DECISION

What started out as a local court case challenging the Texas law prohibiting abortion except to save the mother's life became what may be the most controversial Supreme Court decision in American history: *Roe v. Wade*. After being

²³ *Id.*, at 39.

²⁴ *Reed v. Reed*, 404 U.S. 71 (1971).

²⁵ *Id.*

refused care by all her surrounding physicians, a single, young pregnant woman under the pseudonym of Jane Roe decided to fight back against the law. In her affidavit, she said that she “filed suit on behalf of herself, and all those women who have in the past at that present time or in the future would seek termination of a pregnancy.”²⁶ *Roe v. Wade*, conjoined with the similar case *Doe v. Bolton*, became a class-action suit under the council of Sara Weddington that quickly reached the Supreme Court. In the Netflix documentary *Reversing Roe*, Weddington says, “I was 26. And I was the youngest person ever to argue a case in the Supreme Court.”²⁷ At the time, the court was considered to be very conservative, with four members appointed by Republican President Richard Nixon. These nine middle-aged to elderly men were faced with the burden of deciding the fates of millions of women.

The case was argued twice before the Supreme Court Justices, first on December 13, 1971, and then again on October 11, 1972, before the controversial decision was finalized on January 22, 1973.²⁸ Between the two sessions, counsel for the appellee switched from Jay Floyd to Robert Flowers; meanwhile, Weddington used the time to strengthen her constitutional argument. *Roe v. Wade* is unlike any other court case because, as Justice Stewart emphasizes during the oral reargument, “the basic constitutional question initially is

²⁶ *Roe v. Wade: Oral Argument*, OYEZ (Nov. 11, 2018), www.oyez.org/cases/1971/70-18.

²⁷ REVERSING ROE (Netflix 2018).

²⁸ *Roe v. Wade*, OYEZ (Nov. 11, 2018), www.oyez.org/cases/1971/70-18.

whether or not an unborn fetus is a person.”²⁹ Floyd and Flowers argued that from the point of conception, a fetus is a person and therefore deserves the same constitutional rights as everyone else, but their contentions were weak.³⁰ Rather than trying to pick a side in that impossible argument, Weddington focused on the legal terms of her case by using the Constitution in her favor. She brought up in her first argument that Section One of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.³¹

She chose this segment to emphasize how the Constitution specifically mentions the word “born” in its classification, in which she claimed contradicted the opposition’s argument. Then, Weddington announced that “liberty to these women would mean liberty from being forced to continue the unwanted pregnancy.”³² In this way, she revealed to the Supreme Court Justices how vital reproductive freedom is for American women.

In the end, the Majority found abortion to be one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, with only two dissenting opinions, from White and Rehnquist. The majority decision, written by Justice Blackmun, affirms:

²⁹ *Roe v. Wade: Oral Reargument*, OYEZ (Nov. 11, 2018), www.oyez.org/cases/1971/70-18.

³⁰ *Supra* note 26.

³¹ U.S. Const. amend. XIV, § 1.

³² *Supra* note 26.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.³³

The Court ruled that the Texas statutes under question were unconstitutional and later declared that all state laws forbidding abortion must be dismantled. This ruling affected the laws of forty-six states. New York, Washington, Alaska, and Hawaii were the only states to have overturned their anti-abortion laws prior to *Roe v. Wade*.³⁴ After some time, Planned Parenthood and many other local clinics started offering abortion services to women all over the country.

IV. LEGAL & CULTURAL RAMIFICATIONS OF *ROE V. WADE*

For many, *Roe v. Wade*'s ruling was a cause for celebration, but within the anti-abortion population, the ruling was devastating. Over the past forty years since *Roe*, numerous pro-life organizations, such as American Life League, Right to Life, and Operation Rescue have come together to protest the Supreme Court's decision. The current president of Operation Rescue Troy Newman explains that

³³ Harrison and Gilbert, *supra* note 1.

³⁴ Sarah Kliff, *CHARTS: How Roe v. Wade Changed Abortion Rights*, WASHINGTONPOST.COM (Jan. 22, 2013), www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/?utm_term=.205312a524d5.

his group's mission is and always has been to "rescue those unjustly sentenced to die" just as the Bible says in Proverbs 24:11.³⁵

Although the 1973 decision confirmed abortion as a constitutional right and legalized it nationwide, *Roe* did not outlaw the continuation of state regulations. In fact, any state is allowed to place restrictions or even prohibit abortion during the third trimester of pregnancy except when necessary to save the mother's life.³⁶ Due to the pressure of pro-life politicians and supporters, all sorts of laws and regulations have since been enacted to decrease the accessibility of general abortion.

In 1989, Pennsylvania changed its abortion legislation requiring all patients to endure a twenty-four hour waiting period and to obtain consent from either a parent if the patient is a minor or from a husband if married. In the 1992 court case commonly known as *Planned Parenthood v. Casey*, Planned Parenthood of Southeastern Pennsylvania challenged these regulations as a violation of the rights guaranteed in *Roe v. Wade*. Although the Court's decision reaffirmed that *Roe v. Wade* is good law, the new decision ultimately reduced *Roe*'s authority by establishing the "undue burden" standard that blocks any "substantial obstacle" meant to prolong the process and impede the accessibility of abortion.³⁷ The Justices found that except for the requirement of the husband's consent, Pennsylvania's provisions passed the undue burden test and were therefore

³⁵ REVERSING ROE (Netflix 2018).

³⁶ *Id.*

³⁷ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

constitutional.³⁸ This case resulted in a wave of new state regulations, specifically designed to pass the undue burden test, legalizing such barriers as parental involvement, waiting periods, mandatory ultrasounds, and restricted healthcare coverage. An article written for the Planned Parenthood Action Fund specifies that “in the first quarter of 2018, 37 states introduced 308 new abortion restrictions,” showing how common anti-abortion legislation still is today.³⁹

Until the pro-life movement achieves its ultimate goal of overturning *Roe v. Wade*, its mission is to close down as many abortion clinics as possible. This tactic of closing down clinics makes abortion virtually unattainable for the average citizen living hours away from the nearest clinic. Brigitte Amiri, an ACLU lawyer, mentions in *Reversing Roe* that “right now, there are seven states that have only one abortion provider, and those states have been under siege in terms of restrictions of women’s health care.”⁴⁰ The seven states include North Dakota, South Dakota, Wyoming, Missouri, Kentucky, West Virginia, and Mississippi.⁴¹ Throughout the 80s and 90s, the pro-life movement became violent as protesters started harassing patients, murdering abortion physicians, and even bombing clinics.⁴² Although patients are still harassed and shamed today, the pro-life movement

³⁸ *Id.*

³⁹ *13 Abortion Cases Brett Kavanaugh Could Rule on Right Away*, PLANNED PARENTHOOD ACTION FUND (Sept. 6, 2018), <https://www.plannedparenthoodaction.org/blog/13-abortion-cases-kavanaugh-could-rule-on-right-away>.

⁴⁰ *REVERSING ROE* (Netflix 2018).

⁴¹ *Id.*

⁴² *Id.*

has shifted to a more civil approach by focusing on adopting new legislation and electing pro-life candidates to office.

The issue regarding abortion is not the act itself, but rather how politicized the medical procedure has become. Partisan political alliances have become more important than the legal history of the practice, and the Constitutional protections established by the Court in both *Griswold* and *Roe* are often ignored in favor of controversial moral arguments. Historically, the Republican Party valued limited government regulation on society, but once politicians saw the chance to win support from the massive pro-life demographic, their ideals quickly changed. The 1980 Presidential Election of the conservative candidate Ronald Reagan is a notable shift in modern politics when people's religious beliefs took precedence in their voting. During his time as president, Reagan elected three conservative Justices to the Supreme Court—Justice O'Connor, Justice Scalia, and Justice Kennedy—with the hopes that they would quickly overturn *Roe v. Wade*.⁴³ After *Planned Parenthood v. Casey*, a large portion of the population was disappointed when the new Court decided to reformulate *Roe* rather than reverse it. Since then, the act of regulating abortion has been in the hand of politicians, not doctors. This has caused a discrepancy between the politics and the medicine of terminating a pregnancy. For example, partial-birth abortions became a heated topic among Republicans for decades, but the procedure they tried so hard to stop never even existed.⁴⁴ Dr. Colleen McNicholas, a Gynecologist practicing in St. Louis,

⁴³ REVERSING ROE (Netflix 2018).

⁴⁴ *Id.*

Missouri who often testifies against regulation bills, states in *Reversing Roe* that “there is no other medical procedure, none, not one, that is legislated in the way that abortion is.”⁴⁵

CONCLUSION

There are many misconceptions surrounding *Roe v. Wade* and abortion within society today that skew the general public’s opinion. With modern news outlets becoming less and less reliable, the same issue can have a million different truths. Despite popular belief, no federal dollars are permitted to go to abortion by law. Although often portrayed as an evil organization that must be stopped or defunded, Planned Parenthood is a very important community health center that not only offers safe abortion but also offers lifesaving cancer screenings, sex education, HIV tests, and birth control to millions of people. Planned Parenthood is also not included in the federal budget. Instead the organization functions similarly to a hospital that relies on healthcare and Medicaid for lower-income patients.⁴⁶ Another inconsistency is the infrequency of late-term abortions. Many citizens believe that late-term abortions or abortions after viability are common, but that is simply not true. Dr. McNicholas says, “ninety percent of women who have an abortion have it in the first trimester... and then a smaller proportion have it before twenty weeks. Between twenty to twenty-four weeks we’re

⁴⁵ *Id.*

⁴⁶ *5 Biggest Myths About Planned Parenthood*, IStandWithPP.ORG, <https://www.istandwithpp.org/defund-defined/5-biggest-myths-about-planned-parenthood> (last visited Oct. 12, 2019).

at probably about one percent.”⁴⁷ Usually, the abortions that occur after the twenty-week mark are as a result of a medical problem with the pregnancy.

Roe v. Wade is an extraordinary court case that has changed the lives of millions of American women. The modern politicization of abortion has resulted in the circulation of false information regarding the actual medical practices and morality of the issue. These misconceptions have overshadowed the solid legal precedent under which the Court formed its opinion, including the rulings in *Griswold v. Connecticut* and *Reed v. Reed*. *Roe v. Wade* is good law and its precedent should be protected, regardless of the population’s opinion of whether abortion is right or wrong. In her closing statement, Sarah Weddington said:

We are not here to advocate abortion. We do not ask this Court to rule that abortion is good or desirable in any particular situation. We are here to advocate that the decision as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual. That, in fact, she has a constitutional right to make that decision for herself and that the state has shown no interest in interfering with that decision.⁴⁸

Abortion should not be up for debate between politicians. This personal issue should solely be discussed between a woman and her doctor without involving the rest of the nation. While fears of *Roe*’s reversal have been heightened by the recent conservative Court appointments, organizations

⁴⁷ REVERSING ROE (Netflix 2018).

⁴⁸ *Supra* note 28.

like Planned Parenthood and the ACLU continue to demonstrate their support in protecting the constitutional privacy rights of women.

THE AFFLICTION OF ENVIRONMENTAL RACISM IN ALABAMA SANITATION POLICY

Claire Faivre

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INTRODUCTION

The environmental justice movement emerged in the 1960s in conjunction with the broader Civil Rights movement. Defined as the act of securing environmental equity, the environmental justice movement essentially arose to ensure that no one subset of the population would be disadvantaged in matters of environmental hazards or pollution. Since the 1960s, the movement has evolved to encompass a diverse range of environment related acts of discrimination. This form of policy, or lack thereof, that negatively and disproportionately impacts minority populations in matters of environmental concern, is known as environmental racism. First used in 1993, the term can encompass a wide array of issues, from the placement of toxic facilities, to lax policy enforcement, and even intentional and unintentional neglect).¹ This violation of environmental equity is practiced in the state of Alabama and is preserved in

¹ Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 285-334 (Environmental Law, Vol. 25 No. 2, 1995).

the form of codified sanitation policies that deviate from the standards established at the federal level.

The following will first offer a brief overview of the literature surrounding both the emergence of the fight against environmental racism and the applicability of Title VI in that struggle. It will then examine the specific policy environments at the federal and state level that have allowed for the perpetuation of these abuses, with particular consideration given to the incongruities between the two. Having dissected the specific legislation that facilitates environmental racism within the state, it will then consider the ramifications of this by examining the experiences of Lowndes County and Uniontown, Alabama. Finally, it will seek to elucidate the possible means of remedying the situation, with a practical consideration of the political environment at both the state and federal level.

I. BACKGROUND LITERATURE AND TITLE VI

Much of the existing literature examines the perpetuation of human rights abuses in the form of environmental racism across the nation more broadly. Further, the literature tends to focus on the growing use of Title VI as a means of legal recourse for impacted parties. Two major blocs have emerged in the debate over the effectiveness of Title VI as a means of legal recourse, with some researchers suggesting that, given its current interpretation, it is relatively ineffective, as argued in the work of Edson (2004). Conversely, the work of Fisher (1995) suggests its applicability, but also warns against a complete reliance on its invocation in the fight against environmental racism. Hill (1999) focuses less on compensation for victims of environmental racism,

demonstrating instead that there is a serious disconnect between proposed environmental policy and environmental policy in practice; and in this way has emphasized the importance of altered policy implementation.

The fight against environmental racism intensified in the 1980s gaining broader national attention. Consequently, the US General Accounting Office conducted a study on the relationship between race demographics and the location of hazardous waste facilities; finding that “Three out of the four commercial hazardous waste landfills in the Southeast United States were located in majority black communities”.² Further external investigations suggested that race was a more significant factor in placement of hazardous waste facilities than socioeconomic status.³ These findings thus reaffirmed the validity of the movement for environmental justice. Nearly eighty years after its conception, the fight against environmental racism continues. Led by Senator Cory Booker, new legislation has been proposed that would hold federal agencies accountable in the future placement of new hazardous waste facilities, and would broaden the right to use the Civil Rights Act as a means of legal recourse.

II. STATE AND FEDERAL POLICY ENVIRONMENTS

Little attention has been given to the case of Alabama’s sanitation policy, and even less consideration has been devoted to an analysis of the specific policies that have allowed for the perpetuation of environmental racism in the state. Alabama sanitation policy has systematically

² Rachel D. Godsil, *Remedying Environmental Racism*, 394-427 (Michigan Law Review, Vol. 90 No. 2, 1991).

³ *Id.* at 395

disadvantaged poor, minority populations and consequently perpetuates environmental racism at the state level. By analyzing national policy and comparing that to an analysis of Alabama state sanitation policy, the following will show that Alabama's policy is indeed afflicted with environmental racism.

To best study this proposal, it would prove prudent to use both the United States Constitution and Title VI of the 1964 Civil Rights Act as a means of analyzing national policy. To examine Alabama's sanitation policy, using the Alabama Department of Public Health's codified legislation explicates the current policy environment specifically. Examining the two sets of legislation will allow for a more informed comparison of the sanitation policy directions at the federal and state levels, and will elucidate any existing discrepancies. Further, by examining data collected by the US Census Bureau and local cost estimates of sanitation construction projects, the claim that Alabama's sanitation policies are wrought with environmental racism can be more effectively considered. An analysis of this data will include a scrutiny of the specific policy implications. Potentially controversial are the degrees of interpretation to which the policies could be subjected to. By adhering to existing scopes of legislative interpretation, however, any egregious misconstruals of the data in the form of policy legislation can be mitigated.

Section 8 of the United States Constitution establishes Congress' obligation to provide for the general welfare of American citizens.⁴ A broad interpretation of the text extends this obligation to environmental matters, including that of

⁴ U.S. Const. art. I, § 8.

sanitation concerns. If the constitutional basis for the government's obligation to ensure the sanitary health of all its citizens regardless of race is ambiguous, Title VI of the 1964 Civil Rights Act reaffirms this obligation in no fewer terms. Title VI states that

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁵

Thus, Title VI of the 1964 Civil Rights Act declares that no citizen of the United States can be subjected to discrimination in their right to their well-being as ensured by Section 8 of the Constitution.

As a signatory to the UN's International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the United States has committed to eradicating any discriminatory practices or policies at the federal level. Thus, sanitation policy is required to be free of any discriminatory practices. Though United States federal law has always taken precedence over international law, by ratifying the ICERD, a demonstrated commitment to reform was made to the international community. This was reaffirmed in the 2013 Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination, in which the Obama administration acknowledged "That low income and minority communities often are exposed to an unacceptable amount of pollution" and that the United States would continue to

⁵ Civil Rights Act of 1964, 42 U.S.C § 2000d (1964).

promote environmental justice.⁶ Effectively, this reaffirmed the United States' commitment to combating any instances of environmental racism.

Alabama sanitation policy, as outlined by the State Department of Public Health Administrative Code, explicitly details state policy regarding onsite sewage treatment and disposal. The state of Alabama mandates that it is unlawful to occupy a dwelling that does not have proper sewage disposal facilities.⁷ For homeowners not attached to the municipal sewer, they must install their own septic tanks.⁸ Further, the citizens of Alabama are prohibited from creating any sort of public health hazard.⁹ To the extent that citizens are required to independently provide for some of their sanitation needs, the state government has deviated from the provisions guaranteed by the federal government. Namely, that the government will promote the wellbeing of all citizens, and that policies enacted will be void of discriminatory measures.

This divergence from the national standard of sanitation policy comes as a result of socioeconomic disparities within the state. Though the inhabitants of Alabama who are not connected to the municipal sewer system are legally obligated to install their own septic tanks, the financial burden associated with this undertaking is immense. The average

⁶ U.S. Dep't of State, *United States Report to the Committee on the Elimination of Racial Discrimination* 1-217 (2013), <https://www.state.gov/documents/organization/210817.pdf>.

⁷ ALA. Admin. Code r. 420-3-1-.03 (2017).

⁸ ALA. Admin. Code r. 420-3-1-.02 (2017).

⁹ ALA. Admin. Code r. 420-3-1-.03 (2017).

cost of septic tank installation in the state is \$4,709.¹⁰ According to the figures generated by the US Census in 2017, the median annual income in the state was \$46,472, a relatively significant increase from previous years.¹¹ The financial burden of having to install a septic tank is elucidated then, when considering that this undertaking would constitute 10.13% of the average Alabamians annual income. These figures become even more striking when considering the median income of African Americans in the state. With a median annual income of \$29,210,¹² the installation of a septic tank system would require no less than 16.12% of that year's income. The following will examine the implication of this policy discrepancy by evaluating the ongoing sanitation crisis in Lowndes County, Alabama.

III. RAMIFICATIONS IN ALABAMA

Lowndes County, considered to be part of the Black Belt, is located near Montgomery and is a predominantly African American community. Named initially in recognition of the physical topography of the region, principally the quality of the soil, the term Black Belt later became associated with both

¹⁰ Alabama Septic Tank Installation, <http://www.sortfix.com/septic-tank-installation/al.php> (last visited October 20, 2019).

¹¹ U.S. Census Bureau, *Selected Economic Characteristics, 2013-2017 American Survey 5-Year Estimates* (2017), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>

¹² Brian Lyman, *Census Data: Incomes Rise in Alabama, but Gaps Between Men & Women, Blacks & Whites Remain*, *Montgomery Advertiser*, Sept. 25, 2014.

the physical and human makeup of the region.¹³ Historically, the favorable soil quality in the region lent itself well to agricultural production and was relatively prosperous, but it has since faced considerable economic downturn.¹⁴ Median annual income in the county falls below the state median, and indeed the state median among African Americans, at a reported \$27,914.¹⁵ Largely disconnected from the municipal sewer system, residents are legally obligated by state policy to install their own septic tanks. Due to financial constraints, however, few are able to afford this installation project. This inadequate sewage disposal has gone largely unaddressed by state officials, despite the Alabama Department of Public Health's knowledge of the situation.

Consequently, an entire population of Alabamians live with sewage spilling into their yards. This has led to contaminated water resources and the emergence of the hookworm parasite. Hookworm is a parasitic organism typically found in tropic and subtropic environments.¹⁶ While hookworm is rarely fatal in humans, an infection can lead to stunted development in children, increased blood loss, and subsequent iron-deficiency anemia.¹⁷ Perhaps most

¹³ Gerald R. Webster, Scott A. Samson, *On Defining the Alabama Black Belt: Historical Changes and Variations*, 32 *Southeastern Geographer* 163, 163-172 (1992).

¹⁴ *Id.*

¹⁵ *Supra* 12.

¹⁶ Hoyt Bleakley, *Disease and Development: Evidence from Hookworm Eradication in the American South*, 122 *The Quarterly Journal of Economics* 73, 73-117 (2007).

¹⁷ N. J. S. Lwambo, D. A. P. Bundy, G. F. H. Medley, *A New Approach to Morbidity Risk Assessment in Hookworm Epidemic Communities*, 108 *Epidemiology and Infection* 469, 469-481 (1992).

problematic, though, are the long term impacts of an infestation, which in part inspired the movement to eradicate hookworm from the American south. Successful efforts to eradicate the parasite in the region began in 1910.¹⁸ The work of Bleakley (2007) suggests that after its eradication, school attendance and literacy improved dramatically in those counties previously most impacted.¹⁹ To this extent, a reemergence of the parasite could again hamper human development in the region. As citizens are prohibited from creating any sort of public health hazard, the citizens of Lowndes County are actually in violation of Alabama health code. Alabama's state government has not acted to provide either a municipal sewer system, or to subsidize the cost of individual septic tank installation. This inaction has had an adverse and disproportionate impact on the largely African American population living in Lowndes County, and is a clear violation of Title VI. Financially unable to rectify this improper means of sewage disposal themselves, the people of Lowndes County are caught in the vicious cycle of continued environmental inequality.

In 1982, the state of Alabama received a grant in the total of \$31.7 million from the federal government to expand local sewer systems.²⁰ Scaled for inflation, this figure totals a

¹⁸ Hoyt Bleakley, *Disease and Development: Evidence from Hookworm Eradication in the American South*, 122 *The Quarterly Journal of Economics* 73, 73-117 (2007).

¹⁹ *Id.* at 75

²⁰ Brett Walton, *Hookworm Infections and Sanitation Failures Plague Rural Alabama*, Circle of Blue Water News, (October 20, 2019, 9:04 PM), <https://www.circleofblue.org/2015/water-quality/sanitation-health/hookworm-infections-and-sanitation-failures-plague-rural-alabama/>

striking \$82,487,944.21. This money was to be dispersed among the state's municipalities to further the development of better sanitation systems. Despite shrinking federal and state budgets, Alabama continues to receive grants, albeit of smaller amounts, to rectify its sanitation disparities. Yet, as the case of Lowndes County suggests, there are still communities that place the burden of sewage disposal installation on individuals. In many ways, communities like Lowndes County are stuck in a cycle of poverty and underservice. The residents are largely poor; consequently, the tax base is small and funds for sanitation infrastructure do not exist. It is because of this lack of infrastructure, though, that potential new residents are deterred from relocating to Lowndes County, thus the tax base remains small, and sanitation infrastructure remains nonexistent.

Grant programs are intended to serve as mitigating actors by bridging the poverty gap. However, as suggested by Catherine Coleman Flowers, the founder of the Alabama Center for Rural Enterprise Community Development Corporation and Senior Fellow at the Center for Earth Ethics, the treatment systems that have been built can be traced “[b]ack to those areas that were first inhabited largely by white populations. And even in the two towns that had wastewater infrastructure, it stopped, you know, where the black community started”.²¹ Thus, to the extent that the inhabitants of Lowndes County have been disproportionately impacted by the lack of sanitation systems in spite of federal

²¹ Interview with Catherine Coleman Flowers, Founder, Alabama Center for Rural Enterprise Community Development Corporation, and Senior Fellow, Center for Earth Ethics (April 12, 2017).

grants given to the state, Lowndes County serves as a tangible example of the perpetuation of environmental racism in the state.

But the case of Lowndes County is not unique. Just sixty-five miles west of the County lies Uniontown, where a sanitation and public health crisis of similar magnitude festers. Uniontown, Alabama, is part of the Black Belt and is comprised of a similar demographic makeup to that of Lowndes County, with its inhabitants securing a median household income of \$13,800.²² Unlike Lowndes County, though, the residents of Uniontown are facing a struggle against the massive landfill that disposes of highly toxic coal ash waste.²³ While the location of the landfill itself was contested, its associated impacts in the years since its development have proved exceedingly troublesome. The landfill acts not just as the final resting place for household trash and waste, but in 2009 it was decided that the landfill would also serve as the disposal site for the coal ash.²⁴ This decision came as a result of the comparatively inexpensive cost of dumping the highly toxic waste in Uniontown, and because the landfill operators successfully altered their

²² Kristen Lombardi, *Environmental Justice, Denied: Thirty Miles from Selma, a Different Kind of Civil Rights Struggle*, Ctr. for Pub. Integrity, (October 20, 2019, 9:15 PM), <http://www.publicintegrity.org/2015/08/05/17703/thirty-miles-selma-different-kind-civil-rights-struggle>.

²³ Claire Glenn, *Upholding Civil Rights in Environmental Law: The Case for Ex Ante Title VI Regulation and Enforcement*, 41 N.Y.U. Rev. L. & Soc. Change 45, 46 (2017).

²⁴ Mark Harrison Foster, Jr., *Ash Holes: The Failure to Classify Coal Combustion Residuals as a Hazardous Waste Under RCRA and the Burden Borne by a Minority Community in Alabama*, 12 VT. J. ENVTL. L. 735, 744 (2011).

permit to allow not only for increased quantities of waste disposal, but also for easier site access and exceptions to their prior commitment to act as a non-hazardous waste site.²⁵ With the acceptance of coal ash into the landfill, the transition from a non-hazardous to highly toxic facility began. Coal ash is produced as the byproduct of burning coal in the process of energy generation.²⁶ It is known to contain “[s]ome of the world’s deadliest toxic metals” each with their own associated health risks, but all leading to potentially fatal damage to major organ systems and increased risk of cancer among humans.²⁷ Despite this knowledge, the landfill has been permitted not only to remain, but to expand.

Facing an immediate challenge to their quality of life, and indeed their very health, the residents of Uniontown did not stand idly by. In 2013, thirty five Uniontown residents filed an official complaint, alleging that the Alabama Department of Environmental Management (ADEM) had violated Title VI.²⁸ The complaint suggested that the primarily African American residents of Uniontown had been unjustly impacted by the location and expansion of the landfill, with this disproportionate impact on the residents constituting a

²⁵ *Id.*

²⁶ Patricia Helman, *Toxic Impact: The Regulation of Coal Ash and the Influence of Big Money on Small Communities*, 23 BARRY L. REV. 41, 44(2017).

²⁷ *Id.*

²⁸ Title VI Civil Rights Complaint and Petition for Relief or Sanction, Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama EPA OCR File No. 01R-12-R4, <https://www.documentcloud.org/documents/2067658-12r-13-r4-complaint-redacted.html>

violation of Title VI. The Uniontown complaint was one of the few that the EPA civil rights office actively investigated.²⁹ Ultimately, though, the efforts of Uniontown's residents proved fruitless. Five years after the complaint was filed, the EPA closed its investigation finding "[i]nsufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation".³⁰ For some, the EPA's closure of the investigation was shocking, but for others, it served as a stark reminder that, as a result of limited resources and long ingrained prejudicial practices, environmental racism in the form of reckless waste disposal practices would continue to plague Uniontown. Unfortunately, the cases of Lowndes County and Uniontown are not isolated incidents, but rather a small window into the horrifying conditions certain subsets of Alabama's population are subjected to.

The case of Lowndes County demonstrates the discrepancy between national sanitation policy guarantees and Alabama state policy. Ultimately though, the ongoing impact that discriminatory environmental practices can have is elucidated and a mere policy comparison cannot truly reflect the injustice certain subsets of the population are subjected to as a result of socioeconomic characteristics. Future studies should examine the extent to which this discrepancy between policy at the federal and state levels

²⁹ *Supra* note 22.

³⁰ Closure of Administrative Complaint, EPA File No. 12R-13-R4, Environmental Protection Agency (March 1, 2008), https://www.epa.gov/sites/production/files/2018-03/documents/2018.03.01_lefleur_1_re_letter_of_closure_of_administrative_complaint_fi.pdf

might influence populations across the nation, and should examine the potentially systemic factors that have allowed for this to occur. Within the context of Alabama, future research might consider the grant request process at the local level, and if this has played a role in the disproportionate dispersal of federal funds. Environmental racism includes both intentional and unintentional neglect, and if, as a result of socioeconomic disparities, certain communities have been largely excluded from this request process due to a lack of knowledge, resources, or capability, Title VI considerations become relevant once more.

IV. POTENTIAL SOLUTIONS

If the state of Alabama proves unwilling to reform state policies that place the burden of sanitation infrastructure installation on individuals, and consequently disadvantages minority populations, the federal government may prove to serve indirectly as an effective catalyst of reform. Article VI, paragraph 2, of the United States Constitution, more commonly referred to as the Supremacy Clause, dictates that federal law takes precedence over state law.³¹ In this way, the salience of Section 8 and Title VI of the 1964 Civil Rights Act become more applicable. Essentially, the federal government could use the precedence of federal law over that of state policy to enact reforms that would benefit the general welfare of its citizens, which would require the elimination of discriminatory practices as required by Title VI and indeed under the ICERD.

³¹ U.S. Const. art. VI, § 2.

In an effort to preserve the federal integrity, the Supremacy Clause was established. Accordingly, the United States Constitution ensures that discrepancies between federal and state law be treated as judicial conflicts, and not political ones.³² This preservation of federal authority was intended not to undermine state power, but rather to serve the general welfare. Acting then as a safeguard against threats to constitutionally guaranteed provisions, the Supremacy Clause is one possible means to rectify Alabama's climate of inherently discriminatory sanitation policy. While it is possible that the issue of environmental racism be addressed by Congress, or even an acting President, it is far more likely that an attempt to rectify the situation would come as a result of judicially motivated change. As the work of Bullard (1993) contends, "[e]nvironmental racism is not unique to the southern United States. The resulting problems are national and international in scope".³³ To the extent that environmental racism is a national problem, the issue and invocation of the Supremacy Clause may be more appropriately addressed by SCOTUS.

It is worth noting then the issue's potential path of ascendancy to the Court. In the case of Lowndes County, for example, a class action lawsuit purporting an infringement of their constitutionally guaranteed welfare could suffice. The lawsuit would then need to rise through the courts until it was tried by the Supreme Court of Alabama, which would subsequently issue an appeal to the Supreme Court. While

³² Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. Rev.* 91, 94 (2003)

³³ Robert D. Bullard, *The Threat of Environmental Racism*, 7 *Natural Resources & Environment* 23, 25 (1993).

SCOTUS is unlikely to challenge the ruling of a state's highest court on an issue of state law, the Court is more apt to grant certiorari in cases which concern Constitutional issues.³⁴ As Alabama's sanitation policy impedes the welfare of a certain subset of its population, a clear challenge to the Constitution is made. More likely however, as this argument is rooted in more tangible terms, citizens could cite a violation of Title VI. Regardless, the applicability of the Supremacy Clause then becomes clear. SCOTUS, presented with the clear usurpation of federal law in the interest of state policy, could invoke the Supremacy Clause. Historically, this kind of federal action is exceedingly rare, and has only been enacted when it could be deemed a necessity.³⁵ Yet, as environmental policies that systematically disadvantage certain subsets of the population continue to be enacted nationwide, the necessity of federal action is expounded. Of course, this invocation of the Supremacy Clause raises questions of infringement on states' rights, however, that discussion is beyond the scope of this paper.

The discrepancy between national and state policy has allowed for the continuance of discriminatory environmental practices in the state of Alabama. While questions of states' rights are often raised in the discussion of superimposing federal guarantees to the general well-being of Americans, to

³⁴ Federal Judicial Center, *Jurisdiction: Original, Supreme Court*, <https://www.fjc.gov/history/courts/jurisdiction-original-supreme-court>

³⁵ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Columbia Law Review* 543, 543-560 (1954).

reduce the situation to a mere battle of political sovereignty is to dehumanize the sanitation crisis. Though the citizens of Lowndes County, Alabama, have faced inadequate sanitation infrastructure for years, it was not until recently that the plight of its inhabitants was broadcast around the nation and globe, as the media focused in on the emergence of hookworm. The hookworm discussion was shocking, and in some ways was elevated by the media as the most pressing problem. However, the real story that needs to be shared is that of the specific policy environment that allowed for the sanitation crisis to develop. If mitigating efforts are not taken to reform specific state code, environmental racism in the form of inadequate sanitation infrastructure will continue to plague the state, threatening the future prosperity of Alabamians for generations to come.

**TOXIC INEQUALITY:
AN ANALYSIS OF CIVIL RIGHTS AND
ENVIRONMENTAL RACISM**

William Cope

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INTRODUCTION

The concept of environmental racism has gained increasing attention from the legal community in recent years, and it has raised the question as to whether or not the government has a duty, specifically under statutes such as Title VI of the Civil Rights Act of 1964 or the 14th Amendment, to ensure that all of its citizens have equal access to a clean environment. While no final decisions have been rendered by any court on this matter specifically, existing case law points strongly towards the government having an obligation to provide environmental parity to its citizens. Part 1 will offer a history of the concept of environmental racism in the United States, Part 2 will look at the legal precedent for the right to environmental parity, and Part 3 will examine how these precedents apply to ongoing environmental racism claims in Alabama.

I. THE CONCEPTUAL ORIGINS OF ENVIRONMENTAL
RACISM

In 1979, the Ward Transformer Company of North Carolina illegally dumped transformer oil, containing

dangerous toxins such as dioxin and PCBs, along North Carolina highways at night in order to dodge the costly waste disposal process required by government regulation.¹ Although they were ultimately caught, 240 miles of highway had already been contaminated, resulting in 60,000 tons of dirt that had to be collected and disposed of.² The North Carolina government ultimately decided to construct a landfill to hold the toxic earth in Warren County, a county that was 65% African American and was the 4th poorest county in the state.³ Despite strong initial public outcry, the EPA allocated \$2.5 million to begin construction of the site, and construction officially began in 1982.⁴ Despite peaceful protests and the attention of the Congressional Black Caucus, the landfill was ultimately completed, and remained in Warren County until remediation efforts were completed in 2004, a full twenty-five years later.⁵ It was this incident that led former NAACP Director Dr. Benjamin Chavis to coin the term “Environmental Racism” in 1987 to describe what he viewed as the systemic bias of pollution being concentrated in areas that are predominately populated by people of color.⁶

¹ Reimann, Matt. “The EPA Chose This County for a Toxic Dump Because Its Residents Were 'Few, Black, and Poor'.” *Timeline*, Timeline, 3 Apr. 2017, [timeline.com/warren-county-dumping-race-4d8fe8de06cb](https://www.timeline.com/warren-county-dumping-race-4d8fe8de06cb).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Karl Grossman, *The People of Color Environmental Summit*, in *UNEQUAL PROTECTION-ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR* 273, 278 (Robert D. Bullard ed., 1994).

While instances of environmental racism were by no means new, the Warren County protests finally brought the issue to national attention.

II. ENVIRONMENTAL RACISM PRECEDENT

In the decade after the Warren County incident, several minority communities brought their municipal governments to court for discrimination, citing that their respective governments violated their 14th Amendment rights to equal protection and Title VI of the Civil Rights Act by denying their communities equal access to equitable municipal services and facilities. In *Dowdell v City of Apopka, FL*, the city of Apopka, Florida, had clear geographic divisions along which the town was split into a predominately white community and a predominately African American community, and members of the African American community sued their municipal government for violating the 14th Amendment's equal protection clause and Title VI of the Civil Rights Act for not providing them with the same quality of municipal services and facilities given to the white community.⁷ Specifically, these services and facilities were street paving, storm water drainage, sewage facilities, potable water distribution, and parks and recreational facilities.⁸ The court ultimately held that, although the two communities did not have a disparity in access to parks and recreational facilities and sewage facilities based on comparison of access to and quality of these factors between the two communities, such disparities were found to exist for the water and drainage

⁷ 511 F. Supp. 1375 (1981)

⁸ 511 F. Supp. 1375 (1981)

systems as well as for street paving.⁹ As a result, the court forced the city of Apopka to remediate the municipal services and facilities of the African American community by enjoining the city from spending any funds on the new or improved facilities or services in the white community until the remediation was complete.¹⁰

In *Johnson v City of Arcadia, FL*, another municipality divided along racial lines, the African American community sued the city of Arcadia for violation of the Equal Protection Clause, Title VI of the Civil Rights Act, and the Revenue Sharing Act, which was an act that allocated a certain amount of federal funds to be distributed to state and municipal governments.¹¹ The African American community alleged that their access to parks and recreation, water systems, and road paving were far lesser than the white community's access to the same services.¹² In this case, the court found that the city of Arcadia had violated their rights on all three accounts, and the city was forced to reserve \$415,000 of revenue sharing funds to overhaul the utilities and facilities in the African American community.¹³

It is important to note that in *Johnson v Arcadia*, the court ruled specifically that the superior quality of parks and recreational facilities in the white community, including access to well-maintained parks and sports complexes and shaded benches compared to the overgrown and dilapidated

⁹ *Id.*

¹⁰ *Id.*

¹¹ 450 F. Supp. 1363 (M.D. Fla. 1978); 49 Stat. 383

¹² 450 F. Supp. 1363 (M.D. Fla. 1978)

¹³ *Id.*

parks in the African American community were a compelling reason to rule in favor of the discrimination claim.¹⁴ Based on both of these cases, it is clear that the courts believe that depriving a minority community access to the quality of municipal facilities and services afforded to the white community can constitute illegal discrimination, and *Arcadia* specifically references the inferior condition of parks and other public land in the minority community as compared to the white community as being potential evidence of discrimination. Therefore, it would follow that governments, municipal governments in this instance, have a responsibility to ensure access to the same quality of public lands to all citizens. Additionally, if the cause of such a disparity between the quality of public land in a minority community and a non-minority community were pollution, then based on the precedent set forth in *Arcadia*, the courts could force a city to set aside funds to remediate the polluted lands in order to redress discrimination. However, this all relies on such a disparity in municipal services being deemed discriminatory in the first place, a question which the Supreme Court settled in two separate cases.

In *Washington v. Davis*, two African Americans sued the Washington D.C. Metropolitan Police Department for allegedly rejecting their applications to be police officers on the basis of their race. They maintained that the standardized verbal skill test administered to new applicants by the department violated the Due Process Clause of the 5th Amendment and was unrelated to future job performance and

¹⁴ 450 F. Supp. 1363 (M.D. Fla. 1978)

was failed disproportionately more often by minority applicants than by white applicants. While the D.C. Circuit Court found in favor of the applicants by citing the clause against discriminatory tests in the Civil Rights Act of 1964, the Supreme Court reversed the decision on appeal and found in favor of the Metropolitan Police Department.¹⁵ The Supreme Court's holding stated the lower court has misapplied the Due Process Clause, finding that laws that have a disparate consequence on certain groups are only discriminatory if their intent was to discriminate.¹⁶ Although *Washington v. Davis* added the necessity of intent to government discrimination claims, a subsequent Supreme Court case would add a more developed judicial test for government discrimination.

Village of Arlington Heights v. Metropolitan Housing Development Corp., which was decided by the court less than a year after *Washington v. Davis*, found that the zoning laws in the Chicago suburb of Arlington Heights were not discriminatory simply because they prevented certain parts of the area from being developed into affordable high-density housing for the low-income minority individuals in the area.¹⁷ The court asserted that Metropolitan Housing Development Corp. was within its rights to develop the land without arbitrary changes to zoning laws, citing *Euclid v. Amber Realty Co.*¹⁸ Regarding the discrimination claims brought forward in this case, the Supreme Court cited their

¹⁵ 426 U.S. 229

¹⁶ *Id.*

¹⁷ 429 U.S. 252 (1977)

¹⁸ *Id.*

decision in *Washington v. Davis*, and added that more factors beyond intent were viable considerations in determining what constitutes discrimination.¹⁹ These other considerations are disproportionate impact, the historical background of the challenged decision, the specific preceding events, departures from normal procedures, and any statements made by the decision or policy makers.²⁰ While at first it may appear that these considerations further complicate the process of proving discriminatory action, these considerations are specific points on which discrimination claims can be based, rather than the broader idea of “intent” as set forth in *Washington v Davis*.

III. ENVIRONMENTAL RACISM AND ALABAMA

With all of these established precedents considered, they can now be applied in full to ongoing local issues. Take, for example, the city of Uniontown, Alabama. Uniontown is a town of only 1,775 people, 90.6% of whom are African American, located in Perry County.²¹ Yet despite its small size, Uniontown has commanded serious attention in the past several years over environmental racism claims. Just outside of the limits of Uniontown lies the Arrowhead Landfill, which since 2009 has served as a dumping site for coal ash

¹⁹ *Id.*

²⁰ 429 U.S. 252 (1977)

²¹ Data Access and Dissemination Systems (DADS), American FactFinder - Results American FactFinder - Results (2010), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited Apr 6, 2019).

from Tennessee.²² Coal ash, a byproduct of coal power plants, contains known carcinogens such as formaldehyde and dioxins, as well as heavy metals such as cadmium, nickel, and lead.²³ In response to these conditions, citizens in and around Uniontown organized into the Black Belt Citizens Fighting for Health and Justice (Black Belt Citizens).²⁴

Beginning with the idea of equitable access to quality public land set forth in *Johnson v Arcadia*, there must be compelling evidence that the government is providing the African American residents of Uniontown with land that is markedly less well-maintained than what is available to non-minority citizens. Although it would be difficult to say that the 9.1% of Uniontown residents that are white have significantly better access to clean public land, the Alabama Department of Environmental Management (ADEM) had to approve the landfill, which now stands on the outskirts of an overwhelmingly black and rural town. ADEM, as a state agency, also has a duty to ensure equitable access to quality public land under the same *Johnson v Arcadia* precedent, and approving the landfill in Uniontown appears to be a violation

²² Dennis Pillion, EPA closes civil rights complaints over Alabama landfill al.com (2018), https://www.al.com/news/2018/03/epa_closes_civil_rights_compla.html (last visited Apr 6, 2019).

²³ Power Plants: Your Environment, Your Health | National Library of Medicine, U.S. National Library of Medicine, <https://toxtown.nlm.nih.gov/sources-of-exposure/power-plants> (last visited Apr 6, 2019).

²⁴ Dennis Pillion, EPA closes civil rights complaints over Alabama landfill al.com (2018), https://www.al.com/news/2018/03/epa_closes_civil_rights_compla.html (last visited Apr 6, 2019).

of Uniontown's right to equal protection and to Title VI protections.²⁵ The fact that the landfill was approved in such an overwhelmingly black town also meets the *Arlington Heights* consideration for disproportionate impact

In an attempt to rectify this, the Black Belt Citizens filed a civil rights complaint to the EPA in 2013 citing ADEM's alleged discriminatory action in approving the Uniontown landfill.²⁶ The EPA dismissed two such complaints against ADEM, and in June 2018, ADEM rescinded its policy to accept any civil rights complaints, an action that the Alabama Attorney General's Office said nullified existing civil rights complaints.^{27,28} Going off of the standards of discriminatory intent set forth in *Washington* and *Arlington Heights*, this act of denying Alabama citizens an avenue to redress civil rights complaints seems to constitute both a departure from normal procedure and a statement from decision makers.²⁹ With these considerations in mind, it seems probable that the

²⁵ While nothing in *Johnson v Arcadia* specifically broadens its scope to non-municipal governments, no language within the decision limits its scope to municipalities either.

²⁶ Dennis Pillion, EPA closes civil rights complaints over Alabama landfill al.com (2018), https://www.al.com/news/2018/03/epa_closes_civil_rights_compla.html (last visited Apr 6, 2019).

²⁷ *Id.*

²⁸ Dennis Pillion, ADEM drops civil rights complaint policy. It might cost Alabama millions al.com (2018), https://www.al.com/news/2018/06/adem_drops_civil_rights_policy.html (last visited Apr 6, 2019).

²⁹ A abruptly cancelling the policy constitutes the departure from procedure, and also constitutes a statement because such a drastic action clearly conveys ADEM's opinion of the need (or lack thereof) for environmental Title VI claims

actions undertaken by the Alabama government in Uniontown constitute discriminatory intent under the precedent outlined in *Arlington Heights v Metro Housing* as well as *Washington v Davis*.

Given the precedent established in cases such as *Johnson v Arcadia, FL* and *Dowdell v Apopka, FL*, outlining the government's duty to provide equal access to quality public land for all its citizens, coupled with the definition for discrimination from government policy as provided in *Washington v Davis* and *Arlington Heights v Metropolitan Housing Development Corp.*, it is clear minority individuals have a right to seek remedies, particularly in the form of remediation, from their governments based on Equal Protection and Title VI claims to environmental racism.

**AN ARGUMENT FOR *JULIANA V. UNITED STATES* IN
THE DISTRICT COURT OF OREGON**

Rachel Sharma and Soleil Ozols

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INTRODUCTION

On August 12, 2015, 21 children filed a lawsuit against the government of the United States on the basis that the government had a legal obligation to protect the atmosphere. The plaintiffs are also suing the American Fuel and Petrochemical Manufacturers, the American Petroleum Institute, and the National Association of Manufacturers. They demand that the office of the president and other fossil fuel industries should create a plan to combat climate change and follow through with it.¹ Today, this case still has not been in front of a court in its entirety despite the fact that its legal action has spanned two presidencies. There have been many motions and briefs submitted to the Ninth Circuit Court to stay and dismiss the trial. Although there is no trial date currently, it will eventually be heard at the U.S. District Court in Oregon. Based on the following arguments and precedent, we believe that the District Court in Oregon should side with the plaintiffs because they have a stronger constitutional

¹ Our Children’s Trust, *Details of Proceedings* (2009), <https://www.ourchildrenstrust.org/federal-proceedings>.

argument, rooted in the Fifth, Fourteenth, Ninth, and Tenth amendments, there is state precedent for a holding of this kind, and ruling in favor of the plaintiffs would benefit citizens of the United States.

I. THE DEFENSE'S ARGUMENTS

The government of the United States, as well as the fossil fuel companies that are listed as the defendants in this case, have a strong argument against the plaintiff's claim in *Juliana v. United States*. Their first prong is that the plaintiffs lack standing in this suit. The plaintiffs have asserted that the government caused climate change, but according to the defendants, simply asserting this does not make it so. Neither the plaintiffs nor the district court have taken steps to understand the roles of the consumers who use fossil fuels for energy or the factories, and other manufacturers, who use fossil fuels to create goods and those who purchase those goods. In short, the plaintiffs have not stated the role of the manufacturers who create the products that consumers buy, nor the role of the consumers who buy these goods, which is America as a whole. Both the production and consumption of these goods adds to climate change, but no one on the opposing side has taken measures to get to the bottom of that aspect of climate change.² The plaintiffs have also asserted that the government caused these injuries to the environment by not taking steps to curb emissions. The standing of the plaintiffs is based on alleged injury because of climate change. By stating that the government caused climate

² *Juliana v. United States*, 217 F. Supp. 3d 1224, 2016 U.S. Dist. LEXIS 52940, 46 ELR 20072 (D. Or. April 8, 2016)

change, simply because they did not take any action to stop it, makes their line of logic insufficient to support standing.³

In addition, the defendants bring up the error in the plaintiff's argument regarding the public trust doctrine. The government argues that public trust doctrine is under the discretion of states and does not apply on a federal level. The defense cites cases in which this precedent that holds that public trust doctrine is a matter of state law.⁴ One case in which this clear is that of *United States v. 32.42 Acres of Land*. Within this case, the judges make it clear that public trust doctrine is only applicable to the states and can be transferred to the federal government, but only under certain circumstances.⁵ Therefore, there is substance behind the claim of the defendants that this case should have been dismissed because public trust doctrine does not apply in the manner in which the plaintiffs are asserting that it does.

The defendants also argue that the plaintiff's constitutional claims have no merit. The U.S. government argues that the Due Process Clause has not been used to guarantee over-arching rights for the nation, but rather for the individual to make their own autonomous decisions. The Due Process Clause in the Fifth and Fourteenth Amendments guarantees citizens that no one shall be "deprived of life, liberty, or property without due process of the law."⁶ Thus far the U.S. government has not found there to be substantial

³ *Id.*

⁴ *Id.*

⁵ *United States v. 32.42 Acres of Land*, LEXIS 102108 (S. D. Cal., April 28, 2006).

⁶ U.S. Const. amend. V.

evidence that the Due Process Clause is violated in this case. This belief is backed by the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the court upheld that the right of Due Process Clause is applied to personal choices when the Supreme Court sided with Planned Parenthood, in that women should be able to get an abortion without any notifications to another person.⁷ This precedent points the fact that the plaintiffs in *Juliana v. United States* are applying the Due Process Clause in a way that does not yet carry legal precedent because *Juliana* is dealing with the actions of corporations and governments in relation to their effect on the American people. Never before in the nation's history has a right this broad, such as the right to a safe and clean environment, been used successfully under the Due Process Clause. These arguments by the defense show just how adamant the current administration and the fossil fuel industry are threatened by this case because of the potential damage to their business, future profits and their public image.

II. THE PLAINTIFFS' ARGUMENTS

The argument of the plaintiffs is stronger than that of the defendants in this case. Their argument uses the Fifth Amendment, the Fourteenth Amendment, the Ninth Amendment, public trust doctrine and other rights from the Constitution to prove that the government must protect the environment for their future use and well-being. According to *Santa Clara County v. Southern P. R. Co.* a corporation is

⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

legally considered to be a person, henceforth ensuring that States cannot deny the equal protection of the laws to corporations.⁸ Under this understanding, the American Fuel and Petrochemical Manufacturers, the American Petroleum Institute, and the National Association of Manufacturers are subject to these rights but also are capable of inhibiting the rights of others through their actions. In accordance with the plaintiffs, the continual neglect of the adverse effects of fuel companies and manufacturers, the pollutants these processes give off pollute the environment where the company operates, directly influencing communities around that area. Due to corporate personhood, corporations have many rights that American citizens have, such as the right to life, liberty and the pursuit of happiness, but it also means that those corporations cannot inhibit the rights of others.

The Fifth Amendment Due Process Clause guarantees every American protection of “life, liberty, and property.”⁹ The environmental impact of the actions of the government and the other defendants does hold to this standard. The plaintiffs and future generations will not have their lives protected because climate change affects their safety of life. This violates the constitutional bond to protect citizens from governmental infringement on these aspects of a person’s rights. The defendants have knowingly caused and continued to cause damage to the environment, placing plaintiffs in a position of grave danger. In accordance with the Due Process Clause of the Fifth Amendment, the plaintiffs believe that

⁸ *Santa Clara County v. Southern P. R. Co.*, 118 U.S. 394, (1886).

⁹ U.S. Const. Amend. V.

current issues surrounding greenhouse gas emissions and climate change are an issue for future generations; it is a problem of the present that, if not addressed, could lead to climate catastrophe.¹⁰ This claim is backed on the abuse of the environment as it directly correlates with violations of the constitutional bond to protect citizens from governmental infringement of the Due Process Clause. The plaintiffs sued with the intent that the defendants knowingly have caused and continue to cause damage to the environment, which places Americans in danger because of the significant health alterations related to a dirty environment. In more recent years, there have been strides towards controlling greenhouse gas emissions to slow climate change, such as Atmospheric Trust Litigation. This global litigation campaign works to influence governments to control dangerous levels of greenhouse gas emissions,¹¹ but with an administration that blatantly compromises the discoveries of the scientific community regarding climate effects, the importance of *Juliana v. United States* is imperative to bring attention to the relevant issue of climate change and the government's role in combating it.

The Equal Protection Clause of the Fourteenth Amendment embedded in the Fifth Amendment: "No State shall...deny to any person within its jurisdiction the equal

¹⁰ *Juliana v. United States*, 217 F. Supp. 3d 1224, 2016 U.S. Dist. LEXIS 52940, 46 ELR 20072 (D. Or. April 8, 2016).

¹¹ Mary Wood & Charles Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. OF ENVTL. L. & POL'Y 2, 642-643 (2016).

protection of the laws.”¹² The defendants have denied plaintiffs equal protection of the laws by not protecting the environment, ignoring the evidence that climate issues disproportionately affect their well-being and rights to “life, liberty, and the pursuit of happiness” outlined in the Declaration of Independence.¹³ Despite the Equal Protections Clause being solely applicable to the states, the belief of responsibility of the federal government to pick up the slack of the states is emphasized by the plaintiffs, especially since generations past did not have to concern themselves with the future safety of the environment. The actions of the defendants favor those previous generations and discriminate against present and future generations. Plaintiffs should be a protected class as they and future generations will reap the problems of the defendant’s actions.

The Ninth Amendment allows for enumerated rights that are not mentioned in the Bill of Rights. It states “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁴ Conservation has long been a part of this nation’s history. From the creation of national parks under Roosevelt to the Paris Climate Accords today, conservation has and will remain vital to the nation’s future and well-being as a whole. The actions of the defendants are not in line with the founders’ belief that the government should protect the country’s natural systems for posterity as their actions harm the very environment that the plaintiffs rely on for survival

¹² U.S. Const. amend. XIV, § 1.

¹³ The Declaration of Independence para. 2 (U.S. 1776).

¹⁴ U.S. Const. amend. IX.

and life.¹⁵ A stable climate is necessary for a government to function and for liberty and justice to be upheld. The right of future generations to be sustained by nature and the protection of government intrusion of this right are included in the implicit rights of the Ninth Amendment.

Many of the inquiries in *Juliana v. United States* and other court cases, as to the role of government in the protection of the environment, were in direct correlation with the public trust doctrine, which states that the government has a duty to protect and maintain natural and cultural resources for the public's use.¹⁶ The public trust doctrine has been used in many instances as partial reasoning for environmental issues, such as the preservation of privately-owned wetlands, the encompassing of environmental values and protection, and the fostering of the recreational use of trust resources, such as public beaches.¹⁷ The doctrine pertains to the plaintiff's argument in *Juliana v. United States* because of legislation, such as the Oregon Beach Bill, which affirmed the public trust doctrine in legislation for the state of Oregon. The affirmation of this legal theory of the public trust doctrine is the backbone of the plaintiff's argument that the climate itself is a natural resource that the people have a right to have continued use of. In addition, other states, such as California, Massachusetts, Maine, and Texas have also

¹⁵ *Juliana v. United States*, 217 F. Supp. 3d 1224, 2016 U.S. Dist. LEXIS 52940, 46 ELR 20072 (D. Or. April 8, 2016)

¹⁶ Legal Information Institute, *Public Trust Doctrine*, https://www.law.cornell.edu/wex/public_trust_doctrine.

¹⁷ Richard Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Changing Its Future*, 45 UC Davis L.J. 665, 671 (2011)

affirmed the public trust doctrine as the central argument to fight against privatization in order to preserve nature for future generations. In 1967, the Oregon Beach Bill granted the permanent preservation of ocean beaches for their direct and uninterrupted access by the public.¹⁸ All of this legislation, although on the state level, is backed up by the Constitution to apply to the federal government; this therefore, makes public trust doctrine applicable to the defendants in *Juliana v. United States*. The Tenth Amendment states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁹ The federal government must protect vital natural resources, such as the atmosphere, seas, and wildlife, because the powers to do so only rest with the federal government and cannot rest solely with the states or the people.²⁰ This gives federal weight to public trust doctrine as it means that the government has a constitutional obligation to protect the environment for future generations.

The plaintiffs have a reasonable argument against the defendants that the Fifth, Fourteenth, Ninth, and Tenth Amendments of the Constitution protect their right to have a clean and safe environment. In addition, public trust doctrine and Atmospheric Trust Litigation add more substantial reasoning for the argument of the plaintiffs. The argument of the plaintiffs is stronger than that of the defense because it

¹⁸ H.R. 1601, 54th Leg. (1967).

¹⁹ U.S. Const. Amend. X

²⁰ *Juliana v. United States*, 217 F. Supp. 3d 1224, 2016 U.S. Dist. LEXIS 52940, 46 ELR 20072 (D. Or. April 8, 2016)

answers each of the point of the defense's argument. The defendants claimed that the Due Process Clause of the Fifth and Fourteenth Amendments has legal precedent only when applied to personal choices, however the plaintiffs proclaim that the Fifth Amendment guarantees the right to life, liberty and property, of all citizens. This is violated by the lack of action by the federal government to protect its citizens from forces such as environmental destruction, which significantly impacts human health. The plaintiffs draw upon the Equal Protection Clause of the Fourteenth Amendment to establish the drive for the defendants to disregard the protection of the environment for monetary or other personal gain, at the expense of the quality of life of the public. In relation to the public trust doctrine, the defense backs their argument that the public trust doctrine is a matter of state law based on preceding cases; however, public trust doctrine is applicable on the federal level by the constitution and the Tenth Amendment within it. The plaintiffs cite Atmospheric Trust Litigation to bring forth the lack of effort that the federal government has exercised in order to control dangerous levels of greenhouse gas emissions.

If the Ninth Circuit Court rules in their favor, the plaintiffs want a "prayer of relief". These are their demands of the court, should they side with the plaintiffs. First, the Ninth Circuit should declare that the defendants have and are violating the plaintiff's constitutional rights by contributing and causing dangerous levels of carbon dioxide in the atmosphere and these actions interfere with the climate system of the world. Second, the court should mandate that the defendants quit violating the constitution with their

actions. Third, the court should declare the Energy Policy Act, Section 201 and DOE/FE Order No. 3041 as unconstitutional. Fourth, the court should declare the public trust violations by the defendants and make sure that they cannot violate public trust doctrine again. Fifth, the court should order a comprehensive carbon dioxide inventory of the United States. Sixth, the court should order the defendants to plan and set forth a national agenda to phase out greenhouse gas emissions so as to stabilize the climate and the environment that the plaintiffs will continue to depend upon. Finally, the court should continue to claim jurisdiction over this case so as to monitor the progress that the defendants are making toward the goal of stabilizing the environment. This, and any other action the court deems fit, is what the plaintiffs are asking for, should a verdict by the Ninth Circuit Court come down in their favor.²¹ The neglect of the United States government to regulate the emissions and environmental destruction caused by greenhouse-gas-producing agencies, such as the American Fuel and Petrochemical Manufacturers, the American Petroleum Institute, and the National Association of Manufacturers, is not only reckless and inconsiderate to the current people on this planet, but is also an ongoing concern for future generations since greenhouse gases can remain in the atmosphere for thousands of years.

²¹ *Juliana v. United States*, 217 F. Supp. 3d 1224, 2016 U.S. Dist. LEXIS 52940, 46 ELR 20072 (D. Or. April 8, 2016)

CONCLUSION

In conclusion, the District Court of Oregon should rule in favor of the plaintiffs in the case of *Juliana v. United States* because their argument is clearer and will benefit present and future generations of Americans. This is an issue that should matter to everyone, not just in the United States, but worldwide. Climate change and atmospheric health affects every human being living on planet Earth. It is the government's duty to protect the American people from all threats. Climate change poses a significant threat to the country and its future. They have a duty, legal and moral, to stop climate change and protect the future of America and all her citizens.

ETHICAL DESIGN: POLICY DIRECTION FOR PRIVACY IN EMERGING BIOTECHNOLOGIES AND THE INTERNET OF PEOPLE

Benjamin Spencer

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INTRODUCTION

For thousands of years, technology moved slowly. Within the past two hundred years, however, the pace of development has increased dramatically, from steam engines to cell phones—leaving us little time to consider the repercussions of these technologies before they have already shaped our future. If technology is to continue to advance, it is worthwhile to consider the implications of our actions beforehand so we can avoid ethical, legal, and ecological pitfalls.

When considering the legal and philosophical impact of emerging innovations, the question of privacy is one that

deserves to be taken very seriously. New developments in biological technologies and internet-connected devices predict a world where private information can easily be available to all for the right price—a world where genetic codes are subject to appropriation and patenting, and ones' movements and thoughts are the subject of as much public scrutiny as the President's.

This paper will explore ethical issues in emerging biotechnologies—it will first focus on the moral implications of cloning and stem cells. Then, shifting focus, it will track concerns about technological privacy in a world of open-source information, and the risks that the Internet of Things poses for private citizens who wish to exercise their right to privacy. Finally, concerns over privacy and legality in the coming world of brain-machine interfaces will be discussed in light of recent legislation, with a focus on the protection of personal and biological information, privacy rights, and moral applications of these devices.

I. BIOLOGICAL PRIVACY

A. Recent Innovations

In February 1997, the first successful mammalian product of a cloning technique, known as somatic cell transfer, was first performed. The discovery caused groups and individuals around the world to start assessing how this technology could be used and abused by and for humans. Though most scientists and ethicists have concluded that the current technology used for cloning is far too risky to attempt to

create a human, the specter of potential clones in the public imagination has never faded away.¹

This concern is perhaps justified. Though not yet able to create perfect human duplicates, cloning techniques have generated some remarkable things in the span of a few short years. The most socially accepted form of cloning is therapeutic cloning—the taking of cells from one’s own body and then coaxing them to grow in a certain way to alleviate a disease. This can be most easily achieved by creating an embryo with the patient’s DNA in a petri dish, and then harvesting totipotent or pluripotent stem cells before they differentiate.² This manipulation of DNA and human growth could be safe, effective, and have several uses—such as the creation of vital proteins like insulin without having to harvest it from animal bodies.

Biotechnology also has industrial applications outside of medicine. Since most biotechnology up until now has been used in the healthcare industry, the usage of such technologies has largely been guided by existing medical ethics, with a focus on patient consent and the alleviation of disease at all costs. When these practices leave the operating theater and go into the world, however, it becomes necessary to devise a new ethic for the utilization and management of these technologies.³ The most well-known usage of biological

¹ Henry, Michael. “Biotechnology and the Reconstruction of Humanity.” *Modern Age* 52, no. 2 (March 1, 2010): 125.

² *Id.*, 131

³ Duster, Troy. “The Molecular Reinscription of Race: Unanticipated Issues in Biotechnology and Forensic Science.” *Patterns of Prejudice* 40, no. 4 (September 2006): 429.

innovation outside of medicine has been in the field of agriculture, with the rise of genetically modified organisms, starting with the development of the “Flavr Savr” tomato in 1994, which was approved by the FDA and sold for several years before being pulled from shelves. Since then, crops have been engineered in laboratories to have greater yields, weather resistance, and both pest and pesticide resistance.

These industrial applications often cross over with public health concerns. Though genetically modified crops are believed to have no major long-term health impacts on humans, they haven’t been part of the food pyramid for long enough to see how their routine inclusion in the human diet affects health over a lifetime. This lack of information, and a general public fear, has resulted in mandated public disclosure of the usage of GMO’s in food products. In addition, the widespread usage of GMO’s can cause a genetic bottleneck in plant species, reducing the crops’ ability to bounce back from an unexpected disease or pest infestation.

Industrial GMOs, however, also have a usage in the medical field they took their technology from. There was a movement in the late 1990’s towards the development of vaccine-creating plants that could be grown and harvested around the world.⁴ This would allow for vaccine distribution in hard-to-reach communities with ease, and solve problems regarding the usage of needles and properly storing the vaccines, since the plants could simply be eaten. Though many of the modified plants were unable to survive outside

⁴ Robert, Jason S, and Dwayne D Kirk. “Ethics, Biotechnology, and Global Health: The Development of Vaccines in Transgenic Plants.” *The American Journal of Bioethics* 6, no. 4 (September 21, 2006): W29–W41

of greenhouses, the transgenic technology that was pioneered could easily be resurrected with our ever more sophisticated understanding of gene-modification and diseases.

B. Risks for Exploitation

The risks that GMOs themselves pose to human health and the ecosystem are straightforward—they could alter the way that human bodies work in such a way that they result in disease, and they reduce genetic biodiversity in a way that makes the species less likely to bounce back from unexpected obstacles. However, techniques for genetic manipulation originally developed for industry can be reapplied to people, with much more dire ethical consequences—such alterations pose a severe threat to humans and their privacy through the manipulation, distribution, patenting, and production of genetic code.

Since the National Institutes of Health received a congressional mandate to study the intersection of race and health with the Minority Health and Health Disparities Research and Education Act (Public Law 106-525) in 2000, there has been a surge in medical reports documenting how diseases and disorders vary in their prevalence and severities among race— one example is how the drug Iressa proved to be much more effective in treating late-stage lung cancer in people of Asian descent than in whites. Similarly, the drug BiDil, intended to treat congestive heart failure, was marginally more effective in Blacks than Whites.⁵ It is a slippery slope from claiming that there are substantive differences between races inscribed on the genetic level, to

⁵ *Supra* note 3, at 431.

the notion of eugenics and “faulty” genes. This is not to say that findings of genetic difference should be dismissed—they should be given all the weight in the world to improve treatment for those groups these drugs are most effective for—but the bioethical community must be constantly vigilant against letting facts become ideologies.

This focus on the genetic code as the key to understanding human health and behavior is also what makes such technology incredibly profitable. There is an emerging industry around genetic interpretation, from public ancestry services like 23&Me, to pharmaceutical companies developing genetic combinations for usage in medicine and industry. The story of Henrietta Lacks, whose genetic code was taken without her knowledge—one must constantly weigh the benefits of science against the moral consequences for real people.⁶ It also serves as a warning against human experimentation, and the dangers of valuing any human lives less than others in the name of medical research.

We are in the habit of surrendering our genetic material for a low cost—we leave it around everywhere, in the form of saliva, skin cells, hair, blood, and other fluids. Yet, the human genetic code is being used for the generation of capital in several ways. Though the Supreme Court has ruled that isolated strands of human genetic code cannot by themselves be patented,⁷ various patent offices have set a precedent for

⁶ Skloot, Rebecca. *The Immortal Life of Henrietta Lacks*. Crown, 2010.

⁷ Sherkow, Jacob S, and Henry T Greely. “The History of Patenting Genetic Material.” *Annual Review of Genetics* 49 (November 2015): 161–82. <https://doi.org/10.1146/annurev-genet-112414-054731>.

the patenting of animal genes and various gene-based therapies that can be used to treat disease. One example is the OncoMouse, a patented technology developed by Harvard researchers in 1988 to further cancer research.⁸ A business laid claim to a certain combination of genetic code that it was able to sell and restrict access to for profit.⁹ The patent was upheld by the European Patent Office on the grounds that the mouse possessed significant medical promise and did not result from innately biological processes.¹⁰ The patenting of this lab mouse greatly hindered the development of medicines that relied on such mice for animal testing. Surrendering genetic material without reading the terms and conditions leaves patients open to the manipulation and exploitation of their genetic code for profit—a genetic code that reveals key characteristics about both their physiology and personality, for anyone with the ability to read it.

This ability to read genetic code is of particular concern to those with disabilities and members of minority groups—the ability of institutions of power to discover who you are based on genetics, and then pass judgement upon you, would

⁸ Leder, Philip, and Timothy Stewart. 1988. Transgenic non-human mammals. US Patent 4,736,866, filed June 22, 1984, issued April 12, 1988. <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahhtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=4736866.PN.&OS=PN/4736866&RS=PN/4736866>

⁹ Best, Steven, and Douglas Kellner. “Biotechnology, Ethics, and the Politics of Cloning.” *Democracy & Nature* 8, no. 3 (2002): 439–65. <https://doi.org/10.1080/1085566022000022128>.

¹⁰ “Bioethics and Patent Law: The Case of the Oncomouse.” *World Intellectual Property Organization Magazine*, June 2006.

appear to be a tremendous violation of privacy.¹¹ This would be especially pronounced in the case of transgender individuals, whose gender identity does not conform with their genetics. The ability to read into one's body through genes may be restricted at first, but due to function creep, would likely soon become widespread.¹² Much like a Social Security number, which at first had a very specific use for the Social Security Administration, but soon came to be used by employers, the IRS, DMV, and many other agencies of alphabet soup, genetic identification could soon become used very liberally. Since genetic code is a window into one's body, this is cause for grave concern.

Of course, the only thing worse than someone being able to see through the window is them being able to get inside your house. This is what the wholesale manipulation of the human genome and chemical biotechnology would allow people and institutions of power to do. As an example, the chemicals that control love and libido are well known—testosterone, estrogen, Oxytocin, dopamine, and many others. It is not inconceivable to manipulate these chemicals in the human body to make things like breakups emotionally easier—this is already done to some degree with drugs such as selective serotonin reuptake inhibitors.¹³ Would it be right

¹¹ Clapton, Jayne. "Disability, Ethics, and Biotechnology." *Journal of Religion, Disability, and Health* 8, no. 1-2 (2004): 21–31. https://doi.org/10.1300/J095v08n01_03.

¹² *Supra* note 3, at 437.

¹³ Earp, Brian D, Olga A Wudarczyk, Anders Sandberg, and Julian Savulescu. "If I Could Just Stop Loving You: Anti-Love Biotechnology and the Ethics of a Chemical Breakup." *The American Journal of Bioethics* 13, no. 11 (2013): 3–17. <https://doi.org/10.1080/15265161.2013.839752>.

to take a drug to get through such emotional pain, even at the cost of what such a breakup might teach you? Or, a more pointed dilemma, as characterized by Earp et al.—it would also be possible to use these drugs to remove someone from an abusive relationship, or one resulting from Stockholm syndrome—what do we do when the person in question is suffering, but doesn't want to stop?

Only slightly worse than manipulating someone's chemical biology is altering their fundamental genetic code. With the discovery of genes that contribute to everything from religiosity,¹⁴ to homosexuality,¹⁵ to adherence to rules¹⁶, it becomes possible for parents to not only choose their child's eye color, but also their personality, ethics, and moral code. Such an act would overrule the child's own free will, as their possible choices and predispositions are reduced *in vitro*. The power that biotechnology offers—the widescale knowledge of one's personal genetic makeup, the manipulation of that makeup, and the profiting and categorization that can be done with it—amounts to a tremendous violation of privacy and autonomy if abused.

¹⁴ Goldman, Michael A. "Faith-Boosting Genes." *Scientific American* 291 (October 1, 2004): 110–11. <https://www-scientificamerican-com.pallas2.tcl.sc.edu/article/faith-boosting-genes/>.

¹⁵ Ganna, et al. "Large-Scale GWAS Reveals Insights into the Genetic Architecture of Same-Sex Sexual Behavior?" *Science* 365, no. 6456 (August 30, 2019). <https://doi.org/10.1126/science.aat7693>.

¹⁶ Coletta, Raymond R. "SYMPOSIUM: BIOTECHNOLOGY AND THE LAW: Biotechnology and the Creation of Ethics." *McGeorge Law Review* 32, no. 89 (2000).

C. Policy for Ethical Design

The technologies mentioned above will continue to develop, and as they do, will pose a unique challenge for both ethicists and lawmakers in determining how they can and should be used. The biggest threats that these emerging biotechnologies pose are to the rights to life, freedom, and self-determination, largely centered in the realms of stem cell research and genetic ownership and manipulation.

The right-to-life argument shows up most strongly in arguments about totipotent stem cell research and cloning, which often involve the harvesting of such cells from embryos extremely early in the developmental cycle. Those who defend the right to life at this stage largely depend on religious arguments, or appeal to the potential of the embryo as a future person—interestingly, it is that very potentiality that argues against protecting embryos at this stage. Most embryos are harvested after five or six days of development, and up until the fourteenth day, it is still possible for such an embryo to naturally split in two and develop into twins, or recombine to form one person—when there is no sense of true individuality about the cells in question, it becomes difficult, if not impossible, to speak about what legal rights such a clump may have as a person.¹⁷

Further supporting the use of stem-cells and cloning for therapeutic purposes is that the human body has been documented undergoing a similar process naturally. A woman becomes pregnant, gives birth, and at some later point

¹⁷ Jansen, Brigitte. "Biotechnology and Economy: An Ethical Conflict of Interest?" *Global Bioethics* 17, no. 1 (2004): 203–9. <https://doi.org/10.1080/11287462.2004.10800860>.

suffers an illness such as an underactive thyroid. When the illness mysteriously fades, the thyroid is tested, and cells are found with DNA that matches her child, but not her—just as the mother supports the fetus via the umbilical cord, so can pluripotent stem cells make their way back up into the mother’s bloodstream, where they can be used to repair damaged tissues.¹⁸ That such a process can take place without medical intervention speaks to the potential that such a therapy might have if properly developed and controlled.

Assuming that the use of embryonic tissues and genomes in medical therapies is ethically appropriate, we find that a theoretical choke-point exists at the point where these technologies can be used for not merely reproductive therapy, but reproductive control. This is where many legal systems see fit to draw the line, including Germany with the *Embryonenschutzgesetz*, or Embryo Protection Act of 1990.¹⁹ This law placed strict limitations on the amount of embryos that could be fertilized *in vitro* and transplanted into the uterus as a treatment for sterility, ostensibly with the goal of preventing the destruction of equally “human” embryos that were not chosen to be implanted.²⁰ However, this policy faced a backlash and dramatically slowed the rate of stem-cell

¹⁸ Patel, P. “A Natural Stem Cell Therapy? How Novel Findings and Biotechnology Clarify the Ethics of Stem Cell Research.” *Journal of Medical Ethics* 32, no. 4 (April 2006): 235–39. <https://doi.org/10.1136/jme.2005.012096>.

¹⁹ *Supra* note 17, at 205.

²⁰ Beier, Henning M, and Jacques O Beckman. “OPINION: Implications and Consequences of the German Embryo Protection Act.” *Human Reproduction* 6, no. 4 (April 1, 1991): 607–8. <https://doi.org/10.1093/oxfordjournals.humrep.a137389>.

research in Germany—following new scientific discoveries about the failure rate of fertilized embryos, many ongoing lawsuits brought under the act were suspended by public prosecutors.

This straight-edge denial of embryonic testing leaves very little gray area about what is allowed under the law—however, it also leads to major medical innovations going undiscovered. While it is an admirable goal to protect human life in all its forms, stem cell research simply does not meet the necessary criteria for a moral moratorium. For therapeutic purposes, there are no major legal or ethical hurdles that stand in the way of further research and development—and it is only once those embryos are modified genetically with the intent of creating a person from them that concerns about freedom and free will come into play.

Designer babies have never been closer to being a reality. Many of the concerns about the process of genetic manipulation have to do with safety for the fetus and the potential dangers of playing God—however, such fundamental alterations are also a dramatic invasion of the child's privacy. When someone meddles with your genome and chooses what they want you to be, you can lose all sense of independence and self-definition. These concerns do not weigh on the fetus, of course, but rather the person that they will become. Just as a burglary involves a violation of privacy of the home, so does gene editing involve a violation of the privacy of the body—the body of someone who cannot consent, the most vulnerable members of the population.²¹ It

²¹ These modified embryos are being treated as full persons lacking the ability to consent because they would have been

is a psychological invasion of privacy, not a physical one.²² This is an issue brought into sharp relief by the announcement in late 2018 of the world's first genetically altered babies, created by Chinese researcher He Jiankui, who was quickly ostracized from the scientific community.²³ The potential for misuse of these technologies is rife, especially when it comes to germline editing, and it is vital to consider the rights of those not yet born when we consider implementing them.

As such, appropriate policies need to be in place to ensure that their rights are respected—the most straightforward way to accomplish this would be to treat embryos as full persons, and worthy of all the rights and respects that come with that. However, this position is untenable. Labelling embryos people when they are clearly not would make both stem cell research and abortions unthinkable. Even if embryos were treated as people only after they had been earmarked for full gestation, the same criticism about abortion applies. Some manner of middle ground is required, not only from an ethical perspective, but a legal one. The bushes only get bramblier when one considers that parents are proxy decision makers for their children's medical care, hypothetically putting genetic considerations under their purview.

preselected for implantation and a successful pregnancy—they have a confirmed and actual potentiality to a full human life.

²² Holden, Constance. "Ethics Panel Looks at Human Gene Splicing." *Science* 217, no. 4559 (August 6, 1982): 516–17. <https://www.jstor.org/stable/1688562>.

²³ Cyranoski, David. "The CRISPR-Baby Scandal: What's next for Human Gene Editing." *Nature* 566 (March 11, 2019): 440–42. <https://doi.org/10.1038/d41586-019-00673-1>.

I make no claim to knowing the answer to such a thorny question. The only things that are clear from this analysis is that such a law would need to ensure the ability of the child to have self-determination and thought that isn't clouded by the machinations of human hands. As such, mental modifications intended to make children smarter, or to make them more compliant, should be categorically off-limits. Any modifications to the brain would result in an inability of the child to be as they are or would be, not only in their body, but also in their mind.

Physical modifications, and those intended to repair disabilities, are still very much up for debate. Concerns about body modifications and public access to biological data bear more resemblance to modern concerns over personal information than to more philosophically entrenched issues like those above.

II. TECHNOLOGICAL PRIVACY

A. Recent Innovations

Even as our ability to understand and manipulate the human genome has increased dramatically, the development of technological devices has managed to keep pace. It is easy to critique our everyday reliance on cell phones and the internet, yet only the most dedicated of us will take steps away from the current system, for the simple reason that the current system appears to save us time, money, and energy—and all for the low price of our data.

In the early days of the Internet, there was a very sharp divide between the online world and the offline world. A child could go to school and interact with her friends, and then come home and log into a digital world to hang out with them

all over again, in a different context. The leap from merely being friends online to meeting in person was a big deal, and parents cautioned their children that everyone they interacted with online was likely a predator—a far cry from our present-day Tinder. This was the Internet of Avatars, where we were able to define our online personalities apart from who we were in real life, often in beautiful ways. Those with disabilities could conquer virtual landscapes, and the socially awkward were given a chance to interact without cumbersome body language getting in the way.

As we become more and more connected, a separate realm of computing is developing—the Internet of Things, the devices we surround ourselves with that collect and transmit information about us to other devices and off-site processing facilities. These devices can play music, keep stock of the refrigerator, manage home security, and provide us with all the information the Internet has to offer. They are made to monitor us—hypothetically for both our comfort, and the benefit of law enforcement and the company that built and services the device. Video doorbells and FitBit monitors have already been used in solving crimes, including murders.²⁴ The windows that Alexa, Siri, and Google provide into our lives are a tremendous cause for privacy concerns—and yet, they are merely the physical infrastructure that surrounds us as the relentless pace of our own technological development paves

²⁴ Smiley, Lauren. “A Brutal Murder, a Wearable Witness, and an Unlikely Suspect.” *Wired*. Conde Nast, September 23, 2019. https://www.wired.com/story/telltale-heart-fitbit-murder/?utm_source=pocket-newtab.

the way for the transition from the Internet of Avatars to the Internet of People.

The Internet of People will be characterized by the widespread utilization of brain-machine interfaces, eliminating the traditional barrier of our screen—a sacred barrier that provided anonymity and security. When our minds, through technology, are wired directly into the Internet, there will no limit to how personally we can communicate, how quickly we can share information, and how radically our notions of selfhood and privacy will be destroyed.

The technologies necessary for the Internet of People are already in development. As early as 2003, researchers at Duke University demonstrated that a prosthetic limb could be controlled by implanting a small device in the brain of a monkey, designed to read neural impulses. Today, the technology has moved beyond mere motor control to the reconstruction of thought—a computer program has recently been able to reconstruct the images in people’s heads based upon functional-MRI readings.²⁵ An algorithm looks at patterns of brain activity as participants are shown different pictures—then, by mapping the activity, it can reconstruct a rough version of a new image based on how the participant’s brain responds to it, figuring out which parts of the brain activate for different aspects of a visual image.

²⁵ Wen, Haiguang, Junxing Shi, Yizhen Zhang, Kun-Han Lu, Jiayue Cao, and Zhongming Liu. “Neural Encoding and Decoding with Deep Learning for Dynamic Natural Vision.” *Cerebral Cortex* 28, no. 12 (December 2018): 4136–60. <https://doi.org/10.1093/cercor/bhx268>.

A recent episode of 60 Minutes even focused on new innovations out of MIT—including a wearable device that can track the neural impulses that we usually send to our vocal cords in order to speak, interpret them into words, and then search the Internet and provide us with feedback.²⁶ Mind reading technology is here; it just hasn't yet been built into our devices.

B. Risks for Exploitation

The risk that this kind of technology poses if it should ever become mobile and widespread are obvious—the mass collection of human data, sold for profit and used in ever more creative ways to manipulate those who give up that data. There are three major scenarios in which this technology would prove catastrophic for typical privacy protections—hacking, autonomous interactivity, and preemptive activation.

Hacking is the most straightforward—wearable tech that can monitor our biological states and provide feedback, perhaps by being implanted in our brains, would provide a wealth of information that both light and dark actors would pay handsomely for. A politician looking for an untraceable way to assassinate a rival, or an insurance company wanting to know whether you'll be more of an asset or a liability. When we're hacked today, we lose financial information and family photos, and it's only when hospitals are compromised

²⁶ Pelley, Scott. "Making Ideas into Reality at MIT's 'Future Factory.'" *CBS News*. CBS Interactive, August 4, 2019. <https://www.cbsnews.com/news/60-minutes-mit-media-lab-making-ideas-into-reality-future-factory-2019-08-04/>.

that health information is typically at risk. As biological information becomes more widespread, though, it is likely that even a smaller breach could expose much more sensitive information.

Most implanted medical devices today communicate via Bluetooth and are controlled by cell phones or watches. This setup makes the devices vulnerable to hacking and remote control— especially dangerous in the case of brain implants that are designed to send specialized electrical impulses into gray matter to treat neurodegenerative diseases. A Belgian team of scientists, working with the manufacturer of a certain unnamed device, has demonstrated that such hacking is quite possible.²⁷ When, and it is almost certainly a when, these devices make the leap from Bluetooth to full online connectivity, the risks rise exponentially. The information locked inside our bodies will be accessible to people we've never met before in our lives.

Autonomous interactivity is less of a personal violation, but still threatening to privacy—it occurs when devices communicate with each other without our express consent. In the Internet of Things, this is Amazon's Alexa or Google Home communicating with the doorbell and thermostat, making sure the building runs smoothly. Within a self-contained geographical setting like a house, such a setup may be tenable when it comes to privacy protections. There has

²⁷ Marin, Eduard, David Singélee, Bohan Yang, Vladimir Volski, Guy Vandenbosch, Bart Nuttin, and Bart Preneel. "Securing Wireless Neurostimulators." *Proceedings of Eighth ACM Conference on Data and Application Security and Privacy*, March 21, 2018. <https://doi.org/10.1145/3176258.3176310>.

been a recent shift, however, towards making such a protocol the norm for cell phones and wearables.²⁸

Under this view, our everyday interaction with cell phones has become too strenuous. To lighten the load, our personal devices would be able to routinely track our movements to establish patterns, communicate with other nearby devices if it believed something was out of the ordinary, and send information to both state and third-party agencies without our explicit consent. Ostensibly, this communication is intended to more seamlessly integrate us with and allow us to navigate daily life and the Internet of Things. While there would be the option to opt out of the program, opting in would allow for the unchecked dissemination of personal information on a scale previously unseen. Allowing others to make representations on our behalf is an expression of trust, that our proxy has our best interests at heart. Putting such a power in the hands of unknown actors and corporations is rife with danger.

The final large-scale risk as technology advances is that of preemptive activation— wearables and personal tech knowing what we want before we want it and acting accordingly. Such technology already exists in the form of smart refrigerators that can keep track of their contents and order new supplies whenever the household runs low. A refrigerator, however, only maintains food, something that is outside of the human body. Personal tech could order and

²⁸ Carpintero, Javier, Jose Garcia-Alonso, Niko Mäkitalo, and Javier Berrocal. “From the Internet of Things to the Internet of People.” *IEEE Internet Computing* 19, no. 2 (March 2015): 40–47. <https://doi.org/10.1109/MIC.2015.24>.

recommend medicines, and keep tabs on moods, hormones, and blood sugar levels. This would take the ultimate form of *neuromarketing*, where even the space in our thoughts is up for sale as companies influence us to purchase their products on a more intimate level than they ever could before.²⁹

The technology necessary to implement neuromarketing is still a few years off, but large tech companies are making strides in that direction. Facebook recently bought a startup firm called CTRL-Labs. The company specializes in making watches that decode nerve activity and allow you to interact with computers directly via neural impulses.³⁰ Public response to the acquisition was largely negative—Facebook, for one, isn't in the business of selling personal devices like watches—they sell data, and such a personal method of harvesting it is understandably difficult to swallow. Any policy decisions that are made about such technological methods of data collection and interaction must be able to deal with the above threats appropriately and ethically.

C. Policy for Ethical Design

How much of one's privacy can one consent to give up? Under our current system, there are many opportunities for one to give up their innermost privacy through legally binding

²⁹ Bryan, Bradley. "ARTICLE: Biotechnology, Bioethics and Liberalism: Problematizing Risk, Consent and Law." *Health Law Journal* 11, no. 119 (2003).

³⁰ Murphy, Hannah, and Patrick McGee. "Facebook to Spend \$1bn on Brain-Control Start-up CTRL-Labs." *Financial Times*. *Financial Times*, September 24, 2019. <https://www.ft.com/content/f64bde30-de6c-11e9-9743-db5a370481bc>.

contracts—marriage, for instance, or consenting to participate in an experimental medical trial that will use the results to develop therapies for other patients. There doesn't seem to be an innate ethical issue when it comes to surrendering our privacy—rather, the issue arises when that privacy is exploited. Agreeing to share finances with someone, only to have them run up credit card debt and take you for all you've got is certainly ethically wrong, even if it does have some leeway in the law—such is the benefit of a prenup.

Opportunities for exploitation are far more common when we enter into agreements about privacy that are inherently unbalanced, such as surrendering that privacy to a faceless corporation instead of to a person that we intimately trust with sensitive data. When we further allow such corporations free reign as to what they do with that data—not merely the possession of, but the exploitation of it for profit—the company now has a motive other than protecting the user and providing a service to them.

Many of us are comfortable with surrendering our privacy to take advantage of the services that these companies provide, such as social networking, financial management, and shopping. We understand, to some degree, what the data we surrender will be used for—research, advertising, and the like. As technology develops, however, and our interaction with devices goes from external to internal control, the type of data that we share will be different not in quantity, but in kind—thoughts, not actions, inner biology, not external symptoms—as such, stricter policies will need to be enacted

for what corporations are able to do with that data, if they are allowed to possess it at all.

When it comes to privacy, consent is seen as the benchmark for whether some violation of it is acceptable—if a person agrees that their information can be used in some way, it's acceptable for the entity with that information to do so. As technology develops, however, it will become necessary for people to provide a different kind of consent—the kind that disseminates their information not only to the contracting party, but to other entities as well. Facebook is well known for this, sharing user data for a price—though Facebook still serves as the intermediary for that data. In the world of preemptive activation, however, there need be no such middleman—cell phones and personal devices will be able to communicate without a contracted link between them. It's open consent, not to a party possessing our data, but to a policy disseminating it.

Such a kind of consent is dangerous, and easily exploited. The traditional understanding of consent will need to be overhauled, and likely supplemented by alternative regulatory mechanisms.³¹ If society at large decides, however, that such an arrangement is acceptable, then it becomes the responsibility of those who program and create these devices to ensure that they can interact with each other in a safe and secure manner—the industry at large will be forced to take on the approach of Apple—privacy by design.³²

³¹ *Supra* note 30.

³² Apple certainly has its own problems when it comes to privacy, but they at least serve as an example of keeping all data within a single secure OS.

As evidenced by the mounting number of lawsuits against Big Tech³³ and the increasing promises of 2020 Democratic presidential candidates to initiate anti-trust lawsuits against the largest tech firms, though, many feel that leaving such a large concern as privacy in the hands of corporations themselves is a recipe for disaster—largely because these corporations also have a powerful profit motive.³⁴ To solve this issue will require the proactive cooperation of government regulators and those who design tech to ensure that the necessary protections are built into devices before they ever reach the hands of consumers—not merely privacy by design, but total regulation by design.³⁵

Consider architecture—the way shopping malls and casinos are built is to move people in certain ways, encouraging them to move within predetermined channels and take actions, such as gambling or shopping, that are in the best interests of the people who designed the system. Digital architecture is no different, as people are encouraged by algorithms and links to spend time on certain websites,

³³ Roberts, Jeff J. “Big Tech v. Big Privacy Lawsuits.” *Fortune*, February 23, 2019. <https://fortune.com/2019/02/23/big-tech-vs-big-privacy-lawsuits/>.

³⁴ “2020 Democrats on Breaking Up Tech Giants.” *The New York Times*. The New York Times, June 19, 2019. <https://www.nytimes.com/interactive/2019/us/politics/big-tech-democratic-candidates.html>.

³⁵ Urquhart, Lachlan, and Tom Rodden. “New Directions in Information Technology Law: Learning from Human Computer Interaction.” *International Review of Law, Computers, & Technology* 31, no. 2 (March 28, 2017). <https://doi.org/10.1080/13600869.2017.1298501>

contribute to the generation of their data, and increase profitability for the site owner. Once such architecture is built, people who visit these sites naturally fall into predetermined channels and, once acclimated to the system, are loath to change the way they interact with the system. Any attempts to construct digital architecture in accordance with privacy concerns will need to be proactive, and not merely result from the retroactive application of regulatory law to the system—especially given that privacy protections require extra effort and layers of security to be built into the system protocols.

A secondary concern is that even if these processes are regulated appropriately to restrict access to *personal* data, it is possible for an agent to reconstruct personal information from impersonal information gleaned from devices wired to the Internet of Things—for instance, keeping track of what meats are in the fridge and how often a person leaves the house could provide information about their religion. Since such inference is possible, even seemingly non-sensitive information now falls under the purview of regulators as to what they need to work to control access to.

Regulation by design is only possible with the cooperation of tech designers and regulatory governmental bodies—however, it is easy to see how both entities could have ulterior motives as they construct new digital architecture. The government would prefer access to more information about its citizens, and these companies would like that same information for profit purposes. On October 4, 2019, Attorney General William Barr of the United States, along with representatives from the United Kingdom and Australia, published an open letter requesting that Facebook

halt the implementation of end-to-end encryption into their software, claiming that such encryption would reduce the ability of law enforcement to track the communications of criminals on the site, and that there should be an expedited process for governmental agencies procuring personal data. The letter states, “Companies should not deliberately design their systems to preclude any form of access to content, even for preventing or investigating the most serious crimes.”³⁶

Facebook responded by stating that it objected to the construction of backdoors in software that would make it easier for governments to violate the privacy of its citizens.³⁷ It also noted that there is already existing legislation for allowing government entities access to data with the CLOUD Act of 2018, signed into law as PL 115-141 § 105.³⁸ This is a step towards privacy protections for Facebook, which is attempting to show the public that it can still be trusted. This example shows, however, the kind of regulatory conflict that can exist between the government and corporations when their priorities are misaligned. To ensure that any legislation

³⁶ William Barr, Priti Patel, Kevin McAleenan, and Peter Dutton. OPEN LETTER: FACEBOOK'S "PRIVACY FIRST" PROPOSALS, (2019). <https://www.justice.gov/opa/press-release/file/1207081/download>

³⁷ Abril, Danielle. “Facebook ‘Strongly Opposes’ Reported Letter by AG Barr That Will Ask Mark Zuckerberg to Delay Encrypting Its Apps.” *Fortune*, October 3, 2019. <https://fortune.com/2019/10/03/facebook-doj-bill-barr-letter-mark-zuckerberg-encryption/>

³⁸ US Congress, House, *Clarifying Lawful Overseas Use of Data (CLOUD) Act*, HR 4943, 115th Cong., 2nd sess., introduced in House February 6, 2018, <https://www.congress.gov/bill/115th-congress/house-bill/4943>

that emerges from such conflict is appropriate, it would be beneficial for there to be an ethical review board for such policies. While such a board wouldn't have veto powers on proposals that it feels are ethically dubious like the Supreme Court does for legal issues, it would still bring an external, public, academic perspective to these contested issues.

This is an approach already used by DARPA, though most of what happens within such a secretive research agency goes on behind closed doors. Following the creation of President Barack Obama's Brain Research through Advancing Innovative Neurotechnologies (BRAIN) initiative, an independent Ethical, Legal, and Social Implications (ELS) board was created for any biological, neurological technologies created within the agency.³⁹ Though more public transparency should be required, this active, front-end approach to resolving ethical issues should be widely encouraged.

III. SECURITY IN THE AGE OF BRAIN-MACHINE INTERFACES

Every ethical, moral, and legal concern previously mentioned, especially those relating to privacy, becomes much more potent when we consider them through the emerging lens of brain- machine interfaces and the advent of the Internet of People. For the purposes of policy discussion,

³⁹ Defense Advanced Research Projects Agency: Overview and Issues for Congress. *CRS Report No. R45088*, R45088 § (n.d.). July 24, 2018. <https://advance-lexis-com.pallas2.tcl.sc.edu/api/document?collection=statutes-legislation&id=urn:contentItem:5TBC-CVJ1-JC5P-G011-00000-00&context=1516831>.

these interfaces are understood to be tiny, implantable devices that will connect one's brain to the internet and allow for the remote control of personal devices and near instantaneous communication with others who have such implants.⁴⁰ The advent of such products will likely occur within the lifetime of your average Millennial, to resounding economic success. The worldwide research market for such devices will be approximately \$1.46 billion in 2020 and will only continue to grow at a rate of around 11.5% annually.⁴¹

⁴⁰ It is likely that there will be some devices that will act as wearable tech, and therefore will be removable. However, such devices would face limitations on how quickly and accurately they could interpret brain signals and send feedback to the user, making them less effective. Many of the ethical concerns regarding implantable tech carry over to wearables, though not to quite the same degree.

⁴¹ "Global Brain Computer Interface Market Is Likely to Reach \$1.46 Billion by 2020 at 11.5% CAGR: Says AMR; Increasing Incidences of Brain Disorders Affecting the Movements of Body, Government Funding Setting off the Use of BCI Technologies, Miniaturization of Components Adding to the Growth of BCI Technology Market, and Rising Number of Gaming Industries Implementing BCI Technologies Propel the Growth of the Global Brain Computer Interface Market. The Non-Invasive Segment Contributed to 85% of the Total Market Revenue in 2014. On the Other Hand, the Market across LAMEA Is Anticipated to Cite the Fastest CAGR of 14.9% during the Study Period." *GlobeNewswire*, September 12, 2019. <https://advance-lexis-com.pallas2.tcl.sc.edu/api/document?collection=news&id=urn:contentItem:5X1S-XG01-DY2R-44S8-0000-00&context=1516831>.

The process of developing biotechnology consists of multiple stages—the first, which involved developing the tools necessary for such devices, took place in the early 1990's, and ended with the collapse of many smaller biotech firms. We are now in the second phase, as the technological breakthroughs come quickly. Sometime in the next decade, we will likely move into more fundamental alterations, such as manipulation of the human genome and cybernetic enhancements.⁴² We are on the threshold of these dramatic changes, which makes it more pressing than ever to reconcile some of these vital ethical questions before corporations and the irreversible march of progress make the decisions for us.

It will be necessary to strike a balance between the development of these technologies and ensuring the privacy and security of the consumers who will use them. The government has been supportive of such technological developments in the past, especially when the intended application is medical. A 2009 New York law directed the commissioner of ALS research to develop a statewide public test program for brain-machine interfaces, intended to demonstrate that such therapies were technologically feasible and showed medical promise for the treatment of neurodegenerative disease.⁴³ Such technologies promise to

⁴² Flowers, Edward B. “The Ethics and Economics of Patenting the Human Genome.” *Journal of Business Ethics* 17, no. 15 (November 1998): 1737–45. <http://www.jstor.org/stable/25074010>

⁴³ AN ACT to amend the public health law, in relation to the control of progressive neurological diseases, 2009 Bill Text NY S.B. 3549 (March 24, 2009). <https://advance-lexis-com.pallas2.tcl.sc.edu/api/document?collection=statutes->

radically change how we treat disease, and overcome disability.

And such research should be promoted—while also recognizing the risks that such technologies pose when they are commercialized beyond strictly medical applications, and personal and biological information is concentrated into Internet-connected implantable devices. As argued above, when the kind of information that these devices provide to the manufacturers and third-party actors is different in kind from the information that we provide to them today, our traditional legal understanding of consent becomes strained. Notably, having everyone who uses a technology consent to a policy regarding the use of it does not make that technology more secure.⁴⁴ Security, and the ensuring of privacy apart from the consented use of data, is a separate thorn from the issue of consent in the first place.

For instance—employers may request access to the data on one’s brain-machine interface, much in the same way they can track usage of company-owned devices today. This access could result in the compromising of biological data that could be used to unfairly target people and track their behavior both inside and outside of a work environment.⁴⁵

legislation&id=urn:contentItem:4VXK-3YD0-0291-V1KY-00000-00&context=1516831.

⁴⁴ *Supra* note 30.

⁴⁵ Vlek, Rutger, David Steines, Dyana Szibbo, Andrea Kübler, Mary-Jane Schneider, Pim Haselager, and Femke Nijboer. “Ethical Issues in Brain–Computer Interface Research, Development, and Dissemination.” *Journal of Neurologic Physical Therapy* 36, no. 2 (June 2012): 94–99.

<https://doi.org/10.1097/NPT.0b013e31825064cc>.

The segregation of personal and impersonal data will be almost impossible to accurately map, as evidenced by the religious example mentioned above. The boundaries between therapeutic and personal use, and personal and impersonal data, become ever fuzzier.

A good first move towards ensuring privacy protections for users of these devices will be the recategorizing of biological DNA as personally protected information and codifying that such information can only be released from testing companies and health care offices pursuant to the law. Several states are already making strides towards this reality, including the passage of Arizona State Bill 1297 in May 2019,⁴⁶ and the current procedure of Act 1030 through the state House.⁴⁷

The company Neuralink, founded by Elon Musk, and whose sole stated purpose is to develop these brain-machine interfaces, continues to push the limits of this technology with a dream and incredible amounts of funding at its back. In July

⁴⁶ State of Arizona, House, *AN ACT AMENDING SECTIONS 12-2801, 12-2802 AND 20-448.02, ARIZONA REVISED STATUTES; RELATING TO GENETIC TESTING*, SB 1297, 54th Legislature, First Regular Session, introduced in Senate January 30, 2019. <https://apps.azleg.gov/BillStatus/BillOverview/71907>

⁴⁷ State of Arkansas, House, *TO AMEND THE PERSONAL INFORMATION PROTECTION ACT; AND TO REVISE THE DEFINITION OF "PERSONAL INFORMATION" IN THE PERSONAL INFORMATION PROTECTION ACT*, Act 1030, 92nd General Assembly, Regular Session, introduced in House March 27, 2019.

<http://www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation.aspx?measureno=HB1943>

2019, the company released a report detailing the development of the implantable chips, the precision of the robots that would be tasked with inserting them, and how a simple USB-C port provided all the connection needed to properly monitor the interface.⁴⁸ We are sitting on the cusp of everything that our science-fiction writers have promised us.

The regulation necessary to properly control these BMIs will be unlike any developed before. The system must be secure, and external access to information both biological and digital must be tightly regulated—the process of wiping a virus from one’s brain is not as simple as it is with an external computer. The construction of the digital architecture required will need to be developed in cooperation between programmers and politicians, or there will always be a disconnect between the technology that exists and the legal and ethical parameters that it must live up to. As the envelope of the possible is pushed, our ability to predict and solve ethical and legal privacy and security issues before they arise will be forced to develop as well.

CONCLUSION

This paper is not intended to lay out specific policy proposals for dealing with issues of security and privacy going forwards—only to make clear the contradictions and values that such legislation will need to embody if it is to be effective.

⁴⁸ Musk, Elon, and Neuralink. “An Integrated Brain-Machine Interface Platform with Thousands of Channels.” *BioRxiv*, July 17, 2019. <https://doi.org/10.1101/703801>.

Biological privacy—the right to control who has access to and can manipulate our genetic data—is currently being squeezed by market incentives and emerging medical technologies. The promise of stem-cell based cloning will require unprecedented access to the manipulation and development of personal genetic code, all in the name of new therapies. It is, however, but a short leap to the repurposing of this technology towards reproductive ends, at which point legislation must resolve how to properly balance the parent's right to control of the reproductive process while still ensuring the freedom and independence of the future child. These ethical concerns meet those of privacy, as the relationship between doctor and patient is one of utmost trust—yet, genetic innovation will require the ever more public dissemination of our personal DNA.

Technological privacy is being squeezed in a similar way, by market incentives and the devices we surround ourselves with. As the Internet of Things encapsulates us and paves the way for the Internet of People, legislators will be forced to balance the benefits of these technologies with the security risk they pose as hacking, autonomous interaction, and preemptive activation become more common. Reconciling this threat will require regulators and tech designers to work together to design digital architecture that simultaneously respects privacy and the right of the user to interact with the device as they please.

Such regulatory schemes will inevitably collide with the development of ever more sophisticated brain-machine interfaces, where ethical concerns over biological tech and privacy meet the demands of a technologically driven world built on interaction and open access. The biological and

digital information possessed by these BMIs will need to be strictly controlled to ensure security and privacy for the user—a simple password is no longer enough. The development of such a system will require vertical cooperation between regulators and programmers. If regulation is only applied retroactively, an entire generation of digital architecture will be rendered essentially moot. And as anyone who has ever remodeled a house knows—it’s much easier to build something right the first time than having to tear down and replace a wall after the paint has dried. Imagine doing the same with a skull.

